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ADDIS ABABA UNIVERSITY,
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TACKLING ANTI-COMPETITIVE UNILATERAL ACTS UNDER
THE ETHIOPIAN COMPETITION REGIME: A CASE STUDY OF
ELECTRONIC TRADING AT ETHIOPIA COMMODITY
EXCHANGE

BY

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May, 2018 (G.C)

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Thesis Approval Page

The thesis titled “*Tackling Anti-Competitive Unilateral Acts under the Ethiopian Competition Regime: A Case Study of Electronic Trading At Ethiopia Commodity Exchange*”, by Michael Tilahun Sinshaw is approved for Masters of Law (LL.M).

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Declaration Page

I, the undersigned, declare that this thesis comprise my own work. I have duly acknowledged and referenced all materials used in this work. I understand that non-adherence to the principles of academic honesty and integrity, misinterpretation/fabrication of any data / fact / sources will constitute sufficient ground for disciplinary action by the University, it could also result criminal sanction from the state and civil action from the sources which have not been properly cited or acknowledged.

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Acknowledgment

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Key Terms

- ✓ *Flash crash, Unrepresentative pricing, Failure / refusal to submit orders, Pace making, Marking the closing price, Cornering and dumping, Matching orders, Trading sessions, Electronic trading system, Unfair competition*

Acronyms

AUA	Anticompetitive Unilateral Acts
Proc. No.	Proclamation Number
Art.	Article
Neg. Gaz.	NegaritGazeta
Civ. C.	Civil Code of Ethiopia
Comm. C.	Commercial Code of Ethiopia
WIPO	World Intellectual Property Office
ECX	Ethiopia Commodity Exchange
Rev.	Revision
s.v	<i>Sub Verbos</i>

Abstract

Anticompetitive Unilateral Acts are one of Anticompetitive Acts markets could face. The 2014 Ethiopian Trade competition and consumer protection proclamation, inter alia, provide rules for acts of unfair competition and these rules are the closest rules which resembles to Anticompetitive Unilateral Act; despite their focus on violation of intellectual property rights such as misleading advertisement false allegation etc. against another trader. As a market which facilitates competitive trading platform, the Electronic Trading System in Ethiopia Commodity Exchange is expected to implement competition law of the country. The Electronic Trading System faced / still faces various Anticompetitive Acts; including Anticompetitive Unilateral Acts. The Anticompetitive Unilateral Acts observed in the Commodity Exchange includes flash crashing, Unrepresentative pricing, Failure / refusal to submit trade orders, Pace making, Marking the closing price, Cornering, Dumping, and Matching orders. These Anticompetitive Unilateral Acts are not directly or indirectly mentioned under the competition and consumer protection proclamation. Considering the substantive content of unfair competition rules of the Trade Competition and Consumer Protection and Anticompetitive Unilateral Acts observed in the Commodity Exchange's Electronic Trading System, this thesis investigates whether unfair competition rules under the Competition and Consumer Protection Proclamation are the best means to tackle Anticompetitive Unilateral Acts observed in the commodity exchange's Electronic Trading System or not. Particularly, the thesis revolves around two research questions: (1), does the existing competition regime provide proper rules which adequately tackle the Anticompetitive Unilateral Acts observed in the Ethiopia Commodity Exchange Electronic Trading? And (2), how are the existing Anticompetitive Unilateral Acts in the Ethiopia Commodity Exchange Electronic Trading being tackled by the exchange's rules and are the measures consistent with the rules of the competition law? It is in this light that this thesis seeks to investigate the nature of unfair competition rules of the Competition and Consumer Protection Proclamation, Anticompetitive Unilateral Acts Observed in the Electronic Trading System of the Commodity Exchange, rules of the Commodity Exchange, and incidents addressed by the commodity exchange in this regard.

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went through unstable legislative drafting periods. The 2003 Trade Practice Proclamation (Proc. No. 329/2003) was repealed by the 2010 Trade Practice and Consumer Protection proclamation (Proc. No. 685/2010); which is later on repealed by the new, 2014 Trade Competition and Consumer Protection Proclamation (Proc. No. 813/2013).⁸

In 2008, ‘‘Ethiopia Commodity Exchange’’ is established in Ethiopia as a modern trading system with purpose of, *inter alia*, (1) creating efficient, transparent and orderly marketing system which serves the need of stakeholders such as buyers, sellers, intermediaries and small scale producers, (2) to carry out market surveillance in order to ensure integrity of members/traders and the market (3) to disseminate timely and complete market information.⁹

In October 2015 Ethiopia Commodity Exchange introduced a ‘high calibre’ ‘electronic trading’¹⁰ platform which facilitates five thousand times more transaction than its previous trading system (Open Out-cry).¹¹ The electronic trading system managed to facilitate more than Thirteen Billion birr.¹² Since its official launch, the electronic trading platform suffered from different anticompetitive trading practices, including Anticompetitive Unilateral Acts.¹³

Ethiopia Commodity Exchange is empowered with a power to prescribe and amend trading rules to facilitate competitive trading environment.¹⁴ Ethiopia Commodity Exchange Authority is also responsible for ensuring ‘fair competition in the market’, deter/prevent price manipulation or any other disruption of market integrity, and protect market participants from fraudulent or abusive trading practice.¹⁵

1.2 Statement of the Problem

After ups and downs to legislate a comprehensive competition law, the 2014 Trade Competition and Consumer Protection proclamation attempted to cover the aforementioned four areas of

⁸ Proclamation No.228/1965 (Trade Practice proclamation) could be cited as the pioneer Ethiopian competition law. (see Elias N. Stebeke, Deliverables and Pledges Under Ethiopian Competition law: the need for private sector empowerment and enablement, *Mizan Law Review* vol. 11, no. 1 (2017), p.37)

⁹ Ethiopia Commodity Exchange Proclamation, 2007, Art. 6(1) and 21, Proclamation No. 550/2007, *Neg. Gaz.*, year 13. no. 61 [hereinafter cited as ‘Ethiopia Commodity Exchange Proclamation,’]

¹⁰ The Revised Rules of Ethiopia Commodity Exchange, 2014, Rev. No. 8/2014 Defines Electronic trade as ‘A trade executed on the Exchange’s Electronic Trade Platform’ [available at Ethiopia Commodity Exchange Head Office, Addis Ababa]

¹¹ Ethiopia Commodity Exchange, press release (October 2015) p. 1 – 2 (www.ecx.com.et/NewsAndEvents.aspx#PR) [Last accessed on February 14, 2018]

¹² Official Email Conversation with Biruk Abel, Manager - Information Technology (IT) Division of Ethiopia Commodity Exchange [Available at Annex 01]

¹³ Interview with Bereket Messeret, Manager (Market Surveillance Division) in Ethiopia Commodity Exchange, January 25, 2018. [hereinafter cited as ‘Interview with Bereket Messeret, Manager - Market Surveillance Division’] [Available at Annex 02]

¹⁴ Ethiopia Commodity Exchange Proclamation, cited above at note 8, Art. 12(10)

¹⁵ Ethiopia Commodity Exchange Authority Proclamation, 2007, Art. 5, Proclamation No. 551/2007, *Neg. Gaz.*, year 13. no. 62 [hereinafter cited as ‘Ethiopia Commodity Exchange Authority Proclamation,’]

anticompetitive acts.¹⁶It seems that Article 8 of this proclamation which deals with addressing issues of “Unfair Competition”, is probably the closest rule under the proclamation resembling to Anticompetitive Unilateral Acts. Because, the remaining parts of the proclamation are clearly vested to tackle issues relating to Anticompetitive Agreements, Anticompetitive Merger and Abuse of Dominance.¹⁷

Unfortunately the proclamation fall shortto provide a definition for the term, “Unfair Competition”. Nonetheless the proclamation proceeds with prohibitory rule which states that “No business person may, on course of trade carry out any act which is dishonest, misleading, deceptive and harms or likely to harm the business interest of a competitor.”¹⁸Sub article 2 of Article 8 of the same proclamation list out acts which would qualify as unfair competition:(1) Causing confusion with other businesses or activities of other business persons, (2) possession / disclosure / use of information another business without the latters’ consent and contrary to honest trade practice, (3) false / unjustifiable allegations, (4) comparing goods falsely / equivocally while advertising, (5) disseminating false / equivocal information to consumers, (6) obtaining / attempting to obtain confidential business information of other business persons without their consent, etc. are listed as unfair competition acts.¹⁹

Looking at the above listing, it would be logical if one may wonder if the above listing does really represent anticompetitive unilateral acts which hamper competition or if the listing is just intellectual property related rules which protect good will of businesses.

Ironically, the Civil Code addressed the issue of “unfair competition” as a fault based extra contractual offence when a person, through false publication or by any other means contrary to goodfaith, compromises a reputation of a product or the credit of a commercial establishment.²⁰ Supplying false information is also addressed under the Civil Code as fault based offence; hence, one may analogize this rule as, mutatis mutandis, applicable to business transaction.²¹

Almost as similar as Proc. No. 813/2013, the Commercial Code addressed ‘unfair competition’ as acts of competition which are contrary to honest commercial practice and it includes: (1), acts likely to mislead customers regarding undertaking / products /or commercial activities of competitors and (2), false statement made in course of business with a view to discredit undertaking, product or commercial activity of competitors.²²

¹⁶Trade Competition and Consumer Protection Proclamation, 2014, Art.5, 7, 8 and 9, Proclamation No. 813/2013, Neg. Gaz., year 20. no. 28 [hereinafter cited as ‘Proclamation No. 813/2013’]

¹⁷Ibid.

¹⁸Id. Art.8(1) Proclamation No. 813/2013.

¹⁹ Id. Art.8(2) Proclamation No. 813/2013.

²⁰ Civ. C., Art. 2057

²¹Id. Art. 2059

²² Comm. C. Art. 133

Considering the similarity between ‘unfair competition’ rules of Proc. No. 813/2013 and the rules of the Civil Code and the Commercial Code for the same term, ‘unfair competition’, one may strongly argue that the proclamation simply endorsed intellectual property and business good will rules mentioned on the two Codes rather than crafting rules which are specifically tailored to address anticompetitive unilateral acts such as market price manipulation, irrational pricing etc.

In addition to lack of clarity of the proclamation on defining ‘‘unfair competition’’, the electronic trading system of Ethiopia Commodity Exchange started to experience systematic Anticompetitive Unilateral Acts which are not exactly pointed out on the country’s existing competition law.

As a new trading system for both the Commodity Exchange and the country, the electronic trading system started to exhibit anticompetitive unilateral acts which basically relates to transactions, price, trade order submission, genuineness of orders submitted etc.²³ It would be very hard to argue that Proc. No. 813/2013, especially, ‘unfair competition’ rules adequately addresses the above mentioned anticompetitive unilateral acts; which are not exactly attacks against business persons good will, intellectual property right, false advertisement etc. and their repercussion would not only be limited to competitors; instead the effect could harm integrity of the market, price of commodities, interest of farmers and suppliers whose only mandatory trading platform for commodities such as coffee, sesame, pea bean and Mung Beans the Commodity Exchange’s trading system.²⁴

The following unilateral acts are considered as Unilateral Anticompetitive acts in electronic trading system of Ethiopia Commodity Exchange.

Flash Crushing²⁵: is an act of sudden increase or decrease in price and / or quantity by sellers / buyers to be a champion of a competition being made between competitors. Since the electronic trade is managed by a limited time for trading (sessions of trading) and the electronic trade matches buy and sell orders by matching best selling price with and best buying price, traders (both buyers and sellers) will submit or edit their trade orders to out manoeuvre their competitors by submitting a flash crushed price or quantity few seconds or minutes before closing of the trading session. This act gives undue advantage to a trader who introduces the flash crushed order than other competitors who are following the normal bargaining process.

²³ Interview with Bereket Messeret, Manager (Market Surveillance Division) in Ethiopia Commodity Exchange, January 25, 2018.

²⁴ Ibid.

²⁵ Ibid.

Unrepresentative Pricing²⁶: this is an anticompetitive act by which traders offer a highly exaggerated higher price or very low price; regardless of the actual price the commodity should / could have gotten in a competitive market. This act could have a repercussion, when done intentionally / negligently, against traders; especially, when such pricing is done to eradicate a seller from the market by offering very low and unrepresentative price for his / her commodity and later on purchase the commodity with a low and unrepresentative price to make the seller face severe economic loss leading to his / her business out of market or it may be done to create false higher demand for a given commodity by submitting unrepresentative high price than it actually deserves. Besides, the act may feed false data to the Exchange and may also create artificial / false liquidity of commodities.

Failure / refusal to submit orders in due time²⁷:the electronic trading in Ethiopia Commodity Exchange is partitioned in different stages of submitting orders before and during trading sessions. One of these trading sessions, is a pre-open session by which the Exchange requires traders to submit their pre-open order in order to survey the final trade executed with pre-open order submitted and to analyse pre-open session demand and supply which may not necessarily be reflected on the actual trade. However, traders' failure / refuse to submit their pre-open session orders intentionally / negligently will help to execute a surprise buy or sell order since their intention (demand to purchase or supply to be offered to the market) have never been disclosed to traders. Such hiding of demand and supply information is against market economy principle and competition which expects perfect disclosure of market information.

Pace Making²⁸: Pace making is an act of submitting orders without any intention to execute trade, rather with a sole purpose of creating artificial liquidity. Creating artificial liquidity falsely shows that a given product is needed in the market very much or there is very less demand for a given commodity. After creating false liquidity, traders, later on leave the market by cancelling their orders as soon as they make sure that other traders (especially buyers) have acted on such false liquidity created by pace making. Such act could easily mislead other competitive buyers because the pace maker sets the bar higher by giving better prices and make buyers to follow him until he cancels his order; leaving the remaining buyers to purchase a commodity with a higher price they offered following his lead under false pretences. Pace making may have a serious impact on price discovery and competitiveness of a trading system.

²⁶Ibid.

²⁷Ibid.

²⁸ Ibid.

Marking the Close²⁹: Since, the Commodity Exchange controls price fluctuation by allowing only a maximum of 5% increase or decrease in price from the closing price of the previous trade date,³⁰ traders technically manipulate this regulation by marking a very high / low closing price on which the next day trade will base on. This act could be done to buy / sell a commodity in the next trading date with a cheaper / expensive price than the closing price of the trades currently being executed.

Cornering and Dumping³¹: Cornering is an act of hoarding a commodity from being available in the market until artificially inflated demand and price for the commodity is created. After such inflation of demand and price, sellers will decide to reap the benefit of their anticompetitive act by offering their highly demanded product before reaching expiry of warehouse depositing period. Dumping relates to flooding a commodity in the market with a normal or lesser price than other sellers offer. Such act could be done with an intention to make a certain commodity very cheap and expel competitors who are offering the same commodity with a relatively expensive price than the dumper is offering. This act could highly influence a price of a commodity and eliminates a competition. Cornering and dumping could be done abusing the right to store commodities in warehouses for certain time and sell commodities in the market freely.

Matching Orders³²: this is an Anticompetitive Act by which members who represent different clients (both buyers and sellers) execute trade by selling their client's commodity to their other client, who is a buyer. For instance, if a member, named R PLC represents a seller client (A PLC) and a buyer client (B PLC), the member may match the order of his seller client (selling 'x' quality 2000kg coffee with at least 20,000 birr) with the purchasing order (buying 'x' quality 2000kg coffee with a maximum of 20,000 birr) of his buyer client as he wishes since the person (intermediary member) who bargains on online trading platform represents both sides simultaneously. Such act of matching order may open a wider room to set a higher / lower closing price without dissatisfying his / her clients.

One may strongly argue that Article 8 of Proc. No. 813/2013 don't directly or indirectly address the aforementioned anticompetitive unilateral acts.

Therefore, suitability / adequacy of unfair competition rules of the competition regime is doubtful; especially considering the nature of Anticompetitive Unilateral Acts in the Commodity Exchange and unfair competition rule of the competition regime.

²⁹Ibid.

³⁰Ibid.

³¹Ibid.

³²Ibid. Also available at ECX Market Surveillance Division Report, 2017, p. 2 and 6

1.3 Research Questions

The central research question for this study is the following; is the Ethiopian competition law the best means to challenge Anticompetitive Unilateral Acts in the Ethiopia Commodity Exchange Electronic Trading. The sub-questions are:

1. What are the Anticompetitive Unilateral Acts observed in the Ethiopia Commodity Exchange Electronic Trading?
2. Does the existing competition regime provide proper rules which adequately tackle the Anticompetitive Unilateral Acts observed in the Ethiopia Commodity Exchange Electronic Trading?
3. How are the existing Anticompetitive Unilateral Acts in the Ethiopia Commodity Exchange Electronic Trading being tackled by the Exchange's rules and are the measures consistent with the rules of the competition law?

1.4 Objectives of the Study

The objectives of this study are;

- To identify Anticompetitive Unilateral Acts which the electronic trading in Ethiopia Commodity Exchange faces;
- To assess whether the existing competition regime provide proper rules / standards which adequately tackle Anticompetitive Unilateral Acts or not;
- To study whether the existing competition regime properly / adequately address Anticompetitive Unilateral Acts the electronic trading in Ethiopia Commodity Exchange deals with;
- To analyse how Anticompetitive Unilateral Acts on electronic trading in Ethiopia Commodity Exchange are being tackled by the rules of the Exchange;
- To compare / assess which law is really tackling Anticompetitive Unilateral Acts against the electronic trading of Ethiopia Commodity Exchange; the existing competition law of the country or rules of the Commodity Exchange?

1.5 Significance of the Study

The study will remain significant to understand and analyse the country's competition rules with regard to Anticompetitive Unilateral Acts vis-à-vis the newly developing Anticompetitive Unilateral Acts in the Ethiopia Commodity Exchange Electronic Trading. In addition to pointing out how Ethiopia Commodity Exchange addresses Anticompetitive Unilateral Acts on its electronic trading, the study will be helpful to highlight areas for improvement, if any, of the country's competition regime / the Exchange's rule or standards of addressing such anticompetitive acts. Finally, the study will be useful for future researches which relates to the Commodity Exchange's electronic trading system and competition thereof.

1.6 Research Methodology and Methods

1.6.1 Research Methodology

The study is conducted using Doctrinal and Empirical legal research methods; specifically, empirical research methodology is used in an attempt to answer or clearly understand issues related to the first and partially, the third research question of this study since these research questions are mainly doctrinal by their nature. Doctrinal research methodology is employed to the second and third research question which requires collection of empirical data to answer / address the research question thereof.

1.6.2 Research Methods

In attempt to gather data for the doctrinal part of this study, primary data (including domestic Constitutional Rules, Proclamations, Regulations, and Directives related to trade competition and consumer protection) and secondary data (Books, Journals, Articles, legal encyclopedia, Dictionaries, Commentaries etc.) are consulted. The study gathered both the primary and secondary data from libraries and online source.

Since there is no research yet conducted on competition issues related to Ethiopia Commodity Exchange's Electronic Trading, empirical part of the study is conducted using primary data; less structured interview, less structured questionnaire and archive review. Less structured interview was useful to collect robust information from the commodity Exchange's staffs that are responsible to monitor the trading activities (Market surveillance team), the Exchange's Business Conduct Committee and the legal team which follow up and enforce trading rules. Less structured questionnaires helped to get information related to contemporary Anticompetitive Unilateral Acts in the commodity Exchange's electronic trading system from the traders who participate in the Electronic Trading. For the purpose of clarity and getting clear answers, the research questionnaire and interview questions are prepared in Amharic language and interpreted by the researcher. Based on the permission of the commodity Exchange, Limited Archive review was also conducted on the commodity Exchanges' records / data which exhibit Anticompetitive Unilateral Acts or incidents addressed by the Commodity Exchange's rule on the Electronic Trading System. For the purpose of simplicity and protecting information related to cases (pending or not), the study used fictitious file numbers and incident numbers.

The study employed Purposive Sampling in order to conduct data collection through questionnaire; since, not all traders (members) in the Commodity Exchange (Three Hundred Forty Seven Members and Seventy Non-member Direct Traders) are always active in trading and engage in continuous trade. Hence, the study is conducted using purposive sampling which considers active participation of traders and continuous involvement in the electronic

trading. The study took one hundred members from the total population of members and non-member traders. Accordingly, twenty top coffee sellers, twenty top coffee buyers, twenty top sesame sellers, twenty top sesame buyers, ten top white pea bean buyers and ten top white pea bean sellers are sampled for this study considering the value of trade the members have been engaged on (starting from the beginning of online trading, July 20, 2015 to January 1st 2018). The study took a smaller sample from white pea bean traders because there are very few traders and trades executed on these commodities. Even though the Commodity Exchange is open for trading wheat and maize, unfortunately, the electronic trading is currently limited to facilitating trades on three commodities: coffee, sesame and white pea bean. Ergo, the study took a sample only from traders who are engaged on trading commodities which are hosted in the electronic trading.

After collecting the data the study requires, the study analysed the doctrinal data by comparing / describing and explaining the data gathered vis-à-vis contemporary Anticompetitive Unilateral Acts the Commodity Exchange suffered from. The empirical data collected is analysed (using graph and chart) to examine which Anticompetitive Unilateral Acts are exhibited on the Commodity Exchange's Electronic Trading System. The empirical data is also analysed to explain which rules are being applied by the Commodity Exchange to tackle Anticompetitive Unilateral Acts in the Commodity Exchange.

Finally, the study used a neutral and non-exhaustive literature review which focuses on Anticompetitive Unilateral Acts / Unfair Competition and tries to introduce readers with the existing pile of knowledge related to the subject matter.

1.7 Literature Review

The research team for 'Review of Legal and Institutional Framework for Market Competition in Ethiopia' stated that 'Unfair Competition' relates to actions of firms that causes an economic injury to another firm, through deceptive or wrongful business practice.³³ According to the research team's report, the common examples of unfair competition includes, trade mark infringement and misappropriation, false advertisement, 'bait and switch' selling tactics, unauthorized usage of other firms brand, use of confidential information by former employees to solicit customers, theft of trade secret, breach of restrictive covenant, trade libel, and false representation of product/ service.³⁴

³³Fikremarkos Merso (Dr.), Imeru Tamirat Yigezu (LLM), Seyoum Yohannes (LLM), Yoseph Endeshaw (LLM), Tilahun Teshome Reta (LLB), Review of Legal and Institutional Framework for Market Competition in Ethiopia, (2009, Available at: Addis Ababa Chamber of Commerce), p.21 [hereinafter cited as 'Review of Legal and Institutional Framework for Market Competition in Ethiopia']

³⁴Ibid.

On another literature, Alemayehu Fentaw, denotes that the ‘law of unfair competition’ is primarily comprised of tort rules which addresses issues of tortious acts causing injury to economic interest of business, through deceptive / wrongful business practice.³⁵ Simply put, the law of unfair competition could be defined as one type of fault based extra-contractual liability.³⁶ According to Alemayehu Fentaw, the line which demarcates unfair commercial competition from other areas of laws (such as Extra-contractual Liability Law, Contract Law, Intellectual Property Law or Antitrust Law) is not really clear when it comes to ‘unfair acts’ such as price fixing agreements, breach of contractual obligations, marketing unsafe products, infringing copy right / patent / trade mark rights, or disseminating misleading ads.³⁷

HarkaHaroye, a former chairman of Ethiopian Trade Practice Investigation Commission, on his article, ‘Competition Policy and Laws: major Concept and an Overview of Ethiopian Trade Practice Law’ mentioned that ‘unfair competition’, a dishonest / fraudulent rivalry in trade and commerce, is by its very nature an intellectual property right violation of individuals / firms.³⁸ Infringement of trade mark / trade name / etc., distributing false / misleading information to consumers, false / misleading comparison of goods during advertising etc. are regarded as unfair competition.³⁹

Oddly from the above definitions for unfair competition, Phillip Areeda and Donald Turner consider ‘Predatory Pricing’ (a circumstance by which a firm/s charges very low price by sacrificing short term profit in order to earn later on a huge monopoly profit after causing competitors to exit the market).⁴⁰ ‘Cheap Exclusion’ is also another example of Anticompetitive Unilateral Act which presents a little risk / loss to the firm engaging in such act and such act will later on brings a better gain as compared to the loss.⁴¹

Here is an inspirational literature cited directly from HarkaHaroye’s work;

‘It was as far back as 1889 and 1890 that Canada and USA laid, respectively, their strong foundation for a proper competition regime. If Ethiopia cannot do so after over a century, we need to take the blame. Until Ethiopia’s competition regime is comprehensively addressed, the

³⁵ Alemayehu Fentaw, Ethiopian Unfair Competition law, (The University of Oxford Centre for Competition Law and Policy: working paper CCLP (L) 21), p. 2 (Available at: https://www.law.ox.ac.uk/sites/files/oxlaw/cclp_1_21.pdf)

³⁶ Ibid.

³⁷ Ibid.

³⁸ HarkaHaroye, Competition Policy and Laws: major Concept and an Overview of Ethiopian Trade Practice Law, *Mizan Law Review*, vol. 2, no. 1 (2008), pp. 44 – 51 [hereinafter cited as ‘HarkaHaroye’]

³⁹ Ibid.

⁴⁰ K. Kemp, ‘Taking Advantage’ of Substantial Market Power And Their Profit Focused Tests For Unilateral Anti-Competitive Conduct, *Monash University Law Review*, vol. 41, no. 3, p. 661 (Available at: <http://ssrn.com/abstract=2756425>) [hereinafter cited as ‘K. Kemp’]

⁴¹ Id. K. Kemp, p. 684

business community, consumer of good and services and the transitional economy at large are bound to steadily encounter the pitfalls of inadequate competition laws and regulatory mechanisms',⁴²

Having in mind that there are no literatures which are directly relates to competition issues of the Ethiopia Commodity Exchange Electronic Trading, this study aims at being an eye opener to exhibit the challenges faced and solutions proposed by the Commodity Exchange and competition law of the country to tackle Anticompetitive Unilateral Acts. Furthermore, the study aims at examining suitability of measures the Sand the competition law offers vis-à-vis the problem at hand.

1.8 Organization of the Study

The study comprises of four chapters. The first chapter covers proposal of the study while the second chapter is invested to investigate rules related to Anticompetitive Unilateral Acts under Ethiopian Competition regime and to identify Anticompetitive Unilateral Acts the electronic trading in Ethiopia Commodity Exchange experiences. The third chapter is devoted to assess how the Commodity Exchange tackles Anticompetitive Unilateral Acts on its Electronic Trading System. Chapter four of the study provides conclusion and recommendations (if any), considering the findings of the study. The central research question of this study revolves around the second, third and fourth chapters.

1.9 Scope and Limitation of the Study

The study is strictly limited to addressing the legal framework of Ethiopian competition regime for Anticompetitive Unilateral Acts vis-à-vis Anticompetitive Unilateral Acts on electronic trading system of Ethiopia Commodity Exchange.

Full access to reports / archives of Ethiopia Commodity Exchange on Anticompetitive Unilateral Acts Observed in the Electronic Trading, was a challenge of the study. Hence, the study is limited to data offered by the Commodity Exchange.

⁴²HarkaHaroye, cited above at note 35, p. 51

CHAPTER TWO

ANTICOMPETITIVE UNILATERAL ACTS EXHIBITED IN ETHIOPIA COMMODITY EXCHANGE'S ELECTRONIC TRADING AND RULES ON ANTICOMPETITIVE UNILATERAL ACTS UNDER ETHIOPIAN COMPETITION REGIME

2.1 Observable Anticompetitive Unilateral Acts in Ethiopia Commodity Exchange's Electronic Trading

The Electronic Trading in Ethiopia Commodity Exchange exhibited the following Anticompetitive Unilateral Acts of traders.

2.1.1 Flash Crushing

Flash Crushing is a common name for an act of sudden increase or decrease in price to buy and sell commodities, respectively, during the last seconds or minute before closing of the trading session; this is mainly because the price for trading is usually discovered at the last minutes of the trading and almost 95% of transactions in the Exchange take place on the last minute / seconds of trading.⁴³ This is a predatory Anticompetitive Unilateral Act usually done by both buyers (who want to snatch commodities in the last seconds of trade from other buyers who spent the whole trading session bargaining and competing with other buyer to purchase the same commodity) and sellers (who want to sell their commodities by suddenly dropping down their sell price and offering higher volume of the same commodity offered by other sellers).⁴⁴ For instance if there are three coffee buyers in the market in which all the buyers (Buyer A, B, C) started offering 1200 birr to purchase 10 lot, 8 lot and 2 lot,⁴⁵ respectively, of unwashed Sidama Coffee A2 grade (USDA2). Except Buyer 'C', 'A' and 'B' continued to offer various prices in a competitive fashion and the best buy price offered, reached 1700 birr and only 30 seconds were left before closing of the session. Suddenly, Buyer 'C' flash crushed his buy order by changing the order to 20 lot of the same commodity with 1710 birr and executed the transaction taking all

⁴³ Anticompetitive Unilateral Acts Observed in Electronic Trading, Market Surveillance Division, Ethiopia Commodity Exchange (December 2017), pp. 1 - 2 [hereinafter cited as 'ECX Market Surveillance Division Report, 2017']

⁴⁴ Interview with Bereket Messeret, Manager – Market Surveillance Division

⁴⁵ Official Email Conversation with Tizita Alemu, Managerin Central Depository Division of the Exchange: [1 lot of any unwashed coffee in Ethiopia Commodity Exchange Trading System is equal 2550 kilo gram, 1lot of washed coffee amounts to 1800 kilo gram and 1 lot of non-coffee commodities amounts to 5000 kilo gram] [Available at Annex 03]

available commodities offered in the market without assuming competition risk. Hence, the two competitive buyers are out manoeuvred by the buyer who executed a huge trade taking advantage of the two buyers who discovered a market price (1700 birr) by assuming various market risks such as over pricing.

In addition to disrupting normal price discovery based on demand and supply principles, flash crushing lessens trader's confidence on the Exchange's Electronic Trading System because traders suddenly increase / decrease sell or buy price as they wishes and there is no guaranty as to predictability of price in each trading sessions or execution of a trade by a potential buyer or seller.⁴⁶

Flash crushing also poses a serious threat to future trades since the Exchange regulates fluctuation of price basing on previous trading session / date closing prices. Only a maximum of 5% increase or decrease in price is allowed in pending trading sessions as compared to previous trade closing price of a commodity.⁴⁷ Thus, sudden increase / decrease in price could result inflation / deflation of price of future trades in commodities without there being any economic rational which justify thereof.⁴⁸ Such inflation and deflation of price could also have a negative impact on the commodity Exchange's effort to distribute genuine and accurate price information to its stakeholders, including small scale farmers.⁴⁹ According to Bereket Messeret, flash crushing results creation of artificial liquidity of commodities in the market; inflated price as a result of flash crushing could mislead market actors into believing that the demand for the commodity is increasing and they should purchase the commodity at any cost if they need it or deflated price as because of flash crushing may mislead market actors into believing that the commodity is market is not of a better quality or its demand is very low.⁵⁰

Interview with both Assaf Hailu (Manager: Investigation and Enforcement Division of Ethiopia Commodity Exchange)⁵¹ and Ato Shimelis Habtewold (Chief Compliance Officer and Chairman of Business Conduct Committee in the Ethiopia Commodity Exchange)⁵² shows that the Exchange investigated and forwarded many flash crushing incidents to Business Conduct

⁴⁶ ECX Market Surveillance Division Report, 2017, pp. 1 - 2

⁴⁷ Ibid.

⁴⁸ Interview with Bereket Messeret, Manager – Market Surveillance Division

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Interview with Assaf Hailu, Manager (Investigation and Enforcement Division) in Ethiopia Commodity Exchange, April 10, 2018. [hereinafter cited as 'Interview with Assaf Hailu, Manager - Investigation and Enforcement Division'] [Available at Annex 04]

⁵² Interview with Shimelis Habtewold (Chief Compliance Officer and Chairman Business Conduct Committee) in Ethiopia Commodity Exchange, April 2, 2018. [hereinafter cited as 'Interview with Shimelis Habtewold, Chief Compliance Officer and Chairman Business Conduct Committee'] [Available at Annex 05]

Committee which apparently penalized the acts according to the rules of the Commodity Exchange.⁵³

Fortunately, the Commodity Exchange's investigation and enforcement division provided for this study, an exemplary charge of flash crushing charge forwarded to the Business Conduct Committee of the Exchange which penalized the acts as anticompetitive trading practice.⁵⁴

The questioner gathered from traders of the Commodity Exchange shows that out of one hundred traders, an average of 90% of the traders confirmed that the Electronic Trading System faced / still faces flash crushing act in addition to other Anticompetitive Unilateral Acts.

2.1.2 Unrepresentative Pricing

Unrepresentative Pricing is an act of offering an exaggerated higher price or very low price for a given commodity (by both buyers and sellers) regardless of the actual price the commodity should / could have gotten in a competitive market.⁵⁵ Unrepresentative pricing could have a devastating effect when such pricing is done to eradicate a seller from the market by offering very low and unrepresentative price for his / her commodity and later on purchase the commodity with a low and unrepresentative price to make the seller face severe economic loss leading to his / her business out of market or it may be done to create false liquidity (higher demand) for a given commodity by submitting unrepresentative high price than it actually deserves.⁵⁶ For instance, in cases where a given contraband coffee is being sold in the Exchange's Electronic Trading, since the coffee will ultimately be owned by the government (or regional government where the contraband coffee is seized) and a person who ceased the contraband coffee,⁵⁷ sellers of this commodity tend to sell it with a cheaper price than it deserves and buyers tend to offer unrepresentative low price just cause they know that the coffee belongs to the government. Therefore, buyers and sellers of contraband commodity offers unrepresentative price for the commodity which results an economic loss to the government if the commodity is sold with such price and it may feed false price data to the Exchange and traders who basis on this price for future trades.

Bereket Messeret stated that Unrepresentative Pricing is one of many Anticompetitive Unilateral Acts market surveillance division witnessed and forwarded incidents related thereof to the concerned legal division of the Exchange, investigation and enforcement division. Bereket Messeret pointed out that such pricing could easily be observed from contraband coffee trades;

⁵³ Ibid.

⁵⁴ Ethiopia Commodity Exchange, Compliance Division Charge No. 001, August 2017, unpublished, [Available at Annex06]

⁵⁵ ECX Market Surveillance Division Report, 2017, p. 2

⁵⁶ Interview with Bereket Messeret, Manager – Market Surveillance Division

⁵⁷ Coffee Quality Control and Marketing, 2001, Art. 9.1.10, Directive no. 1/2001

since contraband coffee is considered as a property the government, both sellers and buyers of contraband coffee tends to offer a lower price than the coffee could / should have gotten in a competitive market. Bereket also mentioned that such pricing also be exhibited on trades executed between two affiliated traders who want to determine price of next trades by setting a higher or lower price for a commodity; however, no matter what price the affiliated traders trader their commodity with, they could easily compensate their losses through transfer pricing. Since the affiliated companies and contraband coffee traders report a false trading price which is affected by unrepresentative pricing, it paves a way for tax evasion and misleading the Commodity Exchange into disseminating market price which doesn't represent the market.⁵⁸

Besides, Bereket Messeret mentioned that Unrepresentative pricing could feed false data to the Exchange and may also create artificial / false liquidity of commodities which may apparently mislead the price discovery process.⁵⁹ Bereket also stated that such pricing may mislead the Exchange into disseminating false / unrepresentative price to stakeholders such as small scale traders and international buyers and sellers of commodities.⁶⁰

Interview conducted with Assaf Hailu and Shimelis Habtewold revealed that the Electronic Trading System faced Unrepresentative Pricing of commodities and the Exchange's investigation and enforcement division forwarded charges thereof;⁶¹ the Business Conduct Committee penalized this act claiming that it is against competitive trading practice.⁶² Exemplary charge prepared by Investigation and Enforcement Division is available at Annex 07 of this study.

The data gathered shows that among one hundred interviewees, an average of 85.3% traders who trade in the Commodity Exchange's Electronic Trading System, confirmed that Unrepresentative Pricing exists in the trading platform and they understand such act as Anticompetitive Unilateral practice.

2.1.3 Failure / refusal to submit orders in Due Time

Traders may use market information to make their decisions while buying or selling commodities.⁶³ The Electronic Trading System in Ethiopia Commodity Exchange requires traders to submit their trade orders in various stages. Pre-open session is one the stages where all buyers and sellers are required to submit their pre-trade information in order to avoid any attempt to hide genuine demand and supply information necessary for decision making and

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Interview with Assaf Hailu, Manager - Investigation and Enforcement Division

⁶² Interview with Shimelis Habtewold, Chief Compliance Officer and Chairman Business Conduct Committee

⁶³ ECX Market Surveillance Division Report, 2017, p. 2 and 8

competition.⁶⁴ Failure / refusal to submit pre-open session order could avoid disclosure of market information (demand and supply in the market, quantity, quality, price etc.) and it may lead traders to execute trades without having the necessary trade information.⁶⁵

According to Bereket Messeret, failure to submit pre-open session order gives undue advantage for a person refusing to do so because the demand or supply of this person couldn't be known by other traders or competitors; eventually, leading other traders or competitors to make their market decision without having any information as to the demand / supply of the trader hiding his trade information (the quantity, quality or price this trader wants from the market etc.).⁶⁶

Bereket also stated that such hiding of market information challenges market surveillance divisions' work since the division couldn't gather the necessary trade information to analyse competitiveness of trading activities and performance of traders as compared to their initial (pre-open session) demand or supply.⁶⁷ On his statement, Bereket confirmed that refusal / failure to submit pre-open session order is a systematic tool which leads into unrepresentative pricing.⁶⁸

For instance in cases where buyers fail to submit their pre-open session orders, it may lead other buyers into thinking that they are the only buyers and they will have a better advantage since there is no competing buyer who needs to buy the same commodity or it may mislead sellers into thinking that there are few buyers or no buyers in the market interested on the commodity they are offering and the sellers drastically reduce their selling price to sell the commodity. However, after misleading competing buyers and sellers, the traders who are hiding themselves by refusing / failing to submit pre-open session order, enters the market and execute a surprise trade advantage of competitors or counterpart traders.

Interview with both Assaf Hailu and Shimelis Habtewold revealed that the exchange used to face this Anticompetitive Unilateral Act and the Exchange has penalized the acts in different times based on the investigation and findings of investigation and enforcement division.⁶⁹ However, admitting existence of this anticompetitive act in the Exchange, Shimelis Habtewold, stated that the Commodity Exchange have recently prohibited this act by making submission of pre-open session order a mandatory prerequisite to enter into the actual trading session (Open Session).⁷⁰

⁶⁴ ECX Market Surveillance Division Report, 2017, p. 8

⁶⁵ Ibid.

⁶⁶ Interview with Bereket Messeret, Manager – Market Surveillance Division

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Interview with Assaf Hailu, Manager - Investigation and Enforcement Division and Interview with Shimelis Habtewold, Chief Compliance Officer and Chairman Business Conduct Committee.

⁷⁰ Interview with Shimelis Habtewold, Chief Compliance Officer and Chairman Business Conduct Committee

The researcher managed to review one exemplary charge and offered by the Exchange, relating to failure / refusal to submit per-open session orders on Electronic Trading.⁷¹

Among one hundred traders who participate on the Electronic Trading, an average of 81.6% traders confirmed that failure / refusal to submit pre-open session orders is one of the Anticompetitive Unilateral acts in the Electronic Trading System faced or still faces.

2.1.4 Pace Making

Pace making is an act of submitting continuous offers / orders to create artificial liquidity (from both demand and supply) and eventually cancel such order or offer after making sure that other competitive buyers / sellers are following such pace being made; once the pace maker leave the market by cancelling his order, competitive buyers / sellers who have followed the pace maker's foot step by submitting competitive price will face execution of trade by the higher or lower price they offered for a given commodity following the pace makers steps.⁷² Simply put, this an act of false attempt to trade; which misleads competitors into making a decision under the impression that the order being submitted by the pace maker is a genuine attempt to buy / sell a commodity, while in fact the pace maker's order in a false order submitted simply to mislead others and create artificial liquidity of a commodity in the market, hence the pace maker rejected his order and leave the market for his competitors to buy / sell a commodity with a pace set by the pace maker.

For instance, let's assume that unwashed Jimma Grade A2 coffee could get a maximum of 1250 birr per 1 lot in a normal competitive market and there are three competitive buyers (B1, B2 and B3) who are in the market with the potential to buy the same commodity. Without having any intention to buy (rather simply wanting to inflate the price of the commodity and create artificial liquidity) B1 started and continued to increase his offer 1265 birr to 1275 birr, then to 1295 birr, and finally to 1300 birr. Looking the price being offered by B1, B2 and B3 started and continued to compete with B1 by offering closer or equal prices offered by B1 on every steps (B2 offered a final 1295 birr and B3 offered a final 1300 birr). Few seconds before closing of the trading session, B1 cancels his order leave the market; apparently leaving the active bidder with highest price, B3, to purchase the commodity. Since the Exchange matches best buy price with best sell price, as the best price from buyers' side, B3 will be forced to purchase the commodity unless he cancels his order before the his order automatically matches with sellers order. This example easily shows that if B1 wouldn't have accelerated the pace the commodity would have been sold

⁷¹Ethiopia Commodity Exchange, Compliance Division Charge No. 003, June 2017, unpublished, [Available at Annex 08]

⁷²ECX Market Surveillance Division Report, 2017, p. 2, 5 and 6.

by 1250 birr and there wouldn't be an artificially inflated price (100 birr inflation) or higher liquidity in the market.

Bereket Messeret states that pace making is a deceitful anticompetitive practice usually done by a buyer and it affects the normal price discovery process which is free from artificially raising or minimizing liquidity of commodity in the market.⁷³ Bereket also pointed out that pace making highly influences the next day trade since the Commodity Exchange bases on previous date closing price to determine tolerable fluctuation of price of future trade.⁷⁴

Assaf Hailu stated that pace making is believed to be an act of influencing price and liquidity of a commodity artificially and Market Surveillance Division follows up this incident closely.⁷⁵ However, there is no charge or investigation recorded which related to pace making.⁷⁶

Shimelis Habtewold mentioned that even though there are no cases presented to the Business Conduct Committee after going through the necessary investigation, it is true that Market Surveillance Division closely follows up, prohibits and records incidents relating to pace making and pace makers in the market.⁷⁷

On Average, 87.5% of one hundred interviewees confirmed that there are traders who submit false and misleading orders without having any intention to buy or sell a commodity; rather with a sole intention of pace making to create artificial liquidity of a commodity which raises or decreases price of a commodity.

2.1.5 Marking the Closing Price

Marking the closing price is an Anticompetitive Unilateral Act by which traders intentionally mark a higher or lower closing price in order to use such manipulated closing price as a range for next date trades.⁷⁸ Since the Exchange's trading system manages fluctuation of prices by providing a price range which allows a maximum and minimum of 5% price deviation from previous date closing price of the last trading session,⁷⁹ manipulating closing prices of pending trades could easily help to manipulate future trades.

According to Bereket Messeret, this is a technical way of manipulating price of commodities and Market Surveillance Division considers the act as Anticompetitive Unilateral Act which damages integrity of the Exchange's trading system, ordinary discovery of price and

⁷³ Interview with Bereket Messeret, Manager – Market Surveillance Divisions

⁷⁴ Interview with Bereket Messeret, Manager – Market Surveillance Division

⁷⁵ Interview with Assaf Hailu, Manager - Investigation and Enforcement Division

⁷⁶ Ibid.

⁷⁷ Interview with Shimelis Habtewold, Chief Compliance Officer and Chairman Business Conduct Committee

⁷⁸ ECX Market Surveillance Division Report, 2017, p. 2 and 7

⁷⁹ Official Email Conversation with Shimelis Habtewold, Chief Compliance Officer and Chairman Business Conduct Committee [Available at Annex 10]

credibility of market information the Exchange disseminate to the public and other stakeholders.⁸⁰

Assaf Hailu mentioned that investigation and enforcement division have not yet investigated or prepared charges for incidents related to marking the closing price; however, Assaf pointed out that it is better to review records of Market Surveillance Division since this division keeps records of every incident, including marking closing prices.⁸¹

On his statement, Shimelis Habtewold pointed that Business Conduct Committee haven't yet entertained cases relating to marking a higher / lower closing price in order to reap undue advantage from future trades by doing so; however, since Market Surveillance Division follow up and records anticompetitive incidents, it would be helpful to review their records to ascertain whether traders mark the closing price or not.⁸² Unfortunately, the study couldn't find any charges, decisions or incidents which relates to marking the closing price which shapes the trend of future trades, especially with regard to price.

However, on average, 71.6% of one hundred traders who filed the questionnaire confirmed that traders manipulate future prices by marking a higher or lower closing price for the commodity they want to buy or sell future trade dates.

2.1.6 Cornering and Dumping

Cornering could be understood as an act of hoarding a commodity and refusal to offer the commodity to the market until the commodity becomes rare and its price rises than its actual price.⁸³ After depositing a commodity in the commodity Exchange's warehouse, owners of the commodity or intermediary members who sales the commodity may decide to wait until the last few dates of expiry of warehouse depositing period. Simply put, by deciding not to offer the commodity to the market, traders create artificial demand and rise in price of a commodity.⁸⁴

Both Assaf Hailu and Shimelis Habtewold stated that according to the rules of the Exchange, cornering is an act of purchasing higher quantity of commodities from the market only to sell thereof when the market demand increases or the price for the commodity inflates; and there are such cases forwarded to the Business Conduct Committee.⁸⁵ However, the anticompetitive act which closely resembles to cornering is an act of pre-arranging trades in order to execute trades in discriminatory fashion; discriminating both competitive buyers / sellers.⁸⁶ There are cases

⁸⁰ Interview with Bereket Messeret, Manager – Market Surveillance Divisions

⁸¹ Id. see Footnote 74

⁸² Interview with Shimelis Habtewold, Chief Compliance Officer and Chairman Business Conduct Committee

⁸³ ECX Market Surveillance Division Report, 2017, p. 2 and 7

⁸⁴ Interview with Bereket Messeret, Manager – Market Surveillance Divisions

⁸⁵ Interview with Assaf Hailu, Manager - Investigation and Enforcement Division and Interview with Shimelis Habtewold, Chief Compliance Officer and Chairman Business Conduct Committee

⁸⁶ Ibid.

penalized by the Business Conduct Committee being considered as an act of pre-arrangement. Hence, the idea cornering may fall under the recent acts of pre-arranging trades.⁸⁷

Dumping is an act of selling a commodity with a lesser price than it actually could get from the market or production cost of the commodity.⁸⁸ This act is commonly exhibited on contraband coffee trades mainly because the commodity is usually sold by seller members who don't care whether the commodity is sold in a good / bad price; hence, the traders sell contraband commodity to other traders with a cheaper price than the actual value of the commodity.⁸⁹ Such irrational act could be done with intent to shape future trades in certain fashion by marking the closing price.⁹⁰

Bereket Messeret stated that an act of selling commodities with a cheaper price is witnessed on contraband coffee trades and this highly related to unrepresentative pricing because contraband coffee sellers are offering a contraband coffee with a very cheaper price as compared to its value or actual price in ordinary market had it not been a contraband coffee, the coffee could have gotten a better price.⁹¹

Admitting the above mentioned statement, both Assaf Hailu and Shimelis Habtewold pointed out that Business Conduct Committee have penalized such act of selling contraband commodity with a lesser price than it actually deserves, as an act of unrepresentative pricing; however, the number of cases entertained by the Business Conduct Committee is limited.⁹²

On average, 52.5% one hundred traders admit that the Exchange's trading system faces cornering and dumping of commodities while trading on the Electronic Trading System.

2.1.7 Matching Orders

Until May 2016, Intermediary Members who trade in the Commodity Exchange used to have a right to represent both buyer and seller clients they may have and it is possible for traders to enter into the market with two identical buy and sell orders from their clients; ergo, it was possible to match buy and sell of their clients in the market.⁹³ Such right could help traders to match two orders of their buyer and seller client as they wish; regardless of price discovery and market competition.⁹⁴ However, after May 2016, the Exchange announced that Intermediary

⁸⁷ Ibid.

⁸⁸ ECX Market Surveillance Division Report, 2017, pp. 10

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Interview with Bereket Messeret, Manager – Market Surveillance Divisions

⁹² Interview with Assaf Hailu, Manager - Investigation and Enforcement Division and Interview with Shimelis Habtewold, Chief Compliance Officer and Chairman Business Conduct Committee

⁹³ Interview with Bereket Messeret, Manager – Market Surveillance Divisions

⁹⁴ Ibid.

Members can only be a buyer or a seller; hence, prohibiting the right to represent buyers and sellers in the market and matching orders.⁹⁵

Nevertheless, the Exchange, still have an exceptional room which allows coffee buyer intermediary members to sell by-product coffee in cases where their clients have by-product coffee (local consumption coffee) collected from processing export coffee.⁹⁶ For instance, buyer Intermediary Member may Purchase export standard coffee for his client and after processing the purchased coffee for export, the client may collect by-product coffee which couldn't be exported; thus, the Exchange's system allows this client to sell the by-product via his buyer Intermediary Member. Since the Intermediary Member's normal trading activity is purchasing commodities for its clients, it may receive an order to purchase by-product coffee from one of its clients. Therefore, the intermediary member could act as both buyer and seller who match two orders (by-product coffee sell and Buy).

According to Bereket Messeret, such loophole of trading as both buyer and seller paves a wider room for traders to match buy and sell orders of their clients as they wish; without any regard to competition and formal bargaining process.⁹⁷ On such cases, traders could manipulate price of transaction, liquidity of commodities and price range since one trader can act as both buyer and seller who sets price for the transaction without going through bargaining.⁹⁸ If the transaction had two traders representing buyer and seller, the market could entertain normal bargaining process a better competition.⁹⁹

Furthermore, matching orders could eliminate completion because: (1), the trader who matches the two order could submit identical orders simultaneously and the transaction could be swiftly execute since the Exchange's electronic trading system matches best buy and sell prices immediately; this could easily be done by submitting identical orders.¹⁰⁰ Ergo, other competitive sellers couldn't sell their commodity or buyers may not be able to purchase the commodity being matched by the traders who represents both sides.¹⁰¹ (2), the traders who matches the two orders can set price and determine prices of future trades, (3), unless they act rationally their act could disrupt the price discovery system and it may also feed false or unrepresentative trade information.¹⁰²

⁹⁵ Official Email Conversation with Shimelis Habtewold, Chief Compliance Officer and Chairman Business Conduct Committee and Formal Notice Posted by Ethiopia Commodity Exchange [both Available at Annex 11 and Annex 12]

⁹⁶ Interview with Shimelis Habtewold, Chief Compliance Officer and Chairman Business Conduct Committee

⁹⁷ Interview with Bereket Messeret, Manager – Market Surveillance Division

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ ECX Market Surveillance Division Report, 2017, p. 2 and 6

¹⁰¹ Ibid.

¹⁰² Ibid.

Both Assaf Hailu and Shimelis Habtewold stated that single traders used to act both buyer and seller but after being considered that this act could lead into anticompetitive trading practice, the Exchange recently prohibited trading in both sides.¹⁰³ However, there is still a legal loophole by which a single trader could act as both buyer and seller while trading a by-product coffee.¹⁰⁴ Such matching orders by a single trader are strictly checked and recorded and there is a chance for the concerned divisions to forward anticompetitive matching orders to Business Conduct Committee.¹⁰⁵

On average 52.5% of One hundred traders confirmed that matching orders is one the Anticompetitive Unilateral Acts the Electronic Trading faced or still faces.

In general, the data gathered shows that: (1), the Electronic Trading System faces different Anticompetitive Unilateral Acts which are not specifically mentioned under Article 8 of Trade Competition and Consumer Protection Proclamation; which deals with issues of Unfair Competition.¹⁰⁶ (2), Anticompetitive Unilateral Acts in the Electronic Trading relates to technical price manipulation, disclosure of market information (hiding pre-trade information), genuineness of orders submitted and manipulation current or future transactions; unlike acts of unfair competition listed under Article 8 of Proclamation No. 813/2013 which deals protection of consumers and private intellectual property rights of traders, good will And (3) the Anticompetitive Unilateral Acts the Electronic Trading faces, directly affect competitiveness of the market, price dissemination, ordinary price discovery which basis on demand, supply and other economic factors.

Even though, the managers of Investigation and Enforcement Division and the Chairman of the Business Conduct Committee stated that there is no charge forwarded to Business Conduct Committee relating to Pace Making, Marking the closing price and cornering commodities. Nonetheless, Market Surveillance Division argues that all of the above mentioned seven anticompetitive acts exist in the market despite the lack of formal charges and incidents recorded for some of the acts.

Since the Exchange is the only market place where transactions on the country's valuable export items such as coffee and sesame are facilitated,¹⁰⁷ the more the Exchange faces Anticompetitive Unilateral Acts; it is tougher for traders, small scale farmers and even the country to reap the benefits of competitive market. It is logical to assume that the country may face serious

¹⁰³ Interview with Shimelis Habtewold, Chief Compliance Officer and Chairman Business Conduct Committee

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

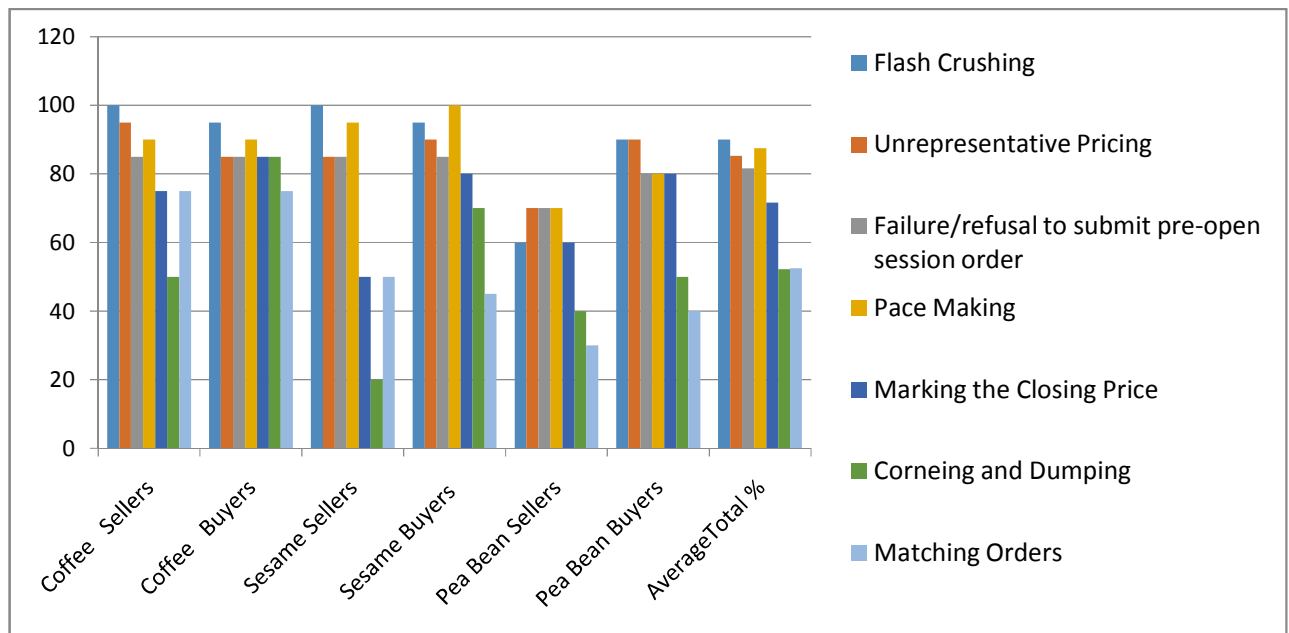
¹⁰⁶ Proclamation No. 813/2013

¹⁰⁷ Coffee Marketing and Quality Control Proclamation, 2017, Proc. no. 1051/2017, Neg.Gaz., year 23, no.72, Art. 19(2) and Sesame and White Pea bean Transaction Regulation, 2010, Regulation no. 178/2010, Neg.Gaz., year 16, no.25, Art. 4

challenges on its exporting front in cases where the only market which is entrusted to facilitate competitive trades on main exportable commodities such as coffee and pulses fails to live up to its goals because of Anticompetitive Unilateral Acts.¹⁰⁸

Besides manipulating single transactions, the aforementioned anticompetitive acts do have the potential to cripple genuine price discovery, and it may create a doubt as to predictability / credibility of the Exchange’s trading system. Furthermore, the anticompetitive acts could pave a way for dissemination of wrong trade information (which may have a serious repercussion on price of commodities), tax evasion, and elimination of competitive traders (in cases of unrepresentative pricing, dumping etc.). A refusal / failure to submit the required pre-trade information could directly impact competition culture of trades, because without disclosure of trade information between traders, it may be hard for traders to make informed market decisions.

The following graph shows data gathered from traders who participate on the Electronic Trading in Ethiopia Commodity Exchange. The chart provided shows how many of the traders admit/ confirm the existence of the above mentioned Anticompetitive Unilateral Acts.



Graph 1

The Next table summarizes statements of the Bereket Messeret), Shimelis Habtewold and Assaf Hailu with regard to Anticompetitive Unilateral Acts observed on the Exchange’s Electronic Trading System.

¹⁰⁸ National Bank of Ethiopia, Domestic Economic Analysis and Publication Directorate, 2016/2017 Annual Report, (2016/2017), p. 46 [shows that coffee and pulse comprise an aggregate 42.7% export earning of the country]

AUA	Bereket Messeret	Shimelis Habtewold	Assaf Hailu
Flash Crushing	√	√	√
Unrepresentative Pricing	√	√	√
Pre-open	√	√	√
Pace making	√	- No charge but surveillance team follows up	- No charge
Marking the close	√	- No charge; check surveillance records	- No charge
Corner and Dump	√	❖ No cornering: Pre-arranging √ ❖ √ Dumping: contraband coffee	❖ Cornering = pre-arranging and √ ❖ Dumping √ on contraband coffee
Matching order	√	√	√

Table 1

Remark: this symbol (√) represents Admitting / Acceptance of existence of the Anticompetitive Unilateral Act in question.

2.2 Rules on Anticompetitive Unilateral Acts under Ethiopian Competition Regime

2.2.1 Jurisprudential Development of Unfair Competition

Since the term ‘Unfair Competition’¹⁰⁹ under Ethiopia Competition Regime is the only rule which resembles to Anticompetitive Unilateral Act, it is important to have a highlight on the jurisprudence of the term.

The term Unfair Competition relates to more than a century old international convention, ‘Paris Convention for the Protection of Industrial Property’, which prohibits any act of competition contrary to honest practice in industrial or commercial matters.¹¹⁰ Particularly, acts causing confusion with good or industrial / commercial activities of a competitor; false allegation which discredit goods or industrial / commercial activities of a competitor, acts misleading the public as to nature / purpose manufacturing process / characteristics of goods etc. are considered as acts

¹⁰⁹ Proclamation No. 813/2013, cited above at note 16, Art. 8 (2)

¹¹⁰ Paris Convention for the Protection of Industrial Property, (March 20, 1883), Art. 10bis (available at: WIPO Data Base of Intellectual Property: Legislative Text) [hereinafter cited as ‘Paris Convention’]

of unfair competition. Trade mark laws of countries such as United States of America were influenced by unfair competition rules of Paris Convention.¹¹¹

Even though some may argue that the scope of unfair competition is being / has been extended to apply to any misappropriation of what equitably belongs to a competitor, in American Federal courts, unfair competition is judged to be a euphemism / a convenient name for the doctrine that no one should be allowed to sell his goods as those of another.¹¹²

Rudolf Callmann explains that unfair competition is a theory which protects trademarks / similar devices adopted by the plaintiff, registered or not will be protected against simulation by a competitor which violates the rules of fair competition and does injury to the plaintiff.¹¹³

Similarly, Charles Grove Haines mentioned that despite recently widening its scope to address ‘any conduct to the part of one trader which tends unnecessarily to injure another in his business’, unfair competition was defined in the dictum that “nobody has any right to represent his goods as the goods of somebody else ” and the term has been used for the first time in courts’ attempt to ensure protection of trademarks.¹¹⁴

Ergo, scrutiny of the aforementioned statements / arguments coupled with the fact that unfair competition rules came into picture before enactment of even the two pioneer competition laws of America and Canada;¹¹⁵ shows that unfair competition is more of intellectual property related rule, which developed through an effort to protect business rights such as trademark, trade name and indication, rather than being anticompetitive rule per se.

2.2.2 Rule on Anticompetitive Unilateral Acts under Ethiopian Competition Regime

Trade Competition and Consumer Protection Proc. No. 813/2013 (hereinafter named as ‘the proclamation’) states that ‘...protecting the business community from anti-competitive and unfair market practices and also consumers from misleading market conducts..’ is the objective of the proclamation. This objective clearly shows that its objectives are classified in three

¹¹¹ Patricia V. Norton, “The Effect of Article 10bis of Paris Convention on American Unfair Competition Law”, *Fordham Law Review*, vol.68, Issue 1 (1999), p.225 [American Trade mark law (Lanham Act of 1946 provide rules which prohibit acts of unfair competition such as : likelihood of confusion, misrepresentation and misappropriation]

¹¹² Rudolf Callmann, “Unfair Competition Without Competition: the Importance of the Property Concept in the Law of Trade Marks ” *37TradeMark Law Rep.* (1947), p. 176 and 177 (available at: University of Pennsylvania Law Review, vol. 95, no. 4, March 1947)

White Tower System v. White Castle System of Eating Houses Corp., **90 F. (2d) 67**, [available at: <https://lawjustia.com/cases/federal/appellate-courts/F2/90/67/1485997/>]

¹¹³ Rudolf Callmann, “Trade-Mark Infringement and Unfair Competition”, *Law and Contemporary Problems*, p.185 and 186 (available at: <https://scholarship.law.duke.edu/lcp/vol14/iss2/2/>)

¹¹⁴ Charles Grove Haines, “Efforts to Define Unfair Competition”, *Yale Law Journal* vol. 29 no.1 (1919), p.2

¹¹⁵ A Reappraisal of a Canadian Anti-combines Act of 1889, cited above at note 4, pp.128 – 130 [Unfair competition rules for trademarks, trade names and indications are included in the 1883 Paris convention. The two pioneer competition rules came into picture in 1889 and 1890 by United States of America and Canada, Respectively]

different categories: prohibiting anticompetitive acts, prohibiting unfair market acts and prohibiting customer misleading acts. Hence, it is noticeable that the proclamation differentiates anticompetitive acts from unfair competition practices and customer misleading acts in the market. Article 8 of the proclamation focuses on providing rules for ‘unfair competition’ while chapter three of the same proclamation devoted itself to address consumer protection rules which prohibit customer misleading market practice. Despite having rules for Abuse of Dominance, Anticompetitive Merger, Anticompetitive Agreement / concerted decisions, the proclamation failed to clearly provide rules for Anticompetitive Unilateral Acts which could be done without being dominant market actor or misleading customers or through merger or agreements as specified under proclamation.¹¹⁶ Therefore, scrutiny of the proclamation reveals that there is no particular rule provided to address Anticompetitive Unilateral Acts per se.

Since, the only article which probably looks close enough to address Anticompetitive Unilateral Acts under the proclamation is Article 8; it would be wise to dissect and examine the substantive content of this article to assess if this article provides proper rules for Anticompetitive Unilateral acts.

2.2.3 Substantive Content of Ethiopian Unfair Competition Rule

For the purpose of better understanding, it is better to separately discuss the rules provided under article 8 of the proclamation as follows:

Article 8(1)

This Article seems to offer a general rule which prohibit unfair competition and possibly, a definition for ‘unfair competition’. The article states that it is prohibited to carry out acts which are dishonest, misleading, deceptive and harms or likely to harm the business interest of a competitor. There is no mentioning of the word competition or prohibition of anticompetitive act under this sub article; rather, it proclaims that dishonest, misleading and deceptive acts which harms or likely harms competitors are prohibited. Hence, article 8(1) appears to be a protection for private business interest (goodwill) of market actors instead of being a rule which aims at promoting competitive trading practice and prohibits anticompetitive acts. Even if one may consider, for argument sake, the above sub article as a competition rule, one may couldn’t help but wonder if all dishonest, misleading and deceptive acts which may or may not harm interest of competitors in the market will always be considered as anticompetitive acts which may lessen competition. For instance, one shoe producing company may discredit its competitor promoting that shoes produced by the later are not products of genuine leather; eventually resulting

¹¹⁶Proclamation No. 813/2013. Art. 5 – 6 (Abuse of Dominance), Art. 7 (Anticompetitive Agreement), Art. 9 – 13 (Regulation of Merger), Art. 13 – 22 (Protection of Consumers).

economic loss to its competitor. This act could be subjected to private laws such as Contract / Tort laws etc. and the act of the perpetrator may not necessarily affect the overall competition / competitive trading practice in the market because; competitive market or not, companies may try to discredit their competitors and promote their goods and services to harvest fruits of their misleading and dishonest act.

Keeping in mind the inclination of this article to protect private interests of traders, it is fair to question if competition law is a tool to enforce private rights of market actors or if it is a public law which aims at shaping a market in a certain fashion. Even though competition law helps to protect private interests of traders, it is ultimately considered as a public law which is concerned with the governance of a state, and it is not simply a form of private regulation concerned solely with the governance of private market.¹¹⁷ This public nature of competition law could also be understood as an inherent political form of regulation which involves balancing of public and private concerns.¹¹⁸ Unfortunately, the above article tends to focus more on private aspect of competition law instead of its public law character. For example, maintenance of competitive free market, which is cited on article 3 (1) the proclamation, could be referred as a public policy choice rather than a mere private rule since it is mainly up to governments to shape the nature of the market; choice of competitive free market is more of a public law which governs market actors and stakeholders in general. Thus, the above statements and arguments reveals that Art. 8 (1) does not directly deal the issue of competition; instead it focuses on protecting right / interest of trades from being violated by the act of other traders.

Article 8 (2) (a) and (b): Confusion and Disclosure / Use of Information

Article 8(2) (a) deals with acts which confuse someone else's business or commercial activities with another business / commercial activity. Simply put, this article prohibits traders from confusing their businesses / commercial activities with other businesses. This article seems a protection for both traders and consumers, because: (1), traders and their goodwill is protected from confusing acts of their competitors who want to pass off other traders' goodwill as their own; ergo confusion of trade names, or trademarks is prohibited,¹¹⁹(2), the prohibition will help consumers to make an informed decision free from any confusing act of traders with respect to trade names, trademarks etc.

¹¹⁷ Michael W. Dowdle, "On the Public Law Character of Competition Law: A lesson from Asian Capitalism", National University of Singapore Law Working Paper Series, no. 2014/004, (2014), p. 6 [available at: <http://lawnus.edu.sg/wps/>]

¹¹⁸ Ibid

¹¹⁹ TradeMark Registration and Protection Proclamation, 2006, Preamble Proc. No. 501, Neg. Gaz. Year 12, No. 31 [hereinafter cited as 'Trademark Registration and Protection Proclamation'] [The preamble it is necessary to protect good will of business persons by protecting their trademarks from confusion between similar goods / services]

The prohibition on the above article inclines more to protection of goodwill of traders / interest related to it and protecting consumers from making wrong decisions because of confusion of business or trading activities. It is hard to grasp a hint which shows that this article is meant to prohibit Anticompetitive Unilateral Acts because it mentions nothing about prohibition of anticompetitive trading practice. Moreover, the above prohibition would fall under the jurisdiction of Trademark Registration and Protection Proclamation,¹²⁰ Commercial Code¹²¹, and Extra Contractual law which prohibits false publication and other acts contrary to good faith.¹²² Hence, it seems that the proclamation repeated rules stated in different legislations in order to govern private matters instead of articulating proper competition rules for Anticompetitive Unilateral Acts. Besides, the Criminal Code of the country criminalizes acts which create confusion with goods, dealing, products or commercial activities.¹²³

Article 8 (2) (b) offers a rule which prohibits possession / disclosure / use of another business persons' information without the consent of the later, in a manner contrary to honest commercial practice. Since the proclamation failed to define what constitutes as 'information', it is important to refer other documents which may define this word. The 1985 Uniform Trade Secret Act describes 'Trade Secrets' as information which includes formula, pattern, compilation, program, pattern, device, method, technique or process which brings economic gain from not being known to the public.¹²⁴ Thus, one could understand information as a sensitive trade secret whose disclosure could result in economic loss to the owner thereof. Acquisition, disclosure or use of such trade secrets without implied or direct consent is regarded as 'misappropriation' of trade secret of traders.¹²⁵ Ironically, Ethiopian Criminal Code follows a rule which prohibits revealing / taking advantage of revealed trade secrets obtained / revealed in a manner contrary to good faith.¹²⁶ Accordingly, as per the above definition and scrutiny of the aforementioned sub article of the proclamation with the criminal rule stated, one may have the audacity to argue that Art. 8 (2) (b) is a protection for private right of traders (trade secret) instead of being a proper competition rule against Anticompetitive Unilateral Act.

¹²⁰ Ibid.

¹²¹ Comm. C. Art. 133 (Cases of Unfair Competition), and Art. 138 (Assumed Trade name and prohibition of confusion of trade names) see footnote 20

¹²² Civ. C. Art. 2057, see footnote 18

¹²³ The Criminal Code of the Federal Democratic Republic of Ethiopia 2004. Art. 719 (b) [hereinafter cited as 'Crim. C']

¹²⁴ Uniform Trade Secret Act: With 1985 amendments (August 1985), Definition 'Misappropriation' and 'Trade Secret'. [available at: www.wipo.int/edocs/lexdocs/laws/en/us034en.pdf] [last accessed: March 08, 2018]

¹²⁵ Ibid.

¹²⁶ Crim. C. Art. 179 (e)

Thus, scrutiny of the above sub articles and arguments stated presents that the two sub articles deals with private right of traders rather than being a means to shape competition culture in markets or prohibiting Anticompetitive Unilateral Acts.

Article 8 (2) (c) and (d): False Allegation and False / Equivocal Commercial Advertisement

Article 8 (2) (c) deals with false / unjustified allegation which discredits / likely to discredit business activities of a trader and goods / services producers or offered by such business person. From the above statement, it is easy to understand that there is no indication or mentioning of prohibition to Anticompetitive Unilateral Act; instead, it simply prohibit false / unjustified allegation which discredit good will of other traders. Ironically, the same rule has been provided under Ethiopian Commercial Code which deals with false statements made in course of business with a view to discrediting the undertaking, products or commercial activities of a competitor.¹²⁷ Furthermore, the Commercial Code provides a relief by cross referring Article 2122 of Ethiopian Civil Code which offers abandonment of the false allegation as a relief. The country's Criminal Code also addressed the issue of discrediting goods / dealing / commercial activities of other traders as a crime entailing fine and simple imprisonment.¹²⁸ However, the current competition law adopted prohibition of false allegation as a proper competition rule while in fact the rule actually deals with protection of private economic right, good will.

Article 8 (2) (d) is all about false / equivocal comparison of goods / services during commercial advertisement. Looking at the direct meaning of the above sub article, one couldn't help but wonder if it is an advertisement law or a competition law which helps to create competitive trading environment. Answering this question requires referring to the country's advertisement proclamation. The Advertisement Proclamation on article 8 (8) states that advertisement which undermines product / service or capacity or reputation of a competitor by comparing / contrasting it with ones' product / service, could result, unless punishable with severe penalty under other laws, a fine up to 150, 000 birr.¹²⁹ The rule mentioned above shows that, the Advertisement Proclamation has already addressed 'unfair content / misleading advertisement' with a sanction as acts contrary to the rule stated. Therefore, it seems article 8 (2) (d) of the competition law seems a redundancy because the same prohibition has been already in place by another specific law dealing with matters of commercial advertisement. Besides, article 8 (2) (d) don't offer any specific rule dealing with Anticompetitive Unilateral Act.

¹²⁷ Comm. Code, Art. 133

¹²⁸ Crim. Code. Art. 179 (a)

¹²⁹ Advertisement Proclamation, (2013), Proc. No. 759, Neg. Gaz., year 18, no. 59, Art. 8 (8) and 34 (1) (c) [hereinafter cited as 'Advertisement Proclamation']

The above mentioned two sub articles revealed that both sub article 2 (c) and (d) failed to provide rules which prohibit Anticompetitive Unilateral Acts. Instead, the sub articles provided a rule against false allegations and advertisement against traders.

Article 8 (2) (e) and (f): Disseminating False / Equivocal Information to Customers / Users and Obtaining or Attempting to Obtain Confidential Information of another Business

Dissemination to consumer or users, false / equivocal information whose source is unknown, in connection with the price / nature / system of manufacturing / manufacturing place / content/ suitability for use or quality of goods / services is regarded as an act of unfair competition. However, the prohibition seems a protection for consumers from being misguided by falsely or equivocally disseminated information. However, Part Three of the same proclamation deals with protecting consumers by granting consumers the right to get sufficient and accurate information or explanation as to the quality and type of service the consumer purchases.¹³⁰ This part of the proclamation (Chapter Three) provides a detailed requirement for display of price and affixing labels on goods offered to consumers.¹³¹ Besides, article 3 (2) of the proclamation clearly shows that ensuring safeness / suitability of goods and services and their equivalence to the price customers pay is an aspect of consumer protection rather than competition. Article 19 of the proclamation also prohibits false commercial advertisement which misleads customers as to nature, component, volume method and date of manufacturing etc. Therefore, article 8 (2) (e) inclines to being a rule for consumer protection rather than Anticompetitive Unilateral Acts.

Article 8 (2) (f), almost as similar as article 8 (2) (b) provide rules for protection of confidential information (trade secrets) of traders from being obtained by other traders through former / current employees of the trader who owns the business secret. This article also prohibits traders from pirating customers of other traders by using trade secrets of the later and lessening competitiveness of a trader because of such act. Nevertheless this rule is not a direct competition rule; on the contrary, it is a protection for trade secret of traders and it seems that the rule wants to incidentally touch up on the idea of lessening competitiveness of traders. World Intellectual Property Office defines trade secret as ‘any confidential business information which provide an enterprise a competitive’.¹³² It is understandable that losing their trade secrets, traders or companies may face an economic loss since other competitors could simply use the divulged trade secret to end dominance of the owner of the trade secret. However, protection for trade

¹³⁰Proclamation No. 813/2013, Art. 14 (1)

¹³¹Proclamation No. 813/2013, Art.14 (Price Display) and Art. 16 (Labels of Goods: such as Name of good, volume of good, quality of good, description of materials used for manufacturing, name and address of manufacturer, manufacturing and expiry date, indication that the good fulfilled the necessary standard of the country).

¹³²http://www.wipo.int/sme/en/ip_business/trade_secrets/trade_secrets.htm [last accessed on March 09, 2018]

secret, doesn't not necessarily qualifies as a competition law for Anticompetitive Unilateral Acts. Thus, it would be very hard to argue that article 8 (2) (f) is a proper competition law which aims at promoting competitive trading environment by managing Anticompetitive Unilateral Acts.

Similar to the aforementioned sub articles of Article 8, sub article 2 (e) and (f) aims at protecting private right of traders (being protected from false information dissemination to their customers and from unlawful usage of their business secret). It is hard to consider such rules as competition proper rules which tackle Anticompetitive Unilateral Acts.

Article 8 (2) (g): Other Similar Acts Specified by Regulation to be issued for the Implementation of the Proclamation

The drafting of this article seems to show that there would be other acts of unfair competition which are not yet included under the proclamation and in general, article 8 is an illustrative article which doesn't exhaust all acts of unfair competition. Regulations are tools of the executive branch of the government which help to implement proclamation adopted the highest organ of the government, the House of People Representative. Being a subordinate to primary law (proclamation), regulations are inferior legislations helpful to implement proclamations without deviating from rules and standards of the proclamation.¹³³ However, the trade practice and competition proclamation simply paved an open door for any regulation of the executive (which would be legislated to implement the proclamation) to determine other acts of unfair competition freely. Hence, it is possible for the executive to include other acts, freely, as acts of unfair competition using article 8 (2) (g) as an authority.

In other words, this article would pave a way for the executive branch to freely extend the list of acts of unfair competition as it pleases; such unlimited power to legislate may lead to abuse of power.

In addition to the above mentioned gap of the law, the competition regime is not yet fortunate enough to have the regulation which would implement the rules stated on the proclamation; i.e., only those acts listed under article 8 of the proclamation would be considered acts of unfair competition.

Thus, the study shows that this specific sub article is not functional yet and gives a wider room to include various acts as acts of 'unfair competition'.

¹³³ Tesfaye Abate, Introduction to Law and Ethiopian Legal System: Teaching Material (2009), pp. 127 – 131

2.2.4 Suitability /Adequacy of Ethiopian Competition Regime's Unfair Competition Rulesto Address Anticompetitive Unilateral Acts in Ethiopia Commodity Exchange's Electronic Trading

In general,scrutiny of each unfair competition rules under article 8 of Trade Competition and Consumer Protection Proclamation shows that this specific article and its sub articles deals with issues of dishonest, fraudulent, misleading and misrepresentative acts against brand, trademarks, trade name etc. These acts are acts of intellectual property right violation rather than being a strict competition rules.¹³⁴On his short article, HarkaHaroye pointed out that many of the cases that Trade Competition and Consumer Protection Authority have decided on are cases of unfair competition (private conflicts over intellectual property right).¹³⁵The writer also mentioned that infringement of such private right is said to have an insignificant effect on the country's economy and the market; hence exerting efforts to handle such cases by Trade Competition and Consumer Protection Authority would be a waste of time and resource.¹³⁶ The above statement by HarkaHaroye shows that acts of unfair competition are not matters of competition and they are merely private issues which could be addressed by private right enforcement mechanisms and there is no evidence which may help to conclude otherwise.

Ergo, considering the acts listed as unfair competition, are technically, issues of private right infringement (Intellectual property right, unfair trade practice rules under the Civil Code, Commercial Code and the Criminal Code), these acts are similarly addressed in other law such as Criminal Code, Commercial Code, Advertisement Proclamation, Civil Code etc. and considering the general jurisprudential development of unfair competition rules, one may strongly argue that rules against unfair competition under the proclamation are not rules against Anticompetitive Unilateral Acts.

Besides, Anticompetitive Unilateral Acts Observed in Ethiopia Commodity Exchange's Electronic Trading relates to transaction manipulation, price manipulation, order manipulation and disclosure of genuine trade information for fellow traders; while on the contrary, Trade Competition and Consumer Protection Proclamation addresses / covers infringement against private intellectual property rights as Anticompetitive Acts (unfair competition) performed by traders unilaterally. Therefore, scrutiny of the rules of 'unfair competition' from competition law perspective, one could deduce that the practical Anticompetitive Unilateral Acts Observed in the Exchange's Electronic Trading couldn't possibly fall under or adequately addressed by the unrelated intellectual property right protection rules listed under the proclamation, i.e. unfair competition rules.

¹³⁴HarkaHaroye, pp. 44 - 46 see footnote 36

¹³⁵ Ibid

¹³⁶ Ibid

CHAPTER THREE

TACKLING ANTICOMPETITIVE UNILATERAL ACTS OBSERVED ON ELECTRONIC TRADING BY THE RULES OF ETHIOPIA COMMODITY EXCHANGE VIS-AVIS THE CURRENT COMPETITION REGIME

3.1 Measures against Acts of Unfair Competition under the Ethiopian Competition Regime

This chapter attempts to examine rules of the current Ethiopian Competition law and rules of Ethiopia Commodity Exchange vis-à-vis Anticompetitive Unilateral Acts observed in Ethiopia Commodity Exchange's Electronic Trading System. The chapter revolves around one research question, i.e. how are the existing Anticompetitive Unilateral Acts in the Ethiopia Commodity Exchange Electronic Trading being tackled by the Exchange's rules and are the measures consistent with the rules of the competition law.

As discussed on the previous chapter, unfair competition rule under the Ethiopian competition regime diverges from the Anticompetitive Unilateral Acts exhibited in Ethiopia Commodity Exchange's Electronic Trading System. However, if one considers / argue that unfair competition rule under the competition regime could also address Anticompetitive Unilateral Acts; especially those exhibited in Ethiopia Commodity Exchange's Electronic Trading, it would be logical to check measures against such unfair acts converge with the rules of the Commodity Exchange which deals with Anticompetitive Unilateral Acts.

Basically, measures against unfair competition under the competition regime could be summarized as Administrative Measures, Compensation, Fines and Criminal Penalty.¹³⁷ The Administrative measures against violations of rules under chapter two of the proclamation (including acts of unfair competition) consists of discontinuation of the unfair competition act, taking any appropriate measure to reinstate competitiveness of a victim of unfair competition, and suspension or revocation of the perpetrators' business license.¹³⁸

Compensating the victim of unfair competition act is the second measure against a perpetrator of unfair competition; following relevant laws which relates to compensation.¹³⁹ The third measure is imposing fine on traders who engage in acts of unfair competition and the fine ranges from

¹³⁷ Proclamation No. 813/2013, Art. 32, 42 and 43.

¹³⁸ Ibid.

¹³⁹ Ibid.

5% to 10% of annual turnover of the perpetrator.¹⁴⁰ Last but not least, the proclamation offers criminal penalty; 5,000 to 50,000 Birr fine and simple imprisonment for acts such as unfair competition.¹⁴¹

Since the rules of the competition regime have been summarized in the above discussion, the same should be done to understand how the Exchange manages Anticompetitive Unilateral Acts under its rules. Therefore, for purpose of clarity, the study dissected rules offered by the rules of Ethiopia Commodity Exchange against Anticompetitive Unilateral Acts, is explained as follows.

A. Rules against Flash Crushing

Even though there is no specific mentioning of the word ‘Flash Crushing’ under the rule¹⁴² of Ethiopia Commodity Exchange, since this act relates to executing a transaction in a fraudulent / unjust manner and it challenges predictability of the Exchange’s trading system, flash crushing may fall under the Exchange’s rule which prohibit traders from engaging on acts detrimental to the best interest of the Exchange, impairs the good name of the Exchange, or is inconsistent with just and equitable principles of trade¹⁴³ or It could also fall under the rule prohibiting any act of trading in a fraudulent manner / indulging in unfair trade practice, including market manipulation.¹⁴⁴

For instance, one of the charges presented to the Exchange’s Business Conduct Committee shows that¹⁴⁵ on July 19, 2017 a buyer trader flash crushed 115 birr (from 1055 birr to 1170 birr to) and 95 birr (from 1055 birr to 1150 birr) and purchased 6.298 lot of local washed coffee. The summary and analysis of the charge shows that the flash crushing act narrowed the chance of other competitive buyers who had the potential to purchase the same commodity if the alleged rule violator didn’t introduced a flash crushed order. The analysis also mentioned that this act challenges the integrity of the Exchange’s trading system and harms interest of competitors. Hence, being considered that this act against the Exchange’s rule which prohibit trading (buying/selling) in a fraudulent manner and the goes against detrimental interest of the Exchange, impair good name of the Exchange, and it is inconsistent with just / equitable principle of trade; Compliance division proposed 23, 206 birr fine for the member and a written warning for the floor representative.

¹⁴⁰ Ibid.

¹⁴¹ Id. Art. 43(6)

¹⁴² The Revised rules of Ethiopia Commodity Exchange, 2014, Rev. no. 8/2014 [hereinafter cited as ‘Revised Rules of ECX’]

¹⁴³ Id. Art. 6.4.5

¹⁴⁴ Id. Art. 14.6.1

¹⁴⁵ Ethiopia Commodity Exchange, Compliance Division Charge No. 001, August 2017, unpublished, [Available at Annex 06]

Since the above mentioned prohibition falls under category three rule violations,¹⁴⁶ measures against flash crushing may be written warning and/or, a fine (6% of the value of the transaction / 20, 000 birr for non-transactional violations) and/or, being required to attend trainings about rules of Exchange at the expense of the rule violator.¹⁴⁷ Hence, the alleged rule violator would have been fined 44,412.00 birr considering lot size, average price submitted by the trader times with standard for unwashed coffee (30 bag times with 85 kilogram and divided to 17feresula then finally multiplied by 6%).¹⁴⁸

While the Trade Competition and Consumer Protection Proclamation limits the minimum and maximum fine range (5,000 birr and 50,000 birr respectively), Ethiopia Commodity Exchange's rule provides no such range; ergo, the fine may be lesser or greater than the fine provided on the proclamation.¹⁴⁹ This could be considered as difference between the Trade Competition and Consumer Protection Proclamation.

B. Rules against Unrepresentative Pricing

The commodity exchange's rule provides five specific provisions which deals with prohibiting acts of manipulating price of a commodity with an aim to create false price or artificial liquidity for the commodity.¹⁵⁰ Even though Article 6.6(f) of the Exchange's rule generally prohibit an attempt or act of manipulating price of a commodity, detailed provisions on Article 14 of the same rule states that it is prohibited for a trader: (1) to make bids / offers with intention for commodities with an intention of creating a false / misleading appearance with respect to the market or the price of a commodity, (2) take part either directly or indirectly in transactions, which are likely to have effect of artificially, raising or depressing the prices of commodities and (3) indulge in any act, which is calculated to create a false or misleading appearance of trading resulting in reflection of prices, which are not genuine.¹⁵¹

Since Unrepresentative Pricing is discussed as, *inter alia*, an act which creates artificial price and liquidity of commodities,¹⁵² one may argue that the Exchange somehow managed to provide a rule to govern such pricing. The following exemplary charge prepared by Investigation and Enforcement Division of the Commodity Exchange, shows how the Exchange addresses issues related to Unrepresentative Pricing.

¹⁴⁶ Revised Rules of ECX, Art. 12.5.3

¹⁴⁷ Id. Art. 15.3.3

¹⁴⁸ Official Email Conversation with Assaf Hailu, Manager – Investigation and Enforcement Division [Available at Annex 13]

¹⁴⁹ Id. see Footnote 140, Trade Competition and Consumer Protection Proclamation

¹⁵⁰ Revised Rules of ECX, Art. 6.6 (f), 14.5.1.2 (a), 14.6.2 and 14.6.3

¹⁵¹ Ibid.

¹⁵² Id. see Footnote 58.

A charge¹⁵³ with a file No., 002, shows that on March 22, 2017, a seller member sold 0.6576 lot of threeunwashed contraband coffees owned by the client, Sibu Sire Worded Trade & Market Development Office (Regional Government) with unrepresentative price (300 birr) because the seller: (1) irrationally failed to prudently use its bargaining time in order to sell the commodity with a better price, (2) flash crushed selling price from 950 birr to 300 birr; reducing 600 birr by single editing, (3) the act of the seller created a difference of 650 birr between two coffee grades which in an ordinary / normal trade would have a maximum of 40 birr difference; ergo, it resulted an artificial liquidity of a commodity,(4), the selling price (300 birr) highly deviates from the last closing price for the same commodity, 780 birr: on January 22, 2017 trade, and (5) trade history from January 1, 2017 to May 1, 2017 shows that the same commodity have been sold with a price between 780 birr and 1000 birr. Hence, because of the above reasons, the seller's act is judged to be unrepresentative pricing which damage the interest of a client and integrity of the Exchange's price discovery. Scrutiny of the above case shows that the seller negligently / intentionally sold with the commodity of his client with a very cheap and unrepresentative price as compared to previous trade records. Ergo, stating the above mentioned Articles (14.5.1.2 (a), 14.6.2 and 14.6.1¹⁵⁴), Investigation and Enforcement Division proposed 6,000 birr fine on the seller member and a written warning for the floor representative since the case falls under category three rule violations.¹⁵⁵

C. Rules against Failure / Refusal to Submit Pre-open Session Order Crushing

Even though it is hard to find a clear prohibition on trading / attempting to trade without submitting a pre-open session order under the trading rules of the Commodity Exchange, traders are held accountable for failure / refusal to submit pre-open session order. Shimelis Habtewold stated that, recently, considering the problems faced as a result of failure / refusal to submit pre-open session order, the exchange introduced a rule which utterly prohibit any attempt to trade without submitting such order.¹⁵⁶ Unfortunately, the study couldn't find the newly introduced rule mentioned by Shimelis Habtewold.

Nonetheless, the next case could be cited as an example for the above statement. A charge with a file No. 003 shows that a buyer member purchased 8 lot of sesame with 2194 birr without submitting a pre-open session order; rather the buyer waited until two minutes remain for closing

¹⁵³ Ethiopia Commodity Exchange, Compliance Division Charge No. 002, March 2017, unpublished, [Available at Annex 07]

¹⁵⁴ Revised Rules of ECX which prohibit buying, selling or dealing in commodities/contracts in a fraudulent manner, or indulge in any unfair trade practices including market manipulation.

¹⁵⁵ Revised Rules of ECX, Art. 12.5.3

¹⁵⁶ Interview with Shimelis Habtewold, Chief Compliance Officer and Chairman Business Conduct Committee

session.¹⁵⁷ Stating that besides being contrary to rules of the Exchange which cautions trades not to engage on deceitful and fraudulent acts while attempting to execute a transaction,¹⁵⁸ the act disregarded a normal bargaining process being followed by fellow competitive buyers.¹⁵⁹ Therefore, considering the above facts and the analysis conducted, the charge proposed a fine, 1% of the value of the transaction (8,776 birr), on the member and a written warning for the floor representative.¹⁶⁰

Looking at the content of the above cited charge, one may understand that the Exchange attempts to address issues relating to failure / refusal to submit pre-open session orders by using provision of the Exchange's trading rule which in general, prohibit deceitful and fraudulent acts done in an attempt to execute trades.¹⁶¹ Since a deceitful or fraudulent act committed in attempt to execute trade falls under category three of the Exchange's rule, the Exchange could punish the wrong doer with a written warning and/or a fine (maximum 6% of the value of the transaction), and/or require the trader to attend trainings on rules of the trading at his own expense.¹⁶²

D. Rules against Pace Making

As explained on prior discussions, Pace Making is all about submitting trade orders without any intention of trading, rather with a mere intention of creating artificial price and liquidity of commodities.¹⁶³ Since the act by itself relates to creating artificial price and liquidity of commodities, it is wise to search for any rule of the Exchange which prohibit thereof.

On one hand, Article 14.6.2 of rule of the Exchange clearly prohibits traders from take part either directly or indirectly in transactions, which are likely to have effect of artificially, raising or depressing the prices of commodities.¹⁶⁴ This article could help to address issues of artificially raising or depressing the price of commodities in any manner, including pace making. On the other hand, Article 6.6 (j) of the same rule prohibits traders from executing trades in order to suggest artificial liquidity of commodities.¹⁶⁵ Even though Article 6.6 (j) prohibits 'executing trades', one may argue that this rule could still be applied for pace making, an act of rushing / slowing down a pace of bargaining and later on cancel orders and leave the market for other traders to execute with a price discovered artificially through pace making; because, executed or

¹⁵⁷ Ethiopia Commodity Exchange, Compliance Division Charge No. 003, June 2017, unpublished, [Available at Annex 08]

¹⁵⁸ Revised Rules of ECX, Art. 6.6 (a), 6.6 (c) and 14.6.1

¹⁵⁹ Id. See Footnote 156

¹⁶⁰ Ibid.

¹⁶¹ Id. see Footnote 156

¹⁶² Id. see Footnote 145 and 146

¹⁶³ Id. see Footnote 27

¹⁶⁴ Revised Rules of ECX

¹⁶⁵ Ibid.

not, if traders in anyway attempt / succeed in influencing a price / liquidity of a commodity, traders need to be responsible for their act.

Whether the trade is executed or not, pace making causes registration of such false price by the Exchange and such false price may highly impact demand and supply analysis of the market because the price being feed to the system in not a genuine order which reflect intentions of the traders. Article 6.4.4 states thatit shall be a violation of the Exchange's rules to enter into or confirm the execution of anytransaction if such transaction is used to cause any price to be reported, registered,or recorded which not a true and bona fide price is.

Even though the continuous effort of this study on searching for official charges / decisions relating to cases of pace making is not successful, the Commodity Exchange's Market Surveillance Division provided a recorded incident¹⁶⁶on pace making. This incident record shows that the buyer submitted 3,705 birr to purchase 1 lot of sesame and edited his price (eight times) in various stages and finally cancelled his order after reaching at / submitting 3,900 birr. Other competitive buyers followed this buyer and reached at a price submitted by the pace maker and finally, six trades has been executed with 3,900 birr; this shows that the alleged rule violator was simply submitting false order in order to push the price of the market up in order to create artificial price and liquidity for the commodity being traded. If the pace maker would have a genuine intention to buy, there is no need to cancel his order even if other competitive buyers offered a better price offered by him; because he could still be the second best price giver to purchase similar commodity which may be offered by other sellers. Therefore, the act of the buyer could be concluded as an Anti-competitive Unilateral Act that goes against the rules of the Exchange which prohibits creating artificial price and liquidity of commodities.

Since violating rules stated on Article 6.6 (f) and Article14.6.2 (artificially influencing price and liquidity of commodities) is considered as category three rule violations,¹⁶⁷the could take appropriate measures for such violations as clearly provided on Article 15.3.3.¹⁶⁸

Therefore, scrutiny of the above rules of the exchange and incident discussed, one may argue that the exchange does have legal rules to tackle pace making.

E. Rules against Marking the Closing Price

Marking the closing price of a commodity with a higher or lower price is mainly done to control prices of future trades of the commodity whose price marked.¹⁶⁹ Simply put, it is an act of manipulating prices of next trades by tempering with current trends being executed in a given

¹⁶⁶Pace Making by a Buyer Member: E-trade (Incident No. 0001), Market Surveillance Division, Ethiopia Commodity Exchange (April 2018), pp. 1 – 3 [Available at Annex 09]

¹⁶⁷Revised Rules of ECX Art. 15.2.3

¹⁶⁸ Id. see Footnote 146

¹⁶⁹ Id. see Footnote 77

trading session. As already explained, the Exchange regulates price of commodities by permitting only 5% (maximum and minimum) fluctuation from previous trade date closing price.¹⁷⁰ Therefore, traders attempt to manipulate future trading prices by tempering with / manipulating previous closing price for the same commodity in order to execute future trades with a cheaper or expensive price. Hence, it is understandable that this anticompetitive act relates to price manipulation.

The commodity Exchange's rule, on Article 6.6 (f) clearly prohibits manipulating or attempt to manipulate price of a commodity.¹⁷¹ Furthermore, cumulative reading of Article 6.4.4 and 14.5.1.2 shows that it is prohibited to: (1) execute any transactions which cause any price to be reported, registered or recorded which not true or bona fide price and (2) create false or misleading appearance with respect to the market or price of commodities.¹⁷²

Since the above rules are covered under category three rule violations,¹⁷³ it is possible for the commodity Exchange to take any measures provided on Article 15.3.3.¹⁷⁴

F. Rules against Cornering and Dumping

Cornering - Ethiopia Commodity Exchange defines 'cornering' as act of buying a large percentage of the available commodity offered for sale at the Exchange to manipulate availability of the commodity and /or to sell it at a profit after inappropriately inflating the price.¹⁷⁵ This may mean that traders are prohibited to purchase large percentage of commodities available in the market in order to create inflation of price, or to create artificial shortage of a commodity; which helps to sell their commodity with expensive price.

Under the Exchange's rule, cornering / attempt to corner a commodity in connection with transaction in the Exchange, could be a ground for discretionary suspension of trading rights of the trader (member) by the Exchange¹⁷⁶ or cornering a commodity / attempt to corner the market to get sufficient control of a particular commodity traded at the Exchange to allow the price to be manipulated could punished as a category three rule violation.¹⁷⁷ The above two rules exhibits that the Exchange provides rules against acts of cornering because it is believed that the act could result price inflation and it may hurt the market in general.

Ironically, the concept of cornering is included under the Trade Competition and Consumer Protection Proclamation as an act of hoarding; Article 24 (1) defines hoarding as an act of hiding

¹⁷⁰ Id. Footnote 78

¹⁷¹ Revised Rules of ECX

¹⁷² Revised Rules of ECX Art. 6.4.4 and 14.5.1.2, respectively

¹⁷³ Revised Rules of ECX 15.2.3

¹⁷⁴ Id. see Footnote 146

¹⁷⁵ Revised Rules of ECX, Art. 2.1.16

¹⁷⁶ Revised Rules of ECX, Art. 4.7.2.1 (c)

¹⁷⁷ Id. see Footnote 146

or storing goods (declared by a public notice issued by a ministry of trade as scares in the market) contrary to regular commercial practice (in case of business person) or beyond personal / family consumption (in cases of person other than business person).¹⁷⁸ However, Article 24 (1) is under part three of the proclamation which is devoted for addressing issues related to ‘distribution of goods and service’, it may be hard to consider Article as a rule against ant-competitive trading practice.¹⁷⁹ Furthermore, it seems that part of the proclamation which prohibits anticompetitive trade practices shows no mentioning of the word hoarding except on Article 5 (2) (a); Abuse of Market Dominance.¹⁸⁰

Hence, it wouldn’t an easy to argue that the current Trade Competition and Consumer Protection Proclamation offer a proper rule for the Commodity Exchange’s Anticompetitive Unilateral Act, Cornering.

Dumping – Black’s Law Dictionary defines dumping as ‘the act of selling large quantity of goods at less than fair value’¹⁸¹ Even though it is an international agreement, the Agreement on the implementation of the 1994 General Agreement on Tariffs and Trade could help on understanding the concept of ‘dumping’ better; *inter alia*, the agreement states that dumping is introducing a product to another country at less than its price / comparable price and the cost of production may be used to analyse whether the product is being dumped or not.¹⁸² Ethiopian Trade Competition and Consumer Protection Proclamation, on Article 5 (2) (b) prohibits selling a commodity below production cost; hence it seems that the proclamation attempted to include the concept of dumping under its rules. Unfortunately, this rule is only applicable to matters of Abuse of Market Dominance.¹⁸³

One of the incident reviewed for this study, Incident No. 0002,¹⁸⁴ shows that on September 9, 2017, a seller member sold 1.482 lot of unwashed contraband coffee owned by its client, Limmu Cosa Woreda Coffee & Tea Development & Marketing Authority Office, with a very cheap price (1085 birr) while the market offers a better price (an average of 1142 birr) for the same commodity in the same trading session. Furthermore, besides selling the commodity with unrepresentative lower price, the incident shows that the seller’s act results economic loss to its client and it marks a lower price range had the this price (1182 birr) is a closing price for the commodity traded. The incident clearly exhibited that the seller sold the commodity with a very

¹⁷⁸ Proclamation No. 813/2013

¹⁷⁹ Ibid.

¹⁸⁰ Id. Art. 5 - 8

¹⁸¹ *Black’s Law Dictionary*, 9th ed., s.v. “Dumping”

¹⁸² Agreement on the implementation of General Agreements on Tariffs and Trade, 1994. [Available at: https://www.wto.org/english/docs_e/legal_e/20-val.pdf] [Last accessed on April 21, 2018]

¹⁸³ Proclamation No. 813/2013

¹⁸⁴ Dumping a Commodity: E-trade (Incident No. 0002), Market Surveillance Division, *Ethiopia Commodity Exchange* (September 2017), pp. 1 – 3 [Available at Annex 14]

cheaper price maybe be because the commodity is owned by the government and the seller's interest is not at stake.

Scrutiny of the Exchange's rule book shows that there is no specific rule prohibiting dumping per se. Nonetheless, the Exchange could still prohibit dumping using its general rules which prohibit any act of manipulating price. For instance, Article 14.6.2 clearly prohibits taking part, directly or indirectly, in transactions which are likely to have the effect of artificially raising or depressing the price of commodities.¹⁸⁵ Therefore, by virtue of this this article, an act of dumping which depresses the price of commodity could be punished as a category there rule violation which entails written warning and/or, fine and/or attendance of trainings on the rules of trading at the expense of the perpetrator.¹⁸⁶

G. Rules against Matching Orders

Despite the statements given by Assaf Hailu and Shimelis Habtewold claiming that the Exchange officially prohibited traders (members) from acting as both buyer and seller; because such act is believed to be contrary to competitive trading practice,¹⁸⁷ the study couldn't find such prohibition under the rules of the Exchange.

However, the study managed to get official confirmation (via email) which clearly shows that the Commodity Exchange prohibited traders from being both buyer member and seller member who trades in the commodity Exchange.¹⁸⁸ In spite of the above mentioned official prohibition, there is still a legal loophole which allows traders to assume both buyer and seller side of membership in order to trade by-product coffee; this loophole is admitted as a narrowly opened window for anticompetitive act.¹⁸⁹

To sum up, the above discussion exhibits that the trading rules of Ethiopia Commodity Exchange providerelatively proper rules which could tackle the aforementioned Anticompetitive Unilateral Acts. However, the trading rules tends to provide general provisions rather than providing specifically designed provisions which considers Anticompetitive Unilateral Acts observed on the Electronic Trading. Furthermore, the Exchange's rule still paves a way for traders to represent both buyer and seller clients and match orders of their clients, especially on by-product coffee trades.

Looking at the rules of Ethiopian Trade Competition and Consumer Protection Proclamation (especially the substantive content of rules on unfair competition explained on the second

¹⁸⁵ Revised Rules of ECX

¹⁸⁶ Id. see Footnote 146

¹⁸⁷ Interview with Assaf Hailu, Manager - Investigation and Enforcement Division and Interview with Shimelis Habtewold, Chief Compliance Officer and Chairman Business Conduct Committee.

¹⁸⁸ Official Email Conversation with Shimelis Habtewold, Chief Compliance Officer and Chairman Business Conduct Committee [Available on Annex 11 and Annex 12]

¹⁸⁹ Id. see Footnote 184.

chapter) and particularly, considering the unique nature of Anticompetitive Unilateral Acts exhibited on the Exchange's Electronic Trading, one may not have the audacity to argue that the competition regime is well equipped to tackle the Anticompetitive Unilateral Activities the Exchange deals with. However, the Exchange provided rules which could be used to prohibit Anticompetitive Unilateral Acts in order to make the market freely competitive.

CHAPTER FOUR

CONCLUSION AND AREAS FOR FUTURE CONSIDERATION

4.1 Conclusion

The overall study of this research revealed various findings which are concluded as follows:

A. Since its official launch in January 1, 2018, the Electronic Trading at Ethiopia Commodity Exchange faced different Anticompetitive Unilateral Acts which relate to: technical price manipulation, disclosure of market information (hiding pre-trade information), genuineness of orders submitted and manipulation of current or future transactions. The study revealed that the Anticompetitive Unilateral Acts observed in the Exchange's Electronic Trading are: (1), Flash Crushing, (2), Unrepresentative Pricing, (3), Failure / refusal to submit pre-open session order, (4), Pace Making, (5), Marking the closing price, (6), Cornering and Dumping and (7), Matching Orders. The study revealed that among the above listed anticompetitive acts, traders admitted that Flash crushing, Pace Making and Unrepresentative pricing and Failure / refusal to submit pre-open session order are the most abundantly observed anticompetitive acts while Cornering, Dumping and Matching orders are the least observed anticompetitive acts in the Electronic Trading.

B. Literatures show that anticompetitive acts could be classified into four categories: Anticompetitive Agreements, Abuse of Dominance, Anticompetitive Merger and Anticompetitive Unilateral Acts. Even though the Ethiopian competition regime provide rules for Abuse of dominance, Anticompetitive agreement, Anticompetitive merger and Unfair competition, one maybe confused to understand which part of this competition regime may cover Anticompetitive Unilateral Acts. Since Anticompetitive Unilateral Act is not about anticompetitive agreements or abuse of dominance or anticompetitive merger; unfair competition maybe the only probable part of the competition regime which could be claimed to deal with unilateral acts. However, the unfair competition rules of the competition regime aim at prohibiting competitors from passing off goods / service of others as one's own good / service in a manner which misleads consumers. This study revealed that the rule of unfair competition

under Ethiopian competition regime is all about protecting intellectual property right (good will) of competitors, and customers from misleading and deceitful acts. It seems that the unfair competition rules are designed to protect private rights of traders and consumers which already have been addressed in various legislations such as the Commercial Code, the 1960 Civil Code, the 1995 Criminal Code and the 2013 Advertisement Proclamation which offers almost as similar rights as offered by unfair competition rules of the competition regime.

C. Anticompetitive Unilateral Acts in Electronic Trading relates to technical price manipulation, disclosure of market information (hiding pre-trade information), genuineness of orders submitted and manipulation of current or future transactions. Furthermore, these acts may have a repercussion effect on reliability of the commodity Exchange's price discovery, competitive trading practice and genuine price dissemination to its stakeholders. To the contrary, unfair competition rules incline to protecting good will of traders and consumer's right by prohibiting acts of passing off goods / service of others' as one's own good / service. The commodity Exchange faced a problem which requires entrenching a competition culture and rules which promotes competitive trade by discouraging Anticompetitive Unilateral Acts. However, the competition regime offers unfair competition rules which aim at protecting private interests of competitors and consumers by simply prohibiting acts of passing off goods and services. There is a noticeable mismatch between the problem of the commodity Exchange and solution offered by the competition regime. Therefore, one may strongly argue that the competition regime does not offer proper tools to tackle unique Anticompetitive Unilateral Acts which eliminate competition from Ethiopia Commodity Exchange Electronic Trading System.

D. Scrutiny of rules of the Exchange, sample charges and incidents reviewed, revealed that the Commodity Exchange's rule book is serving as a tool to tackle the aforementioned Anticompetitive Unilateral Acts by using general provisions (which prohibit any act manipulating, cheating, and involvement in fraudulent acts etc.) and specific provisions (which relates to price, liquidity of commodities, cornering commodities, creating false / misleading appearance of market / price, submitting orders/ executing trades which are not genuine etc.) of the rule book. In other words, the rules of the Exchange provide provisions which could help to tackle the Anticompetitive Unilateral Acts the Electronic Trading suffers from. For these Anticompetitive Unilateral Acts, the Exchange rule book offers a buffet of measures which includes a written warning and/or, a fine not exceeding 6% of the value of the transaction and/or being required to attend trainings on the rules of the Exchange at the expense of the perpetrator. Besides, the Commodity Exchange facilitates a forum by which traders could settle their difference in cases where an act of a given trader results in economic loss against his/her competitors or other traders via conciliation or arbitration; the arbitral award is final and non-

appealable. Thus, the study shows that the Commodity Exchange uses its rules to shape the market in a competitive fashion; especially by prohibiting Anticompetitive Unilateral Acts.

On the other hand, since rules of unfair competition under the competition regime deal with a different subject (such as good will, passing of good / service of others like one's own good / service, false allegation / discrediting etc.) rather than addressing proper Anticompetitive Unilateral Act related issues; comparing the measures / remedies provided under the competition regime and the Exchange's rule would be nothing more than a mere comparison of an apple and an orange.

E. Finally, holistic review of the above conclusions shows that Ethiopian competition law may not be the best means to challenge Anticompetitive Unilateral Acts in Ethiopia Commodity Exchange's Electronic Trading.

4.2 Areas for Future Consideration

The overall study and especially, the findings, urges a serious reconsideration of the following issues or areas of concerns:

- ✘ The competition regime may benefit from reconsidering adequacy or suitability of its rules of unfair competition on addressing Anticompetitive Unilateral Acts in the country. Specifically, the study suggests that; Article 8 of the Trade Competition and Consumer Protection Proclamation may be amended while still not rejecting the existing rule:

(Amendment)

Article 8: Anticompetitive Unilateral Acts

(1) : No business person may in the course of trade, unilaterally, carry out any act which lessen or eliminate competition.

(2) The following shall be deemed acts of Anticompetitive Unilateral Acts

(The listings mentioned on the existing proclamation (sub article 2 (a - g) will be preserved with additional phrase, i.e.,

‘Any of the above mentioned acts / attempts violating intellectual property right of another trader where when such violation is established by the appropriate Authority following due process of law; and where such violation results in elimination / lessening of competitive trading practice it shall be considered as Anticompetitive Unilateral Act.’

(2) Bis the following shall also be deemed acts Anticompetitive Unilateral Acts

- (a) : Any act of submitting transaction orders / executing transaction with fictitious or false price, quantity, quality etc. with an intent to create artificial price or liquidity of goods and services;
- (b) : Any act of refusing to disclose market information with an intent to create market information asymmetry which misleads market actors;
- (c) : Disseminating to market actors, customers, governmental institutions and other stakeholders false market information or rumours with an intent to mislead decision making of market actors, destroy stability of markets in a manner that lessens competitiveness of markets;
- (d) : Unless otherwise provided by law, matching of trades (buy and sell orders) by a single person in a manner which eliminates or lessens competitive trading practice;
- (e) Submitting orders or executing trades with highly exaggerated (high or low) unrepresentative price in a manner contrary to rational economic decision making or with an intent to cause market fluctuation or resulting elimination / lessening of competitive trading practice;
- (f) Any act or attempt of executing trades using insider information which is not available to all traders or the public and where such act / attempt results in elimination / lessening of competitiveness of a market;
- (g) Notwithstanding legally permitted warehousing periods, any act or attempt of cornering goods or services without any economic reason or with an intent to create artificial demand;
- (h) Any act of dumping goods / services without sound economic rationale or in a manner which lessens competitiveness of other market actors;

✘ Even though Ethiopia Commodity Exchange's rules are rules tailored to manage Electronic Trading in Ethiopia, the competition authority could find the Exchange's rules on Anticompetitive Unilateral Acts as an inspirational idea or an insight to the country's trading practice on major exportable items such as coffee and sesame. For instance, the Exchange's rule on price manipulation, market information dissemination, matching orders, unrepresentative pricing and transaction manipulation which affect future trades. Scrutiny of the Exchange's rules and contemporary problems with regard to Anticompetitive Unilateral Acts could help the competition Authority to understand, at least one of the country's major trading platforms; and in order to create uniform competition law under which all business actors are similarly governed according to the standards set by the law of the Authority rather than having different rules in here and there.

- ✘ The competition authority may also benefit from checking consistency of competition rules / directives of various private or public business enterprises in order to create similar application and enforcement of fundamental competition laws of the country.

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3. Shimelis Habtewold, Chief Compliance Officer and Chairman Business Conduct Committee in Ethiopia Commodity Exchange.

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4. With Tizita Alemu, Manager - Central Depository Division of the Exchange. [Available at Annex 03]

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Tables and Graphs

Graph 1 –Summary of Questionnaires gathered

Table 1 – Summary of interviews with Ethiopia Commodity Exchange managers

¹⁹⁰ The annexes could easily be available at request via an email address, mikylaw6@gmail.com