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**ADDIS ABABA UNIVERSITY
SCHOOL OF GRADUATE STUDIES
COLLEGE OF LAW AND GOVERNANCE
SCHOOL OF LAW**

**THE COMPETITION LAW AND INSTITUTIONAL FRAMEWORK FOR
PROHIBITION OF ABUSE OF MARKET DOMINANCE IN THE BANKING SECTOR
IN ETHIOPIA**

By:

Girmaw Amare Alene

**December, 2020
Addis Ababa, Ethiopia**

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A Thesis Submitted to the school of Graduate Studies of Addis Ababa University in Partial Fulfillment of the Requirements for the award of Masters of law (LL.M) degree in Business Law.

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DECLARATION

I, the undersigned, hereby declare that this thesis is my original work, has not been presented for a degree in any other university or institution and that all sources of materials used for the thesis have been duly acknowledged.

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Abstract

Despite Ethiopia's efforts to formulate a commendable competition law and an effective enforcement mechanism tackling anti competitive practices, including abuse of market dominance, the country has been experiencing various abuses of market dominance cases in many sectors. In the Banking sector, the government owned commercial bank, Commercial Bank of Ethiopia, the one with market dominance position- abuses its market dominance position by imposing excessive prices for some of its services, by discriminating among its customers in the provision of credit service and by excluding competitors from some banking business activities. However, no abuse of market dominance claim case has been instituted against the bank so far due to problems attributable to the substantive rules of the competition law itself and the enforcement mechanism established there in. This thesis, thus, assesses the trend of abuse of market dominance in the banking sector and explores the problems in the substantive provisions of the competition law and the enforcement mechanism pertaining to prohibition of abuse of market dominance in the Ethiopian banking sector that continue to instill problems in establishing a successful competition law legal regime. Finally, the paper has tried to point out some measures the government may take to improve the move towards developing a masterpiece competition law and establishing an effective enforcement mechanism with respect to prohibition of abuse of market dominance.

Chapter One

1. Introduction

1.1. Back Ground of the Study

Though the commercial and civil code of 1960 had some scattered provisions on unfair trade practices, Ethiopia introduced Trade Practice Proclamation No.329/2003 (TPP) as its first ever self contained competition law with a view to promote competition in the domestic market. The major objective of the TPP was to secure a fair competitive process and safeguarding the interests of consumers.¹ The Proclamation further provides rules for regulating prices and ensuring equitable distribution of basic goods and services during times of shortage and irregular supply.² But this proclamation lacked specific provisions that address mergers, takeovers and other forms of concentrations/conglomerations.³

The Trade Practice and Consumer Protection Proclamation No. 685/2010 (TPCP) met many of the shortcomings of the TPP, such as making provision for merger control, and strengthening the competition authority in terms of independence and decision-making autonomy.

The latest competition legislation, the Trade Competition and Consumer protection Proclamation No. 813/2013 (TCCPP), among others, has relatively comprehensive provisions regarding establishing abuse of market dominance, the defenses for allegations of abuse of market dominance and the general framework for enforcement of the competition and consumer protection law.

However, there are still legal and enforcement problems in that need to be addressed. Hence, the main objective of this thesis is to examine the adequacy of the legal and institutional framework for the prohibition of abuse of dominance under the current Ethiopian competition law.

1.2. Statement of the problem

Despite the enactment of the TCCPP, the dominant government owned commercial bank; Commercial Bank of Ethiopia (CBE) abuses its dominant market position. The Bank's market dominance can be discerned from its unparalleled branch network including in rural and semi urban areas, where private banks do have no access, high market share, huge capital compared to

¹TPP, Art.3

² TPP,22& 23

³Hailegabriel G. Feyissa, 'European Influence on Ethiopian Antitrust Regime' (September 2009) Vol.3 No.2, Mizan Law Review 280 see also UNCTAD, *A review of Competition Policy in Ethiopia* (United Nations 2018)VIII

other commercial banks, massive private and corporate customers, and high government support and entry barrier for foreign investors.

Government institutions are induced by the government to use CBE for any of their banking needs.⁴ There is also an allegation that government banks favor state owned enterprise in credit provision.⁵ In addition, there is also a claim that the government requires individuals or private organizations participating in state auctioned projects to use commercial bank of Ethiopia for any financial transactions associated with the project.⁶

Moreover, to participate in low cost government constructed houses, interested individuals are required to open a saving account only at the commercial bank of Ethiopia.⁷ Above all, currently, it is the CBE that collects and administers the Diaspora trust fund; sells Great Ethiopian Renaissance Dam project bond and collects public utilities' service fee from customers.

The presence of the above privileges gives CBE a huge leverage to oust private commercial banks from accessing business from government institutions.⁸ In addition, CBE unduly discriminates between government institutions and private institutions / individuals in the provision of credits. The bank usually inclines towards providing credit service to government enterprises than private credit seekers irrespective of their creditworthiness.

Further, in some of its services, the tariff it imposes is very exaggerated and unfair compared to the tariff levied by other private banks. For instance, for local money transfer, CBE levies a minimum of birr 23 while other commercial banks levy an average of birr 11 for the same service.⁹ Similarly, while other commercial banks levy birr 25 for issuing Cash Payment Order (CPO) for customers not having a saving account held in the bank, CBE levies birr 100 for the same service.¹⁰

Such discrimination among customers and an exaggerated services fee by CBE is a clear manifestation of an abuse of dominant position by the bank.¹¹

⁴Kibret moges, *the state of competition and the competition regime of Ethiopia*(Organization for Social Science Research in Eastern and South Africa 2015)175

⁵ ibid

⁶ Ibid,176

⁷ n4

⁸Art. 5(2-b) of the TCCPP provides that preempting of inputs or distribution channels is one of the abuse of Dominance acts prohibited by law.

⁹ My own survey, may 2019

¹⁰ ibid

¹¹TCCPP, Art.5 (2, c & f).

However, no abuse of dominance claim has been instituted against CBE so far due to problems associated with the competition law itself and the enforcement mechanism.¹² Among others;

- 1) Empowering of council of ministers to specify economic activities that should be exempted from the ambit of the TCCPP is not proper as this could give it the opportunity to unnecessarily narrow the scope of the competition law.
- 2) The hierarchy of the proclamation is inferior to other proclamation, regulation, directive or any other administrative decision.¹³ Thus, the competition authority may not initiate investigation against possible anti competitive behavior if such act was permitted by other law or administrative decisions.
- 3) The defenses against allegations of abuse of abuse of market dominance under article 5 sub article 2(d-i) and sub article 3 of the TCCPP are very broad that any business entity that abuses its dominant market position may easily escape liability by invoking any of the defenses.
- 4) Assessment of abuse of market dominance rules enshrined under Article 6 (1) of the TCCPP is incomplete and unclear. As a result, it is very difficult to apply.
- 5) Regarding enforcement, the authority is criticized for poor articulation in respect of its organization, power and function.¹⁴ The authority is also criticized for lacking institutional and personal independence due to gaps in the law.

1.3.Objective of the Research

The general objective of the thesis is examining the adequacy of competition law rules and the enforcement mechanism in tackling Abuse of market dominance in the banking sector. Specifically, the thesis aims to:

- Examine the adequacy and lucidity of Ethiopian Competition law rules on prohibition abuse of dominance.
- Assess if there is abuse of market dominance in the Ethiopian Banking sector and the extent there of.
- Evaluate the efficiency of the Ethiopian trade competition and consumer protection authority in tackling abuse of market dominance in the banking sector.

¹² Interview with Kidanie Tsegaye, presiding Judge of the adjudicative branch of the Authority, September 10, 2020

¹³ TCCPP, Art. 4(3)

¹⁴ Muhammed Kebie Hillo, 'A Critical Appraisal of the Institution Controlling Competition in Ethiopia: Analysis of the Law and the Practice' (Unpublished thesis, AAU 2014),iii

- Examine the legal and practical problems in the prohibition of abuse of market dominance in the Ethiopian banking sector.

1.4. Research Questions

The research addresses the following central research questions.

1. Are Ethiopian Competition Law rules adequate enough to address abuse of market dominance in the banking sector?
2. Is there a problem of abuse of market dominance in the banking sector in Ethiopia?
3. Is the Ethiopian trade competition and consumer protection authority competent to tackle abuse of market dominance in the banking sector?
4. Is the problem of abuse of market dominance adequately controlled by the competition law?

1.5. Significance of the Study

By identifying the legal and enforcement problems of Ethiopian Competition legal regime with respect to prohibition of abuse of market dominance, the thesis is believed to provide an input for legal reform.

It may also assist judges and other personnel of the authority in interpreting and implementing the competition proclamation rules on the abuse of market dominance. The thesis could also serve as a reference material for students, academicians and researchers. At last, this research could motivate further inquiry on the area.

1.6. Scope of the Study

Due to constraints in time, space and finance, this work focuses on the legal and institutional framework for prohibition of market dominance in the Ethiopian banking sector. Hence, other elements of competition law are not considered. Moreover, though there is interplay between law and economics in competition law, the researcher pursued the study from a legal perspective only.

1.7. Methodology of the Study

The study has a combined feature of both doctrinal and non doctrinal legal research based on qualitative data to be derived from both primary and secondary sources. However, some quantitative data was when necessary.

Regarding primary sources, the writer relayed on assessing legislations and other primary data collected through personal observation and interviews with appropriate personnel from the Trade Competition and Consumer Protection Authority (TCCPA).

When selecting the interviewees, the researcher used purposive sampling technique as this method is appropriate to obtain appropriate information from selected individuals based on their experience, position, expertise and other relevant attributes. Accordingly, the writer has interviewed five lawyers from different departments the TCCPA and two other senior lawyers based on their experience on competition law. The data collected through interview was objectively analyzed to reach to conclusion.

With regard to secondary sources, various books, articles, journals, thesis, dissertations, reports, guidelines, cases and other materials on the topic were analyzed in search for relevant answers for the research questions.

1.8.Organization of the Study

This study has four chapters. The first chapter deals with the proposal of the study. The second chapter focuses on the legal and institutional framework for prohibition of abuse of market dominance in general and the case of Ethiopia in particular. The third chapter confines itself with the assessment of the legal and practical problems with respect to the prohibition of abuse of market dominance in the Ethiopian banking sector. Finally, chapter four covers the conclusion and recommendations of the thesis.

Chapter Two

2. Legal and Institutional Framework for Prohibition of Abuse of Market Dominance

2.1. Legal Framework for Prohibition of Abuse of Market Dominance

Introduction

In assessing the legal and institutional framework for abuse of dominance, having a rudimentary conception of competition policy and law is mandatory. Accordingly, competition policy denotes a government policy that is meant to promote the level of competition in markets, and includes governmental measures that affect the behavior of enterprises and the structure of industry and markets.¹⁵ It encompasses two broad areas:¹⁶ The first involves implementing a set of policies that safeguard competition in markets, such as introducing trade policy, eliminating restrictive trade practices, promoting market entry and exit, reducing unwarranted governmental intervention and putting greater trust on market forces.¹⁷ The second, known as competition law, comprises legislations, judicial decisions and regulations that focus on preventing anti-competitive business practices, abuse of market power, anti-competitive mergers and any unnecessary government intervention in the market and may also include provisions on unfair trade practices.¹⁸

But this thesis deals only with the general aspects of competition law in general and Abuse of dominance rules and the enforcement mechanism in particular.

2.1.1. Scope of Competition Law

Though the scope of competition law across the globe varies, it is suggested that it should be a general law applicable to all sectors and economic agents engaged in the commercial production and distribution of goods and services whether private and public.¹⁹

¹⁵ ASEAN Regional Guidelines on Competition Policy, *Chapter 2: Objectives and Benefits of Competition Policy*, available at, <https://www.mycc.gov.my/sites/default/files/Chapter-2.pdf> accessed on June 2, 2019

¹⁶ *ibid*

¹⁷ CUTS, *Challenges in Implementing competition Policy and Law: An Agenda for Action* (CUTS Centre for International Trade, Economics & Environment D-217, Bhaskar Marg, Bani Park, Jaipur 302 016, India, July 2002) available at <http://demo.netcommlabs.net/cutsinternational/PDF/challenges.pdf> last accessed on 05/06/2019

¹⁸ n,15

¹⁹ R. Shyam Khemani, 'Application Of Competition Law: Exemptions And Exceptions' (United Nations Conference On Trade And Development, United Nations, New York And Geneva, 2002) 2,3; Angayar Kanni Ramaiah, *Competition Law and Exemption Policy in Malaysia: When, Why And Why Not?* (Dec, 2015) Vol. 8, Issue 4 *International Journal of Business, Economics and Law* 81

Applying single legal principles and standards to firms engaged in similar activities is believed to ensure fairness; equality and non-discriminatory treatment under the law.²⁰The other rationales for general application of competition law relates to the interdependence of economic activities conducted in different markets, and the promotion of allocative efficiency.²¹ Conditions prevailing in one market may affect prices and outputs in other markets either because one good or service is an input in the production of other goods and/or services, or because the goods and services are substitutes or complements to each other.²²Thus, exempting one sector from the application of competition law could create distortions that can affect the efficiency of economic activity conducted in other sectors.²³

Though competition law should apply to all sectors and firms engaged in commercial activity, in practice, various exemptions and exceptions are permitted for social, economic, and political reasons.²⁴ In this context, the granting of exemptions and exceptions does not necessarily imply the weakening of competition law enforcement rather such instances may be necessary for furthering the objectives of competition law policy.²⁵

United Nations Convention on Trade and Development (UNCTAD) grouped the economic activities that are eligible exemptions into at least four categories:²⁶ Exemptions aimed at balancing unequal economic or bargaining power; Exemptions aimed at addressing information, transaction costs and “collective action” problems; Exemptions that reduce risk and uncertainty and Special sector and interest group demands.

Further, The UNCTAD model law on competition expressly states that Competition law shall not apply to the sovereign acts of the government, or to acts of firms or natural persons which are compelled or supervised by the governments acting within their delegated power.²⁷

²⁰ n19; Angayar Kanni Ramaiah, Competition Law and Exemption Policy in Malaysia: When, Why And Why Not? (Dec,2015) Vol. 8, Issue 4 International Journal of Business, Economics and Law 81

²¹n19

²² ibid

²³ibid

²⁴ n19

²⁵OECD, ‘Competition Policy’(1994 Workshop With The Dynamic Non-Member Economies, Paris, 1996) 31 available at <<https://www.oecd.org/daf/competition/prosecutionandlawenforcement/2697296.pdf> accessed on June 23/2019

²⁶R.Shyam Khemani, n19, 27-33

²⁷UNCTAD, *Model Law On Competition* ,(UNITED NATIONS 2007) chapter II, Part II (C)

Whatever the ground of exemption may be, R. Shyam Khemani noted that, when governments need to make exemptions, it is necessary to adopt certain basic procedures and principles. In this regard, he suggested that: ²⁸Exemptions should be granted on a limited-time basis with periodic review; the review of exemptions should include analysis of their impact on economic efficiency and consumer welfare, and whether indeed there are overriding benefits that serve the consumer or broader economic interests; the exemptions should be granted after public hearings with the participation of the interested and affected parties; the exemptions should be as least restrictive of competition as possible and Exemptions should be generic, referring to types of economic activities or arrangements, and be less sector-specific.

With such principles, R. Shyam Khemani believes that the number, nature and scope of the exemptions and exceptions is expected to be more limited, and the procedures more accountable and transparent.²⁹

In Ethiopia, Article 4(1) of TCCPP provides that it shall apply to any “commercial activity” or “transaction in goods and services” conducted or having effect in Ethiopia. The proclamation doesn’t exempt any “commercial activity” or “transaction in goods or services” on the basis of ownership structure or the type of economic activity. This is in line with the general recommendation of UNCTAD. However, thorough reading of the whole contents of Article 4 of the proclamation reveals many problems which I will discuss under chapter three of this thesis.

2.1.2. Objectives of Competition Law

Though the objectives of competition policy and law across jurisdictions may vary depending on the economic, political and social peculiarities of each country, a study conducted by Organization for Economic Co-operation and Development (OECD) summarized the basic objectives of competition law and policy in most jurisdictions in to two broad categories:³⁰ (i) Promoting and protecting the competitive process, and (ii) Attaining greater economic efficiency. According to OECD, competition policy is also believed to achieve other supplementary objectives as well: pluralism, de-centralization of economic decision-making,

²⁸ n19, 27-33

²⁹ Ibid, 2,3

³⁰OECD Global Forum on Competition, ‘The Objectives of Competition Law And Policy’(Centre For Co Operation With Non-Members directorate For Financial, Fiscal And Enterprise Affairs 29-Jan-2003)2,3 <<http://www.oecd.org/daf/competition/2486329.pdf>> accessed on June 2, 2019

preventing abuses of economic power, promoting small business, fairness and equity and other socio-political values.³¹

Competition policy is believed to introduce a “level-playing field” for all market players.³² Competition law, on the other hand, is believed to provide the market with a set of “rules of the game” that protects the competition process itself, rather than competitors in the market.³³

However, the inclusion of multiple objectives in the competition policy is said to increase the risks of conflicts and inconsistent application of competition policy.³⁴ The incompatible interests of various stakeholders may strictly restrain the independence of competition policy authorities, lead to political intervention and thereby negatively affect economic efficiency.³⁵ Therefore, it is desirable that each country need to formulate the objectives of its competition law based on its particular needs and, in this regard, competition authorities should proactively involved in government policy formulation.³⁶

In Ethiopia, as outlined under Art.3 of the TCCPP, protecting the Business community from anti competitive and *unfair market practice*; establishing a system conducive for the promotion of competitive free market; protecting consumers from misleading market conduct; preventing proliferation of goods and services that endanger the health and well being of consumer; ensuring that consumers get goods and services safe and suitable to their health and equivalent to the price they pay and accelerating economic development are identified as the major objectives of the proclamation.

Though the main objective of competition law should be protecting the competition process, Article 3 (1) of TCCPP emphasizes on protecting competitors than competition and the competition process. In this respect, Kenea Kiteta argued that, as the preamble of the proclamation stipulates that commercial activities must be conducted based on the free market economy of the country, it should be presumed that the Proclamation has the objective of

³¹ibid

³²Dovile Venskutonyte and Maarten Pieter Schinkel, ‘Bespoke Competition Policy for Developing Countries’ (University of Amsterdam, June 2015)2

³³ibid

³⁴n34

³⁵ibid

³⁶World bank-OECD , *A Framework For The Design And Implementation Of Competition Law And Policy* (The World Bank and OECD 1998), 93

protecting the competitive process.³⁷ However, the writer doesn't agree with the views of the writer. Because, the fact that business activities are conducted according to the rules of free market doesn't necessarily mean that there is competition in the market.

In addition, the Proclamation does not give meaning to the term "Unfair market practice." As a result, one may ask if the term is to refer to "unfair trade practice"³⁸ as envisaged under article 2(9) of the proclamation.

Secondly, the objective of the proclamation indicated under Article 3(2) that states "... to ensure that consumers get goods and services safe and suitable to their health and equivalent to the price they pay..." could venture the competition and consumer protection Authority to a responsibility it can't shoulder. Because, ensuring that consumers get goods and services equivalent to the price they pay is something that can't be achieved taking in to account the dynamic nature of the market. Ensuring such objective may require fixing the price of each and every goods and services in the market and following up if these goods and services are sold for the price fixed.³⁹

In this respect, a judge from the adjudicative branch of the authority believes that so that the authority could focus on competition matters, matters related to consumer protection need to be addressed by separate legislation.⁴⁰

2.1.3. General Overview of Abuse of Market Dominance

Abuse of dominance is one of the most complicated areas of competition law and policy in most jurisdictions.⁴¹ Depending on the circumstances, a certain form of conduct may have either negative or positive effects towards achieving competition objectives.⁴² As a result, analyzing the effects of a certain conduct is very cumbersome and time-consuming. Further, firms could earn high profits as a result of superior innovation and risk taking, that earning of high profits should not be penalized as this would risk innovation and investment.⁴³ It should also be recognized that

³⁷Kenea Kiteta Abdi, 'The Legal And Institutional Framework Of The Ethiopian Competition Law And Its Enforcement'(Unpublished thesis, AAU, JUNE 2011) 47

³⁸ According to Art.2 (9) of the Trade Competition and Consumer Protection Proclamation, "Unfair Trade Practice" Is defined as any Act in violation of the provisions of Trade Related Laws.

³⁹Berihun Gezahegn, 'The Unregulated Status Of Corporate Groups And Competition Issues In Ethiopia: Abuse Of Market Dominance And Anticompetitive Agreements'(Unpublished thesis,AAU,2014)76

⁴⁰ n12

⁴¹ World bank-OECD , *A Framework For The Design And Implementation Of Competition Law And Policy* (The World Bank and OECD 1998), 93

⁴²ibid

⁴³ ibid,69

even where high profits do not result from superior innovation but from the exercise of market power, such profits will in most markets attract entry and expansion of competitors and taking away such profits may thus undermine the markets own mechanism to restore competition.⁴⁴

Hence, since excessive or unpredictable intervention can discourage enterprises from engaging in pro-competitive activities, competition authorities should be very vigilant while investigating any allegation of abuse of dominance.⁴⁵

In Ethiopia, abuse of market dominance is recognized as one of the anticompetitive acts prohibited by law since the inception of the first self contained competition law in 2003. The TPP under article 11 provided an illustrative list of acts that are labeled as acts of abuse of dominance. However, this proclamation was criticized for having no provisions on assessment of market dominance and prohibiting holding of market dominance per se instead of prohibiting its abuse.⁴⁶

Under TPP, once it is proved that the firm is acting in a manner that gives it an opportunity to control the relevant market; such act will automatically be declared abusing their market dominance position.⁴⁷

Under TCCPP, holding dominance position in a relevant market is not an offense by itself but its abuse is.⁴⁸ This proclamation provided definition to the term “dominance” and determined the relevant market that should be considered in establishing market dominance.

According to article 7 of this proclamation, market dominance may be assessed by taking in to account the market share of the alleged businesses entity in the market or its capacity to set barriers against entry of others in to the market or other factors. Regarding the determination of the numerical expression of the market share sufficient to determine market dominance, the council of ministers was bestowed to determine it by regulation.⁴⁹

In addition, like that of its predecessor, this proclamation provided non exhaustive list of activities that are considered as an abuse of dominance.⁵⁰

⁴⁴ OECD, Working Party No.2 on Competition and Regulation ‘Excessive Prices’(17th October 2011)Directorate for Financial and Enterprise Affairs Competition Committee Background Paper 4 available at <https://www.oecd.org/regreform/sectors/49482277.pdf> accessed on April 24/2020

⁴⁵ n41, 69

⁴⁶n3, 283-284

⁴⁷ibid

⁴⁸ TCCPP Art.5.

⁴⁹ TCCPP, Art.7 (4).

⁵⁰ TCCPP, Art.8.

Under this proclamation, a firm the alleged for abusing its dominant market position may escape liability if it can prove that its acts are indispensable and decisive that it can't achieve its business purpose in any other way.⁵¹ In this regard, acts which aim to maintain quality and safety of goods and services, leveling with prices or benefits offered by a competitor, and achieving efficiency and competitiveness and other were particular legitimate defenses recognized by the proclamation.⁵²

Under the TCCPP, abuse of a dominant position arises when affirm/s having dominant position in the relevant market engage in acts that are leveled as abusive by the proclamation.⁵³

The proclamation sets out three cumulative elements that must be ascertained to establish an abuse of dominance in a relevant market: First, the firm/s must have the actual capacity to control prices or other conditions of commercial negotiations or eliminate or utterly restrain competition in a relevant market.⁵⁴ Second, the firm/s must engage in activities that are designated as abusive by the proclamation or by the regulation to be issued for the implementation of the proclamation.⁵⁵ Third, the firm/s who engages in abusive practices must have no justifiable economic reasons for engaging in such activities.⁵⁶

Ascertainment of existence of abuse of market dominance involves three fundamental stages: definition of the relevant market, establishing dominance and, finally, identifying specific practices of the dominant firm that may be harmful to competition.

2.1.3.1. Definition of Relevant Market

To assess the power of the firm in a market, it is indispensable to first define the relevant market.⁵⁷ Defining the relevant market is crucial in assessing whether the undertaking is in a position to prevent effective competition from being maintained and behave independently of its competitors, customers and consumers.⁵⁸

⁵¹ TCCPP, Art.9.

⁵² *ibid*

⁵³ TCCPP, Art.5, 6.

⁵⁴ TCCPP, Art.6 (1).

⁵⁵ TCCPP, Art.5(2)

⁵⁶ TCCPP, Art.5(3)

⁵⁷ Dr.Schakravarthy, ' Dominance and its Abuse'2 available at https://www.circ.in/pdf/CPS-06-Abuse-Dominance-Ethiopia-Workshop_May08.pdf

⁵⁸ Hasmik Tigranyan and Sophio Kurtauli, *Prohibition of abuse of dominant position: Comparative analysis of Georgian, Armenian and EU competition laws*(Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) 2017)43

The UNCTAD Model Law on Competition defines “Relevant market” as the general conditions under which sellers and buyers exchange goods or services.⁵⁹ Definition of relevant market, thus, calls for the delineation of the product and geographical lines within which specific groups of goods, buyers and sellers interact to establish price and output.⁶⁰ In simple terms, defining relevant market denotes identifying the particular products produced or services rendered by an enterprise(s) in a given geographic area.⁶¹ Relevant Market includes all substitutable products or services, and all nearby competitors, to whom consumers could turn in the short term if the restraint or abuse increased prices by a significant amount.⁶²

Market definition generally includes firms that can rapidly alter their production processes to supply substitute products/services if the price so warrants.⁶³ The rationale for this is that these firms will tend to dampen or curb the ability of existing firms in the market to raise price above the competitive level.⁶⁴ Market Definition has two fundamental dimensions:

- A) Relevant product market:** refers to products or services that are considered as substitutable by the consumer, by reason of their prices, consumer preferences, intended use etc.⁶⁵ Where the products or services that compete in a market are perceived as substitutable from a standpoint of the consumer, these goods or services are considered to belong to the same product market.⁶⁶ On the demand side, the relevant product market encompasses all substitute products and services that the consumer would switch to, if the price of the product under investigation is to increase.⁶⁷ From the supply side, on the other hand, this would include all producers who could, with their existing facilities, switch to the production of such substitute goods.⁶⁸
- B) Relevant geographic market:** denotes a market that embraces the area in which the circumstances of competition for supply of goods or provision of services are specifically homogenous and can be distinguished from the conditions prevailing in the neighboring

⁵⁹n27, chapter II, Part II,4

⁶⁰n27

⁶¹ ibid

⁶² Neha Jain, ‘Defining Dominance: An Analysis of the Competition Act, 2002’(2014), 8 NUALS L.J. 175

⁶³ ibid

⁶⁴ ibid

⁶⁵n25,60-61

⁶⁶n25

⁶⁷ n62

⁶⁸ ibid

areas.⁶⁹ If buyers of a product sold at one location were to switch to buying the product from a source at another location in response to price increase, then those two locations are in the same geographic market.⁷⁰ The 'relevant geographic market', thus, is the area of effective competition in which the seller operates and to which the purchaser can practicably turn for supplies.⁷¹ While determining the relevant geographic market, factors such as regulatory trade barriers; local specification requirements; consumer preferences etc are considered.⁷²

In Ethiopia, too, the TCCPP envisages that definition of relevant market shall include both the product and geographical dimensions of the market. In this regard, relevant market shall refer to the market that comprises the goods and services that actually compete with each other that are substitutable.⁷³ On the other hand, the geographic aspect of market definition denotes the area in which the conditions of competition are sufficiently homogeneous and can be distinguished from the conditions of competition in neighboring market.⁷⁴

2.1.3.2. Establishing Dominant Position

Once the relevant market is defined, ascertaining whether the firm under investigation acquires a dominant position in the market defined is done by looking into various factors.⁷⁵ The concept of dominant position varies according to national legislation that providing a universally acceptable definition to it is hardly possible.⁷⁶

The UNCTAD Model Law on Competition defines dominance in chapter IV-I (i) as a situation “...where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control a relevant market for a particular good or service, or groups of goods or services”.

This definition reveals that, an enterprise/s is said to be in a dominant position if it has an economic strength to independently of its competitors and customers to determine economic parameters, such as, price, supply, the amount of production and distribution. A firm that has a

⁶⁹Hasmik Tigranyan, ‘Improvement of dominant position regulation under Armenian Competition Law using EU Competition Law best practice ‘unpublished thesis, Yerevan, 2012)18

⁷⁰ n36,13,

⁷¹ n62

⁷² ibid

⁷³ TCCPP, Art.6(3)

⁷⁴ TCCPP, Art.6(3)

⁷⁵ n40,46

⁷⁶ The ASEAN Secretariat, *Handbook on Competition Policy and Law in ASEAN for Business*, (The ASEAN Secretariat Community Relations Division (CRD), Jakarta, Indonesia, 2017) 6-7

power to control a relevant market for goods and services can restrict new entry in the market or foreclose the existing weaker traders or create barriers in economic freedom of its potential competitors.⁷⁷ Besides, a dominant firm would have the ability to set prices above the competitive level, to sell products of an inferior quality or to reduce its rate of innovation below the innovation level that could have existed had normal competition been maintained in the market.⁷⁸

It has however been generally acknowledged that dominance per se is not anti-competitive since firms may lawfully achieve a dominant position in the market through, for example, innovation, superior production or distribution methods or greater entrepreneurial efforts, i.e. conduct that is encouraged under competition.⁷⁹

In determining market dominance, the market share of a firm in a relevant market is one of the important factors to be considered.⁸⁰ Accordingly, the existence of a market share of or above a specified level in the relevant market gives rise to a presumption of existence of a dominant position, while low market share would suggest little or no market power.⁸¹ Market share is usually measured by money value, units of sale, units of production, and capacity index like production capacity, or size of reserve and the like.⁸²

A high market share is, in general, a necessary but not a sufficient condition to establish the existence of market power.⁸³ The difference between the market share of the firm under consideration and the market share of its closest competitor can also be taken as a signal of market power.⁸⁴ The weaker the position of its competitors and the higher and more stable the level of market share held by a firm, the greater the degree of market power it is likely to have in the market.⁸⁵ However, market share alone is not sufficient in absence of any qualitative criteria,

⁷⁷ CUTS, 'Competition Policy & Law Made Easy: Monographs on Investment and Competition Policy #8' (CUTS Centre for International Trade, Economics & Environment D-217, Bhaskar Marg, Bani Park Jaipur 302 016, India, 24

⁷⁸ *ibid*

⁷⁹ UNCTAD, *The effects of anti-competitive business practices on developing countries and their development prospects*, (United Nations, New York and Geneva, 2008) 84

⁸⁰ n41,13

⁸¹ n25,60-61

⁸² n41,14

⁸³ Sneha Singh and Syed Ahmed, 'Perfect Competition and Abuse of Dominant Position' (KIIT School of Law, Bhubaneswar, 2015) available at <<https://www.lawctopus.com/academike/perfect-competition-and-abuse-of-dominant-position/>> accessed June 24/2019

⁸⁴ n41,72

⁸⁵ *ibid*

such as, barriers to entry or other indicators of defendant's capacity to control competitors.⁸⁶ Hence, barriers to entry, exit or expansion and durability to market power are identified as the most important additional factors in the assessment of dominance.⁸⁷

If entry barriers faced by the rivals are low, the enterprise which has high market share may not be able to continue with significant market dominance for long.⁸⁸ Thus, even where a single firm has an overwhelming market share, it may be unable to exercise market dominance if entry by new firms or expansion by existing competitors is easy.⁸⁹ All these elements can make two undertakings holding the same market share in similar markets to be in a very different situation.⁹⁰

The other factor that may be considered in defining dominant position is the buyers' countervailing power.⁹¹ A firm with a high market share as a supplier may not be dominant if there is a customer whose market share as a buyer is even higher.⁹² It is even possible for a firm to hold a dominant position as a buyer of a certain good or service, if there are no other buyers with significant market power and no sellers with such power, either.⁹³

The Size and assets of the firm is another factor that needs to be looked into to establish whether the enterprise is economically sound so as to make decisions independently of other market forces.⁹⁴ It is believed that a firm with the largest size and huge resources will be placed in a better dominant position than an enterprise with small size and little resources.⁹⁵

Apart from the size and resources of the firm, the size and importance of its competitors is another factor that needs to be considered in the assessment of dominant position.⁹⁶ If an

⁸⁶ Eric van Damme, Pierre Larouche and Wieland Müller, 'Abuse Of A Dominant Position: Cases And Experiments' (2006) Tilburg University Discussion Paper DP 2006-020,2 available at <https://www.researchgate.net/profile/Eric_Damme/publication/228230724> accessed on June 23/2019

⁸⁷ OECD, 'Techniques And Evidentiary Issues In Proving Dominance/Monopoly Power'(2006) Directorate For Financial And Enterprise Affairs Competition Committee policy roundtables, 7 available at <<https://www.oecd.org/daf/competition/abuse/41651328.pdf>>June 3 /2019

⁸⁸Ibid,8

⁸⁹ n41,72

⁹⁰ Department For International Development, 'Competition Assessment Framework: An Operational Guide for Identifying Barriers to Competition in Developing Countries'(2008)16 available at <https://www.oecd.org/daf/competition/reducingregulatoryrestrictionsoncompetition/46192459.pdf> accessed on June 25/2019

⁹¹n41,50

⁹²ibid

⁹³ibid

⁹⁴Competition Commission of India, *introduction to Competition Law part 1-basic Introduction*,20

⁹⁵ibid

⁹⁶ ibid

assessment of the smaller firms' market share relative to the largest firm is small, the largest firm is more likely to have dominance.⁹⁷

The reliance of consumers on the allegedly dominant firm can also give an evidence to determine if it is dominant in reality.⁹⁸ Where the consumers' reliance on the product/service of the firm is high, it would be considered as a relevant factor conferring dominant position to that firm.⁹⁹

Dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise is another factor that could provide a valuable support in the assessment of dominance.¹⁰⁰ In this respect, an undertaking that holds a statutory monopoly in a relevant market could be treated as holding a dominant position or legal monopoly granted to a firm puts them in a dominant position.¹⁰¹

In Ethiopia, Article 6 (1) of the proclamation states that, "a business person either by himself or acting together with others in a relevant market is deemed to have a dominant position, if it has the actual capacity to control prices or other conditions of commercial negotiations or eliminate or utterly restrain competition in the relevant market." However, this provision fails explicate what actual capacity does refer.

In assessing market dominance, the authority is permitted to use the market share of the business person, his capacity to set barriers against the entry of others into the market and other factors as it may find necessary.¹⁰² In this respect, the council of ministers is mandated to determine the numeric expression of market share necessary to establish dominance though it has not issued yet.¹⁰³

Under the Kenyan competition Act, the acquisition of not less than half of the market share in the market gives an irrefutable presumption that the firm is in a dominant position, while acquisition of market share between 45-50% gives a refutable presumption of dominance.¹⁰⁴ In South Africa, on the other hand, a firm will be irrefutably considered in a dominant position if it has at least 45% of that market share. If its market share is at least 35% but less than 45%, the firm will be

⁹⁷ibid

⁹⁸ibid

⁹⁹ibid

¹⁰⁰ ibid

¹⁰¹General Motors Continental NV v. Commission of the European Communities; Case 26- 75, Judgment of the Court of 13 November 1975.

¹⁰² TCCPP, Art.6(2)

¹⁰³ TCCPP, Art.6(3)

¹⁰⁴ The Kenyan Competition Act No. 12 of 2010, sec. 23

considered dominant unless it proves otherwise.¹⁰⁵ Any other firm with market share less than 35% will be considered to have market dominance if and only if it has a market power.¹⁰⁶

2.1.3.3. Abuse of a Market Dominance

Acquisition of market dominance in a relevant market is not a crime by itself unless it is proved that the firm has abused its power. The underlying aim of any anti monopoly law is not to condemn the growth of firms but to deter them not to use their economic power as a means of excluding competitors and exploiting consumers.

Thus, once dominant position is proved, the analysis then shifts to whether a firm's behavior might be regarded as crossing the line from normal competitive behavior to an abuse of a dominant position.¹⁰⁷

In this respect, the definition of what is abusive depends on the objective of the law:¹⁰⁸ If the main objective of the law is economic efficiency, then welfare-reducing actions should be considered to be abusive.¹⁰⁹ If, on the other hand, fair trading is the main objective of the law, then, taking advantage of a better bargaining position may be considered abusive.¹¹⁰

Abuse of dominance denotes practices where a dominant firm uses its dominant power to increase prices above competitive levels, or to prevent smaller competitors from increasing their market shares, or to discourage market entry.¹¹¹ These acts involve conducts that exclude competitors (exclusionary abuses), and conducts that exploit consumers (exploitative abuses).¹¹²

Exploitative conduct covers practices where by a dominant firm uses its market power to exploit other market participants without directly affecting the structure of the market.¹¹³ These abuses relate to price or non-price conditions imposed by a dominant operator on customers.¹¹⁴ The

¹⁰⁵ Republic of South Africa Competition Act No. 89 OF 1998 section 7

¹⁰⁶ *ibid*

¹⁰⁷ n41,14

¹⁰⁸ *ibid*

¹⁰⁹ *ibid*

¹¹⁰ *ibid*

¹¹¹ DFID, DEPARTMENT FOR INTERNATIONAL DEVELOPMENT, "Competition Assessment Framework", An operational guide for identifying barriers to competition in developing countries, 2008, 26-27

¹¹² *ibid*

¹¹³ CUTS INT'L, Competition Law In Vietnam: A TOOLKIT 36 (2007), Hassan Qaqaya And George Lipimile (Eds.) , "The Effects Of Anti-Competitive Business Practices On Developing Countries And Their Development Prospects"(UNCTAD, UNITED NATIONS New York and Geneva, 2008)P.46

¹¹⁴ *ibid*

dominant firm may use its market power to charge excessively high prices to consumers or to reduce payments to suppliers, a behavior that directly harms consumers or suppliers.¹¹⁵

Exploitative abuses include imposing unreasonable buying or selling prices of goods or services or fixing minimum re-selling prices causing damage to customers; Restricting production, distribution of goods, services, limiting markets, preventing technical and technological development, causing damage to customers; Imposing dissimilar commercial conditions in similar transactions in order to create inequality in competition; Imposing conditions on other firms for the purchase or sale of goods or services or forcing other firms to accept obligations that have no direct connection with the subject of such contracts.¹¹⁶

Exclusive abuses, on the other hand, relates to attempts by dominant firms in the relevant market to maintain and reinforce their market power by eliminating or obstructing rivals from participating in the market.¹¹⁷ Unlike exploitative abuse, exclusive abuse directly targets the firm's competitors.¹¹⁸ This group of abusive practices consists of two general sets of exclusive behavior: selling goods or providing services below total prime cost aimed at excluding competitors and preventing new competitors from entering the market.¹¹⁹ Such behavior could harm consumers by reducing competition, inducing higher prices, reducing customer choice or reducing incentives for investment and innovation.¹²⁰

2.1.4. Conducts Deemed to be an Abuse of Dominance

Conducts that constitute an abuse of dominance vary across countries that what is abusive in a certain country may not be abusive in another country.¹²¹ According to UNCTAD model law on competition,¹²² Predatory behavior towards competitors, such as using below cost pricing to eliminate competitors; discriminatory pricing or terms or conditions in the supply or purchase of goods or services; fixing the prices at which goods sold can be resold; Partial or complete refusal

¹¹⁵ The ASEAN Secretariat, *Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN*(ASEAN Secretariat, Jakarta: December 2012) 36,37

¹¹⁶Tran Thang Long, Gordon Walker, 'Abuse Of Market Dominance By State Monopolies In Vietnam' (5/7/2012)Vol. 34:2, Houston Journal Of International Law 195-198

¹¹⁷ibid,42

¹¹⁸Ibid,195-198

¹¹⁹ ibid

¹²⁰ibid

¹²¹OECD, 'Abuse of Dominance and Monopolization'(Organization For Economic Co-Operation And Development, PARIS,1996)9

¹²² n27

to deal on an enterprise's customary commercial terms; Making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods; Imposing restrictions concerning where, or to whom, or in what form or quantities, goods supplied or other goods may be resold or exported; and Making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee are recognized as acts of abuse of dominance if they are committed by a dominant business entity.

In Ethiopia, close reading of Art.5 of the TCCPP reveals that discrimination on price and other conditions, predatory pricing, refusal to deal, tying and bundling contracts, limiting production, market restriction, raising rival's costs, excessive pricing, resale price maintenance, denial of essential facility, preempting inputs or distribution channels and such other acts that may be determined by the council of ministers are acts that are designated as acts of abuse of dominance.¹²³

Consequently, once it is proved that the firms/s is engaged in any of such acts; it is presumed that the firm is abusing its market dominance position. In such cases, assessment of the likely effect of such acts to prevent or lessen competition in a market is not a prerequisite on the part of the authority. In other words, having determined that the firm has engaged in a practice of anti-competitive acts illustrated in the proclamation, determining whether this practice has resulted or is likely to result in substantial harm to competition it is not necessary.

Though art 5 of the TCCPP is relatively comprehensive, it fails to prohibit exclusive dealing agreements as an act of abuse of dominance. In other jurisdictions, for instance, the US, exclusive dealing agreement is an act of abuse of market dominance under section 3 of the Clayton Act of 1994 and per se prohibited if it has the effect of foreclosing competitors while under Article 101 section 1 of the TEFU, exclusive agreements are classified abusive and hence prohibited if there is 80% exclusiveness.¹²⁴

¹²³ TCCPP art 5(2)

¹²⁴ Maria Brouwer , 'EU and US Competition Policy on Abuse of Dominance in High tech Industries'(University of Amsterdam, 2011) available at https://www.researchgate.net/profile/Maria_Brouwer/publication/254914577_US_and_EU_competition_policy_on_abuse_of_dominance_in_high_tech_industries/links/54993a530cf21eb3df5f7063/US-and-EU-competition-policy-on-abuse-of-dominance-in-high-tech-industries.pdf?origin=publication_detail> accessed on February20/2020

Hence, as exclusive dealing arrangements may cause market foreclosure on competitors and harm to consumers, it is better if the Ethiopian rules on abuse of market dominance have provisions on exclusive dealing.

The stringent qualifying requirements stipulated under the TCCPP before an act can be prohibited may also pose problems for enforcement of abuse of dominance rules. For instance, under Art.5 (2-d), before a firm can be held liable for refusal to deal, it is necessary to prove that its acts were contrary to the clearly prevalent market practice. In this regard, assessing the prevalent market practice and then examining the acts of the business person against the prevalent market practice identified could be very burdensome and difficult to apply.

2.1.5. Defenses for Abuse of Dominance Claims

A dominant business person that engages in abuse of dominance acts may escape liability if it can prove that it has justifications. For instance, in the European commission, a firm alleged for abuse of market dominance may escape liability if it can prove that the efficiency gains that are likely to result from the potentially abusive conduct offset any likely negative effects on competition and consumer welfare generated by that conduct; those efficiency gains have been, or are likely to be brought about as a result of the potentially abusive conduct; the potentially abusive conduct is necessary for the achievements of those efficiency gains; and the potentially abusive conduct does not eliminate effective competition by removing all or most existing sources of actual or potential competition.¹²⁵

On the other hand, in Qatar, the justifications available to firms accused of abuse of market dominance can be grouped objective and efficiency justifications.¹²⁶ Accordingly, to justify abusive conduct on the basis of objective necessity, the dominant firm need to demonstrate simultaneously that the conduct is indispensable to the provision of the respective product or service, and the conduct is proportionate to the provision of the respective product or service, i.e. the provision cannot be achieved in a manner less harmful to competition.¹²⁷

On the other hand, to justify abusive conduct on the basis of efficiency gains, the dominant firm needs to demonstrate that the conduct produces efficiencies that outweigh the anti-competitive

¹²⁵ OECD, Roundtable On The Role Of Efficiency Claims In Antitrust Proceedings, DAF/COMP/WD(2012)70)18-Apr-2013, p.14

¹²⁶ Communications regulatory Authority state of Qatar, ‘Statement of Competition Policy’(October 21, 2015) 10-11

¹²⁷ *ibid*

effects on consumers. This would be the case if the following four criteria are simultaneously fulfilled:

The conduct brings efficiency gains by, for example, reducing costs for the provision of the services in question, and the efficiency gains are passed on to consumers; these efficiency gains cannot be achieved without the conduct, i.e. the conduct is indispensable to the efficiency gains; the efficiency gains outweigh the harm to competition and negative effects on consumer welfare resulting from the anti-competitive conduct; and the abusive conduct does not eliminate effective competition and thus reduce consumer welfare in the long term.¹²⁸

In Ethiopia, the TPCPP and the TCCPP recognize defenses that may be invoked by firms alleged for violating the abuse of dominance rules. Accordingly, acts which have the object of maintaining quality and safety of goods and services, leveling with the prices offered by a competitor, and achieving efficiency and competitiveness are legitimate defenses envisaged by the two proclamations.¹²⁹

Under the TPCPP, to invoke the defense of ‘legitimate business purpose’, the firm has the onus to prove that his acts are indispensable and decisive by their nature that he can’t achieve his business in any other way than the act challenged.¹³⁰ Under this proclamation, the “legitimate business person” defense can be invoked to all acts designated as acts of abuse of dominance by law that the authority need to determine each allegation of abuse of market dominance on a case by case basis.

The TCCPP dropped the expression ‘legitimate business purpose’ as a defense and replaced it with defense of ‘justifiable economic reasons’. However, what constitute ‘justifiable economic purpose’ is not explicitly indicated under the proclamation but maintenance of quality and safety of goods; leveling with prices or benefits offered by a competitor; achieving efficiency and competitiveness and other similar reasons to be specified by the regulation to be issued by the council of ministers are stated as instances of justifiable economic reasons.

Under this proclamation, the defense is available only to denial of essential facility, discrimination in price and other conditions, tying and bundling arrangements, imposing restriction on resale of goods.¹³¹

¹²⁸ *ibid*

¹²⁹ TPCP, Art.9 and TCCPP, Art.5 (2) (e), (f), (g), (h), & 5(2).

¹³⁰ TCCPP Art.9.

¹³¹ TCCPP Art.5(2)

To benefit from the defenses, the TCCPP doesn't require the firm to prove that its acts are indispensable and decisive by their nature that it cannot achieve its business in any other way than the act challenged.¹³² This makes the defense of "justifiable economic purpose" very simple compared to the balancing qualification requirements in the European commission and Qatar.

2.2.The Institutional Framework for Prohibition of Market Dominance

Though there is no uniform institutional design for competition authorities across the globe, having minimum guarantees of independence is believed to give competition agencies the necessary authority to act impartiality.¹³³

To decrease the uncertainty of the business community about the enforcement of government policies, UNCTAD suggests that the government should formulate competition policy and assign its enforcement to an independent agency.¹³⁴ In another study, to ensure the independence of the authority, UNCTAD noted that appointment of competition authorities' officials in the involvement of more than one wing of the government is more favorable than an appointment by a minister.¹³⁵ Additionally, UNCTAD assumes that competition officials, whose terms are not renewable and cannot be removed from office, except before the end of their tenure, have less incentive to please with their decisions those who appointed them.¹³⁶ As identified by UNCTAD, another aspect by which the independence of a Competition Authority can improved is establishing legal framework that enables the authority to freely comment for public policy, regulation and legislation improvement.¹³⁷

¹³² TCCPP Art.9.

¹³³World Bank, 'Building Institutions for Markets: World Development Report' (Washington D.C., 2002)23

¹³⁴ UNCTAD Secretariat, 'Independence and Accountability of Competition Authorities' (a note submitted on the ninth session of the UNCTAD Trade and Development Board, 15-18 July 2008) 3; Yassamine Afifi, Independence Of The Egyptian Competition Authority Assessment And Recommendation, Global Anti Trust Review, P.7

¹³⁵UNCTAD, 'The role of competition policy in promoting economic development: The appropriate design and effectiveness of competition law and policy'(Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Geneva, 8–12 November 2010) , 5ff

¹³⁶ UNCTAD Secretariat, n134,8

¹³⁷ Ibid, 9

On the other hand, World Bank stated that to assure the independence of the Authority, the head of the competition authority should be appointed by a committee or the parliament rather than by the president or the prime minister.¹³⁸

The CUTS Centre on Competition, on its part, stressed that, to ensure their financial independence, competition authorities should be financed from a combination of funds allocated by the legislature and those received from filing fees instead of funds allocated by the government.¹³⁹ According to the CUTS, the least independent authorities are those that form part of a government ministry and are also subject to civil service restrictions on recruitment and on central budget allocations for the administrative services.¹⁴⁰

OECD, on the other hand, stressed that to avoid tensions that may arise between the minister responsible for competition policy and the competition authority as a result of insufficient precision on their respective roles and responsibilities, the manner how the competition authority shall relate to the executive and legislature should also be prescribed in the competition law.¹⁴¹

OECD further suggests that, the competition law should clearly recognize the independence of the authority by explicitly prescribing the functions, powers, the manner in which management and staff are to be appointed, their tenure and removal, and how the agency is to be financed.¹⁴² In this regard, to ensure independence of the authority, appointment of the authority's personnel based on well-defined professional criteria and with the involvement of both the executive and the legislative branches of the government is preferable.¹⁴³ Additionally, OECD, suggests that any Head or equivalent and members of the adjudicating body of the competition authority should be appointed for a fixed-term, with a prohibition on their removal without due causes predefined with the appropriate judicial review.¹⁴⁴

The existence of rules on conflicts of interest and rules determining what is incompatible with other activities in the public or private sector can further guarantee independence and prevent

¹³⁸ n133,141,142

¹³⁹ CUTS Centre, 'pulling up our Socks: A Study of the Competition Regimes of Seven Developing Countries of Africa and Asia: The 7-up Project' (2003) paper 0303, 53-54.

¹⁴⁰ *ibid*

¹⁴¹ OECD Global Forum on Competition, 'Independence of Competition Authorities - From Designs to Practices' (1-2 December 2016),9-20

¹⁴² *ibid*

¹⁴³ n115

¹⁴⁴ n141

conflict of interest from occurring with regard to private interests as well as political affiliations is identified as the other the other most important ingredient that is believed to ensure the independence of competition agencies.¹⁴⁵

In Ethiopia, the TCCPP established the Trade Competition and Consumer Protection Authority (TCCPA) as an autonomous federal government body with its own legal personality and accountable to the Ministry of Trade.¹⁴⁶ Physically, the office of the Authority is not located in an office within any government ministry.

Some argue that, as accountability of the authority to the Ministry of Trade could undermine the institutional independence of the authority, it should be accountable to the house of peoples' representatives.¹⁴⁷

The TCCPP lacks provision that stipulate the independence and accountability of the Appellate Tribunal; the organ to whom it shall be accountable and issues related with the source of budget and administration.

Practically, the appellate tribunal is physically located in the building leased by the Authority has no separate annual budget or any other resources rather it shares the resources of the Authority.¹⁴⁸ Regarding structure, the appellate tribunal is under the supervision of the Authority, practically, the Authority has the power to receive periodic report from the tribunal and evaluate its performance.¹⁴⁹ This subordination is believed to make the independence of the tribunal at stake as the authority may repress the tribunal through budgeting, resource allocation, evaluation and other mechanisms.¹⁵⁰

With respect to the powers and functions of the TCCPA, the TCCPP has conferred the Authority with Administrative, legislative, adjudicative, investigative, competition advocacy and consumer protection functions.

¹⁴⁵ Sofia Alves, Jeroen Capiou and Ailsa Sinclair, 'Principles for the Independence of Competition Authorities' (April 2015) Vol 1, No 1 Competition Law international (European Commission, Brussels), 16

¹⁴⁶ TCCPP, Art.27(1&2).

¹⁴⁷ Interview with Fikadu Yami and Getu Melkie, principal and senior attorney at Ethiopian Insurance Corporation, respectively, April, 22,2020

¹⁴⁸ Interview with kochito G/Mariam, presiding Judge of the Appellate tribunal, September 10,2020

¹⁴⁹ *ibid*

¹⁵⁰ Interview with Habtamu Mamo, Judge of appellate tribunal, September 11,2020

As an entity with separate legal personality, the Authority has the power to own and administer property; enter in to contracts, and employ and administer its staff and sue and be sued.¹⁵¹ Further, it has a duty to organize judicial organs and provide support to industrial self regulation.¹⁵² The other duty of the Authority is regulation of merger.¹⁵³ Giving advice and support to the concerned regional organs with respect to consumer protection is also another function of the Authority.¹⁵⁴ Furthermore, the proclamation has mandated the Authority to establish a procedure where by disputes arising between traders or consumers and traders would be resolved by mutual agreement and negotiation.¹⁵⁵ The other mandate of the Authority is collecting service fees for cases it adjudicates from non governmental clients.¹⁵⁶

In its power of investigation, the Authority has the power to make investigation through its investigative officers up on its initiation or up on complaints it receives from clients.¹⁵⁷ In conducting investigation, it has the power to call for the assistance of the police under the command of the federal government and to make search necessary search and seizure.¹⁵⁸

The other function of the authority is prosecution. Pursuant to, Art. 37(2&3) of the TCCPP any person who sustains damage arising from an act of unfair competition can institute an action for damages before the adjudicative branch of the Authority. Accordingly, if the claimant proves that its rights are infringed, the authority has the power to order payment of compensation to the claimant or impose other administrative measures on the perpetrator.¹⁵⁹

On the other hand, an action against individuals and business persons for taking administrative measures and imposing administrative penalty by the adjudicative branch of the Authority or for imposing criminal penalty by the competent federal court is instituted by the prosecutors of the Authority.¹⁶⁰

Legislative power is identified as one of the main functions of competition Authorities. Authorities usually issue specific guidelines for market definition, merger regulation, abuse of

¹⁵¹ TCCPP, Art 31(2).

¹⁵² TCCPP, Art 31(2).

¹⁵³ TCCPP Arts.9-13.

¹⁵⁴ TCCPP Art.30(13)

¹⁵⁵ TCCPP Art.30(10)

¹⁵⁶ TCCPP Art.40

¹⁵⁷ TCCPP Art. 36 (1-a).

¹⁵⁸ TCCPP Art. 36 (1-b). and Art 36 (3, 4

¹⁵⁹ TCCPP Art.32

¹⁶⁰ TCCPP Art.37 (1).

dominance enforcement, cartel regulation.¹⁶¹For instance, Kenyan and South African competition Authorities have issued their own detailed guidelines on regulation of merger.¹⁶²

In addition, they may issue directives and other internal working procedures for better enforcement of the competition and/or consumer protection law. Furthermore, Competition Authorities play pivotal role in the preparation, amendment or review of legislation on restrictive business practices, or on related areas of regulation and competition policy.

In Ethiopia, the TPP authorized the council of ministers or regional council to issue regulations necessary for implementation of the proclamation while the investigative commission was authorized to develop rules and directives necessary to efficiently undertake its powers and duties.¹⁶³ Under this proclamation, it was also stipulated that appropriate Authority may issue public notices necessary for implementation of the proclamation.¹⁶⁴

However, the TPCPP seized the legislative power of the authority. The power of making regulations and public notices were left to the Ministry of Trade and the minister respectively.¹⁶⁵

Similarly, under the TCCPP the Authority has no power to develop its own rules and directives of procedures necessary for discharging of its duties as the power to issue regulations and public notices is vested on the council of ministers and the Ministry of trade respectively.¹⁶⁶

Regarding consumer protection, many countries issue a consumer protection law separate from their competition legislation while others merge their consumer protection law provisions with their competition legislations. For instance, South Africa, china, India, Brazil, and Botswana have consumer protection acts separate from their Competition Acts while others, such as Kenya and Tanzania merge their consumer protection law with their competition law.¹⁶⁷

In Ethiopia, the TCCPP has a chapter specifically devoted to consumer protection.¹⁶⁸The consumer protection provisions of the proclamation have the object of protecting consumers from misleading market conducts, preventing the proliferation of goods and services that

¹⁶¹ n27, chapter II, Part II (C)

¹⁶² See Competition Authority of Kenya, Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act , Competition Commission Of South Africa, Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998, 31 May 2016

¹⁶³ TPP, Art.29

¹⁶⁴ TPP, Art.28

¹⁶⁵ TCCPP, Art.55

¹⁶⁶ TCCPP Art.46

¹⁶⁷ See art. 55 and the ff of the republic of Kenya competition Act. No. 12 of 2010 and article 51 and the ff of The Fair Trade Practices Act, 1994 of Tanzania

¹⁶⁸ TCCPP. 14-26.

endanger the health and well being of consumers and creating conducive environment by which consumers get goods and services equivalent to the price they pay.¹⁶⁹To realize these objectives, the Authority is mandated to regularly announce to consumers goods banned by the government or internationally from being consumed or sold, regulating prices of basic goods and services, determining the condition of sale and distribution of basic goods and services and protecting consumers from unfair practices of business persons.¹⁷⁰

From the alternatives provided for consumers to enforce their rights in regional or federal competition authorities or in relevant regular courts, it can be inferred that consumer rights protection has been given greater attention than promotion of competition.¹⁷¹

Practically, too, compared to competition matters, the Authority is involved on consumers' right protection issues.¹⁷² In this respect, the director stated that as consumer protection can be realized once commendable level of competition is achieved in the market; the main focus of the Authority should be on implementation of competition matters. In addition, he argued that, since maintaining competition by itself is huge task, it is better to have a separate consumer rights protection legislation and enforcement agency.

Regarding advocacy, it is suggested that, apart from enforcing the competition law, the duty of the competition agency shall extend to participating in the formulation of the country's economic policies to bring about policies that lower barriers to entry, promote deregulation and trade liberalization, and otherwise minimize unnecessary government intervention in the marketplace.¹⁷³

In addition, competition authorities should be given a responsibility of advising the Government on the impact of proposed or existing laws and regulation on competition and involve in educating the business community and the general public about the benefits of competition policy law.¹⁷⁴

In Ethiopia, the TCCPP states that the Authority shall take appropriate measures to develop public awareness on the provisions and implementation of the proclamation by organizing

¹⁶⁹ TCCPP, preamble

¹⁷⁰ TCCPP, Art.25, 26 & 30.

¹⁷¹ TCCPP, Art.20 (2&3), 34 and 37

¹⁷² Interview with Getinet Ashenafi, the director of the investigative department of the Authority, September 10,2020

¹⁷³n77,31

¹⁷⁴n135

educations and training programs.¹⁷⁵In addition, the Authority has to undertake research in connection with trade competition and consumer protection and initiate policy proposals.¹⁷⁶

But the proclamation doesn't authorize the Authority to participate in drafting of policies, laws, and regulations or to comment and provide its opinions on the existing policies, laws, regulations, directives or any government decisions that have implications on competition. As a result, the authority has no opportunity to formally challenge regulations, directives, decisions and measures that could have negative implications to competition. Further, there is no mechanism for the Authority to communicate its policy proposals to the parliament. As a result, any policy proposal by the Authority, to reach to the Parliament, should pass through the Ministry of trade - an institution by virtue of law has no legal obligation to present the opinion of the Authority to the parliament.

Regarding budget allocation, the TCCPP doesn't grant the authority the power to independently decide over the sources, size and use of the budget in support of its mission. The authority generates its funds only from the budget to be allocated by the government.¹⁷⁷ Thus, in the absence of any alternative source of funding, the competition Authority may remain dependent on the goodwill of the government in respect of the budget to be allocated to it.

Regarding the personal independence of the authority, it is stated that, the independence of the Authority can be influenced by appointment mechanism, appointment criteria, appointment term and dismissal mechanism of the Authority's general director, the deputy general directors, and the judges of the adjudicative branch of the Authority.

In Ethiopian context, cumulative reading of Art 28(1&2) and 35(1) of the Proclamation discloses that a Director General, the Deputy Director Generals and the judges of the Authority are appointed by the Prime Minister. Appointment of the director general and the deputy director generals of the Authority by the Prime Minister involve the recommendation of the Minister of Ministry of Trade while such recommendation is not a requirement for appointment of judges.¹⁷⁸ Kidanie noted that Appointment of judges and higher officials of the authority by the prime

¹⁷⁵TCCPP, Arts.30(2&6)

¹⁷⁶TCCPP, Art.30 (4).

¹⁷⁷ TCCPP, Art.44.

¹⁷⁸ TCCPP, Art.28 (1), Art.28 (2) and Art.35 (1)

minister could undermine the personal independence of the authority.¹⁷⁹ Hence, he proposes that the appointment of such personnel, especially, the judges has to be made according to the procedure followed for the appointment of judges of ordinary courts.

Regarding the appointment criteria, Ethiopian competition law does not set any minimum requirements or qualifications for the director general, deputy director generals, judges or any other officials. Further, the Ethiopian competition law does not set any rules controlling the political affiliations of the director general, the deputy director generals and department leaders. As a result, the Prime minister is free to appoint the director general, deputy director generals and judges based on criteria not related to their qualification and experience.¹⁸⁰ Similarly, the Minister of Ministry of trade may recommend for the post of the director general and the deputy generals individuals base on their political background that their merit.

The issue of security of tenure is another factor that may positively or negatively influence the personal independence of the Authority. In Ethiopia, there is no fixed term for the appointment of the director general, deputy director generals and judges of the authority. Similarly, the law does not provide for any condition that needs to be fulfilled in order to dismiss them. Therefore, like that of their appointment, the fate of their dismissal will be decided by the prime minister.

Regarding, the dismissal of other employees of the Authority, the procedure is similar with other civil service officials. This indicates that these employees cannot be removed from their office prior to retirement age, unless they voluntarily resign or lost their occupational capacity.¹⁸¹

On the basis of this, it is clear that high level officials of the Authority have lower security of tenure than that of other employees. Thus, officials who fear premature dismissal may be keen to adopt decisions that are not against the interest of the government.¹⁸²

¹⁷⁹ n12

¹⁸⁰ Interview with Mekides Mekuria, judge at the adjudicative branch of the authority, September 10,2020

¹⁸¹ Federal Civil Servants Proclamation, 2017, Arts. 68-73, Proc.No.1064/2017.Neg.Gaz.,year 24, No.12.

¹⁸²n141

Chapter Three

3. Major Legal and Institutional Problems in the Prohibition of Abuse of Market

Dominance in the Banking Sector in Ethiopia

3.1.Overview of Abuse of Market Dominance in the Banking Sector in Ethiopia

According to the 2017/2018 NBE annual report, as of June 2018, CBE had more than 1375 branches. This accounts about 30% of the total branch network of all commercial banks while the second bank with largest branches, Awash Bank, had only 382 (8%) branches. In the same period, the total capital of the bank was birr 43,851,800,000 (56.2%) out of the total capital of birr 78,074,600,000 owned by all commercial banks.

Currently, almost all of government institutions are induced by the government to use CBE for any of their banking needs.¹⁸³ There is also an allegation that government banks favor state owned enterprise in credit provision.¹⁸⁴ In addition, there is also a claim that the government requires individuals or private organizations participating in state auctioned projects to use commercial bank of Ethiopia for any financial transactions associated with the project.¹⁸⁵

Moreover, to participate in low cost government constructed houses, interested individuals are required to open a saving account only at the commercial bank of Ethiopia.¹⁸⁶ Above all, currently, it is the CBE that collects and administers the Diaspora trust fund; sells Great Ethiopian Renaissance Dam Bond and collects public utilities' (e.g. Electricity and water) service fee from customers.

The presence of the above privileges gives the CBE a huge leverage to oust private commercial banks from accessing business from government institutions.¹⁸⁷ In addition, CBE discriminates between government institutions and private institutions / individuals in the provision of

¹⁸³n4; Fikremarkos Merso (Dr.) and others, *'Review of the Legal and Institutional Framework for Market Competition in Ethiopia'* (Addis Ababa Chamber of Commerce and Sectoral Associations, 2009)

¹⁸⁴ n4

¹⁸⁵ n4, 176

¹⁸⁶ n4

¹⁸⁷ Art. 5(2-b) of the trade competition and consumer protection proclamation provides that preempting of inputs or distribution channels is one of the abuse of Dominance acts prohibited by law.

credits.¹⁸⁸ The bank usually inclines towards providing credit service to government enterprises than private credit seekers irrespective of their creditworthiness.

Further, in some of its services, the tariff it imposes is very exaggerated and unfair compared to the tariff levied by other private banks. For instance, for local money transfer, CBE levies a minimum of birr 23 while other commercial banks levy an average of birr 11 for the same service.¹⁸⁹ Similarly, while other commercial banks levy birr 25 for issuing CPOs for customers not having a saving account held in the bank, the commercial bank levies birr 100 for the same service.¹⁹⁰

Such discrimination among customers and an exaggerated services fee by CBE is a clear manifestation of an abuse of dominant position by the bank.¹⁹¹

However, no abuse of dominance claim has been made against the CBE by the authority or any other body so far. Regarding this, Kidanie, a presiding judge of the adjudicative branch of the authority stated that, though discriminatory acts of the bank and that of the unfair service fee the bank imposes on its customers could instigate action; nobody had brought action against the bank due to lack of awareness among the customers about their rights and the inability of the authority to gather evidence about such acts of the bank.

Kidanie stated that, though five abuse of market dominance cases, mostly excessive price, were brought to the adjudicative branch of the authority, all of the cases were rejected due to the inability of the prosecutors to prove the excessiveness of the price. However, the writer was couldn't get the opportunity to examine the cases since nobody could help me trace the files.

Hence, this chapter of the thesis is devoted to appraising the problems in the legal and institutional framework for prohibition of abuse of market dominance in Ethiopia based on the assessment of the law and the practice.

3.2.Problems Related to the Law

3.2.1. Problems Related to the objectives of the TCCPP

As outlined under Art.3 of the TCCPP, the main objectives of the proclamation is protecting the business community from anti competitive and unfair market practice; establishing a system

¹⁸⁸ n4

¹⁸⁹ My own survey, may 2019

¹⁹⁰ ibid

¹⁹¹TCCPP, Art.5 (2, c & f).

conducive for the promotion of competitive free market; protecting consumers from misleading market conduct; preventing proliferation of goods and services that endanger the health and well being of consumer; ensuring that consumers get goods and services safe and suitable to their health and equivalent to the price they pay and accelerating economic development are identified as the major objectives of the proclamation.

In light of the main objectives of competition law outlined under chapter two, the Proclamation has some problems.

Firstly, though, the main objective of any effective competition law should be protecting the competition process, Article 3 (1) of the proclamation reveals the emphasis of the law on protecting competitors than competition and the competition process.

In this respect, Kenea Kiteta argued that, as the preamble of the proclamation stipulates that commercial activities must be conducted based on the free market economy of the country, it should be presumed that the Proclamation has the objective of protecting the competitive process.¹⁹² However, the assertion of this writer doesn't seem sound. Because, the fact that business activities are conducted according to the rules of free market doesn't necessarily mean that there is competition in the market. Thus, if the government has genuine aim to adequately defend the competitive process, such objective of the law need to be clearly indicated in the proclamation.

The other related problem is that, the Proclamation does not give a clue as to the meaning of the term "Unfair market practice." As a result, one may ask if the term is to refer to "unfair trade practice"¹⁹³ as envisaged under article 2(9) and Article. If that is so, then, one may conclude that the proclamation envisages the protection of the business community from any act in violation of "trade related laws." This line of interpretation, however, may not work as the term "trade related law" may connote many laws that are very remote to competition law. For instance, contract law may be designated as "trade Related law" but competition law may not lend hands to business persons who suffer lose as a result of violation a contract they inter with some other business person. Hence, the writer believes that the term "Unfair market practice" has to be clearly defined in the proclamation.

¹⁹²Kenea Kiteta Abdi, 'The Legal And Institutional Framework Of The Ethiopian Competition Law And Its Enforcement'(Unpublished thesis, AAU, JUNE 2011) 47

¹⁹³ According to Art.2 (9) of the Trade Competition and Consumer Protection Proclamation, "Unfair Trade Practice" Is defined as any Act in violation of the provisions of Trade Related Laws.

The objective of the proclamation "... to ensure that consumers get goods and services safe and suitable to their health and equivalent to the price they pay..." indicated under Article 3(2) could also venture the competition and consumer protection Authority to a responsibility it can't shoulder. Because, ensuring that consumers get goods and services equivalent to the price they pay may require fixing the price of each and every goods and services in the market and following up if these goods and services are sold for the price fixed.

3.2.2. Problems Related to the Scope of the TCCPP

Article 4(1) of TCCPP states that the proclamation shall apply to any "commercial activity" or "transaction in goods and services" conducted in or having effect in Ethiopia. In this regard, the proclamation seems to be in line with the recommended practices as it is a general law applicable to all sectors and to all economic agents in an economy engaged in the commercial production and supply of goods and services. In addition, the law's ambition to apply to any commercial activity or transaction in goods and services conducted abroad but does have an effect in Ethiopia is a novel invention and appreciable to protect the economy from imported distortion.

However, as the council of ministers is authorized to determine by regulation those economic activities it deems vital for facilitating economic activities to be exempted from the application of the provisions of the proclamation dealing with anti competitive practices,¹⁹⁴ the scope of application of the proclamation is made dependent on the will of the council of ministers. Using this prerogative, the council of ministers may exempt economic activities that it believes could better serve the short term interest of the government without regard the long term goal of a competitive market.¹⁹⁵

In addition, though delegation of power of the legislature to the executive is common, delegation is not the complete handing over or transference of a power from one organ to another rather, by the Enabling Act the legislature, lays down broad guidelines and detailed rules are enacted by the delegated authority.¹⁹⁶ Hence, the proclamation should have provided the general list of exemptions and leave the details to the council of ministers instead of leaving the whole power to

¹⁹⁴ TCCPP, Art 4(1)

¹⁹⁵ Yassamine Afifi, *Independence Of The Egyptian Competition Authority Assessment And Recommendation*, *Global Anti Trust Review*, P.7

¹⁹⁶Saad Abdulbaqi Sabti and Rama Subbaiah, 'Conceptual Analysis of Sub Delegation: An Overview'(2017)Volume 3, Issue 3, *International Journal Of Law* 75-79 available at

the council of ministers. In this respect, the repealed trade practice proclamation No.329/2003 and the trade practice and consumer protection proclamation No. 683/2010 provide a list of activities that are exempted from the ambit of the proclamation.

The other problem regarding the scope of the proclamation is the hierarchy of the proclamation with respect to other proclamations, regulations, directives and administrative. Under Article 4(3) of the proclamation it is stated that the proclamation shall not affect the applicability of regulatory functions and administrative measures that may be under taken in accordance with other laws. This envisages that the provisions of the proclamation will be applicable only if these provisions do not contradict with any other proclamation, regulation, directive or any other administrative decision. Kidanie stated that, this provision has made it very difficult for any abuse of dominance claim to succeed.¹⁹⁷

Finally, taking in to account the capacity of the TCCPA and the country in general, extending the scope of the proclamation to extraterritorial business activities and transaction in goods and services that have an effect on Ethiopia would remain on paper.

In Kenya, the Competition Act No. 12 of 2010, under Article 6 provides for the extra- territorial application of the Act. However, the Act applies if and only if the act is committed by: a citizen or ordinarily resident of Kenya, an entity incorporated or carrying on business within Kenya, any person in relation to the supply or acquisition of goods or services by that person into or within Kenya; or any person in relation to the acquisition of shares or other assets outside Kenya resulting in the change of control of a business, part of a business or an asset of a business, in Kenya. This indicates that, for the Kenyan Competition Act to apply extra territorially, either the person or the transaction has to have a close connection to the country. This could make the apprehension and prosecution of the defendant and the enforcement of the law possible.

Hence, the rules of the TCCPP dealing with extra territorial application of the proclamation should be amended to make it pragmatic.

3.2.3. Problems Related to Market definition in Abuse of Market Dominance Cases

The TCCPP recognizes definition of relevant market as one of the essential steps in the establishment of abuse of dominance case. Under the proclamation, it is indicated that the

¹⁹⁷ n12

relevant market includes both the product and geographical dimensions of the market. Regarding the product market, the proclamation envisages that the relevant market shall refer to the market that comprises the goods and services that actually compete with each other that are substitutable.¹⁹⁸ On the other hand, the geographic aspect of market definition denotes the area in which the conditions of competition are sufficiently homogeneous and can be distinguished from the conditions of competition in neighboring market.¹⁹⁹

However, the rules related to definition of relevant market have problems, at least, on two grounds: Firstly, regarding definition of relevant geographic market, though the proclamation under article 6(4) reiterates that, the geographic market relevant for assessment of market dominance shall be the area in which the conditions of competition are sufficiently homogenous and can be distinguished from the conditions of competition in neighboring markets”, it doesn’t say anything if such area is to mean any market in Ethiopia or a substantial part of Ethiopia or any market in the world. Thus, in the absence of any clear stipulation, in this regard, it could be difficult for the competition and consumer protection authority to delineate the relevant geographic market necessary for the assessment of market dominance.

In this regard, many countries delineate in their competition laws that the point of reference for defining the relevant geographic market shall be the whole or the substantial part of the country concerned. For instance, section 24(1) of the competition act of Kenya clearly stipulates that, any conduct which amounts to the abuse of a dominant position in a market in Kenya, or a substantial part of Kenya, is prohibited. This envisages that the point of reference to be used in delimiting the relevant geographic market is the whole territory of Kenya or a substantial part therein.

Secondly, the proclamation failed to prescribe the factors that could be taken in to account in determining if the goods or services could compete or are substitutable to each other in the process of assessing the relevant product market. Similarly, the proclamation doesn’t put any factor that may be considered in defining the relevant geographic market necessary for determining any allegation on abuse of dominance.

¹⁹⁸ TCCPP, Art.6(3)

¹⁹⁹ *ibid*

3.2.4. Problems Related to Establishing Market Dominance

Article 6 (1) of the proclamation states that, “a business person either by himself or acting together with others in a relevant market is deemed to have a dominant position, if it has the *actual capacity to control prices or other conditions of commercial negotiations or eliminate or utterly restrain competition* in the relevant market.”

In assessing market dominance, the TCCPA is permitted to use the market share of the business person, his capacity to set barriers against the entry of others into the market and other factors as the Authority may find it vital.²⁰⁰ In this respect, the council of ministers is mandated to determine the numeric expression of market share necessary to establish dominance.²⁰¹

Yet, the council of ministers has not issued the regulation that determines the numeric expression of market share necessary to establish dominance. Hence, the only available tools at the hands of the authority to assess market dominance are, the capacity of the firm to set entry barriers to the market and other factors the Authority may consider necessary. But, in the absence of any indication in the proclamation as to how to measure the capacity of the business person to set barriers and what are the other “appropriate factors” which help to determine market dominance, the law as it stands could have no answer.²⁰²

3.2.5. Problems Related to Designation of Abuse of Market Dominance Acts

Under Art.5 (2) of the TCCPP, once is proved that the firm/s is engaged in any of acts designated as acts of abuse of market dominance, assessment of the likely effect of such acts to prevent or lessen competition in a market is not a prerequisite on the part of the authority. The Kenyan, South African and Indian competition Acts hold a similar position with the Ethiopian law in the sense that the acts illustrate the acts that, if committed by a dominant firm, would amount an abuse without regard to the degree of their anti competitive effect.²⁰³

In other jurisdictions, such as, Canada, the EU and US, on the other hand, the involvement of the firm in acts designated by law as acts of abuse of dominance doesn’t suffice to prosecute the alleged firm, rather, it has to be proved that the act complained of has or likely to have the effect

²⁰⁰ TCCPP, Art.6(2)

²⁰¹ TCCPP, Art.6(3)

²⁰² n4,191

²⁰³ The Kenyan Competition Act No. 12 of 2010, sec. 24, Republic of South Africa competition Act No. 18 of 2018: Competition Amendment Act, 2018, section 8. and Competition Act 2002 No.12 of 2003 of India, section 8.

of preventing or lessening competition in a market.²⁰⁴Such effects based approach to enforcement of abuse of dominance rules seems to be better than the form based approach adopted by Ethiopia, Kenya and India. Because, acts, such as, tying and fidelity rebates may not have significant anticompetitive effect that such acts should be termed illegal where it genuinely risk the anti competitive exclusion of competitors from the market.²⁰⁵

Hence, it is reasonable to revise the Ethiopian competition law in such a way that a firm that engages in acts listed as acts of abuse of market dominance under Art.5 of the proclamation shall be prosecuted only when it is proved by the authority that such acts have established anti competitive effects.

Regarding the acts prohibited as acts of abuse of market dominance, the Ethiopian competition law prohibits; discrimination on price and other conditions, predatory pricing, refusal to deal, tying and bundling contracts, limiting production, market restriction, raising rival's costs, excessive pricing, resale price maintenance, denial of essential facility, preempting inputs or distribution channels and such other acts that may be determined by the council of ministers.²⁰⁶

Relatively speaking, the acts designated as acts of abuse of dominance by the proclamation are comprehensive. Yet, there are still some limitations in the provision that need to be reviewed to make the abuse of dominance rules more practical.

Firstly, though exclusive dealing agreements are directly or indirectly considered as acts of abuse of dominance in other jurisdictions, the Ethiopian abuse of market dominance rules fail to level such agreements as an act abuse of market dominance.

Hence, as exclusive dealing arrangements may cause market foreclosure on competitors and harm to consumers, it is better if the Ethiopian rules on abuse of market dominance have provisions on exclusive dealing.

Secondly, the majority of acts identified by the proclamation as acts of abuse of dominance need a qualifying requirement before they can be prohibited. For instance, under Art.5 (2-d), before a business person who refuses to deal can be held liable for violation of the law, it is necessary to prove that his acts were contrary to the clearly prevalent market practice. In this regard, assessing

²⁰⁴Competition Act. R.S., 1985, c. C-34, s. 1R.S., 1985, c. 19 (2nd Supp.), s. 19 , Paragraph 79(1)(c) of Canada, Art.102 of TFEU and Verizon Communications Inc v Law Offices of Curtis V. Trinko LLP117 (Trinko), 540 US 398 (2004)

²⁰⁵ Slaughter and May, 'An overview of EU competition rules'(June 2016)15

²⁰⁶ TCCPP art 5(2)

the prevalent market practice and then examining the acts of the business person against the prevalent market practice identified could be very burdensome.

3.2.6. Problems Related to Defenses for Abuse of Dominance Claims

In Ethiopia, the TPCPP and the TCCPP recognize defenses that may be invoked by firms alleged for violating the abuse of dominance rules. Accordingly, acts which have the object of maintaining quality and safety of goods and services, leveling with the prices offered by a competitor, and achieving efficiency and competitiveness are legitimate defenses envisaged by the two proclamations.²⁰⁷

Under the TPCPP, to invoke the defense of ‘legitimate business purpose’, the firm has the onus to prove that his acts are indispensable and decisive by their nature that he can’t achieve his business in any other way than the act challenged.²⁰⁸ In this case, the “legitimate business person” defense can be invoked to all acts of abuse of dominance.

The TCCPP dropped the ‘legitimate business purpose’ defense and replaced it with the defense of ‘justifiable economic reasons’. However, what constitute ‘justifiable economic purpose’ is not indicated under the proclamation. The proclamation simply lists down, maintenance of quality and safety of goods; leveling with prices or benefits offered by a competitor; achieving efficiency and competitiveness and other similar reasons to be specified by the regulation to be issued by the council of ministers as instances of justifiable economic reasons.

Under this proclamation, the defense of ‘justifiable economic reasons’ is not available to all acts of abuse dominance, but only to denial of essential facility, discrimination in price and other conditions, tying and bundling arrangements, imposing restriction on resale of goods.²⁰⁹

Unlike the TPCPP, under the TCCPP, the alleged firm is not required to prove that his acts are indispensable and decisive by their nature that it cannot achieve his business in any other way than the act challenged.²¹⁰ This indicates that, firms accused of abusing their market dominance may easily invoke one of the defenses and escape prosecution.

²⁰⁷ TPCP Art.9 and TCCPP, Art.5 (2) (e), (f), (g), (h), & 5(2).

²⁰⁸ TCCPP Art.9.

²⁰⁹ TCCPP Art.5(2)

²¹⁰ TCCPP Art.9.

3.3. Problems Related to the Institutional Framework

Though the institutional framework of competition law in Ethiopia has improved since the establishment of the trade practice commission in 2003, there are still serious shortfalls that may affect an effective enforcement of the competition law. These problems relate to the institutional and personal independence of the Authority.

3.3.1. Problems Related to the Institutional Independence of the Authority

The problems related to the institutional independence of the authority are mostly associated with the relationship of the authority with the executive organ of the government and other regulators, its powers and functions and the budget allocation mechanism.

3.3.1.1. Problems Related to the Relationship of the Authority with the Executive Organ of the Government and Other regulators

Though the Authority is established by law as an autonomous organ with its own vicinity, the fact that it is made accountable to the ministry of trade is alleged to challenge its institutional independence. Some argue that, making the Authority accountable to the ministry of trade is not a problem by itself since by virtue of the Constitution; ministries are accountable to the parliament.²¹¹

The other set back that could compromise the effective enforcement of the competition law is the absence of clear stipulation regarding the independence and accountability of the Appellate Tribunal. The TCCPP fails to specify the body to whom the tribunal shall be accountable and issues related with the source of budget of the tribunal and the manner of administration of judges.

According to Mr. Kochito G/Mariam, currently, the appellate tribunal is physically located in the building leased by the Authority and has no separate annual budget or any other resources rather it shares the resources of the Authority.²¹² Regarding structure, the appellate tribunal is under the supervision of the Authority that the Authority has the power to receive periodic reports from the tribunal and evaluate its performance.²¹³ Thus, practically speaking, it is difficult to say that the appellate tribunal is established independently from the Authority. A judge from the tribunal

²¹¹ n147

²¹² n148

²¹³ ibid

expressed his concerns that this subordination could negatively affect the independence of the tribunal as the authority may use budgeting, resource allocation, evaluation and other mechanisms as a means of repression.²¹⁴

Above all, the TCCPP doesn't visualize the working relation of the authority with other regulators who have an overlapping power on competition matters in their respective areas, such as, the Broadcast Authority, the Drug Fund and Pharmaceutical Supply Agency, Communication Authority and Ethiopian Commodity Exchange Authority. As a result, serious conflict of jurisdiction may arise.²¹⁵

3.3.1.2. Problems Related to Powers and Functions of the Authority

The TCCPP confers the Authority with Administrative, legislative, adjudicative, investigative, competition advocacy, consumer protection and alternative dispute resolution functions on competition and some non competition matters. In this respect, the proclamation has granted a good deal of administrative, investigative, prosecution, adjudicative and consumer protection to the authority.

However, the legislative and advocacy power of the Authority provided in the proclamation is very limited. The TCCPP does not confer the Authority with the power to develop its own rules and directives of procedures necessary for discharging of its duties. The power to issue regulations and public notices necessary for proper enforcement of the proclamation is vested on the council of ministers and the Ministry of trade respectively.²¹⁶ It is stated that this could restrain enforcement of the proclamation at least for the following reasons:²¹⁷

Firstly, the council of ministers and the ministry of trade, who are mostly politicized institutions, may issue regulations and directives to the expectations of the political party they belong instead of to the strict requirements of free market. Secondly, the Authority has better expertise and knowledge on competition and consumer protection matters than the council of ministers and the Ministry of Trade. Thirdly, the Authority is in a better position to appreciate the challenges it faces and its particular needs. Thus, denying the Authority not to make the rules and directives

²¹⁴ n150

²¹⁵ n12

²¹⁶ TCCPP Art.46

²¹⁷ n12

necessary for enforcement of the competition law and transferring such powers on the council of ministers and the ministry of trade may deter effective enforcement of the proclamation.

Regarding advocacy, Art.30 (2) of the TCCPP states that the Authority shall take appropriate measures to develop public awareness on the provisions and implementation of the by organizing various education and training fora and providing education and training.²¹⁸ In addition, the Authority is mandated to undertake research in connection with trade competition and consumer protection and initiate policy proposals.²¹⁹

However, the proclamation doesn't have provision that empowers the Authority to participate in drafting of policies, laws, and regulations or any government decisions that have implications on competition. Further, the practice of the authority to lobby the government for deregulation and trade liberalization, and otherwise minimize unnecessary government intervention in the marketplace is very limited as the involvement of the authority in such cases is not made mandatory.²²⁰ As a result, it is very difficult for the authority to formally challenge regulations, directives, decisions and measures that could have negative consequences in establishing a competitive.

Further, the proclamation fails to devise a mechanism whereby the Authority could communicate its policy proposals to the Parliament. As a result, any policy proposal by the Authority, to reach to the Parliament, should pass through the Ministry of trade - an institution by virtue of law has no legal obligation to present the opinion of the Authority to the parliament.²²¹

3.3.1.3.Problems Related to the Budgetary Independence of the Authority

In Ethiopia, the Authority has no power to independently decide over the sources, size and use of the budget in support of its mission. It generates its funds only from the budget to be allocated by the government.²²² The Authority is not empowered to administer and use the adjudication fee it collects or the fine it imposes on violators nor can it generate other funds through grants, donations or any other resources. As a result, due to general shortage of resources of the country,

²¹⁸TCCPP, Arts.30 (6).

²¹⁹TCCPP, Art.30 (4).

²²⁰ n12

²²¹ n188

²²² TCCPP, Art.44.

the annual budget the government allocates to the Authority is usually insufficient to assist the Authority achieve the multifaceted duties assigned to it by law.²²³

Thus, in the absence of any alternative source of funding, the competition Authority may remain dependent on the goodwill of the government in respect of the budget to be allocated to it.

3.3.2. Problems Related to the Personal Independence the Authority

The independence of the competition authority will not be complete by merely giving institutional independence unless it is supported by personal independence. Personal independence of the authority is influenced by appointment mechanism, appointment criteria, appointment term, dismissal mechanism of the Authority's general director, the deputy general directors, the judges of the adjudicative branch of the Authority and that of the appellate tribunal.

Accumulative reading of Art 28(1&2) and 35(1) of the TCCPP reveals that a Director General, the Deputy Director Generals and the judges of the Authority as well as the judges of the appellate tribunal shall be appointed by the Prime Minister. In appointing the director general and the deputy director generals, the prime minister has to secure the recommendation of the Minister of Ministry of Trade.²²⁴ However, the appointment of judges by the Prime Minister doesn't require the recommendation of the Minister or any other body.²²⁵

Regarding dismissal of the director general, deputy director generals, and judges of Authority and that of the appellate tribunal the law is silent that their dismissal will be decided by the prime minister. As noted under chapter two, the appointment and dismissal of the above personnel by the prime minister could seriously undermine the personal independence of the authority.

The Ethiopian competition law does not set any minimum requirements or qualifications for the director general or the deputy director generals does it require a minimum representation of particular fields of specialty or expertise within the leadership of the Authority.

The law provides that the judges of the adjudicative branch of the Authority and that of the appellate tribunal shall have the necessary professional qualification, educational back ground and experience for the post. But no guideline has been issued to determine the professional

²²³ n12

²²⁴ TCCPP, Art.28 (1).

²²⁵ TCCPP, Art.28 (2) and Art.35 (1).

qualification, educational back ground and experience of the director general and the deputy director general.

As a result, the Prime minister may appoint the director general, deputy director generals and judges based on criteria not related to their qualification and experience.

The other drawback of the Ethiopian competition law is that it does not set any rules controlling the political affiliations of the director general, the deputy director generals and department leaders. In addition, Ethiopian competition law doesn't have any provision that prevent situations of conflicting interests in the management and execution of activities of the Authority. As a result, any leader of the Authority may participate in the deliberations or voting concerning matters he has a direct or indirect interest in the case.

A possible threat to decision-making independence may be posed by a lack of security of tenure.²²⁶ The sole threat of early dismissals can substantially impair the ability of a decision maker to act independently for mainly two reasons.²²⁷

First, the threat may lead to prior compliance with the government on the side of the officials of the authority in an attempt to avoid the threat in reality. Second, the mere existence of the threat can create a suspicion about the officials' impartiality. However, that suspicion has to be avoided as it can substantially weaken the public and business confidence in the objectivity, impartiality and consequently legitimacy of the agency.²²⁸

In Ethiopia, there is no fixed term for the appointment of the Director General or the deputy director generals. The term of office of these officials is, thus, dependent up on the personal decision of the prime minister. Therefore, officials who fear premature dismissal may be keen to adopt votes for decisions that are not against the directions of the government. This will significantly undermine the personal autonomy of officials of the competition authority.

²²⁶ n141,11

²²⁷ *ibid*

²²⁸ *Ibid*, 11-12

Chapter Four

4. Conclusion and Recommendation

4.1. Conclusion

- Despite the absence of concrete rules in the TCCPP to assess the existence of abuse of market dominance, the assessment of the Ethiopian banking sector based on experiences of other countries reveals that CBE abuses its market dominance, at least, in the following grounds. Firstly, the service fee it levies for domestic money transfer and to issue CPO is twofold of the service fee levied by other banks. In addition. The bank is alleged to discriminate between private and public customers in the provision of credit services. Thus, as unfair price and discrimination between customers are the two aspects of abuse of market dominance, it can be concluded that CBE abuses its market dominance position. However, no abuse of market dominance action has been brought against the bank so far. This is mainly because of the following three grounds. Firstly, proving excessiveness of the service fee levied by the bank was very difficult due to lack of clear guidance in determination of excessiveness of prices. Secondly, the majority of abuse of market dominance acts of the bank, especially discrimination between customers is made by the order of the government, the owner of the bank. Thirdly, no one has brought an accusation to the TCCPA against the acts of the bank nor does the authority have made an investigation on the bank on its initiation.
- The scope of the TCCPA is so broad in that it seeks to address anticompetitive trade practices, unfair competition, regulating the distribution of goods and services, regulating prices for basic goods and services, regulating product labeling, preventing proliferation of goods and services that endanger the health of consumers and accelerating economic development, objectives that should be addressed under different policies.²²⁹
- Formulation of competition law of a country has to take in to account the reality of the country. Accordingly, taking in to account the economic and political reality of the country, the extra territorial application of the TCCPP may not be practical, at least for the time being.

²²⁹ This has also been a problem under the repealed proclamations of 2003 and 2010. see Fikremarkos Merso (Dr.) and others, *'Review of the Legal and Institutional Framework for Market Competition in Ethiopia'* (Addis Ababa Chamber of Commerce and Sectoral Associations, 2009)

- In the absence of clear guidelines, entrusting the council of ministers to exempt economic activities it deems vital for facilitating economic development of the country may unnecessarily narrow down the scope of the TCCPP. In addition, such broad power granted to the council of ministers could grab the inherent power of the parliament to make law. Further, as a political organ, the council of ministers may tend to exempt economic sectors that better serve the short term interest of the government on power without due regard to the principles of competition law.
- As per Art.4 (3) of the TCCPP, the proclamation is inferior to other proclamations, regulations and other administrative measures to be taken as per other laws. This provision could make the TCCPP almost inapplicable. Further, this provision contradicts the general principles of interpretation of laws.
- The Proclamation doesn't have any provision that resolves conflict of jurisdiction and the issue of pendency that may arise regarding cases handled by adjudicative branch of the authority and other institutions having adjudicative power. In addition, the relationship between the authority and other regulators, such as, the communication Authority, the broad cast authority, and the food and medicine provision and supervision authority is not regulated by the proclamation.
- Though competition advocacy is a corner stone for formulation and effective enforcement of competition law, the power of the authority in Ethiopia, in this respect, is limited to generating policy ideas only.
- The TCCPP doesn't provide guidelines regarding the factors that may be considered in defining relevant product and geographic market necessary for assessment of market dominance. In the absence of any guidelines, the business community may be uncertain about the factors to be considered by authority in the definition of relevant market.
- Though exclusive dealing is an act of abuse of market dominance in many countries, the TPCPP doesn't designate it as such. This may create a leeway for firms to perpetuate abuse of market dominance through exclusive dealing agreements.
- The Ethiopian abuse of market dominance rules do not require the adjudicative branch of the authority and that of the appellate tribunal to assess the anti competitive effects of any challenged act while entertaining abuse of dominance cases. As a result, an act that has pro

competitive effects may be condemned due to the mere fact that it is designated as an act of abuse of dominance under the TCCPP.

- The appointment mechanism of higher officials and judges of the Authority doesn't allow the participation of more than one wing of the government, particularly, the parliament. It is the prime minister who appoints the general director, the deputy general directors, judges of the adjudicative branch of the authority and the judges of the appellate tribunal. This may give the prime minister an opportunity to appoint officials who could unconditionally submit to his needs and priorities instead of the principles of competition law.
- The proclamation has no rules that restrict the political affiliations of high profile officials of the authority that many of these personnel may be from a single political party. This could undermine the effectiveness and integrity of the authority in the performance of its duties.
- Though the Competition authority is structurally separated from any ministry, it is still affiliated to the ministry of trade. The authority is made responsible to the ministry of trade in its day today activities. As a result, the authority as an entity may be influenced by political considerations of the government.
- The competition law doesn't require the general director, the vice general directors, the judges of the adjudicative branch of the authority and that of the appellate tribunal to have a minimum qualification and experience in a field relevant to competition law. This may lead to an appointment of officials with no sufficient knowledge and experience relevant to the post.
- Term of office and dismissal mechanism of the director general, the deputy general directors, judges of adjudicative branch of the authority and that of the appellate tribunal is not set out in the proclamation. As a result, such personnel may submit to the needs of the government official who appointed them due to fear of arbitrary dismissal.
- While experiences show that the competition authority shall be financed by funds from different sources, the source of funds for the Ethiopian competition authority is limited to the fund to be allotted by the government. This may seriously hamper the independence of the authority as the budget allocating body may make the release of the budget conditional up on its satisfaction on the overall aspects of the authority.

4.2.Recommendation

- Since the scope of the TCCPP is too broad, matters related to regulating the distribution of goods and services, regulating prices for basic goods and services, regulating product labeling and preventing proliferation of goods and services that endanger the health of consumers should be addressed under different policies as an attempt to address all these objectives in one piece of legislation will create conceptual confusion and practical problems in enforcing the law.
- Taking in to account the current economic and political realities of Ethiopia, the extra territorial applicability of the TCCPP seems impractical. Hence, it is recommended that the TCCPP has to apply for extra territorial acts only when the party or the transaction that produced anti competitive acts in Ethiopia has close connection with the country.
- In the absence of clear guidelines, entrusting the council of ministers to exempt economic activities it deems vital for facilitating economic development of the country may unnecessarily narrow down the scope of the TCCPP. Hence, the writer recommends that, the parliament shall make at least framework exemptions and delegate the details to the council of ministers with a clear guideline on exemptions to ensure that exemptions do not defeat the objectives of the competition law.
- The fact that the TCCPP is made inferior to any other proclamation, regulations and government decisions would literally mean that the authority couldn't take any action on any anti competitive behavior so long as such act is permitted by any other law what so ever the anticompetitive effect of the alleged act. Therefore, if it is to comply with the free market policy of the country, the TCCPP has to be made superior in hierarchy to any other proclamation and other secondary legislations.
- As the TCCPP has no provision that address conflict of jurisdiction matters related with pendency, a problem may arise when a certain case is brought both to the adjudicative branch of the authority and other institutions having adjudicative power, In addition, the fact that other regulators, such as, the communication Authority, the broadcast authority, and the food and medicine provision and supervision agency have stake on competition matters in their respective areas complicates the issue of conflict of jurisdiction. Hence, the TCCPP need to have provisions that address conflict of jurisdiction.

- To establish a standard and predictable assessment of abuse of dominance process in a country, the Ethiopian competition law should provide the list of at least some of the factors the competition authority may consider in defining the relevant product and geographic market.
- The fact that the adjudicative branch of the authority and that of the appellate tribunal are not required assessing the anti competitive effects of any challenged act while entertaining abuse of dominance cases may cause condemnation of acts with pro competitive effects. Thus, as the main objective of the competition law is to safeguard competition in the market, the proclamation need to have provisions that mandate the authority, the adjudicative branch of the authority and that of the appellate body to assess the anti competitive effect of each alleged act before passing any decision.
- The defenses available for firms accused of abusing their market dominance position should be applicable only when the firm proves that the alleged act has overriding benefit.
- Making the competition authority accountable to the ministry of trade may undermine its independence. Hence, to enhance the independence of the authority, the writer recommends that the authority need to be accountable directly to the house of peoples representatives.
- Similarly, as the appointment of the general director, the deputy general directors, judges of the adjudicative branch of the authority and the judges of the appellate tribunal by the prime minister could compromise their personal independence, it is recommended that their appointment need to be conducted by the participation of more than one wing of the government, particularly, the house of peoples representatives.
- To ensure transparent appointment mechanism within the authority, the adjudicative branch of the authority and the appellate tribunal, it is suggested that the appointment criteria should be set in the law. Further, to guarantee the personal independence of the authority, it is recommended that the term of office and dismissal mechanism of such personnel should be clearly indicated in the law.
- The only source of budget of the TCCPA is a budget to be allocated by the government. As a result the government may use budget allocation as weapon to subjugate the authority. Therefore, to ensure the budgetary independence of the authority, the writer suggests that the authority should be allowed to get its budget through different means, such as,

adjudication and merger regulation fee, donation and other means, subject to continuous follow up as to the disposition of the fund.

- Though the TCCPP provides that an independent appellate tribunal has been established, it doesn't state to whom it should be accountable. Practically, the tribunal is made accountable to the authority. As a result, it is difficult to say that the appellate tribunal is established independently from the authority. Therefore, to ensure the independence and accountability of the judges and other personnel of the tribunal, the proclamation needs to have sufficient rules outlaying the accountability structure of the tribunal.
- Taking in to account the special expertise and knowledge the authority may have on competition matters, the advocacy function of the authority to formulate opinions, give advice and provide guidance on matters related to competition policy and law in general and to submit proposal for amendment of legislations on competition matters and participate in the drafting of legislations in particular should be guaranteed.
- To simplify its activities the power of the authority to issue working rules, procedure manuals, enforcement guidelines and other necessary documents need to be ensured by the proclamation

Bibliography

Books, Journal, and other Documents

1. Angayar Kanni Ramaiah, Competition Law and Exemption Policy in Malaysia: When, Why And Why Not? (Dec,2015) Vol. 8, Issue 4 International Journal of Business, Economics and Law
2. ASEAN Secretariat, Handbook on Competition Policy and Law in ASEAN for Business 2017,(The ASEAN Secretariat, Community Relations Division (CRD),Jakarta, Indonesia,2018)
3. ASEAN Regional Guidelines on Competition Policy, Chapter 2: Objectives and Benefits of Competition Policy, available at, <https://www.mycc.gov.my/sites/default/files/Chapter-2.pdf> accessed on June 2, 2019
4. ASEAN Secretariat, *Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN*(ASEAN Secretariat, Jakarta: December 2012)
5. Berihun Gezahegn, 'The Unregulated Status Of Corporate Groups And Competition Issues In Ethiopia: Abuse Of Market Dominance And Anticompetitive Agreements'(Unpublished thesis,AAU,2014)
6. Communications regulatory Authority state of Qatar, 'Statement of Competition Policy'(October 21, 2015)
7. Competition Commission of India, *introduction to Competition Law part 1-basic Introduction*,
8. CUTS, Challenges in Implementing competition Policy and Law: An Agenda for Action(CUTS Centre for International Trade, Economics & Environment D-217, Bhaskar Marg, Bani Park, Jaipur 302 016, India, July 2002) available at <http://demo.netcommlabs.net/cutsinternational/PDF/challenges.pdf> last accessed on 05/06/2019
9. CUTS Centre, 'pulling up our Socks: A Study of the Competition Regimes of Seven Developing Countries of Africa and Asia: The 7-up Project' (2003) paper 0303
10. CUTS, 'Competition Policy &Law Made Easy: Monographs on Investment and Competition Policy #8'(CUTS Centre for International Trade, Economics & Environment D-217, Bhaskar Marg, Bani Park Jaipur 302 016, India)

11. Dovile Venskutonyte and Maarten Pieter Schinkel, ‘Bespoke Competition Policy for Developing Countries’ (University of Amsterdam, June 2015)
12. Department For International Development, ‘Competition Assessment Framework: An Operational Guide for Identifying Barriers to Competition in Developing Countries’(2008) available at <https://www.oecd.org/daf/competition/reducingregulatoryrestrictionsoncompetition/46192459.pdf> accessed on June 25/2019
13. Eric van Damme, Pierre Larouche and Wieland Müller, ‘Abuse Of A Dominant Position: Cases And Experiments’ (2006) Tilburg University Discussion Paper DP 2006-020 available at <https://www.researchgate.net/profile/Eric_Damme/publication/228230724> accessed on June 23/2019
14. Fikremarkos Merso (Dr.) and others, ‘*Review of the Legal and Institutional Framework for Market Competition in Ethiopia*’(Addis Ababa Chamber of Commerce and Sectoral Associations,2009)
15. Hailegabriel G. Feyissa, ‘European Influence on Ethiopian Antitrust Regime’ (September 2009) Vol.3 No.2, Mizan Law Review 280 see also UNCTAD, *A review of Competition Policy in Ethiopia* (United Nations 2018)
16. Hasmik Tigranyan and Sophio Kurtauli, *Prohibition of abuse of dominant position: Comparative analysis of Georgian, Armenian and EU competition laws*(Deutsche GesellschaftfürInternationaleZusammenarbeit (GIZ) 2017)
17. Kenea Kiteta Abdi, ‘The Legal And Institutional Framework Of The Ethiopian Competition Law And Its Enforcement’(Unpublished thesis, AAU, JUNE 2011)
18. Kibret moges, *the state of competition and the competition regime of Ethiopia*(Organization for Social Science Research in Eastern and South Africa 2015)
19. Maria Brouwer , ‘EU and US Competition Policy on Abuse of Dominance in High tech Industries’(University of Amsterdam, 2011) available at <https://www.researchgate.net/profile/Maria_Brouwer/publication/254914577_US_and_EU_competition_policy_on_abuse_of_dominance_in_high_tech_industries/links/54993a530cf21eb3df5f7063/US-and-EU-competition-policy-on-abuse-of-dominance-in-high-tech-industries.pdf?origin=publication_detail> accessed on February20/2020

20. Muhammed Kebie Hillo, 'A Critical Appraisal of the Institution Controlling Competition in Ethiopia: Analysis of the Law and the Practice' (Unpublished thesis, AAU 2014)
21. Neha Jain, 'Defining Dominance: An Analysis of the Competition Act, 2002'(2014), 8 NUALS L.J.
22. OECD, 'Abuse of Dominance and Monopolization'(Organization For Economic Co-Operation And Development, PARIS,1996)
23. OECD, 'Competition Policy'(1994 Workshop With The Dynamic Non-Member Economies, Paris, 1996) 31 available at <<https://www.oecd.org/daf/competition/prosecutionandlawenforcement/2697296.pdf> accessed on June 23/2019
24. OECD Global Forum on Competition, 'The Objectives of Competition Law And Policy'(Centre For Co Operation With Non-Members directorate For Financial, Fiscal And Enterprise Affairs 29-Jan-2003) <<http://www.oecd.org/daf/competition/2486329.pdf>> accessed on June 2, 2019
25. OECD, 'Techniques And Evidentiary Issues In Proving Dominance/Monopoly Power'(2006) Directorate For Financial And Enterprise Affairs Competition Committee policy roundtables, available at <<https://www.oecd.org/daf/competition/abuse/41651328.pdf>>June 3 /2019
26. OECD Working Party No.2 on Competition and Regulation 'Excessive Prices'(17th October 2011)Directorate for Financial and Enterprise Affairs Competition Committee Background Paper available at <https://www.oecd.org/regreform/sectors/49482277.pdf> accessed on April 24/2020
27. OECD, Roundtable On The Role Of Efficiency Claims In Antitrust Proceedings, DAF/COMP/WD(2012)70)18-Apr-2013
28. OECD Global Forum on Competition, 'Independence of Competition Authorities - From Designs To Practices' (Directorate For Financial And Enterprise Affairs Competition Committee 21-Nov-2016)
29. Saad Abdulbaqi Sabti and Rama Subbaiah, 'Conceptual Analysis of Sub Delegation: An Overview'(2017)Volume 3, Issue 3, International Journal Of Law
30. Dr.Schakravarthy, ' Dominance and its Abuse' available at https://www.circ.in/pdf/CPS-06-Abuse-Dominance-Ethiopia-Workshop_May08.pdf

31. Shyam Khemani, 'Application Of Competition Law: Exemptions And Exceptions'(United Nations Conference On Trade And Development, United Nations, New York And Geneva, 2002)
32. Slaughter and May, 'An overview of EU competition rules'(June 2016)
33. Sneha Singh and Syed Ahmed, 'Perfect Competition and Abuse of Dominant Position' (KIIT School of Law, Bhubaneswar, 2015) available at [<https://www.lawctopus.com/academike/perfect-competition-and-abuse-of-dominant-position/>](https://www.lawctopus.com/academike/perfect-competition-and-abuse-of-dominant-position/) accessed June 24/2019
34. Sofia Alves, Jeroen Capiiau and Ailsa Sinclair, 'Principles for the Independence of Competition Authorities' (April 2015)Vol 1, No 1 Competition Law international(European Commission, Brussels)
35. Tran Thang Long, Gordon Walker, 'Abuse Of Market Dominance By State Monopolies In Vietnam' (5/7/2012)Vol. 34:2, Houston Journal Of International Law
36. UNCTAD, *Model Law On Competition* ,(UNITED NATIONS 2007) chapter II, Part II (C)
37. UNCTAD, 'Abuse of Dominance'(Trade and Development Board Commission on Investment, Technology and Related Financial Issues Intergovernmental Group of Experts on Competition Law and Policy, Ninth session, Geneva, 15–18 July 2008) available at https://unctad.org/en/Docs/c2clpd66_en.pdf accessed on June 25/2019
38. UNCTAD, 'The role of competition policy in promoting economic development: The appropriate design and effectiveness of competition law and policy'(Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Geneva, 8–12 November 2010)
39. UNCTAD Secretariat, 'Independence and Accountability of Competition Authorities' (a note submitted on the ninth session of the UNCTAD Trade and Development Board, 15-18 July 2008)
40. World Bank, 'Building Institutions for Markets: World Development Report (Washington D.C., 2002)
41. World bank-OECD , *A Framework For The Design And Implementation Of Competition Law And Policy* (The World Bank and OECD 1998)
42. Yassamine Afifi, 'Independence of the Egyptian Competition Authority Assessment And Recommendation' Global Anti Trust review, available at

http://www.icc.qmul.ac.uk/media/icc/gar/gar2010/Pub6912-GARJou_1-ECA-Yaif.pdf
[accessed January 14/2020](#)

Legal instruments

1. National Legislations

- The Commercial Code of the Empire of Ethiopia Proclamation, 1960, Proc.No.166, Neg.Gaz.Year 19, No.3.
- Trade Practice Proclamation, 2003, Proc.No. 329, Neg.Gaz.Year 9, No. 49.
- Trade Practice and Consumers Protection Proclamation, 2010, Proc. No.685, Neg.Gaz.Year 16, No.49.
- Trade Competition and consumer protection proclamation, 2014, proc.No.813, Neg.Gaz.Year 20, No.28.
- Federal Civil Servants Proclamation, 2017, Proc.No.1064/2017.Neg.Gaz.,year 24, No.12.

2. Foreign Legislations

- The Kenyan Competition Act No. 12 of 2010, sec. 23
- Republic of South Africa Competition Act No. 89 OF 1998 section 7
- Republic of South Africa competition Act No. 18 of 2018: Competition Amendment Act, 2018, section
- Competition Act 2002 No.12 of 2003 of India, section
- Competition Act. R.S., 1985, c. C-34, s. 1R.S., 1985, c. 19 (2nd Supp.), s. 19 , Paragraph 79(1)(c) of Canada,
- The Fair Trade Practices Act, 1994 of Tanzania
- Competition Authority of Kenya, Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act
- Competition Commission Of South Africa, Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998, 31 May 2016

Cases

- General Motors Continental NV v. Commission of the European Communities; Case 26- 75, Judgment of the Court of 13 November 1975
- Art.102 of TFEU and Verizon Communications Inc v Law Offices of Curtis V. Trinko LLP117 (Trinko), 540 US 398 (2004)

Interview

- Interview with Fikadu Yami and Getu Melkie, principal and senior attorney at Ethiopian Insurance Corporation, respectively, April, 22, 2020
- Interview with kochito G/Mariam, Judge of the Appellate tribunal, September 10, 2020
- Interview with Kidanie Tsegaye, presiding Judge of the adjudicative branch of the Authority, September 10, 2020
- Interview with Mekides Mekuria, judge at the adjudicative branch of the authority, September 10,2020
- Interview with Habtamu Mamo, Judge of appellate tribunal, September 11,2020
- Interview with Getinet Ashenafi, the director of the investigative department of the Authority, September 10,2020