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**ADDIS ABABA UNIVERISTY**

**COLLEGE OF LAW AND GOVERNANCE STUDIES,  
SCHOOL OF LAW**

**THE LEGAL GAPS IN CONTROLLING ABUSE OF MARKET  
DOMINANCE IN ETHIOPIA – APPRAISAL OF THE EXISTING  
LEGAL REGIME**

**YIDNEKACHEW HAILE W/MARIAM**

**JUNE, 2020**

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**ADDIS ABABA UNIVERSITY**  
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**APPROVAL SHEET**

**THE LEGAL GAPS IN CONTROLLING ABUSE OF MARKET  
DOMINANCE IN ETHIOPIA – APPRAISAL OF THE EXISTING LEGAL  
REGIME**

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## **DECLARATION**

This thesis paper is my original work, has not been submitted in any other university and materials used in it have dully been acknowledged.

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## **ABSTRACT**

*Abuse of a dominant position is a danger to the functioning of the free market. In most countries, finding an abuse of dominance involves several distinct steps: defining the relevant market, determining whether the firm is dominant by considering its market share, barriers to entry and other characteristics, and evaluating whether the behavior was abusive in terms of the competition law.*

*The aim of this paper is to present the legal and practical problems in controlling abuse of market dominance in Ethiopia, under the latest competition law of Ethiopia which is trade competition and consumers' protection proclamation number 813/2013. In order to achieve these goals, I have used the content analysis to discover both legal and practical problems in controlling abuse of market dominance in Ethiopia. And lastly, the paper presented those discovered legal and practical problems. The Practical problems are mainly emanated from the legal problems.*

## **ABBREVIATIONS AND ACRONYMS**

ART	Article
CUTS	Consumer Unity and Trust Society
EC	European Community
ECJ	European Court of Justice
EPRDF	Ethiopian People’s Revolutionary Democratic Front
EU	European Union
ETCCPA	Ethiopian Trade Competition and Consumer Protection Authority
ETCCPP	Ethiopian Trade Competition and Consumer Protection Proclamation
ETPCPP	Ethiopian Trade Practice and Consumer Protection Proclamation
FDRE	Federal Democratic Republic of Ethiopia
OECD	Organization for Economic Co-operation and Development
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
UN	United Nations
USA	United States of America
WB	World Bank

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# CHAPTER ONE

## 1. INTRODUCTION

### 1.1. BACKGROUND OF THE STUDY

In economic theory, the term market competition, and accordingly, the study of competition policies and laws only make sense in a free market economy. The free market economy is a type of economy in which the activities of production and distribution are carried out primarily based on independent decisions of the majority of economic actors in a decentralized manner. The Free market economic system relies on market competition. In a free market economy where competition exists sellers are striving for buyers' interest in order to achieve certain business objectives like for example profits, sales or market share. In other words this is to mean that sellers may compete each other as a rivalry in terms of price, quality, service or combination of these and other factors that are valued by customers.<sup>1</sup>In a free market the sellers or the business firm are mostly in competition just to be the best among other competitors and even some times they compete each other to eliminate one another through anti-competitive acts. It is at this point that laws and policies become necessary to regulate such kind of anti-competitive acts to protect not only the interests of the business community but also the consumers. Business firms in fair competition do their best in terms of innovation, choice, quality and services to attract their customers.<sup>2</sup> In contrary, some business firms may engage on 'unfair methods' which involve the adoption of restrictive business practices such as predatory pricing, exclusive dealing, forming cartels and the like<sup>3</sup> rather than focusing on innovation, choice, quality and services. Usually, markets are far away from what is called perfect competition "where a large number of firms produce homogeneous goods, fix one price, where the entry and exist are free and easy, where there is a perfect mobility of all players in the market and where all the buyers and sellers have perfect information of the condition of the market."<sup>4</sup> When there is perfect competition in the

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<sup>1</sup>The World Bank and Organization for Economic cooperation and Development(OECD), A Frame work for the Design and Implementation of Competition Law and Policy (U.S.A, 1998), P.1

<sup>2</sup> Cuts, All about competition policy and Law for the Advanced Learner (KBS Printers, India, 2000), p. 1

<sup>3</sup> Ibid

<sup>4</sup> Ibid, p. 3

market, the consumer is sovereign, as his welfare is maximized. Since perfect competition is more or less a theoretical assumption and it is hard to exist in actual market it is true that market imperfections and restrictive business practices are common in market situations many of which are man-made.<sup>5</sup> Because of this, Government intervention in markets just to rectify these imperfections and even failures through competition policies become inevitable. And many world countries have competition policy and law. Competition law, as one component of competition policy, is a law that encourages or pursue to maintain market competition by regulating anti-competitive conducts of business enterprises through public and private enforcement. This is mainly done for the safety of the market and for the protection of the consumers. Now a day's many literatures' and legal instruments categorize Anti-competitive acts into four major groups. These are abuse of market dominance/monopolization, anti-competitive arrangements, merger and acquisitions and under some jurisdiction unfair competition.<sup>6</sup>

Monopoly is bad for the consumer and the economy. But a firm is legally free to achieve a large market share and to expand as big as it wishes. The problem arises only when there is abuse of dominance. There is significant deviation among countries regarding the precise definition of dominance, the range of practices and conducts that should be condemned as anti- competitive.<sup>7</sup> The concept of a dominant position of market power refers to anti-competitive business practices in which a firm holds when it accounts for a significant share of a relevant market and has significantly larger market share than its next larger rival.<sup>8</sup> Abuse of dominance, as one of the most common forms of illegal practice, “is one of the most challenging areas of competition law since firms can achieve dominant position legitimately through innovation, superior production or greater entrepreneurial effort, and many practices that appear on the surface to be anti-

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<sup>5</sup> Harko Haroye, Competition policies and Laws: “Major concepts and an Overview of Ethiopian Trade practice law,” (2008), Journal of Mizan Law Review, Vol.2 No. 1, p. 34

<sup>6</sup> Ibid, p. 38

<sup>7</sup> Detecting abuse of dominance Available at <https://www.lexology.com/library/detail.aspx?g=bd2b38f1-9b66-448f-9bca-835c2fb9b94e> last visited on April 28/2020

<sup>8</sup> United Nations Conference on Trade and Development, Model law on Competition: Substantive possible Elements for a competition Law, Commentaries and Alternative approach in Existing legislation, (2010), p.35

competitive can serve legitimate pro-competitive purposes.”<sup>9</sup> Abuse of dominant market position, a typical monopolistic practice is regulated by anti-trust laws in many countries and regions.

The legal protection for consumers from abuse by market actors has passed several stages of development. The Ethiopian legal regime which is the recent Ethiopian Competition and Consumer protection law (Proclamation number 813/2013) prohibits the above mentioned Anti-Competitive trade practices with the objective of protecting consumers in the market place. Among them abuse of market dominance is one of them. Since abuse of market dominance is prohibited as it’s considered as an anti-competitive it will have a paramount importance to study about abuse of market dominance, like what it does to mean, how it is detected or determined whether a firm has a dominant position or not, what acts are abusive and what are not, purpose of prohibiting the act, and the like. Therefore, the thesis will try to discuss all the issues that are related with prohibition of abuse of market dominance, with special emphasis of legal and practical problems.

## **1.2. Statement of the problem and Research Question**

As I have said earlier in the introduction part, abuse of dominance “is one of the most challenging areas of competition law since firms can achieve dominant position legitimately many practices that appear on the surface to be anti-competitive can serve legitimate pro-competitive purposes”.<sup>10</sup> In many laws having a dominant position by itself is not illegal. What is illegal is abusing it. Even there are some acts that doesn’t considered as an abuse when they are backed by justifiable economic reasons. So in this regard there are many problems. The first problem is that on the criteria to assess whether a company has a dominant position or not? Once we have identified the dominant position the next problem is that when do we say there is an abuse? What kind of acts does constitute as an abuse and which acts are considered as justifiable economic reasons? Even why the laws put such kind of an exception also needs a study? Therefore, to solve the above problems and since the topic of the thesis is the legal gaps in controlling abuse of market dominance in Ethiopia, the following issues will be raised and resolved as much as possible with the inclusion of other related issues with the matter.

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<sup>9</sup> Supra, note 1, p. 69

<sup>10</sup> Ibid

1. What are the legal and practical problems in controlling abuse of market dominance in Ethiopia?
2. Are our laws and our Institutions are efficient to promote effective enforcement of competition laws in the area of market dominance?
3. Are our laws with regard to abuse of market dominance are enforceable?

### **1.3. Objectives of the Study**

#### **1.3.1. General Objective**

The Major objective of this study is to investigate the legal and practical problems in controlling abuse of market dominance in Ethiopia.

#### **1.3.2. Specific Objective**

The following points are believed to be the specific objectives of this study.

- To evaluate about our laws and our Institutions are efficient to promote effective enforcement of competition laws in the area of market dominance.
- To assess our laws with regard to abuse of market dominance are enforceable.

### **1.4. Significance of the Study**

The competition authorities should properly understand when a firm's actions could be considered as an anti-competitive and as a result abusive because improper intervention may harm the consumers', the economy and the business community itself. The business community especially when it has a dominant position by having a large market share also needs to understand the law and economics in this area, which is mostly hard to understand.

So, the underlying worth of this paper can be seen from three major perspectives. The first perspective and primary use of this research is for the Trade Competition and Consumer Protection Authority and to Ministry of Trade in Ethiopia. This thesis will able them to see the legal and practical problems in controlling abuse of market dominance in Ethiopia and as a result enable them to solve the problems. The second importance of this research is for the firms to know what acts are considered as an abuse and which are not and enable them to protect them from punishment. The third significance of the thesis could be used as a reference by different

stakeholders who are interested by the area such as government agencies, other researchers and the like.

### **1.5. Scope of the Study**

The researcher would carry out a study on the legal and practical problems in controlling abuse of market dominance in Ethiopia. Even though there are four kinds of anti-competitive act namely Abuse of market dominance or monopolization, Anti-competitive merger, Anti-competitive agreement and Anti-competitive unilateral acts (unfair competition), the researcher would only have considered to seek, assess and answer the research question regarding only Abuse of market dominance or monopolization in Ethiopia. And even with regard to abuse of market dominance the focus of the thesis is in relation to legal and practical problems, just analyzing those provisions that are found by the current competition and consumer protection proclamation number 813/2013 governing prohibition of abuse of market dominance.

### **1.6. Research Methodology**

Since the thesis is more of doctrinal research, in the first part, conceptual discussion on abuse of market dominance, the law and experience of some foreign countries were reviewed. Due to time and resource constraints, experiences of few countries were evaluated. The experience of the United States of America (U.S.A) and European Union(EU) were analyzed. These countries are selected purposefully because they can represent the rest world since prohibition of abuse of market dominance is related with free market economic system. Best practice guides issued by the World Bank(WB), organization for economic cooperation and development(OECD) as well as the United Nations conference on Trade and Development(UNCTAD) will be utilized in such appraisal. In this regard, the study is entirely doctrinal for it relies on other countries system and theory. Abuse of dominance as an anti-competitive act is discussed in detail starting from its origin.

In the second part, which is the Ethiopian experience, the research will make use of both primary and secondary sources. The first primary source which is studied include, text of the law, which is “Ethiopian Trade competition and consumers’ protection proclamation”’ proclamation number 813/2013 and some other relevant laws (As long as necessary). The researcher also used texts

about the law as Secondary sources. Such include books, journals, unpublished materials, reports, newspapers and bulletins and internet sources.

So, since the research is mainly a doctrinal research and as the nature of the study requires acquiring deep knowledge of the subject matter and deep legislative analysis to assess the legal and practical problems in controlling abuse of market dominance in Ethiopia the texts of the law are analyzed in detail.

### **1.7. Organization of the Paper**

The paper is structured in four chapters. The first one covers the research proposal where in a background of the study, the research problem and questions, the objective and methodology of the study discussed. The second chapter is all about the conceptual discussion on abuse of market dominance and which mainly include review of foreign literature. As such, abuse of market dominance will be learned from international instruments. Under the chapter origin, meaning, element and assessment of market dominance, acts that are considered as an abuse, justifiable acts that are not considered as an abuse and purpose for the prohibition of abuse of market dominance in foreign jurisdiction will be scrutinized.

The third section takes the discussion on the legal and practical problems in controlling abuse of market dominance in Ethiopia. To this end, the current trade competition and consumer protection proclamation and other relevant laws will be examined with the search for any help to the matter. The fourth and the last chapter forward the conclusion from the study and gives out viable recommendations (areas for consideration) that can be of help to the problem.

## CHAPTER TWO

### 2. CONCEPTUALIZING ABUSE OF MARKET DOMINANCE

#### 2.1. INTRODUCTION

In economic theory, the term market competition which is one ideal element of a market economy, and accordingly, the study of competition policies and laws only make sense in a free market economy.<sup>11</sup> The free market economy is a type of economy in which the activities of production and distribution are carried out primarily based on independent decisions of the majority of economic actors in a decentralized manner.<sup>12</sup> In the free market context competition signifies a state and affairs where in sellers compete with each other to attract buyers with a view to maximizing their sales, profit and market share.<sup>13</sup> But this may not always be true. Because the sellers may not always act in a competitive way and they may even engage in activities that hinders or lessons competition. So, there may be a case of need of regulating market competition. Because the pure free market model is not sufficient enough to provide for some essential aspects or components of the real market like addressing the three allocation issues: What goods to produce(resource allocation), how to produce the goods(production), and who receives the goods produced(distribution), production of public goods(like national defense), merit goods(like education and health care) and institutional costs(like costs of setting up financial institutions, litigation, government etc.), just because of its unrealistic assumptions.<sup>14</sup> These market failures of the pure free market provide justification for government intervention in the market with significant implication for market competition. Such intervention generally falls under the purview of competition policy.<sup>15</sup>

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<sup>11</sup>Fikremarkos Merso, Imeru Tamirat Yigezu, SeyoumYohannes, Yoseph Endeshaw and Tilahun Teshome Retta, Review of the Legal and Institutional Framework for market competition in Ethiopia, (Private sector Development Hub/Addis Ababa Chamber of Commerce and Sectoral Associations,2009), p.7

<sup>12</sup> Ibid

<sup>13</sup> What is competition? available at <http://www.businessdictionary.com/definition/competition.html>.) last accessed on March 10, 2020.

<sup>14</sup> Supra, note 11, page 11-12

<sup>15</sup> Ibid

Competition policy refers to “governmental measures that directly affect the behavior of enterprises and the structure of industry ... (and) covers a whole raft of executive policies and even approaches”.<sup>16</sup> In this sense it is safe to say that competition policy includes two components: economic policies that enhance competition in local and national markets, and laws designed “to regulate anti-competitive business practices by firms and unnecessary government intervention in the market.”<sup>17</sup>

Competition law is one of the most important element of competition policy and it is generally understood as a tool designed to control and to prohibit anti-competitive practices and tendencies that might risk competition.<sup>18</sup> Anti-competitive practices, also called restrictive business practices (RBPs), are practices that prevent or reduce competition in a market. Many competition laws across countries reveals three areas as the core operation concerns of competition law. Those are<sup>19</sup> collusive agreements or anti-competitive arrangements, abuse of dominance, otherwise called, control of monopoly power or a dominant position, and mergers and acquisitions. In addition to these three practices, some countries may provide provisions by considering Unfair competition<sup>20</sup> as a restrictive business practice in their competition laws. For instance, the Ethiopian Trade Practices Proclamation number 329/2003 (ETPP) and even the subsequent and the recent proclamations, such as, Ethiopian Trade practice and consumers’ protection proclamation number 685/2010 (ETPCPP and Ethiopian Trade competition and consumers’ protection proclamation number 813/2013 (ETCCPP) and the Tanzanian Fair Competition Act of 2003 discusses the issue of Unfair competition. So, among these anti-competitive acts the concern of this thesis is Abuse of a dominant position.

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<sup>16</sup> Challenges in implementing a competition policy and Law: An Agenda for Action, CUTS Centre for International Trade, Economics and Environment, July 2002 page 54

<sup>17</sup> Competition policy and Law made Easy, page 28

<sup>18</sup> Supra, note 11, page 14

<sup>19</sup> Pulling up our socks- A study of competition Regime of Seven Developing countries of Africa and Asia under the 7-up project, CUTS Center for Competition, Investment and Economic regulation and DFID, 2003, page 33.

<sup>20</sup> Article 10 of the ETPP, Article 21 of ETPCPP and Article 8 of ETCCPP and Article 15 of the 2003 Tanzanian Fair Competition Act.

## 2.2. ORIGIN

The origin of abuse of dominance as one major pillar of competition law is highly associated with the origin of competition law. This is because one of the major function and targets of competition law is to avoid anti-competitive business practices and also one of the common elements of competition law is abuse of dominance.

Canada and the United States of America (USA) were among the first countries on the globe to introduce competition Law, in 1889 and 1890 respectively.<sup>21</sup> These laws, the Canadian Combines Act of 1889 and the US Sherman act of 1890, resulted from a revolt of the industrial trusts, which controlled large parts of commerce through collusion and abuse of their huge economic power.<sup>22</sup>

But regarding modernity many literatures considered the Sherman Act, passed by the US congress in 1890, as the first “modern” competition law.<sup>23</sup> Despite the fact that there is alternative explanations abound, it is widely believed that the Sherman Act was adopted to address the issue of competition following the formation of powerful trusts, especially in the railroad industry. This practice involved the transfer of stocks in competitive companies to trustees who would then control the activities of previously competitive companies. The area of law subsequently came to be called anti-trust law. The development of anti-trust law in the US until 1930s took the form of judicial decisions and interpretations<sup>24</sup> that “reflected the experiences of the American economy as it went through an industrial revolution, the Depression, and the New Deal.”<sup>25</sup> Since the 1940s, a series of hypothesis and school of thought

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<sup>21</sup> Supra, note 1, p 23.

<sup>22</sup> S. Joekes and P. Evans, Competition and Development: International Development Research Center, (2008), p.3

<sup>23</sup> Supra, note 9, page 14

<sup>24</sup> The US legal system follows a common law approach wherein the courts take a role in legislation by establishing what the law is in relation to specific cases. This lies in contrast to ‘Civil Law’ systems where laws are enacted by a legislative body and the courts are generally restricted to interpretation.

<sup>25</sup> Alison Jones and Brenda Sufrin, EC Competition Law: Texts, Cases, and Materials, Oxford University Press, 2001, p. 19

have guided the enforcement of anti-trust law in the US.<sup>26</sup> These ideas, lessons and overall thinking in US anti-trust law have influenced competition law systems all over the world.

The proliferation of modern competition law only really occurred after World War II.<sup>27</sup> Next to the US anti-trust law the European community (EC) competition law is another influential competition law in the modern world, which was necessitated by the creation of the EC economic system and was at least in part influenced by the US anti-trust law.<sup>28</sup> Later on many competition laws of the globe were influenced by the US and EC competition laws. For example, the 1947 competition law of Japan and the 1974 competition law of Australia were influenced by the US Sherman Act of 1890, the 1980 competition law of South Korea, the 1992 competition law of Taiwan and the 1999 competition law of Indonesia were influenced by the 1947 competition law of Japan and 1957 competition law of Germany and the 1992 competition law of Thailand was influenced by the 1980 competition law of South Korea.<sup>29</sup>

In contrast with the experience of developed countries where competition law was necessitated by national exigencies, the emergence and development of competition law in developing countries have been influenced more by trade liberalization and globalization rather than the need of their domestic markets. In 1995, there were only 35 nations competition regimes but the number has increased to more than 80 by the year 2000<sup>30</sup> and to more than 100 by 2003.<sup>31</sup> More than half of the countries with competition regimes in the 1990s, "the decade of liberalization,"<sup>32</sup>

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<sup>26</sup>The "workable competition" hypothesis, which was influential in the 1940s and 1950s, was displaced by the "conduct performance" paradigm developed by the Harvard School in the 1950s. This paradigm led to an anti-trust policy that intervened in the market to protect small businesses against large firms. The Chicago school, another school of thinking which emerged subsequently, argued that allocable efficiency as defined by the market should be the sole purpose of anti-trust law.

<sup>27</sup>supra, note 23, P.3

<sup>28</sup> Supra, note 25, p. 27

<sup>29</sup> Supra, note 11, p.15

<sup>30</sup> Philippe Brusick, Globalization: Enhancing Competition or Creating Monopolies? CUTS Centre for Competition, Investment & Economics Regulation, 2000, p. 1

<sup>31</sup> Supra, note 19, p. 20

<sup>32</sup> Cassey Lee, Model Competition Laws: The World Bank-OECD and UNCTAD Approaches Compared, Faculty of Economics & Administration University of Malaya, August 2004, p. 1

So, as we have learned competition law of the world is started in US and Europe, through Germany, and the rest of Europe's competition law is highly influenced with Germany's competition law. Latin America's competition law was influenced by Americans'. And then African and Asia's competition law is highly influenced by the competition law of Europeans. Therefore, competition law of Africa, Asia and Europe can be categorized in one group and the America and Latin American's competition law in other group.

The concept of the dominance position was defined and clarified by the Court of Justice in 1978 through the United Brands case (27/76 February 1978). The Court considered that a dominant position is "a position of economic strength owned by a company that has the power to restrict the competition, being able to have an independent position compared to other competitors and customers" (case 27/76, 1978 ECR 207).

### **2.3. MEANING OF ABUSE OF MARKET DOMINANCE**

In both developed and emerging markets abuse of a dominant position, or monopolization, is one of the most challenging and complex areas of competition law.<sup>33</sup> The concept of a dominant position of market power refers to anti-competitive business practices in which a dominant firm may engage in the market.<sup>34</sup> In competition law, dominant position or monopolization refers to a position of economic power that an entity holds, making it capable of regulating the relevant market autonomously from any or a combination of the competitors, customers, suppliers, or consumers.<sup>35</sup> In other words, a company (or group of companies) is said to be dominant if it is so

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<sup>33</sup> Supra, note 1, p. 69

<sup>34</sup> United Nations Conference on Trade and Development, Model Law on Competition: Substantive Possible Elements for a competition Law, Commentaries and Alternative approach in Existing legislation, (2010), p. 35. Market power represents the ability of a firm (or a group of firms acting jointly) to raise and profitably maintain prices above the level that would prevail under competition for a significant period of time. It is also referred to as monopoly power. The exercise of abuse of a dominant position of market power leads to reduced output and loss of economic welfare. In addition to higher than competitive prices, the exercise of market power can be manifested through reduced quality of service or a lack of innovation in relevant markets. Factors that tend to create market power include a high degree of market concentration, the existence of barriers to entry and lack of substitutes for a product supplied by firms whose conduct is under examination by competition authorities.

big, or is capable of controlling the market, that it can act independently or regardless of how other players may act or react to its actions.

When a firm that is already dominant in a market and when the firm engages in activity that significantly lessens competition in that particular market may tantamount as an abuse of dominance. The fact that a firm has a dominant market position does not constitute an anticompetitive practice unless such position is abused. Thus, competition laws very rarely prohibit dominant position by and in itself.<sup>36</sup> Instead, the laws define what constitutes “dominant position” and provide a non-exhaustive list of instances of abuse.<sup>37</sup> Though these list may vary from jurisdiction to jurisdiction and from countries to countries based on their own case by case determination by their competition authorities, instances of abuse commonly identified include excessive prices, predatory pricing, discriminatory pricing, refusal to deal/ supply, conditions of resale, raising rivals’ costs, and tying sales.<sup>38</sup>

The WB-OECD model law defines “dominant position” in terms of “a necessary but insufficient condition” in a form of numerical market share threshold of 35 percent<sup>39</sup> and suggests that, for developing countries, quantitative benchmarks may be easier to apply than qualitative approach of dominance because the later requiring sophisticated information and human resource capacity. On the other hand, the UNCTAD model law provides that abuse of dominance occurs<sup>40</sup>:

I. “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;” and

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<sup>35</sup> Guide to the Functions and Records of the Competition Authority, available at (<http://www.skillnets.ie/sites/skillnets.ie/pdf> ) <https://www.skillnetireland.ie/publications/#tabs-4>p.11, last visited on March 21, 2020. Dominant position of market power refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or a group of goods or services. *See* Definition and scope of application of UNCTAD Model on competition law.

<sup>36</sup> A possible exception can be Pakistan and India, which seems they prohibit market dominance per se.

<sup>37</sup> *Supra*, note 11, p,19

<sup>38</sup> *Ibid*

<sup>39</sup> *Ibid*

<sup>40</sup> *Ibid*

ii. “Where the acts or behavior of a dominant enterprise limit access to a relevant market or otherwise unduly restrain competition, having or likely to have adverse effects on trade or economic development.”

The practice of determining dominance also varies. A 2002 survey of 50 countries by the WB has found that 28 had qualitative definition of dominance while the remaining 22 countries adopted quantitative benchmarks with wide variance.<sup>41</sup>

There is a need to make a distinction between “a legitimate dominant market position and abuse of dominant market position.”<sup>42</sup> This is because most of the time the law doesn’t prohibit holding a dominant position but what the law prohibits is abusing the dominant position. As a matter of fact, firms could attain a dominant market position legally. For instance, innovation, superior production or distribution methods or greater entrepreneurial efforts may enable a firm to hold a dominant market position.<sup>43</sup> So, having a dominant position by itself may not have problem, but the problem arises when the firm starts to abuse its position. It is a fact that abusive acts necessitate the presence of dominant market position and it is similarly true that a specific dominant market position that doesn’t result in abusive act is mostly outside the scope of competition law.

## **2.4. ELEMENTS OF MARKET DOMINANCE**

Competition law provisions regarding abuse of a dominant position in different jurisdiction include certain common elements. These elements are, first before the law can applied, it is necessary to define the relevant market in which the possible abuse is realized.<sup>44</sup> Second, it is essential to ascertain the existence of a dominant position by the firm and or group of firms and third it is important to identify specific practices that may be harmful to competition and assess their overall effects in the relevant markets.<sup>45</sup> Concerning the specific content and application of these elements can vary significantly among countries. For example, some countries’ laws

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<sup>41</sup> Supra, note 32, p.12

<sup>42</sup> Supra, note 5, P. 30

<sup>43</sup> Supra, note 1, p.69

<sup>44</sup> Ibid

<sup>45</sup> Ibid

specify that a dominant position can be inferred largely or entirely on the basis of a large market share but in contrast, some countries' statutes require consideration of entry conditions and other factors that influence the ability of firms with large market shares to exercise market power<sup>46</sup>. An additional key difference is that in some countries the mere charging of high prices or the carrying out of other exploitative acts may be treated as abuses, while in others the law focuses on exclusionary conduct by firms that harms the competitive process (that is, a conduct which prevent competing firms from entering and expanding).<sup>47</sup>

### **2.4.1. Defining Relevant Markets**

Based on the United Nations Conference on Trade and Development(UNCTAD) model law on Competition (2010) relevant market is defined as: -

*“the general conditions under which sellers and buyers exchange goods, and implies the definition of the boundaries that identify groups of sellers and of buyers of goods with in which competition is likely to be restrained. It requires the delineation of the product and geographical lines within which specific groups of goods, buyers and sellers interact to establish price and output. It should include all reasonably substitutable products or services, and all nearby competitors to which consumers could turn in the short term if the restraint or abuse increased prices by a not insignificant amount.”*

The objectives in defining the relevant market is to identify the firms that compete with each other with respect to the supply of a given product and the geographical area in order to determine the competitors, the extent of competition, and whether other firms can effectively constrain the prices of the alleged monopolist.<sup>48</sup> By doing so, the relevant market frames the environment which competition actually takes place. The investigation of dominant market position would give sense only when it is done with regard to a relevant market and the relevant market for the assessment of a dominant position “is the market that comprises all products or

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<sup>46</sup> Ibid, p. 69

<sup>47</sup> Ibid

<sup>48</sup> Supra, note 8, p.17

services that actually or potentially compete with each other.”<sup>49</sup> To define a relevant market is “to describe the context for the exercise of market power, which is, the ability of an enterprise to profitably raise prices above competitive levels for a significant period of time.”<sup>50</sup>

Defining the relevant market involves the process of identifying the particular product/services or class of products produced or services rendered by an enterprise(s) in a given geographic area and involves two dimensions which will be discussed below, namely, identifying the relevant product and geographic markets. Dominance over a market may be assessed only when the relevant market has been established.

## **2.5. ASSESSMENTS OF MARKET DOMINANCE**

Detecting when a firm’s action is an abuse of market power, as opposed to a competition action, is one of the most complex and controversial areas in competition policy.<sup>51</sup> Before assessing whether a firm abuse its market power or not, it is highly important first to assess the existence of a dominant position. This is because a firm can’t abuse dominance if it is not dominant in the first place.

Detecting whether a firm occupies a dominant position in a market involves two principal steps: defining the two components of relevant market, the relevant product and geographic markets, and assessing the degree of dominance exercised by the firm(s) within the market.<sup>52</sup>

The product market is about the goods or services that are bought and sold while geographic market refers to the location of the production or the sale of the product.<sup>53</sup> The entire aim is to decide the magnitude to which purchasers would shift between substitute products or source of supply<sup>54</sup> in response to a small but important and permanent price increase. In other words, the product market is all about “those products or services which consumers would switch to if price of the relevant product or service rose, when that switching prevents prices from rising above the

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<sup>49</sup> EC commission Notice on the definition of Relevant Market for the purpose of community Competition Law (97/c 372/03)

<sup>50</sup> Supra, note 1, p. 10

<sup>51</sup> Assessment of market dominance available at: <http://www.oecd.org/daf/competition/abuse/> Last visited on April 28/2020

<sup>52</sup> Supra, note 1, p.70

<sup>53</sup> Supra, note 42, p.39

<sup>54</sup> Supra, note 1, p.10

competitive level”.<sup>55</sup> So, to define the geographic market the buyers’ opinion of the substitutability of products made or sold at several locations is very important. It is assumed that if buyers of a product sold at one location were to shift to buying the product from a source at another location in response to a small but important and permanent price increase, then those two locations are in the same geographic market.

After a relevant market, with its components, has been defined, it is essential “to establish the existence of a dominant position of a firm, the essence of which is the power to behave independently of competitive pressures.”<sup>56</sup> And once the relevant markets have been defined, it is generally a straight forward analysis to determine whether a firm occupies a dominant position. This depends on two main factors: the market share of the dominant firm and the extent of entry barriers.<sup>57</sup>

### **2.5.1. The Assessment of Market Shares**

In general, the greater the market share of an alleged dominant firm, the more likely it is to exercise market power<sup>58</sup>. It is generally hard to set out market shares threshold at which a firm can be judged to have or not have significant market power<sup>59</sup>. It is unlikely, however, that a firm with a market share of less than 35 percent, like for example 5 percent, would have the ability to reduce output or impose a significant price increase above the competitive level because a) it has relatively little current output to restrict; and b) there are clearly other firms (covering 95 percent of the market) who are likely to be able to replace any lost output. Conversely, where a firm has a market share of 65 percent or more, it is much more likely to exercise market power, if significant entry barriers exist. The market share of the allegedly dominant firm is important because it tells us how much of the market the firm currently supplies and therefore what its potential is for substantially reducing output in the market and the variability of market shares is relevant because it indicates the extent to which players have been able to increase their output in

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<sup>55</sup> The U.K Guide line on Abuse of dominance, Article 3(3)

<sup>56</sup> Supra, note 1, p.71

<sup>57</sup> Ibid

<sup>58</sup> Ibid, p.72

<sup>59</sup> Ibid

the short run in the past.<sup>60</sup> Even if it's hard to set out, determining a firm's dominance from its market share requires setting a minimum market share threshold to establish dominance. Even though the market share that dominant firms enjoy differs from jurisdiction to jurisdiction and from industry to industry, it is generally assumed that market shares below 50 percent do not constitute dominance, while market shares above 75-80 percent are indicative of market dominance.<sup>61</sup>

A firm's ability to exercise market power may not only depend by its own market share but also by the size of other firms in the market. For example, even if a firm has a market share of 50 percent, its ability to exercise market power may be limited if the rest of market consists of a small number of competing firms that compete vigorously with the leader as opposed to a cluster of weaker firms that simply adopt prices established by the leader.<sup>62</sup> Finally, even where a single firm has an overwhelming share of a market, it may be unable to exercise market power if entry by new firms or expansion by existing competition is easy. Such firm can't be said to exercise dominance over a market as it has a limited power over it. Nonetheless, the approach adopted by most legal systems is to primarily depend on the assessment of market shares as a point of departure for assessing market dominance,<sup>63</sup> and supplant it with other more advanced economic tools, where need be.<sup>64</sup>

When a firm has a dominance of market power, the dominance power may enable the firm to engage in some restrictive business practices including charging of higher prices to exclude or deter competition from the market. The market shares of a firm and the existence and the extent of market entry barriers are the most important factors to show the dominant position of a firm.<sup>65</sup> The market share of a business firms could indicated mostly through production capacity, production volume and sales by value.

*“Under competition laws of some countries, a particular market share (often 40-50%), creates a rebuttable presumption of dominant position. However, it is*

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<sup>60</sup> Mike Walker and Joao Pearce Azevedo, *European Competition Law Review, Dominance: Meaning and Measurement*, (2002), p. 5

<sup>61</sup> Massimo Motta, *Competition policy: Theory and practice* (Cambridge, 2005), P.142

<sup>62</sup> *Supra*, note 1, p.71

<sup>63</sup> *Supra*, note 60, p. 142

<sup>64</sup> OECD, *Policy Roundtable, Market Definitions*, p.79

<sup>65</sup> *Supra*, note 5, p.40

*really hard or somehow troublesome to set out definite thresholds at which a firm can be judged as having or not having a significant market power. At any rate, the greater the market share of a firm, the more likely is that firm to exercise dominant market power.<sup>66</sup>*

## **2.5.2. Assessment of Entry conditions**

As mentioned above the existence and the magnitude of market entry barriers are important factors to determine whether a firm has a dominant market position or not. If business firms' could easily enter to the market and they become adequately profitable, the firm's dominant position will certainly decline over time. There are different classifications of entry barriers and the entry barriers have different effects. These barriers can be categorized as absolute barriers to entry and those barriers which are not absolute.

*“For example, if a business firm has to be licensed before it enters into a certain business activity, the government license serves as an absolute barrier because the firm in question cannot enter into the business without having that license. Generally, it can be said that the question of entry is the question of time, money and profit opportunity. There are factors which strengthen the dominant market position of the already existing business firm/s by repelling the new entrants. This is so, where, among other things, entry into a certain business takes a long time and if it requires spending a lot of money, and above all where there is a less or minimal profit opportunity.”<sup>67</sup>*

## **2.6. ACTS THAT ARE CONSIDERED AS AN ABUSE**

Once a firm's dominance has been established, the next phase is an abuse of dominance case involves ascertaining whether the firm in question actually violated the law prohibiting acts of abuse of dominance.

Two broad types of business conduct have traditionally been recognized as abusive by competition laws and enforcement agencies.<sup>68</sup> The first class of acts is referred to as exclusionary abuses and includes those practices that are aimed at competitors. In such cases, the dominant

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<sup>66</sup> Ibid

<sup>67</sup> Id, p. 41

<sup>68</sup> Supra, note 1, p.72

firm attempts to suppress competition<sup>69</sup> by weakening its competitors' ability to compete. An undertaking may also use such tactics to extend its market power over the markets. Such practices include refusal to deal with a competitor, raising competitors' costs of entering a market, charging predatory prices or tying the sale of one product to another. Exclusionary abuses require careful analysis. This should take account of the competitive environment in which the firm operates; because a potentially abusive practice (such as exclusive dealing) may also help firms compete more efficiently, by, for instance, improving the quality of service to consumers.

The second class of abusive acts, which is called exploitative abuses, refers to acts in which a firm takes undue advantage of its market power by charging excessively high prices to its customers, discriminating among its customers, paying low prices to suppliers, or through related practices.<sup>70</sup>

These practices are abusive when put in place by a dominant firm because the market doesn't offer alternatives for consumers. However, when there is sufficient competition in the market, such behavior (especially potentially exclusionary acts) may enhance market efficiency and benefit consumers because it is motivated by the need to compete efficiently, not to make anti-competitive profits. In a competitive market, exploitative practices would do much harm to the firm itself than market. Because there would be no barriers to entry and because the price set by exploiter is high, the market would attract new entrants, posing a threat to the firm.

The underlying theme in exploitative abuses is the profiteering of dominant firm at the expense of customers. Enforcement against exploitative first requires establishing the fair price that should have been charged by the firm, which is often difficult, since accurate and timely information on costs and demand is generally unavailable or expensive to acquire. Moreover, a strict regulation against exploitative abuses can easily be classified as price regulation, and may discourage investment. Generally, exclusionary abuses are given priority over exploitative abuse by enforcement agencies because elimination of the former types of abuses, often through structural changes, can usher in competition in the markets and minimize or eliminate

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<sup>69</sup> Ibid

<sup>70</sup> Ibid

exploitative practices.<sup>71</sup> The divide between exploitative and exclusionary abuses, however, becomes blurred with respect to some acts that can result in both effects at a time.

In most jurisdictions, acts of abuses are defined in general terms usually accompanied by illustrative list of prohibited acts. However, as noted earlier there is considerable divergence among jurisdictions about the range of practices and conducts/acts that should be condemned as anti-competitive, and the following behaviors are commonly considered as abusive and prohibited by competition laws of many countries.

### **2.6.1. Excessive pricing**

Excessive prices that restrain competition is prohibited.<sup>72</sup> The prohibition of charging of high prices as an abuse of market dominance by a dominant firm is a contentious subject in anti-trust law. But this does not mean that the government should regulate the price of a good or a service in a free market economy. In a free market economy, it is highly expected that the price should be regulated by the market itself. So, what is prohibited here is when a firm abuses its market power by negating the free market economic principles and charging unreasonable excessive price. In addition, it does not mean that every price increase is unacceptable by considering as anti-competitive because surges in demand, high unit costs and exercise of market power and other reasons may cause price increase. Prohibition of excessive price is a feature of consumer oriented competition laws.

### **2.6.2. Price discrimination**

Where a seller sold a product or provide a service by charging different prices according to the profile of the customer by looking their sex, age group, religion or the like without the existence of appreciable cost differences that might justify different prices,<sup>73</sup> there is said to be price discrimination. This act refers treating of customers in a dissimilar manner without a cost based or lawfully acceptable reason.

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<sup>71</sup> Ibid p, 73

<sup>72</sup> Ibid

<sup>73</sup> Ibid

### **2.6.3. Tie-ins**

A tie-in, is an abusive act, which consists in making the sale of one product (the tying good) conditional upon the purchases of another product (the tied good). This behavior is considered as an abusive “only when the firm has a dominant market position, and even when the firm has a dominant position, the decision on whether or not the tie-in is abusive requires the analysis of the purpose of the tie-in and the market context.”<sup>74</sup>

Sometimes two products are vertically related, with one good an input in the production of the other. If so, the competition agency must try to understand the reasons for the tie-in.

### **2.6.4. Predatory pricing**

This is the other type of abusive acts by which the business firm sold its commodities with a very low price with the intention of driving competitors out of market to prevent new entry and to successfully monopolize the market. It seems that predatory pricing or in other words selling goods or services at unreasonably low prices has no any problem or may even appear advantageous to the consumers. “But predation is condemned not because it results in low prices but because it is likely to lead to reduced output and high prices in the future.”<sup>75</sup> Because once the firm monopolizes the market by this technique it may abuse its monopoly power by charging high price and reducing output, finally has a negative effect for the consumers. So, when the predatory pricing is motivated with such kind of negative intent it is not allowed by competition authorities.

### **2.6.5. Vertical restraints**

“Vertical restraints are restrictions that are imposed by the upstream firm (a manufacturer or a wholesaler) on a downstream firm (a retailer). In these restraints, the downstream retailer agrees to limit where it sells the product, or not to sell rival products and, at times, the retailer agrees not to sell below prices established by the manufacturer.”<sup>76</sup>

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<sup>74</sup> Ibid, p. 77

<sup>75</sup> Ibid, p. 77 -78

<sup>76</sup> Ibid, p. 78 - 79

### **2.6.6. Refusal to Deal and Denial of Access**

The general principle is that business firms have all the freedom to choose their contracting partners including competitors and they are not obliged to collaborate against their will. But as an exception dominant firm's decisions not to contract with other firms may be considered as an anti-competitive and unlawful.<sup>77</sup> Therefore, refusal to deal is one of the exception.

This is the kind of practice of refusing or denying supply of a product to a purchaser, usually a retailer or wholesaler.<sup>78</sup> The practice may be adopted in order to force a retailer to engage in resale price maintenance, i.e., not to discount the product in question, or to support an exclusive dealing agreement with other purchasers or to sell the product only to a specific class of customers or geographic region. The dominant firm may refuse to deal with other firm or with his competitor to safeguard its interest when the other firm is a bad credit risk, doesn't have adequate inventory or provide adequate sales service, product advertising and display, etc. The competitive effect of refusal to deal/sell generally have to be weighed on a case-by-case basis and it is necessary to look at the market power of the firm, the rationale for the refusal, and the resulting competitive harm.

Denial of access to an essential facility is a particular type of refusal to deal. This act prohibits denial of access by a competitor or a potential competitor to an essential facility controlled by a dominant business person. An essential facility under Art 2(8) of TCCPP is defined as “an infrastructure or resource that cannot be easily found or not much often available and which is very important to competitors in order to supply their goods and services to their customers”.

### **2.6.7. Supply Constraints**

The price of goods is a function of supply and demand. A dominant firms position in the market allows it to influence, if not control, the supply of product in the market. The firm may thus manipulate markets by constraining output and reap the benefits of increased prices. Limiting production, hoarding or diverting goods as well as preventing or withholding goods from being sold in the regular channels of trade can serve as an example.

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<sup>77</sup> Francisco Marcos, “The prohibition of single firm market abuses: U.S. Monopolization Versus E.U. Abuse of dominance,” *Working Paper IE Law School*, 2017, p. 19

<sup>78</sup> Refusal to deal, available at: <http://www.oecd.org/daf/competition/abuse/> Last accessed on April 28/2020

## **2.7. JUSTIFIABLE ACTS THAT ARE NOT CONSIDERED AS AN ABUSE**

In abuse of dominance or monopoly cases it is important to ensure that the law doesn't inadvertently curb superior efficiency or adoption of efficient business practices because competition authorities shouldn't discourage firms to compete aggressively nor punish those that are successful through legitimate means.<sup>79</sup>

Investigating alleged abuses of a dominant position can be among the most challenging and difficult tasks for a competition agency or authority as the case may be.<sup>80</sup> This is because practices that can qualify as abuses (predatory prices, tie ins, vertical restraints) can also promote efficiency. Consequently, investigating alleged abuses of a dominant position will require a careful rule of reason analysis, in which possible anti-competitive harm is weighed against possible efficiency benefits. For example, tying is often motivated by the firm's desire to maintain or increase its reputation for quality or product reliability. This shouldn't be considered abusive since it increases efficiency and market demand. Like for example, poor servicing of a dominant firm's product by an independent company may negatively influence the reputation of the dominant firm and result in lower sales. To avoid this the dominant firm might sell its products and services together through a tie-in contract and this tie-in contract may not be considered as an abusive rather it is considered as a justifiable act that are not considered as an abuse.

If a company can show that a particular conduct is objectively justified, or having possible efficiency benefits from the practice, or that it leads to positive effects that outweigh the negative effects on competition and consumers, the conduct is not abuse.

## **2.8. PURPOSE FOR THE PROHIBITION OF ABUSE OF MARKET DOMINANCE**

It is well known that, one of the directions of competition policy (competition law) is prohibition of abuse of dominant position. The purpose of this prohibition is prevention of abuse of dominant position by dominant economic entities in their economic Sector. In this regard it

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<sup>79</sup> Supra, note 1, p.72-73

<sup>80</sup> Ibid p.82-83

should be noted, that holding a dominant position is not prohibited: it is the abuse of that position that is prohibited.

So, as long as the major aim or objective of competition law is prohibiting anti-competitive acts and abuse of dominant position is the major one, the purpose or objective of competition law can also be considered as the purpose of prohibiting abuse of market dominance. In other words, we can derive the purpose of prohibition of abuse of market dominance from the purpose of competition law.

Generally speaking, the objective of competition law is maintaining and enhancing market competition by addressing restrictive business practices (anti-competitive acts) and regulate market structures that significantly lessen competition.<sup>81</sup> It is indeed well settled that the core purpose and emphasis of competition law is the maintenance of competition by guarding off markets from the practices of firms that impede competition. According to the background document on the WB-OECD model law, “the most common of the objectives cited is the maintenance of the competitive process or free competition, or the protection or promotion of effective competition.”<sup>82</sup> This is what invariably is found in any standard competition law. For example, a survey involving 23 countries has found that “the enhancement of competition”, elimination/prevention of RBPs (Restrictive business practices)” and “economic efficiency” to be most cited objectives of competition law.<sup>83</sup> Nonetheless, apart from the consideration of economic efficiency, governments do have other socioeconomic and even political objectives, and priorities they wish to promote through competition laws such as consumer welfare and development. It is not indeed uncommon to come across such objectives as ensuring employment, protecting small businesses and promoting export. The efficiency objective of competition law may promote other objectives as well. For example, promoting efficiency of the economy would also promote consumer welfare.

Competition Law of EU and its Member states also address the enforcement of the prohibition of abuse of dominant position: “The aim is to prevent companies with a dominant position in their economic sector from abusing this position and from distorting competition in intra-community

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<sup>81</sup> Supra, note 19, P. 54

<sup>82</sup> Supra, note 32, P. 4

<sup>83</sup> Ibid, p.5

trade. This aim requires preventive intervention to investigate company mergers, since these may create dominant positions.”<sup>84</sup> The particular objectives are to establish open, non-partitioned market; no over concentration, fairness, international competitiveness.<sup>85</sup> So, we can say that the purpose of prohibition of abuse of market dominance is to enhance competition, economic efficiency, consumer welfare, development, innovations and the like.

## **2.9. SOME FOREIGN EXPERIENCES WITH REGARD TO PROHIBITION OF ABUSE OF MARKET DOMINANCE**

### **2.9.1. Experience of USA**

In United States anti-trust law, monopolization is illegal. The Sherman Act is the nation’s and even the world’s oldest antitrust law, passed in 1890, it makes it illegal for competitors to make agreements with each other that would limit competition. Monopolization is a federal crime under section 2 of the Sherman Anti-trust act of 1890. It has a specific legal meaning, which is parallel to the “abuse” of a dominant position in EU competition law, under Treaty on Functioning of European Union (TFEU) Article 102.<sup>86</sup> “Monopolist is a firm with significant and durable market power. Courts look at the firm's market share, but typically do not find monopoly power if the firm (or a group of firms acting in concert) has less than 50 percent of the sales of a particular product or service within a certain geographic area.”<sup>87</sup> The Sherman Act is one of three core federal anti-trust laws, along with the Clayton Antitrust act<sup>88</sup> and the Federal Trade Commission Act. Section 2 of the Sherman Anti-trust act prohibits all contracts, combinations,

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<sup>84</sup> European Parliament Fact Sheets on Abuse of a dominant position and Investigation of Mergers, Available at: <http://bit.ly/2sddp03>, Last visited on April 10, 2020.

<sup>85</sup> Materilas-Tilotsen John, European Union Law: Text cases and

<sup>86</sup> Monopolization in US, available at: <https://en.wikipedia.org/wiki/Monopolization>, Last visited on April 28/2020

<sup>87</sup> Available at <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined> Last visited on April 28/2020

<sup>88</sup> The Clayton Antitrust Act (15 U.S.C. § 12) was adopted in 1914, adding to existing federal antitrust law in the United States. The Clayton Act builds on the Sherman Antitrust Act by prohibiting mergers and acquisitions determined to be harmful to competition. available at <https://www.classlawgroup.com/antitrust/federal-laws/antitrust-clayton-act/> Last visited on April 20, 2020

and conspiracies that unreasonably restrain interstate and any efforts to monopolize any part of interstate commerce by stating that any person “who shall monopolize ... any part of the trade or commerce among the several states, or with foreign nations shall be deemed guilty of a felony”.<sup>89</sup>

*“The central challenge in monopolization doctrine is differentiating between conduct that helps to obtain or maintain a monopoly through anticompetitive means (such as exclusive contracts that substantially foreclose competitors from the market without an offsetting pro-competitive justification) as opposed to conduct that helps to obtain or maintain a monopoly through pro-competitive means (such as introduction of a superior or lower cost product). In general, conduct that helps a firm gain or maintain a monopoly only because it makes the firm more efficient is generally viewed as pro-competitive, while conduct that otherwise impairs the efficiency of rivals could be anticompetitive.”<sup>90</sup>*

Under long established precedent, the offences of monopolization under section 2 have 2 elements. First that the defendant possesses monopoly power in a properly defined market and second that the defendant obtained or maintained that power through conduct deemed unlawfully exclusionary. The mere fact that conduct disadvantages rivals doesn't without more, constitute the sort of exclusionary conduct that satisfies this second element. Instead, such conduct must exclude rivals on some basis other than efficiency.

The Sherman Act doesn't prohibit every restraint of trade, only those that are unreasonable. There are two broad types of Sherman Act violations such as violations “per se” and violations of the “rule of reason”.

Violations per se are actions that always restrain trade and regulate little investigation into its impact on competition. When prosecuting a per se violations, the actions intention doesn't need to be proven, only the fact that the action took place. Examples of this type of violation are price fixing, market division schemes, bid rigging, and group of boycotting.

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<sup>89</sup> Supra, note 87

<sup>90</sup> Available at <https://www.lexology.com/library/detail.aspx?g=bd2b38f1-9b66-448f-9bca-835c2fb9b94e>,

Last visited on April 28/2020

Violations of the “rule of reason”: Some business practices must be examined in context, under what is called a “rule of reason” analysis. A business practice violates the Sherman Act under a “rule of reason” analysis if it is found to unreasonably restrain trade. Examples of this kind of violations are monopolies, tying, exclusive dealing, and price discrimination.

For several decades’ courts drew the line between efficient and inefficient exclusion by asking whether the conduct under scrutiny was competition on the merits. Courts equated such competition on the merits with unilateral conduct such as product improvement, the realization of economies of scale, innovation, and the like. Such conduct was lawful per se, since it constituted the normal operation of economic forces that a free economy should encourage. At the same time, courts condemned as unlawful exclusion, tying contracts, exclusive dealing and other agreements that disadvantaged rivals. Monopolization requires proof of a causal connection between the anti-competitive conduct and the obtaining or maintenance of monopoly power. “Provided that the anti-competitive conduct and the existence of monopoly power are rigorously proven, US law generally permits a looser standard of proof of the causal connection between the two.”<sup>91</sup>

Under the US anti-trust law “there is no definitive list of what conduct can constitute monopolization but the main categories that US law has recognized include predatory pricing, exclusive dealing, loyalty discounts, tying or bundling, refusal to deal and abuses of governmental process.”<sup>92</sup>

A firm who are alleged by abuse of dominance can raise a defense.

*“Beyond arguing that there is no monopoly power and no anticompetitive effect, a defendant can argue that the conduct has pro-competitive effects. Pro-competitive effects include reducing costs, providing higher-quality products, stimulating investment and preventing free-riding. Often, a burden-shifting analysis is applied in monopolization cases, where the plaintiff must first establish anticompetitive effects, then the defendant must provide a pro-competitive*

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<sup>91</sup> Ibid

<sup>92</sup> Ibid

*justification, and then ultimately the burden is on the plaintiff to prove that the anticompetitive effects outweigh the pro-competitive benefits.*”<sup>93</sup>

## **2.9.2. Experience of EU**

In Europe abuse of market dominance was prohibited for the first time in article 86 of the treaty of the EC in 1954 and later on by article 82 of EC and currently by article 102 of the TFEU<sup>94</sup> and these laws list down the types of abuses in contrast to US which relies mostly on judicial interpretation of the concept as discussed above.

Article 102 of TFEU dictates as follows:

*“Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. So to establish an abuse of dominant position in EU as per this article there are five major elements. Such as (i) there must be an ‘undertaking’ single or collective (ii) a dominant position (iii) held in internal or common market (iv) abuse and (v) effect on interstate trade.”*

Even if the dominant position has not been defined in EU law (art.102 of TFEU), the standard definition emerges from the decision of European court of justice(ECJ) in the United Brand’s Case<sup>95</sup> and subsequently affirmed in other Cases.<sup>96</sup> The court stated that “The dominant position

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<sup>93</sup> Ibid

<sup>94</sup> Supra, note 77, p.4

<sup>95</sup> Case 27/76 United Brands Co. and United Brands Continental Bv v. European Commission (1978), C.M.L.R. 429

<sup>96</sup> Supra, note 60, p. 1

referred to in this Article relates to a position of economic strength enjoyed by undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to and appreciable extent independently of its competitors, customers and ultimately of its consumers.”

In EU the dominant firm may defend itself by invoking valid or objective justifications. These include protection of commercial interests<sup>97</sup>, technical or commercial constraints(example in relation to refusals to supply), efficiencies and public interests(general treaty objectives).<sup>98</sup>

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<sup>97</sup> ECJ stated that “The fact that an undertaking is in a dominant position cannot disentitle it from protecting its commercial interests if they are attacked.” See supra, note 95

<sup>98</sup> Eirik Osterud, EU Competition Law-Abuse of Dominance (Article 102 TFEU), University of Oslo: Department of Private Law, p.28

## **CHAPTER 3**

# **THE LEGAL AND PRACTICAL PROBLEMS IN CONTROLLING ABUSE OF MARKET DOMINANCE**

### **3.1. A SHORT HISTORY OF ETHIOPIAN COMPETITION LAW**

#### **INTRODUCTION**

For the most part of its modern history, the Ethiopian Economy has been underdeveloped. Likewise, the competition regime has been and still is under developed. The early attempts at protecting the competitiveness of markets through prohibiting restrictive business practices can be traced back to the early 1940's, when the imported Goods Proclamation No.38/43 was enacted. Competition law was evolving in Ethiopia when the Derg took over the helms of power and introduced the command economic system in the country. The economic policy of the country at the time envisaged the control of the means of production by the state and little room was left for the private sector to operate in the economy. There was no need for competition law in the country as there was no competition to protect. After the fall of the Derg, competition law resurfaced in the legal arena with the introduction of the free market economy. Proclamations were enacted in 2003, 2010 and 2013 to that effect. I would have discussed these periods very shortly just to shed lights to show the history of competition law in Ethiopia.

#### **3.1.1. Early Developments**

One can trace the roots of competition law in Ethiopia to the reign Emperor HaileSELLASE I, when three proclamations were enacted to provide for the regulation of trade in certain sectors. The Enactment of the Imported Goods Proclamation No. 38/43, the locally produced goods Proclamation No.53/44 and the Locally Rendered Service Proclamation No.133/52 set up a system of setting the maximum prices for imported goods, locally produced goods and locally rendered services, respectively. These proclamations aimed at eliminating price fixing and controlling price. Although not a full-fledged competition regime, these laws were a result of, and aimed at checking, anti-competitive acts in specific sectors of the economy.

### **3.1.2. The Unfair Trade Practice Proclamation No. 223/65**

This Proclamation was enacted to prohibit “unfair trade practices” across all sectors and for the control of standards and prices of certain goods and services deemed essential for the needs of the population.<sup>99</sup> It repealed the previous proclamations dealing with price control and was primarily aimed at setting up a unified system of price control by the government.

In addition to providing for the price control mechanism, the proclamation prohibited traders from engaging in or becoming party to unfair trade practices,<sup>100</sup> which were defined as:

“acts of any one person or of several persons by way of actual agreement, arrangement, or informal understanding having or designed to have to direct or indirect effect of restraining or injuring trade of the free competition therein, or any monopolistic profiteering or discriminatory actions which operate or are likely to operate against the interest of the public whether consumers, producers, dealers. Or others.”<sup>101</sup>

This broad definition encompassed two major areas of competition law, such as, abuse of dominance and anti-competitive agreement. No acts were listed as constituting unfair acts and acts were to be examined individually and tested for their effect on trade and competition or the interest of the public.

### **3.1.3. The Derg Years (1974-1991)**

After the dethroning of the Emperor by the Derg, the economic policy put in place envisioned a government, which was directly involved in running major economic activities leaving minimal room for the private sector. As discussed earlier, competition law is only instrumental where a free market economy has been put in place and the economic policy during the Derg years was diametrically opposed to the free market ideology. The government nationalized industries and took the responsibility of running them itself. These times were marked by absence of competition in markets and hence, of competition law.

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<sup>99</sup> Preamble para 2

<sup>100</sup> Art 5 (a) (1)

<sup>101</sup> Art (2) (h)

### **3.1.4. Post EPRDF Era (Post 1991)**

After the downfall of the Derg regime Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) came in to power in 1991 and then established the transitional government. After the establishment of the transitional government Ethiopia has promoted its free market economy in a number of ways and reduces its intervention in to the economy and also promoted both domestic and foreign private investments. And then the government introduced its first formal competition law in 2003 by enacting the trade practice proclamation.

#### **3.1.4.1. The Trade Practice Proclamation No. 329/2003**

After the introduction of the free market economic system, the first legislation dealing with restrictive business practices were enacted in 2003 as the Trade practice proclamation number 329/2003.<sup>102</sup> It was part of a series of measures undertaken by the government that were aimed at the realization of a reformed economic policy.<sup>103</sup> In addition to regulating anti-competitive practices, the proclamation also dealt with unfair competition and, to some extent, consumer protection.

The proclamation was enacted with the purpose of making sure that trade was practiced in accordance with the free market economic policy;<sup>104</sup> and with the desire of establishing a system for the promotion of competition environment by regulating anti-competitive practices in order to maximizing economic efficiency and social welfare.<sup>105</sup>

#### **3.1.4.2. The Trade Practice and Consumers Protection Proclamation No. 685/2010**

The Trade practice and consumer protection proclamation<sup>106</sup> was enacted in 2010 and strengthened the legal protection accorded to competition by introducing an array of definitions, detailed enumeration of prohibited acts, exemptions and exclusions.

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<sup>102</sup> Trade practice proclamation, 2003, proc. No. 329, Federal Neg. Gaz., year 9, No.49

<sup>103</sup> Supra, note 11, p. 60

<sup>104</sup> Supra. Note 88, preamble para. 1

<sup>105</sup> Ibid, para. 2

<sup>106</sup> Trade practice and consumers' protection proclamation, 2010, proc. no. 685, Federal Neg. Gaz., 16<sup>th</sup> year No. 49

### **3.1.4.3. The 2013 Trade Competition and Consumers Protection Proclamation (813/2013)**

The Trade practices and Consumers' protection was repealed and replaced by the Trade Competition and consumers' protection proclamation number 813 in 2013. Even though the above mentioned two legislations have promoted free markets and consumer protection, it lacked them clarity, and did not comprehensively addressing important issues related to abuse of dominance, merger regulation, consumer protection, and independence of implementing institutions. To remedy these faults, and further strengthen the free market economy and consumer protection, Ethiopia has enacted this proclamation in 2013. This proclamation tries to solve those recommended problems of the previous proclamation.

This proclamation is the currently governing law on the area and the main point of these thesis which is the legal and practical gaps in controlling abuse of market dominance is entirely depended on this one.

## **3.2. THE LEGAL FRAMEWORK FOR THE PROHIBITION OF ABUSE OF MARKET DOMINANCE IN ETHIOPIA**

Ethiopia Trade competition and consumer protection proclamation (hereinafter cited 'the proclamation')<sup>107</sup>, under Section Two of Part Two state rules, to govern issues related to abuse of dominance. Article 5(1) of this proclamation articulates that 'no business-person, either by himself or acting with others, may carry on commercial activities, by openly or dubiously abusing the dominant position he has in the market'. This is a clear prohibition against the act of abusing market dominance in the market, whether it is done solely or in a group.

Furthermore, the proclamation provides or lists out acts that are considered to be acts of abuse of dominance. For better clarity and understanding of the essence of the rule, it is imperative to examine (Article 5 of this proclamation)<sup>108</sup> the following acts listed as prohibited acts of abuse of dominance.

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<sup>107</sup> Trade Competition and Consumer Protection Proclamation, 2013, Proc. no. 813, Federal Neg.Gaz., year 20, no.28

<sup>108</sup> Ibid.

- A. Limiting production, hoarding or diverting or preventing or withholding good from being sold in a regular channel of trade.
- B. Doing directly or indirectly such harmful acts, aimed at a competitor, selling at a price below the cost of production, causing the escalation of the cost of a competitor, or preempting inputs or distribution channels is prohibited.
- C. Directly or indirectly imposing unfair selling price or unfair purchase price.
- D. Refusing contrary to the prevailing market practice, to deal with others on terms the dominant business-person customarily or possibly could employ as though the terms are not economically feasible to him.
- E. Without justifiable economic reason, denying access by the competitor or potential competitor to an essential facility controlled by the dominant business-person.
- F. Without justifiable economic reason, discriminating customers in price and other conditions in the supply and purchase of goods and services.
- G. Without justifiable economic reason, making the supply of particular goods and services dependent on the acceptance of competitive or non-competitive goods or services or imposing restriction on the distribution or manufacturing of competing goods or services or making the supply dependent on the purchase of another goods or services having no connection with the goods or services sought by the customer.
- H. Without justifiable economic reason and in connection with the supply of goods and services, imposing such restriction as to where or to whom or in what condition or quantities or at what price the goods or the services shall be resold or exported.
- I. other similar acts specified by regulation to be issued for the implementation of the proclamation.

The proclamation considers the following as 'Justifiable Economic Reasons' (a) maintenance of quality and safety of goods and services, (b) leveling with price or benefits offered by a competitor, (c) achieving efficiency and competitiveness and, (d) other similar reasons specified by a regulation to be issued for the implementation of the proclamation.

Saving rules provided to analyze the existence of ‘dominant position’, the above rules are the governing laws that regulate abuse of dominance related issues.

The next sub-topic will deal with the legal gaps or problems associated with rules governing abuse of dominance under the Ethiopian Competition law.

### **3.3. THE LEGAL LOOPHOLES (PROBLEMS) IN CONTROLLING ABUSE OF MARKET DOMINANCE IN ETHIOPIA**

#### **3.3.1. Abuse listing vs. Definition**

The proclamation, addressing issues related to abuse of dominance, opted to illustrate or list out acts that are considered to be acts of abuse of dominance, rather than defining the terms ‘abuse’ and ‘dominance’. It would have been very helpful and sound to offer definitions of ‘abuse’ and dominance with the listing approached followed. Since the listings are indicated as an illustrative list for acts considered as abuse of dominance, having a clear definition for the term, abuse of dominance can help to understand the nature of the abuse and other acts that may haven’t been included under the list. Besides, whenever the lawmakers expand the listing by including new acts as abuse of dominance, the definition would serve as a tool to examine if the act is an abuse of dominance by virtue of the definition given; otherwise, every act could be considered as an abuse of dominance and the list will be ever-expanding, which may be abused, intentionally or negligently by the lawmakers.

A closer look at the listing<sup>109</sup> indicates that the lawmakers attempted to include under the proclamation all means of abuse of dominance pointed out under the framework for design and implementation of competition policy; developed by Organization for Economic Co-operation and Development (OECD) – these acts are, price discrimination, excessive pricing, tie-ins, refusal to deal, predatory pricing to avoid competitor, raising rivals cost, putting vertical restraints (by upstream wholesalers and producers against downstream retailers to prohibit distribution for a certain group or territory, to limit quality and quantity in certain territories, exclusive dealing agreements, etc.).<sup>110</sup> Furthermore, the listing addresses issues related to

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<sup>109</sup> Trade Competition and Consumers Protection Proclamation, cited above at note 107, Art. 5

<sup>110</sup> OECD - framework for design and implementation of competition policy development, pp. 72-79

limiting production, hoarding, denying access to essential facilities to competitors; unless it is justifiable for economic reasons. Besides, the proclamation is designed to be illustrative rather than exhaustive; Article 5(2) (i) provides that, by a subsequent regulation to be issued to implement the proclamation, it is possible to include other related acts to be acts of abuse of dominance.

Unfortunately, this part of the proclamation brought two significant legal problems that should have been addressed as soon as possible. One of these problems is that the proclamation, to this date, failed to be supported the promised regulation to be issued for the implementation of the proclamation. Hence, the list is, for now, an exhaustive list, until the regulation comes with a more or lesser listing of acts as abuse of dominance. Currently, the market may have been entertaining acts that are not listed under the listing of Article 5 of the proclamation.<sup>111</sup> A new way of abusing dominant positions might have been developed in the market. Nonetheless, the lawmakers and legal framework failed to conduct proper research to assess practical and latest ways of abuse of dominance to effectively use their power to issue regulations that manage the latest developments or tricks used to abuse a dominant position.

The other legal gap under the listing of the proclamation is that it failed to address issues related to abuse of dominance and intellectual property right. It may be a legal right to have a dominant position in areas of intellectual property but abusing such dominance in a manner that avoids or lessen competition in a market needs to be regulated. Abuses in acquiring intellectual property rights and exercising of these rights could be a legitimate concern for competition authorities.<sup>112</sup> Those intellectual property-related areas that may pose issues of competition are generally summarized in three categories, i.e., (1): acquisition of patents, (2): transfer of technology through a licensing arrangement, and (3): cooperative arrangements among innovative firms.<sup>113</sup>

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<sup>111</sup> Trade Competition and Consumer Protection Proclamation no. 813/2013

<sup>112</sup> OECD - framework for design and implementation of competition policy development, p. 81

<sup>113</sup> Ibid.

### 3.3.2. Assessment of dominance

Laws governing abuse of dominances mainly focuses on two major aspects, i.e., determining the dominant status of a trader and evaluating the behavior<sup>114</sup>.

Assessment of dominance is a fairly complicated issue that requires providing a sound explanation for various related issues. Article 6 of the proclamation<sup>115</sup> governing this matter provided its way of assessing or determining the dominance of traders. Scrutiny of the way how the proclamation determined the dominance of traders is full of vagueness that demands further explanation. To understand the problem, it is wise to dissect the ways of assessment to examine their clarity and adequacy.

#### A. The Issue of Relevant Market

In principle, the objective of defining the “market in both its product and geographic dimension is to identify those actual competitors of the undertaking involved that are capable of constraining those undertakings and of preventing them from behaving independently of effective competitive pressure.”<sup>116</sup> To assess the dominance of a trader, the Ethiopian law requires identifying the ‘Relevant Market’ the trader is operating in.<sup>117</sup> The immediate question one may ask maybe, what is ‘relevant market’?. By virtue of Article 6(3), the relevant market is a market that comprises goods or services that compete with each other or goods or services that can be replaced by one another; and the geographic area for this market is the area in which competitions are sufficiently homogenous and can be distinguished from the competition in the neighboring markets.<sup>118</sup>

The above definition deals with issues such a competing or substitutable goods or services. However, the law failed to explain ‘competing goods and services’ or goods or services that can be replaced by one another (substitutable). Hence, from the text of the law, there is no way to know what are competing goods or services, or substitutable goods or services. Without having a

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<sup>114</sup> OECD, Policy round table – abuse of dominance and monopolization- 1996 – p.7-8

<sup>115</sup> Ibid.

<sup>116</sup> Dragan Benazic, Defining the Relevant Market in Function of Managing Competition Policy, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2232748](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2232748)) p. 5. Last visited on March 15/2020

<sup>117</sup> Trade Competition and Consumers Protection Proclamation, cited above at note 107, Art. 6(1)

<sup>118</sup> Ibid, Art. 6(3) and (4).

proper explanation for these ideas or tests of the relevant market, the text of the law would remain unenforceable or very hard to enforce. Such a vague statement could open doors for different legal interpretation by authorities and the judicial organ that deals with the proclamation, besides creating for the business community.

Similarly, the phrases, ‘sufficiently homogenous competition’ and ‘neighboring market’ have no clear definition or explanation that helps subjects of the law to understand and enforce the rules related to dominance and its abuse.

The above-mentioned loopholes of the proclamation made it very complicated to understand the market (relevant market) in which the ‘dominant trader’ is unduly exerting his/her market power against or at the expense of competitors or competition in the market. Thus, defining ‘substitutability of goods and services’ and ‘geographical scope’ of the relevant markets considered to evaluate dominance, remains significantly important to grasp and the overall rules and standards related to abuse of dominance.

#### B. The tools to Assess Dominance

The proclamation generously offers a variety of tools that could be used to assess the dominance of traders.<sup>119</sup> The proclamation states that ‘dominant position in a certain market may be assessed by taking into account the business persons’ **share in the market** or his **capacity to set barriers against the entry** of others into the market or **other factors as may be appropriate or the combination of these factors**’ [emphasis added]<sup>120</sup>

Nonetheless, one can hardly state that these tools come with adequate clarity or explanation to effectively apply the tests/tools in assessing dominance. Let’s examine these tools to understand and their application.

#### I. Market Share

Market share is indicated as one of the factors or tools to be considered in assessing the dominant position of a trader in a relevant market. However, the proclamation never offers any standard on how to calculate the share of traders in a relevant market. Logically, one of the sensible ways of calculating shares of traders requires the total market size and share of each trader in this market;

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<sup>119</sup> Ibid Art. 6(2) 813/2013

<sup>120</sup> Ibid.

this would only be done by conducting proper research on this regard, mainly based on the volume of sale each trader has in a market. Since there is no guidance on how to calculate shares of traders in a market, this assessment is simply inapplicable, until standards are provided by future legislation, as promised by Article 6(5) of the proclamation.<sup>121</sup>

## II. Capacity to set a barrier on entry

Concerning ‘capacity to set barrier against entry’ of other traders in the market, the main legal issue that requires explanation is whether if the legislature intended to manage the actual or potential capacity of traders to set barriers against the entry of traders. There is no indication to which side the lawmakers intended to incline; both the actual and potential capacity could be used to assess the dominant position.

Besides, the rule limited itself to govern barriers against entry; there is no clue if the law also governs capacity (either actual or potential) to set barriers that may hamper smooth market competition in the market. After the competitor’s entry into the market, the dominant market actor with strong capacity may find creative ways of making the business life of other traders difficult in ways that distort the competition culture.

## III. Other factors as may be appropriate

This is one of the vague criteria mentioned under the proclamation to assess dominance; there is no clue about what these factors could be. It gives wide privilege to the competition authority to consider ‘anything’ as an ‘appropriate factor’ to be used for assessing dominance. This could have negative out-comes against traders, because, authorities may consider fairly less strong or weak traders (financially speaking) as a dominant market actor to be subjected to closer supervision. The privilege to determine the factors and also their appropriateness to assess dominant position could be abused and applied differently against different traders in a manner different fashion.

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<sup>121</sup> Art. 6(5) 813/2013

#### IV. Combination of these factors

The last tool stated under the proclamation is ‘combination of these factors. This means the regulatory authority has unlimited power to combine any standards/tools they deem fit in their assessment to determine the dominant position. For example, they could neglect to rely on market share and choose to follow and combine ‘capacity to set a barrier on entry’ with any other ‘appropriate factor’ they deem relevant for their assessment to determine relevant position. The text of the law provided the tools for assessment as options to choose from, not as cumulative conditions to be considered and applied together. Hence, the authority could use either share in the market, or capacity to set a barrier on entry, or ‘appropriate factors’ or combination of these factors. This paves a wider room for the authority to abuse their right and apply any standard they deem fit for their examination; and to make matters worse, the proclamation didn’t even to encourage the uniform application of standards as much as possible based on the principle of impartiality, to avoid misuse of the standards against traders.

#### **3.3.3. Rule of reason**

A contrary reading of Article 5(2)(e), (f), (g), and (h) of the proclamation indicates that there are justifiable economic reasons that may exceptionally permit the commission of ‘abusive’ acts by a dominant trader.<sup>122</sup> Article 5(3) provides a list of economic reasons that justify abusive acts by a dominant trader; however, the proclamation left a significant room for future regulation to determine other ‘justifiable economic reasons’. Unfortunately, the proclamation still waits for future regulation to indicate if there are any other economic reasons to be included.

The need to have a regulation to address this gap appears considerably crucial when a trader argues that his act shall be considered as justifiable economic reason that is permitted by reason – even though the list of the ‘justifiable reason’ is not updated by regulation. This poses a dilemma for the competition authority; because the authority couldn’t make laws, rather enforce rules provided. On the other hand, though not indicated under the proclamation, the act committed by the trader may be justified by economic reasons or even the act may look like an act that would help competition flourish, but they may have to punish this act and the trader simply because this act hasn’t been added a justifiable act – as envisaged by the proclamation.

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<sup>122</sup> Trade Competition and Consumers Protection Proclamation, cited above at note 107

### **3.4. PRACTICAL PROBLEMS IN CONTROLLING ABUSE OF MARKET DOMINANCE IN ETHIOPIA**

The aforementioned legal loopholes created as a result of drafting problems against rules that govern abuse of dominance, not only created a hurdle that challenges the clear understanding of the rules from an academic perspective, it also posed a considerable practical problem that directly relates to enforcement on these rules.

Practical implementation of abuse of dominance, inter alia, requires: (1) having a clear definition for the terms ‘abuse and dominance’, (2) clarity on defining the relevant market, (3) clarity on how to choose tools to assess abuse of dominance, (4) a standard to determine share amount in the market, (5) determining if actual and/or potential capacity of traders is considered while assessing their ability to set barriers on entry, (5) providing a clear statement about what ‘other factors’ are considered to be appropriate to assess dominance, and finally, (6) providing sufficient clarity on how the above mentioned multiple tools of assessing dominance could be used together, if possible.

Failure to provide clarity on these vague rules, besides indicating the competition law was poorly drafted, sets a considerable challenge to even think of a way of implementing part of the competition law, abuse of dominance. For example, in a situation where there is no standard to determine market share, where there is no indication about the ‘other relevant factors’ that could be used to assess dominance, where it is hard to tell if actual or potential capacity to set barrier shall be used, and in a situation where it is vague how the competition authority could use a combination of these assessment tools at its discretion, would make it almost impossible to assess dominance of traders in the market.

### **3.5. EFFICIENCY OF LAW AND INSTITUTION TO PROMOTE ENFORCEMENT OF COMPETITION LAWS IN AREAS OF MARKET DOMINANCE**

Logically speaking, enforcement of competition law in a market relies on or relates to the efficiency of existing law and institution/authority that responsible to handle competition issues. Concerning the existing law, one could applaud the effort made by the lawmaker to put in place

rules that govern competition law and consumer protection; however, the adequacy and efficiency of this law, especially, the part that deals with ‘abuse of dominance’ is full of legal loopholes that complicate matters and creates problems to enforce the law efficiently. Hence, one may consider that if there is an enforcement problem related to rules of abuse of dominance, inadequacy, or lack of clarity of the law contributed to its negative role against effective enforcement.

Even though the main goal of this research work is not related to research institutional strength and weakness of the competition authority, it is very crucial to examine some issues that relate to enforcement of abuse of dominance rules. The strength of institutional enforcement power may depend on various factors such as structural strength, financial capacity, independence of the institution (structural, operational, and budgetary), etc.<sup>123</sup> Even in cases where the competition institution or authority properly organized and equipped, the issue of enforcement of vague abuse of dominance would be a bottleneck that hinders effective and efficient competition rule enforcement.

Furthermore, the competition authority is faced with a problem of setting procedures and guidelines for investigation of violations related to competition rules, including abuse of dominance.<sup>124</sup> Even though the proclamation stated powers of the investigator of the competition authority,<sup>125</sup> there are no detailed rules enacted by the authority to develop scientific, detailed investigation procedures tailored for the investigation of competition law violations. Lack of such procedural rule would make investigators find it hard to be guided by a procedural rule that would help them to conduct their investigation properly and to conclude their investigation successfully based on objective standards and procedures that are in line with the general objectives and specific rules of the proclamation vis-à-vis in consideration of salient features of competition laws. One could argue that the criminal procedure code and civil procedure code are not per se tailored for the investigation of competition law violation which may require the involvement of various sectors such as auditing<sup>126</sup> and economics and the related analysis<sup>127</sup> to

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<sup>123</sup> Supra, note 11, PP. 77 - 87

<sup>124</sup> Ibid p. 83

<sup>125</sup> Trade Competition and Consumers Protection Proclamation, cited above at note 107, Art. 36

<sup>126</sup> OECD – competition and Regulation in Auditing and Related professions – 2009 – p.12

determine the effect of abusive acts and analyze ways of committing thereof. This may have a direct negative impact on the enforcement of violations relating to abuse of dominance. In this regard, it is very crucial to ask if the competition authority is properly equipped and trained to conduct highly complicated forensic auditing and economic analysis that helps to investigate abuse of dominance in a relevant market. This area may be a sound research area that would be helpful to examine the enforcement capacity of the authority.

### **3.6. ENFORCEABILITY OF ABUSE OF DOMINANCE RULES OF ETHIOPIAN COMPETITION LAW**

Discussion in this particular sub-section is strongly related to the legal loopholes that have already been discussed in the previous sub-sections. *Inter alia*, it is logically presumable that enforcement of any law requires having a clear and adequately sufficient law.

The case of Ethiopian competition law, particularly, rules on abuse of dominance offered vague, inadequate, and seemingly complicated rules that incapacitate enforcement organs to successfully apply the law for investigating violation, adjudication of cases and creating awareness for the public at large and mainly, for the traders who are subjected to the rules of abuse of dominance.

Scrutiny of the aforementioned legal loopholes of rules of abuse of dominance makes is fairly clear that it is practically very hard and to conclude that the rules are adequate, clear, and easily understandable for enforcement of the law against violators. Hence, one may make a strong argument claiming that the abuse of dominance rules under Ethiopian competition law is very hard to enforce.

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<sup>127</sup> United Nations Conference on Trade and Development, The Use of Economic Analysis on Competition Cases, 2009.Introductory page/preamble. Available at: <file:///C:/Users/Michael%20Tilahun/Desktop/Abuse%20of%20dominance/1/competition%20and%20economic%20analysis%20.pdf>, Last visited on April 28/2020

# **CHAPTER FOUR**

## **CONCLUSION AND AREAS FOR FUTURE CONSIDERATION**

### **4.1. CONCLUSION**

Despite the recent introduction of competition law to Ethiopian market and the need to take time to learn and improve the legal framework to have strong competition law and policies, it is important to make sure that rules promulgated are not vague and could be implemented by the authorities concerned or the subjects of the law.

Scrutiny of Ethiopian Trade Competition and Consumer Protection Proclamation, particularly the part that is the focus of this research (rules related to abuse of dominance) exhibited the following legal loopholes and challenges relating to the rules per se and their enforcement:

- A. Even though the proclamation listed acts that are considered as abuse of dominance, there is no clear definition for the term ‘abuse’ or ‘dominance’. The listing seems an ever-expanding list that will be abused by the lawmaker or regulating authority. Had the law offered a clear or adequate definition for the idea of abuse of dominance, the public, especially, those involved in business would have a better understanding of the prohibition and refrain from acts that may not have been in the listing. The listing provided also failed to include abuses relating to exercising intellectual property rights, i.e., abuse of dominance that has to do with (1): acquisition of patents, (2): transfer of technology through a licensing arrangement, and (3): cooperative arrangements among innovative firms.
- B. Assessment of Abuse of dominance in the legal framework appeared to be confusing and gives unlimited and unregulated power to the regulatory authority; the law provided a buffet of assessment tools from which the authority could choose without any objective criteria. To the discretion of the authority, the law gives the right to choose from the following tools: considering share in a market, considering the capacity to set barriers on entry, considering other appropriate factors, or combination of these factors. This makes the application of the tools very unpredictable and paves wider rooms for abuse by the authority. It would have been

wiser to provide objective criteria to use the tools mentioned to assess dominance. Furthermore, the law failed to provide a clear standard

- C. Relevant Market: the fact that the rules never defined ‘competing goods and services’ or goods or services that can be replaced by one another (substitutable), it is very hard to understand the idea of ‘Relevant Market’ to assess dominance in the market.
- D. Market Share: since the rule never offered ways of calculating market share in the relevant, it is very hard to consider this dominance assessment criterion as a functioning standard.
- E. Capacity to set a barrier on entry: since the law failed to indicate if actual and/or potential capacity to set barrier against entry shall be considered, the law remains vague and subject to different interpretation, besides being a challenge for enforcement.
- F. Other factors as may be appropriate: this assessment standard has never been supported by any clue that may indicate what the lawmakers had in their mind about ‘Appropriate factors’; it seems that the competition authority should determine what qualifies as ‘appropriate factor’ to be considered while assessing dominance. The lawmaker should have used its power to make the laws in a detailed and clear manner that will not open rooms for abuse by wrong interpretation of authorities against the expense of the business community. To make matters worse, the competition authority hasn’t even attempted to list or explain those factors to be considered as appropriate. Hence, it is possible for the lawmaker, at any time, to consider any factor it deems fit as an ‘appropriate factor’ to assess dominance.
- G. Combination of these factors: the other very complicated assessment tool is that the competition authority is at liberty to use a combination of any factors or tools to assess dominance. There is no objective guidance for the authority on how to choose and combine those multiple tools to assess dominance. Hence, the competition authority may combine any factors at its discretion without any objectivity. This would make the assessment of dominance unpredictable and flexible in ways that the authority prefers rather than being an objective, clear and predictable rule that will govern the public properly.
- H. Considering the above-mentioned legal loopholes, one may wonder how these loopholes impact the practical application of the rules to solve actual problems. It is fairly easy to understand that lack of clear and adequate rules to assess dominance, or relevant market or guiding definition for abuse of dominance would pose a serious question relating to the practical applicability of abuse of dominance rules in Ethiopia.

- I. Challenges posed by the legal loopholes and their limitation to govern actual abuse of dominance related problems, suggests that enforcement of abuse of dominance rules could face a very significant challenge. One may even have the audacity to make an educated guess that suggests the enforcement of the rules is highly improbable. If there is an enforcement-related problem or lack of implementing the rules, it is sensible to think that the legal loopholes played their part in the problem.
- J. The proclamation still waits for the coming regulation to provide an additional rule of reason that could provide for exceptional abuse acts that would contribute positively to the market or competition therein. Lack of regulation may have a risk of determining acts not indicated under the proclamation as a prohibited or not justified, hence, punishable act.

#### **4.2. AREAS FOR FUTURE CONSIDERATION(RECOMMENDATION)**

The overall research, especially the findings, urges for reconsideration of the following areas of concern or improvement:

Definition: providing a clear definition of abuse of dominance would help to understand the general nature of the act. It also helps to protect fair competition acts of dominant acts from being considered as abuse acts that are against the competition in the market. Having the definition and providing a non-exhaustive list of examples of acts that are considered as abuse of dominance would help the subjects of the law clearly understand the prohibited act of abuse of dominance which is complemented by the list provided as an example. Even though it is unlikely to find a universally accepted definition for abuse of dominance, it is possible to take lessons from countries with developed competition law or organizations that focus on competition law; Organization for Economic Cooperation and Development could be a good example on this regard.

- ✓ For discussion sake, this statement could offer ideas that may help to define abuse of dominance

*“Abuse of a dominant position occurs when a dominant firm in a market, or a dominant group of firms, engages in conduct that is intended to eliminate or*

*discipline a competitor or to deter future entry by new competitors, with the result that competition is prevented or lessened substantially”<sup>128</sup>*

*Or*

In our European court decision, Dominance is defined as follows

*“...a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.”<sup>129</sup>*

The following explanation could help to develop a definition for ‘Abuse’

*“Conduct may be abusive when, through the effects of conduct on the competitive process, it adversely affects consumers directly (for example, through the prices charged) or indirectly (for example, conduct which reduces the intensity of existing competition or potential competition).”<sup>130</sup>*

- ❖ **Intellectual Property Right Related Abuses:** predatory acts of traders relating to intellectual property could have their negative impact to lessen or avoid competition in the market. This problem may even become more serious when such a predatory act may be done by the dominant actors in the market.
- ✓ Thus, among other things, the competition regime may benefit from setting rules that govern abuse of dominance relating to intellectual property, especially on areas of (1): acquisition of patents, (2): transfer of technology through a licensing arrangement, and (3): cooperative arrangements among innovative firms.
- ✓ The competition authority could benefit from providing rules that prohibit the abuse of dominant position that sets barriers against entry or lessens innovation or that limits access to a resource or restrictive exclusive agreements that are against the competition in the market.

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<sup>128</sup> Available at: [https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00511.html](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00511.html), Last visited on April 28.

<sup>129</sup> European Court Definition - Case 27/76 United Brands v Commission [1978] ECR 207, [1978] 1 CMLR 429. Available at: [Case 27/76 United Brands v Commission \[1978\] ECR 207, \[1978\] 1 CMLR 429](#). This definition has been used in other cases

<sup>130</sup> Office of Fair Trading, Abuse of Dominant Position – Understanding Competition Law, 2004, p. 18

- ❖ **Methods of Assessment of Dominance:** having different tools for assessment of abuse of dominance is not by itself a problem; it is good flexibility by which the competition authority easily assesses dominant position using different assessment tools considering different cases. However, these multiple assessment tools are not developed or implemented in a disorganized or arbitrary fashion, it could result in problems. The assessment tools provided by Ethiopian abuse of dominance rule failed to provide coherence and clarity to manage abuse of dominance assessment. Hence, solving these problems would be very crucial to improve the law.
- ✓ Application of ‘**share in the market**’ or ‘**capacity to set barriers against the entry**’ or ‘**other factors as may be appropriate**’ or ‘**the combination of these factors**’ shall be clearly explained how and for which particular cases these tools should be applied separately or in combination. Having clarity of application of these standards, considering the nature of cases, size of companies, the capacity of companies, the rules shall be tailored to indicate when and how they will be implemented for assessment of dominance.
- ✓ Combining or blending of these assessment tools could also be very sensible if it is guided by governing principles and objective criteria which ensures that the competition authority will be bound by rules rather than implementing the power to freely combine the assessment tools arbitrarily. Finding a sensible balance in this regard could give ease to the subject of the law to understand the rules, it would make the rules predictable and the enforcement by the authority to be objective and not open for abuses.
- ❖ **Relevant Market:** In this regard, it is very important to clearly define what competing goods or services, or substitutable goods or services are; otherwise, every effort for understanding the crucial idea of the relevant market would become futile. Since the competition and consumer protection rule lacks a clear explanation for substitutable or competing for goods and services, the proclamation would benefit from getting clarity of some sort.
- ✓ Even though it is complicated in practice, theoretically, the substitution of products could easily be understood with a question “if consumers are confronted with the unavailability of one product or it is available only at a higher price - how easily can they switch to a different

product?”<sup>131</sup> for the sake of discussion, the following definitions could be considered for brainstorming:

*“Substitute product is one that serves the same purpose as another product in the market”<sup>132</sup>*

*Or*

*“Substitute goods or substitutes are goods that a consumer perceives as similar or comparable so that having more of one good causes the consumer to desire less of the other good”<sup>133</sup>*

- ❖ **Market Share:** Since the rules governing abuse of dominance don’t provide the way to calculate market share, the makers could benefit from providing how to calculate shares in the market.
- ✓ In practice, the total market size and market shares are often available from market sources, i.e. companies estimate, studies commissioned to industry consultants, and/or trade associations. When this is not the case, or also when available estimates are not reliable, it is possible to usually ask traders in the relevant market to provide their sales report to calculate the total market size and market shares.<sup>134</sup> Providing such a standard would help fill the current legal loophole. One may logically assume that the bigger market actors would keep books and accounts; hence, evaluating reliable books and accounts to calculate the market share of individual traders or the total market size.
- ❖ **Capacity to set a barrier on entry:** the governing rules that deal with abuse of dominance don’t offer a clue if actual and/or potential capacity to set barriers is relevant to analyze dominance; it simply states, ‘capacity to set barriers against entry...’. Clarity on this regard helps would be for the betterment of the rules governing abuse of dominance.

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<sup>131</sup> Available at: <https://www.faegredrinker.com/en/insights/publications/2009/9/guidelines-on-the-definition-of-relevant-market>, Last visited on April 29/2020

<sup>132</sup> Available at: <https://corporatefinanceinstitute.com/resources/knowledge/economics/substitute-products/>, Last visited on April 29/2020

<sup>133</sup> Available at: [https://en.wikipedia.org/wiki/Substitute\\_good](https://en.wikipedia.org/wiki/Substitute_good), Last visited on April 29/2020

<sup>134</sup> Guidelines on the Definition of Relevant Market, Fair Trading Commission of Seychelles, p.12, available at: <http://ftc.sc/wp-content/uploads/2018/11/FTC-Guidelines-on-Relevant-Market.pdf>, Last visited on April 29/2020

- ✓ For the sake of assessing the capacity to set barriers against entry, it is important to assess the actual capacity to set barriers; however, it also doesn't hurt to assess potential capacity to set barriers against entry. Focusing only on actual capacity would make other traders with a significant potential capacity to set a barrier to be ignored while they use their capacity to abuse their capacity in a way that affects the entry of others in the market. Hence, it will be helpful to redraft the rule in a manner that also includes a potential capacity of traders to set barriers against the entry of others, besides the capacity to set actual capacity to set barriers. Considering both actual and potential capacity wouldn't result in anything harmful against traders, since, it is just a way of assessing their capacity, not a conclusion / determining of an act as abusive behavior.
- ❖ **Other factors may be appropriate:** this is the other area that requires a better explanation from the law. What exactly is considered as 'factors' and the standards for 'appropriateness' isn't indicated under the rules. Hence, correction in this regard will make the rules stronger and clear.
- ✓ The following factors are considered as additional factors to be considered while assessing dominance: (1) legal Provision – in cases when some private or governmental business entities are given exclusive legal right, they may develop a dominant position, (2) Superior and Efficient Technology, (3) Vertical Integration – in cases where there are an arrangement between suppliers and dealers that dominates the market, (4) Economies of Scale – this is a competitive advantage comes when traders average cost of production or distribution of product/service fall as a result of an increase in output. This gives the strong capacity for those traders who can produce in bulk to benefit from lesser production cost, unlike their small scale rivals, (5) Access to Capital – wide range of local or international source to get access to capital, (6) Access to key input which couldn't be easily accessed by competitors as a result of their limited capacity or connection, (7) Advertising, Reputation, and Product Differentiation, (8) Profit – traders with higher profit margin may dominate the market, (9) Opportunity Cost – the value of something to be sacrificed to achieve something, etc.<sup>135</sup>

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<sup>135</sup> University of Orebro Department of Behavioral, Social and Legal Sciences Legal Studies, Definition of dominance within the meaning of Article 82 EC, 2007, pp. 15-28 Available at: <http://oru.diva-portal.org/smash/record.jsf?pid=diva2%3A134898&dswid=4051>, Last visited on May 1/2020

- ✓ The above-mentioned factors may be used on a case by case basis considering the nature of businesses and realities in the market; this may be considered as ‘appropriateness’ test.
- ❖ **Combination of these factors:** this method of testing abuse of dominance may be considered as the one that requires a very creative, and objective explanation. The law never offers a system to blend the above-listed dominance assessment method or tools. Thus, finding the right recipe is significantly important to make avoid confusion, both in the text of the law and attempt to implement the rule.
- ✓ Solving this problem has to do with applying the proper assessment tool to assesses different companies. The assessment tools may be effectively applied if the competition authority provides an explanation that indicates which tools are relevant and proper to assess which undertaking. For instance, in cases where it is possible to get all the financial documents and reliable audit reports of trades in a given sector, applying market share assessment tools may be a direct and ideal tool. However, if there is no or unreliable financial records, the authority may resort to assessing their capacity (actual and/or potential) to set a barrier against the entry of competitors.
- ✓ When it comes to finding the proper recipe to combine two or more assessment tools, again, the authority could provide which combination could successfully and properly help to identify the dominant position of traders. Applying such objective and measured techniques may help the authority enforce abuse of dominance rules properly, and it also assures predictability of the rules and their application
- ❖ **Rule of Reason related gap:** the proclamation hasn’t been supported by a regulation that should have been issued to cover various detailed matters, including, adding more rule of reasons that could justify some acts of traders.
- ✓ The competition regime and subjects of this law could benefit from a detailed regulation that will provide for any additional reasons, if any, which will be considered as an exception to abuse of dominance rules. Lack of addressing this gap as soon as possible could make traders responsible for violating the abuse of dominance rules when their actions should have been an exception to the general prohibitions because of their positive impact on the market.
- ❖ **Improving Enforcement of the Competition:** *Inter alia*, legal loopholes could be considered are one of the multiple factors that hinder effective implementation of laws in

general. It has been indicated that gaps in Ethiopian rules of abuse of dominance, might have played their part to hinder the desired level of enforcement.

- ✓ Even though there could be plenty of reasons that may help to improve enforcement of competition law, rectifying problems and filling legal loopholes to the very law that governs competition in the market could be considered as one of the keys to help the enforcement authority. Practical limitations faced by the competition authority and subjects of the law, especially as a result of gaps in the law itself, demands a rectification to enable stakeholders to understand the law clearly and enforce it better.

# BIBLIOGRAPHY

## Books, Journal, and other Documents

- The World Bank and Organization for Economic cooperation and Development(OECD), A Frame work for the Design and Implementation of Competition Law and Policy (1998)
- Cuts, All about competition policy and Law for the Advanced Learner (KBS Printers, India, 2000)
- Harko Haroye, Competition policies and Laws: Major concepts and an Overview of Ethiopian Trade practice law, Mizan Law Review, Vol.2 No. 1, (2008)
- United Nations Conference on Trade and Development, Model law on Competition: Substantive possible Elements for a competition Law, Commentaries and Alternative approach in Existing legislation, (2010)
- Fikremarkos Merso, ImeruTamiratYigezu, SeyoumYohannes, Yoseph Endeshaw and TilahunTeshome Retta, Review of the Legal and Institutional Framework for market competition in Ethiopia, (2009)
- Challenges in implementing a competition policy and Law: An Agenda for Action, CUTS Centre for International Trade, Economics and Environment, (2002)
- Competition policy and Law made Easy
- Pulling up our socks- A study of competition Regime of Seven Developing countries of Africa and Asia under the 7-up project, CUTS Center for Competition, Investment and Economic regulation and DFID, (2003)
- S. Joekes and P.Evans, Competition and Development: International Development Research Center, (2008)
- Alison Jones and Brenda Sufrin, EC Competition Law: Texts, Cases, and Materials, Oxford UniversityPress, (2001)

- Philippe Brusick, Globalization: Enhancing Competition or Creating Monopolies? CUTS Centre for Competition, Investment & Economics Regulation, (2000)
- Cassey Lee, Model Competition Laws: The World Bank-OECD and UNCTAD Approaches Compared, Faculty of Economics & Administration University of Malaya, (2004)
- Francisco Marcos, The prohibition of Single Firm Market Abuses: U.S. Monopolization Versus E.U. Abuse of dominance, Working Paper IE Law School, (2017)
- Eiric Osterud, EU Competition Law-Abuse of Dominance (Article 102 TFEU), University of Oslo: Department of Private Law, p.28
- United Nations Conference on Trade and Development, Model Law on Competition: Substantive Possible Elements for a competition Law, Commentaries and Alternative approach in Existing legislation
- EC commission Notice on the definition of Relevant Market for the purpose of community Competition Law (97/c 372/03)
- The U.K Guide line on Abuse of dominance
- Mike Walker and Joao Pearce Azevedo, European Competition Law Review, Dominance: Meaning and Measurement, (2002)
- Office of Fair Trading, Abuse of Dominant Position – Understanding Competition Law, (2004)
- Massimo Motta, Competition policy: Theory and practice, (2005),
- OECD, Policy Roundtable, Market Definitions, (1994)
- OECD, Policy round table – abuse of dominance and monopolization- (1996)
- European Parliament Fact Sheets on Abuse of a dominant position and Investigation of Mergers, Available on, <http://bit.ly/2sddp03>, Last visited on April 10, 2020
- OECD – competition and Regulation in Auditing and Related professions, (2009)

## WEBSITES

- <http://www.oecd.org/daf/competition/abuse/>Last accessed on April 28/2020
- <https://en.wikipedia.org/wiki/Monopolization>, Last visited on April 28/2020
- <https://www.classlawgroup.com/antitrust/federal-laws/antitrust-clayton-act/> Last visited on April 20, 2020
- <https://www.lexology.com/library/detail.aspx?g=bd2b38f1-9b66-448f-9bca-835c2fb9b94e> last visited on April 28/2020
- Dragan Benazic, Defining the Relevant Market in Function of Managing Competition Policy, (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2232748](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2232748)) Last visited on March 9, 2020
- United Nations Conference on Trade and Development, The Use of Economic Analysis on Competition Cases, (2009), Introductory page/preamble. Available at: <file:///C:/Users/Michael%20Tilahun/Desktop/Abuse%20of%20dominance/1/competition%20and%20economic%20analysis%20.pdf>, last visited on March 9, 2020
- Available at: [https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00511.html](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00511.html), Last visited on March 9,2020
- European Court Definition - [Case 27/76 United Brands v Commission \[1978\] ECR 207, \[1978\] 1 CMLR 429](#). Available at: [Case 27/76 United Brands v Commission \[1978\] ECR 207, \[1978\] 1 CMLR 429](#). Last visited on Dec. 15/2019
- Available at: <https://www.faegredrinker.com/en/insights/publications/2009/9/guidelines-on-the-definition-of-relevant-market>, Last visited on March 12, 2020
- Available at: <https://corporatefinanceinstitute.com/resources/knowledge/economics/substitute-products/>, Last visited on April 1, 2020
- Available at: [https://en.wikipedia.org/wiki/Substitute\\_good](https://en.wikipedia.org/wiki/Substitute_good), Last visited on April 8,2020

- Guidelines on the Definition of Relevant Market, Fair Trading Commission of Seychelles, Available at: <http://ftc.sc/wp-content/uploads/2018/11/FTC-Guidelines-on-Relevant-Market.pdf>, Last visited on April 20,2020

## **LEGAL INSTRUMENTS (LEGISLATION)**

### **Foreign Legislation**

- The United Republic of Tanzania, Fair Competition Act, No.8 of 2003.

### **National Legislations**

- Unfair Trade Practice Decree, 1963, Dec.No.50, Neg.Gaz. Year 22, No.22.
- Unfair Trade Practices Proclamation, 1965, Proc.No. 228, Neg.Gaz. Year 24, No.19.
- Trade practice proclamation, 2003, Proclamation No. 329, Federal Neg. Gaz., 9<sup>th</sup> year No.49
- Trade practice and consumers' protection, 2010, proclamation no. 685, Neg. Gaz., 16<sup>th</sup> year No. 49
- Trade competition and Consumers protection, 2014, proclamation no. 813, Neg. Gaz. Year 20, No. 28