ADDIS ABABA UNIVERSITY

SCHOOL OF GRADUATE STUDIES

COLLEGE OF LAW AND GOVERNANCE

SCHOOL OF LAW

A CRITICAL APPRAISAL OF THE INSTITUTION CONTROLLING COMPETITION IN ETHIOPIA: ANALYSIS OF THE LAW AND THE PRACTICE

By

MUHAMMED KEBIE HILLO

MAY, 2014

ADDIS ABABA, ETHIOPIA

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

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Approved by Board of Examiners

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Advisor	signature	Date
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Examiner	Signature	Date
_____	_____	_____
Examiner	Signature	Date

DECLARATION

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

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Date: _____

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ABSTRACT

The fact certain country has adopted competition legislation by itself is not an end to control anticompetitive acts in the market place unless it is accompanied by effective and efficient institution implementing this legislation. The institution controlling competition in Ethiopia is known as the Ethiopian Trade Practice and Consumer Protection Authority. The establishment of the Authority is a recent phenomenon and there are many legislative and practical problems associated to it which this study identified. The legislative and practical problems identified by this study are those set in the succeeding paragraphs.

Legislatively, the organization, structure, power and functions of the Authority were not well articulated in line with the best experience of countries with similar economic system with Ethiopia. There is no detail description about the qualification of the person to be appointed as Director General, the judges and other staff of the Authority. The issue of conflict of interest and matters regarding immunity of a Director General and the Judges of the Authority is not legislatively addressed in Ethiopia. The Authority does not have secretariat in its organization which may carryout administrative and investigation function. No detailed rules on competence, procedures and priorities of the institutions in case conflict of jurisdiction arise between the Authority and other regulatory bodies set by legislation. The independence of the Authority is under questions due to the fact, the recommendation and appointment of Director General and the Judges of the Authority is made by executive government organ and the Authority is also accountable to it. The fund of the Authority is allotted by the executive body and this make the Authority to be financially dependent on the political organ of the government. The Authority does not have investigative power; administer the service fee it collects and power to issue implementing directives. Only one legal protection mechanism recognized by the law.

Practically, the Authority has not become to date fully operational due to factors related to human resource and other infrastructure. There is only one division of the adjudicative tribunal, which situated at the head office, established so far. No competition case had been entertained so far by the Authority. The Authority centered its advocacy works on consumer rights protection than competition. This paper identified the earlier mentioned legislative and practical problems and finally suggests some recommendations which the writer thinks to be appropriate.

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ABBRIVATIONS AND ACRONYMS

AAU	Addis Ababa University
AACCSA AI	Addis Ababa Chambers of Commerce and Sectoral Associations Arbitration Institute
Art	Article
CUTS	Consumer Unity and Trust Society
EC	European Community
ETCCPA	Ethiopian Trade Competition and Consumers protection Authority
ETCCPA	Ethiopian Trade Practice and Consumer Protection Authority
ETCCPP	Ethiopian Trade Competition and Consumers Protection Proclamation
ETPCPP	Ethiopian Trade Practice and Consumers Protection Proclamation
EU	European Union
FDRE	Federal Democratic Republic of Ethiopia
OECD	Organization for Economic Co-operation and Development
UNCTAD	United Nations Conference on Trade and Development
UNGCP	United Nations Guide Lines on Consumer Protection
UN	United Nations
USA	United States of America
WTO	World Trade Organization

CHAPTER ONE

1. INTRODUCTION

1.1 BACKGROUND OF THE STUDY

The economic system of a certain regime may plunge in either administrative or market mechanisms.[1] The administrative mechanism is the economic system where the state itself owns and manages the economy.[2] Market mechanism on the other hand is the circumstance where by private ownership and action supplemented by government action manages the economy.[3]

Canada and the United States of America were among the first countries on the globe to introduce competition law, in 1889 and 1890 respectively.[4] Many European countries introduced competition laws in the 1950s, after World War II and most of developing countries did not introduce competition laws until the 1990s.[5]Competition law can be understood as rules that govern the interaction between businesses with each other in the market place.[6] Competition laws promote economic efficiency and social welfare by prohibiting restrictive business practices and creating equal level playing fields for firms[7]. A market is perfectly competitive when there are many firms trying to outdo each other in the price and/or the quality of the product or service they offer, and when there is open entry and exit of firms.[8] In reality perfect competition is not necessarily to be realized and only effective competition- that is the presence of an actual or potential rival that could viably contest the market needed.[9] In the competitive setting, resources are allocated to where consumer welfare is optimized through market force and efficiency can be optimized by constraining firms to produce more with less(technical efficiency) and by inducing better resource allocation(allocative efficiency).[10] Competition may sometimes not enough to ensure that the market performs its role of efficient allocation of resources and in such cases

[1] Solomon Abay ,Notes 8 on Theories and Principles of Economic law(AAU,unpublished),(2012-2013)
[2] Id
[3] Id
[4] The World Bank and OECD, A Framework for Design and Implementation of Competition Law and Policy, (1998), p.23.
[5] Ibid
[6] Ibid
[7] Ibid
[8] M.Medalla(ed.), Competition Policy in East Asia,(2005),p.4.
[9] Ibid
[10] Ibid

rules may be needed to take place of competitive process that market fails to bring about. A dynamic and competitive environment, underpinned by sound competition law and policy, is an essential characteristic of a successful market economy.[11]

A country implementing competition policy and law needs to have an expertise properly trained and adequate resources. Independence and accountability of the Authority controlling competition are also issues to be considered. A full national competition policy requires a great deal of technical expertise on the part of the competition authority.[12] The Authority needs competent and knowledgeable staffs that are able to define markets, identify anticompetitive actions, and judiciously construct and administer tests for market concentration and the effects of mergers and acquisitions.[13]

The enforcement mechanism of competition law and policy vary depending on the legal and institutional infra structure to that end. Most laws rely on sanctions and penalties to prevent violations. The expected cost of violating the law is determined by the penalty imposed on those who are caught and by the probability that a violation will be uncovered and successively prosecuted.[14] The probability of detecting a violation depends on different factor which relates to the capacity and efficiency of competition authority.[15] These factors, inter alia, includes the administrative and legal power of enforcing Authority, the procedure and budget it uses, the expertise it use and the independence of the enforcing Authority. The proper enforcement of competition law requires knowledge of both law and economics and thus lawyers and economist should be employed by the enforcement Authority.[16]Adequate staffs with honorable salary should be also employed to assist the expertise.[17]

The history of competition law in Ethiopia traced back to the era of emperor government of 1960s. The first attempt during this time was to control competition through private law which

[11] , The World Bank and OECD, cited above at note 4, p.v.
[12]Medalla, cited above at note 8, p.12.
[13] Ibid
[14] Id,p.18
[15] Ibid
[16] D. Smith and S. Sun, "Introducing Competition Policy into Developing Economy: A summary of Lessons Learned," Perspectives, Vol.2, No.4,p.3
[17] Ibid

was the then enacted commercial code.[18] Later on the imperial regime directly recognized competition by enacting the Unfair Trade Practice Decree in 1963.[19] The enforcement mechanism left to the ordinary court as there was no institution established for that purpose. Due to the political system it followed, there was no competition policy and law during the military government. The system at the time was socialist and thinking of competition was impractical. There was no competition law during the transitional period from 1991-1995. There was, however, a tacit application of the rules on unfair competition under the commercial code. The Federal Democratic Republic government of Ethiopia (FDRE) has enacted the competition law in 2003.[20] This law was amended and replaced by new law in 2010(ETPCPP).[21] This law again amended and replaced by Ethiopian Trade Competition and Consumers Protection in 2014[22].Unlike the competition rules during imperial regime, the new competition law established institution for the enforcement of the law. There have been arguments among scholars whether the new law is purely competition law or not. Regardless of the arguments, mentioning few points about the enforcement institution is worthy as the title framed within this context. The proclamation established Trade Competition and Consumers Protection Authority as the enforcing institution. There are various issues come up with the organization, structure, powers, functions, the legal framework and practical challenges of Ethiopian Trade Competition and Consumers Protection Authority which this paper will address. This paper will, therefore, appraise the legal and practical problem the institution enforcing competition in Ethiopia against the above backgrounds.

[18] The Commercial Code of the Empire of Ethiopia Proclamation, 1960, Art.133-134, Proc.No.166, Neg.Gaz.Year 19, no.3. There are few provisions under the commercial code dealing with unfair competition ranging from Art.130-134. These provisions are few in number and scope as it does not address all competition issues. It can, however, be taken as the first attempt to control competition in the country's history.

[19] Unfair Trade Practice Decree, 1963, Dec.No.50, Neg.Gaz.Year 22, no.22. Enacted latter as Unfair Trade Practices Proclamation, 1965, Proc.No. 228, Neg.Gaz.Year 24, no.19.

[20] Trade Practice Proclamation, 2003, Proc.No. 329, Neg.Gaz.Year 9, no. 49.

[21] Trade Practice and Consumers Protection Proclamation, 2010, Proc. No.685, Neg.Gaz.Year 16, no.49.

[22] Trade Competition and Consumers Protection Proclamation,2013,proc.No.813,Neg.Gaz.Year 20, no.28.

1.2 STATEMENT OF THE PROBLEM AND RESEARCH QUESTIONS

Competition policy and law have been in practice for a longer period of time in different parts of the globe. There may, however, be slight difference among competition law of different countries. There are certain principles which are commons and considered the main objectives of the law which helps to control or eliminate merger and acquisitions, abuse of dominant positions and control of cartels. Competition law may cover three areas which are restrictive agreements, abuse of market power and mergers and acquisitions. Competition laws vary in terms of their coverage and content, reflecting differing social, political, cultural and legal contexts.[23] An enforcement mechanism is also varies like that of the law. The enforcement of competition policy and law may be seen from the perspectives of the structure, organization of the Authority, the power and function and the legal protection mechanisms. Accordingly, competition Authority should be independent from government (financially and operationally), accountable to (the parliament or public) and empowered to (make rules, monitor market, investigate anti-competitiveness, make decision, enforce sanctions, adjudicate cases, advocate competition, educate the public).[24] The sanction it may give also be civil (tort compensation, nullity), Administrative (fine), and criminal.[25] The legal protection mechanisms for the function of the competition authority may also, internal complaint mechanism, judicial review or review by peripheral institutions.[26]

The Ethiopian competition law of 2014, which was Trade Competition and Consumers' Protection Proclamation, established Trade Competition and Consumers Protection Authority of Ethiopia as an organ empowered to enforce competition and other matters covered in the proclamation. The Trade Competition and Consumers' Protection Authority (here in after the ETCCPA) suffer from many legislative and practical problems in discharging its power and functions. These problems may be pictured from the organization, structure, power and function of the ETCCPA and the competition culture.

Organizational the ETCCPA suffer from some legislative problems which can affect the practical functioning of it. The problems are those related with the appointment of Director General and

[23] Medalla, cited above at note 8, p.17.
[24] Solomon Abay, cited above at note 1
[25] Id
[26] Id

Judges, the absence of detailed qualification requirements for the Director General and Judges, absence of secretariat and the fact there is no tenure of time set.

Structurally, there are certain legislative problems which may be observed from the Ethiopian Trade Competition and Consumers Protection Proclamation which has a direct impact on the practical operation of ETCCPA. The ETCCPA is legally declared autonomous in one aspect and the appointment of the staffs is made by the political organ on the other hand. So, there is a paradox here. On the other point ETCCPA is accountable to the Ministry of Trade which clearly deteriorates the functional independence of the Authority. The ETCCPA is financially dependent on the executive organ of the government.

Regarding the powers and functions of ETCCPA different legislative and practical problems may be posed. First, the Authority does not have criminal jurisdictions. Secondly, ETCCPA does not have implementing directive making power. Thirdly, ETCCPA does not have the power to institute the case. Fifthly, the legal protection mechanism recognized under Ethiopian Trade Competition and Consumers Protection Proclamation was only one. Lastly, ETCCPA does not have the power to administer the service fee it collects.

There are many practical problems raised with regard to the organization, structure, power and function of the ETCCPA. There are no necessary expertises in the ETCCPA. Competition advocacy and educating public is minimal. There is no competition cases entertained by the ETCCPA so far, and the setback for this is the lack of human powers on the area and less public awareness. Absence of competition culture has also brought difficulties on the functioning of ETCCPA. There is no branch office of ETCCPA established so far at the regional states. In general, the overall practical challenges faced by the Authority are those related to lack of institutional strength in its organization, structure, power and function and lack of competition culture at business community, general public and government levels.

The above mentioned legal and practical problems are the manifestation of the institution controlling Competition in Ethiopia and the researcher, to solve the problems, designed the research questions as follows:

- What should the organization of the ETCCPA look like?

- How ETCCPA should be structured to accomplish its mission and to which organ it should be accountable?
- Does the ETCCPA need to have secretariat?
- Does the legal protection mechanism recognized under the law is sufficient?
- What are the practical challenges hindering the functioning of ETCCPA?
- What should be done to strengthen the efficiency of ETCCPA?

1.3 LITERATURE REVIEW

John W.van de Gronden & Sybe A.de Vries stated that an important issue regarding the implementation of competition law is the position of the body entrusted with this implementation task.[27] Accordingly, most member states of European Union have granted competition authority more or less independent status from the political sphere.[28] An important advantage of an independent Competition Authority is that the application and enforcement of competition rules are not influenced by political and volatile considerations.[29] By delegating competition law enforcement powers to an independent body, the legislature tries to guarantee that the application and interpretation of competition rules is mainly based up on economic and legal arguments alone and is not shaped by political pressure.

According to Frank Emmert [30], the best laws and the most admirable institutions remain useless if they lack the ability to adopt effective decisions. In the area of competition oversight, three options of enforcement may be placed.[31] First, there is an administrative option which requires a powerful and independent Competition Authority with a meaningful investigative powers and ability of imposing substantial penalties.[32] The Authority in this context should be authorized and equipped not only to analyze markets in a theoretical way but to go out on so called "down-raids" to investigate enterprises in the field. The second option for enforcement of competition law is the private or tort law option according to which competitors, suppliers or customers to

[27] W.van de Gronden & A.de Vries, " Independent Competition Authorities in the EU," Utrecht Law Review:Vol.2,No.1(2008),p.1.
[28] Ibid
[29] Ibid
[30] F. Emmert, How To and How Not To Introduce Competition Law and Policy in Transitional and Developing Economies , (http://www.SSRN.com.pdf) last visited on may 15, p.28
[31] Ibid
[32] Ibid

bring tort cases and collect compensation for proven damages from an enterprise that has violated competition rules[33]. Finally, there is the criminal law option of holding the management of a firm personally liable for anti-competitive conduct and imposing jail sentences against the worst offenders[34]. This is widely considered particularly effective because the managers as employees may like to take the bonuses for earning super-competitive profits but they won't like to do time in jail for having made extra money for their shareholders.

World Bank and OECD paper on a framework for the design and implementation of competition law and policy[35] stated that through competition advocacy a competition agency may influence government policies by proposing alternatives that would be less detrimental to economic efficiency and consumer welfare. It may serve as buttress against lobbying and economic rent-seeking behavior by various interest groups.[36] It may also foster greater accountability and transparency in government economic decision making and promote sound economic management and business principles in both the public and private sectors.[37] There is direct relationship between competition advocacy and enforcement of a competition law, and the connection is especially strong in transition and developing economies.[38] Markets in many of developing countries are initially concentrated with few firms dominating and the role of competition advocacy is to facilitate the condition that lead to competition. To accomplish this purpose competition authority may be given explicit or implicit mandate. In general, competition advocacy in transition and developing economies may be most important in the policy areas of: Trade liberalization, Economic regulation, State aids, Operations of local governments and privatization.[39]

David SMITH and Su SUN wrote that, a country implementing a competition policy needs an enforcement agency with properly trained employees and adequate resources to enforce its new statute.[40] It is also essential that it be politically independent, and operates transparently to avoid

[33] Id,p.29
[34] Ibid
[35] The World Bank and OECD, cited above at note 4, p.104.
[36] Ibid.
[37] Ibid
[38] Ibid
[39] Id,p.105
[40] Smith and Sun, cited above at note 16, p.3.

charges of corruption.[41] The proper enforcement of competition policy requires knowledge of law and economics and thus, both lawyers and economist should be employed by the enforcement agency.[42] They will need adequate staffs to assist them with their responsibility and the employees should be well paid to reduce problems with corruption.[43] The investigation of competition issues tend to be fact intensive, and the staff should be large enough to gather and assess these facts.[44] The amount of resources made available for enforcing the competition law is a key and the amount of resources needed will be depend on the size of the economy and the amount of anticompetitive activity.[45]

OECD global forum on competition document point out that[46], Competition Authorities face a number of challenges or obstacles when they promote competition, whether that promotion is through enforcing a competition law or through trying to persuade society and government of the advantages of competition.[47]Lack of competition culture has been identified as the central impediment and many challenges and obstacle follow from this central impediment.[48] It appears that lack of competition culture is due to the self-interest of those who expect to lose with the introduction of competition and who have the power to oppose it.[49]

According to commentaries on UNCTAD Model law on competition law[50] the number of members of competition Authority differs from country to country. In some legislation the number is not fixed and may vary with a minimum and maximum number.[51] Legislation of different countries provides an appropriate authority with powers to remove from office a member of the competition Authority that has engaged in certain actions or has become unfit for the post.[52] The tenure of the office of the chairman and member of the Authority is, for stated

[41] Ibid
[42] Ibid
[43] Id,p.4
[44] Ibid
[45] Ibid
[46] OECD Global Forum on Competition, Challenges/Obstacles Faced by Competition Authority in Achieving Greater Economic Development through the Promotion of Competition, (2003), p.2.
[47] Ibid
[48] Ibid
[49] Ibid
[50] 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.72.
[51] Ibid
[52] Id,p.73

period, with or without the possibility of reappointment, and the manner of filling vacancies should stated in the legislation.[53] Once the decision is rendered by competition Authority, it can be challenged through request for review by the Authority of its decision or through lodging an appeal to the ordinary court.[54]

Susan Joekes and Phil Evans[55] discussed that, the challenges in legislating and implementing competition law in developing countries are those relating to training of judges, absence of the cost of running Authority, adequate human resources, adequate and independent financial resource and legal enforcement tools. A problem of many developing countries is lack of skill in competition law among the judiciary.[56] The cost of maintaining a competition Authority is often raised by many developing countries as a reason not to institute competition laws and institutions.[57] Competition law enforcement requires both legal and economic expertise and yet attracting high quality staff is very difficult in developing countries.[58] Without sufficient financial resources, the Authority will be unable to function effectively and ideally and its operational revenue should be independent of Politicians and Ministries.[59] A competition Authority must have the power to initiate its own investigations; to request information from any public or private businessperson; and to enter business premises to collect information and seize documents, computer hard drives, and other evidence to help it uncover wrongdoing.[60] Employing stiff sanctions for abusive competition is an important weapon in any Authority's armory.[61] Imposing fines that are sufficiently high to discourage further offences is a key element of this. Parties opposed to competition measures are more organized and more politically active than those who may gain from a strong competition regime.[62]Engaging with stake-holders for and against competition law and policy is, therefore, important during the legislative phase and, perhaps, even more important once the competition Authority begins to

[53] Ibid
[54] Id, p.81
[55] S.Joekes and P.Evans, Competition and Development: International Development Research Center, (2008), p.41.
[56] Ibid
[57] Ibid
[58] Id,p.42
[59] Id,p.43
[60] Id,p.44
[61] Id,p.45
[62] Id,P.46

enforce the law.[63] To be effective competition Authority should also search out and foster coalitions with like-minded departments and agencies of government.[64]

Trade Competition and consumers' protection proclamation established ETCCPA as the institution controlling competition.[65] Structurally, the Authority is autonomous organ accountable to the then ministry of trade and industry, the now ministry of trade.[66] The authority shall be free from any interference or direction by any person with regard to cases it adjudicates.[67] Organizationally, the Authority would have a Director General and the necessary judges to be appointed by the Prime Minister of Ethiopia up on recommendation by the Minister of Trade.[68] It has also necessary staffs without clear indication as the specific qualification required.[69] Coming to power and functions, the Authority would have adjudicative and investigative power.[70] The adjudicative power of the Authority is also limited to civil and administrative actions.[71] The Authority does not have secretariat. The focus of this paper is, to critical appraises the structure, organization, functions and power of the Trade Practice and Consumers Protection Authority from the legislative and practical perspective against the above discussed literatures. There are many problems observed from the legal framework which have practical impact on the function of the Authority and these will be analyzed from the best practice of different regimes.

1.4 OBJECTIVES OF THE STUDY

1.4.1 GENERAL OBJECTIVE

The overall objective of this thesis is to evaluate the legislative and practical problems relating to the structure, organization, powers and functions of the institution controlling competition in Ethiopia in line with the basic principles at international arena.

[63] Id, P.46
[64] Id, p.66
[65] Trade Competition and Consumers' Protection Proclamation, cited above at note 20, Art.27
[66] Ibid
[67] Id, Art.35
[68] Id, Art.28
[69] Ibid
[70] Id, Art.32 &36
[71] Id, Art.32

1.4.2 SPECIFIC OBJECTIVES

The specific objectives of the thesis are:

- To detect the legislative and practical problems on the structure of ETCCPA;
- To identify the legislative and practical problems in the organization of the ETCCPA; specifically those relating to the appointment, qualification and tenure of the office of the general director, judges and others staff;
- To point out the major issues that would have been considered in the legal framework on the structure and organization of ETCCPA.
- To evaluate the power and functions ETCCPA and show the problems of lack of investigative power has on the functioning of ETCCPA.
- To identify the major practical challenges which hindered ETCCPA from achieving its' objectives.
- To suggest the possible legal protection mechanisms that would have been included in the Ethiopian Competition law.

1.5 SIGNIFICANCE OF THE STUDY

This research focus on the legislative and practical problems of the structure, organization, power, functions and other related issues of the institution controlling competition in Ethiopia and recommend the solution from the best practice of different regimes. Hence, it may have scores of significant for different organs. It may expectantly contribute much in the amendment of the competition legislation of the country. It may enable ETCCPA to understand the legislative and practical problems and urges for the reform. The study may also serve as a foundation and may call the attention of those who want carryout further studies on the area. Finally, it may serve as a reference material in the academic sphere.

1.6 SCOPE OF THE STUDY

The overall objective of the study is to point out the legal and practical problems of the Trade Practice and Consumers Protection Authority of federal government of Ethiopia. The data collection is, therefore, limited to the Federal government's Trade Practice and Consumers protection Authority. Due to time and financial constraints data collection on Regional State

consumers' rights adjudication body will not be included. The establishment of Regional States consumers' rights adjudication body will be examined from the legal framework and the data that will be collected from ETCCPA.

The experience of few countries may be scrutinized in the due course of analyzing the legal framework of the institution controlling competition in Ethiopia. Consequently the law of, South Africa, Tanzania, India, European Union, USA, OECD and UNCTAD model law were made part of the study. The selection of the above countries experience is nothing but the more or less existence of common elements among the countries legislation and their best experience.

1.7 RESEARCH METHODOLOGY

1.7.1 RESEARCH METHODS

As the thesis primarily focuses on appraisal of the legal frame work and practical problems of the institution controlling competition in Ethiopia, a qualitative research approaches particularly analytical type of research methods employed.

1.7.2 DATA COLLECTION TECHNIQUES AND ANALYSIS

All relevant primary and secondary data gathered from available data resources. The key techniques to obtain the data source of the research includes reviewing various documents, observation and scheduled interviews with relevant organs such as ETCCPA , Ministry of Trade, Ethiopian Chambers of Commerce and Sectoral Associations and etc. The qualitative data collected through observation and interview was systematically grouped based on the responses and analyzed accordingly.

1.8 LIMITATION OF THE STUDY

The researcher faced time and budget constraints and due to this unable to assess the views of Regional States on the need for establishment of branch office of ETCCPA. The difficulty of easily finding interviewees as they were occupied by different tasks was also another limitation of the study.

1.9 ORGANIZATION OF THE PAPER

This paper attempts to examine the legislative and practical challenges of the institution controlling competition in Ethiopia and to accomplish these the paper was organized in the following sequences. The paper is divided in to five chapters. The first chapter will deal with the introductory chapter consisting of background of the study, statement of the problems and research questions, literature review, objective of the study, significance, scope, methodology and limitation of the study. The second chapter highlights the general conception of competition law and policy and Ethiopian Trade Practice and Consumers Protection law. The third chapter deals with the enforcement of competition law and policy. This is an integral part of the paper and it discusses the general overview of the institution controlling competition. The fourth chapter devotes to the appraisal of the institution controlling competition in Ethiopia. It analyzed the legislative and practical problems on the area. Lastly, chapter five concludes the findings and forwards the feasible recommendations based on the study results.

CHAPTER TWO

COMPETITION POLICY AND LAW: THE GENERAL CONCEPTION AND AN OVERVIEW OF ETHIOPIAN TRADE COMPETITION AND CONSUMERS' PROTECTION LAW

2.1 COMPETITION POLICY: THE CONCEPT AND OBJECTIVES

For a longer period of time, every country on the globe had been using different laws and rules to regulate the market. These laws and rules were designed to ensure a fair play in the market place.[72] Market rules are not a new phenomenon but have existed for a longer period of time to govern market activities. They existed long before the introduction of what we now call market economy.[73] The origin of modern competition policy can be traced back to the end of the 19th Century, which came into existence mainly as a reaction to the formation of trusts in the United States.[74] Competition policy or anti-trust-as it was originally called is now over 100 years old.[75] Competition is a process and competition policy is largely a curative when that process fails to work.[76] As competition has replaced state regulation in many economic fields and competition policy has been one of the most important areas in recent years.[77]

It is not an easy task to define the concept competition policy in one statement as the term represents broad concepts. A possible definition might be, competition policy is the set of policies and laws which ensure that competition in the marketplace is not restricted in a way that is detrimental to society.[78] Governmental measures that directly affect the behavior of enterprises

[72] Joekes and Evans, cited above at note 55,p.2
[73] Ibid
[74] History of Competition Laws in Different Countries, (http://www.SSRN.com.pdf), last visited on June13, 2013 p.2.
[74] Id
[75] M. Brouwer, US and EU Competition Policy on Abuse of Dominance in High Tech Industries, (2011), p.2.
[76] Id
[77] K.Suzuki, Competition Law Reforms in Britain and Japan: Comparative Analysis of Policy Networks, (2004), p.xii. The term ''regulation'' refers to the various instruments by which governments impose requirements on enterprises and citizens. It thus embraces laws, formal or informal orders, administrative guidance and subordinate rules issued by all levels of government, as well as rules issues by non-governmental or professional self-regulatory bodies to which governments have delegated regulatory power. *See* Definition and scope of application of UNCTAD Model on competition law.
[78] History of competition laws in different countries, cited above at note 67,p.28

and the structure of industry constitute competition policy.[79] Competition Policy is an instrument to achieve efficient allocation of resources, technical progress, consumer welfare and to regulate concentration of economic power detrimental to competition.[80]

The adoption of competition policy in many countries of the globe after the 1990s is due to its economic and non-economic justifications. The result of shift in international political and economic situation can be mentioned as justification for the growing adoption of competition policy. The rationales for the adoption of competition policy, inter alia, are the global move from administrative state type to competition and regulatory state type, the rise of reform motive towards free market and the growing recognition that competition decentralizes decision making, facilitates economic restructuring, increases innovation, technology change and economic efficiency, enhances consumer welfare and assists economic development.[81]

To convene its primary tasks, for competition policy, two requirements must to be fulfilled. First, there is a need for an effective antitrust law to deal with the anticompetitive behavior of firms and secondly, there is a need to examine and evaluate government policies that impact on competition.[82]A workable competition policy has certain elements which are an integral part of it. Antitrust law, the regulation of monopolies, consumer protection and regulation of domestic policy and regulation are generally considered to be an integral parts of competition policy.[83]

Competition legislation is usually a law of general application which applies to all sectors of the economy unless specific exemption is made. Within in these general understanding, there is complex interactions between competition policy and other public economic policies. Although the nature of this interface is largely determined by country-specific factors, the list of public policies that influence the state of competition policy prevailing in an economy tends to be quite lengthy.[84] A paper published by World Bank and OECD stated the followings as a list of micro

[79] CUTS, Challenges in Implementing a Competition Policy and Law: An Agenda for Action,(2002),p.i.
[80] Ibid
[81] Ibid
[82] Medalla, cited above at note 8, p.8.
[83] Ibid
[84] The World Bank and OECD, cited above at note 4, p.7.

industrial government policies that can support or adversely impinge on the application of competition policy:[85]

- Trade policy, including tariffs, quotas, subsidies, antidumping actions, domestic content, regulations, and expert restraints.
- Industrial policy
- Regional development policy
- Intellectual property policy
- Privatization and regulatory reforms
- Science and technology policy
- Investment and tax policies
- Licenses for trades and professions

Due to their adverse impact on competition, the formulation and implementation of the above mentioned policies need to be taken in to account competition principles. It is if competition principles are taken into account in the formulation of the above mentioned policies that a certain country may establish competition in the market places.

Different government policies may lean to inject market distortions that impede the competitive process. The competition policy authority, therefore, need to be involved in proactively in government policy formulation to ensure that the market remain open, free, flexible, and adaptable.[86] Competition policy framework should be considered the fourth corner stone of government framework policies along with monetary, fiscal, and trade policies.[87] Competition policy, therefore, works most effectively when introduced together with other market-oriented reforms, such as the elimination of inefficient regulatory regimes, privatization and demonopolisation of industries, and liberalization of trade and investment.[88]

Competition policy that is consistent with the rule of law may indeed be helpful in attracting foreign direct investment.[89]Developing countries may be able to attract foreign direct investment

[85] Id, p.8
[86] Id, p.9
[87] Ibid
[88] S. Grewlich, Globalization and Conflict in Competition Law: Elements of Possible Solutions, (2001),p.6.
[89] Ibid

by implementing transparent and effective competition policy.[90] In this regard, competition policy may in fact enhance the attractiveness of an economy by providing a transparent and principle-based mechanism for the resolution of disputes involving such investment that is consistent with international norms that are widely accepted internationally.[91] Competition policy may indeed lead to vibrant markets and help optimize the benefits of foreign direct investment by encouraging participating companies to construct state-of-art production facilities, to transfer up-to-date technology in to host countries and to undertake training programmes, and by preventing the exploitation of consumers.[92]

The underlying principles or requirements in the accomplishment of competition policy tasks are mainly summarized in to two. These two major requirements for a competition policy to fulfill its tasks are, first is a need for an effective antitrust law to deal with the anticompetitive behavior of firms and second is a need to examine and evaluate government policies that impact competition.[93]

Competition policy may be influenced by different social and historical reasons and tends to respond to different objectives. There are a number of different economic, social and political objectives which may also form part of any particular competition policy. It has been recognized that the fundamental rationale for introduction of a set of competition policies has been to promote the economy of a given country and the well being of both its consumers and its industries generally.[94] In addition to these fundamental objectives, there are also various supplementary objectives of competition policy that may be mentioned. It includes, among others, protecting small businesses, preserving the free enterprise system, and maintaining fairness and honesty.[95]

[90] Id, p.7
[91] Ibid
[92] D.Anderson, Issues concerning Economic Development and International cooperation, in The work of the WTO working Group on Interaction between Trade and completion policy, (1999),p.5
[93] Medalla, cited above at note 8, p.8.
[94] Id,p.71
[95] The World Bank and OECD, cited above at note 4, p.2.

2.1.1 MAJOR OBJECTIVES OF COMPETITION POLICY

While many objectives can be ascribed to competition policy, the most common of the objective cited is the maintenance of competitive process or free competition, or the protection or promotion of effective competition.[96] The basic objectives of competition policy is also to maintain and encourage competition in order promote efficient use of resources while protecting the freedom of economic action of various market participants.[97]

2.1.2 SUPPLEMENTARY OBJECTIVE OF COMPETITION POLICY

In response to sociopolitical concerns, various objectives of competition policy other than economic efficiency and enhanced consumer welfare have been identified.[98] These include protecting small businesses, preserving the free enterprise system, and maintaining fairness and honesty. Competition polices in addition to the general objective discussed above, have seen as a way of achieving a number of other objectives as well. These are pluralism, decentralization of economic decision making, prevention of abuse of economic power, promotion of small businesses, fairness and equity and other socio political values.[99] These supplementary objectives tend to vary across jurisdictions and overtime, reflecting the changing nature and adaptability of competition policy as it seeks to address current concern of society while remaining steadfast to the basic objective.[100] An evaluation of goals of competition policy reveals that competition is not an end by itself; rather, it is a means to achieve other goals, including competitive prices, the optimal allocation of resources in society, the optimal introduction of new products and processes and optimal level of productive efficiency.[101]Competition policy can be an effective tool in reducing corruption, ensuring that consumers gain from liberalization and trade reform, and limiting the power of the largest corporations nationally, regionally, and globally.[102]

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[96] Ibid
[97] Id,p.8
[98] Id ,p.4
[99] Id, ,p.8
[100] Ibid
[101] S. Crampton and A. Facey, Revisiting Regulation and Deregulation Through the Lens of Competition Policy: Getting the Balance Right, (2002), p.20.
[102] Joekes and Evans cited above at note 55, p.11.

2.2 COMPETITION LAW

The first modern expressions of what we now call competition law started in North America with the Canadian *Combines Act* of 1889 and the (USA) *Sherman Antitrust Act* of 1890.[103] These laws resulted from a revolt of the rural and urban poor against the power of what were called the industrial trusts, which controlled large parts of commerce through collusion and abuse of their huge economic power.[104] The laws were also passed to head off more populist and radical responses to an increasingly abusive form of industrial capitalism.[105] The proliferation of modern competition law only really occurred after World War II.[106] Although, previously, many countries had some market-regulating rules (most European countries have had such laws since the middle Ages), they tended to be biased in favor of the largest and most powerful firms and guilds and against the consumer and smaller players.[107]

Competition law can be defined as a set of rules that govern the way that businesses interact with each other in the marketplace.[108] Competition is a force that creates initiatives for increasing productivity in the economy and ensures the satisfaction of consumer wants and needs.[109]

Competition has been acknowledged as important force bringing about economic development and growth over a longer period of times. The transition from a centrally-controlled to a market based economy is challenging due to governments uncertainty with the restructuring of economic system. Changing the economic system requires commitment from government and establishment of legal and structural framework of economy. As competition operates best in a free-market economy, the challenges facing developing economy is to come up with an effective mechanism of transition towards a free market.[110]

Competition legislation is usually a law of general application; it applies to all sectors of economic activity unless special exemptions are provided.[111] It is a general principle to organize

[103] Id, p.3
[104] Ibid
[105] Ibid
[106] Id ,p.5
[107] Ibid
[108] Medalla, cited above at note 8, p.16.
[109] Moges Kibre, Policy-induced Barriers to Competition in Ethiopia, (2008), p.8.
[110] Id, p.1
[111] Ibid

the economic system of a country. It follows that the first reform recommendation about competition law is that it should apply as broadly as possible.[112] The scope and nature of exclusion of certain sectors in different jurisdiction is similar and the common examples are in the area of agriculture and cooperatives, labour, intellectual property and performing rights, infrastructure industries, financial services, media and self-regulation of professional services.[113] Competition is not necessarily a natural state for many markets. In some, such as gas, water, and electricity markets, the need for major infrastructure impedes competition. But in other services and goods markets, policies that promote competition can be used to encourage fair play among firms, to shed light on other-wise murky pricing and contracting practices, and to open up opportunities for small- and medium-sized enterprises to grow.[114]

The end result and goal of competition is to establish workable competition. Workable competition has certain indicators which can be expressed in terms of structure, conduct, and performance.[115] According to *Scherer and Ross*, indicators of workable competition are the followings:[116]

Structure

- The number of traders is at least as large as economies of scale permit;
- There are no artificial barriers to entry and mobility and
- There are moderate and price-sensitive differences in the quality of the products offered

Conduct

- Some uncertainty exists as to whether rival firms will try to increase sales and market share by lowering the prices of their products;
- Firms strive to attain their goals independently, without collusion;
- There are no unfair, exclusionary, predatory, or coercive tactics;
- Inefficient suppliers and customers are not shielded permanently;
- Sales promotion in informative, or at least not misleading and

[112] Ibid
[113] OECD Global Forum on Competition, Regulatory Reform, (2004), P.3.
[114] Joekes and Evans, cited above note 55,p.2.
[115] Id ,p.4
[116] Scherer and Ross(1991) as quoted in Joekes and Evans, cited above at note 48,p.4.

- There is no persistent, harmful price discrimination.

Performance

- Firms' production and distribution operations are efficient and not wasteful of resources ;
- Output levels and product quality (i.e. variety, durability, safety, reliability and etc.) is responsive to consumer demands;
- Profits are at levels just sufficient to reward investment, efficiency, and innovation;
- Prices encourage rational choice, guide markets towards equilibrium, and do not intensify cyclical instability;
- Promotional expenses are not excessive and
- Success accrues to sellers who best serve consumer wants.

The origins of modern competition law were, thus, a response to abuse by firms. The term competition law and unfair competition law is sometimes[117] confusing and used interchangeably. In the context of some national legal regime the terms have different concepts.[118] Competition law includes two distinct legal regimes; one protects competitors against unfair competition and the other protects the process of competition from restraints.[119]Unfair competition law regimes contain principles and procedures that entitle a private party to take legal action against an economic actor who has engaged in conduct that is deemed 'unfair' and thereby harmed the economic interest of the plaintiff.[120] Unfair competition law is often understood as part of or closely related to tort law and is specifically intended to protect private economic interests.[121]

2.2.1 OBJECTIVES OF COMPETITION LAW

Competition law promotes economic efficiency and social welfare by prohibiting restrictive business practices and creating a level playing field for firms. Competition is a crucial factor in driving growth. First, it places pressure on firms to increase their efficiency.[122] Second, it ensures

[117] F.Gerber, "Competition Law and The WTO: Rethinking the Relationship," Journal of International Economic Law, Vol.10, No.3 (2007), pp.707-724.
[118] Ibid
[119] Ibid
[120] Ibid
[121] Ibid
[122] Competition and growth: how can government policy help?'-(http://www.oft.gov.uk/news-and-updates,speeches/2011/1511), last visited on July 5, 2013

that more productive firms increase their market share at the expense of the less productive ones.[123] The lower productivity firms may then exit the market, to be replaced by higher productivity firms. Third, in the presence of competition, firms will aim to innovate to gain a cost advantage, to differentiate their products, or to bring new products to the market place.[124] The objective of competition law is to realize the aforementioned advantages of competition. To accomplish these, competition law should address private and public restrictions on competition. private restriction on competition are among others, price-fixing cartels or abuse of market power by dominant firms and the impact that they can have on efficiency and innovation are well known.[125] It is also essential to recognize that governments can also have an adverse impact on competition, and as a result, the growth of a particular public sector.[126]

2.2.2 COMMON ELEMENTS IN COMPETITION LAW

Competition law is basically to address private and public restrictions on competition.[127] The model law on competition put forward by the United Nations conference on Trade and Development (UNCTAD) outlines the aim of competition law as:[128]

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

Despite existence of different competition rules in scope and details among different countries of a globe, there are certain principles which are common and essential elements in competition law of many countries. These principles are principles framed under model law on competition of the United Nations. The principles are, control of abuse of dominant position, Merger and cartel prohibitions. These principles are common in many countries competition law including the Ethiopian Trade practice and consumer protection proclamation. The following sub-topics will address these three main principles in details.

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[123] Ibid
[124] Ibid
[125] Id, p.2
[126] Ibid
[127] United Nations Conference on Trade and Development, cited above at note 50,p.14
[128] Id, chapter I

2.2.2.1 ABUSE OF DOMINANT POSITION

Abuse of a dominant position, or monopolization, is one of the most challenging areas of competition law in both developed and emerging markets.[129]A firm holds a dominant position when it accounts for a significant share of a relevant market and has significantly larger market share than its next largest rival.[130] The concept of a dominant position of market power refers to anti- competitive business practices in which a dominant firm may engage in order to maintain or increase its position in the market.[131]A dominant position essentially means a business can act independently of its competitors and consumers, that is, it is strong enough to operate without having to take account of the reaction of its competitors or consumers.[132] A business may be dominant by its best performance of offering high quality product at lower price than its competitors.

Competition law provisions regarding abuse of a dominant position in different jurisdiction include certain common elements. These elements are, first, before the law can be applied, it is necessary to define the relevant market in which the possible abuse is realized.[133] Second, it is necessary to establish the existence of a dominant position by the firm or group of firms and

[129]The World Bank and OECD, cited above at note 4, p.69. "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common 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 competitive disadvantage;(d) making the conclusion of contracts subject to acceptance by other parties of supplementary obligation with the subject of such contracts" *see Article 82 of EU competition law*

[130] United Nations Conference on Trade and Development, cited above at note 50,p.35

[131] Id, 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. *See Ibid*

[132]Guide to the Functions and Records of the Competition Authority, (http://www.skillnets.ie/sites/skillnets.ie*pdf*) p.11, last visited on September 21, 2013.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.

[133] The World Bank and OECD, cited above at note 4, p.69.

third, it is important to identify specific practices that may be harmful to competition and assess their overall effects in the relevant markets.[134]

The approach taken by European Union concerning, the abuse of dominant position is that, size alone is no crime and there is no need to ask how a company acquired a dominant position in the first place.[135] The difference between a firm that has a dominant position versus one that does not is merely that the former "has a special responsibility not to allow its conduct to impair genuine undistorted competition".[136] What is prohibited is the abuse of dominant position. EU does not have to worry about dominant firms as such, in particular about the way they become dominant, as long as they do not also engage in abusive conduct.[137]Only when size and abuse come together, EU law draws the line and offers remedies.

There might be different market situations which evident anti-competitiveness of dominant position. The competition effect of dominant position may be examined against these situations in the markets. Abuses of dominant position in the market are evidenced by:

A. **Excessive prices**- An excessive price charge by firms having dominant position is one of the manifestations of abuse of dominant position. There might be different factors, such as increase in demand, high cost of production and exercise of market power, which may mentioned as a cause for price increment. Competition authority should take care of these factors in evaluating abuse of dominant position. Determining whether price charged by certain firm is excessive is a difficult task as various factors may be mentioned for the increment.
B. **Price discrimination**- Price discrimination is the practice of a seller charging different prices according to the profile of the customer and in the absence of appreciable cost of

[134] Ibid
[135] Emmert, cited above at note 30, p.16.
[136] Ibid
[137] Ibid

differences that might justify different prices.[138] In price discrimination a firm needs to have a customer who will pay different prices.[139]

C. **Tie-ins**-A tie-in is the sale of one product (the tying good) on condition that the buyer purchases another product (the tied good).[140] Such behaviors become abusive only when the firm has market power in the tying goods. Even when the firm has market power, detailed analysis of the purpose of the tie-in and market context required to categorize behavior as abusive.[141] Tying raises concerns for competition policy when it allows supernormal profits to be made in a properly defined market and this might be the case when tie-in practices raise entry barriers to competitors and enable exercise of market power in the tied market.[142]

D. **Refusal to deal**- A duty may not be imposed on a firm to cooperate with its competitors against their will. Refusal to deal is prohibited in a situation where dealing with the competitors does not force the firm in question to incur unnecessary expenses or damages and when the dealing is crucial for the business operation of the other competitors.[143]

E. **Predatory pricing**- Predatory pricing is the practice of a dominant firm selling its products at a price so low as to drive competitors out of a market, prevent new entry, and successfully monopolize the market.[144] The firm considers not the present loss but the future high returns.[145] Predation is prohibited because it is likely to lead to reduced output and higher prices in the future.

F. **Vertical restraints**- vertical restraints are restrictions that an upstream firm places on its downstream firm. The best example can be when the manufacturer or wholesaler place restraint on retailers. Vertical restraints include exclusive territories (downstream retailer

[138]The World Bank and OECD, cited above at note 4, p.74. If potential entrant believes that entry will be met with a predatory response, it may choose not to enter. Predatory pricing (setting price so low that they could be profitable only if they induce exit followed by substantially higher prices thereafter) is a costly and sometimes risky way to compete. *See Ibid.*

[139] Ibid

[140] Joekes and Evans cited above at note 55, p.74.

[141] Ibid

[142] The World Bank and OECD, cited above at note 4, p.75.

[143] Harka Haroye, "competition policies and laws: Major concepts and an Overview of Ethiopian Trade practice law," Mizan Law Review, Vol.2 No.1,(2008),p.41

[144]The World Bank and OECD, cited above at note 4, p. 77.

[145] Ibid

agrees to limit where it sells the product); exclusive dealing (retailer agrees not to sell rival products); and resale price maintenance (retailer agrees not to sell below prices established by manufacture).[146] Vertical restraints harm competition by being used to support collusion and raising rival costs, thus creating barriers to market entry.

It is not an easy task for competition authority to investigate anti-competitive effect of abuse of dominant position because some practices that may qualify as abuses may also promote efficiency. Accordingly, investigating alleged abuse of dominant position require great care of analyzing the anti-competitive effect against the possible economic efficiency it brings in the market.

2.2.2.2 MERGER CONTROL

Merger is an amalgamation or joining of two or more firms into an existing firm or to form a new firm.[147] Merger is a mechanism by which firms can expand the size of their economic activity or form new business. There are different ways through which firm may combine. One firm may purchase from another firm all of its outstanding securities, all or some of its operating assets, or a significant share of its outstanding securities.[148] Two firms may also exchange a security to form a single enterprise.

A variety of motives exist for mergers: to increase economic efficiency, to acquire market power (strength of a firm in a particular market), to diversify, to expand into different geographic markets, to pursue financial and research and development synergies, etc.[149]It is not all mergers that pose negative impact on competition. Some mergers pose no significant or no threat at all on competition. Many simply are investment by firms with available cash and do not affect

[146] Id ,79

[147] Joekes and Evans cited above at note 55, p.72. Mergers refer to situations where there is a legal operation between two or more enterprises whereby firms legally unify ownership of assets formerly subject to separate control. Those situations include takeovers, concentrative joint ventures and other acquisitions of control such as interlocking directorates. See *Definition and scope of application of UNCTAD Model on competition law.*

[148] The World Bank and OECD, cited above at note 4, p.41.

[149] Joekes and Evans, cited above at note 55,p.72

competition in the markets.[150] Some mergers, however, would seriously harm competition by significantly increasing the probability of exercising market power.[151]

Based on their likely effect on competition mergers can be classified in different categories. Mergers are classified in to three categories, namely Horizontal, Vertical and Conglomerate.[152] Horizontal mergers are between firms that produce and vend the same products or close substitutes, i.e. between competing firms.[153] The term horizontal signifies that the two enterprises are at the identical level in the chain of production. For example, it may be a situation in which two manufacturers of steel, two distributors of beer, or two retailers of electronics equipment competing for customers within a given geographic area. If significant in size, horizontal mergers can reduce competition in markets. Vertical mergers take place between firms at different levels in the chain of production- firms that have actual or potential buyer-seller relationships.[154] Vertical integration between firms operating at different stages of production usually increases economic efficiency, although they may sometimes have an anticompetitive effect.[155] Conglomerate mergers are neither horizontal nor vertical, that is, the firms neither produce competing products nor are in an actual or potential buyer-seller relationship.[156] Conglomerate mergers are mergers between firms in unrelated business activity. Sometimes this type of merger can also become anticompetitive.

Competition law of different jurisdiction prohibits anti-competitive practice of abuse of dominant position and anti-competitive restrictive agreement in addition to mergers. Anti-competitive mergers are those that significantly increase the likelihood of anti-competitive abuse of dominant position and anti-competitive restrictive agreements.[157] Horizontal mergers can be seen as best example since it reduces the number of independent actors in the market. Anti-competitive effect of horizontal mergers can be classified in to two broad categories; namely unilateral effects and coordinated effects.[158] A merger that has anticompetitive unilateral effects

[150] The World Bank and OECD , cited above at note 4,p.41
[151] Ibid
[152] Ibid
[153] Id,p.72
[154] Id ,p.42
[155] Id ,p.72
[156] Id ,p.42
[157] Ibid
[158] Ibid

creates a single firm with substantial market power or significantly increases the market power already enjoyed by a single firm.[159] Merger is with highest possibility of creating monopoly or high market power in the worst situation.[160] A horizontal merger with anti-competitive coordinated effect may reduce competition by making it easier for the firms remaining in the market to coordinate their behavior.[161] Horizontal mergers with coordinated effect can expressed in the explicit or implicit agreements over the price to be charged, which seller to serve certain geographic area and which seller to serve particular customers.[162] The successfulness of horizontal mergers with anti-competitive coordinated effect depends on the following four conditions:[163]

- All significant firms in the market must be persuaded to join the colluding group;
- These firms must then able to agree on their future anticompetitive behavior;
- The firms must be able to detect whether a participating firm is cheating on the agreement in order to gain more its fair share of sales; and
- The firms must be able to collectively punish such a cheating firm so as to maintain the terms of coherence of the original agreement.

Vertical mergers are less likely to result in a loss of competition because they do not immediately reduce the number of competitors in a market.[164] On the other hand, vertical merger may enhance a dominant firm's position by increasing the difficulty of entering its market.[165] In addition to enhancing dominant position which can prevent market entrance for other firm, vertical merger may also facilitate collusion among firms at a given level in the manufacturing or distribution chain which can be anticompetitive.

As it was discussed above conglomerate mergers involves firms operating in unrelated markets. Conglomerate mergers are ignored due to its anti-competitive effect. The most important point to be considered in conglomerate arrangement is the financial strength it brings to the concerned parties. A considerable of increase in the financial strength of the combined enterprise could

[159] Ibid
[160] Ibid
[161] Id,p.43
[162] Ibid
[163] Ibid
[164] Id ,p.44
[165] Ibid

provide for a wider scope of action and leverage vis- a vis competitors or potential competitors of both the acquired and the acquiring enterprises.[166] This is more visible if one or both of the firms are in dominant position of market power.

2.2.2.3 CARTEL PROHIBITION

Cartels have been in practice by business communities for over a long period of time. Adam smith, often recognized as the father of modern economics, wrote in 1776 in the Wealth of Nations:

> *" peoples of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."*[167]

A cartel is an illegal agreement between two or more competitors not to compete with each other.[168] Cartels can further be identified as arrangement(s) between competing firms designed to limit or eliminate competition between them, with the objective of increasing prices and profits of the participating companies and without producing any objective countervailing benefits.[169] Agreements among enterprises are basically of two types, horizontal and vertical.[170] Horizontal agreements are those concluded between enterprises engaged in broadly the same activities, i.e. between producers or between wholesalers or between retailers dealing in similar kinds of products.[171] Vertical agreements are those between enterprises at different stages of the manufacturing and distribution process, for example, between manufacturers of components and manufactures of products incorporating those goods, between producers and wholesalers, or

[166] United Nations Conference on Trade and Development, cited above at note 50, p.55.
[167] The World Bank and OECD, cited above at note 4.p.21.
[168] There are two main ways in which cartels can be treated in competition law. The first is to treat all cartels as illegal, meaning that practices such as price-fixing and other cartel-related behavior violate the law regardless of the market power of participants, their motives, or the purported business justifications. The second way is to use the rule of reason analysis, meaning that it is up to the competition authorities to prove the harmful of economic effects of cartels. *See,* The World Bank, Building Institutions for Markets, World Development Report, (2002), p.24. *can be accessed at World Bank website*
[169] Joekes and Evans, cited above at note 55,p.70
[170] Ibid
[171] United Nations Conference on Trade and Development, cited above at note 50,p.22

between producers, wholesalers and retailers.[172] There are no pro-consumer benefits from cartels, and because they are blatantly anti-competitive, cartels are usually secret conspiracies.[173]

Cartels agreements may be in written or oral forms. Whenever it was in written form there would be no legal controversy as to its existence. Enterprises, most of the time, refrain from entering into written form agreement, especially where there is clear prohibition by law. They prefer the informal or oral agreements, because such agreements raise the problem of proof, since it has to be established that some form of communication or shared knowledge of business decisions has taken place among enterprises and establishment of such evidence is cumbersome.[174] Proof in such a case depends on circumstantial evidence.[175]

Cartels are manifested in different fashion of agreements. Followings are some to mention:

1. ***Price fixing***- price-fixing is a term generically applied to a wide variety of actions taken by competitors having a direct effect on price.[176] Price fixing cartels aim to directly ensure that cartel members are able to charge higher prices for specific goods or services than they could if they competed with each other.[177] In addition to simple agreements on which price to charge, the following are also considered as price-fixing:[178];

- Agreements on price increases;
- Agreements on standard formula according to which prices will be computed;
- Agreements to maintain a fixed ratio between the prices of competing but non-identical products;
- Agreements to eliminate price discounts or establish uniform discounts;
- Agreements on credit terms that will be extended to customers ;
- Agreements to remove products offered at lower prices from the markets so as to limit supply and keep prices high;
- Agreements not to reduce prices without notifying other cartel members;

[172] Ibid
[173] Guide to the Functions and Records of the Competition Authority, cited above at note 132, p.10.
[174] Ibid
[175] Ibid
[176] The World Bank and OECD, cited above at note 4, p.22.
[177] United Nations Conference on Trade and Development, cited above at note 50, p.10.
[178] The World Bank and OECD , cited above at note 4,pp.22-23.

- Agreements to adhere to published prices;
- Agreements not to sell unless agreed-on price terms are met; and
- Agreements to use a uniform price as the starting point for negotiations.

2. ***Market sharing***- market sharing cartels occur where cartel members agree among themselves to dived up the market or decide who should get a particular contract.[179] In market sharing, firms can control price by allocating among themselves customer or markets. The allocation can be made on geographically or customers or classes of customers.
3. ***Limiting production***- through controlling the amount of goods or services provided, the cartels make the price high and take pleasure in the benefit.
4. ***Bid rigging or collusive tendering***- occurs where competing undertakings agree on strategy for how they will bid for a particular contract.[180] Bid rigging is an agreement between parties over which competitor will in a tender-often from government agencies.[181] There are numerous and various forms of bid-rigging. These can generally be categorized in Bid suspension, Complementary bidding and Bid rotation. Bid suspension is an agreement where one or more competitors agree to refrain from tendering or to withdraw a previously submitted tender so that another company can win the tender.[182] In Complementary bidding the competing companies agree among themselves as to who should win a tender, and then agree that the others will submit artificially high bids to create the appearance of vigorous competition.[183] Bid rotation is the agreement where the competitors take turns being the winning tender, with the others submitting high bid.[184]

Cartels can be practiced by party sellers and buyers in the market with the view to avoid competition. The most common types of cartels agreements among sellers are price-fixing agreements, bid-rigging agreements, customer allocation agreements, territorial allocation

[179] United Nations Conference on Trade and Development, cited above at note 50, p.10.
[180] Id,p.11
[181] The World Bank and OECD, cited above at note 4,p.23
[182] Ibid
[183] Ibid
[184] Ibid

agreements, and output restriction agreements.[185] The most common cartels among buyers are price-fixing agreements, allocating agreements and bid-rigging agreements.[186]

Cartels are generally harmful to the society as a whole since the participating institution charges high price than it would in competition market place. Cartels are illegal act and many countries establish sever sanctions, usually in the form of heavy fine. In the United States and Canada cartels are prosecuted as crimes.[187] The fine or penalty imposed should be sufficient enough to deter cartels agreement. Cartels are difficult to detect, and unless penalties are very stringent, conspirators may feel that the benefits from the illegal conduct will outweigh the risk of punishment.[188] Thus fines must exceed the expected profit from cartels.

2.2.3 CHALLENGES IN INTRODUCING COMPETITION LAW

Challenges are many folds in introducing competition law and it is more common in developing economies.[189] Many countries do not have a competition law and the reason for these might be first, there is lack of awareness about competition law in the country or lack of capacity to design and enact the law and secondly, it is either believed not to be necessary or there is opposition to it.[190]In developing economies barriers to competition in domestic markets arise from public policy and onerous regulations on potential new entrants or exit barriers. In developing countries, competition law and policy may face many challenges. Among the key ones are ensuring political and societal support, enforcing the laws with limited resources, and dealing with cross-border enforcement problems.[191] The problems faced in all countries and made more difficult in developing countries include getting the law before legislative bodies, getting that law through legislative bodies, and then ensuring that the authority charged with the task of enforcement has the resources needed to carry out the job.[192] All these require political and public support. Lack of resource is a determinant obstacle to the enforcement of competition policy and law. The required resources are not just financial, but include institutional capacity, particularly skilled

[185] Id, P.21
[186] Ibid
[187] Id,P.24
[188] Id, P.24
[189] CUTS, cited above at note 79, p.10.
[190] Ibid
[191] Joekes and Evans, cited above at note 55,p.11
[192] Id, p.12

human resources, and wider societal capacity to engage with reform process.[193]Any country introducing a competition law will need judges and lawyers trained in competition law as well as skilled staff able to indentify anticompetitive behavior.[194]

2.3 COMPETITION POLICY VERSUS COMPETITION LAW

Despite the fact that the common objective of competition policy and law is to preserve and promote competition as a means to ensure the efficient allocation of resources in an economy, certain distinctive features of the two should be considered. Although competition law is one component of competition policy, competition policy and law are not identical. Competition policy could be taken as a positive instrument because it facilitates competition, while competition law could be regarded as a negative instrument because it prevents anti-competitive practices.[195]

Competition and the policies that help to underpin it are among the most important elements of modern regulation.[196] Almost every government around the world relies on competition to deliver a more efficient economy and help drive economic growth.[197] Most of those governments are also committed to developing the policy tool kit that lets them harness the process of competition and stop those who might seek to abuse it.[198] Competition and the competition policy tool kit can also be used to eliminate corruption and rigged bidding process and thus maximize the value of public expenditure.[199]

Despite the fact that, the word competition and competition policy are sometimes confusing and used interchangeably, it is important to identify the distinction between it. Competition policies have existed for hundreds of years and are known as market regulating laws which are designed to ensure fair play field in the marketplace. Competition is a process through which interaction in

[193] Ibid
[194] Ibid
[195] Harka Haroye, cited above at note 143, p.38.
[196] Joekes and Evans cited above at note 55, p.2.
[197] Ibid
[198] Ibid
[199] Ibid

the market place is regulated and competition policy is a curative when that process fails to work.[200]

The object of competition law is, generally, twofold: first, to ensure that anticompetitive behavior and agreements are restricted with the object of competition, second, to assure that normal market dynamics occur.[201] Competition policy is largely intended to cure abuses in the marketplace (cartels and barriers to rivalry) or to ensure that future abuses do not occur (by blocking mergers).[202] To complicate matters, competition policy includes things like advocacy and coordination with government departments that go beyond competition law.[203] Competition policy refers to those governmental measures that directly affect the behavior of enterprises and the structure of industry.[204] An appropriate competition policy includes both micro-economic policies and competition law. Competition law is the enactments of legislation that aim at lessening anticompetitive practices by the private sector in the marketplace. Competition law and policy are part of a tool kit that all governments need and most use to deal with the modern world economy.[205]Competition policy may refer to all government measures having an impact on the conditions of competition in the markets which is wider than implementation of competition law.

2.4 AN OVERVIEW OF ETHIOPIAN TRADE COMPETITION AND CONSUMERS PROTECTION LAW

Ethiopia has gone through different phases of economic development. The economic system of the country has been from market-oriented mixed economy (pre-1974), extreme state controlled centrally planned economy (1975-1991) and to a hybrid of state-controlled and market-oriented economic development (1991- to date).

Following the takeover of power by pro socialism regime in 1974, almost all economic establishments were nationalized. All modern economic establishment including land, banks and

[200] Id ,p.3
[201] Id ,p.6
[202] Ibid
[203] Id
[204] Cuts, All About Competition Policy and Law for the Advanced Learner, (2000), p.17. as quoted by Harka Haroye, cited above at note 136.
[205] Joekes and Evans, cited above at note 55,p.6.

insurance companies, manufacturing, transport, trade enterprises, commercial farms, urban rented houses, etc., were nationalized.[206] With regulated markets and controlled prices, even the traditional sector came under the control of the centrally planned economy.

With a change in political regime in 1991, the restructuring of economic system begins. There were key policy reforms undertaken to restructure the economy. Those key policy reforms includes, economic development strategy, industrialization Strategy, Financial policy, Trade policy, Privatization, Monetary and Exchange rate policies, investment policy and restructuring and competition.[207]

It was in 2003, for the first time that, competition law of the country was proclaimed. This law was named Trade Practice Proclamation. Many critique may be raised against this Proclamation because it mixed up competition and regulation. It failed to fairly address basic principles in competition law such as Mergers. It mainly dealt with abuse of dominant positions and other competition related matters including consumers' protection. It was, therefore, not normally defined as competition proclamation as it involved issues outside competition such trade policy, unfair competition, anti-dumping, and price regulation.[208] Its major objectives include: securing a fair competitive environment through the prevention and elimination of anticompetitive environment through prevention and elimination of anticompetitive and unfair trade practice; and safeguarding the interest of consumers through the preventions and elimination of restraints on the efficiency supply and distribution of goods and services.[209]

Trade practice proclamation was repealed and replaced by Trade C competition and Consumers Protection Proclamation in 2014.[210] The new proclamation is better than the former one in addressing competition issues. Like the former proclamation, the new one has addressed certain issues outside competition such as consumer's protection, unfair competition and price regulation. The latter proclamation is better in addressing competition matters, because it deals with the basic principles in competition laws which are abuse of market dominance, regulation of restrictive agreements and regulation of mergers. Unlike the repealed one, this Proclamation

[206] Moges Kibre, cited above at note , p.3.
[207] Id ,pp 3-6
[208] The Trade Practice Proclamation, cited above at note 21
[209] *See Id , the preamble*
[210] Trade Competition and Consumers Protection Proclamation, cited above at note 22.

may, therefore, be considered as competition law of the country. Under the following topics, an overview of the Trade Competition and Consumers Protection Proclamation will be discussed. The discussion will not only be about competition issues as the Proclamation itself addresses some related matters. Competition and related matters addressed in the Proclamation are the followings:

2.4.1 ABUSE OF MARKET DOMINANCE

One of the anticompetitive acts prohibited under Ethiopian competition law is abuse of market dominance. It is an important thing to define the concept and scope of abuse of market dominance in competition law in order to assess (determine) the existence of it. Ethiopian Trade Competition and Consumers Protection Proclamation, here in after ETCCPP or the Proclamation, defined abuse of market dominance as an act in which a person either by himself or acting together with others in a relevant market, is deemed to have a dominant market position if he has the actual capacity to control prices or other conditions of commercial negotiations or eliminate or utterly restrain competition in the relevant market.[211] The general message of the definition is that the anticompetitive business practice of enterprise or business person having dominant position is prohibited for the reason it can eliminate or affect competition.

Dominant position in concept is about the size an enterprise has in the market and it is not a crime by itself in many jurisdictions competition law. The questions of liability come, when the position is abusive (anticompetitive). The ETCCPP seems to be in line with this framework as under Art.5 it states the principle that no business person may individually, or jointly, with others carry on commercial activity by openly or dubiously abuse the dominant position he has in the market. Here it should be noted that the fact that a firm has dominant position does not entail to liability. Under the ETCCPP, it is not all acts of abuse of market dominance that entail liability. Exception is stipulated in the Proclamation under Art.5 (2). When a business person conducts business to achieve legitimate business purposes, by ensuring that the acts he commits are indispensable, decisive by their nature and cannot be achieved in any other ways, it does not

[211] Id , Art.6

amount to liability on the ground of abuse of market dominance.[212] Sometimes, a firm may become dominant by its best performance and liability does not follow from that.

There are certain common elements in the provision of competition laws of different jurisdictions as to abuse of dominant market position; which are defining relevant market, establishing the existence of dominant position and identifying specific practices that may be harmful to competition and assessing that effect. The ETCCPP adopted these elements in its provisions. Thus, Relevant markets is defined as the market that comprises goods or services that actually compete with each other or fungible goods or service that can be replaced by one other[213] As to the establishment of the existence of dominant position the ETCCPP provides that, a 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 in to the market or other factors as may be appropriate or a combination of these factors[214] Concerning the third elements which is identifying specific practice that may be harmful to competition, the Proclamation under Art. 5 list down acts of abuse of market dominance which are harmful to competition. The list of acts of abuse of dominant market positions which are harmful to competition constitutes the following:

1) Limiting production, hoarding or diverting or preventing or withholding goods from being sold in regular channels of trade;
2) With the view to restrain or eliminate competition, doing directly or indirectly such harmful acts, aimed at a competitor, as selling at a price below cost of production, causing the escalation of the costs of a competitor, preempt inputs or distribution channels;
3) Directly or indirectly imposing unfair selling price or unfair purchase price;
4) Contrary to the clearly prevalent trade practice refusal 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;
5) Without justifiable economic reasons, denying access by a competitor or a potential competitor to an essential facility controlled by the dominant business person;

[212] Id ,Art.5(2)
[213] Id, Art.6 (3)
[214] Id ,Art.6(1)

6) With a view to restrain or eliminate competition, impose discrimination between customers, in prices and other conditions in the supply and purchase of goods and services;
7) Without any justifiable cause and with the view to restrain or eliminate competition:
    a) Making the supply of particular goods or services dependant on the acceptance of competitive or non competitive goods or services or imposing restrictions on the distribution or manufacture of competing goods or services or making the supply dependant on the purchase of other goods or services sought by the customer;
    b) In connection with the supply of goods or services, imposing such restrictions as where or to whom or in what conditions or quantities or at what prices the goods or services shall be resold or exported.

It is stated in the ETCCPP that, the Council of Ministers may determine by regulation, the numerical expression of the degree of market dominance.[215] The determination of the existence of abuse of market dominance either numerically or in terms of acts needs an expert in the area. The fact, in the ETCCPP, that the power to numerically determine degree of abuse of market dominance given to the Council of Ministers is not logical and feasible. It would better and logical if such power is given to Trade Competition and consumers Protection Authority because of the assumption that an expert on the area would be there than in the Council of Ministers.

Abuse of market dominance is anti-competitive and may significantly harm the economic activities of a country. Despite the existence of this fact, abuse of market dominance may bring about efficiency. This is a situation where a firm becomes dominant by its best performance of offering high quality product at lower price than its competitors. The ETCCPP provides for the circumstance by which Council of Ministers may exempt some trade activities from the application of the provisions of abuse of market dominance where the activities are deemed vital in facilitating economic development.[216]

[215] Id , Art.6(5)
[216] Id ,Art.(5)(3)

2.4.2 REGULATION OF RESTRICTIVE BUSINESS AGREEMENTS

Restrictive business agreements, in many jurisdictions called cartel, is an agreement among business entities not to compete with each other. The agreement is designed to limit or eliminate competition between enterprises with objective of increasing price and profits. The ETCCPP does not specifically address the issue of cartels. A restrictive business agreement for the purpose of the ETCCPP includes agreements, concert practice or decisions of associations of business persons.[217] The term agreement, in the Proclamation, includes mutual understanding, written or oral contract and operational procedures whether or not legally enforceable.[218] The Proclamation defined concerted business practice as a unified or cooperative conduct of business persons depicted in a way that does not look like an agreement and done to substitute individual activity.[219]

There have been two approaches as to the treatment of restrictive business agreements in competition law. The first one is to treat all cartels per se illegal regardless of the market power of participants, motives or purported business justification. The second approach is to use rule of reason analysis which depends on the proof of harmful effects of restrictive business agreements. ETCCPP adopted the latter approach as it set a principle under Art.7 which reads "*agreement or concerted practice or a decision by an association is prohibited if it has the object or effect of preventing, restricting or distorting competition*". A contrario reading of the provision is that restrictive business agreement is allowed as far as it does not prevent, restrict or distort competition. The illegality of the agreements depends on the proof that the agreements have harmful effect on competition. The Complaining party could substantiate its' complaint with evidence showing restrictive agreement is intended to prevent, restrict or distort competition.

Restrictive business agreements may be manifested in different fashions. Competition laws of different countries for lucidity purposes list down acts constituting restrictive business agreements. Accordingly, Art.7(1) &(2) of the ETPCPP list acts which constitute restrictive business agreements having impact on competition. The acts are the followings:

[217] Id ,Art.7
[218] Id ,Art.7(3)(a)
[219] Id ,Art.7(3)(b)

a. Agreements or concerted practices or decisions by an associations of business persons in a horizontal relationship and having the object or effect of directly or indirectly fixing prices, collusive tendering and allocating customers, or marketing territories or production or sale by quota
b. Agreement between business persons in a vertical relationship that has an object or effect of setting minimum retail price.

As it can be seen from the above list, the Proclamation prohibits both horizontal and vertical restrictive business practice. For the purpose of the ETCCPP, Horizontal agreements or relationship is deemed to exist between competing business persons in a certain market, whereas vertical relationship is deemed to exist between business persons and their customers or suppliers or both.[220]

ETCCPP does not only list restrictive business agreements leading to liability but also sets the way out available for a person accused of such acts. The person accused of anticompetitive restrictive business agreements may defend itself by proving that the technological or efficiency or other pro-competitive gains of the agreement outweigh the detriment of the prohibited acts.[221]

2.4.3 REGULATION OF MERGER AND UNFAIR COMPETITION

Merger is a joint of two or more firms into an existing form or to form a new one. It is a mechanism by which a firm expands its size in economic activities. Merger, in principle, is anticompetitive but it should be noted that not all mergers pose negative impact on competition.

In the ETCCPP merger is deemed to have occurred when two or more business organizations previously having independent existence amalgamate, or when such business organizations pool the whole or part of their resource together to carry on certain business.[222] Merger may also occur by directly or indirectly acquiring shares or securities or assets of a business organization by a person or group of persons jointly or the business of another person through purchase or any other means.[223]

[220] Id ,Art.7(3)(C)
[221] Id ,Art.7(1) &(2)
[222] Id ,Art.9(3)(a)
[223] Id ,Art,9(3)(b)

Similar to the previously discussed issues (abuse of market dominance and restrictive business agreements); the principle in Merger pursuant to the ETCCPP is that not all merger cases are prohibited. Merger is prohibited where Trade Competition and Consumers Protection Authority decided that it causes or is likely to cause a significant restriction against competition or eliminates competition.[224] Notification of Merger shall be made any person who proposes to enter in to an agreement or arrangement of merger shall give notice to the Authority by disclosing the details of the proposed merger.[225] Pursuant to Art. 9(2) of the ETCCPP no Merger arrangement shall be implemented before ETCCPA grants permission. ETCCPA may examine additional documents in order to reach the decision of granting or denying Merger application.[226] The ETCCPA shall have the power to examine and decide on merger cases. Once it decided that merger is anticompetitive, it shall notify the body that conducts commercial registration.[227]

Sometimes, even though ETCCPA found that the Merger is anticompetitive, it may permit Merger where an applicant justifies gains from Merger outweigh its anticompetitive effect.[228] The term competition law and unfair competition are sometimes confusing and may be used by many persons interchangeably. However, it should be noted that, the critical examination of different literature and competition law of different countries demonstrate that the terms are not identical. Unfair competition law contains principles and procedures that entitle a party to take legal actions against economic actors who engage in unfair business conducts. Unfair competition law is part of or related to tort law than competition. Competition law on the other hand is a set of principles that governs how a business person acts in a market place. It sets equal playing level fields for business actors. Competition and unfair competition law are two distinct legal regimes governing different subject areas.

The provisions under the ETCCPP dealing with unfair competition is a distinct legal regime providing principles and procedures available to private parties through which they may proceed to get remedy for unfair business conduct committed against them.[229] In the Proclamation it is that provided that any act or practice carried out in the course of trade, which is dishonest,

[224] Id, Art,9(1)
[225] Id ,Art,10(1)
[226] Id ,Art.10(3)
[227] Id ,Art.11(1)(b)
[228] Id .Art.11(2)
[229] Id ,Art.8(1)

misleading, or deceptive and harms or is likely to harm the business interest of a competitor shall be deemed to be an act of unfair competition.[230] Art.8 (2) of the Proclamation lists acts and practices of unfair competition which are prohibited. The prohibited acts are the following:

a) Any act that causes or is likely to cause confusion with respect to another business person or its activities, in particular, the goods or services offered by such business person;
b) Any act of disclosure, possession or use of information, without the consent of the rightful owner of that information, in a manner contrary to honest commercial practice;
c) Any false or unjustifiable allegation that discredits, or is likely to discredit another business person or its activities, in particular the products or services offered by such business person;
d) Comparing goods and services falsely or equivocally in the process of commercial advertisement;
e) With a view to acquire an unfair advantage, disseminating to consumers or users, false or equivocal information including the source of which is not known, in connection with the prices or nature or system of manufacturing or manufacturing place or content or suitableness for use or quality of goods and services;
f) Obtaining or attempting to obtain confidential business information of another business person through his ex-employee or obtaining the information to pirate his customers or to use for purposes that minimize his competitiveness; and
g) Other similar acts specified by regulation to be issued for the implementation of this proclamation

2.4.4 CONSUMERS PROTECTION

In a number of countries, consumer protection legislation is separate from competition legislation. In some countries, however, such as Australia, Hungary, Poland and France, the

[230] Id ,Art.21(1)

competition law contains a chapter devoted to consumer protection.[231] Undoubtedly, competition issues are closely related to the protection of consumers' economic interests.

In principle competition legislation and consumers' protection legislation are separate legal regimes despite many of competition issues are closely related to protection of consumers' economic interest. The ETCCPP has a separate chapter dealing with consumer protection. The writer is of opinion that, the Ethiopian competition law would better separate competition legislation from consumer protection. The proclamation has recognized the rights of consumers as provided for by UN Guidelines for consumer protection (UNGCP). The best example for this is Article 14 of the Proclamation. Consumers rights enshrined under Article 14 of the proclamation are, the right to get sufficient and accurate information or explanation on the quality and type of goods and services he/she purchases; selectively buy goods or services; not to be obliged to buy for the reasons that he/she looked into quality or options of goods and services or he/she made price bargain; be received humbly and respectfully by any business person and to be protected from such acts of the business person as insult, threat, frustration and defamation; claim compensation or related rights thereof either jointly or severally from persons who have participated in the supply of goods or services as manufacturer, importer, wholesaler, retailer or in any other way for damages he has suffered because of purchase or use of goods or services.

The proclamation has tried to enforce consumer rights by requiring: The display of price of goods and services (Art.15), labeling of goods (Art.26), issuing of receipt (Art. 17), disclosure of the businesses(Art.18), Regulation of commercial advertisements(Art. 19) ,defects in goods(20),contractual waiver of rights(21) and Prohibition of acts that are considered to be unfair and misleading (Art.22).

[231] United Nations Conference on Trade and Development, cited above at note 50, p.64.

CHAPTER THREE

ENFORCEMENT OF COMPETITION POLICY AND LAW: THE GENERAL OVERVIEW OF THE INSTITUTION CONTROLLING COMPETITION

3.1 ESTABLISHMENT AND COUNTRIES EXPERIENCE OF THE INSTITUTION CONTROLLING COMPETITION

Functioning institutions and procedures make the difference between laws that may well stay dead letter, and laws that will be effectively applied.[232] A country should in addition to adoption of necessary substantive law, adopt an effective institution overseeing it. Recent enactments of legislation and legislative amendments in different countries show trends towards the creation of new bodies for the control of restrictive business practices, or changes in existing authorities in order to confer additional powers on them and make them more efficient in their functioning.[233] Governments have introduced competition laws, and competition authorities to enforce them, because of concerns about the anticompetitive behavior of firms, in response to economic crises, or because of international pressures, which may or may not be crisis induced.[234]In some countries, there has been a merging of different bodies into one empowered with all functions in the area of restrictive business practices, consumer protection or corporate law.[235] Ethiopia followed this approach as the Trade Competition and Consumers Protection Authority is empowered with competition matters, consumer's protection and unfair business practices.

In most member states of the European Union, competition authorities are granted a more or less independent status from political sphere.[236] One of the important aspects of independent competition authority is that the application and enforcement of competition rules cannot be affected by political consideration. Developed countries such as USA and EU member states needed decades to develop the sophisticated levels of competition oversight we find today.[237] Transitional and developing countries may follow the same course and essentially develop substantive laws, procedural laws, suitable designs and powers for competition authorities, as

[232] Emmert, cited above at note 30, p.23.
[233] United Nations Conference on Trade and Development, cited above at note 50, p.65.
[234] Building Institutions for Markets, supra note 168, p.23.
[235] United Nations Conference on Trade and Development, cited above at note 50, p.65.
[236] van de Gronden & de Vries, cited above at note 27,p.32.
[237] Emmert, cited above at note 30, p.25.

well as institutional and procedural rules for specialized courts, on their own in a kind of trial and error fashion.[238]

Taking the above mentioned facts as a background, the writer attempts to discuss experience and establishment of some countries institution controlling competition. Accordingly, the detailed experience of the following countries constitutes part of these discussions. In addition to the countries mentioned below, the writer tries to discuss other countries experience under the succeeding title '*organization and structure of competition authority'*. The criteria for selections are nothing but the more or less compliance of the countries' legislation with UNCTAD recommendation on competition.

3.1.1 Indian competition Act

In India the institution established to control Competition is named Competition Commission. The institution was established by Indian Competition Act of 2002 which was later amended in 2007. The commission established as a body corporate having its own legal personality.[239] As far as the composition of the Commission is concerned, the Commission consists of a chair person and not less than two and not more than six other members.[240] The chairperson and all other member shall be persons of ability, integrity and standing and who have special knowledge of, and such professional experience of not less than fifteen years in, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy.[241] The chairperson and other members of the Commission are appointed by the Central Government from a panel of names recommended a selection committee consisting of, the chief Justice of India or his nominee, the secretary in the Ministry of Corporate Affairs, the secretary in the Ministry of Law and Justice and two experts of repute who have special knowledge, and professional experience in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters including competition law and policy.[242] The Indian competition Act clearly stipulates tenure of time for chairperson as well as the other

[238] Ibid
[239] The Indian Competition Act, *2002,No.12 of 2003* as amended by the competition Act,2007,Art.7
[240] Id, Art.8(1)
[241] Id, Art.8(2)
[242] Id, Art.9(1)

members of the Commission. Accordingly, chairperson and the other members hold office for a term of five years and are eligible for re-appointment provided that they may not hold office after they attained the age of sixty-five years.[243] For the purposes of assisting the Commission in conducting inquiry in to the contravention of the provisions of competition Act and performing such other function provided by the Act, the central government may by notification appoint Director General.[244] For the efficient performance of its functions, the Commission may appoint a secretary and such officers and other employee as it considers necessary.[245]

The principal duties of the Indian Competition Commission are to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried out in the country's market.[246] The Commission has the power to inquire into any alleged contravention of the provisions of Competition Act and may give such orders as it thinks appropriate.[247] The Competition Commission has the power to impose penalty fort the contraventions of the provisions of Competition Act.[248] It shall also take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues.[249] The central government up on the approval of parliament by law allocates a sum of money to the Competition Commission.[250] Regarding legal protection mechanism, the Indian Competition Act provides for the establishment of two legal protection mechanisms. These are review by Competition Appellate Tribunal and as the last resort review by the Supreme Court of the country.[251]

3.1.2 South African Competition Act

The institution controlling competition in South Africa is known as the Competition Commission. The competition commission of South Africa has jurisdiction throughout the Republic of South Africa, it is a juristic person and must exercise its functions in accordance

[243] Id, Art.10(1)
[244] Id, Art.16(1)
[245] Id, Art.17(1)
[246] Id, Art.18
[247] Id, Art.19
[248] *See Id* from Art.42-48
[249] Id, Art.49(3)
[250] Id, Art.50.The competition commission has a source finance called ''competition Fund". The Fund constitutes all government grants received by the commission, the fees received under the competition Act and the interest accrued on the amounts on these moneys. *See* art.51(1)
[251] Id, Art.53A(1) and 53(T)

with South African Competition Act.[252] The Competition Commission is independent and subject only to the constitution and the law. It must be impartial and must perform its functions without fear, favor, or prejudice and each organ of the state must assist the Commission to maintain its independence and impartiality, and to effectively carry out its powers and duties.[253]

The functions of the South African Competition Commission as stipulated in the Competition Act are to implement measures to increase market transparency; implement measures to develop public awareness of the provisions of the Act, investigate and evaluate alleged contravention of the Act; authorize, with or without conditions, prohibit or refer mergers of which it receives notice.[254] It may refer matters to the competition tribunal; negotiate agreements with any regulatory authority to co-ordinate and harmonize the exercise of jurisdiction over competition matters within relevant industry or sector and ensure consistent application of the principles of the Act; participate in the proceedings of any regulatory authority; advise and receive advice from any regulatory authority and etc.[255]

The Competition Commission is headed by a Commissioner. The Commissioner must be appointed by the Minister of Trade and Industry from person with suitable qualifications and experience in economics, law, commerce, industry or public affairs for a term of five years with the possibility of reappointment.[256] The Minister of Trade and Industry must also appoint at least one person, and may appoint other persons, with suitable qualifications and experience in economics, law, commerce, industry or public affairs as Deputy Commissioner to assist the commissioner in carrying out the functions of the competition commission.[257] For the proper functioning of the institution, the commissioner may appoint inspector and other staff necessary.[258]

In South Africa, the adjudicative function of the Competition Commission is carried out by Competition Tribunal. The competition tribunal consists of a chairperson and not less than three, but not more than ten other personnel appointed by the president of the country up on

[252] Republic of South Africa competition Act, 1998, Art.19 (1), *Government Gazette, No.89 of 1998.*
[253] Id, Art.20(1) and (3)
[254] Id, Art.21(1)
[255] Ibid
[256] Id, Art.22(1) &2
[257] Id, Art.23(1)
[258] Id, Art.24 and 25

recommendation by the Ministry of Trade and Industry.[259] Regarding the qualification of members of the Competition tribunal South African competition Act provides that each members of the tribunal must be a resident citizen of the country, have suitable qualifications and experience in economics, law, commerce, industry or public affairs and committed to the purposes and principles enunciated in the Act.[260] A person may not be a member of the competition Tribunal if that person is an office-bearer of any party, movement, organization or body of a partisan political nature; is an un rehabilitated insolvent; is subject to an order of a competent court holding that person to be mentally unfit or disordered or has been convicted of an offence committed after the constitution 1993 took effect and sentenced to imprisonment without option of a fine.[261] Subject to re-appointment, the term of office of the chairperson and every other member of the competition tribunal is five years and no person may be appointed to the office of the chair person of the tribunal for more than two consecutive terms.[262]

The competent authority to review the decision of the competition tribunal in South Africa is Competition Appeal Court. The status of Competition Appeal Court is similar with that of a high court.[263] The Competition Appeal Court consists of at least three members, each one of whom is a judge of high court and two other members, each of whom is a citizen of South Africa, and is ordinarily resident in the republic and has suitable qualifications and experience in economics, law, commerce, industry or public affairs.[264]

The Competition Commission of South Africa is financed by the money that is appropriated by parliament to the commission, fees payable to the commission in terms of the Act, income derived by the commission from its investment and deposit of surplus and money received from any other source.[265] Financially the South African competition can be said independent as the allocation from government is made by sovereign power.

[259] Id, Art.26(1)
[260] Id, Art.28(1) and 2
[261] Id, Art.28(3)
[262] Id, Art.29(1)&2
[263] Id, Art.36(1)
[264] Id, Art.36(2)
[265] Id, Art.40(1)

3.1.3 Tanzanian Fair competition Act

In Tanzania, the competition law governing competition matters and the institution controlling it is known as the ***Fair competition Act*** *of 2003*. The institution controlling competition in Tanzania is Fair Competition Commission (herein after the Commission).[266] The Commission is independent and shall perform its functions and exercise its powers independently and impartially without fear or favor.[267] As far as the composition of the Commission is concerned it is constituted by five members who are; A chairman, who shall be a non-executive appointed by the president of the country; three non- executive members appointed by the minister responsible for the Commission and the Director General.[268] The appointment is made upon the recommendation by the Nomination Committee. Before maintaining a person as a candidate for appointment to the Commission, the nomination committee shall satisfy itself that the person is qualified for the appointment because of his/her knowledge of, or experience in, industry, commerce, economics, law, public administration or other related fields.[269] In order to maintain impartiality of the Commission and for the purpose of avoiding conflict of interest, a person shall not be qualified for appointment as a member of the commission if owing to the nature of the office he/she holds is likely to exert influence on the commission.[270] The fixed tenure of time for chairman and Director General is four years; for one member tenure is three years and for the remaining two members it is five years.[271] Members are eligible for reappointment for one further consecutive term but shall not be eligible for re-appointment thereafter.[272]

Numerous functions of Competition Commission are listed in the Fair competition Act and the following are the essentials to mention. The Commission shall, inter alia, promote public knowledge, carry out research into matters relating to competition and protection of the interest of consumers, investigate impediments to competition, overlook and comment on government

[266] The United Republic of Tanzania, *Fair Competition Act, No.8 of 2003*, Art.62(1).
[267] Id, Art.62(2)
[268] Id, Art.62 (6) A person appointed as the Director-General shall be graduate of a recognized university, possess at least ten years experience in one or more of the fields of management, law, economics or finance, satisfy the board that he is unlikely to have a conflict of interest, be willingness to serve as the Director –General and finally be in the opinion of the board otherwise well suited to perform the functions and duties of Director-General competently and honestly. *See Id second schedule*
[269] Id, Art.63(5)
[270] Id, Art.63(6)
[271] Id, Art.63(7)
[272] Id, Art.63(8)

policies and activity of regulatory authority on matters of competition.[273] It may also make representation in other government bodies on competition issues and represent the country at international fora concerned with matters relating to competition or the interest of consumers.[274] The Commission and any person may initiate a complaint against an alleged prohibited practice and the Commission may render a decision after thorough investigation and hearing of evidences.[275]

The funds of the Commission are from various sources. The funds of the Commission comprise of; fees not exceeding 2.5% of business licenses; any grants, donations, bequests or other contributions made to the Commission; funds allocated to the commission from different regulatory authority; funds allocated to the commission by Parliament, fees collected by the Commission and all other payment due to the commission in respect of any matter incidental to its functions.[276] Financially, it can be said that the Commission is independent as the sources are from its' own services and parliament approved fund of the government.

The Fair Competition Act of Tanzania establishes Fair Competition Tribunal as organ enabled to review the decision of the Competition Commission and the status of the tribunal is similar with that of the Tanzanian High Court.[277] The Tribunal shall consist of a chairman who shall be a person holding the office of a Judge of the High Court appointed by the President after consultation with the chief Justice and other six members appointed to serve on part time basis by the President of the country after consultation with the Attorney-General from the candidate nominated by a Nomination Committee.[278] As far as qualification is concerned, no person shall be appointed as a member of the Tribunal other than the chairman, unless he qualifies for appointment by virtue of his knowledge of, or experience in industry, commerce, economics, law or public administration.[279]

[273] Id, Art.65
[274] Ibid
[275] Id, Art.69
[276] Id, Art.78(1)
[277] Id, Art.83(1)
[278] Id, Art.83(2)
[279] Id, Art.83(3)

3.2 ORGANIZATION AND STRUCTURE OF COMPETITION AUTHORITY

In the organization of competition authority matters regarding composition of the Competition Authority (chairmanship and number of members) and the manner in which they are appointed, including the authority responsible for their appointment should be specified. The number of members of a competition authority differs from country to country. In some legislation the number is not fixed and may vary within a minimum and maximum number, such as in Switzerland and India.[280] Other countries state in their legislation the exact number of members, for example Algeria, Argentina, Brazil, Cote d'Ivoire and etc.[281]The legislation may also leave it to the chairman of competition authority to determine the number.

The qualification of persons to be appointed as chairmen and staff in terms of academic and experience is determinant and competition legislation sets the qualifications that any person should have in order to become a member of the authority. For example in Peru, members of the Multi sectorial Free Competition Commission must have a professional degree and at least ten years of experience in its respective field of knowledge.[282]In the appointment of persons on the job, verification of absence of conflict of interest is necessary. The legislation should state, persons in question should not have interests which would conflict with the functions to be performed. In Germany for example, member of the authority must not be owners, chairmen or members of board of management or the supervisory board of any enterprise, cartel, and trade industry association.[283]It is further necessary to stipulate the tenure of office of the chairman and members of the authority, for a stated period, with or without the possibility of reappointment, and the manner of filling vacancies. The tenure in office of the members of the competition authority varies from country to country. At present, members are appointed in Italy for 7 years,

[280] United Nations Conference on Trade and Development, cited above at note 50, p.66.
[281] Ibid
[282] Ibid .In Brazil, members of the Administrative Economic protection Council are chosen among citizens reputed for their legal and economic knowledge and unblemished reputation. In Chile, the National Economic Prosecutor must be a lawyer and have 10 years' professional experience or three years seniority in service. *See id.*
[283]Id. In India a person not have any financial or other interest likely to affect prejudicially his functions. *See Id*. In Hungary, the president, vice presidents, competition council members and other civil servant staff members of the competition authority may not pursue activities for profit other than those dedicated to scientific, educational, artistic, authorial and inventive pursuits, as well as activities arising out of legal relationships aimed at linguistic and editorial revision, and may not serve as senior official of a business organization, or a members of a supervisory board of directors. *See* Act *NO.LVII of 1996 on the prohibition of Unfair and Restrictive Market Practices of Hungary*, Articles 38(3) (d)

in Hungary for 6 years, in Algeria and panama for 5 years, and in Argentina for 4 years and Mexico for 10 years, and in Bulgaria, and Pakistan for 5 years.[284] Different legislation of different countries also provide for the possibility of reappointment to the post. For example in countries such as Thailand, the republic of Korea, Argentina, India, Canada and Australia, members have the possibility of being reappointed, but in the case of Brazil this is possible only once.[285] The manner in which removal of members of the authority is effected is crucial, since it would avoid arbitrary removal and ensure job security. The members of competition authority should also have possible immunity against prosecution or any claim relating to the performance of their duties or discharge of their functions. For any action done by good faith or under competition law, members of the authority should be immune from prosecution.

Structurally, as the researcher tried to note in the preceding topic, one of the advantages of establishing an independent competition authority is that, the decision regarding the application and enforcement of competition rules is not affected by political consideration. According to the commentary on UNCTAD model law on competition, the most efficient type of competition authority is the one independent of government body with strong judicial and administrative powers for conducting investigations and applying sanctions.[286] It is this trend that should be adopted by the countries on the road of introducing the institution, as it is very important, because it protects the competition authority from political influence and enable it to be efficient. By delegating competition law enforcement powers to an independent body, the legislature tries to guarantee that the application and interpretation of competition rules are mainly based upon economic and legal arguments alone, and is not shaped by political pressure.[287]

In the exercise of its powers, a competition authority must be independent from political forces, which essential means that there cannot be supervisory function of the Ministry of Justice or the Ministry of Commerce or any other branch of the executive.[288] It is generally accepted that decisions by competition authorities should be based on objective evidence, that those authorities should maintain a consistent respect for market principles, and that the decision-making process

[284] Id, p.67
[285] Id, p.67
[286] Id, p.66
[287] van de Gronden & De Vries, cited above at note 27,p.32.
[288] Emmert, cited above at note 30, p.24.

should be neutral and transparent.[289] The reasoning behind this view is that sound policy outcomes are assured only when decisions by the competition authority are not politicized, discriminatory or implemented on the basis of narrow goals of interest groups.[290]

The institutional budget and the positions and salaries of the experts working for the competition authority must be protected against politically motivated sanctions or cuts.[291] One way of achieving this is to connect the budget and salaries to those of other state institutions, such as the courts or the different ministries via a rule that any institutional budget and individual salary changes.[292] If the competition authority is deemed to need additional resources and/or the ability to pay higher salaries than those at other government agencies, one way of achieving this can be through a rule that allows the competition authority to keep a percentage of the fines it imposes for the enforcement of the competition rules.[293] The application fee collected by the authority can be also employed for the same purpose. Transparence and accountability should be in place in such a case against the potential abuse by the authority.

Governments need to ensure the independence of the competition authority in the appointment of its members. One suggestion is that the head of the authority be appointed by a committee or the parliament rather than by the president or the prime minister.[294] Independence of competition authorities from government ministries may be more important in developing than industrial countries, where there are more checks and balances in the political systems and where greater transparency protects the independence of competition authority.[295] Independence of competition authority from day-to-day political influence can affect the authority's capability to promote competition and public confidence in its work. Clearly competition authority must be independent from any enterprises or associations subject to its jurisdiction. Independence is seen

[289] United Nations Conference on Trade and Development, Independence and Accountability of Competition Authorities, (2008), p.3.
[290] Ibid
[291] Emmert, cited above at note 30, p.24.
[292] Ibid
[293] Ibid
[294] Building Institutions for Markets, cited above at note 168, p.26.
[295] Ibid

as important for consistent, predictable and transparent enforcement of competition law and advocacy of pro-competition regulatory reform.[296]

3.3 THE POWERS AND FUNCTIONS OF COMPETITION AUTHORITY

In Most legislation dealing with competition of different jurisdictions a competition Authority has a list of the functions and powers that the Authority possesses for carrying out its tasks and which provide a general framework for its operations. The important point to be noted here is that the functions of competition authority must be based on the principles of due process of law and transparency.

Competition authority might be conferred with different powers and functions to properly achieve its goal. The first and may be the most important power of a competition authority is the power of making inquires and investigations up on receiving complaints.[297] One of the important powers enabling competition authority to function well is investigative power. Investigative power enables the authority to get detailed evidence about the case complained of and is before it. The investigative power of the authority, among other includes powers to enter premises, to search for and seize or copy documents that may provide evidence of a violation of competition law.[298] It also includes powers to require documents and written responses to questions to be delivered to the competition authority, and powers to require witnesses to answer questions orally.[299] In Turkey, the competition board may up on an application or on its own initiative, open an investigation directly or conduct a preliminary enquiry to determine whether or not it is necessary to carry on an investigation.[300] The authority must be empowered to order persons or enterprises to provide information and in case of non-compliance obtain search warrant or court order in order to secure the proper functioning of that information. In many countries, including Argentina, Australia, Germany, Italy, Hungary, Norway, Pakistan, Peru and the Russian Federation, as well as in member countries of European community, the competition authority has the power to order enterprises to supply information and authorize a staff member to enter

[296] Id ,p.24
[297] OECD Global Forum on Competition, Challenges/obstacles faced by competition Authorities in Achieving Greater Economic Development Through the Promotion of Competition,(2004), p.2
[298] Ibid
[299] Ibid
[300] United Nations Conference on Trade and Development, cited above at note 50,pp.68-69

premises in search of relevant information.[301] The experience of different countries shows there are two approaches. First, the authority by itself can order enterprises or individuals to supply information and secondly, the authority may need to secure court order or a search warrant in order to enter premises and conduct search for information. It is to be noted also that the general principles and due process of law should be maintained in the course of carrying out investigation. Up on conducting necessary investigations, the authority would take necessary decisions, such as to initiate proceedings or call for discontinuation of certain practices. It may also deny or grant authorization of matters notified, or to impose sanctions, as the case may be.

The authority may undertake studies, publish reports and provide information to the public. The authority could undertake studies on competition law and policy improvements and related matters in the country and obtain expert assistance in the due course of its studies. Legislation may specifically stipulate the type of studies conducted. For example, in Thailand the office on Price Fixing and Anti Monopoly has the power and the duty to study, analyze and conduct research concerning goods, prices and business operations.[302] In Argentina, the Competition Commission may prepare studies related to markets, including research into how their conduct affects the interests of consumers.[303] The authority could publish its activity regularly (may be an annual report) to the public in accessible manner. Many competition laws oblige the competition authority to submit an annual report to the legislature and to place its reasoned decision on public record.[304] There should be periodic reports and this is a manifestation transparency in the activities of the authority.

The well established competition authority has the power to issue regulations on competition matters. The power to issue implementing regulations assists Competition Authority to accomplish its tasks. It may also assist in the preparation, amendment or review of legislation on restrictive business practices, or on related areas of regulation and competition policy. Owing to the specialization and unique experience on competition matters of competition authority, the

[301] Id, p.69 In Argentina or Austria, a court order is required for entry in to private dwellings. In Germany while search order is required, search can be conducted without if there is a danger in delay. In turkey, where an on the spot inspection to obtain copies of information, documents, books and other instruments is hindered or likely to be hindered, a criminal magistrate can order that the inspection be performed. *See Id at*,p.70

[302] Id, p.70

[303] Id, p.70

[304] United Nations Conference on Trade and Development, cited above at note 289, p.4.

enactment of new law or amendment gives the authority additional responsibility for advising on the draft bills which affect competition. The special exposure of the authority on the area could also require it, studying and submitting to the Government the appropriate proposals for the amendment of legislation on competition. The authority can, therefore, formulate opinions, give advice and provide guidance on competition policy and law.

Competition authority could have the power to impose sanctions appropriate for the violation of competition law, failure to comply with decisions or orders it gives or the appropriate judicial authority, for failure to supply information or documents requires within the time limits specified and furnishing any information, or making any statement, which the enterprise knows, or false or misleading information supplied. The sanctions imposed by competition authority could be of different kinds. Pursuant to the UNCTAD model law on competition, the sanctions could include:[305]

i. Fines(in proportion to the secrecy, gravity and clear cut illegality of offences or in relation to the illicit gain achieved by the challenged activity)
ii. Imprisonment(in cases of major violations involving flagrant and international breach of the law, or of an enforcement decree, by a natural person);
iii. Interim orders or injunctions;
iv. Permanent or long term orders to cease or to remedy a violation by positive conduct, public disclosure or apology, etc.;
v. Divestiture(in regard to completed mergers or acquisitions) or rescission(in regard to certain mergers, acquisitions or restrictive contracts);
vi. Restitution to injured consumers;
vii. Treatment of the administrative or judicial finding or illegality as prima facie evidence of liability in all damage actions by injured persons.

The power to impose fines on enterprises or individuals may be vested either in the competition authority or judicial authority, or it may be divided between the two. In Pakistan, panama, Peru, the Russian federation, Switzerland and the EC, competition authority has powers to impose

[305] Id, chapter XI

fines.[306]In Australia and the United States of America, the power to impose fines is vested in the courts.[307] The maximum amount of fines may vary across jurisdictions and may depend on the type of infringement committed. Infringements may be committed willfully or negligently and fines vary accordingly. A fine may be calculated depending on the profit made as a result of infringement. It would seem logical that the fines be indexed to inflation, and that account be taken of both the gravity of offences and the ability to pay by enterprises, so that the smaller enterprises would not be penalized in the same manner as larger ones.[308] In the normal course of things, the power to impose imprisonment would be vested in judicial authority. Majority of competition legislations on the globe consider certain anti-competitive act as criminal and set the jurisdiction and penalties for ordinary court. It is in the USA, under the Sherman Act Antitrust Division prosecution was established and criminal penalties are governed by general federal criminal statutes, the federal rules of criminal procedures and the U.S sentencing Guidelines.[309] In countries where the judicial authorities are responsible for decisions, the courts have the power to impose the presumed prisons terms. The continuation of anticompetitive act may be prohibited or the act may be discontinued through interim measures or injunction for protection of legal or economic interest of the interested persons. For example, in Hungary, the Competition Council may, by an interim measure, prohibit in its injunction the continuation of illegal conduct or order the elimination of the unlawful situation, if prompt action is required for the protection of legal or economic interest of the interested persons.[310] An action could also be pertinent when the formation, development or continuation of economic competition is threatened. The other sanction imposed by competition authority is permanent or long term orders to cease and desist or to remedy a violation by positive conduct, public disclosure or apology. In this sanction, there is a possibility of considering of the publishing cease and desist orders as well as the final sentence imposing whatever sanction considered by authority as adequate.[311] It would make the business community and consumers to be in a position to know that a particular enterprise is engaged in an unlawful behavior.

[306] Id, p.72
[307] Ibid
[308]Id ,p.73
[309] Id ,p.80
[310] Ibid
[311] Id, p.74

3.4 THE LEGAL PROTECTION MECHANISMS FOR THE FUNCTION OF COMPETITION AUTHORITY

Legal protection mechanisms are the remedies available to the parties after the case has been entertained by the authority. Once the case entertained by competition authorities, there might be various ways of challenging the decision. These ways of challenging the decision of competition authority is legal protection mechanisms for the function of it. Legal protection mechanisms may be of different types and following are some worthy of mentioning.

The first legal protection mechanism is review by competition authority of its decisions in light of changed circumstances. The circumstances prevailing at the time of decision making may change in many instances and the available remedies need to be review by competition authority. It is recalled that competition authority can, for example, periodically or because of a change of circumstances review authorizations granted and possibly extend, suspend or subject the extension to the fulfillment of conditions and obligations.[312] Accordingly, enterprises or individuals should be equally given the possibility of requesting review of decisions, when circumstances prompting the decisions have changed or ceased to exist.

The right to appeal against the decision of competition is another legal protection mechanism enshrined in many countries competition law. Since the judiciary plays roles in competition matters in almost all jurisdictions, having a judiciary that understands competition policy concepts, goals and instruments is of great importance.[313] The appeal right may specifically be mentioned in competition law or where about from the letter, may be lodged under the civil, criminal or procedural codes. Competition laws of many countries rightly provide various grounds for appellate review, including review (under various standards) on finding of fact and conclusions of law made in the initial decision.[314] Appeal may involve a rehearing of the case or be limited to a point of law. Regarding the competent body to which appeal is lodged, different countries have different approaches. In Italy, appeals against administrative measures adopted by

[312] Id, p.75

[313] International competition Network, Competition and the Judiciary, 6th ICN Annual Conference, (2007),p.5

[314] United Nations Conference on Trade and Development, cited above at note 50, p.75. In other countries, appeal is possible in cases specifically mentioned in the competition law, as is the case, for example, with decisions of the Swedish competition Authority. In Turkey, some decisions of the competition Board have been annulled by the High Administrative court (the council of state) because of the participation of board members in investigation teams, as this violated Turkish law requiring that investigation and adjudication be separated. *See Ibid*

competition authority fall within the exclusive jurisdiction of Tribunal of Latium(which is part of the judiciary competent for administrative matters) with the exception of the annulment proceedings and claims for damages, and emergency measures that must be filed in front of the competent court of Appeal.[315] Appeal may be made to administrative courts, as in Gabon, Lithuania, Colombia, Venezuela and Zambia or to judicial courts, as in Cote d'Ivoire, Panama, Spain, Switzerland and Ukraine, or to both, as in the Russian Federation, where an appeal may be lodged in an ordinary court or a court of arbitration.[316] In India and Pakistan, appeals go directly to the Supreme Court and the High court, respectively.[317]

3.5 FACTORS TO BE CONSIDERED BY COMPETITION AUTHORITY IN PRIORITIZING WORK AND IDENTIFYING THE MOST DAMAGING PRACTICES

It is common that due to different factors associated with the legal and institutional infrastructures, developing countries' competition authority may find a huge number of anti-competitive practices. It is impossible for the competition authority to handle all anti competitive cases at the same time due to limited resources. It is therefore recommended that, the authority should prioritize its works. Prioritization is the process of translating strategic objectives into operational priorities and essentially it involves deciding which projects or types of projects not to do and which project or type of projects to do.[318] In economies with limited enforcement resources, it may well be advisable to keep the new competition law focused on the behavior that is, clearly the most harmful to consumers.[319] The amount of resources needed basically depends on the size of economy and the number of anti-competitive behavior in the market. Even with a fairly generous budget, enforcement authority needs to set priorities for its enforcement goals.[320] A good way to start with this process is to focus first on horizontal restraints of trade, especially

[315] Ibid
[316] Ibid
[317] In Germany, appeals may go through the courts. Alternately in case of a merger which has been blocked by the competition authority, the parties can request exceptional approval from the Ministry of Economic Affairs. In Austria appeals go to the Supreme Cartel Court at the Supreme Court of Justice. The European Community has created a specialized Court of First Instance to hear antitrust appeals, since such cases had begun to be a burden on the European Court of Justice because of the extensive factual records involved. *See Id*
[318] Agency Effectiveness Handbook, (http://www.internationalcompetitionnetwork.pdf,) last visited on December 15, 2013.

[320]Strategic Priorities of Competition and Regulatory Agencies in Developing Countries, (http://www.circ.in/pdf/strategic%2520priority...), last visited on June 10, 2013.

cases of price fixing and bid rigging and this can bring large benefits for consumers by breaking up the cartels and introducing competition.[321] In developing economies competition authority cannot investigate every case that might be brought before it. In such circumstances, the authority should focus on those cases of anti-competitive behavior which have caused or which have the greatest potential to cause harm to the local economy.[322] Following are the factors to be considered in prioritizing the works by the competition authority.

3.5.1 LIKELIHOOD OF COMPETITIVE HARM

The economic impact of anti-competitive harm is the exclusionary market power of the actors. The exercise of exclusionary market power can significantly harm consumers by disadvantaging competitors, even if it falls short of forcing the excluded firms to exist from the market.[323] Many agencies use the potential impact anticompetitive act on consumer welfare or the economy as a prioritization criterion.[324] The impact of anticompetitive on consumer welfare may be direct which could relate to price, quality, range, innovation, or service.[325] It may also have indirect effect which could come as a result of changes in consumer, business or government behavior.[326] The authority may consider the expected impact of anti competitive effect on the economy in prioritizing its' works. This captures, for example, whether, as a result of the agency's actions, economic efficiencies and productivity would be expected to increase, as well as the impact on macroeconomic variables.[327]The economic evaluation of competitive harm that comes from anti-competitive acts should be taken as a factor in prioritizing the work by the competition authority.

3.5.2 RESOURCE NEEDED FOR THE INVESTIGATION

Resource is one of the determinant factors in the functioning of competition authority. The amount of resources needed for investigation is considered a very important factor in prioritizing cases.[328] Prioritization provides a mechanism for agencies to allocate resource to

[321] Ibid
[322] Ibid
[323] Id ,p.9
[324] *Agency Effectiveness Handbook*, cited above at note 318, p.31.
[325] Ibid
[326] Ibid
[327] Id,p.32
[328] Strategic Priorities of Competition, cited above at note 320, p.10.

the most relevant projects in a resource constrained environment. Proper handling of competition cases needs experienced expertise. Many of competition authorities, especially those in developing economy, lack the data, the expertise, the special skills, and the time required to take specific cases.[329] The best of laws cannot be applied without adequate human resources.[330]Some competition cases might involve a high level economic analysis that complements a legal one in order to detect and analyze and the authority should take in to consideration this in prioritizing the case. Financial resources are a necessary complement to human resources.[331] Since competition law cases often consume large sums in investigation and trail costs, it is vital that enforcement decision be taken on rational basis. Where the economy does not allow, priority should be given to cases the enforcement of which are cheaper.

3.5.3 RELEVANT MARKET

The size and importance of the relevant market constitutes important factors in prioritizing cases. The relevant market comprises all companies (and their products) within a specific geographical area, which are connected to each other in such a way that they constrain the competitive behavior of each other.[332]

3.5.4 DETERRENT VALUE OF PURSUING

This factor is about the likelihood of anti-competitive effect on consumers prevented as a result of deterrence value of case investigated and adjudicated. The relevant issues in this scenario may be, whether parties are likely to be a party to other similar arrangements, whether it is a wider issue affecting other sectors, whether other recent cases have covered the same issues.[333] This factor also includes the harm that would be reduced or removed as a result of taking action. The competition Authority could examine the deterrent value of the previously investigated and adjudicated cases in prioritizing its works as this can enable it to effectively utilize existing limited resources.

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[329] Ibid

[330] United Nations Conference on Trade and Development, Competition, Competitiveness and Development: Lessons from Developing Countries,(2004),p.37

[331] Id,p.38

[332] Strategic Priorities of Competition, cited above at note 320,p.9

[333] Id ,p.10

3.5.5 POLICY CONSIDERATION

Policy consideration is another factor to be considered in taking action against a particular case brought in violation of competition legislation. Some authorities may choose to prioritize action concerning particular sectors of the economy.[334] Reasons for choosing priority sectors may include public policy considerations relating to the development or protection of a specific sector, consumer protection considerations relating to markets with a significant number of consumers or the expected stronger impact on consumer welfare or the economy of acting in a specific sector.[335] The policy consideration could also include, the new sector, priority sector, need for policy, novel infringement, and whether the sector concern is particularly important for specific country.[336]

3.6 CHALLENGES FACED BY COMPETITION AUTHORITIES IN DEVELOPING COUNTRIES

Competition authorities in developed and developing countries may encounter different challenges and obstacle which may hinder it from enforcing and promoting competition law and policy. Despite the challenges may be similar in both, developed and developing countries, the degree varies. Some challenges may however be unique to developing countries due to political and economic situations. For example low level of economic development and government regulation and bureaucracy may be mentioned as the unique characters of competition law enforcement in developing countries. The main challenges for competition authorities in developing countries is to appropriately allocate their resources in enforcing competition law, in order to focus on the kinds of conduct or transactions by firms, which most seriously obstruct the proper working of markets.[337]

An increasing number of developing countries have adopted competition policies at national level as part of a coherent set of policies to create comparative advantage and internationally competitive industries.[338] With the expansion of globalization to all corners of the globe and the practice towards removing trade barriers and market integration developing countries have no

[334] *Agency Effectiveness Handbook*, cited above at note 318, p.32.
[335] Ibid
[336] Strategic Priorities of Competition, cited above at note 320, p.10.
[337] Id, p.12
[338] Ibid

choice but to introduce competition legislation. It is on this account that currently many of the countries on the globe have adopted competition policy and law. The integration of the laws in to countries legal system is not, however, without limitation.

Institutionally a number of challenges can be pointed out against the competition authority of developing economies. A research paper entitled *strategic priorities of competition and regulatory agencies in developing countries* affirms the possible institutional obstacles of competition authority as follows:

> *Institutional challenges include various factors that prevent a competition authority from performing its duties in the most effective way like insufficient institutional and budgetary independence; overlapping jurisdiction with other regulators, or unclear division of responsibility with other regulators; relations between the courts and competition authorities; insufficient investigatory or enforcement powers; and other factors that hamper the effective operations of the authority like insufficient resources or difficulties attracting and retaining qualified staff. Competition authorities also face challenges beyond institutional issues, such as in advocacy and communications or more broadly, from the lack of competitive culture.* [339]

It is these factors and others which are not mentioned in the above quoted statement that constitute obstacles of Competition Authority in developing economies. Generally, despite many challenges faced by competition authority, the following may be mentioned as the main challenges manifested in developing countries.

3.6.1 LACK OF RESOURCES

Well managed competition benefits the consumers through ensuring lower price and better products by creating equal playing field. In many countries, however, the benefits of competition laws and policy have yet to emerge visible, because enforcement has been hampered by inadequate staffing, lack of resource, and reliable data or sufficient information about production costs, market shares and consumer behavior.[340] Lack of resources, including budgetary allocation

[339] Id ,pp.12-13
[340] Id ,p.14

to the competition agency is one of the challenges which hampered the functions of competition authorities.[341]

The problem of resource in a country may result in small staffing, lack of needed technical staff and scarce financing. In many countries, the limited number of staff available is a challenge, because it places severe strain on the agency's ability to respond readily to queries and complaints, requests for data, and other appointments.[342]

As it was discussed above, competition authorities should prioritize their work with the available budget and existing expertise to meet their goals. The source of the budget of a competition authority may be the state or independent sources such as international donations. Alternative sources of funds such as, keeping fines imposed, fees charged for complaints or fees for other services provided would be considered. Whenever the source of the budget is the state, the autonomy of the allocation should be assured mainly through allocation by legislature of the country. The allocation of budget by the relevant ministry would imply less degree of autonomy.

3.6.2 LIMITED EXPERTISE IN COMPETITION ANALYSIS

A full national competition policy and law requires a great deal of technical expertise on the part of the competition authority.[343] The authority needs competent and knowledgeable staffs that are able to define markets, identify anticompetitive actions, and judiciously construct and administer tests for market concentration and the effects of mergers and acquisitions.[344]The competition authority must dispose of suitable and sufficient human, physical and financial resources. While many developing countries have recently adopted competition laws and established competition authorities, the scarcity of human capital implies that such authorities may do well to focus their attention on a smaller set of issue.[345]

Enforcement of competition law needs special skills, training and experience due to the special nature of competition cases. Competition authority requires a considerable degree of skill and competence to address complex issues ranging from how to determine dominance or at what

[341] A. Son, Challenges Facing New Competition Enforcement Agencies, (2006), P.6.
[342] Strategic Priorities of Competition, cited above at note 320,P.14
[343] Medalla, cited above at note 8, p.12.
[344] Id, p.13
[345] Building Institutions for Markets, cited above at note 168,p.33

level to set threshold limits or how to evaluate competition cases using a rule of reason approach.[346]However, in developing economies dealing with such serious competition issue is difficult due to limited expertise. The expertise could be of multidisciplinary as the nature of competition cases requires so. Competition experts are crucial for a competition authority to properly enforce competition law. Both lawyers and economists should be employed by the enforcement authority to properly handle competition cases. A few judges, strategically assigned to deal with competition cases, should be trained in the details of competition law and economics.[347]

Recruiting of professional and technical staff is cumbersome for developing countries due to various reasons. One of the reasons is affordability of the experts, as majority of developing countries do not offer courses and/or continuing legal education programs specific to competition law and its enforcement.[348] Competition authority should engage in sharing of experience with other countries, technical training program to available staffs in cooperation with international organizations working on area and form partnership with the academics to tackle the problem on expertise. The experience and technical assistance should take in to account the economic environment and legal system of a country.

3.6.3 DEFICIENT LEGISLATION

Well articulated legislation is essential for the realization of competition in a country. It is a legislation that if properly adopted can enhance competition in the market place and realizes the protection of consumers' rights. Many developing countries import competition law from abroad due to various reasons which may include but not limited to absence of sufficient human resources, finance and external political sway. In the majority of developing economies competition legislation is adopted on the approach of one size fits all. Accordingly, legislations have been designed which do not adequately deal with all the changes which a competition authority in a particular country needs and moreover, there are numerous instances of confusing terminologies and ambiguity of provisions.[349] The rich but confusing terminologies and perhaps ambiguity of some clauses in the law makes the job of a competition authority exhausting and

[346] United Nations Conference on Trade and Development, cited above at note 330, p.61.
[347] Joekes and Evans cited above at 55, p.64.
[348] Strategic Priorities of Competition, cited above at note 320, p.17.
[349] Id ,p.18

time consuming.[350] Competition legislations in developing economies are also sometimes tends to miss essential principles of competition law uncovered. Insufficient coordination and compatibility between the competition law and regulatory laws is a challenge faced by competition Authorities in enforcing the law[351]. These make competition Authorities not to properly address all competition complaints that are brought before it. Deficient legislation is one of the biggest obstacles faced by competition authority of developing countries in enforcing the law.

3.6.4 ABSENCE OF A COMPETITION CULTURE

Competition authorities face a number of obstacles when promoting competition and one of the reasons behind is lack of competition cultures**.** Competition culture refers to the awareness of the general public, including business community, politicians and civil servants about competition law and the benefits of competition.[352] Public education is vital to facilitate the acceptance of competition policy principles as central element of the national economic and development policy, both with the polity and the public.[353] Competition is a new phenomenon in most of developing countries and consequently competition culture hasn't yet sufficiently developed. It appears that lack of competition culture is due to self-interest of those who expect to lose with the introduction of competition and who have the power to oppose it.[354] Competition promotes and accelerates economic change through construction of equal playing field in the market among the actors. Economic change may result in the redistribution of wealth. Expected losers in the redistribution may oppose competition.

To create competition culture, public education and advocacy is necessary. The creation of competition culture involves a process of public education to facilitate the acceptance of competition policy principles as a central element of national economic policy, both politically and within the national business community.[355] Developing competition culture requires the financial and human resource strength of competition Authorities. There are certain prerequisites for effective advocacy by a competition agency which are among others, the agency should have

[350] Ibid
[351] Son, cited above at note 341, p.6.
[352] Id ,p.21
[353] Id ,p. 7
[354] OECD Global Forum on Competition, cited above at note 297,p.2
[355] WTO Annual Report , Special Study on Trade and competition policy,(1997),p.5

a significant degree of independence from political influence; the agency should have sufficient resources to support both its enforcement and advocacy functions and the agency must acquire credibility as an effective and impartial advocate for competition.[356]Competition Authority in developing economies lacks these for different reasons and it would be cumbersome to carry out its mission. Competition authority in developing countries may, therefore, face great challenges on making known to the public the importance of competition legislation and institution. Since competition culture is essential in the enforcement of competition law and policy, competition authority should be devoted to the creation of the culture among the general public, government entities and business communities.

3.6.5 LACK OF COOPERATION WITH OTHER LOCAL REGULATORS AND THE ISSUE OF JURISDICTION

An economic and administrative regulation issued by executive authorities at any level has an impact on the enforcement of competition. Such regulations issued need to be reviewed by competition authority prior to its adoption. This is more important if this regulation limits the independence and liberty of action of economic agents or if it creates discriminatory or on the contrary favorable conditions for the activity of particular firms and if it results in a restriction of competition.[357]

The effective enforcement of competition law and policy calls for the cooperation and coordination of different stakeholders. Competition authority in developing countries should meet other regulators in order to ensure clarity with respect to jurisdiction and to develop opportunities to share information on responsibilities, procedures, and policy.[358] Further cooperation and interaction with other relevant competition authorities and sector-specific

[356] C.John, "Competition Advocacy: Challenges for Developing Countries," OECD Journal of competition Law and Policy,(2005), Vol.6 ,pp69-80

[357] United Nations Conference on Trade and Development, cited above at note 50,p.56

[358] The competition authority must develop relationships with government ministries, regulatory agencies, and other bodies that formulate, enact, and administer policies affecting demand and supply conditions in various markets. Such relationships, based on mutual respect, recognition of professional expertise, and appreciation of the respective responsibilities and policy mandates of different organizations, will facilitate communication and a search for alternatives that are less harmful to competition and consumer welfare. *See note 1,p.100*

regulators, particularly by putting formal arrangements in place for liaising with the regulators concerned, with the purpose to promote competition in such markets should be encouraged.[359]

Despite the fact that their approach and scope is different, competition authority and regulatory agencies are engaged in market regulation. Even though both share common goals; it needs to be appreciated that they have generally different legislative mandates and their perspective regarding competition matters may be different. Regulators may generally fall in to two categories-those with a mandate pertaining to specific sectors (sectoral regulators) and competition authority established to enforce national competition laws.[360] Sector regulators apply technical or economic regulation to a specific sector and they sometimes substitute themselves for the managers of the regulated firms to specify prices, quantities or qualities.[361] The over sighting role of both institutions is better well articulated. Competition authority aims at protecting and promoting competition and economic efficiency through prevention of abuse of dominant position, cartels and restrictive business agreements. Regulatory agencies on the other hand engaged in supervision of regulated sector of economies. Both authorities should cooperate in applying competition policy for the benefit of the market. In order to avoid conflict between competition law enforcement and the application of sectoral regulation, developed country have adopted detailed rules on competence, procedures and priorities of the institutions.[362]

There are confusing of jurisdiction between competition authority and industry specific regulation in developing economies. The boundaries between the roles of sectoral regulators and competition authorities are difficult to define and in many countries the issue remains unresolved.[363] To avoid the problems coming with conflict of jurisdiction, there should be a clear definition of the jurisdiction between competition authority and regulatory agencies. Further, both competition and regulatory agencies need to work hard for the establishment of an

[359] Strategic Priorities of Competition, cited above at note 320, p.23.
[360] CUTS, Competition Authorities and Sector Regulators: What is the best Operational Framework, (2008),p.1
[361] M. Mateus, "Why should National Competition Authorities be Independent and How should they be Accountable," European Competition Journal, Vol.3, No.1, (2007), p.27.
[362] Strategic Priorities of Competition, cited above at note 320, p.24.

[363] S. Mehta, Competition Policy in Developing Countries, Bulletin on Asian Pacific Perspectives, (http://www.unescap.org/pdd/publications/bulletin2002/ch.7.pdf), last visited on October 5,2013

institutional framework that guarantees the adequate scope of regulation, sound institutional credibility, independence, policy consistence and coordination among the institutions.[364]

3.6.6 LACK OF INDEPENDENCE

The structural position of the body entrusted with the enforcement of competition is a crucial issue in attaining the benefits that comes out of competition law and policy. The independence of competition authorities must be understood as the probability of implementing policies without the interference of political agents of the private sector.[365] The competition law and policy enforcer's stature, credibility, and independence from political influence are important considerations, particularly if decisions are to be based on competition impacts rather than balanced against other policies.[366] Independence of authority can be interpreted at least in legal, political and economic as well as in factual terms.[367] The Authority that is created as a separate entity, not part of a ministry and responsible directly to parliament or legislature for its budget, is structurally independent.[368] An important aspect of establishing independent competition authority is that the enforcement of competition policy and law are not affected by political circumstances. Competition authority needs to have full independence in order to decide the case solely on objective application of existing legislation. The authority which is defined as independent is nonetheless connected to government ministry structurally. No instructions should be directed to the authority from the ministry or other government institution in the functioning of the authority.

Competition policy and law are most of the time challenged by rent-seeking. The greater the potential for monopoly profit, the greater the incentive to try to influence decision-makers to

[364] Strategic Priorities of Competition, cited above at note 320, p.25.
[365] Ibid
[366] OECD Global Forum on Competition, cited above at note 113,p.5
[367] Strategic Priorities of Competition, cited above at note 320,p.24
[368] John, cited above at note 355, p.1. The most impartial person will have limited ability to disregard political considerations if he does not have the fiscal resources to carry out his actions. It is thus extremely important that determining the authority's budget be free of political considerations. Although this cannot be accomplished in full, the authority being part of the government, there are several methods to reduce political pressures through budget setting. One method is to base at least part of the budget upon some income that is generated by the authority, such as on fees charged by them for merger decisions and fines imposed for anti-competitive conduct. Another important method is to separate the authority's budget from that of other government functions and make it transparent to the public. *See United Nations Conference on Trade and Development, cited above at note 325, p.48.*

obtain or protect that profit. Thus the body entrusted to prevent monopoly and other anti-competitive practice should be shielded from rent-seeking influence.

CHAPTER FOUR

A CRITICAL APPRAISAL OF THE INSTITUTION CONTROLLING COMPETITION IN ETHIOPIA: ANALYSIS OF THE LAW AND THE PRACTICE

4.1 ORGANIZATION AND STRUCTURE OF THE AUTHORITY

The concept of organization of competition authority refers to matters regarding the composition of authority's members and the manner of their appointment. For the Competition authority in order to properly accomplish its tasks, the composition of members of it should be legislatively well regulated. The main issues addressed in organization of competition authority are, the qualifications of members, the number, manner of appointment and organ responsible for appointment, tenure , the manner of removal and others. The Structure of competition authority refers to the relationship between the authority and political entity. The underlying principles in the structure of competition authority are that, the authority should be independent of executive government organ functionally and financially. Within these frameworks, the writer will try to discuss in the following topics the legal framework and the practical state of affairs on the organization and structure of Competition Authority of Ethiopian.

4.1.1 ORGANIZATION OF THE AUTHORITY

As it was mentioned in the preceding discussions, the authority controlling competition in Ethiopia is known as the Trade Competition and Consumers Protection Authority (herein after the Authority). It is Art.28 of Ethiopian Trade Competition and Consumers Protection Proclamation (ETCCPP) which deals with the organization of the authority. The provision does not give, as such; detail of the organization of the authority as it simply state few points. The authority shall have, a director General to be appointed by the Prime Minister upon the recommendation of Ministry of trade; and the necessary judges and staff.[369] The problem here is that, there is no details description about the qualification of the person to be appointed as a Director General, the judges and other staff of the Authority with the exception of few points mentioned regarding the judges under Art.35 of ETCCPP. There should be, at least minimum requirements, provided for in the law as to the qualification of the person to be Director General.

[369] Trade Competition and Consumers Protection Proclamation, cited above at note 22, Art.28.

Many jurisdictions experience shows, the Director General or the Chairman of the Authority needs to have certain knowledge and experience in the fields economics, law, commerce, industry or public affairs. The person who qualifies to be appointed as Director General of the Authority in Ethiopia is not described in the law. It seems the qualification is something to be determined by the appointing body. The one deemed qualified by the appointing organ will take the post. What makes the situation more amazing is the fact that there is no tenure of time set for which the Director General remain in office. The period of time for which a Director General holds office and matters regarding the possibility of reappointment are not governed by ETCCPP. The recommendation on UNCTAD model law on competition and many countries legislation set the tenure of time for the Director General/chairman/, judges and other staff of the Authority with the possibility of reappointment or without reappointment. The ETCCPP is silent as to this specific subject and the implication is that, the time might depend on the will of the appointing body. It would have been better had the duration and manner of removal is set for the Director General as it can boost the efficiency of the Authority. The business community is also in support of it.[370] Further, ETCCPP provided nothing about the conflict of interest that may exist between the individual to be appointed as a Director General the Authority. It is essential that before a person is appointed as the chairman of the Authority it should be checked whether he/she has conflict of interest with it. Since the Director General represent the interest of both government and the business community a conflict of interest with these groups should be checked before appointment. In Germany for example, member of the authority must not be owners, chairmen or members of board of management or the supervisory board of any enterprise, cartel, and trade industry association.[371] The issue of conflict of interest is not governed by the ETCCPP and the appointment of the Director General by executive organ may complicate the matter even more. ETCCPP does not govern the possible immunity that should be given to the Director General and other members of the Authority. It would have been better had the ETCCPP governed matters regarding immunity as this will build confidence on the functions of members and protect them from internal or external pressures.

[370] Interview with Ato Yohannes Woldegebriel, Director of AACCSA AI, on October 23 2013

[371] United Nations Conference on Trade and Development, cited above at note 50,p.66

The Director General is the chief executive of the Authority and shall organize, direct and administer the activities of the Authority.[372] He /she shall also make sure that the powers and duties of the Authority provided for under ETCCPP are executed. The Authority does not have a secretariat and the whole administrative affair of the institution is shouldered by the Director General. This might be a cumbersome task for the Director General as the administration of the Authority's activities is a heavy responsibility. It is recommended that the Authority should have a secretariat empowered to carryout administrative and investigative affairs.

Each division of the adjudicative tribunal of the Authority shall have one presiding and two other judges to be appointed by the Prime Minister.[373] The adjudicative tribunal of the Authority may have a number of divisions as the case may be. The number of cases brought before the tribunal might determine the number of divisions to be established, because the more the number of competition cases the more additional divisions of the tribunal are needed. The judges shall have the necessary professional qualification, educational background and experience needed for the post. The qualification, educational background and experience put for judges are too general. The ETCCPP should have stated the desired specific professional qualification, education background and experience needed for the post. Many literatures and different countries' experience suggests for the qualifications of being educated in economics, law, commerce, industry or public affairs fields and experience ranging from three to ten years on the area.[374] The validity behind these requirements is the multidisciplinary nature of competition cases. Competition cases require multidisciplinary knowledge and experience as issues of law, economics, commerce and other may be involved in it. The requirements stated under ETCCPP for the appointment of judges are vague. This is so because, the qualification needed for the post is clear and these should have been provided for in the law. Just like that of Director General, there is no duration of time set for office of the judges. Once a judge is appointed the question as to when he/she leaves the office is not determined by ETCCPP. Many jurisdiction set for a fixed period of time for the judges as this could be necessary to improve the efficiency of the institution. The recruitments and appointment of judges should also be made against the conflict of interest that might arise due to holding the office and the ETCCPP is silent on this issue. A

[372] Trade Competition and Consumers Protection Proclamation, cited above at note 22, Art.31(1)
[373] Id ,Art.35(1)
[374] United Nations Conference on Trade and Development, cited above at note 50, p.66.

judge should not have an affiliation with the government organ and owners, chairmen or members of board of management or the supervisory board of any enterprise, cartel, and trade industry association.[375] Furthermore matters regarding the manners of removal and immunity against prosecution for acts done in good faith by the judges which left ungoverned by the ETCCPP should have been built-in into it as it is an integral part of many competition legislation and important for the establishment of effective and efficient competition adjudicative body.

Though the ETCCPP states the Authority shall have necessary staff, there is no clause regarding the qualification of staff members. Any person should not be made staff member of the Authority. The minimum qualification requirement should be provided for by the law. They are assisting personnel to the adjudicative and administrative function of the Authority and are expected to be persons having awareness on the area of competition or related fields.

The Authority is established by ETPCPP in 2010 and later re-established in 2014 by proclamation 813/2013. The Authority became operational in 2012. The adjudicative tribunal of the Authority was inaugurated and became functional in October 2013.[376]Currently, the Authority has a total of ninety three (93) staffs including the Director General and Judges.[377] The supporting staff of the Authority are organized in thirty Directorate which are; corporate communication Directorate, human resource Directorate, audit Directorate, planning and information management Directorate, finance Directorate, trade competition affair vice General Director, consumer protection vice General Director, inquiry, research and dissemination directorate, investigation directorate, prosecution directorate, judgment execution directorate, advocacy directorate and market information and distribution Directorate.[378] The employee to the above mentioned directorates are hired by the Authority on the basis of guide line and criteria set by Ministry of Civil Service.[379] The writer recommends that it is better if the criteria are set by the Authority rather than the Ministry of Civil Service. Addis Ababa Chamber of Commerce and Sectorial Association as the intuition representing business community is in support of clear

[375] Ibid
[376] Interview with Ato Mesfin Sintayehu, Personnel of Human Resource of ETCCPA, on February 14 2014
[377] Interview with Ato Demis Yosef, Director of Human resource of TPCP Authority, on February 14 2014
[378] Interview with Ato Mesfin Sintayehu, cited above at note 376
[379] Ibid

criteria set by law for the hiring staff of the Authority.[380] According to the guideline set by the Ministry of Civil Service the above mentioned organizations of the Authority require a total of two hundred twenty five (225) staff.[381] The Authority has so far ninety three staff and the executing staff of the Authority believes the existing human resource is not sufficient and the Authority is doing its best to fulfill human resource deficiencies.[382] Some of the organization of the Authority is made without taking into account ETPCPP. It is so because the Authority has investigation directorate without having investigative power under the law. The investigative power is given to Ministry of Trade under the law and the act of the Authority is in contravention to this. The current number of staff is less than half of the total amount of human resource set for the Authority and according to the writer's view this will hamper the proper functioning of the Authority.

The Authority has not become to date fully operational due to factors related to human resources and other infrastructure.[383]The practical appraisals of the Authority demonstrate that it lacks institutional strength. This is specially manifested in lack of human resource in capability (knowledge and skill) and experience on competition and consumer rights protection issues.[384] The proper execution of ETCCPP requires competent staff in (knowledge, skill and experience) in the area of economics, law, commerce, industry or public affairs. According to Ato Tesfaye[385], the organization of the Authority does not support the general functions and objective of the institution. To tackle this, the Authority is launching various initiatives to enhance the capacity of judges and other staff.[386] To enhance the capacity of members of the Authority, training has been given with collaboration of Ethiopian institute of human resource development.[387] The Authority is looking for experience sharing program from countries such as Germany and South Africa.[388] The writer does not believe that experience sharing program which may last for a week or month won't boost the human capacity of Authority. Feasible

[380] Interview with Ato Yohannes Woldegebriel, cited above at note 370
[381] Interview with Ato Mesfin Sintayehu, cited above at note 376
[382] Ibid
[383] Interview with Ato Getnet Ashenafi, Prosecutor III of ETCCPA ,on November 5 2013
[384] Interview with Ato Tesfaye Niway, Presiding Judge at ETCCPA Adjudicative Tribunal, on November 5 2013
[385] Ibid
[386] Ibid
[387] Interview with Ato Mesfin Sintayehu,cited above at note 376
[388] Interview with Ato Tesfaye Niway, cited above at note 384

initiative program like that of training in agreement with higher education institutions (domestic or abroad) should be adopted to boost the Authority's human capacity.

4.1.2 STRUCTURE OF THE AUTHORITY

The most efficient type of competition Authority is the one independent of government body with strong judicial and administrative powers for conducting investigations and applying sanctions. In the exercise of its powers, the competition authority must be independent from political forces, which means there should not be supervision from the executive organ of the government in the adjudicative and administrative functions of the Authority. The decision of the Authority should depend on the objective evidence presented before it. Structurally, the most efficient and effective competition Authority is the one independent from political influence in all aspects.

The ETCCPP establishes the Authority as an autonomous Federal government organ having its own legal personality.[389] It is also stated under Art. 35(3) of the ETCCPP that the Authority shall be free from any interference or direction by any person with regard to the cases it adjudicates. Though these provisions of ETCCPP seem to have established an independent Authority, there are other provisions of the Proclamation which dictate otherwise and bring in to question the independence of the Authority.

First, though the Authority is recognized as an independent organ, the appointments of the Director General and judges are made by the executive organ. Not only appointment, even the recommendation is made by the executive organ which is the Ministry of Trade. The Director General and the judges of the Authority are appointed by the Prime Minister of the country, who is the chief executive. In the scenario where there are no express legal requirements for the recruitment of the Director General and judges of the Authority, it is difficult to presume the personnel appointed by the executive organ are independent. ETCCPP simply states, the Prime Minister appoints the nominee presented by the Ministry of Trade. It is recommended that the establishment of the Competition Authority should be made up on nomination by the nominee committee composed of different organs and the appointment be made by the sovereign power (the parliament). Even if the appointment is not made by the parliament, the nomination should

[389] Trade Competition and Consumers Protection Proclamation, cited above at note 22,Art.27(1)

be made by the committee representing different interest groups on the basis of standard criteria established by competition legislation. Two legal problems in the ETCCPP may be raised which impact the independence of the Authority. The first is that, the Proclamation did not set a standard criterion for a person to be appointed as a Director General or a Judge. Secondly, the Proclamation empowers the chief executive organ of the government to appoint a Director General and the Judges which significantly harms the independence of the Authority in the well functioning of its activities and achieving its goals. Governments need to ensure the independence of a competition authority in the appointment of its members. One suggestion is that the head of the authority and judges should be appointed by a committee or Parliament rather than by the Prime Minister. The ETCCPP would have included this approach to establish viable independent Authority. Practically, the appointment of Director General and Judges of the Authority is made by the Prime Minster of the Federal Republic of Ethiopia. This may have a devastating impact on the Functional independence of the Authority. This is so because from the beginning the recommending and appointing body may choose those ones who are loyal to them as the criteria for this are to be determined by them. In such a situation the Authority may be driven by political influence than purely law and existing procedures. When asked about the profile of the Director General and Judges of the Authority, the Personnel of human resource responded as the Authority has no information on the issue and it is something to be determined and known by the appointing body.[390] The Authority has only detailed profile of supporting staffs which it hires depending on the guideline and criteria set by Civil Service Minister.[391] The one who set criteria for supporting staff of the Authority is the executive organ of the government. The writer believes it would have been suitable had the Authority given power to sets criteria for supporting staffs it hires as it knows better who fits for the post than anyone else.

Secondly, the Authority is accountable to the Ministry of Trade which is an executive government organ. The activities of the Authority are overseen by the executive organ and this can adversely affect the independence of the Authority. It is recommended that the competition Authority should be accountable to the Parliament (the legislature) in order to ensure its independence. The ETCCPP did not establish independent Authority as it makes the activity of the Authority to be superintended by the executive organ (which is the political arm of the

[390] Interview with Ato Mesfin Sintayehu, cited above at note 376.
[391] Ibid

government).Practically, the accountability of the Authority is goes to Ministry of Trade. This can harm the independence of the Authority as Ministry of Trade is an executive government body. The Authority could have, simply, been made accountable to the Parliament.

Finally, the budget of the Authority is allotted by the executive body and this makes the Authority to be financially dependent on the political organ of the government.[392] The source of the budget is one of the main factors which censure the independence of the Authority. The financial independence of the Authority is secured through allotment of the fund by the legislative body (parliament), enabling the Authority to utilize service fees it collects and all other payment due to the Authority in respect of any matter incidental to its functions, enabling the Authority to explore for grants and donation from non-governmental organizations.[393] In South Africa, the competition commission is financed by the money that is appropriated by parliament to it, fees payable to the commission in terms of the Act, income derived by the commission from its investment and deposit of surplus and money received from any other source.[394] Almost similar approach is adopted by Fair competition Act of Tanzania. The Ethiopian competition law did neither recognize the Authority to utilize fees it collects from different services it renders nor enable the parliament to appropriate fund to it. Financially, the Authority is dependent on the executive government body and this will seriously censure the functional independence of the Authority. Practically, the Fund of the Authority comes from Government treasury which is allotted to Ministry of Trade.[395]The parliament does not directly allocate budget to the Authority. It is the Ministry of Trade which allots finance to the Authority.[396] The fee collected by the Authority through services it renders goes to government account as the Authority is not given power to utilize it.[397]

4.2 POWERS AND FUNCTIONS OF THE AUTHORITY

Competition legislation of a given country, in addition to establishing independent competition Authority should list down the power and functions of the Authority as this will enable to know the boundary limit of it. Competition authority might be conferred with different powers and

[392] Trade Competition and Consumers Protection Proclamation, cited above at note 22, Art. 44
[393] United Nations Conference on Trade and Development, cited above at note 50,p.66
[394] Competition Act of South Africa, cited above note 252, Art.40 (1).
[395] Interview with Ato Mesfin Sintayehu,cited above at note 376
[396] Ibid
[397] Ibid

functions to properly achieve its goal. In listing the powers and functions of a competition Authority, similarity is not observed among different jurisdictions. Some jurisdictions list down almost all the powers and functions that should be conferred on a competition Authority. Others list few of them and confer a broad power which is out of competition like that of consumer protection. The Ethiopian Competition Authority is given certain powers and functions on competition subject matters and other additional powers and function which are out of the ambit of competition such as, consumers' protection and unfair business practices. The writer is of opinion that the Authority could have given only competition matters .once the competition matters properly addressed by the Authority the issue of consumer protection may come to picture by default. The number of expertise in the country is also another point of concern. On the basis of the list of powers and functions under ETCCPP, the writer tried to group them into the following sub-titles.

4.2.1 ADMINISTRATIVE POWER AND DUTIES

Competition Authority of Ethiopia is established as an institution having legal personality and the following administrative power is conferred on it. The Authority as any other legal entity can own property, enter into contracts, sue and be sued in its own name.[398]The Authority shall have the power to employ necessary staffs, determine administration and dismissal of these staff in accordance with Federal Civil Servants Proclamation.[399] Practical, the criteria for the employment of necessary staff of the Authority depend on the guideline set by Civil Service Minister of Ethiopia.[400] The head office of the Authority shall be in Addis Ababa and it may establish branch office elsewhere as may be necessary. So far, no branch office of the Authority has been established either in Addis Ababa or in Regional States.[401] It is only the head office which was inaugurated in 2012 which is operational. The Authority shall give necessary advice and support to the concerned regional organs with respect to consumer protection.[402] The Authority may also establish relationship and cooperation with national, continental and

[398] Trade Competition and Consumers Protection Proclamation, cited above at note 22, Art. 30(15).
[399] Id Art.31(2)(b)
[400] Interview with Ato Mesfin Sintayehu, cited above at note 376
[401] Interview with Ato Getnet Ashenafi, cited above at note 383
[402] Trade Competition and Consumers Protection Proclamation, cited above at note 22, Art. 30(13)

international bodies having an objective of realizing competition.[403] Further, the Authority may perform such other activities necessary for the attainment of its objectives.[404]

In discharging of its duties, the Authority may collect service fees. ETCCPP did not put details as to how this fund shall be administered. The fees collected by the Authority in relation to adjudication function it rendered credited to government account.[405] The Authority may not utilize this money directly.[406] Had the Authority been given the mandate to administer the fund it collects as a fees with proper accounting and auditing by external organ, it would have been a step towards ensuring financial independence of the Authority which could have, on the other hand, enabled it to carry out its functions without undesired influence.

4.2.2 ADJUDICATIVE POWER AND DUTIES

Adjudicative powers and duties of the Authority is one of the main tools through which the Authority may ensure the implementation of ETCCPP. On the basis of applications submitted to it on violation of the proclamation, the Authority has the power to adjudicate, impose administrative sanctions, and get complainants compensated for damages they sustained.[407] An action before the Authority may be instituted by, any person who is concerned that his rights under part two of ETCCPP (control of restrictive agreement); consumers to protect their rights provided under proclamation and prosecutor of the Authority for administrative or civil measures to be taken against violators of the provisions of the proclamation.[408] The Authority shall have the power and duties to conduct adjudication on acts of violation prohibited under ETCCPP.[409] The adjudicative power is vested on the tribunal of the Authority established pursuant to this proclamation.

The Authority may order any person to furnish information and submit documents that may be required and summon witnesses to appear and testify before the adjudicative tribunal.[410] In addition to adjudication and taking other necessary steps, the Authority shall also have the power

[403] Id, Art.30(14)
[404] Id, Art.30(16)
[405] Interview with Ato Mesfin Sintayehu, cited above at note 376
[406] Ibid
[407] Trade Competition and Consumers Protection Proclamation, cited above at note 22, Art. 32.
[408] Id, Art.37(1) &(2)
[409] Id,Art.37 & 38
[410] Id, Art.38(1) a & b

to execute administrative decisions it passes and order police or any appropriate organ for their execution.[411]

Up on end of the process of completion of adjudication, the Authority takes measures which are administrative depending on the provisions of the Proclamation violated. The administrative measures that may be taken by the Authority are the ordering of the discontinuation or injunction of the act pronounced inappropriate, taking of any other appropriate measure that enables to reinstate the victims' competitive position and the suspension or revocation of the business license of the offender.[412]

ETCCPP criminalizes certain acts which are committed in violation of it. It is when any person violates Art.32 (1) (a), 33(3), 39(2), 26(6), 22, and 24 proclamations or fails under the circumstances stated under Art.43 (6)-(9). If an offence is committed in violations of the above provisions, in addition to the administrative measures taken by the Authority, criminal prosecution will be held in an ordinary court. Some competition legislations on the globe consider certain anti-competitive acts as criminal and set the jurisdiction and penalties for ordinary court. The Ethiopian approach is also in line with this as ETCCPP conferred the criminal jurisdiction on ordinary court. Pursuant to Art.37 (1) (a) ETCCPP the prosecutor of the Authority shall based on the finding to investigation institute an action for criminal prosecution before competent federal courts.

In addition to adjudicating cases and taking administrative measure to ensure competition, the Authority is given certain powers and duties which would help it make certain competition in the markets place. One of these power and duties is to make study and research in connection with commercial competition and consumer interests and rights.[413] It has also the power to take appropriate measures which it assumes will increase market transparency.[414]

The establishment of adjudicative tribunal of the Authority is recent. The tribunal is launched in October, 2013.[415] The Authority has only one tribunal which is situated at the head office. There is no consumer rights adjudicative tribunal established in any of the Regional States so far. The

[411] Id,Art.38(1), c & d
[412] Id,Art.32(2)
[413] Id,Art.30(4)
[414] Id,Art.30(1)
[415] Interview with Ato Getnet Ashenafi, cited above at note 383

number of tribunals according to, the presiding judge of the Authority is to be determined by the number of cases that may come before the Authority.[416] So far, the number of cases brought before the Authority did not necessitate establishment of an additional tribunal.[417] The tribunal has one Presiding and two other additional Judges at the time of launching. Currently, one Judge has resigned and only two Judges are left on the tribunal.[418] The educational background of all Judges is first degree in law according to the Presiding judge of the Tribunal.[419] The writer is of the opinion that the current educational and professional experiences of the Judges do not fit the power and functions given to adjudicative tribunal of the Authority. The educational background of the Judges should be multidisciplinary, including but not limited to fields such as Economics, law, commerce, industry or public affairs fields as the issue of competition covers these issues. The adjudicative tribunal of the Authority like that of other departments lacks appropriate expertise. It is difficult to say competition cases are being entertained by the Authority. No cases regarding merger, abuse of dominant market position or restrictive business agreement has so far been investigated by the Ministry of Trade nor adjudicated by the Tribunal. The cases the Authority has thus far entertained are those related to unfair trade practice which are not competition issue but related to consumer rights protection.[420]

4.2.3 INVESTIGATIVE POWER

The first and may be the most important power of a competition authority is the power of making inquires and investigations up on receiving complaints or on its own motion. This is one of the most important powers of competition Authority that enables it to effectively and efficiently function**.** Investigative power enables a competition authority to get detailed evidence about the case complained of before it. The investigative power of authority, among other, includes powers to enter premises, to search for and seize or copy documents that may provide evidence of a violation of competition law. Investigation also includes powers to require documents and written responses to questions to be delivered to the Competition Authority, and powers to require witnesses to answer questions orally. Unless investigative power is given to the competition Authority, it would be unwise to expect, the objectives for establishment of

[416] Interview with Ato Tesfaye Niway,cited above at note 384
[417] Ibid
[418] Interview with Ato Mesfin Sintayehu, cited above at note 376
[419] Ibid
[420] Interview with Ato Tesfaye Niway, cited above at note 384

Authority to be fulfilled. In many countries, including Argentina, Australia, Germany, Italy, Hungary, Norway, Pakistan, Peru and the Russian Federation, as well as in the European community, competition authorities are given broad investigative powers.[421]

In Ethiopia, as provided under Art.36 of ETCCPP, investigative power is given to the Authority. The Authority shall conduct investigation where there is sufficient ground to suspect, based on its own information or information given to it by any person, that an offence has been committed.[422] For the purpose of investigation, the Authority has investigative officer empowered to enter the business premises of suspect, take sample of goods necessary for investigation, examine and take copies of records and documents kept in any form and seize goods illegally stored or being transported or seal their storage or container.[423] The concern here is that the Authority lacks experienced and qualified expert who will carry out this power effectively and efficiently.

4.2.4 LEGISLATIVE POWER

The power to issue implementing directives assists the competition Authority to accomplish its tasks. Competition Authority may also assist in the preparation, amending or review of legislation on restrictive business practices, or on related areas of regulation and competition policy. A well established competition authority has the power to issue implementing directives. Owing to the specialization and unique experience on competition matters of competition authority, the enactment of new law or amendment give the authority additional responsibility for advising on the draft bills which affect competition. The special exposure of the Authority on the area could also require it, studying and submitting to the Government the appropriate proposals for the amendment of legislation on competition. A Competition Authority can, therefore, formulate opinions, give advice and provide guidance in competition policy and law matters.

The ETCCPP does not confer the Authority with the power to issue implementing directives. Owing to the presence of expertise on competition matters in the Authority, the proclamation should have conferred the power to make directive to the Authority. Taking in to account the

[421] United Nations Conference on Trade and Development, cited above at note 50,p.66
[422] Trade Competition and Consumers Protection Proclamation, cited above at note 22,Art.36(1)
[423] Id, Art.36(4)

special exposure of the Authority on competition area an additional power to submit proposal for amendment of legislation on competition and participate in the drafting of legislation should have been given to the Authority. The Authority should have been given, in general, the power to formulate opinions, give advice and provide guidance on matters relating competition policy and law.

4.2.5 CONSUMER RIGHTS PROTECTION

In a number of countries, consumer protection legislation is separate from competition legislation. In some countries, however, such as Australia, Hungary, Poland and France, their competition laws contain chapters devoted to consumer protection.[424] In principle competition legislation and consumers protection legislation is separate legal regime despite many of competition issues are closely related to protection of consumers' economic interest. The Ethiopian ETCCPP adopted the approach of making consumer protection legislation part of the competition legislation. The Proclamation has a chapter devoted to consumer protection. Accordingly, the Authority is given certain powers and duties to ensure the protection of consumer right. As the matter of competition by itself is huge and needs the Authority that could have concerned only with it, it would have better had the proclamation recognized consumer right protection Authority separately. The Authority is given the power to protect consumer from unfair business practice.[425] The Authority should regularly announce to consumers goods banned by the government or internationally from being consumed or sold.[426] Detailed matters on consumer rights protection have been provided in the ETCCPP and the power and duties to ensure consumer rights protection is not limited to the Authority. In addition to the Authority, the adjudicative power and duties on consumer rights protection is given to regional states' consumer protection quasi -judicial organs. Regional states may, when necessary, establish organs that adjudicate on matters of consumer rights protection.[427] Consumers' rights protection quasi-judicial bodies are to be established by regional states and shall have jurisdiction in connection with commercial activities licensed by the regional states or business persons engaged in such commercial activities or commercial activities conducted in the regional states.

[424] United Nations Conference on Trade and Development, cited above at note 50,p.64
[425] Trade Competition and Consumers Protection Proclamation, cited above at note 22, Art. 30(8)
[426] Id, Art. 30(5)
[427] Id, Art.34

These are indication that great attention is given to consumer rights protection. Despite these implications, there is gap in detailing the professional and experience requirements for persons to be appointed as judges. No requirements and procedures are set for the recruitment and appointment of judges to work on the adjudicative benches of consumer protection cases. Unlike the previous proclamation, the new proclamation is silent as to the questions of who appoints the judges at regional states consumer right protection tribunal.

Practically, the Authority gives great attention to consumers' right protection than competition issues. This is evidenced by public advocacy on consumer rights so far made by the Authority both at Federal and Regional states levels. In 2013 alone the Authority has organized different public awareness programs on Consumers' rights Protection for around twenty thousands (20,000) peoples representing different groups of the society at Federal and Regional states levels.[428] The core focus of ETCCPP is competition and the issue of consumer rights protection is subsidiary. Once great attention is given to implementation of competition matters, consumer rights protection is something that can be realized incidentally. To properly protect consumer rights, what to be done is therefore to focus on how to ensure competition. The primary focus therefore should be given to competition than consumer rights protection. In countries where competition matters are severe, it is unwise to think of consumer rights protection as the core for realization of consumer rights protection is competition issue.

4.2.6 COMPETITION ADVOCACY

Competition culture refers to the awareness of the general public, including business community, politicians and civil servants about competition law and the benefits of competition. Competition is a new phenomenon in most of developing countries and consequently competition culture hasn't yet developed. It appears that lack of competition culture is due to self-interest of those who expect to lose with the introduction of competition and who have the power to oppose it. To create competition culture public education and advocacy is necessary. Competition Authority should engage in different ranges of competition advocacy works in order to develop competition culture which would help the proper implementation of competition law.

[428] Interview with Ato Getnet Ashenafi, cited above at note 383.

According to the ETCCPP, the Authority has the duty to take appropriate measures to develop public awareness on the provisions and implementation of the Proclamation.[429] As the proclamation deals with matters other than competition, a clear and detailed power should have been given to the Authority on promotion of competition advocacy, creating awareness and imparting training on competition issues. The Authority has also a duty to organize various education and training fora and provide education and training in order to enhance the awareness of consumers.[430] Though these are some of the steps towards creation of competition culture, the writer does not believe that there is sufficient legal framework. Just like what was provided regarding consumers awareness enhancement under Art.30 (6), a clear and detailed rule should have been stated regarding enhancing the awareness of the general public on competition and its purposes.

One of the functions claimed as being executed by the Authority is advocacy. The Authority from the time of its establishment has carried out a lot of advocacy works, though it is centered on consumer rights protection. Different training and workshops have been conducted for different sections of the society, especially for business community, consumer Associations and Justice Organs both at Federal and Regional States levels.[431] The Authority has embarked on aggressive advocacy works on consumer rights protection. The Authority has carried out different public education programs, particularly the giving of training and public awareness creation program on consumer rights. It is estimated that the Authority has organized public awareness program for around 20,000 peoples from different sector at Federal and Regional states in 2013 alone.[432] Different public advocacy on consumer rights protections are also being made by the Authority through electronic and print media.[433] In addition to what has been done regarding creation of public awareness on consumer rights protection, great attention should be given to competition advocacy as it is an essential element to realize consumer rights protection.

[429] Trade Competition and Consumers Protection Proclamation, cited above note 22, Art. 30(2).
[430] Id,30(6)
[431] Interview with Ato Getnet Ashenafi, cited above at note 383.
[432] Ibid
[433] Ibid

4.3 LEGAL PROTECTION MECHANISMS

Legal protection mechanisms are the remedy available to the parties after case has been entertained by the Authority. Once a case has been entertained by competition authorities, there might be various way of challenging the decision. Legal protection mechanisms are in general one way of challenging the administrative and civil measures taken by the Authority. The legal protection mechanisms include, inter alia, review by the Authority rendering decision and appeal. Review on appeal may be made either by ordinary court or the appellate competition tribunal. ETCCPP recognized only one legal protection mechanism. This legal protection mechanism is review by appeal. The organ having appellate power in Ethiopia is Federal Trade Competition and Consumer protection Appellate Tribunal.[434] The Federal Appellate Tribunal may up on examining an appeal confirm, reverse or vary the decision, or remand the case.[435]The decision of Federal Appellate Tribunal can be appealed to Federal Supreme Court on the ground of error of law with exception of the decision regarding to prohibit merger or revoke merger.[436] The appellate tribunal is yet established and should be organized with qualified expertise on competition area. The Proclamation should have recognized various legal protection mechanisms as it is important for the parties to the case. At least review by the Authority should have been recognized as a legal protection mechanism in addition to appeal right. Review by the Authority is important because the circumstance prevailing at the time of decision making may change in many instances and it is easy for the party if the Authority sees the cases on basis of the circumstance changed.

4.4 RELATIONSHIPS BETWEEN COMPETITION AUTHORITY AND OTHER REGULATORY BODIES

An economic and administrative regulation issued by executive authorities at any level has an impact on the enforcement of competition. Such regulations issued need to be reviewed by competition authority prior to its issuance. The effective enforcement of competition law and policy calls for the cooperation and coordination of different stakeholders. Though, the competition authority of a country is structurally expected to be independent, this does not mean

[434] Trade Competition and Consumers Protection Proclamation, cited above note 22,Art.33(1)
[435] Id,Art.33(3)
[436] Id, Art.39(1)&(2)

that the Authority should not cooperate with other regulatory organs of the government. The goal of competition authority and other regulatory bodies are the same in regulating the markets. The difference is on the approach to achieve that goal. Competition authority aims at protecting and promoting competition and economic efficiency through prevention of abuse of dominant position, cartels and restrictive business agreements. Regulatory agencies on the other hand engage in supervision of regulated sector of economies. Both authorities should cooperate in applying competition policy for the benefit of the market. In order to avoid conflict between competition law enforcement and the application of sectoral regulation, developed country have adopted detailed rules on competence, procedures and priorities of the institutions. Though proclamation no.865/2010 provide for compromise approach to resolve the conflict of jurisdiction that may arise between the Authority and other regulatory body, the new proclamation is silent on the matter. Just like developed nations, it would have been better had the proclamation set detailed rules on competence, procedures and priorities of the institutions. The setting of detailed rules as to which institution is competent to see which case, the procedures of resolving conflicts of jurisdiction and to which institution priority should be given in case of conflict of jurisdiction between the Authority and other regulatory government bodies is very important in addressing the issues.

4.5 PRACTICAL CHALLENGES FACED BY THE AUTHORITY IN ACHIEVING ITS GOALS

The establishment of competition Authority in Ethiopia is a recent phenomenon and consequently it is susceptible to different challenges in its move to ensure competition in the market place. According to an interview conducted with the officials of the Authority, one of the challenges faced by the Authority is lack of institutional strength in human resource capability.[437] The Authority lacks skilled and experienced manpower in competition. The proper implementation of competition legislation requires manpower with the background in economics, law, commerce, industry or public affairs fields. When we examine the profile of Judges of the Adjudicative Tribunal of the Authority they are individuals with first degrees in law. Taking this in to account it is difficult to think these guys will properly handle competition cases that might come before them. Among the Judges, at least there should be someone who has

[437] Interview with Ato Tesfaye Niway, cited above at note 384.

multidisciplinary knowledge or educational background other than law such as economics or commerce. Lack of skilled and experienced man power is manifested in almost all departments of the Authority and this makes the implementation of ETCCPP cumbersome.[438] The Authority lacks not only experts but also other supporting staff as the number it currently has is less than half of the total the Authority is supposed to have.[439]

Lack of competition culture within the business community, government bodies and general public is another factor which affects the proper functioning of the Authority.[440] As the issue of competition in Ethiopia is a recent phenomenon, there is a minimal awareness about the concept and purpose of competition among the business community, general public and government organs. Neither business community nor the general public are active in making complaints on the violation of ETCCPP provisions dealing with competition.[441] The government is also silent on the issues despite the existence of various violations of competition provisions by business entities. There is also lack of assertiveness on the side of consumers to raise and fight for their rights to be protected.[442] Consumers are not active in complaining the violation of ETCCPP provisions concerning consumer rights protection. The overall practical challenges faced by the Authority are related to lack of institutional strength in its organization, structure, power and function and lack of competition culture at business community, general public and government levels.

[438] Ibid
[439] Interview with Ato Getnet Ashenafi, cited above at note 383.
[440] Interview with Ato Tesfaye Niway, cited above at note 384.
[441] Ibid
[442] Ibid

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSION

Competition law aims at promoting economic efficiency and social welfare by prohibiting restrictive business practices, anti-competitive merger, abuse of dominant market position and creating equal level playing fields for firms. Despite the existence of different competition rules in scope and details among different countries of the globe, there are common elements which are in the Competition law of many countries. These common elements are framed under Model law on Competition of United Nations. They are; control of abuse of dominant position, Merger and cartel prohibitions. These principles are common among many countries' competition law including Ethiopian Trade Practice and Consumer Protection Proclamation.

Ethiopia had practiced different economic system under different regimes and key policy reforms undertaken to restructure the economy with political change in 1991. These key policy reforms includes, economic development strategy, industrialization Strategy, Financial policy, Trade policy, Privatization, Monetary and Exchange rate policies, investment policy and competition. It was in 2003, for the first time, Competition law of Ethiopia proclaimed. This law is named as Trade Practice Proclamation. This Proclamation was repealed and replaced by Trade Practice and Consumers Protection Proclamation in 2010. The new Proclamation is better than the former one in addressing competition issues, because it deals with the basic principles in competition laws which are abuse of market dominance, regulation of restrictive agreements and regulation of mergers. Like the former Proclamation, the new one has addressed certain issues which are not purely competition such as consumer's right protection, unfair competition and price regulation.

The functioning institutions and procedures make the difference between laws that may well stay dead letter, and laws that will be effectively applied. Country should in addition to adoption of necessary substantive law, adopt an effective institution over sighting it. The fact certain country has adopted competition legislation by itself is not an end to control anticompetitive acts in the market place unless it is accompanied by effective and efficient institution implementing this

legislation. It is on this idea that many jurisdictions on the globe have adopted an independent institution controlling competition in addition to enacting the law.

The most important issues to be considered in the establishments of institution controlling Competition are the organization and structure of this organ. Organization of competition authority concerned with matters regarding the composition of the authority, qualification, the manner in which they are appointed, the organ responsible for their appointment, immunity and manner of removal from post. The qualification of a person to be appointed as chairmanships and staff in terms of academic and experience is determinant. The academic qualification of chairman and members of tribunal in many jurisdictions is suitable qualifications and experience in economics, law, commerce, industry or public affairs. The number of members of a competition authority differs from country to country. In some legislation the number is not fixed and may vary within a minimum and maximum number and in others the exact number of members clearly stated. In the appointment of a person on the job, verification regarding absence of conflict of interest is necessary. The member of the authority must not be owners, chairmen or members of board of management or the supervisory board of any enterprise, cartel, and trade industry association. It is further necessary to stipulate the time of office of the chairman and members of the authority. The manner in which removal of members of the authority effected is crucial, since it avoids arbitrary removal and ensures job security. The members of competition authority should be also possible immunity against prosecution or any claim relating to the performance of their duties or discharge of their functions.

Structurally, the most efficient competition authority is the one that is independent of government bodies with strong judicial and administrative powers for conducting investigations and applying sanctions. In the exercise of its powers, competition authority must be independent from political forces, which is essential means that there cannot be supervisory function of the Ministry of Justice or the Ministry of Commerce or any other executive branch of the government. It is generally accepted that decisions by competition authorities should be based on objective evidence. Governments need to ensure the independence of the competition authority in the appointment of its members. One suggestion is that the head of the authority be appointed by a committee or the Parliament rather than by the President or the Prime Minister of the country. The budget of the authority should be also protected against political influence. One

ways of doing this is to allocate the budget by parliament and allowing the Authority to use fees it collects. Competition authority must be also independent from any enterprises or associations subject to its jurisdiction.

Competition authority might be conferred with different powers and functions to properly achieve its goal. The first and may be the most important power of competition authority is the power of making inquires and investigations up on receiving complaints. Investigative power enables the authority to get detailed evidence about the case complained of before it. The investigative power of the authority, among others includes powers to enter premises, to search for and seize or copy documents that may provide evidence of a violation of competition law. The authority may also be given a power and duties to undertake studies, publish reports and provide information to the public. The well established competition authority has the power to issue regulations on competition matters. The power to issue implementing regulations assists Competition Authority to accomplish its tasks. The Authority may also assist the preparation, review and amendment of competition legislation and policy. It may, therefore, formulate opinions, give advice and provide guidance on competition policy and law matters. Competition authority could have the power to impose sanctions appropriate for the violation of competition law, failure to comply with decisions or orders it gives. In the exercise of its power and duties, the Authority should give a decision and there could be a mechanism of challenging this decision. These mechanisms may be review by the Authority, review by appellate body or peripheral institutions.

It is common that due to different factors associated with the legal and institutional infrastructures, developing countries' competition authority may find a huge number of anti-competitive practices. It is impossible for the competition authority to handle all anti competitive cases at the same time due to limited resources. It is, therefore, recommended that the authority should prioritize its works. The factors to be considered in prioritizing the works by competition authority are; the Likelihood of competitive harm, Resource needed for the Investigation, Relevant Market, Deterrent value of pursuing and Policy Consideration.

Competition authorities in developed and developing countries may encounter different challenges and obstacles which may hinder it from enforcing and promoting competition law and policy. Some of these challenges may be unique to developing countries due to political and

economic situations. The challenges which hinder competition Authority from enforcing and promoting competition law in developing countries includes among others; Lack of Resources, Limited Expertise in Competition Analysis, Deficient Legislation, Absence of a Competition culture, Lack of cooperation with other local regulators and the issue of Jurisdiction and Lack of Independence.

The institution controlling competition in Ethiopia is known as the Ethiopian Trade Practice and Consumer Protection Authority (ETCCPA). The Authority is established in 2010 G.C by Ethiopian Trade Practice and Consumer Protection Proclamation (ETPCPP) and later re-established by proclamation no.813/2013 in 2014 G.C. It became functional in 2012 G.C and now has a total of 93 staff out 225 it supposed to have. It has not become to date fully operational due to factors related to human resource and other infrastructure. The Authority shall have a director General and the necessary judges to be appointed by the Prime Minister upon recommendation by Ministry of Trade and other staffs. There is no detail description about the qualification of a person to be appointed as a Director General, the judges and other staff of the Authority. The person qualified to be appointed as a Director General of the Authority in Ethiopia is not described in the law. It seems the qualification is something to be determined by the appointing body. There is no tenure of time set for a Director General and the Judges of the Authority. The issue of conflict of interest and matters regarding immunity of a Director General and the Judges of the Authority is not legislatively addressed in Ethiopia. The Authority does not have secretariat in its organization which may carryout administrative and investigation function. Each division of the adjudicative tribunal of the Authority shall have one presiding and two other judges to be appointed by the Prime Minister of Ethiopia. The adjudicative tribunal of the Authority is inaugurated and became functional in October, 2013. There is only one division of the adjudicative tribunal established so far consisting of three judges with law first degree educational background and one of the judge has resigned from post among them.

The independence of institution controlling competition in Ethiopia is under question because of first, the recommendation and the appointments of the Director General and judges are made by the executive organ. Secondly, the Authority is accountable to the Ministry of Trade which is an executive government organ. Finally, the budget of the Authority is allotted by the executive

body and this make the Authority to be financially dependent on the political organ of the government.

The Ethiopian competition Authority is given certain powers and functions on competition subject matters and other additional powers and function which are out of the ambit of competition such as, consumers' protection and unfair business practice. The Authority has administrative power to perform juridical act. It may employ the necessary staffs and administer in accordance with Federal Civil Service Proclamation. The Authority may also collect service fees, though the ETCCPP did not detail how this fund will be administered. The Authority has an adjudicative power to entertain cases brought before it and impose administrative and civil sanctions, and gets complaints compensated for damages they sustained. It has also the power to execute the decision it passes. So far, no cases regarding merger, abuse of dominant market position or restrictive business agreement has been investigated nor adjudicated. The few cases the Authority has thus far entertained are those related to unfair trade practice which are not competition issue but related to consumer rights protection. The Authority does not have criminal jurisdiction. The ETCCPP does not confer the Authority with the power to issue implementing directives. The Authority has given detailed power and duties on consumer rights protection and it is active in this regard.

The Authority from the time of its establishment has carried out a lot of advocacy works, though it is centered on consumer rights protection. Different training and workshops have been conducted for different sectors of the society, especially for business community, consumer Associations and Justice Organs both at Federal and Regional States level. Less competition advocacy work has been done by the Authority comparing with that of consumer rights protection.

Appeal is the only legal protection mechanism recognized under ETCCPP. Other legal protection mechanisms such as review by the Authority itself is not recognized under ETCCPP.ETCCPP did not set detailed rules on competence, procedures and priorities of the institutions in case conflict of jurisdiction arises between the Authority and other regulatory bodies.

In general, legislatively in the organization of the Authority, there are no clear and detail qualification requirements set for a Director General and the judges, no tenure of time set for a

Director General and the Judges, the issue of conflict of interest and matters regarding immunity of a Director General and the Judges of the Authority was not addressed and the Authority does not have secretariat in its organization which may vested with administrative and investigation power. Structurally the Authority is not independent because, the recommendation and appointment of a Director General and the Judges is made by the executive organ of the government, the Authority is accountable to executive body, which is the political arm of the government and financially dependent on political organ of the government. As far as the power and functions of the Authority is concerned, it does not have investigative power, does not set the criteria and guideline for the staff it hires, cannot administer the service fee it may collects and does not have the power to issue implementing directives. Only one legal protection mechanism, which is appeal right, was recognized in the proclamation. The issue of conflict of jurisdiction that may arise between the Authority and other regulatory bodies was not also settled in the legislation. To tackle the above mentioned legislative problems, the writer recommends for the overhaul ETCCPP in line with the recommendations on UNCTAD model law on competition and best experience of country with similar economic system. The establishment of competition Authority in Ethiopia is a recent phenomenon and consequently it is susceptible to different challenges in its move to ensure competition in the market place. The overall practical challenges faced by the Authority are those related to lack of institutional strength in its organization, structure, power and function and lack of competition culture at business community, general public and government levels. Due to this reason the Authority is engaged in reactive approach. The Authority should have followed the proactive approach with the existing staffs as this may the preferred approach especially for those countries with huge anti-competitive business practice.

5.2 RECOMMENDATIONS

The challenges to the institution controlling competition in Ethiopia, as it was discussed earlier, are those related deficient legislation and lack of institutional strength in manpower capability. Depending on the legal and practical appraisal made earlier in the body of the paper, the writer recommends the followings:

5.2.1 ORGANIZATION OF THE AUTHORITY

In the organization of ETCCPA, there is no clear and detail qualification and experience requirements for the person to be appointed as Director General and Judge. Unless the standard criteria are set by the legislation, the post may be abused by the appointing body. It is recommended that there should be minimum requirements set by ETCCPP for the Director General and Judges. The qualification requirements should set the criteria of knowledge and experience in the fields of economics, law, commerce, industry or public affairs fields and experience of certain years in respective fields.

As it was recommended by UNCTAD model on competition and included in many jurisdictions Competition law, the duration of time in office should set for the Director General and Judges of the Authority as this may boost the efficiency of the Authority. The matters regarding the possibility of reappointment or not should also be addressed in the legislation.

The issue of conflict of interest of a person appointed as Director General and Judges with the Authority did not addressed in ETCCPP. It is essential that any person before being appointed as the chairman of the Authority or Judge should be checked whether he/she has conflict of interest with it. The Director General and Judges represents the interest of both government and business community, the conflict of interest against these groups should be checked before their appointment. The Director General, Judges and other staffs of the Authority should not be owners, chairmen or members of board of management or supervisory board of any enterprise or trade association. This should also be addressed in the legislation.

ETCCPP does not govern the possible immunity that should be given to the Director General and other members of the Authority. It would have been better had the proclamation govern matters regarding immunity as this will build confidence on the functioning of members and protect them from internal or external pressures. The manner in which removal of the Director General and judges is made should also be clearly addressed in the competition legislation of the country.

ETCCPA does not have secretariat. Just like what has been done by countries like South Africa, it would have been better had the Authority was organized in the Secretariat which will be vested with the power of Administrative and Investigation and the tribunal independent of the

secretariat which will adjudicate the case and take the necessary measures. The Authority as an administrative body should be separated from the tribunal.

5.2.2 REGARDING THE STRUCTURE OF THE AUTHORITY

The structural independence of the Authority is under question as the nomination and appointment of Director General and Judges is made by an executive organ and there is no detailed qualification requirement set by the law. The fact the Authority is accountable to the executive organ complicate the matters more. In order to have independent Authority, the writer recommends, there should be a nominee committee composed of different stakeholders for the recruitment of Director General and the Judges, the appointment should better be made by the parliament and the accountability should also be to the parliament. The fund of the Authority should better be allotted by the parliament rather than Ministry of Trade. The Authority should also be empowered to use fees it collects through different service it rendered and receive money from other sources such as aid agencies.

5.2.3 POWER AND FUNCTIONS

The ETCCPP does not confer the Authority with the power to issue implementing directives. Owing to the relatively presence of expertise in competition matters in the Authority, the proclamation could have conferred such a power on the Authority. The Authority should be empowered to submit proposal for the amendment of legislation on competition and participate on the draft of it. Further the Authority should be empowered to review the economic and administrative regulation issued by executive government organ of any level as this has an impact on the enforcement of competition.

The Authority does not have the power to set a criteria and guideline for the staffs it hires. The writer recommends that, the Authority should be given a mandate to set criteria and guide lines in hiring its staffs than using the criteria and guide line set by Ministry of Civil Service as the Authority is the appropriate organ that knows betters the one who will fit for the post.

The Authority should be empowered to administer the service fees it collects from different service it renders and derive income by investing and depositing its money. Further the Authority

should be empowered to receive money from other sources such as national and international aid agencies.

The only available legal protection mechanism, in Ethiopia, on the decision of the Authority is appeal rights. The Federal Trade Competition and consumer protection appellate Tribunal has not yet established. The Tribunal should, therefore, be established with appropriate staff as soon as possible as the adjudicative tribunal of the Authority has become operational. The proclamation could have also recognized various legal protection mechanisms as it may important for the parties to the case. At least review by the Authority could have been recognized as a legal protection mechanism in addition to appeal right.

5.2.4 CAPACITY BUILDING

The practical appraisals of Authority demonstrate as it lacks institutional strength. This has been manifested in lack of human resource in capability (knowledge and skill) and experience in competition and consumer rights protection issues. The fact competition legislation is adopted and institution controlling it inaugurated does not a guarantee to ensure competition. The institution should be strong enough to implement the competition law. Enforcement of competition law needs special skills, training and experience due to the special nature of competition cases. It is recommended that feasible initiative program like that of training accord with higher education institutions (domestic or abroad) should be adopted to boost the Authority's human capacity.

Currently, the number of members of the Authority is less than half of the total number of manpower it supposed to have. A lot is expected to be done from the Authority to fill this gap. The Authority should hire the necessary staffs at least to the extent enable it handle the cases brought before it. The Authority should be composed of staffs possessing suitable qualifications and experience.

The Authority has only one adjudicative tribunal which is situated at the head office in Addis Ababa. As anti-competitive business practice may occur at any corner of the Country, the Authority should establish branch office at regional states. This should be done with appropriate staffs with the necessary knowledge and experiences.

The overall practical challenges faced by the Authority are those related to lack of institutional strength in its organization, structure, power, function and lack of competition culture at business community, general public and government levels. The Authority should do a lot on capacity building in collaboration with stakeholders and different NGOs to tackle these problems and boost its institutional strength.

5.2.5 THE OVERALL ASPECT

The Authority has embarked on aggressive advocacy works on consumer rights protection. Just like what has been done regarding creation of public awareness on consumer rights protection, great attention should be given to competition advocacy as it is an essential element to realize consumer rights protection. Competition advocacy should be made the primary target of the Authority as this may help a lot to ensure competition in the market place. The Authority should be devoted to the creation of the competition culture among the general public, government entities and business communities.

The institution controlling competition should be strengthened to the extent able to handle complicated competition cases that may arise due to economic development. One way of doing this is through overhauling the existing deficient competition legislation. The Ethiopian legislature should, therefore, overhaul ETCCPP in line with the recommendations on UNCTAD model law on competition and the best experience of countries with efficient competition legislation.

Finally, ETCCPP does not address the issue of conflict of jurisdiction that might arise between the Authority and other regulatory organs. It would have been better had the proclamation set detailed rules on competence, procedures and priorities of the institution to avoid conflict of jurisdiction that might arise.

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