ABABA UNIVERSITY

SCHOOL OF GRADUATE STUDIES

COLLEGE OF LAW AND GOVERNANCE

SCHOOL OF LAW

CONTROLLING ANTICOMPETITIVE ACTS OF GOVERNMENT IN TRANSPORT SECTOR IN ADDIS ABABA

By

ARBA BEYENE UBA

JUNE, 2019

ADDIS ABABA, ETHIOPIA

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ADVISOR SOLOMON ABAY (PhD, Associate Professor)

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DECLARATION

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

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Advisor: Solomon Abay (PhD, Associate Professor)

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Abstract

Competition is promoted for efficient allocation of economic resources and consumer welfare. Anti-competitive behavior however is considered to be vice to the market competition resulting in misallocation of resources and manipulation of consumers. So it was believed that effective competition regime is needed to curtail Anti-competitive behavior in the market. Conventionally, competition regime is concerned with private acts which can distort competition in the market.[1]

Developments in the competition/antitrust regime, however has witnessed that state restraints can result in promoting anti-competitive behaviors of market actors. The state restraints are usually result from unnecessary, anticompetitive statutes, ordinances, and regulations imposed by state and local governments, including local regulatory authorities and considered to be one of major sources of economic inefficiencies.[2] This is the focus of this paper. The trade competition and consumer protection proclamation in this regard lacks particularity. As result of this, the Transport Authority of Addis Ababa enacted different directives which have effect of restricting competition.

I suggest amendment of the proclamation to incorporate rules that maintain cooperative relationship between the regulatory bodies and competition authority and that the law must require regulators to notify and seek mandatory advice from competition authority in a situation where it wants to take measures that affect economic activities in the market for which advice must be binding except the regulator justify its rejection of advice made by competition authority. Moreover, I suggested the competition authority to commit resources including human power to play its role of competition advocacy. In this regard the amendment aforementioned must come up with guidelines as to the scope of this role of the authority.

[1] Eleanor M. Fox and Deborah Healey (2014), "When the State Harms Competition- The Role for Competition Law", Anti-Trust Law Journal, Vol.79, No. 3, p. 773

[2] Peter C. Cartensen (2011), "Controlling Unjustified, Anticompetitive State and Local Regulation: Where is Attorney General Waldo", The Anti-Trust Bulletin, Vol.56, No. 4, P. 772

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CHAPTER ONE

Background of the Study

1.1. Introduction

Competition is promoted for economic efficiency and consumer welfare. Anticompetitive acts are against these benefits to economy and general public. Competition law is traditionally associated with the regulation of abuse or aggregation of market power by private firms. Distortions of market competition may nevertheless be occasioned by government agencies that abuse their regulatory powers. Anti-competitive government acts manifest themselves in the form of sophisticated policy rooted in law in various forms such as antitrust exemptions for state-owned enterprises and other favored classes; discriminatory tax measures and other trade restrictions; obligations on authorities to purchase from nominated favored suppliers; and arbitrarily adopted sanitary rules preventing the import of products from outside the region. Therefore, it is imperative for competition regime to incorporate rules disciplining such a vice of anticompetitive acts of government to maintain competition.

It is in Civil[3] and Commercial Code of Empire of Ethiopia[4] concepts of unfair competition introduced first. Ethiopian government, after paradigm shift with coming in to power of EPDRF in 1991 adopted market economy as policy direction of the country. Yet, the country introduced the competition regime in 2003. The competition law introduced at that time failed to incorporate all aspects of competition law. Among such lacunae of the law, with respect to its application on State Owned Enterprises (SOEP); failure to incorporate relationship between competition and different regulatory agencies and public procurement process are mentionable ones.

Newly enacted competition and consumer protection proclamation tried to fill some of lacunas in previous statute such as application of competition law on (SOEP). However, it failed to incorporate other rules like application of competition regime on public procurement

[3] Proclamation to Provide Civil Code of Empire of Ethiopia of 1960, Proc No.165, Negarit Gazette, Year 19, No. 3, Art. 2057

[4] Proclamation to Provide Commercial Code of Empire of Ethiopia of 1960, Proc No.166, Negarit Gazette, Year 19, No. 3, Arts. 130-134

process and relationship between competition regime and sector specific regulatory bodies such as Transportation Authority. Lack of clear guidance with respect to relationship between competition regime and sector specific regulatory agencies is highly likely to lead to inconsistent and uncertain regulatory intervention. This is what regulatory practice confirms in this country.

The focus of this paper is on effect of lack of rules and guidance on relationship between competition regime and transport authority more specifically on regulatory statutes and measures which are unjustified and exorbitant anticompetitive acts on transportation sector in Addis Ababa city. Government intervention in passenger and freight transportation will be examined in order to illuminate its ant-competitive behavior.

In order to do so the paper is divided into four parts. The first part of the paper is devoted to deal with introductory matters and design of the paper as to how to go about addressing the central point of the material. In the next part of the paper, acts of government that are considered as anticompetitive will be highlighted. The third part of the paper is designated to examine how to address the anticompetitive regulatory intervention by transport authority. The fourth and final part of the paper provides conclusion and recommendations with respect to the subject matter of the paper.

1.2. Market Actors in the Sector

Transport service in Addis Ababa city is rendered in different modalities. Transportation service of passenger and freight are the two well-known services in the city.

Ethiopian economy in general can be considered as statist: state and local ownership of business is rule, not the exception. State and market stayed in close relation and this continues to exist until the current political movement towards liberalization of market to have benefits of economic leverage it brings. Government intervention can pose high difficulty for the competition than those where the economy is not statist. Transportation sector is not the exception to this general rule of statist economy. Until 1992 transitional government, it is Anbessa Bus owned by government has the exclusive right to operate large

bus service in Addis Ababa.[5] Taxi service is also regulated and restricted on zonal basis by public authorities. It was in 1992 that public transportation market deregulated by the then transitional political regime.[6]

1.2.1. Passenger Transport Operators

Passenger transport operators can be categorized as publicly owned and privately owned. Anbessa City Bus, Sheger Bus or Express Bus and Public Service Bus are purely owned by the government. Government has also some share on Alliance Transport Bus which is on the way to dissolve because of different problems including absence of parking space in the city and high loan burden. Until recently, Anbessa City Bus contributed for about 15% of public transport market share.[7] It was initially created in 1963 as privately owned enterprise and nationalized after the coming to the power of military junta in 1974. Currently it owns more than 730 buses rendering the service.[8] Fares are set and controlled by the government-owner which compensates subsidy the city government provides. Fares though modified recently are much lesser than what is set for mid or mini buses. It is also less than the fare set for Sheger Express Bus and Alliance Bus. The reduction of state compensation in the form of subsidy[9] coupled with structural difficulties; lessen the operation of Anbessa City Bus. Of course, it is being under reform to improve its service with the help of advanced technologies.[10] Part of this reform is providing additional buses in the city.[11]

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[5] Trans-Africa Consortium, "Overview of public transport in Sub-Saharan Africa", available at: https://www.uitp.org/sites/default/files/cck-focus-papers-files/Transafrica (accessed on March 3, 2019), p. 24-25

[6] Ibid

[7] Ibid

[8] Tilahun Meshesha (2014), "Demands for Urban Public Transportation in Addis Ababa", Journal of Intelligent Transportation and Urban Planning, Vol.2, issue 3, P.82

[9] Ibid note 10

[10] Interview with Ato Zelalem on April 23,2019

[11] Ibid

Sheger Express Bus is another publicly owned large bus category that rendering passenger transportation in the city. There are about 200 buses in the sector under this enterprise. Its introduction into the market is partly attributable to the problems related to Anbessa City Bus and partly to the supply and demand gap in the sector. As it is in the Anbessa City Bus, fare is set and controlled by the government. The fare is low relative to taxi and other mid buses.

Public Service Bus is another modality of passenger transportation in the city under the ownership of government. It has two kinds of service modalities. Transportation service to public servants to and from work is the first modality. The second modality is providing service to general public in order to remedy the shortage of passenger transportation at peak hours- the time where workers travel to their work and returning to home.

Taxis and mid buses are other modalities of transportation service. In addition to Anbessa City Bus and Sheger Express Bus[12], there are about 10,000 to 12,000 white and blue taxis, 460 Higer buses, 366 supplementary vehicles, 1500 Lada Taxis and about 1500 meter taxis[13] provide service in different modalities.[14]With the introduction of Ride-Sharing platform however, owners of vehicles who imported them as capital goods for investment and personal use provide passenger transportation in the city.

Studies have established that the demand for public transportation is left unmet despite the presence of all these actors in the market.[15] Besides lack of sufficient infrastructure, low profit margin, increasing population and high expansion of the city; restrictive government regulation might have partly exacerbated the gap between demand for public transportation and supply of the service. Therefore it is important to soften regulatory intervention to the extent needed to ensure safety and security of customers.

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[12] Alliance Bus was also rendering passenger transportation to the public, but now it stopped the services primarily because of bank loan and lack of parking space in the city.

[13] Berhanu Fekade, "Unsettled Tension Between "Bole Taxes" and the [Transport] Authority", Reporter (16 August , 2018)

[14] See Tilahun Meshesha, p. 82 and see also Wondem Mekuriaw on "Performance and Challenges of Zonal Taxi Transport System in Addis Ababa" (MA Thesis, Addis Ababa University, 2012), p.30

[15] See Tilahun Meshesha at p. 82 and see also Ausimane Thiam, at p.24

1.2.2. Freight Transportation

Freight transportation service is rendered by different operators using different vehicles ranging from light vehicle with the capacity of 5 quintals to 300 quintals. Some passenger vehicles such as Lada Taxi also involve in freight transportation. Taxis with or without passengers also render the freight transportation services despite firm zoning system they are required to comply with.

There are about 23 associations with the total number of 123 vehicles exclusively providing freight transportation. In spite of this, freight transportation remains problematic in the city primarily because of shortage of vehicles which render the service. Therefore there has to be measure which alleviates the problem.

1.3. Statement of problem

Lack of rules defining the relationship between sector specific regulators and competition regime may pave a way for regulators to abuse their power which ultimately can have an effect of distorting competition in the market. The proclamation on trade competition and consumer protection lacks such a definition regulating this relation. Hence it is highly likely that sector specific regulators such as Transport Authority abuse their regulatory power in a way distorting competition in transport market.

Transport service providers in Ethiopia are among highly regulated actors in the market through variety of policy apparatus. Of course, regulation serves multiple of purposes by promoting quality service, safety and security of passengers and efficient use of resources. In such a scenario, it complements goals set by competition regime. But there are possibilities where regulatory acts by government authorities turn out to be against competition. This can be manifested in the form of discriminatory price setting; measures paving a way to incumbents continue to dominate the market by putting restriction for new entrants, discriminatory taxation and so on.

In Addis Ababa, provision of transportation is mainly regulated by Transport Authority of Addis Ababa City Government. Among restrictive regulatory interventions conducted by the authority; requirement as to the number of vehicles to enter into the market, limiting areas of

operation for taxis operating on contractual basis and permission of discriminatory duty free importation of vehicles for some organizations can be categorized as actions that are susceptible to regulatory abuse which in effect distorts competition in the sector.

Yet, the demand for passenger as well as freight transportation is unmet. This problem is also confirmed by the transport policy of the city by adopting what the studies in the sector show.[16] Thus, aforementioned restrictive and unjustified regulatory interventions, no doubt, can exacerbate the problem. Competition authority cannot take measures to rectify the problem because of lack of rules defining power of the competition authority vis-à-vis sector specific regulators as the law stands now.

1.4. Research Questions

1. What are anticompetitive acts of government in transport sector in Addis Ababa?
2. How should they be controlled?

1.5. Objectives

The objectives of the paper are as follows:

To examine regulatory intervention that is anticompetitive by Transport Authority of Addis Ababa City

To suggest incorporation of rules on relationship between competition regime and regulators in order to enable the competition authority take appropriate measures when unjustified regulatory intervention made.

1.6. Significance of the Study

Writer of the paper is interested in exploring acts of Transport Authority that encourage anticompetitive acts of private actors in passenger transportation, more specifically, on measures taken by Transport Authority of City Government of Addis Ababa on taxi and related service providers. It may tangentially touch up on services provided by the

[16] The Federal Democratic Republic Of Ethiopia Ministry Of Transport: Transport Policy Of Addis Ababa (August, 2011) P.5

government itself in order to differentiate interventions that are apt and not from competition point of view.

There are some works by Ethiopian writers related to competition regime from both legal and economic point of view. These are article by Harka Haroye,[17] research by Kibre Moges[18], and article by Hailegabriel G.Feyissa[19]. None of these materials address the issue of interface of competition regime with sector specific regulators.

There are also writings by authors of different jurisdiction with respect to the interface that should be between the regulators and competition regime. Among them I found one article by Wenche S. Egeland, Andreas J Tveito and Christian Lund[20] relevant because it directly deals with regulation and competition in taxi service industry in Norway. Other writings are helpful in differentiating regulatory interventions that are aimed at promoting legitimate public interests from those that are in a way exceeding legitimate public interests and paving a way for private actors, especially incumbents, to manipulate these intervention in order to pursue their anticompetitive acts by maintaining the market position they previously have. As I have repeatedly stated, the aim of the purpose of this paper is to show the effect regulatory intervention on competition as result of absence of guidance with respect to relationship between competition regime and regulatory authorities. It specifically tries to address the issue of anticompetitive acts of government in transportation sector in Addis Ababa which none of aforementioned works address directly. Specifically:

- The research will identify gaps in competition proclamation with respect to the relation that should exist between competition authority and regulators and recommend amendments.

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[17] Harka Haroye (2008), "Competition Policies and Laws: Major Concepts and an Overview of Ethiopian Trade Practice Law", Mizan Law Review, Vol.2, No. 1

[18] Kibre Moges, The State of Competition and Competition Regime in Ethiopia: Potential Gaps and the Enforcement Challenges, (OSSREA, 2015)

[19] Hailegabriel G.Feyissa(2009), "European Influence on Ethiopian Antitrust Regime: A Comparative and Functional Analysis of Some Problems", Mizan Law Review, Vol.3, No.2

[20] Wenche S. Egeland, Andreas J Tveito and Christian Lund(2009), "Regulation and Competition in the Norwegian Taxi Service Industry", Competition Law International Vol.5, No. 34

- To point out some way outs for those who are vulnerable to regulatory abuse by using canons of legal interpretation.
- It may initiate further researches on the area and can be used as reference.

1.7. Scope of Study

There are multiple of transportation services subjected to regulation in Addis Ababa City. Among these services, this paper focuses on passenger transportation services rendered in different modalities and transportation of goods by different trucks in Addis Ababa City. Zoning of Taxi service, limitations as to numbers of vehicles to form an association, duty free importation of some taxis and credit facilitation are points that needs due attention in this paper. Passenger transportation service rendered by Addis Ababa Light Train is not part of the study because there is no need to entertain competition issue where the service is provided by single actor

1.8. Limitation of the study

The major challenges I have encountered are unavailability and inaccessibility of materials, unwillingness some officers in Transport Authority and Trade Competition and Consumer Protection Authority and transport service providers for interview.

1.9. Methods/Methodology

The data used for the purpose of this paper are generally relied on primary and secondary data. Specifically it uses laws, reflection of previous work experience and experience sharing of members of the operators. In the case of Secondary data, relevant official reports, legal documents and research papers were used in the study. They were also gathered from various published journals, reports, books, project reports, public speeches and related materials.

In order to have insight on interpretation of the laws by concerned body, unstructured interview will be administered. Interview of persons in Transport Bureau of Addis Ababa, Competition and some of members of Taxi associations was conducted in due course of the research. Therefore, analysis of laws, documents and other secondary sources will be made.

1.10. Data analysis and interpretation

Qualitative data gathered will be analyzed qualitatively by arranging issues of facts and law then putting separately in to the context it fits the most. I will employ rule of legal instruments interpretation for legal analysis and logical reasoning for factual analysis.

CHAPTER TWO

Anticompetitive Acts of Government in Transportation Sector in Addis Ababa

2.1. Conceptual Underpinnings of Anti-Competitive Acts of Government

Anticompetitive acts traditionally and primarily are related to acts of private entities and laws put primary emphasis on those entities in order to ensure competitive market and designed to control anticompetitive behaviors of private firms[21]. These laws prohibit acts that harm or seek to harm market or competition process among businesses and have no legitimate business purpose.[22] Acts that can be categorized as anticompetitive for private firms are cartels, abuse of dominance or market power and anticompetitive mergers.

Nevertheless, government itself can distort competition in the market by its regulatory intervention. But what constitutes anticompetitive acts of the government? Unlike acts and conducts of private entities, government itself does not engage in the practice which violates competition law of the given country. Rather, it paves a way for private entities to take part in the acts and take advantage of regulatory intervention of government to defend them when issue of anti-competitiveness arises.

What specific acts are categorized as anti-competitive acts of the government at first place? Statutes conferring antitrust immunity while allowing private parties to agree on anticompetitive conduct, which is considered as approving the acts by private parties, can be mentioned as one of its forms.[23] Secondly, it is fostered through directly regulating operation of market in a manner foreclosing entry and competition by otherwise qualified entities.[24] Regulations or case specific decision by state and local authority that affect competitive market in the field subject to regulation can also be characterized as anticompetitive acts of

[21] Eleanor M. Fox and Deborah Healey, p.769

[22] Black's Law Dictionary, 9th Ed. p.91

[23] Peter C. Cartensen above note 2, p.782

[24] Ibid

government. Local ordinances adopted by cities, towns and counties[25] in some countries are also considered as acts of anticompetitive nature.

2.2. Entrance Standards

A. Burdensome Licensing Requirements

It is certainly true that licensing in some professions, in which faulty service cannot readily be cured, serves legitimate interest.[26] In that case it is inevitable for the state to provide appropriate mechanism to check the person beforehand.[27] License could serve as evidence for qualification of the person intending to enter into the market. Therefore, carefully designed and implemented licensing can help benefit consumers specifically by ensuring high quality services, safeguarding against serious harm, and offer workers clear guidelines around professional development and training when licensing requirements closely match the qualifications needed to perform the job.[28]

Licensing requirements however, have effect of entry barrier to new comers in business environment. So, licensing regime stifles competition and innovation; and further heightens barriers to entry and expansion in the market. Here the firm incurs cost of entry barrier at the initial stage of the business which it is going to participate and then compete for business.[29] Thus the entrants take into consideration of this cost whether doing business in specific market which is subjected to stringent entry barrier is profitable. When they ascertain that they can never be profitable in the said market, it is unlikely that the start business meeting all regulatory requirements. The effect would be leaving consumers with increased price,

[25] Ibid

[26] Roland W. Donnem, "Federal Antitrust Law versus Anticompetitive State Regulation", Antitrust Law Journal, Vol.39, (1970), p. 955

[27] Ibid

[28] US Department of Treasury Report (2015), Occupational Licensing: A Framework For Policymakers, available at: https://obamawhitehouse.archives.gov/sites/default/ files/docs/icensingreport-final-nonembargo.pdf (accessed on 7 May, 2019) P.3

[29] Luis Orea," Entry deterrence through regional regulation and strict licensing policy: an analysis of the large retail establishments in Spain" Oxford Economic Papers , Vol.64, (Oxford University Press, 2012), p.544

markups, and without alternatives as to quality of products by leaving the market to the incumbents.[30]

Lengthy process for licensing to enter into the market is one of familiar problems complained by entrants in different sectors of economy.[31] It usually takes 2-3 years for the new entrant to secure license to operate a given business.[32] It is manifested by requiring qualities or standards that are irrelevant for the business that the new comer is wishing to start.[33] It may also involve requirements that entrant should make sure that he/she/it is free from criminal prosecution and conviction. Conviction as to the crime related to profession or business that new comer is going to engage in could be justified for different reasons.[34] But the general requirement that one should be free from conviction may fail to serve legitimate purpose.

Another problem with license, as established in literatures, is its initiation. Pressure of licensing a given group usually comes from the concerned group itself.[35] Justification the group is grounded on claim that the general public requires protection from incompetence and fraud prevalent in a given industry.[36] Specifically, there is perhaps the need to regulate new entrants to the sector so as to protect the consumers from fly by night operators and their

[30] Ibid, p.540

[31] Competition Commission of South Africa, Promoting Healthy Competition, Seminar on Health Market Inquiry (14 February, 2018), available at: www.compcom.co.za/wp-content/.../09 , p.7

[32] Ibid

[33] Ibid

[34] ibid

[35] Ronald W. Donnem above note 26, p. 954

[36] Richard A." Knudsen, Licensing Professions and Occupations in Nebraska", Nebraska Law Review Vol. 29, pp. 146- 147

products.[37] The real motive behind this pressure could however be creating state sanctioned monopoly or encouraging anticompetitive behavior.[38]

Sometimes, associations of certain profession may be entrusted with the licensing power. They may abuse this power to create barrier for entrants to the market. Other way of putting restraints is, powerful business actors using their market capacity by lobbying the state to adopt certain standard which erects entrance barrier to the new comers.[39] Here comes regulatory capture in which the government intervenes in the market under guise of correcting market failures but to benefit those subjected to the regulation into picture. Generally therefore, by making it harder to enter into certain profession, licensing as one aspect of regulation restricts opportunities and reduces general economic efficiency.[40]

With regard to the issue on hand, licensing is not problematic because it is equally applicable on all operators of both passenger and freight transport service providers except for emerging technological platforms like Ride-Sharing which I will treat with some details in other section of the material. It is prohibited for a person drive a motor vehicle on any road without having the proper driver's qualification certification license.[41] It also prohibits an owner or possessor of motor vehicle from allowing any person to drive his/her motor vehicle without verifying that the person is a holder of the proper driver's qualification certification license.[42] Accordingly, any individual wishing to drive a motor vehicle is required to have drivers' qualification certificate. Therefore, it is equally applicable on every person and prohibition against allowing another person to drive one's own vehicle without holding drivers'

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[37] Lorna-Lee De Bruyn and Christopher Gibson, Regulatory Standards as a means of creating a Barrier to Entry, the case of The Competition Commission and Netstar Vehicle Tracking, available at: www.compcom.co.za/.../**Regulatory-Standards.Barrier**s , P.2

[38] Richard A supra note 36, p. 147

[39] Eleanor M.Fox (2008), "An Anti-Monopoly Law for China Scaling the Walls of Government Restraints" Antitrust Law Journal , Vol. 173, P. 180

[40] US Department of Treasury above note 28, p.4

[41] A Proclamation To Provide For Driver's Qualification Certification License, 2018, Proc. No. 1074, Federal Negarit Gazzeta, Year 24, No. 27, art 23/1/

[42] Ibid Art.23(2)

qualification certificate as well is equally binding every person. No discriminatory licensing standard which specifically favors incumbent operators is provided under the law. The requirement to have driving license of the category[43] is provided on the ground to prevent accidents that are caused by lack of experience and competence on the part of drivers. But this requirement, either misunderstood or the wording of the provision influenced officials of transport authority in tending to require technology platforms to have the driving and operation license.

One thing that needs oversight from the regulatory authority is the mismatch of the license the drivers held and the service they provide when it comes to those service providers with the help of technological plat form more specifically drivers using their personal vehicle and for the purpose of investment. Of course, it is type of the vehicle that the proclamation focuses on rather than the service that the driver renders though the service is public transportation service for which trainers are required to pay more than automobile trainers. According to article 8(3) of Proc No. 1074/2018, the training of automobile can even be provided by private person using personal vehicle up on permission for temporary trainers' license from relevant authority. In this case it is free of cost or with little cost to secure the license of automobile vehicle. The age and educational qualification requirement is also much less than that required for public transportation service.[44] Therefore, it is obvious that the requirements are less stringent in which actors of the same category are subjected to different regulatory standards which actually have implication on competitive equality of market actors. Hence, to state the obvious, it is anti-competitive in effect.

B. Tax Incentive, Number of Vehicles and Institutional Set-Up Requirements

I. Tax incentive

While the use of tax concession may be a justifiable policy intervention in attracting limited amount of foreign capital and employment creation, no doubt its use however conflicts with the competition law to the extent it confers undue competitive advantage over other

[43] Ibid, Art. 10

[44] Ibid, Art. 12(1)

companies. Tax incentives for both domestic and foreign investors can be discriminatory which turn out to be anticompetitive act of government.

In this regard, Meter Taxi service providers are discriminated for the tax incentive on the ground whether or not they are under business organizations (Private Limited Companies, Partnerships, Share Companies or Joint Venture) to provide the service. Anyone who individually interested to engage in Meter Taxi is required to pay import duty while those in the form of business organization are not required to pay import duty.[45] The reason on the part of transport authority is that transport sector should be corporatized so that responsibility for risk such as theft, battery and rape related to passenger transportation service shouldered by business organizations than individual service provider.[46]

Besides tax discrimination among Meter Taxi Operators based ownership modality as mentioned above, other operators such as 'Lada', Tourist Taxis, and Lifan 530 were imported with duty. Specifically when it comes to Meter taxis, there are 26 Associations of Meter Taxis with total number of about 1000[47] taxis imported free of tax and with some amount of loan that the government facilitated. Numerically the taxis these associations own are more than double those owned by Tourist taxi associations. Government support coupled by numerical advantage, exposed the taxi operators other than Meter taxi operators to unfair competition.

It is clear that individual who wishes to engage especially in mini taxi service cannot stand the competition from those operating in associations because of tax and other benefits that government confer to them. Whether or not the intervention is necessary is beyond the reach of this paper. However, discriminatory tax leverage between taxis of different kind and based on business modality can by no means be justification and failed to take into consideration of the reality on the ground. In this regard, as it has been mentioned above, the demand for passenger transportation in general and supply of the service remain apart.

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[45] Directive to Decide and Control Organization, Licensing and Service Provision of Meter Taxi No.1/2009, Art. 9.4.2

[46] Interview with Ato Zeleke conducted by Sheger Radio on November 27, 2018

[47] Tilahun Meshesha cited at note 8 above, p. 83

Incentivizing incorporation may enable us to reap the fruits it brings and achieve the safety and security needs that the authority is worried about because of resultant participation of competitive firms in the economy. It is even suggested to incentivize incorporation in Ethiopia if the country needs to have competitive firms when we fully integrate globally.[48] The economic benefit that incorporation would bring can be visible because of its ability to pool resources together and engage in viable economic activity. Involvement of about 26 associations in Meter taxi service can serve as an example for the contribution of incentive conferred. Incentivizing incorporation should not be taken to mean the other forms of business organizations must be prohibited or discouraged.[49]

The problem however is the culture of corporatization in the country. It is immature in the sense that the people do businesses in traditional way.[50] As it is indicated earlier in this material, participation of few operators in the Meter taxi service illustrates the influence of this culture even though they are favored by government through tax incentive. Perhaps, tax relief or incentive could be one way of incentivizing people to incorporate and be competitive in business environment as it is suggested. But it is not the only way to encourage business persons to incorporate. Nor is it a way of eliminating the immature culture of corporatization in the country. The paradox is that the demand for mass transportation and supply remain unmet while the government provides tax incentive only to operators incorporated as business organization which is ineffective because it is highly influenced by traditional way of doing business.

II. Number of Vehicles Requirement

The directive puts minimum number of vehicles to operate Meter taxi service. Minimum of 35 vehicles are required to render the service in business organization.[51] The business organization could adopt any of the form (Ordinary Partnership, General Partnership, Limited

[48] Wondimnew Kassa, Corporatization In Ethiopia: A Move Towards Coping With Globalization And Accession To The WTO, (unpublished Master's thesis, Addis Ababa University, 2014) P.107

[49] Ibid

[50] Wondimnew above supra note 48, p. 108

[51] Directive on Meter Taxi, Art.9.4.3

Partnership, Joint Venture, Private Limited Company Or Share Company) under the Commercial Code of Ethiopia.[52] The authority might have thought that credit worthiness of the organizations can be ensured by requiring them to be established with significant amount of capital. Of course, some creditworthiness is needed and as such requirement for minimum vehicles can help to achieve this goal. This was the motive behind legislator as provided under article 13(2) of Transport Proclamation number 468/2005.[53] This requirement however, could be contradictory with what is aimed at the preamble and objective part[54] of the directive. Even from comparative point of view, the required number of vehicles is well beyond what is required in cities of advanced countries like Korea.[55]

One of objectives of the directive is ensuring accessible transportation service in the city. Given the immature culture, as indicated above, of incorporation in the country compounded with difficulty of pooling such a huge capital could make it highly unlikely to encourage actors to enter into the market. Whichever form of business organization adopted, minimum number of vehicles requirement remains the same. So it discourages business organizations other than Share Companies because ability of others to pool huge capital is very limited.[56] This is opposite to what is on the ground in which Private limited Companies for example are increasing at far greater rate than share companies. Among registered companies in the country about 96% is private limited company while Share Companies account for only 4% in 2008.[57] If this trend continued even with slight change, this shows that private limited companies are major channels through which business is conducted among business organization. Moreover, it can also be an indication of people's unwillingness to participate

[52] Ibid Art. 5.4

[53] Interview with Teshome Ginto, Team Leader of Road Transport Service Associations,' in Federal Transport Authority.

[54] See article 3 of on Meter Taxi

[55] OECD, p.155. except for Seoul and Bussan the minimum number of vehicles required is 30.

[56] If we take private limited company as an example, maximum number of members under article 510 (2) Commercial Code is fifty. Therefore it is less likely to secure sufficient number of actors in the market with requirement of this minimum number of vehicles conforming to requirements of the code.

[57] Nigusie Tadesse, Major Problems Associated with Private Limited Companies in Ethiopia: The Law and The Practice, (Unpublished Master's Thesis Addis Ababa University, March 2009), P.64

in public companies because of influence of immature culture of incorporation. The conclusion actually could be that the requirement directive puts is incompatible with its objective of ensuring accessible and quality passenger transportation. Therefore, it would have been better, had it been designed in a manner encouraging PLCs by softening requirements without losing its aim of ensuring credit worthiness of associations i.e. striking the balance between the objectives. Furthermore, requiring less number of vehicles can even encourage people to render the service in share company form.

On the other hand the requirement of the directive, obviously favoring business organizations albeit, so burdensome, for the individual person to engage in the service is much more than what is required from business organization. Besides denying tax benefit that the organizations enjoy, it requires an individual to own 20 vehicles/taxis to operate Meter Taxi.[58] This is an equivalent as banning an individual from operating the service. Trends in advanced countries show otherwise in this regard. Individuals are not required to fulfill certain number of vehicles to operate taxi service.[59] In our system given the requirements by directives, only few people fulfilling the requirement might participate in the sector. Market will either continue with the shortage or dominated by few- in both cases consumers will be left with less alternative and forced to pay high price.

The case of freight transportation is somewhat different from passenger transportation. Individuals are free of requirements to own certain number of vehicles to render freight transportation. Minimum and maximum number of vehicles is required for the business organizations to operate in freight transportation. Minimum of 5 and maximum of 15 vehicles for special freight category; minimum of 2 and maximum of 10 vehicles for liquid freight and minimum of 35 and maximum of 70 vehicles for solid freight transportation service required by organizations.[60] Organizations intending to participate in combination of service

[58] Directive on Meter Taxi, Art. 9.4.2

[59] OECD, p. 155

[60] Directive to Decide and Control Organization, Licensing and Service Provision of Freight Transportation in The City, No.05/2010, Article 12.1-12.3

categories are required to fulfill the minimum numbers of vehicles required in each category.[61]

One thing that can be noted is that some of the requirements are hardly to be met. For example minimum of 35 vehicles requirement in solid freight transportation does not encourage potential entrants in sector intending to channel their business in organization form. In this part of the business too it allows limited actors with capacity to take part in the business because of huge capital it requires to commence the business.

The odd thing about the directive on Meter Taxi is its provision prohibiting the authority from issuing license to potential providers of blue and white (commonly called Lada Taxis) or Tourist Taxi service. Only those previously operating in the market can obtain operation license and renewal service.[62] It is an indication that termination of operation of these taxis.[63] The provision restricts the number of Blue and White taxis or Tourist taxis to current operators and even vanish the service they provide because it is normally expected that those vehicles currently in the market will depreciate and stop rendering the service. Thus, restricting number of actors in the market means allowing monopolistic behavior which is *ipso facto* anticompetitive.[64] Completely vanishing the service from the market, while the need for the service persists, mean forcing consumers to unaffordable services.

The authority using regulatory power, not the market, is trying to drive the service out of the market. In the interview with Yitagesu Moges,[65] the reason behind this prohibition by the directive was to ensure quality service by replacing these taxis with Meter taxis. The reasoning from the side of authority is in complete contradiction with realities which the studies reveal. Unavailability of alternatives for passenger transportation is one of chronic

[61] Ibid Art.12.4

[62] Directive on Meter Taxi, article 21.3

[63] Transport Policy , supra note 16, p.7

[64] OECD 2014

[65] Yitagesu Moges, Team Leader of Department of Transport Associations' Organization

problems that we face daily in the city.[66] Thus, completely denying new licenses without proving that the service is dangerous to the consumers is unacceptable from competition point of view. This prohibition is not limited to contravening competition regime: it is against constitutional right of citizens to engage in the work they choose.[67]

Regulator intrusion is not limited to setting standards with regard to minimum and maximum number of vehicles which can be translated to minimum capital required to establish the business. It also proscribes the institutional set-up and human resource for the operation that the organizations are required to follow. For example organizational structure of Meter Taxi organizations, according to the directive should be permanent having service call center.[68] It is further required that the organization must have manager, operation manager and call center workers.[69] It is stringent when it comes to freight transportation. It goes far in proscribing even office equipment including chairs and tables that associations required to fulfill to secure operation license.[70]

Some countries have quality regulations scheme including requirement as to existence of operation facilities like business office.[71] But, detail requirement including personnel and institutional set up is against trends of the countries and contravenes economic freedom of individuals. Issues like institutional set-up can be determined by market which is highly related to, among other things; services provided by competitors and creativity required by specific business.

Leaving the extent to which these entrance standards and restriction affected business environment in transportation sector of the city for further study, no doubt, will reduce intensity of rivalry within the market and thereby reduce innovation in the industry and the

[66] Tilahun Meshesha, Supra note 10, p.82

[67] Constitution

[68] See article 9.5 of Directive on Meter Taxi

[69] Ibid

[70] See appendix 1 and 2 of Directive on Freight Transportation

[71] OECD, p. 155

development of new products to better serve consumer demands. Besides this, restriction of entrance by limiting vehicles in the market would even hurt the lower-income people relatively more because they spend a larger share of their incomes on transportation than do high-income people.[72] Hence, removal or loosening of entry barriers and letting the actors to compete while upholding quality regulation is essential in allowing new firms to flourish wherever persons with entrepreneurial flair can identify profitable opportunities.[73]

2.3. Operation Regulation

In this part of the paper not all operation regulation are addressed in detail. Rather it highlights only operation regulations that inhibit competition in the sector. Accordingly, area limitation to render the service that the Tourist and Blue and White taxis are subjected on one hand freedom enjoyed by Meter taxis in respect to areal limitation is the main concern. In addition to this, operation by other actors by the help of technology platform and response of the authority are highlighted.

It is allowed for the Meter taxi operators to render the taxi service in every corner of the city as per article 5.1 of directive on Meter Taxi number 1/2009. It defines Meter taxi as "*vehicle having 4-7 seats, installed cab meter and operate by phone, radio connector, or physical call to render taxi service in the boundaries of the city."(Translation is mine).* One thing that must be noted in this definition is that vehicles failing to meet requirements in the directive cannot participate in Meter Taxi modality. Some of requirements such as cab meter may serve the interest of consumers by clearly determining the distance covered at specific time. But minimum seats required in the directive have effect of restricting participants in the market.

No limitation or zoning is imposed on Meter taxis. This means that it can operate on roads by hailing passengers, queue for passengers in airport and take and return to and from hotels, commercial and other service institutions without limitation. There is also an indication that

[72] Frankena, Mark W. (1979), Urban Transportation Economics, (Toronto: Butterworth), pp.74-75

[73] Ibid , p. 25

Meter Taxi operators not limited to render the service within the city. The authority is obliged to give exit license for the operators when they intend to render the service out of the city.[74]

The directive also imposes the obligation on authority to provide support, facilitate negotiation when conflict of interest arises and advertise the service provided by Meter taxi using different forums.[75] Therefore, besides tax and loan benefit package at the entrance of the industry in the market, the authority is also required to ensure smooth functioning of this industry by providing support, (may be by providing parking, designated place for queuing in areas of operation like airport and giving priority contract for transport service needed by government organ) involving in amicable dispute resolution mechanisms and facilitating the service by giving exit permit for out of city service.

On the other hand, Tourist taxis are limited to operate in airport and around star hotels. According to article 5.3 of the directive, Tourist taxi is defined as "yellow vehicle rendering taxi service by setting the fare by agreement and operate in airport and around star hotels (translation is mine)." Therefore these operators are limited in terms of area of operation. The case of Blue and White taxis commonly called 'Lada' taxis is the same to Tourist taxis. They are allowed to operate in areas other than designated to the two operators mentioned above.[76]

The point here is not to oppose the government support. Its anticompetitive effect is the one that should be condemned. It would have been better, had it been equally applicable to all. Particularly, limiting the two operate in areas designated to them while allowing Meter taxi to operate without limiting is allowing one operator to enjoy competitive advantage and exposing to unequal income sources. The playground for the two is not equal. The complaint from the side of other taxi owners is that the authority favored Meter taxi in all aspects.[77] Giving equal opportunity by providing the support to any actor in the market and leaving

[74] Article 15.12 of Directive on Meter Taxi

[75] Ibid, sub articles 4 and 8 of article 15

[76] Directive on Meter Taxi, article 5.2

[77] Reporter cited at note 13

them to compete on grounds of price, quality and other work procedures is advisable given the demand for the service by different modalities persist.

2.4. Authority's View of Technology Platforms and Its Impact on Competition

Technology platform in this part is to mean services provided by business organizations by help of mobile application more specifically, Uber mobile application. This is one of sharing economy model- collaborative consumption which seems odd to capitalist economy. Particular to transportation service, ride-sharing is becoming popular after its emergence in 2010.[78] These entities do not provide or own vehicle, but rather only serving to connect the drivers on the road and consumers by using smart phone application with faster pickups and easier payments.[79] The entities engaged in this business promote their service as the way of utilizing vehicles with empty seats and lowering fuel consumption with low transportation.[80] Despite the contribution this technological platform in convenience[81], employment creation, generation of revenue, innovation in the sector, and alternative for consumers, it was considered as disruptive to competition and those in the industry.[82]

Opposition from incumbents in the sector to push back these innovative entities has been common in countries where this technologically supported innovative and collaborative economic undertaking was started.[83] The incumbents in the sector accuse those operators in ride- sharing of failure to comply with safety, insurance, tax and other regulatory

[78] Yanelys Crespo, Uber v. "Regulation: 'Ride-Sharing' Creates a Legal Gray Area", Miami Business Law Review, Vol. 25, p.79

[79]Joshua M. Mastracci (2015), "A Case for Federal Ride-Sharing Regulations: How Protectionism and Inconsistent Lawmaking Stunt Uber-Led Technological Entrepreneurship", Tulane Journal of Technology and Intellectual Property , Vol.18, p.190

[80] Yanelys Crespo note 80 above, p. 85

[81] Ibid

[82] Deven R. Desai (2014), "The New Steam: On Digitization, Decentralization, and Disruption", Hasting Law Journal, Vol. 65, p.1477

[83] Yanelys Crespo note 80 above, p.83

requirements.[84] As note earlier in this material, existing operators in the sector may lobby for the government to ban or at least subject these new entrants to more stringent (perhaps unnecessary) regulation.

Of course at initial stage governments of different countries responded in more or less similar way. They exempted, prohibited or subjected the ride-sharing to similar or unduly heavy regulation.[85] The justification behind these measures, according to some writers, was that the platform of sharing does not fit with existing regulatory framework which is amenable to competitive than collaborative economic behaviors.[86] Because of this, seize and hold in the custody of vehicles by individual operators and outright banning were common response from regulators.[87]

The argument from providers of technology platforms is that they do not render transportation service whereas the opponents i.e. argue that these entities circumvent regulation and licensing requirement that they are required to contend with.[88] Providers of technological platform further argue that the law and regulatory environment must made progress so that sharing economy get its proper treatment rather than forcing 21st century business to work under 20th century laws in the words of Browning.[89]

The Ride-sharing transportation service, which is created by Hybrid Designs PLC, is provided by call and text means.[90] Similar response was made from Transport Authority of Addis Ababa to stop the service provided with the help of Ride-sharing Technology.[91] It

[84]Deven R. Desai above, p.1477

[85] Ibid, p.79

[86] Yanelys Crespo note 80 above, p.83

[87] Yanelys Crespo above, p.79

[88] John G. Browning (2014), "Emerging Technology and Its Impact on Automotive Legislation", DEF. COUNS. J., Vol. 91, p. 84

[89] Ibid

[90] Berhanu Fikade**, "**Authority Defies Uber-Style Taxi Service"**,** Reporter, (10 November, 2018)

[91] Ibid

categorized the technology platform as illegal and issued stern warning to stop their operation. The justification of the authority taking the measure of warning was that for one to engage in transportation service, it should get licensed by authority because licensing transportation service is solely entrusted to the same.[92] However, the technology platform provided by Hybrid Designs PLC does not have license from the Authority and hence lacks legality.[93]

"Besides illegality of the service it provides from regulatory point of view, safety and security of passengers is compromised when this platform is left unregulated" Daniel says. Of course this is what worries the authority the most since it does not have exposure to who is engaged in the service and what is going on according to Dawit Zeleke, the general manager of the authority.[94] They also provide the service by code 3 vehicles though permitted to provide the rental service, not passenger transportation- taxis service.[95] Therefore, all they do, according to Dawit is illegal and that is why the authority issued notice for those vehicle owners and the technology platform to stop the service.

The Lada taxi operators responded in a similar manner as what happened in other jurisdictions. "They are engaged in randomly attacking operators on contractual basis under Uber platform" says Daniel Belihu, one of owners of code 3 vehicles as result of reduction in market share of incumbents.[96] The writer also observed that some of Lada taxi operators carrying message opposing provision of transportation service by code 2 and 3 vehicle owners by help of ride-sharing technology. In interview with EBC, different respondents of Lada taxi owners claimed that they have made application to the authority to stop service provided by vehicle owners with code 2 and 3 under the contract with Hybrid Designs PLC.[97]

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[92] Ibid

[93] Ibid

[94] Interview with Dawit Zeleke, General manager of the authority, 10 February, 2019

[95] Ibid

[96] Interview with Daniel Belihu on Reporter cited at 92

[97] EBC Interview with members of Lada owners' association on 18 April, 2019

They further claim that in terms of quality, Lada taxis are old whereas those with code 2 and 3 are new and comfortable as result of which they lose customers because it is difficult to stand the competition.[98]

The other problem raised by respondents is that even the government officials take part in service provision using their personal vehicles. The authority on its part accepts some of claims by respondents and recommends providers of technology platform to approach those having transportation operation.[99] This seems the authority surcease its stand of complete banning of the service altogether by categorizing it as illegal. But this does not give solution to the problem especially competition concerns.

As mentioned above the primary concern of authority is compromise on safety and security of passengers. Regulators of course are equipped in ensuring safety and security of consumers by setting standards for this purpose. This concern is understandable regulating to achieve this goal is acceptable. However, banning the service altogether is not the solution and it does not alleviate the problem raised by incumbent operators.

Trends of other countries show that safety and security concerns are regulated by other means than prohibiting the service out right. It is left to companies to self-regulate themselves by setting standards to ensure safety and security of passengers and drivers. The role of public regulators is regulating self-regulation- whether the entities comply with the standards they set and standards meet the needs of the time. In order to ensure safety, rider must go through rigorous background checks- three step checks i.e. county, federal and multistate checks in United States.[100] This is the standard set by the companies not the regulator.

Although it can be argued that self-regulation in our system unknown trend and can't be effective, the authority and other regulatory organs entrusted with safety and security powers can effectuate the standards set by relevant regulator. Thus, banning by no means could be appropriate measure to deal with safety and security issues of the rider and passenger. It may

[98] Ibid

[99] Interview with Takele Lulena, Deputy General Manager of the Authority, EBC, 18th April, 2019

[100] Yanelys Crespo, supra note 80, p.102

benefit few actors in the market by encouraging monopolistic behavior while exposing consumers to higher price, lesser quality and with little or no alternative.

The other crucial concern and reason for initial banning of the platform was that it was considered as disruptive technology with respect to competition in other jurisdiction. In US for example emergence of ride-sharing companies threaten the very existence of taxi companies merely by competing with them.[101] In addition to support by advanced technology they are not required to comply with similar regulatory regime. Thus, traditional claims of excess and destructive competition are common arguments on the side of incumbents and regulators also responded accordingly.[102]

As mentioned above initially, measure resulted from this assertion was completely banning the service. Countries' situation however varies for different reasons such as economic development and resultant affordability of the service provided by the help of these platforms. The way these actors treated is different accordingly. Lifting regulatory requirements that are unnecessary and unjustified[103] by constraining to the level more closely to legitimate public interests goals[104] for existing business entities in the market was response made in some jurisdiction in order to level the playground.

The question remains is it really disruptive in our transport service? Incompatibility of legal framework because of failure of the law maker to keep pace with technological change and the business modality the platform brought is considered by some as the major challenge to conduct the business in passenger transportation service.[105] Transportation service license requirement could be arguably be incompatible with the service this platform provides. Driving license, training and insurance follows the purpose for which the vehicle is used in

[101] ibid, p.83

[102] Peter C. Cartensen above note 2, p. 784

[103] Joshua M.Mastracci note above, p.199

[104] See Peter C. Cartensen supra note 2, p.771

[105] Hailemichael Teshome Demissie, Mersha Chanie and Solomon Mesfin. ''Uberization and Law on a Collision Course", Reporter, (10 November 2018)

other jurisdiction. This however is not the case in Ethiopia. Therefore the platform is not unduly beneficial of regulatory requirements by escaping the same.

As stated by Hailemichael and *et al*[106] it is not the luxury of consumer choice that our transportation sector lacks. Rather we lag behind the basics of the service itself. Being unaffordable for the general mass, it cannot be considered as disruptive in the sector. This is to mean that few customers need the service supported by technology platform with quality vehicles. But for the majority cannot afford the service and as such helpful in covering some of the needs in the market.

The response of those in the sector is understandable because of losing market share but it undermines the incentive to innovate or investment in new technology in the sector.[107] Lobbying to entrench current providers rather than not protecting the interest of consumers and to limit competition[108] should be curtailed. The claim that Lada taxi owners as to quality of vehicles that operator under Hybrid Designs PLC use is what customers need and of course, it is one of grounds of competition- quality is one of benefits that competition offer, as competition is rivalry in terms of quality, price of service or combination of these and other factors that are valued by customers.[109] Therefore it should be encouraged in order to develop competition culture.

There is possibly one competition issue on operators serving in contractual basis to share with Hybrid Designs PLC. Tax benefit that providers of the service using personal car enjoy is valid concern. Of course it is not benefit *per se* the government allowed, rather it is supervisory failure from the authority to follow and report those engaged in transportation service to tax authority-Ministry of Revenue. Needless to state, taxi operators are required to pay tax on income they drive. But those who use their personal car escape this requirement

[106] Ibid

[107] Joshua M. Mastracci

[108] Ibid

[109]The World Bank and Organization for Economic Cooperation and Development (OECD), A Framework for the Design and Implementation of Competition Law and Policy (U.S.A, 1998), p.1 , cited in Harka Haroye above note 22, p. 33

because of assumption that their vehicles are used for personal consumption as the authority failed to follow what they do on ground. This is one of the complain that Lada taxi owners raised in the interview with EBC.[110] The authority according to them, failed to investigate and continue in its recklessness about the issue that operators in contractual relation with the platform use their personal car. This inaction on the part of authority could be considered as favoring anticompetitive behavior in the market.

[110] Interview on EBC above

CHAPTER THREE

RATIONALE AND THE WAY FOR CONTROLLING ANTICOMPETITVE ACTS OF GOVERNMENT IN TRANSPORT SECTOR IN ADDIS ABABA

3.1. Rationale

3.1.1. Risk of Regulatory Capture

It is presupposed that the theory of market competition works in free of restraints –either public or private.[111] It is possible that private restraints work their vice with the support of public authority.[112] They may lobby government to adopt certain standard[113] or manipulate neutral regulatory standards for their own private ends.[114] Thus, regulatory capture may undermine pursuit of public interest by regulatory intervention. This is what the opponents of "capture" theory of regulation advocate.

One of justification for government intervention is that market is imperfect and needs correction using different approaches of intervention to ensure the interest of general public is protected. Competition and regulation are among prominent ways of intervention to correct market failure. But the interest of the general public can be subverted by pressure, influence, and 'bribery' to protect the interests of those who were the subjects of the regulation.[115]

It is easy for subjects of regulation to come together and lobby the government to set regulatory standards to hinder entrance into the market and may serve as source of information when state wants to regulate certain aspect of economy; yet biased and

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[111] Eleanor M. Fox above note 41, p. 180

[112] Ibid

[113] Ibid

[114] Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker & Ernest A. Nagata (2005), "Cheap Exclusion", Antitrust Law Journal, Vol. 72, P. 987-988

[115] Anthony Ogus, Regulation: Legal Form And Economic Theory,(Oxford 1994, Clarendon Press), p.57

incomplete information.[116] Regulators themselves may engaged in furtherance of their own interest or use their own definition for public interest driven intervention.[117] It is therefore maintained that public choice theory suggest that the regulatory agencies that try to limit the problematic behaviors by industries often end up condoning that behavior and even insulating those from market rivalry.[118]

In the interview of the owners of Lada taxi with reporter, the respondents claimed that government officials themselves are engaged in rendering taxi service under contract with Hybrid Designs PLC though it is vehemently denied by the PLC.[119] The claim was also reaffirmed in the interview with ETV.[120] The reluctance of authority to investigate based on information the Lada operators provided coupled with repeated complain of taking part of officials and other individuals without having the license to operate taxi service indicates some symptom of regulatory capture though it lacks tangible evidence.

Other indication of regulatory capture of the authority by interest group as illustrated in chapter two of this material are favoring Meter taxi operators to benefit from tax relief, government accelerated loan, operation limitation on some other operators while allowing Meter taxi operators without limitation and support for Meter taxi operators. Favoring certain group without any acceptable justification that inhibits competition is nothing but failure by regulator because of different reasons. Regulatory capture is one among them. Thus, risk of regulatory capture by interest groups a fear when designating issue of competition to regulators-in qualified terms sector specific regulators because it leads to subjugation of the

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[116] Frances H. Miller (1980), "Antitrust and Certificate of Need: Health Systems Agencies, the Planning Act, and Regulatory Capture" The Georgetown Law Journal, Vol.68, P.879

[117] Michael F. Levine and Jennifer L. Forrence, "Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis" Journal of Law, Economics and Organization, Vol. 6, (Yale University, 1990), P.68

[118] Dogan and Lemley (2008), "Antitrust Law and Regulatory Gaming" available at: https://www.researchgate.net/publication/228249023 (accessed on 22 April, 2019), p.2

[119] Reporter above note 13

[120] EBC above note

very efficiency that is being sought.[121] Therefore, assigning the issue of competition on regulator can be counterproductive and dictates designing the room for competition authority taking over the role or oversee the function of regulatory authorities.[122]

3.1.2. **Objectives of Regulation and Competition Concern**

Goals of legislature establishing the regulatory agencies or regulators who run those are to achieve something other than competition.[123] Regulators even may eliminate competition by sponsoring cartel.[124] They may mandate actors in certain market to use advanced technology regardless of effect of the mandate on competition.[125] In narrow sense of terms, competition is not issue at all when we think regulatory intervention because natural monopolies are focus of regulation in this regard.[126]

In terms of goals they set to achieve, regulators often aim at objectives other than competition. They may focus on their primary objectives while ignoring the effect that objective on market competition. In this regard we can take the case of Meter taxi directive that the authority enacted. It is to follow modernized system of transportation because good image has to be built in the city as being seat for different diplomats and other international organization.[127] The last paragraph of preamble of the directive aims at promoting active participation of private sector in the sector. But the authority's primary mandates are: to license associations intending to engage in the sector; ensuring safety and security of passengers; ensuring services supported by advanced technologies and working towards fair

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[121] Quoted in N. Dimgba, "The Need and the Challenges to the Establishment of a Competition Law Regime in Nigeria" (2007) available at www.globalcompetitionforum.org/..Nigeria.

[122] Dogan and Lemley above, note 118, p.3

[123] Ibid 16

[124] See Parker v. Brown, 317 U.S. 341 (1943).

[125] Dogan and Lemley above, note 118, p.17

[126] Anthony Ogus above, note 115, p.6

[127] See preamble of the directive

fee considering the payment capacity of customers with quality transport service.[128] Therefore, it is true that it gives primacy to its goals and pools its resources towards achieving these goals.

Of course this is what one observes when look into the directive on Meter taxi in its totality. As discussed in chapter two of this material it proscribes: minimum number of vehicles to form association; design and instruments to be installed in the vehicle and fostering of the service fare to be paid per kilometer. Even the directive goes further and prohibits the authority from issuing license to new Tourist and Blue and White taxis.[129] In this regard it turns blind eye towards competition issues.

Sector specific regulators may be required to take competition issues into consideration while taking actions to achieve the goals for which they are established. This is not their primary mandate; rather it is sideline or peripheral mandate that they are required to. They will not necessarily make it their primary concern among conflicting priorities.[130] One possible reason could be capture as discussed earlier.[131] Another is associated with lack of expertise on issues of competition in the specific regulatory bodies.

Leaving the first reason to discussion on regulatory capture, the second reason is of importance in our country's context. Entertaining competition issues requires special skills, training and experience[132] because it involves issues of complex nature and different disciplines.[133] It needs both lawyers and economists to properly handle competition matters.[134] It is established that most developing countries suffer from lack of expertise

[128] The Addis Ababa City Government Transport Authority Structure and Function Regulation No.71/2015, Addis Negari Gazeta, 8 year, No.71, Article 4

[129] See Directive on Meter Taxi, article 21.3

[130] Dogan and Lemley above, note 118, p.16

[131] Id, p.19

[132] Muhammed Kebie, A Critical Appraisal of Institution Controlling Competition in Ethiopia: Analysis of The Law and The Practice, (Unpublished LLM Thesis, Addis Ababa University, 2014) p.64

[133] Ibid, p.65

[134] Muhammed Kebie above, note 132, p.65

associated with absence of courses specific to competition law and its enforcement or the problems associated to un-affordability of professionals in the field even for competition authority.[135] The obvious conclusion that can be made is that most of officers in regulatory agencies lack expertise on the issue of competition. It is clear that lack of appropriate human resource may lead to under-enforcement.[136]

Coming to the transport sector of this country, different legal instruments mandate respective authorities to take competition issues into consideration in various ways while making decisions and regulatory measures. One can find the illustration for this in article 13 sub 2 of proclamation No. 468/2005. The specific provision is produced hereunder:

> *The Authority shall, in order to ensure the provision of competitive road transport services, determine the number of members that may join an association.*

From this provision we can understand that when taking measures in relation to numbers of members that can join transport service associations, the authority is mandated to take into consideration of issues of competition. The other illustration can be found in preambles of different directives that the authority enacted. One of objectives that preambles of directives endorse is accessibility. It is difficult to achieve this objective without alternative means of service in the sector for consumers of different ability. As stated time and again, competition in a given market provides consumers with alternatives. It is this alternative that ensures accessibility the directives are aiming at. There is also an incident of taking into consideration of issues of competition in the sector. Zoning of code 3 minibuses can be mentioned in this regard.

Operators of code 3 minibuses commonly identified as "white taxis" started the service in order to respond strike opposing taxi zoning by owners and drivers of taxis in 2011.[137] But

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[135] United Nations Conference on Trade and Development (UNCTAD), Competition, Competitiveness and Development: Lessons from Developing Countries,(2004), p.61

[136] Id, p.37, The research is done to draw lesson from developing countries and our country obviously is not under this category. Hence the problem is exacerbated when it comes to least developed countries such as ours.

[137] See preamble of Code 3 Public Transportation Zoning Directive No.2/2009

they were not operating under regular zoning.[138] They did not have zoning banner made from metal but operate on the basis of paper issued temporarily as supportive to taxi transport. They however take advantage of this paper zoning banner to have zonings of different terminals in the city and operated without limit which in effect harmed operators with permanent zoning banner by taking away income.[139] The directive is to correct this unfairness in the sector which can fairly be argued as to avoid anticompetitive effect of the measure. The problem however is that the authority failed to turn this into its custom. Therefore, it can be claimed that it is incidental not intentional measure to ensure competition in the sector.

Although the authority is mandated to take into consideration of competition, it failed to do so. This can be attributable to various reasons. Among these reasons: first, it is not the primary goal that the authority is created for as mentioned above. The second reason is lack of professionals in the sector. Let alone professionals having knowledge of competition regime, the authority suffers from lack of experts specific to transportation sector.[140] In such a scenario, it is difficult to be confident of transport authority ensuring competition in the sector.

The risk of regulatory capture by subjects of regulation; competition being not primary concern of regulatory agencies and lack of experts particularly in sector specific regulators more specifically in least developed countries can possibly lead us to one suspicion- whether regulators are well situated to handle competition matters. It has long been established that consumer interests often are subservient to industry interests in regulatory process because of efficiency on the part of industry in organizing its interest and putting pressure to achieve their needs.[141] It is therefore, concluded that regulators are ill situated to entertain the issue of competition and protect the interests of consumers.

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[138] Ibid

[139] Id Article 2.2

[140] Transport Policy above note 16, p.7

[141] James C. Cooper; Paul A. Pautler; Todd J. Zywicki, "Theory and Practice of Competition Advocacy at the FTC", 72 Antitrust Law Journal (2005) Pp.1099-1100

It should be noted however that intervention through regulation and competition are not always contradictory. Regulation defines how the market operates and set a ground for competition in positive terms. It is to correct market imperfection that the two instruments strive but with different approaches, ex ante for regulation and ex post for competition except for issues related to merger.[142] It is not to deny or undermine the practice and role played by regulators in structuring the market to establish[143] and promote competition.[144] It is to say that competition authority is relatively well situated to handle competition matters in the market. This is because it has advantage over other regulatory agencies in that it has experts to analyze what constitutes competitive market by deciding market power and what turns out to be anticompetitive behavior.

As stated earlier, generally there are areas where regulatory intervention provides panacea and there are also areas where competition or market forces correct the market failure at issue. The problem is to determine which of the two best fits to solve the problem when they compete to solve the same issue- market inefficiency.

3.3. Approaches to Control Anticompetitive Acts of Regulators

As above discussion shows, competition may not be inhibited only by private anticompetitive conducts,[145] but also, in certain situations by public regulatory and rule making.[146] Regulatory intervention to correct market failure may go beyond what is strictly necessary and result in

[142] Frank Naert, "Competition Authorities and Regulators in Belgium: Hierarchy Versus Cooperation", Competition and Regulation in Network Industries, Vol. 10, p. 141

[143] Maher M. Dabbah (2011), "The Relationship Between Competition Authorities and Sector Regulators", Cambridge Law Journal, Vol.70, P. 115

[144] In Uruguay for example, sector specific regulators are entrusted with the power to promote, not limited power to take into consideration of competition matters as per article 27 of the Defense of Competition in Trade Act.

[145] Conducts that are private anticompetitive restraints are; collusion among competitors, anticompetitive mergers, vertical arrangements in restraint of competition and unilateral abuse of dominant positions.

[146] International Competition Network Conference (ICN hereinafter), "Advocacy and Competition Policy", (Naples Italy, 2002), p.2

impeding competition.[147] Therefore enforcement of competition should not be limited to private restraints.

As Muris states:

Attempting to protect competition by focusing solely on private restraints is like trying to stop the flow of water at a fork in a stream by blocking only one of the channels. Unless you block both channels, you are not likely to even slow, much less stop, the flow.... The same is true of antitrust enforcement. If you create a system in which private price fixing results in a jail sentence, but accomplishing the same objective through government regulation is always legal, you have not completely addressed the competitive problem. It has simply dictated the form that the problem will take.[148]

Adopting competition regime as guiding rule is important signaling device to investors that the market would be guided by rules which promote certainty to both domestic and international firms in the marketplace. As Pham states, "an effective competition law, as is now widely recognized, is a concomitant requirement for market-based reforms. Such a law aims at limiting unnecessary interventions or abuses of power in the marketplace by the state or by private sector enterprises that adversely affect economic efficiency and consumer welfare".[149] But the question remains how anticompetitive acts of regulators curtailed?

Countries adopted different mechanisms in order to curtail restrictive government interventions that inject distortions to competition. The mechanisms however are broadly categorized in two approaches: namely exclusivity and concurrency. Within these approaches there are ranges of differences that may reflect level of their economic development and primacy given to competition regime. In addition to this, the existing state and culture of competition also contributed to the differences they foster. Now let us look at these models and the bearing they have on our competition regime.

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[147] Ibid

[148] Timothy J. Muris (2oo5), Principles for a Successful Competition Agency, University of Chicago Law Review , Vol. 72, p.170

[149] N. Dimgba above note 121

A. Exclusive Model

By exclusive model I mean entrusting the power to handle competition issues in all sectors on competition authority. This is promoted for; maintaining consistency of competition enforcement across all sectors; reduces capture by industry; enforcement by competition authorities minimizes the prospects of unnecessary distortion of competition which can arise from heavy intervention by sector regulators; minimizing duplication in enforcement efforts of competition and enables competition enforcement by experts in the area.[150] Rule of reason on which competition authority heavily relies on as a norm[151] can be used to entertain competition issues by the competition authority which is difficult to be implemented by sector specific regulators because the common means adopted by them are outright requirement to fulfill a given requirement and *ex ante* intervention.

United States (US) is in the forefront by adopting this model. Department of Antitrust has mandate to oversee competition issues across the sectors. Judicial decision however played a major role in defining the interface between regulators and competition regime. Outright immunity from antitrust scrutiny (this was born in exceptional confidence in government before d skeptical theories of government known as "Public choice theory" began to gain sway) was initially trend.[152] Later on, for private restraint to claim immunity from antitrust scrutiny, it has to prove that state approved and supervised[153], intended to displace[154] application of competition law and sometimes required/ compelled (as additional requirement to show strong evidence that state approved and supervised)[155] its action. This shows pattern of development in limiting regulatory restriction on competition by requiring fulfilling some criteria that state forced to act in such a way. It also helps limit private actors from

[150] Maher M. Dabbah above note 143, P. 118

[151] Ibid

[152] Parker Vs Brown above note 129

[153] See Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)

[154] See California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) see also Cantor v. Detroit Edison Co., 428 U.S. 579 (1976)

[155] Goldfarb v Virginia

manipulating neutral regulatory actions to their malicious purpose. Generally, "state action doctrine" developed from relevant case law, is a tool to reconcile the tension between regulatory intervention and antitrust policy of US. But this does not mean that delineation is clear cut. The mandate of some regulators extends beyond enhancing competition, thus, leading to overlap in which case congress decides case by case.[156]

This should not be taken as that the exclusive model is free of defect and criticism. Challenges of adopting this model are: lack of requisite expertise in the sectors; lengthy process as result of rule of reason approach subjugation or less attention to other social objectives and lack of developed mechanisms to resolve disputes between market players.[157] Because of these challenges, it is advocated that concurrency model is an approach that offer better way to reconcile the tension between regulators and competition regime.[158]

B. Concurrency Model

This approach gives regulators the chance to adopt broader perspective on how to regulate sectors by taking into consideration of competition matters.[159] It also helps regulator move in the direction of reduced regulatory intervention[160] by giving a way to competition. The concurrency here is to mean that both regulatory and competition matters are treated by collaborative arrangements by public bodies of the two matters.

Consultation with competition authority is one form of collaboration to entertain the issue of competition. In Pakistan for example, sector regulators may consult with Monopoly Control Authority of the country but they don't have to be bound by the advice of the authority.[161]

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[156] Rafaelita M. Aldaba and Geronimo S. Sy, Designing a Cooperation Framework for Philippine Competition and Regulatory Agencies, (Discussion Paper Series No. 2014-31), p. 20

[157] Maher M. Dabbah above note 143, p. 119

[158] Ibid

[159] Maher M. Dabbah above note 143, p. 120

[160] Ibid

[161] Cuts Centre For Competition, Investment & Economic Regulation, "Competition and Sectoral Regulation Interface",(Briefing Paper No.5/2003), available at: www.cuts-ccier.org/pdf/**Competition_and_Sectoral_Regulation_Interface**.pdf p.2

Interlocking the directorates of competition authority and other sector regulators is another example of this model. Zambia can be mentioned as example in this regard.[162] Sector regulators in Portugal are obliged to coordinate with competition authority on competition matters.[163]

This approach is promoted for strengthening advantages of putting competition matters exclusively in competition authority and regulators as independent actors by enabling competition authority to oversee and advise the sector for regulators to embrace competition perspective.[164] The approach enables regulators to develop broad and comprehensive perspective on how to best regulate[165] and encourages involvement of competition authority when regulators face deficiencies such as capture and lack of expertise in competition matters.

Of course there is the third scenario or approach of handling the competition matters. It is a way of putting competition matters exclusively in the hands of regulators to enhance the same along with regulatory function. But this approach cannot sufficiently deal with competition issues for reasons mentioned in the section dealing with rationale for controlling anticompetitive acts of government such as lack of experts and resources, problem of capture and giving primacy given to other objectives provided under statute establishing concerned authority.

At the heart of this model it is competition advocacy role of competition authority that helps it keep the mandate of enhancing competition and protecting the same by proactive involvement in restrictive regulatory rule making and measures. The advocacy role of the authority however will gain attention later on this material after dealing with the interface that exists in Trade Competition and Consumer Protection Proclamation No. 813/2013.

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[162] Ibid, p.3

[163] UNCTAD 2004, cited in Rafaelita M. Aldaba and Geronimo S. Sy above note 156, p. 19

[164] Maher M.Dabbah above note 148, p.121

[165] Ibid, p.120

3.4. The Ethiopian Context

Can we make use of trade competition and consumer protection proclamation to control anticompetitive acts of such as demonstrated in transport sector? In research repository titled "State of Competition in Ethiopia: Challenges and Gaps",[166] Professor Tilahun argues that the proclamation under article 4 sub article 3 gives precedence to other regulatory acts/intervention of government over competition. Under the said proclamation, it is provided that provisions of proclamation would not preclude other regulatory acts of government. So should this be taken as that the proclamation is giving priority for regulatory acts of government (even the effect being anticompetitive or promoting the same) over competition concern?

Siding with above arguments cannot be totally dismissed. There could be possibility of adopting such an interpretation. The first reason could be absence of clear contrary provision that gives priority for competition concerns. Absence of such a clear provision accompanied by the provision, which seemingly prioritizing regulatory intervention by the government can lead one to this kind of conclusion.

The second reason to substantiate the above argument is objectives of the proclamation. In the objective part of the proclamation, most importantly in its preamble, no single word is there to reason out that the proclamation gives precedence for competition over regulatory intervention of government. Therefore, it is hardly possible to conclude that the prior objective is to ensure competition when government act, which otherwise could be legitimate, distorts or even having the effect of eliminating competition.

The third reason to incline to the conclusion of the above argument is the scope of application of the proclamation. Regarding competition the scope of application of proclamation is limited to traditionally designated areas which are regarded as anticompetitive private

[166] Kibre Moges above note 23, pp. 186-87

behaviors in literatures. These are: abuse of dominance,[167] anticompetitive agreements or concerted actions[168], unfair competition[169] and merger regulation.[170]

So should this lead us to the immediate conclusion the regulatory intervention, whatever the purpose is, are immune from competition law scrutiny? In other words can we say that the tension between competition policy and other government policy is solved in way giving precedence to regulatory intervention? The tension is unsettled rather. The provision under issue is stating the obvious. Accordingly, it can be interpreted that it is possible for the government to intervene using instruments other than competition regime, when it thinks those instruments fit to solve the problem than the market forces.

If the intent of legislature is to confer outright immunity from competition law scrutiny on private business actors, it is unnecessary to delegate power to determine by the regulation to council of ministers economic activities which are considered as vital for economic development of the country which deserve exemption from application of provisions concerned with anticompetitive practices of business in the part two of the proclamation.[171] Regulatory functions and administrative measures that fall under specified activities that council of ministers by regulation as vital for economic development can enjoy outright immunity rather.

Another argument that can be posed against precedence of regulatory functions and administrative measures over competition law relates to objectives of the proclamation. The last limb of article 3(1) of proclamation No.813/2013 states that one of its objectives is to establish system that is conducive for promotion of competitive free market. Thus, the

[167] See Article 5 of Proclamation No.813/2013

[168] Ibid Article 7 (1&2)

[169] Ibid, article 8

[170] Ibid, article 9

[171] See article 4(2) of the proclamation No.813/2013

objective of proclamation is not only limited to protection of business from anticompetitive behavior but also it aims at creating competitive environment.[172]

Aiming at promoting competition and at the same time giving primacy to regulatory measures and functions, more specifically anticompetitive ones, cannot go together. So treating any regulatory intervention as out rightly precluded beyond reach of the application of competition scrutiny in this context is as equivalent as denying the role of competition regime in economy. When countries move towards liberal economy in which private economic actors are expected to take the lead, more is expected from competition regime and its enforcement. It is obvious that Ethiopia is moving towards liberalized economy to become part of global community with limited economic barriers.[173] Therefore the above conclusion stating regulation is given primacy is inconsistent with the objective of promoting competition and what the proclamation envisage by giving power to councils of ministers to come up with list of exemption under sub article 2 of article 4 of the proclamation because the list is unnecessary if any measure by regulatory body becomes outside the purview of the proclamation's competition concerns. But the question still is whether the tension between competition policy and other policies that government intervenes via regulation such as transport sector regulation as the matter of particular emphasis of this paper is settled.

The proclamation in this regard lacks provisions delineating the areas pertaining to regulation and that of competition regime. It does not define the relation that is to be expected from both competition and regulatory authorities. The relationship of competition authority with the Transport Authority is not exception to this. In the interview with Hailemariam T/Michael, Integrated Transport Information and Research Core Process Group leader, he does not remember a single instance where the authority thought of the impact of directives issued and measures taken by the authority on competition.[174] Nor does the competition authority tried to

[172] See Kibremogrtes above note 23, p. 184

[173] The move to join WTO, privatization process undertaken and the current political decision to privatize economic sectors previously considered as cash cow such as telecommunication and airlines can exemplify the liberalization context of the country. Public private partnership arrangements recently put in place is another illustration of economic liberalization in the country.

[174] Interview on Wednesday April 10, 2019

cooperate with the authority.[175] Apart from lacunae in the law, there is no established practice between these authorities. So, what is remedy for problems raised in chapter two of the paper- how can anticompetitive measures and inactions of Transport Authority are remedied?

I am going to consider the issues with reference to competition consideration that proclamation on transport sector seeks to address and requirements to be fulfilled by business organization to form one among alternatives. It is also relevant to look into provisions of constitutions with respect to issues of complete ban on licensing new Tourist taxis and Lada taxi operators after issuance of the directive on Meter Taxi No, 1/2009. But this does not permanently address the issue from competition point of view unless the content of the law amended to include definition with regard to relationship between the authorities and strengthening competition culture in economic activities by giving attention to competition advocacy which will be dealt with later on.

3.5. Enforcement of Commercial Code, Proclamation Establishing Transport Authority and Provisions of Constitution

1. Issues Related to The Number of Vehicles Requirement to Form an Association

It is important to devise a mechanism of averting risk when one thinks of establishing business entity. Minimum capital requirement is primary way of overcoming the problem related to risk insolvency to protect the interests of creditors though rejected by some that it is "no longer an appropriate conceptual apparatus to employ in safeguarding the interests of creditors." [176] But the requirement should not be used in a way discouraging business men from entering the market of their choice. Therefore there has to be way striking the balance between protecting the interest of creditors by maintaining creditworthiness of the entity and choice of business men to enter into certain market taking into account of potential return for them and real demand of the product or the service in the market.

[175] Ibid

[176] John Armour, Legal Capital: An Outdated Concept? (University of Cambridge Working Paper No. 320, 2006). http://www. cbr.cam.ac.uk/pdf/WP320.pdf.

In Ethiopia, we have the system of minimum capital requirement to establish corporate business entities especially, PLC and S.C. It is 15,000 ETB[177] and 50,000 [178]for PLC and S.C respectively. The amount of minimum capital requirement put in place in this regard reflects realities on the ground when commercial code was enacted about 60 years ago or so. Now it does not conform to the reality on the ground to establish viable business.[179]

As noted before, requirement of different amounts of vehicles in different directives fails to take into account of the need of transportation service and culture of corporation on the ground. Strictly speaking, one can argue that it does not amount to fixed minimum capital requirement. But the amount of capital required entering in passenger transportation at specific time when business men want to engage. The amount of money may fluctuate based on market situation at specific time when one starts the business. The value of 36 vehicles currently without doubt, by far exceeds 15000 ETB and 50000 ETB.

Transport proclamation 468/2005 under article 13(2) provides that the authority shall determine the number of members that may join commercial transportation associations in order to ensure competitive road transport services. At first place the authority is entrusted with the power to determine the number of members not vehicles to form an association or capital. The limit imposed on the authority on the hand is *ensuring competitive road transport service (*emphasis is mine) when determining the number of members to join association engaged in transportation service.

In absence of provision in the proclamation regarding minimum capital of an association it is unacceptable for directive to determine capital required to establish an association on commercial road transport service. When it is viewed from investment point of view it is not

[177] Commercial Code of Ethiopia Article 306(1)

[178] Commercial Code of Ethiopia Article 512(1)

[179] Jetu Edosa, "Introducing Single Member Companies in Ethiopia: Major Theoretical and Legal Consideration", (LLM Thesis, Addis Ababa University, 2014), P. 96. He argues in his thesis that though there is an argument against minimum capital requirement in literatures, the nature of single member company dictates minimum capital requirement because it is capital rather than an individual that secures the interests of creditors.

encouraging to engage in the sector given return expected from the service. From legal point of view, in a situation where the proclamation leaves the power to determine the number of members to the authority, provisions of commercial code are applicable on issues related to capital to commence the business by associations using canons of legal interpretation.[180]

The associations of commercial road transport service providers required, if at all, to fulfill requirements provided under commercial code depending up on forms of business organization they opt for.[181] Apparently, the requirement under the directive is not minimum capital to establish an association that going to engage in transportation service. But the amount of money to purchase 36 vehicles can be ascertained at the time it is conducted and be taken as the capital requirement for that specific time. Besides this, as noted earlier in chapter two the number of vehicles required is the same regardless of the form of business organization one seeks to establish.[182] Therefore the requirements provided in the directives[183] are inconsistent and hence one can get them set aside by court of law.

Another point that can be raised in relation to this issue in the proclamation is to interpret it in a way giving effect to the provision when providing for the determination of number of members to join the association by ascertaining the intention of legislature. In the interview with Yitagesu Moges,[184] he told me that directives are enacted in accordance with the transport proclamation No. 468/2005 and requirements by the directives are set with requirement as to the number of members provided in the proclamation in mind. When determining the number of members that may join an association the authority however is

[180] It is clear in the hierarchy of laws directive is inferior to proclamation in our country and if the need arises to interpret these laws the superior prevails over inferior. Therefore commercial code specifies the minimum capital required to commence business in the form of PLC and S.C. whose minimum capital required are 15000 ETB and 50000 ETB respectively according to article 306(1) and 512(1) of commercial code.

[181] It has to be noted that even the minimum capital required under commercial code is not necessarily paid up when the entities commence their business or to be registered and get licensed to operate the business they want.

[182] See article 9 of Directive on Meter Taxi No.1/2009

[183] Both of directives on Meter Taxi and Freight Transportation require number of vehicles whose value by far exceed what is provided under commercial code to commence a business in the form of PLC and S.C.

[184] Yitagesu Moges above note 65.

mandated to take into consideration of creating competitive service in mind. In this regard it can be argued that authority in determining the number may even limit it, which may or may not have implication on capital, in order to ensure competitive service. The position taken by transport authority of the city is against this objective of the proclamation rather. The requirement set by directives has the effect of concentrating the business in the hands of few actors which can result in manipulation of the position they have in the market. Therefore the provision delegating the power to determine the number of members that may join associations in the sector should be interpreted in a way giving effect to the sprit to its contents specifically concerning competition consideration must be addressed.[185]

As discussed before the proclamation on transportation has not provided the number of members that are allowed to join associations in the sector. Rather, it delegates this power to transport authority. The power delegated to the authority is not without limitation. It is mandated to make sure that whether the restriction as to number of members it determined promote competition. Subsidiary laws in contrast with this mandate can be checked against the mandate imposed on the authority. One thing that must be noted is that the power to determine the number of members may or may not have effect on capital needed to establish and commence the business in the sector. In a situation where there is no specificity as to the minimum capital in the proclamation, applicable law in this regard is commercial code. The number of vehicles to form an association in transport sector provided in the directives which in effect requiring minimum capital to commence the business is not in line with the mandate of the authority provided by the proclamation. Nor does it conform to minimum capital requirement set under commercial code.

The justification of the authority is also unacceptable. One reason that forced to adopt the directives and putting requirements is to ensure safety and security of passengers. According to the authority it is to create responsible and creditworthy organizations in order to make passengers safe. As stated earlier, literatures establish that such requirements do not assure

[185] Of course the wisdom of entrusting regulator to determine such issue is an acceptable and can be manipulated by the same because of problems mentioned earlier in this chapter. Restriction such as numerical limitation are prone to anticompetitive measures from the sector regulators knowingly or unknowingly because of capture by interested groups, lack of resources and losing sight to the competition issues because of specific duties by the statute establishing them.

safety and security of passengers. Different forms of safety and security standards can alleviate the problem and it is proper power given to the regulatory bodies to set safety and security standards.

The other restriction directives put are: banning the license of new entrants seeking to operate White and Blue and Tourist taxis and number of vehicles required to operate Meter Taxis individually. In absence of compelling circumstances to justify such a requirement contravenes with the individual right to take part in occupations of his/her choice which is enshrined in the constitution.[186] In the constitution it is stipulated that "Every Ethiopian has the right to engage freely in economic activity and to pursue a livelihood of his choice… "[187] Any law denying this right of the citizens is ineffective and any organ of the government, of which the transport authority is one, is obliged to respect this right.[188]

In this section of the material, I pointed some of way outs for the moment resorting to provisions in commercial code which are applicable for different business organizations, one's right to engage in work of his/her choice under the constitution and provision in transport proclamation concerned with determination of number of members to join associations to ensure competitive service. In this regard I used canons of interpretation to point out some way out for the existing problems in the sector under consideration. But this kind of solution cannot be suggested when the intervention by the regulator is that of not naked, rather guised intervention. Directly disciplining it by the trade competition and consumer protection authority is not possible as the law stands now. So what role can be played by this authority? Competition advocacy role can be proper action by the authority. It is therefore time to consider this role, its scope and its effect in our context.

[186] Article 41(1) of the FDRE Constitution

[187] Ibid

[188] Ibid articles 9 and 13(1)

3.6. Competition Advocacy Role of the Competition Authority

As I have tried to mention earlier, competition advocacy role of competition Authority is one way of demonstrating concurrency model of relationship between regulators and competition authority. It is important to remind that I use the definition adopted by ICN in 2002. Accordingly it is defined as follows:

> *Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition*.[189]

The definition produced hereinabove signifies that competition advocacy is related to all activities related to promotion of competitive environment mechanisms other than enforcement. This does not mean however that advocacy does not contribute for enforcement and vice versa.[190] Another main component of the definition which is more relevant to the issue under consideration is related to recipients of the advocacy. It targets "other public authorities in charge of regulation or rule making"[191] and general public to create awareness about benefits of competition policy in general.[192] These two functions of the authority are essential in contributing for what is commonly called competition culture "which is characterized by the awareness of economic agents and the public at large about competition rules".[193]

When it is said that advocacy is non-enforcement instrument, the power to convince other public bodies is very important in this regard. Through this role competition authority can

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[189] ICN note 151 above, p. II

[190] Ibid p. IV

[191] Ibid p. II

[192] Ibid pp II-III

[193] Ibid p. IV

push regulators to remove unnecessary regulations in order to improve competition in that particular sector.[194] It may by guiding them also push regulators for pro-competition changes or competition concerns are taken into account when amendment or proposal for new legislation is made.[195] These are ways how advocacy works towards regulatory bodies to promote competition in respective sectors. It is not limited to preventing burdensome anticompetitive acts of regulators in trying to achieve objectives they are mandated to achieve. It also serves as an alert for private actors in the market. Incumbents in the sectors have incentives to lobby with regulators to take measures that restrict entry into market or any other way favoring them to maintain the status quo in the market. But the involvement of competition authority by way of proposals for regulators to move in direction promoting competition awareness by constituents of society serve as an alert to stop those lobbyists and in effect saves waste of resources.[196]

Generally among the functions of competition advocacy: reviewing of existing laws and suggesting removal or amendment if anticompetitive; advising regulators on measures that might foster anticompetitive practices; outreach activities to educate the public and conducting studies and research of actual or potential state measures influence on market outcomes are the major ones.

As to the relevance and prioritization of this role to developing and transition economies, it has been argued that it is relevant for these countries and must be prioritized. The first reason forwarded is that the countries have undertaken privatization and general market liberalization activities. This resulted emergence of intensive regulations and interest groups lobbying with government for the reinstallation of lost privileges.[197] In addition to this, it is argued that enforcement of competition law requires sophisticated system of adjudication[198]

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[194] ICN above note 146, p.3

[195] Ibid

[196] ICN above note 146 at ii

[197] Simon J. Evenett (2006), " Competition Advocacy: Time for a Rethink, Northwestern Journal of International Law & Business , Vol 26, Pp 498-99

[198] Ibid

for which these country lack experience and resources. Being under category of developing countries' club and in transition from statist economy to market economy Ethiopia can be benefited from advocacy role of the competition authority.

But one issue that should be addressed at this juncture is whether the authority can engage in this activity in absence of provision in law entrusting the role as duty of competition authority. The definition in discussion above does not rule out advocacy function of the authority in absence of explicit provision to this effect. The survey by ICN shows that advocacy work of the authority is not limited situation where the law stipulates explicitly. It is practiced even absence of mandatory provisions as to this effect. But this does not mean that the absence of mandatory provision does not affect its effectiveness.

The result of the survey shows that where regulators are required by mandatory provision to consult the competition, the advocacy function of the authority becomes effective.[199] This is what is often called "carrot and stick" rule. Timeliness of consultation that early consultation with the authority and prescription as to the binding nature of the advice are another essential elements for the effectiveness of advocacy in addition to compulsory consultation requirements on issues that potentially will have impact on the market competition.[200] But this is to mean that in case where law provides explicit stipulation as to compulsory nature of the advice makes it more effective. Its absence does not prevent the authority from engaging in advocacy work. So it is to mean that it is commendable to incorporate provision to this effect.

Applying this to our situation, the authority along with other enforcement functions can conduct competition advocacy even in absence of explicit provision to this effect. Nothing prevents it from engaging in this function so long as there is no clear law preventing such an activity. But one should not lose sight that incorporating it in law and defining its scope is important to attain the objective sought to be achieved. It has strengthening effect for proper implementation of competition law.

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[199] See ICN above note 146, at VIII

[200] Ibid

Examining the law, the competition authority along with other functions is required to conduct study and research in connection with trade competition.[201] It also empowers the authority to establish relationship and cooperation with institutions having similar objective.[202] Though it is controversial whether it can interpreted as empowering the authority to cooperate with regulators in order to make sure that pro competition measures taken by the regulators, at least it can be taken as indication that the proclamation allows cooperation if regulators seek help in this regard. The proclamation also designates the power to undertake related and conducive activities that help the authority to accomplish its objective.[203]

One of objectives of the authority as stated earlier, is ensuring competition process. One mechanism to do so is by disciplining anticompetitive government interference is competition advocacy as suggested by studies conducted by ICN. Therefore it can be taken as the proclamation encourages the authority to take part in it. This should not be taken to mean that the law is clear about advocacy role of the authority. The expressions used in aforementioned provisions can be interpreted in different ways thereby dislocating this function from the authority. Writer is of opinion that clear provision giving advocacy power to the authority in order to prevent potential anticompetitive regulatory intervention along with power of intervention when the intervention happen to be of anticompetitive effect must be stipulated. Note must be made that given plethora of regulators and competition authority in its infancy measures like interlocking officials is not tenable in the opinion of the writer. Requiring regulators to consult competition authority in matters related to economic regulation like restricting entry, numbers of actors and standards of economic nature may help the authority achieve its objectives. Of course this is not the only way to intervene and authority may sometimes opt to assign officials to regulators when it deems necessary and capable. Saying this, it is important to shed light on the practice of competition advocacy.

[201] See article 30(4) of Trade Competition and Consumer Protection Proclamation.

[202] Ibid sub article 14

[203] Ibid sub article 16

But what the practice look like? The practice in this regard is discouraging. Although, it is envisaged for the authority to play its proper role of competition advocacy, no progress is made in this regard. Its advocacy function is mainly channeled to consumer protection aspect in the proclamation.[204] The advocacy function related to competition, if at all, is limited to awareness creation towards general public and business community through some published materials.[205] But this does not give the function its full picture. The authority may sign memorandum of agreement with regulators such as transport authority. No interface with regulators and intervention *ex officio* by the authority is made to curtail or minimize the anticompetitive measures that have been discussed in chapter two of this material. It is wrong to be bounded by one activity while in charge of two duties and hence the authority must show up in order to influence decisions and measures that turn out to be anticompetitive.

[204] Muhammed Kebie above note 132, p.86

[205] Interview with Hailu sime, Officer in Competition department on 12 May, 2019

CHAPTER FOUR

Conclusion and Recommendation

4.1. Conclusion

Competition is promoted for ensuring both static and dynamic efficiency in the market and consumer welfare in that it provides them with alternatives and lesser price. But free competition cannot reinforce itself as neo liberalists claim by asserting that market heals itself. It can be prone to market aggregating tendencies of actors in the market. This can be either through private restrictive behavior or public regulatory intervention. Public regulatory intervention results in restrictive to market actors in two ways: one is neutral regulatory rules and measures manipulated by incumbents and the other is by putting pressure on regulators to come up with rules and measures discriminating and restricting the entry to maintain the status quo.

Ethiopia as a country after demise of military government of Derg in 1991 made paradigm shift from command economy to market economy. Adoption of competition law and establishing organ in charge of implementing this law is one of illustration as to the endeavor the country made. However, for the law to have its full effect it must address problems that hinder its implementation. From competition point of view one of contentious area is the relationship between competition and other public policies. Different countries addressed it in differing ways depending up on competition culture they have, economic development and the experience of the country with respect to government involvement in the economy. This interface is important in minimizing exorbitant and unnecessary regulatory intervention if defined in unequivocal manner. The paper thus treated the issue by specifying to relationship of competition authority with transport sector in Addis Ababa.-

When one looks into transport sector of Addis Ababa, actors in the market are very few and demand for the service, both passenger and freight, is unmet as established by studies conducted previously. In such a situation, it is important to more liberalizing the market by opening it to new entrants with softened regulation regarding safety and security of general public. But in practice it is the other way around. The transport authority of city government took restrictive measures in the sector. These measures include: unnecessary licensing requirements; required number of vehicles to engage individually in the service which are

difficult to be met with except for few; tax incentive and government facilitated loans based on business format; banning of taxis working on the basis of contract with technology provider for ride sharing; failure to take measure on operators using private vehicles and discriminatory zoning of taxis on the basis of whether it is Meter Taxi or not. Interviews further revealed that there are symptoms of regulatory capture on the part of the transport authority.

Risk of capture is one of the reasons why intervention by competition regime is required because it drags away efficiency of market for which competition is primarily placed for. Incumbents in the sector can influence their regulators by lobbying or serving as source of information in favor them when regulators seek to control behaviors in the sector. It is easier for subjects of regulation to organize and lobby because they few and they have incentive to do so. Objective for which regulators established and lack of resources and expertise are other reasons that make regulators ill situated to entertain competition matter. So there has to be mechanism to reconcile the issue.

Trends of countries show that this problem is addressed in two approaches in which there are variations. These are exclusive and concurrency models. Trade Competition and Consumer Protection Proclamation does not settle tension between competition law and regulatory intervention. In order to point remedy for problems identified in chapter two of the paper the writer resorted to commercial code for issues related to seemingly indirect requirement of minimum capital and provision of the constitution on issues related to provisions directives putting undue limitation on individuals right to work. Using canons of interpretation, I argued that provision regarding numerical requirement in transport proclamation must be interpreted in way facilitating competition and directives contravening it are ineffective in their application to the matter. These are provisional measure not settling the issue perpetually. The law needs to incorporate rules defining and delineating powers of regulators and role of competition authority in curtailing anticompetitive acts such as illustrated by this paper.

Of course the rules settling tension under discussion must not be taken as the only measure that can alleviate the problem. Competition advocacy by competition authority can play a significant role in minimizing regulator which turns out to be anticompetitive. This can be achieved by publishing reports on competitive environment in particular sector, signing memorandum of understanding and giving recommendation to remove existing law or make

changes on rules potential rules and measures that are thought to harm competition in the sector. In Ethiopia, the law in this regard lacks clarity whether the authority can engage in such an activity. Literatures show that this function can be discharged regardless of explicit provision to this effect. Therefore, nothing prevents the competition authority from undertaking competition advocacy. It is better for the authority to become more effective in its function if it is incorporated in the law making consultation mandatory and advice given by the authority binding. The practice in this regard is not promising. Advocacy work of the authority is limited to consumer protection part of the proclamation. It seldom undertakes study and research in relation to competition matters. If the authority is committed to take action, competition advocacy is right way intervene in when regulators take measures that unduly affecting competition. But it failed to do so.

4.1. Recommendations

One possible recommendation forwarded is that the proclamation must be amended to include rues on relationship that is expected to exist between regulators and competition authority. In this regard the writer suggests that the law must require regulators to notify earlier possible time and mandatory consultation with competition before enacting or taking measures that could restrict actors in the market. Practices like interlocking of directors and officers of different departments are unlikely tenable given infancy of the authority and experts it has. While amending the law it must also be in a way forcing the competition authority to take action on its own initiation when regulators restrict competition without any legitimate ground. Therefore concurrency model with features mentioned above is suggested to be adopted in our law of competition.

The second recommendation relates to interpretation of transport proclamation No.468/2005 on issue of limiting number of members to join commercial transport service. The objective under article 13 of the proclamation is ensuring competitive service as stated before. Therefore directives restricting entry must be inapplicable to ensure the competition in the sector. If at all, the role of directives must be limited to making sure of safety and security of the consumers by maintaining technical standards applicable on all actors in the market.

The third and final recommendation relates to advocacy role of the authority. The authority could have conducted competition advocacy activity even in absence of explicit provision as

to this effect as it has been established in literatures. It has also been argued that competition advocacy suggested for developing and transition economies because of: high number of regulators, lack of experts they face and limited resource to enforce highly sophisticated competition laws. It has been noted however that the authority has not conducted the activity because of gaps in understanding as to the concept itself and its role. The writer suggests that the authority must commit resources including human power to reap the fruits of competition advocacy.

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