Review of the Legal and Institutional Framework for Market Competition in Ethiopia
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<td>Addis Ababa Chamber of Commerce and Sectoral Associations</td>
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<td>AfDB</td>
<td>African Development Bank</td>
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<td>CBE</td>
<td>Commercial Bank of Ethiopia</td>
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<td>COMESA</td>
<td>Common Market for Eastern and Southern Africa</td>
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<td>DG-COMP</td>
<td>Directorate General for Competition (European Union)</td>
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<td>DTIS</td>
<td>Diagnostic Trade and Investment Survey</td>
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<td>FDI</td>
<td>Foreign Direct Investment</td>
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<td>FDRE</td>
<td>Federal Democratic Republic of Ethiopia</td>
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<td>FTA</td>
<td>Free Trade Area</td>
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<td>FTC</td>
<td>Federal Trade Commission (United States)</td>
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<td>GATS</td>
<td>General Agreement on Trade in Services</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>GDP</td>
<td>Gross Domestic Product</td>
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<td>GoE</td>
<td>Government of Ethiopia</td>
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<td>IMF</td>
<td>International Monetary Fund</td>
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<td>IPRs</td>
<td>Intellectual Property Rights</td>
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<tr>
<td>MFN</td>
<td>Most Favoured Nation</td>
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<tr>
<td>MNCs</td>
<td>Multinational Corporations</td>
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<tr>
<td>MoFED</td>
<td>Ministry of Finance and Economic Development</td>
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<td>MoFTR</td>
<td>Memorandum of Foreign Trade Regime</td>
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<td>NBE</td>
<td>National Bank of Ethiopia</td>
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<td>NT</td>
<td>National Treatment</td>
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<td>OECD</td>
<td>Organization for Economic Co-operation and Development</td>
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<td>OFT</td>
<td>Office of Fair Trade (UK)</td>
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<tr>
<td>PASDEP</td>
<td>Program for Accelerated and Sustained Development to End Poverty</td>
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<td>PSD</td>
<td>Private Sector Development</td>
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<tr>
<td>RBPs</td>
<td>Restrictive Business Practices</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>SDPRP</td>
<td>Sustainable Development and Poverty Reduction Program</td>
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<td>SMEs</td>
<td>Small and Micro Enterprises</td>
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<tr>
<td>SNNPRS</td>
<td>Southern Nations, Nationalities and Peoples Regional State</td>
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<td>ToR</td>
<td>Terms of Reference</td>
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<td>ToT</td>
<td>Turnover Tax</td>
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<td>TRIPS</td>
<td>Agreement on Trade-Related Aspects of Intellectual Property Rights</td>
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<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<td>UNGCP</td>
<td>United Nations Guidelines for Consumer Protection</td>
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<td>UTPs</td>
<td>Unfair Trade Practices</td>
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<td>VAT</td>
<td>Value Added Tax</td>
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<td>WB</td>
<td>World Bank</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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INTRODUCTION

This study on “The Review of the Legal and Institutional Framework for Market Competition in Ethiopia” was commissioned by the Private Sector Development (PSD) Hub of the Addis Ababa Chamber of Commerce and Sectoral Associations (AACCSA).

The main objective of the study is “to develop a position paper for the business community and come up with recommendations for reforming the existing legal and institutional framework affecting market competition so as to create a competitive business environment and promote private sector led economic growth.” The study has also been spurred by the fact that there is an on-going work on the part of the government to issue a new law that would replace the previous Trade Practices Proclamation No.329/2003. In light of this, the business community wishes to come up with its own recommendations regarding the necessary changes that need to be made in the current legal and institutional framework in the form of a position paper. The position paper is expected to form the basis for the business community to initiate an informed dialogue with the relevant government organizations for the reform of the current legal and institutional framework for market competition in Ethiopia.

In order to come up with appropriate proposals for the required changes in the existing legal and institutional framework that would enhance market competition in Ethiopia, the scope of work provided in the ToR requires that the study take into account the review of both the domestic and global market situation as well as Ethiopia’s accession to the World Trade Organization (WTO). The study is also expected to establish the link between the development of a competitive market, human rights and consumer protection.

The methodology followed in undertaking the study involved the acquisition and review of both primary and secondary data and information. The Consultant has made an extensive and in-depth review of the available literature and other documents in the area of market competition and a comparative study of the experience of other countries in regulating market competition in their respective jurisdictions. Moreover, collection and
review of available literature has also been carried out by the Consultant to examine the linkages between market completion and consumer protection and human rights as well as the impacts of globalization, international trade and Ethiopia's accession to the WTO on market competition system of the country. Collection of primary data involved interviews with representatives of the Trade Practices Commission, the business community, law enforcement organs, the judiciary and consumer associations at both the Federal and Regional levels. In addition, all the cases so far handled by the Commission and concluded have been reviewed.

Before embarking on the review and analysis of the legal and institutional framework for market competition in the Ethiopian context, it is essential for the study to provide the conceptual framework underlying market competition and its linkages with consumer protection as well as globalization and international trade. Part I of this study therefore addresses the theoretical background to market competition and the rationale for regulating market competition. It also examines the policy environment that influences market competition as well as the relevant contents of the legal and institutional framework for regulating market competition by also relating such issues with experiences from both developed and developing countries. It also discusses the linkages between market competition and consumer protection and the relationship of market competition with globalization and international trade are also discussed.

Part II mainly focuses on the current policy, legal and institutional framework for market competition in Ethiopia. It provides a background for market competition in the country. The major policy and structural barriers that undermine market competition as the prevailing types of anticompetitive business practices have also been highlighted. Furthermore, the contents of the current law and institutional framework are also discussed and the relevant gaps in the current regulatory framework highlighted. The final part, Part III, comes up with the main findings and recommendations of the study, which also aims to serve as a position paper for the business community initiating a dialogue with the relevant government agencies responsible for the preparation of the legal and institutional framework for market competition in Ethiopia.
CHAPTER ONE

Market Competition: A Background

Free Market and the Rationale for Regulation

In economic theory, the term market competition, and accordingly, the study of competition policies and laws only make sense in a free market economy. This is a type of economy in which the activities of production and distribution are carried out largely based on independent decisions of the majority of economic actors in a decentralized manner. It has never made much sense at all to consider the role of competition where a considerable bulk of a nation's economic activities is principally steered by state-sanctioned plans.

Considerations related to the basic features of a free market economy take into account the performance of markets if they are to approximate the perfectly competitive market model, and also their shortcomings if they are flawed by elements that avoid competition, such as monopoly and oligopoly. It thus becomes essential to briefly clarify the concepts of a perfectly competitive market, monopoly and oligopoly as well as the rationales for government regulation.

The Perfectly Competitive Market

"A perfectly competitive market is one in which there are a large number of buyers and sellers, the product is homogeneous, all the buyers and sellers have perfect information, and there are no barriers to entry and exit". The share of each seller in this market is so insignificant that sellers lack market power, i.e., the power to influence the product's price or quality. This, coupled with the identical quality of goods, sets a unique market price at which firms can sell any quantity of these goods. In this type of market firms are price takers and not price setters.

The market determines the most efficient allocation of resources for the production of goods and services through changes in relative prices as a function of demand and supply. If a commodity is in short supply relative

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1. Alison Jones and Brenda Sufrin, EC Competition Law: Text, Cases, and Materials, Oxford University Press, 2001, p. 8
to the number of people who want to buy it, its price will rise, producers and sellers will make higher profits and production will tend to rise to meet the excess demand. If the available supply of a commodity is in a glut situation, the price will tend to fall, thereby attracting additional buyers and discouraging producers and sellers from entering the market. Thus, the sum total of interactions between buyers and sellers determines the goods and services produced, the use of resources such as labor and capital, and the distribution of goods and services among customers.

In the free market context, competition signifies a state of affairs wherein sellers compete with each other to attract buyers with a view to maximizing their sales, profits and market share. Assuming a free flow of information, those offering the best practicable combination of price, quality, and service will attract the buyers and prosper. Since a seller’s success in a market economy depends on satisfying customers by producing the products they want and selling those goods and services at prices that meet the competition they face from other businesses, competition plays a regulatory function in balancing demand and supply. Consumers benefit from this competition among firms because they get better products at lower prices.

In a perfectly competitive market where individual firms have no noticeable influence on market price, “competition drives firms to become more efficient and to offer a greater choice of products at lower prices because of the fear that only the fittest will survive in the market”. Consequently, “the cost of the last unit of output (marginal cost) would just equal what consumers would be willing to pay for that unit”. Such a state of “perfect competition” is considered the most efficient market condition in terms of utilization of available resources since additional value cannot be derived for anyone without affecting somebody else. Thus, it functions as a theoretical framework of analysis and standard of regulation in contrast to which markets are evaluated.

The perfectly competitive market model makes some basic assumptions about the behavior of consumers and producers as well as the structure

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2 http://www.businessdictionary.com/definition/competition.html
3 CUTS Centre for Competition, Investment & Economic Regulation, Competition Policy and Law Made Easy, Monographs on International Competition Policy No. 8, 2001, p. 6
4 K. P. Ramaswamy, Market Structure, Competition and Performance: The Analytical Background, not dated, p.2
5 This conception has led to the development of the doctrine of “Perfect Competition” as a theoretical framework of analysis and standard of regulation. The doctrine, which has influenced government efforts to maintain competition through anti-trust laws/policy views market competition as a means by which prices are minimized to approach the marginal cost of production.
of the market. The following are the five basic assumptions underlying the model.

1. **Motivational Assumptions.** Consumers seek to maximize utility or satisfaction from the consumption of goods and the enjoyment of services and amenities while producers seek to maximize profits or economic wealth.

2. **Perfect Information.** Consumers have, in advance, complete information about product performance and the satisfactions that various goods, services, and amenities will provide them, and producers have complete information about the production processes from which they choose. Both producers and consumers have full information about all relevant prices.

3. **Resource Mobility.** Resources are mobile, at least in the long run - they can be transferred from one use to another in response to economic incentives such as price changes.

4. **Homogeneous Commodities.** Each unit of each commodity and input is undifferentiated from other units of the same commodity or input. Consumers have no preference as to which producer provides the commodities they purchase, and producers have no preferences among suppliers of the same input or consumers of the same output.

5. **Large Industries, Small Individuals.** The purchases of each consumer represent such a small proportion of the total output of any commodity that the decisions of a consumer have no influence on the price of the commodity. Similarly, each producer purchases such a small proportion of the total output of a given industry that his/her actions have no influence on the price of the product or the inputs used in its production.

**Monopoly Market**

A monopoly is a market with a single seller, large numbers of buyers, no close substitutes of the product though there may be reasonably adequate substitutes, and high entry barriers. The existence of a single seller in the

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6 A more detailed list of assumptions behind the perfectly competitive market are the same as those of a pure free market economic model which are found in any introductory text on economics. This particular list has been adapted from various texts, particularly - H. Mathiesen, Exhibition: The perfect market economy, Encyclopedia of Corporate Governance, 1997 (Available at: www.encycogov.com/searchpage/htm)

7 A market with large number of sellers and buyers may be monopolistic if there is substantial product differentiation. In such a market, referred to as monopolistic competition, each seller will have certain price setting power resulting in different prices. Markets for fast moving consumer goods such as tooth-paste and soap are examples of such a market.

---
market may be created due to "barriers which prevent other firms from entering the market or because there is a natural monopoly". Barriers to entry may be created by the monopolist or legal and other privileges that protect the incumbent against the possible entry of new competitors. A natural monopoly, on the other hand, occurs in markets where only one seller can operate profitably due to a very high minimum efficient scale.

In a monopoly market, the only seller is the price and output setter. Based on the assumption that producers seek to maximize profit and economic wealth, "the theory predicts that as the firm is not constrained by competitors it will price as high as it possibly can". Thus, the price of the product will be higher than in a perfectly competitive market. On the other hand, the monopolist is subject to two constraints. First, since supply and price are functionally related, the firm cannot set both at the same time. Neither can it control the demand side of the market. Thus, the single seller has to choose between setting price and allow demand to determine output, and set output and allow demand to determine price. Moreover, there may be reasonably adequate, though not close substitutes outside the market. Thus, some customers will react to higher prices by choosing to leave the market for the firm's product and purchase something else. The result is "a downward sloping demand curve" with lower demand for the product with increasing price.

Though the seller in a monopoly market will get maximum price for the product by producing only one unit, it will have to increase output to cover production costs. However, increasing output will lower the price on all units keeping the monopolist's marginal revenue below market price. Since the seller will incur losses by producing beyond the point where the cost of producing the last unit (marginal cost) equals the marginal revenue, the supply would be less than in a competitive market. Thus, prices are higher and output is restricted in a monopoly market resulting in abnormal profits to monopolists and denying the product to customers willing to pay the amount equal to the marginal cost. The costs of monopoly thus include:

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8 Alison Jones and Brenda Sufrin, EC Competition Law: Text, Cases, and Materials, Oxford University Press, 2001, p. 10
9 The minimum efficient scale refers to the point in economies of scale where average cost ceases to fall with increased production. Where the seller has to supply a large quantity before reaching this point, only one firm can operate efficiently.
10 Alison Jones and Brenda Sufrin, EC Competition Law: Text, Cases, and Materials, Oxford University Press, 2001, p. 10
11 CUTS Centre for Competition, Investment & Economic Regulation, Competition Policy and Law Made Easy, Monographs on International Competition Policy No. 8, 2001, p. 8
12 Alison Jones and Brenda Sufrin, EC Competition Law: Text, Cases, and Materials, Oxford University Press, 2001, p. 10
• **Redistribution of income.** The above marginal cost pricing in a monopoly leads to the transfer of wealth from consumers to producers.\(^3\)

• **Deadweight loss.** A monopoly market leads to an allocation of resources that is inefficient in the sense of failing to satisfy consumer wants as completely as possible.

• **“X-efficiency”**. A monopolist, who is under less pressure to reduce costs compared to firms in competitive markets, is likely to be internally inefficient and have rising costs. These will be reflected in even higher prices.

**Rationale for Regulating Market Competition**

Due to limited resources and unlimited wants and needs, every society has to address three allocation issues: what goods to produce (resource allocation), how to produce the goods (production), and who receives the goods produced (distribution). The pure free market is an economic model in which markets answer all questions related to allocation. Such a theoretical model leaves no space for the role of the government in making decisions on the three allocation issues. The role of the government is rather limited to the enforcement of property rights and contracts.

On the other hand, the pure free market model as discussed above fails to provide for some essential aspects or components of the real market. These include:\(^3\)

• **The production of public goods** – these are goods like national defense that are consumed collectively and are subject to free-rider problems. These goods and services could not be realistically provided in a free market.

• **Merit goods**: These are goods and services such as education and health care that are essential to the consumer. Merit goods tend to be under-provided in a free market and since they have benefits consumers may not consider in deciding how much to consume. For instance, if the decision whether to send children to school is left exclusively to parents, not all of them will decide to do so.

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\(^3\) This is why firms in a competitive market may wish to emulate the effect of monopoly by colluding to set the price above the competitive level or to restrict output.

\(^4\) The loss of consumer surplus which is not turned into profit for the producer.

\(^5\) For a glossary of these and other terms, see the just business glossary on the Norfolk Education and Action for Development available at: www.nusbiz.org/glossary.html
Market externalities: These are the spill-over effects of production or consumption for which no price is paid. Externalities occur when the actions of a consumer or producer have impact on persons other than themselves. Positive externalities or external benefits are advantageous impacts for which the beneficiaries do not have to pay while negative externalities or external costs are disadvantageous impacts for which those affected receive no payment. Market externalities are not reflected in a free-market price. For example, a telephone subscriber benefits from an increase in the number of subscribers since she can make and receive calls from more people but does not have to pay for the increased utility. On the other hand, a tannery polluting a river affects the health of local residents but does not have to bear their medical bills.

Institutional costs – the costs of setting up financial institutions, litigation, government, etc., that are necessary to the operation of a real life market are not addressed in the free market.

These failures of the pure free market provide justification for government intervention in the market with significant implications for market competition. In addition, since market competition as understood in the free market sense is based on unrealistic assumptions, it cannot describe the true behavior of consumers and producers or the structure of the real market. For instance, consumers often make decisions on limited information while sellers do not always offer the optimum price or quality as anticipated by the free market model of competition. Mainstream economic theory thus advocates for the intervention of the government in the market through regulation to ensure that the structure of industry and behavior of firms in as much as possible approaches the ideal perfectly competitive market wherein firms compete through increased quality, cost-efficiency, optimum use of resources, technological innovation, etc. Such intervention generally falls under the purview of competition policy.

Competition Policy

Competition policy refers to “governmental measures that directly affect the behavior of enterprises and the structure of industry ...(and) ... covers a whole raft of executive policies and even approaches”. In this sense competition policy could be understood to include two components: economic policies that enhance competition in local and national markets; and, laws designed

16 Market failure refers to a situation where the price mechanism results in an inefficient or grossly unfair resource allocation.
17 Challenges in Implementing a Competition Policy and Law: An Agenda for Action, CUTS Centre for International Trade, Economics & Environment, July 2002
to regulate anti-competitive business practices by firms and unnecessary
government intervention in the market.\textsuperscript{18}

\begin{center}
\textbf{Figure 1 The Contents of Competition Policy}\textsuperscript{19}
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<th>Competition Policy</th>
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<td>Private Actions</td>
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<td>Government Policies</td>
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<td>Deregulation &amp; Privatisation</td>
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<td>Trade Policy</td>
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<td>Industrial Policy</td>
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<td>Regulations Governing Capital and FDI</td>
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<td>Consumer Policy</td>
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<td>Other Policy</td>
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<td>Such as:</td>
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<td>Regional Development Policy;</td>
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<td>Small and Medium Enterprises (SMEs);</td>
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<tr>
<td>Reservation Policy etc.</td>
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Policies with implications for market competition include deregulation
and privatization, trade liberalization, consumer protection, intellectual
property, industrial policy, government procurement, labor, and taxation. In
addition, sector-specific policies in various areas, such as health, electricity,
telecommunications, financial services etc., also affect market competition.\textsuperscript{20}

- **Deregulation and privatization**: Regulatory reform by easing
  regulatory requirements and opening up previous monopolies for
  the private sector is a measure aimed at broadening the scope of
  competition.

- **Trade liberalization**: Trade liberalization opens up domestic
  markets to foreign competition.

- **Consumer protection policy**: Consumer protection policy and law
  seek to protect and promote the welfare of consumers by regulating
  the behavior of firms mostly in their relationship with consumers.
  Since competition among firms usually results in benefits to the
  consumer in the form of higher quality, lower prices and increased
  quantity, these regulatory measures often promote competition
  among firms. But, consumer protection interests may also create
  competing policy considerations favoring lesser competition to
  protect consumers.

\textsuperscript{18} Competition Policy & Law Made Easy, p. 28
\textsuperscript{19} CUTS, Competition Policy and Law Made Simple
\textsuperscript{20} Adapted from CUTS, Competition Policy and Law Made Simple
• **Intellectual Property Rights.** Intellectual property rights (IPRs) provide a temporary monopoly for the right holders in order to provide incentives for innovation. It thus promotes competition among firms through quality. On the other hand, the monopoly inherent in IPRs may provide market power which may be abused by the right holder thereby stifling competition.

• **Industrial policy and government procurement.** Government policies favoring particular sectors or clusters of businesses have short and long term effects on competition. Government procurement policies and laws are especially important in small and transition markets where the government is a major buyer.

• **Labour policy.** Legislation concerning the hiring and firing of workers exists to protect employment and to ensure certain standards in working conditions, but this may also constitute a barrier to exit for firms.

• **Taxation.** Governments may target groups for preferential treatment in taxation and to create certain incentives for businesses and this may affect competition.

In addition, sector-specific policies in various areas, such as health, electricity, telecommunications, financial services etc., also affect market competition.

While a few countries, such as India and Botswana, have a single comprehensive document outlining their competition policy, in most cases it is found scattered throughout the texts of the various economic and social policies of governments.

**Competition Law**

Competition law is a major component of competition policy. Though, as discussed in the subsequent sections, the precise scope of competition law may vary from jurisdiction to jurisdiction, it is generally understood as a tool designed to control and to prohibit anticompetitive practices and tendencies that might risk competition. Competition law is the main focus of this report.

**Historical Background**

The Sherman Act passed by the US Congress in 1890 is considered the first ‘modern’ competition law. Though alternative explanations abound, it is widely believed that the Sherman Act was adopted to address the issue of competition following the formation of powerful trusts, especially
in the railroad industry. This practice involved the transfer of stocks in competitive companies to trustees who would then control the activities of previously competitive companies. The area of law subsequently came to be called anti-trust law. The development of anti-trust law in the US until the 1930s took the form of judicial decisions and interpretations[^21] that "reflected the experiences of the American economy as it went through an industrial revolution, the Depression, and the New Deal"[^22]. Since the 1940s, a series of hypothesis and schools of thought have guided the enforcement of anti-trust law in the US[^23]. These ideas, lessons and overall thinking in US antitrust law have influenced competition law systems all over the world. Another influential competition law in the modern world is the European Community (EC) Competition Law, which was necessitated by the creation of the EC economic system and was at least in part influenced by the US antitrust law[^24].

<table>
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<tr>
<th>Country</th>
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<tr>
<td>Japan (1947)</td>
<td>USA (1890)</td>
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<td>Australia (1974)</td>
<td>USA (1890)</td>
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<tr>
<td>South Korea (1980)</td>
<td>Japan (1947), Germany (1957)</td>
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<td>Taiwan (1992)</td>
<td>Japan (1947), Germany (1957)</td>
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<td>Indonesia (1999)</td>
<td>Japan (1947), Germany (1957), EC</td>
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As would be discussed later, unlike the experience of developed countries where competition law was necessitated by national exigencies, the emergence and development of competition law in developing countries have been influenced more by trade liberalization and globalization rather than the need of their domestic markets. In 1995, there were only 35 national competition regimes but the number has increased to more than 80 by the

[^21]: The US legal system follows a common law approach wherein the courts take a role in legislation by establishing what the law is in relation to specific cases. This lies in contrast to 'Civil Law' systems where laws are enacted by a legislative body and the courts are generally restricted to interpretation.

[^22]: Alison Jones and Brenda Sufrin, EC Competition Law: Texts, Cases, and Materials, Oxford University Press, 2001, p. 19

[^23]: The "workable competition" hypothesis, which was influential in the 1940s and 1950s, was displaced by the "conduct – performance" paradigm developed by the Harvard School in the 1930s. This paradigm led to an anti-trust policy that intervened in the market to protect small businesses against large firms. The Chicago school, another school of thinking which emerged subsequently, argued that allocable efficiency as defined by the market should be the sole purpose of anti-trust law.

[^24]: Alison Jones and Brenda Sufrin, EC Competition Law: Texts, Cases, and Materials, Oxford University Press, 2001, p. 27
year 2000\textsuperscript{35} and to more than 100 by 2003.\textsuperscript{36} More than half of the countries with competition laws have adopted their competition regimes in the 1990s, “the decade of liberalization”.\textsuperscript{37}

**Aims and Objectives of Competition Law**

Generally, the objective of competition laws is maintaining and enhancing market competition by addressing “restrictive business practices and regulate market structures that significantly lessen competition”.\textsuperscript{38} It is indeed well settled that the core purpose and emphasis of competition law is the maintenance of competition by guarding off markets from the practices of firms that impede competition. According to the background document on the World Bank-OECD model law, “the most common of the objectives cited is the maintenance of the competitive process or of free competition, or the protection or promotion of effective competition.”\textsuperscript{29} This is what invariably is found in any standard competition law. For example, a survey involving 23 countries has found that “the enhancement of competition”, “elimination/prevention of RBPs (Restrictive Business Practices)” and “economic efficiency” to be the most cited objectives of competition laws.\textsuperscript{30}

Nonetheless, apart from the consideration of economic efficiency, governments do have other socioeconomic and even political objectives, and priorities they wish to promote through competition laws such as consumer welfare and development. It is not indeed uncommon to come across such objectives as ensuring employment, protecting small businesses and promoting export. In the South African Competition Act, for instance, it is clearly stated that aside from promoting the efficiency and adaptability of the economy, the promotion of a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons, is also another objective having the same rank as that of promotion of efficiency.\textsuperscript{31}

\textsuperscript{29} Philippe Brusick, Globalization: Enhancing Competition or Creating Monopolies?, CUTS Centre for Competition, Investment & Economics Regulation, 2000, p. 1

\textsuperscript{30} Pulling Up Our Socks – A Study of Competition Regimes of Seven Developing Countries of Africa and Asia under the 7-Up Project, CUTS Centre for Competition, Investment & Economic Regulation and DFID, 2003

\textsuperscript{31} Cassey Lee, Model Competition Laws: The World Bank-OECD and UNCTAD Approaches Compared, Faculty of Economics & Administration University of Malaya, August 2004, p. 4
The efficiency objective of competition law may promote other objectives as well. For example, promoting efficiency of the economy would also promote consumer welfare. The issue becomes more complex as promoting efficiency through competition may come into conflict with another sociopolitical goal or vice versa.\textsuperscript{32} Balancing the different and potentially conflicting objectives is a delicate issue competition authorities across jurisdictions have to grapple with in interpreting and enforcing competition laws.

**Coverage and Scope of Application**

A competition law, in general, consists of provisions with respect to:\textsuperscript{33}

- **Behavior and structure of firms in the market**, such as anticompetitive agreements, abuse of dominance, mergers and acquisitions, and unfair trade practices (not all competition laws address it);

- **Institutional and enforcement design**, such as structure and composition of competition authority, selection and terms and conditions for the members of competition authority, powers and functions of competition authority, and other implementation provisions; and

- **Competition advocacy**, which consists of public analysis, comments and recommendations by a competition authority with respect to anticompetitive effects of existing and future policies, laws, regulations, and other actions of the government; and, generating and enhancing awareness of the stakeholders, such as business, consumers etc, on competition issues.

The scope of competition law, i.e., the activities and persons subject to its provisions, typically includes all commercial activities: “actions, transactions, agreements and arrangements involving goods, and services”\textsuperscript{34}, and “both public and private sector firms”.\textsuperscript{35} However, the activities of the State, local governments and institutions acting with delegated government authority are normally outside the purview of competition law.\textsuperscript{36} The UNCTAD model law expressly states that the law:


\textsuperscript{33} Competition Policy & Law Made Easy, Monographs on Investment and Competition Policy, #8, Cuts Centre for International Trade, Economics & Environment, 2001, p. 29

\textsuperscript{34} Cassey Lee, Model Competition Laws: The World Bank-OECD and UNCTAD Approaches Compared, Faculty of Economics & Administration University of Malaya, August 2001, p. 5

\textsuperscript{35} Olivia Jensen, Contours of A National Competition Policy: A Development Perspective, Cuts Centre for International Trade, Economics & Environment, Briefing Paper No. 2, 2001, p. 3

\textsuperscript{36} Ibid.
"Does not apply to the sovereign acts of the State itself, or to those of local governments, or to acts of enterprises or natural persons which are compelled or supervised by the State or by local governments or branches of government acting within their delegated power."

In some national competition laws, exemptions are also provided for specific activities, enterprises or sectors. Such exemptions are usually justified for strategic reasons (e.g. defense), overriding public policy (e.g. SMEs, export sector), or existence of a sector specific regulatory framework (e.g. utilities). The WB-OECD model law excludes workers and employees union-related activities from the purview of the competition law.

**Anticompetitive Practices**

There is significant variation in the thematic scope of competition laws among countries parallel to the objectives of the laws and multifarious policy considerations prevailing at the national level. Yet, a review of existing competition laws across countries reveals three areas as the core operational concerns of competition law. Those are collusive agreements, control of monopoly power or a dominant position, and mergers and acquisitions.

**(a) Restrictive (Collusive) Agreements**

While the relationships and transactions among business enterprises inherently take the form of implicit or explicit agreements, some such agreements have the tendency to reduce or eliminate competition. These "anticompetitive" agreements are referred to as collusive or restrictive agreements. Restrictive agreements may be made between competing firms at the same stage of the production process or those at different stages. Agreements between two or more firms at the same level are known as horizontal agreements or, where inherently anticompetitive, cartels. Agreements between firms at different levels on the other hand are designated vertical agreements or "vertical restraint". Most forms of restrictive agreements, with the exception of collusive bidding, can take place horizontally or vertically. The WB-OECD and UNCTAD model competition laws identify five major types of restrictive agreements.

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33 Pulling Up Our Socks – A Study of Competition Regimes of Seven Developing Countries of Africa and Asia under the 7-Up Project, CUTS Centre for Competition, Investment & Economic Regulation and DFID, 2003

34 Pulling Up Our Socks – A Study of Competition Regimes of Seven Developing Countries of Africa and Asia under the 7-Up Project, CUTS Centre for Competition, Investment & Economic Regulation and DFID, 2003, p. 39

35 These are sometimes referred to as "restrictive trade (or business) practices" in conjunction with some issues overlapping with abuse of dominant position.
These are price fixing, quantity fixing, market allocation, refusal to deal and collusive bidding/tendering. Most competition laws also expressly prohibit these types of agreements. Restrictive agreements are in many cases subjected to per se illegality and may be prosecuted as crimes as well. Other restrictive agreements are subject to rule of reason which normally involves threshold criteria based on market share and comparison between the limits on competition and benefits in efficiency.

(b) Abuse of Dominance

Abuse of dominance refers to actions of a firm already dominant in a market that significantly lessens competition in that particular market. The fact that a firm has a dominant market position does not constitute an anticompetitive practice unless such position is abused. Thus, competition laws very rarely prohibit dominant position by and in itself. Instead, the laws define what constitutes “dominant position” and provide a non-exhaustive list of instances of abuse. Subject to case-by-case determination by the national competition authorities, instances of abuse commonly identified include excessive prices, predatory pricing, discriminatory pricing, refusal to deal/supply, conditions of resale, raising rivals’ costs, and tying sales.

The WB-OECD model law defines “dominant position” in terms of “a necessary but insufficient condition” in a form of numerical market share threshold of 35 percent and suggests application of abuse of dominance where such firm attempts to suppress competition. On the other hand, the UNCTAD model law provides that abuse of dominance occurs:

i. Where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control a relevant market for a particular good or service, or groups of goods or services; and

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

40 Cassey Lee, Model Competition Laws: The World Bank-OECD and UNCTAD Approaches Compared, Faculty of Economics & Administration University of Malaya, August 2004, pp. 8-9
41 In such cases cartel agreements are treated as illegal regardless of whether the set prices or output are reasonable or not. Under such an approach, the prosecutor need only prove that an agreement was made and that it could be anticompetitive. It is not relevant whether the effect was in fact anticompetitive.
42 However, cartels are not always illegal per se, as in Canada, where the cartel must affect a large part of the market, or in Spain, Sweden and the UK where a rule-of-reason approach is adopted.
43 A possible exception is Pakistan, which seems to prohibit market dominance per se.
44 World Bank (2002) suggests that, for developing countries, quantitative benchmarks may be easier to apply than qualitative approach of dominance—the later requiring sophisticated information and human resource capacity.
The practice of determining dominance also varies. A 2002 survey of 50 countries by the WB has found that 28 had qualitative definition of dominance while the remaining 22 countries adopted quantitative benchmarks with wide variance.46

(c) Mergers and Acquisitions

Merger involves a fusion between two or more firms whereby the identity of one (or more) is lost and results in a single firm, while acquisition (or takeover) refers to purchase of all or a sufficient amount of the shares of another firm to enable it to exercise control.46 Mergers and acquisitions may involve firms that are competitors (horizontal), firms at different levels of production-supply chain (vertical), or firms in unrelated business (conglomerate).47 Generally, competition concerns arise in relation to horizontal mergers and acquisitions.

Mergers and acquisitions may impact on competition in two ways. The process reduces the number of competitors in a market and may create a dominant firm or increase already existing dominance. Thus, at least some mergers may create risk of abuse of dominance. The regulation of mergers and acquisitions is thus predicated on the assumption that “it is far better to prevent the acquisition of market power than it is to attempt to control or to break up the market power once it exists.”48 In some cases the control of mergers and acquisitions may also involve post-merger dissolution.

Almost all competition laws prohibit mergers and acquisitions where “they substantially restrict competition”.49 In most cases, the law requires firms to communicate their intention to merge or take over another firm especially where the new entity is likely to have substantial market power. The WB-OECD and UNCTAD model laws, as well as laws in the US and EU provide for pre-merger notification.50 However, in some countries the system of

45 Cassey Lee, Model Competition Laws: The World Bank-OECD and UNCTAD Approaches Compared, Faculty of Economics & Administration University of Malaya, August 2004, p. 12
46 Competition Policy & Law Made Easy, Monographs on Investment and Competition Policy, #8, Cuts Centre for International Trade, Economics & Environment, 2001, p. 22
47 Competition Policy & Law Made Easy, Monographs on Investment and Competition Policy, #8, Cuts Centre for International Trade, Economics & Environment, 2001, p. 22
48 Olivia Jensen, Contours of A National Competition Policy: A Development Perspective, Cuts Centre for International Trade, Economics & Environment, Briefing Paper No. 1, 2001, p. 6
49 Pulling Up Our Socks – A Study of Competition Regimes of Seven Developing Countries of Africa and Asia under the 7-Up Project, Cuts Centre for Competition, Investment & Economic Regulation and DFID, 2003, p. 10
50 Cassey Lee, Model Competition Laws: The World Bank-OECD and UNCTAD Approaches Compared, Faculty of Economics & Administration University of Malaya, August 2004, p. 12
notification is voluntary while in others notification is necessary only after completion of the merger or acquisition process.

### Market Competition and Unfair Competition

Unfair competition relates to the actions of firms that cause an economic injury to another firm, through a deceptive or wrongful business practice. The terms “unfair competition” and “unfair trade practices” are often used interchangeably while some legal systems make distinctions between the two. Where the latter is the case, “unfair competition” is used to refer only to those actions that are meant to confuse consumers as to the source of the product, while “unfair trade practices”, comprises all other forms of unfair competition. In this narrower sense, the meaning of “unfair competition” is limited to misleading advertisement and false representation which includes: “Any statement which is not true either because it hides facts that are important or suggests falsehood... (or) ... is put in such words or context that it may give rise to two meanings, one of which is false, would be misleading.”

The most common examples of unfair competition are trademark infringement and misappropriation. Other practices that fall into the area of unfair competition include false advertising, “bait and switch” selling tactics, unauthorized substitution of one brand of goods for another, use of confidential information by former employee to solicit customers, theft of trade secrets, breach of a restrictive covenant, trade libel, and false representation of products or services.

The purposes of unfair competition law, as stated in the various laws, appear to follow two general trends focusing on the relationships between businesses and/or businesses and consumers. The first trend highlights the protection of “industrial property rights” by enforcing a level of “honest practices in industrial or commercial matters”. For instance, the Unfair Competition Prevention and Trade Secret Protection Law of the Republic of Korea

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51 The argument for opting for voluntary notification is that “abuse of dominance” provision will take care of any anticompetitive practices.
52 Unfair Competition Law: an overview, Legal Information Institute, University of Cornell Law School, 2008 (available at: http://topics.law.cornell.edu)
53 Competition Policy & Law Made Easy, Monographs on Investment and Competition Policy, #8, Cuts Centre for International Trade, Economics & Environment, 2001, p. 26
54 Misappropriation involves the unauthorized use of an intangible asset not protected by trademark or copyright laws.
55 Unfair Competition Law: an overview, Legal Information Institute, University of Cornell Law School, 2008 (available at: http://topics.law.cornell.edu)
56 Law No. 911, Promulgated on Dec. 30, 1961 as last Amended by Law No. 6421, Feb. 2, 2001
explicitly aims "to maintain orderly trade by preventing acts of unfair competition such as improper use of domestically well-known trademarks and trade names, and by preventing infringement of trade secrets". The unfair trade practices provision of the Thai Competition Law similarly aims at "restricting unfair trade practices by any business operators that would adversely affect other business operators". Here, the targeted practices are prohibited irrespective of whether consumers would benefit from the act or practice. On the other hand, some competition laws stress actions of firms more directly targeting consumers. A case in point is the Unfair Competition Law of Grenada which focuses on "inaccurate statement about relations concerning... commercial, industrial and agricultural transactions... contained in public communications or announcements... if such statements are capable of giving the impression of an especially favorable offer". Similar attention to misleading or deceptive statements is also indicated in the Indian Monopolies and Restrictive Trade Practices Act. However, most unfair competition laws incorporate both issues, though dealing with them in separate provisions or parts of the same legislation.

Market Competition and Consumer Protection

As indicated above, the free market model makes some assumptions about the situation and conduct of consumers as well as producers that are unlikely to exist in the real world market. These include numerous buyers and sellers in the market with perfect information about products, no barriers to entry or exit from the market, and consumers and producers bearing entirely the respective costs of their production and consumption activities. The failure of these assumptions, which are preconditions for free operation of markets leading to welfare maximization, create concerns for consumers in relation to access, pricing, safety, quality and choice of goods and services. Consumer protection is a way of dealing effectively with these adverse effects of market failure from the demand side.

In regulatory terms, consumer protection refers to the set of laws and policies aimed at ensuring social justice, equity and fairness in the relationships between producers and consumers. The major problems consumer protection seeks to address include imperfect information about product attributes, imperfect information about market prices, consumer costs of

59 Mark Armstrong, Interactions Between Competition and Consumer Policy, Munich Personal RePEc Archive, MPRA Paper No. 7258, February 2008, p. 2 (available at: http://mpra.ub.uni-muenchen.de/7258/)
obtaining market information, supplier costs of advertising, and consumers possessing imperfect information about their own needs. Consumer policies and laws thus deal with duress and undue sales pressure, information problems pre-purchase and undue surprises post-purchase.

On 9 April 1985 the United Nations Assembly adopted eight principles as the United Nations Guidelines for Consumer Protection (UNGCP) to provide a framework for strengthening national consumer protection policies around the world. These are:

- **The right to safety** — To be protected against products, production processes and services which are hazardous to health or life;

- **The right to be informed** — To be given facts needed to make an informed choice, and to be protected against dishonest or misleading advertising and labeling;

- **The right to choose** — To be able to select from a range of products and services, offered at competitive prices with an assurance of satisfactory quality;

- **The right to be heard** — To have consumer interests represented in the making and execution of government policy, and in the development of products and services;

- **The right to satisfaction of basic needs** — To have access to basic essential goods and services, adequate food, clothing, shelter, health care, education and sanitation;

- **The right to redress** — To receive a fair settlement of just claims, including compensation for misrepresentation, shoddy goods or unsatisfactory services;

- **The right to consumer education** — To acquire knowledge and skills needed to make informed, confident choices about goods and services while being aware of basic consumer rights and responsibilities and how to act on them; and

- **The right to a healthy environment** — To live and work in an environment which is non-threatening to the well-being of present and future generations.

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The nexus between competition and consumer protection is to be found in their common purpose – a functioning free market by addressing market failures. That is, while competition relates to the supply side of the market, consumer protection works from the demand side. Thus, “competition and consumer protection... are intimately related, two sides of the same coin”.

The linkage is also manifest in the role of competition as a tool for consumer protection. By ensuring the efficient allocation of resources in the market, competition brings forth “the best possible choice of quality, the lowest possible prices, and adequate supplies to consumers”. In fact, it has been argued that:

“There is little role for consumer policy when all product attributes and prices are easily observed and evaluated at the time of sale, when search costs are not significant when consumers sample offers from multiple suppliers, and when most consumers are capable of making reasonably ‘good’ decisions concerning the product in question.”

In markets for such products, the most effective tool of consumer protection will presumably be maintaining free competition among suppliers. However, such situations are very rare in the real market.

The linkage between market competition and consumer protection logically entails comparable relationships between the respective policies and laws. First, competition and consumer protection policies and laws have a shared purpose in relation to quality, prices and choice, which have implications for consumers. “For consumers, an effective competition policy & law leads to lower prices and improved services. An improvement in the coverage of competition law and a reduction in the time taken to remove barriers to competition mean a lot for the consumer.” Seen from this perspective, “competition law provides consumers with a choice of competing products and services and consumer protection law allows consumers to exercise

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62 Nitya Nanda, Competition Policy and Consumer Protection Policy, CUTS Viewpoints No. 1, 2005, p. 1
63 Mark Armstrong, Interactions Between Competition and Consumer Policy, Munich Personal RePEc Archive, MPRA Paper No. 7258, February 2008, pp. 3-4 [available at: http://mpra.ub.uni-muenchen.de/7258/]
64 Challenges in Implementing a Competition Policy and Law: An Agenda for Action, CUTS Centre for International Trade, Economics & Environment, July 2002, p. 11
that choice free from fraud, coercion, deception, or demonstrably false information".\(^6\)\(^5\)

Similarly, consumer protection policies such as information policies and prohibition of misleading or fraudulent advertising can enhance competition.\(^6\)\(^6\) Informed consumers are by far more influential in straightening the competitive process than uninformed consumers. Second, as a result of such shared purpose, there is substantial overlap in the substantive contents of competition and consumer protection policies or laws. Examples include "policies which act to reduce consumer search costs or switching costs, or which reduce industry advertising costs".\(^6\)\(^7\) Another area of law that has direct implications for consumer protection and market competition is the regulation of quality standards.

This does not however mean that market competition always benefits consumers. While it is true that market competition results in optimum price, quality and choice of goods and services, its major objective is the efficient allocation of resources. Thus, one or more of the results may be sacrificed for efficiency in highly competitive markets. For instance, when firms face stiff price competition, product quality often suffers since the lower price-cost margins will not give firms sufficient incentives to expand market shares through increased quality.\(^6\)\(^8\) Highly competitive markets where there are a large number of suppliers have also been found to harm uninformed consumers by providing an unmanageable range of options. This is especially true for previous monopoly markets that have been recently liberalized. Conversely, consumer protection measures may work against market competition. Examples include:

"Unduly strict licensing of professions; unduly strict interpretations of misleading marketing regulations which act to protect market incumbents rather than consumers; ill-focused information remedies can act to relax competition"


\(^6\)\(^6\) Mark Armstrong, Interactions Between Competition and Consumer Policy, Munich Personal RePEc Archive, MPRA Paper No. 7258, February 2008, p. 43 (available at: http://mpra.ub.uni-muenchen.de/7258/)

\(^6\)\(^7\) Mark Armstrong, Interactions Between Competition and Consumer Policy, Munich Personal RePEc Archive, MPRA Paper No. 7258, February 2008 (available at: http://mpra.ub.uni-muenchen.de/7258/)

\(^6\)\(^8\) Mark Armstrong, Interactions Between Competition and Consumer Policy, Munich Personal RePEc Archive, MPRA Paper No. 7258, February 2008, p. 30 (available at: http://mpra.ub.uni-muenchen.de/7258/)
between suppliers, and also cause other de-emphasized aspects of market performance to falter". 69

These measures have historically resulted in diminished competition and barriers to entry.

**Institutional Framework for Regulating Market Competition**

Competition laws provide for a government body responsible for implementing and enforcing competition law. However, there is significant variation among countries in terms of institutional arrangements, autonomy, mandate, and relationships with other institutions.

**The Competition Authority**

The first major issue that may need to be considered in examining the institutional structure of the regulatory framework for competition is whether the administration of competition law is undertaken by a single or multiple institutions. Two or more institutions may be mandated to regulate market competition for a number of reasons, including state structure (federal or other non-unitary system of government), legislative history of the competition regime, and the role of sector regulators in overseeing competition related activities within their respective sectors.

The competition regime in the US is a typical example of a multi-institutional framework for the regulation of competition. At the federal level, there are two principal “competition authorities” - the Antitrust Division of the United States Department of Justice mandated to enforce the criminal aspects of antitrust laws while the United States Federal Trade Commission is mandated to regulate “unfair methods of competition” through Section 5 of the Federal Trade Commission Act. 70 In addition, there are a number of federal sector regulators with statutory authority to regulate competition within a specific sector. Examples of US federal agencies with specific mandates to regulate competition include the Federal Communications Commission, the bank regulatory agencies, the National Surface Transportation Board and the Nuclear Regulatory Commission. 71

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69 Ibid, p. 35
71 Spencer Weber Waller (2005), p. 635
The nature of the federal structure in the US has also resulted in another tier of institutions at the state level. All fifty states have competition attorneys who work under their elected (occasionally appointed) Attorney General. On the other hand, not all federal arrangements lead to multiple institutions. A case in point is Australia where the administration of competition law, as well as most sector regulation issues, is the responsibility of a single independent agency at the federal and state levels. Similarly, the Competition Commission of India is the principal competition agency at both federal and state levels. However, unlike Australia, there are sector regulators with competition regulation mandates. These include the Telecommunications Regulatory Authority of India, the Central Electricity Regulatory Commission, the Securities and Exchange Board of India, the Reserve Bank of India, the Insurance Regulatory and Development Authority and other institutions established to regulate major ports, oil and gas, railways and civil aviation as well as State Electricity Regulation Commissions established in most states.

This is not limited to federal arrangements. The overlap between the principal competition authority and sector regulators is very common since “sectoral regulators are typically assigned tasks (other than price determination) that impinge on competition in the sector”. For instance, sector regulators in the United Kingdom are mandated to enforce the UK Competition Act concurrent with the principal competition authority, the Office of Fair Trade (OFT), in their respective sectors.

**Powers and Functions**

Typically, a competition authority has four essential functions: investigation, prosecution, adjudication, and advocacy. The first three functions, which are regulatory in nature, are usually separated to ensure the integrity of the agency.

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72 Spencer Weber Waller (2005), p. 635
74 S. Chakravarthy, Why India Adopted a new Competition Law, CUTS, 2006, p. 29
75 Pulling Up Our Socks — A Study of Competition Regimes of Seven Developing Countries of Africa and Asia under the 7-Up Project, CUTS Centre for Competition, Investment & Economic Regulation and DFID, 2003.
76 Pulling Up Our Socks — A Study of Competition Regimes of Seven Developing Countries of Africa and Asia under the 7-Up Project, CUTS Centre for Competition, Investment & Economic Regulation and DFID, 2003, p. 63
77 Arguably, competition authorities also exercise some form of rule-making functions relating to the preparation of guidelines or administrative directives to explain and elaborate the competition law.
• **Investigation:** The competition authority makes inquiries about anticompetitive practices in the market either on receipt of complaints or on its own.

• **Prosecution:** After the inquiry, if the competition authority finds that any firm is posing hurdles to fair competition then it makes charges against the defaulting firm.

• **Adjudication:** Taking necessary decisions, including the imposition of restrictions on or granting injunctions against the defaulting firm, is one of the functions of a competition authority.

• **Advocacy:** Conducting "non-regulatory" activities aimed at creating a competition culture by informing consumers and firms and assisting other government bodies in the implementation of mandates relevant to competition.

If they are to function properly, competition authorities need to be mandated with a mix of these basic functions taking into account the actual context in which they operate. Competition authorities may also have additional mandates relating to consumer protection or additional functions such as registration of business undertakings and conflict resolution.

This does not, however, mean that all competition agencies have mandates relating to each of the powers and functions. There are variations among legal systems.

**Autonomy and Accountability**

The other major issue for competition authorities is autonomy. Autonomy is a necessary condition to ensure that businesses and consumers have confidence and respect for the competition authority, especially where it is a quasi-governmental authority.

Autonomy is about separation of policy implementation from policymaking so that competition authorities reach their decisions based on objective evidence and consistent respect for market principles through neutral and transparent decision-making process. In other words, autonomy ensures that decisions by the competition authority are not politicized, discriminatory or implemented on the basis of narrow goals of interest groups. Competition law has to deal with the following aspects of institutional autonomy:

• **Structural Autonomy** — Competition authorities are usually established as legally independent institutions with distinct legal personality and structurally separate from government ministries;

• **Operational Autonomy** — The functions and powers of the competition authority as well as the composition, appointment, tenure and removal of management and staff are determined by the enabling law; and

• **Budgetary Autonomy** — Competition laws often determine the financing of the competition authority and its relationship with the executive and legislature.

However, since a competition authority is part of the government structure, competition laws usually provide for a system of accountability in the form of checks and balances and review procedures. Thus, no competition authority can in practice be totally independent. The word “autonomous” is used to reflect the “trade-off” between independence and accountability and “the fact that competition authorities are essentially public sector bodies that render a public service, often staffed by civil servants and wholly dependent on subventions from Government”.79

The World Bank – OECD model law recommends a competition authority that is “independent from any government department and receives its budget from and reports directly to the President /legislature of the country”. Similarly, the UNCTAD Model Law suggests a competition authority that is “quasi-autonomous or independent of the Government”.

**Separation of Investigation and Adjudication**

The nature of regulatory functions necessary for the implementation of competition laws poses a concern of concentration of power. If the same competition authority exercises the breadth of the typical functions, it would be taking up the role of the police (investigation), the public prosecutor (prosecution), the judiciary (adjudication), and the legislature (rule-making). This would cause a host of fundamental problems including those relating to rule of law, accountability, transparency, due-process, legitimacy and integrity. Particularly, the adjudicatory functions of the competition authority raise more serious concerns for a number of reasons including:

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• Risk of conflict of interest and over-zeal on the part of an administrative body with both investigative and adjudicatory functions;
• The purpose of the adjudicatory process as a determination of the rights and duties of persons; and
• Administrative adjudication as an encroachment on the inherent mandate of the judiciary.

On the other hand, the nature of competition cases may arguably justify adjudication of these cases through a system outside the regular judicial process. At the outset, the issues that need to be resolved require an expert level understanding of anti-competitive practices as well as practical knowledge of the market, which the average judge is not expected to be conversant in. Moreover, competition disputes inherently require speedy resolution even at the cost of fair trial at the pain of becoming irrelevant by the time fair determinations are made. A recent review of competition laws in seven developing countries made the following recommendations:

"... having to go to court in every case might diminish the competition authority's effectiveness since litigation is usually a long and arduous process. This is especially so in developing countries where there is little awareness of competition issues within the existing judicial structures. Further, in developing countries the judicial systems are often overloaded and undermanned. Such litigation might also stretch the authorities' resources too much. It is, therefore, necessary that a balance be found between the flexibility needed to properly enforce the competition law on the one hand, and the obligation to prevent prejudice and arbitrariness in the outcome on the other."80

Thus, competition laws have to make a decision on the question of whether or not to give competition authorities adjudicative mandates and, where such mandate is given, on how to separate these powers from the other powers of the authority.

The World Bank-OECD Model law recommends a "self-contained" separate judicial system for competition cases, while the UNCTAD Model recommends that the competition authority should have the power to impose or at least

80 Pulling Up Our Socks – A Study of Competition Regimes of Seven Developing Countries of Africa and Asia under the 7-Up Project, CUTS Centre for Competition, Investment & Economic Regulation and DFID, 2003, p. 52
recommend sanctions. The International Competition Network (ICN), on the other hand, has favored "structures of decision-making in which the investigative and adjudicative processes are strictly separated" over "systems in which the exercise of these functions is conflated" on the basis of their potential to pass muster at judicial review and the risk of constitutional challenge.81

Consolidating Competition and Consumer Protection Enforcement Mandates

Competition and consumer protection policies and laws are substantively interrelated and sometimes overlapping. To restate some of the major points:

• Consumer welfare is the shared goal of both competition and consumer protection policies/laws which they address from the supply and demand sides of the market respectively; and

• However, competition policy and laws are primarily designed to sustain competitive markets, sometimes at the cost of the consumer.

The shared and competing objectives have led to a situation where the objectives of competition laws and therefore the mandates of competition authorities across countries vary widely.

In the United States the Federal Trade Commission (FTC) enforces both competition and consumer protection through Section 5 of the Federal Trade Commission Act which prohibits both unfair methods of competition and unfair or deceptive acts and practices.82 Various sector regulators including the Federal Communications Commission, the bank regulatory agencies, the National Surface Transportation Board, and the Nuclear Regulatory Commission83 also have mandates relating to both issues. On the other hand, the Antitrust Division within the Department of Justice has mandates limited to competition issues. Competition authorities in Australia and Sri Lanka also have mandates in both areas.

In most other cases, the competition authorities have mandates generally limited to competition issues with some additional mandate to enforce specific consumer issues such as unfair competition rules and price review. Where there is a consumer protection law, its enforcement is typically more dispersed. That is, even if a single agency may be charged with enforcing the law, other government ministries, sector regulators and in some countries

81 UNCTAD (2008), p. 10
83 Spencer Weber Waller, In Search of Economic Justice, 2005, p. 635
regional and local governments as well as non-government actors, especially consumer organizations, are also actively involved.

Globalization, Trade and Competition

Since the 1980s, governments across Africa, Asia and Latin America have embarked on a range of reform measures in their economy. Liberalization of trade through significant reduction of tariff and non-tariff barriers to trade, deregulation and privatization were chief among the measures as a wider shift toward private capital, hastened by the end of the Cold War and dissolution of the Soviet Union. The changes were propelled by the International Monetary Fund–World Bank structural adjustment programs that imposed these conditions of loans. Similarly, trade liberalization was accelerated through a series of negotiations under the auspices of the General Agreement on Tariffs and Trade (GATT), later the World Trade Organization (WTO), where tariffs have been considerably lowered and non-tariff barriers have been significantly reduced, particularly those on non-agricultural goods.

The last few decades have thus seen huge changes in the way developing countries manage their economies. Most governments have moved away from central planning toward supporting a market economy and allowing the growth of local, privately owned businesses. A wave of privatization across the globe has seen governments withdraw, in large part, from providing not only goods but also infrastructure and social services for their people.

These in-country changes have taken place at the same time as great changes have swept the global economy. The world has been grappling with a process known as globalization which is a complex process encompassing multifaceted and interrelated processes including the massive increase in international trade in goods and services, capital flows, the global integration of the production process, the domination of market oriented economic policies, significant harmonization of trade rules and institutions. Merchandise trade has become freer and more capital is available. Firms everywhere are encouraged to export while facing greater competition from both imports no longer subject to high tariffs and foreign firms that set up commercial operations locally. The increasing trend of the movement of goods, services, capital, people and information across national boundaries,

**UNCTAD (2000), *The Role of Competition Policy in Economic Reforms in Developing and other countries*, at 7, Geneva

**Prachi Mishra and Petia Topalova, *How Does Globalization Affect Developing Countries* IMF Bulletin, Vol. 8 No.3 (September 2007)**
assisted by reduced cost of transport and communication has led to the spread of technology and ideas as well as to the evolution of global values and a range of global agreements and norms ascribed to by the great majority of states. **86**

**The Multilateral Trading System**

Attempts were first made in the 1930s to coordinate international trade policy. At first countries negotiated bilateral treaties. Later, following World War II, international organizations were established to promote trade by, for example, liberalizing tariff and non-tariff trade barriers. The General Agreement on Tariffs and Trade, or GATT, signed by 23 non-Communist nations in 1947, was the first such agreement designed to remove or loosen barriers to free trade. GATT members held a number of specially organized rounds of negotiations that significantly reduced tariffs and other restrictions on world trade. After the round of negotiations that ended in 1994, the member nations of GATT signed an agreement that provided for the establishment of the World Trade Organization (WTO). The agreement, which was signed at an April 1994 meeting in Morocco, was set to take effect January 1, 1995. Under the pact, trading nations undertook to slash tariffs by an average of about 40 percent, reduce non-tariff barriers such as government price supports, free up trade in services, and install international protections for patents, trademarks, and copyrights. The agreement called for the replacement of the GATT organization**87** with a new World Trade Organization (WTO) to enforce the pact and resolve trade disputes. Throughout 1995, GATT and the WTO coexisted while GATT members sought their governments' approval for WTO membership. After the transition period, GATT ceased to exist.

(a) The World Trade Organization

The World Trade Organization (WTO) is an international body that promotes and enforces the provisions of trade laws and regulations. The World Trade Organization has the authority to administer and police new and existing free trade agreements, to oversee world trade practices, and to settle trade disputes among member states. The WTO was established in 1994 when the members of the General Agreement on Tariffs and Trade (GATT), a treaty and international trade organization, signed a new trade pact. The WTO was created to replace GATT.

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86 Ibid
87 GATT originated after World War II (1939-1945) as a charter for the International Trade Organization (ITO), a proposed specialized agency of the United Nations. GATT was signed by 23 nations at a trade conference in 1947 and became effective in January 1948. Although the ITO failed to win ratification by the United States Congress in 1950 and never came into being, the GATT remained in use to govern international trade.
The WTO began operation on January 1, 1995 and co-existed with the original GATT until December 1995, when the members of GATT met for the last time. Although the WTO replaced GATT, the trade agreements established by GATT in 1994 are part of the WTO agreement. However, the WTO has a significantly broader scope than GATT; GATT regulated trade in merchandise goods. The WTO expanded the GATT agreement to include trade in services, such as international telephone service, and protections for intellectual property—that is, creative works that can be protected legally, such as sound recordings and computer programs.

The WTO is also a formally structured organization whose rules are legally binding on its member states. The organization provides a framework for international trade law. Members can refer trade disputes to the WTO where a dispute panel composed of WTO officials serves as arbitrator. Members can appeal this panel’s rulings to a WTO appellate body whose decisions are final. Disputes must be resolved within the time limits set by WTO rules. Although the WTO operates a dispute settlement process similar to the one under GATT, it has stronger power to enforce agreements, including authority to issue trade sanctions against a country that refuses to revoke an offending law or practice.

All of the 128 nations that were contracting parties to the new GATT pact at the end of 1994 became members of the WTO upon ratifying the GATT pact. By 2005 the WTO had 149 members. Another 32 nations and 7 organizations enjoyed observer status. Member and observer nations account for more than 97 percent of world trade.

The WTO is based in Geneva, Switzerland, and is controlled by a General Council made up of member states’ ambassadors who also serve on various subsidiary and specialist committees. The ministerial conference, which meets every two years and appoints the WTO’s director-general, oversees the General Council.

(b) WTO Principles and Rules

The basic rationale for the establishment of the global trading system is rooted in attempts to liberalize international trade through the removal of measures put in place by governments to protect their domestic markets. The WTO thus aims to liberalize trade through significant reduction of tariffs and elimination of non-tariff trade barriers and outlawing discrimination in trade. The principle of non-discrimination, which is a cornerstone of the

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*The preambles of the GATT (1947) and the Agreement Establishing the World Trade Organization (the Marakesh Agreement)*
international trading system provides for the prohibition of discrimination by a country between its trading partners and discrimination between its own and foreign goods. Thus, the principle of non-discrimination has two aspects: the Most Favored Nation (MFN) rule and the National Treatment (NT) rule. The implementation of these rules is supported by the application of a third rule requiring transparency in domestic legal regimes affecting trade.

The MFN clause stipulates that a nation will extend to other signatories treatment comparable to that accorded any other nation with which it has, or may have in the future, a commercial treaty. WTO Members are bound to grant to the products of other Members treatment no less favorable than that accorded to the products of any other country. Under Article 1 of the 1947 GATT, any advantage, favor, privilege or immunity in connection with importation or exportation, or imposed on the international transfer of payments for imports or exports and with respect to the method of levying such duties and charges, granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating or destined for the territories of all other contracting parties. That is, all existing rights and privileges granted to other nations become immediately applicable to the signatory nations, and all rights and privileges granted to other nations in later treaties become applicable to them as soon as those treaties take effect. Thus, no country is to give special trading advantages to another or to discriminate against it.

The NT rule, on the other hand, stipulates that once goods have entered a market, they must be treated no less favorably than equivalent domestically-produced goods. In simple language the principle states that imported foreign products and local products should be treated equally. Article III of GATT requires that imports should not be treated less favorably than similar domestic goods. The national treatment to be accorded involves internal taxes, regulations and requirements affecting the internal sale, purchase, transportation, distribution, and internal quantitative regulations requiring the mixture, processing or use of the products in specified amount.

Finally, the requirement of transparency obliges members of the WTO to publish and make available their laws, rules, decrees guidelines affecting trade - to the extent that those laws affect trade in goods or services as well as

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89 GATT (1994), Article I, GATS Article II and TRIPS Article II.
90 Article III GATT. See Articles XXII and III of the GATS and TRIPS respectively.
91 Article I of the General Agreement on Trade and Tariffs, (1947)
92 Article III/1 GATT 47
infringe the minimum standards of the TRIPS agreement. Two important principles are established under Article X of the GATT 1994. First, all laws and regulations, judicial decisions and administrative rulings, etc., affecting imports and exports should be published; furthermore, they may not be enforced before official publication. Second, administration of these laws, regulations, etc., shall be uniform, impartial and reasonable; independent judicial, arbitral or administrative instances should be instituted for recourse for prompt review and correction of action inconsistent with this principle.

(c) Competition and the Multilateral Trading System

As noted above, encouraging competition through elimination of trade and non trade barriers is at the heart of the multilateral trading system. In that one can see that the entire agreements of the multilateral trading system have a direct or indirect bearing on competition. Indeed, in recognition of the close relation between trade and competition, the original instrument designed to establish the International Trade Organization, the Havana Charter, included a part dealing with competition. Chapter V of the Havana Charter provides, “Each Member shall take appropriate measures... to prevent ... business practices affecting international trade which restrict competition, limit access to markets, or foster monopolistic control.” While the Havana Charter was the principal source of the original GATT (1947), Chapter V dealing with competition was not carried over into the WTO.

After the establishment of the WTO in 1994, efforts have also been exerted to bring a multilateral framework on competition within the ambit of the multilateral trading system. One of the so-called “Singapore issues” tabled for negotiation during the First Ministerial Conference of the WTO in Singapore in 1996 was a competition agreement as part of the multilateral trading system. Singapore Ministerial Declaration established “a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework”. The Working Group on Competition Policy enjoyed significant progress in sharing experiences in competition law among members. But opposition to adding competition to the negotiations agenda gradually increased. Along with two other proposed items, the topic of competition was set aside from WTO deliberations after the Cancun Ministerial Conference of 2003. The 2001 Doha Declaration has also recognized “the case for a multilateral framework on competition policy” (paragraph 23). But

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93 Ibid
94 Ibid
95 Ibid
no significant progress has been made on the issue at the WTO. Finally, the
July 2004 Decision on the Doha Work Programme states the following: The
Relationship between Trade and Investment, Interaction between Trade
and Competition Policy and Transparency in Government Procurement:
the Council agrees that these issues, mentioned in the Doha Ministerial
Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form
part of the Work Programme set out in that Declaration and therefore no
work towards negotiations on any of these issues will take place within the
WTO during the Doha Round.

Consequently, the WTO does not have any specific regime dealing with
competition. Two important features of the WTO deserve attention in
relation to competition. First, WTO agreements do not address themselves
to private actors (firms) but rather to WTO members. Second, the main
objective of the WTO is liberalization through successive rounds of
negotiations aimed at reducing tariffs and eliminating non-trade barriers
as well as by prohibiting discriminating in trade. WTO members do not
thus have particular obligations to control monopolies or cartels as long as
regulations do not discriminate against imported goods.

 Nonetheless, some WTO agreements do contain provisions dealing with
specific aspects of competition as well as the institutional infrastructure
for the implementation of the competition laws. For example, as will be
discussed later, the General Agreement on Trade in Services (GATS) and
the Agreement on Trade-Related Aspects of Intellectual Property Rights
(the TRIPS Agreement) both contain rules on monopolies, exclusive service
suppliers and anticompetitive practices.

Furthermore, there are several trade issues covered by the WTO which
cannot be fully separated from competition issues. The following could
be good examples showing further the interrelation between trade and
competition in the context of WTO:

- Antidumping laws and the question of dumping raise a number of
  competition policy issues such as predatory price discrimination
  behavior (but the objective of competition and antidumping rules
  could be different. While the objective of the former is to protect
  competition itself and consumers but not competitors, the latter
  aims to protect the competitors).

- The formulation and application of product standards, sometimes
designed to promote the free flow of products among nations, can
nevertheless be used to inhibit fair competition.
• Many governments have state trading enterprises or state trading monopolies which in certain circumstances may be justified for specific and valid governmental purposes but in other circumstances may undermine trade flows and market principles.
• Subsidies can be used to restrain trade, as can quantitative restrictions.

The Multilateral Trade Regime and Competition Law

Though the major concern of international trade regimes is the openness of domestic markets to foreign firms, many of the core trade issues have implications for market competition in the domestic market as well as competition policy and law. Based on the texts of the various multilateral trade agreements, membership in the international trade regime requires harmonization of domestic economic policies and laws in a number of areas. These typically involve trade policy issues directly relevant to the external sector, such as tariffs, foreign exchange and import restrictions, and removal of other protectionist measures already in place as well as availing protection to FDI and IPRs. These trade policy changes can either significantly promote or impede the economic goals of competition policy. Thus, engagements with the multilateral trading system inherently affect the landscape for market competition and entail significant changes in the country’s competition policy and regulatory framework.

More directly, international trade raises new concerns by introducing foreign firms, especially Multinational Corporations (MNCs), with dual implications for competition within the domestic market. On the one hand, these businesses are thought to increase competition on the basis of quality, ability to innovate, deliver on time and adjust to changing market conditions. Globalization may in this sense have the effect of promoting competition and widening consumer choices in terms of quality and efficient services. On the other hand, the involvement of foreign firms may adversely affect market competition and makes it more difficult to control anti-competitive practices. Major concerns in this respect include the possibility that market power may become concentrated in the hands of MNCs and the formation of international cartels. Such anticompetitive practices are difficult to regulate and address since the operations of the involved organizations often take place outside the territories of the affected country. Trade liberalization may also pose significant challenges for developing countries as it may prematurely expose domestic industries to overwhelming foreign

96 In practice, the process of joining the WTO, which takes place through bilateral negotiations with each existing member, results in changes with more profound effects on the domestic competition and the legal regime.
97 UNCTAD (2000), "Competition Policy, Trade and Development in the Common Market for Eastern and Southern Africa (COMESA)" at 7
competition or encourage dumping of subsidized products threatening their very survival. These concerns arising from the multilateral trading system need to be addressed through national competition policies and laws.

This explains why several countries have adopted competition laws in order to avoid the development of concentrated market structures, to promote fair competition and to ensure consumer welfare. The issue of adopting competition law, in its role as curative to market ills, has achieved prominence partly because countries feared losing the possible gains from liberalization to anticompetitive agreements or practices. Simultaneously, the development of competition laws in developing countries was promoted, supported and initiated by international aid and development agencies including the World Bank, OECD and UNCTAD. For instance, Indonesia and Thailand developed their competition laws as part of the structural adjustment programmes the countries implemented subsequent to the Asian financial crisis in the late 1990s. The Zambian Competition and Fair Trading Act (1995) got similarly adopted as a result of conditionality set by the World Bank and IMF.

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9 Cassey Lee, Model Competition Laws: The World Bank-OECD and UNCTAD Approaches Compared, Faculty of Economics & Administration University of Malaya, August 2004, pp. 1-2
CHAPTER TWO

Competition Policy and the Law in Ethiopia

Country Profile

The Federal Democratic Republic of Ethiopia (FDRE) is a country in north-eastern Africa. Geographically, the country covers a land area of 1,133,380 sq km (437,600 sq miles). The total population of Ethiopia is estimated at around 77 million making it the second most populous country in Africa next to Nigeria. This means that, nearly 10 percent of the population of Sub-Saharan Africa lives in Ethiopia. The population is growing at an estimated rate of more than two percent (2.3%) and is expected to reach 100 million by 2018 and 130 million by 2030. Life expectancy at birth is 49.03 years. The country has a predominantly rural demography with a substantial majority of Ethiopians (83.8%) living in rural areas.

Table 2 Key Figures

<table>
<thead>
<tr>
<th>Land area, thousands of km²</th>
<th>1 104</th>
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<tbody>
<tr>
<td>GDP per capita, USD at constant 2000 prices (2006/07)</td>
<td>141</td>
</tr>
<tr>
<td>Life expectancy (2007)</td>
<td>52.9</td>
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<tr>
<td>Illiteracy rate (2007)</td>
<td>52.5</td>
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Source: AfDB/OECD, African Economic Outlook, 2008

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99 Central Statistical Authority, Statistical Abstract 2005, P. 20: The latest census for which figures are available was performed in 1994; this figure is the July 2006 official estimate. The CIA World Fact Book (2006) puts the population at 74,777,981 while UNICEF (mid-2005) estimates are 77,381,000.


101 The total fertility rate is 5.22 children born per woman with a birth rate of 37.98 births/1,000 and a death rate of 14.86 deaths/1,000 population (2006)

102 45.5 UNDP 2004 and 46 UNICEF 2003

103 The GNI per capita at current prices has reached $180 by the end of 2006, according to AfDB sources.
The FDRE Constitution provides for a tiered government system consisting of a federal government, 9 ethnically-based regional states and two city administrations — Addis Ababa and Dire Dawa.104

The Economy

Ethiopia is one of the poorest economies in the world characterized by very low macro-economic, social and demographic indicators.105 A 2007 World Bank country economic memorandum lamented:

"The most striking feature of Ethiopia's current situation is the extraordinarily low level of development, from almost any angle: average incomes, productivity, average education and health status, economic insecurity, roads, electricity, water and sanitation, or access to radio. This is not a product of recent events, but of long term historical performance.”106

<table>
<thead>
<tr>
<th><strong>Infrastructure Indicators</strong></th>
<th><strong>Ethiopia</strong></th>
<th><strong>Low Income Countries</strong></th>
<th><strong>Sub-Saharan Countries</strong></th>
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<tr>
<td>Fixed lines per 100 population 2006</td>
<td>1.1</td>
<td>3.1</td>
<td>-</td>
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<tr>
<td>Mobile subscribers per 100 population 2006</td>
<td>1.83</td>
<td>9.1</td>
<td>-</td>
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<tr>
<td>Electricity consumption kwh per capita 2006</td>
<td>34</td>
<td>317</td>
<td>456</td>
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<tr>
<td>Percentage of households with electricity connection 2006</td>
<td>6</td>
<td>34</td>
<td>-</td>
</tr>
<tr>
<td>Roads Km/1,000 sq km 2006</td>
<td>33.2</td>
<td>189</td>
<td>166</td>
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Source: World Bank, April 2007

On the other hand, more recent reports indicate significant positive changes in infrastructure indicators across the board. The following are indicative figures from official sources by the end of August 2007:107

- Fixed line coverage per 100 population has reached 1.16 while mobile subscriptions for the same population size reached 1.57;
- Total electricity coverage at village and town level, which was 17 percent a year earlier, reached 22 percent;
- Road density increased to 38.6 Km/1,000 sq km.

104 The status of Dire Dawa as a federal city administration was not originally confirmed in the Constitution.
While these figures are still far below the averages for low income or Sub-Saharan countries, the current trend shows accelerating infrastructure development within Ethiopia. Thus, even more significant positive changes in infrastructure indicators were expected to be reported for 2008. The targets set under the current development plan, if successfully achieved, would see most of the above indicators doubling by September 2009.

In 2003/2004 the country recorded a GDP Growth of 11.6 percent mainly because agricultural production improved significantly following two consecutive drought years (2001/02-2002/03).\textsuperscript{106} The growth registered during the last three years ending 2006 averaged 10.7 percent.\textsuperscript{109} According to the International Monetary Fund (IMF) and the African Development Bank, Ethiopia was the fastest growing non-oil driven African economy in 2007 with a 10.5 percent GDP (8.2 percent real GDP) growth. The largest contributor to GDP growth was agriculture, which accounted for approximately 42 percent of the total GDP.\textsuperscript{110}

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<th>Table 4 Sector Contributions to GDP</th>
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<td>Sector</td>
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<tr>
<td>Agriculture</td>
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<td>Industry</td>
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<td>Services</td>
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<td>Growth in Real GDP</td>
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<td>Growth in Real GDP Per Capita</td>
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Source: NBE (www.nbe.gov.et) based on data from the Ministry of Finance and Economic Development Revised Series, 1999/00 Base) -- 2004/05\textsuperscript{112}

The Ethiopian economy is expected to continue strong performance with real GDP estimated to have grown by 8.2 percent in 2006/07, and projected to grow by 7.5 percent and 7.4 percent respectively in 2008 and in 2009, with more balanced growth across sectors.\textsuperscript{113} In fact, the most recent global development projections for 2009 expect the Ethiopian economy to be among the four fastest growing economies in the world.\textsuperscript{114}

\textsuperscript{109} MOFED. Dec. 2006
\textsuperscript{110} OECD, 2006
\textsuperscript{112} 2006/2007 figures from AIDB/OECD, African Economic Outlook, 2008
\textsuperscript{114} AIDB/OECD, African Economic Outlook, 2008, p. 303
\textsuperscript{114} According to recent reports quoting the Economic Intelligence Unit of The Economist magazine, the Ethiopian economy is expected to grow by more than 7% reaching 31 billion USD in GDP (larger than the 10th largest economy in Africa for 2007) despite the global economic slowdown anticipated in 2009. This would make it the fourth fastest growing economy for the year.
Despite improvements in the overall economy, a 2007 report indicated that 23 percent of the population of the country still lives on less than one US dollar a day. The same report shows that income per capita in Ethiopia is also one of the lowest in the world at around 160 US dollars. The human development situation is dismal as well. The Human Development Index for 2006 ranked Ethiopia 170 out of the 177 countries while the Human Poverty Index ranks the country 92 out of 95.

Though agriculture is the most important sector in the economy, only less than 11 million hectares of the nearly 32 million hectares of viable agricultural land comes under cultivation annually. Still, agriculture remains the country's most important enterprise, employing more than 85 percent of the country's population and accounting for more than 40 percent of total GDP and 90 percent of export earnings in 2006.

**The Market**

The size of the contestable market in Ethiopia is very small with only 46 percent of the total value of production subject to meaningful competition. Two factors limit the volume of goods and services transacted through contested

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115 Kibre Moges, Policy Induced Barriers to Market Competition in Ethiopia, CUTS Centre for Competition, Investment & Economic Regulation, 2008 (Website: www.cuts-ccier.org), Table 1: Value Added of Goods and Services Marketed Under Competition, p. 8
markets.\(^{118}\) The first is the impact of subsistence agriculture where two-thirds of the produce is retained for home consumption. As a result, 37 percent of the total value added is not marketed. Ethiopian agriculture is still characterized by small-scale subsistence production systems where crop yields remain very low.

Figure 3 Comparative Labor Productivity in Agriculture

In addition, persisting state monopoly excludes another 17 percent of the gross domestic product (GDP) from the contestable market.\(^{119}\) In 1991, public sector enterprises were responsible for over 95 percent of output in food processing, textiles, beverages, tobacco and leather and footwear industries and employed over 70 percent of the workforce in the industrial sector.\(^{120}\) Though the dominance of state enterprises in the manufacturing sector has reportedly declined first to around 80 percent and then half of outputs in the past five years,\(^{121}\) they are still dominant in sub-sectors including cement, steel, sugar, textile, and leather tanning. The legal barriers to entry in telecommunications, postal service, and electric energy sectors also perpetuate the monopoly market.

\(^{118}\) Kibre Moges, Policy Induced Barriers to Market Competition in Ethiopia, CUTS Centre for Competition, Investment & Economic Regulation, 2008 (Website: www.cuts-ccier.org), p. 7

\(^{119}\) Kibre Moges, Policy Induced Barriers to Market Competition in Ethiopia, CUTS Centre for Competition, Investment & Economic Regulation, 2008 (Website: www.cuts-ccier.org), pp. 7-8

\(^{120}\) IMF, 2007, p. 12

\(^{121}\) WB 2007, p. 29
The private sector in Ethiopia, on the other hand, has not yet fully recovered from the impact of nationalization and other socialist-oriented policies of the previous government. Though the economic modernization and liberalization since the early 1990s have increased the size and role of the private sector, it is still small and composed mostly of small and young firms. For instance, despite the ongoing privatization and easing of the regulatory burden, both the share of private investment to capital formation and its contribution to real GDP stood at about 11 percent in 2005/06. According to an investment climate assessment (ICA) study, the obstacles to private sector growth in Ethiopia include cumbersome licensing requirements, rigid labor market regulations, costly property registration, lengthy export and import procedures, and the high cost of enforcing contracts.

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<th>Table 5 Demand Composition</th>
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<td>Gross capital formation</td>
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<td>Consumption</td>
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<td>Private</td>
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<td>External demand</td>
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<td>Exports</td>
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<tr>
<td>Imports</td>
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<td>Real GDP growth</td>
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Source: AfDB/OECD (2008) based on domestic authorities' data; estimates (e) and projections (p) based on authors' calculations. (http://dx.doi.org/10.1787/317526905677)

114 Ibid.
Even within the formal private sector, ownership is concentrated in the hands of endowment enterprises and a large conglomerate with holdings in many sectors, the MIDROC group, which “has a size and orientation that makes it highly influential and important in the Ethiopian business life”. According to one recent study, the existing market picture has been depicted as follows:

- Though formally liberalized at least in part, the cement industry, sugar industry, telecommunications, postal and electric power services could be cited as monopoly markets especially owned and run by the Government. The utility of public sector dominance in these sectors has been explained by the need to ensure sufficient investment in infrastructure networks and enhance competitiveness among domestic businesses. For instance, the Ethiopian Telecommunication Corporation (ETC) is making substantial investments to upgrade telecommunications infrastructure, notably by connecting more than 600 high schools to the internet, installation of fiber-optic cables, connecting over 4,706 rural homes with basic phone lines under the rural connectivity project, and testing of a radio station that would connect 5,000 homes. The government is also overseeing an expansion of the mobile and fixed-line networks. Similarly, the Universal Electrification Access Programme extends electricity to under-served rural areas. Generation capacity has expanded considerably and will increase further in the next few years, as four hydropower projects are under construction. However, from the perspective of market competition, the effects of public sector monopoly in these industries may be considered adverse.

125 SIDA, 2004, p. 26
126 CUTS Centre for Competition, Investment & Economic Regulation, From the Bottom Up, CUTS, 2007 (Website: www.cuts-ccier.org, www.cuts-international.org), p. 75

As per the Telecommunications (Amendment) Proclamation No. 281/2002, the Ethiopian Telecommunications Corporation is given the status of “sole telecommunications service provider” with monopoly on open list of services except broadcasting service and intercom connections (articles 2/1/3-4). Other businesses could only be licensed to provide services such as telecenters or resale service, outside cabling or Wireless Local Loop lines installation or maintenance, telecommunication exchange installation or maintenance, and in-house or building cable installation (article 7/9).

128 The responsibility of generating, transmission, distribution and selling of electric power is vested in the state owned Ethiopian Electric Power Corporation (EEPCO). However, Proclamation No. 37/1997 allows the participation of domestic private investors in the production and supply of electrical energy with an installed capacity of up to 25 MW. On the other hand, production and supply of electrical energy with an installed capacity of above 25 MW is open to foreign investors. The provision embraces the development of small and medium scale capacity plants from diesel, coal, gas, hydrop and other sources. Council of Ministers Regulation No. 7/1996 and as amended in No. 36/1998 extends attractive package of encouragement in the form of duty and profit tax exemptions.
• Soft drinks industries, owned by two firms, namely MOHA and East African Bottling Ltd., could be good examples of oligopoly markets. This has resulted in denial of one of the basic rights of consumers, the right to choose among different products and services. For instance, in the five star international Sheraton Addis hotel, one cannot get soft drinks manufactured by the East African Bottling Ltd, (Coca Cola and Sprite), only because the hotel does not serve soft drinks not produced by its sister enterprise, MOHA that produces Pepsi and Mirinda.

• Plastic industries and soap industries could be taken as monopolistically competitive.

• If we look at the leather and leather products sector, the market is not concentrated. There we have about 20 industries in the market with approximately a few variations in the market share. Further, study is needed to know the market concentration in leather industry.

• Though there is an extensive practice of traditional mining involving large communities, the formal mining sector, especially the mining of gold, is practically monopolized by an individual private firm.

• The ownership of land is exclusively vested in the state and shall not be subjected to sale or other means of exchange. Hence, no secondary market for land on its own exists in the country. As for the primary market, the minimum price for auction is set by the Government. Thus, it is a monopoly price.189

Policies and Practices with Implications on Market Competition

With a change in the political regime in 1991, Ethiopia embarked upon a program of economic stabilization and structural adjustment to transform the economy from command to market economy, speed up the integration of the economy into the world economy and encourage the wider participation of the private sector in the development of the national economy. Spearheaded by international financial institutions such as the International Monetary Fund (IMF) & World Bank (WB), the Government of Ethiopia (GoE) adopted an orthodox structural adjustment program of stabilization,

189 Kibre Moges, Policy Induced Barriers to Market Competition in Ethiopia, CUTS Centre for Competition, Investment & Economic Regulation, 2008 (Website: www.cuts-ceter.org), Table 1: Value Added of Goods and Services Marketed Under Competition, p. 10
liberalization and privatization, primarily focusing on deregulating markets and re-instating private actors into the modern economic sector. Ethiopia's adjustment policies ran for more than four years, under a Structural Adjustment Facility (1993-1996) and Enhanced Structural Adjustment Facility (1996-1999). The Government's key objectives and a strategy to stimulate private sector development have been further elaborated in the Industrial Development Strategy (2002)

The GoE continued the economic reform program by particularly targeting poverty reduction through rapid, economic growth. This was encapsulated in the Sustainable Development and Poverty Reduction Program (SDPRP) prepared in July 2002 through a process of extensive consultations with the private sector and civil society under the Public Private Consultative Forum. In recent years, the GoE has developed a comprehensive development policy that targets economic growth and poverty reduction. Key elements of the policy, which is known as the Program for Accelerated and Sustained Development to End Poverty (PASDEP), include promotion of a market-led transformation of the rural economy, and the decentralization of political, economic, and administrative powers and functions. The PASDEP has been adopted by the Council of Ministers, the highest executive body, and presented to the Parliament. The document was then adopted by the legislature as a legal document, defining the national development plan for the 5-year period (2005/06-2009/10). Thus, the PASDEP is considered a national plan for guiding all development activities during the five years ending early September 2010.

This PASDEP is the first 5-year phase to attain the goals and targets set in the MDGs at a minimum and realize the country's vision of joining the rank of middle-income countries. Thus, above and beyond the MDGs, the overall development plan, in which the PASDEP covers the first phase, has set the following goals for the economy:

- To build an economy which has a modern and productive agricultural sector with enhanced technology and an industrial sector that plays a leading role in the economy;
- To sustain economic development and secure social justice; and
- Increase per capita income of citizens so that it reaches at the level of those in middle-income countries.

Along this line, the main objective of the Five-Year Development Plan has been stated as laying the directions for accelerated, sustained, and people-
centered economic development as well as to pave the groundwork for the attainment of the MDGs by 2015. As an overarching development plan, the PASDEP goes beyond setting guidelines for development policy in general. It also outlines the sector policies, strategies, and programs to be pursued during the five-year period in some detail. The major policy areas covered in the document are agriculture, education, health, HIV/AIDS, infrastructure, tourism, mining, trade and industry development, urban development, regional development strategy and urban-rural linkages as well as cross cutting issues such as population, gender, the environment, governance and capacity-building.

Relative to the previous poverty reduction strategy (SDPRP), PASDEP places much greater emphasis on commercialization of agriculture, diversification of production and exports, and private sector investment. These objectives would be pursued through a range of policies and instruments including:

- Modernization of the research and extension systems through investment in institutions of higher learning, national and regional research, technical and vocational education and training, and farmer training centers;
- Enhancing competition and increasing efficiency in agricultural input and output markets;
- Strengthening the rural credit system;
- Improving irrigation and water management;
- Increasing land tenure security;
- Creating a conducive investment climate for commercial agriculture; and
- Reducing the vulnerability of families living in regions prone to drought.

**Policies Impacting on Market Competition**

Since 1992, the Government has successfully implemented a series of reform programmes that have substantial implications for market competition. These include the following short-term economic stabilization and structural adjustment measures:

- Deregulation of domestic prices, liberalization of foreign trade, privatization of public enterprises, and abolition of all export taxes and subsidies;
• Devaluation of the exchange rate followed by the introduction of inter-bank foreign currency market and the determination of exchange rates based on market forces;

• Enhancing private sector development and private-public partnership through providing effective industry association, and creating a forum for consultation between the private sector and the government;

• Promulgation of a liberal investment law for the promotion and encouragement of private investment, both foreign and domestic, and issuance of a new labour law; and

• Strengthening and enhancing institutional support for the export sector through strengthening/revitalizing existing institutions and establishing such new institutions as the Ethiopian Livestock Marketing Authority; the Ethiopian Leather and Leather Products Technology Institute, and the Ethiopian Export Promotion Agency.

The Industrial Development Strategy, which has been in effect since 2002, explicitly refers to the private sector as the engine of growth and industrial development and stresses export-led industrialization and competitiveness. The strategy underlines the significance of market competition to realize effective resource allocation in the country and the importance of competitiveness to the integration of the economy into the international economic system. Moreover, the Industrial Development Strategy recognizes the need to design and implement policies targeting the private sector to realize the principles of competition and build the capacity required to be competitive in the market. Finally, the facilitating role of the government, in terms of creating an enabling environment for private sector development and industrialization and intervention when appropriate to correct market failures, are reiterated in the strategy.

The 2002 revised investment law reduced areas of investment exclusively reserved for the Ethiopian Government only to the transmission and supply of electrical energy through the integrated national grid system and non-courier postal services. Investment in telecommunication services and manufacturing of weapons and munitions shall only be made in partnership with the Ethiopian Government. The minimum capital requirement for foreign investors was also reduced from 500,000 to 100,000 USD for fully foreign-owned investments, and from 300,000 to 60,000 for joint investments with domestic partners. Thus, except in few important activities, a wide
sector of the domestic economy is now opened for private investment. Moreover, an incentive scheme that includes tax holiday, duty free import of machinery and equipment, and free land grant particularly for investment in some regional states, is in place to encourage investment, particularly foreign investment.

**Areas Reserved for Domestic Investors**

The following areas are exclusively reserved for domestic investors.

- Retail trade and brokerage;
- Wholesale trade (excluding supply of petroleum and its by-products as well as wholesale by foreign investors of their products locally produced);
- Import trade (excluding LPG, bitumen and up on the approval of the Council of Ministers; materials used as inputs for export products);
- Export trade of raw coffee, chat, oil seeds, pulses, hides and skins bought from the market and live sheep, goats and cattle not raised or fattened by the investor;
- Construction companies excluding those designated as Grade 1;
- Tanning of hides and skins up to crust level;
- Hotels other than those star-designated, motels, pensions, tea rooms, coffee shops, bars, night clubs and restaurants excluding international and specialized restaurants;
- Travel agency, trade auxiliary and ticket selling services;
- Car-hire and taxi-cabs transport services;
- Commercial road transport and inland water transport services;
- Bakery products and pastries for the domestic market;
- Grinding mills;
- Barber shops, beauty saloons, and provision of smith workshops and tailoring services except garment factories;
- Building maintenance and repair and maintenance of vehicles;
- Saw milling and timber making products;
- Customs clearance services;
- Museums, theaters and cinema hall operations;
- Printing industries.

Notwithstanding the provision of paragraph 1 of this schedule, the following areas of investment are exclusively reserved for Ethiopian nationals:

- Banking, insurance and micro credit and saving services;
- Travel and shipping agency services;
- Broadcasting services; and
- Air transport services using aircraft with a seating capacity of up to 20 passengers.
Based on the findings of a comprehensive civil service reform program initiated in 1996, the GoE has been taking measures especially since 2003, to streamline business licensing, import-export regulation, foreign exchange regulation, and others. According to the 2006 Investment Climate Assessment Study conducted by the World Bank, improved conditions prevail in business registration and licensing, customs clearance, telecommunication services and labor regulations. However, the study has also identified concerns in areas such as access to land, the firms’ perceptions of the overall tax regime, access to credit, and utilities (electricity and water).

Structural Challenges to Competition

The market liberalization process initiated in 1991 has removed most of the institutional barriers to trade such as: the enforcement of the quota system, price control, preferential treatment given to state enterprises and co-operatives, limitations imposed on capital ceilings for wholesale and retail trade, restrictions on the number of merchants in a particular market.

On the other hand, limited studies and secondary sources of information as well as discussions with the business community point out a number of regulatory measures and sectional interests claimed as posing strong barriers to competition in the Ethiopian domestic market. These include:

- **Public Sector Dominance**: The public sector still holds significant monopoly and dominance, not only in industries often considered as natural monopolies, such as energy, telecom, postal service, water supply, railway and airway, but also in manufacturing and services, such as cement, sugar, tobacco, textiles, banks and insurance companies. The Government controls over 50 percent of the total value of production of medium and large-scale enterprises and 70 percent of the value of modern economic activities. As a result, the structure of the economy still remains highly skewed and far from being competition inducing. One indicator may be the relative shares of the public and private sector in gross capital formation as a percentage of GDP, which stood at 12.2 and 8.3 respectively for 2005/6. On the other hand, the privatization of state owned enterprises that had stalled in recent years has accelerated since the restructuring of the Privatization and Public Enterprise Supervising Authority (PPESA). According to PPESA, 14 enterprises were

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130 Kibre Moges, Policy Induced Barriers to Market Competition in Ethiopia, CUTS Centre for Competition, Investment & Economic Regulation, 2008 (Website: www.cuts-ccier.org), pp. 7-10.

131 AfDB/OECD, African Economic Outlook, 2008, p. 304 (available at: http://dx.doi.org/10.1787/321010615666)
privatized in 2007 in sectors such as tourism, mining, industry and agro-industry, bringing the total number of public enterprises privatized to 247.1

- **Price Control:** Prices are either partially or fully regulated by the Ministry of Trade and Industry, which is mandated to recommend to the Council of Ministers and implement price control regulations on basic commodities and services.\(^\text{133}\) Similar powers have been given to the Agency for Government Houses in relation to the rental prices of government owned housing\(^\text{196}\) as well as comparable mandates for sector regulators in telecommunications, power and water supply services. Thus, the prices of basic commodities and services such as bread and fuel, minimum deposit rate of interest on saving, passenger transport fares, exchange rate, user-charges for telephone, electricity and potable water supply as well as rental price of nationalized urban houses are all administratively fixed. On the other hand, the prices of agricultural produce, which constitute the bulk of marketable commodities in the economy, have generally been liberalized with significant competition enhancing results.

- **Transparency in Government Procurement and Privatization:** The Government is the single largest purchaser of goods and services in Ethiopia. As such, its actions in the markets can be instrumental to foster competition in the domestic market. However, granting contracts, i.e., bids for public projects, and procedures for procurement by tendering are far from being competitive, and privatization is partly done through personal negotiations with some favored investors (for instance, in the case of gold mine). This lack of transparency does not encourage competition. Informants have also stated that corruption has remained one major impediment for market competition. More transparent procedures have however been used for more recent privatization procedures with eight of the 14 enterprises privatized through equity sales and the remainder through joint ventures. More information has also been made available by the responsible government body, i.e. the Privatization and Public Enterprise Supervising Authority or PPESA, in relation to these processes. Overall, Ethiopia's score under the World Bank indicators also improved from 25.1 in 2005 to 36.9 in 2006.


\(^{128}\) Article 15/6 of the "Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia" Proclamation No. 471/2005

• **Distorted Financial Market**: The state-owned Commercial Bank of Ethiopia (CBE) accounts for about 75 percent of total banking sector assets and deposits, and over 50 percent of loans in 2006. Such heavy dominance may deter entry of other small banks. Moreover, state owned banks, including the central bank\(^{135}\), have little operational autonomy. Over 50 percent of CBEs claim is held by the Government and public enterprises. Even the National Bank of Ethiopia (NBE), which is the regulatory and supervisory body, cannot in practice effectively enforce its directives on state-owned banks because of Government interference. This denies private banks the required level field to compete in the market freely. Finally, non-financial public enterprises are not allowed to be customers of the private banks. Such exclusionary policy deters competition. On the other hand, the NBE is implementing a Financial Sector Capacity Building Programme which aims to contribute to the development of a transparent, well-regulated and competitive financial sector, including a corporate regulatory framework and government bond markets. In this respect, the Licensing and Supervision of Banking Business Directive recently introduced by the NBE on the appointment of board members in financial institutions are expected to improve the governance of financial institutions by reducing corruption and conflicts of interest thereby improving the environment for competition within the sector.

• **Inconsistent Tax Administration and Incomplete and Inefficient Business Registration**: The Government has recently introduced a Value Added Tax (VAT) on enterprises having an annual turnover greater than USD 57,000 while all other enterprises register for the much lower Turnover Tax (ToT). However, due to capacity limitations on the part of the tax authority to enforce, enterprises having equal annual turnover are registered for different tax systems paying significantly different rates. Moreover, while the computerized VAT system makes it easier to trace already registered enterprises and enforce tax payments, the ToT system is based on estimates and difficult to enforce. The result is a grossly distorted market driving firms registered for VAT out of competition and discouraging others to do so. Moreover, the presence of unregistered traders and illegal brokers in the market was unanimously identified by government, business and consumer representatives contacted for this study. This is apparently attributable to incomplete coverage and inefficiencies in the business registration system.

\(^{135}\) Nearly half of the members of the board of governors of the NBE are directly picked by the Council of Ministers chaired by the PM, and the board is chaired by the chief economic advisor of the PM.
• Unfair Competition from Party-affiliated Enterprises: A number of relatively large enterprises operating in many sectors, including manufacturing, transport, finance, trade, etc., have been established under a single management. These enterprises, which are affiliated with the ruling party, have been alleged by the private sector for controlling the supply of certain goods and services in the market. The DTIS reported that importers interviewed have stated that they are facing unfair competition from party owned enterprises (World Bank, 2003). Similarly, members of Ethiopian Chambers of Commerce interviewed for another study have complained about the monopolistic position of party affiliated enterprises in the distribution of construction materials particularly cement (ECC, 2007). Some of the representatives of the SNNPRS Chamber of Commerce conducted for this study similarly complained that private businesses and public enterprises (including party affiliated business organizations) are not treated equally by regulators.

• Lack of Awareness among Business Community and Enforcers: The majority of informants including representatives of the judiciary, law enforcement and especially the business community and consumers, have very limited awareness about the legal, policy and institutional aspects of the regulatory framework for market competition in Ethiopia. With the exception of officials of regional trade bureaus, very few among the respondents were able to respond to inquiries as to the contents of the law or the mandates of the regulatory bodies. Similarly, these informants do not have any useful knowledge of anticompetitive practices except for hoarding. Even in this case, substantial variations were noted among respondents’ in understanding the prohibitions on hoarding.

It has to be noted, however, that the issue if and to what extent the above affect competition in Ethiopia has not yet been properly studied. Such a study, which analyzes the competitive implications within the overall development policy context, would be timely.

Prevalent Anticompetitive Practices
There is a dearth of information on the nature and prevalence of anticompetitive practices in the domestic market in Ethiopia. Though conclusive data is not available, collusive agreements and abuse of dominance appear to be widely prevalent in the market. For instance, a recent survey has indicated that collective price fixing, entry barriers and bid rigging are
the most prevalent anticompetitive practices in Ethiopia.\textsuperscript{136} As noted in the previous section, an emerging problem in Ethiopia involves vertically (and horizontally) chained enterprises, particularly endowment enterprises, colluding to fix prices from production or import through the retail end of the market for construction materials, particularly cement and steel.\textsuperscript{137}

From a review of existing literature on the issue, there appears to be more anticompetitive behavior in the markets for essential commodities and services like sugar, cement, electricity, water, soft drink and air transport as well as the financial sector, wherein public enterprises exclusively deal with government owned financial institutions.\textsuperscript{138}

**Figure 5 Most Prevalent Anticompetitive Practices Identified by the Business Community**

![Bar Chart](source: World Bank, Investment Climate Survey for Ethiopia (2006))

Discussions held with government representatives and members of the business community in selected towns were more revealing. While concrete cases were not forthcoming, representatives of the regional Bureau of Trade and Industry, judiciary, law enforcement, and business community identified...
price fixing and hoarding as most prevalent anticompetitive practice.139 At the federal level and in most of the regions the problem was taken so seriously that task forces were formed to tackle the problem, especially in the grain market.140 A form of hoarding prevalent in some regions involves grain traders from the one region and illegal brokers in another colluding to delay delivery trucks outside towns until the supply in the town has been sold.141 Moreover, some members of the business community complained of what amounts to abuse of dominance by the government retail chain. According to these respondents, the public enterprise ties sales of unrelated products such as edible oil with sugar, which it buys at government auctions.142

Similarly, representatives of the business community and consumers also stated that collective price fixing is a common practice particularly in specific sectors such as the market for construction materials.143 Reportedly, traders in these sectors routinely communicate and fix the prices of the materials to maintain the same prices for goods despite differences in production costs. However, the most prevalent anticompetitive practice identified by these respondents across sector is bid rigging.144 While it is prevalent in almost all sectors, it is reportedly more prevalent in some sectors such as construction, government procurement.145 The respondents considered bid-rigging to be

139 Interview and FGDs with representatives of the Bureaus of Trade and Industry, Courts, Police Commissions, and Chamber of Commerce and Sectoral Associations in Hawassa, Dire Dawa, Bahirdar and Mekelle reveal that hoarding is indeed the most prevalent anticompetitive practice in the respective regions.

140 Interview with representatives of the Diredawa Police Commission and Bureau of Trade and Industry, July 2008 (The task force was established as per a ToR prepared by the Ministry of Trade and Industry and adopted by the Dire Dawa Bureau of Trade and Industry to investigate and control the causes of inflation. The task force is made up of representatives of the Trade and Industry Bureau, the Police Commission, Bureau of Rural development, Internal Affairs Bureau, the Dire Dawa Chamber of Commerce and Sectoral Associations, the Cooperatives Office, and Federal law enforcement.)

141 FGDs with representatives of the Mekele Chamber of Commerce and Sectoral Associations (By contacting their agents (usually illegal brokers) in Mekele some traders reportedly order the trucks carrying grain to stay on the outskirts of the town until the supply in the town is finished.)

142 FGDs with representatives of the SNPRS Chamber of Commerce and Sectoral Associations, Hawassa, June 2008

143 Respondents from the Bahirdar Chamber of Commerce and Sectoral Associations and two Consumers Associations as well as those representing the Mekele Chamber of Commerce and Sectoral Associations have identified collective price fixing as a widely prevalent form of anticompetitive practice in the construction sector.

144 FGDs with representatives of the Mekele Chamber of Commerce and Sectoral Associations, and Bahirdar Chamber of Commerce and Sectoral Associations as well as the two Consumers Associations in Bahirdar have identified bid rigging as a prevalent practice.

145 Representative of Mekele Chamber of Commerce and Sectoral Associations, the Bahirdar Chamber of Commerce and Sectoral Associations and two Consumers Associations in Bahirdar partially attributed this to corrupt practices in government bids based on frequent complaints by the business community. Other factors mentioned by respondents in the Amhara, SNNP and Tigray Regions as well as Diredawa include weak consultation between the government and the business community and limited awareness on the relevant law on the side of the business community as well as concerned government officials. For instance, none of the respondents contacted in Diredawa knew of the existence of this Proclamation, but not its purposes and the manner of its implementation.
especially prevalent in sectors where there are a small number of suppliers such as Grade 1 and 2 contractors, high-end metal and wood work, and construction materials. The prevalence of bid-rigging was confirmed by representatives of the regional Trade Bureaus who mentioned that some traders have two or more licenses they use to submit apparently competitive quotes for the same bid.

Respondents have stated that collective price fixing is another prevalent anticompetitive practice in the country. The recent collective price fixing by beer companies was cited as an indicator of how widespread the practice has become all over the country. It has been reported in the media that beer companies in the country have officially announced a collectively fixed price for draught and bottled beer. Consumers have a general feeling that prices of commodities are being fixed collectively. In addition, consumers and representatives of the Regional Trade Bureaus identified an emerging trend of predatory pricing among traders operating in rural areas. Some traders have taken up to selling essential goods at very low prices seeking to push recently flourishing consumer associations/cooperatives out of business.

**Competition Law: The Trade Practices Proclamation**

As part of its market liberalization program, Ethiopia has adopted a specific law dealing with competition in 2003 entitled, “The Trade Practices Proclamation No. 329/2003 (hereinafter called the Trade Practices Proclamation or the Proclamation). There is currently an on-going legislative process on a new bill to replace the current proclamation. The government has already circulated the draft copy of the new proclamation (hereinafter referred as the Draft Proclamation) for comments. The discussion of the Ethiopian competition law in this part mainly focuses on Proclamation No.329/2003 which is currently in force. However, limited references to and discussions on the new draft proclamation are also included as appropriate.

The Trade Practices Proclamation has four parts: Part I comprises of general provisions that pertain to citation, definitions of terms, objectives, scope of application of the law and exceptions, cases on which the law

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146 Corruption in government bids, particularly in the construction sector, was identified among the most prevalent anticompetitive practices in discussions with the Bahirdar Chamber of Commerce and Sectoral Associations and the two Consumers’ Associations as well as the Mekelle Chamber of Commerce and Sectoral Associations.

147 For instance, representatives of the Tigray Trade Bureau mentioned the practice of some traders having 2 or 3 trade licenses in the same area, e.g. stationery (one in their own name and others in the name of their wife or children) for the purpose of bid rigging. They actually operate only one of the license and the other two are used for the purpose of submitting 3 different proposals for the same bid.

148 These claims were mentioned in discussions with representatives of the Mekelle Chamber of Commerce and Sectoral Associations. Although concrete evidence is not available, the incidence of this practice has been confirmed by respondents from the Regional Trade Bureau.
does not apply. Part II deals with acts that are regarded as anticompetitive practices and their consequences. In Part III, the Proclamation lays down rules on the powers of the Commission, the public organ entrusted with the responsibility of enforcing the law. Appeal procedures against the decisions of the commission are also included in this Part. The final part, designated as "miscellaneous provisions" under the Proclamation, carries rules on labeling, pricing regulations as well as remedies for violation.

Prior to embarking upon discussion on the substantive provisions of the law, this section examines the rationale and context underlying its promulgation. Then the key features of the legislation, i.e., objectives, scope of application, and prohibited trade practices, will be discussed with emphasis on provisions directly pertinent to market competition as discussed in the first part of this report. Other "trade practices" prohibited and regulated under the Trade Practices Proclamation will also be discussed as a basis for further analysis.

**Rationale**

The rationale for the legislation, as indicated in the Preamble, is the need to:

- Ensure that market practices are undertaken in a manner consistent with the free market economic policy of the country;
- Establish a system that is conducive for the promotion of competitive environment,
- Regulate anticompetitive practices in order to maximize economic efficiency and social welfare; and
- Safeguard the public from price hike and for equitable distribution of goods and services in times of regular and short supply.

The decade following the change of government in 1991 was marked by deregulation, liberalization and economic policy reform in Ethiopia. The Trade Practices Proclamation is part of this larger reform process triggered by the fundamental changes in the economic policy framework as is indicated by the first rationale in the text of its preamble.

The title of the Proclamation refers to "trade practices" rather than "competition", which may be interpreted to mean that the rationale of the law is something other than maintaining and promoting market competition. Thus, we need to clarify the meaning of "trade practices" and its correlation with the concept of market competition. If the thematic coverage and scope
of application of the Proclamation can be used as an indicator, the intention seems to be covering all commercial activities of traders. On the other hand, in other countries, the use of trade practices to designate an area of economic regulation is more often encountered in the context of "unfair competition" where "unfair trade practices" is often used as an alternative. Yet, some legal systems have used similar terminology to designate their competition laws – usually modified to "restrictive trade practices" or "fair trade practices". In such cases the nomenclature also indicates the exclusion of at least some competition issues, the concurrent use of "monopolies" or even "competition".

The preamble for the draft proclamation is identical to the one in force in the statement of its rationale in relation to the first three items. However, the last rationale, i.e., price control and equitable distribution of basic goods and services, has been removed and replaced by a reference to the need to

<table>
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<tr>
<th>Country</th>
<th>Year</th>
<th>Act</th>
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<tr>
<td>India</td>
<td>1969</td>
<td>The Monopolies and Restrictive Trade Practices Act</td>
</tr>
<tr>
<td>Pakistan</td>
<td>1971</td>
<td>The Monopolies &amp; Restrictive Trade Practices (Control &amp; Prevention) Ordinance</td>
</tr>
<tr>
<td>Sri Lanka</td>
<td>1987</td>
<td>Fair Trading Commission Act</td>
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<tr>
<td>Kenya</td>
<td>1989</td>
<td>Restrictive Trade Practices, Monopolies and Price Control Act</td>
</tr>
<tr>
<td>Tanzania</td>
<td>1994</td>
<td>Fair Trade Practices Act (No. 4)</td>
</tr>
<tr>
<td>Zambia</td>
<td>1995</td>
<td>Competition and Fair Trading Act</td>
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<tr>
<td>South Africa</td>
<td>1998</td>
<td>The Competition Act</td>
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<tr>
<td>Malawi</td>
<td>1998</td>
<td>Competition and Fair Trading Act</td>
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<tr>
<td>Mauritius</td>
<td>2003</td>
<td>The Competition Act</td>
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<tr>
<td>Namibia</td>
<td>2003</td>
<td>The Competition Act (Act No. 2)</td>
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While the Proclamation is not unique in this respect, the use of the term "trade practices" in the nomenclature may potentially create ambiguity and uncertainty. First, the term apparently covers the actions and behaviors of traders, a very broad area of economic regulation, of which competition law may be an aspect, which cannot realistically be dealt with by a single legislative document or area of law. This is likely to create confusion as to the subject matter of the Proclamation by suggesting the inclusion of issues such as business registration. A similar, but more specific concern in this connection is that "trade practices" have been given meaning neither in legislative practice, nor in general jurisprudence. In contrast, the terms "competition", "unfair competition", and "consumer protection" are clearer and more widely used to designate similar laws.
establish "Competition Commission and Competition Tribunal". Though the draft has maintained the term "trade practices" in the title, this change in the rationale will have significant implications on the objectives, scope and substantive content of the legislation.

**Objectives**

The Trade Practices Proclamation has two stated objectives (Article 3). These are: (1) Securing a fair competitive process through the prevention and elimination of anticompetitive and unfair trade practices (UTPs); and (2) safeguarding the interests of consumers through the prevention and elimination of restraints on the efficient supply and distribution of goods and services.

A closer consideration of these two objectives of the Proclamation reveals that its subject matter is not limited to preserving competitive markets, as is further evidenced by the coverage of the Proclamation. In addition, it seeks to address unfair or deceptive conduct by one competitor against another; regulation of prices for basic goods and services in times of shortage; and consumer information disclosure requirements on labels. It even included an anti dumping provision as one type of unfair competition. The objectives of the Proclamation thus venture into the purview of trade policy, consumer protection, antidumping, and price regulation. As noted earlier, these are distinct areas of policy and legislation with different and often divergent purposes and interests such as development, economic integration, social welfare and the like.

Conceptually, these issues come together with competition at the level of competition policy, which simultaneously serves to preserve and promote competition as a means to ensure efficient allocation of resources in an economy, resulting in the best possible choice of quality, the lowest prices, and adequate supplies to consumers. Competition law, on the other hand, is quite narrow in its scope.

Competition law typically addresses anticompetitive practices with a view to maintaining market competition and market competition itself serving primarily the purposes of allocative efficiency, and also other ends, as had been discussed in the general part. As such, a generic and the immediate

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*Even at the policy level, the issues overlap rather than merge. For instance, while consumer welfare issues are a proper concern of competition policy, the bulk of consumer issues could only be dealt with within a comprehensive consumer protection policy.*
objective of competition law is ensuring efficient allocation of resources. As has been indicated in the discussion in the general part, the issue is what must be thought of as the ultimate end of competition law, something that must lie beyond merely ensuring competitiveness of the markets. Besides efficient allocation of resources, different countries have provided in their legislations ends such as innovation, consumer welfare, promotion of export trade, and others. Though competition usually is thought to lead to consumer welfare through the lowering of prices and affording of variety of goods and services, it is not necessarily so. An illustrative example is predatory pricing where by fixing the price too low a dominant firm creates a barrier to entry. Such behavior is almost always prohibited by competition laws despite the advantages to consumers at least in the short run. Moreover, such kind of welfare may not necessarily be a goal a nation will always seek to achieve. There may be other welfare issues beyond lower prices. An illustrative example is the case of the South African Competition Act, in which encouraging historically disadvantaged people is provided as one aim of the Act.

Another more persistent and hotly debated issue is the treatment of unfair trade practices in competition laws of some countries. Unfair trade practices, also referred to as unfair competition, cover a wide range of illicit or deceptive actions of firms intended to secure undue advantage over competitors. Typically, these are covered under general laws protecting proprietary rights such as intellectual property, contracts, extra-contractual liability (torts) and unlawful enrichment, or laws specifically designed to protect consumers like advertisement rules. However, a few of the countries that have adopted competition laws have incorporated the prevention and prohibition of unfair competition among the objectives of their competition laws.

The following table provides a summary of some of the competition laws reviewed for this study.
<table>
<thead>
<tr>
<th>Countries</th>
<th>Objectives</th>
<th>Sources</th>
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<tbody>
<tr>
<td>UNCTAD Model Law</td>
<td>To control or eliminate restrictive agreements or arrangements among enterprises, or mergers and acquisitions or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development.</td>
<td>UNCTAD, 2007&lt;sup&gt;100&lt;/sup&gt; Cassey Lee, 2004&lt;sup&gt;151&lt;/sup&gt;</td>
</tr>
<tr>
<td>WB-OECD Model Law</td>
<td>To maintain and enhance competition in order ultimately to enhance consumer welfare.</td>
<td>World Bank and OECD, 1999&lt;sup&gt;152&lt;/sup&gt; Cassey Lee, 2004</td>
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<td>Pakistan</td>
<td>The broad objectives of the law are to provide measures against: (1) Undue concentration of individual economic power; (2) Monopoly power; and (3) Restrictive trade practices.</td>
<td>Cuts, 2003 p. 98&lt;sup&gt;155&lt;/sup&gt;</td>
</tr>
<tr>
<td>Sri Lanka</td>
<td>The promotion of effective competition and the protection of consumers.</td>
<td>Cuts, 2003 p. 98</td>
</tr>
<tr>
<td>Kenya</td>
<td>The objective of Kenya’s competition law is to encourage competition in the economy by: (1) Prohibiting restrictive trade practices; and (2) Controlling monopolies, concentrations of economic power and prices.</td>
<td>The Restrictive Trade Practices, Monopolies and Price Control Act, Cap. 504 of the Laws of Kenya, 1988, Kenya Gazette, 23&lt;sup&gt;rd&lt;/sup&gt; December 1988</td>
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<sup>104</sup> Cassey Lee, Model Competition Laws: The World Bank-OECD and UNCTAD Approaches Compared, Faculty of Economics & Administration University of Malaya, August 2004
<sup>155</sup> Cuts Centre for Competition, Investment & Economic Regulation, Pulling Up Our Socks: A Study of Competition Regimes of Seven Developing Countries of Africa and Asia under the 7-Up Project, 2003 p. 98
<table>
<thead>
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<th>Country</th>
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<td>South Africa</td>
<td>The purpose of this Act is to promote and maintain competition in the Republic in order to: (1) Promote the efficiency, adaptability and development of the economy; (2) Provide consumers with competitive prices and product choices; (3) Promote employment and advance the social and economic welfare of South Africans; (4) Expand opportunities for South African participation in world markets and to recognize the role of foreign competition in the Republic; (5) Ensure that small and medium sized enterprises have an equitable opportunity to participate in the economy; and (6) Promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.</td>
<td>Republic of South Africa, Competition Act, Competition Act, Act No. 89 of 1998, Government Gazette Vol. 400, Cape Town, 30 October 1998, Article 2</td>
</tr>
<tr>
<td>Tanzania</td>
<td>The main objectives of the Act are to: (1) encourage competition in the economy by prohibiting restrictive trade practices, regulating monopolies, concentration of economic power and prices; (2) protect the consumer; and (3) provide for other related matters.</td>
<td>Tanzania, The Fair Trade Practices Act, 2003</td>
</tr>
<tr>
<td>Zambia</td>
<td>The Act has the following objectives: (1) Encouraging competition in the economy by prohibiting anti-competition trade practices; (2) Regulating monopolies and concentration of economic power so as to protect consumer welfare; (3) Strengthening the efficiency of production and distribution of goods and services; and (4) Securing the best possible conditions for the freedom of trade and expansion of entrepreneurship base.</td>
<td>Zambia, The Competition and Fair Trade Act, CUTS, 2003 p. 98</td>
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Even by the standards of the more permissive competition laws, the Trade Practices Proclamation has bundled widely disparate objectives. Conceptually disaggregated, the objectives of the Proclamation cover anticompetitive conduct, unfair and deceptive conduct between individual competitors, importation of goods at prices that are below wholesale in the country of production, prices for basic goods and services, and product labeling. These assorted issues have been collectively designated “trade practices”, which is seemingly too vague to serve the purposes of legal interpretation. In addition to the inherent conceptual confusion, the mixes of competing policy considerations that have to be accommodated are likely to create

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134 Tanzania, The Fair Trade Practices Act, An Act to promote and protect effective competition in trade and commerce, to protect consumers from unfair and misleading market conduct and to provide for other related matters, 2003.
implementation and enforcement challenges. A telling piece of information in this respect is the widespread belief among representatives of trade and industry bureaus, law enforcement, judiciary, the business community and consumers of equating competition issues with regulation and control of inflation and price control.

Keeping in mind the fact that market competition, unfair competition consumer protection are broadly different areas of the law with their own particularities, specific objectives and jurisprudence, the approach in the Proclamation is found to not only defy logic, but is also observed to have discouraged the specialized development of these laws most of which are by and large new to the nation. This observation is apparently shared by the drafters of the new legislation who have chosen to limit the comparable provision to strictly competition objectives with consumer welfare as an ultimate goal (Article 3/1). The Draft Proclamation also highlights “ensuring technological progress”, “ensuring access to markets” and “expanding opportunities” for businesses to participate in world markets along with the traditional “greater efficiency” objective of competition law. It is thus more in line with the mainstream jurisprudence on the relationship between competition law and consumer protection law.

On the other hand, the second paragraph of the same Article, i.e., Article 3/2, states “preventing and eliminating business practices that jeopardize the interest of individual traders... and their business goodwill” as a parallel objective of the draft proclamation. This appears to be a conscious decision to maintain unfair and deceptive conduct between individual competitors within the purview of competition law.

Coverage and Scope of Application

As mentioned in the preceding sub-section, the substantive provisions of the Trade Practices Proclamation cover four areas of regulation. These are:

- The prohibition of anticompetitive behavior,
- Prohibition of unfair competition or unfair trade practices,
- Regulation of prices for basic goods and services in times of shortage, and
- Requirement of disclosure on labels of basic consumer information such as weights and measures.

The anticompetitive practices prohibited under Articles 6 and 11 of the Proclamation are fairly typical of those found in competition laws around the world and follow the EC-Treaty Article 81 and 82 models.
But as noted in the earlier section, an important issue in terms of the thematic coverage of the Trade Practices Proclamation is that four conceptually distinct areas are treated within the same text. Each of these areas of law involve a distinct set of policy and legal considerations even coming into conflict in some cases. The draft proclamation substantially narrows down this wide coverage by removing the price control and labeling provisions.

As a rule, the provisions of the Proclamation are applicable to “all persons involved in any commercial activity” (Article 4). By way of exception though, some of the provisions of the Proclamation may not be applicable in the following cases at the discretion of the institution mandated to follow up the implementation of the Proclamation:

- Commercial activities that are, according to the investment proclamation exclusively reserved for the Government;
- Enterprises having significant impact on development and designed by the Government to accelerate growth; and
- Basic goods and services that are subject to price regulations.

In addition, the Ministry of Trade and Industry has the power to regulate prices of basic goods and services upon the authorization of the Council of Ministers.

The Proclamation gives a great deal of room for interpretation and leaves power to grant exemptions in the hands of a Commission composed of high government officials and the Minister of Trade and Industry. The Commission has the authority to exempt (1) enterprises that have “significant impact on development and (are) designed by Government to fasten growth and facilitate development;” and, (2) “basic (goods) or services that are subject to price regulations” (Article 5).

The Proclamation does not define or give any guidelines on how the phrase “significant impact on development” is to be interpreted. If, in the absence of any guidelines, it is to be applied to priority areas identified by the Government, these may include agriculture and all exporting enterprises, specifically leather, textile, coffee, floriculture, meat processing, and other sectors identified as priority areas by the Industrial Development Strategy. Exempting the range of sectors and activities from the application of the law would significantly curtail its application. Moreover, since the mandated body (the Commission) entertains cases only after allegations of violation, it appears that an exemption on these grounds may be granted ex post
facto, i.e., after an alleged violation of the law has taken place. Similarly, "basic goods and services" are defined vaguely as "goods or services related to the daily material needs of (the) consumer." Because later provisions of the Proclamation permit the Minister of Industry and Trade to make recommendations to the Council of Ministers for regulating the price of goods (Article 22) as well as exempt "basic goods and services" from the Proclamation (Article 5(3)), the vagueness of this definition may have significant ramifications.

The provisions of the Draft Proclamation attempted to address some of these concerns. Article 4/2 of the draft exempts the sovereign acts of the State, marketing of basic public utilities by public enterprises, and "collective agreements in respect of conditions of employment" and empowers the Council of Ministers to regulate prices of basic goods and services. Moreover, the definition of "basic goods and services" has been qualified to include only those goods and services "the shortage of which in the market may lead to unfair trade practices" (Article 2/1).

**Prohibition of Anticompetitive Practices**

Generally, the Trade Practices Proclamation provides a workable framework for regulating anticompetitive practices. However, the Proclamation does not have a specific provision addressing mergers, takeovers and other forms of concentrations/conglomerations. These practices, which basically have the purpose of increasing or concentrating market power while decreasing the number of firms, inherently carry the risk of diminishing or precluding competition. Moreover, concentration of market power is a step towards position of dominance that may lead to abuse of dominance—an anticompetitive practice recognized in the Trade Practices Proclamation as well as almost all other competition laws. Thus, with the exception of some European countries, notably Austria, almost all jurisdictions prohibit mergers and acquisitions that may substantially hinder competition. Since not all mergers have such a result, granting wide administrative discretion in the determination of anti-competitiveness is also common legislative practice.

Jurisdictions permissive of mergers and acquisitions do so for a number of reasons. Some countries consider the practice a market driven mechanism of determining optimum firm size and do not prohibit concentration of market power unless it constitutes a barrier to entry. Others tolerate joint ventures, mergers, and other collaborations as a necessary measure to enhance the competitiveness of firms in the international market through
the pooling of resources and to enhance technological development through increased investment in expensive research and development projects. In the case of developing countries with emerging competitive markets the size of firms is often too small. Thus, mergers and acquisitions may not be considered a problem and may even be promoted with a view to increasing competitiveness.

Any one of these reasons may arguably justify the omission of mergers and acquisitions from the Trade Practices Proclamation. In fact, the features of the domestic market are likely to call for a permissive attitude towards consolidation of market power in some sectors. However, there are also opposing considerations that may require some form of merger regulation. One such consideration is the reported prevalence of conglomerations in the import and distribution of construction materials as well as the manufacturing sector. Additional reasons include the country’s current and anticipated involvement in the Common Market for Eastern and Southern Africa (COMESA), the Free Trade Area (FTA), and its aspiration to join the World Trade Organization (WTO) as well as exposure to cross-border mergers in the progressively globalizing international market.

Finally, the Proclamation is also silent about whether its provisions are applicable to unfair or restrictive trade practices in regulated sectors like telecommunications and energy. The issue in particular is which regulation would prevail in cases when a sector is regulated by more than one regulatory law and by more than one regulator. It is common for competition statues to deal with this, at times, thorny issue. But, our proclamation is silent on this issue. The rules of interpretation would imply that the Proclamation, which is the latter law, supersedes the competition rules of previous proclamations in matters covered in its provisions. It could also be argued that the special laws applicable to a single sector would prevail over the Proclamation. Whatever the case, it would have been more appropriate if the Trade Practices Proclamation has included a provision explaining its relationship with other laws on matters of competition. In the absence of a provision to this effect, the uncertainty in this regard would only be resolved by the interpretation of the provisions of the Proclamation by the Commission.

The substantive provisions of the draft trade practices proclamation prohibit three types of anticompetitive practices: abuse of dominance; agreements, concerted practices and decisions of association by undertakings, and some forms of concentration. These prohibitions cover the whole spectrum of anticompetitive behavior of firms and structure of the market within the
scope of competition laws and jurisprudence. Furthermore, the regulation of concentration, which is an alternative terminology for mergers and acquisitions, addresses both sides of the argument on the absence of comparable prohibitions in the current Trade Practices Proclamation. It does so by qualifying the mandates of the regulating agency in three significant ways. First, the principle for prohibition of concentration (Article 14) and the mandating provision (Article 17) provide that only those concentrations causing or likely to cause "a significant restriction or elimination of competition" may be prohibited by the competition agency. Moreover, Article 16/2 of the draft proclamation mandates the Council of Ministers to issue a regulation determining the threshold of concentration subject to regulation by the Commission. Finally, the commission’s mandate is further limited by a time limit for its decision anticipated by Article 17/4 of the draft. Failure to reach a decision within the prescribed timeframe gives the parties to implement their agreement. On the other hand, but for similar reasons, Articles 18 and 19 of the draft provide for very liberal standards of case-by-case exceptions by the Commission and the exemption of whole sectors of the economy by the Council of Ministers.

**Anticompetitive Agreements**

The Trade Practices Proclamation generally prohibits "any oral or written agreement that restricts, limits, impedes or harms free competition in the process of production or distribution" (Article 6/1). The provision also makes specific reference to price fixing, bid rigging ("collusive tendering"), market and customer allocations, quantity fixing, and refusals to deal (Article 6/2). However, the Ministry may authorize exceptions to these prohibitions when "the advantages to the Nation are greater than the disadvantages" (Article 7). That is, if the Ministry believes that such an agreement has a "national advantage outweighing its disadvantages", then the agreement could be authorized to continue.

This provision of the Trade Practices Proclamation prohibits all forms of collusive agreements identified in the WB-OECD and UNCTAD model competition laws. Since these forms of restrictive agreements, with the exception of collusive bidding, can take place horizontally or vertically, a literal interpretation of the provision would be inclusive of both types. However, taking into account the reported existence of dominant conglomerates and affiliated enterprises across sectors, it would have been more advantageous if the Proclamation specifically mentioned the application of the provision in horizontal as well as vertical agreements.
One missing element in the Proclamation is lack of a definition of what is meant by agreement, though it is commonly found in the competition statutes of many countries. Furthermore, the Proclamation also lacks the proscription of a possible anti-competitive conduct carried out in concert, or through what may be called an agreement through conduct. Generally speaking, the whole idea is to capture all kinds of collusive activities carried out with the view to distort or kill competition. So, it is common to include in the definition of concerted practices such acts carried out by conduct and without any agreement in the proper sense of the terms so long as this collusive conduct could be judged to have replaced their independent actions.

Furthermore, as discussed in the general part of this report, competition laws usually make distinctions between what are known as prohibitions in accordance to “per se” rules and prohibitions on the basis of “rule of reason”. So, after providing for the general rule of prohibition, laws go on to specifically list down collusive activities that will be prohibited no matter what. Such are acts in respect of which no justification is permitted. We call them “per se” prohibitions. Normally, all other prohibitions are taken as susceptible to the “rule of reason” analysis. This basically means that the defendant accused of such acts will be availed the chance to prove that his acts, which may already be proven to be anti-competitive, have other gains that are in conformity with anyone or more of the objectives of the law. The Proclamation does not seem to be clear on this distinction, which is again reckoned as one of its deficiencies in terms of its substantive competition law part.

Still, whether an agreement would be regarded as anticompetitive is left to the discretion of the Ministry of Trade and Industry without sufficient guidelines. Though consideration of relative national advantage is justifiable ground for tolerating anti-competitive agreements, the absence of reasonable criteria makes the determination totally discretionary and unpredictable. For instance, the exception may be routinely used to discriminate against foreign companies.

From another perspective, the absence of criteria for the determination of anti-competitive agreements leaves the Commission at liberty to apply per se or rule of reason alternatively and arbitrarily. Arguably, the enumeration of specific forms of collusive agreements and the wording of sub-Article 2 may be interpreted as prescribing per se standards while sub-Article 1 requires
the application of rule of reason. This, however, is subject to alternative interpretations. It would have been more appropriate if the Proclamation has indicated the criteria to be applied in a more unequivocal manner.

Articles 11 – 13 of the draft proclamation provide for a more comprehensive set of rules on the regulation of anticompetitive agreements, which is at the same time more discerning in its treatment of vertical and horizontal relationships. The use of the per se rule, in other words presumption of anti competitive agreement, is also treated explicitly and with sufficient guidelines. Though stated as an exception, the rule of reason is applicable to all cases not expressly covered by the per se rule.

Abuse of Dominance

The Trade Practices Proclamation states that “no person may carry on trade which gives opportunity to control a relevant market for goods or services; or limit access to a relevant market or otherwise unduly restrain competition, having or being likely to have adverse effects on market development” (Article 11/1). It also specifically prohibits most types of monopolistic conduct listed as prohibited in many jurisdictions including price discrimination, tying arrangements, refusals to deal, excessive prices, and predatory pricing (Article 11/2).

An issue that needs to be addressed forthwith in the wording of Article 11/1 is that it literally prohibits “dominance” rather than “abuse of dominance”. The fact that a firm has a dominant market position does not constitute an anti-competitive practice unless such position is abused. The wording of this provision is also at odds with prevalent legislative practice in two ways. First, the scope of the provision is not limited to firms already having dominant market position but extends to all persons. As such, taken literally, it is applicable to all firms irrespective of their market share. Secondly, the provision prohibits conduct “likely to have adverse effects on market development” rather than the prevalent stand of significantly lessening competition in a particular market. This makes it applicable to neutral or, even, pro-competitive conduct depending on anticipated developments in the specific market.

Any analysis of monopoly must begin by trying to define the concept of “relevant market”. This is so because a firm can only be regarded dominant in a defined market or markets. Side by side with an analysis of whether or not one is a monopolist, it must also be verified in which market the alleged monopolist is unduly exerting its weight. So, the question here is: how do we
define market for purposes of the assessment of monopoly. This is the other
deficiency of the Proclamation. A definition of the term relevant market is
very important. Two parameters are used in the identification of the market;
those so called product (service) market and the geographic scope of this
market. The whole idea is identification within a certain geographic locality
those products (services) that compete with one another. This is another
missing element in the Proclamation.

On another note, the wording of Article 11/2, in particular the phrase
“shall be deemed” seems to suggest across the board and possibly per se
determination of abuse of dominance. In this connection it may be relevant
to point out two considerations. Unlike restrictive or anti-competitive
agreements such as bid rigging, abuse of dominance is a very fluid concept
determined in reference to the position of the firm and effects of the specific
act on competition in the relevant market. The proper focus of competition
law in this context is defining “dominant position” rather than prohibiting
specific conduct, the idea being dominant firms should be subject to higher
levels of scrutiny. Thus, an enumerated list of prohibitions should at most
be regarded as an indicative list subject to case-by-case determination and
should not be taken as prescriptive.

The Proclamation also appears to include a comprehensive list of common
forms of abuse of dominance across jurisdictions. This may have the effect
of creating conflicting mandates within the same implementation agency in
practice. For instance, the prohibition of predatory pricing and excessive
pricing under Article 11/2/a would give the implementing body the role of
a price regulator which, in the absence of standards to determine dominance,
would be in conflict with its competition mandates.

Finally, it has to be remarked that abuse of dominance cases may, for other
pro-competitive ends and objectives, have to be tolerated. Thus, we also
need a provision which permits the defendant to fight back an action based
on abuse of dominance, whenever he could prove that its acts have other
economically beneficial targets which are concomitant with the objectives
of the competition law. This does not seem to be a possibility under the
Proclamation though it is a usual practice elsewhere.

Unlike the Trade Practices Proclamation, the draft proclamation does
not prohibit abuse of dominance (Article 5); nor does it suffer from lack
of guidelines on the assessment of dominance (Articles 6 and 7). Other
concerns raised in relation to the current legislation have also been addressed
under Articles 5 – 9 of the draft. Notably, the draft provisions clearly provide
for the rule of reason standard by giving the defendant the opportunity to challenge the charges on broad grounds (Article 9). Finally, the draft Article 10 mandates the Council of Ministers to exempt “activities vital in facilitating economic development” through regulations.

**Prohibitions of Unfair Competition**

In addition to anticompetitive practices, a fairly complete law of unfair competition is provided for in the Proclamation. The Trade Practices Proclamation defines unfair competition as “any practice, in the course of commercial activities that aim at eliminating competitors through different methods” (Article 10/1). Articles 10(2) (a)-(g) provide a list of acts and practices that are deemed to constitute unfair competition. These acts and practices generally relate to the understanding of unfair competition or unfair trade practices in other legal systems. Article 10(2) (h) and (i), on the other hand, address conduct related to imported goods. Article 10(2) (i) prohibits importing goods for humanitarian purposes without authorization from the Ministry, while Article 10(h) amounts to an antidumping provision.

Nonetheless, the definition of unfair competition under the Proclamation is unique. The relevant legislative practice and jurisprudence defines unfair competition through dual cumulative criteria — economic injury to another firm and deceptive or wrongful business practice. While the wording may vary, the element of actions that are considered “contrary to honest commercial practice” is considered an essential element of unfair competition. The Ethiopian law, on the other hand, defines unfair competition with reference to intention to eliminate competitors.

This definition departs from the normal practice in two ways. First, instead of the usual standard of actual harm to a business interest, the Proclamation uses intended elimination, which is more ambiguous. This will have various implications to the determination of whether an act or practice amounts to unfair competition. For one, considering the provisions for investigation of violations upon compliant by the aggrieved party (Article 15/1/a), it is not clear how the complainant could establish standing for compliant based on the intentions of a competitor. The implementing authority as well as courts entertaining appeals from its decisions will also face similar problems.

Secondly, the Trade Practices Proclamation does not require that the act be “unfair”. Most unfair competition laws define unfair competition as an act or practice violating standards of honesty or fairness for competitive advantage. A typical example is the Monopolies and Restrictive Trade Practices Act of India (1969) which defines “unfair trade practice” as “a trade practice which,
for the purpose of promoting the sale, use or supply of any goods or for the provisions of any services, adopts any unfair method or unfair or deceptive practice”. The Mauritius Protection against Unfair Practices (Industrial Property Rights) Act (2002) goes a step further and defines “contrary to honest commercial practice” as inclusive of:

“any practice, which may constitute a breach of contract, a breach of confidence, an inducement to breach or the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that any such practice was involved in the acquisition”.

The most obvious of implications of omitting the unfair or deceptive method standard in defining unfair competition is prohibition of methods of fair competition that may lead to the elimination of a competitor. This makes the purpose of the law safeguarding the existence of firms in the market irrespective of their efficiency or lack thereof, which in itself hampers competition and contradicts the interests of consumers.

As noted earlier, unfair trade practices are usually covered in consumer protection laws or other special laws such as copyright law. However, competition laws of some countries address the issues under Articles 10(2) (a)-(g) of the Ethiopian Trade Practices Proclamation. On the other hand, the Proclamation is apparently unique in dealing with the importation of goods for humanitarian purposes and antidumping issues. As indicated in discussing the objectives of the Proclamation, a competition law should preferably focus on competition issues rather than incorporate divergent interests and issues. The challenges involved in doing so will be discussed in connection with the institutional framework.

The draft proclamation has a significantly narrower substantive coverage of unfair competition limited to a definition based on potential or actual harm, four types of cases where the per se rule applies and private standing within a single provision (Article 20). Yet, the provision addresses all the above concerns in relation to the legislation in force. Thus, while the very inclusion of unfair competition rules within the scope of competition law may still be questioned, the draft proclamation does so in a manner more consistent with legislative practice and jurisprudence.

**Consumer Protection**

Apart from anticompetitive practices, the Proclamation makes provisions in relation to consumer protection as well. The Proclamation has attempted to
address the issue of consumer protection by providing rules dealing with labeling and those on price regulation of basic goods and services. This is in addition to the rules on unfair competition which, as noted earlier, have important ramification on consumer protection.

Articles 20 and 21 of the Trade Practices Proclamation require prices to be posted and goods to be labeled with country of origin, weight, material content, warranties, and similar matters of interest to the consuming public. These rules are found in the miscellaneous section of the Proclamation. Consumers will be better off if they are informed of prices, contents and measures. In this sense, the rules on labeling would play an important role in protecting consumer interests. Since more informed consumers would be able to contribute toward more competitive market process, disclosure of such basic information by sellers has a positive impact on competition. However, consumer information is a consumer rights issue usually dealt with under separate consumer protection laws. On the other hand, if the objective is to provide rules for consumer protection, it is not clear why the Proclamation provides for only few of the several consumer protection mechanisms. It also remains a puzzle why the provisions on consumer protection have been shoved in a miscellaneous part of the Proclamation. On the other hand, these labeling rules aid in market transparency, which in turn will valuably contribute towards making the markets more competitive. So perhaps, the legislator thought of the competitiveness of markets in providing for these rules, in addition to consumer protection.

The rules on price regulation of basic goods and services appear to be a strange addition in the Proclamation. The scheme provided in relation to these goods and services is that whenever there is a shortage of any good or service in the market related to the daily material need of the public, and traders resort to what the Proclamation terms as unfair trading practice as a result of its shortage, then the government, through the Ministry of Trade and Industry, may step in and determine the price and distribution of the scarce good or item. Presumably, it is the Ministry which is empowered to determine whether or not goods and services are basic. Saving the details, the determination of goods and services as basic removes them from the competitive market and subjects them to a regime of government planning. Thus, if one is to think of any link whatsoever with a legislation that has to do with competition, it is rather the absence of competition in the marketing of these goods, and nothing else. On the other hand, the price regulation mandate of the Ministry raises more concerns in relation to conflicting roles of the Ministry in addressing anticompetitive practices while at the
same time setting prices. Again, the fact that “basic goods” have not been defined in the Proclamation creates the risk of uncertainty for investors.

As noted in the discussion of objectives and coverage, the draft proclamation does not contain provisions addressing consumer protection and price regulation issues.

### Institutional Framework

As is normal in the tradition of enforcing competition laws, the Trade Practices Proclamation creates an institution to undertake the implementation of the law. This new institution in the law is what is termed as the Commission, but which has more of the features of quasi-judicial organ, as will be explained below. But, it is readily known when one reads some of the provisions of the Proclamation that the Ministry of Trade and Industry is also an enforcing institution, indeed the more authoritative one, albeit less visible. The Proclamation also mandates the establishment of a Secretariat, operating as just one department under the organizational structure of the Ministry, with the aim of aiding the Commission in the discharge of its duties. (Article 2 (9) and Article 18) The Trade Practices Investigation Commission is fully within the Ministry of Trade and Industry hierarchically accountable to the Minister (Art. 12).

The draft trade practices proclamation envisages a significantly different institutional framework involving a more autonomous “Federal Competition Commission” and an even more autonomous, even independent, “Federal Competition Tribunal” for the implementation of its provisions. Unlike the Trade Practices Investigation Commission established under the Proclamation currently in force, which is but part of the MoTI, the Commission suggested by the draft law is an autonomous federal government agency (Articles 21 and 22) with limited reporting obligations towards the Ministry. On the other hand, the establishment of an independent competition tribunal suggests narrower mandate across functions. The competition tribunal in the draft law appears to be more of a judicial institution rather than an administrative tribunal in terms of its mandates, independence and accountabilities.

### The Competition Commission

(a) **Appointment and Composition**

The Trade Practices Proclamation provides for the establishment of a Trade Practices Commission. According to the Proclamation, the Commission would be composed of an unspecified number of members from government,
private and consumer associations (Article 13/1). The Commissioners, including the chairperson, are recommended by the Minister of Trade and Industry and appointed by the Prime Minister (Article 13/2). Though the Proclamation requires that the Commission also have on it representatives from a consumer association and from the "...private organ..." (Article 13(1), this is not the case in practice. The Proclamation does not determine the term of office of the Commissioners.

Currently four Commissioners, who are high-level government officials, constitute the Commission whose chairperson, as mandated by the Proclamation is appointed by the Prime Minister upon the recommendation of the Ministry of Trade and Industry. But, at the time when the Commission was set up, which was roughly five years ago, the Commission had five members. The one member, who was the Director General of the Federal Cooperatives Commission, had to step down since he reached retirement age. The Commission is being chaired by a person who is a member of the House of People’s Representatives and who at the time of the setting up of the Commission was also serving as the Minister of Justice. The other three members, who are also in high places within the government and who still are in active duty, are the economic advisor of the Prime Minister with a Minister’s portfolio, the Director General of the Quality and Standards Authority of Ethiopia and Governor of the National Bank of Ethiopia. As mentioned above, the statutorily mandated representatives of the consumer’s association and of the so-called private sector are, in practice, excluded from the Commission.

It must be observed that the Proclamation simply provides for "...private organs and consumers association..." to be represented in the Commission. What is a bit puzzling about the Proclamation in this regard is that it has not made it clear as to which specific entities it was referring to when it provided for the representation of the private organ and a consumer association. To begin with, the term "private organ" is absolutely unclear. What is at first noticeable is the fact that what are envisaged are several such organs, as the term is stated in the plural. But, despite this, the question of which organ, person or entity is being referred to by this term remains unanswered by the Proclamation. It is also a futile attempt if one was to resort to the "Definitions" part of the Proclamation. It is evident that absent guidance from the Proclamation this term would only remain to be nebulous to refer to anyone or anything.
Secondly, the Proclamation seems to have had in mind one consumer association by having reference to this particular provision; a kind that has a statutory existence or at the least sort of a statutory recognition. One cannot think of anything else when this provision is written this way, and in the absence of identification through the Definition part of the Proclamation. However, nothing of this sort has as yet existed in the country, and thus the question of which particular association is being referred to remains unclear.

The draft proclamation provides for the appointment of a commissioner and a deputy commissioner by the Prime Minister upon recommendation by the Minister of Trade and Industry (Article 26). Once appointed, neither official may be removed from office before a term of five years except in cases involving serious misconduct, manifest incompetence or disabling illness (Article 27). In relation to the appointment and composition of competition tribunal, the draft proclamation simply provides for application of “the laws governing the tenure, discipline, removal and transfer of judges of the Federal Government” (Article 37). Interpreted in light of the appropriate laws, the draft law in effect provides for the appointment of judges of the competition tribunal for life (until the age of retirement) by the House of People’s Representatives upon nomination by the Prime Minister.

The draft proclamation has improved upon the current framework in a number of dimensions including clear appointment procedures, fixed terms of office and security of tenure for officials of the commission as well as very high levels of independence for judges constituting the tribunal that is comparable to the federal judiciary. On the other hand, the draft arguably represents a shift away from widely accepted principles of administrative practice in some important ways. Potentially most important among these is the retraction of stakeholder participation from decision-making by the commission apparently linked to the removal of consumer protection from the mandates of the competition authority. This may be considered at variance with accepted principles of administrative practice. Another possible point of concern may be at least apparent ambiguity on the status of the competition tribunal in relation to the judiciary – especially the Federal Supreme Court. That is, it appears that the draft law has created an additional judicial branch of government that is directly accountable to the House of People’s Representatives (Article 30/2).

(b) Powers and Functions

Article 15 (1) (a) of the Proclamation makes it clear that the Commission is mainly responsible for investigating complaints of violations of the law
when such complaints are submitted to it by any aggrieved party. The subsequent provisions in Article 15 (1) provide for some other associated powers that are principally designed to help the Commission discharge its duties of investigation. These are:

- Compelling any person to submit information and documents necessary for the carrying out of commission’s duties;
- Compelling witnesses to appear and testify at hearings;
- Taking oaths or affirmations of persons appearing before it, and examine any such persons;
- Entering by showing the commission’s ID card and search the premises of any undertaking during working hours, in order to obtain information or documents necessary for its investigation; and
- Appointing or employing, upon the approval of the Minister, experts to undertake professional studies as may be necessary.

Therefore, once a complaint is submitted before the Commission, it must investigate the matter for which it may need to compel people to testify, to undertake on the spot investigation of premises and documents, and to demand expert opinion on matters that demand so. After having investigated the matter, the Commission should render its judgment as to whether or not a commission of any of the proscribed acts has taken place, after which, if it is satisfied that an offence has been committed, it may “…take administrative measures or/and give penalty decisions” (Article 15 (1) (g)). Even though this provision states that the Commission “takes” these so-called administrative measures, such is not the case since the Commission’s power, as per subsequent provisions, is not anything more than recommending to the Minister the administrative measures that must be taken. So, instead of taking the measures itself, it rather recommends the taking of some specified measures. The following table shows the position taken on the powers and functions of competition authorities by international organizations and countries.
Table 8 Powers and Functions of Competition Authorities

|------------------|---------------------------|-------------|----------|
| • Making inquiries and investigations, including as a result of receipt of complaints  
  • Taking the necessary decisions, including imposition of sanctions, or recommending the same to a responsible minister  
  • Undertaking studies, publishing reports and providing information for the public  
  • Making and issuing regulations  
  • Assisting in the preparation, amending or reviewing of legislation on restrictive business practices, or on related areas of regulation and competition policy  
  • Promoting exchange of information with other states | • The competition office shall have the right to make submissions to state administrative authorities engaged in designing or administering legislation or regulation that could affect competition in any market.  
  • When hearings are held with regard to the adoption or administrations of such laws and regulations, the competition office shall have the right to intervene in such proceedings and also the right to publish such submissions and interventions. | • Competition Commission of India (CCI) will be established with investigative, prosecutorial and adjudicative powers. It will also have advocacy functions.  
  • CCI will be assisted by the Director-General, with extensive investigative powers.  
  • However, the DG will not have any suo moto power. | • The authority has recommendatory, investigative and legislative powers.  
  • For proceeding on an enquiry, the authority has the power vested in a civil court under the Code of Civil Procedure, 1908, in respect of certain matters.  
  The authority's main functions are:  
  • To register undertakings, individuals and agreements;  
  • To conduct enquiries into the general economic conditions of the country, with particular reference to the concentration of economic power and the existence or growth of monopoly power and restrictive trade practices;  
  • To conduct enquiries in individual cases, to give advice to persons or undertakings seeking such advice to determine whether or not a certain course of action was consistent with the provisions of the law. |
Sri Lanka (new law in 2003)
• The FTC has the power, either on its own motion or on a complaint made by another, to investigate: a monopoly situation, merger situation or the prevalence of any anticompetitive practices.
• FTC has the authority to review the price of any article and hold an inquiry on the price of the commodity.
• Under the 2003 law, Consumer Protection Authority (CPA) will have investigative and prosecutorial power, while the Consumer Protection Council will have adjudicatory powers. CPA will however have the adjudicatory power in consumer protection-related cases.

Kenya
• The role of the Commission is to receive complaints and investigate them while also initiating investigations and making recommendations to the Minister on what action to be taken on possible breaches of the Act.
• The Restrictive Trade Practices Tribunal established under Section 64 of the Act operates independently as the Court of first appeal and falls administratively under the Ministry of Finance and Planning.

Tanzania
• The current Fair Trade Practices Commission is not independent of the hierarchical structure of the parent ministry.
• Trade Practices Tribunal has been established as the appellate body
• The Commissioner for Trade Practices is responsible to monitor, investigate, evaluate, prosecute, issue orders, impose penalties or otherwise resolve alleged contravention.
• The Tribunal has jurisdiction to hear and determine any complaint relating to trade practice, to inquire into any matter referred to it and to issue orders.
• Appeals from decisions of the Tribunal are limited to judicial review.

Zambia
• The ZCC is empowered to monitor, control and prohibit acts or behaviour likely to adversely affect competition and fair-trading in the country subject to ministerial over-ride.

Generally, as may easily be gathered from Article 15 (1) of the Ethiopian Proclamation, the Commission seems to be having a dual characteristic. On the one hand it is an investigating organ, much like that of a prosecutor, and on the other it is also an adjudicating organ, just like any judicial organ. As has been discussed in the general part, this practice of dual function of the competition authority is not so common a practice in many countries. The prevalent practice appears to be separation of functions. Competition authorities are normally confined to studying trends of market competition, investigating breaches of the law and prosecuting cases of breaches, while either a separate quasi-judicial organ, either within the authority or an independent one, or a specialized or ordinary bench within the judiciary is entrusted with the task of adjudicating competition cases. Viewed from this perspective, the Ethiopian approach is a little bit different and unusual since the same organ renders judgment on a matter that it has investigated.
It is the opinion of the consultant that it is better if we opt for a separation of functions than consolidation for the age-old reasons of separation of powers and a system of check and balance. The tenets of procedural rule of law command that an independent organ adjudicates justiciable matters. Furthermore, attention should also be given to the distinctive difference of these two tasks. Leaving the details, we want to remark that the two tasks are without doubt distinctively different types of tasks. They even require different sets of procedures, and also different types of expertise. Furthermore, the separation of functions would also give us the opportunity for the gradual development of specialized expertise in these two fields. Accordingly, the longer the state of such consolidation of functions, the more chances are lost in boosting specialization of functions, and through it, an enhanced capacity to deal with competition cases. But, once we leave the authority or an independent department within the authority with the investigative and prosecutorial functions, the question of to which organ we have to entrust the adjudicative function is something we will turn to in the coming pages. The options are, as mentioned above, the following: the regular courts or a specialized bench within the regular judiciary, an independent quasi-judicial organ, or a similar organ as an independent department within the competition authority.

The Commission in practice is a lot more of an adjudicatory organ than an investigating one. As stated above it works in a fashion very much akin to the regular courts. As most of its cases are unfair competition cases dealing with goodwill misappropriation that are brought by private parties, most of the proceedings before the Commission are like any other ordinary civil suit before any regular civil bench of the judiciary. It has indeed compelled persons to appear before it and received their testimonies, but even that is in the course of an ordinary court-like proceedings. However, it has seldom chosen to use other techniques of investigation such as visits to firms, examination of documents and persons, or even the employment of experts that aid in the investigation works. In short, it has not in practice made use of even the little powers it had been given.

One of the problems of the Commission is its lack of any procedure for the disposition of its duties of investigation and adjudication. As can easily be gathered, the prosecutor’s tools and procedures are different from that of the adjudicator’s. Procedural issues of prosecution mostly deal with the safeguards that should be put in place when persons are to be summoned and questioned or premises are to be searched, and other related acts of investigation. Indeed, it also deals with issues of how the
process of investigation is to be set in motion, including the manner of how complainants are to lodge their complaints and accusations. On the other hand, the adjudicator’s tools and procedures, quite different from that of the investigator’s, mostly deal with the manner of receiving pleadings and admitting evidence and then, based on these, pass a judgment. It is also true that the adjudicator’s procedure must incorporate rules that determine the persons who have the right to bring the actions, and how formally they have to lodge their actions. In the Proclamation, it has simply been stated in such a way that an aggrieved party may bring a compliant before the Commission. But, what kind of a person is an aggrieved party? For instance, it is not clear if it is possible for any administrative agency, including the Ministry of Trade and Industry and the police, to submit complaints of violations of the provisions of the Proclamation.\textsuperscript{165} Obviously, it is difficult to think of such organs as aggrieved parties.

As stated above, at present, the Commission does not have complete sets of procedures. The Proclamation in Article 19 empowers the Commission to "...develop rules and directives of procedure to..." enable it to "...efficiently undertake its powers and duties." Furthermore, these procedures are to be adopted by a special majority decision of two-third of members of the Commission. Two observations would at once be made here. Firstly, it is difficult to imagine this directive of procedure to be of the types which have been highlighted in the preceding paragraph. As procedural rules of the type in the preceding paragraph have the potential to affect the basic rights of individuals they are normally to be enacted by the appropriate legislative organ having the constitutional power to enact such laws; and not lower organ of administration such as the present Commission. Secondly, the Commission has not as yet issued a complete set of procedural rules. What it has issued so far is a rule governing how and when it will conduct its meetings.

In practice, as stated above, the proceedings of the Commission look more like the proceedings of an ordinary civil suit before the regular courts. Even the parties, who mostly are private ones, tend to make use of the provisions of the Civil Procedure Code of 1965 when they plead before the Commission, either orally or in writing.

The next point of inquiry is what the Commission’s powers are after it finds that an act contrary to the Proclamation has been committed. Generally
speaking, it may order remedial actions that may include cease-and-desist orders and also measures that would restore the victim’s competitive position. In addition to these, it may also order what may truly be regarded as administrative measures, which are suspension or cancellation of business licenses and also seizure and selling of goods that are subject to price regulation (Article 25).

Aside from these remedial and administrative measures the Commission is also empowered to impose penalties, all of which are fines. The relevant provision, which is Article 26, states that violation of the provisions of the Proclamation may entail a fine of up to 10 percent of the value of the total assets of the violator or, in the alternative, 15 percent of yearly gross total sales. Furthermore, accomplices to the act of violation are also to be punished by a fine ranging from Birr five thousand up to Birr fifteen thousand.

Cases abound in which the Commission has imposed penalties. In almost all the cases concerning violations of the provisions of the Proclamation, the Commission had imposed penalties whenever it was satisfied that a violation had occurred. This is so even if the cases concern unfair competition, which indeed, are by far the types of cases the Commission has been preoccupied with. Thus, in a typical unfair competition case before the Commission in which the plaintiff alleges infringement of its registered or unregistered trademark, if the Commission finds that the plaintiff’s mark is a protected one and also that the defendant’s act is infringing, then what the Commission would typically order is the cessation of the marketing of the defendant’s products or services bearing the alleged mark, after which it will fine the defendant. The amount the defendant pays goes to the coiffeurs of the government, since it is a penalty. It might appear a little bit odd that in a typical civil action involving civil case and brought by a private party, the Commission would impose penalty as though the case was a purely criminal or an administrative one.

Incidentally, mention should also be made at this juncture of the fact that the Commission had declined to award compensation to victims of an anti or unfair competition act. The Commission has consistently been of the opinion that it is not empowered by the Proclamation to award damages. For instance, in one case involving a dispute between an association of salt producers in Afar Region and one of its members who wished to deviate from the decision of the association, the plaintiff had in its statement of claim prayed for compensation of the damage he alleged to have sustained as a result of an anticompetitive decision of the association’s board.\textsuperscript{150} The

\textsuperscript{150} Hagos Hailemichael \textit{et al.} Vs. Mukur Salt Production Plc. File No. 01/09/30 decided on 06/04/99 (EC)
association was established by salt producers in an area called Afdera in Afar Region whose purpose was to allocate production quota to its members and also fix the price of salt which each member had to respect. By denying access to some of the benefits of being a member, the association had a means of ensuring that its members would obey its decisions. Even though the Commission easily found the acts of the defendant anticompetitive and ordered its cessation, it however declined from entertaining the plaintiff’s claim for compensation on the grounds mentioned above.

It is indeed true that there is a provision in the Proclamation which appears to indicate that the Commission has the power to award damages. This is Article 25(3) in which it is stated that the Commission can “…take any appropriate measure that enables the victim’s competitive position to be reinstated.” The question that at once would arise is whether, in the face of such a wording of the legislation, it is not possible to reinstate the plaintiff, through the award of damages, to the competitive position it had lost as a result of the defendant’s acts. What if in the above case it was possible for the plaintiff to show that he could have made more profits, at least in the short run, by producing more and selling it at a competitive price? Wouldn’t it have enabled the plaintiff to gain some lost ground if he was to be awarded this lost profit? This is indeed open to differing opinions.

Though the Commission is empowered to exercise such powers, its decisions are not final. All its decisions, including its penalty decisions, are subject to the approval of the Minister of Trade and Industry (Art. 15 (2)). It is further provided in Article 15 (3) that the Minister, to whom a decision of the Commission has been submitted, may approve, amend or remand for review any decision of the Commission. Moreover, it is the Ministry, which is authorized to execute any administrative measures or/and penalty decisions of the commission that have been approved by the Minister (Art. 16 (1)), for which, if it finds it necessary, it may order the police force in order to execute the same.

Decisions of the Commission which have been approved by the Minister are appealable. The appeal may be lodged to the Federal High Court within 30 days from the date the appellant was aware of the approval of the Commission’s decision (Article 17). The Federal High Court has designated a specific bench to entertain cases arising out of the Commercial Code and Trade Practices Proclamation.157

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157 In matters where the Commercial Code of 1960 and the TPP overlap, as in the case of unfair competition, the Ethiopian Supreme Court has determined that the matter must first be brought before the Trade Practices Commission.
It clearly transpires from the foregoing discussion that the Commission's powers are confined to just investigating and trying cases of violations of the Proclamation. Even its investigative powers rely upon a case being brought before it by an aggrieved party. It cannot on its own initiate investigation of probable violations. Viewed from the perspectives of the experiences of other countries, this is very much a limited power. It is to be recalled from the discussion in the general part that competition authorities have in addition to their powers of investigation are also entrusted with the task of carrying out such other tasks that would enhance the competitive culture of markets. This includes activities aimed at studying different markets and taking or recommending appropriate measures that would improve the competitiveness and transparency of markets. Furthermore, it is also normally desired that competition authorities act as active advisors to both the executive and the legislative branches, whenever they are to take measures in their own spheres that may have repercussions on the competitiveness of markets. They are also expected to make unsolicited recommendations to these organs of the state. It is also common in many countries for competition authorities to be entrusted with the task of authorizing exemptions from the application of parts of the competition law rules and also studying the effects of proposed mergers and acquisitions and also authorizing the same.

The Ethiopian Competition Commission does not have any of these very important powers. As discussed elsewhere in this report, competition is a complex and multi-dimensional socio-economic issue. Evidently, it cannot prevail simply because a nation has a good competition law and strong enforcement agencies. As has transpired from the report on the general part, competition is basically an economic phenomenon intrinsically related with the size and performance of markets and the overall economy. The purpose of competition law is to keep an otherwise sizable and potentially competitive market from artificial forces that may hinder competition. In overly agrarian economies like Ethiopia in which subsistence-based farming prevails, and with a very poor level of total production output, the initial challenge would be lifting the whole market up, boost productivity, and put in place the necessary infrastructure. That in turn would facilitate the creation of markets which will have the potential to invite so many participants. In these state of things, we also need an authority that has the power and responsibility to be engaged in research, advisory and advocacy works.

As for the manner of discharging its duties, the Proclamation set up the Commission in such a way that the conduct of its business shall be carried out through a regular and extraordinary meeting of the Commissioners.
The Proclamation under Article 14 requires the Commission to regularly meet once in a month unless it finds it necessary to hold meetings within less than a month. By having regard to the powers of the Commission, which will be discussed in the subsequent part, it appears that these meetings were envisaged to serve as the venue in which the Commission would discharge its main statutory duty, which is to investigate and adjudicate cases falling under the Proclamation. It thus ideally required the presence of all of the Commissioners, or aptly judges, to assemble and conduct their business in a manner similar to a quasi-judicial organ. Observation of the proceedings of the Commission indicates that it has been conducting its business in so similar a manner as that of an ordinary judiciary. It sits in a room which also has a good number of seats not only for the parties but also other spectators. In short it had been running public trials of cases brought before it. As far as decision making is concerned, the Proclamation provides for a rule of majority vote, and also for the chairperson to have a casting vote in cases of tie votes. But, we have not come across cases in which the Commissioners had to be divided in their decisions.

When we come to the question of whether the meetings have been as regular as desired it is readily observed that they have not been so. Absenteeism has been a recurrent problem, often times frustrating the conduct of business due to lack of the necessary quorum. The Proclamation provides that more than half of the Commissioners/judges be present to permit the conduct of business. However, instances abound in which even three members would not show up for meetings, thereby disabling the Commission from starting its business. The busy schedule of members has been blamed as the cause. This is observed to be an outcome of none other than the fact that they shoulder other huge government responsibilities. It is the opinion of the Chairperson of the Commission as well that this fact has to a certain extent contributed towards the overall weakness of the Commission, in spite of the members commitment to hold regular Commission meetings, which however has seldom succeeded due to the busy schedule of its members. Even though it has got some 38 decisions to its credit over the past five years, which is so low a number for that duration, it must be remarked that the members of the Commission have not been giving it the due attention that it desperately needed. It could be said that their main duties in their other offices, which indeed are demanding, have forced the Commissioners to regard their duties in the Commission as something of a secondary or even lower importance.

As things stand now, the Ethiopian commission could be summed up as just an active adjudicator, but a very weak implementer of the law. But, mention

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Interview with Ato Harka Haroye, the Chairperson of the Trade Practices Investigation Commission
should be made that even at adjudication its potential appears to be heavily skewed one. Around 80 percent of the cases it has so far tried are private disputes over mainly trademark infringement cases, whose contribution towards competitiveness of the markets is not as pronounced as would have been if the competition law part of the Proclamation were to be enforced better.\textsuperscript{159} In conclusion, both the enforcement and implementation of the competition law is rather weak.

(c) Institutional Autonomy and Accountability

The Commission established by the Trade Practice Proclamation is accountable to the Ministry of Trade and Industry. Moreover, its mandate is limited to conducting investigations upon a formal complaint from an aggrieved party and submitting the result of its verdict to the Ministry with suggestions on administrative measures or penalties to be taken if found offensive. The Ministry can either fully accept, or alter, or totally drop the decision of the Commission. Thus, the Ministry of Trade and Industry is the highest body authorized to deal with the implementation of the proclamation. Though the Commission has a Trade Practices Secretariat, it is significantly accountable to the Minister rather than the Commission. In addition, as the Commission is an agency of the Ministry of Trade and Industry, it does not have its own budget.\textsuperscript{160} Thus, the Trade Practices Commission established by the Proclamation is both structurally and functionally a department within the Ministry of Industry. In this context, one would be hard pressed to find any relevance in discussing institutional autonomy; be it structural, operational or budgetary.

The meaning of structural autonomy is as discussed in the general part of this report. Basically, it relates to whether or not the competition authority, in our case the Commission, is a legally independent body or part of a government department. We have also reported that the prevailing practice in many countries favors an independent regulatory agency with substantial autonomy from a line ministry.

The Ethiopian scenario is very much different in this regard. Right from the beginning the commissioners are appointed by the Prime Minister upon recommendation by the Minister of Trade and Industry, allowing the Minister to have a control on who becomes the Commissioner. This would

\textsuperscript{159} So far the Commission has adjudicated/investigated 38 cases out of which 24 are unfair competition cases and just five are cases dealing with competition law. The rest are cases of improper jurisdiction, which the Commission rejected right at the beginning.

\textsuperscript{160} Kibre Moges, Policy Induced Barriers to Market Competition in Ethiopia, CUTS Centre for Competition, Investment & Economic Regulation, 2008 (Website: www.cuts-ceir.org), p. 21
not have been that much of a threat to the Commission’s independence and autonomy if it were not possible for anyone to dismiss them except with a cause stipulated by law. However, the Proclamation does not have a single provision dealing with the matter of removal of the Commissioners. It may therefore validly be argued that it is not impossible to remove a Commissioner without a good cause; and this may prove to be a probable source of insecurity. Good competition statute must provide that officials of the competition authority may not be removed unless for a specified cause, as discussed in the general part.

But, as stated above, the crucially important matter is the independence of the Commission. As it is now in the proclamation, it is completely engulfed in the structure of the Ministry. More threat to the structural autonomy is the fact that its Secretariat and entire support staff are employees of the Ministry, coming under the direct control of the Ministry. The staff needs of the Commission, the terms of employment of employees, their salaries, promotions and dismissal are all determined by the Ministry. The Commission thus cannot control the Secretariat and its staff. This kind of structure appears to be an unusual one since the Commission is not in charge of its own support staff. At present, the Commission has just four employees, two of which are secretaries, one is an expert and the last one is an archives controller. It is quite difficult to imagine the Ethiopian competition law regime being managed by just this very few individuals.

Operationally too, the Commission is fully subsumed within the Ministry. Even though it is commendable that it is a multi-member body made up of experts from relevant fields, the fact that its decisions are subject to the approval of the Ministry gravely undermines its operational autonomy. As mentioned above, the fact that the Commissioners are senior government officials with huge other responsibilities has also seriously weakened its ability to be in full command of its tasks, and has also wasted away its chance of becoming one full, dedicated and vibrant body with long and short term plans of its own. Reflecting its lack of structural and operational autonomy, it must also be remarked that the Commission is not at all visible in the budget as an independent body. It shares from what is allotted to the Ministry, and it is the latter which determines how much goes to the Commission.

Summing up, it is quite evident that the competition authority is not the ideal type of authority enjoying an appropriate working atmosphere. In the light of its legal set up, it is a weak and passive organ.
The following is a discussion of the practice among countries with a view to laying the basis for findings and recommendations on institutional autonomy and accountability issues.

**Structural Autonomy**

Structural autonomy, also called de jure independence, relates to whether or not the institution mandated to regulate competition is a legally independent body or part of a government department. According to a recent multi-country study, “an effective regulator will typically have its mandate clearly defined by law and will not be subject to ministerial control and discretion or the agency’s status outside the executive and legislative branches of Government.”

A study of regulatory regimes in 23 OECD countries has identified the following four institutional approaches:

- **Independent regulatory agencies**: These are “autonomous bodies, provided with specific powers and are governed by one or several commissioners, appointed for a definite and non-revocable period”. The US, UK, Canada and Australia are among the countries identified as having established independent regulatory agencies for competition issues.

- **Independent advisory agencies**: While similar to independent regulatory agencies in purely structural terms these institutions “provide advice to the Ministry and are responsible for monitoring and arbitration, but have no definite regulatory powers”.

- **Ministerial agencies**: These are “institutions formally subordinated to the line ministry and managed by a president or director, appointed for an indefinite, but revocable, period ... (which) ... operate on a separate budget, under an autonomous management, and may be subject to a differentiated legal framework”.

- **A fourth option**, which has been reported in The Netherlands, involves the administration of competition law and regulation by a government ministry.

The majority of competition law regimes provide for a legally independent institution with substantial administrative autonomy from vertically-integrated ministries. Examples include the UK, Canada, Australia, India, South Africa, Sri Lanka, Tanzania, and Zambia. Ministerial agencies specifically mandated to regulate monopolies are also common. Such

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161 (BottomUp Study, p. 21)

Institutions have been found in Finland, Hungary, the Netherlands, Norway and Sweden. The Antitrust Division of the United States Department of Justice may also be considered an example though its mandate extends only to the criminal aspects of competition law.

Independent advisory agencies are few and generally found alongside an autonomous or ministerial agency. A typical example is Mauritius where the Competition Act (2003) establishes a competition advisory council as well as an Office of Fair Trading. Other countries having established similar institutions include Belgium, Greece, Luxembourg and Spain. Even fewer countries have established their regulatory institutions as semi-autonomous departments under a Ministry. The following are examples:

- The Monopolies and Prices Commission of Kenya is established under the Ministry of Finance and Planning;
- In Mauritius the Office of Fair Trading as a public office is accountable to the Ministry of Commerce and Co-operatives;
- The Namibia Competition Act (Act no. 2 of 2003), which is yet to come into force, provides for the establishment of the Namibian Competition Commission (NaCC) accountable to the Minister of Trade and Industry; and
- In Malawi the Competition and Fair Trading Commission reports to the Minister for MTPSD.

In general, the trend appears to favor independent regulatory agencies with other structures usually taking a supplementary role in a multi-agency institutional framework.

**Operational Autonomy**

The second aspect of institutional independence is operational or functional autonomy. This relates to the decision making structures and processes within the competition authority. The following have been identified as the most critical elements in this respect:

- The agency’s governance structure should consist of multi-member commissions composed of experts.
- Senior personnel should enjoy security of tenure: clear rules, ideally involving two government bodies, must govern their appointment and, especially, dismissal.

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164 Bottom Up, p. 21
• The tenure of appointment for members should be long enough to allow members to develop expertise without developing entrenched positions.\(^{165}\)

The ideal competition authority is "a multi-member body made up of experts in law, economics, business administration and international law... to ensure the independence and quality of the personnel".\(^{166}\) The members of such a body are preferably appointed for non-renewable terms through a process involving more than one government branch and may only be removed for causes prescribed by law. The rationale is that "the appointment of competition officials by a minister is considered less conducive to independence" and "competition officials whose terms are not renewable and cannot be removed from office except by legal procedure have less of an incentive to please those who appointed them".\(^{167}\)

In most legal systems, the competition authority is established in the form of a multi-member commission with representatives from government, industry and consumers. Some countries have opted for a competition authority with its investigative arm established as a department within a ministry and the adjudicative arm as a commission or council. Examples include Brazil, Burkina Faso, Panama, Tunisia and Vietnam.\(^{168}\) The practice also shows a general trend "away from the appointment of public officials towards the appointment of trained economists and lawyers".\(^{169}\) In Italy the individuals must be members of the supreme administrative court, court of cassation, university professors or respected business executives of particularly high repute.\(^{170}\)

Most competition laws provide for the representation of stakeholders in one form or another. For instance, the Malawi Competition and Fair


\(^{170}\) A few of the laws provide for additional criteria such as minimum age in the laws of Brazil and the Bolivarian Republic of Venezuela and prohibitions on affiliations to associations of any kind in Croatia. The laws of Costa Rica and Zimbabwe require members to undergo psychometric tests.
Trading Commission comprises of ten members—two representing business interests, two representing consumer interests, three professional appointees, and three ex-officio members representing government departments—all of whom are nominated by the responsible minister and appointed by the President.\textsuperscript{171} An even more diverse representation of stakeholders is provided for the Zambian Competition Commission wherein the Board of Commissioners includes:

"Two people representing consumer interests and representatives from the Law Association of Zambia; the Zambia Federation of Employers; the Economics Association; the Zambia Congress of Trade Unions; the Institute of Certified Accountants; the Engineering Association of Zambia; the Zambia Bureau of Standards; the Zambia Association of Commerce and Industry; the Zambia Association of Manufacturers; the Ministry of Commerce, Trade and Industry; the Ministry of Finance and Economic Development".\textsuperscript{172}

Competition laws providing for the mandatory representation of consumer groups and professional associations in the competition authority include those of Denmark, Swaziland and Switzerland.

One of the few exceptions is the Office of Fair Trading in Mauritius which consists of public officers.\textsuperscript{173} Even in this case, the Office is complemented by a multi-member ministerial advisory council with representatives of the Mauritius Chamber of Commerce and Industry, two representatives of consumer organizations and five experts along with government officials.

Another exception is the Namibia Competition Act which proposes a competition commission composed solely of experts appointed by the overseeing Minister. Section 5 (2) of the Act directs the Minister of Trade and Industry to appoint experts "who in the opinion of the said Minister have expertise in industry, commerce, economics, law, accountancy, public administration or consumer affairs".\textsuperscript{174} The following examples indicate the various approaches to the appointment of members across competition law regimes:\textsuperscript{175}

\textsuperscript{171} BottomUp, p. 95
\textsuperscript{172} PullinUp, p. 52
\textsuperscript{173} BottomUp, p. 128
\textsuperscript{174} BottomUp, p. 177
• In Denmark and Singapore, the minister with primary competition policy mandates appoints the chief executive of the authority and the members of the commission.

• In Indonesia, Jamaica and Zimbabwe, the minister appoints the board of commissioners with or without endorsement from a higher authority, and the commissioners appoint the chief executive.

• In Burkina Faso, Costa Rica, Czech Republic, Slovakia, Tunisia, Uruguay, Vietnam and Switzerland, the minister submits nominations for appointment by the country’s president, prime minister, cabinet of ministers or Parliament.

• In Australia and Bosnia and Herzegovina, each State nominates a member of the commission.

• In Albania, the Parliament, the cabinet and the presidency all nominate members to the board.

• In Italy, nominees to the board of commissioners are vetted by Parliament.

• In Panama, nominations for members originate from the presidency and appointments are confirmed by Parliament.

• In Japan, the Emperor approves Parliament’s appointments and dismissals of members.

Even though ministers appoint the members of the competition authority in most legal systems, the members and especially the chief officials cannot be dismissed except with cause stipulated by law. There are, however, some exceptions to this general trend. A case in point is Sri Lanka where the Minister of Internal and International Trade and Food not only appoints the members of the 13 member Fair Trading Commission but can also remove any member of the Commission by simple order, without having to provide any reason for the removal.176

The conditions of service of competition officials also vary among legal systems. For example, the laws of Indonesia, Jamaica, Swaziland, Turkey and Zambia provide for part-time appointment of members subject only to conflict of interest rules while their counterparts in Italy may not be engaged in any other professional or business activity or hold another public

\[176\] Pulling Up Our Socks - A Study of Competition Regimes of Seven Developing Countries of Africa and Asia under the 7-Up Project, CUTS Centre for Competition, Investment & Economic Regulation and DFID, 2003, p. 53
office. Though the tenure of members and officials similarly varies among legal systems, most provide for limits in the form of fixed terms like in Italy, non-renewable terms as in Slovakia and Uruguay, or maximum years of service in Switzerland.

**Budgetary Autonomy**

The other aspect of independence, which is usually considered part of operational autonomy, relates to the source and allocation of budget. The concern here is “the use of budgetary restrictions as a way of curtailing or penalizing enforcement”. Generally, the allocation of annual budgets of the competition authority as a block grant directly by the legislature is considered to permit the authority a high degree of budgetary autonomy. Ideally, competition authorities should also have access to “independent sources of funds, such as user fees or levies on the regulated industry” with rates determined by the law establishing the agency. If, on the other hand, the budget is allocated by the government, it “should come from the general budget and without strings attached”.

The more prevalent practice among countries is to provide for the allocation of funds directly by the legislature. The competition authorities of Albania, Bosnia and Herzegovina, Bulgaria, Colombia, Pakistan, the Russian Federation, Singapore and Slovakia submit budget requests directly to the finance ministry or treasury. In some cases, the authority may raise and retain additional funds from fees. For instance, competition authorities in Australia, Peru, Zimbabwe, South Africa and Turkey can receive income from filing fees in addition to budgetary allocations by their respective legislatures while the Fair Trading Commissions of Sri Lanka and Jamaica have to do with parliamentary allocations. In some cases, the extra-budget sources account for the bulk of the funds for the competition authority:

“Filing fees and service fees accounted for over 70 per cent of revenue receipts of the South African Competition Commission – reportedly one of the best funded in Africa – and financed over 64 per cent of its 2006/07

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178 UNCTAD, 2008, p. 9
179 BottomUp, p. 22
180 BottomUp, p. 22
181 Pulling Up Our Socks – A Study of Competition Regimes of Seven Developing Countries of Africa and Asia under the 7-Up Project, Cuts Centre for Competition, Investment & Economic Regulation and DFID, 2003, p. 53; and UNCTAD (2008), p. 9
expenditures ... filing fees accounted for around 30 per cent of the Zambian Competition Commission’s 2007 budget.”

On the other hand, some countries, especially those having established their competition authorities as semi-independent departments within government ministries, leave the allocation and utilization of budgets to the overseeing ministry. A case in point is Malawi where the MTPSD determines budgetary issues for the Office of Fair Trading. Similarly, budgetary allocations for the Namibian Competition Commission go through the Minister of Finance and Trade. Other countries where the competition authority’s budget goes through the parent ministry include the Bolivarian Republic, Venezuela, Japan, Latvia, Panama, Turkey, Uruguay, Vietnam and Zimbabwe. In Brazil and Tunisia, the competition authority’s budget is part of the allocation to the ministry and dispensed at the discretion of the responsible minister.

Administrative Accountability

Competition authorities are government agencies operating with public funds. As such they are subject to the normal accountability structures and procedures applicable to the public sector. Moreover, accountability mechanisms in the form of checks and balances and review procedures should be in place “to ensure that the authority does not act over-zealously”.

The enabling legislation often prescribes performance reporting mechanisms such as annual reports to the legislature and duty to place reasoned decisions on public record. Similarly, financial accountability is usually integrated in the budgetary process in the form of financial reporting periodically or at key stages of the process.

For most countries, financial audits and periodic reports are the major instruments of accountability with an emerging recognition of the need for “assessment of the overall effectiveness and impact of competition enforcement”. In some countries, competition authorities are required to submit a detailed operational strategy along with requests for budget allocation. The following are some examples:

182 UNCTAD. 2008, pp. 13-14
183 BottomUp, p. 95
184 BottomUp, p. 177
185 UNCTAD (2008), p. 11 (For example, the United Kingdom’s Office of Fair Trading is subject to quinquennial reviews that are a recent requirement for all agencies and non-departmental public bodies. This is an important recognition, in particular for developing countries.)
• UK’s Office of Fair Trading is required to prepare an annual statement of intent that outlines objectives and specific deliverables (indicators).

• In Latvia, the operational strategy covers a three-year period.

• In Australia, the competition authority is required to respond with a Statement of Intent to the Minister’s annual Statement of Expectation that outlines relevant government policies and priorities that the competition authority is expected to observe in its operations.

(d) Separation of Functions

The Ethiopian Trade Practices Proclamation does not make any structural or functional distinction between the investigative and adjudicatory functions of the Commission. Among the powers of the Commission listed in the Proclamation are found investigating complaints by aggrieved parties (15/1/a), compel witnesses to testify at hearings (b), and give decisions on complaints (g). The practice of whether or not to separate the investigative and adjudicative powers varies across countries. In many countries, the competition authority is not mandated to carry out adjudicatory functions which are instead exercised by the regular courts or special benches within the court system:

• The Antitrust Division of the US Department of Justice only has investigative and prosecutorial powers and has to take its cases to court for adjudication.

• The Zambia Competition Commission does not have the mandate to issue legally binding final orders prohibiting conduct found to have violated the competition law and has to take all cases to a court of law for adjudication.

• The powers of the Namibian Competition Commission do not include adjudication.

The majority of legal regimes, however, provide for a framework wherein adjudicatory functions are exercised by separate sections of the competition authority or an independent administrative tribunal:

• The 2003 law in Sri Lanka creates two separate bodies — Consumer Protection Authority to investigate practices/cases and Consumer Protection Council to adjudicate competition cases.

• South Africa has a Competition Commission with primary responsibility for determining and investigating cases under the Act, and a Competition Tribunal to rule on most cases.
• Tanzania has the Fair Trade Practices Commissioner and the Appeals Tribunal.

• In Mauritius, the decisions of the Office of Fair Trading may be appealed to the Competition tribunal.

In such cases, the competition law almost always provides for appeal to the judiciary on the decisions of the competition authority. However, according to the International Competition Network (ICN), most legal systems limit the appeal on competition cases to procedural review of the law “... whereby the appeal body confines itself to a consideration of the law, including a review of procedures adopted by competition authorities in the exercise of their investigative and decision-making functions, rather than a consideration de novo of both evidence and legal arguments”.\textsuperscript{186}

Accordingly, the role of the courts is to ascertain whether the competition authority has abused its discretionary powers. Lack of jurisdiction, procedural irregularities, error of law, defective reasons, manifest error of appreciation, and error of fact are among the grounds for appeal in most laws. This appellate jurisdiction may be exercised by the normal courts or a specialized competition bench:

• **In South Africa**, a specialized Competition Appeals Court has been created within the High Court to entertain competition cases.

• **In India**, decisions of the Competition Commission can be appealed against in the Supreme Court.

• **The decisions of Pakistan’s Monopoly Control Authority** can be appealed before both the High Courts and the Supreme Court.

• **The Federal Trade Commission of the US** has both investigative and adjudicative functions with rights of appeal to the courts.

• **The European Union’s Directorate General for Competition (DG-COMP)** performs both investigative and adjudicative functions and these functions are only separated at the appellate level (Court of First Instance or European Court of Justice).\textsuperscript{187}

• **In Mauritius**, the decisions of the Office of Fair Trading may be appealed to the Competition tribunal and any party dissatisfied with the determination of the Competition tribunal may appeal to the Supreme Court.

\textsuperscript{186} UNCTAD, 2008, p. 10

\textsuperscript{187} This bundling of investigative and adjudicative powers is increasingly being criticized by both competition lawyers and businesses, especially with respect to merger control. The main critique is that there are not enough checks and balances in the system.
One point worth mentioning may be that, irrespective of separation or consolidation of functions, judicial review in many countries is either confined to administrative courts or the administrative court is the court of first instance. Examples include Venezuela, Colombia, Croatia, Latvia, Tunisia and Turkey. This has been attributed to the need for expertise in areas other than the law to adjudicate competition cases. A different approach has been adopted by some countries, such as Denmark, Singapore, South Africa and the United Kingdom, which have constituted specialized competition appeal courts within the judiciary.

(e) Competition and Consumer Protection Mandates

In the following paragraphs we will try to see how the interface or linkages between competition and consumer protection policies and laws affects the structure and operations of the competition authority.

While the substantive linkages between competition and consumer protection have come to receive wide recognition, there is still substantial debate on the advantages and disadvantages of institutional integration of enforcement. The dilemma here starts from the very nature of policies and laws in the two areas.

From the perspective of the interests accommodated and actors involved, consumer protection is more diverse and goes beyond ensuring the efficient allocation of resources. In fact, competition regimes (policies, laws, etc) are only one among the various mechanisms for consumer protection. On the other hand, competition cases are broader in scope in the sense that they affect entire markets while consumer protection cases typically involve a specific practice by a single firm. The regulatory tools available to competition and consumer protection purposes are also different. Thus, "as a practical matter, there are differences in how those policies work, and in the nature of the process by which decisions are taken and implemented".188

In this context, the proponents of integration in the enforcement of the two areas stress that it would have the effect of clarifying jurisdictional issues, enable the comprehensive treatment of issues from both perspectives, focus enforcement on non-price competition, and bring about a more consistent implementation of regulatory policy.189 Others, on the other hand, point out the limits of such integration and advice a more cautious approach

189 Spencer Weber Waller, In Search of Economic Justice, 2005, p. 637
involving the consolidation of competition and consumer protection mandates at the supervisory level. Thus, they argue:

“whatever view is taken of the appropriate degree, if any, of institutional integration of competition and consumer law enforcement, an important goal should be as a minimum to ensure that the competition policy authority has the expertise required to monitor developments in the design and administration of consumer policy and to act as an advocate for competition in the consumer policy process; similarly, consumer agencies should arguably, have the skills to monitor and assess competition issues”.

From the perspective of effectively implementing provisions relating to market competition as such, i.e., regulation of anticompetitive behavior and market structure, it might be advisable to have separate competition and unfair competition laws. The practical argument here is based on the dominating nature of unfair competition cases due to incidence of smaller but more numerous complaints by affected firms. Competition issues, on the other hand, affect entire markets without an identifiable victim. This is especially true in the case of the Ethiopian Trade Practices Proclamation which does not mandate the Commission to investigate cases on its own initiative. For instance, out of the 16 specific cases reviewed for this study, 11 were found to be unfair competition disputes while only two involved claims of anticompetitive practices. The remaining three cases dealt with scope of application of the Proclamation.

The Ministry of Trade and Industry

The Ministry of Trade and Industry is an important organ for the implementation of the Proclamation. As discussed above and in regard to the implementation of the three major areas of the Proclamation, which are also the points of contact with the Commission, it is important in the following ways:

- It nominates Commissioners for appointment;
- It has the final say on the decisions of the Commission;
- It is the organ empowered to execute the approved decisions of the Commission; and
- It sets up a secretariat for the Commission and also manages it.

But, it must be noted that the Ministry has some other duties in the Proclamation. As noted above, it is given the power to authorize the conclusion of agreements, irrespective of being captured by Article 6, if it deems that they give more advantage to the nation than if they are prohibited.

Moreover, it is also given in Article 22 the power to regulate the prices of what the Proclamation terms as "basic goods and services". They are defined in Article 2 (1) as goods and services related to the daily material need of the consumer, the shortage of which in the market may lead to unfair trade practice. Additionally, the Ministry is given the power to determine the distribution, sales and movement of these so-called basic goods and services. (Article 23) This area of the Proclamation on basic goods and services is fraught with plenty of issues, prime among which is the manner of determining what a basic good or service is. The most baffling question is: what sort of a practice is to be deemed so unfair that it may be brought by a shortage of either a good or a service? It seems that the Ministry would make determination of what goods or what services are to be regarded as basic, even though a clear mention is not made to that effect. In general, especially given the fact that anything could possibly be a basic good or service, based on the wording of the definition, it appears that the Ministry's powers, alongside that of Regional Bureaus, is so wide, that one may start to question the limits of this purported price regulation and regulation of distribution. These, and the many other related issues, would undoubtedly invite abundant discussion; but they are outside the scope of the present study. Suffice it to note that once a certain good or service is deemed as basic, the marketing of this good or service would not anymore be subject to the competitive process of markets. The government takes control of its pricing and its distribution, in much the same fashion as in planned economy, which in effect means that it will not anymore be captured by particularly the competition law part of the Proclamation. By way of conclusion on this matter, the Commission does not have any say on the matters related to basic goods and services.191

191 However, the wording of Article 5 is really an eye-catching one. While providing for the non-applicability of certain provisions of the Proclamation, including on basic goods and services, it stated that it is the Commission which decides on their non-applicability. Obviously, it is not the Commission which determines what goods are basic and what are not. On the other hand, it seems not to make much sense for the Commission to sort of bless what the Ministry has already decided. Against these backgrounds, the only role open for the Commission is to make a determination of which specific provisions of the Proclamation would be inapplicable when a particular good or service is deemed by the Ministry as basic. But, even this understanding is not free from defects, particularly since the Commission is an investigating organ, and not an active regulator, as Article 15 (1) clearly says.
The Secretariat

The Secretariat’s role in the implementation of the Proclamation is mainly to serve as an executive of the Commission’s decisions. To that effect sub-articles (1) (a) and (b) of Article 18 state that the Secretariat shall implement the directives and execute the approved decisions of the Commission. What is more, the Secretariat, true to its name, also supports the Commission in terms of giving secretarial services, like keeping minutes, reports, decisions and other documents.

Interestingly enough, the Secretariat has one power that the Commission does not have; which is to carry out advocacy works. Article 18 (1) (d) states that the Secretariat shall prepare forums and disseminate information to enhance public awareness regarding the implementation of the Proclamation. In this regard, the Secretariat has so far organized three annual workshops in which it invited experts to discuss the implementation of the Proclamation.

Finally, mention should be made of the fact that the Secretariat is also duty bound to perform other functions as shall be determined by the Commission. But, this raises the question of to whom the Secretariat is accountable. As stated at the beginning of this chapter, the Proclamation has made the Secretariat a department under the organizational structure of the Ministry (Article 2 (9)). Nothing has expressly been stated as regards the accountability of the Secretariat. But, it appears that institutionally it is accountable to the Ministry while functionally it comes under the Commission. In practice as well, matters related to personnel and finance, and also to material needs of the Commission and the Secretariat are decided by the Ministry, and not by the Commission. However, in respect of matters that appertain to the tasks of the Commission, such as keeping records, it appears that the Chairman of the Commission is in command of the Secretariat.

Regional Trade and Industry Bureaus

A question that one may ask is how the institutional picture in the law appears in the light of the presently existing federal structure in the country. In exact terms, the question is whether the institutions now appearing in the Proclamation are unitary federal institutions having powers over all cases, wherever they arise, or whether the regions have been bestowed with some powers of their own as far as the implementation and enforcement of this Proclamation is concerned.

Countries following a federal state structure would be posed with the broader issue of how to implement competition laws within the framework
of the federation. The initial constitutional issue would be whether the jurisdiction to legislate on competition law falls within the federal government’s power or that of state government’s, or even, within what some countries call concurrent powers. Secondly, especially when the jurisdiction belongs either to the federal government or becomes a concurrent power, the issue of the involvement of states in the implementation of the law is the other concern. The general part of this paper has to a limited extent discussed how other countries have tackled these issues.

In Ethiopia, the understanding seems that all the major parts of the Proclamation, i.e. the competition and unfair competition parts of the law as well as the provisions on labeling and price regulation of basic goods, are within the federal government’s jurisdiction. The preamble seems to be clear in this regard, when it speaks of the need to make trade practices conform to the free-market economic policy of the country, and also of other country-wide needs for curbing anticompetitive acts and regulating prices of basic goods. Furthermore, Article 4 of the Proclamation states that the Proclamation applies to all persons involved in any commercial activity, without any further qualification as to the place where the activity must be carried out. Accordingly, there is no doubt that the scope of application thought by this provision is the whole of the Federal Democratic Republic of Ethiopia, thereby confirming that it is a federal law. Besides, it seems clear from the reading of Article 55 of the Federal Constitution that the power to enact a commercial code is a power belonging to the Federal legislature. This argument presupposes that all the major areas covered in the Proclamation could, when thematically thought, be categorized under the commercial code, even though they have been enacted in a piece of legislation. The only major part that may possibly cast doubt on this presupposition is that of the competition law, which may be argued to have more of an administrative law characteristic than it could be regarded as convenient candidate of the commercial code. At any rate, an argument based on Article 55 (6) of the Constitution could become handy for doubters even though they may allege that the House of Federation has not given its green light for the enactment of this proclamation.192

Regional organs have been given some limited power in this Proclamation as far as implementation; and particularly the implementation of the part on the regulation of price. Basically their power is confined to the determination of the distribution of basic goods and services as per Article 23. As mentioned

192 This constitutional provision provides that laws that are necessary to establish and sustain one economic unit could be enacted by the House of People’s Representatives, if the House of Federation believes that they are such kinds of laws. The House of Federation did not have a say in the enactment of this Proclamation.
above, since this is a part that is beyond the scope of this paper, not much can we say on it, except to once again point out that the determination of a certain good or service as basic has the effect of forestalling the application of the proclamation, since the marketing of such a good or service will come under government control. Clearly enough, none of what the Commission is supposed to do comes under the power of the Regions.

Lastly, Regional Bureaus have the power to issue public notices, which is also a power bestowed upon the Federal Ministry. However, even though the respective areas on which these two organs can issue these notices have not specifically been provided in the Proclamation, it seems that the power of the Regions cannot go beyond the regulation of the distribution of those goods and services deemed basic by the Ministry.

**Ethiopia’s Accession to the WTO and its Implications for Competition in Ethiopia**

**The WTO Accession**

In furtherance to the reform measures the country has been taking for the last 17 or so years, the Government of Ethiopia has decided to further integrate the country’s economy into the global economy by joining the WTO. Ethiopia has formally applied for accession to the WTO on 13 January 2003 and the WTO’s General Council has established a Working Party (WP) on 10 February 2003. The Memorandum of Foreign Trade Regime (MoFTR) was submitted in December 2006. Questions on different elements of the MoFTR were received and consolidated replies have been submitted in January 2007. The First WP Meeting was held in May 2008. It is expected that actual negotiations would start soon. The country has been an observer in the WTO since 1997.

**Timeline of Ethiopia’s WTO accession process**

- January 2003: formal application.
- February 2003: WP established.
- December 2006: MoFTR submitted.
- January 2007: answers for questions (from the US and Canada) submitted.
- May 2008: First WP meeting.

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193 Information available at http://www.wto.org/english/tratop_e/acc_e/etliiopia_e.htm
194 Ibid
The Accession Process to the WTO

The process of accession to the WTO is demanding and lengthy. In addition to formalities, the process involves three substantive phases:

- The applicant’s preparation of a MoFTR describing in detail its policies and institutions that have a bearing on the conduct of international trade;
- The fact finding phase based on questions and answers drawn from the MoFTR; and
- The negotiation phase.

To kick-start the negotiation process, the applicant would be required to submit its initial schedule of “offers” in goods and services. This consists of (a) the detailed schedule of tariffs the applicant proposes to impose on goods and the level at which the tariffs are “bound”; (b) The commitments (and limitations) it makes to maintain access to its market for services. This includes the so called “horizontal commitments” involving market access and national treatment which would apply to all service sectors, and commitments and limitations regarding the different modes of supply in the covered service sectors and sub-sectors. In addition the applicant is requested to make commitments regarding the level of support it plans to provide for its agriculture relative to a base reference period (usually three representative years before the application for accession) as well as other aspects of its support for agricultural trade (e.g. export subsidies).

Once these offers are tabled, the accession process enters its final phase, which involves specific bilateral negotiations between the applicant and each WTO member who wishes to hold them, regarding the tariff level or the degree of openness of the service sector proposed by the prospective member.

It is to be noted that the negotiation takes place in one direction only: the applicant is asked to demonstrate how it intends to meet the existing WTO provisions. Existing members can ask the applicant for concessions; but the reverse is not usually the case.

Potential Benefits of WTO Accession

As a benefit, joining the WTO may:

- Allow much greater access to foreign markets and larger export opportunities;

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Based on information from WTO (2005) supra
• Encourage much larger flows of FDI;
• Make local producers and manufacturers to be more competitive and international market focused; and
• Increase transparency and predictability (enhances discipline on the government and also on the other trading partners).

It is true that membership to the WTO may create more access to foreign markets and bring with it export opportunities to the business community. However, the main problems with Ethiopia's export is not lack of market access; at least for the short and medium terms, the main problem is lack of capacity to produce export products both in terms of quality and quantity. Yet, even if market access were a major problem for Ethiopia's exports, WTO membership may not necessarily resolve the problem since protectionism is still rampant in the WTO member countries and that market access still remains a bone of contention in the trading system itself, especially in relation to agricultural products on which Ethiopia has export interests.

By making the policies and laws of the country more predictable and transparent, accession to the WTO may encourage investors and bring in more FDI into the country. Nevertheless, WTO membership is no guarantee for increased FDI in the country though it certainly contributes to it. Investors will consider other factors like transport and communication infrastructure, reliable energy supply, administrative complexity and availability of skilled manpower. Even if FDI was to increase in volume as a result of accession, it does not necessarily mean that it will bring about economic development in the country.

In profitable domestic consumption sectors, foreign investments may overwhelm domestic investors (which may generally not be as strong as the foreign counterparts) and in some cases may eliminate them. When FDI enters the economy in sectors where there are competing domestic firms, or firms already producing for export markets, the very act of foreign investment may take away investment opportunities open to domestic entrepreneurs prior to the foreign investments. Moreover, MNCs may use their dominant position or resort to anticompetitive practices to control the market at the expense of the infant local firms. Given the very limited capacity of the competition agencies in countries like Ethiopia, it would often be difficult to investigate anticompetitive practices by the MNCs and take the necessary measures.
WTO membership is also taken as a means to ensure policy lock-in. Ethiopia has significantly liberalized its market over the period of the past one decade or so. WTO membership is a potent tool to tie the hands of the government from reversing earlier policies. Once a commitment is made at the WTO, whether on tariff rate or on the areas of services liberalization, the government cannot renge on its commitments without paying compensation to its trading partners. Paying compensation involves a politically painful process and the government is least likely to take such a risk by jeopardizing its political interests. This policy lock-in will serve not just foreign investors but will also be a guarantee for domestic investors from arbitrary measures of the government.

**Challenges and Costs of WTO Accession**

Both the industrial and agricultural sectors in Ethiopia are not in a position to compete globally and lack competitive advantage, economies of scale, cutting edge technology, marketing caliber and efficient production and distribution set up. The comparative advantage in labor has also not been fully utilized, due to its low productivity resulting mainly from lack of education and skill, poor health etc. Several supply side constraints such as lack of linkages within and between productive services and infrastructural sectors, underdeveloped human resources, shortcomings in production technologies, deficiencies in physical infrastructure, and inability to generate adequate resources to address its problems shall also overwhelmingly undermine the country’s capability to capitalize the economic opportunities of the world trading system. Other bottlenecks include transport and communication problems, lack of requisite credit facilities, cumbersome bureaucratic procedures, lack of data on exportable items, and lack of awareness among the business and private sector. All of these pose significant challenges in the competitive capacity of the local industries with the more advanced foreign firms. The infant industries being less armed with technology, efficient management and raw materials, may find it difficult to compete with the products coming from abroad, and may eventually collapse. In other words, a more liberal trade regime encouraged by the WTO membership may expose infant industries to stronger competition from abroad.

**Implications of the Accession for Market Competition in Ethiopia**

As discussed earlier, the implications of WTO accession are not limited only to the rules but extend to the modus operandi of the institution in charge of implementing the rules.
(a) Trade in Goods

The objectives of the multilateral trading system on trade in goods created by GATT is to provide industries and business enterprises from different countries a secure, stable and predictable environment in which they can tread with one another under conditions of fair and equitable competition. This objective is achieved basically by removing or regulating barriers to trade. GATT divides barriers into tariff and non-tariff barriers and encourages that if there is a need for protection of the domestic market, tariffs are better than non-tariff barriers. This is because tariffs are considered to be more transparent and predictable compared to non-tariff barriers. On the other hand, the GATT encourages the tariffs to be kept as low as possible so that they will not stand as unnecessary barriers to international trade. To this end, several rounds of negotiations were held under the auspices of the GATT with a view to promoting reduction of tariffs. Once tariffs are reduced through negotiations among members, they are bound against further increases.

One important concern that may have implications on competition in Ethiopia is the level at which the country binds its tariffs during the accession procession. As noted earlier, Ethiopia has been undertaking reform measures in its economy since the regime change in 1991. The country has radically changed its trade regime including tariffs, and abolished both quantitative restrictions and import quota. The maximum and the average import tariffs have been reduced from 230 percent to 35 percent and from 41.6 percent to 17.5 percent respectively.

Experience shows that acceding countries would be requested to bind all tariffs—while many developing countries continue to have a large portion of their tariff schedule outside agriculture unbound. This means that Ethiopia may be required to reduce further its current tariff rate and bind it at a certain level.

Further reduction of import tariffs may result in the further surge in imports and paralyze the already weak industries of the country. This has already been observed in the textile and shoe manufacturing enterprises when cheap and often subsidized foreign products inundated the country driving the domestic industries out of the business. Obviously, the industries in Ethiopia are still fragile and cannot compete with the more advanced

196 Preamble of GATT 1994
198 Information obtained from Ethiopian Customs Authority.
foreign companies. The possibility of local industries being victims of anticompetitive practices would be high.

However, tariffs are not the only means through which domestic industries can be protected. Temporary protection of domestic industries is possible through various other WTO-compatible measures. There are at least three different types of such measures, collectively known as trade remedy measures, which could be used by the Government to protect local industries.

The first is antidumping measure. If a foreign supplier sells goods at a price below the cost of supplying the same goods in the domestic market, it is considered an act of “dumping”. Due to dumping of such products in the domestic market, the prices of those goods are reduced considerably, thereby providing benefits for the domestic consumers. However, this act hurts domestic industries that are involved in the production of competing products. In order to protect the domestic industry, the government can levy an amount equivalent to the “margin of dumping” at the border, thereby creating level playing field for the domestic players. This duty is known as anti-dumping measure. Nevertheless, the mere existence of dumping does not entitle Ethiopia to take anti-dumping actions; the government has to determine the extent of dumping and show that the dumping is causing injury to its competing industries.

The second is countervailing measure. While anti-dumping measures are taken to create a level playing field for the domestic enterprises to protect them against unfair competition by the foreign enterprises, which are caused due to the action of the private sector of a foreign country (dumping), countervailing measures are taken for the same purpose, except that these measures are taken to counteract the act of providing subsidies by foreign governments. When a foreign government provides trade-distorting subsidies for its domestic enterprises, the importing country has a right to impose additional duty over and above the normal duty in order to ‘countervail’ the impact of such subsidy in its market. Subsidies could hurt domestic industries in the markets of the importing country, the exporting country or a third country where a country’s products compete with the subsidized products. In all these cases, a country could take countervailing measures. However, as in the case of anti-dumping measures, the government should investigate the extent of subsidies and prove that

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200 Agreement on Subsidies and Countervailing Measures.
201 Ibid.
they are hurting its domestic industries before imposing the countervailing measures. The Agreement also makes a distinction between “prohibited subsidies” -- those considered to be trade distortive and have a negative effect on the trade interests of another country, and “actionable subsidies” which are permitted unless otherwise the complaining country specifically show that they have a negative effect on its trade interests.

The third is safeguard measure. Even when goods are not dumped into Ethiopia’s market, but there is a sudden surge of import leading to 'serious injury' to the domestic enterprises, the country reserves the right to impose safeguard measures to protect its domestic industry. Safeguard measure in effect means restriction of imports of a particular product with a view to “safeguard” domestic industries.

However, the actual application of these measures is not all that easy. Effective use of these measures calls upon the following actions:

- First, the Government should reserve its right during the negotiation to prepare necessary legislation and designate and/or create institutions to conduct investigations necessary to prove the existence of unfair competition;
- Second, Ethiopia does not yet have laws on anti-dumping, countervailing and safeguards and there is a need to put these laws in place;
- Third, conducting investigation is a resource demanding task. It does not only demand physical and financial resources, but well qualified human resources as well. Therefore, it is necessary to conduct training of the necessary personnel who are going to be involved in the investigation process, including the art of calculating dumping margin, countervailing duty, safeguard duty etc., in a WTO compatible manner; and
- Fourth, a sound commercial information system is required for the investigating authorities to be able to find out as to which goods arrived in which quantity from which source.

In the absence of the above conditions, local industries could be subjected to a range of anticompetitive practices from foreign firms. Ethiopia needs to put in place all these conditions while further opening its borders for further competition.

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*Article XIX GATT 1994 and the Agreement on Safeguards*
(b) Trade in Services

With the coming to force of GATS in 1995, legally binding rules were set for all trade in "commercial services" such as business, engineering, communications, entertainment, construction, finance, retail trade, tourism and transport. In fact only two areas are not covered by GATS: air transport and "services supplied in the exercise of governmental authority."\(^{203}\)

As with other WTO Agreements, GATS rules are for liberalization. According to WTO, the objective of GATS is to spur economic growth by removing barriers limiting trade in services and enabling countries to attract FDI by opening the highly regulated services to international competition.\(^{204}\) GATS aims at increasing international trade in services by removing unnecessary restrictions and internal government regulation that are barriers to trade in the sector.

Despite the economic reform measures in the country which resulted in the privatization of some of the hotels, restaurants and retail trades, and in the opening up of some of the sub-sectors like the financial sector for private investment, the key service sectors are still under strict regulations of the government.

The investment laws of the country state that some of the services are exclusively reserved for the government; some are exclusively for the government or government with joint venture with private companies; still some are reserved for the domestic investors and others only for nationals.\(^{205}\)

Hence, the service sector seems to be "less liberalized" and will be perhaps the sector which will be targeted most by WTO Members during the accession negotiations. Even now pressure has been mounting on the government to liberalize these sectors. Western diplomats have in fact openly asked the government to open up the telecommunications sector, which obviously is a lucrative market for foreign companies.\(^{206}\)

In principle, GATS rules appear to be more flexible than those of GATT. First, according to GATS, it is Ethiopia that chooses which service sectors it wants to open for foreign competition. There is no as such a minimum requirement for commitments; opening one sector or two could be sufficient.

\(^{203}\) Article 1.3 GATS.

\(^{204}\) WTO (2002), Measuring Trade in Services: A training Module.

\(^{205}\) The investment laws in force are Proclamation No. 84/2004 (as amended) and Council of Ministers Regulations 84/2003.

\(^{206}\) The US Ambassador, for example, openly requested the government to open the telecommunications and banking sectors emphasizing that Ethiopia must "get trade going". See IRIN News, "Ethiopia: US Ambassador calls for telecommunications and banking reforms, 4 March 2004. (Available at http://www.irinnews.org)
Second, Ethiopia can put limitations even on those sectors it willingly committed to open up for foreign competition. Hence, in theory, Ethiopia, for example, while committing the financial sector for foreign competition, could limit the number of branches a foreign bank may open in the country or it may clearly state that it will give some preference to local firms in the sector.

More specifically, Ethiopia’s obligation under the GATS should be considered in light of the two general operational rules: the top down rules and the bottom up rules. The former are rules which apply to all services of the members without any qualification.207 Upon acceding, Ethiopia will be required to enforce such rules. The most important of such rule is the most favored nation (MFN) (Article II), according to which Ethiopia should treat all members of the WTO equally in the service sector and that any benefit, preference, or favor given to one should automatically apply to all members. In principle, Ethiopia cannot and should not give any preference for a particular firm from one country for any reason. If it opens one sector for foreign competition, it should do it to all members at the same time. For example, if Ethiopia prefers a telecom company from a particular country on the ground that it has an experience in working in a similar developing country, its act could be challenged as contravening the MFN clause of the GATS. Of course, Ethiopia can put an exemption from the applicability of the MFN, albeit only for a maximum of ten years.208

The second rules, the bottom up rules, are rules which apply to those sectors where Ethiopia has specifically made commitments to open up for liberalization. The application of these rules presupposes that Ethiopia has made commitments in the GATS. The two important principles under the bottom up rules are the National Treatment209 and Market Access.210 According to the national treatment principle, Ethiopia should treat foreigners and nationals equally in those service sectors it has made commitments. Hence, Ethiopia may not give special preference to its own infant service providers. According to the market access principle, Ethiopia should not limit access to foreign service providers in the domestic market. For example, it should not limit the area of operation, number of branches etc., of a foreign service provider. However, at least in theory, Ethiopia has the right to put limitations on the services it committed to open for foreign competition. Hence, upon making a commitment in one sector, Ethiopia

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207 GATS Part II
208 Article II and Annex, GATS.
209 Article XVII.
210 Article XVI.
could put conditions like giving some support for local firms or limiting the number of branches of the foreign company.

While GATS rules are certainly flexible, the practise is quite different for those countries that have joined the WTO recently. The fate of these countries was determined more by their accession negotiations than the rules of WTO. They had to meet the requests of members to buy their membership, though the requests were ordinarily not in line with WTO rules. The LDCs that joined the WTO recently, Cambodia and Nepal have been required to open up several service sectors and sub-sectors beyond what the WTO rules require.\footnote{Nepal was forced to extend its offer from initially three to several sectors such as business services, including professional and computer services, financial services, telecommunications, health services, tourism and travel, transport, educational services and construction and engineering. See in general, Nepal and the WTO, the Nepalese Trade Promotion Centre, Katmandu, 2001, p. 256-257.}

Consequently, Ethiopia's accession to the WTO would likely result in the opening up of some of the key service sectors for participation of both local and foreign firms. This is an important opportunity to end monopoly and enhancing competition in the service sector. On the other hand, given the limited capacity of the local firms to compete with the more advanced foreign firms, it is likely that the latter would be the main actors in the sector. The country needs to put in place a regulatory framework and institutional infrastructure that would effectively check the often sophisticated anticompetitive practices of these firms.

As noted earlier, GATS contains some provisions already dealing with competition. Article VII, for example, provides that each member of the agreement ensure that any monopoly supplier of a service in its territory does not, in supplying the monopoly service in the relevant market, act in a manner inconsistent with the member's obligation relating MFN treatment under Article II and specific commitments. The Agreement further states that when a monopoly supplier competes, either directly or through an affiliated company, a member will ensure that the supplier in question does not abuse its monopoly position in one market to dominate another market in a manner inconsistent with its commitments. The provision applies in cases of exclusive service suppliers, where a member, formally or in effect, authorizes or establishes a small number of service suppliers and substantially prevents competition among these suppliers on its territory. Similarly, Article VIII:3 provides for the Council on Trade in Services to act in connection with a complaint by a member against a monopoly supplier of a service of any other member, by requesting information from that
member relating to the supplier’s conduct. Article VIII:4 further provides for notification by members to the council of the grant of monopoly rights regarding services covered by their commitments.

The Telecommunications Schedules of Specific Commitments Reference Papers also contain specific references to anticompetitive practices in telecommunications. It provides for appropriate measures for the purpose of preventing suppliers, alone or together with others, from engaging in or continuing to engage in anticompetitive practices such as anticompetitive cross-subsidization, using information obtained from competitors with anticompetitive results.

(c) Intellectual Property Rights (IPRs)

The main objective of the TRIPS Agreement is to provide minimum standards for the protection of IPRs. Unlike the other agreements of the WTO which require members to refrain from interfering in the free transactions of trade, the TRIPS Agreement requires a positive action from the state in the sense that it forces members to legislate laws taking into account the minimum standard it has prescribed. The IPRs covered by the Agreement are copyright and neighbouring rights (Part II section 1), trademarks (section 2), geographical indications (section 3), industrial designs (section 4), patents (section 5), layout designs of integrated circuits (Section 6) and undisclosed information (section 7).

The TRIPS Agreement, one of the major agreements of the WTO, while obliging members to provide minimum standards for the protection of IPRs, it also recognises members' rights to take measures “to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain or adversely affect the international transfer of technology” (article (8)2). The article addresses any abuse of intellectual property rights by the right holders. The Agreement further provides “that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology” (Article 40(1)).

The practices mentioned in the TRIPS agreement are exclusive grant-back provisions, provisions preventing challenges to the validity of IP rights and coercive package licensing. Thus the TRIPS Agreement does recognize that IP can be a factor in creating market power and that specific abuses may need to be addressed. While the TRIPS Agreement and national laws do provide their own remedies to check the anticompetitive practices by IPR
holders such as compulsory license, the issue could also be addressed in the competition laws. Indeed, some countries such as South Africa address the issue in their competition laws.

(d) Implications on State Trading Enterprises

WTO rules do not in principle prohibit ownership of trading enterprises by the state or even state monopoly of specific sectors in the economy. But state trading enterprises would have to comply with some obligations designed to ensure transparency and fairness in trade. The basic obligation in respect to state trading enterprises as contained in Article XVII of GATT 1994 is that enterprises which are state-owned, or receive exclusive or special privileges from the state, shall act in a manner consistent with the general principles of non-discriminatory treatment, that is, should make any purchases or sales strictly on the basis of commercial considerations. This principle does not apply to government procurement, that is, purchases made by governments or governmental agencies for their own immediate consumption and not for transformation and resale. Members have to notify the products which are imported or exported into or from their territories by state trading enterprises.

The rules on state trading enterprises could thus have important implications in addressing the anticompetitive practices of the different enterprises owned by the state or those enterprises that receive exclusive or special privileges from the state.

(e) Implications in Relations to the Institutional Framework on Competition

Transparency is one of the core WTO principles. Two important principles are established under Article X of the GATT 1994: first, all laws and regulations, judicial decisions and administrative rulings, etc., affecting imports and exports should be published; furthermore, they may not be enforced before official publication; and second, administration of these laws, regulations, etc., shall be uniform, impartial and reasonable; independent judicial, arbitral or administrative instances should be instituted for recourse for prompt review and correction of action inconsistent with this principle.

Lack of autonomy has been identified as one of the problems facing the Trade Practices Commission in Ethiopia. The requirements of transparency would require Ethiopia not only to establish an autonomous and functioning administrative or arbitral body but also to apply the laws in a uniform and impartial way.
CHAPTER THREE

Major Findings and Recommendations

The study has come up with the following findings and recommendations which may serve as the bases for the business community to pursue dialogue with the government and other stakeholders with a view to influencing the creation of an environment conducive for market competition in Ethiopia.

Policies and Structures with Implications on Market Competition

This study has shown that there are significant barriers such as public sector dominance, wide price control, lack of transparency in government procurement and privatization, inconsistent taxation and the like to an effective competition in the domestic market. Therefore, there is a need for policy reform in these areas to promote effective market competition. The business community should create forums and lobby relevant decision makers to bring about the required policy changes.

The Legal Framework

1. The Proclamation aims to achieve too many aims that are incongruent. It at the same time seeks to prohibit anticompetitive conduct, regulate unfair and deceptive conduct between individual competitors, prohibit importation of goods at prices that are below wholesale in the country of production, regulating prices for basic goods and services, and regulating product labeling. The objectives of the Proclamation thus venture into the purview of trade policy, consumer protection, antidumping, and price regulation. Each of these areas has a distinct perspective in terms of the thematic issues and relationships it seeks to regulate as well as appropriate enforcement mechanisms. The attempt to deal with these three areas with different objectives in one piece of legislation has not only created conceptual confusion but also practical problems in enforcing the law. Apart from the conceptual confusion, this may create problems of enforcement of the law. From the perspective of the business community, this lack of clarity in the scope and coverage of the law will inevitably create uncertainty as to what the law is intended to apply to and may lead
to discretionary practices in enforcing the law. The recommendation in this respect is that these areas, for reasons elucidated in the report, must be dissociated; and that they must be enacted in different pieces of legislation.

2. The Proclamation uses the term “trade practices” and this may potentially create ambiguity because the term apparently covers the actions and behaviors of traders, a very broad area of economic regulation that cannot realistically be dealt with within a single legislative document or area of law. This is likely to create confusion as to the subject matter of the Proclamation by suggesting the inclusion of issues such as business registration. What is more, the term “trade practices” have been given meaning neither in legislative practice nor in general jurisprudence. There is a need to use more specific and clearer terminologies such as “competition”, “unfair competition”, and “consumer protection”.

3. The Proclamation leaves power to grant exemptions in the hands of a Commission composed of high government officials and the Minister of Trade and Industry. The Commission has the authority to exempt enterprises that have significant impact on development and are designed by Government to fasten growth and facilitate development; and, basic goods or services that are subject to price regulations. The Proclamation does not define or give any guidelines on how the phrase “significant impact on development” is to be interpreted. The vagueness of this definition may have significant ramifications. There is a need to provide specific guideline on exemptions to ensure that exemptions are given for reasons which conform to the objectives of the competition law.

4. The rules on price regulation of basic goods and services appear to be a strange addition in the Proclamation. The idea is that whenever there is a shortage of any good or service in the market related to the daily material need of the public, and traders resort to what the Proclamation terms as unfair trading practice as a result of its shortage, then the government, through the Ministry of Trade and Industry, may step in and determine the price and distribution of the scarce good or item. It appears that, it is the Ministry which is empowered to determine whether or not goods and services are basic. The fact that “basic goods” have not been defined in the Proclamation creates the risk of uncertainty for investors. In addition, the determination of goods and services as basic removes them from the competitive market and subjects them to a regime of government
planning. The price regulation mandate of the Ministry raises more concerns in relation to conflicting roles of the Ministry in addressing anticompetitive practices while at the same time setting prices. It is understood that public policy may dictate the need to resort to price regulation of basic goods and services. However, it is recommended that the best way to achieve the objective is to develop a separate law dealing with the issue of price regulation with the involvement of stakeholders.

5. The Proclamation is also silent about whether its provisions are applicable to unfair or restrictive trade practices in regulated sectors like telecommunications and energy. The issue in particular is which regulation would prevail in cases when a sector is regulated by more than one regulatory law and by more than one regulator. There is a need to include a provision explaining its relationship with other laws on matters of competition.

6. In relation to prohibition of anticompetitive practices:

- The Proclamation does not have a specific provision addressing mergers, takeovers and other forms of concentrations/conglomerations. In the case of developing countries with emerging competitive markets the size of firms is often too small. Thus, mergers and acquisitions may not be considered a problem and may even be promoted with a view to increasing competitiveness. In fact, the features of the domestic market are likely to call for a permissive attitude toward consolidation of market power in some sectors. However, there are also opposing considerations that may require some form of merger regulation. One such consideration is the reported prevalence of conglomerations in the import and distribution of construction materials as well as the manufacturing sector. There is a need to have a regulation of merger taking into account the peculiar needs of the country in encouraging larger size of firms and enhancing their competitiveness.

- The Proclamation also lacks a proscription of what in many other countries laws is known as concerted practices. These are agreement-like arrangements done by conduct and without agreement in the proper sense of the term. This may have the effect of distorting the market and thus should be included in the Proclamation.
In relation to anticompetitive agreements, the Trade Practices Proclamation prohibits all forms of collusive agreements identified in the WB-OECD and UNCTAD model competition laws. Since these forms of restrictive agreements, with the exception of collusive bidding, can take place horizontally or vertically, a literal interpretation of the provision would be inclusive of both types. However, taking into account the reported existence of dominant conglomerates and affiliated enterprises across sectors, there is a need to specifically state that the law applies both to horizontal as well as vertical agreements.

Whether an agreement would be regarded as anticompetitive is left to the discretion of the Ministry of Trade and Industry without sufficient guidelines. Though consideration of relative national advantage is justifiable ground for tolerating anticompetitive agreements, the absence of reasonable criteria makes the determination totally discretionary and unpredictable. There is a need to provide for criteria to determine whether or not an agreement is anticompetitive.

Abuse of dominance part of the Proclamation has some deficiencies. First of all, it literally prohibits "dominance" rather than "abuse of dominance". The fact that a firm has a dominant market position does not constitute an anti-competitive practice unless such position is abused.

There is thus a need to provide that it is abuse and not dominance that is a vice. Furthermore, there is also a need to define the concept of relevant market as abuse of dominance can only be carried out on a definite market, which definition should also take into account the geographic and product dimensions of the relevant market. On the other hand, abuse of dominance cases may, for other pro-competitive ends, have to be tolerated. Accordingly, there is a need for a provision which permits the defendant to fight back an action based on abuse of dominance, whenever he could prove that its acts have other economically beneficial targets that are concomitant with the objectives of the competition law.

In relation to unfair trade practices, the Trade Practices Proclamation does not require that the act be "unfair". The most obvious of implications of omitting the unfair or deceptive method standard in defining unfair competition is prohibition of methods of fair competition that may lead to the elimination of
a competitor. This makes the purpose of the law safeguarding the existence of firms in the market irrespective of their efficiency or lack thereof, which in itself hampers competition and contradicts the interests of consumers. It is recommended that this issue be clarified in the law.

The Institutional Framework

- The study has found out that the Trade Practices Commission lacks the level of autonomy necessary to instill confidence among the business community. An administrative agency, especially one with adjudicatory powers, needs to be structurally independent, functionally autonomous, and secure in its budgetary allocation. This does not however mean that agencies are not subject to accountability structures and procedures in as long as these are clear and pertinent. The most independent agencies are accountable to the lawmaking body in their decisions and budgets (e.g. the Ethiopian Human Rights Commission) while those accountable to the top executive are still considered structurally autonomous due to the low likelihood of interference in their day to day functions. Agencies accountable to a line ministry, even where established as autonomous bodies, are considered least independent. The Trade Practices Commission is for all intents a department within the Ministry of Trade and Industry in terms of structure, decision making, and budget allocation. In fact, despite the wording of Article 15 of the Proclamation, it is the Ministry rather than the Commission which should properly be considered the competition authority in Ethiopia.

- To enable the authority to discharge its functions and responsibilities, it must have a stronger institutional standing and structure. The existing authority, the Commission, is rather poorly set up. It is therefore recommended that the authority have an independent status of its own, be bestowed with the necessary autonomy (institutional, operational and budgetary). Its decisions in regard to its advocacy, advisory and prosecutorial functions must not anymore be subject to any Ministry. It must do its job free from interference from any organ but being accountable to higher authorities, either the House of People’s Representatives or the Council of Ministers. From operational and budgetary autonomy point of view, it must be allowed to own its own request budget, and administer its finances. It must also be allowed to prioritize its tasks keeping in mind the objectives of the law. In most legal systems, the competition authority is established
in the form of a multi-member commission with representatives from government, industry and consumers. There is a need to go away from the appointment of public officials toward the appointment of trained economists and lawyers.

- There is the need to have separate bodies dealing with the investigation and adjudication of competition cases. These bodies, as explained in the report, may be completely separate bodies, as is evidenced in the practice of some nations, or may be different departments within the larger competition authority. Either way, there is a need to ensure that one is independent from the other. But, as the subject of competition is a multi-disciplinary field with its own complexities, it is recommended for the establishment of a special tribunal to try competition cases rather than leaving the matter to the regular courts. In this case, there is also a need to ensure that parties have recourse to the regular courts for appeal, especially on points of law.

- At present, the Commission lacks representation from the private sector and consumers even if such representation was envisaged by the Proclamation. There is the absolute need to comply with these requirements of the law.

- The competition authority, which will mainly have the power of investigation, must also be equipped to undertake such other tasks which are very important for the development and sustenance of competitive markets. These are advisory and recommendatory as well as advocacy tasks.

- Matters related to competition law, and also ensuring competition, do fall under the federal jurisdiction. While it is possible to allow states to devise their own competition policies conforming to the federal one, the power to prosecute and to try cases falling under the competition law should be a federal matter. The law should clearly reflect this.

- It is highly recommended that there should be procedural rules for the Competition Commission that guides its investigative and prosecutorial duties.

Ethiopia’s WTO accession and prospects and challenges for market competition in Ethiopia:

1. Ethiopia’s WTO accession may have benefits for market competition in Ethiopia. By making the country’s rules affecting trade and the institutions affecting trade transparent and predictable, it may have
a positive rule in ensuring fair market competition. It may also result in the liberalization of economic sectors currently under government monopoly to private participation which in turn enhances market competition.

2. On the other hand, there could also be challenges arising from the accession. The accession requires more opening up of the economy and participation of MNCs in the different sectors of the economy. The MNCs being stronger in terms of finance, management and experience than local industries may end up in monopolizing the local market that can also have an impact on market competition. The MNCs may also abuse their dominance and resort of anticompetitive practices such as duping and subsidy which often is the case. While WTO allows taking measures in such cases, the procedures are quite complex and beyond the capacity of the regulatory organs in the country. Ethiopia needs to put in place the appropriate rules dealing with unfair trade practices such as duping and subsidy and enhance the capacity of the regulatory organs with a view to ensuring market competition as it moves to accede to the WTO.
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