

JIMMA UNIVERSITY
COLEGE OF LAW AND GOVERNANCE
SCHOOL OF GRADUATE STUDIES
SCHOOL OF LAW



**EVALUATING ISSUES RELATED WITH CONSOLIDATION OF INVESTIGATION,
PROSECUTION AND ADJUDICATION POWERS UNDER THE ETHIOPIAN
COMPETITION AUTHORITY: A Comparative Analysis**

BY

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**A Thesis Submitted in Partial Fulfillment for the Requirement of Master
Degree of Laws (LL.M) in Commercial & Investment Law.**

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JIMMA UNIVERSITY
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and Adjudication Powers under the Ethiopian Competition Authority: A
Comparative Analysis**

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DECLARATION

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

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ABBREVIATIONS AND ACRONYMS

Art.	Article
Arts.	Articles
ACCC	Australian Competition and Consumer Commission
CA	.....	Competition Authority
CAC	.....	Competition Appeal Court
CCI	.....	Competition Commission of India
EPRDF	.....	Ethiopian People’s Revolutionary Democratic Front
ETCCPA	.....	Ethiopian Trade Competition and Consumer Protection Authority
EU	.....	European Union
FDRE	.....	Federal Democratic Republic Of Ethiopia
FTC	.....	Federal Trade Commission
GD	.....	General Director
MoFED	.....	Ministry of Finance and Economic Development
MoTI	.....	Ministry of Trade and Industry
MoT	.....	Ministry of Trade
NCAs	.....	Network for Competition Authorities

OECD..... Organization for Economic Co-operation
and Development

RSA..... Republic of South Africa

UN..... United Nation

UNCTAD..... United Nations Conference on Trade and
Development

USA..... United States America

UK..... United Kingdom

WTO..... World Trade Organization

ABSTRACT

Ethiopia currently enacted a Trade Competition and Consumer Protection law in 2013 that established an autonomous Trade Competition and Consumer Protection Authority an institution responsible for the implementation competition law. Among other things, the law entitled the Authority with the powers of investigation, prosecution and adjudication. Besides these investigative, prosecution and adjudicative organs under the Authority, the law also established an appellate tribunal named the Federal Trade Competition and Consumer Protection Appellate Tribunal.

Organizationally, the three organs of the Authority are under the direct and mandates of the Authority. They are not entitled with their own independence and status of a juristic person, like the experiences of other jurisdictions. Moreover, the Trade Competition and Consumer Protection law does not clearly define the independence and accountability of the Federal Trade Competition and Consumer Protection Appellate Tribunal. Structurally to whom the tribunal is accountable and issues related with administration of tribunal judges are not indicated under the law.

The multiplicity of powers and functions held by the Authority qualify it as “Government in Miniature” due to the consolidation of powers of investigation, prosecution and adjudication it enjoy. This paper evaluates issues related with those of power consolidated monopolistically on the mandate of the Authority by the law and argues that the issues like independence, accountability, check and balance, fairness and as a result the notion of rule of law are not addressed well in the competition law in order to facilitate a fully fledged enforcement of the competition cases.

CHAPTER ONE

Introduction

1.1. Background of the Study

The governments in developed market economies rely on competition policy to prevent excessive use of economic power by offering choice to purchasers, exposing an individual's power to restrain by rival's power, and motivating companies to become more efficient.¹ The idea of having competition regimes started to take shape in North America and Europe in the 19th century in response to the demands of democratization and industrialization. These both continents recognized the potential benefits of competition and potential harms of unrestrained economic freedom.²

The adoption of a competition law by different countries, especially developing and transitional economies has experienced an unprecedented growth since 1990s. However, the degree of success of enforcing competition law in the majority of developing countries was relatively low. Competition is of overwhelming importance for the functioning of market economies. It is this deriving force that facilitates countries of the world to have a competition law and enforcing institution.

On the need of having a competition laws enforcing institution, the key institutional framework questions like who investigates and initiates a competition action, what body adjudicates contested competition proceeding, does a branch of the enforcement agency adjudicates or is there a completely independent and special tribunal are the main policy issues that will come immediately on the mind of policy makers.

¹ . Solomon Abay, 2009, Designing the Regulatory Roles of Government in Business: The lessons from Theory, International Practice and Ethiopia's Policy Path, Journal of Ethiopian Law, vol.23 No.2, P.87

² . *Ibid*, p.88

Since the EPRDF coming to the power, the political economy shuffle from the socialistic oriented ideology to free market economy thereafter market based economic activities have become increasingly evident that derives the country to turn her face to have a defined competition policy and law. Accordingly, the country enacted the first competition law of the Trade Practice Proclamation of 2003. This proclamation authorized the then Ministry of Trade and Industry (MoTI) to deal with enforcement of the law. An investigation commission, under the MoTI was established to monitor the day to day implementation of the law. The competition commission set as part and parcel of the ministerial line. Due to its institutional framework draw backs that make it as one department of the MoTI and the need to have a competition authority with a more autonomous power that can enforce competition cases independently from the then MoTI become a reason for the Trade Practice Proclamation of 2003 to be repealed by the succeeding Proclamation Trade Practice and Consumer Protection of 2010.

The Trade Practice and Consumer proclamation of the 2010 envisages a significantly different institutional framework involving a more autonomous “Federal Competition Authority” and unlike the Trade Practices proclamation it apportioned the tasks of investigation and adjudication with the MoTI and the Competition Authority. Other than integrating consumer protection right with competition cases, the proclamation tried its best to separate those distinct procedures like investigation, Prosecution and adjudication, followed in distinct expertise knowledge and facilitated the regime for a better check and balance between the MoTI and the Authority.

In order to ensure the enforcement of trade competition and protection of consumers’ right, currently Ethiopia has adopted a specific law dealing with trade competition and consumer protection Proclamation No.813/2013. This law institutionally entitles the Competition Authority with immense power and functions. Other than policy advocacy, powers of investigation, institution of action (prosecution) and adjudication are responsibilities of the Authority with its various organs. Moreover, the law established an appellate tribunal whose structural independence and accountability is not clearly defined. In a simple word the Authority is given with a consolidated power of investigator, prosecutor and judge on the cases it entertains and driving it of the problem lack of objectivity. This aggregation of power under the mandate of the Authority also be point of contention for independence of those separated organs, accountability,

check and balance system between the organs, fairness and rule of law. Further the administration issues of both the adjudicative benches of the Authority and the Federal Appellate Tribunal judges are not made clear. In addition to this, the Authority's independence by itself is not effective due to loose accountability of the institutions. Accountability in most cases are manifested by supervision, evaluation and reporting to the structurally superior organs of the government. The law in this regard does not expressly define in what manner the accountability of the Authority to the MoT realized.

The main focus of this paper is, therefore, to evaluate issues related with consolidation of power of investigation, prosecution and adjudication under the mandate of the Authority. Moreover, there will be discussion on the experiences of other jurisdictions regarding to the issue. Accordingly, the experiences and institutional frameworks of France, Republic of South Africa, Australia and India are selected on different criteria for a comparison purpose. And the paper is organized in four chapters. Chapter one of the thesis will discuss about the general backgrounds of the study as an introductory remarks. Thus, background of the study, statement of the problem, the scope of the study, objectives, significance, research methodology, limitations of the study and literature review would be highlighted.

Chapter two of the thesis is designed to help the reader better understand on the conceptual framework of competition and competition law and policy. This chapter tries to sketch the conceptual and definitional features and the essence (economics) of the regime, objectives and policy issues of competition system.

Chapter three deals with comparative analysis of the institutional framework and legal regimes of the Ethiopian trade competition and consumer protection Authority. In this chapter an overview on the institutional framework of competition authorities, their organizational structure, power and functions, including the Ethiopian Trade Competition and Consumer Protection Authority, are discussed. Besides power and function of the Ministry of Trade (MoT) is also discussed briefly. In light of institutional framework/design a comparative analysis of other jurisdictions like France, Republic of South Africa (RSA), Australia and India is the theme of this section.

Chapter four is devoted in evaluating issues related with consolidation of investigation, prosecution and adjudication powers under the Ethiopian competition Authority. This chapter being the core of the research explores about the issues associated with consolidation of power of investigation, prosecution and adjudication under the competition authority. Accordingly, organizational independence of the organs of the Authority, independence of the tribunal judges of the adjudicative benches of the competition authority and the Federal Appellate Tribunal, the procedural fairness and rule of law, the availability of accountability and check and balance between the three organs of the Authority is the main concern. Finally, a section of conclusion and recommendations is provided towards the end of the Paper. This section tries to briefly summarize the conclusions and culminates with the part dealing with the outlined recommendations.

1.2. Statement of the problem

The last few decades have seen huge changes in the way developing countries manage their economies.³ Most governments in such countries have moved away from central planning towards supporting a market economy and allowing the growth of local, privately owned business. During these times countries have adopted or are in the process of enacting competition laws. There is growing awareness among these countries of the adverse effects of anti-competitive practices on their economies as well as their populations. The effects of such practices are not questionable. Nevertheless, developing countries have come to recognize the potential benefits that can be derived from competition law enforcement. The drive to establish legal and institutional frameworks in order to fight anti-competitive practices has intensified in recent decades.

Ethiopia being one of the developing country, is taking a solid action from enacting a competition law, trade competition and consumer protection proclamation No.813/2013 (hereinafter the Proclamation), to establishment of competition law enforcing institution. The 2013 trade competition and consumer protection, unlike its predecessor Trade Practice and

³. Even in Africa it is evident looking the economic change and development in countries, for instance, Nigeria, Botswana, Ethiopia, and the like.

Consumer protection Proclamation, under its preamble states that the enactment of this proclamation is that the need to determine the powers and duties of the concerned organs that will be in charge of the responsibility to carry on investigation, prosecution and judicial responsibility in order to ensure the implementation of the proclamation.

However, the proclamation other than giving a due attention to the efficiency of economy or market competition as an objective, additionally it also ensures protecting the business community from anti-competitive and unfair market practices, and consumers from misleading market conducts, and establishing a system that is conducive for the promotion of competitive free market, ensuring that consumers get goods and services safe and suitable to their health and equivalent to the price they pay and accelerating the economic development as an objective of the competition law.⁴ For the implementation of the laws of the proclamation enacted in line with the objectives listed hereinbefore, the institution trade competition and consumer protection Authority is assigned with those consolidated specific duties.⁵

Within certain systems, the competition authority brings enforcement actions before the court, which acts as final decision-maker with respect to alleged breaches of the competition rules. In other systems, the competition authority itself is empowered to take infringement decisions, and the courts provide an appeal mechanism or review function for such administrative decisions.⁶ This implies that countries are free to follow design choices available for the institutional framework. Institutional framework concerned, for instance, the United Nation (UN) Model Law on Competition (2010) - Revised Chapter XI provides generally three⁷ structural models.⁸

4 . Proclamation No.813/2013, The Federal Negarit Gazeta of The Federal Democratic Republic of Ethiopia, 20th Year No.28, Addis Ababa, 21st March, 2014, Art.3.

5 . See, part five of the trade competition and consumer protection proclamation. Accordingly, the consolidated power includes: investigation, institution of action and adjudication of cases.

6 . Procedural Fairness: Competition Authorities, Courts and Recent Developments, 2011, OECD Policy Roundtables, p.11, available at,

<http://search.myway.com/search/GGmain.jhtml?searchfor=procedural+fairness%3A+Competition+Authorities%2C+courts+and+recent+development+oecd+pdf> , (accessed at 23, Mar. 2015)

7 . (a) The bifurcated judicial model – the Authority has investigative powers, and must bring enforcement actions before courts of general jurisdiction, with rights of appeal to general appellate courts;

(b) The bifurcated agency model – the Authority has investigative powers, and must bring enforcement actions before specialized competition adjudicative authorities, with rights of appeal to further specialized appellate bodies or to general appellate courts;

(c) The integrated agency model – the Authority is empowered with both investigative and adjudicative functions, with rights of appeal to general or specialized appellate bodies. *See also*, UN Model Law on Competition Law cited infra note 12

In this context the Ethiopian Trade competition and Consumer Protection proclamation loads the enforcement power, a competition cases concerned, only on a single independent organ, i.e. the Authority. The Authority is established as an autonomous organ of the government with its legal personality and given with tasks of conducting investigation, institution of action and adjudication of competition cases. All the tasks that are furnished in a specific judicial system by separated organ of the government are completely in a whole-sale extent occupied and enforced by the Authority. Therefore, in what manner the tribunal judges are impartial and in what measurement the authority become successful by enforcing all justice system in single roof? On the hand, how far the independence of the Authority with regard to the cases it adjudicates on the mere fact that its accountability to the MoT?. In this regard, for all practical matter the Authority is judiciary.

In addition, establishment of a special tribunal, other than regular courts of law, needs various goals. Accordingly, cases dispensed in this special tribunal presumed adjudicated by well experienced professionals with law, economics and in the field of commerce, however, the proclamation is silent regarding as to structural independence and accountability of the appellate tribunal. It also does not specifically define the manner of governance of the tribunal judges under the Authority, so that it will be independent and accountable adjudicative tribunal.

When the trends of other jurisdictions are observed, in fact, there are various fashions in the organization of the competition agency, especially, in case of judicial power and investigative duty of the cases. In this regard lessons will be taken in case there is a well and independent competition agency for the efficient judicial power implementation. As compared to other jurisdictions, the Ethiopian Trade competition and Consumer Protection Proclamation regarding to its institutional framework it does not made various organs of the Authority, especially, the Investigation, Prosecution and Adjudication organs independent rather they are consolidated under the single Competition Authority. Moreover, other than establishing the Federal Appellate

⁸ . United Nations Conference on Trade and Development, Model Law on Competition (2010) - Revised Chapter XI, Geneva 2011, p.3, available at, <http://search.myway.com/search/GGmain.jhtml?searchfor=the+independence+of+tribunal+judges+of+competition+authority+of+republic+of+south+Africa+pdf> , (accessed at, 22, Mar. 2015)

Tribunal the law does not entitle the institution with de-jure and de-facto independence and also the administration issues of tribunal judges are a point of controversy. Therefore, this study will evaluate those issues like independence, accountability, efficient check and balance system, procedural fairness, rule of law and administration of tribunal judges under the consolidated power format of the Authority with a comparative basis of other jurisdictions.

1.3. The scope of the study

The whole study is concerned with evaluating issues like independence, impartiality, accountability, check and balance system within the organs of the Authority, fairness which is related with consolidation of investigation, prosecution and adjudication powers the Ethiopian competition authority. The scope of this study thus limited to the issue of evaluating institutional framework/design and judicial power emanated from the trade competition and consumer protection proclamation to the federal trade competition and consumer protection authority. Moreover, the study also includes the ministry of Trade (MoT) as it is a main stakeholder in implementation of the competition laws and the judicial system in trade competition and consumer protection proclamation.

In addition, the practice which is evident in other jurisdictions in light of institutional and judicial independence and the consolidation of power at the hands of the authority are analyzed in contrast with the Ethiopian competition law enforcement and the institution itself. Consequently, the competition laws and authorities of France, South Africa, Australia and India were made part of the study. As far as the geographical limit of the study concerned, the information will be collected from the Federal Trade competition and Consumer Protection Authority, the Ministry of Industry (MoT), and the Federal high court as well.

1.4. Objective of the Study

The primary objective of conducting this piece of paper is to assess problems associated with consolidation of power and independence issues under the Trade competition and Consumer Protection Authority enshrined with the proclamation and to assess the extent trade competition and consumer protection proclamation shields the independence of various organs of the

Authority for all its activities and administration of judges. And specific objectives of the study are; to assess the administration issue of tribunal judges as a factor that hinders the judicial efficiency due to lack of independence and impartiality, to assess the independence of competition Authority tribunal judges as it conform with the notion of independence of the regular court judges, to assess the competition authority tribunal judges as an impartial dispensers of justice and handing down rule-based decisions, to assess whether there is influence from the government through the Director General on the organs of the competition Authority and finally, to come up with possible solutions with a view to address the shortfalls which are assessed by the study.

The writer of this paper chooses specific issues like the question of independence of the institution and tribunal judges of the authority and the effect of power consolidation on the hands of the Authority, because of the following objectives:

- Examining the current organizational structure, i.e. consolidation of investigative, prosecution and adjudicative power under single roof of the Competition Authority in light of organizational independence. Because independence is the primary requirement for every institutions serving as judiciary.
- Evaluating whether there is internal and external check and balance system within the three organs (investigation, prosecution and adjudication) of the authority. Consolidations of those powers like investigation, prosecution and adjudication under the single Authority without a check and balance system may cause for the breach of fundamental rights of individuals and it is also contrary to rule of law.
- Evaluating how and in what manner the relationship between the Competition Authority and Ministry of Trade workout. As per the competition cases the Authority is entitled to adjudicate cases fall under its jurisdiction by its Adjudicative benches and take administrative measures. These judicial and decisional tasks should be enforced impartially and independently so that the Authority's de-facto independence is really manifested. The de-jure independence to be realized the accountability of the Authority to MoT should be expressly known.

- Evaluating administrative relationship between the Director General and the tribunal judges and the manner on which the tribunal judges are governed under the competition proclamation of the country. Administrative issues are crucial for the professionals to be impartial and independent of their judicial career. Unless governance issues under the Authority is clearly known, tribunal judges to the Authority face lack of job guarantee and this will as a result made judges to be influenced by the higher officials of the Authority on the cases they are adjudicating.
- Since the current Trade Competition and Consumer Protection proclamation is the newcomer and enough research on this area is not done. The Ethiopian competition proclamations are known by their lack of stability. Since 2003 till 2013 the competition laws are amended for about three times. And all amendments have their own strong and weak sides; therefore, regarding institutional design what the current competition proclamation look like is the idea that is not addressed by any research.

So, the paper evaluates the issues related with the consolidation of power on the competition Authority regarding to its investigative, prosecution and adjudication power and institutional and tribunal judges' independence and accountability issues and other jurisdictions practice in the issues are analyzed for the purpose of in sighting a well formed independent enforcement institution of competition laws and to have efficient and effective competition system follow procedural fairness and respect rule of law with a check and balance format.

1.5. Research Questions

The proposed study various questions which are to be answered. Accordingly, the research question comprises main and specific questions. These are the following:

1.5.1. Main Questions

- What are the problems associated with the consolidation of investigation, prosecution and adjudication power of the Ethiopian Trade Competition and Consumer Protection Authority in enforcing the competition law?
- To what extent should the competition law shields the independence of the organs under the competition authority for all its activities and administration of tribunal judges?

1.5.2. Specific Questions

- How the relationship between the Competition Authority and the Ministry of Trade (MoT) workout?
- On which law does whether the Competition Authority Tribunal or Federal Appellate Tribunal judges are to be governed?
- How could be the internal and external check and balance system is realized between the organs of the Competition Authority?
- What is the administrative relationship between the Director General of the Competition Authority and the Tribunal Judges?

1.5. Significance of the Study

The significance of the study may be seen from the perspectives of those who are affected or benefited by the operation of the current competition law and consumer protection. In this context the business community, consumers and the government itself are the one from the beneficiaries. The paper recommends important points regarding to the institutional organization of the competition Authority as per its institutional framework and judicial independence. The tribunal judges to the competition authority seem not independent and accountable administratively and professionally. Moreover, the Appellate Tribunal is not clearly defined as it is structurally independent and accountable. This is a great problem to entertainment of cases impartially.

The proclamation overloads the Authority with all judicial tasks that may be alien for the most jurisdictions and incompatible for the justice system and it is eroding fairness and rule of law principles. Therefore, by recommending the possible suitable institutional organization as per to the institutional and judicial independence and then the business community, consumers and also the government will be benefited because of strong institutional and judicial independence and appropriate judicial system installation in competition system that hosts various cases that come from the current ample economic transaction and development.

The paper is also important for the law making organ to reconsider the Trade competition and Consumer Protection Proclamation in force by showing the gaps concerning the problems of consolidation of power and institutional and judicial independence of the Trade competition and Consumer Protection Authority.

1.6. Research Methodology

The selection of the methodology is based on what kind of information is sought, from whom and under what circumstances. As the title of the research tells us the study is conducted by evaluation of some issues of measurements like institutional and professional independence, accountability, check and balance system, fairness and administration of judges. As a result, there is no a short and fast rule only to stick on a specific method in order to conduct the investigation of the study. The general trend in this regard is that using more than one method can output a good result, even if it adds some workload other than the need of time and financial resource.

On the above background, the methods used in this research was a qualitative research and a sort of multiple methods are applied that including primary sources like interview and secondary sources including various written materials and legislations.

1.6.1. Sources of Data

The information for this study was gathered from both primary and secondary sources of data. The primary sources of data for this study are gathered through interview from the Federal Trade competition and Consumer Protection Authority Research and Study Directorate, Adjudicative benches tribunal judges, Federal Appellate Tribunal Judges, Investigation and Prosecution Directorate and other staffs. Also from the Ministry of Industry (MoT) law professional staffs, as a respondent. Accordingly, two judges from the Federal Appellate Tribunal, one judge from Adjudicative benches of the Authority and generally three judges are interviewed. Additionally, including Directorate Directors three staffs from the Authority and one staff member from MoT four personnels are interviewed.

The secondary sources of data are gathered from various books, journals and publications are also be used to review the literature and to support research findings.

1.6.2. Sampling Technique and Data Gathering Instruments

In selecting the concerned participants, the researcher in conducting the study has employed purposive sampling technique based on the interviewees' experience, position, expertise, education, and other attributes so as to acquire general information capable of addressing the research questions of the study.

In collecting data, the researcher has used interview, documentary analysis, legislative analysis and literatures. Additionally, documentary resources published or unpublished materials, relevant internet sources and comparative analysis are made parts of data gathering tools in conducting the study.

1.6.3. Ethical consideration

In conducting the study, the following ethical considerations have been employed;

- **Consent;** all the participants of the study had been requested their free consent before their participation in the study.
- **Proper acknowledgement;** proper acknowledgement have been made to their contribution to the study.

1.7. Limitation of the study

On the way of conducting this study the researcher has come across with some limitations, which tried to affect the outcome of the research. Firstly, due to various factors surrounding them, informants are not willing to give information freely. The researcher witnessed that some interviewees' are not confident in order to give information. This lack of confidence springs from different factors surrounding them. Secondly, the regime of competition being new phenomenon for the country and also the proclamation being new enactment, still informants are not as such clear with institutional framework/design of the competition law. Finally, the cases

they have adjudicated being very limited tried to throw some limitations on the results of the study. But the researcher by consulting various literatures, legislations and experiences of other jurisdictions has made his effort to minimize the limitations that are faced hereinabove.

1.8. Literature Review

Competition in economic terms denotes the process of rivalry between firms for the patronage of consumers with a view to achieving a particular business end such as profits or market share.⁹ Competition is at the heart of market-based economy.

After the historic event of political transformation, in 1991, Ethiopia became a country with a liberalized market and an open economic policy. It is evident that since the emergence of the regime market based economic activities are become increasing.¹⁰ In addition to market liberalization, a ground work for the accession of WTO forced the country to enact a Trade practice Proclamation (No.329/2002), in April 2002, and which was announced on April 17, 2003 under the Proclamation No.329/2003, to promote competition in the domestic market.¹¹ However, the need of the enactment of the competition law being the aforementioned reasons, it is not far from defects which as a result become the cause for its amendment by the succeeding Trade Practice and Consumer Protection Proclamation No.685/2010. Also this proclamation does not have a chance to survive more than three year in force. It is also not free from defect which leads it to be repealed.

As per a book written by a research team¹² in titled, “Review of the Legal and Institutional Framework for Market Competition in Ethiopia”, the competition commission under the trade

⁹ . Mamo E. Mihretu, Fikremarkos Merso and Kassahun Melese, Final Report, Study on the Impact of the Trade Related Issues in the Economic Partnership Agreement on Ethiopia, October 2010, Submitted to The Ministry of Trade of Ethiopia, p.87

¹⁰ . Gebremedhine Birega Degaga, et al, competition Regimes in the World – 43 ,Ethiopia, A Civil Society Report, p.230 , available at, <http://search.myway.com/search/GGmain.jhtml?searchfor=competition+regimes+in+the+world-+ethiopia%2C+a+civil+society+report+pdf> , (accessed at, 24, Mar.2015)

¹¹ . *Ibid*, p.231

¹² . The Article, Review of the Legal and Institutional Framework for Market Competition in Ethiopia, is written by the Research Team including; Fikremarkos Merso(Dr), Imiru Tamirat Yigezu, Seyoum Yohannes, Yosef Endeshaw and Tilahun Teshome Retta(prof.). available at,

practice proclamation No.329/2003 has a dual function, i.e. investigation and adjudicatory power of competition cases.¹³ The dual function of the competition Commission is no so common a practice in many countries.¹⁴ The prevalent practice appears to be separation of functions in different organs. Accordingly, the Trade Practice and consumer protection proclamation No.685/2010 comes with, may be after having the suggestion of the research team, two seemingly independent organs, i.e. the MoTI and Competition Authority, with investigative and adjudicatory powers respectively. This is also evident in other jurisdictions, for instance, in U.S competition system at the Federal level there are two agencies, the Antitrust Division of the Department of Justice and the Federal Trade Commission (FTC) with the power of adjudicatory and investigation respectively.¹⁵ In fact, the consolidation of power on the competition commission (under the repealed law) is tried to give a solution by dividing the power to two organs under the trade practice and consumer protection proclamation 685/2010 (repealed) competition law. During this time the issue that was not addressed is the problem of independence. Even the aforementioned research conducted in a team does not address the issue of independence of the competition Authority and the respective judges of the Authority. Surprisingly, the current proclamation in force consolidates the power on the hands of the Authority which was a main reason for the amendment of the trade practice proclamation of 2003. In this regard, this study tries to stick up on evaluating issues related with the consolidation of power of investigation, prosecution and adjudication under the competition Authority. Accordingly, institutional framework, independence and accountability of organs under the Authority, the issues of check and balance between the investigative, prosecution and adjudicative organs of the Authority, procedural fairness and rule of law due to consolidation powers and administration of tribunal judges to adjudicative benches of the authority and the Federal Appellate Tribunal are the major concern.

<http://search.myway.com/search/GGmain.jhtml?searchfor=LLM+thesis+of+the+ethiopian+competition+law+in+addis+ababa+university+pdf&st=tab&ptb=935E4832> , (accessed day Mar18. 2015)

¹³ . Fikremarkos Merso, et al, Review of the Legal and Institutional Framework for Market Competition in Ethiopia, 2009, Produced and distributed by the Addis Ababa Chamber of Commerce and Sectoral Associations, Addis Ababa, Ethiopia, p.82-83

¹⁴ . *Id*, at 83

¹⁵ . Eleanor M. Fox, US and EU Competition Law: A Comparison, p.341, available at, <http://search.myway.com/search/GGmain.jhtml?searchfor=US+and+EU+competition+law+comparision+pdf&st> , (accessed at, 20, Feb. 2015)

Competition law scholars like Michael J. Trebilcock and Edward M. Iacobucci argue that any competition-policy institutional regime must address among other things four fundamental questions.¹⁶ First, who investigates and initiates proceedings (including the relative roles of public and private enforcement)? Second, to the extent that investigation and other enforcement activities are undertaken by the government, which branch of the government is responsible? For example, the questions of who hires competition policy bureaucrats, to whom are they accountable, and whether the competition-enforcement body is part of a line ministry or is an independent agency with its own budget and personnel policies must be addressed. Third, what body adjudicates contested competition proceedings? Does a branch of the enforcement agency adjudicate, or is there a completely independent body? What process does the adjudicative body follow? Finally, to what extent is there judicial review of competition decisions?¹⁷

The Ethiopian Trade Competition and Consumer Protection Authority (ETCCPA) concerned, however, it is an independent federal government organ having its own legal personality, is accountable to the Ministry of Trade (MoT).¹⁸ As per the fundamental question as stated above, in what manner shall the competition policy institutional regime is designed and other issues concerned, the Ethiopian competition law, i.e. the Trade Competition and Consumer Protection Proclamation currently in force established the Federal Trade Competition and Consumer Protection Authority as federal government organ having its own legal personality and with accountability to the Ministry of Trade (MoT).¹⁹ The proclamation also entitles consolidated power to the Authority. Accordingly, the proclamation entitles the powers of investigation, prosecution and adjudication under the mandates of the Authority, however, it does not define the accountability and independence of the organs including to the Appellate Tribunal. Also the budgetary independence is not entitled for all organs under the Authority.

¹⁶ . Michael J. Trebilcock and Edward M. Iacobucci, 2010, Designing Competition Law Institutions: Values, Structure, and, Mandate, Loyola University Chicago Law Review, vol.41, issue 3, Article 5. P.457. available at, <http://search.myway.com/search/GGmain.jhtml?searchfor=designing+competition+law+institutions%3A+values%2C+structure+and+mandate+pdf> , (accessed date, Mar.6/2015)

¹⁷ . Supra note 16.

¹⁸ . Supra note 4, Art.27 (1) and (2)

¹⁹ . Ibid

On the issue concerned to what body adjudicates contested competition cases, the proclamation tries to apportion the adjudicative organs in to two. These include, the Adjudicative Benches of the Authority and the Federal Appellate Tribunal. Structurally it obvious that the Adjudicative Benches of the Authority are under the direct and mandate of the Authority but the Appellate Tribunal concerned, it is open for a controversy. The Proclamation, however, established the Appellate Tribunal it does not clearly define the de-jure and de-facto independence and accountability of the Tribunal. Therefore, one may in the way that the Federal Appellate Tribunal is structural under the mandate of the Authority.

Ideally, one should consider not only the level of formal independence of a CA, i.e. as guaranteed by the legal framework, but also the level of effective independence, which depends on its actual ability to avoid interference and capture from the government and itself. The stronger the separation between investigator, prosecutor and adjudicator the more balanced the decision is likely to be.²⁰ In the same token, the stronger the independence of tribunal judges the more impartial decision of competition cases. But this is not evident under the current trade competition and consumer protection law. It consolidates the power on the competition authority and the existence of more balanced decisions fall under question. Therefore, this study strives to evaluate the issue related with consolidation of those powers of investigation, prosecution and adjudication under the CA of Ethiopia. In this context issues like independence and accountability of the CA and various organs under the Authority, internal and external check and balance between the investigative, prosecution and adjudicative organs of the Authority, procedural fairness in light of consolidation of power, rule of law are the issues evaluated through the paper. Moreover, it tries to know the manner of administration of judges because it has paramount effect on impartiality of judges and independence of the judicial system within the Authority.

²⁰. Supra note 12, p.17

CHAPTER TWO

The Conceptual Framework of Competition and Competition Law and Policy

2.1. Introduction

Consumers gain a lot from healthy competition in the market. This is because of two reasons: first, competition enables the firms to operate efficiently and second, competition offers consumers a greater choice of products at lower prices. This, in turn, leads to higher benefits to the consumers and helps in economic growth and development. However, to ensure that consumers enjoy maximum benefits, competition must be maintained in the market. This is ensured through a sound competition policy, of which competition law is an integral part. Here in comes the role of the Government: Government, in general, and the competition authority in particular. They should keep an eye on the market behavior and use several tools to promote competition on one hand, and check anti-competitive practices, on the other. Thus the national interest and the consumers' interest rather than individual producer's interest are protected.

When we deal with competition policy and competition law it will seem to as that these terms are often used synonymously but they can be distinguished. The former is broader since it describes the way in which governments take measures to promote competitive market structure and behavior.²¹ Competition policy will therefore encompass within it a system of competition law.²² But for the purpose of conceptual understanding of the competition policy and law the terms are used interchangeably for the purpose of this paper.

2.2. Competition policy

Certainly every economy is in need of a competition policy that enables the business environment to flourish according to fair set rules of competition. Competition policy is generally regarded as that set of public policy tools that lay the foundations for a market economy by allowing for the efficient allocation of resources. A competition policy is not just

²¹ . Alison Jones and Brenda Sufrin, *EC Competition Law: Text, Cases, and Materials*, 3rd edition, Oxford University Press, New York, 2008, p.5

²² . Ibid

trade practices law. It includes both policies that are specifically directed at promoting competition and policies that have an indirect impact on competition.²³ Its impact may be either on market structure influencing the incentives for competitive conduct or have a direct impact on market conduct.²⁴

At best competition policy can be seen as just one of set of policy tools required to create an efficient market economy. Competition policy cannot stand alone to create an efficient market economy but other governmental policies should conform to basic market principles. Trade policy, industrial policy, privatization, social policy and the like are need to be conducted in a manner compatible with the market mechanism for an economy to function as efficiently as possible.²⁵ To answer the question whether competition policy is effective in a country can also be heavily influenced by the effectiveness of other policy areas such as trade, regulation, privatization and so forth. Answers would thus reflect the effectiveness of a mix of policies rather than antitrust policy narrowly conceived.

Competition policy therefore refers to government measures that directly affect the behavior of enterprises and the structure of industry.²⁶ An appropriate competition policy includes both:

- a) Policies that enhance competition in local and national markets such as liberalized trade policy , relaxed foreign investment and ownership requirements and economic de-regulation; and
- b) Competition law designed to prevent anticompetitive business practices by firms and unnecessary government intervention in the marketplace.

2.3. The essence of competition policy and regimes

²³ . Uganda Law Reform Commission, a study report on competition law (LAW COM. PUB. NO.6 of 2004), Kampala, p.5

²⁴ . Ibid

²⁵ . Ibid

²⁶ . Ibid

The competition regime is well known to most people, both in terms of its aim and in terms of its application. Competition law is intended to ensure that the marketplace is competitive and is not distorted by anticompetitive practices, so that worthy options are made available to consumers.

A perfectly competitive market requires the existence of a large number of seller and buyers, where each seller would have only a small share of the market. Such a market further assumes that there are no entry or exit barriers or information asymmetries and that both the seller and the buyer have access to the market. Sellers are price takers, not price makers, and the price of a product equals its marginal cost while making only a normal profit. A perfectly market assumed to bring about both allocative and productive efficiency with the effect that the overall society's welfare is maximized.²⁷ Allocative efficiency is achieved when the goods are produced in the quantities desired by the society while productive efficiency is achieved when goods are produced at the lowest possible cost. It is also understood that competition enhances dynamic efficiency by inter alia facilitates innovation and technological growth.²⁸ But Economists still quarrel about the effects of the intensity of competition for innovation as well as for growth.²⁹ They claimed that monopolistic firms are more innovative because they face looser financial restrictions and because they will be able to cash in on their innovations more sweepingly than smaller firms with small or even negligible market shares. Thus it is argued that monopolistic market structures would lead to higher rates of innovation (and subsequently growth) and hence introduced a tradeoff between static and dynamic efficiency. The theoretical argument is still contested and the empirical evidence highly ambiguous.³⁰

In fact, however, a research³¹ does support the thesis that competition is good for development, both stimulating new business and benefiting consumers. Dutz and Hayri (1999), after surveying the existing empirical evidence and conducting a major cross-country study, found a strong

²⁷. Supra note cited at 9, p.87

²⁸ . Ibid

²⁹ . Stefan Voigt, The Economic Effects of Competition Policy – Cross- Country Evidence Using Four New Indicators, University of Kassel and ICER, Torino, p.4, Available at, <http://search.myway.com/search/GGmain.jhtml?searchfor=the+economics+of+competition+policy+pdf>

³⁰ . Ibid

³¹ . A research conducted by Dutz, M.A and A Hayri (1999); Does more intensive competition lead to higher growth? CEPR Discussion Paper No. 2249.

correlation between long-run growth and effective enforcement of antitrust and competition policy. A recent study by the United Nations Conference on Trade and Development (UNCTAD) reviewed the literature and commissioned case studies around the world. The results (Brusick et al. 2004) broadly support the view that competition is good for development, and the authors argue that competition policy is very much complementary to other instruments for encouraging enterprise development.³²

Given that there is no consensus on the relationship between the intensity of competition and growth, 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. This ensures best possible utilization of available resources.³³ In the short term, consumers are allowed to choose from an array of options that would have been produced absent a competition violation; in the long term, it ensures the free market will be able to innovate. Competition law ensures, inter alia, that the economy responds to consumer demand rather than to government directions or individual business preferences.³⁴

2.4. Objectives of Competition law and policy

The objective of competition laws is maintaining and enhancing market competition by addressing “restrictive business practices and regulate structures that significantly lessen competition”.³⁵ It is indeed well settled that the core purpose and emphasis of competition law is the maintenance of competition by guarding of 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

³² . Supra note 29.

³³ . Monographs on Investment and Competition Policy, Competition Policy & Law Made Easy, vol.8, 2011, Jaipur Printers P. Ltd, p.6

³⁴ . Irina Haracoglou, 2007, Competition Law, Consumer Policy and the Retail Sector: the systems’ relation and the effects of a strengthened consumer protection policy on competition law, The Competition Law Review, Vol.3, Issue 2, p.178, available at, <http://search.myway.com/search/GGmain.jhtml?searchfor=the+competition+policy+and+regimes+of+US+pdf>

³⁵ . Supra note cited at 9.

free competition, or the protection or promotion of effective competition”.³⁶ This is what invariably is found in any standard competition law. For instance, a survey involving 23 countries has found that “the enhancement of competition”, “elimination/prevention of restrictive business practices” and “economic efficiency” are the most cited objectives of competition laws.³⁷

Nonetheless, apart from consideration of economic efficiency, governments do have other socio-economic and even political objectives, and priorities they wish to promote through competition law 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.³⁸ This implies the Competition Act’s policy purposes begin with economic efficiency, but they extend much further.

It is possible for systems of competition law to pursue objectives other than the economic one of welfare and efficiency.³⁹ Whether they should and, if so, what other objectives should be pursued is extremely controversial.⁴⁰ In the Republic South African Competition Act of No.89/1998, for instance, it is clearly stated that aside from promoting the efficiency adaptability of the economy, the promotion 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.⁴¹ The efficiency objective of competition law may promote other objectives as well. For example, promoting efficiency of the economy would also promote consumer welfare.⁴² Moreover, under the Ethiopian competition Proclamation also protecting and ensuring consumers’ interest and acceleration of economic development are other objectives of the competition law and policy other than promoting welfare and efficiency in the market, in fact, these leads to economic development.

³⁶ . Supra note cited at 9.

³⁷ . Ibid

³⁸ . Ibid

³⁹ . Supra note cited at 21.

⁴⁰ . Ibid

⁴¹ . Art.2 of the Competition Act of the Republic of South Africa cited infra note 75.

⁴² . Supra note cited at 9.

Generally, often other than the assumed purpose of safeguarding and promoting competition for the stated objective of economic efficiency, competition laws contain other purposes, such as furthering technological progress, improving international competitiveness, securing the survival of small and medium enterprises, and regional development concerns.

2.5. The Historical Background of the Ethiopian Competition Policy and Regimes

Ethiopia as a long polity practiced different type of economic transformation, which has been characterized, by its unique kind of traditional agrarian economy.⁴³ Within this dominant type of economy the principal economic actors and the form of ownership of the economic resources has been changing depending on the economic policy orientation of the previous and current governments.⁴⁴ Due to various economic ideology that followed by different governing regimes of the country, there is no consolidated law and policy of competition in the country since the coming to power of the EPRDF.

2.5.1. Pre-1974

The imperial regime claimed to have a free market economic policy orientation. However, it failed to have a consolidated type of competition law. Of course, this government has been merited for its introduction of modern legal system in the country including the codification and promulgation of the commercial code, which primarily regulates the types, formation, and dissolution of commercial partnerships trademark and trade name registration and the legal protection that should be given for such commercial rights.⁴⁵

2.5.2. Post-1974

Ethiopian economy since 1974 till 1991 operated under centrally planned economy and hence there were no conditions for competition policy application. Hence, the country's' economic

⁴³ . Abebe Asamere et al, Competition scenario In Ethiopia, 2006, compiled by Aha Ethiopian Consumer Protection Association, p.23, available at, <http://search.myway.com/search/GGmain.jhtml?searchfor=historical+background+of+competition+policy+and+regime+in+Ethiopia+pdf> , (accessed date, Mar. 6/2015).

⁴⁴. Ibid

⁴⁵. Ibid

history on the other hand was characterized by its socialist form of economic system in which competition in the market can't be envisaged as a matter of ideological principle. The main economic actor in the economic system was the government.⁴⁶ The economy was highly centralized and there was neither real nor nominal kind of economic competition in the market. In terms of ideology and general policy, the “Derg” opted for a socialist economic system where market forces were deliberately repressed and socialization of the production and distribution process pursued vigorously. By all measures it adopted a “hard control” regime between 1974/75 and 1989/90.⁴⁷ In this period let alone having a competition law as such, even the existing commercial law was in practice for quite rare incidences. This period at last came to an end in 1991 in which Ethiopia experienced another historic breakthrough both in its type of political system and economic policy orientation.⁴⁸

2.5.3. Post-1991

After the downfall of the “Derg” regime, the transitional government of Ethiopia and the subsequent successions officially proclaimed that the economic policy of the country is a free market economy. Adherence to a belief in the market economy leads to a great importance being attached to competition policy and the introduction of competition laws.

Since 1992, the Government has successfully implemented a series of reform programs that have substantial implications for market competition. These include the following short-term economic stabilization and structural adjustment measures:⁴⁹

- 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;

⁴⁶. Supra note cited at 43.

⁴⁷. Alemayehu Geda , The Political Economy of Growth in Ethiopia , Vol.2, p.3, Available at, <http://search.myway.com/search/GGmain.jhtml?searchfor=historical+background+of+competition+policy+and+regime+in+Ethiopia+pdf> , (accessed date, Mar.21/2015)

⁴⁸ . Supra note cited at 43.

⁴⁹ . Supra note cited at 12.

- 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 labor 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.⁵⁰ 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.

Though this has been the policy direction, competition law as a consolidated form of law is not yet in place except the coming into force of Trade Practice Proclamation of 2003. In this period trade practice proclamation No. 329/2003 was legislated with a purpose of regulating trade practices.⁵¹

As of the coming into force of this proclamation, 35 cases were registered for investigation in the trade practice investigation commission office out of which 13 cases got decision. Four cases not fall under the jurisdiction of proclamation 329/2003, whereas two cases pended additional information. The rest of the cases found to be under investigation for hearing.⁵²

⁵⁰ . Supra note cited at 12.

⁵¹ . Supra note cited at 43.

⁵² . Ibid

The gap of the trade practice proclamation is, it does not address all the issues, which should actually to be addressed in the competition law.⁵³ As the proclamation does not incorporate all competition related issues, it is not possible to discuss in detail issues of approaches to horizontal restraints, vertical restraints, dominant market position, mergers and acquisitions cross border abuses, checks and balances and other further details.

The succeeding proclamation next to the Trade practice proclamation of the 2003 is the Trade practice and Consumer Protection Proclamation No.286/2010. This proclamation too hosts gaps, for instance, the proclamation does not specifically mention ‘economic efficiency’ or market competition as an objective either in the preamble or under art.3 which defines its objectives. While lack of specific mention to market competition makes the proclamation different from many other laws in the area. Moreover, the single tiered appeal system is also another reason for the amendment of the law. However, the competition law of the country is not stable, currently the new law Trade competition and Consumer Protection Proclamation No.813/2013 is enacted and governing competition cases.

2.6. Objectives of Competition Law and Policy under the Ethiopian Competition Regime

Given that there is no stability on the competition regime of the country, all competition law enactments beginning from the Trade Practice Proclamation of 2003 till the current Trade competition and Consumer Protection Proclamation of 2013, states the objectives of the law in different format and style.

Under the first specific law that had the purpose of safeguarding and promoting competition, the Trade Practice Proclamation No.329/2003 contained its stated objectives. Accordingly, its major objectives was to secure a faire competitive process through the prevention and elimination of anti-competitive and unfair trade practices, and safeguarding the interests of consumers, through

⁵³ . Supra note cited at 43.

the prevention and elimination of any restraints on the efficient supply and distribution of goods and services.⁵⁴

The main concern of promoting economic efficiency was not indicated under the stated objectives of the proclamation. But under the preamble part of the proclamation it is indicated that the policy background for the enactment of the law is a desire to establish a system that is conducive for the promotion of competitive environment, by regulating anti-competitive practices in order to maximize economic efficiency and social welfare.

After the repeal of the Trade Practice Proclamation, the succeeding proclamation is the Trade Practice and Consumer Protection Proclamation No.685/2010. The rationale of the proclamation as stated in the preamble are to ensure that the market practices are undertaken in a manner consistent with a free market economic policy of the country; to protect the business community from anti-competitive and unfair market practices; consumers from misleading market conducts; to establish a system that is conducive for the promotion of competitive market; and to prevent the proliferation of goods and services that endangers the health and well being of consumers.⁵⁵

The proclamation also devoted an article defining its objectives. The indicated objectives of the proclamation are promoting consumers rights and benefits; ensuring the suitability of the supply of goods and services to human health and safety and installing a system of follow up; ensuring that manufacturers, importers, service dispensers and persons engaged in commercial activities in general carry on their activities in a responsible way; and preventing and eliminating trade practices that damage the interests and good will of businessperson.⁵⁶

It is interesting to note that the proclamation does not specifically mention ‘economic efficiency’ or market competition as an objective or under the preamble save as the various world countries concern of competition law is promoting economic efficiency. Indeed, the main preoccupation of the proclamation seems to be more to promoting other objectives such as consumer protection

⁵⁴ . See Proclamation No.329/2003, The Federal Negarit Gazeta of The Federal Democratic Republic of Ethiopia, 9th Year No.49, Addis Ababa, 17 April, 2003, Art.3 (repealed)

⁵⁵ . See the Preamble of Proclamation No.685/2010, The Federal Negarit Gazeta of The Federal Democratic Republic of Ethiopia, 16th Year No.49, Addis Ababa, 16 August, 2010, (repealed)

⁵⁶ . Supra note 55, Art.3

and ensuring the suitability of the supply of goods and services to human health and safety rather than to promoting economic efficiency.⁵⁷

Currently, the governing competition law of the country is the Trade Competition and Consumer Protection Proclamation No.813/2013. Unlike its predecessor, it includes the notion of economic efficiency by its stated objectives. The indicated objective of the proclamation are protecting the business community from anti-competitive and unfair market practices, and also consumers from misleading market conducts, and to establish a system that is conducive for the promotion of competitive free market; ensuring the consumers get goods and services safe and suitable to their health and equivalent to the price they pay; and lastly accelerating economic development.⁵⁸ Therefore, the current Ethiopian competition proclamation concerned, at least it tried to mention the economic efficiency or market competition as an objective of the law. This fact makes it a competition law in line with most of the world countries competition law mentioning economic efficiency or market competition as the primary objectives.

But when the laws of other jurisdictions are assessed there are other objectives of competition law and policy. Accordingly, competition laws contain other purposes, such as furthering technological progress, improving international competitiveness, securing the survival of small and medium enterprises, and regional development concerns as it is discussed above on section 2.4.⁵⁹ In this regard the Ethiopian competition law and policy tried to include “consumer protection” as an additional objective other than the main objectives stated on the preamble or the provision stating the objectives of economic efficiency or market competition. Lack of adequate, comprehensive consumer protection is a detriment to the achievement of healthy, competitive markets, as well as of healthy consumers. If explicit consumer protection provisions are included in the competition regime, there is potential for realizing greater national public goods. This additional objective of the competition law is included since the enactment of the repealed proclamation of the 2010 Trade Practice and Consumer Protection.

⁵⁷ . Supra note cited at 9.

⁵⁸ . Supra note 4, Art.3

⁵⁹ . Supra note 29.

CHAPTER THREE

Comparative Analysis of the Institutional Framework and Legal Regimes of the Ethiopian Trade Competition and Consumer Protection Authority

3.1. Introduction

Almost all countries with advanced market economies have competition laws, and most transition and developing countries have such a law or are in the process of creating one.⁶⁰ A competition law is an overarching set of rules that touches in some way almost all sectors in a market economy. National legal systems vary among countries and so do mechanisms for enforcing competition laws. Judges who hear and decide competition cases may be generalists or specialists; they may be members of the national court system or of a specialized competition tribunal.⁶¹ Countries also may vary in their format or design of competition enforcing institutions. Accordingly, countries may chose the integrated model of competition Authority- an agency integrating both taskforces of anti-competitive and consumer protection issues; or separate mode of institutional design- an independent competition Authority and independent judicial system for the adjudication of competition cases. Therefore, institutional design for the enforcement of competition and consumer protection plays a greater role in the efficiency, fairness and independence of the competition regime.

One of the fundamental issues to consider in designing the institutional structure of a competition authority is the scope of its mandate, specifically, whether it will be confined to “core” competition/antitrust issues, such as regulating mergers and preventing cartels and abuses of dominance, or whether the authority will have broader responsibilities that extend, for example, to consumer protection and sector-specific matters.⁶²

⁶⁰ . OECD Policy Rountables, Judicial Enforcement of Competition Law, 2009. P.166

⁶¹ . Ibid

⁶² . Biac, A Note: Roundtable on Changes in Institutional Design of Competition Authorities, submitted for Item VIII of the 122nd meeting of the OECD Competition Committee on 17-18 December 2014, p.2, Available at,

3.2. Institutional Framework of Competition Commission/Agencies/Authorities

There is a wide variety of institutional frameworks in which competition authorities operate. Apparently, the institutional framework is mainly relevant for competition law enforcement and much less so for competition advocacy. Still a brief discussion of the basic models seems to be in order. As it is indicated under chapter one of the proposal of this paper currently the global trend of institutional design of competition commission/agencies or authorities (for the purpose of this study hereinafter Authority) identified in to three Models. These include; the bifurcated judicial model; the bifurcated agency/tribunal model; and the integrated agency model. These models are the popular and applied in various world countries and jurisdictions in pure or mixed format. This implies, if a country has a competition regime, then the design or framework of the institution would not be out of these three models or mix of them. The distinguishing natures of these models discussed below.

3.2.1. The Bifurcated Judicial Model

A competition regime tailored on the format of this model obliges the competition authority to go to regular courts for the enforcement of competition cases. Studies reveal that, where courts are strong, independent, honest, and efficient (as in the US), the bifurcated judicial model has some significant advantages. In this context, the Ethiopian Trade Competition and Consumer Authority seem to follow this model in the enforcement of consumer right protections. The Authority's prosecution institutes an action to the regular court of respective jurisdictions.

With respect to accountability, the bifurcated judicial model entails significant accountability through the process of judicial appeal. The model scores poorly with expertise in the performance of the adjudicative function, but conversely, does reasonably well with respect to detachment. Again, the bifurcated judicial model scores well with respect to transparency and probably strikes a reasonable balance with respect to confidentiality.⁶³

<http://search.myway.com/search/GGmain.jhtml?searchfor=integrated+model+of+competition+Authority+in+light+of+fairness+pdf> (accessed on, April, 20/2015)

⁶³ . Supra note cited at 16, P.460-462.

3.2.2. The Bifurcated Agency/Tribunal Model

The bifurcated agency/tribunal model is an institutional model that competition authorities are required to go to a specialized competition tribunal for the enforcement of competition cases. Due to various reasons courts in developing countries are weak, therefore, the bifurcated agency/tribunal models have some significant advantage according to some studies.⁶⁴ For instance, jurisdictions adopting bifurcated agency/tribunal models, the South African, Chilean, and Canadian experiences reveal the importance of ensuring that the members of the adjudicative tribunal have substantial legal and economic expertise of a consistent and continuous nature.⁶⁵

On its face, this model seems designed to achieve a reasonable balance amongst the various values⁶⁶. The model ensures a high level of independence in the performance of the adjudicative function, while ensuring some degree of accountability in the performance of this function through the judicial appeal process. Moreover, this model may also be designed to provide a reasonable balance between administrative efficiency and due process values in that all proceedings shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.⁶⁷

⁶⁴ . Eleanor M. Fox and Michael J. Trebilcock, *The Design of Competition Law Institutions and the Global Convergence of Process Norms: The GAL Competition Project*, 2012, New York University Law and Economics Working paper 304, p.8, Available at, <http://search.myway.com/search/GGmain.jhtml?searchfor=integrated+model+of+competition+Authority+in+light+of+fairness+pdf> (accessed date, April, 20/2015)

⁶⁵ . Ibid, p.9

⁶⁶ . The normative criteria or values for evaluating competition law institutions are likely to be inherently uncontroversial. (Michael J. Trebilcock and Edward M. Iacobucci, 2010) argue that any competition-policy institutional regime must address five fundamental questions. First, who investigates and initiates proceedings (including the relative roles of public and private enforcement)? Second, to the extent that investigation and other enforcement activities are undertaken by the government, which branch of the government is responsible? For example, the questions of who hires competition policy bureaucrats, to whom are they accountable, and whether the competition-enforcement body is part of a line ministry or is an independent agency with its own budget and personnel policies must be addressed. Third, what body adjudicates contested competition proceedings? Does a branch of the enforcement agency adjudicate, or is there a completely independent body? What process does the adjudicative body follow? Fourth, to what extent is there judicial review of competition decisions? Finally, what role, if any, is there for political review by elected officials of competition agency decisions? See also note cited at Michael J.Trebilcock.

⁶⁷ . Supra note cited at 16, p.461-462

3.2.3. The Integrated Agency Model

The integrated agency/authority model is also the other type of institutional design of competition regime. Under this type of model, a single specialized agency undertakes investigative, enforcement and adjudicative functions. The integrated agency model represents an agency with a double mission: responsibilities for the enforcement of both competition law and consumer protection law.⁶⁸ For instance, Australian Competition and Consumer Commission (ACCC), the UK, the Office of Fair Trading (OFT), the EU, Japan, China, and US Federal Trade Commission (FTC) are representatives for the integrated agency model.⁶⁹ In this regard, due to inclusion of consumer protection objective and its double mission or objective, the Ethiopian Trade Competition and Consumer Protection Authority (ETCCPA) on its institutional framework seem to be grouped under the integrated agency/authority model.

Generally, whichever model is chosen either bifurcated judicial, bifurcated agency or integrated models, cases go to court, whether immediately or ultimately. The studies reveal numerous problems with court systems including unacceptable delays and unknowledgeable jurists. In some jurisdictions, review of agency or tribunal determinations is de novo (South Africa) and in others review is deferential to fact-finding, at least normally and to some extent (European Union; US—appeals from the FTC). Concerns have arisen in both directions that is too much intrusion by appellate courts (like South Africa) and too little examination by appellate courts (like the case of European Union) thus underlining the observation that there are costs, benefits, and trade-offs of both approaches, and feasible solutions are particular to the context.⁷⁰

3.3. Institutional Framework (Design) of Competition Authorities under the Experiences of Some Jurisdictions

⁶⁸ . Eleanor M. Fox and Michael J. Trebilcock, *The Design of Competition Law Institutions and the Global Convergence of Process Norms: The GAL Competition Project*, 2012, New York University Law and Economics Working paper 304, p.8, Available at, <http://search.myway.com/search/GGmain.jhtml?searchfor=integrated+model+of+competition+Authority+in+light+of+fairness+pdf> (accessed date, April, 20/2015)

⁶⁹ . Ibid

⁷⁰ . Supra note 68.

Institutional framework (design) concerned, it does not simply about institutional set up or institutional organization but also includes many other factors. Is competition law located in a common law or civil law system? Is enforcement civil only or also criminal? Is there one federal enforcement body or more (as in China and the United States)? Is there a right of private enforcement, and how does private enforcement interact with public enforcement? The elements vary from jurisdiction to jurisdiction, with virtually all jurisdictions aspiring to efficient and effective enforcement subject to effective protection of rights, and subject to the context of the jurisdiction.⁷¹ Here in under experiences of some jurisdictions regarding to institutional framework are discussed.

3.3.1. France

In France March 2nd, 2009 marked the advent of the Competition Authority, which was created by way of transformation of the previous Competition Council.⁷² The Authority takes over the current organization of the Council while incorporating the teams formerly in charge of carrying out dawn raids within the Ministry of Economy. Thus, France now enjoys a single independent competition agency.

3.3.1.1. Organizational Structure and Functions of the Competition Authority

Antitrust cases are launched and prosecuted by the Investigation Services acting under the direction of the General *Rapporteur* with no involvement of the College whatsoever. The College then adjudicates all aspects of the case, with no involvement at all by the Investigation Services in the decision-making process. This separation of functions has proved extremely beneficial because it guarantees an intense debate both with the parties and within the organization that ultimately leads to rich, strong, and fair decisions. Accordingly, due process and rights of defense remain guaranteed by a fully fledged system of internal checks and balances.

⁷¹ . Supra note 68.

⁷² . Bruno Lasserre, *Trustbusters: Competition Policy Authorities Speak Out*, D. S. Evans and F. Jenny Eds., Competition Policy International, 2009, p.2

Given the internal separation between the investigative body and the adjudicative body, the Hearing Officer (which is a first among European NCAs) has not been given a decision-making power on procedural issues. The Hearing Officer is therefore a procedural expert who can follow the investigative process and help resolve issues as they arise before providing feedback to the College.

Generally, the Authority is now solely responsible for making competition work on the markets by overseeing mergers as well as by enforcing rules prohibiting cartels, anticompetitive agreements, and abuses of dominance.

3.3.2. Republic of South Africa

3.3.2.1. Organizational Structure of the Competition Regulatory Authorities

South Africa has a common law legal system.⁷³ Its current competition regime is just over decade old and is based on the Competition Act 1998. The Competition Act, No. 89 of 1998, accordingly, establishes three independent competition regulatory authorities. These are the Commission, the Competition Tribunal (the Tribunal), and the Competition Appeal Court (formerly, the Competition Board). These institutions are established as an independent regulatory authority with respect to the taskforce they are authorized by the Competition Act. Accordingly, the Commission is the investigative and enforcement agency, the Tribunal is the adjudicative body and the Competition Appeal Court (CAC) considers appeals against decisions of the Tribunal. The Competition authorities are functionally independent institutions, but are administratively accountable to the Economic Development Department.⁷⁴

3.3.2.2. Power and Functions of the Institutions

3.3.2.2.1. The Competition Commission

The Competition Commission is empowered by the Competition Act to investigate, control and evaluate restrictive business practices, abuse of dominant positions and mergers in order to

⁷³ . Supra note cited at 68.

⁷⁴ . Annual Report 2013/2014 of The Competition Commission of Republic of South Africa, p.4, Available at, <http://search.myway.com/search/GGmain.jhtml?searchfor=the+laga+Act+of+the+South+African+competition+Act+of+the+2013+pdf> , (accessed date, April, 21/2015)

achieve equity and efficiency in the South African economy. The Commission is independent and subject only to the Constitution and the law; and must be impartial and must perform its functions without fear, favor, or prejudice.⁷⁵

3.3.2.2.2. The Competition Tribunal

The Competition Tribunal is a juristic person. It may adjudicate on any conduct prohibited in terms of Anti-competitive practices, to determine whether prohibited conduct has occurred, and, if so, to impose any remedy provided for in the Act; adjudicate on any other matter that may, in terms of the Act, be considered by it, and make any order provided for in the Act; hear appeals from, or review any decision of, the Competition Commission that may in terms of the Act be referred to it; and make any ruling or order necessary or incidental to the performance of its functions in terms of the Competition Act.⁷⁶ Each member of the Competition Tribunal must have suitable qualifications and experience in economics, law, commerce, industry or public affairs.⁷⁷

3.3.2.2.3. The Competition Appeal Court (CAC)

This institution is established as a court to be known as the Competition Appeal Court, which- is a court contemplated as per section 166(e) of the Constitution of RSA with a status similar to that of a High Court. This implies for all judicial matters regarding competition cases the CAC has the status a High Court. The Competition Appeal Court may review any decision of the Competition Tribunal, consider an appeal arising from the Competition Tribunal, confirm, amend or set aside a decision or order of the Competition Tribunal, or remit a matter to the Competition Tribunal for a further hearing on any appropriate terms.⁷⁸

⁷⁵ . See the Republic of South African, Competition Act, Competition Act, Act No. 89 of 1998, Government Gazette, Vol. 400, Cape Town, 30 October 1998, Art.20. Available at, <http://search.myway.com/search/GGmain.jhtml?searchfor=the+independence+of+tribunal+judges+of+competition+authority+of+republic+of+south+Africa+pdf> , (accessed at, March, 5, 2015)

⁷⁶ . Ibid, Arts.26(1)b and 27

⁷⁷ . Ibid, Art.28(2)b

⁷⁸ . Supra note 75, Art.37

3.3.3. Australia

3.3.3.1. Organizational Structure

As per the Australian Constitution the executive or administration cannot exercise judicial power. In the federal system, judicial power can only be exercised by the courts.⁷⁹ Courts are required to be comprised of independent judicial officers with security of tenure and to have the power to make and enforce orders.

Organizationally, the Australian Competition Code establishes three independent enforcement organs. These are discussed below.

3.3.3.1.1. The Australian Competition and Consumer Commission

The primary enforcement agency for competition law in Australia is the Australian Competition and Consumer Commission (ACCC). The agency is structurally independent of government and, although it reports to the government and is subject to government oversight, it carries out its statutory functions free from government influence.⁸⁰

Australian models have elements of the bifurcated agency models. The agency is responsible for investigating breaches of competition law; taking enforcement proceedings to the courts of general jurisdiction (the Federal Court in Australia); and undertaking first instance adjudications in merger control proceedings and in a variety of regulatory matters (for example in the telecommunications and energy sectors).⁸¹

3.3.3.1.2. The Australian Competition Tribunal

⁷⁹ . OECD Policy Roundtables, Procedural Fairness: Competition Authorities, Courts and Recent Developments, 2012, p.23. Available at, <http://search.myway.com/search/GGmain.jhtml?searchfor=the+independence+of+tribunal+judges+of+competition+authority+of+India+pdf> ,(accessed at, March 21, 2015)

⁸⁰ . Supra note cited at 68.

⁸¹ . Ibid

The Australian Competition Tribunal is a review body. It is a specialist tribunal that sits in divisions comprising one federal court judge and two lay members.⁸² A review by the Tribunal is a re-hearing or a re-consideration of a matter. The Tribunal may perform all the functions and exercise all the powers of the original decision-maker for the purposes of review. It can affirm, set aside or vary the original decision. A presidential member must be a judge of the Federal Court of Australia. Other members must have knowledge of or experience in industry, commerce, economics, law or public administration.⁸³ The Tribunal has no resources of its own. The funds appropriated by Parliament for the purposes of the Tribunal are managed by the Federal Court.⁸⁴

3.3.3.1.3. The Federal Court

In Australia, as a consequence of the constitutional separation of judicial and administrative powers, only a court can determine whether a contravention of the Trade Practices Act has occurred and make orders against offenders.⁸⁵ The relevant court is the Federal Court of Australia (although State and Territory Supreme Courts can hear cases under the Competition Code). Decisions of the Federal Court can be appealed to the Full Court of the Federal Court, and then to the High Court of Australia.⁸⁶

3.3.4. India

3.3.4.1. Organizational structure and Functions of Competition Organs

The Indian Competition Amendment Act of 2007 separated the Commission into two independent bodies. These are the Competition Commission of India (Commission), an expert administrative body, and the Competition Appellate Tribunal (Tribunal), an adjudicatory appellate body.⁸⁷

⁸² . Supra note 68.

⁸³ . OECD Reviews of Regulatory Reform, Competition Policy in Australia, 2010, p.33, Available at, <http://search.myway.com/search/GGmain.jhtml?searchfor=competition+policy+and+regimes+of+France+pdf> , (accessed at, April, 16, 2015).

⁸⁴ . Ibid, p.34

⁸⁵ . Supra note cited at 83.

⁸⁶ . Ibid

⁸⁷ . Supra note cited at 68.

3.3.4.1.1. The Competition Commission

The Commission may commence inquiries either on its own motion or on receipt of a complaint from any person, consumer, or their association or trade association or on reference from the central government or the state government or any other statutory body. The Commission is further assisted by the Director General of Investigation. The Office of the Director General is the investigative arm of the Commission. The Commission must refer all matters for investigation to the Director General.⁸⁸ The Commission is not bound by the findings made by the Director General. The Commission may choose either to accept or reject the investigation report or issue fresh instructions to the Director General for carrying out further investigations. As per the Competition Act of India, all cases relating to anti-competitive practices can only be investigated by the Competition Commission of India (CCI).⁸⁹

3.3.4.1.2. The Competition Appellate Tribunal

The Tribunal discharges the appellate function. Any party aggrieved by an order of the Commission may appeal to the Tribunal. The Tribunal, after giving the parties an opportunity to be heard, may modify or set aside the order of the Commission. Parties aggrieved by the Tribunal's order may make a final appeal to the Supreme Court of India. The Tribunal consists of a chairperson and two other members. Tribunal members are required to have knowledge and experience of not less than twenty-five years in competition matters including areas such as economics, business, commerce, international trade.

The structure of the Indian competition law system is a mix of a bifurcated agency model and the integrated agency model. The Commission is vested with inquisitorial, investigative, regulatory, adjudicatory, and, to a limited extent, advisory jurisdiction. The Tribunal has appellate jurisdiction over the orders passed by the Commission.

⁸⁸ . Supra note cited at 68.

⁸⁹ . Nishith Desai, *Competition Law In India: Jurisprudential Trends and the Way Forward*, 2013, p.17

3.4. Institutional Framework and Legal Regimes of the Ethiopian Trade Competition and Consumer Protection Law

3.4.1. Institutional Framework

One of the fundamental issues to consider in designing the institutional structure of a competition authority is the scope of its mandate, specifically, whether it will be confined to “core” competition/antitrust issues, such as regulating mergers and preventing cartels and abuses of dominance, or whether the authority will have broader responsibilities that extend, for example, to consumer protection and sector-specific matters.⁹⁰

In the current environment of increased budgetary scrutiny, cost reduction is often cited as a key factor in combining multiple functions into a single agency.⁹¹ Such combinations can bring administrative efficiencies as resources are shared and duplicative efforts are minimized.⁹² Currently, a number of jurisdictions, for instance, Australia, UK and the like have undertaken institutional reorganization to the integrated type of agency system. Even if Ethiopia previously does not have a separated institution of consumer protection authority or agency, the enactment of the 2010 Trade Practice and Consumer Protection Proclamation introduced the integrated mode of agency model and the current proclamation also followed the path of the repealed proclamation of 2010 regarding to integration of the competition law with consumer protection regimes. It is evident that the first regime of competition law, i.e. the Trade Practice Proclamation does not include the consumer issues in organized fashion.

In addition to improving efficiency, creating a multifunctional competition authority can also enhance the entity’s overall effectiveness. Integrating multiple functions within a single authority can generate synergies as experts from related fields are brought together to analyze problems collectively.⁹³ In this regard, the current competition proclamation established a single Authority with a multiple functions in enforcing competition and consumer oriented cases.

⁹⁰ . Supra note cited at 62, p.2.

⁹¹ . Ibid

⁹² . Ibid

⁹³ . Ibid

3.4.2. Enforcing Organ of Trade Competition and Consumer Protection law in Ethiopia

3.4.2.1. The Trade Competition and Consumer Protection Authority

The Ethiopian Trade Competition and Consumer Protection Proclamation No.813/2013 (hereinafter the competition Proclamation) under part IV, establishes the Trade Competition and Consumer Protection Authority (hereinafter the Competition Authority) for the enforcement of competition law. The Competition Authority is the primary agency for the enforcement of competition law in Ethiopia with an autonomous federal government body having its own legal personality.⁹⁴ The competition authority shall be accountable to the Ministry of Trade (MoT) and shall be governed by the provisions of the competition proclamation.⁹⁵

The Proclamation under its preamble as an objective stated that to ensure the implementation of the system of trade competition and consumer protection it has to be found necessary to determine the powers and duties of the concerned organs particularly, the organs in charge of investigation, prosecution and judicial responsibility.⁹⁶

3.4.4. Organizational Structure of the Competition Authority

The Competition Proclamation of 2013 establishes three organs under the Authority. These are the Competition organ for conducting investigation, institution of action (prosecution) and an organ with adjudication power. At the federal level the judicial organ within the competition authority further divided in to two. These are the adjudicative bench of the competition authority and the federal appellate tribunal. Though the law ambitiously provides for the establishment of the adjudicative tribunals under the authority, it does not specify whether they are institutionally independent or not.

Personnel organization concerned the Authority shall have a Director General and, as may be necessary, Deputy Director Generals to be appointed by the Prime Minister up on the recommendation of the Minister of Trade. The appointment of judges, assignment of

⁹⁴ . Supra note 4, Art.27.

⁹⁵ . Ibid, Art.27(2) & (3)

⁹⁶ . Ibid, See the preamble of the proclamation cited at 4.

investigative officers and prosecutors are made in accordance with the proclamation. The Authority also has the necessary staff.⁹⁷

3.4.5. Power and Functions of the Authority

The Trade Competition and Consumer Protection Authority is entrusted with various functions, among others investigative, enforcement and judicial powers. Among others the authority is empowered to take appropriate measures to increase market transparency; take appropriate measures to develop public awareness on the provision of the competition proclamation; receive and decide on, merger notifications; and protect consumers from unfair practices of business persons.⁹⁸ It also organize judicial organs with jurisdiction on issues of trade competition and consumer protection; provide support to industrial self-regulation in order to enable various industrial sectors regulate anti-competitive and unfair trade practices; own property, enter into contracts, sue and be sued in its own name; and perform such other related activities conducive for the attainment of its objectives.⁹⁹

3.4.5.1. Conducting Investigation

Under the Ethiopian competition proclamation the investigative functions are not structurally independent from other organs of the Authority- the prosecution and adjudicative. Investigation of competition issues concerned the Authority has a wide range of roles and responsibilities. Accordingly, the Authority shall conduct investigation where there is sufficient ground to suspect, based on its own information or information given to it by any person, that an offence has been committed anywhere, entailing administrative measures and administrative penalty pursuant to Article 32 and 42 or criminal penalty pursuant to sub-article (1) or (7) of Article 43 of the competition proclamation.¹⁰⁰ Entailing criminal penalty that has been committed in Addis Ababa or Dire Dawa city administrations; the authority shall conduct investigation pursuant to sub-articles 2-6 of Article 43 of the proclamation.¹⁰¹

⁹⁷ . Supra note cited at 4, Art.28

⁹⁸ . Supra note 4, Art.30.

⁹⁹ . Ibid

¹⁰⁰ . Id, Art.36(1)

¹⁰¹ . Id, Art.36(1)b

The Authority has a power to order the police forces under the Federal Police Commission and the two city administrations' police commission where it finds necessary to conduct investigation activities.¹⁰² In the course of conducting investigations, the Authority is granted with a power to search or seizure by its investigative officer as ordered by an adjudicative bench of the Authority itself.¹⁰³ Moreover, an investigative officer of the Authority may enter into the business premises of the suspect or any other place where goods are stored or stop a vehicle loaded with goods and conduct search while conducting investigation.¹⁰⁴ Taking samples of goods necessary for the investigation; examining and taking the copies of records and documents kept in any form; and seizing goods illegally stored or being transported or sealing their storage or container are the powers of the Authority while it conducts investigation.¹⁰⁵

3.4.5.2. Institution of Action (Enforcement)

The Ethiopian Competition Authority other than investigating criminal violations has a power to prosecute or enforce the competition issues. Under the Ethiopian competition law where prosecutions are sought, the prosecutor of the Authority based on the findings of investigation institute an action to administrative measures and penalty to be imposed by the adjudicative benches of the Authority and criminal penalty to be imposed by the competent Federal Court. Any other civil cases are instituted by private parties whether it be a business person who has sustained damage arising from an act of unfair competition and claims payment compensation; or consumer who claims payment of compensation for the damages he has suffered because of purchase or use of the goods or services institute an action before the adjudicative bench of the Authority.

Thus, for criminal prosecution, ETCCPA reflects a version of the bifurcated judicial model¹⁰⁶. But in the enforcement of private parties civil claim the Authority seems follow a version of bifurcated agency model¹⁰⁷ on the fact that it is required to go to a specialized competition

¹⁰² . Ibid, Art.36(2)

¹⁰³ . Ibid, Art.36(3)

¹⁰⁴ . Ibid, Art.36(4).

¹⁰⁵ . Ibid, sub-article 1 of Art.36 (a-d)

¹⁰⁶ . See the discussion made on bifurcated judicial model on the previous section of 3.2.1.

¹⁰⁷ . See also the discussion made on bifurcated agency model on the previous section of 3.2.2.

tribunal, i.e. Adjudicative bench of the Authority and then Federal Appellate Tribunal, as the case may be.

3.4.5.3. Adjudicative Benches of the Authority

The authority has also been granted extensive judicial power. It shall have judicial power to take measures and impose fines in accordance with Article 42 of the proclamation on a business person; and order payment of compensation in accordance with the relevant laws to business persons victimized by acts of unfair competition committed in violation of the provisions of part two of the proclamation.¹⁰⁸ The Authority also exercises its judicial power by ordering compensation in accordance with the relevant laws to consumers victimized by transactions conducted in the Addis Ababa or Dire Dawa city administrations in violation of consumers' protection provisions stipulated under part three of this proclamation.¹⁰⁹

Administrative measures concerned, the Authority has a power to take administrative measures by ordering discontinuance of the act pronounced unfair; taking any other appropriate measure that enables to reinstate the victims competitive position; and order suspension or revocation of the business license of the offender pursuant to sub-article (1)(a) of Art.32.¹¹⁰

The adjudicative benches of the Authority in the course of conducting their judicial functions order any person to furnish information and submit documents that may required; summon any witness to appear and testify; execution of orders and decisions of the adjudicative benches; order the police or any other appropriate organ; and order the attachment, seizure and sale of goods. The adjudicative benches also consider the nature, duration, gravity and extent of the offence; the damage suffered; the market circumstances in which commission of the offence took place; benefit derived from the offence; the economic status of the offender and the like during determining administrative penalty or administrative measures.

In most jurisdictions, legislators elect to police by judicial review. It is widely held that independent judicial review of the decisions of competition authorities, whether through the regular courts or through administrative tribunals, is desirable for the sake of the fairness and

¹⁰⁸ . Supra note 4, Art.32 (1) a & b.

¹⁰⁹ . Ibid, sub-article 1 (c)

¹¹⁰ . Ibid, sub-article 2.

integrity of the decision-making process. Due to this fact jurisdictions provide a right of appeal, which is one of the universal rights of defense. Therefore, the Ethiopian competition proclamation is not an exception not to provide this right. Accordingly, any person aggrieved by the decision of the Authority to prohibit merger or to revoke merger approval or to ban a commercial advertisement or by any decision of an adjudicative bench of the Authority may appeal to the Federal Appellate Tribunal within 30 days from the date of decision. The Federal Appellate Tribunal upon examining an appeal submitted to it confirm, reverse or vary the decision, or remand the case with necessary instructions to the Authority or the adjudicative bench of the Authority.¹¹¹ The decision of the Federal Appellate Tribunal on the appeal submitted to it shall be final, provided, however, that the party that claims the existence of mistake on question of law regarding a decision passed may lodge appeal to the Federal Supreme Court within 30 days from the date of the decision.

Most jurisdictions appear to favor a procedural review of competition cases whereby the appellate 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, for instance, like the case of South Africa.¹¹²

A right of appeal to a panel of decision-makers who can set aside decisions based on error is a recognized right of defense. So too is this function a recognized vehicle for obtaining more clarity and thus more predictability of the law. Scope of review of fact-finding differs, with some courts review limited to manifest error of law and others assigned *de novo* review.¹¹³ One can understand from this fact that the standard of review applied by the courts in competition cases varies between jurisdictions, and may also depend upon the particular administrative or judicial act of the country.

When we analyze the appeal system of the Ethiopian competition law, the federal supreme court only entertain the case on error of law but not fact-finding or analyze evidence. The extent of

¹¹¹ . Supra note 4, Art.33(3)

¹¹² . Supra note cited at 68.

¹¹³ . Ibid

judicial review concerned, there are a line of arguments that when there is a lack of separation of prosecutor and decision-maker in the competition law system, more in-depth review seems appropriate.¹¹⁴ It is argued that more intense judicial control is one of the ways to address the emergence of independent national competition and other regulatory authorities, which often have wide-ranging discretionary powers, in order to counterbalance the lack of political and also administrative accountability.¹¹⁵

3.4.5.4. The Federal Trade Competition and Consumer Protection Appellate Tribunal

The Federal Appellate Tribunal is the new invention the 2013 Trade Competition and Consumer Protection Proclamation. Under the repealed law of the Trade Practice and Consumer Protection Proclamation of 2010 this institution was not established. In this regard, the current Proclamation in some extent solved the Problems of loose appeal system which is witnessed under the previous competition proclamation.

Accordingly, this appellate tribunal, like other jurisdictions, for instance, the South African Competition Appellate Court (CAC), may review any decision of the Authority (i.e. to prohibit and revoke merger approvals and to ban commercial advertisements) and Adjudicative Benches of the Authority, confirm, reverse or vary the decision, or remand the case, with necessary instructions, to the Authority or the Adjudicative benches of the Authority for a further hearing on any appropriate terms as the case may be.¹¹⁶

However, the competition appellate court of South Africa is contemplated legally as a court; it is not clear when we come to the Ethiopian experience. Even the Appellate Tribunal's Structural attachment to the Authority and whether or not it is structured with general courts of the Federal Government is not clearly defined. Financially too the Tribunal is dependent on the Authority but it is separately established competition judicial institution. In this regard, for instance, even if the Australian Competition Tribunal has no resources of its own, the funds appropriated by

¹¹⁴ . Supra note cited at 68.

¹¹⁵ . Katalin J. Cseres, Accession to the EU's Competition Law Regime: A Law and Governance Approach, 2014, Year Book of Antitrust Regulatory Studies, University of Warsaw, P.50. Available at, <http://search.myway.com/search/GGmain.jhtml?searchfor=K.J.+Cseres+full+text+of+the+integrated+and+separated+model+of+competition+Authority> , (accessed date, March, 15, 2015)

¹¹⁶ . See Art.33(3) of the proclamation cited at note 4.

Parliament for the purposes of the Tribunal are managed by the Federal Court. Here one can see the actual independence of the Tribunal from the Competition Commission.

Moreover, the status of the Appellate Tribunal is not defined under the law. In fact, when we see the current professional composition of the Tribunal, there are three judges appointed by the Prime Minister of the Country. Accordingly, these judges are previously working in State and Federal Supreme Courts. As appeal concerned, the decision of the Tribunal is appealed to the Federal Supreme Court, provided that the claims are arisen mistake on question of law existed.

3.4.6. The Structural Independence of the Authority

Independence from government politics is an important element of any competition agency. Independence from government, or lack thereof, can have a considerable impact on market stability, the facilitation of investment, and the efficient operations of competition agencies.¹¹⁷ The Trade Practice and Consumer Protection proclamation established the authority as an autonomous federal government organ having its own legal personality.¹¹⁸ Other than its accountability to the Ministry of Trade (MoT), the Authority is an independent federal government body. Including the tasks of investigation all other functions imposed by the proclamation to be enforced are now the mandate of the Authority. This consolidated power of investigation, enforcement (prosecution) and adjudication given for the single Authority is the recent development that the repealed Trade Practice and Consumer Protection Proclamation No.685/2010 does not recognized and it was apportioned the investigation wing to the then Ministry of Trade and Industry (MoTI). The current competition proclamation, in fact, boldly states that the Authority is independent and established the Adjudicative Benches and Federal Appellate Tribunal. The investigative, enforcement and adjudication organs of the Authority are not structurally independent.

However, the proclamation under Art.35 states that judges appointed pursuant to the provision of the proclamation shall be independent of any interference or instructions by any person with regard to cases they adjudicate, surprisingly it is unclear whether or not the adjudication organ

¹¹⁷ . Supra note cited at 62.

¹¹⁸ . Supra note 4, Art.27(1).

including the Federal Appellate Tribunal is structurally independent. The judicial organs with jurisdictions on issues of trade competition and consumer protection are organized by the Authority. Even the Appellate Tribunal is dependent on the Authority on the provision of secretarial and other services. Though the Authority has a budget allocated by the government nothing is indicated about in what manner the budget is allocated to the organs of the Authority including the judicial organs.¹¹⁹ The Tribunals have no budget or resource of their own. The proclamation is also unclear regarding to this issue.

The more prevalent practice among countries is to provide for the allocation of funds to competition authorities are made 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.¹²⁰

3.4.7. Appointment and Composition

The Trade Competition and Consumer Protection Proclamation provides for the establishment of the Authority. According to the Proclamation, the Authority would be composed of a Director General and, as may be necessary, an unspecified number of Deputy Director Generals to be appointed by the Prime Minister upon the recommendation of the Minister of Trade. And judges with the necessary professional qualification, educational background and experience are appointed by the Prime Minister.¹²¹ Other than the members of the appointee, the Authority also comprise investigative officers conducting investigation and prosecutor instituting an action and

¹¹⁹ . Supra note 4, Art.44

¹²⁰ . Review of the Legal and Institutional Framework for Market Competition in Ethiopia, written by the Research Team including; Fikremarkos Merso(Dr), Imiru Tamirat Yigezu, Seyoum Yohannes, Yosef Endeshaw and Tilahun Teshome Retta(prof.). available at, <http://search.myway.com/search/GGmain.jhtml?searchfor=LLM+thesis+of+the+ethiopian+competition+law+in+addis+ababa+university+pdf&st=tab&ptb=935E4832> , (accessed day Mar18. 2015)

¹²¹ . Supra note 4, sub-articles (1) & (2) of Art.28

the necessary staff.¹²² The Proclamation does not determine the term of office of the Director General or Deputy Director Generals, as the case may be.

Moreover, the proclamation is unclear regarding to the administration of judges or it does not indicate that the issue concerned will be governed by directives that may be enacted as per the proclamation. Accordingly, the laws governing the tenure, discipline, removal and transfer of judges is not addressed by the proclamation. Though, these issues are out of the scope of the study, on their own may have effect on the independence and impartiality of the tribunal judges of the Authority.

3.4.8. Power and Functions of the Director General

The proclamation makes it clear that the Director General of the Authority is the chief executive officer of the Authority and direct and administer the activities of the Authority. Accordingly, the Director General shall have the power and duties to ascertain the proper implementation of the powers and duties of the Authority provided under Articles 30 and 32 of the proclamation; employ and administer employees of the Authority based on the principles of the Federal Civil Service law; and represent the Authority in its dealing with third parties.¹²³ Whenever efficient performance in the activities of the Authority is required, the Director General may delegate parts of his powers and duties to other employee of the Authority.¹²⁴

¹²² . Supra note 4, sub-articles (3) & (4)

¹²³ . Ibid, Art.31(1)&(2)

¹²⁴ . Ibid , sub-article (3) of Art.31

CHAPTER FOUR

Evaluating Issues Related With Consolidation of Investigation, Prosecution and Adjudication Powers under the Ethiopian Competition Authority

4.1. Introduction

Independence in a democratic society means accountability. These independence and accountability are two sides of the same coin that should go hand-in-hand. To this extent, internal and external checks and balances need to be designed towards ensuring independence, while making the institution responsible for its actions and decisions.

There is widespread agreement that independent regulators are at the core of regulatory governance in liberalized economies and a globalized world economy. Indeed, the UNCTAD Model Law on Competition is formulated on the assumption that the most efficient type of administrative authority for competition enforcement is likely to be one that (a) is quasi-autonomous or independent of the Government, with strong judicial and administrative powers for conducting investigations and applying sanctions; and (b) provides the possibility of recourse to a higher judicial body. It is generally recognized that any assessment of the independence of competition authorities must necessarily examine both *de facto* independence (what exists in reality) and *de jure* independence (what is reflected in the statutes) because measures of independence vary by country. For instance, in Canada not only the competition Authority but also organs under the competition Authority are independent as per the competition Act of the country. The investigation and research directorate and the competition tribunals operate their task autonomously and this ensures the independence of each organs of the Authority.¹²⁵

In the context of the Ethiopian Trade Competition and Consumer Protection Authority, as it is clearly indicated under the establishing proclamation, independence or autonomy is only given on the Authority level, however, it is accountable to the Ministry of Trade. The Authority, as

¹²⁵ . The OECD Policy Roundtables, Judicial Enforcement of Competition Law, 1996, p.116. available at <http://search.myway.com/search/GGmain.jhtml?searchfor=what+is+competition+law%3F+pdf> , (accessed at, Mar.22, 2015)

discussed under the previous chapter, given with various tasks, for the purpose of this paper, other than the task of policy advocacy. These include investigation, prosecution and adjudication powers. This implies that all procedures that are needed for the fulfillment of rule of law are consolidated under the mandates of the Authority. This in turn pulls out other problems like fairness, institutional independence including the de jure and de facto, check and balance, officers' professional independence issues. Moreover, the independence of the Federal Appellate Tribunal is also the matter of controversy. The Appellate Tribunal has not defined independence and accountability. These and the like issues are evaluated in light of the fairness and rule of law due to the consolidated power of investigation, prosecution and adjudication under the Ethiopian Trade Competition and Consumer Protection Authority.

4.2. Independence and Accountability of the Authority

There is thus a trade-off between independence and accountability, with greater discretion counterbalanced by stricter standards of accountability. This trade-off is generally deemed desirable because it ensures that the competition authority does not stray from the agenda set by the legislature. Independence and accountability can also be seen as interdependent, such that where accountability is perceived to be high, there is increased willingness to concede greater discretion and independence. The opposite is also true in that, where accountability is perceived to be lacking, it can be expected that there will be increased pressure on the executive and legislature to exert control.¹²⁶

Independence and accountability concerned, the Ethiopian competition proclamation states that the Trade Competition and Consumer Protection Authority ('the Authority') as an autonomous establishment to ensure the implementation of the system of trade competition and consumer protection. However, it is independent also made accountable to the Ministry of Trade (MoT).¹²⁷ But the issue that is not made clear with the law is that in what manner the accountability workout? We have said previously that without accountability it is very hard to think

¹²⁶ . Note by the UNCTAD secretariat, Independence and accountability of competition authorities, Geneva, 2008, p.5. available at, <http://search.myway.com/search/GGmain.jhtml?searchfor=independence+and+accountability+of+competition+authority+pdf> , (accessed at, Mar.22, 2015)

¹²⁷ . Supra note 4, Art.27(2)

independence. Therefore, the toolkit of accountability should be clear. According to Ato Tekalign Kedir, legal expert in Ministry of Trade, accountability is expressed in most of cases by supervision, evaluation and reporting system.¹²⁸ In fact, the competition proclamation does not made things clear regarding to accountability.¹²⁹ Various directorates under the Ministry of Trade follow similar trend that their accountability to the Ministry is experienced by being supervised, evaluated and submitting report to the Ministry.¹³⁰ Accordingly, one can assume that the Authority's relationship with the Ministry seems follow similar format.¹³¹

It is thus clear that, in reality, independence is never absolute.¹³² Some would argue that the word “autonomous” is more appropriate terminology, because it reflects the trade-off between independence and accountability.¹³³ In this context the Ethiopian competition proclamation tried to follow the most accepted terminology but it does not make things clear related with accountability and this in its own has impact on independence (on its appropriate terminology ‘autonomous’) of the Authority.

4.3. Institutional (structural) independence

4.3.1. ‘De jure’ Independence

Institutional efficacy demands functional independence. Functional independence for an institution implies achieving the desired degree of autonomy and maintaining an arm's length relationship from various authorities and interest groups generally. De jure independence simply implies what is stated under the laws of a country about specific institutions independence. Accordingly, the Ethiopian competition proclamation established different institutions under the competition Authority. These are the investigation, prosecution and adjudication organs. These organs are directed and administered by the Authority under a wholesale format. As the name indicates these organs are imposed with different responsibilities but are under the same roof. Other than the Federal Appellate Tribunal the law does not give recognition about the

¹²⁸ . Interview with Ato Tekalign Kedir, a legal expert, in MoT, May, 7/2015, Addis Ababa.

¹²⁹ . Ibid

¹³⁰ . Ibid

¹³¹ . Ibid

¹³² . Supra note cited at 126.

¹³³ . Ibid

independence of the organs. Even the independence of the federal appellate tribunal itself is under controversy.

Under Art.33 (1) of the proclamation, it states that the Federal Appellate Tribunal is hereby established. In fact, establishment of the Appellate Tribunal is an important development in the current proclamation as compared with the previous Trade Practice and Consumer Protection Proclamation that does not established such institution and left the regime with a single tier appeal system. But the law failed to use a terms like ‘independent’ or ‘autonomous’. From this one can understand that, even legally, the independence of the appellate tribunal is not recognized. Some argue that the proclamation clearly identified the appellate tribunal as an independent organ of the competition system as it is stated under Art.33 that provides the federal appellate tribunal is hereby established.¹³⁴ For instance, as it is indicated under Art.32 of the proclamation by itself speaks a lot on denoting ‘Adjudicative Benches of the Authority’.¹³⁵ The adjudicative benches of the Authority are under the mandate of the Authority.¹³⁶ But unlike the Adjudicative Benches of the Authority the Federal Appellate Tribunal, at least, its name indicates that as it is separated and independent institution from the Authority.¹³⁷

Independence comprises automatic funding of the institution in question, without having to depend on the whims of other organ of the government. Budget allocation and administration, on the other hand, can be a manifestation for judicial independence.¹³⁸ But the law under Art.30 (12) clearly states that the appellate tribunal shall receive secretarial and other services from the Authority. Therefore, this implies the independence of the appellate tribunal is absurd without its own funding or budget.¹³⁹ Generally, other organs of the Authority are under the direct mandate of the Authority and one cannot speak about independence and also the law by itself does not grant independence for these (investigative, prosecution and adjudicative benches of the

¹³⁴ . Interview with Ato Kochito Gebre Mariam, a presiding judge of the Federal Appellate Tribunal, Addis Ababa, May, 8/2015.

¹³⁵ . Ibid

¹³⁶ . Ibid

¹³⁷ . Ibid

¹³⁸ . Ibid

¹³⁹ . Ibid

Authority) organs but for the Federal Appellate Tribunal autonomy is a necessary condition to ensure that businessmen and other stakeholders have confidence and respect for the Tribunal.¹⁴⁰

4.3.2. ‘De-facto’ Independence

If members of the executive give instructions to representatives of the competition Authority, this is interpreted as a sign that they are not independent. The same holds if decisions by the competition Authorities are overridden by the executive. According to the practical situation witness till nobody whether the executive or other third parties tried to give instructions and overridden the decisions given by the Authority or by the Appellate Tribunal. In fact, it does not mean that in factual condition the Authority or the Appellate Tribunal is not susceptible to manipulation.¹⁴¹ In case of budget and other logistics the organs of the Authority are dependent on the Authority itself. One cannot say that this phenomenon rests its effect on the independence directly or indirectly.¹⁴² Thus the main 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”.¹⁴³ Therefore, especially, the budget dependence of the various organs of the Authority and also the Authority’s financial dependence on the Ministry of Finance and Economic Development (MoFED), i.e. the executive, have negative impact on the de-facto independence.

4.4. Tribunal Judges professional independence

Independence of judges concerned, other than form of appointment¹⁴⁴, accountability, tenure¹⁴⁵ and the like, administration of judges plays a greater role. In addition to this the tenets of justice

¹⁴⁰ . Supra note cited at 134.

¹⁴¹ . Interview with Ato Tesfaye Neway, a Presiding judge of the Adjudicative Bench of the Authority, May, 8/2015, Addis Ababa.

¹⁴² . Ibid

¹⁴³ . Supra note cited at 12, p.96.

¹⁴⁴ . For instance, it is hypothesized that appointment through one important member of the executive (e.g., the prime minister or president) is less conducive to independence than appointment procedures that provide for the participation of representatives of more than one government branch. *See also*, Stefan voigt cited above at note 36. As per Art.35 of the proclamation, the appointment of judges whether it be for the Adjudicative Benches or Federal Appellate Tribunal is appointed by the Prime Minister of the country.

¹⁴⁵ . It is further conjectured that the legal term length of the competition officer is another important variable for the independence of the Authority. It is assumed that they are most independent if they are appointed for life (or up to a mandatory retirement age) and cannot be removed from office, save by legal procedure. In this

requires whether it be judges or panelist to be independent and impartial. Simply stated, judicial independence is the ability of a judge to decide a matter free from pressures or inducements.¹⁴⁶ This independence means that the individual judges deciding particular cases must be able to exercise their professional responsibilities without being influenced by the Executive, the Legislature or any other inappropriate sources. The individual judges have a right to enjoy independence in carrying out their professional duties. This independence does not mean, of course, that the judges can decide cases on the basis of their own whims or preferences: but they have both a right and a duty to decide the cases before them according to the law, free from fear of personal criticism or reprisals of any kind.

In this regard the Ethiopian competition proclamation concerned it divides two types of tribunal judges under the competition regime. These are the adjudicative benches of the Authority's judges and the Federal Appellate Tribunal judges. Both groups of judges shall be legally independent of any interference or instructions by any person with regard to cases they adjudicate.¹⁴⁷ But the adjudicative bench of the Authority concerned the case become different. Judges to the adjudicative benches are under the control of the Authority because on its inception that the bench is solely under the mandate of the Authority.¹⁴⁸ The adjudicative benches are established under the mandate of the Authority. Therefore, the number of adjudicative benches and the necessary logistics are determined and given by the Authority.¹⁴⁹ The General Director (GD) of the Authority, as it is clearly indicated under the proclamation, shall direct and administer and also inspect whether the adjudicative benches are working under the boundary of the proclamation or not.¹⁵⁰

Moreover, the judges of the federal appellate tribunal like the judges of adjudicative benches of the Authority are legally free from any interference on the case they are adjudicating. Still

regard, our competition proclamation does not say anything about the tenure of the tribunal judges. Additionally, Competition officers are further assumed to be less independent if terms are renewable because they have an incentive to please those who can reappoint them. *See also*, Stefan Voigt cited above
¹⁴⁶ . Justice F. B. William Kelly, *An Independent Judiciary: The Core of the Rule of Law*, p.3. available at, <http://search.myway.com/search/GGmain.jhtml?searchfor=the+function+of+judicial+independence+in+modern+legal+system+pdf> , (accessed date, Mar. 20, 2015)

¹⁴⁷ . *Supra* note 141.

¹⁴⁸ . *Ibid*

¹⁴⁹ . *Ibid*

¹⁵⁰ . *Ibid*

administratively and in cases of budget allocation they are under the mandate of the Authority. Especially, administratively the judges of both tribunals relationship with the GD of the Authority are not clear. According to Ato Kochito G/Mariam, a presiding judge of the Federal Appellate Tribunal, the administrative relationship of the judges with the DG of the Authority is not clear under the proclamation. The accountability of the appellate tribunal is also not indicated.¹⁵¹ The judges to the tribunal are appointed by the Prime Minister of the country, however, the proclamation is not as such clear regarding to administrative and discipline issues of these judges.¹⁵² These cases on its own directly or indirectly have impact on the independence of judges.¹⁵³ Currently, judges of both tribunals are claiming about governance issues within the Authority.¹⁵⁴ Appointees are not governed by the civil servant proclamation so that judges whether it be adjudicative benches or appellate tribunal should be governed with its own self-contained rules and regulations.¹⁵⁵ These rules and regulations in its part may include issues like disciplinary responsibilities, resignation, promotion, allowances and so forth.¹⁵⁶ Moreover, it may also indicate for which organ that the judges are accountable.¹⁵⁷ This absence of self-contained rules and regulation about administration of judges under the Authority at least indirectly lays its shadow on job guarantee of the judges.¹⁵⁸ Therefore, this in turn has impact on the independence of the judges.¹⁵⁹

4.5. Consolidation of Power in light of Fairness

From a strictly legal point of view, the combination of all powers, i.e. investigation, prosecution and adjudication, within one institution raises the question of the compatibility of competition law proceedings led by the Authority with the fundamental right to a fair trial as enshrined under the FDRE Constitution. Traditionally, one can think that, it is sufficient for the Authority's Adjudicative benches decisions in competition cases to be subject to review by the Federal Appellate Tribunal or the decisions of the Appellate Tribunal is subject to review in case of error

¹⁵¹ . Supra note 134.

¹⁵² . Ibid

¹⁵³ . Ibid

¹⁵⁴ . Ibid

¹⁵⁵ . Ibid

¹⁵⁶ . Ibid

¹⁵⁷ . Ibid

¹⁵⁸ . Ibid

¹⁵⁹ . Ibid

of law by the Federal Supreme Court, even if the Authority itself is not an "independent and impartial tribunal". But nowadays competition Authorities are entertaining cases¹⁶⁰ that amounts up to in million Birr and the judicial review of the Ethiopian competition regime concerned the appeal system follows on 'mistake of law' not 'fact finding'. Thus competition cases are high-stakes matters for the parties involved, in which treble damages, a desired merger, or perhaps their economic viability is at risk. For this reason, the parties have an incentive to retain quality fairness.¹⁶¹ Therefore, absence of fairness in the course of competition proceeding will have negative impact on the regime and generally on the market system of the country.

In case-by-case decision-making, integrated agencies, raise systemic concerns that the integration of investigation, enforcement (prosecution), and adjudicative functions create bias or lack of objectivity ("confirmation bias")¹⁶², or the appearance of it, in the discharge of the adjudicatory functions vested in the agencies. At least in perception, integration of these functions may render the agencies "judges in their own cause." There are avenues by which these concerns can be and have been addressed even within the integrated agency format. For example, the agency can sharply separate investigative and enforcement functions from the adjudicative functions through use of different personnel and through firewalls. But practically under the Ethiopian competition Authority, for instance, the investigation and prosecution organs are administered by investigation and prosecution directorate directed by the director of the directorate. Above the director the deputy GD and the GD of the Authority hierarchically mandate the activities of the Directorate. Even the Adjudicative benches of the Authority are under the direction and mandates of the Authority.

¹⁶⁰ . Currently, the Federal Trade Competition and Consumer Protection Authority's Adjudicative Bench is entertaining competition cases, for instance, Addis Ababa Foam and Plastic factory Vs. New Flower General Trading plc, the case amounts Birr 3 million and 689 thousands, Elsan impex Vs. Gad Electro-mechanical plc which amounts Birr 1.6 million, Hurts plc Vs. Bayer Crone on which the cases amounts Birr 1 million and 823 thousands. The first two cases are pending cases till May, 29/2015, and the last case that is indicated as an example received its final decision by the Adjudicative bench of the Authority.

¹⁶¹ . The OECD Policy Roundtables, Judicial Enforcement of Competition Law, 1996, p.116. available at <http://search.myway.com/search/GGmain.jhtml?searchfor=competition+policy%2C+consumer+protection%2C+and+economic+disadvantage+pdf> , (accessed at, Mar.22, 2015)

¹⁶² . Confirmation bias entails a person's readiness to accept the version of a story that confirms his or her pre-existing beliefs. *See* Wouter Wils, The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function, 27 WORLD COMPETITION L. & ECON. REV. 202, 215 (2004) as cited by Eleanor M. Fox et al, at note 68.

Whether the Adjudicative benches of the Authority or the Federal Appellate Tribunals are for all practical judicial matter are acting like regular courts. Even the appointees of these Tribunals are previously judges of supreme courts and high courts of respective regions. But currently after the appointment they are judges to the tribunals of the competition Authority and the Appellate Tribunal no more connection with their previous post. For this end there should be separation and independence because the rule of law so requires. At the end of the Eighteenth Century Locke, who strongly influenced the English Revolution of 1688 and the American Revolution of 1776, stated that established laws with the right to appeal to independent judges are essential to a civilized society and that societies without them are still “in a state of nature”. At the core of these and more modern concepts of judicial independence is the theory of separation of powers: that the judiciary should function independently of the legislative and executive arms of government.¹⁶³ The tenets of procedural rule of law also command that an independent organ adjudicates justifiable matters.¹⁶⁴

4.6. Check and Balance

4.6.1. Internal check and balance

Due process and rights of defense remain guaranteed by a fully fledged system of internal checks and balances. Competition cases are launched and prosecuted by the Investigation Services acting under the direction of the investigation and prosecution directorate with no involvement of the Adjudicative Benches of the Authority whatsoever in the Ethiopian competition system. The Adjudicative Bench (currently it is single bench with only three judges) then adjudicates all aspects of the case, with no involvement at all by the Investigation Services in the decision-making process. In fact, this separation of tasks, though it is under the control of the GD of the Authority, has proved extremely beneficial because it guarantees an intense debate both with the parties and within the organization that ultimately leads to rich, strong, and fair decisions.

According to Ato Yosef Getachew investigation and prosecution directorate director, the investigation or prosecution does not follow a specialized procedure in the course of

¹⁶³ . Supra note 146.

¹⁶⁴ . Supra note cited at 12, p.83.

investigation but simply conduct investigation like any investigation done by investigative police.¹⁶⁵ Something different from the regular police investigation is that the directorate conducts investigation especially of market and economic issues.¹⁶⁶ Simple cases may be investigated at personal level but cases that seem complex and needs more attention are investigated within a team. When complaints arise from individuals there is no a special committee or body to hear the complaints of the individual but there is a committee at deputy GD level of the Authority to hear administrative complaints.¹⁶⁷ In fact, this body may not entertain cases related with professional misbehaviors in cases when investigation is conducted.¹⁶⁸ As we have discussed the France experience under chapter three the Hearing Officer like committee at least to control the internal check and balance is no organized under the Ethiopian competition regime. The Hearing Officer is therefore a procedural expert who can follow the investigative process and help resolve issues as they arise before providing feedback to the College under the France experience. Likewise under the consolidated format of the investigation and prosecution organs it needs more internal check and balance within the Directorate.

The Adjudicative Benches of the Authority concerned, at least checked by the Federal Appellate Tribunal with the procedure of appeal as it clearly stated under Art.33 (2) b of the proclamation. But as the investigation and prosecution tasks of the Authority, especially, in cases of investigation the investigation officer shall take various measures like search and seizure. For this end there should be a stricter format of internal check and balance within the Authority. This means, there should be a real and strong check and balance between the investigation organ and prosecution organ. There should be a capacity for the prosecution organ to refuse cases from enforcing due to its un-procedural investigation of the investigator, if any.

4.6.2. External check and balance

Independent agencies are expected to be subject to government oversight and a system of checks and balances. In most jurisdictions, legislators elect to police by judicial review. It is widely held

¹⁶⁵ . An interview made with Ato Yosef Getachew, Director, investigation and prosecution directorate of the Ethiopian Trade Competition and Consumer Protection Authority, May,6/2015, Addis Ababa.

¹⁶⁶ . Ibid

¹⁶⁷ . Ibid

¹⁶⁸ . Ibid

that independent judicial review of the decisions of competition authorities, whether through the regular courts or through administrative tribunals, is desirable for the sake of the fairness and integrity of the decision-making process. Most jurisdictions appear to favor a procedural review of competition cases 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. Accordingly, the intention is not for the courts to substitute their own appreciation, but to ascertain whether the competition authority has abused its discretionary powers.

In this regard too, the Ethiopian trade competition and consumer protection proclamation seems follow the same path. Accordingly, any party that claims the existence of mistake on question of law regarding a decision passed pursuant to Art.33 (3) of the proclamation may lodge his appeal to the federal Supreme Court. Even if the law guarantees external check and balance by way of judicial review, it is not free from problems. Firstly, currently the Federal Appellate Tribunal comprises a single bench with only three judges. All judges to the appellate tribunal are simply law professionals no other staffs are included with other profession like economics, business and the like. This implies that no other reason makes the tribunal special from the regular court of law, i.e. the appellate Federal Supreme Court in cases of appeal in mistake law or fact save as the Federal Supreme Court is the place where external check and balance out of the Authority is exercised. Secondly, as it is discussed above the structural independence of the appellate tribunal is debatable and in '*de facto*' the tribunal is not independent. The International Competition Network (ICN, 2003) asserts that structures of decision-making in which the investigative and adjudicative processes are strictly separated are more likely to pass muster at judicial review than are systems in which the exercise of these functions is conflated. Having these problems the appeal to the federal Supreme Court is only entertained on mistake of law. Being at its infant stage, the Ethiopian competition system needs more and more improvements. According to an interview made with Ato Kochito Gebre Mariam, a presiding judge for the Federal Appellate Tribunal, For instance, the appellate tribunal is not well staffed. Still personnel with various expertise knowledge like economics and business, are not available.¹⁶⁹ In cases where the

¹⁶⁹. Supra note 134.

Tribunal needs the help of these personnels, according to the civil procedure code of the country, it orders the expertise witness whom may be an economist or a person with business knowledge.¹⁷⁰

Beginning from the establishment of the appellate tribunal till now due to a limited number case flow to the knowledge of the presiding judge of the appellate tribunal no appeal is claimed to the Federal Supreme Court.¹⁷¹

4.7. Conclusion and Recommendation

Competition laws are applied all over the world. While at their core they exhibit a high degree of similarity, variations abound on substantive and institutional aspects, and even on the specific goals to be furthered by them. Nowadays all world countries are enacted competition laws due to its constructive importance. Competition laws are intended to ensure that the marketplace is competitive and is not distorted by anticompetitive practices. Due to this crucial importance governments are taking initiatives to have a competition policy. Competition policy is generally regarded as that of set of public policy tools that lay the foundations for a market economy by allowing for the efficient allocation of resources.

Although countries are in need of having a refined competition policy and law, they have been also engaged in identifying various objectives that should be included under the specific competition law and policy. The main objective of a competition law and policy is economic efficiency. But apart from consideration of economic efficiency, governments do have other socio-economic and even political objectives through the regime of competition system.

As far as their importance necessitates competition laws are enacted to be implemented. Implementation of competition law concerned the next worry of the countries may be what the institutional framework or design of the Authority/commission/agency look like. Competition law implementing institutions are designed due to the countries factual situation. In fact, there

¹⁷⁰. Supra note 134.

¹⁷¹. Ibid

are a wide variety of institutional designs in which competition Authorities operate. Accordingly, currently global trend of institutional design of competition Authorities/agencies or commission identified three models. These include the bifurcated judicial, bifurcated agency/tribunal and integrated agency models. These models are the popular and applied in various world countries and jurisdictions in pure and mixed format.

Ethiopia being a new practitioner for the competition regime enacted the first consolidated competition law the Trade Practice in 2003. Before the introduction of this proclamation, the country was used to govern competition like cases by the old-aged the 1960s civil and commercial codes. Historically, before and after 1974, the country does not have a consolidated type of competition law. Even after 1974 the coming of ‘Derg’ to the power nearly all economic system was controlled by the government and due to the socialist form of economic system competition in the market cannot be envisaged.

After the downfall of the ‘Derg’ regime and the coming power of the EPRDF, the economic policy of the country changed from the socialist oriented policy to free market economy. Due to this economic ideology shuffle successive enactment of competition laws since 2003. Beginning by the Trade Practice Proclamation of the 2003, the Trade Practice and Consumer Protection Proclamation of the 2010 and currently the Trade Competition and Consumer Protection of the 2013 are the competition laws that are enacted at different time.

In fact, one can witness an important improvement of the later from the former. Objectively, for instance, the first Trade Practice Proclamation does not include the notion of consumer protection and other socio-economic and political objectives other than objectives of economic efficiency. The Trade Practice and consumer protection Proclamation of the 2010 as a fully fledged competition law come with a notion of consumer right protection and some structural adjustment like separation power between the Authority and the then Ministry of Trade and Industry (MoTI) compared with the Trade Practice Proclamation. Although the Trade Practice and Consumer Protection made things to be improved, it is not free from some defects. Loose appeal system, for instance, are the major stated defects of the Proclamation.

The repealed Trade Practice and Consumer Protection Proclamation witnessed an important procedural requirement. Accordingly, it was apportioned or separated power between two separate organs, i.e. MoTI and the Authority, investigative and adjudicative power respectively. This was considered advisable at least for the matter of check and balance between the institutions. Also it was seen as a good move for expertise specialization so that procedures followed in these two separate powers are distinct.

But under the Proclamation in enforce these issues stated above are denied. Under its institutional set-up the proclamation tried to frame a mixed format of those different models of institutional designs popularly known on worldwide. Accordingly, it consolidated all powers including investigation, prosecution and adjudication in the hands of the Authority. In this context, the Ethiopian Competition Authority seems tailored with the Integrated Agency Model. Under this type of model, a single specialized agency undertakes investigative, enforcement and adjudicative functions. The assumed institution for this type of model is the Ethiopian Competition Authority. The Authority with an integrated agency model represents an agency with a double mission: responsibilities for the enforcement of both competition law and consumer protection law. In the enforcement of competition cases, on the other hand, save as the Federal Appellate Tribunal's being a specialized competition Tribunal, the Authority is required to go to this specialized competition tribunal. In this context, the Authority is modeled in the Bifurcated Agency/Tribunal Model. In the enforcement of criminal penalty, the Authority seems tailored with other type of model, i.e. the Bifurcated Judicial Model. As what is required by this model, the Authority is obliged to go to regular courts for the enforcement of the competition law by imposing criminal penalty by the competent court through its prosecutors.

Moreover, other than the adoption a mixed format of institutional set-up, the Proclamation does not make things clear with administration of the tribunal Judges of the adjudicative benches and the appellate tribunal. Also other than establishing the Federal Appellate Tribunal, the Proclamation is silent about the independence of the tribunal structurally and accountability of judges including the judges of the adjudicative benches of the Authority.

Though the proclamation established the Authority as an autonomous institution, it does not make independent organs of investigation, prosecution and adjudication. All organs are under the

mandate of the Authority. No check and balance mechanism within the organs of the Authority, especially, between the investigative and prosecution organs experienced. However, there is a check and balance between the adjudicative benches of the Authority and investigation; it seems not realistic and effective due to their control under the same Authority. The same conclusion will be furnished to the interaction between the Adjudicative benches of the Authority and the Federal Appellate Tribunal. By and large, laws of those countries selected and discussed as a comparative analysis in this paper show that an organ enshrined for the tasks of adjudication should be made independent. The tenet of procedural laws and the rule of law oblige that any organ engaged of the task of adjudication should be independent and impartial. In this regard, for instance, Competition Act of 1998 of the Republic of South Africa established independent Competition Commission, Competition Tribunal and Competition Appeal Court (CAC).

Independence, in most cases, is realized by budgetary and other logistics independence. Also accountability is the other aspect of independence. But under the Ethiopian competition regime independence for the separated organs of the Authority seems not given a due concern. As a result, it left the tribunal judges accountability and administration issues within the Authority unclear. This in turn this created a problem directly or indirectly on the independence of the judges, though, the de-jure independence provides that the tribunal judges are independent from any undue influence and order of the executives or other third parties.

Moreover, the Authority itself faces the problem of independence. It is known that as there is a trade-off between independence and accountability. This trade-off generally deemed desirable because it ensures that the competition authority does not stray from the agenda set by the legislature. When accountability perceived to be high, there is increased willingness to concede greater discretion and independence and the opposite will be evident when there is loose accountability.

Under the proclamation, though, the Authority is accountable to the MoT, it does not make things clear in what manner the accountability workout. Therefore, on the above premise of the trade-off between independence and accountability it has an impact on the independence of the Authority.

The Trade Competition and Consumer Protection Proclamation consolidated power of investigation, prosecution and adjudication under the single roof of the Authority. This consolidation of power under the Authority without a set-up of independent organizational structure and accountability procedurally affects faire treatment of individuals and it has also create a problem of check and balance between the organs of the Authority. Unless a check and balance system in a specific regime is not maintained well, then it shall derogate the principle of rule of law.

The nature of competition law needs a higher tendency of enforcement capacity. So if properly institutionally framed/designed, competition Authorities by enforcing a competition law very well facilitates economic efficiency and consumer right protection in the country. But if the accountability of the Authority are not clearly defined in a manner that realizes the independence/autonomy of the Authority from the executive, i.e. the MoT; if the proclamation consolidated all the powers of investigation, prosecution and adjudication to a single institution (the Authority) and derogates the tenet of procedural laws, i.e. the principles of fairness and rule of law; if the law does not guarantee the organizational independence like the experiences of other jurisdictions; if the judicial organs under the Authority are not made independent and also the accountability of judges are not defined; if the administration of tribunal judges whether it be the adjudicative benches of the Authority or the Federal Appellate Tribunal are not clear and their job guarantee is at risk; if the adjudicative benches of the Authority and the Federal Appellate Tribunal are not structurally and budgetary independent, how can the regime of competition and the institution established for the enforcement of this law gain confidence from the public in general and help the country's economic development by addressing market economic efficiency and consumer right protection?

In order to frame or design a competition Authority that realizes economic efficiency and protects consumers from misleading market actors by fully fledged enforcement capacity, Ethiopia needs an ideal competition law that addresses the above questions. Accordingly, the paper submits the following recommendation as a point for consideration:

1. The Authority's both de-jure and de-facto independence should be clearly stated by defining the accountability in expressed manner;
2. The organs under the Authority including; investigative, prosecution and adjudicative organs should be established independently. In doing so, check and balance and fairness and shall be addressed;
3. Establishing an independent Federal Trade Competition and Consumer Protection Appellate Tribunal with its own budget and logistics and structurally shall be attached to the regular courts of the country. Accordingly, the administration of judges to the Tribunal shall be made in line with the administration of the regular courts to the Tribunal's counter jurisdiction/structure;
4. Inclusion of a separated law that govern the administration of tribunal judges to the Adjudicative Benches of the Authority; and
5. Creating a check and balance system, especially, between the investigation and prosecution organs and generally within the organs of the Authority.

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ANNEX I

Interview Guides Prepared for the Ethiopian Trade Competition and Consumer Protection Authority

Personal Detail of Respondent

Name of the Respondent (if he or she consented) _____

Position in the Authority _____

Type of the Study: A Master Thesis in Law (LL.M Thesis)

Title: Evaluating Issues Related With Consolidation of Investigation, Prosecution and Adjudication Powers under the Ethiopian Competition Authority: A Comparative Analysis

Objective of this Interview: to gather information so as to evaluate the effects of issues of independence and accountability of various organs in the Authority, check and balance system within the organs, fairness and administration of tribunal judges including the Federal Appellate Tribunal under the Authority in relation with a consolidation powers of investigation, prosecution and adjudication under the Authority and to suggest possible solutions based on the findings.

So, you are kindly re requested to respond to the interviews as your information will be helpful for effective accomplishment of the study and as it will be kept confidential and analyzed anonymously unless you consented for the disclosure of your identity and personal views.

Thank you, in advance, for your co-operation!!

Guiding Questions: (for the Authority)

1. The Authority being a specialized agency entrusted with enforcement of the Trade Competition and Consumer Protection Proclamation No.813/2013. The law entitled the Authority all the powers like investigation, Prosecution and Adjudication of competition case. In fact, these powers are enforced by a distinct expertise Knowledge and needs a clear separation between them, because the tenet of procedural law so requires. So, what measures or actions are has taken by the Authority in order to maintain the independence and a check and balance system within the organs the Authority? In what manner the accountability of the Adjudicative benches of the Authority is maintained?
2. The Trade Competition and Consumer Protection Proclamation No.813/2013 does not clearly state about the administration of judges including the Trade Competition and Consumer Protection Federal Appellate Tribunal judges. Therefore, in this factual situation how will be the relationship between the tribunal judges and the higher officials of the Authority including the Director General of the Authority is governed?
3. What actions are taken to maintain the separation of organs of investigation and prosecution for check and balance system within the organs to be realized?

ANNEX II

Interview Guides Prepared for the Federal Trade Competition and Consumer Protection Appellate Tribunal

Personal Detail of Respondent

Name of the Respondent (if he or she consented) _____

Position in the Tribunal _____

Type of the Study: A Master Thesis in Law (LL.M Thesis)

Title: Evaluating Issues Related With Consolidation of Investigation, Prosecution and Adjudication Powers under the Ethiopian Competition Authority: A Comparative Analysis

Objective of this Interview: to gather information so as to evaluate the factual independence and external check and balance in the competition system and accountability of Federal Trade Competition and Consumer Protection Appellate Tribunal, and administration of tribunal judges in relation with a consolidation powers of investigation, prosecution and adjudication under the Authority and to suggest possible solutions based on the findings.

So, you are kindly re requested to respond to the interviews as your information will be helpful for effective accomplishment of the study and as it will be kept confidential and analyzed anonymously unless you consented for the disclosure of your identity and personal views.

Thank you, in advance, for your co-operation!!

Guiding Questions: (for the Federal Trade Competition and Consumer Protection Appellate Tribunal)

1. The Trade Competition and Consumer Protection Proclamation No.813/2013 established the Federal Trade Competition and Consumer Protection Appellate Tribunal. But it does not make the Tribunal independent in budgetary and other logistics and administration of its employees. So, how will the legal and factual structural independence of the Tribunal from the Authority be maintained?
2. Has there been any challenge faced like disciplinary issues in the course of adjudicating cases by the tribunal judges? Yes___ No___ . If yes, in what manner such challenge is overcome?
3. To whom the Federal Trade Competition and Consumer Protection Appellate Tribunal judges are accountable administratively?
4. The Trade Competition and Consumer Protection Proclamation No.813/2013 states that secretarial support is given by the Authority to Appellate Tribunal. The Appellate Tribunal does not have its own budget. Does this absence of budgetary and other logistic independence have impact on the impartial adjudication of cases of the Tribunal? Yes___ , No___ . If yes, how can such challenges be manifested?

ANNEX III

Interview Guides Prepared for the Ministry of Trade

Personal Detail of Respondent

Name of the Respondent (if he or she consented) _____

Position in the Ministry _____

Type of the Study: A Master Thesis in Law (LL.M Thesis)

Title: Evaluating Issues Related With Consolidation of Investigation, Prosecution and Adjudication Powers under the Ethiopian Competition Authority: A Comparative Analysis

Objective of this Interview: to gather information in order to evaluate the effect of unexpressed accountability of the Authority to the Ministry of Trade impact on the de-jure autonomous/independence of the Authority.

So, you are kindly re requested to respond to the interviews as your information will be helpful for effective accomplishment of the study and as it will be kept confidential and analyzed anonymously unless you consented for the disclosure of your identity and personal views.

Thank you, in advance, for your co-operation!!

Guiding Questions: (for the Ministry of Trade)

1. The Trade Competition and Consumer Protection Proclamation No.813/2013 established an autonomous Trade Competition and Consumer Protection Authority. Even if the Authority is an autonomous competition law enforcing institution it is accountable to the Ministry of Trade. In which functions of the Authority is accountable to the MoT? Save as the MoT being one of a service seeker of the Authority on some competition cases rest on the jurisdiction of the Ministry, how will be the legal autonomous status of the Authority is realized?
2. In what listed manner the accountability of the Authority is expressed?