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# Ethiopian Competition and Consumer Protection Law: Appraisal of the Enforcement Organs and Its Functions

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### ABSTRACT

Enforcement of competition and consumer protection regime and ensuring fair competition and consumer interest in a free market economy depends, among others, upon the effectiveness of competition and consumer protection organ, which is responsible for enforcing. Existing studies reveal that establishment of competition and consumer protection authorities are the most effective way to implement competition and consumer protection law. Despite Ethiopia's effort to legislate three times in a decade and improve the structure of competition and consumer protection authority, still, the competition and consumer protection legal regime have gaps that will negatively affect enforcement of competition and consumer protection law. This article mainly focuses on identifying authorities and institutional designs for consumer protection and competition, which have, in one way or another, the powers on competition and the consumer protection regime under Ethiopian trade competition and consumer protection laws. Moreover, it will assess and evaluate the autonomy and main functions of the existing enforcement organ of competition and consumer protection law based on the pertinent provisions of the current legislation of the country. Finally, the article ends up with a short conclusion and recommendations on the matters discussed under the main body of the article.

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### 1. Introduction

In developing market economies, there is the need to follow an interventionist approach to enhancing competition and protecting consumers due to the existence of a high level of market failure (Solomon, 2009). Developed or efficient market by itself may not be an assurance to bring about consumer welfare and fair competition unless countries have adopted competition and consumer protection laws with appropriate institutions (Maryanne, 2005 and Jilian, 2008).

There is a nexus between competition law and consumer protection law since the competition law focuses on maintaining the process of competition between enterprises and tries to remedy behavioral and structural problems in order to re-establish effective competition in the market the consequences of which are higher development and consumer utility (Tessema, 2015). Consumer protection law, on the contrary, is dealing with the nature of consumer transactions by trying to get better market conditions for the effective exercise of consumer satisfaction (Jaiu, 2005 and Gebremedhin, 2000). Consumer protection law addresses the failings in individual consumer transactions to grant individual consumer remedies (Max, 2007). The two disciplines focus on different market failures and offer different remedies yet, both aim at maintaining a well-functioning competitive market that promotes consumer welfare. The effectiveness of both laws is, *inter alia*, determined by the quality of their enforcement framework (Philippe, 2000).

Always it is unthinkable to expect consumers gain without having a healthy competition in the market since

competition enables the firms to operate efficiently and offers consumers a greater choice of products at lower prices (Daniel, 2015). This, in turn, leads to higher benefits to the consumers and helps in economic growth and development (Wubet and Amare, 2015). A sound competition law and sound competition authority can be ensured a lot of gain for consumers. Hence, the consumer authorities should keep an eye on the market behavior and use several tools to promote competition on one hand and to ensure fair competitive practices at the same time (Alison and Brenda, 2001).

Ethiopia is trying to have a comprehensive competition and consumer protection law, particularly starting from FDRE regimes due to free-market economic policy (Manaye and Getachew, 2015). In doing that, before the enactment of the trade practice proclamation in 2003 (hereinafter TPP), issues of anticompetitive acts or unfair trade practices were addressed under different legislation and enforced by different institutions (Hailegabriel, 2009). In 2003, Ethiopia introduced Trade Practice Proclamation No. 329/2003 with a view to secure fair competitive process through prevention and elimination of anticompetitive and unfair trade practices. However, due to legal and structural limitations of the institutional framework, it failed to serve its intended purpose and it was repealed by The Trade Practice and Consumer Protection Proclamation 685/2010 (hereinafter called TPCPP), which was enacted on June 2010. The TPCPP has made a comprehensive amendment to TPP, and it embodies more functional and extensive provisions that empower the competition and consumer protection authority to oversee enforcement of the same and adjudicate disputed cases.

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Though TPCPP was tried to fill the gap of the TPP, yet it was not full-fledged by itself particularly on the enforcement organ is concerned due to this reason the nation has legislated in 2013 a new Trade Competition and Consumer Protection Proclamation No.813/2013 (hereinafter TCCPP or the proclamation) which made some amendments on its predecessor TPCPP. It establishes a competition authority, called trade competition and consumer protection agency (hereinafter TCCPA or authority), with a power to implement the proclamation. Despite the improvements made under the new Proclamation are commendable, there are still serious shortfalls that are left unaddressed. This article attempts to assess the legal loopholes pertaining to the structural adjustment, functions, and autonomy of TCCPA by critically reviewing the relevant legal provisions of the TCCPP.

### **1. Appraisal of Enforcement Organs of Trade Competition and Consumer Protection Law in Ethiopia**

The TCCPP under part IV establishes the Authority for the enforcement of competition law. The Authority is the primary agency for the enforcement of competition law in Ethiopia with an autonomous federal government body having its own legal personality and accountable to the ministry of trade (TCCPP, 2013). 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 the investigation, prosecution and judicial responsibility (Id, Art. 27 (2) & (3)).

The TCCPP establishes three organs under the Authority. These are the Competition organ for conducting an investigation, the institution of action (prosecution) and an organ with adjudication power. At the federal level, the judicial organ of the authority further divided into two. These are the adjudicative bench of the authority and the federal appellate tribunal. When we see its establishment, except its change of name, it is established by the similar fashion with that of the Authority established under the TPCPP.

Concerning the organization, the Authority will have Deputy Director-General, which is not absent in the previous proclamation, in addition to the Director-General. Their appointment is similar that of the Authority in the TPCPP. What is clearly added in the organization is that investigation officer and especially prosecutors are included, in addition to the existence of judges who are appointed in a similar fashion to that of Judge in the Authority established in the TPCPP. In this regard, Judge shall be independent of any interference or instruction by any person with regard to cases they adjudicate (Id, Art. 28 and 35(3)). In addition to the adjudicative bench of the Authority, the proclamation also recognizes the establishment of Federal Trade Competition and Consumer Protection Appellate Tribunal that is not recognized in the previous proclamation (Id, Art, 33).

When we see the accessibility of the Authority, like that of that of the previous one, it has its head of Addis Ababa and may have branches elsewhere (Id, Art. 29). It has a power of investigating, instituting and adjudicating concerning civil, administrative and compensation aspects of competition and consumer protection regimes (Id, Art. 28).

Although the Authority is the primary and an independent organ vested the power of implementing the rules of the proclamation to protect the interest of consumers and to secure competition, there are also other organs, which

have a power of enforcing the TCCPP directly or indirectly. Among these organs;

The ministry of trade is the first one, which has the power of regulating goods and services in a manner to be suitable for human health and safety of the consumers (Id, Art 23). In addition to this, the Ministry may issue necessary directives implement the proclamation and regulation to be issued by the Council of Ministers (Id, Art, 46(2)).

The other one is Council of Ministers that has the power to issue necessary regulation for the effective implementation of the proclamation as it is clearly stated in the proclamation (Ibid). Thus, this organ plays its role in the protection of the competition and consumers in the country.

The third organ is the ordinary court in the case of criminal violation of the rules enshrined in the TCCPP concerning the prevalence of competition in the trading activities and protection of consumers, both the federal and regional courts, depending on the jurisdiction issue, have the power to entertain the criminal case and render decisions and penalties (Id, Art 37(1) (b) and Article 4).

The Regional State Bureau of Trade and Industries organs have the power of regulating goods and service provided for the consumers for the purpose of checking the human health and safety to the consumer protection on those issues fallen under their respective jurisdiction (Id, Art 23(5)). In addition to this, each region, when necessary, may have their own regional consumers' judicial organ and appellate tribunals for this purpose (Id, Art 34). Besides, the above organs, the federal or, as the case may be, regional police commissions are another organs, duty bound to collaborate when they are requesting their support for the effective enforcement of the proclamation by the Authority (Id, Art, 36(2) and Art, 38(10)).

Despite the fact that the TCCPP has been established different organs and entrusted with the powers and duties to enforce it, yet there is a gap in its structure and composition. According to OECD Principles for Improving Regulatory Enforcement and consumer protection law, the best practice principles for improving regulatory enforcement is the involvement of stakeholders in enforcement and compliance endeavors (OECD (2013)). The TCCPP has established the Authority without providing for representation of stakeholders, especially, from the private sector and consumers and there is no a single provision dealing with the representation of the stakeholders in the TCCPP. The failure to provide for the representation of stakeholders in the Authority can contribute to challenges in enforcement since competition and consumer protection in a market economy involves the interests of the business community and consumers in addition to the government. In fact, the TCCPP has repeated the failure made under the TPCPP and the representation of the stakeholders in TPP, is better than the TPCPP and TCCPP since it provided for the representation of private organs, governments and consumers association (TPP, 2003, Article 13(1)). Undoubtedly, the failure to provide for the representation of stakeholders in the Authority can contribute to challenges in enforcement due to competition and consumer protection in a market economy involve the enormous interests of the business community and consumers in addition to the government. Private sector representation in the Authority would encourage voluntary compliance by business persons to consumer protection regulations because

it makes the business community have owned on the issues of consumer protection and stakeholder's exclusion is adversely affecting their interest in the economy. The government can consider such representation while structuring the Authority as long as there is no prohibition to that effect.

Moreover, the regional states in Ethiopia do not yet have their independent consumer protection law; nor do they have independent institutional frameworks for implementation of TCCPP. Despite the fact that some sort of work processes established by few regions like Amhara National Regional State under the regional Trade Industry Bureaus, there is no independent consumer protection authority or agency established by regions. Nevertheless, the proclamation envisages the establishment of a regional consumer protection, judicial organ, it does not give administrative power to the organ; nor does it give the power to investigate and institute an action against violators (TCCPP, 2013, Article 34). Moreover, the proclamation under Art 29 states for the establishment of branches of the federal authority, which have not been put into effect until now thereby leaving consumers in the regions outside the ambit of the envisaged protection.

## 2. Major Functions of the Authority

Countries in the world give various types of power and functions for their consumer protection and competition law enforcement authorities (Davit, 2007). Ethiopia consumer protection and competition authority like other countries, entrusted various functions, among other investigative, enforcement and judicial powers (Harka, 2008). It is empowered to respond appropriately to increase market transparency; act appropriately 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 (Id, Art. 30). On top of that, the authority organizes judicial organs with jurisdiction on issues of trade competition and consumer protection. Besides, the followings are the most important functions of the authority (Tsema, 2011).

**Conducting Investigation:** the Authority conducts an investigation where there is sufficient ground to suspect, based on its own information or information given to it by any person, that an offense has been committed anywhere, entailing administrative measures or criminal penalty (Id, Article 32 cumulative article 42 and 43 (1) or (7)). The Authority has a power to require the support of the police forces under the Federal Police Commission and the two city administrations' police commission where it finds necessary to conduct investigation activities as provided under Article 36(2) of the TCCPP. In doing this, 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 (Id, Art. 36(3)). 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 research while conducting an investigation (Id, 36(4)). 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 an investigation (Id, Art. 36(1 (a-d))).

**The institution of Action:** So long as the prosecutions are sought, 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. However, a private party 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 institutes any civil cases.

**Judicial Power:** The authority has also been granted an adjudicative power. It shall have judicial power to take measures and impose fines pursuant to Article 42 of the TCCPP on a businessperson. It may also orders 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 merger and cartel (Id, Art. 32 (1) a & b). It has also judicial power by ordering compensation in accordance with the relevant laws to consumers victimized by transactions conducted in the federal city administrations in violation of consumers' protection provisions.

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 require; 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 offense; the damage suffered; the market circumstances in which commission of the offense took place; benefit derived from the offense; the economic status of the offender and the like during determining administrative penalty or administrative measures.

Most countries Competition and consumer protection authorities are normally confined to studying trends of market competition, investigating breaches of the law and prosecuting cases of breaches, while either a separate quasi-judicial organ, either within the authority or an independent one, or a specialized or ordinary bench within the judiciary is entrusted with the task of adjudicating competition cases (Nitya, 2005, and Dessalegn, 2011). However, the authority in Ethiopia normally confined to an investigating bench, and prosecuting cases of breaches, within the judiciary is entrusted with the task of adjudicating competition cases. Hence, Ethiopian adopted different and unusual since the same organ renders judgment on a matter that it has investigated. Hence, better to have a separate and independent organ that has a judicial power. Instead, the authorities should have additional mandates relating to consumer protection or additional functions such as registration of business undertakings.

## 3. Authority's Autonomy under the Trade Competition and Consumer Protection Proclamation

To give a simple definition for the word Autonomy for the context at hand, it is all about separation of policy implementation from policy making so that authorities reach their decisions based on objective evidence and consistent respect for market principles through the neutral and transparent decision-making process (Fikremarkos, Imeru, Seyoum, Yoseph, and Tilahun 2009). Meaning, it is a mechanism of ensuring that decisions passed by the competition authority are not politicized, discriminatory or implemented for the interest of some groups.

Although, the institutional design of authorities are quite distinct due to the difference in socioeconomic and political

realities existing among nations in the world; the importance of having autonomous competition authorities in this contemporary world is not subject to debate (World Bank, 2002 and UNCTAD, 2008). This means countries adjust their institutional framework accordingly their country-specific socioeconomic and political realities. Despite the fact that the country socio-economic and political realities are the determinate factors to ensure the autonomy of institutions, there are some common principles that are advocated by various experts, which must be incorporated in competition legal frameworks (Cuts, 2005). The World Bank Organization for Economic Co-operation and Development (OECD) recommends a competition authority that is “independent from any government department and receives its budget from and reports directly to the President /legislature of the country”. Similarly, the United Nations Conference on Trade and Development (UNCTAD, 2000) suggests a competition authority that is “quasi-autonomous or independent of the Government”.

There are three rationales to grant autonomy to competition and consumer protection authorities: namely, the (perceived) need for policy-makers to improve the credibility of their regulatory commitments, their desire to cope with political uncertainty and the constraints set by the institutional framework (Fabrizio and Martino, 2008).

Even if there is no consensus as to the factors, which should be taken into account to measure the level of a certain authority's autonomy, scholars have developed some general parameters to be used in assessing the autonomy of the authority (Ibid). The term of the office, appointment procedure, dismissal procedure, renewability of appointments and compatibility with other offices of the chairperson as well as the adjudicators are considered to determining the autonomy of Authority. On top of that, legal recognition of the authorities' autonomy, finance procedure of the organization of the authority which includes sources of the budget, the authorities' internal organization and control of the human resources; and regulatory competence of the authority, i.e. rulemaking, sanctioning and monitoring are among the parameters of autonomy of the authority.

Based on the above parameters, the writer tries to evaluate the autonomy of competition and consumer protection authority of Ethiopia by critically reviewing the provisions of the legal regime in the following discussions.

The Trade Competition and Consumer Protection Authority as an autonomous federal organ accountable to the Ministry of Trade (MoT) with a mandate to enforce rules of competition and consumer protection enshrined in the TCCPP (TCCPP 2013, Article 27). A Director General is the head of the authority and Deputy Director General to be appointed by the Prime Minister upon recommendation by the MoT and the Authority is to be composed of judges, investigative officers, prosecutors and other staff.

Obviously, “An effective regulator will typically have its mandate clearly defined by law and will not be subject to ministerial control and discretion or the agency's status outside the executive and legislative branches of Government” (Srinivas and Pradeep, 2006). The majority of competition and consumer protection regimes provide for a legally autonomous institution (OSSREA, 2015).

Appointment and removal of competition authority's director-general, deputy director generals, judges and other staff; and the power to determine employees' salary and other benefits are another determinant factor of structural autonomy

of competition and consumer protection authority (Eleanor and Michael, 2012). Regarding the appointment of the director-general, deputy director generals and judges, the TCCPP clearly states to be made by the prime minister of the state, though such appointment would be made, based on the recommendation of the ministry of trade (TCCPP 2013, Article 28(1) and 35(1)).

The ministry of trade does not have ultimate power on the appointment of the director-general and judges. The director-general of TCCPA is appointed as chief executive that empowered to organize, direct and administer the internal affairs of the Authority. The authority's accountability is made to the ministry of the trade so that there is a view that the authority is not structurally autonomous because accountability of the authority to the ministry would compromise its autonomy. Most scholars prefer the accountability of the authority should have been to the Parliament. Besides, the appointment of the director-general and judges of the authority by the Prime Minister upon the recommendation of the Ministry of Trade would affect the structural autonomy of the authority. In a country where democratic governance is not well established, making a competition authority accountable to a government organ, which has a direct interest in the adjudicative function of the former, would create some sort of interference. This is because the ministry might use its power (the power to access functions of the authority) to influence the authority (Maher, 2010, and Alofi, 2000).

The proclamation provides that the authority is free from any interference or direction by any person with regard to the cases it adjudicates and this is an important guarantee for the authority. It enables it to adjudicate cases without any fear of a pressure from government organs. Besides, formally speaking, judges of the authority are independent of any interference with regard to cases they adjudicate. However, recognizing the freedom of the judges to decide a case based on the facts and provisions of the law alone, even though it is a decisive step to assure operational autonomy, could not ensure the functional autonomy of the authority. The accountability of the judges, appointment, and removal of judges, and the source of authority's budget are also other elements or factors, which should be taken into account while one tries to examine a certain authority's level of functional autonomy (Paolo, 2009). Prime Minister in Ethiopia appoints the judge and the director-general, the authority is accountable to MoT, and this would have a solemn impact on the functional autonomy of the authority.

Nations with high autonomous competition and consumer protection authority entrusted the power to approve budget of the authority to the house of people's representative and competition and consumer protection authorities should also have access to “independent sources of funds, such as user fees or levies on the regulated industry” with rates determined by the law establishing the agency (OECD Global Forum, 2003). When we see the budget of Ethiopian competition and consumer protection authority, though it has its own budget, it is not clear as to which branch of the government organ would have the power to determine the budget (Eleanor, 20115). The proclamation provides that the trade competition and consumer protection authority shall have its own budget, but it does not say anything as to the source of such budget. Thus, this would have its own impact on the autonomy of the authority for the reason that the executive organs of the government have political and

economic interest, which might create an obstacle to implementing the Proclamation solely based on the economic and legal rationales stated in the proclamation (Michael, 2010). Most countries competition and consumer protection law envisages clearly the source of the budget of the enforcement Authority and its budget is approved by legislature organ (Olivia, 2001).

#### 4. Conclusion and Recommendations

In many countries of the world, protection of consumers' from unlawful trading activities is given a vital place in their consumers' protection and preventing unfair competition regulatory laws. Thus, countries have tried to set the respective objectives of protection for consumers and competition under the respective laws. However, recognizing by the well-drafted laws is not a warranty of achievement without strong enforcement organs. Countries have their own enforcement mechanisms for the achievement of the objectives related to the protection of consumers and competition enshrined in the respective laws of the countries.

Ethiopia like many other countries have tried to achieve the rights of consumer and secure fair competition, by enacting the pertinent law. Proclamation No. 813/2013, the Trade Competition and Consumers Protection is the current governing law and it has established Trade Competition and Consumer Protection Authority with different concerned organs like The ministry of trade, Council of Ministers, ordinary courts and the Regional State Bureau of Trade and Industries for the enforcement of the legislation.

The Authority is entrusted with various functions, among other investigative, enforcement and judicial functions are the main one. Among others, the authority is empowered to act appropriately to increase market transparency; respond appropriately to develop public awareness on the provision of the competition proclamation; receive and decide on, merger notifications; and protect consumers from unfair practices of businesspersons.

Competition and consumer protection authority having full autonomous is the cornerstone for proper and effective implementation of competition and consumer protection law. The rationale behind recognition of the authority's autonomy is to ensure the effective implementation of the law and protect the authority from volatile political influences.

The TCCPP establishes the Trade Competition and Consumer Protection Authority as an autonomous federal government organ and in charge of enforcing the competition law. Unlike its predecessor, it is clearly established as separated regulatory organ with its own director general, deputy director Generals, judges, and other employees. The proclamation has also explicitly recognized that the Authority is free from any interference in the adjudication of cases.

Despite the fact that the TCCPA is clearly designated as an independent or autonomous competition and consumer protection authority, there are some provisions within the proclamation, which would affect the authority's autonomy. For instance, the authority is accountability to the ministry of trade, the power of prime minister to appoint judges of the authority, the application of the civil service law to judges of the authority; and the power of council of ministers to approve annual budget would affect the autonomy of the authority.

One of the failures of the TCCPP is absence to recognize the representation of major stakeholders such as consumers, businesspersons in the enforcement authority while the existing reality and international practices justify their

recognition. As a recommendation, market forces and stakeholders shall have representation in the competition authority since they have an irreplaceable role to ensure enforcement of the legal regime and fair competition. Thus, the writer of this article calls for amendments in the law to include mandatory provisions that require the representation of stakeholders, especially, consumers and the business community in the Authority.

Even though the law envisages the establishment of a regional consumer protection judicial organ, it does not give administrative power to the organ; nor does it give the power to investigate and institute an action against violators. Hence, the proclamation should recognize administrative, investigate and institute action power to a regional consumer protection organ against violators. Moreover, despite the fact that the proclamation envisages the establishment of branches of the federal authority anywhere in the country, have not yet been put into effect until now. Therefore, the federal authority should establish its branches in regions since leaving consumers in the regions outside the ambit of the envisaged protection is unfair.

The authority Director General and judges of the trade practice and consumer protection authority should be appointed by the parliament rather than the prime minister despite the fact that the current parliament overwhelmingly occupied by the executive organ. Moreover, the accountability of the authority should be made to the parliament instead of the Ministry of Trade since the proclamation makes its accountability to MoT that will have an impact on its structural autonomy.

The trade competition and consumer protection authority have its own budget, but it is not clear as to which branch of the government organ would have the power to determine the budget and the proclamation does not say anything as to the source of such budget. Practically, the councils of ministers would have the power to approve the annual budget of the authority based on the proposal submitted to it by the director general. Thus, this would have its own impact on the autonomy of the trade competition and consumer protection authority for the reason that the executive organs of the government have political and economic interest, which might affect the autonomy of the authority. Hence, the write strongly recommended that primarily the proclamation should give the power to determine the budget of the authority the house of people's representative to secure its autonomy.

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