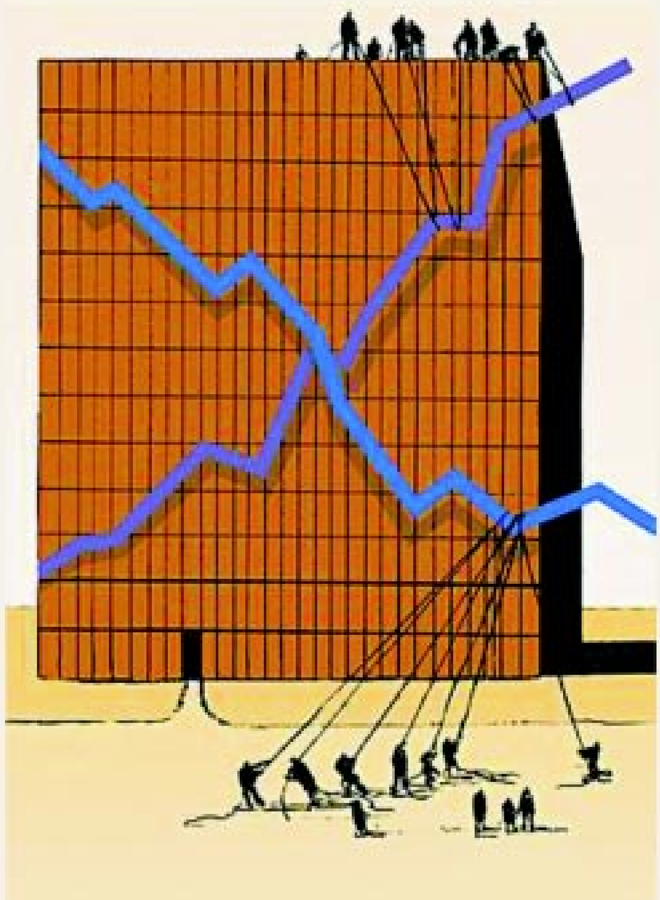
Policy-induced Barriers to Competition in Ethiopia



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NOTE: This paper draws reference from a study entitled "On the Road to Private Sector-Led Economic Growth: Creating and Building Institutions in Ethiopia" (2006). The study included a survey of 675 respondents across the country constituting the business community, civil servants, NGOs, judges and lawyers. This paper has benefited immensely from the survey.

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CONTENTS

Acronyms

CBE	Commercial Bank of Ethiopia
CIF	Cost, Insurance and Freight
COMESA	Common Market for Eastern and Southern Africa
DTIS	Diagnostic Trade Integration Study
ECC	Ethiopian Chamber of Commerce
EEA	Ethiopian Economic Association
FTA	Free Trade Area
GDP	Gross Domestic Product
IMF	International Monetary Fund
NBE	National Bank of Ethiopia
TOT	Turnover Tax
VAT	Value Added Tax
WB	World Bank
WTO	World Trade Organissation

1
Introduction

The transition from a centrally-controlled to a market-based economic management is quite challenging. Governments are often suspicious of uncertainties associated with the process of restructuring, for instance, losing a major source of revenue due to privatisation, hence preferring to proceed cautiously. Futher, not only putting in place essential legal and structural framework has to be in tune with the stage of development of a specific economy in question, but also realising it in practice often becomes difficult and costly. As competition operates best only in a free-market economy, the challenges facing developing economies in transition is to come up with an effective mechanism of transition towards a free market. This is a critical aspect of economic reform.

Despite the challenge, however, the move towards a free-market economic structure is proceeding in most developing economies. An essential aspect of the legal infrastructure reform associated with this process is competition policy reforms. Competition is a force that creates initiatives for increasing productivity in the economy and ensures the satisfaction of consumer wants and needs. The virtue of competition as one of the important driving forces bringing about economic growth is now well acknowledged.

Apart from the challenge that the process of transition to a competitive free market economy poses, there are other formidable barriers to competition. It comes from both the public and private sectors. In countries, where democratic institutions are evolving, the process of establishing supportive structural and legal framework for competition and its implementation in practice is more transparent, effective and progressive. In such an environment, effective competition law can be designed to deal with anticompetitive behaviour and also be applied to private agents and government agencies/

departments. Anticompetitive practices by any party can be challenged by the law. Corrupt tendencies of the public sector can be exposed and checked.

However, in a situation where democratic governance is suppressed, putting in place a competitive legal and institutional framework that can be effectively operational, is daunting. This is so, irrespective of undertaking partial economic reform, along with some form of competition law. In such an environment, not only that the legal and structural reform, i.e., the restructuring of the economy, is partial and distortive, the competition law too often is designed to give more space for discretion and manipulation. Moreover, due to lack of transparency the competition law can hardly be applied to the public sector.

While such situations are not uncommon in developing countries, an extension of this, and perhaps a new phenomenon, is the state where a party in power (government) owns and runs its own business. In such a situation, there is a clear cut conflict-of-interest where national interest is compromised for sectional interest. In this model, competition law is not only least applicable to the government and party-owned enterprises, but it is discriminately applied even to the private sector.

This paper attempts to portray the competition regime in Ethiopia. It shows that irrespective of a decade and a half of market reform measures, economic restructuring still remains partial. Specifically, it shows that many important regulatory provisions, including the competition law, are deliberately designed such that it could be easily manipulated. This has created a distorted competition environment in the country.

The discussion in this paper is more of a macro nature. As such, it does not address detailed competition issues at micro level, such as, for instance, identifying the type and nature of anticompetitive practices at firm level, market concentration by sector/enterprise, etc. Detailed competition issues in Ethiopia are not yet addressed. This would be a worthwhile exercise for a future study.

The rest of the paper is organised as follows: section 2 provides a brief note on the restructuring of the economy, followed by a section on barriers to competition. Section 4, discusses the Trade Practices Proclamation, the existing competition law of the country. The paper concludes with a remark on how to move forward.

2
Evolution of Economic Policy in Ethiopia

2.1. The Backdrop: Central Planning and Competition

Since mid 20th century when organised economic development programme was launched, Ethiopia has gone through different phases of economic development – from a market-oriented mixed economy (pre 1974), to an extreme state controlled central planning (1975-1991), and since 1992 to a hybrid of state-controlled and market-oriented economic development.

Following the takeover of power by a pro-socialist regime in 1974, all modern economic establishments, including land (the most fundamental means of production), banks and insurance companies, medium and large scale manufacturing, transport, trade enterprises, commercial farms, urban rented houses, etc., were nationalised. With regulated markets and controlled prices, even the traditional sector came under the control of the centrally planned economic regime.

With markets regulated and the modern private sector marginalised, market competition as a mechanism for economic development and a motivation for successful business was reduced considerably. Hence, a sort of one-size-fits-all socio-economic management was the prevailing model of the central planning regime.

As such, free competition had been ruled out. However, controlled competition between associations (farmers, producers and service associations) in agricultural, manufacturing and service enterprises, and also between individual workers in an enterprise, had been introduced. For such competition the reward was regulated, and came not from the market but from the state. In the same tune, and unlike market competition, there was no cost or punishment for uncompetitive enterprises. No enterprise would be closed down or even operate at below capacity because of being less competitive. In a similar manner, international trade within centrally planned economies had been regulated with little or no competition but much of cooperation.

Therefore, competition served very little to motivate managers to innovate or improve the efficiency of enterprises as the management and technology, and in turn, the mechanism to enhance productivity, had to come from the centre.

2.2. Partial Restructuring of the Economy: A Move Towards a Market-oriented Policy Regime

With a change in the political regime in 1991, a partial restructuring of the economy began. Spearheaded by international financial institutions International Monetary Fund (IMF) & World Bank (WB), the new regime adopted an orthodox structural adjustment programme – stabilisation, liberalisation and privatisation, primarily focusing on deregulating markets and re-instating private actors into the modern economic sector. Key policy reforms undertaken to restructure the economy include the following:

A. **Economic Development Strategy –** Given the dominant role of marginal agriculture, the economic policy focus has been primarily on agricultural development. The specific strategy was to increase productivity through supply of technical inputs such as fertiliser, improved seeds, pesticides and insecticides. The success of the strategy is, however, limited since marginal agriculture relies entirely on seasonal weather conditions. Moreover, farms are overwhelmingly micro in size, on average, less than 0.5 hectare, and farm implements are crude, thereby limiting the benefit of modern technical inputs.

   Within agriculture, government accords priority to exportables such as coffee, oilseeds, hides and skins, etc., – all being outputs of the traditional sector.

B. **Industrialisation Strategy –** The country's industrial strategy has been more of agriculture-oriented rather than industry *per se*. It is thought that the central role of industry is to help develop agriculture by processing raw materials, hence, the strategy: Agricultural Development Led Industrialisation (ADLI). As such, the industrialisation strategy prioritises natural resource based industries such as textile, leather, meat packing, etc.

Note that this is not the sort of industrialisation strategy acclaimed in the newly industrialising economies of Asia where priorities were on strategic or technologically leading industries such as chemical, electrical and electronics, iron and steel, etc. So Ethiopia's industrial strategy is much in line with the international economic order – or the theory of comparative advantage, i.e., 'stick to agriculture that you can produce relatively better, and not to manufacturing and industrial technology'.

C. **Financial Policy –** Private sector is allowed to invest in financial intermediation. A limited number of small banks and insurance companies are established and have become operational along side large state owned financial institutions. The policy also encouraged the establishment of micro-finance institutions. Foreign banks and insurance companies, however, are not allowed to enter.

D. **Trade Policy –** Markets, on the main product and labour markets, are deregulated and prices decontrolled. The liberalisation policy has a significant impact on the external sector – import and export. Not only that licensing is largely relaxed, but also import tariffs are sharply reduced to an average of 17 percent and a maximum of 35 percent of CIF value. All export taxes, except on coffee, and subsidies, are eliminated. The tariff band is also reduced to only six categories.

E. **Privatisation –** As well known, rolling back the state is at the centre of an IMF driven SAP. As a result, a number of state-owned enterprises (SoEs) have been privatised. The state's strategy, however, is privatising small scale enterprises while retaining large and medium sized ones. Different modalities of privatisation were used. Most enterprises were privatised through an auction system, while few, such as a gold mine, were privatised through negotiations with individual investors. A large number of SoEs have still not been privatised.

F. **Monetary and Exchange Rate Policies –** In line with the orthodox SAP, deep devaluation of the domestic currency was also one of the major liberalisation measures undertaken by the state. After initial devaluation, the currency was allowed to gradually depreciate overtime. Initially, foreign currency rationing was introduced through an auction system, which was later relaxed and made available directly from banks. However, foreign currency is still under the control of the state and not yet privatised.

   Interest rate is partially deregulated. The central bank still sets the minimum commercial deposit rate.

G. **Investment Policy –** Except in few important activities, a wide sector of the domestic economy is open for private investment. Moreover, a reasonable, incentive scheme is in place to encourage investment, particularly foreign investment. It includes tax holiday, duty free import of machinery and equipment, free land grant particularly for investment in some regional states, etc. Further, customs procedures are significantly streamlined and computerised.

H. **Restructuring and Competition –** Moving from a centralised to a market-oriented economy is not an easy task. It involves significant costs. The implications, of these restructuring and liberalisation measures for competition are obvious. At least theoretically, re-instating the marginalised private sector, re-introduces competition in the domestic markets. The incentive driven export policy also encourages domestic suppliers to compete in the international markets. Few foreign investors have also started business, though largely taking up privatised enterprises, and not green field investment. Thus, the policy measures have opened up an opportunity for a market-oriented competition. These measures are part and parcel of a competition policy, though not defined so formally.

3
Current Barriers to Competition

Currently, not only that the restructuring is incomplete and the legacy of central planning still lingering, a number of other regulatory measures and sectional interest are posing strong barriers to competition in the Ethiopian domestic market.

3.1. Public Sector Dominance

The public sector still holds significant monopoly and dominance, not only in industries often considered as natural monopolies, such as energy, telecom, postal service, water supply, railway and airway, but also in manufacturing and services, such as cement, sugar, tobacco, textiles, banks and insurance companies. As noted earlier, a carefully planned and implemented privatisation scheme expands the private sector, thereby enhancing competition. However, privatisation in the Ethiopian context is taken as a mechanism for getting rid of relatively small enterprises while retaining large ones under the state control. Irrespective of the number of enterprises privatised, the Government still controls over 50 percent of the total value of production of medium and large scale enterprises and 70 percent of the value of modern economic activities. As a result, the structure of the economy still remains highly skewed and far from being competition inducing.

Two factors limit the volume of goods and services transacted through contested markets. First is the traditional sector, where production is for own consumption. As shown in Table 1, 37 percent of the total value added is not marketed. This is largely due to agriculture where two-third of the produce is retained for home consumption.

The second factor is state monopoly. Either because of explicit (or implicit) ban on entry, such as in telecommunications, postal service, electric energy or dominance in some manufacturing sub-sectors, such as cement, steel, sugar, textile, leather tanning, etc., 17 percent of the gross domestic product (GDP) is marketed with little or no competition. Hence, of the total value of production, only 46 percent is marketed under an environment conducive to competition; whereas the remaining larger proportion (54 percent) is not subjected to market competition at all. The economy, therefore, is not yet fully restructured to allow a reasonable degree of market competition.

Table 1: Value Added of Goods and Services Marketed Under Competition*

Sector	Value added (US$mn)	(share as percent of total value added)		
		Non-marketed	Public dominated	Potential competition
Agriculture	5866	66		34
Mining & quarrying	61.6			100
Manufacturing	570		26	74
Electricity, gas & water	226.3	33	67	0
Construction	677.7	37	8	55
Trade, hotels & restaurants	1727.9			100
Transport	287.3	30	21	49
Communication	438.7		100	0
Finance	321.7		50	50
Real estate	725.9			100
Defense & Public admin	669.6		100	0
Education and Health	520.1		100	0
Private Hhld. employment	30.7			100
Other services	225.4			100
Total	12349.0	37	17	46

Source: Estimated based on National Accounts data, EEA, data-base system.
** the coefficients used to calculate the share of non-marketed output are approximates.*

3.2. Price Control

Prices are either partially or fully regulated. For instance, rental price of nationalised urban houses, prices of bread and fuel, minimum deposit rate on saving, passenger transport fares, exchange rate, user-charges for telephone, electricity and potable water supply are all administratively fixed. Some of these prices, such as bread, fuel and public transport fares, are set below market prices, though frequently adjusted to follow the market trend. Others, however, such as telephone call rate are much higher than international prices.

With respect to housing, the policy suffers from double standards. While nationalised houses are returned to their legal owners in some towns, they are still retained by the state in others, including in the capital city, Addis Ababa. At the same time, the Government promotes private real estates, development, while retaining some nationalised houses. Moreover, there are two prices for housing rent: the market price and public price for nationalised urban houses (which is low and fixed). Hence, a dual pricing system has been operational for long.

According to a recent survey[1], a large majority of the respondents, nearly two-third, (64 percent) believe that the policy is inconsistent and retards competition in the housing sector.

3.3. Labour Market Distortion

Competition requires standard and transparent employment policy. However, securing employment/position in the public sector – both in the federal and regional states – particularly for senior public posts, it is largely on non-merit criteria, specifically on ethnic and/or political affiliation. This not only retards competition in the labour market but also breeds corruption. It is obvious that such sectional interest undermines the development of a competitive market environment.

Though, in the recent past, the Government had taken some measures to deter corruption at a higher level, the extent of corruption does not seem to reduce. The business community was asked whether there has been an improvement in the extent of corruption since actions were initiated. Over half (55 percent) of the respondents believed that there is little improvement in corruption, while a quarter (24 percent) think otherwise.

1 A 2006 survey of over 600 respondents in Ethiopia comprising business community, civil servants, NGOs and lawyers, done as a part of the study entitled, "On the Road to Private Sector Vs Economic Growth: Creating & Building Institutions in Ethiopia".

3.4. Lack of Transparency

Transparency and fairness are central for building private business confidence and encouraging competition. Government is the single largest purchaser of goods and services in Ethiopia. As such, its actions in the markets can be instrumental to foster competition in the domestic market. However, granting contracts, i.e., bids for public projects, and procedures for procurement by tendering are far from being competitive.

In the case of construction, for instance, while it is clearly known that some foreign countries heavily subsidise their firms competing in Ethiopia, thereby winning every auction they participate, the Government ignores such unfair competition and allows it to continue unabated (Dabbah, 2007).

In the case of privatisation, as noted above, it is partly done through personal negotiations with favoured investors (for instance, in the case of gold mine). This lack of transparency does not encourage competition.

The survey result reflects this opinion. Asked whether auctions and bids for Government projects such as in privatisation, construction, transport, distribution (of cement, fertilizer, sugar, etc) are transparent and fair, half of the respondents confirmed that it has not been so. Only 20 percent of the respondents believed otherwise.

3.5. Lack of Property Rights for Land

The regime believes that land is a free gift of nature. As such, it should be under the control of the guardian of the people (the state) for common benefit, but not as private property. This is constitutionalised so. The right to the ownership of land is exclusively vested in the state and shall not be subjected to sale or other means of exchange. Hence, no secondary market for land on its own exists in the country.

As for the primary market, the minimum price for auction is set by the Government. Thus, it is a monopoly price. Moreover, the Government has the right to cancel any auction; and there is no criterion for such cancellations. Thus, if the maximum bid price of an auction is not what the Government would like it to be, the auction would be revoked.

Such an approach is likely to breed corruption and so it does, thereby distorting the primary land market. The failure to provide strong property rights for land reduces both entry and exit of the private sector. As land is not marketable on its own, it can only be transferred for the structure built on it.

State ownership and control of land has significantly contributed to the lack of easy access to land, its lack of marketability and unreasonably high cost. For instance, a square metre of land at the outskirt of the capital, Addis Ababa, costs between US$120 & US$200; and is rising.

The impact of state ownership of land has a wide repercussion. For instance, access to bank credit has been constrained by legal problems involving the use of land-lease rights for collaterals.

3.6. Distorted Financial Market

The small financial sector is composed of nine deposit taking commercial banks, a development bank, ten insurance companies, 22 micro-financial institutions, about 600 small saving and credit associations, and of course a central bank. Two commercial banks (one being the largest), a development bank, and an insurance company, which is also the largest in the country, are state-owned. With private financial institutions outnumbering public ones, it may sound that the ground for a competitive financial sector is in place. However, it is far from that.

First, the dominant state-owned Commercial Bank of Ethiopia (CBE) accounts for about 75 percent of total banking sector assets and deposits, and over 50 percent of loans (in 2006). The dominance of this bank is two to three times larger than corresponding banks in neighbouring countries – Kenya, Uganda and Tanzania. Such heavy dominance may deter entry of other small banks.

Second, state owned banks, including the central bank, have little operational autonomy. The CBE, being a state-owned bank, operates not under a commercially prudent principle and practice but largely under Government guidance, i.e. – directed credit. Over 50 percent of CBE's claim is held by the Government – central government and public enterprises. A significant proportion of the remaining claim is held by party-affiliated enterprises, which are said to be heavily indebted. As a result, the CBE's non-performing loans at times figure as high as 59 percent (2003) (IMF, 2005). If CBE had operated on commercial basis, it surely would not have incurred such massive non-performing loans. As such, with limited capacity of other private banks, financial resources (credit) to the non-financial private sector is allocated not on a competitive basis but on administrative ground, which is the legacy of central planning.

In a similar vein, the National Bank of Ethiopia (NBE), which is the regulatory and supervisory body, cannot in practice effectively enforce its directives on state-owned banks because of Government interference. "Supervision by the NBE, particularly on state owned banks has been limited and rarely gone beyond monitoring" (2005).[2] This denies private banks the required level field to compete in the market freely.

Third, the minimum deposit rate is fixed, thereby limiting competition between banks, and denying them the opportunity to offer a competitive rate for their customers, thereby making borrowing expensive.

Fourth, because of the large non-performing loans of the state owned CBE, Government has enacted a foreclosure law. Accordingly, banks can foreclose an indebted enterprise and bring to auction or retain the mortgaged assets without any court warrant. However, in practice while many private enterprises came under the hammer, not even a single state- or party-owned enterprise has been foreclosed to date despite the fact that they are the ones said to be heavily indebted and making defaults. Such sectional interest creates double standard in enforcing the rules thereby deteriorating private business confidence and discouraging competition. The Diagnostic Trade Integration Study (DTIS) wrote, "Equal justice under the law may be a good guiding maxim; it may even be a good constitutional principle. But where one of the litigants is a government organ all those high sounding principles are trampled down" (World Bank, 1993).

Fifth, non-financial public enterprises are not allowed to be customers of the private banks. Such exclusionary policy deters competition.

Sixth, foreign banks are not allowed to operate in Ethiopia, despite the fact that they had been operating for long before they were nationalised in 1975. The argument for banning entry of foreign banks includes lack of supervisory skill of the NBE and lack of competitiveness of infant private commercial

2 Nearly half of the members of the board of governors of the NBE are directly picked by the council of ministers chaired by the PM, and the board is chaired by the chief economic advisor of the PM.

banks. However, a better competitive atmosphere would have been created with foreign bank entry rather than the uncompetitive situation existing today.

Lastly, party-affiliated micro-finance institutions, using their favoured position, deter entry of other private micro-finance institutions in regions where the former operates (ECC, 2007). This too deters the expansion of a competitive domestic market.

3.7. Inconsistent Tax Administration

In the recent past, the Government introduced a new Value Added Tax (VAT) on enterprises having an annual turnover greater than US$57,000. All other enterprises have to register for the other type – the Turnover Tax (TOT). However, because of the lack of capacity of the tax authority to enforce, enterprises having equal annual turnover are registered for different tax systems paying significantly different rates – the TOT being much lower. While it is easier to trace already registered enterprises for VAT and enforce tax payments (as the system is computerised), it is practically difficult to estimate the due tax and enforce on those registered for TOT. This grossly distorted the market driving agents registered for VAT out of competition and discourage others to do so (ECC, 2007).

3.8. Sectional Interest and Lack of Enforcement of Contracts

A. **Lack of Independence of the Judiciary**: Perhaps, the most fundamental institutional issue for competition is related to the judicial system. "The enforcement of contracts and property rights constitutes the institutional basis for markets to operate… A proper justice system that ensures proper enforcement of contracts and property rights contributes to economic growth whereas lack of enforcement of contracts leads to retardation… and eventual underdevelopment" (World Bank, 2003).

   Primarily, legal provisions are not available for the judicial review of the administrative actions of the state machinery and there have been almost no legal measures taken to penalise inefficient actions or inaction – except few cases of corruption. Moreover, there is no commercial bench or court to handle business matters ably and promptly. It is not uncommon to queue up for years to obtain judgment.

But the most critical problem is the lack of independence of the judiciary. A World Bank study noted that "In cases where one of the parties is a state enterprise engaged in commercial activities, obtaining and enforcing judgment against the state has been problematic. It was reported that where government interests are at stake, direct interference has been noted; …" (World Bank 2004).

But this is not all. According to the survey, 82 percent of the respondents noted that "political loyalty and ethnic-affiliation are, in many instances, employed as criteria in the selection and appointment of judges, and judges sometimes receive direct orders from the government officials, particularly in political cases" *(Tilahun and Kibre, 2007, p68).* Under such circumstances and where the Government (the party in power) commands a large business empire of its own, it is practically difficult, if not impossible, to realise fair contract enforcement, which, in turn, deters business.

B. **Unfair Competition from Party-affiliated Enterprises**: A new phenomenon emerged along with the coming to power of the current regime. A number of relatively large enterprises in many sectors including manufacturing, transport, finance, trade, etc., are being established under a single management. This business empire is said to be an endowment of the people of a single administrative region.

   The challenge to the private sector is the unfair competition posed by these enterprises. The DTIS reported that "importers interviewed have stated that they are facing unfair competition from party owned enterprises" (World Bank, 2003).

   A related problem with party-owned enterprises arises in distribution. Most members of Ethiopian Chambers of Commerce bitterly complained that the exorbitant prices of construction materials particularly cement, is partly due to the monopolistic position of party affiliated enterprises over its distribution (ECC, 2007). Today, a quintal of cement costs US$17.

C. **Discriminatory Investment Policy**: Regional states are allowed to design their own policies consistent with the federal ones. The investment policy of some regions prohibits licensing an Ethiopian investor from another region, unless jointly so with another investor from the same region. But this does not apply for a foreign investor. Hence, the problem is that of ethnicity. Such ethnic-oriented discriminatory policy discourages competition and development.

3.9. Incentive Schemes Not Encouraging Competition

Different incentives schemes are employed to promote growth of the economy. The one having a uniform application is the investment incentive scheme. However, there are also other incentives applied selectively. For instance, in textiles and leather sectors, which are regarded as strategic industries for growth, the government is making effort to innovate the technology of the enterprises. However, such innovation goes exclusively for SoEs. Exclusive policy, however, discourages contest for state funds. Such incentive scheme should include all enterprise, private and public, within the industries identified as priority areas, and further selection should be on a specified criteria. This would have encouraged competition between firms, thereby enhancing efficiency and growth.

A similar incentive scheme, access to capital, is granted to cut-flower industry (as it is export oriented) but not to other exporting enterprises. Had the system been comprehensive and ubiquitous it would have motivated a number of exporting firms to improve the quality and increase the volume of their export.

The discussion in this section portrays the grim picture of market competition in the country. Competition is a cumulative effect of multidisciplinary issues. The grey political-economy of the regime, which is a hybrid of the legacy of central planning and market-oriented economic management, distortive regulatory measures and practices motivated by sectional interest gave rise to a restrictive environment to practice fair competition in the country.

But such a restrictive situation prevails despite the existence of a competition law meant to help create and enforce domestic competition. The following sections discuss the competition law and the authority established to implement its provisions.

4
The Trade Practices Proclamation

As part of the liberalisation scheme, and implicitly as a support to the requirement for WTO accession, a Trade Practice Proclamation (No. 329/2003), was issued. It was not normally defined as 'competition proclamation' as it involves issues outside competition. It's major objectives include: securing a fair competitive environment through the prevention and elimination of anticompetitive and unfair trade practices (UTPs); and safeguarding the interests of consumers through the prevention and elimination of restraints on the efficient supply and distribution of goods and services.

4.1. Key Elements of the Proclamation and the Gaps

Apart from the general provisions, the proclamation deals with a number of diverse issues including anticompetitive practices, unfair competition, abuse of dominance, the Investigation Commission (i.e., the competition authority), procedural matters and exceptions.

- **Content of the Proclamation**: The proclamation does not exclusively deal with competition law. It bundles various issues outside competition referring to trade policy, unfair competition, anti-dumping, and price regulation. Such bundling of competition and non-competition provisions not only creates confusion but also consumes time and poses difficulty in practice in the decision-making process of the Investigation Commission i.e., the authority. Because of this, "… since its creation the Commission has received a total of 45 complaints [until the end of 2006], which concern trade and unfair competition issues. … Thus, the Commission has received no competition complaints and it has not conducted a single competition investigation since its creation" (Dabbah, 2007). There is, therefore, a need to further polish the proclamation with focus on competition issues only.

- **Anticompetitive Practices**: Any oral or written agreement that restricts, limits, impedes or harms free competition in the process of production or distribution is regarded as anticompetitive activity. Anticompetitive practices prevailing in Ethiopia include: jointly fixing prices, collusive tendering as to determine market prices, market or consumer segmentation, allocation of quota of production and sales, concerted refusal to deal, sell and render services, etc. (Article 6.1).

  Perhaps, one issue that is not clearly articulated under anticompetitive practices is vertical agreement/restraint. As noted in the previous section, an emerging problem in Ethiopia is the practice of party-affiliated enterprises, where vertically (and horizontally) chained enterprises fix/increase prices from production or import through the retail end of the market. The case of construction materials, particularly cement and steel, are such commodities seemed to be subjected to vertical agreements. Therefore, it might be appropriate to clearly articulate the issue of vertical restraint under anti-competitive practices.

  Moreover, whether an agreement would be regarded as anticompetitive is left to the discretion of the Ministry of Trade and Industry (Article 7). If the Ministry believes that such an agreement has a "national advantage outweighing its disadvantages", then the agreement could be authorised to continue. Thus, there is no hard and fast rule to decide on whether an agreement is anticompetitive or not. Although the issue of "national advantage" may be appropriate and is properly defined, addressed and practiced in some countries, for instance in UK and Australia. In case of Ethiopia it is so open ended that it involves a great deal of subjectivity and creates difficulty in decision-making. It might be helpful to include the basis or considerations for such decision, for instance benefits to consumers, dynamic efficiency, economies of scale, industrialisation benefits, reducing regional disparity, etc.

- **Unfair Competition**: In the course of commercial activities, any practice that aims at eliminating competitors through different methods is considered as an unfair practice. The different methods include, among others, causing confusion with respect to the products or services offered by an enterprise; damaging the good will of another enterprise unjustifiably; misleading the public with respect to the activities or products or services of an enterprise; restricting, impeding or weakening the competitive production and distribution of any commercial good or service rendering; importation of goods at prices less than the actual market prices in the principal market of the country of origin with the intent to destroy or injure the production of such goods in the home country; trading in goods imported for humanitarian purpose; etc.

As noted above, UTPs are not included in many competition policies as it involves issues related to trade, price regulation, etc. These have to be addressed in the relevant policy framework. For a poor and limited economy, such as Ethiopia, with no experience with regulating anticompetitive practices, it would be practically advantageous to start with less complicated and easy to handle cases, e.g. those constituting UTPs and affecting consumers directly.

- **Abuse of Dominance**: Article 11.1 states that "no person may carry on trade which gives opportunity to control a relevant market for goods or services; or limit access to a relevant market or otherwise unduly restrain competition, having or being likely to have adverse effects on market development".

  Abuse of dominance includes (Article 11.2), among others, unfair imposition of excessively high or low selling price or service fee or withholding supply or any preemptive behavior to impede entry into markets; misleading commercial statement or notice; hoarding, diverting or withholding goods from normal trade channel; and selling at a price that does not cover production cost to eliminate fair competition.

  A point that has to be clarified with respect to abuse of dominance is that, as it stands, Article 11.1 does not refer to abuse of dominance, but seems to imply that to be a dominant firm itself is prohibited. Dominance and abuse of dominance need to be clearly defined.

- **Special Provisions**: Certain provisions of the proclamation may not be applicable in the following cases. This depends on the discretion of the Commission established to follow up the implementation of the proclamation.

- Commercial activities that are, according to the investment proclamation (which has been changing frequently in the last ten years), exclusively reserved for the Government;
- Enterprises having significant impact on development and designed by the Government to accelerate growth; and
- Basic goods and services that are subject to price regulations.

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

The problem with this article is that it is broadly phrased and its applicability may change from time to time. First, the phrase "significant impact on development" is difficult to define. Is it employment, export earning, higher productivity, or what?

Second, the role of the Government changes from time to time and so will its commercial activities. For instance, the investment proclamation has been changing almost every year for the last five to six years, and so did the activities reserved for the Government. Currently, telecommunication, energy and postal services are the domain of the Government.

Third, the number of enterprises that the Government currently identifies as priority areas for growth is quite numerous, including agriculture and all exporting enterprises, specifically leather, textile, coffee, floriculture, meat, etc.. Exempting all these activities means significantly limiting the applicability of the competition law. Moreover, the relative importance of an activity or enterprise for development changes overtime. In light of such difficulties these special provisions need to be re-specified limiting the scope of exemptions.

- **Exclusion**: As it stands, the competition law provides a basis for regulating anticompetitive practices. That said, however, it is incomplete and requires further reviewing. A major issue in this regard is the exclusion of mergers, takeovers and other forms of concentrations/conglomerations. Some of the possible adverse effects of concentrations are raised under the section on unfair competition. The issue of mergers itself, and its broad potential impacts, however, are not addressed. Given the relatively small size of most enterprises in the country (even those regarded as large in the domestic economy are relatively small by international standards), and the advantage that very large firms have in a competitive world, it may be argued that prohibiting mergers at this stage of economic development may not be beneficial. For instance, EU member countries consider that joint ventures, mergers, and other collaborations may be necessary to enhance technological development and allow European firms to compete effectively in global markets. Under strict guideline, it is up to the competition authority to decide on whether or not to prohibit such moves (World Bank, 2002).

However, given that Ethiopia is a member of the Common Market for Eastern and Southern Africa (COMESA) block and inevitably future member of the Free Trade Area (FTA), and also in light of its aspiration to join the World Trade Organisation (WTO) in the near future, it would be advantagous to address mergers under the competition law but allow the competition authority (the Investigation Commission) – to decide on whether to allow mergers on case by case basis.

Moreover, though some issues relevant to competition are treated in isolation in other documents, such as the commercial code, industrial regulations, etc., cross-border issues, provisions to protect the environment, consumer protection, etc are not comprehensively addressed by the law.

4.2. Institutional Structure

4.2.1. Structure of the Competition Authority: The Ministry of Trade and Industry is the highest body authourised to deal with the implementation of the proclamation. An Investigation Commission, under the Ministry, was also established to follow up the day-to-day implementation of the provisions regularly. The Commission is accountable to the Ministry of Trade and Industry. Its mandate is to make investigations upon a formal complaint from a commercial entity and submit to the Ministry the result of its verdict with suggestions on administrative measures or penalties to be taken if found offensive. The Ministry can either fully accept, or alter, or totally drop the decision of the Commission. So, the Commission has no any final say on competition matters.

In addition, as the Commission is an agency of the Ministry of Trade and Industry, it does not have its own secretariat and budget. Currently, two staff members of the Ministry of Trade and Industry, and a newly employed lawyer are serving as a secretariat.

The Ministry of Trade and Industry has the authority to take administrative measures (even using police force if necessary) in enforcing its decision. However, a party found guilty of the offence filled has the right to appeal to the Federal High Court within 30 days upon receiving the verdict from the Ministry. The latter would not take any measure before the appeal is filled or not acted.

4.2.2. Composition of the Commission: According to the Proclamation, the Commission would be composed of members (unspecified number) from government, private and consumer associations. However, this is not the case in practice. Currently five commissioners, who are or have been high level government officials, constitute the Commission. The chairperson would be appointed by the Prime Minister upon the recommendation of the Ministry of Trade and Industry.

4.3. Reconsiderations of the Composition and Structure of the Investigation Commission

Regarding the composition and structure of the competition authority, the central issue is the 'independence of the commission'. To this end the following changes are recommended.

- Given the specificity of enterprise ownership in Ethiopia, i.e., where it is difficult to dissociate the ownership of endowment enterprises from the Government in power, it is essential to avoid elements of doubts arising with the Commission. The Commission has to be structurally independent of the influence of the government.
- The composition of the Commission has to be broader than what it is now, and may include not only private and consumer society but other civil society representatives. Moreover, the number of representatives of each group has to be specified. A minority representation from the non-government sector would not enable to check the possible decision of the Commission unfavorable to the private sector – producers or consumers.

- The competition authority should be independent of a government ministry – Ministry of Trade and Industry – and should have its own budget. In a country like Ethiopia where democratic governance is not well established and greater transparency is required, independence of the authority is essential. 63 percent in industrial countries and 59 percent in developing countries of the surveyed firms by the World Bank have competition authorities independent of ministries (World Bank, 2002).

- Members of the Commission, including the chairperson should be appointed by the parliament rather than by the prime minister. The Commission should also be able to report its performance to the parliament.

- The competition authority and the private sector (individual firms and Chamber on behalf of its members) should have the authority to lodge suits.

- Moreover, decisions of the Commission should be available for public use. Public availability of competition decisions has a deterrent effect on potential future violations of the competition law. This would help promote the effectiveness of the law, and by providing checks and balances, it could also help ensure the fairness of the proceedings.

- One of the most important factors underlying the effectiveness of competition laws is recognition of the importance of the law and a willingness to enforce it by both the government and citizens. Hence, the Government has to abide by its own laws.

5
Competition Advocacy and the Role of Civil Society

It is obvious that the overarching objectives of competition are economic development and consumer welfare. The interest of consumers, particularly in developing countries, is better protected by consumer associations organised for the advancement of competition.

To this end, it is essential that consumer organisations have a say in the formulation and enforcement of competition law. This requires representation of consumer organisations in the competition authority. In Ethiopia, as noted in the earlier section this is not the case. In fact, "it is understood that the Government was not particularly in favor of including this reference (the Ethiopian Consumer Protection Association) in the Proclamation and that the reference was in fact inserted following a single effort by an official within the Ministry of Trade and Industry who was active in consumer protection matters" (Dabbah, 2007). Hence, no wonder that representatives of the Association and of the private sector are, in practice, excluded from the Commission. However, both the government and citizens would greatly benefit with the inclusion of members of consumer organisations and the private sector through direct protection (watchdog) and fostering competition.

A related issue is advocacy. Ethiopia has long been subjected to a centrally planned economic management, which not only marginalised the private sector but also weakened entrepreneurship culture and instigated a 'hand-out mentality' among consumers at large. To change such a culture, a concerted advocacy program has to be carried out extensively. For this to be effective, it has to be institutionalised. However, the ideal institution, the Commission, is not clearly mandated in the proclamation to carry out its advocacy functions.

As a result, the Commission has never been engaged in any meaningful competition advocacy exercise, since its establishment, except for individual commission members' efforts in rarely held meetings. In fact, even if it has been allowed to run an advocacy programme, it would be very challenging for the commission as its current composition is structurally devoid of members, such as private sector and consumer association representatives that could have spear headed a pro-active advocacy campaign.

It is, therefore, of great importance to mandate the Commission to run an advocacy and capacity building programme as this will significantly simplify and lessen the burden of investigation and enforcement of the law, thereby facilitating its tasks. A successful advocacy and capacity building programme, however, requires the collaboration of civil society organisations (CSOs), such as the Ethiopian Consumer Protection Association, teachers associations, research institutes (such as EEA), and of course trade and labour associations.

6
The Way Forward

The status of the domestic market competition in Ethiopia is restrictive due to the legacy of central planning, where the state still controls a significant proportion of the economy and critical means of production, the prevailing political-economy of the regime where sectional interest (personal, regional/ ethnic) as opposed to national interest of the government in power, and other regulatory constraints limiting the marketability (market-oriented transaction) of goods and services, which in turn adversely affect prices.

What is witnessed in Ethiopia today, perhaps like in some other developing countries too, are not private sector motivated anti-competition practices such as cartelisation, abuse of dominance, mergers and acquisitions that we know from the literature and other countries' experiences. It is rather state-sponsored or policy induced anticompetitive practices. The state exclusively controls critical means of production, such as land. It bans entry and holds a monopoly position in some activities, while retaining a dominant position in others. It allows its affiliated firms to exercise anticompetitive behaviour, such as cartelisation.

Hence, a significant break-through in the competition environment can only come about by addressing the political economy of the state. This includes:

- relinquishing sectional interest for the benefit of national interest;
- privatising critical means of production, such as land, and other large firms; and
- opening up economic activities held on monopoly for private sector participation, such as telecom, power, etc.

These alone will open a wide gate to practice fair competition in the domestic market.

The competition law needs to be improved significantly in line with what is suggested above. However, without further restructuring the economy and relinquishing all sectional interest, the benefit of the competition law would be highly limited. Competition law does not create competition but regulates anticompetitive practices.

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