



A REVIEW OF COMPETITION POLICY IN ETHIOPIA





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ABBREVIATIONS

AfDB	African Development Bank
AGOA	African Growth and Opportunity Act (of the United States of America)
CCC	COMESA Competition Commission
COMESA	Common Market for Eastern and Southern Africa
DFID	Department for International Development, of the United Kingdom
ECCSA	Ethiopian Chamber of Commerce and Sectoral Associations
EIA	Ethiopian Investment Authority
EPA	Economic Partnership Agreement (with the European Union)
EPRDF	Ethiopian People's Revolutionary Democratic Front
GTP	Growth and Transformation Plan: 2010/11-2014/15
ICN	International Competition Network
IDS	Industrial Development Strategy
IMF	International Monetary Fund
IGAD	Intergovernmental Authority on Development
MDGs	Millennium Development Goals
NAM	Non-Aligned Movement
NGOs	Non-Governmental Organisations
OAU	Organisation of African Unity
OECD	Organisation for Economic Co-operation and Development
PASDEP	Plan for Accelerated and Sustained Development to End Poverty: 2005/06-2009/10
PPESA	Privatisation and Public Enterprise Supervising Authority
PPPAA	Public Procurement and Property Administration Agency
SSA	Sub-Saharan Africa
TCCPA	Trade Competition and Consume Protection Authority
UNCTAD	United Nations Conference on Trade and Development
UNECA	United Nations Economic Commission for Africa
UNESCO	United Nations Educational, Scientific and Cultural Organisation
WTO	World Trade Organisation

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EXECUTIVE SUMMARY

Introduction

This Report is a review of the status of competition policy in Ethiopia. It includes an overview of the historical, political, social and economic context of Ethiopia, its market structure and conduct in terms of competition.

The data and information used in the Report was both of a primary and secondary nature. Primary data was obtained from key stakeholders that were consulted and interviewed during a fact-finding visit to Ethiopia during the period 12-16 October 2015. Besides the Trade Competition and Consumer Protection Authority (TCCPA), the consulted stakeholders included Government Ministries and agencies, business associations, business undertakings, and legal practitioners. Secondary data was obtained from desk research and literature review.

All the stakeholders consulted during the fact-finding visit to Ethiopia were unanimous in their support of the beneficial effects of competition policy in the country, and emphasized the importance of greater and more intensive implementation of the policy.

Socio-Economic Background

Ethiopia is one of the fastest-growing economies in the world, and is among the top performing economies with an average Gross Domestic Product (GDP) growth of 11% per annum since 2004. With the economic downturn, the GDP growth has been recorded at 10%¹ for the last five years. The economy of Ethiopia is largely based on agriculture, which accounts for 40.2% of GDP, and 85% of total employment. Many other economic activities depend on agriculture, including marketing, processing, and export of agricultural products. Principal crops include coffee, pulses (e.g., beans), oilseeds, cereals, potatoes, sugarcane, and vegetables.

The major manufacturing activities are in the production of food and beverages, tobacco, textiles and garments, leather goods, paper, metallic and non-metallic mineral products, cement and chemicals.

Ethiopia has substantial deposits of gold, tantalum, platinum, nickel, potash and soda ash, and among construction and industrial minerals are marble, granite, limestone, clay, gypsum, gemstone, iron ore, and coal.

The Government of Ethiopia's current five-year Growth and Transformation Plan (GTPII) (2015/16-2019/20) focuses on building on the existing strategies, both national and sectoral, performance under GTPI, commitment to Sustainable Development Goals (SDGs), economic regional and international integration while maintaining effective political leadership, public participation and ownership.

The Heritage Foundation's findings on Ethiopia in its 2015 Index of Economic Freedom was that Ethiopia's economic freedom score was 51.5, making its economy the 149th freest in the 2015 Index. Its overall score was 1.5 points higher than the previous year, reflecting considerable improvements in monetary freedom, freedom from corruption, and labour freedom. This index has improved to 52.7, now at a 1.5 points higher than 2015, placing Ethiopia at 142nd in 2017.

Legal Framework for Competition in Ethiopia

The evolution of competition policy and competition law in Ethiopia can be traced back to the 1960s, with the introduction of the Commercial Code and Civil Code of 1960, which prohibited unfair trade practices which affected trade within Ethiopia. The Criminal Code of 2004, and Trademark Registration and Protection Proclamation of 2006 also had the objective of prohibiting unfair practices that affected trade within Ethiopia. In April 2003, the Ethiopian Government announced the Trade Practice Proclamation (No. 329/2003) as its first ever competition law to promote competition in the domestic market as part of its economic reforms. Since then, the Trade Practice and Consumer Protection Proclamation (No. 685/2010) was enacted, followed by the Trade Competition and Consumers Protection Proclamation (No. 813/2013).

The major objective of the Trade Practice Proclamation (No. 329/2003) was to secure a fair competitive

¹ See the 2017 Index of Economic Freedom at <http://www.heritage.org/index/country/ethiopia>,

process through the prevention and elimination of anti-competitive and unfair trade practices, and safeguarding the interests of consumers, through the prevention and elimination of any restraints on the efficient supply and distribution of goods and services. The Proclamation further regulated prices and ensured equitable distribution of certain basic goods and services during times of shortage and irregular supply, with the core objective of impeding anti-competitive practices and stopping market monopoly behaviour and/or agreements. Its major shortcoming was that it did not provide for the control of mergers and acquisitions.

The Trade Practice and Consumers' Protection Proclamation (No. 685/2010) repealed and replaced the Trade Practice Proclamation (No. 329/2003). The 2010 Proclamation met many of the shortcomings of the repealed Proclamation, such as making provision for merger control, and strengthening the competition authority in terms of independence and decision-making autonomy.

The Trade Competition and Consumer Protection Proclamation (No. 813/2013), which is the current competition legislation in Ethiopia, came into force on 21 March 2014. The Proclamation is a much improved piece of competition legislation that overcomes most of the shortcomings of the previous proclamations on competition. The relatively few provisions of the Proclamation that require further clarification or amendment are those on the application of the Proclamation, exemptions, merger notification thresholds, and post-merger examinations, which can be rectified through regulations.

The Trade Competition and Consumer Protection Authority (TCCPA) was established under Proclamation 813/2013 as an autonomous federal government body having its own legal personality and accountable to the Ministry of Trade. The Authority has powers of undertaking investigations into competition or consumer protection cases, either on receipt of complaints or at its own initiative, inclusive of deciding on merger notifications and banning advertisements of goods and services which are inconsistent with health and safety requirements. The adjudicative benches of the Authority, which consist of judges appointed under the Proclamation as part of the organisation of the Authority, have judicial powers of taking administrative measures and imposing fines, and of ordering payment of compensation to victimised business persons. The administrative measures taken

include: (i) making cease and desist orders (i.e., the discontinuation of the act pronounced unfair); (ii) taking any other appropriate measures that reinstate the victims' competitive positions; and (iii) suspending or revoking the business licences of the offenders.

A Federal Trade Competition and Consumer Protection Appellate Tribunal was also established with powers of hearing and deciding on appeals against decisions of the Authority.

Institutional and Operational Framework

The organisation of the TCCPA is such that it consists of: (i) a Director General, as its chief executive officer, and Deputy Director Generals, appointed by the Prime Minister on the recommendation of the Minister of Trade; (ii) judges appointed by the Prime Minister; (iii) investigative officers, and prosecutors; and (iv) the necessary staff. The judges constitute the adjudicative benches of the Authority, who have judicial powers of taking administrative measures (such as making cease and desist orders, taking measures that reinstate the victims' competitive positions, and suspending or revoking the business licences of the offenders), and imposing fines, as well as of ordering payment of compensation to victimised business persons.

The Authority has eight Directorates, responsible for: (i) investigation and prosecution; (ii) mergers and acquisitions; (iii) public relations and communication; (iv) market information; (v) consumer affairs, education and training; (vi) research and development; (vii) planning and data management; and (viii) human resources management. The functions of the Directorates are reflective of the Authority's statutory powers and duties, which give prominence to advocacy and public awareness programmes.

While all the Authority's Directorates are involved in core operational activities that enhance competition and consumer protection, the Investigation & Prosecution Directorate and the Mergers Directorate are directly involved in competition matters.

In 2014, the Authority received 65 complaints of anti-competitive practices, and 114 complaints of violations of consumers' rights and interests. Abusive practices of dominant firms (excessive pricing, tying and bundling, refusal to supply, and predatory pricing)

were the most prevalent anti-competitive practices, followed by collusive practices (price-fixing and bid-rigging), and vertical restraints (exclusive supply). The relatively few instances of unfair competition involved misuse of information to weaken competitors. Most of the cases related to consumer protection involved hoarding and diverting of basic goods, and dangerous and poisonous substances. By the 2014/2015 financial year, the Authority had examined nearly a hundred proposed mergers, mostly involving share transfers and acquisitions, with very few amalgamations. The projection for 2017 is a 10% increase in the case load.

The operations of the Authority are largely funded by the Government from annual subventions, which are not adequate for the effective undertaking of the operations. The Authority has still not collected merger notification fees under Proclamation 813/2013, but Ethiopia has received its share of merger notification fees received by the COMESA Competition Commission (CCC) for mergers with a regional dimension. Besides financial constraints, the other major operational constraint facing the Authority is lack of capacity to effectively enforce the provisions of Proclamation 813/2013.

Relationship between Competition Policy and Other Policies and Government Measures

The coordination between competition policy and other government socio-economic policies is vital for economic development. Competition policy should therefore be implemented in coherence with other government policies which affect competition in one way or other with a view to contributing to sustainable economic growth and development. It has however been observed that the interrelationship between competition policy and other public economic policies is so complex that there is often lack of coordination between the policies, leading to policy incoherence.

The analysed socio-economic policies of Ethiopia that affect competition, either positively or negatively, included industrial policy, trade policy, investment policy, public procurement policy, and labour policy. While it was generally found that Ethiopia's industrial policy and competition policy are mutually supportive and not in conflict with one another, there are a

number of micro-industrial government policies that adversely impinge on the application of competition policy, notably those that restrict the entry of new competitors, limit the scope of competitive conduct, and reduce incentives for active competitive engagement. None of the other analysed policies were found to be major deterrents to competition in the country.

Market Structure and Status of Competition in Ethiopia

The major economic sectors in Ethiopia whose market structures were analysed for their competitive effects were the coffee sector, the livestock products sector, the transport sector, the construction sector, the textiles and textile products sector, and the beer sector:

- The coffee sector has a low concentration level, with many players supplying the market, and entry barriers into the market are negligible. With the government's liberalisation of the cash crop market, and encouragement of the private sector to be involved in cash crop marketing, the sector has been opened up for greater competition.
- Free market competition prevails in the livestock sector in Ethiopia.
- With regard to the transport sector, no real competition exists in the railway and air transport on the domestic market, which are monopolised or dominated by SOEs. Road transport services, on the other hand, are subject to intense competition. Entry barriers into the transport sector are mostly of a regulatory nature (high import duties on vehicles, foreign operators not allowed to enter and participate in the sector and passenger transport subject to fare controls).
- In the construction sector, cement industries worldwide are oligopolistic in nature and therefore besieged with anti-competitive practices, with most such practices being of a collusive nature (price-fixing, market-sharing, and bid-rigging). The cement industry in Ethiopia is also oligopolistic, with three main producers. Allegations of other anti-competitive practices in the Ethiopian cement industry have focused on instances of 'hoarding' and 'arbitrary price increases'.

- Entry in both the textiles and apparel businesses is open to all operators, including foreign investors, and there are no particular entry barriers.
- There has been a rapid increase of foreign direct investment (FDI) and local investments in the beer sector in Ethiopia. Free market competition in the sector is prevailing with the exit of SOEs and the entry of new players. The rise in the demand for the product has also led to aggressive marketing and competition between brewers.

Market access analyses and considerations covered the following areas: (i) external trade; (ii) regulation and the State; (iii) sector regulation; (iv) privatization; and (v) concessions.

- Ethiopia's external trade is being greatly facilitated by the various trade agreements it has negotiated at bilateral, regional and multilateral levels with various trading partners under COMESA, EPA and AGOA, which advocate reduction of import tariff duties and removal of non-tariff barriers to trade. The same effects will be felt from Ethiopia's membership of the WTO. This should intensify, and raise the level of, competition in Ethiopia, both between domestic traders and between domestic and foreign traders.
- The Ethiopian Constitution has provisions that guarantee adherence to the fundamental competition principle of non-discriminatory treatment and general application of competition law, subject to justifiable exemptions. The other specific regulations in Ethiopia that impact on competition include those on investment, procurement and sector regulation. Business licensing and foreign exchange allocation regulations also have a profound impact on competition because of their market entry effects.
- Ethiopia has a number of sector regulators in key sectors, such as the telecommunications, electricity, and financial services sectors. The TCCPA is given overall responsibility under Proclamation 813/2013 of promoting competition and enforcing Ethiopia's competition law in all sectors of the economy, including the regulated sectors. There is however need for the Authority to enter into cooperation agreements with sector regulators to forestall any jurisdictional problems that could arise from the investigation of competition cases in the regulated sectors.
- Ethiopia embarked on a privatization programme aimed at encouraging the private sector under its broad-based economic reform programme. Privatisations, like all changes of control, affect the structures of the relevant markets, by producing horizontal or vertical concentrates or conglomerates that affect markets. The likely anti-competitive effects include substantial lessening of competition through monopolisation and market foreclosures. Under its privatization programme, Ethiopia has transferred a number of SOEs to the private sector, but many still have to be privatised. It is imperative that the TCCPA should get involved in the future privatisation of SOEs, either as an advocate for competition and/or an enforcer of the country's competition law, through the establishment of close working relationships under a cooperation agreement with the privatization agency, the Privatization and Public Enterprise Supervising Authority (PPESA).
- Concessions are a particular form of public-private partnership, and are a substitute for privatisation when privatisation is not feasible for political or legal reasons. The granting of concessions in Ethiopia is expected to be intensified with the slow-down in the privatisation programme. The TCCPA's role in the process would be indispensable, not only from its competition advocacy functions but also from its enforcement of the competition provisions of Proclamation 813/2013, particularly those on abuse of market dominance and merger control.

The importance of small and medium enterprises (SMEs) in Ethiopia is that they mainly comprise the country's industrial sector. The country's Industrial Development Strategy (IDS) accordingly declared micro and small enterprises (MSEs) as one of the priority sectors for government direct support with the expectation that such enterprises foster the emergence of entrepreneurs and have the opportunity of creating employment opportunities.

One other particular issue of a market access nature in the implementation and enforcement of competition policy and law in Ethiopia is in the context of regional integration. In that regard, Ethiopia is a member, COMESA, which is the most advanced

in the implementation of competition policy. The COMESA Competition Regulations, which created a 'One Stop Shop' for the notification and assessment of cross-border transactions within the Common Market, were adopted by the COMESA Council of Ministers in December 2004. The enforcement of the Regulations by the COMESA Competition Commission (CCC), commenced in January 2014.

Ethiopia's Proclamation 813/2013 is in relative harmony with the COMESA Competition Regulations in so far as the coverage of common competition and consumer protection issues are concerned. There should therefore be no contradictions in the TCCPA's enforcement of the Proclamation and its assisting the CCC in the investigation of competition and consumer cases under the regional Regulations.

Ethiopia stands to benefit a lot from its active participation in the regional COMESA competition regime, not only from the prevention of anti-competitive practices of a cross-border nature that affect its economy but for which it does not have jurisdiction, but also from technical assistance and capacity building in the handling of national competition cases. In particular, the TCCPA can gain from the CCC's wide experience in merger control. During the first year following the operationalization of the CCC, the Commission examined about 75 mergers and acquisitions with a regional dimension, with some of them having had economic effects on Ethiopia.

Selected Consumer Protection Issues

The TCCPA is the sole organisation in Ethiopia responsible for consumer protection and welfare following the revocation of the operating licence of the Ethiopian Consumer Association.

There are arguments for and against the handling of competition and consumer protection matters in the same legislation and/or under the same enforcement authority. It has been noted that consumer protection is more diverse and goes beyond ensuring the efficient allocation of resources, where competition regimes are only one among the various mechanisms for consumer protection. While competition cases are broader in scope in the sense that they affect entire markets, consumer protection cases typically involve a specific practice by a single firm/business. The

regulatory tools available to competition and consumer protection are therefore different. The dominating nature of consumer cases due to incidence of smaller but more numerous complaints has also been cited as a supporting argument to separate enforcement of competition law and consumer protection legislation.

The proponents of integration of the two areas stress that it would have the effect of clarifying jurisdictional issues, enable the comprehensive treatment of issues from both perspectives, and bring about a more consistent and coherent implementation of regulatory policy. Another advantage of having a single authority with the two functions is that consumer protection issues are more popular with the society so as to benefit the authority in terms of visibility and good reputation. Competition and consumer issues are complementary, and not contradictory, and are so interrelated that the common adage that 'the ultimate objective of competition policy is consumer welfare' was coined.

The advantages of integrating the two areas for implementation under a single authority outweigh the disadvantages such that the trend nowadays is to combine competition and consumer protection provisions in the same legislation for enforcement by a single authority, or to have two separate legislations enforced by a single authority.

It is true that consumer issues, by their nature, are more numerous than competition issues, as has been evidenced in Ethiopia. As such, more resources have to be devoted to their handling. What would be required is proper resource management and allocation to ensure adequate meeting of both objectives.

Conclusion and Recommended Policy Actions

Ethiopia's Trade Competition and Consumers Protection Proclamation (No. 813/2013) is a good piece of competition legislation that is based on international best practice, and takes into account the peculiarities of the country's market conditions. The Proclamation is also much improved from the previous legislations. Very few areas of the Proclamation were found to require improvement or amendment. The identified improvements can however be done by way of subsidiary legislation through regulations, and not necessarily by

amending the Proclamation. The Proclamation makes provision for such regulations.

The Trade Competition and Consumer Protection Authority (TCCPA) has done sterling work in the area of advocacy and public awareness, particularly in the field of consumer protection. This is in line with the provisions of the Proclamation. The enforcement of the Proclamation's competition provisions is however still lagging behind, mainly because of lack of, or inadequate, capacity to handle competition cases on the part of the Authority.

Markets have been opened up to competition in Ethiopia with the removal of many regulatory barriers to entry. What remains are behavioural barriers that are erected by market incumbents to protect themselves from new

entrants. In Ethiopia, behavioural barriers to entry come in various forms, including the abusive dominant firm practices of refusal to supply, predatory pricing, and exclusive supply arrangements, as well as other unfair competition practices aimed at weakening competitors.

The recommended policy actions that are aimed at improving the implementation and enforcement of competition policy and law in Ethiopia resulting from this review of the status of competition policy in the country cover the following areas: (i) legal framework on competition; (ii) competition enforcement; (iii) sector regulation; (iv) competition advocacy; (v) consumer protection; (vi) regional integration; (vii) capacity building; and (viii) other relevant issues. 17 recommendations are made, which are directed to the Ministry of Trade, TCCPA, and cooperating partners.

1. INTRODUCTION

1.1 Objectives of the Report

The objective of this Report is to review the status of competition policy in Ethiopia. At the request of the Ethiopian Government, the United Nations Conference on Trade and Development (UNCTAD) agreed to provide technical assistance to the Ethiopian competition authority, the Trade Competition and Consumer Protection Authority (TCCPA), in the implementation of the country's new competition and consumer protection laws,² under the Project for Strengthening Competition and Consumer Protection Enforcement Capacities in Ethiopia funded by the Grand Duchy of Luxembourg.

In this Report, a review is undertaken of the historical, political, social and economic context of the Ethiopian nation and its people, market structure and conduct in terms of competition. The following areas are covered:

- *Economic Reforms*: the ongoing economic reforms in Ethiopia and their implications for competition policy, as well as their consideration of competition issues; the role of the TCCPA in the reform process; the place of competition issues within the broader macroeconomic policy framework of Ethiopia.
- *Market Access*: the existence of market barriers to entry in the main sectors of the economy; identification of sectors in which the barriers occur, and the causes of the barriers.
- *Market Structure*: determination of the competitiveness of the markets at present and in the future.
- *Small and Medium Sized Enterprises (SMEs)*: role played by SMEs in the economy and government policy measures towards the enterprises.
- *State Owned Enterprises (SOEs)*: government policy measures towards SOEs, and role of such enterprises.

² The Ethiopian Government had on 21 March 2014 introduced a new Trade Competition and Consumers Protection Proclamation (No. 813/2013) to protect the business community from ant-competitive and unfair market practices, and also consumers from misleading market conducts.

- *Sector Regulators*: sectors that are regulated; competition functions of sector regulators; relationship between sector regulators and the TCCPA.
- *Intellectual Property Rights (IPRs)*: interaction between IPRs and competition policy.

1.2 Methodology Used

Data used in the Report was both of a secondary and primary nature. Secondary data was obtained from desk research, literature review on legislations/regulations and other publications on Ethiopian socio-economic policies, in general, and competition and consumer protection policies, in particular. The literature review covered such pertinent issues as, *inter alia*: (i) the country's development plans; (ii) Ethiopian laws and other proclamations on competition and consumer protection;³ and (iii) past reports on competition in Ethiopia.⁴

Primary data was obtained from key stakeholders during a fact-finding visit to Ethiopia during the period 12-16 October 2015. Besides the TCCPA, the stakeholders that were targeted for interviews and consultations included Government Ministries and agencies, business associations, business undertakings, and law offices.⁵ To supplement primary data collection, questionnaires soliciting structured

³ Laws enshrined in both the Trade Practice and Consumers Protection Proclamation (No. 685/2010) and the Trade Competition and Consumers Protection Proclamation (No. 813/2013), as well as other previous proclamations.

⁴ A lot has been written about competition in Ethiopia, for example under the auspices of CUTS International (*Policy-Induced Barriers to Competition in Ethiopia*); Aha Ethiopian Consumer Protection Association (*Preliminary Country Paper of Ethiopia on Competition Regime: Capacity Building on Competition Policy in Select Countries of Eastern and Southern Africa (7UP 3 Project* by Gebremedhine Birega); Ethiopian Trade Practices Investigation Commission (*Competition Policies and Laws: Major Concepts and an Overview of Ethiopian Trade Practice Law* by Harka Haroye); Bahir Dar University (*European Influence on Ethiopian Antitrust Regime: A Comparative and Functional Analysis of Some Problems* by Hailegabriel G. Feyissa); and University of Oxford Centre for Competition Law and Policy (*Ethiopian Unfair Competition Law* by Alemayehu Fentaw, and *Ethiopian Merger Regulation* by Hussein Ahmed Tura).

⁵ The stakeholders interviewed and consulted during the fact-finding visit do not include State-owned enterprises (SOEs) and sector regulators since it these operate under government control and are not subject to competition.

responses from stakeholders were also circulated for completion to some of the key stakeholders.

1.3 Social Benefits of Competition Policy

A number of developing countries have documented the social benefits that have accrued to them from the effective implementation of competition policy. UNCTAD in its 2013 publication on competition issues in the economy of Mozambique⁶ gave the example of Zimbabwe. In its fifth year of the effective implementation and enforcement of competition policy and law, the Zimbabwe Competition and Tariff Commission (CTC), undertook a study on the socio-economic impact of the implementation of competition policy and law in the country, which concluded that the implementation had positively contributed towards general economic development.⁷ However, Merger control through competition law has also been criticised, particularly by those countries with small markets and economies, for impeding the restructuring of firms trying to obtain a 'critical mass' necessary to compete in world markets by the strict application of the 'substantial lessening of competition' test. The Tripartite peer review for Tanzania, Zambia and Zimbabwe in 2012 indicated that competition enforcement in the three countries needed boosting and revitalization in order to match best practice in different aspects.⁸

The argument is that having a 'national champion', even if it abuses its monopoly position on the domestic market allows it to be competitive in

foreign markets. While such arguments may have some basis it has been found that monopolies might enjoy their monopoly rents domestically at the expense of domestic consumers and economic development without necessarily becoming more competitive abroad. Empirical evidence gathered in a study by World Trade Institute,⁹ found that firm size confers very small productivity advantages, if any, and therefore as export performance depends on productivity, the link between merger policy and competitiveness is more apparent than real. It was found in contrast that the costs of domestic concentration and political influence arising from mergers are tangible

The Ethiopian Ministry of Trade advised, during the fact-finding visit, that the country's current competition policy was formulated about 13 years ago, and that the rationale behind the formulation was to better implement the market economy policy of the Government by ensuring fair prices for consumers and fair practice for traders. The competition authorities of other countries, particularly those of South Africa and Zambia, were consulted during the process, and there were also wide consultations amongst stakeholders in Ethiopia, to ensure the realisation of the socio-economic benefits of the policy.

All the stakeholders who were consulted during the October 2015 fact-finding visit to Ethiopia were unanimous in their support of the beneficial effects of competition policy in the country, and emphasised greater and more intensive implementation of the policy.

⁶ UNCTAD, *Competition Issues in the Economy of Mozambique*, United Nations, New York and Geneva, 2013 (UNCTAD/DITC/CLP/2011/6)

⁷ Competition and Tariff Commission, *Report on Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe*, November 2006 (Part I) and December 2008 (Part II), not published.

⁸ See UNCTAD website at www.unctad.org/competition

⁹ World Trade Institute, *Merger Control and Export Performance*, 2002

2. SOCIO-ECONOMIC BACKGROUND

Ethiopia is located in North-Eastern Africa, in the Horn of Africa. The country is bordered by Eritrea to the north and northeast, Djibouti and Somalia to the east, Sudan and South Sudan to the west, and Kenya to the south. Ethiopia has never been colonised. With about 90 million inhabitants,¹⁰ it is the most populous landlocked country in the world, as well as the second-most populous country in Sub-Saharan Africa (SSA), after Nigeria. It occupies a total area of 1.14 million square kilometres, of which 513,000 square kilometres (45%) is arable land and 34,200 square kilometres (3%) is irrigated land.¹¹

The capital city of Ethiopia is Addis Ababa, which is situated in the centre of the country on the foothills of Mount Entoto at an elevation of around 2,400 m (7,874 ft). The city has a population of about 3.168 million (2014 estimate).¹² This figure is estimated to have grown to 6.6 Million in 2017¹³. Urban population of Ethiopia is 19.5% of total population (2015), rising to about 20.2 % of the population is urban areas (21,174,205 people in 2017)¹⁴ and the rate of urbanisation is 4.89% annual rate of change (2010-15 estimate).¹⁵ The currency of Ethiopia is Birrand on 30th October 2017, the rate is 27.14 birr to US\$1.00.

The official working language is Amharic¹⁶, with Oromifa being the other major language. English is the major foreign language taught in schools. There are numerous Ethiopian tribes and ethnic group with over eighty different ethnic groups within the country's borders. The main ethnic groups include the Oromo; the Amhara; the Tigraway; the Sidama; the Gurage and the Wolayta.

The modern history of Ethiopia is divided into three policy regimes: (i) the Imperial Regime: 1930-1974 (the

reign of Emperor Haile Selassie; (ii) the Derg Regime: 1974-1991 ('the committee' of soldiers in Amharic, which opted for a socialist economic system; and (iii) the EPRDF Regime: 1991 to date (under the Ethiopian People Revolutionary Democratic Front (EPRDF), which adopted structural adjustment policies of market liberalisation, with the support of the Bretton Woods institutions (the International Monetary Fund (IMF) and The World Bank).

In referring to the above policy regimes, Geda (2006) summarised that "the last four decades have witnessed a cyclical evolution of policy regimes in Ethiopia. The environment for growth evolved from a fairly market-oriented one to a highly controlled one before being liberalised in the third period. This cyclical policy stance is associated with a growth cycle which was favourable in the first and third periods, and very poor in the second".¹⁷

The current Government of Ethiopia embarked on a programme of economic reform, including rationalisation of government regulation and privatization of State enterprises. The previous Derg Regime had in December 1974 issued a proclamation of Ethiopian Socialism under which on 1 January 1975 all banks and insurance companies in Ethiopia were nationalised. The nationalisation of major industrial and commercial enterprises followed.

Ethiopia is one of the fastest-growing economies in the world, and is among the top performing economies with an average Gross Domestic Product (GDP) growth of 11% per annum since 2004. However, Ethiopia GDP grew by 8.0% in 2015/16, a slowdown from the 10.4% registered in 2014/15. The services and industry sectors led growth during this period. Growth in the agriculture sector was negatively affected by the El Niño induced drought. For 2016/17 and 2017/18, investments in energy and transport infrastructure; on-going reforms to spur industrialisation, such as the development of industrial parks; and continued progression in services are expected to lead growth. Agriculture is projected to rebound and grow steadily¹⁸.

¹⁰ www.csa.gov.et.

¹¹ Ethiopian Investment Commission, An Investment Guide to Ethiopia 2014.

¹² <https://www.cia.gov/library/publications/the-world-factbook/geos/et.html>.

¹³ <http://populationof2017.com/population-of-addis-ababa-2017.html>

¹⁴ <http://www.worldometers.info/world-population/ethiopia-population/>

¹⁵ Ibid.

¹⁶ Article 5 of the Constitution of the Federal Democratic Republic of Ethiopia states that "Amharic shall be the working language of the Federal Government", but that "all Ethiopian languages shall enjoy equal state recognition".

¹⁷ Alemayehu Geda, *The Political Economy of Growth in Ethiopia*, Chapter 4 of Volume 2, 2006.

¹⁸ <https://www.afdb.org/en/countries/east-africa/ethiopia/ethiopia-economic-outlook/>

Box 1: Ethiopia's Growth and Transformation Plan (GTP) At-A-Glance**Overview**

- Ambitious five-year growth plan, with projected (GDP) growth of 11-15% per year from 2010 through 2015.
- Total cost estimated at US\$ 75-79 billion over five years.
- Vast investment opportunities primarily in the agricultural and industrial sectors.
- Plans to complete Ethiopia's accession to the (WTO) and improve commercial regulatory framework.

Commercial Agriculture Opportunities

- Offering over 8 million acres of land to commercial farming investors.
- Expansion will open up opportunities for advanced farming technology, high value crops, progressive irrigation techniques, improved seeds, increased fertilizer use, and strategies to yield multiple harvests each year.
- Looking for commercial farming investors interested in producing high-value horticulture products such as flowers, fruits, vegetables, and herbs.

Massive Industrial and Infrastructure Projects

- Plans to provide basic infrastructure to develop four industrial cluster zones.
- Government-promoted industrial sectors eligible for tax holidays and duty-free imported capital goods include: textiles and garments, leather, sugar, cement, metals and engineering, chemicals, pharmaceuticals, and agro-processing.
- Renewed focus on extractive industries such as gold, oil, gas, potash, and gemstones.
- Roads: road network to increase by 10,000 miles throughout the country.
- Rail: will build a 1,500 mile-long standard gauge rail network with opportunities to supply locomotive engines and railway signaling systems.
- Electricity: power generation to quadruple from 2,000 to 8,000 megawatts alongside 82,500 miles of new power distribution lines and the rehabilitation of 4,800 miles of power transmission lines.
- Renewable Energy: seeking investment in renewable energy projects involving hydro, wind, geothermal, and biofuels to lead this power generation boom.
- Telecom: mobile telephone subscribers projected to jump from 7 to 40 million and Internet services subscribers from less than 200,000 to 3.7 million.

Source: Ministry of Finance and Economic Development

Industrial sector value added for Ethiopia increased by 20.6% in 2015/16, up from 19.8% the previous fiscal year. Construction and manufacturing led the expansion in industry, increasing by 25% and 18.4%, respectively, in 2015/16 compared to 31.6% and 18.2%, respectively, the previous fiscal year. Construction benefited from public infrastructure investment, notably in transport, energy, water and sanitation. Investments in industrial parks, to reduce the cost of doing business, contributed to the steady manufacturing growth. Growth in mining, although still negative, recovered to 3.3% in 2015/16 relative to the 25.6% reduction recorded in 2014/15. Gold exports accounted for 10% of total exports in 2014/15 and 2015/16, but the share of mining in GDP remains low at about 0.8%.¹⁹

As analysed by the World Bank²⁰, the Government of Ethiopia's five-year development plan, the Growth and Transformation Plan: 2010/11-2014/15 (GTP), was

geared towards fostering broad-based development in a sustainable manner to achieve the Millennium Development Goals (MDGs). The GTP envisioned a major leap in terms of not only economic structure and income levels but also the level of social indicators. Details of the GTP are summarised in the Ministry of Finance and Economic Development's Official Portal²¹ as follows in Box 1:

During the first four years of GTP implementation, the share of agriculture, industry and services in GDP averaged at 40.2%, 14.3% and 46.2%, respectively.²² The share of manufacturing (both micro and small scale, and large and medium scale manufacturing) averaged about 5% of GDP, and nearly 50% of the share of industry in GDP was accounted for by the construction sector. Table 1 shows the trends in the structure of GDP by major sectors during the Plan period:

¹⁹ <https://www.afdb.org/en/countries/east-africa/ethiopia/ethiopia-economic-outlook/>

²⁰ The World Bank, *Ethiopia Overview*, (<http://www.worldbank.org/en/country/ethiopia>).

²¹ <http://www.mofed.gov.et>.

²² National Planning Commission, 'The Second Growth and Transformation Plan (GTP II) (2015/16-2019/20) (Draft), Addis Ababa, September 2015.

Table 1: Trends In Structure of GDP by Major Sectors During First Four Years of GTP

Sector	Base Year (2009/10)	End-Year (2013/14)
Agriculture:	41.6	40.0
Crop	27.8	28.2
Livestock & Hunting	11.0	8.2
Industry:	12.9	14.2
Construction	5.8	7.5
Manufacturing	5.0	4.4
Service Sector	45.5	45.8
Gross Domestic Product	100	100

Source: National Planning Commission, 'The Second Growth and Transformation Plan (GTP II) (2015/16-2019/20) (Draft), September 2015.

Box 3: Basis, Objectives and Strategic Pillars of GTP II**1.1 Bases of GTP II**

As a vehicle towards the realization of Ethiopia's vision of becoming lower middle income country by 2015, the Second Growth and Transformation Plan (GTP II) is built on Sectoral Policies, Strategies & Programs, lessons drawn from the implementation of the first GTP, the post-2015 sustainable development goals (SDGs). It has also taken into account global and regional economic situations with direct or indirect bearings on the Ethiopian economy.

Objectives of GTP II

The overarching objective of the Second Growth and Transformation Plan (GTP II) is the realization of Ethiopia's vision of becoming a lower middle income country by 2025. Thus, GTP II aims to achieve an annual average real GDP growth rate of 11 per cent within stable macroeconomic environment while at the same time pursuing aggressive measures towards rapid industrialization and structural transformation.

Strategic Pillars of GTP II

In order to achieve the objectives of GTP II set out above, the following pillar strategies will be pursued:

- Sustaining the rapid, broad based and equitable economic growth and development witnessed during the last decade including GTP I;
- Increase productive capacity and efficiency to reach the economy's productive possibility frontier through rapidly improving quality, productivity and competitiveness of productive sectors (agriculture and manufacturing industries);
- Enhances the transformation of the domestic private sector to enable them become capable development force;
- Build the capacity of the domestic construction industry, bridge critical infrastructure gaps with particular focus on ensuring quality provision of infrastructure services;
- Productively manage the on-going rapid urbanization to unlock its potential for sustained rapid growth and structural transformation of the economy;
- Accelerate human development and technological capacity building and ensure its sustainability;
- Continue to build democratic and developmental good governance through enhancing implementation capacity of public institutions and actively engaging the citizens;
- Promote women and youth empowerment, ensure their effective participation in the development and democratization process and enable them equitably benefit from the outcomes of development;
- Building climate resilient green economy.

Source: National Planning Commission, 'The Second Growth and Transformation Plan (GTP II) (2015/16-2019/20) (Draft), September 2015.

The successor development programme to the GTP, the Growth and Transformation Plan II runs from 2015 to 2020. The bases, objectives and strategic pillars of GTP II, as enunciated in the official Plan document, are stated in Box 3.

The economy of Ethiopia is largely based on agriculture, which accounts for 40.2% of GDP, as

stated above. Many other economic activities depend on agriculture, including marketing, processing, and export of agricultural products. Principal crops include coffee, pulses (e.g., beans), oilseeds, cereals, potatoes, sugarcane, and vegetables. Watkins²³ noted

²³ Thayer Watkins, *Political and Economic History of Ethiopia*, San José State University Department of Economics.

that Ethiopia has the potential for vastly increased agricultural production but at present a relatively small portion of the area of Ethiopia is developed for crop production. The distribution of land use is as follows: (i) cultivation including farrow (12%); (ii) pasture (60%); (iii) forest and woodlands (8%); (iv) swamps (5%); and deserts and wasteland (15%).

The major manufacturing activities are in the production of food and beverages, tobacco, textiles and garments, leather goods, paper, metallic and non-metallic mineral products, cement and chemicals.²⁴ Ethiopia has large deposits of gold, tantalum, platinum, nickel, potash and soda ash, and among construction and industrial minerals are marble, granite, limestone, clay, gypsum, gemstone, iron ore, and coal.²⁵

The Heritage Foundation's findings on Ethiopia in its 2015 Index of Economic Freedom was that Ethiopia's economic freedom score was 51.5, making its economy the 149th freest in the 2015 Index.²⁶ Its overall score was 1.5 points higher than the previous year, reflecting considerable improvements in monetary freedom, freedom from corruption, and labour freedom.

Ethiopia is a member of the Common Market for Eastern and Southern Africa (COMESA)²⁷, and of the Intergovernmental Authority on Development (IGAD)²⁸, a Horn of Africa regional group, whose priority areas include infrastructure development, food security, environmental protection, humanitarian affairs, and conflict prevention, management and resolution.²⁹

²⁴ Ethiopian Investment Commission, *An Investment Guide to Ethiopia 2014*.

²⁵ *Ibid.*

²⁶ www.heritage.org/index/ranking.

²⁷ The Common Market for Eastern and Southern Africa (COMESA) is the largest regional economic organisation in Africa, with 19 member States and a population of about 390 million. It has a Free Trade Area (FTA) and launched a Customs Union (CU) in 2009. The history of COMESA began in December 1994 when it was formed to replace the former Preferential Trade Area (PTA) of Eastern and Southern Africa, which had existed from the earlier days of 1981. COMESA countries include: Burundi, Comoros, D.R. Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe.

²⁸ Members of IGAD include: Djibouti, Ethiopia, Eritrea, Kenya, Somalia, Sudan, and Uganda.

²⁹ Gebremedhine Birega, *Preliminary Country Paper of Ethiopia on Competition Regime: Capacity Building on Competition Policy in Select Countries of Eastern and Southern Africa (TUP 3 Project, AHa ECoPA, Addis Ababa)*.

3. LEGAL FRAMEWORK FOR COMPETITION IN ETHIOPIA

Countries adopt somewhat different competition policies depending on their socio-politico-economic objectives and goals. The one-size-fits-all model therefore is not workable in the formulation, adoption, and implementation of competition policies for countries. There are, however, certain standard principles that have universally been accepted as necessary for coverage in competition laws for the effective prevention of anti-competitive practices, which are: (i) the prohibition of anti-competitive agreements (both of a horizontal and vertical nature); (ii) the prevention of abuse of dominant positions (or monopolisation); and the (iii) regulation of mergers and acquisitions. It has also been accepted that for fairness and impartiality, the law must be enforced by an independent competition authority with autonomous decision-making powers.

3.1 Some Codes and Proclamations with Competition-Related Provisions

The evolution of competition policy and competition law in Ethiopia can be traced back to the 1960s, with the introduction of the Commercial Code and Civil Code of 1960, which prohibited unfair trade practices which affected trade within Ethiopia. The Criminal Code of 2004, and Trademark Registration and Protection Proclamation of 2006 also had the objective of prohibiting unfair practices that affected trade within Ethiopia. In April 2003, the Ethiopian Government announced the Trade Practice Proclamation (No. 329/2003) as its first ever competition law to promote competition in the domestic market as part of its economic reforms. Since then, the Trade Practice and Consumer Protection Proclamation (No. 685/2010) was enacted, followed by the Trade Competition and Consumers Protection Proclamation (No. 813/2013).

The Ethiopian Constitution (Proclamation No. 1/1995) also provided the ultimate legal background to the formulation and enactment of competition policy and law in Ethiopia. The competition implications of the Constitution are analysed below in the Section on 'Regulation and the State'.

This report will focus in more detail on the proclamation numbers 239/2003, 685/2010 and 813/2013.

3.2 Trade Practices Proclamation (No. 329/2003)

The major objective of the Trade Practices Proclamation (No. 329/2003) was to secure a fair competitive process through the prevention and elimination of anti-competitive and unfair trade practices, and safeguarding the interests of consumers, through the prevention and elimination of any restraints on the efficient supply and distribution of goods and services.³⁰ The Proclamation further regulated prices and ensured equitable distribution of certain basic goods and services during times of shortage and irregular supply, with the core objective of impeding anti-competitive practices and stopping market monopoly behaviour and/or agreements.³¹ The salient provisions of the Proclamation are summarised in Box 4.³²

The Proclamation therefore prohibited typical anti-competitive practices such as cartel-like behaviour (fixing prices, collusive tendering, segmenting markets, allocation of production and sales quotas, etc.), and monopolisation (excessive pricing, predatory pricing, refusal to deal, etc.). It also dealt with other aspects related to consumer protection such as prohibiting unfair and deceptive conduct, indication of prices of goods, requiring that product labels disclose basic information which helps consumers compare products, distribution of basic goods, and issuing and keeping receipts. It further proscribed infringements of the property rights of individual firms (creating confusion with respect to the product or services offered by an enterprise; damaging the goodwill of

³⁰ Gebremedhine Birega Dagaga, Abebe Asamere Endale and Kibre Moges, Chapter on Ethiopia in *Competition Regimes in the World – A Civil Society Report*, CUTS International, Jaipur.

³¹ Gebremedhine Birega, *Preliminary Country Paper of Ethiopia on Competition Regime: Capacity Building on Competition Policy in Select Countries of Eastern and Southern Africa (TUP 3 Project)*, AHa ECoPA, Addis Ababa.

³² Gebremedhine Birega Dagaga, Abebe Asamere Endale and Kibre Moges, Chapter on Ethiopia in *Competition Regimes in the World – A Civil Society Report*, CUTS International, Jaipur.

Box 4: Salient Provisions of the Trade Practices Proclamation

- Any agreement that restricted, limited, impeded or harmed free competition, in the process of production or distribution, was regarded as anti-competitive. It included jointly fixing prices, collusive tendering as to determine market prices, market or consumer segmentation, allocation of quota of production and sales, refusal to deal, sell and render services, etc.;
- In the course of commercial activities, any practice that aimed at eliminating competitors through different methods was considered an unfair practice. The different methods included, amongst others, creating confusion with respect to the product or services offered by an enterprise; damaging the goodwill 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; 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.; and
- Unfair imposition of excessively high or low selling price or service fee, or withholding supply or any pre-emptive behaviour to impede entry into markets; misleading commercial statements or notices; hoarding, diverting or withholding goods from normal trade channels; selling at a price that does not cover production cost to eliminate fair competition, etc., were regarded as abuse of dominance.

another enterprise unjustifiably, etc.), and of trade policy (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).

It was however found that a number of pertinent competition issues were not addressed, or adequately addressed, by the Proclamation. For example, the Proclamation did not provide for the control of mergers and acquisitions even though these could lead to monopoly power in production and service provision. While practices associated with abuse of dominance were prohibited, dominance was not clearly defined. Though the protection of intellectual property rights (IPRs) was implied, specific IPRs such as copyright, design, patent and trademarks were not covered. Issues related to competition advocacy were also not dealt with. It was therefore observed that some additional refinements in the framework were necessary for the legislation to meet its desired objective.³³

An Investigation Commission was established under the Proclamation to monitor the day-to-day implementation of the legislation. The Commission was required to receive and investigate complaints submitted by aggrieved parties, and to suggest measures in line with the legislation for addressing those complaints. The Minister of Trade and Industry had statutory powers of approving, amending or remanding for review any decision of administrative measure or penalty submitted to him by the Commission. The Proclamation provided in terms of Article 25 for four distinct kinds of administrative

measures that could be imposed by the Commission, which were: (i) suspension, correction or elimination of the practice in question; (ii) suspension or cancellation of business license; (iii) taking any appropriate measure that enable the victim's competitive position to be reinstated; and (iv) seizure and selling of goods that are subject to price regulations. Moreover, the Proclamation imposed in terms of Article 26 fines upon defendants who would have been proven to have violated any provision by way of penalty.

As stipulated in the Proclamation, the Investigation Commission was expected to comprise members from the Government, private organs and consumer association, appointed by the Prime Minister. However, the Commission that was established had four members chaired by the Minister of Justice, with other members from the Prime Minister's Office, National Bank of Ethiopia, and Quality and Standards Authority of Ethiopia, all of whom were drawn from the Government.³⁴ It also was accountable to the Ministry of Trade and Industry, where its Secretariat was situated in terms of the Proclamation.

The Proclamation was critically analysed by Mr. Harka Haroye³⁵, chairman of the Investigation Commission, and former Minister of Justice, in his 2008 Article in the Mizan Law Review. The critique covered areas of the proclamation that would make enforcement challenging.

³⁴ Gebremedhine Birega, *Preliminary Country Paper of Ethiopia on Competition Regime: Capacity Building on Competition Policy in Select Countries of Eastern and Southern Africa (TUP 3 Project, AHa ECoPA, Addis Ababa.*

³⁵ Harka Haroye, *Competition Policies and Laws: Major Concepts and an Overview of Ethiopian Trade Practice Law*, Mizan Law Review, Vol. 2 No.1, January 2008.

³³ Ibid.

Haroye concluded at that time that “the Ethiopian competition regime is in a very bad state and it must be rescued very soon. The only way to do it is to put in place an adequate competition law and a truly independent and strong competition commission and a competition tribunal”.³⁶

During the fact-finding visit to Ethiopia, it was explained by a private legal practitioner with extensive litigation experience on mergers and acquisitions that mergers were not covered in the Proclamation because the then level of investment in the country in 2003 requiring such transactions was low, and that the relatively few such transactions were mostly share acquisitions that were under the authorisation of other government organs. The Ministry of Trade, the custodian of competition policy in Ethiopia, also advised during the visit that the Proclamation did not contain merger control provisions because of the country-wide dearth of knowledge in the handling of anti-competitive practices and the need therefore to concentrate on unfair trade practices, which were then prevalent in Ethiopia.

3.3 Trade Practice and Consumers’ Protection Proclamation (No. 685/2010)

The Trade Practice and Consumers’ Protection Proclamation (No. 685/2010) repealed and replaced the Trade Practice Proclamation (No. 329/2003). The 2010 Proclamation met many of the shortcomings of the repealed Proclamation, such as making provision for merger control, and strengthening the competition authority in terms of independence and decision-making autonomy.

The Proclamation was arranged in seven Parts, with a total of 58 Articles

The Proclamation in its preamble reiterated the Government of Ethiopia’s commitment that “commercial activities must be undertaken in accordance with appropriate practices based on free market economic policy of the country”. It also stated the desirability of 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 market”.

It further highlighted the necessity of preventing “the proliferation of goods and services that endanger the health and well-being of consumers, following the expansion of commercial activities, and to ensure their safeness and suitability to human health in a sustainable manner, and to create the possibility that consumers get goods and services equivalent to the price they pay”.

Tura³⁷ noted that the Proclamation dealt with consumer protection comprehensively for the first time in Ethiopia since previously consumer protection provisions were scattered across different pieces of legislation.

The Proclamation was however short-lived since it was repealed and replaced by the Trade Competition and Consumers Protection Proclamation (No. 813/2013) only after three years of its coming into force. During the fact-finding visit to Ethiopia in October 2015, it was found out that the Proclamation was not applied because it took too long for the enforcement Authority to effectively become operational. The Trade Competition and Consumer Protection Authority (TCCPA) also submitted that the Proclamation was short-lived because it was besieged by a number of enforcement problems, including that the Authority was not given powers to investigate and prosecute cases. The powers of conducting investigations were given to the then Ministry of Trade and Industry under Part Five of the Proclamation.³⁸ The Authority’s powers and duties under Part Four of the Proclamation³⁹ were limited to deciding on merger notifications, and to adjudicating on applications submitted to it on violations of the Proclamation and imposing administrative and civil sanctions. The consulted representative of the Ministry of Trade, who was involved in the drafting of all of Ethiopia’s three competition Proclamations, also advised that the existence of the Proclamation underwent a big debate in Ethiopia, with much criticism levelled over its provisions, particularly the provisions on investigative and adjudicative functions, and conflict of interest issues.

³⁷ Hussein Ahmed Tura, *Ethiopian Merger Regulation*, University of Oxford Centre for Competition Law and Policy Working Paper CCLP (L) 36.

³⁸ *Part Five: Instituting of Actions and Conducting Investigation* (instituting actions; conducting investigation; relationship with other organs)

³⁹ *Part Four: Trade Practice and Consumers Protection Authority* (establishment; head office; independence of the Authority; powers and duties of the Authority; judicial power and duties of the Authority; organisation of the Authority; powers and duties of the Director General; appointment of judges; regional States’ consumers protection judicial organs; applicability of procedural laws)

³⁶ Ibid.

3.4 Trade Competition and Consumers Protection Proclamation (No. 813/2013)

The Trade Competition and Consumers Protection Proclamation (No. 813/2013), which is the current competition legislation in Ethiopia, came into force on 21 March 2014. The Proclamation's preamble is explanatory on its intentions, it includes; regulation of commercial practices, protection of businesses from anti-competitive practices and consumers from misleading market conducts, ensuring quality, safe and fair prices for goods and services offered to consumers and provides an institutional framework for the enforcement of the law.

The rest of the Proclamation is arranged in six Parts: (i) Part One: General; (ii) Part Two: Prohibition of Anti-Competitive Trade Practices and Regulation of Mergers; (iii) Part Three: Protection of Consumers and Distribution of Goods and Services; (iv) Part Four: Trade Competition and Consumer Protection Authority, Federal Trade Competition and Consumers Protection Appellate Tribunal and Regional Consumers Protection Judicial Organs and Appellate Tribunals; (v) Part Five: Conducting Investigations, Institution of Action and Adjudication; and (vi) Part Six: Miscellaneous Provisions. The following are the brief analyses of the Parts.

(i) Part One: General

This Part deals with definitions, objectives of the legislation, and its scope of application. A total of 16 terms are defined in terms of Article 2 of the Proclamation, which is the main definitional Article of the Proclamation, including the terms 'consumer', 'business person', 'essential facility' and 'unfair trade practice'.⁴⁰ Some other common competition terms are defined in the relevant parts of the Proclamation.

The objectives of the Proclamation are clearly stated in Article 3 as follows: "1/ to protect 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; 2/ to

ensure that consumers get goods and services safe and suitable to their health and equivalent to the price they pay; and 3/ to accelerate economic development."

The provisions of the Proclamation that are related to its scope of application are contained in Article 4, which covers; application of law to any commercial activity or transaction in goods or services conducted or having effect on Ethiopia, exemptions by council of Ministers and due regard that the proclamation may not affect the applicability of regulatory functions and administrative measures to be undertaken in accordance with other laws.

The few exemptions from the application of competition laws that have universally been accepted include those on collective bargaining negotiations and agreements, and on (IPRs). It is however noted that these exemptions are not provided for under Article 4 of the Proclamation, even though the repealed Trade Practice and Consumers' Protection Proclamation (No. 685/2010) specifically exempted from its application "collective agreements applying to employer and employee relationships".

(ii) Part Two: Prohibition of Anti-Competitive Trade Practices and Regulation of Mergers

This Part of the Proclamation is in two Sections, one dealing with prohibition of anti-competitive trade practices (abuse of market dominance, and anti-competitive agreements, concerted practices and decisions), and the other dealing with regulation of mergers.

In the Section on anti-competitive trade practices, abuse of market dominance is prohibited in terms of Article 5(1) of the Proclamation. Article 5(2) lists those acts of abuse of market power that are thus prohibited, and include abuses of both an exploitative and exclusionary nature.⁴¹ The prohibitions cover ; limiting production, sale of goods below cost of production, unfair selling or purchase price, refusal to deal, denial of access to an essential facility, price discrimination; tied and conditional selling and resale price maintenance.

⁴⁰ Definitions of some terms that are exclusively used in specific parts of the Proclamation are also contained in the relevant Parts of the Proclamation, such as Part Two on Prohibition of Anti-Competitive Trade Practices and Regulation of Mergers (on definition or explanation of the terms 'dominant position', 'relevant market', 'agreement', 'concerted practice', 'horizontal relationship', 'vertical relationship', and 'merger').

⁴¹ Exploitative abuses are those in which a firm takes advantage of its market power by charging excessively high prices to its customers, discriminating among customers, paying low prices to suppliers, or through related practices. Exclusionary abuses are those in which a firm attempts to suppress competition, for example, by refusing to deal with a competitor, raising competitors' costs of entering a market, or charging predatory prices. (OECD and World Bank, *A Framework for the Design and Implementation of Competition Law and Policy*, 1999).

Article 5(3) of the Proclamation provides for the consideration of abuse of market dominance using the rule-of-reason approach. The Article provides that certain abusive practices of dominant business persons can be allowed if they have economic justifications related to the: “(a) maintenance of quality and safety of goods and services; (b) levelling with prices or benefits offered by a competitor; (c) achieving efficiency and competitiveness”.⁴²

Article 6 of the Proclamation provides for the assessment of dominance. In terms of Article 6(1), a dominant market position is deemed to occur from having “the actual capacity to control prices of other conditions of commercial negotiations or eliminate or utterly restrain competition in the relevant market”. Article 6(2) goes on to provide that “a dominant position in a certain market may be assessed by taking into account the business person’s share in the market or his capacity to set barriers against the entry of others into the market or other factors as may be appropriate or a combination of these factors”.

The above provisions relate to the ‘dominance test’, which is rather subjective in Article 6(1) and would give wide discretion to the competition authority in determining dominance. Article 6(2) solves that problem by providing for the possible use of a dominance threshold based on market shares, which is more objective. The use of market share thresholds in determining dominance has become common.⁴³

However, the UNCTAD Model Law on Competition, while noting that the use of market share thresholds in determining dominance enhances the efficiency of the enforcement of the competition authority, and gives

entrepreneurs legal certainty, also notes some pitfalls in the use of the method. In that regard, it was found and concluded that “market share thresholds pose the risk of under-emphasizing or over-emphasizing market shares in certain cases, leading to over-enforcement or under-enforcement ... therefore, it is not advisable for a competition law to stipulate irrefutably that a company is dominant when it reaches certain market share thresholds”.⁴⁴ It is true that market share should not be the only dominance determinant since it is only one of the many factors that are involved in assessing dominance.⁴⁵ While a large market share gives the presumption of dominance, other relevant factors in the determination of market power include entry barriers, countervailing power, and import competition. This is amply captured in Article 6(2) of Ethiopia’s competition Proclamation. Article 6(5) of the Proclamation provides that “[t]he Council of Ministers may determine by regulation the numerical expression of the degree of market dominance”.

Section 6(3) of the Proclamation defines the relevant market for the assessment of dominant positions. In line with international best practice, the relevant market as defined comprises both the product/service and geographic dimensions.

Anti-competitive agreements, concerted practices and decisions are also prohibited in terms of Article 7 of the Proclamation. In terms of Article 7(1)(b), those horizontal agreements involving price-fixing, bid-rigging (collusive tendering) and market-sharing are *per se* (or absolutely) prohibited, while Article 7(1) (a) provides that the prohibition of other horizontal agreements is considered using the rule-of-reason approach, by providing that the agreement should “be prohibited if it has the effect of preventing or significantly lessening competition. In terms of Article 7(2) vertical agreements are considered using the rule-of-reason approach, unless they involve resale price maintenance, which are *per se* prohibited.

Article 8(1) of the Proclamation prohibits unfair competition that harms or is likely to harm the business interest of a competitor. Article 8(2) lists what are deemed acts of unfair competition, including: (i) acts that cause confusion with respect to another business person or his activities; (ii) acts of disclosure,

⁴² Article 5(2) of the Proclamation provides that the following abusive practices of dominant business persons can have economic justifications: (i) denying access by a competitor or a potential competitor to an essential facility controlled by the dominant business person; (ii) making the supply of particular goods or services dependent on the acceptance of competitive or non-competitive goods or services or imposing restrictions on the distribution or manufacture of competing goods or services or making the supply dependent on the purchase of other goods or services having no connection with the goods or services sought by the customer; and (iv) in connection with the supply of goods or services, imposing such restrictions as to where or to whom or in what conditions or quantities or at what prices the goods or services should be resold or exported.

⁴³ For example, in the Competition and Consumer Protection Act, 2010 (No. 24 of 2010) of Zambia, it is provided that “a dominant position exists in relation to the supply of goods or services in Zambia, if: (a) thirty percent or more of those goods or services are supplied or acquired by one enterprise; or (b) sixty percent or more of those goods or services are supplied or acquired by not more than three enterprises”.

⁴⁴ UNCTAD, ‘Model Law on Competition’, United Nations, New York and Geneva, 2010.

⁴⁵ As concluded at the Breakout Session of the Unilateral Conduct Working Group of the International Competition Network (ICN) during the 10th ICN Annual Conference, held at The Hague, Netherlands, during the period 17-20 May 2011.

possession or use of information of another business person without the consent of the rightful owner; (iii). False or unjustifiable allegations that discredit another business person or his activities; (iv) comparing goods or services falsely or equivocally in the course of commercial advertisement.

The Section on regulating of mergers prohibits in terms of Article 9(1) of the Proclamation agreements or arrangements of merger “that causes or is likely to cause a significant adverse effect on trade competition”. In terms of Article 9(3) a merger is deemed to have occurred: “(a) when two or more business organisations previously having independent existence amalgamate or when such business organisations pool the whole or part of their resources for the purpose of carrying on a certain commercial activity; or (b) by directly or indirectly acquiring shares, securities or assets of a business organization or taking control of the management of the business of another person by a person or group of persons through purchase or any other means.”

The term ‘merger’ as defined in the Proclamation is therefore wide enough as to include all the three common types of mergers (i.e., horizontal, vertical and conglomerate mergers).

Article 10 and 11 of the Proclamation provides for pre-merger notification procedure and the main consideration while evaluating a merger, including effects on trade competition, test and conditional approvals.

Article 11(2) however provides that a merger proposal may be approved if it is likely to result in technological advancement, efficiency or other pro-competitive gain that outweighs the adverse effect of the merger on competition, and such gain may not otherwise be obtained if the merger is prohibited.

Article 12 provides for the registration of mergers in the official Government commercial register upon presentation of approval of the Authority in accordance with Article 11.

(iii) Part Three: Protection of Consumers and Distribution of Goods and Services

This Part of the Proclamation is also in two Sections, one dealing with the protection of consumers, and the other dealing with the distribution of goods and services. The consumer protection provisions of the Proclamation have relevance to the implementation and enforcement of competition policy and law since competition and

consumer protection are intimately, and have been viewed as two sides of the same coin. The relationship is so strong that it is universally agreed that the ultimate objective of competition policy is consumer welfare and protection. Consumer issues also largely provided the background to the evolution of competition policy and law in Ethiopia, as analysed above in this Section on ‘Legal Framework for Competition in Ethiopia’.

The Section dealing with the protection of consumers (Articles 14 to 22 of the Proclamation) covers issues such as: (i) rights of consumers; (ii) display of price of goods and services; (iii) labels of goods; (iv) issuing receipts and keeping their pads; (v) self-disclosure; (vi) commercial advertisements; (vii) defects in goods and services; (viii) contractual waiver of rights; and (ix) prohibited acts.

Article 23 of the Proclamation gives the Ministry of Trade powers of regulating the distribution of goods and services (banning the distribution of goods and services that do not fulfil the standards of health and safety; conducting quality inspections of locally manufactured or imported goods; inspecting any acts of hoarding or diverting of goods; and the disposal of goods that are spoiled and are dangerous to human health and safety). Article 24 of the Proclamation prohibits “[t]he hoarding or diverting of goods that have been declared as scarce by the Ministry.

Articles 25 and 26 of the Proclamation, grants the Ministry of Trade powers to regulate the prices of basic goods and services, and to determine the conditions of distribution, sale and movement of basic goods and services.

(iv) Part Four: Trade Competition and Consumers Protection Authority, Federal Trade Competition and Consumers Protection Appellate Tribunal and Regional Consumers Protection Judicial Organs and Appellate Tribunals

The Trade Competition and Consumers Protection Authority (TCCPA) is established in terms of Article 27 of the Proclamation “as an autonomous federal government body having its own legal personality”, and accountable to the Ministry of Trade. Article 28 provides for the organisation of the Authority, and stipulates that it should have: (i) a Director General and, as may be necessary, Deputy Director Generals, appointed by the Prime Minister on the recommendation of the Minister of Trade; (ii) judges appointed by the Prime Minister;

(iii) investigative officers, and prosecutors; and (iv) the necessary staff.

The Director General is the chief executive officer of the Authority in terms of Article 31 of the Proclamation, and directs and administers the activities of the Authority, including to: (i) ascertain the proper implementation of the powers and duties of the Authority; (ii) employ and administer employees of the Authority based on the principles of the federal civil service laws; and (iii) represent the Authority in its dealings with third parties.

The adjudicative benches of the Authority (also referred to as the Administrative Court) consist of judges appointed in terms of Article 28 of the Proclamation as part of the organisation of the Authority. Judges have judicial powers according to Article 32(1) of the Proclamation of taking administrative measures and imposing fines, and of ordering payment of compensation to victimised business persons. The administrative measures taken include to: (i) prepare cease and desist orders (i.e., the discontinuation of the act pronounced unfair); (ii) take any other appropriate measures that reinstate the victims' competitive positions; and (iii) suspend or revoke the business licences of the offenders.

Article 33 of the Proclamation establishes the Federal Trade Competition and Consumer Protection Appellate Tribunal, with powers of hearing and deciding on appeals against "(a) decisions of the Authority to prohibit and revoke merger approvals and to ban commercial advertisements; and (b) decisions of the adjudicative benches of the Authority". Article 34 also provides that "each region may, when necessary, establish consumers protection judicial organ and appellate tribunal".

Article 35 of the Proclamation provides that each adjudicative bench of the Authority, as well as the Federal Appellate Tribunal, should have one presiding judge and two judges appointed by the Prime Minister, who should be independent of any interference or instructions by any person with regard to cases they adjudicate.

(v) Part Five: Conducting Investigations, Institution of Action and Adjudication

The Authority has powers in terms of Article 36 of the Proclamation to undertake investigations into competition or consumer protection cases, either on receipt of complaints or at its own initiative. In the

undertaking of the investigations, the Authority has wide search and seize powers.

Article 37(1) of the Proclamation provides that an action for taking administrative measures and imposing administrative penalties by the adjudicative bench of the Authority, or for imposing criminal penalty by the competent Federal court, should be initiated by a prosecutor of the Authority based on the findings of investigations conducted by the Authority's investigative officers. Article 37(2) however also provides that any business person who sustains damages arising from an act of unfair competition and claims payment of compensation may institute an action before the adjudicative bench of the Authority, and Article 37(3) provides that any consumer who claims payment of compensation of violation of his rights under the Proclamation may institute an action before an adjudicative bench of the Authority.

Article 38(1) of the Proclamation provides that the adjudicative benches of the Authority (and the Federal Appellate Tribunal, regional consumers protection judicial organs and regional appellate tribunals) should have the following powers in the discharge of their judicial functions: "a/ to order any person to furnish information and submit documents that may be required; b/ to summon any witness to appear and testify; c/ to execute their decisions and orders; d/ to order the police or any other appropriate organ; and e/ to order the attachment, seizure and sale of goods."

An adjudicative bench of the Authority is required in terms of Article 38(2) of the Proclamation to consider the following factors in determining administrative penalties or administrative measures: "(a) the nature, duration, gravity and extent of the offence; (b) the damage suffered as a result of the offence; (c) the market circumstances in which commission of the offence took place; (d) the benefit derived from the offence; (e) the economic status of the offender; (f) the degree to which the offender cooperated with the Authority during the investigation; and (g) the previous behaviour and criminal records of the offender."

Article 39(1) of the Proclamation provides that "[a]ny 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 the decision". Article 39(2) provides that the decision of the Federal Appellate Tribunal is final,

provided, however, that the appellant may lodge his appeal to the Federal Supreme Court on questions of law within 30 days from the date of the decision.

Article 40 of the Proclamation provides for the payment of adjudication fees, by who wants to institute an action before the adjudicative bench of the Authority or to lodge an appeal before the Federal Appellate Tribunal. The Government is exempt from paying such fees, which are determined by the Council of Ministers.

(vi) Part Six: Miscellaneous Provisions

Part Six of the Proclamation provides, *inter alia*, for the imposition of administrative and criminal penalties. The administrative penalties imposed in terms of Article 42 of the Proclamation.

Article 42(6) of the Proclamation makes leniency provisions. The Article provides that if a person who participated in the commission of an offence involving anti-competitive agreements “gives adequate information that may not otherwise be obtained, on the commission of the offence and the role of the major participants, the Authority may exempt the person from prosecution pursuant to this Proclamation”. Criminal penalties imposed are contained in f Article 43 of the Proclamation.

Article 46 of the Proclamation gives the Council of Ministers powers of issuing regulations necessary for the implementation of the Proclamation. The Ministry of Trade is also empowered of issuing directives and public notices for the implementation of regulations issued by the Council of Ministers.

The concerns by the stakeholders that were consulted during the fact-finding visit to Ethiopia in October 2015 on the Proclamation were more on the implementation and enforcement of the provisions of the Proclamation than on the provisions of the Proclamation themselves. A private legal practitioner mentioned that the treatment of intellectual property rights (IPRs) is not covered in the Proclamation, such that conflict might arise over who has jurisdiction between the TCCPA and law courts on infringements of trademarks arising from the implementation of the Proclamation. There is merit in the observation. On the surface, there seems to be conflict between IPRs and competition policy and law since IP law create and protect monopolies while competition law battles monopolies. In reality, however, IP and competition law are complementary in that they both aim at achieving the same objective, i.e., the promotion of innovation and consumer welfare. Studies have been

made on the tensions between IP law and competition, including a 2007 study by the European Commission on *Competition Policy and the Exercise of Intellectual Property Rights*, which found that the source of conflict between IP and competition law is only apparent. The European Commission concluded that “[a]t the highest level of analysis, IP and competition law are complementary because they both aim at promoting consumer welfare. Competition policy aims at promoting consumer welfare by protecting competition as the driving force of efficient and dynamic markets, providing at all times the best quality products at the lowest prices. The objective of IP laws is to promote technical progress to the ultimate benefit of consumers. This is done by striking a balance between over- and under-protection of innovators’ efforts. The aim is not to promote the individual innovator’s welfare. The property right provided by IP laws is awarded to try to ensure a sufficient reward for the innovator to elicit its creative or inventive effort while not delaying follow-on innovation or leading to unnecessary long periods of high prices for consumers”.

Therefore, as submitted by UNCTAD in a 2002 report⁴⁶, it has thus been noted that competition policies in most countries generally take a favourable attitude to IPRs. However, intervention by competition authorities may be warranted and undertaken where a pragmatic case-by-case analysis indicates IPR-based market power is unreasonably restraining competition in the relevant markets. In that regard, there is concern over cartel-like restraints, exclusionary conduct and monopoly leveraging by dominant firms, refusals to licence IPRs or to sell IPR-protected products, etc., which can all be treated as monopolisation, or abuse of dominant position.⁴⁷

Subsequent to the fact-finding visit to Ethiopia, the TCCPA advised that on the relationship between IP law and competition in Ethiopia, there have been many cases that the adjudicative benches of the Authority had entertained, and the Federal Supreme Court had given decisions. Details of these cases were however

⁴⁶ ‘Competition Policy and the Exercise of Intellectual Property Rights’, report by UNCTAD Secretariat to the Inter-Governmental Group of Experts on Competition Law and Policy held in Geneva, Switzerland, during the period 3-5 July 2002.

⁴⁷ In the Competition Act [Chapter 14:28] of Zimbabwe, it is provided the application of the Act should not be construed so as to limit any IPR, “except to the extent that such a right is used for the purpose of enhancing or maintaining prices or any other consideration in a manner contemplated in the definition of ‘restrictive practice’”.

not made available during the visit for an informed analysis of their determination.

It was also noted that no merger notification thresholds are provided for in the Proclamation, and that this puts an enforcement strain and burden on the Authority. It has now been universally accepted that not all mergers need to be notified, since such a requirement would add a significant and unnecessary compliance burden for the business community and an equally heavy burden for the competition authority that has to review the notifications.⁴⁸ The examination and review of mergers is one of the most resource-intensive activities in the implementation and enforcement of competition policy and law. Competition legislations with merger control provisions should therefore make provision for thresholds below which mergers need not be notified. This however does not mean that mergers below the set thresholds are not subject to merger control. The competition authority should retain the power to challenge such ‘non-notifiable’ mergers, breaking them up after consummation if necessary or preventing their consummation if it learns about them other than through pre-merger notification if the mergers have serious anti-competitive effects on the relevant markets.⁴⁹ The setting of specific merger notification thresholds is a delicate operation and needs special consideration. Too low thresholds may result in the competition authority being inundated with a large number of notifiable mergers with little or no conceivable competitive significance, while too high thresholds could allow certain mergers with serious competition concerns slipping through the competition authority’s net. It has however been observed in several countries that the change is to higher size thresholds for merger notification in order to reduce the number of mergers that must be notified.⁵⁰

Merger notification thresholds may be based on the merging parties’ annual sales turnover, total assets, or both (i.e., the size-of-the-transaction test). Alternatively, they can be based on the parties’ share of the relevant market (the market-share test). It has been found that in most instances, notification mechanisms that use

market-share thresholds to trigger reporting obligations are likely to be inferior to size-of-the-transaction tests.⁵¹ The reason is that calculation of a firm’s market share is more subjective and prone to manipulation than the calculation of turnover or assets. Disagreements between the competition authority and the merging parties are therefore bound to arise on the definition of relevant markets, and the level of the merging parties’ activities in those markets, with the merging parties naturally trying to convince the competition authority that the merger is below the notification threshold.

The TCCPA advised during the fact-finding visit to Ethiopia in October 2015 that the Authority was in the process of drafting Merger Guidelines in terms of Article 46 of the proclamation, in which merger notification thresholds are being provided for, as well as for time limits in the examination of mergers. The proposed merger notification thresholds will be based on the size of the merger, categorised as ‘small’ mergers, ‘intermediate’ mergers and ‘large’ mergers, with only intermediate and large mergers being obliged to be notified to the Authority for examination.⁵²

The Authority was however unsure whether the Proclamation allows the imposition of merger notification thresholds since the provisions of its Article 10(1) if read together with those of Article 12 seem to provide that all merger transactions must be notified to the Authority. Article 10(1) of the Proclamation provides that “any business person who proposes to enter into an agreement or arrangement of merger shall give notice to the Authority by disclosing the details of the proposed merger”, while Article 12 provides that “the concerned government office shall

⁵¹ William E Kovacic, *Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies*, University of Cincinnati Law Review, Vol. 66, No. 4, Summer 1998.

⁵² The Competition Act No. 89 of 1998 of South Africa also provides for merger notification thresholds categorised in ‘small’ mergers, ‘medium’ mergers, and ‘large’ mergers. Section 11 of that Act provides that “(1) The Minister, in consultation with the Competition Commission, must determine: (a) a lower and higher threshold of combined annual turnover or assets, or a lower and a higher threshold of combinations of turnover and assets, in the Republic, in general or in relation to specific industries, for purposes of determining categories of mergers contemplated in subsection (5); and (b) a method for the calculation of annual turnover or assets to be applied in relation to each of those thresholds ... (5) For the purposes of this Chapter: (a) “a small merger” means a merger or proposed merger with a value at or below the lower threshold established in terms of subsection (1)(a); (b) “an intermediate merger” means a merger or proposed merger with a value between the lower and higher thresholds established in terms of subsection (1)(a); and (c) “a large merger” means a merger or proposed merger with value at or above the higher threshold established in terms of subsection (1)(a)”.

⁴⁸ “A Framework for the Design and Implementation of Competition Law and Policy”, The World Bank, Washington D.C., and Organisation for Economic Co-operation and Development (OECD), Paris, 1999.

⁴⁹ Ibid.

⁵⁰ OECD Journal of Competition Law and Policy, Vol. 3, No. 1, Organisation for Economic Co-operation and Development (OECD), Paris, 2001.

require the presentation of approval of the Authority ... before registering a merger in the commercial register”.

Article 10(1) of the Proclamation can however be interpreted as not to mean that *any* agreement or arrangement of merger must be notified to the Authority, but only that *an* agreement or arrangement of merger should be notified in whatever form as determined by the Authority. The problem however is with Article 12 of the Proclamation, which requires the specific approval of the Authority of a merger before it can be registered in the commercial register. It is nevertheless submitted that the above should not prevent the Authority from imposing thresholds for the purposes of filtering those small merger transactions that are unlikely to have any significant adverse effect on competition from its full examination, while still requiring notice of all mergers for the purposes of Article 12. All this can be explained in the Merger Guidelines being drafted by the Authority.

The Authority also raised the issue of how to deal with post-merger examinations since these are not provided for in the Proclamation. It was explained that a number of mergers are being concluded in Ethiopia without being notified to the Authority, with the Authority becoming aware of the transactions well after the event. For effective merger control, the Authority must enforce the pre-merger notification provisions of the Proclamation through the imposition of administrative penalties in terms of Article 42(4) of the Proclamation, which provides that “any business person who participates in a merger in violation of the provisions from Article 9 to Article 13 of this Proclamation shall be punished with a fine from 5% up to 10% of his annual turnover”. Pre-merger notification provides competition authorities with the opportunity to stop the merger if it will result in a substantial lessening of competition in a relevant market since it is much easier to stop the merger in advance rather than to try to ‘unscramble the eggs’ once the merger has been concluded.⁵³ In a pre-merger notification situation, the competition authority is not so much constrained in terms of the most suitable remedies, and the costs to the merging firms for the implementation of the remedies are minimised. It can also be argued that political pressure in favour of a merger is not so high in a pre-merger notification situation because there

would not be so many stakeholders in the transaction at that stage. In a pre-merger notification situation, information on the merger is also easily gathered and available from the merging parties in their quest to have the transaction approved.

In the absence of post-merger examination provisions in the Proclamation, the only option that the Authority would have in dealing with those merger transactions that were consummated without being notified to it, apart from penalising the parties to the mergers in terms of Article 42(4) of the Proclamation, is to investigate the transactions under Section One of Part Two of the Proclamation as possible anti-competitive trade practices (i.e., abuse of market dominance, or anti-competitive agreements, concerted practices and decisions, or unfair competition).

One of the issues raised during the fact-finding visit to Ethiopia was the lack of jurisdiction over mergers and acquisitions that are concluded outside Ethiopia, but have effect in Ethiopia, between companies that do not have physical presence in Ethiopia. Similar concerns over such global mergers were also expressed by the TCCPA. Article 4 of the Proclamation clearly provides that “[t]his Proclamation shall apply to any commercial activity or transaction in goods or services conducted *or having effect* within the Federal Democratic Republic of Ethiopia” (own emphasis). This means that commercial merger transactions that have an effect in Ethiopia fall under the application of the Proclamation, and therefore the jurisdiction of the Authority, even if they are concluded outside Ethiopia. The only problem would be the enforcement of the Authority’s decision on the transactions if none of the merging parties have physical presence in Ethiopia in the form of subsidiaries. The problem is however being addressed under the regional COMESA Competition Regulations, which cover Ethiopia, under which the COMESA Competition Commission (CCC) has the means of dealing with extra-jurisdictional mergers, and powers of enforcing its decisions on such mergers.

The private legal practitioner that was consulted also pertinently felt that Constitution problems might arise over the establishment in the Proclamation of the regional consumers’ protection judicial organs and appellate tribunals together with the Federal Trade Competition and Consumers Protection Appellate Tribunal. In his submission on the matter, the legal practitioner noted that the scope of application of the Proclamation indicates that it will apply to any transaction taking place in Ethiopia, which would

⁵³ Mark A Warner, *International Aspects of Competition Policy – Possible Directions for the FTAA*, in “World Competition: Law and Economics Review”, Vol. 22 No.1, March 1999.

include the regional States and the Federal territories of Addis Ababa and Dire Dawa. The Proclamation also provides that regions can establish consumer protection judicial organs and appellate tribunals, but does not say anything about the jurisdiction of regions see matters related to competition, even when the issue takes place or will have an effect within one region only. This would mean that all competition matters, including those whose effect might be limited to one region, will be seen by the tribunal established at the Federal level under the Authority as provided under Article 37(2) of the Proclamation.

Under the Constitution of Ethiopia, the Federal Parliament has legislative jurisdiction to issue laws on matters that are determined by the House of Federation (the Upper House) to be necessary for the creation of one economic and political community. The House of Federation has not decided so far that matters related to competition are necessary to the creation of one economic and political community. The Constitution also provides that the Federal Parliament can issue laws to regulate inter-State commerce. However, intra-State/region competition issues would be outside its legislative jurisdiction. Regional States have residual legislative jurisdiction over all matters not expressly falling under the legislative mandate of the Federal Parliament, and this should arguably include regulation of competition matters whose effect/impact is limited to one region. The Constitution further provides that Federal courts have jurisdiction on

federal matters, while regional courts have jurisdiction on matters arising in a regional State. Accordingly, it could be argued that resolution of issues related to competition within one regional State should be the mandate of regional judicial organs and not the tribunal set up by the Authority. Constitutional problems might therefore arise should the regional organs decide to establish competition structures and institutions that do not conform to those of the Federal organ. This is however not an issue right now because the Federal and regional organs are overseen by the Government.

The TCCPA submitted that the above ideas should be seen in line with the provisions of the Ethiopian Constitution, which give power on trade to the Federal Government. Article 51 of the Constitution provides that the powers and functions of the Federal Government include to “regulate inter-State and foreign commerce”. Therefore, competition issues are constitutionally under the Federal Government.

On the whole, the Trade Competition and Consumers’ Protection Proclamation (No. 813/2013) is a good piece of legislation that covers all the salient elements of competition policy and law, including consumer protection. It also overcomes most of the shortcomings of the previous proclamations on competition. The relatively few provisions of the Proclamation that require further clarification or some amendments can be rectified through regulations (i.e., subsidiary legislation to the Proclamation).

4. INSTITUTIONAL AND OPERATIONAL FRAMEWORK

No matter how well drafted, and comprehensive, a competition legislation is, the law cannot be effectively enforced without an enforcement competition authority as provided for under Part Four of the Trade Competition and Consumers Protection Proclamation (No. 813/2013), together with other relevant institutions.

Ethiopia's competition authority, the (TCCPA), is well established, with 60% of the positions on its staff establishment filled. As of October 2015, the professional positions in the Authority were filled by lawyers, economists, business administrators, and managers, as shown in Table 4.

Table 4: Professional Qualifications in the TCCPA, October 2015

Qualification	No. of Employees
Law	13
Economics	8
Accounting and Finance	11
Management (general, marketing, business)	8
Administration (public, business)	3
Management Information System	1
Educational Planning Management	2
Administrative Management	2
Agricultural Management	1
Journalism	2

Source: TCCPA Human Resources Directorate

The Authority has a total of 220 positions on its establishment, of which 100 were filled as of October 2015. It was however advised that there is a high turnover of staff in the Authority, mainly because of uncompetitive salaries *vis-à-vis* in the private

sector, regardless of the fact that the salaries of the Authority's line staff are higher than those in the Civil Service. Table 5 shows the effects of the staff turnover during the Authority's 2013/14 and 2014/15 financial years.

Table 5: Staff Turnover In TCCPA

Financial Year	Terminations/Resignations	Recruitments	Deficit
2013/14	39	34	5
2014/15	40	37	3

Source: TCCPA Human Resources Directorate

The Authority has eight directorates, whose functions are briefly described in Table 6.

Table 6: Functions of Directorates of TCCPA

Directorate	Functions																																								
Investigation & Prosecution	The Directorate undertakes investigations into competition and consumer protection concerns. In its prosecution functions, it prepares cases for handing over to the Administrative Court (the adjudicative benches of the Authority) for decision.																																								
Mergers	The Directorate enforces the merger control provisions of the Trade Competition and Consumers Protection Proclamation (No. 813/2013), and examines mergers and acquisitions.																																								
Public Relations & Communication	The Directorate is the spokesperson of the Authority. It is involved in advocacy work, and creates awareness of consumers and traders of the work of the Authority using all forms of media.																																								
Market Information	The Directorate collects data from the market to create transparency of the Authority. The data is analysed and interpreted for the information of the public. It also undertakes market surveillances to protect consumers and businesses against defective and sub-standard goods, and misleading advertisements. The information collected is also internally used by the Authority's investigators.																																								
Human Resources Management	The Directorate is responsible for all aspects of human resource management (staff recruitment, development, etc.)																																								
Consumer Affairs, Education and Training	The Directorate undertakes public awareness and training programmes in all Ethiopia's 9 regions aimed at consumers and traders. So far, over 60 000 participants have been involved in the training programme, and 85% of them have reported satisfaction with the training.																																								
Research & Development	<p>The Directorate undertakes research and studies on competition and consumer issues. The following studies have so far been undertaken:</p> <table border="1"> <thead> <tr> <th colspan="2">• Competition Studies</th> <th colspan="2">• Consumer Studies</th> </tr> </thead> <tbody> <tr> <td>1</td> <td>Assessment of anti-competitive practices on beer and soft drink industries</td> <td>1</td> <td>Conduct survey on causes of price raise of basic consumption commodities and impact on consumers</td> </tr> <tr> <td>2</td> <td>Preliminary study to identify and control merger transactions</td> <td>2</td> <td>Impact of pyramid schemes on the economy and consumers</td> </tr> <tr> <td>3</td> <td>Trade competition policy and law overview</td> <td>3</td> <td>Private health institutions and service fee overview</td> </tr> <tr> <td>4</td> <td>Unfair trade competition</td> <td>4</td> <td>Role of cooperatives on market stabilisation</td> </tr> <tr> <td>5</td> <td>Market, relevant market and competition policy</td> <td>5</td> <td>Causes and impacts of false or misleading commercial advertisements on domestic market and consumers</td> </tr> <tr> <td>6</td> <td>Anti-competitive agreements</td> <td>6</td> <td>Shortfalls of public transportation services and impacts on consumers</td> </tr> <tr> <th colspan="4">Joint Competition/ Consumer Studies</th> </tr> <tr> <td>1</td> <td colspan="3">Prevalence of anti-competitive practices and their impact on consumers</td> </tr> <tr> <td>2</td> <td colspan="3">Impacts of imported substandard products on consumers and competition</td> </tr> </tbody> </table> <p>The studies are undertaken either with the help of donor organisations (so far on impact anti-competitive practices in Ethiopia, problems of public transportation, and misleading consumer practices) or using the Authority's own resources (on merger guidelines, abuse of dominance, and sub-standard products and impact on consumers, which are still being undertaken).</p>	• Competition Studies		• Consumer Studies		1	Assessment of anti-competitive practices on beer and soft drink industries	1	Conduct survey on causes of price raise of basic consumption commodities and impact on consumers	2	Preliminary study to identify and control merger transactions	2	Impact of pyramid schemes on the economy and consumers	3	Trade competition policy and law overview	3	Private health institutions and service fee overview	4	Unfair trade competition	4	Role of cooperatives on market stabilisation	5	Market, relevant market and competition policy	5	Causes and impacts of false or misleading commercial advertisements on domestic market and consumers	6	Anti-competitive agreements	6	Shortfalls of public transportation services and impacts on consumers	Joint Competition/ Consumer Studies				1	Prevalence of anti-competitive practices and their impact on consumers			2	Impacts of imported substandard products on consumers and competition		
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Joint Competition/ Consumer Studies																																									
1	Prevalence of anti-competitive practices and their impact on consumers																																								
2	Impacts of imported substandard products on consumers and competition																																								
Planning & Data Management	The Directorate is responsible for preparing the Authority's Annual Budget and Annual Operational Plans, as well as quarterly reports. The three strategic issues in the Authority's Planning are: (i) capacity building; (ii) advocacy; and (iii) enforcement. The Department is also responsible for data management under the Authority's IT (information technology), with all data collected being published.																																								

Source: TCCPA Human Resources Directorate

The functions of the Authority's Directorates are reflective of its statutory powers and duties in terms of Article 30 of the Proclamation, which give greater prominence to advocacy and public awareness programmes, particularly those aimed at consumer protection. The TCCPA confirmed this prominence on the ground when it stated that consumer issues are very big and sensitive in Ethiopia and the Authority therefore give them greater attention through its advocacy and public awareness programmes and enforcement.

While all the Authority's Directorates are involved in core operational activities that enhance competition and consumer protection, the Investigation & Prosecution Directorate and the Mergers Directorate are responsible for handling competition cases.

As has already been stated, the Investigation & Prosecution Directorate undertakes investigations on anti-competitive and consumer cases. Anti-competitive practices are investigated by the Authority's investigative officers, with the findings being submitted

Table 7: Comparative Schedule of Anti-Competitive and Consumer Cases Handled by TCCPA in 2014

	Anti-Competitive Cases	Consumer Cases
Complaints received	65	114
Cases referred to adjudicative benches/ federal courts	4	30
Cases terminated/ decided upon	10	16
Cases still under investigation/ prosecution	51	68

Source: TCCPA Investigation & Prosecution Directorate

to the in-house prosecutors for preparation for handing over to the adjudicative benches of the Authority (the Administrative Court) for decision. Regarding consumer cases, all such cases are considered as criminal matters, and are therefore handed over to the Federal courts, and not to the adjudicative benches of the Authority, after investigation.

In 2014, the Authority received 65 complaints of anti-competitive practices, of which 4 were handed over to the adjudicative benches of the Authority after investigation and prosecution, and investigations on 10 of them were terminated. The rest were still under investigation by the time of the fact-finding visit. During the same period, 114 complaints of violations of consumers' rights and interests were received. Of those, 38 violations were referred to the Authority's prosecution section, with proceedings on 30 of them having been instituted, and court decisions were rendered on 16 of them. Table 7 comparatively shows the anti-competitive and consumer cases handled by the Authority.

Of the 4 cases of anti-competitive practices that were referred to the adjudicative benches of the Authority for decision, only one case was related to abuse of dominance, with the rest related to unfair competition. During the fact-finding visit to Ethiopia in October 2015 the Authority advised that cartels are a problem in Ethiopia, and that a number of such cases had been

brought to the attention of the Authority. The Ministry of Trade confirmed that besides unfair trade practices (i.e., practices that can negatively affect other traders), the other prevalent anti-competitive practices in Ethiopia are price collusions. The Ethiopian Chamber of Commerce and Sectoral Associations (ECCSA) also stated that anti-competitive practices are prevalent in Ethiopia, as confirmed by studies it has commissioned. For example, in the 2009 study on *Baseline Survey on Competition and Markets in Ethiopia*,⁵⁴ the existence of anti-competitive practices was analysed in a total of 17 product markets in the agricultural, industrial/ manufacturing, and services categories, and abuse of dominance was found to be the most prevalent, followed by collusive practices, and then by vertical restraints, as shown in Table 8.

The abusive practices of dominant enterprises were found to include tying and bundling, refusal to supply, excessive pricing, and predatory pricing. The vertical restraints were mostly of an exclusive supply nature. With regard collusive practices, price-fixing and bid-rigging were predominant. The incident of unfair competition related to misuse of information to weaken competitor.

⁵⁴ 'Baseline Survey on Competition and Markets in Ethiopia', study commissioned by the Addis Ababa Chamber of Commerce and Sectoral Associations with financial support from the Swedish Agency for International Development Cooperation (SIDA), June 2009.

Table 8: Occurrences of Anti-Competitive Practices in 17 Product Markets in Ethiopia

Market Category	Abuse of Dominance	Collusive Practices	Vertical Restraints	Unfair Competition
Agricultural	5	1	1	0
Industrial/ Manufacturing	9	5	1	1
Services	1	1	0	0
Totals	15	7	2	1

Source: 'Baseline Survey on Competition and Markets in Ethiopia', study commissioned by the Addis Ababa Chamber of Commerce and Sectoral Associations, June 2009.

Table 9: Mergers and Acquisitions Investigated by TCCPA Up To Financial Year 2014/2015

Sector	Acquisitions of Shares	Combinations	Amalgamations	Total
Agriculture	15	2	-	17
Manufacturing	42	6	2	50
Services	10	4	-	14
Mining	6	1	-	7
Import-Export	4	-	-	4
Construction	7	-	-	7
Total	84	13	2	99

Source: TCCPA Mergers Directorate

Most of the cases related to consumer protection that were handled by the Authority in 2014 involved hoarding and diverting of basic goods, and dangerous and poisonous substances.

The adjudicative benches of the Authority are courts of first instance, whose decisions can be appealed against to the Appellate Tribunal. The adjudicative benches of the Authority do not deal with mergers and acquisitions examined by the Authority. Any appeals against the Authority's determination on mergers and acquisitions are made directly to the Appellate Tribunal. It was however advised during the fact-finding visit that if parties to a merger transgress any other competition provisions of the Proclamation then the matter would be referred to the adjudicative benches of the Authority for decision. So far, only three cases have been appealed against to the Appellate Tribunal, with two of them having been decided upon and one remanded back to the courts of first instance on points of law. No appeal against the Authority's determinations on mergers and acquisitions has yet been made to the Appellate Tribunal.

The Mergers Directorate of the Authority has examined nearly 100 merger cases, mostly involving share

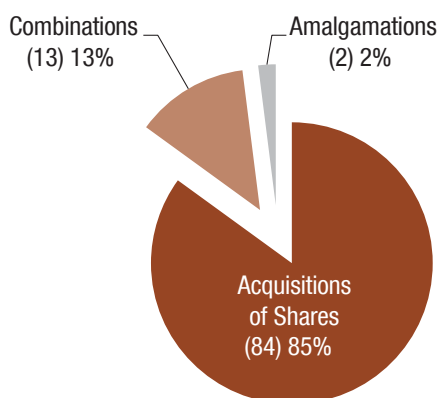
transfers and acquisitions, with very few amalgamation cases, as shown in Table 9.

Figure 1 graphically and comparatively shows the forms of the mergers and acquisitions that were investigated by the Authority.

Most of the merger cases that were investigated by the Authority were found not to have had any economic impact in the relevant markets. During the fact-finding visit in October 2015, the Ministry of Trade advised that mergers and acquisitions are still very few in Ethiopia. The Government's investment drive is however expected to result in an upsurge in merger transactions.

The operations of the Authority are largely funded by the Government of Ethiopia. Its current 2015 Budget, which is wholly financed by the Government is Birr 27 million (about US\$1.287 million), while during the previous year it was initially granted Birr 19 million (about US\$900,000), which was subsequently increased to Birr 22 million (about US\$1.049 million). The major expenditure items under this year's Budget include salaries (Birr 7.8 million (about US\$371,960)) and training (Birr 3.7 million (about US\$176,440)). The

Figure 1: Comparative Forms of Mergers and Acquisitions Investigated By TCCPA



Source: TCCPA Mergers Directorate

Authority has still not collected merger notification fees under the Proclamation, but this will be provided for in the merger guidelines that are being drafted by the Authority. However under the merger notification fee revenue-sharing scheme of the COMESA Competition Regulations, Ethiopia was entitled to receive about COM\$269,660 (equivalent to US\$269,660) from mergers with a regional dimension but with effects in Ethiopia that had been notified to the COMESA Competition Commission (CCC) during the period February 2013 to December 2014. Adjudication fees can also be paid to the Authority in terms of Article 40 of the Proclamation. The TCCPA advised during the fact-finding visit that its Government funding is not adequate for the effective undertaking of its operations.

The Authority benefits from specific capacity-building projects, such as that of UNCTAD funded by the Grand Duchy of Luxembourg for three years (2015-2017) for strengthening the enforcement capacity of TCCPA. Other organisations that have provided capacity-building to the Authority have included the European Union (Euro 800,000 worth of various projects for 3 years), German Corporation for International Cooperation GmbH GIZ (for advocacy and awareness programmes, studies and study tours to Germany), and The World Bank (on enforcement and training).

A number of shortcomings of the Authority were identified during the fact-finding visit, some of which were perceived while others were real, with suggestions made on how to overcome them. The major shortcoming was the Authority's lack of capacity to effectively enforce the Proclamation. The private legal practitioner consulted noted that because of this lack of capacity, the Authority still has not come up with the necessary regulations and guidelines on the implementation of Ethiopia's competition policy and enforcement of competition law. The TCCPA was aware of this need for supplementary regulations and guidelines which would facilitate the enforcement of Proclamation 813/2013. This need was taken into consideration in the development of the UNCTAD Project for Strengthening Competition and Consumer Protection Enforcement Capacities in Ethiopia. In this context, the drafting of guidelines on Merger Analysis and on Abuse of Dominance is ongoing within the UNCTAD Project. Furthermore, future project activities include drafting of: (i) guidelines on market analysis and definition of relevant market; (ii) consumer protection guidelines; (iii) regulations on

unfair commercial practices; and (iv) an investigation manual for competition case handlers.

It was also mentioned that the Authority has still not build up adequate capacity to regulate mergers, and tends to go beyond its mandate by enforcing other laws in the regulation of mergers.⁵⁵ The Authority itself admitted its lack of enforcement capacity. The Investigation and Prosecution Department submitted that it is trying to develop skills on how to investigate and get evidence for the better undertaking of its investigative and prosecutorial functions. The Administrative Court (the adjudicative benches of the Authority) advised that adjudicating on abuse of dominance cases had proved problematic because of the requirements of defining relevant markets, calculation of market shares, proving dominance, etc., and that this therefore requires capacity building. It also advised that the application of the 'rule of reason' principle had also been problematic, and whether the principle should be applied by the Authority's prosecutors before the matter is referred to the adjudicative benches. In order to assist the TCCPA in overcoming some of these challenges and developing its investigation skills, some workshops and on-the-job training for staff dealing with mergers have been undertaken in 2015, and more training workshops will be organized in 2016 and 2017 within the UNCTAD Project.

A suggestion was made that the adjudicative benches of the Authority should be set up as a separate organisation for the effective and acceptable separation of investigative and adjudicative functions. While that would be the ideal situation, the proposition would be very costly for a developing country like Ethiopia. In any case, the present arrangement effectively separates the Authority's investigative and adjudicative functions. Under the arrangement, different persons undertake not only the investigations but also prosecutorial work before the matter is handed over to the adjudicative benches for decision. The adjudicative benches of the Authority are comprised of judges appointed by the Prime Minister, and have the necessary professional qualifications, educational background and experience needed for the posts. They are also given statutory independence of any interference or instructions by any person with regard to cases that they adjudicate.

⁵⁵ An example was given of the Authority rejecting a merger not on competition grounds, but that the transaction did not meet the minimum capital investment requirements, which is the mandate of another regulatory authority.

5. RELATIONSHIP BETWEEN COMPETITION POLICY AND OTHER POLICIES AND GOVERNMENT MEASURES

Competition policy and law cannot be divorced from other public policies of a socio-economic nature since the objectives, which are of a societal kind, are the same. The coherence between policies is therefore imperative. The interface between competition policy and other public policies led Khemani (1999) to conclude that a “case can be made that competition policy should be viewed as the fourth cornerstone of government economic framework policies along with monetary, fiscal and trade policies”.⁵⁶ In concluding that there is a strong relationship between competition policy and a country’s other economic policies, Khemani listed a number of micro-industrial government policies that can support or adversely impinge on the application of competition policy.⁵⁷

In the case of Ethiopia, the socio-economic policies that may affect competition either positively or negatively, could include, industrial policy, trade policy, regulatory policy, investment policy, public procurement policy, and labour policy, which are analysed below.

5.1 Industrial Policy

Industrial policy is not a clearly defined term, as pointed out by UNCTAD⁵⁸, but attempts have been made to identify its main elements. The World Bank

has been quoted as having defined industrial policy as to mean “government efforts to alter industrial structure to promote productivity-based growth”.⁵⁹ Industrial policy has also been seen as “a concerted, focused, conscious effort on the part of government to encourage and promote a specific industry or sector with an array of policy tools”⁶⁰, and that “it consists of government measures applied to sectors or industries in order to advantage them”⁶¹. Industrial policy can therefore be considered to be a government policy instrument that targets selected industries by directing resources to those industries to accord producers a ‘comparative advantage’.⁶²

Countries may adopt industrial policies for many different reasons, such as to correct market failures, or to foster economic development⁶³, with the creation of ‘national champions’ being paramount in the industrial policies of a large number of countries, particularly developing countries. According to the OECD (2009), various instruments are used in the implementation of industrial policies, including “government procurements, exemptions from competition laws, regulatory barriers to competition, arranged mergers and acquisitions, control of acquisitions of national champions by foreign investors, and easy access to commodity resources”⁶⁴, while further support in the creation and protection of national champions is through the granting of State aid. Pengestu (2002) also identified the three government market interventions of external market intervention, product

⁵⁶ R. Shyam Khemani, Chapter on ‘Objectives of Competition Policy’, in *A Framework for the Design and Implementation of Competition Law and Policy*, The World Bank, Washington D.C., and Organisation for Economic Co-operation and Development, Paris, 1999.

⁵⁷ Ibid. Khemani listed a number of microindustrial government policies that can support or adversely impinge on the application of competition policy, including: (i) trade policy (including tariffs, quotas, subsidies, anti-dumping actions, domestic content regulations, and export restraints); (ii) industrial policy; (iii) regional development policy; (iv) intellectual property policy; (v) privatisation and regulatory reform; (vi) science and technology policy; (vii) investment and tax policies; and (viii) licenses for trades and professions. He also noted that in addition, “various sector-specific policies in environment, health care, telecommunications, cultural industries, financial markets, and agricultural support schemes tend to have measures more likely to restrict than to promote the objectives of competition policy”.

⁵⁸ UNCTAD Secretariat, *The Relationship between Competition and Industrial Policies in Promoting Economic Development*, United Nations Conference on Trade and Development, Geneva, 2009 (TD/BC.1/CLP/3).

⁵⁹ Donor Committee for Enterprise Development, *Industrial Policy*, (<http://www.enterprise-development.org/industrial-policy>)

⁶⁰ L.J. White, ‘Antitrust policy and industrial policy: a view from the U.S.’, New York University Law and Economics Working Paper, No. 118, 2008.

⁶¹ UNCTAD Secretariat, *Empirical Evidence of the Benefits from Applying Competition Law and Policy Principles to Economic Development in order to Attain Greater Efficiency in International Trade and Development*, United Nations Conference on Trade and Development, Geneva, 1998 (TD/B/COM.2/EM/10/Rev.1)

⁶² R. Wade, *Governing the Market*, Princeton University Press, Princeton, 1990.

⁶³ OECD Secretariat, *Competition Policy, Industrial Policy and National Champions*, Organisation for Economic Co-operation and Development, Paris, 2009 (DAF/COMP/GF (2009)9).

⁶⁴ Ibid.

market intervention, and factor market intervention as instruments and measures to implement industrial policy.⁶⁵ It has also been noted that the state of development of a given country may be relevant to its industrial policy, and argued, for example, that for a country producing agricultural commodities to become an industrial or technologically advanced country, government intervention (e.g., in the form of State aid, protection or government procurement) would be necessary.⁶⁶

Industrial policy inevitably interfaces with competition, but that interface has both convergences and divergences. The convergences are that central to both policies is competitiveness and economic development, and one of the key instruments and measures used in the effective implementation of industrial policy is product market intervention aimed at promoting competition in domestic markets, competition policy and law. The divergences are that while competition policy is centred on the premise that it should protect the competition process, and not individual competitors, through indiscriminate enforcement of competition law, industrial policy promotes specific industries or sectors, with the creation and promotion of national champions being the key element of that policy. OECD (2009) however noted that there are arguments for and against the creation and maintenance of national champions under industrial policy⁶⁷, and concluded

that “to reduce the potential for conflict between industrial policy and competition policy one can adopt an industrial policy that promotes national champions only in those sectors where it is justified and necessary for enhancing the competitiveness of the economy in question. A competition policy promoting national champions can be a viable and effective option in this context provided: (i) that a market failure actually exists; (ii) that the aid is necessary and proportionate to remove it; and (iii) that these positive effects are not outweighed by the negative ones deriving from the distortion of competition. Any such measures adopted according to such a policy must be transparent and temporary”.⁶⁸

It is noted that there is not necessarily always a conflict between a properly defined industrial policy and competition policy, and the following three principles help to ensure that competition policy and industrial policy are more complementary than contradictory, that: (i) industrial policy support should be as far from the market as possible, since the closer one gets to providing support to selected sectors and firms, the more difficult it is for industrial policy and competition policy to co-exist; (ii) support for industrial policy and competition policy should not translate into a competition policy that is perceived to be opposed *a priori* to large firms; and (iii) without compromising their own approach, competition policy enforcers can espouse prioritisation principles or apply prosecutorial discretion in a way which supports the industrial and social policy objectives of government.⁶⁹ It is also suggested that any industrial policy instrument used should be neutral and be applied across the board.

⁶⁵ Pengestu (2002) also identified the following three sets of instruments and measures to implement industrial policy through government interventions: (a) *external market interventions*, including import tariffs, quotas, licensing and local content programmes, and export promotion measures such as export subsidies, export processing zones and subsidised credit; (b) *product market interventions* aimed at promoting competition in domestic markets, competition policy and law; and (c) *factor market interventions*: foreign direct investment performance requirements and restrictions in the capital and finance markets, labour market and equity objectives (M. Pengestu, ‘Industrial Policy and Developing Countries’ in *Development, Trade, and the WTO: A Handbook*, edited by B. Hoekman, A. Mattoo, and P. English, The World Bank, Washington D.C., 2002).

⁶⁶ OECD Secretariat, *Competition Policy, Industrial Policy and National Champions*, Organisation for Economic Co-operation and Development, Paris, 2009 (DAF/COMP/GF(2009)9).

⁶⁷ OECD Secretariat, *Competition Policy, Industrial Policy and National Champions*, Organisation for Economic Co-operation and Development, Paris, 2009 (DAF/COMP/GF(2009)9). According to the OECD, arguments in favour of national champions are usually based on one or more of the following propositions: (a) in certain industries infant companies need specialised knowledge, experience, and support in relation to start-up costs; (b) subsidies can attract internationally mobile researchers; (c) the promotion of agglomeration of clusters can help participants to become more innovative and competitive; (d) government investments can supplement large companies’ investments in plant and equipment, thereby enhancing their productivity;

(e) governments may need to correct short-term market failures; and (f) one may wish to rescue failing companies or industries to prevent a slow-down and the consequent job losses. A number of clear disadvantages are, however, recognised concerning the creation and maintenance of national champions. For a start, the social cost of supporting specific industries can be significant. It is also argued that: (a) by protecting domestic firms from foreign competition, one actually harms the productivity and the competitiveness of the domestic economy; and (b) the protection of incumbents and ailing firms is likely to dampen growth in both developing and developed countries. Finally, it is argued that champion companies should result from their superior competitive performance and market forces and that one should not take it for granted that the government will actually choose the right firms and therefore avoid inefficiency-related mistakes. Interventionist industrial policies that favour incumbents and seek to pick winners or to reward losers should therefore be avoided. (OECD Secretariat, *Competition Policy, Industrial Policy and National Champions*, Organisation for Economic Co-operation and Development, Paris, 2009 (DAF/COMP/GF(2009)9).

⁶⁸ Ibid.

⁶⁹ Ibid.

Table 10: The Ethiopian Industrial Policy and Development Phases

	Imperial Period (pre-1974)	The Dergue Regime (1975-91)	The EPRDF Regime (post 1992)
Guiding policy/vision	Market oriented	Command economy	Market oriented
Public/private role	Private-led	State-led	Private-led but also strong State
Ownership structure	Dominance of foreign owned enterprises	Dominance of public owned enterprise	Dominance of domestic private owned enterprises
Target industries	Import substituting and labour intensive industries (e.g., textile, food, cement)	Import substituting and labour intensive industries, but also basic industries	Export oriented and labour intensive industries (e.g., textile, leather, agro-processing, cement)
Envisaged key player	Foreign investment	Public sector investment	Domestic private sector
Policy instruments	<ul style="list-style-type: none"> • Protection of domestic market through high tariff and banning of certain imports; • Provision of economic incentives & preferential credit scheme 	<ul style="list-style-type: none"> • Protection of domestic market through high tariff and quantitative restrictions; • Financing, subsidizing, ensuring monopoly power for the SOEs 	<ul style="list-style-type: none"> • Direct support for selected export sectors through capacity building and other means; • Provision of economic incentives & preferential credit scheme

Ethiopia's industrial policy is enunciated in the Industrial Development Strategy (IDS), which was approved in 2002 and is regarded as the country's first-ever comprehensive industrial development plan.⁷⁰ The development of industrial policy in Ethiopia can however be traced to the Imperial Period (pre-1974) through the Dergue Regime (1975-91), and the EPRDF Regime (post 1992), as shown in Table 10.⁷¹

As stated in the official Ethiopian Government Portal, on Policies and Strategies,⁷² the Industrial Development Strategy (IDS) of 2002 put in place the principles that primarily focus on the promotion of agricultural-led industrialisation, export development, and expansion of labour intensive industries. These principles are inter-dependent and inter-linked. The Strategy has also set the other principles that clearly state the pivotal contribution of the private sector, the leadership role of the government, and the integrated and coordinated participation of the public at large in nurturing the strategy. The Strategy refers to those industries that are primarily involved in the production of manufactured goods, but also includes other industrial classified sectors.

The following are the fundamental principles of the Strategy: (i) considering the private sector as an engine of the IDS; (ii) implementing agricultural development-led industrialisation; (iii) implementing export-led industrialisation; (iv) focusing on the expansion of

labour-intensive industry direction; (v) implementing effective domestic-foreign investment partnership; (vi) implementing the direction where the government plays a leading managerial role; and (vi) implementing the principle that encourages the active participation of the public, through (a) government-private sector forum, (b) peasants and industrialists integration, and (c) employer-employee relation.

The IDS declared the following priority sectors for government direct support: (i) textile and garment; (ii) meat, leather and leather products; (iii) other agro-processing industries (e.g., sugar and sugar related industries; (iv) construction; and (v) micro and small enterprises (MSEs).⁷³ According to Gebreeyesus (2013)⁷⁴, the selection of the textile, leather, and other agro-industries was justified on the ground that they are labour-intensive and provide strong linkages with the agricultural sector and comparative advantage to compete in the export market, while the construction sector was assumed to be the basis for the development of other sectors, and the MSEs were expected to foster the emergence of entrepreneurs and a potential to create large employment opportunities. The list of priority sectors was expanded over time to include the flower industry and some import substituting industries (such as metal and engineering, chemical and pharmaceutical).

⁷⁰ Tilmann Altenburg, *Industrial Policy in Ethiopia*, German Development Institute Discussion Paper 2/2010, Bonn, 2010.

⁷¹ Mulu Gebreeyesus, *Industrial Policy and Development in Ethiopia: Evolution and Current Performance*, presentation at the 'Learning to Compete (L2C): Accelerating Industrial Development in Africa' conference organised by UNU-WIDER, June 24-15, 2013, Helsinki, Finland.

⁷² <http://www.ethiopia.gov.et/policies-and-strategies1>

⁷³ Mulu Gebreeyesus, *Industrial Policy and Development in Ethiopia: Evolution and Current Performance*, presentation at the 'Learning to Compete (L2C): Acceleration Industrial Development in Africa' conference organised by UNU-WIDER in Helsinki, Finland, on 24-25 June 2013.

⁷⁴ Mulu Gebreeyesus, *Industrial Policy and Development in Ethiopia: Evolution and Present Experimentation*, Learning to Compete Working Paper No.6, Africa Growth Initiative, African Development Bank Group, and United Nations University-World Institute for Development (UNU-WIDER).

The targets and accompanying government supports were explicitly stated in the country's five-year development plans⁷⁵ (i.e., the Plan for Accelerated and Sustained Development to End Poverty (PASDEP: 2005/06-2009/10) and the Growth and Transformation Plan (GTP: 2010/11-2014/15)). The extensive support programmes, which are largely directed at the exporting firms and industries, included: (i) economic incentives (including generous credit schemes); (ii) capacity building; (iii) cluster development (establishment of industrial zones in different parts of the country); and (iv) direct investment (in areas where government believes are in short supply of the private sector, or in other new or/and expansionary investment projects).

The IDS spells out important elements that impact on competition. The Strategy's fundamental principle of considering the private sector as an engine of the IDS confirms Ethiopia's adoption of the free market economy system. Under such a system, enterprise efficiency and productivity is key to the needed competitiveness for survival. According to Khemani (1999), competition in market-based economies refers to a situation in which firms or sellers independently strive for buyers' patronage in order to achieve a particular business objective, for example, profits, sales, or market share.⁷⁶ Competition is viewed as an important process by which firms are forced to become efficient and offer greater choice of products and services at lower prices – it gives rise to increased consumer welfare and allocative efficiency, and it includes the concept of 'dynamic efficiency' by which firms engage in innovation and foster technological change and progress.⁷⁷

Competition however needs to be regulated if it is to effectively contribute to the private sector's engineering of the IDS. Unregulated competition on its own has been found not adequate to maximize the full benefits of competition, since firms if left on their own have the tendency of increasing profits through the easiest of means, such as the elimination of competitors and the exploitation of their monopoly or dominant positions.

⁷⁵ Ibid.

⁷⁶ R. Shyam Khemani, 'Objectives of Competition Policy', in *A Framework for the Design and Implementation of Competition Law and Policy*, The World Bank, Washington D.C., and Organisation for Economic Co-operation and Development (OECD), Paris, 1999.

⁷⁷ R.S. Khemani and D.M. Shapiro, *Glossary of Industrial Organisation Economics, Competition Law and Policy Terms*, Organisation for Economic Cooperation and Development (OECD), Paris, 1991.

The Strategy's fundamental principle of implementing the direction where the government plays a leading managerial role has close competition linkages with the above. While the private sector is recognized as the engine for growth, a distinction is made between 'rent seeking' and 'developmental' capitalists. The importance of State leadership is to support developmental firms, and to fill market failure gaps, which are normally caused by lack of, or inadequate, competition.

The implementing export-led industrialisation fundamental principle of the IDS play a crucial role in securing dependable markets for value-added agricultural products, which depends on the exporters' competitiveness in world markets. It is difficult for a business to become competitive in world markets when competition on its domestic market is weak.

Ethiopia's industrial policy and competition policy are mutually supportive, and not in conflict with one another. The policy looks at the development and promotion of whole industries or sectors, and does not place specific business undertakings at unfair competitive advantage over competing firms in the same industries or sectors through the creation of national champions. The promotion of micro and small enterprises (MSEs) under the policy is pro-competitive since that not only facilitates the entry of new players in the market, thereby increasing competition, and reducing the levels of market concentration, but also strengthens the MSEs to enable them to better constrain the anti-competitive conduct of larger firms. The instruments used in the implementation of the policy are also not in the form of direct financial support, such as the provision of State aids, that distort competition, but in the form of general economic incentives and capacity building across the prioritised industries and sectors that do not distort the level playing field for competitors in the industries and sectors. The instruments used also do not grant exemptions from the country's competition law, or create regulatory barriers to competition.

5.2 Trade Policy

Trade and industrial policies are closely related since many types of industrial policies contain common elements with other types of interventionist policies such as trade policy. An example is the import substitution industrial policy where trade barriers are temporarily imposed on some key manufacturing

sectors. Some nations attempt to protect their industries with trade policies that place a heavy burden on importers through the imposing of various trade barriers to give domestic producers of goods and services competitive advantage.

Trade policy is composed of a set of rules, regulations and instruments that aim at changing international trade flows in favour of the country's exports, in particular, and its economic growth and development in general. The three main arguments for import restricting trade policies include national defence theory, infant industry theory, and anti-dumping theory. According to the national defence argument, certain industries that are vital to a nation's defence (such as weapons, aircraft, and petroleum) should be protected from foreign competitors so that there is a domestic supply on hand in case of an international conflict. Under the infant industry argument, it is believed that new domestic industries should be protected from foreign competition for so long so that they have a chance to develop. Ideally, as the new industry matures and becomes able to stand on its own feet and compete effectively with other producers, the protections will be removed. Proponents of the anti-dumping argument believe that if dumping is allowed (i.e., selling of a good in a foreign country at a lower price than it is sold for in the domestic market), foreign producers will temporarily cut prices and drive domestic firms out of the market, then they will use their monopoly to exploit consumers.

Disadvantages of a trade policy based on establishing barriers to trade include: (i) increased cost to consumers; (ii) increased costs to domestic suppliers; (iii) reduced competition; and (iv) escalations of trade protectionism. One of the most important disadvantages of trade restrictions is that it drives up the price of goods in a country where trade barriers artificially raise the price of imported products. Trade barriers force consumers to pay higher prices since products that could otherwise be made available by relatively cheap imports take more resources to produce domestically. Price hikes due to trade barriers do not just affect consumers, they also put a strain on firms which supply raw materials and commodities to domestic industries. Trade barriers lessen foreign competition, leading to fewer product choices for consumers, and less local producer incentive to create high-quality products available to the public. Over time, one country's policy of trade restrictions may lead to similar measures taken by other countries

who lose out in the international trade game because they cannot export products for a profit. This cuts down on economic efficiency and competition on a global scale.

Ethiopia presently does not have a comprehensive trade policy, as stated by the Ministry of Trade during the fact-finding visit, with the country's trade policies currently spread and incorporated in various sectoral policies, such as agriculture, manufacturing, etc. The Ministry is however working on the formulation of a comprehensive trade policy. Ethiopia has a 10.3 per cent average import tariff rate.⁷⁸ As part of the economic reforms under the EPRDF government, import tariffs in Ethiopia have been streamlined and substantially reduced from a maximum 230 per cent.

Ethiopia is still not a member of the World Trade Organisation (WTO). It achieved the status of Observer State of the WTO in 1984 and applied to join the organisation in 2003.⁷⁹ Ethiopia's desire to join the WTO was driven by the economic reforms that it had undertaken under the auspices of the International Monetary Fund (IMF) structural adjustment programs that were implemented since the coming to power of the EPRDF-led government in 1991. As stated in the Memorandum of Foreign Trade Regime it submitted to the WTO, Ethiopia's decision to join the WTO is based on four inter-related government economic objectives, which are: (i) to accelerate economic growth and development; (ii) to attract foreign investment; (iii) to secure predictable and transparent international market access; and (iv) to influence the speed, nature and direction of globalisation.

The fundamental principles of the WTO are as follows: (i) trade without discrimination (a country should not discriminate between its trading partners (most-favoured-nation principle), and similarly, it should not discriminate between its own and foreign products and services (national treatment)); (ii) predictability of market access, ensured through binding tariffs (putting a cap on tariff rates), removing quantitative restrictions, and eliminating non-tariff barriers to trade; (iii) fair competition (the rules on non-discrimination provide a level playing field, and the WTO also allows the use of such measures as anti-dumping duties and countervailing measures to ensure a level playing field); and (iv) promoting development (the WTO recognises

⁷⁸ The Heritage Foundation, *Ethiopia*, 2015 (www.heritage.org/index/country/ethiopia, downloaded on 12/8/2015).

⁷⁹ https://www.wto.org/english/thewto_e/acc_e/a1_ethiopia_e.htm.

special needs of developing countries and least developed countries (LDCs), binding tariffs, and calls for enhanced market access conditions for LDCs and seeks increased technical assistance from developed countries).

Trade liberalisation under the WTO thus means increased competition between imports and domestically produced goods. WTO membership therefore has wide-ranging social, cultural, and economic impacts since accession means a commitment to open one's economy to external competition and to benefit from a multilateral trading system. For Ethiopia to fully benefit from the multilateral trading system, it will have to strengthen the competitiveness of its domestic industries, through increased domestic competition, and increase the export capacity of its products.

In addition to the WTO efforts, Ethiopia is also a member of other regional, continental and international trade pacts. It is a member of the Common Market for Eastern and Southern Africa (COMESA) trade bloc, although it has not yet acceded to the COMESA free trade area and customs union arrangements. The main focus of COMESA, which replaced in 1994 the Preferential Trade Area for Eastern and Southern African States, is on the formation of a large economic and trading union through regional integration and cooperation in a number of areas, including cooperation in trade liberalisation and development. COMESA forms a major market for both internal and external trading, with its 19 Member States, population of over 470 million and annual import bill of around US\$170,895 million with an export bill of US\$112,546 million.⁸⁰ Ethiopia enjoys preferential market access to COMESA countries.

At the continental level, Ethiopia has signed and ratified the Abuja Treaty that aims to establish an Africa Economic Community (AEC) among the continent's 54 countries. The Treaty emphasises the importance of setting up the AEC through the coordination, harmonisation, and progressive integration of the activities of regional economic communities (RECs). The formation of a Tripartite Free Trade Area (TFTA) among the three RECs in eastern and southern Africa to which Ethiopia belongs, namely COMESA, the East African Community (EAC) and the Southern African Development Community (SADC), is part of the preparatory action based on the Abuja Treaty.

⁸⁰ COMESA website (www.comesa.int).

At the international level, Ethiopia is a member of the African, Caribbean and Pacific (ACP) group of countries, which has a preferential trade arrangement with the European Union, and is part of the Eastern and Southern Africa (ESA) configuration that is currently negotiating an Economic Partnership Agreement (EPA) with the European Union.

Ethiopia qualifies for preferential access to the markets of the United States of America under the African Growth and Opportunities Act (AGOA). Thus, most Ethiopian products can enter into these markets quota and duty free. Furthermore, a broad range of manufactured goods from Ethiopia are entitled to preferential access under the Generalised System of Preferences (GSP) in the United States, most countries of the European Union and other developed countries. No quota restrictions are placed on Ethiopian exports falling under 1800 products currently eligible for GSP treatment.

Competition policy and law is central in most of the above trading arrangements to which Ethiopia is party, with the realisation that restrictive business practices by market players could adversely affect the achievement of the trade liberalisation objectives and goals. Appropriate competition provisions are therefore being negotiated under these arrangements.

5.3 Investment Policy

An investment policy is composed of the legal, regulatory and institutional framework for foreign direct investment (FDI) with the aim of attracting FDI, as well as to maximise the benefits from it. Investment policy also covers domestic investment in the local economy.⁸¹ An overview of Ethiopia's investment policies and incentives, as outlined by the Ethiopian Investment Authority (EIA), now called the Ethiopian Investment Commission (EIC), is summarised in Box 6.

While Ethiopia has attracted significant foreign investment in textiles, leather, commercial agriculture and manufacturing, a number of industries and sectors are restricted to domestic investors, notably the banking, insurance, telecommunications and micro-credit industries.⁸² It has however also been noted

⁸¹ <http://unctad.org/en/Pages/DIAE/Investment%20Policy%20Reviews/Investment-Policy-Reviews.aspx>.

⁸² Central Intelligence Agency, *The World Fact Book* (https://www.cia.gov/library/publications/the_world_fact_book/geos/et_html, downloaded on 5/08/2015).

Box 6: Ethiopia's Investment Policies and Incentives**The Investment Policy – Admission**

- Foreign investors can invest alone or in partnership with domestic investors in areas open for foreign direct investment (FDI)
- No restrictions on equity ownership in joint venture (JV) investment
- Required to have investment permit from EIA
- Required to allocate minimum capital: (i) USD 200,000 for a single investment project; (ii) USD150,000 for joint with a domestic investor; (iii) USD100,000 for technical consultancy if wholly owned; or (iv) USD50,000 jointly with a domestic investor.

Incentives – Regulatory

- Guarantee against expropriation or nationalisation (Constitution and investment law)
- Full repatriation of profits, dividends, principal and interest payments on external loan, etc. out of Ethiopia in convertible currency
- The right to employ expatriate experts and management staff
- Bilateral Investment Promotion & Protection Treaties with 30 countries
- Double taxation avoidance treaties with 18 countries

Fiscal

- Customs duty exemption on imported capital goods, construction materials, and spare parts worth up to 15% of the value of imported capital goods
- Income tax exemption (2 to 9 years)
- Loss carry forward (for half of income tax exemption period)
- The incentive policy does not discriminate between domestic and foreign investors, though there are positive lists for FDI participation

Ethiopian Investment Agency (EIA) & One-Stop Shop

Providing over 26 licensing and registration services, including investment license, business license, customs duty free approval, capital registration, authenticating documents

Other Services Provided on Behalf of Investors

Execution of investors' requests: (i) for land required for their investment projects; (ii) for residence permits; (iii) for approval of environmental impact assessment studies conducted on their investment projects; and (iv) to acquire water, electrical power and telecommunications services.

Focus Areas**(a) Manufacturing investment opportunities with a backward linkage to agriculture**

Textiles & Garments/Apparel	Leather & Leather Products
<ul style="list-style-type: none"> • Production of textile fabrics • Production of garments • Production of other textile products (carpets, curtains, etc.) 	<ul style="list-style-type: none"> • Tanning of hides & skins up to finished level • Leather goods & articles (shoes, garments, etc.)

(b) Agricultural investment opportunities

Agro-Processing	Agricultural Opportunities
<ul style="list-style-type: none"> • Processing of horticulture • Pulses & edible oil seeds • Sugar processing, including ethanol • Animal feed • Barley for brewing & grapes for wine • Slaughtering, etc. 	<ul style="list-style-type: none"> • Rubber tree plantation • Sugarcane plantation • Horticulture • Floriculture • Fibre crops: cotton, jutes, etc. • Cattle raising & dairy development

(c) Other Investment Opportunities

Mining	Tourism
<ul style="list-style-type: none"> • Underdeveloped sector with huge potential particularly in gold, iron ore, potash, tantalum, gemstones, gypsum, marble, granite, etc. • Significant potential in oil & gas • As at 2013: (i) 261 licenses had been issued by Ministry of Mines, of which 207 were exploration licenses and 4 mining licenses; (ii) 137 companies were operating in the sector (66 foreign firms, 36 joint venture partnerships and 35 local companies); (iii) the total number of direct employees in those companies was estimated to be around 6,000; (iv) artisanal miners numbers exceeded 500,000 according to a recent UN study. 	<ul style="list-style-type: none"> • Ethiopia has historical, natural and cultural key assets to drive tourism (source of the Nile River, origin of human kind, birthplace of coffee, etc.) • Addis Ababa is Africa's political capital, the base of many international organisations and NGOs • Improved connectivity through extensive network of Ethiopian Airlines • Ethiopia is politically stable and its popular tourist destinations are safe and secure • Large value chain and investment opportunities (hotels, tour operators, food suppliers, retail services, etc.) • Supportive regulatory environment (tax holidays, licensing, etc.)

Source: Ethiopian Investment Agency

that the minimum capital requirement for launching a business is higher than the level of average annual income,⁸³ such that this constitutes a serious barrier to entry into many industries for domestic investors.

According to the Ethiopian Investment Commission (EIC), the Rural Development Policy and Strategy (RDPS), the Industrial Development Strategy (IDS) and other sectoral policies and strategies have initiated a new push towards creating frameworks conducive to economic and social development.⁸⁴ The RDPS underlines that the agriculture-led development will bring about fast economic growth, enable the Ethiopian people become beneficiary of economic growth, and lay solid foundation for industrial development. The IDS focuses on export manufacturing with priority given to textile and garments, leather and leather products, agro-processing, and small and micro-enterprises. Due to the investment-friendly environment created in the country, the inflow of foreign direct investment (FDI) has been increasing over the last twenty-one years. Accordingly, out of the total investment projects licensed between 1992 and 2012, FDI's share was about 15.80 per cent. However, the overall trend of investment in 2012 both the total number of projects and capital invested have shown slight increase. Ethiopia remains an untapped and unexploited market for investors. China, India, Sudan, Germany, Italy, Turkey, Saudi Arabia, Yemen, the United Kingdom, Israel, Canada and the United States are the major sources of FDI.

⁸³ The Heritage Foundation, *Ethiopia*, 2015 (www.heritage.org/index/country/ethiopia, downloaded on 12/8/2015).

⁸⁴ Ethiopian Investment Commission, *Ethiopian Investment Guide 2014*.

The Ethiopian Investment Commission (EIC) advised during the fact-finding visit that Ethiopia's investment policy is primarily aimed at encouraging FDI, specifically in manufacturing, but that domestic investors are also encouraged. Incentives given to foreign and domestic investors are basically the same. However, sectors such as legal service, banking, insurance, mass media, advertising, and transport are not open to foreign investors.

On the whole, Ethiopia's investment policy is competition-friendly. The investment drive is targeted at both foreign and domestic investors, and the incentive policy does not discriminate between domestic and foreign investors. While there are positive fiscal lists for foreign direct investment participation, certain investment areas are reserved for domestic investors in line with the country's development plans, particularly those related to poverty eradication and the promotion of SMEs who largely contribute to competition.

5.4 Public Procurement Policy

According to the OECD, procurement is the process of purchasing goods or services, and "the primary objective of an effective procurement policy is the promotion of efficiency, i.e., the selection of the supplier with the lowest price or, more generally, the achievement of the best 'value for money'".⁸⁵ Public procurement is thus the process of purchasing goods

⁸⁵ OECD Competition Committee, *Competition and Procurement: Key Findings 2011*, Organisation for Economic Co-operation and Development, Paris, 2011.

or services by the public sector, the aim of which is to secure the best value for public money, and is an issue of key importance for a country's economic development.⁸⁶

A competitive bidding process is often relied upon in public procurement, to achieve better value for money when supplying companies genuinely compete, ideally, by setting their terms and conditions honestly and independently. It has however been found that corruption and collusion between bidders and procurement agents put competition in public procurement at great risk.⁸⁷ Anderson, Kovacic and Müller (2011) also concluded that corruption on the part of public officials and collusion among potential bidders are two main challenges in the public procurement process.⁸⁸

The internationally accepted basic principles that guide the implementation of an effective and efficient system of public procurement are transparency, accountability, objectivity, fairness and non-discrimination. The principle of transparency is central since: (i) it helps to attract a greater number of participation, thereby encouraging competition; (ii) it also makes the whole procurement process open and fair, thus avoiding the possibility of favouritism and discrimination; (iii) it makes it easy for procuring entities and officials to be accountable; and (iv) it is an effective tool to curb corruption.

It was not until 2005 that there was a comprehensive procurement law in Ethiopia. There were only a few provisions in the Civil Code (1960) regulating the procurement procedure. Chapter 3 of the Code dealt with contract of public works (in Code, a contract

of public works is defined as “a contract whereby a person, the contractor, binds himself in favour of an administrative authority to construct, maintain or repair a public work in consideration of a price”). Article 3246 of the Code provided that “the administrative authorities may put up for competition the working out of a project of a work among skilled persons or among specialised undertakings”. Article 3247 went on further to provide that “(1) The administrative authorities shall fix freely the time within which the competitors shall send in their projects, the conditions of form and of substance to which such projects shall conform and all other conditions of the competition. (2) The administrative authorities shall also determine, as they think fit, by whom and in which manner the competitions shall be judged and ranked. (3) They shall choose freely the persons whom they admit to take part in the competition, without having to give a reason for their choice”.

In 2005, the Federal government enacted a law providing a detailed procedure of public procurement (Proclamation No. 430/2005), which also introduced the embracing of the basic principles of transparency, accountability, fairness and non-discrimination as its guiding principles. Proclamation No. 430/2005 was replaced in 2009 by the current Ethiopian Federal Government Procurement and Property Administration Proclamation No. 649/2009., The Proclamation in its preamble states the following objectives: (i) to achieve better transparency, efficiency, fairness and impartiality in public procurement and to enable the utilisation of the large sum of public money spent on procurement in a manner that ensures greater economy and efficiency; (ii) to ensure that an organisation enabling the realisation of the economic benefit and efficiency flowing from bulk purchase is in place; and (iii) to ensure that public property in which a significant amount of public money is invested is utilised in such a manner as to enable the government derive maximum benefit.

Pertinent definitions of relevant terms used in the procurement process are made in the Proclamation,

Article 3(1) of the Proclamation provides that it “applies to all Federal Government procurement and property administration”, but Article 3(2)(a) goes on to provide that “the Minister in consultation with the heads of the relevant public bodies may in the interest of national security or national defence decide to use a different procedure of procurement and property administration in which case the Minister shall define by a directive the method of procurement and property

⁸⁶ Ibid. The importance of public procurement to a country's economic development include the following: “(i) the goods and services involved typically affect a large section of the population; (ii) public procurement often involves physical infrastructure or public health, which support other forms of economic activity; (iii) it impacts on international competitiveness; (iv) it can impact on the investment climate; (v) distortion of public procurement typically has the heaviest detrimental impact on the most disadvantaged in society, who rely on public services and infrastructure to the greatest extent; and (vi) public procurement often concerns ‘public goods’, and so government failures cannot be addressed by private market mechanisms”.

⁸⁷ UNCTAD, *Competition Policy and Public Procurement*, Geneva, 2012, available at: http://unctad.org/meetings/en/SessionalDocuments/circlpd14_en.pdf.

⁸⁸ Robert D. Anderson, William E. Kovacic, and Anna Caroline Müller, *Ensuring Integrity and Competition in Public Procurement Markets: A Dual Challenge for Good Governance*, Chapter in ‘The WTO Regime on Government Procurement: Challenge and Reform’, S. Arrowsmith and R. Anderson, eds., Cambridge University Press, 2011.

administration to be followed in order to serve the interest of economy and efficiency". Article 3(2)(b) also provides that the Proclamation "does not apply to contracts a public body enters into with another public body for the provision of goods, works, consultancy or other services at cost".

Article 5 of the Proclamation provides for principles of public procurement and property administration,

The Proclamation's enforcement agency, the Public Procurement and Property Administration Agency (PPPAA) was established under Article 12 of the Proclamation as an autonomous Federal government organ having its own juridical personality, and accountable to the Minister of Finance and Economic Development.

Chapter Three of the Proclamation provides for basic public procurement procedures Article 24 and 25 gives direction on discrimination between candidates and preferential treatment for Ethiopians by order of the Minister whenever it is necessary.

The methods of procurement in terms of Article 33(1) of the Proclamation are: "(a) open bidding; (b) request for proposals; (c) two-stage tendering; (d) restricted tendering; (e) request for quotation; and (f) direct procurement". While the preferred procedure of procurement is open bidding (Article 33(2) of the Proclamation), public bodies may use a method other than open bidding only where conditions for use of such other method that are stipulated in the Proclamation are satisfied (Article 33(3)).

Chapter Ten of the Proclamation provides for international competitive bidding. Article 59(1) provides that "open international bidding shall be used whenever in national open bidding an effective competition cannot be obtained unless foreign firms are invited to bid or for procurements above a threshold established level for national bidding to be determined by a directive to be issued by the Minister".

The establishment of the Board reviewing complaints on public procurement is provided for in Chapter Thirteen of the Proclamation. In terms of Article 70(2) of the Proclamation, the Board is accountable to the Minister of Finance and Economic Planning. Upon deliberation on a complaint submitted to it, the Board in terms of Article 72(3) of the Proclamation may give one of the following decisions: "a) that the procurement proceeding in respect of which a complaint was lodged be rectified or terminated; b) to

dismiss the case where in its judgment the complaint is unfounded".

The miscellaneous provisions of the Proclamation under Chapter Fifteen provide, *inter alia*, for offences and punishment. The offences include bribery and other corrupt practices in the procurement processes. The penalties include both the imposition of fines and imprisonment.

The Public Procurement Manual that was prepared in 2008 for the Ministry of Finance and Economic Development and the Public Procurement and Property Administration Agency (PPPAA)⁸⁹ was revised in December 2011 by the PPPAA to align it with Proclamation No. 649/2009. Besides the general provisions, the Manual covers the following areas: (i) basic procurement rules; (ii) procurement planning; (iii) procurement methods; (iv) request for proposals (RFP) method; (v) complaint review procedure; (vi) procurement audit; and (vi) contract management, delivery and payment.

The objective of the Manual is to provide guidance to public bodies for effective implementation of their procurements, adhering to Proclamation No. 649/2009. The Manual provides where necessary, additional interpretations, information, and clarification that would enable the user to follow appropriate methods, processes and procedures in carrying out the various activities required for procurement of works, goods and service. The purpose of the Manual is to state the ways in which the Proclamation improves public procurement in Ethiopia, which are to: (i) ensure procurement is conducted in the most efficient manner possible; (ii) encourage competition between persons and/or firms who are willing to supply/provide goods and services and undertake works in the public sector; (iii) ensure that all persons and firms, who are providing works, goods and services in the public sector, are treated equally; (iv) ensure that public sector procurement is implemented fairly; (v) improve business opportunities within Ethiopia; and (vi) introduce the Proclamation which applies to all public bodies involved in public procurement.

The Government of Ethiopia represented by the PPPAA requires public bodies, as well as bidders, to observe the highest standards of ethics during the procurement and the execution of contracts. In

⁸⁹ The Manual was prepared by International Business Initiatives (IBI) under the World Bank Public Sector Capacity Building Program (PSCAP).

pursuance of this policy, the Government defines, for the purposes of this provision, the terms set forth below as follows:

Ethiopia's public procurement law and policy are therefore basically in line with international best practices. The guiding principles for the implementation of an effective and efficient system of public procurement of transparency, accountability, objectivity, fairness and non-discrimination are taken aboard. The risk of corruption and collusion between bidders and procurement agents has been minimised by the prescription of statutory penalties. The policy and law also recognise the importance of competition, and the threat of anti-competitive practices, in the procurement process. Collusive practices between bidders of a bid-rigging nature are proscribed under the policy and law in line and coherent with the provisions of the Trade Competition and Consumers Protection Proclamation (No. 813/2013).

It should however be noted that Proclamation No. 649/2009 has some provisions that have the effect of limiting competition, but all in the national interest. The provisions of Article 3(2)(a) effectively exclude from the application of the Proclamation procurement affecting national security or defence, but this is acceptable taking into consideration the highly sensitive nature of such type of procurement. The exclusion is also subject to consultations, and the determination of other appropriate procurement methods that serve the interest of economy and efficiency. Article 3(2)(b) does not subject public bodies to procurement procedures of the Proclamation if the contract for the provision of goods, works, consultancy or other services is between themselves. This gives public bodies preferential treatment and removes competition from the private sector. Preferential treatment in public procurement procedures is extended in terms of Article 25 of the Proclamation to "goods produced in Ethiopia, for works carried out by Ethiopian nationals and for consultancy services rendered by Ethiopian nationals", and to small and micro-enterprises. These preferences are in support of the government's other developmental plans and strategies, and exist in most other jurisdictions.

The wide competition implications of Ethiopia's public procurement policy demand that the competition authority, the TCCPA, and the procurement agency, the PPPAA, work closely together in promoting competition in public procurement processes, particularly in ensuring adherence and compliance with the provisions of the Public Procurement Manual.

5.5 Labour Policy

Labour policy encompasses the controls that regulate, direct and protect employment relationship. The main element of the policy therefore is the contract of employment. Labour law, on the other hand, defines minimum conditions of work that must be observed by parties to an employment contract.

It has long been accepted that workers need to be protected from employers who extract rent from employment relationship. In that regard, government regulation of labour markets to protect workers from their employers takes various forms, including prohibiting discrimination in the labour market, and empowering labour unions to represent workers in negotiating with employers.

The Ethiopian Constitution provides in terms of Article 42 for rights of labour. The rights include: "the right to form trade unions and other associations to bargain collectively with employers or other organisations that affect their interests"; (ii) "the right to express grievance, including the right to strike"; (iii) "the right to equal pay for equal work"; and (iv) "the right to reasonable limitations of working hours, to rest, to leisure, to periodic leaves with pay, to remuneration for public holidays as well as healthy and safe work environment".

According to the Ethiopian Investment Commission (EIC)'s *Investment Guide to Ethiopia 2014*, the Government of Ethiopia, in conformity with the international convention and other legal commitments, has issued a labour law to ensure that worker-employer relations are governed by the basic principles of rights and obligations with a view to enabling workers and employers maintain industrial peace and work in spirit of harmony and cooperation. The Labour Law is consistent with the investment policy of the country. Foreign investors should obtain work permits for their expatriate employees directly from the EIC during the implementation phase of the project. The government has strategic intervention to ensure linkage between economic growth and employment. Wages and salaries vary depending on the size of enterprise, type of profession and level of skills required. They are determined by agreement between the employer and the employee. Generally, the cost of labour in Ethiopia is low by African standards. Labour disputes in Ethiopia are resolved through the application of the law, collective agreements, work rules and employment contracts.

Ethiopia's labour law is enshrined in the Labour Proclamation (No. 377/2003). In 2011, the Addis Ababa Chamber of Commerce and Sectoral Associations (AACCSA) commissioned a study on *The Impact of Ethiopian Labour Laws on Business Efficiency and Competitiveness*.⁹⁰ The background to the study was that there was a strong argument that Ethiopian workers had been overprotected by strict labour laws that impeded industrial growth and employment creation, and that labour legislations stipulated minimum benefits that accrued to workers and restricted the rights of hiring and firing, thereby raising labour costs and affecting productivity and competitiveness.

According to the findings of the study, enterprises face diverse labour problems, including lack of labour discipline, work slowdown and insubordination, which negatively affect business efficiency and competitiveness. The study concluded that the application of the labour law had direct impact on business efficiency and competitiveness in Ethiopia. Some of the contents and general application of the Labour Proclamation (No. 377/2003) were considered factors that affect labour productivity and profitability of enterprises. Some Articles of the Proclamation such as those regarding probation period, good causes for dismissal and suspension of workers provide very limited or narrow grounds for action by enterprises. Those Articles on compensation, penalty for late payment, back-pay for reinstated workers, on the other hand, create heavy financial burden on enterprises affecting their efficiency and competitiveness.

However during the fact-finding visit to Ethiopia, none of the stakeholders consulted specifically cited the labour policy in Ethiopia as a major deterrent to competition in the country.

5.6 Coherence between Competition Policy and Other Government Objectives

The coordination between competition policy and other government socio-economic policies is vital for economic development. Competition policy, in

promoting and maintaining competition, should be implemented in coherence with other government policies which affect competition in one way or other with a view to contributing to sustainable economic growth and development. It has however been observed that the interrelationship between competition policy and other public economic policies is so complex that there is often lack of coordination between the policies, leading to policy incoherence. This is particularly so in developing countries, most of whom are aiming to achieve economic growth within the shortest period through a multiplicity of economic policies.

While it has generally been found that Ethiopia's industrial policy and competition policy are mutually supportive and not in conflict with each other, there are a number of micro-industrial government policies that potentially support or adversely impinge on the application of competition policy, with some sector-specific policies that tend to have measures more likely to restrict than to promote the objectives of competition policy. The formulation of and implementation of these and other policies therefore need to be tuned to take into account competition principles to ensure consistency in government decision-making and avoid distortions in the marketplace.⁹¹

The OECD found that some government policies can unwittingly weaken competition, and that in many sectors, laws and regulations unnecessarily restrict the entry of new competitors, limit the scope of competitive conduct and reduce incentives for active competitive engagement, thus constraining productivity. Conversely, economic performance can be improved if governments identify and remove unnecessary restrictions on product market competition. A specific methodology to help governments eliminate regulatory barriers to competition has been developed by the OECD in the form of the Competition Assessment Toolkit.⁹² Competition assessment toolkits help governments to eliminate regulatory barriers to competition by providing a method for clarifying unnecessary restraints on market activities and developing alternative, less restrictive measures that still achieve government policy objectives. The OECD Competition Assessment Toolkit's checklist probes

⁹⁰ 'The Impact of Ethiopian Labor Laws on Business Efficiency and Competitiveness', study commissioned by the Addis Ababa Chamber of Commerce and Sectoral Associations with financial support from the Swedish Agency for International Development Cooperation (SIDA), December 2011.

⁹¹ Ibid.

⁹² <http://www.oecd.org/daf/competition/assessment-toolkit.htm>.

three kinds of government restrictions on competition: (i) restrictions on starting new businesses; (ii) regulations that affect the ability of businesses to compete; and (iii) regulations that affect business behaviour by changing the incentives of businesses to act as vigorous rivals.

The Department for International Development (DFID) of the United Kingdom and CUTS International also developed similar competition assessment frameworks. According to the DFID, a competition assessment should analyse the strength of competition in the relevant market(s), and should identify any factors impeding more effective competition. Key issues are: (i) the structure of the market; (ii) entry barriers; and (iii) anti-competitive conduct. Where competition is found to be limited, an estimate should be made of the likely extent of the harm that results from this. An assessment should conclude with a view on whether there are competition problems in the sector that require correction, and if so, what the most appropriate remedies are.

The private legal practitioner consulted during the fact-finding visit specifically identified the National Tobacco Enterprise Proclamation (No. 37/1992) (NTEP) as one of the laws in Ethiopia that are not in coherence with the provisions of the Trade Competition and Consumers' Protection Proclamation (No. 813/2013) (TCCPP). Under the NTEP, the National Tobacco Enterprise was given an exclusive right to produce, process, manufacture, distribute, import and export tobacco and tobacco products in Ethiopia, thus giving it virtual monopoly in the tobacco industry that shuts out competition. On the other hand, the TCCPP promotes competition between undertakings. While monopolies are not explicitly prohibited under the Proclamation, they effectively prevent or inhibit competition between independent undertakings.

The provisions of the Food, Medicines and Health Care Administration and Control Proclamation (No. 661/2009) (FMHCACP) on how much information should be put on the packaging and labelling of products were also identified as not coherent with the relevant consumer protection provisions of the TCCPP. It was submitted that the required labelling information under the FMHCACP is scanty, while that under the TCCPP is very detailed, and that this can cause confusion to enterprises and consumers on which of the provisions to follow.

Under the FMHCACP it is merely provided that "any producer, importer, distributor or retailer of packed food shall not supply it to the market or distribute it otherwise unless it is duly packed and labelled ... the label of any packed food shall be written either in Amharic or English language ... *the type and content of nutrition, usage guide and shelf-life of nutritionally produced food shall be stated in an unfading and clearly marked on its package*" (own emphasis).

It was also felt that there should be a functional link between the Trademark Registration and Protection Proclamation (No. 501/2006) and the Trade Competition and Consumers' Protection Proclamation (No. 813/2013) to give the TCCPA the necessary jurisdictional powers over infringement of trademark rights under Proclamation 501/2006, since such infringements are classified as unfair competition under Proclamation 813/2013.

The Ethiopian Chamber of Commerce and Sectoral Associations advised during the fact-finding visit that its 2009 study on the *Baseline Survey on Competition and Markets in Ethiopia* identified a number of other government laws and policies that negatively affect competition in Ethiopia.⁹³ The most intrusive policy was the involvement of State enterprises in various sectors of the economy. The SOEs were said to put competing private operators at a competitive disadvantage because of their privileged relationships with the banking sector, which was dominated by the State. In the particular case of the State-owned Agricultural Input Supply Enterprise (AISE), the enterprise was said to be the only participant in tenders for the allocation of foreign exchange for the importation of fertilizers, and given the expected large size of import lots. The government was also alleged to have adopted discriminatory measures regarding the calculation of fertilizer prices, with AISE being allowed to include cost calculation items such as overheads, interest and transportation, whereas private operators were denied that possibility. Regulatory barriers to entry in certain markets were also cited. For example, the sugar import trade was reserved to domestic operators, with explicit exclusion of foreign investors.

⁹³ 'Baseline Survey on Competition and Markets in Ethiopia', study commissioned by the Addis Ababa Chamber of Commerce and Sectoral Associations with financial support from the Swedish Agency for International Development Cooperation (SIDA), June 2009.

6. MARKET STRUCTURE AND STATUS OF COMPETITION IN ETHIOPIA

6.1 Market Structure in Major Economic Sectors

This section analyses the implications on competition of some government laws and policies in the major economic sectors in more detail.

6.1.1 Coffee Sector

Coffee is one of the most important traded commodities in the world, and the sector's trade structure and performance have large development and poverty implications, given the high concentration of production by small-holders in poor developing countries.⁹⁴ It is also the most important export crop for Ethiopia,⁹⁵ and earned US\$745.1 million in exports in 2012/13.⁹⁶

Ethiopia is Africa's leading producer of Coffee Arabica,⁹⁷ and is the birthplace of that variety of coffee. It also grows other varieties of coffee, such as Robusta coffee. It is the fifth largest coffee producer in the world next to Brazil, Viet Nam, Colombia, and Indonesia, contributing about 7 to 10 per cent of total world coffee production.⁹⁸ Ethiopia has huge potential to increase coffee production as it is endowed with suitable elevation, temperature, soil fertility, indigenous quality planting materials, and sufficient rainfall in coffee growing belts of the country.⁹⁹

Coffee is grown in two regions of the country, namely, Oromia and the Southern Nations, Nationalities and People Regions (SNNPR). According to Tefera

and Tefera (2013)¹⁰⁰, 95 per cent of Ethiopia's coffee is produced by small holder farmers on less than two hectares of land while the remaining 5 per cent is grown on modern commercial farms. Coffee production systems in Ethiopia are generally categorised into four areas, i.e., forest coffee, semi-forest coffee, garden coffee, and plantation coffee. Forest coffee is a wild coffee grown under the shade of natural forest trees, and it does not have a defined owner. Semi-forest coffee farming is a system where farmers thin and select forest trees to let sufficient sunlight to the coffee trees and to provide adequate shade. A farmer who prunes and weeds the forest area once a year claims to be the owner of the semi-forest coffee. Garden coffee is normally found in the vicinity of a farmer's residence. Plantation coffee is planted by the government or private investors for export purposes.

Tefera and Tefera (2013)¹⁰¹ noted that Ethiopians are heavy coffee drinkers, ranked as one of the largest coffee consumers in Sub-Saharan Africa, and nearly half of the country's coffee production is locally consumed. Coffee in Ethiopia has both social and cultural value. It is mainly consumed during social events such as family gatherings, spiritual celebrations, and at times of mourning. Coffee supplied and traded on the domestic market usually has a lower quality (coffee on the local market is mainly coffee destined for export but was rejected for failing to meet quality standards), but its price is usually higher than export prices. A new development in Ethiopian major cities regarding coffee consumption is the emergence of small roadside stalls selling coffee to passer-by customers in a traditional manner, which have grown popular among coffee consumers who are frustrated by the escalating price of coffee and the deteriorating quality of coffee served in cafes and coffee shops.

The local coffee-consumption market in Ethiopia is highly competitive, with many players supplying the market. Entry barriers into that market are negligible, as evidenced by the emergence of roadside coffee selling stalls in the major cities.

⁹⁴ Bart Minten, Seneshaw Tamru, Tadesse Kuma, and Yaw Nyarko, *Structure and Performance of Ethiopia's Coffee Export Sector*, Ethiopia Strategy Support Program Working Paper 66, Ethiopian Development Research Institute and International Food Policy Research Institute, June 2014.

⁹⁵ Thayer Watkins, *Political and Economic History of Ethiopia*, San José State University (www.sjsu.edu/faculty/watkins/ethiopia.htm), downloaded on 5/08/2015.

⁹⁶ Ethiopian Investment Commission, *Ethiopian Investment Guide 2014*.

⁹⁷ Ethiopian Government Portal, *Investment Opportunities* (www.ethiopia.gov.et/investmentopportunities), downloaded on 13/08/2015).

⁹⁸ USDA Foreign Agricultural Service, 'Ethiopia Coffee Annual Report', GAIN Report Number: ET-1302 (prepared by Abu Tefera and Teddy Tefera), May 2013.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

The Ethiopian Government's coffee policy revolves around its trade and controlling the hard currency earned from exports aiming to maximise foreign exchange. While there are no policies affecting coffee production, there are some regulations that affect the marketing process. For example, it is illegal to sell export quality coffee on the local market even if there is a better local price, and any coffee related business requires a special license for domestic wholesaling, coffee exporting, or coffee roasting. Any exporter found storing more than 500 tons of coffee without having a shipment contract with an importer would be penalised by revoking the trader's right to buy or sell coffee at the Ethiopian Commodities Exchange for three months.

The Ethiopian Commodities Exchange (ECX) was established in 2008 to handle the marketing of agricultural commodities such as coffee, sesame and beans. Nearly all coffee in Ethiopia is sold on the ECX floor, either directly through organised coffee producers' cooperatives or middle men. Coffee grading is conducted by ECX. For coffee, the main reason for establishing the Exchange was to eliminate the huge number of middlemen involved in coffee distribution, and to enable coffee farmers to benefit from prevailing market prices. The Board members are government officials, and that provides them an opportunity to have a regulatory oversee in the coffee marketing process. Until recently, the ECX fell under the administration of the Ministry of Trade.

As noted by the Addis Ababa Chamber of Commerce and Sectoral Associations (AACCSA) in the study it commissioned on *Baseline Survey on Competition and Markets in Ethiopia* regarding the level of competition in the cash crop market in which coffee is traded, "the government has liberalised the cash crop market and encouraged the private sector to be involved in cash crop marketing. Coffee, the major cash crop, is now sold to exporters by auction, the bid price of which is decided on the basis of global coffee price trends".¹⁰²

Minten, Tamru, Kuma and Nyarko (2014) studied the structure and performance of the coffee export sector in Ethiopia.¹⁰³ They noted a large change in the number

¹⁰² 'Baseline Survey on Competition and Markets in Ethiopia', report on study commissioned by the Addis Ababa Chamber of Commerce and Sectoral Associations with financial support from the Swedish Agency for International Development Cooperation (SIDA), June 2009.

¹⁰³ Bart Minten, Seneshaw Tamru, Tadesse Kuma, and Yaw Nyarko, *Structure and Performance of Ethiopia's Coffee Export Sector*, Ethiopia Strategy Support Program Working Paper 66, Ethiopian Development Research Institute and International Food Policy Research Institute, June 2014.

of exporters that are active in coffee export markets, from about 100 at the beginning of the 2007-2008 season to 175 exporters by 2012, an increase of 75 per cent. Looking at the concentration ratio of export firms in Ethiopia using the four-firm concentration (CR_4) measure¹⁰⁴, the CR_4 on average was about 40%, which decreased to 25% at the beginning of 2013. The study on the extent to which cooperatives and parastatals, including the Ethiopian Grain Trade Enterprise (EGTE) and State farms, play in coffee exports from Ethiopia showed that the share of cooperatives and parastatals in export trade is relatively small, with the large majority of coffee exports in the hands of the private sector (with a share close to 90 per cent). The share of exports for cooperatives and parastatals varied over time. In the case of cooperatives, the share steadily increased from between 3 and 4 per cent in 2006/07 to between 5 and 6 per cent in 2012/13. The most important cooperative involved in coffee exports is the Oromia Coffee Cooperative Union, which accounted for 57 per cent of the export transactions made by cooperatives, with other important cooperatives including the Yirgachefe, Sidama, and Kafa Forest coffee cooperatives. Parastatals accounted for between 3 to 4 per cent of all coffee exports until the end of 2008. The share of coffee exports coming from parastatals diminished since then as many State farms were privatised. These include the Bebeke and Tappi coffee plantations of the Coffee Plantation and Development Enterprise, which were privatised in 2011/12 and 2012/13, respectively, with the Limu Coffee Plantation being the last to be privatised in 2014. Currently, there are no more State coffee plantations in Ethiopia.

Minten, Tamru, Kuma and Nyarko (2014) concluded that: (i) there had been a decline in concentration ratios in the export sector over time; (ii) there had been an increase in the number of exporters, with a diversity of players (e.g., private sector, cooperatives, parastatals) in the export market, but the shares of incumbent firms are large, possibly because of the expertise and reputation required to gain market share in the coffee export business, as well as problematic access to trade credit for new entrant firms; and (iii) the share of cooperatives and parastatals in the coffee export market is relatively small, with that

¹⁰⁴ The CR_4 measure of concentration is the four-firm concentration ratio that is measured as the sum of the market shares of the four largest firms in the industry. A CR_4 of more than 75% is generally considered to be indicative of a high level of concentration, characterising a highly anti-competitive industry.

of cooperatives increasing over time while that of parastatals decreasing. The coffee sector in Ethiopia has therefore been opened up for greater competition.

6.1.2 Livestock Products

Ethiopia has one of the largest livestock inventories in Africa. Livestock in Ethiopia consists mainly of cattle, sheep, goats, camels, and poultry. According to Asresie and Zemedu (2015),¹⁰⁵ the official estimate by the Central Statistics Agency (CSA) was that in 2006/07, there were 43 million cattle in Ethiopia, 23.6 million sheep and 18.6 million goats, and about 34 million poultry of different varieties. 83% of the population is livestock dependent, and livestock development projects have a clear potential to contribute to poverty alleviation amongst dairy farming households.¹⁰⁶

The economic importance of livestock in Ethiopia is at both household and national levels.¹⁰⁷ At household level, livestock have multiple uses aside from income generation, including draught and pack services, milk and meat for household consumption, and manure for fuel and fertilizer. At national level, livestock accounts for significant formal export earnings. Live animal exports are predominantly cattle. Meat exports are almost entirely from sheep and goats, and hides and skins are primarily from cattle. There is significant informal cross-border trade in live animals, which increases livestock's export importance. The Middle East has been, and remains, the traditional destination for Ethiopia's live animals and meat.

An important downstream industry of the livestock sector is the leather and leather products industry, which has been declared one of the priority sectors for government direct support under the Industrial Development Strategy, together with meat, because of its comparative advantage to compete in the export market.

Players in the Ethiopian livestock products market are numerous, and include large and small holding farmers, livestock traders, abattoirs and meat processing companies, and exporters. Asresie and Zemedu

(2015) noted that the activity in the livestock sector picked up since the government ended its monopoly on livestock trading in 1999, thereby encouraging local and foreign private investments in ranches, meat processing companies and abattoirs.¹⁰⁸

Free market competition therefore prevails in the livestock sector of Ethiopia. However, the Government issues licenses for the export of livestock, and such licenses can only be obtained from the Ministry of Trade after following a complicated process which takes more than two working days and involves the approval of different organisations.

6.1.3 Transport Sector

The transport sector plays a key and important role in Ethiopia, owing to the country's vast surface and landlocked nature. Transport provides service for all other sectors of the economy, and all transport modes and technologies are used in Ethiopia, from horse/ox-drawn carts to railways, and from motorised road transport to shipping. Motorised road transport is the dominant mode, accounting for 95 per cent of all passenger and freight movements.¹⁰⁹

Ethiopia has 681 kilometres of railway, which mainly consists of the Addis Ababa-Djibouti Railway, under the joint control of Ethiopia and Djibouti. The **railway has been rebuilt by** Chinese and Turkish companies and was completed and officially launched in October 2016 by the Ethiopian Prime Minister, Mr. Hailemariam Desalegn. The railway line links Ethiopia's Capital Addis Ababa with the Red Sea port of Djibouti covering a distance of more than 750 Kms.¹¹⁰ The railway service cuts the journey time from three days by road to 12 hours.

Road transportation in Ethiopia had been made difficult because of mountainous terrain and lack of good roads. However, as the first part of a ten-year Road Sector Development Program, the Government of Ethiopia began a sustained effort in 1997 to improve its road infrastructure. According to the Ethiopian Investment Commission (EIC), the road network in Ethiopia in 2012/13 excluding community roads, reached 52,227 kilometres, out of which 37.3 per cent

¹⁰⁵ Aleme Asresie and Lemma Zemedu, *Contribution of Livestock Sector in Ethiopian Economy: A Review*, Advances in Life Science and Technology, Vol. 29, 2015.

¹⁰⁶ Berhe Gebreegziabher (Animal and Plant Health Directorate, Ministry of Agriculture and Rural Development of Ethiopia), *An Overview of the Ethiopian Livestock Sector's Role in Livelihood and Food Safety*, presented at 'Dialogue on Livestock, Food Security & Sustainability' at the 22nd Session of COAG, FAO in Rome, Italy on 16 June 2010.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ 'Baseline Survey on Competition and Markets in Ethiopia', report on study commissioned by the Addis Ababa Chamber of Commerce and Sectoral Associations with financial support from the Swedish Agency for International Development Cooperation (SIDA), June 2009.

¹¹⁰ <http://www.bbc.com/news/world-africa-37562177>

were Federal roads and the remaining 62.7 per cent were rural roads with an annual growth rate of 10.7 per cent.¹¹¹ Based on the classification of the road network, about 19,500 kilometres are in the Federal network, asphalt road constituted 37 per cent and gravel road 63 per cent. All-weather rural road grew by 14 per cent per annum constituting 32,727 kilometres of the total road network in 2012/13. In line with the five-year Growth and Transformation Plan (GTP), the Government has targeted to increase the total road network to 64,500 kilometres in 2014/15.

As of 2012, Ethiopia had 58 airports, and among these, the Bole International Airport in Addis Ababa and the Aba Tenna Dejazmach Yilma International Airport in Dire Dawa accommodate international flights. *Ethiopian Airlines* is the country's flag carrier and is wholly owned by the Government of Ethiopia. It is one of the fastest-growing carriers in the industry, and one of Africa's largest airlines, and from its hub at the Bole International Airport, serves a network of 16 domestic and 62 international destinations.¹¹²

Air transport is an important part of Ethiopia's transport network. *Ethiopian Airlines* services include both passenger and cargo transport in its international flights and domestic routes. Regarding its cargo services, *Ethiopian Airlines* operates over 40 cargo destinations spread across Africa, Europe, Asia and the Middle East via its hub – Addis Ababa, and another cargo hub at Liege in Belgium. In addition to *Ethiopian Airlines*, other airlines such as *Emirates*, *KLM*, *Lufthansa*, *Turkish Airlines* and *Kenyan Airways* have flight schedules from and to Addis Ababa.¹¹³

The government of Ethiopia has established the Ethiopian Shipping and Logistics Enterprise to ensure efficient, cost effective and reliable import and export movement of cargo to and from the seaports of the neighbouring countries.¹¹⁴ The Enterprise is currently operating two dry ports, which are located at Modjo and Semera, 73 kilometres and 588 kilometres from Addis Ababa, respectively. The Enterprise is operating other four sub-terminals, which are located at Dire Dawa, Mekele, Combolcha and Gelean, 515 kilometres, 783 kilometres, 376 kilometres, and 34 kilometres, respectively, from Addis Ababa. Addis Ababa is linked by road to the Port of Djibouti, 910

kilometres, at the Gulf of Aden. The ports of Barbara, 964 kilometres from Addis Ababa, in Somaliland, and Port Sudan, 1,881 kilometres away from the Ethiopian capital, in Sudan are other external trade routes that provide export-import services. Another potential port accessible to Ethiopia (in the south) is Port Mombasa, in Kenya, 2,077 kilometres away from Addis Ababa.¹¹⁵

No real competition exists in the railway and air transport on the domestic market. There is only one railway, Ethio-Djibouti Railway, which is State-owned, engaged in passenger and cargo transport service along the railway line connecting Djibouti with Ethiopia. *Ethiopian Airlines* dominates the domestic flight, and the international flight in some competition with airlines of different countries permitted to operate in Ethiopia. There are few private airlines in Ethiopia operating small aircrafts, but they do not provide effective competition to *Ethiopian Airlines*.

Road transport services, on the other hand, are subject to intense competition. The services are delivered in the majority of the cases by private transport providers. In road freight transport, there are two main types of operators, namely transport associations and transport companies. Transport associations are in fact cooperatives of individual truckers and small trucking firms whose main function is to secure cargo for their members. Over one hundred such associations are in operation. Transport companies include some SOEs that resulted from the break-up of the dominant SOE, Ethiopia Freight Transport Corporation, as well as newly established private companies. The transport companies are numerous, numbering almost one hundred.

The passenger road transport business also includes two main segments, namely urban transport and intercity transport. Taxis, minivans and minibuses (seating 9 to 12 passengers) are mostly used in urban transport, together with some maxi-buses (seating more than 45 passengers). Intercity service is performed with midi-buses (seating 13 to 45 passengers) and maxi-buses. The operators are public transport companies, taxis and minibus associations/companies, and individuals.

Entry barriers into the transport sector are mostly of a regulatory nature. The high import duties on vehicles tend to slow down the modernisation of the fleet. Foreign operators are also not allowed to enter and participate in the sector. Passenger transport

¹¹¹Ethiopian Investment Commission, *Ethiopian Investment Guide 2014*.

¹¹²Ibid.

¹¹³Ibid.

¹¹⁴Ibid.

¹¹⁵Ibid.

is subject to intense regulation, with the regulatory authorities responsible for licensing operators and for determining schedules, as well as for setting of fares.

6.1.4 Construction Sector

Construction activities in Ethiopia are fast growing, demanding huge volumes of products such as cement and cement products, ceramic products, etc.

There are quite a large number of different categories of contractors operating in the construction market. The Government also has a construction wing that is engaged in public construction works. The sector is open to foreign contractors as well. Competition in the sector in general follows the principles of free market competition, even though the sector is susceptible to collusive practices of a bid-rigging nature. A player in the building industry who responded to the questionnaire prepared under this review confirmed that the main obstacle to free and fair market access in the sector is the bid process due to corrupt practices. Anti-competitive agreements of a hardcore cartel nature (particularly bid-rigging, or collusive tendering) were therefore cited as the most prevalent restrictive business practice in the industry, together with unfair competition practices (i.e., acts likely to mislead customers regarding the undertaking, products or commercial activities of competitors, or any false statements made in the course of business with a view to discredit the undertaking, products or commercial activities of competitors). Abuse of dominant position was also cited as prevalent in the industry.

The cement industry is a crucial component of Ethiopia's construction sector, as it supplies an essential input that supports much needed infrastructure development. The Government of Ethiopia is promoting a strategic development plan to bring about fast and sustainable economic growth. The programme is expected to expand the country's infrastructure and help to reduce its housing shortage, encouraging the local construction and cement markets.

Ethiopia's Cement Industry Development Strategy (2015-2025) plans to revamp the country's cement sector after the realisation that the cement industry is facing several challenges, including high production costs. Most of the cement factories use coal as fuel, which has to be imported even though coal deposits are found in different parts of the country. The construction boom that started in 2008 created

a huge demand for cement that led to the importation of cement in large quantities. That prompted the Ethiopian government to invite local and foreign investors to invest in the cement industry, which resulted in a number of cement factories being built in a short period of time and the banning of imports of cement. With a view of avoiding market saturation and price wars, the Ministry of Industry stopped issuing licenses to new cement factories, but only as a temporary measure.

As at 2009, the bulk of cement output in Ethiopia came from three main producers, namely Massebo Cement (in Mekelle), Mughher Cement (near Addis Ababa) and National Cement (Dire Dawa). Since then, new entrants have included Dangote Cement (in Muger, about 80 kilometres from Addis Ababa) and Habesha Cement (near Addis Ababa). At the 7th Africa Cement Trade Summit that was held in Addis Ababa in April 2015, the Minister of Industry informed that there were 18 cement producer companies in Ethiopia.¹¹⁶

The installed production capacity of the 18 cement companies (including the new entrants Dangote and Habesha) is 11.2 million tonnes.¹¹⁷ Based on the four-firm concentration measure (CR₄), the Ethiopian cement industry, with a CR₄ of about 63%, is moderately concentrated, as shown in Table 11.

Cement is a highly capital intensive industry, and the capital intensity is enhanced by scale economies characterising some parts of the production process. Cement factories are normally integrated with quarrying operations and the production of clinker. The production of cement is a complex business, requiring specialised skills that are not always easily available. Entry in the Ethiopian cement industry is however open to all operators, including foreign investors, and there are no particular regulatory barriers of a permanent nature, with the possible exception of environmental requirements.

Cement industries worldwide are besieged with anti-competitive practices because of their oligopolistic nature, with most such practices being of a collusive nature (price-fixing and market-sharing arrangements, and collusive tendering). The situation in Ethiopia should not be much different. Allegations of other anti-

¹¹⁶ *The Reporter* newspaper (allafrica.com/stories/201520074.html).

¹¹⁷ Construction Review Online (constructionreviewonline.com/2015/04/Ethiopia-competition-challenges-and-prospects-of-ethiopia-cement-industry-strategic-perspective/).

Table 11: Concentration Level in the Ethiopian Cement Industry, 2015

Cement Company	Installed Capacity (tonnes)	Market Share (%)	Concentration (CR ₄)
Derba Midroc	2 500 000	22.32	22.32
Dangote Cement	2 500 000	22.32	22.32
Habesha Cement	1 400 000	12.50	12.50
Massebo Cement	700 000	6.25	6.25
Others	4 100 000	36.61	-
Totals	11 200 000	100	63.39

Source: Construction Review Online

competitive practices in the Ethiopian cement industry have focused on instances of 'hoarding' and 'arbitrary price increases'.¹¹⁸

6.1.5 Textiles and Textile Products

The textile industry in Ethiopia produces cotton and nylon fabrics both for the domestic and export markets. Woollen fabrics and apparels made from different textile fabrics are also imported into the country. The economic importance of the textile industry to Ethiopia is that it is the largest employment opportunity creator among the group of medium and large manufacturing establishments. It is therefore no wonder that the industry is one of the priority sectors identified for government direct support under the Industrial Development Strategy (IDS).

The Ethiopian Investment Commission (EIC) has also identified textiles & garments/apparel as one of the focus areas for attracting investment constituting

manufacturing investment opportunities with a backward linkage to agriculture. Investment in the industry is encouraged with various incentives, including the income tax relief shown in Table 12.

The textiles and apparel sector consists of over 100 medium-sized and large industrial plants, and over 4 000 small and micro enterprises in the artisan manufacture of garments. The medium-sized and large industrial plants include a combination of public and private enterprises, the latter being newly established, green field operations or the result of privatisation.

The 2009 study on *Baseline Survey on Competition and Markets in Ethiopia* that was commissioned by the Addis Ababa Chamber of Commerce and Sectoral Associations reported on competition-related aspects of the textiles and apparel industry, whose findings still have implications on current competition in the industry.¹¹⁹ Box 9 contains the pertinent findings.

¹¹⁸'Baseline Survey on Competition and Markets in Ethiopia', report on study commissioned by the Addis Ababa Chamber of Commerce and Sectoral Associations with financial support from the Swedish Agency for International Development Cooperation (SIDA), June 2009.

¹¹⁹'Baseline Survey on Competition and Markets in Ethiopia', report on study commissioned by the Addis Ababa Chamber of Commerce and Sectoral Associations with financial support from the Swedish Agency for International Development Cooperation (SIDA), June 2009.

Table 12: Income Tax Relief for Textile and Textile Products Industry

No.	Investment Activity	In Addis Ababa & Special Zone of Oromia Surrounding Addis Ababa	In Other Areas
1	Preparation and spinning of cotton, wool, silk and similar textile fibres	Exemption from income tax for 4 years	Exemption from income tax for 5 years
2	Weaving, finishing and printing of textiles	Exemption from income tax for 5 years	Exemption from income tax for 6 years
3	Finishing of fabrics, yarn, warp and weft, apparel and other textile products by bleaching, dyeing, shrinking, sanforizing, mercerizing or dressing	Exemption from income tax for 3 years	Exemption from income tax for 4 years
4	Other textile finishing activities	Exemption from income tax for 2 years	Exemption from income tax for 3 years
5	Manufacture of knitted and crocheted fabrics	Exemption from income tax for 4 years	Exemption from income tax for 5 years
6	Manufacture of made-up textile articles, except apparel		
7	Manufacture of carpets		
8	Manufacture of wearing apparel (including sport wears)		
9	Manufacture of accessories for textile products		

Source: Ethiopian Investment Agency

Box 8: Competition-Related Findings of the Chamber of Commerce Study

The State has effectively exited the production of apparel but still plays an important role in textiles, where a dozen mills are still in State hands. Starting from the late 1990s, several plants active in various lines of business have been privatized (e.g., Gonda Ginnery, Akaki Blanket Factory, Addis Garments, etc.) through commercial tenders, while others were leased under management contracts. In general, the Government has displayed an open attitude towards private investors, including foreign ones, but in certain cases privatization has proved difficult to achieve and/or there have been some reversals. For instance, in early 2009, the Government had to take back Arbaminch, which had previously been leased to a Turkish company.¹²⁰ Similar problems were encountered in the past with the Chinese company managing Nazareth Garments.

The State is also active in the growing of cotton, the main input for the textiles industry. Significant tracts of land have been transferred to private commercial farmers, whose cotton output has been increasing. However, the Government is still investing heavily in some cotton growing schemes (e.g., Upper Awash Valley, Abebo, etc.), in order to support the anticipated expansion of textiles export.

Source: Addis Ababa Chamber of Commerce and Sectoral Associations

Textiles manufacturing is a fairly capital intensive business and scale economies tend to give larger plants competitive advantage over smaller operations. Textiles projects approved by the then Ethiopian Investment Agency (EIA) were in the Birr 500-550 million range. Apparel manufacture is much less capital intensive, with industrial operations typically falling in the Birr 10 to 50 million range, and 'cottage' operations being started with very little capital as low as Birr 150 000. Apparel manufacture is also relatively simple from the technical point of view, whereas textiles mills are complex operations requiring high level of skills.

Regarding market access, entry in both the textiles and apparel businesses is open to all operators, including foreign investors, and there are no particular barriers.

The emphasis placed by the Government of Ethiopia on the development of the textiles industry has meant that export-oriented operators have had a comparatively easier access to funding from State-owned banks. However since the funding is provided in a non-discriminatory manner, this does not cause serious competition concerns.

6.1.6 Beer Sector

The beer industry in Ethiopia is of long standing. The first clear beer brewery, *St. George*, was established in the early 1920s. The beer market is predominantly supplied by local producers, with only limited quantities of special beers imported. Exports are also limited.

In 2009, there were six breweries in Ethiopia controlled by five companies, of which three were State-owned (Bedele, Meta Abo, and Harar), one was owned by an endowment enterprise (Dashen), and one fully private and controlled by foreign interests (BGI, which is controlled by the French Castel group). In 2011, Heineken of The Netherlands, one of the largest international breweries, acquired Bedele and Harar breweries. It has since constructed a new brewery in Addis Ababa, where it has been producing its new *Walia* brand of beer since September 2014. Diageo, another global beer brewery, bought Meta Abo Brewery in 2013. BGI Ethiopia, the producers of the *St. George* beer brand, has a 42% share in Raya Brewery, which will join the market in January 2016. Bavarian NV, a Dutch company, also has a 49.9% share in Habesha Brewery, which is under construction.

Table 13: Concentration Level In the Ethiopian Clear Beer Industry

Beer Company	Production Capacity (hectolitres)	Market Shares (%)	Concentration (CR ₄)
BGI Ethiopia (owns three breweries at Addis Ababa, Hawassa and Kombolcha)	2 700 000	38.03	38.03
Heineken S.C. (owns <i>Walia</i> , Harar and Bedele breweries)	2 500 000	35.21	35.21
Diageo (owner of Meta Abo Brewery)	1 000 000	14.08	14.08
Dashen Brewery	900 000	12.68	12.68
	7 100 000	100	100

Source: Addis Fortune, Vol. 15, No. 763, published on 14 December 2014.¹²¹

¹²¹ www.addisfortune-net/articles/walia-takes-overheineken-domination-of-the-ethiopian-beer-market

Table 13 provides beer production capacity in the clear beer industry in Ethiopia. According to the market shares of the major producers, the beer sector is highly concentrated, with a CR₄ of 100%.

Beer brewing is a capital-intensive business. A player in the beer industry of Ethiopia, who responded to the questionnaire prepared under this review, estimated the capital expenditure required to enter the industry on a scale necessary to gain a significant market share (of say 5% or more), both as a new entrant and as a company which already has the necessary technology and expertise, at about US\$30 million. In addition to that, about US\$7 million was estimated as the requisite annual expenditure on advertising and promotion to enter the industry competitively. Other factors affecting entry included supply chain bottlenecks, and insufficient locally sourced raw materials (barley and hops) and packaging materials. Operations are also technically complex and recourse to expatriate beer masters is common. Under these conditions, only large operators with significant experience in the sector could conceivably consider entering the market. The industry player who responded to the questionnaire however advised that this is an industry that is projected to grow significantly in the next ten years, and that there has been a rapid increase of FDI and local investment in the sector.

It was also advised that all breweries in Ethiopia are currently wholly or partially owned by foreign companies through mergers and acquisitions, and that this has resuscitated the industry. Rising demand has also led to aggressive marketing and competition between brewers.

Before the entry of new players, that is the multinational beer breweries, and the exit of SOEs, competing breweries were suspected of forming collusions to increase prices of beer, as evidenced by the uniformity of price increases of clear beer of different brands.¹²² Currently, free market competition in the beer market seems to be prevailing. The acquisition by Heineken and Diageo of State-owned breweries, and building of new ones producing new brands, increased competition for BGI Ethiopia's *St. George*, Ethiopia's oldest beer brand that was bought by France's Castel Group in 1998. As a result of the increased

competition, beer prices had dropped by as much as 20 per cent by December 2014,¹²³ with a wider choice of quality brands.¹²⁴

While there is traditional beer in Ethiopia, like in all other African countries, it is not in serious competition with industrial clear beers because it is often home-brewed or produced by small scale artisan-like operations, and is not considered by many as a close substitute to industrial clear beer.

The industry player who responded to the questionnaire advised that there is a high prevalence in the beer market of vertical restraints, such as resale price maintenance, exclusive distribution, tie-in sales, and quantity forcing, and unfair competition practices. The respondent also expressed the opinion that the prevalence of abuse of dominant position, such as excessive pricing, predatory pricing, refusal to deal, and discriminatory practices, is medium, while there are no anti-competitive agreements of a horizontal nature, including hard-core cartel activities of price-fixing, market-sharing, bid-rigging, and output restrictions.

6.2 Market Access

6.2.1 External Trade

Ethiopia's merchandise exports expanded in value by 5.6% in 2013/14, to reach US\$3.25 billion, although their GDP share decreased from 6.5% to 5.9% year on year, and imports rose from US\$11.5 billion in 2012/13 to US\$13.7 billion in 2013/14, causing the trade deficit to deteriorate, from US\$8.4 billion to US\$10.5 billion.¹²⁵ The effect on the overall balance of payments however remained contained, with the deficit down to US\$91.5 million in 2013/14 from US\$6.5 billion the previous year.

Ethiopia's major export goods in 2013 were coffee, khat, gold, leather products, live animals, and oilseeds, and its main export destinations were: China (13%); Saudi Arabia (8.3%); Germany (8.3%); United States (8.1%); and Belgium (7.1%). Major imports are food

¹²² 'Baseline Survey on Competition and Markets in Ethiopia', report on study commissioned by the Addis Ababa Chamber of Commerce and Sectoral Associations with financial support from the Swedish Agency for International Development Cooperation (SIDA), June 2009.

¹²³ Reuters Business News of 1 April 2015 (uk.reuters.com/article/2015/04/01-ethiopia-beverages-idUKKBN0547B20150401).

¹²⁴ Addis Fortune, Vol. 15, No. 763, published on 14 December 2014 (addisfortune-net/articles/walia-takes-overheineken-domination-of-the-ethiopian-beer-market).

¹²⁵ AfricanEconomicOutlook(2015)(www.africaneconomicoutlook.org/en/country-notes/notes/east-africa/ethiopia - downloaded on 5/08/2015).

and live animals, petroleum and petroleum products, chemicals, machinery, motor vehicles, cereals and textiles, with the main import sources being: China (15.3%); Saudi Arabia (8.1%); India (7.2%); and the United States (5.6%).

Ethiopia's external trade is being greatly facilitated by the various trade agreements it has negotiated at bilateral, regional and multilateral levels with various trading partners under COMESA, EPA and AGOA¹²⁶. While the facilitation will be more on generation of exports from tariff reductions and removal of non-tariff barriers by Ethiopia's trading partners, domestic firms now face, or will face, greater import competition from the trade liberalisation. The same effects will be felt from Ethiopia's membership of the WTO. This should intensify, and raise the level of, competition in Ethiopia, both between domestic traders and between domestic and foreign traders.

6.2.2 Regulation and the State

Regulation is a very general word covering many different types of public constraints on market behaviour or structures.¹²⁷ It can however be defined as referring to the various instruments by which governments impose requirements on enterprises and citizens. The effects of regulation on competition can be both of a positive and negative nature. The positive effects are that regulation basically aims at alleviating market imperfections. The negative effects can come in the form of regulatory barriers to competition, such as the creation of administrative hurdles (e.g., lengthy and complex authorisation procedures that frustrate the establishment of new market players; compliance with uncommon norms and standards that constitute barriers to market entry; and preventing foreign firms from competing in national markets).

The Constitution of the Federal Democratic Republic of Ethiopia (Proclamation No. 1/1995), which came into force and effect on 21 August 1995, is the country's supreme law, and therefore mother of all regulations. In terms of Article 9(1) of the Constitution, "[t]he Constitution is the supreme law of the land. Any law, customary practice of a decision of an organ of state

or a public official which contravenes this Constitution shall be of no effect". The Constitution has a number of provisions that impact on competition through its regulation of the economy and society.

The Constitution treats everyone equally. Article 25 provides that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status". Article 41(3) provides that "[e]very Ethiopian national has the right to equal access to publicly funded social services".

The Constitution however recognizes the need for affirmative action in its preamble, which states that "[f]ully cognizant that our common destiny can best be served by rectifying historically unjust relationships and by further promoting our shared interests". Article 35 therefore provides that "[w]omen shall, in the enjoyment of rights and protections provided for by this Constitution, have equal right with men" and that "[t]he historical legacy of inequality and discrimination suffered by women in Ethiopia taken into account, women, in order to remedy this legacy, are entitled to affirmative measures. The purpose of such measures shall be to provide special attention to women so as to enable them to compete and participate on the basis of equality with men in political, social and economic life as well as in public and private institutions".

The importance to competition of the above provisions of the Constitution is that the provisions guarantee adherence to the common competition principle of non-discriminatory treatment and general application of competition law, subject however to justifiable exemptions.

The Constitution provides for the role of both the State and non-State players in the economy of Ethiopia. Article 40(1) provides that "[e]very Ethiopian citizen has the right to the ownership of private property"¹²⁸, and that unless prescribed otherwise by law on account of public interest, that right should include the

¹²⁶ AGOA (African Growth and Opportunity Act) is a United States Trade Act enacted in May 2000 as Public Law 106 of the 200th Congress, which has been renewed to 2025. The legislation significantly enhances market access to the United States for qualifying sub-Saharan African (SSA) countries.

¹²⁷ International Competition Network, *Enforcement Experience in Regulated Sectors*, Report of the ICN Antitrust Enforcement in Regulated Sectors Working Group to the Third ICN Annual Conference held in Seoul, South Korea, in April 2004.

¹²⁸ 'Private property' for the purpose of the Constitution in terms of Article 40(2) means "any tangible or intangible product which has value and is produced by the labour, creativity, enterprise or capital of an individual citizen, associations which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common".

right “to acquire, to use and, in a manner compatible with the rights of other citizens, to dispose of such property by sale or bequest or to transfer it otherwise”. Article 40(3) however provides that “[t]he right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and the peoples of Ethiopia”, and that land is a common property of the ‘Nations, Nationalities and Peoples’¹²⁹ of Ethiopia and should not be subject to sale or to other means of exchange. Article 40(6) nevertheless provides that subject to the ownership of land by the State, “government shall ensure the right of private investors to the use of land on the basis of payment arrangements established by law”. Article 40(7) also provides that “[e]very Ethiopian shall have the full right to the immovable property he builds and to the permanent improvements he brings about on the land by his labour or capital”, and that this right include “the right to alienate, to bequeath, and, where the right of use expires, to remove his property, transfer his title, or claim compensation for it”.

Foreign nationals are also given some protection under the Constitution. Article 6(2) provides that foreign nationals may acquire Ethiopian nationality, and Article 32(1) provides that “[a]ny Ethiopian or foreign national lawfully in Ethiopia has, within the national territory, the right to liberty of movement and freedom to choose his residence, as well as the freedom to leave the country at any time he wishes to”.

The Constitution also has provisions that impact on the investigation and adjudication of cases, including competition cases. Article 20 provides for the rights of accused persons. The rights include the competition best practice of adherence to the rules of natural justice (“accused persons have the right to full access to any evidence presented against them, to examine witnesses testifying against them, to adduce or to have evidence produced in their own defence, and to obtain the attendance of and examination of witnesses on their behalf before the court”; and “accused persons have the right to be represented by legal counsel of their choice”), and of right of appeal (“all persons have the right of appeal to the competent court against an order or a judgment of the court which first heard the case”). Article 26 provides that “[e]veryone has

the right to privacy. This right shall include the right not to be subjected to searches of his home, person or property, or the seizure of any property under his personal possession” and “[e]veryone has the right to the inviolability of his notes and correspondence including postal letters, and communications made by means of telephone, telecommunications and electronic devices”, and that public officials should respect and protect these rights. These provisions regulate the gathering of information and evidence in competition investigations through ‘dawn raids’. Article 37 provides that “[e]veryone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power”, which compels competition decisions to be made either within specified periods of time or as expeditiously as possible.

The other specific regulations in Ethiopia that impact on competition include those on investment and procurement, which were analysed above, and on sector regulation, which will be analysed in the following section. Business licensing and foreign exchange allocation regulations also have a profound impact on competition because of their market entry effects.

The Ethiopian Chamber of Commerce and Sectoral Associations advised during the fact-finding visit that it is currently taking two to three months to register a company in Ethiopia, and that this is mainly because there normally is no one-window facility in the registration, with one having to go through a number of authorities before registration with the Ministry of Trade. The Chamber however confirmed that there is a special window for foreign investors in manufacturing, the processes of which are shorter, and that there are plans for one-window company registration services for all other industries and sectors for all investors, both foreign and domestic. The Ethiopian Investment Commission (EIC) confirmed that it has established a one-stop shop for investor licensing and registration services to avoid investor frustration, which handles investment licensing, business licences, capital registration, work permits, granting of loans, etc. It was advised that excluding land acquisition, it takes the EIC about two weeks to license and register a business in Ethiopia for foreign investors, and only a week for domestic investors because of less stringent capital registration requirements.

With regard to Ethiopia’s monetary and exchange rate policies, CUTS International noted: “In line with

¹²⁹The term ‘Nation, Nationality or People’ for the purpose of the Constitution is defined under Article 39(5) as to mean “a group of people who have or share large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory”.

the orthodox structural adjustment programme, deep devaluation of the domestic currency was also one of the major liberalization 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 privatized.”¹³⁰

Any governmental foreign exchange allocation system inevitably discriminates some businesses against others, and deters entry into markets by new players.

6.2.3 Sector Regulation

The interface between sector regulation and competition is a highly contentious issue, and the problem was extensively explored in a 2006 UNCTAD study.¹³¹ Despite playing complementary roles in fostering competitive markets through the alleviation of market imperfections, and safeguarding consumer welfare, sector regulation and competition policy employ different approaches and hold different perspectives that can be a source of friction. The blurring of the roles played by sector regulation and competition policy in the undertaking of the common regulatory tasks of competition protection (controlling anti-competitive conduct and mergers), access regulation (ensuring non-discriminatory access to necessary inputs, particularly network infrastructure), economic regulation (adopting measures to control monopoly pricing), and technical regulation (setting and monitoring standards to ensure compatibility and to address privacy, safety and environmental concerns)¹³² heightens the friction.

UNCTAD noted the following different mandates and approaches of sector regulators and competition authorities:¹³³ (i) the mandate of sector regulators is to

substitute for lack of competition, with a broad range of socio-economic goals, while that of competition authorities is to protect and enhance the process of competition, with emphasis on efficiency and consumer welfare; and (ii) in their approach, sector regulators attenuate effects of market power wielded by natural or network monopoly, impose and monitor behavioural conditions, use *ex-ante* prescriptive approach, and frequent interventions requiring continual flow of information, while competition authorities forestall and penalise anti-competitive conduct, impose structural (and behavioural) remedies, *ex-post* enforcement (except with merger review), and information gathered in case of investigation – with more reliance on complaints.

Nevertheless, the interaction of sector regulation and competition law and policy is not only unavoidable but is also necessary. That interaction is further described in the UNCTAD Model Law on Competition¹³⁴

Jurisdictional conflicts between sector regulation and competition law also occur as a result of ambiguities as to whether sector regulation or competition law has precedence with regard to competition issues in the regulated sectors. In many countries, sector regulators preceded competition authorities, and were thus given responsibility for competition issues in their respective sectors, which most are jealously preserving. Even in cases where new sector regulators are being created after the establishment of competition authorities, many countries choose to give them some competition responsibilities as a means of infusing and spreading competition principles in the sector-regulatory regime.

Ethiopia has a number of sector regulators in key sectors of the economy, such as the telecommunications, electricity, and financial services. The Ministry of Trade advised during the fact-finding visit that unlike under the previous competition Proclamations, the TCCPA is given overall responsibility under the current Proclamation of promoting competition, and enforcing the country's competition law, in all sectors of the economy, including the regulated sectors. In promoting competition and enforcing competition law in the regulated sectors, the Authority however needs to cooperate with the relevant sector regulators through Memoranda of Understanding (MoUs) like the one it signed and entered with the Food, Medicines and Health Care Controlling Authority (FMHCA).

¹³⁰CUTS Centre for Competition, Investment & Economic Regulation, *Policy-Induced Barriers to Competition in Ethiopia*, CUTS International, Jaipur, 2008.

¹³¹UNCTAD study on “Best Practices for Defining Respective Competences and Settling of Cases which Involve Joint Action by Competition Authorities and Regulatory Bodies” (TD/RBP/CONF.6/13/Rev.1 and TD/B/COM.2/CLP/44/Rev.2, of 17 August 2006).

¹³²*Relationship between Regulators and Competition Authorities*, OECD, Paris, 1999.

¹³³UNCTAD study on “Best Practices for Defining Respective Competences and Settling of Cases which Involve Joint Action by Competition Authorities and Regulatory Bodies” (TD/RBP/CONF.6/13/Rev.1 and TD/B/COM.2/CLP/44/Rev.2, of 17 August 2006).

¹³⁴UNCTAD, *Model Law on Competition*, United Nations, New York and Geneva, 2010 (TD/RBP/CONF.7/8).

MoUs between the TCCPA and sector regulators would forestall jurisdictional problems that could arise should the Authority investigate competition cases in the regulated sectors. Even though this has still not happened, it is bound to happen, as advised by the Authority during the fact-finding. During that visit, the Authority advised that no mergers in the financial services sector between commercial banks had so far been notified to it for examination, but that eventuality would cause jurisdiction problems for the Authority since the financial services sector is under the sector regulation of the National Bank of Ethiopia.

6.2.4 Privatization Programme

The Ethiopian Government, in line with its commitment to encourage the private sector, has adopted a broad-based economic reform programme, under which one of the reform measures is a privatisation programme that has transformed a lot of public enterprises into private ones.

One of the main arguments for the privatization of publicly owned operations is the estimated increases in efficiency that can result from private ownership, with the increased efficiency expected to come from the greater importance private owners tend to place on profit maximization as compared to government, which tends to be less concerned about profits.

Privatization is therefore considered to bring more efficiency and objectivity to the company, something that a government company is not concerned about. The advantages of privatization thus include: (i) the removal of political interference; and (ii) general increase in efficiency. In countries that embark on a serious development of a market economy, privatization of SOEs has been given a high priority.

Privatisation can however result in publicly owned monopolies being converted into private ones, with devastating effects on competition.¹³⁵ It is therefore in the area of privatisation that a competition authority's role as a competition advocator is most required.

¹³⁵Most SOEs are privatised with considerable market power, which can be exercised post-privatisation through engagement in various anti-competitive practices of both exclusionary and exploitative nature. Privately owned monopolies have also been found to be more difficult to control and regulate than publicly owned ones. The competition advocacy role of competition authorities in privatisation is therefore very important. While most competition authorities do not have the necessary statutory powers of blocking a privatisation, what they have are powers of competition advocacy.

As pointed out by OECD, "a competition agency's participation as advocate for competition is probably nowhere more important than in privatization".¹³⁶ The International Competition Network (ICN) defined the term 'competition advocacy' as to refer to "those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other government entities and by increasing public awareness of the benefits of competition"¹³⁷. The Turkish Competition Authority on its website also referred to 'competition advocacy' as "the initiatives by competition authorities in relation to establishing and fostering a competition environment mainly through their relations with other public organisations, but also through raising public awareness of the benefits of competition, besides implementing competition rules".¹³⁸

Competition advocacy in privatization therefore plays a key role in the effective implementation of competition policy. While the enforcement of competition law is critical in the fight against restrictive business practices, and in ensuring consumer welfare, competition advocacy is vital in promoting voluntary compliance with the law, and in facilitating effective enforcement.

As also pointed out by OECD, one of the most significant forums for competition advocacy is in regulatory reform or deregulation.¹³⁹ In most developing countries, the economies are characterized by State-owned monopolies in infrastructure industries, such as telecommunications, electricity, railways, air transportation, and petroleum. Other markets, including financial markets, are also characterized by a high degree of government participation and control. Privatisation and deregulation of these sectors is usually a priority in countries that are progressing towards a market economy, and it is critical that these processes incorporate sound competition policy principles.

¹³⁶OECD, *Competition Advocacy: Challenges for Developing Countries*, 2004. (<http://www.oecd.org/daf/competition/prosecutionandlawenforcement/32033710.pdf>)

¹³⁷*Advocacy and Competition Policy*, report prepared by the ICN Advocacy Working Group for the ICN's Conference Naples, Italy, 2002 (available at www.internationalcompetitionnetwork.org/upload/library/doc.358.pdf).

¹³⁸<http://www.rekabet.gov.tr>

¹³⁹OECD, *Competition Advocacy: Challenges for Developing Countries*, 2004. (<http://www.oecd.org/daf/competition/prosecutionandlawenforcement/32033710.pdf>)

Privatisations, like all changes of control, affect the structures of the relevant markets. A 2000 UNCTAD study noted that privatization may produce horizontal or vertical concentrates or conglomerates that may affect one or more markets.¹⁴⁰ The likely anti-competitive effects include substantial lessening of competition through monopolization and market foreclosures.

In a privatization process, the objectives of agencies responsible for competition and those responsible for the privatization may also differ. The competition agency, on one hand, could be trying to make sure that the process is transparent, prevent collusion between bidders, and monitor the effects of economic concentrations on the markets. The agency handling the privatization, on the other hand, would be trying to sell to the highest bidder and to obtain as high price as possible, disregarding the need of ensuring that the process does not restrict free competition. In privatization sales, the State has an interest in maximizing its revenues from the disposal of its enterprises, and to dispose of the enterprises as quickly as possible to resolve fiscal problems. The incentive therefore is to create and sell an enterprise that has market power, and that is insulated from competition, since that attracts higher bids from potential buyers. Therefore, as noted by Khemani and Clark (1999), there is tension in the privatization process between the desire of the State to obtain the maximum price for the privatized assets and need for the creation of efficiency-enhancing, competitive markets.¹⁴¹

Since privatisation can be an intensely political process, and there may be powerful interests in support of an anti-competitive transaction, competition advocacy in privatization should be aimed at raising awareness of privatization authorities and politicians and persuading them of the importance of adhering to competition principles during privatisations. The competition principles that must be followed include those related to regulation of mergers and acquisitions, and elimination of abuse of dominance (monopolisation).

¹⁴⁰UNCTAD, *Developing a Competition Advocacy Model in the Context of the Introduction of Competition Policies in Latin America*, United Nations, New York and Geneva, 2000 (UNCTAD/ITCD/CLP/Misc.12).

¹⁴¹R. Shyam Khemani and John Clark, Chapter on "Competition Advocacy", in *A Framework for the Design and Implementation of Competition Law and Policy*, The World Bank, Washington, D.C., and Organisation for Economic Co-operation and Development (OECD), Paris, 1999.

Khemani and Clark (1999)¹⁴² observed that "[t]hrough competition advocacy a competition agency can influence government policies by proposing alternatives that would be less detrimental to economic efficiency and consumer welfare. It can serve as a buttress against lobbying and economic rent-seeking behaviour by various interest groups. It can foster greater accountability and transparency in government economic decision-making and promote sound economic management and business principles in both the public and private sectors".

Ethiopia embarked on a privatization programme aimed at encouraging the private sector under its broad-based economic reform programme. The reform programme followed the accession to power of the Ethiopian People Revolutionary Democratic Front (EPRDF) in 1991, which adopted the typical structural adjustment policies of market liberalisation with the support of the IMF. As part of the reforms, the Ethiopian Government launched a programme for the privatisation of SOEs in 1995. The statement on the privatisation programme that appeared in 2012 in the Ethiopian Government Portal on Investment Opportunities is summarised in Box 10.

Selvam (2007)¹⁴³ noted that privatisation in the Ethiopian context was conceived "as an important ingredient of the transformation from a command to a market oriented economy, reduction of alarming budget deficit and external debt, injection of openness into economy and development of private sector at macro level, and alleviation of problems such as managerial inefficiency and poor performance of SOEs at the micro level". He further noted that "the first and foremost reason that expedited the privatisation programme in Ethiopia was the poor performance of SOEs particularly in production and utilisation of plant capacity", and that "a rise in the number of weak SOEs and their disappointing performance in production became major syndromes for privatisation".

In its October 1999 Report, the Commercial Section of the United States Embassy in Addis Ababa reported on the progress of the privatisation programme in Ethiopia, which it noted as a good start on privatisation.¹⁴⁴ It

¹⁴²World Bank and OECD Report on "A Framework for the Design and Implementation of Competition Law and Policy" <http://documents.worldbank.org/curated/en/977331468759588195/pdf/multi-page.pdf>

¹⁴³Dr. Jesiah Selvam, *Privatisation Programme in Ethiopia: Is the Cause Justified?*, African Renaissance, Vol.4 No.1, 1st Quarter 1 2007 (papers.ssrn.com/so/3/papers.cfm?abstract_id=987606).

¹⁴⁴http://www.geocities.com//o-dagmawi/NewsOct99/Oct2_Privatization.html.

Box 10: EPA Statement on Launch of Privatisation Programme in Ethiopia

The Ethiopian Government launched a programme for the privatization of state owned enterprises in early 1995. Accordingly, the Ethiopian Privatisation Agency (EPA) was established to implement the privatization programme in the same year. The Government has laid the ground to privatize most of the state owned enterprises. Accordingly, EPA has received a stock of 113 state owned enterprises from the government for privatization in the years ahead. As indicated in EPA's work schedule, out of these enterprises, a total of 43 State owned enterprises are in the pipeline for privatization in the near future. Most of these enterprises fall under manufacturing, construction, agriculture and agro-industry, hotels, transport, trade and mining sectors. There is a strong commitment from the Government to fully privatize state enterprises in the coming few years.

Source: Ethiopian Government Portal on Investment Opportunities (<http://www.ethiopia.gov.et/investmentopportunities>)

was reported that up through May of 1999, Ethiopia had privatised 175 public firms. Those consisted mainly of the 72 units within the Ethiopian retail trade corporation, composed of small shops that dealt in groceries, food, shoe and leather goods, construction materials, automotive service, textiles, and stationary. In addition, the government had sold 14 small hotels and restaurants, 34 printing offices, and 15 furniture stores. The manufacturing industries privatised included three flour mills, three edible oil mills, four furniture and woodworking plants, the bottling plants for Coca-Cola and Pepsi Cola, several tanneries, and various chemical, metal working, and construction factories. The most prominent privatisations were the sales of the Lega Dembi gold mine, the Saint George brewery, the National Tobacco factory, and a number of meat, dairy and livestock farms. The total sum obtained from those privatizations was 2.86 billion Birr.

It was also reported that Ethiopia's continued privatisation would take place in tranches, with the first tranche involving 41 SOEs being offered to the public, including:

- nine firms in the food industry (flour mills and edible oil factories);
- four firms in the garment industry;
- four textile factories (including recently equipped plants in Awassa and Arba Minch);
- six firms in the leather industry;
- four construction materials companies;
- the three remaining public breweries of Meta, Harar, and Bedele;
- the Awash Winery;
- the Ethiopian Plastic Factory; and
- several tea and coffee plantations.

In 2004, the Ethiopian government merged the Ethiopian Privatisation Agency (EPA) and the Public Enterprises Supervising Authority (PESA) to form the Privatisation and Public Enterprise Supervising Authority (PPESA) with a view to coordinating the implementation of the privatisation programme with the activities of public enterprises.¹⁴⁵ PPESA was established by Proclamation No. 413/2004.

In March 2012, PPESA had sold off seven State firms, and was eyeing privatization of another forty firms.¹⁴⁶ It was however also reported that the privatization ruled out airlines, telecommunications and banks. More recently in December 2013, PPESA offered eleven enterprises for sale, including Ethiopian Pharmaceuticals Manufacturing S.C.¹⁴⁷ From the eleven enterprises offered for sale, only five attracted bidders. They were Ethiopian Pharmaceuticals Manufacturing S.C., Hamaressa Edible Oil S.C., Bakelcha Transport S.C., Kambolcha Textile S.C., and Caustic Soda S.C. The enterprises that failed to attract any bidders were the Ethiopian Minerals Development S.C., Bahir Dar Textile S.C., Wayra Transport S.C., Artistic Printing Enterprise S.C., Agricultural Mechanisation Services Enterprises and Transport Construction Design S.C.

The opening privatisation bid for the 2015/16 fiscal year in July 2015 drew three bidders for one enterprise and none for the other four offered by PPESA.¹⁴⁸ PPESA had offered to sell Bilito Sirano Farm, Bahir

¹⁴⁵ www.ppesa.gov.et.

¹⁴⁶ <http://www.reuters.com/article/2012/03/29/ethiopia-privatisation-idUSL6E8ET53G201>

¹⁴⁷ The other State-owned enterprises offered for sale were Hamaressa Edible Oil S.C., Bekelcha Transport S.C., Kombolcha Textile S.C., Caustic Soda S.C., Kombolcha Textile S.C., Ethiopian Minerals Development S.C., Bahir Dar Textile S.C., Weyra Transport S.C., Artistic Printing Enterprise S.C., Agricultural Mechanisation Service Enterprise and Transport Construction Design S.C. (<http://allafrica.com/stories/201312170198.html>)

¹⁴⁸ addisbiz.com/component/tags/tag/302-ethiopian-privatization-public-enterprise-supervising-agency-ppse (downloaded on 1/1/2016).

Dar Textile S.C. and Kombolcha Textile S.C. through negotiation with the winning bidder, while it offered no negotiation for Agricultural Mechanisation Services Enterprises and Artistic Printing Enterprise S.C.

PPSEA during Ethiopia's first Growth and Transformation Plan: 2010/11-2014/15 (GTP) transferred 52 enterprises to private ownership, from which it collected Birr 13.6 billion.¹⁴⁹ It had also transferred enterprises in a joint venture scheme where the Agency managed to transfer seven out of the ten enterprises planned. For the second GTP, the Agency plans to transfer 16 enterprises, only four of which will be offered for sale for the first time. These are National Alcohol & Liquor Factory, Awash Melekassa Aluminium Sulfate & Sulfuric Acid S.C., Langan Resort Hotel, and Ethiopian Pulp & Paper Factory S.C.

From the above, it seems clear that the desired revenue-generating objective of Ethiopia's privatization programme was met in that the SOEs were sold to the highest bidders, and considerable revenue accrued to the State. What is not clear is whether competition concerns were fully taken into account in the process, or were sacrificed. For example, the approved privatisations involved acquisitions of the SOEs by other established enterprises in the same relevant markets, and that therefore constituted mergers as defined in Proclamation No. 813/2013 for regulatory control by the TCCPA. The acquisition of Ethiopian Pharmaceutical Manufacturing S.C. by Medi Tech Ethiopia Plc, and of Tikur Abay Transport S.C. by Bekelcha Transport S.C., in particular constituted horizontal mergers, which are the most harmful to competition of the three common types of mergers by the mere fact that they reduce the number of competing firms in the relevant market. Such mergers directly lead to market concentration, which could in turn create monopoly or dominant positions that reduce or eliminate competition. Therefore, the competitive effects of horizontal mergers in particular need to be thoroughly examined by competition authorities.

It is noted that the TCCPA was not fully operational at the time of the above privatisations¹⁵⁰, but it is imperative that the Authority get involved in the future privatisation of SOEs, either as an advocate of competition and/or

an enforcer of the country's competition law. Ethiopia is implementing an ambitious privatisation programme, and the formulation and enactment of the country's competition policy and law, with the establishment of the enforcement competition authority should ensure that the privatisation process is done effectively and transparently in line with competition principles.¹⁵¹

The Trade Competition and Consumers Protection Proclamation (No. 813/2013) give the TCCPA the necessary advocacy functions. The powers and duties of the Authority in terms of Article 30 of the Proclamation include: "(i) to take appropriate measures to develop public awareness on the provisions of this Proclamation and its implementation; (ii) to undertake study and research in connection with trade competition and consumer protection, and initiate policy proposals; and (iii) to organise various education and training forums and provide education and training in order to enhance the awareness of consumers".

The Proclamation also has elaborate merger control provisions, which give the TCCPA the necessary powers of examining and making determinations on mergers and acquisitions. In terms of Article 9(3) of the Proclamation, a merger is deemed to have occurred: "(a) when two or more business organisations previously having independent existence amalgamate or when such business organisations pool the whole or part of their resources for the purpose of carrying on a certain commercial activity; or (b) by directly or indirectly acquiring shares, securities or assets of a business organisation or taking control of the management of the business of another person by a person or group of persons through purchase or any other means". The Authority can therefore use the merger control provisions of the Proclamation to intervene in those privatisations that constitute mergers.

It is however noted that the Proclamation does not specifically apply to privatization transactions. Article 4(1) of the Proclamation provides that "[t]his Proclamation shall apply to any commercial activity or transaction in goods or services conducted or having effect within the Federal Democratic Republic of Ethiopia". Since privatisations are commercial activities, privatization transactions would therefore fall

¹⁴⁹Ibid.

¹⁵⁰The former Trade Practice and Consumers Protection Authority was however operational, and had merger control powers under the Trade Practice and Consumers' Protection Proclamation (No. 685/2010).

¹⁵¹A. J. Kububa, in his presentation on *Competition Advocacy in Privatisation*, at an UNCTAD workshop on 'Role of Competition in Fostering Economic Development', held in Addis Ababa, Ethiopia, on 10 June 2014.

under the application of the Proclamation, and thus the jurisdiction of the TCCPA, but could be exempted under Article 4(3) of the Proclamation, which provides that “the provisions of this Proclamation may not affect the applicability of regulatory functions and administrative measures to be undertaken in accordance with other laws” since the privatisation programme of Ethiopia is governed by another Proclamation.

The TCCPA should therefore have close working relationships, and negotiate and conclude a cooperation agreement, with PPESA. Under such a relationship and agreement, TCCPA would receive prior notification from PPESA of privatisation cases to enable it to assess the competitive effects of the transactions, and give the necessary competition advocacy advice and guidance.

It was however advised during the fact-finding visit to Ethiopia that the privatisation programme has slowed down, and that PPESA might be restructured. The Ethiopian Chamber of Commerce and Sectoral Associations (ECCSA) nevertheless noted that there are still a number of SOEs in various industries and economic sectors of Ethiopia, notably: (i) the telecommunications sector; (ii) the energy sector; (iii) the mining industry (particularly in gold mining); and (iv) the agriculture industry. In some of the industries and sectors, private companies are also allowed. For example in the mining industry, some mining permits have been given to private companies, and private companies are also allowed in the agriculture industry. The private legal practitioner consulted during the visit also advised that Ethiopia still has a lot of SOEs despite the privatisation programme, and that new ones are even being established, for example, in the sugar and metal industrial technology sectors. Most of the SOEs compete with other enterprises in the private sector, with the notable exception of the ones in the telecommunications and electricity sectors, and the tobacco industry.

The remaining SOEs seem not to cause much competition concerns in Ethiopia. During the fact-finding visit, the Ministry of Trade advised that before the previous week’s Cabinet reshuffle, the Ministry used to have two SOEs under its administration, the Ethiopian Grain Trade Enterprise (EGTE) and the Ethiopian Trading Enterprise (ETE), which competed with private companies in their respective trading areas. The SOEs received no preferential treatment from the Government, and complied with all regulations like private companies. They also financed

their operations from their own income, and the Ministry could have let them leave the market had they failed to finance themselves. The Ethiopian Chamber of Commerce and Sectoral Associations (ECCSA) however submitted that even though in principle the Government grants equal opportunities to SOEs and private companies, in reality private companies are discriminated against by other public organisations in favour of SOEs to make them less competitive. The example given was the Development Bank of Ethiopia, which allegedly gives more financial assistance to SOEs in the form of loans. It was also suspected that SOEs benefit more from the allocation of land, which is State-owned, in terms of lease requirements.

As stated in the *Baseline Survey on Competition and Markets in Ethiopia* study commissioned by the Addis Ababa Chamber of Commerce and Sectoral Associations, the presence of SOEs, who *de jure* or *de facto* often enjoy preferential treatment whenever dealing with government authorities, distorts fair competition in the relevant markets.¹⁵² The statement is more than a mere perception since it can be corroborated by practical experiences of many countries, both developing and developed.

6.2.5 Concessions

According to the OECD, an accepted definition of a concession is “a grant to a private firm of the right to operate a defined infrastructure service and to receive revenues deriving from it”.¹⁵³ Apart from infrastructure services, the right to use natural resources may also constitute the subject of concessions.¹⁵⁴ Concessions are a particular form of public-private partnership, and are often viewed as a substitute for privatisation when the latter is not feasible for political or legal reasons.¹⁵⁵ OECD noted that concessions often occur in situations where competition *in* the market is not feasible, or not likely to flourish, because of natural monopoly or

¹⁵² ‘Baseline Survey on Competition and Markets in Ethiopia’, report on study commissioned by the Addis Ababa Chamber of Commerce and Sectoral Associations with financial support from the Swedish Agency for International Development Cooperation (SIDA), June 2009.

¹⁵³ OECD, *Policy Brief: Competition Policy and Concessions*, Organisation for Economic Co-operation and Development, Paris, May 2007 (<http://www.oecd.org/dataoecd/12/47/38706036.pdf>)

¹⁵⁴ UNCTAD, *Public Monopolies, Concessions, and Competition Law and Policies*, United Nations Conference on Trade and Development, Geneva, April 2009 (TD/B/C.1/CLP/2).

¹⁵⁵ OECD, *Policy Brief: Competition Policy and Concessions*, Organisation for Economic Co-operation and Development, Paris, May 2007 (<http://www.oecd.org/dataoecd/12/47/38706036.pdf>).

related structural conditions, but that concessions are a way of providing competition for the market.¹⁵⁶ The awarding of concessions is where competition for the market occurs, and the most effective means of the awarding has been found to be through the auctioning system, using either the ascending-bid auction or the first-price sealed-bid auction.¹⁵⁷

UNCTAD also noted that building and operating large infrastructure projects, such as airports and toll roads, are typical examples where concessions may be used, but the concessionaire may take over the operation of existing infrastructure, often with the concessionaire assuming the financial risks.¹⁵⁸

As stated by OECD, a competition agency has an important role to play in concessions, and should become involved early in the process. The involvement of the competition agency is strongly suggested to be as follows: (i) the competition agency can use its competition advocacy functions at the initial stage by assisting the concessioning agency in designing the structure of the concession to maximize post-award competition, for example by recommending appropriate horizontal and vertical splits, and ensuring that there should be no exemptions or exclusions from the competition law in sectors where there are concessions; (ii) the competition agency can also advise on the concession award process, particularly in the selection of the most efficient means of award and on minimising the opportunities for collusion in auctions; and (iii) the competition agency must vigorously enforce the competition law throughout the process. Where the concessionaire is a monopolist, the abuse of dominance provisions of competition law must be applied, and merger control provisions of competition law should be applied, either to horizontal mergers between competing concessionaires or to vertical acquisitions by monopolist concessionaires that could have harmful effects to competitive markets.¹⁵⁹ The application of merger control provisions of competition law must be done *ex-ante* as part of the concession awarding process before the concession award; otherwise it would be ineffective, while the application of the abuse of dominance provisions has to be done *ex-post* on infringement of the law.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ UNCTAD, *Public Monopolies, Concessions, and Competition Law and Policies*, United Nations Conference on Trade and Development, Geneva, April 2009 (TD/B/C.1/CLP/2).

¹⁵⁹ OECD, *Policy Brief: Competition Policy and Concessions*, Paris, May 2007 (<http://www.oecd.org/dataoecd/12/47/38706036.pdf>).

The Civil Code (1960) of Ethiopia has some provisions on concession of public services in its Chapter 2. Article 3207 of the Code provides that: "(1) Any activity which a public community has decided to perform for the reasons that it has deemed it to be necessary in the general interest and considered that private initiative was inadequate for carrying it out shall constitute a public service. (2) The concession of a public service is the contract whereby a person, the grantee, binds himself in favour of an administrative authority to run a public service getting a remuneration therefor by means of fees received on the use thereof".

Article 3216 of the Code provides that the administrative authorities having granted the concession may, during its currency, impose on the grantee (concessionaire) all the obligations which they think fit for the proper operation or improvement of the service granted, and modifications of the organisation of the service provided in the act of concession or in the specifications (as long as they do not modify the nature or object of the contract). Article 3224 provides that neither the administrative authorities nor the grantee should take measures discriminating between the users and destroy the equality of treatment of the users, and that tariffs of service may not contain differentiation between categories of users unless such differentiations are in respect of different conditions of users in relation to the public service. Article 3227 provides that while the duration of the concession should be fixed by the contract, it may not exceed sixty years. It is also provided that unless otherwise expressly provided, the concession should be deemed to have been made for a period of seven years.

The principles and controls of competition are therefore enshrined in the concessions provisions of the Code. The granting of concessions in Ethiopia is expected to be intensified with the slow-down in the privatisation programme. The TCCPA's role in the process would be indispensable, not only from its competition advocacy functions but also from its enforcement of the competition provisions of Proclamation 813/2013, particularly those on abuse of market dominance and merger control.

6.2.6 Small and Medium Sized Enterprises

While a broad generic definition can be taken for 'small and medium-sized enterprises' (SMEs), different countries have specific definitions for what types of enterprises can be called an 'SME'. According to OECD, "SMEs are defined as non-subsidary,

independent firms which employ fewer than a given number of employees. This number varies across national statistical systems. The most frequent upper limit is 250 employees, as in the European Union. However, some countries set the limit at 200 employees, while the United States considers SMEs to include firms with fewer than 500 employees. Small firms are generally those with fewer than 50 employees, while micro-enterprises have at most ten, or in some cases five, workers. Financial assets are also used to define SMEs. In the European Union, SMEs must have an annual turnover of EUR 40 million or less and/or a balance sheet valuation not exceeding EUR 27 million".¹⁶⁰

It has been advanced that three keywords can be used to define SMEs – ‘small’, ‘single’ and ‘local’.¹⁶¹ SMEs are *small* in nature, either in terms of number of employees, or capital and assets, or turnover. Most SMEs have a *single* owner who could also be the sole employee. The ‘single’ also refers to single products produced or services provided. SMEs are essentially *local* in nature, with their market usually localised to the area where they are located, or may be ‘local’ in the sense that they operate from a place of residence. SMEs are not limited to any particular type of industry or service, and can include small manufacturing facilities, small processing units, trading companies, export-import companies, distribution, retailing, rental, service company, etc. A key fact that distinguishes SMEs from enterprises in the informal sector is the fact that they are legally registered companies/businesses.

The importance of small and medium enterprises in Ethiopia is that they mainly comprise the country’s industrial sector, as stated by the Ethiopian Investment Commission (EIC).¹⁶² The country’s Industrial Development Strategy (IDS) accordingly declared micro and small enterprises (MSEs) as one of the priority sectors for government direct support with the expectation that such enterprises foster the emergence of entrepreneurs and have the opportunity of creating large employment opportunities.

During the fact-finding visit to Ethiopia, the Ministry of Trade advised that the Ministry’s policy on SMEs is that micro and small enterprises (MSEs) must be given

all possible assistance since they comprise a sizable number of enterprises in Ethiopia (10-15%) and generate a lot of employment. The Ministry assists MSEs, particularly in the licensing of their businesses through the establishment of a one-stop licensing and registration window, and providing them with training opportunities. The Ethiopian Chamber of Commerce and Sectoral Associations also submitted that SMEs have an important role to play in the economy of Ethiopia, particularly in employment generation. SMEs’ major problem is however accessing financing services, since commercial banks have a preference for large companies in granting loans because most SMEs lack collateral. The Micro and Small Enterprises Agency and the Development Bank of Ethiopia are however actively promoting these enterprises.

6.2.7 Regional Competition Regimes

One other particular issue of a market access nature in the implementation and enforcement of competition policy and law in Ethiopia is in the context of regional integration. In that regard, of all the regional groupings that Ethiopia is a member of, COMESA is the most advanced in the implementation of competition policy. Article 55 of the Treaty Establishing the Common Market for Eastern and Southern Africa enunciates the COMESA competition law and provides for the formulation of rules to regulate competition in the Common Market. The Article provides for the prohibition of “...any agreement between undertakings or concerted practices which has as its objective or effect the prevention, restriction, or distortion of competition within the Common Market”.

In December 2004, the COMESA Council of Ministers invoked Article 55 of the COMESA Treaty by adopting the COMESA Competition Regulations. The adoption of the COMESA Competition Regulations was in realisation that enforcement of competition and consumer policies in the Common Market could help to facilitate the achievement of regional economic integration.

The COMESA Competition Regulations created a ‘One Stop Shop’ for the notification and assessment of cross-border transactions within the Common Market, thereby reducing the burden and cost of doing business in the COMESA region, given that such transactions no longer needed to be examined in each Member State. The COMESA competition regime also provides the only and most extensive network of national competition authorities in Africa. The

¹⁶⁰OECD, *Policy Brief: Small and Medium-sized Enterprises: Local Strength, Global Reach*, Paris, June 2000.

¹⁶¹Global Development Research Center, “What are SMEs?” (www.gdrc.org/sustbiz/what-are-smes.html).

¹⁶²Ethiopian Investment Commission, *Ethiopian Investment Guide 2014*.

Regulations established the COMESA Competition Commission (CCC) for its enforcement, which enjoys international legal personality in the territory of each Member State and the legal capacity required for the performance of its functions.

With the commencement of the enforcement of the COMESA Competition Regulations in January 2013, there are now two separate legal regimes which govern the enforcement of competition law in the COMESA region, namely: (i) the national competition laws, which are the national legal orders comprising the respective bodies of competition rules within each of the COMESA Member States; and (ii) the regional legal framework, which comprise the body of legal rules created at COMESA level such as the COMESA Competition Regulations and Rules. Given the two legal orders, the national order applies to the

prohibition of anti-competitive practices emanating at national level, hence enforced by the national competition authorities in their respective Member States, whereas the regional framework is invoked where there is a cross-border impact. The impact of cross-border trade is implicit in light of the scope of application of the Regulations which mandates the CCC to intervene only when the agreement or conduct has an appreciable effect on trade between Member States.

In order to effectively implement and enforce the COMESA Competition Regulations, the harmonisation of the Regulations with national competition laws is a requirement. The extent of the harmony between Ethiopia's national competition law, which is enshrined in Proclamation 813/2013, and the COMESA Competition Regulations is shown in Table 14.

Table 14: Harmony of COMESA Competition Regulations and Trade Competition and Consumer Protection Proclamation

Provisions	COMESA Competition Regulations	Ethiopian Competition Proclamation
General	<ul style="list-style-type: none"> Definition of terms used in the legislation. The purpose of the Regulations is to promote and encourage competition by preventing restrictive business practices and other restrictions that deter the efficient operation of markets, and to protect consumers against offensive conduct by market actors. The Regulations apply to all economic activities whether conducted by private or public persons within, or having an effect within, the Common Market. Exemptions and exclusions include collective bargaining agreements, and certain activities of trade unions and professional associations. 	<ul style="list-style-type: none"> Definition of terms used in the legislation. The objectives of the Proclamation are to: (i) protect 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; (ii) ensure that consumers get goods and services safe and suitable to their health and equivalent to the price they pay; and (iii) accelerate economic development. The Proclamation applies to any commercial activity or transaction in goods or services conducted or having effect within Ethiopia. Exemptions may be specified by the Council of Ministers in regulations.
Institutional Arrangements	<ul style="list-style-type: none"> Establishment of an enforcement Commission, with provisions on: (i) functions and powers of the Commission; (ii) appointment of Director and recruitment of staff of Commission; (iii) composition, tenure, and functions of Board of Commissioners. 	<ul style="list-style-type: none"> Establishment of an enforcement Authority, consisting of a Director General, investigative officers and prosecutors, and judges of adjudicative benches. Establishment of an Appellate Tribunal, and regional consumers' protection judicial organs.
Anti-Competitive Business Practices and Conduct	<ul style="list-style-type: none"> Prohibition of abuse of dominant position, and of anti-competitive agreements (fixing prices, collusive tendering, market or customer allocation). Authorisation of anti-competitive practices 	<ul style="list-style-type: none"> Prohibition of abuse of market dominance, anti-competitive agreements, and unfair competition.
Mergers and Acquisitions	<ul style="list-style-type: none"> Pre-merger notification. Substantive merger control test of substantial prevention or lessening of competition. Behavioural and structural remedial action on anti-competitive mergers. 	<ul style="list-style-type: none"> Pre-merger notification. Substantive merger control test of significant adverse effect on competition. Merger determination in the form of approval, with or without conditions, or prohibition of the merger transaction.
Consumer Protection	Consumer protection provisions covering: (i) false or misleading representation; (ii) unconscionable conduct in consumer and business transactions; (iii) warning notice to the public; (iv) product safety standards and unsafe goods; (v) product information standards; (vi) liability in respect of unsuitable goods, and for defective goods causing injury or loss; and (vii) unidentified manufacturer.	Consumer protection provisions covering: (i) rights of consumers; (ii) display of price of goods and services, and self-disclosure; (iii) labelling of goods, and issuing receipts; (iv) commercial advertisements; (v) defects in goods and services; (vi) contractual waiver of rights; and (vii) distribution of goods and services (hoarding and diverting of goods, regulating prices of basic goods and services, distributing of basic goods).

Ethiopia's Proclamation 813/2013 is in relative harmony with the COMESA Competition Regulations in so far as the coverage of common competition and consumer protection issues are concerned. The Proclamation however has more elaborate provisions on consumer protection, including those on hoarding and basic goods and services price regulation. Its provisions on unfair competition also extend the prohibition of abusive exclusionary practices of dominant firms to practices by all firms aimed at harming the business interests of competitors. This is not surprising since by their nature, national competition laws should be more elaborate and specific on those competition and consumer protection concerns that are of particular worry to the country.

There should therefore be no contradictions in the TCCPA's enforcement of the Proclamation and in its assisting the CCC in the investigation of competition and consumer cases under the regional Regulations. In that regard, cooperation agreements between the CCC and national competition authorities in the application and enforcement of the Regulations are being negotiated.

Ethiopia stands to benefit to a great extent from its active participation in the regional COMESA competition regime, not only from the prevention of anti-competitive practices of a cross-border nature

that affect its economy but for which it does not have jurisdiction, but also from technical assistance and capacity building in the handling of national competition cases. In particular, the TCCPA can gain from the CCC's wide experience in merger control. During the first year following the operationalization of the CCC, the Commission examined about 75 mergers and acquisitions with a regional dimension, with some of them having had economic effects on Ethiopia. Indeed, TCCPA did receive technical assistance from COMESA, which, with the support of and in cooperation with UNCTAD, detached the head of its Mergers & Acquisitions Department in December 2015 for a month to TCCPA to provide on-the-job training to TCCPA's staff members in handling merger cases.

The CCC is encountering challenges related to the implementation of the Regulations within the COMESA Member States emanating from some Member States' legal systems that require international law instruments to be incorporated into the national law before their application. This domestication of the COMESA Competition Regulations has not been done by some Member States. This particularly affects the investigation of anti-competitive business practices of a cross-border nature, which need to be undertaken in the affected Member States.

7. SELECTED CONSUMER PROTECTION ISSUES

During the fact-finding visit to Ethiopia it was advised that the Ethiopian Consumer Association was presently not functioning because its license had been revoked. That effectively left the TCCPA as the sole organisation responsible for consumer protection and welfare.

There were however stakeholder views expressed during the visit that competition promotion functions and those related to consumer protection should not be undertaken by the same Authority because consumer issues are normally so numerous that they overwhelm competition issues, and therefore call for more time of the Authority at the expense of competition matters. Arguments have been advanced for and against the handling of competition and consumer protection matters in the same legislation and/or under the same enforcement authority. While the substantive linkages between competition and consumer protection have come to receive wide recognition, there is still substantial debate on the advantages and disadvantages of institutional integration of enforcement.

It has been noted that consumer protection is more diverse and goes beyond ensuring the efficient allocation of resources, whereas competition regimes are only one among the various mechanisms for consumer protection. While competition cases are broader in scope in the sense that they affect entire markets, consumer protection cases typically involve a specific practice by a single firm. The regulatory tools available to competition and consumer protection are therefore different. The dominating nature of consumer cases due to incidence of smaller but more numerous complaints has also been cited as a supporting argument to separate enforcement of competition law and consumer protection legislation.

The proponents of integration of the two areas stress that it would have the effect of clarifying jurisdictional issues, enable the comprehensive treatment of issues from both perspectives, and bring about a more consistent and coherent implementation of regulatory policy. Another advantage of having

a single authority with the two functions is that consumer protection issues are more popular with the society so as to benefit the authority in terms of visibility and good reputation. Competition and consumer issues are complementary, and not contradictory, and are so inter-related that the common adage that ‘the ultimate objective of competition policy is consumer welfare’ was coined.

As stated by the Addis Ababa Chamber of Commerce and Sectoral Association (AACCSA), the nexus between competition and consumer protection is to be found in their common purpose – a functioning free market by addressing market failures.¹⁶³ UNCTAD underlies the complementary relationship between competition and consumer protection policies. Competition policy addresses the supply side of the market and aims to ensure that consumers have adequate and affordable choices, while consumer policy tackles demand-side issues and aims to ensure that consumers can exercise their choices effectively.¹⁶⁴ The DG Competition of the European Commission is quoted as having stated that competition and consumer protection are intimately related – two sides of the same coin. The AACCSA stated further that the linkage is also manifest in the role of competition as a tool for consumer protection, since by ensuring the efficient allocation of resources in the market, competition brings forth the best possible choice of quality, the lowest possible prices, and adequate supplies to consumers.

The advantages of integrating the two areas for implementation under a single authority outweigh the disadvantages such that the trend nowadays is to combine competition and consumer protection provisions in the same legislation for enforcement by a single authority, or to have two separate

¹⁶³ *Review of the Legal and Institutional Framework for Market Competition in Ethiopia*, report commissioned by the Addis Ababa Chamber of Commerce and Sectoral Associations with financial support from the Swedish Agency for International Development Cooperation (SIDA), February 2009.

¹⁶⁴ UNCTAD, *The Benefit of Competition Policy for Consumers*, (TD/B/C.I/CLP/27), Geneva, 2014, available at: http://unctad.org/meetings/en/SessionalDocuments/ciclpd27_en.pdf and for more on consumer protection and competition policy see the background note by the UNCTAD Secretariat at: http://unctad.org/meetings/en/SessionalDocuments/tdbciemd2_en.pdf.

legislations enforced by a single authority. In the East and Southern African region, the new Competition and Consumer Protection Act, 2010 (No. 24 of 2010) of Zambia has both competition and consumer protection provisions, and is administered by the Competition and Consumer Protection Commission (CCPC). In Seychelles, the Fair Trading Commission (FTC) administers both the Fair Competition Act, 2009 and the Consumer Protection Act, 2010. At the regional level, the

COMESA Competition Regulations contain both competition and consumer protection provisions administered by the CCC.

It is true that consumer issues, by their nature, are more numerous than competition issues, as has been evidenced in Ethiopia. As such, more resources have to be devoted to their handling. What would be required is proper resource management and allocation to ensure adequate meeting of both objectives.

8. CONCLUSION AND RECOMMENDED POLICY ACTIONS

8.1 Conclusions

The regulation of competition is a fairly recent phenomenon in Ethiopia. The evolution of competition policy and law can however be traced back to the Imperial Regime (1930-1974) since it pursued a market-based economic policy. It was during that period that the Commercial Code (1960) and the Civil Code (1960) were adopted with provisions that prohibited unfair practices that affected trade within Ethiopia. The Criminal Code (2004) and the Trademark Registration and Protection Proclamation (No. 501/2006), which had the same objective of prohibiting unfair practices that affected trade within Ethiopia, were subsequently passed during the current EPRDF Regime, which is in place since 1991. The EPRDF Regime had adopted the typical IMF-sponsored structural adjustment programs promoting market liberalisation, and was committed to enforcing a free market economic policy following the socialist economic policies of the Derg Regime of 1974-1991, and therefore formalised competition policy and law in Ethiopia.

Ethiopia enacted its first ever competition law in 2003 under the Trade Practice Proclamation (No. 329/2003). Since then, the law has been improved, and the legislation has been changed twice, in 2010 and 2013. The current Trade Competition and Consumers Protection Proclamation (No. 813/2013) is a good piece of competition legislation that is based on international best practice and takes into account the peculiarities of the country's market conditions. It covers the three major competition concerns, that is, anti-competitive agreements of both horizontal and vertical nature, abuse of dominance, and anti-competitive mergers and acquisitions.

Very few areas of the Proclamation were found to require improvement or amendment. The identified improvements can however be done by way of subsidiary legislation through regulations and guidelines, and not necessarily by amending the Proclamation. The Proclamation makes provision for such regulations. In that regard, there is need for provision to be made: (i) for the application of the

Proclamation to all economic sectors in Ethiopia, including those subject to sector regulation; (ii) for the extension of exemption from the application of the Proclamation to collective bargaining negotiations; and (iii) that the Proclamation should not be construed so as to limit any intellectual property rights (IPRs) except in cases where such a right is used for anti-competitive purposes.

The competition policy and law implementation and enforcement agency, the Trade Competition and Consumer Protection Authority (TCCPA) has done sterling work in the area of advocacy and public awareness. This is in line with the provisions of the Proclamation. There is however need for further advocacy work in the areas of: (i) competition assessment of laws, regulations and government policies; and (ii) privatization process, including awarding of concessions.

The enforcement of the Proclamation's competition provisions was however found to be still lagging behind that of consumer protection provisions, mainly because of lack of, or inadequate, capacity to handle competition cases on the part of the TCCPA, as submitted by the consulted stakeholders and admitted by the Authority itself. To facilitate the effective enforcement of the merger control provisions of the Proclamation, UNCTAD is assisting the TCCPA in drafting merger guidelines, in which merger notification thresholds will be provided for. There is need for market share-based dominance thresholds in order to facilitate investigations into abuse of dominance cases. Within the Project for Strengthening Competition and Consumer Protection Enforcement Capacities in Ethiopia, funded by the Grand Duchy of Luxembourg, UNCTAD will assist the TCCPA in drafting guidelines on abuse of dominance, and on market analysis and the definition of the relevant market. Furthermore, the formulation and adoption of a leniency programme would facilitate the identification of cartel activities.

Most markets have been opened up to competition in Ethiopia with the removal of many regulatory barriers to entry, including the privatization of SOEs. What remains are behavioural barriers to entry that are

erected by market incumbents to protect themselves from competition. In Ethiopia, behavioural barriers to entry come in various forms, including abusive practices by dominant firms such as refusal to supply, predatory pricing, and exclusive supply arrangements, as well as other unfair competition practices aimed at weakening competitors.

8.2 Recommendations

The recommended policy actions that are aimed at improving the implementation and enforcement of competition policy and law in Ethiopia arising from this review of competition policy in the country are outlined in Table 15.

Table 15: Recommended Policy Actions

Legal Framework on Competition		
Observations	Recommendations	Directed To
Article 4(2) of the Trade Competition and Consumers' Protection Proclamation (No. 813/2013) (TCCPP 2013) give the Council of Ministers powers of exempting by regulation any trade activities from the application of the provisions of Part Two of the Proclamation (on prohibition of anti-competitive trade practices and mergers). While the Council of Ministers may only exempt those trade activities that are deemed vital in facilitating economic development, the exemptions may nevertheless distort competition in the relevant markets if their competitive effects are not adequately analysed.	1 Regulations by the Council of Ministers exempting any trade activities from the application of the provisions of the Proclamation for the purposes of facilitating economic development should be based on analyses by the TCCPA of public interest benefits expected from exemptions versus the negative effects of exemptions on competition in the relevant markets.	Ministry of Trade and TCCPA
Article 4(3) of the TCCPP 2013, which provides that the provisions of the Proclamation may not affect the applicability of regulatory functions and administrative measures undertaken in accordance with other laws, can also be used to effectively exempt from competition law those economic sectors that are subjected to sector regulation.	2 The application of the TCCPP 2013 to all economic sectors in Ethiopia, including those subject to sector regulation, should be provided for in a subsidiary legislation to the Proclamation.	Ministry of Trade
Unlike in the previous Trade Practice and Consumers' Protection Proclamation (No. 685/2010), collective bargaining negotiations and agreements are not exempted from the application of the TCCPP 2013. Exemption of collective bargaining negotiations from the application of competition law is a normal practice.	3 The exemption from the application of the provisions of the TCCPP 2013 should be extended to collective bargaining negotiations by subsidiary legislation to the Proclamation.	Ministry of Trade
Intellectual property rights (IPRs) are not covered in the TCCPP 2013 in terms of the protection of the rights and/or their treatment in the enforcement of competition law.	4 It should be provided for in a subsidiary legislation to the TCCPP 2013 that the Proclamation should not be construed so as to limit any intellectual property right (IPR) except to the extent that such a right is used for anti-competitive purposes.	Ministry of Trade
Competition Enforcement		
Observations	Recommendations	Directed To
The merger control provisions of the TCCPP 2013 provide for pre-merger notification, but do not specifically provide for merger notification thresholds. Merger notification thresholds, based on the size-of-the-transaction criterion, are being provided for in the Merger Guidelines that are being drafted.	5 The Merger Guidelines should explain that mergers below the set thresholds could still be subject to examination by the Authority if they seem likely to have adverse effects on competition.	TCCPA
The TCCPP 2013 does not provide for post-merger notification, and this has presented enforcement problems to the TCCPA on how to undertake post-merger examination of merger transactions consummated without notification in terms of the Proclamation.	6 The TCCPA must enforce the merger control provisions of the TCCPP 2013 by penalizing in terms of Article 42(4) of the Proclamation those parties to mergers that breach the merger notification provisions of the Proclamation, to avoid post-merger examinations that are not provided for in the Proclamation.	TCCPA
The 'dominance test' provided for in terms of Article 6(1) of the TCCPP 2013 is rather subjective since it gives wide discretion to the competition authority in determining dominance. Article 6(2) of the Proclamation however provides for the possible use of a dominance threshold that is based on market shares, which is more objective. Article 6(5) of the Proclamation also provides that the Council of Ministers may determine by regulation the numerical expression of the degree of market dominance.	7 The Council of Ministers should determine by regulation a market share-based dominance threshold as provided for in the TCCPP 2013 for indisputable application and enforcement. Pending that, the thresholds could be provided for in the guidelines on abuse of dominance being drafted under the Grand Duchy of Luxembourg/ UNCTAD Project for Strengthening Competition and Consumer Protection Enforcement Capacities in Ethiopia.	Ministry of Trade and TCCPA

Table 15: Recommended Policy Actions

Competition Enforcement		
Observations	Recommendations	Directed To
<p>The collusive practices of price-fixing and bid-rigging are prevalent in Ethiopia, yet none have so far been referred to the adjudicative benches of the TCCPA or Federal courts for remedying because of lack of evidence, regardless of the fact that Article 42(6) of the TCCPA 2013 provides that the Authority may exempt from prosecution any person who participated in the commission of an offence involving anti-competitive agreements who gives information on the commission of the offence and the role of the major participants.</p>	<p>8</p> <p>The TCCPA should formulate and adopt in terms of Article 42(6) of the TCCPP 2013 a Leniency Programme that sets the conditions under which immunity can be granted to participants in collusive and cartel activity (in particular agreements on price fixings and bid-rigging) who by their cooperation contribute to the uncovering of cartels.</p>	TCCPA
Sector Regulation		
Observations	Recommendations	Directed To
<p>Ethiopia, like all other countries, has a number of sector regulators in key sectors of the economy with natural monopolies or where there is lack of adequate competition. Despite playing complementary roles in fostering competitive markets, there is bound to be jurisdictional conflicts between sector regulators and competition authorities on promotion of competition in regulated sectors.</p>	<p>9</p> <p>To forestall jurisdictional problems with sector regulators on the promotion of competition in the regulated sectors, the TCCPA should conclude and enter into Memoranda of Understanding (MoUs) with all sector regulators in Ethiopia aimed at facilitating cooperation between them.</p>	TCCPA
Competition Advocacy		
Observations	Recommendations	Directed To
<p>Some laws and government policies in Ethiopia were found to weaken competition, unintentionally. Government policies can weaken competition, and in many sectors, laws and regulations unnecessarily restrict the entry of new competitors, limit the scope of competitive conduct and reduce incentives for active competitive engagement. Conversely, economic performance can be improved if governments identify and remove unnecessary restrictions on product market competition.</p> <p>There is therefore need to identify and remove all unnecessary legislative and regulatory restrictions on market competition for the improvement of economic performance in the country.</p> <p>A specific methodology to help governments eliminate barriers to competition that has been developed by organizations such as OECD and DFID in the form of the competition assessment toolkit or framework. Competition assessment toolkits help governments to eliminate barriers to competition by providing a method for identifying unnecessary restraints on competition and market entry and developing alternative, less restrictive measures that still achieve government policy objectives. These instruments can be used as part of an overall, high-level evaluation of existing laws and regulations (either for the economy as a whole or for specific sectors), as part of a Regulatory Impact Assessment process for new laws and regulations, or by competition authorities to structure their competition advocacy efforts.</p>	<p>10</p> <p>A competition assessment of all laws, regulations and government policies in Ethiopia should be undertaken to identify and remove all unnecessary legislative and regulatory restrictions on market competition. This exercise may be given priority in sectors which are crucial to the Ethiopian economy,</p>	TCCPA
<p>Ethiopia has embarked on an ambitious Privatisation Programme that has seen a lot of State-owned enterprises (SOEs) turned into private companies. While privatisations increase operational efficiency of the affected enterprises, they may also result in public monopolies being turned into private ones, with devastating effects on market competition.</p>	<p>11</p> <p>The TCCPA should get involved in the future privatisation of SOEs in Ethiopia, either as an advocate of competition and/or an enforcer of the country's competition law. In that regard, the Authority should establish close working relationships with the Privatisation and Public Enterprise Supervising Authority (PPESA) through a cooperation agreement.</p> <p>As a substitute, or complement, to privatization, Ethiopia can grant concessions to private companies to operate defined infrastructure services in a form of public-private partnership, with the involvement of the TCCPA.</p>	Ministry of Trade and TCCPA

Table 15: Recommended Policy Actions

Consumer Protection			
Observations		Recommendations	Directed To
The Ethiopian Consumer Association is presently not in full operation due to the revocation of its license. That effectively leaves the TCCPA as the sole major consumer protection and welfare organization in Ethiopia.	12	The problems that led to the revocation of the operational license of the Ethiopian Consumer Association should be resolved to enable the Association to fully resume its operations.	Ministry of Trade
Regional Integration			
Observations		Recommendations	Directed To
Stakeholder concerns were expressed over lack of jurisdiction on mergers and acquisitions that are concluded outside Ethiopia, but have effect in the country, between companies that do not have physical presence in Ethiopia. It is true that while the TCCPP 2013 applies to any commercial activity or transaction in goods or services having an effect within Ethiopia, it does not give extra-territorial jurisdiction over foreign-based companies. The COMESA Competition Commission (CCC) is however in a better position to effectively deal with regional and global mergers and acquisitions having an effect in the COMESA region.	13	The TCCPA should cooperate with, and actively participate in the work programmes of the CCC, particularly in the area of merger control for the effective handling of regional and global mergers and acquisitions.	TCCPA
The COMESA Competition Commission (CCC) is encountering challenges related to the implementation of the COMESA Competition Regulations within the region emanating from some COMESA Member States' legal systems that require international law instruments to be incorporated into the national law before their application. This domestication of the COMESA Competition Regulations has not been done by some Member States, including Ethiopia, and this is in particular affecting the investigation of restrictive business practices of a cross-border nature.	14	Ethiopia should expedite the domestication of the COMESA Competition Regulations for the effective implementation of the Regulations.	Ministry of Trade
Capacity Building			
Observations		Recommendations	Directed To
Stakeholder concerns were expressed over the capacity of the TCCPA to effectively enforce the TCCPP 2013, particularly with regard to merger control and the formulation and drafting of the necessary operational regulations and guidelines. The Authority itself admitted its insufficient enforcement capacity, and emphasized the need to develop investigation and economic analysis skills required to handle competition cases.	15	Professional staff of the TCCPA should undergo intensive training on competition law enforcement, including the investigation and adjudication of competition cases. Ethiopia is already getting capacity-building and technical assistance from UNCTAD in the area of competition and consumer protection policies, which must be evaluated to ensure its effectiveness. There are a number of other organizations with the necessary capacity building mandates. The ICN has the Advocacy and Implementation Network Support Programme (AISUP) under which competition authorities from developing countries can get capacity building assistance from being paired with other more developed authorities. ¹⁶⁵ The COMESA Competition Commission's work programme has a component on technical assistance and capacity building, which involves assisting Member States in initiating, establishing and enhancing the implementation and enforcement of their competition laws. It also involves capacity building for the national competition agencies through training, staff exchange programmes and funding support.	Cooperating Partners

¹⁶⁵The Competition and Consumer Protection Commission (CCPC) of Zambia is receiving assistance from the Bundeskartellamt of Germany under the AISUP in case handling on a regular and request basis. The Mongolian competition authority also got assistance under the Programme on: (i) merger control and market definition; (ii) unilateral conduct; and (iii) abuse of dominance.

Table 15: Recommended Policy Actions

Other Relevant Issues			
Observations		Recommendations	Directed To
Stakeholder concerns were expressed over constitutional problems that might arise over the establishment and mandates of regional consumers' protection judicial organs and appellate tribunals together with the Federal Trade Competition and Consumers Protection Appellate Tribunal.	16	The stakeholder concerns over the possible constitutional problems that might arise over the mandates of the regional and Federal adjudicative and appellate organs should be investigated for rectification.	Ministry of Trade
Ethiopia presently does not have a comprehensive trade policy, but such a policy is being formulated by the Ministry of Trade. Trade policies have profound effects on levels of competition in any country.	17	The formulation of Ethiopia's comprehensive trade policy should be expedited for its speedy adoption.	Ministry of Trade

