

Deliverables and Pledges under Ethiopian Trade Competition Law:

The Need for Private Sector *Empowerment* and *Enablement*

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Abstract

This article examines whether Ethiopia's Trade Competition and Consumer Protection Proclamation enacted in 2014 can deliver its pledges toward ensuring fair trade practices. Trade competition envisages viable competitors in the context equal opportunities in operation and access to factors of production of goods and services. It is under such setting that the production and distribution of goods and services can match the level of consumer demand and *choice* (in kind, quantity, quality and price) envisaged in the law. On the contrary, private economic actors cannot be protected from unfair business practices in the context of pressures from non-private sector economic hegemony and politically affiliated oligopolistic entities. It is argued that a broad-based private sector and its *enablement* including the need to address gaps in Ethiopia's land laws, an enhanced autonomy of the Trade Competition and Consumer Protection Authority (TCCPA) in the context of good governance (which includes rule of law and independent judiciary), representation of stakeholders in the Authority, and the empowerment of civil society organizations are crucial to deliver the pledges embodied in Ethiopia's competition law.

Key terms

Trade competition, consumer welfare, private sector empowerment, land policy, oligopolistic pressures, Ethiopia

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Introduction

There have been specific laws on trade practices in Ethiopia since the Trade Practices Decree of 1963¹ and the Trade Practices Proclamation of 1965² which

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¹ Trade Practices Decree No 50/1963.

² Trade Practices Proclamation No. 228/1965.

regulated trade competition with some peripheral reference to consumer protection. After the hibernation of these laws due to a centrally planned economy influenced by Marxist policies from 1975 to 1991, a proclamation was enacted in 2003³ to regulate trade practices, followed by another proclamation on trade competition and consumer protection in 2010.⁴ The current Trade Competition and Consumer Protection Proclamation No. 813/2013⁵ (which was enacted in March 2014),⁶ substitutes the earlier proclamations. These specific laws substantiate the provisions in the Civil Code of 1960 and the Commercial Code of 1960, special legislation on mandatory safety standards, Ethiopia's criminal law and other laws that embody provisions relevant to trade competition and consumer protection.

The unified approach of Proclamation No. 813/2013 (TCCPP) has enabled it to regulate trade competition and consumer protection. This article focuses on trade competition and examines whether the Proclamation *effectively delivers its pledges* toward ensuring fair trade practices. Section 1 addresses the nexus between trade competition and consumer welfare. Section 2 states the prohibitions (that are embodied in the Trade Competition and Consumer Protection Proclamation) against anti-competitive (restrictive) business practices. Administrative enforcement of trade practices and the gaps thereof are highlighted in Section 3.

Section 4 presents an overview of comparative experience in state intervention toward private sector empowerment in contrast to predatory state interventions that adversely affect economic performance. Sections 5 to 8 examine the impediments against and the way forward in the implementation of the pledges toward fair trade practices that are embodied in the Trade Competition and Consumer Protection Proclamation. Even though the competition regime under Proclamation No. 813/2013 is fairly specific and detailed, these sections discuss the challenges in fair competition under settings of excessive non-private sector hegemony, oligopolistic vested interest and problems in land tenure security. The discussion in these sections thus shows the need for the *empowerment* and *enablement* of the private sector.

³ Trade Practice Proclamation No. 329/2003.

⁴ The Trade Competition and Consumer Protection Proclamation No. 685/2010.

⁵ The Trade Competition and Consumer Protection Proclamation No. 813/2013.

⁶ The English version of the Proclamation is unduly designated as Proclamation No. 813/2013 (due to an apparently typographical error in printing on the Proclamation), while it should have been referred to as Proclamation No. 813/2014 because it was enacted on March 21, 2014 (Megabit 12, 2006 Ethiopian Calendar).

1. The Trade Competition and Consumer Welfare Nexus

Laws on trade competition envisage certain core elements of a market economy, i.e., “a market equipped with mechanisms allowing competition between businesses, and the resulting strive for technological progress”,⁷ market share, productivity and competitiveness. In centrally planned economies, where the means of production are state-owned, the economic position of public enterprises is “institutionalized by the socialist economic order itself” and the protection of competition “did not make sense”.⁸

In Hungary, for instance, “competition law fell into a state of hibernation between 1948 and the 1960s” because “the earlier competition acts were not officially abolished” under the socialist government “but in practice they were regarded as ineffective”.⁹ Citing Kornai,¹⁰ Ceres states that the *shortage economy* that existed in Hungary during the period, “created a safe market for the seller and the producer”, and they were as a result “neither interested in nor motivated by quality investment, product innovation, or delivery times”.¹¹

An economic system need not necessarily be socialist or centrally planned for competition law to be dormant because other factors, as well, affect the level of application of competition law. Based on South Korea’s experience, Choi states that until 1980, “most competition laws appear[ed] to be dormant” owing to “the absence of a competition law culture and inexperience with enforcement”.¹² Moreover, Choi notes that “competition policy will tend to lose out in cases of serious conflict with other policy objectives, such as when the government intervenes in private activities” thereby impeding “the development of competition law enforcement” and making it “difficult to establish a competition law culture”.¹³

South Korea’s competition law regime, “used to be similar to that of other developing countries before its comprehensive competition law, the Monopoly Regulation and Fair Trade Act (MRFTA), was first introduced in 1980”.¹⁴ Even

⁷ Magdalena Tulibacka (2009), *Product Liability Law in Transition: A Central European Perspective*, Ashgate, p. 4.

⁸ Katalin Cseres (2004), “The Hungarian Cocktail of Competition Law and Consumer Protection: Should It Be Dissolved?” *Journal of Consumer Policy*, 27: p. 46.

⁹ *Ibid.*

¹⁰ Kornai, J. (2000). The Hungarian reform process: Visions, hopes and reality. In: J. Kornai, *Evolution of the Hungarian economy 1848–1998, Volume II, Paying the bill for the Goulash communism*, pp. 7–119. New York: Columbia University Press, pp. 59, 71.

¹¹ Cseres (2004), *supra* note 8, p. 46.

¹² Yo Sop Choi (2014), “The Rule of Law in a Market Economy: Globalisation of Competition Law in Korea”, *European Business Organization Law Review* 15: p. 420.

¹³ *Id.* p. 435.

¹⁴ *Ibid.*

after this period, it took some years for the entrenchment of competition law which was accompanied by “economic democratisation in Korea, based on the social market economy and *Ordoliberalism*” that can “be interpreted as a means of ensuring competition while improving social welfare and efficiency”.¹⁵

In spite of the neoclassical mainstream thinking in various countries of the Global North, *social market economy* and *ordoliberalism* were in the mainstream in countries such as (West) Germany during the post-World War II era until the Mid 1960s. Such pragmatism facilitates fair competition among private economic actors and at the same time avoids the risk of unregulated *laissez-faire* liberalism. The *caveats* of this approach are features of effective competition law regimes which embody mandatory standards which “do not restrict competition”, and at the same time aspire to eliminate the risk of “what is called in economic theory a ‘market for lemons’—a competition which due to cost incentives for lower quality forces even the ‘honourable’ trader to lower its standards”.¹⁶

Effective competition can positively contribute to consumer welfare because it gives them “a greater choice of products”, but it can also cause problems to consumers owing to the “growing powers of businesses and dangers inherent in products”.¹⁷ Even though competition law embodies standards of conduct, quality and safety, these thresholds “are not always sufficient to safeguard the interests of those who come in contact with those products” unless emerging market policies also involve regulatory market intervention in addition to which they should be “supported by the pressures of the legal profession, academics, ...consumers”,¹⁸ civil society organizations and the media.

Competition law mainly targets at economic efficiency and overall social welfare, while consumer protection law gives due attention to the ultimate individual consumers of goods and services. This is because economic efficiency which may result from competition law is not an end in itself, but a means toward achieving ultimate goals including consumer welfare at individual and group levels. As Cseres notes, competition law “focuses on the maintenance of competitive markets without artificial restraints and it is more concerned with the general economic interests of society than with the specific interests of final consumers”.¹⁹ Yet, effective competition law is a prelude to the enhancement of wider choice in goods, services and price.

¹⁵ Ibid.

¹⁶ Norbert Reich (2011), “Harmonisation of European contract law: with special emphasis on consumer law”, *China-EU Law J*, Vol. 1, p. 61.

¹⁷ Tulibacka, *supra* note 7.

¹⁸ Ibid.

¹⁹ K. J. Cseres (2007), “The Controversies of the Consumer Welfare Standard”. *The Competition Law Review*, Vol. 3, Issue 2. March 2007, p. 133.

In a free market economy, competition law facilitates fair market practices that are crucial to consumer welfare, but cannot substitute specific laws that directly deal with consumer protection. As Averit and Lande duly noted, “antitrust laws aim to preserve a sufficient, although not a perfect, array of options for consumers to choose among”; and consumer protection laws “seek to protect the ability of consumers to make rational choices among competing options”.²⁰ Anti-trust laws widen options in the context of fair market practices because “effective consumer choice requires two things: options in the marketplace and the ability to select freely among them”.²¹ Averit and Lande further indicate the violations that hamper competition “such as price fixing and related horizontal restraints, anticompetitive mergers, unreasonable vertical restraints, and predatory pricing”; and they underline that these practices adversely affect consumer choice.²² These violations “can distort the supply of options by imposing restrictions on the variety of prices and products that the free market would offer”.²³

According to the Competition Commission of COMESA²⁴ to which Ethiopia is a member, “[t]he purpose of competition law is to facilitate competitive markets, so as to promote economic efficiency, thereby generate lower prices, increase choice and economic growth and thus enhance the welfare of the general community”.²⁵ The scope of the consumer’s choice is thus directly proportional to the level of fair business practices in an economy.

2. Prohibited Anti-competitive (Restrictive) Business Practices

2.1 Pre-2003 laws on trade practices

Ethiopia’s Civil Code and Commercial Code (enacted in 1960) embody a few provisions on prohibited commercial practices. According to Article 2057 of the 1960 Civil Code, *faul*²⁶ is committed “where a person through false publications, or by other means contrary to good faith ... compromises the reputation of a product or the credit of a commercial establishment”. This is also stipulated under Article 132 of the 1960 Commercial Code which provides: “A

²⁰ W. Averit and Robert H. Lande (1998), ‘Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law’, *Loyola Consumer Review*, Vol. 10, No.1, p. 46.

²¹ *Id.* pp. 46, 47.

²² *Id.*, p. 47.

²³ *Ibid.*

²⁴ Common Market for Southern and East Africa

²⁵ COMESA Competition Commission (2015), *Consumer Guide to COMESA Competition Regulations*, December 2015, p. 4.

²⁶ The word ‘an offence’ in Article 2057 of the Civil Code is a mistranslation of the word ‘faute’ in the original French Version, drafted by Professor René David.

trader may claim damages under Article 2057 of the Civil Code from any person who commits an act of competition which amounts to a fault.” The duty to pay compensation upon unfair competition is reiterated under Article 134(1)(a) of the Commercial Code. Article 133 of the Code indicates cases of unfair competition, and Article 134 states the judicial remedies against unfair competition.²⁷ Cessation of dishonest practices²⁸ is one of the remedies if Article 2057 of the Civil Code and Articles 133 and 134 are violated. The remedies stated under the Commercial Code further include the “publication, at the cost of the unfair competitor, of notices designed to remove the effect of the misleading acts or statements of the unfair competitor”.²⁹

Ethiopia’s specific antitrust law embodied in the Trade Practices Decree No 50/1963 was amended by the Trade Practices Proclamation No. 228/1965. The Proclamation replaced various laws on price control.³⁰ According to Art. 5(a)(ii) of Proclamation No. 228/1965, no dealer³¹ shall “engage in or become party to an unfair trade practice”.

Article 3(h) of the Proclamation defined unfair trade practice as “actual or tacit agreement, arrangement or informal understanding” that has or is “designed to have the direct or indirect effect of restraining or injuring trade or the free competition thereon or any monopolistic, profiteering or discriminatory activities” that “operate or are likely to operate against the interest of the public whether consumers, producers, dealers or others.” The Proclamation further stated that no dealer shall “buy up, hoard, divert from normal trade channels or in any other way withhold any goods from normal use or consumption”³² or

²⁷ For further discussion, *see* Alemayehu Fentaw (2008), “Ethiopian Unfair Competition Law”, The University of Oxford Centre for Competition Law and Policy Working Paper CCLP (L) 21, pp. 6-10. Available at <https://www.law.ox.ac.uk/sites/files/oxlaw/cclp_1_.21.pdf>

²⁸ Article 2122 of the Civil Code, and Articles 134 (1)(b) and 134 (2)(b) of the Commercial Code.

²⁹ Articles 133 and 134, the Commercial Code.

³⁰ The repealed laws on price control that listed under Article 2 of Proclamation No. 228/1965 are:

“(a) The Imported Goods Price Control Proclamation No. 38 of 1943 as amended by Proclamation No. 46 of 1944 and all Legal Notices, Orders and Regulations made thereunder;

(b) The Locally Produced Goods Price Control Proclamation No. 53 of 1944 and all Legal Notices and Orders made thereunder;

(c) The Locally Rendered Services Price Control Proclamation No. 132 of 1952.

³¹ ‘Dealer’ in Proc. No. 228/1965 is defined as “any natural or juridical person who is engaged in any commercial activity under Article 5 of the Commercial Code or in rendering any services” (Art. 3(b)).

³² Proclamation No. 228/1965, Article 5(a)(i).

“sell any declared article at a price exceeding that fixed by or in a manner ordered by the Minister”.³³

The Minister of Commerce and Industry was empowered to issue written order to declare goods or classes of goods or services “as declared articles to be subject to price control” where it finds that “any goods or classes of goods or services are in short supply or are made the subject of unfair trade practice”.³⁴ Thereupon, the Minister could “issue orders in writing fixing the maximum prices at which such declared articles shall be sold by manufacturers, importers, wholesalers, or retailers or notify the formula whereby the prices of such declared articles shall be computed”.³⁵ Article 4(c) of the Proclamation had empowered the Minister of Commerce and Industry to determine the price and formula “upon the advice of a special committee comprising of such members appointed” by the Minister of Commerce and Industry and of Minister Finance by, *inter alia*, considering the factors³⁶ expressly stated in the provision.

The Trade Practice Proc. No. 329/2003 marked an end to the hibernation of a specific anti-trust legislation on trade practices since the mid 1970s, and it can be regarded as “part of the worldwide surge in competition legislation” after the fall of socialist economies in Eastern Europe”.³⁷ This proclamation mainly addressed trade competition, while the Trade Competition and Consumer Protection Proclamations No. 685/2010 and No. 813/2013 embody provisions that deal with trade competition and consumer protection.

2.2 Anti-competitive (Restrictive) practices Prohibited under Proclamation No. 813/2013

One of the core objectives stated under Article 3(1) of the TCCPP No. 813/2013 is “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”. With

³³ Id. Article 5(a)(iii).

³⁴ Id. Article 4(a).

³⁵ Ibid.

³⁶ The factors stated in Article 4(c) of the Proclamation were:

- (i) cost of production;
- (ii) cost of transportation;
- (iii) turn-over;
- (iv) losses of perishable goods;
- (v) losses through obsolescence;
- (vi) the skill, intellectual activity and time required to accomplish the service.
- (vii) fair profit to the seller or to the person who renders the service.

³⁷ Hailegabriel G. Feyisa (2009). “European Influence on Ethiopian Antitrust Regime: A Comparative and Functional Analysis of Some Problems”, *Mizan Law Review*, Vol. 3, No. 2, p. 272.

this objective in view, the Proclamation expressly identifies the anti-competitive practices that are prohibited, namely, abuse of market dominance,³⁸ anti-competitive agreements, concerted practices and decisions,³⁹ and unfair competition.⁴⁰ The Proclamation also regulates merger by stating prohibited acts in this regard,⁴¹ the procedures of notification,⁴² approval,⁴³ registration⁴⁴ and revocation of approval⁴⁵ of merger.

2.2.1 Abuse of market dominance

A business person either on his/her/its own “or acting together with others in a relevant market, is deemed to have a dominant market position if [he/she/it] has the actual capacity to control prices or other conditions of commercial negotiations or eliminate or utterly restrain competition in the relevant market”.⁴⁶ This may be assessed “by taking into account the business person’s share in the market”⁴⁷ or the capacity of the business person “to set barriers against the entry of others into the market or other factors as may be appropriate or a combination of these factors”.⁴⁸

According to Article 5(1), “[n]o business person, either by himself or acting together with others, may carry on commercial activity by openly or dubiously abusing the dominant position he has in the market.” Eight categories of acts are considered as acts of abuse of market dominance under Art. 5(2). The first four prohibitions stated under Art. 5(2)(a) to 5(2)(d) are categorical and have no exception. The phrase “*without justifiable economic reasons*” in the prohibitions listed under 5(2)(e) to 5(2)(h) ‘shows that the prohibitions can have exceptions. Article 5(3) lists down exceptions that can be considered as “justifiable economic reasons for the purpose of applying the provisions of paragraphs (e), (f), (g) and (h) of Article 5(2). Although the acts of abuse of market dominance refer to the prohibited practices of business persons in their relations with competitors, such acts ultimately distort the scope of *choice* of consumers –in price, goods and services.

³⁸ Trade Competition and Consumer Protection Proclamation No. 813/2013, Arts. 5 and 6.

³⁹ Id., Art. 7.

⁴⁰ Id., Art. 8.

⁴¹ Id., Art. 9.

⁴² Id., Art. 10.

⁴³ Id., Art. 11.

⁴⁴ Id., Art. 12.

⁴⁵ Id., Art. 13.

⁴⁶ Id., Art. 6(1).

⁴⁷ The market that is relevant in the assessment of a dominant position “is the market that comprises goods or services that actually compete with each other or goods or services that can be replaced by one another.” (Art. 6/4).

⁴⁸ Art. 6(2).

2.2.2 *Horizontal anti-competitive agreements, concerted practices or decisions*

Agreements⁴⁹ between or concerted practices⁵⁰ of business persons or any decision by an association of business persons in a horizontal relationship⁵¹ are prohibited under the following situations stated under Article 7. The first relates to the consequence of the agreement, concerted practice of the decision, while the second refers to the nature of the act. The *first* prohibition refers to the agreement, concerted practice or decision that “has *the effect of* preventing or significantly lessening competition, unless a party to the agreement, concerted practice or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect”.⁵² The *second* prohibition is where a horizontal agreement, concerted practice or decision by an association of business persons in a horizontal relationship “involves, directly or indirectly, fixing a purchase or selling price or any other trading condition, collusive tendering, or dividing markets by allocating customers, suppliers, territories or specific types of goods or services”.⁵³

2.2.3 *Prohibited vertical agreements*

Article 7(2) prohibits an agreement between business persons in a vertical relationship⁵⁴ if it either prevents or significantly lessens competition, “unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect” or where it “involves the setting of minimum resale price”. The first prohibition is conditional and it allows balancing between the technological, efficiency or other pro-competitive gains to be obtained *vis-à-vis* preventing or lessening competition. This seems to be too general and susceptible to wide interpretation. The second condition regarding the prohibition of a vertical agreement that sets a minimum resale price is not subject to any exception.

2.2.4 *Unfair competition*

The Trade Competition and Consumer Protection Proclamation No. 813/2013 (like the previous proclamations, e.g. Art. 10 of Proclamation 329/2003 and Art.

⁴⁹ *Agreement* “includes mutual understanding, written or oral contract and operational procedures, whether or not legally enforceable”. (Art. 7(3)(a)).

⁵⁰ ‘*Concerted practice*’ means “a unified or cooperative conduct of business persons depicted in a way that does not look like an agreement and done to substitute individual activity”. (Art. 7(3)(b)).

⁵¹ *Horizontal relationship* “is deemed to exist between competing business persons in a certain market.” (Art. 7(3)(c))

⁵² Art. 7(1)(a).

⁵³ Art. 7(1)(b).

⁵⁴ *Vertical relationship* “is deemed to exist between business persons and their customers or suppliers or both.” (Art. 7(3)(c)).

21 of Proclamation No. 685/2010) gives further clarity to unfair competition, and adds elements to the definition provided under Article 2057 of the Civil Code and Article 133 of the Commercial Code. Art. 8(1) of the Proclamation provides: “No business person may, in the course of trade, carry out any act which is dishonest, misleading or deceptive, and harms or is likely to harm the business interest of a competitor”. Illustrative instances of unfair competition are enumerated under Art. 8(2). With regard to the direct concerns of consumers, this provision, *inter alia*, prohibits “comparing goods or services falsely or equivocally in the course of commercial advertisement”⁵⁵ and it forbids the dissemination of “false or equivocal information” which may include “information the source of which is not known, in connection with the price or nature or system of manufacturing or manufacturing place or content or suitability for use or quality of goods or services”.⁵⁶

2.3 Regulation of merger

Articles 549 to 554 of the Commercial Code regulate amalgamation of firms. These provisions give prime focus to procedural issues and the rights of creditors. The TCCPP goes beyond these concerns and prohibits “an agreement or arrangement of merger”⁵⁷ that causes or is likely to cause a significant adverse effect on trade competition”.⁵⁸ The Proclamation states that any agreement or arrangement of merger may come into effect only upon “obtaining approval from the Trade Competition and Consumers Protection Authority”.⁵⁹

Upon receiving notification of the proposed agreement or arrangement of merger,⁶⁰ the Authority shall “investigate the possible adverse effect of the proposed merger on trade competition”⁶¹ in the course of which it may, where deemed necessary require the parties “to submit additional information or document within a specified period of time”.⁶² The Authority shall also “invite,

⁵⁵ Art. 8(2)(d).

⁵⁶ Art. 8(2)(e).

⁵⁷ “For the purpose of applying the provisions of this Article merger shall be deemed to have occurred:

- a) when two or more business organizations previously having independent existence amalgamate or when such business organizations 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.” (Art. 8(3) of Proclamation No. 813/2013).

⁵⁸ Art. 9(1).

⁵⁹ *Id.*, Art 9(2).

⁶⁰ *Id.*, Art. 10(1).

⁶¹ *Id.*, Art. 10(2).

⁶² *Id.*, Art. 10(3)(a).

by a notice published on a newspaper having wide circulation, any business person who is likely to be affected by the said merger, to submit his written objections, if any, within 15 days from the date of publication of the notice”.⁶³

After the investigation of the proposed merger, the Authority shall approve the merger if it is “not likely to have any significant adverse effect on trade competition”⁶⁴ or “subject to certain conditions”, if it is of the opinion that the likely significant adverse effect of the merger on trade competition can be eliminated by complying with the conditions attached thereto”.⁶⁵ Subject to the exception stated under Art. 13(1), the Authority shall not approve the merger “if it is of the opinion that the merger is likely to have a significant adverse effect on trade competition”.⁶⁶ However, it “may approve a merger proposal where the merger is likely to result in technological, efficiency or other pro-competitive gain that outweigh the significant adverse effects of the merger on competition, and such gain may not otherwise be obtained if the merger is prohibited”.⁶⁷ The approval of merger may be revoked by the TCCP Authority where the Authority “discovers that the approval was obtained based on the presentation of false or fraudulent evidence” or if “the conditions on the basis of which the approval has been obtained are not fulfilled”.⁶⁸

3. Administrative Enforcement and Gaps

3.1 Administrative Enforcement under the Proclamation

The TCCPA is entrusted with the task of regulating trade practices and consumer protection. It provides “support to industrial self-regulation in order to enable various industrial sectors regulate anti-competitive and unfair trade practices”⁶⁹ and organizes “judicial organs with jurisdiction on issues of trade competition and consumers protection”.⁷⁰ According to Article 30 of the TCCP Proclamation, it undertakes study and research in connection with trade competition and consumer protection, and initiate policy proposals⁷¹ and decides on “merger notifications in accordance with the provisions of this Proclamation”⁷²

⁶³ Id., Art. 10(3)(b).

⁶⁴ Id., 11(1)(a).

⁶⁵ Id., 11(1)(c).

⁶⁶ Id., Art. 11(1)(b)

⁶⁷ Id., Art. 11(2).

⁶⁸ Id., Art. 13(1).

⁶⁹ Id. Art. 30(10).

⁷⁰ Id. Art. 30(9).

⁷¹ Id. Art. 30(4).

⁷² Id. Art. 30(3).

The adjudicative benches of the TCCP Authority “shall have the judicial power to impose administrative penalties⁷³ which, in accordance with Article 42 of the Proclamation, can include “a fine from 5% up to 10%” of the business person’s turnover if there is abuse of dominance,⁷⁴ unfair competition⁷⁵ and prohibited merger⁷⁶ in violation of Articles 5, 8 and 9, respectively. The fine payable for anticompetitive horizontal and vertical agreements –prohibited under Articles 7(1) and 7(2)– shall be 10% of the business person’s turnover.⁷⁷ Article 42(2) of the Proclamation further embodies criminal penalties.

The administrative penalties stated in the Proclamation are imposed by the adjudicative benches of the Authority.⁷⁸ In addition to fine, the administrative measures may include “(a) the discontinuation of the act pronounced unfair”; (b) “any other appropriate measure that enables to reinstate the victim’s competitive position;” or (c) “the suspension or revocation of the business license of the offender”.⁷⁹

There are activities of the Authority that are commendable. For example, it has, in July 2017, “sued Ambo Mineral Water PLC and the East African Bottling Company for undergoing an illegal merger” without notification to the Authority.⁸⁰ The suit states that the participation of the companies in unfair trade practices and it presents their acts as unlawful merger in violation of fair trade practices. In spite of various commendable pursuits and achievements of the Authority, there are gaps in its autonomy and scope of functions that need to be addressed as highlighted below.

3.2 Gaps in the Autonomy and Powers of the TCCP Authority

Article 27(1) of the Proclamation states that the Authority is an “autonomous federal government body having its own legal personality.” This envisages independence in the appointment of the Director General and the judges of the tribunals. However, The Authority is accountable to the Ministry of Trade (Art. 27/1). The Director General is appointed by the Prime Minister (Art. 28/1), and judges of the Federal Trade Competition and Consumer Protection Appellate Tribunal shall be appointed by the Prime Minister (Art. 35/1).

⁷³ Id Art. 32 (1)(a).

⁷⁴ Id Art. 42 (1).

⁷⁵ Id Art. 42 (3).

⁷⁶ Id Art. 42 (4).

⁷⁷ Id Art. 42 (2).

⁷⁸ Id Art. 32 (1)

⁷⁹ Id Art. 32 (2).

⁸⁰ Dawit Endeshaw, The Reporter, 15 July 2017, Available at:

<<http://www.thereporterethiopia.com/content/beverage-companies-hot-water>>. Last visited: 28 July 2017.

As Kahsay⁸¹ observes, the autonomy of the Authority would be directly or indirectly affected due to (a) the accountability of TCCPA to the Ministry of Trade, (b) the power of the Prime Minister to appoint the Director General of TCCPA and the judges of the appellate tribunal, (c) “the application of the civil service law to judges of the authority”, (d) “the power of council of ministers to approve annual budget of the authority”, and (e) “absence of ... private sector representation in the competition authority”.⁸² Harka’s observations⁸³ further substantiate the need for the independence of the Authority because situations may arise where the Ministry could appear as a respondent in a litigation that involves consumer protection. He cites a case (adjudicated at the Commission that was established based on the Trade Practice Proclamation No. 329/2003)⁸⁴ in which the Ministry was plaintiff.

Comparable with the Auditor General, the Authority could be directly accountable to the House of People’s Representatives. It is, however, to be noted that such independence and rendering the Authority accountable to the House of People’s Representatives should be accompanied by (a) law reform in administrative laws which not only empowers but also controls such authorities under clear administrative procedures and judicial review, and (b) effective judicial reform which enhances predictability, wider access to justice, judicial decisions without delay and public confidence.

The representation of stakeholders in the Authority and its adjudication organs can enhance autonomy and effectiveness. As Tessema observes, non-representation of stakeholders in the Authority “can contribute to challenges in enforcement because trade competition and consumer protection in a market economy involve the interests of the business community and consumers in addition to the government”.⁸⁵ Such empowerment of stakeholders is part of the bigger setting which should allow the private sector to become the engine of Ethiopia’s economic activities, commensurate with the pledges made in various policy documents including Growth and Transformation Plans.

⁸¹ First names are used for Ethiopian authors (unless used otherwise by the authors themselves) because surnames in official documents such as passports are not family names as such, but a grandfather’s first name.

⁸² Kahsay G. Medhin (2016). “Ethiopian Competition Law: Appraisal of Institutional Autonomy”, *International Journal of Innovative Research & Development*, Vol. 5, Issue 2, p. 84.

⁸³ Harka Haroye (2008). “Competition Policies and Laws: Major Concepts and an Overview of Ethiopian Trade Practice Law”, *Mizan Law Review*, Vol. 2, No. 1, January 2008, p. 50.

⁸⁴ *Ibid.*

⁸⁵ Tessema Elias (2015), “Gaps and Challenges in the Enforcement Framework for Consumer Protection in Ethiopia”, *Mizan Law Review*, Vol. 9, No. 1, September 2015, p. 97.

Another challenge that needs to be noted relates to the fragmentation of regulatory monitoring and enforcement. For example, there are overlapping functions between regulatory offices with respect to acts such as misleading advertising which is prohibited under both the Advertising Proclamation 759/2012 and the TCCP Proclamation (enforced respectively by the Ethiopian Broadcasting Authority and TCCP Authority). Overlapping mandates between regulatory offices creates problems in the implementation of the TCCP Proclamation.

Moreover, there is ambiguity whether TCCPA can regulate the trade practices of state-owned enterprises. A case in point is the merger of the Commercial Bank of Ethiopia and the Construction and Business Bank (CBB) in December 2015/ January 2016. The issue is whether TCCPA should have examined the effect of the merger on the interests of private banks, and whether the decision of the Council of Ministers would suffice as stated under the Public Enterprises Proclamation No. 25/1992 which merely requires the decision of the Council of Ministers⁸⁶ upon the proposal of the Public Financial Enterprises Agency. Unless the TCCP Authority is empowered to ensure fair trade practices in all business enterprises (private and public), such gaps are bound to continue thereby causing a *double standard* in the definition of anti-competitive practices as applied to private economic actors and state owned enterprises.

4. Comparative Experience in State Intervention toward Private Sector Empowerment –versus- Predatory Interventions

4.1 Domestic private sector empowerment through protectionism, but without patronage: 18th century neo-mercantilist interventions

Although productivity and competitiveness are crucial in developing economies, the private sector in these countries cannot nurture its competitiveness in the context of the neo-liberal *laissez-faire* (non-interventionist) state. It was under comparable circumstances that neo-mercantilist views were forwarded in the 18th and 19th centuries by Alexander Hamilton (1755–1804) and Friedrich List (1789–1846). Both wanted their countries (i.e. the United States and Germany) “to maintain a positive balance of trade, and to increase industrial exports which had long-term advantages over raw material exports”.⁸⁷

Hamilton was the first US Secretary of Treasury, and in his 1791 *Report on the Subject of Manufacture*, “argued that the United States could preserve its independence and security only by promoting economic development through

⁸⁶ Article 35(1) of the Public Enterprises Proclamation No. 25/1992.

⁸⁷ Theodore H. Cohn (2016), *Global Political Economy: Theory and Practice, Seventh Edition*, Routledge, p. 58

industrialization, government intervention, and protectionism”.⁸⁸ Hamilton considered the intervention of the US government “as necessary to promote industrialization, because Britain as the only industrialized power discouraged manufacturing in its colonies”. He argued that “to counter Britain’s advantages, the U.S. government had to promote the use of foreign technology, capital, and skilled labor and adopt protectionist policies such as tariffs and quotas to bolster its fledgling industries”.⁸⁹

Friedrich List held similar views and he “emphasized the importance of manufacturing for a state’s economic development”.⁹⁰ According to List, “a nation which exchanges agricultural products for foreign manufactured goods is an individual with *one* arm, which is supported by a foreign arm”.⁹¹ He stated that “Germany and the United States could catch up with the British only by providing protection for their *infant industries*,”⁹² and argued that “late industrializers (the United States and Germany at the time) required more government involvement if they were to “catch up” with Britain—the leading state”.⁹³ However, Friedrich List had a double standard with regard to the Global South because “he ruled out industrialization for the South” stating that the countries in the North “were ‘specially fitted by nature for manufacturing,’ whereas Southern states should provide the North with ‘colonial produce in exchange for their manufactured goods’.”⁹⁴

Although Hamilton advocated for state intervention to protect manufacturers in the US (from British manufactured goods), he was against excessive *patronage* from government. He believed that the private sector should be left to itself without the need of “endeavor by the extraordinary patronage of Government, to accelerate the growth of manufactures”.⁹⁵

Indeed, it can hardly ever be wise in a government, to attempt to give a direction to the industry of its citizens. This under the quick sighted guidance of private interest, will, if left to itself, infallibly find its own way to the most profitable employment: and ’tis by such employment, that the public

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid, citing (in FN 16) Friedrich List, *The National System of Political Economy (1841)*, trans. Sampson S. Lloyd (London: Longmans, Green 1916), p. 130.

⁹² Ibid

⁹³ Id., at 339.

⁹⁴ Id. at 67, citing (in FN 65) List, *The National System of Political Economy*, p. 154.

⁹⁵ Alexander Hamilton’s Final Version of the Report on the Subject of Manufactures, Philadelphia, December 5, 1791, Communicated on December 5, 1791] (To the Speaker of the House of Representatives), Available at: <<https://founders.archives.gov/documents/Hamilton/01-10-02-0001-0007>>, Accessed 05 August, 2017

prosperity will be most effectually promoted. To leave industry to itself, therefore, is, in almost every case, the soundest as well as the simplest policy.⁹⁶

Hamilton thus argued in favour of protectionism from imports, and he meanwhile opposed excessive patronage in the activities of the private sector. Although protectionism was effective during the 18th and 19th centuries, it could not be viable since the 1960s. For example, there were various developing countries that pursued economic policies influenced by the *dependency theory*⁹⁷ according to which developing countries merely serve as passive ‘peripheries’ in the supply of raw material to the ‘core’ world economy.⁹⁸ The pursuits of *Import Substitution Industrialization* (ISI) of the late 1960s and 1970s did not materialize in most developing countries that did not blend import reduction with export enhancement. As the experience of some countries in East Asia (indicated below) has proven, the viable path under the global age goes beyond import substitution.

4.2 20th century developmental state intervention toward private sector empowerment

Countries such as South Korea, Taiwan and Singapore pursued *export-led* growth in lieu of protectionism and import substitution, and this required state intervention to support the private sector toward the enhancement of agricultural transformation and manufacturing. In these countries, export enhancement did not mean increase in the export of unprocessed prime food products such as crops and fruits (thereby creating shortage of supply and steady rise in prices in the local market), but it meant enhanced export of value added manufacturing and processed agri-business products that are labour intensive during the initial phases. The State intervention in these countries was not driven by economic theories as such, but rather involved pragmatic policies, decisions and regulations in response to reason and clearly observable facts on the ground. The *modus operandi* of these states and their steady achievements were *post facto* analyzed and interpreted to explain the practices and pursuits of developmental states.

⁹⁶ Alexander Hamilton’s Final Version of the Report on the Subject of Manufactures, Philadelphia, December 5, 1791, Communicated on December 5, 1791] (To the Speaker of the House of Representatives), Available at: <<https://founders.archives.gov/documents/Hamilton/01-10-02-0001-0007>>, Accessed 05 August, 2017.

⁹⁷ See, for example, Andre Gunder Frank (1966), The Development of Underdevelopment, Monthly Review, September 1966.

⁹⁸ See also, Andre Gunder Frank (1967) *Capitalism and Underdevelopment in Latin America*, London: Monthly Review Press.

Owing to the current wave of globalization, protectionism—in its variant of neo-mercantilism—seems to be outdated. On the other hand, the private sector in developing countries cannot thrive and be competitive in the context of the neo-liberal *laissez-faire* (non-interventionist) state due to the race (in the global economy) between unequal competitors. East Asian developmental states of the 1960s were thus “immersed in a dense network of ties that [bound] them to societal allies with transformational goals”⁹⁹ to support the private sector, while at the same time retaining their autonomy.

As Evans notes, a state can be called developmental if “embeddedness and autonomy are joined together”.¹⁰⁰ This “embedded autonomy, not just autonomy, gives the developmental state its efficacy”.¹⁰¹

Embeddedness provides sources of intelligence and channels of implementation that enhance the competence of the state. Autonomy complements embeddedness, protecting the state from piecemeal capture, which would destroy the cohesiveness of the state itself and eventually undermine the coherence of its social interlocutors. The state’s corporate coherence enhances the cohesiveness of external networks and helps groups that share its vision overcome their own collective action problems. Just as predatory states deliberately disorganize society, developmental states help organize it.¹⁰²

Vartiainen, indicates three salient features of a successful developmental state. Its *first* feature is its strength in the implementation of collective developmental objectives, meritocracy and insulation “from both the market and the logic of individual utility maximization”. The *second* feature of a developmental state is its embeddedness as manifested in its “thick external ties to the economy’s organized agents such as corporations, industrialists, associations and trade unions.” And *thirdly*, a developmental state has “a relationship of *mutual dependence* or *mutual balance* between the state and the rest of the economy” in such a manner that the state can be “able to ‘discipline’ economic actors such as firms and trade unions, while appreciating that their privileged positions ultimately depend on the success of the economy”.¹⁰³

⁹⁹ Peter Evans (1995), *Embedded Autonomy: States and Industrial Transformation*, Princeton University Press, p. 248.

¹⁰⁰ *Id.* at 12.

¹⁰¹ *Id.* at 248.

¹⁰² *Ibid.*

¹⁰³ Juhana Vartiainen, “The Economics of Successful State Intervention in Industrial Transformation” in *The Developmental State* (1999), Edited by Meredith Woo-Cumings (Cornell University Press) pp. 218-219 [in E. N. Stebek (2013), “Overview of Country Experience in Land Rights and Developmental Statehood”, *Mizan Law Review*, Vol. 7, No. 2, pp. 212, 213.

Amsden also notes the balance between providing assistance to the private sector and at the same time the capacity to monitor and discipline the sector. She states that the effective industrialization in countries such as Korea, Japan and Taiwan can be attributed to the state's "power to discipline big business, and thereby to dispense subsidies to big business according to a more effective set of allocative principles".¹⁰⁴

The term 'disciplining' the private sector does not mean suppression or patronage, but merely means facilitation, support and monitoring. Evans states the challenges in enhancing a competitive market under a setting of oligopolistic networks in the private sector that is not harnessed, and he observes that "[p]rivate capital, especially private capital organized into tight oligopolistic networks, is unlikely to provide itself with a competitive market".¹⁰⁵ The state cannot thus be "a passive register of these oligopolistic interests" and should facilitate the conditions which "they are unwilling to provide for themselves" because only a state "that is capable of acting autonomously can provide this essential 'collective good'".¹⁰⁶

During such state intervention, embeddedness facilitates "information and implementation, but without autonomy, embeddedness will degenerate into a super-cartel, aimed, like all cartels, at protecting its members from changes in the status quo".¹⁰⁷ Both aspects of the intervention (i.e. embeddedness and autonomy) involve competence, commitment and integrity in the state apparatus. Meritocracy was the bedrock of recruitment and appointment in all government organs of developmental states. This enabled the members of the state apparatus to be professionally competent and motivated in the course of facilitating information and implementation, while integrity ensured autonomy from private benefits in the course of the private sector's economic gains.

To this end, they acted as coherent entities within the units of the state and in the course of facilitating the pursuits of private economic actors. The coherence of such states "involves more than just reining in the greed of individual officeholders" and it further "involves entrepreneurship" in helping "formulate projects that go beyond responding to the immediate demands of politically powerful constituents".¹⁰⁸

¹⁰⁴ A. H. Amsden (1989), *Asia's Next Grant, : South Korea and Late Industrialization*, New York: Oxford University Press, p. 144. [[in E. N. Stebek (2013), "Overview of Country Experience in Land Rights and Developmental Statehood", *Mizan Law Review*, Vol. 7, No. 2, p. 212).

¹⁰⁵ Evans, *supra* note 99 at 57.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Id.*, at 57, 58.

¹⁰⁸ *Ibid.*

Although the developmental states of the 1960s were authoritarian, they were meritocratic and committed to the collective good. They controlled predatory greed in the state apparatus (and the business sector), not only *via* legal articulations but mainly through *leading by example*, i.e., by living and doing as they ‘preached’. The officeholders in these developmental states did not aspire to be billionaires, but rather cherished the success of private economic actors.

Since the mid 1970s, however, there was a stage when *autonomy* gradually receded in East Asia’s developmental states (such as South Korea) due to the gradual formal and informal bondage between the political and the business elites. This marked a phase in which developmental statehood became obsolete and outlived its usefulness.¹⁰⁹ The political and socio-economic transition in these countries eventually led to mature market economy and constitutional democracy since the 1980s.

4.3 The nature of predatory state intervention

State power in predatory states is “used for capricious extraction and wasteful consumption” and this “diminishes private productive capacities rather than enhancing them. Welfare and growth both suffer”.¹¹⁰ They fail to realize the risks toward *fragility* and *failed statehood* even though extreme impoverishment and crisis can ultimately destroy their dreamland. Yet, they usually cherish the *trap* threshold which weakens civil societies and stunts an entrepreneurial (and vibrant) private sector. The observations of Evans clarify this trap:

Extracting a larger share from a shrinking pie is not the optimal way to maximize revenues, but it may be the only way consistent with the survival of predatory states. The disorganization of civil society is the sine qua non of political survival for predatory rulers. Generating an entrepreneurial class with an interest in industrial transformation would be almost as dangerous as promoting the political organization of civil society. For predatory states, ‘*low-level equilibrium traps*’ are not something to be escaped; they are something to be cherished.¹¹¹

Predatory states do not base their ‘legitimacy’ on genuine consent, a political myth, a country-wide mission or theory. They rather resort to simulations, lies and repression which are all expensive and budget-intensive. Thus, the more untrustworthy and repressive a predatory government becomes, the closer it gets to its eventual downfall in spite of such ‘*low-level equilibrium traps*’.

¹⁰⁹ See for example, Eun Mee Kim (1993), “Contradictions and Limits of a Developmental State: With Illustrations from the South Korean Case” *Social Problems*, Vol. 40, No. 2 (May, 1993) pp. 231-232.

¹¹⁰ *Id.*, at 247.

¹¹¹ *Id.* at 248.

4.4 Challenges in the effectiveness of trade competition in developing countries

Unlike the neo-mercantilist protectionism that was accorded to domestic manufacturers in the USA and Germany (highlighted in Section 4.1), and the state intervention to support the private sector in developmental states (indicated in Section 4.2), state intervention in most developing countries seems predatory. Aydin and Büthe note that most developing countries “exhibit high levels of both economic and political inequality; some still have autocratic regimes in which insiders use their political power to extract economic rents by restricting market entry” while “others have leaders who for their political survival depend upon the support of entrenched economic insiders”.¹¹²

According to Aydin and Büthe, these conditions “ensure powerful opposition to the meaningful implementation of any competition law”.¹¹³

In many of the new competition law jurisdictions, the state retains a large ownership stake in many industries or is still expected to guide outputs and inputs of the private sector. Moreover, in a number of these jurisdictions, corruption is rampant in the executive branch, and the judiciary is far from [being] independent, contributing to generally poor rule of law and limited access to justice.¹¹⁴

Aydin and Büthe have identified resource constraints, unsupportive or hostile political–legal Environment, lack of competition culture¹¹⁵ and institutionally underdeveloped markets.¹¹⁶ They noted the resource constraints at three levels: “financial resources for the competition agency; legal and economic expertise within the implementation/ enforcement agency; and antitrust and economic expertise within the judiciary”.¹¹⁷ Their observations regarding unsupportive or hostile political-legal environment include “weak rule of law and low judicial

¹¹² Umut Aydin & Tim Büthe, *Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits*, 79 *Law and Contemporary Problems* 1-36 (2016), p. 2. Available at: <http://scholarship.law.duke.edu/lcp/vol79/iss4/1>

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ “Distrust toward—or at least anxiety regarding—market mechanisms is common in many developing countries, ..., [and] the normative commitment to market competition as the fundamental principle of economic relations is in many developing countries weak—among economic elites as well as in society at large.” (Id. at 20)

¹¹⁶ “Competition law and policy can only improve the performance of a market economy if there actually is a market—a market that, absent anti-competitive structures and conduct, is functional. Two types of contextual factors render markets too dysfunctional to support an effective competition policy: institutional deficiencies, ... and market imperfections created by geographical and other physical constraints...” (Id. at pp. 21, 22).

¹¹⁷ *Id.* at 15.

independence” in many developing countries that have adopted competition laws”, and these challenges are exacerbated by gaps in ‘access to justice’ and completion policy enforcement.¹¹⁸

They further indicated that “often-pervasive corruption exacerbates the problem by creating uncertainty about the impartiality of competition law enforcement whenever suspicion of corruption extends to the judiciary or the competition agency”.¹¹⁹ The close alliance that is created “between entrenched economic elites in oligopolistic industries and a small group of political insiders” is, according to Aydin and Bütke, meant to “(re)distribute a larger share of the national income to themselves”.¹²⁰

These observations are substantiated by the remarks of Abel Mateus, former President of the Portuguese Competition Authority. He indicated three factors that adversely affect the effectiveness of a competition enforcement regime.¹²¹ The first factor relates to “vested interests that dominate economic policy making, either through legal means ... or illegal means (corruption, abuse of public service power, or cronyism)”.¹²² He further noted “inefficient public administration and regulatory systems that limit the capacity and effectiveness of public bodies, including the NCA [National Competition Authority]”,¹²³ and “inefficient judicial systems that preclude the sanctioning of violation of the competition law” as impediments to the effective enforcement of the trade competition regime.

5. Economic Elite and ‘Endowment’ Pressures on Ethiopia’s Private Sector

Private sector empowerment is *broad-based* so that the competitors operate in the context of a vibrant economy whereby the demand and supply side of goods and services are undertaken by millions of persons who are actively engaged in the process. This requires effective competition under conducive socio-economic realities and political will. As Pamela Samuelson duly noted, “people don’t adopt rules just because they are clear or consistent; they adopt rules

¹¹⁸ Id. at 18.

¹¹⁹ Id. at 19.

¹²⁰ Ibid.

¹²¹ Abel Mateus, in *Competition and Development* (D. Daniel Sokol *et al.* eds., 2013) at 115–16 [cited (Fn75) in A.E. Rodriguez & Ashok Menon, *The Causes of Competition Agency Ineffectiveness in Developing Countries*, 79 *Law and Contemporary Problems* 37-67 (2016), p. 59] Available at: <http://scholarship.law.duke.edu/lcp/vol79/iss4/2>

¹²² Ibid.

¹²³ Id., at 59, 60.

because they make sense in ordering human affairs”.¹²⁴ The laws and institutional framework (highlighted in Sections 2 and 3, above) should thus be examined not only in terms of their clarity and consistency, but particularly in light of their effectiveness in regulating social conduct.

There should be strong and viable competitors for competition law to be effective. This does not, however, undermine the significance of Ethiopia’s competition law, but rather shows that the law can hardly bring about fair trade practices and consumer welfare in the absence of fair competition. Tessema states that various researchers have “identified public sector dominance” and “unfair competition from party-affiliate enterprises” accompanied by inadequate awareness “among business community and enforcers as some of the main causes for limited competition”.¹²⁵

Such non-private sector market dominance in chemical fertilizers, for example, does not only adversely affect market competition, but also involves conflicts of interest between increasing revenue from sale and the distribution of chemical fertilizers *vis-à-vis* the role of the state in giving due attention to environmental sustainability –in accordance with its pledges of green development. Where, for example, a political party affiliated endowment or a state agency is a major importer of pesticides and chemical fertilizers, conflict of interest is likely to arise between the pursuits of enhancing sale *vis-à-vis* sustainable land management (SLM).

An issue arises at this juncture whether ‘*developmental patrimonialism*’ justifies the Ethiopian variant of intervention in the economy. A study by Vaughan and Gebremichael¹²⁶ “suggests that contemporary Ethiopia shows key features consonant with the concept of ‘developmental patrimonialism’, which under certain circumstances has been conducive to transformational economic growth in other parts of the world”.¹²⁷ However, their research “supports the general perception that business and politics are closely linked in Ethiopia” and their study “has examined one specific instance of ideologically driven engagement by politicians in the commercial arena”.¹²⁸ They also state the

¹²⁴ Pamela Samuelson (1984), “Good Legal Writing: of Orwell and Window Panes” 46 *University of Pittsburgh Law Review* 149 (Fall 1984), p. 164. Available at < Available at: <http://scholarship.law.berkeley.edu/facpubs/1050>>

¹²⁵ Tessema Elias, *supra* note 85, p. 96.

¹²⁶ As indicated in Footnote 81, first names are usually used in Ethiopia for in-text reference to authors. However, Mesfin Gebremichael’s patronymic is used in accordance with the usage of the authors in *infra* note 127.

¹²⁷ Sarah Vaughan and Mesfin Gebrehiwot (2011), *Rethinking business and politics in Ethiopia The role of EFFORT, the Endowment Fund for the Rehabilitation of Tigray*, Africa Power and Politics, Research Report 02, August 2011, p. 12.

¹²⁸ *Id.*, at 59.

caveat that *developmental patrimonialism* becomes successful not only by enabling the pot to grow, but it should also “ensure reasonably equitable and sustainable access to it”.¹²⁹ On the contrary, “a transition economy of low productivity, poorly co-ordinated markets and opportunistic rents, unregulated entrepreneurialism has frequently led to non-developmental kleptocracy”.¹³⁰

Vaughan and Gebremichael state the transitional context in which “the Ethiopian government is reluctant to rely on a private sector” due to “some elements of which it sees as rent-seeking, law-breaking and [being] uncooperative”. They also indicate that the economy’s continued emphasis on political ties “undoubtedly carries an alternative set of risks, not least the political capture of resources which are not then used to serve economically productive or sustainable developmental ends”.¹³¹

Another risk is the tendency for developmental patrimonialism to degenerate into less economically productive forms in cases where regimes with strong leadership continuity experience succession crises. This is potentially a further set of challenges that Ethiopia and its ruling party have yet to demonstrate they will be able to transcend.¹³²

Developmental patrimonialism (as indicated in Section 4.2, above) was successful in the developmental states of the 1960s and early 1970s as a transition toward empowering private economic actors and domestic industrialization. However, it was not an end in itself, as observed from the success of developmental states in East Asia which marked their obsolescence and the ultimate transition of these states to mature market economy since the 1980s.¹³³

6. Hedged Ideology -versus- Overt ‘Market-friendly’ Marxism

The experience of the transition economies such as Eastern Europe does not justify the Ethiopian setting which seems to be caught in the midst of a trap that involves pledges of a market economy without a broad-based private sector as its key actor. It is to be noted that the transition economies of East Europe did not procrastinate in the empowerment of the private sector. A question may also arise whether there is another option that enables a blend between a political entity’s Marxist disposition and a broad-based private sector empowerment.

¹²⁹ *Id.*, at 60.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *See*, E. N. Stebek (2013), “Overview of Country Experience in Land Rights and Developmental Statehood”, *Mizan Law Review*, Vol. 7, No. 2, pp. 218-221; *see also*, Kim (1993), *supra* note 109.

There are countries such as China and Nicaragua whereby communists did not hedge their ideology. In Nicaragua, the Sandinistas¹³⁴ (who were Marxists) tolerated political pluralism, while countries such as Cuba sustained their policies for decades despite the fall of the Eastern Block. It is to be noted that “the private sector with large, medium, small and micro entrepreneurs existed in Nicaragua throughout the revolutionary government’s tenure”.¹³⁵ In fact “the revolutionary government made the private sector a key part of the national economy”.¹³⁶ The private sector “retained its independence and was instrumental in the electoral defeat of the revolutionaries”.¹³⁷ Eventually, the Sandinistas managed to win elections, which ultimately seems to have led to contested election processes, particularly after Daniel Ortega managed to stay in power for a third term after the ‘amendment’ of Nicaragua’s Constitution.¹³⁸ The initial phase of tolerance and pluralism seems to have been replaced by dominance and hegemony.

China, on the other hand, retained its one-party state policy, and has rather given primacy to economic reforms (by blending market economy and socialism) unlike USSR’s reforms that gave primacy to political restructuring under Gorbachev. Ethiopia has not pursued the Chinese or the Nicaraguan path. The party in power since 1991 was Marxist throughout its years of struggle, but it could not sustain its ideology after the downfall of the Eastern Block. In spite of its pledges to embrace market economy, the Marxist past seems to create conflicting patterns in policymaking, legislation and their implementation.

In China, the Marxist political identity is not forfeited but blended with the market economy. However, there is always a challenge when the past subconsciously guides the present in the form of reflexive decisions rather than a carefully synthesized and blended policy choice. The latter is the case in China where the Communist Party attributes its legitimacy to an ideology, and not the ballot box.

The Nicaraguan and Chinese models represent regimes that do not conceal or deny their political ideology. When Marxist ideology is hedged or concealed, while on the other hand the market economy is claimed to be pursued, the reflexive intervention of the mindset adversely affects sound economic policymaking and its implementation. Meanwhile, the identity crisis in ideology becomes conducive to graver oligopolistic realities thereby creating the fusion

¹³⁴ *Sandinista National Liberation Front* (Spanish: Frente *Sandinista* de Liberación Nacional, FSLN).

¹³⁵ David Close (1999), *Nicaragua: The Chamorro Years*, Boulder, Lynne Rienner Publishers, p. 19.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ See, for example *the Guardian*, 7 November 2016.

of political influence and economic rent in the conduct of many officeholders. The Ethiopian setting seems to be in the midst of this trap whereby the private sector has not yet managed to be at the wheels as opposed to various pledges and official statements. Under such setting, the ‘deliverables’ of a socialist economy, in spite of their mediocrity and inadequacy (housing, modest house rentals, subsidized food prices, ration card sale for basic commodities, smallholder farmer or communal farm landholding security, etc.) are eroded without the corresponding realization of the gains in market economy.

7. Towards Nurturing Tax Compliance and a Broader Tax Base

Tax *compliance* envisages standards of conduct in a country’s value system which can nurture the thoughts, actions and habits of taxpayers to perform their tax obligations *willingly* and *comfortably*. Tax non-compliance, on the other hand, prompts tax enforcement which constitutes an aspect of law enforcement, and it may involve penalties and deterrence. However, unlike various violations that involve law enforcement, tax authorities do not “start from a crime and work backward to suspects, but scan” for tax records¹³⁹ and primarily address the root causes.

From the perspective of individual ‘rewards’ and ‘cost’, there can be the incentive to under-report or conceal income “to the extent that this behavior is financially rewarded”¹⁴⁰ by the payment of lower taxes thereby increasing ‘net profit’ and disposable income. However, depending on the “endogeneity of honesty”, i.e. “the social, psychological, and moral forces that induce individuals to pay their taxes in full”,¹⁴¹ there are societies where “many taxpayers are inherently honest, reporting truthfully regardless of the incentive to cheat”.¹⁴²

Tax compliance *vis-à-vis* the incentive to cheat are usually affected by the level of ability to pay, honesty in the value system of a society, personal moral standards, ‘fairness’ in tax rates and the level of effective, efficient and fair tax enforcement. Fair tax rates envisage a broad tax-base which results from private sector development. It is the expansion of tax base that can ease the tax burden per tax payer so that each economic actor can pay taxes with ease and comfort.

¹³⁹ James Andreoni, Brian Erard and Jonathan Feinstein (1998), “Tax Compliance”, *Journal of Economic Literature*, Vol. 36, No. 2 (Jun., 1998), Published by: American Economic Association, p. 818.

¹⁴⁰ Brian Erard and Jonathan S. Feinstein (1994), “Honesty and Evasion in the Tax Compliance Game”, *The RAND Journal of Economics*, Vol. 25, No. 1 (Spring, 1994), p. 1

¹⁴¹ *Id.*, at 17

¹⁴² *Id.*, at 1.

On the contrary, problems in private sector development adversely affect the direct tax base and can create the propensity of governments to raise tax burden on the private sector (that is already in the midst of challenges of survival). This renders tax compliance difficult, and also suppresses the viability of the private sector. The other option of heavy reliance on indirect taxes such as Value Added Tax (VAT), would steadily suppress consumer welfare, and encourage the proliferation of options such as street vending.

The three principles in a well-designed tax system are (a) *effectiveness* “in raising revenue”, (b) *efficiency* “in its effects on economic decisions of households and businesses”, and (c) fairness and *equity* “in its impact on different groups in society”.¹⁴³ Raising *revenue* without adversely affecting *efficiency* and *equity* becomes possible only if the tax base is strengthened through private sector empowerment and enablement. In countries like Ethiopia where street vending and selling in small tents on pedestrian lanes (in the name of small enterprises) is widespread, tax payers face challenges on three fronts: i.e., tax burden, economic elite pressures and the waves of street vending. Even if street vending seems to enable consumers to buy goods at a relatively cheaper price, its long-term impact on the private sector and tax revenue adversely affects the society at large, and thus consumers in general.

8. The Significance of Land Tenure Security in Private Sector Empowerment and Fair Competition

8.1 Gaps in the enhancement of fair access and tenure security to means of production

In spite of the privatization of various public-owned enterprises (since 1991) and the liberalization pursuits in Ethiopia, the private sector has not yet become the major actor in the economy.¹⁴⁴ While land constitutes one of the factors of production, Ethiopia’s urban¹⁴⁵ and rural¹⁴⁶ land laws are susceptible to resource capture and corruption owing to the various restrictions in land tenure security, transferability and scope of land rights (including very weak access to credit

¹⁴³ See, for example, Bruce R. Bolnick (2004), *Tax Reform and the Business Environment in Mozambique*, A Review of Private-Sector Concerns; Technical Report submitted to USAID/Mozambique by Nathan Associates, December 2004, p. 3.

¹⁴⁴ See for example, Elias N. Stebek (2016), “The Constitutional Right to Enhanced Livelihood in Ethiopia: Unfulfilled Promises and the Need for New Approaches”, *Mizan Law Review*, Vol. 10, No. 1. (September 2016), pp. 144-147.

¹⁴⁵ See Elias N. Stebek (2015), “Challenges in Access to Urban Land for Business Activities under Ethiopian Law: Between Oligarchy and Broad-based Private Sector”, *Mizan Law Review*, Vol. 9, No. 1 (September 2015), pp. 37-82.

¹⁴⁶ See Muradu Abdo (2015), “Reforming Ethiopia’s Expropriation Law”, *Mizan Law Review*, Vol. 9, No. 2 (December 2015), pp. 301-340.

through landholding rights as collaterals). This has adversely affected broad-based value creation by a viable private sector which is conducive to wider job opportunities, a competitive economy and fairly wider choices for consumers in the market at fair and affordable price.

Private sector development is not the outcome of mere pledges and declarations. It is rather the result of factors that enhance the economic activities of the private sector in the production of goods and services. In the agricultural sector, it is directly related with land rights and tenure security of smallholder farmers and other investments in agriculture. This should not, however, be mixed up with large-scale land acquisitions for speculative purposes, that contradict genuine forms of responsible agricultural investments. With regard to smallholder farms, land rights and tenure security determine productivity, investments in the fertility of land, sustainable land management (SLM) and access to credit. Such settings are conducive to land consolidation and agricultural transformation thereby enabling achievers among smallholder farmers to reinvest and consolidate their agricultural activities.

The AU Framework and Guidelines on Land Policy recommends that member states should formulate and operationalize “sound land policies as a basis for sustainable human development that includes assuring social stability, maintaining economic growth and alleviating poverty and protecting natural resources from degradation and pollution”.¹⁴⁷ The Framework and Guidelines indicates the role of land in Africa’s agricultural economy, other sectors of the economy and gender relations.¹⁴⁸ The enhancement of agricultural productivity and food security requires the “ability to secure access to land resources through a variety of tenure systems that guarantee returns for short or long term investments”.¹⁴⁹ It also needs wider transferability through “robust land rights transfer systems and markets offering various types of rights (whether primary or secondary)” which can “expand opportunities for the acquisition of land resources for many agricultural users engaged in large or small scale, formal or informal operations”.¹⁵⁰

Such tenure security in land rights not only enhances agricultural productivity and food security, but also strengthens the purchasing power of the rural population thereby augmenting the dynamism of the overall economy including off-farm economic activities in rural Ethiopia. Vibrant economies in

¹⁴⁷ AUC-ECA-AfDB Consortium (2010). *Framework and Guidelines on Land Policy in Africa: Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods*. (African Union, African Development Bank and UN Economic Commission for Africa), p. 2.

¹⁴⁸ *Id.* pp. 7,8.

¹⁴⁹ *Id.* p. 16.

¹⁵⁰ *Ibid.*

the rural sector thus emanate from grassroots empowerment in which land rights and tenure security are crucial. And this envisages empowerment in all dimensions of rural landholding (land use, enjoyment of the fruits of the land holding, and the scope of disposal) and due regard to all elements in the bundle of land rights, i.e., assurance, duration and breadth.

This does not however, justify land concentration in the hands of the few through laissez faire liberalization, but rather calls for pragmatic policies that can enhance efficiency, equity, social stability, gender justice and environmental sustainability.¹⁵¹ In this regard McAuslan states that:

“the evidence tends to suggest that a totally unregulated market in land produces land hoarding and speculation; a loss of land rights by the poor; a depletion of natural resources; and the external costs of land development-pollution, public health problems, degradation of land, transport costs-passed on to the public sector to deal with”.¹⁵²

Nor does state ownership of land (in its extreme version) bring about economic efficiency and environmental sustainability even if *–prima facie–* it seems to bring about equity and distributive justice. As McAuslan duly observes, this option is not only the feature of socialist government policies, but was also, to a certain extent, “the feature of many colonial land regimes”¹⁵³ so that colonial powers *could have free reign over land*. The argument in favour of public ownership of land is that “land is too important a resource to the state to allow private individuals to own it” and that public ownership of land enables the state “to ensure that it can implement its policy”.¹⁵⁴ However, the disadvantages of large-scale governmental involvement in land relations “outweigh the presumed advantages” due to the downsides that “include expense, corruption; misallocation of resources; inappropriate solutions to problems and agency capture”.¹⁵⁵

The models that can, according to McAuslan, address the downsides of unregulated market in land and the other extreme of large-scale government involvement can be the *regulatory model* which can encounter various challenges and the *facilitative model*¹⁵⁶ which unlike the regulatory model can

¹⁵¹ See for example, the adverse impact of laissez faire liberalization in Nikita Sud (2007). “From Land to the Tiller to Land Liberalisation: The Political Economy of Gujarat's Shifting Land Policy”, *Modern Asian Studies*, Vol. 41, No. 3 (May, 2007), pp. 603-637 (Published by: Cambridge University Press).

¹⁵² Patrick McAuslan (1987). ‘Land Policy: A Framework for Analysis and Action’, *Journal of African Law*, Vol. 31, No. 1/2 (Spring, 1987), p. 203.

¹⁵³ Id., p. 201.

¹⁵⁴ Id., p. 202.

¹⁵⁵ Ibid.

¹⁵⁶ Id. pp. 203-206.

be implemented in the formal land regime, customary land holdings and unofficial land markets with a view to securing optimal efficiency, equity, social harmony and environmental sustainability.

8.2 Land readjustment as a practical synthesis between inclusion and transformation

As a synthesis between the extremes, landholdings of small-holder farmers can be used as capital contributions in consolidated farms or modern agricultural investments in which the prime actors are the landholders themselves. Facilitative interventions can also enhance the consolidation of smallholder farms or access to credit for peri-urban, urban and rural landholders. Access to credit based on landholding can enhance assets, productivity and farm consolidation. For example, access to credit can enable landholders to build shades that can be rented to potential investors (in various economic activities) based on master plans and urban plans.

In peri-urban areas, the state can be the facilitator in the relationship between investors and landholders so that the latter can contribute their holdings as capital contribution in projects such as housing development (under the scheme of land readjustment). Or, the state can intervene in readjustment procedures (in urban and peri-urban areas) whereby urban development can be conducted without displacing the original landholders:

At the very least, the readjustment procedure can be regarded simply as a method for changing the division of land. The land is serviced and part of the land (sites) is sold to cover the cost of the project, and the rest is divided between the original land owners and users according to the original land area or value depending on the agreement or the requirements of the jurisdiction. Also a land use agreement can be reached with the public bodies and the development of social housing or other socially beneficial outcomes may be connected to the procedure.¹⁵⁷

Achamyelah suggests that “land readjustment is potentially an appropriate land development tool to alleviate peri-urban land development limitations in Ethiopia”¹⁵⁸ and he notes: “introducing land readjustment as a peri-urban development tool builds up a participatory and voluntary partnership between the municipality and local peri-urban landholders”.¹⁵⁹ In the absence of such

¹⁵⁷ Kauko Viitanen *et al* (2010). Editor: Stig Enemark, *Hanoi Declaration on Land Acquisition in Emerging Economies*, International Federation of Surveyors (FIG), FIG Publication No. 51. February 2010, p. 15.

¹⁵⁸ Achamyelah Gashu Adam (2015). “Land readjustment as an alternative land development tool for peri-urban areas of Ethiopia”, *Property Management*, Vol. 33, Iss 1 p. 36.

¹⁵⁹ *Id.*, p. 56.

empowerment of landholders, there would be many phony ‘investors’ (foreign, multinational or domestic) who submit very attractive projects and business plans, but on the contrary aim at land possessions in the name of allotments for investment. Such ‘investors’ aim at the land to be allotted to their ‘investment’ and tend to ultimately divert their activities (in the guise of successive losses due to power outage, foreign currency shortages for raw materials, etc) after having possessed the land in the name of value-creating investments such as manufacturing, large-scale farming, and other business activities.

Good practices in competitive manufacturing envisage that investors usually hold shades and premises as tenants (or capital contribution agreements with landholders) in the context of competitive and stable house rental markets. These investors then focus on the installation of their machineries, start up of operations, production processes and marketing (rather than spending most of their efforts and capital in the construction of premises).

8.3 The relationship between unsound land laws and corruption

Sources of unearned economic rent should be abolished (or at least minimized) for the private sector to be viable, vibrant and strong. As Tollison observes, “[n]ormally, the concept of rent seeking is applied to cases where governmental intervention in the economy leads to the creation of artificial and contrived rents”.¹⁶⁰ According to Tollison, “[s]eeking such returns leads to social costs because output is fixed by definition in, for example, a government regulatory regime”.¹⁶¹ He notes that entrepreneurship under such circumstances inevitably becomes negative, and the rent gathered is dissipated thereby leading “to no increase in output or the allocation of resources to higher valued uses”.¹⁶²

In the context of natural resources, economic rent gathering refers to an entitlement to (or the denial of) a resource or access or economic benefit that is scarce. This is accompanied by the discretion of officeholders in the decision process. In Nigeria, it is usually related to oilfield concessions, in certain African states its sources emerge largely from minerals, and in Ethiopia its major source is rural and urban land.

Even if land is scarce in most countries, it cannot be susceptible to unearned economic rent gathering unless offices are entitled to allocate or withdraw land rights with discretionary powers. Other rent gathering opportunities can include discretions of officeholders to allow or deny scarce opportunities such as foreign exchange (if there is shortage and restriction), duty-free import facilities, and other scarce goods or services. The extent to which land in Ethiopia can be

¹⁶⁰ Robert D. Tollison (2012), “The economic theory of rent seeking”, *Public Choice*, Vol. 152, No. 1/2, The intellectual legacy of Gordon Tullock (July 2012), pp. 73-82, at 75.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

relieved from discretionary powers and opportunities (that prompt rent-gathering) thus determines the pace of private sector development which is a *sine qua non* factor for fair competition among economic actors in access to resources and the production of goods and services.

Concluding Remarks

Ethiopia's Trade Competition and Consumer Protection Proclamation No. 813/2013 has embodied provisions (highlighted in Sections 2 and 3) that aim at ensuring trade competition. However, there are gaps in enforcement. The comparative experience briefly indicated in Sections 4 and 5 indicates positive *vis-à-vis* predatory aspects of state intervention. Although crude protectionism (as it was practised under neo-mercantilism) seems to be difficult at present, developmental state interventions were successful in Eastern Asia during the 1960s and early 1970s. In contrast to these positive interventions, predatory states impede the development of a broad-based private sector because the '*low-level equilibrium trap*' in the role of private economic actors and absence of strong civil societies constitute the foundation for discretionary powers, suppression and rent gathering.

The various challenges discussed in this article have created gaps between the *pledges* that are embodied in the law and the *deliverables* thereof. The challenges stated in Sections 5 to 8, show that monopolistic and oligopolistic pressures and gaps in land rights and tenure security adversely affect fair trade practices and the contribution of land as one of the core factors in production and private sector empowerment. The sections show the need for a broad-based and strong private sector that can be an engine of the economy (in accordance with the pledges that are articulated in Ethiopia's Growth and Transformation Plans). This requires rectifying monopolistic and oligopolistic pressures, nurturing rule of law, and reforming Ethiopia's land laws.

As indicated in various studies, Ethiopia's land law involves restrictions in land tenure security, transferability, access to credit, etc. –and it lacks a coherent and sound land policy other than the general principles of public ownership of land embodied in the FDRE Constitution. As McAuslan notes, land “is the foundation of shelter, food, work and a sense of nationhood” and “land policy cannot be allowed to go by default;” because “a national land policy is at least as important as a national foreign or defence policy”.¹⁶³

The 1975 land reform was not preceded by a national land policy, but was informed by the ideology of Marxism-Leninism. It was the same generation that adopted the principle of public ownership of land in the 1995 Constitution

¹⁶³ McAuslan, *supra* note 152, p. 206.

without, however, giving due attention to a comprehensive and holistic land policy that should have defined the elements and core aspects of public ownership of land, a principle that prevails in various jurisdictions under different interpretations. Reflexive law-making thus seems to have influenced the various land laws that have steadily eroded the land rights and tenure security of landholders thereby stunting the private sector's access to core factors of production such as land and access to credit.

Ethiopia's land regime is not only economically and environmentally inefficient, but it is also the primary source of corruption as highlighted in Section 8.3. According to a World Bank's study,¹⁶⁴ corruption in the land sector is increasing due to "a weak policy and regulatory framework surrounding land allocation, titling, and management". The study notes the "opportunities for asset capture by elite and senior officials as well as corruption in the implementation of existing land policy and laws". The report states that the acts of the corrupt practices include "informal fees, officials' allocation of land to themselves or developers, and issuance of forged land documents".¹⁶⁵ Likewise, the 2016 Executive Opinion Survey conducted by the World Economic Forum shows that corruption (followed by problems in access to financing) ranks first among the *most problematic factors in doing business* in Ethiopia.¹⁶⁶

Prospects of rectifying gaps in this regard have objective timelines, because grand and petty corruption are difficult to reverse if they become 'systemic', i.e., a way of life. The longer Ethiopia procrastinates against *empowering* and *enabling* the private sector, the magnitude of erosion in Ethiopia's value system can put pursuits of shortcut profiteering and speculation into the mainstream, thereby rendering moral standards of honest business practice the exception rather than the norm. At such a stage of moral decadence, 'trade competition' would merely become competition in bribery, counterfeits, manipulation and fraud rather than quality, fair price and standards. ■

¹⁶⁴ Janelle Plummer, Editor (2012), *Diagnosing Corruption in Ethiopia: Perceptions, Realities and the Way Forward for World Bank Group Key Sectors* (The World Bank, Washington D.C.).

¹⁶⁵ For further discussion, see, E. N. Stebek (2015), "Challenges in Access to Urban Land for Business Activities under Ethiopian Law: Between Oligarchy and Broad-based Private Sector, *Mizan Law Review*, Vol. 9, No. 1, pp. 72-76.

¹⁶⁶ World Economic Forum (2016), *The Global Competitiveness Report* (2016-2017), p. 174. Available at: <http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf>
