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## Ethiopian Competition Law: Appraisal of Institutional Autonomy

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### **Abstract:**

*Enforcement of competition regime and ensuring fair competition in a free market economy depends, among others, up on the effectiveness of competition authority. Existing studies reveal that establishment of autonomous competition authorities is the most effective way to implement competition regimes and ensure market competition. Despite Ethiopia's effort to legislate three times in a decade and improve autonomy of competition authority, still the competition legal regime have gaps that will negatively affect autonomy of the competition authority, which directly affects enforcement of competition legal regime. This article assesses the gaps in the existing competition legal regime from the perspective of the competition authority's autonomy. Common features and practices of effective enforcement strategies and institutional designs for autonomous competition authority, and experiences from some countries based on their success and relevance to Ethiopia are used as benchmarks. It is argued that there are some provisions within the proclamation, which would affect the authority's autonomy. These are: the competition authority's accountability to the ministry of trade; the power of prime minister to appoint judges of the authority; the application of the civil service law to judges of the authority; and the power of council of ministers to approve annual budget of the authority (source of the authority's budget) would directly or indirectly affect the autonomy of the authority. Based on such findings, the writer recommends the sort of measures that the government shall take in order to ensure autonomy of competition authority and competition in the nation.*

**Keywords:** *competition authority, institutional autonomy, Ethiopian competition law*

### **1. Introduction**

To maintain free market economic system and protect consumers from anticompetitive acts of traders or firms, states have been enacting competition regimes, though there might be some differences among such competition regimes as to the content and number of specific objectives to be achieved.<sup>1</sup> Mere enactment of laws or piece of legislation, however, could not make the objectives and policies set to be achieved by competition regimes practical. In order to enforce the legal regime; it is must to establish enforcement organ/s charged with specific powers and duties. Besides, a meaning full implementation of the competition regime requires putting in place not only a proper and adequate competition law, but it also needs establishment of enforcement authority which has legal and practical autonomy.

States, taking the political and economic realities in to consideration, have been granted their competition authority a more or less autonomy from the political sphere. An important advantage of an autonomous competition authority is that the application and enforcement of competition rules are not influenced by volatile political considerations. By delegating the mandate to enforce competition law to an autonomous institution, legislatures try to guarantee that the application and interpretation of competition rules is mainly based upon economic and legal arguments alone, and is not shaped by political pressure.

In Ethiopia, before the enactment of trade practice proclamation in 2003, issues of anti-competitive acts or unfair trade practices were addressed under different legislations and enforced by different institutions. In 2003, Ethiopia introduced Trade Practice Proclamation No. 329/2003 with a view to secure fair competitive process through prevention and elimination of anticompetitive and unfair trade practices.<sup>2</sup> However, due to legal and structural limitations of the institutional framework, it failed to serve its intended purpose.<sup>3</sup> As a result, it was repealed by The Trade Practice and Consumer Protection Proclamation No. 685/2010 (hereinafter called TPCPP), which was enacted on June 8, 2010. TPCPP has made a comprehensive amendment to the previous proclamation, and it embodies more functional and extensive provisions that empower the competition and consumer protection authority to oversee enforcement of the same and adjudicate disputed cases.

<sup>2</sup>Article 3 of The Trade Practice Proclamation, Proc. No.329, 2003, *Federal Negarit Gazeta*, 9th Year No.49

<sup>3</sup>Harka Haroye "Competition Policy and Laws: Major Concepts and an Overview of Ethiopian Trade Practice Law", *Mizan Law Review*, Vol.2, No.1, pp.33-35

To overcome the challenges that had been faced while TPCPP was implementing, the nation has legislated, On March 21, 2014, a new Trade Competition and Consumer Protection Proclamation No.813/2014 (TCCPP) was enacted which made some amendments on its predecessor, trade practice and consumer protection proclamation No 685/2010 (TPCPP). It establishes a competition authority, called trade competition and consumers protection agency (hereinafter TCCPA), with a power to implement the proclamation. Although the improvements made under the new Proclamation are commendable, there are still serious shortfalls that are left unaddressed. This article attempts to address the legal loopholes pertaining to the autonomy of TCCPA. In doing so, relevant provisions of proclamation will be assessed taking the common and established features of autonomous competition authorities. The focus of this paper is, therefore, to evaluate autonomy of the authority established by the proclamation by critically reflecting on the relevant legal provisions of competition law.

The paper has three parts. The first part of the paper discusses common and established features of autonomous competition authorities developed to assess autonomy or otherwise of a certain nations' competition authorities. The second part of the paper analyses relevant legal provisions of Ethiopian competition law and argues the effect of the same on the autonomy of TCCPA. The last part of the paper concludes and recommends.

### *1.1. Common Features of Autonomous Competition Authorities*

Establishment of autonomous competition authorities has recently been the corner stone of institutional reforms to ensure that competition law's implementation from political influences.<sup>4</sup> Despite the fact that the institutional design of competition authorities are quite distinct due to the difference in socio-economic and political realities existing among nations in the world; the importance of having autonomous competition institution in these days is not subject to debate.<sup>5</sup> Thus, countries adjust their completion institutional framework with their respective country-specific socio-economic and political realities. However, there are some common principles that are advocated by various experts, which must be incorporated in competition legal frameworks to ensure autonomy of institutions. The general argument behind autonomy of competition authority is the assumption that the most efficient type of authority and sound policy outcomes are assured if the institution involved in enforcement of such policies or laws are autonomous.<sup>6</sup> According to Gilardi, there are three general justifications or rationales to grant autonomy to competition and authorities: namely, the (perceived) need for policy-makers to improve the credibility of their regulatory commitments, their desire to cope with political uncertainty and the constraints set by the institutional framework.<sup>7</sup>

The credibility argument considers that policy-makers may be unable to achieve their goals unless their regulatory promises are credible.<sup>8</sup> This applies "especially in the case of utilities reforms, the goal of which was to create a market in sectors previously characterized by the presence of a state-owned monopolist." He further stated that the achievement of this goal presupposes that private investors can be persuaded to enter the newly opened market, which requires certain assurances that the regulatory set-up will be unbiased and protected from political manipulation.<sup>9</sup> Thus, Delegation of regulatory competencies to independent regulatory agencies can be a means to achieve this goal. In addition to the credibility argument, as stated above, establishment of independent regulatory competition and authority is meant to cope up with political uncertainties. In other terms, granting autonomy to regulatory authorities (including competition authorities) serves as a means to prevent the influence, which might come out of short run political interferences.<sup>10</sup> Finally, the institutional context may affect these two dynamics. Because veto players make policy change more difficult, they could be a functional equivalent of regulatory independence with respect to both credibility and political uncertainty pressures.<sup>11</sup>

So far, we have seen the justifications for granting autonomy to competition and consumer protection authority. In the discussions to follow, the write will try to review common features of autonomous competition authorities.

Though there is no consensus as to the factors which should be taken in to account to measure the level of a certain competition protection authority's autonomy, scholars have developed some general parameters to be used in accessing the autonomy of the authority- indicators of effective autonomy. Gilardi summarizes the determinant factors of competition and competition authority's autonomy: that is; term office, appointment procedure, dismissal procedure, renewability of appointments, compatibility with other offices of the chairperson (commissioner) as well as the adjudicators; legal recognition of the authorities' autonomy, formal obligations of the authority, overturning of decisions; finance and organization of the authority which includes sources of the budget, the authorities' internal organization and control of the human resources; and regulatory competence of the authority, i.e. rule making, sanctioning and monitoring.<sup>12</sup>

<sup>4</sup>The UNCTAD Secretariat, Independence and Accountability of Competition Authorities, Available at [http://www.unctad.org/en/docs/c2clpd67\\_en.pdf](http://www.unctad.org/en/docs/c2clpd67_en.pdf), p 1 (accessed on Nov.18,2015)

<sup>5</sup>See World Bank, *Building Institutions for Markets*, World Development Report: Washington D.C., 2002. p23

<sup>6</sup>The UNCTAD Secretariat, supra note 4.

<sup>7</sup>Fabrizio Gilardi and Martino Maggetti, The independence of regulatory authorities, 2008 .retrieved on Nov 18, 2015 from [http://www.fabriziogilardi.org/resources/papers/gilardi\\_maggetti\\_handbook.pdf](http://www.fabriziogilardi.org/resources/papers/gilardi_maggetti_handbook.pdf), p 5

<sup>8</sup>Ibid

<sup>9</sup>Ibid

<sup>10</sup> Ibid

<sup>11</sup> Ibid

<sup>12</sup> Id

The first determinant factors refer to the status of the agency head and/or management board. The Crucial point here is that the length of the term office (longer terms increase autonomy); whether competition authority's officials are appointed by a single actor such as a minister or by a more encompassing procedure; whether they can be dismissed; whether the appointment is renewable; whether it is compatible with other public offices; and Whether the autonomy of officials is an explicit requirement.

The second elements refer to the relationship between the authority and elected politicians or administrative organs. It evaluates the issue that whether the independence (autonomy) of the authority is formally stated in the legal regime, what its formal obligations are, and under which conditions its decisions can be overturned.<sup>13</sup>

The third one considers the financial and organizational autonomy of the authority, which depends on whether the budget comes from the government or from other sources (such as fees levied on the regulated firms) and on whether the agency is free to organize its internal structures and to determine its staff policy (for instance, salary structures).

In addition to the formal autonomy of the authority recognized in the law, the practical application of such legal autonomy should be taking in to account in evaluating competition and consumer protection authority. By Formal autonomy, we mean the autonomy of the authority recognized in provisions of the law. It does not consider the fact that whether the provisions of the law are practically applicable or not. In other terms, it only analyses the provisions of the competition legal regime to determine existence of authority's autonomy. Defacto-autonomy refers practical application of the legal or formal autonomy of the authority. Thus, in addition to the formal autonomy stated in the competition legal regime, the practical application of provisions of the law should be evaluated in order to hold a conclusion as to the autonomy of the authority.

A competition authority that has formal autonomy is usually established as an autonomous institution not physically located in a government ministry (under executive organ of the government).<sup>14</sup>The trend across most jurisdictions in both developed and developing nations is to establish competition enforcement regimes comprising separate institutions that have substantial administrative autonomy from traditionally vertically integrated ministries.<sup>15</sup> Moreover, there are other indicators of the autonomy of competition and consumer protection authorities. Some of these relate to the conferring of operational autonomy of the authority by prescribing its functions, powers, and the manner by which members of management and staff are to be appointed, their tenure and removal, and how they are to be financed and the prescription of how they relate to the executive and legislature.<sup>16</sup>The existences of these attributes are supposed to assure organizational autonomy of competition authorities.

The mode of appointment of competition and consumer protection officials, as indicated above, has many things to do with autonomy of the authority. It is generally said that the appointment of competition officials by a minister is less conducive to independence than appointment procedures that provide for the participation of representatives of more than one government branch.<sup>17</sup> Moreover, it is assumed that competition officials who cannot be removed from office except by legal procedures have less of an incentive to please those who appointed them.<sup>18</sup>Inmost cases, even though ministers might -be the appointing authority, as a check and balance, the members and chief executives cannot be dismissed except with causes stipulated by law.<sup>19</sup>

The means of budget allocation has its own impact as far as the Autonomy of competition authority concerned. A process whereby the legislature allocates an annual budget to a competition authority, giving it the discretion to apportion it to various uses, is perceived to grant a high degree of budgetary autonomy to the authority.<sup>20</sup> However, in some cases, competition authorities fall under the portfolio of parent ministries for financial, administrative and reporting purposes, such that the authority's budget request is routed through the parent ministry for approval by the finance ministry and Parliament.<sup>21</sup> In this case, the authority's budget is part of the parent ministry's allocation and is released at the ministry's discretion. In other cases, the competition authorities themselves directly submit their budget proposal to the parliament.<sup>22</sup> This latter way of budget allocations gives the authorities the maximum level of autonomy.<sup>23</sup> Moreover, the degree of freedom that a competition authority has in its daily business of enforcing competition law and taking decisions is usually interpreted to mean that a competition authority is not subject to routine direct supervision by government organs and has been granted all the necessary power to fulfill its tasks.<sup>24</sup> Such an authority would thus have the discretion to set its own priorities as to the identification and investigation of competition cases and the pursuit of competition complaints.<sup>25</sup> It would also have

<sup>13</sup>Fabrizio Gilardi and Martino Maggetti, supra note 7 , P. 6

<sup>14</sup>The UNCTAD Secretariat, Supra note 4, P.5

<sup>15</sup>OECD Global Forum on Competition, Optimal Design of a Competition Agency, 2003, retrieved on Nov. 19,2015from: <http://www.oecd.org/dataoecd/58/29/2485827.pdf>,p.6

<sup>16</sup>Id p.5

<sup>17</sup>Id p8

<sup>18</sup>Ibid

<sup>19</sup>Ibid

<sup>20</sup>The UNCTAD Secretariat, Supra note 4,p.7

<sup>21</sup>Ibid

<sup>22</sup>Ibid

<sup>23</sup>Ibid

<sup>24</sup>OECD Global Forum on Competition, Supra note 15, p.6

<sup>25</sup>Ibid

the discretion to decline to investigate cases where it considers the motives of the complainant suspicious.<sup>26</sup> Unlike this, ministerial departments are constrained, as they would be subject to ministerial priorities and political interference.<sup>27</sup>

Finally, the existences of advocacy functions also reflect the autonomy of competition and consumer protection authorities. Other than businesspersons and the public, government organs as a whole are key targets of competition advocacy.<sup>28</sup> Accordingly, the ability of a competition and consumer protection authority to freely comment on and recommend improvements in public policy, regulation and legislation is an attribute by which the operational independence of competition authorities could be assessed.<sup>29</sup> For this, many laws give competition authorities the responsibility of advising government organs about the impact of the latter's actions, laws and policies on competition.<sup>30</sup>

## 2. Ethiopian Competition Authority

### 2.1. Introduction

Recognizing the importance of ensuring competition to its free market economy,<sup>31</sup> Ethiopia introduced the Trade Practice Proclamation in 2003<sup>32</sup>, which was later amended in 2010 and 2014. Although Ethiopia has enacted and amended laws that prohibit anticompetitive practices and behaviors, the level of competition in the country has been very low.<sup>33</sup> Existing studies and empirical evidence show the prevalence of anti-competitive practices.<sup>34</sup> Various views are forwarded regarding the possible causes for limited competition in Ethiopia. Maher M. Dabbah has identified involvement of government in the local market, political factor (the level of dedication of government to enhance free market economy), and institutional problem to be causes for limited competition in developing countries.<sup>35</sup> Moreover, Fikremarkos Merso, Imeru Tamirat & others have identified public sector dominance, price control, transparency in government's procurement and privatization, distorted financial market, inconsistent tax administration and business registration, unfair competition from party-affiliate enterprises and lack of awareness among business community and enforcers as some of the main causes for limited competition.<sup>36</sup> According to Roberto Zavatta and Samuel Feyisa the problem of limited competition in Ethiopia, is among other things, attributable to market concentration, public sector dominance, (lack of involvement of) foreign investors and prevalence of anticompetitive practices.<sup>37</sup>

Although various studies state, as aforementioned, the prevalence of anti-competitive practices as one of the causes that have stifled the competition in Ethiopia, they fail to directly indicate the contributory causes like lack of autonomous institution/s that could effectively enforce competition regimes for the prevalence of such practices.<sup>38</sup> Effective implementation of competition laws, as studies reveal, does not only base on the mere establishment of an enforcement authority but also depends on the level of the authority's legal and practical autonomy.<sup>39</sup> Thus, the writer tries to evaluate the autonomy of competition authority by critically reviewing the provisions of the legal regime and practices.

<sup>26</sup> Ibid

<sup>27</sup> Ibid

<sup>28</sup> OECD Global Forum on Competition, Supra note 15, p.10. Advocacy work targets beyond unfair business practices in the private business sector; and it further aims at solving problems caused by unnecessary public intervention in an economy and problems caused by the implementation of state measures which advance private interest. See also Haraka Haroye, supra note 2, p.45

<sup>29</sup> Ibid

<sup>30</sup> Ibid

<sup>31</sup> Ethiopia has adopted free market economic policy since 1991 (See *Industrial Development Strategy of Ethiopia* prepared in 1994

<sup>32</sup> Trade Practice Proclamation, Proc. No.329, 2003, *Federal Negarit Gazeta*, 9th Year No.49

<sup>33</sup> All competition laws; i.e., the 2003 Trade Practice Proclamation, the 2010 Trade Practice and Consumer Protection Proclamation, articles 5-21 and the new 2014 Trade Competition and Consumer Protection Proclamation, article 5-13 prohibit the anti-competitive practices and behaviors.

<sup>34</sup> Especially, anti-competitive agreements have been identified as the most prevalent anti-competitive practices that affect competition in Ethiopia. Price fixing is the most prevalent in Ethiopia and it needs attention and severe sanction. Prices of goods and services are usually agreed by the traders including trade associations regardless of the quality of the products and services. See for example, studies conducted by Roberto Zavatta and Samuel Feyisa, *Baseline Survey on Competition and Market in Ethiopia*, Private Sector Development Hub/AddisAbaba Chamber of Commerce and Sectorial Associations, 2009; Fikremarkos Merso, Imeru Tamirat Yigezu and Others, *Review of the Legal and Institutional Framework for Market Competition in Ethiopia*, Private Sector Development Hub/Addis Ababa Chamber of Commerce and Sectorial Association, 2009; World Bank (2006), Report on Investment Climate Survey for Ethiopia.

<sup>35</sup> Maher M. Dabbah (2010), *Competition Law and policy of developing countries: A critical assessment of the challenges to establishing an effective competition law regime*, Queen Mary University of London, School of Law Legal Studies Research Paper No. 53/2010, p11-12.

<sup>36</sup> Fikremarkos Merso and Others, Supra note 34, pp. 53-56.

<sup>37</sup> Roberto Zavatta & Samuel Feyisa, supra note 34, pp. 93-104.

<sup>38</sup> The UNCTAD Secretariat, Supra note 4, p 1

<sup>39</sup> Ibid

## 2.2. Appraisal of the Authority's Autonomy

The trade practice and consumer proclamation no. No.813/2014(TCCPP) has established the Trade Competition and Consumer Protection Authority as an autonomous federal organ accountable to the MoT with a mandate to enforce rules of competition and consumer protection enshrined in the same.<sup>40</sup> A Director General heads the authority & Deputy Director General to be appointed by the Prime Minister upon recommendation by the MoT and the Authority is to be composed of judges, investigative officers, prosecutors and other staff.<sup>41</sup> The Authority shall have its head office in Addis Ababa and may establish branch offices elsewhere as may be necessary.<sup>42</sup> Comparatively speaking, the authority is more powerful than its predecessor is, because it has the full power to investigate, prosecute and adjudicate alleged violations of rules of competition and consumer protection.<sup>43</sup> The mandate to investigate alleged violations under the repealed law was the responsibility of ministry of trade and the relevant regional bureaus. Again, under the previous law, the authority was not expressly granted the power to institute actions for alleged violations. The new law has also fundamentally departed from the repealed one by establishing new and second tier, called the federal trade competition and consumer protection appellate tribunal, to the adjudicative organ of the authority. Although the improvements made under the legal regime are commendable, the country is still experiencing a range of anti competitive practices. Hence, one can safely hold that the law and its enforcement is still far from complete and not free from gaps.

In preceding sections of the paper, the writer has briefly reviewed the rationales for establishment of an autonomous competition authority and the factors, which could be used to evaluate whether or not a certain competition authority is autonomous. In this part, taking such discussion as theoretical background, the autonomy of Ethiopian trade practice and consumer protection authority (TCCPA) will be analyzed. The evaluation or discussion would be relied more on the provisions of the law, interviews and literature for the reason that TCCPA is still not fully established and functional. The main points that are going to be dealt with here under, therefore, is whether the TCCPA has autonomy or not; and what are the legal loopholes which give a way for the potential interested parties (including executive organs of the government) to interfere in functions of the authority. The executive organ may interfere especially in the adjudicative function of the authority for two reasons: first, the government, like other governments of developing countries, is involved in business activities and could be brought before the authority as defendant; second, the government could also be plaintiff and brings about allegation or accuses against businesspersons.

### 2.2.1. Structural Autonomy

Structural autonomy, also called organizational autonomy, relates to whether or not the competition authority mandated to regulate competition is a legally independent body or part of a government department. According to a recent multicounty study, "an effective regulator will typically have its mandate clearly defined by law and will not be subject to ministerial control and discretion or the agency's status outside the executive and legislative branches of Government"<sup>44</sup> The majority of competition law regimes provide for a legally autonomous institution with substantial administrative autonomy from vertically integrated ministries.<sup>45</sup>

TCCPP establishes the authority as an autonomous federal government organ having its own legal personality.<sup>46</sup> It is, thus, an autonomous organ structurally separated from the Ministry of Trade. This explicitly legally recognized status of the authority is an important development when it is compared to the status of the Investigative Commission under the repealed Trade Practice Proclamation No.329/2003. The Investigative Commission was a mere department of the Ministry of Trade and Industry.

The Authority has its own judges, investigative officers, director general, deputy director generals, and the necessary staff.<sup>47</sup> It is generally taken that having one's own organizational structure with judges, head of the authority and necessary staffs is important indicator of the organizational autonomy of competition authorities.<sup>48</sup> On top of that, appointment and removal of competition authority's director general, deputy director generals, judges and other staff; and the power to determine employees' salary and other benefits is also other determinant factor of structural autonomy of competition and consumer protection authority. Regarding appointment of the director general, deputy director generals and judges, the law clearly states to be made by prime minister of the state, though such appointment would be made, based on recommendation of ministry of trade.<sup>49</sup> As far as the ministry does not have ultimate power on the appointment of the director general and judges, at least theoretically, the involvement of ministry of trade in the process of appointment might not have a problem in relation to the organization or structural autonomy of the authority.

<sup>40</sup> article 27 of Trade Competition and Consumers Protection Proclamation, Proc. No. 813, 2014, *Federal Negarit Gazeta*, 20th Year, No. 28.

<sup>41</sup> article 28 of trade competition and consumer proclamation no. No..813/2014

<sup>42</sup> article 29 of competition and consumer proclamation no. No..813/2014

<sup>43</sup> See Article 30 of trade practice and consumer proclamation No. No.813/2014

<sup>44</sup> Srinivas Raghavan and Pradeep S Mehta, Institutional Independence in India, Discussion Paper, CUTS Centre for Competition, Investment & Economic Regulation (CUTS C-CIER), 2006, p. 6

<sup>45</sup> Examples include the UK, Canada, Australia, India, South Africa, Sri Lanka, Tanzania, and Zambia. Therefore, In general, the trend appears to favor independent regulatory agencies with other structures. *ibid*

<sup>46</sup> Art.27 (1) of Trade Competition and Consumer Protection Proclamation 813/2014

<sup>47</sup> article 28 of Trade Competition and Consumer Protection Proclamation 813/2014

<sup>48</sup> Interview with Ato Merkebu Feleke, Director General of Ethiopian Trade Competition and Consumer Protection Authority, on august. 21, 2015

<sup>49</sup> Cumulative reading of article 28(1) and 35(1) of Trade Competition and Consumer Protection Proclamation 813/2014

The power to supervise and direct day-to-day activities or functions of the authority and existence of advocacy function also reflect organizational or structural autonomy of the competition and consumer protection authority. The director general of TCCPA is appointed as chief executive and empowered to organize, direct and administer the internal affairs of the Authority. He is also mandated to follow the proper implementation of the powers and duties of the authority. By advocacy function, we mean the role of TCCPA in advising government organs while they design policies or enact laws with a view to protect potential conflict of such policies and laws with the objectives of the competition and consumer protection proclamation. It also includes the freedom of the authority to criticize and claim reconsideration of government policies and laws, which are in contrary to the proclamation. Though it is not specifically include all the above stated elements of advocacy functions, the proclamation generally recognizes advocacy function of TCCPA. One can observe such recognition under article 30 of the proclamation, which stipulates that the authority have the power to “initiate policy issues, participate on policy and drafting undertakings by other organs of the government”.

Since the authority’s accountability is made to the ministry of trade, there is a view that the authority is not structurally autonomous because accountability of the authority to the ministry would compromise its autonomy.<sup>50</sup> Those with this view prefer the accountability of the authority to the parliament. Besides, the appointment of the director general and judges of the authority by the Prime Minister upon the recommendation of the Ministry of Trade would affect structural autonomy of the authority, though indirectly. Considering the same issue, in the move for the amendment of the repealed Trade practice and Consumer Protection Proclamation No. 685/2010, it was recommended that its members and the chairperson be appointed by the Parliament rather than by the Prime Minister.<sup>51</sup>

Thus, according to the above argument, though the authority is legally recognized as organizationally or structurally autonomous organ and that it is separated from the ministry of trade as well as from other government organs, there are provisions, which actually could make the legally recognized structural autonomy less effective. In spite of this, there is counter argument to the above line of argument that, at least theoretically, the authority has structural autonomy. Firstly, the accountability of the Authority to the Ministry of Trade is limited only for administrative activities and limited to submit report.<sup>52</sup> And there is no room for interference in the judicial activities of the Authority as the law has clearly granted it autonomous status.<sup>53</sup> In fact, accountability is not a problem by itself as accountability is the attribute of every government organ. The issue rather lies on balancing autonomy and accountability. In a country where democratic governance is not well established, making a competition authority accountable to a government organ, which has direct interest in the adjudicative function of the former would obviously create some sort of interference. This is because the ministry might use its power (the power to access functions of the authority) to influence the authority.

### 2.2.2. Operational Autonomy

The second aspect of institutional independence is operational or functional autonomy. It relates to the decision-making structures and processes within the competition authority. The following have been identified, as stated in the preceding discussions, as the most critical elements in this respect:

- The agency’s governance structure should consist of multi-member commissions composed of experts.<sup>54</sup>
- Senior personnel should enjoy security of tenure: clear rules, ideally involving two government bodies, must govern their appointment and, especially, dismissal.
- The tenure of appointment for members should be long enough to allow members to develop expertise without developing entrenched positions.<sup>55</sup>

Put differently, Operational autonomy refers to the functional autonomy of the TCCPA which depends on the powers and functions of the authority, appointment of the authority’s general director and judges, and tenure and removal of the director general and other employees. It also depends on the power of the authority to determine its employee’s scale of salary as well as other benefits. The ideal competition authority is “a multi-member body made up of experts in law, economics, business administration and international law to ensure the independence and quality of the personnel”.<sup>56</sup> Most competition laws provide for the representation of stakeholders in one form or another.<sup>57</sup>

<sup>50</sup>Interview with Bruktawit Walegn, Expert in Regulatory Work Process of Ministry of Trade on Sept. 2,2015.

<sup>51</sup>Organization for Social Science Research in Eastern and Southern Africa (OSSREA), The State of Competition and Competition Regime in Ethiopia: Potential Gaps and Enforcement Challenges , (2015) pp211-217

<sup>52</sup> Interview with Ato Merkebu Zeleke, supra note 43.

<sup>53</sup>Ibid.

<sup>54</sup>Olivia Jensen, Contours of A National Competition Policy: A Development Perspective, CUTS Centre for International Trade, Economics & Environment, Briefing Paper No. 2, 2001, p. 7

<sup>55</sup>Ibid

<sup>56</sup>Ibid

<sup>57</sup>For instance, the Malawi Competition and Fair Trading Commission comprises of ten members – two representing business interests, two representing consumer interests, three professional appointees, and three ex-officio members representing government departments all of whom are nominated by the responsible minister and appointed by the President. Olivia Jensen, supra note 54, p. 95

The proclamation provides that the authority is free from any interference or direction by any person with regard to the cases it adjudicates.<sup>58</sup> This is an important guarantee for the authority. It enables it to adjudicate cases without any fear of or pressure from government organs. Besides, formally speaking, judges of the authority are independent of any interference with regard to cases they adjudicate. However, recognizing the freedom of the judges to decide a case based on the facts and provisions of the law alone, even though it is decisive step to assure operational autonomy, could not ensure the functional autonomy of the authority. The accountability of the judges, appointment and removal of judges, and the source of authority's budget are also other elements or factors, which should be taken in to account while one tries to examine a certain authority's level of functional autonomy.

With respect to functional autonomy of TCCPA, some doubts are raised based on four points: First, the relationship between the judges and the director general is not clear; second, the authority is accountable to the ministry of trade which is a party to the case; third, appointment of judges by the prime minister based on the recommendation of the ministry of trade could indirectly affect the proclamation, they might have the duty to accept the direction of the director general which actually puts the autonomy of the judges under question mark; and fourth, the governing judges by civil service laws of the nation like other civil servants.<sup>59</sup>

As studies and long run practices reveal, one of the best principles for improving regulatory enforcement and functional autonomy of competition authorities is the involvement of stakeholders in enforcement and compliance endeavors.<sup>60</sup> Market forces, the private sector and civil society support compliance and enforcement. These forces should thus be explored wherever possible because the problems cannot be addressed solely through inspections and enforcement thereby necessitating many other means of attaining the regulatory objectives, which depends the autonomy and effectiveness of competition authorities.<sup>61</sup> The TCCPP has established the Authority without providing for representation of stakeholders especially, from the business communities. The Proclamation has repeated the mistake made under the 2010 Proclamation. In this regard, it is plausible to say that the 2003 Proclamation, inspite of gaps in its implementation, was better than the subsequent two proclamations. The failure to provide for the representation of stakeholders in the Authority can contribute to challenges in enforcement and institutional autonomy since competition in a market economy involves the interests of the business community.

There are also counter arguments that the authority has operational autonomy.<sup>62</sup> This is because, on one hand, the law has clearly provided for the freedom of the authority from interference incases it adjudicates. Secondly, this mode of appointment of the judges of the tribunals is not a problem by itself. Thirdly, the relationship between the director general and judges is limited to administrative matters. Fourthly, the accountability of the authority to the ministry of trade would also be limited to administrative matters of the former. Finally, the experiences of many countries show to this effect.<sup>63</sup>

As it is to be recalled, the main justification to establish an autonomous competition and consumer protection authority is to minimize political interference in implementation of competition protection's legal regime. Given the specificity of enterprise ownership in Ethiopia, i.e. where it is difficult to disassociate the ownership of endowment enterprises from the Government in power, it is essential to ensure autonomy of the authority. Specifically, permitting the executive organ of the government to appoint and dismiss judges and director general could indirectly affect the autonomy of the authority, as the executive would have an interest in case where the publicly owned business organizations and other endowments accused of anticompetitive acts or unfair competition. In addition, the law is not clear as to the tenure, salary, discipline and related matters of judges. The low salary scale and the lack of the tenure security under the civil service law, compared with the judiciary, could be one factor affecting decisional independence of the judges. Therefore, for the above reasons, the appointment of director general and judges by the prime minister; and accountability of the authority to minister of trade and other stated gaps of the competition law would have a great impact on the functional autonomy of the authority.

### 2.2.3. Financial Autonomy

The other aspect of competition authority's institutional autonomy, which is usually considered part of operational autonomy, relates to the source and allocation of budget. The concern here is "the use of budgetary restrictions as a way of curtailing or penalizing enforcement".<sup>64</sup> Nations with high autonomous competition and consumer protection authority entrusted the power to approve budget

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<sup>58</sup> Article 27, 32 and 33 of the trade practice and consumer protection proclamation No. 831/2014

<sup>59</sup> Those with this argument prefer a distinct law by which the judges of the authority could be governed. Kibre Moges, Policy-induced Barriers to Competition in Ethiopia, CUTS International, Japura, India, 2008, p.21. Interview with Dr. Fikremarkos Merso, professor of law in Addis Ababa university, on August, 2015. He said that the TCCPA's accountability to the ministry of trade, which has also interest on the operation of the authority, would affect the autonomy of the authority for the reason that the ministry has a power to investigative anti competitive acts of firms or business individuals and institute cases before the authority for adjudication.

<sup>60</sup> OECD (2013), Best Practice Principles for Improving Regulatory Enforcement and Inspections, Draft Report Submitted to the Public Consultation, p5

<sup>61</sup> Ibid

<sup>62</sup> Interview with ato Merkebu Zeleke, Supra note 43,

<sup>63</sup> Ibid

<sup>64</sup> United Nations Conference on Trade and Development, Independence and accountability of competition authorities, TD/B/COM.2/CLP/67, Trade and Development Board, Commission on Investment, Technology and Related Financial Issues, Intergovernmental Group of Experts on Competition Law and Policy, Ninth session, Geneva, 15–18 July 2008, p. 22

of the authority to the house of people's representative.<sup>65</sup>Ideally, competition authorities should also have access to "independent sources of funds, such as user fees or levies on the regulated industry" with rates determined by the law establishing the agency.<sup>66</sup> If, on the other hand, the budget is allocated by the government, it "should come from the general budget and without strings attached".<sup>67</sup>The more prevalent practice among countries is to provide for the allocation of funds directly by the legislature.<sup>68</sup> In some cases, the authority may raise and retain additional funds from fees.<sup>69</sup>

It is generally taken that having one's budget is important indicators of the organizational autonomy of competition authorities. Though TCCP has its own budget, it is not clear as to which branch of the government organ would have the power to determine the budget. Though the proclamation provides that TCCPA shall have its own budget, it does not say anything as to the source of such budget. According to the director general of the authority, Ato Merkebu Zeleke, councils of ministers would have the power to approve the annual budget of the authority based on the proposal submitted to it by the director general. Thus, this would have its own impact on the autonomy of the TCCPA for the reason that the executive organs of the government have political and economic interest, which might create an obstacle to implement the proclamation solely based on the economic and legal rationales stated in the proclamation. the position of the proclamation in this regard is thus in contrary to the established practices of developed and developing nations where competition authorities have a power to submit their annual budget for approval before the legislature.

### 3. Conclusion and Recommendation

Having autonomous competition authority is corner stone for proper and effective implementation of competition and consumer protection law. The rationale behind recognition of the authority's autonomy is to ensure the effective implementation of the law and protect the authority from volatile political influences. An authority to be considered as an autonomous government organ, among other things: first, its autonomy should be expressly stipulated in the law; second, it should have separate existence from the executive organ of the government in relation to budget, accountability, appointment and dismissal of the director general and judges; third, the authority's power to advocate competition should be expressly stated or recognized under the provision of the law ; finally , it should have appropriate and legally recognized power and duties which enable it to supervise the day to day activities of its employees and properly implement provisions of the law.

The Ethiopian trade competition and consumer protection No.831/2013 establishes the Trade competition and Consumer Protection Authority as an autonomous federal government organ and responsible to enforce the competition Law. Unlike its predecessor, it is clearly established as separated regulatory organ with its own director general, deputy director Generals, judges, budget and other employees. The law has also explicitly recognized that the Authority is free from any interference in adjudication of cases.

Even Though the TCCPA is clearly designated as an independent or autonomous competition authority, there are some provisions within the proclamation, which would affect the authority's autonomy. These are: its Accountability to the ministry of trade; the power of prime minster to appoint judges of the authority; the application of the civil service law to judges of the authority; and the power of council of ministers to approve annual budget of the authority; and absence of market forces and private sector representation in the competition authority would directly and/ or indirectly affect the autonomy of the authority.

. Thus, based on the papers finding, I would like to recommend the following:

- ✓ Director General and judges of the trade practice and consumer protection authority should be appointed by the parliament rather than by the prime minister; and other specific law in place of civil service law should govern judges. The authority should also be able to report its performance to the parliament.
- ✓ The trade competition and consumer protection authority's annual budget should be determined or approved by house of people's representative for such would help to make the authority free from indirect influence of the executive organ of the government.
- ✓ Market forces and private sector shall have representation in the competition authority since they have irreplaceable role to ensure enforcement of the legal regime and fair competition.

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<sup>65</sup> OECD Global Forum on Competition, Supra note 15, p 6

<sup>66</sup>United Nations Conference on Trade and Development, supra note 64, p. 22

<sup>67</sup>Ibid

<sup>68</sup>The competition authorities of Albania, Bosnia and Herzegovina, Bulgaria, Colombia, Pakistan, the Russian Federation, Singapore and Slovakia submit budget requests directly to the finance ministry or treasury. Pulling Up Our Socks – A Study of Competition Regimes of Seven Developing Countries of Africa and Asia under the 7-Up Project, CUTS Centre for Competition, Investment & Economic Regulation and DFID, 2003, p. 53; and UNCTDA (2008), p. 9

<sup>69</sup>For instance, competition authorities in Australia, Peru, Zimbabwe, South Africa and Turkey can receive income from filing fees in addition to budgetary allocations by their respective legislatures while the Fair Trading Commissions of Sri Lanka and Jamaica have to do with parliamentary allocations. Ibid



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