

# **MEKELLE UNIVERSITY**



## **FACULTY OF LAW**

### **Abuse of Market Dominance in Ethiopia: Legal Frameworks and Enforcement Challenges**

**Submitted in Partial Fulfillment of the Requirements for the Degree of Master of Laws (LL.M) in Business law**

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**Mekelle, Tigray, Ethiopia**

**MEKELLE UNIVERSITY**

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**Approval sheet by board of examiners**

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**Advisor Signature Date**

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## **Declaration**

I declare that this LL.M. thesis, titled Abuse of Market Dominance in Ethiopia: Legal Frameworks and Enforcement Challenges, is my own original work. It has not been submitted, in whole or in part, for any degree or qualification at any other university.

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Date: 14/3/2026

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Date: 14/3/2026

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## **Abstract**

Competition law's role in promoting fair market dynamics and consumer welfare is inevitable, particularly in developing economies like Ethiopia, where market dominance can lead to exploitative and exclusionary practices. This LL.M thesis examines the general topic of abuse of market dominance (AMD) within Ethiopia's competition framework, particularly on the legal provisions, enforcement mechanisms, and practical challenges under the Trade Competition and Consumer Protection Proclamation No. 813/2013.

Despite of the laws prohibiting AMD, significant gaps persist in regulation and enforcement, allowing dominant firms to engage in anti-competitive behaviors such as exclusive dealing, restricting essential facilities, unfair contract terms, tying and bundling, and abuse of economic dependence or abuse without dominance.

The study employs a mixed-methods approach, combining doctrinal legal analysis of Ethiopian laws, proclamations, and international comparisons with empirical non-doctrinal methods, including semi-structured interviews with key stakeholders such as officials from the Ministry of Trade and Regional Integration, judges, businesspersons, and consumers. Data was collected from primary sources (interviews, legal documents) and secondary sources (scholarly articles, reports), analyzed qualitatively.

The research identifies prevalent AMD practices in sectors like telecommunications (e.g., Ethio-Telecom's exclusive agreements), manufacturing (e.g., Keste Damena's improper franchise fees), and mobile services (e.g., Transsion Holdings' restrictions on spare parts). Legal gaps include unregulated intersections with intellectual property rights, inadequate penalties, and absence of provisions for abuse without absolute dominance. Enforcement challenges encompass limited institutional capacity, conflicts of interest within the Ministry, and insufficient resources.

Ethiopia's competition framework is foundational but undermined by weak enforcement and practical gaps, leading to market distortions and reduced consumer choice. Recommendations include revising laws to address relative dominance and intellectual property abuses, enhancing the Anti-Competitive and Law Violation Prevention Desk's independence and capacity through training and resources, raising public awareness on competition rights, and fostering inter-institutional collaboration for effective oversight.

## **ABBREVIATIONS AND ACRONYMS**

AMD	Abuse of market dominance
EC	European Commission
CRBLP	Commercial registration and business licensing proclamation
IPRs	Intellectual Property Rights
SSNIP	significant and non-transitory increase in price
TFEU	Treaty on the Functioning of the European Union
MoTRI	Ministry of Trade and Regional Integration
(TCCPA)	Trade Competition and Consumer Protection Authority

## CHAPTER ONE

### 1. INTRODUCTION

#### 1.1. Background of the study

Free market advocates for conditions where market forces determine the role in the operation of the market. Competition policy and law aims at promoting competition, make market work better and contributes to market efficiency and effectiveness.<sup>1</sup> However, free market economy is not a panacea to all problems, government intervention through the adoption of competition and consumer protection, is necessary.

In a monopolistic market form, one firm in the concerned industry with no close substitutes for the product of the monopolist is a price maker.<sup>2</sup> Monopolistic market is expressed by scarcity of goods, poor quality, high prices, unresponsiveness to consumers, unreasonable, irrational, or incomprehensible terms of dealing, an arbitrary and highhanded attitude.<sup>3</sup>

Dominant position of a firm can be established through the share the firm holds and the extent of market entry barriers.<sup>4</sup> Indicators of market share includes the production capacity, production volume and sales volume.<sup>5</sup> Market entry barriers can be absolute or relative. Absolute barriers include government's policies, which does not allow licensing of potential competitors.<sup>6</sup> The restriction to market entry can also be created naturally, strategically, and through regulatory and policy barriers.<sup>7</sup>

Abuse of dominant market position comprises the exclusion of competitors, and exploitation of consumers.<sup>8</sup> Exploitative abuses includes charging excessively high prices to its customers, discriminating

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<sup>1</sup>Ignatius lebogang nkuna, essential facilities and abuse of dominance in south African competition law, Masters of law thesis, University of Pretoria,(May 2013),P.1

<sup>2</sup>Harka Haroye, *competition policies and laws: Major Concepts and an Overview of Ethiopian Trade Practice Law*, Mizan Law Review ,Vol. 2 No.1, (Jan 2008),P.36

<sup>3</sup> Ibid,P.36,

<sup>4</sup> Robert Anderson,et.al,The World Bank and Organization for Economic Cooperation and Development (OECD), A Framework for the Design and Implementation of Competition Law and Policy (U.S.A, 1998), P.72

<sup>5</sup> supra note 3,P 40

<sup>6</sup> Ibid,,P.40

<sup>7</sup>Department for International Development (DFID),Competition Assessment Framework: An operational guide for identifying barriers to competition in developing countries, (January 2008),P.16

<sup>8</sup>Ibid, P.27

among customers, paying low prices to suppliers; on the other hand exclusionary abuses conducts are acts that suppress competition, by refusing to deal with a competitor, raising competitors' costs of entering a market, or charging predatory prices.<sup>9</sup>

Market power is defined as the ability to control price, to exclude competition, or behave to appreciable extent independently of competitor, consumers or suppliers.<sup>10</sup> However, unless used to manipulate potential competitors and consumers, possessing dominant position in a market is not per se illegal.

Usually the firm, which has dominant business, engages in restrictive vertical agreements. Restrictive business agreement (vertical or horizontal) are prohibited anti-competitive business practices. Among other things, resale price maintenance, exclusive distribution agreement, exclusive dealing agreement are considered as prohibited vertical agreements.<sup>11</sup> Price fixing, bid rigging, and allocation of markets can also be cited as instances of horizontal vertical agreements which impeded competition.<sup>12</sup>

Exclusive dealing and exclusive territories have the effects of leading to the elimination of options that consumers might prefer; it significantly restricts downstream firms in the choices that they can offer to consumers.<sup>13</sup>

In recent decades, there has been a significant increase in the adoption of competition policy and laws among developing economies around the world. This growth reflects the recognition that effective competition frameworks are crucial for fostering healthy markets and protecting consumer welfare. However, the implementation and enforcement of these competition regimes has often been challenging for many developing countries.

The young competition authorities in these economies frequently struggle to effectively deal with the rising complexities of corporate behaviors and evolving market dynamics. One particular area where antitrust enforcement has been particularly weak in developing markets is the handling of "abuse of dominance" cases.

Dominant firms in these markets may engage in exclusionary or exploitative practices that harm competition and consumers. Yet, the underdeveloped capacities of the competition agencies, limited resources, and

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<sup>9</sup>Supra note 4,P.72

<sup>10</sup> Supra note1, P.5, citing, M Neuhoff (Smit) et.al. A Practical Guide to the South African Competition Act, 2nd Ed,(2006),P.12

<sup>11</sup> Supra note 3,P.43

<sup>12</sup> Ibid, P.42

<sup>13</sup> Neil W. Averitt and Robert H. Lande ,*Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*, Loyala Consumer law Review, Vol.10,Issue.1, (1998), p.48

potentially political considerations can impede their ability to robustly investigate and address such anticompetitive conduct by dominant players.

This implementation gap between the well-intentioned competition laws on the books and the realities of effective enforcement remains a significant obstacle for developing economies seeking to harness the benefits of vibrant market competition. Strengthening the institutional capabilities, independence, and resources of competition authorities will be critical for these countries to tackle complex abuse of dominance issues and promote competitive markets that serve the public interest.<sup>14</sup>

Ethiopia has adopted competition and consumer protection proclamations and updated it several times. Though the introduction of the law and respective amendments are a good move, the practice of competition and consumer protection remains still unchanged.<sup>15</sup>

The trade competition and consumers protection proclamation, lists acts, which are considered as act of abuse of dominance.<sup>16</sup> From the reading of the provision, the acts are classified in to two i.e. rule of reasons prohibitions and per se prohibitions. Article 5(2) delineates eight specific categories of actions that constitute abuse of market dominance. The first four prohibitions, outlined in sections 5(2) (a) to 5(2) (d), are categorical and strictly enforced, meaning there are no exceptions to these rules. These provisions reflect a zero-tolerance stance on certain types of behavior that can undermine market fairness.

Conversely, the subsequent prohibitions listed in sections 5(2) (e) to 5(2) (h) include the phrase “without justifiable economic reasons,” indicating that there may be circumstances where exceptions apply. This nuance acknowledges that not all practices considered abusive are inherently unjustifiable; some may be defended under specific economic rationales.

Hence, the study will deal on abuse of dominance acts listed under the trade competition and consumer protection proclamation and other unregulated practices. It will also investigate the exploitative and exclusive acts of firms which are monopolized by the government, and individual traders.

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<sup>14</sup> Hassan Qaqaya and George Lipimile , the Effects of Anti-Competitive Business Practices on Developing Countries and Their Development Prospects ,(2008), P.2000

<sup>15</sup> Fikremarkos Merso, et’al , Review of the Legal and Institutional Framework for Market Competition in Ethiopia,(2009),P.59

<sup>16</sup> Trade competition and consumer protection proclamation ,2013,Article.5,Proclamation no.813,Neg.Gaz.Year 20,No.28 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).

## 1.2. Statement of the problem

The current proclamation prohibits anti-competitive trade practices. Among other things, it prohibits abuse of market dominance<sup>17</sup>, anti-competitive agreements, concerted practices and decisions<sup>18</sup>, and unfair competition.<sup>19</sup> Abuse of market dominance practices which are listed in the trade competition and consumer protection proclamation<sup>20</sup> has adverse effect on consumers, competitors, and the market.<sup>21</sup> However, despite these provisions, significant legal and enforcement gaps persist, undermining the Proclamation's effectiveness in curbing abuse of dominance. It also slows technological progress, and restricts the offer.<sup>22</sup> This research is necessary to investigate these deficiencies, as they allow dominant firms to engage in exploitative behaviors without adequate oversight, leading to market distortions and economic inefficiencies that stifle innovation and consumer choice in Ethiopia's evolving economy.

Exclusive distribution agreement whereby distributors are assigned exclusively within a geographic area or over particular types of clients or over specific products are restrictive business practices. Despite the Proclamation's broad prohibition of this act, dominant firms persist in engaging in these activities, highlighting a blatant enforcement gap. This weakness is manifested with limited institutional capacity of the Trade Competition and Consumer Protection Authority (TCCPA) in terms of resources, expertise, and proactive investigations; and a lack of publicly reported enforcement actions specifically targeting exclusive dealing as abuse of dominance. Therefore, there is a need for a research to examine exclusive distribution agreements by dominant firms, evaluate the TCCPA's regulatory approach, identify precise legal and practical deficiencies, and propose actionable improvements.

Similarly, the restriction of essential facilities, defined under the Proclamation as *an infrastructure or resource that cannot be easily found or not much often available, and which is very important to competitors in order to supply their goods and services to their customers*<sup>23</sup> represents a direct form of abusive of dominance. Other trader's capacity to compete in the market will be hampered, as they will not have access to these essential facilities to deliver goods and services to their customers. However, enforcement remains weak due to ambiguities in defining "essential" facilities and proving dominance. Hence, a study is needed to bridge these gaps through empirical analysis and policy recommendations.

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<sup>17</sup>Ibid, Article 5 and 6

<sup>18</sup> Ibid ,Article 7

<sup>19</sup> Ibid, Article 8

<sup>20</sup> Ibid, Article 5(2)

<sup>21</sup> Marginean and Mihai, Positive and negative effects analysis in abuse of dominance, (November 2017),P.15

<sup>22</sup> Ibid ,P.15

<sup>23</sup> Supra note 16,Art.2(8)

Tying sales further illustrate enforcement deficiencies, where dominant or monopolistic firms condition the purchase of one product on unrelated services (Article 5(2)g), forcing consumers to rely solely on the dominant provider and denying market access to alternatives. Yet the Proclamation's provisions lack mechanisms for swift intervention or penalties tailored to Ethiopia's context, highlighting the need for research to evaluate local cases and propose strengthened regulatory frameworks.

Unfair contract terms, including mandatory after-sale repair and maintenance services that require customers to approach only the dominant seller (thereby denying competitors access to spare parts markets), compound these issues as exploitative abuses.<sup>24</sup> These terms exploit unequal bargaining power, but the law's general prohibitions fail to address sector-specific vulnerabilities, such as in tech industries, where dominant firms can impose them without fear of effective sanctions. This gap in enforcement perpetuates market exclusion, making it essential to conduct research that substantiates these observations with literature and proposes amendments for fairer contractual safeguards.

In a significant development, franchise business has been officially acknowledged and defined for the first time in Ethiopia through the CRBLP (Commercial Registration and Business Licensing Proclamation).<sup>25</sup> However, there is a flaw in the definition provided for the term 'franchise agreement' in Article 2(33) of the CRBLP. This flaw lies in the failure to legally recognize franchise agreements that involve an independent association of Intellectual Property Rights (IPRs) such as trademarks, service marks, trade secrets, copyrights, patents, and more. The current definition only grants legal recognition to franchise agreements associated with a trade name. Considering that IPRs are fundamental to any franchise agreement, this narrow scope imposed by the CRBLP unquestionably hampers the growth and expansion of franchise businesses within the country.

Franchise business, although relatively new, is being introduced as a form of business within the Ethiopian business community. It is becoming increasingly common for certain business entities to charge franchise fees to potential franchisees. However, the legislative framework pertaining to franchise business regulation in Ethiopia is riddled with uncertainties and fails to establish any legal safeguards for franchisees engaged in contracts with equal bargaining power.<sup>26</sup> The absence of a comprehensive legislative framework undermines

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<sup>24</sup>Shardul Amarchand et.al, *In brief: abuse of dominance in India*. <https://www.lexology.com/library/detail.aspx>,last assessed on 8 May 2021,last visited 8 May 2021

<sup>25</sup> Commercial registration and business licensing proclamation, 2016, Proclamation no.980, Neg. Gaz. 22<sup>nd</sup> Year No.101

<sup>26</sup> Homda Robera Haile ,The protection of franchisees in Ethiopia: de lege lata and de lege ferenda, LL.M thesis,(June 2020),P.30

fair dealings and good faith between the parties involved, leaving franchisees vulnerable to potential abusive conduct by franchisors.

Moreover, even in cases where franchisors do not meet the dominance threshold defined in Article 6 (e.g., significant market share enabling independent behavior from competitors and consumers), they can still engage in "abuse without dominance," a concept recognized in comparative competition law as abuse of economic dependence. This occurs when a franchisee is economically reliant on the franchisor due to sunk investments, limited switching options, or imbalanced contractual power, allowing the franchisor to impose unfair terms without objective justification—mirroring exclusionary or exploitative behaviors like tying or refusal to supply, but without requiring market-wide dominance.<sup>27</sup> In the Ethiopian context, this gap prompts for further study and investigation as franchisors, often leveraging global brands, can exert such dependence on local franchisees in nascent markets, potentially stifling innovation and entry without triggering dominance-based enforcement.

Consequently, it is imperative to address issues surrounding the legal foundation for charging franchise fees, royalty fees, and the overall regulation of franchise business in Ethiopia. Thorough research is needed to bridge the gap between existing laws and practical implementation, ensuring that franchisees are afforded adequate legal protections and fostering an environment of fairness and transparency in the franchising sector.

Hence, the researcher will explore the above discussed abuse of dominance practices and the way the competent organ regulates. Furthermore, the gaps in the laws in regulating abuse of dominance needs to be investigated. The absence of well conducted research on abuse of market dominance in the study area also motivates the researcher to conduct the research.

### **1.3. Objective of the research**

#### **1.3.1. General objectives**

To critically analyze Ethiopia's legal and institutional framework on abuse of market dominance, evaluate its implementation in practice, and propose evidence-based recommendations for effective implementation.

#### **1.3.2. Specific objectives**

The specific objectives of the research are:

- To analyze the substantive provisions, scope, and legal gaps in Ethiopia's abuse of market dominance law;

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<sup>27</sup> Mor Bakhom, Abuse without Dominance in Competition Law: Abuse of Economic Dependence and its Interface with Abuse of Dominance, The Max Planck Institute Research Paper No. 15-15 (2015), pp. 1-2

- To identify and evaluate the exclusionary and exploitative practices employed by dominant firms in selected sectors (e.g., telecom and franchising);
- To examine the institutional capacity, procedural mechanisms, and practical challenges facing competition authorities in enforcing abuse of dominance law;
- To propose legal, institutional, and policy reforms to strengthen regulation and effective implementation of abuse of market dominance law in Ethiopia.

#### **1.4. Research Question**

- 1) How comprehensive and effective is Ethiopia's legal framework for regulating abuse of market dominance?
- 2) What forms of exclusionary or exploitative conduct are commonly practiced by dominant firms in key Ethiopian markets?
- 3) How does the businesspersons who hold dominant position in the given market act?
- 4) What are the principal institutional, legal, and practical barriers to effective enforcement of abuse of dominance provisions in Ethiopia?
- 5) How does the law distinguish between well-functioning dominance and abusive one?

#### **1.5. Research Methods and Methodology**

In conducting the study, the researcher employed a mix of doctrinal and non-doctrinal research approaches, and the details are presented below.

##### **1.5.1. Research Design**

To achieve the main research objectives, the study adopted a mixed-methods approach, integrating doctrinal legal analysis with empirical non-doctrinal methods such as semi-structured interviews.

Participants were selected through purposive sampling to ensure relevance and expertise. Data analysis primarily employed qualitative techniques.

##### **1.5.2. Research strategy**

In order to realize the intended purpose of the study, a number of strategies were employed in gathering pertinent data. First, key informants were contacted in order to obtain their consent to take part in the study. Secondly, secondary data sources were identified and sorted out on the basis of their relevance for the study. Thirdly, a series of interviews was conducted with the key informants in accordance with the prior arrangements made with the respondents. Fourthly, responses from different respondents were examined to check their consistency

with each other. Finally, data obtained from primary sources were substantiated with facts from secondary sources.

## **1.6. Data types and sources**

To conduct the research, the researcher used both primary and secondary source of data.

### **1.6.1. Primary source of data**

The researcher gathered data from the FDRE Constitution, proclamations (mainly the Trade Competition and Consumer Protection Proclamation No. 813/2013), directives, regulations, and interviews with the Desk Head at the Ministry of Trade and Regional Integration Anti-Competitive and Law Violation Prevention Desk, judges of the Trade Competition and Consumer Protection Bench, business persons, and consumers.

### **1.6.2. Secondary source of data**

The researcher analyzed various secondary sources, including scholarly books on competition law and consumer protection, relevant journal articles published in academic databases and credible internet sources such as reports from international organizations.

### **1.6.3. Data collection tools**

As a tool for collecting the relevant data the researcher used an interview and analyzed the laws. Data was collected through an in-depth interview and analysis of documents.

### **1.6.4. Sampling size and techniques**

The researcher purposively conducted an interview with the head of the Anti-Competitive and Law Violation Prevention Desk under the Ministry of Trade, selected businesspersons with dominant positions in a given market, and some selected consumers.

The researcher employed purposive (non-probability) sampling and conducted semi-structured open-ended interviews with key informants: the Anti-Competitive and Law Violation Prevention Desk (investigation lead), judges handling dominance abuse cases, dominant firms, and affected consumers.

### **1.6.5. Data analysis and interpretation**

Qualitative analysis was employed to discuss the data, which was collected from both primary and secondary sources. Hence, an analysis of the data collected through the means specified was used to draw the logical inferences, concluding remarks and policy implications.

## **1.7. Ethical considerations**

The researcher conducted the study ethically and responsibly. Ethical considerations were applied throughout the research process, including proper citation of other works, obtaining informed consent from all respondents,

and ensuring the confidentiality of their information. Respondents were fully informed about the purpose of the research, their voluntary participation, and their right to withdraw at any time. Unless they expressly wished otherwise, the names and identifying details of the respondents were kept confidential.

### **1.8. Significance of the study**

The study will serve as a good basis for forthcoming researchers who have a desire to carry out a research on related topics. It will also be a great input for law and policy makers to consider the gaps in the legal and institutional framework.

This research will enhance the understanding of policymakers, judges, and prosecutors responsible for addressing abuse of market dominance in Ethiopia, with a focus on legal frameworks and enforcement challenges in identifying abusive conduct by dominant firms. It will also assist the business community—particularly firms with dominant or relative market positions—to grasp the complex law and economics in this area.

The thesis will highlight legal and practical obstacles in regulating abuse of market dominance, enabling stakeholders to address these issues effectively. Additionally, it will clarify which firm actions are deemed abusive and which are not, helping businesses avoid penalties. Finally, it will serve as a valuable reference for various stakeholders, including government agencies, researchers, and others interested in the field.

### **1.9. Delimitation of the study**

The scope of the study is geographically limited to Ethiopia, where it examines abuse of dominance practices among selected dominant firms operating within the country, under the regulatory framework of Ethiopian laws, particularly Proclamation 813/2013.

The research focuses on investigating the various forms, types, and practices of abuse of dominance, while also analyzing the relevant laws and institutions responsible for regulating such conduct. Specifically, it addresses key issues stipulated under Proclamation 813/2013, including restricting essential facilities, franchise agreements (with particular attention to the legal basis for charging franchise fees), unfair contract terms, exclusive dealing agreements, excessive pricing, and tying and bundling.

The study analyzes these practices among selected dominant firms in Ethiopia, including, among others, Ethio-Telecom (with a specific focus on the legality of its franchise fee charges), Keste Damena Foam, and TECNO Mobile.

### **1.10. Rule of citation**

The Mekelle University School of Law rule of citation will be pursued throughout the research.

### **1.11. Organization of the study**

The thesis is organized in to four chapters. Chapter one serves as the introductory section, providing the background of the study, statement of the problem, research questions, general and specific objectives, research methodology (including design, strategy, data types, sources, collection tools, sampling, and analysis), ethical considerations, significance and delimitation of the study, rules of citation, and an overview of the overall organization of the thesis.

Chapter Two offers a general theoretical overview of abuse of market dominance, covering key concepts such as the test for establishing dominance (including definition of the relevant market), forms and types of abuse (e.g., restricting essential facilities, exclusive dealing, predatory pricing, discounts and rebates, unfair contract terms, tying and bundling, and excessive pricing), defenses available to accused firms, the burden of proof, and available remedies.

Chapter Three applies this framework to the Ethiopian context through a practical case study, distinguishing effective from abusive dominance, analyzing the existing legal regime, identifying legal gaps (such as intersections with intellectual property, inadequate administrative penalties, and lack of regulation for abuse of economic dependence without full dominance), and examining real-world practices by dominant businesspersons, including exclusive dealing, franchise and royalty fees, essential facility restrictions, unfair contract terms, and tying/bundling.

Chapter Four concludes the thesis with an introduction to the final section, presentation of research findings, overall conclusions drawn from the analysis, and specific recommendations for addressing the identified issues in Ethiopia's competition law regime regarding abuse of market dominance.

## 2. Chapter Two: General overview of Abuse of Market Dominance

Competition is fundamentally connected to economic freedom, which encompasses the freedom to engage in contracts and participate in the marketplace. Legally, economic freedom manifests through the contractual relationships that businesses and consumers establish in their daily transactions. Economically, it is represented by the goal of maintaining an open and competitive market by preventing and penalizing actions that hinder the economic freedom of participants. Competition law is designed to safeguard economic freedom by prohibiting and penalizing anticompetitive practices, such as cartels and abuse of market dominance, while also monitoring transactions like mergers that could potentially disrupt market openness and competitiveness.<sup>28</sup>

In a free market economy, the central element is competition. Fair competition offers several alternative services and products.<sup>29</sup> Fair market competition entails in better allocation of resources and competitive relationships which results in price decrease, buyer's stimulation, and technological innovations.<sup>30</sup> In the free market context competition signifies a state and affairs where in sellers compete with each other to attract a buyers with a view to maximizing their sales, profit and market share.<sup>31</sup>

“A perfectly competitive market is one in which there are a large number of buyers and sellers, the product is homogeneous<sup>32</sup>, all the buyers and sellers have perfect information, and there are no barriers to entry and exit”<sup>33</sup>

The share of each seller in this market is so insignificant that sellers lack market power, i.e., the power to influence the product's price or quality. This, coupled with the identical quality of goods, sets a unique market price at which firms can sell any quantity of these goods. In this type of market firms are price takers and not price setters.<sup>34</sup>

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<sup>28</sup> Ibid, Mor Bakhoum ,P.1

<sup>29</sup> Supra note 21, Marginean,P.2

<sup>30</sup> Ibid, Marginean ,P.2

<sup>31</sup> What is competition? Available at <http://www.businessdictionary.com/definition/competition.html>.) last accessed on June 10, 2021.

<sup>32</sup> **Homogeneous products** are products that are identical in their quality and use and are indistinguishable between different brands.

Jeremy Cook .*Homogeneous Product | Definition, Features & Examples*, <https://study.com/academy/lesson/homogeneous-products-definition-lesson-quiz.html> last visited on 2/10/2024

<sup>33</sup> Supra note 15 ,FIKREMARKOS, P.8

<sup>34</sup> Ibid ,Fikremarkos ,P.7

Classical economic theory posits that a competitive marketplace incentivizes businesses to continually find ways to lower their operational costs and develop new and improved products and services. This dynamic is seen as beneficial for consumers, as it leads to downward pressure on prices and a greater variety of offerings to choose from.

The underlying logic is that in a competitive environment, firms have a strong motivation to out-perform their rivals. This compels them to identify and implement more efficient production processes, leverage new technologies, and invest in research and development to create products that better meet evolving consumer demands. These efforts to gain a competitive edge ultimately translate into consumers enjoying lower prices and a wider selection of goods and services.

The theory suggests that competition acts as an "invisible hand" that guides the market toward the most optimal outcomes for both producers and consumers. Firms are incentivized to be responsive to market signals and consumer preferences, rather than becoming complacent or engaging in exploitative practices that might be possible in less competitive settings.

Of course, the real-world applicability of this classical economic model has been debated, with factors such as market concentration, regulatory environments, and information asymmetries potentially complicating the assumed dynamics. But the essential logic of competition driving innovation and consumer welfare remains a central tenet of mainstream economic thought.

However, traders may sometimes use a variety of actions and illegal acts that have adverse effects on competition and consumers in trying to achieve dominant market position, to attract many more potential clients and to eliminate their competitors.<sup>35</sup> To regulate these acts countries has established legislative framework. Abuse of dominance is one of the most common forms of illegal trade practice. These market failures (a situation where the price mechanism results in an inefficient or grossly unfair resource allocation) of the pure free market provide justification for government intervention in the market with significant implication for market competition.<sup>36</sup>

The implementation of effective competition laws may be a critical necessity for the economic self-protection of developing economies. These laws can help safeguard against anti-competitive practices carried out by foreign-based companies and their local subsidiaries operating within the developing markets.

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<sup>35</sup> Supra note 21,P.3

<sup>36</sup> Supra note 15, P.12

Developing economies often face significant challenges in maintaining a level playing field and ensuring fair competition in their domestic markets. Large multinational corporations, with their vast resources and market dominance, may engage in predatory pricing, abuse of dominant positions, and other anti-competitive tactics to stifle local businesses and limit consumer choice.

The enactment and enforcement of robust competition laws can provide developing countries with the legal framework to monitor, investigate, and address such unfair business practices. These laws empower regulatory authorities to intervene and impose sanctions when necessary, deterring foreign-based firms and their local subsidiaries from engaging in conduct that undermines the competitive landscape and harms the economic interests of the developing economy.

By establishing and upholding competition laws, developing nations can better protect their domestic industries, foster innovation, and promote consumer welfare. This can be a crucial component of their overall economic development strategy, enabling them to build resilience and defend their markets against the potential abuses of power by large, foreign-based corporations.

The benefits of competition in a market-oriented economy are multifaceted. First and foremost, competition helps keep prices low for consumers by incentivizing firms to offer the best possible value. However, the advantages of competition extend beyond just low prices. Competition also creates opportunities for new businesses, including small firms, to enter markets and grow. This influx of new competitors puts pressure on existing dominant firms to continually innovate and improve their offerings in order to stay relevant.

The potential upsides of a more market-oriented economy are significant, but they will not fully materialize unless there are effective mechanisms in place to prevent dominant firms from engaging in anti-competitive practices. While it is not always straightforward to determine whether a firm or group of firms holds a dominant market position, or whether their conduct is truly anti-competitive, the importance of regulating dominant firms and protecting the broader economy from their efforts to maintain or expand their market power is widely recognized. Appropriate regulations and oversight are necessary to ensure that the benefits of competition - low prices, new business opportunities, and innovation - can be fully realized.

The key is striking the right balance - allowing markets to function freely and competitively, while also providing the necessary guardrails to prevent dominant firms from undermining that competition through abusive tactics. This requires a nuanced, evidence-based approach to competition policy and enforcement. But the potential payoffs, in terms of a more dynamic, innovative, and consumer-friendly economy, make it a worthwhile endeavor.

However, what is illegal is not the dominant position but the abuse of it.

In the Ethiopian legal system a definition is not given to the term abuse of market dominance in general and dominance in particular.

### **2.1. When is a firm deemed to be dominant? Establishing the dominance test**

In order for a firm to contravene the provisions of trade competition and consumer protection proclamation which prohibits abuse of market dominance, it must be first established that such firm is dominant in a specific market where the conduct that is complained of has occurred or is occurring.

There are differing perspectives on what precisely constitutes dominance or market power from a competition policy standpoint. One view defines it as the ability of a firm to engage in anti-competitive behaviors, such as effectively excluding competitors from the market. Another perspective considers market power to be the capacity of a firm to act with a degree of independence from competitive pressures, often demonstrated by the firm's ability to sustain prices above the competitive level.

The concept of what constitutes an abuse of market dominance can vary significantly across different jurisdictions. The specific criteria and enforcement of these practices differ from country to country.<sup>37</sup>

In some jurisdictions, laws may determine that a dominant market position can be inferred primarily from a company's large market share. In contrast, other countries require a broader analysis that considers additional factors, such as market entry conditions and other elements that affect the ability of firms with significant market shares to exert market power.

Another important distinction lies in how different jurisdictions approach pricing practices. In certain countries, simply charging excessively high prices or engaging in other exploitative behaviors can be classified as abuses of market dominance. Conversely, other jurisdictions tend to focus more on exclusionary practices—conduct that harms the competitive landscape by preventing rival firms from entering the market or expanding their operations.

These variations highlight the complexity of competition law and underscore the need for businesses to understand the specific legal frameworks in the jurisdictions where they operate.

Regardless of the specific definition adopted, the determination of whether a firm holds a dominant market position typically necessitates defining the relevant market within which the firm's allegedly anti-competitive conduct has occurred. This requires an analysis of factors like the availability of substitutes, geographical

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<sup>37</sup> Supra note 4, P.69

boundaries, and the extent of customer switching. Only by clearly delineating the relevant market can one properly assess the extent of the firm's market power.

In accordance with paragraph 1 of Article 102 of the Treaty on the Functioning of the European Union (TFEU), any abuse by one or more undertakings of a dominant position within the internal market, or in a substantial part of it, is deemed incompatible with the internal market and is therefore prohibited. This prohibition is particularly significant as it aims to maintain fair competition and protect trade between Member States.

To effectively implement this article, four key criteria must be fulfilled:

1. **Existence of a Dominant Position:** The first criterion requires the identification of one or more undertakings that hold a dominant position in the EU market or in a substantial part of it. A dominant position is generally understood as a situation where a company can operate independently of competitive pressures, allowing it to influence market conditions.
2. **Abusive Exploitation of Dominance:** The second criterion involves showing that the undertaking or undertakings in question have exploited their dominance in an abusive manner. This could include practices such as predatory pricing, exclusive dealing, or other anti-competitive behaviors that distort market dynamics.
3. **Causal Connection:** The third criterion necessitates the establishment of a causal link between the dominant position held by the undertaking and the abusive conduct exhibited. It is essential to demonstrate that the abuse is a direct result of the dominance, thereby linking the two elements in a meaningful way.
4. **Potential Effect on Trade:** Finally, the fourth criterion examines the potential impact of the abusive conduct on trade between Member States. This involves assessing whether the behavior in question could affect market access or competition in a manner that disrupts trade flows within the EU.

Together, these criteria provide a comprehensive framework for evaluating cases of abuse of market dominance, ensuring that competitive conditions are preserved within the internal market.<sup>38</sup>

Determining dominance is thus a nuanced, fact-specific exercise that requires careful market definition. There is no single, universally accepted test. But the importance of this analysis cannot be overstated, as it forms the foundation for identifying and addressing anti-competitive behaviors by dominant firms - behaviors that can undermine the very benefits of a competitive market economy.

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<sup>38</sup>Panagiotis Stamatis, *The abuse of dominant position*, 2016, LL.M in transnational and European commercial law, mediation, arbitration and energy law ,P .6

### **2.1.1. Definition of Relevant Market**

The definition of a relevant market for the purposes of assessing market power and potential anti-competitive conduct has two key dimensions - product and geographic. These dimensions are generally delineated based on an evaluation of the substitutability of the products or services offered by the allegedly dominant firm within a specific geographic territory.

The fundamental objective of this market definition exercise is to determine whether there are viable competitive alternatives available to consumers that would effectively constrain the firm's ability to exercise market power. In other words, the aim is to identify the smallest set of product offerings and geographic area in which a hypothetical monopolist could profitably implement a small but significant and non-transitory increase in price (commonly referred to as the SSNIP test)<sup>39</sup>

### **2.2. Forms of abuse of market dominance/monopolization**

Two broad types of business conduct have traditionally been recognized as abusive by competition laws and enforcement agencies: <sup>40</sup>

Exploitative abuses occur when a firm leverages its market power to impose excessively high prices on customers, discriminate among them, pay suppliers low prices, or engage in similar practices.

Exploitative abuses, includes actions taken by businesses to take unfair advantage of their market power by charging unreasonable prices to customers, treating some customers differently than others, paying suppliers below-market prices, or engaging in similar behavior .Some abuses relate to pricing, hence price charged by the firm with monopolist/dominant position can be considered anti-competitive, either for being too low, too high or discriminatory.<sup>41</sup> It may also take the forms of abuses which concern either the quantity or quality of goods/services being sold or bought, or other behaviour of the monopolist/dominant firm. But, it is also not uncommon to see conducts by the monopolist/dominant firm with a combination of different types of forms of abuse.

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<sup>39</sup> David Fruitman, Abuse of Dominance in Developing Economies A Focus on the Issues in Cambodia, Laos and Vietnam,( 2006) P.7

<sup>40</sup> Supra note 4 ,P.72

<sup>41</sup> Francisco Marcos, The prohibition of single-firm market abuses: U.S. monopolization versus E.U. abuse of dominance, Working Paper IE Law School, ( 2017) , P.10

Exclusionary abuses happen when a firm tries to stifle competition, such as by refusing to engage with a competitor, increasing the costs for competitors to enter the market, or employing predatory pricing strategies.

It is deemed to have exclusionary effects because it expel or bar from the market firms; and other group of practices are considered to have exploitative effects, because the dominant firm/monopolist apply conditions or charge prices to their customers that would be impossible if the market was truly competitive.<sup>42</sup>

Yet on other perspective, most of conducts forbidden are market structure abuses (where the power of the dominant/monopolist is used to distort the market to its own advantage) whilst others are market power leveraging abuses, when a company uses its strong position in the market to win business in a separate market.

### **2.3. Types of Abuse of dominance**

Although there is a consensus about some types of conduct that are labeled to fall in the prohibition in many systems, there are still some difference on the conditions that need to be meet for conduct to be consider as prohibited. There are also conducts that are forbidden in one legal system but are not considered illegal in the other, excessive pricing is one.<sup>43</sup>

#### **2.3.1. Restricting essential facilities**

After confirming that a firm holds a dominant position in a specific market, it becomes imperative to further establish whether the facility in question is in fact an essential facility.

An essential facility is defined as “an *infrastructure or resource that cannot be easily found or not much often available, and which is very important to competitors in order to supply their goods and services to their customers.*”<sup>44</sup>

The Ethiopian trade competition and consumer protection proclamation provides a general definition of an "essential facility" as infrastructure or resources. In contrast, the European Commission (EC) law offers a more detailed and expansive definition of an "essential facility."

According to the EC law, an "essential facility" can encompass a wide range of products and services, including: raw materials ,intellectual property rights ,services, information ,infrastructure, access to physical places like harbors or airports, parts of telecommunications networks, software interfaces

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<sup>42</sup> Ibid, P.10

<sup>43</sup>Ibid,P.10

<sup>44</sup>Supra note 16,Article 2(8)

This more comprehensive definition under EC law recognizes that essential facilities can take many forms beyond just physical infrastructure. They can also include intangible assets, access rights, and technological interfaces that are crucial for businesses to be able to compete effectively.

The contrast between the general definition in Ethiopian law and the more specific, broad definition in EC law highlights how different jurisdictions can approach the concept of essential facilities differently. The EC definition provides more clarity and scope in identifying what may constitute an essential facility that competitors must be granted access to in order to ensure a level playing field.

The requirements for essential facility are cumulative and both rest on the conception of reasonableness: first it must be an infrastructure or resource that cannot be easily found or not much often available; secondly without access to such infrastructure or resource a competitor cannot reasonably provide goods or services to its customers.

The concept of an "essential facility" refers to an input that is indispensable, meaning there is no actual or potential substitute on which competitors in the downstream market could rely, at least in the long term. The negative consequences of refusing access to this essential input must also be apparent.

For an input to be considered truly indispensable, three key factors must be present:

1. The refusal to provide access would likely eliminate all competition in the downstream market. Without the essential input, competitors would be unable to viably participate.
2. The refusal to supply the input has no objective justification. There must not be a legitimate business reason for denying access.
3. Access to the input must be indispensable for competitors to conduct their business. There must be no other alternative or substitute available on the market that could adequately replace the essential facility.

Establishing the existence of an essential facility and the duty to share it requires a strict set of criteria. This is necessary to strike a balance between imposing a duty to deal and respecting the fundamental rights of companies, such as the right to choose one's trading partners and freely dispose of one's property.

The bar for proving the existence of an essential facility and the obligation to provide access must be high, in order to avoid undermining important property rights and the general freedom of companies to determine with whom they will do business. Only in clear-cut cases of indispensable inputs with no viable alternatives should such a duty be imposed.

The opinion of Advocate General Jacobs in Bronner highlights that the primary aim of Article 102 of the Treaty on the Functioning of the European Union (TFEU) is to prevent the distortion of competition and to safeguard the interests of consumers, rather than to protect the position of individual competitors. The focus is on maintaining a competitive market environment that benefits consumers, rather than on shielding specific market players from competitive pressures.<sup>45</sup>

Additionally, Advocate General Jacobs cautions that imposing a duty for companies to deal with their competitors should be approached with care. Such interventions could potentially impact innovation, as companies may lose the incentive to develop competing facilities and infrastructure. This is because it would enable other competitors to effectively "free ride" on the investments and efforts made by the company in building those facilities.<sup>46</sup>

A refusal to give a competitor access to an essential facility is acceptable only when it is justified economic reasons.<sup>47</sup> Some of the justified economic reasons for refusing essential facility includes

Granting access to an essential facility may not be economically viable in cases where the facility is already operating at full capacity or when the requesting company lacks the financial stability or technical competence to utilize the facility effectively.<sup>48</sup> It would be unfair to compel the respondent to provide access to a competitor if doing so would hinder the respondent's ability to adequately serve its own customers.<sup>49</sup>

Though the trade competition and consumer protection proclamation indicates justified economic reasons as a defense for restricting essential facility it is imperative to infer from the definition given in the proclamation that the following defense are acceptable and compatible to the law.

- It can't be proved that the alleged dominant firm is in fact dominant
- The complaint and the defendant firms are not competitors in a specific market or
- The facility is not an essential facility.

It is also imperative to discuss here the remedies for an acts of restricting essential facilities which contravene the trade competition and consumer protection proclamation. To date, to the researcher's knowledge *no court*

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<sup>45</sup> Sarah Louise van Hamel, *The Amazon Investigations: A New Era of Competitive Abuses*, (2020) P.30 citing, Case C-7/97 Opinion of Advocate General Jacobs in Bronner

<sup>46</sup> Ibid, Sarah Louise van Hamel, ,P.30

<sup>47</sup> Supra note 16, Art.5(2) e

<sup>48</sup> Supra note 1, P.16

<sup>49</sup> Ibid, P.16

*has ordered a firm to provide access to an essential facility following a finding that Article 5(2) e of the TCCPP has been infringed.*

The trade competition and consumer protection adjudicative bench<sup>50</sup> is bestowed with the power and duties to take administrative measures (which includes discontinuation of the act, any measure that enable to reinstate the victims competitive position, suspension or revocation of the business license of the offender) and fine, order payment of compensation to competitor and/or consumer.

### **2.3.2. Exclusive dealing**

Exclusionary conduct is explicitly targeted at a firm's competitors, and it is only by damaging those competitors that it leads to a reduction in competition that ultimately harms consumers. Exclusionary acts are actions taken by a dominant company that impede or prevent other firms from entering or expanding within a market. However, distinguishing between healthy competition and anticompetitive conduct amounting to exclusive dealing requires the application of different legal tests.

This explains why American jurisprudence has developed a more nuanced test for attempted monopolization cases. To establish liability, there must be proof of three elements:

- 1) Predatory or anticompetitive behavior,
- 2) A specific intent to monopolize, and
- 3) A dangerous probability of achieving monopoly power.<sup>51</sup>

The fact that exclusionary conduct does not always result in a clear-cut reduction in consumer welfare adds to the complexity in assessing the anticompetitive nature of such conduct. While exclusionary acts by a dominant firm are explicitly aimed at hindering the ability of competitors to enter or expand in the market, the ultimate impact on consumer welfare may not be immediately apparent or straightforward.

This is because even though exclusionary practices may damage the competitive position of rival firms, they do not necessarily lead to a demonstrable lessening of competition that directly harms consumers. There can be mitigating factors or countervailing considerations that make the overall impact on consumer welfare less direct or more nuanced.

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<sup>50</sup>Supra note 16,Article 33

<sup>51</sup> OLUFOLAHAN ADELEKE, Assessing Exclusionary Conduct in Abuse of Dominance: the relevance of the Extraterritoriality Rule and Public Interest for Developing Countries, LLM in commercial law,P.18

For example, the dominant firm's exclusionary tactics may temporarily raise prices or reduce consumer choice, but could also spur innovation or efficiency gains that benefit consumers in the long run. Alternatively, the exclusion of weaker rivals may allow the dominant firm to achieve greater economies of scale and pass on those cost savings to consumers.

As a result, the assessment of whether allegedly exclusionary conduct is truly anticompetitive requires a more sophisticated, case-by-case analysis that goes beyond just examining the impact on competitors. The courts and competition authorities must carefully weigh the complex interplay between the exclusionary behavior, the state of competition, and the ultimate effects on consumer welfare.<sup>52</sup>

Since the ultimate effects of exclusionary conduct on consumers are not always immediate, consumers may not immediately experience higher prices or reduced product availability. There is a reasonable risk that the anticompetitive harm stemming from exclusionary practices could be underestimated. This raises the question of how exclusionary conduct ultimately impacts the public interest.

The key points are:

1. The effects of exclusionary conduct on consumers are not always immediately apparent.
2. This can lead to an underestimation of the anticompetitive harm caused.
3. This raises concerns about the broader public interest implications of such exclusionary practices.<sup>53</sup>

The American approach to competition law allows dominant firms to defend their unilateral or exclusionary conduct by arguing that it did not ultimately harm consumers. In contrast, the European Commission views consumer welfare as a key objective of competition policy. The European approach presumes consumer harm when a dominant firm engages in abusive conduct that distorts competition in the market. However, the European view maintains that protecting the competitive process itself should remain the primary focus of competition law, rather than just consumer welfare outcomes.<sup>54</sup>

An Exclusionary acts are scenarios where by a dominant firm impedes or prevent other firms from entering into, or expanding within a market.

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<sup>52</sup> Emanuela Arezzo, Intellectual Property Rights at the Crossroad between Monopolization and Abuse of Dominant Position: American and European Approaches Compared, *John Marshall Journal of Computer & Information Law*, vol. 24, issue 3, (2007) P.16

<sup>53</sup> Ibid,P.16

<sup>54</sup> Supra note 50, Olufolahan Adeleke, P.6

Exclusionary claims are formed either through vertical restraints or abuses of dominance by anticompetitive foreclosing upstream or downstream markets. Exclusivity can result from contractual obligation (de iure exclusivity) or from inducements not to use alternative sources (de facto exclusivity).<sup>55</sup>

In US section 2 of the Sherman Act, and section 3 of the Clayton Act prohibits exclusivity arrangements that foreclose competition or tend to create a monopoly.<sup>56</sup>

However, the prohibition of exclusive dealing is not with an exception, firms with dominant position can defend itself by showing that it has an offsetting pro-competitive explanation and that there are efficiencies in distribution/supply coming out it.<sup>57</sup>

The American approach to competition law allows dominant firms to defend their exclusionary or unilateral conduct by demonstrating that it did not ultimately harm consumers. In other words, as long as the conduct did not lead to negative outcomes for consumers, it can be justified under the American framework.

In contrast, the Ethiopian competition law seems to take a stricter stance on exclusionary acts by dominant firms. The Ethiopian law appears to prohibit such conduct unconditionally, without allowing for exceptions or defenses based on the lack of negative consumer impact.

Specifically, the Ethiopian law states that it is unlawful for a dominant business person to "refuse, contrary to the clearly prevalent trade practice, to deal with others on terms the dominant business person customarily or possibly could employ, as though the terms are not economically feasible to him." This suggests that the mere act of refusing to deal with others on reasonable terms is prohibited, regardless of whether it can be shown to have harmed consumers.

This represents a departure from the American approach, which focuses more on the end effects on consumers rather than the nature of the dominant firm's conduct itself. The Ethiopian law seems to prioritize preserving the competitive process and structure of the market over narrow consumer welfare considerations. This likely reflects a policy choice to maintain a more interventionist stance toward dominant firm behavior.<sup>58</sup>

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<sup>55</sup> Unilateral Conduct Working Group, Exclusive Dealing (Chapter 5), Unilateral Conduct Workbook (2013), presented at the 12<sup>th</sup> annual ICN conference Warsaw, Poland, P.34-49

<sup>56</sup> Supra note 40 ,Francisco Marcos , P.11

<sup>57</sup>Ibid,P.11

<sup>58</sup> Supra note 16 ,Article 5/2/ d

### **2.2.4. Predation /predatory pricing**

It is a situation whereby a firm which has dominant position in a given market sells its product below the cost of the production, or loses some profit intending to exclude competitors by raising their cost. Predatory pricing will end up in harming consumers as the firm will increase the price of the product after ousting of potential competitors.<sup>59</sup>

The European courts of justice has indicated the unlawfulness of predatory pricing, even in the case that there was not likelihood that the dominant firm would later on recoup the losses incurred.<sup>60</sup>

Though not regulated by many laws predatory buying or bidding will have the same negative impact on consumers. This is a situation where in a monopolist/dominant firm engages in anti-competitive and unlawful conduct in its purchasing behavior.

### **2.2.5. Discounts and Rebates**

In striving buyer's patronage one form of seller's competition is through pricing. However, the capacity and dominance of the firm should be considered in the competition policy. If firm which has dominant position charges less for its products competitors with lower capacity will be ousted from competition as they will not afford staying in the market.<sup>61</sup>

Price discounts that are granted on the condition that the customer buys all or most of its needs from a given dominant/monopolist are anti-competitive; because it restricts buyers from freely choosing its suppliers. It also prevents competitors from entering the market as potential customers are already made dependent to the dominant firm in the market.

### **2.2.5. Unfair terms of contract**

The COMESA competition regulation includes exploiting consumers by diverging from the usually established market as on form of abuse of dominance practice.

The European Union's competition rules prohibit dominant firms from engaging in any business activities that exploit their customers or suppliers in a manner that frustrates the objectives of the EU's Common Market.

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<sup>59</sup> Supra note 40 ,Francisco Marcos ,P.12,

<sup>60</sup> Ibid ,P.12

<sup>61</sup> Ibid ,P.13

This represents a broad and proactive approach to regulating the conduct of dominant market players. Rather than just focusing on demonstrable harms to consumers, the EU rules target any exploitative behavior by dominant firms that undermines the intended benefits of the integrated European single market.

The language used - "any business activity that results in the exploitation" - suggests a low threshold for intervention. Dominant firms are expected to refrain from engaging in practices that allow them to extract unreasonable advantages from their trading partners, even if those practices do not necessarily lead to clear-cut consumer harm.

The reference to "frustrating the benefits expected from the establishment of the Common Market" further indicates that the EU's competition framework is oriented towards preserving the integrity and proper functioning of the pan-European marketplace. Dominant firm conduct that interferes with the free flow of goods, services, capital and labor across national borders would be viewed as problematic, even if domestic consumers are not directly harmed.

This expansive approach contrasts with the more narrowly defined consumer welfare standard that is the primary focus of US antitrust enforcement. The EU appears to view competition policy as a tool for promoting broader economic and political integration, not just protecting individual consumer interests.<sup>62</sup>

### **2.2.6. Tying and bundling**

A tie-in contract is a contract whereby the supplier of one product (the tying product) conditions the sale of that product on the purchase by the purchaser of another product (the tied product). If, for example, the supplier of an operating system (the tying product) that is, the basic software for computers, imposes a condition on the purchaser or licensee that the latter must purchase or receive a licence for other software (for example, browser software and a tied product), this is a tie-in arrangement.<sup>63</sup>

Unilateral tying and leveraging are considered abusive when the following conditions are fulfilled.<sup>64</sup>

- The presence of two separate products or services capable of being tied. The purchase of a commodity must be conditioned upon the purchase of another commodity;

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<sup>62</sup> COMESA competition regulations ,( December 2004) ,Article 18(1)g

<sup>63</sup> Mitsuo Matsushita et.al, The World Trade Organization Law, Practice, and Policy third edition, oxford university press,(2015) , P.789

<sup>64</sup> Ibid , P.789

- The seller must have sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product; and
- The tying arrangement must affect a ‘not insubstantial’ amount of commerce: a tie-in arrangement is only considered to be abusive if a ‘substantial’ portion of the market is affected.

### **2.2.7. Excessive Pricing**

An undertaking in a dominant market position must not charge excessively high prices for its products. Generally, the threshold for determining excessive pricing is difficult task, and the costs used for comparison often allow for varying interpretations. Additionally, the purpose of competition law is not to impose specific price levels, or price regulation.

The assessment of excessive pricing can occur in two stages. First, one examines the relationship between the undertaking's income and its costs. If this warrants further investigation, abuse may be identified by evaluating the price level in absolute terms, comparing it with competing products within the same market, or using prices from a comparable relevant market as a benchmark. Assessing pricing in absolute terms might involve comparing the profitability of a dominant undertaking with that of other companies. Ultimately, the relationship between pricing and the economic value of the product will also be considered in the final evaluation.

## **2.4. Defenses to allegations of abuse of dominance**

In addition to the argument that there is no monopoly power and no anti-competitive effect, a defendant can argue the pro-competitive effects of the conduct of its market dominance acts. Reducing costs, providing higher-quality products, stimulating investment and preventing free-riding are among pro-competitive effects and possible defenses of dominant firms.<sup>65</sup>

- Cost Reduction: Lowering operational costs can lead to more competitive pricing for consumers.
- Higher-Quality Products: Innovations and improvements in product quality can enhance consumer choice and satisfaction.
- Stimulating Investment: Dominant firms can attract investment, which can foster further innovation and growth within the industry.
- Preventing Free-Riding: By implementing exclusive agreements, firms can ensure that their investments in marketing and product development are not undermined by competitors who benefit without contributing.

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<sup>65</sup> Supra note 24, last assessed on July 9, 2021

## **2.5. Burden of proof**

First plaintiff must establish anticompetitive effects, then the defendant must provide a pro-competitive justification, and then ultimately the burden is on the plaintiff to prove that the anticompetitive effects outweigh the pro-competitive benefits<sup>66</sup>

Another approach on burden of proof is dominant firms should defend themselves by asserting that their conduct did not have the effect of harming consumers.

## **2.6. Remedies for Abuse of dominance**

Finally, one must consider potential remedies in situations where an abuse of dominance has been demonstrated. A preliminary matter is the purpose of the remedy being imposed. If compensation of victims of abusive conduct is desired, the remedy may involve private litigation. Alternatively, if the primary concern is to ensure the dominant firm does not profit from its behaviour, some form of disgorgement or other financial penalty may be required. Another potential remedial goal may be to eliminate the anti-competitive effects of the abusive conduct; in this case, behavioural or structural remedies may be appropriate including voiding contractual terms, changes to regulatory environments, prohibition orders, mandatory licensing, and other forms of mandatory orders or even 'de-mergers'.

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<sup>66</sup>Ibid

### **3. Chapter Three: An Analysis of market dominance abuse in Ethiopia: A practical case study**

There is a dearth of information on the nature and prevalence of anticompetitive practices in the domestic market in Ethiopia. Though conclusive data is not available, collusive agreements and abuse of dominance appear to be widely prevalent in the market. For instance, a survey has indicated that collective price fixing, entry barriers and bid rigging are the most prevalent anticompetitive practices in Ethiopia.<sup>67</sup>

#### **3.1. Distinguishing between effective and abusive market dominance in Ethiopia**

A firm is deemed to be abusing its market dominance under Ethiopian law if it has the actual ability to control prices or other terms of commercial negotiations, or to significantly restrict competition in a relevant market.<sup>68</sup> This assessment considers the firm's market share and its ability to create barriers to entry for other businesses, along with any other relevant factors.<sup>69</sup> The market in question must consist of goods or services that directly compete with each other or are substitutable.<sup>70</sup> Additionally, the firm must engage in practices classified as abusive by the law or any regulations established for its enforcement.<sup>71</sup> Finally, firms involved in such abusive practices must lack justifiable economic reasons for their actions.<sup>72</sup>

According to Article 5(1) of TCCPP, it is prohibited for any business person, whether acting individually or in concert with others, to engage in commercial activities that involve the overt or dubious exploitation of a dominant market position. This regulation is designed to ensure fair competition and protect the integrity of the market.

From the reading of the provision, the acts are classified in to two i.e. rule of reasons prohibitions and per se prohibitions.

Article 5(2) delineates eight specific categories of actions that constitute abuse of market dominance. The first four prohibitions, outlined in sections 5(2) (a) to 5(2) (d), are categorical and strictly enforced, meaning there are no exceptions to these rules. These provisions reflect a zero-tolerance stance on certain types of behavior that can undermine market fairness.

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<sup>67</sup> Supra note 15, P.66

<sup>68</sup> Supra note 16 Art. 6(1)

<sup>69</sup> Ibid, Art. 6(2)

<sup>70</sup> Ibid, Art. 6(3)

<sup>71</sup> Ibid, Art. 5(2)

<sup>72</sup> Ibid, Art. 5(3)

Conversely, the subsequent prohibitions listed in sections 5(2) (e) to 5(2) (h) include the phrase “without justifiable economic reasons,” indicating that there may be circumstances where exceptions apply. This nuance acknowledges that not all practices considered abusive are inherently unjustifiable; some may be defended under specific economic rationales.

To provide clarity on what constitutes a "justifiable economic reason," Article 5(3) enumerates various exceptions that can be invoked when applying the provisions of paragraphs (e), (f), (g), and (h) of Article 5(2). This framework allows for a more flexible interpretation of the rules, permitting businesses to engage in certain practices that, while potentially abusive, can be justified within a broader economic context.

It is important to note that the acts of abuse of market dominance primarily pertain to the prohibited conduct of businesses in relation to their competitors. However, these actions have significant repercussions for consumers as well. By distorting competitive dynamics, such abuses limit consumer choices regarding prices, products, and services. Ultimately, the implications of market dominance extend beyond the immediate interactions between businesses; they can profoundly affect the overall market landscape and the welfare of consumers, leading to a less diverse and potentially more costly array of options available to them.

In summary, the provisions outlined in Article 5 seek to strike a balance between maintaining competitive markets and allowing for certain economic rationales that can justify specific business practices, thereby ensuring both fair competition and consumer protection.

### **3.2. The legal regime governing abuse of market dominance in Ethiopia**

Specific laws governing trade practices in Ethiopia have been in place since the Trade Practices Decree of 1963<sup>73</sup> and the Trade Practices Proclamation of 1965<sup>74</sup>, which regulated trade competition with some reference to consumer protection. After these laws were largely inactive due to a centrally planned economy influenced by Marxist policies from 1975 to 1991, a proclamation was enacted in 2003<sup>75</sup> to regulate trade practices. This was followed by another proclamation on trade competition and consumer protection in 2010.<sup>76</sup>

The current Trade Competition and Consumer Protection Proclamation No. 813/2013<sup>77</sup>, enacted in March 2014, replaces the earlier proclamations. These laws complement the provisions in the Civil Code of 1960 and the

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<sup>73</sup> Unfair Trade Practice Decree, 1963, Decree.No.50, Neg.Gaz. Year 22, No.22

<sup>74</sup> Unfair Trade Practices Proclamation, 1965, Proc.No. 228, Neg.Gaz. Year 24, No.19.

<sup>75</sup> Trade Practice Proclamation, 2003, Proclamation No. 329, Neg.Gaz. Year 9<sup>th</sup>,No.49

<sup>76</sup> The Trade Competition and Consumer Protection,2010, Proclamation No. 685, Year 16<sup>th</sup> No. 49

<sup>77</sup> Trade competition and consumer protection proclamation ,2013,Proclmation no.813,Neg.Gaz. Year 20, No.28

Commercial Code of 1960, as well as special legislation on mandatory safety standards, Ethiopia's criminal law, and other laws relevant to trade competition and consumer protection.

A business person, whether acting independently or together with others in a relevant market, is considered to hold a dominant market position if they have the actual capacity to control prices or other conditions of commercial negotiations, or to eliminate or significantly restrain competition in that market. This assessment may take into account the business person's market share<sup>78</sup>, their ability to set barriers to entry for others, or other relevant factors, including a combination of these elements.<sup>79</sup>

### **3.3. Legal Gaps in Controlling abuse of market dominance**

#### **3.3.1. Failure to govern Abuse of dominance and IP**

The legal gap under the listing of the TCCPP and other relevant laws is that it failed to address issues related to abuse of dominance and intellectual property right. It may be a legal right to have a dominant position in areas of intellectual property but abusing such dominance in a manner that avoids or lessens competition in a market needs to be regulated. Abuses in acquiring intellectual property rights and exercising of these rights could be a legitimate concern for competition authorities.<sup>80</sup> Those intellectual property-related areas that may pose issues of competition are generally summarized in three categories, i.e., (1): acquisition of patents, (2): transfer of technology through a licensing arrangement, and (3): cooperative arrangements among innovative firms.<sup>81</sup>

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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).

<sup>78</sup> The relevant market for assessing a dominant position encompasses those goods or services that are in direct competition with one another or that exhibit a sufficient degree of interchangeability or substitutability from the perspective of consumers. This definition is articulated in Article 6(4) of the Trade Competition and Consumer Protection Proclamation No. 813/2013

<sup>79</sup> Supra note 16, Art. 6 (2)

<sup>80</sup> Yidnekachew Haile W/Mariam, the legal gaps in controlling abuse of market dominance in Ethiopia – appraisal of the existing legal regime, (June 2020) P.36 citing, Shyam Khemani, framework for design and implementation of competition policy development, (1999) P.80

<sup>81</sup> Ibid

### **3.3.2. Legal Gap for Fines: Under Administrative Penalties**

Financial sanctions for abuses of a monopoly position are limited to a maximum of 10% of the company's total revenues<sup>82</sup>. This is calculated as 5% to 10% of the annual turnover, multiplied by the number of years the anti-competitive behavior occurred. However, there is ambiguity regarding how aggravating factors—such as being a ringleader, a repeat offender, or obstructing an investigation—and mitigating factors—like having a limited role or being encouraged by legislation—are considered when determining fines within the 10% legal cap. Additionally, the law lacks clarity regarding cases where a firm is unable to pay the imposed fines for its legal infringements.

### **3.3.3. Failure to regulate Abuse without dominance in competition law: abuse of economic dependence**

Competition law is designed to safeguard economic freedom by prohibiting and penalizing anticompetitive practices, such as cartels and abuse of dominance, while also monitoring mergers that could impact market competitiveness. This legal framework, informed by economic theory, focuses on the market power of participants within a defined relevant market. To determine if competition is hindered, it is essential to establish whether a market participant holds a dominant position and abuses it. In cases of abuse of dominance, the anticompetitive actions may target competitors (exclusion) or consumers (exploitation), but they must ultimately affect competition within the relevant market; if not, an abuse of dominance is generally not found.

This approach often overlooks the concept of relative dominance and its implications when a market participant holds a superior bargaining position over its business partners. Economic power among market participants is not distributed evenly. In certain instances, a business may lack a dominant position in the broader market but maintain a stronger economic position relative to its trading partners. Such disparities can lead to situations where a weaker partner relies on a stronger one to compete effectively. The exploitation of this unequal bargaining power can undermine the weaker party's ability to compete.<sup>83</sup>

Most jurisdictions refrain from intervening in business-to-business transactions unless the relevant market is impacted. However, some jurisdictions have provisions addressing abuse of economic dependence, also known as abuse of superior bargaining position. Similar measures exist in some competition laws to tackle issues of unequal bargaining power. Economic dependence differs from abuse of superior bargaining position, and while

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<sup>82</sup> Supra note 16, Art.42(1)

<sup>83</sup> Supra note 26, P.2

some jurisdictions handle these through traditional abuse of dominance rules, others may resort to contract or civil law to address issues arising from asymmetrical economic power.

The concept of abuse of economic dependence is not recognized in US or EU competition law. However, several EU member states, including Italy, Germany, and France, have included provisions in their competition laws to address uneven bargaining power, often referred to as abuse of economic dependence.

The Ethiopian TCCPP regulates only absolute of market dominance conduct under Article 5 and its subsequent provisions. As a result, relative dominance and economic dependence remain unregulated, leading to unequal bargaining power, where the weaker party must rely on a stronger party to compete effectively. This exploitation of unequal bargaining power can hinder the weaker party's competitiveness. Aside from some provisions in the civil code, there is currently no law in Ethiopia addressing this issue of unequal bargaining power.

### **3.3.4. Regulatory Gaps**

The primary legal instrument regulating abuse of market dominance positions in Ethiopia remains the Trade Competition and Consumer Protection Proclamation No. 813/2013, promulgated in 2014 and now more than ten years old.

Among the pressing new challenges requiring modern competition law reform—especially in the area of abuse of dominance—are artificial intelligence (AI), digital platforms, and technology-driven industries.

Furthermore, although many issues were left to be regulated through subsequent regulations and directives, they remain unregulated even after more than ten years. These issues include the following: the Proclamation promised that “other similar acts [of abuse of market dominance]” would be specified by regulation to be issued for the implementation of this Proclamation;<sup>84</sup> it also promised that other similar justified economic reasons [for abuse of market dominance] would be specified by regulation to be issued for the implementation of this Proclamation;<sup>85</sup> moreover, the Council of Ministers was entrusted to determine by regulation the numerical expression of the degree of market dominance.<sup>86</sup> However, neither a new comprehensive law nor all the promised regulations and directives have been enacted more than a decade later.

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<sup>84</sup> Supra note 16 Article 5(2) I

<sup>85</sup> Id Article 5(3) d

<sup>86</sup> Id Article 7(5)

### **3.4. Abuse of market dominance Law and the practices of businesspersons who hold dominant position in a given market**

According to a survey conducted by the World Bank, the Investment Climate Survey for Ethiopia (2006), the business community in Ethiopia identified several prevalent anticompetitive practices.<sup>87</sup> Topping the list was Collective Price Fixing, which accounted for 45% of the reported practices. This refers to the collusive behavior of firms setting prices jointly rather than independently, thereby undermining competition.

The next most prevalent practice was Entry Barriers, which restrict new firms from entering the market and challenging incumbents. This was followed by Bid Rigging, where competitors collude to manipulate the bidding process, and Market Sharing, where firms divide up the market and customers amongst themselves to avoid direct competition.

Tied Selling, where the sale of one product is conditional on the purchase of another, was also identified as an anticompetitive practice. Notably, Price Discrimination and Predatory Pricing, where firms charge different prices to different customers or deliberately underprice to drive out competitors, were reported less frequently at only 10% of the identified practices.

Finally, Refusal to Deal, where firms deny access to essential facilities or inputs, was the least prevalent at 5% according to the survey findings. Overall, the report highlighted the significant competition concerns facing the Ethiopian business environment, with the most egregious practices being those that directly undermine pricing, market access, and free and fair competition.

#### **3.4.1. Exclusive dealing**

Exclusive dealing agreement is an agreement whereby downstream firms are prohibited from dealing with competing producers or distributors.

In Ethiopia, a comprehensive review of the existing literature reveals a significant prevalence of anticompetitive behavior within markets for essential commodities and services. This includes critical sectors such as sugar, cement, electricity, water, soft drinks, and air transport. Additionally, the financial sector exhibits similar patterns, where public enterprises often engage exclusively with government-owned financial institutions.<sup>88</sup> Such dynamics create barriers to entry for private competitors and limit consumer choice, ultimately undermining market efficiency. The concentration of power among state-run entities stifles competition, leading to higher prices and reduced quality of goods and services. Addressing these anticompetitive practices is

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<sup>87</sup> Supra note 15, P.57

<sup>88</sup> Id.P.15

essential for fostering a more vibrant and equitable economic environment in Ethiopia, where diverse market participation can drive innovation and better serve consumer needs.<sup>89</sup>

In a survey conducted by World Bank, Investment Climate Survey for Ethiopia (2006), among the Most Prevalent Anticompetitive Practices Identified by the Business Community in Ethiopia was Exclusive Dealing which took fifteen percent.

#### **3.4.1.1. Ethio-Telecom signs Exclusive deal with master agents: de Jure exclusivity**

Ethio-Telecom is the sole state-owned telecommunications service provider in Ethiopia, holding a dominant position in the market. It operates a vast network of shops and franchises across the country, serving as the primary provider of telecom products and services.

Competition is crucial in telecommunications as it promotes innovation, lowers prices, and enhances service quality.

Exclusive dealing, while potentially beneficial in some contexts, can also raise concerns about market foreclosure and anticompetitive practices.

In the following pages I will examine Ethio-Telecom's exclusive dealing agreements with national distributors and analyzes their implications under Ethiopian competition law. It assesses whether these practices constitute an abuse of market dominance and explores their impact on competition and consumer welfare.

Exclusive dealing refers to agreements where a seller restricts a buyer from purchasing products or services from competing suppliers. This can create barriers to entry for competitors and potentially harm competition in the market.

Different jurisdictions have varying approaches to exclusive dealing. In Ethiopia, Proclamation No. 813/2013 addresses competition and consumer protection, prohibiting certain exclusionary practices by dominant firms.

##### **A. Description of the Exclusive Agreements:**

Seven National Organizations and Institutions Sign Exclusive Business Partnership Agreement with Ethio-Telecom to Distribute Telecom Products and Services<sup>90</sup>

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<sup>89</sup> Ibid , P. 85

<sup>90</sup>Ethio Telecom, Seven National Organizations and Institutions Sign Exclusive Business Partnership Agreement with Ethio telecom to Distribute telecom Products and Services, <https://www.ethiotelecom.et>, Last visited on 17<sup>th</sup> January 2026

Based on the signed agreement, these national distributors would exclusively engage in business areas such as telebirr services, mobile airtime top up, new SIM card sales, SIM card replacement services, handset and devices sales on behalf of Ethio-telecom as main distributors as well as providing the company's products and services for the customers by opening their own franchise shops.

Ethio-telecom therefore, has signed a strategic business partnership agreement with Hidase Telecom Share Company, Ethiopian Postal Service, Nared General Trading PLC, Highlight Stationery & Manufacturing Trading, Smart Digital Technologies PLC, Teleport Technologies PLC and Alami Industrial Engineering that would enable them to exclusively distribute telecom products and services nationwide.

Likewise, 13 organizations have signed agreement with Ethio-telecom to exclusively distribute Ethio-telecom products and services at the company's Zonal and Regional level.<sup>91</sup>

This agreement designates these master agents as the sole distributors for Ethio-telecom's services, effectively preventing them from entering into similar agreements with a potential competitor in the Ethiopian telecom market.

Historically, Ethio-telecom has been the sole provider in Ethiopia's telecom sector, operating without competition until the anticipated launch of Safaricom's services. This exclusive agreement with master agents aligns with Ethio-telecom's strategy to strengthen its market position ahead of Safaricom's entry.

Among the participating companies that signed the exclusive agreement are national-level entities such as EthioPost (the national postal carrier), Hidase Telecom, and TelePort. These companies operate as master agents within Ethio-telecom's distribution network, which includes a hierarchical structure of master agents, agents, and retailers.

The exclusive agreement signed by national-level entities restricts their ability to engage with Safaricom. This exclusionary practice limits Safaricom's access to experienced telecom service providers and retailers within distribution network, which operates through a hierarchical structure of master agents, agents, and retailers. This constraint could adversely impact Safaricom by impeding its opportunities to collaborate with companies possessing substantial expertise in telecom service provision and retailing.

The agreement's legality and implications are not framed within Ethiopia's legal context, particularly under Article 5, Sub-article (d) of Proclamation No. 813/2013 on Trade Competition and Consumers Protection. This

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<sup>91</sup> Ibid

article prohibits dominant businesses, like Ethio-telecom, from engaging in practices that unfairly exclude other potential competitors or restrict trade to an extent that is economically detrimental to other market participants.

By making these master agents its exclusive distributors, Ethio-telecom aims to consolidate its market presence and control over distribution channels. This strategy not only secures a strong foothold ahead of Safaricom's launch but also potentially limits Safaricom's ability to quickly establish a competitive distribution network.

The agreement's compliance with prevailing trade practices and legal standards is critical. It must align with principles of fair competition in general and abuse of market dominance prohibitions in particular, ensuring that Ethio-telecom does not abuse its dominant market position to the detriment of consumers or other market participants.

### **B. Examination of Ethio-Telecom's Dominance:**

Ethio-Telecom holds a commanding position in Ethiopia's telecommunications industry, evidenced by its 94.5% market share and a subscriber base of 78.3 million. The company's dominance is underpinned by several key factors:

1. **Extensive Infrastructure:** As a state-owned enterprise, Ethio-Telecom benefits from significant investment in infrastructure, allowing it to cover a large geographical area and serve millions of customers effectively.
2. **Regulatory Advantages:** Being a government entity, Ethio-Telecom enjoys certain regulatory privileges that facilitate its market operations and hinder new entrants.
3. **Distribution Network:** The Company operates numerous shops and franchises nationwide, controlling a significant portion of the telecom distribution channels, further entrenching its market position.

According to Proclamation No. 813/2013, particularly Article 6, a business can be deemed to have a dominant market position if it can control prices, restrict competition, or set significant barriers to entry. Ethio-Telecom's characteristics aligns with the criteria set under article 6 sub 1 of the proclamation ;based on the fact that it has a market share holding 94.5% of the market share clearly indicates Ethio-Telecom's ability to influence pricing and market conditions significantly.

Furthermore The Company's established infrastructure and distribution network create substantial entry barriers for potential competitors, such as Safaricom, which entered the market in 2022.

The entry of the Safaricom-led consortium in 2022 represents a significant shift in the competitive landscape. While Ethio-Telecom has historically enjoyed a monopoly, the presence of Safaricom introduces potential challenges:

Generally, Ethio-Telecom's dominance in the Ethiopian telecommunications market is characterized by its extensive market share, regulatory advantages, and comprehensive distribution network. However, the new competition posed by Safaricom may challenge its status, potentially leading to shifts in pricing, innovation, and service quality. The ongoing developments in this sector will be crucial in determining whether Ethio-Telecom can maintain its dominant position or if it will need to adapt in response to increased competition.

### **C. Impact on Competition and Consumer Welfare**

Exclusive dealing agreements may limit competition by preventing potential competitors like Safaricom-Ethiopia from entering the market or expanding their operations. This could result in reduced innovation and less favorable outcomes for consumers.

Consumers may face limited choices, potentially higher prices, and less innovative services due to restricted competition in the telecommunication services. Stakeholders such as consumer advocacy groups may voice concerns over these practices.

#### **3.4.2. Legal ground for charging franchise and royalty fee by dominant firms in Ethiopia**

##### **A. Regulation of franchise business**

In the Ethiopian context, the power dynamics in franchisor-franchisee relationships, particularly concerning international franchises, are significantly skewed. This imbalance is largely due to the relatively underdeveloped state of private businesses within the country. As Ethiopia witnesses an influx of internationally recognized brands eager to enter its market, the disparity between these established franchises and the local business landscape becomes increasingly pronounced.

The expansion of franchise businesses brings both opportunities and challenges. On one hand, the entry of global brands can stimulate economic growth, create jobs, and introduce new products and services to Ethiopian consumers. On the other hand, the lack of robust domestic private enterprises can leave local franchisees vulnerable to exploitation, as they may lack the resources, experience, and negotiating power to engage on equal footing with their international counterparts.

This situation underscores the urgent need for effective regulation of franchise agreements in Ethiopia. Prudent regulatory frameworks can help ensure that franchise relationships are equitable and that local franchisees are protected from potentially unfair practices. Such regulations should focus on promoting transparency,

establishing minimum standards for franchise agreements, and providing support for local businesses to strengthen their capacity and negotiation skills.<sup>92</sup>

The registration of a franchise shall be conducted in accordance with the regulations established under the CRBLP. A franchise agreement refers to a contract made for consideration between the franchiser and the franchisee, allowing the franchisee to conduct business activities using the trade name of a recognized product or service. This agreement enables the franchisee to benefit from the nature and experience of the franchiser's operations.<sup>93</sup>

To apply for a special certificate of commercial registration for franchising, the following documents must be submitted along with the application form:<sup>94</sup>

1. A notarized franchising contract, along with an authenticated original and a copy.
2. A notarized registration certificate of the franchiser.
3. A photocopy of the franchisee's valid trade license.
4. Two passport-sized photographs taken within the last six months that clearly show the identity of the franchising manager.
5. The original and necessary copies of a valid identification card or passport of the franchising manager.
6. If the application is submitted by an attorney, include the original and a copy of the power of attorney, as well as the original and necessary photocopies of valid identification cards or passports for both the principal and the attorney.

Failure to register a franchise agreement with the commercial register will render it void. Therefore, the validity of franchise agreements is entirely contingent upon their registration with the commercial registry from the outset.

## **B. Eligibility for franchise protection**

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<sup>92</sup> Rediet Yilma, Regulation of Franchise Agreements in Ethiopia, , December 2020, P.24

<sup>93</sup> Supra note 25, Article 2(33)

<sup>94</sup> Commercial Registration and Licensing Council of Ministers Regulation,2016, Council of Ministers Regulation No. 392 Article 9 (1) ,Neg. Gaz. Year , 22<sup>nd</sup> Year No.101

Intellectual property rights (IPR) are a crucial component of any franchise system. The term "intellectual property" encompasses a diverse array of rights pertaining to intellectual creations. Within the context of franchise operations, trademark law, trade name law, and copyright law are particularly significant.

The existence of a robust infrastructure for the effective protection and enforcement of IPRs is indispensable for the successful expansion of franchising. The quality of IPR protection in a given jurisdiction is of paramount importance to the parties involved in a franchise agreement, as intellectual property lies at the core of their business relationship. In most jurisdictions, the IPRs that can be licensed under a franchise agreement typically include trademarks, trade names, copyrights, trade secrets, industrial designs, and, where applicable, patents.<sup>95</sup>

### **C. Examining the legal basis for charging Franchise fees by Ethiopian Keste Damena foam for retail shops selling its products**

Keste Damena is a private limited company that began producing polyurethane foam in Addis Ababa, Ethiopia, over 25 years ago. Today, it is recognized as the leading foam manufacturer in Ethiopia, known as Rainbow Foam Industry. Keste Damena aims to become a dominant player in the foam market across Africa and beyond.<sup>96</sup>

The company's business portfolio includes a wide range of products, such as mattresses, bedding accessories, sofas, chairs, kitchen cabinets, bed frames, home décor, and more.

A trade name is the official name by which a company conducts its business activities. This name may coincide with a registered trademark, but it serves a distinct purpose. The primary function of a trade name is to establish a unique identity in the marketplace, providing protection against the use of identical or similar names within the same industry or geographical area, especially when such use could lead to consumer confusion. Determining whether confusion exists hinges on various factors, including the nature of the businesses involved, their locations, and the demographics of their customer base.<sup>97</sup>

The right to a trade name is conferred automatically through its usage; it takes effect the moment the public can recognize it. This can occur through various channels, such as printed materials, advertisements, or online platforms. While registration in a trade register is not a prerequisite for protection, it can enhance the credibility

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<sup>95</sup>Supra note.88, P.39,Citing , WIPO, In Good Company: Managing Intellectual Property Issues in Franchising, (2019) No.5 Intellectual Property for Business Series 10.

<sup>96</sup>Keste Damena <https://www.kestedamena.com> browsed 03 November 2024

<sup>97</sup> <https://www.everythingaboutfranchise.com/information/franchise-and-the-different-fields-of-law/franchise-and-intellectual-property-law/> last visited on 11/3/2024

of the trade name and provide additional legal advantages. The protection of a trade name extends as long as it is actively used and is valid in the specific geographical area where it is employed.

Unlike trademark rights, which require a certain level of distinctiveness to qualify for protection, trade names do not have to meet this criterion. However, it is crucial that a trade name does not mislead consumers or infringe upon existing trade names or trademarks owned by others. Conducting a thorough search, or hiring a professional to do so, to ensure that a chosen trade name is not already in use is a prudent step before launching your business. This diligence can prevent potential legal disputes and protect any brand's integrity in the competitive landscape.

A trade name is the official designation under which a company operates its business. While it may overlap with a registered trademark, its primary purpose is to create a unique marketplace identity. This uniqueness protects against the use of identical or similar names within the same industry or geographic area, particularly to prevent consumer confusion. The assessment of whether confusion exists depends on several factors, including the nature of the businesses, their locations, and the demographics of their customer bases.

Franchise agreement is defined as a contract made for consideration between the franchisor and the franchisee. This agreement allows the franchisee to conduct business under the trade name of a recognized product or service, sharing in the knowledge and experience of the franchisor. The key reason for granting a trade name and allowing the franchisor to charge a franchise fee is to enable the franchisee to operate under the established identity of a well-known product or service, benefiting from the recognition and leadership of the owner. (Emphasis added)<sup>98</sup>

It is important to note that mere distribution agreements between large companies and retail outlets do not qualify as franchise agreements. Franchising represents a more sophisticated form of licensing, where the franchisor grants the franchisee the right to use its intellectual property and is registered in a competent body.<sup>99</sup> Therefore, simply distributing products under a trade name does not justify the imposition of a franchise fee.

Hence, the franchise and royalty fees charged by Keste Damenas do not qualify for legal protection under Ethiopian laws governing franchise businesses, nor do they meet the international standards applicable in this context. Consequently, Keste Damene's actions constitute an abuse of market dominance and/or economic dominance over retailers in the area where the company operates.

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<sup>98</sup> Supra note 25, Article 2(33)

<sup>99</sup> Supra note 90

In conclusion, Keste Damena's imposition of franchise fees, in the absence of any legally recognized franchise agreement with distributors of its products constitutes an unfair trading condition.

Retailers are economically dependent on Keste Damena as a leading foam supplier with no adequate substitutes, the practice also amounts to abuse of market dependence.<sup>100</sup> Furthermore, retailers depend economically on Keste Damena because its foam products are the primary or exclusive option with strong brand recognition, high production capacity, and consumer preference, making the retailers difficult to switch to other foam producers and/or suppliers despite their availability.

### **3.4.3. Restricting essential facility**

#### **3.4.3.1. Restrictions on essential facilities by transmission manufacturing PLC Ethiopia**

Transsion Holdings is a mobile phone manufacturer based in Shenzhen, China. In 2017, it became the largest smartphone manufacturer by sales in Africa and also sells devices in South Asia. Its brands include Itel and Infinix for phones, Caricare for after-sales services, and Oraimo for accessories. The company manufactures phones in various locations, including China, Pakistan, Ethiopia, Bangladesh, and recently, India.

A manufacturing plant was set up in Ethiopia in 2011. The company's success in Africa is largely due to its ability to tailor phone features to meet the specific needs of African consumers. For instance, Transsion's phones include a camera feature that calibrates exposure for darker skin tones, ensuring that facial details are preserved. Additionally, the phones are equipped with dual SIM functionality, which is popular among African users who often use multiple SIM cards to save money. Long battery life is another key feature, addressing the challenges posed by low electrification rates and frequent blackouts in the region. Furthermore, the devices support multiple African languages, with Tecno being the first major mobile phone brand in Ethiopia to offer an Amharic keyboard. Transsion also invests heavily in advertising its mobile phone brands across Africa.<sup>101</sup>

#### **A. Restriction on essential facilities for phone maintainers by transsion holding in Ethiopia**

The denial of access to essential facilities is a key concern under Ethiopia's competition law framework. The Trade Competition and Trade Practices Proclamation explicitly prohibits the "*denial of access to an essential facility*" by a dominant market player.

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<sup>100</sup> Supra note 62, Article 19(2)(a)

<sup>101</sup> <https://transsion.com>, Last visited on *October 2024*

An essential facility is an infrastructure or resource that is necessary for competitors to effectively compete in a market. In this case, transsion holding is deemed to be denying access to the essential accessories and spare parts required for the maintenance and repair of Tecno and Itel mobile phones.

In the case of transsion holding a leading smartphone brand in Ethiopia, the company appears to be engaging in such anti-competitive practices. Based on interviews with mobile phone repairers, transsion holding is denying access to essential accessories and spare parts required to maintain and repair Tecno and Itel mobile devices.<sup>102</sup>

By restricting the sale of these repair components to its own independent service providers, transsion holding is effectively monopolizing the aftermarket for its products. Customers seeking to repair their Tecno or Itel phones have no choice but to use transsion holding's authorized maintenance centers, as the necessary parts are not made available to third-party repairers.

By restricting the sale of these essential accessories and parts to its own independent mobile maintenance providers, transsion holding is effectively monopolizing the maintenance and repair services for its own products. This allows transsion holding to control the aftermarket for its phones.

This anti-competitive behavior not only harms consumers by limiting their choices and increasing maintenance costs but also stifles competition from independent repair shops the development of a competitive and vibrant mobile repair market which in turn forces consumers to rely solely on the company's own service centers. This is likely to lead to higher repair costs and reduced consumer choice. It undermines the principles of free and fair competition that the Proclamation aims to promote

The actions of transsion holding appear to violate the provisions of the TCCP Proclamation no.813 that prohibit the abuse of a dominant market position. Specifically, Article 5(2) E of the Proclamation states that it is an abuse of dominance to "refuse to give other enterprises access to an essential facility which it controls.

#### **3.4.4. Unfair Terms of Contract**

##### **3.4.4.1. After sale repair and maintenance service terms of Tecno mobile**

Tecno's approach to after-sale services has raised significant concerns among consumers and industry observers alike. Reports indicate that customers are often pressured into replacing fully functional components of their devices, such as screens, even when the underlying issue may lie elsewhere, such as in the battery port.

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<sup>102</sup> Interview with Anonymous mobile maintainer, Mekelle , on 12 March 2020

This suggests a potential misalignment of interests, where repair centers may be incentivized to recommend unnecessary replacements to generate additional revenue, rather than providing the most cost-effective solution for the consumer.

#### **3.4.5. Tying and bundling**

Furthermore, Tecno is engaging in alleged tying practices by requiring retailers to purchase slow-moving phone models alongside their orders for popular devices. In an interview with Mr. Samson Tecno mobile distribution managers, he argued that the act of tying is policy package by the company<sup>103</sup> This bundling of products that are not in high demand with the in-demand smartphones appears to violate prohibitions on anti-competitive tying under article 5 sub 2 (g) of the TCCP Proclamation.

### **3.5. Challenges and bottlenecks affecting the implementation and enforcement of the law on AMD?**

Enforcement of antitrust regulations is influenced by political factors. The level of intervention—whether strong or hesitant—reflects public choice and varies based on the goals and characteristics of each jurisdiction. In cases of market dominance, two primary perspectives emerge.<sup>104</sup>

The U.S. approach emphasizes confidence in the market's self-correcting mechanisms. Here, dominance is not viewed with suspicion; rather, it is seen as a potential indicator of healthy competition that can foster innovation. U.S. antitrust authorities express concern that excessive intervention might stifle dominance and protect less efficient firms from competitive pressures.

Conversely, Europe adopts a different stance. The focus is on maintaining market openness and safeguarding the competition process and market structure. This perspective is evident in the heightened responsibilities placed on dominant firms to avoid practices that could foreclose competition or leverage their position to gain unfair advantages over rivals.<sup>105</sup>

#### **3.5.1. Challenges in regulating abuse of dominance and pricing**

In Chapter Two, Section 2, Subsection Four, I have discussed various forms of pricing abuses related to market dominance practices. This includes topics such as predatory pricing, discounts and rebates, unfair contract terms, tying and bundling, excessive pricing, and price discrimination.

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<sup>103</sup> Interview with Mr. Samson Bogale ,Tecno shop distribution manager ,Addis Ababa, Interviewed on 3/18/2026

<sup>104</sup> Supra note 27, P.26

<sup>105</sup> Ibid,P.26

However, it is particularly challenging for competition authorities to accurately assess a firm's costs when evaluating whether the prices charged are excessive, determining instances of price discrimination, or identifying cases where a dominant firm is selling products at unreasonably low prices. This difficulty extends to establishing what the "right" prices should be.

In Ethiopia, the Anti-Competitive and Law Violation Prevention Desk face significant practical challenges in determining excessive pricing and understanding production costs.<sup>106</sup> These challenges arise from several factors:

1. **Incomplete Cost Data:** There is often a lack of comprehensive data on all costs incurred by producers in Ethiopia, making it difficult to set appropriate prices.
2. **Malicious Underreporting:** Firms may intentionally underreport their production costs to evade taxes and circumvent regulations imposed by competition authorities. This further complicates the authorities' ability to assess pricing practices accurately.

These issues highlight the complexities faced by Ethiopian competition authorities in regulating pricing practices effectively.

### **3.5.2. The Anti-Competitive and Law Violation Prevention Desks Conflict of Interest with the ministry of trade**

The Ministry of Trade and Industry (MoTRI) plays a crucial role in fostering trade and supporting business activities. The executives within MoTRI are actively engaged in various tasks, including commercial registration and the cancellation of licenses. Their primary objective is to develop the trade sector and encourage participation from trade actors.

However, the anti-competitive trade practice prevention desks operates with a different focus; it serves a regulatory role, implementing measures against businesses that exploit the market. This distinction highlights the differing objectives of these two bodies.

The integration of the regulatory authority within the executive branch raises concerns about the autonomy and independence of the institution. As noted by Mr. Getnet in an interview, the commercial registration departments and senior officials at the ministry advises not to burden businessmen with trade practice and

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<sup>106</sup> Interview with Mr. Getnet Ashenafi, Desk Head at Ministry of trade and regional integration Anti-Competitive and Law Violation Prevention Desk, December 10, 2024

consumer protection scrutiny over minor details. The ministry's approach is to create a welcoming environment for traders to invest, rather than to overly scrutinize their business practices.

In summary, while MoTRI aims to facilitate and promote trade, the Competition Authority is tasked with ensuring fair market practices, which can sometimes lead to conflicting objectives between the two entities.

### **3.5.3. The institutional restructuring of MoTRI**

Before the restructuring of the Ministry of Trade into the Ministry of Trade and Regional Integration, the Trade Competition and Consumer Protection Proclamation (TCCPP) established the Trade Competition and Consumer Protection Authority as an autonomous federal entity under the Ministry of Trade<sup>107</sup>. The Authority was led by a Director General and a Deputy Director General, both appointed by the Prime Minister based on recommendations from the Ministry of Trade. The Authority comprises judges, investigative officers, prosecutors, and other personnel.<sup>108</sup> Its headquarters was located in Addis Ababa, with the option to establish branch offices as needed.<sup>109</sup> Additionally, the Proclamation anticipated the creation of regional consumer protection judicial bodies.<sup>110</sup>

Currently, Proclamation No. 1263/2021 outlines the powers and duties of the executive organs of the Federal Democratic Republic of Ethiopia, establishing the Ministry of Trade and Regional Integration and replacing the former Ministry of Trade.

Under this new ministry, the organizational structure includes the Trade System and Licensing Sector Directorate. Within this directorate, there is a Department of Domestic Trade and Consumer Protection, which oversees the Anti-Competitive Trade Practice Prevention Desk.

In an interview with the head of the Anti-Competitive and Law Violation Prevention Desk, it was noted that the establishment of the new enabling proclamation has rendered the former Trade Competition and Consumer Protection Authority (TCCPA) without legal standing.

The desk faces challenges due to its limited budget and human resources for addressing market dominance abuses. Unlike the previous authority, which included a director, deputy director, judges, and investigative officers, the current Anti-Competitive and Law Violation Prevention Desk consists of a Records and Archives

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<sup>107</sup> Supra note 16 ,Article 27

<sup>108</sup> Ibid, Article 28

<sup>109</sup> Ibid, Article 29

<sup>110</sup> Ibid, Article 34

Clerk, specialists in anti-competitive practices and product market law violations, case monitoring specialists, and investigative and prosecution experts at various levels.

The Desk is operating with an insufficient number of personnel who possess the specialized legal and economic expertise required to effectively enforce competition law. Particularly, the Desk lacks professionals with adequate knowledge and practical experience in the investigation and prosecution of abuse of market dominance cases.

This capacity gap poses a significant challenge to the proper implementation of the Trade Competition and Consumer Protection Proclamation No. 813/2013. The Proclamation expressly prohibits dominant undertakings from engaging in practices that restrain competition or exploit consumers, and it mandates timely, evidence-based enforcement actions. However, without trained investigators, legal officers, and economists who understand market-power assessment, complex commercial conduct, and evidentiary standards under Ethiopian competition law, the Desk is unable to fully discharge its statutory responsibilities.

## 4. CHAPTER FOUR

### 4.1. Introduction

This research delves into the landscape and implications of competition policy and law in Ethiopia, emphasizing the significance of promoting fair market dynamics through governance against abuse of market dominance practices. The research reflects that while competition law is essential, its successful implementation is hindered by numerous challenges, particularly abuse of market dominance.

The researcher primarily explore Ethiopia's competition laws, focusing specifically on the issue of abuse of market dominance. Particularly it reviews relevant legislations in practice and analyzed the practices of dominant firms.

### 4.2. Research Findings

#### I. Monopoly and Dominance:

The research identifies that monopolistic firms often exploit market dominance through unfair practices—either exclusionary methods that bar competition or exploitative tactics that disadvantage consumers.

#### II. Legal Gaps: There are critical legal gaps in Ethiopian law concerning:

- Abuse in the context of intellectual property rights.
- Ambiguity exists in applying aggravating (e.g., repeat offenses) or mitigating factors. No clarity on handling insolvent firms further weakens deterrence.
- Lack of regulations for addressing economic dependence.
- Regulatory Delays: Over 10 years post-enactment, key regulations (e.g., on additional abusive acts, economic justifications, dominance metrics)

#### III. Practical Case Studies of Abuse by Dominant Firms

1. **Exclusive Dealing:** Ethio-Telecom (94.5% market share, 78.3 million subscribers) engages in de jure exclusivity by signing agreements with master agents (e.g., EthioPost, Hidase Telecom) to distribute services like telebirr and SIM cards exclusively, preventing dealings with competitors like Safaricom. This violates Article 5(2)(d), forecloses market entry, reduces innovation, raises prices, and harms consumer welfare by limiting choices.
2. **Franchise and Royalty Fees:** Keste Damena (leading foam manufacturer) charges unauthorized franchise/royalty fees to retailers without registered agreements under the Commercial Registration

and Business Licensing Proclamation (CRBLP). This constitutes abuse of dominance/economic dependence, as retailers rely on its products due to brand strength and limited substitutes, violating fair trading conditions and international standards. Franchise regulation is inadequate, focusing only on trade names and ignoring broader IP (e.g., trademarks, patents).

- 3. Restriction of Essential Facilities:** Transsion (Tecno/Itel brands) denies spare parts and accessories to third-party repairers, monopolizing after-sales services and violating Article 5's prohibition on refusing access to essential facilities. This increases repair costs, limits consumer choice, and stifles independent repair markets.
- 4. Unfair Contract Terms:** Tecno pressures consumers into unnecessary replacements (e.g., screens for battery issues), exploiting dominance in after-sales services and raising concerns about consumer exploitation.
- 5. Tying and Bundling:** Tecno ties sales of popular phones to slow-moving models for retailers, violating Article 5(2)(g) and distorting distribution.

#### **IV. Challenges and Bottlenecks in Implementation and Enforcement**

- A. Political and Institutional Influences:** The Anti-Competitive and Law Violation Prevention Desk faces conflicts of interest within the Ministry of Trade and Regional Integration (MoTRI), which prioritizes trade promotion over scrutiny. This undermines independence, as MoTRI advises leniency to attract investment.
- B. Capacity Constraints:** The Desk lacks specialized personnel (e.g., economists, legal investigators with expertise in market-power assessment), budget, and resources. Post-restructuring (Proclamation No. 1263/2021), the former autonomous Trade Competition and Consumer Protection Authority (TCCPA) lost legal standing, reducing it to an understaffed desk without judges or dedicated officers.
- C. Practical Enforcement Difficulties:** Assessing costs for abuses like predatory pricing, excessive pricing, or price discrimination is hindered by incomplete data and malicious underreporting by firms (e.g., to evade taxes). This makes determining "right" prices challenging.

### **4.3. Conclusion**

Ethiopia's legal framework for regulating abuse of market dominance, centred on the Trade Competition and Consumer Protection Proclamation No. 813/2013, is moderately comprehensive on paper but demonstrably ineffective in practice. Article 5 establishes a clear distinction between well-functioning dominance and abusive dominance: a firm holds a dominant position when it possesses the actual capacity to control prices, restrict competition, or erect barriers to entry (Article 6), yet the conduct becomes abusive only when it falls within the

eight enumerated categories in Article 5(2). The first four categories (5(2)(a)–(d)) are per se prohibitions with zero tolerance, while the remaining four (5(2)(e)–(h)) are subject to a rule-of-reason analysis that permits “justifiable economic reasons” as listed in Article 5(3). This structure correctly separates efficient market leadership from anticompetitive exclusion or exploitation. However, the framework’s effectiveness is severely undermined by persistent legal and regulatory gaps.

First, the law fails to address abuse of dominance involving intellectual property rights. Second, the 10 % turnover cap on administrative fines lacks clear guidelines on aggravating and mitigating factors or mechanisms for non-payment, rendering sanctions predictable and insufficiently deterrent. Third, the Proclamation regulates only absolute (market-wide) dominance and ignores relative dominance or abuse of economic dependence; weaker trading partners remain unprotected against superior bargaining power. Fourth, critical implementing regulations promised in 2013—defining “other similar acts,” additional justifiable economic reasons, and the numerical threshold for dominance—have never been issued more than a decade later. Finally, the law has not been updated to capture modern challenges such as digital platforms, AI-driven pricing algorithms, or data-driven exclusionary strategies.

The case studies examined in this chapter confirm that dominant firms in Ethiopia routinely engage in both exclusionary and exploitative conduct. The most prevalent practices identified by businesses are exclusive dealing, unfair trading condition and abuse of economic dependence, denying access to genuine spare parts and accessories, thereby monopolizing the aftermarket and breaching Article 5(2)(e) (refusal of access to an essential facility).

Enforcement barriers are both institutional and practical. The 2021 restructuring dismantled the autonomous Trade Competition and Consumer Protection Authority, folding its functions into a low-capacity “Anti-Competitive Trade Practice Prevention Desk” within the Ministry of Trade and Regional Integration. The Desk suffers from acute shortages of specialized investigators, economists, prosecutors, and judges; limited budget; and an inherent conflict of interest, as the same Ministry whose mandate is to promote trade and ease licensing simultaneously regulates anticompetitive conduct.

#### **4.4. Recommendations**

- I. Regulatory authorities may need to investigate restricting essential facilities, unfair terms of contract, and abuse of economic dependence allegations and take appropriate enforcement action to address apparent abuse of dominant market practices.
- II. **Enhanced Regulatory Framework:**

Existing competition laws should be revised to address identified gaps and ensure the inclusion of relative dominance or economic dependence.

### **III. Capacity Building:**

The competition authority should be strengthened by equipping with adequate resources and independence to effectively monitor and enforce compliance.

Hence, strengthening human-resource capacity—through recruitment of qualified professionals and targeted training in competition-law analysis, market-dominance assessment, and prosecutorial procedures—is essential to ensure effective enforcement of the rules governing abuse of dominance and to uphold the objectives of the Proclamation, including promoting fair competition, safeguarding consumer welfare, and fostering a competitive market economy in Ethiopia.

### **IV. Public Awareness:**

There should awareness raising for consumers and businesses about their rights and responsibilities under competition laws to encourage reporting of anti-competitive practices to the concerned government bodies. Even without adequate legal rules and clear directives for addressing abuse of dominance, there remains a significant gap in how the law with its shortcoming are communicated to the public. Therefore, raising public awareness is essential.

### **V. Institutional Collaboration:**

Better integration and cooperative efforts among various regulatory bodies to promote effective enforcement of competition laws should be encouraged.

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