



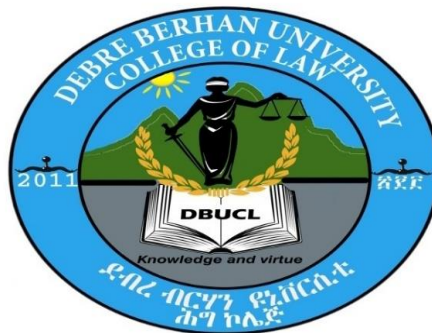
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Debre Berhan University



“From the community to the community”

DEBRE BERHAN UNIVERSITY COLLEGE OF LAW

E-COMMERCE AND THE FUTUTE OF COMPETITION REGULATION UNDER ETHIOPIAN LAW



**A Thesis Submitted in Partial Fulfillment of the Requirements of LL.M Degree in Business
and Investment Law at the College of Law**

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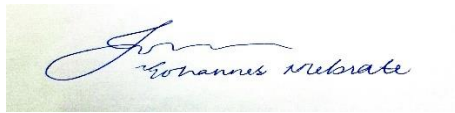
September 2020

Declaration

I, Yohannes Mebrate do hereby declare that the thesis 'E-Commerce and The Future of Competition Regulation Under Ethiopian Law' is my original work and that it has not been submitted for any degree or examination in any other university. Where other people's work has been used, this has been properly acknowledged.

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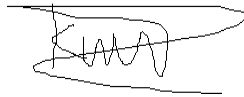
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List of Acronyms/Abbreviations

CR	Concentration Ratio
DDI	Data-Driven Innovation
EU	European Union
EDI	Electronic Data Interchange
ECX	Ethiopian Commodity Exchange
EFT	Electronic Fund Transfer
ETCCPA	Ethiopian Trade Competition and Consumer Protection Authority
FDRE	Federal Democratic Republic of Ethiopia
GTP	Growth Transformation Plan
HHI	Herfindahl -Hirschman Index
ICTs	Information and Communication Technologies
IP	Intellectual Property
ISP	Internet Service Provider
R&D	Research and Development
MFN	Most Favored Nation
MFC	Most Favored Clause
NGOs	Non-Governmental Organizations
OECD	Organization for Economic Cooperation and Development
PCW	Price Comparison Website
RPM	Resale (or Retail) Price Maintenance
SME	Small and Medium-sized Enterprises
SNNIP	Small but Significant Non-transitory Increase in Price
UNCTAD	United Nations Conference on Trade and Development.

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Abstract

Ethiopia has recently introduced various policies and strategies to promote free market economy and engagement of the private sector in economic activities. These policy documents and strategies envision the development of efficient market competition and the attendant regulatory framework. These policy aspirations are in the process of being translated into legal frameworks which, among other objectives, would create a conducive environment for the proliferation of competitive e-commerce marketplaces.

With the rise of new online marketplaces, novel issues of competition are bound to arise. Chief among such issues are Big Data and its algorithm, network effect, disruptive effects of e-commerce on offline market, net neutrality, multi-side markets and free offer of products. The Trade Competition and Consumer Protection Proclamation No. 813/2013 is the prime operative competition legal framework in Ethiopia. But a set of new laws are now in the offing.

This thesis examines whether, and to what extent, relevant Ethiopian laws attend to the issues of competition in emerging e-commerce marketplaces. As such, it thoroughly investigates whether the current and developing competition legal and institutional framework attend to common anticompetitive conducts in e-commerce. The thesis argues that relevant competition legislations do not adequately address e-commerce anticompetitive practices. It demonstrates that novel e-commerce issues such as control of data, net neutrality, indirect network effect, disruptive innovation, free offer of product and their anticompetitive effect, multi-sided market and their regulation, disruptive effects of e-commerce on incumbents are not fully addressed under the existing legal framework of relevant laws, including current and draft competition law instruments. It also shows that most of these laws do not appear to have e-commerce marketplace in mind. Moreover, this thesis also indicates that Ethiopian relevant competition law falls short of attending to the complexities of e-commerce market competition, particularly to non-price factors and tacit anticompetitive conducts.

Key Words: Competition, E-commerce.

Chapter One

Introduction

1. Background

The Internet has facilitated commercial transactions at a significantly reduced cost.¹ It further enables the e-commerce to cover a wide geographic area and make them more transparent and competitive. E-commerce was first introduced with the help of the leading technologies such as Electronic Data Interchange (EDI) and Electronic Fund Transfer (EFT) which have enabled users to exchange business information and carry out electronic transaction.²

E-commerce has become major platform among the fields of internet-based services, and its impacts are undeniably considerable in numerous economic sectors.³ It has freed local consumers from relying on limited choices and information of local markets⁴ by providing products at lower prices, accessible, and avoiding waste of time and cost, to raise few.⁵

Despite of the fast growth in the uptake of e-commerce over the past few decades, it raises a number of novel issues concerning the regulation of market competition. Since the enactment of Sherman Act in 1980, the competition law has been adopted by various countries. It has, further, been able to become the global agenda. International organizations like United Nations Conference on Trade and Development (UNCTAD) and Organization for Economic Cooperation and Development (OECD) are actively engaged in designing and providing guidelines for the application of competition law.⁶ Although considerable advancements have been made under the development of competition law, contextualizing its legal framework to the newly arrived e-

¹ OECD, 'Competition Issues in Electronic Commerce' (23 Jan 2001) DAF/CLP (2000) 32, 21.

² R G Javalgi (eds) 'The Dynamics of Global E-commerce: An Organizational Ecology Perspective' (2005) 22 *International Marketing Rev.* 420,427.

³ UNCTAD, *Digital Economy Report 2019: Value Creation and Capture: Implication for Developing Country* (UN publications, 2019) 8.

⁴ Ariel Ezrachi and Maurice E Stucke, *Virtual Competition: The Promise and Perils of the Algorithm- Driven Economy* (Harvard University Press, 2016) 1.

⁵ OECD 'Implications of E-commerce for Competition Policy-Note by BIAC' (28 May 2018) DAF/COMP/WD (2018)73.

⁶ See, e.g., UNCTAD, *Model Law on Competition Law: UNCTAD Series on Issues in Competition Law and Policy* (United Nations, 2007).

commerce has become one of the fields of research and debates.⁷ Particularly, certain non-price factors such as disruptive innovation, network effect, free offer of product, control of personal or any other relevant data, multi-sided market in e-commerce has brought about competition concerns.

The disruptive innovation is an introduction of technology or innovation which is outside of the value network of an incumbent.⁸ It has potential to distract an already established business model and lessen the competition. Within the context of contemporary global market, the disruptive innovation is usually attributed to e-commerce. This is because various features of business models and new e-commerce platforms are introduced having significant impact on incumbents in offline market.⁹ Therefore, disruptive innovation triggers competition concerns where e-commerce marketplaces start to expand and introduce different market model and channel from an incumbent.

The network effect contributes to the e-commerce dominance by allowing online firms to broaden their base. Network effect refers to the effect that an increase in number of users has on the value of product(s) and influences it has on other existing or potential users¹⁰ i.e. value of marketplace grows with number of participants and its enticing effect on non-customers. Therefore, an online firm having strong network effect has greater chance to acquire market power comparing to those who do not have.

The control of users' or any other relevant data (also referred as Big Data) plays key roles in e-commerce. The control of data is not a new concept and it has long been used as economic input. But the Big Data within context of the digital economy is its exponential increase in the capacity to collect, transmit, process and analyze through sophisticated computer algorithm at reduced

⁷ See, e.g., Ezrachi and Stucke (n4) 50.; Lina M Khan 'Amazon's Antitrust Paradox' (2017) 126 *The Yale L J* 710; See also Cosmo Graham and Fiona Smith (eds), *Competition, Regulation and the New Economy* (Hart Publishing, 2014).

⁸ Joseph Bower and Clayton Christensen, 'Disruptive Technologies: Catching the Wave' (1995) 73 *Harvard Business Rev.* 43, 44.

⁹ OECD, 'Hearing on Disruptive Innovation- Note By BIAC' (12 June 2015) DAF/COMP/WD (2015)48,2.

¹⁰ Marshal Van Alstyne, Geoffrey Parker, and Sangeel Choudary, 'Pipelines, platforms, and the New Rules of Strategy' (2016) 94 *Harvard Business Review* 54, 56.; See also OECD (n5) 10

cost.¹¹ Therefore, consumers' online activities, their personal data and their shopping preferences are relevant feeding factors to monitor online marketplaces.¹² To access this data, online platforms tend to sophisticate their data controlling capacity and aggressively work towards the full control of users' data and preferences to attract more consumers to their platforms. Thus, control of data confers market power to such platforms and makes a market entry very difficult to compete against such platform.¹³

Even though e-commerce fosters competition and innovation through more products and market players, some of its peculiar characteristics indicated above and other factors such as free offer of product and multi-sided market can also give rise to anticompetitive practices such as cartels, vertical restraints and abuse of dominance or unilateral conducts by dominant firms.¹⁴ Therefore, the advent of e-commerce calls for a thorough investigations as to the nature and scope of the problem as well as possible legislative responses.

In Ethiopia different legislations have been issued and several more are under legislation process. Within the context of e-commerce, Ethiopia has promulgated Electronic Transaction law to improve national e-commerce efficiency and foster e-transactions.¹⁵ Apparently, to promote the safety and efficiency of the payment system, to protect interest of users and increase the use of financial services, the National Bank of Ethiopia has issued Licensing and Authorization of Payment Instrument Issuers Directive No. ONPS/0112020. E-commerce marketplaces are emerging and Ethiopia undertakes to invite oversea e-commerce platforms. Currently, there are more than 29 (twenty-nine) e-commerce platforms operating in Ethiopia.¹⁶ Ethiopian government has signed Memorandum of Understanding (MOU) with Chinese e-commerce firm, Alibaba to establish Electronic World Trade Platform (eWTP).¹⁷ The government is also taking

¹¹ UNCTAD Digital Economy Report 2019 (n 3) 27.

¹² Ibid.

¹³ OECD 'Big Data: Bringing Competition Policy to the Digital Era' (27 October 2016) DAF/COMP (2016)14.

¹⁴ OECD (n 5) 11.

¹⁵ Electronic Transaction Proclamation, Federal Negarit Gazeta, Proclamation No.1205/2020.

¹⁶ 'Operational Readiness', Ministry of Innovation and Technology Digital Transformation Program Office (2020) (On file with author).

¹⁷ 'Alibaba Group to establish an eWTP Hub in Ethiopia', FDRE Office of the Prime Minister (2 December 2019) available at < <https://pmo.gov.et/news/>>; Also see CGTN Africa, Alibaba, Ethiopia sign MoU on creation of an

steps to launch capital market and outsource telecom sector to private firms.¹⁸ Thus, with sheer action of Ethiopian government to reform its legal frameworks and market, proliferation of online trading is inevitable; and this in turn brings up the attendant legal issues, including market competition.

The current competition rules in Ethiopia are contained in a broader legislation. There are competition provisions which are inadvertently indicated under different legislations.¹⁹ Apparently, Trade Competition and Consumers Protection Proclamation No. 813/2013 is an operative piece of legislation that deals with market competition regulation. In addition, Merger Directive No. 1/2016 is adopted by Minister of Trade and Industry. Beside these, there are draft bills underway.²⁰ The Trade Competition Proclamation is a much-improved piece of competition legislation that overcomes most of the shortcomings of the previous proclamations on competition.²¹ However, it is unclear to what extent it adequately responds to aspects of competition regulation in the context of e-commerce. Against this backdrop, this thesis examines the extent to which, and whether current Ethiopian relevant laws attend to the novel competition issues in the emerging e-commerce marketplaces

2. Statement of the Problem

E-commerce is a recent development in the fields of commercial transactions. Above all, it has drastically transformed the way the business transactions are undertaken. However, it is not

Electronic World Trade Platform (26 November, 2019) <<https://bit.ly/2FexuZG>> [Last accessed on 7 September2020].

¹⁸ ‘Addis Ababa Stock Exchange in 2020’ The Reporter (22December 2018) < <https://bit.ly/2F9xuue>> [Last accessed on 7 September2020].

¹⁹ See, e.g., Civil Code of the Empire of Ethiopia Proclamation No.165/1960, Art.2057.; Commercial Code of the Empire of Ethiopia Proclamation No.166/1960, Art. 133, Art. 134 (1)(2); Communications Service Proclamation, Federal Negarit Gazeta, No.1148/2019, Art. 47, Art.48.

²⁰ The Pieces of legislation under drafting process are Trade Competition and Consumer Protection Proclamation (hereinafter ‘draft trade competition proclamation’), Trade Competition and Consumer Protection Regulation of Council of Ministers (hereinafter ‘draft trade competition regulation’, Directive to Provide for the Assessment of Relevant Market Provisions of ETCCPA (hereinafter ‘draft relevant market directive’), Directive on Implementation of Public Interest Provisions of ETCCPA (hereinafter draft public interest directive’), Directive on Implementation Anti-competitive Agreements Provisions of Ministry of Trade and Industry (hereinafter ‘draft anticompetitive agreements directive’), Directive on Implementation of Abuse of Dominance Provisions of Ministry of Trade and Industry (hereinafter ‘draft abuse of dominance directive’), and Directive to Amend the Merger Directive of Ministry of Trade and Industry (hereinafter ‘draft merger directive’).

²¹ UNCTAD, *A Review of Competition Policy in Ethiopia* (United Nations Publications, 2018) viii.

without a set of legal concerns, particularly regarding market competition. The authority should always remain alert in the changing market to have coping mechanisms to new developments in the economy. That is why the area of competition regulation is amongst fields of law which subject to comparatively frequent change.²²

Apparently, with an advent of e-commerce, there are non-price effects and factors that occur online marketplaces. They play key roles in revenue increase in addition to actual sales of goods and services. These non-price effects pose competition regulation concerns as to whether contemporary competition law regulate non-price factors having more or equal effect with those price effect factors.²³ The key non-price effects are Big Data, network effect, free offer of products and disruptive innovation. In addition, multi-sidedness of some of e-commerce marketplaces also exhibit non-price effects.

As noted under background section, with an advent of e-commerce, relevance of Big Data has increased. With use of computerized algorithm, e-commerce platforms can process personal data to trace customers' preference and further predict market trends.²⁴ The more e-commerce platforms meet customers' preference, more likely to attract customers. However, the control of Big Data may increase concentration of markets in the hands of few e-commerce platforms²⁵ which will raise various competition issues.

The network effect also exhibits significant effect in e-commerce. Although the network effect is not new concept, with an advent of Big Data and flexibility of e-commerce, the network effect is a very relevant tool to entice more users to the a given e-commerce platform.²⁶ An e-commerce platform that able to build strong network effect has more opportunity to control the whole market as other competitors tend to lose their customers to the one having strong network effect.

²² Oliver Budzinski and Annika Stöhr, 'Competition Policy Reform in Europe and Germany: Institutional Change in the Light of Digitization' (2018) 24 Ilmenau Economics Discussion Paper 1, 32 < <https://bit.ly/2R3JwaY> > [Last accessed on 7 September2020]

²³ UNCTAD, 'Note by the UNCTAD Secretariat on Competition Issues in the Digital Economy' Intergovernmental Group of Experts on Competition Law and Policy 18th session UN Doc TD/B/C. I/CLP/54 (2019) 3.

²⁴ Ibid, 4.

²⁵ OECD 'Big Data' (n 13) 10 -12.

²⁶ UNCTAD (n23) 3.

Because, to avoid inconvenience, customers are forced to use a platform having more users and products so that they able to conveniently access services and goods.²⁷

The disruptive innovation also takes major share in building market power of e-commerce platform. Conveniences, flexibility, new ways of delivery and business model of e-commerce disrupt the offline incumbents.²⁸ A disruptive innovation leads to the displacement of existing technologies and business models, and creates new market and its own value networks.

Therefore, the aforementioned factors have underlining impact on market competition and they are likely to increase tendencies of market concentration and control of market by few online firms. On the other hand, their non-price effects bring about novel concerns as to whether competition laws which have been used to regulate traditional market may able to address anticompetitive maneuvers in e-commerce.

Within the legal framework of Ethiopia, there are different pieces of legislation that directly or indirectly address issues of competition.²⁹ Specifically, Trade Competition Proclamation No. 813/2013 (here in after the Trade Competition Proclamation) is the operative competition law in Ethiopia governing issues of competition. The Trade Competition Proclamation addresses five core pillars of competition issues. Those are, abuse of market dominance, anti-competitive agreements, concerted practices and decisions including both vertical and horizontal restraint, unfair competition and merger as an anti-competitive practice. It does also establish the Trade Competition and Consumer Protection Authority (TCCPA) having an autonomous power to regulate market competition with in boundary of Ethiopia and to establish separate judicial organ.³⁰ The Merger Directive also addresses issues that arise out of merger application and their

²⁷ Paul Belleflamme and Martin Peitz, 'Platforms and Network effect' (2016) University of Mannheim / Department of Economics Working Paper 16-14, 2 < <https://bit.ly/2Ze4TuF> > [Last accessed on 7 September2020]

²⁸ OECD, 'Hearing on Disruptive Innovation- Note By BIAC' (12 June 2015) DAF/COMP/WD (2015) 48,2.

²⁹ See, e.g., Civil Code (n19); See also Communications Service Proclamation (n19).

³⁰ Trade Competition and Consumer Protection Proclamation, Federal Negarit Gazeta, Proclamation No. 813/2013, Art. 27.

assessment.³¹A Draft Trade Competition Proclamation and a series of Directives are being drafted to provide for further details and guidelines.³²

However, it is still unclear whether and to what extent the Proclamation and other Ethiopian relevant laws can regulate competition issues, particularly, in the context of aforementioned competition concerns in e-commerce. Therefore, this thesis explored relevant Ethiopian laws to assess whether and to what extent they attend to the advent of competition issues under e-commerce.

3. Research Question

The main research question of this thesis is whether, and to what extent, relevant Ethiopian laws addresses potential competition issues presented by the advent of e-commerce. Furthermore, this thesis sought to address whether current legal and institutional framework fit for purpose to regulate e-commerce competition maneuvers.

4. Objective of the Study

The prime objective of this thesis is to examine the degree to which current relevant Ethiopian laws attends to the unique competition features of e-commerce.

5. Significance of the Study

This thesis has two main significances. First, it examined and found out the legal framework gap(s) related to competition aspects of e-commerce. Second, it forwards recommendations and provide outlooks for the consecutive studies going to be undertaken in the field.

6. Literature Review

Various researchers examined competition regulation of Ethiopia and found out various gaps and drawbacks. First, regulatory measures taken by various sectors and their implication on competition and autonomy of the authority are assessed. Researchers found out that inconsistent state and sector specific regulatory measures hinder and decapitate autonomy of the authority

³¹ Merger Directive of Ministry of Trade and Industry No. 1/2016.

³² Draft Bills (n20).

and it promotes anticompetitive behaviors.³³ Furthermore, government's monopoly hold in import, distribution, and political primacy, particularly the ethnolinguistic configuration of the country impedes market competition.³⁴ Researchers recommend government sectors should be required to align with competition regulation and should take precaution that likely to affect the autonomy of the authority.³⁵ Market reform that embraces private sectors, adopting less stringent and market-oriented measures are also suggested.³⁶

Second, various researchers have also examined institutional frameworks of Ethiopian competition regulation. According to their findings, lack of authority's independence put its effectiveness in question.³⁷ It is also argued that the collusion of trade competition and consumer protection in one piece of legislation affect optimal functionality of the authority.³⁸ Furthermore, putting both investigation and adjudication power under similar structural framework leads to conflict of interest.³⁹ It is also found out that lack of skilled human resource and specific requirement as to qualification of adjudicators and investigators are other constraints.⁴⁰ Therefore, institutional framework reform and giving autonomous power is strongly recommended.

Apparently, different researches and publishing have perused in to particular fields vis-a-vis competition regulation. Berihun Gezahegn examined corporate group and their implication on competition.⁴¹ Berihun stresses that corporate groups have significant anticompetitive role when

³³ Arba Beyene Uba 'Controlling Anticompetitive acts of Government in Transport Sector in Addis Ababa' (LLM thesis, Addis Ababa, 2019); Kibre Moges Belete, *The State of Competition and the Competition Regime of Ethiopia: Potential Gaps and Enforcement Challenges* (OSSREA Publishing, 2015); Fikremarkos Merso et al., *Review of the Legal and Institutional Framework for Market Competition in Ethiopia* (Addis Ababa Chamber of Commerce and Sectoral Association, 2019).

³⁴ Belete (n33) 211.

³⁵ Arba Beyene (n33) 56.

³⁶ Belete (n33)212.

³⁷ Michael Tekie 'Review of the Rules and Enforcement Framework of Competition Law in Ethiopia' (LLM thesis, Addis Ababa 2015); Muhammed Kebie Hillo 'A Critical Appraisal of the Institution Controlling Competition in Ethiopia: Analysis of the Law and the Practice' (LLM thesis, Addis Ababa University, 2014); Fikremarkos Merso et al. (n33).; Belete (n33) 206 – 209.

³⁸ Merso et al. (n33) 117.

³⁹ Ibid, 121 - 122

⁴⁰ Kebie (n37) 88 – 89.

⁴¹ Berihun Gezahegn 'The Unregulated Status of Corporate Groups and Competition Issues in Ethiopia: Abuse of Market Dominance and Anticompetitive Agreements' (LLM thesis, Addis Ababa, 2014).

they are remained unregulated both in the Commercial Code and competition law. Berihun recommends that competition laws should recognize corporate groups under its legislative ambit.

Harka Haroye examined the Ethiopian competition policies and laws.⁴² As such, he provided and discussed the general objectives of competition policy and law such as the preservation of consumer welfare, maintenance of competitive process or of free market, and detection of anticompetitive conducts and prevention of unwanted government intervention respectively. Harka discussed few competition issues such as abuse of dominance, excessive price on product or service, price discrimination, refusal to deal, tie-in, predatory pricing, vertical restraints and merger and acquisitions. He examined the then Trade Practice Proclamation No. 329/2003 in light of the aforementioned objectives and competition issues. Harka argued that the Trade Practice Proclamation did not adequately address the aforementioned competition rules. He also found out that the Proclamation provided factors alien to the objective of competition law such as anti-dumping, labeling and price regulation. He recommended that adequate competition law must be designed.

The UNCTAD reviewed the current Ethiopian competition policy.⁴³ In so doing, the UNCTAD enquired in to the Ethiopian policy and legal framework, market structure, institutional framework and socio-economic backgrounds within the context of competition. It also provided the genesis and historical generations of Ethiopian competition law with special focus on the current Trade Competition Proclamation. The UNCTAD argues that the Trade Competition Proclamation is much improved instrument having based on international best practices. However, the review reveals that, some of the provisions of the Trade Competition Proclamation require amendment and clarification such as the scope of the application and/or exemption, merger notification and post-merger examinations; which it recommends that should be amended and incorporated. It recommends that further advocacy work should be made and privatization process should be continued.

⁴² Harka Haroye, 'Competition Policies and Laws: Major Concepts and an Overview of Ethiopian Trade Practice Law' (2008) 2*Mizan L Rev.* 33.

⁴³ UNCTAD, *A Review of Competition Policy in Ethiopia* (n21).

Alemayehu Fentaw critically examined the unfair trade competition provisions provided under the Commercial Code, Civil Code, Criminal Code and the Trade Practice Proclamation and the interrelationship they have with the later.⁴⁴ He argued that there is a discrepancy between the unfair competition provisions of the Commercial Code and the Trade Practice Proclamation as to the standard used to determine the unfair competition. Alemayehu claimed that the former establishes honest commercial practice while the latter confined the same to whether the act has the eliminating effect whatever the mental state is. He also argued that the Proclamation had posed procedural discrepancy of ‘pendency’ under which the Proclamation did not prohibit the adjudication of an already instituted civil case at a competent court of law. He recommended that narrow interpretation should be made under the proclamation to avoid the discrepancy.

Hailegabriel G. Feyissa conducted comparative study and analysis of Ethiopian competition regulation, particularly on the Trade Practice Proclamation of 2003.⁴⁵ He argued that provisions of the Trade Practice Proclamation are much influenced by and benefited from the developed competition statutory and case laws of Europe. He examined some provisions of the Trade Practice Proclamation in comparison to provisions of the 1957 Rome Treaty which established the European Community (EC). He found out that the scope and exemption of some sectors under the Trade Practice Proclamation is very extended and even deprived the goal of the Proclamation. Hailegabriel also revealed that the Proclamation did not provide regulatory rules on merger and vertical agreements. He further argued that the abuse of dominance provisions stood against the very objectives of the Proclamation i.e. efficiency and consumer protection. He recommended for contextual interpretation of the ambiguous provisions, learning from the experience of other jurisdictions, and for the revision of legislations and structural framework.

Michael Tilahun undertook case study on electronic trade of Ethiopian Commodity Exchange (ECX).⁴⁶ In so doing, Michael examined transaction rules of ECX vis-à-vis relevant competition laws. The study is limited to unilateral anticompetitive acts and specific sector i.e. ECX. He

⁴⁴ Alemayehu Fentaw, ‘Ethiopian Unfair Competition Law’ (2008) The University of Oxford Centre for Competition Law and Policy Working Paper CCLP (L) 21. < <https://bit.ly/2R05M5x>> [Last accessed on 7 September 2020].

⁴⁵ Hailegabriel G. Feyissa, ‘European Influence on Ethiopian Antitrust Regime: A Comparative and Functional Analysis of Some Problems’ (2009) 3*Mizan L Rev.* 271.

⁴⁶ Michael Tilahun Sinshaw ‘Tackling Anticompetitive Unilateral Acts Under the Ethiopia Competition Regime: A Case Study of Electronic Trading at Ethiopian Commodity Exchange’ (LLM thesis, Addis Ababa, 2018).

argues that acts such as flash crashing, unrepresentative pricing, refusal to submit trade orders, pace making, marking closing pricing, dumping and matching orders are not included in relevant competition laws. The researcher recommends that relevant competition laws should incorporate aforementioned conducts.

While the aforementioned studies have contributed in finding out key policy, legal and institutional framework gaps and practical problems, the advent of e-commerce and its competition regulation in Ethiopia is not addressed or researched. It is inevitable that those studies and findings on contemporary competition regulation of Ethiopia have significant implication and relevance for e-commerce competition regulation. However, the peculiar features of factors arise in e-commerce call for thorough analysis and study. Therefore, this thesis focuses on critical analysis of relevant Ethiopian laws vis-à-vis factors that trigger competition concerns in e-commerce.

7. Research Methodology

To attend to objectives of the research and to address the research question, this thesis primarily employed doctrinal research method. It examined relevant Ethiopian laws on competition with respect to the competition issues arise in e-commerce.

In order to review background information for the study, this thesis thoroughly reviewed relevant literatures on the area of competition and e-commerce issues. As such, it scrutinized wide ranges of publicly-available materials, including academic literatures as well as reports and Notes by, government, regional and international organizations such as EU, UNCTAD and OECD.

In order to get facts firsthand about backgrounds of the competition law and institutional framework of ETCCPA, the study made slight empirical research. Thus, under this thesis interview and semi structured questions are undertaken within the context of e-commerce with key informants in the Authority, and who have participated on drafting process of competition legislations.

8. The Scope of the Study

For the workability of the research, this thesis limits the scope of the study to analysis of relevant Ethiopian laws on competition regulation within the context of e-commerce in Ethiopia. However, it does not deal with the e-commerce law nor on its legal frameworks at national or international level.

9. Organization of Thesis

The thesis is organized into 4 (four) chapters. The introductory chapter sets the background of the study, outlines the research question, objectives sought to be achieved, research questions, significance, methodologies to be used, and the scope of the study and the organization of the research.

Chapter two examines key competition issues and how they arise in e-commerce. In so doing, it will set the background for chapter three by demonstrating different concepts of market competition and how they arise in e-commerce.

Chapter four of the thesis mainly focuses on examining the research findings. To draw the picture of current Ethiopian legal frameworks regulating competition, it will assess relevant Ethiopian laws. Based on this, it will assess whether and to what extent the Ethiopian relevant law attends to the e-commerce market competition.

Finally, chapter five of the thesis draws conclusion(s) of the thesis, key findings and offers some recommendations.

Chapter Two

Electronic Commerce and Market Competition: An Overview of Key Legal Issues

2.1 Introduction

The advent of e-commerce has brought about numbers of business opportunities. E-commerce is growing at faster speed even more than the overall economic activities so that it has able to share significant part of total economy.⁴⁷ While this thesis is being undertaken, Applied Communications Inc (ACI) Worldwide research announced that global e-commerce retail sale has achieved 209% year-over-year revenue growth in 2020.⁴⁸

A recent OECD report aptly puts the dramatic increase of e-commerce as follows:

[E-commerce is a] convenient, enabling people to shop online from any location and at any time of day, and it can lower prices and expand the variety of products available. More firms are buying and selling online than ever before, including across borders. The absolute value of the e-commerce market is growing and an increasing share of firms is selling online, including small and medium-sized enterprises (SMEs). This is true across industries, including in traditionally consumer-facing sectors.⁴⁹

This OECD report points out three core determinants for the booming of e-commerce marketplaces, i.e. simplicity, accessibility, and cost-effectiveness of e-commerce. In addition, the e-commerce platforms provide a digital infrastructure for a variety of services, including marketplaces, application stores, social networking sites, and search engines. Thus, it is increasingly shifting the global business landscape.⁵⁰ But, it also brings along a number of legal issues including consumer privacy, allocation of domain name rights, recognition of digital

⁴⁷ Gary P. Schneider, *Electronic Commerce* (11th edn, Cengage Learning, 2015) 5.

⁴⁸ 'Global E-commerce retail sales up 209 percent in April' ACI Universal Payments < <https://bit.ly/2ZgKOUy> > [Last accessed on 7 September 2020].

⁴⁹ OECD, *Unpacking E-Commerce: Business Models, Trends and Policies* (OECD Publishing, 2019) 9.

⁵⁰ UNCTAD Competition Issues in the Digital Economy (n23) 2.

signatures, treatment of intellectual property rights, development of financial payment systems, and application of competition laws.⁵¹

This chapter examines core competition issues that commonly arise in the growing e-commerce marketplaces globally. There are a number of anticompetitive conducts in market competition. However, this chapter only discusses selected anticompetitive conducts. This is because the selected anticompetitive conducts and issues demonstrate peculiar feature in e-commerce marketplaces and attract attention of scholars as to their regulation. This chapter shows e-commerce activities and factors that trigger competition issues such as network effect, disruptive innovation, and Big Data at global level, multi-sided market and free offer of product. In so doing, it seeks to offer a general background to the key legal issues and investigation in chapter three as to the degree to which current Ethiopian relevant laws attend to such emerging issues of anticompetitive conduct arise in e-commerce.

2.2 Network Effect in E-Commerce

Network effect is a phenomenon whereby the use of a given platform by more numbers of user influence or attract other non-users to use such platform.⁵² The more there are users on a given platform, the more likely for other users enticed to such platform. This is due to an interdependence of factors that entails network effect. For instance, if most of the customers use a credit card called 'X' other users also attracted to use 'X' credit card as more popular card is widely accepted and more convenient to transact with.

Apparently, the network effect can occur on supply side and/or demand side.⁵³ The supply side network effect happens when suppliers or sellers are attracted to online platform having more buyers. The buyers side network effect will occur in similar fashion when buyers tend to visit a platform having multiple sellers or suppliers. For instance, in the online marketplaces where an intermediary having more suppliers/sellers attracts more buyers, sellers cannot or it is unlikely

⁵¹ David Causins, 'Competition Aspects of E-commerce' (30th Annual Conference of Economists, Perth, September 2001) 2.

⁵² Belleflamme and Peitz (n27) 2.

⁵³ Ibid

for them to survive on their own selling platform; but to join an intermediary's platform to get more buyers.

The main distinction between online network effect from offline is that the former is driven by the economies of networks while the latter is driven by economies of scale.⁵⁴ Economies of network denotes an increase of value as numbers of users or buyers increase.⁵⁵ In virtual online services such as software sells, their sales size is directly linked to the size of compatible window users. This means, if most of customers use window 'X', it will attract more application developer to make application for such window. This also called indirect network effect. Under an indirect network effect, an increase in demand on one side will tend to increase demand on the other side.⁵⁶ In a direct network effect, economies of network apply when more buyers are attracted to online market places having more customers. For instance, where different buyers are concentrated on a given online market place, it becomes larger. Thus, the buyers tend to buy from the larger online marketplace for convenience purpose. This shows that under online market, the more the network is strong, the more likely for online firm to become large.

A network effect can bring economic efficiency by making goods and services accessible to wide users. However, it can also produce anticompetitive effect. It leads a firm having the network effect to acquire dominance and exercise market power.⁵⁷ This can further lead to two major scenarios of abuse of dominance. First, the dominant firm may impose high price as its goods are attractive to buyers and when it is unlikely for them to switch to other sellers. Second, an online seller may set lower price which will drive out emerging competitors i.e. predatory pricing through investment effect.⁵⁸

In general, the network effect can be used to attain efficiency as it allows for more buyers and sellers to interact, especially in an intermediary e-commerce business model. However, as it is

⁵⁴ Carl Shapiro and Hal Varian, *Information Rules: A Strategic Guide to the Network Economy* (Harvard Business School Press, 1999) 173.

⁵⁵ Ibid, 174.

⁵⁶ Neil Gandal, 'Compatibility, Standardizations, & Network Effects: Some Policy Implications (2002)18 *Oxford Review of Economic Policy*80, 80.

⁵⁷ Causin (n51) 8.

⁵⁸ Belleflamme and Peitz (n27) 11.

indicated above, an online firm can use the opportunity of network effect it has to dominate the market and abuse their dominance by obstructing new entry and driving potential emerging platforms from the market through predatory pricing, vertical restraints and through other anticompetitive conducts.

2.3 Disruptive Innovation and E-commerce Market Competition

The disruptive innovation occurs when firms introduce cheap, and convenient product, new business model or delivery process which disrupts an already established business process.⁵⁹ It redefines performance along parameters such as accessibility, simplicity, convenience, or user-friendliness.⁶⁰ A disruptive innovation leads to the displacement of existing technologies and business models and creates new markets and their own value networks. Within this context, a disruptive innovation can occur between offline and online market and/or between online platforms.

In the contemporary global market, the disruptive innovation is associated with online platforms.⁶¹ For instance, Uber disrupting the taxi business, Amazon replacing traditional brick and mortar shops, Air BnB changing the hotel market, and Booking.com disrupting the traditional hotel reservation market.⁶² Therefore, disruptive innovation triggers competition concerns in e-commerce as it significantly affects the market competition of incumbents.

There is a delineating line between a sustaining and disruptive innovation. The former is an improvement made to a given product or technology to increase the output or modernize the service within value network while the latter is a break through innovation which completely or significantly supplant the incumbent with new package outside of value network.⁶³ In other words, the sustaining innovation comes from within to expand, modernize, and improve the product or service at hand. It is advantageous for value chains surrounding it as it increases their value and efficiency. Unlike the sustaining innovation, disruptive innovation comes from outside

⁵⁹ OECD(n9) 2.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Bower and Christensen (n 8) 44.

and drastically diminish the value chain already established in the market while establishing its own domain. It has considerable effect on the incumbents in the market.

The disruptive innovation is wider than other forms of anticompetitive practices. It can materialize without even noted by incumbents in the market. Thus, identifying sustaining innovation from disruptive innovation needs careful analysis.⁶⁴

2.4 The Rise of Big Data and Market Competition

The Big Data is processing and analyzing of multiple (crude) users' or any other relevant data through analytical method called algorithm in order to accrue value from the extraction of such data and for effective use of information.⁶⁵ In e-commerce, Big Data is advantageous in many aspects. The major one is that through the analysis of extracted and pooled users' data, it enables online firms to better understand market and to forecast business trends, improve production and delivery of goods and services.⁶⁶ Furthermore, the use of Big Data for innovative and creative purposes such as in a process known as Data-Driven Innovation (DDI) allows companies to improve the quality of their products and develop entirely new services, by better understanding and targeting individual consumer needs.⁶⁷

However, the Big Data exhibits major competition concerns. The control of consumer data by online firms and processing it to determine potential consumers' preference may lead few firms to dominate the online market and to further obstruct the new entry.⁶⁸ The more a firm possesses the Big Data the more network effect they have i.e. tendency of subscription by users to the firm having more users.⁶⁹ The interrelationship of the Big Data and network effect lead online firms

⁶⁴ OECD, 'Disruptive Innovation and Competition Policy Enforcement- Note by Alexandre de Streel and Pierre Larouche' (20 October 2015) DAF/COMP/GF (2015)7, 4.

⁶⁵ Andrea De Mauro, Marco Greco and Michele Grimaldi, 'A Formal Definition of Big Data Based on its Essential Features' (2016) *65Library Rev.* 122.; also see Ezrachi and Stucke (n4) 15-18.

⁶⁶ OECD, 'Big Data: Bringing Competition Policy to The Digital Era - Background note by the Secretariat' (27 October 2016) DAF/COMP (2016)14, 14.

⁶⁷ Ibid.

⁶⁸ Nathan Newman, 'Search, Antitrust, and the Economics of the Control of User Data' (2014) 31 *Yale J on Regulation* 401, 405.

⁶⁹ Ezrachi and Stucke (n4) 1.

to overtake the majority of market share and further enable them to extract users' or any relevant data to build their domain at the pain of emerging and potential competitor.

It is argued that the competition concern raised over the Big Data is overstated and without real world evidence. The proponents of this argument argue that acquisition of users' data improves the quality of services, and used as effective minimization of costs of product and service for users, often for free.⁷⁰ However, the control of such data will lead few firms to manipulate data and to attain strong network effect and wide user base. It also implicates 'a winner takes all' which will in turn leads to market concentration and abuse of dominance by few e-commerce platforms.

At the global level, the competition concerns over the Big Data often associated with big online search engine firms like Google which extract user's data, analyze it and sell it to advertisers.⁷¹ This may not be a concern for local online market places like Ethiopia having no search engines. However, local online marketplaces can use Big Data to analyze their customers' preference using data algorithm which will enable them to customize each goods and services to their users' personal preference using cookies. This will strength their network effect and enables them to obliterate potential competitors from the market. Therefore, as much as Big Data can be a relevant tool to attain efficiency, it can also trigger the competition issues in e-commerce.

Related to factors such as network effect, disruptive innovation, control of personal data, pricing algorithm, and other non-price factors, there are a number of competition issues arise out of online marketplaces such as abuse of dominance, predatory pricing, exclusive distribution, vertical and horizontal restraints, and merger. Therefore, these key competition issues are discussed below to demonstrate how the aforementioned factors trigger competition concerns in the e-commerce marketplaces.

2.5 Abuse of Dominance in E-commerce Marketplaces

⁷⁰ See, e.g., Andres Lerner, 'The Role Of "Big Data" in Online Platform Competition' (2014) <<file:///C:/Users/John/Downloads/SSRN-id2482780.pdf>> [Last accessed on 7 September 2020].

⁷¹ See, e.g., Newman (n68)

An abuse of dominance is an engagement of dominant firms in to anticompetitive conducts by using the market power they have in the market.⁷² Primarily, in e-commerce, the abuse of dominance manifests itself in two major ways. The first one is use of network effect under which a dominant online firm uses the network effect to abuse potential competitors.

Second, online market places may use and control users' personal or any relevant data to attract advertisers and/or suppliers to their platform. The suppliers or advertisers are interested to sell and promote their product on the market place having more users. Furthermore, with an advancement of technology, the online market places or advertisers can analyze the personal data of users by using computer algorithm to determine and track personal preferences of buyers.⁷³ The exploitation of personal data may raise privacy concerns and can be regulated by privacy law.⁷⁴ Beyond that, however, at the aggregate level, the control of crude users' data leads to the aforementioned anticompetitive conduct i.e. abuse of dominance through control of personal data.⁷⁵

The other natures of abuse of dominance in e-commerce are its multi-side feature and non-price effect. It means, an online firm is usually multi sided having direct interaction with buyers on one hand and advertisers or suppliers on the other side. Under this circumstance, an online marketplace offers different services for free to its users while taking commission from advertisers who promote their product on the platform.⁷⁶ For example, an online newspaper publisher may allow free access to online readers for free while they raise revenue from the advertisers. Regarding the non-price effect, the online market place is not selling any goods or service having price effect; but attracting both buyers and sellers to a single platform where they can get the service they want and transact. Therefore, in e-commerce, unlike the offline market, more value is given to the number of buyers and/or sellers interacting on a given online platform than immediate price-based capital. Thus, the brick-and-mortar competition law cannot capture

⁷² OECD 'Implications of E-commerce for Competition Policy - Background Note' (6 June 2018) DAF/COMP (2018)3,27.

⁷³ See, e.g., Newman (n68) 428.

⁷⁴ Ibid, 425.

⁷⁵ Ibid.

⁷⁶ Ezrachi and Stucke (n4) 28-29.

abuses arise out of such type of dominance since the former favors consumer welfare through minimized or free of cost.⁷⁷

Related to multi-sided market, an issue of network neutrality may also arise when an Internet Service Provider (ISP) or a platform owner collect revenue from customers and content providers.⁷⁸ By using a dominance position, the ISP or platform owner may favor its own product over the other sellers or content providers on its platform.⁷⁹

Furthermore, the online firms may use their dominance they have or use their market power and demonstrate various anticompetitive conducts such as predatory pricing, refusal to supply, and tying or bundling.

2.5.1 Predation in E-commerce

There are two types of predation: predatory pricing and non-price predation. The predatory pricing constitutes significant lowering of price below product cost to deter or eliminate potential rival(s).⁸⁰ The non-price predation is strategic behavior designed to raise rivals' costs through excessive investment with an anticipation of weakening the rivals.⁸¹ Therefore, predation is ultimately anticompetitive on two grounds. First, it obstructs entry or drives out competitors. Second, even though consumers are beneficiary of excessive investments or decrease in price for temporary course of time, they will be affected by price recoupment or increase after competitors are eliminated or deterred from entry.

In e-commerce, the predation primarily occurs in a similar fashion with offline market. However, there are few features that delineate e-commerce and classical predation. First, their immediate purpose differs. Under the offline predation, the immediate expectation of dominant firm is to deter new entry and drive out competitors while the online firm is to attain more network effect

⁷⁷ UNCTAD (n23) 5.

⁷⁸ Herbert Hovenkamp, 'Antitrust and Information Technologies' (2016) 68 *Fla L Rev.* 419,446.

⁷⁹ UNCTAD (n23) 7.

⁸⁰ OECD, 'Predatory Foreclosure' (15 May 2005) DAF/COMP (2005)14.

⁸¹ Terry Calvani, 'Non-Price Predation: A New Antitrust Horizon' (1985) 54 *Antitrust LJ*409, 410.

and to become dominant or to sustain an attained dominance.⁸² In the long run, the strong network effect will enable the online platform to attain dominance in the market and to sustain its market power.⁸³ In order to gain more user and sustain dominance, predation can be manifested in three major ways; i) forfeiting profit while selling, ii) undercutting the prices of similar products competitors sell and then overtaking the competitor, and iii) taking away the retailers share of market through distribution by insourcing the distribution chain.⁸⁴

Second, predation under multisided market demonstrates significant difference from that of offline predation.⁸⁵ This is due to presence of services having no value along the value chain of online platform. Under multi-sided market, a given e-commerce platform may allocate the network effects and broad control of user's data it possesses to advertisers while allowing users to access the product for free.⁸⁶ In the same relevant online market, there can be agency or platform which sells the same information to different interested bodies. A typical example for this is a software or application developer online firm which also uses such products for free for its own sales of goods or services. On the other hand, a given online firm may buy the same application and software to support its online sales for which it is going to make user to pay. This will raise the issue of predation when the developer uses the product below the cost or even for free. Under the case at hand, the other online platform is expending a cost to buy the same application or software.

Third, price flexibility on online marketplace makes it cumbersome to identify the minimum bar to establish predation. This means, through pricing algorithm, online product prices can be changed more than twice in a single day.⁸⁷ Frequent price readjustment and price drop below the competitors may result in consumer benefit under which the price dropping below average cost promotes customers welfare.⁸⁸ Thus, even though tacit predations aforementioned above promotes consumer welfare, predation has two key anticompetitive implications. First, the frequent price fluctuation in a race to offer minimum price will drive other competitors or deter

⁸² Khan (n7) 747, 756.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ OECD (n72) 27.

⁸⁶ Ibid.

⁸⁷ Khan (n80) 791.

⁸⁸ Ibid.

the entry.⁸⁹ Second, it further exposes the overall market competition to ‘race to the bottom’ where online firms opt for dropping price rather than competing for efficiency.

Fourth, products under online platforms can be transmitted anywhere at nearly no cost, and costs typically do not vary with transmission distance. This means that the relevant antitrust market in which competition occurs is at least nationwide and perhaps worldwide. As a result, local retailers such as bookstores, who might have a certain amount of power in smaller communities, face increased competition. Within the context of predation, the advantage of wide accessibility and no or minimum cost of transmission will strength the online platform and drive out local retailers out of market.

Within the domain of e-commerce generally, an anti-competitiveness of predatory pricing under e-commerce exhibits similar features with offline market. However, the presence of multi-sided market and non-price effect make predation in e-commerce more complicated and harder to trace. Furthermore, the advantage of e-commerce platform accessibility in a given geographical area at lower cost makes it wider and broader in scope than predation in offline market. Therefore, these cumulative factors of predation in e-commerce give rise to anticompetitive conducts which have overall economic efficiency effects and impacts.

2.5.2 Tying or Bundling in E-commerce

Tying is a scheme plotted by a seller requiring a buyer to purchase extra unit having tied with the principal product.⁹⁰ It may harm the competition by allowing incumbents to broaden their base and go out of their principal goods to another domain.⁹¹ This will in turn affect the competing firm or trader who is selling a product to which a tying seller extending his domain. This is called foreclosure.⁹² For example, if a monopoly telecom company provides wi-fi services and also offers the wi-fi router (modem) for sell, it is limiting the market of electronic businesses

⁸⁹ UNCTAD (n23) 6.

⁹⁰ Erik Hovenkamp and Herbert Hovenkamp, 'Tying Arrangements and Antitrust Harm' (2010) 52 *Ariz L Rev.* 925,926.

⁹¹ *Ibid*, 927.

⁹² *Ibid*.

selling router. The second type of tying and bundling is extraction. It happens when buyers are forced to pay high price when they need to purchase tied (accessory) good(s).⁹³

In e-commerce context, tying or bundling cases appear to be less frequent and not always to result in an antitrust violation.⁹⁴ But scholars put two scenarios under which tying and bundling may happen. First, when an online platform owner provides internet service and also engages in selling and delivery of accessory goods and services. An internet is a separate service. An Internet Service Provider (ISP) may also require customers to buy accessory goods and services when they subscribe to internet service. Specifically, when either of tied service is free, concerns over tying or bundling and its regulation through conventional competition laws come in to picture. In other words, brick-mortar competition law may not capture tying of services or good of which either of them is free. Second, when price comparison sites offer both ranking and advertising services.⁹⁵ Price comparison websites primarily designed to display product prices of various e-commerce platforms. But in addition to price comparison service, they may also sellout their platform to advertisers who want to reach users of the former. Under this scenario, price comparison website users are also made to view the advertisement which is tied to the service they are looking for i.e. price lists of various platforms.

There are two common grounds shows that tying and bundling is sometimes or most of the time becomes unavoidable.⁹⁶ First, most of the products are tied contractually or on the basis of the intellectual property license which leads to the formation of such product. Thus, sellers or suppliers cannot avert this contractual or intellectual basis of such tying. Second, some products are inherently tied by their virtue or functional requirement. Therefore, we cannot always arrive at objective conclusion regarding tying and bundling; but thorough analysis and assessment on case-by-case, certain anticompetitive tying or bundling can be spotted.

⁹³ Ibid.

⁹⁴ OECD (n72) 34.

⁹⁵ Daniel Mandrescu ‘Applying EU Competition law to Online Platforms: The Road Ahead-Part 2’ (2017) 38*European Comp. L Rev.*410, 440-441.

⁹⁶ See, e.g., Hovenkamp and Hovenkamp (n90) 926.

2.5.3 Free Riding in E-commerce

Within domain of e-commerce, a forced free riding occurs when online platform owner exploits the innovation introduced by a seller who uses its platform.⁹⁷ This issue arises when such appropriation of innovation discourages or likely to discourage innovative online trade transaction in a downstream market.⁹⁸ The intellectual property (IP) law may protect individual right; but it is not feasible to regulate collective market behavior by IP law.⁹⁹ Because, the IP law only protects individual rights. The aggregate legal consequence may only be regulated by competition law from the aspect of its anticompetitive effect.

2.6 Merger in E-commerce

Merger is commonly categorized into horizontal, vertical and conglomerate (constituting both).¹⁰⁰ In addition to common mergers in traditional market, specific merger issues may arise in e-commerce when online incumbents having the relevant data (Big Data) come under a single firm to operate. The concentration of data in the hands of few-commerce platforms will have significant effect in e-commerce.¹⁰¹

Most of the time, a merger under e-commerce is made with an anticipation of improving quality, innovate and to have strong network effect to attract more consumers i.e. it has no price effect. The minimum threshold requirement cannot capture the transactions having no price effect such as innovation.¹⁰² However, bringing similar testing methods and tools (which are discussed below) to e-commerce may not help to assess merger anticompetitive effect.¹⁰³

⁹⁷ Howard Shelanski, 'Information, Innovation, Innovation, and Competition Policy for the Internet' (2013) 161 *University of Pennsylvania L Rev.* 1663, 1699.

⁹⁸ *Ibid.*

⁹⁹ OECD(n72) 36.

¹⁰⁰ European Commission, 'Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings' (2008) 265/07Of. J C para 3 <<https://tinyurl.com/y22g8e9t>> {Last accessed on 21 May 2020}.

¹⁰¹ OECD(n72) 27.

¹⁰² Marina Lao, 'Erring on the Side of Antitrust Enforcement When in Doubt in Data-Driven Mergers' in Nicolas Charbit (eds), *Douglas H. Ginsburg An Antitrust Professor on The Bench* (Institute of Competition Law, 2018) 520.

¹⁰³ Shelanski (n 97) 1667.

With regard to assessment of dominance and merger, different tools are used. Among different tools, defining a relevant market is a common tool used by most of competition authorities. However, it is argued that whether defining the relevant market is a feasible tool to address and detect abuse of dominance and merger in a given market, specifically in online marketplaces. Thus, the next section discusses the assessment of relevant market vis-à-vis assessment of merger and abuse of dominance in e-commerce.

2.7 Defining Relevant Market Under E-commerce

Identifying a relevant market marks the beginning of a given competition enquiry followed by assessing market power.¹⁰⁴ A relevant product market constitutes goods or services that are substitutable in terms of their character, prices, function, and being transacted in homogenous competition condition in a distinctive geographical area.¹⁰⁵

The relevance of market definition is to assess a boundary of a given firm as to whether it attains dominance or opted for merger to strength their market power.¹⁰⁶ In order to assess this, the market definition tries to find out whether there are market concentration, substitutable products in the market or whether alternatives to customers to switch to other similar products in the market is limited even if price is increased. To identify dominance, a market concentration ratio is also identified.

Related to assessment of relevant market, different tools are used such as the Herfindahl-Hirschman Index (HHI), Concentration Ratio and Small but Significant Non-transitory Increase in Price (SNNIP). Within competition context, the HHI is a statistical computation of market concentration, especially to analyze horizontal merger.¹⁰⁷ It is calculated by taking percentage of market share of firms in question, summing up and squaring them.

¹⁰⁴ Cosmo Graham, 'Introduction: The New Economy and its Characteristics' in Cosmo Graham and Fiona Smith (eds), *Competition, Regulation and the New Economy* (Hart Publishing, 2014) 4-5.

¹⁰⁵ European commission, Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law (1997) O J EC 97/C 372 /03, 6.

¹⁰⁶ Ibid.

¹⁰⁷ Stephen Rhoades, 'The Herfindahl-Hirschman Index' (1993) 79 *Fed Res Bull* 188, 188.

$$HHI = \sum_{i=1}^n (MS)^2$$

If firm A holds 40%, B holds 30%, C holds 25% and D holds 5% of market share, the HHI will be:

$$(40)^2 + (30)^2 + (25)^2 + (5)^2$$

$$1600 + 900 + 625 + 25 = 3,150$$

If firm A and B apply to merge, the HHI result will be:

$$(40 + 30)^2 + (25)^2 + (5)^2 = 5,550$$

Therefore, market concentration index increases by 2,400. Different countries adopt various ranges of the HHI under which they may fix a given range to determine whether there is market concentration. Such range takes between 1 up to 10,000. The market competition is said to be pure when it is closer to 1 and there is monopoly or high market concentration when it is closer to 10,000.¹⁰⁸

The SNNIP is a test introduced in U.S to assess merger back in 1982.¹⁰⁹ The SNNIP attempts to define segments of substitutable products in the relevant market to assess whether customers have alternative(s) to switch to other product when price increase by 5% up to 10%.¹¹⁰ More substitutable products are included to SNNIP test till it's concluded that available substitutable product cannot influence or attract customers even if those collective firms or single firm under test increase price by 5% up to 10%. In other words, the relevant market is defined when potential substitutable product in market is weak to divert customers from those firms who have increased their prices by 5% up to 10%.

Within the context of e-commerce, competition authorities and scholars have already taken a position which favors innovation over the price competition in terms of realizing viable economic growth and social welfare.¹¹¹ Scholars suggest that rather than trying to define market

¹⁰⁸ Ibid.

¹⁰⁹ U.S. Department of Justice and the Federal Trade Commission, 'Horizontal Merger Guidelines' (2010) Para.4

¹¹⁰ Ibid.

¹¹¹ See, e.g., Jonathan B. Baker, 'Beyond Schumpeter Vs. Arrow: How Antitrust Fosters Innovation' (2007) 74

Antitrust L J575, 601

and assess market power, under e-commerce, it is preferable to give more attention to innovation and other non-price effects such as network effect.¹¹² This is due to two edged feature of innovation as it may improve market efficiency or, in adverse, drive out incumbent firms from markets. Even if there are multiple e-commerce platforms in the market, availability of substitutable product and distinctive geographical areas do not necessarily happen always, especially in cases of multi-sided market.¹¹³

Therefore, the available and current tools being used to define market may not meet the more complex and multifaceted e-commerce. Thus, tools such as the SSNIP test, as well as the most consensual measures of market concentration, fall short of capturing the specific features of these markets.¹¹⁴

2.8 Vertical Restraint in E-commerce

A vertical restraint refers to certain types of practices by manufacturers or suppliers relating to their products.¹¹⁵ However, the vertical coordination does not always affect the competition and if it does, it is only in limited circumstances.¹¹⁶ Manufacturers, sometimes, restrict their flow of supply on online market for pro-competitive purposes like averting free-riding by potential online competitors, under which the later cultivate the opportunity of selling its product at the cost of the former (manufacturer) who promoted and incurred cost to introduce the product.¹¹⁷

Under e-commerce, one of the vertical restraint concerns is disruptive intervention of e-commerce platform against the regular distribution channel. It means, manufacturer may engage in e-commerce to distribute their product directly to buyers.¹¹⁸ On the other hand, they may also supply the same product to distributor in offline market. This will primarily bring about a disruptive effect on the regular distributors in both online and offline market.

¹¹² See, e.g., Shelanski (n97) 1673-1674.

¹¹³ Ibid, 1673-1675.

¹¹⁴ OECD, 'Big Data' (n66)14.

¹¹⁵ OECD, 'Glossary of Industrial Organization Economics and Competition Law' < <https://bit.ly/2FaDCCj>> [Last accessed on 7 September 2020].

¹¹⁶ Paolo Buccirossi (eds), *Handbook of Antitrust Economics* (MIT Press, 2008) 354 – 390.

¹¹⁷ OECD, 'Vertical Restraints for On-Line Sales' (12 September 2013) DAF/COMP (2013)13, 6.

¹¹⁸ Andreas Kirsch & William Weesner, 'Can Antitrust Law Control E-Commerce? A Comparative Analysis in Light of U.S. And E.U. Antitrust Law' (2006) 12*University of California* 297, 301.

Furthermore, it will likely to create stiff price competition between manufacturers and regular distributor. This will lead manufacturer to vertically restrain the product or to fix resell price maintenance. The resell price maintenance is where manufacturer tend to fix the minimum or maximum selling price so as to secure sustainable product profit.¹¹⁹ Under this case, the online vertical restraint does not solely happen in the online sell; but the resell price maintenance is supporting the sustainability of product being sold by manufacturer online.

The online marketplace abuse through vertical restraint occurs when the online marketplace owners abuse their ownership while offering their platform to online retailers and compete with the similar product on the same platform.¹²⁰ They may abuse downstream online retailers on their platform by limiting choice and view of their product. This leads to vertical restraint when the platform owners intervene in selling activities of downstream online retailers on their platform. However, this is not a pure vertical restraint since online retailers can avoid this by switching to other platforms. But it is likely to occur when such platform owner is a dominant having strong network effect so that the switching cost is very high for retailers to look for another platform. This type of restraint is also called ‘margin squeeze’.¹²¹

Apparently, there are also some vertical integrations that give rise to anticompetitive issues. Some of the restraints are: price-based restraint i.e. resale price maintenance (RPM) and Non-price-based restraint: selective distribution, and exclusive distribution.

2.8.1 Resell Price Maintenance/ Minimum Advertised Price in E-commerce

Resell price Maintenance is, when suppliers, to maintain their marginal profit, fix the upper or lower limit or fix the actual price while distributing product(s) to retailers.¹²² However, resell price maintenance may not be a major concern since there are different price comparison mechanisms and price transparency on online markets.¹²³ The price comparison mechanism

¹¹⁹ Ibid.

¹²⁰ UNCTAD (n23)7.

¹²¹ OECD(n72) 36.

¹²² Pauline M Ippolito, 'Resale Price Maintenance: Empirical Evidence from Litigation' (1991) 34 *JL & Econ* 263,263.

¹²³ OECD (n5) 7.

makes the online market more transparent comparing to offline market which makes it hard for suppliers to influence retailers or wholesalers to sell at a given fixed price. The major concern for competition can be minimum advertised price. It is a restraint whereby a manufacturer limits the price at which a retailer can advertise goods, while placing no restriction on the price actually charged. In e-commerce context, a price published on the internet constitutes an advertised price, while the price revealed when presenting the shopping basket at checkpoint is the actual fixed price.¹²⁴ This will help the manufacturers to set the actual price without being noticed on the price comparison.

2.8.2 Dual Pricing

Dual Pricing is different price arrangement made by manufacturers depending on the channel of distribution.¹²⁵ Usually, the manufacturers adopt dual policy to compensate costs incurred by offline wholesalers including pre-and after sales service provisions. The dual pricing has adverse effect on online channels as it escalates price competition between both channels. This will in turn discourage the online sells channels and diminish competitive efficiency of e-commerce. Dual pricing does not give rise to peculiar anticompetitive conduct in e-commerce. It is an externality that has an impact on overall e-commerce activities and competitiveness.

2.8.3 Selective Distribution and Online Sales Ban

Selective distribution is an agreement between manufacturers/suppliers and retailers which requires an authorized dealer or retailer to only sell to identified customer or only on specified platform or to identified dealer.¹²⁶ The online sales ban is selective banning of specific online market place which requires retailers not to sell on such platform.¹²⁷ Most of the time vertical restraint rises in the online context related to the concern over the control, good will, image of

¹²⁴ John Asker & Heski Bar-Isaac, 'Advertising and related restraints' (2019) Columbia Academic Commons Department of Economics Discussion Paper, 2 <<https://bit.ly/2EYbXoF>> [Last accessed on 7 September 2020].

¹²⁵ OECD (n72) 21.

¹²⁶ Buccirosi (n 116) 2.

¹²⁷ OECD (n72) 21-27.

product or brand ¹²⁸ and to avoid free riding. Free riding is a conduct where customers using online services to research products only to then purchase in-store.¹²⁹

Selective distribution and online sales ban trigger anticompetitive conduct when such restrictions entail foreclosure of suppliers or buyers, leads to entry barriers, soften competition or promote collusion between the suppliers and distributors. The market foreclosure happens when a manufacturer or supplier set maximum limit to be attained by distributor so that the later can only enter the market after fulfilling such criteria, which will in turn cause entry barrier.¹³⁰ Foreclosure, softening of competition and collusion at the distributors' level may harm consumers in particular by increasing the retail prices of the products, limiting the choice of price-service combinations and distribution formats, lowering the availability and quality of retail services and reducing the level of innovation of distribution.¹³¹

2.8.4 Exclusive Distribution

Exclusive distribution is a way of assigning a distributor in a specific area by supplier or manufacturer to sell goods. In both e-commerce and offline market, exclusive distribution gives rise to anticompetitive restraint when it limits retails outlets and limit inter-competition between retailers by giving sole right to one of them.¹³²

The suppliers/manufacturers make an exclusive distribution for different reason of which the followings are the main factors. Those are: to bring and introduce new product or brand to the market, to control benefit from economy of scale and to incentivize those retailers having invested and incurred cost to introduce the product at hand.¹³³

2.9 Horizontal Restraint in E-commerce

¹²⁸ Ariel.Ezrachi, 'The Ripple Effects of Online Marketplace Bans' (2017) 40 *World Competition L & Eco. Review* 47, 52.

¹²⁹ OECD (n72) 23.

¹³⁰ Buccirossi (n 116) 6.

¹³¹ European Commission, Guidelines on Vertical Restraints (2010) C 130/01, Para.101.

¹³² OECD (n72) 16.

¹³³ Ibid.

Horizontal restraint is a potential anticompetitive practice that comes in to picture when firms undertake collusion to rig the competition.¹³⁴ The collusion is likely to occur whenever such collusion seems profitable comparing to available competitive measures to attain efficiency.¹³⁵ This indicates how hard to detect the cartels as it is more appealing to participants to engage in anticompetitive collusion than keeping the welfare balanced. Among the horizontal restraints, price-fixing, market allocation and bid rigging cartels are major and harmful practices against the welfare of both competitive market and consumers.¹³⁶

In terms of e-commerce, in addition to conventional restraints, the use of algorithm pricing by online firms triggers cartels.¹³⁷ In other words, under e-commerce, the collusion transform itself in to impalpable domain where pricing algorithms continually monitor and adjust to each other's prices and market data.¹³⁸ In the local and emerging market, without the presence of pricing algorithm, the online firms may spy on each other as to the price adopted across the platforms. This by default leads to adoption of uniform price with competitors on online market either tacitly or expressly.¹³⁹ Readily available information on any product and price transparency may facilitate collusion since it allows online sellers to flexibly adopt similar price. In addition to traditional horizontal restraints, there are different forms of activities that can potentially cause collusions in online markets such as hub-and-spoke and Most Favored Nation clause (MFC).

2.9.1 Hub-and-spoke Collusion

In a traditional aspect, a hub-and-spoke constitutes the manipulation of actors- the spokes, in the market by mastermind-the hub, behind the curtains. It is usually employed by a given firm by inviting other potential conspirators to undertake a given acts.¹⁴⁰ Here, the hub may fix the price and/or determine details of the product to be distributed by spokes; but the latter may not

¹³⁴ Ariel Ezrachi and Maurice E Stucke, 'Artificial Intelligence & Collusion: When Computers Inhibit Competition' (2017) 2017 *U Ill L Rev* 1775, 1782.

¹³⁵ Lester G Telser, *Competition, Collusion, and Game Theory* (The Macmillan Press, 1971) 178.

¹³⁶ OECD (n72)

¹³⁷ Ezrachi and Stucke, 'Artificial Intelligence & Collusion' (n134) 1782.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*, 1787.

necessarily know each other nor make intentional cartels. Thus, the spokes will tacitly adopt similar product price.

In E-commerce, the computer algorithm facilitates conspiracy as a 'hub' for competitors in the online market-the 'spokes'. This occurs when e-commerce platforms fix price for 'spokes' operating under its platform or outsource price computation and determination to third party for various reason such as saving cost and time of computation.¹⁴¹ Thus, it is likely that the price strategy will become aligned by default which will in turn lead to tacit collusion.¹⁴² The hub-and-spoke collusion is mainly undertaken by competitors either intentionally or most of the time tacitly as the third party has significant role in determining price so that the competitors become the victim of aligned price strategy.¹⁴³

2.9.2 Most Favored Customer Clause

Most favored customer clause is a promise by one party to treat a buyer as favorably as that party treats its best customer.¹⁴⁴ Thus, in terms of price, the customer who holds the privilege of MFC under its contract clause will not be made to pay higher price than the favored customer of seller.¹⁴⁵ In supplier-retailer relationship, this same clause holds the undertaking of supplier to deliver the product at the same price it delivers to other retailers or competitor in down-stream market.¹⁴⁶

The MFC may have two anticompetitive effects: exclusionary and collusive. MFC triggers tacit cartels when different online firms adopt similar price range. When the incumbents have already concluded the contracts having the MFC, it becomes hard for the newly coming competitor to establish new price dealing, especially at lower or minimum price bar. This will exclude new entrant to get in to the market which is already fenced by the high price bar dealing through MFC

¹⁴¹ Ibid, 1788.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Pinar Akman, 'A Competition Law Assessment of Platform Most-Favored-Customer Clauses' (2016)12 *J Competition L & Eco.* 781, 781.

¹⁴⁵ Pinar Akman and Morten Hviid, 'A Most-Favored-Customer Clause with a Twist' (2006) 2 *Eur Competition J* 57, 57.

¹⁴⁶ Ariel Ezrachi, 'The Competitive Effects of Parity Clauses on Online Commerce' (2015)11 *European Competition J*488,489.

clause.¹⁴⁷ The collusive nature may occur when the MFC the adoption of same or closer minimum price level by sellers which will inversely dampen price and freeze competition at certain level.¹⁴⁸

2.10 Conclusion

Most of competition issues in offline market also occur in e-commerce marketplaces. Some of anticompetitive conducts do not always arise in e-commerce nor in traditional market. They are anticompetitive conducts that arise out of the interrelationship between online and offline sales channel such as disruptive advent of e-commerce and its competitive impact on incumbent offline sales channel, and vertical restraints which limits and determine which channels of sale to be adopted from offline and online sales channel. Furthermore, some features of competition issues under e-commerce are non-price factors. Most of the e-commerce market competitions are not also conducted within market; but they compete to overtake the whole market i.e. a ‘winner takes all’ approach. This chapter has shown how the network effect, control of data, net neutrality, free offer of product, and multi-sided market pose market competition concerns in e-commerce. Various competition issues such as abuse of dominance, merger, vertical and horizontal restraints are discussed. In so doing, how the aforementioned factors in e-commerce trigger these competition issues are demonstrated. Thus, the control of relevant data and having strong network effect may lead competition concerns such as abuse of dominance. Free offer of product also triggers predation. The multi-sided market also poses competition concern, especially with regard to assessment of relevant market. With these in mind, the next chapter will analyze Ethiopian relevant legal frameworks to assess whether and to what extent they attend to the aforementioned competition concerns arise in e-commerce.

¹⁴⁷ Steven C. Salop & Fiona Scott Morton, ‘Developing an Administrable MFN Enforcement Policy’ (2013) 27 *Antitrust J* 15, 19.

¹⁴⁸ Jonathan B. Baker, ‘Vertical Restraints with Horizontal Consequences: Competitive Effects of “Most-Favored-Customer” Clauses’ (1996) 64 *Antitrust L J* 517, 519.

Chapter Three

E-commerce and the Future of Competition Regulation in Ethiopia

3.1 Introduction

This chapter examines the extent to which current Ethiopian law attends to the common issues of competition in e-commerce marketplaces discussed in chapter two. It argues that Ethiopian relevant law does not adequately address competition issues that arise in the context of e-commerce. With the advent of e-commerce, issues such as network effect (both direct and indirect), control of data (either personal or any relevant data), disruptive innovation, multisided markets, free offer of products and platform neutrality are common factors that potentially trigger competition concerns in e-commerce. Particularly, the aforementioned factors exhibit non-price effect which may not be captured by price-based competition provisions.

Apparently, Ethiopia is unequivocally opening up for digital markets.¹⁴⁹ Even though e-commerce marketplaces are at a nascent stage, there are considerable expansions and startups mushrooming.¹⁵⁰ In light of these developments, this chapter critically examines relevant laws as well as draft instruments vis-a-vis potential competition issues in e-commerce marketplaces. Moreover, the discussion in this section is informed by data gathered through interviews with relevant authorities.

3.2 E-commerce and Competition Regulation in Ethiopia: A Critical Survey of Relevant Laws

3.2.1 General

¹⁴⁹ ‘Alibaba Group to establish an eWTP Hub in Ethiopia’, FDRE Office of the Prime Minister (2 Dec, 2019) available at < <https://pmo.gov.et/news/>> Also see CGTN Africa, Alibaba, Ethiopia sign MoU on creation of an Electronic World Trade Platform (26 November, 2019) <<https://bit.ly/2FexuZG>> [Last accessed on 7 September 2020].

¹⁵⁰ According to a recent account, there are more than 29 e-commerce platforms in Ethiopia that offer online sales, delivery, and ride services. See ‘Operational Readiness’ FDRE Ministry of Innovation and Technology Digital Transformation Program Office (June 2020) (on file with author).

Market competition and its policy making is feasible only in free market economy.¹⁵¹ This is because in free market economies, market competitors exercise independent decision-making when they sell and buy products. Otherwise, competition law's role is lesser when major economic activities are sanctioned by state regulatory measures.¹⁵² Ethiopia had a closed market regime till 1991 when the transitional government adopted a free market economy which opened the market for private enterprises. From that time onward, different policies and strategies have been adopted to foster a free market economy. The FDRE Constitution stipulates that government policies should guarantee every person equal benefit from the country's intellectual and material resources, equal opportunity to improve their economic conditions and promotion of equitable distribution of wealth among them.¹⁵³

In line with this, different policies have been introduced that seek to embrace free market economy and promote market competition. The first Industrial Development Strategy indicated that Ethiopia adopts free market economy and underlines that the private sectors are the backbone of the industrial development of Ethiopia.¹⁵⁴ It also declares that the government should intervene to regulate the economic activities.¹⁵⁵ However, the Strategy does not provide how should the government intervene (either through regulation or administration) or to what extent it should regulate.¹⁵⁶ The revised Industrial Development Strategy fills this gap by providing implementing strategies that should be followed.¹⁵⁷ It also recognizes free market economy and importance of the private sector engagement.¹⁵⁸ Even though these strategy documents do not directly address the policy and legal framework of market competition, they set the background for better market competition. They ensure this through promotion of the private sector engagement and creation of conducive environment for industrial and market development.

¹⁵¹ Merso et al (n33) 7.

¹⁵² Ibid.

¹⁵³ Constitution of the Federal Democratic Republic of Ethiopia Proclamation, Federal Negarit Gazeta, Proclamation No. 1/1995, Art. 89 (1-2).

¹⁵⁴ See the Industrial Development Strategy of the Federal Democratic Republic of Ethiopia (Amharic Version, (August 2002) 5;

¹⁵⁵ Ibid, 44.

¹⁵⁶ Ibid.

¹⁵⁷ See the Ethiopia Industrial Development Strategic Plan (2013 – 2025) (September 2013).

¹⁵⁸ Ibid, 44.

The Information and Communication Technology (ICT) Policy was first introduced in 2002 and has been revised in 2009.¹⁵⁹ It mainly focuses on paving the way for developments of ICT infrastructure¹⁶⁰, human resource¹⁶¹, and legal system and security¹⁶². The Policy also focuses on e-government development which covers education¹⁶³, health¹⁶⁴ and agricultural¹⁶⁵ sectors. In addition, the Policy recognizes participation of the private sector in operating ICT services.¹⁶⁶ The Draft ICT Policy and Strategy introduces e-commerce as one of its principles which was not incorporated in the preceding ICT Policy.¹⁶⁷ Including the aforementioned objectives of the ICT Policy, the Draft Policy stresses on the development of e-commerce by creating legal frameworks which regulates e-commerce transaction, facilitating e-payment system and creating awareness about the e-commerce.¹⁶⁸ Within context of e-commerce market competition, recognition of the private sector as key role player, expansion of ICT facilities and infrastructure under the ICT Policy contribute to the proliferation of e-commerce and its market competition regulation.

Similarly, a Digital Transformation Strategy is being prepared with objectives of developing the digital ecosystem, and leverage technology.¹⁶⁹ The Strategy mainly focuses on unleashing value from agriculture,¹⁷⁰ increasing global value chain through the promotion of manufacturing¹⁷¹, building IT-enabled services¹⁷², and utilizing digital as the driver of tourism competitiveness.¹⁷³ It further gives emphasis to technology-driven pathways, digital transformation through ICT infrastructure building, including expansion of e-commerce.¹⁷⁴ The Strategy underlines that both

¹⁵⁹ The National Information and Communications Technology Policy and Strategy of the Federal Democratic Republic of Ethiopia (August 2009).

¹⁶⁰ Ibid, 5.

¹⁶¹ Ibid, 7.

¹⁶² Ibid, 8 – 11.

¹⁶³ Ibid, 14.

¹⁶⁴ Ibid, 16.

¹⁶⁵ Ibid, 18.

¹⁶⁶ Ibid, 19.

¹⁶⁷ The Draft National Information and Communications Technology Policy and Strategy of the Federal Democratic Republic of Ethiopia (September 2016) 8.

¹⁶⁸ Ibid.

¹⁶⁹ See the Draft Digital Ethiopia 2025: A Digital Strategy for Ethiopian Inclusive Prosperity (June 2020).

¹⁷⁰ Ibid, 21 – 28.

¹⁷¹ Ibid, 28 – 35.

¹⁷² Ibid, 35 – 40.

¹⁷³ Ibid, 40-48.

¹⁷⁴ Ibid, 69 – 70.

public and private sectors should cooperate to build vast logistic sector, delivery or national addressing system, and opening up of market opportunities for investors to engage in e-commerce.¹⁷⁵ Even though the Strategy does not directly discuss about market competition, it can be taken as a foundation for prospective comprehensive digital policy development and legal reform. It will also have positive impact in creating competitive e-commerce marketplaces.

After coming to office, the current Prime Minister has introduced the Home Grown Economic Reform Agenda.¹⁷⁶ The Agenda is primarily set to reduce the role of the state in economic activities.¹⁷⁷ In doing so, it focuses on correcting macroeconomic imbalances, reforming structural frameworks and policies, and creating new opportunities and growth.¹⁷⁸ With regard to competition, the agenda incorporates the importance of sectoral and market reforms.¹⁷⁹ It specifically pledges to improve efficiency of domestic markets for goods and services such as removing barriers to entry, enforcing competition law and improving the efficiency of commodity market supply chain.¹⁸⁰

Furthermore, Ethiopia is going to adopt a Ten-Year Development Plan soon.¹⁸¹ The Draft Digital Strategy technically implies that the Development Plan is going to replace the current Growth and Transformation Plan II (GTP II) by incorporating the implementation of medium-term national development goals to be achieved by 2025 as one of its objectives.¹⁸² The major goals of the Development Plan are consolidation and further development of the agricultural sector, and industrialization.¹⁸³ It also stresses on embracing digital economy and technological transfer. It mainly gives priority and set to foster six identified sectors of which service, particularly, IT- based services, and manufacturing are the major sectors. Ultimately, the

¹⁷⁵ Ibid.

¹⁷⁶ A Homegrown Economic Reform Agenda: A Pathway to Prosperity of Ethiopia (Office of the Prime Minister, September 2019).

¹⁷⁷ Ibid, 3 – 7.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid, 19 – 30.

¹⁸⁰ Ibid.,25.

¹⁸¹ ‘Ethiopia Unveils 10-Year Development Plan’, Fana Broadcasting Corporate (11 Jun, 2020) <<https://bit.ly/3bB2IXd>> [Last accessed on 20 August 2020]

¹⁸² See the Draft Digital Strategy (n165) 14.

¹⁸³ Ibid.

Development Plan aims to encourage privatization.¹⁸⁴ The Development Plan's commitment to promote privatization in various sectors has positive implication on market competition both in offline and online markets.

To a degree, the above highlighted policies and strategies lay the foundation for efficient and fair market competition, specifically for e-commerce. They recognize participation of the private sector as a crucial determinant of development. As noted above, the market competition becomes more efficient when market is free from restraining regulation(s). In light of this, the above indicated policies and strategies promote free market and engagement of private enterprises. With regard to e-commerce marketplace, they give emphasis to developing ICT infrastructure, and logistics to build a conducive market system for e-commerce. Even though the indicated policies and strategies do not give broad emphasis to the significance of market competition regulation, they can be taken as a decisive step to facilitate the later.

In addition to the above policy documents, there are also different pieces of legislations which address competition issues. The following codes are promulgated to address different legal objectives. However, they can still be used to regulate certain anticompetitive conducts arise in both offline and online market places. The Civil Code of Ethiopia provides false publications or any other means which likely to hurt reputation of product or goodwill of business establishment.¹⁸⁵ Similarly, Commercial Code of Ethiopia prohibits unfair competition and provides remedies for infringements.¹⁸⁶ It stipulates conducts which are against honest commercial practices such as misleading conducts and false statements against business or product(s). Federal Democratic Republic of Ethiopia Criminal Code also criminalizes unfair competition conducts such as false and confusing statements or conducts, offering undue benefits to another's worker to entice them fail in their duties and revealing trade secret.¹⁸⁷

¹⁸⁴ Ibid.

¹⁸⁵ Civil Code of the Empire of Ethiopia Proclamation, Negarit Gazeta, Proclamation No.165/1960, Art.2057.

¹⁸⁶ Commercial Code of the Empire of Ethiopia Proclamation, Negarit Gazeta, Proclamation No.166/1960, Arts133, 134 (1-2).

¹⁸⁷ Criminal Code of the Federal Democratic Republic of Ethiopia Proclamation, Federal Negarit Gazeta, Proclamation No. 414/2004, Art. 719.

The aforementioned codes attempt to address competition relationship between individuals rather than the overall market competition and its implication on efficiency. While these provisions could be put to use within the domain of anticompetitive conducts such as fraud and false statements, they fall short of addressing novel concepts and issues of competition, particularly in e-commerce marketplaces.

The more recently adopted Communications Service Proclamation incorporates separate competition rules.¹⁸⁸ In doing so, it attempts to regulate competition in the Ethiopian telecom market. It generally prohibits any anticompetitive agreements or conducts which are likely to lessen telecommunications market competition.¹⁸⁹ The Communications Service Proclamation only focuses on competition between Telecom operators.¹⁹⁰ The Communications Service Proclamation provides that the Communications Authority has autonomous power to determine and regulate the compliance of business persons in telecom market to competition laws and directives.¹⁹¹ This indicates that the Authority refers to relevant competition laws to entertain the case.

Related to internet service and content provision, the issue of network or platform neutrality may arise. Net neutrality may have different forms and concepts. Within the context of competition, net neutrality may arise when Internet Service Providers (ISPs) or platform owners discriminate between users and content providers or between sellers who offer their product on such platform.¹⁹² A platform owner may also appropriate the innovation introduced by seller(s).¹⁹³ This may lead to both non-price and price discrimination and other forms of anticompetitive restraints. It appears that competition provisions of the Communications Service Proclamation are only confined to anticompetitive conducts that arise between Telecommunication Operators and as to infrastructure and service they deliver. By virtue of this, it does not apply to e-commerce platforms and the relationship they have with content providers or sellers on such telecommunication platform.

¹⁸⁸ See Communications Service Proclamation, Federal Negarit Gazeta, Proclamation No.1148/2019, Arts 47-48.

¹⁸⁹ Ibid, Art.48.

¹⁹⁰ Ibid.

¹⁹¹ Ibid, Art. 47.

¹⁹² See UNCTAD ‘Competition Issues in the Digital Economy’ (n23) 7.

¹⁹³ Shelanski (n97) 1699.

The E-transaction Proclamation provides about network neutrality up on which the conditions stipulated under conventional legal requirements are fulfilled and equally treated with contracts concluded electronically.¹⁹⁴ Regarding platform neutrality, Dr. Abiyot Bayou, the Director of Digital Transformation Program at Ministry of Innovation and Technology (MiNT) argues that the Competition Authority should look into competition aspects of e-commerce, particularly platform neutrality.¹⁹⁵ The interviewee adds that the advent of e-commerce exhibits novel concerns over net neutrality such as remote trust building without physical presence and examination of goods.¹⁹⁶ Thus, the e-transaction Proclamation does only address the neutrality of conventional legal requirements of contracts towards agreements made electronically, and consumer protection under contracts concluded electronically.¹⁹⁷ As such, issues of platform neutrality within the context of competitions are relegated totally to the nation's competition law.

Apparently, a Draft Electronic Transaction Regulation of Council of Ministers introduces tie-in sales and abuse of dominance as the e-commerce anticompetitive conducts. The Draft Regulation provides that where e-commerce operator(s) or seller(s) offer tie-in sell, it should clearly inform the customer as such.¹⁹⁸ Tie-in sell occurs where seller binds a consumer to take the desired good if only the later also agrees to take different goods.¹⁹⁹ The Draft Regulation also provides that tie-in sell should not be made on default base.²⁰⁰ The Draft Regulation does not actually prohibit tie-in sell as anticompetitive conduct. It rather offers the requirement a seller should fulfill when selling the tied goods or services i.e. promptly informing the customer about the tie.

The Draft Electronic Transaction Regulation prohibits abuse of dominance stipulating that e-commerce platform(s) or platform owners should not abuse their dominance by using technical advantages, user volume, ability to control relevant industries and other operators' reliance on

¹⁹⁴ Electronic Transaction Proclamation, Federal Negarit Gazeta, Proclamation No.1205/2020, Arts. 7 –17.

¹⁹⁵ Dr. Abiyot Bayou, Director of Digital Transformation Program at Ministry of Innovation and Technology, Interview held on 14 July, 2020, at 2:06 P.M.

¹⁹⁶ Ibid.

¹⁹⁷ Electronic Transaction Proclamation (n194) Art. 28 – Art.34.

¹⁹⁸ Draft Electronic Transaction Council of Ministers Regulation (2020), Art. 13 (1).

¹⁹⁹ Ibid, Art. 2(9).

²⁰⁰ Ibid, Art. 13 (2).

them in trading.²⁰¹The Draft Regulation more or less addresses the novel factors that give rise to anticompetitive conducts in e-commerce. However, it does not include factors such as introducing disruptive innovation, control of data (Big Data) and network effect which have more or equal contribution with the factors mentioned under the Draft Regulation. The Draft regulation actually provides about personal data protection.²⁰² However, it provides only from the aspect of right to privacy provided under relevant privacy law and provisions.²⁰³ Therefore, the anticompetitive effects arise out of control of collective personal data or other relevant data may not fall under the ambit of data protection laws which deal at individual level.

In the next section, relevant competition instruments are examined. The trade Competition and Consumer Protection Proclamation No. 813/2013 is a piece of legislation that deals with market competition and regulation in all sectors. For merger implementation and procedures, Merger Directive No. 1/2016 (herein after Merger Directive) has been issued by Ministry of Trade and Industry. In addition, there are also proclamations, regulation and directives which are under drafting process.²⁰⁴ Therefore, in the following section, this thesis critically examines these laws as well as draft instruments in light of key and potential competition issues in e-commerce marketplaces explored in chapter two. Since the core objective of this thesis is to examine competition aspects of e-commerce, it is only confined to examining competition provisions within context of e-commerce.

3.3 The Trade Competition Proclamation and Anticompetitive Conducts in E-Commerce

This section enquires in to relevant competition instruments. It does so by investigating the relevant rules vis-à-vis potential anticompetitive issues that commonly arise in e-commerce. It demonstrates whether and the extent to which the relevant rules attend to the later. Moreover, the discussion in this section is informed by collected data through interviews with relevant authorities.

²⁰¹ Ibid, Art. 16.

²⁰² See Ibid, Art. 17.

²⁰³ See Ibid, Art. 17(1).

²⁰⁴ Draft Bills (n20).

3.3.1 An Overview of the Competition Legal Framework

The current primary competition law of Ethiopia, Proclamation No. 813/2013 is adopted relatively recently i.e. in 2013. Similarly, most of the policy instruments are adopted in the past few years. However, up on a closer examination, it appears that these legal instruments do not appear to be drafted with e-commerce in mind.

As noted above, there are draft pieces of legislation in progress. Various features are added and amendments are made to those bills. Despite some of them appear to inadvertently address e-commerce market competition, as discussed below, there is no explicit and exhaustive stipulation as such.

Related to the issue at hand, this thesis has enquired into the background of draft bills to find out whether those pieces of legislations are intended to address e-commerce market competition. In so doing, key officials of the FDRE Trade Competition and Consumer Protection Authority (hereinafter ‘Authority’) who have been participating on drafting of these instruments are interviewed. According to Mr. Michael Tekle, the Director General of the Authority, the specific anticompetitive issues in e-commerce have not been brought to the table.²⁰⁵ Because, the interviewee justified that, the draft bills are being prepared to amend, provide details and to introduce certain features which are not incorporated in the current Trade Competition Proclamation. The interviewee further argues that the available provisions of competition law can apply to any anticompetitive conduct irrespective of the nature of market channel.²⁰⁶ Mr. Mengistu Molla, Research and Development Director of the Authority, adds that the draft legislations and the amendments focus on attaining consumer welfare which attempts to deal with conducts that likely to affect the consumers whether offline or online marketplace rather than the novel anticompetitive effects of e-commerce.²⁰⁷ Thus, the interviewees underlined that, the e-commerce, as an emerging marketplace, has not been considered in the drafting exercise.

²⁰⁵ Mr. Michael Tekle, Director General at ETCCPA, Interview held on 09 July, 2020, at 2:28 P.M.

²⁰⁶ Ibid.

²⁰⁷ Mr. Mengistu Molla, Research and Development Director at ETCCPA, Interview held on 09 July, 2020, 1:51 P.M.

The Background Document to Provide Justification for the Amendment of the Proclamation No. 813/2013 also supports this claim.²⁰⁸ The Background Document provides justifications for the amendment of certain provisions the Trade Competition Proclamation such as the scope of application.²⁰⁹ It justifies that the autonomy given to the Council of Ministers to exempt certain trade activities from competition regulation is general so that the specific exempted trade activities are made to be incorporated under the amending proclamation.²¹⁰ However, the Background Document does not say anything about considering e-commerce market competition under the scope of the Draft Trade Competition Proclamation.

With this in mind, there are key anticompetitive issues covered by the trade competition law. Thus, the following section discusses the extent to which existing laws address key anticompetitive issues in the context of e-commerce.

3.3.2 Abuse of Dominance

Abuse of dominance is an engagement of dominant firms in to anticompetitive conducts by using the market power they have in the market.²¹¹ The Trade Competition Proclamation addresses conducts that constitute abuse of dominance.²¹² These are limiting production, preventing or withholding goods from being sold in the regular channel of trade, predation, price fixing, refusal to supply, denial of essential facilities, price discrimination, tying and unilateral restraints.²¹³

In light of e-commerce, as noted above, concerns over platform neutrality may arise where an e-commerce platform operator competes with other sellers on its own platform.²¹⁴ In case an e-commerce platform operator denies sellers or competitors the access to its platform, provision of

²⁰⁸ The Background Document of the Federal Democratic Republic of Ethiopia TCCPA to Provide Justification for the Amendment of Proclamation No. 813/2013 (Amharic Version, December 2019) (On file with author).

²⁰⁹ Ibid, 5.

²¹⁰ Cf. Trade Competition and Consumer Protection Proclamation, Federal Negarit Gazeta, Proclamation No. 813/2013, Art. 4(2) with Draft Trade Competition and Consumer Protection Proclamation (2019), Art. 4 (2).

²¹¹ OECD (n72) 27.

²¹² See Trade Competition Proclamation (n210), Art. 5.

²¹³ Ibid, Art. 5.

²¹⁴ UNCTAD (n23) 14.

Trade Competition Proclamation about refusal to “essential facility” may address this.²¹⁵ As showed above, Draft Electronic Transaction Regulation can also be used to deal with the same issue.²¹⁶ Even though the aforementioned provision of the Proclamation and Draft Regulation does not mention ‘platform neutrality’, it provides that refusal to essential facility without a justifiable economic reason would amount to abuse of dominance.²¹⁷ By virtue of this, a platform owner who refuses to allow access to its platform to a competing seller can be held accountable. However, this provision falls short of addressing platforms on account of discrimination that may be made between content providers or between its own product. The platform owner may favor its own or its partners’ goods or services to be viewed more or do other algorithmic maneuvers. The Trade Competition Proclamation stipulates that the regulation to be issued may provide the details with regard to other forms of discrimination.²¹⁸ However, the draft Regulation narrows discrimination down to price-based conducts i.e. selling the same product at different prices.²¹⁹

Concerns over ‘free riding’ may also arise out of platform neutrality where a platform owner exploits or appropriates the business model or innovations designed by another seller on its platform.²²⁰ This may weaken competition and overall economic efficiency of online marketplaces. However, the Trade Competition Proclamation and draft bills do not address forced free riding as anticompetitive conducts. At an individual level, intellectual property (IP) law may regulate the unlawful appropriation of innovation. However, the public interest and anticompetitive conducts that arise from collective abuse may not fall under the ambit of IP law.

The Trade Competition Proclamation provides methods of assessment of abuse of dominance.²²¹ In doing so, it provides capacity to control price or other conditions of commercial negotiations, market share and ability to set barrier to entry in the relevant market within a distinctive geographical area as tools of assessing abuse of dominance.²²² Likewise, the Draft Trade

²¹⁵ Trade Competition Proclamation (n210) Art. 5((2)(e)).

²¹⁶ Draft E-transaction Regulation (n198) Art. 13 (1).

²¹⁷ Trade Competition Proclamation (n210) Art. 5((2)(e)).

²¹⁸ Ibid, Art. 5(2)(i).

²¹⁹ See Draft Trade Competition and Consumer Protection Regulation (2019), Art. 12.

²²⁰ Shelanski (n97) 1699.

²²¹ Trade Competition Proclamation (n210) Art.6.

²²² Ibid, Art. 6 (1-4).

Competition Proclamation stipulates similar provisions by incorporating ‘relevant market’ under definition part.²²³The background document to Draft Trade Competition Proclamation indicates that the definition of relevant market is inserted under definition part to give comprehensive and uniform legal definition to the respective issues that may require relevant market assessment.²²⁴ According to the Trade Competition Proclamation, the relevant market constitutes goods or services that share similar feature(s) and compete with each other within market of distinctive geographical area.²²⁵ In addition, the Draft Trade Competition Regulation elaborates factors that need to be considered when assessing a relevant market such as market position of the dominant business person, conditions of entry and expansions such as regulatory barriers, existence of economies of scale or scope and network effects.²²⁶ In addition, the draft Abuse of Dominance Directive²²⁷ and the draft Relevant Market Assessment Directive stipulate evaluating tools to be considered when assessing relevant market.²²⁸

However, within the context of e-commerce, the Trade Competition Proclamation and draft bills do not appear to fully attend to assessment of dominance in e-commerce for five key reasons. First, the e-commerce platforms in question may have linkages with other platforms for various reasons such as supplementary services and facilities for the operation of the platform. Similar to offline markets, a given e-commerce platform may also have different group firms run by a single owner and which sell multiple goods and services. This platform has advantages of managerial costs, research and development (R&D) costs, and indirect and direct network effects. Based on this, even though each service and good is not substitutable, the combined market share they have against other e-commerce platforms is significant. Therefore, in addition to network effects and other factors listed under the Trade Competition Proclamation and the

²²³ Draft Trade Competition and Consumer Protection Proclamation (2019), Art. 2(7).

²²⁴The Background Document (n208) 4.

²²⁵ Trade Competition Proclamation (n210) Art. 6(3 & 4); Draft Trade Competition Proclamation (n223) Art. 2(7).

²²⁶ Draft Trade Competition Regulation (n219), Art.6.

²²⁷ Draft Abuse of Dominance Directive is provided to implement the Trade Competition Proclamation while the Draft Trade Competition Regulation is being drafted based on Draft Trade Competition Proclamation. Due to this factor, some of the provisions are inconsistent, do not follow proper chain of hierarchy and they create unwanted redundancy over the determination of relevant market. Cf. Draft Trade Competition Regulation, Draft Abuse of Dominance Directive, and Draft Relevant market Assessment Directive.

²²⁸ Draft Directive on Implementation of Abuse of Dominance Provisions (2019), Art. 12; See also Directive to Provide for the Assessment of Relevant Market Provisions (2019).

aforementioned draft legislations, privileges a given platform cultivates through linkage with other undertakings and between each other would contribute for its dominance.

Second, a given e-commerce platform may be backed by an already established offline incumbent having wide access to supply and sales market comparing to its competitors. This may give privilege to such e-commerce platform to attain dominance over other online competitors having no access to supply or sales market. However, the Trade Competition Proclamation and draft bills do not address this factor.

Third, an e-commerce platform with access to considerable user and other relevant data has advantage over competitor (s). This gives it the advantage of tracking customer preferences, and predicting market trends or demands.²²⁹ Therefore, in the e-commerce context, significant access to and control of user data or other relevant data would give an advantage to an online retailer to meet their customers' preference, which will in turn help to entice more customers to its platform. However, Ethiopian competition laws have not incorporated the control of data as a factor to be considered when assessing abuse of dominance.

Fourth, innovation also plays key roles in attaining dominance. It creates disruptive pressure on other competitors having lesser innovation capacity while it increases the productivity of a platform employing it. The draft Abuse of Dominance Directive provides the grounds the Authority should use when determining market share such as 'product capacity' of the business person under investigation.²³⁰ A broader reading of 'product capacity' may involve innovation; but product capacity does not necessarily arise out of innovation. Capital investment and adding input may increase product capacity without making any improvement to means of production.

Finally, indirect network effect plays a key role in attaining dominance and market power in a short period of time where an increase in demand for a given good or service increases the demand for other products.²³¹ This is an externality factor that contributes to attainment of dominance in a given relevant market. Related to this, in e-commerce platforms, there are multi-

²²⁹ Ezrachi and Stucke (n4) 15-18.

²³⁰ Draft Abuse of Dominance Directive (n228) Art. 13(4).

²³¹ Gandal (n56) 80.

sided markets under which a given online marketplace undertakes differing delivery of goods on one side and service on the other. In such cases, a platform may cultivate significant amount of revenue from one side and funds its network effect on the other side. For instance, an online marketplace may attract advertisers to its platform by using more customers and network effect it has. Therefore, such inter-linkage of benefits has significant implication for the attainment of dominant position. Generally, linkages with other undertakings, access to supply and sales market or combined market share effects, indirect network effect, access to personal data, and disruptiveness of platforms in question through innovation are not addressed under competition law of Ethiopia.

In addition to the aforementioned scenarios of abuse of dominance, there are also anticompetitive conducts likely to arise through abuse of dominance such as predation and tying or bundling.

3.3.2.1 Predation

Predation constitutes significant lowering of price below product cost to deter or eliminate potential rival(s) or raising rivals' costs through excessive investment with an anticipation of weakening them.²³² The Trade Competition Proclamation and draft legislations treat predation only from the aspect of price-based anticompetitive plots.²³³ However, e-commerce platforms may deliver a given service for free or completely forfeit potential revenue it could have accrued to increase selling size of another good or service of its own. For instance, an online software and website developer firm may give free use and access of those software and application to boost its delivery of goods or service on the other side. Selling above or below the cost is still within the domain of price range. The Draft Trade Competition Regulation provides that predatory pricing is a conduct of deliberately incurring losses or foregoing profits in the short term to foreclose its actual or potential competitors.²³⁴ Within this context, forfeiting profit also falls in price category. This is because there is still a sell at a given range of price despite of forfeiting profit. However, delivering a given good or service for free has no price value, though

²³² OECD, 'Predatory Foreclosure' (n76) 14; Calvani (n81) 410.

²³³ See Trade Competition Proclamation (n210) Art. 5(2(b)); Draft Trade Competition Proclamation (n223) Art. 7(2) cum. Draft Trade Competition Regulation (n219) Art.8 and Draft Abuse of Dominance Directive (n228) Art.22(2) cum. Art.24.

²³⁴ Draft Trade Competition Regulation (n219) Art. 8 cum. Draft Trade Competition Proclamation (n223) Art 7(2).

it has significant impact on those potential competitors who would pay to install the same software or application and further require their user to pay for these extra services.

The Trade Competition Proclamation and draft legislations stress on ‘an intent to harm’ as a defining criterion to assess predation.²³⁵ However, an e-commerce platform in question may not have the intent to harm or it may operate its normal course of trade activity having ‘tacit’ predation effect which further softens competition in online market. Furthermore, the Trade Competition Proclamation and relevant legislations clearly incorporate consumer welfare as one of their major objectives.²³⁶ Regarding this, Mr. Getinet Ashenafi argues that Trade Competition Proclamation gives priority to consumer welfare.²³⁷ The interviewee also states that competition law should always give a priority to overall market efficiency so that consumer welfare shall come after efficiency. Making consumer welfare an objective of competition law justifies the anticompetitive conduct likely to benefit consumers for a provisional period of time. But it will have effect on overall economic inefficiency in the long-run. This is because a predator may offer its product at a lower or free of cost in an expectation of recouping the price after acquiring a large number of users to its platform. Therefore, the current Ethiopian competition law do not address tacit predation and free offer of goods and services.

E-commerce can cover a wide geographical area without extra cost whether buying order is made within closer or longer range. Despite most of goods sold online engage physical delivery, pure e-commerce may not require physical engagement. For instance, an online book seller has delivery and convenience advantage over local book retailers. This has even further disruptive effect on local retailing. Within the context of predation, an online book dealer has zero-cost advantage as to delivery, physical carriage of books to local markets and inconvenience issues that arise out of distance. However, there is no explicit provision which address tacit predation under Ethiopian competition law.

²³⁵ See Trade Competition Proclamation (n210); Draft Trade Competition Proclamation (n223); Draft Trade Competition Regulation (n219); Draft Abuse of Dominance Directive (n228).

²³⁶ See, e.g., Trade Competition Proclamation (n210), Preamble.

²³⁷ Mr. Getinet Ashenafi, Director of Investigation and Prosecution at ETCCPA, Interview held on 7 July 2020, at 9:20 A.M.

3.3.2.2 Tying or Bundling

Under the Trade Competition Proclamation, tying and bundling involves compelling customers to take another product to get the product they actually want.²³⁸ The Draft Trade Competition Regulation further provides factors that need to be considered when assessing tying and bundling.²³⁹ These are potential cost saving which benefits customer, efficiency, market entry enhancement and purchasing power which ensure benefits for the supplier.²⁴⁰

Both the Trade Competition Proclamation and the draft bills stress only on price-based tying and bundling when both products can be measured in terms of price value. However, in e-commerce, tying and bundling may occur through binding free offers with another price-based accessory product for sale. For instance, a platform owner may offer free internet service to sell accessories and different articles related to internet use. This reality in e-commerce context is overlooked in current and upcoming competition laws.

3.3.3 Merger

The Trade Competition Proclamation provides that merger is prohibited where it is likely to affect market competition.²⁴¹ It sets out constituting elements of a merger. Merger concerns amalgamation of whole or part of independently existing firms and/or acquisition of another firm's shares, security, or assets.²⁴² The draft Trade Competition Proclamation law adds market and public interest as preconditions in addition to trade competition.²⁴³ The draft Regulation provides factors to be considered before approval of merger such as structure of relevant market concerned, potential competition, market position of [merging firms], access to supply and market, and whether merger will generate efficiencies or increase innovation.²⁴⁴ Furthermore, the Merger Directive specify points that shall be taken in to account from the aspects of trade

²³⁸ Trade Competition Proclamation (n210) Art. 5(2(g)).

²³⁹ Draft Trade Competition Regulation (n219) Art.9 (4).

²⁴⁰ Ibid.

²⁴¹ Trade Competition Proclamation (n210) Art. 9(1).

²⁴² Ibid, Art. 9 (3 ((a) (b))).

²⁴³ Even though a term 'trade competition' contains public interest and market competition, the draft Trade Competition Proclamation redundantly provides market competition, trade competition and public interest as a separate pre-requirement. See Draft Trade Competition Proclamation (n210) Art. 13(1).

²⁴⁴ See Draft Trade Competition Regulation (n219) Art. 20(2).

competition such as numbers of competitors in market, potential to dominate, entry barrier, market share, growth, innovation and price of market.²⁴⁵ It also lists factors to be considered from market perspective such as relevant market analysis, state of demand and supply, price and quality standard, state distribution channel, market share and market concentration.²⁴⁶ Apparently, it adopts two tools to assess market concentration for merger approval. Those are: a) Herfindahl-Hirschman Index (HHI)²⁴⁷ and; b) Concentration Ratio (CR).²⁴⁸ Minimum threshold requirement²⁴⁹ is also incorporated under the Directive to assess capital, annual turnover [and]/or assets of firms under question.²⁵⁰ Regarding the assessment of relevant market, either for assessment of dominance or for merger approval, in addition to HHI and CR, the draft Relevant Market Directive also adopts Small but Significant Non-transitory Increase in Price (SSNIP).²⁵¹ A common feature of these three tools is that they are all price related tools.

The trade Competition Proclamation and draft legislations address most of anticompetitive issues that commonly arise in the merger of e-commerce platforms. The draft Regulation and the Merger Directive set out factors that should be considered when assessing merger approval.

However, there are still set of issues not addressed in the above discussed set of laws. First, they revolve around price-based effects. The aforementioned provisions and factors, including market share, are acquired through sells of goods and service. Standards to be used such as Herfindahl-Hirschman Index or Concentration Ratios are indicators of this assumption i.e. they are used to assess price-based merger conducts.²⁵² The minimum threshold requirement also indicates the assessment of merger from aspects of their actual capital value in the market. However, there

²⁴⁵ See Merger Directive No. 1/2016, Art.20(1).

²⁴⁶ Ibid, Art.20(2).

²⁴⁷ Merger Directive (n245) Art. 7(D) provides that if HHI index is above 25%, the merger application in question is likely to effect market competition. Furthermore, Draft Relevant Market Assessment Directive Art. 16(2) provides the actual formula to be applied while calculating HHI. However, the result of HHI cannot be put in percentage, if we apply the equation of HHI indicated in chapter two of this thesis. The result should be between 1 up to 10,000 in actual figure. To get the result in form of percentage, we have to multiply the HHI formula by 10,000 divided by 100. See, e.g., Stephen A Rhoades, 'The Herfindahl-Hirschman Index' (1993) 79 *Fed Res Bull* 188, 189.

²⁴⁸ See Merger Directive (n245) Art. 7(2(D)).

²⁴⁹ Minimum threshold means the value used to determine the type of mergers that are likely to cause significant adverse effect on trade competition, the market or public interest. See Merger Directive (n245) Art.11.

²⁵⁰ Ibid, Arts 11-16.

²⁵¹ Draft Directive to Provide for the Assessment of Relevant Market Provisions (2019), Art. 6 (2-5) cum. Art. 13(2(a)).

²⁵² Merger Directive (n245).

are non-price effects having equal or more effect with stipulated factors and preconditions. As noted above, network effect is significant when numbers of buyers have effect on other customers in the relevant market. It is likely for a firm having network effect to dominate the market. Upon merging, the network effect will enable the merged firm to control and dominate the relevant market in a short time. Therefore, while assessing pre-merger conducts, network effect of merging business organizations should also be taken into account.

In addition, in e-commerce, there are multi-sided markets which may make revenue from one side of the market and offer free service on the other side. For instance, a given e-commerce platform may give free access to music, books and different publishing to attract more users to its platform while making revenue from advertisers on the other side who need to promote their product on the platform having a wide user base. Under this scenario, goods and services are being delivered for free. Therefore, the question is whether the HHI should take the overall annual turnover of that platform including the revenue from advertisement or should only focus on the transaction being made between a platform and its customers, which is free. It is also hardly computable using SSNIP as long as there is no increase in price at all. However, there is no provision dealing with multi-sided markets under the Trade Competition Proclamation, Merger Directive and available draft legislations.

Second, regarding post-merger assessment, the Trade Competition Proclamation addresses under the theme of merger revocation in the Trade Competition Proclamation.²⁵³ The Trade Competition Proclamation and Merger Directive set out grounds to be considered when undertaking post-merger assessments.²⁵⁴ These grounds are whether the approval was obtained on the presentation of false or fraudulent evidence, and the conditions on the basis of which the approval was obtained are not fulfilled.²⁵⁵ These provisions limit the scope of post-merger assessment to fraudulent events and to the preconditions set under pre-merger approval.

However, merging firms may have a detrimental effect on the market even if they secure approval without any precondition to its effect. In the e-commerce context, a given platform having

²⁵³ Trade Competition Proclamation (n210) Art. 13.

²⁵⁴ Merger Directive (n245) Arts. 27 - 29;

²⁵⁵ Ibid.

considerable amount of capital may merge with a smaller platform having innovative ideas. Approval may be issued automatically since it is very hard to predict how profitable will the acquired innovation be. But the merged e-commerce platforms may become dominant in a short period of time using such innovative ideas. Therefore, post-merger assessment should not be limited to the aforementioned two grounds. It may be hard to capture to set precondition at the time pre-merger assessment was undertaken. But overall anticompetitive scenarios that emerge after merger should be taken in to account. When assessing merger, due care must be taken not to fall under the ambit of abuse of dominance assessment. Post-merger shall be assessed within the scope of the effect merger has brought in the market upon absence of precondition(s) which should have been set.

3.3.4 Vertical Restraints

The Trade Competition Proclamation does not clearly address the issues of vertical restraint.²⁵⁶ It rather provides standards that should be considered when determining vertical restraint. Vertical restraint is a given restraint the manufacturers or suppliers impose on wholesalers or retailers as to distribution or price of the product.²⁵⁷ The Draft Trade Competition Proclamation introduces an exemption clause under which business person(s) may apply to the authority to be exempted from sanction of vertical restraining by justifying the reason.²⁵⁸ Moreover, the Draft Trade Competition Regulation stipulates conducts that constitute vertical restraints and justifiable economic reasons. These are exclusion or restriction agreement on distribution sales channel, or territory, advertising and setting quota on sales, goods and services promotion.²⁵⁹ It provides justifiable grounds such as necessity, aversion of inefficiency, technical feasibility and other aspects of production or their distribution.²⁶⁰ The Draft Anti-competitive Agreement Directive elaborates conducts that are considered as vertical restraints with justifiable economic reasons. These are agreements as to sole distribution, exclusive distribution, exclusive procurement, and restriction to buy or to produce competing products.²⁶¹

²⁵⁶ See Trade Competition Proclamation (n210) Art. 7(2(a)).

²⁵⁷ OECD, 'Glossary' (n115).

²⁵⁸ Draft Trade Competition Proclamation (n223) Art. 8(4).

²⁵⁹ Draft Trade Competition Regulation (n219) Art. 16(2).

²⁶⁰ Ibid, Art. 16(3).

²⁶¹ Draft Directive on Implementation of Anticompetitive Agreements Provisions (2019), Art. 26 cum. Art 23(2).

Overall, the legal framework for vertical restraint is inconsistent and incomprehensive. Those defining elements which have to be incorporated under the Trade Competition Proclamation or Regulation are inserted in the Draft Anticompetitive Agreement Directive. Details that needed to be set out under the Draft Directive are inadvertently provided under the Draft Trade Competition Regulation. Redundant and unstructured provisions such as justifiable economic reasons overshadow what is objective vertical restraint is and what is not.²⁶²

The aforementioned vertical restraint provisions can regulate issues that arise in e-commerce. However, there are still key issues not covered by the Trade Competition Proclamation and relevant draft legislations. First, the Trade Proclamation and draft legislations stress on technological gain and other efficiency-based factors.²⁶³ In so doing, these provisions allow for vertical restraint to promote technological gain and efficiency. On the other hand, an advent of e-commerce, which uses fintech tools, by itself is a technological gain and promotes efficiency on many levels. However, relevant trade competition provisions are vague as they do not limit the scope of technological gain and efficiency. This will in turn allow for e-commerce platforms to exploit market under the pretext of promotion of technological gain and efficiency.

Second, the advent of e-commerce platforms would create a disruption on incumbent wholesalers and retailers in the market where a manufacturer may directly offer its product to consumers. It would substantially drive out intermediaries out of market and weaken competition. As noted above, the Merger Directive incorporates disruption on demand and supply line as a major factor to be considered when assessing merger effect.²⁶⁴ Similarly, disruption on the value chain and distribution line of incumbents should be considered under vertical restraints.

Third, relevant provisions on vertical restraints are two dimensional. In other words, they only regulate and address the vertical restraints between upstream and downstream market channel

²⁶² cf. Draft Trade Competition Proclamation (n223) Art.30, Draft Trade Competition Regulation (n219) Art. 16 with Draft Anticompetitive Agreements (n261) Arts. 23(2), 26, and 34 - 37.

²⁶³ See, e.g., Trade Competition Proclamation (n210) Art. 7(2(a)).

²⁶⁴ Merger Directive (n245) Art. 20(E).

within a single market. However, the emergence of e-commerce itself adds third dimension of market channel. Therefore, other than vertical restraints between single upstream and downstream market channel, a single incumbent can play vertical restraint between offline and online market at the same time. For instance, in ‘dual pricing’ mechanism, a manufacturer may incentivize offline wholesalers or retailers for their pre-and-after sell physical services.²⁶⁵ This will affect the online platforms as it exposes them for high price competition without having any incentive in their sell or physical delivery. It further weakens and diminishes online trade as retailers prefer to stay in offline markets to avoid high price competition. Therefore, competition legislation should consider the interrelationship between offline and online markets and anticompetitive impacts they have against one another, specifically vertical restraints and their effects.

3.3.5 Horizontal Restraint

According to the Trade Competition Proclamation, horizontal restraint is concerted practice(s) or decision(s) or agreement(s) made between business persons to fix purchasing or selling price or any other trading condition(s), collusive tendering or dividing market by allocating customers, supplies, territories or specific types or goods or services.²⁶⁶ As per this law, a horizontal agreement becomes anticompetitive when such an agreement outweighs technological efficiency or other pro-competitive gains.²⁶⁷ It further defines ‘agreement’ and ‘concerted practice’ as mutual understanding which is undertaken in any form, whether or not having legal effect²⁶⁸, and cooperative conduct of business person which has no feature of agreement and done to substitute individual activity respectively.²⁶⁹

In terms of horizontal restraint, there are a number of explicit and tacit horizontal restraints that arise in e-commerce. Among these, key horizontal restraints are ‘hub-and-spoke’ and ‘most favored clause. Hub-and-Spoke occurs when a given third party or owner of a group company manipulates its customers or firms under its control to adopt similar price or other similar

²⁶⁵ OECD (n72) 21.

²⁶⁶ Trade Competition Proclamation (n210) Art. 7(1(b)).

²⁶⁷ Ibid, Art.7(1(a)).

²⁶⁸ Ibid, Art. 7(3).

²⁶⁹ Ibid, Art. 7(3).

conditions.²⁷⁰ Customers or users may not be aware of the conduct or may implicitly agree to its effect. The hub-and-spoke may also be facilitated through use of pricing algorithm under which an automated computer system adopts similar pricing with a competing product.²⁷¹ The adoption of similar price will in return triggers horizontal restraint.

Similarly, most favored clause (also known as parity clause) triggers anticompetitive cartels, either intentional or tacit, when a promise by one party to treat a buyer as favorably as the other party treats its best customer tends to adopt similar pricing.²⁷² For instance online hotel booking service may undertake to offer the same price or package other competing firm(s) offer to their prime customer. This will in turn give rise to tacit adoption of similar pricing.

Broad meanings given to agreement and concerted practice under the Trade Competition Proclamation avoid ambiguity that arise as to the ‘scope’ of agreement and ‘concerted practice’. However, there are still gaps left unaddressed under the Trade Competition Proclamation and relevant draft legislations. First, even though the scope of agreement and concerted practices are provided, an overall reading of these provisions clearly shows that they are still intention-based cartels. In order to prove the existence of a cartel under trade competition legislations, parties have to have intention to undertake cartel whether it is oral or contractual or legal or illegal. As noted above, parties may adopt similar price tacitly through facilitation of computerized algorithm or most favored clause or hub-and-spoke arrangement.

Second, in the case of hub-and-spoke cartel, the person causing such cartel may not be a party to the agreement. It can be a third-party manipulating price or determining the conduct which gives rise to tacit or explicit cartel. However, the Trade Competition Proclamation and draft bills confine horizontal restraint into agreement(s) between business persons or association of business persons or unified or cooperative conducts.²⁷³ Therefore, the trade competition provisions cannot address tacit horizontal restraints that occur without any form of agreement and intention to its effect.

²⁷⁰ Ezrachi and Stucke (n4) 1788.

²⁷¹ Ibid.

²⁷² Akman (n144) 781.

²⁷³ Trade Competition Proclamation (n210) Art. 7 ((1)(3)).

3.3.6 Competition in E-commerce Marketplaces and the Current Institutional Framework

The current institutional framework relating to competition involves regulation of market competition, investigation, and adjudication. To carry out these activities, the Trade Competition Proclamation establishes the Ethiopian Trade Competition and Consumer Protection Authority.²⁷⁴ The Authority has judges, investigative officers, prosecutors and different necessary staff to carry out its functions.²⁷⁵ The Authority is given broad powers such as organizing a judicial organ to investigate, prosecute and adjudicate issues arise out of trade competition and consumer protection.²⁷⁶

Even though the Authority is given autonomous power to deal with trade competition issues, the establishment of Federal Attorney General has taken away the prosecution mandate of the Authority.²⁷⁷ Mr. Yibeltal Yimer complains that transfer of prosecution power has deprived the prosecution autonomy given to the authority.²⁷⁸ This further puts the autonomy of the investigation power of the Authority in question and likely to exacerbate the gap of expertise on competition, specifically with respect to the novel anticompetitive conducts that arise in e-commerce. This is because the prosecutors of the Authority are believed to have more experience or exposure to competition issues comparing to the General Attorney prosecutors who used to engage in criminal investigation and prosecution. Adding to that, e-commerce introduces novel anticompetitive conducts which need extra expertise or skill on commercial related subjects. Therefore, the snatching of prosecuting power from the Authority creates gap with regard to building uniform structure of skilled human resource within the autonomy of the Authority.

Furthermore, overall activities of the Authority, especially with regard to judicial organs, there is no specific provision nor regulation or directive which stipulates the standard of competency to be considered when hiring judges, investigators, prosecutors and key supporting staff. The establishment of a separate Authority indicates special attention given to the market competition regulation. It is also inevitable that the Authority needs experts to carry out investigation,

²⁷⁴ Ibid, Art. 27.

²⁷⁵ Ibid.

²⁷⁶ Ibid, Art. 30 cum. Arts.35, 36 and 37.

²⁷⁷ Federal Attorney General Establishment Proclamation, Federal Negarit Gazeta, Proclamation No. 943/2016, Art. 22(6) cum. Arts. 6(3(a)(e)) and 4((a) (c)).

²⁷⁸ Mr. Yibeltal Yimer, Investigation Officer/Prosecutor at ETCCPA, Interview held on 09 July, 2020, at 2:40 P.M.

prosecution and adjudication of competition issues. On top of that, the advent of e-commerce introduces various anticompetitive conducts which are complex, and require specialty in understanding the legal consequence that arise out of those conducts. According to Mr. Getinet Ashenafi and Mr. Kidane Tsegaye, most of the authority's judges, investigators, prosecutors are law graduates with little or no specialty in the field of competition law, specifically, with no trainings of e-commerce related subjects.²⁷⁹

The Trade Competition Proclamation confines the role of the adjudicative bench to take administrative measures and determine anticompetitive conducts based on already set rules under Part Two of the proclamation and other relevant laws.²⁸⁰ Furthermore, the Trade Competition Proclamation states that civil procedure [and]/or criminal procedure may be used when conducting adjudications.²⁸¹ However, this limits the interpretation discretion of adjudication judges by using cases and precedents. Giving interpretation power to the adjudicative body has a significant role in making the legal provisions more flexible to keep up with new developments which are common in the digital environment. Progressive case law (precedent) would contribute to the development of the law by narrowing the gaps in laws and guidelines dealing with the novel anticompetitive conduct that arise in e-commerce.²⁸² Since one of the relevance of establishing a separate adjudicative body is to confer independence and for efficient exercise of competition regulation, giving interpretation power to adjudicative bench and/or appellate tribunal will enable the authority to control and regulate novel anticompetitive maneuvers that routinely emerge in e-commerce marketplaces.

3.4 Conclusion

In Ethiopia a number of policies and strategies such as ICT policy, Digital Transformation Strategy, Home Grown Economic Reform Agenda and similar policies are introduced. This has been accompanied by implementing pieces of legislation such as the E-transaction Proclamation and various draft bills. This chapter examined whether and the degree to which current Ethiopian laws and policies address issues of competition in emerging e-commerce marketplaces.

²⁷⁹ Mr. Ashenafi, (233); Mr. KidaneTsegaye, Adjudication Bench Coordinator at ETCCPA, Interview held on 07 July, 2020, at 08:50 A.M.

²⁸⁰ Trade Competition Proclamation (n210) Art. 32 (1((a)(b)) (2)) cum. Art. 42.

²⁸¹ Ibid, Art.41.

²⁸² Sonia Jozwiak Gorny and Magdalena Jozwiak, 'E-commerce and EU Competition Law' in Arnlod R. Lodder and Andrew D. Murray (eds), *EU Regulation of E-commerce* (Edward Elgar Publishing, 2017) 318.

This chapter demonstrated that novel e-commerce issues such as control of data, net neutrality, indirect network effect, disruptive innovation, free offer of product and their anticompetitive effect, disruptive effects of e-commerce on incumbents are not fully addressed under the existing legal framework of relevant laws, including current and draft competition law instruments. It is also showed that most of these laws do not appear to have e-commerce marketplace in mind. Moreover, this chapter indicated that Ethiopian relevant competition law falls short of attending to the complexities of e-commerce market competition. This is because most of the aforementioned issues are non-price factors and tacit by their nature. In certain circumstances, these factors also occur in multi-sided market which further complicates the regulation of these novel e-commerce anticompetitive conducts.

Chapter Four

Conclusion and Recommendations

Conclusion

The advent of e-commerce brings about different competition concerns. Flexibility, innovation-based market operation, non-price competition such as control of the Big Data and its algorithm, network effect (both direct and indirect), free offer of products, disruptive effect through innovation, wide geographical coverage at lower or with no cost, and multi-sided markets have brought about novel competition regulation challenges.

The policies and strategies which are introduced under different topics and legal instruments clearly show that Ethiopia is bound for free market economy. This sheds the light on the development of various instruments in line of free market economy including the promulgation of the competition law. It is also a promising factor to create conducive environment for the prospective e-commerce marketplaces and its market competition regulation.

Various legal instruments such as the Civil Code, Commercial Code, Criminal Code and Communications Service Proclamation have attempted to address competition issues. Apparently, the Trade Competition Proclamation is a specific piece of legislation that addresses market competition issues. The Merger Directive is also issued to provide for implementation of merger application. In addition, numbers of draft legislations are in progress.

This thesis critically examined the legal instruments indicated above. It demonstrated that the general provisions which are stipulated to regulate market competition can still address and regulate e-commerce market competition. This is because each anticompetitive conduct may not change their feature no matter what the market channel is.

However, there are still loopholes that remain unaddressed. The competition concerns over factors such as control of data, indirect network effect, net neutrality, multi-sidedness of few e-commerce market, disruptive effects of arrival of e-commerce in market, and free offer of products and their anticompetitive effects are not fully addressed. Apparently, limited case law development discretion and lack of strong legal empowerment of the Authority with regard to expertise and skill is also another gap of the competition law. The legal reforms and

incorporations of various standards and factors have major significance to the regulation of e-commerce marketplaces. However, the Ethiopian relevant competition law does not adequately address the factors arise with the advent of e-commerce marketplaces.

Recommendation

The Competition law is a major legal instrument that oversees market competition and its efficient outcomes. As shown in this thesis, the advent of e-commerce has both efficient and anticompetitive effect. Therefore, comprehensive and proactive competition should be designed to catch-up with flexible and complicated anticompetitive maneuvers arise in e-commerce. Specifically, Ethiopian law should consider the following factors and measures;

- With flourishing of e-commerce marketplaces in Ethiopia, it is vital the Ethiopian competition legal framework explicitly address competition aspects of e-commerce;
- Disruptive innovation can create new value chain and supplant the business model of incumbent. It is an ambiguous factor that confuses with technological gain and sustaining innovation which are meant to renovate the business activities. Disruptive innovation has anticompetitive effect on incumbents by creating new market channel and new value chain. Therefore, competition laws should provide delineating line between these concepts and design legal framework which detect disruptive effects of e-commerce.
- In e-commerce, non-price competitions such as control of data, network effect (both direct and indirect) and free offer of products can be used as key inputs of business model. Therefore, the competition legislations should include such non-price factors as tools of assessment for different anticompetitive conducts. Ethiopian competition law should also consider their overall effect and anticompetitive outcomes subjectively.
- Multi-sided market is more common in e-commerce. Therefore, Ethiopian competition law should clearly provide what standards to be followed and how they should be assessed when there are separate value chains across each market side with in single e-commerce platform.
- In terms of institutional legal framework, the Authority's adjudicative bench should have broader legal interpretation autonomy to interpret and develop case law to be used as a precedent. The E-commerce brings multiple novel subjects in to market competition.

Therefore, the competition law should equip the authority with sufficient and flexible legal autonomy to enable them act proactively.

- Generally, due to global nature of e-commerce, those who are dominant in global market have significant effect on small scale and emerging platforms in Ethiopia. Therefore, more attention should be given to strengthening the authority's autonomy and investigation capacity to enable it detect potential anticompetitive maneuvers. Apparently, anticompetitive conducts arise out of the Big Data can also be detected by controlling and collecting Big Data. Therefore, competition laws should back the authority to have 'data access immunity' to collect, analyze and assess relevant data in order to predict and control anticompetitive conducts arise in e-commerce marketplaces.

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Annex I

Interview guide 1

Interview Guide Questions to Officers in the Ethiopian Trade Competition and Consumer Protection Authority

I, Yohannes Mebrate, an LL.M Student in Debre Berhan University undertaking thesis titled ‘Electronic Commerce and Competition Regulation Under Ethiopian Law’, kindly request to inscribe your answer(s) for the following interview questions. I am grateful for your kind cooperation taking your time to respond to the interview.

- Name: _____ (You can leave it unfilled)
- Official Position or Responsibility:

Interview Questions:

1. As one of the participators on trade competition legislations drafting process, has e-commerce market competition considered?
2. What are the qualifications and specialties of investigators, judges and prosecutors of the Authority?
3. What are the criteria and qualification(s) required when hiring investigators, judges and prosecutors of the Authority?
4. Do you think the competition law address market competition issues arise in e-commerce?

5. Do you think the legal framework for the Authority enables to detect the anticompetitive conducts arise in e-commerce?

Annex II

Interview Guide 2

Interview Guide Questions to Officer in the FDRE Minister of Innovation and Technology

I, Yohannes Mebrate, an LL.M Student in Debre Berhan University undertaking thesis titled ‘Electronic Commerce and Competition Regulation Under Ethiopian Law’, kindly request to inscribe your answer(s) for the following interview questions. I ma grateful for your kind cooperation taking your time to respond to the interview.

- Name: _____ (You can leave it unfilled)
- Official Position or Responsibility:

Interview Questions:

1. Do you think the Electronic Transaction Proclamation and Draft Electronic Transaction Regulation address the issue of e-commerce market competition?