



FAIR TRADE PRACTICES OF PUBLIC ENTERPRISES UNDER  
ETHIOPIAN LAW: THE LAW AND PRACTICES; WONDO  
TRADING AND INVESTMENT COMPANY IN FOCUS

BY

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## DECLARATION

The thesis entitled, “**Fair Trade Practices in light of Public Enterprises under Ethiopian Law: The Law and Practices; Wondo Trading and Investment Company in Focus**” is my original work never been presented for a degree in any university before and any materials used in this thesis by way of reference are properly acknowledge.

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## Advisors Approval Sheet

This is to certify that the thesis entitled “**Fair Trade Practices in light of Public Enterprises under Ethiopian Law: The Law and Practices; Wondo Trading and Investment Company in Focus**” submitted in partial fulfilment of the requirements for the LLM Research Proposal in School of Law and Governance Studies specialization in Commercial Law, the graduate program of the school of Law and Governance, and has been carried out by **Eyasu Godana Gosoma** under my supervision. Therefore, I recommend that the student has fulfilled the requirements and hence hereby can submit the thesis to the school.

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## **Abstract**

*This study was geared to analyse the fairness of the trade competition among private entities and public enterprises. To achieve this objective, the attempt was made to examine theoretical and legal frameworks, the fairness of the laws and competition practice by utilizing qualitative research design with predominantly doctrinal legal research method. This has been accompanied by documentary analysis and key informant interview as data collection strategy. The study has found out, market based view, resource based view, trusteeship principle, and survival and growth of business principle and economic efficiency theory as theoretical foundation of the competition and competition laws among which economic efficiency is basis for Ethiopian competition laws. Besides, various national laws are identified as legal frameworks governing competition in Ethiopia. Study has also revealed that, the legal provisions governing competition appears fair among private entities and public enterprises. However, study has disclosed practical fairness of competition among private commercial entities public enterprises is inconceivable due to couple of defects noticeable; among which loopholes regarding the very applicability of relevant law, and lack of implementation regulations; and executive intervention and inequality of playing field as critical legal and practical factors challenging fairness of competition respectively among private commercial entities and public enterprises. Accordingly, study has concluded that impartial law enforcement is doubtful regarding public enterprises and pillars of fair competition are being tainted by different legal and practical factors. Therefore, researcher has recommended that, House of Peoples Representatives to revisit relevant law and avoid ambiguous phrase and resulting subjectivity to different interpretations and Council of Ministers and relevant Ministry to issue regulation and directives and public notices respectively and call for impartial enforcement of competition laws even handily and government's reduced engagement in the economy.*

# CHAPTER ONE

## Introduction

### 1.1. Background of the study

Fair trade practice has many fold purposes in developing economies like Ethiopia. These roles could be explainable in terms of ensuring consumer protection<sup>1</sup>and bringing economic efficiency.<sup>2</sup> These and other purposes, however, could only be achieved when the traders and trade organizations were even-handedly governed with fair and just laws with impartial law enforcing agents.

Even handed law implementation and impartiality of the enforcing agents is questionable with regard to public enterprises. This is signified in different instances like; public enterprises' dominance of economic policy making<sup>3</sup> that has tainted fair competition in favour of them<sup>4</sup> as some writers have alleged. On top of that, competition authorities may not have impartiality to enforce relevant statute over the Public enterprises in Ethiopia. In this connection, World Economic Forum noted:

*Public enterprises which are not subject to the same regulatory regimes as private firms can lower their operating costs. This can entail: (i) simplified procedures to obtain licences or permits; (ii) granting of special rights to extract resources; (iii) exemptions for application of general laws and regulations; (iv) exemptions from regulatory compliance (e.g. environmental or technical specifications); (v) exemptions or non-compliance with information disclosure requirements; (vi) unjustified denial of approvals to potential competitors; (vii) exemptions from building permits or zoning regulations; and, (viii) obtaining of grandfather clauses.<sup>5</sup>*

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<sup>1</sup> Alemayehu Fentaw, "Ethiopian Unfair Competition Law, The University of Oxford Center for Competition Law and Policy". 1-2. See also Tesema Elias, on infra note 24. 83, 94

<sup>2</sup> COMESA Competition Commission, „consumer guide to the COMESA Competition Regulations, (2015)“. See also Tessema Elias, "Gaps and challenge in the enforcement framework for consumer protection in Ethiopia (2015)", Mizan Law Review, Vol. 9, No.1, <http://dx.doi.org/10.4314/mlr.v9i1.3>. 83, 86

<sup>3</sup> Elias N. Stebek, "Deliverables and Pledges under Ethiopian Trade Competition Law: The Need for Private Sector Empowerment and Enablement, Vol. 11, No. 1, (Mizan Law Review, 2017)". 32,35. DO: <http://dx.doi.org/10.4314/mlr.v11i1.2> 35

<sup>4</sup> Yokamo Yoye, Assessing the Effectiveness of Consumer Protection Law: The Law and Practice; LLM Thesis, (2019), Hawassa University, Hawassa, Ethiopia

<sup>5</sup> World Economic Forum, The 15 Initiative Strengthening the Global Trade And Investment System

On top of that, fair trade practices presuppose the existence of fair competition and this is believed to be effectively achieved and maximized through competition among sellers.<sup>6</sup> Despite this assumption, economic competition among business persons has remained largely low<sup>7</sup>. On the contrary different studies evidenced that there are couple of anti-competitive practices like price fixation, or hoarding and price gouging or exclusive distribution arrangements<sup>8</sup>; entry barrier, bid rigging, and market sharing<sup>9</sup> that adversely affect consumers are largely the reality on the ground in the Ethiopian competition land scape<sup>10</sup>.

In this connection, public enterprises have remained in command of quantum of capital that significantly manifest economy's dependence on such enterprises<sup>11</sup>. Some of the essential services such as electricity, telecommunication, shipping and logistics, transport and the like mainly remained under distribution by public enterprises<sup>12</sup> in Ethiopia. This has the effect of shielding them from fierce competition. So, its effect on competition need to be studies since the existence of public enterprise will never disappear<sup>13</sup> although there is new move towards privatization.<sup>14</sup>

The vein of fair competition may be affected by the government intervention on the side of public enterprises. This could be manifested in terms of the system they administered. With this regard majority of them were administered by the board headed by high government official for instance Ethio-Telecom, Commercial Bank of Ethiopia, South Water Works Enterprises, Wondo Trading and Investment Company etc. These Public enterprises are formed to undertake manufacturing, distribution, service rendering or other economics and related activities with a view to selling goods and services.<sup>15</sup> These activities are undertaken

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for Sustainable Development: Governments as Competitors in the Global Marketplace: Options for Ensuring a Level Playing Field (2016) 5 Available at: <http://www.oecd.org/daf/inv/investment-policy/CleanEnergyInfrastructure> Retrieved on: December 23<sup>rd</sup> 2019

<sup>6</sup> Alemayehu Fentaw, "Ethiopian Unfair Competition Law, The University of Oxford Center for Competition Law and Policy". 1-2. See also Tesema Elias, on infra note 24. 83, 94

<sup>7</sup> Kahsay G. Medhn, "Ethiopian Competition Law: Appraisal of Institutional Autonomy, vol.5, No.3 (2016). 77, 77 ISSN 2278 – 0211" available at: [www.ijird.com](http://www.ijird.com) Accessed on: Nov.14/2020

<sup>8</sup> Tessema Elias, „Gaps and challenge in the enforcement framework for consumer protection in Ethiopia, Vol. 9, No.1, (Mizan Law Review, 2015)". 83, 84 Available at: <http://dx.doi.org/10.4314/mlr.v9i1> 83, 95

<sup>9</sup> AHa ECoPA, Competition Scenario in Ethiopia, (2006). 33

<sup>10</sup> Yokamo (n 4) 7

<sup>11</sup> ..... Fair trade act, (2017)

<sup>12</sup> Ibid

<sup>13</sup> Massimo Florio, the Return of Public Enterprise. Working Paper N. 01/2014 (2014) 2 Available at: [www.csilmilano.com](http://www.csilmilano.com) Accessed on: December 23<sup>rd</sup>, 2019

<sup>14</sup> See article 5 (1) and also the Preamble part of Proclamation No. 412/2004 and preamble part of the Public Enterprises Law Proclamation No. 25/1992 par 3

<sup>15</sup> See article 2(1) of the Public Enterprises Law Proclamation No. 25/1992

for gain. This confers on them “commercial nature” making them subject to the rules of the market.<sup>16</sup>

Wondo Trade and Investment Share Company were formed as one of the subsidiary companies of SERADF in 1986 E.C. It was established with the aim of bringing a fundamental socio economic transformation in SNNP Regional State.<sup>17</sup> Despite the fact that the company is established as an endowment, in fact it is proved to be profit making public enterprise.<sup>18</sup> This is very true when one closely looked in to the activities and the resource the company is mobilizing. Currently, the company is operating as a government development entity being administered by the board headed by regional high government official with the objective of filling the market failure by engaging in import export.<sup>19</sup> The Company import cash register machine, water pumps, industrial products, edible oil, power generators, tyres, car battery and etc. It exports, nug, sesame, coffee, and other agricultural products. These are commercial activities. Besides, the company presently owned over billion Ethiopian Birr.<sup>20</sup>

Another important indicator that shows the company is public enterprise is the fact that the company fits best with the characteristics of public enterprise much far than endowment. For instance public enterprise needs to be owned, managed and controlled by government; funded by government, welfare oriented, concentrate on public utility services, responsible to government and observe government formality.<sup>21</sup> These are characteristics that one may notice with Wondo Trading and Investment Company. This is because the SNNPR state is owned and controlling it. It also pledged to fill market failure by providing basic goods and services.

Regarding accountability issue, although government claimed that it is independent from political interference, government may engage in two ways. One is the board is headed by high government official and political appointee as well as politically accountable person. Secondly, in the instance where there is loss in competition, regional government subsidies

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<sup>16</sup> <https://www.ajol.info/index.php/mlr/article/download/117544/107101/0>

<sup>17</sup> Bafana Bafana, (2018), SERADF Corporate & Companies: Accounting and Financial Policy and Procedure Manual

<sup>18</sup> Kibre Megos Belete, The state of competition and the competition regime in Ethiopia: Potential gaps and Enforcement challenges; published 2015, website [www.ossrea.com](http://www.ossrea.com)

<sup>19</sup> Interview with Ato Anteneh Abera, Project Coordinator of Wondo Trading and Investment Company; conducted on November 23, 2019 at Wondo Trading and Investment Company office, Hawassa

<sup>20</sup> Ibid

<sup>21</sup> ----- business studies, MODULE -2 Business Organisations, 157

the company. On top of these, a government higher official controls them at arm's length and taking care of through the back door. This means that government has vested interest and hence there is government interference. Thus, the effect of this interference need to be studied in light of principles of fair competition and enforcement of competition law.

## **1.2 Statement of the Problem**

Laws declare that public enterprises should operate in a competitive environment<sup>22</sup>. Despite this allegation, the fairness of public enterprises' competition begs question. This is because firstly, public enterprises have remained sole provider of some essential services in Ethiopia off competition.<sup>23</sup> Secondly, government's heavy handed intervention on the side of public enterprises. This intervention takes effect in appointing and dismissing higher officials, in hiring and firing of CEOs', in controlling its operation and injection of capital at the time of loss in competition as well as at the time of law making and law enforcement in the case involving public enterprises.<sup>24</sup> Although the pledge in the laws is for the necessity to change the role and participation of the state in the economy and the need to encourage the expansion of the private sector<sup>25</sup>, it did not come in to being yet; rather one can witness the establishment of mega public enterprises one after another whose place in the economy can be easily felt.<sup>26</sup> These enterprises are operating in the fledgling free market podium of Ethiopia.

Thus, based on the above statements of problem, study has strived to achieve following general and specific objectives.

## **1.3 Objective of the study**

### **1.3.1 General objective**

Despite the fact that Ethiopia had recently taken positive steps towards protecting unfair competition by issuing comprehensive laws, in place of different provisions scattered in different body of laws, justness of legal provision relating to fair competition in light of public enterprises still remained as an area of investigation. Fair trade competition can only

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<sup>22</sup> Fair Trade Practice and Consumer Protection Proclamation No. 813/2013

<sup>23</sup> ..... Fair trade act, (2017)

<sup>24</sup> Adam Adem Anyebe, A reflection on public enterprise sector in Nigeria (2015) Vol. 4 No. 4 348

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<sup>25</sup> See the Preamble of Privatization and Public Enterprises Supervising Authority Establishment Proclamation No. 412/2004.

<sup>26</sup> Kibre, (n 17)

be determined by assessing whether the law achieved its intended objectives. One of the major objectives of Trade Competition and Consumer Protection law is to guarantee protection to business institutions as well as consumers. Unfortunately, research had been scant yet on the law and practices in public enterprises. Thus, the overall objective of this research is to analyse the trade competition in light of the business environment of public enterprises in Ethiopia.

### **1.3.2 Specific objectives**

The researcher has tried to address the following specific objectives:

- ✓ To examine theoretical and legal frameworks governing competition in Ethiopia
- ✓ To review the legal provision relating to fair competition;
- ✓ To examine whether competition practices of public enterprises are fair; and
- ✓ To identify legal and practical factors that may affect fair competition among private and public enterprises

### **1.4 Research questions**

The study has tried to answer the following research questions:

- ✓ What are the theoretical and legal frameworks governing competition in Ethiopia?
- ✓ How far just are the laws in regulating competition among private and public sectors?
- ✓ Is the competition practice of the public enterprises fair?
- ✓ What are the legal and practical factors that will affect fair competition among private and public enterprises in competition?

### **1.5 Significance of the study**

Since the study analyses fair competition dimensions both in terms of law and practices, it will offer significant help as a reference for researchers in the area. More over government may utilize it in reforming existing laws. It also tries to play its contributory role in filling gaps and contribute to the existing literature.

### **1.6 Scope of the study**

The scope of this study was limited to analysing fair trade practices in light of public enterprise under Ethiopian law. Among public enterprises, owing to time and budget

limitation, study will focus on Wondo Trading and Investment Company. Substantial part of the study will boil down and rest on the prevalent Ethiopian's laws on public enterprises. Legal and practical aspects will be reviewed.

### **1.7 Limitation of the study**

The researcher, in the course of the study, may face different challenges. Among others, obvious fact that literature resources are scant on the topic, this likely challenge the findings and locating relevant literature materials. This problem will be mitigated by reviewing international literatures on the topic abroad and contextualizing those with our case, shortage of time, lack of knowledge on the part of majority of the participants on the subject matter of the study, fair competition mean may be challenges the researcher may face.

## **1.8 Research Methodology and Methods**

### **1.8.1 Methodology of the study**

To achieve the above objectives, the researcher has followed qualitative methodology. Qualitative methodology is preferred because the research is basically meant to analyse fairness of public enterprises' competition.

Since the research is legal, predominantly doctrinal legal research method will be adopted. Research will be based on both primary and secondary data. These data will be analysed by way of critical documentary analysis that will be enriched with qualitative narration of the practical aspect.

### **1.8.2 Data collection techniques**

The researcher followed qualitative methodology in gathering data from responsible organs. Qualitative methodologies of documentary and legal analyses and key informant interview as a strategy will be employed to collect data from public business enterprise.

Accordingly, relevant theoretical, legal and policy documents and literature resources will be identified and organized a head of time and properly reviewed. Purposive selection of the participants for non-doctrinal aspect also used to collect data from government institution and public enterprises under study.

In this connection, participants for key informant interview from among Wondo Trading and Investment Company experts and heads and SNNPRS Trade and Market Development Bureau were selected by employing purposive sampling.

### **1.8.3 Source of data**

Study was conducted based on both primary and secondary data. Primary Sources may include laws like public enterprise proclamation no.412/2004, Trade Practice and Consumer Protection Proclamation No. 813/2014, establishing instruments of Wondo Trading and Investment Company and other foreign laws, cases decided by courts, commentaries, guidelines and bilateral investment treaties as well as from twelve key informant interviewees.

Secondary data was gathered via reports, manuals, internal publications, proceedings, conference seminars; data base systems, Journals, articles and internet as well as books for theories and principles.

### **1.8.4 Sampling technique and data gathering instrument**

Data were collected via documentary and legal analysis, interview that has been accompanied by key informant interview. Key informant interview guideline was employed to collect empirical data; because this tool has given the opportunity of accessing reliable information from the first hand source. Interview has been administered with semi-structured form in order to allow addressing emerging questions on the course of interview while at the same time saving researcher from losing focus.

Data were collected through sampling with purposive type of qualitative nature. This sample design was opted owing to its good potential of enabling to locate identified population. Sample Size was taken from the concerned public enterprise authorities and experts as well as some purposively selected officials and experts of relevant bureau.

To this effect, key informant interview had been conducted with four (4) Ethiopian Trade Business Corporation employees and people with managerial positions, three (3) Wondo Trading and investment Company employees and executive officers and five (5) employees and heads of SNNPRS Trade and Market Development Bureau. In sum, all the twelve key informant interviewees had been interviewed.



### **1.8.5 Data analysis techniques**

Data was analysed with narration. As much as possible data analysis had been made immediately after recording and transcription.

### **1.8.6 Ethical considerations**

It is believed that research must be regulated by ethical norms and values, the researcher had used the following obligatory ethical guidelines while conducting the study. These include taking latter from the department of school of law to the study area and the willingness of the participants has been secured beforehand by informing them about the purpose of research. The researcher had held any information in secrete as regards to the identity of the participants.

### **1.9 Organization of the study**

The thesis is organized in four chapters. Accordingly, chapter one described what the problem is and what the researcher intends to do about it. It described the depth and breadth of the problem, its history and what is known and done so far about the problem thereby indicating the knowledge gap; it justifies why this specific study should be conducted and sets objectives to study it.

Under chapter two, general concepts and theoretical basis of fair trade and public enterprises was dealt with. It indicated on which theory the study is based. It reviews pertinent and current theoretical and empirical literature on the subject. It indicates the current level of knowledge attained on the subject including the various alternative views and debates as well as arguments on the matter between key authorities/intellectuals in the field. It involves review of theory and empirical findings from the field concerning the nature of the problem.

Chapter three is devoted to reviewing existing theoretical and legal frameworks of public enterprises and competition in Ethiopia. On top of this, the fairness of the legal frameworks has been examined along with practice. Finally, chapter identified legal and practical challenges affecting fairness of trade competition among private entities and public enterprises.

Lastly, chapter four made brief summary, draw major conclusions and forward based on the findings discussed under chapter three.

## CHAPTER TWO

### General Overview on concepts and theoretical basis of Fair Competition, and Public Enterprises

#### Introduction

In this chapter, general concepts and theoretical basis of fair trade and public enterprises has been discussed. The attempt will be also be made to show on which theory the study is based. On top of that, pertinent and current theoretical and empirical literature on the subject will be reviewed. Besides, different views and debates on fairness of public enterprises' competition as well as arguments on the matter between key authorities /intellectuals in the field will be dealt with. It involves review of theory and empirical findings from the field concerning the nature of the problem which eventually enable the researcher to formulate a conceptual framework for the study.

#### 2.1. General concepts of fair competition and public enterprises

To begin with, the phrase “Fair Competition” is constructed from two words; Fair and Competition. The word “Fair” has been given different meanings, for instance, Black’s Law Dictionary defined Fair as “impartial, just, equitable, disinterested, free of bias or prejudice”<sup>27</sup>. Whereas, competition is given following meaning “[T]he struggle for commercial advantage; the effort or action of two or more commercial interests to obtain the same business from third parties”<sup>28</sup>. Thus, “Fair Competition” is defined as “Open, equitable, and just competition between business competitors”<sup>29</sup>.

Public enterprises are enterprises established under the ownership of the state or public authorities.<sup>30</sup> Nevertheless, since the features of the public enterprises are different, varies definitions has been forwarded.<sup>31</sup>

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<sup>27</sup> Bryan A. Garner, (ed), Black’s Law Dictionary, (9<sup>th</sup> edt, 2009) 674 Thomson Reuters, USA

<sup>28</sup> Ibid 322

<sup>29</sup> Ibid

<sup>30</sup> Tewodros Meheret, (2014), “The Concept and Characteristics of Public Enterprises in Ethiopia: An overview”, Mizan Law Review, vol.8, NO.2; Available at: <http://dx.doi.org/10.4314/mlr.v8i2.3>

<sup>31</sup> Ibid

Accordingly, International Center for Public Enterprises, for instance set down criterion to be full filled for an entity to qualify as public enterprises. Accordingly, entity or bodies need to provide services and at a fee and therefore qualify to be called enterprises.<sup>32</sup> Others equate Public Enterprise as Government Controlled Enterprise (GCE)<sup>33</sup> or “State Owned Enterprise (SOE)<sup>34</sup> .

Likewise, Expert Groups noted entity with the following nature and trait as public enterprise:

*“Any commercial, financial, industrial, agricultural or promotional undertaking – owned by public authority, either wholly or through majority shareholding – which is engaged in the sale of goods and services and whose affairs are capable of being recorded in balance sheets and profit and loss accounts”<sup>35</sup>.*

These enterprises may have diverse legal and corporate forms. Be it departmental undertakings, public corporations, statutory agencies, established by Acts of Parliament or Joint Stock Companies registered under the Company Law<sup>36</sup>.

As per current proclamation<sup>37</sup> defined fair competition negatively. Instead of defining fair trade, it defined Unfair Trade as “any act in violation of provisions of trade related laws. Accordingly, for the purpose of this study, “Fair Competition” means competition in compliance to relevant laws and this will make operational meaning.

When we come to our case, Proclamation No. 25/1992 under article 2(1) defined public enterprises as State or public authority owned companies<sup>38</sup>. Besides this Privatization and Public Enterprises supervising Authority establishment proclamation No.412/2004 under its article 2(2), added wholly state owned companies, however, excluded enterprises for which other supervising authorities were designated. Some of the public enterprises are Ethiopia

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<sup>32</sup> United Nations, (2008), Department of Economic and Social Affairs Division for Public Administration and Development Management, Public Enterprises: Unresolved Challenges and New Opportunities Publication based on the Expert Group Meeting on Re-inventing Public Enterprise and their Management 27-28 October 2005, New York 89

<sup>33</sup> Renalto Mazzoline, “Government Controlled Enterprises” in International Strategic and Policy Decision,” John Wilsey & Sons

<sup>34</sup> Mary M. Shirley “Managing State-Owned Enterprises” World Bank Staff Paper No. 577.

<sup>35</sup> Prahlad K. Basu (2005), “Reinventing Public Enterprise and their Management as the Engine of the Development and n Growth Public Enterprises: Unresolved Challenges and New Opportunities” United Nations, 10

<sup>36</sup> Ibid

<sup>37</sup> Proclamation No. 813/2013 art. 2(9)

<sup>38</sup> See Public Enterprises Proclamation No. 25/1992

electric Utility (EEU), Etho-Telecom, Ethiopia Shipping and Logistics Services Enterprises<sup>39</sup> are few examples of the public enterprises in Ethiopia.

## 2.2. Theories of Fair Trade

The goal of Fair Trade is using trade as a tool for improving the livelihoods of the poorest.<sup>40</sup> It is important for Fair Trade to build on its successful practical ways of working and take a broader strategic approach in order for it to achieve greater impact. Fair trade is about creating market opportunities for producers who would not normally have access to exporting with their own limited resources, so that the resulting business dealings enable producers to make improvements in their lives.<sup>41</sup> On the other hand, Fair Trade is an alternative approach to conventional international trade where, trading partnership aims at sustainable development for excluded and disadvantaged producers<sup>42</sup> through better trading conditions, by awareness raising and by campaigning.<sup>43</sup>

The goals of Fair Trade are improving the livelihoods and well-being of producers by improving market access, strengthening producer organizations, paying a better price and providing continuity in the trading relationship;<sup>44</sup> promoting development opportunities for disadvantaged producers, especially women and indigenous people, and to protect children from exploitation in the production process; raising awareness among consumers of the negative effects on producers of international trade so that they exercise their purchasing power positively; set an example of partnership in trade through dialogue, transparency and respect; campaigning for changes in the rules and practice of conventional international trade; and protecting human rights by promoting social justice, sound environmental practices and economic security.<sup>45</sup>

With the view of realizing these goals, fair trade has its base one or more of the following theoretical reasons. These approaches are briefly presented as follows:

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<sup>39</sup> Tewodros (n 29), 333, 333

<sup>40</sup> Andy Redfern and Paul Snedker, (2002), Creating Market Opportunities for Small Enterprises: Experiences of the Fair Trade Movement; SEED Working Paper No. 30

<sup>41</sup> Ibid

<sup>42</sup> <https://hnp.org/catholic-relief-services-sells-eco-palms-for-palm-sunday/> Accessed on February 12<sup>th</sup>, 2020

<sup>43</sup> Ibid

<sup>44</sup> <https://fairtradeforall.weebly.com/> Accessed on February 12<sup>th</sup>, 2020

<sup>45</sup> Ibid

### **a. Alternative/parallel trade systems**

The holding of the alternative/ parallel trade approach for Fair Trade is that, fair trade was born out of politics as much as it was born out of business. This indicates that it was a political reaction to the rise of free trade, capitalism and the power of the TNC. Therefore not surprising that the dominant model of Fair Trade has been the parallel or alternative supply chain approach.<sup>46</sup>

Developing the alternative approach to trade requires buying directly from and building relationships with producers and trading with individual groups.<sup>47</sup>

### **b. Empowerment approach to Fair Trade**

Empowerment approach to Fair Trade holds that, the key goals of Fair Trade is empowerment of producers; where if the producers own the means of production and have some degree of representation although not necessarily control over the business.<sup>48</sup> Thus the central tenet of the approach is not important to prescriptions and prohibitions to ensure fair trade. Rather, for empowerment approach, just empower producers, that will ultimately bring fairness of trade.

### **c. Fair Trade as a by-product of Social Development**

Fair trade as a by-product of social development displays that, Fair Trade comes out of a specific and direct response to poverty and disaster relief.<sup>49</sup> It is also believed that fair trade is based in income generation activities of producers supported by Southern NGOs and is primarily around crafts production.<sup>50</sup> Thus, it was crafts focused and in many cases received significant subsidy from the development organizations and donors as well as structured such that there was no clear boundary between the development activities and the trading activities.<sup>51</sup>

This theory has the impact of assuring Fair Trade in terms of providing access to markets for poor producers for instance in Bangladesh.<sup>52</sup> So the donor support has stimulated the

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<sup>46</sup> ibid

<sup>47</sup> Ibid

<sup>48</sup> Ibid 24

<sup>49</sup> Ibid 25

<sup>50</sup> Ibid

<sup>51</sup> Ibid

<sup>52</sup> The mid-term review of the DFID funded Bangladesh Export Marketing Assistance Programme highlights both growth and an increasing commerciality of income generation activities of the large NGOs. Some like

development of jobs and businesses. How these businesses compete longer term in the market will be interesting to see; but what we can say is that Fair Trade has enabled income generation projects to grow and develop.<sup>53</sup>

#### **d. The Rules based approach to Fair Trade**

The rule-based approach to Fair Trade was developed with the view to provide better opportunity for any business to take part fairly in Trade activities. It operates in two specific ways; first it sets standards and certification process for the Fair trade. Second, it licenses National Initiatives to endorse products with a consumer mark.<sup>54</sup>

The process of ensuring fair trade commences with producers where producers who meet Fair trade criteria in a regularly updated register, distributed to Fair trade importers.<sup>55</sup> Fair trade importers are traders authorized to participate in the Fair trade scheme by signing an importer contract.<sup>56</sup> This importer contract governs the way that trade works and gives the right of inspection to prove that the rules have been adhered to.<sup>57</sup>

Having the bearings of abovementioned theories in mind let proceed to discuss briefly about the motives and purposes of establishing public enterprises.

### **2.3. Motives & Purposes of the Establishment of Public Enterprise**

There are fundamental reasons that make having large public enterprise almost inescapable in the developing countries.<sup>58</sup> These reasons may involve, firstly, the rate of private capital formation is too slow and inadequate for many purposes.<sup>59</sup> This practical necessitates government intervention special in the area where private investors are either not willing or not able to launch for the interest of general development.<sup>60</sup> These areas are area that requires provision of public goods and services, for instance public road, public light, etc.

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Aarong (the trading arm of BRAC) and Juteworks have gained mainstream market access and now supply goods to mainstream businesses like Ikea.

<sup>53</sup> Id 41

<sup>54</sup> Ibid 27

<sup>55</sup> Ibid

<sup>56</sup> Ibid

<sup>57</sup> Ibid

<sup>58</sup> Evelyn A. Yeye, (1983), Analysis of the success of public enterprises in Nigeria: An organizational study of the New Nigeria Development Company. Scholar Works at University of Montana Graduate Student Theses, Dissertations, & Professional Papers Graduate School. 8 Available at: <https://scholarworks.umt.edu/etd>

<sup>59</sup> Ibid 9

<sup>60</sup> Ibid

Secondly, the need to spur economic growth, in the light of national priorities, should the private entrepreneurs unable to undertake certain economic activities which they consider as having only marginal profit level.<sup>61</sup>

Thirdly, for the purpose of ensuring political stability in developing nations where foreign investors are shy or reluctant to come and invest.<sup>62</sup> This happens when government enters into partnership with indigenous private sector and attracts foreign partners with the view to promote industries. This may guarantee good faith of the government and enhance the trust of foreign investors.

Fourthly, with the objective of ensuring welfare effect of the development, government may set public enterprises in place.<sup>63</sup> This is in line with new concept of development that dictates true national economic growth which involves increase in per capita and equitable distribution of income.<sup>64</sup> Here one need to take note that, in the economies where government assumes important role, latter is responsible for the general welfare of its citizens and hence owes a fundamental duty to regulate productive activities in the public interest.<sup>65</sup>

Fifthly, government may establish public enterprises for strategic purpose.<sup>66</sup> For instance, government may get involved in the production of arms and armaments and defense materials.<sup>67</sup> Due to national security and survival, these areas of production would not be left to private hands in its entirety.<sup>68</sup>

The sixth reasons may be international comparability.<sup>69</sup> International comparability can sometimes force a government to make some public undertakings, like Airlines, Telecommunication.<sup>70</sup> This is fascinated by the need to participate effectively in international markets in such a way that in compliance to laid down rules and procedures,

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<sup>61</sup> Ibid

<sup>62</sup> Ibid

<sup>63</sup> ibid

<sup>64</sup> Ibid

<sup>65</sup> Ibid

<sup>66</sup> Ibid

<sup>67</sup> Ibid

<sup>68</sup> Ibid

<sup>69</sup> ibid

<sup>70</sup> Ibid 10

as well as the desire to gain recognition and acceptance into international bodies like the United Nations.<sup>71</sup>

Finally, the need to make optimal use of human and material resources may set ground for the establishment of public enterprises.<sup>72</sup> Here public enterprise system provides a generally more rigid and freer authority to hire and fire and thus make employees more committed and responsible to their jobs.<sup>73</sup>

Of course, some country may establish public enterprises to solve its country specific problem by setting in place some criteria. Uganda, for instance, the reasons for the creation of Public Enterprises was dynamic depending on the regime that was making the policy.<sup>74</sup> For example during the colonial 1940s the government gave the weakness of the private sector to make the necessary investments; the needed to plan and control the economic development; the need to foster local entrepreneurship; the need for economic independence; the need to stimulate capital development; and the need to build the required infrastructure as official reasons for the creation of public enterprises.<sup>75</sup>

Aftermath of post-independence first regime of Milton Obote government had established a number of Public Enterprises like; the Produce Marketing Board, the National Housing and Construction Corporation, the National Insurance Corporation, the Coffee Marketing Board, and the Uganda Dairy Corporation.<sup>76</sup> The major reason given then was local economic development catalyzing effect of the Public Enterprise.<sup>77</sup> During the Idi Amin regime, the Public Enterprise was expanded with the need to return the economy to Ugandans as underlying reason.<sup>78</sup>

At the reign Yoweri Museveni in the last quarter of 1980s, government stipulated around six criteria for government's participation in Public Enterprises. These criterions include first, Political criteria: activities like providing information and broadcasting services; second, Security: activities that provide internal and external security for instance oil supply and airlines; third, Essential services: like health and education that cannot be met by the private sector; fourth Natural monopolies: this includes investments requiring large capital

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<sup>71</sup> Ibid 10

<sup>72</sup> Ibid 10

<sup>73</sup> Ibid 10

<sup>74</sup> Ibid 41

<sup>75</sup> Ibid

<sup>76</sup> Ibid 43

<sup>77</sup> Ibid 43

<sup>78</sup> Ibid 43



investment like Utilities and railways; fifth, Environment: preservation and conservation of Uganda's wildlife and natural environment e.g. national parks; sixth, Capital intensive and resource based projects: which requires investments and technology in priority sectors which the private sector is not able to or willing to provide like chemicals, fertilizers, metals, cement; and lastly, for the purpose of ensuring equitable geographical distribution.<sup>79</sup>

In Nigeria, the reasons for establishing the Public Enterprises were shortage of local capital for expansion and technological improvements; control of commanding heights by government to prevent a few elite enriching themselves at the expense of majority of Nigerians; correction of market failure resulting from public monopoly and misallocation of public resources; facilitating regional development through location of public enterprises and their branches; job creation, and provision of social services.<sup>80</sup>

So latter or sooner, one need to take note that, the establishment and the existence of public enterprises are inevitable. In this connection United Nations expert group meeting noted that, *“as long as there is government, there are likely to be Public Enterprises since they actually represent a form of political expression of the economic intention of the government; or sometimes an economic expression of its political intention”*.<sup>81</sup> It also disclosed that Public Enterprise as representative of *“a structural arrangement through which government or other public authorities can make investment for a number of purposes some social other economic or even political”*. The reality is being this, at its par value reasons that justify public investment via public enterprises have been regarded as presence extreme poverty, weak private sector<sup>82</sup>, and others. In fact these reasons are not genuine justifying one; nevertheless, most of them could not be overlooked.<sup>83</sup> And these have enabled Public Enterprise to survive even in the face of severe assault from proponents and economic hardship.<sup>84</sup>

Boiling down the issue to our case, Ethiopia has been establishing public enterprises under the many policy rationales; but mainly to fill the market failure<sup>85</sup>

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<sup>79</sup> Ibid 43

<sup>80</sup> Ibid 44

<sup>81</sup> Id 5, 80

<sup>82</sup> Ibid

<sup>83</sup> Ibid

<sup>84</sup> Ibid 80-81

<sup>85</sup> Public Enterprises Establishing Proclamation No. 25/1992

## 2.4. Trends of the Public Enterprise Formation

The creation of the Public Enterprises is ongoing.<sup>86</sup> Before the wave of privatization, Public Enterprise had been formed through several ways.<sup>87</sup> It could come into being through nationalization be it partial or total, it could be formed by law as a body corporate under a specific statute by way of shareholding by the State or a public authority either in part or whole; or else it could be established by law under company law with some or all of its shares owned by the State or a public authority; it may be formed by state confiscation of private enterprises for instance Uganda and Ethiopia in the 1970's.<sup>88</sup>

Besides, recently Public Enterprises have been formed through the process of public service reform.<sup>89</sup> In recent times, public service reform programs has played significant role in reshaping and reforming the Public Enterprise, for instance Uganda.<sup>90</sup>

Likewise, in Ethiopia, public enterprises come in to existence through various ways; but mostly, public enterprises are formed, merged or dissolved by the decision of the Council of Ministers.<sup>91</sup> There are couples of public enterprises that come in to being through the wave of public service reform. For instance, Omo Sugar Factory, Ethio-Sugar Factory, Kuraz Sugar Factory etc.<sup>92</sup> is some of the public enterprises.

Whatever the way public enterprises come in to being, they must operate being under the law regulating entities having the same characteristic and carryout same activity. Since the focus of this study is commercial public enterprise, one of the conducts regulated in commercial activity is fairness of competition. Accordingly, here after the paper will tries to review briefly about Wondo Trading and Investment Company, pillars of fair competition and the practice of public enterprises in light of fairness of competition.

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<sup>86</sup> Ibid 86

<sup>87</sup> Ibid

<sup>88</sup> Ibid 87

<sup>89</sup> Ibid

<sup>90</sup> Ibid 88

<sup>91</sup> Yitagessu Nigussie, (2018), Merger Of Public Enterprises Vis-a-Vis Trade and Consumers' Protection in Ethiopia: Analysis of Regulatory and Supervisory Aspects, College of Law and Governance Graduate Studies School of Law, Addis Ababa University

<sup>92</sup> ..... EPRDF Seminar Paper presented on 5<sup>th</sup> party anniversary, Bahar Dar, Ethiopia.

## 2.5. General Review about Wondo Trading and Investment Share Company

Wondo Trading and Investment Share Company is one of the SERADF subsidiary company. SERADF was established in 1986 E.C in the name of Wondo Company<sup>93</sup> with the view to bringing a fundamental socio economic transformation in SNNP Regional State in particular and in Ethiopia in general.<sup>94</sup> This company is overseen by a Council and Board composed of members who represent various sections of society.<sup>95</sup> The role of Board is to provide strategic leadership, maintain and support the Company's mission and purpose and ensure long term viability and continuity of the subsidiary companies, including Wondo Trading and Investment Share Company.<sup>96</sup>

SERADF, entrusted with the mandate of managing and ensuring the profitability of the companies in which SERADF is a major shareholder.<sup>97</sup> Its subsidiary companies are engaging in diversified businesses including Agro Business, Transport Sector, Import and Export Business, and Others being incorporated as private limited companies under the Commercial Code of Ethiopia.<sup>98</sup>

Wondo Trading and Investment Share Company, as one of the SERADF subsidiary company is operating as a government development entity and administered by the board headed by high government official of the region with the disclosed objective of filling the market failure by engaging in import export.<sup>99</sup> Company import cash register machine, water pumps, industrial products, edible oil, power generators, tyres, car batteries and etc. It exports, nug, sesame, coffee, and other agricultural products.<sup>100</sup> Company owned over 1 billion capital and its share is almost owned by SERADF.<sup>101</sup>

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<sup>93</sup> Bafana, (n 16)

<sup>94</sup> Ibid

<sup>95</sup> Ibid

<sup>96</sup> ibid

<sup>97</sup> ibid

<sup>98</sup> ibid

<sup>99</sup> Id, (n 18)

<sup>100</sup> Ibid

<sup>101</sup> Ibid

## 2.6. Pillars of fair competition

The objective of fair competition is to promote healthy competition via banning anti-competitive agreements between firms, like price fixing or to carve up markets, illegalizing abuse a dominant market position.<sup>102</sup> Through this banning of anti-competitive agreements, competition law advances consumers through detecting and sanctioning anti-competitive practices, including cartels, the abuse of market power, uncontrolled mergers and bid-rigging in public procurement.<sup>103</sup>

Thus, competition law is conceived as a guarantee against the conduct of businesses that would potentially suppress free trade and competition.<sup>104</sup> Besides, Public enterprises have public purposes to achieve like creating employment opportunity, provision of public service, accessing basic services, fair distribution, economic development, and advancing other public interest.<sup>105</sup>

When we see the issue in Ethiopian context, as can be seen from the very preamble and provisions dealing with the objectives of competition law, one of the objectives of competition law was to enhance economic efficiency, boost the protection of the consumer and to stabilize the economy.<sup>106</sup>

Against this background, competition and competition law is guided by certain couples of pillars that here after called as pillars of fair competition. Few of these pillars are presented as follow:

One of the principles of fair competition is *competitive neutrality*. Competitive occurs where no entity operating in an economic market is subject to undue competitive advantages or disadvantages.<sup>107</sup> Competitive neutrality requires that governments should

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<sup>102</sup> Office of Fair Trading, A quick guide to competition and consumer protection laws that affect your business, Published by the Office of Fair Trading, Crown copyright 2007, Edition 10/08, P.4, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284428/oft911.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284428/oft911.pdf) [accessed on 16 December, 2017] [herein after OFT, A quick guide to competition and consumer protection laws that affect your business]

<sup>103</sup> UNCTAD, The benefit of competition policy for consumers, P.3 cited in Yitagesu Nigussie, (2018),

<sup>104</sup>Max Huffman, Competition Law and Consumer Protection, P.1 available at [https://www.biicl.org/files/4553\\_the\\_integration\\_of\\_competition\\_law\\_and\\_consumer\\_protection.pdf](https://www.biicl.org/files/4553_the_integration_of_competition_law_and_consumer_protection.pdf) Pdf [accessed on 16 December, 2017] [herein after Max , Competition Law and Consumer Protection]

<sup>105</sup> Tewodros Meheret, The Concept and Characteristics of Public Enterprises in Ethiopia: An Overview, Mizan Law Review, Vol. 8, No.2, 2014, PP 333- 370, at P.346 cited in Yitagesu Nigussie, (2018)

<sup>106</sup> See the preamble and article 5 of the Proclamation No. 813/2013

<sup>107</sup>Organization for Economic Co-operation and Development (OECD),Competitive Neutrality;National practices, OECD 2012, available at <https://www.oecd.org/daf/ca/50250966>. Pdf [accessed on 08/08/2017], P.10 [herein after, OECD, Competitive Neutrality]

not use their legislative or fiscal powers<sup>108</sup> to the advantage of their own businesses over the private sector.<sup>109</sup> By far, competitive neutrality aims to promote efficient competition by minimizing competitive advantages government business activities may enjoy over their private sector competitors simply because they are government owned.<sup>110</sup>

***Impartial law making*** for the subjects engaging in similar or same activities; this denotes that law making organ should not bias among any commercial entity so long as they are operating at the same market landscape.<sup>111</sup> This is of course one of the internal morality of the law that any law making organ need to observe and complied with.

***Impartial application*** of the general law is another principle. This pillar dictates that effective system of competition law should be a general law with general application. In another word, the law should apply to all sectors and to all economic agents in an economy engaged in the commercial production and supply of goods and services irrespective of the type of ownership (be it privately owned or public/ state owned).<sup>112</sup>

Thus, competition law should be applicable to the subjects if they participate in daily practice of commerce. When states or state-controlled entities operate in the marketplace as commercial operators, their activities are not immune from merger enforcement. The legal and regulatory framework for state owned enterprises should ensure a level-playing field in markets where state-owned enterprises and privates sector companies compete in order to avoid market distortions.<sup>113</sup> It is logical to subject entities engaged in the same or similar activity to the same set of legal principles and standards to ensure fairness, equality and nondiscriminatory treatment under the law.<sup>114</sup> Besides, the economic reasons relate to the interdependent nature of economic activities conducted in different markets,

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<sup>108</sup> <https://www.pc.gov.au/about/core-functions/competitive-neutrality/commonwealth-competitive-neutrality-policy-statement-1996.pdf> [accessed on 16 December, 2020]

<sup>109</sup> Antonio Capobianco and Hans Christiansen, Competitive neutrality and State-Owned Enterprises: Challenges and policy options, Organization for Economic Co-operation and Development (OECD) (2011), OECD Corporate Governance Working Papers, No.1, P.5 available at [www.oecd.org/daf/corporateaffairs/wp](http://www.oecd.org/daf/corporateaffairs/wp) [accessed on 02/08/2017], [herein after, Capobianco and Christiansen, Competitive neutrality and State-Owned Enterprises]

<sup>110</sup> John Nellis, (2005), The Evolution of Enterprise Reform in Africa: From State-owned Enterprises to Private Participation in Infrastructure — and Back? The Fondazione Eni Enrico Mattei Note di Lavoro Series Index: <http://www.feem.it/Feem/Pub/Publications/WPapers/default.htm> pdf. 14 NOTA DI LAVORO 117.2005

<sup>111</sup> Tesfaye Abate, (2009), Introduction to Law and Ethiopian Legal System, Ethiopia Justice and Legal Research Center, Addis Abeba, Ethiopia

<sup>112</sup> Khemani, Application of Competition Law, 5

<sup>113</sup> Capobianco and Christiansen, Competitive neutrality and State-Owned Enterprises, 5

<sup>114</sup> Id 55

in which one market can affect prices and outputs in other markets either because one good or service is an input in the production of other goods and/or services, or because the goods and services are substitutes or complements to each other.<sup>115</sup>

These and other corner stones of the fair competition may be vitiated by different competition distorting behaviors in practice. These behaviors may be emanated from various sources, but mainly from the acts of government. Hereunder, practical pitfalls of the fair competition with regard to public enterprises are presented briefly as follow.

## **2.7. Practical application of fair competition in light of public enterprises**

Although in principle fair competition requires competitive neutrality, impartial law making and even-handed law enforcement, public enterprises are often exempt from certain laws, such as competition and bankruptcy laws, and that exemption creates market distortions and reduces management accountability.<sup>116</sup>

Despite the overall goal of competition law, that is avoiding restrictive behavior, improper price rise, earn greater profits that do not take in to account fair consuming and utilization of goods and services by subjecting commercial entities to same rules of laws, public enterprises usually subjected to sectorial regulators which avail fair treatment for them.<sup>117</sup> Even worst, despite their role as regulators the government may, in fact, restrict competition through granting Public enterprises various benefits not offered to private firms. While in some areas this preferential treatment will be direct and obvious, there may also be indirect preferential treatment through other means.<sup>118</sup>

Preferential treatment by the state, in the form of loose regulatory regimes containing exemptions from antitrust regulations, favorable tax treatment, more lax corporate governance requirements compared to private firms, and preferences to public enterprises in public procurement, monopolies and advantages of incumbency<sup>119</sup> of public enterprises are some of the major acts distorting fair competition.

Sometimes governments may make a conscious decision to depart from competitive neutrality in their State Owned Enterprise sectors, on condition to maintaining the public

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<sup>115</sup> *ibid* 14

<sup>116</sup> World Bank, Corporate Governance of State- Owned Enterprises, 36

<sup>117</sup> *Ibid* 37

<sup>118</sup> *Id* 58, 4

<sup>119</sup> *Id* 112, 37

service obligations, public enterprises as a tool for industrial policy, and in order to protect fiscal revenues of the government and etc.<sup>120</sup>

In one way or another, not subjecting commercial actors to competition law through exemption or exception, will have consequences direct and indirect as well as adverse effects on the economic system as a whole.<sup>121</sup>

Regarding merger control also there is defect with regard to public enterprises since merger limit effective competition in the market. From the general experience of most jurisdictions when we come to the Ethiopian competition law and practice, though the current Trade Competition and Consumer Protection Proclamation envisage the merger regulation provisions, it is not clear as to the application of such law on public enterprise. There is no clear exemption of the law on the public enterprises. Pertaining to the TCCPP the TCCPA is the enforcer of the merger provisions of the law. Apart from the general application of the TCCPP, there is special governance of merger in relation to merger of banks or insurance company, which requires the merger approval of the National Bank of Ethiopia.<sup>122</sup>

In sum, in most countries including Ethiopia, public enterprises are subject to the competition law. Despite this, they may also design partial exemptions that protect some types of public enterprises' businesses or some aspects of their business activities<sup>123</sup> from fierce competition.

## **2.8. Conclusions**

Researcher based on above discussions emanating from literature review, has drawn following conclusions. Fair trade practice plays vital role in protecting consumers and enhancing economic efficiency. This could be achieved when it has been governed even handedly through the vain of fair and just laws. Impartial law making and enforcement is, however, doubtful regarding public enterprises where government heavy handed intervention is affecting fair competition in favor of public enterprises. Fair Trade competition concept is guided by the couple of theoretical rationales. Among these, alternative/parallel system to fair trade, empowered approach to fair trade, fair trade as a by-product of social development and rule-based approaches are the major ones. Fair

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<sup>120</sup> Id 58, 8

<sup>121</sup> Id 57, 7

<sup>122</sup> Yitagessu, (n 88)

<sup>123</sup> Id 55

completion law has couple of pillars among which competitive neutrality, impartial lawmaking and enforcement were back bone. These pillars, however, are being tainted and violated by different acts of government in practice, particularly in favor of public enterprises. These acts of violation like exempting public enterprises off from the application of some laws, availing public enterprises favorable and or preferential treatment in public procurement etc. are some of the major competition distorting acts of the government.



## **CHAPTER THREE**

### **Findings and Discussions**

#### **Introduction**

Under this chapter major findings will be presented and discussed. In doing so, analysis will be directed towards achieving each specific objective of the study. To this end, the attempts are made to critically analyse the fair trade competition in light of the business environment of public enterprises; both of the law and the practice. As part of this and with the view to achieve the study will try to address theoretical and legal frameworks governing competition in Ethiopia. On top of this, the study will comparatively review the justness of legal provisions relating to fair competition. Besides, the study will examine whether competition practices of public enterprises are fair or not. If not, the study will identify legal and practical factors that may affect fair competition (if any) among private and public enterprises.

To this end, it was planned to conduct in-depth interviews with Ethiopian Trade Business Corporation and Wondo Trading and Investment Company. Accordingly, key informant interviews had been conducted with five (4) Ethiopian Trade Business Corporation employees and people with managerial positions, five (3) Wondo Trading and Investment Company employees and executive officers and five (5) employees and heads of SNNPRS Trade and Market Development Bureau. In sum, all the twelve in-depth interviewees had been interviewed.

The identity and their respective responsibilities of the in-depth interview participants have been shown in table 1 below.

Table 1: key informant interview participants based on their positioning in the government and Commercial public enterprises

<b>Institutions</b>	<b>Size of key informant</b>	<b>Responsibility of the key informant</b>
SNNPRS Bureau*	5	Bureau deputy head and head of Finance Department
		Consumer Affairs Directorate Director
		Consumer Affairs Directorate Training and Consumer Education Higher expert
		Consumers' Affairs officers (1)
		Inspection and regulation Directorate Higher Expert
Wondo Trading and Investment Company	3	Head of Trade Department (1)
		Head of Industry Product Cluster
		Sales officer
Ethiopian Trade Business Corporation Consumer Product Business Unit (CPBU)	4	Acting Manager
		Store sales Manager
		Consumer service supervisor
		Sales man
Total	12	

Source: *Researcher's own tabulation, 2019*

Key: \* Regional Bureau of Trade and Market Development

## **3.2. Examining theoretical and legal frameworks governing competition in Ethiopia**

To begin with, competition as many of the legal concept has been guided with theoretical assumptions. These theoretical assumptions would have backed by legal frameworks. Thus, hereunder this section the attempt will be done to examine theoretical basis of competition that has had legal backing up. To this end, firstly, we will have a brief look at to the theoretical frameworks and then the ways how it has recognized under legal frameworks.

### **3.2.1. Theoretical frameworks governing competition**

Competition emanates from the concept of strategic management;<sup>124</sup> where the formed based on couple of theoretical frameworks that are derived from three different roots of strategic management<sup>125</sup>. These theoretical frameworks may involve, transaction cost theory, agency theory, evolutionary economics and the resource-based view of the firm derive from the economic roots of the discipline, while contingency theory, resource-dependence theory, and organisational ecology derive from the sociological roots.<sup>126</sup> Among these theories, few of them are presented here below as follow:

#### **a. The Market-Based View**

Market-Based View of competition dictates that; industry factors and external market orientation are the primary determinants of firm performance. This theory also noted that the value of the firm is embedded in the competition.<sup>127</sup> Besides, theory believes in the fact that the profitability or performance of the firms are determined solely by the structure and competitive dynamics of the industry within which it operates.<sup>128</sup> Accordingly, theory has discloses three sources of market power. These are monopoly, barriers to entry and bargaining power.<sup>129</sup>

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<sup>124</sup> Wang, H. (2014). Theories for competitive advantage. In H. Hasan (Eds.), *Being Practical with Theory: A Window into Business Research* (pp. 33-43). olongong, Australia: THEORI. [http://eurekaconnection.files.wordpress.Com/2014/02/p-33-43-theoriebook\\_finaljan2014-v3.pdf](http://eurekaconnection.files.wordpress.Com/2014/02/p-33-43-theoriebook_finaljan2014-v3.pdf) Theories-of-competitive-advantage-

<sup>125</sup> Ibid

<sup>126</sup> Ibid

<sup>127</sup> Ibid 34

<sup>128</sup> Ibid

<sup>129</sup> Ibid 35

When we see each of these sources of market powers, if a firm has a monopoly, it means that it has a strong market position and therefore performs better.<sup>130</sup> High barriers to entry for new competitors in an industry lead to reduced competition and this result in better performance.<sup>131</sup> Finally, higher bargaining power within the industry relative to suppliers and customers can also lead to better performance.<sup>132</sup> Thus, it calls for the special attention to be paid for competition.

### **b. The Resource-Based View**

The Resource-Based View of competition noted firm's internal environment as a main driver for competitive advantage. Accordingly, theory emphasises on the resources that firms have developed in the competitive platform.<sup>133</sup> In the same taken, it places special focus on the resource the firm has in its possession. Moreover, it denotes that as the firm come across having more resource, it performs well in competition.<sup>134</sup>

### **c. Trusteeship Principle**

Trusteeship principle dictates that, resource, no matter the manufacturers or service provider is, belongs to the society at large. This resource is supplied by the society while the manufacturers and producers are in possession of such product as a trustee. Therefore, they need to utilize such resources efficiently in a way that would enhance societal benefit is the interest of the public in general. This rational interest of the public is believed to be achieved through the vein of competition.<sup>135</sup>

### **d. Survival and growth of business principle**

Survival and growth of business principle dictates that on the face of globalization and fierce competition, it is difficult for the businesses to continue with malpractices and without protecting the interests of the consumers<sup>136</sup>. Thus, to survive the business need to be competing fairly and justly.<sup>137</sup>

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<sup>130</sup> Peteraf, MA& Bergen, ME2003, 'Scanning dynamic competitive landscapes: a market-based and resource-based framework', *Strategic Management Journal*, vol. 24, no.10, pp. 1027-1041

<sup>131</sup> id 124

<sup>132</sup> Grant, R1991, 'The resource-based theory of competitive advantage: implications for strategy formulation', *California Management Review*, vol. 33, no. 3, pp. 114-135

<sup>133</sup> Id 126

<sup>134</sup> Ibid

<sup>135</sup> Yokamo, (n 4)

<sup>136</sup> Osler (n 71) 19

<sup>137</sup> Consumer Protection: A Theoretical Framework, Ch 2. 1

### **e. Economic efficiency theory**

Theory of economic efficiency dictates that, competition would bring economic efficiency.<sup>138</sup> The same theory has disclosed that economy will operate and yield the optimum at competitive free market economy.<sup>139</sup> Accordingly, those who propagate this theory tries to enhance competition with the view to accelerate economic development.<sup>140</sup>

Thus, one or more of the above discussed theories has made the theoretical foundation for the competition and competition laws. In our case, to judge to which theory our law sticks to, it seems paramount important to see the very preamble of the trade competition and consumer protection law along with the major objectives of such law.

The close look at to the preamble displays, the governments' motive to have commercial activities operating according to free market policy;<sup>141</sup> on the other hand it also emphasized on protection of both business community from anti-competitive and unfair market practices and consumers from misleading market practices.<sup>142</sup> These, paragraphs in general, specially paragraph two and three in particular tells us that Survival and growth of business is under pinning principle. This is because, as it has been discussed briefly above, business needs to protect the interest of the consumers, if it needs to sustain at all.

Paragraph two and three capitalizes on the protection of the consumers' safety, health, legitimate interest and protecting them from misleading market practices. Thus, preamble and inner provisions displayed that principle of Survival and growth of business has a place in our law.

On the other hand, looking in to the objectives of the law may convey that, the proclamations' objective of accelerating economic development.<sup>143</sup> Economic efficiency aims at accelerating economic development through the vein of competition. This holds true for our Trade Competition and Consumer Protection Proclamation.

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<sup>138</sup> Robert Hev, (1987), Competiton for efficient economic development accessed at: <http://jostalst-electrolbrary.org.123>

<sup>139</sup> Ibid

<sup>140</sup> Ibid

<sup>141</sup> Trade Competition and Consumer Protection Proclamation No. 813/2013 first Paragraph and art. 3(1)

<sup>142</sup> Ibid

<sup>143</sup> Ibid, Art 3(3)

Thus, one may plausibly claim the principle of Survival and growth of business and Economic Efficiency have laid the foundation for the Competition law of Ethiopia.<sup>144</sup>

### **3.2.2. Legal frameworks governing competition in Ethiopia**

In the following sub-section we will look at legal frameworks that backed theoretical foundation in our case. The nation has put in place couple of legal instruments that guides competition. For the case at hand, Ethiopia has laws that have relevance and/ or pertinence to competition. Some of these laws are listed briefly as follow:

#### **a. FDRE Constitution of 1995**

FDRE Constitution of 1995 has declared free market economy. Under article 41 which deals with Economic, Social and Cultural Rights it is provided that, "*Every Ethiopian has the right to engage freely in economic activity and to pursue a livelihood of his choice anywhere within the national territory*".<sup>145</sup>

Besides, the constitution establishes the right to own a private property, with the state having a power to expropriate it upon payment of compensation. The private property right of individuals is guaranteed under the Constitution. Unless the law provides otherwise in the public interest, this right shall include the right to use and enjoy property, and in so far as it does not violate the rights of others, to sell, transfer by succession or by any other means.

Individuals are free to engage in economic activities of their choice as per art 41(1). Individuals are free to choose profit-making activities as well as it is possible to contract with workers who sell their labor with individual bargaining.

These shows that constitution sets foundation for free market economy. This has something to do with competition; since free market is unthinkable without competition or free market economy is *sino-que-non-cause* for competition. Therefore, FDRE constitution as well has set for legal framework for governing competition.

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<sup>144</sup> See closely first two paragraphs of the preamble part and also art 3(1) & (3) of the Trade Competition and Consumer Protection Proclamation No.813/2013.

<sup>145</sup> Art 41(1) of the FDRE Constitution 1995

## **b. Trade Competition and Consumer Protection Proclamation No. 813/2013**

Trade Competition and Consumer Protection Proclamation No.813/2013 is mainly meant to achieve the objectives of protecting business community from anti-competitive and unfair trade competition. Besides, it also geared to accelerate economic development.<sup>146</sup> Even most importantly, as can easily be seen from the very nomenclature of the proclamation is named as " Trade Competition and Consumer Protection Proclamation".<sup>147</sup> From inner investigation one may note that, the proclamation have the parts specially devoted to competition under part two section one and section two. Furthermore, it involves principles, prohibitions, regulatory organs with designated powers and responsibilities, adjudicatory organ and procedures as well as penalties and kinds of penalty.<sup>148</sup> So, this proclamation, Trade Competition and Consumer Protection Proclamation No.813/2013 is the most pertinent law that have the bearing on competition.

## **c. 2004 FDRE Criminal Code**

The prevailing criminal code has provisions that prevent certain acts that would taint fair competition and hence provide for penalty should the prohibition is violated.<sup>149</sup> For instance, article 719 has provided for the prohibition of "Unfair Competition" and penalty thereof.<sup>150</sup> Thus, 2004 FDRE Criminal code has the relevance in governing competition by penalizing acts against competition.

## **d. Council of Ministers' Regulations, Ministry of Trades' Directives and Public Notices**

This is because the Trade Competition and Consumer Protection Proclamation No.813/2013 under its art. 46 indicated that, "The council of Ministers may issue regulations necessary for the implementation of this Proclamation".<sup>151</sup> The same article also provided for the issuance of Public Directives and Notices. For the sake of understanding the full relevant part of the provision is produced as follow; "*[T]he Ministry may issue directives and public notices necessary for the implementation of this Proclamation and regulations .....*".<sup>152</sup> However, despite this

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<sup>146</sup> See article 3 (1) & (3) of the Trade Competition and Consumer Protection Proclamation No.813/2013

<sup>147</sup> See art 1 of the Trade Competition and Consumer Protection Proclamation No.813/2013

<sup>148</sup> See the Trade Competition and Consumer Protection Proclamation No.813/2013

<sup>149</sup> See art of 2005 FDRE Criminal code of Ethiopia

<sup>150</sup> See art 719 & ff of the 2004 Criminal Code of Ethiopia

<sup>151</sup> See art 46 (1) of the Trade Competition and Consumer Protection Proclamation No.813/2013

<sup>152</sup> Ibid, art 46 (2)

provision, aforementioned Regulations, Directives and Public Notices did not come in to being yet.<sup>153</sup> Nevertheless, had it been issued, it would have relevancy and governing effect on the competition. But for the time being these tools have not made parts and parcels of competition governing framework.

### **3.3. Review of the Legal provision relating to Fair Competition**

Under this sub-section the attempt is made to critically review legal provisions relating to competition. For this effect the focus will be made on reviewing relevant laws identified in the previous sub-section. On the course of doing this, analysis will be made on legal provisions via legal analysis.

Accordingly, the review of legal provisions that have the relevance with competition will be made on the basis of law as it appears.

One of the relevant laws governing competition is FDRE Constitution of 1995. The relevant part of the constitution is art 41 which provides for the right to engage freely in economic activity and to pursue a livelihood of his choice anywhere. Except this general provision, nothing is regulated in detail. Of course, no body expect constitution to regulate each and every detail since the details will be left to specific laws.

Another one of the laws governing competition is Trade Competition and Consumer Protection Proclamation No.813/2013.

Trade Competition and Consumer Protection Proclamation No.813/2013, as it has already indicated above sub-section, has the parts dealing with competition issues. Here under this part, the review of the fairness's of these provisions in governing competition. The fairness issue will be judged from the vantage point of impartiality or neutrality of its provisions and enforcing agents in governing competition between private and public business enterprises.

To begin with, Trade Competition and Consumer Protection Proclamation No.813/2013 under its part enumerating objective of the proclamation, it has mentioned that, protecting business community from anti-competitive and unfair market practices,<sup>154</sup> as one of the its objectives. This objective has mentioned at first.

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<sup>153</sup> Yokamo, (n 4)

<sup>154</sup> Art 3 (1) of the Trade Competition and Consumer Protection Proclamation No.813/2013



On the course of protecting business community from anti-competitive and unfair market practices, it has provided for the prohibition of certain anti-competitive trade practices.<sup>155</sup> This prohibition ranges from the prohibition of abuse of market dominance and extends to regulation of merger.<sup>156</sup> However, despite its general application on any commercial activity or transaction in goods or services,<sup>157</sup> this proclamation has noted that, some of the provision especially Part Two of this Proclamation may not apply up on the specification by the regulation to be issued by the Council of Ministers. This potential exemption is aimed to exonerate those trade activities it deems vital in facilitating economic development.<sup>158</sup>

This, discretionary power of the Council of Ministers ignite the suspicion of the fact whether this proclamation apply at all on public enterprises or not. This suspicion further solidified and strengthened due to the fact that almost all of the public enterprises were established at the pretext and with the motto of facilitating and catalysing economic development. Therefore, the regulation of Council of Minister might have exempted public enterprises from the application of the Trade Competition and Consumer Protection Proclamation No.813/2013. However, this regulation of Council of Minister is yet to come in to being. Therefore, the attempt will be made to investigate substantive fairness of the proclamation assuming that it applies on public enterprises unless otherwise provided.

Regarding the prohibition of abuse of dominant position, the proclamation has out-rightly prohibited abuse of market dominance; either individually or acting in group; openly or dubiously.<sup>159</sup> On top of that, it has also spelt out the acts of dominance as follow:

- a) Limiting production, hoarding or diverting, preventing or withholding goods from being sold in the regular channels of trade;*
- b) doing directly or indirectly such harmful acts, aimed at a competitor, as selling at a price below cost of production, causing the escalation of the costs of a competitor or pre-empting inputs or distribution channels;*
- c) Directly or indirectly imposing unfair selling price or unfair purchase price;*
- d) Refusing, contrary to the clearly prevalent trade practice, to deal with others on terms the dominant business person customarily or possibly could employ as though the terms are not economically feasible to him;*

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<sup>155</sup> Ibid, Art 5 (1)

<sup>156</sup> Ibid, art. 5 through art 13

<sup>157</sup> Ibid, Art 4(1)

<sup>158</sup> Ibid, Art 4(2)

<sup>159</sup> Ibid art 5(1)

- e) without justifiable economic reasons, denying access by a competitor or a potential competitor to an essential facility controlled by the dominant business person; without justifiable economic reasons, discriminating customers in prices and other conditions in the supply and purchase of goods and services;*
- g) without justifiable economic reasons making the supply of particular goods or services dependent on the acceptance of competitive or non-competitive goods or services or imposing restrictions on the distribution or manufacture of competing goods or services or making the supply dependent on the purchase of other goods or services having no connection with the goods or services sought by the customer;*
- h) without justifiable economic reasons and in connection with the supply of goods or services, imposing such restrictions as to where or to whom or in what conditions or quantities or at what prices the goods or services shall be resold or exported; other similar acts specified by regulation to be issued for the implementation of this Proclamation.<sup>160</sup>*

One may note that, many of the prohibited acts are either acts emanated from lack of good faith or acts done with the intent to have the competitors get out of the market. The latter is basically manifested by lack of justifying economic reasons. On this point the law has already listed out what constitutes justifying economic reasons. These reasons are presented below on sub article 3 of the article 5.

*3/ the following shall be deemed justifiable economic reasons for the purpose of applying the provisions of paragraphs (e), (f), (g) and (h) of sub article (2) of this Article:*

- a) Maintenance of quality and safety of goods and services;*
- b) Levelling with prices or benefits offered by a competitor;*
- c) Achieving efficiency and competitiveness;*
- d) Other similar reasons specified by regulation to be issued for the implementation of this Proclamation.*

As it has produced above, legally recognized economic reasons are acts taken for the sake of maintaining quality and safety of goods and services, levelling or setting a balance of prices

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<sup>160</sup> Ibid article 5 (2)

of benefits vis a vis competitor; achieving efficiency and competitiveness. These acts works as legally recognized reason for both private and public enterprises similarly. Since the law provides these acts as legal economic reason equally, regardless of the nature of commercial entity, one could plausibly conclude that law does not make difference regarding justifying economic reason.

Thus, this very article seems free from value judgement and neutral in governing competition among private and public enterprises.

Another relevant article dealing with competition issue is article 7. This provision talks about anti-competitive agreements, concerted practices and decisions and prevents them on conditional basis. Here the note needs to be taken that, law do not prohibit all sorts of agreements and concerted practices. Rather, agreement or the concerted practices has to be anti- competitive. Besides, it must have competition preventing or significantly lessening effect;<sup>161</sup> or it involves, directly or indirectly, fixing a purchase or selling price or any other trading condition, collusive tendering, or dividing markets by allocating customers, suppliers, territories or specific types of goods or services.<sup>162</sup>

These prohibitions, however, have exceptions where a party to the agreement, concerted practice or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs the effect<sup>163</sup> it had on competition.

The close look at to the provision shows that it has general application and hence impartial in wording and content.

Another an important provision is article 8. This provision deals with issue of Unfair Competition. This provision is basically meant to govern the relation among the business community and hence geared to avoid unfair trade competition. For the sake of whole understanding, the full content of the provision is produced here below:

### **Article 8 Unfair Competition**

*1/ No business person may, in the course of trade, carry out any act which is dishonest, misleading or deceptive, and harms or is likely to harm the business interest of a competitor.*

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<sup>161</sup> Ibid, art. 7(1)(a) & 7(2)(a)

<sup>162</sup> Ibid, art. 7(1)(b) & 7(2)(b)

<sup>163</sup> Ibid, art. 7(1)(a) & 7(2)(a)

*2/ the following shall be deemed acts of unfair competition:*

- a) Any act that causes or is likely to cause confusion with respect to another business person its activities, in particular, the goods or services offered by such business person;*
- b) Any act of disclosure, possession or use of information of another business person, without the consent of the rightful owner, in a manner contrary to honest commercial practice;*
- c) Any false or unjustifiable allegation that discredits, or is likely to discredit another business person or its activities, in particular the goods or services offered by such business person;*
- d) Comparing goods or services falsely or equivocally in the course of commercial advertisement;*
- e) disseminating to consumers or users, false or equivocal information including information the source of which is not known, in connection with the price or nature or system of manufacturing or manufacturing place or content or suitability for use or quality of goods or services;*
- f) Obtaining or attempting to obtain confidential business information of another business person through his current or former employees or obtaining the information to pirate his customers or to use for purposes that minimize his competitiveness;*
- g) Other similar acts specified by regulation to be issued for the implementation of this Proclamation.<sup>164</sup>*

As we can note from above provisions, law has equally provided acts that have been condemned as unfair in competition. Any business entity which commits any or many of above mentioned acts, is considered as it committed unfair act in trade competition as matter of law; be it private or public enterprise. Thus, here again general overview of the provision does not display partiality and non-neutral applicability at least in its par value.

Another issue that may have direct impact on competition is issue of merger. Merger may affect competition since it involves the amalgamation or pooling resource;<sup>165</sup> or taking share of or control of the other pre-existing business organization.<sup>166</sup> This has the effect of narrowing down the number of competitors or brings two independently existing businesses

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<sup>164</sup> Ibid, art. 8

<sup>165</sup> Ibid, art 9(3)(a)

<sup>166</sup> Ibid, art 9(3)(b)

in to unity or at least in situation where conflict of interest exists or in a situation where mutual cooperation and understanding becomes a must. Thus, in order to make competition fair, the issue of merger need to be regulated impartially. To this effect section two of the part two of the proclamation<sup>167</sup> has tried to regulate cases of merger. To begin article 9 and following of the section talks about merger, prohibitions, notifications, approval and revocation of the merger. To this point, it is important to present the full content of the article.

*Article 9. Prohibitions*

*1/ No business person may enter into an agreement or arrangement of merger that causes or is likely to cause a significant adverse effect on trade competition.*

*2/ No agreement or arrangement of merger may come into effect before obtaining approval from the Authority pursuant to Article 11 of this Proclamation.*

*3/ For the purpose of applying the provisions of this Article merger shall be deemed to have occurred:*

- a) when two or more business organizations previously having independent existence amalgamate or when such business organizations pool the whole or part of their resources for the purpose of carrying on a certain commercial activity; or*
- b) by directly or indirectly acquiring shares, securities or assets of a business organization or taking control of the management of the business of another person by a person or group of persons through purchase or any other means.*

As it has been already produced above, prohibited acts are prohibited acts for all business entities be it private or public. Here, nowhere in the provision that indicates double standard or partiality in regulating merger of business enterprises among private businesses and public enterprises. Accordingly, one may conclude that legal prohibitions are fair.

Therefore, this provision as well evenly governs and does not late public enterprises to take undue advantage over private one via merger.

Finally, 2004 FDRE Criminal Code has prohibited unfair trade competition and has provided for the penalty as follow:

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<sup>167</sup> Ibid

*Article 719. - Unfair Competition.*

*Whoever intentionally commits against another, an abuse of economic competition by means of direct or any other process contrary to the rules of good faith in business, in particular:*

*(a) by discrediting another, his goods or dealings, his activities of business or by making untrue or false statements as to his own goods, dealings, activities or business in order to derive a benefit therefrom against his competitors; or*

*(b) by taking measures such as to create confusion with the goods, dealings or products or with the activities or business of another; or*

*(c) by using inaccurate or false styles, distinctive signs, marks or professional titles in order to induce a belief as to his particular status or capacity; or*

*(d) by granting or offering undue benefits to the servants, agents or assistants of another, in order to induce them to fail in their duties or obligations in their work or to induce them to discover or reveal any secret of manufacture, organization or working; or*

*(e) by revealing or taking advantage of such secrets obtained or revealed in any other manner contrary to good faith, is punishable, upon complaint, with a fine of not less than one thousand Birr, or simple imprisonment for not less than three months.<sup>168</sup>*

Here above law has provided for acts that is considered as unfair competition. These acts are discrediting another, creating confusion, granting or offering undue benefits to the servants, agents or assistants of another competitor with the view to disclose business secret and revealing or taking advantage of such secrets against good faith.

To consider these acts as unfair competition, there are certain legal element that need to be fulfilled. These elements are act has to be committed intentionally; should be commission against economic competition; in contrary to the rules of good faith in business. From this provision one may note that, acts considered as unfair competition and elements to be fulfilled works for all business entities be it private or public.

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<sup>168</sup> 2004 Criminal code of Ethiopia

Thus, it is imperative that nothing shows the partiality in regulating competition among private and public enterprises.

### **3.4. Fairness of competition practices of public enterprises**

In the above sub-sections, the effort is made to identify and assess the legal frameworks and the fairness of such legal frameworks in regulating competition. Now under this sub-section, the turn is to examine the practical fairness of competition. In doing this, the concept of practical fairness of competition as it is taken as the levelling of the playing field for both public and private enterprises, will be tested in light of Even handed application of competition laws; practical fairness of the trading platform among private and public enterprises and affording equal protection of business community from anti-competitive or unfair market practices. Furthermore, test will be made in light of the extent of compliance with legal prohibitions and prescriptions.

Accordingly, first the resort will be had to analyse the practical fairness of public enterprises vis-à-vis some selected yardsticks of fairness indicators.

#### **a. Even handed application of competition laws**

Even handed application of law demands that, equal and impartial application of legal rules and provisions in the same situation. In the context at hand there has to be equal and impartial application of legal rules. In this regard, as some in-depth interview respondent noted, there is practical problem in even handed application of legal rules vis-à-vis public enterprises. As Ato Yohannes Mina<sup>169</sup> has noted, bureau exerts its best effort to have laws enforced. However, said Yohannes, there is intrusive intervention from the executive arm of the government. This intervention is very much visible where at the time when public enterprises are involved in legal proceeding.

On top of this, another interviewee<sup>170</sup> has also confirmed that, subjecting public enterprises to the law just like private ones is unthinkable in the present law enforcing platform. Others<sup>171</sup> as well noted similarly explaining in different language but conveying same messages to the

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<sup>169</sup> Interview with Ato Yohannes Mina, SNNPRS Trade and Market Development Bureau, Consumers' Affairs Directorate Director, Hawassa, March 3<sup>rd</sup>, 2020

<sup>170</sup> Interview with Ato Yene Ledamo, SNNPRS Trade and Market Development Bureau, Consumers' Protection Directorate Consumer Education and Training Officer, Hawassa, March 1<sup>st</sup>, 2020

<sup>171</sup> Interview with Ato Yohannes Abera, SNNPRS Trade and Market Development Bureau, Consumers' Affairs Directorate Higher Expert, Hawassa, March 3<sup>rd</sup>, 2020

effect that, even handed application of laws on public enterprises is hardly possible. Thus, one may conclude that even handed application of law on public enterprises is not attained.

### **b. Practical fairness of the trading platform among private and public enterprises**

Practical fairness of the competition emanates from the fairness of rules of the game, and levelling playing field. Levelling playing field in turn also involves accessing market; both the market of input and the market of product and equal treatment throughout the process. These cumulatively forms trading platform.

These issues are very much interwoven with fairness of the rules and impartial application of such rules on the ground. To understand the practical fairness of the trading platform, however, it is pervasive to see each point that composes of trading platform, i.e accessing the market of input, the market of product and equal treatment throughout the process.

Regarding the practical fairness of the accessing market, in-depth interviewees have disclosed that, ensuring practical fairness in accessing market among private and public enterprises is proved to be hardly possible in the current business platform.<sup>172</sup> The respondents have again uncovered, super-extended veins of public interest pretexts.<sup>173</sup> Ato Mulugeta Alamayehu<sup>174</sup> has expounded this as public enterprises are as well positioned in accessing input market; since they would not face as such hardship in accessing foreign hard currencies to **buy** input ingredients. Not only this but also, the public enterprises in majority of time import ingredients at the free of customs duty.<sup>175</sup> Besides, the same holds true for export as well, as Mr. Yokeris<sup>176</sup> noted. This difference in accessing medium of exchange brings about practical unfairness in the field of competition.

Furthermore, regarding the access of product market, there is also differential judgement in terms of item of trading. As some of the in-depth interviewees have contended, some of the items tradable for public enterprises are prohibited for the private once and relinquished to

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<sup>172</sup> Interview with W/ro Almaz Aboye, SNNPRS Trade and Market Development Bureau, Consumers' Affairs Directorate Higher Expert, Hawassa, March 3<sup>rd</sup>, 2020

<sup>173</sup> Interview with Ato Mintesinot Mergiya, Wondo Trading and Investment Company, Product Division Head, Hawassa, March 8<sup>th</sup>, 2020

<sup>174</sup> SNNPRS Trade and Market Development Bureau, Inspection and Regulation Directorate Director, Hawassa, March 3<sup>rd</sup>, 2020

<sup>175</sup> An interviewee with Mr. Basilik Yokeris, Ale Bejimila PLC , Store sales Manager, Hawassa, March 3<sup>rd</sup>, 2020

<sup>176</sup> Alle Bejimila PLC , Store sales Manager, Hawassa, March 3<sup>rd</sup>, 2020



and considered as contraband.<sup>177</sup> For instance, edible oil and sugar is tradable by the Wondo Trading and Investment Company, however, the same item is condemned as a contraband when it is found under possession of private enterprise. Accessing foreign exchange is simple for public enterprises since it is given priority.<sup>178</sup> This will simplify public enterprises' importing of raw materials, which is hardly possible for private enterprises.<sup>179</sup> This all shows us practical unfairness in accessing market and preferential for one and adverse treatment for other. This resulted in difference in treatment among private and public enterprises. The cumulative effect of these has vitiated practical fairness of trade platform.

### **c. Prohibition of anti-competitive or unfair market practice**

Law has set forth couple of prohibited prescribed practices that requires compliance. These prohibitions may include: abuse of dominance, anti-competitive agreements, concerted practices and decisions; and unfair competition.<sup>180</sup> Merger is also prohibited if it is likely to have adverse impact on competition.<sup>181</sup>

Concerning prescriptions, business person is duty bound to display the price, affix the labels, and refrain from the false or misleading commercial advertisements, particularly about the nature, components, quality, source, weight, volume, methods of manufacturing and manufacturer and expiry date; and the expected result by using the goods and services.<sup>182</sup>

If the competition to be fair; there have to be equal practical compliance with above mentioned prohibitions and prescriptions; and impartial law enforcement at the time of transgression. To be clear with the issue of fairness in terms of compliance and equal law enforcement, it seems pervasive to see each prohibitions and actions following the transgression if any.

Regarding abuse of market dominance by the public enterprises is concerned; it seems a grey area that needs to be regulated further. This is because as Yokamo contended, to consider that there is market dominance, the degree of market share has to be determined by the

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<sup>177</sup> Interview with Ato Eyasu Tomas, SNNPRS Trade and Market Development Bureau, Trade Registration and Licence Higher Expert, Hawassa, March 3<sup>rd</sup>, 2020

<sup>178</sup> Ibid

<sup>179</sup> Ibid

<sup>180</sup> Article 5 through Article 8 of the Trade Competition and Consumer Protection Proclamation No.813/2013

<sup>181</sup> Article 9 through Article 13 of the Trade Competition and Consumer Protection Proclamation No.813/2013

<sup>182</sup> Article 14 cum Article 15 and 16 of the Trade Competition and Consumer Protection Proclamation No.813/2013

regulation issued by the Council of Ministers; which is not yet issued.<sup>183</sup> So, it is implausible to test event of law enforcement in the mid of total inapplicability.

Concerning anti- competitive agreements, concerted practices, and decisions; as key informant noted, anti-competitive agreements, concerted practices and decisions are common and it appears as if legally allowed for the public enterprises.<sup>184</sup> According to Ato Mulugeta, majority of public enterprises are granted public works free of competition and normal bidding. As per him, Wondo Trading and Investment Company is trading on non-compatible items. This is to say that in the majority of the items the Company is sole importer, this amounts anti-competitive practices.

Regarding unfair competition; respondents noted that there are no as such grave acts of unfair competition by the public enterprises.<sup>185</sup> This is owing to their better positioning in the business platform.<sup>186</sup> However, said respondents even law enforcement would have been problematic had it been unfair competition.<sup>187</sup> This is because, said Ato Anteneh, although government claimed that company is independent from political interference, government engages actively at least vividly in two major ways. One is the board is headed by high government official and political appointee as well as politically accountable person. Secondly, in the instance where there is competition, regional government subsidies the company. On the top of these, government higher officials are always in controlling at arm's length and always taking care of through the back door. These facts make the government's political interference crystal clear; according to Ato Anteneh.

Moreover, as per Ato Anteneh, this act of political interference has the retarding effect on the competition and enforcement of consumer protection law evenly. This is because of the reason that government that is bestowed with the power of enforcing fair competition and consumer protection law has the vested interest. In the case involving government development enterprises like Wondo Trading Company, since government has vested interest, even handed enforcement is hardly possible. This is due to conflict of interest and consequent political tainting of the competition authority or court decision.<sup>188</sup>

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<sup>183</sup> Yokamo, (n 4)

<sup>184</sup> An interview with Ato Mulugeta Alamayehu, SNNPRS Trade and Market Development Bureau, Inspection and Regulation Directorate Director, Hawassa, March 3<sup>rd</sup>, 2020

<sup>185</sup> Id 169

<sup>186</sup> Ibid

<sup>187</sup> Id 18

<sup>188</sup> Ibid

On the other hand, Regulation of merger is concerned, according to the respondents, public enterprises are not expected to go through exasperating procedures of merger regulation.<sup>189</sup> Rather, they prefer to seize what they intended to achieve through short cut under the jungle of operational efficiency for maximizing public utility pretext.<sup>190</sup> For example, the merger of Commercial Bank with Construction Bank.

Concerning compliance with prescriptions, in-depth interviews were asked "*whether commercial public enterprises complied with legal obligations to display the price, affix the labels, and refrain from the false or misleading commercial advertisements, particularly about the nature, components, quality, source, weight, volume, methods of manufacturing and manufacturer and expiry date; and the expected result by using the goods and services*".

On these points, the respondents<sup>191</sup> could not raise specific instances, rather they limited themselves on displaying one truth even handed enforcement of legal provisions at the time of transgression is infeasible for the same above mentioned reasons.

Thus, one may plausibly argue that there is irregularity and questionability of compliance of public enterprises with legal prohibition and prescriptions.

### **3.4. Legal and Practical factors affecting fair competition among private and public enterprises**

The last objective that is envisaged to be attained by this study is identification of legal and practical challenges affecting fairness of competition among private and public enterprises. In achieving this objective, in-depth interviewees were asked "what are the critical legal and practical challenges that affect the fairness of competition among public enterprises and private business entities? "

This question has addressed in two levels; firstly, legal factors were addressed and then practical factors were dealt with.

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<sup>189</sup> Id 169

<sup>190</sup> Id 180

<sup>191</sup> Ibid

### **3.4.1. Legal factors affecting fair competition among private and public enterprises**

Regarding legal factors, in-depth interviewees have identified couple of legal loopholes that may have negative impact on regulating fair competition among private and public enterprises. According to in-depth interviewees, the very applicability of the pertinent law, the Trade Competition and Consumer Protection Proclamation No.813/2013 is doubted and hence currently questionable. As it has already been stated under section 4.3 above, article 4 of the Trade Competition and Consumer Protection Proclamation No.813/2013, has provided that Council of Ministers may exempt some trade activities that it deems vital in facilitating economic development from the application of part two of the proclamation.<sup>192</sup> This may pave the way to be opportunistic for those mental in favour of public enterprises.

This holds true with regard to regulation of merger. This is because, the phrase "facilitating economic development" is value laden and ambiguous that calls for different interpretation.<sup>193</sup> It is also easily manipulatable. On top of this, owing to institutional set up ineptness, concerned government controlling organs, intervention and regulation at time of merger request is very much lenient.<sup>194</sup>

Another legal factors affecting fair competition again lack of implementation regulation that is presumed to be issued by the Council of Ministers. In this connection, an in-depth interview respondent noted that, public enterprises, in majority of cases, are in market dominant position in fact.<sup>195</sup> Not to regulate such market dominance by law,<sup>196</sup> regulation that would determine market share is not yet in place.<sup>197</sup>

These and other legal loopholes have gravely affecting challenges of fairness of the competition.<sup>198</sup>

### **3.4.2. Practical factors affecting fair competition among private and public enterprises**

Finally, in this sub-section the attempt has been made to assess practical challenges of fair competition among public enterprises and private entities. Here, a brief look at has been had

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<sup>192</sup> Art 4(2) of the Trade Competition and Consumer Protection Proclamation No.813/2013

<sup>193</sup> Id 180

<sup>194</sup> Ibid

<sup>195</sup> Id 169

<sup>196</sup> Art 6(2) & (5) of the Trade Competition and Consumer Protection Proclamation No.813/2013

<sup>197</sup> Yokamo, (n 4)

<sup>198</sup> Id 180

to the practical reality that poses the challenge against the fairness of trade competition among public enterprises and private entities.

In-depth interviewees have displayed couple of factors that challenges fairness of competition. To begin with, one of the practical challenges of the fairness of competition among private business entities and public enterprises is executive intervention.<sup>199</sup> Ato Mulugeta has added, majority of law enforcing activities against public enterprises are sabotaged by government organ intervention.

As Anteneh Abera,<sup>200</sup> disclosed Wondo Trading and investment Company is government development entity and administered by the board headed by high government official. The company's main objective, as Anteneh noted is to fill the market failure by engaging in import export. On the top of that he disclosed although government claimed that it is independent from political interference, government engages actively in different ways. One is the board is headed by high government official and political appointee as well as politically accountable person. Secondly, in the instance where there is competition, regional government subsidies the company. According to Ato Mintesinot,<sup>201</sup> this shows that, the un-levelled playing field. On the top of these, government higher officials are always in control of public enterprises at arm's length and always taking care of them through the back door. These facts make the government's political interference crystal clear.<sup>202</sup>

Moreover, this act of political interference has the retarding effect on the competition and enforcement of trade competition and consumer protection law evenly.<sup>203</sup> This is because of the reason that government that is bestowed with the power of enforcing fair competition and consumer protection law has the vested interest.<sup>204</sup> In the case involving public enterprises like Wondo Trading Company, since government has vested interest, even handed enforcement is hardly possible.<sup>205</sup> This is due to conflict of interest and consequent political tainting of the competition authority or court decision.<sup>206</sup>

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<sup>199</sup> Ibid

<sup>200</sup> Coordinator of Wondo Trading and investment Company

<sup>201</sup> Id 169

<sup>202</sup> Id 18

<sup>203</sup> Ibid

<sup>204</sup> Id 169

<sup>205</sup> Ibid

<sup>206</sup> Id 180

# CHAPTER FOUR

## Conclusions and Recommendations

### 4.1. Introduction

In chapter three the attempt has been made to discuss major findings of the study. In this chapter, the effort is exerted to make brief summary, and draw conclusions based on above discussions emanating from literature review and empirical evidences. Finally, based on conclusions recommendations has been forwarded.

### 4.2. Summary

The study was geared to analyse the fairness of the trade competition in light of public enterprises. To achieve this general objective, the attempt was made to examine theoretical and legal frameworks governing competition and the fairness of such legal frameworks as well as the very practice of competition on the ground has been examined by using qualitative research methodology with predominantly doctrinal legal research methods; along with documentary analysis and in-depth interview as data collection strategy.

Accordingly, with regard to reviewing theoretical and legal frameworks, relevant theories and laws were reviewed by documentary analysis and legal analysis respectively. In connection to theories, study has found out that market based view, resource based view, trusteeship principle, survival and growth of business principle and economic efficiency theory has laid down the theoretical foundation of the competition and competition laws among which economic efficiency deemed pertinent for Ethiopian competition laws.

Regarding legal framework, study has identified that Trade Competition and Consumer Protection Proclamation No. 813/2013, Federal Democratic republic of Ethiopia Criminal Code Proclamation No.414/2004, Federal Democratic republic of Ethiopia Constitution 1995 and forthcoming regulations, directives and public notices of the Council of Minister and Ministry of Trade and Market Development respectively, as legal frameworks governing competition in Ethiopia.

In the same token, the study has reviewed the fairness of the provisions governing competition and disclosed that as it appear right now legal provision did not showed inclination in favour of public enterprises and identified as fair.

Moreover, study also assessed practical fairness of competition among private commercial entities and public enterprises. Here study has depicted that practical fairness of competition among private enterprises and public enterprises are inconceivable due to couple of defects noticeable in even handed application of competition laws, fairness of trading platform, equal compliance with legal prohibition and prescriptions.

Finally, study has identified legal and practical factors affecting fair competition. Accordingly, loopholes regarding the very applicability of relevant law; (e.g. trade competition and consumer protection proclamation No.813/2013) owing to the ambiguity of the certain phases and lack of implementation regulations are identified as legal factors affecting ensuring fairness of competition among private entities and public enterprises.

With regard to practical factors, study has pointed out, executive intervention and sabotage of law enforcing activities; and inequality of playing field as critical practical factors challenging fairness of competition among private commercial entities and public enterprises.

### **4.3. Conclusions**

From the above summary and the discussions that we had so far, we can plausible draw following conclusion.

Fair trade practice plays vital role in protecting consumers and enhancing economic efficiency. This could be achieved when it has been governed even handedly through the [vain](#) of fair and just laws.

Impartial law making and enforcement is, however, doubtful regarding public enterprises where government heavy handed intervention is affecting fair competition in favour of public enterprises.

Fair competition law has couple of pillars among which competitive neutrality, impartial law making and enforcement were back bone. These pillars, however, are being tainted by loopholes in law and lack of implementation edge of laws and violated by different acts of government in practice, particularly in favour of public enterprises.

These acts of violation like exempting public enterprises off from the application of some laws, availing public enterprises favourable and or preferential treatment in public procurement etc. are some of the major competition distorting acts of the government.

Based on these conclusions, following recommendations are forwarded by the researcher.

#### **4.4. Recommendations**

One of the serious pitfalls identified in ensuring fair competition is legal loopholes emanating from ambiguity in its phrase. Accordingly, House of Peoples Representatives and state councils are kindly requested to revisit relevant law and avoid ambiguous phrase and resulting subjectivity to different interpretations.

Another pitfall is the lack of implementing regulation and directives. To rectify this, Council of Ministers and Trade and Market Development are advised to fill this gap by issuing regulation and directives and public notices respectively. Besides, these the same institutions of the government with power of issuing regulations and directives are kindly informed to make fair and just laws regulating competition in such a way that subjects entities engaging in same or similar activities to the same rules of laws.

Although, laws are impartial in their phraseology and wording, its implementation lacks impartiality in practice. Therefore, concerning government organ is advised to enforce competition laws even handily.

In order to enhance fair competition and reap the fruits of it, government should hands off and refrain from the acts of intervention that likely have the effect of negatively affecting fairness of business competition in the business landscape.

Finally, since the government is intervening in the market behind the public enterprises under the pretext of filling the market failure, stabilize the market and fastening development. These reasons are not genuine reasons in majority of cases. Therefore, government is advised to reduce its engagement in the economy.



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- Trade Competition and Consumer Protection Proclamation No.813/2013
- FDRE Criminal code of Ethiopia, Proclamation No. 414/2004
- FDRE Constitution 1995
- Public Enterprises Establishing Proclamation No. 25/1992
- Public Enterprises Proclamation No. 412/2004.

## **Key Informants**

- An interview with Ato Mulugeta Alamayehu, SNNPRS Trade and Market Development Bureau, Inspection and Regulation Directorate Director, Hawassa, March 3<sup>rd</sup>, 2020
- An interviewee with Mr. Basilik Yokeris, Ale Bejimila PLC , Store sales Manager, Hawassa, March 3<sup>rd</sup>, 2020
- Interview with Ato Anteneh Abera, coordinator of Wondo Trading and investment Company
- Interview with Ato Eyasu Tomas, SNNPRS Trade and Market Development Bureau, Trade Registration and Licence Higher Expert, Hawassa, March 3<sup>rd</sup>, 2020
- Interview with Ato Mintesinot Mergiya, Wondo Trading and Investment Company, Product Division Head, Hawassa, March 8<sup>th</sup>, 2020
- Interview with Ato Yene Ledamo, SNNPRS Trade and Market Development Bureau, Consumers' Protection Directorate Consumer Education and Training Officer, Hawassa, March 1<sup>st</sup>, 2020

- Interview with Ato Yohannes Abera, SNNPRS Trade and Market Development Bureau, Consumers' Affairs Directorate Higher Expert, Hawassa, March 3<sup>rd</sup>, 2020
- Interview with Ato Yohannes Mina, SNNPRS Trade and Market Development Bureau, Consumers' Affairs Directorate Director, Hawassa, March 3<sup>rd</sup>, 2020
- Interview with W/ro Almaz Aboye, SNNPRS Trade and Market Development Bureau, Consumers' Affairs Directorate Higher Expert, Hawassa, March 3<sup>rd</sup>, 2020

## Appendixes

### Hawassa University College of Law and Governance School of Law

Questions prepared for the Wondo Trading and Investment share company leaders and higher experts.

#### Respondent's personal information

Name of the Respondent -----

Position in the company-----

Education level-----

**Type of the Study:** A Master Thesis in Law (LL.M Thesis)

**Title: Critical Analysis of Unfair Trade Competition Practices in light of Public Enterprises; The Law and Practices : Wondo Trading and Investment Company in Focus.**

**Thank you!**

**Eyasu Godana (LL.M candidate).**

1. Wondo trading and Investment Company is the one of the regional public enterprise that aimed to stabilize the market gaps in selected goods compared to the private limited company. So, now to what extent does the company achieving the compiled goals and how does it compete with private company which engaged with the same commercial line?-----  
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2. Provided that the company has contributing to achieve the goals established for.; can we say that trade competition law is effectively implementing on wondo company? For instance, Trade Competition and Consumer Protection Proclamation no. 813/2013.  
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3. Trade Competition and Consumers Protection Proclamation No. 813/2013 has the objective of ensuring fair trade. To achieve this objective, proclamation provided for a

set of prohibited market conducts. Does the company work in line with TCCPP no. 813/2013?-----  
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This question must be examined in terms of the prohibition of:

- ✓ Abuse of market dominance;
- ✓ Anti- competitive agreements, concerted practices, and decisions;
- ✓ Unfair competition; and
- ✓ Regulation of merger

4. Under TCCPP no.813/2013, business person/company is duty bound to display the price, affix the labels, and refrain from the false or misleading commercial advertisements, particularly about the nature, components, quality, source, weight, volume, methods of manufacturing and manufacturer and expiry date; and the expected result by using the goods and services. Does the company comply with these obligations and prohibition?  
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➤ What the practice on the ground look like? Is the practice are in line with law?  
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5. Under the current law, business person as well as business institution like company prohibited from failing to meet a warranty obligation, misrepresenting the need for repair or replacement of parts; delivering a service below the standard recognized in the business or with deficiency; making available for sale or selling goods dangerous to human health and safety; refusing to sell goods or service; selling goods or services without using standard marks or at a price above the affixed; unduly favoring one consumer.

➤ Are the Wondo Company complied with these prohibitions?

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➤ What is the practice on the ground look like concerning above obligations?

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6. Did the company engaged in acts of unfair competition any time before? If the company practice does not conform to currently working law, which government institution should concern soon and take a measure? What precaution can be taken by the company not to be participating in prohibited conducts?

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7. Do you think that wondo trading and investment company competition is fair with any other companies that engaged in the commercial activities? If your answer is no;

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✓ What are the critical practical, institutional, and legal challenges that affect fair competition the company?-----

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Thank you very much!

Eyasu Godana (LL.M candidate)