Ethiopian ‘Unfair Competition’ rules: Competition Proper Rules or a Misnomer Referring to Anticompetitive Unilateral Acts?

Abstract

Contemporary literatures and organizations such as OECD summarizes Anticompetitive Acts into four major categories; abuse of dominance, anticompetitive merger, anticompetitive agreements and anticompetitive unilateral acts. The latest Ethiopian Competition and Consumer Protection Proclamation (Proclamation No. 813/2013) included the above mentioned three categories of anticompetitive acts (abuse of dominance, anticompetitive merger and anticompetitive agreement) and seemingly replaced rules dealing with anticompetitive unilateral act with ‘Unfair Competition’ rules. Since enactment of the first competition proclamation (Proclamation No. 329/2003), ‘Unfair Competition’, became common term all competition proclamations (both repealed and the functioning proclamation) shares with almost indistinguishable difference. Now, considering the jurisprudential development of ‘Unfair Competition’ and the substantive content of this rule in both domestic and international legal arena, two questions linger into the author’s mind; (1) is ‘Unfair Competition an interchangeable name for describing ‘Anticompetitive Unilateral Acts? And (2) is the substantive content of ‘Unfair Competition’ a competition proper rule which really address competition issues, specifically, Anticompetitive Unilateral Acts? Or is it a rule which deals with a different issue? This short article tries to answer the above questions by scrutinizing the jurisprudential development of the concept / term with its substantive content; considering both domestic and international sourced. Finally the author proposes a solution by striking a balance between the existing rules of ‘Unfair Competition’ and the need to draft competition proper rule for Anticompetitive Unilateral Acts.

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OECD Organization for Economic Co-operation and Development (OECD)
1. Background

Competition law (also known as “Anti-trust law”) is a law that promotes or seeks to maintain market competition by regulating anti-competitive conducts of companies through public and private enforcement. Competitive trading activities and anti-competitive trading activities are subjected to competition law. The 1889 Canadian “Competition law” and the 1890 American “Sherman Act” are the two pioneer competition laws of the twentieth century.

Contemporary studies shows that anticompetitive trading acts could generally be categorized into four major categories: Anticompetitive Agreements, Abuse of Dominance, Anticompetitive Merger and Anticompetitive Unilateral Acts. Anticompetitive Unilateral Acts are those acts which could be done by individual market actors which distort competitive trading practice through their unilateral action designed to exclude actual or potential competitors.

Ethiopia introduced the first two competition laws in 1963 (Trade Practice Decree no. 50/1963) and 1965 (Trade Practice Proclamation no. 228/1965); however the country resorted to, due central planning economic policy which gives lesser attention to competition and competitive trading practice; during the period from 1975 to 1991. The year 2003 marked the beginning of the recent Ethiopian competition regime proclamation which mingled and tried to address competition and consumer protection issue in one proclamation (Proclamation No. 813/2013). The young competition regime went through unstable legislative drafting periods. The 2003 Trade Practice Proclamation (Proc. No. 329/2003) was repealed by the 2010 Trade Practice and Consumer Protection proclamation (Proc. No.

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2 Competition could be defined as “a situation in market oriented economies by which firms or sellers independently strive for buyers’ patronage; providing competitive price, quality, quantity or service which will hopefully results a better profit, sales, market share etc.” (World Bank and Organization for Economic Co-operation and Development (OECD), Frame Work for the Design and Implementation of Competition Law and Policy, (1999), p.1. [hereinafter cited as ‘World Bank and OECD’])

3 Competition Law-Historical Background

4 http://shodhganga.inflibnet.ac.in/bitstream/10603/100395/10/10_chapter%202.pdf [last accessed on February 07, 2018]

5 https://www.google.com/search?ei=H818WrHDKMOUsGJ_p7YCg&q=competition+law&oq=competition+l
aw&gs_l=psyab.3...245236.248234.0.248429.15.9.0.0.0.0.0.0.0...0..1c.1.64.psyab..15.0...0.WiFDibmLk [last accessed on February 07, 2018]


7 World Bank and OECD, cited above at note 1, pp. 19, 59, 69 and 141

After ups and downs to legislate a comprehensive competition law, the 2014 Trade Competition and Consumer Protection proclamation attempted to cover the aforementioned four areas of anticompetitive acts.\textsuperscript{10} Despite the three time amendment of competition and consumer protection related rules, one noticeable term and rule, i.e. ‘Unfair Competition’ remained unchanged.\textsuperscript{11} It seems that Article 8 of this proclamation which deals with addressing issues of ‘‘Unfair Competition’’, is probably the closest rule under the proclamation resembling to Anticompetitive Unilateral Acts. Because, the remaining parts of the proclamation are clearly vested to tackle issues relating to Anticompetitive Agreements, Anticompetitive Merger, Abuse of Dominance and Consumer Protection.\textsuperscript{12}

Unfortunately the proclamation fall short to provide a definition for the term, ‘‘Unfair Competition’’. Nonetheless the proclamation proceeds with prohibitory rule which states that ‘‘No business person may, on course of trade carry out any act which is dishonest, misleading, deceptive and harms or likely to harm the business interest of a competitor.’’\textsuperscript{13}

Sub article 2 of Article 8 of the same proclamation list out acts which would qualify as unfair competition: (1) Causing confusion with other businesses or activities of other business persons, (2) possession / disclosure / use of information another business without the latters’ consent and contrary to honest trade practice, (3) false / unjustifiable allegations, (4) comparing goods falsely / equivocally while advertising, (5) disseminating false / equivocal information to consumers, (6) obtaining / attempting to obtain confidential business information of other business persons without their consent, etc. are listed as unfair competition acts.\textsuperscript{14}

Looking at the above listing and discussion, it would be logical if one may wonder about two issues; (1), meaning or idea of ‘Unfair Competition’ and (2), whether the above listing does really represent Anticompetitive Unilateral Acts which hamper competition or the listing is

\textsuperscript{9} Proclamation No. 228/1965 (Trade Practice proclamation) could be cited as the pioneer Ethiopian competition law. (see Elias N. Stebeke, Deliverables and Pledges Under Ethiopian Competition law: the need for private sector empowerment and enablement, MIZAN LAW REVIEW vol. 11, no. 1 (2017), p.37)


\textsuperscript{12} Ibid.

\textsuperscript{13} Id. Art. 8(1) Proclamation No. 813/2013.

\textsuperscript{14} Id. Art.8(2) Proclamation No. 813/2013.
just intellectual property related rules which protect good will of businesses. Thus, this brief article focuses on discussing the historical background and nature of rules relating to unfair competition and the interplay of this rule with rules against Anticompetitive Unilateral Acts.

2. Jurisprudential History ‘Unfair Competition’

   International Development

The term Unfair Competition relates to more than a century old international convention, ‘the 1883 Paris Convention for the Protection of Industrial Property’, and it appeared in this convention for the first time as a rule which prohibits any act of competition contrary to honest practice in industrial or commercial matters. Particularly, acts: (1), causing confusion with good or industrial / commercial activities of a competitor; (2), false allegation which discredit goods or industrial / commercial activities of a competitor, and (3), acts misleading the public as to nature / purpose manufacturing process / characteristics of goods etc. are considered as acts of unfair competition. Literatures reveals trade mark laws of countries such as United States of America were influenced by unfair competition rules of Paris Convention. Hence, one can easily notice that the 1883 Unfair Competition rules of the Paris Convention for Protection of Industrial Property predates the late coming competition laws of (1889 Canadian Competition Law) and United States (1890 Sherman Act).

Even though some may argue that the scope of unfair competition is being / has been extended to apply to any misappropriation of what equitably belongs to a competitor, in American Federal courts, unfair competition is judged to be a euphemism / a convenient name for the doctrine that no one should be allowed to sell his goods as those of another.

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Rudolf Callmann explains that unfair competition is a theory which protects trademarks / similar devices adopted by the plaintiff, registered or not will be protected against simulation by a competitor which violates the rules of fair competition and does injury to the plaintiff.\(^{18}\) Similarly, Charles Grove Haines mentioned that despite recently widening its scope to address ‘any conduct to the part of one trader which tends unnecessarily to injure another in his business’, unfair competition was defined in the dictum that “nobody has any right to represent his goods as the goods of somebody else ” and the term has been used for the first time in courts’ attempt to ensure protection of trademarks.\(^{19}\)

Ergo, scrutiny of the aforementioned statements / arguments, coupled with the fact that unfair competition rules came into picture before enactment of even the two pioneer competition laws of America and Canada;\(^{20}\) shows that unfair competition is more of intellectual property related rule, which developed through an effort to protect business rights such as trademark, trade name and indication, rather than being anticompetitive rule per se.

**Domestic Development; the case of Ethiopia**

The Civil Code of Ethiopia addressed the issue of ‘unfair competition’ as a fault based extra contractual offence when a person, through false publication or by any other means contrary to good faith, compromises a reputation of a product or the credit of a commercial establishment.\(^{21}\) Supplying false information is also addressed under the Civil Code as fault based offence; hence, one may analogize this rule as, mutatis mutandis, applicable to business transaction.\(^{22}\)

The Commercial Code also addressed ‘unfair competition’ as acts of competition which are contrary to honest commercial practice and it includes: (1), acts likely to mislead customers regarding undertaking / products /or commercial activities of competitors and (2), false statement made in course of business with a view to discredit undertaking, product or commercial activity of competitors.\(^{23}\)

\(^{18}\) Rudolf Callmann, “‘Trade-Mark Infringement and Unfair Competition’”, *Law and Contemporary Problems*, p.185 and 186 (available at: https://scholarship.law.duke.edu/lcp/vol14/iss2/2/)

\(^{19}\) Charles Grove Haines, “Efforts to Define Unfair Competition”, *Yale Law Journal* vol. 29 no.1 (1919), p.2

\(^{20}\) A Reappraisal of a Canadian Anti -combines Act of 1889, cited above at note 4, pp.128 – 130 [Unfair competition rules for trademarks, trade names and indications are included in the 1883 Paris convention. The two pioneer competition rules came into picture in 1889 and 1890 by United States of America and Canada, Respectively]

\(^{21}\) Civ. C., Art. 2057

\(^{22}\) Id. Art. 2059

\(^{23}\) Comm. C. Art. 133
The Criminal Code of the country also prohibits acts of confusing goods / business activities, discrediting goods / business activities and revealing / taking advantage of trade secrets, of other traders as an act of Unfair Competition.\(^\text{24}\)

The above discussion shows that the country adopted rules of Unfair Competition to regulate acts which could damage good will of traders and their economic advantage.

The research team for ‘Review of Legal and Institutional Framework for Market Competition in Ethiopia’ stated that ‘Unfair Competition’ relates to actions of firms that causes an economic injury to another firm, through deceptive or wrongful business practice.\(^\text{25}\)

According to the research team’s report, the common examples of unfair competition includes, trade mark infringement and misappropriation, false advertisement, ‘bait and switch’ selling tactics, unauthorized usage of other firms brand, use of confidential information by former employees to solicit customers, theft of trade secret, breach of restrictive covenant, trade libel, and false representation of product/service.\(^\text{26}\)

On another literature, Alemayehu Fentaw, denotes that the ‘law of unfair competition’ is primarily comprised of tort rules which addresses issues of tortious acts causing injury to economic interest of business, through deceptive / wrongful business practice.\(^\text{27}\)

Simply put, the law of unfair competition could be defined as one type of fault based extra-contractual liability.\(^\text{28}\)

According to Alemayehu Fentaw, the line which demarcates unfair commercial competition from other areas of laws (such as Extra-contractual Liability Law, Contract Law, Intellectual Property Law or Antitrust Law) is not really clear when it comes to ‘unfair acts’ such as price fixing agreements, breach of contractual obligations, marketing unsafe products, infringing copy right / patent / trade mark rights, or disseminating misleading ads.\(^\text{29}\)

Harka Haroye, a former chairman of Ethiopian Trade Practice Investigation Commission, on his article, ‘Competition Policy and Laws: major Concept and an Overview of Ethiopian Trade Practice Law’ mentioned that ‘unfair competition’, a dishonest / fraudulent rivalry in trade and commerce, is by its very nature an intellectual property right violation of

\(^{24}\) Crim. Code, Art. 719 (a), (b) and (e)


\(^{26}\) Ibid.

\(^{27}\) Alemayehu Fentaw, Ethiopian Unfair Competition law, (The University of Oxford Centre for Competition Law and Policy: working paper CCLP (L) 21), p. 2 (Available at: https://www.law.ox.ac.uk/sites/files/oxlaw/cclp_1__21.pdf)

\(^{28}\) Ibid.

\(^{29}\) Ibid.
individuals / firms.\textsuperscript{30} Infringement of trade mark / trade name / etc., distributing false / misleading information to consumers, false / misleading comparison of goods during advertising etc. are regarded as unfair competition.\textsuperscript{31}

Therefore, examining the historical development of the term ‘Unfair Competition’, both internationally and under the domestic legal environment, one could have the audacity to strongly argue that ‘Unfair Competition’ rules are rules dealing with good will (including trade mark, trade name, indications, origin etc.) of traders from being abused by acts of passing off goods / services of others as one’s own rather than crafting competition proper rules which aims at encouraging competitive trading practice and prohibiting unilateral acts which lessen or avoid competitive trading practice. Now, besides arguing that ‘Unfair Competition’ rules are not competition proper rules by their very nature from jurisprudential point of view, let’s examine whether the substantive content of Ethiopia ‘Unfair Competition’ rules exhibits competition related rules or something else.

\section*{3. Substantive Content of Ethiopian ‘Unfair Competition’ Rule}

For the purpose examining the substantive content of the Unfair Competition rule, it is best to dissect article 8 of the Proclamation No. 813/2013 as follows:

\textbf{Article 8 (1)}

This Article seems to offer a general rule which prohibit unfair competition and possibly, a definition for ‘unfair competition’. The article states that it is prohibited to carry out acts which are dishonest, misleading, deceptive and harms or likely to harm the business interest of a competitor. There is no mentioning of the word competition or prohibition of anticompetitive act under this sub article; rather, it proclaims that dishonest, misleading and deceptive acts which harms or likely harms competitors are prohibited. Hence, article 8(1) appears to be a protection for private business interest (goodwill) of market actors instead of being a rule which aims at promoting competitive trading practice and prohibits anticompetitive acts. Even if one may consider, for argument sake, the above sub article as a competition rule, one may couldn’t help but wonder if all dishonest, misleading and deceptive acts which may or may not harm interest of competitors in the market will always

\textsuperscript{31} Ibid.
be considered as anticompetitive acts which may lessen competition. For instance, one shoe producing company may discredit its competitor promoting that shoes produced by the later are not products of genuine leather; eventually resulting economic loss to its competitor. This act could be subjected to private laws such as Contract / Tort laws etc. and the act of the perpetrator may not necessarily affect the overall competition / competitive trading practice in the market because; competitive market or not, companies may try to discredit their competitors and promote their goods and services to harvest fruits of their misleading and dishonest act.

Keeping in mind the inclination of this article to protect private interests of traders, it is fair to question if competition law is a tool to enforce private rights of market actors or if it is a public law which aims at shaping a market in a certain fashion. Even though competition law helps to protect private interests of traders, it is ultimately considered as a public law which is concerned with the governance of a state, and it is not simply a form of private regulation concerned solely with the governance of private market.\footnote{Michael W. Dowdle, “On the Public Law Character of Competition Law: A lesson from Asian Capitalism”, National University of Singapore Law Working Paper Series, no. 2014/004, (2014), p. 6 [available at: \url{http://lawnus.edu.sg/wps/}]} This public nature of competition law could also be understood as an inherent political form of regulation which involves balancing of public and private concerns.\footnote{Ibid} Unfortunately, the above article tends to focus more on private aspect of competition law instead of its public law character. For example, maintenance of competitive free market, which is cited on article 3 (1) the proclamation, could be referred as a public policy choice rather than a mere private rule since it is mainly up to governments to shape the nature of the market; choice of competitive free market is more of a public law which governs market actors and stakeholders in general. Thus, the above statements and arguments reveals that Art. 8 (1) is does not directly deal the issue of competition; instead it focuses on protecting right / interest of trades from being violated by the act of other traders.

**Article 8 (2) (a) and (b): Confusion and Disclosure / Use of Information**

Article 8(2) (a) deals with acts which confuse someone else’s business or commercial activities with another business / commercial activity. Simply put, this article prohibits traders from confusing their businesses / commercial activities with other businesses. This article seems a protection for both traders and consumers, because: (1), traders and their goodwill is protected from confusing acts of their competitors who want to pass of other...
traders’ goodwill as their own; ergo confusion of trade names, or trademarks is prohibited,\(^{34}\) (2), the prohibition will help consumers to make an informed decision free from any confusing act of traders with respect to trade names, trademarks etc. The prohibition on the above article inclines more to protection of goodwill of traders / interest related to it and protecting consumers from making wrong decisions because of confusion of business or trading activities. It is hard to grasp a hint which shows that this article is meant to prohibit Anticompetitive Unilateral Acts because it mentions nothing about prohibition of anticompetitive trading practice. Moreover, the above prohibition would fall under the jurisdiction of Trademark Registration and Protection Proclamation,\(^{35}\) Commercial Code\(^{36}\), and Extra Contractual law which prohibits false publication and other acts contrary to good faith.\(^{37}\) Hence, it seems that the proclamation repeated rules stated in different legislations in order to govern private matters instead of articulating proper competition rules for Anticompetitive Unilateral Acts. Besides, the Criminal Code of the country criminalizes acts which create confusion with goods, dealing, products or commercial activities.\(^{38}\) Article 8 (2) (b) offers a rule which prohibit possession / disclosure / use of another business persons’ information without the consent of the later, in a manner contrary to honest commercial practice. Since the proclamation failed to define what constitutes as ‘information’, it is important to refer other documents which may define this word. The 1985 Uniform Trade Secret Act describes ‘Trade Secrets’ as information which includes formula, patter, compilation, program, pattern, device, method, technique or process which brings economic gain from not being know to the public.\(^{39}\) Thus, one could understand Information as a sensitive trade secretes whose disclosure could result economic loss to the owner thereof. Acquisition, disclosure or use of such trade secrets without implied or direct consent is regarded as ‘misappropriation’ of trade secret of traders.\(^{40}\) Ironically, Ethiopian Criminal Code follows a rule which prohibits revealing / taking advantage of revealed trade secrets.

\(^{34}\) TradeMark Registration and Protection Proclamation, 2006, Preamble Proc. No. 501, Neg. Gaz. Year 12, No. 31 [hereinafter cited as ‘Trademark Registration and Protection Proclamation’] [The preamble it is necessary to protect good will of business persons by protecting their trademarks from confusion between similar goods / services]

\(^{35}\) Ibid.

\(^{36}\) Comm. C. Art.133 (Cases of Unfair Competition), and Art. 138 (Assumed Trade name and prohibition of confusion of trade names) see footnote 20

\(^{37}\) Civ. C. Art. 2057, see footnote 18


\(^{40}\) Ibid.
obtained / revealed in a manner contrary to good faith.\(^{41}\) Accordingly, as per the above definition and scrutiny of the aforementioned sub article of the proclamation with the criminal rule stated, one may have the audacity to argue that Art. 8 (2) (b) is a protection for private right of traders (trade secret) instead of being a proper competition rule against Anticompetitive Unilateral Act.

Thus, scrutiny of the above sub articles and arguments stated presents that the two sub articles deals with private right of traders rather than being a means to shape competition culture in markets or prohibiting Anticompetitive Unilateral Acts.

**Article 8 (2) (c) and (d): False Allegation and False / Equivocal Commercial Advertisement**

Article 8 (2) (c) deals with false / unjustified allegation which discredits / likely to discredit business activities of a trader and goods / services producers or offered by such business person. From the above statement, it is easy to understand that there is no indication or mentioning of prohibition to Anticompetitive Unilateral Act; instead, it simply prohibit false / unjustified allegation which discredit good will of other traders. Ironically, the same rule has been provided under Ethiopian Commercial Code which deals with false statements made in course of business with a view to discrediting the undertaking, products or commercial activities of a competitor.\(^{42}\) Furthermore, the Commercial Code provides a relief by cross referring Article 2122 of Ethiopian Civil Code which offers abandonment of the false allegation as a relief. The country’s Criminal Code also addressed the issue of discrediting goods / dealing / commercial activities of other traders as a crime entailing fine and simple imprisonment.\(^{43}\) However, the current competition law adopted prohibition of false allegation as a proper competition rule while in fact the rule actually deals with protection of private economic right, good will.

Article 8 (2) (d) is all about false / equivocal comparison of goods / services during commercial advertisement. Looking at the direct meaning of the above sub article, one couldn’t help but wonder if it is an advertisement law or a competition law which helps to create competitive trading environment. Answering this question requires referring to the country’s advertisement proclamation. The Advertisement Proclamation on article 8 (8) states that advertisement which undermines product / service or capacity or reputation of a competitor by comparing / contrasting it with ones’ product / service, could result, unless

\(^{41}\) Crim. C. Art. 179 (e)  
\(^{42}\) Comm. Code, Art. 133  
\(^{43}\) Crim. Code. Art. 179 (a)
punishable with severe penalty under other laws, a fine up to 150,000 birr.\textsuperscript{44} The rule mentioned above shows that, the Advertisement Proclamation has already addressed ‘unfair content / misleading advertisement’ with a sanction as acts contrary to the rule stated. Therefore, it seems article 8 (2) (d) of the competition law seems a redundancy because the same prohibition has been already in place by another specific law dealing with matters of commercial advertisement. Besides, article 8 (2) (d) don’t offer any specific rule dealing with Anticompetitive Unilateral Act. 

The above mentioned two sub articles revealed that both sub article 2 (c) and (d) failed to provide rules which prohibit Anticompetitive Unilateral Acts. Instead, the sub articles provided a rule against false allegations and advertisement against traders.

\begin{center}
\textbf{Article 8 (2) (e) and (f): Disseminating False / Equivocal Information to Customers / Users and Obtaining or Attempting to Obtain Confidential Information of another Business}
\end{center}

Dissemination to consumer or users, false / equivocal information whose source is unknown, in connection with the price / nature / system of manufacturing / manufacturing place / content / suitableness for use or quality of goods / services is regarded as an act of unfair competition. However, the prohibition seems a protection for consumers from being misguided by falsely or equivocally disseminated information. However, Part Three of the same proclamation deals with protecting consumers by granting consumers the right to get sufficient and accurate information or explanation as to the quality and type of service the consumer purchases.\textsuperscript{45} This part of the proclamation (Chapter Three) provides a detailed requirement for display of price and affixing labels on goods offered to consumers.\textsuperscript{46} Besides, article 3 (2) of the proclamation clearly shows that ensuring safeness / suitableness of goods and services and their equivalence to the price customers pay is an aspect of consumer protection rather than competition. Article 19 of the proclamation also prohibits false commercial advertisement which misleads customers as to nature, component, volume method and date of manufacturing etc. Therefore, article 8 (2) (e) inclines to being a rule for consumer protection rather than Anticompetitive Unilateral Acts.

\textsuperscript{44} Advertisement Proclamation, (2013), Proc. No. 759, \textit{Neg. Gaz.}, year 18, no. 59, Art. 8 (8) and 34 (1) (c) [hereinafter cited as ‘Advertisement Proclamation’]

\textsuperscript{45} Proclamation No. 813/2013, Art. 14 (1)

\textsuperscript{46} Proclamation No. 813/2013, Art. 14 (Price Display) and Art. 16 (Labels of Goods: such as Name of good, volume of good, quality of good, description of materials used for manufacturing, name and address of manufacturer, manufacturing and expiry date, indication that the good fulfilled the necessary standard of the country).
Article 8 (2) (f), almost as similar as article 8 (2) (b) provide rules for protection of confidential information (trade secrets) of traders from being obtained by other traders through former / current employees of the trader who owns the business secret. This article also prohibits traders from pirating customers of other traders by using trade secrets of the later and lessening competitiveness of a trader because of such act. Nevertheless this rule is not a direct competition rule; on the contrary, it is a protection for trade secret of traders and it seems that the rule wants to incidentally touch up on the idea of lessening competitiveness of traders. World Intellectual Property Office defines trade secret as ‘any confidential business information which provides an enterprise a competitive’.

It is understandable that losing their trade secrets, traders or companies may face an economic loss since other competitors could simply use the divulged trade secret to end dominancy of the owner of the trade secret. However, protection for trade secret, doesn’t not necessarily qualifies as a competition law for Anticompetitive Unilateral Acts. Thus, it would be very hard to argue that article 8 (2) (f) is a proper competition law which aims at promoting competitive trading environment by managing Anticompetitive Unilateral Acts.

Similar to the aforementioned sub articles of Article 8, sub article 2 (e) and (f) aims at protecting private right of traders (being protected from false information dissemination to their customers and from unlawful usage of their business secret). It is hard to consider such rules as competition proper rules which tackle Anticompetitive Unilateral Acts.

**Article 8 (2) (g): Other Similar Acts Specified by Regulation to be issued for the Implementation of the Proclamation**

The drafting of this article seems to show that there would be other acts of unfair competition which are not yet included under the proclamation; i.e., article 8 is an illustrative article which doesn’t exhaust all acts of unfair competition. Regulations are tools of the executive branch of the government which help to implement proclamation adopted the highest organ of the government, the House of People Representative. Being a subordinate to primary law (proclamation), regulations are inferior legislations helpful to implement proclamations without deviating from rules and standards of the proclamation. However, the Trade Competition and Consumer Protection Proclamation simply paved a wide open door for any regulation of the executive (which would be legislated to implement the proclamation) to determine other acts of unfair competition freely. Hence, it is possible for the executive to

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include other acts, freely, as acts of unfair competition using article 8 (2) (g) as its authority
to do. In other words, this article would pave a way for the executive branch to freely extend
the list of acts of unfair competition as it pleases; such unlimited power to legislate may lead
to abuse of power.

In addition to the above mentioned gap of the law, the competition regime is not yet fortunate
even to have the regulation which would implement the rules stated on the proclamation;
i.e., only those acts listed under article 8 of the proclamation would be considered acts of
unfair competition.

To sum up, the substantive content of article 8 (Unfair Competition) rule under the Ethiopian
Trade Competition and Consumer Protection Proclamation tends to incline to addressing
business good will and related violations such as trade mark violation, creation of confusion,
false allegation, using / abusing trade secret of others, false advertisement etc. It would be
really challenging to consider this rule as competition proper rule which are meant to prohibit
market actors from engaging on Anticompetitive Unilateral Acts which lessen / avoid
competition from the market or there is no indication / connection drawn to show the
importance the rule of Unfair Competition in promoting competitive trading practice or
curbing Anticompetitive Unilateral Acts.

**4. Anticompetitive Unilateral Acts**

As discussed before, Anticompetitive Unilateral Acts relates to unilateral acts of lessening /
avoid competition from the market through different techniques.\(^{49}\) Such Anticompetitive Acts
may relate to manipulating: 1: price, 2: transaction, 3: information dissemination, 4: liquidity
of commodities (by artificially raising or depressing demand or supply of a commodity via
cornering / hoarding and dumping commodities), 5: price ranges (in markets where there is
price range to regulate fluctuation of price; Ethiopia Commodity Exchange could be a good
example), and 6: price discovery system (which in normal course of things base of economic
variable such as demand and supply).\(^{50}\) The above listing shows that it is possible for traders
to lessen or eliminate competition from the market simply by their unilateral act (mainly by

\(^{49}\) Id. World Bank and OECD, pp. 141

\(^{50}\) Michael Tilahun, *Tackling Anti-Competitive Unilateral Acts Under The Ethiopian Competition Regime: A*
*Case Study Of Electronic Trading At Ethiopia Commodity Exchange*, 2018, Addis Ababa University Law
School: Masters (LL.B) Graduation Thesis on the Field of Business Law, P. 42  [Available at Addis Ababa
University Library]
manipulating price, transaction and information dissemination) without abusing intellectual property right of other traders (false allegation, abuse of trademarks, creating confusion, equivocal comparison / advertisement, etc.).

However, one may argue that violations on good will (intellectual property rights including trade name, trademark, indication etc.) of traders and acts of misleading or confusing goods / services by way of passing of others’ good / service as one’s own good / service could have an impact of lessening / avoiding competition because the more traders are hurt by anticompetitive acts of their competitors, there will be a probability of economic loss which may eventually drive traders out of a competition. Nonetheless, there are laws designed specifically for addressing such violations and economic loss; hence, unless there is a clearly established link between an act of passing off / false allegation, confusing advertisement etc. and lessening / avoiding of competition in the market, it would be far-fetched and hasty generalization to simply conclude that any unilateral act against trader’s good will or intellectual property is Anticompetitive Unilateral Act.

5. Concluding Remark

In general, one may strongly argue that Ethiopian ‘Unfair Competition’ is not a competition proper rule and it is a misnomer to refer Anticompetitive Unilateral Acts as ‘Unfair Competition’ because the historical / jurisprudential background (both domestic and international laws), literatures dealing with ‘Unfair Competition’ and the substantive content of Ethiopian Unfair Competition rule, Paris Convention for Protection of Industrial Property exhibits that it is a rule meant and tends to govern intellectual property related rights and violations instead of serving as a competition proper law which mainly focuses of promoting competition culture and prohibiting Anticompetitive Unilateral Acts. Hence, considering the fact that there is intellectual property office and different laws which focuses on protecting intellectual property right such as good will and trademarks, it would be logical and important to create a nexus between the rule of ‘Unfair Competition’ and competition law; besides drafting a proper rule for Anticompetitive Unilateral Acts the market is facing or may faces in in future.

Proposed Solution

As pointed out in earlier discussion, it appears that the term Unfair Competition, is a misnomer which couldn’t be used as an interchangeable term for describing Anticompetitive
Unilateral Acts and the substantive content of this rule deals with a different (intellectual property related matters and violation) rather than being a tool to encourage competition and control Anticompetitive Unilateral Acts. Hence, considering the gap, the authors proposes the following amendment which can strike a balance between the existing rule of ‘Unfair Competition’ and the need to have competition proper rules for Anticipative Unilateral Acts.

(Amendment)

Article 8: Anticompetitive Unilateral Acts

(1) No business person may in the course of trade, unilaterally, carry out any act which lessen or eliminate competition.

(2) The following shall be deemed acts of Anticompetitive Unilateral Acts

(The listings mentioned on the existing proclamation (sub article 2 (a - g) will be preserved with additional phrase, i.e.,

‘Any of the above mentioned acts / attempts violating intellectual property right of another trader where when such violation is established by the appropriate Authority following due process of law; and where such violation results in elimination / lessening of competitive trading practice it shall be considered as Anticompetitive Unilateral Act.’

(2) Bis: the following shall also be deemed acts Anticompetitive Unilateral Acts

(a) Any act of submitting transaction orders / executing transaction with fictitious or false price, quantity, quality etc. with an intent to create artificial price or liquidity of goods and services;

(b) Any act of refusing to disclose market information with an intent to create market information asymmetry which misleads market actors;

(c) Disseminating to market actors, customers, governmental institutions and other stakeholders false market information or rumours with an intent to mislead decision making of market actors, destroy stability of markets in a manner that lessens competitiveness of markets;

(d) Unless otherwise provided by law, matching of trades (buy and sell orders) by a single person in a manner which eliminate or lessen competitive trading practice;
(e) Submitting orders or executing trades with highly exaggerated (high or low) unrepresentative price in a manner contrary to rational economic decision making or with an intent to cause market fluctuation or resulting elimination / lessening of competitive trading practice;

(f) Any act or attempt of executing trades using insider information which is not available to all traders or the public and where such act / attempt results elimination / lessening of competitiveness of a market;

(g) Notwithstanding legally permitted warehousing periods, any act or attempt of cornering goods or services without any economic reason or with an intent to create artificial demand;

(h) Any act of dumping goods / services without sound economic rational or in a manner which lessens competitiveness of other market actors;

References

Laws

6. Trade Practice Proclamation, Proclamation No. 228/1965

International Instruments

1. Paris Convention for the Protection of Industrial Property, (March 20, 1883)

Other Bibliography Materials: (Books, Articles, Working Papers, Reports, Charges, Incidents)
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