



CENTRAL EUROPEAN UNIVERSITY BUDAPEST,  
LEGAL STUDIES DEPARTMENT, LL.M,  
INTERNATIONAL BUSINESS LAW PROGRAM, 2012/2013

# **COMPARATIVE ANALYSIS OF THE APPLICABLE LEGAL PROTECTION FOR PURCHASERS ON THE INTERNET, IN EUROPE AND USA- LESSONS FOR NIGERIA**

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## **LLM SHORT THESIS**

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## **ABSTRACT**

The Internet has introduced novel situations that never existed before in the world of commerce. New contracts and new commodities that never existed before have now emerged and purchasers are left with little or no form of protection. The most unique thing about the Internet is: the Internet itself; such that; as a whole, its nature encompasses several issues which create uncertainty when compared with real world commerce. This could relate to issues like the location of the parties, what law to apply, which Court has jurisdiction to hear the case and withdrawal or cancellation rights.

This thesis focuses on bringing out the benefits of e-commerce for purchasers; to highlight the challenges faced by purchasers in online transactions; and to discover how these issues are being tackled in Europe and USA, by comparing how both systems have protected their online consumers, in order to set an example and present a stepping stone for the Nigerian Legal system in its developmental journey in the E-Commerce world.

This thesis elaborated the different approaches used by both the EU and US jurisdictions in protecting online purchasers in E-commerce and found out that the EU approach is more consumer-friendly. This thesis also discovered that in Nigeria there is no legislation on E-commerce protection or regulation, although there is a bill on cyber crime protection but it has not been passed into law..

This paper therefore highlighted suggestions for Nigeria that will improve its e-commerce protection through providing infrastructure, repealing old laws and enacting new laws that will reflect the global trends of today.

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## INTRODUCTION

Electronic Commerce emerged in the 20<sup>th</sup> Century, due to the need for a faster platform for all forms of trading in commerce.<sup>1</sup> Prior to this, commerce was carried out manually in the real world between individuals and traders without the help of technology. The sudden change was so drastic and far reaching that the whole world was awakened to the need to upgrade one's knowledge of technology in order to keep up with the latest trends.

Trade itself has existed almost as long as man has existed but, this new innovation called E-commerce is far different from what had been the norm in the world of commerce before, and this has brought huge problems which have led to the some legislation, both private and public in some jurisdictions in order to regulate and control its excesses.

In the United States for instance, there has been a lot of focus on private regulation of the market due to the *laissez faire* and free market economy that exists in the US. In Europe, more concentration is placed on public regulation and control of the market. There are a lot of Directives by the EU that are concentrating on protecting consumer rights. According to Viviane Reding, "Consumers need to know their rights will be enforced and reputable traders need to know that unfair traders will face appropriate penalties."<sup>2</sup>

Due to the nature of the internet, it is harder to control the transactions happening on it, when compared with the transactions in the real world and based on its virtual nature, it is not

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<sup>1</sup>Search result on E-Commerce, Britannica Academic Edition, <http://www.britannica.com/EBchecked/topic/183748/e-commerce> (last visited March 1<sup>st</sup> 2013).

<sup>2</sup> Viviane Reding, the Vice President of the European Commission, EU Commissioner for Justice; Speech at the European Consumer Summit in Brussels: Towards a More Coherent Enforcement of EU Consumer Rules, 2 (March 19, 2013). Available at: [http://europa.eu/rapid/press-release\\_SPEECH-13-237\\_en.pdf](http://europa.eu/rapid/press-release_SPEECH-13-237_en.pdf)

tangible, since it exists in cyberspace and is capable of reproducing itself in multiple locations at the same time since there are no borders restricting it.<sup>3</sup>

In Nigeria, however there is no legislation protecting online purchasers. The Consumer protection Act in Nigeria focuses on the safety and quality or merchantability of products sold in Nigeria.<sup>4</sup> But, it does not provide e-commerce protection. Also, the Sale of goods Act 1893, used in Nigeria, is outdated since it does not extend to online contracts.<sup>5</sup> There has also been a Bill on Cyber crime proposed at the National Assembly in Nigeria since 2011, called the “draft Nigerian Cyber crime Act”, which will adequately fight cyber crime in Nigeria, but has not been passed into law till date.<sup>6</sup>

Hence, this thesis seeks to highlight the need for a reform of the Consumer protection laws of Nigeria to expand the level of protection for consumers in the online market; to suggest methods that will, increase the level of trust in the Nigerian cyber space or business environment for cross border transactions and to foster its internal market.

To achieve this, I will make a practical and analytical comparison of two developed jurisdictions, the US and European approaches, in order to discover how the issue has been successfully dealt with in those areas.

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<sup>3</sup> David G. Post, Governing Cyberspace, Vol. 43, No. 1, The Wayne Law Review, 155, 159-160 (Fall 1996), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=11477](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=11477)

<sup>4</sup> Consumer Protection Council Act, Chapter C25 , Decree No. 66 of 1992, Laws of the Federation of Nigeria, Section 2(2004)[http://www.google.hu/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&sqi=2&ved=0CDcQFjAA&url=http%3A%2F%2Fwww.cpc.gov.ng%2Findex.php%2Fdocuments-and-forms%2FCPC%2520Act%2520pdf.pdf%2Fdownload&ei=RFNKUf\\_zJoT5sgbJmYCIDQ&usg=AFQjCNGkDrpjuhSmsjdm7\\_zCqZkhru\\_7PA&sig2=rR3QPu16bXLyFRGC9pHC9Q&bvm=bv.44158598,d.Yms](http://www.google.hu/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&sqi=2&ved=0CDcQFjAA&url=http%3A%2F%2Fwww.cpc.gov.ng%2Findex.php%2Fdocuments-and-forms%2FCPC%2520Act%2520pdf.pdf%2Fdownload&ei=RFNKUf_zJoT5sgbJmYCIDQ&usg=AFQjCNGkDrpjuhSmsjdm7_zCqZkhru_7PA&sig2=rR3QPu16bXLyFRGC9pHC9Q&bvm=bv.44158598,d.Yms)

<sup>5</sup> Nat OFO, Sale of Goods Act in Nigeria: A Century and A Score and Still Going Strong! Available at: <http://thecorporateprof.com/sale-of-goods-act-in-nigeria-a-century-and-a-score-and-still-going-strong/> (last visited on the 29<sup>th</sup> March, 2013)

<sup>6</sup> Elly Okutoyi, Nigeria Not in a Position to Fight Cybercrime, says NCC, March 13, 2013. Available at: <http://www.humanipo.com/news/4593/Nigeria-not-in-a-position-to-fight-cybercrime-says-NCC>

Chapter one will bring out the similarities and differences between real world commerce and Electronic commerce and reveal their features that sharply contrast with each other in their mode of operation and also highly the benefits of e-commerce. Chapter two will then embark on a journey to the United States to find out what e-commerce tools and level of protection for purchasers are seen in their e-commerce disputes.

Thereafter, chapter three will discuss the European jurisdiction to find out how this issue is being handled as well. Chapter four will visit to Nigeria to see why presently there is a wide gap in the level of development of e-commerce protection and find out the cause of the lacuna in the laws. Finally chapter five will propose solutions and suggest the best method or jurisdiction which Nigeria should adopt in order to make progress in e-commerce issues.

## **I. REAL WORLD COMMERCE vs. ELECTRONIC COMMERCE**

### **1.1. Contracts- real world contract vs. online contract**

Real world contract is defined under common law as a legally enforceable promise which was made for a valid consideration and may be express, implied in fact or implied in law (quasi contract).<sup>7</sup> Under civil law, there is no need to furnish consideration.<sup>8</sup>

Under the Uniform Commercial code, a “Buyer” is defined as “a person who buys or contracts to buy goods.”<sup>9</sup> “Seller” means “a person who sells or contracts to sell goods.”<sup>10</sup> “Contract for sale includes both a present sale of goods and a contract to sell goods at a future time.”<sup>11</sup>

On the other hand, online contracts or the field of Electronic Commerce can be narrowly defined as transactions executed over the internet.<sup>12</sup> An electronic shop is a web-based software system that offers goods and services, also collects offers, deals with delivery and accepts payment.<sup>13</sup>

### **1.2. Goods**

Under the UCC, “Goods” are defined as “movable things which are existing and identified before any interest in them can pass.”<sup>14</sup> Where the goods are not existing and identified they are termed “future” goods and the sale becomes a contract to sell.<sup>15</sup>

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<sup>7</sup> Lexis Nexis Capsule Summary, Contract s, §§1.01 & 1.02, 1 ( 2004)  
<http://www.lexisnexis.com/lawschool/study/outlines/pdf/contracts.pdf>

<sup>8</sup> Zarrokh Ehsan, Practical concepts in Contract Law (2008) Available at: <http://mpira.ub.uni-muenchen.de/10077/1/Practical-concepts-in-Contract-Law.pdf>

<sup>9</sup> Uniform Commercial code – Sales, §2- 103, 1(a) (as amended in 1994)

<sup>10</sup> Ibid at 1(d)

<sup>11</sup> Ibid at 2-106

<sup>12</sup> Zeinab Mohamed El Gawady, 2 available at [http://www.must.edu.eg/Publications/Businees\\_Res5.pdf](http://www.must.edu.eg/Publications/Businees_Res5.pdf)

<sup>13</sup> Andreas Meter, Henrik Stormer, Ebusiness and Ecommerce, Managing the Digital Value Chain, (Elizabeth Gosselin Trans., 2009) Available at: <http://bookfi.org/dl/619250/f71040>

<sup>14</sup> UCC 2-105

In contrast, goods are seen in a different perspective on the internet, due to the inherent nature or dematerialization of the internet, by which material assets lose their relevance in place of new intangible assets.<sup>16</sup> This has led to a departure from the original real world principles which are based on the clear distinction of goods and services.<sup>17</sup> Now we have new property rights, which were not originally covered by civil or common Law, but which also need to be protected by law.<sup>18</sup> Nowadays online transactions include the use of virtual currencies which are used to purchase virtual intangible goods, which are traded and purchased online.<sup>19</sup> Some websites using virtual currencies include gaming websites, virtual worlds, online communities and social networking websites.<sup>20</sup> A clear example is the 2<sup>nd</sup> life website where virtual currencies are used to purchase virtual goods including land, online..<sup>21</sup>

### 1.3. Benefits of E-commerce

The world we are in today is increasingly getting more global, and almost everything can be done on the internet. Access to information on the internet is only a few clicks away and can be accessed in a few seconds, depending on your bandwidth. It is expected that E-commerce will soon take over and become even as normal as real world commerce. Business men must now keep up with the pace, or risk being left behind.<sup>22</sup>

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<sup>15</sup> Ibid

<sup>16</sup> THOMAS HOEREN, *Electronic Commerce and Law- Some Fragmentary Thoughts on the Future of Internet Regulation From a German Perspective*, in LEGAL ASPECTS OF GLOBALIZATION, CONFLICT OF LAWS, INTERNET, CAPITAL MARKETS AND INSOLVENCY IN A GLOBAL ECONOMY, Kluwer L. I., 35, 36 (Jurgen Basedow and Toshiyuki Kono, eds., 2000)

<sup>17</sup> Ibid

<sup>18</sup> Ibid

<sup>19</sup> Peg Corwin, Virtual Currencies and Virtual Goods — Definitions and Revenue Streams in Social Networks. Available at: <http://howtostartasocialnetwork.com/2009/12/07/virtual-currencies-and-virtual-goods-definitions-and-revenue-streams-in-social-networks/>

<sup>20</sup> Ibid

<sup>21</sup> <http://secondlife.com/>

<sup>22</sup> Q.G.R., Benefits of e-commerce. Available at: <http://www.ajml.com.au/downloads/resource-centre/references/operational-management/Benefits%20of%20ecommerce.pdf>

One of the benefits of e-commerce is the increase in the responsiveness and service of the supplier and more participation of the purchasers.<sup>23</sup> For example, the online purchase of air tickets and online check-in system of most airlines which eradicates the unnecessary long check-in queues on boarding.<sup>24</sup> Also automatic confirmation and email feedback response is also a quick relief for purchasers.<sup>25</sup> The use of email can also increase the level of relationships between customers and suppliers since it is faster to use and readily available; it can also increase the level of consumer trust and loyalty when the seller engages in secure payment systems and reliable delivery methods..<sup>26</sup>

#### **1.4. Dangers of E-commerce**

Usually, purchasers need to be very wary of the dangers of internet scams on the internet. In real world contracts, the parties, in the course of executing the transaction, meet face to face and exchange information like place of business or home address, photocopies of drivers' license or international passport, which makes it less likely for fraud to occur. On the other hand, due to the depersonalized nature of the internet, it is very easy for people to create multiple personalities; which are false, and the issue of confirming the true identity of persons on the internet via an IP address remains a major problem till today<sup>27</sup>

Hence, based on the speed of information flow on the internet, it is easy for purchasers to be defrauded on the internet since tracing the true identity of persons on the internet is a herculean task or totally impossible. Computers can therefore easily be employed as a powerful tool by criminally minded people.<sup>28</sup> Innocent unsuspecting victims can easily be defrauded and lose their savings over totally non-existent basis for the transaction.

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<sup>23</sup> Ibid

<sup>24</sup> Ibid

<sup>25</sup> Ibid

<sup>26</sup> Ibid

<sup>27</sup> Thomas Hoeren, 43-44

<sup>28</sup> PAUL CULLEN, *Computer Crime*, in *LAW & THE INTERNET, REGULATING CYBERSPACE*, 207, 207 (Lilian Edwards & Charlotte Waelde, eds., 1997)

The major problem with computer crimes is that it is a trans-jurisdictional matter.<sup>29</sup> Hence knowing what law will apply in a particular case can be difficult in some cases.

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<sup>29</sup> Ibid

## **II. HOW PROTECTED ARE THE AMERICAN PURCHASERS IN E-COMMERCE ISSUES?**

### **2.1. Issues affecting the purchasers in e-Commerce in the USA and how they are handled**

#### **2.1.1. Security**

It is very necessary to have security in online transactions due to the risk of exposure of sensitive information like credit card data, phone numbers, and addresses.<sup>30</sup>

#### **2.1.2. Privacy**

To protect data privacy, there must not be any breach of the lawful or contractual duty to secure or preserve the private data of consumers in order to protect them: for example, the consumer's private information must not be sold to third parties without the knowledge or consent of the consumer.<sup>31</sup>

#### **2.1.3. Identity Verification**

This is a major issue in online transactions since it is most times difficult to confirm the real identify of the other party.<sup>32</sup> It could be a machine at the other end of the computer and this can therefore lead to parties denying transactions.

#### **2.1.4. Identity theft**

Identity theft is the unauthorized and mischievous use of a person's information fraudulently, to deceive others, or commit a crime.<sup>33</sup> Identity theft occurs when your personal information

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<sup>30</sup>Zarrokh Ehsan, Practical concepts in Contract Law 15 (2008) Available at: <http://mpira.ub.uni-muenchen.de/10077/1/Practical-concepts-in-Contract-Law.pdf>

<sup>31</sup> Kuanchin Chen & Adam Fadlalla, Online Consumer Protection, Theories of Human Relativism, 19 (IGI Global, 2009) Available at: <http://bookfi.org/dl/1196662/fed049>

<sup>32</sup> Lorna Brazell, Electronic Signatures Law and Regulation, 3

<sup>33</sup> Kuanchin Chen & Adam Fadlalla, 19

is stolen and used without your consent.<sup>34</sup> It can have damaging effects on your finances, credit history and reputation and may not be easy to resolve.<sup>35</sup>

Access to such information can be acquired through means like phishing; by which consumers are deceived into releasing their personal data through unsolicited mails.<sup>36</sup> Also hackers can obtain such information from an insecure company site; or when the data is exposed physically and carelessly, by the consumers themselves; or not properly disposed by a business handling such information.<sup>37</sup> Consumers must thus be careful when using the internet, not to divulge too much information about themselves on the internet, to avoid having their information being sold or stolen and used fraudulently.

Signs consumers should look out for are: unexplained bank withdrawals; calls about debts which they know nothing about; unfamiliar bank charges; medical bills which they did not use; or where they are arrested for a crime which someone else committed in their name.<sup>38</sup>

The Credit reporting companies in the US offer protection for a purchaser or consumer, whose credit card, wallet, or social security card is reported stolen or who is a victim of identity theft, when the matter is promptly reported to the card company: the company can place a fraud alert on the purchaser's card file; the consumer can also order his credit report; and create an identity theft report.<sup>39</sup> The Fair Credit Reporting Act (FCRA) mandates a consumer reporting agency to block the reporting of a consumer's file information that resulted from the effects of an identity theft.<sup>40</sup> This is done to avoid more loss for the consumer.

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<sup>34</sup> FTC, Taking Charge, What to Do If Your Identity Is Stolen, 3 Available at: <http://www.consumer.ftc.gov/articles/pdf-0009-taking-charge.pdf>

<sup>35</sup> Ibid , 3

<sup>36</sup> Kuanchin Chen & Adam Fadlalla, 19

<sup>37</sup> Ibid 19

<sup>38</sup> FTC, Taking Charge, What to Do If Your Identity Is Stolen, 4

<sup>39</sup> Ibid FTC 4-5

<sup>40</sup> The Fair Credit Reporting Act (FCRA), §605B, 28 Available at: <http://www.ftc.gov/os/statutes/031224fcra.pdf>

When informed of the missing or stolen card, the consumer reporting agency must place a fraud alert in the victim's file and inform the other agencies.<sup>41</sup> Placing a fraud alert is free and operates for 90 days.<sup>42</sup> It prevents the thief from using the card since the alert makes companies verify your identity first before issuing credit in your name, or they may try to contact you first.<sup>43</sup>

### **2.1.5. Internet fraud/scams**

On 12<sup>th</sup> January, 2012, the Internet Corporation for Assigned Names and Numbers (ICANN) called for applications for the introduction of new top level domain names which triggered some concerns by the International Consumer Protection and Enforcement Network (ICPEN) that this could increase fraud on the internet if proper safeguards were not implemented by ICANN.<sup>44</sup> ICPEN therefore suggested that before increasing the domain names, ICANN should effectively enforce its policies by ensuring strict compliance, in order to protect the consumers.<sup>45</sup> The reason for this is due to the fact that most internet fraud on the internet succeeds due to the self-duplicating nature of the internet, hence, there needs to be more caution.

ICPEN is however, an Organization that comprises Consumer protection authorities from almost 40 countries, most of which also belong to the Organization for Economic Cooperation and development (OECD).<sup>46</sup> The goal of ICPEN is to create awareness about trans-border activities that may affect consumers, like fraud prevention; deceptive fraudulent

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<sup>41</sup> Ibid (FCRA), §605A (a) (1) (A) & (B)

<sup>42</sup> FTC, Taking Charge, What to Do If Your Identity Is Stolen, 6

<sup>43</sup> Ibid, 6

<sup>44</sup> Rod Beckstrom, Letter to Dr. Stephen D. Crocker, Re: Consumer Protection Concerns Related to New gTLDs and RAA Amendments. Available at: [http://icpen.org/files/icpenDownloads/ICPEN\\_Letter\\_to\\_ICANN.pdf](http://icpen.org/files/icpenDownloads/ICPEN_Letter_to_ICANN.pdf)

<sup>45</sup> Ibid

<sup>46</sup> ICPEN brochure, Available at: [http://icpen.org/files/icpenDownloads/ICPEN\\_brochure\\_february\\_4\\_2009.pdf](http://icpen.org/files/icpenDownloads/ICPEN_brochure_february_4_2009.pdf)

advertising; and so on, and to encourage cooperation between law enforcement agencies in different countries.<sup>47</sup>

In the U.S., the Federal Trade Commission accepts complaints from consumers who may have fallen victims of these scam artists.<sup>48</sup> On its website it also suggested some things that consumers can do to avoid fraud, like: to avoid wiring money to strangers; not to send cash to unknown people but to do business with trusted sites and with well known merchants, and to use credit card since it's a more protected means of payment than sending cash; also to ignore messages that ask for financial data; not to play foreign lotteries; not to agree to collect a check from an unknown person who expects you to wire money back, since the check may be fake; to always read your bills and monthly statements regularly; to give to established charities rather than to one coming from nowhere; also to buy prescription drugs from licensed U.S pharmacies in order to avoid ordering fake drugs; to avoid deals that desperately ask you to send cash immediately; and finally, to know who you are dealing with, and where they are from, by carrying out an internet search to check for negative reviews.<sup>49</sup>

An example of scam includes tech support scams, wherein an unknown person calls to say that he detected viruses on your computer and offer you free assistance by which means he can in turn install malware (malicious software) into your computer without your knowledge, which can maliciously damage or hijack your system, or where you get pop-ups asking you to click and download such free computer scanners.<sup>50</sup> Criminals can also use malware to steal your information and perpetrate crime. Other examples of scam observed in the U.S., include

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<sup>47</sup> Ibid

<sup>48</sup> FCT R., 10 Things You Can Do To Avoid Fraud. Available at: <http://www.onguardonline.gov/articles/0001%2520Avoiding%2520Scams.pdf>

<sup>49</sup> Ibid

<sup>50</sup> FTC, Onguard online. Available at: <http://www.onguardonline.gov/articles/0011-malware> (last visited on 21st March, 2013)

email, phone, postal mail, and Internet scams by which consumers are deceived into sending money to the scam artists.<sup>51</sup>

### **2.1.6. Consumer rights**

The Federal Trade Commission is the U.S consumer protection agency. Its Bureau of Consumer Protection assists consumers to avoid fraud, deception, and unfair business practices in the marketplace.<sup>52</sup> The Bureau is responsible for: enforcing federal consumer protection laws; creating awareness in the consumers about their rights and ways of protecting themselves and; accepting complaints filed by consumers in fraud or identity theft related issues.

## **2.2. U.S. E-commerce legislation.**

### **2.2.1. UETA- Uniform Electronic Transactions Act, 1999**

UETA was enacted and approved for all the States in the U.S.<sup>53</sup> Its purpose is to remove barriers to electronic commerce by recognizing and validating electronic records and signatures.<sup>54</sup> It is procedural in nature, so the substantive rules of contract are not changed by the Act.<sup>55</sup> Some parts are modeled after the UNCITRAL Model Law on Electronic Commerce.<sup>56</sup>

The Act applies to electronic records or electronic signatures.<sup>57</sup> It does not apply to trusts and real estate transactions, and negotiable instruments.<sup>58</sup> But, it applies to electronic records and

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<sup>51</sup> FTC R., 10 Things You Can Do To Avoid Fraud.

<sup>52</sup> FTC, Bureau of Consumer Protection, Available at: <http://ftc.gov/bcp/index.shtml> (last visited on 21st March, 2013)

<sup>53</sup> The Uniform Electronic Transactions Act (1999) Available at: <http://euro.ecom.cmu.edu/program/law/08-732/Transactions/ueta.pdf>

<sup>54</sup> Ibid

<sup>55</sup> Ibid

<sup>56</sup> Ibid

<sup>57</sup> Ibid Section 4

<sup>58</sup> Ibid Section 3(b) (1)

signatures relating to transactions related to business, commercial and governmental affairs.<sup>59</sup>

It prevents the rejection of the validity of a contract on the ground that it was signed electronically.<sup>60</sup> By virtue of UETA, Electronic records and signatures are admissible in court proceedings.<sup>61</sup> The Act however applies only to transactions between parties who have agreed to transact business by electronic means.<sup>62</sup>

Furthermore, an electronic record or signature must be attributable to the person or must result from his action, and this is determined by the parties' agreement and surrounding circumstances.<sup>63</sup> It even recognizes the electronic signatures of notaries as valid.<sup>64</sup> The Act also allows agents to conclude contracts where the agent was acting on behalf of the principal, even without the knowledge of the principal.<sup>65</sup>

### **2.2.2. E-Sign Federal Act- Electronic Signatures in Global and National Commerce Act, U.S., 2000**

The Act provides that a signature or contract relating to transaction shall not be denied its validity or effect or enforceability solely on the ground that such signature or contract is in an electronic form.<sup>66</sup> It also replaces the need of retaining the paper version of documents, since it says that electronic records of information or a contract can be retained, where it accurately reflects the information and remains accessible to all the parties who are entitled to have such access.<sup>67</sup> It also allows the electronic signatures of notaries.<sup>68</sup> It allows the use of electronic

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<sup>59</sup> Ibid Section 3(a)

<sup>60</sup> Ibid Section 7

<sup>61</sup> Ibid Section 13

<sup>62</sup> Ibid Section 5 (b)

<sup>63</sup> Ibid Section 9 (a) and (b)

<sup>64</sup> Ibid Section 11

<sup>65</sup> Ibid Section 14

<sup>66</sup> Electronic Signatures in Global and National Commerce Act, Section 101 (a) (1) and (2) (2000) Available at: <http://www.gpo.gov/fdsys/pkg/PLAW-106publ229/pdf/PLAW-106publ229.pdf>

<sup>67</sup> Ibid Section 101 (d)

<sup>68</sup> Ibid Section 101 (g)

agents but the action of such electronic agent must be legally attributable to the person to be bound.<sup>69</sup> It does not apply to wills, family law matters, and some sections of the UCC.<sup>70</sup>

More so, the Act promotes the acceptance and the use of electronic signatures in international electronic commerce to eradicate obstacles to electronic signatures in order to develop e-commerce in the U.S., subject to its principles which are: to remove paper-based obstacles to electronic transactions; allow parties to ascertain the appropriate authentication technologies which they will use for their transaction; allow parties to prove in court that their authentication method is valid; avoid discrimination against electronic signatures and authentication methods from other jurisdiction: hence it is technologically neutral.<sup>71</sup>

### **2.2.3. Privacy Protection**

The US does not have a uniform encompassing privacy law.<sup>72</sup> On a Federal level, some industries are covered while others are not.<sup>73</sup> At State level, there are different State enactments.<sup>74</sup> The Controlling the Assault of Non-Solicited Pornography and Marketing Act, 2003 (CANSPAM Act) is a federal Act regulating the transmission of unsolicited mails in the US.<sup>75</sup> It defines commercial electronic mail message as” any electronic mail message the primary propose of which is the commercial advertisement or promotion of a commercial

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<sup>69</sup> Ibid Section 101 (h)

<sup>70</sup> Ibid Electronic Signatures in Global and National Commerce Act, Section 103 (It does not apply to contracts or other records governed by the UCC, except sections 1–107 and 1–206 and Articles 2 and 2A.)

<sup>71</sup> Ibid, Section 301

<sup>72</sup> Differences between the privacy laws in the EU and the US -Available at: <http://resources.infosecinstitute.com/differences-privacy-laws-in-eu-and-us/>

<sup>73</sup> Ibid

<sup>74</sup> Ibid

<sup>75</sup> Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CANSPAM Act of 2003)

product or service (including content on an Internet website operated for a commercial purpose”<sup>76</sup>

The Act prohibits internet fraud by those sending bulk commercial messages from protected computers; like, those transmitting such mail messages with the intent to deceive and mislead their recipients; sending false information through bulk commercial electronic mails; creating five or more email accounts or two or more domain names with multiple false identities to send bulk commercial messages from any or all of the accounts or domain names.<sup>77</sup> It also restricts those sending false or misleading information.<sup>78</sup> It also prohibits sending electronic mails with non-functioning return electronic mail address.<sup>79</sup> It provides that where a recipient requests to be removed from receiving the messages, this must be respected within ten business days from the receipt of the request.<sup>80</sup> There must also be a clear description of the message and the address of the sender must be stated. The recipient must also be given the opportunity to opt out from receiving further emails.<sup>81</sup>

In the U.S, the Children’s Privacy Protection Act (COPPA) was enacted in 1998 to ensure the privacy and security of children below the age of 13 years who use the internet.<sup>82</sup> Its goal is to keep parents in control over the kind of data collected from their underage children on the internet.<sup>83</sup> The Act requires website operators directed to children under the age of 13, that collect personal information from them, or that know that they will collect such information, to announce on their website, the type of information collected from children and how such

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<sup>76</sup> Ibid Section 3(2) (A)

<sup>77</sup> Ibid Section 4

<sup>78</sup> Ibid Section 5 (a) (1)

<sup>79</sup> Ibid Section 5 (2) (A)

<sup>80</sup> Ibid Section 5 (4)

<sup>81</sup> Ibid Section 5(5)

<sup>82</sup> Ibid Kuanchin Chen, 20

<sup>83</sup> Ibid Kuanchin Chen, 20

information is being used, and to also obtain verifiable consent from the parents of the children.<sup>84</sup>

Breach of this is seen as a violation of the deceptive or unfair acts or practices rule, contrary to section 18(a)(1)(B) of the Federal Trade Commission Act.<sup>85</sup> However, when the information is collected and used only once, to respond directly and not stored or used to re-contact the child, then there is no need to obtain the verifiable parental consent.<sup>86</sup>

In conclusion, from my observation, the US has various federal and State laws on different aspects of e-commerce protection, but not as harmonized as we will see exists in some respect in the EU, which will be treated in the foregoing chapter.

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<sup>84</sup> Children Online Privacy Protection Act, Section 1303 (b)(1)(A)(i) & (ii) (1998) Available at: <http://www.ftc.gov/ogc/coppa1.pdf>

<sup>85</sup> Ibid Section 1303 (c)

<sup>86</sup> Ibid Section 1303 (b) (2) (A)

### III. THE EUROPEAN EXPERIENCE- BETTER OR WORSE?

#### 3.1. E- Commerce in Europe.

People in Europe engage in online shopping but, from consumer statistics carried out by the European Commission, it was confirmed that most online consumers in Europe come from Countries like UK (71%), Denmark (70%), the Netherlands (69%) and Luxembourg (65%); and less common in the Eastern and Southern European Countries, with the lowest number in Countries like Romania (6%), Bulgaria (7%) and Italy (15%).<sup>87</sup> Based on the foregoing, the need to have a much higher level of protection of online purchasers in Europe cannot be over-emphasized.

In addition, most of the online purchasers in Europe prefer to buy online from their national sellers, while cross border transactions may occur between smaller markets in Western and Northern Europe, or those having ties with such large cross border markets.<sup>88</sup>

In Europe, Germany and the UK are the two biggest e-commerce markets; others are Netherlands, Denmark, Poland and France.<sup>89</sup> Studies have shown that the purchasers in these countries prefer to buy from their national sellers, in order to have a quicker means of resolution of problems they may encounter, to avoid extra delivery or custom charges, and for faster delivery of their purchases.<sup>90</sup> Interestingly, 15% of these purchasers, said they did not know what their consumer rights were, when buying online- cross border and 14% said they had less information concerning offers from foreign sellers.<sup>91</sup> Therefore, due to the need to ensure a form of self-preservation, these foregoing online purchasers preferred to take less

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<sup>87</sup> EC.R., Consumer Conditions Scoreboard- Consumers at Home in the Single Market, Monitoring the Integration of the Single Retail Market and Consumer Conditions in the Member States, 7<sup>th</sup> ed., 15, SEC (May 2012) 165 final. Available at: [http://ec.europa.eu/dgs/health\\_consumer/information\\_sources/docs/ca/7th\\_edition\\_scoreboard\\_en.pdf](http://ec.europa.eu/dgs/health_consumer/information_sources/docs/ca/7th_edition_scoreboard_en.pdf)

<sup>88</sup> Ibid 16

<sup>89</sup> Ibid 24

<sup>90</sup> Ibid, 24

<sup>91</sup> Ibid, 24

risk and shopped with sellers in their own locality rather than engaging in seemingly untraceable transactions outside their jurisdiction.

Thus, the Eurobarometer survey revealed that over half of EU consumers (52%) are more confident to purchase online within their own locality than engaging in cross border transactions, although there is more confidence in those who engaged in cross-border e-commerce as 58% of purchasers who have made at least one cross border purchase in the EU are also comfortable with local and foreign sellers.<sup>92</sup>

Also, the purchasers did not only buy goods and services online, but also used the internet to obtain information related to their intended purchase; or to make a price comparison, before making their decision, but studies have shown that these search engines or intermediaries were most times unreliable, since only 19% of price comparison websites showed the correct final price, including VAT, other taxes and delivery costs.<sup>93</sup> Hence, to tackle this problem, it was concluded that it was necessary to have codes of conduct, best practices and/or guidelines to checkmate price and product quality and in order to have a more reliable comparison.<sup>94</sup>

It was also discovered that in online transactions, purchasers encounter similar real world problems when purchasing goods online, like delayed delivery, damaged products, non-delivery, delivery of wrong products, different and higher final price.<sup>95</sup> Other problems include, stolen credit card details, wrong or unsafe products delivered and too little information available.<sup>96</sup>

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<sup>92</sup> Ibid 24

<sup>93</sup> Ibid 21

<sup>94</sup> Ibid, 22

<sup>95</sup> Ibid 24- 25

<sup>96</sup> Ibid, 25-26

### 3.2. Money Issues- Payment

On payment issues, the European Commission proposed to take initiatives that will improve payment by means such as card, internet, or mobile phones based on reports received via a Green Paper which was adopted by it, which was basically aimed at checking the pros and cons of the payment systems.<sup>97</sup> Other goals of the Green Paper was to check payment security and data protection and was to present conclusions by mid- 2012.<sup>98</sup>

After the adoption of the Green Paper, there was a public consultation and a conference which was held on May 4, 2012 in Brussels to address the issues raised in the Green Paper which include issues like cross border electronic payments, mobile payments, card payments, market integration, data protection, more choices and transparency for consumers, more innovation, more payment security and customer trust.<sup>99</sup>

After the receipt of all the contributions of the relevant stakeholders which included, consumer groups, banks, merchants, academia, lawyers, and so on, the summary of their contributions was encapsulated in the Feedback Statement on the Green Paper.<sup>100</sup>

One of the issues addressed in the Feedback Statement was the issue of the effect of different multilateral interchange fees applying in different domestic Member States and in cross-border payments, and whether it will create a problem for an integrated market.<sup>101</sup> Respondents had divergent views in response to this.<sup>102</sup> While card schemes and banks respondents supported the application of different fees, and blamed other factors as

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<sup>97</sup> Ibid 27

<sup>98</sup> Ibid 27

<sup>99</sup> Green Paper- Card, Internet and Mobile Payments. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011DC0941:EN:NOT> (last visited on 20th March, 2013)

<sup>100</sup> EC.R., Feedback Statement On European Commission Green Paper, Towards An Integrated European Market For Card, Internet And Mobile Payments, 3, Available at: [http://ec.europa.eu/internal\\_market/payments/docs/cim/gp\\_feedback\\_statement\\_en.pdf](http://ec.europa.eu/internal_market/payments/docs/cim/gp_feedback_statement_en.pdf) (last visited on 20th March, 2013.)

<sup>101</sup> Ibid, 3

<sup>102</sup> Ibid, 3

responsible factors operating as barriers to market integration, like regulations and certifications.<sup>103</sup>

On the other hand, merchants, consumer organizations, and non-bank payment service providers, were against the application of different fees since they are unjustified, and they further argued that the same fees should apply to all transactions whether domestic or cross border transactions since doing otherwise was to them, a barrier to market integration.<sup>104</sup>

Another issue addressed in the Green Paper feedback was whether there was need to allow non-banks to have access to information, on the availability of funds in the bank account of customers with their consent and the limit to this.<sup>105</sup> The majority of the payment card schemes and banks were totally opposed to allowing such access since this could lead to fraud, misuse or misappropriation of the data and infringement of data protection could also arise.<sup>106</sup>

Payment methods used by purchasers in Europe include: Credit transfers and direct debits which are both regulated by the SEPA Credit Transfer (SCT) and SEPA Direct Debit (SDD) rulebooks developed by the European Payments Council (EPC) for payments in euro.<sup>107</sup>

Another type of payment is Payment cards which are used commonly for retail payments.<sup>108</sup>

E-payment is also another mode of payment and it is payment made over the internet, by: a remote payment card transaction via the internet; credit transfers via online-banking; or direct debits; through e-payment providers, with which the consumer has registered an individual account which is funded through 'traditional' payment methods, like bank transfers or credit

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<sup>103</sup> Ibid, 3

<sup>104</sup> Ibid, 3

<sup>105</sup> Ibid, 12

<sup>106</sup> Ibid 12

<sup>107</sup> EC.R. Green Paper, Towards an integrated European market for card, internet and mobile payments, COM/2011/0941 final. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011DC0941:EN:NOT> (last visited on 20<sup>th</sup> March, 2013.)

<sup>108</sup> Ibid

card payments.<sup>109</sup> Also, Mobile payment (m-payments) is also another form of payment and refers to payment initiated and concluded via a mobile device and can take place either remotely or at the point of sale.<sup>110</sup>

Payment problems observed were the rejection of domestic debit card schemes outside the Member State of origin, which hindered the growth of the Single Market, and fraudulent use of payment cards which mostly occurred in remote transactions.<sup>111</sup>

### **3.2.1. Single Euro Payments Area (SEPA)**

SEPA extends to retail payments instruments, credit transfers, payment cards and direct debits.<sup>112</sup> It visualizes that there should be no distinction between domestic electronic retail payments, i.e. payment transactions where at least one of the parties is not a financial institution (or which does not take place between two banks), and cross-border payments in euro across the EU.<sup>113</sup> It is also contended that this lack of distinction should also be extended to non-euro payments within the EU since only by this can there be a true digital Single Market in the EU, since purchasers would be able to use a single bank account for all their transactions, whether within or outside their jurisdiction.<sup>114</sup>

### **3.2.2. Protective measures for purchasers in money issues**

Purchasers must check whether their payments are secure. To check this, they must look out for the security of the seller's site, that the device they are using for the transaction is secure; there must be encryption of the connection between the purchaser's device and the seller's site.<sup>115</sup>

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<sup>109</sup> Ibid

<sup>110</sup> Ibid

<sup>111</sup> Ibid

<sup>112</sup> Ibid

<sup>113</sup> Ibid

<sup>114</sup> Ibid

<sup>115</sup> ECC-Net, 40

Charge-back is a form of protection for consumers in online payments, which is regulated by the Payment Services EU Directive by which the consumer can demand that the payment service provider forcefully recover back funds from the receiver, mostly in cases where fraud has occurred or where a deduction was made without consent of the consumer or where the transaction was concluded without the purchaser knowing the actual amount for the transaction.<sup>116</sup>

### **3.3. Efforts to harmonize consumer protection laws by the European Union**

#### **3.3.1. Consumer Protection (E-Commerce Directive 2000/31/EU)**

The EU is always concerned about the free movement of goods, services and the freedom of establishment of businesses, and to ensure that these are carried out without barriers and to have an internal market without internal frontiers.<sup>117</sup>

The E-commerce Directive defines a service provider as “any natural or legal person providing an information society service.”<sup>118</sup> While an established service provider is defined as “a service provider who effectively pursues an economic activity using a fixed establishment.”<sup>119</sup>

For commercial communications the Directive provides that the communication shall be identifiable, and should clearly state on whose behalf it is made, and that promotional offers, games, when permitted, shall also be clearly identifiable.<sup>120</sup> Also, senders of unsolicited mails

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<sup>116</sup> Directive 2007/64/EC of the European Parliament and of the Council  
Of 13 November 2007

on Payment Services in the Internal Market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, Available at:  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:319:0001:0036:EN:PDF>

<sup>117</sup> Directive 2000/31/EC Of The European Parliament and of The Council, Article 1 (June 8, 2000) Available at:  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:178:0001:0001:EN:PDF>

<sup>118</sup> Ibid, Article 2

<sup>119</sup> Ibid Article 2

<sup>120</sup> Ibid Article 6

should be clearly identifiable and the recipient must be allowed to opt out.<sup>121</sup> It is also provided by the Directive that contracts formed by electronic means should be given validity.<sup>122</sup> The Directive also requires that: when consumers place orders through technological means, the service provider must acknowledge receipt of the order by electronic means and without undue delay.<sup>123</sup>

As part of the European Commission's efforts in protecting online purchasers in Europe, the Commission has proposed to increase the Internal Market Information System (IMI) and the Consumer Protection Cooperation Network (CPC) which will monitor the accurate application of the E-commerce Directive and other Directives which are focused on online consumers' protection.<sup>124</sup>

### **3.3.2. Consumer protection – (Directive on consumer rights)**

The EU is very dedicated to the protection of consumers in online transactions. Consumer rights have been further strengthened by the adoption of the Consumer rights Directive in October 2011; which must be transposed into National law by December 13, 2013.<sup>125</sup> The Directive offers online purchasers in Europe, more protection when they carry out internet transactions, by eradicating hidden charges on the internet, expanding withdrawal rights to 14 days time frame, and increasing price transparency.<sup>126</sup> It applies to contracts concluded between a trader and a consumer.<sup>127</sup> There is also the Directive regulating the sale of

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<sup>121</sup> Ibid, Article 7

<sup>122</sup> Ibid, Article 9

<sup>123</sup> Ibid, Article 11

<sup>124</sup> Consumer scoreboard, 27

<sup>125</sup> Ibid 27

<sup>126</sup> Ibid, 27

<sup>127</sup> Directive 2011/83/EU Of the European Parliament And Of The Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, Article 1. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:EN:PDF>

consumer goods, which prohibits sellers from selling non- conforming goods to purchasers.<sup>128</sup>

### 3.3.3. Consumer protection (The Unfair Commercial Practices Directive)

According to Viviane Reding,

The Unfair Commercial Practices Directive is proving to be a valuable tool to increase consumer welfare. The Directive has helped national consumer protection watchdogs curb a broad range of unfair business practices: such as providing untruthful information to consumers or using aggressive techniques to influence their choices.<sup>129</sup>

The Directive addresses unfair terms in a contract that has been concluded between a seller and a consumer and applies to any kind of transaction whether online or offline.<sup>130</sup>

According to the Directive,

A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.<sup>131</sup>

The subject matter and adequacy of the price are however not considered in determination of the unfair nature of the terms.<sup>132</sup> Also the terms when written, must be drafted in plain intelligible language and any doubts will be resolved in favour of the consumer.<sup>133</sup>

The list of unfair terms can be found in the annex to the Directive and in summary some of them are: excluding the legal liability of the seller or supplier; limiting the legal rights of the consumer; allowing the seller or supplier to retain sums paid by the consumer upon his

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<sup>128</sup> Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees (May 25, 1999) Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999L0044:en:HTML>

<sup>129</sup> Viviane Reding, 5

<sup>130</sup> Council Directive 93/13/EEC, On Unfair Terms in Consumer Contracts, Article 1 (April 5, 1993) Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:en:NOT>

<sup>131</sup> Ibid Article 3

<sup>132</sup> Ibid, Article 4

<sup>133</sup> Ibid, Article 5

cancellation of the contract, without granting the same right to the consumer; allowing only the seller or supplier to terminate the contract and not the buyer and so on..<sup>134</sup>

### 3.3.4. Identity Verification (E-Signature Directive)

Online transactions created a new way of executing contracts and in Europe the E signature Directive stipulated acceptable ways by which a contract can be properly executed. The issue here is basically the fact that unlike in real contracts where there are protective measures like notarization and legalization of documents, this is not physically possible with online contracts since there is difficulty in ascertaining the true identity of the other party.<sup>135</sup>

The E-signatures Directive distinguishes between electronic signatures and advanced electronic signatures. According to the Directive,

Electronic signature means data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication. Advanced electronic signature means an electronic signature which meets the following requirements:...uniquely linked to the signatory, is capable of identifying the signatory; is created using means that the signatory can maintain under his sole control; and is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable.<sup>136</sup>

The E-signatures Directive employs a higher level of security by the use of double locks also known as the public and private cryptography and uses the encryption system which shows that a digital signature is connected to a particular person.<sup>137</sup>

The above ensures some form of protection for the online purchasers since there is a high level of security when this mechanism is used. It is also a more secure level of protection since the party can confirm whether the document has been tampered with or not.<sup>138</sup>

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<sup>134</sup> Ibid See Annex, for the complete list.

<sup>135</sup> Lorna Brazell, Electronic Signatures Law and Regulation , 3 (2004)

<sup>136</sup> Directive 1999/93/EC of the European Parliament and of the Council on a Community Framework for Electronic Signatures, Article 2 (December 13, 1999) Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999L0093:en:HTML>

<sup>137</sup> Lorna Brazell p.3

<sup>138</sup> Ibid

In addition to the foregoing, certification authorities also come into play in the process; and they are responsible for verifying the identity of the key owners, issuing them with certificates for that purpose.<sup>139</sup> The term “Public Key Infrastructure” or PKI refers to the certification authorities and the Certificate databases or directories used for the whole process.<sup>140</sup> The use of this higher level of security protects consumers since they can verify if a contract which they intend to execute has been tampered with.

### 3.3.5. Privacy- (Data protection Directive)

Privacy is of high value since there is the need to be certain that companies handling such sensitive information are doing so in the proper manner.<sup>141</sup> In fact, fears relating to personal data are one of the factors responsible for most consumers avoiding E-commerce, today.<sup>142</sup> Consumers need to be informed about the risks relating to data storage and its effects towards them.<sup>143</sup>

The EU Data Protection Directive provides for the protection of the fundamental rights and freedoms of natural persons and privacy in the processing of their personal data.<sup>144</sup> Under the Directive, 'personal data' means “any information relating to an identified or identifiable natural person.”<sup>145</sup> Also, an identifiable person “is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.”<sup>146</sup>

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<sup>139</sup> Ibid

<sup>140</sup> Ibid

<sup>141</sup> ECC-Net, The European Online Marketplace, Consumer complaints 2010-2011, 46 (September, 2012) Available at: [http://ec.europa.eu/consumers/ecc/docs/e-commerce-report-2012\\_en.pdf](http://ec.europa.eu/consumers/ecc/docs/e-commerce-report-2012_en.pdf),

<sup>142</sup> Ibid

<sup>143</sup> Ibid

<sup>144</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Article 1. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML>

<sup>145</sup> Ibid Article 2 (a)

<sup>146</sup> Ibid Article 2 (a)

Processing of personal data' “means any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;”<sup>147</sup>

According to the Directive, personal data must be fairly and lawfully processed; must be collected and used for the purpose for which it was collected; must be used adequately and for purposes relevant to the reason it was collected; must be accurate and up-to-date and kept or preserved to protect the data<sup>148</sup> In order to ensure the legitimacy of the data, member states are to ensure that the personal data may be processed only if the owner of the data gave his consent for the processing; where it is needed to perform a contract; to comply with a legal obligation; to protect the owner of the data; to perform a public interest task or in the exercise of official authority.<sup>149</sup>

The Green Paper that was adopted by the EC had a Feedback Statement relating to the issue of data protection, wherein a majority of the supply stakeholders, like the banks, card schemes, card associations, payment processors, and so on, were of the uniform view that the Data Protection Directive and National data protection authorities were sufficient measures to ensure data protection in Europe.

They pointed out though, that there was need for constant evolution in the industry and recommended a number of sophisticated technologies that are capable of protecting the integrity of data, like: 3D Secure encryption, EMV infrastructure, DDA/CDA chip cards, and PCI DSS. In addition, card manufacturers recommended a higher level of card security

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<sup>147</sup> Ibid Article 2(b)

<sup>148</sup> Ibid Article 6

<sup>149</sup> Ibid Article 7

features like smart card devices or similar highly secure elements, which should be carried by each citizen, and thus eradicate the use of magnetic-stripe-only cards.<sup>150</sup>

Furthermore, Merchants were of the opinion that information stored should be reduced, and opined that double encryption of sensitive card data would be a great progress. Consumers suggested that a more holistic approach should be employed which should comprise a more harmonized and legally binding framework for payments security and extend to all the players in the industry. Public authorities, finally, recommended that end users of payment instruments should ensure the safety of their security features and protect customer data.<sup>151</sup>

### **3.3.5. The European Small claims Procedure.**

The European Small Claims Procedure was established by the Regulation (EC) No 861/2007.<sup>152</sup> Its focus is to enable consumers to have access to justice in cross border issues by simplifying the litigation process in civil and commercial matters and reducing costs.<sup>153</sup> Cases covered are those with sums under EUR 2 000, excluding interest, expenses and disbursements (at the time of filing. Judgments delivered are recognized and enforceable in the other Member States without the need for a declaration of enforceability.<sup>154</sup>

The European Small Claims Procedure is a viable tool for consumer redress that is often overlooked.<sup>155</sup> The Procedure is swift, simple and reduces the workload of judicial Courts.<sup>156</sup> By the small claims procedure, cross border claims are initiated through the means of harmonized procedural rules in the EU.<sup>157</sup> There is no need for legal representation since the

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<sup>150</sup> Feedback Statement, 26

<sup>151</sup> Ibid, 26

<sup>152</sup> Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0001:0022:EN:PDF>

<sup>153</sup> [http://europa.eu/legislation\\_summaries/consumers/protection\\_of\\_consumers/116028\\_en.htm](http://europa.eu/legislation_summaries/consumers/protection_of_consumers/116028_en.htm)

<sup>154</sup> Ibid

<sup>155</sup> Viviane Reding, 7

<sup>156</sup> Ibid

<sup>157</sup> Ibid

proceedings are written and its judgment is enforceable throughout the Union.<sup>158</sup> Hence, by this procedure, consumers can enforce their rights.<sup>159</sup> The procedure is however not well known by consumers, so it will be good to promote it.<sup>160</sup>

According to Viviane Reding, the EC has provided several practical means that can aid the small claims procedure, like interactive online forms, training tools for judges and other professionals, comprehensive guide for practitioners, and a simplified guide for consumers.<sup>161</sup>

### 3.3.6. The European Consumer Centers (ECC) Network

The European Consumer Centres Network (ECC-Net) which is established in the 27 EU Member States, Norway and Iceland is responsible for informing and assisting consumers on disputes or complaints arising from their cross border purchases; raises awareness on traders' obligations and renders information to consumer on their rights.<sup>162</sup> Thus, it renders advice and assistance to consumers in cross border claims.<sup>163</sup>

The ECC addresses complaints from several consumers and most times, these complaints are resolved in an amicable manner with the trader.<sup>164</sup> According to statistics and figures, the

ECC-Net received 31,324 and 30,939 information requests in 2010 and 2011 respectively concerning both online and offline purchases of products and services. Of these, 19,113 and 17,750 respectively were simple complaints of which 10,670 and 9,534 (55,8% and 53,7%) concerned online purchases.<sup>165</sup>

When a purchaser cannot resolve a dispute with the trader, he may contact the ECC website addresses of any of the ECC Networks, which may be approached, especially the most

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<sup>158</sup> Ibid

<sup>159</sup> Ibid

<sup>160</sup> ECC-Net, The European Online Marketplace, Consumer complaints 2010-2011, 11 (September, 2012) Available at: [http://ec.europa.eu/consumers/ecc/docs/e-commerce-report-2012\\_en.pdf](http://ec.europa.eu/consumers/ecc/docs/e-commerce-report-2012_en.pdf)

<sup>161</sup> Viviane Reding, 7

<sup>162</sup> ECC-Net, The European Online Marketplace, Consumer complaints 2010-2011, 6-7

<sup>163</sup> Ibid, 10

<sup>164</sup> Ibid, 8

<sup>165</sup> Ibid, 13

relevant to the dispute, in terms of its location.<sup>166</sup> The ECC may resolve the dispute or where this is impossible, may refer the matter to arbitration or litigation.<sup>167</sup> An example of a case resolved by the ECC is as follows:

A French consumer ordered computer software from a seller based in Malta. Having installed and used the software, the consumer was not happy with its performance. The consumer contacted the trader seeking a rescission of his contract arguing that according to the trader's 30-day money back guarantee he was entitled to a full refund. No response from the trader was received and the consumer decided to contact ECC France. Following the intervention of ECC Malta, a full refund was processed.<sup>168</sup>

The ECC also encountered some complaints relating to minor contracts in which mobile phones or internet accounts were operated by minors to conclude contracts. Ordinarily, minors, by law, are incapable of entering legally binding contracts, but the problem is that most times, they use their parents' payment cards to enter such contracts, without obtaining their parents' consent and without knowing the financial implications.<sup>169</sup>

Other cases encountered by the ECC relate to issues of internet fraud. The ECC defines fraud as "an intentional deception, done for personal gain or for the purposes of damaging another individual."<sup>170</sup> Most deals or offers affected by internet fraud, as observed by the ECC, relate to second hand cars, designer clothes, electronic products, mobile phones and laptops, and so on.<sup>171</sup> Most times the offers are very attractive and mouth-watering, that the purchaser gets deceived into his assumed luck of making a fast profit.<sup>172</sup> He is then asked to transfer money into the seller's account and after this is done, the seller disappears without delivering the goods.<sup>173</sup>

Other interesting cases encountered by the ECC, worthy of note, are the Animal rescue cases which is a novel kind of fraud reported by ECC Poland, Estonia and Austria, in which consumers run into internet offers of free animals, whose owners have died but with a catch that they need to pay some money for the airport storage and transport of the pets in order to

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<sup>166</sup> Ibid , 12

<sup>167</sup> Ibid, 14

<sup>168</sup> Ibid , 16

<sup>169</sup> Ibid, 43

<sup>170</sup> Ibid, 49

<sup>171</sup> Ibid, 49

<sup>172</sup> Ibid, 49

<sup>173</sup> Ibid, 49

receive them.<sup>174</sup> They could also say that the pet was involved in an accident while it was been transported to the fraud victim and so he/she should pay more for the pet's treatment before it can be sent to him/her.<sup>175</sup>

The perpetrators of fraud are not resting on their oars but, purchasers need to be alert and well informed in order not to fall victims of them. The ECC cooperates with the Police by reporting fraud cases, like the ECC in Bulgaria which signed an agreement with the cyber crimes unit of the police to refer fraud cases to it. Others working with the police and stakeholders, against cyber crimes are the ECC Finland, France, and Germany.<sup>176</sup>

In conclusion, from my observation, the European approach has more protective measures in e-commerce issues than seen in the US, since the EU has various Directives regulating different aspects of e-commerce and is also more consumer-friendly than the US.

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<sup>174</sup> Ibid, 51

<sup>175</sup> Ibid, 51

<sup>176</sup> Ibid, 53

## **IV. WHAT ABOUT NIGERIA?**

### **4.1. Problems facing online purchasers in Nigeria**

In order to understand the best way Nigerian purchasers can be protected there is a need to start from the roots, and understand some of the major problems which they encounter in order to apply a holistic approach to finding a long lasting solution as to how they can be protected. The problems which are facing many Nigerian purchasers are very fundamental and are not exclusive to legal inadequacies but, are also based on other factors which I would briefly highlight hereunder, before addressing issues similar to US and EU:

#### **4.1.1. Lack of regular power supply**

Adequate power supply is very necessary for any nation's development but acquiring and using it is very expensive and remains a problem in Nigeria today.<sup>177</sup> Nigeria is still facing challenges in its power distribution throughout the nation.<sup>178</sup> In order for Nigeria to effectively meet up with other industrialized nations, there must be generation of adequate power; which must be effectively transmitted round Nigeria; and must effectively reach the consumers or end- users.<sup>179</sup>

In order to operate a business you need regular power supply and in order to use your computer for e-commerce transactions like placing orders or checking your emails for confirmation and so on, you need electricity. But the lack of electricity in Nigeria for many is a major factor discouraging even the smallest business minded people since they cannot effectively carry out their business without electricity.

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<sup>177</sup> A. S. Sambo, B. Garba, I. H. Zarma and M. M. Gaji, Electricity Generation and the Present Challenges in the Nigerian Power Sector, ECN, 1. Available at: <http://www.worldenergy.org/documents/congresspapers/70.pdf>

<sup>178</sup> Ibid 1

<sup>179</sup> Ibid , 1- 2

There are also many rural areas and villages in Nigeria that do not enjoy the luxury of electricity power supply and they use bush lamps and firewood. Some of them have never seen a Television, let alone, a computer. If Nigeria must meet the Industrial pace in which the world is going, there needs to be swift rural emancipation and development.

#### **4.1.2. Limited internet access and High cost of Internet access**

This is another problem facing online purchasers in Nigeria. Firstly, the cost of using the internet is on the high side in Nigeria and this discourages the few who know how to use it, since they have to pay heavily for the internet access. Hence, it limits the accessibility of the internet, since it is not readily available to the masses and to small entrepreneurs who need to be regularly up-to-date with the trends of the market and need to be regularly informed about the new and evolving risks involved in e-commerce. Thus, the lack of information leads to unforeseen risks, since purchasers are not aware of how to protect themselves and could therefore be victims of risks like Internet scams and cyber crimes.

#### **4.1.3. Mistrust for the system – fear of the unknown**

Nigerians basically are always security conscious and are very selective when divulging personal information. Most Nigerians do not release their personal information especially when related to their finance due to lack of internet security or privacy and lack of technologies to ensure data protection in Nigeria. Even at Banks, consumers are warned not to release their ATM pins to even the bank staff because there is no trust.

#### **4.1.4. Illiteracy**

Illiteracy is a major problem facing most Nigerians today, since there are a lot of rural areas where people do not have access to education. In such places, the e-commerce discussion is unproductive since it is a wasted effort.

There have however been a lot of efforts to educate the people in rural areas by some non-profit organizations which carry out skill acquisition programmes: like the one organized by the United Nations Educational, Scientific and Cultural Organization- UNESCO, called the World Youth Empowerment Foundation which carries out computer literacy programmes for rural dwellers in Nigeria.<sup>180</sup> Another non-profit organization is called CARE, NGO located in Kaduna, Nigeria, and focused on grass root computer education of the rural dwellers and community development.<sup>181</sup>

#### **4.1.5. Lack of technical knowledge of e-commerce tools**

It still boils down to the issue of computer literacy since most people in Nigeria have never seen a computer and even when they have, have never operated it before. Thus, this is a setback to the growth of e-commerce in Nigeria and the expansion of its internal market, since the masses like the rural dwellers that constitute a large bulk of the population cannot partake in e-commerce since they cannot use its tools and this drags the Country backwards.

#### **4.1.6. Cyber crimes**

The Nigeria law enforcement agencies and criminal justice system are dazzled by the problems of cyber crimes, since the problems are far over-whelming and incomprehensible by them.<sup>182</sup> In Nigeria most cyber crimes are unreported hence the number is far more than the apparent.<sup>183</sup> The prosecutors and judges are not well equipped to grapple with the situation.<sup>184</sup>

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<sup>180</sup> Available at: <http://worldyouth1.tripod.com/id15.html> (last visited on 22nd March, 2013)

<sup>181</sup> Available at: <http://care-ngonigeria.org/> (last visited on 22<sup>nd</sup> March, 2013)

<sup>182</sup> Nuhu Ribadu, Former Executive Chairman, Economic and Financial Crimes Commission, EFCC, Nigeria, Keynote address at the 40<sup>th</sup> annual session of UNCITRAL in Vienna: Cybercrime and Commercial Fraud: A Nigerian Perspective, 2 (July 2007) Available at: [http://www.cnudmi.org/pdf/english/congress/Ribadu\\_Ibrahim.pdf](http://www.cnudmi.org/pdf/english/congress/Ribadu_Ibrahim.pdf)

<sup>183</sup> Ibid

<sup>184</sup> Ibid

This trend has really led to a lot of disadvantages for so many Nigerian business men who, though genuine, are made subject to stricter security checks and most times refused transactions by other foreign countries.<sup>185</sup> Hence, the law enforcement needs to be constantly trained in order to successfully combat cyber crimes in Africa.<sup>186</sup>

Types of scam recorded include credit card scam, contract scam, job scam, currency scam, marriage scam, immigration scam, counterfeiting and religious scam.<sup>187</sup> The fraudsters also clone websites, and engage in false representations and other types of e-commerce fraud.<sup>188</sup> They acquire fake credit cards from insecure websites and their counterparts living abroad who work in the postal service.<sup>189</sup> There is also the production of fake gift cards and cheques.<sup>190</sup>

On the EFCC official website, there is a list of different kinds of scams that are used like: 419 scam- also known as obtaining by false pretences and came to be known as 419 since it is prescribed under Section 419 of the criminal code; the promise of wedlock scam; lottery or sweep stake scams, inheritance scams.<sup>191</sup> The website also offers some safety tips to consumers similar to the ones on the FTC website in U.S., to warn them on how to avoid fraud.<sup>192</sup>

#### **4.1.7. Privacy**

In March, 2013, the National Information Technology Development Agency (NITDA) proposed a Blue print for the adoption of the Public Key Infrastructure (PKI) security in

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<sup>185</sup> Ibid, 3

<sup>186</sup> Ibid, 3

<sup>187</sup> Ibid, 1

<sup>188</sup> Ibid, 2

<sup>189</sup> Ibid

<sup>190</sup> Ibid

<sup>191</sup> Available at: <http://www.efccnigeria.org/efcc/> (last visited 22<sup>nd</sup> March, 2013)

<sup>192</sup> Available at: <http://www.efccnigeria.org/efcc/index.php/scams-safety>

Nigeria to ensure data protection,<sup>193</sup> This was stated by Mrs. Mary Nduma, the current President of the Nigeria Internet Registration Association (NIRA) at the NITDA's PKI Blueprint for Nigeria and Stakeholder's Engagement workshop held in Abuja, Nigeria on March 19<sup>th</sup>, 2013, which she confirmed will shut out hackers and help Nigeria's E-commerce.<sup>194</sup> In the Blue print, it was stated that:

The 'paperless office' concept has been around for well over a decade. However, it has failed to move from theory to reality because of cultural reticence, unequal access to technology, and the lack of an adequate legal and service infrastructure to support such a paradigm shift.<sup>195</sup>

The internet is a passage way for many Nigerian business men, yet it is very vulnerable to being exploited by hackers. The security of data should therefore be the prime focus in order to have a more profitable use of the internet, and the focus should be on protecting the message, not the medium.<sup>196</sup> The Public key cryptography provides the needed message protection.

It was also stated that:

A Public Key Infrastructure (PKI) based on public key cryptographic techniques provides the technical framework (including protocols, services, and standards) to support applications with five security capabilities: user authentication, data confidentiality, data integrity, non-repudiation, and key management.<sup>197</sup>

One of the benefits of using the PKI is that it ensures accurate authentication of the identity of the owner of the signatures.<sup>198</sup> Secondly, the accuracy of the message can also be relied upon and tested when the PKI is used.<sup>199</sup> Also, the secrecy and privacy of the data are

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<sup>193</sup> Adeola Tukur, NITDA to adopt Public Key Infrastructure to avert Internet fraud, Peoples Daily, Nigeria, March 20<sup>th</sup> 2013. Available at: <http://peoplesdailyng.com/nitda-to-adopt-public-key-infrastructure-to-avert-internet-fraud/> (last visited on 24<sup>th</sup> March, 2013)

<sup>194</sup> Ibid

<sup>195</sup> PKI Blueprint in Nigeria, National Information Technology Development Agency (NITDA), Ministry Of Communication Technology. Para 1.0 Available at: <http://emaxconsultancy.com/pki.pdf> (last visited on March 24<sup>th</sup>, 2013)

<sup>196</sup> Ibid para 1.0

<sup>197</sup> Ibid para 1.3

<sup>198</sup> Ibid , para 1.2.1

<sup>199</sup> Ibid

protected by this method.<sup>200</sup> In addition, the integrity of the data is also ensured since the data cannot be tampered with, or modified.<sup>201</sup> Lastly, the owner of the signature cannot deny the message as not emanating from him and the recipient cannot deny the receipt of the message.<sup>202</sup> Hence it ensures non-repudiation.<sup>203</sup>

## **4.2. Consumer protection in Nigeria- lacuna in the laws and inadequate judicial remedies.**

### **4.2.1. Safety of goods**

The National Agency for Food and Drug Administration and Control (NAFDAC) is responsible for the safety of food, drugs and other related products manufactured, imported, exported from, advertised, distributed, sold, and used in Nigeria.<sup>204</sup> Hence they check quality of goods and check for fake drugs and harmful toxic foods and other items, in order to protect public health. But, these issues are beneath those faced in the cyberspace today has transformed far more than tangible possessions, so there are more troublesome issues that affect consumers today than what the eyes can perceive.

### **4.2.2. The Consumer Protection Council Act**

The Consumer Protection Council Act, Cap, C25, Laws of the Federation of Nigeria was first enacted as Decree No. 66 of 1992, by the then Federal Military Government of General Ibrahim Babangida, the then President and Commander-in-Chief of the Armed Forces of

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<sup>200</sup> Ibid para 1.2.2

<sup>201</sup> Ibid para 1.2.3

<sup>202</sup> Ibid , para 1.2.4

<sup>203</sup> Ibid , para 1.2.4

<sup>204</sup> Available at: <http://www.nafdac.gov.ng/index.php/mission-a-vision>

Nigeria.<sup>205</sup> There was a bill proposed by the National Assembly for the amendment of the CPC Act.<sup>206</sup>

The Act established the Consumer Protection Council of Nigeria.<sup>207</sup> The Commission was established to help consumers seek redress for consumer complaints; to check and eliminate hazardous products from the market, to regularly publish banned or unapproved products; to seek compensation for consumers who are injured by dangerous products; to be responsible for creating public consumer awareness; to encourage the development of quality standards to protect the consumers; to issue guidelines to the major players in the industry like the manufacturers, importers, and so on; to encourage the formation of consumer groups; to ensure that consumers are considered and protected against exploitation by companies, firms and trade associations; to ensure the adoption of safety measures for products; and to perform any other function imposed upon it.<sup>208</sup> The Act also established a State Committee which will assist the Council but from each State of the Federation and under the supervision of the Council.<sup>209</sup>

Basically, the Act focuses on addressing issues relating to violation of consumer rights by way of trade provisions or services which have caused loss for the consumer.<sup>210</sup> It also focuses on the safety of products and places the duty of informing the general public of the existence of hazardous substance of a product, on its manufacturer as soon as he discovers of

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<sup>205</sup> Consumer Protection Council Act, Chapter C25, Decree No. 66 of 1992, Laws of the Federation of Nigeria, (2004)[http://www.google.hu/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&sqi=2&ved=0CDcQFjAA&url=http%3A%2F%2Fwww.cpc.gov.ng%2Findex.php%2Fdocuments-and-forms%2FCPC%2520Act%2520pdf.pdf%2Fdownload&ei=RFNKUf\\_zJoT5sgbJmYCIDQ&usg=AFQjCNGkDrpjuhSmsjdm7\\_zCqZkhru\\_7PA&sig2=rR3QPu16bXLyFRGC9pHC9Q&bvm=bv.44158598,d.Yms](http://www.google.hu/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&sqi=2&ved=0CDcQFjAA&url=http%3A%2F%2Fwww.cpc.gov.ng%2Findex.php%2Fdocuments-and-forms%2FCPC%2520Act%2520pdf.pdf%2Fdownload&ei=RFNKUf_zJoT5sgbJmYCIDQ&usg=AFQjCNGkDrpjuhSmsjdm7_zCqZkhru_7PA&sig2=rR3QPu16bXLyFRGC9pHC9Q&bvm=bv.44158598,d.Yms)

<sup>206</sup> Consumer Protection Council Amendment Bill, (2010)[http://www.google.hu/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.nassnig.org%2Fnass2%2Flegislation.php%3Fid%3D1023&ei=f1VKUaybJcTYtAack4DgDg&usg=AFQjCNHs2sR\\_N5DXFC3CbhMhYCY0I4rrCg&sig2=QRh8DDecXfO4djffpk3elg](http://www.google.hu/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.nassnig.org%2Fnass2%2Flegislation.php%3Fid%3D1023&ei=f1VKUaybJcTYtAack4DgDg&usg=AFQjCNHs2sR_N5DXFC3CbhMhYCY0I4rrCg&sig2=QRh8DDecXfO4djffpk3elg)

<sup>207</sup> CPC Act, Section 1(1)

<sup>208</sup> Ibid, Section 2 (a) – (k)

<sup>209</sup> Ibid Section 4 (1)

<sup>210</sup> Ibid, Section 8 (a) and (b)

the hazard and to also recall the said product.<sup>211</sup> It also creates criminal sanctions like fines and imprisonment for violations of the provisions of the foregoing paragraph.<sup>212</sup> It also punishes the deliberate wrong advertising of a consumer item.<sup>213</sup>

The amendment bill of the Consumer Protection Act, 2010, introduced more coverage for the Council since it modified and broadened its scope of operation.<sup>214</sup> Its added functions are: to engage in regular research study and analysis of consumer products and services, and publish its observations; to act generally to minimize risk and injuries which may occur from certain consumer items and services rendered to consumers; to ensure compliance of telecommunication service providers and digital satellite service providers with international standards and quality; to regularly issue food control guidelines, additives and dangerous herbicides and pesticides; to create and maintain an injury information centre; seek compensation for persons who suffer injuries and those who die from negligent acts of or professional incompetence from any surgeries or medicaments rendered to any patient by any person.<sup>215</sup> The Act however, does not extend to e-commerce consumer protection since e-commerce is not even mentioned in, or covered by the Act.

#### **4.2.3. Lack of E-commerce contract laws in Nigeria**

Presently, in Nigeria, E-commerce is still a very new phenomenon and so there are no enacted laws that are specifically directed to protect online purchasers in Nigeria. Commerce or trade, generally in Nigeria is regulated by the Sale of Goods Act, 1893 which is still applicable today. The Sale of Goods Act became part of Nigerian applicable laws by virtue of its incorporation into Nigerian law with other English laws of general application, in force

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<sup>211</sup> Ibid, Section 9 (1)

<sup>212</sup> Ibid, Section 9 (2)

<sup>213</sup> Ibid, Section 11

<sup>214</sup> Ibid Recital

<sup>215</sup> CPC Amendment bill, Section 2, (new k) – (q)

before the 1<sup>st</sup> January, 1900 in the United Kingdom.<sup>216</sup> Nigeria is still governed by the UK Sale of Goods Law, 1893 except the former Western Mid-Western States, comprising: Oyo, Ekiti, Osun, Ondo, Edo, Delta States except Lagos State, which all apply the Sale of Goods Law of 1959 which was enacted by the then former Western Region Parliament.<sup>217</sup> The Sale of Goods Act, 1893 is however too outdated to meet the present global commercial demands).<sup>218</sup>

#### **4.2.4. Lack of Cyber crimes laws in Nigeria**

The Economic and Financial Crimes Commission (EFCC), is responsible for combating financial crimes like advanced fee fraud, money laundering, counterfeiting, computer credit card fraud, contract scam, and also for combating all kinds of financial crimes.<sup>219</sup> It also strives to eradicate corruption and protect national and foreign investments in Nigeria.<sup>220</sup> However, the EFCC Act is very inadequate to fight cyber crimes since it does not cover cyber crimes as are seen in online transactions today and so there has been so much anticipation for some reform of the law.

Therefore, in 2011, a cyber crimes' committee was set up to find solutions to the Internet cyber crimes in Nigeria.<sup>221</sup> The committee later submitted their Draft Cybercrime Act to the President which later led to the creation of the Draft Nigerian Cybercrime Act which

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<sup>216</sup> Nat OFO, Sale of Goods Act in Nigeria: A Century and A Score and Still Going Strong! Available at: <http://thecorporateprof.com/sale-of-goods-act-in-nigeria-a-century-and-a-score-and-still-going-strong/> (last visited on the 22<sup>nd</sup> March, 2013)

<sup>217</sup> Ndubuisi Augustine Nwafor, Whither the CISG? Case for Its Acceptance in Nigeria, SSRN, 1 (December 23, 2012) Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2193316](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2193316)

<sup>218</sup> Ibid, 2

<sup>219</sup> The Economic and Financial Crimes Commission (Establishment) Act, part II (2004) Available at: [http://www.efccnigeria.org/efcc\\_homepage\\_files/establishment\\_act\\_2004.pdf](http://www.efccnigeria.org/efcc_homepage_files/establishment_act_2004.pdf)

<sup>220</sup> Available at: <http://www.efccnigeria.org/efcc/> (last visited 22<sup>nd</sup> March, 2013)

<sup>221</sup> Femi Oyesanya, Review of Draft Nigerian Cybercrime Act. Available at: <http://www.gamji.com/article3000/NEWS3561.htm> (last visited on March 24, 2013)

proposed a legal frame work for the creation of an Independent Cybercrime Agency and the legal foundation for cybercrime and cyber security.<sup>222</sup>

The proposed Act provided for the punishment of various kinds of cyber crimes including: unauthorized modification of the contents of any computer; illegal communication using electronic messages; illegal interception; data & system interference; misuse of devices; email bombing; computer trespass; computer identity theft & impersonation; cyber-squatting; computer contamination; cyber-terrorism; intellectual property; computer offences against minors; other sexual offences, and so on.<sup>223</sup> The bill was not passed into law, at the time it was proposed and was rejected on the ground that some of its contents were a duplication of the functions of some existing law enforcement agencies in Nigeria.<sup>224</sup>

There was another attempt to pass the law on cybercrimes at the National Assembly, sometime in February, 2013.<sup>225</sup> The current move was carried out by stakeholders in the House of Representatives and tagged “a Bill for an Act to amend the Criminal Code Act, CAP C38 Laws of the Federation of Nigeria, 2004 in order to provide for offences and penalties relating to computer misuse and cybercrimes.”<sup>226</sup>

There were supporters of the Bill from the Federal Ministry of Justice; the Supreme Court; the Nigerian Bar Association; and so on, and there are speculations that this bill should be allowed to see the light of day and become passed into Law, this time around, since this there is now more understanding of its necessity in Nigeria.<sup>227</sup> There was also a second bill proposed relating to records retention and data protection.<sup>228</sup>

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<sup>222</sup> Ibid

<sup>223</sup> Ibid

<sup>224</sup> Chukwu David, Nigeria: Representatives Reject Cyber Bill (2 March 2011 ) Available at: <http://allafrica.com/stories/201103020802.html>

<sup>225</sup> Kunle Azeez, Stakeholders seek passage of Cybercrime Bill, National Mirror, February 21<sup>st</sup> 2013. Available at: <http://nationalmirroronline.net/new/stakeholders-see-passage-of-cybercrime-bill/> (last visited on March 24, 2013)

<sup>226</sup> Ibid

<sup>227</sup> Ibid

<sup>228</sup> Ibid

Nevertheless, till date the bills have still not been passed into law and there remain no e-commerce protection laws in Nigeria as we speak. The Nigerian Communications Commission announced that Nigeria is not ready to fight cyber crimes since the required legislation needed to prosecute offenders; the Harmonized Cyber Security Bill has still not been passed into Law.<sup>229</sup>

In 2012, during the second reading of the bill, it was reported that the Economic and Financial Crimes Commission (EFCC) had made 288 cybercrime- related arrests but that 234 of the cases were still pending in court due to absence of cybercrime legislation to prosecute them

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<sup>229</sup> Elly Okutoyi, Nigeria Not in a Position to Fight Cybercrime, says NCC, March 13, 2013. Available at: <http://www.humanipo.com/news/4593/Nigeria-not-in-a-position-to-fight-cybercrime-says-NCC>

## V. LESSONS FOR NIGERIA AND SUGGESTIONS

Online shopping should be encouraged to thrive in Nigeria since it has a lot of benefits for purchasers. Studies carried out by the European Commission show that some of the benefits of buying online are: lower prices; time savings; ease of comparing prices; the ability to order goods at any time; and also saves time and money.<sup>230</sup>

Therefore, if E-commerce is properly managed and if proper safe-guards are put in place, it will be a blessing to Nigeria, or to any country for that matter, since it can be tapped positively to the benefit of purchasers. But if not properly regulated, purchasers can be easily endangered or put at risk. Where E-Commerce is properly managed, it can also bring considerable welfare improvements for online purchasers in Nigeria, in terms of both price and choice, if it is properly harnessed, since when purchasers can visit several online shops, they can have multiple options to choose from, when compared with offline transactions.<sup>231</sup>

Nigeria's population is currently estimated to be about 167 Million people.<sup>232</sup> E-commerce has not been widely tapped in Nigeria, except amongst the elite who may have been exposed to cross border transactions by their trips abroad. The masses which are the larger bulk of the population of Nigeria have never heard of online purchase, or if they have, do not have the means or the skills to make use of the benefits of online transactions. For the few ones making use of E-commerce, there is no law in Nigeria protecting them.

In order for Nigeria to move forward in the sphere of e-commerce and in order to have better protected purchasers or consumers, there is a lot of hard work to be done and the Government has a major role to play.

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<sup>230</sup> Consumer scoreboard, 22

<sup>231</sup> Ibid

<sup>232</sup> Festus Abu, Nigeria Population To Hit 367 Million In 2050 –UN, The Punch Newspapers, April 6, 2012. Available at: <http://www.punchng.com/news/nigeria-population-to-hit-367-million-in-2050-un/> (last visited on: March 19, 2013.)

Firstly the solution has to be divided into phases. I will refer to the first phase as the infrastructure stage. This should be divided into classes and should focus on providing the necessary amenities and technological tools needed to move Nigeria forward. This should therefore include the provision of constant power supply and the development of other sources of power supply from sources of renewable energy like wind, solar, geothermal, hydroelectric, ocean-hydrokinetic, and biomass.<sup>233</sup> There should also be the provision of computers in primary and secondary schools where children can learn how to use the computer at infancy stage.

The second phase should be the information and awareness phase. In this stage, there has to be an increased level of education and awareness in the grass roots or rural communities in order to teach them how to access and use the computers. Hence, I would suggest that the Government of Nigeria should team up with the non-profit Organizations which are already working on similar projects, create more Organizations, fund them all, and supervise the transformation process so that it will not be hijacked. Where this is successfully achieved then more than half of the nation would have become computer literates and then can the e-commerce discussion be more meaningful to them.

It is important to note, that it is not only in the rural areas in Nigeria that the knowledge of the use of computers is scarce. Even in the cities, there are still many people in Nigeria who cannot operate a computer and there was even a recent disgraceful case of the Lagos State Commandant of the Nigerian Security and Civil Defence Corps, NSCDC, who was asked on air, on a Channels Television Interview, about the name of NSCDC's website, and he did not know the name of the website of the Organization.<sup>234</sup> Also another reported case was about

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<sup>233</sup> Phillip Brown, Gene Whitney, U.S. Renewable Electricity Generation: Resources and Challenges (2011) Available at: <http://www.fas.org/sgp/crs/misc/R41954.pdf>

<sup>234</sup> Interview with Mr. Obafaiye Shem, Senior NSCDC official, Available at: <https://www.youtube.com/watch?v=kaurbDSCgho> (last visited on 23<sup>rd</sup> March, 2013)

some Nigerian Professors who were asked to send emails as part of their assessment for the position of Vice Chancellor at a Nigerian University, and they could not because they did not know how to send an email.<sup>235</sup>

Therefore, the Nigerian government must consider the third phase, which is to embark on rigorous computer training programmes to train the workforce on how to use the tools of technology in order to increase the level of awareness in the society. Also most Nigerian computer graduates were either only taught the theory aspects of computers or did not have enough Technologists in the field to make them fully baked to withstand the competition in the global market. Hence, the government needs to provide more computers practical training programmes for the public and private work force and the unemployed graduates in order to make them more globally relevant.

The next phase should be to introduce new laws into Nigeria that will protect consumers especially when they purchase online. Hence there must be the enactment of laws that will secure their contracts; give them better redress; and give them consumer rights like withdrawal and cancellation rights.

Furthermore, to ensure a swift development of E-commerce in Nigeria, there is the need for an abolition of the Sale of Goods Act 1893, and the introduction of a more indigenous Law that will accommodate the present times and that will also accommodate E-commerce and other technological issues in Nigeria in order for Nigeria to move with the global trend in the world today.

In addition, the lack of a proper E-commerce law in Nigeria is a major factor contributing to the lack of development of E-commerce in Nigeria. Nigerian online purchasers are not protected under any law and even for financial or identity issues, there is no form of

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<sup>235</sup> Laju Arenyeka, My Oga at the top: New media lessons for the older generation (March 22, 2013) Available at: <http://www.vanguardngr.com/2013/03/my-oga-at-the-top-new-media-lessons-for-the-older-generation/>

protection for online transactions, since the law, being an ass can only speak when the proper enactments are put in place.

In the Nigerian legal system as most systems today, where an offence is not specifically prescribed in a statute book, it cannot be an offence, unless provided by law. Therefore, there is the need for an awakening in Nigeria and a speedy development of the process in order to tap into the benefits of E-commerce which are time and cost saving.

Another phase will be to adopt laws that foster e-commerce in Nigeria. Taking the European serious consumer protection approach as a guide, Nigeria should adopt laws that will protect consumer rights, restrict unfair terms, ensure conformity of consumer goods, ensure more data protection, like the proposal of NITDA for instance, on the adoption of the PKI method of authentication of documents.

Nigeria must also pass the draft Nigerian cyber crime Act into law since it promises to eradicate all the ills and scams in the e-commerce growth of Nigeria. The EFCC Act is inadequate to fight cyber crimes in Nigeria and so, the Nigerian Cyber crimes Act must be passed into law which should be administered by a specialized Nigerian Cyber Crimes Commission. To achieve this, there are two options: the first one is that the Nigerian Cyber Crimes Commission can be carved out of the current EFCC in order to save resources, or created to be independent from the EFCC. I would highly suggest the second option since it would encourage more dedication to the task at hand and create employment opportunity for well trained IT forensics specialists and Information security experts. The Organization can however, work with the EFCC for the purpose of obtaining useful information which they may come across, but it should be independent to avoid dereliction of duties and unwanted interference or control.

Nigeria must follow other Countries in the fight against cyber crime by enacting the law which will equip the Judges and the law enforcement agencies in fighting and punishing

offenders. I therefore highly recommend the adoption of the draft Nigerian Cyber Crime Act since only then can there be real protection for online purchasers in Nigeria.

Another phase is the practical consumer protection process which should be to establish consumer support and relief centers which should be made readily available and accessible to the general public, like the ECC in Europe and FTC in the U.S. The Consumer Protection Council can be empowered to handle online cross border consumer issues and not only on quality issues within Nigeria. Hence, they should be able to secure redress and liaise with foreign networks to trace sellers in other jurisdiction who have acted in unfair practices towards Nigerian purchasers.

The CPC should also work hand in hand with law enforcement agencies and free legal aid Organizations to ensure that consumer rights are redressed and enforced since without enforcement, a law enacted is toothless. There should be deliberate International networking efforts to ensure that they can freely dialogue with other Countries when there are cross border issues involved. There should also be the establishment of the small claims court as seen in Europe which would specialize in consumer issues and obtain redress for the masses, without the use of a lawyer.

Finally there should be regular consumer conferences or summits which will create avenues for general feedback from the consumers. There should also be a database of consumer cases for ease of reference and regular updates of consumers on new threats in e-commerce to keep them up-to-date with the trends in the global society. In Europe, for instance, the January 2012 Communication on e-commerce set out planned actions which included initiatives on better enforcement of consumer protection legislation and a better transparency of offers for consumers and also proposed legislation on an EU-wide online redress tool for cross-border

disputes.<sup>236</sup> This arrangement was intended for online purchasers to be able to submit their complaint online free of charge, or at a subsidized rate and in their own language.<sup>237</sup>

Furthermore, in 2013, the EC held a European Consumer Summit in Brussels, where it was stated that consumer rights need to be enforced even more than its present state in Europe.<sup>238</sup>

According to Viviane Reding, “Access to effective justice is essential for the enforcement of existing consumer EU legislation.”<sup>239</sup>

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<sup>236</sup> Consumer Scoreboard, 26

<sup>237</sup> Ibid, 27

<sup>238</sup> Viviane Reding, 2

<sup>239</sup> Ibid, 7

## CONCLUSION

Let me say at this juncture, that there is no need to reject the European approach as some may suggest, probably on the ground that Nigeria is a common law system like the U.S. and so that the U.S. model alone should be followed. That would not yield the best result for Nigeria in this case. From the Directives of the EU which are focused on consumer protection, it is quite glaring that the EU approach: a more purchaser/consumer-friendly system since they are determined to ensure that consumers are not treated unfairly. This determination is not so strongly felt in the U.S. approach.

Nevertheless, both methods can be copied side by side since the issue in question is e-commerce which respects no single jurisdiction, but crosses all borders by just a few clicks, and creeps through any security checks by just a malware. Hence, Nigeria must adopt as many Directives of the EU as possible and merge them with those of the US that are relevant, as models with which to frame her own indigenous laws, since this will positively portray Nigeria as a consumer friendly Country and a cyber crime combatant. Only then can the world take Nigeria serious and change their perspective about the business environment in Nigeria. All the Directives of the EU are very standard and elaborate and can be used as a model for Nigeria in its development of E-commerce. Hence, it is relevant to state that there must be a practical and tactical approach, followed by a constant monitoring and upgrading of the laws in order to build up E-commerce in Nigeria to an enviable height.

In addition, Nigeria needs to seriously take advantage of E-commerce and this issue cannot be over- stretched, since E-commerce encourages a single world trading system and also encourages globalization. Hence, in order to be a force to be reckoned with, Nigeria must engage in serious and deliberate e-commerce development efforts that will propel it forward

in the global market. This will lead to a change of attitude towards Nigeria from other International nations which will treat Nigerian purchasers with more dignity and trust.

Lastly, by enacting the proper e-commerce laws, anti-cyber crimes Act, e-commerce contract laws that are more globally current, consumer protection laws that are more up to date, Nigeria will send the message across that she is ready to defend consumers and also ready to fight cyber crime. When that time finally comes, the whole world will back her up.

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