

**ENFORCEMENT OF CONSUMER PROTECTION UNDER THE NEW
LEGAL REGIME OF ETHIOPIA IN THE LIGHT OF THE EU AND US
LAWS AND PRACTICES: A COMPARATIVE ANALYSIS**

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ACRONYMS

ADR-Alternative Dispute Resolution

ALJ- Administrative Law Judge of the United States

BaFin- Federal Financial Supervisory Authority of Germany

BMELV- The Federal Ministry of Food and Agriculture of Germany

BP-British Pound

BVL-Federal office of Consumer Protection and Food Safety of Germany

CAMRA-Campaign For Real Ale in the United Kingdom

CAT-Competition and Appeal Tribunal of the United Kingdom

CFI-Court of First Instance of the European Union

CFPB-Consumer Financial Protection Bureau of the United States

CJEU-Court of Justice of the European Union

CID-Civil Investigative Demand of the Federal Trade Commission of the United States

CMA- Competition and Markets Authority of the United Kingdom

COM-Communication from the EU Commission

COMESA-Common Market for Eastern and Southern African States

CPSC-Consumer Product Safety Commission of the United States

CSA- Charities and Societies Agency of the Federal Democratic Republic of Ethiopia

CSP- Charities and Societies Proclamation of the Federal Democratic Republic of Ethiopia

DOJ- Department of Justice of the United States

ECJ- European Court of Justice

ECOA-Equal Credit Opportunity Act of the United States

EEC- European Economic Community

EPA- Environmental Protection Authority of the United States

FCBA-Fair Credit Billing Act of the United States
 FCRA-Fair Credit Reporting Act of the United States
 FDA- Food and Drug Administration of the United States
 FDCA-Federal Food, Drug and Cosmetic Act of the United States
 FDCPA- Fair Debt Collection Practices Act of the United States
 FDRE- Federal Democratic Republic of Ethiopia
 FTC- Federal Trade Commission of the United States
 FTCA- Federal Trade Commission Act of the United States
 GTP- Growth and Transformation Plan of the Ethiopian Federal Government
 KO- Swedish Consumer Agency
 OFT- Office of Fair Trading of the United Kingdom
 NGOs- Non-governmental Organizations
 NLRB-National Labor Relations Board of the United States
 PHSA- Public Health Services Act of the United States
 SEA- Single European Act
 SEC- Securities and Exchange Commission of the United States
 SOS- Secretary of State of the United Kingdom
 SME-Small and Medium Sized Industries
 TCCPA-The Federal Trade Competition and Consumers' Protection Agency of Ethiopia
 TFEU- Treaty on the Functioning of the European Union
 TILA- Truth in Lending Act of the United States
 TPCPA- The Federal Trade Practices and Consumers' Protection Agency of Ethiopia
 TPIC- The Federal Trade Practices and Investigation Commission of Ethiopia
 USC- United States Code
 VZBV- The Federation of German Consumer Organizations

EXECUTIVE SUMMARY

In Ethiopia, there has been no integrated and separate consumer protection law until the 16th of August 2010, except the repealed Trade Practices Proclamation NO 329/2003 which had a limited protection for consumers and the COMESA Treaty for Competition Regulation (ratified by Ethiopia in 2004 which has coverage for consumers' protection in cross-border transactions and still is applicable).

In August 16, 2010, the Federal parliament enacted Proclamation NO 685/2010 as a break through which wholly repealed the previous Proclamation NO 329/2003. The proclamation is a new development in granting consumers' rights up to establishing an autonomous government agency (though accountable to the Ministry of Trade) named Trade Practices and Consumers' Protection Authority having judicial functions in imposing administrative measures, civil sanctions and awarding compensations for consumers.

According to the recent amendment Proclamation No 813/2014, the TPCPA currently renamed as TCCPA has gained added power of investigation, asking for reliefs (litigation) and prosecution in criminal matters.

This purely depicts the public law nature of consumer law in Ethiopia. It's further evidenced by the three fold aims of the new proclamation (Proclamation No813/2014) namely, in establishing a system that is conducive for the promotion of competitive market, for protecting the well being of consumers and in accelerating the economic development of the country.

In the purview of consumer protection, the EU member states predominantly focused on the public enforcement strategy and in recent years they are also implementing the private enforcement mechanism particularly collective actions. This does not, however, mean that there is no mix of the public-private enforcement scheme in the EU member states

Consequently, the landscape of consumer law enforcement may be put like this: public bodies involvement in the UK (OFT), Ireland (National Consumer Agency) and recently in the Netherlands(Consumer Agency) together with self-regulatory agencies and consumer ombudsmen ; public involvement particularly administrative enforcement prevalent in Cyprus, Latvia, Lithuania, Poland, Slovakia, Malta and Hungary; prevention through negotiation and recommendation practiced in Nordic Consumer Ombudsmen and enforcement by private business and consumer associations in Austria and Germany without however undermining the supervisory mandate of public authorities.

In the US, though the conventional approach of enforcement is highly attached to the private attorney general model, due to the restructuring and strong power bestowal to the administrative agencies such as the FTC ,FDA, and CFPB makes public enforcement to gain momentum. Put otherwise, the named federal agencies and other state agencies are at the forefront in the realm of public enforcement of consumer laws particularly the FTC is empowered to conduct investigations, to lodge files in asking different reliefs in the administrative and civil courts and in limited situations in filing criminal charges before criminal courts and further issue hard laws that should be in congruence with the laws promulgated by the Congress.

This thesis argues that public enforcement and private enforcement are not mutually exclusive options but reinforce each other. However, it has to be cognizant that both enforcement models have their own strengths and weaknesses. The very aim of the thesis goes on to vividly capture the public enforcement model of consumer protection in the Federal Government of Ethiopia that is spear headed by the TCCPA-Trade Competition and Consumers Protection Authority and further embrace a more viable and sustainable enforcement framework and mechanism in the country. In doing so, the prevailing laws and practices of the EU and the US do have important place both as a litmus test and as a guidelines to Ethiopia's current enforcement scenario.

INTRODUCTION

General

Nowadays, consumers do possess more rights in terms of choice of goods and services than a few decades before particularly in the western democracies even if the corresponding risks connected with the named goods and services have shown an upsurge.¹

In the EU, consumer law is developed through primary and secondary legislations. Before the enactment of the Treaty on the European Economic Community (EEC) or Rome Treaty in 1958, consumer protection law within the Community was highly characterized by national approaches². Since the primary focus of the EEC Treaty was aimed towards the achievement of a common market (now termed as the Internal Market), by safeguarding the four fundamental freedoms, namely freedom of movement, freedom of goods, freedom of capital, and freedom of establishment, the protection afforded to consumers was incidental³. Therefore, raising the standard of living and quality of life according to Article 2 of the EEC Treaty had been subordinated to an integration mechanism related to production without constituting an independent and specific policy statement⁴.

¹ F.Cafaggi and H.Miclitz, Administrative and Judicial collective enforcement of consumer law in the US and the European Community, EUI working paper law N02007/22, 7(2007) available at <http://cadmus.eui.eu/bitstream/handle/1814/6980/LAW-2007-22.pdf?sequence=1>.

² Pelkmans, The Institutional Economics of European Integration, 318(1986). See Cafaggi & Miclitz, supra at 5-7.

³ Stephen Weatherill, EU Consumer Law and Policy, 1-33, (2005).

⁴ The EEC Treaty of 1958, Official Journal 25.3.1957, Art. 2, available at Official Journal of the European Communities, http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_eec_en.htm. See also Weatherill, supra at 1-33.

In 1979, the current CJEU-Court of Justice of the European Union or the then European Court of Justice has made a judgment on *Cassis de Dijon* or *fruit spirit* case, by interpreting Art.30 of the EC, stating that consumer protection can be invoked as a justification for restricting freedom of movement of goods even though indistinct product norms are applied by a member state so long as the justification is proportional and non-discriminatory⁵. This approach is later incorporated in the 1987 Single European Act (SEA) which promotes the functioning of the internal market⁶. Consequently, high level of consumer protection could be taken as a justifiable ground for restricting or derogating the four fundamental freedoms.

The Maastricht Treaty of 1992 had clearly endorsed consumer protection as an independent principle for EU law as per Article 129(a). The consumer policy in the named treaty was based on double foundations: as an internal market policy on the one hand and as specific action to support consumer policy measures taken by member states on the other⁷. Of course, the twin principles of proportionality (the measure should not go beyond what is necessary to attain the aim of the treaty) and subsidiarity(the EU should only take a given measure which fall within the shared competence in so far as only the matter shall not be sufficiently achieved by the member states) should not be neglected.

⁵ *Judgment of February 20, 1979, ECJ, Case C-120/78 Rewe- zentral AG v Federal Monopoly Administration*. available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61978CJ0120&from=EN>.

⁶ Weatherill, *supra* at 1-33.

⁷ H.W Micklitz, J. Stuyck, E. Terryn, *Cases, Materials and Text on Consumer Law*, 379, (2010). see also The Maastricht Treaty of 1992, Art.129(a).

A further development of EU independent consumer policy is also marked by the 1999 Treaty of Amsterdam. By virtue of the Treaty, the consumer's health, safety and economic interests were given due regard and the Community's powers extended too. As consumer protection was not the exclusive jurisdiction of the community by virtue of Art.153 thereof, the latter was authorized to apply flexible instruments, by way of enacting directives, in the area of consumer protection⁸.

The prominent role of consumer protection in the EU is further noticed in the 2009 Lisbon Treaty. To begin with, pursuant to Article 4(2) (f) of the Treaty, consumer protection falls within the shared competence of the Union and the Member states. In consonant with Article 12 of the Treaty, also, consumer protection requirements which are laid down under Article 169 of the Treaty shall be taken in to account in defining and implementing other Union policies and activities⁹.

In the purview of secondary legislations particularly the role of directives was far-reaching. The various directives enacted by the EU (more than 15 directives) in the sphere of consumer laws substantially affected the procedural laws of member states particularly directives that have trans-border application like injunction directive, administrative cooperation directive, small

⁸ Fabrizio Caffaggi: The Great Transformation-Administrative & Judicial Enforcement in Consumer Law, 21 Loy.CLR, 2-4, (2009) , available at <http://lawcommons.luc.edu/cgi/viewcontent.cgi?article=1086&context=lcclr>.

⁹ The Treaty of Lisbon of 2007, (Amending the Treaty of the European Union and the Treaty Establishing the European Community) Official Journal of the EU Notice No 2007/C306/01, Arts.4(2)(f), 12 & 169, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2007:306:FULL&from=EN>.

claims procedure and rules relating to ADR resulted in the shift of member state laws on the enforcement of consumer protections¹⁰.

In this regard, however, the CJEU's judicial activism in the construction of substantive laws as well as demanding the twin requirements of equivalence and effectiveness in the implementation of domestic procedural laws */effet utile principle/* should not be neglected¹¹. The EU Commission has also played a greater role in crafting the European Consumer Strategy (2007-2013) and the Green Paper on Consumers Collective action in the protection of consumer interests¹².

When we go to development of Consumer protection in the United States of America, the protection had been engulfed by the common law notion of contracts. Since common law contracts are underpinned by the very principles of sanctity of freedom of contracts inspired by the due process clause in the XIV Amendment of the Constitution and by the well known doctrine of Caveat emptor (let the buyer beware) coupled with the economic efficiency approach in the interpretation of contracts by courts¹³, the Government had placed itself to intervene in

¹⁰ Caffaggi, *supra* at 5-6.

¹¹ *Ibid.*

¹² *Id* at 4. See also Communication from the Commission to the Council, EU Consumer Policy Strategy 2007-2013, COM99Final, Brussels, 13.3.2007(2007), available at http://ec.europa.eu/consumers/archive/overview/cons_policy/doc/EN_99.pdf.

¹³ Victor E. Schwartz & Cary Silverman, Common Sense Construction of Consumer Protection Acts, *Kansas Law Review* Vol.54,5,10,(2006) available at http://www.law.ku.edu/sites/law.drupal.ku.edu/files/docs/law_review/v54/schwartz.pdf. See also Spencer Weber, Consumer Protection in the US: An Overview (Working Paper) Chicago School of Law, 2-4,(2012). It has to be noted that in the remarkable case between *Lochner v New York* (198 U.S 45(1905)),

market failures. Meaning, before the introduction of stringent federal consumer protection laws (primarily by the FTC) and state consumer protection laws which make one answerable for acts of false advertisement and deceitful commercial practices, such acts were regulated by state common laws of contract or tort¹⁴.

The deplorable conditions in the American meat packing industry exposed by the investigative journalist Upton Sinclair in his bestselling novel the *Jungle* also led to creation of the FDA (Food & Drug Administration). The enactment of the Federal Trade Commission Act as a Federal Act in 1914, by the then President of the US Woodrow Wilson as one of his major acts during the progressive era, has established the FTC as an independent agency of the Federal Government in the promotion of consumer protection and elimination and prevention of anti-competitive business practices¹⁵.

Following the notable speech made by John F.Kennedy in 1962 and the “Great Society Program” in the Johnson Administration, the Magnuson–Moss Warranty Act is enacted in 1975 as a federal act which governs warranties on consumer products. It was enacted by Congress in response to the wide spread misuse by merchants of express warranties and disclaimers¹⁶. The required

the Federal Supreme Court struck down a New York legislation which limits the working hours of an employee not more than 10 hours per day and 3 years after this judgment, however, in the case between Muller v Oregon(208 U.S 412 (1908)), the Supreme court upheld the Oregon legislation which demand restriction of working hours for women on the ground that the state has an interest in protecting women’s health.

¹⁴Schwartz & Silverman, supra at 8-10.See also Weber, supra at 3-4.

¹⁵ Id.at 5-10.see also Id at 2-6.

¹⁶ Weber,supra at 2-6.

standard terms and conditions of the warranty are, however, set out by the rules of the FTC. The Wheeler–Lea Act of 1938 is also a Federal law that amended Section 5 of the FTCA to widen the power of the FTC to prescribe unfair or deceptive acts or practices as well as unfair methods of competition¹⁷.

We obtain further different federal consumer protection laws in specific areas such as Truth in Lending Act (TILA), Fair Credit Reporting Act(FCRA), Fair Debt Collection Practices Act(FDCPA), Clayton Act and Dodd-Frank Act. As obligations stemming from contract or tort are matters left to individual states competence, there are also different State Consumer protection laws for specific subject matters. A harmonization work, however, has been made by the Restatement II on the law of Contracts and by the Restatement III on the law of Torts on the specific areas of the doctrine of unconscionability and product liability accordingly¹⁸.

At this juncture, it has to beware that enforcement of consumer law should be discerned in this particular thesis, not in its narrower sense which only includes enforcement through judicial and quasi-judicial (administrative) mechanisms; it should be comprehended in its broader understanding in order to embrace also enforcement via negotiation, settlement and arbitration.

Let me overview the situation in Ethiopia. There has been absence of integrated consumer protection law before the introduction of Proclamation No 685/210. Before the introduction of this law, Trade Practices Proclamation N0 329/2003 had been in place having limited protection to consumers. Due to this, the protections afforded to consumers had been on the basis of public

¹⁷ Ibid.

¹⁸ Mickltiz & et.al supra at 410. See also Weber, supra at 15-20.

and private laws namely the penal Code, regulatory laws of different nature, the Commercial Code and Civil Code provisions on the laws of contract and torts¹⁹.

For instance the Civil Code of Ethiopia has incorporated, in the chapter dealing with contracts of sales, the Seller's obligation to provide warranty against defects and non-conformity correlated with the buyer's right to demand remedy for the damage resulting from breach of such warranty (Arts.2287-2300).In tort, the manufacturer of defective products is strictly liable for damages caused by the normal use of such products (Art.2085) .The Revised Criminal Code of 1996 and the Commercial Code of 1960 sanction unfair commercial practices²⁰.

The Federal parliament enacted Proclamation NO 685/2010, on the 16th of August 2010, as a break through which totally repealed the previous Proclamation NO 329/2003.The proclamation is a new development in granting consumers' rights up to establishing an autonomous government agency (though accountable to the Ministry of Trade) named Trade Practices and Consumers' Protection Authority having judicial functions in imposing administrative measures, civil sanctions and awarding compensations for consumers²¹.

¹⁹ Samuel Teshale, Consumer Protection under Ethiopian Private International law ALJ,3-5 (2005) available at https://www.academia.edu/4030078/Consumer_Protection_Under_Ethiopian_PIL.&seealso<http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/COMESACompetitionRegulations.pdf>.

²⁰ Teshale, supra at 4-5.See also Desalegn Adera, The Legal and Institutional frame work for Consumer Protection in Ethiopia, LLM Thesis, Addis Ababa University School of Law, 46-50, June (2011) available at official website of theEthiopianLegalbrief,<https://chilot.files.wordpress.com/2013/05/thelegalandinstitutionalframeworkforconsumerprotection-in-ethiopia.pdf>., last up date: 01/01/2014.

²¹ Trade Practice and Consumers' Protection Proclamation, Procl.NO 685/2010 Federal Gazette No 6 Year No 49 16 August2010,Arts.3,31,33&35availableatOfficialwebsiteofEthiopianLegalBrief<http://chilot.files.wordpress.com/2011/01/685-ae.pdf>, last update 9/01/2011.

According to the newly amendment Proclamation No 813/2014, the TPCPA currently TCCPA's power is widened to embrace power of investigation, asking for reliefs (litigation) and prosecution in criminal matters²². This shows the public law nature of consumer law in Ethiopia which is further gathered from Art.3 of the new proclamation which enshrines the very purpose of the law²³.

Therefore, the new legal regime of consumer protection in Ethiopia in the sphere of its public and private actors, the legal and institutional frame work of the named actors in the enforcement mandate, the available remedies in the new proclamation NO 813/2014 together with other public and private law and the actual enforcement primarily carried out by the TPCCA with its investigation, litigation, adjudication and criminal prosecution powers should be reckoned from this enforcement scheme and shall be the central aim of the thesis in light of the prevalent laws and practices of the EU and the US.

Research Questions

Even if Proclamation NO 685/2010 is promulgated as a break-through legal regime of consumers' rights protection(as recently repealed by the new Proclamation No 813/2014), the TCCPA at the federal level is at the stage of infancy in carrying out the powers vested in it by the new proclamation.

In line with the very topic of the thesis, the research questions that require cautious treatment, inter alia, are: can the enforcement frame work and mechanisms laid down by the law

²² Trade Competition & Consumers' Protection Proclamation, Proclamation No 813/2014 Federal Gazeta 20th Year No 28, Addis Ababa, 21st March 2014, Art.36 & Art.37

²³ Trade Practice and Consumers' Protection Proclamation, Art.3.see also Trade Competition & Consumers' Protection Proclamation, Art.3

sufficiently attain the Ethiopian Government's clear policy of ensuring protection to Consumers' rights? Are the named enforcement frame work and mechanisms viable in light of the prevalent consumers' rights enforcement laws and practices of the EU and the US without ignoring however the Ethiopian Constitutional, economic and political settings? And what would be the best possible alternatives for effective and efficient enforcement of consumers' rights in Ethiopia?

Research Objectives

The thesis aims two-fold purposes: The first purpose focuses on delving in to the enforcement of consumers' protection in Ethiopia under the new legal regime in light of the prevalent consumer rights enforcement laws and practices of the EU and the US. The second aim of the thesis, however, is to identify the enforcement pitfalls, hindrances and perils of the current consumers' protection law and forward suggestions and recommendations that yield practical relevance.

The Scope of the Research

In consonant with the very topic of the thesis, the research mainly targets the enforcement part of consumers' protection law in Ethiopia at the federal level. In so doing, the previous and the current Ethiopian legislations on the pertinent part will be highly treated for clear discernment. The prevalent laws and practices of the EU and the US will have important place both as a litmus test and as a guidelines to Ethiopia's current scenario in order to embrace a viable and sustainable enforcement frame work and mechanism.

Significance of the Research

The thesis will have a multitude contribution in my mind. To mention a few of them, being the subject matter in general very infant in Ethiopia and is almost untouched, it would be an

enormous source of reference for further research work whether conducted domestically or abroad.

Undeniably, the primary enforcing authority of the law-the TCCPA would also be the primary beneficiary of the research by making use of the thesis as an input for amendment of the relevant legislation. Ethiopian resident or foreign charities working on the promotion of consumers' rights in Ethiopia also can avail the thesis as a benchmark for their continued research mandate and intervention strategies.

Research Design & Methodology

The research will be done by making use of primary and secondary sources. Primary sources comprise relevant legislations and practical cases. Books, journals, unpublished materials, reports, interviews and internet sources will be employed as secondary sources. The sources are utilized following a comparative perspective.

The basic rationales for choosing the two legal regimes may be two fold. First, the remarkable public enforcers of consumer law namely the OFT and FTC are situated in the named jurisdictions respectively and secondly as a result of UK's accession to the EU, the enforcement mandate of the OFT is particularly dependent on intra-community laws in general and consumer laws enacted by the EU in particular.

Accordingly, analyzing the EU laws and practices renders the thesis scholastic and workable. Besides, the shared power of consumer law enforcement in the US constitutional setting demands an understanding of States consumer law enforcement apart from discerning the FTC's and other federal agencies consumer law enforcement mandate.

In delving the practical situations of enforcement of consumers' protection law in Ethiopia, prominent cases and interviews will be utilized to make the thesis solid. Moreover, relevant Books, excerpts, journals, treatises, and other available materials will be part of the study.

Limitation of the Research

As I mentioned earlier, since its establishment on the 16th of August 2010, the Trade Practices and Consumers' Protection Authority has not been operational till the end of October 2013. This clearly leads to the unavailability of abundant cases and can be taken as a natural limitation. However, three relevant cases which are decided after July 2014 are a subject of treatment in the thesis even if this made the research task onerous due to continuous revision of the draft work.

Moreover, the promulgation of the new proclamation No 813/2014 that wholly repealed the break through proclamation No 685/2010 in March 2014 pending the thesis originally designed in consonant with Proclamation No 685/2010 made me to restructure the contents of the research in line with the current proclamation No 813/2014 in order to render the thesis up to date and complete though it vehemently demands additional time than my previous time schedule.

Contents of the Chapters

Chapter one will focus on the general criteria and approaches of enforcement (public or/and private) in general and Consumer Protection Law in particular in the two major jurisdictions of EU and the US. Having this in mind, the Ethiopian situation will be dealt.

Consumer Protection in terms of Legal and Institutional framework will be discussed in Chapter Two. To this end, a comparative analysis on the matter in the EU and US will be made. The Ethiopian case with particular focus on the new legal regime also will be discussed at this stage.

Chapter Three shall address the available remedies to Consumers in the realm of both public and private laws. In so doing, the prevalent principles, legislations, and case laws of the EU and the US will be given a critical consideration. The remedies provided to consumers in the current legal regime of Ethiopia shall also be delved in which are backed by practical cases in the light of the two major jurisdictions.

Actual enforcement of consumer law protection, at the federal level, which is primarily carried out by the TCCPA will be fully devoted in Chapter Four of the thesis. At this cleavage, the existing enforcement practices in the EU (particularly the enforcement mandates of the OFT of UK and the KO of Sweden, due to their divergent enforcement roles, will be explored for clear discernment) and the US (specifically the enforcement mandates of the FTC) will be the aim of the Chapter for due comparative study. Then, the thesis will be finalized by clear conclusions and tenable recommendations in order to realize a more robust and viable consumer law enforcement in Ethiopia.

CHAPTER-ONE

General Criteria and Approaches of Public-Private Enforcement in Ethiopia Consumer Protection Law in the light of the EU and US laws and Practices

1. 1 General

In the consumer society, as it stands today in western type democracies, consumers have a larger choice of products and services originating from all over the world than they did decades ago²⁴. Risks associated with products and services have also increased, as have mass problems and mass damages, often in a trans-border dimension²⁵.

Enforcement of consumer laws, however, is not only a key regulatory question when it comes to designing and implementing efficient markets but it triggers a broader set of theoretical questions concerning the relationship between states and markets and the combination of centralized and decentralized strategies²⁶. The EU and the US, though battling against common problems, maintain different standard setting and enforcement regimes²⁷. This Chapter pinpoints briefly the general approaches and theories prevalent in the enforcement of consumer protection (either public or private, or public and private), within the EU and US dimensions. It also portrays the

²⁴ Cafaggi & Miclitz, *supra* at 7.

²⁵ *Ibid*.

²⁶ F.Cafaggi and H.Miclitz, *New Frontiers of Consumer Protection: the interplay between private & public Enforcement*, Intersentia,1(2009) .

²⁷ Cafaggi and Miclitz, *supra* note 1at 1.

enforcement approach incorporated under the new legal regime of Ethiopia by virtue of Proclamation NO 685/2010(as is repealed by Proclamation No 813/2014).

Certainly, enforcement should be discerned, as I explained in the introductory part of the entire work, not in its narrower sense which only includes enforcement through judicial and quasi-judicial (administrative) mechanisms; it should be comprehended in its broader understanding in order to embrace also enforcement via negotiation, settlement and arbitration.

With all intent and purpose, to hastily comprehend the general approaches and theories of enforcement, whether the enforcement regimes are administrative or judicial or extra-judicial or all, it seems at this stage crucial to embark on the criteria for public-private enforcement that is equally applicable to the public/private dichotomy of consumer protection and the discussion will follow as regards the division of enforcement agents in to public and private parties. This public/private division streamlines the policy reasons behind protection of consumer law in a given polity and thus is essential to sketch a road map for understanding the remaining chapters.

1.2 The General Criteria for Public-Private Enforcement

To begin with, the debate over the comparative advantages of public and private enforcement dates back to the ages of Montesquieu and Jeremy Bentham. Following that Becker and Stigler tried to delineate the prone and cones of both enforcement mechanisms. Later on, Landes and Posner argued that private enforcement may lead to over-deterrence. Polinsky, on the other hand, argued that private enforcement may ensue under deterrence²⁸.

²⁸ A.M Polinsky and S.Shavell, The Theory of Public Enforcement, Stanford Law and Economic Olin Working PaperN0322May,3,5,(2006)availableat<http://web.stanford.edu/group/siepr/bin/siepr/?q=system/files/shared/pubs/papers/pdf/05-16.pdf> . See also Polinsky & Shavell, Hand Book of Law and Economics(vol.1) Elsevier B.V, 2-4,

As it is clear that, public enforcement of law is the use of governmental agents to detect and to sanction violators of legal rules. Private enforcement, however, is the bringing of suits by victims of harm or those threatened by harm²⁹. The justification for private or public enforcement can be drawn in the following way.

The first one is connected to information about the identity of violators. When victims of harm naturally possess knowledge of who injured them, allowing private suits for harm will motivate victims to initiate legal actions and thus will harness the information they have for purposes of law enforcement. This may help to explain why, for instance, the enforcement of contract law and tort law is primarily private in nature in general and in the purview of consumer protection in particular. When, however, victims can't easily identify who injured them, it may be desirable for public enforcement to be employed³⁰. One may suggest that reward may be injected to friends or neighbors of private persons to assist the latter rather than intervention of the public authorities. This is, however, a wasteful effort to finding violators when it is viewed from the economic point of view.

The second criterion is associated with the capacity of gathering information. Private parties may face hardship in gleaning information which is expensive but worthwhile information to aid enforcement in case of sophisticated crimes such as pyramid promotional schemes, hardcore frauds or cartels in consumer law violations in genera and that relate to specifically computerized

(2007)availableat<http://www.law.harvard.edu/faculty/shavell/pdf/07PolinskyShavellPublic%20Enforcement%20of%20Law-Hdbk%20LE.pdf>.

²⁹ Polinsky & Shavel, *supra* at 3-4.

³⁰ *Ibid*.

data base of finger print records. In such a case, therefore, enforcement is preferable to be carried out by public authorities³¹.

The third criterion is linked with the use of force. Force may be needed to gather information, apprehend violators and prevent reprisal, yet the state frequently will not want to permit private parties to use force. Therefore, in such a case, public enforcement is favored when the effort is to identify and apprehend violators³². Particularly in the realm of consumer protection, this is true where the relevant legislations grant public agencies to impose administrative measures (like injunction or administrative fines) or criminal prosecution.

The fourth criterion is connected with public good. The very purpose of private enforcement is to make good or prevent private damage in that it is neutral to public good. If policy makers address to pursue public good, they primarily will choose public enforcement whose goal is to attain social welfare. This is particularly the case in consumer protection matters where imposing administrative measures or discharging criminal prosecution is bestowed to public agencies. Private enforcement is not, however, devoid of in achieving public aim. For instance, in the USA by allowing individuals to claim punitive damages, even in consumer law matters, the government can attain achieve one of the central purposes of public law which is deterrence³³.

The fifth criterion is attached with bureaucratic bottlenecks. If the administrative mechanisms have an agency problem and can't be easily alleviated, sticking to the public enforcement mechanism may end in vanity. In such as case, the role of private enforcement is highly

³¹ Polinsky & Shavel, *supra* at 3-4.

³² *Id.* See also Polinsky and Shavell *supra* note 28 at 2-4.

³³ *Ibid.*

significant³⁴. In case of consumer law, this may be applicable by allowing private parties to bring private suits, or representative or class actions on the basis of contract or tort laws.

The last but not the least criterion of enforcement choice is associated with cost of litigation. When the cost of litigation as compared to the outcome of the dispute is so disproportionate, individuals may decline to institute their claims. In this case, though collective action may be workable, it is so effective only in matters of small claims in general and in matters of consumer disputes in particular where individuals may easily share their costs of litigation. Where the value of the dispute is, however, very huge it may result in free riders (though the problem may be mitigated by law firms particularly in the US) and in such a situation, public enforcement might be more preferable³⁵.

By way of conclusion, public enforcement and private enforcement in general and in the realm of consumer law enforcement are not mutually exclusive options but reinforce each other. Currently, without prejudice to the different legal systems in place and the variation in the particular problem at stake, the debate is focused to administrative and judicial remedies in order to render the enforcement options robust and workable. The challenge of policy makers particularly in the sphere of consumer protection is to find an optional mix of public and private enforcement taking in to account their constitutional, legal, economic, and political settings.

³⁴ Polinsky & Shavel, *supra* at 3-4.

³⁵ *Id.* at 4-6. See also J. Maria Glover, The Structural Role of Private Enforcement Mechanisms in Public Law, 53 Wm. & Mary L. Rev. 1155, 1158, (2012) available at <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3423&context=wmlr>.

1.3 Public Enforcement in Consumer Protection

1.3.1 The EU & US Approaches

1.3.1.1 The EU Approach

In the EU, as regards the public-private divide, the landscape is quite heterogeneous. In Austria and Germany for instance private organizations are active players particularly as regards domestic consumer disputes as they are entrusted quasi-public functions³⁶. In these countries, however, public authorities remain bound to supervisory tasks, in particular as far as consumer organizations receive public funding³⁷.

Whilst in Scandinavian, consumer ombudsman or consumer *ombud* in particular in Sweden- Consumer Agency- is at the forefront of the development of consumer protection³⁸. Consumer organizations only play a subsidiary role. It is quite natural to assert that consumer organizations play a less important role in countries with a strong consumer agency like the Swedish case.

This is mainly the result of the minimum harmonization policy of the EU under directive 98/27/EC (injunctive directive in cross border consumer law violations) which leaves to the member states to decide whether to put injunction relief in the hands of administrative bodies or courts³⁹. However, the EU has changed its policy with its long term effects on the interplay between public and private bodies in consumer law enforcement⁴⁰. In so doing, the

³⁶ Cafaggi and Miclitz, supra at 27.

³⁷ Ibid.

³⁸ Cafaggi and Miclitz, supra at 28. See also Weber, supra at 548.

³⁹ Cafaggi and H. Miclitz, supra at 17-22.

⁴⁰ Cafaggi and H. Miclitz, supra at 17-22.

Administrative Cooperation Regulation NO 2006/2004/EC in its Arts. 1 & 2 obliges member states to designate one public authority to manage trans-border law enforcement⁴¹.

The list of issues is the same under directive No 98/27/EC (15 directives listed in the annex), but the policy is quite different. Member states have no choice any more to put enforcement in the hands of private or public bodies or both; they have to grant public bodies legal rights to take legal actions. The sanctions, however, remain to member states' national laws.

In short, the fact that the Administrative Cooperation Regulation obliges member states to assign only a designated public authority in managing trans-border law enforcement does not suggest that the resultant remedy should be administrative. The remedy might only be judicial as in the case of Austria, Germany, and Luxemburg. This triggers also whether consumer protection is regulated under a given polity by way of public law or in the realm of private law.

In the EU, we can conclude that even if consumer protection is a matter of shared competence pursuant to Art.4 of the TFEU, the EU regulates consumer matters when they can only be sufficiently addressed by it and without however going beyond what is necessary in order to attain the intended purpose (the twin requirements of subsidiarity and proportionality should be met)⁴². There is also no centralized authority having a clear delineated power in enforcing

⁴¹ Ibid. See also Administrative Cooperation Regulation, Regulation No 2006/2004/EC on cooperation between national authorities responsible for the enforcement of consumer protection laws, L 364/1 9.12.2004, Arts.1&2.

⁴² The Amsterdam Treaty of 1992 and the Lisbon Treaty of 2007, Official Journal of the EU Consolidated Versions of the Treaty on European Union and Treaty on the Functioning of the European Union, Vol.51 Notice NO 2008/C115/01, 9 May 2008, Art 5 TEU cum Art. 2 TFEU available at official website of the European Union <http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=OJ:C:2007:306:FULL&from=EN>.

consumer law. The European commission operates as a catalyst or even as a silent regulator depending on which new form of governance (comitology, Lamfalussy) applies⁴³. At this cleavage, it shouldn't be, nonetheless, neglected that the EU commission in enforcing competition law, (one of the aims of EU competition law being protecting the welfare of consumers), in conjunction with the member states national competition authorities and national courts in a decentralized fashion by virtue of Directive N0 1/2003, is also safeguarding the interests of EU consumers.

Though there are numerous directives enacted by the EU, having a minimum or maximum harmonization effect, Consumer protection, however, is by and large a matter left to member states and they have no homogeneous bodies in enforcing consumer law. There are member states that have laid down enforcement only in the hands of a competent ministry or independent agency like Latvia and Lithuania (in Sweden Consumer organizations will go to court only if they don't seek remedy from the Consumer ombud)⁴⁴. There are others that have combined administrative and judicial enforcement such as Belgium, Hungary, and UK⁴⁵. Also are others simply relied on judicial enforcement alone like Austria, Germany, Greece, and Luxembourg⁴⁶. In fact, this will be discussed more in the next chapters.

⁴³ Cafaggi and Miclitz, *supra* at 13.

⁴⁴ *Id* at 23.

⁴⁵ *Ibid*.

⁴⁶ *Id*.

1.3.1.2 The US Approach

In the US, when we come to enforcement of consumer law, it is believed that even if there are disclosure duties on the part of traders, there is information asymmetry between consumers in the first place and further the rigorous requirements of standing in courts of law prevent interested persons particularly consumer organizations to lodge a suit⁴⁷. To this end, public agencies such as the FTC, FDA, CFPB and other state agencies are at the forefront in the realm of public enforcement particularly the FTC is empowered to lodge files in asking different reliefs in the administrative and civil courts and in limited situations in filing criminal charges before criminal courts .

Moreover, as compared with the EU, it can be said that the strong federal dimension makes the landscape in the US homogenous although the presence of state agencies should not be underestimated⁴⁸. This matter will be further unraveled in the second chapter while I explain the institutional frame work part of enforcement.

1.4 Private Enforcement in Consumer Protection

Private law enforcement has to do with the relationship between individuals who vindicate their rights under private law. It is typically in civil court that judges are to ensure the application of the law in disputes between the parties. A main point of consumer law enforcement concerns the

⁴⁷ Schwartz & Silverman, *supra* at 5-10.see also Glover, *supra* at 1153-1156.Further see Catherine M.Sharkey, An Institutional Perspective on the Regulation of Products in the United States, Intersentia, 139-150,(2009).

⁴⁸ Cafaggi and Miclitz, *supra* at 15.

sphere of contract law but this doesn't exclude claims for damages being backed by tort claims. Private action may be either taken by private party or by collective action⁴⁹.

As I explained earlier, the public-private divide stems from the goal of a certain law in a given polity particularly consumer law in our case. Where countries uphold that consumer protection is an integral part of the role of a state and hence part of public law, they assume public bodies the primary regulatory power and leave certain space to the private enforcement regime. By limiting myself to the main theme of the chapter, I do mention the situation in the EU and the US accordingly.

1.4.1 The EU & US Approaches

1.4.1.1 The EU Approach

In relation to private sphere, consumers and other associations play a more important function in EU than in the US, although a recent empirical research shows the impact differs substantially among EU member states if we disaggregate old and new member states and even within the old ones⁵⁰. Contrary to this, plaintiffs and defense lawyers (primarily law firms) play a strategic role in shaping the enforcement alternatives in the US while they don't exist or merely have a minor role in the EU enforcement frame work⁵¹.

In Europe, one can't strictly obtain class actions; yet, representative action, group action and model or test cases are available. A broad variety of consumers affected by the same type of accident, injury or violation of the law might- instead of bringing the case to court themselves-

⁴⁹ Weber, *supra* at 544-54.

⁵⁰ Cafaggi and Miclitz, *supra* at 23-32.

⁵¹ *Ibid.*

transfer their right to a representative, it can be a consumer organization by availing representative action⁵².

Group action is available (which may be opt-in or opt-out) where one claimant, either an individual consumer or a consumer organization can seek redress and ask for judgment on behalf a group with equal or similar problems⁵³. (Sweden is a notable example of opt-in procedure and Portugal is the hallmark of opt-out procedure). In some legal systems like Germany they select a test or model case and then the final outcome of the judgment may be extended to other injured parties who are in same factual and legal situations⁵⁴.

In short, private enforcement via US type class action has a big debate in the EU. To date, European efforts have shown a marked distrust of lawyer entrepreneurialism as the driving force behind collective actions⁵⁵. Instead, they have opted for either group consolidation orders that coordinate among litigants already in the legal system or for representative actions brought by non-governmental organizations⁵⁶.

A private party actor in the realm of private enforcement at cross-border consumer disputes is at issue only in the EU perspective. This is because in the US federal and state laws address the matter clearly. In the EU, since there are numerous consumer protection directives, whether

⁵² Cafaggi and Miclitz *supra* at 25.

⁵³ *Ibid.*

⁵⁴ *Id* at 26.

⁵⁵ Cafaggi and Miclitz, *supra* at 30-32.

⁵⁶ *Id* at 25.

individual parties can privately enforce their right at the national courts by relying on the relevant directives is open to argument.

The CJEU has consistently held that a directive can't impose obligations against individuals and thus can't be relied up on as such.⁵⁷ That means, even though enacted at the EU level, unless the directives are transposed by the national legislators of member states, as a matter of principle, they have no horizontal direct effect save cases which raise issues of fundamental human rights or values⁵⁸. Therefore, consumer directives can only have vertical direct effect in that individuals can rely on them and sue for damages against the state or emanations of states even if the directives are not transposed or failed to be fully transposed by the member state provided the provisions in the directive are unconditional and sufficiently precise and further individuals can prove the causal link between the harm sustained and the non-transposition or the failure to fully transpose thereof.

⁵⁷ *Judgment of 14 July 1994, ECJ, Case C-91/92 Paola Faccini Dori v Receb srl*[ECR-03325] available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61992CJ0091&from=EN>.

⁵⁸ *Judgment of 22 November 2005, ECJ, Case C-144/04 Werner Mangold v Helm*[ECR-09981], available at <http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d2dc30d619a3d721c3c046f69f0f81b17afff431.e34KaxiLc3qMb40Rch0SaxuOaN50?text=&docid=56134&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=155218>(The court held that in the case of age discrimination -which is a right to equal treatment derived from the general principle of non-discrimination as expressed in the various international instruments and which is part of community law- national courts may set aside any provisions of national law which conflict with the directive even where the period prescribed for the transposition of the directive had not expired.

In *Marshall*⁵⁹ Case, however, the Court in its dictum accentuates that national courts are duty bound to interpret national law and more importantly legal provisions that have been adopted for complying with the requirements of a directive so far as possible in the light of the wording and the purpose of the concerned directive.

Besides, in the *Dillenkofer*⁶⁰ case, which is an emanation of the *Francovich*⁶¹ judgment, the ECJ ruled that consumers who suffer damage from the non-transposition of a directive can claim damages from the State as long as the causation element is satisfied.

Summing up, without prejudice to the protection accorded to individuals by member states before the enactment of consumer protection directives at the EU level, it can be asserted that in case where consumer directives are transposed, individual parties can be players of private enforcement in EU even against individual traders. Contrary to this, should the relevant consumer directive remains non-transposed in a given member state, individual parties as a rule only can have standing against the national government and not against individual traders.

⁵⁹ *Judgment of 2 August, 1993, ECJ, Case C-271/91[ECR-04367] M.Helen Marshall v Southampton and South west –Hampshire Area Health Authority*, available at http://eur-lex.europa.eu/resource.html?uri=cellar:a690f835-b42b-4308-8620-4fec96eff686.0002.06/DOC_1&format=PDF.

⁶⁰ *Judgment of 8 October 1996, ECJ, Joined cases C178/94, C179/94 & C188/90/94[ECR04845] Erich Dillenkofer and others vs Federal Republic of Germany* available at <http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:61994CJ0178&from=EN>.

⁶¹ *Judgment of 19 November 1991, ECJ, Joined cases C-6/90 & C-9/90[ECR-05357] Andrea Francovich and others v Italian = Republic* available at http://eurlex.europa.eu/resource.html?uri=cellar:7a76ea3fa919475c8cbe29e0b260ebc4.0002.03/DOC_1&format=PDF.

1.4.1.2 The US Approach

In the US, we shouldn't forget that unlike the EU, regulation of wrong doing by private parties is not merely an ad hoc private law supplement to public enforcement by regulators⁶². It's often an institutional feature of US public law. As I mentioned earlier the US experience with ex post regulation turns critically on the role of private enforcement to supplement more limited state responsibility for compensation and deterrence⁶³. As *Issacharoff* puts it, "the US generally regulates consequences not market entry".⁶⁴ This assertion is not totally in place as regulatory agencies such as the FDA and the FTC possess ex ante enforcement mandates.

To this end, a US style class action is in principle a group action but with very specific features that do not exist in EU group action models. The lawyer particularly the law firm plays a key role in preparing, organizing and financing the class action. His investments will be compensated by contingency fees. Once the class is defined, consumers can only pursue their rights individually, if they opt- out⁶⁵.

1.5 The Ethiopian Approach

1.5.1 Public Enforcement in Consumer Protection

In the light of the forgoing discussions, I can describe the Ethiopian context in the following manner. As I described earlier, till the enactment of Proclamation No 685/2010 Ethiopia lacks integrated consumer protection legislation except Proclamation No 329/2003 having limited

⁶² Glover, *supra* at 1140-1158.

⁶³ Id at 1146-1147.

⁶⁴ Id at 1146.

⁶⁵ Cafaggi and Miclitz, *supra* at 25.

protection for consumers. Accordingly, Proclamation No 685/2010 may be dubbed as a break through legislation that gives adjudicatory power to the TPCPA in imposing administrative measures, civil sanctions and awarding compensations for consumers.⁶⁶

The recent amendment Proclamation No 813/2014, however, extended the power of the TPCPA renamed as TCCPA in order to carry out power of investigation, power of litigation, and prosecution in criminal matters⁶⁷. Hence, it is safe to assert that consumer protection in Ethiopia is primarily with in the ambit of public law and also mainly enforced by pertinent administrative agencies.

At this juncture, it is interesting also to mention that the Ethiopian Government in its 5 years Growth and Transformation Plan, formulated after 3 months from the enactment of Proclamation NO 685/2010, (valid from Nov 2010/11-2014/15) clearly lays down “supporting consumers’ rights and security by improving the regulatory frame of trade as one of the major trade policies of the country”⁶⁸. Therefore, public enforcement is the primary focus of consumer law in the current legal setting of Ethiopia.

1.5.2 Private Enforcement

In terms of private litigation either by private consumers or collective actions, the case of private consumers is clearer than collective actions. First, as the new proclamation addresses the

⁶⁶ Trade Practice and Consumers’ Protection Proclamation, Arts.3, 31, 33 & 35.

⁶⁷ Trade Competition and Consumers’ Protection Proclamation, Art.36 & Art.37.

⁶⁸ Ministry of Finance & Economic Development, Growth and Transformation Plan GTP of the FDRE, Vol.1 Main Text, Vol.1 Main Text 2 November 2010, 63(2010) available at http://planipolis.iiep.unesco.org/upload/Ethiopia/Ethiopia_GTP.pdf.

compensation issue in the perspective of contractual matters between traders and consumers, Art.4 (5) of the proclamation expressly spells out resort to the Civil Code in case where an extra-contractual claim arises. Second, a victim may rely on Art.2035 of the Civil Code to bring an extra-contractual claim because the provision makes infringement of a specific and explicit provision of a law, decree or administrative regulation as a liability extra-contractually.

In the purview of collective action, since Proclamation No 685/2010 as well as Proclamation No 813/2014 incorporate the application of the Civil Procedure Code, by virtue of Art.38 of the Code, representative suits (opt-in) by one of the members having the same interests is possible⁶⁹. In such a case, consumer associations which have no interest in the suit lack *locus standing* to sue because the representative suit has personal character in which further delegation even to a lawyer is not allowable. Consumer associations can represent in litigation, in consonant with Art.37 (2) of the Federal Constitution, only if their members' interests are at stake⁷⁰.

⁶⁹ Trade Practice and Consumers' Protection Proclamation, Art.40. See also Trade Competition & Consumers' Protection Proclamation, Art.41.

⁷⁰ The FDRE Constitution, Proclamation No 1/1995 of the Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, Addis Ababa, 1st year No 1, 21st August 1995, Art.37(2) available at Official websiteoftheEthiopianLegalBriefhttps://docs.google.com/viewer?a=v&pid=explorer&chrome=false&embedded=true&srcid=0B4f0l6J9WQrBODQ5YmM3MjltNDBlNy00MGJkLWEwODEtZDRhNjEzMzE3Yzc3&hl=en_GB%3C/a%3E, last update:9/04/2011.

I do recap that, consumer law enforcement in Ethiopia may be described as an aggressive public enforcement including awarding of compensation (which may be rarely found in the EU in anti-trust law infringements) apart from discharging investigation , granting administrative remedies and filing criminal charges and private enforcement in achieving compensation made predominantly by individual consumers and in very limited situations conducted by representative suit whose content has no counterpart both in the EU and the US. Besides, Private enforcement via consumer associations is restricted only to their members.

CHAPTER TWO

The Legal and Institutional Framework of Consumer Protection Law in Ethiopia in the Light of the EU and US Laws and Practices

As the nomenclature connotes, the focus of this chapter will be two-fold: the legal frame work and the institutional frame work .To be consistent and persistent, the legal frame work as well as the institutional frame work of consumer protection law in the EU and the US will be touched first. Then, the situation in the Ethiopian case will be given due attention.

2.1 Legal Frame Work

2.1.1 The EU Approach

In the ambit of legal frame work, it should bear in mind that, the scope of coverage of the named consumer protection laws will only be discussed. As regards the remedial part and enforcement matters will be the focus of the 3rd and the 4th chapter accordingly.

In order to discern the scope of application of consumer law in the EU, it is of paramount importance to delineate who a consumer is. Different notions of consumer exist not only between the member states but even with in some member states and within the EU consumer *aquis*.

All the EU consumer protection directives at least refer to a consumer as a natural person acting outside his trade, business or profession. For instance Art.2 of the Unfair Commercial Practices Directive speaks consumer as only a natural person who in commercial practices is acting for

purposes which are outside his trade, business, craft or profession. Consumers are categorized as the average, the weak and the vulnerable pursuant to Art.5 of the same directive⁷¹.

Since most of the directives have a *minimum harmonization* effect⁷², member states are free to extend the scope of consumers to include legal persons too. Belgium, Spain and Germany are notable examples that extend the coverage of consumers, apart from natural persons, to embrace legal persons particularly SMEs.⁷³

Following the minimum harmonization directives, professional buyers or a business man acting through a company is not a consumer (*Cape case*⁷⁴ of the ECJ). Further, when elaborating the

⁷¹ Unfair Commercial Practices Directive, Directive 2005/29/EC of the European Parliament and the Council, Official Journal of the European Union, L 149/22, 11 May 2005, Art.5 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005L0029&from=en>.

⁷² This is a European community concept in which member states are obliged to incorporate in their domestic legislations the minimum standards set by the directive which is not subject to regression unless derogation is explicitly allowable by the very directive. The member states are, however, entitled to introduce more favorable measures than is required by the directive.

⁷³ Micklitz & et.al supra at 390-395. See also Jules Stuyck, Do we need consumer protection for small businesses at EU level? , European Regulatory Private Law: from conflict to platforms, Springer, Liber Amicorum for Hans Micklitz, Purangem, K. Rott, ch.17 361 (2014) available at http://link.springer.com/chapter/10.1007/978-3-319-04903-8_17#page-1.

⁷⁴ Judgment of 22 November 2011, ECJ, Joined cases C-541/99 & C-542/99 *Cape v Ideal Service* available at <http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d2dc30d6c7a52821464a44c79f13cac77612c8c3.e34KaxiLc3qMb40Rch0SaxuOaN50?text=&docid=46869&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=207691>.

Brussels I Regulation, the ECJ says in the *Gruber* case a buyer can't invoke the protection of consumer under the named regulation where the contract partly concerns the buyer's trade⁷⁵.

The ECJ follows a two pronged approach in defining consumers: favoring free trade and skeptical of any restrictions at the national level. In this case, the court used the reference for consumer who is reasonably circumspect and well informed. The *Mars*⁷⁶ case (where the ECJ says consumers won't be misled by oversized markings on packaging) is the best example. Whereas, in the *Koipe*⁷⁷ case the CFI-Court of First Instance ruled that the Spanish consumer is not circumspect when he buys olive oil. Moreover, the ECJ when annulling an arbitration clause excluding recourse to ordinary courts of law in the *Mostazo Claro*⁷⁸ case applied the standard of vulnerable consumers.

Apart from the CJEU's judicial activism in delineating the scope of coverage of consumers, the EU relevant directives also specify the type of goods that are provided for protection as consumer products. To mention a few directive on *unfair terms in consumer contracts*⁷⁹ and

⁷⁵ Judgment of 16 September 2004, ECJ, C-464/01 *Gruber v BayWa AG*, available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=49857&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=207963>.

⁷⁶ Judgment of 6 July, ECJ, C-470/93 *Mars v Verein gegen Umweltsen*, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61993CJ0470&from=EN>.

⁷⁷ Judgment of 12 September 2007, CFI, Case T-363/04 *Koipe v OHIM*, available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=62796&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=208620>.

⁷⁸ Judgment of 26 October 2006, ECJ, C-168/05 *Elisa Maria Mostaza Claro v Centro Movil Milenium SL*, available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=63926&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=208887>.

⁷⁹ Council Directive on unfair terms in consumers directive, directive 93/13/EEC OJ L 095, 21.04.93, of 5 April 1993 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993L0013&from=en>.

*unfair commercial practices directive*⁸⁰ concern on corporeal movables. The product liability directive (85/374/EEC), however, excludes agricultural products and games from consumer products unless the member states incorporate in the definition of consumer products in their national laws⁸¹.

Having said that, the scope of seller or supplier and the type of harmonization are treated differently in the case of product liability directive. Art.3 of the directive defines a producer as a manufacturer of a finished product, the producer of any raw material or the manufacturer of any component part and any person who by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer.

Any person who imports for sale, hire, leasing or any form of distribution in the course of his business shall also be deemed to be a producer according to the clear language of the directive. Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer who supplied him the product. The same shall apply, in the case of an imported product, if it doesn't indicate the identity of the importer even if the name of the producer is indicated⁸².

⁸⁰ Unfair Commercial Practices Directive, Directive 2005/29/EC of the European Parliament and the Council. .

⁸¹ Directive on the approximation of the laws, regulations and administrative provisions of the member states concerning liability for defective products, Council Directive 85/374/EEC, 25 July 1985, Art.2 , available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31985L0374&from=EN>, Official Journal of the European Communities , L210, 07.08.1985.

⁸² Directive on the approximation of the laws, regulations and administrative provisions of the member states concerning liability for defective products , Arts.3 (2) & 3(3) .

The directive is a maximum harmonization as regards producer's liability is concerned and thus suppliers can't be held liable without prejudice to the exceptional liability imposed on them by domestic law on grounds of fault or warranty as per Art.13. This is clearly gathered from the ECJ's judgment in the *Maria Victoria Gonzalez*⁸³ case of Contamination Blood.

Further, the *defective television set* case upholds the ECJ's strong position in rejecting the interpretation made by the Cour de cassation of France in making suppliers liable. The *Skov Aeg* (Toxic eggs) case of Denmark is another remarkable case which evidences the ECJ's consistent judgment in absolving suppliers from no-fault liability⁸⁴. In case of directives on unfair terms in consumer contracts and unfair commercial practices directive, however, the measures pertain to minimum standards which are not subject to regression by member states and further the latter may introduce or impose stringent requirements other than those laid down in the named directives for the protection of consumers⁸⁵.

2.1.2 The US Approach

In the US, even though the state consumer protection laws coupled with contract laws and the UCC are applicable according to the circumstance of the case, for instance, the *Manguson Moss*

⁸³ *Judgment of 25 April 2002, ECJ, C-183/00 Maria Victoria Gonzalez Sanchez v Medicina Austuriana SA*, available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=47303&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=214357>.

⁸⁴ *Judgment of 10 January 2006, ECJ, C-402/03 Skov AEG v Bilka Lavprisvarehus A/S*, available at <http://curia.europa.eu/juris/showPdf.jsf?sessionid=9ea7d0f130de457196f5cebd4a7987d5fd07c5a94347.e34KaxiLc3eQc40LaxqMbN4Ob3eMe0?text=&docid=57286&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=180773>.

⁸⁵ Council Directive on Unfair Terms in Consumer Contracts, Art.8. See also Directive on Unfair Commercial Practices, Art.9.

Warranty Act ⁸⁶15 USC 2301 defines a consumer as a buyer other than for purpose of resale of any consumer product. It also includes the assignee or any other person who is entitled by the warranty terms or by virtue of state law against the warrantor .Consumer product means any tangible personal property which is distributed in commerce and which is normally used for personal, family, or house hold purposes. A joint reading of the definition of consumer and consumer product unveils in the US also the definition of consumer is limited to natural persons as in the EU case.

The difference, in the ambit of scope of coverage of consumers and consumer products, however, may be explained in two ways. First, the assignee can't invoke the protection of consumers in the EU unlike the US assignee. The *Shearson*⁸⁷ case of the ECJ vividly illustrates this difference. The scope of consumer products has no any restriction in consisting tangible movables which is not always the case in the EU. In the EU, with respect to the product liability directive, unless member states incorporate in their domestic laws, agricultural products and games are not included in the sphere of consumer products.

The second difference goes to scope of coverage of producers in the product liability regime .In the EU, save the liability of the supplier in rare cases, only the producer or the importer is answerable for product liability under the no-fault liability doctrine. In the US, not only the producers but also the suppliers and retailers are liable.

⁸⁶ This is a federal lemon law enacted in 1975 which deals with warranties on consumer products. The statute was sponsored by Senator Warren G.Manguson of Washington, Representative John E.Moss of California and Senator Frank Moss of Utah.

⁸⁷ *Judgment of 19 January 1993, ECJ, C-89/91 Shearson Lehman v TVB* , available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX:61991CJ0089>.

2.2 Institutional framework

2.2.1 The EU Approach

In terms of institutional frame work, as distinguished from the legal framework-which governs the scope of protection of the relevant consumer laws, the enforcement agents that I highlighted in chapter one, in the realm of either public or private enforcement or public and private enforcement (depending on the incumbent legal system's enforcement setting), will demand basic understanding. The main focus of the subject relates to the domestic enforcing agents. As it deems relevant, however, the enforcing agents at the cross-border or EU level shall be explored.

In the EU situation, owing to the divergent enforcement framework in the member states, it is appropriate to figure-out the instructional frame work in the UK, Germany and Sweden as a representative for these diverse approaches.

The UK enforcement approach rests firmly on the public authority model. The OFT (Office of Fair Trading) is a an independent non-ministerial governmental department of the UK established by the Fair Trading Act of 1973 which enforces both consumer protection and competition law acting as UK's economic regulator. It is led by a board consisting of a chairman, a chief executive, two executive directors and 7 non-executive members. The board gives the OFT strategic vision and prospection, plus the range and depth of experience to ensure that its new powers matched by proper accountability⁸⁸.

⁸⁸ OfficialwebsiteoftheOfficeofFairTrading,availableat<http://www.offt.gov.uk/OFTwork/consumerenforcement/jsessionid=D0B0CDE1CD623B4CBF4D09D84A6342DF#UwWQDIVFgQM>,lastupdate:31/12/2013(closed).Seealso officialwebsiteofCommissionforMarketsAuthority,availableat<https://www.gov.uk/government/organisations/competition-and-markets-authority/about>, last update 03/09/2014.

The OFT, when complaints are made to Director General of Fair Trade, investigate, impose an injunction or administrative penalties in consumer credit matters or take the matter to court. Part 8 of the Enterprise Act of 2002, however, restricts the OFT to enforcing legislation only where there has been a violation that affects the collective interest of consumers⁸⁹. At this juncture, it may be appropriate to bear in mind that the Competition and Market Authority (CMA) launched in shadow form on 1, October 2013 replaced the existing Competition Commission and OFT and began operating fully on 1 April, 2014 and shall focus on enforcement of consumer law violations with respect to systemic failures in market⁹⁰.

The Enterprise Act of 2002, also allows consumer bodies that have been approved by the secretary of state for Trade and Industry, to be designated as super-complainants to the OFT. These super-complainants are intended to strength the voice of consumers. CAMRA, the Citizens' Advice Bureau, Consumers Council for Water, Consumer Direct, Good Garage Scheme, National Consumer Council, and Post Watch are to mention a few of them⁹¹.

In Germany, BMELV is the responsible public agency for consumer policy, consumer protection and general matters regarding consumer information. It's specifically responsible for consumer health protection as well as protection from deception with regard to food, animal feed, cosmetics and other commodities including the pertinent labeling law, composition and labeling

⁸⁹ Official website of the Commission for Markets Authority. See also OFT, Debt Collection-guidance for all businesses engaged in the recovery of consumer credit debts, July (2003)(updated November 2011), available at <http://www.consumeruk.co.uk/rules-creditors-debt-collectors.asp>.

⁹⁰ Official website of the Commission for Markets Authority.

⁹¹ Enterprise Act of 2002 available at http://www.legislation.gov.uk/ukpga/2002/40/pdfs/ukpga_20020040_en.pdf. see also Official website of the Commission for Markets Authority.

of tobacco products; food and nutrition policies specifically dietary education; and the protection of consumers' economic interests including fundamental issues regarding consumer information. The BVL is, however, the autonomous agency that is responsible for enforcement of consumer disputes at the EU level.⁹²

The Federal Government, in Germany, generally enacts legislation governing consumer protection within the ambit of its constitutional competence. The 16 federal states, the *Länder*, are responsible for the enforcement of laws. Hence there is no central supervisory authority for consumer protection. To this end, consumers concerned are themselves generally responsible for asserting private claims under civil law and there is no public enforcement authority that takes care of this for them. In contrast, the public authorities are responsible for enforcing safety and health protection measures for consumers⁹³.

In addition to that, government funded private organizations in particular operate in the field of consumer protection alongside other sector specific government supervisory organs like the BaFin which is responsible for supervising all financial services, the Federal Cartel office monitors compliance with competition law, and the Federal Network Agency for Electricity,

⁹² Official website of the BMELV available at http://www.bvl.bund.de/EN/07_TheFederalOffice/federal_office_node.html;jsessionid=ABEA6A8645840D1CB43A10BEF218D1C7.1_cid332, last update: 01/1/2014. see also Official website of the EU, Institutions of Consumer Policy, November (2010), available at http://ec.europa.eu/consumers/archive/overview/country_profile/DE_web_country_profile_en.pdf.

⁹³ Official website of the BMELV. see also official website of the EU, Institutions of Consumer Policy.

Gas, Telecommunication, Post and Railway monitors compliance with consumer protection rules laid down in the Tele Communications Act or Postal Service Ordinance⁹⁴.

In terms of private institutions, German consumer organizations don't require approval from the State in order to take up work there. The VZBV which is an umbrella of 42 member organizations and Stiftung Warentest (German Premier Testing Organization), is the one that operates throughout Germany and receives funding from the federal budget. VZBV, for instance, covers around 90% of its budget with annual institutional grants provided by the federal government. It represents consumers in public and vis-à-vis policy makers, public authorities, businesses, economic operators and civil society at national, European and international level. Its tasks also include collective redress through class action law suits⁹⁵.

In the Swedish case, the Ministry responsible for consumer policy, nationally and at the EU-level, is the Ministry of Justice. The Swedish Consumer Agency is headed by a director general who is also consumer ombudsman (KO)⁹⁶. The Agency is responsible for the enforcement of consumer legislation and pursues legal action in court in the consumer interest. It can take legal measures against misleading advertising, and other types of marketing, unfair contract terms, incorrect price information, dangerous products and services. The consumer ombudsman may

⁹⁴Weber, supra at 540, 548. see also official website of BaFin, last update 01/01/2014. Further see Official website of the EU, Institution of Consumer Policy.

⁹⁵ Weber, supra at 548. see also official website of the EU, Institution of Consumer Policy.

⁹⁶ Official Website of the Swedish Consumer Authority, available at <http://www.konsumentverket.se/otherlanguages/English/AbouttheSwedishConsumerAgency/>, last update 31/12/2013. See also Official website of the EU, Institution of Consumer Policy.

also decide to represent a consumer in a case in court against a trader or in group actions⁹⁷. There is also a public body named National Board for Consumer Complaints which gives recommendation, free of charge, for disputes between consumers and traders. Its decision is non-binding; however, in practice the parties adhere to the recommendation⁹⁸.

The Swedish Consumer Association is an independent, non-partisan cooperative organization consisting of 28 member organizations in the purview one of the Private enforcement instructions in the private institutional framework. It aims to strengthen the position of consumers in order to improve peoples' ability to bring their consumer complaints. The Swedish Consumer Coalition is also doing the same. They are funded by the government and the fund is monitored by the Swedish Consumer Agency (KO)⁹⁹.

2.2.2 The US Approach

Consumer protection, in the US, is a matter that is not the exclusive jurisdiction of the Congress under Art. I Section 8 of the US Constitution nor is a reserved power left to the states by virtue of Amendment X of the Constitution.¹⁰⁰ Instead it is a concurrent jurisdiction between the federal government and the states. This doesn't however mean that member states are left free to legislate what they desire. If the Congress elects to legislate on a matter which falls under a

⁹⁷ OfficialWebsiteoftheSwedishConsumerAuthority,availableat<http://www.konsumentverket.se/otherlanguages/English/AbouttheSwedishConsumerAgency/>,lastupdate31/12/2013.See also Official website of the EU, Institution of Consumer Policy.

⁹⁸ Weber, supra at 548. See also Official website of the EU, Institution of Consumer Policy.

⁹⁹ Weber, supra at 548. See also Official website of the EU, Institution of Consumer Policy.

¹⁰⁰ The Constitution of the United States of America of 1787, Art. I Sections 8 & 10 and Amendment X available at <http://www.usconstitution.net/const.pdf>.

concurrent jurisdiction and further demands non-derogation by state laws from the standards other than implementation, in such a case state laws are to be enacted in line with federal laws; lest the latter will preempt the former by virtue of the supremacy of federal laws enshrined under Section VI of the Constitution.

When we look at the institutional framework of public agencies in the enforcement of consumer protection law, the FTC (Federal Trade Commission) is the one that ignites our mind. It is established in 1914 as an independent federal agency consisting of the Bureau of Competition, the Bureau of Consumer Protection and the Bureau of Economics. The FTC derives its consumer protection jurisdiction primarily from Section 5(a) of the FTCA which prohibits “unfair or deceptive acts or practices in or affecting commerce”¹⁰¹.

The FTC has investigation, litigation, prosecution, adjudication and rule-making powers. The investigation is carried out by investigation staff of the FTC around violations of 46 statutes, 39 of which relate to the FTC’s consumer protection mission. TILA, FCBA, FCRA, ECOA, and FDCA are the remarkable. Administrative measures are imposed by the ALJ (Administrative Law Judge). It may also seek temporary or permanent injunction before a court of law. It may further enact rules and standards concerning industry wide practices¹⁰².

¹⁰¹Official website of the Federal Trade Commission available at <http://www.ftc.gov/about-ftc/bureaus-offices> & <http://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection>, last update 3/9/2014. see also Desalegn Adera, The Legal and Institutional frame work for Consumer Protection in Ethiopia, LLM Thesis, Addis Ababa University School of Law, 46-50, June (2011) available at <https://chilot.files.wordpress.com/2013/05/the-legal-and-institutional-framework-for-consumer-protection-in-ethiopia.pdf>.

¹⁰² Official website of the Federal Trade Commission. see also Adera, *supra* at 46-50.

In the US, there are also several federal and state organs dedicated to the protection of consumers. To mention a few, the CFPB (Consumer Financial Protection Bureau) that has a central mission to make markets for financial products and services workable for Americans- whether they are applying for a mortgage, choosing among credit cards, and using any number of other consumer financial products¹⁰³.

The CPSC (Consumer Product Safety Commission) is created in 1972 through the Consumer Product Safety Act. The CPSC reports directly to Congress and the President and regulates the sale and manufacture of more than 15,000 different consumer products from cribs to all terrain vehicles. Its authority ranges from barbecue grills to swimming pools¹⁰⁴.

The FDA (Food and Drug Administration) is responsible for protecting public health through the regulation and supervision of food safety, tobacco products, dietary supplements, prescription and over the counter pharmaceutical drugs (medications), vaccines, biopharmaceuticals, blood transfusions, medical devices, electromagnetic radiation, cosmetics, emitting devices and veterinary products. The FDA also enforces other laws, notably Section 361 of the Public Health

¹⁰³ Official website of the Consumer Financial Protection Bureau available at <http://www.consumerfinance.gov/the-bureau/>. See also Adera, supra at 46-50.

¹⁰⁴ Official Website of the Consumer Product Safety Commission, available at <http://www.cpsc.gov/en/Regulations-Laws--Standards/>, last update: 24/01/2014. see also Adera, supra at 46-50.

Service Act and associated regulations, many of which are not directly related to food or drugs¹⁰⁵.

At individual state level, State Attorney Generals are charged with enforcing state consumer protection laws in collaboration with state consumer protection public agencies and thus may bring law suits on behalf of collective actions of consumers, investigate possible violations, issue injunctions or consent orders to suspend or terminate ongoing illegal activity, and bring criminal cases that fall within their jurisdiction (as different from the power of the DOJ and the FTC) in order to regulate trade practices¹⁰⁶.

In the realm of private institutional frame work apart from class actions which are typically handled by law firms, we do obtain the following as exemplary: Citizens Utility Board which represents the interests of residential utility consumers in their respective state or regions; Consumer Federation of America-that advocates for consumers to state and federal legislation and regulatory bodies and carry out consumer education; National Consumer Law Centre -that advocates on behalf of low income consumers who have been harmed by deceptive, fraud or unfair practices; and Public Citizen which is a non-partisan organization that represents

¹⁰⁵ Official Website of the Food and Drug Administration Authority available at <http://www.fda.gov/Safety/Recalls/EnforcementReports/default.htm>, Official last update: 31/12/ 2013 .See also Adera, supra at 46-50.

¹⁰⁶ Official Website of the Federal Trade Commission. See also Adera, supra at 46-50.

consumers' interests before the executive, legislative and judicial branches of the US government¹⁰⁷.

2.3 The Ethiopian Approach

Let me go to the Ethiopian scenario. I do elaborate the legal frame work and the institutional framework of consumer protection in Ethiopia with particular focus on the new proclamation (Proclamation N0 685/2010 as recently repealed by Proclamation N0 813/2014). Relevant public regulatory agencies will also be highlighted and private institutions further will be viewed.

2.3.1 The Legal Frame Work

To begin with, the Federal Constitution, under Art.51 (2) & Art.52 (2) (c), empower both the federal government and the regional states to formulate economic and social development policies in their respective spheres. It is certain to say that ensuring consumer protection means a contribution to the economic and social objectives of a given polity. Consumer protection matter is, therefore a concurrent power between the federal and regional states¹⁰⁸. Our focus will be on

¹⁰⁷Official Website of the Federal Trade Commission. see also Official Website of CUB(Citizens Utility Board), available at <http://www.citizensutilityboard.org/mission.html>, last update: 04/09/2014; Official Website of NCLC(National Consumer Law Center), available at <http://www.nclc.org/about-us/about-us.html>,last update 04/09/2014 and Official Website of Public Citizen available at <http://www.citizen.org/about/> ,last update 04/09/2014.

¹⁰⁸ In the Ethiopian Federal Constitution, pursuant to Art.52(1), all power that is not exclusively vested in the federal government neither is given concurrently with the federal government and the regional states shall be reserved to the regional states. In the Ethiopian Federation, only the Federal Constitution is supreme, not the federal laws (Art.9 (1) of the Constitution). In matters of concurrent jurisdiction, therefore, state laws are to be enforceable in so far as they are in line with the Federal Constitution, notwithstanding the fact that they might go afoul of the federal laws unless the federal laws are enacted following the advice and consent of the House of Federation with a view to establish and sustain one economic community.(See Art.55(6))available at Official website of the Ethiopian Legal Brief

the basis of the new proclamation which is enacted at the federal level (regional states have not yet enacted their own consumer protection laws).

Art.2 (4) of Proclamation NO 685/2010 defines a consumer as a natural person who buys goods and services for his personal or family consumption where the price is being paid by him or another person and not for manufacture or resale. Art.2 (8) of the Proclamation also defines goods as movable commodities that are being purchased or sold or by which any commercial activity is conducted between persons except monies in any form and securities. Sub-article 11 of Art.2 further defines service as any commercial dispensing of service for consideration other than salary or wages¹⁰⁹.

From these, we can comprehend that a person to be afforded the protection of consumer law should be a natural person. In the repealed Proclamation No 329/2003, however, Art.2 (5) had conferred the protection to legal persons as well. In Ethiopia, there are a number of Micro and Small scale Enterprises having a clear policy support from the government and which have key role in the country's economic growth.

In so far as these entities are entered in to a legal transaction with a view to securing personal consumption, the law should give them a shield of protection as what we have seen in Belgium, Spain and Germany. The new authority in due course I think will face a problem of such a nature

https://docs.google.com/viewer?a=v&pid=explorer&chrome=false&embedded=true&srcid=0B4f016J9WQrBODQ5YmM3MjItNDBlNy00MGJkLWEwODEtZDRhNjEzMzE3Yzc3&hl=en_GB%3C/a%3E, last updated :9/04/2011.

¹⁰⁹ Trade Practice and Consumers' Protection Proclamation, Arts.2(4),2(8) & 2(11). see also Trade Competition & Consumers' Protection Proclamation, Arts.2(4), 2(1) & 2(2) .

and by availing its policy recommendation power, it might submit an amendment proposal in the future to the council of ministers ,though the recent amendment proclamation No 813/2014 still doesn't address this point. Regional states also should consider the matter rather than they hasten to copy and paste federal laws.

When we see the issue as to whether the assignee can invoke the protection accorded to consumers, the personal character of the consumer contract coupled with the clear wording of the law in excluding the assignee would seem the EU approach prevails in Ethiopia.

Further, the definition says the price in the consumer contract may be paid by a third party. This elaboration is superfluous because in the law of contract the debtor's obligation may be performed a third party even without the debtor's knowledge unless the contract is essential to the creditor or has been expressly agreed by the contracting parties¹¹⁰. The definition only embraces corporeal movables (not incorporeal movables).This is gathered from the exclusion of securities which are incorporeal movables from the law. Moreover, service excludes the relationship between employer and employee service which is based on wage or salary and thus only pertains to services of a commercial nature (which are of course backed by consideration).

When we view the position of the law on the side of the trader, Art.4 (1) of proclamation No 685/2010 says this proclamation shall apply to all persons carrying on commercial activities and to any transaction in goods and services within the Federal Democratic Republic of Ethiopia.

A joint reading of Art.2(5) and Art.2(6) of the proclamation also reveals that a commercial activity is an activity that is carried on by a business person and in turn a business person means

¹¹⁰ The Ethiopian Civil Code , Proclamation No. 165 of 1960 , 19th Year No. 2 Negarit Gazeta Extraordinary, Addis Ababa, 5th May 1960, Art. 1740, available at official Website of Ethiopian legal brief <http://chilot.files.wordpress.com/2011/01/civil-code-english.pdf>, last updated: 01/01/2014.

any person who professionally and for gain carries on any of the activities specified under Art.5 of the Commercial Code or who dispenses services or who carries on those commercial activities designated as such by law¹¹¹. Art.5 of the Commercial Code embraces business persons in the realm of manufacturers, producers, importers, wholesalers and retailers.

We can thus garner that consumers can invoke the application of the new law so long as they are in privity with the manufacturer or retailers and further if they want to resort to tort claims (because they usually are not in privity with the manufacturers), they can avail Art.4 (5) of the proclamation which reserves to have recourse to tort claims.

The law also provides in its Art.4 (2) that “this proclamation shall apply to a commercial activity even though conducted outside the Federal Democratic Republic of Ethiopia if its outcome has effect in Ethiopia”¹¹². This necessarily triggers the issue of private international law and still Ethiopia has , at this moment, a *draft private international law* which is not yet enacted and Arts.23-25 of the draft Private International law mentions what is laid down under Art.16 of the Brussels I Regulation and Art.6 of the Rome I Regulation of the EU¹¹³.

¹¹¹ Trade Practice and Consumers’ Protection Proclamation, Arts.2 (5), 2(6) & 4. see also Trade Competition & Consumers’ Protection Proclamation, Arts.2(5), 2(6) & 4 .

¹¹² Id at Art.4(2). See also Id at Art.4(1).

¹¹³ The draft law is crafted under the aegis of the Federal Justice and Legal System Research Institute, which is accountable to the Ministry of Justice by virtue of Art. 33(13) of Proclamation No. 691/2010 (that amends the Institute’s establishing Regulation No. 22/97), that defines the powers and duties of the executive organs of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, 17th Year No.1, 27 October (2010) available at Official website of Ethiopian Legal Brief <http://chilot.files.wordpress.com/2011/01/691-ae.pdf>, last update: 01/01/2014. See also Brussels I Regulation, Council Regulation (EC) No.44/2001 on jurisdiction and the recognition and

Accordingly, a consumer who is domiciled in Ethiopia may bring proceedings against the trader before the place of the court where the trader resides. On the other hand, the other party may only bring proceedings against the Ethiopian consumer before the Ethiopian courts.

Besides, the draft Private International Law lays down in dealing with choice of law as Ethiopian law should be the applicable law on consumer contracts. The upshot of this draft law is that excluding the jurisdiction of Ethiopian courts and the application of Ethiopian consumer protection law as the governing law in consumer disputes may render the foreign judgment short of recognition and enforcement in Ethiopia.

The proclamation, however, shall not apply to the sovereign acts of the state which is exclusive of public enterprises, basic utilities, basic goods and services subject to the decision of the council of ministers¹¹⁴.

The proclamation further is inapplicable to supervisory activities and measures undertaken in accordance with the Food, Medicine and Health Care Administration and Control Proclamation NO. 661/2009, by the Food, Medicine and Health Care Administration Agency. This is without

enforcement of judgments in civil and commercial matters, 22 December 2000, Art.16 available at Official website of the European Communities <http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32001R0044&from=EN>, L 12/1 16.1.2001. Further see Rome I Regulation, Regulation (EC) No.593/2008 of the European Parliament and the Council on the law applicable to contractual obligations of 17 June 2008, Art.6 available at Official Journal of the European Union, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:EN:PDF>, L 177/6, 4.7.2008.

¹¹⁴ Trade Practice and Consumers' Protection, Art. 4(3)(a-d). The new amendment proclamation No 813/2014, however, speaks in general terms about the power of the council of ministers in exempting from the application of the law trade activities that are vital in facilitating economic development.

prejudice to the adjudicatory and enforcement power of the Trade Practice and Consumers Protection Authority¹¹⁵.

2.3.2 The Institutional Frame Work

The main focus of this part will be the forefront public agency—the Trade Practice and Consumers’ Protection Agency—which is established by virtue of Proclamation N0. 685/2010 (renamed as The Trade Competition and Consumers’ Protection Agency by virtue of Proclamation No 813/2014). Relevant regulatory agencies will also be highlighted. The institutional frame work in the realm of private institutions further is also viewed.

2.3.2.1 Public Realm

The Trade Practices and Consumers’ Protection Agency (renamed as the Trade Competition and Consumers’ Protection Agency) is an autonomous federal government organ having its own legal personality. It is comprised of a director general, as a chief executive officer, appointed by the prime minister, judges and the necessary staff, having its own budget¹¹⁶.

The Director General, as a chief executive officer, organizes, directs and administers the activities of the authority. For each division of the adjudication tribunal, the authority has one presiding judge and two other judges¹¹⁷. According to the recently designed organizational structure, the Authority has 2 Deputy Director Generals (on Competition matters and Consumer

¹¹⁵ Ibid at Art.4(6).Art.4(3) of the new amendment Proclamation No 813/2014, nonetheless, stipulates the idea that the consumer law doesn’t affect regulatory functions undertaken in accordance with other laws.

¹¹⁶ Trade Practice and Consumers’ Protection Proclamation, Arts. 31-33. See also Trade Competition & Consumers’ Protection Proclamation, Arts.27-31. Further see Adera *supra* at 74-90.

¹¹⁷Id.

protection matters), and 7 program directorates (there are also 5 support directorates) under the Deputy Director Generals namely Investigation, Prosecution, Judgment Execution, Research, Training and Education, Consumers Affairs and Information Analysis¹¹⁸. It has to be noted that the Adjudication Tribunal in so far as administrative matters is concerned is accountable to the Director General¹¹⁹.

The Trade Practice and Investigation Commission (under the repealed proclamation No 329/2003), however, had neither its own budget nor its own staff. It was instead dependent up on the then Ministry of Trade and Industry for its budget and staff¹²⁰.

As per Art.34 of Proclamation No 685/2010, the authority is empowered to take appropriate measures to increase market transparency, and ban the advertisement of goods and services that are in- consistent with health and safety requirements. It has also the power to take administrative and civil measures (including awarding compensation) against business persons in violation of the relevant consumer law. Organizing education and training to enhance the awareness of consumers and the power to initiate and advocate policy issues and participate on policy and strategy drafting by government organs also fall within the mandates of the authority¹²¹.

¹¹⁸ TCCPA, Organizational Structure, 5 January (2014).

¹¹⁹ One can easily infer from Art.37(2) of The Trade Practice and Consumers' Protection Proclamation and Art.31(2)(a) of the Trade Competition & Consumers' Protection Proclamation.

¹²⁰ Trade Practice Proclamation No. 329/2003, Federal Negarit Gazeta, 9th Year No.49, Addis Ababa, 17th April 2003, Arts.12&13 available at Official website of Ethiopian Legal Brief, <http://chilot.files.wordpress.com/2012/10/proc-no-329-2003-trade-practice.pdf>, last update 9/01/2011. See also Adera supra at 74-90.

¹²¹ Trade Practice and Consumers' Protection Proclamation, Art.34. See also Trade Competition & Consumers' Protection Proclamation, Ar.30. Further see Adera, supra at 74-90.

The Proclamation stresses also that the authority is free from any interference or direction by any person with regard to the cases it adjudicates.(Art.33).Under the repealed Proclamation No 329/2003, the Trade Practice and Investigation Commission can investigate on consumer law violations; its decision should, however be approved by the then Minister of Trade and Industry. Consequently, the Minister had the power to approve, amend or remand for review any decisions of administrative measure or penalty submitted to it by the commission¹²².

In general, we can understand that, the power granted to the authority is extensive so that we can't find any counterpart neither in the US nor in the EU. We may equate with the situation in the UK except in the latter compensation is granted only in the financial sectors by the enforcing public authority. As regards the issue of the functional and institutional independence of the authority, it will be discussed in chapter 4.

The Law also provides for the establishment of regional consumer organs that adjudicate on matters of consumers' rights protection and for the appointment of judges there to by the presidents of regional states in connection with commercial activities licensed by the respective regional states or commercial activities conducted in their respective regions¹²³.As to whether establishment of consumer protection agency is optional at the regional level together with the scope of its authority as compared to its federal counter part and whether recourse to ordinary courts is allowable or not will be a subject of treatment in the 4th chapter.

¹²² Id at Art.33.see also Id at Art. 35(3). Further see Adera, supra at 74-90.

¹²³ Trade Practice and Consumers' Protection, Art. 39(2).See also Trade Competition & Consumers' Protection Proclamation, Ar.34. Further see Adera,supra at 74-90.

The Law is zealous to require both the federal and regional courts to organize trade practice and consumer protection divisions with a view to expedite the trade practice and consumer protection adjudications. Both levels of courts have criminal jurisdiction on matters of consumer law violations. They also have appellate jurisdiction on the administrative measures taken or civil judgments rendered by the Trade Practice and Consumers' Protection Authority, though the appellate jurisdiction of state courts was silent in Proclamation No 685/2010 and clearly addressed to the contrary in the recently amendment Proclamation No 813/2014¹²⁴.

The recently amendment Proclamation No 813 /2014 extends the role of the prosecutor of the Authority in filing criminal charges to the relevant federal courts which was the duty of the public prosecutor of the Ministry of Justice by virtue of Art.35(4) of Proclamation No 685/2010¹²⁵. Let me briefly touch the structural frame work of other federal public agencies in Ethiopia particularly in the realm of national quality infrastructure, health and financial services.

Until recently, the Quality and Standards Authority was the sole responsible organ mandated to perform the entire national quality infrastructure-which embrace standardization, metrology, conformity assessment and accreditation. The authority is now divided in to 4 different organs undertaking separate assignments.

The first one is the Ethiopian Standards Agency which is established by virtue of Proclamation No. 193/2010 as an autonomous federal government agency having its own legal personality and accountable to the Ministry of Science and Technology. The Agency is empowered to develop,

¹²⁴ Id at Art. 48.see also Id at Art.34.

¹²⁵ Trade Practice and Consumers' Protection, Art. 34(5).See also Trade Competition & Consumers' Protection Proclamation, Art.37(1)(b). Further see Adera,supra at 74-90.

approve, publicize and implement Ethiopian standards. The Agency may also be recognize any standard published by a national , regional, international or any other standardization body as Ethiopian standard when it is relevant. The Agency further has the power to develop and implement awareness creation strategies for consumers on the benefits of quality and standards of goods and services¹²⁶.

The second is The National Metrology Institute that is established by virtue of Proclamation N0. 194/2010 as an autonomous federal organ empowered to determine and maintain national measurement etalons; to publish and declare to the public measurement units to be used in the country , symbols of measurement units and national measurement etalons; to support industries in establishing their own calibration laboratories through providing theoretical and practical training and consultancy on metrology; to establish national metrology laboratory and provide calibration services; and to work in cooperation with the relevant stakeholders to ensure the existence of an integrated support for strengthening the national quality infrastructure¹²⁷.

The third is the Ethiopian National Accreditation Office which is established by virtue of Proclamation N0.195/2010.It's empowered to contribute its part for the acceptance and

¹²⁶ The Ethiopian Standards Agency Establishment Regulation, Council of Ministers Regulation N0 193/2010,Federal NegaritGazeta17th Year N0 13,Addis Ababa, 10th February,2011,Art.6 availableat Official website of the Ethiopian legal Brief <http://chilot.files.wordpress.com/2011/12/reg-no-193-2010-ethiopian-standards-agency-establishment.pdf>, last updated: 01/01/2014.See also Adera,supra at 74-90.

¹²⁷ The National Metrology Institute Establishment Regulation, Council of Ministers Regulation N0 194/2010,FederalNegaritGazeta17thYearN014,AddisAbaba,10thFebruary,2011, Art.3 & Art.6 available at Official Website of Ethiopian Legal Brief <http://chilot.files.wordpress.com/2011/12/reg-no-194-2010-national-metrology-institute-establishment.pdf> , last update 01/01/2014.see also Adera, supra at 74-90.

appreciation of Ethiopian products and services in domestic and international markets by developing appropriate infrastructure of national accreditation system compatible with international requirements and establish and implement a system that enable to develop conformity assessment and management system consultancy services compatible with international practices.¹²⁸.

The fourth national quality infrastructure public body is the Ethiopian Conformity Assessment Enterprise which is established by virtue of Proclamation 196 N0. 196/2010. It has the function of organizing robust certification, inspection and testing laboratory services. The enterprise is also empowered to provide certification of conformity with respect to imported products by assessing their conformity to the relevant national standards¹²⁹.

In the realm of health matters, the Ethiopian Food, Medicine and Health Care Administration and Control Authority is notable example. The Authority, established by virtue of Proclamation N0. 661/2009 as an autonomous federal agency having its own legal personality, has the power to prepare and submit to the appropriate organs health and regulatory standards for safety and

¹²⁸ The Ethiopian National Accreditation Office Establishment Regulation, Council of Ministers Regulation N0 195/2010, Federal NegaritGazeta 17th Year N015, Addis Ababa, 10th February, 2011 Art.5 available at Official Website of Ethiopian Legal Brief, <http://chilot.files.wordpress.com/2011/12/reg-no-195-2010-ethiopian-national-accreditation-office-establishment.pdf>, last updated: 01/01/2014. See also Adera, supra at 74-90.

¹²⁹ The Ethiopian Conformity Assessment Enterprise Regulation, Council of Ministers Regulation N0 196/2010, Federal NegaritGazeta 17th Year N0 16, Addis Ababa, 10th February, 2011, Art.3 available at Official Website of the Ethiopian Legal Brief <http://chilot.files.wordpress.com/2011/12/reg-no-196-2010-ethiopian-conformity-assessment-enterprise-establishment.pdf>, last updated: 01/01/2014. See also Adera, supra at 74-90.

quality of food, safety, efficacy and proper use of medicines, competence and practice of health professionals, hygiene and environmental health and up on approval ensure implementation of observance of same (Art.4).

It's also empowered to issue, renew, suspend and revoke certification of competence for specialized health institutions, food and medicines processing plants, quality control laboratories, bioequivalence centers, importers and exporters, storages and distributors and transnational health service institutions. It further has the power to initiate policy and legislation to strengthen the quality of foods and medicines, issue the import and export permits for food, medicine as well as their distribution, sale, use, packaging and labeling, advertisement and promotion¹³⁰.

In the perspective of the financial services, the National Bank of Ethiopia is prevalent. It is established by an amendment Proclamation (which is Proclamation N0 591/2008).It was first established by Order N0 30/1963 and it shall continue to exist as autonomous federal agency having board of directors, Governor and Vice Governor and the necessary staff. The purpose of the National Bank is to maintain stable rate of price and exchange to foster a healthy financial system and to undertake such other related services as are conducive to rapid economic development of Ethiopia¹³¹. In particular, pursuant to Art.5 (7), it has the power to license and

¹³⁰ Food, Medicine, and Health Care Administration and Control Proclamation, Proclamation No 661/2009, Federal Negarit Gazeta 16th Year N0 9, Addis Ababa, 13th January 2010, Art.4 available at Official Website of the Ethiopian Legal Brief <http://chilot.files.wordpress.com/2011/01/661-food-medicine-and-health-care-administration-and.pdf>, last updated: 01/01/2014. See also Adera, supra at 74-90.

¹³¹ The National Bank of Ethiopia Establishment (as amended) Proclamation, Proclamation N0 591/2008, Federal Negarit Gazeta 14th Year N0 50, Addis Ababa, 11th August 2008, Art.4 available at Official Website of the Ethiopian Legal Brief, <http://chilot.files.wordpress.com/2011/01/proc-no-591-2008-the-national-bank-of-ethiopia-establishment.pdf>, last updated: 01/01/2014. See also Adera, supra at 74-90.

supervise banks, insurers and other financial institutions which have direct interaction with consumers.

2.3.2.2 Private Realm

In the ambit of private instructional frame work for the enforcement of consumer protection law in the Ethiopian context, consumer associations and cooperative societies may be mentioned. The Ethiopian Consumer Protection Association may in particular be cited as the notorious consumer association in the country. It's a non-for-profit association founded in 2001 and is re-registered as an "Ethiopian Resident" Charity .Its main objective is to promote and protect consumers' rights in Ethiopia through research based awareness raising , consumer education, and training¹³².

Pursuant to Art. 2(3) of the Charities and Societies Proclamation NO 621/2009, an Ethiopian resident charity is formed under the laws of Ethiopia and which consist of members who reside in Ethiopia and who receive more than 10% of its funds from foreign sources. In consequence of this, by virtue of Art.14 (5) of the Charities and Societies Proclamation, resident charities can't engage , inter alia, in the advancement of human and democratic rights and in the promotion of the efficiency of justice and law enforcement services. Advocacy or lobbying services are reserved to Ethiopian charities-that are formed under the laws of Ethiopia, all of whose members

¹³² Official website of the Consumers International available at <http://www.consumersinternational.org/ourmembers/membdirectory/Ethiopian%20Consumer%20Protection%20Association%20%28ECOPA%29>, last update: 23/12/ 2013.

See also Adera, *supra* at 74-90.

are Ethiopians, generate income from Ethiopia and if they use not more than 10% of their funds which is received from foreign sources and wholly controlled by Ethiopians¹³³.

The last but not least point that is worth mentioning in the private structural frame work goes to consumer cooperative societies. These are cooperative societies established in consonant with the Cooperative Societies Proclamation N0. 147/1998, by individuals on voluntary basis to collectively solve their economic and social problems to democratically manage same¹³⁴. It is estimated that as of 2011 there are 37,247 Primary Cooperatives and 245 Unions of which 3% and 5% count for Consumers Cooperative and Consumers Union respectively¹³⁵.

It has to be cognizant of the very fact that, as I mentioned earlier in chapter 1, consumer associations or societies in the sphere of private institutions can only represent their own

¹³³ Charities and Societies Proclamation, Proclamation N0 621/2009, Federal Negarit Gazeta 15th Year N0 25, AddisAbaba, 13th February 2009, Art. 2(2) available at official Website of the Ministry of Foreign Affairs <http://www.mfa.gov.et/docs/Charities%20and%20Socities%20Legislation.pdf>, last update:04/09/2014.

¹³⁴ Cooperative Societies Proclamation, Proclamation No. 147/98, Federal Negarit Gazeta, 5th Year of No.27 , AddisAbaba,29December1998,Art.2(2)availableatOfficialWebsiteofEthiopianLegalBriefhttps://docs.google.com/file/d/0B4f0l6J9WQrBMzJkZDM2ZDgtMDRkOC00MjU4LWIzNDktODY1MzU4YWU1ZWZk/edit?hl=en_GB&pli=1, last update: 01/01/2014.

¹³⁵ Bezabih Emana, Cooperative Moment in Ethiopia, Working paper presented in the Workshop on Perspectives for Cooperatives in Eastern Africa, Uganda Organized by Fredrich Ebert Stiftung Foundation 2-3 October,(2012) availableatOfficialWebsiteOfFesUgandahttp://www.fesuganda.org/media/documents/Cooperatives/Cooperatives_in_Ethiopia_-Bezabih_Emana.pdf, last update : 31/12/2013.

members following the application of Art.37 of the Federal Constitution and Art.38 of the Code of Civil Procedure, unlike the cases in the EU and the US¹³⁶.

¹³⁶ FDRE Constitution, Art.37(2)(a), allows any association representing the collective or individual interest of its members(having a justiciable matter) to bring a suit before an ordinary court of law or any other competent body vested in judicial power. The Code of Civil Procedure, Decree No.52 of 1965, Negarit gazeta, Addis Ababa, 25th Year No.3, 8th October,1965 , Art. 38 regulates the situation where by several persons having the “same interest’ can sue or be sued by one of their representative either voluntarily or through court authorization available at Official Website of Ethiopian legal Brief, <http://chilot.files.wordpress.com/2011/01/civil-procedure-code-english.pdf> , last update:01/01/2014.

CHAPTER THREE

Remedies for Violations of Consumer Protection Laws in Ethiopia in the Light of the EU and US Laws and Practices

3.1 General

The most important characteristic feature of a legal right is its enforceability. Legal remedies must be available to the person whose right is infringed or abridged. *Nagendra Singh* has the following to say on this point: “If there is right, there must be a remedy; but, in spite of the fact that there is a recognized right if there is no remedy available to the aggrieved when the right is violated, such a right unenforceable in character becomes a mere shadow without substance and ceases to be legal right”.¹³⁷

The term remedy refers to the means by which a right is enforced or the violation of a right is prevented, redressed or compensated. In so far as this thesis is concerned, the term will be used in a broader sense to include not only civil and criminal sanctions but also extra-judicial (administrative) actions which sanction or deter the violation of consumer rights¹³⁸.

With this general background, I shall focus on the available remedies for consumer law violations in the realm of private and public law in the jurisdictions of the EU and the US and will also examine the situation in Ethiopia.

¹³⁷ Jerzy Krzechunowicz, *The Ethiopian Law of Compensation for Damage*, Faculty of Law , Addis Ababa 11, (1973).

¹³⁸ Weber, *supra* at 540-548.

3.2 The EU Approach

3.2.1 Private Law Remedies

In the EU consumer *aquis*, private law remedies may be categorized in to specific and general in nature. In the former case, the relevant consumer laws may enshrine specific remedies like the right of withdrawal and remedies stemming from non-conformity .Therefore, the laws that should be addressed as regards the named specific remedies will be the consumer rights directive and the directive on certain aspects of the sale of consumer goods and associated guarantees. As regards other directives such as the unfair terms in consumer contracts and unfair trade practices directive , since the named directives don't specify the particular remedy apart from directing member states to provide for adequate protection for consumers, the remedies will fall in the scope of general remedies particularly invalidation stemming from unfair terms or fraud arising from unfair practices¹³⁹.

In the latter situation however, the EU consumer laws may leave the general remedies of contract law and tort law to member states and they grant to consumers remedies such as invalidation of contract, cancellation, specific performance and damages in the realm of contractual relationships and damages or compensation in relationships stemming from non-contractual relationships or in matters of tort law. Having mentioned this, for the sake of convenience and easy discernment, let me discuss the specific and the general remedies of private law separately.

¹³⁹ Directive on Unfair terms in consumer contracts, Arts. 3 & 6. see also Unfair Commercial Practices Directive, Arts. 5-8 & 11.

3.2.1.1 Specific Remedies

A. The Right of withdrawal

The right of withdrawal is a legal mechanism that ensures the consumer's free will, well considered and informed. It gives the consumer the possibility, without giving any reasons and without incurring any penalty, of no longer being bound by a contract in to which he has entered in to¹⁴⁰. According to Stauder, the recognition of the principle is based on the presupposition that its responsible exercise is the best guarantor of contractual justice¹⁴¹.

The idea is that once the period to invoke the named right has not passed, it serves as an exception to the principle of *pacta sunt servanda* and to the contrary it reinforces this entrenched principle of contract law so long as the period to invoke the right of withdrawal has not expired.

The right of withdrawal is not an invention of the EU. Most member states first introduced a cooling-off period for door step selling in the 1960s and 1970s before the right has emerged at EU level by virtue of the Doorstep Selling Directive(85/577/EEC)¹⁴². Several directives like timeshare directive, distance selling, life assurance, distance selling for financial services and

¹⁴⁰ Micklitz & et.al , supra at 239.

¹⁴¹ Id at 240.

¹⁴² Micklitz & et.al supra at 241. See also Council Directive on the protection of consumer in respect of contracts negotiated away from business premises, 85/577/EEC, of 20 December 1985, Art.5, available at Official Website of the European Communities <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31985L0577:en:HTML>, Official Journal L 372, 31.12.1985. Further see Directive on the protection of consumers in respect of distance contracts, Directive 97/7/EC of the European Parliament and the Council of 20 May 1997, Art.6, available at Official Website of the European Communities, <http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:31997L0007&from=en>, L 144/19, 4.6.97.

customer credit also introduced the right vertically. Member states are free to stretch the scope of coverage to other subjects¹⁴³.

Now, the right of withdrawal is incorporated in the Consumer Rights Directive (2011/83/EU) which repealed the Doorstep Selling and life assurance Directive. In so doing, the directive harmonizes the right of withdrawal on distance selling and off-premises contracts¹⁴⁴.

In order to invoke the right of withdrawal the consumer is not obliged to prove his mental state. Meaning, he is not required to show that he was manipulated by the trader. This was derived from the ECJ judgment in the *Travel-Vac*¹⁴⁵ case. Likewise, the ECJ upheld in the

¹⁴³ Micklitz & et.al , supra at 240-242. See also Directive on the Protection of consumers in respect of certain aspects of time share , resale and exchange contracts, Directive 2008/122/EC of the European Parliament and the Council of 14 January 2009, Art.6, available at Official Journal of the European Union, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:033:0010:0030:EN:PDF>, L330/50, 3.2.2009; Council Directive on the coordination of laws, regulations and administrative provisions relating to direct life assurance, Directive 90/619/EC, 8 November 1990 (repealed by the consumer rights directive), Art.13. Directive concerning distance marketing for consumer financial services, 2002/65/EC of the European Parliament and the Council, 23 September 2002, Art.6 available at Official Journal of the European Union, <http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32002L0065&from=N> L271/16, 9.10.2002; Directive 2008/48/EC of the European Parliament and the Council of 23 April 2008, Art.14, available at Official Journal of the European Union, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:133:0066:0092:EN:PDF>, L 133/66, 22.5.2008.

¹⁴⁴ The Consumers Rights Directive, Directive 2011/83/EU of the European Parliament and the Council on Consumer Rights of 25 October 2011, Art. 9 extend duration of the withdrawal right to 14 days save Art. 16 (which was 7 days in the repealed directives) in the case of off- premise or distance contracts without giving any reason and without incurring any costs other than those provided for in Arts. 13(2) and 14 available Official journal of the European Union <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0083&from=EN>, L304/64, 22.11.2011.

¹⁴⁵ Micklitz & et.al , supra at.242 .See also *Judgment of 2 April 1999, ECJ, C-423/97 Travel vac slv v Sanchis*, available at European court Report 1999, <http://eurlex.europa.eu/legalcontent/EN/TXT/HTML/?isOldUri=true&uri=CELEX:61997CJ0423>, I-02195.

*CrailsheimerVolksbank*¹⁴⁶ case that the consumer is not required to establish the very fact that the trader was aware of the nature of the contract when an intermediary acts on the latter's behalf.

According to the Consumer rights directive, the withdrawal period is extended from 7 days (which was in the doorstep directive) to 14 days that is reckoned from either the date of conclusion of contract in case of contract of service or from the date of entering in to delivery in case of contract of sale. The 14 days period may be prolonged to 12 months in so long as the trader has not provided for the exercise of the right of withdrawal to the consumer¹⁴⁷. During the withdrawal right period, as a matter of principle, there is no prohibition in performing an obligation. Member states can, however, prohibit the trader from receiving payment until the period expires¹⁴⁸.

The legal effect of withdrawal may be twofold: it releases both parties from performing their obligations in the contract and allows not to concluding the contract if it is in the stage of an offer¹⁴⁹. To this end, the trader shall reimburse all the payments received from the consumer except costs for normal wear and tear and postal fees incurred by the consumer for sending the goods. Consequently, the consumer shall only be liable for any diminished value of the goods

¹⁴⁶ Micklitz & et.al, supra at 244. see also Judgment of 5 October 2005, ECJ, C229/04 *CrailsheimerVolksbank* v *Klaus Conrad* and et.al, available at <http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ead672d36b1634644bc1bcf7f9a434a3127f.e34KaxiLc3qMb40Rch0SaxuOaN50?te,Ext=&docid=60667&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&ci,EEEEd=383458>.

¹⁴⁷ Consumer Rights Directive, Art.9 cum Art.10. See also Micklitz & et.al, supra at 240-244.

¹⁴⁸ Id at Art.9(3).

¹⁴⁹ Id at Art. 12. See also Micklitz & et.al, supra at 240-244.

resulting from the handling of the goods other than what is necessary to establish the nature, characteristics and functioning of the goods (Austrian supreme court case of *VKI*)¹⁵⁰ and postage fee for sending the goods (excluding delivery costs) if the trader (seller) has not shouldered the obligation¹⁵¹.

As the directive sets out minimum standards so that member states can introduce more favorable protection to consumers (of course with no regression of prevailing practices before the implementation of the directive and also derogation is not allowable unless permitted by the named directive), they can extend the 14 days period of right of withdrawal and the subject matters too¹⁵².

B. Remedies emanating from non-conformity

The relevant directive which deals with certain aspects of sale of goods and associated guarantees is Directive 99/44/EC. To begin with, the directive pursues double aims: to ensure high level of consumer protection as laid down under Art.153 (1) &(3) of TFEU and to harmonize differences in law among member states which distort competition in the internal market¹⁵³.

¹⁵⁰ Micklitz & et.al, supra at 273.

¹⁵¹ Consumer Rights Directive, Art.9 cum Arts13& 14. See also Micklitz & et.al, supra at 273.

¹⁵² Consumer Rights Directive, Arts.3(4) & 3(6).

¹⁵³ Directive on certain aspects of the sale of consumer goods and associated guarantees, Directive 99/44 of the European Parliament and the Council, 25 May 1999, Art.1, available at Official Journal of the European Communities <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999L0044:en:HTML>, L171, 07.07.1999. See also Micklitz & et.al, supra at 270-275.

By virtue of Art.2 (1) of the directive, the seller must deliver goods to the consumers which are in conformity with the contract of sale. Sub article 2 of the same article speaks that consumer goods are presumed to be in conformity with the contract if they comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model; are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted; are fit for the purposes for which goods of the same type are normally used; and show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect given the nature of the goods and taking in to account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative particularly in advertising or on labeling¹⁵⁴.

Moreover, two things are noteworthy at this moment. First, there shall not be a lack of conformity if at the time the contract was concluded the consumer was aware or couldn't reasonably be unaware of the lack of conformity or if the lack of conformity has its origin in materials supplied by the consumer .Second, any lack of conformity resulting from incorrect installation of the consumer goods shall be deemed to be equivalent to lack of conformity of the goods if installation forms part of the contract of sale of the goods and the goods were installed by the seller or under his supervision¹⁵⁵.

When we come to the remedies, in the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge unless this is

¹⁵⁴ Directive on certain aspects of the sale of consumer goods and associated guarantees, Art. 2(1) & 2(2).see also Micklitz & et.al , supra at 270-275.

¹⁵⁵ Id at Art.2(3)& Art.2(5). See also Ibid.

impossible or disproportionate. (Art.3 (3)). A remedy shall be deemed to be disproportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable, taking in to account: the value of the goods would have if there were no lack of conformity, the significance of the lack of conformity, and whether the alternative remedy could be completed without significant inconvenience to the consumer¹⁵⁶.

The consumer may, however, require an appropriate reduction of the price or have the contract rescinded, pursuant to sub article 5 of Art.3, if the consumer is entitled neither repair nor replacement, or if the seller has not completed the remedy within a reasonable time, or if the seller has not completed the remedy without significance inconvenience to the consumer. It should be nonetheless, worth noting that the consumer is not entitled to have the contract rescinded if the lack of conformity is minor¹⁵⁷. This principle stems from the law of contract in that rescission should only be operational where the breach is material¹⁵⁸.

As is evident from the aforementioned discussions, the named remedies have hierarchical structure. The German Federal Supreme Court, in the “faulty car engine case” accentuated that the hierarchical nature of the remedies prevents a claim for damages until a reasonable period of time for the seller to repair or replace has elapsed.¹⁵⁹

Member states can adopt additional remedies under national laws in consonant with Art.8 of the directive though the directive is silent as regards damages and we may conclude that a contract

¹⁵⁶ Directive on certain aspects of the sale of consumer goods and associated guarantees , Art.3(3) 2nd paragraph.

¹⁵⁷ Id at Art.3(5).

¹⁵⁸ Professor Sganga, Material on Consumer law Protection, Department of Legal Studies, CEU, Budapest, 50,(2013/14).

¹⁵⁹ Ibid.

may be come to an end as a matter of last resort, where no other remedy has provided for a satisfactory outcome in the EU context¹⁶⁰.

3.2.1.2 General Private law Remedies available to consumers

In this part, I do pin point the general private law remedies which a consumer can invoke just like any other contractant in the law of obligations, whether contractual or delictual. Put otherwise, general remedies come to the scene so long as specific remedies are absent or are considered inadequate so that the gap is filled by them accordingly. Given the very core issue of the thesis, I will focus briefly on matters of invalidation, specific performance and damages in the realm of contractual remedies (as consumer relationship between traders primarily arises from contractual relationship) and damages in the purview of tort remedies.

A. Invalidation

As it is crystal clear that, the notion of invalidation of contract may be viewed from the ideas of relative and absolute nullity of a contract in that in the former case the defect is attached with incapacity, fraud, mistake and duress occurred at the stage of formation of the contract and in the latter case the contract is flawed, at the stage of formation, due to the illegality or immorality of the obligations assumed by the parties under national laws. In case of cancellation, however, the contract is tainted not at the stage of formation, rather at the very point of performance of the contractual obligations¹⁶¹.

Accordingly, consumers can invoke this particular remedy particularly where the specific remedy can't be invoked (for instance due to expiry of the period of withdrawal) or where the

¹⁶⁰ Directive on certain aspects of the sale of consumer goods and associated guarantees, Art.8.

¹⁶¹ Professor Sganga, Material on Contracts-Introduction with Focus on Common Law_DLS, CEU, Budapest 190-199, (2013/14).

relevant EU consumer directive is not transposed in to national law (where the period of transposition has not yet expired). This was practically applied in Spain during the time when the implementation of the time share directive has not been expired in the *Juan Bautista* case. The Castellon court of appeal ruled that the seller had acted in bad faith by deliberately concealing information on a penalty clause and this vitiated the consent of the consumer thus leading to the nullity of the contract on the ground of fraud¹⁶².

B. Specific Performance

In order to exercise the remedy of specific performance particularly in continental Europe, the claimant should establish the twin requirements needed in the law of contract namely proving particular interest in the performance of the contract and ensuring that the performance of the contract doesn't entail a violation of the personal liberty of the debtor¹⁶³. Therefore, consumer contracts are not exceptions from this principle so that each case should be filtered in light of these principles.

When we translate this principle in most contracts of sales of corporeal chattels entered in to by consumers as buyers, the upshot is that the consumer should prove either the absence of purchase in replacement or should establish that purchase in replacement entails a considerable expense in order to be granted by the court the remedy of specific performance.¹⁶⁴

¹⁶² Micklitz & et.al, supra at .233. See also Sganga, supra note 158 at 50-55.

¹⁶³ Sganga, supra note 161 at 190-199. See also The Ethiopian Civil Code, Art.1176 & Art.2329. Further see Rene David, Commentary on Contracts in Ethiopia, Published by the faculty of law Haile Silassie I University, Addis Ababa, 58,(1973).

¹⁶⁴ David, supra at 57-58.

C. Damages

In relation to damages, it's important to avoid the confusion between the words "damage" and "damages". The former refers to an injury caused to the person's interests while the latter is the redress, i.e. compensation awarded to remedy the injury, which we are discussing¹⁶⁵. The underlying principle is that "who so ever causes damage to another shall make it good"¹⁶⁶.

Damages may be classified as liquidated, compensatory, nominal and punitive. Liquidated damages are frequently awarded where there is a provision stipulated in the contract which allows the claimant to invoke such relief (since it was difficult to ascertain the damages at the time of conclusion of the contract) provided that the amount fixed in the contract is reasonable as compared to compensatory damages¹⁶⁷. Compensatory damages may take the form of present and future damages having the very aim to place the claimant in the position he would have been had the contract been performed. Since the standard of the damages is benefit of the bargain, particularly present material damage may be further divided in to *damnum emergens* (occurrence of loss or diminution of estate) and *lucrum cessans* (loss of profit or non-increase of estate)¹⁶⁸.

Nominal damages are awarded for recognition of the right of the claimant resulting from breach of contract even though he has not incurred any actual loss. Punitive damages are in place often in common law countries where the claimant can prove that there was malice or gross negligence

¹⁶⁵ Krzechunowicz, *supra* at 11.

¹⁶⁶ *Ibid.* See also Prosser, Privacy and the Right to publicity, 48 CALR, 383-387, (1960), available at official website of California law http://www.californialawreview.org/assets/pdfs/misc/prosser_privacy.pdf, last update 01/01/2014.

¹⁶⁷ Sganga, *supra* note 161 at 199. See also Krzechunowicz, *supra* note 137 at 12-19.

¹⁶⁸ Sganga, *supra* note 161 at 199. See also Krzechunowicz, *supra* note 137 at 12-19.

on the part of the debtor in breaching the contract even though the claimant has not incurred any damage¹⁶⁹. It has a central purpose in deterring the violator of contractual obligations. In Europe, UK and Ireland excepted, punitive damages would have an adverse economic impact, create unpredictable results and are thus considered contrary to public order¹⁷⁰.

In general, the application of damages in the EU member states is not uniform. For instance, under English law, a person who is induced to enter a contract as a result of a false pre-contractual statement may be able to claim damages in tort or on the basis of a contractual warranty. In Germany, a contractual claim for damages would be available by virtue of the *culpa in contrahendo* principle even though the violation is pre-contractual duty¹⁷¹. Contrary to this, French and Belgian law consider pre-contractual liability as extra-contractual liability. This is clearly evident particularly from the Brussels Court of Appeal judgment in the *Axa Belgium* case¹⁷².

One thing is worth mentioning here. In the realm of non-contractual liability particularly in matters of product liability, by virtue of the adoption of Directive 85/374/EEC at the EU level, as a matter of general rule member states are not allowable to extend no-fault liability other than the

¹⁶⁹ Ibid.

¹⁷⁰ Sganga, supra note 161 at 190-199.

¹⁷¹ Ibid.

¹⁷² Micklitz & et.al, supra at 236.

producer (as the directive is a maximum harmonization measure in the community acquis) so that suppliers can only be liable under national law on the basis of fault¹⁷³.

3.2.2 Public Law Remedies

In a nutshell, public law remedies regardless of the model of enforcement (whether enforcement is carried out by public agencies or individual parties in attaining public aims) pursue the objectives such as prevention of the reprehensible act or omission, deterrence (either general or particular) or rehabilitation or integrating the perpetrator in to the society by enabling him duty conscious, either by imposing administrative measures or criminal sanctions. The same holds true in the case of consumer protection.

3.2.2.1 Administrative Measures

Administrative measures, in the ambit of consumer protection, may take injunctive orders, administrative fines or revocation or suspension of trade or professional license. Injunctive relief is granted to the consumer by the public agency or administrative tribunal directing the trader to do or refrain from doing a certain act. It may be temporary or permanent in nature. Where it is temporary, it doesn't conclude a right and sought to enforce an established right but to maintain the status quo until the trial of the merits can take place. Where it is permanent, the trader is enjoined from continuation of or from resuming an act prejudicial to the consumer¹⁷⁴. Administrative fines (penalties) are, however, distinguished from criminal fines in most cases (though it is debatable) as they are smaller in amount, the criteria for liability is less lenient as

¹⁷³ Directive on the approximation of the laws, regulations and administrative provisions of the member states concerning liability for defective products, Council Directive 85/374/EEC, 25 July 1985, Art.1 cum Art.13, available at Official Journal of the European Communities, <http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:31985L0374&from=EN>, L210, 07.08.1985.

¹⁷⁴ Weber, *supra* at 540-548. See also Prossen, *supra* at 383-387.

compared to criminal fines and compulsory labor can't be imposed in lieu of them where the trader fails to perform administrative fines except entailing revocation or suspension of trade or professional license¹⁷⁵. Revocation of trade or professional license may be imposed on a permanent basis to preclude the trader from engaging in the very business that was the foundation of the repugnant act and suspension may be applied for a certain period usually not more than 5 years taking in to consideration the gravity of the reprehensible act and the personal character of the trader¹⁷⁶.

In the EU, due to a divergent enforcement approaches as I mentioned in chapter 1, this remedy is in place in the purview of administrative remedies notably in the UK and the Nordic countries (particularly in Sweden)¹⁷⁷. To this end, injunction relief is frequently applied, be it temporary or permanent, by disqualifying a company director from acting. Hard core cartels, price fixing, bid rigging or pyramid promotional schemes entail administrative fines¹⁷⁸.

3.2.2.2 Criminal Sanctions

In the realm of consumer protection law in the EU, criminal sanctions may be either fines (as distinguished from administrative fines) and restriction of liberty which may be manifested in the form of simple imprisonment where the violation is considered as misdemeanor under law or in the form of rigorous imprisonment (the amount of imprisonment and the level of execution where compulsory labor is implemented that makes quite different from simple imprisonment),

¹⁷⁵ Ibid.

¹⁷⁶ Id.

¹⁷⁷ Id.

¹⁷⁸ Official Website of the Commission for Markets Authority.

where the violation is a serious offence(felony) under national law. The notable offences are hardcore cartels, price fixing, hoarding, bid rigging or pyramid promotional schemes¹⁷⁹.

To this end, as is evident that in the EU there is a disparity in the application of criminal sanctions in the member states. Some of them do not incorporate imprisonment as a distinctive type of penalty in consumer law violation (rather than treating by way of fraudulent practices as an offence entailing imprisonment and by administrative fines) such as Germany and Italy. Some of them, however, do make consumer law violation as a reprehensible act entailing imprisonment (apart from administrative fines and criminal fines), not exceeding 5 years, such as UK and Ireland¹⁸⁰. Particularly in the UK, perpetrators of pyramid promotional schemes (those where the money for participants is derived primarily from introducing others rather than for the sale of a product or service) which affect a huge number of consumers are recently sentenced 6 months even if they plead guilty¹⁸¹.

3.3 The US Approach

3.3.1 Private law Remedies

Following the same discussion pattern, I shall mention the specific and general private law remedies in the sphere of private law in the US in the following way.

¹⁷⁹ Weber, *supra* at 540-548. see also Prossen, *supra* at 383-387.

¹⁸⁰ Bloomberg law reports, Interplay between Antitrust and Criminal law in Europe, 3, (2011) available at Official website of Bloomberg (Anti-trust & trade) <http://www.mwe.com/info/pubs/pinotti0611.pdf>,) last update: 01/01/2014.

¹⁸¹ Official website of the Commission for Markets Authority.

3.3.1.1 Specific Remedies

A. The Right of withdrawal

To begin with withdrawal right in the US, unlike the EU, is limited to specific categories of goods or services. For instance, we may find the named right in the financial sector, insurance products or in real estate transactions. Withdrawal right is also available by states consumer protection acts in the field of e-commerce¹⁸².

The FTC, pursuant to its power vested in it by the Federal Trade Commission Act sets out standards, provides 3 days minimum cool off period for distance and door-to-door selling. States Consumer Protection Acts, however, provide generous terms for example New York or California Consumer Protection Acts provides a 30 days cooling-off period of withdrawal right. The idea is that the rules made by the FTC are minimum standards that are not subject to derogation unless allowed by the FTCA so that States via their Consumer Protection Acts may accord more protection to consumers by extending the period stipulated in the FTC rules.¹⁸³

B. Remedies emanating from non-conformity

In the US, the Magnuson Moss Warranty Act provides that any warrantor warranting a consumer product by means of a written warranty must disclose, fully and conspicuously in simple and readily understood language, the terms and conditions of the warranty to the extent required by the rules of the FTC¹⁸⁴.

¹⁸² Official Website of the Federal Trade Commission.

¹⁸³ Id.

¹⁸⁴ Consumer Product Warranties, Title 15 US Code Chapter 15, Section 2302 available at Cornell University Law School, LII, <http://www.law.cornell.edu/uscode/text/15/chapter-50>, last update: 04/09/2014.

The FTC has enacted regulations governing the disclosure of written consumer product warranty terms and conditions on consumer products actually costing the consumer more than 25USD (15 USD as amended)¹⁸⁵.

The Act is meant to provide consumers with access to effective and reasonable remedies where there is a breach of warranty on a consumer product. Section 2301(10) of the Act stipulates that the warrantor may elect whichever of the remedies (repair, replacement or refund) except that the warrantor may not elect refund unless he is unable to provide replacement and repair is not commercially practicable or cannot be timely made or the consumer is willing to accept such refund¹⁸⁶.

In such a case we can discern a clear difference that in the US the choice mainly rests on the warrantor and he can only opt for refund where it is either accepted by the consumer or if the replacement can't be practical and repair is not commercially practicable. In Europe, the remedies are based on hierarchy rather than choice. In case of refund also, in the US, depreciation is taken in to account because the Act defines refund as the actual price less reasonable depreciation based on actual use¹⁸⁷. In this regard, it should bear in mind that the definition of conformity and its regulation is left to the States Consumer Protection Acts¹⁸⁸.

¹⁸⁵Id.

¹⁸⁶Consumer Product Warranties, Section 2301(10).

¹⁸⁷Id at Section 2301(12).

¹⁸⁸ Sganga, *supra* note 158 at 50-60.

3.3.1.2 General Private law Remedies available to consumers

In the realm of general private law remedies available for consumers, I shall concentrate on the distinguishing features of the US legal system as the very common principles are dealt in the foregoing discussions.

A. Invalidation

In the US, apart from what I discussed in this part while I was dealing with the EU situation, particularly unfair terms in consumer contracts are invalidated by the principle of unconscionability (Section 2 UCC-2302). The very idea is to curb unfair terms stemming from inequality of bargaining power. A clause may be deemed unconscionable where in light of general commercial background and commercial needs of the particular trader the clause is so extreme and so one sided to appear as unconscionable. This test was incorporated in the US Court of Appeals following the definition given by Corbin¹⁸⁹.

B. Specific Performance

In the US, specific performance is not a common law remedy as distinguished from invalidation or damages. Instead, it is an equitable remedy in that it may be granted by the equity court when the relief by way of damages is not adequate to the claimant in our case to the consumer because the subject matter of the contract may be unique to the consumer for instance in contract of sale of corporeal chattels where the subject matter of the contract should be delivered to the consumer following the agreed specification. Even in such circumstances, exercising specific performance

¹⁸⁹ *Williams et al v walker Thomas furniture*, 350 F.2d 445 R88, United States Court of Appeal District of Columbia, 11 August, (1965) available at Official Website of JUSTIA US Law <http://law.justia.com/cases/federal/appellate-courts/F2/350/445/74380/>, last update:03/09/2014.

shall not cause unreasonable or disproportionate hardship to the seller (i.e. if purchase in replacement is at ease, the remedy can't be invoked)¹⁹⁰.

This remedy is also subject to equitable defenses like laches(delay) and bloody hands(he who invokes equity should come with clean hands or shouldn't come with bloody hands) . The very idea of specific performance is associated to the common law and civil legal systems rational of contracts in that in the former case the economic costs of the contract is given paramount importance and in the former case the moral element(*pacta sunt servanda*) prevails to the economic costs¹⁹¹.

C. Damages

With respect to damages, the US consumer is entitled to punitive damages (in addition to compensatory damages) unlike the case of the EU, UK and Ireland excepted. As I mentioned, it is taken as a means of attaining public goals (particularly the very aim of deterrence) by private enforcement mechanisms in the US.

The other important rationale also is that it is taken as a limitation to the principle of efficient breach in that once the contracting party highly expects performance from the contract rather than the breach, the latter becomes arbitrary and capricious and thus contrary to good faith unless the party who breaches the contract is made liable by way of punitive damages¹⁹².

Regarding product liability, unlike the EU, the liability extends to the wholesaler or retailer (apart from the producer) having also limited defenses contrary to the EU(such as fault on the

¹⁹⁰ Sganga, *supra* note 161 at 190-210.

¹⁹¹ *Ibid.*

¹⁹² *Id* at 202.

part of the consumer or inherent defect of the product).In the EU, however, the defenses are wide by virtue of Art.7 of the Product Liability Directive .In this case it has to beware that though the scope and extent of liability is regulated by specific product liability legislations, the remedies still fall within the ambit of general remedies ¹⁹³.

3.3.2 Public Law Remedies available to consumers

Following again the same pattern, I shall touch administrative and criminal sanctions as remedies of consumer law violations in the US.

3.3.2.1 Administrative Measures

Succinctly, in the US we do obtain injunctive relief, administrative fines and revocation or suspension of trade or professional license as measures in the ambit of administrative remedies. For instance, disqualified from being a company director or banned from making or selling weight loss products fall in the sphere of injunctive relief. To this end, The FTC may issue a cease and desist order or an administrative tribunal may also issue an injunctive order¹⁹⁴.The FTC, however, can request an injunctive order from an ordinary court of law following Section 13 of the FTCA which will be elaborated in Chapter 4.Violations of cease and desist order and violations of Trade regulation rules(concerning consumers) which may be dubbed as acts of contempt also entail administrative fines of USD16,000 and USD 11,000 per violation accordingly¹⁹⁵.Deceptive and unfair practices, hardcore fraud or hardcore cartels further result in imposition of administrative fines apart from entailing criminal punishment ¹⁹⁶.

¹⁹³ Sganga, supra note 158 at 50-55.

¹⁹⁴ FTCA, Title 15, Section 15.

¹⁹⁵FTCA, Title 15, Section 5.

¹⁹⁶ Official website of the Federal Trade Commission.

3.3.2.2 Criminal Sanctions

In the realm of criminal sanctions, the pertinent statutes dealing with consumer protection incorporate huge sum of criminal fines and imprisonment (including rigorous imprisonment) against any violation unequivocally. Accordingly, hardcore fraud on consumers (particularly in case of mortgages or telemarketing) entails an average of 40 months¹⁹⁷. The enforcement is handled by cooperation between the FTC and the DOJ (that means the criminal prosecution is primarily carried out by the DOJ and the civil case the return of money or illegal profits to consumers is handled by the FTC) which will be a subject of discussion in Chapter 4.

3.4 The Ethiopian Approach

3.4.1 Private Law Remedies

As I mentioned earlier, private law remedies in the field of consumer protection are specific remedies and general private (civil) law remedies. To this end, I shall elaborate the situation prevailing in Ethiopia in both spheres.

3.4.1.1 Specific Remedies

Specific remedies embrace remedies associated with the right of withdrawal and remedies stemming from non-conformity as a result of a warranty obligation (either made by the law or arises from the very contract). In the Ethiopian case, the very disappointing part is that Proclamation No 685/2010 which establishes the Trade Practice and Consumers' Protection Agency is devoid of the remedy concerning the right of withdrawal to consumers given the highly pervasive informal business transaction in the country and particularly the high presence of door-to-door transactions in many places. The recently amendment Proclamation No 813/2014

¹⁹⁷ FTCA, Title 15, Section 16(b). see also Title 28 of the USC, Section 516.

even has not included it too. Therefore, my focus will only be, in this regard, with respect to the remedy emanating from non-conformity.

A. Remedies emanating from non-conformity

Art.28(2)&(3) of Proclamation No. 685/2010(as well as Art.20(2) of the new Proclamation No 813/2014) dubiously incorporate the remedies such as replacement(repair is not explicitly stated), and refund granted to the consumer where there occurs non-conformity either emanating from legal or contractual warranty. We can carefully discern two important points from the named provision. First, the choice in implementing the said remedies is solely in the hands of the consumer and secondly the period for invocation of the remedy by the consumer from the seller should be within 15 days reckoning from the receipt of the goods or from the purchase of the service without prejudice to legal or contractual warranties more advantageous to him¹⁹⁸.

The law, as one can at ease comprehend, is flawed in three points: even though choice is given to the consumer (like the EU approach), there may be times where by replacement or refund may be disproportionate or unreasonable to the trader with out, however, jeopardizing the very interest of the consumer. Therefore, even the new proclamation doesn't take in to account the security of transactions at all. This was clearly seen in the *Molla Bazezew*¹⁹⁹ case in which the Adjudication Tribunal granted refund of the price of the energy saving stove proved defective by the consumer without further inquiry of repair or replacement. Put otherwise, the Adjudication Tribunal should have scrutinized the application of repair or replacement to ensure the security

¹⁹⁸ The Trade Practice and Consumers' Protection Proclamation, Art.28(2) & (3).see also Trade Competition & Consumers' Protection Proclamation, Art.20(2).

¹⁹⁹*Judgment of the Federal Trade Competition & Consumers' Protection Agency Adjudication Tribunal, 22 July 2014, File No 0009, Molla Bazezew V Brothers Energy Saving Stoves PLC.*

of commerce which is the very aim of the legislation rather than hastily grant the consumer refund of the contract price thereof.

The second defect observed from the new proclamation is that fixing 15 days period of demand against the seller on defects occurred on goods or services as is reckoned from the date of purchase may be impractical. This is just because the provision cross refers the application of legal or contractual warranties in the contract sale of corporal chattels (Arts.2290-2298 of the Civil Code) so that unless and until the consumer was in position to examine the goods or services purchased from the seller and thus the defect was revealed by the results of the examination, the seller wouldn't be successful in invoking this period as a statute of limitation in a consumer litigation.

This defense though pleaded by the defendant Yangfan Motors was rejected by way of preliminary ruling in the *Zerihun Ayalew's*²⁰⁰ case even if the defendant prevailed in the merit due to the fact that the contractual warranty period was 24 months. Therefore, the consumer law should at least maintain (if not granting more protection to consumers) the protection accorded to ordinary buyers in the Civil Code. For instance in the EU context, subject to member states right to introduce more favorable protection, the period of limitation shall not be lower than 2 years as from the time of delivery and even shall not be lower than 1 year in the case of second-hand goods²⁰¹.

²⁰⁰ *Judgment of the Federal Trade Competition & Consumers' Protection Agency Adjudication Tribunal, 22 July 2014 File No 00015, Zerihun Ayalew v Yangfan Motors PLC.*

²⁰¹ Directive of the European Parliament and the Council on certain aspects of the sale of consumer goods and associated guarantees, Arts.5(1)& 7(1).

The third flaw easily seen from the law is that the remedy of repair is not incorporated distinctly from the remedy of replacement as these concepts regulate different matters. The Adjudication Tribunal tried, nonetheless, to accept the remedy of repair as one of consumers' relief in the *Ababu Shimelis*²⁰² case though the named consumer didn't prove with preponderance that the purchased item (SONY/LCD) was defective due to other than power fluctuation or insects.

3.4.1.2 General Private law Remedies

In this specific part, I shall focus on the remedies like invalidation, specific performance and damages for discussion.

A. Invalidation

Invalidation, in the consumer contracts in Ethiopia, may emanate from either general business terms which are under Ethiopian law voidable unless they are known or undertaken by the consumer or prescribed or approved by the public authorities (Art.1686) or it may stem from fraud following Art.1704 or false statements which affect the very essence of the contract (Art.1705) or exceptionally on the ground of unconsonability in consonant with Art.1710(2) of the Civil Code where the consent of the consumer has been obtained by taking advantage of his want or simplicity of mind or manifest business inexperience. However, unconsonability or lesion is not a ground of invalidation in the case of sale of an immovable.(Art.2887 of the Civil Code)²⁰³.

²⁰² *Judgment of the Federal Trade Competition & Consumers' Protection Agency Adjudication Tribunal, 22 August 2014 File No 00018, Ababu Shimelis v Glorious PLC.*

²⁰³ The Ethiopian Civil Code, Arts. 1686, 1704, 1705, 1710(2) & 2887. See also David, *supra* at 78-82.

B. Specific Performance

Specific performance under Ethiopian law of contracts in general is stipulated under Art.1776 of the Civil Code. To availing this provision the consumer should establish the twin requirements of the law in that he must have a special interest in the contract and the contract must be enforced without affecting the personal liberty of the debtor²⁰⁴.

Particularly, when we examine the contract of sale of corporeal chattels or movables the principle is reinforced in the following: the consumer can't exercise specific performance where purchase in replacement can be executed without considerable expense. This remedy is further subject to the defense of delay or laches as per Art.2331 of the Civil Code²⁰⁵.

C. Damages

In relation to damages to be specific, liquidated damages (Arts.1889-1895), compensatory damages (Art.1799 cum 1790) and nominal damages (Art.2114) are available under Ethiopian law²⁰⁶. It has to be noted that where the dispute arises from contractual relationship, the consumer will be granted reasonable damages (not actual damages) unless he can prove that the trader has acted maliciously or with fraud in which case actual damage will be awarded²⁰⁷. In this case, however, if the trader can prove that the consumer has actually sustained below the reasonable

²⁰⁴The Ethiopian Civil Code , Arts.1176 & 2892. See also David, *supra* at 58.

²⁰⁵ *Id* at Arts.2330 & .2331. See also David, *supra* at 78-82.

²⁰⁶ The Ethiopian Civil Code, Arts.1889-1895, 1799 & 1790, & 2114. David, *supra* at 68-76.

²⁰⁷ *Id* at Arts.1799 & 1801. see also David, *supra* at 68-76.

damages calculated on objective grounds, the amount of damages will be diminished accordingly²⁰⁸.

In this regard, it has to be noted that by virtue of Art.22(6) of Proclamation No 685/2010 and more clearly as per Arts. 14(5) and 20(3) of the new Proclamation No 813/2014 give a right to the consumer to lodge a claim of damages or compensation to the Federal Trade Competition and Consumers' Protection Authority where he suffers damage because of transaction in goods or services or due to failure of the seller to perform his obligation of replacement or refund²⁰⁹.

The Federal Trade Competition and Consumers' Protection Adjudication Tribunal, however, in the *Molla Bazezew*²¹⁰ case rejected the relief of compensation incurred for installing and proper use of the stove asked by the plaintiff arising from the defective energy saving stove on the ground that such expenses have no connection with the proved defect.

As it is ascertained, the disputed energy saving stove requires additional costs that should be borne by the buyer for its proper usage. To this end, if the appliance or the energy saving stove is inoperative, the cost incurred by the consumer will be unnecessary unless the seller make the appliance workable. In the case at stake, the seller failed to render the appliance workable and thus the compensation claim filed by the consumer was tenable provided its amount might be cautiously assessed. Therefore, this case clearly illustrates the Adjudication Tribunal's failure to construe the relevant provisions of the legislation following its letter and spirit.

In the case of tort matters, however, the principle of assessment of damages is the actual loss sustained by the consumer which may be nonetheless subject to mitigation where there is contributory negligence on the part of the consumer²¹¹. Further, in the sphere of non-contractual

²⁰⁸ The Ethiopian Civil Code, Arts.1799 & 1800. see also David, *supra* at 68-76.

²⁰⁹ Trade Practice and Consumers' Protection Proclamation, Art.22(6).see also Trade Competition & Consumers' Protection Proclamation, Arts.14(5)& 20(3).

²¹⁰ *Molla Bazezew V Brothers Energy Saving Stoves PLC*.

²¹¹ The Ethiopian Civil Code,Art.2090& 2098. See also Krzechunowicz, *supra* note 137 at 13-32.

liability specifically product liability Art.2085 of the Civil Code only makes liable the producer or manufacturer of the product the same as the EU does. The difference, however, is that in Ethiopia, unlike the EU, the producer has only to prove the fault of the consumer in order to be exempted from liability²¹². Therefore, the manufacturer can't be exonerated from liability even if he proves that he has committed no fault or it was impossible to establish the cause of the damage or that the damage was due to the fault of a third party²¹³.

At this cleavage, I may say that punitive damage is not in place under Ethiopian law of obligations. Even the current consumer protection law has not incorporated the concept clearly because it refers only “compensation or damages” so that it is unwise to claim that the legislator has envisaged the notion in into its mind while crafting the law.

3.4.2 Public Law Remedies

By making use of the same clear pattern, I shall touch administrative and criminal sanctions as remedies of consumer law violations in Ethiopia.

3.4.2.1 Administrative Remedies

The break through legislation of the Ethiopian consumer protection law (Proc.685/2010) vividly mentions injunctive relief and cancellation or suspension of business license as administrative measures in Art.35(3) of the Proclamation and when we read also Art.50 we may reach also the conclusion that administrative fines are also included in administrative measures(this is also true

²¹²The Ethiopian Civil Code, Art. 2086(2). See also David, *supra* at 68-76.

²¹³ Id at Art.2086(1).

by virtue of Arts.32(2) & 42 of the new Proclamation No 813/2014)²¹⁴. In the purview of injunctive relief, banning to manufacture or marketing a given product or disqualifying a natural person from being or continuing as company director are the best examples. Administrative fines may be imposed against abuse of market dominance, anti-competitive agreements or concerted practices, unfair competition or hoarding and diverting of goods ranging from 5% to 10% annual turnover²¹⁵.

As I mentioned earlier the federal public agency which is empowered to impose administrative measures is the Trade Practice and Consumer Protection Authority (currently renamed as the Trade Competition & Consumers' Protection Authority by virtue of Art.27 of Proclamation No 813/2014). The scope of enforcement together with its added powers will be discussed under Chapter 4.

3.4.2.2 Criminal Sanctions

In the purview of Criminal sanctions, the Trade Practice and Consumer Protection Proclamation No 685/2010 in its Art.49 (5) states that (apart from anti-trust crimes) the criminal fines that will be imposed by a trader ranges from 50,000 to 100,000 Ethiopian Birr(from 2500 to 5000 USD) and the incarceration may be from 3 years to 7 years²¹⁶.

However, the new amendment Proclamation No 813/2014 in its Art.43 (6) reduces the criminal fines to 5,000 to 50,000 Ethiopian Birr (from 500 to 2500 USD) and the incarceration to simple imprisonment (from 10 days to 3 years in accordance with the definition given as per Art.106 of

²¹⁴ Trade Practice and Consumers' Protection Proclamation, Art.35(3) & 50. See also Trade Competition & Consumers' Protection Proclamation, Art.32(2) & 42.

²¹⁵ Trade Competition & Consumers' Protection Proclamation, Art.42.

²¹⁶ Trade Practice and Consumers' Protection Proclamation, Art.49(5).

the Revised Criminal Code)²¹⁷. The reprehensible acts that demand criminal prosecution to mention a few of them are failure to observe the administrative measures, furnishing false information on the material facts of goods or services, applying a pyramid scheme of sale, failing to meet warranty obligations, selling goods which is dangerous to human health and safety, falsifying the country of origin of goods, and hoarding and diverting of goods entailing on average from 1 year to 5 years imprisonment²¹⁸. It has to be noted that by virtue of Art.3 of the Revised Criminal Code (Proc.414/2004) special legislations of criminal character are part of the criminal code²¹⁹.

By availing its added power, the Trade Competition and Consumers' Protection Authority Prosecution Directorate is empowered to institute criminal charges before the Federal courts following Art.37(1)(b) of the new Proclamation No 813/2014 which will be a subject of treatment in Chapter 4.

²¹⁷ Trade Competition & Consumers' Protection Proclamation, Art.43(6).

²¹⁸ Id at Art.43.

²¹⁹ The Criminal Code of the Federal Democratic Republic of Ethiopia, Art.3.

CHAPTER FOUR

Actual Enforcement of Consumer Protection in Ethiopia in the Light of the EU and US

Laws and Practices

4.1 General

As I succinctly mentioned the enforcement approaches in the legal systems of the EU and the US in general and in the ambit of consumer protection in particular in Chapter One, I have noted that each legal system has its own hall marks and rationales in choosing the public and/or private enforcement model.

In the purview of consumer protection, the EU member states predominantly focused on the public enforcement strategy and in recent years they are also implementing the private enforcement mechanism particularly collective actions²²⁰. In the US, though the conventional approach of enforcement is highly attached to the private attorney general model, due to the restructuring and strong power devolved to the administrative agencies such as the FTC and FDA makes public enforcement to gain momentum²²¹.

These days, dwelling on the distinction between public and private enforcement model becomes outdated. What is relevant however is that to have a mix of the named models in order to render the enforcement framework robust and workable²²². In so doing, the very concern is to identify the available remedies (whether they are administrative or private) and to vesting the power to the institution that best safeguards the available remedies thereof.

²²⁰ Cafaggi and Miclitz, supra at 27. See also Weber, supra at 548.

²²¹ Cafaggi and Miclitz, supra at 27. see also .Schwartz & Silverman, supra at 5-10. Further see Weber, supra at 2-6.

²²² Cafaggi and Miclitz, supra at 27. See also Weber, supra at 548.

Having this in mind, I shall discuss the actual enforcement of consumer law in the EU and in the US and shall also examine the scenario in Ethiopia.

4.2 The EU Approach

In this part, I do focus on the few rules which are adopted at the EU level pertaining to consumers redress in cross border disputes and then I shall focus on the actual enforcement prevailing in the UK particularly by the OFT and the practice in Germany and Sweden in order to discern very well the divergent national law practices.

4.2.1 Cross-border Consumer Disputes

In the EU, the landscape of consumer law enforcement may be put like this: strong public bodies involvement in the UK (OFT), Ireland (National Consumer Agency) and recently in the Netherlands (Consumer Agency); public involvement coupled with administrative enforcement prevalent in Cyprus, Latvia, Lithuania, Poland, Slovakia, Malta and Hungary; prevention through negotiation and recommendation practiced in Nordic Consumer Ombudsmen and enforcement by private business and consumer associations in Austria and Germany²²³.

At the EU level, few rules on consumers redress exist mainly leaving the matter to national laws of member states. To this end, we may obtain laws in matters of injunction, judicial cooperation, small claims payment, uncontested claims, legal aids, collective actions, damages, jurisdiction and choice of law.

Directive 2009/22/EC (which repealed Directive 98/27/EC) governs cross-border enforcement of injunctions. Member states are obliged, pursuant to Art.2 of the directive, to designate court or administrative authorities competent to rule on injunction matters which are brought by

²²³ Micklitz & et.al . supra at 503. See also Cafaggi and Micklitz, supra at 27. Further See Weber, supra at 548.

“qualified entities”-entities having legal interest in protecting the interest of consumers as per Art.3 of the directive. The power of the designated authority may be injunction, publication or criminal fines -if allowed by the laws of the member state concerned²²⁴.

From the injunction directive we may deduce several points. Member states are obliged to designate only public entities in matters of enforcing cross-border injunction. Though the public authorities might be courts (not necessarily administrative agencies), countries like Austria and Germany will not be allowed to entrust such power to businesses or professional associations if they desire to do so²²⁵.

The directive also acknowledges the involvement of consumer associations in asserting the rights of consumers without a further requirement of standing by the member states (of course in representative suits and not in class actions).The directive further envisages criminal sanctions as matters purely left to the member states. What is important at the EU level is that so long as the very requirements of equivalence and effectiveness are satisfied in pursuing the aims intended by the directive, imposing criminal fines or imprisonment goes to the discretion of the member states²²⁶.

Regulation N0 2006/2004/EC governs the administrative cooperation between national authorities responsible for the enforcement of consumer protection laws in matters of intra-community infringements. (Arts. 1& 2).The very purpose of the regulation is to require member states to setup enforcement authorities and to lay down a minimum of common investigation and

²²⁴ Directive of the European Parliament and the Council on Injunctions for the Protection of Consumers’ Interests, Directive 2009/22/EC, 23 April 2009, Art.2 & Art.3 available at Official Journal Of the European Union, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:110:0030:0036:EN:PDF>, 1.5.2009.

²²⁵ Id at Art.2. See also Micklitz & et.al , supra at 500-505. Cafaggi & .Micklitz, supra at 25-27.

²²⁶ Id, Art.3(b). See also Micklitz & et.al , supra at 500-505. Further see Cafaggi & .Micklitz, supra at 25-27.

enforcement powers for these watch dogs. In addition to public authorities, member states are empowered, if not obliged, to designate NGOs as enforcers²²⁷.

We can understand from the regulation that in matters of trans-border administrative cooperation member states are obliged to set-up only public authorities. That means, even though the injunctive remedies can be sought from a court of law, administrative cooperation can only be done by designating a public authority pursuant to the regulation.

Therefore, private organizations are clearly precluded from doing such tasks. What member states can do is that they may set up NGOs as enforcers of administrative cooperation in matters of intra-community infringements apart from establishing public authorities.

In terms of enforcement of cross-border consumer disputes at the EU level, Regulation N0 861/2007/EC regarding small claims procedure is also relevant even though the legislation is not limited to consumer matters. The regulation is intended to simplify and speed-up litigation concerning small claims in cross border cases and to reduce costs following enforcement. (Art.1). Small claims are claims whose amount doesn't exceed 2000 Euros(excluding interest). In so doing, the claim may be brought by post, fax or email, (oral hearing is not mandatory), the judgment must be rendered within 6 months, and the judgment can be enforced without any possible appeal, provision of security and declaration of enforceability²²⁸.

²²⁷ Regulation of the European Parliament and the Council on cooperation between national authorities for consumer protection law, Regulation No 2006/2004, 27 October 2004, Arts. 1, 2 & 4, available at Official Journal of the European Union, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R2006&from=en>, L364/2, 9.12.2004. See also Micklitz.& et.al supra at 500-505. Further see Cafaggi & Micklitz, supra at 25-27.

²²⁸ Regulation of the European Parliament and the Council Establishing a European small claims procedure, Regulation No 861/2007, 11 July 2007, Arts. 1, 4, 5, 15 & 20, available at Official Journal of the European Union, <http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32007R0861&from=en>, L 199/2, 31.7.2007. See also Micklitz.& et.al, supra at 500-505. Further see Cafaggia & Micklitz, supra at 25-27.

Other relevant legislations which regulate enforcement of cross-border consumer disputes at the EU level are Regulation N0 1896/2006/EC and Regulation N0 805/2004/EC on matters in creating a European order for uncontested pecuniary claims (specific to money matters) and uncontested claims in general(whether money or non-money matters) cases accordingly, though these legislations again are not confined to consumer matters²²⁹.

As I mentioned in Chapter One, collective actions in the EU can be categorized in to four different ways: joint actions where individual claims are bundled in a single trial and the outcome only binds parties; representative actions where rights are assigned to the entity that acts on behalf of the individual plaintiffs; test cases where a judgment on an individual claim serves as a model for similar cases(practiced in Germany) and real group action where a plaintiff acts on behalf of a group of individuals who will be bound by the outcome of the procedure if they have opted-in or unless they have opted-out²³⁰.

In group actions, the plaintiff may be either a private party who is a member of the group or a consumer association or public agency (OFT or Consumer Ombudsmen) representing the interests of consumers. In the EU member states, the opt-in group actions are prevalent in

²²⁹ Regulation of the European Parliament and the Council creating a European order for payment procedure, RegulationNo1896/2006,12December2006,Arts1&2availableatOfficialJournaloftheEU<http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32006R1896&from=EN>,L 399/1, 30/12.2006.See also Regulation of the EuropeanparliamentandthecounciloncreatingaEuropeanenforcementorderforuncontestedclaims,RegulationNo805/2004,Arts.13,availableatOfficialJournaloftheEuropeanUnion<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:143:0015:0039:EN:PDF>, L 143/17, 30.4.2004.Further see Micklitz& et.al, supra at 500-505 and Cafaggi & Miclitz, supra at 25-27.

²³⁰Micklitz& et.al, supra at 526.see also Cafaggi & Miclitz,supra at25-29.

Sweden and Finland and we may find the opt-out procedure in Portugal, Dutch and Denmark (in case where the consumer ombudsmen exercises enforcement)²³¹.

In the EU, US type class actions are predominately unknown or diluted owing to the discovery process attached to it, for reasons of contingency fee and the very assumption that it is considered as contrary to the due process so law²³².

The EU Commission by way of recommendation through its Green Paper in 2008 addresses to member states to apply group action in matters of consumer collective redress (by allowing consumer associations to have standing to sue on behalf of consumers) however it leaves the adoption of the opt-in or opt-out procedure to the member states²³³.

In the case of damages, the ECJ (deriving its idea from the Francovich jurisprudence) in the *Dillinkofer* judgment has accentuated its position by stating that a member state is liable to pay damages to consumers who lost money as a result of the bankruptcy of a tour operator when it failed to protect consumers against insolvency of tour operators by fully implementing the package holiday directive²³⁴.

Having said this, let me mention the rules pertaining jurisdiction and choice of law in consumer disputes on cross border cases. The rules on jurisdiction are embodied in Regulation N0 44/2001/EC (Brussels I Regulation) and the applicable laws in matters of contract and non-

²³¹ Ibid.

²³² J.Stuyck, “ Class actions in Europe-Opt in or Opt-out: that is the Question EBLR 488-89, (2009), available at OfficialwebsiteofKluwerLawonline<https://www.kluwerlawonline.com/abstract.php?area=Journals&id=EULR2009022>, last update:03/09/2014.

²³³ Commission of the European Communities, Green Paper on Consumer Collective Redress.

²³⁴ *Dillinkofer and et.al v Federal Republic of Germany*. See also Micktitz& et.al , supra at 538.

contractual relationships are governed by Regulation N0 593/2008/EC (Rome I Regulation) and Regulation N0 864/2007/EC (Rome II Regulation) respectively. For all intent and purposes, a European element should be established for the application of the named laws. The connecting factors can be the parties' domicile, the place of delivery, the place of payment, the place where the events occurred or the choice of another court of law.

In the Brussels I Regulation, as a matter of general rule Art.2 states that a defendant domiciled in a member state is to be sued in the courts of that member state. In consumer disputes, however, by virtue of Art.16 (1) of the regulation a consumer is given the option to file his suit either in the court that situates in his place of residence or in the other party's residence²³⁵. The trader is only entitled to sue the consumer in the court of the member state where the consumer habitually resides. The trader should be active in the sense that he directs his activities to the member state where the consumer is domiciled²³⁶.

Derogation by the parties may be possible on three grounds pursuant to Art.17 of the regulation. The agreement must be entered after the dispute has arisen, the agreement must allow the consumer to bring proceedings in courts other than those indicated above, and both the trader and

²³⁵ Council Regulation (Brussels I Regulation) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Regulation (EC) No.44/2001, 22 December 2000, Art.2 & Art.16(1) available at Official website of the European Communities, <http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32001R0044&from=EN>, L12/1 16.1.2001.

²³⁶ Id at Art.15(1)(c) & Art.16(2).

the consumer must be resident in the same member state at the time of conclusion of the agreement provided that such agreement is not contrary to the law of that member state²³⁷.

In the realm of applicable law, Rome I Regulation governs on the law applicable to contractual obligations. To rely on the provisions of the Regulation, it is clear that there must be a contractual relationship between the trader and the consumer and the former must direct business to the latter's habitual place of residence and the contract must fall within the scope of the activities listed in the Regulation²³⁸. In the first place, choice of law must not deprive the consumer of protection accorded to him by the member state where he habitually resides. The default rule is that in consumer disputes the applicable law is the law of the member state where the consumer has his habitual residence by virtue of Art.6(1) of the Regulation. The Regulation doesn't, however, restrict the application of mandatory norms of the forum state²³⁹. The gist of the regulation is that under the guise of agreement between the consumer and the trader, the former shall not be precluded from invocation of the applicable law as the law of the member state where he habitually resides for regulating the consumer dispute at stake.

²³⁷ Council Regulation (Brussels I Regulation) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters , Art.17. See also Sganga supra note 158 at 60-78.

²³⁸ Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), Regulation No. 593/2008 of 17 June 2008, Arts. 1 & 2, available at Official Journal of the European Union <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:EN:PDF>, L 177/6 , 4.7.2008.

²³⁹ Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), Arts. 6(1), 6(2) & 9(2).

In matters of non-contractual liability, Rome II Regulation in its Art.4 (1) says the general principle of the applicable law as the law of the member state where the damage occurs. Apparently, this rule doesn't provide for special treatment for consumers. However, sub Article 2 of the same article puts, however, two exceptional grounds that predominantly favor consumers. The first ground is that if the member state of the consumer and the trader is the same where the damage occurs, in such a case the applicable law would be the law of the member state where both parties reside and not the law of the member state where the damage occurs. The second ground is that if the suit manifestly connected with a member state other than the member state where the damage occurred (as consumer issues are primarily considered as public policy issues that affect national policies of most countries), the applicable law would be the law of the former member state (even though both parties reside in the same member state)²⁴⁰.

In the sphere of consumer disputes, Art.5 speaks with product liability suits in that the applicable law is the law of the member state where the person sustained the damage had his habitual residence and in unfair competition matters Art.6 says the applicable law is the law of the member state where the collective interests of consumers are likely to be affected²⁴¹.

²⁴⁰ Regulation of the European Parliament and the Council on the law applicable to non contractual obligations(RomeII), Regulation No 864/2007, 11July2007, Arts.4(1) & (2) available at Official Journal of the European Union cum <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:0049:EN:PDF>, Official Journal of the European Union L 199/4 , 31.7.2007.

²⁴¹ Regulation of the European Parliament and the Council on the law applicable to non contractual obligations (RomeII), Arts.5&6.

4.2.2 The UK case

In the UK, consumer law enforcement may be carried out by three enforcers. Primarily, enforcement is done by the OFT(Office of Fair Trading) and in some cases the SOS (Secretary of State) may designate sectoral regulators and consumer protection bodies as enforcers in respect of all or a limited range of infringements²⁴². Given the space and taking the more relevant criterion, I shall discuss the actual enforcement scenario implemented in the OFT.

4.2.2.1 Enforcement Roles of the OFT

The Enterprise Act of 2002, has established the OFT on a statutory basis as a corporate body on 1 April 2003. Under the old law (FTA73) the OFT did not exist as a legal entity, but was merely the administrative support for the Director General of Fair Trading. Under the new law, the statutory position of Director General of Fair Trading has been abolished and his functions transferred to the OFT²⁴³.

When we read carefully the named Act, we reach the conclusion that the OFT (currently Competition and Markets Authority) has investigation power, the power of civil litigation (asking relief) , the power of adjudication , the power of criminal prosecution (in cartel matters) and the power of rule making in the protection of consumers interests. As the power of rule making as such is not controversial, it won't be a subject of discussion here.

However, one thing should be underscored is that the rules enacted by the OFT are not hard laws unlike the rules made by the FTC .Instead, the rules are soft laws addressed to the relevant

²⁴² Office of Fair Trading, Enforcement of Consumer Protection Legislation, at 23.

²⁴³ Id at 6. See also official website of Commission for Markets Authority.

businesses having only a recommendation purpose that doesn't entail the full force of legal sanctions, nonetheless in practice honored by businesses²⁴⁴.

A. Investigation Power

Although the OFT's power of investigation extend to cartel offences besides specific consumer law violations, I shall focus only on the investigation procedure on consumer law violations. To this end, the underlying principle of OFT in undertaking investigation is to getting the infringement stopped without the need to go to court. To this end, a 14 business days consultation period is in place between the OFT and the alleged violator (the business concerned)²⁴⁵.

Where the OFT is highly in need of an interim measure from the court, the 14 business days consultation period may be shortened to 7 days²⁴⁶. During the consultation period, the business may be willing to enter in to an undertaking with the OFT (by admitting the violation and to rectify it within a given period of time) or the consultation might end in deadlock. If the undertaking is not honored by the business as per his commitment or if the consultation is unavailing, the OFT can seek its relief before the ordinary courts particularly to the High Court or County Court of UK or Court of Session or Sheriff in Scotland²⁴⁷.

It has to bear in mind that the CMA(Competition and Markets Authority)launched in shadow form on 1, October 2013 replaced the existing Competition Commission and OFT and began

²⁴⁴Office of Fair Trading, Enforcement of Consumer Protection Legislation at 16. See also official website of Commission for Markets Authority.

²⁴⁵Id at 23.

²⁴⁶ Id at 24.

²⁴⁷ Office of Fair Trading, Enforcement of Consumer Protection Legislation, at 23.

operating fully on 1 April, 2014 and shall focus on enforcement of consumer law violations with respect to systemic failures in market ²⁴⁸.

B. Power of Litigation or Praying for Relief

When the matter is brought to court, the business may be given the opportunity by the court to enter in to an undertaking in rectifying its alleged violation. If the business is consented to make an undertaking in order to cease the infringement and doesn't keep its words, it will face a contempt of court entailing fine and or imprisonment for up to two years²⁴⁹.

Injunction reliefs can take two forms either prohibitory or affirmative. In the first case, the court orders the business to refraining from doing a certain act. In the case of affirmative injunction, the court orders the business to expel the officer who violates the law and then urges the business to do its own normal business (which is of course legal)²⁵⁰.

C. Power of Adjudication

In this case it has to be clear that, administrative fines can be imposed by the OFT in relation to only violations of competition laws particularly cartels and in matters of consumer credit that have an upper ceiling of 50,000 BP. In the first case, the aggrieved party can lodge his appeal to the CAT (Competition Appeal Tribunal), which can't entertain de novo appeals, however, it is

²⁴⁸Official website of Commission for Markets Authority.

²⁴⁹Office of Fair Trading, Enforcement of Consumer Protection Legislation, at 24.

²⁵⁰ Ibid.

restricted to reviewing the lawfulness and fairness of the OFT's decision²⁵¹. In case of consumer credits, the OFT does have a power to impose administrative penalties or suspend or revoke credit licenses subject to a right of appeal to the administrative tribunal for such matters namely First Tier Tribunal Consumer Credit which follows the same appeal procedure with CAT. The ordinary court only, however, imposes civil penalties in consequence of other consumer law violations²⁵².

D. Criminal Prosecution Power

In the purview of criminal prosecution, the OFT's power is restricted only to cartel offences. As one of the aims of competition law in the EU is to protecting the welfare of consumers, this power of the OFT in safeguarding consumers interest is not relegated. According to the gravity of the offence, OFT may file summary trial before the magistrate court or trial on indictment before a jury. Before the magistrates, a convicted offender may receive a six month term of imprisonment and/or a fine up to the statutory maximum. On conviction of the indictment, an offender may receive a maximum of five years' imprisonment and/or an unlimited fine²⁵³.

4.2.3 The German Case

In Germany, the BMELV-the Ministry of Food and Agriculture is the federal responsible public agency for consumer disputes that is in charge of Consumer Infrastructure Act. There are, however, sector specific federal agencies that discharge supervisory functions. For instance,

²⁵¹ Office of Fair Trading, Enforcement of Consumer Protection Legislation, at 16.

²⁵² Ibid.

²⁵³ Office of Fair Trading, Enforcement of Consumer Protection Legislation, at 18.

consumer rights based on contract law and mercantile law such as unfair competition, copy right, insurance and passengers right are governed by the Federal Ministry of Justice. The Federal Ministry of Economics regulates consumer rights in the field of competition and price policy, telecommunication and energy. General product and equipment safety are regulated by the Federal Labor Ministry. The Federal Ministry of Finance also regulates consumer rights arising from financial and capital market law²⁵⁴.

The idea is that there is no central consumer protection authority in Germany except the aforementioned sector specific federal regulatory agencies. Even the BVL- Federal Office of Consumer Protection and Food Safety is established following the administrative cooperation regulation (Regulation No 2006/2006) of the EU to supervise only cross-border consumer disputes. There are also government funded private regulatory bodies in Germany and matters that are left unregulated by the named federal agencies and private self-regulatory bodies are regulated by the Landers²⁵⁵.

In the realm of private self-regulatory bodies particularly in the financial sector, for instance, Association of German Banks is the best example. It hears complaints lodged by a consumer against a member bank and examines decisions taken by the bank and makes conciliatory proposals that are binding on the bank up to a certain amount, the upper ceiling, however, is revised by the Deutsche Bundes Bank (central bank of the Federal Republic of Germany). Besides, consumer complaints against banks that do not belong to the banking association are entertained by the Deutsche Bundes Bank²⁵⁶.

²⁵⁴ Official website of the BMELV. see also Official Website of the EU, Institutions of consumer policy, at 2-6.

²⁵⁵ Id.

²⁵⁶ Official website of the BMELV. See also Official Website of the EU, Institutions of consumer policy, at 4-6.

There are also municipal arbitration boards in the Landers having an out of court settlement mandate. Settlements reached before the arbitration boards may be compulsory or voluntary depending on the rules of the respective Landers. Should the settlement is compulsory, the arbitrators have the power to issue enforcement order. If the settlement is considered as voluntary as per the rules of the respective Lander, the enforcement is dependent up the will of the trader who has a controversy with the consumer²⁵⁷.

Therefore, we can understand from the foregoing discussion is that in Germany enforcement of consumer protection is carried out by sector specific regulatory bodies, self-regulatory bodies and through municipal arbitration bodies of the respective Landers. The BVL is only confined to enforcement of consumer disputes at the cross-border (EU) level. Hence, the role of public enforcement through administrative agencies is sector specific and enforcement through courts is the prevalent practice²⁵⁸.

4.2.4 The Swedish Case

Let me examine the Swedish case. The Swedish Consumer Agency, which is headed by a Director General, is also Consumer Ombudsman (KO) is responsible for the enforcement of consumer legislation²⁵⁹. The Agency also administer the public funding which goes to consumer organizations that meet the “activity support”, “organizational support” and “Project support” criteria which are prescribed by the government²⁶⁰.

²⁵⁷ Official website of the BMELV. See also Official Website of the EU, Institutions of consumer policy, at 4-6.

²⁵⁸ Id.

²⁵⁹ Weber, *supra* at 548. See also Official website of the EU, Consumer Policy, at 4-6 .

²⁶⁰ Ibid. See also Official website of the EU, Consumer Policy, at 5.

The Agency has not as such investigation power in the strict sense of the term. However, it may arrange a consultation session with a given business where it deems that there is an infringement. If at this stage a commitment is entered by the concerned business and if it is not further honored, it amounts to a violation of a court order entailing of fines. In the OFT case, however, violation of a commitment or an undertaking concluded by a business with the OFT doesn't equate with a violation of a court order; it serves only as an evidence before a court of law to demand an injunctive order²⁶¹.

Further the OK is devoid of power in imposing civil or administrative penalties. Nor does the National Board for Consumer Complaints have such power. The Board has the power to investigate complaints between traders and consumers at the central level (municipal consumer advisers pursuing mediation service at the local level) and recommend a solution to the dispute which has no binding effect though in practice complied by the parties. The power to impose administrative or civil penalties is vested in market courts²⁶².

The KO also is not mandated to prosecute criminal offences related to consumer violations. The KO may represent consumers in civil suits by a procedure called "KO Support" (in a collective suit) when it believes that the matter affects a great number of consumers by making use of the opt-in group action²⁶³.

²⁶¹ Weber, *supra* at 548. See also Official website of the EU, Consumer Policy, at 4-6.

²⁶² Ibid. see also Official website of the EU, Institutions of Consumer Policy, at 6.

²⁶³ Ibid.

What makes different from the KO of Sweden and the BVL of Germany is that the latter is primarily established for the protection of trans-border infringements of consumer laws at the community level following the injunction directive and the administrative cooperation directive. In Sweden, the Ministry of Justice is responsible for consumer policy at the EU-level (in addition to its domestic responsibility)²⁶⁴.

The other significant difference is that in Germany representation in collective suits of consumers is undertaken by consumer organizations (not by the BVL) which are funded by the government unlike the case in the OK (the OFT, however, may carryout representation in collective consumers suits)²⁶⁵.

4.3 The US Approach

4.3.1 General

As I mentioned in Chapter One, the general enforcement approach in the US (not only restricted to consumer matters) is a diffused one in that enforcement mechanisms should be entrusted to the regulator with the best regulatory commands of information to wrong doing and whether the actors with superior command of information are in fact adequately incentivized to get operation that information via-enforcement of the underlying substantive law.

This assertion is sweeping and has been changed through time. Due to the establishment of administrative agencies having enormous powers of consumer protection like the FTC, FDA, and CFPB, there is a strong move in the US in the enforcement of consumer laws through

²⁶⁴ Weber, *supra* at 548. See also Official website of the EU, Consumer Policy, at 4-6.

²⁶⁵Official website of the BMELV. see also Official website of the EU, Institutions of Consumer Policy, at 2.

administrative agencies. Therefore, rather than hastily drawing a conclusion with respect to the enforcement mechanisms which is rapidly changing, it is wise to examine the actual enforcement scenario prevalent in the country.

The US Federal Constitution doesn't expressly grant the Congress to enact legislation on consumer matters. The Congress is now making use of the "proper and necessary" clause of the Constitution (named elastic clause) in order to enact federal legislations on consumer matters. Indeed, this legislative power is filtered by the entrenched *ejusdum generis* (the invoked proper and necessary matter should be similar to the preceding enumerated powers given to the Congress)²⁶⁶.

Once a federal law is enacted, when it becomes in conflict with a state law, the former will trump the latter by the very doctrine of pre-emption which was derived from the judgment of the Supreme Court in the famous case of *Altria Group v Good*²⁶⁷. In this case, the Court employed two yardsticks in upholding the principle of preemption of federal laws. The first one is that the intent of the Congress should be ascertained in that the historic police powers of states shouldn't be superseded by the Federal Act unless that was the clear and manifest intent of the Congress and the second yardstick was that even if there is no apparent clash between the federal law and state laws, the federal law may supersede the state laws if the federal regulatory scheme is so

²⁶⁶ According to Black's law Dictionary(also crafted by Gerald Hill and Katheleen) the Latin term *ejusdum generis* or of the same kind describes the idea that where a law lists specific classes of persons or things and then refers to them in general terms, the general statements only apply to the same kind of persons or things specifically listed.

²⁶⁷ *Altria Group Inc. v Good (USC)*, 501 F.3d of 15 December 2008 available at Official website of Cornell University Law School <http://www.law.cornell.edu/supct/html/07-562.ZO.html>, last update:01/01/2014.

pervasive to occupy the field in that area of law²⁶⁸. As I discussed the enforcement actors at the federal and state level and in the realm of public and private spheres in the second chapter very well, it is better to focus the actual enforcement carried out by the FTC at the federal level as a representative of the US consumer protection enforcement.

4.3.2 Enforcement Roles of the FTC

The FTC is established in 1914 as an independent federal agency (autonomous politically, administratively and financially from the executive) consisting of the Bureau of Competition, the Bureau of Consumer Protection and the Bureau of Economics²⁶⁹. The FTC derives its consumer protection jurisdiction primarily from Section 5(a) of the FTCA which prohibits “unfair or deceptive acts or practices in or affecting commerce”. Briefly, the FTC has investigation, litigation, adjudication, prosecution, and rule-making powers. For our purpose, however, I shall focus only on its power relating to investigation, civil litigation or asking for Relief, adjudication and criminal prosecution. The power of rule making or legislation by delegation is not as such too controversial in the realm of actual enforcement, however it has to be noted that the FTC’s rules are hard laws in the sense that they are binding to the addressees and the OFT’s rules are to the contrary soft laws which have the effect of recommendation to the addressees thereof²⁷⁰.

²⁶⁸ *Altria Group Inc. v Good USC*.

²⁶⁹ Official website of the Federal Trade Commission. See also Adera, *supra* at 46-50.

²⁷⁰ Official website of the Federal Trade Commission. See also Office of Fair Trading, *Enforcement of Consumer Protection*, at 6.

A. Power of Investigation

To begin with, consumers can submit complaints about a particular company on line by using the FTC Complaint Assistant. Other channels, such as blog posts and tweets, can also spark the FTC's interest. The complaints filed by consumers at local Better Business Bureaus are reviewed and sometimes forwarded to the company or to the FTC, or both²⁷¹.

When the FTC suspects that a violation of consumer protection laws may be occurring, it often does some initial research before deciding whether to open an investigation. The information identified in this process usually dictates the types of questions the agency asks the company in an investigation. In some situations, particularly if the FTC believes that there is an imminent threat of significant consumer injury, it can seek immediate relief in court, for example by: filing a complaint for a permanent injunction, filing a motion for a temporary restraining order, requesting an asset freeze, requesting that a temporary receiver be appointed over the defendant or seeking other equitable relief²⁷².

If the FTC does not seek immediate relief, for instance in court to disqualify a person from continuing as a company director or to obtain a banning order from making or selling a given product, it often contacts a target company to request information as part of an investigation. The request, which in most cases remains confidential, can be either: informal (for example, in an access letter) or formal (for example, in a CID (civil investigative demand) or subpoena). An access letter or other informal request for information typically comes from the FTC attorney

²⁷¹ FTC, Investigations operating Manual, 14,(2011)available at http://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch03investigations_0.pdf, last update:01/01/2014.

²⁷² Id at 1-4.

who is leading the investigation. Most access letters make a general statement that the agency is conducting an investigation to determine if the practices violate a statute or regulation without including details about the investigation or alleged violations. The FTC may issue a CID or subpoena if it has concerns that the company may not cooperate or the matter has a higher profile within the FTC²⁷³.

Once a court order is issued by the FTC, its scope is not limited to cease and desist by the business, it may embrace restitution to consumers or imposing administrative fines. Should the consent order be violated, the FTC is entitled to use the courts (whether administrative or ordinary) in order to seek the available remedies. In this case regard, the FTC can ask for injunction (both in administrative tribunal and ordinary courts) or civil penalties only in ordinary courts²⁷⁴.

We can understand from this is that the consent order like the case of OFT is taken as evidence before a court of law and can't be considered as a violation of court order unlike the case of the Swedish KO. What makes different in the case of OFT and FTC is that the former can claim civil penalties before the CAT in matters of competition law violations particularly in case of Cartels and consumer credits, whereas the FTC can only demand civil penalties stemming from consumer law violations before ordinary courts, not from the ALJ.

²⁷³FTC, Investigations operating Manual, at 4-8.see also 15 USCA Section 57b-1(C)(1).

²⁷⁴ Id at 1-4. See also 15 USCA Section 57b-1(C)(1).

B. Power of Litigation or Asking For Reliefs

The FTC may ask for reliefs as I mentioned earlier following the outcome of investigation and particularly if the consent order becomes unavailing. What is very remarkable is that the FTC can only require before the ALJ an injunctive relief and in the Federal Courts, however, the FTC can demand injunctive relief, civil penalties of up to USD 16,000 per violation of the FTC regulations and restitution for victimized consumers. Before the ALJ, the procedure is expedited and governed by the FTC's Rules of Practice; whereas, before filing to the Federal courts, the FTC should consult with the DOJ as the latter is primarily empowered to bring civil and criminal cases on behalf of the US government²⁷⁵.

In this regard, both the OFT and the KO require injunction relief only from ordinary courts unlike the FTC (it can demand from the ALJ as well) and in case of demanding collective damage action (restitution for victimized consumers or disgorgement remedies), the role of OFT and KO is limited as compared to the FTC because they encourage consumer associations to do that. The FTC (in conjunction with law firms) represents victimized consumers for demanding claims of restitution after consultation with the DOJ.

C. Power of Adjudication

Succinctly, adjudication in this context should be taken within the meaning of the administrative adjudication power given to the ALJ which is part of the FTC structure. The ALJ is empowered to order injunctions asked by the FTC staff of the Office of the General Counsel by availing the expedited procedure. Decisions of the ALJ are reviewed by the FTC on *de novo* basis which will

²⁷⁵ Title 15 of the USC, Section 5 of the FTCA.

become final and an aggrieved party can appeal to the Federal Circuit Court and eventually to the Supreme Court of the United States, if the latter chooses to accept the case²⁷⁶.

In this respect, we can understand that CAT of the UK is empowered to matters of competition law violations and its decisions are not reviewable on a de novo basis by the UK courts. Whereas the decision of the ALJ in the FTC are subject to de novo review by the FTC(however once confirmed they are not reviewable on de novo grounds; only on grounds of capriciousness or arbitrariness reviewable by the US Circuit Courts or by the Supreme Court).

D. Power of Criminal Prosecution

In terms of criminal prosecution, the Power of the FTC is very much limited as compared to the OFT.As a matter of general rule, the power to prosecute criminal charges on behalf of the peoples of the USA in general and the government in particular belongs to the DOJ (Department of Justice).The Consumer division of the criminal division will follow up the case before the competent federal court particularly hard core fraud on consumers in the purview of mortgages and telemarketing²⁷⁷.

On this point, the role of the FTC is twofold: the first and the foremost is to provide for sufficient information including in assisting the DOJ of the investigation process for due prosecution. The other role of the FTC is that where the DOJ is unwilling to bring a criminal charge (for lack of

²⁷⁶ Title 15 of USCA, Section 45(1).

²⁷⁷ Id at Sections 45(1) & 54.

sufficient evidence or difference in rule interpretation) and a consensus can't be reached, the DOJ may authorize the FTC to institute a criminal charge on the latter's own cost and peril²⁷⁸.

4.4 The Ethiopia Scenario

4.4.1 General

Since I have devoted to the institutional framework of consumer protection in Ethiopia in chapter 2 by exploring the previous and current legislations in conjunction with the existing federal structure of the country in the ambit of the public sphere and the private arena, my focus shall be the enforcement roles of the forefront federal agency named TCCPA.²⁷⁹

4.4.2 Enforcement Roles of the TCCPA

The TCCPA is devoid of rule making power neither in the form of soft laws nor in hard laws. The power to enact regulation is vested in the Council of Ministers and the Ministry of Trade is empowered to issue directives pursuant to Art.46 of the new Proclamation No 813/2014²⁸⁰.

Pursuant to the newly amendment legislation of the Ethiopian Consumer law (that repealed the break through Proclamation No 685/2010 by virtue of Art.47 (1) of Proclamation No 813/2014), the TCCPA will have investigation, power of litigation or asking for remedies and criminal prosecution in addition to administrative adjudication power vested in it by Art.35 of Proclamation No 685/2010. With this understanding, I shall discuss the named powers separately.

²⁷⁸ Title 15 of USCA, Section 45(1) & 54.

²⁷⁹ Trade Competition & Consumers' Protection Proclamation, Arts. 22(6), 32 & 36.

²⁸⁰ Id at Art. 46.

A. Power of Investigation

The current working manual (that is formulated on the basis of the new amendment proclamation No 813/2014) of the Investigation Directorate classifies the Directorate in two core work processes: collection of evidence and conducting investigation. Experts in the collection of evidence core work process do garnering of information and evidences for alleged violation of consumer laws including receiving complaints. When they obtain information and evidences for alleged violation, they may choose to refer the matter to the investigation core work process for further investigation or they may decide the case to be investigated or rectification measure shall be taken by another specifically designated public agency for the matter at stake which is, however, subject to approval by the Director of Investigation²⁸¹.

The investigation core work process on its side shall carry out further investigation and may refer the case, for administrative or criminal prosecution, to the Prosecution Directorate or further remand the matter to the Collection of Information & Evidences core work process where it thinks that the evidences are insufficient to warrant prosecution or it may close the case where it believes that the allegation is unfounded having secured the prior consent of the Director of Investigation²⁸².

In this regard, we may notice that although the Manual needs development and continuous revision, the Investigation Directorate is not able to make a consultation with the concerned businesses and thus to issue consent order which we have seen in the case of the OFT, KO and in the FTC. Instead, the Directorate is charged with police tasks and investigations of a criminal

²⁸¹ TCCPA, Investigators and Prosecutors working Manual, Addis Ababa , January, 5-7, (2014).

²⁸² Id at 5-7.

nature following the formal rules of the Code of Criminal Procedure²⁸³. Even the power of the Director of Investigation is restricted to opening or closing of the files.

B. Power of Litigation or Asking for remedies

From the forgoing discussion, it is clear that it is the Prosecution Directorate that is empowered to ask for the available remedies in the new proclamation from the administrative tribunal or from the federal courts²⁸⁴. In the purview of administrative remedies, if we carefully read the new Proclamation No 813/2014 in its Art.30 & 31, we can comprehend that the Director General or his delegate of the TCCPA may issue injunctive orders as this power is not exclusively given to the Adjudication Tribunal.

Therefore, the Prosecution Directorate can only ask for injunction order from the Adjudication Tribunal only if the TCCPA has not issued the injunction order before. Further, the Prosecution Directorate is only empowered to ask for injunction relief only from the Adjudication Tribunal and not from the Federal Courts. Further, the Directorate is not able to bring collective actions to victimized consumers neither before the Adjudication Tribunal nor before the Federal Courts²⁸⁵. In such a case, we may say that the Ministry of Justice may represent citizens, in particular women and children who are unable to institute and pursue their civil suits only before the federal courts (and not represent before the Adjudication Tribunal)²⁸⁶.

²⁸³ TCCPA, Investigators and Prosecutors working Manual, at 5-7.

²⁸⁴ Trade Competition & Consumers' Protection Proclamation, Arts. 32 & 36.

²⁸⁵ TCCPA, Investigators and Prosecutors working Manual, at 5-7.

²⁸⁶ The Definition of Powers & Duties of the Federal Democratic Republic of Ethiopia Proclamation, Proclamation No 691/2010, Federal Gazeta, 17th Year No 1, Addis Ababa, 27th October 2010, Art.16(11), available at Official Website of the Ethiopian Legal Brief, <http://chilot.files.wordpress.com/2011/01/691-ae1.pdf>, last update: 09/04/2011.

We can grasp three remarkable points here. The first one is that, unlike the case of the OFT and the KO, the prosecution directorate can demand injunction order from the adjudication tribunal just like the practice in the FTC. What makes the difference with the FTC is that the FTC can make cease and desist order only by way of a prior consent order and injunction relief can also be sought by the FTC from a court of law if it deems appropriate. In the TCCPA, however, injunction order can be made by the Director General or his delegate in the absence of a consent order and injunction relief can only be sought by the Prosecution Directorate from the Adjudication Tribunal.

The Second point, just to reiterate, is that the Prosecution Directorate cannot in the alternative ask for injunction relief from an ordinary court of law which is contrary to the practice of the OFT, KO and the FTC. The third point is that the Prosecution Directorate is devoid of the power to sue collective action on behalf of victimized consumers to the Adjudication Tribunal or to Federal Courts (which is contrary to the practice in the OFT, KO, and the FTC) this makes the consumers to pass through the rigorous requirements of Art.38 of the Code of Civil Procedure in order to bring representative suits either before the administrative tribunal or federal courts unless they are represented by the Ministry of Justice only before the Federal Courts.

C. Power of Adjudication

In terms of administrative adjudication, I can say that the TCCPA adjudication tribunal is empowered to entertain injunction relief, civil claims (like replacement or refund), administrative fines and granting compensation to consumers. In this case, it has to be clear in mind that before the adjudication tribunal claims of injunction and administrative fines should be brought by the Prosecution Directorate. Civil claims or individual or collective claims of compensation should, however, can only be brought by individual parties or consumer associations or cooperative

societies in so far as they meet the requirement of Art.38 of the Code of Civil Procedure²⁸⁷. *Molla Bazezew*, *Zerihun Ayalew* and *Ababu Shimelis* which are discussed in depth in Chapter are notable examples²⁸⁸.

The administrative tribunal follows the procedures prescribed in the Code of Civil Procedure without any reservations or exceptions. The new Proclamation also established an Appellate Adjudication Tribunal (it has not officially started its operation) which will hear appeals on a de novo basis and after that the decision becomes final. An aggrieved party will lodge his appeal to the federal Supreme Court only on grounds of error of law and finally the case may be submitted to the Federal Supreme Court Cassation Division if one can establish a fundamental error of law²⁸⁹.

In case of individual or collective tort actions(which are not tried by the TCCPA adjudication tribunal) , the Federal Court of First Instance shall try the case if the amount in controversy is not more than 500,000ETB (around 25,000USD) and further tried by the Federal High Court will proceed on appeal whose decision is final if confirmed and can only be reviewed by the Federal Supreme Court Cassation Division (by passing the Federal supreme Court) should there be a

²⁸⁷ Trade Competition and Consumers' Protection Proclamation, Arts.32 & 36.see also TCCPA Administrative Tribunal Working Manual Addis Ababa, January,14-32, (2014) .See also The Code of Civil Procedure, Art.38 regulates the situation where by several persons having the "same interest" can sue or be sued by one of their representative either voluntarily or through court authorization.

²⁸⁸ *Molla Bazezew V Brothers Energy Saving Stoves PLC*.See also *Zerihun Ayalew v Yangfan Motors PLC*. Further see *Ababu Shimelis v Glorious PLC*.

²⁸⁹ Trade Competition and Consumers' Protection Proclamation, Arts.32 & 36. TCCPA Administrative Tribunal Working Manual, at 14-32.Regarding the Adjudication Appellate Tribunal, face to face interview with the TCCPA Registrar Ato(Mr) Yibeltal , on September 13, 2014, reveals that the Tribunal's Judges are not still appointed by the Federal Government and a number of Memorandum of Appeals are awaiting them.

fundamental error of law. If the amount in controversy is more than 500,000ETB (around 25,000USD), the case shall first be tried by the Federal High Court and on appeal goes to the Federal Supreme Court whose decision is final if confirmed and can only be reviewed by the Federal Supreme Court if there is a fundamental error of law²⁹⁰.

D. The Power of Criminal Prosecution

By availing its added power, the TCCPA Prosecution Directorate is empowered to institute criminal charges before the Federal courts following Art.37 (1)(b) of the new Proclamation No 813/2014²⁹¹. The criminal acts enumerated in the named proclamation include failure to observe administrative measures, furnishing false information on the material facts of goods or services, applying a pyramid scheme of sale, failing to meet warranty obligations, selling goods which is dangerous to human health and safety, falsifying the country of origin of goods, and hoarding and diverting of goods²⁹².

In the purview of Criminal sanctions, the Trade Practice and Consumers' Protection Proclamation No 685/2010 in its Art.49 (5) states that (apart from anti-trust crimes) the criminal fines that will be imposed by a trader ranges from 50,000 to 100,000 Ethiopian Birr (from 2500 to 5000 USD) and the incarceration may be from 3 years to 7 years. However, the new amendment Proclamation No 813/2014 in its Art.43 (6) reduces the criminal fines from 5,000 to

²⁹⁰ The Federal Courts Proclamation, Proclamation NO 25/1996 Federal Gazette No 2 Year No 13, Addis Ababa, 15th February 1996, Arts. 3, 5 & 9, 14 available at Official Website of the Ethiopian Legal Brief <http://chilot.files.wordpress.com/2011/01/proc-no-25-1996-federal-courts.pdf>, last update: 27/08/2014.

²⁹¹ Trade Competition & Consumers' Protection Proclamation, Arts. 37(1)(b). See also TCCPA, Investigators and Prosecutors working Manual, at 5-7.

²⁹² Id at Art.43.

50,000 Ethiopian Birr (from 500 to 2500 USD) and the incarceration to simple imprisonment²⁹³. By virtue of Art.3 of the Revised Criminal Code (Proc.414/2004) special legislations of criminal character are part of the criminal code²⁹⁴.

In this regard we need to know that according to the Revised Criminal Code criminal fines as a matter of principle ranges from 10 to 10,000 ETB and in case of legal persons it may extend to 500,000 ETB(25,000 USD)²⁹⁵. Simple imprisonment applies to offenders who are not serious danger to the society entailing from 10 days to 3 years as a general rule and it may extend to 5 years where it is expressly provided for in the Special Part of the Code²⁹⁶. Rigorous imprisonment, however, applies to those who are a serious threat to society and it ranges from 1 year to 25 years and it may be capital punishment when expressly provided by the Special Part²⁹⁷. The TCCPA Prosecution Directorate till now has not filed any criminal indictment before the Federal Courts²⁹⁸.

From this we can understand that the TCCPA has similar criminal prosecution power with the OFT, unlike the case of the FTC and KO. However, the OFT's criminal prosecution mandate is limited to offenses of cartel and crimes committed against the financial services. The FTC has only a gap filling criminal prosecution role where it believes that the prosecution is not well pursued by the DOJ and in the KO of Sweden, to the contrary, criminal prosecution is entirely unknown.

²⁹³ Trade Practice and Consumers' Protection Proclamation, Art.49(5). See also Trade Competition & Consumers' Protection Proclamation, Art.43(6).

²⁹⁴ Criminal Code of the Federal Democratic Republic of Ethiopia, Art. 3.

²⁹⁵ Criminal Code of the Federal Democratic Republic of Ethiopia , Art.90(1).

²⁹⁶ Id at Art.106.

²⁹⁷ Id at Art.108.

²⁹⁸ Face to face Interview made with the Registrar of TCCPA.

CONCLUSION & RECOMMENDATIONS

In Chapter one, I have explored the general criteria and approaches of enforcement (public or/and private) in general and Consumer Protection Law in particular in the two major jurisdictions of EU and the US.

With this background, I have also elaborated the Ethiopian situation vividly and thus concluding that consumer law enforcement in Ethiopia may be described as an aggressive public enforcement including awarding of compensation (which may be rarely found in the EU in anti-trust law infringements) apart from granting administrative remedies and imposing administrative fines and private enforcement in attaining compensation predominantly by individual consumers and in very limited situations by representative suit whose content has no counterpart both in the EU and the US. Besides, Private enforcement via consumer associations is restricted only to their members.

Consumer Protection in terms of Legal and Institutional framework was part of the discussion in Chapter Two. To this end, a comparative analysis on the matter in the EU and US has been made. The Ethiopian case with particular focus on the new legal regime was also analyzed. In so doing, the scope of coverage of the new legal regime in conjunction with the enforcement agents in the realm of public and private spheres have been clearly addressed.

Chapter Three addressed the available remedies to Consumers in the realm of both private law and public law. In the realm of private law, specific and general remedies have been treated. Administrative measures and criminal penalties have also been given due attention in the sphere of public law remedies. To render the analysis complete and workable, the prevalent principles, legislations, and case laws of the EU and the US were a subject of critical consideration. The

remedies provided to consumers in the current legal regime of Ethiopia (both in the sphere of private law having specific and general character and in public law) were thoroughly explored together with practical cases decided by the TCCPA Adjudication Tribunal recently in the light of the two major jurisdictions.

Actual enforcement of consumer law protection, at the federal level, which is primarily carried out by the TCCPA-Trade Competition and Consumers' Protection Agency has been devoted to detailed examination in Chapter Four of the thesis. To this end, the TCCPA's power of investigation, power of litigation, power of adjudication and power of criminal prosecution in law and in practice have been treated.

Moreover, the existing enforcement practices in the EU both in cross-border consumer disputes and in domestic controversies (particularly the enforcement mandates of the OFT of UK and the KO of Sweden for better discernment had been explored) and the US (specifically the enforcement mandates of the FTC) were the aim of the Chapter for due comparative study.

Having made a brief recapitulation of the named chapters of the thesis, I shall pinpoint the below mentioned points by way of recommendations there of:

1). Pursuant to Art.2 (4) of the new Trade Competition and Consumers Protection Proclamation No 813/2014 in order for a person to be afforded the protection of consumer law should be a natural person. In Ethiopia, however, there are a number of Micro and Small scale Enterprises having a clear policy support from the government(which is enshrined in the 5 years Growth and Transformation Plan valid from 2010-2014) which possess a key role in the country's economic growth. Besides, in the previously repealed Proclamation No 329/2003, nonetheless, Art.2 (5)

had conferred the protection to legal persons particularly SME apart from granting protection to natural persons.

Therefore, the new legislation has no justifiable rationale in excluding micro and small scale enterprises. In so far as these entities entered in to a legal transaction for the purpose of securing personal consumption, the law should give them a shield of protection as what we have seen in Belgium, Spain and Germany.

Professor Stuyck, an EU competition law practitioner, in his contribution to the *liber amicorum* of Hans Micklitz has argued that even though providing favorable conditions for setting up SME is a legitimate policy aim, protecting them at the end weaken their resistance against exploitation from large businesses²⁹⁹. However, his argument is untenable for two reasons. First, though his argument is confined to the EU situation, he has not reached a clear conclusion that the existing EU consumer laws have adequately safeguarded the very interests of SME .

The second and the most important reason is that in the current Ethiopian situation, due to the Government's policy commitment in providing strong support to SME, we do obtain a clear legal frame work that evidences the government's special attention. For instance, the federal public procurement laws grant preference margin to SME. Due to this preferential right, SME are given a preference margin of 3% and 15% when they compete with local suppliers and international bidders accordingly. Besides, as regards bid security, performance bond and advance payment guarantee obligations, SME are only obliged to furnish a letter of guarantee from the government body that organizes and oversees them. However, other contractors or suppliers are supposed to present a bid security of 2% of the contract price in the form of bank

²⁹⁹ Stuyck supra note 73 at 368-370.

guarantee or insurance bond, 10% of the entire contract price as a performance bond in the form of bank guarantee and an amount equal to the advance payment (that doesn't exceed 30% of the contract price in any case) by way of bank guarantee.³⁰⁰

Therefore, providing favorable conditions for setting up SME should be translated to incorporate preferential treatments that are backed by policy justifications beyond turning down obstacles so as to make the starting point of the race the same. So long as SME, in Ethiopia, are practically granted preferential rights when they are doing businesses, there is no strong justification that precludes them from obtaining protection while they appear as consumers, a situation that inevitably demands more protection. Styuck's fear about preferential treatment in that it may weaken SME's resistance towards large businesses is not justifiable so far as the treatment is granted with a view to empower SME in order to make a fair competition with large businesses and has an end date when this aim is achieved. Hence, Styuck's argument (even it is questionable at the EU level) may not be endorsed in Ethiopia.

2). Even though the TCCPA is established as an autonomous administrative agency, it's accountable to the Ministry of Trade by virtue of Art.27(2) of Proclamation No 813/2014. In this regard we should understand that though the agency may be administratively autonomous, in terms of politics and finance the Ministry of Trade is the ultimate Monitor given the one party dominance and parliamentary form of government in Ethiopia.

³⁰⁰ The Ethiopian Federal Government procurement and property administration proclamation, Procl.No 649/2009, 15th Year N0 60, Addis Ababa, 9th September 2009, Art.25(2) available at Official website of the Ethiopian Legal brief, <http://chilot.files.wordpress.com/2011/01/procurement.pdf>, lastupdate:09/04/2011.see also Ministry of Finance and Economic Development, Federal public procurement directive, June (2010), Art.16.20.5, available at official websiteoftheFederalPublicProcurementandPropertyAdministrationAgency, http://www.ppa.gov.et/index.php?option=com_docman&Itemid=26&lang=en, last update, 09/10/2014.

In the United States, there are around 28 independent Federal Administrative Agencies, which may be established in the form of commission, bureau or board, such as the FTC, CFTC, SEC, EPA, CPSC, CFPB and NLRB having administrative, political and financial autonomy and are directly accountable to the Congress (not to the office of the President who is the chief executive) in order to fully accomplish their envisioned mandate. Therefore, these administrative agencies have no connection with the pertinent government departments nor with the president.

One may argue that the US can't be a bench mark for the proper functioning of administrative functions by citing the UK case. In the UK, there are two situations that one can observe: in the first situation we may obtain non-ministerial or non-departmental government bodies like the OFT(recently renamed as Competition and Markets Authority), Postal Service Commission, and Food Standards Agency which are independent in terms of administration, finance and politics and there are also administrative agencies otherwise dubbed as “next-Thatcher agencies” such as the Office of Attorney General and the Office of Treasury that are autonomous in terms of administration and finance from government ministries namely the Ministry of Justice and Ministry of finance but they are politically accountable to the Office of the Crown.

Thus, even what we have seen in the UK is not existent in Ethiopia. Put otherwise, even if the TCCPA is not independent in terms of finance and politics from the Ministry of Trade unlike the case in the OFT, its autonomy is only limited to administration which is lesser protection than next-Thatcher agencies do.

Therefore, my idea is that in order to render an effective and efficient consumer law protection by the TCCPA in Ethiopia, given the legal, economic and political setting of the country, the office should embrace, apart from its administrative autonomy, financial and political

independence from the Ministry of Trade if not ardent to employ the US model as the best practice, it may make use of the UK approach. Even opting for the next-Thatcher agencies model of the UK may not be workable in Ethiopia as it demands multi party system to mitigate the undue political interference thereof.

3). The Private sector had representation in the Trade Investigation Commission in the former Trade Practices Proclamation No 329/2003 by virtue of Art.13(1). However, neither the private sector nor consumer protection associations are devoid of any advisory role or stake holders involvement in the new proclamation No 813/2014. As per the clear language of the GTP, the private sector and non-governmental organizations are believed to be the key actors in the full success of the Growth and Transformation Plan. Therefore, *a fortiori* the new proclamation should be in perfect congruence with the GTP policy rationale than what was incorporated under the obsolete Proclamation No 329/2003.

4). In the Ethiopian case, the very disappointing part is that the newly promulgated Proclamation No 813/2014 which is aimed towards more protection to consumers is absent of the remedy concerning the right of withdrawal to consumers given the highly pervasive informal business transaction in the country and particularly the high presence of door-to-door transactions in many places.

As I mentioned in Chapter 3 the right of withdrawal is a legal mechanism that ensures the consumer's free will, well considered and informed. It gives the consumer the possibility, without giving any reasons and without incurring any penalty, of no longer being bound by a

contact in to which he has entered in to³⁰¹. Briefly, it is a universally recognized right that ensures contractual justice.

The EU minimum harmonization directives lay down at least 14 days that may be elongated by member states or in the US the FTC rules stipulate 3 days cooling-off period subject to prolongation by States. Therefore, in the absence such remedy, the protection accorded to consumers will be meager.

5). Even though the choice is given to the consumer (like the EU approach) in case where the specific remedies of replacement or refund are prayed by same in Ethiopia following Proclamation No 813/2014, there may be times where by replacement or refund may be disproportionate or unreasonable to the trader with out, however, jeopardizing the very interest of the consumer. This was clearly seen in the *Molla Bazezew* case in which the Adjudication Tribunal granted refund of the price of the energy saving stove proved defective by the plaintiff without further inquiry of repair or replacement. Therefore, the Adjudication Tribunal should apply the remedies according to their practical relevance and further ensure that the remedies attain security of commerce as envisioned by the Federal legislature rather than hastily grant the consumer refund of the contract price thereof.

6). The defect observed from the new proclamation No 814/2014, in its Art.20, is that fixing 15 days period of demand against the seller on defects occurred on goods or services as is reckoned from the date of purchase may be impractical. This is just because the provision cross refers the application of legal or contractual warranties in the contract of sale of corporal chattels so that unless and until the consumer was in position to examine the goods or services purchased from the seller and thus the defect was revealed by the results of the examination, the seller wouldn't not be successful in invoking this period as a statue of limitation in a consumer litigation.

³⁰¹ Mickltiz & et.al , supra at 239.

This defense was rejected by way of preliminary ruling in the *Zerihun Ayalew's* case even if the defendant prevailed in the merit due to the fact that the contractual warranty period was 24 months.

Therefore, the consumer law should at least maintain the protection accorded to ordinary buyers in the Civil Code. Ethiopia can learn from the EU in this particular matter. In the EU context, subject to member states right to introduce more favorable protection, the period of limitation shall not be lower than 2 years as from the time of delivery and even shall not be lower than 1 year in the case of second-hand goods³⁰².

7) The other flaw easily seen from the law is that the remedy of repair is not incorporated distinctly from the remedy of replacement as these concepts regulate different matters when we look at the comparative analysis that I have made. The Adjudication Tribunal tried, nonetheless, to accept the remedy of repair as one of consumers' relief in the *Ababu Shimelis* case though the named consumer didn't prove with preponderance that the purchased item (SONY/LCD) was defective due to other than power fluctuation or insects. Therefore, in order to secure legitimacy and legal certainty, the legislature should incorporate the remedy of repair vividly rather than leaving the unfettered discretion to the TCCPA.

8). In the *Molla Bazezew* case, it has been clear that the Adjudication Tribunal granted refund of the price of the energy saving stove proved defective by the plaintiff without further inquiry of repair or replacement. The Tribunal didn't address, however, whether normal wear and tear or depreciation should be taken in to account or not. This will be a hurdle during the execution proceedings.

In such a case, I believe with vehemence that the US approach is tenable as refund is considered as the actual price less reasonable depreciation based on actual use and thus pursues security of commerce and social justice. Though the TCCPA Adjudication Tribunal has decided 3 cases at this moment, it has to incorporate entrenched legal principles that serve security of commerce and social justice which are acceptable by the Ethiopian federal legislator.

³⁰²Directive of the European Parliament and the Council on certain aspects of the sale of consumer goods and associated guarantees, Art.5(1)&Art.7(1).

9). Arts. 14(5) and 20(3) of the new Proclamation No 813/2014 give a right to the consumer to lodge a claim of damages or compensation to the Federal Trade Competition and Consumers' Protection Authority where he suffers damage because of transaction in goods or services or due to failure of the seller to perform his obligation of replacement or refund.

The Federal Trade Competition and Consumers' Protection Adjudication Tribunal, however, in the *Molla Bazezew* case rejected the relief of compensation incurred for installing and proper use of the stove asked by the plaintiff arising from the defective energy saving stove on the ground that such expenses have no connection with the proved defect. As it is ascertained, the disputed energy saving stove requires additional costs that should be borne by the buyer for its proper usage.

To this end, if the appliance or the energy saving stove is inoperative, the cost incurred by the consumer will be unnecessary unless the seller make the appliance workable. In the case at stake, the seller failed to render the appliance workable and thus the compensation claim filed by the consumer was tenable although its amount might be cautiously assessed. In effect, the Adjudication Tribunal misconstrued the clear message of the provision to the contrary.

Hence, in awarding compensatory damages, the Adjudication Tribunal should accurately assess the notion of present and future material damage that is enshrined in the Ethiopian law of obligations by taking in to consideration occurrence of loss(*damnum emergens*) and loss of profit(*lucrum cessans*) .

10). The TCCPA is devoid of rule making power neither in the form of soft laws (as in the case of the OFT) nor in hard laws (as in the case of the FTC). The power to enact regulation is vested in the Council of Ministers and the Ministry of Trade is empowered to issue directives pursuant to Art.46 of the new Proclamation No 813/2014.

Particularly, this lack of power makes the TCCPA to wait the issuance of directives by the Ministry of Trade in case where there needs full elaboration of terms and concepts following the legal framework envisaged in the pertinent proclamation and regulations. For instance, the problem raised in the recommendation no.8 regarding the practical effect of refund may be easily addressed by the implementation directive of the named proclamation.

As the directives should be in harmony with the very proclamation and regulation, the Federal Legislator has no convincing cause in limiting the power of the TCCPA to other enforcement powers like the powers of investigation, litigation, adjudication and criminal prosecution which are however highly sensitive.

The reality on the ground further strengthens this paradox. To cite a practical example, the Ethiopian Commodity Exchange Authority which is a federal administrative agency that ensures effective, efficient, reliable and transparent market in Ethiopia is bestowed to issue directives pursuant to Art. 34(2) of Proclamation No 551/2007. Therefore, the TCCPA should have the power to issue directives for the proper implementation of the proclamation in order to make its enforcement mandate more effective and efficient.

11). The new Proclamation No 813/2014 coupled with the Investigators and Prosecutors Manual of the TCCPA which is framed following the letter and spirit of the proclamation don not grant to the Investigation Directorate the power to make a consultation with the concerned businesses and thus to issue consent order which we have seen in the case of the OFT, KO and in the FTC. Instead, the Directorate is charged with mere police tasks and investigations of a criminal nature following the formal rules of the Code of Criminal Procedure. Even the power of the Director of Investigation is restricted to opening or closing of the files.

At this juncture, I am not arguing that the power to issue a consent order should be necessarily given to the Investigation Directorate. It may be devolved to the Prosecution Directorate. However, the pressing point is that in order to render expedited and cost effective tasks, the TCCPA as an administrative agency should be able to issue a consent order and thus to make an undertaking with businesses. Failing this, the matter may be submitted to the TCCPA if there is an administrative violation or the case may be submitted to Federal courts should there be commission or omission of a criminal act.

12). In the purview of injunction relief, if we carefully read the new Proclamation No 813/2014 in its Art.30 & 31, we can comprehend that the Director General or his delegate of the TCCPA may issue injunctive orders as this power is not exclusively given to the Adjudication Tribunal. Therefore, we can conclude that the Prosecution Directorate can only ask for injunction order

from the Adjudication Tribunal only if the TCCPA has not issued the injunction order before hand.

In this regard two things should need due attention: first the law should make clear the delineation of power between the TCCPA director general or his delegate on the one hand and the Adjudication Tribunal on the other hand. Meaning, either the Adjudication Tribunal should be given appellate jurisdiction after the junction order is issued by the TCCPA director general or his delegate or the Tribunal should be the sole authority to issue injunction relief.

Second, even though the TCCPA Adjudication Tribunal is empowered to issue injunction order unlike the OFT and KO(in those cases only ordinary courts are authorized to issue injunction orders), in the Ethiopian case ordinary courts are precluded from issuing injunction order as per the clear message of the new Proclamation No 813/2014. So long as the TCCPA adjudication tribunal is authorized to issue injunction order, there is no just cause to prohibit ordinary courts from doing same. In this regard, the FTC's experience should be heeded. The FTC may ask for injunction relief either from the ALJ or from ordinary courts as it deems appropriate.

13). The Prosecution Directorate of the TCCPA is not able to bring collective actions to victimized consumers neither before the Adjudication Tribunal nor before the Federal Courts (which is contrary to the practice in the OFT, KO, and the FTC).

In such a case, one may argue that the Ministry of Justice may represent citizens, in particular women and children who are unable to institute and pursue their civil suits only before the federal courts (and not represent before the Adjudication Tribunal). This assertion, however, is not a panacea to the hardships sustained by consumers and particularly it does not give an answer to the representation issue before the Adjudication Tribunal in case of civil claims (replacement or refund) or claims of compensatory damages.

Therefore, lack of collective representation power by the Prosecution Directorate urges consumers to pass through the rigorous requirements of representative suit that is stipulated

under Art.38 of the Code of Civil Procedure in order to prove same interest in the specific cause of action. This problem is even exacerbated by lack of standing of consumer associations representing consumers other than their members. Hence, the named power should be given to the Prosecution Directorate to realize a robust and workable enforcement of consumer protection law in the today's Ethiopia.

14). A careful reading of Arts.32 and 36 of the new Trade Competition & Consumers' Protection Proclamation No 813/2014 together with Investigators and Prosecutors Working Manual of the TCCPA reveal that before the adjudication tribunal claims of injunction and administrative fines should be brought by the Prosecution Directorate.

The Adjudication Tribunal, however, entertains claims of injunction reliefs prayed for by individual parties. This may be easily gathered from *Zerihun Ayalew's* case though the plaintiff's permanent injunction petition is rejected due to absence of proving with preponderance that the purchased vehicle was defective.

Hence, individual parties lack standing to ask for injunction orders as per the clear language of the law so that the Adjudication Tribunal should apply the law rather than going a foul with what the law says.

15).The new proclamation No 813/2014 by virtue of its Art.33 has established an Appellate Adjudication Tribunal which will hear appeals on a de novo basis and after that the decision becomes final. An aggrieved party will lodge his appeal to the federal Supreme Court only on grounds of error of law and finally the case may be submitted to the Federal Supreme Court Cassation Division if one can establish a fundamental error of law.

The very point, however, is that still now the Appellate Adjudication Tribunal has not started its operation. Consequently, the three consumer dispute cases which are so far decided by the

Adjudication Tribunal are waiting hearing of the memorandum of appeal before the office of the Registrar. Therefore, proper enforcement of the law includes hearing the grievance of consumers by way of appeal as is vested in the law in due time so that the enforcement framework should yield expedited and effective service thereof.

16).Following its added power as per Art.37 (1)(b) of the new Proclamation No 813/2014, the TCCPA Prosecution Directorate is empowered to institute criminal charges (without any conditions and restrictions unlike the cases in the OFT and FTC) before the Federal courts.

In the purview of Criminal sanctions, the repealed Trade Practice and Consumers' Protection Proclamation No 685/2010 in its Art.49 (5) states that (apart from anti-trust crimes) the criminal fines that will be imposed by a trader ranges from 50,000 to 100,000 Ethiopian Birr. The new amendment Proclamation No 813/2014, nonetheless, in its Art.43 (6) reduces the criminal fines from 5,000 to 50,000 Ethiopian Birr (from 500 to 2500 USD).

In this regard we need to know that according to the Revised Criminal Code criminal fines as a matter of principle ranges from 10 to 10,000 ETB and in case of legal persons it may extend to 500,000 ETB(25,000 USD).

As in case of consumer disputes the sellers are practically legal persons in Ethiopia (whether they be sole proprietors having unlimited liability or private limited or share companies having limited liability), the upper ceiling of the criminal fines indicated in the new proclamation is one tenth of the criminal fines set out in the general part of the criminal code. Given the strong interest in protecting consumers proclaimed by the Ethiopian Government, the amount of fines stipulated in the new proclamation is not a perfect reflection of the Government's commitment and thus opens the door to calculated criminals in transgressing the law.

Further, when we carefully observe the criminal fines in the ambit of competition rules particularly devoted to agricultural commodities in Arts.27-29 of the Ethiopian Commodity Exchange Authority establishing Proclamation No 551/2007, it ranges from 200,000 ETB (10,000 USD) to 1,000,000 ETB(50,000 USD) which is 5 to 20 times higher than what is stipulated under Art.43(6) of Proclamation No 813/2014. Hence, due to these practical justifications, the criminal fines that are laid down in the current consumer law of Ethiopia, at the federal level, should be able to serve one of the major aims of the Ethiopian Criminal law, i.e deterrence(whether general or particular) that is enshrined under Art.1 of the Revised Criminal Code of 1996.

Should the aforementioned recommendations of mine are incorporated in the Enforcement framework of consumers' protection law in Ethiopia, we may realize more viable and robust enforcement than we are currently pursuing.

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