



**ADDIS ABABA UNIVERSITY**  
**SCHOOL OF GRADUATE STUDIES**  
**SCHOOL OF LAW**

**Regulating E-Commerce in Ethiopia: Lessons from the Rules of Ethiopian  
Commodity Exchange**

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**By: Senait WondafrashMulugeta**

**May, 2015**

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**A Thesis submitted to Addis Ababa University, the school of Graduate  
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**Advisor: Solomon Abay (D/r)**

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## **Abstract**

In a very short time span, e-commerce has emerged to claim a major share of the business and economic headlines. It has the potential to radically alter existing economic and social structures and arrangements. As a result, most governments are taking an active role in determining the regulatory environment surrounding the implementation and development of e-commerce. In Ethiopia, the existing laws which regulate commercial transaction were enacted before cyber-world and hence, they are not capable of facilitating e-transactions. Hence, The Federal Republic of Ethiopia Ministry of communication and information Technology has prepared a draft e-commerce law with a view to solve the hurdles the existing laws create for the development of e-commerce within the country.

On the other hand, ECX has a rule that regulate e-commerce which is conducted within the institution. Hence, the main purpose of this paper is to examine this rule of the exchange to ascertain the sufficiency of the rule to regulate e-commerce with a view to draw an experience for the regulation of e-commerce in Ethiopia.

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## **Acronyms**

B2B- Business to Business

B2C- Business to Customer

B2G- Business to Government

C2C- Customer to Customer

ECX- Ethiopian Commodity Exchange

EDI- Electronic Data Interchange

EFT- Electronic Funds Transfer

GTC- Good till cancel

GTD- Good till date

ICT- Information and Communication Technology

MSITS - Manual on Statistics of International Trade in Services

NCA- national certifications agency

OECD- Organization for Economic Cooperation and Development

UNCTAD- United Nations Conference on Trade and Development

UNICTRAL- United Nations Commission on International Trade Law

# CHAPTER ONE

## THE RESEARCH PROPOSAL

### 1.1 BACKGROUND OF THE STUDY

E-commerce is relatively a new concept. Though different people define the term e-commerce in different ways, it can simply be defined as buying and selling of products using internet and the worldwide web.

With the rapid expansion and development of the Internet, the way customer shop and commercial law operates has changed and hence, more and more business is done online with the use of the World Wide Web.<sup>1</sup> Though it is difficult to pinpoint when e-commerce has begun, the growth of e-commerce is largely associated with the development of the internet for commercial use. The internet has opened to commercial use in 1991 and it gain popularity among the general public in 1994 and by 2000 a great number of business companies in the United States and Western Europe represented their services on the World Wide Web.<sup>2</sup>

A key idea behind e-commerce is the ability to take orders and receive payments through an electronic storefront.<sup>3</sup> Hence, e-commerce cuts through boundaries such as time and geography to put business owners and customers into virtual contact with one another.<sup>4</sup> From the business owner's perspective, e-commerce provides a way to instantly satisfy demand for products, services, and information of each customer individually.<sup>5</sup> From the customer's perspective, e-commerce offers convenience, variety, cost savings, and anonymity.<sup>6</sup> Ultimately, e-commerce shifts the power from the merchant to the consumer and also provides a way for the business to connect its customers, vendors, suppliers and employees

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<sup>1</sup>Global E-commerce Regulation,( <http://e-commerce.hostip.info/pages/513/>) last visited on 02/09/2014

<sup>2</sup>A. Ernest A., L.Capozzoli, K.Thomas , Electronic Commerce: A Conceptual Framework([sbaer.uca.edu/research/swma/2000/06.pdf](http://sbaer.uca.edu/research/swma/2000/06.pdf))last visited on 13/10/2014) last visited on 13/10/2014

<sup>3</sup>J. Kenneth, Regulating E-commerce Using XML ([www.cs.um.edu.mt/-CSaw04/proceeding/13.pdf](http://www.cs.um.edu.mt/-CSaw04/proceeding/13.pdf)) last visited on 12/09/2014

<sup>4</sup> Ibid

<sup>5</sup> Ibid

<sup>6</sup> Ibid

all over the world.<sup>7</sup> The business, as such, is now capable of reaching an finite number of customers over the Web, seeking out potential markets that were once outside its traditional business boundaries.<sup>8</sup>

Generally, e-commerce is about openness, connectivity, and integration between businesses and customers. Hence, it helps in overcoming geographical limitations, gaining new customers with search engine visibility, reduction of cost, eliminating travel time and cost, creating targeted communication and in providing comparison shopping.

Thus, because of its importance some federal, state and regional governments encourage the adoption of electronic commerce by enacting and enabling legislation.<sup>9</sup>The legislative lacunae in this field has been corrected in the process, which has had at least a few repercussions since a potential buyer can have more confidence in the online trading act.<sup>10</sup> Yet, the reticence regarding the methods of securing the commercial act is still present.<sup>11</sup>

In Ethiopia, e-commerce is at early stage of development. However due to globalization and the opportunities available for its development, it will not be far e-commerce to influence the way business is done in Ethiopia. The primary task for the development of e-commerce in Ethiopia is developing a framework for regulating e-commerce in a way it boosts consumers' confidence and in a way it creates conducive environment for the application of e-commerce. This is mainly because, the existing laws which may be applicable to e-commerce do not address some of the issues involved in e-commerce. Hence, the country has enacted a draft e-commerce law with a view to solve the problems of the existing laws create for the application of e-commerce.

Ethiopian Commodity Exchange(hereinafter it may be referred as the exchange) has its own internal rule on the manner and operation of contracts in relation to commodity exchanges. Contract shall mean and include all types of contracts in commodities commenced by the

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<sup>7</sup> Ibid

<sup>8</sup> T. Buford, What Exactly is E-commerce? and How Big is E-commerce?,(<http://www.webtomorrow.com/ecommer1.htm>) last visited on 12/09/2014

<sup>9</sup>M. Ali Nassir, Legal Issues Involved In E-commerce, ([ubiquity.acm.org/ article.cfm id=985607](http://ubiquity.acm.org/article.cfm?id=985607)) last visited on 09/09/2013

<sup>10</sup> V. Silvu, The Premises and The Evolution of Electronic commerce,([http://www.scientificpapers.org/wpcontent/files/1121\\_The\\_premises\\_and\\_the\\_evolution\\_of\\_electronic\\_commerce.pdf](http://www.scientificpapers.org/wpcontent/files/1121_The_premises_and_the_evolution_of_electronic_commerce.pdf)) last visited on 25/09/2014

<sup>11</sup> Ibid

Board of the Exchange and specifically approved by the Authority for trading on the exchange.<sup>12</sup> The rule maintains that members of the exchange shall execute transactions only in such contracts as specified by the Board of Directors and approved by the authority.<sup>13</sup> Further, the rule also holds an issue of trade card. Members of the exchange shall issue trade cards for each transaction done by them for their clients on the exchange trading floor. Such Order Tickets shall be issued strictly, as the format prescribed by the exchange.<sup>14</sup>

E-commerce will be more relevant in the future as to the nature of transaction which is tried in some respects of ECX's activities. For instance, it is worthwhile to consider the following provisions from ECX's bylaws on the application of direct specialty trade.

Producers of specialty commodity entitled under specific provision of relevant laws to engage in direct export may engage with international buyers through the Direct Specialty Trade facility of the Exchange. The Direct Specialty Trade facility is not intended to execute an actual international sales contract between producer and international buyer, but only to facilitate the process of price discovery and market coordination. The international sales contract shall be executed directly between the producer and the international buyer, after the conclusion of the Direct Specialty Trade bidding session conducted by the Exchange.<sup>15</sup>

Hence, ECX has enacted a law which regulates e-commerce. Therefore, the main purpose of this paper is showing how e-commerce should be regulated in Ethiopia by taking in to consideration the experience of ECX.

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<sup>12</sup>Revised Rules of the Ethiopia Commodity Exchange, 2010, Art. 7.1, No.5/2010, as amended, Revised Rules of the Ethiopia Commodity Exchange No.4/2010

<sup>13</sup> Id, Art. 7.3

<sup>14</sup> Id, Art. 7.8

<sup>15</sup> Id, Art. 5.6

## **1.2 STATEMENT OF THE PROBLEM**

E-commerce is widely considered as the buying and selling of products over the internet, but any transaction that is completed solely through electronic measures can be considered as e-commerce.

E-commerce is perceived as an important element of most developed economy.<sup>16</sup> As a result, most governments are taking an active role in determining the regulatory environment surrounding the implementation and development of e-commerce.<sup>17</sup>

In order to enjoy the benefit of conducting business through an electronic medium or e-commerce it should be encouraged using different mechanisms. One and the most important means of encouraging the development of e-commerce is setting regulatory framework for e-commerce since e-commerce is a relatively new concept and the existing laws do not accommodate some of the issues involved in e-commerce. In Ethiopia, the law which regulates e-commerce is only at a draft stage. On the other hand, in the country, ECX has a rule for the regulation of e-commerce on commodity market.

## **1.3 OBJECTIVE OF THE STUDY**

### **1.3.1 GENERAL OBJECTIVE**

E-commerce is an important element for fostering business. Taking into account the importance of e-commerce, the general objective of this paper is that to analyze the rule of ECX which regulates e-commerce with a view to show how e-commerce should be regulated in Ethiopia.

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<sup>16</sup>Ian Hosein, A. Edgar, "The Regulation of Electronic Commerce: Learning from the UK's RIP Act", Journal of Strategic Information System, Vol. 11(2002) p.5

<sup>17</sup>Ibid

### **1.3.2 SPECIFIC OBJECTIVES**

The Specific Objectives of the study are the following.

- To define and explain e-commerce
- To identify issues involved in e-commerce
- To identify the rationale for regulating e-commerce
- To identify the areas of e-commerce which should be regulated
- To indicate possible mechanisms of regulating e-commerce
- To analyze the rule of ECX regulating e-commerce in order to show its sufficiency for the regulation of e-commerce
- Taking into account the experience of ECX, indicating which issues should be incorporated in the regulation of e-commerce in Ethiopia

### **1.4 RESEARCH QUESTIONS**

This paper tries to answer the following major research questions:

- i. What is the concept of e-commerce?
- ii. What is the rationale for regulating e-commerce?
- iii. Which areas of e-commerce are subject to regulation?
- iv. What are the main issues involved in regulation of e-commerce?
- v. What are the mechanisms for regulating e-commerce?
- vi. To what extent the rule of ECX regulating e-commerce is sufficient for the regulation of e-commerce? and
- vii. What issues should be addressed for the proper regulation of e-commerce in Ethiopia?

## **1.5 SIGNIFICANCE OF THE STUDY**

E-commerce is important in fostering business activities and as a result, it has a great impact on the economy as a whole. Hence, the government has to contribute its role for the development of e-commerce. The most important thing, which should be done on the side of the government to encourage e-commerce, is dealing with its regulation aspect. Hence, the government is expected to create conducive environment to foster its development by designing a regulatory framework.

Therefore, at the end of the study government and other stake holders able to understand the importance of regulating e-commerce. Furthermore, they can observe from the experience of ECX which issues and in what way they should be addressed for the proper regulation of e-commerce in Ethiopia. Generally, the study has significance in designing regulatory e-commerce framework in Ethiopia.

## **1.6 METHODOLOGY**

The study will use both primary and secondary data. Thus, both domestic and the various nations' laws will be the main sources of the research. Thus, this study is also depends on interviews with necessary persons and organs and observations in relation to ECX acts as to e-commerce practices for the facilitation of commodity market in Ethiopia. Furthermore, internet and library works are going to be employed in the research process.

This study will analyze secondary sources such as books, articles, documents, internet sources and etc. in order to have a clear picture about e-commerce, issues involved in e-commerce, mechanisms of regulating e-commerce. Thus, the experience ECX on regulating e-commerce and what the regulatory e-commerce framework should look like in as per the existence legal landscape for the future of country's e-commerce regulation will be studied.

## **1.7 SCOPE OF THE STUDY**

This study aimed at designing e-commerce regulation in Ethiopia. For this purpose, the study tries to examine the experience of ECX on regulating e-commerce. Though the study tries to consider some general issues related to e-commerce and its regulation, it is limited to the regulation of e-commerce in ECX and Ethiopia. Hence, the study only takes the experience of ECX in order to take a lesson for the regulation of e-commerce in Ethiopia. .

## **1.8 ORGANIZATION OF THE STUDY**

The main purpose of this study is to analyze the experience ECX on regulating e-commerce with a view to draw regulatory e-commerce framework in Ethiopia. However, some introductory concepts and other issues related with regulation of e-commerce will be the concerns of this paper. Concededly, the paper will have five chapters. As a prelude to the study, chapter one introduces the background of the study, statement of the problem, objective, significance of the study, research methods, scope and limitation of the study.

Chapter two will provide a general overview on e-commerce and its application. Under this chapter, the following points will be the main issues. What e-commerce means, its features, categorization, stages involved in it, the prospects and challenges for its application. In addition, this chapter will deal the area of e-commerce which is the subject of regulation and the issues that can be raised in dealing with e-commerce regulation. Chapter three will explore the experience of ECX in regulating e-commerce. In this chapter, an attempt will be made to assess how ECX is treating e-commerce as per the existing scenario in Ethiopia. This part of the study goes on to pin point what experience can be taken from ECX in regulating e-commerce for the purpose of designing e-commerce regulatory framework in Ethiopia. Chapter four of the study deals about what regulatory e-commerce framework in Ethiopia should look like. This chapter will review the existing laws of Ethiopia that have implication on e-commerce. Moreover it tries to indicate the challenges and prospects of designing regulatory framework in Ethiopia. Finally, the main parts of the study will wind by providing a section of conclusion and recommendations.

## Chapter Two

### Fundamentals and Regulatory Aspects of E-commerce

#### 2.1 Introduction: The Mainstreaming of E-commerce

Internet and E-commerce had followed, inevitably, a similar road since these concepts cannot be mutually excluded one from the other one.<sup>18</sup> Technology juggernauts behind e-commerce are the Internet and the World Wide Web, which appears in the late 1960s to connect a small number of mainframe computers and their users.<sup>19</sup>

The Internet has since grown into the world's largest network, connecting over 500 million computers worldwide.<sup>20</sup> The Internet links businesses, educational institutions, government agencies, and individuals together, and provides users with services such as e-mail, document transfer, newsgroups, shopping, research, instant messaging, music, videos, and news.<sup>21</sup>

Nevertheless, it is difficult to pinpoint just when e-commerce began in which there were several precursors to e-commerce.<sup>22</sup> This is mainly because the growth of e-commerce is taking place so rapidly and in so many directions that even experts are at a loss to find any established business models for comparison.<sup>23</sup> People have compared the rise of e-commerce to the radio industry in 1920s, television in the 1950s, video players in the 1970s, and personal computers in the 1980s.<sup>24</sup> While these technologies had a significant impact, they pale in comparison to the impact that e-commerce may eventually have on business.<sup>25</sup>

In the late 1970s, a pharmaceutical firm named Baxter Healthcare initiated a primitive form of B2B e-commerce by using a telephone-based modem that permitted hospitals to reorder supplies from Baxter.<sup>26</sup> This system was later expanded during the 1980s into a PC-based remote order entry system and was widely copied throughout the United

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<sup>18</sup> V. Silviu, Cited above at note 10

<sup>19</sup> Introduction to E-commerce (<http://www.pearsonhighered.com/samplechapter/0131735160.pdf>) last visited on 23/12/2014uuu

<sup>20</sup> Ibid

<sup>21</sup> Ibid

<sup>22</sup> Ibid

<sup>23</sup> Prasad Bingi, Ali Mir, and Joseph Khamalah, "The Challenges Facing Global E-commerce: A Multidimensional Perspective", *Information Systems Management Journal*, Vol. 17(4), p.26

<sup>24</sup> Ibid

<sup>25</sup> Ibid

<sup>26</sup> Introduction to E-commerce, cited above at note 19

States long before the Internet became a commercial environment.<sup>27</sup> The 1980s saw the development of Electronic Data Interchange<sup>28</sup> standards that permitted firms to exchange commercial documents and conduct digital commercial transactions across private networks.<sup>29</sup> In the B2C arena, the first truly large-scale digitally enabled transaction system was deployed in France in 1981.<sup>30</sup> The French Minitel was a videotext system that combined a telephone with an 8-inch screen; hence, none of these precursor systems had the functionality of the Internet.<sup>31</sup> Generally, when we think of e-commerce today, it is inextricably linked to the Internet.<sup>32</sup>

Therefore, one can say e-commerce begins in 1995, following the appearance of the first banner advertisements placed by ATT, Volvo, Sprint, and others on Hotwired.com in late October 1994, and the first sales of banner ad space by Netscape and Info seek in early 1995.<sup>33</sup>

Since then, e-commerce has been the fastest growing form of commerce in the United States.<sup>34</sup> The emphasis was on deconstructing conventional dealings channels and disintermediation existing channels, using new pure online companies who aimed to achieve impregnable first mover advantages.<sup>35</sup> Overall, this period of e-commerce was characterized by experimentation, capitalization, and hyperactive competition.<sup>36</sup>

Even today, some considerable time after the so called 'dot com or internet revolution', e-commerce remains a relatively new, emerging and constantly changing area of business management and information technology.<sup>37</sup> From this, electronic data interchange

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<sup>27</sup> Ibid

<sup>28</sup> Electronic Data Interchange (EDI) developed earlier. An EDI is a standard for processing and transmitting information between computers over private communication networks called value-added networks (VANs). It requires expensive and complex custom software, dedicated communication links and in many cases strictly compatible equipment. The main users are large businesses and their first tier suppliers. The EDI standard is now less used because of their relatively high costs compared with the more Flexible Transmission Control Protocol/Internet Protocol (TCP/IP) based Internet systems.

<sup>29</sup> Introduction to E-commerce, supra at note 19

<sup>30</sup> Ibid

<sup>31</sup> Ibid

<sup>32</sup> Ibid

<sup>33</sup> B. David ., Globalization and the Western Legal Tradition, Recurring Patterns of Law and Authority (2007) p.10

<sup>34</sup> Ibid

<sup>35</sup> Ibid

<sup>36</sup> Ibid

<sup>37</sup> Electronic Commerce: UNICTRAL Commission Presents Framework for Future Action(<http://www.google.com.et>)last visited on 12/10/2014.

was the next stage of e-commerce development. In the 1960s, a cooperative effort between industry groups produced a first attempt at common electronic data formats.<sup>38</sup> The formats, however, were only for purchasing, transportation and finance data, and were used primarily for intra-industry transactions.<sup>39</sup> It was not until the late 1970s that work began for national Electronic Data Interchange standards, which developed well into the early 1990s.<sup>40</sup>

With the advent of the Internet, the term e-commerce began to include the following scenarios, inter alia<sup>41</sup>

- Electronic trading of physical goods and of intangibles such as information
- All the steps involved in trade, such as on-line marketing, ordering payment and support for delivery
- The electronic provision of services such as after sales support or on-line legal advice

## **2.2. Definition and Essences of E- Commerce**

### **2.2.1. Terminological and Conceptual Definition**

The term e-commerce means many different things to many people and hence, there are different definitions and understandings about e-commerce.

In simple terms e-commerce may be defined as the buying and selling of goods and services using computer mediated networks. However, at first the term electronic commerce means

“The execution of commercial transactions electronically, using technology such as Electronic Data Interchange (EDI) and Electronic Funds Transfer (EFT), which gave an opportunity for users to exchange business information and do electronic transactions.”<sup>42</sup>

Moreover, different experts have defined e-commerce in different ways. Vladimir Zwass, the top-ranked scholarly journal in the area of e-commerce, defined e-commerce as the sharing of

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<sup>38</sup> Ibid

<sup>39</sup> Ibid

<sup>40</sup> Ibid

<sup>41</sup> Ibid

<sup>42</sup> History of e-commerce (<http://www.e-commerce-land.com/history-e-commerce.html>) last visited 05/08/2014

business information, maintaining business relationships, and the conducting of business transactions by means of telecommunications networks.<sup>43</sup>He also pointed out that e-commerce includes not only buying and selling of goods over Internet, but also various business processes within individual organizations that support the goal.<sup>44</sup>

Treese and Stewart have also given their view of e-commerce as the use of the global internet for purchase and sale of goods and services, including service and support after the sale.<sup>45</sup> They view e-commerce in the broad sense as it includes the use of computing and communication technologies in financial business, online airline reservation, order processing, inventory management and etc.<sup>46</sup>

Another expert, Daniel Minoli and Emma Minoli, defines e-commerce as any purchasing or selling through an electronic communication medium.<sup>47</sup> According to these scholars Internet based commerce, in general, and web based commerce in particular are important sub-disciplines of e-commerce.<sup>48</sup>They further explained e-commerce as the symbiotic integration of communications, data management, and security capabilities to allow business applications within different organizations to automatically exchange information related to the sale of goods and services.<sup>49</sup>

The definition of e-commerce also provided in various international documents. Some of the definitions given by these documents are provided below.

OECD provided a definition on e-commerce in its narrow and broad sense. The narrow definition of e-commerce is a;

“the sale or purchase of goods or services, whether between businesses, households, individuals, governments, and other public or private organizations, conducted over the Internet. The goods and services

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<sup>43</sup> Vladimir Zwass, “Electronic Commerce: Structures and Issues”, International Journal of Electronic Commerce, Vol. 1 No.1(1996) p.3

<sup>44</sup> Ibid

<sup>45</sup> Jerry Gao, introduction to E-commerce(<https://www.uop.edu.jo/download/research/members/introduction.pdf>) last visited on 15/08/2014

<sup>46</sup> Ibid

<sup>47</sup> Ibid

<sup>48</sup> Ibid

<sup>49</sup> Ibid

are ordered over those networks, but the payment and the ultimate delivery of the good or service may be conducted on or off-line.”<sup>50</sup>

Broadly it is defined as;

“the sale or purchase of goods or services, whether between businesses, households, individuals, governments, and other public or private organizations, conducted over computer- mediated networks.

The goods and services are ordered over those networks, but the payment and the ultimate delivery of the good or services may be conducted on or off-line.”<sup>51</sup>

United Nations Conference on Trade and Development (UNCTAD) on the conference which is held in Geneva on 2002 has also provided a simple definition of e-commerce. It defines e-commerce as a means of enabling and supporting the exchange of information, goods and services between companies.<sup>52</sup> Commerce that is free of any paper-based documents and where computer, telecommunication and Internet technologies are used to transact goods, advertise their products and offer services to a global market.<sup>53</sup>

There is a debate among consultants and academics about the meaning and limitations of both e-commerce and e-business.<sup>54</sup> Some argue that e-commerce encompasses the entire world of electronically based organizational activities that support a firm’s market exchanges including a firm’s entire information system structure.<sup>55</sup> Others argue that e-business encompasses the entire world of internal and external electronically based activities, including e-commerce.<sup>56</sup>

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<sup>50</sup> OECD, Guide to Measuring the information society  
(<http://browseoecdbookshop.org/oecd/pdfs/free/9311021e.pdf>) last visited on 14/08/2014

<sup>51</sup> Ibid

<sup>52</sup> Joseph Kiggundu, Designing e-commerce strategies: Roles of Governments and non- governments actors (<http://www.ugandainvest.com>) last visited on 15/08/2014

<sup>53</sup> Ibid

<sup>54</sup> Introduction to E-Commerce, cited above at note 19

<sup>55</sup> Ibid

<sup>56</sup> Ibid

The Manual on Statistics of International Trade in Services (MSITS 2010) and OECD defined e- business and commerce as follows.

“E-business includes all aspects of online business activity purchasing, selling, marketing of new ideas and products and services, handling logistics, support service. Whereas, international e-commerce can be defined as consisting of transactions that involve online orders leading to the (import or export) delivery of goods and services.”<sup>57</sup>

Adopting a more general definition of e-commerce significantly reduces the definitional obsolescence caused technology advances and, consequently would not require revision as new business practices are introduced and previously defined business practices are replaced. A more general and flexible definition of electronic commerce is the process of deploying computer and communications technology to support an organization’s sales process.<sup>58</sup> This definition eliminates the need to delineate precisely how the sales process is performed via electronic media both at domestic and global level.<sup>59</sup>

Domestic e-commerce involves within border transactions through the internet or other external networks, while international e-commerce relates to cross-border transactions. These transactions may refer to selling or buying goods and/or services, which are then delivered online or physically. The transaction-based concept that restricts e-commerce solely to buying and selling makes it distinct from other forms of e-business.<sup>60</sup>

The most appropriate definition of e-commerce may depend on the question being investigated. Thus, in academic literature e-commerce is broadly defined, as it refers to an activity that is part of more general information and communication technology

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<sup>57</sup>OECD , Impact of Globalization on a National Account([www.oecd.library.org](http://www.oecd.library.org))last visited on 12/09/2014

<sup>58</sup> Introduction to E-commerce, cited above at note 19

<sup>59</sup> Ibid

<sup>60</sup> OECD, cited above at note 57

(ICT) activities.<sup>61</sup> This is also true for policymakers who employ broad definitions emphasizing the impact of e-commerce on all aspects of the economy.<sup>62</sup> At other times, narrower definitions can be used to address more specific policy areas such as intellectual property rights, taxation, outsourcing and trade.<sup>63</sup>

A major change is that the proposed definition is no longer based on a narrow-broad distinction. Indeed, the new term “computer networks” no longer includes the networks distinction between internet and other e-commerce related electronic transactions.<sup>64</sup> The underlying rationale of this new definition is that information can now be collected based on either transaction mode.<sup>65</sup> In addition, the term “computer network” is broadly defined to give the flexibility to accommodate future changes in how e-commerce is conducted.<sup>66</sup>

E-commerce refers to a wide range of online business activities for products and services.<sup>67</sup> It also pertains to any form of business transaction in which the parties interact electronically rather than by physical exchanges or direct physical contact.<sup>68</sup> E-commerce is usually associated with buying and selling over the Internet, or conducting any transaction involving the transfer of ownership or rights to use goods or services through a computer-mediated network.<sup>69</sup>

Therefore, the following can be taken as a more complete definition of e-commerce :

“ the use of electronic communications and digital information processing technology in business transactions to create, transform, and redefine relationships for value creation between or among organizations, and between organizations and individuals.”<sup>70</sup>

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<sup>61</sup> E-commerce ([http://www.unece.org/fileadmin/DAM/stats/groups/wggna/GuideByChapters/Chapter\\_13.pdf](http://www.unece.org/fileadmin/DAM/stats/groups/wggna/GuideByChapters/Chapter_13.pdf)) last visited on 13/09/2014

<sup>62</sup> Ibid

<sup>63</sup> Ibid

<sup>64</sup> Ibid

<sup>65</sup> Ibid

<sup>66</sup> Ibid

<sup>67</sup> B. Zorayda, *E-Commerce and E-Business* (<http://en.wikibooks.org/wiki/Category%3AE-Commerce%20and%20E-Business>) last visited on 27/9/2014

<sup>68</sup> Ibid

<sup>69</sup> Ibid

<sup>70</sup> Ibid

Modern e-commerce typically uses the World Wide Web at least at one point in the transaction's life-cycle, although it may encompass a wider range of technologies such as e-mail, mobile devices, social media, and telephones as well.<sup>71</sup>

Generally, e-commerce process includes the following business activities.<sup>72</sup>

- Pre-sales and Post-sales support
- Internal Email and messaging
- Online publishing of corporate documents and forms
- Advertising and promotion of products and services

### **2.2.2. Features of E-commerce**

E-commerce technology and their business significance deserves a brief exploration, as well as a comparison to both traditional commerce and other forms of technology-enabled commerce. It has its own features and these distinct features of e-commerce are discussed below.

#### **A. Ubiquity**

In traditional commerce, a marketplace is a physical place one should visit in order to transact. E-commerce, in contrast, is characterized by its ubiquity: it is available just about everywhere, at all times.<sup>73</sup> It liberates the market from being restricted to a physical space and makes it possible to shop from your desktop, at home, at work, or even from your car, using mobile commerce.<sup>74</sup>

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<sup>71</sup>E-commerce, (<http://www.mljinfotech.com/e-commerce.php>) last visited on 25/09/2014

<sup>72</sup>Ibid

<sup>73</sup>Ijjaj Md. Laisuzzaman, Nahid Imran, Abdullah Al Nahid, Md. Ziaul Amin, Md. Abdul Alim, "The Framework for Implementing E-commerce: The Role of Bank and Telecom in Bangladesh", *Journal of Telecommunications*, Vol. 1(2010), p. 57

<sup>74</sup> Philip Evans and S. Thomas, *E-commerce*(<http://www.google.com> ) last visited on 24/10/2014

## **B. Global Reach**

Electronic commerce expands the marketplace to national and international markets.<sup>75</sup> E-commerce technology permits commercial transactions to cross cultural and national boundaries far more conveniently and cost-effectively than is true in traditional commerce.<sup>76</sup> As a result, the potential market size for e-commerce merchants is roughly equal to the size of the world's online population over 1 billion in 2005, and growing rapidly, according to the computer industry.<sup>77</sup>

## **C. Richness**

Information richness refers to the complexity and content of a message.<sup>78</sup> The Internet and web can deliver to an audience of millions rich marketing messages in a way not possible with traditional technologies like radio, TV and magazines.<sup>79</sup>

## **D. Interactivity**

E-commerce technologies allow for interactivity, meaning they enable two-way communication between merchant and consumer.<sup>80</sup> It is similar with face to face communication but on a massive global scale.<sup>81</sup>

## **E. Information density**

The Internet and the Web vastly increase information density that is the total amount and quality of information available to all market participants, consumers, and merchants alike.<sup>82</sup> E-commerce technologies reduce information collection, storage,

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<sup>75</sup> Benefits and Limitations of e-commerce (<https://saravanesh.files.wordpress.com/2009/06/lecture-02.pdf>) last visited on 28/10/2014

<sup>76</sup> Ijaz Md. Laisuzzaman, Nahid Imran, Abdullah Al Nahid, Md. Ziaul Amin, Md. Abdul Alim, Cited above at note 73, Vol. 1, p.58

<sup>77</sup> Philip Evans and S. Thomas, Cited above at note 74

<sup>78</sup> Introduction to e-commerce, cited above at note 19

<sup>79</sup> Er.Sartag Singh Bajwa, 7 features of e-commerce (<http://www.slideshare.net/sbajwa9009/7-features-of-e-commerce>) last visited on 27/09/2014

<sup>80</sup> Introduction to e-commerce, cited above at note 19

<sup>81</sup> Er.Sartag Singh Bajwa, cited above at note 79

<sup>82</sup> Introduction to e-commerce, cited above at note 19

processing, and communication costs.<sup>83</sup> At the same time, these technologies increase greatly the currency, accuracy, and timeliness of information by making information more useful and important than ever.<sup>84</sup> As a result, information becomes more plentiful, less expensive, and of higher quality.<sup>85</sup>

## **F. Personalization or Customization**

E-commerce technologies permit personalization in a sense that merchants can target their marketing messages to specific individuals by adjusting the message to a person's name, interests, and past purchases.<sup>86</sup> The technology also permits customization that is changing the delivered product or service based on a user's preferences or prior behavior.<sup>87</sup>

## **G. Universal Standards**

One prominent feature of e-commerce technologies is that the technical standards of the Internet and therefore the technical standards for conducting e-commerce are universal standards i.e. they are shared by all the nations around the world.<sup>88</sup> In contrast, most traditional commerce technologies differ from one nation to the other.<sup>89</sup>

### **2.3. Classification of E-commerce**

E-commerce can be classified as domestic and international. International e-commerce is a commerce which involves cross-border transaction over the internet while domestic e-commerce is within border e-commerce through the internet or other the external networks.<sup>90</sup>

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<sup>83</sup> Ibid

<sup>84</sup> Ibid

<sup>85</sup> Ibid

<sup>86</sup> Ijaj Md. Laisuzzaman, Nahid Imran, Abdullah Al Nahid, Md. Ziaul Amin, Md. Abdul Alim, cited above at note 73, vol. 1, p.58

<sup>87</sup> Introduction to E-commerce, cited above at note 19

<sup>88</sup> Ijaj Md. Laisuzzaman, Nahid Imran, Abdullah Al Nahid, Md. Ziaul Amin, Md. Abdul Alim, cited above at note 73, Vol. 1, p.58

<sup>89</sup> Philip Evans and S. Thomas, cited above at note 74

<sup>90</sup> E-commerce available at

[http://www.unece.org/fileadmin/DAM/stats/groups/wggna/GuideByChapters/Chapter\\_13.pdf](http://www.unece.org/fileadmin/DAM/stats/groups/wggna/GuideByChapters/Chapter_13.pdf) last visited on 20/09/2014

Moreover on the bases of the parties involved in the transaction e-commerce can also mainly categorized as Business to Business, Business to Consumer, Business to Government and Consumer to Consumer e-commerce.

### **2.3.1. Business to Business E-commerce (B2B)**

B2B e-commerce refers to the exchange of products, services or information between business entities.<sup>91</sup> Business to Business can also be defined as a type of commerce transaction that exists between businesses or a transaction that occurs between a company and other company to transfer services and products.<sup>92</sup>

A possible explanation for this might be that Business to Business includes online wholesaling in which businesses sell materials, products and services to other businesses on the websites.<sup>93</sup> Global B2B transactions comprise 90 per cent of all e-commerce.<sup>94</sup>

If these transactions are domestic, they are relatively straight forward and could be done in the same way as traditional business is done, and communicating of the order, invoicing, tracking of the order and payment can all be performed online between the two parties.<sup>95</sup> Whereas if it is international order, where it could involve a number of container loads, or even a shipload of goods, the trade cycle will involve greater risks and more parties will be involved in the transaction.<sup>96</sup>

A solution to B2B e-commerce problem is the creation of specialized B2B Internet portals, which facilitate transactions via trusted third parties, thereby reducing the number of parties involved.<sup>97</sup>

### **2.3.2. Business to Consumer E-commerce (B2C)**

B2C refers the exchange of products, information or services between business and

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<sup>91</sup>YaserAhangariNanehkaran, "An introduction to Electronic Commerce", International Journal of Scientific & Technology Research, Vol. 2 (2013), P. 192

<sup>92</sup>Ibid

<sup>93</sup>Ibid

<sup>94</sup>World Trade Organization, E-commerce in Developing Countries: opportunities and challenges for small and medium-sized enterprises ([https://www.wto.org/english/res\\_e/booksp\\_e/ecom\\_brochure\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/ecom_brochure_e.pdf)) last visited on 10/10/2014

<sup>95</sup>Shaun Lake, E-Commerce and LDCs' Challenges for Enterprises and Governments ([unctad.org/e-commerce/event\\_docs/kathmandu\\_background.pdf](http://unctad.org/e-commerce/event_docs/kathmandu_background.pdf)) last visited on 12/10/2014

<sup>96</sup>Ibid

<sup>97</sup>Ibid

consumers in a retailing relationship.<sup>98</sup> Some of the first examples of B2C e-commerce were amazon.com and dell.com in the USA and lastminute.com in the UK.<sup>99</sup> In this model of e-commerce there are only few parties involved in the chain and therefore a relatively simple paperless transaction.<sup>100</sup> Hence B2C e-commerce allows businesses to sell without traditional intermediaries and thus reduce their operating costs, which are ultimately passed on to customers as lower prices.<sup>101</sup>

### **2.3.3. Business to government e-commerce (B2G)**

Business to government (B2G) e-commerce is generally defined as e-commerce between companies and the public sector.<sup>102</sup> It refers to the use of the internet for

- public procurement,
- licensing procedures, and
- other government- related operations.<sup>103</sup>

In B2G e-commerce, the public sector generally assumes the pilot role in establishing e-commerce in an effort to make its procurement system more efficient.<sup>104</sup> In fact the size of the B2G e-commerce market as a component of total e-commerce is still rather insignificant as government e-procurement systems still remain comparatively undeveloped.<sup>105</sup>

### **2.3.4. Consumer to Consumer E-commerce(C2C)**

As the name itself indicates the parties involved in consumer to consumer e-commerce are individuals. Hence Consumer to Consumer e-commerce is an electronic internet facilitated medium, which involves transactions among users and it is a business model which two consumers deal business with each other directly.<sup>106</sup> One of the best examples is eBay with its e-auctioning system.<sup>107</sup>

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<sup>98</sup> Introduction 1

<sup>99</sup> Ibid

<sup>100</sup> T. Richard, *Electronic Commerce: The Strategic Perspective*(2<sup>nd</sup> ed.,2008), p.9-10

<sup>101</sup> Prasad Bingi, Ali Mir, and Joseph Khamalah, Cited above at note 23, p.27

<sup>102</sup> World Trade Organization, Cited above at note 94, p. 4

<sup>103</sup> Ibid

<sup>104</sup> Ibid

<sup>105</sup> Ibid

<sup>106</sup> Yaser Ahangari Nanehkaran, Cited above at note 92, P. 192

<sup>107</sup> T. Richard, Cited above at note 92, p. 8-9

## 2.5. E-commerce application and Limitation per se

In the emerging global economy, e-commerce has increasingly become a necessary component of business strategy and strong catalyst for economic development.<sup>108</sup> Specifically, e-commerce has enhanced productivity, encouraged greater customer participation, and enabled mass customization, besides reducing costs.<sup>109</sup>

The field of e-commerce is broad. There are many applications of e-commerce, such as home banking, shopping in electronic malls, buying stocks, finding a job, conducting an auction, collaborating electronically with business partners around the globe, and providing customer service.<sup>110</sup>

E-commerce represents more than a technology. It is a pervasive phenomenon built around the applications of ICTs and it has the potential to affect every aspect of the value chain for products and services. Beside its benefits, e-commerce has some limitations which may be technical or nontechnical.

Hence, the following can be considered as technical limitation of e-commerce.<sup>111</sup>

- Lack of universally accepted standards for quality, security, and reliability
- Insufficient telecommunications bandwidth
- Still-evolving software development tools
- Difficulties in integrating the Internet and EC software with some existing (especially legacy) applications and databases
- Need for special Web servers in addition to the network servers
- Expensive and/or inconvenient Internet accessibility for many would-be users

On the other hand, nontechnical limitation of e-commerce is listed as follows:<sup>112</sup>

- Unresolved legal issues
- Lack of national and international government regulations and industry standards
- Lack of mature methodologies for measuring EC

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<sup>108</sup> B. Zorayda, cited above at note 67

<sup>109</sup> Ibid

<sup>110</sup> [Electronic Commerce, \(www.wiley.com/college/turban/0471073806/sc/ch09.pdf\)](http://www.wiley.com/college/turban/0471073806/sc/ch09.pdf) last visited on 08/09/2014

<sup>111</sup> A. Meier, H. Stormer, *E-Business & E-Commerce : Managing the Digital Value Chain* (1<sup>st</sup> ed.2009), P.18.

<sup>112</sup> Ibid

- Many sellers and buyers waiting for EC to stabilize before they take part
- Customer resistance to changing from a real to a virtual store. Hence, people do not yet sufficiently trust paperless, faceless transactions.
- Perception that EC is expensive and unsecured

Although e-commerce has the above technical and nontechnical limitations, these limitations, especially the technical ones, will lessen or be overcome as a time passes.<sup>113</sup> Moreover, appropriate planning will reduce some of the impacts of them.<sup>114</sup>

## 2.4. E-commerce Contract

### 2.4.1. Definition and the legal Terrain of E-commerce Contract

In traditional commerce, transactions do not pose any significant problem because there are elaborate common law and statutory rules that govern such transactions.<sup>115</sup> Online transactions are a source of revenues but the following obstacles are restricting the possibility of concluding online contracts across frontiers. Firstly, the formal requirements to conclude any type of transactions, secondly the legal uncertainty as to the lawfulness or validity of electronic contracts.<sup>116</sup> These transactions need rules to govern the relationship between the parties. The primary vessel for these rules is the contract per se.<sup>117</sup>

The determination of the moment when a contract can be said to have come into existence on the internet, giving rise to the existence of rights and obligations as between the parties, has been one of the vexed issues in e-commerce.<sup>118</sup> For example, it is difficult to determine the time and place of conclusion of an electronic contract. In fact, the time when the contract is formed is important in determining the passing of property and transfer of loss or damage in cases of sale of goods.

The contract can be viewed as perhaps the most important self-regulatory measure available

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<sup>113</sup>Electronic commerce, cited above at note 110

<sup>114</sup> Ibid

<sup>115</sup>TI Akomolede, "Contemporary Legal Issues in Electronic Commerce in Nigeria", PER/PELJ, Vol. 11(2008), p.5

<sup>116</sup>European Commission (EC), Electronic commerce in the Internal Market – A proposal presented by the Commission for a European Parliament and Council

<sup>117</sup> Ibid

<sup>118</sup>TI Akomolede, Cited above at note 103, p.5

to parties engaging in electronic commerce. It is recommended to include specific provisions on the terms and conditions applicable to e-transactions. Provisions shall include the terms of delivery of goods, payment mode and terms, title and ownership, passing of risks, rights, etc according to the type of e-transaction to be undertaken.<sup>119</sup>

Contracts are fundamentally voluntary exchanges. Maximum attention should be given to freedom of contracts and party autonomy. The majority of writers affirm that to conclude a contract, even electronically, an offer and an acceptance must be passed. Parties drafting contracts and those parties who would accept them, must be thoughtful about certain terms, such as disclaimers, choice of law and jurisdictional forum, consumer protection, limitation of liability issues and questions of mandatory local law. As known, an offer and an acceptance forms a contract, but an offer and an acceptance concluded electronically can be considered as partial evidence of the conclusion of a contract.<sup>120</sup>

The exchange of consents will give legal effects to the contract, without having to respect requirements of form, except in such situations where the law requires a written or stamped document i.e. bill of lading and contract of sale of goods.

“With respect to contractual and evidentiary formalities, there is an increasing consensus that, so long as an electronic communication has a sufficient measure of reliability, durability, and integrity as to its content, no particular form or formal procedure is required in order to ensure its effectiveness for the purpose for which it is created.”<sup>121</sup>

There is a need to establish a legislative framework for e-commerce and increase confidence by stating provisions related to legal protection for electronic transactions. Most national laws and international conventions include provisions requiring most of documents to be presented in an original form, and it is not easy to determine an electronic document is presented in an original form. Hence, major problems arise when laws require the storage of information in a

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<sup>119</sup> Ibid

<sup>120</sup> United Nations Economic Commission for Europe (UNECE), Electronic Commerce Agreement, Recommendation No.31 ([www.unece.org/cefact/recommendations/rec31/rec31\\_ecetrd257e.pdf](http://www.unece.org/cefact/recommendations/rec31/rec31_ecetrd257e.pdf)) last visited on 18/10/2014

<sup>121</sup> Nations Centre for Trade Facilitation and Electronic Business (<http://www.unece.org/cefact/>) last visited on 23/8/2014

paper form.

Indeed, in such cases it will not be valid to store in an electronic document.<sup>122</sup>

#### 2.4.2. Stages of E-Commerce Contract

Because of the commercialization of the Internet, the world of the consumer has experienced a fundamental change. The ubiquity of the Internet involves several advantages with regard to the availability of markets. The Internet allows consumers and entrepreneurs to conclude contracts from wherever they are. The features that specify online trading from regular trades materialize in three areas: information flow, cash flow and commodity flow.<sup>123</sup> Information flow represents the means of trading, cash flow provides the conditions for trading, and commodity flow is the result of the trading process.<sup>124</sup>

Three factors make e-commerce unique. Firstly, virtuality: e-commerce is carried out in a virtual online environment where the buyer and seller do not engage in face-to-face contact.<sup>125</sup> Instead, consumers use a computer to obtain information about sellers, the products and services they offer, terms and pricing.<sup>126</sup>

Secondly, unboundedness: as the Internet has no physical boundaries, online transactions can be performed wherever an Internet connection is available.<sup>127</sup>

Finally, multiplicity of actors involved: a number of actors in addition to the consumer and the seller are involved in the e-commerce trading process to ensure verification.<sup>128</sup>

Hence an e-commerce trading process comprises of three main stages: pre-contractual, contractual process and post-contractual.<sup>129</sup>

**Pre-contractual stage:** Consumers might be misled about the identity of the trader, the products and services offered, and/or terms and pricing and he might also be subject to

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<sup>122</sup> Maria Gabriela Sarmiento, E-commerce Workshop on Legislative requirements for E-commerce (<https://www.itu.int/ITU-D/ecdc/Seminars/StLucia/.../draftlegalaspects.pdf>) last visited on 18/08/2014

<sup>123</sup> J. Binding, K. Purnhagen, "Regulations of E-Commerce Consumer Protection Rules in China and Europa Compared- Same Same but Different", Journal of Intellectual Property, Information Technology and E-Commerce Law, Vol. 2,(2011) p. 2

<sup>124</sup> Id., p.1.

<sup>125</sup> Id. p. 2

<sup>126</sup> Ibid

<sup>127</sup> Ibid

<sup>128</sup> Ibid

<sup>129</sup> Ibid

a lack of information on availability of offers.<sup>130</sup>

**Contractual stage:** Consumers face irregularities related to contract terms such as missing information or use of pre-checked boxes (e.g. for insurances).<sup>131</sup> Especially problems of consent evolve at the contractual stage in which personal information may be exposed and consumer behavior may be tracked without the knowledge or consent of the consumer.<sup>132</sup>

**Post-contractual stage:** Products or services might not be delivered, or may be damaged in the transportation process, delivered products or services, may not be as wanted, sellers may deal with complaints in an unsatisfactory manner, consumers may face challenges to return goods.<sup>133</sup>

## 2.6 The Reason Behind E-Commerce Regulation

In traditional industries, regulation is often considered for monopolies, to address ‘windfall’ profits; to manage externalities and information asymmetries.<sup>134</sup> Moreover it is used to ensure continuity and availability of service; to control excess competition.<sup>135</sup> It is also used for public goods and situations of scarcity and rationing and in circumstances where bargaining power is unevenly distributed or for other social policy aims.<sup>136</sup> Regulation is also considered necessary in order to be consistent with existing statutes and other regulatory regimes, especially in light of technological changes.<sup>137</sup> This can take the form of introducing for the first time.<sup>138</sup>

E-commerce is relatively new concept which is a result of technological advancement. Since e-commerce is a true engine for trade and development and since it has ability to create a truly global economy<sup>139</sup>, the existence of a supportive and predictable regulatory framework is an important prerequisite for enhancing trust in electronic commerce and thus promoting its

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<sup>130</sup> Ibid

<sup>131</sup> Ibid

<sup>132</sup> E. Dahiyat, ‘Towards recognition of liability in the digital world: Should we be more creative’, International journal of laws and technology, Vol.19, No. 3(2011), p. 224.

<sup>133</sup> Ibid

<sup>134</sup> Ian Hussein, A. Edgar, cited above at note 16, Vol. 11(2002) P. 34

<sup>135</sup> Ibid

<sup>136</sup> Ibid

<sup>137</sup> Ibid

<sup>138</sup> Ibid

<sup>139</sup> Chris Swindells, Kay Henderson, “Legal Regulation of Electronic Commerce”, Journal of Information Law and Technology, Vol.3 (1998), p.1

development.<sup>140</sup> Most national laws were developed in the absence of electronic systems. Hence, concerns had been expressed that existing paper-based legal systems might be unable to accommodate e-commerce and could lead to uncertainty, which would hamper global electronic trade.<sup>141</sup> The speed, at which e-commerce will develop, depends to a large extent on the existence of a favorable legal environment that facilitates electronic commerce by boosting the trust of both businesses and consumers.<sup>142</sup>

Moreover, e-commerce requires transparent and clear regulations as the contracting parties do not necessarily know each other and there is hardly, if any, face-to-face contact while negotiating an agreement. This anonymity makes many potential customers suspicious of electronic transactions. Their worry about the privacy and safety of personal data (e.g. Credit card information) and its potential misuse is well known.<sup>143</sup> The contracting parties should therefore be able to count upon the law, where required, to enforce the provisions of contracts concluded using electronic devices.<sup>144</sup> Further, the customer should be able to trust that his personal privacy is always maintained.<sup>145</sup>

## **2.7 Regulatory Tools In E-Commerce Regulation**

As it is explained in the above subsection, regulation of e-commerce is necessary as there are a number of issues involved in it which should be addressed. Hence a number of instruments may be applied to regulate these issues. This instrument includes government regulation, supervision and enforcement, self-regulation or co-regulation, technology, prudent behavior or market surveillance.

Moreover the writer calling as Freiberg, for example, identifies six categories of regulatory tools:<sup>146</sup>

- (1) Economic tools (such as through making markets, taxing, quotas or pricing);
- (2) Transactional tools (where governments influence behavior through contract or grant conditions);

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<sup>140</sup> UNCTAD, Building Confidence in Electronic Commerce and Development (file:///C:/Users/frework%20demise/Desktop/building%20eco.pdf) last visited on 19/10/2014

<sup>141</sup> Ibid

<sup>142</sup> Ibid

<sup>143</sup> Ibid

<sup>144</sup> Ibid

<sup>145</sup> Ibid

<sup>146</sup> R. Baldwin, Colin Scott, Christopher Hood, A Reader on Regulation (1998), p. 2-4

- (3) Authorizing tools (such as registration, licensing or accreditation);
- (4) Informational tools (such as product labeling or continuous disclosure regimes);
- (5) Structural tools (of physical design, or processes such as our paying tax arrangements);
- and (6) legal tools (such as laws, rules and regulations).

Using the above regulatory tools, key regulation addresses among others licensing, information duties, misleading advertising, duties of platform operators ,conclusion of contract, form, contract terms, burden of proof, remedies, the right to withdrawal and data protection.<sup>147</sup>

Viewed this way, regulation can be either positive, where behaviors are encouraged through assistance and incentives; or negative, where behaviors are discouraged through prohibitions, disincentives and traditional command and control.

Moreover, in order to be effective, compliance with regulation is a major issue. This especially applies in the area of e-commerce, where regulation can barely keep pace with the fast developing e-technology.<sup>148</sup> Businesses and their associations may engage in self-regulation.<sup>149</sup> These schemes have their own rules and methods for monitoring conduct.<sup>150</sup> Technology, such as encryption, can be employed to reduce risks in the payment system.<sup>151</sup>

## **2.8 Competing Aspects in E-commerce Regulation**

E-commerce has raised issues at the nucleus of the regulation of traditional practices and procedures particularly those resulting from legal requirements applicable to the form and evidence of legal acts.<sup>152</sup> Besides other legal issues such as consumer issues, privacy and security issues, taxation and jurisdictional issues are also involved in e-commerce regulation.

E-commerce is difficult to regulate for two main reasons. Firstly, the scope of electronic commerce and the technology involved changes rapidly.<sup>153</sup> Traditionally, the formulation of

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<sup>147</sup> B. Robert , International Legal Issues of E-Commerce ( <http://www.faegre.com>) last visited on 24/8/2014

<sup>148</sup> J.Binding, K. Purnhagen , Cited above at note 111, Vol. 2, p.2

<sup>149</sup> Ibid

<sup>150</sup> Ibid

<sup>151</sup> B.Robert, Supra at note 147

<sup>152</sup> Maria Gabriela Sarmiento, cited above at note 122

<sup>153</sup> Chris Swindells and Kay Henderson, Supra at note 127, Vol.3, p. 4

the law has been an evolutionary process, adapting to suit the needs of society.<sup>154</sup> Secondly, the very nature of the technology involved means that it is transnational.<sup>155</sup> This leads to problems as to which legal system has jurisdiction over e-commerce transactions. Moreover, the following competing aspects are involved in e-commerce regulation.

### **2.8.1 Taxation Issues**

Federal, state, and local authorities are scrambling figure out how to get a piece of the revenue created electronically.<sup>156</sup> The problem is particularly complex for interstate and international commerce.<sup>157</sup> For example, some claim that even the state in which a server is located deserves to receive some sales tax from an e-commerce transaction.<sup>158</sup> Others say that the state in which the seller is located deserves the entire sales tax (or value-added tax in some countries).<sup>159</sup> Moreover where and how tax collection be controlled is an issue. However in USA and in many other countries there is a tax ban on e-commerce.

### **2.8.2 Privacy and Data protection**

While shopping on the Internet, most people typically do not think about what is happening in the background. The entire process in web shopping looks very simple but there are many hurdles need to be jumped to complete the order. Customer information has to pass through several hands so security and privacy of the information are a major concern. The privacy and security of a customer's personal information lies within the hands of the business.

Hence there is a constant tension between a desire by the public for privacy and a need for information about the viewing audience.<sup>160</sup> Sometimes the tension is left to be resolved in the marketplace; governments have often mediated it through various data protection regulation.<sup>161</sup>

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<sup>154</sup> Ibid

<sup>155</sup> Ibid

<sup>156</sup> Electronic Commerce, cited above at note 110

<sup>157</sup> Ibid

<sup>158</sup> Ibid

<sup>159</sup> Ibid

<sup>160</sup> Joseph regale Jr, Framework for global e-commerce( <http://www.w3.org/TR/NOTE-framework-970706.html>)last visited on 15/09/2014

<sup>161</sup> Ibid

### **2.8.3 Security**

If Internet users do not have confidence that their communications and data are safe from unauthorized access or modification, they will be unlikely to use the Internet on a routine basis for commerce.<sup>162</sup> Hence there must be secure environment where personal data is protected. For this purpose, a range of technologies (encryption, authentication, password controls, firewalls, etc.) and effective, consistent use of those technologies, all supported globally by trustworthy key and security management infrastructures are required.<sup>163</sup> On the other hand government wants to access to keys to maintain a safe society.

### **2.8.4 Choice of law and Forum**

E-commerce technology allows commerce to cross cultural and geographical boundaries and it is characterized by its borderless nature. Hence the buyer may be from one country and the vendor may be from another country. However in cases of dispute which law will be applicable and which court assume jurisdiction over the matter, the country of the buyer or the seller? is a major tension in dealing e-commerce. In this regard, some countries adopt a "country of origin" approach under which jurisdiction would always rest with the jurisdiction of the seller in an online transaction. Whereas, others support a "country of destination" approach that ensures that consumers can always sue in their home jurisdiction.

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<sup>162</sup> ibid

<sup>163</sup> ibid

## Chapter Three

### Experience of ECX to Regulate E-commerce

ECX is an institution established by law with the main objective of providing a fair and equitable marketplace for agricultural commodities<sup>164</sup> and with a view to improve its service ECX has started electronic trading system for these agricultural commodities. Hence, under this chapter it is tried to analyze the mechanisms employed by the ECX to regulate e-commerce.

#### 3.1 Market and Legal Terrain for E-commerce

Commodity Exchange can be simply defined as a central place where sellers and buyers meet to transact in an organized fashion, with certain clearly specified and transparent ‘rules of the game’.<sup>165</sup> In its wider sense, a commodity exchange can also be defined as any organized market place where trade, with or without the physical commodities, is funneled through a single mechanism, allowing for maximum effective competition among buyers and among sellers.<sup>166</sup>

The Ethiopian commodity exchange proclamation no. 550/2007 has also defined commodity exchange as an exchange where standardized commodity-linked contracts are traded.<sup>167</sup> Hence, ECX is an institution established by law to set forth “the rules of the game” for sellers and buyers as well as intermediary actors so that they all compete effectively in a transparent manner in a centralized market.<sup>168</sup>

ECX is an institution owned by the government having its own legal personalities.<sup>169</sup> ECX as it is an institution which is owned by the government, it is supervised by the ministry of agriculture and rural development and regulated by Ethiopian Commodity Exchange Authority.

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<sup>164</sup> Ethiopian Commodity Exchange Proclamation, 2007, Art 2(6), proc. No. 550, Neg. Gaz. Year 13, No. 61

<sup>165</sup> Eleni Z. Gabre-Madhin and Ian Goggin, Does Ethiopia Need a Commodity Exchange?: An Integrated Approach to Market Development: Concept Note (<http://www.ecx.com.et/KnowledgeCenter.aspx>) last visited on 20/10/2014

<sup>166</sup> Ibid

<sup>167</sup> Ethiopian Commodity Exchange Proclamation, 2007, Art 2(5), proc. No. 550, Neg. Gaz. Year 13, No. 61

<sup>168</sup> Getahun Seifu, ‘Revisiting Company Law with the Advent Ethiopian Commodity exchange (ECX): An Overview’, Mizan Law Review, Vol. 4 No. 1, (2010), p. 124

<sup>169</sup> Ethiopian Commodity Exchange Proclamation, 2007, Art 3(1), proc. No. 550, Neg. Gaz. Year 13, No. 61

ECX is established as a demutualized corporate entity with clear separation of Ownership, Membership, and Management. Thus, owners cannot have trading stake, members cannot have ownership stake, and the management can neither be drawn from the owners nor from the members.<sup>170</sup> ECX creates trust and transparency through aggressive market data dissemination to all market actors, through clearly defined rules of trading, warehousing, payments and delivery and business conduct, and through an internal dispute settlement mechanism.<sup>171</sup>

ECX is established with a view to solve the problems associated with the traditional agricultural marketing system.

““The traditional agricultural marketing system is characterized by high cost and transacting risk. Ethiopia’s marketing system is characterized by high costs and high risks of transacting. These conditions result in only one third of total agricultural output reaching the market and commodity buyers and sellers tend to trade only with those they know, to avoid the risk of being cheated or default. Trade is done on the basis of visual inspection because there is no of product quality or quantity, which drives up marketing costs, leading to high consumer prices. For their part, small-scale farmers, who produce 95 per cent of

Ethiopia’s output, come to the market with little information and at the mercy of the merchants in their nearest and only market, unable to negotiate better prices or reduce their market risk”””.<sup>172</sup>

In order to give response to these problems associated with the traditional agricultural marketing system, ECX is established to create an efficient, transparent and orderly marketing system, which serves the needs of buyers, sellers and intermediary actors.<sup>173</sup> Besides, it promotes the increased participation of small-scale agricultural producers, such as farmers

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<sup>170</sup> Ethiopian commodity exchange company profile ( <http://www.ecx.com.et/CompanyProfile.aspx>) last visited on 12/10/2014

<sup>171</sup> Ibid

<sup>172</sup> Getahun Seifu, supra at note 155, Vol. 4, no. 1, P. 124-125

<sup>173</sup> Ethiopian Commodity Exchange Proclamation, 2007, preamble, proc. No. 550, Neg. Gaz. Year 13, No. 61

and cooperative societies, by providing those with up-to-date market information that will enable them negotiate better prices for their products.<sup>174</sup>

The Exchange is a marketing system that will coordinate better, that will link faster, and that will protect the interests of both sides of the trade.<sup>175</sup>

The purposes in which the ECX is established is dealt under article 6 of the proclamation establishing ECX no. 550/2007. Among the purposes of ECX, creating an efficient, transparent, and orderly marketing system that serves the needs of buyers, sellers, and intermediaries, and promoting increased market participation of Ethiopian small scale producers can be mentioned as its primary purpose. The other purpose of ECX is to fundamentally change the traditional agricultural products trading system into a modern and centralized trading system with grade-specific standardized contracts and with coordinated offers to sell and bids to buy through a physical trading floor, with face-to-face open outcry bidding, or an electronic order matching system or both.

“This single market mechanism which bring buyers and sellers at any point in time will result in price discovery, that is, the emergence of true market-clearing price for a good at a particular point in time due to the highest possible concentration and competition among buyers and among sellers.”<sup>176</sup>

This would mean that the market will be competitive; products will get their true prices as a result of the competition and at the end of the day pave the way for the producers to get the price they deserve for their produce.<sup>177</sup> The market, rather than various actors who strive to obtain their own advantage, will determine what should be paid for a commodity.<sup>178</sup>

ECX assures all commodity market players the security they need in the market through providing a secure and reliable End-to-End system for handling, grading, and storing commodities such as coffee, sesame, haricot beans, maize, and wheat.<sup>179</sup> Moreover, it arranges

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<sup>174</sup> Ibid

<sup>175</sup> ECX company profile (<http://www.ecx.com.et/CompanyProfile.aspx>) last visited on 12/10/2014

<sup>176</sup> Eleni Z. Gabre-Madhin and Ian Goggin, *Supra* at note 151, p.6

<sup>177</sup> Getahun Seifu, *supra* at note 155, vol. 4, no. 1, p. 125

<sup>178</sup> Ibid

<sup>179</sup> ECX company profile (<http://www.ecx.com.et/CompanyProfile.aspx>) last visited on 12/10/2014

matching offers and bids for commodity transactions, and a risk-free payment and goods delivery system to settle transactions, while serving all fairly and efficiently.<sup>180</sup>

Generally, ECX aims to provide market integrity by guaranteeing the product grade and quantity and operating a system of clearing and settling of payments and goods.<sup>181</sup> It also enhances market efficiency by operating a trading system where buyers and sellers can coordinate smoothly at minimal costs.<sup>182</sup> It create market transparency by disseminating market information in real time to all market players and allow risk management by offering its contracts for future delivery, providing sellers and buyers a way to lock-in prices for delivery of the physical goods at a pre-specified price.<sup>183</sup>It also provides an additional layer of protection for compliance with its laws by setting up compliance and alternative dispute settlement mechanisms in its structure.<sup>184</sup>

Therefore, ECX aims at creating a fair market by informing the market and the society about the price movement and related issues on a regular basis and by regulating the conduct of its actors thereby enabling the commodity marketing system to contribute to the country's development.<sup>185</sup>

By doing all of the above activities,ECX serves individuals, companies, public enterprises, cooperative, and the economy as a whole.

As it explained above, ECX is a market place where buyers and sellers come together for the purpose of transacting to each other. Market may be physical market or traditional market where buyers and sellers physically appear to transact to each other. Market can also be electronic in which the trading is conducted through an electronic medium. Hence,as ECX is a market place, it can conduct its service either physically or electronically. If ECX allows the transaction to take place through an electronic medium, the transaction is considered as electronic trading/ commerce as opposed to physical or traditional trading which requires the physical appearance of transacting parties. Therefore, the nature of the service provided by the ECX forces it to use e-commerce.

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<sup>180</sup> Ibid

<sup>181</sup>GetahunSeifu, supra at note 155, vol. 4, no. 1, p. 126

<sup>182</sup> Ibid

<sup>183</sup> Ibid

<sup>184</sup> Ibid

<sup>185</sup> Ibid

Since ECX began operating in 2008 with the goal of implementing a modern transparent trading system for major agricultural commodities, traders had to bargain on the floor of ECX headquarters near Mexico Square. However, ECX has completed all the preparations to implement e-commerce which enables traders to transact to each other without a need to go to the office of ECX.

### **3.2 ECX and Its Mandate to Regulate E-commerce**

ECX is an institution established by law with clearly defined powers and responsibilities. It is proclamation no. 550/2007 which established ECX and sets rules how and what the ECX undertakes. The purposes for which the ECX is established are listed under article 6 of proclamation no. 550/2007. These purposes of the ECX are

- Creating an efficient, transparent, and orderly marketing system that serves the needs of buyers, sellers, and intermediaries, and that promotes increased market participation of Ethiopian small scale producers;
- Providing a centralized trading mechanism in which offers to sell and bids to buy are coordinated through a physical trading floor with open outcry bidding or an electronic order matching system or both;
- Providing automated back office operations to record, monitor, and publicly disseminate information on Exchange transactions;
- Providing standardized grade-specific contracts as the basis of Exchange trading;
- Conducting trading on the basis of product grade certificates and guaranteed warehouse receipts;
- Clearing and settling all transactions conducted on the Exchange to minimize default risk;
- Providing a mechanism for dispute resolution through arbitration;
- Providing timely market information to the public;
- Parrying out market surveillance to ensure the integrity of the members and of the market;
- Avoiding Contingent risk to the market through implementing risk management by employing proper management mechanism.

Hence, this provision under sub article 2 empowers ECX to conduct physical trading in which buyers and sellers physically appear on the trading floor of ECX to participate in an open outcry bidding for commodities. During regular business hours, the ECX trading floor holds various sessions for transacting different commodity contracts.<sup>186</sup> Trades are made in the pits on the trading floor by bidding or offering a price and quantity of contracts, by using a physical representation of a trader's intentions with their hands.<sup>187</sup> Market prices can thus, change throughout trading hours and these prices are transmitted in real time to producers and consumers by electronic price tickers located in the country.<sup>188</sup> The prices are also shown on the ECX website and can be obtained through a mobile phone service.<sup>189</sup> Once a transaction has been made, the transaction orders are recorded on Order Tickets in standard lot sizes of standardized commodity grades (referred to as contracts).<sup>190</sup> The ECX automated back office system ensures the existence and validity of the Warehouse Receipt backing the sale, the availability of buyer funds in a deposit account, and where applicable the validity of the Member-Client agreement.<sup>191</sup> Besides, the ECX guarantees payment against delivery through an internal system for clearing and settlement of contracts, in collaboration with partner banks.<sup>192</sup> Every trading day, ECX clears the net obligations of all of the market participants and transmits orders to partner banks and warehouses to settle transactions through transferring funds in one direction and warehouse receipts in the other direction.<sup>193</sup>

The ECX provides additional layers of security through the Arbitration Tribunal that has licensed arbitrators who assure the speedy and professional resolution of any commercial disputes that may arise.<sup>194</sup> Additionally, the ECX maintains a system of market surveillance where experts monitor the behavior of market actors to protect the market from manipulation, excessive speculation, fraud, or other malpractice.<sup>195</sup>

Furthermore, as per article 6(2), ECX has a mandate to conduct electronic trading system for the purpose of achieving its goal. The proclamation for establishing ECX no. 55o/ 2007

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<sup>186</sup>Ethiopian Commodity Exchange([www.ecx.com.et/Operations.aspx](http://www.ecx.com.et/Operations.aspx)) last visited on 12/10/2014

<sup>187</sup> Ibid  
<sup>188</sup> Ibid  
<sup>189</sup> Ibid  
<sup>190</sup> Ibid  
<sup>191</sup> Ibid  
<sup>192</sup> Ibid  
<sup>193</sup> Ibid  
<sup>194</sup> Ibid  
<sup>195</sup> Ibid

mandates ECX to develop its own rules for the governance of its various operations. The rules of the exchange developed by ECX provide the blueprint for all rules governing membership, management, trading, warehousing, clearing and settlement, and other operations of ECX, in addition to the conduct of its members.<sup>196</sup>

Therefore, the proclamation establishing ECX no. 550/2007 authorized ECX to have electronic trading system and to regulate its electronic trading system as well. Accordingly, ECX has amended its rules so as to incorporate such provisions which are applicable to the electronic trading system and this rule is cited as Ethiopia Commodity Exchange Rules Amendment No.8/2014. This rule lay down principles on how electronic trade should be conducted under the ECX trading system.

### **3.3 ECX and the rule regulating E-commerce**

As it is said above, ECX is a market place where buyers and sellers come together to transact agricultural commodities assured of quality, delivery and payment. For this purpose the exchange provides marketing system which includes physical and electronic trading system. In order to regulate these activities conducted within the institution, the exchange has enacted different rules.

The rule which deals about electronic trading is Ethiopian commodity exchange rule amendment no. 8/2014. This rule is enacted in order to better accommodate provisions which are applicable to electronic trading system. Through this rule the exchange regulates various issues involved in e-commerce.

This rule defines electronic trade for the purpose of limiting the jurisdiction of ECX. Hence it defines electronic trade as a trade executed on the exchange's electronic trade platform.<sup>197</sup> Thus, a trade which is conducted through a platform other than the platform provided by the ECX is not subject to regulation by the exchange. Therefore, only those transactions conducted through the exchange's electronic platform are subject to regulation by the exchange. Here a question may arise as to the meaning of electronic trading platform.

Within the context of this rule, electronic trading platform is an automated screen based trading system of the exchange where authorized representatives make bids and

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<sup>196</sup> Commodity trading ( <https://bezahcg.wordpress.com/commodity/>) last visited on 15/10/2014

<sup>197</sup> Ethiopia Commodity Exchange Rules Amendment No.8/2014, 2014, Art.2(2) (2.1.23), Rule no. 8/2014, as amended, Revised Rules of the Ethiopia Commodity Exchange No.7/2013.

offers.<sup>198</sup>Therefore, this rule only applicable to those trading which are conducted by means of the platform of the exchange.Furthermore, not all persons could access the exchange’s electronic platform rather only those authorized representatives who can make bids and offers through the exchange’s electronic platform.

This amended rule of the exchanges under article 2(15) laydown electronic trading sessions which enables to know what is going on each session. These sessions include: pre-opening, pre-opening no cancel,open, pause, close, maintenance period. Besides the exchange is vested with a power to add some other session if it is necessary.During the pre- opening period, it is possible to enter orders, cancel prior orders; however, trade is not allowed at this session.<sup>199</sup>On the other hand, during pre- opening period no cancel session, it is possible to enter orders;whereas no cancellation, modification and trade is allowed.<sup>200</sup>The third session is open session in which all activities are allowed. Open session is a trading session where orders are matched and hence, it is possible to enter orders, modify or cancel before the order is executed.<sup>201</sup>The other session is pause and pause is ceasing trading prior to closing when there is a need to keep the integrity of the Exchange trading or any security reason.<sup>202</sup> During this period, only cancellation is allowed.<sup>203</sup>The fifth session is close and it is end of trading hour where no order can be entered, modified or cancelled.<sup>204</sup> The last session is maintenance period. Maintenance period is a period of time after close session where the market remains closed and members cannot enter, modify, view or cancel orders.<sup>205</sup> During this period, the exchange performs maintenance work such as other back office work is finalized and expired Good Till Date orders are purged.<sup>206</sup>

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<sup>198</sup> Id, Art. 2(2)(2.1.24)

<sup>199</sup> Id, Art. 2(15)(5.2.3)(a)

<sup>200</sup> Id, Art. 2(15)(5.2.3)(b)

<sup>201</sup> Id, Art. 2(15)(5.2.3)(c)

<sup>202</sup> Id, Art. 2(15)(5.2.3) (d)

<sup>203</sup> Ibid

<sup>204</sup> Id, Art. 2(15)(5.2.3)e)

<sup>205</sup> Id, Art. 2(15)(5.2.3) (f)

<sup>206</sup> Ibid

As it is tried to mention above, only those authorized representatives can make bids and offers through an electronic platform provided by the exchange. Thus, article 2(17)(5.3.2)(b) of rule no. 8/2014 provides who could access the electronic platform provided by the exchange. In other words the rule provided minimum requirements for being a representative members who can access the exchange's electronic platform. Accordingly, a person can be an electronic trade representative if:

- the representative is recognized as an exchange actor,
- he/she has attended certification courses in commodity marketing, exchange electronic trading and other trainings required by the exchange and successfully passed the examination and
- he/ she submits a letter of appointment from the member which shall be approved by the exchange.

These requirements are cumulative in a sense that all should be met and the absence of one of the requirement denies a person from having an access to the electronic platform provided by the exchange.

The rule under article 2(17)(5.3.2)(c)also provided a distinct requirement for clients to have an access to the electronic platform provided by the exchange.

A client may enter an instruction on the platform if :

- the member and the client have entered in to a member client agreement,
- the client attended the exchange's electronic trading training
- the member gets the client an appropriate exchange electronic trading user Id
- the member opens a separate clearing and settlement account on behalf of the client and
- client is otherwise qualified to trade on the exchange

Therefore, the fulfillment of these requirements that will enables a person to access the electronic platform of the exchange. This rule of the exchange underarticle 2(17)(5.3.2)(c)makes members responsible for all trade related responsibilities of client instructions on the electronic trade platform including any

support to the client in placing, modifying or cancelling the instruction. For this purpose all client instructions is subject to review by their respective members.<sup>207</sup> A member is also authorized either to approve or reject each client instructions unless the client establishes straight through processing of his instructions.<sup>208</sup> Though members are authorized to reject client's instruction, they cannot simply reject client's instruction. It must be on the bases of good reason. Thus, the law article 2(17)(5.3.2)(f) has established what amounts good reason in such cases. These are: where the client's instruction violates the exchange's trading rule or up on the client's request. In line with this, the rule article 2(17)(5.3.2)(h) imposes duties on members to assist in case of violation or potential violations of the exchange's rule through or with the use of electronic platform. Accordingly, members may be required to produce documents, to give response to questions raised by the exchange, to appear during investigation and such other things. The rule under article 2(17)(5.3.2)(i) also provided the possibilities that the exchange may suspend or terminate access to the electronic platform of the exchange if the exchange determines that the actions of Electronic Trade Representative or the Client threaten the integrity or liquidity of any contract or violate any Exchange rule, or if the Electronic Trade Representative, the Client or the Member fails to cooperate in an investigation.

In this connection a member may be considered to have committed an act detrimental to the interest of the exchange if a member knows or should have known an electronic trade representative or an approved client to enter his own instruction has violated the law in connection with the use of the electronic trading platform and the member fails to take appropriate action.

Further, this rule under article 2(17)(5.3.2)(g) requires all connections to the electronic trading platform, including direct connections of Clients entering instructions on their own behalf, non-clearing members and their Electronic Trading Representatives, to be guaranteed by a clearing member that assumes responsibility for all activity through the connection.

The exchange under this rule recognizes electronic signature by requiring use of a unique id. The rule under (2)(17)(5.3.3)(a) requires each electronic trade representatives and clients entering his/her own instruction to have a unique id to access the electronic platform of the exchange.

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<sup>207</sup>Ethiopia Commodity Exchange Rules Amendment No.8/2014, 2014, Art.2(17)(5.3.2)(d), Rule no. 8/2014, as amended, Revised Rules of the Ethiopia Commodity Exchange No.7/2013

<sup>208</sup>Id. Art.2(17)(5.3.2)(e)

Moreover, the rule under article (2)(17)(5.3.3)(c) prohibits an Electronic Trade Representative or a Client entering its own instructions to enter an instruction or permit the entry of an order by an individual using a user ID other than the Electronic Trade Representative's or the Client's own unique user ID. In this respect, the rule under article(2)(17)(5.3.3)(b) imposes duty on members to ensure that registration of ID is current and accurate at all times for all Electronic Trade Representatives and Clients entering their own instructions.

Therefore, only certified Electronic Trading Representatives or an approved Client to enter his own instruction can process electronic trade transactions on approved workstations for electronic trade of the exchange.<sup>209</sup> Furthermore, the rule under article 2(21)(5.5.2)(5.5.2.1)(c) requires each electronic trading representative or an approved client to enter his/her own instruction to have a unique identification (ID) number which shall be provided by the Exchange and which shall be used to log on to the electronic trading platform. Hence only a person, who is assigned a user ID created by the exchange, can either enter an instruction or an order on the exchange's trading platform.

The rule also under article 2(21)(5.5.2)(5.5.2.1)(d) requires minimum data elements to be entered when entering an instruction or order. These data elements are:

- Assigned user id
- Member id
- Price
- Quantity
- Side( buy or sell)
- Validity
- Delivery location and
- Product information

This information enables a transacting party to have trust in the transaction as well as it enables s him/her to take a well informed decisions.

Further, the exchange under article 2(21)(5.5.2)(5.5.2.1)(c) has provided the need of record with respect of instructions received by electronic trade representative which is not capable of

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<sup>209</sup>Ethiopia Commodity Exchange Rules Amendment No.8/2014, 2014, Art.2(21)( 5.5.2.1) (a) - (b), Rule no. 8/2014, as amended, Revised Rules of the Ethiopia Commodity Exchange No.7/2013

being immediately entered into the electronic trading system. In this case, the electronic trade representative must maintain a record including the account designation, date, time of receipt and which going to be entered into the electronic trading system when it becomes executable. However, this rule doesn't apply to clients entering their own instruction, since they are the one who enters their own instruction.

The exchange through exchange's electronic trading system control center has provided a mechanism where it gives support and manages problems to members and electronic trade representatives.<sup>210</sup>The exchange may provide this support during specified hours via a specified telephone number or through electronic means and for clients entering their own instructions;they must contact the exchange through their member or electronic trade representative.<sup>211</sup>

The rule also regulates phantom order. Hence, the rule under article 2(17)(5.3.5) has provided the instances in which a certain order or an instruction is considered as phantom. Accordingly, a phantom order is an order/instruction

- 1) That was caused by a failure, malfunction or negligent operation of an Exchange system, service or facility, or
- 2) Whose terms (e.g., contract, quantity or price) were changed without authorization of the Trade Representative or a Client entering its own instruction placing the instruction solely as a result of a failure, malfunction/ or negligent operation of an Exchange system, service or facility.

If these cases occurred, the rule under article 2(17)(5.3.5) (c), (d),(e) has provided remedies to be taken by the exchange. These remedies may be closing the market, deleting bids and offers, and/or suspending new bids and offers or any other remedies as the exchange thinks fit. However, the exchange will not be liable or responsible to the parties to any transactions that are voided pursuant to the rule. The exchange is only liable for those phantom order transactions executed on the exchange trading system which are not voided. In this case, the exchange is liable for loss on the liquidation of positions resulting from execution of such phantom orders, but such liability is limited to the price difference between the actual sell

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<sup>210</sup> Id, Art. 2(17)(5.3.4)

<sup>211</sup> Ibid

price and the price at which the positions could have been liquidated during the relevant time period.

The exchange's rule also provides about order validation that is the number of days good till dates ( GTD) and good till cancelled(GTC) orders is cancelled by the system if they are not executed within the specified period or reject if the order price fall outside of daily price limit.<sup>212</sup> However, the rule doesn't specify the number of days such orders will be cancelled rather it gives the mandate to the ECX.

Moreover, the exchange's amendment rule no.8/2014 under article 2(22)(5.5.3) provides the possibility of making visible to traders all details of executed trades. For the purpose of privacy of the transacting parties, this rule prohibits the disclosure of the identity of the parties. Hence, the identity of the parties will not be disclosed in case where all the details of the executed trades is made available to traders.

The other issue that has been dealt under the rule is priority of instruction approval. Accordingly, the priority criteria in the instruction approval execution process is time and non-client entered instructions shall be entered into the electronic trading platform by the electronic trading representative in the order received.<sup>213</sup>

The rule also regulates a condition where instructions fail to immediately enter into the electronic trading platform. If instructions because of justifiable and reasonable cause cannot be immediately entered in to the electronic platform, it should be entered as soon as possible according to the order received.<sup>214</sup> The rule also prohibits membersto place an order on his/her own account at the electronic trading platform before approving all outstanding client instructions.<sup>215</sup>

The ECX amendment rule no.8/2014 gives opportunity to electronic traders to modify or cancel the order they place through the electronic platform of the exchange. Accordingly, an electronic trade representative or a client entering his/her own instruction can modify or cancel the order/instruction he/she places before it is executed.<sup>216</sup> This modification of an

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<sup>212</sup> Id, Art. 2(21)(5.5.2)(5.5.2.2)

<sup>213</sup> Id, Art.2( 25)(5.5.9) (a) -(b)

<sup>214</sup> Ibid

<sup>215</sup> Id, Art. 2(25)(5.5.9) (c )

<sup>216</sup> Id, Art. 2(25)(5.5.11) (a)-(b)

order/instruction results in new timestamp potentially affecting order of priority for execution.<sup>217</sup>

The other thing which has been incorporated under the exchange's rule is the requirement of electronic audit trail. Hence, the exchange is required to maintain for a minimum of 10 years audit trail containing all relevant attributes for electronic orders, including order entry, modification and cancellation.<sup>218</sup>

The rule also deals about confirmation of Trades Executed and Recorded on the Electronic Trading Platform. The electronic trading system may furnish the electronic trade representative and their clients entering instructions on their own behalf with a reconciliation report and it is the mandate of the exchange to determine the content and time when the report is issued.<sup>219</sup> The exchange is also duty bound to review matched and executed trades.<sup>220</sup>

Further, the rule regulates which trade orders are acceptable. Accordingly, article 2(29)(5.5.16) of the rule provides that acceptable trade orders are market order and limit order. A market order is an order to buy or sell at the best price available, on the other hand, a limit order is an order to buy or sell at a specific price ("limit price") or better.<sup>221</sup> Further the rule Art. 2(29)(5.5.16.2) specifies which limit orders are acceptable for execution on the electronic platform. These are:

- All or Non- order- to match the order completely or not at all.
- Day Order: an order that can only be executed on the same day unless cancelled.
- Good till date (GTD): available for execution till end of the date specified in the order.
- Good till cancel (GTC): available for execution until it is cancelled.
- In addition to the above limit orders, the exchange is authorized to add additional order types with the prior approval of the Ethiopian commodity exchange authority where there is a market need.

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<sup>217</sup> Id, Art. 2(25)(5.5.11)(c)

<sup>218</sup> Id, Art(27)(5.5.13)

<sup>219</sup> Id, Art. 2(28)(5.5.15) (a)

<sup>220</sup> Id, Art. 2(28)(5.5.15) (b)

<sup>221</sup> Id, Art. 2(29)(5.5.16.1)(a)- (b)

The rule under article 2(33) also establishes possible solutions for failure of an electronic trade platform. Primarily, the exchange is expected to avoid electronic system failures through redundancy mechanisms, business continuity and disaster recovery planning. However, besides all the precautions, if a major Electronic Trade Platform system failure occurs, the exchange may take one of the following actions considering the overall interest of the market.

- the Exchange may extend trading hours or
- the exchange may operate a separate trading session on the same day after the end of usual trading session, or
- Use alternative trading options.

The other thing which has been dealt under the rule is electronic match orders. Hence, on the electronic trading platform, opposite orders for different clients that are simultaneously placed by an electronic trading representative with discretion over both accounts or opposite orders directly entered into the electronic trading platform by two clients of the same member may be matched by the system.

The rule incorporates prohibitive provisions which members are required to refrain from doing the acts stated in those provisions. Accordingly, members and their Trading Representative are prohibited from disclosing another person's order to buy or sell except to a designated exchange official or the authority.<sup>222</sup> They are also prohibited to solicit or induce someone else to disclose such information.<sup>223</sup>

Members and their trading representatives under article 37(6.3)(6.3.3) are also prohibited from taking, directly or indirectly, the other side of any order of another person revealed to such member or trading representative by reason of his relationship to such other person. They are also prohibited from making any prearranged buy or sale order.<sup>224</sup>

Moreover, members and trading representatives are prohibited from withholding or withdrawing from the market any order or part of an order of another person for the benefit of another person.<sup>225</sup>

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<sup>222</sup> Id, Art. 37(6.3)(6.3.2)

<sup>223</sup> Ibid

<sup>224</sup> Id, Art. 2(37)(6.3)(6.3.4)

<sup>225</sup> Id, Art.2(37)(6.3)(6.3.6)

Members and their trading representatives are prohibited from being both principal ( for his account) and an agent ( for the account of others) in any transaction.<sup>226</sup> Member or his Trading Representative are also prohibited to give a name and, thereby make accommodation trades, offsetting two opposing trades for the purpose of concealing the true nature of the crossed transactions.<sup>227</sup>

They are also prohibited from engaging in acts that are detrimental to the best interest of the exchange, impairs the good name of the exchange, or is inconsistent with just and equitable principles of trade.<sup>228</sup>

Moreover, the rule under article 2(39)(6.5) prohibits all members and trading representatives are prohibited from directly or indirectly accepting or executing an order/instruction for any commodity traded or otherwise listed for trading on the exchange if such member or trading representative knows, or with the exercise of reasonable care, should have known that the transaction was executed or carried out.

The rule, under article 2(40)(6.6), also provided other prohibitive acts such as cheating, false reporting, deceiving, bucket orders, extorting, manipulating, corner a commodity, disseminating wrongful information, conduct a trade using insider information and artificially influence liquidity.

### **3.4 The Essences of Regulation of E-commerce by ECX**

In legal and economic literature, there is no fixed definition of the term regulation.<sup>229</sup> Hence it can be defined as the employment of legal instruments for the implementation of social-economic policy objectives.<sup>230</sup>

Regulation can also be defined as ““the making and enforcing of rules by government actors or the direct intervention of the state irrespective of the form of intervention or as all forms of influence affecting behavior from whatever source and for whatever purpose.””<sup>231</sup>

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<sup>226</sup> Id, Art. 2(38)(6.4)(6.4.1)

<sup>227</sup> Id, Art. 2(38)(6.4)(6.4.2)

<sup>228</sup> Id, Art. 2(38)(6.4)(6.4.5)

<sup>229</sup> Johan den Hertog, General Theories of Regulation (<http://encyclo.findlaw.com/5000book.pdf> ) last visited on 1/27/15

<sup>230</sup> Ibid

There are a variety of regulatory interventions that are possible, with a varying degree of control exerted.<sup>232</sup> Excluding the laissez faire ideal, at one end of an interventionary-spectrum is self-regulation, where the government delegates the task of regulation to the industry itself.<sup>233</sup> At the other end, regulation through statute and creation of regulatory bodies.<sup>234</sup>

When one looks in to the ECX rule which regulates e-commerce, it has regulated all matters related to e-commerce. Hence in order to transact in the electronic platform of the exchange one should abide by the rule of the exchange and all transactions which are conducted on the electronic platform of the exchange are executed in the manner provided under the rule. Therefore the essence of regulation of the exchange is regulation through statute and a designated office for this purpose and members, trading representatives and clients entering their own instruction should act in the manner provided in the rule

This is mainly because of the nature of the exchange that for all transactions conducted under the auspices of the exchange, the exchange will establish a rule which all members and trading representatives are expected to act in manner provided in the rule. Accordingly the exchange has enacted rule for regulating e-commerce.

### **3.5 Experience Transplantation from ECX to Regulate E-commerce**

Besides recognizing electronic signature and electronic means of communication, there are other six main legal issues involved in e-commerce which should be addressed while regulating e-commerce. These legal issues includes; jurisdiction and applicable law, consumer issues, taxation, privacy, security and intermediary liability issues.

For the proper application of e-commerce across the globe, different international bodies have provided guidelines on how the issues involved in e-commerce should be regulated. Therefore, under this section, how and to what extent the ECX has addressed these issues will be analyzed by taking in to account those guidelines provided by these international bodies for the purpose of taking a lesson for the regulation of e-commerce in Ethiopia.

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<sup>231</sup> Solomon Abay, 'Designing The Regulatory Roles of Government In Business, The Lesson From Theory, International Practice and Ethiopia's Policy Path', *Journal of Ethiopian Laws*, Vol.23, no.2 (2002) p.66

<sup>232</sup> Ian Hoisen, A. Edgar, cited above at note 16, Vol. 11(2002), Vol.11(2002)p. 34

<sup>233</sup> Ibid

<sup>234</sup> Ibid

The first important thing for the application of e-commerce is recognition of electronic signature. The exchange under this rule recognizes electronic signature by requiring use of a unique id. The rule under (2)(17)(5.3.3)(a) requires each electronic trade representatives and clients entering his/her own instruction to have a unique id to access the electronic platform of the exchange. With this respect UNCITRAL Model Law on electronic commerce under article 7 provides

(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if: (a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and (b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

These model laws have been largely accepted by the majority of developed countries or adapted to meet with their local features.<sup>235</sup> So use of identification mark, usernames, passwords, certification, box ticking, etc., are now enough to establish proof of electronic signature depending on the system.<sup>236</sup>

Therefore, what the exchange did in order to identify and ascertain whether the information is given by that electronic trade representative or a client entering his/her own instruction is in line with the UNICTRAL model law on the electronic commerce as user ID is possible for establishing a person's signature.

The other issue that must be addressed in e-commerce laws is applicable law and choice of forum. Applicable law and choice of forum are distinct concepts that must both be addressed when addressing Internet jurisdiction concerns.<sup>237</sup> Applicable law refers to which country's law will be applied to a particular dispute.<sup>238</sup> Some contracts specify which law should be applied when a dispute arise. If it so, the law which is specified in that contract will be

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<sup>235</sup>Punuka Attorneys & Solicitors, Legal and Institutional Framework for E-commerce in Nigeria([www.punuka.com](http://www.punuka.com)) last visited on 25/12/2014

<sup>236</sup> Ibid

<sup>237</sup>Michael Geist, A Guide to Global E-commerce, (<https://www.itu.int/ITU-T/special-projects/ip-policy/.../Attach04.doc>)last visited on 15/12/2014

<sup>238</sup> Ibid

applicable. However, where such a clause has not been included in a contract, it is left to the courts to determine which law should be applied.

On the other hand, Choice of forum refers to which court will decide a particular dispute. The majority of internet jurisdiction cases address this latter issue, as courts struggle with the question of whether they can assert jurisdiction over a particular dispute.<sup>239</sup> Once the appropriate court has been identified, the court will then be asked to determine which law should be applied.<sup>240</sup>

The issues' concerning jurisdiction and choice of law has not been addressed in the ECX rule regulating e-commerce. This is mainly because these issues are no longer an issue for ECX since all transactions and disputes arising from these transactions are governed by its own rules and also these disputes settled by its own dispute resolution mechanisms. Hence, there is no instance in which question of applicable law or jurisdiction will arise and that is why these issues has not been addressed in the ECX's rule regulating e-commerce.

The third important issue in e-commerce regulation is consumer issues. Unlike the offline environment, where consumers enter a store, inspect potential purchases and judge for themselves the trustworthiness of a seller, the online world does not provide the same opportunity to use a "buyer's instinct."<sup>241</sup> Rather, many consumers are forced to proceed on faith, knowing precious little about the seller to whom they are entrusting their credit card data.<sup>242</sup> Hence, some kind of protection must be given to online consumers. Among the issues that must be addressed in order to protect online consumer is the issue of fair business, advertising and marketing practices. Businesses who engage in an electronic commerce should be under obligation to pay due regard to the interest of consumers and act in accordance with fair business, advertising and marketing practice.<sup>243</sup> With this respect, ECX under article 5.5.5, 6.3, 6.4, 6.5 and 6.6 of the rule regulating e-commerce has dealt matters related to fair business, advertising and marketing practices. Accordingly members, trading representatives and/or clients entering their own instruction are duty bound to act in accordance with fair trade, advertisement and marketing practices.

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<sup>239</sup> Ibid

<sup>240</sup> Ibid

<sup>241</sup> Id p. 23

<sup>242</sup> Ibid

<sup>243</sup> OECD, Recommendation of the OECD Council Concerning Guidelines for Consumer Protection In The Context of Electronic Commerce([www.oecd.org/dataoecd/18/13/34023235.pdf](http://www.oecd.org/dataoecd/18/13/34023235.pdf)/[www.oecd.org/sti/consumer/2091663.pdf](http://www.oecd.org/sti/consumer/2091663.pdf))last visited on 15/12/2014

The other issue related to consumers is online disclosure. There is a need for clear and obvious online disclosure of information. This information include following three things:<sup>244</sup>

Firstly, there is a need for a clear and obvious online disclosure of information about the business including identification of the business, its legal name, address, contact information and government registration or license numbers.

Secondly, sufficient information about the goods or services whichenable consumers to make an informed decision about whether or not to enter into the transaction.

Thirdly, information about the transaction including terms, conditions and costs associated with the transaction. This may include making the information available in multiple languages, an itemization of costs, terms of delivery, as well as details on any limitations or warranties.

In this aspect, the ECX rule which regulates e-commerce lays an obligation for the disclosure of information which includes assigned user id, member id, price, quantity, side (buy or sell), validity, delivery location and product information. However, the rule has filed to address issue relating to payment. The rule doesn't mention about the disclosure as to payment arrangement and consumers' security resulting from the payment mechanism of the institution. This is because trading members and intermediary members(for his/her clients as well) are required to open a separate account in a recognized bank which the ECX is authorized to give settlement instruction on his/her behalf.<sup>245</sup> Thus, as payment is conducted as per this provision, the issue of payment arrangement and the security thereto will not arise. Hence;there is no need to address this issue.

In addition to these information, the rule gives mandate to ECX to add some other information to be disclosed when a need arise. This gives a chance to the exchange to give response to the changes that may occur as a result of technological advancement as well as to give response to practical problems that the exchange is expected to require the disclosure of such other information.

The other issue that must be addressed in dealing online consumers is confirmation process.

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<sup>244</sup> Ibid

<sup>245</sup> Revised Rules of the Ethiopia Commodity Exchange, 2010, Art. 4(4.5) (4.5.1)-(4.5.2), No.5/2010, as amended, Revised Rules of the Ethiopia Commodity Exchange No.4/2010

“To avoid ambiguity concerning the consumer’s intent to make a purchase, the consumer should be able, before concluding the purchase, to identify precisely the goods or services he or she wishes to purchase; identify and correct any errors or modify the order; express an informed and deliberate consent to the purchase; and retain a complete and accurate record of the transaction”<sup>246</sup>.

With this respect, the exchange’s rule provides for all members, trade representatives and clients entering their own instruction the right to cancel or modify his/order before it is executed.<sup>247</sup> This gives consumers an opportunity to correct their mistakes .

The rule also stipulates the need to maintain audit trail containing all relevant attributes for electronic orders, including order entry, modification and cancellation. Besides, the rule demand the disclosure of reconciliation report to electronic trade representatives and to their clients entering their own instruction.<sup>248</sup> However, the time when and the content of the report is not specified in the rule. The exchange is authorized to specify the time and the content of the report.<sup>249</sup>

Further, the rule provides how order is matched on the electronic system<sup>250</sup> as well as it provides the need to specify for how long his/her order remains valid or after when his/her order is cancelled though the date is not specified.<sup>251</sup>

Moreover, the rule provides which orders are acceptable for execution on the electronic trading platform of the exchange. This makes electronic trade representatives and clients entering their own instruction to have a clear picture about which orders are acceptable.

The rule also specifies how errors and omissions that are committed in handling orders can be resolved.<sup>252</sup> The existence of this provision enables parties in the transaction to have confidence in the transaction since there is remedies if any error and omission occurs in

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<sup>246</sup> OECD, cited above at note 243

<sup>247</sup> Ethiopia Commodity Exchange Rules Amendment No.8/2014, 2014, Art.2(25)( 5.5.11), Rule no. 8/2014, as amended, Revised Rules of the Ethiopia Commodity Exchange No.7/2013

<sup>248</sup> Id, Art. 28 (5.5.15)

<sup>249</sup> Ibid

<sup>250</sup> Id, Art. 2(25)(5.5.10)

<sup>251</sup> Id, Art. 2(21)(5.5.2)(5.5.2.2)

<sup>252</sup> Id, Art. 2(32)(5.5.19)

handling their orders. Besides, the rule under article 32(5.5.19.3) establishes procedures in resolving errors and omissions.

The other issue which is related to consumers is education and awareness.

“Governments, business and consumer representatives should work together to educate consumers about electronic commerce, to foster informed decision-making by consumers participating in electronic commerce, and to increase business and consumer awareness of the consumer protection framework that applies to their online activities.”<sup>253</sup>

With this regard, the rule requires trading representatives and clients entering their own instruction to attend electronic trading training in order to use the electronic platform of the exchange. This enables electronic trade representatives and clients entering their own instruction to have a clear picture about the whole process of e-commerce

The exchange, through the exchange’s electronic trading system control center, is required by the rule to provide support and problem management to members and trading representatives<sup>254</sup> and under article 2(34)(5.5.20) it also stated remedies for failure of electronic trading platform of the exchange. Besides these, the rule provides how to handle phantom orders.<sup>255</sup>

The provisions of the ECX amendment rule no.8/2014 which deals consumer issues are provided in a detail manner and in the manner compatible with the guideline provided by OECD for consumer protection. The existences of these provisions dealing different issues related to consumers are necessary in order to put them in better position to make a well informed decision. Moreover it will boost consumers’ confidence in the transaction since it stipulates alternatives solutions for different errors and omissions that may occur in the electronic transaction.

Therefore, in regulating consumer issues all, what is incorporated in the ECX amendment rule no.8/2014 should be addressed for the purpose of boosting consumers’ confidence in the

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<sup>253</sup> OECD, cited above at note 243

<sup>254</sup> Ethiopia Commodity Exchange Rules Amendment No.8/2014, 2014, Art.2(17)( 5.3.4), Rule no. 8/2014, as amended, Revised Rules of the Ethiopia Commodity Exchange No.7/2013

<sup>255</sup> Id, Art. 32(5.3.5)

electronic transaction as well as for the purpose of making consumers to take a well informed decision.

The third issue that must be addressed in regulating e-commerce is taxation. Taxation issue is not dealt under the exchanges rule regulating e-commerce. This is mainly because the nature of the exchange itself doesn't allow it to levy tax by itself. Moreover, only members or their trading representatives or their clients are allowed to use the electronic platform of the exchange and one of the requirement in order to acquire membership seat in the exchange is registration for value added tax and the presence of tax registration number and all what is expected from the exchange is reporting to the tax authority all the executed transactions including the names of the parties. Accordingly taxation issue is dealt by the tax authority. Hence the exchange has treated taxation issue in the same manner with the floor trading system.<sup>256</sup>

The fourth issue in e-commerce regulation is privacy issue.

“The core principle behind privacy issue is collection, use or disclosure of personal information during the course of commercial activity must do so only with the prior knowledge and consent of the concerned individuals and such information may only be used for the purposes for which consent has been given.”<sup>257</sup>

With respect to privacy issue, ECX amendment rule no.8/2014 incorporates two provisions. Article 2(22)(5.5.3) stipulates about the non-disclosure of the identity of the parties. This provision while stating the possibility of making visible to traders all the details of executed trades, it prohibits the disclosure of the identities of the parties for the purpose of protecting the privacy of the parties. The other provision that deals privacy issue is article 2(37)(6.3.2) which prohibits members and trading representatives from disclosing another person's order to buy or sell except to a designated official or authority. Besides this, the rule prohibits members and trading representatives to solicit or induce someone else to disclose such information. From these two provisions it is possible to say the information is acquired through the consent of that person since those information are disclosed while one intends to involve in the transaction and once he/she has an intention to involve in the transaction, he/she also intended to give the required information. Hence, those information are collected

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<sup>256</sup> Interview with W/ro Yetnayet Beyene, Head of regulation office at ECX, on 05/12/2014

<sup>257</sup> Michael Geist, cited above at note 241

and used with the prior knowledge of the concerned individuals as well as those information are used only for the purpose it is intended. With this respect, disclosure of information is not prohibited to a designated official or authority since this is necessary for the trading activity and for the overall interest of the market. Therefore, privacy issue under the exchange's rule is dealt in a way it encompasses the core principles of privacy .

The other issue in e-commerce regulation is security. There is a comparable rule in the ECX rule of amendment no.8/2014. The rule requires each trading representatives and clients entering their own instruction to have a unique id.<sup>258</sup> It is the exchange that issue the user id in the manner prescribed by the exchange<sup>259</sup> and it is the duty of members to ensure the registration for user id by the electronic trade representatives and clients entering their own transaction are current and accurate.<sup>260</sup>The rule also prohibits the usage of other person's user id and one can enter an instruction only by using his/her own id.<sup>261</sup> The exchange is also required to establish system account management.<sup>262</sup>Hence, each user will conduct secured transaction and there will not be suspicion as to somebody else might transact using his/her name.

The last issue that must be addressed in regulating e-commerce is intermediary liability issue. Internet intermediaries are mostly defined as

“intermediaries that bring together or facilitate transaction between third parties on the internet, they give access to, host, transmit and index content products and services, originated by third parties over the internet or provide internet based services over the internet.”<sup>263</sup>

Hence, when one talk about intermediary liability it is about the liability of intermediaries who do not involve in the content creation or initiation. In this respect, the ECX can be considered as an intermediary since its main service is bringing together or facilitating transaction between members, trading representatives and clients by providing an organized market place for the exchange of commodities and for the electronic trading, it provided electronic platform.

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<sup>258</sup>Ethiopia Commodity Exchange Rules Amendment No.8/2014, 2014, Art.2(17)( 5.3.3), Rule no. 8/2014, as amended, Revised Rules of the Ethiopia Commodity Exchange No.7/2013

<sup>259</sup> Id, Art. 17(5.3.3)(a)

<sup>260</sup> Id, Art. 17(5.3.3)(b)

<sup>261</sup> Id, Art. 17(5.3.3)(C)

<sup>262</sup> Id, Art. 17(5.3.3)(e)

<sup>263</sup> J. Graham, H. Smith(ed.), Internet Law and Regulation(4th ed.,2007) 5- 15.

“ Thus, the exchange as an intermediary it is only liable for phantom orders which was caused by a failure, malfunction or negligent operation of an exchange system, service or facility, or whose terms for instance contract, quantity or price were changed without authorization of the trade representative or a client entering its own instruction placing the instruction solely as a result of a failure, malfunction or negligent operation of an Exchange system, service or facility.”<sup>264</sup>

Hence, the exchanges’ liability is only for those phantom orders that are caused as a result of failure, malfunction or negligent operation of the exchange’s system, service or facility.

“The other liability of the exchange as an intermediary is for losses related to incorrect trade report for which the exchange fails to provide notification that an exchange system, service or facility may produce such incorrect information and also for which the exchange fails to provide notification of a means to obtain correct trade report from such system, service or facility.”<sup>265</sup>

Therefore, the liability of the exchange is limited for those losses which are related to the exchange’s system, service or facility. The rule has also established the liability of members as they act as intermediary in some instances.

Therefore, the exchange rule has addressed intermediary liability issue by providing different liability regime for different intermediaries involved in the transaction.

So far it is tried to show how the rule of the exchange regulates the legal issues involved in ecommerce. The rule has addressed all legal issues of ecommerce except choice of law and forum and taxation issues. Hence, it is not possible to take an experience from the exchange as issues of taxation and choice of law and forum as have not incorporated in the rule.

With respect to other issues it is possible to take an experience from the exchange. With respect to consumer issues it is possible to take an experience as to what information is expected to be provided to consumers, what is expected from service providers to protect

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<sup>264</sup>Ethiopia Commodity Exchange Rules Amendment No.8/2014, 2014, Art.2(17)( 5.3.5), Rule no. 8/2014, as amended, Revised Rules of the Ethiopia Commodity Exchange No.7/2013

<sup>265</sup> Id, Art 2 (31)(5.5.18.2)

consumers from unfair trade practices and misleading advertisement, what alternatives should be provided to consumers to correct their mistakes even to change their mind in the transaction and other related issues. The exchange has also dealt privacy issue in a way it protects privacy of consumers and hence it is possible to take an experience from the exchange in dealing privacy issues. The other issue which it is possible to take an experience from the exchange is internet governance and domain name. The exchange has assigned a separate office which administer the exchange's online system and which assign user id which enable one to access the electronic platform of the exchange. Hence, through this mechanism the exchange can administer its electronic trading system in a proper manner. The last issue which is addressed by the exchange's rule is liability of internet intermediaries. The rule established liability of intermediaries by providing different liability regime for different intermediaries.

Generally, the exchange's rule on the electronic commerce boosts consumers' confidence by requiring minimum information to be given to consumers, by guarantying consumers' security and privacy, by giving a right to correct errors or right of cancellation before the transaction is executed, by protecting consumers from unfair trade practices and such other thing as it is discussed above. On the other hand it doesn't impose such a different requirement for the use of the electronic platform of the exchange compared to the floor trading system.

Therefore, on the issues that are addressed by the exchange's rule, the rule of the exchange is adequate for the regulation of ecommerce in Ethiopia as well.

## Chapter Four

### Designing Regulatory E-commerce Framework in Ethiopia

#### 4.1 Current Status of E-commerce in Ethiopia

The Ethiopian ICT sector is among the least developed in the information development index.<sup>266</sup> Though several reasons are mentioned for this, the government acknowledged the following:<sup>267</sup>

- Limitations in telecommunications network, which is mainly designed for voice grade communication, and limited numbers of both fixed and mobile telephones,
- Lack of skilled human resources coupled with low ICT literacy,
- Low level of Internet service and poor connectivity
- Underdeveloped physical and telecommunications infrastructure
- Underdeveloped market for computer hard- and software products aggravated by high cost of acquisition,
- Lack of organized data and information resources, and poor accessibility to those that exist.
- Limited or no public awareness on the role and potential of ICT
- Undeveloped private sector and
- Legal and regulatory constraints

Besides the above mentioned reasons, it is also believed that the under development of ICT in Ethiopia is because of the telecommunication service is owned only by the government and this absence of competition results the ICT infrastructure to be more inefficient.<sup>268</sup>

The under development of ICT in Ethiopia and the under development of online banking system and the use of credit card, e-commerce in Ethiopia is at its infant stage. In the 2001 survey, there were two businesses to consumer models identified and only one online

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<sup>266</sup>Lishan Adam, Ethiopia ICT Sector Performance Review 2009 2010: Towards evidence-based ICT policy and regulation (<http://www.researchictafrica.net/>) last visited on 20/12/2014.

<sup>267</sup>Federal Democratic Republic of Ethiopia Information Communication Technology Policy (ICT) (<http://www.abyssinialaw.com/root/policies-and-strategies>) last visited on 20/09/2014

<sup>268</sup>Shaun LaKe, cited above at note 95

magazine.<sup>269</sup> Since then, there is an increase in the number of internet service providers both in the areas of information provision such as online newspapers and entertainment sites, online advertisement, and to a lesser degree online retail and online auction sites.<sup>270</sup> Even with an inferior ICT infrastructure, companies in Addis Ababa are able to operate profitable online businesses.<sup>271</sup> Among these, EthioGift and Genuine leather craft can be mentioned.<sup>272</sup>

Majority of online information provision services are unpaid and depend on sponsors and the fact that it is free of payment will likely increase the demand of such kind of services in the future even if it subject to payment.

Moreover, there is a development in online banking system and use of credit cards and this by itself will have a positive impact for the growth of e-commerce in Ethiopia.

Besides, Ethiopia has a large number of diaspora which are considered as a positive catalyst and clients for e-commerce.<sup>273</sup> The government of Ethiopia has also recognized the potential benefit of e-commerce and they are drafting laws which regulate e-commerce. Hence, there is no doubt that e-commerce is rapidly becoming a growth area in Ethiopia and its potential to transform the landscape of the economies of the world.

## **4.2 Reviewing the Existing Laws of Ethiopia that have Implication on E-commerce**

Within the emergence of the Internet as a medium for forming commercial contracts, legislatures around the world were and are still very active to provide a regulatory framework for electronic commerce.<sup>274</sup> The main goal for that is to facilitate electronic commerce and remove obstacles that face its growth.<sup>275</sup> In respect to electronic contracting rules, legislatures face a primary question in whether they need a new set of rules in the electronic setting or the substantial traditional rules are capable to accommodate the new environment.<sup>276</sup>

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<sup>269</sup>Rahwa w. Welderufael, The Liabilities of Intermediary Service Providers in Ethiopia: Learning from the Best Practices of EU and USA ([www.abysinialaw.com](http://www.abysinialaw.com)) last visited on 15/09/2014

<sup>270</sup> Ibid

<sup>271</sup> Shaun Lake, Supra at note 95

<sup>272</sup> Id, p.13-14

<sup>273</sup> ICT Policy, (n 4) p 6

<sup>274</sup>HishamTahat, Factors affecting E- commerce contract law (<http://www.bileta.ac.uk/content/files/conference%20papers/2005/Factors%20Affecting%20E-%20commerce%20Contract%20Law.pdf>) last visited on 12/10/2014

<sup>275</sup> Ibid

<sup>276</sup> Ibid

Hence, in this subsection, those laws of Ethiopia that have implication on e-commerce will be analyzed in order to determine whether they are capable of accommodating e-commerce or not.

#### **4.2.1 The Ethiopian Commercial law visavis E-commerce**

In Ethiopia trade and business is mainly regulated by the commercial code of Ethiopia. The commercial code of Ethiopia was enacted in 1960 that is before the introduction of the new way of doing business through e-commerce. The law was basically designed to regulate commercial transactions which are done in a physical world. Hence it is difficult to apply this law to the electronic world where business is done without paper through an electronic medium. For this purpose it is better to examine some of the provisions of the commercial code which has impact on e-commerce.

Title four of the commercial code which deals about commercial registers indicates that law only recognize the commercial register using paper based methods under the physical world. For instance the law under article 86 and 89 requires local registers to be kept in each TaklayGuezat by a person appointed by the Ministry of Commerce and Industry.

The law under article 88 further stipulates that publicity through the commercial register to be effected, with regard to persons, by the entry of declarations made by such persons before the authorities responsible for keeping local registers. Hence, commercial registration is only possible using paper based method under the physical world.

To show that the law was not primarily made to facilitate e-commerce, the requirement of writing, signature, original documents and retention of documents under manual filling system can be observed from articles 95, 96, 97 and 98 of the Ethiopian Commercial Code.<sup>277</sup>

Article 95(1) of the commercial code requires entries to be made upon a written statement made by the person seeking registration. Article 96 also requires a statement under Art. 95. (1) to be in writing and in three copies signed by the person seeking registration or his representative, and to be handed to the official in charge of the local register. Further, article 96(2) requires all necessary documents, if any, to be annexed to the statement. Moreover article 97(2) requires the officials in charge of the register to check all documentary evidence supporting the statement and the conformity of the statement to such evidence and under sub

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<sup>277</sup> Adam Mambi, An Assesment Report on Developing E-commerce Law For Ethiopia, (2010, Unpublished, Ministry of Information and Communication Technology) p.26

article 3 the official is entitled to require the applicant to produce additional documents and information if it is necessary. Article 98(3) also requires the official to keep a copy of the statement and to file it and under sub article 4 the law requires one copy to be sent to the department of the central commercial register.

With respect to the place of registration the law under article 103 provides that:

- ( 1) The application for registration shall be made at the registry of the TaklayGuezat within whose jurisdiction the person seeking registration carries on his trade. Where the applicant carries on several trades, ,he shall make the application at the registry in the TaklayGuezat within whose jurisdiction the principal place of business is situate.
- (2) Where the head office of the business is abroad, the trader shall make the application at the registry in the TaklayGuezat within whose jurisdiction the principal branch or agency is situate.”

With respect to the place and manner of registration of mortgages the law under article 179 provides that

- (1) The mortgage shall be registered by the official Ministry of Commerce and Industry with keeping Guezat the register of mortgages of businesses.
- (2) The mortgage shall be entered in the register kept in the TaklayGuezat within whose jurisdiction the business is situate.
- (3) Where the business comprises branches or agencies situate outside the jurisdiction of the TaklayGuezat, .the mortgage shall be entered in the register kept in each TaklayGuezat within whose jurisdiction each branch or agency is situate.

Therefore, from the above provisions of the commercial code, it is possible to conclude that while e-government and e-commerce encourage people to register their business online, the Commercial Code does not give room for registration electronically in Ethiopia.<sup>278</sup>

On other hand, the Commercial Registration and Business Licensing Proclamation no. 67/1997 which seem to be recent law, still do not give room for conducting trade and

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<sup>278</sup> Ibid

business electronically.<sup>279</sup> This can be seen from article 6 which deals about application for registration and decision. Article 6 provides that a businessperson shall, before starting his commercial activity, apply for a principal or summary registration by completing and submitting to the Appropriate Authority the application form, prescribed by the Regulations, to which he shall attach the necessary documents.

The Ethiopian legal system that regulates contract transactions requires contracts to be made in certain forms for legal validity with requirements of writing and handwritten signatures.<sup>280</sup> These forms of legal provisions are common under the Commercial Code as indicated under the following provisions<sup>281</sup>;

Art. 152 of the commercial code. - Sale to be in writing. The sale of a business shall be null and void unless evidenced in writing.

Furthermore, the law seems to exclude electronic publications of business transactions as provided under article 164.<sup>282</sup> Article 164(1) of the commercial code provides that where the business is sold, the buyer shall ensure that a notice to this effect is published in the official Commercial gazette and in a news –paper empowered to publish legal notices circulating in the TaklayGuezat where the head office of the business is situate.

The evolution of digital technology based on e-commerce which has brought a revolution on a paper based or manual signatures paving way for electronic or digital Signatures seem to pose legal uncertainty and validity under offline laws that were created to suit paper based methods.<sup>283</sup> The current legal system in Ethiopia does not support the use and applicability of electronic signatures to facilitate e-commerce.<sup>284</sup>

For instance the Commercial Code provides that for commercial instruments such as negotiable instruments to be valid they must be signed with manuscript signatures.<sup>285</sup> This is inferred from article 823- 827 of the commercial code. Moreover this can be evidenced by the following provisions.

Art. 734. - Signature.

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<sup>279</sup> Id, p.27

<sup>280</sup> Id, p.29

<sup>281</sup> Ibid

<sup>282</sup> Ibid

<sup>283</sup> Id. P.35

<sup>284</sup> Ibid

<sup>285</sup> Ibid

( 1) Declarations made by commercial instruments shall bear the **signature** of ,the person making them.

( 2) Nevertheless, signature may be apposed by a handwritten mark or by mechanical process such as a stamp.

( 3) When a physical person is unable to sign, !his consent shall be evidenced by an authentic declaration on the instrument.

Art. 748. - Forms of endorsement.( 1) An endorsement shall be in written on the bill of exchange or on a slip affixed thereto (allonge) and **it shall be signed** by the endorser.

Art. 761( 1) An acceptance shall he written on the Bill of exchange and expressed by the word"accepted" or any other similar words. It shall be signed by the drawee. The simple signature of the drawee on the face of the bill constitute an acceptance.

The law further provides that “where any of the requirements provided in Art. 735 is absent the instrument shall not be valid 'as a bill of exchange, except in the cases specified in sub-art. (a), (b) and (c) hereunder”.

Article 741 further provides that if a bill of exchange bears signatures of persons incapable of binding themselves by a bill of exchange, forged signatures, signatures of fictitious persons or signatures which for any other reason cannot bind the persons who signed the bill of exchange or on whose behalf it was signed, the obligations of the other persons who have signed it shall be valid.

#### **4.2.2 Ethiopian Contract Law vis-avisE-commerce**

The development of ICTs and the use of e-commerce facilitate contracts and other related agreements to be made electronically as part of distance selling contracts.<sup>286</sup> Generally a contract is any agreement that can be enforced by the law, between two or more persons to do or abstain from doing some act or acts with an intention of creating legal relations.<sup>287</sup>

Contract is considered as a law among the parties.<sup>288</sup> Hence, the parties are bound by terms of the contract and any dispute arising out of the contract is decided as per the contract. Priority is given to the parties autonomy and hence, the law of contract is primarily designed to fill

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<sup>286</sup> Id. P. 29

<sup>287</sup> K. Smith, Law for Business, (13<sup>th</sup> ed .2006) p.85.

<sup>288</sup> Civil Code of the Empire of Ethiopia, 1960, Art. 1731, Proc. No. 165, Neg. Gaz. Year 19, no. 2

the gap that might exist in the contract. However, in some cases the law imposes some mandatory provisions which the parties are required to comply with.

The laws governing contracts are among the key areas, which can be affected by the development, and use of e-commerce.<sup>289</sup> Most laws that deal with contracts provide for certain legal requirements which might only apply on the physical world environment. For instance, for some type of contracts the law requires special form for concluding a valid contract such as some contracts to be in writing, the contract to be under seal and in some instances the law requires signature and third party authentication or involvement such as notarial execution.<sup>290</sup> These requirements are only applicable in a physical world.

The legal concepts of writing and signatures under the current laws do not involve data message. In addition to that, it is impossible for both parties entering into contract to use other parties to witness their transactions under cyberspace.<sup>291</sup>

The Ethiopian civil code Under article 1719(1) gives freedom for the parties to choose any type of form while concluding a contract. However under sub article (2) the law provides that if a special form is required by law, the parties are required to conclude that contract in the form required by the law. Hence, since the law gives freedom to choose form to the parties, it is possible to conclude a contract in any form including electronic contract which facilitates e-commerce. However, in some instances if the law requires special form the contract must be concluded in the form prescribed by the law and in these cases it may not be possible to conclude electronic contract. There are some provisions in the civil code which require special form for some type of contracts and in effect which hamper the development of e-commerce. The following provisions can be mentioned as an example.

Art. 1723(1) A contract creating or assigning rights in ownership on an immovable or an usufruct, or mortgage of an immovable property shall be in writing and registered with a court.

Art. 1723(2) Any Contract by which an immovable is divided and any compromise relating to an immovable shall be in writing and registered with a court or notary.

Art. 1724 Any contract binding the government or public administration shall be in writing and registered with a court, public administration or notary.

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<sup>289</sup> Adam Mambi, *Supra* at note 236, P.27

<sup>290</sup> *Ibid*

<sup>291</sup> *Ibid*

Art. 1725 requires contract of guarantee and insurance contract to be made in writing.

Art. 1127 (1) Any contract required to be in writing shall be supported by a special document signed by all parties.

Besides these, there are some legal questions remained unregulated in the digital world.

“The contract law of Ethiopia do not address some legal questions involved in cyberspace contracts. Such questions includes when and where the contract is deemed to be formed?

In what ways can acceptance be communicated and where transactions really happen? Can a computer or web server accept an offer and form a contract? What type of the contract that is likely to be created; is it unilateral or bilateral?

And how can the terms be honored?”<sup>292</sup>

#### **4.2.3 Auction under the Ethiopian Law vis-avis E-commerce**

There has been rapid growth in the development and use of online auctions aimed both at consumers and businesses.<sup>293</sup> Computer technology has facilitated auction business to be carried online whereby buyers are not necessarily forced to come face to face with auctioneers and even other competing parties.<sup>294</sup> Unlike the traditional auction, the world of technology has now embarked on the so-called online auction which raises interesting legal questions including the method of acceptance by the auctioneer.<sup>295</sup> The general principle under current law in most countries like Ethiopia, stipulates that, a sale by auction is completed on the fall of the auctioneer’s hammer or in any other customary manner.<sup>296</sup> Hence, the contract is deemed to be completed when the thing is knocked down upon the last bid being made. This can be reflected from the following provision of the Civil Procedure Code

Art. 1688. - Sale by auction

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<sup>292</sup> Id. 29

<sup>293</sup> Id. P. 32

<sup>294</sup> Ibid

<sup>295</sup> Ibid

<sup>296</sup> Ibid

(1) Whosoever offer a thing for sale by auction shall be deemed to be a declaration of intention and not an offer.

(2) in such a case, the contract shall be completed when the thing is knocked down upon the last bid being made

Therefore, there is no room for online auction as the law only requires the knocking down of a thing for the conclusion of a contract.

#### **4. 2.4 The Draft Electronic Commerce Proclamation**

As it is tried to mention above, the existing laws of Ethiopia do not have a room for e-commerce. In fact, they do not allow electronic transaction. In order to solve the problems associated with the existing laws, the Ministry of Information and Communication Technology has prepared a draft e-commerce law.<sup>297</sup> This draft law has dealt different issues that exist in e-commerce although it has some incomplete sentences. It also expected to avoid the hurdles created by the commercial and contract law for the conclusion of electronic transaction.

The draft e-commerce proclamation recognizes electronic signature, electronic writing documents and data messages.<sup>298</sup> It also recognizes electronic registration, electronic means of payment and electronic means of publication and communication.<sup>299</sup>

This e-commerce proclamation under section 30 recognizes online auction as opposed to the provision of the civil procedure code which do not have a room for online auction.

The draft proclamation under chapter vi from section 29- 40 deals about communication of data message and electronic documents. Under these sections, the proclamation recognizes electronic contract and gives guidelines as to how a valid and a legally enforceable electronic contract can be concluded.

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<sup>297</sup>This draft law is referred as the “Federal Republic of Ethiopia Electronic commerce Proclamation Bill of 2010”

<sup>298</sup> This draft proclamation under chapter iv from section 8-22 has dealt different issues associated with electronic signature. It recognizes electronic signature and it amended those provisions of the commercial code and civil code dealing with contracts, which requires writing and signature for the conclusion of a contract to encompass electronic signature and data message.

<sup>299</sup> These concepts are provided from section 23-28 of the draft proclamation of electronic commerce bill 2010.

The proclamation from section 41 to 47 and the following also incorporates provisions for the protection of consumers. Hence, it provides the minimum information to be given to consumers, it gives right to consumers the right to review the entire electronic transaction, to correct any mistakes, to withdraw from the transaction before finally placing any order, the right to cancel the transaction without any reason and without any penalty for goods within seven days after the receipt of the goods and of services within seven days after the conclusion of the contract.

Moreover, suppliers are obliged to perform their obligation within thirty days after the day on which the supplier received the order, unless the parties have agreed otherwise and if the supplier fails its obligation within thirty days consumers are entitled with the right of cancellation after giving seven days of prior written notice. For the protection of consumers, this draft proclamation provides for the possibility of establishing online consumer affairs committee by the ministry in which consumers submit their complaint of non-compliance of the provisions of the proclamation by the suppliers.

Section 48 and 49 of the draft proclamation deals about data protection and generally data controllers should only collect, collate, process or disclose data that are acquired in e-transaction for the purpose it is intended and other use should be made only upon permission or if it is only required by law.

The draft proclamation also incorporates provisions which are applicable to carriage of goods in e-commerce. The other two chapters of the draft proclamation deals about regulation of certifying authorities and supplier of certification services and about of the national certifications agency (NCA) and the licensing of certificate authorities.

The draft proclamation has also incorporated provision which govern liabilities of service providers and intermediaries. This draft proclamation under section 72 exempts service providers and intermediaries from liability for which the person or party acting as a service provider merely provides access if such liability is founded on:

- a. the obligations and liabilities of the parties under the electronic data message or electronic document
- b. The making, publication, dissemination or distribution of such material or any statement made in such material, including possible infringement of any right subsisting in or in relation to such material: provided that

- i. The service provider or intermediary does not have actual knowledge, or is not aware of the facts or circumstances from which it is apparent, that the making, publication, dissemination or distribution of such material is unlawful or infringes any rights subsisting in or in relation to such material;
- ii. The service provider or intermediary does not knowingly receive a financial benefit directly attributable to the unlawful or infringing activity; and
- iii. The service provider intermediary does not directly commit any infringement or other unlawful act and does not induce or cause another person or party to commit any infringement or other unlawful act and/or does not benefit financially from the infringing activity or unlawful act of another person or party.

Moreover, provisions which is applicable to security issues has incorporated in the draft e-commerce proclamation. Accordingly:

“access to an electronic file, or an electronic signature of an electronic Datamessage or electronic document shall only be authorized and enforced in favor of the individual or entity having a legal right to the possession or the use of the plaintext, electronic signature or file and solely for the authorized purposes.”<sup>300</sup>

Besides, the electronic key for identity or integrity will not be made available to any person or party without the consent of the individual or entity in lawful possession of that electronic key.<sup>301</sup>

This draft proclamation, under section 74 also requires any person who obtained access to any electronic key, electronic data message, or electronic document, book, register, correspondence, information, or other material pursuant to any powers conferred under the proclamation, not convey to or share the same with any other person except for the purposes authorized under the proclamation. The draft proclamation also under section 75 provided penalties for unauthorized access into or interference in a computer system/server or information and communication system without the knowledge and consent of the owner of the computer or information and communications system.

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<sup>300</sup>Section 73(1) of the FDRE draft e-commerce proclamation 2010.

<sup>301</sup> Id. section 73(2)

Generally, by taking a lesson from the ECX, this draft proclamation has more or less addressed various issues involved in e-commerce and primarily it is expected to solve the problems that the existing laws have for the development of e-commerce. However, there are some issues which this draft proclamation failed to incorporate.

Among others, jurisdictional issues- choice of law and forum and taxation issues remains unregulated in the draft proclamation. This draft proclamation also failed to address the minimum requirements to supply goods and services over the internet.

The draft proclamation has also failed to incorporate provisions concerning fair business, advertising and marketing practices in online environment.

The draft proclamation has mentioned nothing about education and awareness. Education and awareness are important to foster informed decision-making by consumers participating in electronic commerce, and to increase business and consumer awareness of the consumer protection framework that applies to their online activities.

There are different intermediaries involved in e-commerce with distinct level of immunity. These intermediaries may be mere conduit, caching and host providers. However, this draft proclamation doesn't make a distinction between internet service providers and give the same liability regime applicable to all.

### **4.3 Challenges in Developing Regulatory E-commerce Framework in Ethiopia**

E-commerce has been hailed by many as an opportunity for developing countries to gain a stronger foothold in the multilateral trading system.<sup>302</sup> E-commerce has the ability to play an instrumental role in helping developing economies benefit more from trade.

Unlike the requirements necessary to run a business from a physical building, e-commerce does not require storage space, insurance, or infrastructure investment on the part of the retailer.<sup>303</sup> The only pre-requisite is a well-designed web storefront to reach

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<sup>302</sup> World Trade Organization, cited above at note 94

<sup>303</sup> Ibid

customers.<sup>304</sup> Additionally, e-commerce allows for higher profit margins as the cost of running a business is markedly less.<sup>305</sup>

Though this is the fact, e-commerce is at infancy in Ethiopia. The challenges facing Ethiopia are multi-varied and they are political and have also socio-economic ramifications. The following can be mentioned as a challenge in developing a regulatory framework in Ethiopia though they are not exhaustive.

Since the vast majority of Ethiopia population lives in rural areas and largely illiterate which implies that extremely low levels of computer literacy skills, it will be a challenge for developing a regulatory framework in Ethiopia.

Ethiopia has a large population with cultural and linguistic diversity. Patterns of settlement are such that the population is dispersed over wide and inaccessible areas geographically with little developed physical and ICT infrastructure. Creating locally-relevant content and applications for this large population across terrains difficult of access, and using upwards of 80 languages is a real challenge.

E-commerce involves different legal issues from recognizing electronic signatures, licensing internet service providers and taxation issues, through mundane issues of consumers, privacy and security issues. These different issues are the concerns of different administrative authorities for instance taxation issues are dealt by Ethiopian customs and revenues authority, consumer issues are the concerns of consumer protection authority and determining which authority should have the power to regulate e-commerce as a whole can be mentioned as a challenge in the regulation of e-commerce in Ethiopia.

Regulation by itself has its own costs and as Ethiopia is among the poor countries in the world which faces multiple economic and social problems, investing in creating conducive environment for the application of e-commerce is a challenge for the country.

The nature of e-commerce by itself is a challenge. E-commerce is borderless and developing a regulatory framework which has an effect outside the territory of Ethiopia needs special attention and utmost care in analyzing the consequence of the regulatory framework.

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<sup>304</sup> Ibid

<sup>305</sup> Ibid

The absence/lack of skilled man power who have all the necessary knowledge for the development regulatory framework is also another challenge. Developing a regulatory framework for e-commerce requires knowledge in that particular area and understanding the local environment.

#### **4.4 Prospects in Developing Regulatory E-commerce Framework in Ethiopia**

Despite the above mentioned challenges for developing regulatory e-commerce framework in Ethiopia, there are also opportunities which have positive impact for the development of regulatory e-commerce framework in Ethiopia. Among others the following prospects can be mentioned.

Different regional and international bodies are working in collaboration with the Ethiopian government for ICT development as well as in creating conducive environment for the application of e-commerce by providing technical and financial assistance. For instance UNECA is giving legal consultancy for drafting e-commerce law in Ethiopia.

As it is tried to mention in the above subsection, e-commerce involves different legal issues which are the concerns of different authorities. Hence its regulation involves the integration of these authorities and the cooperation of these different authorities will help for the proper regulation of e-commerce in Ethiopia.

The government of Ethiopia is also working for the development of ICT and this commitment on the side of the government is a cornerstone for the development regulatory e-commerce framework in Ethiopia.

#### **4.5 Developing Regulatory E-commerce Framework in Ethiopia**

The nature of e-commerce including the global nature of the technology, low cost, opportunity to reach hundreds of millions of people, interactive nature, variety of possibilities, and resourcefulness and rapid growth of the supporting infrastructures especially the Web result in many potential benefits to organizations, individuals, and society. Hence, to exploit the potential benefits of e-commerce, it is expected from the part of the government to create a conducive environment for the development of e-commerce in Ethiopia.

At international scene, a major recognition and regulation of electronic commerce began with the adoption of the UNCITRAL Model Law on Electronic Commerce in 1996. The aim of the model law was to ensure that the practices of member states in the area of electronic commerce, as emerging practice in commercial transaction should be uniform and acceptable practice. Hence, member states are expected to draft their laws in conformity with the model law.

In Ethiopia efforts were made at regulating e-commerce. However, these laws are at the draft stage. The draft laws that are expected to govern e-commerce are 'The Electronic Commerce Draft Proclamation' and 'The Electronic Transaction Draft Proclamation'.<sup>306</sup> However, upon the suggestion of the ministry of justice these two draft laws are merged as it is believed that they deal similar matters.<sup>307</sup>

The draft e-commerce law has regulated different issues involved in e-commerce. However, there are also some issues which the draft law has failed to address. Hence, in designing the regulatory framework of e-commerce, all the issues involved in e-commerce has to be addressed for the purpose of creating conducive environment for the application of e-commerce.

Generally, for the proper application of e-commerce in the country, working towards the creation of conducive environment is unquestionable. ECX has enacted a law that regulates e-commerce in a way it facilitates e-commerce in the institution. Therefore, we can take a lesson from the ECX for the proper regulation of e-commerce in Ethiopia as well.

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<sup>306</sup> Interview with Ato Aseged Fitih Awek, IT Standardization and Regulation principal Expert at FDRE Communication and information Technology Minister, on 08/10 2014

<sup>307</sup> Ibid

## Chapter Five

### Conclusion and Recommendation

E-commerce which is the idea of replacing physical trade with electronic trading system has changed the way business is done across the globe. In the traditional trading system, buyers and sellers should physically appear in order to transact. Whereas in e-commerce is possible to transact without physical appearance of both transacting parties. Hence, buyers and sellers may not know each other and the market is not limited with physical space. With the use of the internet and the worldwide web, buyers and sellers could meet and transact even if they live in different countries even more they are in different continents. Hence, e-commerce offers new opportunities to improve the efficiency of business operations and to reduce costs associated with trade procedures, providing increased competitive advantages to the commercial actors ready to embrace new methods of work and trade.<sup>308</sup>

Thus, e-commerce can simply be defined as the buying and selling of products and services through the use of computer mediated networks. E-commerce is relatively a new concept and it has its own unique features which differentiate it from traditional trading system. Among others, e-commerce is ubiquitous to mean that it is available everywhere and hence, one can transact from wherever he/she is. Besides, e-commerce is borderless in a sense it crosses cultural and geographical boundaries. These features of e-commerce call some issues which the existing laws which were mainly enacted to facilitate paper based transactions cannot address. Hence, as e-commerce offers new opportunities to businesses and consumers, there has to be some regulatory scheme which is capable of facilitating transaction. There are a

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<sup>308</sup>United Nations Economic Commission for Europe (UNECE), Electronic Commerce Agreement, Recommendation No.31([www.unece.org/cefact/recommendations/rec31/rec31\\_ecetrd257e.pdf](http://www.unece.org/cefact/recommendations/rec31/rec31_ecetrd257e.pdf))last visited on18/10/2014

number of issues involved in e-commerce which must be addressed while regulating e-commerce. Use and recognition of electronic signature, privacy and data protection issue, security issue, consumer protection issue, taxation issue and applicable law and choice of forum issues can be mentioned as a main issues involved e-commerce.

E-commerce is in a way to be part of the ECX activities. The primary role of ECX is bringing buyers and sellers together to transact among themselves assured of quality, quantity and payment. For this purpose, the exchange provides physical trading system where buyers and sellers physically appear to participate in an open outcry bidding which is conducted on the floor of the exchange. Besides, the exchange has accomplished its preparation to provide electronic trading where buyers and sellers could transact using the electronic platform of the exchange and by doing so the exchange allows e-commerce to be part of the institution's activity. The mandate of the exchange to conduct e-commerce within the institution is derived from the proclamation for establishing ECX no. 550/1997. This proclamation under article 6 authorizes the ECX either to conduct floor or electronic trading system or both. The ECX has enacted different rules so as to govern various matters related with the institution's activities and all the undertakings are performed in accordance with these rules. Thus, in order to facilitate the electronic trading system of the institution, the exchange has amended its rule in a way it is capable of accommodating e-commerce. The rule that regulates e-commerce is ECX amendment rule no. 8/2014 and it regulates various issues involved in e-commerce. This rule regulated issues related to consumers, privacy, security and liability of internet intermediaries. With respect to these issues of e-commerce, the exchange has addressed it in a way it fit the guidelines given by international bodies for the creation of conducive environment for the application of e-commerce. Besides, it doesn't lay down any burdensome obligation for the parties involved in the transaction. For instance, there is no special payment, that is different from floor trading system for using the exchange's electronic platform. However, the rule has failed to address issues of taxation and choice of law and forum, which are expected to be addressed in e-commerce regulation. This is because there is no instance where the exchanges levy tax for the transaction which took place within the institution. Besides, there is no instance for the issue of choice of law and forum to arise as all the undertakings conducted within institution are settled in accordance with the rules of the exchange and disputed are solved by its own means of resolving disputes. Therefore, it is possible to say the rule of the exchange is facilitative and thus, it has a great impact for the development of e-commerce within the institution.

In Ethiopia, the existing laws which regulate transactions are primarily made to facilitate paper based transactions as they are enacted before the cyber world. They do not have a room for electronic signature, electronic registration and other related matters. Hence, they hamper the development of e-commerce.

With a view to solve the gaps that the existing laws have, the Federal Democratic Republic of Ethiopia Ministry of Communication and Information Technology has prepared a draft law, The Federal Democratic Republic of Ethiopia E-commerce Proclamation Bill 2010.

This draft proclamation has incorporated provisions which facilitate e- transactions. The draft proclamation recognizes electronic signature, electronic writing documents, data messages, electronic registration, electronic means of payment and electronic means of publication and communication. It also recognizes online auction and electronic contract and it lays down principles as to how a valid and legally enforceable contract can be concluded. Moreover, it includes consumer issues, privacy and data protection issues and issues related to carriage of goods in e-commerce. It also deals about regulation of certifying authorities, supplier of certifying authorities, supplier of certification services, and about of the National Certifications agency (NCA) and the Licensing of Certificate Authorities. These provision of the Draft e-commerce proclamation has to retained since they are important in e-commerce regulation and most of the provisions which are related with use and recognition of electronic signature and communication, consumer issues, privacy and data protection and security are regulated in the same way with ECX. However, there are some issues that are left unregulated by the draft e-commerce proclamation. Regulation of ecommerce includes dealing with issues of taxation and choice of law and forum. However, these issues remains unregulated in Ethiopia. Hence, these issues must be addressed in the regulation of e-commerce in Ethiopia. . Moreover, the following lessons can be taken from the ECX to include in the draft proclamation:

1. The ECX rule has incorporated a provision which lays minimum requirements to access the electronic platform of the exchange. Likewise, the draft e-commerce proclamation has to stipulate minimum requirements to be a supplier of goods and services over the internet.
2. Online consumer issues, among others, it includes dealing with fair business, advertising and marketing practice. ECX in regulating e-commerce has provided a

principle of fair business, advertising and marketing practice. Hence, this must be taken and included in the draft e-commerce regulation.

3. The Rule of ECX in addressing consumer issues it has incorporated a provision as to education and awareness and members and trading representatives are duty bound to attend a training given by the exchange. hence, it is a duty to give and attend training on e-commerce. However, the rule has said nothing on education and awareness. The draft has to include a provision which impose duty on businesses, concerned government bodies and consumer representatives to educate consumers.
4. The draft e-commerce proclamation, in dealing intermediary liability issue, it doesn't make any distinction and provides same liability regime for all intermediaries involved in the transaction. On the other hand, ECX makes a distinction among different intermediaries in determining liability. Hence, a lesson has to be taken from the ECX and the proclamation has to establish different liability regime for different intermediaries- Host, Mere conduit and catching.

Generally, if the above recommendations are incorporated, the draft e-commerce proclamation will be more complete for the regulation of e-commerce. Moreover, since this proclamation is at a draft stage, efforts has to be made for its approval within a short period of time.

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## **Interviews**

Interview with W/ roYetnayetBeyene, Head, Rules office at ECX, 05/12/2014

Interview with AtoAsegedFitihAwek, IT Standardization and Regulation principal Expert at FDRE Communication and information Technology Minister, on 08/10 2014

