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ADDIS ABABA UNIVERSITY
College of Law and Governance Studies
Masters of Business Law (LLM)

**Consumers and Third Parties Protection under
the National Payment System Proclamation
No.718/2011**

By

Ashenafi Lemecha Moti

February, 2017
ADDIS ABABA

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Consumers and Third Parties Protection under the National Payment System
Proclamation No.718/2011

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A Thesis Submitted in Partial Fulfillment for the award Masters Degree of Law (LLM)
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Dedication

To my late mother Abebech Mamo whose encouragement and patience gave me the strength to join this School of Law. Mam I feel sorry for not seeing this, to my father Lemecha Moti for his advice and encouragement to stay strong during the painful time I went through.

Declaration

The thesis is my original work, has not been submitted for a degree in any other University and that all materials used have been duly acknowledged.

Declared by

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Acknowledgment

First and foremost, I would like to thank the **Almighty God** to give me the courage through his endless love and blessings that helped me to finalize this study.

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Abstract

As result of the rapid development of payment systems worldwide, the Ethiopian Government has enacted the National Payment System Proclamation No 718/2011. It is widely believed that the enactment of this law is one step forward to modernize the payment system of the country. Consequently, the use of electronic systems to transfer funds provides substantial benefits to consumers. However, due to the unique characteristics of such systems, the application of existing consumer protection legislation is unclear, leaving the rights and liabilities of consumers and financial institutions in electronic fund transfers undefined.

A cursory look at the various provisions of NPSP shows that it has not provided adequate legal framework to protect consumers of PI and EFT. Therefore, this paper argues that neither the NPSP nor TCCPP provides sufficient safeguard for the rights and interests of consumers. Moreover, NPSP lacks clarity with respect to whether regular courts could assume jurisdiction in disputes involving the consumer and PII. Hence, an attempt is made to clarify this issue. It further examines issues relating to protection of third parties under the NPSP. The paper, among other things, recommends that a law which determines the reciprocal rights, liabilities and obligations of consumers and PII should be enacted so as to protect consumers. It also recommends that an exception to the principle of irrevocability of payment should be made.

ACRONYMS AND ABBREVIATIONS

Art- Article

ATM – Automated Teller Machines

BIS- Banks for International Settlements

CC- Civil Code

CSIs- Clearing and Settlement Institutions

EC-European Community

EFT – Electronic Fund Transfer

EU – European Union

EU-European Union

MABD- Regulation of Mobile and Agent Banking Services Directives No.FIS/01/2012

NBE – National Bank of Ethiopia

NPL- National Payment Law

NPS – National Payment System

NPSP – National Payment System Proclamation No. 718/2011

OECD- Organization for Economic Cooperation and Development

PII- Payment Instrument Issuer

PIN- Personal Identification Number

PI-Payment Instrument

PIs- Payment Instruments

POS – Point of Sale

Proc- Proclamation

TCCPP- The Trade Competition and Consumer Protection Proclamation No. 813/13

UNCITRAL- United Nations Commission on International Trade law

USAID-United States Agency for International Development

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CHAPTER 1: INTRODUCTION

1.1 Background of the study

The development of safe and efficient NPS has relevance for the monetary policy, financial stability and overall economy of the country. The modern payment system whereby funds are transferred electronically is a key factor to extend banking services to the majority of unbanked Ethiopians principally because financial institutions do not need to open offices and invest heavily in order to provide a banking service¹.

On the other hand, efficient and secure payment system enables the monetary policies of the government to reach the economy easily and foster investment growth and national saving. It seems that the government of Ethiopia having the view described above has enacted the National Payment System Proclamation No.718/ 2011. However, the modern payment system comes with its own peculiar features and risks. For instance, loss or theft and subsequent unauthorized use of payment instruments (PIs) are peculiar risks. The terms and conditions of PIs in most cases are prepared unilaterally by the issuer of the instrument and are not subject for negotiation.² Moreover, the rule of evidence provided under the NPSP is susceptible to fraud and will affect the legitimate interest of the consumer which ultimately becomes detrimental for the development of National Payment System (hereinafter NPS).

Hence, in order to benefit from the fruits of NPS, there should be appropriate legal framework which protects the consumers. There should be also a mechanism to protect third parties who have a claim against the party involved in the NPS. Thus, the main theme of the thesis is to uncover the legal frameworks for the protection of consumer and third parties in the NPSP. Based on the findings, the paper has recommended measures that need to be taken so as to protect consumers and third parties in NPS.

¹ Explanatory note of the National Payment System Proclamation No. 718/2011

² Simret Zewdie Kebede, *Electronic Funds Transfer; And the Case for Consumer Protection in Ethiopia*, Oslo university, 2013, p.1, available at: <https://www.duo.uio.no/handle/10852/39024?show=full>, (last accessed on October 3, 2016)

1. 2 Statement of the Problem

In order to have a better functioning NPS in Ethiopia, among other things, it is essential to have appropriate legal framework that extends adequate protection for consumers and third parties. To this end, it is also necessary to take consideration of substantive due process of law during the enactment of the law regulating such areas.

The NPSP largely deviate from the existing laws governing business and evidentiary issues which are primarily designed to facilitate paper-based transactions. For instance, the NPSP recognizes the legal validity and admissibility of electronic records and electronic signatures in relation to transfer of funds³. It is clear that by recognizing the legal validity and admissibility of electronic records and electronic signatures, the NPSP removes legal obstacles and it enhances legal certainty and commercial predictability where electronic communications and electronic signatures are used in connection with the payment system⁴. Nevertheless, the newly introduced rule of evidence under the NPSP may pose some practical challenges in terms of probative value and methods of acquiring such evidences in order to protect customer's rights until the jurisprudence of court interpretation takes root on the matter. Hence, taking into account the newness of the electronic payment system in Ethiopia, its development could be hindered easily by the loss of confidence on the part of the user unless there could be a mechanism to ensure the rule of evidence prescribed under NPSP safeguard the rights of consumers.

Currently, the rights, liabilities, and obligations of consumers and PII are determined by the standard contract prepared by the latter. Thus, leaving such matters to be regulated by the standard contract may subject consumers for exploitation.

Moreover, the NPSP provides disputes arising among the parties involved in the NPS concerning any civil matter shall be resolved either by mediation or arbitration. As result, there is a controversy with respect to whether the consumer is under obligation to settle a dispute with PII either through mediation or arbitration and whether regular courts have a jurisdiction to entertain

³The National Payment System Proclamation No. 718/2011, art 21(1), **Federal Negarit Gazeta**, 17th Year, No. 84 (Hereinafter NPSP). This provision stipulated that where any law provides that information or any other matter shall be in writing, such requirement shall be deemed to have been satisfied if such information or matter is rendered or made available in an electronic form and accessible so as to be usable for subsequent reference.

⁴ Kinfie Micheal Yilma and Halefom Hailu Abraha , "The Internet and Regulatory Response in Ethiopia: E-commerce", **Mizan Law Review** , Vol. 9, No.1, p.142

cases related to unauthorized fund transfer. Furthermore, the NPSP provides the irrevocability of payment made through the system. Thus, it is believed that this may have an impact against third party creditor's rights.

1.3 Research questions

- 1) Does the NPSP prescribe the reciprocal rights, obligations and liabilities of the PI issuer and consumer in relation to unauthorized transactions?
- 2) To what extent the dispute settlement mechanisms envisaged under article 31 of the NPSP could be applicable for the consumer of electronic payment?
- 3) Is the dispute settlement mechanism envisaged under NPSP compatible with the right of access to justice and right to appeal of persons?
- 4) To what extent the rules of evidence provided in the NPSP ensures adequate protection to consumers of electronic payment system?
- 5) Does the NPSP envisage adequate legal safeguards to the rights of third party creditors whose rights are protected under the bankruptcy law?

1.4 Scope of the study

The thesis examines the National Payment System Proclamation No. 718/2011 in general with particular emphasis on the provisions relating to protection of consumer and third parties.

To understand the concept at hand in a systematic manner, the experiences of other jurisdictions particularly the protection extended to consumer and third parties is touched upon frequently. The selection of jurisdictions is made taking into consideration their level of advancement in the NPS and available of studies in these countries. Accordingly, repeated reference is made to USA, England, and EU. In addition, Kenya has been selected as result of the fact that it is a developing country and relatively has better payment system law than Ethiopia. The best practices of these jurisdictions have been discussed to elaborate the major issues of the thesis.

1.5 Objective and significance of the study

Since the NPSP was introduced in 2011, the concepts incorporated thereunder are alien to the majority of the Ethiopian legal community. To the knowledge of the researcher, there is no comprehensive research done analyzing the provisions incorporated under the NPSP nor

particularly on the protection, this law extends to consumers and third parties. Thus, the writer examined whether the Ethiopian NPSL meets the international standard with respect to the protection of consumers and third parties. Moreover, the research evaluated how far the rule of evidence introduced by the NPSP goes along with the inbuilt nature of the rule of evidence provided under the substantive and procedural laws of the country.

In terms of significance, I hope the study will have both academic and legal significance. It also hoped that it would initiate further study on the subject matter as it is an unexplored area of law. Moreover, it could be also an input for the legislator to set in place appropriate safeguard for the protection of the rights of the user of the electronic payment system and third parties.

1.6 Methodology of the Study

The writer has employed a qualitative method in the course of the research. The writer has collected, analyzed and interpreted the relevant provisions of the NPSP, Trade Competition and Consumer Protection Proclamation No. 813/2013(TCCPP) and other relevant laws in light of protection of consumers. The writer has also made an endeavor to obtain data through key informant interview from the officials and experts of the National Bank of Ethiopia (NBE), Trade Competition and Consumer Protection Authority (hereinafter the authority), Commercial Bank of Ethiopia and Dashen Bank with regard to the main issue of the thesis. Moreover, the writer also made an attempt to analyze some court cases to elaborate the major issues of the thesis. Furthermore, relevant literature such as books, journals, unpublished materials, were collected from libraries and internet sources were collected and analyzed to highlight on major conceptual, theoretical and legal frameworks of the consumers and third parties' protection in some selected countries.

1.7 Limitation of the study

The major limitation encountered by the writer is that though the former has made repeated attempt to get the minutes of the NPSP by having a cooperation letter from the university, officers of the library of parliament has refused to provide the minutes of NPSP claiming that they are prohibited by the order given by higher government officials. As result of this, the researcher attempt to find out the intention of the legislature behind each provision of the NPSP has been impacted. In addition, though there are many foreign literatures written with respect to

protection of consumers in electronic payment system, they are neither available freely online nor in our library. Moreover, there is no material written on the NPSP as well as the NPSP has not been fully practiced as result lack of awareness about the concept in the regulatory body, PI issuer such as banks and practicing lawyer has limited the writer in getting relevant information and data to enrich the research with practical reality. Furthermore, the writer unable to find the terms and conditions of mobile and agent banking, point of sale and internet banking, as a result the writer has limited his study to terms and conditions of debit card in particular ATM card. Hence, it was not easy for the writer to conduct the research in such circumstance. Therefore, the writer had obliged to heavily rely on internet and articles on journal.

CHAPTER 2: - OVERVIEW OF NATIONAL PAYMENT SYSTEM

2.1 Payment and Payment System in General

Payment is defined as performance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of an obligation.⁵ This definition tells us that payment is made to discharge an obligation of a certain contract/ transaction. It can also be defined as the process by which monetary instruments, typically cash and deposit claims, are transferred between the payee and payer to finalize a transaction.⁶ In general, we can say that payment is a transfer of funds from the payer to the payee.⁷

Payments can be classified on the basis of the different types of payer/payee involved.⁸

a) Wholesale payments: - These types of payments are made between financial institutions. Such type of payment usually has a high value and time critical in its nature. As a result of this, they need to be cleared and settled on a particular day, sometimes even within a particular time period on that day. Their share in the total number of payments is relatively small but owing to their high value, their orderly settlement is essential for the proper and stable functioning of financial markets.⁹

b) Retail payments: - these types of payments are conducted between non-financial institutions.¹⁰ There are normally large numbers of retail payments, but these have substantially lower average values than wholesale payments and are not usually cleared and settled in the same manner. That is being said, in some countries, retail payments are settled in systems designed for both retail and wholesale payments.¹¹

⁵Bryan A. Garner , **Black's law dictionary**, (9thed), West Publishing Co, USA, p.1242

⁶Wondwossen Taddesse and Tsegai G. Kidan, E-Payment: Challenges and Opportunities in Ethiopia, United Nation Economic Commission for Africa, 2005, p.8 available at :

www.ethioconstruction.net/sites/default/.../ePayment%20Study.pdf , (last accessed on December 24,2016)

⁷Tekabe Sintayheu and GadiseGezu ,‘Challenges and opportunities of E-payment in Ethiopia’s banking industry with reference to private commercial banks’, **International Journal of Scientific and Research Publications**, Vol. 6, Issue 8, 2016, p. 503

⁸ Tom Kokkola, Payments, securities and derivatives, and the role of the Euro system, 2010, p.25 available at: <http://www.ecb.europa.eu>, (last accessed on October 19,2016)

⁹ NPSP, supra note 3, art 2(14)

¹⁰ id, art 2(22)

¹¹ Tom Kokkola, supra note 8, p.25

In addition to the two categories mentioned reference is sometimes made to commercial payments. These are payments generated by corporations. Depending on the size and type of corporation as well as the type of underlying commercial transaction, these can sometimes have fairly large values. Large international corporations tend, in particular, to generate some payments which resemble wholesale payments more than retail payments¹².

Payment system is an infrastructure consisting of institutions, instruments, rules, procedures, standards and technical means established to effect the transfer of monetary value between parties discharging mutual obligations.¹³ What makes it a “system” is that it employs cash-substitutes with the use of electronic money and other types of PIs.¹⁴

The payment system has been evolving over centuries and in the form of money.¹⁵ The existing PIs in Ethiopia comprise cash, paper-based instruments (such as check, promissory note and bill of exchanges) and to some extent electronic payment.

The European Central Bank defines electronic payment as a payment that is initiated, processed and received electronically. In electronic payment, funds are held, processed and received in the form of digital information and their transfer is initiated via electronic PI.¹⁶ These include debit cards, credit cards, electronic funds transfers, direct credits, direct debits, internet banking and electronic commerce payment systems. Payment via mobile devices such as a mobile phone is also a type of electronic payment since mobile devices rely on electronic data processing and transmission.¹⁷

Payment system has a number of advantages. Among others: it allows safe and timely completion of transactions, in other words, the payer in a given transaction is not supposed to carry paper money and deliver the same to the payee by going from a certain place to the other, rather he /she can effect payment through the bank in which he/she holds an account to the payee

¹² id, p. 27

¹³Okifo Joseph and Igbunu Richard , Electronic Payment System in Nigeria ; - Its economic Benefits and Challenges , **Journal of Education and Practice** ,Vol. 6 , No. 16 , 2015, p.56

¹⁴ ibid

¹⁵ Mulualem Sime and Lishan G/Amlak, Electronic Payment System:Its Prospects and Challenges :-Case Study on Commercial Bank of Ethiopia and Zemen Bank S.C, Admas University College, Addis Ababa, Ethiopia, 2013, p.78 available at: repository.smuc.edu.et/bitstream/123456789/2440/.../7th%20SRF.77-108.pdf, (last accessed on October 22,2016)

¹⁶Wondwossen Tadesse and Tsegai G. Kidan, supra note 6 , p.8

¹⁷ ibid

through payee's bank.¹⁸ Moreover, it allows the customers of one bank to make payments to other banks thereby minimizing the risks of fraud and erroneous payments to illegitimate creditors. To state it in different terms, the payer is not required to transport a paper money from one place to the other so that it can avoid the burden of carrying the money and the possibility of theft during transit from place to place. The payer can simply make payment through the electronic process and thereby save time. Furthermore, it is also vital to the operation of financial markets as they are used to settle trading of various financial instruments such as government securities, commercial paper, stocks, foreign exchange, and derivatives.¹⁹

Electronic payment systems apart from their convenience and safety also have a significant number of economic benefits which include mobilizing savings and ensuring most of the cash available in the country are with banks. This will make funds available to borrowers for both businesses and individuals.²⁰ Therefore, we can say that payment systems are a vital part of the economic and financial infrastructure. Payment systems, however, can also involve significant exposures to risks for members. It is for this reason that national banks have always taken into account the design and operation of payment systems additional control features to mitigate this risk²¹. Some of these risks are a credit risk, liquidity risk, settlement risk, operational risk and legal risk.²²

2.2 The Legal and institutional framework of National Payment System in Ethiopia

2.2.1 Legal Framework

NPL addresses issues such as what constitute money, the payment instructions to pay, who may provide payment service, govern the relationship between customers and the payment service provider, regulate the relationships and transactions among payment service providers in processing and settling payment instructions, provides the organ who sets the overall policy,

¹⁸Yaqub J. O,Bello H. T,Adenuga I. A and Ogundeji M. O, "The Cashless Policy in Nigeria: Prospects and Challenges", ***International Journal of Humanities and Social Science***, Vol. 3 No. 3; 2013, p.202

¹⁹ see explanatory note, supra note 1, p.1

²⁰ Mulualem Sime and Lishan G/Amlak, supra note 15 , p.67

²¹Leon Joseph Perlman, Legal And Regulatory Aspects Of Mobile Financial Services, University Of South Africa, School of Law, (Unpublished), 2012, p.145 available at : citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.970, (last accessed on October 3, 2016)

²² Explanatory note, supra note 1, p.11

guidance and regulation.²³ There are no unified laws regulating payment system in Ethiopia, though the NBE closely supervises and regulates the payment system.

Laws relating to payment are found under the Commercial Code in the provisions relating to the negotiable instrument and bank transfer. They are also found under proclamation No 591/2008, which is a proclamation promulgated to establish the NBE of Ethiopia. In addition, they are found in the Banking Business Proclamation No 592/2008 and under Ethiopian commodity exchange proclamation No 550/2007. However, the prime laws regulating the payment system are found under the national payment system proclamation No.718/2011

The NPSP was enacted, to provide rules on establishment, governance, operation, regulation and oversight of the NPS so as to ensure its safety, security, and efficiency. It also deals with issues related with EFT such as terms and conditions of PIs, complaint resolution procedure, the validity of electronic record, electronic communications and presentment of image for payment such as a cheque.²⁴

The other law related with payment system is the directive issued by the NBE of Ethiopia concerning mobile and agent banking directive No. FIS /01/2012 (MABD). This directive applies on financial institutions that provide mobile and agent banking. Moreover, the law of contract and agency may also have some bearing in the payment system. It is understandable that the customers have a contractual relationship with the financial institutions. Hence, the rights and obligations of the customers and the financial institutions are determined solely on the basis of the contract made between them in the absence of laws governing the matter. The financial institutions act as agents of the customers in transmitting order and receiving instructions from their customers. Thus, the financial institutions have to act within the bound vested upon them otherwise, they will be held liable for the transactions they have conducted beyond the power given by their customers.

²³ Benjamin Geva , “Payment Law: Legislative Competence in Canada” ,**Banking and Finance Law Review**, Vol. 31, No. 1,2015, p.4

²⁴ NPSP, supra note 3, the preamble

The regulation of payment services (payment system) has some basic issues regardless of the jurisdiction involved.²⁵ At its heart, payments law must resolve four fundamental questions: who bears the risk of unauthorized payments? What must be done about claims of error? When are payments completed so that they discharge the underlying liability? And when can they be reversed? Who has to prove what and what is the standard of proof?²⁶ These and other issues have been addressed under chapter three of this thesis.

2.2.2 Institutional Framework for Payment System

2.2.2.1 The National Bank of Ethiopia: Powers and Duties

The NBE has a power to establish, own, operate, participate, regulate and supervise an integrated payment system consisting of a large value funds transfer system and retail funds transfer system as well as in central securities depository.²⁷ In addition to the power and duties vested upon it in accordance with the Proclamation No. 591/2008, among other things, the NBE has the power to authorize persons to establish and operate a system and issue PIs. Moreover, it has the power to designate PIs that can be issued and determine conditions, limitations, and standards for their issuance, establish conditions, rules, procedures and standards for the governance, operation and management of systems. Furthermore, it has also a power to verify from time to time that such conditions, rules, procedures or standards are met and to prescribe to participants and operators investments in relation to building system infrastructure and system interoperability.²⁸

The NBE is the only operator of payments system unless other person is authorized by the NBE.²⁹ No operator may introduce new system; merge with or take over a system of another operator; enter into any arrangement or agreement for the sale or disposal, by amalgamation or otherwise, of its business, or effect major changes in its line of business; redeem its own shares or effect a reduction of its capital other than through reduction due to operating losses, amend its

²⁵ Rhys Bollen, *Best practice in the regulation of payment services*, RMIT University, School of Accounting , (Unpublished) , 2010, p. 8 available at: <https://researchbank.rmit.edu.au/eserv/rmit:7919/RhysBollen.pdf> (last accessed on December 20,2016)

²⁶ A Rosenberg, “Better than cash? Global proliferation of Payment Cards and Consumer Protection policy”, *Columbia Journal of Transnational Law*, Vol.44, 2006, p.563

²⁷ NPSP, supra note 3, art 4(a) cum 4(b)

²⁸ id , art 4

²⁹ id, art 5(1)

memorandum and articles of association or alter the name under which it is authorized to operate a system without the prior written approval of the NBE.³⁰

Moreover, the NBE may by written notice prohibit an operator from operating any system where the system is detrimental to the reliable, safe, efficient and smooth operation of the NPS or the prohibition is otherwise in the interest of the public.³¹

The NPSP allows entities other than banks to be operators of system.³² However, the fact on the ground is that the NBE does not give authorization for entities other than banks to operate a system.³³ Therefore, such practice may tend to give financial institutions to have monopoly on operating a system and thereby limit the option available for consumers.

2.3.1 Authorization for Operating a System³⁴

A person who intends to operate a system has to submit an application to the NBE for authorization to establish and operate a system.³⁵ After the receipt of the application, the NBE may make such inquiries as it may consider necessary for the purpose of satisfying itself with the genuineness of the particulars furnished by the applicant, his capacity to operate a system, the credentials of the participants of the applicant's system and any other matter related to the application.³⁶ Upon examination made on the application, if the NBE found out that the application made to it is complete and conforms to the provisions of the NPSP and directives issued by it, it may issue an authorization for operating the system in accordance with the NPSP.

Before issuing an authorization, however, the NBE, among other things, has to give due considerations to the terms and conditions of operation of the proposed system, including any security procedure, interests of consumers, including the terms and conditions governing their relationship with operators³⁷, and the financial status, experience of management and integrity

³⁰ id, art 5(3)

³¹ id, art 5(4)

³² id, art2(18)

³³ An interview with Ato Kidanu Gizu, Legal Officer at the National Bank of Ethiopia, held on January 4/2017, Addis Ababa.

³⁴ NPSP, supra note 3, art 2(18). The term system includes a payment, clearing and settlement system.

³⁵ id, art 6(1)

³⁶ id, art 6(3)

³⁷ id, art 2(18).The term operator refers to the National Bank, a financial institution or any other entity authorized by the National Bank as operator.

of the applicant.³⁸The NBE is under obligation to make a decision on the application submitted to it within 60 days.³⁹

2.3.2. Suspension of Authorization

The NBE may suspend an authorization given to operate a system on those grounds listed under the NPSP. Among other things, it may suspend an authorization in the case where the operator has failed to observe the NPSP, or regulations and directives issued in accordance with the NPSP.⁴⁰ It could also suspend the authorization when the operator has failed to supply accurately and on time the information requested by the appropriate authority pursuant to the NPSP and in case where the operator has failed to comply with the order issued by the NBE.⁴¹

Upon suspending the authorization given for operator, the NBE is under obligation to notify the operator, in writing, of the reasons for suspension and the measures to be taken to rectify the shortcomings within a fixed period of time and the operator which has received a written notification of suspension is under obligation to rectify the shortcomings within the fixed period of time.⁴² However, the operator may not be given an opportunity to rectify the shortcoming in case where the failure of the operator to discharge his obligation threatens the safety, security, and efficiency or financial stability of the country.⁴³

Once the operator is suspended, it cannot be involved in the activities it was authorized for under the NPSP.⁴⁴

2.3.3. Revocation of Authorization

The NBE may revoke the authorization of the operator, among other things, on the grounds that the operator has obtained authorization by submitting false or wrong information, the operator

³⁸ id, art 6(4)

³⁹ id, art 6(5)

⁴⁰ id, art 7(1)(a)

⁴¹ id, art 7(1)(b)cum art 7(1)(d)

⁴² id, art 7(2) &7(3)

⁴³ id, art 7(4)

⁴⁴ id, art 8

operates the system contrary to the purpose and conditions subject to which the authorization was issued and has repeatedly committed the faults specified in under Article 7 of the NPSP.⁴⁵

Before deciding to revoke the authorization, the NBE shall require the operator to submit its written opinion on the anticipated revocation of the authorization. However, the authorization shall be revoked where the operator has not submitted his opinion within 30 days from the day the letter was received by him or his opinion is found not to be adequate.⁴⁶ There are controversies among the legal community with respect to whether the operator could make an appeal against the decision of NBE to revoke an authorization.⁴⁷

The first line of argument is that article 9 of the NPSP lists the grounds for revoking the authorization of the operator. Accordingly, the first limb of sub-article 1 of article 9 says without prejudice to sub-article 3. However, under article 9, we cannot find sub-article 3. Thus, from this provision, it can be inferred that that sub-article 3 is left out of the NPSP unintentionally and this sub-article possibly refers to the appeal rights of the operator against the decision of the NBE by reading the first limb of article 9(1) with the other sub-articles. Hence, the operators can make an appeal against the decision of the NBE to revoke the authorization.⁴⁸

The second line of argument is that that the first limb of article 9(1) is referring to article 9(2), which gives an opportunity to operator to defend itself against the stand taken by the NBE to revoke the authorization and the sub-article 3 referred in the first limb of art 9(1) is slip of pen so that it should have been sub-article 2. Thus, the operator has no right to appeal against the decision of the NBE.⁴⁹

There is also the third line of argument with respect to the issue at hand. The proponent of this line of argument argues that once the NBE has revoked the authorization of the operator, the latter may take his allegation to either mediation center or arbitration panel in accordance with

⁴⁵ id, art 9

⁴⁶ id, art 9(2)

⁴⁷ An Interview with W/ro Kibre Moges , Legal Service Head at National Bank of Ethiopia , held on January 2, 2017 Addis Ababa, Ato Menedefro Meherte, Legal Service Head of Commercial Bank of Ethiopia, held on October 23, 2016, Addis Ababa and Ato Kidanu Gizu , supra note 33. The result of interview made with these interviewees reveals the existence of such controversy.

⁴⁸ An interview with w/ro Kibre Moges , supra note 47

⁴⁹ An interview with Ato Kidanu Gizu, supra note 33

article 31 of the NPSP.⁵⁰ However, this argument does not seem plausible since article 31 of the NPSP applies to civil disputes arising from the NPS because of the following reasons. Firstly, matters that constitute NPS are enshrined under article 2(16) of the NPSP. Accordingly, revocation of authorization has not been incorporated as a matter to be covered under the NPS. Secondly, it's the NBE which is empowered to issue a directive for the resolutions of disputes arising in relation to NPS. Hence, if the operator brings an allegation against the NBE in accordance with the rule enacted by the latter, it does not seem fair and reasonable since the question of impartiality could be raised and it is not appropriate for one to be a judge in his own case. Therefore, it is better to make an analogy with the Banking Business Proclamation No. 591/2008⁵¹, so as to let the operator bring allegation in a court of law against the revocation of the authorization by the NBE since the court is not expressly precluded from making an analogy by the NPSP. However, as the law stands now, it seems that it is not allowed for the operator to challenge the decision of the NBE to revoke the authorization in the courtroom.⁵² However, such prohibition would open a door for the official of NBE to exercise its power arbitrarily.⁵³

In addition to this, it could also violate the constitutionally recognized right of a person i.e. the right of access to justice. The FDRE constitution provides that everyone has the right to bring a justifiable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power.⁵⁴ However, this basic right has not been given due consideration while enacting the NPSP. Therefore, there should be a certain avenue to challenge the decision of the NBE either in the courtroom or in other independent body. Otherwise, it could be counterproductive since it opens a door for the personnel of the NBE to exercise their power arbitrarily. Hence, the NPSP should be amended to allow the operators to challenge the decision of the NBE in front of the independent body.

⁵⁰An interview with Ato Mandefro Meherte, supra note 47

⁵¹ The Banking Business Proclamation No. 592/2008, art 32(5), **Federal Negarit Gazeta**, 14th Year, No. 57. This provision provides that any person aggrieved by the decision of the National Bank to revoke the license may petition to the Federal High Court within 30 days from the effective date of the revocation.

⁵² NPSP, supra note 3, art 9

⁵³ An interview with Ato Kidanu Gizu, supra note 33

⁵⁴ The Constitution of the Federal Democratic Republic of Ethiopia No.1/1995, art 37(1), **Federal Negarit Gazeta**, 1st year, No.1

2.4. Electronic Fund Transfer

Payment by electronic funds transfer, which is the theme of this paper, has been described as the 3rd of the three main edges of payment. The first and the second edges of payment respectively are cash and paper-based payment such as payment through Cheques and Bills of Exchange.⁵⁵ There is, however, no universally accepted legal definition of Electronic Funds Transfer.

UNICITRAL model law defines fund transfer as a process in which one or more of the steps that were previously done by paper-based techniques are now done by electronic techniques.⁵⁶ On the other hand, the NPSP defines fund transfer as any transfer of funds either representing an order of payment or transfer of money, which is initiated by way of instruction, authorization or order to a financial institution to debit or credit an account maintained with that financial institution and includes POS transfers, ATM transactions, direct deposits or withdrawal of funds, transfer initiated by telephone, internet, card or other devices⁵⁷. The NPSP has not defined electronic fund transfer. It rather defines fund transfer. Since the NPSP has defined fund transfer rather than electronic fund transfer. Thus, it is better to look at how other jurisdictions define electronic fund transfer.

In USA Electronic Funds Transfer is defined as transfer of funds initiated through an electronic terminal, telephone, computer including online banking or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit a consumer's account and may include but not limited to POS transfers, ATM transfers, direct deposits or withdrawal of funds, transfers initiated by telephone, and transfers resulting from debit card transactions, whether or not initiated through an electronic terminal.⁵⁸

When we compare the definition provided for fund transfer in the NPSP and the definition provided for electronic fund transfer in the regulation E (USA) they are almost similar, though

⁵⁵ kutwa Ariba Charles, Electronic Funds Transfer: Legal Implications and the law in kenya, University of Nairobi, School of Law ,(Unpublished), 2001, p.1 ,available at : erepository.uonbi.ac.ke/.../Kutwa_Electronic%20ofunds%20transfer%3A%20legal%20implications%20... , (last accessed on December 23,2016)

⁵⁶ UNICITRAL, Legal Guide on Electronic Fund Transfers, New York, 1987, available at: https://www.uncitral.org/pdf/english/.../transfers/LG_E-fundstransfer-e.pdf, (last accessed on September 29,2016)

⁵⁷ NPSP, Supra note 3, art 2(13)

⁵⁸ Regulation E §205.3(b)

the NPSP has left out the term electronic. Therefore, for the purpose of this thesis, we can define electronic fund transfer as a transfer initiated by way of instruction, authorization or order to a financial institution to debit or credit an account maintained with that financial institution which is initiated by telephone, the internet or card and includes POS transfers and ATM transactions.⁵⁹

There are two categories of Electronic Funds Transfer systems: these are non-consumer activated systems and consumer activated systems. In the case of Non-consumer activated EFT system, it is the bank which normally selects and activates the system.⁶⁰ Some corporate or institutional customers may be given direct access to these systems, but the bank's consumer customers i.e. its personal account holders do not have similar direct access.⁶¹ On the other hand, in the case of consumer activated EFT system, it's the consumer who selects and activates the particular EFT system to be used in the transaction. Consumer - activated EFT systems include cash dispensers, ATM, Tele-shopping, mobile and internet banking.⁶² The focus of the thesis is on this second category of electronic fund transfer, in particular on ATM.

2.5 Payment Instruments

The European Payment Services Directive in the Internal Market No 2007/64/EC (hereinafter, Directive) defines PI as any personalized device(s) and/ or set of procedures agreed between the payment service user and the provider and used by the user in order to initiate payment order.⁶³ On the other hand, an access device in the U.S. is defined as a card, code, or other means of access to a consumer's account or a combination used by the consumer to initiate EFTs and may include debit card, PIN, telephone transfer and telephone bill payment codes and other means to initiate an EFT to or from a consumer account.⁶⁴ In almost similar fashion the NPSP defines PI as any instrument, whether tangible or intangible, that enables a person to obtain money, goods or service or to otherwise make payment or transfer money such as cheques, drafts, and cards⁶⁵. Accordingly, PIs can be used to obtain money, make payment or transfer money.

⁵⁹ Simret Zewdie Kebede, *supra* note 2, p.4

⁶⁰ Kutwa Ariba Charles , *supra* note 55 , p.13

⁶¹ *ibid*

⁶² *id*, p.14

⁶³ The EU Payment Services Directive on Payment Services in the Internal Market, the European Parliament and the Council , Directive 2007/64/EC, 2007 , art 4(23)

⁶⁴ Regulation E §205.2(a)(1)

⁶⁵ NPSP, *supra* note 3, art 2(20)

There is a variety of PIs, each with its own characteristics depending on the type of relationship and transaction between the payer and the payee. The traditional PIs in Ethiopia are cash and checking transfer. Cash is a legal tender defined by the NBE to represent values and used as a major instrument of payment. NBE has authorized Birr to be used as a legal tender throughout the country. Like in other African countries, in Ethiopia also cash is a dominant means of payment.⁶⁶

Checking transfer is a fund transferred directly via a signed draft or check from a consumer's checking account to a merchant or other individual. Checking transfer is the second most common form of payment in terms of a number of transactions in Ethiopia.⁶⁷ Though it is not possible to find the exact magnitude of percentage share of the check based and cash based payments in the country, cash based payments far exceed check-based payments⁶⁸. On the other hand, electronic PIs⁶⁹ are Society for Worldwide Interbank Financial Telecommunication (SWIFT)⁷⁰, Western money transfer, Card based payments (this may include mobile prepaid card payments and credit card⁷¹) and (ATM)⁷².

As provided under the NPSP, cards are one type of PIs. A card is defined as any card or other device, including a code or any other means of access to an account that may be used from time to time to obtain or deposit money or to make payment and includes debit, credit and stored value cards⁷³. Hence, cards may be used to obtain or deposit money or to make payments.

⁶⁶Wondwossen Taddesse and Tsegai G. Kidan, supra note 6, p.32

⁶⁷ ibid

⁶⁸ id,p.33

⁶⁹ ibid. Electronic payment can be defined as convenient, safe and secure methods for payment of bills and other transactions by electronic means such as card, telephone, the internet, EFT and etc. Electronic payment gives consumers an alternative to paying bills and debts by cash, cheque, money order etc. Its main purpose is to reduce cash and cheque transactions.

⁷⁰ ibid. The Society for worldwide Interbank Financial Telecommunication (SWIFT) is an organization Maintained by banks and financial institutions throughout the world. It operates a network of communication which can be used by banks and other financial institutions for money transfers, for opening letter of credit, and generally for transmission of messages from institution to institution. It provides a messaging service that enables to settle majority of high value payments internationally. Banks in Ethiopia currently settle their foreign transaction payment through SWIFT. According to the information obtained from NBE most banks in Ethiopia use SWIFT primarily for international payment.

⁷¹ id, p.35 . There is no issuer of local and international credit cards. But there are some business firms (e.g. Hotels, supermarkets, etc) that accept international credit card such as master card and Visa.

⁷² id, p.36. ATMs enable customers to withdraw limited amount of money from their account at any time and enable customers to check their account balance.

⁷³ NPSP, supra note 3 , art 2(2)

The NPSP has defined neither debit nor credit cards, it rather defined stored value card as a prepaid card in which the record of funds can be increased or decreased⁷⁴.

A credit card is a small plastic card issued to users as a system of payment.⁷⁵ It allows its holder to buy goods and services based on the holder's promise to pay for these goods and services.⁷⁶

The issuer of the card creates a revolving account and grants a line of credit to the consumer (or the user) from which the user can borrow money for payment to a merchant or as a cash advance to the user.⁷⁷

A debit card (also known as a bank card or cheque card) is a plastic card that provides an alternative payment method to cash when making purchases. Functionally, it can be called an electronic cheque, as the funds are withdrawn directly from either the bank account or from the remaining balance on the card. Debit cards may also allow for instant withdrawal of cash, acting as the ATM card for withdrawing cash and as a check guarantee card. In some cases, the cards are designed exclusively for use on the internet, and no need to have physical card⁷⁸.

A credit card is different from a debit card in that it does not withdraw money from the users account after every transaction. The issuer lends money to the consumer to be paid to the merchant. Holders of a valid credit card have the authorization to purchase goods and services up to predetermined amount called a credit limit. The vendor receives essential credit card information from the cardholder, the bank issuing the card actually reimburses the vendor, and eventually, the cardholder repays the bank through regular monthly payments. If the entire balance is not paid in full, the credit card issuer can legally charge interest fees on the unpaid portion⁷⁹.

Unlike credit cards, in debit cards funds are transferred immediately from the bearer's bank account instead of having the bearer pay back the money at a later date. PIs that are listed under

⁷⁴ id , art 2(26)

⁷⁵ Mattewos Kinfе, Challenges and Prospect of E-Banking in Ethiopia, , Addis Ababa University, College of Business and Economics,(unpublished),2016 , p.16

⁷⁶ E.P.Ellinger , E.Lomnicka and R.J.Hooley, Modern Banking Law, (3rd ed), Oxford University Press, UK, 2002, p.530

⁷⁷ ibid

⁷⁸ Mattewos Kinfе, supra note 76, p.16

⁷⁹ ibid

the NPSP are not exhaustive. Thus, we can incorporate other types of PIs. Income, assets, age and education level could affect consumers' choice of PIs.⁸⁰

2.6 Payment Instrument Issuer

The NPSP has not mentioned the establishment that can issue PI nor set out conditions need to be fulfilled in order to become PII. The NPSP has empowered the NBE to authorize a person to issue PIs⁸¹. In addition to this, the NBE also empowered to designate PIs that can be issued and to determine their conditions, limitations, and standards for their issuance.⁸² PI can be issued by the operator authorized by the NBE. An entity should not be bank to issue PIs. Entities other than banks can issue PIs so long as they are authorized by the NBE.⁸³

2.7 Consumer Protection: General Remarks

Regulation of payment system should always be based on consumer protection and efficient risk allocation. Generally, parties to any payment system would prefer legal default rules that allocate any risk to the party in a best position to avoid it. Basically, that requires placing the loss on the party who can minimize the sum of loss avoidance costs and residual losses that remain even once cost-effective precautions are taken.⁸⁴ In most countries, the government has recognized that pure contractual rules are inadequate to protect consumers. In other words, purely contractual terms do not always engender trust and confidence on the consumers. In addition, they do not strike a satisfactory balance between the needs of consumers and industry⁸⁵.

Thus, some minimum conduct rules are commonly advocated. Among these rules are found the rule concerning error resolution, payment times and loss allocation are vital.⁸⁶

In general, placing the risk of loss from fraud on banks induces them to invest optimally in creating fraud prevention methods that can then be implemented by them and their customers⁸⁷.

⁸⁰Joanna Stavins, Effect of Consumer Characteristics on the Use of Payment Instruments, 2001, p.22, available at: <https://www.bostonfed.org/-/media/Documents/neer/neer301b.pdf>, (last accessed on October 22, 2016)

⁸¹ NPSP, supra note 3, art 2(20)cum art 4(2)(a)(1)& 4(2)(b)

⁸² id, art 4(2)(b)

⁸³ id, art 2(18)

⁸⁴Clayton P. Gillette& Steven D. Walt, "Uniformity and Diversity in Payment Systems", **Chicago-Kent Law Review**, Vol.83, No. 4, 2014, p. 529

⁸⁵ Rhys Bollen, supra note 25, p.10

⁸⁶ ibid

Commentators generally see the following as the significant baseline consumer protections that should be enacted for cyberpayments not already covered by existing consumer protection legislation or regulation: (1) initial disclosures; (2) verification or validation methods as appropriate to the particular cyber payment product; (3) error resolution; and (4) limits on liability for loss, theft, or unauthorized use.⁸⁸

Most payment service providers especially financial institutions use contract and agency so as to manage risks. Not surprisingly, the terms and conditions drafted by or on behalf of the institutions are quite ‘pro-institution’ in their detail (e.g. risks are often borne by the consumer). In other words, losses are mainly borne by the consumers in such kinds of arrangement.⁸⁹ However, management of these risks needs to be balanced against other public policy objectives since such practices may have a tremendous impact on the development of financial institutions in general and payment system in particular.

Most payment services provide a clear allocation of liability for unauthorized and unsuccessful payments. They also generally accept that customers need regular transaction reports and a cheap and easily accessible form of error resolution.⁹⁰

Consistent with the common understanding that legal rule should minimize the costs of payment systems; each system should allocate the loss of unauthorized use to the party in the best position to avoid it. It is also important that providers use robust security systems to ensure that only the actual owner is able to transact on a customer’s account.⁹¹

Related to security is the level of privacy protection provided for customers. Confidence and trust in payment services depend in part on the degree of privacy protection provided. While customers do not expect absolute privacy, banking-type services are traditional ones where customers expect a high level of privacy.⁹²

⁸⁷ ibid

⁸⁸ Hughes. SJ, **Regulation Of Electronic Commerce: A Case For Regulating Cyber payments**, 2015 , p. 823

⁸⁹ ibid

⁹⁰ Rhys Bollen, supra note 25, p.41

⁹¹ Clayton P. Gillette& Steven D. Walt, supra note 85, p. 532

⁹² Rhys Bollen, supra note 25, p. 42

CHAPTER 3: - THE LAW ON NATIONAL PAYMENT; CONSUMERS AND THIRD PARTIES PROTECTION IN ETHIOPIA

3.1: - Consumers Protection under National Payment Law

3.1.1 Consumer vs. Customers Defined

Since the thesis primarily deals with consumer protection in NPL, it is essential to define what constitutes consumer so as to delimit the application of consumer protection laws and there is also a need to evaluate the distinction between customer and consumer. The NPSP has defined neither consumer nor customer.⁹³ However, it has used the term consumer under article 6(4) (F) and similarly, it has used the term customer under article 10(1), 10(4) 19(1) and 22(4). Thus, it is essential to look at how these terms are defined in other laws of the country.

Article 2(4) TCCPP defines consumer as a natural person who buys goods and services not for the purpose of reselling but for personal or family consumption.⁹⁴ Here, it is discernable that it is only natural person who buys goods and services for personal or for family consumption that is considered as a consumer. In addition, legal persons are out rightly excluded from being considered as consumers.

However, there are circumstances in which legal persons can be a direct consumer of goods and services and there are also instances in which legal persons may not have equivalent bargaining power with the business person. As a result of this, it is argued that some legal persons, such as associations, owing to their lack of bargaining power and experience should be treated as consumers.⁹⁵ Accordingly, countries such as Austria, France and the Czech Republic have incorporated legal persons in the definition of consumer, if they are either acquiring goods or services for private use or act as final users. Nevertheless, in our country, whether the legal person has used the goods and services for private use or it is the final user, it does not make the

⁹³ see NPSP, supra note 3, art 2

⁹⁴ Bryan A. Garner, supra note 5 has given identical meaning with the trade practice and consumer protection No. 813/2014 and it states that consumer is a person who buys goods and services for personal, family or household use, with no intention of resale; a natural person who uses products for personal rather than business purposes.

⁹⁵ Rafał Mańko, The notion of 'consumer' in EU law, 2013, p.2 , available at: [www.europarl.europa.eu/.../LDM_BRI\(2013\)130477_REVI_EN.pdf](http://www.europarl.europa.eu/.../LDM_BRI(2013)130477_REVI_EN.pdf), (last accessed on September 10, 2016)

legal person a consumer since the TCCPP unequivocally refers to natural persons.⁹⁶ The assumption of the law is that legal persons can negotiate better terms and conditions in their favor while entering into agreement with the business person. However, this is not the reality especially in the banking products and services in countries like Ethiopia since the terms and conditions of PI prepared by PII are the same for both natural person and legal person and it is not subject for negotiation.

MABD define a customer as an individual or entity who uses mobile and agent banking services of financial institutions offered through mobile devices.⁹⁷ Based on this definition it can be said that customer is an individual or entity who uses electronic fund transfer (hereinafter EFT) services or to whom a PI is issued.⁹⁸ As highlighted above, though many legal persons are not in a position to negotiate better terms and conditions in their favor, they are excluded from being a beneficiary of consumer protection laws. Thus, every discussion made in this thesis does not include legal persons; it rather refers to the consumer as defined in TCCPP. Consequently, the writer examined consumer protection issue in the NPSP in general and PIs such as ATM card in particular. Hence, the term customer has been given the same meaning with the term consumer and used interchangeably with the latter throughout this thesis.⁹⁹

3.1.2 Consumer Protection in National Payment Law

The NPSP has envisaged some provisions which are pertinent for the protection of consumers in the payment system. Firstly, it provides that no person can operate a system unless it has secured authorization from the NBE.¹⁰⁰ Accordingly, in order to operate a system a person has to secure an authorization from the NBE. This is primarily intended to protect consumers and the financial stability of the country.¹⁰¹ Secondly, no operator can introduce a new system or can merge with

⁹⁶ Trade practice Proclamation No.329/2003, art 2(5), Federal Negarit Gazeta, 9th Year, No. 49. This repealed Proclamation define consumer as “any person who buys goods or services for personal consumption.” This proclamation, unlike the one provided by the new trade competition and consumer protection No 813/13 defines consumer as any person without specifying it as a natural person. But it clearly indicated that the buying of goods or services had to be for personal consumption. Thus, it can be said that legal person could be covered under this proclamation.

⁹⁷ The Regulation of Mobile and Agent Banking Services Directives No.FIS/01/2012 (hereinafter MABD), art 2(5).

⁹⁸ Semrit Zewdie Kebede, supra note 2, p. 8

⁹⁹ Though the MABD has defined customer to include legal persons, the writer will not use the term customer to refer legal persons. Thus, the term customer is employed to refer only to natural person throughout the thesis.

¹⁰⁰ NPSP, supra note 3, art 5(1)

¹⁰¹ Explanatory note , supra note 1, p.11- 12

another operator without the authorization of the NBE.¹⁰² Though this primarily involves the issue of competition, it also takes into account consumer protection issues. Thirdly, no operator could enter into any arrangement or agreement for resale or disposal, by amalgamation or effect major changes in its line of business without the approval of the NBE.¹⁰³ Fourthly, the NBE is empowered to revoke or suspend the authorization given for system operators.¹⁰⁴ The NBE may revoke or suspend the authorization given to operator on the ground of failure to protect the consumer. Fifthly, it sets the conditions upon which the operator of a system may use agents for delivering services to the public.¹⁰⁵ This is also intended to protect consumers from abuse committed by the operator through the use of agents or by agents themselves. Sixthly, Operators, participants or issuers of PIs may not avoid any obligations owed to their users by reason only of the fact that they are parties to a shared system and that another party to the system has actually caused the failure to meet the obligations and finally , it provides that any issuer of PIs is under obligation to prepare clear and standard sample terms and conditions, in relation to electronic fund transfers and stored value cards, applicable to all its customers in a similar manner and make it available for their review and possible agreement.¹⁰⁶ These are the major stipulations which directly or indirectly envisage consumer protection issue in NPS law.

3.1.3 The Legal and Institutional Framework for consumer protection in Ethiopia

Before 1991 in Ethiopia, there was no codified law on consumer protection. The protection of consumers has relied on private laws such as the law of contract and the law on extra-contractual liability and public laws such as criminal and regulatory laws.¹⁰⁷

After the process of liberalization and deregulation in the post-1991 era, the government comes up with trade practice proclamation No 329/2003. This proclamation has recognized the issue of consumer protection directly for the first time.¹⁰⁸ This proclamation has been replaced by proclamation No 685/2010. Again this Proclamation has been recently replaced by TCCPP. Nowadays, it is this proclamation that is being used for protecting consumers in Ethiopia. As we

¹⁰² NPSP, supra note 3, art 5(3)(a) cum art 5(3)(b)

¹⁰³ id , art 5(3)(c)

¹⁰⁴ id, art 7 cum art 9

¹⁰⁵ id, art 10

¹⁰⁶ id , art 19

¹⁰⁷Dessalegn Adera, The Legal and Institutional Framework for Consumer Protection in Ethiopia, Addis Ababa University, School of Law ,(Unpublished), 2011, p.56

¹⁰⁸ ibid

can see from article 4 of TCCPP the scope of its application extends to any commercial activity or transaction in goods or services conducted or having an effect within the federal democratic republic of Ethiopia.

TCCPP defines commercial activity as any activity carried on by a business person as defined under article 2(5) the same Proclamation.¹⁰⁹ Business person, on the other hand, is defined as any person who professionally and for gain carries on any of activities specified under article 5 of the commercial code or who dispenses services or carries on those commercial activities designed as such by law.¹¹⁰

From the cumulative reading of art 2(5) and 2(6) of TCCPP, it is possible to infer that banks are business persons within the meaning of this law and article 5(20) of the commercial code. Moreover, since the services provided by the banks are not exempted as provided under 4(2) of TCCPP by the regulation issued by the council of ministers, then, it can be safely concluded that TCCPP would be applicable for the consumers of banks in general and for the user of PIs in particular. However, officials from the Trade Competition and Consumer Protection Authority argue that the TCCPP would not be applicable to protect customers of banks in general and the user of payment instrument in particular.¹¹¹ They provide the following justifications for their assertion. Firstly, the customer of banks does not fulfill the conditions set out under art 2(4) of TCCPP. In other words customers are not consumers within the meaning of TCCPP. Secondly, the authority would assume jurisdiction whenever there is a violation of prohibited acts as enshrined under art 22 of TCCPP but, not for existence of unfair contractual terms in a certain contractual dealing / transactions. Thirdly, they argue that the authority has never received an application from customer of banks regarding the damage sustained by them as result of the unfair terms of the standard contract and the violations of any rights enshrined under the TCCPP.

¹⁰⁹ Trade competition and Consumers Protection Proclamation No, 813/2013, Federal Negarit Gazeta, 20th Year, No. 28 (hereinafter the TCCPP), art 2(6)

¹¹⁰ id, art 2(5)

¹¹¹ an interview with Ato Girma Alemar, the Vice Corporate Affairs Director of the Trade Competition and Consumer Protection Authority, held on January 4, 2017, Addis Ababa cum an interview held with Ato Mulugeta Abera, the Vice Director of Awareness Creation and Law Enforcement of the Trade Competition and Consumer Authority, held on January 4, 2017, Addis Ababa

When we see the institutional framework for protecting consumers in Ethiopia, an autonomous federal body called Trade Competition and Consumers Protection Authority (hereinafter the authority) has been established having its own legal personality under the TCCPP.¹¹² The authority among others has a power take a measure to increase market transparency, taking a measure to increase public awareness on the issue of consumer's protection and to protect consumers from unfair practices of business persons.¹¹³ Accordingly, it has the power to protect the user of PIs from unfair practices of banks. Of course the prime regulatory and supervisory body of the banking sector in Ethiopia is the NBE¹¹⁴. However, it can be argued that so long as the powers and functions of the NBE are not affected and the council of ministers has not issued a regulation to exempt the banking sector from the application of part two of TCCPP, the authority can exercise its power to protect consumer of banking businesses.¹¹⁵ Hence, a consumer who uses PIs to initiate EFT is thus entitled to enjoy the rights enshrined in TCCPP.

3.1.4. Consumer's Protection in the Context of Electronic Payment System

The issue of consumer protection in electronic payment system has gained increased attention since the global financial crisis, which increased pressure for providers to be transparent in their business conduct, disclose key information about their products and services, and treat consumers fairly and ethically.¹¹⁶ Thus, an effective consumer protection framework within a payment system can increase consumer confidence thereby increasing adoption and active use of the services. Otherwise, consumers may be exposed to various kinds of risks while conducting transactions through the electronic payment system. For instance, payment service provider employees may gain access to consumer accounts and use the private information for dishonest purposes, or fraudsters may use social engineering scams to obtain money or information from unsuspecting customers.¹¹⁷ Therefore, since payment service provider is the entity providing the

¹¹² NPSP, supra note 3, art 27(1)

¹¹³ id , art 30

¹¹⁴ The National bank of Ethiopia Establishment (as Amended) proclamation No.591/2008, art 5(7), **Federal Negarit Gazeta**, 14th Year, No. 50

¹¹⁵ NPSP, supra note 3 , art 4(2) cum 4(3)

¹¹⁶ World Bank, Global survey on Consumer Protection and Financial Literacy ; oversight framework and practices in 114 Economies , 2014, p.4, available at: documents.worldbank.org/.../Oversight-frameworks-and-practices-in-114-economies , (last accessed on October 22,2016)

¹¹⁷ International telecommunication Union, focus group technical report on commonly identified consumer protection themes for digital financial services, 2013, p.1, available at <https://www.itu.int/.../ITU.../focusgroups/.../ConsumerProtectionThemesForBestPractices.pdf>, (last accessed on January 8, 2017)

service to the consumer and is ultimately responsible for ensuring transparent, fair, and safe services and protecting the consumer's funds and personal information.¹¹⁸

Generally, the following are considered as vital for minimizing the risks that the consumers would be exposed to.

3.1.4.1 Provision of Information and Transparency: Disclosure

Providing consumers with information and transparency in payment services and products is crucial to develop trust and uptake. The absence of information is likely to result in consumer lack of knowledge and awareness of key product features, terms and conditions, which heightens the risk to consumers.¹¹⁹ Thus, to counter this, clear, adequate, accurate and complete information should be provided to all users.¹²⁰

TCCPP imposes an obligation of disclosure on the business person. It provides that any business person upon request by consumer relating to goods or services he/she sells should satisfactorily disclose information requested by the former.¹²¹ As banks are business persons they are bound to disclose informations to the customers.¹²² Moreover, the NPSP stipulates that any issuer of PIs is under obligation to prepare clear and standard sample terms and conditions, in relation to electronic fund transfers and stored value cards, applicable to all its customers in a similar manner and make it available for their review and possible agreement.¹²³ This duty envisages that PII such as banks has the following obligations.

Firstly, they have an obligation to make the terms and conditions of PI clear and standard. However, the NPSP has not provided what factors constitute to make a PI clear and up to the standard. Thus, it better to look at how other jurisdictions treat the requirement of clarity.

¹¹⁸ *ibid*

¹¹⁹ *ibid*

¹²⁰ Provision of information and transparency also require the PI issuer to be transparent in fixing fees, to make the terms and conditions of particular services transparent, to provide a notice period to change the terms and conditions of a given services and to use simple and plain advertisement during advertisement.

¹²¹ TCCPP, *supra* note 110, art 18(2)

¹²² *ibid*

¹²³ NPSP, *supra* note 3, art 19(1)

In USA payment instrument issuers are under obligation to provide clear and readily understandable terms and conditions.¹²⁴ In addition to this, it is mandatory to make the terms and conditions available in the English language so long as requested by the customers.¹²⁵ In similar fashion the EU Payment Services Directive (hereinafter the directive) provides the information and conditions for payment service must be given in easily understandable words and in a clear and comprehensible form, in an official language of the Member State where the payment service is offered or in any other language agreed between the parties.¹²⁶

Thus, from the experience of this jurisdictions, it is understandable that unlike the NPSP they puts an obligation on PII to prepare the terms and conditions of PI at least in the official language of the state as well as the language that would be used while preparing the terms and conditions should simple and clear so that any ordinary person can understand them. However, in our country PII most often than not uses jargon terms and English language to prepare the term and conditions of PIs.¹²⁷ This would open a door for PII to obtain defective consent from customers. Such practice does not only violate the requirement of clarity prescribed under article 19(1) of the NPSP, but it also violates the obligation imposed on the business person by the TCCPP article 18(2).¹²⁸ Thus, the validity of the contract which is made in language which cannot be understood by customers would be subject to controversy. It may even subject for invalidation so long as the consumer is able to prove the existence of fundamental mistake as result of a language used for preparing the terms and conditions of PI.¹²⁹

Secondly, PII has an obligation to make the terms and conditions of PIs available for review and possible agreement. This is intended to give an opportunity to customers to look at the terms and conditions of the contract in advance and to decide either to sign the contract or refuse to do. In addition to this, it shows that the customer must be given an opportunity to examine the terms and conditions of the contract before the conclusion of the agreement. Thus, it is possible to say

¹²⁴Regulation E, 12 C.F.R. § 205. 4(a)(1) (amended 1981)(hereinafter Regulation E)

¹²⁵ Regulation E §205.4(a)(2)

¹²⁶ European union Payment Service Directive 2007/64/EC, supra note 63 , art 41(1)

¹²⁷ See the terms and conditions to provide ATM service prepared by the Dashen Bank S.C and Commercial Bank of Ethiopia which are annexed at the back of this thesis. (annex two and three)

¹²⁸ TCCPP, supra note 110, art 18(2) provides that any business person up on request by consumer relating to goods or services he sells satisfactorily disclose him and let the consumer take the information he wants.

¹²⁹ George krzeczunowich ,**Formation and Effects of contracts in Ethiopia**, Addis Ababa University, Faculty of Law, 1983, p.19

that the disclosure of terms and conditions of EFT and stored value cards should be made before the conclusion of the agreement.¹³⁰

The Ethiopian contract law provides that a contract is formed upon the consent of the parties who define the object of their undertakings and agree to be bound thereby.¹³¹ In addition to this, it provides that a contract is deemed completed where the parties have expressed their agreement thereto and reserves or restrictions intended by one party shall not affect her agreement as expressed where the other party was not informed of such reserves or restrictions.¹³² Moreover, it provides that a contract is not deemed to be completed unless the parties have expressed their agreement to all the terms of the negotiation.¹³³ Thus, the consumer is assumed to have given a free consent when he /she is given the opportunity to review the terms and conditions of PIs and then agree to the terms and conditions. Otherwise, the contract would have a defect during the formation and the validity of the contract made between the consumer and the PII will be contestable. Especially, the stipulation of the law of contract is very serious regarding commercial contracts. It provides that general terms of business applied by a party shall not bind the other party unless she knew and accepted them or they were prescribed or approved by the authorities.¹³⁴ Thus, it is discernable from this that the consumer could not be bound for PII who have not disclosed the terms and conditions of PIs.

Thirdly, the PII has an obligation not to discriminate between customers. Thus, PII's are not allowed to make discrimination between and among their customers. In similar fashion, TCCPP provided that it is prohibited to unduly favor one consumer over the other.¹³⁵

The other issue that is relevant for discussion is whether the obligation of disclosing the terms and conditions of PI would go to the extent of prescribing the contents that should be disclosed to the customers of EFT.

¹³⁰ The writer has personally observed at the Commercial Bank of Ethiopia Lideta and sadist kilo branch that the banker does not provide the terms and conditions of ATM service; they simply tell the consumer to fill in the form prepared by them if he/she wants to have an ATM card. This practice is against the obligation prescribed under art 19 of NPSP and art 18(2) of TCCPP. (see annex four)

¹³¹The Civil Code of the Empire of Ethiopia proclamation No .165/1960, art 1679, **Negarit Gazeta extra ordinary issue** ,19th Year, No.2

¹³² id , art 1680

¹³³ id, art 1695(1)

¹³⁴ id , art 1686

¹³⁵ TCCPP, supra note 110 , art 22(16)

In jurisdictions such as US and EU, the PIIs are required to make some mandatory disclosure.¹³⁶ However, the NPSP has not prescribed terms and conditions which should be mandatorily disclosed before the conclusion of the agreement. Even in terms and conditions issued by the PII, there is no disclosure as to the amount of fee charged from the customer and the right of the consumer to documentation is not provided.¹³⁷ Thus, the PII exercises discretion as regards what to disclose to its customers. Such practice could be challenged by raising the provision of the law of contract. The Ethiopian law of contract provides that undisclosed terms of the contract in principle do not bind the other contracting party;¹³⁸ however various factors may hinder the consumer for bringing allegation based on this principle in the court of law.¹³⁹

One may argue that the discretion of Ethiopian banks on what to disclose is subject to the oversight of the NBE which is authorized to approve terms and conditions of the PIs before they become available to customers.¹⁴⁰ However, the banks which are contacted by the writer have said that the terms and conditions prepared by them are simply made available for customers without securing an approval from the NBE.¹⁴¹ Here, it is understandable that such activities are in violation of art19 (2) of the NPSP.¹⁴² Therefore, it is pressing that the NBE should discharge its mandate properly so that the consumer will have the required protection.

¹³⁶ See Regulation E §205.7(b) and The EU Payment Services Directive 2007/64/EC, supra note 63, art 42. Financial institutions are required to disclose liability of consumers for unauthorized EFT, telephone number and address of the financial institution, its business days, types of transfers and limitations on frequency or dollar amount, applicable fees, rights of the consumer to documentation, a summary of the consumer's right to stop payment of a preauthorized EFT, liability of the institution, confidentiality of consumer information and error resolution.

¹³⁷ see the terms and conditions Prepared by Dashen Bank S.C and Commercial Bank of Ethiopia which are annexed at the back of this thesis(annex two and three)

¹³⁸ Semri Zewdie Kebede, supra note, 2 , p. 19

¹³⁹ Some of the factors could be the huge cost involved in litigation, lack of awareness and education on the part of consumers.

¹⁴⁰ Semri Zewdie Kebede, supra note, 2 , p. 19

¹⁴¹ An interview with Ato Mandefro Mehrete , supra note 47

¹⁴² The term and conditions are not delivered to consumers when an application is made for ATM card and mobile banking service in some Commercial bank of Ethiopia branches. Thus, it is difficult to say the consumers have agreed to the term and conditions set in place by the banks. (see annex four)

3.1.4.2. Data and Privacy¹⁴³

Data protection and privacy measures are concerned with the way that data is collected, stored, shared and exploited.¹⁴⁴ Unless the data and privacy of customer are respected and protected in electronic payment, the customer could be susceptible to a severe damage. As described in chapter two bankers – customer relationship could be considered as an agency contract. Thus, banks duty of privacy emanates from this nature of the contract. The agent is duty bound to be confidential to his/her principal.¹⁴⁵ However, customer data privacy is not an absolute one, it could be subject to some qualified exceptions.

The issue of privacy has been regulated modestly under the NPSP. It provides that a director, a manager or an employee of an operator, a participant, or issuer of PI have an obligation not to disclose any confidential information relating to any person except required or ordered by the court, law, legally authorized person or NBE.¹⁴⁶ Thus, it is discernable that the confidential information of the customers may be disclosed under three circumstances.¹⁴⁷ These are when the court ordered the disclosure of the confidential information, or when the law provides so or when the confidential information is disclosed to legally authorized persons or when the disclosure is made to the NBE.

¹⁴³ Kinfé Micheal Yilma and Halefom Hailu Abraha, *supra* note 4, p.133-135. Ethiopia does not have laws that are specifically designed to deal with privacy in general and electronic privacy in particular except a few set of rules contained in various pieces of legislation that guarantee the right to privacy in an indirect fashion. The 1995 the constitution of the Federal Democratic Republic of Ethiopia art 26 recognizes and grants protection to the right of privacy in general and in particular to communication made through electronic devices. It provides that everyone has the right to the inviolability of his notes and correspondence including postal letters, and communications made by means of telephone, telecommunications and electronic devices. In addition to this constitutional provision, the rules regarding personality rights incorporated under the civil code such as the right to inviolability of correspondence may have an implication in the electronic privacy. Moreover, the proclamation to provide for freedom of information has incorporated provisions which can possibly safeguard electronic privacy. Though this proclamation grants individuals a right to obtain information from the public authority, it has made exceptions on the basis of public and private interests. Furthermore, the rules incorporated under the Ethiopian Criminal Code of the 2004 and cyber space proclamations are the most important legislation that deals with electronic privacy. The Code among others penalizes violation of the privacy of correspondence' including electronic communications. The cyber proclamation also penalizes hacking and cracking of computers, computer systems and computer networks. The draft data protection legislation also has significant bearings on electronic privacy.

¹⁴⁴ *id.*, p.133

¹⁴⁵ Civil Code, *supra* note 132, art 2209(2) provides that the agent may not make to the determinant of the principal any information obtained in the course of performance of his duties.

¹⁴⁶ NPSP, *supra* note 3, art 35(2)

¹⁴⁷ *id.*, art 35(2)(e)

In case where the director, manager or an employee of an operator, a participant or issuer of PI fails to disclose confidential information under the circumstance described above they will be held criminally liable.¹⁴⁸ However, the NPSP has not provided a civil recourse consumers may have against an employee of the banks who have disclosed the confidential information or banks.

The consumer has a contractual relationship only with the bank/ payment service provider; he/she has no contractual relationship with the manager, director or an employee of an operator, a participant or issuer of payment service. Thus, the consumer may not have recourse on the latter on the basis of contract law. Therefore, the customer could have recourse against them based on the laws of extra-contractual liability. As stated above the director, manager or an employee of an operator has an obligation not to disclose the confidential information of the customer. In case these individuals have not complied with this obligation, it amounts an infringement of law within the meaning of article 2035 of the civil code.¹⁴⁹ On the other hand, one may argue that consumer may have a direct recourse against the banks on the basis of extra-contractual liability law since the latter is responsible for the faults of its employee in a case where the fault is a professional fault.¹⁵⁰ However, this argument may not hold water since article 2037 of the civil code excludes the application of the extra-contractual liability laws in the case where the parties have a contractual relationship.

3.1.4.3 Fraud and Error Resolutions Protections

Fraud is a key issue for consumer protection as not only can it result in loss of funds or the misuse of personal data but the fear of fraud can prevent users from adopting electronic payment system. Thus, the issue of fraud should be regulated seriously. Accordingly, the NPSP has provided various sanctions and penalties against fraudsters under article 35 of the NPSP.

Error resolution protection is also important in electronic payment system since machine may subject to software breakdown or errors. However, the NPSP nowhere mentions the obligation of PII for the resolutions of error. On the other hand, the terms and conditions of Commercial and Dashen bank provides that unless the bank accepts the existence of error on its part, the

¹⁴⁸ id , art 35(2)(d)

¹⁴⁹ Civil Code ,supra note 132, art 2035 stipulate that a person commits an offence where he infringes any specific and explicit provision of a law, decree or administrative regulation

¹⁵⁰ id, art. 2126

consumer agree to the amount in his account and the debit and credit made to his account and also accepts the banks records and evidence pertaining to the financial transaction made with bank as true and correct.¹⁵¹ From this contractual clause, we can observe two things. Firstly, it is inferable that these banks are not assuming obligations for investigating an error alleged by the consumer, and even if it is made it is discretion to be exercised by them to admit the existence of error. However, PII should assume an obligation to investigate an allegation of error made by the consumer. Secondly, such terms and conditions shift the bank's obligation to the consumer. Thus, it is in violation of the NPSP since the latter at least require the PII to produce prima facie evidence to show the existence of fund transfer. Therefore, the banks should be under obligation to conduct good faith investigation.¹⁵² Accordingly, in the case where the banks have failed to conduct appropriate investigations, they should be sanctioned and the consumer should be entitled to damages.

3.1.4.4 Dispute Resolution Mechanism

As the use of electronic payment system is to expand with more services and products being made available to consumers, it becomes increasingly essential to have effective recourse mechanisms in place. Principle 9 of the G20 High-Level Principles on Financial Consumer Protection states that access to redress should be accessible, affordable, independent, fair, accountable, timely and efficient.¹⁵³ In addition to this, it sets out that PII among other things should set in place complaints policy and procedures, alternative dispute resolutions or external recourse and timeframe provided for dispute resolution.¹⁵⁴ In view of this, the NPSP has imposed an obligation on operators, participants, and issuers of PIs to establish internal complaint handling procedures in relation to electronic fund transfers and stored value facilities and to advise users on the procedures for lodging complaints.¹⁵⁵ Moreover, the NPSP empowers the NBE to prescribe procedures for investigating and handling complaints in relation to electronic

¹⁵¹ See clause 3 of the Dashen Bank and Commercial Bank of Ethiopia debt card holder agreement that are annexed at the back of this thesis.(Annex two)

¹⁵² See also explanatory note, supra note 1, p.15. The legislature has imposed an obligation on PII to establish internal complaint handing procedures in relation to electronic fund transfer and stored value facilities under art 20 of proclamation believing that the PII would resolve complaint reported by the consumer by conducting good faith investigations.

¹⁵³The World Bank, supra note 117, p. 27

¹⁵⁴ ibid

¹⁵⁵ NPSP, supra note 3, art 20(1)

fund transfers and stored value facilities by the directive.¹⁵⁶ Furthermore, any operator, participant or issuer of PI shall resolve complaints or disputes with its customers in relation to the processing of electronic fund transfers or stored value cards promptly through its internally established systems. Such persons may not require their customers to present their complaints to any other party to the shared system or to have those complaints or disputes investigated by any other party to the shared system.¹⁵⁷

The NPSP stipulated that disputes among parties involved in the NPS concerning any civil matter arising under the NPSP shall be resolved by mediation.¹⁵⁸ The NPSP does not define the term parties on the definitional article; rather it defines the term participant. Participant is defined under the NPSP as a party who participates in a payment, clearing or settlement system as a direct participant which opens and maintains a settlement account at the NBE or any other settlement entity or an indirect participant which shall only be able to settle its obligations due through the account of a direct participant.¹⁵⁹ Thus, in order to be called a participant, a person should open an account and maintain a settlement account at the NBE and should further participate in payment, clearing or settlement system either directly or indirectly. Hence, consumers who use the electronic payment system are not considered as participants since they do not open and maintain an account at the NBE. Therefore, the term participant does not refer to customers. So, then whom does the term “Parties” under Art. 31(1) refers to?

There is a controversy with respect to the term parties under art 31 of the NPSP and whether the consumer can take his allegation to regular courts. Some legal practitioners argue that the term parties under article 31(1) also refer to customers who use electronic payment system. According to this line of argument, the dispute settlement mechanism envisaged under the NPSP is intended to resolve disputes efficiently and amicably. Thus, whenever a dispute arises between these two parties, it should be resolved either by mediation or arbitration so that the confidence of the customers would be enhanced in the payment system. Thus, consumers have no right to take their case to regular court. On the other hand, the other line of argument poses that the term parties under article 31(1) only refers to those entities who provide payment, clearing and

¹⁵⁶ id , art 20(2)

¹⁵⁷ id, art 22(4)

¹⁵⁸ id, art 31(1)

¹⁵⁹ id, art 2(18)

settlement service either directly or indirectly and who open and maintain an account at the NBE. These requirements are cumulative. Thus, consumers are not covered under this provision, so that they can either take their claim to regular courts or they can use alternative dispute settlement to settle their disputes. The writer subscribes to the second line of argument because of the following reasons. Firstly, article of 31(1) of the NPSP stipulates that disputes among parties involved in the NPS concerning any civil matter arising under it shall be resolved by mediation and failing mediation, it should be resolved by arbitration.

The first question which crosses our mind when we see this provision is that who are the parties involved in the NPS? What is NPS after all? To answer this question we need to look article 2(16) (a) of the NPSP. This provision envisages the parties involved in the NPS. These parties are payment service providers, including operators, participants, issuers of PIs and any third party acting on behalf of them, either as an agent or by way of outsourcing agreements, whether entirely or partially operating in the country. However, the consumer is not listed as one of the parties involved in the NPS.

Secondly, the legislature has imposed an obligation on PII to establish internal complaint handling procedures in relation to electronic fund transfers and stored value facilities under art 20 of the NPSP to settle a dispute between the consumer and PII through the amicable process. Hence, the legislature does not incorporate two separate provisions which have the same purpose.

Thirdly, had the legislature intended to oust the jurisdiction of regular courts from entertaining cases relating to unauthorized transfer, it should have been provided clearly. Therefore, the consumers have no obligation to settle the dispute with the PII through mediation or arbitration. In other words, the consumer can directly take his claim to regular court. Then the question is do the social court has a power to entertain cases involving unauthorized fund transfer for the amount of money less than 5000/five thousand /?¹⁶⁰ Or is it the power of the federal courts to entertain cases involving unauthorized fund transfer/ transaction without considering the amount

¹⁶⁰ See the case between Mr. Halfom G/egzi (the plaintiff) and the Commercial Bank of Ethiopia (the defendant) which is annexed at the back of this thesis. In this case the plaintiff file a suit for amount 4000 (four thousand) in file number 034/09 at social court for an alleged unauthorized transaction. The defendant raised preliminary objection that the matter should be resolved either by mediation or arbitration , not by court of law in accordance with art 31 of NPSP (see annex 10)

of claim involved? Art 5(6) of proc 25/96 provides that the federal courts have jurisdiction over suits relating to business organizations registered or formed under the jurisdiction of Federal Government organs. The power of authorizing a person to operate a system and to issue PI belongs to the NBE in accordance with art 4(2) (a) (b) of the NPSP. Hence, PIs are business organizations registered and formed under the jurisdiction of the federal government.

In addition, the Federal Supreme Court Cassation Division under file number 52041 in case between machinery of agriculture and technology share company and Ethiopian insurance corporation and under file number 43912 in case between Africa insurance company vs. heirs of Ibrahim Musa (2 people), has decided that the power to entertain cases involving business organizations registered by the federal government belongs to the federal courts even if the amount of claim involved in the suit is less than 5000(five thousand) birr. This decision has taken away the power of social courts which is vested on them by art 50 of revised Addis Ababa city charter. Thus, the social court has no power to entertain cases involving unauthorized fund transfer. Moreover , according to art 2(4) Proclamation No. 454 /2005 the interpretation of a law by the Federal Supreme Court rendered by the cassation division with not less as five judges shall be binding on federal as well as regional council at all levels. Therefore, based on the above reasoning the power to entertain cases involving unauthorized fund transfer belongs to federal courts. On the other hand, state courts may exercise jurisdiction in cases involving unauthorized transaction in accordance with article 80(4) and 80(5) of the FDRE constitution. In general, the jurisdiction to entertain the dispute rose between the consumer and payment service provider would be determined in accordance with Federal courts proclamation No 25/1996. Therefore, the rights of the consumer to make an appeal and to bring the justifiable matter to the court of law would not be affected and the consumer has no obligation to go through mediation or arbitration to settle its dispute with the PII.

The NPSP has opted for private dispute settlement mechanisms such as mediation and arbitration. This is in line with the accepted mode of settling a dispute related to payment system

worldwide.¹⁶¹ Thus, the stand taken by the legislature is sound, since dispute arises from the payment system, need to be resolved within a short period of time, efficiently and amicably.¹⁶²

The first option chosen by the legislature to settle a dispute involving payment system is mediation.¹⁶³ However, Ethiopia does not have a legal and institutional framework for settling the dispute through mediation. It may argue that the rule related to conciliation in the civil code may help to start things off the ground until the legal and institutional framework is set in place.

The NBE is empowered to issue a directive on the resolutions of disputes which arises from the NPS.¹⁶⁴ However, the NBE has not issued the directive at the time of writing this thesis.¹⁶⁵ Thus, the failure of NBE to enact such directive would hurt the payment system in general and participants in particular.

The NPSP also states that where the disputes cannot be resolved through mediation, the matter shall be settled by arbitration and the award given by arbitration tribunal would be final and binding on the parties.¹⁶⁶ Now, the question is what is the implication of the term final under this provision? The term final under ordinary legal parlance imply that a certain decision is not appealable, except on grounds of procedural error, fraud, or mistake.¹⁶⁷ Thus, according to the stipulation of the NPSP, the decision rendered by the arbitration tribunal regarding the dispute relating to the payment system is not appealable except on the grounds listed under the civil procedure code.¹⁶⁸

¹⁶¹Kenya and UK has employed the same way of settling dispute raised between participants in payment system. (see world Bank, supra note 117, p.7)

¹⁶² An interview with Ato Kidane Gizu, supra note 33

¹⁶³ Kamil Abdu Oumer, Modernization and Institutionalization of Mediation to Resolve Commercial and Investment Disputes in Ethiopia, Addis Ababa University, School of Law, (Unpublished), (2014) p.7

¹⁶⁴ NPSP, supra note 3, art 31(4)

¹⁶⁵ An Interview with Ato Solomon Damte, Officer of Payment Oversight Department at National Bank, Addis Ababa, January 2, 2016

¹⁶⁶ NPSP, supra note 3, art 31(3)

¹⁶⁷ Bryan A. Garner, supra note 5, p.706

¹⁶⁸The Civil Procedure Code of the Empire of Ethiopia Proclamation, No. 52/1965, art 351, **Negarit Gazeta extra ordinary issue**, 25th Year, No.3. According to this provision appeal is possible from arbitral awards in case where the award is inconsistent, uncertain or ambiguous or is on its face wrong in matter of law or fact. In addition to this the parties can take an appeal if the arbitrator omitted to decide matters referred to him. Moreover, it is also possible for the parties to make an appeal if irregularities have occurred in the proceedings, in particular where the arbitrator failed to inform the parties or one of them of the time or place of the hearing or to comply with the terms of the submission regarding admissibility of evidence or refused to bear the evidence of material witness or took evidence in the absence of the parties or one of them or the arbitrator has been guilty of misconduct.

The first proviso of article 31(3) of the NPSP tells us that that the award given by the arbitration panel is final and binding. On the other hand, the second proviso of the same article tells us that the parties can make an appeal from the award given by the arbitration in accordance with the civil procedure. This provision is self-contradictory because if parties are allowed to make an appeal from the award, there is no need to state that the award given by the arbitration panel is final and binding. In addition, if the parties are not allowed to make an appeal from the award, there is no need to state that the provisions of the civil procedure code will not be affected. Thus, if the parties are allowed to make an appeal from the award of arbitral award article 31(3) of the NPSP should be discarded since it has no purpose to serve. However, a close reading of article 31(3) tells us that it is not allowed for the parties to take an appeal from the arbitral award on the grounds listed under the civil procedure code because the NPSP set out that the parties cannot make an appeal from the arbitral award. Moreover, to make the provision effective we need to interpret as the provision prohibits appeal. Otherwise, it has no purpose to serve. Then what recourse the party may have if the appeal is not allowed? The only recourse that the parties are left with is to submit an application of cassation to the Federal Supreme Court cassation division. This is possible because the FDRE constitution provides that the Federal Supreme Court has a power of cassation over any final court decision containing a basic error of law.¹⁶⁹ In addition to this, the Federal Supreme Court Cassation Division under file number 42239 has decided that it has the power to assume jurisdiction on cases decided by arbitration panel so long as the decision contain a basic error of law even if the parties agreed to oust its jurisdiction. This decision is binding and has the effect of law in accordance with article 2(4) of proclamation No 454/2005.¹⁷⁰ Moreover, the NPSP has not ruled out the possibility of submission of cassation application to the Federal Supreme Court Cassation Division. However, it does not seem the legislature has an intention to let the Federal Supreme Court cassation division entertain dispute arose between participants or payment service provider considering complex nature of payment system.

¹⁶⁹ The Constitution of the Federal Democratic Republic of Ethiopia , supra note 54, art 80(3)

¹⁷⁰ Federal Courts Proclamation Re-amendment Proclamation No. 454/2005, art 2(4), **Federal Negarit Gazeta**, 18th Year, No.63 stipulated that the interpretation of a law by the Federal Supreme Court rendered by the cassation division with not less than five judges shall be binding on Federal as well as Regional council at all levels.

3.1.5. Approval and Amendment of Terms and Conditions of Payment Instruments

PII such as banks prepares terms and conditions for the product or service they provide for their customers. These terms and conditions determine the rights, duties, and liabilities of the customers. However, the parties can freely determine the object of a contract so long as they have complied with such restrictions and prohibitions as are provided by law.¹⁷¹ Accordingly, the PII has an obligation to prepare clear and standard sample terms and conditions, in relation to electronic fund transfers and stored value cards applicable to all its customers in a similar manner and make it available for their review and possible agreement.¹⁷² Thus, it is discernable that the PII has a duty to disclose the terms and conditions of PII. Though the NPSP has imposed a duty of disclosure on the PII, it has not prescribed the legal effect of failure to comply with such duties.

The NPSP has entrusted the NBE to prescribe the basic terms and conditions to be applicable to contracting parties in the business of electronic fund transfers and stored value facilities.¹⁷³ However, until the time of the writing of this thesis, the NBE has not issued a directive determining the basic terms and conditions of PIs.¹⁷⁴ On the other hand, banks are issuing different types of PI such as ATM and Green card.¹⁷⁵ The NBE has never approved the terms and conditions of PI rather it approves the proposal which includes a business plan, risk assessment and risk mitigation submitted by banks to provide a given service/ product.¹⁷⁶ This is against the clear stipulation of the law. Thus, the consumer may challenge the legality of terms and conditions prepared by the banks whenever a dispute arises.

The NBE is also empowered to approve the terms and conditions prepared by the PII and any subsequent amendments to it.¹⁷⁷ However, the NPSP has failed to mention factors that should be taken into considerations while approving the terms and conditions of PII. According to the interview held with Ato Solomon Demtew the NBE has never taken into consideration the issue

¹⁷¹ Civil Code , supra note 132, art 1711

¹⁷² NPSP, supra note 3, art 19(1)

¹⁷³ id , art 19(3)

¹⁷⁴ An interview with Solomon Damte , supra note 166

¹⁷⁵ Green card is type of debit card issued by Dashen Bank (see annex one)

¹⁷⁶ An interview with Solomon Damte ,supra note 166

¹⁷⁷ NPSP, supra note 3, art 19(2)

of consumer protection while it allows banks to provide various electronic payment system rather it worries about the financial stability of the country.¹⁷⁸

3.1.6 Comparing Rule of Evidence under the Electronic Payment System and the Traditional Rules of Evidence

With the introduction of electronic payment system personal relationship has been replaced with a man to machine interaction. Thus, the interaction is made through electronic communication.¹⁷⁹ This advancement has, in some instances, hindered the use of traditional signatures. As such, a necessity arises for the creation of unique signatures for conducting electronic transactions that are electronic signatures.¹⁸⁰ Accordingly, today electronic payment system uses an electronic signature or other method of security procedure for authenticating an order given by the customers to the financial institutions. Consequently, the evidence that would be produced by the financial institution to show the existence of an order given by the customer is electronic record generated by a computer which has no original or signed records.¹⁸¹ However, many legal rules in Ethiopia assume the existence of paper records, signed records, and original documents.¹⁸² In addition, the law of evidence though sometimes relies on oral testimony and other kinds of physical objects; it relies primarily on paper records.¹⁸³ Thus, considering the deep-rooted traditional rule of evidence that we have in our country, the new rules of evidence introduced by the NPSP such as the admissibility of electronic records and the production of electronic signature as a proof of fund transfer may face strong challenges from various stakeholders.

In the traditional rule of evidence, authentication is made through manual signature. Accordingly, the basic purpose of signing any document is to authenticate the document and to identify and bind the person who signs cannot claim later on that he had not signed a particular

¹⁷⁸ *ibid*

¹⁷⁹ *id*, art 2(9) defines electronic communication as electronic exchange of messages in a standardized format that allows visual display or listening of data that is clear and readily understandable and receiving and retaining the information in the message for subsequent retrieval such as by printing, recording or any other means for later use.

¹⁸⁰ *id*, art 2(11) defines electronic signature as a data in an electronic form, affixed to or logically associated with, an electronic message, which may be used to guarantee the authenticity and identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message.

¹⁸¹ Nandan Kamath , **Laws Relating To Computers , Internet and E- Commerce :A Guide To Cyber Laws & The Information Technology Act , 2000 with Rules, Regulations and Notifications** (3rd ed), Universal Law Publishing co. Pvt. Ltd , India, 2007, p.49

¹⁸² *ibid*

¹⁸³ *ibid*

document.¹⁸⁴ In ordinary payment document, for example, a cheque, the nature of its identity is retained that is a signature on the document remains there, whether made by an unauthorized person or not, however, an automated data transfer differs fundamentally in that once fed into the computer the data seems to lose its identity.¹⁸⁵ It is retained in a computer memory and becomes accessible only by computer programs.¹⁸⁶ Hence, it is not an easy task to identify the alterations made in the data retained in the form of electronic record. In addition to this, in the traditional rule of evidence distinction is made between primary and secondary evidence though the document is proved to be authentic.

Primary evidence envisages the existence of a single original and this is an impossible proposition as regards computer documents.¹⁸⁷ Evidence which is produced as a result of electronic payment systems are computer generated evidence which in turn is a copy of data package. In other words, computer generated evidence are not original evidence. Thus, computer evidence is not regarded as primary evidence. Moreover, in the traditional rule of evidence to protect the integrity and authenticity of a certain document, there is a rule called best evidence rule. This rule essentially means that if the evidence sought to be admitted indicates the existence of better evidence, it should not be admitted, unless a satisfactory explanation of the absence of better evidence has been given. However, the solutions which have been devised to deal with paper-based records are not readily applicable to electronic records. Thus, the following section is devoted to explaining how authentication is made in the electronic payment system.

3.1.7. Authentication and Authorization of Payment Instructions¹⁸⁸

Authentication procedure employed in electronic payment system among other things should have the following functions: firstly, it should ensure the identity of the customer who issued the

¹⁸⁴ *ibid*

¹⁸⁵ *ibid*

¹⁸⁶ Aywa Samuel, Legal aspects of Electronic Payments in Kenya , An evaluation of the nature and quality of electronic banking in Kenya, and the legal aspects posed by adoption of the same in light of existing laws, Moi University , School of Law, (Unpublished), 2014, p.35, available at: www.academia.edu/.../LEGAL_ASPECTS_OF_ELECTRONIC_BANKING_IN_KENYA, (last accessed on September 12,2016

¹⁸⁷ *ibid*

¹⁸⁸ Authentication is to authenticate the identity of the person who signed the data so it is known who participated in the transaction.

payment instruction; secondly, it should ensure that customer data are not accessible to persons other than the rightful holder; and thirdly, to use the security procedure agreed between the bank and customer as a non-repudiation measure, preventing the customer from denying the execution of the instruction.¹⁸⁹

As highlighted above in electronic payment system authentication is made through electronic signature. However, all types of electronic signatures have no equal level of reliability. Thus, in order to use the electronic signature as replacement of manual signature, the former should provide the functions of authentication mentioned above¹⁹⁰. In today's world, the type of electronic signature which provides similar functions with the manual signature is digital signature.¹⁹¹

A digital signature is a type of electronic signature which is uniquely linked to the signatory, capable of identifying the signatory, created using means that the signatory can maintain under his sole control; and it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable.¹⁹² However, the NPSP has not make a distinction between various types of electronic signature, neither provide any standard as to what type of electronic signature meets the legal requirement of signature and it is not aligned with international model laws.¹⁹³ It further, provides that any electronic signature provided by the payment service provider would have prima facie evidence against the customer to prove the transfer of funds.¹⁹⁴ This stipulation is currently affecting a number of ATM card users.¹⁹⁵

¹⁸⁹ Samahir Mohammed Ali Abdulah, Legal Risk Associated with Electronic Funds Transfer, Plymouth University, School of Law, (Unpublished), 2014, p.105, available at: https://www.plymouth.ac.uk/.../2. General Conditions for Postgraduate Research Degree Students_PGR.pdf, (last accessed on January 23, 2016)

¹⁹⁰ An interview with Halfom Hailu, Deputy Director of Legal and Policy Affairs and a Cyber Law and Policy Researcher at the Ethiopian Information Network Security Agency, held on January 3, 2017, Addis Ababa

¹⁹¹ *ibid*

¹⁹² Community Framework For Electronic Signatures ;The European Parliament and of the Council Directive 1999/93/EC, 13 December 1999, Article 2 (2) (a-d)

¹⁹³ African Union Convention on Cyber Security and Personal Data Protection art 7(4) (a) states that an electronic signature created by a secure device which the signatory is able to keep under his exclusive control and is appended to a digital certificate shall be admissible as signature on the same terms as a handwritten signature.

¹⁹⁴ NPSP, *supra* note 3, art 23(3)

¹⁹⁵ An interview with Ato kidanu Gizu, *supra* note 33

A four digit password given by the banks for the use of ATM card is one type of electronic signature. However, this four digit password could be accessed by insiders and fraudsters.¹⁹⁶ Thus, unlike the digital signature, this type of signature cannot identify the person who gives the authorization, it is not under the exclusive control of the signer and it is not possible for the signer to know the modifications made to the instructions.¹⁹⁷

Therefore, these types of security procedures do not solve the problems relating to unauthorized transactions. Thus, the stand taken by the legislature would have great effect on the consumer. Hence, the banks should be under obligation to employ digital signature to authenticate the instructions or authorization given by the consumers. Otherwise, the use of four digit password will continue to affect the financial interest of the consumers/, especially of ATM users.

3.1.8. Admissibility of Electronic Records

The NPSP provides that where any law provides that information or any other matter shall be in writing, such requirement shall be deemed to have been satisfied if such information or matter is rendered or made available in an electronic form and accessible so as to be usable for subsequent reference.¹⁹⁸ Consequently, electronic records are admissible so long as it is available in electronic form and accessible for subsequent reference. Moreover, the NPSP provides that without being affected by any provision to the contrary in any other law or customary practice, information as to any transfer of funds through a system which is contained in any document, computer print-out, hard copy, microfilm, floppy or hard disc or any other electronic media or form shall be admissible in any court as evidence of the transfer concerned.¹⁹⁹ Thus, electronic document for all practical purposes has the same legal effect as paper-based original documents. In addition, electronic records cannot be denied validity solely because it's in electronic format or not original.²⁰⁰ This is intended to do away with the stringent requirement provided under the civil code.²⁰¹

¹⁹⁶ *ibid*

¹⁹⁷ The draft Electronic Signature Proclamation art 2(3) stipulate that digital signature should be able to identify the signer, it should be under the exclusive control of the signer and it should enable us to know the modification made to the instructions given through electronic communication.

¹⁹⁸ NPSP, *supra* note 3, art 21(1)

¹⁹⁹ *id*, art 23(1)

²⁰⁰ UNICTRAL MODEL LAW on Electronic Signature, 2001, art, 6(1)

²⁰¹ Civil Code, *supra* 132, art 1721-1728, art 2427, 2003, 2005

Electronic records are computer generated evidence. Thus, they can be categorized under the documentary evidence.²⁰² Computer generated documentary evidence can be classified into three types.²⁰³ The first category of computer generated evidences are the calculations or analyses that are generated by the computer itself through the running of software and the receipt of information from other devices such as built-in clocks and remote sensors.²⁰⁴ This type of evidence is usually known as real evidence.²⁰⁵ The second category of computer generated evidence is documents and records produced by a computer that are copies of information supplied to the computer by human beings. These types of evidence are deemed as hearsay evidence.²⁰⁶ The third category of computer generated evidence is called derived evidence. It is the type of evidence which combines real evidence with information supplied to the computer by human beings to form a composite record.²⁰⁷

However, the NPSP provide blanket acceptance of electronic records.²⁰⁸ It does not make any distinction among different type of computer generated evidence.²⁰⁹ In addition to this, it is not considerate of cases of unauthorized transfer caused by computer fraud or an internal fraud at the financial institution which are outside the ability of the consumer to prove. This would expose the consumer for fraud and ultimately the public will lose trust in the payment system.²¹⁰ Therefore, there is a need to make a distinction among different types of computer generated evidences so as to protect consumers.²¹¹

²⁰²Documentary evidence is defined by the draft evidence rules as all documents produced for the inspection of the court(see the Draft Evidence Rule 57)

²⁰³ Nandan Kamath, supra note 182 , p.53

²⁰⁴ id, p.81

²⁰⁵ ibid. For instance, if a bank computer automatically calculated the bank charges due from customer based upon tariff , the transactions on account and the daily cleared credit balance would be a piece of real evidence .

²⁰⁶ibid. For example, cheques drawn and paying in slips credited to bank account are considered to be hearsay evidence.

²⁰⁷ ibid. For instance, the figure in daily balance column of bank statement could be considered as derived evidence

²⁰⁸ An interview with Ato Mandefro Meherete, supra note 47

²⁰⁹ NPSP, supra note 3, art 23(1)

²¹⁰ An interview held with Halfom Hailu , supra note 191

²¹¹ Nandan Kamath, supra note 182, p.52. In addition to the failure to make distinction among different computer generated evidences. The NPSP has not provided express threshold requirement for the admissibility of computer generated evidences other than availability in electronic form and accessibility for subsequent reference. In contrast, the UK civil evidence act, 1968 will only admit computer generated evidence if it satisfies two tests. The first test is there must be no reasonable ground for believing that the statement is inaccurate because of improper miss use of computer. Secondly, the computer must have been operating properly at all times or at least the part that was not operating properly must not have affected the production of the document or the accuracy of the contents. These conditions are set in place due to the fact that computers are machines, unreliable and unavailable for cross examination. However, the NPSP does not prescribe such obligation on payment system provider to proof the

3.1.9. Authorized vs. Unauthorized Transfer (Transactions)

An EFT is commonly initiated by means of an “access device”²¹² such as a debit card, issued to the consumer by the financial institution, which is capable of accessing the account from which the customer is permitted to withdraw. Where the use of that access device is by the consumer to whom it was issued, or by another person acting under the consumer’s authority, the ensuing electronic fund's transfer is authorized.²¹³ In this case, the fund transfer is made by the consumer himself or by the person who has an express or an implied authority from the consumer. On the other hand, the unauthorized transfer is a transfer initiated by a person other than the customer without actual authority to initiate the transfer and from which the customer receives no benefit.²¹⁴ Thus, to say the fund transfer is unauthorized, firstly, the transfer should be initiated a person other than the customer, secondly, the person should not have an authority at the time of transfer, thirdly, the transfer is made out of the customer’s account and lastly, the consumer should not benefit out of transfer. It is only when these conditions have been satisfied that we can say there is an unauthorized transfer of funds. However, unauthorized fund transfer does not include fund transfer initiated by a person who was furnished with the access device by the consumer, namely someone with lawful control of the access device, unless the financial institution is notified of the termination of the transaction authority; a transaction which was initiated with fraudulent intent by a consumer or accomplice; or a fund transfer initiated by the bank or its employee.²¹⁵

Unauthorized EFT may be prompted by a customer’s negligence, as where the consumer writes the Personal Identification Number on the card or on a piece of paper kept with the card. A person stealing the card with the PIN obtains full control of the access device.²¹⁶ Hence, so long

computer was working properly at the relevant time neither provides when the courts are allowed to reject the electronic records provided by payment service provider. It seems that courts will only reject the electronic record produced by the payment service provider when the electronic records are not accessible or it is not available for subsequent references.

²¹² See Regulation E §205.2(a) (1). Access device is defined as a card, code or other means of access to a consumer’s account or any combination, thereof, that may be used by the consumer for the purpose of initiating electronic funds transfers. The term includes debit cards, personal identification numbers, but does not include magnetic tape or other devices used internally by financial institutions to initiate the electronic funds transfer.

²¹³Kilonzo.D. Kethi , “An Analysis of the Legal Challenges posed by Electronic Banking” ,**Kenya law review** , Vol. 1 , 2007, p.323

²¹⁴ Electronic Funds Transfer Act (1978), 15 USC, section 1693 and Regulation E, section 205.6.

²¹⁵ ibid

²¹⁶ Kilonzo.D. Kethi ,supra note 214, p. 339

as the access device is obtained by perpetrators unlawfully, the transfer made by them would be considered as unauthorized transfer. However, in our case so long as a fund transfer is made using the access device obtained by customers from the financial institutions, the transfer is considered as authorized transfer and consumers will bear full responsibility.

As provided under the NPSP fund transfer involves an order of payment or a transfer of money, which is initiated by a person by way of instruction, authorization or order to a financial institution to debit or credit an account maintained with that financial institution and includes point of sale transfers, automated teller machine transactions, direct deposits or withdrawal of funds, transfers initiated by telephone, the internet, card or other devices.²¹⁷ Hence, it is understandable that fund transfer can be initiated by the instruction, authorization or order given by a customer to the financial institutions to debit or credit the account maintained in the latter. It is also implied that the financial institutions cannot debit or credit the customer's account unless they receive instructions or authorization or orders from the consumers. However, the NPSP neither provides the circumstances under which we can say that consumer has given an authorization for the transaction nor defines authorized and unauthorized transactions. This may cause a problem while determining the liability of consumer and the PII.

3.1.10. Burden of Proof for Electronic Fund Transfer

Many financial institutions provide in their standard terms and conditions that the customer is to be liable for all use made of the card or Personal Identification Number, whether authorized by the customer or not.²¹⁸ Such a term allows the bank to debit its customer's account even if it has no mandate to do so.²¹⁹ This assumes that the card is always used by the consumer or by another person in concert with the customers. However, this is not always true and the information of the card can be obtained through different means in this technologies world.²²⁰ Hence, it is not appropriate to avoid the burden of proof by imposing liability on a consumer for both authorized and unauthorized transactions.

²¹⁷ NPSP, supra note 3, art 2(13)

²¹⁸ see the term and conditions of Commercial Bank of Ethiopia(annex three , clause 8) and Dashen bank S.C (annex two, clause 8)

²¹⁹ *ibid*

²²⁰ An interview with Halfom Hailu , supra note 191

Banks also exonerate themselves through contractual terms from proving that the fund transfer is made in accordance with the direct or indirect authorization of the consumer.²²¹ Such contractual terms are illegal in their nature because the NPSP has clearly provided the payment service provider could make a prima facie case about the occurrence of fund transfer by producing payment instructions, messages and funds transfer that are initiated, processed or executed through electronic means including electronic signatures.²²² Thus, unless the payment service provider adduced those evidence, it should not be exonerated from liability for unauthorized transactions. However, the NPSP has not ruled out the possibility of shifting the burden of proof through contractual terms.²²³

The NPSP provides that payment instructions, messages, and funds transfers that are initiated, processed or executed through electronic means including electronic signatures shall be admissible as prima facie evidence of the matters or transactions carried out.²²⁴ Thus, to prove the occurrence of fund transfer, once the financial institutions produced the electronic signature of the consumer, it is up to the consumer to rebut a prima facie case made by the financial institutions. It is easy for a financial institution to meet this standard since in a civil case the standard of proof is that of a balance of probabilities, often referred to as "proof on a preponderance of probabilities" or "proof by a preponderance of evidence".²²⁵

In jurisdictions which have developed payment system such as the UK, a financial institution is required to prove three things in order to show fund transfer.²²⁶ First, the institution is required to prove actual verification, including, where applicable, that it was the actual card issued by it, rather than unauthorized copy of it, or no card at all was used in the relevant transaction. Second, the financial institution is required to prove the soundness of the security procedure used for verification. For instance, using digital signature could constitute sound security procedure.

²²¹ The Dashen bank ATM service agreement provides that the consumer is agreed with the written as well as the electronically produced evidences and cannot rebut these evidence in whatever means.(Annex two, clause 3(2)of card holders agreement)

²²² Civil Code ,supra note 132, art 1711 cum 1716

²²³ In USA and UK it is illegal to shift burden of proof to consumer through contractual terms.(see regulation E §205.6 and Payment Service Regulation ,art 67)

²²⁴ NPSP, supra note 3, art 23(3)

²²⁵ J. Sopinka, S.N. Lederman, and A.W. Bryant, **The Law of Evidence in Canada**, 2nd ed , Butterworths, Toronto, 1999, p. 154.

²²⁶ Benjamin Geva, "Consumer Liability in Unauthorized Electronic Funds Transfers" **Canadian Business Law Journal** , Vol. 38, No. 2, 2003, p.233

Third, the institution should be able to prove its own lack of negligence in the verification process. However, the NPSP does not impose such obligations on the payment service provider. In addition to this, it does not make a distinction between various types of electronic signature. Thus, while recognizing electronic signature which does not identify the consumer and which does not remain under the exclusive control of the consumer, it is very damaging for the consumer to stipulate payment service provider can make prima facie case against the consumer by producing electronic signature such as four digit password. Thus, the onus of proving intrusions cannot be sustained by a consumer.²²⁷

3.1.11. Electronic Fund Transfer Parties' Liability for Unauthorized Transactions.

The NPSP has not prescribed reciprocal obligations and liabilities of the PII and consumer in relation to unauthorized transactions. As result of this, the rights of the consumers are compromised by the financial institutions which have a huge bargaining power. Hence, in order to avoid the exploitation of consumers by the PIIs, it is necessary to draw a lesson from jurisdictions such as UK and USA.

In the UK, the reciprocal obligations and liabilities for the financial institutions and customers in relation to unauthorized transactions have been clearly outlined under the payment service regulation 2009.²²⁸ In particular, it sets out the reciprocal obligations and liabilities of the financial institutions and customers with respect to PIs. This regulation among other things requires the customers to use the PI in accordance with the specific terms and conditions of the contract, to take all skill and care to protect the security PI and to inform his bank instantly on becoming aware of the loss, theft, misappropriation or any unauthorized use of the PI.²²⁹ Therefore, the non-observance of these obligations by the customer will entail liability for unauthorized transactions/ transfer. On the other hand, the payment service regulation also imposes various obligations on the PII. The following are some of the obligations of the PII. Firstly, they have to protect and prevent any access to the security procedures of the cards, other than the customer to whom the card has been issued,²³⁰ Secondly, to abstain from sending an

²²⁷ ibid

²²⁸ Uk Payment service regulation(hereinafter regulation), 2009, Part 6, regulation, 57

²²⁹ ibid

²³⁰ id, regulation 58

unwanted PI other than as a replacement for a current one;²³¹ thirdly, to guarantee that a suitable means is always available to enable the customer to make required notifications in case of loss, theft, or misappropriation of the PI;²³² fourthly, to cancel the payment device directly after the notification and to adopt adequate security procedures .²³³ Similarly, the non-observance of such obligations will cause the banks to assume liability for unauthorized transactions.²³⁴ These obligations have not been stipulated under the NPSP.

3.1.12 Consumer Liability for Unauthorized EFT Transactions

The customer's liability for unauthorized fund transfer, lost or stolen cards, or default in protecting personalized security features of cards has not been regulated under the NPSP. In UK and USA, a consumer incurs no liability from unauthorized transactions. The consumer would be liable for unauthorized transfer when the card or other means of access utilized for such transfer was an accepted card or other means of access and the issuer of such card, code, or other means of access has provided a security procedure to identify the consumer.²³⁵ These requirements are cumulative. Thus, the consumer would be liable only in the case where the transaction is activated by his card and the type of security employed by the payment service provider is capable of identifying the consumer. In other words, the mere usage of the card for activating transactions could not entail automatic liability.

However, as explained above the NPSP has not imposed an obligation on the payment service provider to employ a type security procedure which identifies a consumer and thus by default it has recognized the four digit password used by banks as one type of electronic signature. Therefore, the consumer would be fully liable for transactions conducted by his card without other additional requirements.²³⁶

²³¹ id,58(a)

²³² id, 58(c)

²³³ id,58(d)

²³⁴ similar rules are also found under the Electronic Fund transfer Act of 1978 and Regulation E

²³⁵ Regulation E §205.2(a)(1)).

²³⁶ The Federal First Instance Court in case between wubshet Betew(the plaintiff) and Commercial bank of Ethiopia(defendant)(file number 03850) reached on the conclusion that unless the plaintiff reveals the secret number of the ATM card , it is very narrow to withdraw money from his account and there is now way a theft or fraudster come to know the secret number of the plaintiff . Thus, the plaintiff is liable for money withdrawn from his account. However, there is no evidence produced by the defendant which substantiates the stand taken by the court. (see judgment of the court annexed at the back of this thesis, annex 5)

The Commercial Bank of Ethiopia and Dashen Bank ATM service agreement clause 8 provides that a consumer would be fully liable in respect of each transaction conducted by the use of his/her card. In addition to this, it provides that unless the bank has admitted the occurrence of an error in its operation, the former would not be liable for an unauthorized transfer.²³⁷

These banks do not make a distinction between authorized and unauthorized transfer so long as the transfer is made using the PI issued by them. Thus, the consumer will assume full liability whether the authorization is made by him or fraudster. However, imposing automatic liability on the basis of compliance with security procedures such as a four digit password seems to be unfair since a consumer may not be in a position to provide a positive proof that he or she has not given the instructions.²³⁸ In any event, loss prevention or minimization does not universally point to the consumer as the appropriate risk bearer. Rather, the imposition of loss on financial institutions will enhance the development of improved technologies for precluding unauthorized transfers as well as for identifying the wrongdoer and his or her apprehension.

It is against this background that some balance ought to be struck between loss distribution and loss prevention or minimization.²³⁹ Consequently, many regimes have a cap on the losses that consumers are exposed to in the case of fraudulent or unauthorized transactions and the consumer is only responsible for payments that he/she authorizes.²⁴⁰ Consumer liability for the full amount is, however, not to be precluded once the consumer becomes aware of unauthorized transfers but does not advise the financial institution that would have been in a position to deny access to the wrongdoer.²⁴¹

As result of the absence of law governing the liabilities of parties involved in EFT, in our country, the liabilities of the banks and consumers are determined based on the standard contract prepared by the former. Thus, the liability of consumer is unlimited or no caps as long as the transactions are activated by the use of PI are issued by the banks.²⁴² Such practice is

²³⁷ See clause 8 of the Commercial Bank of Ethiopia and Dashen Bank S.C terms and conditions.(Annex three and annex two respectively)

²³⁸ Benjamin Geva, supra note 227, p.237

²³⁹ *ibid*

²⁴⁰ Rhys Bollen, supra note 25, p.53

²⁴¹ *ibid*

²⁴² In UK the liability of customer in the case of unauthorized transfer has been regulated under the payment service regulation 2009. Accordingly, the customer is liable for loss due to unauthorized transactions up to £50 and the PI issuer bears any losses that exceed £50. Here, the customer is liable up to £50 regardless of the customer's mistakes

counterproductive to the development of modern payment system since the public may lose trust and confidence when consumers become liable for unauthorized and fraudulent transactions. Therefore, the liabilities of consumers and banks should be provided by the law and it should not be left only to be determined by the standard contracts prepared by banks.

3.1.13 The Payment Instrument Issuer's Liability for Unauthorized EFT Transactions

The NPSP has not enshrined the liability of PIIs for unauthorized fund transfer. Thus, like the liability of consumer, their liability is determined based on the standard contract prepared by them. In this standard contract, the PIIs most often than not shift their liability to consumers through contractual terms. For example, clause ten of the terms and conditions of the Commercial Bank of Ethiopia provides that the bank would not assume liability for a consumer in the event of damage arising out of the failure or malfunction of any machine including any ATM terminal be on-line or off-line. Hence, it is relevant to see the experience of other countries to understand how they regulate the matter.

In USA and UK PIIs are liable for loss resulting from unauthorized transactions in the following circumstances. Firstly, they are liable for loss occurring after they have been notified by the consumer that his card has been lost, misused or stolen, or that the security access code or other

and regardless of the customer's lack of knowledge of the unauthorized transactions. In addition to this, the PI issuer has an obligation to provide appropriate means of notification (Payment Service Regulation, 2009, Regulation 62(2)(B),). Otherwise, the customer will not be held liable for losses occurred as result of the failure of providing appropriate means of notification (Payment Service Regulation, 2009, regulation 62(3)(b). Moreover, the customer has a duty to inform his bank without undue delay upon becoming aware of the unauthorized nature of the transaction, and the delay can never exceed 13 months from the date the customer's account is debited(Payment Service Regulation, 2009, Regulation 51(3)(b) . Furthermore, the customer is completely liable for all losses if he acted fraudulently or with "gross negligence" and the paying bank can prove that such was the case. In this case the customer is committing fraudulent act against his bank or he/she is not taking reasonable care to avoid the possibility of unauthorized transactions. Under this situation the customer will bear all the losses of unauthorized transactions (UK Payment Service Regulation 62(2). Similarly, In USA, consumer liability for unauthorized transaction is allocated in the following manner. If a consumer notifies the loss or theft of access device within two business days after learning of loss or theft, the maximum liability is USD 50 or a lesser total amount of the unauthorized transfer. If the consumer makes the notification after more than two business days after learning of loss or theft up to 60 calendar days after the transmittal of statement showing first unauthorized transfer made with the access device, for transfer occurring within the 60 day of period, the lesser of USD 500 or the sum of lesser of USD 50 or the amount of unauthorized transfer in first two business days and the amount of unauthorized transfers occurring after two business days. The consumer assumes unlimited liability until the financial institution is notified for all unauthorized transfers occurring after the 60-day period(see Regulation E 205.6(b)-2 and 205.6(b)-3) The distinction between these countries is that in USA the ceiling of liability determined considering the time in which the customer has notified the occurrence of unauthorized transactions. On the other hand, in UK, though the customer has an obligation to notify the occurrence of unauthorized transaction as soon as he became aware of, but he/she remains liable up to £50 until notification is made.

electronic device to permit electronic consent has been breached. However, in our case, the consumer is liable so long as the card is used for activating transactions and does not matter whether the card is lost, misused or stolen. Even the terms and conditions of the commercial bank of Ethiopia and Dashen Bank do not provide in clear words that the bank's liability for unauthorized transaction occurred after notification has been made by the consumer.²⁴³ Secondly, they are liable for the loss if it is not attributable to or not contributed by the consumer.²⁴⁴ This requires the negligence / or intentional act of the consumer to be held liable for the loss. Again, the negligence or the mental element of the consumer does not matter for exonerating the consumer from liability in Ethiopia.²⁴⁵ Thirdly, they will be held liable for the loss caused by the fraudulent or negligent conduct of officers of or agents appointed by them. In such circumstance also the banks in Ethiopia do not assume express obligations in the contract. However, a consumer may hold them liable for the damage he/she sustained through extra contractual liability law. Fourthly, they will be held liable for the loss occurred as result of companies and other providers involved in networking arrangements. In our country, it is known that the ATM card is prepared by companies and the worker in these companies may produce a card that is forged, faulty, expired so that they are able to conduct unauthorized transactions.²⁴⁶ Here again, banks do not provide express obligation in the standard contract to assume liability arising from unauthorized transactions made by expired or forged cards. After all the banks have no means to detect the forged card from the authorized card.²⁴⁷ In this regard, one of the commercial banks has been exposed to fraudulent acts committed by unknown individuals. This bank has been obliged to pay back to its customer around about 400000. This fraud is committed not by the use of the customer cards, rather according to the information obtained through the interview the information uploaded in the magnetic stripe can be obtained through different means so that the fraudster could withdraw the money using fake cards.²⁴⁸ Thus, from this

²⁴³ See clause 2(f) of the term and conditions of Commercial Bank of Ethiopia and Dashen Bank S.C . (annex three and annex two respectively)

²⁴⁴ In our country the contribution or the attribute of consumer for unauthorized transaction are not taken in to consideration for making the consumer liable for loss. It is sufficient if the card is used to withdrawal the money (see clause 8(a) of the Commercial Bank of Ethiopia and Dashen Bank S.C.

²⁴⁵ The Dashen Bank S.C ATM card agreement clause 4(b) provides that the bank has no liability for all transactions initiated or affected by the cardholder or any other person to whom the cardholder discloses his PIN ,intentionally or un intentionally , voluntarily or involuntarily or any other way.

²⁴⁶ interview with Ato Solomon Demetew , supra note 166

²⁴⁷ ibid

²⁴⁸ interview with anonymous, held on January 3,2016, Addis Ababa

incident it is possible to infer that the money from customer account could not only be withdrawn through the use of the ATM card provided by the PII, but also the money can be withdrawn through the use of fake cards after obtaining the information loaded on the ATM card of a customer . This incident contradicts the widespread belief that the money could be withdrawn from the customer account only by the use of the ATM card provided by the PII and the insertion of the PIN code simultaneously. In addition, it also shows that the banks are not being employing adequate and robust security procedure to protect customer's financial interest.

Currently, the security procedure employed by the bank is the secret number given to the consumer and a camera attached to the ATM machine.

The picture or the image taken by the ATM machine camera is usually invisible, as result, the banks or the customer will unable to identify the man who withdraws the money from the consumer account.²⁴⁹ Moreover, the images of persons who withdrew money from the ATM machine will be kept for six months, after the expiry of six months the images will be destroyed.²⁵⁰ Hence, the consumer will not only loss a recourse right against the PI since neither the contract made with PI nor the existing laws backs up their claim, but also lose the opportunity to seek remedy through the use of extra-contractual liability law against the fraudster. Finally, they are liable for the loss occurred before the consumer has received his card or security access code.²⁵¹

In principle, a consumer shall be liable for losses resulting from an unauthorized transaction where the consumer has contributed to the losses by delaying notification of loss, or theft of the card, the consumer should not be liable for that portion of the loss incurred on any one day which exceeds the daily transactions limit applicable to the card,²⁵² other device or account or

²⁴⁹ *ibid*

²⁵⁰ *ibid*

²⁵¹ In case between the Ato Girma Tilahun(applicant)and Commercial bank of Ethiopia(the defendant) , The applicant has argued that birr 14,800(fourteen thousand) has been withdrawn from his account through the use of ATM card , without receiving the ATM card. On the other hand, the defendant denied the allegation of the plaintiff. Finally, the defendant admitted that the applicant has not taken the ATM card and paid the amount of money claimed by the applicant. as result the case has been closed (see annex 11)

²⁵²In case between Mr Halfom G/egzi (the plaintiff) and the Commercial Bank of Ethiopia(the defendant) in file number 034/09 at social court the plaintiff argued that while he tried to withdraw money by the ATM card , the machine refused to execute his authorization , in the next day he has seen that his balance is debited with an amount of birr 4000. Then the plaintiff has opened a suit against the defendant and argued that that he has not withdrawn the money and alternatively argued that birr 4000 is more than the daily transaction limit. Thus, the bank should be

that portion of the total loss incurred which exceeds a number of funds standing in the consumer's account.²⁵³ In this circumstance also the terms and conditions of the Commercial and Dashen bank do not provide for their liability in case of loss.

From the above discussion, it is possible to understand the existence of unfair contractual terms in the term and conditions prepared by the banks. Banks are able to do this as a result of lack of laws governing the liability of PII for unauthorized transfer of funds/ transactions.

The lack of laws in this regard also manifested in the decision made by the Federal Supreme Court Cassation Division file 96309. In the case between Dashen bank (hereinafter the applicant) and Mr. Abebayaw Gebru (the respondent), it has decided on the liability of banks for unauthorized fund transfer after notification is given to them.

The respondent has brought his claim against the applicant at the Federal First Instance Court file number 189176 alleging that he has had an agreement with the applicant for mobilizing his fund deposited under account number 50100055 02016 through the use of ATM. Accordingly, the respondent has been using the ATM card for mobilizing his funds deposited in the applicant bank. However, the respondent has lost the ATM card on Tir, 23, 2003 E.C and then he notified the bank the loss of his ATM card on Tir, 25, 2003 E.C. After the respondent has notified the loss of his ATM to the applicant, birr 40,300.00/forty thousand three hundred / has been withdrawn from his account by unknown individuals. Thus, he prayed the court to give a verdict that forces the applicant to refund the amount of unauthorized transfer with its interest. On the other hand, the applicant has admitted in its statement of defense that the respondent has given notification about the loss of ATM card on Tir 25, 2003. However, it argued that the respondent has never asked the applicant to close his account number. Thus, so long as the respondent has

liable birr 4000 or it should be liable for amount of withdrawal which passes the daily limit stipulated under the contract. However, this case has been closed since the court entertaining the case lacks material jurisdiction on the matter. Banks do not assume liability for the fund transfer occurred beyond the daily limit transaction according to their terms and conditions. (See annex two and three).

²⁵³ In case between Commercial Bank of Ethiopia (the plaintiff) and Mr. Samson Reta (the defendant) in file number 120588 at the Federal First Instance Court. The plaintiff brought an action against the defendant claiming that the latter has withdrawn 9000 birr which exceeds the amount of funds standing in his account. Accordingly, the court made a decision in favor of the plaintiff. However, the court has not ascertained whether the defendant himself has withdrawn the money by himself or in concurrent with someone else or whether the actual card issued for the defendant has been used for withdrawing the money. The court has only relied on the statement of account produced by the plaintiff and the oral testimony to make the decision in favor of the plaintiff. (see annex nine)

not asked the bank specifically to close the account number, the applicant has no right to close the account. In addition, the respondent has an obligation to keep the password secretly and it is only when the password is disclosed to somebody else that it is possible to withdraw money through the use of ATM. Thus, since the respondent has not discharged the obligation indicated under the contract, the applicant has no liability to refund unauthorized transfer made out of the respondent account.

The court after examining the argument raised by both parties stated that under the card payment agreement made by the parties, article 2(2) provides that the customer would bear the responsibility of unauthorized transfer till the time of notification and the contrary reading of this stipulation tells us that once notification is made in writing to the bank, the latter will bear the liability for unauthorized transfer of funds from the customer's account. In addition to this, under the agreement made by the parties there is no specific stipulation which imposes an obligation on a customer to request the bank to close his/her account number and it is admitted by the applicant that the respondent has written the secret number of the ATM card on the notification form prepared by the bank, accordingly, employees of the bank can easily access the secret number of the ATM card. Therefore, the argument of the applicant has been quashed for the reasons described above and the court decides the applicant to refund the amount of money withdrawn after the respondent has given notification with its interest.²⁵⁴ Then, the applicant submits an appeal to the Federal High Court in file number 13422. However, the Federal High Court after entertaining the arguments of both parties and hearing expert witnesses has upheld the decision of the lower court.²⁵⁵ Then the applicant has submitted his allegation to the Federal Supreme Court cassation division.

After examining the arguments of the parties the Federal Supreme Court Cassation Division stated that the parties are not at issue with regard to the fact that the respondent has notified the applicant of the loss of ATM card, the authorization for payment is made after the notification is given to the applicant, the non-existence of obligation on the part of the respondent to ask for the closure of the account number and the fact that the respondent has filled the secret number on the notification form prepared by the applicant . After stating these admitted facts the Federal

²⁵⁴ see annex six

²⁵⁵ see annex seven

Supreme Court said that the lower court which has the power to weigh the evidence has come to conclusion based on the testimony of experts that even if the respondent has written a secret number on the notification form prepared by the bank, the notification form should have been destroyed. However, respondent has not done this. Therefore, the conclusion drawn by the lower court from the expert witnesses has no error.²⁵⁶

The applicant bases his allegation by saying the respondent has not kept the secret number of the ATM card and thereby failed to observe the obligation stipulated in the contract. However, once the respondent has written his secret number on the form prepared by the applicant, the password will no longer be confidential and there is no stipulation in the contract made between the parties which exonerate the applicant from liability in a case where the respondent has not asked the closure of the account number. In addition to this, the applicant has not raised the argument that shows it has taken reasonable care to prevent an access to the account of the respondent.

The court further proceeded and said that the applicant is expected to show that it has taken reasonable care and has made no fault with regard to the unauthorized withdrawal of the applicant's money. However, without showing these the allegation of the applicant raising the closure of the account by the respondent has no legal and contractual basis. Therefore, the lower court decisions are upheld.

It is discernible from the Federal First instance Court Decision that the court relied on its decision on the contract made between the parties and customary banking practice and has never cited any rule governing the matter.

The decision made by the cassation division may send a message that the bank will only be liable for unauthorized fund transfer occurred after the notification is made. In addition, the court has stated that the banks are expected to take reasonable care and they should not be at fault. It is obvious that whether the banks have taken reasonable care and whether they are at fault would be determinable on a case by case basis. However, it is necessary to determine the major rights, duties, and liabilities of parties in electronic payments by legislation, rather than leaving much discretionary power for the court to determine the obligations of parties involved in the electronic payment. This would go in line with our civil law values.

²⁵⁶ see annex eight

3.1.14 Remedies against Unfair Contract Terms in Electronic Payment Instruments

Negotiation over terms is not simply a matter of contractual freedom. Many factors obscure the purity of individual bargain and contribute to the parties' inability to make informed choices.²⁵⁷The contractual relationship between the PII and the consumer is governed by the issuer who is in a stronger bargaining position and offers the contract on a 'you like it, you take, you don't like it, you leave it' basis.²⁵⁸Neither the NPSP nor TCCPP has incorporated express provision which protects the consumer from unfair contract terms. In this regard, the European directive on Unfair Terms in Consumer Contracts protects a consumer from being bound by unfair terms. Accordingly, unfair is defined as any contractual term 'which has not been individually negotiated and contrary to the requirements of good faith and causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer'.²⁵⁹Consequently, the contractual term which is deemed to be unfair towards the customer will not bind the latter.

The first possible remedy a consumer may have against unfair contractual terms is invalidation. Contracts may be invalidated on the grounds listed under Ethiopian contract law.²⁶⁰ Among other things, contracts may invalidate on the grounds of fraud, mistake, and duress. However, as provided under the civil code a contract may not be invalidated on the sole ground that its terms are substantially more favorable to one party than the other party.²⁶¹ It is understandable from this that the customers may not claim the invalidation of the contract on the mere fact that the contract highly favors the banks, rather beyond showing the contract is more favorable to the bank, the customer should show that the banks obtained his/her consent by taking advantage of his want, simplicity of mind, senility or his business inexperience.²⁶² Some writers argue that whenever the banks shifts a liability to customers for both authorized and unauthorized transactions by using the standard terms and conditions such contract should be considered as

²⁵⁷ Geraint Howells and Stephen Weatherill, **Consumer Protection Law**, (2nd ed), Ashgate Publishing Limited, England, 2006, p.261

²⁵⁸ Panagiota Kontogeorgou and Michael G. Alexiou, Enhancing Consumer Confidence in Electronic Commerce: Consumer Protection in Electronic Payments, 17th BILETA Annual Conference, 2002, p.6, available at: <https://www.scribd.com/>, (last accessed on September 10, 2016)

²⁵⁹ European Directive on Unfair Terms in Consumer Contracts 93/13 EEC, art 3(1)

²⁶⁰ Civil Code, Supra note 132, art 1696-1710

²⁶¹ id, art 1710(1)

²⁶² id, article 1710(2)

unconscionable contract calling for invalidation.²⁶³ However, considering the narrow application of invalidating contract based on want, the simplicity of mind, senility or business inexperience, the writer believes that it would be very difficult to get EFT contract invalidated on these grounds. In addition, they argue that the victim of unfair EFT terms could get a remedy from TCCPP since the preparation of terms which are not individually negotiated with the customer amounts to an unfair act. It is obvious that the TCCPP is applicable to any commercial transaction in goods or services conducted or having an effect within Ethiopia.²⁶⁴

Consequently, the scope of application of TCCPP could also extend to EFT contracts made between the customer and the banks; however, TCCPP has not listed unfair contractual terms as one of prohibited acts.²⁶⁵ In addition, unfair practices which are defined under article 2(9) of the consumer protection does not encompass unfair contract terms since incorporating unfair contract terms has not been outlawed by any trade-related laws which are currently effective. Moreover, TCCPP provides that the provisions of a contract made between a consumer and a business person that provide for the waiver of rights vested in the consumer under it shall be of no effect.²⁶⁶ It is discernable from this that in order to invalidate the contract made by the customer and the banks based on this ground requires the customer to show the contract violates one of its rights enshrined under the TCCPP. The rights of the consumer have been enshrined under the TCCPP.²⁶⁷ Here again, the use of unfair terms and conditions by the banks could not violate the consumer rights enshrined under the consumer NPSP. Hence, the consumer cannot invalidate the EFT contract on this ground. Thus, the writer has not seen the tenability of the argument raised by the above writer. Therefore, art 22 of proc TCCPP should be amended to include unfair contractual terms as prohibited if it is intended to protect consumers of banking business in Ethiopia.

²⁶³ Simret Zewdie Kebede, *supra* note 2, p.43

²⁶⁴ TCCPP, *supra* 110, art 4(1)

²⁶⁵ *id.*, art 22

²⁶⁶ *id.*, art 21

²⁶⁷ *id.*, art 14

Chapter 4:- THIRD PARTY PROTECTION UNDER THE NATIONAL PAYMENT LAW

4.1 General Remarks

The third party is a generic legal term for any individual/ entity who does not have a direct connection with a legal transaction but who might be affected by it.²⁶⁸ Thus, the term third party in this thesis refers to those individuals or entities who are the creditors of the participants but, who can be affected by the finality of payment made between the participants.

4.2 Zero Hour Rule

The zero-hour rule may be defined as a provision in the insolvency law of some countries whereby the transactions conducted by an insolvent institution after midnight on the date the institution is declared insolvent are automatically ineffective by operation of law.²⁶⁹ It is inferable from this that once a certain institution has been declared bankrupt by the court of law, the transactions made after it will become void. Such rule had been applicable in the payment system in countries like the UK. However, this rule has been repealed by the Financial Markets and Insolvency (Settlement Finality) Regulations 1999. It is widely believed that maintaining such rule to be applicable in the payment system will bring about systematic risk²⁷⁰ against the financial stability of a given country.²⁷¹

The NPSP provides that the entry or payment that has been effected in accordance with the rules of the system shall be final and may not be revoked, reversed, or set aside, including without limitation, by insolvency or bankruptcy proceedings or any other law or practice similar in purpose and effect and is not subject to any provision of law or order of an administrative or judicial authority that operates as a stay of that payment.²⁷² From this stipulation, it is understandable that the bankruptcy law will not be applicable for an issue that arises from the payment system. However, here third parties who are receiving payments are protected by the

²⁶⁸ West's Encyclopedia of American Law, 2nd edition.

²⁶⁹ European central bank ,Glossary of terms related to payment, clearing and settlement systems, 2010 , p.27, available also at <https://www.ecb.europa.eu/.../glossaryrelatedtopaymentclearingandsettlementsystems.pdf>, (last accessed on October 23, 2016)

²⁷⁰ Tom Kukkola, supra note 8, p.128. Systemic risk refers to the domino effect that can arise following the failure of one participant in a payment system. It refers to the situation where the inability of one market participant to fulfill its payment obligations in a timely manner results in the inability of other participants to fulfill their obligations in the system or elsewhere in the financial system, and ultimately in the failure of the whole financial system.

²⁷¹ An interview with w/ro kibre Moges, supra note 47

²⁷² NPSP, supra note 3, art 14(2)

above stipulation. Nevertheless, the third party creditors who are not the receiver of the payment but, who has a claim against system participant or payment service provider may face risks since the general bankruptcy law is not applicable to protect their interests. Thus, it can be said that the NPSP makes distinction between classes of creditors for providing protection.

The general bankruptcy law among other things safeguards the interest of creditors by allowing the transactions conducted after the day of suspension or the declaration of bankruptcy of the debtor to be invalidated.²⁷³ However, this protection could not be applicable for the creditors of the participant since the NPSP unequivocally validates the transactions made after the day of suspension of payment and the declaration of bankruptcy.

4.3 Finality of Payment

The term finality is traditionally used to denote the moment a settlement or transfer becomes irrevocable and unconditional.²⁷⁴ It is often used in a legal sense (i.e. as regards the discharging of obligations, where it means that a transfer or settlement cannot be reversed by the counterparties involved or by third parties).²⁷⁵ Thus, once the payment becomes final in accordance with the rule of a system, third parties and parties involved in the payment system have no right to reverse the payment made. This is done because participants may subject to credit and liquidity risks between the times that instructions for the transfer of funds or securities are accepted for settlement by the payment system and the time the order is actually settled, as the transfer order could be revoked or a system participant could become insolvent.²⁷⁶ Hence, it is understandable that the concept of finality is introduced to reduce insolvency related risks resulting from participation in payment, clearing, and settlement system.

In 1998 the European Union adopted the Settlement Finality Directive in order to reduce systemic risk linked to payment, clearing and settlement systems and protects systems and their participants against the adverse effects of insolvency proceedings opened against another system participant. Firstly, it provides that once transfer orders have been entered in a system in

²⁷³ The Commercial Code of the Empire of Ethiopia Proclamation No .165/1960, Negarit Gazeta , art 1030

²⁷⁴ Tom Kokkola, supra note 8, p.146

²⁷⁵ *ibid*. In its 1992 report on delivery versus payment in securities settlement systems, the Committee on Payment and Settlement Systems described finality as “a concept that defines when payment, settlement and related obligations are discharged”. Thus, a final transfer is defined as “an irrevocable and unconditional transfer which effects a discharge of the obligation to make the transfer”.

²⁷⁶ *id* ,147

accordance with its rules, those orders and their netting²⁷⁷ are legally enforceable and binding on third parties even in the event of insolvency proceedings being opened against a participant, provided that the time at which the transfer orders entered the system under the rules of that system preceded the opening of the insolvency proceedings.²⁷⁸

The risk of the insolvency of a system participant or the revocation of a transfer order would drastically alter the settlement positions of other system participants. As a result, those participants might not have sufficient liquidity or securities to be able to meet their obligations under the system possibly resulting in further spillover effects, thereby creating systemic risk.²⁷⁹ Thus, the prevention of systemic risk is essentially the prevention of a situation in which system participants do not have sufficient liquidity or securities at the time of settlement²⁸⁰ as a consequence of another system participant's insolvency or the revocation of a transfer order. To that end, it is essential to ensure that all transfer orders entered in a system can be settled, regardless of whether the sending institution has become insolvent or a transfer order has been revoked.

Secondly, it abolishes zero-hour rules which automatically render void, retroactively, all transactions carried out by a bankrupt participant on the day of the opening of insolvency proceedings.²⁸¹

Thirdly, it provides that a system's rules must clearly indicate the last possible point at which the relevant parties have the power to revoke a transfer order.

²⁷⁷ NPSP, supra note 3, art 2(17) defines netting as the determination of the net payment obligations or the determination of the net termination value of settlement obligations by setting off or adjusting the payment obligations between two or more participants within the payment system.

²⁷⁸ Tom Kokkola, supra note 8, p.146. This is of particular importance in the event of insolvency proceedings being opened against the entity issuing the transfer order. Thus, administrators are prevented, for example, from selectively choosing between favorable and unfavorable transactions. This provision applies to all transfer orders entered in a system, regardless of whether they have been subject to netting.

²⁷⁹ *ibid*

²⁸⁰ NPSP, supra note 3, art 2(23) defines settlement as the act of discharging obligations by transferring funds, securities or financial instruments between two or more parties.

²⁸¹ Tom Kokkola, supra note 8, p. 146

Finality is not absolute. It is possible to revoke a transfer order where the underlying obligations between the parties concerned involve illegal activities such as fraud or the infringement of legislation on money laundering.²⁸²

The NPSP has also incorporated similar provisions with the EU settlement finality directive, although there is some variance between them. It provides that any system shall specify the rules to achieve finality of payment in its operations. This includes rules establishing irrevocability of orders once these have entered into the books of the system.²⁸³ In addition, the entry or payment that has been affected in terms of rules issued under sub-article (1) of this Article shall be final and may not be revoked, reversed, or set aside, including, without limitation, by insolvency or bankruptcy proceedings or any other law or practice similar in purpose and effect and is not subject to any provision of law or order of an administrative or judicial authority that operates as a stay of that payment.²⁸⁴ Moreover, the NBE is empowered to issue directives which prescribe finality of payment, settlement, netting, and loss allocation and apportionment.²⁸⁵

In EU payment may be revocable if there is a fraud or an infringement of law/ money laundering, however, this essential exception has not been provided under the NPSP. Though, the NPSP has entrusted the NBE to enact directives pertaining to the finality of payment, the former has not issued the directive nor there is a rule governing the finality of payment currently.²⁸⁶

An operator, a participant of a system or issuer of PIs which becomes bankrupt, placed in scheme of arrangement or wound up shall immediately lodge a copy of the decision or order with the NBE. An operator, a participant or issuer of PIs which has lodged an order or a decision pursuant to article 15(2) of NPSP is prohibited from operating or participating in a system.²⁸⁷

²⁸² *ibid*

²⁸³ NPSP, *supra* note 3, art 14(1)

²⁸⁴ *id*, art 14(2)

²⁸⁵ *Id*, art 14(3)

²⁸⁶ Interview held with Solomon Demte, *supra* note 166

²⁸⁷ NPSP, *supra* note 3, art 15 (2)

It is important to impose on the operator or participant to notify the NBE in case where it goes bankrupt, placed in scheme of arrangement or wound up, however, it is important too, to allow other stakeholders especially of the creditors of the participant or operator to notify the occurrence of the above situations to the NBE since this may help third party creditors to protect their interests. In addition, the NPSP provides that insolvency or bankruptcy, the winding up or the opening of scheme of arrangement of a participant in a system shall not affect the finality or irrevocability of any entry or payment which became final and irrevocable in accordance with sub-article (2) of Article 14 of the NPSP in case where the copy of the relevant order or decision declaring bankruptcy, the winding up or the opening of scheme of arrangement of a participant was not lodged with the NBE.²⁸⁸ The contrary stipulation of this provision tells us that the payment made through the payment system may become revocable in the case where the payment is made after the decision declaring bankruptcy is lodged to the NBE. This is the only circumstance envisaged under the NPSP triggering the revocability of payment made through a payment system. The explanatory note of the NPSP has stated that payment made by mistake could be revocable; however, the NPSP has not provided such exception.²⁸⁹

4.4 Comparing Protection of Third Parties (creditors) under Bankruptcy Law and the National Payment System Proclamation

Under the bankruptcy law of Ethiopia once a trader is declared bankrupt he /she shall not administer or dispose of his/her property, however, acquired, from the day he is declared bankrupt until he is discharged.²⁹⁰ The debtor is denied to dispose his property in order to protect the rights of creditors.

The Ethiopian law of bankruptcy makes certain acts of the debtor which are done after suspension of payments and the declaration of bankruptcy invalid. Acts made by the debtor prior to adjudication such as gratuitous assignments,²⁹¹ payments of debts not due and payments of

²⁸⁸ id , art 16

²⁸⁹ see explanatory note, supra note 1, p.15

²⁹⁰ The Commercial Code of the Empire of Ethiopia Proclamation No .165/1960, Negarit Gazeta , art 1023

²⁹¹Where the debtor has transferred a right or property without getting a return for it either in the form of price or service, the act shall become invalid as a result of the declaration of bankruptcy.

debts due through negotiable instrument and securities set up fifteen days before the date of declaration of bankruptcy are subject to invalidation.²⁹²

In addition to this, as a result of the declaration of bankruptcy, the payments made after the date of suspension of payments could be invalidated. Not only the payments he made but also all acts for consideration that are entered into after the date of suspension of payments shall be invalidated as a result of the adjudication of bankruptcy of the debtor. Such acts shall be invalidated only where there is a request on the part of the trustees.²⁹³ According to article 1030 of the Commercial Code, the trustees can request for invalidation of payments or other acts for consideration that took place after the date of suspension of payments, where the parties who have received payment or have dealt with the debtor did so know that suspension of payments had taken place.²⁹⁴ In other words, the existence of bad faith on the part of the parties who dealt with the debtor is a ground for the trustees to request invalidation.

From the above discussion, it is understandable that the acts made by the debtor after suspension of payment or after adjudication of bankruptcy would be subject to invalidation so as to protect creditors of the debtor. Now, the writer will examine whether such protection is extended for creditors of a participant in the payment system under the NPSP.

The NPSP provides that entry or payment that has been effected in terms of rules issued under sub-article (1) of Article 14 shall be final and may not be revoked, reversed, or set aside, including, without limitation, by insolvency or bankruptcy proceedings or any other law or practice similar in purpose and effect and is not subject to any provision of law or order of an administrative or judicial authority that operates as a stay of that payment.²⁹⁵ Thus, unlike the creditors of other traders, the creditors of a participant in payment system have no right to invalidate or require a stay of payment or reverse the payment made after suspension of payment and adjudication of bankruptcy. This is primarily because the NPSP has been enacted to provide rules on establishment, governance, operation, regulation and oversight of the NPS so as to ensure its safety, security, and efficiency.²⁹⁶ Thus, the major concern of the NPSP is to ensure the

²⁹² Commercial Code , supra note 287, art 1029

²⁹³ id, art 1030

²⁹⁴ ibid

²⁹⁵ NPSP, supra note 3 , art 14(1)

²⁹⁶ id, the preamble

financial stability of the country through adopting modern payment system. Hence, it is not surprising that it failed to protect third party creditors who are not the receiver of payment but, who has a claim against a participant or the payment service provider. In other words, NPSP makes distinction between different types of creditors to extend protection. Secondly, the failure to protect the creditors of the participant in the payment system is not peculiar to Ethiopia; the same rule has been adopted by the European Union since adopting zero hour rule would disturb the financial position of the participants in case one of the participants becomes insolvent. Thirdly, this is one of the prime principles advocated by banks for international settlement for the safety of payment system.²⁹⁷ Thus, it becomes necessary to make choice from the two classes of creditors. Accordingly, since the financial stability of the country involves huge public interest, precedence is given for creditors who are a receiver of payment over the protection of creditors who are not a receiver of payment but, have a claim against participant.²⁹⁸

²⁹⁷ An interview with Kibre Moges ,supra note 47 cum an interview with Kidanu Gizu ,supra note 33

²⁹⁸ ibid

Chapter 5: - Conclusion and Recommendations

5.1 Conclusion

Regulation of payment system should always be based on consumer protection and efficient risk allocation. Unlike our country in most countries, the government has recognized that pure contractual rules are inadequate to protect consumers. Thus, some minimum conduct rules are commonly advocated. Initial disclosures, verification or validation methods as appropriate to the particular electronic payment product, error resolution and limits on liability for loss, theft, or unauthorized use have been seen as the significant baseline consumer protections that should be enacted for electronic payments not covered by existing consumer protection legislation .

The reciprocal rights, obligations, and liabilities of payment instrument issuer and consumers in relation to unauthorized transactions have not been enshrined in the NPSP. Hence, the rights, liabilities, and obligations of the parties are determined by the contract made between banks and payment instrument issuer. However, since the contract is unilaterally prepared by PII by considering their interest only, it is adhesive in its nature and it is not consumer protective. This can be manifested in the following ways.

Firstly, the NPSP has not prescribed terms and conditions which should be mandatorily disclosed to consumer before the conclusion of the agreement. It has also failed to envisage the effect of failure to disclose the terms and conditions of PIs by PII. Secondly, the liabilities of consumers and PII for unauthorized transactions have not been provided under the NPSP. Thirdly, whenever an allegation of the unauthorized transaction is made by customers against PII (banks) in a court of law, courts usually rely on the standard contract prepared by the latter and customary banking practice. Issues such as the adequacy of the security procedure employed by the bank have never been raised. However, relying on customary banking practices for determining the obligations of parties involved in electronic payment system may not be accurate standard since the latter is different from the ordinary banking service in many ways. Therefore, such determination of liability based on customary banking practice and standard contract prepared by the PII would have an impact on the development of payment system since it may hold liable the customer who is innocent. Fourthly, unlike other countries, in Ethiopia, a customer is fully liable for transactions conducted by his card or device. However, imposing automatic liability on the basis

of compliance with security procedures such as four digit password seems to be unfair since a customer may not be in a position to provide a positive proof that he or she has not given the instructions. In addition to this, unlike many regimes, there is no a cap or loss allocation on the losses that consumers are exposed to in the case of fraudulent or unauthorized transactions in Ethiopia. Such practice could become counterproductive against the development of payment system.

The NPSP is silent with regard to appeal rights of an operator of a system once its authorization is revoked by the NBE. In this regard, there are three lines of argument. The first line of argument is that once the authorization of the operator is revoked, the latter can bring an appeal against the decision of the NBE in accordance with art 32(5) of the Banking Business Proclamation No. 592/2008. The second line of argument is that the operator has a right to be heard before the NBE revoked its authorization. Thus, once the NBE has given an opportunity to be heard to the operator and the latter failed to convince the NBE, the decision made to revoke the authorization of the operator by the NBE is not subject to appeal. The third line of argument is that once the authorization of the operator is revoked, the latter can make an allegation to the mediation center or an arbitration tribunal in accordance with art 31 of the NPSP. However, the first line of argument seems plausible because, firstly, the NPSP has not ruled out the possibility of making an analogy with the Banking Business Proclamation No. 592/2008. Secondly, prohibiting the operator from taking an appeal against the decision of the NBE would violate the right to access to justice enshrined in the FDRE constitution. Thirdly, prohibiting the operator to take an appeal would give an opportunity for the officials of the NBE to exercise their power arbitrarily.

Banks (PII) are business persons within the meaning of Article 2(5) TCCPP. In addition, the trade activities conducted by banks are not exempted from the application of part two of TCCPP by the regulation issued by the council of ministers pursuant to art 4(2) of TCCPP. Thus, TCCPP is applicable for the bank customers in general and for the users of PIs in particular. Hence, a consumer who uses PIs to initiate EFT is thus entitled to enjoy the rights enshrined in the TCCPP. Accordingly, PII should disclose the terms and conditions of PI to consumers before letting the latter conclude an agreement with them to use the PI.

PII have an obligation to make the terms and conditions of PI simple and clear. However, the NPSP has not provided what factors constitute simple and clear. In addition to this, it has failed to put an obligation on PII to use the language which can be understood by the consumer or to provide the terms and conditions of PI in the working language of the area where the service is given.

The terms and conditions of PIs are prepared in English, a language that is not understood by the majority of the people Ethiopia. This opens a door for the PII to obtain defective consent from consumers.

Banks (PII) do not provide the terms and conditions of ATM card and mobile banking. Hence, the legality of such contract would be contested since the Ethiopian law of contract stipulates that undisclosed terms of the contract do not bind the party and it cannot be said that the parties have defined their obligations sufficiently and have given their consent thereto.

There are two lines of arguments with regard to the scope of application of art 31 of the NPSP. The first line of argument is that this provision is not applicable mandatorily in the dispute between the consumer and the PII. On the other hand, other argues that customers should exhaust their allegation with the PII in accordance with art 31 of the NPSP before they take their claim to the regular courts. The first line of argument seems to be plausible for the following reasons. Firstly, article 2(16) (a) of the NPSP envisaged parties which can be involved in the NPS. These parties are payment service providers, including operators, participants, issuers of PIs and any third party acting on behalf of them, either as an agent or by way of outsourcing agreements, whether entirely or partially operating in the country. However, customers are not envisaged as one of the parties involved in the NPS. Secondly, the legislature has imposed an obligation on PII to establish internal complaint handling procedures in relation to electronic fund transfers and stored value facilities under article 20 of the NPSP to settle a dispute between customers and PII through the amicable process. Hence, the legislature does not incorporate two separate provisions which have the same purpose. Thirdly, had the legislature had an intention to oust the jurisdiction of regular courts from entertaining cases relating to unauthorized transfer, it should have been provided clearly. Therefore, customers have no obligation to settle the dispute with the PII through mediation or arbitration. Hence, the customer can directly take his claim to regular court without going through either mediation or arbitration proceeding. Consequently, pursuant

to art 5(6) of Proc No.25/96 and the interpretation made by the Federal Supreme Court Cassation Division in file number 52041 and 43912, the power to entertain cases involving unauthorized fund transfer belongs to federal courts.

The dispute settlement mechanisms envisaged under NPSP are compatible with the right of access to justice and the right to appeal to persons for the following reasons. Firstly, the dispute settlement described under article 31 of NPSP is not applicable in dispute between customers and the PII. Thus, customers can take his claim to the court of law without going through either mediation or arbitration. Accordingly, customers can exercise his rights of appeal in accordance with the civil procedure code. Hence, the right of the customer to bring a justifiable matter to and to obtain a decision or judgment by, a court of law and its right of appeal would not be affected. Secondly, the dispute settlement mechanisms envisaged under the article is applicable for the parties involved in NPS. Though the NPSP stated that the award given by the arbitration is final and binding, it has not ruled out the possibility taking claim by one of the parties to Federal Supreme Court Cassation Division. Here again, the rights of persons to access to justice will not be affected.

The NPSP also states that where the disputes cannot be resolved through mediation, the dispute shall be settled by arbitration and the award given by arbitration tribunal would be final and binding on the parties. Here again, there are two lines of argument with respect to whether the parties have appeal rights against the decision of arbitration panel. The first group argues that the parties cannot make an appeal from an arbitral award even on the grounds enshrined under the civil procedure code. On the other hand, the second group argues that the parties can make an appeal from the decision of arbitral panel on the grounds listed under the civil procedure code. It seems that the first line of argument is more plausible since the legislature would not have state the decision of the arbitration is final and binding, had the parties entitled to appeal rights once the award is given the arbitration panel. In addition to this, to make article 31(2) of NPSP effective it is necessary to interpret the provision as it prohibits appeal. Otherwise, it has no purpose to serve.

The rules of evidence enshrined under the NPSP do not ensure adequate protection for consumers of the electronic payment system and they are entirely designed to safeguard the interest of PII. These can be discerned from the various provisions of NPSP. Firstly, the NPSP

has not made a distinction between different types of electronic signature; neither provides any standard as to what type of electronic signature meets the legal requirement of a signature. For instance, the four digit password given by the PII for the use of ATM card is one type of electronic signature. However, unlike the digital signature, this type of signature cannot identify the person who gives the authorization and it is not under the exclusive control of the signer and it is not possible for the signer to know the modification made to the instructions he has given. Nevertheless, the NPSP with all the above problems of this kind of electronic signatures, it has made the latter admissible as prima facie evidence of the matters or transactions being carried out. These types of security procedures do not solve the problems relating to unauthorized transactions.

Secondly, the NPSP has recognized the admissibility of the electronic record. Thus, electronic document for all practical purposes have the same legal effect as paper-based original documents and cannot be denied validity solely because it's in electronic format or not original.

The problem of NPSP is not for the mere fact that it recognizes electronic records, it rather provides blanket acceptance of electronic records. In other words, it does not make any distinction between different types of computer generated evidence. Thus, the blanket acceptance of computer generated evidence will only protect the interest of PII. This exposes consumers to fraud and for losses of funds unlawfully. Moreover, NPSP also provides that information as to any transfer of funds through a system which is contained in any document, computer print-out, hard copy, microfilm; floppy or hard disc or any other electronic media or form shall be admissible in any court as evidence of the transfer concerned. Here, the NPSP has recognized any kinds of computer generated evidence to prove the transfer of funds. It fails to make a qualification. It needs to be qualified.

The NPSP has failed to make a distinction between authorized and unauthorized fund transfer. However, making a distinction between authorized and unauthorized transfer is essential to determine the liability of the customers and PII.

Neither NPSP nor TCCPP has incorporated express provision which protects the consumer from unfair contract terms. The terms and conditions of PIs issued by PII such as Commercial Bank of Ethiopia and Dashen Bank envisage unfair contractual terms. In particular, they shift the liability

that they should assume by themselves to customers. For instance, their terms and conditions provide that they are not liable for losses resulting from the malfunction of the ATM machine. For remedying the damage that could be sustained by the consumer as result of this, some argue that the contract is unconscionable and is subject to invalidation. They further argue that the victim of unfair EFT terms could get a remedy from TCCPP since the preparation of terms which are not individually negotiated with the customer amounts to unfair act. Thus, the consumer can get a remedy from the authority. On the other hand, others argue that the authority has not empowered to entertain cases relating to unfair contractual terms. Thus, the consumers of EFT cannot get remedy from the authority. It seems that this argument is more plausible than the first one because though TCCPP is applicable to any commercial or transaction in goods or services conducted or having an effect within Ethiopia, it has not listed unfair contractual terms as one of the prohibited acts under article 22. In addition, unfair practices which are defined under article 2(9) of the consumer protection does not encompass unfair contract terms since incorporating unfair contract terms has not been outlawed by any trade-related laws which are currently effective. Moreover, unfair contractual terms used by the PII cannot waive the rights of consumers as enshrined under TCCPP.

The NPSP provides the irrevocability of payment made in accordance with rules of a system. It makes distinction between classes of creditors to provide protection. On one hand, creditors who are the receiver of a payment have been guaranteed sufficient protection in the interest of the stability of payment system . On the other hand, however, creditors who are not the receiver of a payment have no protection under the NPSP. Thus, unlike the creditors of other traders, the creditors of payment service provider/ participant who are not the receiver of payment in payment system has no right to invalidate or require a stay of payment or reverse the payment made after suspension of payment and adjudication of bankruptcy. Thus, third party creditors who are not receiver of payment in payment system and whose interest and stake is protected under the bankruptcy law have no adequate protection under the NPSP. Moreover, though the explanatory note of the NPSP has promised that there could be an exception to the irrevocability of payment, it has failed to envisage exceptions. Thus, failure of the NPSP to provide exceptions to the principle of the irrevocability of payment could be counterproductive for the development of payment system.

5.2 Recommendations

- The NPSP is silent with respect to appeal rights of operators in the event of revocation of authorization by the NBE. Thus, it should be amended to allow the operators to challenge the decision of the NBE to revoke an authorization given to them in front of independent bodies such as court or tribunals.
- The NPSP should be amended in a way that it lists factors that should be taken into consideration for approving PIs or the NBE should list factors that should be taken into consideration for approving PIs by the directive. While doing so consumer protection issue should be given prime concern.
- The obligation of PII to conduct good faith error investigation, employing robust security procedure and the burden to prove a transaction is authorized should be imposed on PII by legislation.
- The term parties under article 31(1) of the NPSP should be defined under art 2 of the NPSP to avoid the controversy arising out of it.
- Article 31(3) of the NPSP is self-contradictory. One hand, the first proviso of art 31(3) of the NPSP state that without the prejudice to the provisions of the civil procedure relating to appeals. This gives an impression that either party can take an appeal in accordance with the civil procedure code. On the other hand, the second proviso of the same provision states that the arbitral award given in accordance with article 31(2) is final and binding on the parties. This gives the impression that the parties are not entitled to take appeals. Thus, this provision should be crafted in the following ways.

Article 31(3) Notwithstanding to provisions of the Civil Procedure Code relating to appeals, the Arbitral award under sub-article (2) of this Article shall be final and binding on parties.

- The NPSP assimilates all types of an electronic signature as one and the same. However, it should make a distinction between various types of signature and provide the use of digital signature so as to protect consumers.
- The NPSP has envisaged blanket acceptance of computer generated evidence for proving fund transfer. Thus, a distinction should be made between various types of computer-generated evidence.

- The rights, obligations, and liabilities of consumers and PII should be provided by law and it should not be left only to be determined by the standard contract prepared by banks. Accordingly, since the liability of consumers is unlimited or no caps as long as the transaction are activated by the use of PI issued by the PII, like others countries caps and loss allocation should be introduced based on the contribution made by either party for the occurrence of unauthorized transactions. To this end, consumer protection legislation which limits the liability of consumers for unauthorized transactions to a certain legal ceiling should be enacted.
- Though TCCPP applicable on PII, it has no substantive provisions to protect consumer of PI from unfair contractual terms. Thus, art 22 of proc813/ 13 should be amended to include unfair contractual terms as prohibited act. A distinction should be made between authorized and unauthorized transactions so that the liability of parties involved in electronic fund transfer can easily be determined.
- An obligation to disclose mandatory terms and conditions of the contract such as the liability of consumers for unauthorized fund transfer, the right to documentation, the liability of the PII, fee and charges and error resolution should be imposed on the PII.
- Article 14 of NPSP provides the principle of the irrevocability of payment made in accordance with the rule of a system. However, it is failed to mentions exceptions to this principle. Thus, art 14 of the NPSP should be amended to make mistaken payment and payment involving money laundering revocable.

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Interview with W/ro Kibre Moges , Legal Service Head at National Bank of Ethiopia , Addis Ababa

Interview with Ato Halfom Hailu , Deputy Legal Service Head at Information Network Security Agency, Addis Ababa

Annex One

Interview guides prepared for the Trade Competition and Consumer Protection Authority

Personal detail of the respondent (if he/she consented) -----

Position in the authority -----

Type of Study; - A Master thesis in law (LLM thesis)

Title:-Consumers and Third Parties Protection Under the National Payment System Proclamation No.718/2011

The objective of this interview is to assess the view of the officials of the authority with regard to the application of the Trade Competition and Consumers Protection Proclamation No. 813/13 in banking industry in general and for user of Payment instruments in particular and to know whether there is formal or informal cooperation between the National Bank and the authority to protect consumers of banking industry in general and user of payment instrument in particular and finally to suggest possible solutions in the findings .

So, you are kindly requested to respond to the interviews as your information will be helpful for effective accomplishment of the study and as it will be kept confidential and analyzed anonymously unless you consented for the disclosure of your identity and personal views.

Thank you, in advance, for your co-operation

Guiding questions

- 1) Do you think the Trade Competition and Consumer Protection No 813/13 are applicable on the banking industry in general and for user of payment instrument in particular?
- 2) Is there any allegation made by the consumer against payment instrument issuer (banks) in the authority?
- 3) Is there any cooperation between the National Bank and the authority to protect consumers of payment instrument?
- 4) is there anything done by the authority to protect the consumers of banking industry in general and user of payment instrument in particular?

Annex Two

Interview Guides prepared for National Bank, Banks and Information Network Security Agency (Q, 4,10and 11)

Personal detail of the respondent (if he/she consented) -----

Position in the authority -----

Type of Study; - A Master thesis in law (LLM thesis)

Title:-Consumers and Third Parties Protection Under the National Payment System Proclamation No.718/2011

The objective of this interview among others is to evaluate whether the National Bank is discharging its mandate as provided under the NPSP. It also intended to assess the view of the officials of the National Bank on whether NPSP has provided sufficient safeguard to protect consumers of PIs. Moreover, it is also intended to assess the view of the officials of National whether the NPSP protects creditors of participant or payment service provider. Furthermore, it is also intended to obtain their views with regard to the application of article 31 of the NPSP.

So, you are kindly re requested to respond to the interviews as your information will be helpful for effective accomplishment of the study and as it will be kept confidential and analyzed anonymously unless you consented for the disclosure of your identity and personal views.

Thank you, in advance, for your co-operation

Guiding questions

- 1) Is the National Bank examining the application made for obtaining authorization for operating a system in light of consumer protection issue? If yes what aspects are subject to examination to obtain a license for operating a system?
- 2) Do you think that the reciprocal obligations and liabilities of the payment instrument issuer and consumer in relation to unauthorized transactions are prescribed in the National Payment System Proclamation No 813/13?
- 3) To who does the term parties refers to under art 31(1) of the NPSP, is consumer incorporated? Or is it only refers to participants?
- 4) Do you think that automatic compliance with security procedure such as four digit password (bank ATM) should always entail the liability of consumer for all transactions whether authorized by him or not? If yes, do you think that is fair and reasonable?

- 5) Unlike the banking business proclamation, the National payment system proclamation is silent about the appeal rights of operator in case the National bank has revoked its license on the grounds mentioned under article 9(1) of NPSP. What do you think about the silence of the NPSP about the appeal rights of the operators of the system?
- 6) Art 14(1) of the NPSP provides that the entry or payment that has been effected in accordance with the rules of the system shall be final and may not be revoked, reversed, or set aside, including without limitation, by insolvency or bankruptcy proceedings or any other law or practice similar in purpose and effect and is not subject to any provision of law or order of an administrative or judicial authority that operates as a stay of that payment. How do you see this stipulation in light of bankruptcy law? Are the rights of participant creditors protected? Do you think is there any plausible justification for insertion of this provision in the NPSP? Should do not be any exception to it?
- 7) Art 31(3) of the NPSP provides that the award given by the arbitration panel would be final and binding. Would it mean appeal is not possible? Is it not self contradictory (provision itself)? What about the power of cassation division? How do you see in light of art 37 of the FDRE constitution
- 8) Is there any dispute between the participants reported to the National Bank? If yes how it get resolved? Any directive with regard to dispute resolution between participants issued by the National Bank?
- 9) Is there any sample terms and conditions for payment instrument issued by the National Bank? Have you ever seen the National Bank approving the term and conditions of payment instrument prepared by banks?
- 10) Art 23 of the NPSP provide that without being affected by any other law or customary practice, information as to any transfer of funds through a system which is contained in any document, computer print-out, hard copy, microfilm, floppy or hard disc or any other electronic media or form shall be admissible in any court as evidence of the transfer concerned. Isn't blanket acceptance of computer generated evidence? Should not be any distinction among computer generated evidence? How do you see from perspective of consumer protection?
- 11) Art 23(3) of the NPSP provides that payment instructions, messages and funds transfers that are initiated, processed or executed through electronic means including electronic

signatures shall be admissible as prima facie evidence of the matters or transactions carried out. Is this provision consumer protective? Are all electronic signatures are capable of proving the transaction is activated by consumer? Shouldn't be any qualification among and between electronic signatures? Is it appropriate to have prima facie assumption against consumer based on any type of electronic signature produced by payment instrument issuer?

- 12) Are there any grievance presented to the National Bank by consumers of bank claiming that their account has been debited without giving authorization?