PAVING THE PATH TO AN ENHANCED CONSUMER PROTECTION FOR THE NIGERIAN ONLINE MARKET: THEORIES AND CONCEPTS*

Abstract

The development of the Nigerian online market is indeed of great importance. This is especially as it provides enormous benefits to consumers, traders and the economy. The benefits of the online market are as myriad as the challenges that discourage consumers from fully enjoying its potentials. The legal issues include- inadequate consumer protection measures and lack of effective consumer dispute resolution and redress. These unresolved issues have resulted in uncertainty and lack of consumer confidence in the online market; they have also served as disincentives for businesses to adopt fair business practices. In order to facilitate the growth of electronic commerce in Nigeria, these issue have to be resolved urgently through government/legislative intervention. In recognition of the need for a legal framework for the protection of consumers in the Nigerian online market, this article interrogates some of the competing rationales for consumer protection so as to determine what the underlying theory for the development of the legal framework should be. It finally recommends that a hybrid theory, which takes into consideration the inequality of bargaining power and the need to promote consumer confidence and fair business practices, should be adopted.

Key words: *E-commerce, consumer, online market, consumer protection, Nigeria.*

1. Introduction

Currently in Nigeria, there are over 70 online shops[1] that sell varied products to consumers, ranging from cloths, fashion accessories, cooking utensils, baby products, electronics and cosmetics to air tickets, banking services, travel packages and software's;[2] with a few brave individuals willing to buy. The benefits of the online market[3] are just as enormous as the challenges that discourage consumers from fully enjoying the potentials of the market. One of the benefits is that it provides both consumers and traders with access to an enormous marketplace where goods and services are bought and sold without the geographical barriers that usually constrain international trade. Whereas, some of the challenges are that due to the virtual nature of the internet, consumers are unable to physically inspect the goods displayed online before purchase and may discover notable differences in size, shape, colour and quality of the goods when delivered, this may result in the change of mind and the desire to cancel the transaction and seek refund. After the goods have been delivered, the consumer may also discover that a vital part is missing or that the product does not function as it should, giving rise to the need to return the goods and seek refund or repairs. However, It is not unusual to see a clause in the terms and conditions of an online contract which states that there will be no refund of money after payments have been made in reliance to the *caveat emptor* principle in Nigeria,[4] this by all means represents an unfair term in electronic contract which was inserted without any input of the consumer who also could not inspect the goods before purchase. The consumer may also discover that they have been defrauded, or tricked into disclosing their financial and personal information. Furthermore, most consumers purchase products online without fully understanding that they are entering into a contract with the seller, neither do they understand the implications of the terms and conditions that they agree

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[1] V Duthier, 'Nigerian Embraces Online Shopping?' [2013] Cable News Network (CNN) http://edition.cnn.com/videos/business/2013/01/14/marketplace-africa-nigeria-online-shopping.cnn?iref=allsearch last accessed on 09 February, 2017.

[2] Some of these online shops include Dealdey, Jumia, Konga, Jiji.ng, Kaymu, OLX, effritin.com

[3] For Consumers: increased competition, lower prices; varied product choice, the ability to shop at any time from vendors located anywhere around the world, time saving, convenient, and healthy for the cashless policy introduced by the CBN (although some online shops also allow customers to order items and pay by bank transfer or cash at the point of the delivery. For sellers and the economy: easy entry into the online market- this is especially important for SME's, access to more customers based within and outside the sellers state/country of residence, alleviation of poverty by providing more job opportunities for the unemployed, contribution to the growth of the country's GDP, etc.

[4] I S Nwankwo, ICT and Law in Nigeria- Online shopping and consumer protection in Nigeria, 2015 https://iheanyisam.wordpress.com last accessed on 15 February, 2017.

to with the mere click of a mouse. This has resulted in consumers being subjected to unfair contract terms which limit their rights as consumers and give suppliers unfair advantage over them.

There also exist the issue of lack of effective methods of enforcing consumer rights. In the unfortunate event that a consumer experiences any of the above described challenges, the consumer should be able to access justice without hassle. This is especially as consumer electronic transactions are usually of small value,[5] therefore making it illogical for consumers to access justice through litigation and the other existing forms of dispute resolution in Nigeria which are known to be quite expensive, complex and time consuming for consumers with small claims. The lack of effective dispute resolution system is of great significance because even where there exist robust consumer rights, consumer protection will remain fictitious without an effective means of enforcing those rights and resolving disputes.

Presently in Nigeria, there are no laws that specifically regulate the activities of online sellers or protect the interest of consumers who engage in e-commerce. The existing laws were enacted before the emergence of the internet and information communication technology and do not adequately cater for the peculiar nature and needs of the internet. For instance, the CPC Act[6] was enacted in 1992, and the major protection it accords to consumers is on product safety and not on the transactional aspects of product purchases. Unfortunately, the current bill aims to amend the CPC Act[7] does not change the format of the law, and indeed will have no significant impact with respect to online consumers.[8] The Electronic Transactions Bill 2011, which is still awaiting presidential assent, in the same vein, recognises the consumer who engages in e-commerce, but does not provide for the protection of the consumers interests. If these legal barriers are not adequately dealt with, consumers will remain reluctant to engage in e-commerce, businesses will not be incentivized to adopt fair business practices and the growth of the internet market will remain stunted. There is therefore need to develop a legal framework that regulates online activities, especially electronic commercial transactions and protect consumers who engage in these transactions as self-regulation has proven to be insufficient.

This paper is divided into four parts. The first part being the introduction is closely followed by the second part which analyses key concepts in this area, such as electronic commerce, consumer and consumer law. This conceptual analysis aims at deepen understanding of the thesis of this paper. The third part is the theoretical analysis which interrogates competing theories of consumer protection that seek to justify or criticise the need for consumer protection regulations both in the online and traditional market. It aims to address the question of why consumers in the online market should be treated differently from consumers in the traditional physical market by providing them with a legal framework that caters for their peculiar interests, for any law that demands obedience should also be justifiable.[9]The fourth part concludes the study.

2. Conceptual Analysis

Electronic Commerce (E-Commerce)

E-Commerce, also referred to as ‘electronic transactions’ and ‘internet sales’ has no generally accepted definition. Article 1 of the African Union Convention on Cyber Security and Personal Data Protection[10]defines e-commerce as the act of offering, buying, or providing goods and services through computer systems and telecommunications networks such as the internet or any other network using electronic, optical or similar media for distance information exchange. The UNCITRAL Model Law on E-Commerce defines as e-commerce as ‘the sale or purchase of goods or services, conducted

[5] J Hornle, *Cross Border Internet Dispute Resolution* (Cambridge University Press, 2009).
[6] Consumer Protection Council Act, C25 Laws of the Federation of Nigeria, 2004.
[7] Bill to amend the Consumer Protection Council Act, No. 66 of 1992. 2008.
[8] I S Nwankwo (n. 4)
[9] Chen-Wishart, M. Regulation Unfair Terms in p. 105
[10] Article 1

over computer networks by methods specifically designed for the purpose of receiving or placing of orders.[11] The OECD guidelines[12] defines e-commerce transaction as:

> …the sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders. The goods or services are ordered by those methods, but the payment and the ultimate delivery of the goods or services do not have to be conducted online. An e-commerce transaction can be between enterprises, households, individuals, governments, and other public or private organisations.

However, the OECD 2009 Guideline for interpretation provides that this definition includes: orders made on Web pages, extranet or EDI. E-commerce is defined by the method of making the order and excludes: orders made by telephone calls, facsimile, or manually typed e-mail. The express exclusion above was borne out of the need to provide a simple, coherent and pragmatic definition that concentrates on those methods of e-commerce that are known and definable, those that are currently most important.[13] In electronic transactions, the goods or services are ordered electronically, but the payment and delivery of products do not have to be conducted online. Goods could range from conventional products like furniture, beverages, clothing, books, where the contract of sale is executed via electronic means but delivery is effected by conventional methods; or intangible products like software's, copyright images and music etc., where both the contract of sale and delivery are effected through electronic means. It also covers a wide range of services such as banking and financial services, insurance services, legal services, travel and tourism services etc.

These electronic transactions can be executed either between parties within the same jurisdiction or parties in different jurisdictions using personal computers, laptops, tablets and mobile phones. The e-commerce transactions usually occur between businesses (Business-to-Business) B2B; businesses and consumers (Business-to-Consumer) B2C which is the focus of this research; private businesses and the public sector (Business-to-Government) B2G; and between consumers (Consumer-to-Consumer) C2C. The various modes through which electronic contracts can be executed include: Electronic Mail System (Email), Website Trading (Click wrap), and Electronic Data Interface (EDI). Gringras[14] describes e-mail as the system where simple messages, letters, pictures, sounds, videos etc. are exchanged from an author to one or more recipients, via the internet or other computer networks.

Web trading is the most common mode of electronic contracting. Products for sale are advertised on the website (webvertisement) and the buyer clicks on icons indicating the item he wishes to purchase, the mode of payment and delivery. The buyer is then presented with a standard form contract, which is usually in small prints and overly too long, which has been drafted by the seller without any form of input from the buyer. The agreement can be viewed by the buyer who either 'Agrees' or 'Disagrees' with the standard terms and conditions by mouse-clicking the desired icon. In the instance where he 'Agrees' to the terms, he may proceed with the transaction, but where he 'Disagrees' with the terms of the contract, the transaction is automatically terminated.

The Consumer

The term 'consumer' is an agent noun for the word *consume*, which is derived from the Latin word *consumere*, meaning to use up, eat or waste.[15] There is presently no judicial definition of 'consumer'

[11]United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce, adopted in 1996, United Nations Publication.

[12] Organization of Economic Cooperation and Development, *OECD Guide to Measuring the Information Society* (OECD Publishing 2011)

[13] Supra p.15

[14] T. Elle's '*Gringras: The Law of the Internet* (3rd ed. 2008) p. 5

[15] A D Badaiki, *Consumer Protection and Standard Form Contracts in Nigeria* (Chrisdom:USA 1999) p. 9

in Nigeria. O'Shea and Rickett[16] stated that the term 'consumer' 'is not a creature known to common law'. Explaining why common law has never defined 'consumer', Badaiki[17] advanced that this is mainly because the term is a business term and not a legal term. However, the courts have often used the term in a number of decided cases, for instance Donoghue v Stevenson.[18] Section 32 of the Consumer Protection Council Act (CPC Act) 1992 defines 'consumer' as an individual who purchases, uses, maintains or disposes of products or services. According to Monye,[19] the use of the word 'individual' in this definition is not used in a strict sense, as section 6 of the CPC Act provides that groups and classes of people who have suffered loss or injury as a result of the use of any goods, product or services may make a complaint or seek redress.[20]Ajai,[21]on the other hand, criticized the definition by the CPC Act as being too wide, and containing verbose words like 'maintains' and 'disposes' which are grammatically and logically out of place. This indicates that any individual who buys, maintains or 'gets rid of products' should be considered a consumer. Even where the individual is not considered a weaker party because he has the requisite skill and knowledge to make a good bargain and might even be purchasing the goods for commercial purposes. The definition of 'consumer' in the CPC Act is in dire need for a redraft. Nevertheless, the definition in the CPC Act applies to not just individuals who purchase goods, but also individuals who use them. This is quite different from the narrow definition of 'consumer' by the Moloney Committee on Consumer Protection in the United Kingdom (UK) where 'consumer' was defined as one who purchases (or hire-purchases) goods for private use or consumption.[22] From this definition, only parties in a contractual relationship are covered, therefore excluding non-contractual persons. The beneficiary of a purchase cannot be afforded the protection as a weaker party; neither can the recipient of a gift or a trade sample. The Electronic Commerce (EC Directive) Regulation 2002[23] defines 'consumer' as 'any natural person who is acting for purposes other than those of his trade, business or profession'. This definition is very similar to the ones provided by most other EU consumer legislations.[24] It is therefore safe to state that the EU consumer law approach restricts the concept 'consumer' to mostly natural persons- a legal person does not qualify as a consumer. Furthermore, a professional who buys a one-off product for use in his business/profession cannot be afforded consumer protection. The judicial argument proffered by the European Court of Justice (ECJ) as the reason for this approach in *Oceano Grupo Editorial SA v. Rocio Murciano Quintero*[25], and other similar cases[26], is that the system of protection is based on the idea that the consumer is the weaker party in the contract with respect to bargaining powers and level of knowledge, as against the seller. Legal persons and companies are not seen as weaker persons, because they are deemed to be economically stronger, more experienced in legal matters, more powerful and better organised, and thus need no protection.[27] The court further stated that the idea of protection must be seen as an exception to the rule of freedom of contract and must therefore be strictly interpreted. However, can the argument of the ECJ be applied to start-ups/SME's

[16] P O'Shea & C Rickett, 'In Defence of Consumer Law: The Resolution of Consumer Disputes' (2006) 28 Sydney *Law Review* p. 139.

[17] A D Badaiki, (n. 15)

[18] For instance, Lord Atkin in the case of Donoghue v. Stevenson (1932) A C 562 employed the term to refer to a neighbour in law.

[19] F Monye,'Research Report on the state of Consumer Protection in Nigeria; A review of Consumer protection in the Telecommunications Sector in Nigeria' (2014) www.consumerawareness-ng.org Last accessed on 5th September, 2015.

[20] Section 6 of CPC Act provides that groups and classes of people who have suffered loss or injury as a result of the use of any goods, product or services may make a compliant or seek redress.

[21] O. Ajai. '*Caveat Venditor!* Consumer Protection Decree No. 66 of 1992 Arrives in the Nigerian Market Place' (1992/93) 23 Nigerian Current Law Review.

[22] Moloney Committee on Consumer Protection, 'Final Report of the Committee on Consumer Protection' (Cmnd 1781) 1962, para. 2.

23 Which regulates electronic transactions in the United Kingdom.

[24] For instance, the Doorstep selling Directives 85/577/ECC of 20 December, [1985] OJ C 92/1; The Unfair Contract Term Directive 93/13/ECC of [1987] OJ L 95/0029-0034; the Distance Selling Directive 97/7/EC [1997], OJ L 144/19-27; Consumer Sales Directive 99/44/EC [1999] OJ L 171/0012-0016, etc.

[25] ECJ, 27 June 2000, Case C-240/98, ECR 1-4941;

[26] *Cape SNC v. Idealservice Srl*, ECJ, 22 November 2001, Case C-541/99 [2001] ECR 1-9049.

[27] B Schuller, 'The Definition of Consumer in EU Law', in Devenney, J. & Kenny, M., (eds.), *European Consumer Protection: Theory and Practice* (Cambridge, 2012) pp. 123-142

and non-profit organisations acting for purposes outside their trade, business and profession, who might not have the resources to protect their interests?

Contrary to the EU consumer law approach, member states of the European Union have chosen different legislative techniques to transpose this definition.[28] According to French case law, an association of natural persons can be considered a 'consumer' under specific conditions.[29] Under Spanish law[30] a consumer can be a natural or legal person, but has to be a final addressee of the product. A person is a final addressee if he does not integrate the product in production, transformation and commercialisation processes. Whereas in Greece, natural and legal persons are considered consumers, whether the product is for personal or business/professional use. As long as he is the last person on the supply chain, in other words, the end user.[31] In South Africa, the Consumer Protection Act, 2008[32] (CPA SA) adopts a broad approach to the definition of consumer, whereas the Electronic Communications and Transactions Act, 2002[33] (ECTA) adopts a more narrow approach to the definition. Section 1 of CPA SA provides that 'consumer' means '…in respect of any particular goods or services, means— (a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business; (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3); (c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e) From the above definition, the use of the term 'a person' implies that a consumer is not just restricted to a natural person, but also extends to a legal/juristic person. However, section 5 (2)(b) which limits the scope of the CPA SA provides that the CPA SA does not apply to any transaction 'in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equal or exceeds the threshold value determined by the Minister in terms of section 6'.

Also from the definition in the CPA SA, a consumer is not also restricted to a person who has a contractual relationship with the seller; it also applies to a user, recipient, beneficiary of goods and services or a franchisee. However, the opposite is the case for the ECTA, where Section 1 provides that a 'consumer' means 'any natural person who enters or intends entering into an electronic transaction with a supplier as the end user of the goods or services offered by the supplier'. The difference in approach can be explained- the ECTA is relatively limited in scope, applicable to only consumer protection issues that arise from electronic transactions or data messages, so it is understandable if it only applies to parties to the electronic transaction.[34]Whereas, the CPA SA is a legislation that is quite broad in scope, applicable to every transaction that occurs within the Republic of South Africa with very few exceptions.[35]Hence, the adoption of a narrow approach in the CPA SA will occasion great hardship on the members of the society who are in dire need of protection but are restrained because they are users of the questionable products which has caused them harm and exploitation. This paper therefore proposes that in the definition of 'consumer' the CPC Act should adopt the broad definition whereas the narrow definition should be adopted in the legal framework for the protection of consumers in the online market.

[28] H Schulte-Nolke, C Twigg-Flesner & M Ebers, *EU Consumer Law Compendium* (Sellier, Munchen 2008) pg 174
[29] ibid p.175
[30] Article 1(2) of the Law General for the Protection of the Consumers and Users, 26/1984, of July 19.
[31] H Schulte-Nolke, C Twigg-Flesner & M Eber, (n.28)
[32] Act No. 68 of 2008
[33] Act No. 25 of 2005
[34] Section 4 (1) of the Electronic Communications and Transactions Act, 2002.
[35] Section 5 (1)(a) of the Consumer Protection Act, 2008 (South Africa)

There is also the question as to whether a 'consumer' is also to be determined by the nature of the seller/supplier.[36] With the growth of e-commerce, individuals acting for purposes other than their business or profession can now sell unwanted products to other consumers on websites like OLX, Dealdey, Jiji.ng, eBay, Amazon, preloved.co.uk, etc. This type of transaction is referred to as consumer-to-consumer (C2C) e-commerce. Deducing from the primary rationales for consumer protection, a consumer is to be protected because he is a weaker party contracting with a more powerful supplier who has better information and higher bargaining power. This raises the question of whether the consumer also needs to be specially protected where the transaction is not part of the suppliers business, and where the supplier is just as vulnerable as the consumer. In other words, where the transaction is between consumers, should the buyer be protected as a consumer especially as the consumer-trader is also most likely not 'economically stronger, more experienced in legal matters, more powerful and better organised' than the consumer-buyer. It is therefore the submission of the researcher that the nature of the supplier should be factored in when determining and defining who a consumer in an electronic transaction is and that when a supplier is himself acting outside his business, on a one-off trade, the entire consumer protection requirements should not apply to him. This is because the strict application of some of the consumer protection measures (for instance the right to withdraw) might be unfair to him and might discourage other consumer-traders from engaging in e-commerce. Nevertheless, some of the very important measures, like the mandatory information requirement, should also apply to the consumer-trader.[37]

Some conceptions of 'consumer', especially in the EU, provide that for a transaction to be classified as a consumer contract, the purpose for which the goods is purchase should be personal and not professional. This raises the question of whether dual purpose transactions/use[38] can be considered as private purpose transactions which qualifies the buyer as a consumer. Although this question has not been addressed in Nigeria by the judiciary or legislature, the Courts in Germany and Italy[39]have focused on the question of which purpose (private or business) the product used more predominant.[40] However, in Austria and Belgium, only contracts concluded exclusively for private purpose are considered consumer contracts.[41]

In the development of a legal framework for the protections of consumers who engage in e-commerce, the best approach for the definition of 'consumer' is a hybrid approach which is neither too narrow nor too broad. Therefore, 'consumer' in this context, should be a person[42] (natural or legal) who enters or intends entering[43] into an electronic transaction with a supplier as the end user[44] of the goods or services offered by the supplier.

[36] Seller has been defined by the above mentioned EU Directives as any natural or legal person who is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name or on behalf of a trader.
[37] For instance, the information disclosure requirement.
[38] Dual purpose transactions/use is where a private person uses a product for both private and business use. For instance, the purchase of a computer by a sole proprietor for both private and business purposes.
[39] OLG Naumburg, NJW-RR 1998, 1351; Lavopa v. Soc. Inditel S.P.A. Judgement of Tribunale Bari 31 August 2001. cited in H Schulte-Nolke, C Twigg-Flesner & M Ebers (n.28)
[40]H Schulte-Nolke, C Twigg-Flesner & M Ebers (n.28)
[41] ibid
[42] This is to promote confidence in the digital market and consequently facilitate the growth of e-commerce by providing protection for weaker parties in electronic transactions irrespective of whether they are natural persons or legal persons in the form of small businesses/sole proprietors. To ensure that a legal person is entitled to protection as a consumer, it will have to prove that its asset value or annual turnover, at the time of the transaction, equal or does not exceed the threshold value determined by the Minister.
[43] This is especially important as in Nigeria, only 10% of consumers make payment for goods purchased online via electronic payments. Due to the risk associated with online scams, payments for online transactions are mostly made in cash during delivery of the goods or at the bank before the goods are delivered.
[44] In order to create legal certainty and accommodate dual-purpose user, it is important that protection is not restricted to personal users only

3. Theoretical Analysis

The theoretical framework interrogates theories that criticise[45] government intervention in the market (even in the form of consumer protection) and the ones that justify[46] them. It finally recommends the theory that should be adopted in the development of a legal framework for the protection of consumers that engage in e-commerce.

3.1. Arguments against Government Regulation

The Classical Contract Theory

The doctrine of freedom of contract was the prevailing intellectual movement in the late nineteenth century. This doctrine served as the foundation for the classical contract theory. Proponents of this theory posit that parties of equal bargaining power, skill and knowledge should have the freedom to choose, with whom to contract with; whether to contract; and on what terms the contract should be, without restrictions or government intervention. David Weber describes the right to contract as the ability to gain and dispose of possessions and services, alter legal relationships, and act with some guaranty as to future obligations and rights. [47] This notion is based on the ground that if two parties are observed entering into a voluntary private exchange, the presumption must be that both feel that the outcome is to make them better off, otherwise that would not have entered it.[48] 'According to traditional theory, [the] individual is the best protector for his own interests. Since the contract is made by the parties' agreement, then its content's validity shall be protected herein.'[49] The classical contract theory has been criticised as not reflecting the harsh realities of the marketplace. This is because in today's market, equal parties do not always exist and strong parties usually impose unfair and oppressive bargains upon those who are vulnerable and weak. With the development of information technology and the emergence of standard form contracts, transactions are concluded at a distance, with parties not having the opportunity to individually negotiate the terms of the contract they agree to.

Classical Economic Theory

The classical economic theory of the free market, to a great extent, shares the same ideology with the classical contract theory. These theories have been referred to by Trebilcock[50] as the 'private ordering paradigm.' Classical economic theorists argue that the market functions best with minimal external intervention.[51] That businesses, consumers and the rest of the society are better off without external intervention[52] in the decision making process in the market. Adams Smith, the chief proponent of the classical economic theory, acknowledged that although there are areas where the market is not the best regulator, for instance, education. However, in a perfectly competitive economy, the appropriate role of government should be limited to certain basic functions such as maintenance of law and order, enforcement of contracts and provision of public goods. Otherwise markets, consumers and producers are best left to operate on their own with *laissez-faire*. Therefore, the traditional liberalists are of the view that with regards the interests of the consumer, the market is the best instrument to protect them. The classical economic theory stressed the importance of competition, as against monopoly, and postulates that in a competitive market, the 'invisible hand' tends to correct demand/supply and moves

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[45] The classical contract theory, the classical economic theory, the digital libertarian theory

[46] The theory of asymmetric information, exploitation theory and the consumer-confidence argument.

[47] D Weber. 'Restricting the Freedom of Contract: A Fundamental Prohibition'(2013) 16 *Yale Human Rights and Development Journal* 51

[48] P Csern, *Freedom of Contract and Paternalism: Prospects and Limits of an Economic Approach* (Palgrave Macmillan 2012)

[49] Z J Wang, 'Law of Obligation' Beijing: China University of Political Science and Law (2001) cited in M Zhaohua, 'Party Autonomy, Private Autonomy, and Freedom of Contract' 10 *Canadian Social Science*, No. 6. www.csccanada.org. Last accessed on 23 June, 2016.

[50] M Trebilcock, 'Rethinking Consumer Protection Policy' in Charles Rickett & Thomas Telfer (eds.), *International Perspectives on Consumers' Access to Justice* (Cambridge:2003)

[51] S Adam, *An Inquiry into the Nature and Cause of the Wealth of Nations* [London:1776]

[52] This government intervention could be in the form of taxation, imposition of minimum wages, consumer protection, imposition of standards, licensing, subsidies, bailouts, price control etc.

the markets towards their natural equilibrium where buyers are able to choose between various suppliers; and businesses that do not compete successfully are allowed to fail. In essence, the free market is one where parties compete freely through voluntary exchange on terms settled by agreement, on their own or with others, free from interference with their person or their property.[53] The economic theory is based on the assumption that markets where goods and services are traded are free and perfectly competitive, and that any form of external intervention (even in the form of consumer protection) will impose unnecessary cost on participants. The economic theory of free market economy has been criticised as flawed because it is based on the assumption that competition and information is perfect. Whereas, the opposite is the case, the market is far from perfect. The case is even worst in markets in emerging economies, where market failures are perhaps more pronounced and thus stronger government intervention is called for. These theories which were developed in the eighteenth century, before the advancement in technology and the emergence of the online market, have also been applied to the online market in the form of the digital libertarian theory.

Digital Libertarian Theory

In the debate as to whether government should intervene in the activities in the online market, Digital libertarians[54] are of the view that activities on the internet cannot and should not be regulated by any government.[55] They argue that the online market is better governed by itself through ethics, informal rules and unwritten codes which have been developed and accepted overtime by cyberspace participants (a new *lex mercatoria*).[56] That where conflicts and wrongdoings arise, the online market is in the best position to identify and address them. They observe that, due to the borderless nature of cyberspace, any attempt by the government to regulate the cyberspace will prove futile. Hence, they assert that to promote economic efficiency and facilitate e-commerce, the relationship between the producers and the consumers should be voluntary and unhindered by government intervention. Also, consumers in the online market should be able to protect their interests with the range of resources available to them online and offline, such as professional advice, online ratings and reviews. The position of the libertarians is based on the anonymous nature of the internet and the difficulty to enforce any law on the internet. Their proposition relies on two forms of mechanisms which are the screening and signalling mechanisms. The screening mechanism refers to a process through which an under-informed party can gain more information by inducing the other party to provide more information. This mechanism relies on the consumer's ability and willingness to gather relevant information and distinguish between good and bad transactions. Whereas, the signalling mechanism is where an informed party who has relevant information about a supplier sends out signals that allow less informed parties to learn more about the quality of the products, this can be in the form of online reviews and feedback.

The views of the libertarians have also been criticised as being highly unrealistic because they do not appreciate the cost implication of the screening mechanism. The cost of gathering information, either by personal research or by consulting a professional such as a lawyer, is too high and unreasonable especially as the consumer contracts are usually of low-value. Additionally, information about businesses which can be accessed through online ratings and reviews cannot be entirely trusted because businesses have been known to hire people who pretend to buy their products online and leave very positive ratings and reviews. While the signalling mechanism might be efficient in providing a level of protection to consumers, it is unlikely that all sellers will willingly provide relevant and accurate information about the quality of the product, especially sellers of low quality products.

The argument of the digital libertarians does not hold sway anymore as national regulation of the internet has proved possible. This is evidenced by the successfully enacted national laws for the

[53] S Copps, *The Legal Foundation of Free Markets* (Institute of Economic Affair IEA: 2008) p19.

[54] J.P. Barlow, J.T. Delacourt, D.R. Johnson, D. Post, Trotter Harder etc.

55 Segura-Serrano, 'Internet Regulation and the Role of International Law' (2006) 10 *Max Planck Yearbook of United Nations Law* p.194.

56 D. R. Johnson & D. Post, 'Law and Borders-The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review*. p.1367.

regulation of internet activities, for instance, the Cybercrimes (Prohibition, Prevention, etc.) Act, 2015.

3.2. Arguments for Government Intervention

These theories argue that government intervention in the market in the form of regulations is necessary especially in consumer contracts. This is primarily because of market failures and the vulnerability of consumers. Also interrogated in this work is the fourth argument for government intervention which is a combination of the consumer interest argument and the business related argument.

Theory of Asymmetric Information

Some economists[57] acknowledging the effect of market failure on the classical economic theory set out to develop an aspect of economics using neoclassical tools of analysis while introducing more realistic assumptions. This resulted in the development of economics of information. The economics of information is concerned with the economic implication of information asymmetry in the market. The early development of this aspect of economics have been credited to Williams Vickrey[58] and James Mirrlees,[59]and later, George Akerlof, Michael Spence and Joseph Stiglitz. They recognized that information in the market is very valuable but imperfect; that obtaining information can be costly; that there are important asymmetries of information; and that the extent of information asymmetries is affected by actions of firms and individuals.[60]Stiglitz reasoned that if information was perfect, as assumed by the classical economists, contract enforcement will be a simple matter and courts will be able to quickly determine whether the contract had been fulfilled or not.[61] Information asymmetry is about the study of decisions in transactions where one party has more information than the other. This creates an imbalance of power in transactions, which can cause the transaction to go bad. This theory is based on the assumption that at least, a party in a transaction has better information than the other parties, and that information asymmetry leads to adverse selection. A classical description of this model was done by George Akerlof,[62] who explained that in a market, the owner/seller has more information about the quality of the goods than the potential buyer and might place the price of his low quality/bad goods (lemons) at the same price as the good quality ones. That the ignorance of the buyer will lead him to assume that all goods in the market have the same quality (most often, bad quality). This assumption will make him bid down the price of the goods, thereby driving the good quality goods (who cannot sell at a lower price) away from the market. This cycle is what he refers to as 'adverse selection.' Akerlof further provides two ways through which information asymmetry can be address in the market, they are the signalling and screening mechanisms. That a party who suffers adverse selection should protect himself by screening potential Buyers/sellers or by looking out for signals of quality. Signaling is a means through which a party can protect himself in the market by looking out for signals of quality such as warranties, advertisements and prices.[63]Screening refers to a mechanism through which an under-informed party can gain more information by inducing the other party to provide more information. For instance, in a labour market, the job seeker who has more information about his ability than the employer might be asked to provide a referee from his former employer.[64] In reality the signalling and screening mechanisms are unable to correct the problem of information asymmetry because of the prevalence of moral hazards. Besides, the cost of applying these mechanisms will be borne by the consumer; this may serve as a discouragement to him. Warranties, advertisements and reviews can be used to mislead consumers.

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[57] Williams Vickrey , James Mirrlees, George Akerlof, Michael Spence and Joseph Stiglitz etc.

[58] V Williams, 'Counter Speculation, Auctions, and Competitive Sealed Tenders' (1961)16 *Journal of Finance* p. 8.

[59] J Mirrlees, 'An Exploration in the Theory of Optimal Income Taxation' (1971) 41 *Review of Economics Studies* p. 261.

[60]J Stiglitz, 'The Contribution of Economics of Information to Twentieth Century Economics' 115 (4) *Quarterly Journal of Economics* (2000) p. 1441.

[61] Ibid

[62] G Akerlof, 'The Market for Lemons: Qualitative Uncertainty and the Market Mechanism' (1984) 3 *Quarterly Journal of Economics* p. 488.

[63] Ibid

[64] G Priest, 'The Theory of Consumer Production Warranty' (1981) 90 *The Yale Law Journal,* p. 1297.

Exploitation Theory

The classical contract theory is based on the assumption that contracting parties have equal bargaining power and therefore should be left to exercise their will voluntarily. This assumption is wrong because contractual parties do not always have equal bargaining power. This is especially so in consumer contracts where standard form contracts are mostly used without any prior negotiation or input from the consumer. In such contracts, the buyer's freedom of contract ceases to be real freedom because the terms of the contract were exclusively drafted by the seller and only involuntarily accepted by the buyer.[65]Standard form contracts provide sellers with the chance to incorporate terms that serve their interest at the detriment of the buyer. Restrictions on the buyer's freedom are not primarily because the contract is on a take-it-or-leave-it basis, and the buyer can chose whether to go on with the contract or not, but because in certain industries, the terms are practically the same among sellers, so that the consumer is really not in a position to shop for better terms. So, the consumer has no meaningful freedom of choice. The exploitation theorists therefore argue that that modern capitalism and market imperfection has contributed to the inequality of bargaining power resulting in producer sovereignty instead of consumer sovereignty. That consumers need protection because they have few options but to purchase and contract on the terms set by large and powerful businesses who can impose whatever terms they want on consumers. Additionally, these businesses are able of exploiting significant information in their favour by limiting their legal obligations to the consumers as much as possible.[66]Kessler, the chief proponent of this theory, also reasoned that sellers will attempt to incorporate terms that reduce the risk of a court or jury being influenced by 'irrational forces' to decide against a powerful defendant.[67] This theory was widely accepted in the 1970s as the only coherent explanation for standardized contracts.[68]However, this argument is no more seen as a good reason for government intervention in the market. This theory has been criticised for not considering the effect of competition in the market, and that whatever power producer are assumed to have, is limited by competition between businesses. In disregard of this assertion, Cserne rightly argues that businesses do not compete with respect to contract terms; they only compete with respect to observable dimensions, such as price and observable quality features.[69]

The Consumer-Confidence Argument

It has been observed that with recent developments in consumer protection and the emergence of the online market, the above arguments for government intervention in the market are no longer sufficient. These theories were satisfactory when the traditional market was the only market available for commercial transactions. Although the traditional market and the online market are similar, the online market poses new and peculiar challenges to consumers. The consumer-confidence argument is often used by the European commission as a justification for strengthening consumer protection in the digital and single market; and also by international organisations like the Organisation of Economic Cooperation Development (OECD) and the United Nations.[70] They are of the opinion that the consumer is an important and indispensible player in any market whose actions (or inactions) are vital for the growth of the market,[71] as without consumption, there will be no production. That consumer confidence plays a vital role in ensuring that consumers participate in the market as protecting the consumer reduces the reluctance of consumers engage in the e-commerce, consequently facilitating the growth of the online market and providing businesses and consumers with the opportunity to benefit from the potential of the online market.[72] This is especially important as the online market

[65] F Kessler, 'Contracts of Adhesion- Some Thoughts about Freedom of Contract' (1943) *Columbia Law Review* 629.
[66] J Malala, 'Consumer Protection for Mobile Payments in Kenya: An Examination of the Fragmented Legislation and the Complexities it Presents for Mobile Payments' KBA Centre for Research on Financial Markets and Policy Working Paper Series 2013, p. 23. www.kba.co.ke>img>pdf last accessed on 11th July, 2016.
[67] F Kessler (n. 65)
[68] Ibid
[69] P Csern (n48)
[70] T Wilhelmsson, 'The Abuse of the 'Confident Consumer' as a Justification for EC Consumer Law' (2004) *Journal of Consumer Policy*, Vol. 27: 317. p. 320
[71] D Oughton & C Willett, 'Quality Regulation in European Private Law' (2002) *Journal of Consumer Policy*, Vol. 25 299-328 p.303.
[72] T Wilhelmsson, (n. 70)

lacks the existence of physical presence, which usually gives consumers the assurance that the business is truly operational.[73] According to George Kotona[74] there are two important factors that influence consumer decision making process about purchasing. The first factor is, an objective factor called *ability or capacity to buy* and the second one is, a subjective factor called the *willingness to buy*. Therefore the rationale for consumer protection in the online market should be to promote the *willingness to buy*- consumer confidence and consequently, facilitate electronic commerce.[75] The type of protection that enhances consumer confidence in the online market can only be achieved through regulatory intervention.

4. Conclusion and Recommendations

The peculiar challenges which arise from the virtual and cross-border nature of the internet cannot be corrected by market mechanisms, therefore the market cannot be self-regulated, and hence government regulatory intervention specially tailored for the online market is needed.[76] None of the arguments for government intervention in the market 'exclusively' captures the basis of why and how a legal framework for the protection of consumers in the online market should be developed. They are all valid arguments and can contribute to the development of a comprehensive legal framework. Therefore, this paper recommends that a hybrid theory, which takes into consideration information asymmetry, inequality of bargaining power and the need to promote consumer confidence and fair business practices, should be adopted. Most consumers in Nigeria do not know their rights and therefore cannot enforce them. The development of a comprehensive legal framework, which is normative in nature and empowers government agencies and civil societies to fight for the rights of consumers will aid consumer education; arm consumers with a bargaining tool which can be used in the enforcement of their rights; and influence the adoption of fair business practices by traders who will otherwise not be so willing to comply but have to do so because of the existence of effective enforcement mechanisms.

[73] S Yuthayotin, Access to Justice in Transnational B2C E-Commerce: A Multidimensional Analysis of Consumer protection Mechanisms (Springer: Switzerland 2015).
[74] G Kotona, Psychological Economics (1975) cited in Sutatip Yuthayotin, (n. 73)
[75] Ihuoma Ilobinso, 'Consumer Protection in the Context of Electronic Commerce: A Nigerian Perspective' being a paper presented at the Faculty of Law Seminar Series, October 2015, University of Lagos
[76] C Coteanu, *Cyber Consumer Law and Unfair Trading Practices* (Ashgate 2005)