

A CRITICAL ANALYSIS OF THE ONLINE CONSUMER'S RIGHT TO INFORMATION IN NIGERIA*

Abstract

In the bid to provide optimum protection to consumers governments in various jurisdictions have adopted different policies, laws and measures, which are all directed at eliminating the disparities in the consumer/seller relationship and ensuring that basic consumer rights are protected. There are various measures generally used in protecting the economic interest of consumer's who engage in e-commerce. This paper discusses the information disclosure requirement as one of those measures and as a primary means of protecting the consumers' right to information in Nigeria, South Africa and the United Kingdom. It finds that disproportionate focus is usually placed on mandating the provision of requisite information to consumers at the expense of ensuring that consumers understand and take advantage of the provided information. It therefore recommends that to achieve optimum protection for consumers in the online market by means of the information disclosure measure, attention should be given to the design and framing of consumer information. Additionally, there should be a standardized form for disclosure which will be used to streamline the types of information provided to consumers and the manner they are presented.

Keywords: Online Consumer, Right to Information, Protection, Disclosure, Nigeria

1. Introduction

One of the principal arguments for the regulation of consumer transactions is the prevalence of information asymmetry. Proponents of the economics of information contend that information in the market is very valuable, yet imperfect.¹ Their theory is based on the assumption that one of the contractual parties in a contract (usually the seller) often has better information than the other party (the consumer).² Without appropriate regulation, there would be insufficient incentive for the seller to volunteer certain relevant information to the consumer. Consequently, the consumers will continue to be confronted with the challenge of protecting their economic interests via decision making which is reflective of their true preferences. In recognition of this challenge, the consumers' right to information is one of the basic consumer rights declared by the former US President, John F. Kennedy, in his address to the US congress on 15 March 1962.³ President Kennedy declared that there are four basic consumer rights: the right to safety, the right to be informed, the right to choose and the right to be heard. These basic rights have been expanded by the United Nations through the United Nations Guidelines on Consumer Protection⁴ (UNGCP) to include: the right to satisfaction of basic needs, the right to redress, the right to consumer education, and the right to a healthy environment.⁵ These rights are now provided for in several pieces of legislations in different jurisdictions, including Nigeria. Although there are various other measures used in protecting the economic interest of consumers who engage in electronic commerce (e-commerce), information disclosure requirement is the most commonly used technique. Therefore, this paper discusses the information disclosure requirement as a supplementary means of protecting the consumers' right. It equally discusses the nature of information disclosure in relation to consumer transactions. The study also reflects on the arguments for and against the use of information disclosure requirements as a regulatory technique in consumer contracts. The Part IV examines the information disclosure requirements in the regulation of electronic transactions in Nigeria, specifically the Federal Competition and Consumer Protection Act. The final part makes recommendations and concludes the discourse.

2. The Nature of Information Disclosure Requirements

In recognition of the impact of information asymmetry on consumers and the need to eliminate the imbalance in knowledge between consumers and sellers, laws which impose information disclosure duties on sellers have been passed in many jurisdictions, including Nigeria. Some of these laws prohibit the provision of misleading and false information to consumers, while some others mandate businesses to provide positive information⁶ or issue

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¹ V. Williams, Counter Speculation, Auctions, and Competitive Sealed Tenders, 16(1) *Journal of Finance* (1961) 8-37; J. A. Mirrlees, An Exploration in the Theory of Optimal Income Taxation, 38 (2) *Review of Economics Studies* (1971) 175-208; J. E. Stiglitz, The Contribution of Economics of Information to Twentieth Century Economics, 115 (4) *Quarterly Journal of Economics* (2000) 1441-1478.

² Ibid

³ D. Atoki, The State of Consumer Rights Protection in Nigeria, being a paper delivered at the Public Lecture by the Centre for Human Rights, Faculty of Law, University of Lagos on 23 March 2015 at 6.

⁴ UNCTAD, *United Nations Guidelines for Consumer Protection*, United Nations, 2016.

⁵ Ibid

⁶ For instance the price of the goods, description of the goods, details of the supplier, details of delivery, etc.

warnings to consumers. This method of regulating consumer contracts has been in practice since the 1970's and beyond⁷ and has been the most widely used regulatory technique for the protection of consumers.⁸ Whitford⁹ states that common law of misrepresentation can be interpreted to require the disclosure of contractual information.¹⁰ He also highlighted the common laws effort to induce information disclosure in some cases where the court has ruled that a party to a contract cannot rely on a limitation/exclusion clause to avoid contractual liability unless he has taken extra steps to bring the term to the notice of the adhering party before the contract is entered into.¹¹ Classic examples of legislations that mandate the provision of relevant information or warnings to consumers include: the Sale of Goods Act, the Hire Purchase Act 1965, National Agency for Drug Administration and Control Act Cap N1 LFN 2004 (NAFDAC Act) and National Tobacco Control Act 2015. However, most of these legislations are not exactly relevant to or apply to consumers who engage in e-commerce. In some jurisdictions, for instance the United Kingdom, almost all the recently enacted consumer protection legislations include information disclosure requirement provisions for the benefit of consumers.¹² The requirements are more detailed where the consumer transaction is to be concluded by parties at a distance; outside the business premises of the seller, this includes electronic commerce transactions.

Information disclosure as a consumer protection measure is considered to be the least intrusive of all the measures, because it avoids heavy handed interference with the supplier's choice about what to bring to the market and what not to include in the terms, thereby limiting the consumer's access to varied products of different quality.¹³ Generally, the information disclosure requirements aim to improve transparency, protect the consumers' autonomy and contribute to the efficient working of the market. It ensures that parties have given their genuine consent and that there is agreement with respect to what exactly the subject matter of the contract is. Consequently, preventing the occurrence of mutual mistake- where each party has a different view of the situation.¹⁴ Information disclosure requirement is especially needed where:

1. The products take up a relatively high proportion of consumer expenditure;
2. The products are technically complex;
3. There is no basis for consumer assessment at the point of sale;
4. There is little advance consumer knowledge of required performance.¹⁵

3. Arguments For and Against the Use of Information Disclosure Requirements as a Technique for Consumer Protection

The use of information disclosure as a measure for combating information asymmetry is perceived by some as a product of the political struggle and compromise between those who believe that government should not interfere in the market (*laissez faire* approach) and those who favour direct government intervention in the market.¹⁶ This is because information disclosure requirement provisions aim to transfer the duty of care to the consumer once he has been provided with the requisite information. Hence, the consumer now has complete autonomy and takes responsibility for his purchasing choices.¹⁷ It helps to overcome the problem of information asymmetry without distorting the market by imposing specific prices, quality and contract terms. Proponents of information disclosure regulations postulate that comprehensive information disclosure will cause many consumers to refrain from engaging in certain economically harmful decisions, thereby making them more careful shoppers. Additionally,

⁷ J. Hamilton and L. E. Gillies, The Impact of E-commerce Developments on Consumer Welfare - Information Disclosure Regimes, 11(4) *Journal of Financial Regulation & Compliance* (2003) 329-348 at 332

⁸ G. Howells, The Potential and Limits of Consumer Empowerment by Information, 32(3) *Journal of Law and Society* (2005) 349-370.

⁹ W. C. Whitford, The Function of Disclosure Regulation in Consumer Transactions, 1973(2) *Wisconsin Law Review* (1973) 400-470

¹⁰ *J.B. Williams Co. v FTC*, 381 F.2d 884 (6th Cir. 1967); *Obde v. Schlemeyer*, 56 Wash. 2d 449, 353 P.2d 672 (1960) both cited in W. C. Whitford, The Function of Disclosure Regulation in Consumer Transactions, 1973(2) *Wisconsin Law Review* (1973) 400-470.

¹¹ Whitford, *supra* note 10; see the cases: *Parker v South Eastern Ry. Co.* [1877] 2 C. P. D. 416.

¹² For instance, Electronic Commerce (EC Directive) Regulations 2002, Consumer Contract (Information, Cancellation, and Additional Charges) Regulations 2013, Consumer Rights Act 2015, Consumer Protection (Amendment) Regulations 2014, etc.

¹³ G. Howells and T. Wilhelmsson, EC and US Approaches to Consumer Protection-Should the Gap Be Bridged?, in *Yearbook of European Law 1997*. Oxford University Press (1999) 207-267.

¹⁴ For instance, where the buyer thinks she is buying a black shoe, when in fact, the seller is selling a blue shoe.

¹⁵ United Nations Conference on Trade And Development (UNCTAD), *Manual on Consumer Protection*, United Nations Publication (2016) at 81.

¹⁶ M. A. Edwards, The Virtue of Mandatory Disclosure, 28(47) *Notre Dame Journal of Law, Ethics and Public Policy* (2014); M. A. Edwards, Empirical and Behavioural Critiques of Mandatory Disclosure: Socio-Economics and the Quest for Truth in Lending, 14 *Cornel Journal of Law and Public Policy* (2005).

¹⁷ G. Howells, *supra* note 9

that it will compel suppliers to engage in better trade practices thereby making consumer transactions 'fairer' and 'pro-consumer.'¹⁸

Information disclosure requirement has, on the other hand, been the subject of considerable criticisms. Critics have questioned the efficiency of this regulatory technique.¹⁹ Most of their criticisms are based on studies of consumer behaviour by behavioural economists who found that information disclosure requirements have not achieved its purpose of impacting consumer behaviour and consequently reducing information asymmetry and facilitating the market. The major criticism is that, most often, consumers do not read information provided to them²⁰. Studies have shown that most consumers, irrespective of their level of education, lack the time and patience to read the information specifically disclosed to them.²¹ Where they read the information, they are either unable or unwilling to process and understand the overwhelming amount of information supplied, therefore, they still go on to make rationally poor transactional decisions.²² Consumers are usually discouraged from reading the information provided due to the complex and unappealing manner in which the information is presented- as they are usually lengthy, complex in terms of language, written in small prints and generally unattractive.²³ It has been submitted that some businesses use the information disclosure requirement to camouflage unfair terms buried in the terms of contract.²⁴

Critics also decry the administrative burden and cost it imposes on businesses who put in place monitoring systems to ensure compliance.²⁵ They argue that the cost of compliance outweighs the benefits.²⁶ Therefore, "lawmakers should stop using it, commentators should stop proposing it, and interest groups should stop advocating."²⁷ They reiterate that their objection to mandated information disclosure is not based on the belief that information is not vital, but that it is a regulatory technique that seeks to give people information they did not ask for and do not like to use, information that they often find irrelevant and complex. They also argue that lawmakers think that making information available alone is enough; as a result insufficient thoughts is given to how information is communicated to consumers and how it can be given to ensure impact on behavioural outcome.²⁸ They also think that the use of this regulatory technique provides lawmakers with an easy escape route from making more direct laws that aim to solve a specific regulatory problem.²⁹

Proponents of mandatory disclosure argue that although it has not made any drastic improvement in alleviating information asymmetry, it serves some additional purposes.³⁰ For instance, mandatory disclosure improves accountability and deters firms from misconduct, it empowers intermediaries and watchdogs to oversee the conduct of businesses and it helps government improve enforcement actions.³¹ Proponents claim that mandatory information disclosure improves consumer autonomy and freedom of choice³² and they also contend that since there is no better substitute for mandated disclosure, it is better than nothing and should not be abandoned.³³ Contrary to the recommendation of the critics, this study supports the continuous use of information disclosure technique in addition to the other more direct regulatory techniques in electronic consumer transactions. This is primarily because the impersonality of electronic transactions weakens the relationship between sellers and consumers.³⁴ The distant nature of the internet deepens information asymmetry in consumer contracts. Consumers

¹⁸W. C. Whitford, supra note 10.

¹⁹ Omri Ben-Shahar and Carl Schneider, *More than you wanted to Know: the Failure of Mandated Disclosure*, Princeton University Press (2014).

²⁰ M. A. Edwards, Empirical and Behavioural Critiques of Mandatory Disclosure, supra note 23; BER and NCC, supra note 20.

²¹ G. Straetmans, Misleading Practices, the Consumer Information Model and Consumer Protection, 5 *Journal of European Consumer and Market Law* (2016) 199–210; BER and NCC Report, supra note 2.

²² Y. Bakos, F. Marotta-Wurgler, D. Trossen, Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts, *New York University Law and Economics Working Papers* 195, (2014).

²³ *ibid*

²⁴G. Howells, supra note 9.

²⁵ BRE and NCC, supra note 20.

²⁶ M. A. Edwards, The Virtue of Mandatory Disclosure, supra note 23.

²⁷ O. Ben-Shahar. and C. Schneider, supra note 26.

²⁸ BRE and NCC, supra note 20.

²⁹ *ibid*

³⁰ W. C. Whitford, supra note 10.

³¹ *ibid*

³² M.B.M. Loos, N. Helberger, L. Guibault, C. Mak and L. Pessers, Digital Content Contracts for Consumers, *Centre for the Study of European Contract Law Working Paper Series No. 2012-05* (2012).

³³ O. Ben-Shahar and C. E. Schneider, Coping with the Failure of Mandated Disclosure 11(83) *Jerusalem Review of Legal Studies* (2015).

³⁴ United Nations Conference on Trade and Development (UNCTAD), *Consumer Protection in Electronic Commerce, Second Session of the Trade and Development Board*, United Nations Publications, (2017).

are more vulnerable online to misleading and deceptive conduct and therefore, there is need for relevant and accurate information about the goods and the transactions. This therefore serves as a more cogent rationale for the use of mandatory information disclosure technique.

In electronic transactions, contracting parties do not usually meet physically; rather they deal with each other from a distance through information communication technology. Before purchase, the consumers do not typically have the opportunity to physically inspect the goods or to properly assess the quality and the true value of the product in the same manner as consumers who purchases products from the traditional marketplace. The decision of the consumer to buy or not to buy the product is most often based on information provided by the seller who does not always have sufficient incentive to disclose relevant and clear information which he believes might discourage potential buyers from purchasing the product. Although access to adequate and simplified information does not promise to solve all the problems that arise from consumer electronic contracts, it promises to reduce dissatisfaction and disputes by providing interested consumers with sufficient information to determine whether the goods they propose to purchase meets with their realistic expectation and preference. For instance, if a seller is mandated to provide consumers with information on whether the goods being purchased is a new product in its original packaging or tag, a new product without a tag or the original packaging, a fairly used product, a product made in China, USA or Nigeria; the consumer will be able to decide whether he really wants to buy the product at the price it is being sold for or whether he would rather buy from another seller with a more competitive price. It may save the consumer from dissatisfaction as a result of having purchased goods that did not meet with his expectations.³⁵ It may also save the consumer from the need to terminate the contract, return the goods and seek refund. Besides, the purpose of mandatory Information disclosure is not solely to influence the behaviour of all consumers, but also to pressure suppliers to embrace better trade practices and in the same vein to provide the few interested consumers with the tool to protect their interests. Therefore, the question should not be whether mandatory information disclosure technique should be used to protect consumers who engage in e-commerce, but rather, how can mandatory information disclosure be used to achieve optimum protection for consumers in the online market?

4. Statutory Requirements of Information Disclosure for Consumers in the Context of E-Commerce

In Nigeria, in the recent past, there was no enactment that directly mandated the seller in business-to-consumer e-commerce to provide specific information to the consumer about the goods, the seller or the transaction. For instance, the Consumer Protection Commission (CPC) Act³⁶, which was the primary consumer protection legislation in Nigeria, did not have any specific provision that stipulated what the rights of the consumers were. Neither did it have any provision that mandated the seller to provide consumers with relevant information. The Act was more focused on protecting the health and safety of consumers as opposed to their economic interest. However, the recently enacted Federal Competition and Consumer Protection (FCCP) Act 2019 provides more robust protection to consumers in the context of e-commerce. It relies on information disclosure technique as a tool for protecting consumers who engage in electronic transactions. For the online market to function effectively, consumers need to be provided with accurate information in an effective manner. Hence, this part of the paper aims to answer the following questions: What type of information should be provided to consumers? When should the information be provided? And how should it be provided?

The internet is more prone to fraud due to its virtual nature. The cost of setting up and running a website is much cheaper than that of setting up and running a physical shop. Hence, an online shop can disappear within seconds without leaving a trace. When buying from the traditional market, the consumer has the opportunity to physically meet with the seller and gain some knowledge about him. This knowledge will usually aid the consumer in deciding whether the seller should be trusted or not, the opposite is the case in online transactions. Consequently, consumers' need easily accessible information to make informed choices and protect their interests.

5. Information about the seller

The consumer should have the necessary information about the seller to enable them identify the seller so as to assess the seller's reliability; to communicate easily with the seller when the need arises; send complaints/feedbacks; and serve legal processes to the seller if disputes arise. Therefore, information about the seller should include the legal name of the business/seller, its trade name, principle geographic address, telephone number, email address, and details of any relevant professional/trade membership or government registration and licensing.³⁷ The section 119 (a) and (b) of the FCCP Act provides that the seller shall provide a written sales

³⁵ Organisation for Economic Co-Operation and Development (OECD), *OECD Conference on Empowering E-Consumers: Strengthening Consumer Protection in the Internet Economy*, OECD Publishing (2010)

³⁶ Consumer Protection Council Act, Cap 25, Laws of the Federation of Nigeria, 2004

³⁷ Organisation of Economic Co-operation and Development (OECD), *Best Practice Examples under the OECD Guidelines on Consumer Protection in the Context of Electronic Commerce*, OECD Economy Papers, No. 61, OECD Publishing (2002).

record of each transaction to the consumer to whom any goods and services are sold to. The sales record should contain the supplier's full name, or registered business name; the address of the premises where the goods are sold or supplied from. However, it does not require the seller to provide contact details which can be used for distance communication. For instance, telephone number or email address or any other detail which might aid the consumer to communicate with the seller from a distance. If the information requirement provision is to be considered sufficient for the protection of consumers in the online market the seller must also be mandated to provide the consumer with functional contact details which would allow the consumer communicate with the seller conveniently from a distance.

However, in UK regulation 13(1) of the Consumer Contract (Information, Cancellation and Additional Charges) Regulation 2013 (SI 2013/3134) mandates the seller to provide information listed in schedule 2 of the regulation to the consumer in a clear and comprehensible manner. Items b-f of Schedule 2 deals with information about the seller. It provides that the seller should make available to the consumer: the identity of the trader, the geographical address at which the trader is established and, where available, the trader's telephone number, fax number and e-mail address, to enable the consumer to contact the trader quickly and communicate efficiently, etc. The use of the phrase 'where available' in item (c) with respect to the provision of contact details for distance communication indicates that the provision of this information is somewhat discretionary. If consumers who purchase goods online are to be provided with optimum protection then the provision of the sellers contact details for effective distance communication should be made mandatory. This is especially as electronic transactions are made from a distance therefore it is only logical that consumers should be provided with the sellers contact details for ease of distance communication. Hence, it is recommended that the phrase 'where available' be replaced with 'at least any one of these contact details'.

On the other hand, regulation 6 of the Electronic Commerce (EC Directive) Regulations 2002 contains provisions about the general information to be provided by an information society service provider. It provides that a person providing an information society service shall make available to the recipient of the service and any relevant enforcement authority, in a form and manner which is easily, directly and permanently accessible, the following information: the name of the service provider, geographic address, other details of the service provider (including his e-mail address) which make it possible to contact him rapidly and communicate with him in a direct and effective manner, registration details of the service provider where the service provider is registered in a trade, professional or similar body.

The E-Commerce Regulation, in addition to other information, simply requires the seller to provide the consumers with his contact details, including the sellers email address, this is commendable. However, if these requirements are strictly provided for in the FCCP Act (which will be a general consumer protection statute when passed) then it might be too stringent on sellers in the traditional market who might not already have an email and does not care to have one. Therefore, if this requirement is to be included in the FCCP Act, it should be restricted to sellers who sell goods online. Section 26 of the Consumer Protection Act of the Republic of South Africa (CPA SA) has provisions mandating sellers to provide sales record to consumers of goods or products just like in the FCCP Act. However, Section 26(1)(a) provides that the requirement to provide sales record does not apply to transactions which Section 43 of the Electronic Communications and Transactions Act (ECTA SA) 2002³⁸ applies to. Therefore, Section 26(1) (a) effectively puts the CPS SA outside the scope of this part of the paper as Section 43, which is in chapter vii of the Act, deals with consumer protection in the context of electronic transactions. Section 43(1) (a)-(g) of ECTA SA stipulates that a supplier/seller of goods or services which is provided by electronic means must provide consumers with the certain information on the website where the products are offered. The information includes the full name and legal status of the supplier, the physical address, telephone number, website and email address. It also requires the seller to inform the consumer and provide details of membership of any self-regulatory or accreditation bodies to which the seller belongs or subscribes to. In the case of a legal person, the consumer should be informed of the business's registration number, place of registration and physical address where the seller will receive legal services of documents. Information requirements about the seller as provided in section 43(1)(a)-(g) is quite robust and without the unnecessary discretion as in the UK's Consumer Contract (Information, Cancellation and Other Charges) item (c) of the second schedule.

6. Information about the Product

Consumers should be provided with complete description of the goods they propose to purchase. The information should be clear and sufficient enough to aid consumers make informed decisions. This is especially because, as a result of the virtual nature of the internet, consumers do not usually have the opportunity to physically inspect the

³⁸ The ECTA regulates electronic communications and transactions in South Africa, chapter VII deals with consumer protection while section 43 contains with information disclosure requirements

goods they intend to purchase to ensure that it meets up with their preferences with regards quality, size, color, product and other specifications.³⁹ Their transactional decisions are most often based on the description of the product as provided by the trader. Requiring the online trader to provide a three dimensional picture, which rotates to show all sides of the product and allows the consumer to read the product information of the body of product would go a long way in protecting the consumers' right to information.⁴⁰ However, it might not be realizable because of the cost implications on SMEs. Therefore the emphasis should be on simply providing one or more clear pictures of the product and including a clear description of the product, example- the size, colour, manufacturer, country of origin, the current state of the product (new, in original packaging; new, but not in original packaging; fairly used; refurbished; damaged, etc.), whether the product requires additional components to be functional (e.g ear phones, antennas, batteries, etc) and what type. There have been instances where consumers relied on the pictures provided by the seller, but still turn out to be disappointed by their purchases because the size of the goods displayed on the website looked different from reality, probably because the picture of the product was taken at a close/far range, making it look much bigger/smaller than it really is. Therefore, to limit the challenge of consumers purchasing goods online without understanding how to use the information provided (for instance, measurements) it recommended that the online trader should be required to provide a clear picture of the product being held, or worn or placed beside an average sized person. Section 117 of the FCCP Act deals with product labeling and trade description. However, the section does not state what information is required to be included in the trade description. The Act also requires the trader of used/second-hand/re-conditioned/re-built/re-made goods to apply a conspicuous notice clearly stating the condition of the product.⁴¹ Section 199(d)–(i) requires sellers to provide consumers with sales record which should include the name or description of the product, the quantity, the unit and total price of goods including applicable taxes. For instance, the FCCP Act should explicitly list what information is required in the trade description, for instance, the colour, size, country of origin, etc. Although the FCCP Act is more detailed than the ET Bill, it is still not comprehensive enough as there is still room for improvement.

Unlike the FCCP Act, the CPA SA requires the trader to provide the consumer with trade description. It stipulates when a trade description is to be considered as having been applied to goods. It also goes on to empower the Minister to prescribe categories of goods that are required to have trade description applied to them; rules to determine country of origin of any goods; and the information that is required to be included in any trade description.⁴² When these prescriptions have been made by the Minister, the sellers whom these rules apply to must disclose the country of origin of the product, the presence of any genetically modified ingredients and any other prescribed information.⁴³ Section 24⁴⁴ does not take into consideration the information needs of consumers in the online market. Perhaps, that is the reason why Section 24 refers online consumers to section 43 of ECTA SA. Section 43 (h) ECTA SA requires online sellers to make available on their website where the products for sale are offered, sufficient description of the main characteristics of the product offered for sale to enable the consumer make an informed decision on the proposed electronic transaction. This provision is not adequate as it leaves the interpretation of 'sufficient description' to individual understanding. In the same vein the UK's Consumer Contract (Information, Cancellation, and Additional Charges) Regulations 2013 requires that the online trader should make available information on 'the main characteristics of the goods or services', to the extent appropriate to the medium of communication and to the goods or services'.⁴⁵ Although this requirement is not as detailed as expected, issues on what the main characteristics of the product entails may not arise as the UK has always made available explanatory notes and guidelines on the regulation for easy implementation of the law. The Electronic Commerce (EC Directive) Regulation does not have any provision on information about the product which is to be provided to the consumer.

7. Information about the Transaction

The consumer should also be provided with information about the transaction before the conclusion of the contract. For instance, information about the cost of the product, currency of the transaction, additional costs, payment process, shipping, delivery, return policy, privacy policy, dispute resolution mechanisms, etc. Such information influences the decision to purchase from a particular seller or not. For example, the consumer would

³⁹ Ihuoma Ilobinso, Protecting Consumers in the Online Market from Unfair Contract Terms: The Nigerian Perspective, 19(1) *Nigerian Journal of Contemporary Law* (2018) 51-69.

⁴⁰ OECD, Best Practice, supra note 46

⁴¹ Section 118 FCCP Act

⁴² Section 24 (4) CPA SA

⁴³ Section 24 (5)(6) CPA SA

⁴⁴Section 26 CPA SA requires sellers to provide sales record which discloses the name or description of the product, the quantity, the unit and total price of goods including applicable taxes just like in Section 199 (d) – (i) FCCP. However, Section 26 CPA SA does not apply to electronic transactions because the fall within the scope of Section 43, ECTA SA.

⁴⁵ Consumer Contract (Information, Cancellation and Additional Charges) Regulations 2013, Schedule 2.

be able to decide whether he wants to wait for a couple of weeks to receive purchased goods which are to be shipped from China or whether he would rather purchase from a seller who will be shipping from Lagos within days but at a higher cost. Similarly, section 116 (1) of the FCCP Act contains provision on the disclosure of price of goods and services. It provides that an undertaking shall not display any goods or services for sale without adequately displaying to the consumer a price (expressed in the currency of the Federal Republic of Nigeria) of those goods or services. It goes on in Section 116(2) to explain how the requirement on the disclosure of price can be achieved. Section 116(3) also provides that a consumer shall not be required to pay a price for any goods or services higher than the price displayed for them. It further states that if more than one price is concurrently displayed, the consumer shall pay the lower or lowest of the prices displayed. The provisions of the FCCP Act on the display of price are quite similar to the provisions in section 23 of the CPA SA, although the CPA SA is more detailed. In addition to the basic provisions also contained in the FCCP Act, the CPA contains provisions on instances when the suppliers will not be bound by price displayed. However, as stated earlier, Section 23 does not apply to transactions which are within the scope of section 43 of the Electronic Communications and Transactions Act (ECTA), this includes consumer electronic transactions.

The ECTA, on the other hand, mandates suppliers who offer goods and services by way of electronic transactions to provide the consumer with information about the transactions.⁴⁶ The required information include: the full price of the goods or services, including transport costs, taxes and any other fees or costs; the manner of payment; any terms of agreement that will apply to the transaction and how the terms may be accessed, stored and reproduced electronically by consumers; the time of dispatch or delivery; the manner and period within which consumers can access and maintain a full record of the transaction; the return, exchange and refund policy of that supplier; any alternative dispute resolution code to which that supplier subscribes and how the wording of that code may be accessed electronically by the consumer; the security procedures and privacy policy of that supplier in respect of payment, payment information and personal information; where appropriate, the minimum duration of the agreement in the case of agreements for the supply of products or services to be performed on an ongoing basis or recurrently; and the rights of consumers in terms of section 44, where applicable. The provisions of the ECTA SA is commendably more comprehensive than the Nigerian FCCP Act as it contains requirement on price disclosure, information on delivery and performance, the return/exchange/refund policy of the business, dispute resolution mechanisms, privacy policy, the consumers rights and obligations, the sellers rights and obligations, and general information on the terms of the contract.

8. Communication and Presentation of Consumer Information

In consideration of factors like information overload and failure of consumers to read and understand information provided, attention needs to be paid to the timing, design and presentation of information to consumers. Consumers should only be presented with information that they need at the moment when it is relevant to them.⁴⁷ It should be presented in a manner that allows for easy access before and after they enter into the contract.⁴⁸ For instance, information about the product should be positioned at a central place on the first page of the website. Information about the seller and the transaction should be made available to consumers via a well-labeled link on the first page of the website and should also be easily accessible from all other pages. The essence of insisting that all relevant information are presented or accessible from the first page of the website is to ensure that consumers have all the relevant information to aid them make informed decisions before entering into the contract. The FCCP Act does not explicitly require the trader to provide the consumer with information about the product, the seller or the transaction before or after the consumer enters into the contract. Rather it states that the seller shall provide a written sale record of each transaction to the consumer to whom any goods and services are sold to. The sales record should contain information about the product, trader and transaction.⁴⁹ However, the use of the past tense 'sold' and 'supplied' in the provision indicates that the sales record should be provided to the consumer after the transaction has been entered into. Regulation 14(2) of the Consumer Contract (Information, Cancellation and Additional Charges) Regulation requires a trader in a distance contract concluded by electronic means where the consumer is obligated to pay to provide information about the product and the transaction to the consumer before the consumer places the order. Unfortunately, the information to be provided to the consumer prior to the contract does not include information about the trader. The Regulation also requires the trader to provide the consumer with confirmation of the contract in a durable medium⁵⁰ within a reasonable time after the conclusion of the contract, but not later than the time of delivery of any goods supplied under the contract.⁵¹ The

⁴⁶ Section 43(1)(i)-(r) and (2)

⁴⁷ M.B.M. Loos, N. Helberger et al, *supra* note 39

⁴⁸ *ibid*

⁴⁹ Section 119 FCCP Act

⁵⁰ Information is provided in a durable medium when the information can be stored, accessed easily and reproduced at convenience. For instance, sheet of paper, brochure, floppy disk, CD-ROM, DVD, Computer Hard Drive, Email, etc.

⁵¹ Regulation 16 CCA

confirmation must include all the information referred to in the second schedule of the Regulation⁵² unless the trader had already provided the consumer with this information on a durable medium prior to the conclusion of the contract.

9. Right to Plain and Understandable Language

Section 115 of the FCCP Act contains a presentation provision. It stipulates that where the Act or any other law⁵³ requires that a notice, document or visual representation is to be produced or provided to a consumer, such information is to be presented in the prescribed form. If there is no prescribed form, then it should be provided in plain and understandable language. Most information disclosure requirement provisions usually contain this general requirement that information provided should be clear, easy to understand and in plain language.⁵⁴ The purpose of this provision is to ensure that communication to consumers is done in a clear and effective manner⁵⁵ so that consumers are able to read and understand the terms and all other information before becoming bound by them. It seeks to advance fairness in the actual process of contracting so that consumers can protect their own interests when dealing with sellers.⁵⁶ The campaign for the use of plain language (the plain language movement) in consumer contracts dates as far back as the 1970's and has persisted till date.⁵⁷ Section 115 FCCP Act elevates the presentation provision from being merely a guidance on how information should be given to being a fundamental consumer right. Section 115 (2) FCCP Act explains that an information will be considered as being in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the information is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance, and import of the information without undue effort. It further provides that when determining whether information is in plain language or not, the following factors should be taken into account: the context, comprehensiveness, organization, form, style, vocabulary, usage and sentence structure of the notice, document or visual representation.⁵⁸

Some commentators have commended this exact provision in the CPA SA⁵⁹ for taking into consideration, not just the words of the information but also the context, structure, vocabulary, style and the general outlook.⁶⁰ In other words, information provided in fine prints or in legalese, technical or archaic language may not be considered to be plain.⁶¹ Whereas, some other commentators have criticized the provision for being too broad, as it does not provide much direction to drafters as to what is specifically required of them.⁶² It leaves more to be desired as a number of phrases require further clarification. For instance, who is an 'ordinary consumer'; what does the phrase 'average literacy skills' imply bearing in mind the level of illiteracy in Nigeria and the possibility that some members of the illiterate population may engage in e-commerce using symbols and voice-based web systems. How does the seller determine whether the language of his consumer contract can reasonably be considered to have met the standard of the 'ordinary consumer' with 'average literacy skills' and 'minimal experience'? How does a seller gauge what constitutes 'undue effort'? Will the consultation of an advisor or the use of a dictionary be considered to cost the consumer 'undue effort'? Will the use of a translator by a consumer who does not read English language be considered as 'undue effort'?

The publication of guidelines by the Commission on methods for assessing whether the information provided satisfies the 'plain language' requirement as stipulated in section 115(3) FCCP Act should provide the much needed clarification. However, what is the guarantee that the Commission will act speedily bearing in mind the 'Nigerian factor' and the possibility of the Commission towing the path of their South African counterpart- National Consumer Commission (NCC) who till date have not yet published a guideline as suggested by section 22(3) CPA 2008. However, if the Commission decides to publish a guideline on how to assess whether information/contract is in plain language or not, it has to define and explain who an 'ordinary consumer' is, clarify what the different classes of consumers are so that the information provider can easily identify which specific class of consumers the information is intended (this is because the provision presupposes the existence of different classes of consumers);⁶³ state what the criteria should be in determining literacy skills and the level of experience of

⁵² Information about the product, trader and transaction.

⁵³ In other words, this section only applies to information required by legislation only.

⁵⁴ G. Straetmans, *supra* note 28

⁵⁵ P. N. Stoop and C. Churr, *Unpacking the Right to Plain and Understandable Language in the Consumer Protection Act 68 Of 2008*, 16(5) *Potchefstroom Electronic Law Journal* (2013) at 528.

<https://www.ajol.info/index.php/pelj/article/view/101894> accessed 10 January 2019.

⁵⁶ *ibid*

⁵⁷ *ibid*

⁵⁸ Section 115(2) FCCP Act

⁵⁹ Section 22 CPA SA

⁶⁰ F. Gordon and C. Burt, *Plain Language*, 10(4) *Without Prejudice* (2010) 59-60.

⁶¹ P. N. Stoop and C. Churr, *supra* note 82

⁶² *ibid*

⁶³ J. Bernard, *In search of the Ordinary Consumer and Plain Language in South Africa*, 4 *Journal of Texas Consumer and Commercial Law* (2014) 1-14 at 5

consumers; and what will constitute 'undue effort'. Section 115 FCCP Act is an exact replica of the presentation requirement in section 22 of the CPA SA, except for section 22(3) CPA which requires the Commission to publish the guideline for public comments. This is suspiciously absent from the FCCP Act.⁶⁴ The benefits of receiving public comments on the guideline cannot be overemphasized as this will ensure that the interests of all stakeholders are adequately represented.

The presentation provisions in Nigeria's FCCP Act and South Africa's CPA differ from the provisions in the United Kingdom's electronic consumer contract regimes.⁶⁵ The UK's Regulation 13(1) of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations (CCR) simply states that before the consumer is bound by a distance contract, the seller must give or make available⁶⁶ to the consumer the information required by the regulation in a 'clear' and 'comprehensible manner', and in a way appropriate to the means of distance communication used (emphasis is mine). In the same vein, regulation 9(1) of the Electronic Commerce (EC Directive) Regulations provides that where a contract is to be concluded by electronic means a seller shall, prior to an order being placed by the buyer of a product, provide to that buyer in a "clear", "comprehensible" and "unambiguous manner", the required information. The Regulations do not prescribe how the requirement to make information "clear", "comprehensible" and "unambiguous" should be met. This has been criticized by commentators as being unquantified, vague and too general, leaving broad discretion to the judges on how to interpret it.⁶⁷ Notwithstanding the lack of details, Regulation 13 (1) CCR should be commended for instantly providing consumers with a remedy where the seller fails to comply with the provision.

10. Conclusion

While it is agreed that the current information disclosure model does not currently achieve the desired impact on consumer decision, this regulatory technique still remains essential for consumer e-commerce. This is largely because e-commerce is a distance contract where purchases take place with little or no personal interaction and opportunity to physically examine the product. The consumers' transactional decision is based on information provided by the trader. Therefore, the concerns about information disclosure as a technique for protecting consumers who purchase online should go beyond the consideration of whether the use of this technique is still necessary. Rather, the consideration should be on how this technique can be rejuvenated and made more effective. In other words, consumer protection regulations should not only mandate the provision of relevant information to consumers, but they should also require that information be presented in an attractive and easily comprehensible manner so as to avoid information overload.⁶⁸ encourage consumers to utilise the information provided; and facilitate comparison by consumers and interested third parties, such as reviewers and consumer groups. Therefore, this paper recommends that all online sellers should be mandated to provide consumers with the requisite information in a clear manner using three standard forms which require the sellers to fill them out with information about the product, trader, and transactions. The forms should be provided for at the appendix of the relevant legal framework. To promote uniformity, ease comparison, and ensure that the form is not clustered with irrelevant information that might distract consumers; the forms should be made up of closed-ended questions. The filled-out form which contains information about the product should be situated at the first page of the e-commerce website where the image of the product is displayed. The forms which contain information about the trader and the transaction should be situated at other pages but can be easily accessed through well labelled links from any page of the website. To ensure that the parties can access the provided information in the future should they need it, these forms should also be provided to the consumer within a reasonable time after the contract has been entered and not later than at the time of delivery in a durable form. Finally, to ensure compliance, the consumer should be empowered to cancel the contract where it can be proved that the trader did not comply with any of the requirements.

⁶⁴ Section 22(4) CPA

⁶⁵ Electronic Commerce (EC Directive) Regulations 2002 No. 2013 and The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 No. 3134

⁶⁶ Regulation 8 provides that something is made available to a consumer only if the consumer can reasonably be expected to know how to access it.

⁶⁷ G. Straetmans, *supra* note 28; BER and NCC, *supra* note 20

⁶⁸ M. A. Edwards, *Empirical and Behavioral Critiques...*, *supra* note 23