

**REGIONAL INTEGRATION AND CONSUMER WELFARE: AN
APPRAISAL ON THE EAST AFRICAN COMMUNITY LAWS**

**BY
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(G62/71070/08)**

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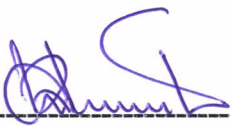
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DECLARATION

I, **Tom Mutei**, do hereby declare that this is my original work, and that the same has not been submitted for the award of a degree in any other University.

Signed: _____


Dated: _____


This thesis has been submitted for examination with my approval as University Supervisor

MR. YASH VYAS

Signed: _____

Dated: _____


DEDICATION

To my wife Mutheu and my children Ndindi, Ndaisi and Solovea for their inspiration and support.

ACKNOWLEDGEMENTS

Firstly I dutifully acknowledge the guidance, supervision and support of my supervisor Yash Vyas who dedicated a lot of his time, effort and knowledge to enable the success of this study.

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TABLE OF ABBREVIATIONS

1. E.A.C-----East African Community
2. E.A.C.C.P-----East African Community Customs Protocol
3. EU-----European Union
4. ASEAN-----Association of South East Asian Nations
5. MERCOSUR-----The Southern Common Market
6. SQMT-----Standards, Quality, Assurance, Metrology and Testing
7. KEBS-----Kenya Bureau of Standards
8. TBS-----Tanzania Bureau of Standards
9. WTO-----World Trade Organisation
10. C.C.K-----Communication Commission of Kenya
11. HACCP-----Hazard Analysis Critical Control
12. OHSAS-----Occupational Health and Safety
13. CIN-----Consumer Information Network
14. WMA-----Weights and Measures Agency
15. TFDA-----Tanzania Food and Drugs Authority
16. ASCORWA-----Consumer Association of Rwanda

ABSTRACT

This study is premised on the assumption that efficient consumer protection is important for the full realization of the benefits of economic integration and more so for the East African Community whose member states are developing countries.

Based on the foregoing assumption, the study seeks to examine the law as one of the various factors that influence and determine the level of consumer protection both at the national and community level. This obtains from the hypothesis that a unified, harmonized and well developed consumer protection legal regime is one of the major determinants of the full realization of the primary objective of economic integration which is the improvement of welfare.

On that basis, the study proceeds to examine from the standpoint of the East African consumer, the various treaties, protocols and other pieces of legislations both at the national level of member states and at the East Africa Community level that relate to consumer protection. The extent to which national and community laws have safeguarded consumer interests in the integration process is investigated. For comparative purposes, the study relies on experiences of European Union, MERCOSUR and ASEAN, and explores ways in which advances made in such regional blocs are useful to strengthening the East African legal framework.

The findings reveal that there is generally a fragmentary structure of laws in the municipal laws of respective member states. At the community level, the efforts towards consolidation of laws are influenced by policy to enhance regional trade and investment rather than protect consumer interests. Therefore the incorporation of the consumer protection mechanism into law is inadequate both at the municipal and community levels.

The study makes specific recommendations to be effected in or within the legal regime governing the East African Economic Integration with a view of having a comprehensive consumer protection legal regime developed and entrenched in the integration process. This will be necessary for the full realization of the benefits of economic integration stated above.

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LIST OF STATUTES

1. The East African Competition Act
2. The East African Standards, Quality Assurance, Metrology, and Standardization Act 2006
3. The Standards Act Cap 496
4. The Weights and Measures Act Cap 513
5. Trade Descriptions Act Cap 505
6. Pharmacy and Poisons Act
7. Food Drugs and Chemical Substances Act
8. Kenya Communication Act
9. Restrictive Trade Practices Monopolies and Price Control Act
10. The Electricity Act Uganda -1999
11. The Uganda Communications Act -1997
12. The Uganda Standards Act -1983
13. Tanzania Standards Act No. 3 of 1975
14. The Weights and Measures Act
15. Tanzania Food and Drug Authority Act
16. The Fair Competition Act No. 8 of 2003

TREATIES AND PROTOCOLS

1. Treaty for the Establishment of the East African
2. The Maastricht Treaty -1993
3. The Treaty of Amsterdam -1999
4. The Treaty of Asuncion -1991
5. The Protocol for the Establishment of the East African Customs Union
6. East African Protocol on Standardization, Quality Assurance and Testing.

CHAPTER ONE: INTRODUCTION TO THE STUDY

1.1 BACKGROUND

Business transactions have increased in the East African region as the efforts of economic integration are actualised. Regional trade between member states mean that Ugandan citizen increasingly consumes goods and services from Kenya, Burundi, Rwanda hence he participates in several transactions based on different requirements for accreditation, standards, quality assurance and labelling of goods and services. Generally, the East African consumer is exposed to different municipal laws and protective mechanisms. In Uganda consumer protection laws are contained in the Electricity Act, Uganda Standards Act, Bank of Uganda Statute and the Uganda Communications Act. In Tanzania pertinent laws are specified in the Food and Drugs Act, Standards Act and Fair Competition Act. In Kenya, consumer protection laws are stated in *inter alia*; the Trade Descriptions Act, Standards Act, Foods and Drugs Act, Pharmacy and Poisons Act, Public Health Act, Restrictive Trade Practices, Monopolies and Price Control Act, Weight and Measures Act and Kenya Communication Act. An East African consumer is therefore exposed to laws scattered in a number of statutes. There exists a fragmentary structure of municipal laws in relation to consumer protection. It is argued that a unified approach to consumer protection is desirable in light of increased trade in goods and services owing to the reality of economic integration. It is felt that such a unified application of laws serves protective function of law better rather than a fragmentary approach which exposes the consumer to low protective mechanism.

Prior to the adoption of the East African Standards, Quality Assurance, Metrology, and Standardization Act 2006(hereinafter referred to as the “SQMT Act”) and the East African Competition Act, little or no efforts had been undertaken to harmonise regional standards on the quality of goods. Understandably, more emphasis had been placed on the harmonisation of taxation laws and policy as the Treaty for the Establishment of the East African Community (hereinafter the “East African Treaty”) provides that a customs union shall be the first stage in the process of economic integration. Article 5 of the East African Treaty provides that the customs union shall be followed by a common market, then a monetary union and ultimately a political

federation. Whilst it is recognised that harmonisation of tax laws and policies is central to the establishment of customs union and a common market, it is equally important to unify laws that regulate other important economic relations like consumer protection law.

Efforts to harmonise respective municipal laws at the community level have been limited to the adoption of the SQMT Act and the Competition Act. These efforts leave out other important aspects of consumer protection including product liability and labelling. It is behind this background that this research is conducted. It investigates the extent to which consumer protection has been taken into account and how the continued process of integration has incorporated issues on consumer rights.

1.2. STATEMENT OF THE PROBLEM

Consumer laws serve to protect the consumer from misleading information by traders. Consumer protection law within respective EAC member states as currently constituted are unconsolidated. This fragmented structure of municipal laws create loopholes in the application and enforcement of national laws for the benefit of the consumer when participating in economic transactions in which consumer has a weak bargaining power.

At the Community level enactment of several pieces of legislation has addressed certain aspects of consumer protection. However, such provisions are geared towards speeding up the process of economic integration through boosting trade and elimination of trade barriers rather than consumer protection. A balance approach to the implementation of policies at the Community level ought to be pursued hence protecting the safety and health of the consumer which is equally important.

The study examines the adequacy of the consumer protection mechanism within the EAC legal framework. It explores the utility of unification and harmonisation of national laws into a consumer protection law in line with regional economic integration. The challenges posed by the approach adopted by the EAC legal framework towards consumer protection are assessed and an alternative perspective with a bias in favour of the consumers' interests is explored.

1.3. CONCEPTUAL FRAMEWORK

One of the objectives of consumer protection law is to redress the huge imbalance between the limited resources of the consumer and the resources of the company selling products to the consumer. It is applied to ensure that the consumer should have autonomy to exercise choice and that the behaviour of businessmen is regulated to ensure that they operate in a manner that allows exercise of such consumer sovereignty. The study examines the utility of the protective function of law as it explores the advantages of harmonisation of laws of member states that are party to regional economic integration agreements or treaties. The study also seeks to evaluate the utility of Treaties and legislation on consumer protection within the EAC.

Therefore the study is based on the positivist claim that law guides and justifies our conduct¹. Unlike Natural Law Theorists, Positivists view law as a matter of social fact with focus of the nature and content of law. Natural Law Theorists represent the law as enforcing natural rights and evaluate the law through assessment of its moral value. Classical positivists like Bentham and Austin rejected the natural law position as they felt that the law should be evaluated by reference to its utility rather than description of whether law is morally binding or other moral considerations².

This study seeks to evaluate the utility of law in regulating and guiding the behaviour of businessmen to ensure consumer interests are safeguarded. In particular, this study applies analysis of law with the view of assessing its normative character. It applies the approach propounded by Hart³ that law is a useful tool for guiding, justifying and prescribing conduct. It seeks to evaluate the legal validity of rules by examining their establishment in recognised sources like statutes and treaties⁴. The study evaluates municipal laws and of EAC consumer protection laws and municipal laws and the utility in regulating the behaviour of businessmen at the market place to ensure they conduct themselves in a prescribed manner. The prescribed manner that the consumer protection laws would be aiming to secure is restriction of businessmen from unfair

¹ Simmonds N.E., "Central Issues in Jurisprudence: Justice Law and Rights" 2002 Second Edition (London: Sweet and Maxwell)

² Ibid at p. 128

³ Ibid at p.130

⁴ Ibid

practices that conceal disclosure on certain information which adversely affects consumer's self determination.

1.4. JUSTIFICATION OF THE STUDY

As regional economic integration becomes a reality in East Africa, it is important to make a consideration of how this process of integration impacts on important aspects of the lives of East Africa citizens. Consumer welfare is an integral part of the public health and safety of citizens. Effectiveness and adequacy of laws that seek to protect the consumer's welfare are vital attributes in safeguarding such vital aspects of human life. The need to examine the adequacy of consumer protection laws is therefore necessary to ensure that the public is not exposed to harmful or substandard products that would affect their health and safety. With increased trade in goods and services in the region, need arises to examine legal framework on consumer protection.

There is paucity of literature on the existence of efforts on harmonization of consumer protection laws within the process of economic integration of East African States. This study seeks to address issues on harmonization, contribute to existing literature and provoke further studies in the area. Studies have been undertaken on the harmonisation of policies and strategic activities which have been broad in scope. Few studies have also been undertaken in respect of the harmonisation of regional tax laws with the aim of realisation of a customs union. However, no comprehensive study has been undertaken on importance of harmonisation of consumer protection laws towards facilitating the objectives of economic integration. This study aims to fill gaps in existing literature by specifically examining the importance of integration of consumer protection laws regionally and how such integration will enhance consumer protection complementary to protection afforded to citizenry through municipal laws.

The study also seeks to influence policy change by recommending a balanced approach to implementation of policies and enactment of laws at the Community level. The investigation is therefore important because it highlights areas that need attention and recommend reforms to ensure optimum consumer protection in the process of integration.

1.5. OBJECTIVES OF THE STUDY

The study seeks to achieve the following objectives:

- (i) To examine whether respective municipal laws of EAC member states adequately cater for consumer welfare in the integration process
- (ii) To examine efforts at harmonisation of consumer protection laws within the EAC framework and assess the adequacy of such efforts through comparative study of other regional blocs like EU, MERCOSUR and ASEAN
- (iii) To evaluate the challenges faced by EAC member states in the process of harmonising consumer protection laws and explore ways to manage such challenges
- (iv) To make recommendations on the development, enactment and entrenchment of a comprehensive, unified and harmonized consumer protection legal regime to ensure maximised benefits to the consumer

1.6. HYPOTHESES

The hypotheses to be tested in this study are;

- a. Fragmented consumer laws in respective member states negatively impact on protection of consumer rights within the EAC.
- b. Harmonisation of consumer protection laws within the EAC framework ensures that requirements for competitive trading practices, standards, quality assurance, accreditation, and metrology are enforced to safeguard consumer welfare

1.7. RESEARCH METHODOLOGY

This study has been written descriptively, analytically and prescriptively. The methodology employed in this study is quantitative.

The study relies on both primary and secondary data. As the study undertakes the review of municipal laws and Community laws on consumer protection, it relies on primary data in Treaties and Acts of Parliament.

In the analysis of the adequacy of municipal laws and Community laws in safeguarding consumer interests, the study relies on secondary data contained in treatises, journals, articles, newspapers, reports, working papers. A comparative study is also undertaken to gauge the adequacy of Community laws against best practices in the European Union. In this regard, data has been sourced from the internet and in particular, the EU, MERCOSUR and ASEAN websites. The use of quantitative methods has its weaknesses and it is acknowledged below as one of the limitations to the study.

1.7. ASSUMPTIONS AND LIMITATIONS

Although Rwanda and Burundi are member states to the EAC, the analysis in the study has focused on consumer protection laws in Kenya, Tanzania and Uganda. It is acknowledged that this is a limitation to the study. However, this is due to lack of information and data on the state of consumer laws in the two countries. Secondly, Rwanda and Burundi are new members to the EAC having joined in 2007 and therefore it is difficult to evaluate their performance of implementation of community laws having been members for barely two years. Further, internet sources in such jurisdictions have not proved to be useful due to problems of language barrier as their systems are formatted in French. There is a gradual shift to use of English but the process has been slow.

The use of quantitative methodology is a limitation as data analysis relies on physical measurement of variables. Use of both qualitative and quantitative methodology would have been desirable to ensure that the limitations of methods used in this study were checked. However, the methodology employed was convenient due to logistical considerations like time.

1.8. LITERATURE REVIEW

Literature addressing the issue of harmonisation of consumer protection law in the EAC is scarce. However, commentators have written widely on broader issues of harmonisation of laws in the process of regional economic integration in relation to efforts to unify laws in other jurisdictions. The review of literature discussed below in chronological order attempts to summarise works relevant to this study and which are useful to analysis in subsequent chapters.

Averitt and Lande (1997)⁵ discuss the thesis on the unified theory of competition law and consumer protection. Their article is about the relationship between competition and consumer protection law. Its purpose is to define each area of law, to delineate the boundary between them, to show how they interact with each other, and to show how they ultimately support one another as the two component parts of an overarching unity.

They argue that the fundamental factor in the overarching unity of consumer and competition laws is "consumer sovereignty". Competition and consumer protection law share a common purpose in that both are intended to facilitate the exercise of consumer sovereignty or effective consumer choice. Consumer sovereignty exists when two fundamental conditions are present. There must be a range of consumer options made possible through competition, and consumers must be able to choose effectively among these options.

In the article, consumer sovereignty is described as the state of affairs in which the consumers are truly "sovereign," in the sense of having the power to define their own wants and the opportunity to satisfy those wants at prices not greatly in excess of the costs borne by the providers of the relevant goods and services. The concept of consumer sovereignty goes so far as to embody at least some implicit notions about the proper relationship between the individual and the state.

⁵Averitt NW and Lande LH, Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law, *Antitrust Law Journal*, Vol.65, p. 713, 1997.

Averitt and Lande opine that on the one hand consumer protection law ensures that buyers are protected from coercion, deception, and other influences that are difficult to evade or to guard against. On the other hand, some anti-competitive practices such as price fixing, related horizontal restraints, predatory pricing, anticompetitive mergers, and unreasonable vertical restraints distort the supply of options, in the sense of imposing restrictions on the variety of prices and products that the free market would offer.

Competition laws may be understood as an activity that unreasonably distorts or restricts the options that otherwise would be available to consumers. A consumer protection violation may be understood as activity that unreasonably interferes with consumer choice among the options provided in the marketplace. These two fields of law, acting together, give consumers the tools they need to exercise consumer sovereignty effectively.

A number of benefits may flow from this unified conception of the trade regulation laws. It should make lawyers practicing in these disciplines more alert to the possibility that a case focusing on one element of consumer sovereignty will also raise issues involving the other element. It may also remind practitioners that a violation under one half of the consumer sovereignty model might sometimes best be remedied by a solution that deals with factors normally considered in actions under the other half. It also suggests that economists practicing primarily in one field should gain insights from the other. Both types of market failures seem to be of equal importance, so both would seem equally deserving of professional study.

Round and Sporer (2003) discusses globalization and consumer protection in East Asia.⁶ They argue that in the presence of market power and imperfect information, consumers will not make optimal decisions and total social welfare will fall. They suggest two policy approaches that can be used to deal with the problem. The first is to attack the root cause; using trade or competition policies to make the market more responsive to consumers' needs and to give primacy to the working of the competitive

⁶ Round D. and Sporer Z. "Globalization and Consumer Protection in South East Asia: It is a Zero sum Game?" *Asian Pacific Economic* Vol. 17, issue 2 at p. 39

process. The second approach is that if, for cultural, historic, economic, institutional or political reasons such an approach is not feasible, the government ought to intervene and enact consumer protection laws to regulate the behaviour of sellers. This paper adopts the second approach in urging the EAC member states to collectively intervene and regulate traders' behaviour.

They further argue that globalization may provide an inbuilt consumer protection mechanism of a type and potency that developing economies have not yet experienced. Government regulation has an optimum beyond which the net marginal benefit of intervention becomes negative. They argue that consumer protection evolves differently according to internal political, social, and economic pressures as well as to external forces such as globalization. Its development is normally thought of as being either top down (government regulation) or bottom up (where grass-root activism either forces a change in behaviour by firms or becomes a populist avalanche that cannot be ignored by government).

They propose four steps of consumer protection, which are;

- a. Direct empowerment of consumers through consumer education and dissemination of information through the media.
- b. Adherence to global standards through product testing and safety evaluation by independent authorities, complaint handling, lobbying for consumer rights to safety, correct information, representation, redress, accurate labelling etc. It is noteworthy that the East Africa may not have the capacity to comply with these global standards.
- c. Voluntary self-regulation by firms or companies themselves. Firms may have a self-accreditation system whose results are publicized. This may make companies improve their consumer interest concerns. Firms need first to have the right attitudes that ensure the protection of the consumer interests. They should develop a consumer protection charter to guide their operations.
- d. Regulation by government through legislation and the creation of a suitable bureaucratic agency and finally enforcement. Direct government intervention, while sometimes essential is necessarily the optimal way to address consumer protection problems. This option, however, if not cautiously implemented may affect free trade

Round and Sporer's paper discusses key steps that may be adopted in consumer protection in an integration process. This study relates specifically to East Africa, with its peculiar geographical, social, political and economic contexts different from East Asia. However, Round and Sporer's discussion is useful in an examination of what steps can be adopted for optimal consumer protection in the process of East African integration

Sylvan (2004)⁷ states that markets have two sides, the supply and demand sides. These sides are equally important in order to create an effective market. Supply side is the competition side and the demand side is the consumer side. She argues that theory and empirical research have shown that firstly; competition is good for consumers, secondly, its good for business, and thirdly, anti-competitive conduct is bad both for businesses and consumers. On the demand side she distinguishes between three types of consumer protection regulation.

First, the equitable rules which according to her are consumer protection laws that make unlawful conduct such as harsh or oppressive collection of debt, unconscionable conduct towards consumers and they include areas such as cooling off periods for selling situations where undue pressure may be present door to door sales.

The second category according to her is 'sensible society laws.' These are the community protections that go to basic societal standards such as safety of products like electrical appliances or toys and food safety.

The last category of consumer protection goes to "market conduct and information rules". These rules are consumer protections, but many of them are also protections for business against other business that seek competitive advantage by trickery.

Sylvan acknowledges that because of the way industrial economists work, all over the world, the focus in terms of competition outcomes has tended to be on the supply side

⁷Sylvan L, "Consumer Regulation: How do we know it is Effective?" Australian Competition and Consumer Commission, A speech to the National Consumer Congress, Melbourne, 15th March 2004, <http://www.accc.gov.au/content/index.phtml/itemId/508102> last accessed 12th December 2008.

but the two sides are complementary. She states that the same way that the misuse of a company's market power inhibits vigorous competition, it also inhibits consumers from exercising the little bargaining power that they have. Sylvan discusses how consumer protection and competition regulation complements each other. Since this study is interested in sustainable development of all sides of the divide then her arguments shall be useful in my discussions.

The Consumer International Report (2005)⁸ states that consumer protection has been part of the European Union strategy for the last two decades. The EU believes that consumers are key economic players and it therefore recognizes their fundamental rights and actively protects their interests. The EU experience has shown that consumer confidence is the main determinant of the success of the single market. As such, consumer policy is very much an integral part of the general single market policy. The evolution of consumer protection in the EU can be traced through three consumer policies; consumer policy 1991-2001, consumer policy 2002-2006 and Health and Consumer policy 2007-2013. The 1991 policy started with the recognition of consumers' rights and the realization that consumers need protection in the environment of the single market. The focus was more on the practical aspects such as consumer education and emergency response. The 2002 policy placed emphasis on the importance of the consumer protection to the effective workings of the single market. The focus was on closer cooperation and commitment towards deeper integration as is evident in the harmonization efforts, effective enforcement measures, and the emphasis on consumer participation in the policy making process. The latest 2007 policy combines health and consumer protection.

The paper outlines the highly developed nature of consumer protection efforts of the European Union. In the EU parliament there are two consumer related committee, the Committee on Environment, Public Health and Food Safety and the Committee on Internal Market and Consumer Protection. At the level of the Council is the employment, social policy, healthy and consumer affairs committee. At the commission level is the health and consumer protection Directorate-General responsible for the areas of public health, food safety and consumer protection. Its

⁸Consumer International "Consumer Protection in the ASEAN Free Trade Area" Asian Pacific Consumer Journal Vol. 42 (4) 2005

main responsibility is to ensure that laws are up to date and being applied effectively in all member states. It also ensures that the single market works for the benefit of consumers and acts to protect and improve citizens' health.

Understanding the EU consumer protection model is vital in this research because it presents an example that may be emulated by the East Africa Community. The report is of particular importance to this study in its comparative analysis of EU consumer protection with the current consumer protection regime in the EAC.

Zellner⁹ argues that there is nothing like free trade in the world. From the consumer protection view, he argues that there is some evidence which suggests that a fair degree of government involvement in trade is required to promote certain social and economic objectives. This involvement has important implications for households, as consumers, as wage earners, and as tax-payers.

Many companies that have sought protection from imports have claimed they have been injured by unfair competition-dumping, subsidies or predatory pricing. He argues that there are many reasons why nations may protect an industry from foreign competition which include; national security reasons, because of the stage of development in the industry lifecycle, national pride and desire to be self sufficient. Some countries in the East Africa Region already engage in protectionist activities and give some of these reasons to justify their actions.

On national security, he argues that food security is always a high priority and some nations go to great lengths to ensure self sufficiency in the food supply to the extent of encouraging uneconomic productive capacity rather than being dependent on other nations. World-wide food security is an important issue affecting consumers, both for humanitarian reasons and because it may affect domestic food security. He says that consumers have an important role to play in ensuring food security. Some of the options for consideration in addition to high cost self-sufficiency are food reserves, two tier pricing, government trading and export embargoes.

⁹Zellner J A, "International Trade and Consumers: Some Alternatives, Economic Research Service, USDA" <http://ageconsearch.umn.edu/bitstream/17665/1/ar830172.pdf> last accessed on 12th December, 2008

Zellner raises serious issues that need to be taken into account in consumer protection within the East Africa community. Issues of food security, national development and pride are issues that should be taken into account. My study shall also give due regard to these issues.

Waller (2005)¹⁰ argues that competition and consumer protection laws are intimately related, constitute two sides of the same coin of consumer sovereignty hence economic justice. According to him consumer protection and competition law share a common purpose, or at a minimum, share an imperative not to work at cross-purposes. There is also an increasing need for international cooperation in both fields. Most importantly, the opportunity exists to engage the public and articulate the benefits of both bodies of law in common sense terms to rally support for a more competitive and consumer friendly economy.

Competition law deals with the preservation of competitive markets. In all the nearly one hundred countries that have some recognizable form of competition law, there are some common features between consumer protection and competition laws. Anticompetitive agreements that injure competition are discouraged, with price fixing, bid rigging, and market division by competitors being the prototypical violations. Acts of monopolization, attempted monopolization, or the abuse of the dominant position also are prohibited, with the litigation over Microsoft's behaviour in the United States and the European Union being the most prominent recent example. Mergers and acquisitions that pose a serious risk of leading to either anticompetitive collusion or a dominant position typically are discouraged as well. Consumer protection law covers a broader and more diffuse bundle of areas. Unfair and deceptive advertising is prohibited, as are acts of outright fraud. Consumer credit, debt collection, and warranty transactions are regulated in various ways, but primarily through mandatory disclosures of terms and charges. Increasingly, identity theft and the use of the Internet for fraudulent and deceptive purposes have been the focus of consumer protection law as well.

¹⁰Waller S W "In Search of Economic Justice: Considering Competition and Consumer Protection Law" 2005 Vol. 36 Loyola University Chicago Law Journal 457

He concludes that bringing together these two bodies of law can indeed clarify points of law in a market economy. However, the exercise will not be worth it unless the focus remains on real, demonstrable value to individual consumers, and not merely hypothetical consumer welfare in the guise of wealth maximization.

The article by Waller is important as it enables one understand the significance of the study's inclusion of the draft Competition Bill as an integral part of strengthening the consumer protection mechanism in the EAC legal framework.

Cseres (2006)¹¹ argues that opening up markets to competition does not automatically lead to more consumer benefits. When consumers have insufficient information about the choices they can make or they face high search and switching costs they are not able to take the advantages made possible by effective competition and to activate competition. Information failures, therefore, can distort the working of an otherwise competitive market and can lead to sub-optimal effects and inefficiency.

He states further as follows that the main focus of competition law is market failures originating from collusive or exclusionary practices. By prohibiting anti-competitive behaviours competition law enhances the competitive structure of markets for goods and services. It maintains the availability of consumer choice on the market by lowering prices and widening the range of products and services for consumers.

However, even in competitive markets serious consumer problems may arise. These are principally related to information failures that may lead to situations where consumers are not able to take the advantages made possible by effective competition. Consumers might have insufficient information about the choices they can make or they face high search and switching costs and consequently, conclude bad deals or get disconnected to certain markets. In such situations consumers are unable to activate competition and this ultimately retards competition.

¹¹ Cseres K.J., "The Impact of Consumer Protection on Competition and Competition Law; the Case of Deregulated Markets, Amsterdam Center for Law & Economics" Working Paper No. 5 of 2006. Available at <http://ssrn.com/paper=903284>, accessed on 20 January 2009.

Consumer protection has a comparative advantage in addressing information failures like imperfect information and information asymmetries. Its true focus is to provide good quality and cost of consumer information and to make well-informed decisions possible.

In markets characterized by repeat consumption, consumers who have previously purchased a good or a service from one firm would incur certain costs if they purchased the competitor's product. In order to avoid these costs consumers remain loyal to their previous supplier and as a result firms retain a certain degree of market power over repeat-purchasers.

Switching from one supplier to another costs money and time. Switching costs can be financial, psychological or they can be related to time. Actual or perceived switching costs maybe a reason for consumers' immobility, as they remain locked-in to one supplier. Switching costs also influence firms' behaviour. The costs of switching include search costs, i.e. finding the best deal, transactions costs of actually making the change and psychological costs related to uncertainty.

He concludes that empowered consumers are a relevant part of a successful market. When they are able to shop around and they are able to compare different deals in order to reach a decision that best suits their circumstances. Empowered consumers are essential to encourage and facilitate competition and ultimately to raise consumer welfare.

Spencer, Neil and Kati's article is important as it stresses the importance of educative function consumer protection institutions can play in ensuring that consumers are empowered and make informed choices in exercising consumer sovereignty

Jason (2006)¹² discusses the theory of consumer sovereignty in the modern global era. He discusses three assumptions that underlie the idea of consumer sovereignty. First, consumers are rational in the sense that they attempt to make optimal choices given their preference structures. Second, consumers are informed in the sense that they have enough knowledge to make optimal choices. Finally, consumers are able to

¹²Jason L., "Consumer Sovereignty in the Modern Global Era" 2006 Journal of Private Enterprise

purchase goods in a competitive marketplace. He also agrees with a political writer Cobb¹³ who stated that democracy depends on a free market economic system, which in turn is based on consumer sovereignty, which is really 'voting with dollars' for our favourite products and services. Political sovereignty is necessarily tied to the people's right to sell or buy whatever they find useful" because consumer sovereignty facilitates democratic participation-and provides an important line of defence against an overweening state. This theory by Jason is one of the theories that underlie this study.

Tenga (2007)¹⁴ examines the consumer protection regime in Tanzania and the capacity of the principal national enforcement institution, the National Consumer Advisory Council (NCAS). He also gives an overview on the adequacy of the consumer protection laws prior to the establishment of the NCAS vide the enactment of the Fair Competition Act in 2003. The commentary by Tenga is useful as it gives an insight into the strengths and weaknesses of consumer protection laws and national institutions charged with implementation and enforcement. The article is of particular usefulness to this study when analysing the state of consumer protection laws at the national level.

Marques¹⁵ discusses consumer protection in the context of regional integration. He argues that some time ago, Consumer Protection was a matter of national Law, since the activities of most people were limited to the territory of their own country, a typical national relationship with no international element but today's regional and national reality is different with the opening of markets to foreign products and services, with increasing economic integration, regionalization of trade, transport facilities, mass tourism, growing telecommunications, complete network connections and electronic Commerce, inevitably consumption crosses national borders. He further contends that with the above scenario, foreign goods are on supermarkets

¹³Cobb J., The Real Threat to U.S. Sovereignty, Heritage Foundation Lecture No. 497, <http://joecobb.com/essays/the-real-threat-to-us-sovereignty> last accessed 23rd February 2009.

¹⁴ Tenga R.W. "Consumer Protection in Tanzania: Challenges and Prospects for National Consumer Advisory Council" available at <http://scribd.com/doc/18533159/Tenga-rw-Consumer-Protection-Tanzania-Challenges-and-Prospects-for-NCAS-May-2007> last accessed 29th September 2009.

¹⁵ Insufficient Consumer Protection in the Provisions of Private International Law-The need for an Inter-American Convention (CIDIP) on the Law Applicable to certain contracts and Consumer Relations.

shelves, services are offered by providers across borders using electronic and print media, the internet and mass advertising in the day-to-day lives of most citizens. Further, the consumer in this context cannot be at a disadvantage in terms of safety, quality, guarantees or access to justice merely because he or she buys products or uses services from another country. He argues that integration should be accompanied by a unified and harmonised Consumer Protection legal regime to ensure that the intended benefits of integration like improved consumer welfare is fully achieved. This theory is important to this study as it is directly relevant to the research problems set out herein.

From the foregoing and related literature it is apparent that the issue of consumer protection in regional economic integration in East Africa has not been specifically addressed. Therefore the aim of this study is fill the gaps in existing literature.

CHAPTER BREAKDOWN

CHAPTER 1 INTRODUCTION TO THE STUDY

This chapter outlines the background to the study, states the research problem and itemizes the research questions. It then discusses the conceptual framework upon which the study is grounded. Justification of why the research area was chosen is discussed. The chapter proceeds to detail the research objectives, hypotheses and research methodology. The chapter concludes by detailing the material referred to for analysis in the literature review section.

CHAPTER 2: OVERVIEW OF CONSUMER PROTECTION LAWS IN THE EAC REGION

This chapter introduces the concept of consumer protection, its scope and application. It examines respective national laws on consumer protection with particular emphasis on Uganda, Tanzania and Kenya. It evaluates the level of protection accorded to consumers under the legal structure of respective national laws.

CHAPTER 3: HARMONISATION OF CONSUMER PROTECTION LAWS IN THE EU, MERCUSOR AND ASEAN

This chapter undertakes a comparative study between the East Africa Community and the European Union on harmonisation of consumer protection laws. The European Union's consumer protection mechanism is highly developed in the world and therefore serves as a precedent in developing the East Africa Consumer protection regime. The chapter also briefly examines the MERCOSUR model which is useful because it is applicable in developing countries similar to those in the EAC.

CHAPTER 4: HARMONISATION OF CONSUMER PROTECTION LAWS IN THE EAC

This chapter examines the efforts of harmonisation of consumer protection laws within the EAC integration process. It discusses the adequacy of such efforts and the challenges faced in harmonisation of such laws.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

This chapter shall detail conclusions drawn from the study. Based on that, this study will proceed to make recommendations on what measures can be adopted to improve and strengthen consumer protection mechanisms within the EAC legal framework.

2. CHAPTER TWO: CONSUMER PROTECTION LAWS IN THE EAC REGION

INTRODUCTION

This chapter outlines respective municipal consumer protection law in the EAC region with particular emphasis on Kenya, Uganda and Tanzania. It seeks to define the scope of consumer protection law, its objective and the concept of consumer rights. The chapter assesses the structure of municipal laws and in particular it examines the effect of fragmented municipal laws on consumer protection.

2.1. RELATIONSHIP BETWEEN NATIONAL LAW AND REGIONAL LAW

The study of municipal laws in the context of regionalism is important as harmonisation of laws regionally is unlikely to be effective where municipal laws and national institutions are themselves weak. Further, enforcement of proposed regional law would be achieved in the respective nations hence it is important to identify the strength of national laws in facilitating enforcement and capacity of such institutions.

An examination of municipal consumer protection laws is important because a regional law is inextricably linked to municipal laws of member states. The success and/or shortcomings of legal systems at the national level are bound to have a proportional effect at the Community level. Why this is important is that given the varied levels of protection at the National levels in the five countries, the asymmetries present challenges both to the Member States when relating to each other and at the community level when it comes to integration.

The relationship between municipal law and international law raises theoretical question on the application of dualism and monism¹⁶. Both theories are premised on the assumption that there is a common field in which international law and municipal law co-operate simultaneously in regard to the same subject matter. Problem arises where there is a conflict between two sets of laws, which system is supreme. According to the theory of dualism, municipal law provides that international law applies in whole or in part within the jurisdiction. In the case of conflict between

¹⁶ Brownlie I. (2003) *Principles of Public International Law* Sixth Edition (London: OUP) at p. 32

international and municipal law, a municipal court would apply municipal law. There are divergent views on the definition of monism. Lauterpacht defines monism as an assertion of the supremacy of international law even within the municipal sphere and the individual as a subject of international law. International law is seen as the best available moderator of human affairs and the more effective means for safeguarding the welfare of individuals.

Kenya employs dualism in its international relations as confirmed in the decision in the case of **Okunda and another v. Republic**¹⁷. The case involved a constitutional reference to the High Court of Kenya to determine the issue whether requirements under international law were supreme over municipal law. Under section 8/1 Official Secrets Act 1968 of the East African Community provided that the consent of the Counsel to the Community was necessary for prosecutions under that Act. The Kenyan Attorney General brought prosecutions against the appellants and the question arose as to whether the Attorney General could institute such prosecution without the consent of the Counsel to the Community which question was referred to the High Court. Before the Court for consideration was the requirement under section 26 (8) of the Constitution which provided that the Attorney General was not under the control of any person in the exercise of this functions. Therefore it was submitted for the Attorney General that section 8/1 of the Official Secrets Act was inconsistent with section 26(8) of the Kenyan Constitution which prevailed since the East African Community was a creation of Parliament which is itself subject to the Constitution. It was argued for the Community that section 8/1 was purely procedural and any conflict should be resolved in favour of the Community. The Community's argument was premised on Article 95 of the Treaty that Partner States were required to pass legislation to give effect to the Treaty and confer on Acts of the Community the force of law in their territories. The Court held that there was conflict between the AG's function and the requirement of consent. Secondly, there is no conflict between the Treaty and the Kenyan Constitution. Thirdly, "Act of Parliament" in the Treaty of East African Cooperation Act section 10(3) does not include the Kenyan Constitution. Laws of the Community are other laws within the Constitution, section 3, and are void to the extent of any inconsistency to the Constitution.

¹⁷ (1970) E.A. L.R. 453.

The fundamental aims of regional integration include the acceleration of economic growth, social progress, cultural development and promotion of regional peace and stability. But there is the need to have in mind that these aims and consumer protection pose a highly intertwined and heady mix of challenges and conflicts¹⁸. A review of the laws and policies of member states is therefore important to be able to make a diagnosis of the adequacies and challenges of EAC laws.

2.2. SCOPE OF CONSUMER PROTECTION LAW

Before examining specific laws in the respective countries, it is important to understand the scope of consumer protection and consumer rights. The consumer is defined as a natural person or any group of natural persons composing an association who acquires, obtains, and uses goods or services for personal use and not for commercial purposes. Consumer protection laws are principles, rules and regulations designed to ensure free and adequate flow of information in the market place to enable a consumer exercises freedom of choice when purchasing and using goods and services¹⁹. Consumer protection law prevents traders from gaining undue advantage over consumers through non-disclosure of vital information that would otherwise enable such consumers make informed decisions in business transactions. Consumer protection law therefore intervenes to regulate behaviour of businesses and intervenes to require them to disclose information and adhere to certain minimum standards with the intention of protecting public health and safety. Consumer protection law covers a wide range of concerns in safeguarding public health and safety in the context of consumer/business interactions. These include product safety, product quality, pricing unfair business practices, fraud, misrepresentation, metrology and labelling. For the purposes of this study, the discussion in this chapter will examine the following issues in consumer protection.

2.2.1. Definitions

Standard

A standard is a measure that provides for common and repeated use, rules, guidelines

¹⁸ Supra note 2 at p. 2

¹⁹ Garner B, Black's Law Dictionary, 8th Edition, 2004 West Publishing at p. 335

or characteristics for products and their related processes or production methods, with which compliance is not mandatory²⁰. It also refers to terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. A link exists between technical regulations and standards. Technical regulations use standards as a basis for implementing required product characteristics. When a standard is declared binding, it becomes a technical regulation. Standards are voluntary in nature and can be developed by a variety of bodies in the public or private sector.²¹ It is interesting to note that in the Kenyan Standards Act²², there is reference to standards and standardization but there is no specific definition of the terms. Section 2 of the Act which provides general definitions only defines standardization mark as “marks specified under section 10”. Section 2 refers to a “Kenyan Standard” which is defined as a specification or code of practice. Specification is defined as description of any commodity with reference to the nature, quality, strength, purity, composition, quantity, dimensions, weight, grade, durability, origin, age or other characteristic....with which any commodity may be manufactured, produced processed, treated, tested or sampled. Therefore by implication a specification refers to a standard with which commodity may be manufactured.

Quality

Quality is defined as the degree to which a set of inherent characteristics fulfils stated requirements. The quality of goods and services involves many activities that are co-ordinated through quality management. Quality management involves the development from which both processes and people benefit with the objective of continual improvement of product conformance.²³

Metrology

Metrology covers both the theoretical and practical aspects of measurements and can be divided into general metrology (electromagnetic, mechanical, chemical metrology), industrial metrology focused on measurements in production and quality control (calibration procedures and calibration intervals, control of measurement

²⁰ Ibid

²¹ <http://www.eac-quality.net/quality-affects-your-life.html> last accessed 3rd May 2009.

²² Ibid

²³ Ibid

processes and management of measuring equipment). Metrology provides the technical means to ensure correct measurements by the implementation of a harmonized system of measurement which comprises the International System of Units (SI), accurate measuring instruments complying with international standards, and validated methods and procedures. Metrology is discussed in weight and measures laws in the respective municipal laws. Legal metrology relates to mandatory technical requirements that ensure correct measurements in terms of protection of the consumer.²⁴

Accreditation

Accreditation is the formal recognition of competence and is applied to laboratories, inspection bodies and certification bodies. International activity in accreditation is in the form of co-operation between national or regional accreditation systems, which seek to provide a worldwide accreditation capability through networks of mutual recognition agreements.²⁵

Consumer Rights

Consumer protection law primarily seeks to safeguard and enforce consumer rights. Consumer rights can be defined as the consumer's claim to just, good or proper treatment and such consumer's entitlement to protection from harm or wrong doing when dealing with a provider of a service or a distributor of a product.²⁶

Prior to the consumerism movement in mid-twentieth century, there was no legal protection of consumers from unfair and fraudulent trade practices. In the 1950s, the consumerism movement pushed for legal enforcement of consumer rights against unfair trade practices. By 1960, the concept of product liability had been developed where an aggrieved consumer only had to prove injury from use of a product rather than the discharge an onerous burden of proof by showing corporate negligence. Consumer rights gained recognition following the adoption of the Consumer Bill of Rights extolled by the former US president John F. Kennedy in his 1962 speech to the Congress. He stated that consumers were entitled to four basic rights, namely the right to safety, right to information, right to be heard and the right to choose freely.

²⁴ *ibid*

²⁵ *Ibid*

²⁶ Howard B., "What are my Consumer Rights?" available at

<http://www.bizcommunity.com/Article/196/160/17811.html> last accessed on 30 April 2009

Since adoption of the Consumer Bill of Rights in 1962 consumer movements through Consumer International has in recent years have expanded the scope of consumer rights by the inclusion of four other rights.²⁷ These are; the right to satisfaction of basic needs, the right to redress for defective goods, right to education and, the right to a healthy environment²⁸.

In 1985, the United Nations General Assembly endorsed the concept of consumer rights and adopted the UN Guidelines for Consumer Protection. These guidelines embrace the principles of the eight consumer rights and provide a framework for strengthening national consumer protection policies. With the UN's adoption of the Guidelines, consumer rights were elevated to a level of international recognition and legitimacy, acknowledged by both developed and developing countries.²⁹ Consumer rights are enforced through application of consumer protection laws by inspectorate functions of public authorities. However consumer rights are also asserted by non-governmental organisations and individuals through consumer activism

2.3. NATIONAL LAWS ON CONSUMER PROTECTION

There is no single legislation in the respective EAC member states that consolidates principles, rules and regulations on consumer protection. Kenya has taken steps in consolidating consumer protection law however the Consumer Protection Bill has not been enacted into law. As discussed below, the obtaining position on municipal laws reflects the fragmentary nature of municipal laws in the EAC.

2.3.1. UGANDA

Uganda has no consolidated law in respect to consumer protection. Most provisions on consumer protection are contained in existing laws providing for the regulation of anti-competitive trade practices. As such government agencies and functionaries are aware of the benefits fair competition can confer on the economy and on the

²⁷ David E., the Basics of Economics, Greenwood Publishing Group, 2004, Pp 131-159.

²⁸ This right is incorporated in environmental law in Kenya through Section 3 of Environmental Management and Co-ordination Act provides inter alia that "Every person in Kenya is entitled to a clean and healthy environment and had the duty to safeguard and enhance the environment".

²⁹ United Nations "Guidelines for Consumer Protection" 1999 New York, United Nations.

consumer.³⁰ Private monopolies are not normally subjected to any restrictions or control, but in certain sectors such as financial and insurance there are certain rules at least on mergers and similar phenomena. The government is loath to intervene except in a few select sectors considered too sensitive to be left entirely to the vagaries of market forces.³¹

There is no general regulatory body or authority or Government agency in place to regulate anticompetitive practices and consumer protection. There are, however, a number of sectoral regulatory agencies established to protect consumers from anticompetitive practices in certain sectors. Some of the legislations and organizations that provide for competition and consumer protection aspects are discussed below.

2.3.1.1. Standards

In Uganda, the issue of standards principally provided for in the National Bureau of Standards Act. The Act established the Uganda National Bureau of Standards (hereinafter referred to as the “UNBS”). UNBS is established as a regulatory authority mandated to develop and promote standardization, quality assurance, laboratory testing and metrology.³² The Bureau is tasked with inter alia formulation and promotion of the use of standards; enforcing standards in protection of the public health and safety and the environment against dangerous counterfeit and substandard products; ensuring fairness in trade and precision in industry through reliable measurement systems; strengthening Uganda’s economy by enhancing competitiveness of local industries and promotion of quality exports through standardization, quality assurance, testing and metrology.

The Act provides a consumer protection mechanism as it seeks to ensure that products put up for sale to the public adhere to certain minimum standards. Adherence to such minimum standards ensures that the health and safety of the public is protected. Unlike laws in Kenya and Tanzania which addresses issues of metrology in separate

³⁰ Consumer Education Trust, “Competition and Consumer protection scenario in Uganda” available at http://siteresources.worldbank.org/INTCOMPLEGA_IDB/Resources/UgandaMonograph.pdf last accessed on 31 July 2009.

³¹ *ibid*

³² <http://www.unbs.go.ug/index.php>. last accessed on 3 May 2009.

Acts, the Uganda Standards Act covers all issues concerning standards, metrology, quality assurance and testing.

2.3.1.2. Sectoral Consumer Protection Laws

Information Communication and Technology Sector

The Uganda Communications Act³³ provides for the restructuring of the communications industry in Uganda. The Act establishes the Uganda Communications Commission mandated to ensure that consumers are protected from excessive tariff increases and unfair competition within the communications sector³⁴. It liberalizes and introduces competition in the industry through regulating and licensing competitive operators to achieve rapid network expansion, standardization as well as operation of competitively priced quality services.

Operators are not allowed to deny access or service to a customer except for delinquency of payment of dues or for any just cause. Operators are required to provide equal opportunity for access to the same type of services to all customers in a given area at more or less the same tariff, limiting variations to available or appropriate technologies required to serve specific subscribers.

Under the Act, the Commission may, of its own accord, investigate any activities which may breach fair competition, or the Commission can be alerted by any person by lodging a complaint which may constitute grounds for investigation.

Health Sector

In the health sector, there are a number of statutes in place to regulate practitioners, namely Medical and Dental Practitioners Statute, 1996, Allied Health Professional Statute, 1996, Nurses and Midwives Act, 1996, Pharmacy and Drugs Act, 1970, National Medical Stores Statute, 1993 and the National Drug Policy and Authority Statute, 1983. The main objective of these laws is to protect consumers of health services from unscrupulous or unqualified medical personnel. For instance, the Medical and Dental Practitioners Statute governs the activities of doctors and dentists. It has established a Medical and Dental Practitioners Council which has the duty of monitoring and exercising general supervision, controlling medical and dental

³³ Uganda Communication Act, 1997

³⁴ Section 4 of the Uganda Communication Act, 1997.

standards and enforcing medical and dental ethics. In regulating the activities of medics and dentists, the statute serves as a proactive measure in protecting consumers from professional negligence.

Financial Sector

There are two major statutes that regulate banking and financial institutions. These are the Bank of Uganda Statute 1993 and the Financial Institutions Statute 1993.

The Bank of Uganda Statute makes provisions for regulating the issuing of legal tenders and maintaining a sound financial structure. The Central Bank is established under the same statute to supervise, regulate, control and discipline all financial institutions, insurance companies and pension funds, as stipulated in section 5(j) of the statute. In its dealings with financial institutions, the Central Bank controls unfair trade practices by seeking their cooperation in order to maintain adequate and reasonable banking services for the public. The provisions in the statute ensure fair competition in the financial and banking sector hence acting as a protection mechanism to the consumer.

Energy Sector

Ugandan laws in the energy sector seek to protect the consumer of electricity through provisions in the Electricity Act³⁵. The Electricity Regulatory Authority is established under the Act as the regulatory authority charged with ensuring compliance to mandatory standards as a means of protecting the consumer³⁶. The provisions target unfair pricing, quality assurance and anti-competitive practices by electricity suppliers. The ERA is empowered to revoke licences or refuse renewal of licences where licencees do not comply with statutory requirements³⁷.

2.3.1.3. Non-governmental Consumer Protection

Uganda Consumer's Protection Association

The Uganda Consumer Protection Association is a non-governmental organization engaged in policy advocacy for an environment that enables consumers to exercise

³⁵ Electricity Act of 1999

³⁶ Section 5 of the Electricity Act

³⁷ Section 11 of the Electricity Act

their rights by influencing business practices and regulatory activities³⁸. It is a member of Consumer International, which is an international organization movement campaigning for consumer welfare.³⁹ Its main activities include advocacy for; food and nutrition rights, fair trade in goods and services and effective regulatory conduct. Its objectives include educating public on consumer rights and responsibilities, promoting the social and economic welfare of consumers, facilitating defence of consumer rights through strategic activities, enhance access to justice on consumer welfare actions through offering legal aid and collaboration with other groups involved in consumer protection.

There are several other nongovernmental organisations involved in consumer protection work. Consumer Education Trust (hereinafter referred to as “CONSENT”) is a registered organization with membership comprising administrators, lawyers, food scientists, information technology specialist, media experts, civil engineers and social workers. CONSENT is involved in empowering consumer, by offering advisory services, promoting ethical practices among business and engaging policy makers to enact people-friendly policies for present and future generation.

Other organisations are involved in specific sectors. For example, the Uganda ICT Consumer Protection Association is consumer group undertaking advocacy programmes specific to the ICT sector. The Uganda ICT Protection Association is a lobby group that seeks to redress complaints by ICT consumer in Uganda.⁴⁰ The lobby group more particularly addresses the issue of slow data speeds delivered by internet service providers that do not correspond with the bandwidth paid for over pricing of services and substandard mobile handsets. It is a proactive independent body that sets standards for services providers and creates an avenue for educating the public on consumer rights. It complements the regulator, the Uganda Communication Commission which is a government agency.

³⁸ <http://www.eac-quality.net/gu http:ality-affects-y-o.ir-llfe/consumer-organizations/uganda.html> last accessed 3 May 2009.

³⁹ <http://www.consumersinternational.org/HomePage.asp?NodeID=89645> last accessed on May 2009.

⁴⁰ http://www.wougnet.org/cms/index2.php?option=com_content&do_pdf=1&id=352 last accessed on 3 May 2009.

2.3.2. KENYA

Like in Uganda, there is no single legislation that addresses consumer protection in Kenya. However, the Consumer Protection Bill 2007 has been drafted as an attempt to consolidate all laws regarding consumer protection. Two years down the line, the Bill has not been enacted into law and protection of the Kenyan consumer is provided in the existing fragmented laws. Consumer protection law is provided for in common law and statutory law.

2.3.2.1. Common Law

Consumer protection is provided for in common law as was demonstrated in the case of Donoghue v Stevenson⁴¹. The law of negligence was applied by imposing product liability hence ensuring that the consumer protection is achieved. In the case, a man bought from a retailer a bottle of ginger-beer manufactured by the defendant. The man gave the bottle to his lady friend who became ill from drinking the contents. The bottle contained the decomposed remains of a snail. The bottle was opaque so that the noxious substance could not have been seen and was not discovered until the lady was refilling her glass. The consumer sued the manufacturer in negligence. It was held by the House of Lords that the manufacturer was liable to the consumer. The consumer had no cause of action in contract against either the retailer or the manufacturer, because it was not she but her friend who bought the bottle. Her claim arose in tort, and the breach of a duty of care owed to herself as a consumer.

2.3.2.2. Statutory Law

Standards

The issue of ensuring standards in consumer protection law in Kenya is addressed in the Standards Act⁴². The Act establishes the Kenya Bureau of Standards (hereinafter referred to as "KEBS") which is the regulatory body charged with the responsibility of ensuring that products in the market adhere to requisite standards. To enhance consumer protection, KEBS, is required to; develop Standards and Codes of Practice for use in Trade and Industry, carry out continuous surveillance activities to ensure conformity and compliance with the set Standards and Codes of Practice, test locally

⁴¹ (1932) A.C. 502

⁴² Chapter 496 of the Laws of Kenya

manufactured and imported goods for compliance with Kenyan Standards or any other standards approved by the Kenya Bureau of Standards.

Its responsibilities include inter alia; carrying out quality inspection on imports into the Kenyan market to eliminate sub-standard goods and counterfeit industry, managing product and systems certification schemes⁴³ and providing information on standardization⁴⁴. KEBS also provides trade facilitation services in Metrology, Standards, Testing and Quality Management (MSTQ) including the WTO/TBT National Enquiry Point, certification and accreditation.⁴⁵ It ensures that no technical barriers to trade are created while providing services in standardization and conformity assessment.

Metrology

Adherence to requirements for metrology as a means of enforcing consumer protection is provided for in Kenyan law under the Weights and Measures Act.

The Act establishes the Weights and Measures department as one of the departments in the Ministry of Trade and Industry.⁴⁶ The mandate of Weights and Measures department in relation to consumer protection is to ensure fair trading by ensuring that description of the quantity of products is correct as presented in the market and that weights and measures are not distorted with the intention of misleading the consumer. The Weights and Measures department also plays a crucial role in the fight against counterfeits through the enforcement of the Trade Descriptions Act. The enforcement function of the department is undertaken by an inspectorate comprising twenty (20) field offices spread all over the country. The fight against counterfeits is thus tackled at the zonal levels.⁴⁷

⁴³These include the Diamond Mark of Quality Scheme, ISO 9001 (2000) Quality Management System, ISO 14001 on Environmental Management, Hazard Analysis Critical Control Point (HACCP) and Occupational Health and Safety (OHSAS). These schemes are intended to create confidence in Kenyan goods locally and internationally and thereby spur trade.

⁴⁴ The Standards Information Resource Centre (SIRC) has a wide range of standards, which include Kenya Standards, International Standards such as ISO, IEC and CODEX, Regional Standards and National Standards from other countries such as EEC, Britain, Malaysia, India, Egypt, South Africa, and Zimbabwe). These standards are available at the SIRC in both electronic format and hard copies for sale to industry and any other interested parties.

⁴⁵ <http://www.kebs.org/>

⁴⁶ Chapter 513 of the Laws of Kenya

⁴⁷ http://www.trade.go.ke/index.php?option=com_content&task=view&id=24&Itemid=45&limit=1&limitstart=1 last accessed on 3rd May 2009

Product Safety and Labelling

The function of consumer protection law in safeguarding product safety, proper labelling and description is covered by the Trade Descriptions Act. The Act specifies provisions which prohibit false trade descriptions of goods, services and accommodation facilities. Further, it prohibits misleading information as to the price of goods and misleading information as to the origin of imported goods. It also addresses the issue of misstatements and misrepresentation published by unscrupulous businessmen to induce consumers to enter into contracts. The Act prohibits misstatements and misrepresentations contained in advertisements posted in relation to trade description of goods and services⁴⁸. The provisions in the Act aim to protect the consumer from being misled by information, pricing and advertising published by traders in goods and services.

Public Health and Safety

Provisions for safeguarding the consumer's public health and safety are principally contained in the Public Health Act, Pharmacy and Poisons Act and the Food Drugs and Chemical Substances Act.

Competition Law

Protection of the consumer from unfair and restrictive trade practices is provided for in the Restrictive Trade Practices, Monopolies and Price Control Act. By ensuring fair competition amongst industry players in all sectors, the Act aims to create a level playing field that would result in the consumer securing a variety of choice at competitive prices. The Act establishes the Restrictive Trade Practices, Monopolies and Price Control Commission to regulate practices that would lead to anti-competitive behaviour. For example, the Commission assesses business activities to ascertain whether mergers or acquisitions would result in monopolies.

Sectoral Consumer Protection Laws

The Kenya Communications Act

The Kenya Communication Act establishes the Communications Commission of Kenya (hereinafter referred to as the "CCK"). CCK as the chief regulator of

⁴⁸ Section 6 of the Trade Descriptions Act

telecommunications industry regulator has stepped up consumer protection initiatives as a result of the increase in the number of players in the communications sector, incidences of non-compliance to license conditions and violation of the rights of consumers. Thus, the CCK has created a consumer affairs division which is responsible for strengthening the Commission's capacity to discharge its consumer protection roles.⁴⁹

The functions of the consumer affairs division includes handling complaints and disputes, review regulations on consumer protection from time to time and undertake reviews of consumer contracts and service level agreements and provide advice to consumers. The Kenya Communications Act requires the Commission to ensure that communications services are provided throughout Kenya and that the interests of all users of these services are protected with respect to prices, quality and variety of services, amongst other responsibilities.⁵⁰

Consumer Protection Bill

The Consumer Protection Bill was drafted with the intention of consolidating all Consumer Protection provisions contained in several legislations into one consumer protection law. Currently consumer protection is contained in several Acts of Parliament including *inter alia*; Trade Descriptions Act, The Standards Act, Public Health Act, Foods Drugs and Chemical Substances Act, Environmental Management and Co-ordination Act, Public Health, Restrictive Trade Practices, Monopolies and Price Control Act. Consumer Protection Bill also seeks to incorporate consumer rights and consumer protection principles as outlined by the United Nations Guidelines for Consumer Protection. The Bill introduces several reforms to the area of consumer protection law. It is also responsive to current societal and economic relations as it extends regulation to new trends in e-commerce and distant-trading. Key to the proposed amendments is the establishment of the Kenya Consumer Protection Agency (hereinafter referred to as the "KCPA") as the overall enforcement institution to oversee and monitor compliance of measures geared to protect the consumer. In this respect KCPA is mandated to facilitate the establishment of conflict resolution mechanisms on consumer issues by investigating any complaint received regarding

⁴⁹ <http://www.cck.go.ke/home/index.asp>. accessed 3 May 2009

⁵⁰ <http://www.bizcommunity.com/Article/111/87/22908.html> last accessed on 25 May 2009

consumer issues. The KCPA acts as an advisory and referral authority in that rather than investigating a complaint it may forward it to a competent authority and ensure that action is taken.

It is responsible for the co-ordination of consumer activities and is required to liaise with consumer organizations and the competent authorities to protect consumer interests. Importantly, KCPA is also charged with an educative function which entails promoting education programmes, providing advice to consumers on their rights and proposing measures to address consumer issues.

The Bill also allows for alternate dispute resolution mechanisms, thus avoiding delays in our courts which have huge backlogs. After a dispute that may result in a class proceeding arises, the Bill allows the consumer, supplier and any other person involved in the dispute to resolve the dispute using any procedure that is available in law. A settlement or decision that results from such a procedure will be as binding on the parties as it would be if it were reached by any other legal procedure.

The Consumer Protection Bill is a laudable effort in the harmonisation of Kenyan consumer protection laws which are currently fragmentary hence providing weak enforcement mechanism. The introduction of the KCPA as an overall body for implementation of the Act and overseeing compliance on consumer issues addresses concerns on enforcement and strengthens the consumer protection regime. However, the Bill is yet to be enacted despite its publication in 2007. It is difficult to know exactly when it will be operationalised as its enactment is subject to the unpredictable parliamentary diary and presence of goodwill from members of parliament. Whatever time the Bill will be enacted into law, it is argued that the Bill would provide a good model for adoption by other EAC member states in consolidating their municipal laws and in the negotiation of an EAC consumer protection law.

Although it seeks to address “new areas” of consumer protection, like internet trading and remote trading the Bill does not fully consolidate all areas of consumer protection law. The Bill focuses on issues on trade description, consumer credit, unfair contracts, terms on quality, merchantability, internet agreements and pricing. The Bill does not cover issues on public health and safety, product standards and product liability. It is

not contended here that the Bill ought to have duplicated provisions in the Standards Act, Public Health Act or the Foods Drugs and Chemical Substances Act. However, there ought to have been a provision showing the relationship between the operation of the proposed Bill and other relevant consumer protection laws. Similar to provision explaining specifically the relationship between the Bill and the Sale of Goods Act, as is the case in section 11(4) of the Bill. The Bill could have addressed this issue clearly. For example, “the provisions relating to the right of consumers to public health and safety by virtue of the public health Act are deemed to apply in relation goods or services supplied under a consumer agreement”.

Non-governmental Consumer Protection

The Consumer Information Network

The Consumer Information Network (hereinafter referred to as “CIN”) is a nongovernmental organization which serves as a forum for articulation and advocacy of all aspects on consumers' rights, welfare and interests. CIN is a member of Consumer International Movement.

CIN represents consumers in a number of decision and policy making boards including: at the product standards specification technical committees at the KEBS, trade policy review with the National Committee on World Trade Organization (NCWTO) health and environment committees. CIN has been actively involved in the development of the Bio-safety Bill in Kenya and is a partner in the ongoing multi-country EC-funded project called “Consumer Organizations and the Cartagena Protocol on Bio-safety: Protecting the Consumer's Right to a Healthy Environment in the Developing World”.⁵¹

2.3.3. TANZANIA

Standards

The Standards Act⁵² established the Tanzania Bureau of Standards (hereinafter referred to as “TBS”) as the regulatory authority responsible for ensuring that mandatory statutory standards are adhered to for consumer protection. The Bureau

⁵¹ <http://www.consumersupdate.org> last accessed on 30 May 2009

⁵² Standards Act No.3 of 1975

was established in 1976 as part of the efforts by the government to strengthen the supporting institutional infrastructure for the industry and commercial sectors of the economy. Specifically, TBS was mandated to undertake measures for quality control of products of all descriptions and promote standardization in industry and commerce. It was subsequently renamed Tanzania Bureau of Standards through an amendment to the Standards Act by Act No.1 of 1977⁵³. Similar to its Kenyan and Ugandan counterparts, the TBS is charged with carrying out quality inspection on imports into its markets to eliminate sub-standard goods and counterfeits industry, managing product and systems certification schemes and providing information on standardization.

Metrology

In respect to providing metrology provisions as a form of consumer protection in Tanzania, the Weights and Measures Act was enacted in 1976 to establish the Weights and Measures Agency to ensure that metrology standards were adhered to. The Act seeks to revise and consolidate the law relating to weights and measures and provides for the introduction of the International Systems of Units (SI) as the standard measure⁵⁴. The Weight and Measures Agency (hereinafter referred to as “WMA”) is established under the Weights and Measures Act as an Executive Agency responsible for fair trade transactions through certification of weights and measures. The WMA is solely dedicated to protecting consumers, businesses and manufactures from unfair practice through the application of accurate Weights and Measures. It endeavors to ensure optimum uses of resources and fair trade transactions between investors, producers, transporters and consumers with consumer protection emphasis.

Competition Laws

In Tanzania, provisions against anti-competitive practices are contained in the Fair Competition Act⁵⁵. It aims to promote and protect effective competition in trade and commerce to protect consumers from unfair and misleading market behaviour. The Fair competition Act, 2001 is a general Act which is crosscutting to all sectors being

⁵³ http://www.tbstz.org/tbs_about/ last accessed on 30 May 2009

⁵⁴ <http://www.eac-quality.net/the-sqint-community/national-bodies/tanzania-wma.html> last accessed on 30 May 2009

⁵⁵ Fair Competition Act No.8 of 2003

government or private⁵⁶. The Act seeks to protect the consumers from misleading and deceptive conduct, unfair business practices and unconscionable conduct. Part VI implies certain terms into consumer contracts. These terms relate to conflict of laws, limitation of liability for breach of certain conditions or warranties, undertakings as to title and encumbrances and quiet possession.

The National Consumer Advocacy Council is established under the Act principally to represent the interests of consumers by liaising and consulting with the Fair Competition Commission, and other regulatory bodies. It is also charged with the responsibility of consulting with industry, government and other consumer groups on matters of interest to consumers.

The jurisdiction of a competition authority like the NCAC over all consumer issues has been faulted by academic commentators like Tenga⁵⁷. He acknowledges that establishment of fair markets has positive effects to the protection of the consumer, but he argues that a specific consumer oversight body ought to be established to ensure consumer rights are better protected.

Public Health and Safety

Tanzania Food Drugs and Cosmetics Act

This is an Act which provide for the efficient and comprehensive regulation and control of food, drugs, medical devices, cosmetics, herbal drugs and poisons.⁵⁸ It repeals the Food (Quality Act) 1978 and Pharmacy and Poisons Act. Its main consumer protection concern is to protect the public from substandard food and medication which may harm public health.

Sectoral Consumer Protection Laws

Information Communication and Technology

The Tanzania Communications Regulatory Authority Act⁵⁹ provides for the establishment of the Tanzania Communications Regulatory Authority for the purpose

⁵⁶ www.tralac.org/pdf/competition_Act_Tanzania_2003.pdf last accessed on 30 May 2009

⁵⁷ Supra note 11 at p. 2.

⁵⁸ Supra note 46

⁵⁹ Tanzania Communications Regulatory Authority Act 2003

of regulation of telecommunications, broadcasting, postal services; to provide for allocation and management of radio spectrum, covering electronic technologies and other Information and Communication Technologies (ICT) applications and to provide for its operation in place of former authorities and for related matters.

Non-governmental Consumer Protection

Tanzania Consumer Advocacy Society

Tanzania Consumer Advocacy Society (hereinafter referred to as “TCAS”) is a private, voluntary, nongovernmental, non partisan and non-profit making organization. It was registered in July 2007 under the Companies Act⁶⁰ of 2002, as a company limited by guarantee. TCAS’s objective is to ensure that consumers are aware of their rights and have ability to claim their rights. It seeks to achieve its objectives by holding markets accountable and ensuring that they are more responsive to consumer’s needs and interests. TCAS provides an advocacy platform that would raise consumer’s awareness of their rights and building consumer’s ability to claim their rights.

2.4. OVERALL EVALUATION OF MUNICIPAL CONSUMER PROTECTION LAWS IN EAC

2.4.1. Fragmented Municipal Laws

The United Nations Guidelines for Consumer Protection specify the factors required to an ideal consumer protection policy framework and legal regime and how to ensure optimum consumer protection both internally and externally. States are required to develop and maintain strong consumer protection regimes. States are also encouraged to foster regional co-operation in securing consumer protection by jointly undertaking measures to ensure that quality, standards, product safety are maintained for the consumer’s welfare. As seen above there are aspects of consumer protection in respective municipal laws of member states regarding concerns in communication, health, finance and energy but such issues are not addressed in a law. What exists is a fragmented system of consumer protection laws in all EAC member states. In an effort to consolidate all consumer Laws, Kenya is the only member country in the EAC that has published a consumer protection bill. If and when enacted into law shall

⁶⁰ Chapter 212 of the Laws of Tanzania

be achievement towards promotion of consumer interests in Kenya. However, the Bill provides for the protection of consumer interests generally without specifically incorporating the eight essential consumer rights which are universally recognised. The Bill falls short in showing relationship between the proposed law and other consumer protection laws

However, existing similarities in municipal laws of Partner States can be consolidated as a step towards unification of laws pertinent to consumer protection. In respect to standards legislation, Partner States have similar provisions on regulation of standards for product safety. In Tanzania, standard Act No. 3 of 1975 which establishes the Tanzania Bureau of Standards established under the Standard Act has similar structure to KEBS and the Uganda Bureau of Standards.⁶¹ Tanzania also has the Fair Competition Act of 2003 with similar objectives to the Kenyan Restrictive Trade Practices Monopolies and Price Control Act. Efforts towards complete harmonisation of laws are simplified with the existing similarities in the standards and competition legislation amongst member states. These similarities however, apply to standards and competition laws only. It is the fragmented nature of other consumer protection laws relating to consumer credit contracts, guarantees, misstatements, trade description, public health and safety that pose challenge to consumer welfare. It is important to have these divergent provisions consolidated if we aspire to achieve on harmonized institutions and legal systems at the national and the community level.

2.4.2. Consumer Redress

In Kenya, the national standards body, KEBS outlines that one of the services it offers is consumer protection through handling of consumer complaints. However, interestingly there is no single provision touching on consumer redress in the Standards Act meaning that a consumer with a complaint has no forum whatsoever to ventilate his claim under the Act. As for Tanzania, TBS has listed its functions and operations and there is absolutely no mention of any forum of consumer redress⁶² A good example to be emulated the E.A.C Member States is that of Malaysia, which in an effort to uphold the eight fundamental Consumer rights, the Ministry of Domestic Trade and consumer affairs had come up with the national consumer master plan. This

⁶¹ <http://www.tbstz.org> last accessed on 29 July 2009

⁶² <http://www.tbstz.org> last accessed 20 June 2009

plan in turn, is supported by institutional structures such as the Consumer Affairs Council, State and District Consumer Affairs Councils, the National Consumer Advisory Council and registered Malaysian Consumer Organisations. Within this elaborate structure; Malaysia has established a Consumer Claims Tribunal for consumers to seek redress in relation to complaints arising from disputes on consumer contracts and other issues. A comprehensive legislation, the Consumers Protection Act 1999 governs procedure for bringing claims and remedies available to the consumers.⁶³

2.4.3 Consumer Representation

The role played by civil societies in the EAC Member States in Consumer protection issues is minimal. Ideally, where they have strong presence they are able to address their objectives and influence policy, promote public awareness and participation in sustainable consumption as well as complementing government efforts in these aspects. These organisations are few in number and some of them are members of Consumer International, the only global Organisation concerned with Consumer protection issues.⁶⁴ The activities of these Organisations are small and almost inconsequential with minimal public awareness about them.⁶⁵ In sum, it is defensible to state that these organisations have not played any significant role in consumer protection. This can be attributed to their size and lack of public awareness about them. Again, their operations are centralised no local offices at the grass-root level. For example, the CIN only has offices in Nairobi Kenya. Their general absence and lack of capacity is a challenge to Consumer protection efforts.

2.5. THE CASE FOR HARMONIZATION

From the foregoing discussion of municipal law in the region, it is clear that the legal and institutional framework on consumer protection in Kenya, Uganda and Tanzania are fragmentary. Therefore the pertinent issue to be addressed is whether the challenges from fragmentary legal structure are best addressed through harmonization

⁶³ *supra* note 24

⁶⁴ <http://www.ConsumersInterNational.org> last accessed on 20 June 2009

⁶⁵ Consumer International held their African regional meeting on A2 K in Nairobi on 23rd April 2009, was attended by sixteen African Members and Partners. Nothing much came out of the meeting in terms of consumer representation and redress.

of community laws or are there compelling arguments for retaining the existing structure.

It has been argued that harmonisation of laws in process of regional integration is associated with the advantages of: simplification, legal certainty and predictability; reduction of costs; and, easy access to law. These advantages are interlinked and the discussion below summarises the important elements. Harmonisation leads to simplification in that the application of a uniform law in the region ensures that East African consumers and businessmen are regulated by a single law. This aspect of harmonisation is important as it reflects reality due to increased regional trade brought about by integration of the East African economies. Subjecting goods and services to different rules and sanctions and standards in member states creates confusion for a businessman and it affects efficiency and planning when faced with different requirements in a region which is guided by objective of enhancing trade through free flow of goods and services. The consumer is also disadvantaged where different thresholds on quality, standards and health requirements apply. Such consumers are exposed to low standards where unscrupulous businessmen will look to exploit loopholes in the low requirements in certain jurisdictions.

Harmonisation is also associated with legal certainty which forms a characteristic of a valid law. Businessmen and consumers in the EAC who transact with the knowledge that there is a unified law applicable in region would be certain of their rights and interests. They would be also be certainty of the remedies available to them in the event of breach of their rights in any of the jurisdictions of the member states. Eiselen⁶⁶, a proponent for harmonisation of laws in international economic transactions states, "where there is greater legal certainty there is less chance of disputes and where disputes arise, the inquiry concentrates on factual aspects of the dispute rather than the legal intricacies"

Non-legal arguments advanced in support of harmonisation have also been advanced. It is contended that with greater legal certainty and harmonised laws and procedures,

⁶⁶ Eiselen S, "Adoption of the CISG in South Africa" available at www.Cisgw3.law.pace.edu/cisg/biblio/eiselen.html. Last accessed 23 November 2009

the legal system will in turn facilitate more competitive and efficient markets⁶⁷. For businessmen, a significant barrier to trade is the legal uncertainties in foreign markets. Adoption of a uniform consumer protection law in the EAC region will reduce uncertainties, save time and attendant costs⁶⁸. Because the likelihood of disputes is lowered, businessmen save on time and costs associated with litigation. The saving of costs and time is desirable for businessmen and producers who are primarily concerned on profitability and efficiency.

On the other hand, arguments against harmonisation have been advanced on the premise that unification of law is not an achievable objective with existing different political legal and economic structures. This argument may be valid because, even in the different jurisdictions of member states there exists no harmonised approach to consumer protection with which the EAC model would be based. In the respective municipal law, the laws and enforcement institutions are scattered. Such a scenario makes it difficult to work out issues for protection at the regional. Further, there exists disparities in developmental levels which would make it difficult in enforcement of provisions like standards, testing and quality assurance provisions which require investment in technology and technical capacity. Political will amongst member states to cede control over certain aspects of their executive authority poses a problem to integration efforts. While the observation on diverse political legal and economic contexts is true, it should not be an impediment to harmonisation. The challenges to harmonisation should be viewed as opportunities to develop better consumer protection mechanisms and prospects for co-operation amongst member states. They should not be viewed as insurmountable problems that would stall an otherwise effective approach to consumer issues in the Community. In any event, a proposed regional consumer law could assist member countries to implement effective municipal laws.

Retaining the status quo of fragmented municipal laws is therefore indefensible in light of arguments for harmonisation. The fragmentary legal frameworks negatively impact on the protection of consumer rights and present opportunity for traders to exploit gaps to the detriment of the consumer. Further, there exists no overall body or

⁶⁷ Ibid at p.30

⁶⁸ Ibid at p.31

institution to oversee regulatory bodies undertaking consumer protection and ensure that monitoring and compliance of consumer protection laws. Activities between the bodies remain uncoordinated and certain jurisdictions overlap resulting in duplication of efforts and inefficiency due to increase in transaction costs. In any event the existing national institutions have weak enforcement mechanisms due to financial constraints, low capacity and depleted inspectorates. In other jurisdictions bodies set up for enforcement of consumer protection are ad hoc and have little or weak enforcement mechanisms.

Conclusion

This chapter has identified pertinent municipal laws on consumer protection. It has noted that municipal laws are fragmented and have weak enforcement mechanism. The study of municipal laws of respective countries is important to gauge the enforcement capacities of municipal institutions which are integral part of the implementation of any regional law that is in force or any future laws. The need for harmonisation of laws as a better means of addressing economic relations between member states has been embraced within the EAC framework and its advantages acknowledged within the provisions of EAC Acts and the terms of reference of the Standards sub-committees.

CHAPTER 3

3. HARMONIZATION OF CONSUMER PROTECTION LAWS IN THE EU, MERCUSOR AND ASEAN

A comparative study of consumer protection mechanisms in the EU is significant to this study. There are important lessons to be learned from EU as a developed integration unit which would serve as a model regional economic bloc. The EU experience has proved to be a useful precedent for the development of legal regimes for consumer protection in the ASEAN and MERCOSUR regional blocs. The chapter briefly examines the lessons learned by the ASEAN and MERCOSUR blocs in adopting similar policies and strategies similar to those applied in the EU. Such comparison is important as it measures and gauges consumer protection in the EAC framework with other developing countries with economic, political and social contexts similar to EAC member states.

3.1 EU CONSUMER PROTECTION LAW

In the EU, the notion of 'consumer' means any natural person who, in contracts covered by Directive 93/13, is acting for purposes which are outside his trade, business or profession. The European Court of Justice, in the case of *Cape Snc*⁶⁹ has stated that a consumer is only a physical person and cannot be extended to companies.

Consumer protection forms an integral component of EU law and its importance has been reflected in EU policy for the past 22 years. Consumer policy gained formal recognition in 1st July 1987, when a single Act came into effect and introduced the notion of "consumer protection" into the Treaty of Rome.⁷⁰ Further, the Maastricht treaty of 1993, recognized consumer protection as an explicit EU objective in its own right. In May 1999, the Treaty of Amsterdam gave a fresh impetus to the EU Consumer policy by mandating the EU to promote the interests of consumer to ensure high level of consumer protection on issues respecting the consumer's health, safety

⁶⁹ 22 November 2001 n.C-541-542/1999

⁷⁰ Consumer Policy Strategy 2002-2002 (Com(2002) 208 final)

<http://europa.eu/lagislation/consumer/general-framework-and-priorities/132054en-htm> last accessed on 3rd August 2009

and economic interests. It also provides for the promotion of consumers' right to information and education and the right to join organized groups in order to safeguard their interests. In particular section 153(2), specifically obliges the EU to take consumer interests into account when defining and implementing community policies and activities. Towards this end, the EU has taken positive steps to ensure the community consumer is protected. At the Community level, the health and consumer protection Directorate-General, is responsible for the area of consumer health, food safety and consumer protection. Its main responsibility is to ensure that laws are up to date and being applied effectively in all member countries. It also ensures that the single market works for the benefit of consumers and acts to protect and improve citizens' health.⁷¹

Legal Regime under the EC

The principal aim of harmonisation of laws in the EC is to create an Internal Market for the benefit of businesses and consumers which means both the interests of businessmen and consumers are balanced in the formulation of laws and policies⁷².

Consumer protection law in the EC is contained in the Treaty and through Directives and Regulations issued by the EC Council. The specific provisions in the EC Treaty respecting consumer protection are contained in Article 153, according to which it is mandatory that consumer protection requirements be taken into account in defining and implementing other Community policies and activities.

Article 153 provides that in order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

Art 153 (5) spells out the relationship between community law and municipal in setting levels of protection for consumers. It states that measures adopted by the community towards consumer protection pursuant shall not prevent any Member State

⁷¹ Ibid

⁷² Article 95 of the EC Treaty

from maintaining or introducing more stringent protective measures. However, such national measures must be compatible with the provisions of the Treaty and the member state must notify the Commission.

Consumer Protection Directives

Consumer protection directives are designed to achieve minimum harmonisation of municipal laws as they leave discretion to national authorities of member states to decide on the implementing measures to achieve the desired protective standards⁷³. The Consumer Protection Directives are aimed at establishing competitive markets and enhancing consumer protection and empowerment. The main aspects of consumer protection targeted by the directives include anti-competitive practices, unfair terms in contract law, consumer credit contracts, distance contracts, time share contracts, product liability and product safety. In this regard consumer law cuts across several fields of law including contract, tort, administrative law and competition law.

Thus economic interests of consumers are protected in the European Union Member States through several directives. These Directives are: Directive on Product Liability, Directive on Prohibition of Unfair Terms, Directive on Product Safety; Directive on Prohibition of Unfair Commercial Practices and Directives requiring Co-operation amongst Member States.

Directive on Product Liability

Based on Directive 85/374/EEC of 25th July 1985, the provisions on product liability imposes liability for products in order to ensure high level of consumer protection against damage caused to health or property by a defective product. It also seeks to harmonize all national liability laws that may distort competition and restrict free trade. It has established the principle of liability without fault under which it is not necessary to prove the negligence or fault of the producer or importer. All that is needed is proof of damage and its connection to the product.

⁷³ Art 249 of the Treaty defines "Directives" as legislative acts requiring certain member states to which a certain result is required but it leaves to each national authority to choose method or form of implementation. It is distinguished from "Regulations" which are of general application hence binding to all member states. Regulations do not require implementing measures at the national level and are therefore have direct effect once they are issued.

Directive on Product Safety

The Directive on Product Safety based on directive 2001/95/EC of the EU Parliament, was passed in 2001 and it imposes a general product safety requirement on any product in the market. This Directive is aimed at enforcing safety requirements for all products. It is acknowledged that imposing requirements for specific products may create different standards for consumer protection hence a general requirement ensures that consumers are protected from all products in the market.

Directive on prohibition of unfair commercial practices and Directive on Prohibition of Unfair Terms

Directive 93/13 prohibits a trader from exploiting his position of power in relation to a consumer. This provision targets the use of unfair terms in consumer contracts. It is implemented to ensure that the consumer is not disadvantaged in business transactions as they participate in the market from a weaker bargaining position.

Based on Directive 2005/29/EC, the EC prohibits unfair commercial practices in respect to consumer contracts. Pursuan to the Directive, the consumer has a right to effective administrative or judicial protection and interim measures to proetct the consumer can be taken by way of summary procedure. The provisions in Directive 2005/29/EC recognise the role of consumer associations as protectors of collective interests.

Directives and Regulations requiring Co-operation amongst Member States

The General Product Safety Directive (2001/95/EC) establishes a system of rapid exchange of information on harmful products (RAPEX). This is a system of rapid exchange of information between member states and the commission. If a product poses a serious threat calling for quick action, the member state informs the commission and other states through RAPEX with all details on the product and the risk involved. Action is then taken based on that information. Similarly there is also the Rapid Alert Systems for Food Risks which covers all foodstuffs and animal feeds. This system is implemented by the member states, the Commission in the management capacity and the European Food Safety Authority. The Rapid Alert System for Food Risks facilitates the dissemination of information both to the consumers and the commission on any harmful food products.

EU INSTITUTIONS

The European Food Safety Authority

This authority provides scientific advice and scientific and technical support in all areas impacting on food safety. It constitutes an independent source of information and ensures public awareness and plays an important role in the implementation of the Rapid Alert System for Food Risks.

Network of Consumer Protection Authorities

This came into operation by regulation no. 2006/20044 of the European Parliament and the Council of 27th October 2004. It seeks to ensure co-operation between national authorities responsible for the enforcement of consumer protections laws. It establishes a network of national authorities responsible for monitoring the application of consumer protection legislation. It aims at ensuring compliance with legislation and the smooth functioning of the internal market. Its mandate is restricted to intra-community infringement of consumer protection legislation. Each Member State designates the competent authorities and a single liaison office responsible for the application of the Regulation. The authorities have the power to and are required to act promptly to stop any infringement identified like obtaining injunctive orders. The regulation further establishes a framework for mutual assistance that covers the exchange of information, request for enforcement measures and co-ordination of market surveillance and enforcement activities⁷⁴. All these initiatives are premised on the fact that the EU believes that consumers are key economic players and therefore recognizes their fundamental rights and actively protects their interests. The EU experience has shown that consumer confidence is the main determinant of the success of the single market. At such consumer policy is very much an integral part of the general Single Market Policy.

The evolution of consumer protection in the EU can be traced through the three consumer policies being the Consumer Policy 1991-2001, Consumer Policy 2002-2006 and health and Consumer Policy 2007-2013. All the three are aimed at making

⁷⁴ Supra note 12 at p.19

Consumer policy an integral part of single market and seek to ensure that the consumer is efficiently catered for⁷⁵.

Consumer Representation

Consumer representation issues are well developed and articulated in the EU. The European Consumer Consultative Group (hereinafter referred to as the "ECCG") is the commission's main forum for engaging with consumer organizations. The ECCG advises and guides the commission on policies and activities that effect consumers and acts as a source of information on community matters for national organizations. Its composition includes one member representing the national consumer organization of each member state and one member from each European Consumer Organization. The ECCG in conjunction with the European Consumer organisation, a federation of 40 independent National Consumer organisations, help to ensure that the Consumers are well represented in the EU. It facilitates information exchanges and gives annual reports with logistical support coming from the commission.⁷⁶

EU CONSUMER REDRESS MECHANISM

The EU firmly embraces concept of consumer representation by setting up the European Consumer Centres Network (ECC-Net). This body provides information to enable consumers make informed decisions when purchasing goods and services in the internal market, responds to consumer inquiries and deals with cross-border consumer complaints. It also offers advice on Alternative Dispute Resolution and assistance with settling disputes. It has widespread coverage and it has established 27 Centres in 21 Countries within the EU

In enhancing access to justice for consumers the EC endorsed a Green Paper on *Access of Consumers to Justice* (1993). An Action Plan was operationalised in 1996. Towards encouraging mediation as an alternative means of dispute resolution the EU adopted the Green Paper on ADR and the European Code of Conduct for Mediators. A draft Directive on Civil Mediation has also been published. Further, under the Hague Programme 2005-2010 the Legal Aid Directive is proposed to facilitate access

⁷⁵ Ibid

⁷⁶ Ibid

to justice. Towards convergence on procedural law the process of harmonisation of civil procedure rules has commenced.

Challenges to Implementation of Consumer Protection Law in the EU Regime

The EU Consumer Protection although a model to other infant economic blocs like the EAC, also faced challenges in the implementation of the harmonisation objective. The main challenges to implementation are: differences in implementation; differences in application procedures and legal cultures

As the enlarged European Union consists of diverse legal traditions and legal cultures, there are different approaches to law and litigation, different legal, administrative and judicial structures, differences in the nature of legal professions and different perceptions of law. It is therefore difficult to unify different aspects of law from over 20 jurisdictions into one acceptable law. As a result of the challenges to maximum harmonisation, there lacks coordination and coherence of substantive laws, harmonisation of procedural laws and concerns on enforcement.

The EC has sought to address the challenges of harmonisation through Regulation n.2006/2004 to ensure that member states are working towards harmonisation of laws for the better protection of the consumer. Regulation n.2006 of 2004 requires that there is co-operation between national authorities responsible for the enforcement of consumer protection laws. The Regulation aims at the: establishment of public authorities responsible for enforcement of the laws that protect consumers' interests in dealing with intra-Community infringements; establishment of a network among the different public authorities based on the principle of loyal cooperation which include a minimum of common investigation and enforcement powers; and, strengthening the cooperation between public authorities and consumer associations.

However, even in light of Regulation n.2006/2004 and the establishment of the Network of Consumer Protection Associations, complete or maximum harmonisation still poses a challenge in the unification of rules, principles and procedures of all member states. Currently, it seems that minimum harmonisation is the practical and appropriate solution to the challenges experienced at the EU.

Despite its challenges, the EU protection mechanism formed a key precedent in the formulation of laws and policies adopted by the MERCOSUR. Like the EU, the MERCOSUR recognizes strengthening consumer protection provisions as an integral part to its integration strategy.

MERCOSUR

The MERCOSUR was established on 26th March 1991 by Argentina, Brazil, Uruguay and Paraguay after signing the Treaty of Asunción. The "MERCOSUR," which is an acronym for Mercado Comun del Sur stands for "Southern Common Market" took effect on 31st December 1994. The purpose of the agreement is to set up a common market and eliminate trade barriers among the signatory parties. Chile, Bolivia, Venezuela and Colombia have since joined the MERCOSUR as associate members.

MERCOSUR member states recognised early the need to establish a comprehensive framework on consumer protection within the region. In regard to consumer protection law, the MERCOSUR adopted the stance that all its harmonization efforts would use the highest standards as the benchmark, and as part of its effort to stay competitive. To enhance trade with EU, which is reputed to have one of the highest consumer protection Standards, MERCOSUR was obliged to raise its standards in consumer protection to an equally acceptable high level.⁷⁷ However, up until the year 2000, it had undertaken piecemeal rather than comprehensive measures aimed at consumer protection in regard to advertising and contractual guarantees. Other programmes were implemented on health and safety of cosmetics, food, pharmaceuticals, personal care products and cleaning products.

In 2000, MERCOSUR through the "Presidential Declaration on Fundamental Rights of MERCOSUR Consumers" formally declared consumer protection as a matter of priority. The declaration listed 11 consumer rights that should be adopted by MERCOSUR and member states namely; effective protection of life, health and safety of the consumer and the environment, equilibrium in consumer relations ensuring respect of values of dignity, fairness and good faith; provision of services in safe conditions; access to consumption with freedom of choice; effective reparation of

⁷⁷ Ibid

property and non-property damages and sanctioning of those responsible; consumer education and development of consumer advocacy and alternative dispute resolution methods. The 2000 declaration did not immediately lead to widespread reform of national laws of member states. However, recently MERCOSUR through its Technical Committee No.7⁷⁸ has increased its work on consumer related issues and there are legislative proposals in some member states to revise existing consumer law. In April 2008, Argentina amended its consumer law to strengthen its provisions to accord the consumer better protection. The law introduced punitive damages to be paid by errant suppliers, recognised consumer groups granting them *locus standi* for class action on behalf of consumers and increased period of mandatory guarantee for new products from 3 months to 6 months. It also introduces mandatory requirement for banks to issue full disclosure of information in relation to consumer credit agreements.

MERCOSUR is also a good example of the positive impact a regional organisation has on consumer protection in member states. When it was first founded in 1990, only Brazil had a National Consumer Protection Law, however MERCOSUR has since successfully spurred the enactment of a comprehensive consumer protection laws in Argentina with Uruguay and Paraguay incorporating consumer issues into legislation through amendments of existing laws⁷⁹ This may be most important step the Community should take as once each Member state is required to and puts in place a comprehensive consumer Protection Law, with the right implementation and enforcement mechanisms, at the Community Level it will be easy to achieve both, a comprehensive, unified and harmonized consumer protection legislation and civil procedure code which is easily understandable by the Consumers and sellers.

ASSOCIATION OF SOUTH EAST ASIAN NATIONS

The Association of South East Asian Nations was established on 8th August 1967 by Indonesia, Philippines, Singapore and Thailand to foster co-operation on political and economic issues of common interest. By 1999, the Association of South East Asian

⁷⁸ The Technical Committee No.7 was created to work on the diverse issues like e-commerce, abusive contract clauses and time shares.

⁷⁹ Supra note 12 at p.25

Nations (hereinafter referred to as the “ASEAN”) had succeeded in uniting all countries in South East Asia with Cambodia the last country to join in 1999.

The main objectives of ASEAN are; to accelerate economic growth, social progress and cultural development and to promote regional peace and stability. In 1992 subsequent to the Singapore Declaration, ASEAN stepped up its efforts on formation of a powerful economic grouping by establishing the Asian Free Trade Area (hereinafter referred to as “AFTA”) which is to be achieved through inter alia; elimination of quantitative and non- tariff barriers to trade, harmonisation of standards and conformance measure, and, harmonisation of custom procedures. Pursuant to the Kuala Lumpur Declaration, the ASEAN Charter was adopted in 2007 as the constitutive document for ASEAN detailing its institutional and legal framework. The Charter came into force in December 2008, thirty days after Thailand delivery of its instrument of ratification.

The only provisions specifically addressing consumer protection at the community level in the ASEAN are contained in the Cosmetic Directive. The ASEAN Cosmetic Directive was signed in 2003. The Cosmetic Directive is mandatory and had to be implemented by all member states by January 2008. Article 3 (1) prohibits offering for sale cosmetic products that would harm human health. Other policy measures undertaken by member states are policy initiatives aimed at actualising AFTA with the objective to eliminate duplication of standards which would otherwise constitute technical barriers to trade. Policy measures to eliminate duplication of testing, quality assurance and standards procedures for goods originating from an ASEAN country are implemented by the ASEAN Consultative Committee on Standards and Quality (hereinafter referred to as “ACCSQ”).

In 2007, at the 13th ASEAN Summit held in Singapore, the ASEAN Economic Community Blueprint aimed at attaining a Asian Economic Community by 2015 it was declared that consumer protection should be pursued using the people centred approach. Paragraph 42 of the Economic Blueprint recognises the importance of consumer protection and specifically states that the “building of an integrated economic region with a people centred approach in this region has made ASEAN mindful that consumer protection cannot be precluded in all measures taken to

achieve integration in the region”⁸⁰. To this end the ASEAN proposed the establishment of a Coordinating Committee on Consumer Protection to oversee consumer welfare issues among member countries.

Amongst ASEAN member states, Malaysia has been most proactive in development of a comprehensive consumer protection regime with specific focus on providing for consumer redress. Malaysia has established a Consumer Claims Tribunal for consumer redress. The Consumer Protection Act, a comprehensive legislation protecting the interests of consumers was passed way back in 1999.⁸¹ To strengthen the presence of civil society in consumer protection, the Malaysian government facilitated the formation of the Federation of Malaysian Consumers Association (FOMCA) a National, non-governmental organisation, which acts as an umbrella organisation for all the other Consumer Organizations from all over the Country. The Malaysian government works closely with FOMCA and provides it with financial grants to carry out its consumer Protection Projects.⁸² This example underscores the fact that at the national level, consumer protection legislation must be accompanied by an effective implementation structures and commitment to consumer protection.

The ASEAN framework for consumer protection is not fundamentally different from the EAC legal and institutional structures. In fact in certain areas, the EAC legal framework has done better than its ASEAN counterpart. The EAC through its enactment of the SQMT Act and EAC Competition Act provide for laws for harmonisation of standards and regulation of anti-competitive trade practices. Apart from the Cosmetic Directive ASEAN has made numerous policy measures on elimination of technical barriers to trade, public safety and health measures which are not grounded in law. In any event such policy measures are primarily aimed at trade facilitation and not consumer protection.

Although the EAC structure has some advantages over the ASEAN legal framework, incorporation of elements of consumer representation and consumer redress in the EAC is wanting compared to its ASEAN counterpart. The EAC could draw important lessons from measures proposed in the South East Asian Conference by both

⁸⁰ <http://www.aseansec.org/5187-10.pdf> last accessed on 25 September 2009

⁸¹ <http://www.ciroap.org/apc> last accessed on 28 July 2009

⁸² Ibid

government consumer protection agencies and civil society groups on the incorporation of consumer interests through representation in decision making organs of regional authorities.

3.2. COMPARISON BETWEEN THE EAC LEGAL FRAMEWORK AND BEST PRACTICES UNDER THE EU

The best practices as discerned from examination of the EU legal framework can be summarised as: the prioritisation of consumer issues; a harmonised legal regime; strong consumer representation and redress mechanisms; and, systematic formulation of policies. The discussion below compares the EAC legal framework to the best practices in the EU.

3.2.1. Prioritisation of Consumer Issues

The structure of the EU consumer protection law is fundamentally different from the EAC legal framework. It is specifically provided in its constitutive document that consumer issues must be considered in the formulation of all Community policies⁸³. Consumer issues are prioritised in the Treaty as it is stated that consumer issues must be accorded high level of protection. Conversely, the EAC Treaty does not provide specific accommodation for the “consumer” in its provisions at all. Article 81 provides for the need to adopt a Standards, Metrology and Quality Assurance legislation to ensure harmonisation of such laws in the region. Consumer protection is mentioned as one of the objectives of the adoption of the standards legislation alongside a list of other economic objectives including enhancement of the standard of living, facilitation of interchangeability of products, enhancement of savings in the public and promotion of trade and investment.

The East Africa Protocol on Standardization, Quality Assurance and Testing perpetuates the inadequacies of the Treaty in specifically addressing consumer rights and interests. Its main objective is to ensure application of a common policy on standardization, quality assurance, metrology and testing of products produced and traded within the Community. Subsequently, it is not surprising that the objectives of the SQMT Act were mainly concerned on facilitation of trade and investment. The

⁸³ Art 153 of the Treaty of Rome

protection of consumer interests therein is mentioned in the objectives but not detailed in operative sections of the Act.

3.2.2. Harmonised Law on Consumer Protection

The EU legal framework comprises Directives and Regulations on consumer protection. The EU Treaty specifies that consumer protection is a matter of priority and should be included in all its policies. Directives on product safety, unfair trade practices and product liability are recognisable sources of consumer protection law in the EU. These Directives coupled with the Regulation n.2006/2004 which requires member states to harmonise municipal consumer laws and civil procedures have successfully been implemented towards a harmonised EU consumer protection law. As discussed above, the EAC legal framework is fragmentary in its provision for consumer protection. There is no unified approach to addressing consumer issues through law as provisions are scattered in legislation on standards and quality assurance and competition.

3.2.3. Consumer Representation and Redress Mechanisms

It is clear from EU consumer laws that the issue of providing consumer representation and consumer redress is high up in the agenda as a means of protecting the consumer. Consumer representation has been recognised through the establishment of the ECC-Net with widespread coverage in the Community. Further in facilitating consumer redress, the EC has adopted measures which are aimed at enhancing access to justice, legal aid and offering free advice to consumers on remedies and alternative dispute resolution methods.

The EAC structure does not provide for consumer representation or facilitate consumer redress. This can be partly attributed to the absence of a strong civil society agitating for consumer rights. A regional network for consumer groups is non-existent and there are no efforts to bring together consumer advocacy groups to address consumer issues even though the process of integration is being realised.

3.2.4. Development of Policies and Implementation

The EU legal framework specifies that consumer issues should be prioritised and incorporated in its policies. Prior to the legislation or issuance of regulation on issues

of consumer protection, the EU formulates policies and thorough debate and discussion follows. The trajectory of consumer protection can be traced from three consumer policies. Between 1991 and 2001, the Consumer Policy focused on the facilitation and promotion of consumer representation and education. Such facilitation was aimed at ensuring consumer health and safety; effective response to emergencies and protection of economic interests of consumers. The Consumer Policy 2002-2006 addressed issues of simplifying and harmonisation of national laws to form a uniform and coherent EU law on consumer protection. The policy set to raise standards for consumer protection, ensure effective enforcement of consumer laws. Following from the Consumer Policy 1991-2001, the EU aimed at ensuring greater involvement of consumers in EU policies. Presently, EU policy on consumer protection is contained in the 2007-2013 Policy paper. Its focus centred on: the protection of consumer from health threats and unsafe products; increase ability of citizens to make informed decisions in the market; and, mainstreaming of health and consumer interests across all EU policies.

Decision making in the EAC is not premised on a systematic adoption of policies. In any event, existing policies are centred primarily on establishment of Customs Union, Common Market and fast tracking the East African Federation. There is no policy on consumer protection let alone a harmonised consumer protection law. The paper does not advocate for a wholesale adoption of EU policies in the development of a policy framework for consumer protection. However, there ought to be systematic policy formulation aimed at addressing consumer issues which subsequently inform legislation process.

Overall, the lack of an EAC consumer protection regime reveals the inadequacy of the EAC legal framework and under the existing structure, consumer rights will not be addressed effectively. It is not contended that the EAC ought to wholly adopt the EU legal framework and issue Directives on consumer protection, rather, the EAC ought to adopt an alternative approach in legislating consumer laws through the perspective of consumer rights and interests rather than enhancing industrial and producer's economic interests.

However, review of the EAC legal framework does not spell all gloom for the community. As stated above, compared to the ASEAN scenario, the EAC legal

framework has made a positive albeit inadequate step towards harmonisation of standards and metrology law and competition law. The ASEAN is yet to enact laws to establish regional institutions to ensure objectives of competitive markets and consumer protection are achieved.

Conclusion

This chapter has examined consumer protection law mechanisms in regional economic blocs of EU, ASEAN and MERCOSUR with a view of identifying strengths that can be applied to establish an effective consumer protection regime in the EAC. It has been noted that the EAC legal framework has glaring weaknesses in policy formulation, provision of redress mechanisms, dispute resolution mechanisms, incorporation of consumer representation, procedure and due process as compared to structures established within the frameworks of the EU, ASEAN and MERCOSUR. However, it is also acknowledged that each economic bloc is set against different social, economic and political contexts and the bloc although more developed than EAC in consumer protection each bloc has varying levels of consumer protection to suit its own consumers. Chapter 4 examines the provisions in the Acts specific to consumer protection. It also explores the case for a unified approach to consumer protection of EAC citizens through harmonisation of laws in light of findings from the lessons that can be drawn from other jurisdictions especially the EU approach

4. CHAPTER FOUR

A CASE FOR REVIEW OF REGIONAL AND NATIONAL CONSUMER PROTECTION LAWS

4.1. INTRODUCTION

This chapter discusses the enactments aimed at harmonisation of consumer protection law within the EAC framework and identifying the limitation of such measures.

The discussion of respective municipal laws on consumer protection illustrates that that there is no uniformity and proper coordination among national enforcement institutions. The laws are scattered in various consumer protection laws and without any particular or common address to consumer protection. For a more sustainable trade within the region, regional efforts must be sought to create standards with regard to consumer protection. Currently several efforts have been taken to ensure that there are standards in the region that ensure consumer welfare. Such efforts and the development of East African Standards have been necessitated by the need to harmonize requirements governing quality of products and services in East Africa. It is envisaged that through harmonized standardization, trade barriers which are encountered when goods and services are exchanged within the Community will be reduced and/or removed.⁸⁴ Within the driving aim of such measures is to increase trade within the community and eliminate barriers. Consumer rights enhancement within the East Africa Standards regime is in my view incidental to the main integration objective of facilitating trade. What follows is an analysis of the main steps that have been taken within the region to improve the welfare of consumers.

4.2. CONSUMER PROTECTION LAWS IN THE EAST AFRICAN COMMUNITY

4.2.1. The East African Community Treaty

The Treaty of the Establishment of the East African Community (hereinafter referred to as the “EAC Treaty”) was negotiated and come into force in 1999. The EAC treaty

⁸⁴ Waller S W, “In Search of Economic Justice: Considering Competition and Consumer Protection Law” (2005) Vol. 36 Loyola University Chicago Law Journal, 631 a t p. 634.

provides a framework for the East Africa's integration on various economic areas. On consumer protection, Article 81 of the Treaty provides for standardization, quality assurance, metrology and testing of goods and services within the East African Community. The partner states, among other things, have recognized that standardization, quality assurance, metrology and testing is essential in the enhancement of the standard of living, reduction of unnecessary variety of products, the facilitation of interchangeability of products, the promotion of trade and investment, consumer protection, the enhancement of savings in public and private purchasing, improved productivity, the facilitation of information exchange, the promotion of health as well as the protection of life, property, and the environment.

Article 81 is the foundational provision on the enhancement and harmonisation of standards to among other things protect and enhance the welfare of consumers. It provides a framework for cooperation in enhancing regional standards which in turn would ensure enhanced consumer rights.

4.2.2. East Africa Protocol on Standardization, Quality Assurance and Testing

Pursuant to Article 81(4) of the Treaty, the Partner States agreed to adopt uniform provisions on issues concerning standardization, quality assurance, metrology and testing for the goods and services produced and traded in the Community. They have since negotiated and signed into force the East Africa Protocol on Standardization, Quality Assurance and Testing.⁸⁵

The protocol applies to all products and services whether manufactured, produced, or packaged within the community and without limitation to the products originating in a third country.⁸⁶ It encourages member states to evolve and apply a common policy on standardization, quality assurance, metrology and testing of products produced and traded within the community.

Article 4 of the protocol provides for several obligations that partner states should take into account when developing standards, in quality assurance and quality management, on the environment, in certification, metrology and accreditation. The

⁸⁵ The protocol was signed into force on the 15th January 2001.

⁸⁶ Article 2 of the protocol

Council of Ministers is mandated to make regulations for effective implementation of the protocol.

4.2.3. Standardization, Quality Assurance, Metrology and Testing Act

In 2006, the East Africa Legislative Assembly passed the Standardization, Quality Assurance, Metrology and Testing Act, 2005⁸⁷ (hereinafter referred to as the “SQMT Act”). The SQMT Act was assented to by the heads of states of Kenya, Uganda and Tanzania on 10th September 2006. It came into force on 1st August 2007 through a gazette notice published at the instance of the Council of Ministers. The SQMT Act marked a profound measure towards the harmonisation of standards in the EAC. The Act was enacted because of the need to harmonize the existing national standards laws to conform to the new East Africa Standards. Such harmonization becomes critical in ensuring that goods produced within the EAC region meet the necessary standards to protect consumers and ensure that they are competitive in the international arena. Member countries are obliged to enact laws that are in harmony with the Standardization, Quality Assurance, Metrology and Testing (SQMT) Act to facilitate regional standards.

The specific objectives under the Act include: ensuring standardization, quality assurance, metrology and testing of products produced or traded in the community in order to facilitate industrial development and trade; and, to ensure the protection of the health and safety of society and the environment in the Community. The Act establishes the East African Standards Committee and the East African Accreditation Board as the regulatory bodies in the implementation of the Act. The Act also affords stakeholders a forum to interact and exchange views within various sectors including industry, agriculture, and services.

The harmonisation of standards in the region is to be attained through harmonisation of national laws and policies. Municipal laws are to be harmonised in order to achieve compulsory East African Standards⁸⁸. The process of harmonisation is overseen by the East African Standards Committee spearheaded by the technical management sub-committee. Other subcommittees undertake harmonisation of accreditation, quality

⁸⁷ East African Community Standardization, Quality Assurance, Metrology and Testing Act, 2005

⁸⁸ Section 13 of the Act specifies the compulsory national standards to be developed by each national institution

assurance and testing requirements. The Act also provides for the establishment of uniform national quality system institutions which become the implementers of the Act at the national level. The national quality system institution functions as the national standards body, national metrology institute, national legal metrology department and national accreditation body⁸⁹. It is intended that the strategic activities and procedures adopted by each institution are uniform in nature throughout the community. Respective national standards institutions are required to develop uniform national standards in regulating pertinent sectors.

With regard to accreditation, the Act establishes the East African Accreditation Board⁹⁰ for the efficient working of the institutions at national levels. The Board principally facilitates the cooperation and coordination of accreditation activities to avoid duplication of functions of the national accreditation bodies and national focal points. To this end it is responsible for the promotion of the acceptability of test, certification and inspection results from accredited organizations within the Community. For testing purposes, the Act gives Partner States the leeway to establish or designate organizations to function as test laboratories to provide scientific and technical advice.⁹¹

Section 22 empowers the Partner States to ensure that their public regulatory authorities suspend the manufacture, trading, distribution, or sell products that do not conform to compulsory standards. The Act also specifies important provisions in requiring amendment of national laws to provide for sanctions against manufacturers and businesses contravening compulsory standards relating to product labeling, certification and trade descriptions.

The Act provides for a dispute settlement mechanism⁹² between the Partner States where standards are used to restrict access of products into the other Partner States; or where there is deliberate and willful neglect by a partner State to ensure compliance with standards within its jurisdiction to the detriment of the other Partner States. Disputes between partner states are referred to the Council of Ministers for

⁸⁹ Section 6 of the Act

⁹⁰ Section 11 of the SQMT Act

⁹¹ Section 12 of the SQMT Act

⁹² Section 25 of the SQMT Act

determination. It is not stated what procedure is to be followed where there is non-compliance to the Council's direction or redress mechanism where a partner state is dissatisfied with direction affecting it. It is also unclear, how such directions impact directly on the protection of a consumer and the powers of the Council to monitor and ensure compliance of its orders.

4.2.4. The East Africa Community Competition Act

The East Africa Community Competition Act (hereinafter referred to as the "EAC Competition Act") seeks to promote and protect fair competition in the community and provide for consumer welfare. It establishes the East African Community Competition Committee as the overall regulatory authority on matters relating to competition law.

The EAC Competition Act aims to achieve a number of objectives in relation to consumer protection. It seeks to enhance the welfare of the people in the community by providing consumers access to quality products and services within the community at competitive prices.⁹³ Part III of the Act specifically deals with consumer protection issues.

The Act discourages false representations as to the standard, quality, value, grade or composition, style or model of goods and services⁹⁴. Based on the consumer's right to choose freely, the provision takes into account that consumers ought to be encouraged to purchase what satisfies their needs. The right to choose freely imposes a duty upon any undertaking to disclose correct information regarding description of goods. Such correct information enables a consumer to choose an item or service from a point of knowledge. The Act prohibits unconscionable conduct in consumer transactions. The provision imposes a duty on any undertaking to provide correct and full information of their goods and services.

The East African Community Competition Committee is established under section 37 of the Act and it is mandated to carry out a number of functions. In relation to consumer protection, the committee is mandated to publish dangerous goods in at

⁹³ Section 3 (a) v of the East Africa Competition Act

⁹⁴ Section 28 of the Act

least two newspapers of national circulation in each member state⁹⁵. Such publication seeks to inform the public in the EAC about the health, safety and quality of products within its market. Sanctioning manufacturers through publication of their defective goods also acts as a form of deterrent.

As a measure towards safeguarding public health and safety, the Act enforces product safety provisions by compelling businesses and traders to comply with the set standards⁹⁶. Section 32 also compels businesses to provide consumer product information standards. The consumer product information standards consists of requirements relating to the disclosure of information relating to the performance, composition, contents, methods of manufacturer or processing, design, construction, finish and packaging of goods. It is required that such information should detail the quality, quantity, nature or value of the goods.

Section 33 provides for the measures that may be undertaken to against manufacturers and traders contravening the provisions of the Act. The Competition Committee is empowered to order recall of the goods within certain periods, publicly disclose dangerous and harmful goods, the nature of their defect and the procedure for disposal of such goods and, order the offending manufacturer to replace, repair defective goods or make refund to consumers of such goods. The consumer right to pursue civil recovery through a court of competent jurisdiction is also available to an affected consumer.

The East African Competition Authority charged with enforcing competition law at the community level is established under the Act⁹⁷. Institutionalisation of the Competition Authority has been stalled by bureaucratic delays at the EAC Council despite the adoption of Draft Competition Regulations by heads of national competition authorities and approval of the Sectoral Committee on Trade, Industry and Investment. After endorsement by the Sectoral Committee in May 2009, the Regulations still await the adoption by the Sectoral Council Trade, Investment, Finance and Industry.

⁹⁵ Section 30

⁹⁶ Section 31

⁹⁷ Section 37

Unlike the SQMT Act, the EAC Competition Act provides specific protective provisions aimed at safeguarding consumer welfare. Part III of the act is drafted clearly to ensure that in regulating anti-competitive trade practices, consumer rights and interests are paramount consideration. However, such protection is restricted to Part III of the Act and the scope of consumer issues addressed is limited. Issues on consumer credit, nascent issues on e-commerce are not addressed.

Moreover, with the operationalisation of the EAC Competition Authority in abeyance due to the EAC Council bureaucracy, enforcement of consumer protection and competition issues remain unaddressed. Further, the mandate of the proposed EAC Competition Authority is narrow and relegated to an advisory and facilitative role. As an enforcement institution it ought to be robust and equipped with wide powers to ensure compliance to provisions of the Act.

Indeed competition and consumer protection operate in a complementary manner in ensuring the welfare of all market players. Consumer protection and competition law share a common purpose, or at a minimum, share an imperative not to work at cross-purposes.⁹⁸ It is not contended here that the Competition Act inhibits consumer protection at the EAC but the framework needs to be strengthened to cater adequately for consumer issues.

4.3. ADEQUACY OF EAST AFRICA COMMUNITY LAWS ON CONSUMER WELFARE

4.3.1 Existing fragmentary approach

Consumer protection laws as noted above are contained in the EAC Treaty, SQMT Act and Competition Act. There is no single law which provides specifically for consumer protection. The need for a comprehensive law on consumer protection is important because it would provide a framework within which peculiarities of consumer protection are addressed comprehensively and specifically. The inclusion of consumer welfare issues in other Acts has proved to be ineffective as instruments of protection as such issues are relegated at the expense of other economic pursuits. The regional laws have adopted fragmentary approach in consumer protection applied at

⁹⁸ *supra* note 19

the municipal law. Transposition of such structures brings along inherent weak mechanisms experienced at the national level to the EAC. Enactment of an EAC consumer protection law does not mean that the provisions relating to consumer issues in the SQMT Act and the Competition Act will be rendered nugatory. On the contrary, the consumer protection law will be designed to facilitate the working of the enforcement institutions like the EAC Standards Committee and the Competition Regulatory Authority. To this end a Consumer Protection Authority would be established to as an overall authority to oversee the functioning of such regulatory bodies and ensure that consumer issues are dealt with.

Existing fragmentary national laws themselves pose a great challenge to realisation of an EAC consumer protection law. Assuming that the east African Legislative Assembly enacts a consumer protection law, implementation of the law at the municipal law is likely to be problematic in light of the existing fragmented regimes.

4.3.2 Diverse Development Levels

Disparities in development levels of respective partner states pose a great challenge to the implementation of SQMT Act. The requirements for attainment of successful and complete harmonisation of standards in the community are not an average task for partner states in terms of finances, transfer of technology and capacity.

As an initial step, partner states with different structures from EAC model are required to set up national quality institutions which act as overall enforcement body for standards, metrology, legal metrology and accreditation. National institutions are also required to function as test laboratories to provide scientific and technical advice. Setting of such laboratories requires acquisition of technology and equipping them with modern technology. In order to offer competent scientific advice, the quality institutions need to be staffed with qualified scientists and other professionals. Training, research and other capacity building activities need to be undertaken to conform to international standards and update information taking into account the dynamic nature of scientific evidence.

All these processes require huge investment in transfer of technology and capacity building. In countries with existing structures similar to the EAC model, adapting to

the EAC model would be relatively easier and less prohibitive. Owing to the disparities in developmental levels amongst member states, some jurisdictions may not have adequate resources to effect the required changes to realise harmonisation of laws, policies and institutions desirable for an effective EAC standards regime. With prevailing national developmental concerns on poverty eradication and economic growth, such member states may be reluctant to priorities harmonisation efforts. In a setting where there are disparities in developmental levels, the process of harmonisation of standards is likely to be slow and member states will be enforcing different standards depending to their technological advancements. In light of increased trade amongst member states and the advent of globalisation, the community consumer is exposed to different product standards and more often than such products include substandard and counterfeit goods.

The situation may be remedied through the incorporation of a financial mechanism in the EAC legal framework that would provide funding through grants or concessions to facilitate member states discharge their commitments. As currently constituted, the EAC legal framework does not specifically address the issue of financing. The SQMT Act only alludes to the issue of capacity building and transfer of skills and technology. Under the SQMT Act, the Technical Sub-committee on Metrology is mandated inter alia to “identify training and equipment needs” while the Technical Sub-committee on Testing is charged with the responsibility of “co-ordinating co-operation in testing with the purpose of developing the competence of testing laboratories” and “use of facilities with a view of making them accessible to users of laboratories in the region. The wording of the provisions falls short in specifying transfer of technology and funding mechanisms for member countries. Through the EAC legal framework, member states with access to modern technology ought to be urged to share such advantages with other member states.

Further, complementary provisions on co-operation through information exchange should be encouraged to enhance uniform enforcement throughout the region. For example, a problem may arise where an unsafe product is recalled from one member country but not from other countries due to lack of communication and co-operation in consumer protection matters at regional level. Furthermore, unscrupulous businessmen may not bother with repair, refund or replacement of goods in member

states where the risk of discovery or liability is low or almost nonexistent.⁹⁹ Increased information sharing would prevent businesses from jurisdiction shopping which entails relocating their undertakings in weak enforcement areas to avoid high threshold regimes. The SQMT Act can be said to have made an attempt to address this problem of product safety by empowering the standards committee to declare, publish and implement compulsory standards. The powers of the Standards Committee would be successfully implemented if there is co-operation within Member States and full establishment of a comprehensive legal and administrative mechanism to carry out that mandate. Again this cannot be achieved without harmony in the Consumer protection legal regimes of Member States.

Equally, an EAC consumer protection law is likely to suffer similar challenges. Institutionalisation of national consumer protection agencies would also require considerable input of financial and human resources. In order for proposed national consumer protection agencies to be effective in enforcement, the agencies would need to establish inspectorate departments with national coverage. Establishment of departments nation-wide is essential to enable decentralised approach to monitoring, continuous review and inspection of manufacturers' and traders' activities. This affords consumer greater accessibility to such offices and enables the public to register their complaints at the local level. Establishing and maintaining nation-wide inspectorates would require considerable financial input.

The EAC ought to incorporate financing mechanism to assist member states with weak economic capabilities to attain common standards, quality assurance and metrology requirements.

4.3.3. Political Goodwill

Endorsement of the EAC law by member states is an integral part towards co-operation and developing the legal framework for attaining its objectives as spelled out in the EAC Treaty. Harmonisation of laws requires an investment of resources from member states to realise the objective of establishing uniform standards throughout the region. For example, as discussed above, huge financial and human resources are invested to ensure that each member states fulfil its commitments under

⁹⁹ Supra note 71 at p.14

the SQMT Act. However ascension to the Treaty and endorsement of EA legislation forms one part of the step towards harmonisation. Member states are unlikely to commit financial, human resources or even their time towards conforming to EAC requirements where political good will is lacking. Not only is political goodwill an important factor at the negotiation stages of passing legislation but it is vital in the period after enactment of laws when member states are tasked with implementation. It is not all gloom that there is little or no political goodwill amongst partner states as in the implementation of EAC legislation, the member states have in the past shown unity of purpose. In regard to harmonisation of the budgetary processes, the governments of Kenya, Uganda and Tanzania have in the past closely worked together.

However there has been minimal political co-operation in the area of freedom of movement of labour and capital between member states. Tanzania's municipal laws on immigration and work permits are still restrictive towards other EAC citizens and do not reflect the purposes of the EAC treaty. There have been numerous cases of harassment of Kenyan fishermen in Lake Victoria by Ugandan authorities. The recent Migingo dispute is an indication that political goodwill in facilitating economic relations has not been firmly established between member states. The comments from top Ugandan officials indicate that there are other interests at stake rather than assertion of territorial rights over a one acre Island in which Kenyans and Ugandans have co-existed for over 45 years. There have also been accusations and counter-accusations between member states that Tanzania is aligned more to the Southern African Development Community (SADCC) rather than the EAC. Without delving into the merits of such claims, the fact that there is a manifestation of mistrust amongst member countries shows a lack of political goodwill and is not in consonance with the spirit of the EAC Treaty.

The obtaining position on political goodwill does not fit comfortably with the objectives of the EAC Treaty. One of the ways member states aim to achieve increased co-operation to ultimately realise economic integration is through the unification of laws, policies and institutions. However, with the prevailing political mistrust amongst member states coupled with existing logistical problems, the process of integration is likely to be slowed down. Conventionally, unification of laws

requires that member countries adopt a nuanced legal system with different aspects from its local legal system. In the adoption of an EAC consumer protection law, member states may draw examples from the structure of the Consumer Protection Bill as a model for unification of law in the absence of a consolidated law on consumer protection in the region. In such a scenario, political goodwill between member states faces a stern test as whether other jurisdictions would be willing to adopt the structure of on member state. Such political struggles are likely to be extended from the EAC Council to the parliament thus having an effect on the passing of proposed laws

4.3.4 Regulatory and Enforcement Institutions

Under the SQMT Act, the Standards Committee is structured as an administrative body with the intention of facilitating harmonisation of standards, metrology and testing as means of promoting trade and eliminating barriers to trade. Little mention is made of the third objective of the committee which is to protect health and safety of human lives and the environment. The terms of reference for the sub-committee focus on harmonisation of standards and boosting trade among member states.

The East Africa Standardization Committee consists of heads of National Standards Bodies and other agencies reporting to council of ministers through the co-ordinating committee of permanent secretaries¹⁰⁰. The committee is composed of various subcommittees dealing in different aspects of standardization.¹⁰¹ These subcommittees include the standards technical management committee, technical subcommittee on metrology, subcommittee on testing, subcommittee on quality assurance and accreditation. The Standards Technical Management committee is mandated to spearhead the harmonization of standards in East Africa.

There are no clear provisions in the Act on the mandate of the East African Standards committee as a regulatory authority in enforcing matters concerning standardization. Further, there is no clear consumer redress mechanism incorporated into the Act to ensure that a channel for addressing consumer complaints is in place. The East African Accreditation Board suffers similar limitations in its jurisdiction over

¹⁰⁰ Section 4 of the Act

¹⁰¹ <http://www.eac-quality.net/the-sqmt-community/sub-committees.html> last accessed on the 3 August 2009

consumer protection issues. Its mandate is restricted to performing advisory, liaison and co-ordination functions

4.3.5 Consumer Redress and Representation

There is lack of a consumer redress mechanism which forms an important part of consumer welfare. The Act does not specify the procedure to be followed in the event of a dispute on the interpretation of the Act or a complaint on an issue concerning standardisation. The Act however does provide for liberty to appeal to the EAC Council if aggrieved by the decisions of national quality institutions under section 22 of the Act. Such procedure though open to “any person” proves to be restrictive to consumers as they have little economic power compared to businessmen. Furthermore, there are no rules or regulations to direct interested parties on the procedure for contesting decisions or bringing action before the EAC Council. Predictability and certainty as essential features of law lack in the EAC legal framework on consumer protection especially in providing for consumer redress.

The consumer’s position as the “forgotten protagonist”¹⁰² in the formulation, enactment and implementation of economic integration treaties is evident in the EAC. There is no provision for representation in any of the administrative and legislative bodies of the community. It must be appreciated that if the true objective of economic activity, such as integration is ultimately to achieve welfare gains, consumers must be regarded as equals in the economic game. Consideration needs to be given to how consumer interests and consumer rights can be integrated into negotiations of EAC laws. It is submitted that in the case of the EAC, there is a democracy deficit in relation to consumer representation. The EAC Treaty, the Customs Union Protocol, the EAC Competition Act and the SQMT Act do not even allude to consumer representation in any of the bodies established under them. This is a problem which can be solved by the establishment of a Consumer Council or committee at the Community Level to look into consumer issues and represent consumers in all areas which affect them. A similar initiative has been adopted by MERCOSUR (the Southern Common Market) and the EU consumer protection regime¹⁰³.

¹⁰² Supra note 73 page 29

¹⁰³ Supra note 73 p. 30

The plight of consumers in terms of consumer representation is not aided by the existing weak non-governmental consumer organisations. The activities of these organisations are small-scale and there are low levels of public awareness about the existence or the function of such organisation as advocacy organisations. There lacks a regional network or partnership between nongovernmental organisations involved in consumer protection work. The level of organisation of consumer groups is low compared to other economic blocs like MERCOSUR and the EU which have partnerships comprising consumer organisations from all member states. On the contrary, producers have a strong voice and presence in the EAC through the East African Business Council (EABC) compared to the consumer who has no voice at all. Organised groups like manufacturers and producers are able to lobby for incorporation of their interests into legislation through the EABC.

A robust civil society in consumer protection is important to address consumer issues, influence policy, promotes public awareness and to safeguard the consumers' rights generally where the public and the private sectors fail to implement policies and laws accordingly.

4.3.6 Prioritisation of Industrial Economic Interests over Consumer Protection

It has been argued that consumption is the sole purpose of production and the interest of the producer ought to be attended to only in so far as it may be necessary for promoting that of the consumer.¹⁰⁴ In the context of EAC consumer laws, this observation has been proved to be more idealistic than realistic. Existing EAC laws consumer protection are informed on application of wrong principles which prioritise economic integration and increase in trade rather than consumer welfare and protection. Promotion of consumer welfare in the EAC framework is incidental to economic expansion and growth.

The objectives of the EAC is to develop policies and programmes aimed at widening and deepening co-operation among partner states in economic affairs for mutual benefits. Further, the co-operation aims at accelerating economic growth, social progress, cultural development and to promote regional peace and stability. Against

¹⁰⁴ Smith A., (1976) "The Wealth of Nations Inquiry into the Nature and Causes of the Wealth of Nations" (London : Methuen & Co. Ltd)

the background of these objectives, the EAC continuous to give little attention to a basic but a crucial aspect of law in its rigorous pursuit of increased regional trade. EAC's ultimate vision of a single market should mean that consumer protection measures are developed in tandem with economic measures and such mechanisms need to be established and developed by the time the single market is achieved.

The lack of a sound consumer protection in the EAC legal framework is evidenced by the formulation and implementation of economic policies and laws without the consideration to consumer rights and interests

The reality is that mostly all the efforts have been focused towards the elimination of barriers and enhancement of trade within the EAC thereby ignoring the plight of consumers¹⁰⁵

This means that there should be both at the national level and community level, a comprehensive, unified and harmonized consumer protection substantive legislation. Such consumer protection legislation should also be accompanied by unified law enforcement and administrative mechanisms to ensure that consumer redress can be realised in the event of complaints and disputes.¹⁰⁶

To address this, there should be a people centred approach to the integration process which will ensure that Consumer interests are taken on board.¹⁰⁷ Again, despite the good intentions in moving towards integration, the efforts already made and the ambitions set out in the protocol it can safely be argued that issues of consumer protection have not been given the attention they deserve similar to the EU approach. Basically, integrating markets and opening them to foreign goods and services and the international nature of private relations are a great challenge to consumer protection law.¹⁰⁸

Marques argues that usually in economic integration treaties and protocols, the consumer receives little or no mention of the consumer. The benefits of economic integration are often discussed in terms of benefits to countries, governments,

¹⁰⁵ Article 3 of the Protocol on the establishment of the E.A Customs Union

¹⁰⁶ Supra note 73 page 26

¹⁰⁷ Supra note 14 at p. 11

¹⁰⁸ Marques C.L. Supra note 11 at p.23

businesses and manufacturers hence in this regard integration is supply-driven. There is little mention on how economic integration will benefit consumers except that it would result in greater choice of goods and services. The argument in this paper is that there is more to consumer protection than greater choice and variety of goods and services when countries integrate their economies.

Going by the East Asian example as interdependence increases and national borders become blurred in terms of economics and trade, there is need for more co-operation on consumer protection, rather than the *mélange* of national Laws that are now in the process of development, and whose enforcement is yet to show any consistent pattern, either within or between countries. In integration process consumer protection is an essential complement to competition policy in the promoting sustainable growth and reducing social inequalities in developing economies.¹⁰⁹ A regional consensus on the culture of consumer protection would yield long-term social gains. This would remain a mirage so long as the inadequacies of EAC laws on consumer protection remain unresolved.

4.3.7 Consumer Education and Information

The East Africa Community does not have any regulations or laws governing or providing for consumer education. There is no consumer education programme or committee to spearhead consumer education in the EAC. This has led to an uninformed community consumer in the region who does not know his/her rights and hence does not seek redress when their rights are clearly violated.

In contrast the EU has various specific consumer education programmes to enhance consumer education some of these initiatives are, helping teenagers become informed consumers, training courses for staff of consumer organizations, on-line consumer education and integrated courses professional and graduate courses in consumer affairs in various Universities.

Consumer education is the preparation of an individual through skills, concepts and understanding that are geared to achieve maximum satisfaction and utilization of

¹⁰⁹ Supra note 12 at p.3

one's resources.¹¹⁰ It is the development of skills and knowledge that assists consumers to make discerning choices, sorting out complaints effectively and seeking further information and help. Informed and educated consumers are likely to be more effective individuals in the market place and such information goes a long way in enhancing and protecting their rights.

Objectives of consumer education include inter alia; offering guidance and support on complaint resolution on consumer rights, enabling consumers to obtain optimum value-for-money and enabling consumers to comprehend, interpret and analyze the information offered to them in the market place thus allowing them to make informed decisions.

In the modern consumer oriented, globalised and digital economy, access to information plays a crucial role in the market. One of the main ways of restoring accountability and confidence is by providing consumers with an avenue of redress that is effective enough to address what they perceive as injustice similar to the EU approach which is discussed in detail in chapter 4.

4.3.8 New Areas for Regulation

Electronic Commerce

Electronic commerce, commonly known as electronic Marketing, e-commerce or ecommerce consists of buying and selling of products or services over electronic systems such as the internet or other computer networks. It is conducted through the spurring and drawing on innovations in electronic funds transfer, supply chain management, internet marketing, and online transaction processing, electronic data interchange (EDI), inventory Management Systems and automated data collection systems. E-commerce is generally considered to be the sales aspect of e-business. It also consists of the exchange of data to facilitate the financing and payment aspects of business transactions.¹¹¹

¹¹⁰Fazal A. and Bishan S., Consumer Education: A Resource Handbook (Malaysia: International Organization of Consumers Union) 1991.

¹¹¹ http://en.wikipedia.org/wiki/electronic_commerce last accessed on 20.8.09

Within East African Community Member States, use of e-commerce has greatly advanced and increased with widespread internet usage. In Kenya for example, it is mainly used in the banking industry in electronic money transfers, e-banking by mobile service providers like Safaricom and Zain to who have partnered with Banks to offer Mobile banking with a variety of banking products on offer. They have also introduced the use of mobile money transfer services, payment of bills and banking services.

It must be appreciated that e-commerce has greatly revolutionized the way business is done the world over including East Africa. Hence, it is imperative that the process of integration must embrace all aspects of e-commerce both in legislative provisions and organizational structures. However, the EAC Treaty and other EAC laws have no provisions which address e-commerce. Member countries to the East African Community should adopt electronic commerce regulatory and legislative framework that create confidence for consumers and facilitate the transformation of business towards the creation of an e-market within the community. These measures would enhance consumer protection for consumers who have to use e-commerce daily and who may not have the technical knowhow, information or general ICT skills to understand what rights they may have in respect thereof.

Despite the many advantages of e-commerce, there are concerns that consumers are exposed to risks relating to consumer privacy, confidentiality, and security. A sound regulatory and legislative framework within the community will address these risks in addition to helping member countries adopt measures to protect intellectual property and address the issue of settlement of disputes which arise out of contracts entered at a distance or through electronic commerce. Dispute resolution amongst several jurisdictions would usually involve the complex area of conflict of laws. Legislation in the area of e-commerce would offer much needed legal certainty and articulate consumer rights and interests to ensure that they are protected¹¹². Several Bills have been published by respective member states but no single Bill has been enacted an e-commerce law. At the community level no single agreement, protocol or Act addresses e-commerce and as argued above lack of sound regulatory and legislative frameworks in this area exposes the consumer to the risk of exploitation by

¹¹² Supra note 73 at page 22

manufacturers and producers who may take advantage of the gaps in national and community laws.

Conclusion

The integration process in East Africa is being undertaken with little or no regard to the protection of Consumers in the region. As discussed in this Chapter, the treaty for the establishment of the EAC, the Protocol for establishment of the E.A Customs Union, SQMT Act and the EAC Competition Act have few provisions which are specifically designed to address Consumer protection issues.

At the Community Level, there is lack of a comprehensive legislative and regulatory framework. Without a unified legislation covering all the issues concerning consumer protection, it is difficult to achieve effective consumer protection. It is therefore imperative that the East African Community adopts measures that would afford strong consumer protection mechanisms for the benefit of the community consumer. In light of the infancy of the integration process in the EAC, a comparative study of other established economic blocs is useful to draw lessons which would be helpful in remedying the transient challenges faced in the formulation of an EAC legal framework on consumer protection.

CONCLUSIONS AND RECOMMENDATIONS

This chapter consolidates all the issues examined in the study as it draws conclusions on the findings in the preceding chapters. This chapter draws its conclusions based on the hypotheses formulated in chapter 1 of the study. It also makes recommendations on how best the issues which have arisen in this study regarding incorporation of consumer protection in the integration process should be addressed.

5.1. CONCLUSIONS

5.1.1. Fragmented consumer laws in respective member states negatively impact on protection of consumer rights within the EAC.

Evaluation of respective municipal laws affirms that there is no single legislation in each of the Member states which specifically and comprehensively deals with Consumer Protection. Kenya has taken steps and came up with Consumer Protection Bill which is yet to be enacted into Law. It has been established that in each of the Member Countries, there are several legislations which contain some aspects of consumer protection but consumer welfare issues are not addressed comprehensively therein. Further, existing national institutions have weak enforcement structures due to limited financial and human resources. Their coverage is therefore limited to capital cities due to incapacitated inspectorates. Due to the nature of their respective constitutive laws, the work of national enforcement institutions charged with consumer protection are uncoordinated leaving loopholes for unscrupulous businesses to exploit consumers.

5.1.2. Harmonisation of consumer protection laws within the EAC framework ensures that requirements for competitive trading practices and standards are enforced to safeguard consumer welfare

Harmonisation of laws in the EAC has been undertaken in respect of standards and competition through enactment of the SQMT Act and the EAC Competition Act. The EAC legal framework is principally aimed at regulating anti-competitive practices and

ensuring uniform standards are applied throughout the region. The EAC regime does not specifically address consumer welfare issues as the provisions are aimed at trade facilitation while consumer issues are subordinated to economic, commercial and industrial concerns. Thus, consumer issues are relegated at the expense of EAC's trade and investment priorities including elimination of trade barriers and enhancement of regional trade.

The laws are premised on the wrong assumption that increasing competitiveness and harmonisation of standards would automatically contribute to consumer welfare. The justification of pursuit of economic efficiency and trade facilitation is untenable as it ignores the reality of imperfect markets or market failure and the low levels of consumer education and information which affect consumers' autonomy. Therefore this study contends that the S.Q.M.T Act, 2006 and the EAC Competition Act cannot pass for a comprehensive consumer protection law particularly addressing and facilitating consumer welfare and rights.

Consumer Representation

The study has established that consumer representation as an important aspect in consumer protection is non-existent in the EAC legal framework. In the EAC Treaty, EAC Competition Act or the SQMT Act there is no provision for consumer representation in any of the administrative bodies of the Community. Consumers are at a disadvantaged position in economic relations as compared to producers and traders with a strong and organised representation through the EABC. Similarly, the presence of civil society organisations is fairly weak at the national level. In Uganda, the Uganda Consumer's Protection Association Uganda ICT Consumer Protection Association and CONSENT constitute consumer advocacy groups seeking to champion consumer rights. In Kenya, the Consumer Information Network (CIN) while in Tanzania the TCAS is the main consumer organisation. All these civil Society Organizations operate both dismally and are few in number. Their activities are concentrated in the capital cities meaning that the field of work is limited and not accessible to all consumers.

Consumer Redress

When free trade is facilitated through integration, similarly trade dispute resolution mechanism ought to be facilitated. It must be appreciated that once markets are opened up, consumers want to know where to get redress at minimum costs and conveniently. Obviously, the cost of litigating in foreign countries and in cases involving the application of foreign law can be high, besides being complex, limiting consumers' willingness to claim their rights or have recourse to the justice system. That is why the integration process must be alive to the need to put in place a unified and harmonized consumer redress mechanisms. Such a mechanism is important because if integration aims at fast tracking growth with the Consumer as the ultimate beneficiary, a greater access to redress by Consumers would promote consumer confidence and in turn spur increased trade. This can be done by ensuring that an effective and efficient consumer redress mechanism is made an integral part of the integrated market.

5.2. RECOMMENDATIONS

5.2.1. Enact a specific law on consumer protection at the EAC

Consumer protection as currently contained in respective municipal laws is inadequate in catering for consumer rights. In the wake of regional integration, it is felt that harmonisation will address consumer interests throughout the region. The level of harmonisation will affect the competencies of national laws and national enforcement institutions. Maximum harmonisation would mean that national institutions would have no jurisdiction to set divergent rules and adjudicate on consumer protection.

It is suggested here that minimum harmonization of consumer protection laws is pursued in the Community and such efforts should complement strengthening of national laws in respective countries. With proper formulation and structuring of laws, national institutions and courts can be competent authorities for protection of citizen's consumer rights. Harmonisation of laws through the Community would enable alignment of policies in respective countries, enhance quality of consumer protection, improve national laws and act as a model to younger jurisdictions through development of common concepts and terminology.

It is therefore recommended that an EAC Consumer Protection Act be enacted establishing a regional regulatory authority with robust enforcement capabilities. The proposed regional Consumer Protection Authority would be mandated to oversee implementation of the Act and monitor compliance of consumer issues in the EAC. The Act would also require the consolidation of municipal laws and national institutions where they are fragmentary.

5.2.2. Incorporation of consumer representation, education and consumer redress mechanisms

The EAC legal framework offers little for redress of consumer complaints. The procedure is non-existent. It must be appreciated that in order to achieve welfare gains in integrating markets, consumers must be regarded as equals in the economic game. Consideration needs to be given to how Consumer interests and consumer rights can be integrated into trade negotiation so as to make them democratic.

The suggested incorporation of consumer interests, rights and welfare would be incorporated along the Plan of Action for Consumer Protection adopted by South Eastern Conference on Consumer Protection organised by government consumer protection agencies and CIN as representative of civil society. The Plan of Action is anchored in three pillars of the EAC Consumer Council; the Network of Consumer Protection Agencies; and the EAC standing Committee on Consumer Protection.

a) The EAC Consumer Council

It is envisioned that the EAC Consumer Council shall be an umbrella organisation made up of Consumer Organisations from all EAC Member Countries. This council will ensure enhanced consumer representation and participation in the EAC secretariat. It will be charged with the duty to defend, uphold and promote the rights and interests of Consumers in the EAC.

The Council's mandate will be to maximize the benefits and minimize the risks of an integrated market on consumers in the EAC. It would seek official affiliation with the EAC in order to keep the council connected and represented in all EAC activities and have access to EAC policies, directives and decisions with an impact on the

consumer. Although the ASEAN model does not include an educative function, it is suggested that the proposed EAC Consumer Council undertake responsibility of educating and disseminating information to consumers. This would raise awareness and knowledge amongst consumers and enable them make informed choices at the market place. As discussed in Chapter 3, adopting a programme similar to the EU Consumer Programme would be desirable.

b) The Network of Consumer Protection Agencies

This network of Consumer Protection agencies will comprise of a designated Government agency in each Member State. It will be formally affiliated to the EAC secretariat to enable sharing and exchange of information on Consumer Protection policies and Laws in Member States and to discuss and implement a harmonized system of alert in each Member Countries on banned and harmful products, harmonization of Consumer Protection Laws, harmonization of labelling requirements and product safety standards. It would also establish a system for Consumers to obtain redress in the Consumers home Country where there is injury, damage or loss incurred as a result of goods and services from EAC Member States, capacity building for government officials charged with the implementation of Consumer Protection policies in the EAC and technical assistance to help develop and implement consumer Protection regimes and Programmes to Members of EAC that do not have them in place. Such a network would strengthen enforcement in the region both at the Community level and the national level.

c) The EAC Standing Committee on Consumer Protection

This standing committee is necessary to ensure that there is institutional structure for Consumer Protection in the EAC secretariat and ensure that regional Cooperation on Consumer Protection is included in the official work Programme of the EAC secretariat. The Committee's role would be to promote regional Consumer welfare; to identify regional Consumer problems through surveys and data collection to harmonize Consumer Protection Laws across EAC Member Countries, and to develop cross border enforcement procedures. Further, it would play an active role in advising and assisting the EAC secretariat in balanced policy making. The Committees first task would be to develop a regional Consumer Protection work Programme in

consultation with consumer Protection agencies and Consumer Organizations so as to afford EAC Consumers a high degree of unified and harmonized protection.

5.2.3. Incorporation of financial mechanism and capacity building and real transfer of technology

There is need for member States to co-operate in alerting each other on dangerous products discovered, sharing information and product safety, co-ordinate market surveillance procedures and recall and enforcement systems. Towards facilitating co-operation between member states through exchange of information, skills and transfer of technology, the EAC framework ought to incorporate a financial mechanism that would enable smaller capital importing economies acquire such technical knowhow and knowledge. The EAC would administer the facility by issuing grants and concessions to the smaller economies.

It is argued that incorporation of the above recommendations into EAC legal framework would ensure that high levels of protection are accorded to consumer issues and the welfare of the consumer would be safeguarded in the face of increased economic relations in the EAC.

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