

Providing Sharia-Compliant Consumer Protection in Online Contracts: A Case Study of Saudi Arabia

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Abstract

The emergence of modern technology and online selling in the early 1990s led to a significant shift in business practices, as sellers and buyers no longer needed to follow the traditional contracting process. Indeed, the facilitation of online contracts, sales and purchases over the Internet, such as business-to-consumer contracts (B2C), is one of the most significant technological developments of the Internet age. Despite the benefits of online shopping and its increasing popularity among consumers in recent years, online retailing is not without its problems, and the negative consequences can be severe.

Consumers are affected by several factors when they purchase a product or service online. In short, compared to offline shopping, greater risk and less trust are expected in an online environment. This has led some global organisations to address the need for supranational consumer protection and alleviate risks to online consumers worldwide. However, such initiatives may not have the desired impact on developing countries, as long as these guidelines are not adopted in their national legislation.

The first objective of this study is to investigate the laws regulating online consumer protection in the KSA and to assess whether they have achieved their purposes. A secondary objective is to determine whether or not there is the need for further reform in the legislation of online consumer protection, and if such reform is indicated, how it might be achieved in a way that reflects the needs of a state in the modern world, yet remains consistent with Islamic law. To that aim, the thesis will consider adopting Sharia law's features and take the English consumer protection model as an inspiration to suit the Saudi legal environment to regulate online transactions. Therefore, the best practices and legal principles that come to light from this analysis will then be outlined to fulfil this research's main aim, identifying opportunities for the improvement of consumer protection in Saudi Arabia.

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- Commercial Court Law 1931 Royal Decree No (32).
- Commercial Courts Law 2020 Royal Decree No (M / 93).
- Commercial Data Law 2002 Royal Decree No (M/5).
- Commercial Paper Law 1964 Royal Decree No (M/37).
- Commercial Pledge Law 2004 Royal Decree No (M/75).
- Consumer Protection Association Law 2015 Council of Ministers Resolution (No. 120).
- Commercial Register Law 1995 Royal decree No (M/1).
- Council of Ministers Law 1993 Royal decree No (A/13).
- Consultative Council Law 1993 Royal decree No (A/91).
- E-Commerce Law 2019 Royal Decree No (M/126).
- Electronic Transactions Law 2007 Royal Decree No (M/18).
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- The Consumer Rights Act 2015.
- The Insurance Act 2015 (c 4).
- The Sale of Goods Act 1979 (c 54).
- The Sale of Goods Act 1893 (c 71).
- The Supply of Goods and Services Act 1982 (c 29).
- The Unfair Contract Terms Act 1977 (c 50).

2.2 Regulations

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- Consumer Protection from Unfair Trading Regulations 2008, and its Amendment 2014.
- Electronic Commerce (EC Directive) Regulations 2002.
- Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.
- The Unfair Terms in Consumer Contracts Regulations 1999.

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Table of Abbreviations

AEC	Assembly of Experts Committee
ASA	Advertising Standards Authority
B2B	Business-to- Business
B2C	Business-to Consumer
B2E	Business-to-Employee
B2G	Business-to-Government
BEUC	The European Consumer Organisation
BLG	The Basic Law of Governance 1992
CC	The Consultative Council
CCA	The Consumer Credit Act 1974
CCR	Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013
CCS	Commercial Court System 1931
CJEU	The Court of Justice of the European Union
CMs	The Council of Ministers
CMA	The Competition and Markets Authority
CPA	The Consumer Protection Association
CPAL	The Consumer Protection Association Law 2015
CPASA	The Consumer Protection Association of Saudi Arabia
CPRs	Consumer Protection from Unfair Trading Regulations 2008, and the remedies for unfair commercial practices in the Consumer Protection (Amendment) Regulations 2014
CRA	Consumer Rights Act 2015

CRD	The Consumer Right Directive 2011
CRL	The Commercial Register Law 1995
CSD	The Consumer Sales Directive 1999
C2B	Consumer to Business
C2C	Consumer to Consumer
DSD	Distance Selling Directive 1997
ECB	The E-Commerce Bill 2015
ECD	E Commerce Directive 2000
ECL	The E-Commerce Law 2019
ECRs	Electronic Commerce (EC Directive) Regulations 2002
EGGAE	The E-commerce Guidelines Guide According to The E-commerce
EU	European Union
EULA	End User License Agreement
ERECL	The Executive Regulations of E-commerce Law 2020
ETL	The Electronic Transactions Law 2007
GA	The General Assembly
GCs	General Courts
ICT	Information and Communication Technology
IIFA	The International Islamic Fiqh Academy
KSA	The Kingdom of Saudi Arabia
LCC	The Law of the Consultative Council 1993
LCM	The Law of Council of Ministers 1993
LTA	Legal Transplantation Approach

MC	Ministry of Commerce
MENA	The Middle East and North Africa
NCA	The National Cybersecurity Authority
OECD	The Organisation for Economic Co-operation and Development
OFT	Office of Fair Trading
PBUH	Peace Be Upon Him
SC	Sharia-Compliant
SCC	Saudi Commercial Court
SCPP	Saudi Commercial Provisions and Principles Court
SGA	The Sale of Goods Act 1979
SGSA	The Supply of Goods and Services Act 1982
SMS	Short Message Service
SOGA	The Sale of Goods Act 1893
SP	Service Provider
TFEU	Treaty on the Functioning of the European Union
UCPD	Unfair Commercial Practices Directive 2005
UCTA	The Unfair Contract Terms Act 1977
UK	United Kingdom
UKRN	The UK Regulators Network
UPCD	The Unfair Commercial Practices Directive 2005
UTCCR	The Unfair Terms in Consumer Contracts Regulations 1999

Chapter One: Introduction

1.1 Background

Over recent decades, the popularity of business-to-consumer (B2C) online shopping has significantly increased and it has become one of the most widely used methods for purchasing goods and services.¹ This is due to several factors, such as ease of access to international markets via the Internet, the absence of a need to visit a physical space to buy goods, lower marketing costs, and being open for business 24/7. Online shopping overcomes geographical boundaries and time factors that may impair face-to-face trading, while simultaneously making it easier for consumers to compare services, goods and prices. Hence, the world has essentially become an open market and consumers can now satisfy their need for goods, services and digital content from sellers around the globe.

The popularity of online trading also stems from the fact that online traders do not need to have physical shops to sell their goods and services, hence they do not have to pay various taxes. They have the opportunity to reach consumers worldwide at the lowest costs. Therefore, the low prices for goods and services offered to consumers reflect reduced costs on the traders' side.²

The most recent spike in the growth of online consumption could be attributed to certain circumstances that led to different consumption patterns of consumers around the world. In late 2019, the spread of COVID-19 led to a growth in online consumption and a sharp decrease in demand for services involving face-to-face contact. In the United Kingdom (UK), for example, an online commercial website (Ocado) reported a 6% increase in demand for its services due to the COVID-19

¹ According to the European Commission, 'More consumers are buying online, and their trust in online purchases has dramatically increased'. See European Commission, Directorate-General Justice and Consumers, *Consumer Conditions Scoreboard* (2017) <https://www.mpo.cz/assets/en/consumer-protection/eu-and-the-consumer/news-from-the-eu/2017/8/Consumer-Condition-Scoreboard-2017_Factsheet.pdf> accessed 14 June 2021; According to the UNCTAD secretariat, 'An increasing number of consumers have access to the Internet and engage in e-commerce, which provides easier and faster access to products and services'. UNCTAD 'Consumer Protection in Electronic Commerce TD/B/C.I/CPLP/7' (24 April 2017) Intergovernmental Group of Experts on Consumer Protection Law and Policy Second session Item 3 (e) of the provisional agenda para 2, <http://unctad.org/meetings/en/SessionalDocuments/cicplpd7_en.pdf> accessed 22 June 2021; Gerald Häubl and Valerie Trifts, 'Consumer Decision-Making in Online Shopping Environments: The Effects of Interactive Decision Aids' (2000) 19(1) *Marketing Science* 4; Jiunn-Woei Lian and Tzu-Ming Lin, 'Effects of Consumer Characteristics on their Acceptance of Online Shopping: Comparisons among Different Product Types' (2007) 24(1) *Computers in Human Behavior* 48.

² Farid Huseynov and Sevgi Özkan Yıldırım, 'Internet Users' Attitudes Toward Business to Consumer Online Shopping: a Survey' (2016) 32(3) *Information Development* 453.

pandemic.³ Some commentators expect that the high levels of online consumption due to COVID-19 may not just be limited to the duration of the infection's spread but rather, that this may continue even after the pandemic abates.⁴

However, despite the rapid developments in the popularity of B2C online shopping, there has been some doubt about the extent to which developing countries have been affected by this trend.⁵

In the Kingdom of Saudi Arabia (KSA), offline retail shopping is considered the fourth major sector, after oil, banking and telecommunications, contributing to 17% of gross domestic product (GDP) and representing the largest shopping sector in the Middle East.⁶ Reports predict that the annual growth of major offline shops and stores will increase slightly from 18.7 billion to 24.2 billion, and by 4.4% and 7.2%, respectively.⁷

In 1993, the Internet was introduced in the KSA, with universities and some government sectors the first to use it. The King Faisal Specialist Hospital & Research Centre made the country's first Internet connection.⁸ In January 1999, the Internet was made available to the population through commercial Internet service providers.

Currently, the KSA is the largest spender in the Middle East's Information and Communications Technology (ICT) sector. This is due to a significant shift from 2001 to 2009, where the government, companies and individuals paid more attention to ICT services and products, with more than three times the previous expenditure on ICT.⁹ This has led traders to move towards selling their products and services online.¹⁰

³ Reuters Staff, 'British Online Supermarket Ocado Sees Orders Leap as Coronavirus Spreads', *Reuters* (2 March 2020) <<https://www.reuters.com/article/healthcoronavirus-ocado-group/british-online-supermarketocado-sees-orders-leap-as-coronavirus-spreadsidUSL8N2AV2NL>> accessed 29 June 2021.

⁴ Tsutomu Watanabe and Yuki Omori, 'Online Consumption During the COVID-19 Crisis: Evidence from Japan' (2020) *The Centre for Economic Policy Research* 208.

⁵ Aftab Alam, Omair Malik, Noor Hadi, and Kamisan Gaadar, 'Barriers of Online Shopping in Developing Countries: Case Study of Saudi Arabia' (2016) 12(3) *European Academic Research* 12957.

⁶ Moudi Almousa, 'Barriers to E-Commerce Adoption: Consumers' Perspectives from a Developing Country' (2013) 5(2) *iBusiness* 65.

⁷ Abdullah Basahel and Kamel Khoualdi, 'Hindrances in Providing e-Commerce Services in Saudi Retailing Organizations: Some Preliminary Findings' (2015) *BIJIT - BVICAM's International Journal of Information Technology* 904.

⁸ Grey E. Burkhardt and Seymour Goodman, 'The Internet Gains Acceptance in the Persian Gulf' (1998) 41(3) *Communication of the ACM* 19.

⁹ Abdullah Basahel and Kamel Khoualdi, 'Hindrances in Providing e-Commerce Services in Saudi Retailing Organizations: Some Preliminary Findings' (2015) *BIJIT - BVICAM's International Journal of Information Technology* 904.

¹⁰ Nahla Khalil, 'Factors Affecting the Consumer's Attitudes on Online Shopping in Saudi Arabia' (2014) 11(4) *International Journal of Scientific and Research Publications* 1; Hamed Alshahrani, 'A Brief History of the Internet in Saudi Arabia' (2016) *TechTrends* 19.

According to Basahel and Khoualdi, in 2010, the percentage of Internet users in the KSA increased to 41%, up from 5% in 2001.¹¹ More recently, another study has asserted that nearly 70% of the population in the KSA use the Internet more than once a day.¹²

Similarly, there has been a large shift and significant growth in social networking sites in the KSA, which has the highest growth rate of Twitter usage, with studies indicating that Saudi users send more than 210 million tweets per month. 7.6 million out of the 8.4 million Saudi Facebook users use their mobile phones to access Facebook. The average Internet user in the KSA watches at least one YouTube video every day. At least seven million Internet users have uploaded a video clip once in their lifetime.¹³

Despite this significant increase in internet use, online shopping still has a low level of participation,¹⁴ especially in the B2C retail sectors.¹⁵ Although the COVID-19 pandemic has been an ideal opportunity for the adoption of online shopping by consumers in the KSA, against expectations, consumers' acceptance of online commerce is still low.¹⁶ Consumers are affected by several factors when they purchase a product or service online. Researchers have identified several obstacles examining the acceptance and adoption of online shopping in the KSA; some of these

¹¹ Abdullah Basahel and Kamel Khoualdi, 'Hindrances in Providing e-Commerce Services in Saudi Retailing Organizations: Some Preliminary Findings' (2015) *BIJIT - BVICAM's International Journal of Information Technology* 904.

¹² Haya Alshehri and Farid Meziane, 'Current State of Internet Growth and Usage in Saudi Arabia and Its Ability to Support E-Commerce Development' (2017) 5(2) *Journal of Advanced Management Science* 131.

¹³ Hend Al-Khalifa and Regina Garcia, 'The State of Social Media in Saudi Arabia's Higher Education' (2013) 3(1) *International Journal of Technology and Educational Marketing* 65-76.

¹⁴ Salem Alabdali, 'A Review of the Use of E-Commerce in Saudi Arabia' (2018) 1(6) *Journal for Research on Business and Social Science* 10.

¹⁵ See Moudi Almousa, 'Barriers to E-Commerce Adoption: Consumers' Perspectives from a Developing Country' (2013) 5(2) *iBusiness* 65; Nahla Khalil, 'Factors Affecting the Consumer's Attitudes on Online Shopping in Saudi Arabia' (2014) 11(4) *International Journal of Scientific and Research Publications* 1; Abdullah Basahel and Kamel Khoualdi, 'Hindrances in Providing e-Commerce Services in Saudi Retailing Organizations: Some Preliminary Findings' (2015) *BIJIT - BVICAM's International Journal of Information Technology* 904; Communication and Information Technology Commission, *Report of E-Commerce in Saudi Arabia* (2017) <https://www.citc.gov.sa/en/reportsandstudies/Reports/Documents/CITC_ECOMMERCE_2017_ENGLISH.PDF> accessed 28 June 2021.

¹⁶ Mohamed Ahmed Salem and Khalil Md Nor, 'The Effect of COVID-19 on Consumer Behaviour in Saudi Arabia: Switching from Brick And Mortar Stores to E-Commerce' (2020) 9(7) *International Journal of Scientific & Technology Research* 15.

obstacles are recognised globally.¹⁷ One of the critical factors slowing down the growth of online shopping in KSA is the 'trust' factor.¹⁸

1.2 The Research Problem

Trust, in this regard, is not only an issue with sellers. Instead, the problem is with the online environment itself. Compared to offline shopping, greater risk and less trust are expected in an online environment due to certain factors.¹⁹ These factors include the fact that online consumers cannot see a product before they buy it. In short, consumers enter into online sales 'in the dark'.²⁰ Consequently, a product cannot be physically examined before the contract is signed, which means that consumers cannot ascertain whether the product is useful and as described by the seller.

Although an offline consumer may also not have the opportunity to inspect some products before purchasing them, this is the case for all purchases in online transactions. Moreover, it can be said that an online consumer is more vulnerable compared to other distance consumers, who remotely enter into a contract through mediums (other than the Internet) such as the telephone. This is because many practices that may influence a purchasing decision online, do not occur concerning transactions concluded by telephone, such as algorithms potentially limiting consumer decision-making options.²¹ Hence, the consumer, in this case, is more impacted by online unfair commercial practices than when buying through other distance communication methods.

Online consumers cannot communicate face to face with an online trader, which increases the risk of dishonesty if the seller disappears without consumers

¹⁷ Fahad Aleid, Simon Rogerson and Ben Fairweather, 'Factors Affecting Consumers' Adoption of E-Commerce in Saudi Arabia from A Consumer's Perspective' (International Conference e-Commerce, Portugal, 2009) <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.458.3432&rep=rep1&type=pdf#page=28>> accessed 16 June 2021.

¹⁸ See Najim Alshammari, 'E-Commerce in Saudi Arabia: Characteristics of a Trustworthy Usable E-commerce Websites' (2019) 9(1) International Journal of Information Science 12; Abdul Rahman Altaiar, 'Factors Affecting on the Use of E-Commerce from the Perspective of Saudi Consumers' (2020) 4(9) Journal of Educational Sciences and Human Studies 363; Khulood Almani, 'The Impact of E-commerce on the Development of Entrepreneurship in Saudi Arabia' (2020) 28(4) Journal of International Technology and Information Management 32.

¹⁹ Tatiana-Eleni Synodinou, Philippe Jougleux, Christiana Markou, and Thalia Prastitou, *EU Internet Law - Regulation and Enforcement* (Springer 2017) viii.

²⁰ John Dickie, *Internet and Electronic Commerce Law in the European Union* (Hart Publishing 1999) 93.

²¹ EPRS, *Understanding Algorithmic Decision-Making*, European Parliamentary Research Service (2019) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2019/624261/EPRS_STU\(2019\)624261_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/624261/EPRS_STU(2019)624261_EN.pdf)> accessed 14 June 2021.

knowing their real identity or address. Even if consumers have the address/contact details of a foreign trader, there might still be obstacles in communicating with them. Therefore, it is not surprising that the consumer feels fears in online transactions.

Most studies have stressed that 'trust' plays a vital role in the development and growth of online shopping.²² Pavlou states that in parallel to meeting consumer expectations in online transactions, trust also means removing uncertainties and risks, which can be a significant cause of hesitation in the majority of online commercial environments.²³

It is recognised globally that the existence of solid regulations and relevant laws that protect both businesses and consumers is essential.²⁴ One of the most important concerns for an investor is to protect their investment. Similarly, consumers rely on a set of laws and regulations that will protect their online transactions and ensure product delivery.²⁵ A lack of a legislative system, transparent regulations and government supervision and support is clearly emphasised by consumers and retailers as major inhibitors to their adoption of online commerce.²⁶ Thus, it could be

²² To better understand the relevance of the 'trust' factor as an obstacle to online shopping, it is essential to look at the study conducted by Khalil (2014). In this study, Khalil investigated significant factors affecting online consumer behaviour in the KSA by analysing seven factors: convenience, trust and security, timesaving, language, recommendations, promotions, and buying behaviour. Two methods were used to understand the factors affecting consumers' attitudes directly for online shopping in the KSA: surveys and personal interviews. A sample of 210 respondents was chosen randomly from students and staff of different universities and the general public in the KSA. They found that trust and security are the main factors that hinder people from purchasing online. In conclusion to this survey, Khalil stated that the respondents showed concerns about that the purchased products could be inferior in quality to how they were originally portrayed on the trader's website or could be incorrectly selected, damaged, or may never arrive, or be unsatisfactory in another way. See Nahla Khalil, 'Factors Affecting the Consumer's Attitudes on Online Shopping in Saudi Arabia' (2014) 11(4) International Journal of Scientific and Research Publications 1.

²³ Paul Pavlou, 'Consumer Acceptance of Electronic Commerce: Integrating Trust and Risk with the Technology Acceptance Model' (2003) 7(3) International Journal of Electronic Commerce 126.

²⁴ Although consumer protection aims to protect the interests of consumers, it can be said that they seek to create a subtle balance between consumer and business interests. Too intrusive legislation may discourage companies from contracting with consumers. See EPRS, *Consumer Protection in the EU Policy Overview*, European Parliamentary Research Service (2015) , <[http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA\(2015\)565904_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA(2015)565904_EN.pdf)> accessed 22 June 2021; UNCTAD, 'Consumer Protection in Electronic Commerce TD/B/C.I/CPLP/7' (24 April 2017) Intergovernmental Group of Experts on Consumer Protection Law and Policy Second session Item 3 (e) of the provisional agenda para 13 <http://unctad.org/meetings/en/SessionalDocuments/cicplp7_en.pdf> accessed 22 June 2021.

²⁵ Fahad Aleid, Simon Rogerson, and Ben Fairweather, 'A Consumer's Perspective on E-commerce: Practical Solutions to Encourage Consumers' Adoption of E-Commerce in Developing Countries - A Saudi Arabian Empirical Study' 376 (International Conference on Advanced Management Science, Chengdu 2010) <<https://ieeexplore.ieee.org/stamp/stamp.jsp?tp=&arnumber=5552944>> accessed 29 June 2021.

²⁶ Rayed AlGhamdi, Anne T. A. Nguyen and Vicki Jones, 'Wheel of B2C E-commerce Development in Saudi Arabia' (in Jong-Hwan Kim, Eric T Matson, Hyun Myung, Peter Xu (eds.), *Robot Intelligence*

claimed that a lack of adequate legislation may not only lead to consumer distrust of online shopping but may also threaten the growth and profitability of online shopping.²⁷

The legislative intervention can play an active role in building trust in online shopping, promoting effective business practices, and boosting the prosperity of trading in an online environment.²⁸ This fact has been globally recognised; according to The Organisation for Economic Co-operation and Development (OECD): 'An effective consumer protection must be a cornerstone of any policy approach that aspires to foster a trusted e-commerce marketplace for consumers whose interactions with businesses are typically at a distance, and often across borders.'²⁹

The United Nations Conference on Trade and Development (UNCTAD) has asserted that the main building blocks in fostering consumer confidence in e-commerce are as follows: 'Set up a robust legal and institutional framework governing e-commerce and redress processes, adapt existing regulatory systems to the particular requirements of e-commerce, ensuring effective enforcement of relevant laws, and provide e-commerce consumers with a level of protection not less than that afforded in other forms of commerce etc.'³⁰

The majority of research studies conducted on online commerce in the KSA share similar conclusions and state the importance of government legislation for the implementation and acceptance of online shopping in the KSA.³¹ Khalil claimed that

Technology and Applications 2012. Advances in Intelligent Systems and Computing (Springer 2013). See <<https://arxiv.org/pdf/1302.0820.pdf>> accessed 26 July 2021.

²⁷ Emad Abdel Rahim Dahiyat, 'Consumer Protection in Electronic Commerce: Some Remarks on the Jordanian Electronic Transactions Law' (2011) *Journal of Consumer Policy* 425.

²⁸ Ibid.

²⁹ OECD, *Trust in the Digital Economy*, Panel 3.1 Consumer Trust and Market Growth, 2016 Ministerial Meeting – The Digital Economy: Innovation, Growth and Social Prosperity, (2016) <<https://www.oecd.org/Internet/ministerial/meeting/Consumer-Trust-and-Market-Growth-discussion-paper.pdf>> accessed 29 June 2021.

³⁰ UNCTAD, 'Consumer Protection in Electronic Commerce TD/B/C.II/CPLP/7' (24 April 2017) Intergovernmental Group of Experts on Consumer Protection Law and Policy Second session Item 3 (e) of the provisional agenda para 53 <http://unctad.org/meetings/en/SessionalDocuments/cicplpd7_en.pdf> accessed 22 June 2021.

³¹ E Makki and L.C Chang, 'E-commerce in Saudi Arabia: Acceptance and Implementation Difficulties' (International Conference on e-Learning e Business Enterprise Information Systems and e-Government, Las Vegas, 2014) 119. See <<http://worldcomp-proceedings.com/proc/p2014/EEE2294.pdf>> accessed 16 June 2021; Najim Alshammari, 'E-Commerce in Saudi Arabia: Characteristics of a Trustworthy Usable E-commerce Websites' (2019) 9(1) *International Journal of Information Science* 12; Abdul Rahman Altaiar, 'Factors affecting on the use of E-Commerce from the Perspective of Saudi Consumers' (2020) 4(9) *Journal of Educational Sciences and Human Studies* 363; Khulood Almani, 'The Impact of E-commerce on the Development of Entrepreneurship in Saudi Arabia' (2020) 28(4) *Journal of International Technology and Information Management* 32.

Saudi consumers must be provided with adequate protection for Internet shopping to enhance their trust in shopping online.³² Al-Otaibi and Bach emphasised that the government can overcome these challenges by creating a clear and explicit set of online commerce and consumer protection laws and regulations in the KSA to ensure the rights of all parties.³³ Al-Baqme stated that if the government can devise improved and robust regulations and rules, this will make consumers aware of their rights and ensure just and free trade in the country.³⁴ Basahel and Khoualdi pointed out that this protection must consider the experiences of developed countries that have preceded the KSA in this field, to benefit from their long-term practical experience and success.³⁵ As a result, providing consumer protection legislation will increase trust and confidence in choosing to shop online.

This thesis is built on the above-shared assumptions that the issue of distrust in online shopping can be addressed by proposing a legal framework to meet and resolve consumers' concerns and increase their trust in online shopping.³⁶ This thesis argues that the presence of adequate online consumer protection legislation may diminish such concerns and help consumers gain trust and confidence when they make online transactions.

For instance, an absence of clear refund policies serves as a reason for consumer distrust in the online shopping environment and inhibits the growth and development of online business in the KSA.³⁷ To address and overcome this problem, proper online consumer rights that encompass the most crucial aspects of

³² Nahla Khalil, 'Factors Affecting the Consumer's Attitudes on Online Shopping in Saudi Arabia' (2014) 11(4) International Journal of Scientific and Research Publications 7.

³³ Eyad Makki and Lin-Ching Chang, 'E-commerce in Saudi Arabia: Acceptance and Implementation Difficulties' (International Conference on e-Learning e Business Enterprise Information Systems and e-Government, Las Vegas, 2014) 119. See <<http://worldcomp-proceedings.com/proc/p2014/EEE2294.pdf>> accessed 16 June 2021.

³⁴ Aidh Albaqme, 'Consumer Protection under Saudi Arabia Law' (2014) 28 Arab Law Quarterly 175.

³⁵ Abdullah Basahel and Kamel Khoualdi, 'Hindrances in Providing e-Commerce Services in Saudi Retailing Organizations: Some Preliminary Findings' (2015) BIJIT - BVICAM's International Journal of Information Technology 906.

³⁶ See Chapter Three, section 3.4 of this thesis, To What Extent is the Current Saudi Arabian Legislation on Online Consumer Protection Efficient?

³⁷ This results from not having any clear published policies regarding refunds, to assure customers that their transactions are secured and that they are unlikely to face any loss in the case of damaged goods or unsatisfactory delivery. Therefore, consumers prefer to personally visit and inspect products directly in shops before buying them. See Fahad Aleid, Simon Rogerson and Ben Fairweather, 'A Consumer's Perspective on E-commerce: Practical Solutions to Encourage Consumers' Adoption of E-Commerce in Developing Countries - A Saudi Arabian Empirical Study' (International Conference on Advanced Management Science, Chengdu 2010) <<https://ieeexplore.ieee.org/stamp/stamp.jsp?tp=&arnumber=5552944>> accessed 29 June 2021.

transactions in the Internet environment are necessary. This can ensure that consumers have all the essential information about their purchases, alongside full details on their legal rights, to give them a sense of confidence that higher authorities back them and that they will be able to enforce their rights through the right of redress.

The E-Commerce Law (ECL) 2019³⁸ was published on 26 July 2019 in the KSA and became effective on 24 October 2019, with the Executive Regulations of E-Commerce Law (ERECL) added in 2020.³⁹ The ECL 2019, as the first-ever consumer text, is an essential step for regulating the e-commerce sector in the KSA. Such laws and regulations aim to provide friendly policies that should naturally encourage e-commerce among Saudi consumers. The E-commerce Guidelines Guide According to The E-commerce Law (EGGAE) issued by the Minister of Commerce (MC) states that the ECL 2019 aims to:⁴⁰

1. Support confidence in the validity of e-commerce transactions.
2. Protect the consumer from fraud, deception or dishonesty.
3. Support and develop the e-commerce sector.

The objectives stated above present a real response to the issues faced by consumers in online contracts in the KSA. As mentioned above, confidence in concluding online contracts is a crucial impediment towards online transactions in the KSA, therefore enacting adequate laws to address the risks expected by consumers would stimulate consumer confidence in online shopping. Hence, the regulatory authority's eagerness to enact a law that addresses this problem could be treated as a positive step towards the development of the e-commerce sector.

However, a critical question, which is central to this thesis, relates to how successfully the new law has addressed the relevant issues in the B2C e-commerce market.

³⁸ Royal Decree No. (M/126).

³⁹ Minister of Commerce Decision No (200). The legislation in the KSA is divided into two parts; the first is regular legislation, referred to as 'the laws', issued by the regulatory authority, while the second is subsidiary legislation, referred to as 'the regulations'. See Chapter Three, section 3.2.1.2 of this thesis, Legislation.

⁴⁰ Minister of Commerce (2019), 'The E-commerce Guidelines Guide According to The E-commerce Law' <<https://mc.gov.sa/ar/ECC/Pages/default.aspx> > accessed 16 June 2021.

1.3 Reform-Oriented Research

The primary aim of this study is to investigate the rules regulating online consumer protection in the KSA and to determine whether or not there is a need for further reform. If such reform is necessary, it must be determined how this might be achieved to reflect the needs of a state in the modern world, while remaining consistent with Islamic law.

The proposed legal framework would not only need to fit within the existing Saudi law but also within Sharia law. Many Saudi legal researchers have called on the Saudi government to benefit from developed jurisdictions' approaches in consumer protection, such as English law.⁴¹ Meanwhile, others have criticised these calls, arguing that this transposition may constitute an infringement of the Basic Law of Governance (BLG) 1992 in the KSA,⁴² the 'Constitutional law', since foreign provisions and measures may conflict with Sharia law, which is the first source of law in the KSA legal system, as provided in the BLG.⁴³

Therefore, to determine the best approach to achieve the objectives of this study, three approaches will be introduced in this section.

1.3.1 Traditional Sharia Law Techniques Approach

The first approach is for the KSA to implement consumer protection legislation by adopting the teachings and rulings focusing on protecting the weaker party in the transaction under Sharia law, whereby the interests of the consumer can be addressed to a certain extent.

Sharia law is also referred to as Islamic law, as it is used to represent the law of Islam. All parts of life are covered within the breadth of Sharia law, from religion, hygiene and food, to clothing, family and social life, alongside politics, finance and governance, etc. Protecting the weaker party in transactions is an essential aspect of

⁴¹ According to Abdali: 'Despite the importance of consumer protection, we do not have the due tools and methods to protect consumers' rights. Therefore, we should avail ourselves of the experiences of developed countries; as they have accumulated good experiences.' Aziz Obaid Al Abdali, 'Dynamics of Consumer Protection Across Saudi Arabia' (2012) 5(1) J.Global Business Advancement 43; Abdullah Basahel and Kamel Khoualdi, 'Hindrances in Providing e-Commerce Services in Saudi Retailing Organizations: Some Preliminary Findings' (2015) BIJIT - BVICAM's International Journal of Information Technology 908.

⁴² The Basic Law of Governance, Royal Decree No A/90 (1992).

⁴³ According to Article 7 of The Basic Law of Governance 1992 in Saudi Arabia, 'The authority of the regime is derived from the Holy *Qur'an* and the prophet's Sunnah (Sharia Law) which rule over this and all other state laws'.

Sharia law and is given no exemption. As evaluated by several researchers,⁴⁴ the all-inclusive legal philosophy of Sharia law supports and promotes the protection of consumer rights.

What makes Sharia law values different from other obligations, such as man-made obligations, is that the values of Sharia law rely on a solid basis, which is the belief in the oneness of God and work in His obedience (piety). Any obligations in Sharia law relating to transactions are often derived from divine guidance – i.e. the *Holy Qur'an* and the *Sunnah* of the Holy Prophet (PBUH).⁴⁵ As long as the law is following Muslims' faith and is directed at regulating a society abiding by this religion, it could be hypothesised that Sharia law may prove effective in protecting consumer rights within Islamic jurisdictions. Their close link to the faith makes the legislation relatable and more binding.

Although Sharia law does not provide a specific area of consumer protection, it addresses the contracting parties' rights (whether as consumers or professionals) primarily via the Sharia law of transactions.⁴⁶ Sharia law contains many general principles addressing the protection of the weaker party in contracts and commercial dealings through its values, ethics and moral standards, which help protect the weaker party, irrespective of whether they are a part of the transactions.⁴⁷

Nevertheless, such principles and rules provided by Sharia law have not been drafted as a codified law for easy reference and referral. It may therefore need, in some cases, further explanation and clarification. Consequently, the absence of a codified law that provides a simpler explanation in plain language may constitute an obstacle for consumers in understanding their rights. Nonetheless, there was an old initiative to formulate Sharia law provisions in a codified law from the Ottoman Empire in 1882. There are, however, many drawbacks that may limit the benefits of this initiative. For instance, the provisions contained therein were limited to the perspective

⁴⁴ Mahmoud Mohamed Tantawi, 'Hemaiaat Almustahlik Fi Al Sharia' (1998) 6(2) Journal of Security and Law 12; Mohamed Ahmed, *Heimat Almustahlik Fi Al Fiqh Al Islami* (Dar al-Kuttab al-Sallami 2004); Abdul Sattar Ibrahim Alhiti, 'Hemaiaat Almustahlik Fi Al Fiqh Al Islami' (2004) 19(6) Mutaah Liboboth Wa Aldirasat 189; Mohammed Khalaf Salama, 'Hemaiaat Almustahlik Fi Al Sharia' (2013) Journal of Fiqh and Law 21; Mahmoud Abdul Hamid Saleh, 'Hemaiaat Almustahlik Fi Al Islam' (2016) 1(2) Journal of Islamic Research 129.

⁴⁵ Mohd Billah, *Sharia Standard of Business Contract* (A.S. Noordeen 2006) 30 and 69.

⁴⁶ See Chapter Four, section 4.4.2 of this thesis, Consumer Protection Practices in Online Commerce.

⁴⁷ Abu Bakar Elistina and Amin Naemah, 'Consumer Protection under Islamic Law in the Service Industry' (2011) 8 International Journal of Social Policy and Society 37.

of one of the Sharia law (Hanafi) schools.⁴⁸ Consequently, its rulings do not fully represent Sharia law, but rather the opinions of that legal school.

Furthermore, in modern times, many emerging issues have been found due to the evolution of technology, which has affected consumer protection. There is uncertainty as to whether Sharia law principles are sufficient to regulate this area, significantly since it predates the Internet and electronic contracting methods. However, there is a chance that Sharia law principles are so general that rules could function within an online environment. Therefore, this requires further exploration. Additionally, the current implementation of Sharia law is fragile in the countries that have identified it as a legal tool to tackle consumer rights infringement, and it needs to be revised to establish codified legislation based on genuine Islamic teachings and harmonised with the development of international standards. Therefore, it can be argued that the current implementation of the traditional Sharia law techniques approach alone is not sufficient to provide comprehensive protection for online consumers.

1.3.2 Legal Transplantation Approach

A second approach is to follow the advanced models of consumer protection laws as practiced in developed countries (such as English law), which have more experience in this area.

In the late 20th century, there were significant challenges in the UK for both the trade industry and the government in responding to the e-commerce sector, such as the trust factor. Unlike other developed countries such as the United States (US), Canada, Australia and the major European economies, the UK lagged behind in e-commerce activities. The UK government needed to take a wide range of procedural steps to promote and develop e-commerce.⁴⁹ In the late 1990s, the UK government published several broad policy statements that aimed to help the development and growth of e-commerce.

⁴⁸ See Chapter Four, section 4.2.3 of this thesis, The Four Sunni Schools of Sharia Law.

⁴⁹ Cabinet Office, *e-commerce@its.best.uk* (The Performance and Innovation Unit Report, London, 1999) <<https://ntouk.files.wordpress.com/2015/06/ecommerce-at-its-best-1999-body.pdf>> accessed 22 June 2021.

For instance, the UK government published a white paper entitled 'Our Competitive Future: Building the Knowledge-Driven Economy'.⁵⁰ It expressed an ambition to make the UK the 'best place in the world' for e-commerce, and it proposed several policies to achieve this goal.

One of the main goals of this paper was to improve the infrastructure for competing in the digital world by introducing an e-commerce legal framework. This aimed to ensure parity between online and traditional business methods.⁵¹ This was achieved by adopting regulations that help enhance online trust and empower consumers by developing a simple and straightforward legal administration system that manages and protects the rights of consumers when they use online services for purchases.⁵²

Many policies of such legal frameworks were originally introduced following the European Union's (EU) harmonisation process. The EU has provided a wide range of online transaction requirements that govern how online service providers and traders interact with online consumers.⁵³ These directives have been implemented by the EU member states in their national legislation, including in English law.⁵⁴ The merging of these tools with those of the English laws formed during the previous decades has had a noticeable effect on consumers' confidence online in the UK, as they became the most confident online shoppers in the EU.⁵⁵

⁵⁰ Arthur Pryor, 'Our Competitive Future: Building the Knowledge-Driven Economy' (1999) 15(2) *Computer Law & Security Review* 115 and 116.

⁵¹ *Ibid* 115.

⁵² Anja Rösner, Justus Haucap and Heimeshoff Ulrich, 'The Impact of Consumer Protection in the Digital Age: Evidence from the European Union' (2020) *International Journal of Industrial Organization* 1.

⁵³ Luke Arnold and David Garvey, *E-Commerce & Consumer Protection* (Laytons Solicitors 2015) 3.

⁵⁴ Such as the Consumer Rights Directive (2011/83/EU) (implemented in the UK by the CRA 2013), the Unfair Contract Terms Directive (93/13/EEC) (implemented in the UK by Part 2 of the CRA 2015), the Consumer Sales Directive (CSD) (1999/44/EC) (implemented in the UK by Part 1, Chapter 1 of the CRA 2015), the Unfair Commercial Practices Directive 2005/29/EC (implemented in the UK by the Consumer Protection from Unfair Trading Regulations (CPR)).

⁵⁵ According to data published by the European Commission, 'UK consumers are the most confident online shoppers in the EU where nearly 87.6% of UK shoppers bought domestic goods or services online, UK consumers are also amongst the most aware of EU consumers' rights and one of the savviest about their EU consumer rights, UK online shoppers were also exposed to the least amount of illicit commercial practices'. Also, 'The average level of UK online consumers who trust that their rights as consumers are protected in online environment is 85.3%'. See European Commission, *Consumer Conditions Scoreboard*, (Justice and Consumers Directorate General 2017) <https://ec.europa.eu/info/sites/default/files/consumer-conditions-scoreboard-2017-edition_en.pdf> accessed 14 June 2021; Anja Rösner, Justus Haucap and Heimeshoff Ulrich, 'The Impact of Consumer Protection in the Digital Age: Evidence from the European Union' (2020) *International Journal of Industrial Organization* 1.

Given that a lack of 'trust' is currently considered the main obstacle to adopting online shopping in the KSA, English law instruments could be an appropriate and effective model to inspire the development of a consumer protection regulation system in the KSA and thus increase consumer trust in online shopping.⁵⁶

A legal transplantation approach, as Alan Watson argues,⁵⁷ could be one of the most significant sources of legal development in any community. This is because there is no close relationship between the legislation and the context of the community in which it is implemented. The legislation is a set of rules that can be shifted. Furthermore, it may be argued that each school of law typically adopts legal rules from elsewhere; thus, they were originally enacted in a different context.⁵⁸

However, Legrand argues that it is impossible to import or transplant entire rules and that it is inadequate to do so.⁵⁹ It can be claimed that the mere importing or borrowing of international laws or mere copying and pasting of any laws without a previous investigation of the societal context, cultures and legal system may create complex issues in implementing such rules.⁶⁰ Thus, it can be argued that mere transplantation of the English model to the KSA may not be suitable. In addition, as mentioned above, the proposed framework would need not only to fit into existing Saudi law, but also Sharia law. English law may be based on principles that are not the same as those found in Sharia law, which might also lead to incompatibility in consumer law. However, there is a chance that Sharia law principles are so general

⁵⁶ Manar Ibrahim, 'A Comparative Analysis of Consumer Perception Regarding Ecommerce in Kingdom of Saudi Arabia (KSA), and United Kingdom (UK)' (Master's thesis, the University of Hertfordshire 2016) 65.

⁵⁷ Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press 1974).

⁵⁸ This has already happened in Saudi Arabia with Commercial Court Law 1931, transplanted from different jurisdictions, namely Egypt and France. See Maren Hanson, 'The Influence of French Law on the Legal Development of Saudi Arabia' (1987) 2(3) Arab L. Q. 288; Ansari Abdullah, 'A Brief Overview of the Saudi Arabian Legal System' (2008) NYU School of Law Global Law and Justice <https://www.nyulawglobal.org/globalex/Saudi_Arabia.html> accessed 16 June 2021.

⁵⁹ Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) Maastricht Journal of European and Comparative Law 114.

⁶⁰ For example, the UK has faced many obstacles when applying some provisions, due to transposing some EU measures into English legislation, some of which have been indicated throughout this thesis. See Chapter Five, sections 5.2.4 and 5.4.3.1.2 of this thesis, Consumer Rights Act 2015 and Good Faith.

that English law rules could function within them. Therefore, this requires further exploration.⁶¹

1.3.3 Best-Practice Lessons-to-Learn Approach

A third way is a mixed approach between the two aforementioned options. This means that this approach aims to borrow the best-practice lessons and legal principles from English law and adapt them to KSA to make them Sharia-compliant (SC). In other words, this research does not propose to transpose the English law model into the KSA community without first addressing the need to ensure that these measures and provisions do not conflict with Sharia law and address issues that affect the buying decision of online consumers. Therefore, this thesis adopts this third approach, because this seems to contribute towards proposing and providing **Sharia-compliant consumer protection in online contracts**, which benefits from recent evolutions in the consumer protection field in English law, without conflicting with the values of Sharia law.

In this context, this thesis is not limited to proposing a legal framework that does not conflict with the principles of Sharia law,⁶² but also seeks to critically evaluate the protection already provided by Sharia law techniques. In other words, this thesis questions to what extent can Sharia law techniques adequately protect online consumers. Where there is a need for further reform in the legislation of online consumer protection in the KSA, such reform may need to be addressed by adopting some principles from Sharia law, since religion is seen as a precursor of trust.⁶³

The purpose of these principles is to protect all parties' interests and eliminate any risk or threat that could result in a given transaction, whether conventional or online. Compliance with Sharia law in online commerce may also enhance trust among consumers and traders in an online environment and satisfy the requirement of online Muslim buyers and sellers with a religion-driven attitude. Contracting parties could feel

⁶¹ One of the thesis' objectives is to explore which techniques in Sharia law would affect the adaptation of the English model within the KSA's online environment. See Chapter 6, section 6.3.1 of this thesis, Similarities and Differences among Saudi Law, Sharia law and English Law Approaches.

⁶² Such as those provisions taken from different jurisdictions when they do not violate Sharia law rules, for example, the requirements of prominence in consumer contract in UK Model. Although Sharia law does not explicitly stipulate the prominence requirement with respect to contracts of sale, it can be argued that this requirement is in accordance with the general rules of Sharia law. See Chapter Six, section 6.5 of this thesis, Proposal for Reform of the Online Consumer Protection Regime in the KSA.

⁶³ Haytham Siala, Robert M. O'Keefe and Kate S. Hone, 'The Impact of Religious Affiliation on Trust in the Context of Electronic Commerce' (2004) 16(1) Interacting with Computers 7.

confident if they are aware that they are protected under provisions derived from Sharia law as they trust the protection provided by their religion. They are expected to refrain from doing any practice that would harm the other party because their religion prohibits such practices. Studies indicate that a certain amount of trust is associated with religious teachings within religion-oriented online consumer communities.⁶⁴ Hence, to enhance trust among religious online users, understanding the SC approach of implementing online regulations is very important. Therefore, it can be argued that compliance with spiritual elements, such as SC protection laws, may significantly impact the trust factor among online users in the KSA.⁶⁵

Finally, it is worth noting that the SC approach followed throughout this research is welcomed by the legislature in the KSA. This means greater flexibility, as the KSA regime has become more flexible to develop, adopt and benefit from advanced models and so-called secular legal concepts, to address contemporary legal problems.⁶⁶ Therefore, it can be said that the lessons learned from other, more mature, international laws – such as English laws on consumer protection in online contracts – could also be adopted, provided they are compatible with Sharia law.

1.4 Research Aim and Objectives

The intention of this research is to provide the KSA with the best possible model to foster the development of online shopping, which could lead the KSA to become one of the best online marketplaces in the region, boost the level of consumer participation in online shopping, improve consumer protection, motivate consumer confidence and encourage KSA policymakers to play an active role in the implementation of consumer protection laws in the KSA.

To that aim, this thesis will consider adopting the features of Sharia law and the English consumer protection model to suit the Saudi legal environment to regulate online transactions. Based on this approach, this thesis explores how to create an environment in the KSA wherein the interests of online consumers can be best protected as per English consumer protection legislation, while taking into account the requirements of Sharia law to be SC, as well as the established norms around

⁶⁴ Ibid 7.

⁶⁵ Marjan Muhammad and Muhd Rosydi Muhammad, 'Building Trust in E-Commerce: A Proposed Shari'ah Compliant Model' (2013) 18(3) *Journal of Internet Banking and Commerce* 10.

⁶⁶ Nouf Fetaihi, 'Electronic Contracts, Privacy and Consumer Protection: a Comparative Study of Saudi Arabia's Electronic Transaction Laws' (Master's thesis, University of Westminster 2014) 53.

consumer protection outlined by Sharia law. The best practices and legal principles that come to light from this analysis will then be outlined to fulfil this research's main aim.

1.5 Research Questions

The central question of this thesis is: 'To what extent is the current KSA legislation on online consumer protection efficient?' From this, the aim is to determine whether or not there is a need for further reform and, if such reform is necessary, how this might be achieved in a way that reflects the needs of a state in the modern world, yet remains consistent with Islamic law. In addition, the thesis also aims to explore the following questions:

1. What factors influencing consumer trust in online contracts? To what extent can they be solved through consumer protection legislation?
2. What are the essential requirements of Sharia law for online contracts? What are the techniques and principles of Sharia law that allow the protection of the interests of the consumer in the transaction? Are they applicable to the field of online contracts? Can the techniques of Sharia law serve as a possible solution for proposing a legal framework to protect online consumers in the KSA?
3. What is the English legal protection available for online consumer protection regarding the provision of mandatory information, tackling unfair contract terms and unfair commercial practices, the provision of specific consumer rights for non-conformity and the right of withdrawal? Are the current English consumer protection laws and regulations adequate to address issues that affect the buying decisions of the online consumer?
4. What are the similarities and differences between the Saudi law, English law and Sharia law approaches? To what extent could the potential differences affect the achievement of the study's aim? Which standards in the current laws in the KSA present challenges to the implementation of the English model?

1.6 Methodology and Approach

According to Maxcy, no single method is suitable for solving all problems.⁶⁷ Therefore, a set of methods have been used to understand the research problems, to answer the research questions and achieve their aims and objectives.

This thesis is doctrinal. It investigates the recent KSA legislation regulating online consumer protection and determines whether or not there is a need for further reform and, if such reform is indicated, how this might be achieved in a way that reflects the needs of a state in the modern world, yet remains consistent with Islamic law. This is achieved by examining whether the general rules in Sharia law and the English model can tackle the legal issues under examination. The similarities and differences among Saudi law, English law and Sharia law approaches are illustrated, to analyse the extent to which the above differences can affect the achievement of the study's aim, which is to provide a proposal for reform of the gaps and weaknesses in the consumer protection regime in the KSA.

In summary, taking into account the best-practice lessons-to-learn approach, two different methods are used in this research, as follows:

1. **Doctrinal research:**⁶⁸ To examine the measures provided by Sharia law for consumer protection and relevant English legislation. In addition, a review of the literature and previous studies relating to online contracts and consumer protection will be undertaken.
2. **Reform-oriented research:**⁶⁹ To assess the general rules surrounding consumer protection legislation in the Saudi market, this study seeks to identify the weaknesses and shortcomings in such legislation through an analysis of such legislation and related literature and thereafter suggest solutions to them.

⁶⁷ Spencer Maxcy, 'Pragmatic Threads in Mixed Methods Research in the Social Sciences: the Search for Multiple Modes of Inquiry and the End of the Philosophy of Formalism' (in Abbas Tashakkori and Charles Teddlie (eds), *Handbook of Mixed Methods in Social and Behavioral Research* (SAGE Publications 2003) 51-89.

⁶⁸ Hutchinson defines the doctrinal method as follows: 'Research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future development.' Terry Hutchinson, *Researching and Writing in Law* (Thomson Lawbook Co 2008) 7.

⁶⁹ According to Hutchinson, reform-oriented research is 'research which intensively evaluates the adequacy of existing rules and which recommends changes to any rules found wanting'. Terry Hutchinson, 'Developing Legal Research Skills: Expanding the Paradigm' (2008) *Melbourne University Law Review* 1068.

It should be clarified that this is not a comparative study of legislation in the UK and the KSA as there is only one recent law that includes online consumer protection provisions in the KSA, which was brought into force in late 2019. Thus, it is challenging to compare Saudi legislation with a more mature consumer protection regime, such as English legislation. Instead, this thesis seeks to borrow the best-practice lessons and legal principles from English law and adapt them to the KSA to make them SC, using the best-practice lessons derived from this approach (best-practice lessons-to-learn approach).

1.7 Scope and Limitations

Reference is made to primary sources related to the relevant issues, including regulations, statutes and case law. A set of secondary sources will also be examined to explain these primary sources, including journal articles, textbooks and related opinions relevant to the legal issues under examination.

This study will focus on English consumer protection laws, KSA laws and Sharia law. The following English laws have been referenced: Consumer Rights Act 2015; Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134), which implemented the Consumer Rights Directive (2011/83/EU) and Unfair Contract Terms Directive (93/13/EEC); Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) as amended, which implemented the Unfair Commercial Practices Directive (2005/29/EC); Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013), which implemented the E-Commerce Directive (2000/31/EC).

This research will also look into the most relevant consumer protection case law, in terms of defining certain principles or/and rules in consumer protection. Under KSA law, reference is also made to the E-Commerce Law 2019 Royal Decree No (M/126), the Executive Regulations of E-commerce Law (ERECL) 2020 Minister of Commerce Decision No (200), and the Consumer Protection Association Law 2015 Council of Ministers Resolution (No 120).

This thesis is concerned with the Sunni Islamic school of thought on Sharia law because of its focus on the KSA, where the Sunni school predominates, as discussed in **Chapter Three** of this thesis. This research will rely on several Arabic publications and consumer protection studies on Sharia law. Thus, this research requires the

parallel reading of jurisprudential texts extracted from Sharia law. Texts on Sharia law are represented by the *Qur'an* and the *Sunnah* instructions that were transmitted to the Prophet Muhammad that have led to legislation on the practical application of *the Qur'an*. These also include other formal sources of Sharia law – namely, the consensus of Sharia law scholars on specific matters (*Ijma'*)⁷⁰ and applying the law's underlying principles for new problems based on past decisions on related issues (*Giyas*).⁷¹

This research will focus on contracts relating to the sale of goods and the supply of services, as the provisions of the ECL 2019 only apply to these types of contract.

Although the term 'contract of sale' may refer to all business contracts, including business-to-business (B2B), consumer-to-consumer (C2C), consumer-to-business (C2B), business-to-government (B2G), and business-to-employee (B2E) contracts, this research is limited to contracts related to B2C sales. Moreover, it will generally concentrate on contracts concluded online and not contracts concluded through other means of distance communication, such as mobile phones, fax machines or postal services.

This research does not include an article-by-article analysis of the laws and the implementation of regulations. Instead, it will follow a thematic approach that focuses on certain issues considered to be the most significant in terms of consumer protection in online contracts. This thesis identifies the factors influencing consumer trust when they contract online. Four risks have been identified:

1. Product and services risks.
2. Information risk.
3. Delivery risk.
4. Terms and Conditions Risks.

This thesis sheds light on the legal solutions that might help to limit these factors' effect. They are:

1. the provision of mandatory information;

⁷⁰ Ayman Ibrahim, 'Maslaha: a New Approach for Islamic Bonds' (PhD thesis, the University of Melbourne 2014) xvii.

⁷¹ Etim Okon, 'The Sources and Schools of Islamic Jurisprudence' (2012), *The American Journal of Social and Management Sciences* 107.

2. tackling unfair contract terms and unfair commercial practices; and
3. the right of withdrawal.

It has been reported that these areas are the root problem and source of the risks involved in online transactions.⁷² Therefore, enhancing these areas by implementing effective legal frameworks could reduce the vulnerabilities of the online environment, improve the level of online consumer protection, and increase trust and confidence among online consumers.

1.8 Thesis Structure

Chapter Two aims to clarify the concept of factors influencing consumer trust when they contract online. This chapter defines the notion of these factors. It examines the reasons and justifications that lead consumers to feel that a great deal of risk is involved in online shopping compared to traditional shopping. It also emphasises the necessity of addressing these factors by providing additional consumer protection mechanisms in online transactions to protect online consumers and address the perception of risk.

The following factors have been selected based on the literature review: product risk, information, delivery, terms and conditions. These factors have been chosen to investigate the extent to which they can affect online consumers. This chapter explains the rationale behind the consumer feeling threatened by these factors dimensions by exploring some examples that contribute to clarifying the consumer's perspective.

Chapter Three examines consumer protection in the KSA by discussing the legal aspects of protection. This chapter begins by discussing the legal system, focusing on the foundation of the Saudi legal system, illustrated by consideration of the legislative authorities and regulatory procedures in the KSA.

The significant substantive part of this chapter is the section where online consumer-related law in the KSA is examined – namely, the ECL 2019. This chapter illustrates the background and scope of such a law. It then critically analyses the extent

⁷² See CPASA (2017) 'The KSA Consumer Protection Association's Statement on E-Commerce and its Relation to Consumer Protection'. See <<https://cpa.org.sa/single-data/182>> 25 September 2021.

to which the current regime would provide comprehensive protection for the KSA consumer in online contracts.

Chapter Four illustrates which parts of Sharia law deal with the weaker party in transactions. It also focuses on the authorities that were established under Sharia law to implement and apply laws and regulations taken from the *Qur'an* and *Sunnah* to preserve the weaker party's rights.

To indicate the parts of Sharia law applicable to consumer contracts, it is necessary to illustrate the notion of 'consumer' under Sharia law. This chapter critically analyses how Sharia law tackles issues that may arise in the field of online consumer protection as determined under this study – namely, a need for the provision of mandatory consumer information; prevention of unfair contract terms or unfair commercial practices; and a need for the provision of specific consumer rights.

This chapter will find out whether or not the current situation of Sharia law and its implementation can provide sufficient solutions to the current problems that consumers face in an online environment. It also examines to what extent Sharia law could serve as a guideline for the KSA government in formulating new laws or the amendment of current regulations around consumer protection.

Chapter Five discusses the stages of enacting English consumer protection laws/regulations and the related reasoning of the UK government. It then critically analyses the extent to which the current regime would provide comprehensive protection for the UK consumer in online contracts. It considers the English model of consumer protection in online contracts regarding the available legal system in particular areas.

It can be said the efficiency of the English consumer protection regime relies on whether or not it deals adequately with issues that concern consumers intending to conclude online contracts. To assess this, this chapter examines whether relevant legislation provides explicit provisions in terms of the topics discussed under this study, and if so, how it does this.

Chapter Six concentrates on solutions and suggestions that may enhance consumer confidence and behaviour in Saudi online shops and ensure the safety of an online environment.

It also determines the similarities and differences between Saudi law, English law and Sharia law approaches, to find out to what extent such differences may affect the study's objectives.

This chapter identifies the weaknesses and shortcomings in current consumer protection regulations in the KSA. It then proposes recommendations and suggestions for a legal framework, that is compatible with Sharia law, to protect Saudi consumers in an online environment. The chapter concludes by presenting the contribution of the study and recommendations for future research.

Chapter Seven summarises the main arguments put forward in this research.

Chapter Two: Factors Influencing Consumer Trust in B2C Online Contracts and Consumer Protection

2.1. Introduction

Consumers may face a set of challenges when online shopping.⁷³ Some of these challenges are due to their inability to inspect a product before purchasing it or the inability to interact directly with the provider of a product or service where the provider may be unknown to the consumer. Therefore, having trust in buying a particular product or service online is crucial in motivating consumers to conclude an online transaction.

According to Kim et al., building reliable transactions is the key to the success of any business on the Internet.⁷⁴ Many studies have observed buyer behaviour in terms of online shopping.⁷⁵ These studies have provided valuable ways of understanding the factors that influence a change in consumer behaviour when buying online. Since the focus of this thesis is on proposing a legal framework for online consumer protection in the KSA, it is essential to identify and understand the issues facing online consumers for these to be tackled legally. Therefore, this chapter aims to identify the main categories of factors influencing consumer trust in online shopping, based on the literature review, and to identify their impact on online shopping from a legal standpoint.

⁷³ Tatiana-Eleni Synodinou, Philippe Jougleux, Christiana Markou and Thalia Prastitou, *EU Internet Law - Regulation and Enforcement* (Springer 2017) viii.

⁷⁴ Dan J Kim, Donald L Ferrin and H. Raghav Rao, 'A Trust-Based Consumer Decision-Making Model in Electronic Commerce: The Role of Trust, Perceived Risk, and Their Antecedents' (2008) 44(2) *Decision Support Systems* 544.

⁷⁵ See Dan J Kim, Donald L Ferrin and H. Raghav Rao, 'A Trust-Based Consumer Decision-Making Model in Electronic Commerce: The Role of Trust, Perceived Risk, and Their Antecedents' 44(2) *Decision Support Systems* 544; Sajid Nazir Wani and Sheeba Malik, 'A Comparative Study of Online Shopping Behaviour: Effects of Perceived Risks and Benefits' (2013) 2(4) *International Journal of Marketing and Business Communication* 41; Dragan Benazić and Ana Čuić Tanković, 'Impact of Perceived Risk and Perceived Cost on Trust in the Online Shopping Websites and Customer Repurchase Intention' (conference: 24th CROMAR congress: Marketing Theory and Practice - Building Bridges and Fostering Collaboration, Split, 2015) < https://www.researchgate.net/profile/Ana-Cuic-Tankovic/publication/301296426_Impact_of_Perceived_Risk_and_Perceived_Cost_on_Trust_in_the_Online_Shopping_Websites_and_Customer_Repurchase_Intention/links/5805de3608aef87fbf3bccff/Impact-of-Perceived-Risk-and-Perceived-Cost-on-Trust-in-the-Online-Shopping-Websites-and-Customer-Repurchase-Intention.pdf > accessed 15 June 2021; Oghenerume Freeman Orubu, 'The Impact of Perceived Risk on Willingness to Buy in Online Markets' (2016) 7(1) *E3 Journal of Business Management and Economics* 13; Shaya Alshahrani, 'Perceived Risks in Business-to-Consumer Online Contracts: An Empirical Study in Saudi Arabia' (2020) 14(6) *International Journal of Economics and Management Engineering* 472.

This chapter is divided into three parts: after this introduction this chapter is looking at the literature on factors influencing consumer behaviour, and critically evaluate them (2.2) and conclude (2.3).

2.2. Relevant Factors Influencing Consumer Trust in B2C Online Contracts

There are many factors in online shopping that are a concern for many consumers and play an essential role in explaining consumer behaviour during purchase. They also help to shape consumers' attitudes while searching for information and making a purchase decision.⁷⁶ They are defined as the degree of uncertainty expressed by consumers about a product or service when they purchase online.⁷⁷ They are also defined as the possibility that consumers may not achieve the desired results from transactions when purchasing a service or product online.⁷⁸ They are also defined as the expectation of losses by consumers; the greater the expectation of losses, the greater the perception of risk among consumers. Based on the above definitions, it can be said that factors influencing consumer trust in online shopping consist of two parts: one linked to the uncertainty involved in the purchase decision itself, and the other regarding the effects of this decision, which may be unfavourable.⁷⁹

In this section, four dimensions have been highlighted as the main factors influencing consumer trust in online contracts, based on a literature review, due to their significance and their significant influence on online consumers in making purchase decisions: product/service risk, information, delivery and contract terms. Also, the impact of these risks on consumers towards online shopping in the KSA has been determined empirically.⁸⁰ As this research analyses factors influencing consumer

⁷⁶ Hussaini Mamman, Mustapha Maidawa, and Mohammed Saleh, 'Effects of Perceived Risk on Online Shopping' (Proceedings of the 1st Management Technology and Development Conference ATB, University Bauchi Nigeria 2015) 318 <https://www.researchgate.net/profile/Hussaini-Mamman/publication/306547085_EFFECTS_OF_PERCEIVED_RISK_ON_ON-LINE_SHOPPING/links/57bf14ca08ae2f5eb32e7920/EFFECTS-OF-PERCEIVED-RISK-ON-ON-LINE-SHOPPING.pdf> accessed 29 June 2021.

⁷⁷ Bo Dai, Sandra Forsythe, and Wi-Suk Kwon, 'The Impact of Online Shopping Experience on Risk Perceptions and Online Purchase Intentions: Does Product Category Matter?' (2014) 15(1) *Journal of Electronic Commerce Research* 13.

⁷⁸ Emad Y Masoud, 'The Effect of Perceived Risk on Online Shopping in Jordan' (2013) 5(6) *European Journal of Business and Management* 76.

⁷⁹ Tolulope Olaide Folarin and Emmanuel Abiodun Ogundare, 'Influence of Customers' Perceived Risk on Online Shopping Intention in Malaysia's Apparel Industry' (2016) 4(2) *International Journal of Information System and Engineering* 70.

⁸⁰ Moudi Almousa, 'Perceived Risk in Apparel Online Shopping' (2011) 7(2) *Canadian Social Science* 23; Deborah J. C. Brosdahl and Moudi Almousa, 'Risk Perception and Internet shopping: Comparing United States and Saudi Arabian Consumers' (2013) *Journal of Management and Marketing Research* 1; Moudi Almousa, 'The Influence of Risk Perception in Online Purchasing Behavior: Examination of an Early-Stage Online Market' (2014) 3(2) *International Review of Management and Business Research*

trust to consumer protection with the aim of solving them from a legal standpoint, it is not interested in other threats that would not be tackled legally, such as social, physical and psychological factors. Thus, any such factors have been excluded from the scope of this research. Although other factors, such as privacy risks, can be addressed from a legal standpoint, these are excluded because they are mainly regulated outside consumer protection laws.

The following section deals with the first factor influencing consumer trust in online shopping: product and service risk.

2.2.1 Product and Service Risk

The use of the Internet as a tool with which to shop has created new situations that make it difficult for consumers to assess their choices. In other words, considering the growth of choices, tools that are poor for making choices have had a prominent role in influencing decision-making, which has led to demands for legal regulation.⁸¹

To further elaborate on this last point, based on a marketing perspective, products can be divided into three paradigms: search product, experience product and credence product.⁸² In the context of any sales contract, the characteristics of a consumer's purchasing behaviour vary according to the category of the product – for example, a consumer's desire to purchase credence products may be lower than their desire to buy search products or experience products due to the difficulty of evaluating credence products even after purchase or consumption. Similarly, consumers often need to test experience products to assess their potential value before making a decision, which will only be fully estimated after the purchase.⁸³

Therefore, it can be said that consumers may be reluctant to purchase anything, when they do not know how much they will value the product purchased. As with traditional shopping, consumers can easily know the value of search products by

779; Shaya Alshahrani, 'Perceived Risks in Business-to-Consumer Online Contracts: An Empirical Study in Saudi Arabia' (2020) 14(6) *International Journal of Economics and Management Engineering* 477.

⁸¹ Thomas Wilhelmsson, Geraint Howells, Iain Ramsay, 'Consumer Law in its International Dimension', *Handbook of Research on International Consumer Law* (Edward Elgar 2010) 6.

⁸² Search paradigm refers to products that a consumer can evaluate before purchasing. Experience paradigm refers to products that can be assessed after purchase. Credence paradigm encompasses products that cannot be accurately assessed even after purchase. See Lisa R Klein, 'Evaluating the Potential of Interactive Media through a New Lens: Search versus Experience Goods' (1998) 14 *Journal of Business Research* 195.

⁸³ Tulay Girard, Ronnie Silverblatt and Pradeep Korgaonkar, 'Influence of Product Class on Preference for Shopping on the Internet' (2002) 8(1) *Journal of Computer-Mediated Communication* <<https://academic.oup.com/jcmc/article/8/1/JCMC815/4080402>> accessed 21 September 2021.

conducting an extensive search for such products in various online shops, comparing their prices and descriptions. With online shopping, however, consumers cannot perform any inspections, which may mislead them in terms of the value of either search products or experience products. The distribution channel through which goods are sold or marketed can determine whether such goods can be classified as an experience product. For instance, the sale of some 'search product' through online platforms where the consumer cannot see or inspect the product, can lead to it being reclassified as an 'experience product'.⁸⁴

To further elaborate on this last point, consumers tend to buy some products (experience products) when they can touch and accurately evaluate the function of the products before purchasing.⁸⁵ In general, a consumer in an offline shop can walk around and can test or touch a product before purchasing it and, in some cases, they can test it (or a sample model) at least briefly before deciding whether to buy it or not. This helps reduce the perceived risks to the consumer and may increase the favourable opinion of buyers about traditional stores.⁸⁶

An option to inspect is not available to online consumers, which may result in poor product choices being made due to the consumer's inability to precisely judge the quality of a product online.⁸⁷ For example, in general, when purchasing shoes online, there is a possibility of differences between the actual and perceived product because the size of the shoe does not say anything about how narrow/wide it is, and people with the same shoe size will have a different foot fit in other shoes. In comparison to offline stores, there is no such risk due to the ability of consumers to try a product first and then purchase it.

Furthermore, product/service risk also involves performance risk related to the essential aspect of the goods and services.⁸⁸ This lies in the risk that the product or service might not meet satisfactory quality standards, whereby the purchased

⁸⁴ Horst Eidenmüller, 'Why Withdrawal Rights?' (2010) SSRN 7 <<https://ssrn.com/abstract=1660535>> accessed 23 June 2021.

⁸⁵ Ibid 7.

⁸⁶ Dan J Kim, Donald L Ferrin and H. Raghav Rao, 'A Trust-Based Consumer Decision-Making Model in Electronic Commerce: The Role of Trust, Perceived Risk, and Their Antecedents' 44(2) *Decision Support Systems* 544.

⁸⁷ Oghenerume Freeman Orubu, 'The Impact of Perceived Risk on Willingness to Buy in Online Markets' (2016) 7(1) *E3 Journal of Business Management and Economics* 13.

⁸⁸ Sajid Nazir Wani and Sheeba Malik, 'A Comparative Study of Online Shopping Behaviour: Effects of Perceived Risks and Benefits' (2013) 2(4) *International Journal of Marketing and Business Communication* 41.

product's performance falls below the agreed performance level. Performance risks also include the potential of buying a product or service that does not meet the consumer's expectations.⁸⁹

Regarding intangible content,⁹⁰ performance risks may also pose a significant threat to purchase after a contract's conclusion.⁹¹ For example, a consumer might encounter issues related to the performance failure of digital content, such as when software has a significant defect or does not perform its essential function. In addition, there are issues related to unexpected changes to digital content (e.g. by the removal of a critical feature) without consumer consent or without the consumer understanding the implications of agreeing to such changes; consequently, provider updates of the product may negatively affect the use of the product.

When consumers' perceived product/service risk towards online shopping is high, their intention to shop online will be less.⁹² According to Sharma and Kurien, 'When customers purchase from an e-commerce site, they always have the dilemma whether they are going to get a genuine product or a duplicate one and whether it is a standard product without any defects.'⁹³ Furthermore, when consumers decide to purchase products or services online (despite their reservations) and end up receiving products or services that did not meet quality standards or their expectations, they might give negative reviews based upon their experience of online purchasing, and thus discourage other potential online shoppers. Therefore, some authors have reported that product/service risk is the most significant cause of not purchasing online.⁹⁴

⁸⁹ Bo Dai, Sandra Forsythe and Wi-Suk Kwon, 'The Impact of Online Shopping Experience on Risk Perceptions and Online Purchase Intentions: Does Product Category Matter?' (2014) 15(1) *Journal of Electronic Commerce Research* 13.

⁹⁰ Tangible products can be physically touched, while intangible items such as digital content cannot be physically touched. See Joe Peppard and Anna Rylander, 'Products and Services in Cyberspace' (2005) 25(4) *International Journal of Information Management* 336.

⁹¹ Michel Laroche, Gordon H. G. McDougall, Jasmin Bergeron and Zhiyong Yang, 'Exploring How Intangibility Affects Perceived Risk' (2004) 6(4) *Journal of Service Research* 373-389.

⁹² Murat Çemberci, Mustafa Emre Civelek and Edin Güçlü Sözer, 'The Determinants of Intention to Shop Online and Effects of Brand Equity on E-Store Patronage' (2013) 7(1) *Journal of Global Strategic Management* 121; Kashif Abrar, Muhammad Naveed and Muhammad I Ramay, 'Impact of Perceived Risk on Online Impulse Buying Tendency: An Empirical Study in the Consumer Market of Pakistan' (2017) 6(3) *Journal of Accounting & Marketing* 1.

⁹³ Jitendra K. Sharma and Daisy Kurien, 'Perceived Risk in E-Commerce: A Demographic Perspective' (2017) XXXIV(1) *NMIMS Management Review* 35.

⁹⁴ Bo Dai, Sandra Forsythe and Wi-Suk Kwon, 'The Impact of Online Shopping Experience on Risk Perceptions and Online Purchase Intentions: Does Product Category Matter?' (2014) 15(1) *Journal of Electronic Commerce Research* 15.

In another study, the author surveyed 323 shoppers in the KSA – 50 of whom had never shopped online and 273 of whom had done so – to determine the impact of perceived risks of online shopping on consumers' behaviour. A quantitative approach was chosen for collecting and analysing the data and generating the findings. The questionnaires were distributed electronically through email, social networking sites (e.g. Facebook and Twitter), and mobile phone applications (e.g. Telegram and WhatsApp). The study sample was selected from the general KSA population. The questionnaire was distributed randomly to reflect the consumers' perceived risk and allow for generalisation in the findings. The random sample ensured the representation of all demographic strata. The results indicated that the perceived risk of a product or service had a significant adverse effect on online shopping. Approximately two-thirds of the respondents were concerned about the quality of the products or services and the extent to which they would meet expectations. More than one-third were worried that the products and services would not meet performance standards.⁹⁵

The above discussions deal with this factor, but there are other factors influencing consumer trust in B2C online contracts such as information risk, which will be covered next.

2.2.2 Information Risk

Information asymmetry is one of the most significant challenges to protecting consumer rights in offline and online shopping.⁹⁶ Despite its negative impact in both offline and online contracts, it could be said that information asymmetry is more of a threat in an online contract, which Donnelly and White describe as the 'information deficit'.⁹⁷ In-store consumers can seek full advice from sellers about a given product or service before binding themselves to a contract, whereas online consumers may not have the chance to do so, or at least not instantly. Online consumers may rely mainly upon the information provided on a trader's website to make an informed decision about buying because such information is considered an alternative to the testing and/or touching that occurs when buying in-store.

⁹⁵ Shaya Alshahrani, 'Perceived Risks in Business-to-Consumer Online Contracts: An Empirical Study in Saudi Arabia' (2020) 14(6) *International Journal of Economics and Management Engineering* 480.

⁹⁶ Vasile Dinu, 'The Need for Consumers' Protection' (2010) XII(28) *Amfiteatru Economic Journal* 262-264.

⁹⁷ Mary Donnelly and Fidelma White, 'Regulation and Consumer Protection: a Study of the Online Market' (2006) 13(1) *Dublin University Law Journal* 31.

However, there are many communication options available on commercial websites, such as FAQ pages on websites and call centres, which could provide potential customers with the information they may need. Sellers may also encourage and communicate with potential customers by allowing them to send them emails with questions or concerns about products and services or through social media platforms, marketing, digital marketing, etc. Nevertheless, there is the possibility that parties may miss some vital information while communicating online.⁹⁸ Despite the communication mentioned above, adequate information about an online product or service may not be available promptly, which may cause some negative attitudes among visitors browsing the desired product category.⁹⁹

Before the conclusion of an online contract, the information provided to the consumer should allow the consumer to assess the benefits and risks associated with the online purchase. In this context, providing information to the consumer is not sufficient unless that information is necessary for the consumer to make an informed decision. Howells declares that information requirements limit a trader's freedom by requiring the trader to provide consumers with contract-related information they may prefer not to disclose.¹⁰⁰ This information contributes to putting the consumer in a better transactional position, to make an informed transactional decision.¹⁰¹

Access to reliable, accurate and adequate information enables a consumer to better understand what to expect from a product or service sold, which may reduce potential disputes after the purchase. In other words, if consumers receive reliable information, there is a possibility that negative outcomes might be diminished by ensuring that goods and services will more likely be in line with realistic consumer expectations.¹⁰² Furthermore, providing adequate information helps build consumer trust, which also serves to overcome the feeling of uncertainty experienced when concluding an online contract with an unknown party.¹⁰³

⁹⁸ Joasia Luzak, 'Online Consumer Contracts' (2014) 15(3) *Journal of the Academy of European Law* 384.

⁹⁹ V Geetha and Kalyani Rangarajan, 'A Conceptual Framework for Perceived Risk in Consumer Online Shopping' (2015) 10(1) *Global Management Review* 11.

¹⁰⁰ Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32(3) *Journal of Law and Society* 349.

¹⁰¹ *Ibid.*

¹⁰² *Ibid* 355.

¹⁰³ Giusella Finocchiaro, 'European Law and Consumer Protection in the Information Age' (2003) 12(2) *Information & Communication Technology Law* 113.

Enabling consumers to have access to adequate information about commercial transactions to reach an informed decision is one of the main objectives of consumer policy. Howells argues that the duty of disclosing information to consumers may contribute to tackling information asymmetries between a trader and a consumer, where there is a need for legislative intervention due to the consumer being uninformed or having received incomplete information.¹⁰⁴ Traders may need to have sufficient incentive to provide information to consumers. As such incentives do not exist, the law requires that the information be provided.¹⁰⁵

In this subsection, two information risks that may cause significant harm to online consumers are identified: the risks of anonymity and misleading practice.

2.2.2.1 Anonymity

Information risk refers to the inconvenience that online traders may cause to consumers by failing to provide specific information that ordinary consumers need in order to make an informed transactional decision. This includes a trader's failure to provide information about their identity and business to an online consumer before the conclusion of online contracts, to prevent law enforcement authorities from identifying them and determining their location, and to avoid enabling the consumer to contact them.¹⁰⁶ This has been defined as one of the common challenges consumers face in developing countries.¹⁰⁷

In this regard, the popularity of online trading stems from the fact that online traders do not have to spend a lot of money on building physical shops or make significant capital investments to sell their goods and services.¹⁰⁸ Many online platforms such as eBay provide easy solutions for sellers, such as web store creation and website hosting services. They thus can reach consumers worldwide at the lowest costs, allowing them to pass those savings on to consumers by providing them with

¹⁰⁴ Geraint Howells, 'The Potential and Limit of Consumer Empowerment by Information' (2005) 32(3) *The Journal of Law and Society* 354.

¹⁰⁵ *Ibid* 355.

¹⁰⁶ Shaya Alshahrani, 'Perceived Risks in Business-to-Consumer Online Contracts: An Empirical Study in Saudi Arabia' (2020) 14(6) *International Journal of Economics and Management Engineering* 478.

¹⁰⁷ UNCTAD, 'Consumer Protection in Electronic Commerce TD/B/C.I/CPLP/7' (24 April 2017) Intergovernmental Group of Experts on Consumer Protection Law and Policy Second session Item 3 (e) of the provisional agenda para 5 <http://unctad.org/meetings/en/SessionalDocuments/cicplpd7_en.pdf> accessed 22 June 2021.

¹⁰⁸ Christine Riefa and Julia Hörnle, 'The Changing Face of Electronic Consumer Contracts In the 21st Century: Fit for Purpose?' (in Lilian Edwards and Charlotte Wealde (eds), *Law and the Internet* (Hart Publishing 2009) 95.

cheaper goods and services. This opportunity for traders should not diminish their obligation of ensuring they properly identify themselves to their customers.

Due to minimal barriers to entry into the web environment, sellers could hide their true identities easily.¹⁰⁹ A seller could easily secure an official domain name for their website (for example, I could obtain the domain name www.shayaalshahrani.com), yet the issue lies in the difficulty of identifying the true identity of the seller or the geographical location in which the seller operates. Many forms of deception are likely to make even cautious consumers easy prey to deceptive sellers – for example, a seller can engage in online commerce using simple URL cloaking techniques. Hence, an online trader can use many aliases to mask their true identity. This has led the English law to classify this as a fraudulent representation. While consumer protection measures do not police fraud, disclosure obligations for traders may help diminish their impact on consumer behaviour. Suppose a consumer deals with an unknown party and there is no method for the consumer to know the true identity of such a party; in that case, there is likely to be a sense of uncertainty about the credibility of the online trader, which may lead to reluctance from consumers to purchase online from that particular seller. Further, a consumer protection framework may provide for additional options for sanctioning fraudulent traders for breaches of their information obligations.

On the other hand, when consumers visit an e-commerce platform, they may not be able to easily discern whether the other party in the transaction is a professional trader or another consumer. In addition, consumers may believe that they are entering into a contract with an online platform, while purchasing from a third party listed on an online marketplace. Moreover, Social media platforms such as Facebook Marketplace and Instagram Shopping, do not provide mandatory templates to meet all of the legal requirements that traders are obligated to meet in B2C contracts, such as information about the trader's geographical location, the main characteristics of the goods and services, dispute resolution, etc.¹¹⁰ One of the main requirements in the application of

¹⁰⁹ Rob Kling, Ya-Ching Lee, Al Teich and Mark S. Frankel, 'Assessing Anonymous Communication on the Internet: Policy Deliberations' (1999) 15(2) *The Information Society* 79.

¹¹⁰ Christine Riefa, 'Consumer Protection on Social Media Platforms: Tackling the Challenges of Social Commerce' (in Tatiana-Eleni Synodinou, Philippe Jougoux, Christiana Markou and Thalia Prastitou-Merdi (eds) *EU Internet Law in the Digital Era* (Springer 2019) <<https://ssrn.com/abstract=3373704>> accessed 22 June 2021).

consumer protection rules under some jurisdictions is that the parties are a consumer and a trader.¹¹¹ A consumer's lack of knowledge of the nature of the other party may mislead them as to the opportunity of benefiting from consumer protection laws. Contrariwise, if a consumer is mistaken as to the non-professional nature of the other contracting party, this may unnecessarily discourage the consumer from making a purchase decision.

2.2.2.2 Misleading Practices

Information risk also includes a seller's failure to provide complete information on consumer rights and remedies, as well as information about their entire contractual obligations. It also includes providing incomplete or misleading information about the product and service being purchased;¹¹² for instance, if an online trader allows consumers to conclude a contract without advising them that there are no delivery services in their region.

Consumers may be harmed when they shop online if the information provided by a trader is misleading or omitted, or if it is difficult for the consumer to obtain the necessary information to make an informed decision. Thus, the consumer would make – or be more likely to make – a transactional decision that they would not have otherwise taken. In particular, it is difficult for a consumer to evaluate information that has been presented in a misleading or incomplete manner.¹¹³

Information risk can also be associated with advertising risk. Advertising has been defined as 'a work unit for introducing and selling a good or service to mass media buyers'.¹¹⁴ Online advertising is defined as 'a direct communication, through

¹¹¹ Such as the EU and the UK. See Chapter Five, section 5.3 of this thesis, the Concept of An Online Consumer.

¹¹² Gabriel Sperandio Milan, Suélen Bebbler, Deonir De Toni and Luciene Eberle, 'Information Quality, Distrust and Perceived Risk as Antecedents of Purchase Intention in the Online Purchase Context' (2015) 2(2) *Journal of Management Information System and ECommerce* 111; V Geetha and Kalyani Rangarajan, 'A Conceptual Framework for Perceived Risk in Consumer Online Shopping' (2015) 10(1) *Global Management Review* 9.

¹¹³ Patrick Xavier, 'Consumer Information Requirements and Telecommunications Regulation' (2008) 24 *Routledge The Information Society* 342. According to Alshahrani's study, 'the results also showed that the perceived risk of receiving inadequate information had a significant negative effect. Approximately 80% of the respondents tended not to shop online because of uncertainty and concerns about the accuracy of product or service descriptions. This was followed closely by the feeling that the sellers might not provide sufficient information about their identities or the consumers' rights and obligations. These were obstacles to online shopping for approximately two-thirds of the respondents'. See Shaya Alshahrani, 'Perceived Risks in Business-to-Consumer Online Contracts: An Empirical Study in Saudi Arabia' (2020) 14(6) *International Journal of Economics and Management Engineering* 480.

¹¹⁴ Yusuf Kes, 'Current Approaches in E-Advertisement' (2011) 2(2) *International Journal of Business and Social Science* 124.

which the organisation sends to a general or specified audience information relating to the products and services or its brands, events it is involved in or about itself'.¹¹⁵

Online consumers will come across numerous advertisements every day in their life, in online newspapers, social media, emails or on other websites. Companies typically advertise to achieve one or more of their goals: to inform, persuade or remind, or to build brand awareness or brand loyalty, which can lead to increased sales.¹¹⁶ However, the phenomenal growth in advertising activity on the Internet and marketers' increased capability to rapidly change their online messages have raised concerns about the incomplete and potentially misleading content of Internet advertisements.¹¹⁷ Therefore, the risk of advertising has been identified as an essential factor that affects the intention to shop online negatively and significantly.¹¹⁸

Misleading advertising is defined as advertisements that contain false information or deceive consumers despite providing correct information, or omitting material that the ordinary consumer needs to make an informed decision. Such advertising may mislead or be likely to mislead consumers by increasing the appeal of a particular product to consumers.¹¹⁹ As such, misleading advertising causes or is likely to cause the ordinary consumer to take a transactional decision that they would not have otherwise taken.

Other significant unfair commercial practices may occur in both offline and online transactions. The challenge is that not all unfair commercial practices online can be anticipated due to the continuous development of the online sector, alongside the constant emergence of new practices that might be used to mislead online consumers. The following subsections seek to identify four tools through which an online trader can mislead consumers in ways that do not occur in offline transactions while providing consumers with information.

¹¹⁵ Ibid 15.

¹¹⁶ James D. Ratliff and Daniel L. Rubinfeld, 'Online Advertising: Defining Relevant Markets' (2010) 6(3) *Journal of Competition Law and Economics* 653.

¹¹⁷ Anu Mitra, Mary Anne Reynolds and Christopher Hopkins, 'Can Consumers Recognize Misleading Advertising Content in a Media-Rich Online Environment?' (2008) 25(7) *Psychology & Marketing* 655; Sergio Roman, 'Relational Consequences of Perceived Deception in Online Shopping: The Moderating Roles of Type of Product, Consumer's Attitude Toward the Internet and Consumer's Demographics' (2011) *Journal of Business Ethics* 373.

¹¹⁸ V Geetha and Kalyani Rangarajan, 'A Conceptual Framework for Perceived Risk in Consumer Online Shopping' (2015) 10(1) *Global Management Review* 9.

¹¹⁹ Haddad Eid, *Al Hemaiah Al Madaniah Wa Aljinaeiah Abr Shabakat Al Inteenet*, (Al Shabakah Al Thahabiah 2009) 1.

2.2.2.2.1 Search Engines

Nowadays, search engines are among the most essential tools in an Internet environment. They allow consumers to browse and search for information on the Internet according to a specific algorithm, which leads to diverse search results with information from various sources. When search results stand out, they are ranked based on several different considerations that impact online users – for instance, results get a high number of clicks when they are at the top of search results because ‘searchers’ usually think of only the first few search results.¹²⁰ Therefore, it is not surprising that the impact of the market power of a few search engine providers, alongside their crucial role in controlling access to information, has generated numerous conflicts between stakeholders such as search operators, content creators and consumers.¹²¹

Market information provided by search engine providers such as Google and Yelp is considered one of the most influential sources of online consumer decision-making.¹²² This is because consumers may expect search engines to show impartial and neutral results based on relevance to their search queries. In contrast, many search engines include results based on different criteria, such as the payment they receive from third-party traders.

There are two types of search results provided by search engine providers such as Google: ‘organic search results’, which are results that depend directly on the user’s search terms, and ‘sponsored links’, which refer to results related to the ads and offers created by advertisers who pay Google to display them to users.¹²³ ‘Paid for’ search results may affect the ranking of search results that are not ‘paid for’. However, the problem is that consumers may not be aware of the distinction between these two types of results and will thus be unable to differentiate between them.¹²⁴ Hence, there are fears that traders will exploit search engines by manipulating information to

¹²⁰ Raymundo Reyes, ‘The Legal Obligations of Search Engine Optimization Firms’ (2015) 57(4) Arizona Law Review 1121.

¹²¹ Gasser Urs, ‘Regulating Search Engines: Taking Stock and Looking Ahead’ (2006) 8(1) Yale Journal of Law & Technology 202.

¹²² Mark Patterson, ‘Antitrust, Consumer Protection, and the New Information Platforms’ (2017) 31(3) Antitrust 97.

¹²³ Onyeka K Osuji and Ugochi C. Amajuoyi, ‘Online Peer-to-Peer Lending: Challenging Consumer Protection Rationales, Orthodoxies, and Models?’ (2015) Journal of Business Law 494.

¹²⁴ House of Lords Select Committee on the European Union, ‘Online Platforms and the Digital Single Market’, 10th Report of Session 2015-16, HL Paper 129 <<https://publications.parliament.uk/pa/ld201516/ldselect/ldcom/129/129.pdf>> accessed 24 Jan 2020.

influence consumers to make purchase decisions. Consequently, failure to disclose paid placement in search results can be said to be a misleading practice.

2.3.2.2.2 Comparison Websites

Comparative tools are another influential source of online consumer decision-making, having improved the relative position of traders in the marketplace and helped them to reach a more significant number of consumers across borders.¹²⁵ They also significantly empower consumers by saving time and effort in obtaining various deals suited to individual needs.¹²⁶ Online comparison tools are an essential way to help decision-making, by providing the most appropriate deal to the consumer and by comparing different offers.¹²⁷ However, the high popularity of comparative tools and their influence on consumer decisions has raised concerns about their trustworthiness. This kind of tool can become a severe source of harm to the consumer and risks undermining consumer confidence in online shopping if the transparency of its results and the reliability of comparisons are not guaranteed.¹²⁸ According to the UK Regulators Network (UKRN), there are concerns in several sectors that comparison websites may sometimes restrict or distort consumers' abilities to access, assess and act on information.¹²⁹

Consumers may suffer from a mismatch between their expectations and the information provided by comparison sites in the absence of transparency in the mechanism by which the market can be covered. To complicate matters further, consumers may find that presentation of information on comparison sites and criteria used for ranking is unclear. Many comparison sites attract potential consumers with claims such as 'Best Deals'. Consumers may come to believe that the criteria by which

¹²⁵ European Consumer Summit, *Comparison Tools, Multi-Stakeholder Dialogue on Comparison Tools*, Report of the EU Multi-Stakeholder Working Group (2013) <https://ec.europa.eu/info/sites/info/files/consumer-summit-2013-msdct-report_en_0.pdf> accessed 29 June 2021.

¹²⁶ Ibid.

¹²⁷ Niamh Gleeson, 'Legal and Regulatory Framework for Comparison Websites for Cloud' (2014) SSRN Electronic Journal. See <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2529990> 29 June 2021.

¹²⁸ House of Lords Select Committee on the European Union, 'Online Platforms and the Digital Single Market', 10th Report of Session 2015-16, HL Paper 129 <<https://publications.parliament.uk/pa/ld201516/ldselect/lducom/129/129.pdf>> accessed 24 Jan 2020.

¹²⁹ The UK Regulators Network, *Price Comparison Websites* (27 September 2016) <<https://www.ukrn.org.uk/wp-content/uploads/2018/11/201609027-UKRN-PCWs-Report.pdf>> accessed 29 June 2021; Christiana N. Markou, *Consumer Protection, Automated Shopping Platforms and EU Law* (Routledge 2019).

the deal was chosen are neutral and that they receive the cheapest deals, and that these websites are the ones that offer the best value for money.

For example, in English law, the Competition and Markets Authority (CMA) found that comparison websites are not always transparent about how they reach specific search results, how the results are ranked and whether any business relationships could affect the ranking.¹³⁰ Thus, it could be argued that the blurring of the criteria used for ranking and the scope of comparison may lead a consumer to believe that they have obtained the best deal while there are, in fact, many better deals available elsewhere that the comparison site has not picked up.

Moreover, comparison sites may offer promotional prices for a product. When a consumer decides to make a purchase, they must go to the trader's website, but when the consumer does so, that product cannot be found at the price that was provided on a comparison site – for example, a trader may announce a price discount for an airline ticket, but when the consumer clicks the button to complete the booking, the advertised flight is not available at the promoted rate. This is a so-called 'drip',¹³¹ which misleads the consumer about the price and does not reveal the total amount of the goods or services being sold. The consumer does not detect the additional charges until after clicking the button.

2.2.2.2.3 Consumer Reviews

The Internet allows consumers to access a wide range of information about goods and services. Online consumer reviews are considered a substantial portion of such information.¹³² Many online shopping platforms allow consumers to give their opinion about their purchases to inform other consumers about their experience with a particular seller or supplier. In this regard, consumer reviews are an essential factor upon which several consumers rely on purchasing online.¹³³ They are one of the most

¹³⁰ Ibid.

¹³¹ Jana Valant, *Consumer Protection in the EU Policy Overview*, European Parliamentary Research Service, (2015) <[http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA\(2015\)565904_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA(2015)565904_EN.pdf)> accessed 22 June 2021.

¹³² Kendall L Short, 'Buy My Vote: Online Reviews for Sale' (2013) 15 *Vanderbilt Journal of Entertainment and Technology Law* 441.

¹³³ Kate Mathews Hunt, 'Gaming the System: Fake Online Reviews v. Consumer Law' (2015) 31(1) *Computer Law & Security Review* 3.

important sources of information for a consumer as they represent advice to potential consumers, whether positive or negative.¹³⁴

The CMA estimates that 'more than half of UK adults use them [reviews]' and that 'most consumers said that the product or service purchased after reading reviews matched up to their expectations' and 'find them valuable'.¹³⁵ Howells argues that a consumer information strategy should not only focus on the positive information a trader provides but also enable a consumer to obtain any negative information about online traders.¹³⁶ From a legal perspective, online reviews can be considered part of the pre-contractual information, as they contribute to shaping the contractual will of consumers and can address information asymmetries between companies and consumers.¹³⁷

In addition, customer reviews may help improve marketplace quality and efficiency and reduce poor commercial practices. When consumers receive products or services that do not meet quality standards or expectations, they may give negative reviews based upon their experience and thus discourage other future online consumers from purchasing such goods or services.

However, there are many risks associated with relying on these reviews.¹³⁸ Consumer reviews lack transparency due to the possibility of consumer anonymity. Given the inability to verify the identity of commentators, there are concerns that the comments made may be incorrect.¹³⁹ In the UK, specific phrases relating to

¹³⁴ Robert East, Kathy Hammond, and Wendy Lomax, 'Measuring the Impact of Positive and Negative Word of Mouth on Brand Purchase Probability' (2008) 35(3) *International Journal of Research in Marketing* 215.

¹³⁵ Competition and Markets Authority, *Online Reviews and Endorsements Report on the CMA's Call for Information* (The National Archives, Kew, London, 19 June 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/436238/Online_reviews_and_endorsements.pdf> accessed 22 June 2021; 'techUK—Written Evidence (OPL0056)', Parliament.uk (2015) <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/online-platforms-and-the-eu-digital-single-market/written/23392.html>> accessed 24 Jan 2020.

¹³⁶ Geraint Howells, 'The Potential and Limit of Consumer Empowerment by Information' (2005) 32(3) *The Journal of Law and Society* 353.

¹³⁷ Madalena Narciso, 'The Regulation of Online Reviews in European Consumer Law' (2019) *European Review of Private Law* 557; Justin Malbon, 'Taking Fake Online Consumer Reviews Seriously' (2013) *Journal of Consumer Policy* 15.

¹³⁸ House of Lords Select Committee on the European Union, 'Online Platforms and the Digital Single Market', 10th Report of Session 2015-16, HL Paper 129 <<https://publications.parliament.uk/pa/ld201516/ldselect/ldcom/129/129.pdf>> accessed 24 Jan 2020.

¹³⁹ See Arnold Roosendaal and Simone van Esch, 'Commercial Websites: Consumer Protection and Power Shifts' (2007) 6(1) *Journal of International Trade Law and Policy* 15.

trustworthiness and authenticity on TripAdvisor, such as ‘reviews you can trust’ and ‘reviews from real travellers’, were considered as misleading information according to a decision issued by the Advertising Standards Authority (ASA).¹⁴⁰ This is because these reviews could not be proven to have been submitted by real travellers as the site did not have a mechanism to verify the reviews.¹⁴¹

To complicate matters further, reviews may not even be written by consumers. Instead, companies may hire writers to do reviews that are limited to writing opinions that match their interests, which can be positive for the hiring company but negative for a competitor.¹⁴² Often, fake positive reviews, allegedly written by satisfied consumers, are written by a trader or someone commissioned by the trader to increase the number of positive reviews on review sites and raise their ranking above their rivals, whereas fake negative reviews, submitted by or on behalf of competitors, aim to undermine a company in the eyes of consumers.¹⁴³ Discovering the truth may be difficult for ordinary consumers due to their inability to communicate with other reviewers via the trader’s website. Therefore, consumers may rely on incorrect information when entering into a contract, significantly so if the purchase decision is affected by biased online reviews.¹⁴⁴

A trader may also suppress genuine negative consumer reviews and promote positive reviews to maintain their reputation, without informing consumers that they are only reading a limited selection of positive reviews. In this case, a consumer is likely to assume that such reviews reflect the experiences of all consumers who dealt with the trader. Likely, the ordinary consumer who has not been in contact with this trader, may choose to conclude a contract with this trader instead of a competitor who has not participated in such a practice. This may contribute to consumers continuing

¹⁴⁰ Advertising Standards Authority and Committee of Advertising Practice, *Annual Report 2012* (2012) <<https://www.asa.org.uk/asset/B8B912C3-029B-48A3-9DCA340683BB1662/>> accessed 30 June 2021.

¹⁴¹ Michael Wukoschitz, ‘Reviews you can trust – UK Advertising Standards Authority Finds TripAdvisor Ads Misleading’ *The International Forum of Travel and Tourism Advocates* (1 Feb 2012) <<https://iftta.org/content/reviews-you-can-trust-uk-advertising-standards-authority-finds-tripadvisor-ads-misleading>> 29 June 2021.

¹⁴² Kendall L Short, ‘Buy My Vote: Online Reviews for Sale’ (2013) 15 *Vanderbilt Journal of Entertainment and Technology Law* 441.

¹⁴³ Competition and Markets Authority, *Online Reviews and Endorsements Report on the CMA’s Call for Information* (The National Archives, Kew, London, 19 June 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/436238/Online_reviews_and_endorsements.pdf> accessed 22 June 2021.

¹⁴⁴ Madalena Narciso, ‘The Regulation of Online Reviews in European Consumer Law’ (2019) *European Review of Private Law* para 4.

to read reviews or contacting the trader, which they would not have done had they known that negative reviews had been suppressed. Failure to inform consumers that only a select group of reviews are provided to them without publishing all genuine customer ratings can also be considered to be an omission of material information.

2.2.2.2.4 Social Media Platforms

Social media platforms, such as Twitter, Facebook and Instagram, are no longer limited to communicating with friends and relatives. Rather, the use of these platforms has extended to include buying and selling, marketing products through advertisements, and providing consumer reviews.¹⁴⁵ However, these platforms have not been spared the issues consumers face on other online platforms, which can quickly undermine consumer confidence.

Many studies have confirmed that fraudsters increasingly use social media.¹⁴⁶ According to Consumers International, scams offline and online may not be increasing in general, yet it has been confirmed that the Internet and social media are increasingly being used to commit such scams.¹⁴⁷

Deceitful commercial practices are used across many social media networks where, for example, hidden and misleading advertising may be mixed with social and cultural content created by users. Moreover, consumers may perceive social media platforms as tools to exchange information and ideas between individuals, while social media is regularly used for marketing goods and services. The problem is that consumers may not be aware of this. For example, a celebrity may be given a deal in exchange for posting photos of purchased goods or services.¹⁴⁸ A consumer may assume that the celebrity was inspired to purchase these products based on an authentic experience; consequently, this practice might cause consumers to make a

¹⁴⁵ Christine Riefa and Christiana Markou, 'Online Marketing: Advertisers Know You are a Dog on the Internet!' (in Andrej Savin and Jan Trzaskowski (Eds), *Research Handbook on EU Internet Law* (Edward Elgar 2014) 383.

¹⁴⁶ See Thomas Renault, 'Market Manipulation and Suspicious Stock Recommendations on Social Media' (2017) SSRN. See <<https://ssrn.com/abstract=3010850>> accessed 29 June 2021; Yang, Yuhong Xu, Yizhou Sun, Yuxiao Dong, Fei Wu and Yueting Zhuang, 'Mining Fraudsters and Fraudulent Strategies in Large-Scale Mobile Social Networks' (2021) 33(1) IEEE 169. See <<https://ieeexplore.ieee.org/abstract/document/8744319>> accessed 29 June 2021.

¹⁴⁷ Consumers International, *Social Media Scams: Understanding the Consumer Experience to Create A Safer Digital World* (2019) <<https://www.consumersinternational.org/media/293343/social-media-scams-final-245.pdf>> accessed 27 September 2021.

¹⁴⁸ Christine Riefa and Laura Clausen, 'Towards Fairness in Digital Influencers' Marketing Practices' (2019) *Journal of European Consumer and Market Law* 67.

purchasing decision that they would not otherwise have made. Further, if the consumer falls victim to such practices, there is a question of the burden of proof that the celebrity was involved in advertising and was not just sharing details of their personal life.

The above discussions deal with this factor, but there are other factors influencing consumer trust in B2C online contracts such as delivery risk, which will be covered next.

2.2.3 Delivery Risk

Delivering products to consumers is one of the most critical issues for any business. People tend to shop online because it is easy and convenient, and timely delivery is one result that a shopper expects. Many online shoppers hope that they can shop from their homes or offices and receive deliveries at convenient times, and in some cases, receive these quicker than when shopping offline.¹⁴⁹ However, despite the development of online shopping, many consumers are unwilling to shop online due to barriers and concerns associated with losses and risks around the delivery of products.

2.2.3.1 Delivery Issues

A delivery risk refers to a situation in which an online consumer worries about product delivery¹⁵⁰ and the possibility of total delivery failure.¹⁵¹

Consumers are most concerned with delivery risks, including late receipt of purchased products, receiving different goods and not receiving the products purchased.¹⁵² Non-delivery can occur due to postal workers delivering a consumer's

¹⁴⁹ Yu-Kai Huang, Yi-Wei Kuo and Shi-Wei Xu, 'Applying Importance-Performance Analysis to Evaluate Logistics Service Quality for Online Shopping among Retailing Delivery' (2009) 7(2) *International Journal of Electronic Business* 128.

¹⁵⁰ Farid Huseynov and Sevgi Özkan Yıldırım, 'Internet Users' Attitudes Toward Business to Consumer Online Shopping: a Survey' (2016) 32(3) *Information Development* 452; Aishah Arshad, Zafar Maira, Fatima Iffat and Khan Shaista Kamal, 'The Impact of Perceived Risk on Online Buying Behavior' (2015) 1(8) *International Journal of New Technology and Research* 13.

¹⁵¹ Mohd Shoki Md Ariff, Michele Sylvester, Norhayati Zakuan, Khalid Ismail, and Kamarudin Mat Ali, 'Consumer Perceived Risk, Attitude and Online Shopping Behaviour; Empirical Evidence from Malaysia' (IOP Conference Series: Materials Science and Engineering, 58(1), IOP Publishing 2014) 4 <<https://iopscience.iop.org/article/10.1088/1757-899X/58/1/012007/pdf>> accessed 16 June 2021.

¹⁵² Juo-Tzu Tseng, Hsiang-Lin Han, Yea-Huey Su and Yi-Wen Fan, 'The Influence of Intention to Use the Mobile Banking - The Privacy Mechanism Perspective' (2017) 9(1) *Journal of Management Research* 117; Neeraj Mathur, 'Perceived Risks towards Online Shopping' (2015) 3(2) *International Journal of Engineering Development and Research* 296-300.

purchase to the wrong address or the goods being lost during shipment.¹⁵³ As a result, additional time, if not cost, is required to obtain the purchased product.

The risk of delivery also includes those risks related to consumers' fears that they may receive damaged goods. It is noted here that the goods may not have been damaged when the trader sent them, but the damage may have occurred while dispatching them to the consumer. Goods may be damaged during shipment either because of a lack of proper packaging to protect the goods from damage or due to damage occurring while handling during the transfer process.¹⁵⁴ A dispute may arise over determining who is responsible for damages related to goods before they reach the consumer. Consequently, this may lead to consumers suffering to get their rights recognised.

Many consumers also worry about their ability to return purchased products if they are not satisfied with them.¹⁵⁵ Perceived refund risk is defined as a situation in which certain conditions may prevent online consumers from exercising their right of withdrawal or asking for a refund for a purchased product after making a purchase.¹⁵⁶ A previously conducted survey investigated problems consumers have faced with past returns. This survey showed that 41% of online consumers waited too long to receive a credit/refund, while 32% had trouble getting a returned item to the shipping company, and 27% could not reach the online trader for help.¹⁵⁷

Delivery risk is considered one of the obstacles that discourage online consumers when they decide to purchase from the Internet¹⁵⁸ because they are not

¹⁵³ See Zhang Lingying, Wojie Tan, Yingcong Xu and Genlue Tan, 'Dimensions of Consumers' Perceived Risk and Their Influences on Online Consumers' Purchasing Behaviour' (2012) 2(7) Communications in Information Science and Management Engineering 9.

¹⁵⁴ Claudia Iconaru, 'Perceived Risk when Buying Online: Evidence from a Semi-Structured Interview' (2012) 22(2) Economics Series 66.

¹⁵⁵ Leo R Vijayasarathy and Joseph M Jones, 'Print and Internet Catalog Shopping: Assessing Attitudes and Intentions' (2000) 10(3) Internet Research 191.

¹⁵⁶ Farid Huseynov and Sevgi Özkan Yıldırım, 'Internet Users' Attitudes Toward Business to Consumer Online Shopping: a Survey' (2016) 32(3) Information Development 460.

¹⁵⁷ Susan Kleinman, *Online Shopping Customer Experience Study* (ComScore Inc 2012) 16.

¹⁵⁸ Mohammad Hossein Moshref Javadi, Hossein Rezaei Dolatabadi, Mojtaba Nourbakhsh, Amir Poursaeedi and Ahmad Reza Asadollahi, 'An Analysis of Factors Affecting on Online Shopping Behaviour of Consumers' (2012) 4(5) International Journal of Marketing Studies 81; Vishal B Javiya, 'Examining the Relationship between Perceived Risks and Online Shopping Intention' (2017) 2(5) Journal of Arts, Science & Commerce 90; Irish Crizanee Dig, Lea Marissa Domingo and Michael Consignado, 'Perceived Risks and Online Purchase Intention of Young Professionals in the Fifth District of Cavite' (Presented at the DLSU Research Congress De La Salle University, Manila 2017) 1 <<https://www.dlsu.edu.ph/wp-content/uploads/pdf/conferences/research-congress-proceedings/2017/EBM/EBM-II-018.pdf>> accessed 29 June 2021.

sure whether or not they will receive the goods they purchase.¹⁵⁹ A study conducted by Yıldırım and Huseynov with students from the University of Ankara, Turkey, investigated online consumer behaviour. The study found that more than half of those who responded (61%) had concerns about the timely arrival of goods; others (56.4%) had concerns about damage to products during the shipment process; some (45.6%) expressed concern about the delivery of a product to the wrong person, and some (39.5%) feared that a product would be lost during shipment and not delivered at all.¹⁶⁰

Contrarily, Olaide and Ogundare¹⁶¹ claim that delivery risk does not have a significant influence on online shopping intention.¹⁶² They also assume that the reason behind this result is because a delay in the delivery of a product to the consumer may occur due to a particular set of circumstances, such as customs checks, which the consumer can know about by tracking the delivery details; therefore, a delay in delivery does not mean that the trader is not willing to deliver the product to the consumer who paid for it. Consequently, consumers' trust does not need to be influenced by delivery delays.

However, the delivery risk is not only related to the delayed delivery of a product to the consumer but includes a range of other risks, such as non-delivery of a product or receiving damaged goods, which affect online shopping take-up. Furthermore, more recent studies have rejected the hypothesis from Olaide and Abiodun's paper, which claims that there is no connection between delivery risk and consumer intent when

¹⁵⁹ Mohammad Hossein Moshref Javadi, Hossein Rezaei Dolatabadi, Mojtaba Nourbakhsh, Amir Poursaeedi and Ahmad Reza Asadollahi, 'An Analysis of Factors Affecting on Online Shopping Behaviour of Consumers' (2012) 4(5) *International Journal of Marketing Studies* 81.

¹⁶⁰ Farid Huseynov and Sevgi Özkan Yıldırım, 'Internet Users' Attitudes Toward Business to Consumer Online Shopping: a Survey' (2016) 32(3) *Information Development* 452. According to Alshahrani's study (2020): 'the fear of non-delivery would have a negative influence on attitudes toward online shopping. It has been considered to be one of the key barriers to online shopping. For 80% of the respondents, one of the most important shipping and delivery hurdles in Saudi Arabia was the difficulty in returning products and obtaining refunds. More than two-thirds of the respondents were concerned about long delivery times and in-transit damage. More than 50% indicated fears of non-delivery or loss during transit.' Shaya Alshahrani, 'Perceived Risks in Business-to-Consumer Online Contracts: An Empirical Study in Saudi Arabia' (2020) 14(6) *International Journal of Economics and Management Engineering* 480.

¹⁶¹ Tolulope Olaide Folarin and Emmanuel Abiodun Ogundare, 'Influence of Customers' Perceived Risk on Online Shopping Intention in Malaysia's Apparel Industry' (2016) 4(2) *International Journal of Information System and Engineering* 78.

¹⁶² They claimed this result complies with another piece of research carried out by Javadi et al. See Mohammad Hossein Moshref Javadi, Hossein Rezaei Dolatabadi, Mojtaba Nourbakhsh, Amir Poursaeedi and Ahmad Reza Asadollahi, 'An Analysis of Factors Affecting on Online Shopping Behaviour of Consumers' (2012) 4(5) *International Journal of Marketing Studies* 81.

shopping online and shows a statistically significant relationship between delivery risk and consumer intent when shopping online.¹⁶³

2.2.3.2 Time Loss Risk

Time loss risk refers to the loss of time and the inconvenience incurred by consumers during online transactions. It also includes the time and effort lost in returning and replacing products that do not meet expectations and are not of satisfactory quality. It can further include circumstances where products have been delivered but do not comply with the specifications of the goods ordered. Here, a certain amount of consumer time or effort is wasted when goods are replaced or repaired before use.¹⁶⁴

When consumers buy online, they are paying for products that they do not receive immediately, waiting instead for delivery of the already paid-for product, which in some cases may take too long. Therefore, time will be wasted between the payment and delivery of the product, whereas in an offline shopping environment the consumer would have taken possession of the product at the time of purchase and therefore already had opportunity to use it.¹⁶⁵ According to Masoud, time risk refers to the inconvenience of placing an order or delaying receiving the product.¹⁶⁶ This inconvenience increases when payment is made before delivery of the product.¹⁶⁷ Consumer behaviour when shopping online is negatively affected when the consumer feels that the time risk is high.¹⁶⁸

Time loss may also accrue in traditional stores: consumers may waste time and effort travelling to a store or shopping between different stores to find what they are

¹⁶³ Irish Crizanee Dig, Lea Marissa Domingo and Michael Consignado, 'Perceived Risks and Online Purchase Intention of Young Professionals in the Fifth District of Cavite' (Presented at the DLSU Research Congress De La Salle University, Manila 2017) 1 <<https://www.dlsu.edu.ph/wp-content/uploads/pdf/conferences/research-congress-proceedings/2017/EBM/EBM-II-018.pdf>> accessed 29 June 2021; Vishal B Javiya, 'Examining the Relationship between Perceived Risks and Online Shopping Intention' (2017) 2(5) Journal of Arts, Science & Commerce 90; Shaya Alshahrani, 'Perceived Risks in Business-to-Consumer Online Contracts: An Empirical Study in Saudi Arabia' (2020) 14(6) International Journal of Economics and Management Engineering 480.

¹⁶⁴ Hsin Chang and Su Wen Chen, 'The Impact of Online Store Environment Cues on Purchase Intention: Trust and Perceived Risk as a Mediator' (2008) 32(6) Online Information Review 818.

¹⁶⁵ Oghenerume Freeman Orubu, 'The Impact of Perceived Risk on Willingness to Buy in Online Markets' (2016) 7(1) E3 Journal of Business Management and Economics 15.

¹⁶⁶ Emad Y Masoud, 'The Effect of Perceived Risk on Online Shopping in Jordan' (2013) 5(6) European Journal of Business and Management 76.

¹⁶⁷ Jitendra K. Sharma and Daisy Kurien, 'Perceived Risk in E-Commerce: A Demographic Perspective' (2017) XXXIV(1) NMIMS Management Review 31.

¹⁶⁸ Mohd Shoki Md Ariff, Michele Sylvester, Norhayati Zakuan, Khalid Ismail and Kamarudin Mat Ali, 'Consumer Perceived Risk, Attitude and Online Shopping Behaviour; Empirical Evidence from Malaysia' (IOP Conference Series: Materials Science and Engineering, 58(1), IOP Publishing, 2014) 4 <<https://iopscience.iop.org/article/10.1088/1757-899X/58/1/012007/pdf>> accessed 16 June 2021.

looking for. Conversely, the risk of wasting time and effort during online shopping is not only limited to the pre-purchase stage – it may extend beyond the purchase, as in the case of receiving a defective product which needs additional time to be replaced or repaired or when there is an excessive delay in the delivery of a product. Thus, the time risk in online shopping is more significant compared with traditional shopping in a store.

In 2012, Iconaru took note of the perceived risks to online consumers in Romania. The author conducted a series of interviews with a total of 30 people who had purchased online in the previous three months. The objective of this study was to determine the impact of their fears when deciding to buy from an e-commerce website. The study showed that due to the uncertainty of the online environment, consumers reported higher degrees of risk when buying online than when buying from traditional stores. In terms of time risk, consumers had fears over the effort and time wasted waiting to get money back from the online trader and returning the product purchased.¹⁶⁹

The above discussions deal with this factor, but there are other factors influencing consumer trust in B2C online contracts such as terms risk, which will be covered next.

2.2.4 Terms Risk

Traders and consumers can enter into contracts without the need for a written agreement defining their rights and obligations. However, many traders impose written standard form contracts on consumers. Generally, standard contracts represent the bulk of consumer contracts in offline and online contracts, often offered on a take-it-or-leave-it basis.

Although such standard form contracts exist in offline markets, they are not as common in all transactions as in online shopping. This may occur due to the ease with which consumers' consent can be obtained through the Internet by clicking on the 'Agree' button, instead of signing written forms in offline contracts.¹⁷⁰ In addition, certain terms may be made clear to consumers through notice/reference offline (e.g.

¹⁶⁹ Claudia Iconaru, 'Perceived Risk when Buying Online: Evidence from a Semi-Structured Interview' (2012) 22(2) *Economics Series* 63.

¹⁷⁰ Mark A. Lemley, 'Terms of Use' (2006) 91 *Minnesota Law Review* 466.

by way of a notice advising terms can be viewed online or a notice containing the terms somewhere in the shop), whereas online it is all in one space.

Websites often have policies that include their own terms,¹⁷¹ which usually employ standardised, non-negotiated provisions. The purpose of an online policy is to regulate the relationship between the trader and the consumer and to determine the rights and obligations related to purchases. Each policy may also limit the right to redress in the event of any breach of contract.¹⁷² Therefore, the terms affect the contract significantly. Several factors may contribute to questioning the fairness of standard terms and conditions (terms), such as the unequal bargaining power between the contracting parties and the stronger contractual party (the trader), who is the one who drafts these terms.¹⁷³ Risk to consumers is more likely because consumers cannot negotiate such standard terms and conditions.¹⁷⁴

Furthermore, online traders' lack of transparency may also be seen as one of the risks related to terms. For example, when a seller hides information in the terms about shipping costs, the final price of a transaction will be higher than that initially anticipated by the consumer. Although such costs will have to be disclosed in the ordering process, this disclosure may occur too late to change the consumer's mind regarding the purchase, as the consumer has already invested time and effort in that purchasing process ('sunken costs' theory).¹⁷⁵

Another risk is that, while the terms may be visible on online trader websites, online consumers may not recognise them due to traders not drawing consumers' attention to the location of terms on their websites. In addition, essential terms, such as arbitration requirements, may be buried among terms that may not be of any concern to the consumer or in a sea of words that ordinary consumers do not

¹⁷¹ In other words, websites may include their Terms within other policies that are not explicitly called 'Terms' but instead use labels such as 'privacy policy', 'terms of use', 'terms of service', etc.

¹⁷² Andelka M Phillips, 'Reading the Fine Print when Buying your Genetic Self-Online: Direct-to-Consumer Genetic Testing Terms and Conditions' (2017) 36(3) *New Genetics and Society* 273.

¹⁷³ Elizabeth Macdonald and Ruth Atkins, *Koffman & Macdonald's Law of Contract* (Oxford University Press 2018) 136; Thomas Wilhelmsson, Geraint Howells and Iain Ramsay, 'Consumer Law in its International Dimension', *Handbook of Research on International Consumer Law* (Edward Elgar 2010) 6.

¹⁷⁴ Steve Hedley, *The Law of Electronic Commerce and the Internet in the UK and Ireland* (Routledge 2006) 248; Hans-W Micklitz, Przemysław Pałka, and Yannis Panagis, 'The Empire Strikes Back: Digital Control of Unfair Terms of Online Services' (2017) *Journal of Consumer Policy* 370.

¹⁷⁵ See Austin Rong Da Lianga, Chia Ling Leeb and Wei Tungc, 'The Role of Sunk Costs in Online Consumer Decision-Making' (2014) 13(1) *Electronic Commerce Research and Applications* 56.

understand. Therefore, the presentation may be undesirable, with several unclear terms attached.¹⁷⁶

Confusion, therefore, may also occur when the terms are drafted in unintelligible language or drafted in a way that would not facilitate an online consumer's reading and understanding of them.¹⁷⁷ Many of the standard contracts used by traders have ambiguous clauses, often drafted by lawmakers with experience in drafting contracts. These contracts may contain legal terms that are complex and challenging to understand, such as exclusion clauses, which may also be difficult for some legal trainees to decipher. Thus, there is a potential risk of consumers making a transactional decision that they would not otherwise have taken; for example, consumers may find themselves held to an online service contract that is longer than expected, such as a subscription contract, because they clicked 'Agree' without reading the too-long, detailed terms that were onerous and drafted in small print. These types of unreasonable and unexpected commitments that take effect once consumers purchase goods or services are likely to negatively affect consumer trust in online shopping, not to mention often harm their immediate interests.¹⁷⁸

A question arises as to what happens when the terms and conditions are unfair or detrimental to the consumer. This has led many advanced jurisdictions to provide certain consumer protection specifically to impose general controls on unfair terms in B2C contracts.

It is important to note that disclosing terms to consumers, and how the contract that contains them concludes, remains controversial. Below, this thesis discusses two such methods: browse-wrap and click-wrap contracts.

2.2.4.1 Browse-Wrap Contracts

Consent to the terms and conditions of this contract differs from other types of agreements: simply browsing the website is perceived as consent to the terms and conditions of the contract.¹⁷⁹ According to Mann and Siebeneicher, 'the defining aspect

¹⁷⁶ Robert Oakley, 'Fairness in Electronic Contracting: Minimum Standards for Non-Negotiating Contracts' (2005/2006) *Houston Law Review* 1052.

¹⁷⁷ Marco Loos and Joasia Luzak, 'Wanted: a Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers' (2016) 39(1) *Journal of Consumer Policy* 86.

¹⁷⁸ Florian N Egger, 'Affective Design of E-commerce User Interfaces: How to Maximize Perceived Trustworthiness' (Proceedings of The International Conference on Affective Human Factors Design Asean Academic Press, London, 2001) para 5.2.3 <<https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.29.2787&rep=rep1&type=pdf>> accessed 29 June 2021.

¹⁷⁹ See Graham Smith, *Internet Law and Regulation* (Sweet & Maxwell 2007) 821.

of browse-wrap is that the user need not take affirmative action regarding the terms to complete the relevant transaction.¹⁸⁰ This means that through browse-wrap, the consumer cannot expressly and clearly 'agree' to the terms and conditions before concluding the contract by, for example, clicking a button or ticking a box. Instead, a link to the terms and conditions is usually located at the bottom of the home page of a particular website (e.g. YouTube, Amazon, eBay). Paradoxically, the only way to read the contract or even realise its existence is by entering the website. Nevertheless, browsing the website would constitute acceptance of a contract and be taken as an agreement to abide by specific terms and conditions.¹⁸¹

Browse-wrap contracts are one of the most controversial agreements amongst wrap contracts.¹⁸² Whenever an individual is active on the Internet, there is the potential for them to enter into any contractual relationship. This is not problematic if nothing goes wrong, but issues arise if the consumer enters into a contractual relationship without awareness or recognition.

In the case of browse-wrap contracts, users of the site can move beyond the website's home page without accepting the terms and conditions. A reference to the terms and conditions is usually included at the bottom of the home page and is easily overlooked by consumers, having difficulty finding the link or locating it.¹⁸³ In these circumstances, it can be said that the consumer has not received sufficient notice of the contract terms. If this is not claimed or not proven, and if consumers move beyond the home page, they are deemed to have accepted the terms and conditions.¹⁸⁴

Arguably, the primary source of legal uncertainty in browse-wrap contracts is that there are no apparent means by which users can express their intention to enter into this type of contract, such as clicking on a button that says 'I agree'.¹⁸⁵ Therefore,

¹⁸⁰ Ronald Mann and Travis Siebeneicher, 'Just One Click: the Reality of Internet Retail Contracting' (2008) *Columbia Law Review* 984.

¹⁸¹ Dan Streater, 'Into Contract's Undiscovered Country: a Defense of Browse-Wrap Licenses' (2002) *San Diego Law Review* 1365.

¹⁸² Christine Riefa and Julia Hörnle, 'The Changing Face of Electronic Consumer Contracts In the 21st Century: Fit for Purpose?' (in Lilian Edwards and Charlotte Wealde (eds), *Law and the Internet* (Hart Publishing 2009) 94.

¹⁸³ Jon Fell, John Antell, Jonathan Exell, Vivian Picton, Adrian Roberts-Walsh and Louise Townsend, *IT Law: An ISEB Foundation* (British Computer Society 2007) 15.

¹⁸⁴ Indranath Gupta, 'Are Websites Adequately Communicating Terms and Conditions Link in a Browse-Wrap Agreement?' (2012) 3(2) *European Journal for Law and Technology* 1.

¹⁸⁵ Dan Streater, 'Into Contract's Undiscovered Country: a Defense of Browse-Wrap Licenses' (2002) *San Diego Law Review* 1365.

a critical question concerns the actions of a potential user who has no intention of entering into a legal relationship when carrying out a particular act, such as moving from the home page, and whether that act amounts to acceptance of the terms and conditions. Another question that could arise here is how these terms and conditions can be appropriately brought to the consumer's attention. Often, a consumer may have difficulty finding a link or locating it.¹⁸⁶ In these circumstances, it can be said that the consumer has not received sufficient notice of the contract terms.

2.2.4.2 Click-Wrap Contracts

Click-wrap is a second way in which terms and conditions of the licence are presented to online consumers in a wrapped format.¹⁸⁷ Online traders provide a platform for displaying goods and services via their website, and potential consumers may browse the website. If they are interested in a good or a service, they can find more information by clicking on an icon. In this way, before providing/supplying goods or services, the online trader usually displays their terms and conditions relevant to their offer. To continue to approve the transaction, if the consumer intends to purchase, they must place an order through express conduct by clicking on an icon stating 'Accept' or 'I accept the terms and conditions' or another similar statement representing acceptance of an obligation to pay.¹⁸⁸ The consumer's order will not be processed until the icon is clicked on. Once this step is performed, then the contract is concluded.

Although click-wrap agreements are the most common among circumvention contracts,¹⁸⁹ Clapperton and Coronos state that their use is not without controversy,¹⁹⁰ especially when used in B2C contracts. When a trader presents their terms and conditions during an online purchase, these may disappear after the consumer clicks the 'I agree' button. Mann and Siebeneicher state that online traders can obscure terms and conditions from the consumer after concluding the contract and are more

¹⁸⁶ Jon Fell, John Antell, Jonathan Exell, Vivian Picton, Adrian Roberts-Walsh and Louise Townsend, *IT Law: An ISEB Foundation* (British Computer Society 2007) 15.

¹⁸⁷ Susan Corbett, 'Computer Game Licences: the EULA and its Discontents' (2019) *Computer Law & Security Review* 456.

¹⁸⁸ Adam Gatt, 'Electronic Commerce - Click-Wrap Agreements, the Enforceability of Click-Wrap Agreements' (2002) 18(6) 18 *Computer Law & Security* 405; Graham Smith, *Internet Law and Regulation* (Sweet & Maxwell 2007) 821.

¹⁸⁹ David I Bainbridge, *Introduction to Computer Law* (Longman 2004) 268.

¹⁹⁰ Dale Clapperton and Stephen Coronos, 'Unfair Terms in 'Clickwrap' and Other Electronic Contracts' (2007) 35 *Australian Business Law Review* 155.

effective in hiding the terms and conditions than offline traders.¹⁹¹ Consequently, consumers will neither reread nor copy or download them. Oakley asserts that terms and conditions of up to fifty pages may be presented in a tiny window on the computer screen, with no printable version available.¹⁹² Additionally, the content of these may be subject to change as traders keep updating them.

Another risk is that many consumers tick 'Agree' to the terms without reading them, and even if they read them, they may be unable to understand their legal effects. For example, a study conducted by Gatt, with 502 Internet users, found that 90% of the respondents had never read a terms agreement, and 64% indicated that they always click 'Agree'. In addition, 55% didn't believe that they were entering into a legally binding and enforceable contract even after clicking 'I Accept'.¹⁹³

Although the above factors may also occur in offline contracts, it can be said that the difference between offline and online seems to be more behavioural, since consumers may be so used to clicking 'I agree' etc. that they are jaded and pay even less attention than they do to the usual terms they are concerned with.

2.3 Conclusion

The emergence of modern technology and online selling in the early 1990s led to a significant shift in business practices. These developments have posed a threat to consumers' interests due to mistrust in sellers and other detrimental factors that may not be associated with offline shopping, such as limiting a consumer's ability to communicate directly with an online trader to seek advice and the inability of a consumer to assess the quality of a product to ensure that it complies with their expectations before purchasing it.

This chapter examined the factors influencing consumer trust in online contracts. It highlighted the importance of these factors and how they play a significant role in influencing consumers' behaviour, attitudes, and decision-making when they

¹⁹¹ Ronald Mann and Travis Siebeneicher, 'Just One Click: the Reality of Internet Contracting' (2008) 108 Columbia Law Review 985. According to Alshahrani's study (2020): 'more than 50% of the respondents indicated a fear of encountering terms and conditions that were unintelligible, not visible on the website or difficult to re-access after they agreed to make a purchase.' Shaya Alshahrani, 'Perceived Risks in Business-to-Consumer Online Contracts: An Empirical Study in Saudi Arabia' (2020) 14(6) International Journal of Economics and Management Engineering 481.

¹⁹² Robert Oakley, 'Fairness in Electronic Contracting: Minimum Standards for Non-Negotiating Contracts' (2005/2006) Houston Law Review 1052.

¹⁹³ Adam Gatt, 'Electronic Commerce - Click-Wrap Agreements, the Enforceability of Click-Wrap Agreements' (2002) 18(6) 18 Computer Law & Security 408.

shop online. Since this thesis focuses on proposing a legal framework for online consumer protection in the KSA, it is essential to identify and understand the issues facing online consumers for these to be tackled legally. Therefore, four risks have been identified related to consumer protection policy: product and service risks, information, delivery, and terms and conditions. The law can help limit and reduce these risks to increase trust in online shopping. At issue here is for the law to strike a balance between traders' interests and consumers' interests in online shopping. Finding a fair balance between the two parties of a transaction, a balance that will keep the trader and the consumer protected, boosts confidence in online shopping.

This thesis sheds light on the legal solutions that might help to limit these factors' effect. They are: providing mandatory information, tackling unfair contract terms and unfair commercial practices, and granting the right of withdrawal. It has been reported that these areas are the root problem and source of the risks involved in online transactions in Saudi Arabia. Subsequently, **Chapter Three** examines the extent to which current consumer protection legislation in the KSA can address these risks. After that, the chapter will consider which other legal instruments are provided on the three issues considered to be the most significant in consumer protection in online contracts. From this, the aim is to determine whether or not there is a need for further reform to enhance consumer trust in the KSA's online markets and increase consumer protection, which might in turn increase consumers' intention to shop online.

Chapter Three: The Legal Framework of the KSA for Online Consumer Protection

3.1 Introduction

This thesis argues that for online shopping to develop and flourish, effective online consumer protection laws and regulations must be put in place, giving consumers trust and confidence in the online environment. This chapter focuses on Saudi consumer protection rules to assess how adequately they protect consumers in an online environment. This is evaluated by highlighting the legal solutions provided by Saudi law and examining the extent to which it can be said that they have addressed the risks a consumer faces when shopping online.

This chapter discusses the legal system, focusing on the foundation of the Saudi legal system and illustrating the legislative authorities and the regulatory procedures in the KSA (section 3.2).

The significant substantive parts of this chapter are sections 3.3 and 3.4, where online consumer-related law in the KSA is examined – namely, the E-Commerce Law (ECL) 2019 and the Executive Regulations of E-Commerce Law (ERECL) 2020. The chapter explores the possibility of providing practical solutions to account for those factors and stimulate e-commerce development through legislative intervention and illustrates the background and scope of the ECL 2019. It then critically analyses the ECL 2019 to consider whether it provides the right regulatory and legal environment for adequate online consumer protection. It also checks whether the goals pursued by the legislators have been or could be achieved by the framework and/or to what extent designing such a framework has left gaps in consumer protection. In addition, it establishes which deficiencies the reform programme suffers from.

It is worth noting that the provisions made by the ECL 2019 to protect consumer data have been excluded, despite its crucial nature, because this was outside the scope of the study. In addition, in the following subsections, the term 'SP' is used to refer to traders and practitioners, following the terminology used in the ECL 2019. However, references to SP should be understood as encompassing persons selling goods and/ or providing services on the Internet.

3.2 The KSA's Legal Environment in the Context

The KSA is a civil law jurisdiction heavily influenced by French and Egyptian law.¹⁹⁴ The legal system in the KSA has also, naturally, been influenced by the Islamic teachings codified in Sharia law and embodied in civil and commercial law.

3.2.1 The Sources of Saudi Law

Saudi law has three main sources: Sharia law,¹⁹⁵ legislation and customs.

3.2.1.1 Sharia Law

Sharia law is the primary source of the KSA legal system and the basis of legal regulation. All other sources of law are subordinate to Sharia law, as the first article of the BLG 1992 states:

'[T]he KSA is a fully sovereign Arab Islamic State. Its religion shall be Islam, and its constitution shall be the Book of God (the *Qur'an*) and the Sunnah of His Messenger may God's blessings and peace be upon him. Its language shall be Arabic, and its capital shall be the city of Riyadh.'

In addition, article 7 of the BLG 1992 also states:

'the regime derives its power from the Holy *Qur'an* and the Prophet's Sunnah which rule over this and all other State Laws.'

This means that if other legal sources do not respect Sharia law, they are deemed constitutionally defective. Therefore, all legislation must be consistent with the general principles and purposes of Sharia law and must not conflict with its rulings.¹⁹⁶

There are no codified laws in the KSA to govern many areas of the law, such as criminal law, family law, inheritance and many aspects of contracts. Sharia law represents the primary source of provisions and principles for such areas of law.¹⁹⁷ There are four different Sunni schools of thought in Sharia law, which differ in their

¹⁹⁴ See Hanson Maren, 'The Influence of French Law on the Legal Development of Saudi Arabia' (1987) 2(3) Arab Law Quarterly 288; Ansari Abdullah, 'A Brief Overview of the Saudi Arabian Legal System' (2008) NYU School of Law Global Law and Justice <https://www.nyulawglobal.org/globalex/Saudi_Arabia.html> accessed 16 June 2021.

¹⁹⁵ See Chapter Four of this thesis, Can Sharia Law Be a Solution for Protecting Online Consumers?.

¹⁹⁶ The Basic Law of Governance 1992, art 7.

¹⁹⁷ Fouad Ahmed, *Al Madkhal Lee Andemah Wa Al Huqooq Fi Al Mumlakah Al Arabiah Al Saudiah* (AlAlookah 2004) 24.

doctrinal interpretation.¹⁹⁸ The Saudi courts rely mainly on Sharia law rules according to the interpretation of the Hanbali school. This follows from a royal decree, issued in 1930, which stated:

'[i]t will be sufficient to rule by what is found in the authentic law books of the school of Imam Ahmed ibn Hanbal, which can be applied without the meeting of court members, while judgment with no basis in these texts will require an obligatory meeting.'¹⁹⁹

Although identifying one school may, in theory, contribute to reducing differences among the judges, in practice, the presence of one school of Sharia law in the KSA does not eliminate differences in provisions and procedures. This results from the possibility of having different legal opinions in one legal school, which may lead to more difficulties in obtaining a reliable legal opinion.

Consequently, the Saudi lawmakers tried to prevent these potential conflicts. In 2008, the Saudi Judicial Council issued a decision that restricted the judges to relying on only the two late Hanbali authoritative works authored by the famous Hanbali jurist Mansur ibn Yunus al-Bahuti al-Hanbali (1642):

1. Sharh Muntaha al-Iradat;
2. Sharh al-Iqna.

Thus, when judges encounter an issue, they must follow the answer agreed to by both books or provided by one of them and not the other. However, in the event of a discrepancy between the two books, Sharh Muntaha al-Iradat is the preferred choice. In some cases, a solution to the issue may not be available in either of these two books. Then, judges revert to abridgments or summarisations, as follows:

1. Zad al-Mustaqni fi Ikhtisar al-Muqni by Sharf al-Din Abu al-Naja al-Hajjawi (968H/1560);
2. Dalil al-Talib li Nayl al-matalib, by Mar'i ibn Yusuf al-Karmi (961H/1554).

¹⁹⁸ See Chapter Four, section 4.2.3 of this thesis, The Four Sunni Schools of Sharia Law.

¹⁹⁹ Judicial Council Decision No 3 of 1/17/47 associated with the High Ratification dated 3/24/1347. See also Alreasah Al Ammah Libuhuth Al Elmiah Wa Al Efta, 'Edad Al Majalah' (1991) Majalaht Alreasah Al Ammah Libuhuth Al Elmiah Wa Al Efta, 33/32 <<https://www.alifta.gov.sa/Ar/Magazine/Pages/issues.aspx?cultStr=ar&View=Page&PageID=4586&PageNo=1&BookID=2>> accessed 16 June 2021.

Finally, if judges still cannot answer the above sources, they can refer to other Hanbali law books and decisions issued according to the prevailing opinion they contain.²⁰⁰

3.2.1.2 Legislation

Legislation is the second primary source of Saudi law, after Sharia law. Article 48 of BLG 1992 states:

‘The Courts shall apply rules of the Islamic Sharia in cases that are brought before them, according to the *Holy Qur’an* and the Sunnah, and according to laws which are decreed by the ruler in agreement with *Holy Qur’an* and the Sunna.’²⁰¹

Legislation in the KSA is divided into two parts; the first is general legislation, referred to as ‘the laws’, issued by the regulatory authority.²⁰² The second is subsidiary legislation, referred to as ‘the regulations’, encompassing those legal instruments issued by the executive authority according to the powers granted to them by the constitution. These aim to facilitate the implementation of laws issued by the regulatory authority.²⁰³

Legislation is the most potent means of rulemaking in modern law, especially in the KSA, with a high number of laws and regulations passed nowadays.²⁰⁴ This is due to many factors, including that the legislation is characterised by precise drafting and is easy to refer to.²⁰⁵

A problem relevant to this study is that the e-commerce sector in the KSA suffered from a lack of a legal framework controlling such a sector. Therefore, many researchers have recommended that a comprehensive legal framework for this sector

²⁰⁰ Muhammad Alfawzan, *Al Tantheem Al Qadaee Al Jadeed Fi Al Mammlakah Al Arabiah Al Saudiah* (Maktabat Al Qanoon Wa Al Eqtsad 2010) 209.

²⁰¹ This is an official translation in the English language. See <https://www.shura.gov.sa/wps/wcm/connect/ShuraEn/Internet/Laws+and+Regulations/> accessed 16 June 2021.

²⁰² The term ‘regulatory authority’ is used for the legislative power that lays down statutory laws and regulations in the KSA. It is worth noting that the word ‘legislation’ - which represents secular law - is not used by the BLG 1992. The reason for this is due to the Islamic belief that only God can legislate. Therefore, the term ‘regulatory authority’ is used instead. See Ansari Abdullah, ‘A Brief Overview of the Saudi Arabian Legal System’ (2008) NYU School of Law Global Law and Justice <https://www.nyulawglobal.org/globalex/Saudi_Arabia.html> accessed 16 June 2021.

²⁰³ Muhammad Swilam, *Al Madkhal Le Dirasat Al Qanoon* (Al-Rushd 2016) 70.

²⁰⁴ Fouad Ahmed, *Al Madkhal Lee Andemah Wa Al Huqooq Fi Al Mummlakah Al Arabiah Al Saudiah* (Al Alookah 2004) 37.

²⁰⁵ The Basic Law of Governance 1992, art 71; the Law of Council of Ministers 1993, art 23; the Law of the Consultative Council 1993, art 18.

should be introduced.²⁰⁶ However, the regulatory authority only recently responded to these calls with the introduction of the ECL 2019.²⁰⁷ This thesis will assess whether or not this response has adequately addressed consumer protection issues.²⁰⁸

3.2.1.3 Customs

Customs can be defined as practices that people frequently use that create a belief that they are binding.²⁰⁹ Contrary to legislation, a custom is treated as an automatic source of the law. In other words, customs are not created by an authority but by the people/trade by practice. This characteristic is evident in the emergence of legal rules and their development, as a customary rule continuously develops itself according to the development of the needs of society and its circumstances.

For a custom to be considered a legal norm, it must have two elements – namely, formal and substantive elements. However, when the custom infringes the general principles of Sharia law, it will have no legal effect. A formal element refers to a case where people are accustomed to frequently practising a particular behaviour in a specific aspect of their social life until that behaviour becomes acceptable to all.²¹⁰ For instance, one of the commercial legal customs is that a signature on the back of a cheque is considered a transfer of ownership. A substantive element refers to the belief that a particular custom is legally binding and must be followed. Therefore, the infringement of such a custom may be subject to the punishment imposed by a competent authority.²¹¹ Hence, the difference between custom and mere habits becomes more apparent, as the latter consists of only the formal aspect without believing that such habits are binding as a legal rule.

Customs can contribute to reducing the defects of legislative texts. They can be a supplement to legislation and effectively contribute to filling gaps in it – for instance, a custom is used to define the rights and obligations of the auctioneer and

²⁰⁶ Eyad Makki and Lin-Ching Chang, 'E-commerce in Saudi Arabia: Acceptance and Implementation Difficulties' (International Conference on e-Learning e Business Enterprise Information Systems and e-Government, Las Vegas, 2014) 119. See <<http://worldcomp-proceedings.com/proc/p2014/EEE2294.pdf>> accessed 16 June 2021.

²⁰⁷ Royal Decree No (M/126).

²⁰⁸ This is discussed extensively in Chapter Three, section 3.3 of this thesis, Online Consumer-Related Law in the KSA: E-Commerce Law 2019.

²⁰⁹ Fouad Ahmed, *Al Madkhal Lee Andemah Wa Al Huqooq Fi Al Mumlakah Al Arabiah Al Saudiah* (Al Alookah 2004) 39.

²¹⁰ Hassan Kira, *Al Madkhal Ila Al Qanoon* (Al Ma'rifah 1974) 158.

²¹¹ Muhammad Swilam, *Al Madkhal Le Dirasat Al Qanoon* (Al-Rushd 2016) 74.

what they deserve by way of charges under Saudi legislation.²¹² As customs develop by practice in an acceptable way to society members, they are more flexible than legislation, which can only be changed by the relevant authority, resulting in the provision of legal solutions to new issues. Consequently, a custom seems to be the most appropriate means for the development of social conditions.²¹³ However, it does not represent a suitable solution for addressing urgent regulatory needs.

This criticism is particularly pertinent in modern times, as it is arguable that new issues that require urgent solutions potentially arise every day. To form a new custom, a period must pass for this custom to be established and be formed as legally binding. Therefore, a custom is a slow way of creating legal rules, since it is slow to form, develop, and change.²¹⁴

Furthermore, the nature of a custom – specifically, that it is not in written form – may create legal uncertainty as to its existence or even in its intention. The challenge of uncertainty may increase due to differing customs from one region to another and from one category to another. When multiple rules govern the same issues in different ways, this could lead to a variety of legal rules in one country. Therefore, it is not an appropriate way to address the problems arising in e-commerce identified by this study nor to create a cohesive legal framework.

3.2.2 The Regulatory Authorities in the KSA

The regulatory authority is shared by the King, the Council of Ministers (CMs), and the Consultative Council (CC).²¹⁵ It exercises its jurisdiction by the Law of the Consultative Council (LCC),²¹⁶ the Law of Council of Ministers (LCM)²¹⁷ and the BLG. Exercising the competence of the regulatory authority is conditional on not opposing the provisions of Sharia law – namely, the *Qur'an* and the *Sunnah*. According to article 67 of the BLG 1992:

'The Regulatory Authority shall be concerned with the making of laws and regulations which will safeguard all interests, and remove evil from the state's affairs, according to Sharia.

²¹² The Commercial Court System 1931, art 31.

²¹³ Hassan Kira, *Al Madkhal Ila Al Qanoon* (Al Ma'rifah 1974) 158.

²¹⁴ Muhammad Swilam, *Al Madkhal Le Dirasat Al Qanoon* (Al-Rushd 2016) 78.

²¹⁵ The Basic Law of Governance 1992, art 44.

²¹⁶ Law of the Consultative Council (LCC) 1993, Royal Decree No (A/91).

²¹⁷ Law of the Council of Ministries (LCM) 1993, Royal Decree No (A/13).

Its powers shall be exercised according to provisions of this Law and the Law of the Council of Ministers and the Law of the Shura Council.’²¹⁸

3.2.2.1 The King

The King of the KSA, as affirmed in the BLG 1992, is the ultimate authority over all state powers, including the legislature,²¹⁹ since he has the authority as the head of the country and the head of the legislature to repeal, enact or amend any laws and regulations by a royal decree. A royal decree is the most potent regulatory tool in which the King expresses his will, and it is the highest decision issued by the King. This royal decree may never be appealed in front of any judicial authority because it is an act of sovereignty that is not subject to appeal.

In addition, in the legislative process, which includes drafting and enacting international treaties, agreements, regulations, and privileges by the legislative bodies in the kingdom (undertaken by the CMs and the CC), alongside accreditation and amendment, will be made by royal decrees. The King can agree on and refuse proposals from either of the two legislative bodies. Thus, the King is considered the head of the legislative and executive branches.²²⁰

3.2.2.2 The Council of Ministers (CMs)

In the KSA, the role of CMs is not limited to the executive functions of the state only, but rather, they share regulatory authority with the King and the CC.²²¹ Article 1 of the LCM 1993 has made it clear that the CMs are a statutory body headed by the King. As has already been mentioned in the BLG under Article 44, the King is the final adjudicator regarding the three state powers: organisational, executive and judicial.

3.2.2.3 The Consultative Council (CC)

The legislative powers of the CC are summarised as the ability to propose a new draft law or amend a law that has been enacted and studied within the council. After deliberation, the head of the CC shall present the results reached to the King regarding new or amended laws.²²² For this to happen, the CC needs to make a valid decision,

²¹⁸ This is an official translation in the English language. See <<https://www.shura.gov.sa/wps/wcm/connect/ShuraEn/Internet/Laws+and+Regulations/>> accessed 16 June 2021.

²¹⁹ The Basic Law of Governance 1992, art 44.

²²⁰ Ibid.

²²¹ Ibid.

²²² The Law of the Consultative Council 1993, art 23.

which means two-thirds of the CC members must agree for a legislative proposal or amendment to be adopted.²²³ Consequently, decisions are not considered valid unless approved by a majority of the council members.

3.2.3 Regulatory Procedures in the KSA

There are certain considerations that the regulatory authority must take into account in the process of enacting legislation, which are as follows:

1. It must not conflict with Sharia law provisions.²²⁴
2. It must comply with the fundamental law, namely the BLG 1992.²²⁵
3. It must satisfy the interests of the country and must not be harmful to state affairs.²²⁶

3.2.3.1 Proposing a New Law

At its first stage, the Law is provided as a draft, proposal or a bill, emerging from the CC and/or from the CMs. There are two ways to propose a bill in the KSA. Firstly, any group of ten members of the CC has the right to propose a new draft law or an amendment to a law already in force and submit it to the Head of the Council, where the Head shall submit the proposal to the King.²²⁷ This means that before referring the CC's opinions to the CMs, such views are subject to review by the King. Secondly, every minister may propose a draft law or regulation related to the work of his ministry. Every member of the CMs may propose what they deem worthy of discussion in the CMs' meetings after the approval of the King in his role as Prime Minister.²²⁸

The Head of the CC, after discussion, presents the bill to the King of the KSA, who refers it to the CMs at his sole discretion. The CMs has the right to approve or modify the bill. Decisions are issued as soon as the King approves them if the opinions of both the CC and the CMs are agreed upon. This means that the two Councils and the King must approve every legislative proposal or amendment which becomes law. In the case of the approval of a proposal or bill, it is referred to one of the competent committees and the Assembly of Experts Committee (AEC). They will consider it alongside the authority that holds jurisdiction over the relevant topic. Their findings are

²²³ Ibid, art 16.

²²⁴ The Basic Law of Governance 1992, art 1 and 7.

²²⁵ The Law of the Consultative Council 1993, art 1.

²²⁶ Ibid, art 67.

²²⁷ Ibid 23.

²²⁸ The Law of the Council of Ministries 1993, art 22.

reported, and then the bill is returned, along with the CC study, to the CMs, where it is reviewed again under the terms of the bill regulations.

However, opinions may differ between the two Councils. In this case, if the CMs reject the bill, then it is not possible to re-introduce it except if it is deemed necessary to do so.²²⁹

3.2.3.2 Discussion and Voting

After the submission of the report of the AEC to the CMs, the latter reviews the report and discusses it in detail. The CMs then analyses each article and votes on the whole bill. According to Article 21 of the LCM 1993, if the CMs approve the bill, it will then be transferred to the Royal Court to the next stage of ratification by the King. He has a leading and independent law-making role and the highest authority over all the country's organs, including the regulatory authority. But if the discussion of the CMs ends with the rejection of the bill that the AEC has submitted, then it will be considered terminated.

3.2.3.3 Certification

The CMs issues its decision to approve the bill. It organises a royal decree of the bill to transfer it to the King for viewing and authentication.

3.2.3.4 Issuance

The King issues his order approving the bill when he signs the Law's decree.

3.2.3.5 Publication

The decree and the Law accepted are published in the official state gazette (Umm Al-Qura). The Law takes effect from publication date unless the state determines another particular date for the Law to come into force.²³⁰

3.2.4 Judicial System in the KSA

Since the KSA is an Islamic state, its judicial system is based on Sharia law for criminal and civil cases. The King is at the head of the legal system, who acts as the final authority of appeal and a pardon source. The Saudi court system consists of three

²²⁹ Fouad Ahmed, *Al Madkhal Lee Andemah Wa Al Huqooq Fi Al Mumlakah Al Arabiah Al Saudiah (AlAlookah 2004)* 19-20.

²³⁰ The Basic Law of Governance 1992, art 71; the Law of the Council of Ministries 1993, art 23, and the Law of the Consultative Council 1993, art 18.

main parts.²³¹ The largest is the Sharia Courts, which hear most cases in the Saudi legal system. The Sharia Courts are organised into three categories: Courts of the First Instance (General, Criminal, Personal Status, Commercial, and Labour Courts), Courts of Appeal and the Supreme Judicial Council. Supplementing the Sharia Courts is the Board of Grievances, which hears cases that involve the government (administrative judiciary). The Board of Grievances is also organised into three categories: Courts of the First Instance, Courts of Appeal, and the Supreme Judicial Council.²³² The third part of the Saudi court system consists of various committees within the government ministries that address specific disputes such as medical errors.

Concerning online contracts, the court that hears disputes arising from contracts concluded online differs depending on the type of dispute. In the KSA, there are several commercial courts, with each having different duties in terms of commercial judgements. Examples of such a division are presented below:

1. General Courts, which consider the conflicts resulting from a breach of contractual obligations according to the rules of contractual responsibility.
2. Commercial Courts, which consider disputes between traders related to their business.
3. Judicial Jurisdiction Committees, such as the press and publication committee, consider violations of the press and publication system.

Each one of these courts has a judicial competence depending on the type and nature of the conflict.

It is clear from this division that the General Court is judicially competent to hear disputes that arise in B2C contracts. This court exists in all cities of the KSA due to its multiple jurisdictions. When a dispute occurs between a consumer and a trader, the general court in the same city that the consumer and a trader live is the specialised court to hear such cases. There are, however, many difficulties that a consumer may encounter in claiming their rights in the event of a dispute with an online seller.²³³ For

²³¹ Royal Decree No (M/78).

²³² It is worth mentioning here that this Supreme Judicial Council is an independent entity with entirely different powers from the Supreme Judicial Council mentioned above.

²³³ Fahad Al-Daoud, 'Al Ektisas Al Qadaee Fi Aqd Al Tijarah Al Electroniah' (2013) 60(15) The Journal of Justice 202; Saleh Al-Manzlawi, 'Al Hemaiah Al Qadaeiah LI Mustahlek Al Mutaqeed Abr Al Internet Fi Thoo Ahkam Nitham Al Murafaat Al Shareih Al Saudi' (2011) 23(2) King Saud University Journal of Law and Political Science 169.

instance, the general rules for pleadings state that a consumer must (if a claimant) file a lawsuit against the defendant (the seller) in the city court in which the defendant resides.²³⁴ Consequently, consumers may be reluctant to claim their rights due to the hardships they will incur (travelling, material costs, physical fatigue) in doing so. Therefore, there is a need for legislative intervention in granting the online consumer more protection by getting the competent court to consider B2C contracts within the jurisdiction of the consumer's domicile.²³⁵

3.3 Online Consumer-Related Law in the KSA: E-Commerce Law 2019

3.3.1 The Need for Consumer Protection in E-Commerce Development

Consumers' mistrust of being able to obtain legal protection in encountering any problems in online shopping is one of the factors affecting their adoption of e-commerce in the KSA.²³⁶ This concern was reinforced due to the absence of clear online commerce law in the KSA.²³⁷ A lack of a legal framework to regulate e-commerce was one of the key challenges to promoting online shopping in developing countries, including the KSA.²³⁸ Consumers may not conduct online purchases if they find that they are not clearly protected from unfair commercial practices/contractual terms or that their rights as consumers are not comprehensively guaranteed.²³⁹ Thus,

²³⁴ The Law of Procedure before Sharia Courts 2013 Royal Decree No (M/1), art 36.

²³⁵ Although such difficulties were briefly mentioned above due to their significance, this study does not suggest any legal solutions to such challenges. This study focuses on substantive, not procedural, consumer protection.

²³⁶ Fahad Aleid, Simon Rogerson and Ben Fairweather, 'Factors Affecting Consumers' Adoption of E-Commerce in Saudi Arabia from A Consumer's Perspective' (International Conference e-Commerce, Portugal, 2009) <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.458.3432&rep=rep1&type=pdf#page=28>> accessed 16 June 2021.

²³⁷ Rayed AlGhamdi, Steve Drew and Thamer Alhussain, 'A Conceptual Framework for the Promotion of Trusted Online Retailing Environment in Saudi Arabia' (2012) 7(5) International Journal of Business and Management (IJBM) 143.

²³⁸ Eyad Makki and Lin-Ching Chang, 'E-commerce in Saudi Arabia: Acceptance and Implementation Difficulties' (International Conference on e-Learning e Business Enterprise Information Systems and e-Government, Las Vegas, 2014) <<http://worldcomp-proceedings.com/proc/p2014/EEE2294.pdf>> accessed 16 June 2021; Najim Alshammari, 'E-Commerce in Saudi Arabia: Characteristics of a Trustworthy Usable E-commerce Websites' (2019) 9(1) International Journal of Information Science 12; Abdul Rahman Altaiar, 'Factors affecting on the use of E-Commerce from the Perspective of Saudi Consumers' (2020) 4(9) Journal of Educational Sciences and Human Studies 363; Khulood Almani, 'The Impact of E-commerce on the Development of Entrepreneurship in Saudi Arabia' (2020) 28(4) Journal of International Technology and Information Management 32.

²³⁹ Aleid et al. note that the absence of a legal and regulatory framework for consumer protection is one of the main obstacles to online shopping. See Fahad Aleid, Simon Rogerson and Ben Fairweather, 'Factors Affecting Consumers' Adoption of E-Commerce in Saudi Arabia from A Consumer's Perspective' (International Conference e-Commerce, Portugal, 2009) <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.458.3432&rep=rep1&type=pdf#page=28>> accessed 16 June 2021.

a lack of adequate law might not only lead to consumers distrusting online shopping, but it might also threaten the growth and profitability of online shopping.²⁴⁰

In the context of sale contracts, many Saudi consumers have suffered from insufficient consumer protection rules and policies in terms of the current Saudi regulations. In conventional agreements, compared to online contracts, the negative impact of this lack of sufficient consumer protection rules can be reduced, where consumers in brick-and-mortar shops have better and greater options for evaluating the goods they intend to purchase.²⁴¹ This has influenced the behaviour of many Saudi consumers when purchasing online.²⁴² According to Al-Ghamdi et al.: 'A large number of the customer sample fear that they might not receive their purchased products in the form or quality specified on the website. As such, they are not comfortable to buy without physical inspection.'²⁴³

In addition, as Aleid stated, the majority of consumers fear shopping online in the KSA, due to various issues related to the policies of return and exchange and a lack of knowledge of the terms.²⁴⁴ This was partly due to the KSA's lack of any published policies regarding refunds in existing laws in general. Therefore, consumers are forced to visually check the products and buy them directly at stores.²⁴⁵

²⁴⁰ Emad Abdel Rahim Dahiyat, 'Consumer Protection in Electronic Commerce: Some Remarks on the Jordanian Electronic Transactions Law' (2011) *Journal of Consumer Policy* 425.

²⁴¹ See Chapter Two, section 2.2 of this thesis, *The Perceived Risks of Online Shopping*.

²⁴² According to Arab News, '90 percent of consumers do not know their rights or duties, and that makes them fall prey to some traders' 'greed' and loss of their consumer rights'. See Arab News Staff, '90% of Consumers Ignorant of Their Rights' *Arab News* (27 June 2015) <<https://www.arabnews.com/news/452024>>. This article does not determine whether the study included all Saudi consumers who make Internet-based purchases or the size of the surveyed consumers (sample).

²⁴³ Rayed AlGhamdi, Steve Drew, and Thamer Alhussain, 'A Conceptual Framework for the Promotion of Trusted Online Retailing Environment in Saudi Arabia' (2012) 7(5) *International Journal of Business and Management* 143.

²⁴⁴ Fahad Aleid, Simon Rogerson and Ben Fairweather, 'Factors Affecting Consumers' Adoption of E-Commerce in Saudi Arabia from A Consumer's Perspective' (International Conference e-Commerce, Portugal, 2009) <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.458.3432&rep=rep1&type=pdf#page=28>> accessed 16 June 2021.

²⁴⁵ Fahad Aleid, Simon Rogerson and Ben Fairweather, 'A Consumer's Perspective on E-commerce: Practical Solutions to Encourage Consumers' Adoption of E-Commerce in Developing Countries - A Saudi Arabian Empirical Study' (International Conference on Advanced Management Science, Chengdu 2010) <<https://ieeexplore.ieee.org/stamp/stamp.jsp?tp=&arnumber=5552944>> accessed 29 June 2021.

Al-Ghamdi et al. also asserted that the absence of a specific consumer rights protection act for online shopping was a concern for online consumers.²⁴⁶ It also played an active role in the further emergence of fraud and theft in the KSA online market.²⁴⁷ According to Aljarboa: 'Weak legal and regulatory oversight for selling products online in [the KSA] could result in fraud and theft.'²⁴⁸

This has also been asserted by a survey conducted with Saudi consumers, in which most of the participants mentioned that there were no clear regulations and legislation to protect all the involved parties' rights in online shopping.²⁴⁹ Numerous interviewees stated that they had been victims of online fraud in the KSA and could not find an appropriate source from which to seek justice and protection. In addition, most of the victims were unaware of which government department to approach and where they should take their complaints.²⁵⁰

The above studies highlight a lack of efficient laws and regulations that can effectively empower online consumers with rights related to information and withdrawal rights, as well as protecting them from unfair commercial practices/contract terms. Thus, there was an urgent need to create a legal framework to protect consumers when they engage in online shopping in the KSA.²⁵¹ This has led many

²⁴⁶ Rayed AlGhamdi, Steve Drew and Thamer Alhussain, 'A Conceptual Framework for the Promotion of Trusted Online Retailing Environment in Saudi Arabia' (2012) 7(5) *International Journal of Business and Management* 140.

²⁴⁷ According to Arab News, 'Statistics show 20 percent of consumers in the Kingdom have been victims of online fraud or theft', '20% of Saudi online shoppers defrauded'. See News Staff, '20% of Saudi Online Shoppers Defrauded' *Arab News* (27 June 2015) <<http://www.arabnews.com/saudi-arabia/news/768106>>. This article does not determine whether the study included all Saudi consumers who make Internet-based purchases or specify the sample size of surveyed consumers; Aziz Obaid Alotaibi and Christian Bach, 'Consumer Awareness and Potential Market for e-Commerce in Saudi Arabia: Challenges and Solutions' (ASEE Zone I Conference University of Bridgeport, Bridgeport, 2014) 1 <<http://www.asee.org/documents/zones/zone1/2014/Student/PDFs/120.pdf>> accessed 29 June 2021.

²⁴⁸ Soliman Aljarboa, 'Online Shopping in Saudi Arabia: Opportunities and Challenges' (2016) 7(4) *International Journal of Managing Value and Supply Chains* 12.

²⁴⁹ AlGhamdi Rayed, Drew Steve and Alfaraj Osama, 'Issues influencing Saudi customers' Decisions to Purchase from Online Retailers in the KSA: a Qualitative Analysis' (2011) 55(4) *European Journal of Scientific Research* 585.

²⁵⁰ Fahad Aleid, Simon Rogerson and Ben Fairweather, 'A Consumer's Perspective on E-commerce: Practical Solutions to Encourage Consumers' Adoption of E-Commerce in Developing Countries - A Saudi Arabian Empirical Study' 376 (*International Conference on Advanced Management Science, Chengdu 2010*) <<https://ieeexplore.ieee.org/stamp/stamp.jsp?tp=&arnumber=5552944>> accessed 29 June 2021.

²⁵¹ Rayed AlGhamdi, Steve Drew and Thamer Alhussain, 'A Conceptual Framework for the Promotion of Trusted Online Retailing Environment in Saudi Arabia' (2012) 7(5) *International Journal of Business and Management* 140; Nahla Khalil, 'Factors Affecting the Consumer's Attitudes on Online Shopping in Saudi Arabia' (2014) 11(4) *International Journal of Scientific and Research Publications* 7; Soliman

researchers to argue that the development of a legal framework for e-commerce would enhance trust between sellers and consumers and provide security for electronic transactions.²⁵²

It should be mentioned here that a consumer protection body exists for the regulation of traditional commerce in the KSA; they are called the Consumer Protection Association (CPA). This association aims to protect consumers' interests; safeguard and defend their rights; represent their cases before public and private bodies; protect them against all kinds of deception, counterfeit, fraud, deceit, falsification in goods, services and inflated prices; and promote consumer awareness and rationalised consumption. To achieve its objectives, the association may undertake the following:

- Propose laws and regulations that enable it to carry out its work related to consumer protection.
- Determine procedures and methods of filing complaints and obtaining rights.
- Handle consumer complaints, study and analyse them, and cooperate with the relevant authorities to develop solutions to address them.
- Promote the culture of consumer protection, holding seminars and conferences, conducting studies, research, and other educational activities in the field of consumer protection, etc.
- Represent consumers in domestic and international committees and bodies concerned with consumer protection, cooperate with them, and participate in their activities according to applicable procedures.

Nonetheless, it is not viewed as an actively supportive body;²⁵³ consumers do not trust that this association can protect them regarding their complaints concerning

Aljarboa, 'Online Shopping in Saudi Arabia: Opportunities and Challenges' (2016) 7(4) International Journal of Managing Value and Supply Chains 13.

²⁵² Abdul Rahman Altaiar, 'Factors affecting on the use of E-Commerce from the Perspective of Saudi Consumers' (2020) 4(9) Journal of Educational Sciences and Human Studies 363; Khulood Almani, 'The Impact of E-commerce on the Development of Entrepreneurship in Saudi Arabia' (2020) 28(4) Journal of International Technology and Information Management 32.

²⁵³ See Eyad Makki and Lin-Ching Chang, 'E-commerce in Saudi Arabia: Acceptance and Implementation Difficulties' (International Conference on e-Learning e Business Enterprise Information Systems and e-Government, Las Vegas, 2014) 119. See <<http://worldcomp-proceedings.com/proc/p2014/EEE2294.pdf>> accessed 16 June 2021.

offline transactions.²⁵⁴ This association has not played a sufficient practical role in combating practices that may harm consumers, such as enforcing action. Therefore, consumers are frustrated that this body is not acting as expected and would possibly not trust this body with policing the fairness of online transactions either.

The government of the KSA issued the E-Commerce Law (ECL) 2019 as a real response to the issues faced by consumers in online contracts in the KSA. As mentioned above, confidence in concluding online contracts is a crucial impediment towards online transactions in the KSA; therefore, enacting adequate laws to address the risks expected by consumers would stimulate consumer confidence in online shopping. Hence, the regulatory authority's eagerness to pass a law that addresses this problem could be treated as a positive step towards the development of the e-commerce sector. However, a critical question here relates to how successfully the new law has addressed the relevant issues in the B2C e-commerce market. This is the central question of this thesis.

3.3.2 Background of the E-Commerce Law (ECL) 2019

In 2014, the Ministry of Commerce of the KSA (MC) put forward the E-Commerce Bill (ECB), which aims to boost confidence in e-commerce transactions, provide protection for consumers, and support the scope of e-commerce in Saudi society.

The ECB passed the first phase of the regulatory procedures by 2016;²⁵⁵ this became the ECL 2019,²⁵⁶ which includes 26 articles. It was published on 26 July 2019 and became effective on 24 October 2019. Its executive regulations were thereafter issued in 2020.²⁵⁷ The primary role of the regulations is to add additional conditions that were not covered in the law and/or provide interpretations that may clarify the scope of the law if there is ambiguity in its applications. Although there is no particular

²⁵⁴ Rayed AlGhamdi, Anne T. A. Nguyen, and Vicki Jones, 'Wheel of B2C E-commerce Development in Saudi Arabia' (in Jong-Hwan Kim, Eric T Matson, Hyun Myung, Peter Xu (eds.), *Robot Intelligence Technology and Applications 2012. Advances in Intelligent Systems and Computing* (Springer 2013). See <<https://arxiv.org/pdf/1302.0820.pdf>> accessed 26 July 2021.; Eyad Makki and Lin-Ching Chang, 'E-commerce in Saudi Arabia: Acceptance and Implementation Difficulties' (International Conference on e-Learning e Business Enterprise Information Systems and e-Government, Las Vegas, 2014) 119. See <<http://worldcomp-proceedings.com/proc/p2014/EEE2294.pdf>> accessed 16 June 2021.

²⁵⁵ See Chapter Three, section 3.2.3.1 of this thesis, Proposing a New Law.

²⁵⁶ Royal Decree No (M/126).

²⁵⁷ The Executive Regulations of E-Commerce Law (ERECL) 2020, Minister of Commerce Decision No (200).

time frame for the stages of legislation (the regulatory procedures) in Saudi law, it can still be said that the ECL 2019 has taken a long time to come into force.

Nevertheless, this delay could be justified because it takes time for bills to emerge into law, since each stage requires sufficient discussion and ratification. Moreover, since 2015, the bill has been published on the MC website, where they have called on experts and researchers to express their views and suggestions on the bill via the website.²⁵⁸ Hence, the intention of the regulatory authority may well have been for the bill to be thoroughly considered in all respects by those interested in addressing potential gaps before it came into force.

The issuance of the ECL 2019 is an essential step for regulating the e-commerce sector in the KSA. Historically, there were a few laws regulating offline commerce in the KSA.²⁵⁹ However, the adequacy of these laws and regulations could be questioned as they were not explicitly enacted for consumer contracts. Rather, they apply to all commercial contracts, including B2B and B2G. Moreover, their application may not be extended to online shopping in some cases.²⁶⁰ This has led some researchers to assert that there are no clear legal regulations that extend their applicability to an online environment in order to be able to protect online consumers.²⁶¹ One of the few regulations of e-transactions in the KSA is the Electronic Transactions Law (ETL), enacted in 2007.²⁶² However, this law focuses on the electronic methods used to conduct electronic transactions, such as electronic signatures, and the credibility of an electronic message in a contract's conclusion. It does not tackle the other, more substantive, online contract problems discussed within this study.²⁶³

²⁵⁸ See <<https://mc.gov.sa/ar/mediacenter/News/Pages/24-11-20-01.aspx>> accessed 16 June 2021.

²⁵⁹ For example, Commercial Data Law (CDL) 2002 Royal Decree No (M/5); Anti-Commercial Fraud Law (ACFL) 2008 Royal Decree No (M/19).

²⁶⁰ For example, Anti-Commercial Fraud Law (ACFL) 2008 focuses on provisions concerning the production of a fraudulent product and provisions relating to investigation, trial and penalties in cases of violation of the law, but it only focuses on the provisions of fraudulent goods that can be consumed. There is no provision for products that may exist in an online environment, such as those that tend to be intangible – e.g. digital content.

²⁶¹ Asid Hassan Al-Thunibat, 'Hemaiat Al Mustahlek Fi Al Nitham Al Saudi Bin Al Waqee Wa Al Maamol: Dirasah Muqaranah Bilqanoon Al Masree' (2016) 8(2) *Jordanian Journal of Law and Political Science* 97; Obaid Alabdali, 'Saudi Consumers' Attitudes Towards Advertising: a Contemporary Perspective' (2009) 4(4) *Journal for International Business and Entrepreneurship Development* 265.

²⁶² Royal Decree No (M/18).

²⁶³ Fahad Aleid, Simon Rogerson, and Ben Fairweather, 'Factors Affecting Consumers' Adoption of E-Commerce in Saudi Arabia from A Consumer's Perspective' (International Conference e-Commerce, Portugal, 2009)

Another related law is the Consumer Protection Association Law (CPAL) 2015.²⁶⁴ This law provides some relevant provisions to this study – namely, the legal definition of consumer under consumer protection legislation. However, most articles of this law focus on the provisions related to administrative matters concerning organising the association, such as provisions of membership, the general assembly and the objectives of the association. This law does not provide any provisions that address problems that may occur in consumer contracts.

The ECL 2019 adds to a series of laws and regulations maintained by the KSA concerning regulating trading within its borders. The E-commerce Guidelines Guide According to E-Commerce Law (EGGAE) issued by the MC states that the ECL 2019 aims to:²⁶⁵

1. Support confidence in the validity of e-commerce transactions.
2. Protect consumers from fraud, deception or dishonesty.
3. Support and develop e-commerce.

The objectives stated above are a real response to the issues faced by consumers in online contracts in the KSA, as detailed in the previous sections.

The structure of the ECL 2019 is divided up as follows:

Article: One	Definitions.
Article: Two	Scope of the Law.
Articles: Three and Fifteen	The Provisions of the Service Provider Website.
Article: Four	Electronic Errors.
Article: Five	Consumer Data.
Articles: Six - Nine	Information Requirements.
Articles: Ten - Twelve	Electronic Advertising.
Articles: Thirteen and Fourteen	Right of Withdrawal.
Articles: Sixteen - Twenty-Four	Enforcement, Penalties, and Trial.
Articles: Twenty-Five and Twenty-Six	Publication of the Law.

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.458.3432&rep=rep1&type=pdf#page=28> accessed 16 June 2021.

²⁶⁴ The Consumer Protection Association Law 2015, Council of Ministers Resolution (No 120).

²⁶⁵ Ministry of Commerce (2019) The E-commerce Guidelines Guide According to The E-commerce Law (EGGAE) 2019, <https://mc.gov.sa/ar/ECC/Pages/default.aspx> accessed 16 June 2021.

It can be said that the ECL 2019 is a quantum leap in the consumer protection system in the KSA. However, one wonders to what extent a law of just 26 articles can address the issues consumers face in online contracts. To complicate matters further, this law is the first legal framework to introduce special provisions for online consumer protection in the KSA. In other words, there is no other law in the KSA that contains either more general or more specific articles to protect consumers.

Consequently, it could be said that it is difficult for a single law consisting of only a few articles to cover all the aspects of consumer issues in online contracts and other risks that can also occur in offline contracts. This thesis argues that the current law does not provide a comprehensive legal framework that regulates consumer contracts. Therefore, there is still an urgent need to either expand this law to include many issues related to consumer protection or for it to be supported by other laws dealing with relevant topics, such as those in offline contracts. However, regarding the issues identified under this study, it can be said that the efficiency of the ECL 2019 to protect consumers relies on whether or not it deals adequately with problems that concern consumers intending to conclude online contracts. To assess this, the following sections will examine whether and how the law and its executive regulations provide clear provisions that are likely to be adequate in terms of the issues discussed under this study.

3.3.3 The Scope of the ECL 2019

Article 2 of the ECL 2019 states that it applies to contracts concluded through electronic means, including online contracts by businesses (whose parties are either a trader or practitioner)²⁶⁶ and consumers.

Generally speaking, there is no definition for the term 'consumer'. Its meaning differs from one domain to another. The concept of a consumer has two meanings – one is economical and the other is legal. The notion of consumption initially appeared to be purely economic. It refers to the final stage of the three economic cycles, coming after the production and distribution stages. The notion of a consumer from an economic standpoint is:

²⁶⁶ This section will further explain the difference between trader and practitioner.

‘Any person who performs the consumption of goods or services, regardless of his or her status (individual or legal entity), or average consumer or professional, and the purpose of the consumption, whether to meet the needs of self, family or craft.’²⁶⁷

The economic theory seeks to encourage consumption and to improve products to meet people’s desires. Consequently, all people are consumers, regardless of their character or the purpose of their consumption. On the other hand, the legal theory seeks to protect consumers’ health and money and establish a balanced contractual relationship between the contracting parties while bearing in mind that a consumer is the weaker party in a B2C contract.²⁶⁸

In the Saudi regime, the CPAL 2015²⁶⁹ states that the notion of a consumer includes ‘any natural or legal person acquiring a commodity or service, whether for a charge or for free, to fulfil a personal need or the needs of others’.²⁷⁰ Whereas article 1 of the ECL 2019 has further expanded the concept of a consumer and defines a consumer as ‘the person who deals in e-commerce with a desire to obtain products or services that the service provider provides’.

Generally, there is a significant similarity between the definitions provided by the above laws. The only formal difference between the two definitions arises in the scope of the purpose of the transaction, which was determined by the CPAL 2015 – namely, to fulfil a personal need or the needs of others.

Hence, a question that may arise is, what is the legislator’s intention by using the phrase ‘fulfil the needs of others’?

The Saudi legislator may, by ‘the needs of others’, intend to mean those personal needs that do not include a business purpose, such as if a consumer purchases a good as a wedding gift for a neighbour. Nonetheless, the statement of the Saudi legislator does not expressly state that the purpose of the needs of others must be personal. On the other hand, it can be said that the term is broad and has not been deliberately specified to include any purposes that can be described as the needs of others, whether personal or business purposes. For example, buying with

²⁶⁷ Youssef Shendi, ‘Al Mafhoom Al Qanuni lel Mustahlik’ (2010) Journal of Sharia and Law 142.

²⁶⁸ Arnold Roosendaal and Simone van Esch, ‘Commercial Websites: Consumer Protection and Power Shifts’ (2007) 6(1) Journal of International Trade Law and Policy 18.

²⁶⁹ Consumer Protection Association Law 2015, Council of Ministers Resolution (No 120).

²⁷⁰ Ibid, art 1.

intent to resell is considered a business practice under Saudi law, even if it is exercised only once or by someone not classified as a trader under Saudi law.²⁷¹ In this case, if consumers purchase a good with the intention of selling it to their neighbours, can the buyer be classified as a consumer under Saudi law?

It is impossible to provide a definitive answer to this question due to a lack of cases providing interpretations of this material. However, it seems that both personal and business purposes are covered from the author's point of view, as the CPAL 2015 definition itself does not exclude business purposes from the scope of consumption. In addition, regulatory procedures in the KSA go through many stages, starting from the proposal of a bill until its publication, either as a law or regulation.²⁷² Through these stages, legal experts consider the bill to ensure that its words reflect the legislator's intention. Therefore, all meanings of the provisions reflect the legislator's intention, unless this is expressly provided otherwise.

Furthermore, by looking at the definition of 'consumer' that was recently provided in the ECL 2019, we find that the law does not provide any restrictions on the purpose of a transaction. This clearly shows that business purposes are not excluded from the scope of consumption. Consequently, the definition adopted in the ECL 2019 creates a consistent definition with the KSA enforcement body that enforces the law – namely, the CPAL 2015.

From these definitions, either a natural person or a legal entity can be a consumer, regardless of the purpose of the transaction. Therefore, a trader can contract as a consumer even if their purposes fall within the scope of that individual's trade or business.

A trader under the scope of the ECL 2019 is defined as 'The person who is registered in the commercial registre that engages in e-commerce',²⁷³ while a practitioner is defined as 'The person who is not registered in the commercial register that engages in e-commerce²⁷⁴ as a seller'. There are many requirements that commercial law imposes for a person to gain the status of a professional trader. One

²⁷¹ Musaeed AlJubairi, *Sharh Al Nitham Al Tijari Al Saudi* (AlHumaithi 2020) 54.

²⁷² See Chapter Three, section 3.2.3 of this thesis, Regulatory Procedures in the KSA.

²⁷³ The E-Commerce Law 2019, art 1.

²⁷⁴ *Ibid*, art 1.

of the most important of these requirements is, among other things, registration in the commercial register. Article 2 of the Commercial Register Law (CRL) 1995²⁷⁵ states:

‘Every trader must apply to register their name in the commercial registry in which their commercial place is located, whether it is the main centre, branch, or agency.’

Registration in the commercial register refers to a specific record in the MC. The names of traders and all data related to their trade or industry are recorded, whether individuals or companies. As a result, if a seller does not obtain a commercial record, they are not considered a professional trader under Saudi law. Therefore, it can be understood that the definition of practitioner found in e-commerce refers to a seller who did not acquire trader status under Saudi laws – e.g. by not registering – as well as a person who sells their goods only occasionally, as a layperson.

Furthermore, the provisions of the ECL 2019 apply to all e-commerce platforms that participate in providing products and services to Saudi consumers, whether or not they are registered in the KSA with the E-Shop Registration Authority.²⁷⁶ As a result, the notion of a trader/practitioner is wide enough to include the activities of government departments and local and public authorities, alongside not-for-profit organisations, such as charities. This means that these bodies may therefore classify as a trader or practitioner.

Confusingly, both traders and practitioners are referred to in the ECL 2019 as service providers (SPs). This term is inaccurate as an SP is limited to those providing services. Therefore, a trader who sells a good or supplies digital content cannot be described as an SP. This term may then cause uncertainties among most consumers, such that they may believe the law does not protect them in contracts for the sale of goods. Therefore, using this term seems unnecessarily complicated. It was expected that the ECL 2019 would introduce a simplified legal framework, easily understandable to the ordinary person. It appears that this objective was not sufficiently achieved. This is not something that reflects the stated aims for which this law was introduced – namely, to simplify and clarify the objectives of the law.

This thesis argues that the regulator had the opportunity to better draft these terms by providing one word that may apply to whoever sells goods or provides

²⁷⁵ The Commercial Register Law (CRL) 1995, Royal Decree No (M/1).

²⁷⁶ The E-Commerce Law 2019, art 2(2).

services in e-commerce platforms under the scope of the ECL 2019. For instance, phrases such as ‘trader, dealer, or business’ seem to be plainer to describe whoever engages in selling or providing services through online platforms, whether they are natural persons or legal entities or registered in the commercial registry or not. This may help make the provisions easier to read and understand, especially for consumers.

Based on the above definitions of both SP and consumer, this thesis believes that the ECL 2019 rules do not only apply to the B2C model but may also apply to other models, if contracting parties conclude their contracts through electronic means such as the Internet. These models are:

- B2B contracts.
- C2C contracts.
- C2B contracts.

However, these models are usually excluded from the scope of consumer protection laws. The ECL 2019 provisions, as a consumer policy, are supposed to protect a consumer from a professional party. But it may be that the legislature intended to protect the contracting parties in these models. In that case, the question here is: To what extent can we say that this law has achieved the desired goals behind its legislation, such as the problem of this study, which is to increase the confidence of the weaker party to engage in online shopping?

In the following paragraphs, this thesis tries to deduce the justifications behind covering these types of models in such a law and analyses how this can contribute to achieving the desired goals behind the law.

In B2B, a contract is made between two professional parties for profit, such as the interaction between a wholesaler and a retailer. The definitions of consumer adopted by the Saudi regulator are closer to economic theory than legal theory. When we say that the notion of a ‘consumer’ includes any natural or legal person who purchases a good or service via e-commerce platforms, this then means that protection will be provided for each individual, whether they were an ordinary person or a professional trader. This scope of protection is not consistent with what the application of a consumer protection policy should be. For instance, paternalistic protection over a business cannot be justified.

Moreover, there are apparent differences between professional purchasers (particularly legal entities) who intend to purchase goods/services for business purposes and those who only plan to use them for personal use. In the former case, the purchasers are usually more cautious, less susceptible to bias, and may have the tools to protect themselves. Consequently, the main aim behind consumer protection laws may not be realised: to protect the weaker party in a contract.²⁷⁷ In addition, the protection of both parties of a contract in commercial contracts is already present in private law provisions.²⁷⁸ We can also find these provisions in the 'chapter of the sale' in the classical books of Sharia law.

The concept of a consumer in the ECL 2019 may have a positive side, by protecting everyone engaged in the e-commerce sector. However, this extended protection (by considering the professional trader as a consumer) does not mean that the law has achieved its objective. As mentioned in **Chapter One**, the trust factor among online users in the KSA has been identified as one of the most critical obstacles to the growth of the e-commerce sector. In response, the government introduced the ECL 2019. Protecting ordinary consumers from fraud, deception or dishonesty to increase their confidence in the Internet as a shopping tool was one of the main objectives of this law. However, the broad scope of the definition of a consumer has not been aimed only at the category that needs to be protected in B2C contracts (the weakest party); it also targets other parties that have no justification for protecting them in consumer legislation, such as companies.

Although this broad scope of protection has a positive side, as mentioned above, there are also many negative sides. One contracting party may pay many costs due to the scope of this protection, which can negatively affect the e-commerce sector. For example, suppose professional traders enter into a contract as consumers. In that case, they may use the right of withdrawal as a way to escape from their obligations without justification, which could lead to the undermining of many commercial contracts and professional traders not abiding by their agreements.

²⁷⁷ See Arnold Roosendaal and Simone van Esch, 'Commercial Websites: Consumer Protection and Power Shifts' (2007) 6(1) *Journal of International Trade Law and Policy* 18; Kaviar Hossein, 'Consumer Protection in Electronic Contracts' (2011) 2(2) *International Arab Journal of E-Technology* 96; Mohammad Karim, 'Protection of Rights of Consumers in Business Transaction: A Comparative Approach with Special Reference to Islamic Law' (2014) 10&11 *International Islamic University Chittagong Studies* 183.

²⁷⁸ Such as the Commercial Court Law (CCL) 1931, Royal Decree No (32).

If everyone who purchases a good or service is considered a consumer under the ECL 2019, the following question arises: Is there a specific segment of buyers who need special protection in certain types of contracts, which is not provided by the existing commercial law or Sharia law?

Should we argue that there should be more restrictions to limit the protection provided by law to only a specific group of purchasers who are acquiring a good or service for purposes that are outside that individual's business? Otherwise, there will not be much difference between the protection offered to B2C contracts and other commercial contracts such as B2B contracts.

In C2C, a transaction occurs between two consumers as a private person sells their own used goods – for example, to another consumer. A contract that includes a 'practitioner' and a 'consumer' can be classified as a C2C contract since the parties to the contract are, in fact, consumers (i.e. peers – individuals acting in a personal capacity). Hence, a question arises about the reason behind the inclusion of this type of contract within the scope of the ECL 2019, although this law aims to protect consumers in B2C contracts. In B2C contracts, there is no equality between the two parties, as is the case in C2C contracts, as one party is a professional who is supposed to have more bargaining power than the consumer and, therefore, the consumer needs enhanced protection under the law. Due to the equality between the two parties of a C2C contract, the provisions of the civil code provide a basic level of protection for the contracting parties in such a contract. The idea of equality between C2C parties is perhaps evident in traditional contracts, since the contracting parties meet in person and/or the good physically exists at the time of the conclusion of the contract.

In contrast, as discussed in **Chapter Two** of this thesis, various risks may occur in an online environment, such as information asymmetry in transactions where the contracting parties/goods may not be physically present at the time of the conclusion of the contract, or the identity of the seller may be hidden. Therefore, the two parties' relationship to C2C contracts in an Internet environment is not necessarily 'balanced'.²⁷⁹ Perhaps, this prompted the Saudi legislator to protect the consumer in this type of contract in an Internet environment.

²⁷⁹ Emma Psaila, Sara Fiorentini, Marta Santos Silva and Ana Gomez, *Exploratory Study of Consumer Issues in Online Peer-to-Peer Platform Markets - Task 5 Report – Legal Analysis Report*, Directorate-

Furthermore, the Saudi regulator has successfully solved one of the significant issues in an Internet environment: the inability to distinguish between a professional and an amateur in commercial transactions. This matter has been observed in many jurisdictions²⁸⁰ and has caused consumers to be deprived of protection in some contracts concluded on those platforms, due to a lack of knowledge of whether the other party is acting in the capacity of a private individual or a professional trader.²⁸¹ It seems that the ECL 2019 contributes to eliminating the legal uncertainty that may arise in this field by applying its provisions to whoever uses e-commerce platforms as a tool to sell goods or supply services to consumers. From this, if a seller uses Internet platforms, including C2C platforms, to sell goods or supply services as a primary source of income and/or as a sideline, then the ECL 2019 rules will apply.

However, this result cannot be inevitable because the legislator did not decisively interpret the criteria by which a trader or practitioner can be described as engaging with electronic commerce, as mentioned in the above definitions. One of the most controversial points relates to determining factors that must be considered when classifying a person as engaging in e-commerce. Unfortunately, this point cannot be addressed as the Saudi court has no foreseeable cases that will define these criteria.

In C2B, a consumer supplies or sells their services/ digital content or products to a business. Although this model is the same as C2C contracts in its effects, it differs from the others above in the state of the consumer in a contract, as the latter is a party who is selling or supplying a good, service and digital content to a business. Many websites are concerned with traders purchasing consumer goods such as vehicles, jewellery, antiques, etc.²⁸² Several factors that often occur in most consumer contracts, that justified legal intervention to protect consumers in B2C contracts, may not happen in this type of model – for instance, consumers cannot negotiate standard

General for Justice and Consumers, Brussels (European Commission, 2017) para 5.1 <https://ec.europa.eu/newsroom/document.cfm?doc_id=45244> accessed 16 July 2021.

²⁸⁰ Such as the EU and UK. See Chapter Five, section 5.3.4 of this thesis, Online Trader Scope Under Consumer Protection Legislation.

²⁸¹ Emma Psaila, Sara Fiorentini, Marta Santos Silva and Ana Gomez, *Exploratory Study of Consumer Issues in Online Peer-to-Peer Platform Markets - Task 5 Report – Legal Analysis Report*, Directorate-General for Justice and Consumers, Brussels (European Commission, 2017) para 5.1 <https://ec.europa.eu/newsroom/document.cfm?doc_id=45244> accessed 16 July 2021.

²⁸² See, for instance, www.webuyanycar.com (UK); <https://haraj.com.sa/> (KSA).

terms and conditions in B2C. In contrast, the consumer may be the best-positioned party who imposes the terms or the price in C2B.

However, can a consumer's bargaining power in this type of model be considered an indicator of the equality between the two parties, or the consumer's better position than that of a trader in this type of model? Therefore, does a consumer need additional protection against a trader?

A professional trader often has an advantage over a consumer even if they are a buyer. Many factors may affect a consumer's selling decision, which a professional trader may exploit. Loos argues that there are often circumstances that compel consumers to sell their valuables, such as when a consumer is in a difficult financial situation or they are selling their inheritance, often in a period of grief.²⁸³ By being aware of these conditions, traders may tend to take advantage thereof, imposing unfair terms in their contracts or practicing unfair commercial practices, especially if consumers do not have sufficient information about their rights and obligations. Thus, in many ways, the position of consumers in C2B contracts is similar to that of consumers in B2C contracts.²⁸⁴

However, contrary to what was expected, we find that the ECL 2019 protects the professional traders (who deals in e-commerce with a desire to obtain products or services) against the consumer (who acts in a personal capacity and enters into a contract as practitioner) in this type of model.

In conclusion, based on the above analysis, consumers have a clear need for protection, whether in traditional contracts or on the Internet, when they are the weakest party in a transaction (i.e. against a professional party such as in B2C and C2B contracts). In contrast, that need can be minimised when it is with an equal party, such as in C2C contract, unless there are factors that can give one of the parties an advantage over the other, such as when a contract is concluded via the Internet. Conversely, protecting a business such as a professional trader or company cannot be justified in consumer protection legislation. However, even if the Saudi legislator

²⁸³ Marco Loos, 'The Modernization of European Consumer Law: a Pig in a Poke?' (2019) *European Review of Private Law* 126.

²⁸⁴ *Ibid.*

decided to cover only C2C and C2B models, the legislator must provide appropriate protection for each of these types.²⁸⁵

3.3.4 Main Instruments of Consumer Protection in ECL 2019

This research does not include an article-by-article analysis of the laws and the implementation of regulations. Instead, it will follow a thematic approach that focuses on the three issues considered to be the most significant in consumer protection in online contracts. They are:

1. the provision of mandatory information;
2. tackling unfair contract terms and unfair commercial practices; and
3. the right of withdrawal.

It has been reported that these areas are the root problematic areas and source of the threats and risks involved in online transactions.²⁸⁶ Therefore, enhancing these areas by implementing effective legal frameworks could reduce the vulnerabilities of an online environment, improve the level of online consumer protection, and increase trust and confidence among online consumers.

Considering that the topics, as this thesis outlined in **Chapter One**, will focus on the above issues, only these sections of this law are relevant, and these will be examined in more detail. Therefore, this section analyses the adequacy of the instruments provided by the ECL 2019 to protect consumers in online contracts. Three subsections fall under this section: Information Requirements, Legal Boundaries of Online Advertising and Consumer Right of Withdrawal.

3.3.4.1 Information Requirements

There are three information requirements that the SP must disclose to the consumer. This information relates to the identity of the SP, the contract and the invoice.

The ECL 2019 requires the SP to disclose a statement to the consumer clarifying information related to their identity and their business' information on their commercial website.²⁸⁷ This includes the SP's name or any distinctive identification

²⁸⁵ See Chapter Three, section 3.4 of this thesis, To What Extent is the Current Saudi Arabian Legislation on Online Consumer Protection Efficient?.

²⁸⁶ See CPASA (2017) 'The KSA Consumer Protection Association's Statement on E-Commerce and its Relation to Consumer Protection'. See <<https://cpa.org.sa/single-data/182>> 25 September 2021.

²⁸⁷ The E-Commerce Law 2019, art 6.

thereof and the SP's address (unless registered with one of the online shops' authentication entities),²⁸⁸ contact information and the name and number of registration if registered to a commercial registry or other publicly available records.²⁸⁹ The ECL 2019 also requires any SP practising a profession to be subject to special regulation, requiring a licence or permit to practice, and to disclose the licence or permit number, its expiry date, and the granting authority on the website.²⁹⁰

In this regard, the place of business of the SP indicates the address of the location of the business registered in the commercial register for the trader,²⁹¹ whereas the place of business of the practitioner is the place they determine for their web shop, unless proven otherwise.²⁹² If the SP has more than one place of business and has not specified one of them, the recognised place of the SP will be the one closest to the area of the conclusion of the contract, taking into account the circumstances that the parties were aware of or anticipated at any time before or at the conclusion of the contract.²⁹³

In addition, if the practitioner is a natural person who does not have a place of business, the recognised place of business shall be their legal residence, according to the standards and conditions specified by the regulations.²⁹⁴ The place is not considered a place of business merely because it includes the equipment and technology supporting the information system used by the SP to conclude the contract or enables other parties to have access to a referenced information system.²⁹⁵ Furthermore, the use of a domain name or email address connected to a particular

²⁸⁸ According to the ECL 2019: 'online shops' authentication entities are the entities authorized by the Ministry of Commerce to authenticate electronic shops.' See the E-Commerce Law 2019, art 1.

²⁸⁹ The E-Commerce Law 2019, art 6.

²⁹⁰ Ibid, art 9.

²⁹¹ Ibid, art 3(1)(a).

²⁹² Ibid, art 3(1)(b).

²⁹³ Ibid, art 3(2).

²⁹⁴ Ibid, art 3(3). According to the Executive Regulations of E-Commerce Law 2020 (ERECL) 'The place of business of the Practitioner (natural person) is the place that is determined in the Electronic Shop, or in the authentication certificate issued by the E-Shops Authentication Entity. If the Practitioner (natural person) within the Kingdom does not have a place of business, then his place of business shall be his place of residence, in accordance with the registered National Address. The place of business in which the Practitioner is practicing shall be appropriate to the nature of the activity and the scope of work undertaken in the place of business, and the exercise of the activity therein shall not prejudice public tranquility'. See the Executive Regulations of E-Commerce Law 2020, art 3.

²⁹⁵ The E-Commerce Law 2019, art 3(4).

country by the SP does not create a presumption that the place of business is located in that state.²⁹⁶

However, anonymity creates specific problems in the application of consumer legislation, particularly in determining who is responsible when a fault occurs in an online purchase. Thus, this may reduce the possibility of the consumer obtaining a remedy. In addition, consumers may believe that they are entering into a contract with an online platform, while in fact, they are purchasing from a third party listed on an online marketplace. Online platforms may not provide mandatory templates to meet all of the legal requirements that traders are obligated to meet in B2C contracts. This is left to the traders to reveal.

To address such issues, the disclosure of identifying information is not limited to the SP only. Instead, the Executive Regulations of E-Commerce Law 2020 (ERECL) imposes such obligations on online platforms even if they are not part of the contract.²⁹⁷ The notion of platforms refers to an electronic platform that acts as an intermediary between the SP and the consumer on any website or application that provides services for the facilitation of e-commerce transactions, such as online advertisement services or services for the promotion of products or services, or services that enable the acceptance of orders or payment, or any other service that facilitates practising e-commerce.²⁹⁸ Platforms need to request the SP's data, including contact information, authorisation documentation (if any), and the certificate of registration in the commercial register (if any). After that, the platform must store this data to ensure its preservation and protection for it to be accessed when needed, update the data periodically, and submit the data to the MC if requested.²⁹⁹ This may also help address difficulties in verifying the identity of the SP, which is considered one of the problems created by online retailing in the UK, as will be further discussed in **Chapter Five** of this thesis.³⁰⁰

In terms of the contract information, the ECL 2019 requires the SP to provide a statement to the consumer clarifying the relevant information of the contract to be

²⁹⁶ Ibid, art 3(5).

²⁹⁷ According to art 18(2)(c) of the Executive Regulations of E-Commerce Law 2020: 'The intermediary platform shall disclose required platform Data in accordance with Article 6 of the Law and the Regulations.'

²⁹⁸ The Executive Regulations of E-Commerce Law 2020, art 18(1).

²⁹⁹ Ibid, art 18(2)(d).

³⁰⁰ See Chapter Five, section 5.4.1.1 of this thesis, Identity of the Online Trader.

concluded, including the procedures to be taken to conclude the contract;³⁰¹ the main characteristics of the products or services under contract;³⁰² the total price, including all fees, taxes, or additional amounts related to delivery (if any);³⁰³ payment, delivery, and implementation arrangements; guarantees (if any);³⁰⁴ etc.³⁰⁵

The ERECL 2020 requires the SP to disclose further information about the duration of the contract and its expiry date, if applicable.³⁰⁶ Another requirement is the right to withdraw from the contract, where withdrawal is permissible, and the provision of information regarding costs incurred by the consumer in the exercise of this right, alongside the steps the consumer should take if they wish to exercise the right to withdraw from the contract. The trader is also obliged to inform the consumer in advance that they are not legally entitled to the right of withdrawal if the contract includes a good or service that is excluded from the scope of the law.³⁰⁷

The ERECL 2020 also requires the SP to disclose the procedures and methods used to receive and resolve consumer complaints.³⁰⁸ In addition, the SP must disclose details of the price to be paid – such as the original price, delivery costs, and taxes (if any)³⁰⁹– as well as the tax number (if any),³¹⁰ in addition to any other costs that may be incurred in the future, along with an indication of how they are calculated,³¹¹ payment terms, recurring payments (if any), after-sales services (if any),³¹² and conditions for the provision of these services, as well as details of shipping and delivery provisions if so required.³¹³

There is an obvious shortcoming in the provisions of the ECL 2019 and its 2020 executive regulations regarding the information requirements mentioned above. It is noticed that the regulation repeats some of the previously provided requirements in the law without a persuasive reason for doing so. It is understood from article 7(g) of

³⁰¹ The E-Commerce Law 2019, art 7(a).

³⁰² Ibid, art 7(c).

³⁰³ Ibid, art 7(d).

³⁰⁴ Ibid, art 7(e).

³⁰⁵ Ibid, art 7(f).

³⁰⁶ The Executive Regulations of E-Commerce Law 2020, art 7(1)(d).

³⁰⁷ Ibid, art 7(1)(a).

³⁰⁸ Ibid, art 6(1)(b).

³⁰⁹ Ibid, art 7(1)(c).

³¹⁰ Ibid, art 6(1)(c).

³¹¹ Ibid, art 7(1)(b).

³¹² Ibid, art 7(1)(c).

³¹³ Ibid, art 7(1)(e).

the ECL 2019 that the regulation will add additional conditions not covered in the law.³¹⁴ It is also logical for the regulation to provide interpretations that may clarify the scope of the information requirements already mentioned in Article 7 of the ECL 2019 if there is ambiguity in its applications. Contrary to what was expected, however, the regulation includes phrases that are a direct copy of some of the (apparent) information requirements that were previously mentioned in the provisions of the law, such as the total price, including all fees, taxes, or additional amounts related to delivery (if any).

Regarding the invoice, after concluding the contract the SP is required to submit to the consumer a downloadable receipt that includes the following data:³¹⁵

1. The name of the SP if the SP is a practitioner, or the trade name of the SP if the SP is a trader, and a description of the product or service subject to the contract.
2. Confirmation of the contract and the date of its execution.
3. The total price of the product or service, the value of taxes (if any) clarifying the details of the cost, how it is calculated, and the conditions of claiming it.
4. Shipping, transportation and delivery charges (if any).
5. The SP's tax number (if any).
6. The delivery date of the product or service.
7. The name of the carrier delivering the product and delivery route tracking data (if any).
8. A summary of the replacement and refund provisions in cases where this is permissible (if applicable).
9. The method of payment and confirmation of full payment if it has been made.

However, there is also a delay in providing the consumer with some necessary contract information promptly. For example, one piece of information that the ERECL 2020 only requires to be provided in the invoice (thus after the conclusion of the contract) is a summary of the replacement and refund provisions in cases where this is permissible (if applicable). Such information may influence the consumer's decision

³¹⁴ According to ECL 2019, 'The SP shall provide a statement to the Consumer clarifying the terms and conditions of the contract to be concluded, provided that the statement includes the following: ... g- other information specified by the Regulations'. The E-Commerce Law 2019, art 7(g).

³¹⁵ The Executive Regulations of E-Commerce Law 2020, art 8.

whether to purchase. Thus, a failure to provide such information at an early stage, namely in the pre-contractual information, may seriously harm the consumer.

In this regard, the SP is obliged to inform the consumer of any anticipated delay or difficulties that may have a material effect on the delivery or the execution of the contract.³¹⁶ However, neither the ECL 2019 nor its 2020 executive regulations provide guidance on cases in which the effect could be considered material to the delivery or the execution of the contract. Nonetheless, unless the SP and the consumer agree to another period for the delivery or performance of the agreement, the consumer may terminate the contract if the SP delays the delivery or the execution for more than 15 days from the date of conclusion of the contract or the agreed date, and may recover the payment made under the contract for the product or service or other costs of such delay, unless the delay is due to *force majeure*.³¹⁷

However, delivery risks are not limited to delayed product delivery. There are other risks, such as risks related to consumers' fears that they may receive damaged goods. It is noted here that the goods may not have been damaged when the SP sent them, but the damage may occur during delivery to the consumer. Goods may be damaged during shipment due to different reasons, either because of a lack of proper packaging to protect the goods from damage or through mishandling. However, the ECL 2019 and its executive regulations do not provide any provisions to determine whether the goods would remain at the SP's risk, the consumer's, or a person identified by the consumer to take possession of the goods. Nor do they determine at which point the risk passes to the consumer from the supplier. The ECL 2019 and its 2020 executive regulations do not discuss the implications of receiving a defective good, nor the consumer's rights in this case.

There is no civil law or general code of contract in the KSA that can serve as a reference for such matters. Instead, the general rules of contracts in Sharia law will be considered. However, to resolve this, the consumer will have to file a lawsuit against the trader in the city court in which the defendant resides. Consequently, consumers

³¹⁶ The E-Commerce Law 2019, art 14(2).

³¹⁷ *Ibid*, art 14(1). *Force majeure* is defined as an unavoidable accident that cannot be expected, which leads to the impossibility of compliance with the commitment, such as if part of the state's territory was isolated due to a flood that cut off any means of communication. Consequently, the Saudi legislator imposes on the SP the obligation to deliver the goods, unless this is impossible, even if there is a hardship in delivering the goods, even when there are emergency circumstances proven.

may be reluctant to claim their rights due to the hardships that they will incur (travelling, material costs, physical fatigue) to obtain their rights.

Another matter addressed by the ECL 2019 is that it requires the SP to clarify to the consumer the procedure for concluding the contract clearly and easily, by stating in the field designated for payment that once this field has been clicked, the contract shall be concluded and that the agreement shall entail the obligation to pay.³¹⁸ Therefore, it is no longer sufficient for the final stage of the ordering process to consist of the click of a button entitled 'Confirmation of Purchase' or 'Purchase Order' when a transaction is concluded through a website. Instead, such buttons must indicate to the consumers their immediate payment obligation – for example, by being labelled 'Pay Now'.

Nonetheless, the SP may provide this information in any way possible, provided this indicates to the consumer that the order implies an immediate payment obligation. This rule is mainly geared towards situations where online contracts are made and is one of many provisions to increase consumer protection online.

Furthermore, the ERECL 2020 requires the SP to provide a link to the contract information, including the terms on their website, with an explanation of any subsequent amendment to the data.³¹⁹ However, the adequacy of using hyperlinks as a prominent and transparent way to bring information regarding the terms of the contract to the consumer's attention in contracts formed via the Internet is not apparent. In these circumstances, the consumer has not received sufficient notice of the contract terms. This risk further increases in browse-wrap contracts, where the consumer cannot clearly express that they 'agree' to the terms before concluding the contract by, for example, clicking a button or ticking a box. Instead, a link to the terms is usually located at the bottom of the home page of a particular website. Therefore, the obligation to confirm the payment as outlined under the ECL 2019 by clicking on 'Pay Now' seems to prevent browse-wrap contracts' validity, when there is no obligation to pay.³²⁰

³¹⁸ The Executive Regulations of E-Commerce Law 2020, art 7(2).

³¹⁹ Ibid, art 6(2).

³²⁰ There is no civil law or cases that could serve as a reference for interpretation whether or not Saudi law would consider such contracts as valid.

Finally, the ERECL 2020 addresses input errors that may occur in online transactions. The regulations set a deadline for consumers to correct their mistakes within 24 hours of when the order is sent to the trader.³²¹ The regulation does not specify the means through which consumers can contact traders. Thus, it can be said that every means that can be used to inform traders about such errors is acceptable under the ERECL 2020. The ERECL 2020 states that the consumer has the right to correct errors even after receiving goods or providing services from the supplier.³²² In this case, consumers can benefit from such provision ‘unless the Consumer has benefited from the Service Provider’s product or service, or otherwise derived utility from them’.³²³ Many questions can be raised here. What would constitute a ‘benefit’ under the ERECL 2020 (for example, if the consumer discovers an error after receiving goods and then testing and inspecting them)? In this case, it is not clear whether the consumer could benefit from the above provisions or not. In addition, the mechanism by which consumers can prove that they did not benefit from the service if it was supplied from the supplier is not clear. Thus, there is a need to clarify how the above provisions are to be applied. On the other hand, the ERECL 2020 states the SP’s right to correct errors that may occur in their transactions, such as pricing errors, under two conditions:³²⁴

1. The SP’s right to correct errors must be imposed in the contract terms.
2. The correction must be made before the good is shipped or the service is supplied to the consumer.

In this case, consumers have the right to either uphold or cancel the contract. If consumers decide to cancel the contract, they are eligible to get a full refund for what they paid for the good or service, as well as any costs incurred by them based on this error.

The above provisions deal with this consumer issue, but there are other issues such as misleading advertisements, which will be covered next.

³²¹ The Executive Regulations of E-Commerce Law 2020, art 4(1).

³²² Ibid, art 4(2).

³²³ Ibid.

³²⁴ Ibid, art 4(3).

3.3.4.2 Legal Boundaries of Online Advertising

This section discusses unfair commercial practices under the ECL 2019 – namely, misleading advertising. However, the law not only prohibits misleading advertisements but also makes additional provisions aimed at protecting consumers from any online advertisement. There are three legal measures that the Saudi legislator has taken to control advertisements aimed at online consumers. Firstly, the ECL 2019 treats any online advertising as providing pre-contractual information that is binding to the parties to a contract.³²⁵ It seems that the Saudi legislator considers advertising in this case as part of the formation of the contract, as either an offer or a part of it. For instance, when an SP advertises a good at a specific price, then this displayed price would be considered as part of the contract and be binding on the trader. This means that the agreement will be regarded as binding on the SP once the consumer has issued acceptance towards the advertisement (offer).

Generally, an offer is preceded by a stage called 'invitation to treat', where one of the parties to the contract invites the other party to make an offer to form the contract. However, it may be challenging to determine the differences between an offer and an invitation to treat due to the similarities between the two procedures.³²⁶ The importance of differentiating between an invitation to treat and an offer is that acceptance of the latter creates a binding contract between the two parties to the contract, unlike an invitation to treat.

In many jurisdictions, advertisements are usually treated as an invitation to treat because they lack essential information that would make them an offer, or they lack the legal intent to create a binding contract such as a restaurant menu that displays prices.³²⁷ Thus, an advertisement will not be part of a contract and will not be considered binding on the trader if it is considered an invitation to purchase. The latter does not have any objective intention to create a contractual obligation. Nonetheless, suppose the words of the advertisement indicate the intent to bind the advertiser and

³²⁵ The E-Commerce Law 2019, art 10(1).

³²⁶ Mohd Billah, *Applied Islamic Law of Trade and Finance, A Selection of Contemporary Practical Issues* (Sweet & Maxwell Asia 2007) 11-19.

³²⁷ Such as English contract law. See Jill Poole, *Contract Law* (Oxford University Press 2016) 23; Ewan McKendrick, *Contract Law Text, Cases, and Materials* (Oxford University Press 2016) 61.

there is confidence in all the terms used by the advertiser. In that case, the advertisement will likely be considered an offer rather than an invitation to treat it.³²⁸

The general rules of contracts in Sharia law apply in this matter. The legal schools of Sharia law differ on this point, with two contrasting perspectives: the first perspective argues that the display of goods that include a price, etc. is considered an offer under Islamic contract law.³²⁹ This is because these practices are considered a sign of the trader's intention to establish a contractual relationship with potential consumers. In addition, when the trader displays or advertises goods in this manner, they make a particular promise and must fulfil their promise according to the general principles of Sharia law. Therefore, if the consumer accepts the trader's offer, the contract is binding on both parties to the contract.

In contrast, the other perspective argues that displaying or advertising goods with a price is merely an invitation to treat in Islamic contract law.³³⁰ One factor that justifies this perspective is that holding a trader to a price or contract may cause hardship in some cases, such as when goods are out of stock. In this case, it is not limited to causing trouble but also causes injustice to the trader, as they may need to pay a significant number of damages due to a lack of stock, for example. This approach is supported by the fact Sharia law discourages actions that would harm one of the contracting parties.

This thesis argues that it is not clear whether all online advertisements have the characteristics of an offer. Usually, not all the necessary contract terms are mentioned in advertisements. This would create uncertainty in terms of the contract, which would call into question the validity of an offer being made through an online advertisement. Moreover, the advertiser usually requires potential purchasers to negotiate by requesting an order to purchase. This means that they have no intention of making an offer.

On the contrary, if all advertisements in an online environment are considered offers, every Internet user can accept these 'offers' and make them become binding

³²⁸ Linda Mulcahy and John Tillotson, *Contract Law in Perspective* (Cavendish Publishing Limited 2004) 66.

³²⁹ Mohd Billah, *Applied Islamic Law of Trade and Finance, A Selection of Contemporary Practical Issues* (Sweet & Maxwell Asia 2007) 16.

³³⁰ Md Abdul Jalil and Muhammad Khalilur Rahman, 'Islamic Law of Contract is Getting Momentum' (2010) 1(2) *International Journal of Business and Social Science* 181.

contracts. Consequently, millions of Internet users can sue advertisers for breach of contract when traders cannot supply goods or perform a service due to an overwhelming number of requests. Consequently, it can be said that not all online advertisements can be considered as offers.

Secondly, the ECL 2019 requires online advertisements to contain the name of the advertised product or service, the name of the SP, any distinctive identification thereof (unless registered with one of the online shops' authentication entities),³³¹ and the contact information of the SP.³³² The SP is also required to provide the consumer with a means to request the cessation of the transmission of online advertisements, and the SP shall cease sending online advertisements to the consumer upon receiving this request.³³³ This aims to protect the consumer from harassment and inconvenience due to receiving dozens of emails that promote goods or services they are not interested in. Therefore, based on this provision, the business must allow the consumer to unsubscribe from email advertisements.

Further, the ERECL 2020 requires an online advertisement to clearly state that it is an advertisement, with information related to the product or service that allows the consumer to make an informed and conscious decision.³³⁴ According to this, the SP must ensure that consumers receive the information they need to make informed decisions about products or services, whether or not the consumer asks for it.

However, these articles may cause much debate. A question may be raised about the extent of the SP's obligations in clarifying information related to a product or service when advertising their product under the ECL 2019. To complicate matters further, there might be certain limitations on the communication medium via some electronic tools, which may impose restrictions such as those on time and space – for example, it may be difficult to disclose all related information via SMS. Moreover, the concept of 'allows the consumer to make an informed and conscious decision' about a product or service is broad.³³⁵ The information that a consumer needs to make an

³³¹ According to ECL 2019: 'online shops' authentication entities are the entities authorized by the Ministry of Commerce to authenticate electronic shops.' See the E-Commerce Law 2019, art 1.

³³² The E-Commerce Law 2019, art 10(2).

³³³ The Executive Regulations of E-Commerce Law 2020, art 10(2).

³³⁴ Ibid, art 10(1).

³³⁵ According to article 10(1)(b) of the EREL 2020: 'the electronic advertisement, when published or sent, shall include the following: Information related to the product or service that allows the consumer to make an informed and conscious decision ...etc.'

informed decision may vary from one consumer to another. In addition, a literal reading of this concept may result in the trader being obliged to provide a high level of disclosure. Unfortunately, there are not yet any cases that could clarify the scope of this article.

To remove this ambiguity, the Saudi legislator must determine the related information that an SP must disclose in an online advertisement, such as information contained in the contract and the invoice, considering the restrictions imposed on the communication medium via some electronic tools.

Thirdly, the ECL 2019 prohibits misleading advertising towards online consumers. Article 18(e) of the ERECL 2020 requires intermediary online platforms to delete any content that violates the provisions of the law and regulations, alongside the website terms of use. This may include misleading advertisements posted on online platforms.

There are two types of advertisements classified as misleading under the ECL 2019: the first is any false display, statement, allegation or misrepresentation that may lead, directly or indirectly, to deceiving or misleading the consumer.³³⁶ The second is using a logo or trademark that the SP does not have the right to use, or using a counterfeit trademark.³³⁷ Any misleading advertisement that an SP may use to mislead consumers and influence their ability to make an informed decision constitutes an offence under the ECL 2019.³³⁸

Misleading advertisements are the only unfair business practice that is prohibited by the ECL 2019. However, many unfair business practices can occur in online and offline shopping that have not been expressly forbidden by the ECL 2019 – for example, business practices that intimidate or exploit consumers, restricting their ability to make free or informed choices. In addition, the concept of misleading advertisements is limited to some aspects of practices that may cause a consumer to make an erroneous decision.³³⁹

³³⁶ The E-Commerce Law 2019, art 11(a).

³³⁷ Ibid, art 11(b).

³³⁸ Ibid, art 17 and 18.

³³⁹ Not receiving proper information and/or receiving false or deceitful information.

However, other practices that have not been included in the scope of the law may fall under the meaning of misleading advertisements. For example, as we know from an instance of English law that will be discussed in **Chapter Five** of this thesis, omitting or hiding material information may also result in consumers taking a transactional decision they would not have taken otherwise. Moreover, there are other tools that an online trader can use to mislead the consumer in ways that do not occur in offline transactions, such as those that occur in comparison website platforms, which are one of the most influential sources in online consumer decision-making. This tool can become a severe source of harm to the consumer and risks undermining the consumer's confidence in online shopping if the transparency of its results and the reliability of comparisons are not guaranteed.³⁴⁰

The above provisions deal with this consumer issue. However, there is a legal right that the Saudi legislation grants for the first time to the consumer in B2C contracts – namely, the right of withdrawal – which will be discussed in the following section.

3.3.4.3 The Consumer's Right of Withdrawal

Withdrawal rights in contracts are used as a consumer protection solution. The right of withdrawal may be defined as the right through which a consumer may cancel a contractual relationship arising from a contract with a trader without incurring any liability for non-performance or providing any reasons for exercising such right.³⁴¹ In other words, consumers will be exempt from contractual obligations simply because they have changed their mind for whatever reason – i.e. if they have come across a better offer, or without any reason at all.³⁴² In the context of online contracts, a consumer can exercise the right of withdrawal in contracts concluded remotely under the ECL 2019. This applies to most contracts for the sale of goods or the supply of services. However, there are some exceptions where consumers lose their right of withdrawal in certain circumstances. According to article 13(2) of the ECL 2019, the consumer shall not be entitled to terminate the contract in the following cases:

³⁴⁰ House of Lords Select Committee on the European Union, 'Online Platforms and the Digital Single Market', 10th Report of Session 2015-16, HL Paper 129 <<https://publications.parliament.uk/pa/ld201516/ldselect/ldecom/129/129.pdf>> accessed 24 Jan 2020..

³⁴¹ Jan Smits, 'Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law: The Right to Change Your Mind?' (2011) 29(3) Law Reviews and Journals 672.

³⁴² Horst Eidenmüller, 'Why Withdrawal Rights?' (2010) SSRN 2. See <<https://ssrn.com/abstract=1660535>> accessed 23 June 2021.

- a. If the contract contains products manufactured at the consumer's request or according to the specification that the consumer stipulated, except for products that are defective or do not conform to the agreed specification.
- b. If the contract pertains to videotapes, compact discs, software, or computer programs that the consumer has used.
- c. If the contract deals with the purchase of newspapers, magazines, publications and books.
- d. If there is a defect in the product caused by the possession of the consumer.
- e. The contract deals with the provision of accommodation, transportation or food services.
- f. If the contract deals with purchasing online software products, excluding software that has a defect that prevents the completion of the download or does not conform to what was agreed upon.
- g. Other conditions determined by the regulations.

Also, the ERECL 2020 provides some exceptions where consumers lose their right of withdrawal in certain circumstances, unless otherwise agreed, in the following cases:

- a. If the subject of the contract is a product liable to deteriorate within the period of the permissibility of the contract termination.
- b. If the subject of the contract is a product that cannot be resold for health reasons.
- c. If the subject of the contract is a product containing several elements that have been merged and cannot be returned to their original condition.
- d. If the subject of the contract is a hotel reservation service, travel ticket, vehicle rental, transportation or event management service.
- e. If the subject of the contract is a product designed and produced specifically for the consumer according to the specification of the consumer's request.
- f. If the contract is concluded at a public auction.
- g. If the subject of the contract is a product or service for which the price may be subject to change during the period in which the agreement may be terminated, depending on a market characterised by continuous price volatility outside the control of the SP, such as gold and silver.

Again, it is noticeable here that there is an overlap in information between the provisions of the ECL 2019 and its executive regulations. It is understood from term G in Article 13(2) of the ECL 2019 that the regulation will add additional conditions that were not covered in the law. It is also logical for the regulation to provide interpretations that may clarify the scope of the exceptions already mentioned in Article 13 (2) of the ECL 2019, if there is ambiguity in its applications. Contrary to what was expected, however, much of the phrases in the regulation are direct copies of the (apparent) exceptions terms that were previously mentioned in the provisions of the law; therefore, providing such terms seems unnecessarily complicated. Instead, the regulation should have provided solutions to issues related to applying the right of withdrawal, which were absent from the ECL 2019.³⁴³ This does not reflect the stated aims of this law and its executive regulations – namely, the simplification and clarification of the objectives of the law.

In this regard, the ECL 2019 states that consumers would only be able to use the right of withdrawal if they have not used an SP's product, benefitted from a service, or derived any utility.³⁴⁴ However, this article does not define what is understood by using a product under the scope of the law. Consequently, it is unclear whether consumers can benefit from the right of withdrawal if they only test a good after receiving it. If that is the case, then it would be necessary to consider how to determine whether or not the goods have merely been tested or have been used by the consumer.

Under the ECL 2019, the determination of the start of a seven-day cancellation period varies depending on the type of contract concluded. The cancellation period begins on the day following the conclusion of the contract when the subject of the contract is a service. In contrast, the cancellation period for a contract for the sale of goods begins on the day following the date of receipt of the goods.³⁴⁵ However, there is uncertainty in several situations where it is difficult to determine the day on which the cancellation period ends – for instance, as we know from an example of English law that will be discussed in **Chapter Five** of this thesis, in the case of a sales contract, whether the contract is for multiple goods, multiple lots, regular delivery, or goods

³⁴³ Such as those dealing with the reimbursement of the payments that the SP receives from the consumer, which this thesis will discuss in this section.

³⁴⁴ The E-Commerce Law 2019, art 13(1).

³⁴⁵ Ibid.

under one order that is then delivered on different days. Therefore, failure to specify a more precise end date for the right to withdraw may create a dispute between the consumer and the SP.

For the right to withdraw to be effective, consumers must be awarded their right to withdraw from the contract, and their withdrawal from the contract should be easy.³⁴⁶ To achieve this goal, one of the most essential pre-contractual information requirements imposed by the ECL 2019 is to provide consumers with information about the right to withdraw from a contract, where termination is permissible and the steps a consumer should take if they wish to exercise their right to withdraw from the contract, or to stipulate that the consumer is not entitled to withdraw from the agreement.³⁴⁷

The ERECL 2020 obliges the SP to provide an invoice that consumers can easily save after the conclusion of a contract.³⁴⁸ However, the Saudi legislator did not request this requirement from the trader concerning the provision of contract information before the conclusion of the contract. As mentioned previously, one aspect of pre-contract information is information about the right of withdrawal. The question that may arise here is: How can it be assured that the SP has provided this information before concluding the purchase contract when there is no consent or acknowledgement mechanism through which it can be confirmed before the purchasing decision is made?³⁴⁹ (e.g. in a form and manner which is easily, directly and permanently accessible). In addition, the ECL 2019 does not make any provisions concerning how a consumer can exercise this right when an SP delays in providing or fails to provide this information in a timely manner.

The outcome of exercising the right of withdrawal is to terminate the contractual relationship between the trader and the consumer under the contract. Accordingly, neither party is required to perform any obligations. A consumer may cancel a distance contract during the cancellation period or an offer at any time before the contract is

³⁴⁶ Reinhard Steennot, 'The Right of Withdrawal under The Consumer Rights Directive as A Tool to Protect Consumers Concluding A Distance Contract' (2013) 29(2) Computer Law & Security Review 119.

³⁴⁷ The Executive Regulations of E-Commerce Law 2020, art 7(1)(a).

³⁴⁸ Ibid, art 8.

³⁴⁹ The law does not expressly state who bears the burden of proof in this case. Therefore, Sharia law provisions may apply. According to the Prophet: 'The proof is due from the claimant, and the oath is due from the one the claim is made against.' See Sunan at-Tirmidhi, Book 15, Hadith 21.

entered into without giving any reason or incurring any liability. Following the exercise of the right of withdrawal, each party shall return items received under the contract. Concerning the delivery of goods, it is the responsibility of the consumer to pay for the return of any goods if the obligation is included in terms of the contract.³⁵⁰ However, the consumer may be exempted from this duty if the trader has offered to collect them.

One of the most critical issues that an online consumer may face about their right to withdraw is the reimbursement of any payments that the SP receives from the consumer, including any amounts imposed for delivery. The ECL 2019 has not made any special provisions discussing this issue. Many questions may be raised here. Firstly, the ECL 2019 does not discuss the time frame in which the SP must pay the amount due to the consumer. In addition, the law does not discuss when the SP may keep some of the sums the consumer paid, such as any amount a consumer paid for an enhanced delivery service, or to what extent traders could charge consumers a fee in exchange for reimbursement. Therefore, these gaps in the ECL 2019 mean the consumer risks being subjected to unknown costs or uncertainty regarding their reimbursement.

3.4 To What Extent is the Current Saudi Arabian Legislation on Online Consumer Protection Efficient?

The KSA has been negatively impacted by a delay in the development of the e-commerce sector. One proposed solution to confront this issue was the introduction of legislation regulating e-commerce contracts, including provisions for consumer protection. As previously discussed,³⁵¹ in late 2019, the regulatory authority finally passed the ECL 2019, which took approximately five years to be brought into force. The main goals that the ECL 2019 sought were to support confidence in the validity of e-commerce transactions, support and develop e-commerce, and enhance consumer protection selectively in the KSA for the digital age. The law was expected to cover many significant aspects of e-commerce to keep pace with developments in the online environment in the 2020s. Unfortunately, however, the law has not met those expectations.

³⁵⁰ The Executive Regulations of E-Commerce Law 2020, art 7(1)(a).

³⁵¹ See Chapter Three, section 3.3.2 of this thesis, Background of the E-Commerce Law (ECL) 2019.

Despite the excessively long time it took the ECL 2019 to emerge into an act, this reform programme suffers from four significant deficiencies. Firstly, the concept of a consumer in Saudi law is broadly characterised, so a professional trader may fall under this concept. Consequently, consumer protection provisions will not achieve the objective for which they were introduced.³⁵² Consumer protection legislation should provide some exceptions to the rules of other commercial contracts to protect consumer interests – for instance, the right to withdraw is an exception from the principle of the *pacta sunt servanda*.³⁵³ One of the justifications for introducing such a right is that it is exercised within a very narrow framework to protect the interests of the weaker party in a contract.³⁵⁴

With the current definition of consumer in Saudi law, this right cannot be justified, since a professional trader can also use this. Therefore, there is a need to narrow the concept of the consumer and its limitation to specific cases, taking into account the main objectives of enacting consumer protection laws, such as protecting the economically weaker contracting party and/or the less legally experienced one. In addition, if a trader can be a consumer, what is the benefit of enacting special laws that have particular provisions which differ from those in commercial laws? Rather, when consumer provisions are limited to a specific category of purchasers, this will lead to limited application. This may help to introduce more far-reaching consumer legal provisions because they will be limited to use in certain circumstances.

Nonetheless, as explained in **Chapter Two** of this thesis, an Internet environment is considered risky compared to a traditional environment, making

³⁵² It aims to protect one party who has no experience in contracting from another professional party to address the imbalance of power, whether legal or economically, and not to protect a professional party from another.

³⁵³ Marco Loos, 'Rights of Withdrawal' (in Geraint Howells, & Reiner Schulze (Eds.), *Modernising and Harmonising Consumer Contract Law* (Sellier European Law Publishers 2009) 239; Geraint Howells, Christian Twigg-Flesner, and Thomas Wilhelmsson, *Rethinking EU Consumer Law* (Routledge 2018) 36.

³⁵⁴ See Christian Twigg-Flesner, Reiner Schulze and Jonathan Watson, 'Protecting Rational Choice: Information and the Right of Withdrawal' (in Geraint Howells, Iain Ramsay, and Thomas Wilhelmsson (eds), *Handbook of Research on International Consumer Law* (Edward Elgar 2018) 111-138. The justification for this type of right varies between different jurisdictions. For example, in Sharia law, the right of withdrawal may be justified based on the theory of al-Khayrat (options), which will be explained in detail in Chapter Four, section 4.4.2.4 of this thesis, Consumer Options for Validly Terminating the Contract (*Khiyarat*). However, it seems that the introduction of this type of right in Saudi law results from the Saudi legislature being affected by the legal framework of some advanced jurisdictions, such as the UK, which will be explained in detail in Chapter Five, section 5.4.4 of this thesis, The Consumer's Right of Withdrawal.

consumers more hesitant to use electronic means as a shopping tool. Saudi legislators may have intended to expand the concept of the electronic consumer to protect all parties entering e-transactions, regardless of whether the goods are purchased for personal use or not, to increase confidence in and/or the popularity of online shopping in the KSA.

However, this argument cannot, in any case, justify protecting a professional party in consumer laws, as the necessary protection may be provided to those who engage in e-transactions in the relevant commercial laws instead, such as that already provided by the ETL 2007. Even if we accept this argument, we find great consistency between the ECL 2019 and the CPAL 2015 concerning the concept of consumer, notwithstanding that the latter covers both online and offline transactions. Consequently, this sheds doubt on the validity of the argument that the justification for this expansion of the concept is due to the legislator's desire to protect the parties to a contract in e-transactions.

However, even if the Saudi legislator decided to protect consumers in C2C and C2B models, they would have to provide appropriate protection for each of these types. The Saudi legislator has not yet provided adequate consumer protection for B2C contracts in the ECL 2019. There are many gaps/weaknesses in the existing rules for protecting consumers in this model. Therefore, this thesis argues that applying the ECL 2019 in C2C and C2B models may create challenges due to the uncertainty of the appropriateness of current provisions of the law in terms of these models, discussion of which is outside the scope of this study.³⁵⁵ The Saudi legislator was expected to solve problems facing consumers when they are a party to B2C contracts; as such, a law was enacted to address issues in this type of contract. Once these problems have been addressed, Saudi legislators may consider (as a second step) the possibility of covering other models, especially those closer to the nature of B2C contracts, such as C2B models.

Secondly, the provisions of the ECL 2019 do not cover all the aspects related to consumer protections that already exist in traditional contracts as well as ones that occur in an online environment; either (a) there are no provisions at all, such as

³⁵⁵ For example, Andrés Guadamuz González, 'eBay Law: The Legal Implications of the C2C Electronic Commerce Model' (2003) *Computer Law & Security Review* 468.

provisions regarding unfair contract terms, intangible goods such as software/digital content and consumer rights, to ensure that goods and services conform to their expectations or (b) there are specific provisions, but they do not sufficiently address all relevant aspects, such as reimbursement concerning the right to withdraw. Consequently, the failure of the ECL 2019 was not only in not keeping pace with developments in the online environment in the 2020s, but it also did not contribute to solving problems that already existed before the Internet became more popular in the KSA.

Thirdly, the ECL 2019 attempts to address certain issues in e-commerce by using ancient rudimentary instruments that may not be adequate for the evolution of the era of digitisation. For instance, to combat the deception and misinformation that consumers may face in online contracts, the ECL 2019 only prohibits misleading advertisements. No doubt banning such a practice may contribute to protecting consumers from its results. However, importantly, this is not the sole form of deception or misinformation faced by modern consumers in an online environment. Many other unfair business practices can only occur in online contracts due to the nature of the online environment – for instance, there are tools that an online trader can use to mislead the consumer in ways that do not occur in offline transactions, such as multiple ways of price gouging in online platforms. Therefore, there is a need for legal methods of boosting the effectiveness of regulatory systems and mechanisms to be commensurate with the online world.

Fourthly, there is an obvious shortcoming in the provisions of the ECL 2019 and its 2020 executive regulations. Generally, the main objectives of the regulations are either to add additional requirements that are not covered in the law or to provide interpretations that may clarify the scope of the ECL 2019 if there is ambiguity in its applications. Unfortunately, however, the regulations have not met those expectations in some respects, such as information requirements and the consumer's right of withdrawal requirements. This also does not reflect the stated aims for which this law and its executive regulations were issued in 2020 – namely, the simplification and clarification of the objectives of the law.

Nevertheless, it is worth noting that these criticisms of the ECL 2019 do not diminish its relevance in the legal system of the KSA. The ECL 2019 is a step forward

towards improving the current consumer protection and the e-commerce legal framework in the KSA, where no consumer protection regime in the KSA protected the rights of consumers prior to 2019. Yet more needs to be done. In conclusion, after a lengthy reform process, with the final law taking around five years to be brought into force, this is a somewhat disappointing result.

3.5 Conclusion

This chapter provided an overview of the legal environment of the KSA and the general structure of its legal system, focusing on the foundation of the Saudi legal system and illustrating the legislative authorities in the KSA and the regulatory procedures, to give a clear idea of how decisions and legislation are usually made in the KSA.

This chapter also examines why the ‘trust’ factor is an obstacle that has led to a low level of online shopping in the KSA. It discusses the impact upon consumers’ confidence when the Internet is used as a shopping tool and determines the factors that have helped exacerbate some consumers’ mistrust in online shopping. It also explores possible ways to help to limit those factors, support e-commerce development, and improve or boost confidence levels in online consumers via a legislative intervention.

This chapter has concentrated on online consumer-related law in the KSA – namely, the ECL 2019 and its 2020 executive regulations. It examines how successfully the KSA has addressed relevant issues in the B2C e-commerce market. This is the central question of this thesis.

At the outset, the historical background for issuing these legislations was reviewed, focusing on the scope covered by the law and its regulation. In this context, the legal framework of consumers and SPs was defined in the ECL 2019 and compared with the relevant laws. This chapter also analysed the adequacy of instruments provided by the ECL 2019 to protect the consumer in online contracts. Three instruments were identified: information requirements, legal boundaries of online advertising, and consumer right to withdraw.

This chapter has illustrated provisions dealing with information requirements that the SP must disclose to the consumer. Disclosure of information is not limited to the SP only, but the ECL 2019 imposes these obligations on online platforms even if they are not part of the contract. This chapter has illustrated how providing such

information could play an active role in meeting the challenges that consumers may face in online contracts.

It has also examined a critical dimension of the ECL 2019: it contains provisions that prohibit misleading online advertisements. To limit false information that may be included in the advertisement, what is contained in the advertisement is considered pre-contractual information that is binding on the parties to the contract. Thus, the prohibition of these practices may help to minimise and prevent unfair practices in an online environment.

The ECL 2019 also introduces a new right in the KSA, which is the right to withdraw. The benefits of having the right to withdraw in the KSA have been illustrated in this chapter. The outcome of exercising the right of withdrawal is to terminate the contractual relationship between a trader and a consumer under a contract. Accordingly, neither party is required to perform any obligations.

The ECL 2019 is a step towards improving the current consumer and e-commerce legal framework in the KSA. But in general, after a lengthy reform process, with the final law taking around five years to be brought into force, this is a somewhat disappointing result because the resulting reforms suffer from significant deficiencies.

To sum up, the current Saudi law and its implementation do not provide adequate solutions for the existing problems faced by online consumers. Therefore, there is more that needs to be done.

The next chapter will examine the first model on which the government of the KSA can rely to achieve adequate enforcement for consumer protection regulations in the KSA. It investigates the requirements by which the concept of Shariah compliance can be achieved. It also seeks to examine the measures provided by Sharia law for consumer protection on the legal solutions that can limit the factors influencing consumer trust in online contracts. They are: providing mandatory information, tackling unfair contract terms and unfair commercial practices, and granting the right of withdrawal. It seeks to find out whether or not the current situation of Sharia law and its implementation can provide sufficient solutions to the current problems that consumers face in an online environment. It also examines to what extent Sharia law could serve as a guideline for the KSA government in formulating new laws or the amendment of current regulations around consumer protection.

Chapter Four: Can Sharia Law Be a Solution for Protecting Online Consumers?

4.1 Introduction

Sharia law is the foundation of legislation in the KSA. All aspects of life are covered within the fold of Sharia law, including religion, hygiene, food, clothing and family, alongside social life, politics, finance and governance. Consumer protection, as another vital aspect of Sharia law, is therefore equally covered. The all-inclusive legal philosophy of Sharia law, as evaluated by several researchers, supports and promotes the protection of consumer rights.³⁵⁶ This is reflected in several principles of Sharia law. The purpose of these principles is to protect the interests of all involved parties and eliminate any risk or threat posed by a given transaction, whether conventional or online.³⁵⁷ Given that religiosity could be considered a precursor to trust,³⁵⁸ perhaps the shortcomings in the current consumer protection regulations and practices could be addressed by adopting or strengthening the application of some principles of Sharia law. Therefore, this chapter will examine the relevant principles and rules of Sharia law that relate to consumer protection in B2C contracts.

Initially, this chapter will clarify the legal framework of Sharia law and illustrate the concept of Sharia. It will also introduce the primary and secondary sources of Islamic jurisprudence. Online contracting will then be discussed within the context of Sharia law to investigate the concept of shariah compliant 'SC' private law-making and the requirements for achieving this concept.

The chapter will then describe which parts of Sharia law deal with consumer protection. The chapter will also focus on the authorities that were established under Sharia law to implement and apply laws and regulations, taken from the *Qur'an* and Sunna, to preserve consumer rights. To indicate parts of Sharia law applicable to

³⁵⁶ Mahmoud Mohamed Tantawi, 'Hemaiaat Almustahlik Fi Al Sharia' (1998) 6(2) Journal of Security and Law 12; Mohamed Ahmed, *Heimat Almustahlik Fi Al Fiqh Al Islami* (Dar al-Kuttab al-Sallami 2004); Abdul Sattar Ibrahim Alhiti, 'Hemaiaat Almustahlik Fi Al Fiqh Al Islami' (2004) 19(6) Mutaah LiBohoth Wa Aldirasat 189; Mohammed Khalaf Salama, 'Hemaiaat Almustahlik Fi Al Sharia' (2013) Journal of Fiqh and Law 21; Mahmoud Abdul Hamid Saleh, 'Hemaiaat Almustahlik Fi Al Islam' (2016) 1(2) Journal of Islamic Research 129.

³⁵⁷ Hamed Mustafa Mansoul, 'Al Mushkilat Al Qanuni Le Ogod Al Tijarah Al Electroniah Muqaranah Bi Al figh Al islami' (2016) Journal of Sharia and Law 281.

³⁵⁸ Haytham Siala, Robert M O'Keefe, and Kate S Hone, 'The Impact of Religious Affiliation on Trust in the Context of Electronic Commerce' (2004) 16(1) Interacting with Computers 7.

consumer contracts, it is necessary to illustrate the notion of a 'consumer' under Sharia law.

Finally, this chapter will examine how Sharia law tackles issues that may arise in the field of online consumer protection as determined under this study – namely, a need for the provision of mandatory consumer information and the prevention of unfair contract terms or unfair commercial practices, and a need for the provision of specific consumer rights.

It is worth noting that in this chapter, this thesis does not examine Sharia law as a divine source for legislation, as it believes that Sharia law is applicable for all periods and places. Instead, the examination here is directed to the human Ijtihad deduced from the provisions of Sharia law by scholars (the jurisprudence) and the current applications of Sharia law in Muslim countries such as the KSA, to find out the adequacy of such provisions to protect consumers in an online environment.

4.2 The Legal Framework of Sharia Law

In medieval times, Sharia law was one of the principal legal systems. The role of Sharia law was not limited to the structure of a political framework, but also extended to include social and cultural ideas. Sharia law in the Ottoman Empire also played a significant role in regulating the judicial system, both formally and substantively. Further, it provided many guidelines around structuring the administrative system of the civil state.³⁵⁹

4.2.1 The Concept of Sharia

Sharia has two literal meanings. The first is 'a way or path to the water source'; the second is 'enacting provisions and rules for people'.³⁶⁰ Further, Sharia law has been defined as the provisions that Allah (God) decreed for his slaves concerning religions, worship, ethics and business, to regulate people's relationship with their Lord and their relationships with one another, and to achieve happiness in this life and the next.³⁶¹

For clarity, Sharia law deals with many aspects of day-to-day life, which are broken down into two types: first, the provisions of worship, which are intended to

³⁵⁹ See Wahid bin Abdus Salam Bali, *Quanin Al Shariah Al Islamiah Alti Kant Tahakom Biha Al Dolah Al Uthmaniyah* (Dar al-Taqwa 2013) 5/1.

³⁶⁰ See Muhammad Al-Razi, *Mukhtar Al-Sahah* (Maktabat Lubnan 1986) 141; Mohamed Sallam Madkour, *Al Madkhal Li AL Fiqh Al Islami* (Dar Al Kitab Al Hadith 1996) 9.

³⁶¹ Manna Al Qattan, *Tarikh Al Tashri Al Islami* (Al Maaref 1996) 13.

regulate a person's relationship with their Lord, such as the provisions of fasting or prayer; second, the provisions of transactions, including people's relationships, individually or in groups, such as contracts and family or personal status.³⁶² Sharia law encompasses all public and private law branches and sets out rules governing all aspects of people's lives, including life after death.³⁶³ It deals with many aspects of life not covered by other legal systems, to help Muslims understand that they should lead every part of their lives according to God's wishes. Therefore, it is obvious why Sharia has an important place in its followers' lives, as this legal framework regulates the general and detailed aspects of their life.

Sharia is also referred to as Islamic law, as it is used to represent the law of Islam. As a system of law, it differs to some extent from any other standard text-based legal system.³⁶⁴ The philosophy of law within Sharia differs significantly from other legal philosophies.³⁶⁵ According to Islamic philosophy, Sharia law relies on the Lord's instructions, whereas other legislations are of human construction. Because there is a vast difference between the creator and the creature, the principles of Islamic law are perceived as free from imperfection and injustice, whereas followers of Sharia law perceive other laws as not free from such deficits because they are issued by human beings, who are not infallible.³⁶⁶

Moreover, through the ages, legal edicts have contributed to solving a plethora of human issues. However, these solutions are only temporary because they can only

³⁶² Osama Hamawi, *Mabadi Al Shariah Al Islamiah* (University of Damascus Publications 2009) 27.

³⁶³ Susan Rayner, *The Theory of Contracts in Islamic Law: a Comparative Analysis with Particular Reference to the Modern Legislation in Kuwait, Bahrain, and the United Arab Emirates* (Graham & Trotman Ltd 1991) 1.

³⁶⁴ One of the most striking differences between Islamic law and traditional laws of the West is that the latter may be somewhat limited in aspects that regulate social life, such as individual rights, contracts, civil relations and criminal provisions. In contrast, Sharia law deals with these issues, and more. In other words, one can say that what is generally understood by the term 'law' is only part of the broader concept of Sharia law.

³⁶⁵ Md Abdul Jalil and Muhammad Khalilur Rahman, 'Islamic Law of Contract is Getting Momentum' (2010) 1(2) *International Journal of Business and Social Science* 175.

³⁶⁶ There is a difference between Sharia law and its jurisprudence. Fiqh is the jurisprudence of Sharia law. The main difference between Sharia law and fiqh is that Sharia law is immutable and derived from the sources of Islamic law. In contrast, fiqh is subject to change according to circumstances. Therefore, it is essential to distinguish between Sharia law and fiqh because a lack of differentiation between them leads to 'the tendency to perceive the whole Islamic legal system as completely divine and thereby to (mis) represent the whole system as inflexible and unchangeable.' Accordingly, jurisprudence is interpreted by humans while Sharia law is not. However, to ensure that the interpretation is correct, there are several requirements that a scholar must meet in order to derive the relevant rulings from Sharia law sources; for example, a scholar must have a deep knowledge of the Quran, Sunnah, and Arabic language, etc. See Abdul Karim Zidan, *Muqaddimah Fi Dirasat Al Shariah Al Islamiah* (Dar Omar ibn al-Khattab 1969) 40.

address specific community issues or might only be adequate at a particular time. As a result, the passage of time requires changes to these legal rules as societies develop and their demands change. This does not apply to Sharia law since its rules and principles are broad rather than pertaining to a specific category or period. Sharia rules have been enacted for nearly fourteen centuries. During this period, many laws have changed or been abandoned, but the rules and principles of Sharia law remain applicable for all periods and places. Thus, it can be described as timeless and placeless.³⁶⁷

Furthermore, common and civil law lack authority over the human conscience because punishment alone may not be sufficient to deter an offender from committing their crime; people are aware that there is no legal authority unless the offender is implicated in or convicted of an offence. Thus, there may be room for offenders to circumvent the law and escape its power.³⁶⁸ Contrarily, Sharia law is religious, and its provisions are based on the doctrine of reward and punishment in the Hereafter. Any act committed by any person is subject to such a doctrine.³⁶⁹ Compliance with the provisions of Sharia law, such as the obligation of honesty and refraining from fraud in sales and purchases, is considered obedience to God, for which those who are committed to it will be rewarded in the Hereafter. Sharia law warns against violating its provisions, such as by committing murder, for which the perpetrator shall be punished in life. God also promises to punish the perpetrator of such crimes in the Hereafter if they receive no earthly punishment. This may encourage self-monitoring, either personally or publicly, as fear of punishment in the Hereafter is greater than the fear of worldly punishment. This fear acts as a preventative measure, discouraging people from committing crimes and thus aiming to help reduce the spread of offences in society.³⁷⁰

Sharia law has been criticised in several ways. The most significant criticism is the claim that Sharia law may only be applicable in areas of law such as personal status and family law, not in other areas of law. Vogel discussed these allegations³⁷¹

³⁶⁷ Osama Hamawi, *Mabadi Al Shariah Al Islamiah* (University of Damascus Publications 2009) 28.

³⁶⁸ Fatima Sabaak, *Alshariah Wa Al Tashreee* (Rabetat Al Alam Al Eslami 1997) 14.

³⁶⁹ Mohamed Sallam Madkour, *Al Madkhal Li AL Fiqh Al Islami* (Dar Al Kitab Al Hadith 1996) 30.

³⁷⁰ Abdul Karim Zidan, *Muqaddimah Fi Dirasat Al Shariah Al Islamiah* (Dar Omar ibn al-Khattab 1969) 43.

³⁷¹ Frank Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Brill 2000) xi–xiii.

and largely attributed his criticisms to a lack of knowledge of Islamic law and its applications. He also stressed that Sharia law covers all areas of law, including commercial, criminal and contract law.³⁷² Sharia law is one of the three most widely used legal systems at an international level, along with common law and civil law. Sharia law is broadly similar to global legal systems, with its techniques to classify and formulate legal standards. However, unlike other legal systems, Islamic law has evolved through the contexts of different Islamic societies and their political systems through the centuries. Its development was therefore not related to any particular community or state.³⁷³ As a result, Sharia law has become the most widely used religious law.³⁷⁴

There may be a lack of clarity for non-specialists of the term ‘Sharia law’ and its application in contemporary life. This is due to several factors. For instance, according to Baderin, there is ‘a traditional misconception about Islamic law being wholly divine and immutable’.³⁷⁵ It could be claimed that the main reason for this belief is not differentiating between the sources of Islamic law and the methods of devising provisions such as ‘*Ijtihad*’.³⁷⁶ This point can be briefly explained by the definition of both Sharia and *fiqh*. Sharia is already defined, whereas *fiqh* means, literally, ‘understanding’. *Fiqh* is the jurisprudence of Sharia. Although usually referred to as Sharia law, these terms are not synonymous. As it pertains to Islamic law, Sharia law is a different legal system with its sources, methods, principles and procedures, in isolation from other legal systems. The main difference between Sharia and jurisprudence *fiqh* is that Sharia law is immutable and derived from the sources of Islamic law, whereas *fiqh* is subject to change according to circumstances. Therefore, it is essential to distinguish between Sharia law and *fiqh* because a lack of differentiation between them leads to ‘the tendency to perceive the whole Islamic legal system as completely divine and thereby to (mis) represent the whole system as inflexible and unchangeable’.³⁷⁷

³⁷² Ibid.

³⁷³ Peter Mansfield, *The New Arabians* (JG Ferguson Publishing Co 1981) 21.

³⁷⁴ See Gamal Bader, ‘Islamic Law: its Relation to Other Legal Systems’ (1978) 26(2) *The American Journal of Comparative Law* 187.

³⁷⁵ Mashood A Baderin, *International Human Rights and Islamic Law* (OUP 2005) 33.

³⁷⁶ See further information on this in Chapter Four, section 4.2.2 of this thesis, Formal Sources of Sharia Law.

³⁷⁷ Mashood A Baderin, ‘Understanding Islamic Law in Theory and Practice’ (2009) 9(3) *Legal Information Management* 187.

4.2.2 Formal Sources of Sharia Law

The provisions of Sharia law are derived from many sources, which can be divided into two classes. The first class comprises sources that were derived via revelation – namely, the *Qur'an* and Sunnah, which are considered the primary sources of Sharia law. The second class is comprised of independent interpretations of the legal sources (*Ijtihad*). These are sources that rely on diligence and reason in enacting provisions such as consensus (*Ijma*), logical reason (*Qiyas*), and local custom (*Alorf*),³⁷⁸ which are considered the secondary sources of Sharia law.³⁷⁹

When an issue is under consideration, scholars of Sharia seek an answer to this issue first in the *Qur'an* and Sunnah and then in the practice of early Muslims. When these two types of sources are silent on the subject, Sharia law scholars then apply their reasoning to interpret the law using various means of legal reasoning to find a solution to the issue, such as *istihsan* (juristic preference), *istishab* (presumption of continuity), *maslahah* (juristic analysis of the commonwealth) and *magasid al-Sharia* (interpretation of the general purposes of the law), etc.³⁸⁰

However, these are not sources of Sharia law; instead, they are used when it is a struggle to discover the law from primary texts and apply it to a new situation. Thus, when the *Qur'anic* text is unambiguous on the matter under consideration, it is not permissible to exercise *ijtihad* in that matter.

The sources of Sharia law are also divided into original and dependent sources. The sources are those on which the schools of jurisprudence agree as sources for the enactment of provisions. They are also called agreed sources. There are four sources: the *Qur'an*, Sunnah, consensus (*Ijma*) and logical reason (*Qiyas*). Dependent sources are accepted only by some legal schools as sources for enacting provisions such as local custom (*Alorf*).³⁸¹

³⁷⁸ A traditional and widely accepted way of behaving or doing something specific to a particular society, place or time.

³⁷⁹ Osama Hamawi, *Mabadi Al Shariah Al Islamiah* (University of Damascus Publications 2009) 35.

³⁸⁰ Etim Okon, 'The Sources and Schools of Islamic Jurisprudence' (2012) *The American Journal of Social and Management Sciences* 107.

³⁸¹ Abdul Karim Zidan, *Muqaddimah Fi Dirasat Al Shariah Al Islamiah* (Dar Omar ibn al-Khattab 1969) 182.

From the above, it is therefore relevant to turn our attention to these four original legal sources.

4.2.2.1 The *Qur'an*

The Holy *Qur'an* is the first and supreme source of Sharia law.³⁸² The origin of the word '*Qur'an*' in Arabic is derived from the verb *qara'a*, which means 'to read' but only in the sense of 'revelation', whether it is partial or whole.³⁸³ The Holy *Qur'an* is defined as the word of God as it was revealed to the Prophet Muhammad in Arabic, conveyed in a way that is seen as categorically establishing its authenticity.³⁸⁴ Its most widely known and popular name is the *Qur'an*; however, several names for the *Qur'an* are mentioned among its verses, such as the Book³⁸⁵ or the Criterion,³⁸⁶ among others.

Muslims from all schools of thought in Sharia law believe that the *Qur'an*, in the present era, represents the words of God, which have been preserved from the time of their revelation to today. The *Qur'an* was revealed to the Prophet Muhammad gradually (between 610AD and 623AD). The wisdom of revealing it over these twenty-three years was a response to the problems and questions that the Prophet faced in dealing with Muslims and non-Muslims alike. Two-thirds of the *Qur'an* was revealed over thirteen years in Mecca, and the rest over ten years, in Medina. This method of revelation has demonstrated that the *Qur'an* can be described as a practical guide for tackling issues that may arise in the real world.³⁸⁷

Some provisions were not preceded by any particular problems or questions, such as those concerning the family and penalties for certain crimes imposed to form a particular society based on specific rules and principles.³⁸⁸ The *Qur'an* is described as the miraculous support of the Prophet Muhammad by God in his prophecy of truth. As scholars of Sharia law, and Muslims of all classes, accept no controversies of the *Qur'an's* divinity and form, this makes it the most reliable authoritative source of Sharia

³⁸² Abdal-Haqq Irshad, 'Islamic Law: An Overview of its Origin and Elements' (1996) *Journal of Islamic Law* 19.

³⁸³ Etim Okon, 'The Sources and Schools of Islamic Jurisprudence' (2012) *The American Journal of Social and Management Sciences* 106.

³⁸⁴ See Muhammad Abdel-Haleem, '*Qur'an* and Hadith' (in Tim Winter (eds)), *The Cambridge Companion to Classical Islamic Theology* (CUP 2008) 19.

³⁸⁵ *The Qur'an*, 2:2.

³⁸⁶ *The Qur'an*, 25:1.

³⁸⁷ See Sulaiman Al-Qarawi and Mohammed Al-Hassan, *Al-Bayan Fi Oloom Al-Qur'an* (Maktabat Al-Dhalal 1994) 169-187.

³⁸⁸ Fatima Sabaak, *Alshariah Wa Al Tashreee* (Rabetat Al Alam Al Eslami 1997) 31.

law.³⁸⁹ Therefore, there is no dispute among Muslims regarding the belief that the *Qur'an* offers a complete code for living both as individuals and as a society.³⁹⁰

The provisions of the *Qur'an* are not limited to purely spiritual and religious matters such as prayer and fasting, but also moral, ethical and secular affairs, which from a Western perspective may encompass social mores such as the obligation to respect one's parents and the prohibition against assault. The *Qur'an*, unlike secular legal systems, sees law and morality as inextricably linked – one cannot exist without the other.³⁹¹ Moreover, in its verses, the *Qur'an* discusses many 'special legal provisions', most of which are constitutional and discuss general issues. These verses provide explicit provisions for the international, public, private and domestic aspects of community life. However, few *Qur'anic* verses provide specific legal provisions, in the form of statutory provisions such as those concerning temporal matters such as contracts, trade, and crimes, or provisions concerning the payment of Zakat³⁹² or bequests.

The Holy *Qur'an* provides the principles of Sharia and its rules of *haram* (forbidden) and *halal* (permissible). The method of the *Qur'an* in the statement of provisions is described in terms of general principles and rules, and the commands are outlined generally,³⁹³ only infrequently stating the details of the provisions. As mentioned previously, this is because the *Qur'an* was not codified like other laws that deal with various issues.³⁹⁴

There may be many cases where a ruling on a particular issue cannot be found in the *Qur'an*, but it should be noted that the verses of the *Qur'an* contain information that may nevertheless help in reaching a ruling for a specific given case about which

³⁸⁹ Mahmassani Sobhi, 'The Principles of International Law in the Light of Islamic Doctrine' (1966) 117. Hague Academy of International Law 229.

³⁹⁰ Ramadan Alsharnabasi, *Muqaddimah Fi Dirasat Al Fiqh Al Islami* (Al-Istana Press 1982) 167.

³⁹¹ Jonathan Ercanbrack, 'The Law of Islamic Finance in the United Kingdom: Legal Pluralism and Financial Competition' (PhD thesis, University of London 2011) 59.

³⁹² Zakat is defined as: 'obligatory contribution assessed based on certain assets owned by a Muslim that satisfy certain conditions and is to be distributed to specified categories of beneficiaries.' See MASB, *Technical Release i-1 (TR i-1): Accounting for Zakat on Business* (Malaysian Accounting Standard Board 2006) <https://www.masb.org.my/pdf.php?pdf=Accounting%20for%20Zakat%20TRI-1.pdf&file_path=uploadfile> accessed 16 June 2021.

³⁹³ Despite this, certain verses in the *Qur'an* provide precise detail, such as verses related to the fundamentals of belief and the principles of worship, as well as verses pertaining to the provisions of inheritance and penalties for certain crimes, because such provisions are related to fixed interests that do not change with the changing of times, customs, and ways of life.

³⁹⁴ Ayoub Al-Jarbou, 'Judicial Independence: Case Study of Saudi Arabia' (2004) 19(1) Arab Law Quarterly 13.

there is no detailed answer.³⁹⁵ This flexibility helps scholars to use these indications as the logical reason (*Qiyas*) to discover the correct provision and apply the *Qur'an* in all eras and among all nations following Sharia law.³⁹⁶

The texts of the *Qur'an*, concerning their meanings, are classified into definitive (*qat'ii*) and speculative (*Zanni*) stipulations. Definitive texts have a unique interpretation, and no other meaning can be inferred. For example, in the *Qur'an*, God says:

'O you who have believed, surely wine and games of chance, and altars (for idols) and divining (i.e. divination by arrows or in any other way) are only an abomination of Ash-Shaytan's (the all-vicious, the Devil) doing, so avoid it, that possibly you would prosper.'³⁹⁷

This is a specific and clear rule on the prohibition of alcohol and gambling; the word 'avoid' does not have more than one explanation.

Speculative stipulations refer to texts that have more than one interpretation. For example, God says in the *Qur'an*:

'And divorced women shall await by themselves for three periods.'³⁹⁸

In Arabic, the word 'period' has two opposite meanings; the first meaning refers to when a woman is menstruating and the second when she is not. Thus, there is an argument among Sharia schools about this rule because of the difference in interpretation of this word.

A large number of *Qur'anic* texts fall within the definitive category, while those classified as speculative are considered very few in the *Qur'an*. The speculative category is characterised by multiple meanings, which may leave provisions vulnerable to interpretation in this regard. Therefore, its texts need to be interpreted accurately to obtain the correct legal interpretation. To do so, one turns first to the *Qur'an* by searching in other verses that explain these speculative rules more clearly.

³⁹⁵ Hallaq Wael, 'Was the Gate of Ijtihad Closed?' (1984) 16(1) International Journal of Middle East Studies 4.

³⁹⁶ Mustafa Zarqa, *Al Madkhal Al Fiqhi Alaam* (Dar Al Qalam Damascus 2004) 115; Abdul Karim Zidan, *Muqaddimah Fi Dirasat Al Shariah Al Islamiyah* (Dar Omar ibn al-Khattab 1969) 186.

³⁹⁷ *The Qur'an* 4:90.

³⁹⁸ *The Qur'an* 2:228.

If no explanation is found, the sayings of the Prophet Muhammad are consulted, and finally, the interpretation of the companions of the Prophet, respectively.

The *Qur'an* comprises one hundred and fourteen chapters, or *Surat*, including eighty-six *Surat Makiya*, which were imparted to the Prophet Mohamed before he migrated from Mecca to Medina, and twenty-eight that were imparted to him in Medina, after the migration. The *Qur'an* is divided into thirty parts, each part consisting of two sections, and each section consisting of four quarters, totalling 6,236 verses in all.

4.2.2.2 The Sunnah

The Sunnah is classified as a divine source of law, similar to the *Qur'an*. It is the second primary source of Sharia law. The *Qur'an* confirms this in many verses. One such verse reads thus:

'Nor does he [the Prophet] speak of (his own) desire. It is only an Inspiration that is inspired.'³⁹⁹

These teachings must be followed by Muslims according to the commands of the *Qur'an*, as stated in several places within the *Qur'an* itself:

'He who obeys the Messenger obeys Allah';⁴⁰⁰ 'Obey Allah and His Messenger'.⁴⁰¹

The Sunnah, linguistically, means 'the used method, whether good or bad'.⁴⁰² The Sunnah was technically defined as the deeds, utterances and silent approval issued by the Prophet Mohammad in his lifetime.⁴⁰³ It was also defined as 'the Prophet's statements and behaviour (doings and sayings) and his approval or disapproval of the statements and behaviour of others that he observed during his lifetime'.⁴⁰⁴

Scholars have divided the Sunnah into the following three categories:

(1) Expressive words, which the Prophet said at various opportunities – for example, when Prophet Muhammad explicitly said,

'Pray as you see me pray'.

³⁹⁹ *The Qur'an*, 53:3–4.

⁴⁰⁰ *The Qur'an*, 4:80.

⁴⁰¹ *The Qur'an*, 3:32.

⁴⁰² See Muhammad Al-Razi, *Mukhtar Al-Sahah* (Maktabat Lubnan 1986) 207.

⁴⁰³ Ali Al-Amidi, *Al Ihkam fi Usul Al Ahkam* (Dar Al-Sumaiti 2003) 227.

⁴⁰⁴ Bernard Kenneth Freamon, 'Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence' (1998) *Harvard Human Rights Journal* 19.

(2) Actions – this type of Sunnah consists of the Prophet's deeds and actual instruction, such as the way he performed the prayer, the fasting, the ritual of *hajj* (pilgrimage), or a transaction he concluded such as a sale or other financial transaction.

(3) The implicit approval of acts, which can be an action performed in either the presence or absence of the Prophet Muhammad, but such acts are only valid in his absence if he was aware of them.⁴⁰⁵ The tacit approval of the Prophet Muhammad may be inferred from his silence, indicating the permissibility of the acts. Because God sent the Prophet to the people to inform them of the provisions of Sharia law, he would not be silent about something that went against Sharia law.

Among the scholars of Sharia law, the acts and sayings of the Prophet are called 'Hadith' and 'Sunnah'. However, there may be differences in the detailed meanings of these concepts among scholars. The difference between the Sunnah and the Hadith highlights the fact that the latter refers only to the words of the Prophet, whereas the Sunnah is all that is attributed to the Prophet, be it action or statement. Based on this, it is clear that the Hadith is part of the Sunnah, as the Sunnah is more comprehensive in its terms of reference, but in common use, these terms are used interchangeably. The Prophet pointed out that both Sunnah and Hadith were valid sources of Sharia law when he said:

'I have left two matters with you. As long as you hold to them, you will not go the wrong way. They are the Book of Allah and the Sunna of His Prophet.'⁴⁰⁶

Consequently, the *Qur'an* and Sunnah outweigh all other sources of Sharia law.

The Sunnah is divided, in terms of transmission through the ages, into two categories: *Mutawaatir hadeeth*, which means, 'a report which was narrated by a group who could not possibly have agreed upon a lie, from a similar group, and which is based on what they saw or heard'.⁴⁰⁷ The second category is *Ahaad hadeeth*, which refers to 'any Hadith not classified as *Mutawaatir* which does not fulfil all of the

⁴⁰⁵ Abdullah Ibn Qudamah, *Rawdat El-Nazer Wa Jannat Al Munather* (Altdamuriah 1998) 274.

⁴⁰⁶ Imam Malik, *Al-Muwatta* of Imam Malik, Book 46, Hadith 1628.

⁴⁰⁷ Yosef Aidauudi, *Sharh Al Bigoniah* (Dar Al Andalus 1990) 16.

conditions necessary to be deemed *Mutawatir*.⁴⁰⁸ Most of the Sunnah is made up of *Ahaad hadeeth*.

The Sunnah plays multiple roles within the *Qur'an*. It can confirm and clarify words, sentences or verses from the *Qur'an* that most people do not easily understand. Some verses may be general in their meaning, and the Sunnah clarifies and defines them through the Prophet's sayings, actions and confirmations.

Therefore, the importance of the Sunnah is evident in terms of interpreting the general principles of the *Qur'an*. This explanation is not limited to clarifying these principles for all members of society and helps translate them into applicable legal rules for directing the behaviour of daily life. For instance, the *Qur'an* generally referred to a wife's rights in Islam, as in the following *Qur'anic* verse:

'And women have rights similar to their obligations, according to what is fair.'⁴⁰⁹

The Sunnah specifies this. One of the companions asked the Prophet, 'What is the right of the wife of one of us over him?' He replied:

'That you should give her food when you eat, clothe her when you clothe yourself, do not strike her on the face, do not revile her or separate yourself from her except in the house.'⁴¹⁰

In addition, the Sunnah confirms the *Qur'an's* commandment that men be responsible for spending money on their wives, as the Prophet – in the Hadith of pilgrimage, which is long – said regarding women:

'They (women) have rights over you (the men) to provide them with their sustenance and clothing in a reasonable manner.'⁴¹¹

The Sunnah can also be a source for new rulings that may not exist in the Holy *Qur'an*, such as the prohibition of using gold and silk for men, where the Prophet Muhammad said:

'Do not wear silk or brocade and do not drink in vessels of gold and silver, and do not eat in the dishes made of them' (i.e. gold and silver).⁴¹²

⁴⁰⁸ Ibid.

⁴⁰⁹ *The Qur'an*, 2:228.

⁴¹⁰ Sunan Abu Dawud, Book 12, Hadith 97.

⁴¹¹ Sahih Muslim, Book 8, Hadith 1142.

⁴¹² Ibid, Book 37, Hadith 15.

Although the *Qur'an* is above the Sunnah in the hierarchy of sources of Sharia law, it has been observed that a large number of rules of civil law and the law of obligations (financial transactions, marriage) within societies are derived from the Sunnah.⁴¹³ Similarly, rules directly related to the international dimension of Sharia law are also derived from the Sunnah.⁴¹⁴

The Prophet commanded his companions to focus intently on the *Qur'an* and warned them against writing down his Sunnah during the period of the *Qur'an's* revelation because he feared that the companions might be preoccupied with writing and memorising the second source of Sharia (Sunnah) instead of the primary source (the *Qur'an*).⁴¹⁵ In addition, he intended to mitigate the possibility of confusing the recording of the words of Allah with those of the Prophet. Consequently, most of the Sunnah was not drafted until after the death of the Prophet.

For the Sunnah to be regarded as a reliable source in Sharia law, the correctness of its texts should not be questioned. The Muslim scholars made great efforts to save the Sunnah from distortion and alterations. To that end, scholars of Sharia devised practical ways to ascertain the genuineness of the Hadith between the second and third centuries of Islam. These methods later became known as the science of Hadith (*'Ilm-Al-Hadith*) and became another area of Islamic law, which consists of a set of rules and principles concerning the Sunnah to reveal which are the real Hadith and which are fabricated.

Hadith scientists in the third century of migration, from 850 to 915 AD, devoted their time and effort to the analysis and purification of the Hadiths, focusing their attention on a series of narrators in terms of ascertaining their sincerity, reputation and character.⁴¹⁶ This led them to distinguish between genuine and false Hadiths. The Hadiths, therefore, were divided in terms of authentic (*Sahih*), good (*Hassan*), and weak (*Dha'if*).⁴¹⁷ The result of this authentication technique was the adoption of six recognised Sunni groups based on a wide variety of authentic traditions; namely: (1) *Sahih Al-Bukhari* by Muhammad ibn Isma'il ibn Al-Mughirah Al-Bukhari; (2) *Sahih*

⁴¹³ Imran Ahsan Khan Nyazee, *Outline of Islamic Jurisprudence* (Centre for Islamic Law & Legal Heritage 2005) 153.

⁴¹⁴ Muhammad Hamidullah, *The Muslim Conduct of State* (Islamic Book Trust 2012) 23.

⁴¹⁵ *Sahih Muslim*, Book 55, Hadith 92.

⁴¹⁶ Mahmoud Al-Tahan, *Taisir Mustalah Al Hadith* (Markaz Alhuda 1984) 12.

⁴¹⁷ Dahman Abdur-Rahman, 'A Contribution to the Study of the Koranic Sources of Saudi Arabian Business Law' (1988) 3(2) *Arab Law Quarterly* 132.

Muslim by Abu Al-Hasan Muslim ibn Al-Hajjaj; (3) *Sunan Abu Dawud* by Sulayman ibn Al-Ash'ath; (4) *Sunan At-Tirmidhi* by Abu 'Isa Muhammad ibn 'Isa At-Tirmidhi; (5) *Sunan An-Nasa'i* by Abu 'Abdur- Rahman Ahmad ibn Shu'ayb; and (6) *Sunan ibn Majah* by Muhammad ibn Yazid ibn Majah. It is worth mentioning that two of the books, *Sahih Al-Bukhari* and *Sahih Muslim*, hold a unique position among these six groups as they present the highest degrees of authenticity; the acceptance of Hadith is through stringent acceptance criteria, such as allowing reports only from those who are well known to excel in conservation and mastery.⁴¹⁸

4.2.2.3 Ijma' (Consensus)

Ijma', or consensus, is the third source of Sharia after the *Qur'an* and the Sunnah. It linguistically means 'the agreement' and is technically defined as 'consensus or agreement among scholars, *mujtahidun*,⁴¹⁹ from Prophet Muhammad's community in a particular era after the death of the Prophet, on a particular issue of law'.⁴²⁰

Based on this definition, some of the criteria required for consensus to be valid are listed as follows:

1. There must be a consensus among Sharia law scholars; therefore, consensus among non-scholars is not considered *Ijma'*.
2. There must be an agreement between all Muslim scholars in the same era without a single dissent.
3. The consensus must take place after the death of the Prophet because if he was alive, there would be no need for consensus as the Sunnah is a more potent source of consensus.

The concept of *Ijma'* finds validity both in the *Qur'an* and the Sunnah, as there are many quoted references from both sources that point to this meaning. According to the *Qur'an*:

⁴¹⁸ See Ismael Ben Katheer, *Al Baeith Al Hathith Fi Sharh Iktisar Olom Al Hadith Tahgig Ahmed Shaker* (Dar Al Kootob Al Elmiah 2008) 38.

⁴¹⁹ Plural form of (*mujtahid*). The *mujtahid* is the highest class of scholars in Sharia law, as whoever reaches this class can deduce a legal rule for a new issue through his reasoning when all other sources of law are silent on the issue. As this is a severe matter, a *mujtahid* must meet many conditions, such as having a superior knowledge of the texts of the *Qur'an*, the Sunnah and the Arabic language.

⁴²⁰ Muhammad Madkor, *AlMadkhal Lil Fiqh Al Islami* (Dar Al-Kitab Al-Hadith 2005) 218.

‘And whoever contradicts and opposes the Messenger after the right path has been shown clearly to him and follows other than the believers’ way, we shall keep him in the path he has chosen and burn him in Hell.’⁴²¹

Allah (God) has promised to punish those who choose a path that contradicts what the Ummah (Muslim nation) of Muhammad has agreed on. This is because the Ummah of Muhammad is believed to be impervious to error. The Prophet indicated this when he said:

‘My nation will not unite on misguidance, so if you see them differing, follow the great majority.’⁴²²

This is still one of the most widely used references in the Sunnah, demonstrating the validity of consensus as a source of Sharia law.

The importance of *Ijma*’ arises in cases where a legal question is raised, and no clear answer is provided in the *Qur’an* or Sunnah. Here, the scholars of Sharia seek to establish legal rules and principles that answer such questions. These rules and principles must be derived from the *Qur’an* or the Sunnah. These rules by *Ijma*’ are therefore binding on judicial authorities.⁴²³ The reason for limiting the consensus to Muslim scholars is not only their ability to distinguish between wrong or right opinions but also because of their in-depth knowledge of the provisions of the *Qur’an* and Sunnah, which leads them to accept or reject the opinion based on these two sources.⁴²⁴

4.2.2.4 Qiyas (Analogical Deduction)

Qiyas is the fourth source of Sharia law. It is a means of reaching a legal ruling when there is no answer in the three primary sources.⁴²⁵ The *Qiyas* is ranked as the lowest of the legislative sources in the pyramid because it arises from individual reasoning.⁴²⁶

⁴²¹ *The Qur’an*, 3:115.

⁴²² Sunan Ibn Majah, Book 36, Hadith 25.

⁴²³ Imran Ahsan Khan Nyazee, *Outline of Islamic Jurisprudence* (Centre for Islamic Law & Legal Heritage 2005) 163 and 164.

⁴²⁴ Wael Hallaq, ‘Considerations on the Function and Character of Sunni Legal Theory’ (1984) 104(4) *Journal of the American Oriental Society* 680.

⁴²⁵ Mohammad Hashim Kamali, *Sharia Law: An Introduction* (Oneworld Publications 2008) 198 and 199.

⁴²⁶ Irshad Abdal-Haqq, ‘Islamic Law: An Overview of its Origin and Elements’ (1996) *Journal of Islamic Law* 32.

Qiyas means ‘analogical deduction’. The *Qiyas* refers to the analogy that jurists use to reach a judgement on a new legal issue. From a legal viewpoint, *Qiyas* is defined as ‘measuring or estimating one thing in terms of another’.⁴²⁷ This means applying a legal provision in respect of which an express legal provision has been provided in another similar case, in which no provision has been made due to the similarity of their circumstances and reasons.⁴²⁸ Kamali explains the definition, stating that ‘the original case is regulated by a given text, and the *Qiyas* seeks to extend the same textual ruling to the new case’.⁴²⁹ This provision is extended to the new issue because of the commonalities between the original and recent cases, which justify the *Qiyas*:

1. *Asl* – refers to the existence of a legal issue for which a legal provision originates from the *Qur’an* or *Sunnah*.
2. *Far’* – refers to the new issue in which legal provision is required, and none exist in the *Qur’an* or *Sunnah*.
3. *‘Illah* – refers to the common denominator between original and new cases.

‘Illah is an essential element in the *Qiyas* process. According to Moghul, this is because it is the legal justification of a rule or law.⁴³⁰ Therefore, proper determination of the *‘illah* must be made to determine the scope and applicability of the legal rule.⁴³¹ There must be a clear relationship between an original case and a new case. When this happens, the original case can be extended to the recent case by *Qiyas*. For instance, narcotics are considered a new case for which there is no legal provision in the *Qur’an* or *Sunnah*. However, a legal provision was made in a similar case in Sharia law – namely, alcohol. The prohibition of alcohol is due to the harm that may be caused to humans by drinking it. The adverse effects of using narcotics, such as poisoning resulting from their use, are considered the same as the reason (*‘illah*) for alcohol

⁴²⁷ Imran Ahsan Khan Nyazee, *Outline of Islamic Jurisprudence* (Centre for Islamic Law & Legal Heritage 2005) 168.

⁴²⁸ Ibid 146 and 147.

⁴²⁹ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society 2003) 197.

⁴³⁰ Umar Moghul, ‘Approximating Certainty in Ratiocination: How to Ascertain the *Illah* (Effective Cause) in the Islamic Legal System and How to Determine the Ratio Decidendi in the Anglo-American Common Law’ (1999) 4 *Journal of Islamic Law* 125 and 131.

⁴³¹ Ibid.

prohibition. Consequently, narcotic drugs are prohibited in Islamic law based on *Qiyas*.⁴³²

4.2.3 The Four Sunni Schools of Sharia Law

As mentioned previously, although the *Qur'an* and Sunnah are the primary sources of Islamic law, they may not provide all legal rules for new issues in Muslim society. Hence, jurisprudence emerged to determine laws, which led Sharia law scholars to put forward different principles. The various positions taken on these principles are the origin of the schools in Islamic law, where the legal philosophy of each school was established based upon these principles, following lengthy explanation and discussion.⁴³³

Islamic jurisprudence includes many different schools of jurisprudence that arose through the ages. Four of these schools attracted many followers until they became the most prominent schools of jurisprudence in Sharia law. On an individual basis, Muslims do not commit to following one of the schools of jurisprudence in all matters of jurisprudence. Some countries prefer to follow one school on the international front, while others have a mixed methodology. However, all four schools are respected by all Muslim communities.⁴³⁴

As noted earlier, the legal philosophy of the schools of jurisprudence can be summarised in the fact that each school follows a particular Muslim scholar in their understanding of the texts of the *Qur'an* and Sunnah. Certain precise standards were fulfilled by each scholar, proving their ability to reach the proper judgement. This scholar applies the unique original methods and principles of their school. Their followers who adopt and continue the scholar's ways in matters that occur after their death help explain and disseminate their teachings.

Their reliance on personal opinion distinguishes these law schools to establish a new jurisprudence technique known as *Madhab* (doctrine).⁴³⁵ This type of jurisprudence provides answers to issues that have not yet occurred but that may

⁴³² Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2005) 188-189.

⁴³³ Mohammed Ismael Ibraheam, *A'emat Al-Madaheb Al-Arba'ah* (Dar Al-Fiker Al-Arabi 1978) 29.

⁴³⁴ Christopher Weeramantry, *Islamic Jurisprudence an International Perspective* (Palgrave Macmillan 1988) 49.

⁴³⁵ See Al Khatib Al-Baghdadi, *Tarikh Bagdad* (Dar Alkitab Al'almiya 2004) 13/348.

occur in the future. This method has contributed substantially to the development of certain legal areas, such as commercial transactions' laws.⁴³⁶

Sunni schools of jurisprudence are very close in their standards and principles, and the difference between them is limited to detailed and specific matters. These four schools are the Hanafi school, the Maliki school, the Shafi'i school and the Hanbali school.

- **The Hanafi School (690–760)**

The name of this school of jurisprudence derives from its founder, Abu Hanifa Numan bin Thabit, who was born in Kufa, in Iraq, around 700 AD. The tenets of this school derived from the old school of Iraq. The Hanafi school derives its legal rules from the *Qur'an* first, followed by the Sunnah as the second source. In the absence of answers in these sources, the Hanafi school of thought aspires to other secondary sources such as consensus, *Qiyas*, diligence, custom and *Istihsan* (something preferable).⁴³⁷ In contemporary times, followers of the Hanafi school are numerous in certain Muslim countries, from Europe (Albania and Turkey) and the Middle East (Jordan, Lebanon, Syria), to Asia (China, India, Afghanistan, and Pakistan).⁴³⁸

- **The Maliki School (711–795)**

The second school of jurisprudence is the Maliki school. The name of this school is derived from its founder, Malik bin Anas, who was born in Medina in 710 AD. This school of jurisprudence originated in Medina, the city where the Prophet Muhammad lived. This was the principal influence of this school, whose greatest authorities built on the traditions of the Prophet Muhammad and his companions. The scholars of Maliki rely heavily on the Prophet's Hadiths and the deeds of his companions. Al-Maliki's school is similar to other schools in the basic principles of jurisprudence, except that the work of the people of Medina was given priority over the *Ahaad* hadeeth by Imam Malik.⁴³⁹ Today, followers of the Maliki school can be found in areas

⁴³⁶ See Mohamed Farouk Al-Nabhan, *Al Madkhil Ela Al Tashrie Al Islami* (Dar Alqalam 1974) 239.

⁴³⁷ Abdur Rahman Doi, *Shariah: The Islamic Law* (Ta Ha Publishers Ltd 1984) 88–92.

⁴³⁸ Christopher Weeramantry, *Islamic jurisprudence an international perspective* (Palgrave Macmillan 1988) 50.

⁴³⁹ Hans Visser, *Islamic Finance: Principles and Practice* (Edward Elgar Publishing 2009) 15.

such as the Middle East (Kuwait and Bahrain) and the majority of the Muslim population of North Africa and West and Central Africa.⁴⁴⁰

- **The Shafi'i School (767–820)**

The third school of jurisprudence was created by Muhammad Bin Idris Al Shafi'i, born in Gaza in 767 AD. Al-Shafei had a strong knowledge of the tenets of the al-Maliki and Hanafi schools, and he did not establish his school until after he was a pupil of Malik (the Maliki school founder), and then travelled to Iraq and studied under one of the most significant followers of the Hanafi school, namely Mohammad Al-Shaibani. This led Shafi'i to compare these two schools of thought and devise an independent school.⁴⁴¹ The Shafi'i school is similar to other schools in the basic principles of jurisprudence, except that it rejects some secondary sources of Sharia law, such as *Istislah* and *Istihsan*.⁴⁴² Some scholars believe the dispute is verbal and that Shafi'i accepts *Istislah* as a secondary source of Sharia law.⁴⁴³ In modern times, followers of the Shafi'i school can be found in the Middle East and North Africa (Palestine, the United Arab Emirates and Egypt) and some South-East Asian countries, such as Malaysia.⁴⁴⁴

- **The Hanbali School (781–855)**

The fourth school of jurisprudence was created by Abu Abdullah Ahmed bin Hanbal, born in Turkmenistan in 781 AD. Ahmed is known for collecting the most remarkable book of traditions attributed to the Prophet Mohammad, *Al-Musnad*, where he managed more than 40,000 traditions attributed to the Prophet.⁴⁴⁵ The Hanbali school is similar to other schools in the basic principles of jurisprudence. It accepts the sayings of a single companion. It is also the most flexible in most business issues and is also one of the minor widespread schools. Today, followers of Hanbali are mainly

⁴⁴⁰ Sobhi Mahmassani, *Falsafat Al Tashrie Fi Al Islami* (Dar al-Ilm LL millions 1980) 26.

⁴⁴¹ Manna Al Qattan, *Tarikh Al Tashri Al Islami* (Al Maaref 1996) 356–360.

⁴⁴² Hans Visser, *Islamic Finance: Principles and Practice* (Edward Elgar Publishing 2009) 16.

⁴⁴³ Mohamed Said Al-Amour, 'The Istihsan Min Mnthor Al Imam Al-Shafi'i' (The 4th International Scientific Conference Imam Al-Shafi'i, Gaza 2012) <https://www.alaqsa.edu.ps/site_resources/aqsa_magazine/files/860.pdf> accessed 29 June 2021.

⁴⁴⁴ Sobhi Mahmassani, *Falsafat Al Tashrie Fi Al Islami* (Dar al-Ilm LL millions 1980) 28–29.

⁴⁴⁵ Baker Abu Zayd, *Al madkhil Al mufasal Le Madhab Al Emam Ahmad Bin Hanbal* (Dar Al-Asimah 1996) 355.

found in the Middle East, in the KSA and Qatar, where it is the official *madhab*. It also has many followers in Iraq.⁴⁴⁶

Although the Saudi courts rely mainly on Sharia law rules according to the interpretation of the Hanbali school,⁴⁴⁷ the latter does not represent all the provisions of Sharia law. This chapter aims to analyse the protection provided by Sharia law without limiting its scope to one school as a particular school may not provide solutions to some issues or may provide insufficient solutions compared to the others school.

4.3 Sharia Law Concerning Online Commercial Contracts

As mentioned in **Chapter One**, this thesis aims to borrow the best-practice lessons and legal principles from English consumer protection legislation. However, the proposed legal framework would not only need to fit within the existing Saudi law but also within Sharia law. For this purpose, this subsection investigates the legality of online commerce, online contracts, and the requirements by which the concept of Shariah compliance can be achieved.

4.3.1 Online Shopping (Online Commerce)

The emergence of modern technology and online trade in the early 1990s led to a significant shift in business practices. As a modern phenomenon, its legitimacy must be examined in light of Sharia rules and principles. The importance of examining any new matter in Sharia law arises due to potential fears of Muslims concerning their actions and whether they are following the commands of the Lord.

As mentioned previously, in the paragraph on the sources of Sharia law, when new issues arise that are not previously mentioned in the *Qur'an* or Sunnah, scholars of Sharia law consider other evidence, rules and principles that have been codified by scholars across all aspects of a Muslim's life. On this basis, it is possible to conclude whether new issues are compatible with Islamic rules and thus gain legitimacy in Sharia law. Naturally, this extends to online shopping.

One of the Islamic principles stipulated by all schools of jurisprudence is that 'the norm regarding things is that of permissibility'.⁴⁴⁸ This rule means that every

⁴⁴⁶ Sobhi Mahmassani, *Falsafat Al Tashrie Fi Al Islami* (Dar al-Ilm LL millions 1980) 50.

⁴⁴⁷ See Chapter Three, section 3.2.1.1 of this thesis, Sharia Law.

⁴⁴⁸ Abu Al-Harith Al-Ghazi, *Al-Wajeez Fi Ithaah Quaeed Al Fiqh Al Kuliah* (Alresalah 1996) 191.

transaction is permitted in Islamic law unless it is prohibited in the *Qur'an* or Sunnah.⁴⁴⁹ There are many arguments for this presumption from the *Holy Qur'an*, Sunnah and *Ijam*. The *Holy Qur'an* says:

'O ye who believe! fulfil (all) obligations. Lawful unto you (for food) are all four-footed animals, with the exceptions named: But animals of the chase are forbidden while ye are in the sacred precincts or in pilgrim garb: for God doth command according to His will and plan.'⁴⁵⁰

The Holy Prophet said:

'Muslims will be held to their conditions, except the conditions that make the lawful unlawful, or the unlawful lawful.'⁴⁵¹

Thus, any treatment by any community member is valid and legitimate unless it is prohibited on a direct legal basis.

By talking about online shopping in terms of formality, Internet shopping is defined as a process of purchasing goods or services via the Internet, whether for private or professional purposes.⁴⁵² Based on the above rule, it is clear that using the Internet as a means of selling and buying is legitimate under Islamic law because there is nothing to prevent this type of sale. However, this legitimacy may not extend to certain types of transactions when the online contract breaches the contract requirements, such as selling or buying drugs or alcohol.⁴⁵³

Another principle of Sharia law is 'public interest'.⁴⁵⁴ This means that if no legal provision is provided in the *Qur'an* or Sunnah for its legality, nor does the text in the above sources state that it is prohibited,⁴⁵⁵ and the new issue contributes to

⁴⁴⁹ Ibid.

⁴⁵⁰ *The Qur'an*, 5:1.

⁴⁵¹ Sunan at-Tirmidhi, Book 15, Hadith 32.

⁴⁵² Mohd Shoki Md Ariff, Michele Sylvester, Norhayati Zakuan, Khalid Ismail and Kamarudin Mat Ali, 'Consumer Perceived Risk, Attitude and Online Shopping Behaviour; Empirical Evidence from Malaysia' (IOP Conference Series: Materials Science and Engineering, 58(1), IOP Publishing. 2014) 4 <<https://iopscience.iop.org/article/10.1088/1757-899X/58/1/012007/pdf>> accessed 16 June 2021.

⁴⁵³ According to Ibn Majah: 'The Messenger of Allah cursed ten with regard to wine: The one who squeezes (the grapes etc.), the one who asks for it to be squeezed, the one for whom it is squeezed, the one who carries it, the one to whom it is carried, the one who sells it, the one for whom it is brought, the one who pours it, the one for whom it is poured until he counted ten like this.' See Sunan Ibn Majah, Book 30, Hadith 11.

⁴⁵⁴ Abdullah Saleh, 'Al Masalih Al Mursalah Wa Tadbighatiha Al Muasirah' (2000) 16(1) University of Damascus Journal 356.

⁴⁵⁵ Ibid.

considerable legal interests and does not cause harm to others; then, this matter becomes legitimate under this legal principle. Indeed, Sharia law has several purposes; one of the most significant of these is protecting people's interests.⁴⁵⁶

From this point of view, the nature of online shopping creates many unique interests for both parties, whether traders or consumers, which may not be available at times in traditional sales. Based on the introduction to Islamic law mentioned above, we could regard online shopping as a valid means to conduct B2C or B2B contracts.⁴⁵⁷ Substantively, it can be said that online transactions are quite similar to those that are conducted traditionally. For a transaction to be considered legitimate in both physical and virtual terms, many requirements stipulated in Sharia law need to be met,⁴⁵⁸ to which we turn.

4.3.2 Online Commercial Contracts

'Contract' is derived from the word *Aqad*, which in Arabic means 'tie' or 'tensile'.⁴⁵⁹ However, in Sharia law, a contract is defined as 'the connection of an offer issued by one of the parties with the other party's acceptance in a way that originates a legal consequence on its subject matter'.⁴⁶⁰ According to this definition, a contract can only occur if the parties agree to take on a binding obligation.

In Sharia law, the general principles of a contract are derived from the *Qur'an* and the Sunnah. Allah mentions contracts in several places:

'Who believe! Fulfil (all) obligations';⁴⁶¹ 'Fulfil the covenant of Allah when ye have entered into it, and break not your oaths after ye have confirmed them';⁴⁶² 'O you who believe!

⁴⁵⁶ See Tarek Zaher and M Kabir Hassan, 'A Comparative Literature Survey of Islamic Finance and Banking' (2001) 10(4) *Financial Markets Institutions & Instruments* 155.

⁴⁵⁷ It is noteworthy that, since the emergence of the Internet as a medium for trade, Muslim jurists were keen to hold conferences to discuss the legitimacy of online commerce. One of the most prominent of these meeting platforms is Saleh Kamel's Centre for Islamic Economy at Al Azhar University. A seminar titled 'The extension of electronic commerce and the attitude of Islamic legislature' was held on 23 March, 2000, in which Sharia law scholars reached a unified legal decision affirming the legality of online trade without contradicting the principles and rules of Sharia law. See Abdul Jabbar Jabouri, *Hoqooq Al Ensan Bain Al Nossos Wa Al Nisian* (Al-Farabi 2015) 184; Muhammad Alsanad, *Al-Ahkam Al-Faqhiya Lei Ta'amolat El-Electroniyya* (Dar al-Warraq 2004) 167.

⁴⁵⁸ Marjan Muhammad, Muhd Rosydi Muhammad, and Khalil Mohammed Khalil, 'Towards Shari'ah Compliant E-Commerce Transactions: A Review of Amazon.com' (2013 15(9)) *Middle East Journal of Scientific Research* 1229.

⁴⁵⁹ Ben Ahmed Fares *Mu'jam Maqayis Al LUghah* (Dar Al-Fikr 1979) 4/86.

⁴⁶⁰ Abdur Rahman I. Doi, *Shariah: the Islamic Law* (Ta-Ha Publishers 1984) 355.

⁴⁶¹ *The Qur'an*, 5:1.

⁴⁶² *The Qur'an*, 16:91.

Squander not your wealth among yourselves in worthless dealings, but let there be trade by mutual consent.⁴⁶³

These and other verses confirm the necessity of adhering to the various obligations that a person undertakes to commit to, whether commercial, social or political.

Therefore, the term 'contract' clearly refers to obligations and rights arising therefrom.⁴⁶⁴ In addition, it is possible to deduce the principle of sanctity of all types of contracts, whether commercial or otherwise. According to Sharia law, there is also no difference in the rights and obligations arising from a contract between Muslims and foreigners, if they are parties to it.⁴⁶⁵

The contract of sale in Sharia law is called *Al Bay*, which literally means 'do something in exchange for something else'.⁴⁶⁶ In legal terms, jurisprudence presents various definitions of a sale contract, such as the 'exchange of something useful and desirable for something similar to benefit from a permanent possession of a good or service by mutual consent'.⁴⁶⁷ It is seen as a model for all other types of contracts by most Sharia law scholars.⁴⁶⁸ A contract of sale is the most popular contract among people; therefore, it has received significant attention from scholars and led to extensive development of its categories.

This authority is found in the *Qur'anic* verse, which states:

'God has made sale lawful and interest unlawful.'⁴⁶⁹

Thus, a contract of sale becomes the archetype for valid contracts under Sharia law, while the payment and collection of interest are models for invalid contracts.⁴⁷⁰

4.3.3 The Requirements and Conditions of Valid Online Transactions

For a contract to be considered valid under Sharia law, certain conditions must be fulfilled. Most scholars of Sharia law agree that the validity of a contract should be

⁴⁶³ *The Qur'an*, 4:29.

⁴⁶⁴ Mohammed Noor, 'Principles of Islamic Contract Law' (1988) 6(1) *Journal of Law and Religion* 115.

⁴⁶⁵ Muhammad Hamidullah, *The Muslim Conduct of State* (Islamic Book Trust 2012) 152.

⁴⁶⁶ Muhammad Ramli, *Nehaiat Al muhtaj Fi Sharh Al Minhaj* (Dar al-Fikr 1984) 3/372.

⁴⁶⁷ Muhammad Ibn al-Humam, *Fath al-Qadir* (Dar Al-Kutub Al Elmia 1995) 5/73.

⁴⁶⁸ Such as a marriage contract, a rent contract and other types of contracts out of the scope of this research.

⁴⁶⁹ *The Qur'an*, 2:275.

⁴⁷⁰ Hussein Hassan, 'Contracts in Islamic Law: The Principles of Commutative Justice and Liberality' (2002) 13(3) *Journal of Islamic Studies* 258.

evaluated based on an examination of three elements: the formation (offer/acceptance), subject matter, and parties. Hanafi school jurists consider a contract to be valid if one element is met – namely, the rules on formation are observed. However, as the other requirements fall under this element under their interpretation, technically speaking, there is no fundamental difference between the Hanafi school and the remaining Sharia law schools in terms of contract requirements.⁴⁷¹

Online contracts must abide by the same rules as offline contracts, including conforming to the requirements of Sharia law. These requirements are designed to protect both parties' interests and verify that no harm will come from concluding the contract. Fulfilling these requirements shall lead to justice, which is one of the main objectives of Sharia law.

4.3.3.1 Offer and Acceptance

Sharia law prohibits taking any property from others without legal justification. To achieve the consent of the owner of such property, mutual consent is required between the contracting parties, and a contract is considered null and void without it. This principle was derived from the *Qur'an*, which states:

'O you who believe! Eat not up your property among yourselves unjustly except it be a trade among you, by mutual consent.'⁴⁷²

The Prophet has also been reported to say:

'Transactions may only be done by mutual consent.'⁴⁷³

Consequently, factors that may contribute to a failure to meet this requirement may, in turn, render a contract void. For instance, coercion on the part of one of the contracting parties renders a contract void because the condition of free will is not fulfilled. Consent is something personal and internal. Therefore, an offer and an acceptance between the contracting parties are regarded as external evidence of mutual consent.

⁴⁷¹ Wahbah Al-Zuhayli, *Al Fiqh Al Islami Wa Adillatuhu* (Dar Al Fikr Damascus 1984) 1/94.

⁴⁷² *The Qur'an*, 4:29.

⁴⁷³ Sunan Ibn Majah, Book 12, Hadith 49.

An offer refers to the initial proposal made by one of the contract parties (seller or buyer). In contrast, an acceptance refers to the consent of the other party to the offer in such a way as to affect the subject of the contract.⁴⁷⁴ Thus, the combination of offer and acceptance creates a contract.⁴⁷⁵ The Hanafi legal school adopts this definition. In contrast, the other legal schools state that the seller can only make an offer and be accepted by the buyer, where the latter was made before or after the offer.⁴⁷⁶

Under Sharia law, most jurists agree that an offer and an acceptance can be expressed in any form and are not required to be verbal.⁴⁷⁷ Thus, writing – or even body language – are lawful forms for the contracting parties to express an offer and an acceptance. Therefore, the expression of an offer and an acceptance through electronic media, as is the case in online transactions, is lawful under Islamic law. However, all schools of Sharia law refuse to recognise an offer and an acceptance when these are expressed in ambiguous phrases such as in the form of a question – e.g. ‘Are you purchasing from me?’ or ‘Are you selling a product to me?’ – due to the ambiguity in the phrase.⁴⁷⁸

Consequently, three fundamental conditions of an offer and an acceptance should be mentioned. First, the clarity of an offer and an acceptance is one of the most significant elements of a valid contract. The offer and acceptance must be expressed clearly, to reflect each party’s wishes and intentions.⁴⁷⁹ Second, it is required that the subject of the offer and the acceptance reflect one another (conformity requirement), and there must be a clear indication of the willingness of the parties to conclude the contract. Therefore, if the parties do not agree on the subject of the offer (for example, if the offer is made for one thing and the acceptance is made for something else or for

⁴⁷⁴ Adnan Al-Zahrani, *Ahkam Al Tijarah Al Electroniah Fi Al Fiqh Al Islami* (Dar Al-Qalam 2013) 236.

⁴⁷⁵ See Salvatore Mancuso, ‘Consumer Protection in E-commerce Transactions: a First Comparison between European Law and Islamic Law’ (2007) 2(1) *Journal of International Commercial Law and Technology* 5.

⁴⁷⁶ See Muhammad Ibn al-Humam, *Fath al-Qadir* (Dar Al-Kutub Al Elmia 1995) 3/344; Abdullah Ibn Qudamah, *Al Mughni* (Dar al-Alam al-Kitab 1997) 3/561; Yahya ibn Sharaf Al-Nawawi, *Al-Majmoua Sharh Al Muhathab* (Al-Ershad 2008) 7/165.

⁴⁷⁷ Abdul Amir Zahed, ‘Nathariat Al aqd Fi Al Fiqh Al Islami’ (2011) 4(7) *Al Muntada Al Watani Lee Abhath Al Fikr Wa Al Thaqafah* 20.

⁴⁷⁸ See Debian Aldebian, *Al Muamalat Almaliah Al Muasirrah* (Maktabat Al Malek Fahad Al Wataniah 2011) 1/468.

⁴⁷⁹ Abdullah AlNasser, ‘Al Agd Al Electroni’ (2003) *Jameat Al Emarat* 20.

only a part of that thing), then the contract will not take place.⁴⁸⁰ Third, the offer and acceptance need to be connected. This means that the acceptance and offer need to take place in one single session. This session cannot contain any 'unnatural' gap.

The requirements presented below are intended to bind the acceptance with the offer, whether the contracting parties are present in the same place or not. If the contract is concluded without the simultaneous presence of both parties in one location, the contract session takes place, where and when the offer is accepted.⁴⁸¹ These requirements are:⁴⁸²

1. The first party must uphold the offer until the second party accepts it. In other words, the party who issues the offer must not retract their offer before it is accepted.
2. There must not be any indication from the second party showing a lack of desire to continue the conclusion of the contract.

It is required, as just mentioned, that the acceptance is connected to the offer and that the contracting parties are physically present at one meeting session to negotiate the terms of the contract so that the offer and acceptance take place together in one place. If the contracting parties are present at only one meeting session, it is required that the acceptance occurs at the same meeting session in which the offer has been made.

The importance of the concept of the place of meeting and the time required to conclude the contract is emphasised in the Sunnah; the Prophet indicated this meaning when he said:

'When two persons enter into a transaction, each of them has the right to annul it so long as they are not separated and are together (at the place of the transaction); or if one gives the other the right (to annul the transaction). But if one gives the other the option, the transaction is made on this condition (i.e. one has the right to annul the transaction), and it becomes binding. And if they are separated after they have made the bargain and none of them annulled it, even then the transaction is binding.'⁴⁸³

⁴⁸⁰ Mohamed Ben Arfa Eidesoki, *Hashiyat Al Dosogy Ala Al Sharh Al Adim* (Dar Al-Fikr 2006) 4/3.

⁴⁸¹ Adnan Turkmen, *Thwabit Al Aqd Fi Al Fiqh Al Islami* (Maktabat Dar Al Tibaah Al Hadithah 1980) 48.

⁴⁸² Adnan Al-Zahrani, *Ahkam Al Tijarah Al Electroniah Fi Al Fiqh Al Islami* (Dar Al-Qalam 2013) 244.

⁴⁸³ Sahih Muslim, Book 21, Hadith 54.

Consequently, Sharia law requires that an offer's validity be extended during a specific period within which it must be accepted. The requirement of contracts having to be concluded during a meeting aims to alleviate fears of parties' anonymity, as they see each other face to face. Still, it also aims to allow contracting parties to cancel the contract before they leave the meeting place by *Khiyar Majlis*.⁴⁸⁴

However, if the buyer is not present at the meeting place, they can accept the offer from their current location (where they hear about the offer) to show that they know about it. In addition, the connection of the offer and the acceptance between the two parties is achieved when they hear the offer and the acceptance from one another, understand it, and do not show any signs of unwillingness to conclude the contract.

The concept of 'presence in the place of meeting' can be achieved in traditional contracts, where the seller and buyer can negotiate the terms of the contract face to face. Thus, the connection between offer and acceptance is fulfilled clearly and consistently. However, in the context of a distance contract, the seller and the buyer cannot negotiate face to face. There are two cases of offer and acceptance: (a) the contract parties are present 'virtually' in the same space at the conclusion of the contract (although they are located at different locations). In this case, the offer and acceptance are expressed through various electronic media, such as text and chat.⁴⁸⁵ Here, the contract parties shall be deemed present as in a traditional contract;⁴⁸⁶ (b) the seller and buyer are unable to meet virtually. In this case, the offer and acceptance occur by clicking through a computer interface, such as when online contracts are made through websites.

The International Islamic Fiqh Academy (IIFA)⁴⁸⁷ discussed the rules governing the process of contracting, as applied within non-traditional ways of modern communication, at its sixth session. A statement issued by Resolution No. (52/3/6)

⁴⁸⁴ Mohd Zulkifli Muhammad, Tamrin Amboala, Mohd Fahmi Ghazali and Zakiah Hassan, 'Comprehensive Approach for Sharia' Compliance E-Commerce Transaction' (2011) 16(1) Journal of Internet Banking and Commerce 6. See also Chapter Four, section 4.4.2.4.4 of this thesis, *Khiyar Majlis*.

⁴⁸⁵ Abdulrahman Alzaagy, 'The Islamic Concept of Meeting Place and Its Application in E-Commerce' (2007) 1(1) Masaryk University Journal of Law and Technology 32-40.

⁴⁸⁶ (IIFA) Resolution No 52 (3/6) (1) (20 March 1990) <<https://www.iifa-aifi.org/en/7583.html>> accessed 17 June 2021.

⁴⁸⁷ The International Islamic Fiqh Academy (IIFA) is one of the most prominent Islamic organisations focusing on advanced international Islamic studies. It was established in June 1983, based on the recommendation of the Third Islamic Summit Conference of The Organisation of Islamic Cooperation.

provided for the acceptance of conducting contracts via non-traditional forms of contemporary communication. Pursuant to IIFA's rules:

1. Suppose the contract is made between absent parties, where they are not together in one place, or they cannot see each other or cannot hear one another's words, and where there is communication between them in writing or via message or messenger service, including telex, telegraph, fax and computers. In that case, the contract is made at the time the buyer's offer is accepted.
2. If the contract is concluded between two parties meeting simultaneously, but at different locations (via wireless connections such as computers, phones, and so on), it will be considered the same as a contract between parties present in the same place at the same time.
3. If the seller restricts the offer to a specific duration, such as 7 hours, then they must honour the offer during that period and cannot retract it.

The question that could be asked here is: When does a 'meeting session' begin in an online environment? To answer this question, it is necessary to discuss what would be considered an offer in an online transaction.

The legal schools of Sharia law differ on this point: the first perspective argues that the display of goods that have a price and the advertisement of goods that include a price, etc. are considered offers under Islamic contract law.⁴⁸⁸ This is because these practices are considered a sign of a trader's intention to establish a contractual relationship with potential consumers. In addition, when a trader displays or advertises goods in this manner, they make a certain promise and must fulfil their promise according to the general principles of Sharia law. Therefore, if a consumer accepts the trader's offer, the contract is binding on both parties to the contract. Based on this opinion, a 'meeting session' begins when the trader displays the good or service through their website.

From the other perspective, displaying or advertising goods with the price is merely an invitation to treat in Islamic contract law.⁴⁸⁹ One factor that justifies this perspective is that holding a trader to a price or contract may cause hardship in some

⁴⁸⁸ Mohd Billah, *Applied Islamic Law of Trade and Finance, a Selection of Contemporary Practical Issues* (Sweet & Maxwell Asia 2007) 16.

⁴⁸⁹ Md Abdul Jalil and Muhammad Khalilur Rahman, 'Islamic Law of Contract is Getting Momentum' (2010) 1(2) *International Journal of Business and Social Science* 181.

cases, such as when the goods are of limited supply. In this case, traders may experience injustice, as they may need to pay a significant number of damages due to lack of stock, for example. This approach is supported by the fact Sharia law does not encourage anything that would harm one of the contracting parties.

This thesis argues that it is not clear whether all online advertisements have the characteristics of an offer. Usually, not all the necessary contract terms are mentioned in advertisements. This would create uncertainty in terms of the contract, questioning the offer's validity if made through an online advertisement. Moreover, the advertiser usually requires potential purchasers to negotiate by requesting an order to purchase. This means that they have no intention of making an offer. Therefore, treating the display or advertisement of goods with a price as offers may contradict the general rules of Sharia law.

Al-Zahrani believes that a meeting session does not start until the consumer shows their interest in trading, by selecting the good or service and then clicking on it to follow up the purchase process. Thus, the online message presented to consumers to confirm their desire to complete the purchase constitutes an offer by the trader. Meanwhile, clicking on this message to complete the purchase and the payment process is considered an acceptance by the consumer, at which point the contract is concluded.⁴⁹⁰

In summary, an offer and an acceptance in distance contracting may be expressed in any form, be it by action (by clicking on the confirmation button on the site), orally (via chat or phone), or in writing (via email or Messenger), and it will be valid under Sharia law and legally binding if the requirements are met – namely, that they are connected, transparent, and conform to one another.

4.3.3.2 Contracting Parties

An essential requirement to be fulfilled by both parties is the legal capacity (eligibility) and power (mandate) to implement a contract.⁴⁹¹ Legal capacity is defined as the human capacity to claim rights and assume obligations; authority as the power of

⁴⁹⁰ Adnan Al-Zahrani, *Ahkam Al Tijarah Al Electroniah Fi Al Figh Al Islami* (Dar Al-Qalam 2013) 237-240.

⁴⁹¹ *The Qur'an*, 4:5-6.

contract execution.⁴⁹² In Sharia law, legal capacity is divided into two categories: obtaining rights and assuming obligations in a manner recognised by law.

Every person has legal capacity, regardless of gender, race, physical ability or disability. Certain situations that are out of human control may prevent people from obtaining their legal capacities, such as insanity or coercion. In other words, a person acquires legal capacity from the age of maturity. At this age, a person is expected to be able to independently engage in the negotiation of contracts, make the correct decision about whether to enter into a transaction or not, and comply with and fulfil the legal responsibilities required under the contract with regard to Sharia law.

Accordingly, Sharia law annuls and voids contracts concluded by children because they do not have legal capacity; the only valid contracts are those completed with a guardian's permission. In this regard, a question may arise as to whether the legal capacity of the contracting parties can be determined for a transaction to be valid under Islamic law. This issue can be solved where a third party knows the legal capacity of the contractors. For example, usually, those under the age of majority are not legally allowed to carry a credit card. It could be said that the legal capacity of an individual is determined simply by their ability to possess debit or credit cards, which serve as a mode of payment for online transactions.⁴⁹³ This is evidence acknowledging that an individual has reached the legal age and has the authority to execute transactions.⁴⁹⁴ Meanwhile, if the other party is a trader or a company, the company's commercial register or a certificate of approval issued by the relevant authority is evidence of its legal capacity.

However, due to the nature of the Internet, this method alone cannot be sufficient to verify the eligibility of the contracting parties. As explained in **Chapter Two**, the contracting parties may conclude online contracts without communicating face to face. Ineligible people may exploit this by entering into contracts without disclosing their true identity – for instance, if a child takes a parent's credit card without their permission to make an online purchase. Although this transaction is not valid

⁴⁹² Mostafa Abu Zahrah, *Almilkhiyyah Wa Nazariyyah Al-'aqd fi Alshari'ah Allslamiyyah* (Dar al-Fikr al-'Arabi 1996) 261.

⁴⁹³ Credit card issuers usually require an individual to be at least 18 years old to get a credit card.

⁴⁹⁴ Mohammed Bashir Ribadu and Wan Nurhayati Wan Ab. Rahman, 'A Generic Framework for E-Commerce Requirements to Comply with Sharia in Business-to-Consumer Perspective' (Proceedings of SAI Computing Conference, London, 2016) 753 <<https://ieeexplore.ieee.org/document/7556064>> accessed 17 June 2021.

under Sharia law, there is, unfortunately, no requirement under such law to verify who is concluding an online transaction – e.g. by checking ID.

4.3.3.3 The Subject Matter of a Contract

For a contract to be valid, a set of requirements concerning the object and price must be met, including it being lawful, deliverable, extant at the time of conclusion of the contract, and of a stated value. Therefore, failure to fulfil one of these requirements renders the contract void. For example, it is not permitted to sell wild birds in the sky or fish at sea because the trader cannot deliver them to the consumer.

The importance of this condition is to ensure that the consumer obtains the goods without fraud or uncertainty, which may arise because the trader does not possess the goods at the time of the contract. Consequently, it is not sufficient to provide the consumer with detailed information about the product or service; it must be present at the time of the contract and deliverable at the agreed time. However, Sharia stipulates the validity of specific contracts even if this requirement is not met, such as *Bai' Al-Salam*⁴⁹⁵ and *Bai' Al-Istisna*.⁴⁹⁶

Prohibited elements in online shopping can be briefly examined in three parts: *Riba*, *Gharar* and *Maysir*.

4.3.3.3.1 *Riba* (Interest)

Riba literally means an increase⁴⁹⁷ and is defined by Islamic jurists as usury or the practice of lending money at stipulated interest rates.⁴⁹⁸ Sharia law prohibits *riba* or

⁴⁹⁵ This type of sale means that the seller delivers the goods later but receives payment from the buyer at the time of contracting. The seller does not own the goods at the time of sale but promises to deliver them on a specified date. This type of sale requires two conditions to be valid in Sharia law. (A) The information needed by the buyer regarding the goods sold at the time of the contract shall be determined, such as the specifications of the goods to be sold, accurately in terms of quality and quantity, and the exact delivery date of the goods. (B) The buyer shall pay the total price at the time of conducting.

⁴⁹⁶ This type of contract is conducted between a professional and a buyer when the consumer asks the seller to produce a product based on a description provided by the consumer. Unlike Salam, payment may not be due at the time of the contract but can be received at any time during the contract, as long as it is determined and agreed upon at the time of the contract. The contracting parties may revoke this contract if the seller does not proceed with the production of the good. However, the buyer is not entitled to cancel the contract if the material used to produce the item according to the buyer's request was purchased. Therefore the buyer is bound to accept it.

⁴⁹⁷ Mohammed Ibn Manzoor, *Lisan al-Arab* (Dar Sader 1990) 5/127.

⁴⁹⁸ See Ali Al-Adawi, *Hashayt Al-Adawi of Ibn Abizaid Al-Qairawani* (Al Maktabah Al Thaqafiah 1900) 2/132; Mohamed Khatib Sherbini, *Mughni Al Muhtaj* (Mustafa Al-Babi Al-Halabi 1958) 2/21.

usury in all its forms. *Riba* is divided into two parts: *Riba Nasi'ah* and *Riba Al-Fadl*. These are described in more detail, as follows:

Riba Nasi'ah: A type of *riba* that exists in or results from a sale transaction that unduly benefits one of the parties in the form of a surplus or extra amount due to a delay. For example, John wants £100 from Peter and Peter agrees to give it to him on condition that John will pay £120 to pay him back later.

Riba Al-Fadl: This comes into existence in a sales transaction that involves the exchange of one *ribawi* good (e.g. gold, silver, dates, etc.) for the same type of good but a different amount or weight. The Prophet referred to these conditions as follows:

'Do not sell gold for gold, or silver for silver, or wheat for wheat, or barley for barley, or dates for dates, or salt for salt except equal for equal, kind for kind, payment being made on the spot; but sell gold for silver, silver for gold, wheat for barley, barley for wheat, dates for salt and salt for dates, payment being made on the spot, as you wish.'⁴⁹⁹

For example, if John gets 700g of salt from Peter but he has to pay 900g of salt later, then this will be considered *Riba Nasi'ah*, but if John has 700g and wants 900g for his 700g salt (in one session), then this will be *Riba Al-Fadl*.

An exchange of homogeneous goods is only conceivable if there is a difference between them in characteristic or quality;⁵⁰⁰ for example, superior quality silver and low-quality silver. Fear that this transaction will lead to fraud is one of the justifications for prohibiting inequality in selling these items under Islamic contract law. For example, a shrewd seller might claim that one kilogram of one type of rice is equivalent to 5 kilograms of the other due to the excellence of its quality, or that this unique piece of silver is twice as valuable as its weight in silver, which may lead to fraud and harm to the consumer.

To avoid harming one of the contracting parties, Sharia introduced two ways that allow any of these six goods to be exchanged with itself, as follows:

⁴⁹⁹ Mishkat al-Masabih, Book 11, Hadith 58. Bai` al-sarf is a currency exchange trading contract of the same (gold for gold) or a different type (GBP for SAR) that takes place. For this sale to be valid, the exchange must be received by both contracting parties before leaving the contract board (a place where the buyer and seller meet to conduct and discuss the contract from offer to acceptance). Parity is also required if the money is the same, such as selling gold for gold or silver for silver.

⁵⁰⁰ See Muḥammad Ibn al-Qayyim, *I'lam al-Muwaqqi'in An Rab Al Alameen* (Dar Al Kotob Al Elmiah 1991) 2/104.

1. Goods must be exchanged in equal quantities (weight/volume) while ignoring any difference of value/quality between them.
2. A party can sell their good for cash at the market value and purchase the other party's good in exchange for cash proceeds at the market value. In this case, the second party can sell the good at any value they want even if it is more expensive/cheaper than its market value.

Using bank cards, including credit cards, is the preferred method for purchasing goods and services via the Internet in developing and developed countries.⁵⁰¹ A loan is created between the credit card holder and the issuer. In Islam, it is stressed that the issuer is not entitled to make more money than the amount used by the cardholder to purchase goods or services. This is to avoid interest (i.e. *Riba Nasi'ah*).

Instead, online traders may accept many payment methods, including debit cards and, in some cases, other payment systems such as PayPal or Google Wallet. However, various payment cards, including credit cards, are legitimate in Islamic law if the usury element is eliminated.⁵⁰² Sharia law jurists have been keen to keep abreast of the times and devised the idea of a 'Shariah-compliant credit card'. This card is a legitimate alternative under Sharia law for credit card payments for online transactions. For the credit card to be SC, no interest can be charged on outstanding balances. Nonetheless, the card issuer may charge a fixed fee known as an administrative expense or service charge, such as an annual fee and a fixed cash withdrawal fee on the card, as long as this is not increased due to a higher outstanding balance.⁵⁰³

⁵⁰¹ MohdAvesh Zubair Khan, Jabir Daud Pathan, and Ali Haider Ekbal Ahmed, 'Credit Card Fraud Detection System Using Hidden Markov Model and K-Clustering' (2014) 3(2) International Journal of Advanced Research in Computer and Communication Engineering 5458.

⁵⁰² The International Islamic Fiqh Academy (IIFA) issued a resolution pertaining to the use of credit cards; (i) it is not permitted to issue or deal in uncapped credit cards if there is a condition that fixes usurious increase, even if a user intends to settle the balance within a given free period; (ii) it is permitted to issue uncapped credit cards as long as there is no condition that fixes usurious increases to be added to debt; (iii) a credit card issuer may collect fees from the customer upon issue or renewal, as a charge for services rendered; and (iv) it is permissible to use credit cards for buying gold, silver or currencies. See (IIFA) Resolution No 52 (3/6) (1) (20 March 1990) <<https://www.iifa-aifi.org/en/7583.html>> accessed 17 June 2021.

⁵⁰³ Marjan Muhammad and Muhd Rosydi Muhammad, 'Building Trust in E-Commerce: a Proposed Shari'ah Compliant Model' (2013) 18(3) Journal of Internet Banking and Commerce 9.

Therefore, many Sharia law researchers have recommended the issuance and use of a credit card as a payment instrument in online transactions, as long as it does not conflict with the principles and requirements of Sharia law.⁵⁰⁴

Furthermore, in Sharia law, the validity of the sale and purchase of gold, silver and cash currency (*ribawi* goods) requires that two conditions be met – namely, that they are of equal value (i.e. matching the weight in the currency), and the handover (i.e. hand-to-hand delivery) takes place during the contract meeting session. These two conditions must be fulfilled when the goods being traded are the same, such as in the sale of gold for gold. According to the Prophet, in different classes of trade goods, such as the sale of gold for silver, only hand-to-hand delivery in the contract meeting session is required.⁵⁰⁵

Lokmanulhakim et al. pointed out that it is impossible to trade goods of usurious items on the Internet because the condition of the transaction's validity cannot be achieved (the hand-to-hand condition) due to the future delivery aspect of online transactions. Thus, Sharia law will be violated by *Riba al-Nasaiah*.⁵⁰⁶

On the other hand, Al-Zahrani believes that if a trader delivers goods (gold, for example) to a shipping company after receiving payment directly from the consumer and before departing the meeting session, the transaction is valid under Sharia law because the shipping company can be considered an agent acting on behalf of the consumer in receipt; therefore, the handover (i.e. hand-to-hand delivery) among contracting parties can take place in one meeting session.

However, it is required that the consumer expressly authorises the shipping company to receive the goods from the dealer on their behalf.⁵⁰⁷ This contrasts with the future delivery of all non-*ribawi* goods, which exists due to the nature of the transaction itself – namely, the physical absence of parties during the transaction, hence enlisting an intermediary (i.e. mail carrier) to deliver goods to the buyer. Consequently, and contrarily to Lokmanulhakim et al., this thesis agrees that the delay

⁵⁰⁴ Md Monirul Islam, 'E-commerce and E-Payment: Islamic Perspective' (2004) International Islamic University Chittagong Studies 163-170.

⁵⁰⁵ Mishkat al-Masabih, Book 11, Hadith 58.

⁵⁰⁶ Lukmanulhakim Husayn, Mohamed Fairouz, Mohd Bahroddin and Apnizan Adullah, 'Analisis Syariah terhadap produk-produk pelaburan emas di Malaysia' (International Shari'ah Research Academy for Islamic Finance, Malaysia 2012) 20 <<https://www.pelaburanemas.org/download/analisis-syariah-terhadap-produk-produk-pelaburan-emas-di-malaysia.pdf>> accessed 17 June 2021.

⁵⁰⁷ Adnan Al-Zahrani, *Ahkam Al Tijarah Al Electroniah Fi Al Figh Al Islami* (Dar Al-Qalam 2013) 305.

between payment and delivery of the goods does not invalidate e-commerce transactions.

In this regard, it is worth discussing the solutions provided by Sharia law to address one of the most significant delivery issues considered a gap in the current consumer protection legislation in the KSA – namely, when a trader delivers a different quantity of goods than that which the consumer contracted for. In this case, the view of many Sharia law scholars may be applicable, as detailed here:⁵⁰⁸

In the first instance, if the good is a retail item that can be separated, such as a mobile phone, the extra quantity must be returned to the trader. At the same time, the trader is obliged to compensate the buyers in the event of delivering a lesser quantity.

The second instance concerns where the goods are indivisible, such that they cannot be separated from each other, or maybe their separation may affect their usability, such as a piece of cloth. The legal schools hold several different views regarding this case.

The Hanafi school argues that the contract is valid. In this case, the buyer does not have to pay more for the additional quantity. The trader is not obligated to compensate the buyer in the event of delivering a lesser quantity. However, the buyer has the right to either cancel or maintain the contract only where a lesser quantity is delivered.

However, the Maliki school argues that the contract binds both contracting parties in the event of a slight shortage, and the trader must compensate the buyer for that shortage. Nevertheless, the buyer has the right to either cancel or maintain the contract if the shortage is significant.

Thirdly, the Shafi'i school holds that if the trader delivers a different quantity of goods than that which the consumer contracted for in any way, the contract is considered invalid as it is not what the contracting parties contracted for.

The Hanbali school has two views: the first opinion agrees with the opinion of the Shafi'i school. In contrast, the second view is that the contract is valid. It argues

⁵⁰⁸ See Wizarat Al Awqaf Al Kuwaitia, *Al Maosoaah Al Fiqhiyyah* (Tibaah That Al Salasel 1987) 9/47; Abdullah Ibn Qudamah, *Al Mughni* (Dar al-Alam al-Kitab 1997) 4/100.

that there is no bad-faith intention to harm one of the contracting parties.⁵⁰⁹ Consequently, the contract is not considered void according to the general rules of Sharia law. In delivering a larger quantity, the consumer must send the additional quantity back to the trader. If the trader requires a further charge for either keeping the goods with the additional quantity or sending all of the goods back, the consumer then has the right to either cancel or maintain the contract. However, if the trader does not require any charges, there is no option for the consumer to terminate the agreement as the latter received more than they contracted for. If a lesser quantity is provided, the trader must deliver what was missing from the shipment. Otherwise, the consumer has the right to either cancel or maintain the contract.

4.3.3.3.2 *Gharar* (Uncertainty)

Gharar refers to fraud and is always associated with uncertainty and risk. Sharia law strictly prohibits any transaction or contract involving any form of uncertainty. To ensure that a transaction is free from any *gharar*, the contracting parties must be informed of the details of the contract, such as the existence of the object being traded, the method of delivery, the type and characteristics of the good or service to be sold, and transparent terms and conditions listed in the contract.⁵¹⁰

Muhd et al. used Amazon as a case study to examine the permissibility of online transactions from the perspective of Sharia law, particularly in the context of Islamic contract law. The study found that Amazon's online transactions generally satisfy Sharia law requirements for a valid contract, except in two scenarios: (i) transactions involving *Haram* (forbidden) items such as wine, tobacco, and pork; (ii) payment modes involving *riba*, such as conventional credit cards. Regarding *Gharar*, the study concluded that uncertainty in online transactions could be reduced by providing a

⁵⁰⁹ This principle was derived from the actions of the Prophet, as he said: 'Do not leave sheep un milked for a long time, when they are on sale, and whoever buys such an animal has the option of returning it, after milking it, along with a Sa of dates or keeping it. It has been kept un milked for a long period by the seller (to deceive others).' (Sahih al-Bukhari, Book 34, Hadith 102). For clarity, failure to milk an animal for two days or more often leads to their udders becoming engorged with milk. This may deceive the consumer as they might think that the animal habitually produces this much milk each day. Thus, they may pay an amount more than its real value when purchasing it. The prohibition of this practice is due to a trader's bad faith in misleading the consumer. Conversely, there is an implicit obligation of good faith in purchasing and trading.

⁵¹⁰ Ainnur Hafizah Anuar Mokhtar, Mohd Zulkifli Muhammad, Tamrin Amboala, and Mohd Sarwar E-Alam, 'Bai As-Salam and E-commerce: a Comparative Analysis from Sharia Perspective' (Proceedings of the 2nd Applied International Business Conference, Malaysia, 2013) 527 <<http://umkeprints.umk.edu.my/2474/1/Conference%202.pdf>> accessed 17 June 2021.

sufficient description of the goods and services to the consumer;⁵¹¹ the consumer's ability to read the reviews of other consumers; a reliable delivery system; and the absence of anonymity.⁵¹² Therefore, the fulfilment of these factors in online contracts may contribute to reducing uncertainty in B2C transactions.⁵¹³

4.3.3.3.3 *Maysir* (Gambling)

Sharia law strictly prohibits gambling in all its forms, including acquiring wealth by chance.⁵¹⁴ The prohibition of gambling is not without cause but rather a result of the harm that may be caused by it, such as the spread of hostility between those who engage in it because of profit being made by one at the expense of the other – the unlawful taking of another's money, which is forbidden in the texts of the *Qur'an*.⁵¹⁵

4.4 Consumer Protection and Market Control

This section examines the Sharia model of consumer protection. It investigates why Sharia law pays attention to consumers and what sorts of protection it provides.

4.4.1 The Concept of Consumer Protection from a Sharia Perspective

It is essential to start with the notion of a consumer because there are differences between various jurisdictions' definitions, which raises an important question: who is the consumer protected by Islamic law? In addition, as mentioned in **Chapter Three**, the concept of a consumer in Saudi law is broadly characterised so that a professional trader may fall under this concept. Consequently, consumer protection provisions will not achieve the objective for which they were introduced. This subsection examines the consumer concept standards under Sharia law and whether those standards can help improve consumer definition in the KSA legislation.

⁵¹¹ According to the study, this can be achieved in several ways, such as pictorial display of products or 3D images; this enables consumers to acknowledge their precise identification, genus and quantity. See Marjan Muhammad, Muhd Rosydi Muhammad and Khalil Mohammed Khalil, 'Towards Shari'ah Compliant E-Commerce Transactions: A Review of Amazon.com' (2013) 15(9) Middle East Journal of Scientific Research 1233.

⁵¹² Ibid.

⁵¹³ Although it can be said that the requirements mentioned above in this study may help minimise the uncertainty in online transactions from a theoretical standpoint, it is nevertheless not possible to know whether these requirements would achieve their objectives unless clarification of the mechanism by which these requirements can be applied in practice is provided, alongside ensuring that these applications are adequate to reduce uncertainty in online transactions. These topics are discussed in Chapter Four, section 4.4.2 of this thesis, Consumer Protection Practices in Online Commerce.

⁵¹⁴ Marjan Muhammad, Muhd Rosydi Muhammad, Adam Mohd, and Mohd Adam Suhaimi, 'Building Trust in E-Commerce from An Islamic Perspective: A Literature Review' (2013) 5(5) American Academic & Scholarly Research Journal 163.

⁵¹⁵ *The Qur'an*, 2:188.

4.4.1.1 The Notion of a Consumer

The Arabic word for consuming is *istihlak*, which literally means 'perish'. It has several other meanings, such as 'to damage', 'to purchase', and 'to expend'.⁵¹⁶ These meanings taken from Arabic dictionaries do not indicate the contemporary meaning of the word 'consumer', nor do they clearly explain its legal concept. In addition, the term *mustahlik* – i.e. consumer – does not explicitly appear in the classical books of Sharia law. Therefore, contemporary Sharia law jurists have tried to interpret the notion of a consumer under Sharia law.

Alshernabasi defined a consumer as 'any person who gets a thing via purchasing to consume or use it'.⁵¹⁷ Although this definition is more accurate than previous definitions, it can be criticised for not specifying certain details that may have legal effects – for instance, the definition does not indicate the nature of the person who can or cannot be a consumer under Sharia law, whether a natural or legal person. The definition also does not specify to what extent a trader can contract as a consumer – i.e. in a mixed-purpose contract. It also does not indicate any limits on the buyer's use of goods or services after purchase, which is relevant in determining whether a person could still be perceived as a consumer if they do not use such goods or services for their personal use. This definition seems to be more fitting to a general notion of a 'buyer'.

Under Islamic law, individuals will not be legally protected if they are involved in a purchase contrary to Sharia law requirements. In light of this, Galaji and Ginibi define a consumer as 'a person who purchases goods or services for personal use with adherence to Sharia law guidelines'.⁵¹⁸ Atiah and Abdusamad define a consumer as 'any natural or legal person who obtains a good or service as the ultimate beneficiary thereof to satisfy their various needs or the needs of others in accordance with the provisions of Shariah law'.⁵¹⁹ They then broaden the notion of a consumer by allowing the goods to be used not just for their benefit but also for the benefit of others. In addition, a legal person can be a consumer. Following these definitions in

⁵¹⁶ Mohammed bin Yacoub Alfayrouzabadi, *Al-Qamus al-Muhit* (Al Resalah 1986) 1237.

⁵¹⁷ Ramadan Alshernabasi, *Heimat Almustahlik Fi Al Fiqh Al Islami* (Al Dar Al Arabiah Le Al Nasher Wa Al Tawzee 2000) 25.

⁵¹⁸ Mohammed Galaji and Hamed Ginibi, *Qamus Lughat Al Foqaha* (Dar El Nafais 1988) 66.

⁵¹⁹ Waleed Atiah and Abas Abdusamad, 'Mafhoom Al Khaiar Al Qanoni Lel Mustahlik Lel Odol An Al Aqd' (2015), *Journal of the Faculty of Law for Legal and Political Sciences* 924.

determining the notion of an online consumer under Sharia law, an online consumer could be 'an individual purchasing for personal purposes or personal needs of others via the Internet following the rules of Sharia law'.

Therefore, three requirements are identified in order to meet the definition of a consumer under Sharia law, which are listed as follows:

1. A consumer can be a natural or legal person.
2. The purpose of purchasing goods or services must be for personal use, whether the consumer's own or others' use. Therefore, a legal person may contract as a consumer for purposes outside their trade, business or occupation. This definition, however, still does not specify to what extent an individual can act as a consumer in a mixed-purpose contract – i.e. if the purchase is mainly for personal use but includes some elements of business use. This is further problematic as there is no Sharia case law on this matter.
3. Consumer transactions shall be in accordance with Islamic requirements, which are mentioned in this chapter.

However, these definitions can be criticised as contemporary definitions that have no origin in Islamic jurisprudence textbooks and, in some cases, are derived from modern jurisdictions or international laws. Hence, some of the above restrictions may exclude some consumers from obtaining their legal rights guaranteed by Sharia law. The all-inclusive legal philosophy of Sharia law, as evaluated, supports and promotes the protection of buyers' rights, regardless of their professional or personal capacity. It sets various values and ethical and moral standards that help protect anyone, irrespective of whether they are party to a transaction. This is because the power imbalance was not as prevalent centuries ago, giving rise to an additional need to protect particular classes of buyers, such as consumers.⁵²⁰ Therefore, it could be claimed that a buyer protected by Sharia law in any purchasing transaction includes any person who purchases goods or services, whether the buyer is an individual or a legal entity and whether the purchase is to fulfil their personal needs or the needs of others, or with the intent to sell the goods or services for profit. If this reasoning is followed, this would mean that Sharia law created one set of rules for contracts for the sale of goods and provision of services and did not envisage additional protection

⁵²⁰ Abu Bakar Elistina and Amin Naemah, 'Consumer Protection under Islamic Law in the Service Industry' (2011) 8 *International Journal of Social Policy and Society* 37.

being offered to consumer contracts. This, again, may be explained by the fact that Sharia rules were adopted in different times, when such protection may not have been necessary.

In recent times, with the increase in B2C transactions, the need arose to provide additional consumer protection in some jurisdictions, which may not have existed previously. However, these solutions were only temporary, as they were drafted to fulfil the needs of a particular time. As a result, the passage of time requires changes to these legal rules as communities develop and their demands change. This does not apply to Sharia law since its rules and principles are broad rather than specific. Therefore, Sharia law revolves around protecting everyone who needs protection in commercial transactions, regardless of their status or position. This approach of Sharia law guarantees flexibility in its provisions. Moreover, its applicability is not limited to a specific era or particular circumstances.

However, a critical question may arise about whether it is feasible to draft additional protection measures for B2C contracts, with consumers being interpreted more narrowly than buyers, which are compliant with Sharia law.

If Muslim countries wish to narrow the concept of a consumer to a specific scope, this cannot be considered an infringement of the provisions of Sharia law. On the contrary – by extrapolating the classic Sharia books, this thesis finds that protecting the weaker party in contracts is one of the general purposes of the principles of Sharia law. Nonetheless, buyers ‘outside the scope of the narrow concept’ will be able to obtain the protection offered by Sharia law under any legal framework other than consumer contract law, such as in commercial law or civil law. Thus, it can be said that limiting the definition of ‘consumer’ to a certain number of purchasers is compatible with Sharia law.

4.4.2 Consumer Protection Practices in Online Commerce

This section examines the efficacy of the measures provided by Sharia law for consumer protection on the legal solutions that can limit the factors influencing consumer trust in online contracts identified in **Chapter two**; these are determined under this study – namely, a need for the provision of mandatory consumer information, prevention of unfair contract terms and unfair commercial practices, and a need for the provision of specific consumer rights. This is relevant in light of research

questions because, as mentioned in **Chapter Three**, the KSA legislation has a lack of protection in such areas. Therefore, there is a need for further reform. Such reform may need to be addressed by adopting some principles from Sharia law. This subsection examines whether the protection provided by Sharia law in such areas can serve as a possible solution for proposing a legal framework to protect online consumers in the KSA.

This following subsection examines the first legal solution that can limit the factors influencing consumer trust in online contracts identified in **Chapter two**: the provisions of information requirements.

4.4.2.1 The General Obligation to Disclose Information to Consumers

The trader must clarify any information related to the sale that may affect the consumer's decision to buy. This commitment is contained in the second source of Islamic law (Sunnah). The Prophet said:

'The seller and the buyer have the right to keep or return goods as long as they have not parted or until they part; and if both the parties spoke the truth and described the defects and qualities (of the goods), then they would be blessed in their transaction, and if they told lies or hid something, then the blessings of their transaction would be lost.'⁵²¹

This statement does not specify what information should be disclosed to meet this obligation. Instead, Islamic law has made its assessment based on how to ensure that the objective of this commitment is achieved. However, Sharia law refers to several essential requirements that both contract parties must meet before entering into a transaction. Most of these requirements revolve around the consumer's concerns – namely; product characteristics, contractual terms and delivery time, among others. Thus, they may be appropriate to protect the consumer in B2C contracts. When all the requirements are met, the interests of both contracting parties are protected, and the likelihood that one of the parties is exploited by the other is diminished.

By extrapolating from classical books in Islamic jurisprudence, it is possible to say that the information the trader must disclose to the consumer before concluding

⁵²¹ Sahih al-Bukhari, Book 34, Hadith 32.

the contract revolves around two categories:⁵²² the precise characteristics of the good or service and precise information concerning any hidden defects in the items.

4.4.2.1.1 The Precise Characteristics of the Good or Service

Sharia law imposes a set of obligations on the trader that must be met in the contract of sale. This information revolves around measurements, the quality of the goods and their prices, all of which must be disclosed to the consumer.⁵²³ Moreover, as mentioned in the previous paragraph, according to Sunnah, both the buyer and seller are responsible for disclosing all information relevant to the contract before its conclusion.

Not only that, but the concealment of any information related to the characteristics of a product or service that may affect the consumer's decision to proceed is illegal. This provision was also derived from the Sunnah:

'The Prophet Muhammad happened to pass by a heap of eatables (corn). He thrust his hand in that (heap), and his fingers were moistened. He said to the owner of that heap of eatables (corn): What is this? He replied: Messenger of Allah, these have been drenched by rainfall. He (the Holy Prophet) remarked: Why did you not place this (the drenched part of the heap) over other eatables so that the people could see it? He who deceives is not of me (is not my follower).'⁵²⁴

The Prophet Muhammad expands on this duty, saying:

'The Muslim is the brother of another Muslim, and it is not permissible for a Muslim to sell his brother goods in which there is a defect, without pointing that out to him.'⁵²⁵

Therefore, a lack of essential disclosure invalidates the contract.

4.4.2.1.2 Hidden Defects in the Good or Service on Sale

Scholars argue that transactions should be free from any misrepresentation to be considered compliant with Sharia law. Islamic ethics concerning transactions are not limited to disclosing all relevant information to the contract parties in an equal,

⁵²² Ausaf Ahmad and Kazim Awan, *Lectures on Islamic Economics* (Islamic Research and Training Institute 1992) 3.

⁵²³ Abu hamid Ghazali, *Ihya UIUm Al Din* (Dar Ibn Hazim 1963) 75.

⁵²⁴ Sahih Muslim, Book 1, Hadith 190.

⁵²⁵ Sunan Ibn Majah, Book 12, Hadith 110.

adequate and accurate manner,⁵²⁶ but also relate to not disclosing false or misleading information. In this regard, an item for sale free from defects is one of the implied warranties pertaining to transactions in Sharia law.⁵²⁷

Therefore, a trader is required to disclose both obvious and hidden defects in a good or service to be sold to a consumer. Hidden defects refer to any defect that an ordinary consumer may not be able to discover by a simple cursory glance at the item. Thus, if the defect is not stated at the time of the conclusion of the contract, the good is considered free from defects. This duty is achieved by disclosing the defect either orally or in writing, such as in a written description of goods or services sold online. However, in the event of a breach of this duty, the party with inadequate information may request the cancellation of the contract.⁵²⁸

4.4.2.1.3 Critique

As detailed above, by extrapolating from classical books on Islamic jurisprudence, it can be seen that Sharia law aims to provide consumers with clear information related to characteristics and defects. This information is essential to conclude a contract and may help consumers to make the right decision.

However, there is a lack of compulsory rules about information that traders must disclose to consumers if a contract is concluded under Islamic law. A trader may not disclose essential information about the good or service sold because Islamic law did not directly and explicitly oblige them to disclose such information and was unaware of their significance. This then introduces legal uncertainty for traders and exposes them to conducting poor business practices. As a result, this may also lead an ordinary consumer to make an uninformed decision, as they will not possess all the relevant information.

This can happen in traditional transactions, but it is even more severe in online transactions. Compared to online commerce, in-store consumers can seek full advice from sellers about a given product or service before binding themselves to a contract. In contrast, online consumers may not have the chance to do so. Online consumers

⁵²⁶ Ahmad Khaliq and Hassanudin Mohd Thas Thaker, 'Revisiting of an Islamic Options Permissibility from Shariah Perspectives' (2014) 1(3) *Global Review of Islamic Economics and Business* 179.

⁵²⁷ The Ottoman Courts Manual 1876, art 336. See <https://www.iiu.edu.my/deed/lawbase/al_majalle/index.html> accessed 26 September 2021.

⁵²⁸ By *Khiyar Aib*. See Chapter Four, section 4.4.2.4.1 of this thesis, *Khiyar Aib* (Defective Option).

may rely mainly upon the information provided on the trader's website to make an informed decision about buying. Such information is considered an alternative to the testing that occurs when buying in-store. Therefore, there must be more legal regulations and standards requiring online traders to provide reliable information and adequate descriptions of products and services.

For example, Sharia law does not oblige traders to provide information about their identity and business to online consumers before concluding online contracts. This disclosure not only serves to overcome a feeling of uncertainty experienced when concluding an online contract with an unknown party, thus helping to build consumer trust⁵²⁹– it can also help online consumers contact traders easily and enable law enforcement authorities to identify them and determine their location.

Furthermore, the information obligations derived from Sharia law may apply to some extent in online consumer contracts related to tangible goods. However, this information is significantly more insufficient in the sale of intangible goods such as digital content. A trader's disclosure of the main technical or contractual requirements or conditions that may affect a consumer's ability to obtain, access, or use a good or service is essential information that helps the consumer make an informed decision.⁵³⁰

For example, consumers need to be informed about the usage restriction of digital content that may prevent them from using such content in the manner intended. Although, in general, the provision of information concerning the precise characteristics of the good or service to consumers may be required by the rules of Islamic law, such merely general principles and rules may not apply to intangible goods. Consequently, there remains a need for special rules commensurate with the nature of digital content, as these are not provided by Sharia law.

Finally, one of the most significant gaps that can be identified is that the scholars of Sharia law do not determine the manner/method a trader must follow to disclose detailed information relating to a good or service sold, such as in a form and manner which is easily, directly and permanently accessible. Moreover, there is no

⁵²⁹ Giusella Finocchiaro, 'European Law and Consumer Protection in the Information Age' (2003) 12(2) *Information and Communication Technology Law* 113.

⁵³⁰ OECD, *Consumer Protection in E-Commerce: OECD Recommendation* (OECD Publishing 2016) <<https://www.oecd.org/sti/consumer/ECommerce-Recommendation-2016.pdf>> accessed 17 June 2021.

duty for an online trader to confirm that they have provided a consumer with all the required information. Generally, therefore, formal requirements for providing information to consumers are lacking.

Thus, an offline consumer may get further information orally from sellers about a given good or service before binding themselves to a contract. However, in online contracts, it may only be possible to provide contractual information in a written form and on a durable medium, not mentioned in Sharia law.

In this context, Sharia law does not explicitly discuss the criteria for disclosure and the obligations to be followed by online traders to either provide information or make information available to online consumers. The difference is that the latter means that the consumer has the burden of looking for information on the trader's website, while 'giving information' requires a greater effort by the trader to provide the information to the consumer. These legal gaps may cause many disputes between the consumer and the trader. Therefore, there must be more legal regulations and standards determining the legal duty a trader must follow to provide reliable and relevant information and adequate descriptions of products and services to consumers.

The above provisions deal with this consumer issue. The following subsection examines the second legal solution that can limit the factors influencing consumer trust in online contracts identified in **Chapter two** – namely, protecting consumers from unfair commercial practices. Since the current online consumer protection legislation in the KSA are only protecting online consumers from misleading advertising, as mentioned in **Chapter Three**, perhaps the provisions of Sharia law might help develop Saudi law to capture other unfair commercial practices that occur in the Internet environment.

4.4.2.2 Consumer Protection from Unfair Commercial Practices

Transactions that could potentially cause harm to consumers are prohibited in Sharia law. It strongly condemns any transaction involving fraud.⁵³¹ Muslim traders must be

⁵³¹ The term *Ghishh* used in trade means concealing the defects of and adulteration in merchandise. See Mushtaq Amad, *Business Ethics in Islam* (Kitab Bhavan 1999) 113. See also Rafik Issa Beekun, *Islamic Business Ethics* (International Institute of Islamic Thought 1997) 45.

honest at all times.⁵³² Consequently, unfair commercial practices are strongly condemned by the Prophet Muhammad in many Hadiths.⁵³³ The Prophet said:

‘who acted dishonestly towards us is not of us.’⁵³⁴

4.4.2.2.1 Regulatory Structure: General Illegality Clauses and per se Prohibited Practices

As far as the specific type of unfair commercial practices is concerned – namely, misleading actions and omissions – Sharia law provides many guidelines to prohibit their use in trade. These actions fall into two categories: the prohibition of fraudulent actions and all misleading actions. Sharia law addresses these practices by requiring the trader not to use false measures or give any false impression in the promotion or marketing of goods or services.⁵³⁵ Concerning misleading omission, Islamic law requires the contract parties to disclose detailed information about the transaction, which is an essential factor in gaining the other party’s consent before deciding to proceed with the conclusion of a transaction.

In Sharia law, the concept of unfair commercial practices is not confined to misleading practices, but includes all conduct on the trader’s part that may harm the consumer’s interests. Many sales contracts have been banned under Islamic law following the *Qur’an* and Sunnah. Traders in the pre-Islamic era practised a majority of these sales contracts, therefore some of them were forbidden by the Prophet Muhammad himself during his lifetime.⁵³⁶ The main reason for the prohibition of these contracts in Islamic law is to preserve the rights of contractors within the bounds of

⁵³² See Rafik Issa Beekun, *Islamic Business Ethics* (International Institute of Islamic Thought 1997) 45.

⁵³³ The Prophet is reported to have said: ‘The seller and the buyer have the right to keep or return goods as long as they have not parted or until they part; and if both the parties spoke the truth and described the defects and qualities (of the goods), then they would be blessed in their transaction, and if they told lies or hid something, then the blessings of their transaction would be lost.’ See Sahih al-Bukhari, Book 34, Hadith 32.

⁵³⁴ Sahih Muslim, Book 1, Hadith 189.

⁵³⁵ The Sunnah confirmed this; the Prophet said: ‘There are three to whom Allah will not speak on the Day of Resurrection, nor will He look at them or purify them, and theirs will be a painful torment: A man who has surplus water in the desert but refuses to give any to a wayfarer; a man who sells a product to a man after ‘Asr and swears by Allah that he bought it for such and such amount, and he believes him, when that is not the case; and a man who swears allegiance to a ruler, and only does so for worldly gains, so if he gives him some of (these worldly benefits) he fulfills his oath of allegiance, and if he is not given anything he does not uphold his oath of allegiance.’ See Sunan Ibn Majah, Book 12, Hadith 71.

⁵³⁶ Mohammed Shawkani *Nail al-Aowtar Sharh Muntaqa al-Akhbar* (Matba’ah Mustafa al-Halabi 1982) 156-190.

their transactions.⁵³⁷ Some of these prohibited sale contracts are *Bay al-Mukhadarah*,⁵³⁸ *Bay al-Munabadhah*,⁵³⁹ *Bay al-Mulamasah*,⁵⁴⁰ *Bay al-Muzabanah*⁵⁴¹ and *Bay wa Salaf*.⁵⁴²

Further, Sharia promotes freedom for the individual and natural competition in the marketplace.⁵⁴³ However, the idea of hoarding is not acceptable in Islamic law. Hoarding refers to a trader's possession of basic goods or services that they abstain from selling for a period to harm the consumer and raise the price, if they are a monopolist.⁵⁴⁴ This practice harms consumers' interests because the trader is the only one in the market that hoards the items, forcing consumers to purchase them at a high price.

For example, a trader might agree with their suppliers to sell their goods only to them to stockpile essential goods that are not available to other traders. The trader can then exploit this practice to dictate unfair terms in the market. Islam adopts a strict stance on hoarding, which is explicitly banned in the Sunnah. This is because Islam discourages greed and exploitation, and this includes hoarding. This is why the Prophet denounced hoarders in robust terms, saying:

'If anyone with-holds grain for forty days thereby desiring a high price, he has renounced God, and God has renounced him.'⁵⁴⁵

He also said:

⁵³⁷ Mahmood Tantawy, 'Hemaiat Almustahlik Fi Al Sharia Al Eslamiah' (1998) 6(2) Journal of Security and Law 13.

⁵³⁸ Sale of fruits, vegetables and grains before they are almost ripe as there is a risk of them being spoilt before they are ready for consumption. See Sahih al-Bukhari, Book 7, Hadith 806.

⁵³⁹ Throw sale where the seller throws down the goods towards the buyer without the opportunity for them to inspect the goods. The prohibition is also on the barter of goods where two parties mutually exchange goods without any examination by either of them. See Sahih al-Bukhari, Book 7, Hadith 806.

⁵⁴⁰ The subject matter is bought without examining it, but just by merely touching it. Similar to the prohibition of *bay al-munabadhah*. See Sahih al-Bukhari, Book 7, Hadith 806.

⁵⁴¹ The sale of fresh fruits without determining their quantity in exchange for dry fruits whose quantity is measured. See Sahih al-Bukhari, Book 7, Hadith 806.

⁵⁴² Simultaneous selling and lending in a contract where a man says to the other: 'I shall take your goods for such and such if you lend me such and such.' Sunan Abi Dawud, Book 24, Hadith 89.

⁵⁴³ Yusuf Al-Qaradawi, *Dawr Al-Qiyam Wal-Akhlāq Fi Al-Iqtisād Al-Islāmi* (Maktabat Wahbah 1995) 255-257.

⁵⁴⁴ See Abdullah Ibn Qudamah, *Al Mughni* (Dar al-Alam al-Kitab 1997) 4/244; Mohamed Khatib Sherbini, *Mughni Al Muhtaj* (Mustafa Al-Babi Al-Halabi 1958) 2/38.

⁵⁴⁵ Mishkat al-Masabih, Book 11, Hadith 133.

'Spend and do not calculate, (for) Allāh would calculate in your case; and do not hoard, otherwise Allāh would be withholding from you.'⁵⁴⁶

In another Hadith, the Prophet said:

'No one hoards but the sinner.'⁵⁴⁷

Al-Nawawi points out that the Arabic language scholars define the word 'sinner' as disobedient and guilty, and thus Hadith indicates that hoarding is prohibited.⁵⁴⁸

The advantages of the prohibition of hoarding are not limited to the establishment of a free market due to fair competition, preventing traders from assuming a dominant, monopolistic position on the market, but also help to reduce the spread of the black market in society. Price control by the government can eliminate hoarding to meet the needs of society and protect consumers from the greed of unscrupulous traders.⁵⁴⁹ Price fixing may result in the inability of a consumer to negotiate with a trader on the price of a good or service, but on the other hand, the trader is forced to sell the goods at a fixed price that is not excessive. However, it should be noted that Sharia law does not encourage the principle of price-fixing in general and allows traders to earn profits as long as they do not exceed lawful limits.⁵⁵⁰ This principle was derived from the actions of the Prophet, who, when prices became high and he was asked to fix them, replied:

'(No), but I shall pray. Again, the man came and said: Messenger of Allah, fix prices. He said: It is but Allah who makes the prices low and high. I hope that when I meet Allah, none of you has any claim on me for doing wrong regarding blood or property.'⁵⁵¹

However, the Hanafi school argues that fixing prices is permissible under Sharia law in many cases, such as monopolising goods.⁵⁵² The need arises if traders adopt unfair practices to harm smaller traders and consumers. Therefore, the

⁵⁴⁶ Sahih Muslim, Book 12, Hadith 113.

⁵⁴⁷ Ibid, Book 22, Hadith 162.

⁵⁴⁸ See Al Nawawi Yahya, *Al-minhaj Sharh Sahih Muslim Bin Hajjaj* (Dar Ehia Al Turath 1972) 11/43.

⁵⁴⁹ Rafik Issa Beekun, *Islamic Business Ethics* (International Institute of Islamic Thought 1997) 44.

⁵⁵⁰ It is reported that once the prices shot up during the period of the Prophet, the people said: 'O Messenger of Allah! Prices have shot up, so fix them for us.' Thereupon the Messenger of Allah said: 'Allah is the One who fixes prices, withholds, gives lavishly, and provides, and I hope that when I meet Allah, none of you will have any claim on me for an injustice regarding blood or property.' Sunan Abi Dawud, Book 24, Hadith 36.

⁵⁵¹ Sunan Abi Dawud, Book 24, Hadith 35.

⁵⁵² See Alaa Al Deen Al Kasani, *Bada al-Sanai* (Dar Ihya al-Turath al-Arabi 1998) 5/129.

government can fix prices to safeguard consumers' interests and limit the spread of unfair commercial practices.

The protection provided above seems to be akin to competition law and consumer protection. Generally speaking, competition law aims to maintain competition by ensuring that a private act does not suppress free trade and competition and improves consumer interests. However, competition law and consumer protection share the same ultimate aim of protecting consumers' interests. This link is evident in Sharia law.⁵⁵³

Sharia law not only protects consumers from misleading practices but extends this to protect them from aggressive practices – for instance, prohibition on price manipulation is emphasised under Islamic law. Many aggressive practices may lead to price manipulation, which traders have been prohibited from doing. Meeting villagers on a city's outskirts to purchase their goods before they reach the market is one such practice used to manipulate prices.⁵⁵⁴ Anyone who does this exploits the newcomer's ignorance of market conditions by purchasing the goods at a better rate than the market price and then selling those same goods on the market at a high or exorbitant price. Thus, such a practice may weaken a consumer's freedom of choice or behaviour about a product and influence them to enter into a transaction they would not have otherwise concluded. Therefore, the Prophet commands not to negotiate the purchase of items until they are put on the market so that the trader and consumer both benefit from natural market prices.⁵⁵⁵ The Prophet prohibited price manipulation through several traditions. He said:

'A town-dweller should not buy goods for a desert-dweller and charge commission as a broker.'⁵⁵⁶

'It was told to ibn Tawus by his father that ibn 'Abbas said, "The Messenger of Allah forbade meeting the riders, and for a town-dweller." 'I said to ibn 'Abbas: "What does a town-

⁵⁵³ Under Sharia law, the authority has been established to compete and protect consumers under the name of (Hisbah) by enforcing the adequate application and monitoring of markets and retailers. This is known in the UK as the Capital Markets Authority.

⁵⁵⁴ The role of a middleman should be to provide supplies/goods to market without taking undue advantage of the producer and the consumer. Wholesaling is not prohibited per se; it is only when the producer/supplier indulges in unfair practices like hoarding, price manipulation, etc. that it is considered undesirable in Islam.

⁵⁵⁵ Sahih Al-Bukhari Book 34, Hadith 116.

⁵⁵⁶ Ibid, Book 18, Hadith 1775.

dweller (selling) for a desert-dweller mean?" 'He said: "He should not act as a broker for him."''⁵⁵⁷

It is worth noting that if a consumer is heavily exploited, they can demand the termination of the contract or choose to maintain it while also reclaiming the additional amount paid due to the trader's deception (*Ghabn-Fahish*).⁵⁵⁸ In order for consumers to exercise this option, they must prove their ignorance of the actual market value of the purchased goods. Finally, consumers can exercise this option when they become aware of any deception if they were not aware of it at the time of the contract. The legal schools of Sharia law differ in their approach to determining the ability to exercise this option.⁵⁵⁹ However, most schools agree that a consumer has a period of three days from the date of becoming aware of deception to seek a termination of the contract.

4.4.2.2.2 Tools to Protect Against Online Unfair Commercial Practices

The previous section discussed the protection provided by Sharia law to guard consumers against certain unfair commercial practices that may occur in both offline and online transactions. Unlike offline transactions, the challenge for transactions online is that not all unfair commercial practices can be anticipated due to the continuous development of the sector and the constant emergence of new practices that might be used to mislead online consumers.

Given the inability to enumerate all unfair commercial practices that may occur in an online environment, this section seeks to discuss the four tools,⁵⁶⁰ identified in **Chapter Two**,⁵⁶¹ through which an online trader can mislead consumers in ways that do not occur in offline transactions. It also seeks to examine the legal protection provided by Sharia law techniques against unfair commercial practices occurring through the use of these tools and the adequacy of such solutions for consumer protection in online contracts.

⁵⁵⁷ Sunan an-Nasa'i, Book 44, Hadith 52.

⁵⁵⁸ *Ghabn-Fahish* means selling the subject matter for more than it is worth. See Mohammed Almaghrabi, *Mawahib al-jalil fi Sharh Mukhtasar Khalil* (Dar al-Fikr 2010) 4\468.

⁵⁵⁹ Al-Daoud Fahad, 'Khair Al Gabon Wa Tattbigatoooh Al Mouaserah' (2008) 114 *Majalat Al Bohooth Al Islamiah* 382.

⁵⁶⁰ Search engines, comparison websites, consumer reviews and social media platforms.

⁵⁶¹ See Chapter Two, section 2.3.2.2 of this thesis, Misleading Practices.

There are two cases where Sharia law may apply to instances of unfair commercial practices online.

The first case arises in circumstances where an unfair practice has been expressly prohibited under Sharia law. In this case, the relevant Sharia provisions would apply – for example, there are many practices relevant to price gouging on comparison websites. Sharia law prohibits price manipulation in any form. Therefore, Sharia law prohibits every practice aimed at manipulating prices, regardless of the form of that practice, whether that practice is old or new, or if it occurs in online or offline transactions. In addition, an online consumer can benefit from the enforcement provided by Sharia law when they are a victim of unfair commercial practices, such as the options provided for consumers who are deceived (*Ghabn-Fahish*).⁵⁶²

The second case arises where an unfair practice is not stipulated in the classic books of Sharia law. Nevertheless, in this case, the ruling can be deduced from the general rules of Sharia law or *Qiyas*. This can be achieved in one of two ways:

(A) Sharia law protects online consumers through the general rules of Islamic contract law discussed in the previous section. These are summarised in the trader's command to adhere to Islamic ethics, trade and commerce, which is based on justice, honesty and fairness when dealing with the consumer. This command also aims to avoid everything that harms or deceives the consumer, whether the form of that practice is defined or not.

Therefore, when a new unfair practice arises in the Internet environment, it can be considered prohibited under Sharia law, even if the Sharia classic books do not explicitly provide such a prohibition, provided it contradicts the general rules of Islamic law. Consequently, any practice conducted using the four tools mentioned above, which aims to deceive a consumer or cause harm to them, is prohibited under Sharia law. Not only that, but the consumer can also take advantage of the relevant options under Sharia law that allow them to either terminate a contract or obtain a refund.

(B) Any practice that has been prohibited under Sharia law in a specific context can be examined to establish the extent to which the provisions resulting from that practice can be applied to a new context in contemporary reality. This process is

⁵⁶² See Chapter Four, section 4.4.2.2.1 of this thesis, Regulatory Structure: General Illegality Clauses and per se Prohibited Practices.

known as *Qiyas*. For example, *Najash*, which may occur in commercial dealings, is a practice prohibited under Sharia law. The definition of *Najash* differs from one legal school to another, but it can be defined as a false claim to wish or desire to buy goods at a high price as a method of marketing the goods.⁵⁶³ There are many forms of *Najash*, but the most common form of this practice is when a seller displays goods for sale in a public auction. Then, a third party bids up the price of the good, with no real intention to buy it, instead seeking to raise the price for potential buyers to deceive them. This can occur whether the third party does so by agreement with the seller or does so independently.

Nonetheless, *Najash* can take other forms, such as praising a good to increase the chances of it being sold or disgracing a good to ensure it is not sold. Many unfair practices can occur in related tools that are very similar to the practice of *Najash*, such as misleading advertising by digital influencers not revealing they have been paid to promote a product, posting fake online customer reviews, the ranking of search results not showing that top results have been paid for, etc. Consequently, the provisions of *Najash* can be applied to these practices.

4.4.2.2.3 Critique

Reviewing the rules on the prohibition of unfair commercial practices shows that Sharia law could efficiently address many current issues, such as price manipulations, by recognising that modern commercial practices are a new type of previously prohibited commercial practice.

Although the general rules of Sharia law apply to many unfair commercial practices on the Internet, there are some obstacles to the efficiency of applying Sharia law to regulate them. First, in order to find out whether practices that may occur online are considered unfair, we must confirm that this case violates the explicit general rules of Sharia law or compare that case to a similar case that has been previously dealt with by a special provision in Islamic law (*Qiyas*).

An obstacle lies in the fact that issuing this legal ruling requires deep experience with the provisions of Sharia law. In other words, the ordinary consumer (not a specialist in Sharia law) cannot know whether they are protected under Sharia law if

⁵⁶³ Anas Al-Samarrai, 'Najash Wa Atharah Fi Aqd Al Bai' (2010) 6(23) Journal of Surra Man Raa 58.

they fall victim to practices that are not stipulated in the Sharia classic books. Instead, there is a need for codified law to show how the opinions of the jurisprudence of the legal schools of Sharia law are applied to many emerging issues resulting from the evolution of technology. This codification process has not yet occurred.

In summary, it is possible to first say that providing general principles and rules may not be sufficient to minimise or even eliminate such online practices unless accompanied by practical rules through which these practices can be dealt with. Sharia law does not provide such practical guidelines or specific rules. This is one of the reasons why this PhD is exploring the possibility of adopting new rules that would address such practices in the KSA that are Sharia law-compliant.

Secondly, although Sharia law strictly prohibits many unfair commercial practices alone, it does not provide sufficient protection to consumers who fall victim to such practices – for example, Islamic contract law prohibits the practice of *Najash* in any form. However, the penalty for practicing this practice is deferred to the afterlife, not in this world, according to the Sunnah. This may lead some to pursue this practice without fear of punishment, especially those who do not respect their religion, because of the assurance that no worldly punishment will be inflicted on them. Nevertheless, it is possible to punish those who practice this through Tazir under Sharia law.⁵⁶⁴ However, this requires many judicial procedures.

Furthermore, most legal schools of Sharia law argue that the practice of *Najash* does not affect the validity of a contract.⁵⁶⁵ Nevertheless, they differ concerning the right to terminate granted to the consumer if they fall victim to that practice in two respects: the Hanafi and Shafi'i schools argue that a contract is valid so that the consumer is bound by it and has no right to terminate it, while the Maliki and Hanbali schools argue that a consumer is eligible to terminate a contract due to that practice, but under certain conditions; according to the Maliki school, a trader must be aware of a third party pursuing this practice.⁵⁶⁶ The Hanbali school has three conditions: first, the deception must be carried out by a professional person; second, consumers must

⁵⁶⁴ Tazir refers to the punishment for crimes or offenses for which no special penalties are provided by Sharia law. Instead, their determination is at the discretion of a judge or the ruler of the state. See Dennis J. Wiechman, Jerry D. Kendall, and Mohammad K. Azarian, 'Islamic Law: Myths and Realities' (1996) 12(3) Crime & Justice International Online 5.

⁵⁶⁵ Mohammed Alqahtani, 'Al Najash Sowarah Wa Ahkamoh' (2006) 29 Majalat Al Adel 119.

⁵⁶⁶ Ibid 125.

fall victim to that practice without their knowledge; and third, the harmful effects of the deception must be significant.⁵⁶⁷

A consumer's ability to exercise the right of termination is scarce due to the need to fulfill the above conditions. Therefore, a consumer may be deprived of adequate protection in the event of falling victim to many online unfair commercial practices under Sharia law.

The above provisions deal with this consumer issue. The following subsection examines the third legal solution that can limit the factors influencing consumer trust in online contracts identified in **Chapter two** – namely, protecting consumers from unfair contract terms. Since the current online consumer protection legislation in the KSA has not yet addressed this issue, as mentioned in **Chapter Three**, perhaps the provisions of Sharia law might help develop Saudi law to protect consumers from unfair contract terms that occur in the Internet environment.

4.4.2.3 Consumer Protection from Unfair Contract Terms

Legal schools in Sharia law have different standpoints on the freedom that the contracting parties enjoy when imposing terms and conditions in the contract. The Hanafi and Shafi'i schools argue that any condition that is not recognised by Sharia law will not be allowed.⁵⁶⁸ According to these two schools, the basic assumption of the law is that all terms and conditions imposed into a contract will be deemed void except for that which is approved by Sharia law sources. This opinion was adopted based on the tradition of the Holy Prophet:

'Any condition that is not in Allah's Book (the *Holy Qur'an*) is invalid even if there were 100 of them, for Allah's decisions are the right ones and His conditions are the strong ones (firmer), and the *Wala'* will be for the manumitted.'⁵⁶⁹

Based on that, any condition imposed by one of the contracting parties is invalid and is not binding on them unless the *Qur'an* stipulates that it is permissible. However, it seems that this view cannot be applied in practice. Many terms and conditions are not mentioned in the *Qur'an*, and yet they are considered valid under Sharia law – for

⁵⁶⁷ Ibid 126.

⁵⁶⁸ See Alaa Al Deen Al Kasani, *Bada al-Sana'i* (Dar Ihya al-Turath al-Arabi 1998) 5/175; Ali Al-Mawardi, *Al-Hawi Al-Kabir* (Dar al-Kutub al-'Elmiyah 1999) 5/313.

⁵⁶⁹ Sahih al-Bukhar, Book 34, Hadith 119 and 377.

example, a condition to deliver goods to a consumer's home.⁵⁷⁰ Therefore, the above tradition does not mean that the condition must exist or be approved literally in the *Qur'an*, but rather that the condition does not contradict the provisions and rules of Sharia law derived from the *Qur'an* and its other sources.

In contrast, the Maliki and Hanbali schools allow any terms and conditions to be imposed in a contract. They acknowledge the complete independence of the contracting parties' will in contracts and transactions.⁵⁷¹ This opinion is based on the above-mentioned Islamic principle stipulated by all schools of jurisprudence, which is that 'the norm regarding things is that of permissibility'.⁵⁷² Thus, any contract terms imposed by any contracting party are valid and binding unless prohibited on a direct legal basis.

Unfair terms often arise in consumer contracts when a professional trader or provider imposes conditions that cause harm to the consumer in order to obtain certain benefits themselves. However, not all terms imposed by professional traders based on their expertise and experience are considered unfair. Instead, the contract terms must be examined in light of the whole agreement to consider all obligations between the contract parties.

A contract is assessed by testing the legality of its clauses under the general rules of Islamic contract law. In other words, Sharia law does not provide a fairness test for identifying unfair terms; instead, the legality of those terms is assessed. If these conditions do not pass the legality test, the contract's validity as a whole is affected, or the terms may be considered void, and the contract is maintained. Therefore, the consumer is not bound to them. The following section explains the mechanism for a legality test of contract terms under Islamic contract law.

4.4.2.3.1 Legality Test

Sharia law does not protect every single contract term and condition that contract parties may draft. Instead, it provides a set of rules that regulate the contracts in general. These rules are peremptory and binding. They cannot be violated or breached

⁵⁷⁰ Abdullah Ibn Qudamah, *Al Mughni* (Dar al-Alam al-Kitab 1997) 3/382.

⁵⁷¹ See Mohammed Almaghrabi, *Mawahib al-jalil fi Sharh Mukhtasar Khalil* (Dar al-Fikr 2010) 4\373; Muhammad Ibn al-Qayyim, *Ilam al-Muwaqqi'in An Rab Al Alameen* (Dar Al Kotob Al Elmiah 1991) 1/259.

⁵⁷² See Chapter Four, section 4.3.1 of this thesis, Online Shopping (Online Commerce).

because they are considered part of the legal system. These rules relate to the structure and composition of the contract, including its content and interpretation and its implications and obligations arising from it. They also aim to protect the contracting parties from any unfair contractual conditions. They are:⁵⁷³

1. If a contract condition contains claims that are contrary to the rights and obligations of the parties under the contract, it invalidates the contract.
2. The invalid condition, if required in the contract, is not allowed to be fulfilled.
3. Any condition that does not contravene the rights and obligations of the contract does not void the sale.
4. If valid and devoid of uncertainty, contracts do not consider any unintended results that occur after the fact.
5. Every condition, when it is in the interests of the contract, is permissible.
6. Contracts, if valid and devoid of uncertainty, do not consider any unintended results that occur after the fact.

Based on these rules among others, Muslim jurists explain the terms as either valid, irregular or void.

First, we look at valid terms. Al-Sanhuri⁵⁷⁴ claims a term is valid, and so is the contract, if:

(a) a term is required by the contract, such as if the seller requires that the good or service is not delivered/supplied until payment is received, or cases where the consumer requests a refund for faulty goods. This term must be met unconditionally, even if parties do not mention such terms at the moment of concluding the contract;⁵⁷⁵

(b) a term is appropriate to the contract, such as requiring the seller to pay in a particular currency or accept only credit card or cash;

⁵⁷³ See Ali Al-Mawardi, *Al-Hawi Al-Kabir* (Dar al-Kutub al-'Elmiyah 1999) 10/186; Abdul Rahman Al-Jazairi, *Fiqh Al Mathahib Al Fiqhiah Al Arbaah* (Dar Al Kotoob Al Elmiah 2003) 2/160; Mohammed Ibn Muflih, *Alfiroo*, (Alam Al Kutob 1985) 4/230; Ahmad Ibn Taymiyyah, *Fatwa al-Kubra* (Dar al-Kutub al-'Elmiyah 1987) 4/240; Ahmad Al-Qari, *Majalat Al Ahkam Al Shareiah* (Maktabat Al Eqtsad Wa Al Qanoon 2015) 230; Ahmed Mohamed Alzarqa, *Sharh Al Quaeed Al Fiqhiah* (Dar Al-Qalam 1989).

⁵⁷⁴ Abdul-Razzaq Al-Sanhuri, *Masader Al Haq Fi Al Fiqh Al Islami* (Dar Al-Arabiya Heritage 2001) 3/117-153 and 167-194.

⁵⁷⁵ Mohammed Al-Kharashi, *Sharh Mukhtasar Khalil Al-Kharashi* (Dar Al-Fikr 2010) 5/80.

(c) a term does not fall under the previous two types, but does not violate them – for example, when the consumer buys silk and then requires the seller to sew it into a shirt (made to specification or personalised).⁵⁷⁶ Terms arising from the second and third types of terms are binding to contracting parties if agreed upon in the contract. Prophet Muḥammad clarifies this by saying:

‘Muslims will be held to their conditions, except the conditions that make the lawful unlawful, or the unlawful lawful.’⁵⁷⁷

The second type is an irregular term. The effect of having such a term is that it renders the entire contract invalid. Legal school standards differ on the considerations by which a contract term can be described as irregular – for example, the Shafi’i and Hanbali schools argue that a contract term that obligates contracting parties to conclude another contract that includes a loan contract is irregular and nullifies the entire contract. Such conditions are irregular as this practice amounts to usury.⁵⁷⁸ Thus, the contract does not bind either party.

The third type is a void contract term. Unlike the second type, this term is severable from the contract, so that the term alone is null and void, but not the contract.⁵⁷⁹ For example, a contract term will be regarded as void if it conflicts with the contract requirements under the Maliki and Hanbali school.

Based on the last two sections, it can be concluded that unfair contract terms, whether classified as irregular or void terms, are considered null *in ab initio*, as Islamic contract law requires that a contract be free from any of those terms.⁵⁸⁰ Therefore, consumers are not bound by any contract that contains any of these types of terms according to Sharia law.

4.4.2.3.2 Transparency in Dealings

One of Islam’s most significant ethical principles is that transactions must be free from ambiguity and uncertainty. The contract parties must abide by honesty, fairness and

⁵⁷⁶ Mohamed Al-Sarakhsi, *Al-Mabsout* (Dar Al-Maarifah 2010) 13/14.

⁵⁷⁷ Sunan at-Tirmidhi, Book 15, Hadith 32.

⁵⁷⁸ See Al Alaa Al Deen Al Kasani, *Bada al-Sanai* (Dar Ihya al-Turath al-Arabi 1998) 5/169.

⁵⁷⁹ See Abdul Karim Zidan, *Muqaddimah Fi Dirasat Al Shariah Al Islamiyah* (Dar Omar ibn al-Khattab 1969) 398.

⁵⁸⁰ The Kuwait Ministry of Awqaf and Islamic Affairs, *Mausua Fiqhiya Kuwaitiya*, (1983) 9/101 <<http://islam.gov.kw/bohoth/pages/ar/Pages.aspx?PagelD=3>> accessed 20 June 2021.

clarity in their transactions. These principles help protect the contract parties from mutual injustice and resulting disputes.⁵⁸¹

Therefore, transparency is one of the essential principles promoted by Sharia law. This principle was asserted through the *Qur'an* with respect to loan transactions (*Ayat al-Din*); it states that contracting parties should be as transparent and straightforward as possible when concluding contracts and agreements. It is worth noting that *Ayat al-Din* is the longest verse in the Holy *Qur'an*, with 129 words and 551 letters in Arabic.⁵⁸² This has essential connotations, inferring transactions are almost indispensable since they are the most significant source for trade growth. For this, Sharia law encourages transparency among the concerned parties to facilitate their transactions and commerce, invest in positive aspects of society, and contribute towards development and investment.

Under Sharia law, there must be transparency within the contract terms, which must be formulated in a plain and intelligible language that the ordinary consumer can understand⁵⁸³ – for example, when a consumer enters into a contract with the trader to purchase 100 kilograms of sugar at an agreed price. This agreement may be considered void under Sharia law due to the uncertainty of the information necessary for the conclusion of the contract – e.g. a lack of specification as to the sugar type, as there are different types of sugar with the same name. In this case, the product characteristics must be stated and need to be available to the consumer before

⁵⁸¹ Kishwar Khan and Sarwat Aftab, 'Consumer Protection in Islam: The Case of Pakistan' (2002) (39) 4 Australian Economic Papers 488.

⁵⁸² According to the 2.282 of the *Qur'an*: 'O ye who believe! When ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing. Let a scribe write down faithfully as between the parties: let not the scribe refuse to write as Allah Has taught him, so let him write. Let him who incurs the liability dictate, but let him fear His Lord Allah, and not diminish aught of what he owes. If the party liable is mentally deficient, or weak, or unable Himself to dictate, let his guardian dictate faithfully, and get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her. The witnesses should not refuse when they are called on (for evidence). Disdain not to reduce to writing (your contract) for a future period, whether it be small or big: it is juster in the sight of Allah, more suitable as evidence, and more convenient to prevent doubts among yourselves but if it be a transaction which ye carry out on the spot among yourselves, there is no blame on you if ye reduce it not to writing. But take witness whenever ye make a commercial contract; and let neither scribe nor witness suffers harm. If ye do (such harm), it would be wickedness in you. So, fear Allah; For it is Good that teaches you. And Allah is well acquainted with all things. If ye are on a journey, and cannot find a scribe, a pledge with possession (may serve the purpose). And if one of you deposits a thing on trust with another, let the trustee (faithfully) discharge his trust, and let him Fear his Lord conceal not evidence; for whoever conceals it, his heart is tainted with sin. And Allah knoweth all that ye do.'

⁵⁸³ Muhammad Khan, 'The Legal Effects of Unfair Contracts of Sale in Islamic Law' (2018) 33(49) AL-AZVA 24.

concluding the contract. The uncertainty in the above example also includes the terms of the contract, such as the time frame within which the goods must be delivered, the permitted payment methods, and other related terms that must be presented to avoid uncertain elements in the contract.

It must be ensured that each of the contract parties has read and understood the terms of the contract and that their rights and obligations are guaranteed.⁵⁸⁴ Mutual consent must last until all terms of the contract are approved.⁵⁸⁵ Failure to meet one of these requirements may result in a voided contract.

4.4.2.3.3 Critique

As discussed above, Sharia law has effectively addressed unfair contract terms via a test of their legality. One of the advantages that can be emphasised here is that the Sharia law jurists provide detailed examples of applying the test elements to the terms of the contract. This test has three possible results: either the contract and term are valid, the entire contract is void, or only the term in question is void, and the rest of the contract is valid. However, possible concerns can be raised relating to the criteria by which the unfair term can be considered invalid and the contract valid or that the entire contract is invalid once the unfair term is present, as such criteria differ from one legal school to another in Sharia law.

For instance, the Hanafi and Shaafa'i schools believe that a term that allows a trader to stipulate an advantage over a consumer affects a contract's validity. In contrast, the Maliki and Hanbali schools argue that the effect is limited to the term only and does not affect the contract's validity. The importance of this matter is evident in the impact of the legality test result, as in the latter case, the contract is binding on the consumer, unlike in the first case. Nonetheless, any contract that includes a void clause under Sharia law will not bind the consumer in either case. Thus, the difference in the criteria of the above legal schools does not create obstacles if this test is applied in consumer contracts, which will not undermine its usefulness.

⁵⁸⁴ See Ousama Arabi, *Studies in Modern Islamic Law and Jurisprudence* (Brill 2001) 65.

⁵⁸⁵ This condition is stated in the Holy *Qur'an* when stipulating, 'you who believe! Eat not up your property among yourselves unjustly except it is being a trade amongst you, by mutual consent'; *The Qur'an* 4:29. In Sunnah, the prophet Mohamed stated, 'The value of an action depends on the intention behind it'. (Sahih Muslim, Book 33, Hadith 222). He adds, 'You must not act oppressively, and a man's property may not be taken except with his goodwill'. (Mishkat al-Masabih, Book 11, Hadith 181).

Furthermore, most online contracts are standard form contracts drafted by the seller. This type of contract is acceptable under Islamic law unless it includes arbitrary or unfair terms that harm the other party's interests.⁵⁸⁶ Due to the nature of online contracts, many technical methods have been employed that help to ensure that these aims are met. The online world has introduced new tools to enter into a contractual relationship, such as browse-wrap and click-wrap agreements.⁵⁸⁷

It is difficult to say that any of these methods are invalid under Islamic law, but click-wrap is the closest to the teachings of Sharia law. This is because it is more transparent and ensures that the requirements of Sharia law, such as an apparent acceptance of the contract, are met with regard to terms.⁵⁸⁸ However, there is still a gap in current applications of Sharia law in circumstances where there are no technical methods employed to ensure the aims of Sharia law are met.

Transparency in dealings is one of Islam's most significant ethical principles, and a transaction must also be free from ambiguity and uncertainty. However, this transparency requirement is not further defined in Sharia law, nor is there an explicit sanction set for the breach. Although this issue can confront consumers in both traditional and online contracts, it can be said that the magnitude of this issue may be greater in online contracts, as a lack of transparency is considered one of the most critical factors that can cause consumers to abandon their online purchases.⁵⁸⁹

The use of the above agreements has created specific issues for consumers. It is necessary to consider which transparency requirements would be needed to ensure that terms can be considered clear and whether, for example, the use of hyperlinks is a sufficiently prominent and transparent method to bring the terms to the attention of consumers, where contracts are formed via the Internet.

This risk increases through the use of browse-wrap contracts, where the consumer cannot express clearly whether they 'agree' to the terms before concluding the contract by, for example, clicking a button or ticking a box. Instead, a link to the terms is usually located at the bottom of the home page of a particular website (e.g.

⁵⁸⁶ (IIFA) Resolution No 132 (6/14) (16 January 2003) <<https://www.iifa-aifi.org/ar/2128.html>> accessed 20 June 2021.

⁵⁸⁷ See Chapter Two, sections 2.3.4.1 and 2.3.4.2 of this thesis, Browse-Wrap Contracts and Click-Wrap Contracts.

⁵⁸⁸ See Chapter Four, section 4.3.3.1 of this thesis, Offer and Acceptance.

⁵⁸⁹ See Chapter Two, section 2.3.4 of this thesis, Terms Risk.

YouTube, Amazon, eBay). Therefore, a critical question concerns the actions of a potential user who has no intention of entering into a legal relationship when carrying out a particular act, such as moving from the home page, and whether that act amounts to acceptance of the terms.

This may lead the trader to provide terms and conditions in ways that insufficient to attract the consumer's attention. Therefore, there are gaps in the current applications of Sharia law, open to interpretation by judges, that may result in decisions that are not in the consumer's interests because there is no legal definition for referencing or interpreting the drafting of terms in the interests of the consumer.

The above provisions deal with this consumer issue. The following subsection examines the second legal solution that can limit the factors influencing consumer trust in online contracts identified in **Chapter two** – namely, the consumer options for validly terminating a contract (*Khiyarat*) – which will be discussed in the following section. Since the current online consumer protection legislation in the KSA has uncertainty in many aspects related to the exercise of the right to withdraw, as mentioned in **Chapter Three**, perhaps the provisions of Sharia law might help develop Saudi law to cover such aspects.

4.4.2.4 Consumer Options for Validly Terminating a Contract (*Khiyarat*)

Linguistically, *Khiyarat* means choices or options. Legally speaking, it is defined as the right of contracting parties (trader or consumer) to withdraw unilaterally without reference to the other party.⁵⁹⁰

In Islamic law, both contracting parties are granted a mechanism by which their interests are met and protected from potential risk to their business – namely, *Khiyarat*.⁵⁹¹ Islamic law aims to help regulate fair trade, reduce deception and uncertainty in business transactions, and help reduce disputes between contracting

⁵⁹⁰ Mohammed Bashir Ribadu and Wan Nurhayati Wan Ab Rahman, 'E-Commerce Quality Evaluation Metrics: a Sharia Compliance Approach' (2017) 9(3-5) *Journal of Telecommunication, Electronic and Computer Engineering* 104.

⁵⁹¹ Mohd Murshidi Mohd Noor, Ishak Suliaman, Khadher Ahmad, Fauzi Deraman, Mustaffa Abdullah, Faisal Ahmad Shah, Mohd Yakub Zulkifli Mohd Yusoff, Monika Munirah Abd Razzak, Jilani Touhami Meftah, Sedek Ariffin, Ahmad K. Kasar and Mohd Roslan Mohd Nor, 'The Rights of *Khiyar* (Option) in the Issue of Consumerism in Malaysia' (2013) 13(2) *Middle-East Journal of Scientific Research* 155.

parties. When parties are given options to terminate a transaction, the adverse effects of incorrect decisions are reduced.⁵⁹²

In B2C online contracts, online traders must comply with the duty to allow consumers to exercise their legal right(s) if they so need. Sufficient information about consumer cancellation options must be provided to the consumer before establishing a contract, such as the time frame for exercising their rights and cases in which they can exercise them.⁵⁹³ Therefore, the trader and the consumer must fully ascertain the terms of the contract they have entered into.⁵⁹⁴ Hence, it can be argued that giving the consumer cancellation options (*Khiyarat*), as set out in classical jurisprudence books, may help protect consumers from hasty undertakings, such as those that may occur in online transactions due to the speed of transactions and their technological nature. Therefore, providing cancellation options to consumers provides a mechanism through which consumers gain additional time to consider their transactions.

However, numerous challenges confront consumers when they consider exercising Sharia law options. A contract's legality is one of the conditions that a consumer must meet to benefit from the provisions of Islamic law, such as from the described right. The contract must be free of prohibitions that would lead to voiding that contract under Sharia law, such as gambling (*maysir*) and unnecessary risk-taking (*gharar*), and concerning transactions based on unawareness (*jahl*), and trading in prohibited goods.⁵⁹⁵ Therefore, if a contract includes one of the prohibitions mentioned above, the consumer will not exercise this right.

In this regard, Sharia law jurists divide the available options into several categories. These divisions differ between schools of jurisprudence; the Hanafi school divides options into seventeen types, Maliki two, Shafi'i sixteen and Hanbali

⁵⁹² See Mohammed Obaidullah, 'Financial Engineering with Islamic Options' (1998) 6(1) Islamic Economic Studies 73.

⁵⁹³ Mohammed Bashir Ribadu and Wan Nurhayati Wan Ab. Rahman, 'Sharia Compliance Service Quality Metrics for E-Commerce: An Exploratory Analysis'. (Proceedings of the 6th International Conference on Computing and Informatics, Malaysia, 2017) 338, <http://icoci.cms.net.my/PROCEEDINGS/2017/Pdf_Version_Chap06e/PID147-332-340e.pdf> accessed 20 June 2021.

⁵⁹⁴ Mohammed Bashir Ribadu and Wan Nurhayati Wan Ab Rahman, 'E-Commerce Quality Evaluation Metrics: a Sharia Compliance Approach' (2017) 9(3-5) Journal of Telecommunication, Electronic and Computer Engineering 104.

⁵⁹⁵ Rima Turk Ariss, 'Competitive Conditions in Islamic and Conventional Banking: A Global Perspective' (2010) 19(3) Review of Financial Economics 101.

eighteen.⁵⁹⁶ Although it is legal to grant cancellation options to parties in an Islamic contract,⁵⁹⁷ it is necessary to discuss the extent to which they can be practised in online transactions. Four categories of option have been identified that are relevant in ensuring consumer protection in Internet contracts – namely, *khiyar aib* (defective option), *khiyar ru'yah* (the option of inspection), *khiyar majlis* (the option of contractual session) and *khiyar shart* (the option of stipulation).⁵⁹⁸

Unlike the previous sections, not a single section will be devoted to providing critiques on applying the right to terminate a contract in an Internet environment, as such a right has more than one option under Sharia law. Instead, each of these types will be discussed in a separate subsection to assess their effectiveness and to provide a critique, if this is required.

4.4.2.4.1 Khiyar Aib (Defective Option)

Islam promotes lawful transactions and strictly prohibits unlawful actions.⁵⁹⁹ Concealing any defects of a good that may result in reduced value in a way that causes harm to a consumer is one of the practices forbidden by Sharia law. Therefore, a consumer is given legal recourse to address this issue. *Khiyar Aib* refers to a consumer's right to revoke or maintain a transaction when they discover that a defect in a good or service reduces its value or renders it invalid. This also applies in the case of delivery failure.⁶⁰⁰

Any defect in the quality and the attributes of a product or service provided to a consumer which leads to a diminution of the object or its value, or causes difficulties in its proper use, is a defect that gives the consumer the right to use the defective

⁵⁹⁶ Mohd Murshidi Mohd Noor, Ishak Suliaman, Khadher Ahmad, Fauzi Deraman, Mustaffa Abdullah, Faisal Ahmad Shah, Mohd Yakub Zulkifli Mohd Yusoff, Monika Munirah Abd Razzak, Jilani Touhami Meftah, Sedek Ariffin, Ahmad K. Kasar and Mohd Roslan Mohd Nor, 'The Rights of Khiyar (Option) in the Issue of Consumerism in Malaysia' (2013) 13(2) Middle-East Journal of Scientific Research 155.

⁵⁹⁷ Nicholas Foster, *Islamic Commercial Law (II)* (Indret Barcelona 2007) 11; Mohammed Obaidullah, 'Islamic Risk Management: Towards Greater Ethics and Efficiency' (2002) 3(4) International Journal of Islamic Financial Services 1.

⁵⁹⁸ Mohammed Bashir Ribadu and Wan Nurhayati Wan Ab. Rahman, 'Sharia Compliance Service Quality Metrics for E-Commerce: An Exploratory Analysis' (Proceedings of the 6th International Conference on Computing and Informatics, Malaysia, 2017) 338 <http://icoci.cms.net.my/PROCEEDINGS/2017/Pdf_Version_Chap06e/PID147-332-340e.pdf> accessed 20 June 2021.

⁵⁹⁹ *The Qur'an*, 4:29.

⁶⁰⁰ Wahbah Al-Zuhayli, *Al Fiqh Al Islami Wa Adillatuhu* (Dar Al Fikr 1984) 4/3116.

option.⁶⁰¹ In such cases, the consumer has the right to return the item and obtain a full refund from the trader or keep the goods and receive compensation for the defect.⁶⁰²

The Prophet Muhammad referred to this right as he said:⁶⁰³

'A Muslim is the brother of a fellow-Muslim. It is not lawful for a Muslim to sell his fellow-Muslim a deficient item unless he shows him this defect; is not lawful for a person to sell a commodity in which he knows that there is a defect, unless he makes it known; the seller and the buyer have the right to retain or return goods as long as they have not parted or until they part; if both the parties spoke the truth and described the defects and qualities (of the goods), then they would be blessed in their transaction, and if they told lies or hid something, then the blessings of their transaction would be lost.'⁶⁰⁴

For the consumer to exercise the option of defect, three conditions must be met:⁶⁰⁵

1. The defect must already exist at the time of the contract.
2. This defect must cause a decrease in the value of the good.
3. The consumer should not be aware of the defect before receiving the item.⁶⁰⁶

Therefore, if the trader discloses the defect in the item before selling it, the contract is considered valid.⁶⁰⁷

In this regard, consumers may receive damaged goods. It is noted here that the goods may not have been damaged when the trader sent them, but the damage may have occurred while dispatching them to the consumer. Goods may be damaged during shipment due to different reasons, either because of a lack of proper packaging to protect the goods from damage or through damage occurring while handling during the transfer process.

Under Sharia law, if the goods sold are damaged before the consumer takes possession of them, three rules apply:

⁶⁰¹ Nabil Saleh, 'Remedies for Breach of Contract under Islamic and Arab Laws' (1989) 4 Arab Law Quarterly 269.

⁶⁰² Mohammed Bashir Ribadu and Wan Nurhayati Wan Ab Rahman, 'E-Commerce Quality Evaluation Metrics: a Sharia Compliance Approach' (2017) 9(3-5) Journal of Telecommunication, Electronic and Computer Engineering 104.

⁶⁰³ Mahmoud Fayyad, 'Misleading Advertising Practices in Consumer Transactions: Can Arab Lawmakers Gain Advantage from European Insight?' (2012) 26(3) Arab Law Quarterly Journal 287.

⁶⁰⁴ Sahih Bukhari, Book 3, Hadith 20.

⁶⁰⁵ The Ottoman Courts Manual 1876, art 513. See <https://www.iiu.edu.my/deed/lawbase/al_majalle/index.html> accessed 26 September 2021.

⁶⁰⁶ If the consumer discovers any defect or fraud in the goods after receiving them and keeps using them, they cannot exercise the right to terminate the contract in the upcoming days.

⁶⁰⁷ Sahih Bukhari, Book 31, Hadith 292.

1. If the goods are damaged by unforeseen circumstances (e.g. a plague) or by own action of the sold goods, such as where an animal eats something that harms it and it dies, or by the seller's act, the contract is void.⁶⁰⁸
2. If the buyer's act damages the goods, the sale shall not be void, and the buyer shall bear the price.⁶⁰⁹
3. If the goods are damaged by anyone else other than the above, such as the carrier, the buyer has the option to either terminate or uphold the contract. If the buyer terminates the contract, the seller bears the risk of the loss of the goods. If the buyer keeps the goods, they must pay the price of the goods to the seller and seek compensation from the carrier.⁶¹⁰

Consumer rights and interests are genuinely preserved and protected under the practical application of this doctrine. This right may play an active role not only in protecting consumers from being deceived by defective goods and services;⁶¹¹ it can also be helpful to minimise the challenges that consumers may face in online shopping due to their inability to inspect a product before purchasing it or the inability to interact directly with the provider of a product or service.

Therefore, having this right when buying a particular product or service online is crucial to motivating consumers to conclude an online transaction. This has led several studies to suggest that *Khiyar Aib* should be included in the rights that online commerce platforms provide to their customers, to address emerging issues in the online environment and ensure online consumer interests are protected in accordance with Sharia law.⁶¹²

Although the defective option provides consumer protection in online B2C contracts, its enforcement may not be possible in practice. In order for a consumer to use this right, the defect must be substantial, pre-existing and unknown to the consumer. Proving this may not be possible in some cases. In addition, there are two

⁶⁰⁸ Mansour Albohuti, *Alrooth Al Murbee* (Dar Al Kotob Al Elmiah 2002) 208.

⁶⁰⁹ Soliman Althonayan, *Aljwaa'h Wa'hkamha* (Dar Alam Al Kotob 1992) 71.

⁶¹⁰ Mansour Albohuti, *Alrooth Al Murbee* (Dar Al Kotob Al Elmiah 2002) 208.

⁶¹¹ Mohd Billah, 'Caveat Emptor vs Khiyar al-Ayb' (1997) *The American Journal of Islamic Social Sciences* 208.

⁶¹² Mohammed Bashir Ribadu and Wan Nurhayati Wan Ab Rahman, 'E-Commerce Quality Evaluation Metrics: a Sharia Compliance Approach' (2017) 9(3-5) *Journal of Telecommunication, Electronic and Computer Engineering* 104.

ways in which a consumer can apply *Khiyar Aib* – either by terminating the contract or by requesting a refund. However, there is difficulty applying these rights in some online contracts, such as those involving the purchase of digital content. Instead, there is a need to provide rights appropriate to the nature of intangible products, such as rights to ‘replace’ digital content.

Furthermore, the application of the defect option is solely limited to the contracting parties. Therefore, when there is a third party in the contract, they cannot benefit from this option. This may cause harm to the consumer in some instances – for example, when the defect in a good results from neglect by the producer and not the supplier. Consumers cannot pursue legal action as they do not have a contract with the manufacturer.⁶¹³

Furthermore, under Sharia law, traders may impose a term that exempts their contractual liability if there are hidden defects in the goods. If a trader says to a consumer, ‘I would sell you this good, and I am innocent of every defect in it, and then when you find it defective, you do not have the right to return it and ask for a refund’, the defect option loses its effectiveness. Some schools of jurisprudence go further and also exempt the trader from liability in cases where they are not aware of the defect during the contract.⁶¹⁴ According to the Code of Legal Judgements:

‘If the vendor sells property subject to the condition that he shall be free from any claim on account of any defect, the purchaser has no option on account of the defect found therein.’⁶¹⁵

Thus, there is uncertainty about the effectiveness of this option for consumer protection in an online environment.

4.4.2.4.2 *Khiyar Ru’yah* (the Option of Inspection)

This option refers to a consumer’s right to view and inspect a good described at the time of negotiation, which is not shown to consumers at the conclusion of the contract. The right then allows consumers to either uphold or terminate the contract.⁶¹⁶ This

⁶¹³ Parviz Bagheri and Kamal Hassan, ‘The Application of the *Khiyar al-‘Aib* (Option of Defect) Principle in On-line Contracts and Consumer Rights’ (2012) 33(3) *European Journal of Law and Economics* 565.

⁶¹⁴ Mohamed Naguib Awadin Almaqrabi, *Nathriat Al Aqd Fi Al Fiqh Al Islami* (Dar Al-Nahda Al-Arabiya 2003) 129.

⁶¹⁵ The Ottoman Courts Manual 1876, art 342. See <https://www.iiu.edu.my/deed/lawbase/al_majalle/index.html> accessed 26 September 2021.

⁶¹⁶ Zainuddin Ibn Najim, *Al Bahar Al Raieeq* (Dar Al Kootob Al Elmiah 1997) 5/120.

right is granted to the consumer under most schools of Sharia law⁶¹⁷ and is therefore considered an implied condition of the Islamic contract, even if not drafted in its terms. The inspection is fulfilled when the consumer can inspect the purchased item using one or more of their senses.

In order for a consumer to exercise *Khiyar ru'yah*, two conditions must be met:

1. The product description must be provided during the conclusion of a contract.
2. The consumer must not be able to inspect the item before it is received.

Meanwhile, the following scenarios take away the consumer's right to *khiyar ru'yah*: a) the consumer's examination of the goods after they are received does not indicate a lack of interest in them; b) the consumer disposes of the goods after receiving them, such as by sale or consumption; c) when the consumer causes any damage to the goods after delivery and is unable to return them in their original condition; d) the death of the consumer, since the right of this option concerns themselves, not their inheritance.⁶¹⁸

Furthermore, there are multiple viewpoints in Sharia law regarding the permissible duration for exercising the inspection option.⁶¹⁹ One viewpoint is that the consumer has the right to exercise this option within a reasonable time frame, and this time frame is supposed to be short. However, its exact duration has not been specified; nor have the criteria by which to establish whether or not the time frame is reasonable been clarified.

Another viewpoint is that there is no specific time frame for exercising this option. Thus, a consumer may request the cancellation of a contract at any time based on the right of inspection, provided that there is no evidence indicating that the consumer has approved the good, the good has been damaged or the consumer has disposed of it. This time frame seems to be more flexible than the one provided by the previous viewpoint, as the consumer can benefit from this option for the longest

⁶¹⁷ However, the Shafi'i school does not agree because, in that kind of transaction, there exists *gharar* of unknown risks. See Mohamed Khatib Sherbini, *Mughni Al Muhtaj* (Mustafa Al-Babi Al-Halabi 1958) 2/18.

⁶¹⁸ Ahmad Hidayat Buang, *Studies in the Islamic Law of Contracts* (International Law Book Services 2000) 186.

⁶¹⁹ Awang Hamat, Mohd Afandi, and Abd Halim Syakirah, 'Principle of *Khiyar Al-ru'yah* and its Application According to Islamic law As Proposed by Muslim Jurists' (5th International Conference on Islamic Jurisprudence in the 21st century, Kuala Lumpur, 2014) 14 <http://irep.iium.edu.my/73380/7/73380_Principle%20of%20Khiyar%20al-Ru%E2%80%99yah_complete.pdf> accessed 20 June 2021.

possible duration. However, this time frame may harm the interests of the trader, especially if the consumer wishes to exercise this option a long time after the conclusion of the contract.

The last viewpoint is that a consumer may cancel a contract as long as the trader and the consumer met face to face in the contract place. This means that if the contracting parties (or one of them) leave the place of the contract, the time frame of exercising such an option will expire. Although this viewpoint guarantees transparency and clarity of the time frame for exercising this option and protects the trader's interest, this period may, however, undermine the benefit of the option. There are many goods that a consumer cannot adequately assess at the time of concluding the contract, and the consumer may need additional time to do so. In addition, this option cannot be applied to online contracts where the consumer and the trader neither meet face to face nor are present simultaneously at the time of concluding the contract. Hence, the consumer will not benefit from exercising this option.

Khiyar ru'yah is one of the mechanisms that can help build consumer confidence in online shopping. Because goods sold online are sold via a default medium, *khiyar ru'yah* requires that the consumer inspect the item and verify its specifications. Therefore, upon receipt, the consumer can return the item to the online trader and request a full refund if they are dissatisfied with the physical or functional description of the goods. This not only increases service quality and customer satisfaction but also enhances consumer protection in online contracts.⁶²⁰ If the product matches the description, the legal schools of Sharia law differ in two respects: the Hanafi school argues that the consumer chooses between maintaining or terminating the contract after inspecting the product, whether they find it corresponds or is contrary to the description provided by the trader.⁶²¹ The Maliki and Hanbali schools see that the contract binds the consumer if the good matches the description.⁶²²

Despite the multiple benefits of the inspection option in addressing the factors influencing consumer trust to consumer protection in B2C online contracts, such as the information risks mentioned in **Chapter Two**, a consumer may be deprived of this

⁶²⁰ Mohammed Bashir Ribadu and Wan Nurhayati Wan Ab Rahman, 'E-Commerce Quality Evaluation Metrics: a Sharia Compliance Approach' (2017) 9(3-5) Journal of Telecommunication, Electronic and Computer Engineering 104.

⁶²¹ Muhammad Ibn al-Humam, *Fath al-Qadir* (Dar Al-Kutub Al Elmia 1995) 5/141.

⁶²² Abdullah Ibn Qudamah, *Al Mughni* (Dar al-Alam al-Kitab 1997) 3/584.

option if they have seen the goods during or before the conclusion of the contract and their characteristics have not changed. In other words, when a consumer purchases a good for the first time, they are entitled to use this right, but when they purchase the same good in the future, this is no longer the case.⁶²³ Nevertheless, they can then use the *Khiyar Aib* right if the new batch of the same goods is defective. In addition, while this right may protect the consumer's interests, the right cannot exist concerning services where they cannot be inspected even after purchasing. Thus, the consumer may not be able to use this right in many contracts concluded online.

Sharia law jurists do not explain whether the consumer could exercise this option if the contract included an intangible good such as digital content, given that this type of product did not exist in the past. It can be said that provisions relating to the exercising of this right in tangible goods can be transferred to intangible goods such as digital content. There is no evidence from Sharia law classic books that prevents a consumer from benefiting from this option to purchase an intangible good. However, the question then becomes: To what extent can the consumer benefit from this option in intangible goods transactions?

It seems that many issues may arise when applying these rules to intangible goods, which makes their application not possible. Before a contract is entered into, the consumer may be permitted to receive a free trial of the software for a limited period, which leads to a type of inspection. However, there may be differences between the trial version and the real version of the digital content regarding restrictions placed on the trial version, such as its limited functionality. Thus, the trial version may not give the consumer a clear understanding of the digital content. Nonetheless, it is not sufficient that the sold digital content matches the trial version if the digital content does not match any description given by the trader to the consumer.

Furthermore, there are some intangible goods that a consumer cannot inspect within a specific period. Instead, the ordinary consumer may need to spend an extended time thoroughly evaluating the digital content and ensuring that it matches the trader's description. In this case, based on the viewpoint of the Hanbali school, the

⁶²³ Haitham Al-Masarweh and Ahmad Al-Majali, 'Heimaiat Almustahlik Fi Al Oqod Al Elctroniah' (2015) 4(2) Journal of Jazan University 190.

consumer cannot benefit from the right of inspection due to the time frame lapsing.⁶²⁴ Alternatively, the trader may take advantage of this time frame to the detriment of the consumer, as the length of time that the consumer may spend discovering digital content could be considered a sign of consumer interest in the good, which leads to consumers losing this option from the viewpoint of all legal schools that allow this option.⁶²⁵ Therefore, there is a need for legal consideration by Sharia law scholars to review this option in the context of digital content.

Thus, there is uncertainty about the effectiveness of this option for consumer protection in an online environment.

4.4.2.4.3 *Khiyar Majlis* (the Option of Contractual Session)

Khiyar majlis refers to the right of the contracting parties (trader and consumer) to uphold or terminate a contract as long as they remain in the contractual session.⁶²⁶

The term 'contractual session' refers to where the trader and the consumer meet to conclude the contract or commercial transaction.⁶²⁷ In online shopping, as mentioned previously, some believe that a 'meeting session' begins when a trader offers a good or service through their website.⁶²⁸ Al-Zahrani holds a contrary view, stating that a meeting session does not start until the consumer shows their interest in trading by selecting a good or service and then clicking on it to follow up the purchase process.⁶²⁹

Thus, an online message presented to the consumer to confirm their desire to complete the purchase is considered an offer by the trader. Clicking on this message to complete the purchase and payment process is considered acceptance by the consumer, at which time the contract is concluded.⁶³⁰

⁶²⁴ Awang Hamat, Mohd Afandi and Abd Halim Syakirah, 'Principle of *Khiyar Al-ru'yah* and its Application According to Islamic law As Proposed by Muslim Jurists' (5th International Conference on Islamic Jurisprudence in the 21st century, Kuala Lumpur, 2014)14 <http://irep.iium.edu.my/73380/7/73380_Principle%20of%20Khiyar%20al-Ru%E2%80%99yah_complete.pdf> accessed 20 June 2021.

⁶²⁵ Ibid.

⁶²⁶ Ali Abu Sirhan and Ahmed Abou Yahya, 'Mashroeeiat Khair El Majlis Fi Al Figh Al Islami' (2008) *Sharia and Law Journal* 175.

⁶²⁷ Ibid.

⁶²⁸ Khalid Alajluni, *Al-ta'aqud 'an tariq al-Internet* (Dar al-Thaqafah 2000) 75.

⁶²⁹ This opinion seems more logical, as discussed in Chapter Four, section 4.3.3.1 of this thesis, Offer and Acceptance.

⁶³⁰ Adnan Al-Zahrani, *Ahkam Al Tijarah Al Electroniah Fi Al Figh Al Islami* (Dar Al-Qalam 2013) 237-240.

Consumers and traders are not allowed to use this option in three cases:

1. When there is mutual approval and confirmation of the contract by the contracting parties.
2. When two contracting parties leave the contractual session without any reservation.
3. The death of one of the contracting parties.

Although the contracting parties benefit from this option, the consumer may not benefit much from this right in online transactions due to the speed of the online purchasing process, which may not provide them with sufficient time to think and withdraw while the contractual session takes place. Thus, there is uncertainty about the effectiveness of this option for consumer protection in an online environment.

4.4.2.4.4 *Khiyarul Shart* (the Option of Stipulation)

Khiyarul shart is an option that gives the right to one or both of the contracting parties to withdraw from the contract of sale for any reason within a specified period. This option is an appropriate mechanism by which the contract parties can re-evaluate the benefits and costs involved in a given contract, when they have concluded it in the spur of the moment and require a cooling-off period.

There is no doubt that it is essential to allow online consumers to review the goods purchased within a specific time frame. If online consumers feel that they no longer need the goods they have bought, they can get a full refund by committing to send the goods back to the online trader.

The duration of this must be set within the terms of the contract. Therefore, not specifying the time during which this right may be practised leads to an inability of the contracting parties to make any claim after the contract's conclusion. However, according to the Hanafi and Shafi'i schools, this right lasts only three days after the conclusion of the contract.⁶³¹ The stipulated duration must start concurrently with the contract's conclusion. This time frame does not provide adequate protection for the online consumer, as the purchase process in an online environment may take more time than in a traditional environment. It can take longer for an online consumer to receive an item and assess its efficacy and cost, as well as its benefits. On the other hand, according to the Maliki and Hanbali schools,⁶³² the consumer may exercise this

⁶³¹ Mohammed Obaidullah, 'Financial Engineering with Islamic Options' (1998) 6(1) Islamic Economic Studies 77.

⁶³² Ibid.

option within any period agreed upon by the contracting parties, which is more realistic in online transactions, as long as the parties agree that the right starts from the moment the consumer receives the good.

The following scenarios meet the option of stipulation:

1. If the contract is completed by the party stipulating it by exercising their right and disposing of goods.
2. If the *Khiyar shart* period lapses without the consumer indicating that they are not interested in the good. In this case, the contract is concluded.
3. When contracting parties cause any destruction to the goods within the stipulated time frame.
4. The death of a contractor stipulates the condition.

In contrast to the options mentioned above, it can be said that *Khiyarul Shart* is the most suitable for the Internet environment and the closest in its application to the right of withdrawal provided by both Saudi and English law.

4.5 Conclusion

This chapter has shown there is clear evidence from the *Qur'an* and various other Sharia law sources that the concept of an online contract is not alien to Islamic law. Sharia law could, therefore, address various issues arising in online contracting. The first step, however, will be for online contracts to be considered valid under Sharia law, which means that the elements of the contract formation must be fulfilled. Generally, most scholars of Sharia law agree that the requirements of a valid contract consist of the formation (offer, acceptance), subject matter and parties. Thus, if these requirements are met, the contract is valid under Sharia law.

This chapter has examined the approach of Sharia law to tackling issues that may arise in the field of consumer protection – namely, a need for the provision of mandatory consumer information and prevention of unfair contract terms and unfair commercial practices, and a need for the provision of specific consumer rights. As indicated in this chapter, although Sharia law is quite general in regulating contract law and its examples are often outdated in the modern world of commerce, it may still set some consumer protection rules.

However, in modern times, many emerging issues that have affected consumer protection have been found due to the evolution of technology. There are insufficient solutions provided by Sharia law for these recent issues, but Sharia law could still serve as a guideline for the KSA government in the formulation of new laws or the amendment of current regulations around consumer protection, if it were reviewed and updated to keep pace with current developments, as most citizens living in the KSA are Muslim and abide by Sharia law principles. Unfortunately, neglect of Sharia law by the governments of Muslim countries – especially of legal provisions that have organised commercial transactions within primary sources for several decades – has led governments to not take full advantage of those divine provisions that are accepted by the majority of the KSA population.

Hence, this thesis examines to what extent it can be said that the rules of Sharia law and its current applications in Islamic countries are sufficient to solve the risks faced by online consumers. This question may only be answered when the KSA law is examined in the light of Sharia law application and identified consumer protection issues. It will, therefore, be revisited in **Chapter Six** of this thesis. Sharia law is timeless, and thus its principles and rules are general. To make it effective, the KSA would need to add more detailed rules that comply with these general principles and embody the spirit of Sharia law, but that provide more guidance to commercial parties, eliminating legal uncertainty and allowing for efficient enforcement.

Before applying Sharia law in the KSA to protect consumers concluding online transactions, the next chapter will examine another model on which the government of the KSA can rely on to achieve adequate enforcement for consumer protection regulations in the KSA. Namely, it will examine the English consumer protection model, asking whether it could (also) serve as guidance on how to tackle consumer-related problems arising from the absence of sufficient consumer protection laws in the KSA. It seeks to examine whether relevant legislation provides explicit provisions in terms of the legal solutions that can limit the factors influencing consumer trust in online contracts. They are: providing mandatory information, tackling unfair contract terms and unfair commercial practices, and granting the right of withdrawal, and if so, how it does this. It seeks to find out whether or not the current situation of English law and its implementation can provide sufficient solutions to the current problems that consumers face in an online environment. It also examines to what extent English law

could serve as a guideline for the KSA government in formulating new laws or the amendment of current regulations around consumer protection.

Chapter Five: The English Model on Consumer Protection: The Panoply of Texts

5.1 Introduction

This chapter concentrates on the English model – the second one that is examined as to whether it could be relied upon to improve the KSA’s current consumer protection regulations. As mentioned in **Chapter One**, in comparison to the KSA, English law has a long-standing consumer protection practice. In addition, trust was one of the critical factors slowing down the growth of online shopping in the UK. However, the UK consumer was recently identified as the most confident online shoppers in the EU.⁶³³ This was achieved by adopting regulations that help enhance online trust and empower consumers. Given that a lack of ‘trust’ is currently considered the main obstacle to adopting online shopping in the KSA, English law instruments could be an appropriate and effective model to inspire the development of a consumer protection regulation system in the KSA and thus increase consumer trust in online shopping.

As an EU member state, the UK was required to implement various EU directives into its national laws. The role of the English legislator, at least in the early stages, was limited to replicating EU directives⁶³⁴ and incorporating them into English law unchanged.⁶³⁵ This was partially due to concerns that if the directives were not replicated unchanged, they could be misinterpreted.⁶³⁶ Failure to properly implement

⁶³³ According to data published by the European Commission, ‘UK consumers are the most confident online shoppers in the EU where nearly 87.6% of UK shoppers bought domestic goods or services online, UK consumers are also amongst the most aware of EU consumers’ rights and one of the savviest about their EU consumer rights, UK online shoppers were also exposed to the least amount of illicit commercial practices’. Also, ‘The average level of UK online consumers who trust that their rights as consumers are protected in online environment is 85.3%’. See European Commission, *Consumer Conditions Scoreboard*, (Justice and Consumers Directorate General 2017) <https://ec.europa.eu/info/sites/default/files/consumer-conditions-scoreboard-2017-edition_en.pdf> accessed 14 June 2021; Anja Rösner, Justus Haucap and Heimeshoff Ulrich, ‘The Impact of Consumer Protection in the Digital Age: Evidence from the European Union’ (2020) *International Journal of Industrial Organization* 1.

⁶³⁴ Such as The Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs) is an implementation of the EU (then EEC) Unfair Consumer Contract Terms Directive 93/13/EEC into domestic law.

⁶³⁵ Ewan McKendrick, *Contract Law* (Palgrave Law 2015) 309.

⁶³⁶ Hugh Beale, ‘Unfair Terms in Contracts: Proposals for Reform in the UK’ (2004) 27(3) *Journal of Consumer Policy* 300.

EU laws could make national authorities accountable, as the Commission would launch a formal infringement procedure against the country concerned.⁶³⁷

In this regard, it should be noted that EU consumer directives have no direct effect on consumers.⁶³⁸ The member states must implement the provisions of any directive in their local laws, taking into account the interpretation and implementation of these directives in line with their respective legislative requirements.⁶³⁹ Accordingly, faithful national implementation of legal protection will be what the consumer will rely on in member states.⁶⁴⁰

Following the decision of the UK to leave the EU (Brexit), new EU directives and decisions of the EU's Court of Justice will not be binding in English law.⁶⁴¹ Instead, the Westminster parliament will be free to keep or amend its existing consumer rules of European origin. There is a possibility that there will be a significant regulatory divergence between the EU and the UK.⁶⁴² However, it can be said that it would be challenging for the UK authorities to abandon all consumer rules of European origin from all their laws and regulations, which explicitly seek to include the UK directives within its remit.

This chapter starts with an illustration of the English consumer protection regime in online contracts, discussing the stages of enacting UK consumer protection laws and why the UK government has done so. It then critically analyses to what extent it can be said that the current regime would provide comprehensive protection for the UK consumer in online contracts.

⁶³⁷ For example, in *Case 128/78 Commission v United Kingdom* ECLI:EU:C:1979:32, the UK failed to implement art 21 of the Tachograph Regulation 1463/70. See also C-383/92 *EC Commission v UK* ECLI:EU:C:1994:234.

⁶³⁸ Paulina Krukowska and Łukasz Bolesta, 'Direct and Indirect Effect in EU Consumer Law in the Light of "Faccini Dori", "Dillenkofer" and the Other EU Cases' (2014) *Studenckie Zeszyty Naukowe* 21.

⁶³⁹ Adam Jan Cygan, *The United Kingdom Parliament and European Union Legislation* (Kluwer Law International 1998) 7; Christian Twigg-Flesner, *The Europeanisation of Contract Law* (Routledge 2013) 44 and 126.

⁶⁴⁰ Reiner Schulze, Hans Schulte-Nolke and Jackie Jones, *A Casebook on European Consumer Law* (Hart Publishing 2002) 98.

⁶⁴¹ Paula Giliker, 'Regulating Contracts for the Supply of Digital Content: The EU and UK Response' (in Tatiana-Eleni Synodinou, Philippe Jougoux, Christiana Markou and Thalia Prastitou (eds), *EU Internet Law - Regulation and Enforcement* (Springer 2017) 120.

⁶⁴² Cliona Kelly, 'Consumer Reform in Ireland and the UK: Regulatory Divergence before, after and without Brexit' (2018) 47(1) *Common Law World Review* 53.

One of the questions addressed in this chapter is: Who is the consumer protected by English law? It also examines which notion of 'trader' English law uses. Activity in the e-commerce sector has blurred the distinction between professional and amateur traders in commercial transactions. There is a difference between a hobbyist who uses the Internet to offer unwanted items for sale and a professional who actively buys goods for resale. One of the most controversial questions relates to determining who falls under the definition of a trader in an online environment and when an amateur seller can be considered a professional trader under consumer protection laws.

Furthermore, it can be said that the efficiency of the English consumer protection regime relies on whether or not they deal adequately with issues that concern consumers intending to conclude online contracts. To assess this, the following sections will examine whether and how these regulations provide explicit provisions in terms of the issues discussed under this study. This chapter will consider the protection provided by the English model in online consumer contracts and how it deals with the factors influencing consumer trust in B2C online contracts. It will critically analyse the protection provided by the English model in the main instruments of consumer protection that are determined under this study. This analysis will include a discussion of the English consumer laws and how they relate to the provision of mandatory information, tackle unfair contract terms and unfair commercial practices, and provide consumers with the right of withdrawal. This chapter will investigate whether English consumer protection laws fully address the problems that arise in online contractual cases to protect consumers.

5.2 The English Regime on Online Consumer Protection

The emergence of the Internet and e-commerce in the 1990s undoubtedly promised many advantages. New electronic developments, including the Internet, have contributed to the establishment of virtual platforms through which sales contracts and the supply of goods and services can be concluded faster worldwide.⁶⁴³ Unlike other developed countries, such as the US, Canada, Australia, and the major European

⁶⁴³ Yaman Akdeniz, Clive Walker, and David Wall, *The Internet Law and Society* (Pearson Education 2000) 3.

economies, the UK lagged behind in e-commerce performance.⁶⁴⁴ There were significant challenges for the trade industry and the government in responding to the e-commerce sector in the 20th century, such as the trust factor. Lack of trust was an evident and significant barrier to e-commerce for both consumers and businesses. Other challenges included: fear of fraud, privacy concerns, anxiety about content, doubt about legal liability and worry about how redress can be obtained when things go wrong.⁶⁴⁵ The UK government needed to take a wide range of steps to promote and develop e-commerce.⁶⁴⁶

In the late 1990s, the UK government published several broad policy statements aimed at helping the development and growth of e-commerce. For instance, the UK government published a white paper entitled 'Our Competitive Future: Building the Knowledge-Driven Economy'.⁶⁴⁷ The essence of this paper was to set goals to make the UK the 'best place in the world' for e-commerce, and it proposed several policies to achieve this goal. One of the main objectives was to improve the infrastructure to compete in the digital world by introducing an Electronic Commerce legal framework, to ensure parity between online and traditional business methods.⁶⁴⁸ The Cabinet Office also supported this recommendation, which proposed that the government encourage the EU to achieve a co-regulatory approach to e-commerce enforcement and redress.⁶⁴⁹

The following subsections provide a brief overview of online consumer-related legislation in England. However, regarding the issues identified under this study, it can be said that the efficiency of these laws and legislations to protect consumers relies on whether or not they deal adequately with issues that concern consumers intending to conclude online contracts. To assess this, this chapter will examine whether and

⁶⁴⁴ Cabinet Office, *e-commerce@its.best.uk* (The Performance and Innovation Unit Report, 1999) <<https://ntouk.files.wordpress.com/2015/06/ecommerce-at-its-best-1999-body.pdf>> accessed 22 June 2021.

⁶⁴⁵ Ibid.

⁶⁴⁶ Ibid.

⁶⁴⁷ Arthur Pryor, 'Our Competitive Future: Building the Knowledge-Driven Economy' (1999) 15(2) *Computer Law & Security Review* 115 and 116.

⁶⁴⁸ Ibid 115.

⁶⁴⁹ Cabinet Office, *e-commerce@its.best.uk* (The Performance and Innovation Unit Report, 1999) <<https://ntouk.files.wordpress.com/2015/06/ecommerce-at-its-best-1999-body.pdf>> accessed 22 June 2021.

how these pieces of legislation provide explicit provisions in terms of the issues discussed under this study.⁶⁵⁰

5.2.1 Electronic Commerce Regulations (ECRs) 2002

The establishment of an internal market framework through the EU's Electronic Commerce Directive (EC Directive)⁶⁵¹ was the first stage in the harmonisation of e-commerce and consumer protection in Europe,⁶⁵² which was implemented in the UK by the ECRs 2002. The Electronic Commerce Directive (EC Directive) established legal provisions that must be complied with by e-retailers and suppliers when dealing with e-consumers in the 27 member countries of the EU. It aims to boost better use of e-commerce and promote consumer trust in electronic methods such as the Internet as a shopping tool by clearly determining businesses' and consumers' rights and obligations.

The EC Directive/ECRs 2002 apply to commercial electronic activities, including online commerce, whether the goods or services are delivered online.⁶⁵³ Therefore, the regulations apply to the following practices:

- Advertising goods and services online.
- Selling goods and services to businesses or consumers online.
- Transmitting or storing electronic content or provide access to a communications network.

Since certain of these practices fall within the scope of this study, these Regulations may provide adequate provisions to address relevant issues, which will be examined through this chapter.

⁶⁵⁰ See Chapter Five, section 5.4 of this thesis, Main Instruments of Consumer Protection.

⁶⁵¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, particularly electronic commerce, in the Internal Market ('Directive on electronic commerce').

⁶⁵² Simmons and Simmons Communication Practice, *E-commerce Law: Doing Business Online* (Palladian Law Publishing 2001) 63 and 64.

⁶⁵³ Department of Trade and Industry, *A Guide for Business to the Electronic Commerce (EC) Regulations 2002 (SI 2002 No 2013)* (July 2002) para 1.3 <<https://webarchive.nationalarchives.gov.uk/20130103013730/http://www.bis.gov.uk/files/file14635.pdf>> accessed 22 June 2021.

5.2.2 Consumer Protection from Unfair Trading Regulations (CPRs) 2008

The Unfair Commercial Practices Directive (UCPD) 2005⁶⁵⁴ aimed to integrate the European market, ⁶⁵⁵ promote market competition, provide greater transparency and create the right environment for consumers to make rational decisions in the marketplace.⁶⁵⁶ It aims to protect consumers from the influence of unfair commercial practices that may contribute to poor decision-making. It also sets out to prevent fraud from eliminating unfair commercial practices through misleading actions and/or omissions, aggressive practices and other unfair commercial behaviour. These regulations are supposed to protect consumers from unfair commercial practices, such as those that occur in an Internet environment, which this chapter aims to examine.

The implementation of the UCPD in English law resulted in the introduction of the CPRs 2008, which signified the first simplification of a complex legal landscape and replaced several old measures.⁶⁵⁷

This directive is a 'maximum' or full harmonisation directive. Prior to this directive, there was a requirement that, when implementing consumer protection directive measures, member states provide laws that include a minimum level of protection, while more flexibility was allowed regarding national laws providing greater protection. This is not possible with the UCPD because it is a maximum directive. In other words, this means that the member states have no choice but to provide the protection required by the directive, without either falling below that standard or going beyond it.

However, the argument that this directive is a maximum directive has been questioned by some scholars.⁶⁵⁸ For instance, art 3(9) provides that:

'In relation to "financial services", as defined in Directive 2002/65/EC, and immovable property, Member States may impose requirements which are more restrictive or prescriptive than this Directive in the field which it approximates.'

⁶⁵⁴ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer (B2C) commercial practices in the internal market.

⁶⁵⁵ Chris Willett, 'Fairness and Consumer Decision Making under the Unfair Commercial Practices Directive' (2010) 33(3) *Journal of Consumer Policy* 248.

⁶⁵⁶ Hugh Collins, 'Harmonisation by Example: European Laws against Unfair Commercial Practices' (2010) 73(1) *Modern Law Review* 89.

⁶⁵⁷ Christian Twigg-Flesner, 'The Consumer Rights Directive, Consumer Sales and English Law – The Fear of Coherence?' (2015) *Le Nuove Leggi Civili Commentate* 5.

⁶⁵⁸ W.C.H Ervine, 'The Consumer Protection from Unfair Trading Regulations 2008' (2008) *Scots Law Times* 148.

Thus, minimum harmonisation applies to these two sectors.

Previously, enforcement under the CPRs 2008 was limited to criminal and administrative sanctions. Many sanctions have been enforced for finding of certain unfair trade practices that consumers complained about to the (then) Office of Fair Trading or Trading Standards. However, there was a clear gap in relation to the private rights of redress of consumers in case of infringement of the regulations, unless they sued for misrepresentation or breach of the contract. Although CPRs 2008 state that traders are prohibited from using any “unfair business practices” against consumers, the failure to grant the consumer special rights was also a position supported by Reg 28 of the CPRs 2008, which states that:

“[a]n agreement shall not be void or unenforceable by reason only of a breach of these Regulations.”

In most cases, the consumer was unable to get their money back under previous laws governing such practices. The consumer only had one way: to rely on general private law rules if they wanted to take action. Unfortunately, what made this more difficult, however, was that the private law in this area was fragmented, complex and unclear.⁶⁵⁹

After reviewing weaker points in the CPRs 2008, the Law Commission suggested certain recommendations targeting the most serious causes of consumer detriment.⁶⁶⁰ Therefore, CPRs (Amendment) Regulations 2014 gave consumers a new right to civil redress.⁶⁶¹ The 2014 Regulations inserted Part 4A reg.27 into the CPRs 2008 to provide for this civil redress. These private remedies are limited to commercial practices that include misleading actions and aggressive practices, but do not specifically include misleading omissions.⁶⁶² Under this option, therefore, there will be a new right to a remedy in relation to misleading and aggressive practices,

⁶⁵⁹ Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Law Com No 199, 2011) para 1.3 <<https://www.scotlawcom.gov.uk/files/4313/0252/1699/dp149.pdf>> accessed 22 June 2021.

⁶⁶⁰ Law Commission, *A Private Right of Redress for Unfair Commercial Practices?* (Law Com 2008) para 2.88 <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/04/rights_of_redress_advice12.pdf> accessed 22 June 2021; Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Law Com No 332, 2012) part 4 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/236079/8323.pdf> accessed 22 June 2021.

⁶⁶¹ Consumer Protection from Unfair Trading Regulations 2014, reg 27.

⁶⁶² *Ibid*, reg 27(B).

designed to put consumers in the same position as they were before they were exposed to an unfair commercial practice. Consequently, the CRPs provide consumers with rights to redress, enforceable in civil courts,⁶⁶³ which may help reduce misleading business practices.

However, Regulation 27A stipulates three conditions that must be met in order for the consumer to get such remedies, as follows:

1. The contract must be concluded between a trader and a consumer. The relevant transactions are set out in Regulation 27A (2):
 - a. the consumer enters into a contract with a trader for the sale or supply of a product by the trader (a 'business to consumer contract'),
 - b. the consumer enters into a contract with a trader for the sale of goods to the trader (a 'consumer to business contract'), or
 - c. the consumer makes a payment to a trader for the supply of a product (a 'consumer payment').
2. The trader must be involved in the prohibited practices either by way of a misleading act or aggressive practice.
3. This practice must have an important factor in the consumer's decision in entering into this contract or paying for the purchase. Therefore, the consumer must demonstrate that the trader's behaviour significantly influenced the consumer's decision to enter into a contract or making payment.

There are three main remedies available to a consumer: the right to unwind,⁶⁶⁴ the right to a discount⁶⁶⁵ and the right to damages.⁶⁶⁶

However, these rights are framed in a limited manner.⁶⁶⁷ The consumer can only practice them within a specific time frame or only get a certain percentage of the amount paid or in some cases the consumer must choose only one of the rights mentioned above. Moreover, the consumer can only exercise these rights to a remedy

⁶⁶³ Ibid, reg 27(K).

⁶⁶⁴ Consumer Protection from Unfair Trading Regulations 2014, reg 27(E).

⁶⁶⁵ Ibid, reg 27(I).

⁶⁶⁶ Ibid, reg 27(J).

⁶⁶⁷ Christine Riefa and Séverine Saintier, 'Unfair Commercial Practices Directive: Remedying Economic Torts?' (in Paula Gilliker (ed), *Research Handbook on EU Tort Law* (Edward Elgar 2017) 314; James Devenney, 'Private Redress Mechanisms in England and Wales for Unfair Commercial Practices' (2016) *Journal of European Consumer and Market Law* 102.

in relation to misleading actions and aggressive practices and these rights are not available for an infringement under the general clauses.⁶⁶⁸

For instance, if the consumer buys a car, the consumer can obtain redress if the trader provides false information about the car. However, at the same time, the consumer would not be able to get any redress if the trader concealed other information, such as that the car was an insurance write-off. Not only that, but the consumer would not be able to obtain any redress if the trader practices any of the 31 banned practices contained in Schedule 1 of the CPRs 2008. This is despite the fact these have always been considered to be unfair under the scope of the CPRs 2008, without the need for the consumer to provide evidence of the financial harm caused.⁶⁶⁹

However, it can be said that, given the broad interpretation and application of art.6(1) of the 2005 Directive adopted by the European Court in *Canal Digital Danmark A/S (Canal) case*,⁶⁷⁰ the deletion of some information regarding an aspect of the “goods” (i.e., price), might be considered as part of a misleading action rather than constituting merely a misleading omission, and thus this interpretation can help provide the consumer with a right to redress in UK law.⁶⁷¹

Further, this right is not provided to consumers in some cases. Only compensation will be provided to those who entered into a contract or made a payment. For Instance, redress will not be granted to a consumer for a misleading advertisement that induced them to visit an online market, if the consumer then failed to make a purchase. The following example may be clearer, a consumer receives online promotional material about a holiday offer. To communicate with the advertiser, the consumer may have to sacrifice a day of holiday to visit the agency’s office. When the consumer arrives at the agency, they may be forced to park their car in a pay car park, and then discover that the promotional material was misleading, and the agency refuses to book the vacation.⁶⁷² Although there is no contract with the consumer here,

⁶⁶⁸ Cowan Ervine, 'Consumer Redress for Misleading and Aggressive Practices' (2011) 15(3) Edinburgh Law Review 452.

⁶⁶⁹ Peter Shears, 'The Consumer Protection Regulations in the UK: The Story' (2016) 27 (1) European Business Law Review 177.

⁶⁷⁰ C-611/14 *Canal Digital Danmark A/S (Canal)* EU:C:2016:800.

⁶⁷¹ See Hugh Beale, *Chitty on Contracts* (Sweet and Maxwell 2019) para 38-181.

⁶⁷² See Christian Twigg-Flesner, 'Bad Hand? The “New Deal” for EU Consumers' (2018) European Union Private Law Review 166.

the consumer has incurred many other losses. Consequently, it can be said that existing redress may not be sufficient to protect the victim of a fraud in many situations.

5.2.3 Consumer Contracts (Information, Cancellation and Additional Payments) Regulations (CCR) 2013

Further development and improvements to online consumer protection came through various EU directives on distance selling⁶⁷³ and consumer rights that were largely integrated by the EU Consumer Rights Directive (CRD) in 2014.⁶⁷⁴ The UK government attempted to implement the CRD without affecting ongoing national consumer law reforms by introducing the CCR 2013. These regulations aim to place online consumers in a similar position to traditional consumers when negotiating and concluding agreements. The CCR 2013 implements most of the provision in the CRD and deals with some consumer topics such as the consumer's right to withdraw from contracts and pre-contractual information that must be provided to consumers, whether they are contracting on-premises, online or off-premises. Although the ECRs 2002 impose obligations on 'information society service providers' to provide certain information to online consumers about online transactions, the CCR 2013 supplementing the ECRs 2002 requires far more substantive information about the transaction itself and must be provided in a clear and comprehensible way.⁶⁷⁵

⁶⁷³ For example, the Consumer Protection (Distance Selling) Regulations 2000 ('Distance Selling' Regulations) provide legal protection for consumers purchasing goods and services 'at a distance'. The Consumer Protection (Distance Selling) Regulations 2000 implement Directive 97/7/EC of the European Parliament and the Council of 20 May 1997 (OJ L-144/19) on the protection of consumers in relation to distance contracts. This includes purchases made via the Internet, digital television, mail order (including catalogue shopping), phone and fax. Organisations selling online must provide certain information to consumers to make an informed choice about whether or not they wish to buy and offer a 7-working day cooling-off period for certain goods and services. Therefore, during this period, consumers have a right to cancel their purchases. The regulations are amended by The Consumer Protection (Distance Selling) (Amendment) Regulations 2005. However, such regulations have been repealed by the CCR 2013.

⁶⁷⁴ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

⁶⁷⁵ Such as: the main characteristics of the goods, services or digital content; the total price of goods, services or digital content, which is inclusive of applicable taxes and excludes any hidden ancillary costs, unless the consumer has expressly consented to them (e.g. gift wrapping); the arrangements for payment, delivery, performance and the timescale for such delivery; and details of the consumer's right to cancel together with the conditions, time limit and procedures for exercising their right (where applicable).

5.2.4 Consumer Rights Act (CRA) 2015

Over the past few years, the English consumer protection regime has been reviewed and consequently reconstructed. Several legislative reforms have been initiated, aimed at empowering the consumer by providing adequate protection when purchasing goods or services, which required the updating of many laws such as the Sale of Goods Act (SGA) 1979,⁶⁷⁶ the Unfair Contract Terms Act (UCTA) 1977,⁶⁷⁷ the Supply of Goods and Services Act (SGSA) 1982⁶⁷⁸ and the Unfair Terms in Consumer Contracts Regulations (UTCCRs) 1999.⁶⁷⁹ However, such pieces of legislation have been the subject of much criticism, which led to a review of their effectiveness.

Two of the most prominent criticisms were a failure to keep pace with technological change and being unnecessarily complex, fragmented, and – in places – unclear.⁶⁸⁰

Twigg-Flesner argued that the main reason for such complexity was the introduction of new consumer rights derived from EU directives and transposed into English legislation over the past 30 years.⁶⁸¹ Since the UK was bound to implement EU-derived legislation, there had been overlaps and inconsistencies between the EU and pre-existing English legislation.⁶⁸² One of the issues that arose in adopting EU laws was that the UK authorities complied with EU directives to use secondary legislation for this purpose. However, there had been no serious attempts to ensure

⁶⁷⁶ The Sale of Goods Act 1979 (c 54).

⁶⁷⁷ The Unfair Contract Terms Act 1977, c 50, hereafter (UCTA).

⁶⁷⁸ The Supply of Goods and Services Act 1982 (c 29).

⁶⁷⁹ The Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083).

⁶⁸⁰ The Department for Business Innovation and Skills, *Explanatory Notes to the Consumer Rights Act 2015* (Royal Assent on 26 March 2015) para 5 <<http://www.legislation.gov.uk/ukpga/2015/15/notes/division/2>> accessed 22 June 2021.

⁶⁸¹ Christian Twigg-Flesner, 'Some Thoughts on Consumer Law Reform: Consolidation, Codification or a Restatement?' (in Louise Gullifer and Stefan Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law – Essays in Honour of Hugh Beale* (Hart 2014) 67.

⁶⁸² The Department for Business Innovation and Skills, *Explanatory Notes to the Consumer Rights Act 2015* (Royal Assent on 26 March 2015) para 5 <<http://www.legislation.gov.uk/ukpga/2015/15/notes/division/2>> accessed 22 June 2021.

that these new regulations were consistent with existing legislation, which had contributed to this gap.⁶⁸³

Moreover, as Giliker states, the mechanism by which EU measures were transposed into English legislation relied on a 'copy out' approach through which the English legislator reproduced the wording of European directives or modified existing statutory provisions to conform to those required by EU law.⁶⁸⁴ The UK consumer could have faced a confusing overlap of legal remedies that could be used due to introducing a new set of remedies (derived from European directives that are consumer-friendly) into those already existing in English law.⁶⁸⁵ According to Miller, the transposition of the Consumer Sales Directive (CSD)⁶⁸⁶ was tantamount to bringing into English law 'a tortuous web of legal provisions, impenetrable to those unversed in the particular area of sales law', leaving English law 'disjointed, often incoherent, an amalgam of 20th-century consumer protection provisions grafted onto commercially rooted, and orientated rules'.⁶⁸⁷ These reasons, as Riefa asserted, have led to a difficulty in understanding legal rights and duties by both consumers and traders, which in turn has undermined competitiveness and economic growth as a whole.⁶⁸⁸ Therefore, reform of English consumer law became increasingly pressing.⁶⁸⁹

This led to the introduction of the CRA 2015. The CRA 2015 is a quantum leap in the current consumer protection system in the UK,⁶⁹⁰ and it has been described as

⁶⁸³ See Christian Twigg-Flesner, 'Consolidation Rather than Codification – or Just Complication? - The UK's Consumer Rights Act 2015' (2019) *Zeitschrift für Europäisches Privatrecht* 173.

⁶⁸⁴ Paula Giliker, 'The Consumer Rights Act 2015 – a Bastion of European Consumer Rights?' (2017) 37(1) *Legal Studies* 79.

⁶⁸⁵ See the Sale of Goods Act 1979, Pt 5(A); the Supply of Goods and Services Act 1982, Pt 1(B). See also Chris Willett, Martin Morgan-Taylor, and Andre Naidoo, 'The Sale and Supply of Goods to Consumers Regulations 2002' (2004) *Journal of Business Law* 94.

⁶⁸⁶ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 (OJ L-171/7.7) on certain aspects of the sale of consumer goods and associated guarantees.

⁶⁸⁷ Lucinda Miller, 'After the Unfair Contract Terms Directive; Recent European Directives and English Law' (2007) 3(1) *European Review of Contract Law* 91.

⁶⁸⁸ Christine Riefa, 'Codification: The Future of English Consumer Law?' (2015) *European Journal of Consumer Law* 12.

⁶⁸⁹ See Christian Twigg-Flesner, 'Consolidation Rather than Codification – or Just Complication? - The UK's Consumer Rights Act 2015' (2019) *Zeitschrift für Europäisches Privatrecht* 173.

⁶⁹⁰ Chris Willett, 'Re-theorising Consumer Law' (2018) 77(1) *Cambridge Law Journal* 180.

the 'biggest overhaul of consumer rights for a generation'.⁶⁹¹ The main change is that it has concentrated all provisions of consumer protection legislation into one place,⁶⁹² and replaced four significant pieces of consumer legislation: the SGA 1979,⁶⁹³ the UCTA 1977,⁶⁹⁴ the SGSA 1982,⁶⁹⁵ and the UTCCR 1999.⁶⁹⁶ Therefore, a significant aim of the CRA 2015 is to create a 'framework that consolidates in one place key consumer rights covering contracts for goods, services, digital content and the law relating to unfair terms in consumer contracts'.⁶⁹⁷ It also seeks to provide a simplified and modern legal framework that gives the consumer clear rights. Its aims are impressive and respond to real consumer needs.⁶⁹⁸ Moreover, although the consolidation and simplification of legal provisions were the main priorities of the CRA 2015, the reform was not limited to that, it also introduced new provisions related to matters not provided in current legislation, such as software/digital content. This therefore led some to expect that the CRA 2015 would play a vital role in the harmonisation and consolidation of consumer laws in the UK and result in the effective protection of consumer rights.⁶⁹⁹

However, despite this development, the CRA 2015 has been criticised. Twigg-Flesner believes that the introduction of this act is not as significant a development as expected because it is, in fact, not a complete consolidation of all areas of consumer law into a single law.⁷⁰⁰ It was intended to contribute to the aims for which it was created, such as replacing old consumer statutes and regulations with one simple,

⁶⁹¹ Paolo Siciliani, Christine Riefa and Gamper Harriet, 'Introduction' in *Consumer Theories of Harm: An Economic Approach to Consumer Law Enforcement and Policy Making* (Hart Publishing 2019) 8.

⁶⁹² Michael P. Furmston, *Cheshire, Fifoot and Furmston's Law of Contract*, (Oxford University Press 2016) 259.

⁶⁹³ The Sale of Goods Act 1979 (c 54).

⁶⁹⁴ The Unfair Contract Terms Act 1977 (c 50).

⁶⁹⁵ The Supply of Goods and Services Act 1982 (c 29).

⁶⁹⁶ The Unfair Terms in Consumer Contracts Regulations 1999.

⁶⁹⁷ *Ibid* 28 and 259.

⁶⁹⁸ The Department for Business Innovation and Skills, *Explanatory Notes to the Consumer Rights Act 2015* (Royal Assent on 26 March 2015) para 3 <<http://www.legislation.gov.uk/ukpga/2015/15/notes/division/2>> accessed 22 June 2021.

⁶⁹⁹ Muhammad Akbar Khan, 'The Origin and Development of Consumer Protection Laws in United Kingdom' (2017) 3(3) *Journal of Asian and African Social Science and Humanities* 45.

⁷⁰⁰ Christian Twigg-Flesner, 'The Consumer Rights Directive, Consumer Sales and English Law – The Fear of Coherence?' (2015) *Le Nuove Leggi Civili Commentate* 6.

usable law.⁷⁰¹ As a result of the CRA 2015 leaving certain topics outside of its scope and other rules still applying to consumer protection, such as information and cancellation rights in the CCR 2013 and the remedies for CPRs 2014, there may be legal uncertainty and a lack of clarity.⁷⁰² This may create obstacles and difficulties for a consumer, especially a non-specialist, in determining the measures relating to their protection.⁷⁰³

Another example is that the Act tackles provisions related to consumer rights concerning the sale of goods, but the rules relating to the passing of property in goods are not consolidated in the CRA 2015.⁷⁰⁴ In addition, there are overlaps between provisions related to digital products with intellectual property rights that are outside the scope of consumer protection laws. Therefore, it can be said that the CRA 2015 may contribute to the creation of more fragmentation.⁷⁰⁵

However, this thesis argues that other solutions may ensure the complete consolidation of consumer rights into a single law. We note that the provisions relating to unfair terms and conditions have been consolidated in part 2 of the CRA 2015. Therefore, why was the reform restricted to only some consumer laws? There was an opportunity to consolidate the relevant provisions of the CCR 2013 and the CPRs 2008, as amended by the CPRs (Amendment) of 2014. Perhaps it may be because the English legislator fears that the consolidation of the relevant provisions may cause the Act to be inappropriately lengthy.

The law has been criticised for its length, as it has more than 240 pages and has more than 100 pages of explanatory notes, etc. This has led some, such as

⁷⁰¹ Alec Samuels, 'The Consumer Rights Act 2015' (2016) *Journal of Business Law* 166.

⁷⁰² Chris Willett, 'Re-theorising Consumer Law' (2018) 77(1) *Cambridge Law Journal* 183.

⁷⁰³ *Ibid.*

⁷⁰⁴ The Department for Business Innovation and Skills, *Explanatory Notes to the Consumer Rights Act 2015* (Royal Assent on 26 March 2015) para 24 <<http://www.legislation.gov.uk/ukpga/2015/15/notes/division/2>> accessed 22 June 2021.

⁷⁰⁵ James Devenney, 'The Consumer Rights Act 2015 And Related Reforms: An Epic Disappointment?' (in Roger Halson and David Campbell (eds), *Research Handbook on Remedies in Private Law* (Northampton 2019) 292.

Whittaker, to argue that the CRA 2015 is unnecessarily complicated.⁷⁰⁶ For instance, one of the main provisions (section 19), which sets out the relationship between a breach of the statutory terms in contracts for the sale of goods and the consumer's special remedies, contains 15 subsections and just over 750 words. Thus, access to new measures in the CRA 2015 may be difficult or inaccessible, even for the most experienced consumers.⁷⁰⁷

Concerning the second objective of the CRA 2015 – namely, simplification – it seems that this objective was also not sufficiently achieved. The law adopts a somewhat elaborate framework for remedies.⁷⁰⁸ This is particularly so in relation to the remedies regime for unfair commercial practices.⁷⁰⁹ Also, new, often cumbersome terms have been created, such as replacing the reference to 'implied terms' found in earlier statutes with a contract being 'treated as including a term'. It is questionable to what extent these reforms have simplified the regulations for consumers and their advisors.⁷¹⁰ This is not something that reflects the reality of the aims for which this law was introduced: to simplify and clarify the objectives of the law.

It seems, then, that the CRA 2015 has failed to fully achieve the objectives for which it was enacted, which is to consolidate and simplify provisions related to consumer protection in one law. It can be said that the drawbacks found in previous consumer protection laws were not fully addressed in the CRA 2015. This, in turn, led some academics to demand further reforms. Meanwhile, the UK's exit from the EU may be a reason to reduce pressure on the English legislator to comply with EU directives by implementing them in national legislation, but this may increase the

⁷⁰⁶ Simon Whittaker, 'Distinctive Features of the New Consumer Contract Law' (2017) *Law Quarterly Review* 49.

⁷⁰⁷ Paul Joukador, Rachel Hunt and Hogan Lovells, 'Consumer Rights Act 2015: a Step in the Right Direction' (2015) Westlaw, <<https://uk.practicallaw.thomsonreuters.com/6-618-1992?transitionType=Default&contextData=%28sc.Default%29>> accessed 22 June 2021.

⁷⁰⁸ See Hugh Beale, *Chitty on Contracts* (Sweet and Maxwell 2019) para 38-478.

⁷⁰⁹ James Devenney, 'The Consumer Rights Act 2015 And Related Reforms: An Epic Disappointment?' (in Roger Halson and David Campbell (eds), *Research Handbook on Remedies in Private Law* (Northampton 2019) 292.

⁷¹⁰ Simon Whittaker, 'Distinctive Features of the New Consumer Contract Law' (2017) *Law Quarterly Review* 49.

English legislator's need to focus on developing a legal framework and keeping pace with developments, especially in the digital age.

It has to be said that the four legislations briefly introduced in this section do not provide a complete legislative regime governing consumer contracts. Even in contracts for the sale of goods, services and digital content, the CRA 2015 does not provide comprehensive provisions for all issues that might arise in consumer contracts; instead, it either continues to apply the provisions of previous relevant legislation⁷¹¹ or relies on common-law rules.⁷¹² However, regarding the issues identified under this study, it can be said that the efficiency of these laws, including the CRA 2015, to protect consumers relies on whether or not they deal adequately with issues that concern consumers intending to conclude online contracts. To assess this, the following sections will examine whether and how these pieces of legislation provide explicit provisions in terms of the issues discussed under this study.

5.3 The Concept of an Online Consumer

It is essential to start with the notion of a consumer because there are differences between various jurisdictions' definitions, which raises an important question: who is the consumer protected by English law? In addition, as mentioned in **Chapter Three**, the concept of a consumer in Saudi law is broadly characterised so that a professional trader may fall under this concept. Consequently, consumer protection provisions will not achieve the objective for which they were introduced. This subsection examines the consumer concept standards under English law and whether those standards can help improve consumer definition in the KSA legislation.

5.3.1 The Concept Under EU Law

As the implementation of EU consumer directives has primarily shaped English consumer law, it is helpful to determine the notion of a consumer in EU law, even if that notion may be broader in English law.⁷¹³ There is no uniform definition of 'consumer' in EU directives. However, the notion of a consumer has been defined in

⁷¹¹ The Department for Business Innovation and Skills, *Explanatory Notes to the Consumer Rights Act 2015* (Royal Assent on 26 March 2015) para 24 <<http://www.legislation.gov.uk/ukpga/2015/15/notes/division/2>> accessed 22 June 2021.

⁷¹² Consumer Rights Act 2015, s 64(4)(b) and (c).

⁷¹³ Ewan McKendrick, *Contract Law* (Palgrave Law 2015) 312.

most current EU directives as a 'natural person who is acting for purposes outside his trade, business, and profession'.⁷¹⁴ The EU notion of a consumer has two main characteristics: 1) a natural person; 2) acting in pursuit of a private purpose. Therefore, the notion of a consumer does not apply to a legal entity, even if it is not commercial in nature.⁷¹⁵ However, the CRD adopts an approach of looking at the predominant purpose of mixed business and consumer contracts where a natural person concludes a contract to use a good or service for a personal purpose and at the same time can use it for a partial commercial purpose.⁷¹⁶ According to recital 17 of the CRD: ⁷¹⁷

'However, if the contract is concluded for purposes partly within and partly outside the person's trade (dual purpose contracts) and the trade purpose is so limited as not to be predominant in the overall context of the supply, that person should also be considered as a consumer.'⁷¹⁸

Although this recital provides broader consumer protection, it should be borne in mind that the provision of the directive still has a narrow notion of consumer who only acts for purposes not related to trade, etc.

In the next subsection, this thesis discusses the definition provided by English law to determine the closest concept, whether the EU or English, to target the categories of consumers identified in this study.

5.3.2 The Concept Under English Law

Due to the narrowness of the concept of a consumer and its limitation to specific cases, some EU member states such as the UK have expanded consumer protection law beyond the concept of a consumer as given above.⁷¹⁹

⁷¹⁴ Consumer Rights Directive (2011/83/EU), art 2(1). See also Rafał Mańko, 'The Notion of "Consumer" in EU Law' (2013) European Parliamentary Research Service 1. See <[https://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI\(2013\)130477_REV1_EN.pdf](https://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI(2013)130477_REV1_EN.pdf)> accessed 23 June 2021.

⁷¹⁵ Ewoud Hondius, 'The Notion of Consumer: European Union versus Member States' (2005) 28(1) Sydney Law Review 94. This has also been emphasised in case law (e.g. *C-542/99 Cape Snc v Idealservice Srl* ECLI:EU:C:2001:625). However, there is an exception, as business travellers are considered consumers of travel services under art 2 of the Package Travel Directive 90/314/EEC and currently fall under the notion of travellers under the Package Travel Directive 2015/2302.

⁷¹⁶ Christian Twigg-Flesner, *The Europeanisation of Contract Law* (Routledge 2013) 60.

⁷¹⁷ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

⁷¹⁸ This was also adopted in a case under the Unfair Contract Terms Directive. See *C-110/14 Costea v SC Volksbank Romania SA* EU:C:2015:538.

⁷¹⁹ Rafał Mańko, 'The Notion of "Consumer" in EU Law' (2013) European Parliamentary Research Service 1. See

English law has provided various definitions. Article 2 of the ECRs 2002 defines a consumer as ‘any natural person who is acting for purposes other than those of his trade, business or profession’. Whilst the CPRs 2008 define a consumer as ‘any individual who in relation to a commercial practice is acting for purposes which are outside his business’.⁷²⁰ Meanwhile, section 2 of the CRA 2015 has defined a consumer as ‘an individual acting for purposes wholly or mainly outside that individual’s trade, business, craft or profession’. The words ‘wholly or mainly’ have been added into the Act, enabling an individual who partially concludes a contract for commercial purposes to obtain protection from the relevant laws. Thus, when someone purchases a good, such as a car, for personal use, they will be allowed to claim their right as a consumer even if they sometimes use it for commercial purposes.⁷²¹

The definition of the CRA 2015 is consistent with the notion of consumer adopted in reg 1 of the CCR 2013 as well as the CPRs 2008 when it was amended to give consumers a new right to civil redress by CPRs 2014. From these definitions, it can be said that there is a certain similarity between the definition of the CRA 2015, the CCR 2013, and the definition of the majority of current EU directives, but that the CRA 2015’s and the CCR 2013’s definitions are somewhat broader than those used in most EU consumer laws, which makes the pool of potential consumers in the UK larger than intended by the European legislator.⁷²²

Although the definition of English law is broader in its scope than EU law, what they both have in common is that the purpose of the transaction must be outside of business purposes. However, there is no doubt that differences may affect the application of provisions of consumer protection laws. Nevertheless, these effects are

[https://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI\(2013\)130477_REV1_EN.pdf](https://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI(2013)130477_REV1_EN.pdf) accessed 23 June 2021.

⁷²⁰ Consumer Protection from Unfair Trading Regulations 2008, reg 2(1)(b).

⁷²¹ Ewan McKendrick, *Contract Law* (Palgrave Law 2015) 312.

⁷²² Paul Joukador, Rachel Hunt, and Hogan Lovells, ‘Consumer Rights Act 2015: a Step in the Right Direction’ (2015) Westlaw, <https://uk.practicallaw.thomsonreuters.com/6-618-1992?transitionType=Default&contextData=%28sc.Default%29> accessed 22 June 2021.

not as substantial as those determined based on the economic definition, especially since the definition of English law has explicitly stated that the scope of its provisions is aimed at those, where their purpose for the transaction is wholly or mainly outside the scope of their trade. Thus, concerns that a professional party may abuse these provisions to protect their commercial contracts are excluded.

However, some concerns can be raised that a professional party may claim that their reason for purchasing a good/service is mainly for personal purposes when the reality is otherwise. This possibility can occur in societies that lack strict laws, such as developing countries. Therefore, as a first stage, it is probably best to limit the scope of a 'consumer' to a specific category of buyers, such as is defined by European law. In addition, as discussed in **Chapter Two**, this study believes that ordinary persons who lack experience, compared to professional parties, are fearful of online shopping. This has contributed to their reluctance to shop online, which has affected the e-commerce sector. Therefore, this study attempts to provide a legal framework to protect this category of purchasers. This thesis argues that the definition of European law seems most relevant to target the category under this study.

5.3.3 An Average Consumer

When discussing the notion of a consumer, it is essential to mention the so-called benchmark of an 'average consumer', as this benchmark is used in both EU and English consumer law.⁷²³ Before introducing this term into legislation, it emerged in the Court of Justice of the European Union (CJEU) in some instances related to misleading advertising, the free movement of goods and labelling cases.⁷²⁴ In the *Kásler* case, the CJEU applied this standard to check, when applying the unfairness test, whether standard terms were transparently provided to consumers – that is, in plain, intelligible language pursuant to Articles 4(2) and 5 of the 1993 directive.⁷²⁵ The

⁷²³ The 'average consumer' is a necessary element in the UK's legislation on unfair commercial practices. See Consumer Protection from Unfair Trading Regulations (CPRs) 2008.

⁷²⁴ Rossella Incardona and Cristina Poncibo, 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution' (2007) *Journal of Consumer Policy* 21.

⁷²⁵ Unfair Terms in Consumer Contracts Directive 1993 93/13/EEC. See *C-26/13 Kásler v OTP Jelzálogbank Zrt* EU:C:2014:282, para 74.

CJEU defines the average consumer as an individual who is 'reasonably well informed and reasonably observant and circumspect'. The English legislator explicitly adopted this interpretative approach under the CRA 2015 in s 64 of the CRA 2015.⁷²⁶

This thesis can give an example to illustrate the meaning of the average consumer. When an online trader advertises a brand-new iPhone for just £20, the advert may require the consumer to pay by sending cash to a post office box number. This does not mean that the trader's activity is legal or that the consumer cannot report it, but only that the latter may not obtain protection under consumer protection laws against such unfair commercial practices.

By the notion of 'average consumer', the criterion by which the adequacy of the information is to be measured is defined. This means that the consumer actively participates in the market and can reasonably use the information provided by the trader to make an informed decision.⁷²⁷ The benchmark of an 'average consumer' is the crucial point of reference in certain areas of consumer protection. Recital 18 of the UCPD explains that:

'... [t]he average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.'

However, it can be said that the average consumer benchmark may, in some cases, help traders rather than consumers, such as when the consumer claims that they were not aware of a term, subjectively, even if the average consumer should objectively have been aware. For example, according to the CRA 2015:

'a term is prominent for the purposes of this section if it is brought to the consumer's attention in such a way that an average consumer would be aware of the term.'⁷²⁸

Hence, this can help limit traders' responsibilities to consumers.

⁷²⁶ Consumer Rights Act 2015, s 64(5).

⁷²⁷ Christian Twigg-Flesner, 'Innovation and EU Consumer Law' (2005) *Journal of Consumer Policy* 418.

⁷²⁸ Consumer Rights Act 2015, s 64(4).

However, in the case of *Office of Fair Trading v Purely Creative Ltd*,⁷²⁹ Judge Briggs rejected the theory that assumes that an average consumer, being reasonably observant and circumspect, would have read the whole text of any relevant promotional offer.⁷³⁰ According to him:

'I consider that the question whether the average consumer would read the entirety of the (frequently very small) print of a particular promotion raises fact-intensive issues as to the application of regs 5 and 6, rather than being capable of resolution by an invariable and irrebuttable presumption of the type contended for by the defendants.'⁷³¹

Consequently, according to Justice Briggs, it cannot be assumed that the average consumer is neglectful when they do not read all the small print of a trader's promotion.⁷³² Thus, it depends on how the 'average consumer' benchmark is interpreted and applied, which obligations they have, and whether this notion could offer additional protection to individual consumers.⁷³³

However, this approach was not without criticism, as the average consumer benchmark was questioned, especially in substantive consumer law.⁷³⁴ For instance, the exact criterion for 'the average standard' is unclear since this is subject to different calculations. There are differences between referring to average consumers through the use of median and mean. Hence, it can be said that determining the average consumer, especially from an empirical aspect, is very difficult.⁷³⁵ Even if we can set a standard for an average consumer to judge the appropriate level of protection, the result is that less-than-average consumers are not protected unless they are

⁷²⁹ [2011] EWHC 106.

⁷³⁰ *Office of Fair-Trading v Purely Creative Ltd* (2011) EWHC 106 [66].

⁷³¹ *Ibid* [67].

⁷³² See Bram B Duivendorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer 2015) 120.

⁷³³ Paolo Siciliani, Christine Riefa and Gamper Harriet, 'The Limitations of Consumer Law in Tackling Consumer Harm' in *Consumer Theories of Harm: An Economic Approach to Consumer Law Enforcement and Policy Making* (Hart Publishing 2019) 25.

⁷³⁴ Geraint Howells, Christian Twigg-Flesner and Thomas Wilhelmsson, *Rethinking EU Consumer Law* (Routledge 2018) 66-73.

⁷³⁵ *Ibid* 29 and 30.

considered vulnerable.⁷³⁶ However, it is not clear that they do not need protection.⁷³⁷ Hence, there is a need to adequately clarify and justify selecting ‘the average consumer’ as a standard of protection.

Moreover, the average consumer standard can refer to something that is not realistic. The difficulty arises in identifying an informed decision and what should be expected of the average consumer if a business practice is not deployed. It asks what the average consumer, being ‘reasonably well informed, reasonably observant and circumspect’⁷³⁸ would have done, alongside what actual consumers have done or would have done. This raises some concerns that the conjectural interpretation of the response of the average consumer may contribute to the non-application of these provisions properly in practice by the courts and enforcers.⁷³⁹

5.3.4 Online Trader Scope Under Consumer Protection Legislation

The definition of a trader in English consumer protection laws is more uniform. According to the CRA 2015, a trader is ‘a person acting for purposes relating to that person’s trade, business, craft or profession, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf’.⁷⁴⁰ As a result, ‘trader’ is a wide enough term to include the activities of government departments and local and public authorities; not-for-profit organisations, such as charities and cooperatives, are therefore covered.⁷⁴¹

Although the term ‘trader’ is used as a reference to a counterparty to the consumer in B2C contracts, unlike the previous regulations, which referred to it as ‘seller and supplier’, it can be said that this is only a change of label and has no

⁷³⁶ Consumer Protection from Unfair Trading Regulations 2008, reg 2(5)(a).

⁷³⁷ Geraint Howells, Christian Twigg-Flesner and Thomas Wilhelmsson, *Rethinking EU Consumer Law* (Routledge 2018) 29 and 30.

⁷³⁸ Consumer Protection from Unfair Trading Regulations 2008, reg 2(2).

⁷³⁹ Willem Van Boom, ‘Unfair Commercial Practices’ (in Christian Twigg-Flesner (ed.) *Research Handbook on EU Consumer and Contract Law* (Edward Elgar 2016) 391.

⁷⁴⁰ Consumer Rights Act 2015, s 2(2).

⁷⁴¹ The Department for Business Innovation and Skills, *Explanatory Notes to the Consumer Rights Act 2015* (Royal Assent on 26 March 2015) para 5 <<http://www.legislation.gov.uk/ukpga/2015/15/notes/division/3/1>> accessed 22 June 2021.

significant effect in terms of substantive results.⁷⁴² Even if this change did not have a substantive effect, this thesis argues that the use of a precise term such as ‘trader’ to refer to a professional party (a seller or supplier) was a good step and may help (from a formal point of view) to simplify the reading of the law, especially for non-specialists.

From this definition, it can be said that if a seller or supplier uses Internet platforms, including C2C⁷⁴³ platforms, to sell goods or supply services as a primary source of income, the above rules will apply. Conversely, for those who use these platforms to sell something or provide a service occasionally, the provisions of the CRA 2015 will not apply.⁷⁴⁴ There is a difference between a hobbyist who uses the Internet to offer unwanted items for sale and a professional who actively buys goods for resale. One of the main requirements in applying English consumer legislation is that the parties are a consumer and a trader. However, activity in the e-commerce sector has blurred the distinction between professional and amateur traders in commercial transactions and questions arise as to whether the amateurs should be subject to the same obligations as professional sellers. Some platforms, such as eBay, allow the seller to sell goods or supply services that may be a source of additional income for those who sell and supply.⁷⁴⁵ It has been noted by the UK government that ‘the distinction between an individual selling as a consumer and an individual selling as a trader is becoming increasingly blurred’.⁷⁴⁶ One of the most controversial questions relates to determining who falls under the definition of a trader in an online environment and when an amateur seller can be considered a professional trader

⁷⁴² Ewan McKendrick, *Contract Law Text, Cases, and Materials* (Oxford University Press 2016) 456.

⁷⁴³ Consumer to consumer (C2C) references a business model that facilitates commerce between private individuals.

⁷⁴⁴ European Commission, *Exploratory Study of Consumer Issues in Online Peer-to-Peer Platform Markets*, Directorate-General for Justice and Consumers (2017) para 9.1.2 <https://eprints.soton.ac.uk/411699/1/FinalreportMay2017pdf_2_.pdf > accessed 16 June 2021.

⁷⁴⁵ Christine Riefa and Julia Hörnle, ‘The Changing Face of Electronic Consumer Contracts In the 21st Century: Fit for Purpose?’ (in Lilian Edwards and Charlotte Wealde (eds), *Law and the Internet* (Hart Publishing 2009) 93.

⁷⁴⁶ European Commission, *Exploratory Study of Consumer Issues in Online Peer-to-Peer Platform Markets*, Directorate-General for Justice and Consumers (2017) <https://eprints.soton.ac.uk/411699/1/FinalreportMay2017pdf_2_.pdf > accessed 16 June 2021.

under consumer protection laws.⁷⁴⁷ The European Court of Justice (ECJ) discussed this question in the case of *Kamenova*.⁷⁴⁸

In this case, Ms. Kamenova, in her private capacity, posted eight advertisements to sell new and used items on an online platform. Ms. Kamenova, it was stated, should be treated as a professional trader and consequently be subject to professional standards. Kamenova disputed her classification as a trader under relevant consumer protection laws.⁷⁴⁹ The court suggested that Kamenova should not be perceived as a trader in this case. The CJEU provided a non-exhaustive and non-exclusive list of factors that national courts must consider classifying a person as a trader, including⁷⁵⁰ whether the sale via an online platform was carried out in an organised manner, whether the seller aims to generate profit, whether the seller has technical information and expertise related to the goods or service that is not available to the consumer, etc.; nevertheless, fulfilling one or more of these factors is not in itself an indication by which it can be determined whether the seller is qualified to be a trader under UCPD or the CRD.⁷⁵¹ Therefore, this contract will be considered a C2C contract. However, as mentioned earlier, consumer laws do not protect the consumer in C2C contracts because the contracting parties are equal.⁷⁵² But in the existence of only one of the factors mentioned above, it cannot be said that the seller and the consumer are equal, but rather that the seller is in a better position than the consumer, hence the need for consumer protection.

The above-mentioned logical criteria must be considered on a case-by-case basis when the assessment is done. The CJEU also stated that online activity could only constitute a 'commercial practice' if the person is acting for purposes related to their trade, business or profession, and the national court must determine an individual

⁷⁴⁷ Christine Riefa and Laura Clausen, 'Towards Fairness in Digital Influencers' Marketing Practices' (2019) *Journal of European Consumer and Market Law* 66.

⁷⁴⁸ Case C-105/17 *Kamenova* ECLI:EU:C:2018:808.

⁷⁴⁹ Directive 2005/29/EC and Directive 2011/83/EU.

⁷⁵⁰ Case C-105/17 *Kamenova* ECLI:EU:C:2018:808, para 38.

⁷⁵¹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

⁷⁵² See Chapter Three, section 3.3.3 of this thesis, The Scope of the ECL 2019.

case, in the light of all relevant circumstances.⁷⁵³ However, this case formulated a common rule that a practice cannot be considered commercial within the meaning of consumer protection laws unless the practice was of a ‘trader/supplier’, as defined in the same relevant laws.

In theory, this ruling appears extremely important in assisting national courts to determine when a seller can be classified as a trader in an online environment. In practice, however, it does not impact the national courts’ assessment of each case, as determining the facts and assessing the appropriateness of each case remains at the court’s discretion. Moreover, there is a lack of guidance about the relative weight given to each factor. Consequently, this ruling does not explicitly end the legal uncertainty that can arise in this area. However, it can be said that achieving certainty in this area is not solely a judicial task. Instead, a more effective solution to limiting the problems caused by legal uncertainty regarding the line between ‘a private person/hobbyist seller’ and ‘a professional trader’ in online shopping platforms may be introduced via legislative intervention.

A solution may lie in identifying specific factors determined within a narrow framework, especially for transactions concluded via the Internet, through which sellers can be classified as traders once those factors apply to them. For instance, applying consumer protection provisions to whoever uses e-commerce platforms as a tool to sell goods or supply services to consumers, if the seller is placed in a more advantageous position than the consumer, would contribute to eliminating the legal uncertainty that may arise in this field. In other words, consumer protection measures should apply if any factor that would affect the equality between the seller and consumer is present. As mentioned earlier, a seller’s use of the Internet as a selling platform in and of itself may put the seller in a more advantageous position than the consumer. Otherwise, there may be uncertainty in knowing when an individual

⁷⁵³ Case C-105/17 *Kamenova* ECLI:EU:C:2018:808 paras 2,37-40, 45.

acquires a professional trader's status after being an amateur seller, which may cause them to mistakenly falsely declare their status.⁷⁵⁴

5.4 Main Instruments of Consumer Protection

This section examines the efficacy of the measures provided by English law for consumer protection on the legal solutions that can limit the factors influencing consumer trust in online contracts identified in **Chapter two**; these are determined under this study – namely, a need for the provision of mandatory consumer information, prevention of unfair contract terms and unfair commercial practices, and a need for the provision of specific consumer rights. This is relevant in light of research questions because, as mentioned in **Chapter Three**, the KSA legislation has a lack of protection in such areas. Therefore, there is a need for further reform. Such reform may need to be addressed by adopting some principles from English law. This subsection examines whether the protection provided by English law in such areas can serve as a possible solution for proposing a legal framework to protect online consumers in the KSA.

The following subsection examines the first legal solution that can limit the factors influencing consumer trust in online contracts identified in **Chapter two**: the provisions of information requirements.

5.4.1 Information Requirements

Information requirements play an active role in the development of EU measures as a regulatory tool that contributes to the protection of consumers' economic interests,⁷⁵⁵ and they dominate policy agendas and consumer law in the EU and its member states, including the UK.⁷⁵⁶ This can be found in several regulations such as the ECRs 2002, which affect all companies that provide 'information society services'.⁷⁵⁷ According to

⁷⁵⁴ See Christian Twigg-Flesner, 'Bad Hand? The "New Deal" for EU Consumers' (2018) *European Union Private Law Review* 172.

⁷⁵⁵ According to Stuyck, '[t]he right to information is undoubtedly the most fundamental specific consumer right'. Jules Stuyck, 'European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or Beyond the Internal Market?' (2000) *Common Market Law Review* 384; Stephen Weatherill, 'Market Transparency and Consumer Protection' (in Stephen Weatherill (eds), *EU Consumer Law and Policy* (Edward Elgar Publishing, Cheltenham 2013) 84; Geraint Howells and Thomas Wilhelmsson, 'EC Consumer Law - Has it Come of Age?' (2003) 4 *European Law Review* 380.

⁷⁵⁶ Geraint Howells, 'The Potential and Limit of Consumer Empowerment by Information' (2005) 32(3) *The Journal of Law and Society* 352.

⁷⁵⁷ Information society services are defined as: 'any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and

articles 6 and 9 of the ECRs 2002, an online trader must make certain information easily accessible to competent authorities and potential consumers directly and permanently. This approach has been supported by the ECJ, which states:

'[U]nder Community law concerning consumer protection the provision of information to the consumer is considered one of the principal requirements.'⁷⁵⁸

However, the impact of this regulatory tool in protecting consumer rights and interests has resulted in an overlap between various EU directives (e.g. Distance Selling Directive (DSD)⁷⁵⁹ and E-Commerce Directive (ECD)).⁷⁶⁰ This has, in turn, also led to lengthier and more detailed information requirements.⁷⁶¹

The European/English approach to information requirements has been criticised for various reasons. Howells claims that the information requirements provided by EU directives are broad and that there is little focus on their impact.⁷⁶² For example, there were many information requirements that an online trader must comply with under the DSD. However, member states may add additional information requirements before concluding online contracts to suit their market conditions. This can lead to a situation where a trader conducting business in various EU countries may still need to draft different disclosures for consumers in these different European countries. Keeping this in mind, it could be said that requiring online traders to provide further information may contribute to negative consequences for consumer awareness and knowledge regarding contract-related provisions.⁷⁶³

storage of data, at the individual request of the recipient of the service.' See Electronic Commerce Regulations 2002, reg 2(1).

⁷⁵⁸ Case C-362/88 *GB-INNO-BM v Confédération du Commerce Luxembourgeois* ECR 1990/3/I-667, para 689.

⁷⁵⁹ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.

⁷⁶⁰ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of 'information society services', in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'); Zabia Vernadaki, 'Consumer Protection and the Reform of the European Consumer Acquis' (2010) 21(9) *International Company and Commercial Law Review* 319.

⁷⁶¹ According to Nordhausen Scholes, 'a chronological view shows that the information obligations in the consumer protection directives have become more and more detailed and more and more demanding as time has gone on'. See Annette Scholes, 'Information Requirement' (in Geraint Howells and Reiner Schulze (eds), *Modernizing and Harmonizing Consumer Contract Law* (Sellier, Munich 2009) 213. Winn and Haubold also note, 'the lists of information duties in both Directives are long and not very well harmonised'. See Jane Kaufman Winn and Jens Haubold, 'Electronic Promises: Contract Law Reform and E-Commerce in a Comparative Perspective' (2002) 27(5) *European Law Review* 577.

⁷⁶² Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32(3) *Journal of Law and Society* 363.

⁷⁶³ Joasia Luzak, 'Online Consumer Contracts' (2014) 15(3) *Journal of the Academy of European Law* 385.

Winn and Haubold also commented that one of the negative consequences of information overflow is that consumers may not read any of the information provided.⁷⁶⁴ In other words, rather than empowering consumers, this may be overwhelming them.⁷⁶⁵ Therefore, an appropriate approach is to plan to provide a limited range of key sets of information relevant to consumers.⁷⁶⁶ According to Samuels, 'the ordinary consumer needs and desires all relevant information, not too little but not too much'.⁷⁶⁷ However, the Office of Fair Trading (OFT)⁷⁶⁸ argues that the consumer needs as much information as possible to make an informed decision and refuses to recognise the concept of 'an over-informed consumer'. Even if the consumer does not read the information at the time of the contract, the consumer may need that information if something goes wrong; this was argued by the European Consumer Organisation (BEUC), which was concerned about the potential for overload.⁷⁶⁹

Additionally, as Twigg-Flesner states, there is no focus on presenting information so that it is attractive and comprehensible to consumers, which constitutes a weakness at the European level.⁷⁷⁰ A consumer may be interested in the information provided by an online trader that corresponds with their interests or supports the decision they are making. Howells and Wilhelmsson believe that confident and well-informed consumers may interpret the information provided by a trader in ways that suit their prejudices, due to how the information is presented.⁷⁷¹ Therefore, there are concerns that a trader could exploit this weakness and may seek to motivate

⁷⁶⁴ Jane Kaufman Winn and Jens Haubold, 'Electronic Promises: Contract Law Reform and E-Commerce in a Comparative Perspective' (2002) 27(5) *European Law Review* 577.

⁷⁶⁵ Christine Riefa and Julia Hörnle, 'The Changing Face of Electronic Consumer Contracts In the 21st Century: Fit for Purpose?' (in Lilian Edwards and Charlotte Wealde (eds) *Law and the Internet* (Hart Publishing 2009) 116.

⁷⁶⁶ Geraint Howells, Christian Twigg-Flesner, and Thomas Wilhelmsson, *Rethinking EU Consumer Law* (Routledge 2018) 34.

⁷⁶⁷ Alec Samuels, 'The Consumer Rights Act 2015' (2016) *Journal of Business Law* 164.

⁷⁶⁸ The Office of Fair Trading (OFT) was responsible for protecting consumer interests throughout the UK. Its responsibilities have been passed to several organisations, such as the Competition and Markets Authority (CMA).

⁷⁶⁹ The European Union Committee of the House of Lords, *EU Consumer Rights Directive: Getting it Right* (2009) para 125 <<https://publications.parliament.uk/pa/ld200809/ldselect/ldcom/126/126i.pdf>> accessed 22 June 2021.

⁷⁷⁰ Christian Twigg-Flesner, 'Innovation and EU Consumer Law' (2005) *Journal of Consumer Policy* 427.

⁷⁷¹ Geraint Howells and Thomas Wilhelmsson, 'EC Consumer Law - Has it Come of Age?' (2003) 4 *European Law Review* 370 and 382.

consumers to make a purchasing decision by being careful to comply with certain information obligations that may induce consumers into buying their goods or services.

The CRD ⁷⁷² introduced some changes to the level of consumer protection online, and its provisions are implemented by the CCR 2013 and the CRA 2015.⁷⁷³ It was expected that the European legislator would respond to the above criticisms, such as those questioning the effectiveness of the length of the list of information that an online trader must adhere to, should new legislation be proposed. Compared to the DSD, the information list in the CRD is longer and more detailed.⁷⁷⁴ However, the lengthening of the information requirements list may be due to the CRD's aim to achieve full harmonisation, meaning that member states will no longer be allowed to introduce new information requirements to online traders.⁷⁷⁵ The CRD approach is based on the premise that consumers can make an informed decision once they have various information.

However, the information requirements that an online trader is obliged to meet are found in the CRD and other EU instruments. However, information requirements scattered in more than one legal instrument can be seen as a source of potential interference or inconsistencies with the CRD.⁷⁷⁶ For instance, there is a remarkable similarity between the information requirements in the ECD and the CRD for good descriptions and prices, thus meeting the requirements in the CRD could therefore be sufficient to comply with the requirements of the ECD. However, it will depend on the implementation and application of these rules on a national level whether this would hold. Moreover, the information requirements found in Articles 5 and 6 of the CRD can be found in Article 7(4) of the UCPD.

⁷⁷² Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

⁷⁷³ See Oliver Bray and Susan Perkins, 'The New Consumer Contracts Regulations: Key Changes and Implications' (2014) *Computer and Telecommunications Law Review* 99; Oliver Price, Christina Fleming and Charles Russell Speechlys, 'The Impact and Content of the New UK Consumer Contracts Regulations' (2015) *Compliance & Risk*, 4 <<https://uk.westlaw.com/Document/I3504D9E0DFE611E49B21B9E69BEB36A6/View/FullText.html>> accessed 23 June 2021.

⁷⁷⁴ Elizabeth Hall, Geraint Howells and Jonathon Watson, 'The Consumer Rights Directive — An Assessment of its Contribution to the Development of European Consumer Contract Law' (2012) 8(2) *European Review of Contract Law* 139 and 166.

⁷⁷⁵ Joasia Luzak, 'Online Consumer Contracts' (2014) 15(3) *Journal of the Academy of European Law* 384.

⁷⁷⁶ See Van Willem Boom, 'Unfair Commercial Practices', (in Christian Twigg-Flesner (ed.) *Research Handbook on EU Consumer and Contract Law* (Edward Elgar 2016) 388.

Therefore, it can be said that the EU legislator has not sufficiently addressed problems arising from several previous directives that had caused overlapping of information requirements.⁷⁷⁷ This has led some to call for the simplification of information requirements among the various EU instruments to ensure their consistency.⁷⁷⁸

The four factors influencing consumer trust in online contracts identified as involving a consumer are further discussed in the next section. Considering that the topics, as this thesis outlined in **Chapter One**, will focus on the three issues, only these sections are relevant, and these will be examined in more detail. Therefore, this section analyses the adequacy of the instruments of information requirements provided by the UK model to protect consumers in online contracts. Four subsections fall under this section: Identity of the online trader, main characteristics of a product, price, and delivery information.

5.4.1.1 Identity of the Online Trader

As stated above, to build consumer trust in online commerce, it is essential to provide specific information about the identity of a trader/seller before the conclusion of online contracts. Article 6 of the ECRs 2002 attempts to achieve this goal. It imposes an obligation on a person providing an 'information society service', including online sellers, to provide certain information. One aspect is to be identifiable and recognisable (such as a company name and company registration number) in a form and manner that is easily, directly and permanently accessible.⁷⁷⁹ Similarly, the CCR 2013 require online traders to provide consumers with the trader's identity (such as the trader's trading name).⁷⁸⁰

There is a further obligation placed on traders to disclose the geographical address of their place of business and relevant information as to where the consumer can submit any complaints.⁷⁸¹ Providing such information allows law enforcement

⁷⁷⁷ Marco Loos, 'The Modernization of European Consumer Law: a Pig in a Poke?' (2019) *European Review of Private Law* 134.

⁷⁷⁸ European Commission, 'Evaluation of the Consumer Rights Directive, Report from the Commission to the European Parliament and the Council on the application of Directive 2011/83/EU on consumer rights' SWD (2017) 169 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0169&qid=1619829129747&from=EN>> accessed 22 June 2021.

⁷⁷⁹ Electronic Commerce Regulations 2002, reg 6(1).

⁷⁸⁰ Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013, schedule 2(b).

⁷⁸¹ *Ibid*, schedule 2(c).

authorities to identify traders and determine their location. It also enables consumers to contact them easily, which can help overcome any uncertainty when concluding an online contract with an unknown party.⁷⁸² In this regard, an online trader must provide details of their complaints handling policy to consumers before concluding a contract.⁷⁸³ This can show consumers how to pursue their complaints if something goes wrong with an online purchase, thus encouraging consumer confidence in online shopping.⁷⁸⁴

Furthermore, the ECRs 2002 require that the information allows 'rapid contact' and 'direct and efficient' communication with an online trader.⁷⁸⁵ The CCR 2013 require that traders, where possible, operate a telephone line so that consumers can communicate with them.⁷⁸⁶ To ensure that a trader does not exploit this requirement, the CCR 2013 stipulate that a trader cannot make a consumer pay more than a 'basic rate' for telephone calls.⁷⁸⁷ A consumer may not have the ability to telephone an online trader, so the ECRs 2002 and the CCR 2013 also require the provision of an email address to enable consumers to contact and communicate with traders quickly and efficiently.⁷⁸⁸ It could be argued that such requirements imply that online traders are responsible for providing advice and instructions that allow effective communication with potential consumers.⁷⁸⁹ Therefore, this may help eliminate consumer fears of being unable to communicate directly with an online trader to seek advice about potential goods and services, particularly when a consumer cannot assess the quality of a product and ensure that it complies with their expectations before purchasing.

In this regard, the term 'where available', in the context of telephone, fax and email, refers to cases where traders already use these means to communicate with consumers. There are many other means of communication in an online environment,

⁷⁸² Giusella Finocchiaro, 'European Law and Consumer Protection in the Information Age' (2003) 12(2) *Information & Communication Technology Law* 113.

⁷⁸³ Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013, schedule 2(k).

⁷⁸⁴ Per Eklund, 'Electronic Marketing from a Consumer Law Perspective' (in Thomas Wilhelmsson, Salla Tuominen, and Heli Tuomola (eds) *Consumer Law in the Information Society* (Kluwer Law International 2001) 89.

⁷⁸⁵ Electronic Commerce Regulations 2002, reg 6(1).

⁷⁸⁶ Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013, schedule 2(c).

⁷⁸⁷ *Ibid*, reg 41(1).

⁷⁸⁸ Electronic Commerce Regulations 2002, reg 6(1)(c); Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013, schedule 2(c).

⁷⁸⁹ Giusella Finocchiaro, 'European Law and Consumer Protection in the Information Age' (2003) 12(2) *Information & Communication Technology Law* 113.

such as live chat, electronic forms of communication and automated callback facilities, which effectively meet the requirements of direct and effective communication between consumers and traders. The ECRs 2002 and the CCR 2013 do not prohibit such means of communication, as long as consumers are informed about their existence clearly and understandably.

The case of *Verbraucherzentrale Bundesverband eV v Amazon EU Sàrl*,⁷⁹⁰ is worth considering here. The German Federal Union of Consumer Organisations and Associations said Amazon's German website did not inform consumers of their phone and fax numbers clearly and understandably, which constitutes a violation of the country's consumer protection laws. The federation said that although other methods were offered – Amazon's automatic callback and online chat service – they were not considered sufficient means of communication. The ECJ rejected the arguments and confirmed that a critical requirement under the CRD is that traders offer consumers a means of communication that allows the latter to contact them quickly and communicate with them efficiently. The court concluded that an unconditional obligation on traders to provide consumers, in all circumstances, with a telephone number or to establish a telephone or fax line or to create a new email address to allow consumers to contact them appeared to be disproportionate. In interpreting the CRD, the right balance must be struck between protecting consumers and ensuring the competitiveness of businesses. This case highlights that any means of communication would be acceptable as long as this is clearly available to consumers in a way that can be understood.

When consumers visit an e-commerce platform, they may not be able to easily discern whether the other party in the transaction is a professional trader or another consumer. In addition, consumers may believe that they are entering into a contract with an online platform, while purchasing from a third party listed on an online marketplace. Moreover, Social media platforms such as Facebook Marketplace and Instagram Shopping, do not provide mandatory templates to meet all of the legal requirements that traders are obligated to meet in B2C contracts, such as information

⁷⁹⁰ C-649/17 *Verbraucherzentrale Bundesverband eV v Amazon EU Sàrl* ECLI:EU:C:2019:576.

about the trader's geographical location, the main characteristics of the goods and services, dispute resolution, etc.⁷⁹¹ This is left to the traders to reveal.

Generally, an online platform may be obligated to clarify whether a contract is concluded with a trader or an individual. Nonetheless, this depends on whether such platforms would be considered traders under the CCR 2013 and CPRs 2008. This requirement is dependent on the fact that online platforms are classified as 'traders' within the meaning of the regulations above, since the consumer usually does not require payment to benefit from these platforms, and free services are not explicitly covered by these regulations.⁷⁹²

Although one of the main objectives of the ECR 2002 is to define the liability of 'information society service' providers even if they are not classified as a trader, such as online platforms who act as intermediaries in the transmission or storage of information,⁷⁹³ the ECR 2002 do not indicate that an online platform is obligated to clarify whether a contract is concluded with a trader or individual. Anonymity creates specific problems in applying consumer legislation, where one essential requirement is that the parties are a consumer and a trader.⁷⁹⁴ When the parties' character is unknown, the ordinary consumer is not expected to know the seller's identity. Therefore, there may be a possibility that they will miss out on the protection they expect to get, such as the right to withdraw from a contract if they purchase from a business and discover that the other party is another consumer.⁷⁹⁵ Additionally, anonymity creates difficulties in determining who is responsible when a fault occurs in an online purchase, thus this may reduce the possibility of the consumer obtaining a remedy.⁷⁹⁶ Therefore, there is a need for an effective solution that limits problems that arise due to legal uncertainty in the line between 'a private person/hobbyist seller' and

⁷⁹¹ Christine Riefa, 'Consumer Protection on Social Media Platforms: Tackling the Challenges of Social Commerce' (in Tatiana-Eleni Synodinou, Philippe Jougoux, Christiana Markou and Thalia Prastitou-Merdi (eds) *EU Internet Law in the Digital Era* (Springer 2019) <<https://ssrn.com/abstract=3373704>> accessed 22 June 2021.

⁷⁹² Marco Loos, 'The Modernization of European Consumer Law: a Pig in a Poke?' (2019) *European Review of Private Law* 134.

⁷⁹³ *Electronic Commerce Regulations 2002*, reg 17 and 19.

⁷⁹⁴ Christine Riefa, 'The Reform of Electronic Consumer Contracts in Europe: Towards an Effective Legal Framework?' (2009) 14(2) *Lex Electronica* 20.

⁷⁹⁵ Christine Riefa and Julia Hörnle, 'The Changing Face of Electronic Consumer Contracts In the 21st Century: Fit for Purpose?' (in Lilian Edwards and Charlotte Wealde (eds), *Law and the Internet* (Hart Publishing 2009) 96.

⁷⁹⁶ European Commission, 'A New Deal for Consumers' COM(2018) 183 para 2 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0183&from=en>> accessed 22 June 2021.

'trader' in online shopping platforms, which may be introduced via legislative intervention.⁷⁹⁷

5.4.1.2 Main Characteristics of a Product

Product characteristics critically affect a consumer's decision about online purchases.⁷⁹⁸ To make an informed decision, consumers must be able to understand all the essential product attributes. The CRA 2015 and CCR 2013 require online traders to provide consumers with the main characteristics of the goods,⁷⁹⁹ services or digital content⁸⁰⁰ to an extent appropriate to the medium of communication used and to the goods or services.⁸⁰¹ The term 'main characteristics' is an extensive term and may consequently have many meanings. The information required by paragraph (a) of Schedule 2 of the CCR 2013 relates to the main characteristics of the goods. In addition, there is a long list of 'main characteristics' set out in the CPRs 2008,⁸⁰² including a product's availability, benefits, risks, composition, accessories, fitness for purpose, quantity, origin, expected results from its use and the results of tests carried out on it.⁸⁰³ Under Article 11 of the CRA 2015, any information provided by a trader that relates to the main characteristics or is of a category mentioned in paragraph (a) of Schedule 2 of the CCR 2013 constitutes a term in the contract.

Protecting consumers from performance/information risks is not only about requiring a trader to disclose pre-information about the main characteristics of a good or service, but also provides legal guarantees that the consumer can benefit from after purchase, which is called 'implied terms', if the characteristics of a product or service do not match the information provided by the trader or do not meet the expectations of the consumer.

Specific terms are implied in tangible products in consumer online contracts, similar to those traditionally concluded offline. Terms may be implied in contracts by statute, and many statutes imply essential terms in consumer contracts, with a crucial

⁷⁹⁷ A solution was suggested in Chapter Five, section 5.3.4 of this thesis, Online Trader Scope Under Consumer Protection Legislation.

⁷⁹⁸ Meyyappan Narayanan, Bonwoo Koo and Brian Paul Cozzarin, 'Fear of Fraud and Internet Purchasing' (2012) Applied Economics Letters 1615.

⁷⁹⁹ Consumer Rights Act 2015, s 12(2).

⁸⁰⁰ Ibid, s 37(2).

⁸⁰¹ Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013, schedule 2(a).

⁸⁰² Consumer Protection from Unfair Trading Regulations 2008, reg 5(5).

⁸⁰³ Ibid.

role here for the CRA 2015. They are then automatically included in each contract entered into between a trader and a consumer, to which a given statute applies, and are treated as a 'condition'. These terms are referred to as 'legal guarantees' under the CRA 2015 that a trader is obliged to fulfil, which are: the goods must match their description,⁸⁰⁴ be 'of satisfactory quality'⁸⁰⁵ and be fit for any particular purpose made known by a consumer to a trader.⁸⁰⁶ These requirements will be considered as part of the contract,⁸⁰⁷ thus a breach of one of these requirements means that the consumer can terminate the contract by rejecting the goods, refunding the payment and claiming damages for any additional losses.⁸⁰⁸ However, this fit-for-any-particular-purpose term is not to be 'treated as included' if 'the circumstances show that the consumer does not rely, or it is unreasonable for the consumer to rely, on the skill or judgment of the trader'.⁸⁰⁹

In the context of online consumer contracts, consumers are unable to inspect a product before purchasing it. They merely rely upon information that includes images and texts, as provided by the online trader. Therefore, it can be said that most of the goods and services sold online will be 'by description', as the purchase decision of consumers online often depends entirely on the description given by the seller, including the essential characteristics and the identity of the goods.⁸¹⁰ Hence, this implied term provides additional protection to consumers if they enter into an online contract when they are not aware of the nature of another party to a contract, whether they are professionals or amateurs, as such a term applies to private sales and business contracts.

Descriptive words must identify the subject matter of a contract in order for a sale to amount to a sale by description.⁸¹¹ Otherwise, such words will not have

⁸⁰⁴ Consumer Rights Act 2015, s 11.

⁸⁰⁵ *Ibid*, s 9.

⁸⁰⁶ *Ibid*, s 10.

⁸⁰⁷ Victoria Mann and Paula Barrett, 'Consumer Protection: E-Commerce' Westlaw 2 <<https://uk.westlaw.com/Document/I4B4DAEB1460111E2B274F99DB3FAD7CB/View/FullText>> accessed 23 June 2021.

⁸⁰⁸ Christian Twigg-Flesner, 'The Consumer Rights Directive, Consumer Sales and English Law – The Fear of Coherence?' (2015) *Le Nuove Leggi Civili Commentate* 15.

⁸⁰⁹ Consumer Rights Act 2015, s 10(4).

⁸¹⁰ Chenoy Ceil, 'Interpreting S. 13 of the Sale of Goods Act 1979' (2015) SSRN <<https://ssrn.com/abstract=2597201> or <http://dx.doi.org/10.2139/ssrn.2597201>> accessed 22 June 2021.

⁸¹¹ Jack Beatson, Andrew S Burrows and John Cartwright, *Anson's Law of Contract* (Oxford University Press 2016) 173.

implications for the contract.⁸¹² In this regard, it can be argued that prior cases under, for example, section 13 of SOGA 1893⁸¹³ and the SGA 1979⁸¹⁴ might be relevant in their application to consumer contracts, even though care should be taken to recognise the pure consumer context of the CRA 2015.⁸¹⁵ For example, in the *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* case,⁸¹⁶ the House of Lords did not consider the words used to describe the shipyard as a description of the ship but rather as a means of identifying the tanker. Consequently, that contract was not a sale by description within the meaning of Section 13 of the SGA 1979.⁸¹⁷

Moreover, non-essential parts of the description would not be in the scope of the implied condition, even if the buyer relies on them. In *Ashington Piggeries Ltd v Christopher Hill Ltd*,⁸¹⁸ the buyer bought herring meal from the seller, but the buyer complained that they had not obtained the herring meal they wanted under the contract, because they wanted to feed it to minks. The seller had never produced mink fodder, even though he was well versed in animal food production. The buyer provided the seller with a detailed formula. One of those ingredients was herring meal. The seller, however, used a particular type called Norwegian herring meal. This meal was infected with preservatives that led to a chemical reaction. This reaction resulted in the production of DMNA, which caused liver disease in the mink that ate the feed. The buyer sued the seller for a breach of s.13 SOGA 1893. The court rejected the buyer's complaint about a breach of s.13 SOGA 1893 and stated that the herring meal did not breach the description in the contract.⁸¹⁹ The buyer argued that the contract was for herring meal, while the seller provided the buyer with herring plus DMNA. This argument was not convincing to the court, and the court indicated that the reason for the production of DMNA was due to the preservatives present in the herring meal, which in turn caused the chemical reaction. Therefore, DMNA was not something that was added to the herring meal. The court admitted that the meal was contaminated

⁸¹² John Duddington, *Consumer and Commercial Law* (Pearson Education Limited 2013) 48.

⁸¹³ The Sale of Goods Act 1893 (56 & 57 Vict. c.71).

⁸¹⁴ The Sale of Goods Act 1979 (c 54).

⁸¹⁵ See Hugh Beale, *Chitty on Contracts* (Sweet and Maxwell 2019) para 38-462.

⁸¹⁶ [1976] 1 WLR 989.

⁸¹⁷ Although this case does not include a B2C contract, such an act also applies in B2C contracts.

⁸¹⁸ [1972] 1 A.C. 441 (HL).

⁸¹⁹ However, the buyer's claim for a breach of the implied quality terms under section 14 of the Act was upheld.

due to that reaction. However, the meal contamination did not alter the description of the meal or cause it to lose its identity as herring meal.⁸²⁰

Concerning service contracts, Section 49 (1) of the CRA 2015 provides that:

‘Every contract to supply a service is to be treated as including a term that the trader must perform the service with reasonable care and skill.’

This implied term would oblige a trader to provide a service with reasonable care and skill. However, the issue is that there is no special explanation for what is meant by ‘reasonable care’ for these purposes under the CRA 2015. To complicate matters further, the consumer bears the burden of proving that a trader failed to exercise reasonable care and skill in the performance of a service.⁸²¹ Consequently, if there are no specific criteria by which it can be demonstrated that a trader did not provide ‘reasonable care and skill’ for the purposes of the CRA 2015, the consumer may not be able to obtain their right. It is noted that this section was excerpted from S.13 of the SGSA 1982. To fully understand the obligation, it may be necessary to have recourse to the previous case law regarding this requirement in the context of the SGSA 1982.

Certain factors can be inferred from previous cases, such as that the care and skill expected from a professional will not be as expected from an ordinary individual. Instead, it should be as expected from a member of their profession of ordinary competence and experience.⁸²² Also, the manner that a service must be carried out is good and masterful if the supplier is a craftsperson.⁸²³ However, a supplier may implicitly guarantee that their service will fit a particular purpose or lead to a specific result in some particular circumstances of the case.⁸²⁴

In terms of intangible goods, the CRA 2015 introduced a new set of provisions for digital content that reflect those that already exist about goods. Before the CRA 2015, consumers did not always benefit from implied terms when they purchased intangible goods. This is because of the debate about what can be considered goods

⁸²⁰ *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] 1 A.C. 441 (HL) 450.

⁸²¹ Consumer Rights Act 2015, s 54(2) and (3).

⁸²² See *Harmer v Cornelius* [1858] 5 C.B.N.S. [236], [246]; *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. [582], [586]; *Chin Keow v Government of Malaysia* [1967] 1 W.L.R. 813.

⁸²³ See *Kimber v W. Willett Ltd* [1947] K.B. 570.

⁸²⁴ See *Samuels v Davis* [1943] K.B. 526; *Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners* [1975] 1 W.L.R. 1095; *St Albans City and DC v International Computers Ltd* [1996] 4 All E.R. 481; *Zwebner v Mortgage Corp Ltd* [1998] P.N.L.R. 769.

under the Sale of Goods Act.⁸²⁵ In *St Albans City and DC v International Computers Ltd*,⁸²⁶ the court reached the opinion that digital content supplied on a physical medium would be within the scope of contracts for the sale of goods.⁸²⁷ This means that those conditions did not apply when digital content was downloaded via the Internet.⁸²⁸ Hence, the UK government had one of two options: either the concept of goods could be expanded to include intangible goods such as digital content, or contracts for the supply of digital content could be subject to the same implied terms already applied to the goods. The UK government chose the latter option for consumer contracts, while the previous legal status is still in effect in non-consumer contracts.

As shown above, the purpose behind transferring these implied terms in the context of digital content contracts is intended to maintain coherence. Therefore, if the digital content fails to meet any of these rights, the consumer can demand remedies such as repairing or replacing the non-conforming digital content.⁸²⁹ However, consumers can only benefit from these rights and remedies if traders provide digital content at a price.⁸³⁰ Therefore, the CRA 2015 provisions only apply to the online retailer from whom the consumer purchased digital content at a price. These provisions do not apply to intellectual property owners because the consumer has not paid a sum of money to them.

However, there are questions about the appropriateness of applying such provisions in the intangible goods field, especially in the context of software.

Similarly to goods, digital content must fit a particular purpose specified in the contract.⁸³¹ This includes any purpose a consumer makes known to a trader before a contract is concluded. However, this fit-for-any-particular-purpose term is not to be 'treated as included' if 'the circumstances show that the consumer does

⁸²⁵ Robert Bradgate, 'Beyond the Millennium - The Legal Issues: Sale of Goods Issues and the Millennium Bug' (1999) (2) *The Journal of Information, Law and Technology* <https://warwick.ac.uk/fac/soc/law/elj/jilt/1999_2/bradgate> accessed 22 June 2021.

⁸²⁶ [1997] FSR 251.

⁸²⁷ The Court stated that '... if the disc is sold or hired by the computer manufacturer, but the program is defective, (...) there would prima facie be a breach of the terms as to quality and fitness for purpose implied by the SGA...'. See *St Albans City and DC v International Computers Ltd* [1997] FSR 251 [266].

⁸²⁸ See Christian Twigg-Flesner, 'Consolidation Rather than Codification – or Just Complication? - The UK's Consumer Rights Act 2015' (2019) *Zeitschrift für Europäisches Privatrecht* 190.

⁸²⁹ Consumer Rights Act 2015, s 46(3).

⁸³⁰ *Ibid*, s 33. The Department for Business Innovation and Skills, *Explanatory Notes to the Consumer Rights Act 2015* (Royal Assent on 26 March 2015) para 224-226 <<http://www.legislation.gov.uk/ukpga/2015/15/section/47/notes?view=plain>> accessed 22 June 2021.

⁸³¹ Consumer Rights Act 2015, s 35.

not rely, or it is unreasonable for the consumer to rely, on the skill or judgment of the trader'.⁸³² Unlike tangible products, whose purpose may be apparent to consumers even if they are not skilled, some software – for example – has more than one use and is not limited to a specific purpose. Moreover, digital products differ from goods in that they are under a licence, and the consumer can use that software only in accordance with the terms of the licence.⁸³³ Moreover, digital products do not involve the transfer of ownership in the same manner as found with tangible goods. Therefore, the licensor sells the contractual rights to use the digital content under the licence rather than the right to use that content for any purpose the consumer may choose.

The inadequacy of the implied terms to the nature of digital content may be more apparent when we are talking about the other implied terms, 'satisfactory quality and matching description'. Digital content must match any description of it given by the trader to the consumer,⁸³⁴ and must be of satisfactory quality.⁸³⁵ For this condition to be met, digital content must conform to a standard that a reasonable person considers satisfactory, taking into account any other relevant circumstance, including the price of the content, its description and any public statement about the content by the trader.⁸³⁶

Regardless of a consumer's inability to inspect any goods in the context of online shopping, this ambiguity may increase further in terms of digital content. Consumers may have an opportunity to look at a picture of goods before binding themselves into a contractual relationship. However, in the context of contracts for digital content, it is unclear how an invisible item can be examined, mainly if the consumer receives digital content in the form of an object code that can only be checked after revealing the underlying source code. Of course, before a contract is entered into, the consumer may be permitted to inspect a free trial of the software for a limited period. In S. 36(2) of the CRA 2015, a term appropriate to intangible goods

⁸³² Ibid, s 35(4).

⁸³³ See Arnerstal Stojan, 'Licensing Digital Content in a Sale of Goods Context' (2015) 10 Journal of Intellectual Property Law and Practice 750.

⁸³⁴ Consumer Rights Act 2015, s 36.

⁸³⁵ Ibid, s 34.

⁸³⁶ Julie Patient, 'The Consumer Rights Act 2015: a New Regime for Fairness?' (2015) 30(12) Journal of International Banking Law and Regulation 648; Chris Willett, 'Re-theorising Consumer Law' (2018) 77(1) Cambridge Law Journal 192; Christian Twigg-Flesner, 'The Consumer Rights Directive, Consumer Sales and English Law – The Fear of Coherence?' (2015) *Le Nuove Leggi Civili Commentate* 19.

has been used to examine digital content. Instead of requiring correspondence with a 'sample' as in tangible goods, the CRA 2015 clarifies that the consumer may examine a 'trial version' of the digital content. However, there may be differences between the trial version and the real version regarding restrictions on the trial version, such as limited functionality.⁸³⁷ Thus, the trial version may not give the consumer a clear idea about the digital content. Nonetheless, it is not sufficient that the digital content matches the trial version if the digital content does not also match any description of it given by the trader to the consumer.⁸³⁸

Furthermore, suppose the products do not conform to the supply contract in terms of 'fitness for purpose, satisfactory quality and matching description'. In that case, the consumer will be entitled to exercise their right to statutory remedies applied under the CRA.⁸³⁹ This applies according to S. 46(1) of the CRA 2015 to digital content if:

- a. 'a trader supplies digital content to a consumer under a contract,
- b. the digital content causes damage to a device or to other digital content,
- c. the device or digital content that is damaged belongs to the consumer, and
- d. the damage is of a kind that would not have occurred if the trader had exercised reasonable care and skill.'

Therefore, any terms that limit or exclude a trader's responsibility in circumstances where accessing their website causes interference or damage to consumers' computer systems or any data on that system would not bind consumers under the CRA 2015.

However, this section also illustrates that the conditions required to obtain legal remedies did not consider digital content's characteristics when, for example, it did not perform satisfactorily. For instance, the above section of the CRA 2015 requires that for a consumer to be eligible to obtain compensation, the damaged device or digital content must be owned by the consumer. As mentioned above, the online consumer may not own digital content but may obtain a licence to use the content, such as software. If the software is infected with a virus that limits the consumer's ability to use digital content, a question is raised as to who the owner of that software is.

⁸³⁷ Ian J Lloyd, *Information Technology Law* (Oxford University Press 2017) 521.

⁸³⁸ Consumer Rights Act 2015, s 36(2).

⁸³⁹ *Ibid*, s 46.

Consequently, there is a possibility that the consumer will not obtain compensation under this section.⁸⁴⁰

One of the CRA 2015 provisions relates to the characteristics of digital content represented in updates, whether they aim to address errors or provide improvements or new features. The CRA 2015 states that matching digital content to the description of it does not mean that a trader cannot handle errors and add improvements and features, as long as they continue to match the description and information they provided to the consumer before entering into the contract.⁸⁴¹ According to the Act's Explanatory Notes:

'The policy intention is that matching the description should mean that the digital content should at least do what it is described as doing. It is not intended that "matches the description" should mean that the digital content must be exactly the same in every aspect. This section would not, for example, prevent the digital content going beyond the description, as long as it also continues to match the description. This is particularly relevant for updates that may enhance features or add new features. As clarified in section 40, as long as the digital content continued to match the original product description and conform to the pre-contractual information provided by the trader, improved or additional features would not breach this right.'⁸⁴²

However, all information provided by traders to consumers before entering into a digital content supply contract will be treated as a contract term.⁸⁴³ Moreover, the information that traders disclose about the digital content functions and the compatibility requirements of digital content with the relevant hardware or software will be considered part of the contract.⁸⁴⁴

In this regard, there may be changes to the main characteristics of digital content. In this case, changes should only be made with the consumer's explicit

⁸⁴⁰ Ian J Lloyd, *Information Technology Law* (Oxford University Press 2017) 524.

⁸⁴¹ Consumer Rights Act 2015, s 36(2) and (4).

⁸⁴² Department for Business Innovation and Skills, *Explanatory Notes to the Consumer Rights Act 2015* (Royal Assent on 26 March 2015) para 185 <<http://www.legislation.gov.uk/ukpga/2015/15/notes/division/3/1/4/3/3>> accessed 22 June 2021.

⁸⁴³ Consumer Rights Act 2015, s 37(2).

⁸⁴⁴ Julie Patient, 'The Consumer Rights Act 2015: a New Regime for Fairness?' (2015) 30(12) *Journal of International Banking Law and Regulation* 648; Chris Willett, 'Re-theorising Consumer Law' (2018) 77(1) *Cambridge Law Journal* 192; Christian Twigg-Flesner, 'The Consumer Rights Directive, Consumer Sales and English Law – The Fear of Coherence?' (2015) *Le Nuove Leggi Civili Commentate* 19.

consent, whether this change is made before or after the conclusion of the contract.⁸⁴⁵ This may help to minimise the product/service risk for consumers in online shopping. For example, a consumer might encounter issues such as unexpected changes to the digital content contract (by removing a key feature) without understanding the implications of such changes, or issues with updating products by the provider, which may negatively affect the use of the product. This also involves performance risk, in that the product or service might not meet satisfactory quality standards, where the purchased product's performance falls below an agreed-upon performance level.

To sum up, protecting consumers from performance risks is not only about requiring the trader to disclose pre-information about the main characteristics of the good or service but also provides legal guarantees that the consumer can benefit from after purchase, which is called 'implied terms', if the characteristics of the product or service do not match the information provided or the expectations of the consumer. The implied terms have proven effective in protecting contract parties' interests historically, since their first appearance in the SOGA 1893. This perhaps, taking into account the implementation of EU directives,⁸⁴⁶ prompted the English legislator to adopt these terms in the new consumer regime (the CRA 2015). Undoubtedly, one of the most prominent reforms that characterised the CRA 2015 was adopting consumer rights when entering into a contract to supply digital content. However, it can be said that the English legislator has moved a little too quickly to transplant specific provisions that may have proven effective in the context of tangible goods without considering their suitability in different contexts (digital content). As mentioned above, there are many doubts about the precise application of implied terms in intangible goods and their limitations in the context of software in particular. Hopefully, the picture may be more precise when the courts hear cases.⁸⁴⁷ However, this does not mean that there is not a need for legal reform to review these provisions in the context of digital content to be more appropriate to the nature of this type of product.

⁸⁴⁵ Consumer Rights Act 2015, s 36(4).

⁸⁴⁶ The Consumer Sales Directive (CSD)1999/44/EC.

⁸⁴⁷ The question is being discussed in B2B contracts such in the context of commercial agency contracts: *Accentuate v Asigra Inc* [2009] EWHC 2655 (QB) and *Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc* [2014] EWHC 2908 (Ch).

5.4.1.3 Price

According to Willett, pricing is one of the main reasons most consumers prefer one trader over another.⁸⁴⁸ Hence, the importance of transparency in prices, as this makes it easier for consumers to compare goods and services before making a purchase decision. As such, if traders obfuscate prices, they may influence consumer preferences to the consumer's detriment. Such techniques may harm the interests of the consumer and create uncertainty.

The ECRs 2002 require transparency of prices; they must be clearly and unambiguously presented.⁸⁴⁹ In particular, prices should indicate all financial obligations for the consumer, including tax and other costs.⁸⁵⁰ Online commerce may involve selling certain items or services, the price of which cannot be calculated in advance because of their nature. This may result in a consumer incurring costs that they were not aware of prior to the conclusion of a contract. The CCR 2013 tackle this by requiring online traders to disclose to consumers how prices are calculated.⁸⁵¹ This is important to reduce hidden costs that may be unknown to consumers before the conclusion of a contract, which, if they were informed about them in advance, might lead them not to conclude the contract.

Furthermore, online traders must provide details of consumer deposits and financial guarantees and, where applicable, the existence and terms of deposits or other financial guarantees to be paid by the consumer or submitted at the trader's request.⁸⁵² The CCR 2013 require traders to provide clear information to consumers prior to the conclusion of contracts in circumstances where where the consumer must pay for the return of the goods in the event of the cancellation of a contract.⁸⁵³

Moreover, the CCR 2013 assert the importance of obtaining consumers' explicit acknowledgement that their order involves a payment obligation.⁸⁵⁴ Online traders are responsible for notifying consumers of the exact point that they are contractually bound

⁸⁴⁸ Chris Willett, 'General Clauses and the Competing Ethics of European Consumer Law in the UK' (2012) 71(2) Cambridge Law Journal 424.

⁸⁴⁹ Electronic Commerce Regulations 2002, reg 6(2).

⁸⁵⁰ Ibid.

⁸⁵¹ Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013, schedule 2(f).

⁸⁵² Ibid, schedule 2(u).

⁸⁵³ Ibid, schedule 2(m).

⁸⁵⁴ Ibid, reg 14(3).

to pay for the goods or services.⁸⁵⁵ Therefore, it is no longer sufficient for the final stage of the ordering process to consist of the click of a button entitled 'Confirmation of Purchase' or 'Purchase Order' when a transaction is concluded through a website. Instead, such buttons must clearly indicate to consumers their immediate payment obligation – for example, by being labelled 'Pay Now'.⁸⁵⁶

However, a trader may provide this information in any manner, provided this clearly indicates to the consumer that the order implies a payment obligation.⁸⁵⁷ This rule is mainly geared towards making distance contracts, including online contracts, and is one of many provisions to increase consumer protection online.⁸⁵⁸ If a trader has not complied with this requirement, the consumer is not contractually bound.⁸⁵⁹

Article 9 of the ECRs states that an online trader must provide information about the technical means for identifying and correcting input errors prior to placing an order. This means that the standard contract terms on the website must include how the supplier deals with price errors or malicious tampering.⁸⁶⁰ However, the regulations do not explicitly indicate the legal effects of website pricing errors and the limits of an online trader's liability for those errors. To complicate matters further, determining the actual cause of an error is problematic, as it may have been caused by one of the parties to the contract, a third party⁸⁶¹ or a combination of both.⁸⁶² The regulations also do not state in which cases a contract can be binding to both parties or how to protect consumers in the event of any pricing error.

⁸⁵⁵ Ibid, reg 14(4).

⁸⁵⁶ Ibid.

⁸⁵⁷ See also Aashish Srivastava, 'The New EU Consumer Rights Directive: an Empirical Study on Compliance Issues by E-tailers' (2017) *Journal of Business Law* 290.

⁸⁵⁸ Shane McNamee, 'Implementation of the Consumer Rights Directive' (2014) *Journal of European Consumer and Market Law* 191.

⁸⁵⁹ Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013, reg 14(5).

⁸⁶⁰ Daniel Bates, 'Mistakes in Online Transactions - The Lessons to Be Learned from Kodak' (2002) *Internet Newsletter for Lawyers* Mar/Apr 4 <<https://ssrn.com/abstract=2307459>> accessed 22 June 2021.

⁸⁶¹ Such as network providers; administrators of electronic shopping malls; owners of servers; viruses.

⁸⁶² This happened in the UK with the sale of TVs at GBP 2.99 by Argos. Mistakenly, a TV was advertised for sale for £2.99. This pricing did not bind Argos as this was seen as an invitation to treat, and the online consumer purchase was the 'offer'. Argos was free to choose whether or not to accept an offer and create a legally binding contract. Nonetheless, the Argos website sent automatic confirmation emails to consumers after the purchase, which normally represented accepting the offer. Unfortunately, the case was settled before trial. See Malcolm Bain and Brian Subirana, 'E-commerce Oriented Software Agents: Some Legal Challenges of Advertising and Semi-autonomous Contracting Agents' (2003) 19(4) *Computer Law & Security Review* 282.

This thesis also considers whether a trader provides an offer to consumers by putting goods on sale for a special price online. Under English contract law, the display of goods in a window by a trader is treated as an invitation to treat, not as an offer.⁸⁶³ This was confirmed in the case of *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd*,⁸⁶⁴ where the Court of Appeal concluded that the display of goods in a self-service shop was an invitation to treat rather than an offer.⁸⁶⁵

Within the context of online shopping, it can be said that platforms selling goods or services online serve as a self-service shop or a shop window display.⁸⁶⁶ Therefore, if a consumer places an order, the trader is not bound by this order. The price displayed is treated as an invitation to treat, and no contract is concluded until the trader accepts the consumer's offer.⁸⁶⁷ This position is supported by Woodroffe and Lowe, who state: 'although there is no authority on this point, we consider that the offer is made by the consumer, e.g. by clicking on "submit" or "order", and acceptance occurs if – and only if – the supplier accepts by a further communication to the consumer, e.g. by sending an email acknowledgement or confirmation with a reference to the order or booking'.⁸⁶⁸ Therefore, it can be said that if a website is deemed as an invitation to treat, then an online trader will not be obligated to fulfil a contract at the misquoted price in the case of mispricing.

On the other hand, a contract between a consumer and a trader may not be limited to the stage of invitation to treat. Instead, the trader may send a confirmation email, and the cost will be charged to the consumer's payment card. Consequently, consumers may have legal evidence to bind traders to that contract if they accept their offer. Interestingly, this confirmation email may not have been sent by the trader. Instead, confirmation emails may be automatically sent by software programmed for this purpose within the trader's website. From here, it becomes clear that a critical

⁸⁶³ Jill Poole, *Contract law* (Oxford University Press 2016) 23; Ewan McKendrick, *Contract Law Text, Cases, and Materials* (Oxford University Press 2016) 61.

⁸⁶⁴ [1953] EWCA Civ 6.

⁸⁶⁵ *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] EWCA Civ 6. See also *Fisher v Bell* [1961] 1 QB 394.

⁸⁶⁶ Christine Riefa and Julia Hörnle, 'The Changing Face of Electronic Consumer Contracts In the 21st Century: Fit for Purpose?' (in Lilian Edwards and Charlotte Wealde (eds) *Law and the Internet* (Hart Publishing 2009) 102; Jon Fell, John Antell, Jonathan Exell, Vivian Picton, Adrian Roberts-Walsh, and Louise Townsend, *IT Law: An ISEB Foundation* (British Computer Society 2007) 3.

⁸⁶⁷ Jill Poole, *Contract Law* (Oxford University Press 2012) 40.

⁸⁶⁸ Geoffrey Woodroffe and Robert Lowe, *Woodroffe & Lowe's Consumer Law and Practice* (Sweet & Maxwell 2007) 85.

difference between traditional shops and online shops is that in the latter case, a trader may not have the ability to make an intentional decision about accepting or rejecting a consumer's offer.

A trader is obliged pursuant to the ECRs 2002 to provide a consumer with an acknowledgement receipt of their order without undue delay and by electronic means.⁸⁶⁹ However, Reg 11(1) of the ECRs 2002 does not clarify whether this acknowledgement can be considered as acceptance of the contract. It can be said that this acknowledgement may be limited to merely informing the consumer that the seller has received their order. In this context, the terms and conditions of a contract drafted by an online trader may have a role in determining what constitutes acceptance of a contract in online transactions – for example, dispatching goods to a consumer could be tantamount to accepting the contract,⁸⁷⁰ thus the seller may withdraw from the contract before the product is delivered to the consumer. Alternatively, the trader could send another email confirming acceptance of the consumer's offer.

Moreover, a mistake in a transaction, including price errors, makes a contract void or voidable under English contract law.⁸⁷¹ Suppose a trader is not aware of a mistake before a contract is entered into at an incorrect price (for example, the price being unacceptably low, such as a television set being offered online for £3). In that case, the trader may resort to the rules of general contract law to invalidate the contract through the principle of a unilateral mistake to void the contract.⁸⁷² A unilateral mistake occurs when there is a mistake in a transaction, and only one of the parties is aware of the mistake and takes advantage of it.⁸⁷³ In the case of a price error, it can be said that this error usually occurs as a result of a mistake in terms of the contract, where there is a mistaken statement of intent on the part of one party (the seller) provided that the other party (the buyer) knows it.

*Hartog v Colin and Shields*⁸⁷⁴ is important here. In this case, there was a mistake in terms of prices where the trader thought he was pricing per pound (weight

⁸⁶⁹ Electronic Commerce Regulations 2002, reg 11(1).

⁸⁷⁰ John Macleod and James Devenney, *Consumer Sales Law: The Law Relating to Consumer Sales and Financing of Goods* (Routledge-Cavendish 2007) 385.

⁸⁷¹ Jill Poole, *Contract Law* (Oxford University Press 2016) 86.

⁸⁷² David McLauchlan, 'The 'Drastic' Remedy of Rectification for Unilateral Mistake' (2008)124 *Law Quarterly Review* 608; Qi Zhou, 'An Economic Perspective on the Doctrine of Unilateral Mistake in English Contract Law: A Remedy-Based Approach' (2008) 59 *Northern Ireland Legal Quarterly* 327.

⁸⁷³ Ewan McKendrick, *Contract Law Text Cases and Materials* (Oxford University Press 2016) 513.

⁸⁷⁴ [1939] 3 All ER 566.

of the product), but the cost was calculated for each item. This amounted to about a third of the price discussed between the trader and the buyer. The court argued that the contract was void due to an error in pricing, constituting a mistake in terms of the contract. The court asserted that the buyer could not assume that this price was correct, and he should have been aware it was a mistake, partially based on their experience with purchasing such goods. This case, however, highlights a common rule that if the price of a good or service is ludicrously low on a commercial website, a court would likely deem that the intention to create legal relations between an online trader and consumers has not been formed.⁸⁷⁵

However, since online traders/companies may often provide offers and discounts for their customers if they shop online, it may be argued that a consumer may expect to find an excellent deal. This increases if the mispricing is not ludicrously low on a commercial website – for example, a MacBook Air at £909 instead of the regular retail price of £999. Therefore, it is unclear if the above rule can be applied in this situation, especially since it may not be easy to notice this mispricing.

On the other hand, there are other cases in which it is not ascertained whether a consumer realises a trader's mistake or not. The trader and the consumer will be at cross-purposes if the trader intends to sell their goods at price x and the consumer intends to purchase the goods at price z, which is incorrectly indicated on the website. This case is indicated by mutual mistake. In this context, it is worth considering the case of *Centrovincial Estates plc v Merchant Investors Assurance Co Ltd*.⁸⁷⁶

Centrovincial Estates Plc wrote a letter to the defendants, Merchant Investors Assurance Co Ltd, offering them a reviewed rental value of £65,000 per year. The latter was paying an annual rent minimum of £68,000 to the landlords. Therefore, Merchant Investors Assurance Co Ltd gladly accepted their offer and sent their acceptance letter. The claimant claimed a mistake in the proposal, and the intended reviewed rent amounted to £126,000 per annum. However, the defendants rejected the proposed correction. They obligated the claimants to comply with the agreement concluded between them, which in their opinion was binding as a result of their letter

⁸⁷⁵ Daniel Bates, 'Mistakes in Online Transactions - The Lessons to Be Learned from Kodak' (2002) Internet Newsletter for Lawyers Mar/Apr, <<https://ssrn.com/abstract=2307459>> accessed 22 June 2021.

⁸⁷⁶ [1983] Com LR 15.

of acceptance. Still, the claimants rejected the existence of a legally binding contract between the parties due to the mistake.

Although the court considers that there can be no legally binding contract if the offeree knew or should have known that an offer by an offeror contained a mistake, in this case, there was no evidence to support that the defendants either knew or ought to have known about the claimants' mistake. Therefore, they were bound by the acceptance of their offer. According to the judgement:

'it is contrary to the well-established principles of contract law to suggest that the offeror under a bilateral contract can withdraw an unambiguous offer, after it has been accepted in the manner contemplated by the offer, merely because he has made a mistake which the offeree neither knew nor could reasonably have known at the time when he accepted it.'

In conclusion, the above judgments summarise the main principles of English law concerning mistakes. There will be no binding contract if the other party knew of the mistake or should have known about it. Otherwise, the interpretation of the contract will be in favour of the party who reasonably relied on the other party's mistaken declaration. Thus, the mistaken party is bound to adhere to their declaration.

5.4.1.4 Delivery Information

Under the CCR 2013, an online trader must inform consumers of delivery arrangements and all additional delivery charges, prior to concluding a contract.⁸⁷⁷ If these costs cannot be calculated in advance, the trader must inform the consumer that an additional charge may occur.⁸⁷⁸ Such information provided prior to concluding a contract under the CCR 2013 would be a contract term. Therefore, such charges cannot be changed without the consumer's consent.⁸⁷⁹ Moreover, online traders must deliver goods 'without undue delay' or in any case within 30 days from the date on which the contract was concluded.⁸⁸⁰ However, suppose it is practical to deliver the goods earlier. In that case, online traders should not routinely leave delivery until the end of the 30 days, as this may be considered as undue delay.⁸⁸¹

⁸⁷⁷ Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013, schedule 2(j).

⁸⁷⁸ Ibid, schedule 2(g).

⁸⁷⁹ Consumer Rights Act 2015, s 12(2).

⁸⁸⁰ Ibid, s 28(3).

⁸⁸¹ Department for Business Innovation and Skills, *Consumer Rights Act: Goods, Guidance for Business* (September 2015) <<https://www.businesscompanion.info/sites/default/files/CRA-Goods-Guidance-for-Business-Sep-2015.pdf>> accessed 22 June 2021.

This section is one example of the reforms that the CRA 2015 provided in consumer contracts. In the previous regime, no time frame had been defined for goods to be delivered where there was no express condition to deliver an item at a particular time. Instead, the trader was obligated to deliver the good at a 'reasonable time'.⁸⁸² To complicate matters further, no provisions defined what would constitute a reasonable time frame under the previous law. This means that a delivery time frame needed to be ascertained for each case when brought to court in the case of any disputes concerning a B2C contract. Therefore, such a change intends to provide better protection for consumers from possible harm due to a delivery delay.⁸⁸³ In this regard, the CCR 2013 assert that when a trader and a consumer have agreed to deliver a product on a particular date or within a particular period, delivery must occur within such a time frame.⁸⁸⁴

Under the CRA 2015, if a trader does not deliver an item in an agreed time frame or within a reasonable time, the consumer may give the trader another opportunity to deliver the related item.⁸⁸⁵ Nonetheless, as a guarantee of consumer protection, the CRA 2015 allows consumers to terminate a contract in the event of a delay in delivery of the product within an agreed period, if the consumer specified the time frame for the delivery. In such situations, the trader must, without undue delay, reimburse all payments made under the contract.⁸⁸⁶ Although consumers are entitled to avail themselves of these remedies,⁸⁸⁷ the CRA 2015 does not explicitly indicate that these remedies must be set out in contracts by online traders. However, any drafting attempts to limit or exclude such remedies would be deemed ineffective under the CRA 2015.⁸⁸⁸

Vice versa, there are no special provisions in current consumer laws to address such an issue. It could be questioned whether the failure of consumers in taking delivery of goods could be assessed by analogy to, for example, SGA provisions. After all, stricter obligations could be imposed on professional buyers. Suppose a similar

⁸⁸² The Sale of Goods Act 1979, s 29(3).

⁸⁸³ Peter Cartwright, 'Redress Compliance and Choice: Enhanced Consumer Measures and the Retreat from Punishment in the Consumer Rights Act 2015' (2016) 75(2) Cambridge Law Journal 271.

⁸⁸⁴ Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013, reg 42(3).

⁸⁸⁵ Consumer Rights Act 2015, s 28(7).

⁸⁸⁶ Ibid, s 28(9).

⁸⁸⁷ Ibid, s 28(13).

⁸⁸⁸ Ibid, s 31(2).

approach could be adopted in B2C contracts. In that case, it is worth noting that the SGA stipulates that if a buyer fails to take delivery within a reasonable time, they are liable to the trader for any loss occasioned by their neglect or refusal to take delivery. They are also liable for a reasonable charge for the care and custody of the goods.⁸⁸⁹

Section 25 of the CRA 2015 deals with the issue of the quantity of goods. If the trader delivers a lesser quantity of goods to the consumer, the consumer may refuse them, but the consumer must pay for them at the contract rate if they accept the order.⁸⁹⁰ If the trader delivers a greater quantity of goods, the consumer may accept the goods included in the contract and refuse the rest or refuse all products. However, if the consumer accepts all delivered goods, they must pay for them at the contract price.⁸⁹¹

Concerning risk, under the CRA 2015, the goods remain at the trader's risk until they come into the physical possession of the consumer or a person identified by the consumer to take possession of the goods.⁸⁹² The risk passes to the consumer from the supplier at the point of delivery of the goods to the consumer. Delivery of the item is usually by a carrier. In this case, the carrier's identity and the contracting party who instructed them to carry the product must be identified. If the trader issued these instructions, the risk would not be passed on to the consumer until they receive the goods.⁸⁹³ Section 31 of the CRA 2015 states that any contract terms that seek to exclude or limit a trader's liability concerning the passing of risk are not binding on the consumer.

However, there is an exception when a courier is not offered or named by the supplier but chosen and arranged by the consumer. In these cases, risk will pass at the point of delivery of the goods from the supplier to the courier.⁸⁹⁴ However, there are concerns that this provision does not provide adequate consumer protection. The carrier chosen and arranged by the consumer is not expected to test the goods prior to delivering them to ensure that they are not defective. Thus, it may not be clear who is responsible for the damage of the goods, as they may have been damaged before

⁸⁸⁹ The Sale of Goods Act 1979, s 37.

⁸⁹⁰ Consumer Rights Act 2015, s 25(1).

⁸⁹¹ *Ibid*, s 25(3).

⁸⁹² *Ibid*, s 29(2).

⁸⁹³ Alec Samuels, 'The Consumer Rights Act 2015' (2016) *Journal of Business Law* 170.

⁸⁹⁴ Consumer Rights Act 2015, s 29(4).

the courier received them. Although carriers may compensate the consumer for damage, this may be limited to a specific value, which is less than the value of the goods, making the consumer vulnerable to loss.

Again, although most consumer provisions regarding contracts for the sale of goods have been consolidated in the CRA 2015, provisions regarding property transfer have not been included. Instead, it was asserted that such provisions under the SGA will still apply to B2C contracts.⁸⁹⁵ The general rule for determining when property in the goods will be transferred is that this is determined by the seller and the buyer in the contract. Therefore, detailed rules governing the transfer of ownership under the SGA 1979 are not binding on either party to the contract. Instead, the parties will be free to use these rules or reject them entirely.

Still, failure to regulate this issue in consumer contracts may expose a consumer to other risks – for example, if a trader goes into insolvency after receiving payment and before delivering the goods to the consumer. Often, ownership has not yet passed to the consumer. In this case, the consumer is legally considered an unsecured creditor. To complicate matters further, unsecured creditors are listed close to the bottom of the hierarchy of creditors under insolvency legislation.⁸⁹⁶ In other words, the chance of a consumer getting reimbursed for the amount they paid for a good or service is tiny, or they may not get anything at all. Additionally, it is not conceivable that an ordinary consumer (non-legal expert) would be aware of their legal position in this case. According to the Law Commission, ‘the rules are complex, technical and outdated: Some of the terminology is old-fashioned and unclear, and the rules were not designed with consumer transactions or internet shopping in mind’.⁸⁹⁷ Hence, there is an urgent need to regulate rules related to the transfer of ownership of B2C transactions in consumer protection legislation, taking into account the situation of consumer transactions in an online environment.

⁸⁹⁵ The Department for Business Innovation and Skills, *Explanatory Notes to the Consumer Rights Act 2015* (Royal Assent on 26 March 2015) para 24 <<http://www.legislation.gov.uk/ukpga/2015/15/notes/division/2>> accessed 22 June 2021.

⁸⁹⁶ Law Commission, *Consumer Prepayments on Retailer Insolvency* (Law Com No 368, 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/537745/56284_Law_Comm_HC_543_Web_pdf.pdf> accessed 8 August 2021.

⁸⁹⁷ Law Commission, *Consumer Sales Contracts: Rules on the Transfer of Ownership of Goods* (Law Com No 19036, 2020) <<https://researchbriefings.files.parliament.uk/documents/CBP-9036/CBP-9036.pdf>> accessed 8 August 2021.

The above provisions deal with this consumer issue. The following subsection examines the second legal solution that can limit the factors influencing consumer trust in online contracts identified in **Chapter two** – namely, protecting consumers from unfair commercial practices. Since the current online consumer protection legislation in the KSA are only protecting online consumers from misleading advertising, as mentioned in **Chapter Three**, perhaps the provisions of English law might help develop Saudi law to capture other unfair commercial practices that occur in the Internet environment.

5.4.2 Protection Against Unfair Commercial Practices

One of the goals of English consumer protection is to create the right environment for consumers to make rational decisions in the marketplace. These laws try to protect consumers from any challenges that may significantly affect the decision-making process by requiring traders to provide adequate information to consumers and prevent traders from engaging in unfair commercial practices that may weaken the decision-making capacity of consumers. This has been significantly underlined in the CPRs 2008, implementing the Unfair Commercial Practices Directive 2005. The UCPD generally aims to integrate the European market further⁸⁹⁸ and promote market competition, provide greater transparency, prevent fraud and eliminate unfair commercial practices through misleading actions, misleading omissions, aggressive practices and other unfair behaviour.⁸⁹⁹

5.4.2.1 Regulatory Structure: General Illegality Clauses and per se Prohibited Practices

5.4.2.1.1 General Duty Not to Conduct Unfair Commercial Practices

The CPRs 2008 apply to online and offline commercial transactions. These provisions are not limited to two stages before or during the conclusion of the contract but extend beyond the point of sale to cover, for example, after the sale. Unfair commercial practices are defined as:

‘any act, omission, course of conduct, representation or commercial communication including advertising and marketing by a trader, which is directly

⁸⁹⁸ Chris Willett, ‘Fairness and Consumer Decision Making under the Unfair Commercial Practices Directive’ (2010) 33(3) *Journal of Consumer Policy* 248.

⁸⁹⁹ Hugh Collins, ‘Harmonisation by Example: European Laws against Unfair Commercial Practices’ (2010) 73(1) *Modern Law Review* 89; Willem van Boom, ‘Unfair Commercial Practices’, (in Christian Twigg-Flesner (ed.) *Research Handbook on EU Consumer and Contract Law* (Edward Elgar 2016) 388.

connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction if any in relation to a product.⁹⁰⁰

This means that transactions that do not involve a trader and a consumer, such as C2C or B2B, are excluded.

Further, this broad definition includes all acts or omissions. Marginal participation in an unfair commercial practice, such as a printer that produces a misleading document, may be outside the scope of the regulations due to a failure to fulfil the requirement of direct connection.⁹⁰¹ Nevertheless, certain unfair commercial practices may occur even though a trader is not dealing directly with a consumer⁹⁰² – for example, a trader may sell a consumer a good, but an unfair omission or act may occur in a supply chain. In this case, the scope of the CPRs 2008 may be extended to include such commercial practices even if the trader does not deal directly with the consumer, as long as the business practice has sufficiently close contact with the consumer.⁹⁰³ Therefore, it can be said that the scope of the CPRs is not limited to the trader dealing directly with consumers, but rather that this act is directly linked to the commercial practice. The Office of Fair Trading (OFT) states:

‘A trader makes and sells processed cheese slices to supermarkets. Although the trader does not sell directly to consumers, any labels he produces must be in compliance with the CPRs 2008 as they are directly connected with the promotion and sale of the cheese slices to consumers.’⁹⁰⁴

Consequently, actions and omissions in the supply chain may also be considered unfair commercial practices under the CPRs 2008, if they misinform or mislead consumers.⁹⁰⁵

It is clear from case law that individual acts and omissions also fall under the scope of regulations. In *Nemzeti Fogyasztóvédelmi Hatóság v UPC Magyarország*

⁹⁰⁰ Consumer Protection from Unfair Trading Regulations 2008, reg 2(1)(b).

⁹⁰¹ Hugh Collins, ‘The Unfair Commercial Practices Directive’ (2005) 1(4) *European Review of Contract Law* 420.

⁹⁰² See *Surrey Trading Standards v Scottish and Southern Energy Plc* [2012] EWCA Crim 539.

⁹⁰³ Consumer Protection from Unfair Trading Regulations 2008, reg 2(2).

⁹⁰⁴ Department for Business, Enterprise and Regulatory Reform, *Consumer Protection from Unfair Trading Guidance on the UK Regulations* (May 2008) part 1.15 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284442/oft1008.pdf> accessed 22 June 2021.

⁹⁰⁵ W.C.H Ervine, ‘The Consumer Protection from Unfair Trading Regulations 2008’ (2008) *Scots Law Times* 148

Kft,⁹⁰⁶ the CJEU held that erroneous information provided by a trader to a consumer is considered an unfair commercial practice for the purposes of Directive 2005/29 art. 6(1), even though the information concerned a single consumer and a single transaction. The English Court of Appeal took a similar position to the European Court in the case of *R v X Ltd*,⁹⁰⁷ but the assessment depended on the facts of the case. Moreover, in *R v X Ltd*, the Court of Appeal confirmed that isolated incidents could constitute a commercial practice.

Generally speaking, from a practical point of view, most unfair commercial practices are either misleading or aggressive, thus they can be assessed under specific provisions of the CPRs 2008.⁹⁰⁸ On the other hand, some practices do not easily fall under these two types, but are still unfair and pose a risk to the consumer – for example, modem hijacking of the consumer over the Internet. The practice is done when a consumer clicks on a banner to run a programme on their computer. Once they do so, the consumer will be disconnected from their modem and reconnected to a remote server without alerting the consumer. As a result, the consumer will be subject to paying an expensive phone fee compared to a regular dial-up Internet connection. Hence, a general prohibition function arises that deals with unfair commercial practices that cannot be classified as misleading or aggressive if they meet specific criteria. Consequently, the autonomous functioning of general prohibition helps as a safety net to catch unfair commercial practices that are not classified separately in the provisions of the regulations and considered equally unfair.⁹⁰⁹

General prohibition contains two conditions for determining whether a practice is unfair under the CPRs 2008. First, it contravenes the requirements of professional diligence; the skill exercised should fall below the skill and care of the good-faith standards that a trader is expected to exercise with consumers.⁹¹⁰ Second, it materially distorts or is likely to materially distort the economic behaviour of the average consumer about the product.⁹¹¹

⁹⁰⁶ C-388/13 *Nemzeti Fogyasztóvédelmi Hatóság v UPC Magyarország Kft* EU:C:2015:225.

⁹⁰⁷ [2013] EWCA Crim 818; [2014] 1 W.L.R. 591.

⁹⁰⁸ This will be discussed in detail in the following subsections.

⁹⁰⁹ Giuseppe B Abbamonte, 'The Unfair Commercial Practices Directive: An Example of the New European Consumer Protection Approach' (2005) 12(3) *Columbia Journal of European Law* 703.

⁹¹⁰ Consumer Protection from Unfair Trading Regulations 2008, reg 3(3)(a).

⁹¹¹ *Ibid*, reg 3(3)(b).

The normative yardstick of ‘professional diligence’ is open-textured.⁹¹² The provisions of the CPRs 2008 do not determine the criteria by which business can be practiced honestly. Instead, they require traders to treat consumers professionally and fairly, as judged by a reasonable person.⁹¹³ Reg 2 (1) of the CPRs 2008 defines professional diligence as ‘the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either honest market practice in the trader’s field of activity or the general principle of good faith in the trader’s field of activity’. Good faith is one of the cornerstones of the professional diligence test.⁹¹⁴ Despite its importance in this context, the requirements for good faith were not identified under the CPRs 2008. According to Abbamonte, professional diligence is broader than subjective good faith, since it encompasses not only honesty but also competence on the part of the trader. Accordingly, an honest but incompetent antique dealer who sells fakes believing them to be originals will not conform to the standard of professional diligence.⁹¹⁵

Honest market practices have also not been identified in the CPRs 2008. It is clear from the definition of professional diligence that these practices may depend on the trader’s area of commercial activity.⁹¹⁶ Therefore, there must be a careful examination of all relevant facts to assess the professional diligence of a trader. The case of *Office of Fair-Trading v Ashbourne Management Services Ltd* is worth considering here. The defendant was a company whose directors recruited members for gym and health and fitness clubs, provided standard form agreements for their use, and collected payments from members under those agreements. The defendant advised gym clubs to adopt agreements with specified minimum membership periods of 12 to 36 months. The defendant described members who wished to terminate their agreements before the end of the minimum periods as defaulters and dealt with this by registering or threatening to register their defaults with a credit reference agency.

⁹¹² Willem van Boom, ‘Unfair Commercial Practices’, (in Christian Twigg-Flesner (ed.) *Research Handbook on EU Consumer and Contract Law* (Edward Elgar 2016) 390.

⁹¹³ Consumer Protection from Unfair Trading Regulations 2008, reg 3(3).

⁹¹⁴ Paolo Siciliani, Christine Riefa and Gamper Harriet, ‘Introduction’ in *Consumer Theories of Harm: An Economic Approach to Consumer Law Enforcement and Policy Making*, (Hart Publishing 2019) 198.

⁹¹⁵ Giuseppe B Abbamonte, ‘The Unfair Commercial Practices Directive and its General Prohibition’ (in Stephen Weatherill and Ulf Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29* (Hart Publishing 2007) 22).

⁹¹⁶ Paolo Siciliani, Christine Riefa and Gamper Harriet, ‘Introduction’ in *Consumer Theories of Harm: An Economic Approach to Consumer Law Enforcement and Policy Making*, (Hart Publishing 2019) 197.

These practices were unfair commercial practices contrary to the CPRs 2008. The judge noted that one could expect from a professional that:

'He does not include unfair terms in the Terms recommended to clients; that one does not add any terms that are likely to mislead consumers regarding the rights and obligations of the gym club or those of the consumer; that one does not omit material information and provide information that is clear; that one does not demand payment that the consumer is under no obligation to pay. By recommending to gym clubs that they use terms contrary to this advice and insist on their inclusion into contracts, the defendant did not behave in a way that conformed with honest market practices.'⁹¹⁷

Again, *R v X Ltd*⁹¹⁸ is also worth considering here. In this case, the salesman visited a 76-year-old widow to persuade her to purchase a product or service. The salesman spent over 3 hours with the widow and persuaded her to purchase goods costing over £2,500 by producing a document indicating robbery statistics in the area. This commercial practice was considered to be in contravention of the requirements of professional diligence and likely to distort the economic behaviour of the average consumer about the products in question. The judge described the practice as lamentable, deplorable, dismissive and evidencing a breach of honest market practice and good faith.⁹¹⁹

Although such cases clarify unfair commercial practices, which may be helpful in guiding traders to act in a professionally diligent manner, they do not provide clear criteria by which honest market practices can be identified.⁹²⁰

Furthermore, in Regulation 2(1) of the CPRs 2008, the concept of 'material distortion of economic behaviour means, in relation to an average consumer, appreciably to impair the average consumer's ability to make an informed decision thereby causing them to take a transactional decision that they would not have taken otherwise'.

Therefore, there is a need to prove that the average consumer is likely to make a decision with respect to a transaction that they would not normally have taken.

⁹¹⁷ *Office of Fair-Trading v Ashbourne Management Services Ltd* [2011] EWHC 1237 (Ch) [227].

⁹¹⁸ [2013] EWCA Crim 818.

⁹¹⁹ *Ibid* [29].

⁹²⁰ Department for Business, Enterprise and Regulatory Reform, Consumer Protection from Unfair Trading *Guidance on the UK Regulations* (May 2008) para 10.6, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284442/oft1008.pdf> accessed 22 June 2021.

Hence, the presumed consumer impact must be taken into consideration when examining a commercial practice.⁹²¹ However, the concept of causality is somewhat ambiguous since it asks what the average consumer, ‘reasonably well informed, reasonably observant and circumspect’⁹²² would have done, rather than what actual consumers have done or would have done. As van Boom argues, the difficulty arises in how to know what the informed decision would have been and what would have been expected of the average consumer if a business practice had not been deployed.⁹²³ In addition, the assessment is based on a standard rather than a statistical yardstick. Therefore, the average consumer standard can refer to something hypothetically that is unrealistic as it is far off the empirical mark. This, again, raises some concerns that the conjectural interpretation of the response of the average consumer may contribute to the improper application of these provisions in practice by courts and enforcers.⁹²⁴

5.4.2.1.2 Blacklisted Practices

The CPRs 2008 introduce certain practices that are always considered to be unfair.⁹²⁵ This is due to their inherently unfair nature (for example, displaying a trust mark, quality mark or equivalent without obtaining the necessary authorisation).⁹²⁶ Explicitly prohibiting these specific practices under regulations ensures that consumers and traders are clear about what is prohibited and helps provide a high level of consumer protection.⁹²⁷ For example, the CPRs 2008 prohibit falsely claiming or creating the impression that a trader is not acting for purposes relating to their trade, business, craft, or profession or falsely representing themselves as a consumer is one of the blacklisted practices prohibited by the CARs that may occur in the online environment.⁹²⁸

An advantage of claiming that a practice is blacklisted, instead of invoking the general prohibition of unfair commercial practices, is that there is no need to prove its

⁹²¹ Georgios Anagnostaras, ‘The Unfair Commercial Practices Directive in Context: from Legal Disparity to Legal Complexity?’ (2010) 47(1) *Common Market Law Review* 151.

⁹²² Consumer Protection from Unfair Trading Regulations 2008, reg 2(2).

⁹²³ Willem Boom, ‘Unfair Commercial Practices’, (in Christian Twigg-Flesner (ed.) *Research Handbook on EU Consumer and Contract Law* (Edward Elgar 2016) 391.

⁹²⁴ *Ibid.*

⁹²⁵ Consumer Protection from Unfair Trading Regulations 2008, schedule 1.

⁹²⁶ *Ibid.*, schedule 1(2).

⁹²⁷ *Office of Fair-Trading v Purely Creative Ltd & Ors* [2011] EWHC 106.

⁹²⁸ Consumer Protection from Unfair Trading Regulations 2008, schedule 1(22).

likelihood of influencing a consumer's decision to purchase.⁹²⁹ This requirement is not required in the case of blacklisted practices, where it is sufficient to demonstrate that the practice has occurred. In other words, a trader commits a criminal offence once one of these practices takes place, and there is no need to prove its effect, or potential effect, on the average consumer's decision.⁹³⁰

5.4.2.1.3 Misleading Actions and Omissions

A commercial practice can also be unfair if it misleads consumers by action or omission, or both. The CPRs 2008 prohibit 'misleading actions' and 'misleading omissions' that cause, or are likely to cause, an average consumer to take a different transactional decision.⁹³¹ This includes all decisions to purchase goods, services or digital content, including the decision of whether a contractual right would be exercised or decisions not to act.⁹³² These prohibitions are designed to ensure that consumers receive the information they need to make informed decisions about products or services in a clear and timely manner.

Misleading actions constitute an offence under the CPRs 2008. A misleading action occurs when a trader provides consumers with false or deceitful information and it causes or is likely to cause the average consumer to take a different transactional decision. This may occur even if the overall presentation of the information is factually correct, but it is deceitful to the extent that it causes or is likely to cause the average consumer to make a different decision.⁹³³

There are three main types of misleading actions:

- Providing consumers with information that contains false information about one or more specified matters.⁹³⁴
- Creating confusion with competitors' products.⁹³⁵
- Failing to honour commitments made in a code of conduct.⁹³⁶

⁹²⁹ Ibid, reg 3(3).

⁹³⁰ Ibid, reg 12.

⁹³¹ Ibid, reg 5 and 6.

⁹³² Ibid, reg 5.

⁹³³ Ibid.

⁹³⁴ Consumer Protection from Unfair Trading Regulations 2008, reg 5(2)(a).

⁹³⁵ Under regulation 5(3)(a) of the CPRs, a commercial practice is also misleading if it 'concerns any marketing of a product (including comparative advertising) which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor'.

⁹³⁶ Consumer Protection from Unfair Trading Regulations 2008, reg 5(3)(b).

False information must be related to a set of matters stipulated in Regulation 5 to be considered as influencing the transactional decision-making of a consumer and, therefore, as leading to an unfair commercial practice. The price and the main characteristics of the goods or services are likely to be the most important of such requirements. The requirements for the main characteristics are detailed in Regulation 5(5). They generally include information regarding the availability of the good, its benefits and risks, quantity, fitness for purpose and the expected results from use, etc. For example, if a trader declares that a good is made of wood while that good is made of plastic fibres, this would be untruthful concerning the main good's characteristics. Consumers might not buy the same product, or have paid a different price for it, if they had accurate information. Consequently, providing this information to consumers will be regarded as a misleading action under the CPRs 2008.⁹³⁷ Another example is when a hotel booked by consumers online claims that there is free Internet in the rooms, but when consumers arrive, they discover that the service is still under construction. This practice would fall under misleading actions, provided that consumers would have taken a different transactional decision if they had known about this.⁹³⁸

In contrast, misleading omissions include: 1) omitting or hiding material information; 2) providing unclear or ambiguous information; and 3) a failure to identify commercial intent unless this is already apparent from the context. As a result, it causes or is likely to cause the average consumer to take a transactional decision they would not have taken otherwise.⁹³⁹ It can be said that preventing practices that allow a trader to omit information consumers need also includes a rejection that consumers are responsible for obtaining all relevant transactional information that they think might be essential.⁹⁴⁰

Many questions have been raised about the extent of a trader's obligations in clarifying the negative aspects of the goods or services when promoting their product through advertising under the CPRs 2008.

⁹³⁷ Susan Singleton, 'The Consumer Protection from Unfair Trading Regulations 2008 and IT/Internet Viral and Buzz Marketing Issues' (2008) 13(4) Communications Law 117.

⁹³⁸ W.C.H Ervine, 'The Consumer Protection from Unfair Trading Regulations 2008' (2008) Scots Law Times 149.

⁹³⁹ Consumer Protection from Unfair Trading Regulations 2008, reg 6(1).

⁹⁴⁰ Chris Willett, 'Fairness and Consumer Decision Making under the Unfair Commercial Practices Directive' (2010) 33(3) Journal of Consumer Policy 254.

To consider a commercial practice misleading, the manner of provision of material information must be considered, along with the limitations of the communication medium used under Article 6 – for example, a trader may be unable to provide all material information via SMS and instead refer the buyer to their website to obtain more information. However, not disclosing all material information in online newspapers and using small print to refer to where the additional information may be found may be considered a misleading practice.⁹⁴¹ It would depend on the space traders have to promote their products in a newspaper and the manner in which they refer to additional information.

The case of *Canal Digital Danmark A/S (Canal)*⁹⁴² is worth considering here. In this case, Canal Digital Danmark A/S (Canal) ran an advertising campaign for TV subscriptions on TV, the Internet and Canal's website. The subscription price consisted of two packages, costing either Danish krone (KD) 99 or KD 149 for the monthly subscription fee (subscription charge), in addition to a monthly card service fee of KD 389 (the card service charge). In the adverts in question, the monthly subscription charges featured prominently in all of the adverts in question, while the card service charge featured less prominently. The case was referred by the Danish court to the CJEU to ask for guidance on certain issues. A critical question was whether displaying a price component less prominently in an advertisement could be considered a misleading action or an omission under the UCPD. Moreover, if it is considered a misleading omission, to what extent can the context in which this practice occurs, especially the time and space limitations imposed by the advertising medium, be considered?

The court indicated that this practice might be considered a misleading omission 'if such failure causes the consumer to take a transactional decision that he would not have taken otherwise'.⁹⁴³ But in order for this practice to be considered an omission, the court would have to assess each case separately.⁹⁴⁴ In making such an assessment, consideration must be given to the context in which such a practice occurs, especially the time and space limitations imposed by the medium. Therefore,

⁹⁴¹ Susan Singleton, 'The Consumer Protection from Unfair Trading Regulation' (2009) 15(3) *Computer and Telecommunications Law Review* 78.

⁹⁴² C-611/14 *Canal Digital Danmark A/S (Canal)* EU:C:2016:800.

⁹⁴³ *Ibid*, para 64.

⁹⁴⁴ *Ibid*, para 58.

a trader can refer a consumer to their website if it is impossible to provide all the material information concerning the main characteristics of goods or services in the advertisement, due to time and space limitations.⁹⁴⁵

Vice versa, when assessing whether a commercial practice is a misleading action, it is not a requirement to consider its context, such as the time and space constraints that the medium imposes.⁹⁴⁶ Instead, the CJEU stressed the importance of assessing whether displaying one price component more prominently than the other in an advert could lead to a misconception of the total offer.⁹⁴⁷ Consequently, it could lead a consumer to believe that they should only pay the emphasised element of the price. In addition, the less prominent component price should be assessed, and its importance to the total price examined.⁹⁴⁸ This would then help determine whether the practice would be likely to lead a consumer to take a transactional decision they would not have otherwise taken.

The missing information must be 'material' as defined by Regulation 6(3). Material information is information about a product that a consumer needs to make an informed transactional decision.⁹⁴⁹ It also includes any information required by European derived law such as the CCR 2013, where price, including taxes, must be provided.⁹⁵⁰ This information varies from case to case, as the amount of information may be very small, from information related to simple goods to information about more complex goods.⁹⁵¹ According to this, traders must make sure that consumers receive the information they need to make informed decisions about products or services clearly and timely, whether or not the consumer asks for it.

In this regard, the concept of 'consumers' needs' in terms of material information is broad. The information that a consumer needs to make an informed decision may vary from one consumer to another. This may be one of the reasons why 'the average consumer' benchmark is applied to limit traders' burden/cost. In addition, a literal reading of this concept may result in a trader being obliged to a high level of

⁹⁴⁵ Ibid, para 63.

⁹⁴⁶ Ibid, para 42.

⁹⁴⁷ Ibid, para 43.

⁹⁴⁸ Ibid, para 47.

⁹⁴⁹ Consumer Protection from Unfair Trading Regulations 2008, reg 6(3)(a).

⁹⁵⁰ Ibid, reg 6(3)(b).

⁹⁵¹ W.C.H Ervine, 'The Consumer Protection from Unfair Trading Regulations 2008' (2008) Scots Law Times 150.

disclosure. Doing so may result in obstacles to the free movement of goods and services beyond those necessary to achieve adequate consumer protection. In *Office of Fair-Trading v Purely Creative Ltd*,⁹⁵² the court interpreted the meaning of ‘material information’ as necessary to enable the average consumer to make an informed decision, not only that which would assist or be relevant for making such a decision.⁹⁵³

Briggs believes that a literal reading of reg.6(3)(a) and its equivalent in art.7.1 of the UCPD may require that an utmost good faith obligation is imposed not merely in relation to the consumer’s decision whether to contract, but also to every transactional decision. This would impose significant consequences for traders, and it is unlikely that an obligation for this high level of disclosure was the intention of the UCPD lawmakers.⁹⁵⁴ Instead, ‘the question is not whether the omitted information would assist or be relevant, but whether its provision is necessary to enable the average consumer to take an informed transactional decision’.⁹⁵⁵

*Secretary of State for Business, Innovation and Skills v PLT Anti-Marketing Ltd*⁹⁵⁶ also provides an analysis of the mechanism by which materiality is to be determined by reference to the average consumer’s need for information. The Court of Appeal stated that when determining ‘material information’, it is essential to distinguish between information about a good or service that may only be known by the trader and information about alternative products that a consumer can obtain from the marketplace. Thus, the latter is not considered ‘material information’ under the CPRs 2008 that a trader must disclose, as long as a consumer can obtain it by making enquiries in the marketplace. This also includes information relating to the procurement of goods from the supplier, such as its cost or mark-up.

5.4.2.1.4 Aggressive Practices

The CPRs 2008 also prohibit aggressive commercial practices,⁹⁵⁷ which are practices that, in the context of the particular circumstances, intimidate or exploit consumers,

⁹⁵² [2011] EWHC 106.

⁹⁵³ Matthew Stamer and Oliver Bray, ‘Office of Fair-Trading v Purely Creative Ltd: The Net Tightens on Exponents of Sharp Commercial Practices’(2011) 22(4) Entertainment Law Review 118-122.

⁹⁵⁴ *Office of Fair-Trading v Purely Creative Ltd* [2011] E.C.C. 20 [74].

⁹⁵⁵ Ibid.

⁹⁵⁶ *Secretary of State for Business, Innovation and Skills v PLT Anti-Marketing Ltd* [2015] EWCA Civ 76.

⁹⁵⁷ Consumer Protection from Unfair Trading Regulations 2008, reg 7.

restricting their ability to make free or informed choices.⁹⁵⁸ A commercial practice will be seen as 'aggressive' when a trader uses harassment, coercion, or undue influence so that the consumer's ability to act is (or likely is) significantly impaired.⁹⁵⁹ For example, a trader imposes specific non-contractual barriers on the consumer, which may be onerous or disproportionate when the consumer wishes to exercise rights under the contract, such as rights to terminate the contract or switch to another product or trader.⁹⁶⁰ For an aggressive practice to be unfair, it must cause or be likely to cause an average consumer to take a different decision.⁹⁶¹

Again, in *Office of Fair-Trading v Ashbourne Management Services Ltd*,⁹⁶² the court held that the practice of describing members who wished to terminate their agreements before the end of the minimum period as defaulters and registering or threatening to register that information with credit reference agencies was an unfair commercial practice contrary to several regulations of the CPRs 2008, such as regulation 7(2)d. According to the court's judgement:

'Ashbourne's reliance on the terms in chasing payment is contrary to reg.3(3) or regs 3(4)(c) and 7 of the CPR in that it does not meet the standard of honest market practice or good faith that may reasonably be expected; is likely significantly to impair the average consumer's freedom of choice through harassment, coercion or undue influence; and is likely to cause the average consumer to take the transactional decision of making a payment that he would not otherwise take.'⁹⁶³

Although the meaning of coercion or undue influence has been referred to in the CPRs 2008,⁹⁶⁴ the CPRs 2008 fail to define harassment. In this context, regulation 7(2) of the CPRs 2008 identifies some factors that may help determine the occurrence of harassment. Such factors include the use of threatening or abusive language or behaviour; time, location, nature, or persistence; any threat to take any actions that cannot be taken legally; exploitation of the trader for any particular misfortune or circumstance; and onerous or disproportionate non-contractual barriers imposed by

⁹⁵⁸ Willem van Boom, 'Unfair Commercial Practices', (in Christian Twigg-Flesner (ed.) *Research Handbook on EU Consumer and Contract Law* (Edward Elgar 2016) 393).

⁹⁵⁹ Consumer Protection from Unfair Trading Regulations 2008, reg 7(1)(a).

⁹⁶⁰ See C-428/11 *Purely Creative Ltd and others v Office of Fair Trading* ECLI:EU:C:2012:651.

⁹⁶¹ Consumer Protection from Unfair Trading Regulations 2008, reg 7(1)(b).

⁹⁶² [2011] EWHC 1237.

⁹⁶³ *Office of Fair-Trading v Ashbourne Management Services Ltd* [2011] EWHC 1237 [118].

⁹⁶⁴ Consumer Protection from Unfair Trading Regulations 2008, reg 7(3).

the trader.⁹⁶⁵ For example, business practices that unfairly target vulnerable consumers are categorised as aggressive business practices.⁹⁶⁶ Certain groups of people are considered the most vulnerable to facing risks in the Internet environment, such as the elderly, who are more likely to be more vulnerable to mistakes due to their limited ability to use the Internet.⁹⁶⁷ For example, it has been confirmed that older people aged 65 years or above are more likely not to check if a website is secure before providing their bank details or credit card information.⁹⁶⁸ Consequently, they are more likely to be vulnerable to fraud and scams.

5.4.2.2 Tools to Protect Against Online Unfair Commercial Practices

It is crucial to protect consumers, who are typically considered the weaker party, from unfair or dishonest traders, suppliers and marketers of goods and services.⁹⁶⁹ A need for this exists offline and online, but is more evident in contracts involving online transactions, as a web-based environment is propitious to unfair commercial practices.⁹⁷⁰ The nature of an online environment weakens the relationship between the trader and consumers, increasing consumers' vulnerability.⁹⁷¹ Therefore, a lack of

⁹⁶⁵ Although these factors may be beneficial, it has been reported that these factors are vague and not exhaustive. Therefore, there is a need to clarify the harassment further to define its outer framework and prevent any uncertainty that may be exploited. See Onyeka Osuji, 'Business-to-Consumer Harassment, Unfair Commercial Practices Directive and the UK - a Distorted Picture of Uniform Harmonization?' (2011) *Journal of Consumer Policy* 441.

⁹⁶⁶ A vulnerable consumer is one whom the trader could foresee as vulnerable because of mental or physical infirmity, age, or credulity. See *Consumer Protection from Unfair Trading Regulations 2008*, reg 2(5)(b).

⁹⁶⁷ Competition and Markets Authority, *Consumer vulnerability: Challenges and Potential Solutions* (February 2019) para 47 and 48, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/782542/CMA-Vulnerable_People_Accessible.pdf> accessed 22 June 2021.

⁹⁶⁸ Financial Conduct Authority, *The Financial Lives of Consumers Across the UK, Key findings from the FCA's Financial Lives* (Survey 2017 Updated January 2020) para 7.3 <<https://www.fca.org.uk/publication/research/financial-lives-consumers-across-uk.pdf>> accessed 22 June 2021; Natali Helberger, Orla Lynskey, Hans-W Micklitz, Peter Rott, Marijn Sax and Joanna Strycharz, *EU Consumer Protection 2.0, Structural Asymmetries in Digital Consumer Markets* (Bureau Européen des Unions de Consommateurs 2021) paras 112-118 <https://www.beuc.eu/publications/beuc-x-2021-018_eu_consumer_protection.0_0.pdf> accessed 8 August 2021.

⁹⁶⁹ See Arnold Roosendaal and Simone van Esch, 'Commercial Websites: Consumer Protection and Power Shifts' (2007) 6(1) *Journal of International Trade Law and Policy* 18; Paolo Siciliani, Christine Riefa and Gamper Harriet, 'The Limitations of Consumer Law in Tackling Consumer Harm' in *Consumer Theories of Harm: An Economic Approach to Consumer Law Enforcement and Policy Making* (Hart Publishing 2019) 25.

⁹⁷⁰ UNCTAD, 'Consumer Protection in Electronic Commerce TD/B/C.I/CPLP/7' (24 April 2017) Intergovernmental Group of Experts on Consumer Protection Law and Policy Second session Item 3 (e) of the provisional agenda para 16 <http://unctad.org/meetings/en/SessionalDocuments/cicplp7_en.pdf> accessed 22 June 2021.

⁹⁷¹ See Natali Helberger, Orla Lynskey, Hans-W Micklitz, Peter Rott, Marijn Sax and Joanna Strycharz, *EU Consumer Protection 2.0, Structural Asymmetries in Digital Consumer Markets* (Bureau Européen des Unions de Consommateurs 2021) paras 112-118

consumer trust in online platforms is one of the main obstacles to the growth of online shopping.⁹⁷²

As this thesis outlined in **Chapter two**, many unfair commercial practices may occur in both offline and online transactions. The challenge is that not all unfair commercial practices online can be anticipated due to the continuous development of the online sector and the constant emergence of new practices that might mislead online consumers. Instead, this section seeks to identify four tools for an online trader to mislead consumers in ways that do not occur in offline transactions. It also seeks to examine the legal protection provided by English consumer regulations against unfair commercial practices occurring through these tools and the adequacy of such solutions for consumer protection in online contracts.

5.4.2.2.1 Search Engines

Given the importance of unfair commercial practices usually used by search engines, the Competition and Markets Authority (CMA) conducted research to determine unfair practices based on the clarity, accuracy, and presentation of information on these platforms. This study identified practices of some platforms that may mislead consumers and that may be in breach of consumer protection laws and, especially, the CPRs 2008. This study has further identified some principles to limit certain practices of search engine providers. These principles include clearly and prominently informing the consumer that 'paid for' search results may affect the ranking of search results that are not 'paid for'.⁹⁷³

Paying for search results in whole or in part by another trader is not in itself an unfair commercial practice under the CPRs 2008. However, to ensure consumer protection from abuse of this tool, the CPRs 2008 require the search engine provider to distinguish these search results from natural search results. According to Schedule 1 of the CPRs 2008, 'using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by

<https://www.beuc.eu/publications/beuc-x-2021-018_eu_consumer_protection.0_0.pdf> accessed 8 August 2021.

⁹⁷² See Giusella Finocchiaro, 'European Law and Consumer Protection in the Information Age' (2003) 12(2) *Information & Communication Technology Law* 113.

⁹⁷³ Competition and Markets Authority, *Consumer Protection Law Compliance Principles for Businesses Offering Online Accommodation Booking Services* (13 September 2019) para 8 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781624/webteam_online_booking_services_principles.pdf> accessed 22 June 2021.

images or sounds clearly identifiable by the consumer (advertorial)' is considered as a commercial practice that is, in all circumstances, deemed unfair.⁹⁷⁴ Thus, failure to disclose paid placement in search results can be an unfair commercial practice under the CPRs 2008. In addition, the CPRs 2008 prohibit falsely claiming or creating the impression that a trader is not acting for purposes relating to their trade, business, craft, or profession, or falsely representing themselves as a consumer.⁹⁷⁵

5.4.2.2.2 Comparison Websites

Many other unfair business practices may occur on comparison websites. Several of these practices are determined in the blacklist in the Annex part of the CPRs 2008, such as bait advertising,⁹⁷⁶ bait and switch⁹⁷⁷ and passing on materially inaccurate information on market conditions to induce consumers to acquire a product at conditions less favourable than normal market conditions.⁹⁷⁸ As explained above, the mere occurrence of these practices is an unfair practice, without a need to prove an impact on the consumer's decision. However, many practices occur on comparison sites that are not blacklisted.

If a comparison tool displays prices or products that are not available, this could breach Regulations 5 and 6 of the CPRs 2008. The CPRs 2008 prohibit misleading commercial practices, whether by action or omission, which cause or are likely to cause the consumer to take a different transactional decision. Therefore, providers of comparison tools who qualify as traders under the CPRs 2008 must ensure that the information provided by a platform relating to the promotion, sale or supply of a product to consumers must not create confusion with any products, trademarks, trade names or other distinguishing marks of a competitor.⁹⁷⁹ This can help avoid the risk of consumers being misled by lists that are labelled 'best deal' or 'recommended choice'.

In addition, deleting information about the criteria used to classify the results of a comparison, such as falsely claiming the 'best deal' or the price of the deals it offers, which causes or is likely to cause the average consumer to make a different transaction decision, is misleading under the CPRs 2008.⁹⁸⁰ Consequently, it can be

⁹⁷⁴ Consumer Protection from Unfair Trading Regulations 2008, reg 1(11).

⁹⁷⁵ Ibid, reg 1(22).

⁹⁷⁶ Ibid, schedule 1(5).

⁹⁷⁷ Ibid, schedule 1(6).

⁹⁷⁸ Ibid, schedule 1(18).

⁹⁷⁹ Ibid, reg 5(3)(a).

⁹⁸⁰ Ibid, reg 6(1).

said that if comparison websites provide incomplete information related to the price of a displayed deal or how it was calculated and a specific price advantage of a deal, which has caused or is likely to cause the average consumer to make a different transaction decision, this could be considered a misleading business practice.

5.4.2.2.3 Consumer Reviews

There is no specific legislation that addresses the previous issues of consumer reviews or that applies directly or explicitly to online reviews in the UK. However, the CPRs 2008 cover many legal aspects of online reviews. They impose multiple duties on traders, including Internet platforms. In the context of consumer reviews, it may be argued that platform providers should disclose to consumers the true source of the reviews and not create the impression that those published reviews originated from real consumers if they have not. This may include the disclosure of communications between the consumer review tool provider and the trader who provided the goods or services, if that communication is likely to affect the credibility of the reviews.⁹⁸¹ Uncensored reviews may help consumers know that such reviews may not always be as impartial as they appear.

The CPRs 2008 also prohibit traders from publishing fake reviews in the name of consumers, according to point 22 of Annex I of the CPRs 2008, which prohibits 'misrepresentation of self as a consumer'. It can be said that this regulation implies an implicit obligation that any online review provided by an online trader to potential consumers must reflect the actual consumers' opinions and experiences.⁹⁸² However, the CPRs 2008 do not impose any obligations on review providers to make online reviews more reliable. Therefore, it can be said that review platforms may circumvent the law by simply informing consumers about the extent of the reliability of the review mechanism.

A trader may also suppress genuine negative consumer reviews and maintain positive reviews to maintain their reputation, without informing consumers that they are only reading a limited selection of positive reviews. In this case, a consumer is

⁹⁸¹ Competition and Markets Authority, *Online Reviews and Endorsements Report on the CMA's Call for Information* (The National Archives, Kew, London, 19 June 2015) paras 6.7-28 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/436238/Online_reviews_and_endorsements.pdf> accessed 22 June 2021.

⁹⁸² European Commission, 'Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices' SWD (2016) 163 final para 5.2.8 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0163&from=EN>> accessed 22 June 2021.

likely to assume that such reviews reflect the experiences of all consumers who have dealt with the trader. Likely, an ordinary consumer who has not been in contact with this trader may choose to conclude a contract with this trader instead of a competitor who has not participated in such a practice.⁹⁸³ This commercial practice can be considered a misleading omission under the CPRs 2008.⁹⁸⁴ Failure to inform consumers that only a select group of reviews is provided, without publishing all genuine customer ratings can also be considered an omission of material information. This in itself may contribute to consumers continuing to read the reviews or deciding to contact the trader, which they would not have done had they known that negative reviews had been suppressed.⁹⁸⁵ As mentioned previously, consumer protection is not limited to prohibiting the provision of false or misleading information. There is also an obligation on traders to disclose all the material information a consumer needs to make an informed decision. If some online reviews are suppressed, it may be said that the online platform may breach the provisions of the CPRs 2008, if the consumer's decision is based on misleading online reviews, even if the consumer has not made a purchase of a particular good or service.⁹⁸⁶ This practice can also be contrary to the requirements of professional diligence,⁹⁸⁷ where consumers expect platforms to provide all consumer reviews related to the experience of a product or service. Hence, it can be said that in order for this practice not to be unfair, traders must either post positive and negative reviews or inform consumers clearly that not all relevant reviews are posted.

5.4.2.2.4 Social Media Platforms

Generally, it can be said that advertisements on social media that deceive or are likely to deceive consumers by their display of the commercial origin of the goods or services could be considered unfair commercial practices under the CPRs 2008.⁹⁸⁸ In addition, if goods and services are advertised on these platforms in a way that creates confusion

⁹⁸³ Madalena Narciso, 'The Regulation of Online Reviews in European Consumer Law' (2019) *European Review of Private Law* para 29.

⁹⁸⁴ Consumer Protection from Unfair Trading Regulations 2008, reg 6.

⁹⁸⁵ Competition and Markets Authority, *Online Reviews and Endorsements Report on the CMA's Call for Information* (The National Archives, Kew, London, 19 June 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/436238/Online_reviews_and_endorsements.pdf> accessed 22 June 2021.

⁹⁸⁶ Madalena Narciso, 'The Regulation of Online Reviews in European Consumer Law' (2019) *European Review of Private Law* para 29.

⁹⁸⁷ Consumer Protection from Unfair Trading Regulations 2008, reg 3(3)(a).

⁹⁸⁸ *Ibid*, reg 5(2).

with any competitor's products, trademarks, trade names or other distinctive marks, it could also be considered as misleading and therefore unfair commercial practice.⁹⁸⁹ A certain amount of information must be provided under the CPRs 2008 when the advertisement invites purchase.⁹⁹⁰ The material information in invitations to purchase includes the main characteristics of the product, performance, any arrangements for payment, the identity of the trader, the price of the product (including taxes), the address of the trader, delivery and the handling of complaints that differ from reasonable consumer expectations. Therefore, unless these measures are apparent from the context, such practices will be considered a misleading omission if they cause or are likely to cause the consumer to make a different transactional decision.

5.4.2.3 Obstacles of the CPRs' Implementation in an Online Environment

Some scholars argue that current English tools and enforcement mechanisms do not provide sufficient protection to eliminate unfair commercial practices resulting from an online environment,⁹⁹¹ which will be further discussed in the following paragraphs.

Firstly, one of the conditions for applying the CPRs 2008 provisions is that the contractual relationship must be B2C. It may be challenging to establish whether a given contract is concluded within a B2C relationship with respect to some of the above practices in an online environment.⁹⁹² For example, a celebrity marketing a product on social media does not have a direct relationship with the consumer and often not with the trader within the CPRs 2008.⁹⁹³ The latter point allows us to question whether marketing by digital influencers could be directly connected to a transaction concluded between consumers and traders. Although some celebrities may be classified as traders, it is challenging to determine the point at which the activity ceases personally and becomes professional.⁹⁹⁴ Therefore, it can be said that if an

⁹⁸⁹ Ibid, reg 5(3)(a).

⁹⁹⁰ Ibid, reg 6(4). See also W.C.H Ervine, 'The Consumer Protection from Unfair Trading Regulations 2008' (2008) Scots Law Times 150.

⁹⁹¹ Christine Riefa and Laura Clausen, 'Towards Fairness in Digital Influencers' Marketing Practices' (2019) Journal of European Consumer and Market Law 69.

⁹⁹² See Chapter Five, section 5.4.2.1 of this thesis, Regulatory Structure: General Illegality Clauses and per se Prohibited Practices.

⁹⁹³ Christine Riefa, 'Consumer Protection on Social Media Platforms: Tackling the Challenges of Social Commerce' (in Tatiana-Eleni Synodinou, Philippe Jougoux, Christiana Markou, and Thalia Prastitou-Merdi (eds), *EU Internet Law in the Digital Era* (Springer 2019) <<https://ssrn.com/abstract=3373704>> accessed 22 June 2021.

⁹⁹⁴ Christine Riefa, *Consumer Protection and Online Auction Platforms Towards a Safer Legal Framework* (Ashgate Publishing 2015) 26 and 30.

online consumer is misled by a post made by a celebrity, in most cases, that consumer will not benefit from the protection provided by the CPRs 2008.

Secondly, for misleading actions or omissions to constitute an unfair commercial practice, they must cause or be likely to cause an average consumer to take a transactional decision that they would not otherwise have taken under Regulations 5 and 6 of the CPRs 2008. This means that this practice must be a significant factor in a consumer's decision to enter into a contract or make a payment. The Law Commissions concluded that:

'A consumer must show that he or she made the decision to enter the contract, or make the payment to the trader because of the misleading or aggressive practice. It is not necessary to show that the prohibited behaviour was the only, or even the main cause, to enter into the contract. It must, however, at least be a "significant factor" in the consumer's decision.'⁹⁹⁵

The real difficulty lies in whether or not the online content is the cause for making a purchase decision or if that simply reinforces a decision already made by the consumer. For instance, when a consumer decides to purchase a good, but prior to purchasing reads some reviews about some goods, it is not clear whether the consumer was directly affected by the review or whether they would have purchased those goods anyway. A consumer may purchase those goods or services based on other reasons, such as fashion advice and the review only reinforcing their purchase intention. Thus, it is complicated to establish causation in this context.⁹⁹⁶

Thirdly, although the CPRs 2014 provide certain rights (a right to unwind, a right to a discount, and a right to claim damages), these rights are framed in a limited manner.⁹⁹⁷ A consumer can only practise them within a specific time frame or only get a certain percentage of the amount paid or, in some cases, the consumer must choose only one of the rights mentioned above. Moreover, the consumer can only exercise these rights to remedy misleading and aggressive practices, and these rights are not

⁹⁹⁵ Department for Business, Innovation & Skills, *Misleading and Aggressive Commercial Practices: New Private Rights for Consumers - Guidance on the Consumer Protection (Amendment) Regulations 2014* (July 2018) para 18 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721872/misleading-aggressive-commercial-practices-guidance.pdf> accessed 22 June 2021.

⁹⁹⁶ Christine Riefa and Laura Clausen, 'Towards Fairness in Digital Influencers' Marketing Practices' (2019) *Journal of European Consumer and Market Law* 67.

⁹⁹⁷ Christine Riefa and Séverine Saintier, 'Unfair Commercial Practices Directive: Remediating Economic Torts?' (in Paula Gilliker (ed) *Research Handbook on EU Tort Law* (Edward Elgar 2017) 312.

available for infringement under the general clauses.⁹⁹⁸ Further, this right is not provided to consumers in some cases. Only compensation will be provided to those who entered into a contract or made a payment. For instance, redress will not be granted to consumers for a misleading advertisement that caused them to visit the online marketplace, if the consumers fail to make a purchase. Consequently, it can be said that existing redress may not be sufficient to protect victims of fraud in many situations.

Therefore, there is a need to propose legal methods of boosting the effectiveness of the current regulatory systems and mechanisms to be commensurate with the online world.

5.4.2.4 What about the 'New Deal'?⁹⁹⁹

Since most relevant consumer protection laws have been adopted through the implementation of the EU directives, the latest legislative reforms to EU consumer laws, which have been responsive to consumer challenges in the Internet environment, may serve as a guide for developing relevant laws.¹⁰⁰⁰ The 'New Deal' is one of the latest of those reforms.¹⁰⁰¹ Through this initiative, the need to provide access to better and more robust enforcement measures by consumers has emphasised some relevant consumer protection laws to contribute to the empowerment of consumers and the promotion of their rights and to provide appropriate protection for the digital age under EU law.¹⁰⁰²

The modification of the UCPD blacklist to include the prohibition of hidden advertising should therefore be clarified to ascertain whether it applies not only to

⁹⁹⁸ Cowan Ervine, 'Consumer Redress for Misleading and Aggressive Practices' (2011) 15(3) *Edinburgh Law Review* 452.

⁹⁹⁹ Directive (EU) 2019/2161 of the European Parliament and the Council of amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules.

¹⁰⁰⁰ According to Conway, 'Most EU law applicable in the UK as at 31 December 2020 remains in effect within the UK indefinitely as "retained EU law" (unless or until the Government decides to repeal or amend it)'. Lorraine Conway, 'Brexit: UK Consumer Protection Law' (House of Commons Library, 21 May 2021) <<https://commonslibrary.parliament.uk/research-briefings/cbp-9126/>> accessed 4 August 2021.

¹⁰⁰¹ European Commission, 'Proposal for a Directive of the European Parliament and of the Council as Regards Better Enforcement and Modernisation of EU Consumer Protection Rules' COM(2018) 185 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0185&from=EN>> accessed 22 June 2021.

¹⁰⁰² European Commission, 'A New Deal for Consumers' COM (2018) 183 para, ch1, art 2 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0183&from=en>> accessed 22 June 2021.

editorial content in the media, but also to search results in response to a consumer's online search query.¹⁰⁰³ Therefore, to ensure consumer protection from the abuse of this tool, the 'New Deal' requires search engine providers to distinguish these search results from natural search results.

Previously, most online platforms were considered mere facilitators, brokers or 'digital clearinghouses', rather than as sellers or suppliers, and therefore, the platform is not a party to the contract concluded between a consumer and a trader. In addition, some platforms provide their services free of charge as consumers are not required to pay to benefit from their services. Therefore, as there is no contract or payment, such platforms will be outside the scope of many consumer protection laws.¹⁰⁰⁴ However, one of the distinctive additions of these reforms is that they provide a number of information requirements that brokers (online platforms) must adhere to, even if they provide their services for free.¹⁰⁰⁵

This requires the provision of the following information:

1. The main parameters determining rankings of offers.
2. Whether the contract is concluded with a trader or an individual.
3. Whether consumer protection legislation applies.
4. Which trader is responsible for ensuring consumer rights related to the contract.

This rule may address one of the problems identified in this chapter: the consumer does not know the other party's status, causing them to miss the opportunity to obtain legal protection under the relevant consumer protection laws. Despite the importance of this provision, in practice, it may not achieve the desired aim in all cases. The reforms do not stipulate whether online platforms must check a third party's status and assess whether or not they are indeed eligible to be a professional trader under the relevant laws. Instead, the platforms rely on the information the seller provides about themselves, and their role will be limited to presenting such information to the consumer.

¹⁰⁰³ See Directive (EU) 2019/2161, art 20.

¹⁰⁰⁴ It is worth mentioning that providing personal data in exchange for digital content and services is considered payment under the Directive (EU) 2019/770, which was adopted on 20 May 2019 by the Council of the European Union and the European Parliament. However, this has a limited scope of application. There is no general recognition that payment with data is equivalent to monetary payment in consumer law.

¹⁰⁰⁵ Directive (EU) 2019/2161, art 21.

Moreover, it can be said that a private individual may be a hobbyist seller at the point they start their business on an Internet platform, before they later become a professional trader. To further complicate matters, as mentioned previously, the precise line between a trader's and a hobbyist's status is not sufficiently clear under the relevant laws.¹⁰⁰⁶ Hence, it can be said that without a mechanism to assess a trader's status, uncertainty can arise, with traders unsure of when they cross the threshold from an individual to a trader. With this uncertainty comes a risk that the trader may mistakenly make a false declaration about their status.¹⁰⁰⁷ Worse, the consumer may lose the right to litigate and will not benefit from consumer protection laws.

Although the reforms introduced new sanctions that may help to protect consumers, they do not tackle penalties for failure to disclose a seller's status or falsely disclosing whether the obligations are on the platform or the trader, which limits the extent to which consumer protection laws may be applied. It can be said that the platforms or traders would be in breach of Art.6(1)(g) UCPD (misleading action regarding the consumer's rights). Loos argues that this outcome is not the intended consequence.¹⁰⁰⁸ This issue, among others, indicates that these reforms did not properly address the critical issues in consumer protection in the Internet environment.

Although these reforms aim to improve consumer law in the EU and keep pace with the digital age, there is serious doubt whether these proposals represent such a 'New Deal'.¹⁰⁰⁹ An opportunity to fundamentally change the EU's approach to consumer protection has been missed following the fitness check of EU consumer and marketing law;¹⁰¹⁰ for example, one proposal was to review rules against unfair

¹⁰⁰⁶ See Chapter Five, section 5.3.4 of this thesis, Online Trader Scope Under Consumer Protection Legislation.

¹⁰⁰⁷ See Christian Twigg-Flesner, 'Bad Hand? The "New Deal" for EU Consumers' (2018) European Union Private Law Review 172.

¹⁰⁰⁸ Marco Loos, 'The Modernization of European Consumer Law: a Pig in a Poke?' (2019) European Review of Private Law 134.

¹⁰⁰⁹ Christine Riefa and Laura Clausen, 'Towards Fairness in Digital Influencers' Marketing Practices' (2019) Journal of European Consumer and Market Law 71; Christian Twigg-Flesner, 'Bad Hand? The "New Deal" for EU Consumers' (2018) European Union Private Law Review 172.

¹⁰¹⁰ See European Commission, *Study for the Fitness Check of EU Consumer and Marketing Law* (Civic Consulting, Brussels 2017) <<https://op.europa.eu/en/publication-detail/-/publication/11b588d4-772e-11e7-b2f2-01aa75ed71a1/language-en>> accessed 22 June 2021.

commercial practices by adding new practices to the blacklisted ones. Unfortunately, most of these new suggestions have been ignored.¹⁰¹¹

The above provisions deal with this consumer issue. The following subsection examines the third legal solution that can limit the factors influencing consumer trust in online contracts identified in **Chapter two** – namely, protecting consumers from unfair contract terms. Since the current online consumer protection legislation in the KSA has not yet addressed this issue, as mentioned in **Chapter Three**, perhaps the provisions of English law might help develop Saudi law to protect consumers from unfair contract terms that occur in the Internet environment.

5.4.3 Protection Against Unfair Contract Terms

Consumers in the UK have been protected for a long time. Prior to legislation such as the UCTA 1977 and, later, the UTCCRs 1999, protection came to all contractual parties, not only consumers, through the doctrine of incorporation of terms. Under this doctrine, a contract can stand, with an unfair term being excluded from it.¹⁰¹² This could occur when a trader did not bring the consumer's attention to these terms prior to or at the same time as the contract was being formed.¹⁰¹³ Failing this, the term could still be interpreted against the trader as its drafter, which would result in unfair terms being considered non-enforceable against the weaker parties to the contract.

Still, there was a need to regulate unfair terms in contracts in the EU countries in general, and the UK in particular, due to a lack of common concepts of fairness and good faith.¹⁰¹⁴ Ramsay states it was a response to problems in standard contracts, due to consumers' inability to negotiate the contract terms.¹⁰¹⁵ The rules prohibiting unfair contract terms effectively promote ethical values and principles in the markets, thereby supporting the party's autonomy and the freedom of contract. In particular, they help the weaker party in B2C transactions by ensuring that they are not treated unfairly. This may occur by exploiting traders' and companies' capabilities, by

¹⁰¹¹ Marco Loos, 'The Modernization of European Consumer Law: a Pig in a Poke?' (2019) *European Review of Private Law* 134.

¹⁰¹² Christine Riefa and Julia Hörnle, 'The Changing Face of Electronic Consumer Contracts In the 21st Century: Fit for Purpose?' (in Lilian Edwards and Charlotte Wealde (eds) *Law and the Internet* (Hart Publishing 2009) 112.

¹⁰¹³ Simmons and Simmons Communication Practice, *E-commerce Law: Doing Business Online* (Palladian Law Publishing Ltd 2001) 11.

¹⁰¹⁴ Jill Poole, *Contract Law* (Oxford University Press 2016) 320; Elizabeth Macdonald and Ruth Atkins, *Koffman & Macdonald's Law of Contract* (Oxford University Press 2018) 212.

¹⁰¹⁵ Iain Ramsay, *Consumer Law and Policy* (Hart Publishing Ltd, 2012), 397.

providing complex terms that may be used to advance their interests at the expense of consumers and reduce their responsibilities towards consumers. Therefore, the main purpose of legislation relating to contractual terms is to prevent traders from using unfair terms in their B2C contracts. If such terms are present on the market, consumers should not be bound by them.¹⁰¹⁶

These rules not only protect consumers but also contribute to promoting fair commercial practices. Companies that deal fairly and honestly with consumers may be affected by those who use unfair contract terms. Thus, the rules on unfair consumer contract terms implicitly support fair commercial practices and well-functioning consumer markets.¹⁰¹⁷

The CRA 2015 (part 2) provides a simplified and modern legal framework, which now includes a test for the unfairness of terms in consumer contracts, replacing the UTCCRs 1999 and removing consumer protection from UCTA 1977.¹⁰¹⁸ Under section 62 of the CRA 2015, there is a requirement for consumer contract terms and notices to be fair if they are binding upon the consumer.¹⁰¹⁹ Although an unfair term does not bind consumers, a consumer can rely on it if they so wish.¹⁰²⁰ Thus, it can be said that consumers are protected under consumer protection laws, since they can decide whether or not to rely on unfair terms in their contracts, if such terms are still included in them.¹⁰²¹

Although in most B2C contracts terms are standard terms, a contractual term can be deemed unfair even if it has been individually negotiated with the consumer.¹⁰²² It can be said that this part is one of the key characteristics that distinguish the CRA 2015 from other previous laws such as the UTCCRs 1999. Where the latter's

¹⁰¹⁶ Hans-W Micklitz, Przemysław Pałka and Yannis Panagis, 'The Empire Strikes Back: Digital Control of Unfair Terms of Online Services' (2017) *Journal of Consumer Policy* 370.

¹⁰¹⁷ Law Commission, *Unfair Terms in Consumer Contracts: a New Approach?* (Law Com 2012) <http://www.lawcom.gov.uk/app/uploads/2015/06/unfair_terms_in_consumer_contracts_issues.pdf> accessed 22 June 2021.

¹⁰¹⁸ Prior to the CRA 2015 coming into force, two types of regulations governed unfair contract terms in consumer contracts: the UCTA 1977 and the UTCCRs 1999. The UCTA 1977 provisions applied to all commercial contracts. Meanwhile, the UTCCRs 1999 focused on consumer contracts. However, there was no consistency between these two pieces of legislation as there was something of an overlap, while at the same time, there were nevertheless differences between them. For example, the test of fairness used in each was different, which made their application quite tricky.

¹⁰¹⁹ Consumer Rights Act 2015, s 62(1) and (2).

¹⁰²⁰ *Ibid*, s 62(3).

¹⁰²¹ Ewan McKendrick, *Contract Law Text, Cases, and Materials* (Oxford University Press 2016) 458.

¹⁰²² Ewan McKendrick, *Contract Law* (Palgrave Law 2015) 312.

provisions were limited to those contracts 'not negotiated individually', the CRA 2015 removed this condition, and its provisions now extend to individually negotiated terms and consumer notices.¹⁰²³ This widens the scope of application of the CRA 2015 in comparison to EU law.¹⁰²⁴

It seems that the CRA 2015 has adopted an approach that provides consumer protection even if it is contrary to the logic that protects the notion of 'freedom of contract'. It can be said that the reason that protection is not provided in those individually negotiated terms is due to the logic that protects the notion of 'freedom of contract'. Accordingly, companies that impose unfair terms in their contracts do not bind consumers, even if they are aware of them. However, it can be argued that this may not have much impact since most of the terms in consumer contracts take the form of standard terms and are not usually negotiated individually. Further, it can be said that even if these contracts are negotiated individually, it makes them more likely to go beyond the challenge of being unfair.¹⁰²⁵ In other words, a term that has been genuinely individually negotiated is likely to be fair.

5.4.3.1 Fairness Test

The concept of fairness is one of the essential requirements that a trader must consider when dealing with consumers under the CRA 2015.¹⁰²⁶ The fairness test is not limited to terms and also includes consumer notices.¹⁰²⁷ This is one of the most significant differences between the CRA 2015 and previous legislation, where consumer notices were not explicitly covered.¹⁰²⁸ Therefore, a trader must fulfil the requirements of fair terms in consumer notices, such as being written in clear and legible language.¹⁰²⁹ In this context, it should be noted that notices do not need to be in writing, but may take any form intended to be directed to the consumer, a clear correspondence between the Act and the 1993 directive, as enacted by the UTCCRs

¹⁰²³ Christian Twigg-Flesner, 'Consolidation Rather than Codification – or Just Complication? - The UK's Consumer Rights Act 2015' (2019) *Zeitschrift für Europäisches Privatrecht* 197.

¹⁰²⁴ See the Unfair Contract Terms Directive (93/13/EEC); Christian Twigg-Flesner, *The Europeanisation of Contract Law* (Routledge 2013) 62.

¹⁰²⁵ Ewan McKendrick, *Contract Law Text, Cases, and Materials* (Oxford University Press 2016) 455.

¹⁰²⁶ Consumer Rights Act 2015, s 62,63,67,68, and 69.

¹⁰²⁷ *Ibid*, s 62(1).

¹⁰²⁸ The UTCCRs 1999 banned unfair terms in contractual notices but did not affect non-contractual consumer notices. See House of Commons, *Consumer Rights Act 2015* (NO CBP6588, 6 March 2020) para 4.2 <<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06588>> accessed 22 June 2021.

¹⁰²⁹ Consumer Rights Act 2015, s 68.

1999, in the formulation of the general test of the unfairness of terms in consumer contracts. According to Part 2 of the CRA 2015, the imposed fairness test has two key elements:

‘contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.’¹⁰³⁰

5.4.3.1.1 Significant Imbalance

The significant imbalance principle is the first element of the fairness test and refers to an imbalance that may occur in the rights and obligations of the parties to a contract.¹⁰³¹ This may occur in a transaction if a clause is included in consumer contracts that would benefit the trader’s interests at the expense of the consumer – for example, granting the trader undue discretion or imposing a disadvantageous burden on the consumer.¹⁰³² An example is when the consumer has to pay ‘extravagant’ and ‘unconscionable’ charges due to a breach of the contract, while the other party is only entitled to obtain a fractional amount.¹⁰³³ Hence, the court’s duty will not be limited to merely exploring the imbalance in the rights and obligations of the parties but will extend to examining the harm caused to the consumer by the inclusion of such a term. Therefore, if the term does not cause harm of a sufficient magnitude, the term will not be treated as unfair.¹⁰³⁴

In *Director-General of Fair Trading v First National Bank*,¹⁰³⁵ Lord Bingham considered ‘significant imbalance’ and said:

‘The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties’ rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty....This involves looking at the contract as a whole. But the imbalance must be to the detriment of the consumer.’¹⁰³⁶

¹⁰³⁰ Ibid, s 62(4).

¹⁰³¹ *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52; *ParkingEye Ltd v Beavis* [2015] UKSC 67.

¹⁰³² Jill Poole, *Contract Law* (Oxford University Press 2016) 320.

¹⁰³³ *ParkingEye Limited (Respondent) v Beavis (Appellant)* [2015] UKSC 67 [307].

¹⁰³⁴ Paolo Siciliani, Christine Riefa and Harriet Gamper, ‘The Limitations of Consumer Law in Tackling Consumer Harm’ in *Consumer Theories of Harm: An Economic Approach to Consumer Law Enforcement and Policy Making* (Hart Publishing 2019) 24.

¹⁰³⁵ *Director-General of Fair Trading v First National Bank* [2001] UKHL 52.

¹⁰³⁶ Ibid [17].

In other words, the significant imbalance component focuses on inherently unfair terms that the trader may use to exclude liability or limit some consumer rights compared to the trader's position.¹⁰³⁷ This also includes the method by which the contract is negotiated, including terms that affect the substance of the transaction and that may surprise the consumer if they were drawn to their attention.¹⁰³⁸

To this, Lord Millett added:¹⁰³⁹

'It is obviously useful to assess the impact of an impugned term on the parties' rights and obligations by comparing the effect of the contract with the term and the effect it would have without it. But the inquiry cannot stop there. It may also be necessary to consider the effect of the inclusion of the term on the substance or core of the transaction; whether if drawn to his attention the consumer would be likely to be surprised by it; whether the term is a standard term, not merely in similar non-negotiable consumer contracts, but in commercial contracts freely negotiated between parties acting on level terms and at arms' length and whether, in such cases, the party adversely affected by the inclusion of the term or his lawyer might reasonably be expected to object to its inclusion and press for its deletion. The list is not necessarily exhaustive; other approaches may sometimes be necessary.'

The CRA 2015 states that the imbalance must be 'significant'; however, this is an open-textured concept.¹⁰⁴⁰ It may pose a challenge for interpretation because the CRA 2015 does not clearly indicate the distinction between the term 'imbalance' and 'significant imbalance' and the different levels in between. In the *ParkingEye v Beavis* case,¹⁰⁴¹ there was a term that obliged a consumer to pay £85 for exceeding the permitted free parking period of two hours in a parking car.¹⁰⁴² There was no significant imbalance in the rights and obligations of the parties.¹⁰⁴³ The judge also found that the requirement to pay the £85 charge was not a substantively unfair term. It was not manifestly excessive in its amount and was not therefore unenforceable under the UTCCRs 1999. In this case, £85 was considered a proportional amount. However, it is not clear at what point a specified sum becomes 'extravagant' and 'unconscionable', such as in the case of paying a fine of £200.

¹⁰³⁷ Christian Twigg-Flesner, *The Europeanisation of Contract Law* (Routledge 2013) 94.

¹⁰³⁸ W.C.H Ervine, 'The Unfair Contract Terms Regulations Mark II' (1999) *Scots Law Times* 256.

¹⁰³⁹ *Director-General of Fair Trading v First National Bank* [2001] UKHL 52 [54].

¹⁰⁴⁰ Chris Willett, 'General Clauses and the Competing Ethics of European Consumer Law in the UK' (2012) 71(2) *Cambridge Law Journal* 420.

¹⁰⁴¹ *ParkingEye Ltd v Beavis* [2015] UKSC 67 [36-101].

¹⁰⁴² *Ibid* [102] per Lord Sumption and Lord Neuberger.

¹⁰⁴³ *Ibid* [36-101].

Furthermore, the assessment of significant imbalance depends primarily on the context of a transaction.¹⁰⁴⁴As mentioned above, in *DGFT v First National Bank (First National Bank)*, the House of Lords stated that the requirement of significant imbalance is met if a term is so weighted in favour of the supplier so as to ‘tilt’ the parties’ rights and obligations under the contract significantly in their favour when a term includes ‘beneficial option, discretion or power; or by the imposing on the consumer of a disadvantageous burden, risk or duty’.¹⁰⁴⁵ However, there are several issues to be considered in measuring the impact of a term on the parties’ interests – namely, the rights and obligations of the parties to the contract, and in defining a framework of ‘imbalance’ and when it is ‘significant’ – for example, it is unclear when ‘tilt’ implemented by any such term would be considered ‘significant’.¹⁰⁴⁶ Therefore, it can be said that these categories are insufficient and limited to clarifying the categories that are already known and covered by the test; it does not take us much further.

This is related to the first element of the fairness test. Another important element is ‘good faith’, which we will discuss in detail in the next subsection.

5.4.3.1.2 Good Faith

The second component of the fairness test is the term ‘good faith’. Before talking about the requirements of this term in consumer contracts, it is vital to highlight the background of this term, as it is not completely accepted and is therefore controversial. Good faith exists in many civil law jurisdictions, but also in common law jurisdictions such as that of the US,¹⁰⁴⁷ Australia,¹⁰⁴⁸ and, more recently, Canada.¹⁰⁴⁹

Historically, the principle of good faith in commercial contracts has not been an approach that has been recognised in English legislation, despite its recognition in certain specific types of contract.¹⁰⁵⁰ However, the relationship of courts with the

¹⁰⁴⁴ *Office of Fair-Trading v Ashbourne Management Services Ltd* [2011] EWHC 1237 (Ch) [120].

¹⁰⁴⁵ *Director-General of Fair Trading v First National Bank* [2001] UKHL 52 [17].

¹⁰⁴⁶ Chris Willett, ‘General Clauses and the Competing Ethics of European Consumer Law in the UK’ (2012) 71(2) Cambridge Law Journal 420.

¹⁰⁴⁷ *Underhill v Schenck*, 238 N.Y. 7.

¹⁰⁴⁸ *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15.

¹⁰⁴⁹ *Bhasin v Hrynew* [2014] SCC 71; *C.M. Callow Inc. v Zollinger* [2020] SCC 45.

¹⁰⁵⁰ In *Smith v Hughes*, it was held that English contract law does not recognise a formal concept of good faith. This is also upheld in the *Walford v Miles* case, where the court rejected a general obligation to negotiate in good faith. However, the position of the English courts on rejecting good faith does not mean that they have not taken adequate measures to address problems that may arise due to, for example, bad faith. English law also tends not to adopt broad general principles in contracts, such as recognising a doctrine of good faith or general duty of disclosure. Instead, it adopts a doctrine of gradual development by analogy to current precedents rather than relying on general-principle or broad

principle of good faith in commercial contracts began to change over time. After rejecting this principle for decades, the court enforced express contractual terms that obliged contract parties to act in good faith in the case of *Yam Seng Pte Ltd v International Trade Corporation Ltd*¹⁰⁵¹ and was also willing to imply such a term in commercial contracts, in fact. This ruling briefly raised expectations that it represents a qualitative shift in recognising this principle by the English courts, which may enforce the implied principle of good faith more commonly in the terms of commercial contracts. What raised this expectation was that recognition of this principle was not limited to this case but rather in some later cases, the most famous of which was the first-instance decision in *MSC*.¹⁰⁵² English courts have since adopted an express legal obligation to act in good faith in contract performance, but this must be balanced against contractual certainty. The requirements of good faith in such cases basically relied on the contractual context, which means that it may not be limited to the requirements of honesty but may also extend to the requirements of fidelity to the contract.¹⁰⁵³

The principle of good faith was also recognised in *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd*,¹⁰⁵⁴ although the High Court adopted a similar approach to the *Yam Singh* case, stating that the requirement of good faith should be construed widely. However, the Court of Appeal adopted a much more narrow and restrictive approach, as it was held that the obligation to act in good faith was restricted to the aims specified in the term. The Court of Appeal emphasised:

‘[I]f the parties wish to impose such a duty they must do so expressly.’¹⁰⁵⁵

However, the introduction of the principle of good faith has not been wholly welcomed by English courts, although certain attempts indicate that a doctrine of good

statements. See *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB [433] [439]; Ewan McKendrick, *Contract Law* (Palgrave Law 2015) 219. Further, in some contracts – for example, in insurance contracts, the duties of good faith in the performance of such contracts do not depend on the requirements of the parties to the contract, but rather English law imposes such duties because the nature of this type of contract requires obligations of trust and confidence between the parties.

¹⁰⁵¹ *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB).

¹⁰⁵² *Bristol Ground School Limited v Whittingham* [2014] EWHC 2145 (Ch); *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB).

¹⁰⁵³ [2013] EWHC 111 (QB) [135] and [139]; [2013] EWHC 1151 (TCC) [36].

¹⁰⁵⁴ *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200.

¹⁰⁵⁵ *Ibid* [105] per Beatson L.J.

faith in the performance of a contract may be developing.¹⁰⁵⁶ The *MSC* decision at first instance was not spared from objection, as it was overturned by the Court of Appeal and reverted to the traditional position that the English courts have boasted for decades, which does not recognise a general duty to act in good faith in commercial contracts. Lord Justice Moore-Bick commented:

‘recognition of a general duty of good faith would be a significant step in the development of our law of contract with potentially far-reaching consequences... the better course is for the law to develop along established lines than to encourage judges to look for what the judge called in this case “some general organising principle” drawn from cases of disparate kinds... a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement’.¹⁰⁵⁷

In short, it can be said that the key cause of the Court of Appeal’s decision relates to concerns associated with undermining contractual certainty. In other words, there are concerns that the principle of good faith may cause an increase in claims that could undermine the express terms agreed between the parties to a contract, which seeks, therefore, to limit what Lord Justice Moore-Bick fears.¹⁰⁵⁸

EU legislation imposes a duty to negotiate in good faith throughout the whole pre- and contractual relationship in B2C contracts. The UK, as a member state of the EU, was legally required to incorporate EU directives. The first appearance of the principle of good faith in English legislation was through the UTCCRs 1999. Giliker believes that the role of the English legislator in that era was limited to simply copying the directive into secondary legislation without making sufficient effort to bridge the cultural gap around the concept of new terms¹⁰⁵⁹ or fully integrating the directive into domestic law.¹⁰⁶⁰ Given that the doctrine of good faith is not a fixed standard that can be used in most contracts, English lawyers have faced numerous challenges in

¹⁰⁵⁶ *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB). See also *Bates v Post Office Ltd* (no 3) [2019] EWHC 606 (QB).

¹⁰⁵⁷ *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2016] 2 Lloyd's Rep 494 [45].

¹⁰⁵⁸ There is an attempt to imply good faith as a matter of law in relational contracts, such as in *Bates v Post Office Ltd* (no 3) [2019] EWHC 606 (QB). However, the notion of a relational contract is not yet formally accepted by the courts, which tend to revert to implied terms.

¹⁰⁵⁹ Namely, good faith and significant imbalance.

¹⁰⁶⁰ Examples of the difficulties may be found in relation to the Consumer Sales Directive 99/44/EC (CSD) and the Unfair Terms Directive 93/13/EEC (UTD). See Paula Giliker, ‘The Consumer Rights Act 2015 - a Bastion of European Consumer Rights?’ (2017) 37(1) Legal Studies 89.

determining the requirements contained within this condition.¹⁰⁶¹ Poole argues that good faith is not a well-defined and consistent concept in general use under English law.¹⁰⁶²

The inclusion of an express good faith standard in English law caused some commentators to raise questions about applying such a standard where there is no place for it based on the traditional position of English law. Consequently, the English courts may need to interpret something they are unfamiliar with.¹⁰⁶³ On the other hand, there has been some speculation about the possibility of applying this principle, taking into account the continental systems and its spread there,¹⁰⁶⁴ as compared to the directive's aim, which is to approximate the application of the standard of unfair terms throughout the UCTD under Article 3(1). This latter presumption supports this opinion.¹⁰⁶⁵

Therefore, a fundamental question from a judicial standpoint is whether the definition of good faith has been clarified. Before that, however, it is worth mentioning that although the UTCCRs 1999 have been completely repealed, most of their provisions, including the good faith requirement in the fairness test, have been relocated to the CRA 2015. This is surprising because, as mentioned above, English legislation has generally been resistant to recognising a duty to act in good faith concerning contract parties.

It stands to reason that this vague principle would be excluded from the CRA 2015, as there was an opportunity to do so before introducing the CRA 2015 into parliament. However, the Law Commission recommended that the existing test be kept in its current form.¹⁰⁶⁶ The reason for this, in their view, is that the concept of good

¹⁰⁶¹ Ewan McKendrick, *Contract Law* (Palgrave Law 2015) 313; Neil Andrews, *Contract Law* (Cambridge University Press 2015) 589; Scott Cormack, 'Reforming the Fairness Test in the Consumer Rights Act 2015' (2019) 3 *Edinburgh Student Law Review* 103.

¹⁰⁶² Jill Poole, *Contract Law* (Oxford University Press 2014) 276; Meryll Dean, 'Unfair Contract Terms: The European Approach' (1993) 56(4) *The Modern Law Review* 584.

¹⁰⁶³ Hugh Beale, 'The Impact of the Decisions of the European Courts on English Contract Law: The Limits of Voluntary Harmonization' (2010) 18(3) *European Law Review of Private Law* 513.

¹⁰⁶⁴ *Ibid.*

¹⁰⁶⁵ European Commission, 'Guidance on the Interpretation and Application of Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts' (2019/C 323/04) para 1.1 <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC0927\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC0927(01)&from=EN)> accessed 22 June 2021.

¹⁰⁶⁶ Law Commission, *Unfair Terms in Consumer Contracts Advice to the Department for Business, Innovation and Skills* (Law Com 2013) paras 6.29-6.43 <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/unfair_terms_in_consumer_contracts_advice.pdf> accessed 22 June 2021.

faith is no longer vague because of the experience that courts and regulatory bodies have gained in dealing with this test for more than two decades. Many cases were heard by the English courts as well as by the CJEU. This led to the development of interpretation and guidance on the scope of the good faith element of the fairness test, which will be discussed in detail below. Despite the importance of this argument, it has been reported that familiarity with the test may not be a sufficient reason to retain the test if it does not have positive effects on consumer protection.¹⁰⁶⁷

There was some progress when the House of Lords considered this principle in *Director-General of Fair Trading v First National Bank*. Guidance on the interpretation was given to clarify the concepts of ‘core term’ and the notion of ‘good faith’, for the regulations.¹⁰⁶⁸ This case revolved around the fairness of a condition imposed by the bank, which allowed it to obtain additional interest on the remaining portion of a loan, even after the court, having implemented default procedures, issued an order regarding repayment of the loan. Opinions differed on whether the obligation to pay the interest after the ruling on the contested term was issued unfairly to the consumer. The High Court¹⁰⁶⁹ held that this term was not unfair, whereas the Court of Appeal disagreed with that.¹⁰⁷⁰ The House of Lords agreed with the position of the High Court.¹⁰⁷¹ In this case, the Lords took the opportunity to make their point on what could be considered an unfair term under the regulations – i.e. the unfairness test in general and the meaning of good faith in particular.

To clarify the concept of ‘good faith’, Lord Bingham relied on a standard previously adopted in *Interfoto Library Ltd v Stiletto Visual Programmes Ltd*,¹⁰⁷² a case under the UCTA 1977. Based on this, he suggested that good faith embodies the ‘general principle of fair and open dealing’.¹⁰⁷³ Fair and open dealing requires traders to be clear and transparent with consumers regarding the terms of a contract

¹⁰⁶⁷ Paula Giliker, ‘The Consumer Rights Act 2015 – a Bastion of European Consumer Rights?’ (2017) 37(1) *Legal Studies* 92.

¹⁰⁶⁸ Christian Twigg-Flesner, ‘A Good Faith Requirement for English Contract Law’ (2000) 9(1) *Nottingham Law Journal* 80.

¹⁰⁶⁹ *Director-General of Fair Trading v First National Bank* [2000] 2 W.L.R. 1353.

¹⁰⁷⁰ *Director-General of Fair Trading v First National Bank* [2001] UKHL 52 [19].

¹⁰⁷¹ In particular, the County Courts (Interests of Judgment Debts) Order 1991 (SI 1991/1184).

¹⁰⁷² *Interfoto Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433. He noted that good faith ‘does not simply mean that they (parties) should not deceive each other . . . ; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as “playing fair”, “coming clean” or “putting one’s cards face upwards on the table”’.

¹⁰⁷³ Lord Bingham of Cornhill in *Director-General of Fair Trading v First National Bank* [2001] UKHL 52 [17].

and not to have any hidden conditions that would convince a consumer not to make a purchasing decision if they knew about these conditions before concluding the contract. In addition, since a consumer is in a weaker position than a trader in a transaction, the House of Lords stressed the importance of not allowing a trader to exploit this imbalance of power in any way. According to Lord Bingham:

‘Openness requires that terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer’s necessity, indigence, lack of experience, weak bargaining position . . . Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice...’¹⁰⁷⁴

Lord Steyn agreed with Lord Bingham that good faith in the regulations refers to ‘the notion of open and fair dealing’.¹⁰⁷⁵ He believed that the purpose of the provision of good faith in the regulations is ‘to enforce community standards of fairness and reasonableness in commercial transactions’. Based on this opinion, the interpretation of open dealing and fair dealing broadly embodies ‘community standards’, which may include the ideas of a sufficiency of terms, notice and clarity of its wording.¹⁰⁷⁶ It also includes the advantage of the seller or supplier by taking advantage of the borrower’s weakness in bargaining power or lack of professional advice to insist upon a term that would otherwise have been omitted.¹⁰⁷⁷ In this context, Lord Steyn notes that the EU member states have different legal systems. The directive is not a completely harmonious text and does not actually reflect the practical solutions adopted to reconcile legal systems diverging. Consequently, the solution he states is that ‘the concepts of the directive must be given autonomous meanings’,¹⁰⁷⁸ regardless of its application in different legal systems. It is necessary from this view that the criterion for the interpretation of good faith under the directive is subjected to the legislator’s intention under the directive without reference to any other legal system.

¹⁰⁷⁴ Ibid.

¹⁰⁷⁵ Ibid [36].

¹⁰⁷⁶ Ibid [57].

¹⁰⁷⁷ Ibid [57].

¹⁰⁷⁸ Ibid [32].

Furthermore, another problem here is a lack of clarity as to whether 'good faith' and 'significant imbalance' are two separate requirements for a term to be considered unfair or one requirement.¹⁰⁷⁹ The distinction between these two elements is somewhat artificial, as the relevant laws do not indicate any requirement for such a distinction. In 2002, the Law Committee presented a joint consultative paper on unfair terms in contracts that discussed the various possible interpretations of the fairness test.¹⁰⁸⁰ One of the critical issues that led to uncertainty in how the test as a whole was interpreted was the manner in which the two concepts are linked in the test's wording. This has led to a belief that the benefit of the fair test may be undermined because such various interpretations may result in an oscillating level (higher or lower) of consumer protection.¹⁰⁸¹

McKendrick states that case law did not provide sufficient clarity to infer how the test would work. He suggests the relationship between these two requirements could be based on the following. First, it can be said that a finding of 'significant imbalance' is a critical requirement for the unfairness test. Consequently, when the term is contrary to the requirements of 'good faith', this inevitably means that this term causes a 'significant imbalance' in the rights and obligations of the parties to the contract. Thus, it can be said that the requirement of 'good faith' is of little practical importance as the justness of the term can be judged as soon as there is a 'significant imbalance' that harms the consumer.

The second opinion is that 'significant imbalance' is considered a first step to consider the fairness of the term, which helps exclude issues where a defect is not significant. Therefore, it can be said that the requirement of 'good faith' is a dominant test that the courts must apply.

The third opinion is that 'good faith' and 'significant imbalance' are two separate requirements, each of which has an important role to play in the fairness test and

¹⁰⁷⁹ Ewan McKendrick, *Contract Law Text, Cases, and Materials* (Oxford University Press 2016) 458.

¹⁰⁸⁰ Law Commission, *Unfair Terms in Contracts* (Law Com 166, 2002) paras 3.55-3.62 <http://www.lawcom.gov.uk/app/uploads/2015/03/cp166_Unfair_Terms_In_Contracts_Consultation.pdf> accessed 22 June 2021.

¹⁰⁸¹ See Scott Cormack, 'Reforming the Fairness Test in the Consumer Rights Act 2015' (2019) 3 *Edinburgh Student Law Review* 103.

should not be subject to one another. Hence, a question arises about the fundamental difference between these two requirements in practice.¹⁰⁸²

Lord Bingham concluded that the fairness test 'lays down a composite test, covering both the making and the substance of the contract'.¹⁰⁸³ Following on from Lord Bingham's point of view, it can be said that there are two separate requirements to the unfairness test. Good faith is the first component of this test, which relates directly to the procedural aspect of a contract¹⁰⁸⁴ whereas the significant imbalance is directed towards substantive unfairness rather than any procedural aspect.¹⁰⁸⁵ Therefore, a consumer can challenge a term's fairness through the fairness test if they believe that the term is either substantively or procedurally unfair.¹⁰⁸⁶

Procedural fairness can be said to be crucial to protecting the consumer from unfair contract terms. Generally, unfair terms legislation, such as the CRA 2015, aims to protect the average consumer from an 'unfair surprise'.¹⁰⁸⁷ An unfair surprise can occur when certain conditions affecting a contract, such as a unilateral variation term, are hidden in the small print of a standard form contract. In this case, it can be said that this procedure is contrary to the requirements of good faith, as hiding a term is a form of procedural impropriety. In addition, traders have taken advantage of their position, since they can draft a contract to harm consumers by listing those influencing terms in a hidden manner. In this case, consumers may be unlikely to agree upon such terms if they are visible. However, the protection provided here by the relevant consumer protection laws aims to put consumers in a position that enables them to

¹⁰⁸² Ewan McKendrick, *Contract Law Text, Cases, and Materials* (Oxford University Press 2016) 458 and 459.

¹⁰⁸³ *Director-General of Fair Trading v First National Bank* [2001] UKHL 52 [17].

¹⁰⁸⁴ *Ibid* [36]; Maud Piers, 'Good Faith in English Law, Could a Rule Become a Principle?' (2011) *Tulane European & Civil Law Forum* 147; TT Arvind, *Contract Law* (Oxford University Press 2019) 393; Geraint Howells, 'The European Union's Influence on English Consumer Contract Law' (2017) 85 *George Washington Law Review* 1918.

¹⁰⁸⁵ *Director-General of Fair Trading v First National Bank* [2001] UKHL 52 [37]; Hugh Collins, 'Good Faith in European Contract Law' (1994) 14 *Oxford Journal of Legal Studies* 229; Ewan McKendrick, *Contract Law* (Palgrave Law 2015) 312; TT Arvind, *Contract Law* (Oxford University Press 2019) 393; Geraint Howells, 'The European Union's Influence on English Consumer Contract Law' (2017) 85 *George Washington Law Review* 1918.

¹⁰⁸⁶ Consumer Rights Act 2015, s 62.

¹⁰⁸⁷ Law Commission, *Unfair Terms in Consumer Contracts: a New Approach?* (Law Com 2012) para 3.26

<http://www.lawcom.gov.uk/app/uploads/2015/06/unfair_terms_in_consumer_contracts_issues.pdf> accessed 22 June 2021.

make an informed decision and is not designed to protect consumers from making their own bad decisions.¹⁰⁸⁸

However, it can be said that the notion of good faith is not limited to the procedural aspect but also includes substantive elements, which causes an overlap with the concept of significant imbalance. This view was adopted by Lord Steyn, who stated that the concept of good faith refers to an objective criterion and imported the notion of open and fair dealing based on the indications set out in schedules 2 and 3 of the 1994 regulations. From the examples listed in Schedule 3, it was, according to Lord Steyn, clear that:

'any purely procedural or even predominantly procedural interpretation of the requirement of good faith must be rejected.'¹⁰⁸⁹

This does not state explicitly, but strongly suggests that procedural fairness (including transparency) cannot routinely legitimise a term that is sufficiently unfair in substance.¹⁰⁹⁰

The ECJ also provided guidance that helped to clarify the requirements of good faith in consumer contracts. The guidance was characterised by a broad approach. Under ECJ case law, the requirements of good faith refer to the position that a trader could expect to be in if the standard terms were in fact individually negotiated with the consumer.¹⁰⁹¹ This was discussed in *Aziz v Caixa d'Estalvis de Catalunya*:

'The national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations.'¹⁰⁹²

This rule requires the court to consider the outcome if the opposite of the true contractual relationship were true and instead the term had been individually

¹⁰⁸⁸ Law Commission, *Unfair Terms in Consumer Contracts Advice to the Department for Business, Innovation and Skills* (Law Com 2013) para 3.2, <https://www.scotlawcom.gov.uk/files/3313/7095/4984/Unfair_Terms_in_Consumer_Contracts_Advice_Summary.pdf> accessed 22 June 2021.

¹⁰⁸⁹ *Director-General of Fair Trading v First National Bank* [2001] UKHL 52 [36].

¹⁰⁹⁰ Chris Willett, 'General Clauses and the Competing Ethics of European Consumer Law in the UK' (2012) 71(2) *Cambridge Law Journal* 424.

¹⁰⁹¹ Jacobien Rutgers, 'Unfair Terms in Consumer Contracts' (in Stefan Vogenauer and Louise Gullifer (eds.) *English and European Perspectives on Contract and Commercial Law, Essays in Honour of Hugh Beale* (Hart Publishing 2014) 285.

¹⁰⁹² Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya* ECLI:EU:C:2013:164, para 69.

negotiated between the parties.¹⁰⁹³ This ruling clearly indicates that the concept of good faith according to the court is not confined to its procedural aspect, but the term can be contrary to good faith if it is substantively unfair. However, it may be difficult to expect this opinion to be applied by the English courts because the unfairness test in the CRA 2015 already applies to terms that have been individually negotiated as well as terms that have not.

The above ruling is essential in interpreting the CRA 2015 provisions. However, there are questions about how to interpret the remaining legal rules of European origin after Brexit. Brexit means that the Court of Justice has lost power in determining how English courts may interpret relevant consumer provisions. English courts may tend to interpret 'good faith' according to English precepts such as freedom of contract. In this case, this interpretation will not only affect consumer contracts but may also affect attempts to develop a doctrine of good faith outside consumer contracts.¹⁰⁹⁴

In evaluating whether the term provided by *ParkingEye* was unfair, the UK Supreme Court referred to the *Aziz* case.¹⁰⁹⁵ Most judges of the Supreme Court decided that the £85 charge was not unfair as it was emphasised that there was a legitimate interest of the supplier behind the imposition of these conditions. The interest was summarised in urging visitors not to exceed the period of stay in order to efficiently manage the car park for the benefit of the public. The charges were not higher than was necessary to achieve this goal. In addition, substantively speaking, the rational driver would agree, or often agree, with the charge.

On the contrary, Lord Toulson considered the charge might be exorbitant. Lord Toulson argued there are many reasons why a retail car park user may inadvertently exceed a short stay or for good reasons, such as when there is crowding. In this case, the penalty clause does not allow circumstances and a grace period and provides no room for modification. Furthermore, the supplier can fairly assume that the consumer

¹⁰⁹³ According to the UK Competition and Markets Authority: 'the CMA considers the CJEU's approach demonstrates that businesses need, in formulating their contract terms, not just to resist the temptation to take advantage, but actively to take the legitimate interests of the consumer into account'. See Competition and Markets Authority, *Unfair Contract Terms Guidance on the unfair terms provisions in the Consumer Rights Act 2015* (The National Archives, Kew, London 31 July 2015) para 2.24 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf> accessed 22 June 2021.

¹⁰⁹⁴ Catharine MacMillan, 'The Impact of Brexit upon English Contract Law' (2016) *King's Law Journal* 428.

¹⁰⁹⁵ *ParkingEye Ltd v Beavis* [2015] UKSC 67 [105].

would have agreed in individual negotiations with the terms of the level in order for the term to be considered fair. Because this is a consumer contract and there is no equality between the two parties, the burden is supposed to fall on the supplier to provide the necessary evidence to justify this conclusion. Therefore, the Toulson was not persuaded that it would be reasonable to make such an assumption in this case, and thus would have allowed an appeal.

Although judges may agree on certain rules, they differ in their interpretation and consideration of such rules in practice. For example, in the above case, the judges decided that a term that imposes a non-exorbitant amount to achieve a legitimate interest was not unfair. However, most of them argued that £85 is not excessive, while Lord Toulson believed it could be exorbitant. There was also disagreement over whether a rational consumer could agree to this condition and over who had the burden of proof. Consequently, the judges disagreed on whether such a term would be considered unfair under the relevant consumer protection legislation.

Differing interpretations of these provisions make us question the level of protection provided under this test and the extent to which this test can be transferred to another jurisdiction (e.g. the KSA), given the lack of clarity of a mechanism by which the test can be applied.¹⁰⁹⁶ Thus, the different interpretations may create oscillating levels of protection.

5.4.3.2 Transparency

Transparency in consumer contracts is crucial to ensure that markets operate more effectively and increase trust between the trader and the consumer. Suppose terms are provided transparently to consumers. In that case, they can better understand the terms of the contract, which places a consumer in a position to make an informed decision about whether or not to conclude a particular transaction. On the one hand, this means that a trader is obliged to provide the terms to a consumer before concluding a contract, and, on the other hand, a consumer should be able to understand these terms without the need for legal advice.¹⁰⁹⁷ Section 68 of the CRA 2015 attempts to achieve this goal by requiring the trader to draft terms and notices in plain, intelligible language. In addition, if the terms are written, they must be legible.

¹⁰⁹⁶ See Chapter Six, section 6.3.1.5 of this thesis, Unfair Terms.

¹⁰⁹⁷ Marco Loos, 'Transparency of Standard Terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law' (2015) 23(2) *European Review of Private Law* 180.

Prior to the CRA 2015, the regulation included a ‘transparency’ requirement (in plain, intelligible language)¹⁰⁹⁸ but not a ‘prominence’ requirement, which involves bringing terms to a consumer’s attention in such a way that the average consumer who is well informed, observant, and circumspect would be aware of it.¹⁰⁹⁹ However, if a term in a contract or a notice could have different meanings, the meaning most favourable to the consumer is to prevail.¹¹⁰⁰

In *Parker v South Eastern Railway*,¹¹⁰¹ it was held that the trader must present a contract term in a manner that brought its content to the reasonable attention of the consumer. In this case, it was said that the contract terms would be non-binding if the consumer did not see or know that there was any writing on the ticket. Although this case precedes the CRA 2015, it is still relevant post-CRA 2015 as the act adopted many of its provisions following previous laws and regulations. However, a signal that attracts the average consumer’s attention, such as writing in bold on the ticket ‘see back for terms’, could be appropriate and may meet the prominence requirement of the CRA 2015.¹¹⁰²

Over the past years, many CJEU cases have attempted to interpret ‘plain and intelligible terms’ in the context of the 1993 directive.¹¹⁰³ The question was whether the terms of a contract were transparent enough for the consumer to understand the impact of a term on a concluded transaction. The CJEU has held that the requirement of transparency ‘must be construed as involving not only formal but also substantive compliance’.¹¹⁰⁴ In the CJEU case *Kásler (C-26/13)*,¹¹⁰⁵ the court interpreted transparency as not only requiring that the term is grammatically correct, but also that ‘the consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it [that term in a contract]’.¹¹⁰⁶ Thus, the consumer can make an informed decision based on their understanding of

¹⁰⁹⁸ The Unfair Terms in Consumer Contracts Regulations 1999, reg 6(2).

¹⁰⁹⁹ Consumer Rights Act 2015, s 64(4).

¹¹⁰⁰ *Ibid*, s 69(1).

¹¹⁰¹ [1877] 2 CPD 416.

¹¹⁰² Consumer Rights Act 2015, s 64(4).

¹¹⁰³ For example, case of C-92/11 RWE *Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V* ECLI:EU:C:2013:180, para 44; Case C-143/13 *Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA* ECLI:EU:C:2015:127, para 73–77; Case C-96/14 *Jean-Claude Van Hove v CNP Assurances SA* ECLI:EU:C:2015:262, para 40-49.

¹¹⁰⁴ Case C-154/15 *Gutierrez Naranjo* ECLI:EU:C:2016:980, para 20.

¹¹⁰⁵ C-26/13 *Kásler v OTP Jelzálogbank Zrt* EU:C:2014:282.

¹¹⁰⁶ *Ibid*, para 73.

the impact of the term.¹¹⁰⁷ Consequently, if contracts are formally transparent, this does not mean that consumers can understand them, unless they are also substantively transparent.¹¹⁰⁸

Formal transparency refers to the availability of information and the formality requirements that should be met when a term is drafted and provided to consumers. Information about the contract must be made available to consumers prior to the conclusion of the contract and must be provided in a way that consumers can read and understand to make an informed decision.¹¹⁰⁹ Therefore, traders are required to avoid using complicated definitions or strange terms, such as foreign terms, that may not be understood by the consumer – for example, 'Force Majeure'. Traders should also avoid referring to legal provisions that do not concern the consumer in transactions to which they are a party. Formal transparency requirements also require a trader to avoid formulating contractual clauses in small print.¹¹¹⁰

Substantive transparency is the second element of transparency. This refers to the ability of consumers to understand the legal and economic consequences of a contract and other conditions.¹¹¹¹ Transparency is therefore no longer merely limited to making sure that the terms are clearly drafted but also includes that consumers must be in a position where they are able to make the right decision whether or not to enter into a contract.¹¹¹² Essentially, substantively unfair terms can take several forms. For instance, terms that seek to exclude the liability of a trader when negligence leads to death or personal injury,¹¹¹³ and/or restrict or exclude consumer rights in respect of

¹¹⁰⁷ Julie Patient, 'The Consumer Rights Act 2015: a New Regime for Fairness?' (2015) 30(12) *Journal of International Banking Law and Regulation* 643-648.

¹¹⁰⁸ Joasia Luzak and Mia Junuzović, 'Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts' (2019) *Journal of European Consumer and Market Law* 99; Chris Willett, 'Transparency and Fairness in Australian and UK Regulation of Standard Terms' (2013) 37 (1) *University of Western Australia Law Review* 74; Chris Willett, 'The Functions of Transparency in Regulating Contract Terms: UK and Australian Approaches' (2011) 60(2) *International and Comparative Law Quarterly* 357.

¹¹⁰⁹ Joasia Luzak and Mia Junuzović, 'Blurred Lines: Between Formal and Substantive Transparency in Consumer Credit Contracts' (2019) *Journal of European Consumer and Market Law* 99.

¹¹¹⁰ Susan Bright, 'Winning the Battle against Unfair Contract Terms' (2000) 20(3) *Legal Studies* 351.

¹¹¹¹ Marco Loos, 'Double Dutch - on the Role of the Transparency Requirement with Regard to the Language in Which Standard Contract Terms for B2C-Contracts Must Be Drafted' (2017) *Journal of European Consumer and Market Law* 55.

¹¹¹² Eimear O'Brien, 'The UK Consumer Rights Act 2015: Unfair Contract Terms Considered' (2015) 4(6) *Compliance & Risk* 12 and 14.

¹¹¹³ *Consumer Rights Act 2015*, s 65(1).

contracts for the supply of goods,¹¹¹⁴ digital content¹¹¹⁵ or services¹¹¹⁶ will be automatically unfair.

The CRA 2015 also provides an indicative and non-exhaustive list of terms that can be considered substantively unfair, referred to as the 'Greylist'.¹¹¹⁷ These terms are not automatically unfair but may be unfair in some circumstances, but not in other circumstances. For example, terms that have 'the object or effect of requiring a consumer who fails to fulfil his obligations under the contract to pay a disproportionately high sum in compensation'¹¹¹⁸ may be substantively unfair due to their penal nature.¹¹¹⁹ Therefore, the 'greylisted' terms must be subject to a fairness test under section 62 of the CRA 2015. In the *ParkingEye v Beavis* case,¹¹²⁰ there was a possibility that this term would be considered unfair under the UTCCRs 1999, as a term that has the objective or effect of requiring a consumer who fails to fulfil their obligations under the contract to pay a disproportionately high sum in compensation. However, the term was not considered unfair after it was subject to the fairness test.¹¹²¹

Furthermore, online contracting allows traders to enter into a contractual relationship with cross-border consumers. For a consumer to understand their rights and obligations under a contract, they must be able to understand the language used by the trader in drafting the standard contract terms.¹¹²² The consumer may expect the terms to be drafted in their native language or the language in which the contract was concluded. This leads to the question of whether a contract is transparent if it is not drafted in the consumer's first language. If the contract is not drafted in the consumer's first language, they may misunderstand the contract terms. Thus, the consumer will be unable to fully appreciate the potential economic consequences of the contract term to make an informed decision. This has led some to claim that

¹¹¹⁴ Ibid, s 31(1).

¹¹¹⁵ Ibid, s 47(1).

¹¹¹⁶ Ibid, s 57(1).

¹¹¹⁷ Ibid, s 63(1) and (2).

¹¹¹⁸ Ibid, schedule 2(4).

¹¹¹⁹ See also Hugh Beale, *Chitty on Contracts* (Sweet and Maxwell 2019) para 38-391.

¹¹²⁰ *ParkingEye Ltd v Beavis* [2015] UKSC 67 [36-101].

¹¹²¹ Ibid [36-101].

¹¹²² Hans-W Micklitz, 'Unfair Terms in Consumer Contracts' (in Norbert Reich, Hans-W Micklitz, Peter Rott, and Klaus Tonner (eds) *European Consumer Law* (Intersentia Ltd 2014) 143.

transparency is violated if standard contract terms are not drafted in the consumer's native language or in the language in which the contract was concluded.¹¹²³

On the other hand, forcing traders to draft contracts in a foreign language other than one of the countries in which the trader is domiciled may seriously limit traders to only providing their goods or services in that country.¹¹²⁴ This may also lead to traders hiring legal interpreters to translate terms into the native language of consumers across borders, which would result in increased costs for such traders. Therefore, from the author's perspective, it is logical only to require a trader to draft such terms in the same language as that in which the contract is concluded, in plain, intelligible language and in a legible format.

Chapter Two of this thesis mentions that the online world has introduced new tools to enter a contractual relationship, such as browse-wrap and click-wrap agreements. The use of these agreements has created specific issues for consumers. The question arises as to what extent such agreements are deemed to be binding on the consumer under English legislation.

5.4.3.2.1 Browse-Wrap Contracts

In England, there is a lack of judicial decisions on the validity and enforcement of browse-wrap contracts.¹¹²⁵ Macdonald commented, 'the courts of England and Wales have not yet looked at the issue of contract formation in the browse-wrap context'.¹¹²⁶ Thus, it could be said that despite a need to consider the validity and enforcement of browse-wrap contracts in English legislation, there is also a need to consider the issue of browse-wrap contract formation.

However, some guidance may be obtained from some non-electronic cases relating to standard form contracts. Many decisions in case law discuss the incorporation of standard terms and the requirement to include them in a receipt or

¹¹²³ Marco Loos and Joasia Luzak, 'Wanted: a Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers' (2016) 39(1) *Journal of Consumer Policy* 88.

¹¹²⁴ Marco Loos, 'Double Dutch - on the Role of the Transparency Requirement with Regard to the Language in Which Standard Contract Terms for B2C-Contracts Must Be Drafted' (2017) *Journal of European Consumer and Market Law* 59.

¹¹²⁵ Stanely Lai, 'Recent Developments in Copyright, Database Protection and (Online) Licensing' (1999) 7(1) *International Journal of Law and Information Technology* 89.

¹¹²⁶ Elizabeth Macdonald, 'When Is a Contract Formed by the Browse-Wrap Process?' (2011) 19 *International Journal of Law and Information Technology* 285.

ticket. However, these issues were considered by English courts before the emergence of the Internet as a tool through which B2C contracts can be concluded.

In *Thornton v Shoe Lane Parking*,¹¹²⁷ the terms relating to the ticket issued by an automatic machine upon entry to the car park were considered not incorporated by the Court of Appeal. This was because the terms were not visible to the consumer prior to the conclusion of the contract, namely when the driver took the ticket. Instead, they were only displayed after the conclusion of the contract. Such tickets required consumers to refer to the terms displayed in the building. Therefore, the owner of the car park was deemed not to have done enough to bring the terms in question to the attention of the consumer. This case highlights that a court is likely to deem terms binding on the consumer if they are clearly visible and do not require the consumer to go looking for them.

More recently, in *ParkingEye Ltd v Beavis*,¹¹²⁸ Mr. Beavis had overstayed the permitted period of free parking in a retail park by nearly an hour. The car park was managed by the respondent, who had imposed a charge of £85. Beavis argued that the term was contrary to the UTCCRs 1999. The court held that the parking terms imposing the parking charge were not unfair within the scope of the UTCCRs 1999. This was because the respondent had displayed the terms prominently and clearly for any driver who wished to use the car park, and there were no concealed pitfalls or traps related to this disclosure. The difference between this case and the previous case might be that the consumer in the latter case could read the terms before issuing the ticket. Thus, consumers must think about the consequences of their decision before binding themselves to a contract.

It can be said that the decisions held in previous cases can also be applied to contracts formed via the Internet. Consequently, consumers may be bound by the terms in online contracts brought to their attention either prior to or at the same time as the contract was concluded.¹¹²⁹

¹¹²⁷ [1971] 2 QB 163.

¹¹²⁸ [2015] UKSC 67.

¹¹²⁹ Simmons and Simmons Communication Practice, *E-commerce Law: Doing Business Online* (Palladian Law Publishing Ltd 2001) 11.

The adequacy of using hyperlinks as a prominent and clear way to bring the terms to consumers' attention in contracts formed via the Internet was discussed by the ECJ in the *Content Services Ltd* case.¹¹³⁰

Content Services Ltd is a company that provides online services and software downloads. When consumers placed an order with the company, some information about the contract was provided so that the consumer could complete the transaction by ticking a box. However, some information needed by the consumer was not explicitly provided, such as information regarding the right of withdrawal. However, a consumer could access this information by clicking on a hyperlink.

In this case, the CJEU evaluated how information was provided to the consumer – i.e. distinguishing between active and passive information communication. It also considered the possibility of classifying information provided on websites as a durable medium. The court stated that the consumer could remain utterly passive during the communication of information. Given that providing information via a link requires a consumer to make an effort 'to acquaint himself with the information in question and he must, in any event, click on that link',¹¹³¹ accordingly, it held that such a way of providing information was not a sufficient means under the DSD (which now has been replaced by the CRD). The Court has asserted that providing consumers with information about a contract is an obligation of an online trader, instead of expecting consumers to search for such information on the trader's website. Placing this information in a hyperlink was not considered a prominent and transparent way to bring the terms in question to consumers' attention in a contract formed on the Internet.¹¹³² Although this case could be more relevant to click-wrap contracts, which will be discussed in the next section, it can be said that the CJEU's ruling in the *Content Services Ltd* case implies that it is unlikely that the standard term is validly incorporated in the case of browse-wrap licences.¹¹³³

Furthermore, the CCR 2013 asserts that all prior contract information, including terms, provided to comply with the regulations' requirements must be confirmed on a

¹¹³⁰ C-49/11 *Content Services Ltd v Bundesarbeitskammer* ECLI:EU:C:2012:419.

¹¹³¹ *Ibid*, para 33.

¹¹³² Joasia Luzak, 'Online Consumer Contracts' (2014) 15(3) *Journal of the Academy of European Law* 385.

¹¹³³ Peter Rott and Kai Purnhagen, *Varieties of European Economic Law and Regulation, Studies in European Economic Law and Regulation* (Springer 2014) 621.

durable medium¹¹³⁴ (for example, in a hard-copy booklet or by email).¹¹³⁵ The ECRs 2002 also require an online trader selling goods or services via the Internet to acknowledge a consumer's order receipt without any undue delay.¹¹³⁶ Moreover, the CCR 2013 assert the importance of obtaining consumers' explicit acknowledgement that their order involves a payment obligation.¹¹³⁷ An online trader is responsible for notifying consumers of the exact point that they are contractually bound to pay for the goods or services.¹¹³⁸ As mentioned above, a consumer cannot expressly and clearly 'agree' to the terms prior to concluding the contract by, for example, clicking a button or ticking a box in browse-wrap agreements.

But even so, it is no longer sufficient for the final stage of the ordering process to consist of the click of a button entitled 'Confirmation of Purchase' or 'Purchase Order' when a transaction is concluded through a website. Instead, such buttons must clearly indicate to consumers their immediate payment obligation – for example, by being labelled 'Pay Now'.¹¹³⁹ However, the trader may provide this information in any way possible, provided this clearly indicates to the consumer that the order implies a payment obligation.

This rule is particularly geared towards the making of distance contracts, including online contracts, and is one of many provisions to increase consumer protection online.¹¹⁴⁰ As browse-wrap agreements do not comply with this requirement, it could be said that a consumer is, therefore, not bound by a contract or an order.

5.4.3.2.2 Click-Wrap Contracts

Once again, there is a lack of judicial decisions concerning the validity and enforcement of click-wrap contracts under English law.¹¹⁴¹ However, it can be argued that the standard terms and conditions of this type of contract may be incorporated

¹¹³⁴ Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013, reg 16(1).

¹¹³⁵ Ibid, reg 5(c).

¹¹³⁶ Electronic Commerce Regulations 2002, reg 11(1)(A).

¹¹³⁷ Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013, reg 14 (4).

¹¹³⁸ Ibid, reg 14(3).

¹¹³⁹ Ibid, reg 14(4).

¹¹⁴⁰ Shane McNamee, 'Implementation of the Consumer Rights Directive' (2014) *Journal of European Consumer and Market Law* 191.

¹¹⁴¹ See Jana Smlsalova, 'Shrink-Wrap/Click-Wrap Agreements and English Contract Law' (2007) 8 *Common Law Review* 20.

and enforceable by English courts for two reasons.¹¹⁴² First, a commercial website gives prospective consumers a link to invite them to make an offer. In this case, providing consumers with material information regarding the contract is an obligation of an online trader, instead of expecting consumers to search for such information on the trader's website.¹¹⁴³

When a consumer places an order by clicking a button containing explicit consent to the terms and the trader then accepts it, from this point, it can be said that all the elements of the formation of the contract have been fulfilled. It is difficult for consumers to deny the existence of a contract between them and the trader after clicking on the relevant link.¹¹⁴⁴ Secondly, the terms in this contract are provided before the conclusion of the contract. In this regard, it is not sufficient to only provide the terms and conditions to an online consumer prior to concluding a contract for it to be considered legally enforceable. Rather, it must meet relevant requirements such as fairness, transparency and prominent display. Therefore, the consumer will be able to accept those terms simultaneously as the sale contract is formed, and not after doing so.¹¹⁴⁵

5.4.3.3 The Exception from the Fairness Test

Although most contract terms would be subject to the fairness test, there are exceptions. Section 64 of the CRA 2015 states:

- 1- A term of a consumer contract may not be assessed for fairness under section 62 to the extent that:
 - (a) it specifies the main subject matter of the contract, or
 - (b) the assessment is of the appropriateness of the price payable under the contract by
- 2- Subsection (1) excludes a term from an assessment under section 62 only if it is transparent and prominent.

¹¹⁴² Simmons and Simmons Communication Practice, *E-commerce Law: Doing Business Online* (Palladian Law Publishing Ltd 2001) 13.

¹¹⁴³ C-49/11 *Content Services Ltd v Bundesarbeitskammer* ECLI:EU:C:2012:419, para 34.

¹¹⁴⁴ Steve Hedley, *The Law of Electronic Commerce and the Internet in the UK and Ireland* (Routledge 2006) 248.

¹¹⁴⁵ Practical Law IP&IT, Consumer Rights Act 2015: Click-Wrap, Browse-Wrap and Shrink-Wrap Agreements: General Principles. See <<https://uk.practicallaw.thomsonreuters.com/1-618-6384?transitionType=Default&contextData=%28sc.Default%29>> accessed 23 June 2021.

These terms were excluded from the scope of the unfairness test because such testing could be considered an encroachment on the freedom to contract.¹¹⁴⁶ According to Woodroffe, a 'consumer cannot allege unfairness merely because he has made a bad bargain'.¹¹⁴⁷

Although the CRA 2015 aims to protect the interests of consumers, it can be said that this provision seeks to create a balance between consumer and business interests. This section seems to uphold the principle of freedom of contract. Too intrusive a legislation may discourage companies from contracting with consumers.¹¹⁴⁸

However, it is no longer sufficient for the core terms relating to price and subject matter to be in plain, intelligible language.¹¹⁴⁹ In order not to be excluded, a term under assessment must be both transparent and prominent.¹¹⁵⁰ Explanatory notes to the CRA 2015 give the example of a term in the small print.¹¹⁵¹ Therefore, it will be the trader's responsibility to make a more significant effort to draw the average consumer's attention to the core terms.¹¹⁵² This also incorporates structural presentation, meaning that a trader must consider how easy it is for consumers to read, navigate and generally understand a contract.¹¹⁵³ Consumers, therefore, are not bound by the terms of a contract, which are difficult for the average consumer to access, read and understand.¹¹⁵⁴

However, a question remains as to what constitutes a 'core term'. As mentioned above, Section 64 of the CRA 2015 defines core terms as those that define the main subject matter of a contract as well as the price provided in exchange for goods, services or digital content. The English courts have had difficulty determining what

¹¹⁴⁶ Paolo Siciliani, Christine Riefa and Harriet Gamper, 'The Limitations of Consumer Law in Tackling Consumer Harm' in *Consumer Theories of Harm: An Economic Approach to Consumer Law Enforcement and Policy Making* (Hart Publishing 2019) 43.

¹¹⁴⁷ Geoffrey Woodroffe, Christian Twigg-Flesner and Chris Willett, *Woodroffe & Lowe's Consumer Law and Practice* (Sweet & Maxwell 2016) 197.

¹¹⁴⁸ See Chris Willett, 'General Clauses and the Competing Ethics of European Consumer Law in the UK' (2012) 71(2) *Cambridge Law Journal* 425.

¹¹⁴⁹ The Unfair Terms in Consumer Contracts Regulations 1999, reg 6(1).

¹¹⁵⁰ Consumer Rights Act 2015, s 64(2).

¹¹⁵¹ The Department for Business Innovation and Skills, *Explanatory Notes to the Consumer Rights Act 2015* (Royal Assent on 26 March 2015) para 313 <<http://www.legislation.gov.uk/ukpga/2015/15/notes/division/3/2/3/3>> accessed 23 June 2021.

¹¹⁵² Paula Giliker, 'The Consumer Rights Act 2015 – a Bastion of European Consumer Rights?' (2017) 37(1) *Legal Studies* 79.

¹¹⁵³ Victoria Mann and Paula Barrett, 'Consumer Protection: E-Commerce' Westlaw 1 <<https://uk.westlaw.com/Document/I4B4DAEB1460111E2B274F99DB3FAD7CB/View/FullText>> accessed 23 June 2021.

¹¹⁵⁴ Consumer Rights Act 2015, s 64(4).

falls within the scope of core terms, which would then not be subject to review in the fairness test.

For example, in the case of *OFT v First National Bank Plc*,¹¹⁵⁵ there was a credit agreement term that allowed the lender to charge interest on the amount outstanding until payment. This term was contested as not falling under the exception in the Unfair Terms in Consumer Contracts Regulations 1994 Reg.3(2). The Court of Appeal considered this term and held that this term was not a core term but an ‘ancillary provision’,¹¹⁵⁶ the reason being that the charges were not related to the main transaction between the bank and the consumer. Consequently, it failed to meet Regulation Reg.3(2) requirements and was therefore required to satisfy fairness requirements. Conversely, in the case of *Office of Fair-Trading v Ashbourne Management Services Ltd*,¹¹⁵⁷ a term that obliged a consumer to pay the minimum club membership fee was considered a core term that falls under the scope of Regulation 6(2)(a) of the UTCCR 1999. Lord Kitchin did not accept that the term is merely considered a ‘subsidiary provision’, as urged by the OFT,¹¹⁵⁸ the reason being that the term clearly and prominently specifies how long a consumer can benefit from the gym facilities in return for a particular subscription payment.¹¹⁵⁹ Therefore, the term was considered unfair under reg.6(2) of the UTCCR.

The difference between the point of view of what can constitute a core term in terms of price occurred between the English courts in one case – namely, the *Office of Fair Trading v Abbey National plc and others*.¹¹⁶⁰ In this case, there was a question about whether bank charges levied on personal current account customers in relation to unauthorised overdraft use constituted part of the price or remuneration for the banking services provided and whether it was unfair under the scope of the UTCCR 1999 reg.6(2)(b).

The High Court and the Court of Appeal held that bank charges could be subject to review, albeit in slightly different ways. For example, the Court of Appeal held that the contract could be considered a package divided into a ‘core or essential bargain’

¹¹⁵⁵ *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52.

¹¹⁵⁶ *Ibid* [12].

¹¹⁵⁷ *Office of Fair Trading v Ashbourne Management Services Ltd* [2011] EWHC 1237.

¹¹⁵⁸ *Ibid* [152].

¹¹⁵⁹ *Ibid* [152].

¹¹⁶⁰ *Office of Fair Trading v Abbey National plc and others* [2009] EWCA Civ 116.

and ‘incidental or ancillary provisions’.¹¹⁶¹ This approach seems to conform to the approach taken by the EU. Thus, if bank fees are considered incidental or ancillary provisions, they will not fall under the scope of the UTCCRs 1999 reg.6(2)(b).

In contrast, the Supreme Court considered the charges to fall under the scope of Regulation 6(2) because they were part of the remuneration. Despite being a Supreme Court ruling, it was heavily criticised by the Law Commission. One of the primary purposes of unfair terms legislation is to protect consumers against unfair terms, restoring the contractual balance between the parties to a transaction. It has been said, however, that the Supreme Court has failed to protect consumers from unfair terms in such cases and that there was also a procedural failure, as the case had not been referred to the CJEU in order to get a more purposive approach, which could be helpful to consumers.¹¹⁶²

In conclusion, the above cases elaborate on what constitutes a core term, focusing mainly on terms determining prices. However, the problem is the absence of a specific standard by which it is possible to know what may or may not constitute a price under a contract. The CRA 2015 also does not distinguish between main and ancillary price terms, as indicated in some cases above. The Act seems to have limited its role to only replicating the previous provisions of the UTCCRs 1999, without any serious attempt to fill this gap. This could cause uncertainty between businesses and consumers. Therefore, it could be said that there is still a need to address this issue adequately.

The above provisions deal with this consumer issue. The following subsection examines the second legal solution that can limit the factors influencing consumer trust in online contracts identified in **Chapter two** – namely, the right of withdrawal – which will be discussed in the following section. Since the current online consumer protection legislation in the KSA has uncertainty in many aspects related to the exercise of the right to withdraw, as mentioned in **Chapter Three**, perhaps the provisions of English law might help develop Saudi law to cover such aspects.

¹¹⁶¹ Ibid [104].

¹¹⁶² Denis Barry, Edward Jenkins QC, Charlene Sumnall, Ben Douglas-Jones and Daniel Lloyd, *Blackstone’s Guide to E Consumer Rights Act 2015* (Oxford University Press 2016) 109.

5.4.4 The Consumer's Right of Withdrawal

The right to withdraw is one of the solutions introduced by EU lawmakers to remove barriers to cross-border trade growth.¹¹⁶³ This right may help to reduce concerns about the inability of a consumer to inspect goods and ascertain the true identity of a trader. Thus, it can play a prominent role in motivating consumers to purchase across borders and realise the benefits of the internal market.¹¹⁶⁴

Most EU directives require traders to allow consumers to make an informed decision. The right of withdrawal often supplements these information duties.¹¹⁶⁵ In English legislation, such a combination of information duties and withdrawal rights can be found in the CCR 2013.

5.4.4.1 Exceptions to the Right of Withdrawal

There are certain exceptions where consumers lose their right of withdrawal in certain circumstances. For example, in the case of a contract for the supply of sealed goods such as audio, video or computer software, such as CDs or DVDs. These sealed goods would be excluded from the scope of application of the right of withdrawal if the seal on the wrapping is broken.¹¹⁶⁶ It also excludes contracts for the supply of goods with a protective seal that are not suitable for return due to hygiene reasons.¹¹⁶⁷ Another example includes goods that are inseparably mixed, according to their nature, with other elements after delivery.¹¹⁶⁸ These, among others, are examples of online contracts that would not provide consumers with the right to withdraw.¹¹⁶⁹

5.4.4.2 Requirements and Obligations of the Right of Withdrawal

One of the most significant developments under the CCR 2013 is extending the statutory cancellation or cooling-off period. Consumers can cancel orders for goods, services or digital content. This has been increased from seven working days to

¹¹⁶³ For example, the Distance Selling Directive (DSD) 97/7/EC, art 3, 4, and 6.

¹¹⁶⁴ However, European legislation's inadequacy in terms of existing instruments has been criticised as a barrier to cross-border trade. Loos argues that granting withdrawal rights is unlikely to increase cross-border contracts unless other restrictive barriers such as disparate tax rates and language differences are excluded. See Marco Loos, 'Rights of Withdrawal' (in Geraint Howells & Reiner Schulze (eds.) *Modernising and Harmonising Consumer Contract Law* (Sellier European Law Publishers 2009) 247.

¹¹⁶⁵ *Ibid* 239.

¹¹⁶⁶ Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013, reg 28(3)(b).

¹¹⁶⁷ *Ibid*, reg 28(3)(a).

¹¹⁶⁸ *Ibid*, reg 28(3)(c).

¹¹⁶⁹ *Ibid*, reg 28.

fourteen calendar days due to a change in the European legislation that the CCR 2013 followed.¹¹⁷⁰ This change was necessary because of the previously compulsory minimum harmonisation requirement of the DSD, leading to differing cancellation periods in member states and creating uncertainty and compliance costs for traders. Therefore, it was tackled in the CRD, which instead requires a uniform period of 14 days. Meanwhile, it can be said that the essence of the right of withdrawal provided by the CCR 2013 aims to give online consumers more protection due to factors in an online environment, such as a consumer's inability to examine products until they are received, contrary to when a consumer shops in a 'brick-and-mortar' store.¹¹⁷¹ Therefore, increasing cancellation periods from seven to fourteen days may be helpful towards achieving this goal.

However, the term 'day' is not defined in the CCR 2013. It is clear that working days are considered to be part of the period calculated from the withdrawal period, but the CCR 2013 do not indicate clearly whether public holidays are days or whether the period can be extended until the end of the next working day if such a right period ends on one of these days. However, this was identified under the provisions of the CRD, which give consumers fourteen calendar days to withdraw from a contract.¹¹⁷² In this context, the CCR 2013 do not prevent a trader from offering better rights to a consumer, such as a more extended cancellation period. This may contribute to giving consumers more confidence or motivation to conclude a contract via the Internet. However, a trader cannot provide a shorter period than the cancellation period set out in the CCR 2013.

A consumer can withdraw from a contract simply by informing the trader of their decision.¹¹⁷³ However, the consumer must show that they cancelled the contract during the cancellation period.¹¹⁷⁴ There is no prescribed method by which to exercise

¹¹⁷⁰ Oliver Price, Christina Fleming and Charles Russell Speechlys, 'The Impact and Content of the New UK Consumer Contracts Regulations' (2015) Compliance & Risk p.2 <<https://uk.westlaw.com/Document/I3504D9E0DFE611E49B21B9E69BEB36A6/View/FullText.html>> accessed 23 June 2021.

¹¹⁷¹ Victoria Mann and Paula Barrett, 'Consumer Protection: E-Commerce' Westlaw 2. See <<https://uk.westlaw.com/Document/I4B4DAEB1460111E2B274F99DB3FAD7CB/View/FullText>> accessed 23 June 2021.

¹¹⁷² European Commission, 'New EU Rules on Consumer Rights to Enter into Force' MEMO/11/675 (2011) para 4, <https://ec.europa.eu/commission/presscorner/detail/fr/MEMO_11_675 > accessed 23 June 2021.

¹¹⁷³ Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013, reg 32(1) and (2).

¹¹⁷⁴ Ibid, reg 32(6).

this right. Therefore, consumers are free to choose how they exercise this right, either by using the model cancellation form which a trader is obliged to provide pre-contract or by giving any other clear statement setting out their decision.¹¹⁷⁵ Suppose a trader has put the cancellation form on their website, and a consumer opts to fill out and submit that form online. In that case, the trader must send an acknowledgement of receipt on a durable medium, such as email, without undue delay.¹¹⁷⁶ In supplying services and digital content, the CCR 2013 require traders to get consumers to acknowledge that they will lose their cancellation rights once the service is entirely performed or once the digital content supply has begun.¹¹⁷⁷ Confirmation of that consent and acknowledgement must also be provided on a durable medium.¹¹⁷⁸ As the consumer has given their prior consent and has acknowledged the loss of their legal right to cancel, the legal effect of such consent and acknowledgement takes place as soon as the digital content is provided. Concerning the time frame, the confirmation must be provided within a reasonable time after the contract is concluded, before the service and digital content are performed, and before the item's delivery to the consumer.¹¹⁷⁹

Under the CCR 2013, the start of the 14-day cancellation period varies depending on the type of contract concluded:

- 1- The end date is the end of 14 days after the day on which the contract is entered into if the contract is a service contract¹¹⁸⁰ or contract for the supply of digital content not supplied on a tangible medium.¹¹⁸¹
- 2- The end date is the end of 14 days after the day on which the goods come into the physical possession of the consumer or a person identified by the consumer. This is in the case of a sales contract whether the contract is not for multiple goods, or multiple lots, or regular delivery, or goods under one order that is delivered on different days.¹¹⁸²
- 3- The end date is 14 days after the day on which the last of the multiple lots of goods come into the physical possession of the consumer or a person identified by the

¹¹⁷⁵ Ibid, reg 32(3)(a).

¹¹⁷⁶ Ibid, reg 32(4)(b).

¹¹⁷⁷ Ibid, reg 36(2)(b).

¹¹⁷⁸ Ibid, reg 36(1)(b).

¹¹⁷⁹ Ibid, reg 16(4).

¹¹⁸⁰ Ibid, reg 30(2)(a).

¹¹⁸¹ Ibid, reg 30(2)(b).

¹¹⁸² Ibid, reg 30(3).

consumer in the case of a sales contract for goods consisting of multiple lots or 'pieces of something' that are delivered on different days.¹¹⁸³

- 4- The end date of a sales contract for regular delivery of goods during a defined period of more than one day is 14 days, which will be after the day on which the first of the goods comes into the physical possession of the consumer or a person identified by the consumer.¹¹⁸⁴

One of the essential pre-contractual information requirements imposed by the CCR 2013 is to provide consumers with information about their right to cancel, including the terms, time limit, and procedures for exercising that right.¹¹⁸⁵ Therefore, delays in providing or failure to provide this information will result in extended cancellation periods.¹¹⁸⁶ According to the CCR 2013, if information relating to the exercise of this right is provided within 12 months from the first day of the normal cancellation period, the end date of the extended cancellation period is the end of 14 days from the day the consumer receives the information. If not provided within 12 months from the first day of the normal cancellation period, the end date of the extended cancellation period is the end of 12 months from the last day of the normal cancellation period.¹¹⁸⁷ For instance, a consumer purchases goods online, and they are delivered to the consumer on 15 July. Suppose the trader provides the consumer with information about their cancellation right within 12 months – e.g. 15 August of the same year. In that case, 30 August will be the end of the extended cancellation period. If not provided within 12 months, 29 July of the following year will end the extended cancellation period.

If digital content is supplied on a tangible medium, the trader must not begin the supply process before the end of the cancellation period unless the consumer has consented to this and has acknowledged that they will lose their cancellation right. The trader has confirmed this consent and acknowledgement with the consumer. Therefore, a consumer will have no right to cancel a service and digital content contracts once fully performed. However, the consumer will effectively be allowed to benefit from the service and the digital content provided within the cancellation period

¹¹⁸³ Ibid, reg 30(4) and (5).

¹¹⁸⁴ Ibid, reg 30(6).

¹¹⁸⁵ Ibid, schedule 2(l).

¹¹⁸⁶ Ibid, reg 31(2).

¹¹⁸⁷ Ibid, reg 31(3).

without cost, in certain cases – for example, if a trader fails to obtain the consumer’s express request for immediate provision of the services or the consumer’s prior express consent to the trader starting the supply of digital content during the cancellation period.¹¹⁸⁸ Another example is where a trader fails to obtain the consumer’s acknowledgement that they will lose their right to cancel once the services are completed.¹¹⁸⁹

5.4.4.3 Effects of Withdrawal

For the right to withdraw to be effective, the consumer must be awarded their right to withdraw from the contract, and their withdrawal from the contract should be easy. To achieve this goal, the CCR 2013 require a trader to inform a consumer of the right to withdraw and provide the consumer with a standard withdrawal form.¹¹⁹⁰

The outcome of exercising the right of withdrawal is to terminate the contract’s contractual relationship between the trader and the consumer. Accordingly, neither party is required to perform any obligations. A consumer may cancel a distance contract during the cancellation period or an offer at any time before a contract is entered into without giving any reason or incurring any liability.¹¹⁹¹

Although the right of withdrawal may be exercised if a consumer discovers something unexpected after the conclusion of the contract, the consumer can exercise this right without having to prove that they have been influenced or manipulated by the trader or by other circumstances.¹¹⁹² Therefore, there are no requirements to exercise this right (such as the payment of any fees or providing any evidence). In this regard, it is worth noting that the idea behind the withdrawal right does not depend on any performance or non-performance by a trader, since the withdrawal right is not a contractual remedy. The right of withdrawal does not prevent consumers from exercising their other rights, such as statutory remedies, if a trader breaches the contract terms. Provisions regarding the right of withdrawal, such as a time limit on the exercise of the right of withdrawal, are different from other rights (such as a time limit on the exercise of statutory remedies). For instance, in England and Wales, if a trader

¹¹⁸⁸ Ibid, reg 36(2)(a) and 37(2).

¹¹⁸⁹ Ibid, reg 36(2)(b).

¹¹⁹⁰ Ibid, reg 13(1).

¹¹⁹¹ Ibid, reg 29.

¹¹⁹² Bech Serrat and Josep Maria, *Selling Tourism Services at a Distance: an Analysis of the EU Consumer Acquis* (Springer 2012) 101.

breaches a contract (by, for example, supplying faulty goods or providing a poor service), consumers have a maximum of six years from the date of the breach of the contract to seek statutory remedies.¹¹⁹³

Following the exercise of the right of withdrawal, each party shall return items received under the contract. Concerning the delivery of goods, it is the responsibility of the consumer to pay for the return of any goods if this obligation is included in the contract terms. However, the consumer may be exempted from this duty if the trader has offered to collect them.¹¹⁹⁴ In this regard, a consumer will be responsible for the amount by which the value of the goods is diminished due to the consumer handling the goods beyond what is necessary to establish their nature, characteristics and functioning.¹¹⁹⁵ The CCR 2013 allow the trader to deduct the lost value from the sums it is obliged to reimburse to the consumer,¹¹⁹⁶ provided that they will refund the standard delivery costs in full.¹¹⁹⁷ However, the CCR 2013 prevent a trader from making any deduction for use if they have failed to provide a consumer with information on their right to cancel.¹¹⁹⁸

Broadly, the trader must reimburse the consumer for all payments received from the consumer, including any sums charged for delivery.¹¹⁹⁹ Reimbursement of the sums due to the consumer should be made without undue delay.¹²⁰⁰ According to the CCR 2013, the consumer must be reimbursed at the end of 14 calendar days after the day the trader is informed of the consumer's decision to withdraw the offer or cancel the contract in the case of goods sold where the trader has offered to collect the goods or services, and digital content has not been supplied on tangible media. In the case of goods sold where the trader has not offered to collect the goods, the consumer must be reimbursed at the end of 14 calendar days after the day on which the trader receives the goods back, or the day on which the consumer supplies

¹¹⁹³ Law Commission, *Consumer Remedies for Faulty Goods* (Law Com No 188, 2009) para 2.68, <http://www.lawcom.gov.uk/app/uploads/2015/03/cp188_Consumer_Remedies_Faulty_Goods_Consultation.pdf> accessed 23 June 2021.

¹¹⁹⁴ Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013, reg 35(1)(a).

¹¹⁹⁵ *Ibid*, reg 34(9).

¹¹⁹⁶ *Ibid*.

¹¹⁹⁷ *Ibid*, reg 34(3).

¹¹⁹⁸ *Ibid*, reg 34(11).

¹¹⁹⁹ *Ibid*, reg 34(1).

¹²⁰⁰ *Ibid*, reg 34(4).

evidence of having sent the goods back.¹²⁰¹ Moreover, the trader must reimburse the consumer using the same means of payment as the consumer used for the transaction unless the consumer has expressly agreed otherwise.¹²⁰² Thus issuing vouchers is not acceptable unless consumers have expressly agreed to such a solution. The CCR 2013 prevent a trader from charging any fee to consumers for reimbursing them.¹²⁰³ However, where a trader offers a range of delivery methods, the trader only needs to refund what the consumer would have paid for the least expensive, common and generally acceptable kind of delivery offered by the trader.¹²⁰⁴ Therefore, any amounts paid in excess of this for an expedited delivery service may be retained by the trader.¹²⁰⁵

5.5 Conclusion

This chapter has concentrated on the second model that the KSA can rely on to improve its current consumer protection regulations in order to achieve adequate and comprehensive protection.

This chapter aims to help the KSA take advantage of the English legal system's substantial experience in this field by critically analysing its current consumer protection framework for online contracts. Particular focus has been on providing mandatory information, tackling unfair contract terms and unfair commercial practices and providing the consumer the right of withdrawal in English law. These areas have been explored as they are considered extremely important for implementing consumer protection regulations in an online environment. These elements pose severe threats to consumers and have not been addressed sufficiently under KSA laws.

This chapter has examined the information that must be given or made available to consumers before the conclusion of an online contract. This information allows consumers to evaluate the benefits and risks involved in an online transaction/purchase and also builds consumer trust in online commerce. It eliminates the fear of a consumer's inability to communicate directly with an online trader to seek advice about potential goods and services. This is significant due to the inability of a consumer to assess the quality of a product and ensure that it complies with their

¹²⁰¹ Ibid, reg 34(5).

¹²⁰² Ibid, reg 34(7).

¹²⁰³ Ibid, reg 34(8).

¹²⁰⁴ Ibid, reg 34 (3).

¹²⁰⁵ Ibid, reg 34(1), (2), and (3).

expectations before purchasing it. English law attempts to achieve these goals by imposing an obligation on online traders to provide certain information to consumers in their transactions. This chapter has illustrated how providing such information could play an active role in meeting specific challenges that consumers may face in online contracts.

English consumer protection laws also aim to create the right market conditions in which consumers can make informed decisions in the marketplace. These laws aim to protect consumers from any challenges that may significantly affect the decision-making process, by not binding consumers to unfair contract terms that a trader imposes and not recognising substantive results following on from the influences of unfair commercial practices that may contribute to poor decision-making among consumers. Furthermore, the effective principles of fairness in the English model have been examined, aiming to ensure that no party has an unfair advantage over another regarding the terms and conditions of a contract. Thus, it can be argued that introducing these principles may help reduce and prevent unfair practices and unfair contract terms in an online environment.

The benefits of having the right to withdraw in the English model have been illustrated in this chapter. The outcome of exercising the right of withdrawal is to terminate a contract's contractual relationship between the trader and the consumer. Although the right of withdrawal may be exercised if the consumer discovers something unexpected after the conclusion of the contract, such as if the goods do not conform, are not fit for purpose, or are not of satisfactory quality, the consumer can exercise this right without having to prove that they have been influenced or manipulated by the trader or by other circumstances. There are no requirements to exercise this right (such as the payment of any fees and/or provision of any evidence). Therefore, according to the literature reviewed in this chapter, the right to withdraw may significantly enhance consumer confidence in online commerce.

One of the main disadvantages that the KSA may face after adopting such advanced legal provisions and schemes is that its neighbouring countries do not have consistent regulations on consumer protection, which might affect the adequate application of consumer protection regulation in cross-border contracts.

In conclusion, this thesis aims to use the English model as guidance to tackle consumer-related problems arising from the absence of consumer protection laws in the KSA, by learning about and adopting the best-practice lessons, legal principles and rules derived from English consumer protection regulations.

The next chapter will draw a prospective model based on the previous examination of both the Sharia law and English models. This model can best protect the interests of online consumers, as per English consumer protection laws, while taking into account the requirements of Sharia law to achieve the concept of SC consumer protection measures. Before that, there is a need to ensure that no obstacles would affect achieving this aim. The potential differences between the jurisdictions may affect the achievement of the study's aim. Also, the standards in the current laws in the KSA may present challenges to implementing the English model. This will, therefore, be examined in the next chapter of this thesis.

Chapter Six: A Comparative Review and Proposals for Reform the Online Consumer Protection Regime in the KSA

6.1 Introduction

This research aims to propose a legal framework to protect online consumers in the KSA to improve consumer protection, motivate consumer confidence and encourage KSA policymakers to play an active role in implementing online shopping in the KSA. These solutions for Saudi law are derived from the in-depth research conducted on English and Sharia law approaches to online consumer protection presented in previous chapters. The best practices and legal principles were ascertained from this analysis and it is considered these could be adopted in the KSA. The difference in the societal context, cultures and legal systems between the jurisdictions studied would give rise to a potential conflict between them, creating complex issues, especially if the implementation of English law solutions to Saudi law were contemplated. Therefore, this thesis examines whether Sharia law applicable in the KSA would affect the adoption of the English model of consumer protection.

This chapter determines the similarities and differences between the Saudi law, English law and Sharia law approaches in order to establish to what extent such differences can affect the achievement of the study's objectives. It also identifies formal and substantive gaps in the Saudi legislation where online consumer protection is not addressed; this is the salient driver for conducting this research. The chapter then proposes recommendations and suggestions for a legal framework that is compatible with Sharia law and concludes with the contribution of the study, alongside a presentation of recommendations for future research.

6.2 Key Findings

After analysing consumer protection instruments in Saudi law, Sharia law and English law, the following three points have been identified as constituting the main research findings. Firstly, there is a difference among the jurisdictions under this study in the basic concepts of consumers and instruments used for consumer protection, which will be discussed in section 6.3.

Secondly, despite the differences between jurisdictions and based on the analysis presented in this thesis, it could be said that the observed differences do not affect the possibility of using English law as guidance to tackle consumer-related issues in the current Saudi regime. This is because English consumer protection does not conflict with the provisions of Islamic law; in addition, the flexibility of Saudi legislation could benefit from the experiences of developed countries in developing this field. Therefore, some of the solutions adopted in English law could be adopted in the KSA.

Thirdly, there are many deficiencies in the Saudi instrument provided in the ECL 2019 that will lead to inadequate consumer protection. The ECL 2019 raises two kinds of problems, first with the drafting, and second, in its substantive contents. The drafting deficiencies are:

- (1) there is a misuse of the appropriate terminology in some cases, such as using the term 'service provider' to refer to anyone who sells or supplies a good or service over the Internet;
- (2) certain terminology is restricted by the law to only a narrow meaning, such as limiting the concept of misleading advertisements to certain practices without others, which can also be classified as misleading advertisements; and
- (3) other terminology causes an infringement of other legal rules such as general contract law, such as considering online advertisements to be offers in all cases.
- (4) there is a significant shortcoming in the regulations achievement of its objectives, as its role is sometimes limited to repeating the provisions of the law without the need to do so. These deficiencies will be discussed in section 6.4.1.

The problems of the substantive content are:

- (1) a lack of further legal provisions that address issues that consumers may face in online contracts, such as unfair contract terms;
- (2) the law provides incomplete protection, such as granting online consumers the right to withdraw, while omitting to discuss reimbursement problems for payments already received by the SP from the consumer; and

(3) failure to clarify the mechanism for the application of some legal provisions, such as failure to clarify the mechanism by which consumers can confirm that they have obtained the necessary information before concluding the contract. This will be discussed in section 6.4.2.

6.3 A Comparative Review

A legal framework reflects the societal context in which it sits and is consequently affected by several factors such as culture, language, religion and customs. Therefore, there are many differences between the English and Saudi legal systems. Due to the limited scope of this thesis, several procedural issues have not been considered. Instead, this thesis concentrates on an analysis of the legal framework for substantive consumer protection in the KSA, Sharia law and English law in respect of B2C online contracts.

6.3.1 Similarities and Differences among Saudi Law, Sharia law and English Law Approaches

This thesis finds that these jurisdictions generally provide special provisions for consumer protection in the areas that have been identified under the scope of this study, which are: information requirements, consumer protection from unfair terms and unfair commercial practices and the provision of legal solutions for avoiding the consequences of the purchase process, such as the right of withdrawal. However, there is a difference among the jurisdictions under this study in the basic concepts of consumers and the instruments used for consumer protection.

6.3.1.1 Legal Framework

One of the key differences between the jurisdictions under this study is their current legal framework for consumer protection. In English law, the legal framework of consumer protection consists of provisions and laws explicitly crafted to address consumer issues. This study has reviewed several such laws and regulations dealing with consumer issues, including unfair contract terms, unfair commercial practices including misleading advertising, and the right to withdraw in some cases. It can be said that this is something that distinguishes English law from other jurisdictions under this study. Nevertheless, one negative aspect of the various English consumer protection laws is that they are not consolidated and simplified. Provisions related to

consumer contracts still exist in legislation outside the scope of consumer protection laws, such as those related to property transfer under the SGA.

In contrast, the situation is different in the KSA, where consumer protection legislation are relatively new and consequently lack many critical provisions on issues related to online contracts – all that is available are general provisions scattered across the classic books of Sharia law¹²⁰⁶ and some other laws.¹²⁰⁷ As such, their adequacy could be questioned because they are not explicitly designed for consumer contracts. This is further compounded by the absence of unified legislation that applies in the KSA and other neighbouring countries, as found in the EU, which may contribute to online commerce regulation across borders. Although Sharia law is considered a primary source of legislation in most neighbouring countries, unfortunately, neglect of Sharia law by the governments of Muslim countries – especially within legal provisions that have organised commercial transactions within primary sources for several decades – has led governments to not take full advantage of those divine provisions that are accepted by the majority of the country's population.

The extent of the gap between the English model and Saudi law is evident because the latter did not introduce a law containing special provisions for the consumer until 2019. Also, this law does not cover many aspects of consumer protection, such as unfair contract terms, unfair commercial practices, consumer rights, special provisions appropriate to the nature of digital content and other new areas that require protection in online contracts.

This may be because the Saudi legislature is aware of the difficulty of introducing a comprehensive regime that addresses all related issues a consumer might face in an online environment. Consequently, an incremental approach to introducing online consumer protection may have been seen as a more manageable first step.

However, such a slow legislative process may likely lead to a consumer protection regime that will not adequately achieve the goal of protecting consumers from unfair practices committed by traders, and there is thus a need for specialised

¹²⁰⁶ See Chapter Four, section 4.4.1 of this thesis, The Concept of Consumer Protection from a Sharia Perspective.

¹²⁰⁷ See Chapter Three, section 3.3.2 of this thesis, Background of the E-Commerce Law (ECL) 2019.

provisions to be introduced to deal with consumer issues and for these to be organised comprehensively. This claim is based on the general rule mentioned in Article 38 of the Basic Law of Governance (BLG) 1992, which states:

‘Punishment shall be carried out on a personal basis. There shall be no crime or punishment except on the basis of a Sharia or a statutory provision, and there shall be no punishment except for deeds subsequent to the effectiveness of a statutory provision.’

From here, it can be said that failure to provide specialised provisions of consumer protection or providing non-comprehensive provisions amounts to the same outcome.

Sharia law adds some other values that subsequently enhance its scope compared with English law. Sharia law emphasises spiritual aspects alongside physical ones and is mainly concerned with intentions to maintain peace and justice. The notion that a person with deceptive intentions is answerable to the courts and God is absent in English law. Thus, it could be said that this may prove to more effectively protect consumer rights within Islamic jurisdictions, as long as the law is following Muslims’ faith. This makes the laws relatable and more binding.

6.3.1.2 Consumer Notion

Another essential difference among these jurisdictions lies in the notion of a ‘consumer’. In the UK, the legal framework is subject to many criteria; not every buyer of goods or services is considered a consumer subject to protection under consumer laws. For example, in a sales contract, only individuals acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession are protected.¹²⁰⁸

In contrast, the concept of a consumer, recently introduced in the KSA regime, includes everyone who purchases goods or services via e-commerce platforms.¹²⁰⁹ As a result, protection will be provided for each individual, whether they are an ordinary person or a professional. The term *mustahlik* – i.e. consumer – does not explicitly appear in the classical books of Sharia law. Therefore, contemporary Sharia law jurists have tried to define the notion of a consumer under Sharia law. The concept of a

¹²⁰⁸ See Chapter Five, section 5.3.2 of this thesis, The Concept Under English Law.

¹²⁰⁹ See Chapter Three, section 3.3.3 of this thesis, The Scope of the ECL 2019.

consumer in Sharia law is closer to that of Saudi law and the economic definition of a consumer.¹²¹⁰

Hence, there is a difference in the purpose of consumer protection laws under the studied jurisdictions. English law aims to protect the consumer only in B2C contracts according to specific standards. In comparison, the protection provided by Sharia law is not limited to consumer contracts, but rather to any buyer in commercial contracts, even if that buyer is a professional trader. This is because the power imbalance was not as prevalent centuries ago, giving rise to an additional need to protect particular buyers, such as consumers. This approach of Sharia law guarantees flexibility in its provisions, and its applicability is not limited to a specific era or circumstances. However, in recent times, with the increase in B2C transactions, a need arose to provide additional consumer protection in some jurisdictions, which may not have existed previously.

6.3.1.3 Information Requirements

Concerning information requirements, Sharia law, English law and Saudi law agree to provide consumers with the necessary information to conclude a contract. By extrapolating from classical books in Islamic jurisprudence, it is possible to say that the information that a trader must disclose to a consumer before concluding a contract revolves around two categories: the precise characteristics of the good or service and precise information concerning any hidden defects in the items.¹²¹¹ The information requirements in English and Saudi law go beyond that to include other information related to the trader's identity, platform, contract and invoice.¹²¹²

As a model that this thesis seeks to benefit from, English law is the most distinctive, despite the overarching similarity in emphasising the need for consumer information. Its provisions stipulate the relevant aspects more clearly and precisely than in Sharia law and aim to ensure the quality of goods and services to a greater extent through implied terms.¹²¹³ Under English legislation, these terms are referred to as 'legal guarantees' that a trader is obliged to fulfil. The goods/digital content must

¹²¹⁰ See Chapter Four, section 4.4.1.1 of this thesis, The Notion of a Consumer.

¹²¹¹ See Chapter Four, section 4.4.2.1 of this thesis, The General Obligation to Disclose Information to Consumers.

¹²¹² See Chapter Three, section 3.3.4.1 of this thesis, Information Requirements, and Chapter 5, section 5.4.1, also titled Information Requirements.

¹²¹³ See Chapter Five, section 5.4.1.2 of this thesis, Main Characteristics of a Product.

match their description, be 'of satisfactory quality' and be fit for any particular purpose made known by the consumer to the trader. At the same time, the trader must perform the service with reasonable care and skill. These terms are implied, which means they are automatically included as legal incidents of any sale contract. Therefore, the consumer is protected automatically from day one. Unlike English law, Sharia law does not provide for such implied terms in contracts.

Moreover, the emergence of the Internet contributed to certain problems occurring with respect to digital content, such as problems with updates and upgrades. This gives rise to a need to provide consumers with additional information. As Sharia law does not yet have a category for digital content, current information requirements found in classic jurisprudence books do not protect online consumers who enter into digital content contracts. Although the Saudi ECL 2019 is the most recent of the laws analysed in this thesis, it fails to address many of the issues in an Internet environment, such as the abovementioned issues. In contrast, English law is the most efficient in this aspect; its provisions keep pace with the digital age and require traders to provide consumers with various information commensurate with the nature of the goods, services or digital content, whether this is online or offline.

6.3.1.4 Unfair Commercial Practices

Concerning unfair commercial practices, Sharia law protects against all conduct of a trader that may harm the consumer's interests.¹²¹⁴ However, there is no general test that includes specific elements by which to determine what constitutes unfair commercial practice under Sharia law. Further, it is pretty generic in combatting unfair commercial practices, and its examples are often outdated in the modern world of commerce. Therefore, transferring those examples scattered throughout classic books of Sharia law to the ECL 2019 is ineffective. Moreover, the Saudi legislator may face difficulties in being able to classify these practices, since Sharia law prohibits such practices in the form of certain examples without classifying the nature of those practices – for example, meeting villagers on the outskirts of a city to purchase their goods before they reach the market is one such practice used to manipulate prices. For the purpose of this study, this practice has been classified as an aggressive

¹²¹⁴ See Chapter Four, section 4.4.2.2 of this thesis, Consumer Protection from Unfair Commercial Practices.

practice due to its nature, although Sharia law does not explicitly state this classification.

On the other hand, it can be said that English law provides a more practical categorisation of unfair commercial practices prohibited under consumer protection laws, including the following:

1. Misleading actions, when a trader provides consumers with false or deceitful information.
2. Misleading omissions, including omitting or hiding material information or providing unclear or ambiguous information, or a failure to identify commercial intent unless this is already apparent from the context.
3. Aggressive commercial practices that, in the context of the particular circumstances, intimidate or exploit consumers, restricting their ability to make free or informed choices.
4. Blacklisted practices that are always considered to be unfair (for example, displaying a trust mark, quality mark or equivalent without obtaining the necessary authorisation).

English law also provides a general unfairness test with two conditions that need to be cumulatively fulfilled to determine whether a practice is unfair. First, it contravenes the requirements of professional diligence; this occurs when the skill exercised falls below the good-faith standards that a trader is expected to exercise. Second, it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product. The above categories do not exist under Sharia law and Saudi law. The importance of this division is that consumers can easily know their rights and then claim their rights if they are subjected to such practices pursuant to English law. However, neither English nor Sharia law efficiently addresses many online unfair commercial practices linked to consumer reviews or social media platforms.

6.3.1.5 Unfair Terms

Both Sharia law¹²¹⁵ and English law¹²¹⁶ protect consumers from unfair contract terms, but the ECL 2019 has not yet addressed this issue.

¹²¹⁵ See Chapter Four, section 4.4.2.3 of this thesis, Consumer Protection from Unfair Contract Terms.
¹²¹⁶ See Chapter Five, section 5.4.3 of this thesis, Protection Against Unfair Contract Terms.

In Sharia law, contracts are assessed by testing the legality of their clauses under the general rules of Islamic contract law. In other words, Sharia law does not provide a fairness test for identifying unfair terms; instead, the legality of those terms is assessed according to a set of rules and regulations that regulate contracts in general. These rules are peremptory and binding, and cannot be violated or breached because they are considered part of the legal system. The rules relate to the structure and composition of the contract, including its content and interpretation, alongside its implications and obligations arising from it. They also aim to protect the contracting parties from any unfair contractual conditions.

Based on these rules, a legality test has three possible results: the contract and term are valid; the entire contract is void; only the term in question is void, and the rest of the contract is valid.¹²¹⁷

A term is valid, and so is the contract, if: (a) a term is required by the contract, (b) a term is appropriate to the contract, (c) a term does not fall under the previous two types but does not violate them.

The second type is an irregular term. The effect of having such a term is that it renders an entire contract invalid. For example, the Hanbali schools argue that a contract term that obligates contracting parties to conclude another contract that includes a loan contract is irregular and nullifies the entire contract. Such conditions are irregular as this practice amounts to usury, thus the contract does not bind either party.

The third type is a void contract term. Unlike the second type, this term is severable from the contract so that the term alone is null and void, but not the contract. For example, a contract term will be regarded as void if it conflicts with the contract requirements under the Hanbali school.

Based on the last two sections, it can be concluded that unfair contract terms, whether classified as irregular or void terms, are considered null *ab initio*, as Islamic contract law requires that any contract be free from any of those terms. Therefore, according to Sharia law, consumers are not bound by any contract that contains any of these types of terms.

¹²¹⁷ See Chapter Four, section 4.4.2.3.1 of this thesis, Legality Test.

Although the criteria for applying the legality test differ from one legal school to another in Sharia law, such difference does not create obstacles if the test is applied in consumer contracts. This is because any contract that includes a void clause under Sharia law will not be binding on the consumer with respect to irregular or void terms, which will therefore not undermine its usefulness. Moreover, to ensure a consistent level of protection, the Saudi legislator may adopt the criteria provided by the Hanbali school to transfer this test to the ECL. This school is the school chosen by the Saudi courts for the interpretation of Sharia law provisions.

However, traders may be allowed to impose a clause in the terms of the contract that exempts their contractual liability if there are hidden defects in the goods. Some schools of law exempt the trader from liability in cases where they are not aware of a defect when concluding a contract. Such types of condition are not considered an unfair term under Sharia law, thus it is not subject to the legality test.

The application of the fairness test in English law differs from Sharia law, in that its application is not only limited to the terms and conditions of the contract but also goes beyond that to include consumer notices.¹²¹⁸ However, there are certain exceptions – that is, terms that will not be tested for unfairness, including terms that reflect mandatory laws or set the price or describe the main subject matter of the contract, provided they are drafted in plain and intelligible language.¹²¹⁹ In this case, it is no longer sufficient for the core terms relating to price and subject matter to be in plain, intelligible language. Instead, they must also be both transparent and prominent.¹²²⁰ Excluding these terms from the scope of the fairness test makes sense if the above conditions are met. Otherwise, such testing could be considered an encroachment on the freedom to contract, given that they relate to clauses that play an active role in the bargain between the trader and the consumer.

The imposed fairness test has two key elements: good faith and significant imbalance in the parties' rights and obligations. However, this test faces many challenges. The first challenge is in the interpretation of the test elements – for example, the concept of 'significant imbalance' does not appear in Saudi and Sharia laws. Consequently, the Saudi courts may need to interpret something they are

¹²¹⁸ See Chapter Five, section 5.4.3.1 of this thesis, Fairness Test.

¹²¹⁹ See Chapter Five, section 5.4.3.3 of this thesis, The Exception from the Fairness Test.

¹²²⁰ Ibid.

unfamiliar with. Thus, if we want to use this element in the fairness test of consumer contract terms, we must consider its effectiveness in the English context. It turns out that there are many obstacles to interpreting this element. The English law states that the imbalance must be 'significant'; however, this is an open-textured concept. It may pose a challenge for interpretation because English law does not clearly indicate the distinction between the terms 'imbalance' and 'significant imbalance' and the different levels in between. A second challenge that has led to uncertainty surrounding how the test as a whole is interpreted, is the manner in which the two concepts are linked in the test's wording. English law does not provide sufficient clarity to infer how the test would work. This has led to a belief that the benefit of the fairness test may be undermined because these various interpretations may result in an oscillating level (higher or lower) of consumer protection under the UCTA.

Contrary to the requirement of a 'significant imbalance', the principle of 'good faith' has already been introduced in Sharia law and Saudi law. However, it has not appeared in the context of fairness testing in consumer contracts; rather, it has been introduced for other purposes.

In Sharia law, good faith is not only a term for contract law but rather a term for all human actions, whether they are transactions or acts of worship, such as good faith in Muslims' beliefs and religious practices.¹²²¹ This principle was derived from the actions of the Prophet, as he said:

'Do not leave sheep un milked for a long time, when they are on sale, and whoever buys such an animal has the option of returning it, after milking it, along with a Sa of dates or keeping it. It has been kept un milked for a long period by the seller (to deceive others).'¹²²²

For clarity, the failure to milk an animal for two days or more often leads to their udders becoming engorged with milk. This may deceive consumers, as they might think that the animal habitually produces this much milk each day, thus they may pay a higher amount than its actual value when purchasing it. The prohibition of this practice is due to the trader's bad faith in misleading the consumer. Conversely, it is an implicit obligation of good faith in purchasing and trading.

¹²²¹ The Prophet said: 'The reward of deeds depends upon the intentions and every person will get the reward according to what he has intended ...'; 'Actions are judged by motives ...' See Al-Bukhari, Book 1, Hadith 1.

¹²²² Sahih al-Bukhari, Book 34, Hadith 102.

In the classical jurisprudential books of Sharia law, the term ‘good faith’ is not explicitly defined. Instead, Sharia law places many ethical rules on contracting parties, including justice, sincerity, fulfilling promises, transparency, fair dealings, truthfulness, straightforwardness, etc.¹²²³

In Saudi law, the position of the legislator differs in recognising the principle of good faith in commercial transactions; it is recognised as a principle in many commercial laws such as the Commercial Paper Law 1964,¹²²⁴ the Commercial Pledge Law 2004¹²²⁵ and the Commercial Court Law 2020.¹²²⁶ On the other hand, the Saudi legislator does not adopt good faith in some specific cases – for example, according to article 8 of Commercial Pledge Law 2004:

‘[T]he obligations of minors who are not merchants and the obligations of the disqualified, arising from their signatures on the promissory note are null and void for them only, and they may stick to such invalidity in the face of every note holder, even if in good faith.’

That is, the law does not consider the good faith of the holder of the bill. Such protection is only provided to a vulnerable group – minors who are not eligible traders.

However, one of the key obstacles that may hinder the good faith principle from achieving its objectives is a lack of a specific interpretation in Saudi law. Instead, the mechanism for evaluating its application in contracts depends mainly on the judge’s rule, which may differ according to the context. In this case, the judge will have to evaluate each case individually, considering the multiple interpretations provided by classic Sharia books. A lack of autonomous interpretation for good faith may lead to a belief that the benefit of the fairness test may be undermined because the various interpretations may result in an oscillating level (higher or lower) of consumer protection.

Given the current lack of clarity in applying the requirements of good faith and significant imbalance, they may create complex issues in their implementation in a Saudi context. Alternatively, relying on Sharia law techniques to counter unfair

¹²²³ Seok Beom Choi, Nag Hyeon Han, Muhammad Khan, and Jung Han Bae, ‘Towards a Better Understanding of Good Faith Concept in Islamic Contract Law’ (2018) *International Journal of Engineering & Technology* 247.

¹²²⁴ Royal Decree No (M/37) 1964.

¹²²⁵ Royal Decree No (M/75) 2004.

¹²²⁶ Royal Decree No (M/93) 2020.

contract terms, such as applying the legality test under contract law, seems more appropriate.

6.3.1.6 Transparency

Under Sharia law, the terms of a contract must be transparent¹²²⁷ and formulated in a plain and intelligible language that can be understood. English law requires transparency in the drafting of both terms and notices.¹²²⁸ In addition, if the terms are written, they must be legible. However, if a term in a consumer contract or a consumer notice could have different meanings, the most favourable meaning to the consumer will prevail. Contrary to English law, the transparency requirement is not further defined in Sharia law, nor is there a clear sanction set for the breach thereof. Nonetheless, the ECJ provides more explanations for the scope of transparency; it stated that the transparency requirement should be interpreted as not only providing information in a way that consumers can read and understand to make an informed decision but also that consumers must be in a position where they are able to make the right decision whether or not to enter into a contract. Therefore, if the trader does not meet the transparency requirement, the contract terms will be automatically unfair.

However, a question arises as to the mechanism of application of these criteria in online transactions – for instance, placing contract terms in a hyperlink should not be considered a prominent and transparent way to bring the terms in question to the consumer's attention in a contract formed on the Internet. There is, however, no explicit answer to the validity and enforcement of this type of contract in the current provisions of Sharia law and English law.¹²²⁹

6.3.1.7 Right to Withdraw

The consumer's right to withdraw is guaranteed under both English¹²³⁰ and Saudi law,¹²³¹ but the application of this differs from one jurisdiction to another. The essential difference between Saudi and English law is that the provisions of the latter cover more aspects related to the exercise of the right to withdraw.¹²³² The ECL 2019 does

¹²²⁷ See Chapter Four, section 4.4.2.3.2 of this thesis, Transparency in Dealings.

¹²²⁸ See Chapter Five, section 5.4.3.2 of this thesis, Transparency.

¹²²⁹ See Chapter Four, section 4.4.2.2.3 of this thesis, Critique, as well as Chapter Five, section 5.4.3.2.1, Browse-Wrap Contracts and section 5.4.3.2.2, Click-Wrap Contracts.

¹²³⁰ See Chapter Five, section 5.4.4 of this thesis, The Consumer's Right of Withdrawal.

¹²³¹ See Chapter Three, section 3.3.4.3 of this thesis, The Consumer's Right of Withdrawal.

¹²³² See Chapter Five, section 5.4.4.2 of this thesis, Requirements and Obligations of the Right of Withdrawal.

not specify how consumers can test goods to not lose their right of withdrawal. Further, there is uncertainty in several situations where it is difficult to determine the day on which the cancellation period ends, such as whether the contract is for multiple goods in a sales contract. In addition, the ECL 2019 does not make any provisions concerning how a consumer can exercise this right when the service provider 'SP' delays in providing or fails to provide this information on time. Finally, the ECL 2019 has not made any special provisions discussing the reimbursement of the payments that the SP receives from the consumer, including any amounts imposed for delivery. These issues, among others, have been adequately addressed in English law.

Sharia law does not provide the right of withdrawal in the same manner as the mechanism followed by English and Saudi law. However, there are many other *Khiyarat* (options) offered to the consumer by Sharia law. The consumer can withdraw unilaterally without reference to the other party, namely: ¹²³³

1. *Khiyar majlis* refers to the right of the contracting parties (trader and consumer) to uphold or terminate the contract as long as they remain in the contractual session.
2. *Khiyar shart* is an option that gives the right to one or both of the contracting parties to withdraw from the contract of sale for any reason within a specified period. The duration of this must be set within the terms of the contract.
3. *Khiyar ru'yah* refers to the consumer's right to view and inspect a good described at the time of negotiation, which is not shown to consumers at the conclusion of the contract. The right then allows consumers to either uphold or terminate the contract.

Kkhiyar aib refers to the consumer's right to revoke or maintain a transaction when they discover that a defect in the goods or service reduces its value or renders it with insufficient requirements or specifications. Furthermore, this is applicable in the case of delivery failure.

In B2C online contracts, it can be argued that giving the consumer options (*Khiyarat*) as set out in classical jurisprudence books may help protect consumers from hasty undertakings that may occur in online transactions due to the speed and technological nature of transactions. Therefore, providing options to the consumer provides a mechanism through which consumers consider their transactions. Islamic

¹²³³ See Chapter Four, section 4.4.2.4 of this thesis, Consumer Options for Validly Terminating the Contract (*Khiyarat*).

options also provide a mechanism through which the consumer can contemplate their transaction further or revoke the contract – for example, if they enter into a contract based on insufficient information and then afterwards decide that they acted in haste. Giving both traditional and online consumers Islamic options may help create a balance between the contracting parties in commercial transactions. Therefore, in the Sharia law context, *Khiyarat* must be offered to customers to reduce uncertainty, risk, deceit, impairment and discord and to foster mutual satisfaction, making this similar to the right to withdraw. However, numerous challenges confront consumers when they consider exercising Sharia law options, its enforcement may not be possible in practice.¹²³⁴ Nonetheless, it can be said that *Khiyarul Shart* is the most suitable for the Internet environment and the closest in its application to the right of withdrawal provided by both Saudi and English law.

6.3.2 The Extent to Which the Differences Can Affect the Achievement of the Study's Objectives

Despite the differences between jurisdictions and based on the analysis presented in this thesis, it could be said that the above-observed differences do not prevent the possibility of using English law to provide guidance to tackle consumer-related issues in the current Saudi regime. This result was reached because the provisions provided by English law do not expressly conflict with the general rules of Islamic law. On the contrary – many provisions of English law seek to protect the weaker party in a transaction. This is expressly consistent with the purposes of Islamic law. In addition, this study identified many of the risks online consumers face due to a lack of protection provided by the current consumer protection legislation in the KSA, which were efficiently addressed in the English model. Given that a lack of 'trust' is currently considered the main obstacle to adopting online shopping in the KSA, English law instruments could be an appropriate and effective model to inspire the development of a consumer protection regulation system in the KSA and thus increase consumer trust in online shopping. This argument is supported by the position of the legislature in the KSA.

The KSA's legislature has been moving towards adopting an SC approach in consumer protection online. This means greater flexibility, as the KSA regime has

¹²³⁴ Ibid.

become more open to developing, adopting and benefiting from advanced models and so-called secular legal concepts to address contemporary legal problems. Therefore, it can be said that the lessons learned from other more mature legal systems, such as English law, can also be adopted, provided they are compatible with Sharia law.

In summary, the above remarks provide a clear picture of the main aim of this thesis, which is to explore how to create an environment in the KSA wherein the interests of online consumers can best be protected as per English consumer protection laws with regards to the provision of mandatory information, tackling unfair contract terms and unfair commercial practices, as well as the right of withdrawal. Whilst at the same time taking into account the requirements of Sharia law in order to achieve the concept of shariah-compliant 'SC' law, alongside the established norms around consumer protection outlined by Sharia law.

Thus, this research aims to propose a legal framework to protect online consumers in the KSA to improve consumer protection, motivate consumer confidence, and encourage KSA policymakers to play an active role in implementing online shopping in the KSA. The best practices and legal principles that come to light from this analysis, and could therefore be adopted in the KSA, will be outlined in the following sections to fulfil the main aims of this research.

6.4 The Main Gaps in the ECL 2019

After analysing online consumer protection instruments in Saudi law – namely, the ECL 2019 and the ERECL 2020 – this thesis discovered many deficiencies in this legislation, which may lead to inadequate consumer protection. The main deficiencies can be presented in two subsections.

6.4.1 Formal Gaps in the ECL 2019

(1) A trader under the scope of the ECL 2019 is defined as 'the person who is registered in the commercial registry that engages in e-commerce',¹²³⁵ while a practitioner is defined as 'the person who is not registered in the commercial register that engages in e-commerce'.¹²³⁶ However, all of them are referred to in the law articles as a service provider. When we consider colloquial language, this term seems inaccurate, as the term 'SP' should be limited to describing those providing services.

¹²³⁵ The E-Commerce Law 2019, art 1.

¹²³⁶ Ibid.

In contrast, a supplier or seller who sells goods or supplies digital content would not be described as an SP in practice. This legal term may cause confusion, with non-specialists believing that the law does not protect the consumer in contracts involving sellers of goods. Therefore, using such terms seems unnecessarily complicated. This thesis considers that these terms should be redrafted to provide one term that applies to whoever sells/supplies goods or services and digital content in e-commerce platforms under the scope of the ECL 2019.

(2) Misleading advertisements are the only unfair commercial practices that are prohibited by the ECL 2019. The concept of misleading advertisements is limited to one aspect of practices that may cause a consumer to make an uninformed decision, namely when false or deceptive information is provided in them. However, other practices that have not been included in the scope of the law may fall under the meaning of misleading advertisements. For example, omitting or hiding material information may also mislead consumers and cause them to take a transactional decision they would not have taken otherwise.

(3) A further weakness emerges in some articles of the law that mention specific provisions that the SP must adhere to, without clarifying how these provisions are applied in accordance with the law – for example, the SP is obliged to inform the consumer of any anticipated delay or difficulties that have a material effect on the delivery or execution of a contract.¹²³⁷ However, neither the ECL 2019 nor its 2020 executive regulations provide guidance or examples of what a material effect on the delivery or execution of a contract is.

(4) Under the ECL 2019, the determination of the start of the seven-day cancellation period varies depending on the type of contract concluded. The cancellation period begins on the day following the conclusion of the contract when the subject of the contract is the provision of a service. In contrast, the cancellation period for products begins on the day following the date of receipt of goods.¹²³⁸ However, uncertainty arises in several instances when it becomes difficult to determine the day on which the cancellation period ends – for instance, in the case of sales contracts where the contract is for multiple goods, or multiple lots, or regular

¹²³⁷ Ibid, art 14(2).

¹²³⁸ Ibid, art 13(1).

delivery, or goods under one order delivered on different days. Therefore, failure to specify the end date of the right to withdraw may create a dispute between the consumer and the SP.

Nevertheless, it is difficult to assert that the SP has effectively provided this information prior to concluding the sales contract, since there is no consent and acknowledgement mechanism through which it can be confirmed that the online consumer has been provided with such information before deciding to purchase. The importance of this mechanism is highlighted in making the consumer fully aware of all and any supplementary costs that may arise and affect their will to undertake contractual obligations. In addition, the ECL 2019 does not contain any provisions about whether the cancellation period is extended where the SP delays or fails to provide this information.

(5) There is an obvious shortcoming between the provisions of the ECL 2019 and its 2020 executive regulations regarding the information requirements and the consumer's right of withdrawal mentioned above, which can be highlighted in the following points:

(A) It is noticed that the regulation repeats some of the provided requirements in the law without a persuasive reason for doing so. The regulation includes phrases that are a direct copy of some of the (obvious) information requirements previously mentioned in the provisions of the law, such as the circumstances where consumers lose their right of withdrawal. It is understood from term G in Article 7 and 13(2) of the ECL 2019 that the regulation will add additional conditions that were not covered in the law. It is also logical for the regulation to provide interpretations that may clarify the scope of the information requirements already mentioned in Article 7 and 13(2) of the ECL 2019 if there is ambiguity in its applications. Unfortunately, however, the regulations have not met those expectations.¹²³⁹ This also does not reflect the stated aims for which this law and its executive regulation were issued in 2020 – namely, the simplification and clarification of the objectives of the law.

(B) There is also a delay in providing the consumer with some necessary contract information in a timely manner. For example, one piece of information that

¹²³⁹ Such as those dealing with the reimbursement of the payments that the SP receives from the consumer, which this thesis will discuss in this section.

the ERECL 2020 only requires to be provided in the invoice (thus after the conclusion of the contract) is a summary of the replacement and refund provisions in cases where this is permissible (if applicable). Such information may influence the consumer's desire to purchase or make an informed decision. Thus, failure to provide such information at an early stage – namely, in the pre-contractual information stage – may seriously harm the consumer.

(6) It seems that the ECL 2019 is not compatible with other relevant laws, as some provisions appear to breach the general rules of contract law. For instance, Article 10 of the ECL 2019 states that any online advertisement is considered part of the contractual documents supplementing the contract. This phrase is vague, as the Saudi legislator's intent behind the phrase 'part of the contractual documents supplementing the contract' is unclear. It seems that the Saudi legislator considers advertising in this case as part of the formation of the contract, as either an offer or a part of it, and is therefore binding on the parties to the contract. For instance, when an SP advertises goods at a specific price, the displayed price would be considered part of the contract and binding on the trader. This means that the contract will be considered binding on the SP once the consumer has issued acceptance of the advertisement (offer).

However, considering advertisements as offers may create uncertainty. Usually, not all the necessary contract terms are mentioned in advertisements. This would create uncertainty in the terms of the contract, which would then call into question the validity of the offer being made through an online advertisement. Moreover, the advertiser usually requires potential purchasers to negotiate by requesting an order to purchase. This means that they have no intention of making an offer. Conversely, if all advertisements in an online environment are considered offers, every Internet user can accept these 'offers', giving rise to binding contracts. Consequently, millions of Internet users could sue advertisers for breach of contract when the traders cannot supply goods or perform a service due to an overwhelming number of requests. Consequently, it can be said that not all online advertisements can be considered as offers.

6.4.2 Substantive Gaps in the ECL 2019

Beyond the weaknesses in the drafting of the scope of the ECL 2019 and the formulation of some of its provisions, there are substantive gaps in this legislation. This section does not suggest solutions to the substantive gaps identified below. Instead, suggestions and recommendations for related gaps will be presented in the next section, section 6.5.

(1) There is a lack of sufficient provisions concerning information requirements. Product characteristics critically affect a consumer's decision about online purchases. To make an informed decision, consumers must be able to understand all the essential product attributes. However, there are no precise information requirements concerning the main characteristics of products and services that a trader must provide to consumers in purchase contracts. Moreover, the law does not provide legal rights in consumer contracts commensurate with the nature of each good, service or digital content that can be considered as implied terms that those goods or services purchased are in line with consumer expectations. For instance, there is no requirement for the goods to fit any particular purpose made known by the consumer to the trader, as English law requires.

(2) The ECL 2019 does not discuss circumstances where a trader delivers a different quantity of goods than the consumer contracted for. In addition, there are other delivery risks, such as those related to consumers' fears that they may receive damaged goods. It is noted here that the goods may not have been damaged when the trader sent them, but the damage may have occurred during delivery to the consumer. Goods may be damaged during shipment for several reasons, either because of a lack of proper packaging to protect the goods from damage or through mishandling. However, the ECL 2019 does not provide any provisions to determine whether the goods remain at the risk of the trader, the consumer or a person identified by the consumer to possess the goods, at which point the risk passes to the consumer from the supplier. The law does not discuss the implications of receiving defective goods or consumer rights relating to this.

(3) The ECL 2019 attempts to address certain issues in e-commerce by using ancient rudimentary instruments that may not be adequate for the era of digitisation. Many unfair business practices that have not been expressly prohibited by the ECL

2019 can occur in online and offline shopping – for example, business practices that intimidate or exploit consumers, restricting their ability to make free or informed choices. This may lead to the consumer being vulnerable due to other practices that are not prohibited under the law. Furthermore, many other unfair commercial practices can only occur in online contracts due to the nature of the Internet environment. For instance, there are tools that an online trader can use to mislead consumers in ways that do not occur in offline transactions, such as multiple methods of price gouging in online platforms.

(4) There is a lack of provisions regulating contract terms in consumer contracts. The ECL 2019 does not provide a test by which the fairness of the contract terms can be assessed. Additionally, the law requires transparency in providing contract information, including terms, to the consumer. However, transparency requirements are not defined, and there is no clear specific penalty for breaching them. In the context of the Internet, the ERECL 2020 also requires the SP to provide a link to contract information, including the terms, on their website, explaining any subsequent amendments to the data. However, the adequacy of using hyperlinks to prominently and clearly bring such information to consumers' attention when forming contracts on the Internet is not established.

(5) One of the most critical issues facing online consumers regarding the effect of exercising the right to withdraw is reimbursement for payments already received by an SP from a consumer, including any amounts imposed for delivery. The ECL 2019 does not contain any special provisions discussing this issue, which raises several concerns. Firstly, the ECL 2019 does not discuss the time frame for an SP to reimburse such amounts due to a consumer. In addition, the law does not discuss when an SP may keep some of the sums a consumer paid, such as any amounts in excess of this which a consumer paid for a delivery service, or to what extent traders could charge consumers a fee in exchange for reimbursement. Therefore, it can be said that this gap in the ECL 2019 may be a reason for consumers to be subject to unfair costs.

6.5 Proposal for Reform of the Online Consumer Protection Regime in the KSA

Turning to the precise research question of the thesis to consider whether the current law governing online consumer protection in the KSA is sufficient and well organised,

Chapter Three of this thesis analysed the adequacy of the existing laws supporting consumer protection in the KSA to identify gaps where online consumer protection is not addressed.

The thesis has answered the research question in the negative. The current legislation governing online consumer protection in the KSA is insufficient and needs more work for it to become better organised. The weaknesses in Saudi law are listed as follows:

1. Formal weakness in the drafting of several articles in the E-Commerce Law (ECL) 2019 and the Executive Regulations of E-commerce Law (ERECL) 2020, discussed in section 6.2.2 of Chapter Six in this thesis.
2. Substantive legal gaps in several articles in the ECL 2019 and the Executive Regulations of ERECL 2020, discussed in section 6.2.3 of Chapter Six in this thesis.

As a result of these weaknesses and gaps, it has proved necessary to provide a proposal to redraft Articles 1, 7(c), 7(e), 10(1),11, and 13(1) of the ECL 2019 and Articles 6(2), 7(1), 7(2), and 18(2) of the ERECL 2020. All of these will be discussed in this section.

For clarity, the proposals will be presented based on the structural numbering of the current ECL 2019 and its 2020 executive regulations .

Article 1 of the ECL 2019: The Notion of Consumer and Service Provider

This thesis suggests that the Saudi legislature amends article 1 of the ECL 2019 and adopts the notion of consumer under EU law, which defines a consumer as ‘a natural person who is acting for purposes outside his trade, business and profession’.

This definition seems to be more logical to justify the enactment of special consumer protection laws that have special provisions differing from those in commercial laws. Otherwise, there will not be much difference between the protection offered with respect to B2C contracts and that offered to other commercial contracts, such as B2B contracts.

It is probably best to limit the scope of a ‘consumer’ to a specific category of buyer, such as defined by European law. In addition, as discussed in **Chapter Two**, this study believes that ordinary persons who lack experience, compared to

professional parties, have a fear of online shopping. This has contributed to their reluctance to shop online, which has affected the e-commerce sector. Therefore, this study attempts to provide a legal framework to protect this category of purchasers. This thesis argues that the definition of European law seems most relevant to target this category under this study.

Although the proposed definition of a consumer will undoubtedly be narrower in its scope for certain purchasers than the definition provided by Sharia law, this cannot be considered an infringement of the provisions of Sharia law. On the contrary – protecting the weaker party in contracts is one of the general purposes of the principles of Sharia law. Nonetheless, buyers ‘outside the scope of the chosen definition’ are protected by commercial or contract law. Thus, it can be said that limiting the definition of ‘consumer’ to a certain number of purchasers is compatible with Sharia law and will be more protective than the current system under the ECL 2019.

Moreover, this thesis suggests that the Saudi legislature amend article 1 of the ECL 2019 by replacing the term ‘service provider’ with a more accurate term such as ‘supplier’, provided by the CRA 2015, and ‘seller’, provided by Sharia law. It might be suitable to use the term ‘trader’ because this term clearly includes everyone who sells a good or provides/supplies a service or digital content in purchase contracts. However, in the case of Saudi law, the situation is different, as the ECL 2019 differentiates in its provisions between a ‘trader’ and a ‘practitioner’. Moreover, each term has partially different requirements from the other; hence, it seems preferable to use the term ‘seller’ and ‘supplier’ instead of ‘service provider’ in the ECL 2019. Therefore, a seller/supplier could be defined in the context of the ECL 2019 as whoever engages in selling or providing services through online platforms, whether they are a natural or legal entity, or whether they are registered in the commercial registry or not. This may help make the provisions easier to read, especially for a non-specialist.

Article 6(2) of the ERECL 2020: Prominence Requirement

Although there is no explicit answer to the validity of using hyperlinks in contracts formed via the Internet in the current provisions of Sharia law and English law, some protection may be obtained from English cases relating to standard form contracts. This thesis suggests the Saudi legislature benefit from the experience of English law

by amending article 6(2) of the ERECL 2020 to insert a prominence requirement regarding the use of hyperlinks as a way of providing information and terms. The prominence requirement requires that terms be brought to the consumer's attention so that the average consumer who is well informed, observant, and circumspect would be aware of them. Consequently, consumers may not be bound by the terms in online contracts that are not brought to their attention either prior to or at the same time as the contract was concluded.

Although Sharia law does not explicitly stipulate the prominence requirement with respect to contracts of sale, it can be argued that this requirement is in accordance with the general rules of Sharia law. Sharia law strictly prohibits any transaction or contract involving any form of uncertainty, which makes a contract invalid.¹²⁴⁰ To ensure that the transaction is free from any *gharar*, the contracting parties must be informed of the details of the contract, such as by clearly listing terms in the contract. Since this requirement clearly contributes to the fulfilment of the above principle, it can be said that the prominence requirement is compatible with Sharia law.

Article 7 of the ECL 2019: Defining the Main Characteristics of What Is Provided

This thesis suggests that the Saudi legislature amend article 7(c) of the ECL 2019 by adding an item clarifying what is meant by the main characteristics of a product or service. The main characteristics of a product or service or digital content must include all information related to the precise characteristics of the good or service or digital content and its hidden defects, as provided by Sharia law.

In addition, this information should include all information related to a product's availability, including its benefits, risks, composition and accessories, fitness for purpose, quantity, origin, expected results from use and the results of tests carried out on it, as provided in English law. As mentioned previously in **Chapter Four**,¹²⁴¹ a trader must clarify any information related to the sale that may affect a consumer's decision to buy. This commitment is contained in the second source of Islamic law (Sunnah). However, Sharia law does not specify what information should be disclosed to meet

¹²⁴⁰ See Chapter Four, section 4.3.3.3.2 of this thesis, *Gharar* (Uncertainty), as well as Chapter Four, section 4.4.2.3.2, Transparency in Dealings.

¹²⁴¹ See Chapter Four, section 4.4.2.1 of this thesis, The General Obligation to Disclose Information to Consumers.

this obligation. Instead, Islamic law has made its assessment based on ensuring that the objective of this commitment is achieved. Since the above information requirement provided by English law may contribute to the fulfilment of the above obligation, it can be said that the requirement is compatible with Sharia law.

This thesis also suggests the Saudi legislature benefit from the experience of English law by amending article 7(e) of the ECL 2019 to require the SP to provide the necessary information about a consumer's rights if the consumer receives a different quantity of goods from the contracted trader, as well as in the event of receiving damaged goods. In the first case, when the trader delivers a lesser quantity of the goods than contracted for, the consumer may refuse it, but the consumer must pay for it at the contract rate if the consumer accepts it. If the trader delivered a larger quantity of goods than contracted, the consumer may accept the goods included in the contract and refuse the rest or refuse all the goods. However, if the consumer accepts all delivered goods, the consumer must pay for them at the contract price. The provisions adopted from English law are in accordance with the general rules of Sharia law based on the views of some Sharia law scholars.¹²⁴²

In addition, provisions regarding the passing of risk must also be introduced. The experience of English law in this area may be adopted here by making the goods remain at the trader's risk until they come into the physical possession of the consumer or a person identified by the consumer to take possession of the goods. This is also in accordance with the general rules of Sharia law on receiving damaged goods.¹²⁴³

Article 7(1) of the ERECL 2020: (a) A Summary of the Replacement and Refund Provisions

This thesis suggests that the Saudi legislature amend article 7(1) of the ERECL 2020 by requiring the SP to provide a summary of the replacement and refund provisions in cases where this is permissible (if applicable) at an early stage, namely in the pre-contractual information. Such information may influence the consumer's decision whether to purchase. Thus, a failure to provide such information at an early stage, namely in the pre-contractual information, may seriously harm the consumer

¹²⁴² See Chapter Four, section 4.3.3.3.1 of this thesis, *Riba* (Interest).

¹²⁴³ See Chapter Four, section 4.4.2.4.1 of this thesis, *Khiyar Aib* (Defective Option).

Article 7(2) of the ERECL 2020: (a) Information to Be Provided in a Tangible Medium and a Transparent Manner

This thesis also suggests the Saudi legislature benefit from the experience of English law by amending article 7(2) of the ERECL 2020 by adding an item requiring the SP to make all contract information available in a tangible medium so that the consumer can refer to it whenever they want to. In addition, there should be a mechanism through which consumers' explicit acknowledgement that they have been provided pre-contractual information prior to the purchase decision can be confirmed. Such confirmation of consent and acknowledgement should also be provided on a durable medium such as sending the information on a CD or DVD, via a text message or by placing the relevant information in the customer's online account. This implies that a trader must offer a consumer the possibility of saving or printing information.

It is not expected that providing a durable medium exists in the classic books of Sharia law due to the modernity of electronic means. However, such a requirement is not considered a violation of the provisions of Sharia law. Furthermore, it can be argued that this requirement is in accordance with the general rules of Sharia law. One of the key goals for imposing this obligation on a trader is to ensure that the online consumer has been provided with pre-contract information before making a purchase decision. This goal is asserted in several provisions of Islamic law.¹²⁴⁴ Since this requirement clearly contributes to the fulfilment of the above goal, it can be said that providing a durable medium allows consumers to refer to the terms whenever they want and confirms that their consent and acknowledgement are compatible with Sharia law.

(b) Transparency Requirement

Moreover, this thesis suggests that the Saudi legislature amend article 7(2) of the ERECL 2020, clarifying the requirements by which the terms can be described as straightforward or easy. The terms of the contract must be transparent under Sharia law¹²⁴⁵ and must be formulated in a plain and intelligible language that can be

¹²⁴⁴ See Chapter Four, section 4.4.2.1 of this thesis, The General Obligation to Disclose Information to Consumers.

¹²⁴⁵ See Chapter Four, section 4.4.2.3.2 of this thesis, Transparency in Dealings.

understood. English law requires transparency in the drafting of both terms and notices.¹²⁴⁶ In addition, if the terms are written, they must be legible. However, if a term in a consumer contract or a consumer notice could have different meanings, the most favourable meaning to the consumer will prevail. Contrary to English law, a transparency requirement is not further defined in Sharia law, nor is there a clear sanction set for the breach thereof. Therefore, relying on English law techniques for an interpretation seems to be more appropriate.

(c) Fairness Test

Additionally, in this article, this thesis would suggest that the Saudi legislature also introduces provisions by which it can judge the fairness of terms. The provisions of the fairness test in English law are helpful in dealing with unfair contract terms. However, given the current lack of clarity in applying some of its elements, they may create complex issues in their implementation in a Saudi context. Alternatively, relying on Sharia law techniques to counter unfair contract terms, such as applying the legality test under contract law, seems more appropriate.

As there is no civil code in the KSA, courts apply the provisions of Islamic contract law to adjudicate disputes related to contracts, including the legality test under contract law. Saudi courts have applied this theory for more than six decades to test the validity of contracts, whether civil or commercial. By extrapolating many of the judicial precedents,¹²⁴⁷ this thesis finds that the courts were able to protect the party harmed by unfair contract terms by considering three instances of terms associated with contracts:

- The term is valid.
- The term is such that it nullifies the entire contract.
- The term is invalid, but the contract is valid.

The clarity of the elements of this theory has effectively contributed to the courts' ability to apply these elements to contracts in practice, which has contributed to addressing unfair contract terms. Hence, it can be said that the experience gained

¹²⁴⁶ See Chapter Five, section 5.4.3.2 of this thesis, Transparency.

¹²⁴⁷ 1179/2 on 1413 H (SCPP); 2221/2 on 1422 H (SCPP); 141/3 on 1423 H (SCPP); 33251132 on 1433 H (GCs); 33252837 on 1433 H (GCs); 33388994 on 1433 H (GCs); 34169935 on 1434 H (GCs); 34193570 on 1434 H (GCs).

by the courts through applying this test for a period of time may help effectively in applying this theory if it is applied to consumer contracts. Thus, it can be concluded that the legality test under contract law may help achieve the goal of consumer protection because courts are already experienced in providing interpretations of this test.

Article 10(1) of the ECL 2019: Online Advertisement

This thesis suggests removing any ambiguity that may arise due to the legislator's phrasing in Article 10 of the ECL 2019, which states that any online advertisement is considered part of the contractual documents supplementing the contract, by expressly clarifying their position about the classification of online advertisements – either they are an invitation to treat or an offer.

This thesis encourages benefiting from the English law experience by considering that the display of goods or services online is treated as an invitation to treat, not an offer. In this case, the phrase 'part of the contractual documents supplementing the contract' does not mean that all advertisements are considered to be an offer, but rather that when the contract is concluded, and advertisements and other commercial information are provided to the consumer prior to the contract, this information becomes binding upon the trader. For example, if an advertisement promised consumers free repairs for five years, consumers could demand the stated free repairs, as the text in the advert will form part of their contract and will be enforceable.

Article 11 of the ECL 2019: Unfair Commercial Practices

This thesis suggests that the Saudi legislature amend article 11 of the ECL 2019 to amend the entire article so that the ban is not limited to misleading advertisements but rather that all unfair commercial practices should be banned in their various forms. Sharia law techniques can be used in addition to the English law model by prohibiting all conduct on the part of the trader that may pose a risk to the consumer, while providing criteria to establish what an unfair practice is. Unfair practices should include the following:

1. Misleading actions, when a trader provides consumers with false or deceitful information.

2. Misleading omissions, including omitting or hiding material information or providing unclear or ambiguous information, or a failure to identify commercial intent unless this is already apparent from the context.
3. Aggressive commercial practices that, in the context of the particular circumstances, intimidate or exploit consumers, restricting their ability to make free or informed choices.
4. Introduction of blacklisted practices commensurate with the nature of online contracts – for example, falsely claiming or creating the impression that the trader is not acting for purposes relating to their trade, business, craft or profession, or falsely representing oneself as a consumer in an online platform.

Article 13(1) of the ECL 2019: The Normal Cancellation Period

This thesis also suggests the Saudi legislature benefit from the experience of English law by amending article 13(1) of the ECL 2019 to introduce provisions that require the trader to reimburse the consumer all payments received from the consumer where they exercise the right to withdraw. This should be paid back by the end of 7 calendar days, depending on the type of sale. The day on which the normal cancellation period ends depends on several considerations:

- 1- The end date is 7 days after the day on which the goods come into the physical possession of the consumer or a person identified by the consumer. This is in the case of sales contracts where the contract is not for multiple goods, or multiple lots, or regular delivery, or goods under one order that is delivered on different days.
- 2- The end date is 7 days after the day on which the last of the multiple lots of goods comes into the physical possession of the consumer or a person identified by the consumer in the case of sales contracts for goods consisting of multiple lots or 'pieces of something' that are delivered on different days.
- 3- The end date of a sales contract for regular delivery of goods during a defined period of more than one day is 7 days after the day on which the first of the goods comes into the physical possession of the consumer or a person identified by the consumer.

In addition, there should be provisions to prevent a trader from charging any fee to consumers for reimbursing them, except for any amounts in excess of this that a consumer paid for an enhanced delivery service, which the trader may retain. This

result is not only adopted from English law but is also compatible with Sharia law rules if the consumer exercises *Khiyarul shart*, which is very similar in its application to the right of withdrawal.

Article 18(2) of the ERECL 2020: Online Platforms' Duties

Since most relevant consumer protection laws in English law have been adopted through the implementation of EU directives, this thesis also suggests the Saudi legislature consider the latest developments, such as the 'New Deal', which have been responsive to consumer challenges in the Internet environment and may serve as a guide for developing relevant laws. Such development could include amending 18(2) of the ERECL 2020 by adding provisions that prohibit submitting or commissioning someone to submit fake reviews or endorsements and manipulating comparison websites. Online platforms should clarify whether they guarantee that reviews come from real consumers, and how this has been done. Online platforms should not be allowed to claim that consumers provide reviews unless they have taken reasonable and proportionate steps to verify this, such as only allowing consumers who have purchased or used a good or service to provide a review about it.

Moreover, this thesis suggests that the Saudi legislature add provisions that prohibit hidden advertising in the provision of information in search results for an online consumer's search query. Online platforms should provide consumers with information about the main criteria determining the offers' ranking in response to a search query. This includes when search results are based on payments received from the listed traders.

6.6 Contribution of the Study

As the first study that explores, with full analysis and criticism, online consumer protection in Saudi law – namely, the ECL 2019 and its 2020 regulations, this thesis contributes to the development of better online consumer protection in the KSA. Furthermore, this thesis critically analyses the consumer protection mechanics in both Sharia and English law. Therefore, this research aims to propose a legal framework to protect online consumers in the KSA, drawing on the best practices in English legislation, which is a country that has a long-standing practice of consumer protection. This proposal has been submitted in line with the current legislation for consumer protection in the KSA and the overarching principles of Sharia law. Thus, the originality

that distinguishes this thesis from others is that it proposes practical solutions to improve the current regulatory framework of consumer law rather than providing theoretical proposals that may have already been adopted in recent law and regulations or may not be adopted due to the vast differences between the various jurisdictions.

6.7 Recommendations for Future Research

This thesis has highlighted several topics related to online consumer protection and further research in this area is crucial. Doctrinal and comparative legal analysis methods were chosen to achieve the thesis' objectives and answer its questions. However, other methods can also contribute to the attainment of knowledge. To test the efficacy of the ECL 2019 in enhancing the trust of consumers in online contracting, an empirical approach would be particularly relevant.

An additional area for further research is consumer data protection and the courts' jurisdiction to consider electronic transactions. There is a need for the KSA to enhance such areas, especially the latter, to address e-commerce issues at the local level and keep pace with international trends in order to attract foreign investment. These areas are still considered as gaps in Saudi law.

Finally, introducing consumer rights is only the first step in strengthening consumer protection in the KSA. Enforcing such rights is the next logical step and is, therefore, another area ripe for further study, that is nevertheless beyond the scope of this thesis.

Chapter Seven: Conclusion

This thesis examined the issue of mistrust in online shopping in the KSA market. Since this thesis focuses on proposing a legal framework for online consumer protection in the KSA, it is essential to identify and understand online consumers' issues for these to be tackled legally. Therefore, four factors influencing consumer trust in online contracts have been identified: product and service risks, information, delivery, and terms and conditions.

This thesis sheds light on the legal solutions that might help to limit these factors' effect. They are providing mandatory information, tackling unfair contract terms and commercial practices, and granting consumers the right of withdrawal. It has been reported that these areas are the root problem and source of the risks involved in online transactions in Saudi Arabia.

Turning to the precise research question of the thesis, which is "To what extent is the current KSA legislation on online consumer protection efficient" For this purpose, this thesis in Chapter Three analysed the adequacy of the existing laws supporting consumer protection in the KSA in order to identify gaps where online consumer protection is not addressed. We will find that the thesis has answered the above question in the negative. The current Saudi law and its implementation do not provide adequate solutions for the existing problems faced by online consumers. Therefore, there is more that needs to be done.

This thesis identified two models to explore for more effective solutions, namely Sharia law and English law. It sought to examine the measures provided by Sharia law for consumer protection and relevant English legislation and to identify the best practices and legal principles that come to light from this analysis in order to be outlined to fulfil this research's main aim, which aims to provide a proposed model for strengthening the consumer protection system over the Internet in the KSA, identifying opportunities for the improvement of consumer protection in Saudi Arabia.

Sharia law is the foundation of legislation in the KSA. However, one of the important reasons for choosing Sharia law as a model is because compliance with Sharia law in online commerce may also enhance trust among consumers and traders in an online environment and satisfy the requirement of online Muslim buyers and sellers with a religion-driven attitude. Contracting parties may feel confident if they are

aware that they are protected under provisions derived from Sharia law. They trust the protection provided by their religion. They are expected to refrain from doing any practice that would harm the other party because their religion prohibits such practices.

After examining Sharia solutions, this study found that Sharia law sets some consumer protection rules even though Sharia is quite general in regulating contract law. Its examples are often outdated in the modern world of commerce. However, many emerging issues that have affected consumer protection have been found in modern times due to the evolution of technology. There are insufficient solutions provided by Sharia law for these recent issues. However, Sharia law could still serve as a guideline for the KSA government in the formulation of new laws or the amendment of current regulations around consumer protection if it were reviewed and updated to keep pace with current developments, as most citizens living in the KSA are Muslim and abide by Sharia law principles.

As for English law, in comparison to the KSA, English law has a long-standing consumer protection practice. In addition, trust was one of the critical factors slowing down the growth of online shopping in the UK. However, the UK consumer was recently identified as the most confident online shoppers in the EU. This was achieved by adopting regulations that help enhance online trust and empower consumers. Given that a lack of 'trust' is currently considered the main obstacle to adopting online shopping in the KSA, English law instruments could be an appropriate and effective model to inspire the development of a consumer protection regulation system in the KSA and thus increase consumer trust in online shopping.

This study found that English law provides a more practical categorisation of consumer provisions than Sharia law. The legal framework of consumer protection consists of provisions and laws explicitly crafted to address consumer issues. This study has reviewed several such laws and regulations dealing with consumer issues, including unfair contract terms, unfair commercial practices including misleading advertising, and the right to withdraw in some cases. It can be said that this distinguishes English law from other jurisdictions under this study. However, the English models do not efficiently address certain risks, which can significantly cause hesitation in most online commercial environments, such as unfair commercial practices linked to consumer reviews or social media platforms. However, it generally

provides other adequate protection for the consumer in the areas that have been identified under the scope of this study, which may help reform the current consumer protection legislation in the KSA.

Finally, this study demonstrated a difference among the jurisdictions under this study in the basic concepts of consumers and instruments used for consumer protection. This may raise a potential challenge because the proposed legal framework would need to fit within the existing Saudi and Sharia laws. Therefore, an important question arose about the effect of differences between the jurisdictions in achieving the study's objectives. This thesis concluded that despite the differences between jurisdictions and based on the analysis presented in this thesis, it could be said that the above-observed differences do not prevent the possibility of using the two models to provide guidance to tackle consumer-related issues in the current Saudi regime, which this thesis has proposed.

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