

**General Principles of Consumer Protection in E-  
Commerce Trade: a Comparative Study between Sharia  
law and EU laws**

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## **Abstract**

This thesis presents the concept of Sharia law and contrasts it with EU laws in the area of e-consumer protection. These two laws have been chosen as they are exercised in more than one country and do not develop their own juridical procedures other than the Common law. The overriding objective of this thesis is to examine the extent to which European Union laws are different from legislations that are influenced by certain principles of Sharia. In order to achieve the aforementioned objective, this thesis approached a number of main issues, namely: the effectiveness of EU legislation in protecting and safeguarding e-consumer rights, the efficiency of Sharia law in protecting and safeguarding e-consumer rights, and highlighting the essential differences between EU legislation and Sharia law in protecting and safeguarding e-consumer rights. The significance of this research lies in the fact that it rationalizes the changes and developments that have so far taken place in the two jurisdictions which dominate significant portions of the world and yet arise from completely different origins. The thesis identified certain procedures in the Sharia that secure the interest of consumers. In this regard, the concept of “Khiyar-al-Tadlis” is well-established in Sharia law and cannot be found in EU laws and, as a consequence, is highly recommended for e-consumer protection. Moreover, the choice-of-law conflict creates deficits in legal applications and the availability of security procedures for e-consumers. EU laws are significantly lacking when it comes to protection of online consumers across borders. This thesis focuses, specifically, on the recovery measures that both the EU and the Sharia law provide for e-consumers if they suffer any loss as a result of an online transaction and enable them to gain justified compensation. The study aims to provide policymakers with effective measures for preserving the rights of e-consumers and therefore promote electronic trade across different countries. Finally, this thesis will address the current inefficient aspects of e-consumer protection in both Sharia and EU laws and will attempt to propose a solution under which the rights of all concerned parties can be balanced.

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5. Directive 2005/29/EC. (Unfair Commercial Practices).
6. Directive 2006/123/EC. (Services in the Internal Market).
7. Directive 2011/83/EC. (Consumer Rights).
8. Brussels Regulations Recast 2012/1215/EU.
9. Control of Misleading Advertisements Regulations 1988/915, (UK).
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15. *Puncak Niaga (M) Sdn Bhd v NZ Wheels Sdn Bhd* [2012] 1 MLJ 27.
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# CHAPTER ONE: INTRODUCTION

## 1.1 Introduction to the Chapter

E-commerce has undergone rapid growth and witnessed the emergence of a new group of consumers, termed e-consumers. E-commerce trade is different and quite complex as compared to normal trade because it incorporates the critical factors of distance and complexity in nature that online shopping involves. It has been identified that the level of protection provided for e-consumers under law is lower than that for sales through traditional methods<sup>1</sup>. According to Bradley<sup>2</sup>, e-commerce trade has brought a number of cases of abuse for consumers, involving issues regarding security of their credentials and economic losses against fake marketing. The area is of critical importance and yet is entrenched in complexities because of the scope of accessibility, anonymity and immediacy e-commerce offers.

The internet, and e-commerce trade in particular, has experienced unprecedented growth as a forum that underpins defamation and harassment for consumers. One of the salient issues is the lack or variations in consumer protection provided in different jurisdictions, which have increasingly left consumers with inadequate recourse to compensation. A need has been identified for lawmakers to provide sufficient recourse so that consumers are provided with absolute immunity against the service providers and the ratio of frauds must be curtailed<sup>3</sup>.

The creation of websites and e-marketing form the major practical steps employed by e-marketers in their mass media operations. These operations show greater vulnerability to breaching the rights of intellectual property. Since the internet forms a character that is global in its reach, the scope of breaches and infringements occurring in e-commerce negotiations/trade also give rise to worldwide implications causing consumers to face terrific e-commerce exposures<sup>4</sup>. It is also important to note that e-commerce may bring considerable potential gains and benefits to an economy if it is well-regulated under legal obligations, shows

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<sup>1</sup> N. Amin and M. R. Nor, 'An Overview of E-Consumer Protection in Sale of Goods Contracts in Malaysia', *Information Society (i-Society)*, *International Conference IEEE*, 2012, pp. 274-275.

<sup>2</sup> B. Areheart, 'Regulating Cyberbullies through Notice-Based Liability', *Yale Law Journal Pocket Part*, Vol. 117, 2007, p. 41.

<sup>3</sup> *Ibid*, pp. 41.

<sup>4</sup> P. Meland, I. Tondel and B. Solhaug, 'Mitigating Risk with Cyberinsurance' *IEEE Security & Privacy*, vol. 13, no.6, 2015, pp. 38-40.

strict adherence to the law applied to intellectual property and offers rigorous protection for consumers and providers pertaining to misrepresentation, product quality, copyrights, trademarks, patents and trade secrets<sup>5</sup>.

A need has been identified for consumers to show greater awareness of the potential applications used for trade laws and advertising. Advertisements made in e-commerce are broadcasted across various countries and therefore involve trade laws pertaining to those countries. Violations may occur to the legal regimens simply when the information provided in the formulation of a contract or the distribution of products is false or misrepresented. Given that advertisement campaigns are frequently global, it is almost impossible to verify and determine the legality of all of the consumer protection laws that are currently enforced across different nations<sup>6</sup>. However, there are two jurisdictions that cover a wider array of countries and are proportionately applied to various regions in world: Sharia Law and EU law.

This thesis focuses upon the different aspects that consumers suffer through loss, including misrepresentations, contract formation and counterfeit products. Counterfeit products are also linked to copyright infringements. However, the case law available regarding these is limited<sup>7</sup>. This, according to the author, means that defendants might be asked to appear in courts in countries where the internet activities are not targeted specifically. The occurrence of criminal prosecutions has also been reported in different countries related to the sale of fake software, scam websites, and products that are not completely legal. Difficulties faced in e-commerce trade greatly underscore the issues encountered as policymakers try to bridge these gaps through incorporating economic, cultural and ethical values. Negotiation in consumer protection policies occurs in countries where the national issues are given preference and higher importance, as compared to issues originating as a result of globalisation or spread of the internet.

This thesis explores various aspects of consumer protection that the EU and the Sharia laws offer as the internet continues to provide extended options for forming legally binding relationships. This thesis also provides a comparative view of these two jurisdictions that are

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<sup>5</sup> Ibid, pp. 41-43.

<sup>6</sup> A. Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization, and International Law', *European Journal of International Law* vol. 15, 2004, pp. 885-900.

<sup>7</sup> J.M. Newman, 'Raising the Bar and the Public Interest: on Prior Restraints, 'Traditional Contours,' and Constitutionalizing Preliminary Injunctions in Copyright Law', *Va. Sports & Ent. LJ*, vol. 10, no. 3, 2010, p. 323.

strikingly different in terms of their origin and the legal phenomenology they follow. It is within the aim of this thesis to offer an in-depth analysis of e-consumer protection under both EU and Sharia laws. This introductory chapter will, firstly, provide an overall view of the main aims and questions of this study, and provide the rationale for selection of the topic. The justification behind choosing EU and Sharia laws for conducting this type of research will be explained. Further, this chapter will shed light on the methodology used and how crucial it is to follow a comparative approach for this type of study, despite its complications. This chapter will also address the scope and limitations of the study and ethical considerations that should be taken into consideration in approaching the issues covered in this thesis. In addition, an overview of the core concept and the basic foundations of Sharia will be discussed. Finally, this chapter will discuss the concepts of transplantation theory through discussing its challenges and limitations.

## **1.2 Main Aims and Questions of the Thesis**

This thesis is a comparison of Sharia laws and EU laws regarding e-consumer protection. It is mainly based on comparative research which is usually conducted to compare national legal systems and to contrast different forms of globalisation, for example the EU laws for online consumer protection and Sharia laws. This has remained a popular method for conducting law research in the past and helps increase the recognition of non-state and customary laws; it also facilitates reforms through a challenging approach<sup>8</sup>. In practice, researchers make a choice between laws to compare them based on their knowledge or on the explicit provisions they provide for a certain matter of concern. Comparative research is feasible and can be conducted in different areas of law. It forms a complete conceptual framework with a living legacy of bringing about reforms. Comparative research is particularly important at the informative level<sup>9</sup>; for instance, comparison of the consumer protection laws in Islam and the EU will help businesses to set their practices in broader contexts.

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<sup>8</sup> V. Curran, 'Cultural Immersion, Difference and Categories in US Comparative Law', *American Journal of Comparative Law*, vol. 1, no. 46, 1998, p.44.

<sup>9</sup> A. Watson, 'Comparative Law and Legal Change', *Cambridge Law Journal*, vol. 37, no. 2, 1978, p. 314.

Comparative law studies are often criticised for their methods, since there are no hard and fast rules that the author must follow to conduct the study<sup>10</sup>. Indeed, it seems as if researchers act as tourists who visit the other country and read and understand its law to find the similarities and differences with the other selected law<sup>11</sup>. The framework followed is a generalised one and the researcher is free to choose the way that seems convenient to him/her to present the differences observed. However, a firm doctrinal framework is recommended. It has been argued that ‘comparing’ forms a method in its own right and is explicitly termed as ‘comparative method’ and is not bound to follow any concrete guidelines<sup>12</sup>. The functional aspect followed is to find relevant literature and sources to suggest what is common regarding the legal problem and what differences exist in terms of definition and solutions to the issues. The outcomes deduced from comparative research are often divergent<sup>13</sup>.

Comparative research can be carried out for a number of purposes and therefore the techniques and approaches applied differ accordingly<sup>14</sup>. For instance, comparative law is applied to develop a pool of models which allow foreign laws to be modernised and bring about improvements. The choice of models is particularly dictated by the aims and objectives of the study. Legal systems with commonalities in the issues they face regarding a certain legal matter allow the researcher to pick any specific approach he finds appropriate to meet the target goals and objectives<sup>15</sup>. When research is conducted solely for the purpose of harmonisation, then the choice of system is determined by political choices<sup>16</sup>. The researcher is required to present the necessary changes that a legal institution or system must adapt to become harmonised with the required processes. This requires specific knowledge regarding both the laws under consideration<sup>17</sup>. The research becomes particularly more challenging when the two systems

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<sup>10</sup> R. Elliott, C. T. Fischer, and D. L. Rennie, ‘Evolving Guidelines for Publication of Qualitative Research. Studies in Psychology and Related Fields’, *British Journal of Clinical Psychology*, vol. 38, 1999, p. 228.

<sup>11</sup> *Ibid*, pp.228.

<sup>12</sup> M.B. Miles, and A.M. Huberman, *Qualitative Data Analysis: An Expanded Sourcebook*, London, Sage, 1994 p. 39.

<sup>13</sup> *Ibid*, pp. 39.

<sup>14</sup> C.R. Kothari, *Research Methodology: Methods and Techniques*, New Age International, 2004, p. 67.

<sup>15</sup> E. Örüçü and D. Nelken, *Comparative Law: A Handbook*, Hart Publishing, 2007, p. 73.

<sup>16</sup> M. Smits, *Elgar Encyclopaedia of Comparative Law*, Edward Elgar, 2014, p. 450.

<sup>17</sup> *Ibid*, pp. 450.

under consideration are legal-culturally or socio-culturally diverse, such as the laws in the EU and Islamic countries.

Thus, an evaluation of the differences between e-consumer protection in the EU and under Sharia laws lies at the heart of this thesis. Analysing the significant issues that consumers face in online transactions under EU law and determining if there are issues that are common among consumers in the EU and in other countries under which their laws are influenced by the principles of Sharia are also issues of great importance. In particular, the researcher must consider the significant aspects of e-commerce that consumers face in online transactions under Sharia laws, while taking into account the large Islamic population in EU countries.

Having taken into account the above-mentioned aims, this thesis is an attempt to seek answers for a number of wide questions, which include:

- To what extent has EU legislation proven effective in protecting e-consumer rights?
- To what extent has Sharia legislation proven effective in protecting e-consumer rights?
- To what extent do EU and Sharia laws differ in the measures they provide for e-consumer protection?

### **1.3 Why Sharia and the EU Laws?**

E-commerce has been gaining pace in both Islamic and EU states; however, the progress is not on an equal basis<sup>18</sup>. E-commerce trade is influenced by differences in legal frameworks and this has given rise to an unequal distribution of contractual powers between countries. This causes consumers into a weaker position in the global market place<sup>19</sup>. Moreover, these differences also pressurise both governmental and non-governmental consumer bodies to maintain their economic balance<sup>20</sup>. Studies have been conducted that discuss the differences in

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<sup>18</sup> P. Bagheri and K. Hassan, 'The Application of the Khiyar Al-'Aib (Option of Defect) Principle in On-Line Contracts and Consumer Rights', *European Journal of Law and Economics*, vol. 33, 2012, p.155.

<sup>19</sup> S. Mancuso, 'Consumer Protection in E-Commerce Transactions: A First Comparison between European Law and Islamic Law.' *Journal of International Commercial Law and Technology* vol. 2, 2007, p.1.

<sup>20</sup> K. Woo and H.S. Cho, 'Legal Issues and Proposed Solutions of Electronic Agents in Electronic Commerce', *International Commerce and Information Review*, 2011, p. 13.

EU law and the Sharia in the field of commerce and e-commerce<sup>21</sup>. Brown<sup>22</sup> focused on Turkey to determine the implications of Sharia. Turkey remains a secular state which practises Sharia law, but also adopts EU guidelines. Markets in Turkey provide a good way of resolving the competing issues between the EU laws and the Sharia. Sharia manifests a number of prescriptions for financial practices. For instance, it prohibits the receipt of payment and interest and also a number of different commercial insurances that are allowed in the EU laws. Differences in these interpretations provide the basis for Islamic countries to create their own class of banks, transactions and interest processes that comply with Sharia services. This study will focus on these differences considering the different guidelines in various Islamic states.

Legal mechanisms practised in Sharia provide greater opportunities for e-consumers who face a loss following online transactions. Sharia law provides a better chance of revoking contracts for such consumers. One fundamental principle in Sharia that provides protection for online consumers is Khiyar al-Tadlis; an option that Sharia features in cases of misrepresentation or deceit. This feature in Sharia law is unique for e-consumer protection and not found in any other legal system<sup>23</sup>. Consumers facing loss in Muslim countries are, therefore, able to avail themselves of this option. The e-consumer who has faced a loss is able to establish that he/she agreed to enter into the contract because of wilful misrepresentation or deceit by the e-seller. The term 'khiyar' refers to the authority that the Sharia law provides to e-consumers to revoke the contract. In contrast, the term 'tadlis' is used for a misrepresentation that deceived the party. This option remain an important one to strengthen e-consumer protection and provide the right balance to prevent e-consumers from being deceived. In contrast, the EU law maintains its own standard for proving misrepresentation. Firstly, there must be proof that a false statement was made; secondly, this statement was made directly to the party; lastly, the statement was made to induce the party to enter into the e-contract. There

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<sup>21</sup> S. Mancuso, 'Consumer Protection in E-Commerce Transactions: A First Comparison between European Law and Islamic Law.' *Journal of International Commercial Law and Technology* vol. 2, No. 1, 2007, p.1; M. Chawki, 'Islam in the Digital Age: Counselling and Fatwas at the Click of a Mouse.' *Journal of International Commercial Law and Technology* vol. 5, No.4, 2010, p. 165; and R. Bhala, 'Poverty, Islam, and Doha: Unmet Challenges Facing American Trade Law.' *The International Lawyer*, vol.36, No. 1, 2002, p.159.

<sup>22</sup> J. Brown, 'Secularism, Sharia, and the Turkish Financial Markets.' *Brooklyn Journal of International Law*, vol.40, no. 2, 2015, p. 407.

<sup>23</sup> P. Bagheri, and K. Hassan. 'The application of the Khiyar al-Tadlis (option of deceit) principle in online contracts and E-consumer rights.' *Mediterranean Journal of Social Sciences*, vol. 6, No. 4, 2015, pp.155.

arises a question as which of the two approaches is more promising to protect consumers. This thesis will demonstrate the results through comparing the Sharia and the EU laws.

A significant rise in the number of consumers residing in Islamic countries has been observed, thereby making it imperative for lawmakers to consider the protection frameworks provided in Sharia Laws and how they interact with the other regulatory regimens applied in different countries<sup>24</sup>. Considerable growth in Islamic finance in the realm of e-commerce has occurred; the growth was found to be significant both geographically and in value<sup>25</sup>. Banking applications, in particular, are systematically developing in a number of countries and are contributing to promote the importance of Islamic finance and e-commerce applications in a number of countries around the globe<sup>26</sup>. The example of the Sukuk market is worth considering, as it has undergone phenomenal growth in the last few years<sup>27</sup>. Structures followed in e-commerce trade are becoming increasingly complex because the customer base continues to broaden and there are advancements in paradigms followed in emerging markets. According to Zainul, growth in the complexity of products traded through e-marketing is discerning higher risks for both investors and consumers, whereby counterparty risks require increased legal attention<sup>28</sup>.

Contrastingly, the legal obligations followed under EU jurisdiction show increased emphasis on principles that are home-controlled. This doctrine rules that jurisdiction of the home country is applied in e-commerce trading, meaning that the country from where the buyer is making the purchase remains dominant for legal implications, as opposed to the provider's country. This ruling is favourable for the business. For a few years consumers in the EU have been successful in reversing EU directives, which is why consumers in the EU at present are able to sue in their own country. This feature of the EU law for e-commerce seems similar to

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<sup>24</sup> M. Ahmed et al., 'Building Consumers' Confidence in Adopting E-Commerce: A Malaysian Case', *International Journal of Business and Systems Research*, vol. 1, 2007. p. 437.

<sup>25</sup> Ibid 438.

<sup>26</sup> M. Yatim and A. Nasir, *The Principles and Practice of Islamic Banking & Finance* 1st edn., Malaysia, Pearson 2008, p. 221.

<sup>27</sup> I. Lukonga, *Islamic Finance, Consumer Protection and Financial Stability*, 2015, p.10. Available from: <https://www.imf.org/external/pubs/ft/wp/2015/wp15107.pdf> (accessed 15 January 2019).

<sup>28</sup> N. Zainul, F. Osman and M. Siti Hartini., 'E-Commerce from an Islamic Perspective' *Electronic Commerce Research and Applications*, vol. 3, no. 1, 2004, p 281.

the practices implemented in the US<sup>29</sup>. Sharia and EU law differ in the legal terms used and the origin of sources. A comparison of both these jurisdictions for e-commerce trade provides a measure of differences between the two systems<sup>30</sup> and helps to highlight the peculiarities that influence the ways in which consumers are provided protection in e-commerce trade in a number of countries.

This study has chosen to focus solely on issues pertaining to consumer protection in e-commerce trade in the two most prominent jurisdictions that cover a large number of states<sup>31</sup>. The choice of jurisdictions has specifically been limited to EU legislation and Sharia laws, despite the fact that there are other significant laws, such as those applied in the US, Japan and China, which also substantially address the issue of e-consumer protection. However, the choice has been made for EU and Sharia laws mainly because of the wider scope they provide for consumer protection related to both on-line and off-line environments<sup>32</sup>.

In addition to this, another significant reason for this choice is that EU law covers a number of developed states and underpins legal frameworks which follow modern law. Moreover, there are a number of rules in the EU which are similar to those in the UK. European Directives<sup>33</sup> also empower France and England to share a similar legal system. For instance, the legal system exercised in the United Kingdom is usually based upon common law, whereas the legal system exercised in France follows civil law. Therefore, EU frameworks provide an overview of both aspects of English and Civil law. Moreover, the choice for Sharia laws provides a perfect contrasting balance to analyse differences, since it is of equivalent importance and has readily been adopted in a number of Asian and Middle Eastern countries with a substantial impact upon consumer behaviour and attitudes worldwide<sup>34</sup>. Another aspect that makes this combination of jurisdictions an important area of research is the contrasting

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<sup>29</sup> I. Clarke and T. Flaherty, *Advances in Electronic Marketing*, 1st edn., Idea Group Pub 2005, pp. 44-50.

<sup>30</sup> S. Mancuso, 'Consumer Protection in E-Commerce Transactions', p. 3.

<sup>31</sup> Z.I.A. Manaf, *Access to Justice in the Malaysian E-Commerce Sector*, Master in Comparative Laws Thesis, Ahmad Ibrahim, Kulliyyah of Laws, International Islamic University Malaysia, 2015, p. 19.

<sup>32</sup> *Ibid* 17.

<sup>33</sup> Directive 2011/83/EU on Consumer Rights, Directive 2000/31/EC on Electronic Commerce, Distance Selling Directive 97/7/EC, Directive 2005/29/EC on Unfair Commercial Practices, Directive 93/13/EEC on Unfair Contract Terms.

<sup>34</sup> I.A. Nyazee, 'Islamic Law is International Law' *SSRN Electronic Journal*, 2009, pp. 1-3. Available from: SSRN: <<https://ssrn.com/abstract=2407040>> (accessed 15 January 2019).

nature of laws in both developed and developing countries in relation to e-commerce<sup>35</sup>. This is because Sharia law is largely followed in the Middle Eastern and Eastern developing countries, whereas the EU covers a wider area in the West.

#### **1.4 Research Methodology**

Since the study is based on a comparison of the two jurisdictions, it was important to select a research design that allows comparison. Such a comparison of the two jurisdictions required a thorough analysis of the documents and policies relating to consumer protection. This comparison cannot be hypothesized as a quantitative analysis, since it requires a thorough reading and examination of the various research that exists as well as case laws. In order to meet the research goals and objectives established in chapter one, the thesis follows a qualitative research design. A qualitative research design has been chosen because it is content-oriented and will help to analyse EU and the Sharia laws regarding the various enforcements they provide for protecting consumers from misrepresentation, contractual fraud and counterfeit products. This approach will also allow analysis of the e-consumer protection provisions in the selected jurisdictions<sup>36</sup>.

In order to direct the flow of the study towards meeting its goals and objectives established in this chapter and the scope of research provided in chapter two, it is important to determine whether the study will follow interpretivism or positivism, which form two particular research approaches<sup>37</sup>. Interpretivism is applied to qualitative research and positivism for quantitative research<sup>38</sup>. Based on the nature of this study, interpretivism forms a suitable choice. Its subjective nature allows the researcher to explore different aspects of the research problem<sup>39</sup>. This will prove to be a significant methodological approach as it will help to relate the legal implications for e-consumer protection to the social world. For instance, this will help link the legal issues faced by the consumers in EU countries.

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<sup>35</sup> I. Lukonga, Islamic Finance, Consumer Protection and Financial Stability, IMF Working Papers, 2015, p. 15.

<sup>36</sup> H-F. Hsieh, and S.E. Shannon, 'Three Approaches to Qualitative Content Analysis', *Qualitative Health Research*, vol. 15, no. 9, 2005, p. 1278.

<sup>37</sup> K.A. Henderson, 'Post-positivism and the Pragmatics of Leisure Research', *Leisure Sciences*, vol. 33 no. 4, 2011, p. 342.

<sup>38</sup> *Ibid*, pp.342.

<sup>39</sup> M. Andrews, C. Squire and M. Tamboukou, *Doing Narrative Research*, 1st edn., London, Sage 2008, p. 30.

The interpretivism approach will allow us to compare Sharia law with EU law and the social implications they both have for e-commerce. The aspect of social integration is important to consider in this thesis as the e-commerce is linked with a number of social and financial benefits for individuals<sup>40</sup>. Ignoring the social dimensions of both laws will affect the legal obligations that both the selected jurisdictions follow for their respective consumers. These factors support the choice to adopt to an interpretivist approach in this research. In contrast, application of a positivist approach may develop an understanding of the objective realities acting behind the selected subject matters. However, this cannot be conducted for this thesis as it requires experimentation and survey-based information as generally applied in scientific research and therefore will not help in comparing Sharia and the EU law<sup>41</sup>.

Comparison of two jurisdictions requires a methodological framework that is flexible to reach the different areas that the researcher deems important to include in the study. Qualitative research is undoubtedly the most flexible method followed in legal research, since it allows researchers to include a number of structures and methods<sup>42</sup>. However, it also gives rise to challenges for researchers, as they are not bound to follow a standardized structure<sup>43</sup>. Comparing EU and Sharia laws for e-consumer protection can be challenging because both of these are wide-ranging and diverse covering several areas to be included in the research. Malterud<sup>44</sup> has deemed qualitative methods to be effective where the researcher is dealing with comparisons of two certain things, matters or areas of research. It requires no formation of hypothesis and is comparably easier for the researcher to plan the research<sup>45</sup>. Qualitative research is also very flexible economically. The method always leads to generation of useful information synthesised using a number of quality resources<sup>46</sup>.

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<sup>40</sup> I. Ramsay, *Consumer Protection And Policy: Text and Material on Regulating Consumer Markets*, 2nd edn., Oxford, Hart Publishing, 2007, p. 98.

<sup>41</sup> D. Watkins and M. Burton, *Research Methods in Law*, 1st edn., Routledge, 2013, p. 39.

<sup>42</sup> C. Marshall and G.B. Rossman, *Designing Qualitative Research*, London, Sage Publications, 2014, pp 35.

<sup>43</sup> K. Malterud, 'Qualitative Research: Standards, Challenges, and Guidelines' *The Lancet*, vol. 358, no. 9280, 2001, p. 484.

<sup>44</sup> *Ibid*, pp.484.

<sup>45</sup> V. Dickson-Swift, E.L. James, S. Kippen, and P. Liamputtong, 'Doing Sensitive Research: What Challenges do Qualitative Researchers Face?', *Sage Journals*, vol. 7, no. 3, 2007, p. 329.

<sup>46</sup> *Ibid*, pp.329.

In contrast, selection of a quantitative study requires the formation of a hypothesis. The goal of this research is not to quantify the comparison of the Sharia and EU laws, but rather to produce a qualitative review of these for e-commerce. A quantitative research is not an effective way of conducting a comparison since it requires variables and data that are quantifiable<sup>47</sup>. The focus of this research is not to find a relationship between EU and the Sharia Laws, but to explore the extent to which they are able to protect e-consumers and which of them is more successful in enforcing legal principles that offer sufficient security and rights for online consumers.

Since the present study is based on a qualitative comparison between EU and Sharia e-consumer laws, this eliminates the need to incorporate quantitative research. Use of a qualitative research method offers multiple techniques for comparative analysis that make it possible to reach interpretations with greater rigor and depth<sup>48</sup>. It also helps to analyse the use of legal assumptions, basic ideas and concepts that are most appropriate for analysis of the qualitative data<sup>49</sup>. Ethical issues are important to consider when handling data in qualitative research<sup>50</sup>. Since the major aim is comparison of two different jurisdictions for e-consumer protection, the researcher had no other choice, but to decide on a qualitative yet comparative research design<sup>51</sup>.

The selected methodology enhances the significance and applicability of research over a wide area. The study constitutes a critical analysis which targets the issues that contravene consumer protection in the EU and Sharia Laws. The thesis discusses and compares provisions which are inherently followed under both EU consumer and Sharia law. However, it is important to note that the study is not limited to drawing comparisons between Sharia and EU law, but also analyses significant arguments raised regarding promoting developments in the given areas of law. This comparison is made pertaining to rules that focus specifically on providing e-consumer protection.

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<sup>47</sup> Ibid, pp.329.

<sup>48</sup> A. Magana, *Variety in Qualitative Inquiry: Theoretical Orientations*, In MQ Patton, *Qualitative Research and Evaluation Methods*, 2002, p. 76.

<sup>49</sup> Ibid, pp.79.

<sup>50</sup> Ibid, pp.54.

<sup>51</sup> C.R., Kothari, *Research Methodology: Methods and Techniques*, New Age International, 2004, p. 49.

Comparison of one country's law with another's forms the essence of comparative law<sup>52</sup>. The countries that should be included in this thesis to make the comparison remained a daunting task for the researcher since it creates a wide area to cover. To succinctly describe the differences, the thesis makes use of different countries, such as Arabian countries and Malaysia for Sharia law and countries such as Germany, France and Italy for EU law. The research was kept open and the countries that were mostly discussed regarding this subject matter were hand-picked to draw out the differences. Moreover, countries where e-commerce has developed significantly and so currently influence the EU or Sharia law in any way, such as the USA, are also considered in the study.

#### **1.4.1 Significance of Comparative Law Research**

The choice of a comparative nature for this research into Sharia and EU laws in e-commerce<sup>53</sup> can be justified by three main reasons. Firstly, comparison of the Sharia and EU law will enlarge the knowledge to improve e-commerce and also highlight the key points, improvement of which may change some legal aspects of e-commerce in an effective way<sup>54</sup>. A comparative nature has been adopted for this thesis to identify particular areas where understanding of legal rules can be developed to solve the issues that make e-commerce a vulnerable area of trade for buyers and sellers, such as the protection of rights of online consumers<sup>55</sup>. This method has been viewed as an 'effective antidote to the uncritical faith in legal doctrine', since it highlights the contingent and accidental rules, characters and assumptions, while also offering ideas that are just and necessary to bring about change<sup>56</sup>.

Secondly, the comparative nature of this research will enhance the knowledge for Sharia and EU laws to identify the key ideas, implementation of which may improve the common guidelines of consumer protection in e-commerce trade. Comparison of Sharia and EU law is not possible unless a broad-minded approach is adopted, which means identifying systematic

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<sup>52</sup> R. Banakar, 'Power, Culture and Method in Comparative Law', *International Journal of Law in Context*, vol. 5, no. 1, 2009, p. 82.

<sup>53</sup> B. Puchalska-Tych and M. Salter, 'Comparing Legal Cultures of Eastern Europe: The Need for a Dialectical Analysis', *Legal Studies*, vol. 16, 1996, p. 158.

<sup>54</sup> *Ibid*, pp.158.

<sup>55</sup> R.S. Frase, 'Main-Streaming Comparative Criminal Justice: How to Incorporate Comparative and International Concepts and Materials into Basic Criminal Law and Procedure Courses', *W. Va. L. Rev.*, vol. 100, 1997, p. 773.

<sup>56</sup> Zweigert and Kötz, 'Introduction to Comparative Law, p. 22.

weaknesses in the comparative laws and relevant ways to prevent the adoption of these flaws in other jurisdictions. This is considered the contemporary way of conducting comparative research. This rule can be applied in this thesis to enable borrowings and transplants that may feasibly aid their legal traditions<sup>57</sup>.

Thirdly, comparison of the Sharia and EU laws will provide substantive accounts for following the effective rules for e-consumer protection. The EU law is renowned for developing legal structures that prioritise human rights<sup>58</sup>, while also promoting cross-jurisdiction practices and reconsideration of important doctrines<sup>59</sup>. It does not only serve harmonisation of laws, but also facilitates the emergence of useful legal principles that form the current need to fight international crimes and fraud, as well as enabling innocent parties to strengthen their rights to recover their losses<sup>60</sup>.

#### **1.4.2 Challenges in Comparative-Studies**

Sharia law is widely implemented in Eastern and Middle Eastern countries, while EU laws provide coverage for the whole European Union and also influence Great Britain. Comparing such different laws is itself a challenge, as there can be no specific methodology implemented that may derive all the similarities and all the differences that both the given jurisdictions share in regards to e-consumer protection. Smits<sup>61</sup> has highlighted various challenges faced as part of comparative legal methodology; these are varied and can be considered in a number of ways. The methodology of comparative law is referred to as a problem-oriented approach and the functional equivalence. Moreover, it has also been viewed as ‘common core’, ‘model building’, a ‘factual approach’ and a ‘multi-axial’ method that incorporates the functional, historical and dogmatic axes of legal rules. Furthermore, it forms a ‘method of action’ and is considered as the most reliable of all the approaches that emerged during the last century. Its complicated nature is due to the plurality of method and also the availability of multiple approaches. The research possibilities it offers are extensive and so it becomes increasingly difficult for the researcher to make wise choices about how to achieve

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<sup>57</sup> Frase, 'Main-Streaming Comparative Criminal Justice' p. 780.

<sup>58</sup> M.M. Feeley, *Comparative Criminal Law for Criminologists: Comparing for what Purpose?*, 2000, p. 94.

<sup>59</sup> B. S Markesinis, *Foreign Law and Comparative Methodology: A Subject and a Thesis*, 1st edn., Hart Publishing Limited, 1997 p. 45.

<sup>60</sup> Feeley, 'Comparative Criminal Law' p.9.

<sup>61</sup> Smits, 'Elgar Encyclopaedia' p. 446.

the required results. The methodology applies a ‘dynamic systems’ approach to explore contexts, backgrounds and interrelationships.

Comparison involves contrasting and juxtaposing; it can be applied in different fields of study, for example natural and social sciences. It depends on the method of cognition as to how the research material is approached. The method is challenging, since it incorporates essences of both descriptive and empirical research designs. It has been argued that the methods of comparative research have not been ‘invented’, but have emerged from various methods, such as functional, structural, historical, empirical, evolutionary, statistical and thematic. This makes comparative law research a very creative one and demands similar expertise from the researchers.

‘Method’ refers to acquisition of information and its classification into usable conceptual units. It also forms a way to measure data and can be based on documentary research, observations, statistical operations, sample surveys, contextual analysis and in-depth interviews<sup>62</sup>. However, the obvious method followed in comparative research is comparison in terms of contrasting, comparing and juxtaposing. The question remains as to what standard must be followed to execute the comparison. Though comparative law research forms an open-ended methodology, it is analysed strategically through making possible comparisons of the available data. Data collection can best be accomplished through the social sciences: direct investigations and analysis of information<sup>63</sup>.

Contrarian challenge is the common issue that researchers face while making comparisons of different laws<sup>64</sup>. This represents a stage where the comparative approach for conducting the study becomes epistemologically pessimistic. This increases the risk for researchers to deny or ignore some important comparable aspects between the laws. Culture differences may also cause researchers to ignore various differentiating facts regarding the research, mainly when it comes to the drawbacks of the one’s own law. Misconceptions are the common issues that comparative law researchers face, leading to misleading results. A natural

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<sup>62</sup> J. Hartley, *Case Study Research*, in C. Cassell, and G. Symon, (eds.), *Essential Guide to Qualitative Methods in Organizational Research*, London, Sage Publications Ltd, 2004, p. 323.

<sup>63</sup> *Ibid*, pp.323.

<sup>64</sup> V.V. Palmer, 'From Leretholi to Lando: Some Examples of Comparative Law Methodology,' *Global Jurist Frontiers*, vol. 4, 2004, pp. 5-11.

link exists between the ‘contrarian challenge’ and the ‘difference theory’<sup>65</sup>. Particular solutions that Curran has suggested are ‘cultural immersion’ and the ‘organic method’, which researchers may use to conceptualise objects of comparison.

Discussing the Sharia is a sensitive matter, since it is directly linked to the Muslim religion and thus finding drawbacks in it creates a matter of religious debate and arguments. Despite this, a comparison between the Sharia and the EU laws has been chosen as they both represent diversely different backgrounds with varying legal instruments. Moreover, they both are practised in a number of countries where e-commerce is in its developing stages, which is precisely why it provides a wider area for research. For this thesis, it was important for the researcher to realise the critical situations and legal instruments that may create a method of critical research<sup>66</sup>. To fully contextualise the content and purpose of this research, it is likely that there could occur some interpretative error that may create substantial discrepancies in the interpretation of both the laws. This made it important for the researcher to clearly discuss which methodology is suitable in the context of religious interpretations<sup>67</sup>.

The law-in-the-context method seems effective in understanding explanations relative to the contextual aims and objectives. Since Sharia law has its own context, origin and implications that are completely different to those in the EU, it can be applied to comprehend why either of the laws act in a particular manner in e-commerce. Explanatory propositions remain the key point to focus on when using this method for comparing two legal systems. Using this method will allow us to understand the more universal characteristics of Sharia and EU laws for protecting consumers in e-commerce<sup>68</sup>.

Since this thesis considers two legal systems that come from different institutional backgrounds, it remained a challenge for the researcher to keep intact the various explanations in both the legal systems that complement the respective legal practices in e-commerce. It is important to note that case laws are not always a legitimate source for reflecting the correct picture of law as applied in society. If no case law is found regarding a particular method, this

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<sup>65</sup> Curran, ‘Cultural Immersion, Difference and Categories in US Comparative Law’, *American Journal of Comparative Law*, vol. 1, no. 46, 1998, p. 43.

<sup>66</sup> *Ibid*, pp.43.

<sup>67</sup> M.L. Patten, *Understanding Research Methods: An Overview of the Essentials*, UK, Taylor & Francis, 2017, p. 149.

<sup>68</sup> J. Merryman, ‘Comparative Law and Scientific Explanation’, *The American Journal of Comparative Law*, vol. 22, 1974, pp. 81-87.

means either that the law has become obsolete or the societal problem has been mitigated. It might also be perceived as parties being able to settle their case prior to appearing in court or the counsellors of the society being efficient in resolving their issues. An alternative perception that also exists is that decisions are made by mafia authorities while/ since the law sources have grown weaker. In order to unravel an overall account of legal reality, it remains important to analyse decisions of the court in comparative research, but a sociological research method must also be considered alongside. It is further argued that legal sociology alone cannot be applied to cover all aspects of reality, but that additional input from law, economics and psychology are also required<sup>69</sup>. This method is a critical one, in which researchers strive to find the right balance between the ideal research design and the current circumstances.

## **1.5 Materials and Sources**

This research depends completely upon a doctrinal methodology and therefore does not consider an empirical/quantitative approach. It is relevant to consider that the study draws references majorly from primary sources of study involving statutes, case laws, directives, legal frameworks and reports from other legal authorities applied in the jurisdictions selected for comparison. In addition to these, a secondary range of resources has also been considered to elucidate the findings of the primary studies. Literature to be analysed includes journal articles, books, case laws and other content that will prove significant and support the topic under discussion.

Through following a qualitative research design, the thesis conducts a legal analysis to meet the defined research aims and objectives. The paper provides an in-depth analysis of the jurisprudences and their significance in both Sharia and EU laws. The paper adopts a descriptive approach to derive results and is analytical to a certain extent, so that the purpose of the study is fully met within the framework of legal discourse.

## **1.6 Ethical Considerations**

Intellectual honesty forms an essential element, a core obligation for the researcher to conduct the study and represent the findings with honesty; otherwise, the merits of research are compromised. The researcher has made deliberate efforts to assure that ethical regimes have

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<sup>69</sup> C. Rubinson, and C.C. Ragin, *New Methods for Comparative Research?*, Emerald Group Publishing Limited, 2007, p. 378.

been fully complied with. All the findings presented in this research are fully referenced<sup>70</sup>. Documentation of the work is done with the name of the author. It is possible that more than one author has made similar statements; thus, there arises the risk of duplication. Citations include the primary research from where data was selected. According to Birks & Mills<sup>71</sup>, proper citation increases the breadth and depth of the study, as well as its effects. Moreover, the style of documentation also increases the legitimacy of the research. Proper citations have been made in this thesis so that readers are able to determine the extent of knowledge the research may possibly cover<sup>72</sup>. Citations allow readers to develop their understanding of the contribution that the researcher has made to the subject. If the work appears complex and sophisticated, but is not adequately followed by an acknowledgment of the sources, this provokes suspicions of data or intellectual theft on the part of the researcher.

The researcher also shows extensive agreement with principles, such as beneficence, individual respect, non-maleficence and justice, since two contrasting Laws have been compared. Opportunities for misinterpretation abound as most Sharia laws were given in Arabic. Instead of using a translator, the author has included demonstrations that have been translated by Islamic scholars. According to Mishna<sup>73</sup>, inconsistencies become apparent when efforts to interpret or translate the principles go wrong, inadvertently causing the researcher to breach ethical procedures. Such inconsistencies form part of comparative research, since the research is extensive and it is likely that at any point the researcher may diverge from the ethical norms.

In the view of Carrington<sup>74</sup>, divergence is most likely to occur in ethical attributes and guidelines, when lengthy and extensive research is conducted. Gray and Thorpe<sup>75</sup> have also asserted that potential for ethical breaches is greater in big data comparative studies. Such studies pose a great challenge to the synthesising skills of researchers, as they are exposed to

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<sup>70</sup> W.J. Hudson, *Intellectual Capital: How to Build it, Enhance it, Use it*, Wiley 1993, p. 68.

<sup>71</sup> M. Birks, and J Mills, *Grounded Theory: A Practical Guide*, London, Sage, 2015, p. 96.

<sup>72</sup> A.J.S. Coats, *Ethical Authorship and Publishing*, 2009, p. 149-150.

<sup>73</sup> F. Mishna, B.J. Antle and C. Regehr, 'Tapping the Perspectives of Children', *Qualitative Social Work: Research and Practice*, vol. 3, 2004, p. 452.

<sup>74</sup> M.J. Carrington, B.A. Neville and G.J. Whitwell, 'Lost In Translation: Exploring The Ethical Consumer Intention–Behavior Gap' *Journal of Business Research*, vol. 67, 2014, p. 2760.

<sup>75</sup> E.A. Gray and J. Hyatt Thorpe, 'Comparative Effectiveness Research and Big Data: Balancing Potential with Legal and Ethical Considerations', *Journal of Comparative Effectiveness Research*, vol. 4, 2015, p. 61.

large amounts of information which they need to present in an effective yet ethical manner without failing to acknowledge other authors and researchers. Inclusion of a second legal source (a different jurisdiction to which the researcher is not a native) makes it even more challenging for researchers to follow ethical norms. Research confronts the researcher with significant legal and ethical issues; such research must always be executed with caution. This researcher has done his best to incorporate legal and ethical regimes through showing honesty in accumulating and presenting the information.

There can be various consequences of false citations. Failure to acknowledge different sources with the names of their original authors constitutes a serious breach of academic standards and may destroy the career of the researcher. Moreover, failure to do so raises accusations of plagiarism, which is a direct breach of research rights, rules and responsibilities. Plagiarism refers to the inclusion of someone's research or ideas without proper acknowledgment<sup>76</sup>. Plagiarism is a very serious issue that may entitle the researcher to suspension, probation or expulsion. If a researcher fails to cite correct sources, either deliberately or unintentionally, he still can be accused of the act of plagiarism and can be charged with the penalty<sup>77</sup>.

Kaur<sup>78</sup> has further argued that researchers must continue to ensure that their studies are clearly defined and articulated in reference to the chosen subject and must give complete information regarding the work of authors that have been incorporated in the study. Since this study does not involve any human participants, the need for informed consent or explicit permission from the subjects for data collection did not arise. Otherwise, it would have been particularly important for the researcher to present all these binding documents.

## **1.7 Significance and Scope**

Consumer protection forms a fundamental value in field of law and thus remains an important matter of discussion mainly in reference to Muslims working in Central Asia, North Africa and the Middle East. Protection of consumers in Muslim states constitutes an important

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<sup>76</sup> C. Park, 'Rebels without a Clause: Towards an Institutional Framework for Dealing with Plagiarism by Students' *Journal of Further and Higher Education*, vol. 28, no 3, 2004, p. 292.

<sup>77</sup> J. Zobel, and M. Hamilton, 'Managing Student Plagiarism in Large Academic Departments', *Australian Universities' Review*, vol. 45, 2011, p. 23.

<sup>78</sup> K. Sunmeet, 'Ethical and Legal Issues in Educational Research', *Indian Journal of Applied Research*, vol. 4, 2011, p. 134.

matter of concern since the traditional structures exercised in consumer societies are different from those in the Western world. Despite the fact that the Muslim world has been taking gradual steps to keep pace with other legal regimes, the majority of countries have not yet developed independent judiciaries that may allow effective control of consumers' rights<sup>79</sup>.

Developments in the field of e-commerce are due to the benefits it provides for both businesses and consumers. The major issue that impedes this progress is e-commerce trust<sup>80</sup>. A number of research studies have been conducted to resolve this issue of consumer protection and their trust in e-commerce in the context of Sharia law<sup>81</sup>.

This thesis will contribute to develop the Sharia perspective regarding e-consumer protection in comparison with EU laws, thus providing professionals with a better understanding of e-commerce processes in the Islamic states and the European states with clear guidelines towards further development.

The study by Winn<sup>82</sup> remains an important piece of research to examine the differences between EU law and Sharia principles. A close review of the study reveals Sharia as completely different to EU laws. Nonetheless, one common bond unites them: the pursuit of goodwill towards consumers and the protection of their rights. The articulations that Bageri and Hassan<sup>83</sup> have made regarding both the laws suggest that differences mainly lie in the sources of these two laws. The Quran and Sunna remain the undisputed sources of Sharia law, thereby leading it to acquire a somewhat divine status as it is deeply related to religion. In contrast, EU law

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<sup>79</sup> E. Hossein, I. Marboe, and J. Rehman, *The Rule of Law, Freedom of Expression and Islamic Law*, Bloomsbury Publishing, 2017, p.102.

<sup>80</sup> M. Jian, D. Shin, and J. Cohen. 'Trust and risk in consumer acceptance of e-services.' *Electronic Commerce Research*, Vol. 17, no. 2, 2017, pp. 256.

<sup>81</sup> L. Muharman, and M. Kartiwi. 'Privacy and trust in the Islamic perspective: Implication of the digital age.' *In Information and Communication Technology for the Muslim World (ICT4M), 2013, IEEE 5th International Conference on*, pp. 1-6, M. Marjan, M. Muhammad, M. Hussin, M. Jalaldeen, M. Razi, and K. Abdullah. 'Building trust in e-commerce from an Islamic perspective: A literature review.' *American Academic and Scholarly Research Journal*, vol.5, no.5, 2013, pp.161-168, A. Ambag, and M. Suhaimi. 'Exploring factors that influence Muslim intention to purchase online.' *In Information and Communication Technology for the Muslim World (ICT4M), 2014 The 5th International Conference*, pp. 1-6. IEEE, and A. Mokhtar, M. Noordin, and R. Othman, 'Development method for Shariah compliant e-commerce payment processing.' *International Journal of Computer Theory and Engineering*, vol.7, no.5, 2015, pp. 409.

<sup>82</sup> Winn, 'Islamic Law, Globalization and Emerging Electronic Commerce Technologies', p. 6.

<sup>83</sup> Bagheri and Hassan, 'The Application Of The Khiyar Al-Tadlis' (Option Of Deceit) Principle in Online Contracts and E-Consumer Rights' *Mediterranean Journal of Social Sciences*, vol. 6, 2015, p. 155.

derives its commands from common law and other legal sources in the West. It does not deal with law as a matter of religion. It can be said that interpretations from Sharia law can be narrowed down to those that respect the environment and the conditions<sup>84</sup>. This makes it a flexible piece of law to resolve difficulties and explains why it is able to keep pace with contemporary e-commerce developments.

Multinational companies dealing in e-commerce respond more quickly to issues arising from Western legal philosophies. When it comes to dealing with Islamic countries that are governed by Sharia laws, it becomes difficult for them to address consumer protection, since the laws are mainly prescribed by Quran<sup>85</sup>. Regardless of the companies' interests, they are compelled to promote business in different Islamic states and therefore increase the risks and uncertainties for consumers. The way Sharia law and EU laws deal with finances is quite different<sup>86</sup>. Brussels Regulations Recast<sup>87</sup> is the main functional element in the EU for e-consumer protection. There have been arguments regarding its functionality as it was introduced years before the growth of the internet and e-commerce made changes to consumer protection issues. This Recast is discussed in detail in section 5.2 of this thesis. Sharia law does not support any financial deal that involves interest. It protects consumers through assuring the integrity of money they spend in making a purchase. These points constitute significant differences in Sharia and the EU law. Given the fact that international companies are not always mindful regarding the Sharia guidelines, consumers often struggle to find fairness in the outcomes of deals they make.

Consumer protection across different jurisdictions follows a similar notion, that is to empower consumers to make online transactions and also enable the parties to redress their mutual disparities to form strengthened contractual relations<sup>88</sup>. According to Ramsey, the issue of deceitful actions in online transactions, despite being a matter of significant concern, has

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<sup>84</sup> 'Strengthening Relations with Arab and Islamic Countries through International Law : Foreign Investment, E-Commerce and the WTO Dispute Settlement Mechanism' *Uniform Law Review* vol. 6, no. 2, 2001, p. 124 can you delete the space below? I can't!

<sup>85</sup> C. Sabina. 'The effects of Islamic law on business practices.' *Education, Business and Society: Contemporary Middle Eastern issues*, vol.3, no.1, 2010, pp.40-47.

<sup>86</sup> R. Bashir, and W. Rahman. 'An integrated approach towards Sharia compliance E-commerce trust.' *Applied Computing and Informatics*, 2017. P. 5.

<sup>87</sup> Brussels Regulations Recast 2012/1215/EU.

<sup>88</sup> I. Ramsay, *Consumer Protection and Policy: Text and Material on Regulating Consumer Markets*, 2nd edn., Oxford, Hart Publishing, 2007 p. 67.

long been treated as a side issue and thus has not attracted enough legal attention. Ramsey has identified a need to structure legal paradigms across different jurisdictions to resolve individual concerns within a society. Howells<sup>89</sup> has further added that this issue is of considerable importance to reinforce more trustworthy, safer and fairer online transactions. The area of this study projects a wider scope of development for the economy and marketplaces since it will help to provide fairness in terms and contracts and also to underline the significant legal loopholes that inadvertently contribute to the infringement of consumers' protection rights in the UK and Sharia Law.

Bagheri and Hassan<sup>90</sup> have discussed the significance of the Khiyar al-Tadlis principle applied in Sharia law for online contracts and preservation of e-consumer rights. This mechanism arguably forms a distinguishing feature in Sharia law that provides e-consumers with opportunities to recover losses incurred in online transactions and thereby enables them to either revoke their contracts or be compensated for their loss. Khiyar al-Tadlis refers to misrepresentation or an action of deceit, which is characteristically defined only in Sharia Laws and cannot be found in any other legal system. This is because it is solely reinforced by the Sharia law of contracts and does not follow any other source. This option becomes active in cases when a party has suffered through disappointment as a result of making an electronic transaction. This option enables the consumer to establish that his/her agreement was gained deceitfully to form a contract or they showed their will simply as a result of misrepresentation by the other party. The present option provides consumers with the authority to revoke a contract. In Naser's view<sup>91</sup>, Khiyar al-Tadlis plays a major role in maintaining a significant balance between the e-consumer protection and making of online contracts. The major points of protection it affords include deceptive actions and misrepresentation of information.

According to Chuah<sup>92</sup>, standards and attitudes that deliberately follow Sharia law when dealing with commercial affairs, integrally form the structure of rulings taking place in the

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<sup>89</sup> G.G. Howells and R. Schulze, *Modernising and Harmonising Consumer Contract Law*, 1st edn., Munich, Sellier European Law Pub, 2009, p. 14.

<sup>90</sup> Bagheri and Hassan, 'The Application Of The Khiyar Al-Tadlis' (Option Of Deceit) Principle in Online Contracts and E-Consumer Rights', *Mediterranean Journal of Social Sciences*, vol. 6, 2015, p. 155.

<sup>91</sup> K. Naser, 'Limits of Freedom of Contract on the Basis of Consumer Protection', *Journal of Law & Political Science*, vol. 38, 2009, pp. 331-333.

<sup>92</sup> J. Chuah, 'Impact of Islamic Law on Commercial Sale Contracts – A Private International Law Dimension in Europe' *European Journal of Commercial Contract Law*, vol. 2, no. 4, 2010, p 402

world of e-commerce. Traditions drawn on by Sharia Law are actually the arbitration of teachings laid down by the Quran. According to AlwiHassan<sup>93</sup>, Sharia law discourages any practices that support the hiding or stealing of important information or facts which form a critical part of a sale or are applied to gain the consent of either of the parties. Indeed, it has also been stated that jurisdictions based on Islamic values lay greater emphasis upon ensuring truthfulness and trustworthiness in business transactions<sup>94</sup>.

Moreover, the study aims to provide policymakers with effective measures for preserving the rights of e-consumers and therefore promote electronic trade across different countries. The thesis specifically focuses upon the recovery measures provided by both EU and Sharia law for e-consumers if they suffer through any loss in online transactions and enable them to gain justified compensations.

The thesis establishes two significant levels in relation to the defined areas of jurisdiction: e-commerce and consumer protection. Arguments have been raised that the growth of e-commerce has increased threats for consumer protection<sup>95</sup>. The issue underpins a number of factors amongst which the legal ones are prominent, since the legal frameworks constitute major mechanisms that serve to facilitate the development of e-commerce regimes. Apparently, both EU and Sharia law govern a number of states in the world and form two contrasting legal domains, both of which face issues in e-commerce mainly relating to the enforceability of e-commerce contracts and the articulation of misleading information which drives consumers to make a deal online<sup>96</sup>. There are certain legal systems in both jurisdictions which pay only scant attention to the modern classification of commercial contracts and consumer protection; the most prominent of these is Jordan in the Islamic world<sup>97</sup>.

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<sup>93</sup> A. Hassan, *Sale and Contracts in Early Islamic Law*, 1st edn, The Other Press 2007, p. 201.

<sup>94</sup> A-W.Alkhadha, 'The Contract of Sale under the Laws of the Kingdom of Saudi Arabia: A Critical Appraisal and Comparison with the International Regime', Master of Law Thesis, University of Birmingham, 2010, p. 16.

<sup>95</sup> Z. El Gawady, 'The Impact of E-commerce on Developed and Developing Countries Case Study: Egypt and United States', *International Conference of Globalization , Technology and Sustainable Development*, Al Ain - United Arab Emirates, 2005, pp. 21, 32.

<sup>96</sup> M.A. Helalat and F.M. Shogairat, 'The Expiration of the Financial Lease Contract: A Comparative Study Between Jordanian Legislation and Egyptian Legislation' *Journal of Politics and Law*, vol. 9, 2016, p. 103.

<sup>97</sup> F. Kasassbeh, 'Consumer Contract against Unfair Contract Terms: In the Light of the Jordanian Civil Code and the English Regulations on Unfair Terms in Consumer Contracts' PhD Thesis, University of Newcastle Upon Tyne, 1999, p. 25.

### 1.7.1 Significance and Limitations of the Study

Amin and Nor<sup>98</sup> argue that the future of civil law is largely linked to the development of the economic conditions in society. It is easy to see that goods production is increasingly being replaced by service production and that globalized financial markets mean increased risks also for individual players where the internet, software and mobile phone development are completely new prerequisites for financial transactions. In addition, the momentum of development and methods of organizing work are rapidly changing and many jobs are being replaced by robots and machines. When economic conditions / cohesion conditions and values change, civil law also changes, but only gradually and slowly. The significance of this research lies in this fact that it rationalizes the changes and developments that have so far taken place in the two jurisdictions which dominate significant portions of the world and yet arise from completely different origins. The study is substantial in its content since it directs the prospective legal developments to keep pace with economic and technological conditions.

Comparison of both the jurisdictions presented in this thesis is discretionary and consider the phenomenon of social and civil justice that arise from today's situation. The thesis assumes what has been waiting around the corner regarding both these laws relative to developments in the field of e-consumer protection. It has been found that consumer protection in the European Union is based on the substantive laws of each member state and harmonized by Directives emanating from the Commission. There is no procedural uniqueness, since each one adopts judicial and / or extrajudicial criteria to enforce the demarcation of conflicts.

The study is limited in its findings since Sharia law is extremely diverse and has been divided into sects. The thesis has basically considered laws implemented in the UAE and Jordan due to the availability of literature. Analysing laws for each Islamic state is difficult and forms another major topic of research, whereas the European Directives applied in the EU are uniform across all the states. Any exceptions that any state implements in the EU are not very different in effect. It can be concluded that the article does not incorporate explicit e-consumer laws in countries such as Tunisia, Syria, Palestine, Lebanon and others and recommends this as a topic for future research. This thesis also does not include the scope of arbitration for e-

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<sup>98</sup> N. Amin, and R. M. Nor, 'Online shopping in Malaysia: Legal Protection for E-consumers', *European Journal of Business and Management*, vol. 5, no. 24, 2013, p. 81.

consumer protection across European and Sharia legislation, as this forms a wider topic and is highly recommended for future research.

### **1.8 Core Concept of the Sharia Law**

Sharia law only differs to a limited extent from other standard text-based legal systems in the West. However, it has been argued Sharia is a broader and very wide term; indeed, what has been understood as ‘law’ in English only forms part of the concept of Sharia<sup>99</sup>. It has been recognised that Sharia cannot be considered as a law in the modern sense, but it is more than accounts of subject matter<sup>100</sup>. The concept of Sharia has also been defined as the containment that designates rules and regulations for governing each and every aspect of life<sup>101</sup>. More precisely, Sharia is the compilation of guidelines that cover all aspects of human existence and also include after death implications. Due to the vast scope of the Sharia, there can be no single word in English to define it. The closest approximation, however, has been found to be ‘religion’. The way in which Sharia protects consumers and their welfare as they enter into any electronic contract is the subject matter for this thesis. Sharia has emphasised the prescriptive side of the religion, comprising religious ethos and the legal tenets. Thus it provides a basis which covers different disciplines and activities including commerce and e-commerce. Sharia concerns itself with man’s conscience, his acts and intellect, and the relationship he makes with God and his fellow men<sup>102</sup>.

Meshal<sup>103</sup> made a close analysis of the Ottoman Islamic courts to understand how the Sharia law interacts with the society and the way it influences the economy in Islamic countries with a specific focus on Egypt. According to the author, Sharia law faced new legal and cultural orthodoxies during the 16<sup>th</sup> century and it was during this time that an early-modern laws

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<sup>99</sup> S. Saleh, *Commercial Arbitration in the Arab Middle East A Study in Shari’ah and Statute Law* (2nd edn., Graham & Trotman, 2006), p. 16 and N. Coulson, *Commercial Law in the Gulf States: The Islamic Legal Tradition* (1st edn., Graham & Trotman, 1984), pp. 32-36.

<sup>100</sup> *Ibid*, pp. 32-36.

<sup>101</sup> W. El-Malik, 'The Islamic Concept of Changed Circumstances and its Application to Mineral Agreements' *Yearbook of Islamic and Middle Eastern Law*, vol. 2, 1995, p. 30.

<sup>102</sup> O.F. Gençkaya and M.I. Dien, 'Islamic Law from Historical Foundations to Contemporary Practice' *The Sixteenth Century Journal*, vol. 37, 2006, pp. 909-912.

<sup>103</sup> R. Meshal, *Sharia and the Making of the Modern Egyptian: Islamic Law and Custom in the Courts of Ottoman Cairo*, Oxford University Press, 2014, pp. 5.

evoked out providing new concepts in terms of legal implications. Darsh<sup>104</sup> has identified the Fiqh as the major supplementary source of Sharia. The Sharia law uses Usulul Fiqh to empower constant developments on the horizon of Islamic jurisprudence. The two other supplementary sources governing the Sharia include absolute good and equity.

Much has been written and studied regarding the Sharia and its implications over the 14 centuries of Islam, but it still remains difficult to identify the exact guidelines that define Sharia law<sup>105</sup>. This legal system is, indeed, a wide-reaching and influences Muslim countries around the world. According to one author<sup>106</sup>, its greatness lies in the fact that it has managed to change the lives of people from diverse backgrounds. However, its influence varies in terms of degree, yet shows an infinite adaptability towards ever-changing circumstances. The literal meaning of the word 'Sharia' is 'the faith to follow' and thus it lays the foundations for the legal system. Despite having a clear meaning in the Islamic dictionary, it divides into two possible interpretations where one is broader and the other narrower<sup>107</sup>. The broader meaning of Sharia denotes a written text of legal guidelines that Muslim jurists have followed for centuries to deal with their contemporary issues and also to anticipate prospective issues.

Principles are derived from the Quran, which are the words from God, and also 'Sunna', which are the words and acts performed by the last Prophet. There have been some other sources such as ijma, which is the consensus of the community or the scholarly personalities in Islam. It can be said that the Sharia constitutes the major jurist tradition essence of the era in which the jurist himself practised, and also the particular individuals involved. Yamani<sup>108</sup> further identified that Sharia is now the binding authority for Muslims since it sometimes appears different or somewhat contradictory because of ideological issues in the different juristic schools of thought. Moreover, it cannot be represented as the binding legal authority since the implications vary with respect to the circumstances and certain principles might therefore become invalid.

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<sup>104</sup> S. M. Darsh, "The Islamic Sharia and Its Significance for the Islamic Society," *Inter Alia: University of Durham Student Law Journal* 1992, no. 5 (Spring 1996): 30-32.

<sup>105</sup> A. Yamani, 'The Eternal Sharia', *New York University Journal of International Law and Politics*, vol. 12, no. 2, 1979, pp. 205-212.

<sup>106</sup> *Ibid*, pp. 214.

<sup>107</sup> *Ibid*, pp. 205.

<sup>108</sup> *Ibid*, pp.205.

Kharufa<sup>109</sup> has argued that there is no comparable category that Sharia law shares with Western concepts by virtue of general law obligations. The mechanism of entering into a contract within Sharia Law adheres to a simple/ straightforward system. A contract is said to be in place when a positive proposal (iğāb) made by one party is accepted (qabūl) by the other. However, it is required that acceptance must be adequately expressed and in a way which significantly bears the impact of a contractual subject. According to Rowers<sup>110</sup>, Sharia law generally does not permit freedom of contract, but allows a significant degree of autonomy to be selected between the types of contracts to be formed between parties. A sales contract in Sharia law defines the exchange of immovable or movable goods. Upon seeking deliberate insights into the doctrine of Islam, Saleem<sup>111</sup> has claimed that no requirement is imposed for solemn facilities as with traditional contracts or signing of documents to enter into commercial transactions. Instead, contracts in Sharia Law are considered as the cohort of binding statements that cause both the parties to come together. Likewise, a contract is said to be in place when the words of one party comply with the intent or action shown by the other party, such as anything in writing, a signal or a receipt. Sharia Law provides that a sales contract can be made enforceable (tāmm) through taking reciprocal possession (taqābud) of the goods exchanged<sup>112</sup>.

Mancuso<sup>113</sup> has identified significant differences between the different schools of thought applied in Islam. There have been conflicts in opinion in Sharia Laws, which are mainly sect-specific. It has also been found that apparently none of the different schools of thought requires a traditionally signed or written agreement to verify that parties have consented to pursue a transaction. This implies that any form of agreement/contract is considered as valid in Sharia that is supported with full consent from the parties to make a transaction and expressly states their will to be in a contract with each other.

Although the internet and e-commerce form a new phenomenon in this era, Sharia treats them with the same connotations it used to apply to traditional forms of commerce. In Sharia Laws, contracts in e-commerce have been viewed as an exchange of a property or some

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<sup>109</sup> A. al-Din Kharufah, *Transactions in Islamic Law*, 1st edn, Egypt, A S Noordeen, 2009, pp. 9-14.

<sup>110</sup> P.R Powers, *Intent in Islamic Law*, 1st edn., Brill 2006, pp. 187-189.

<sup>111</sup> M.Y. Saleem, *Islamic Commercial Law*, 1st edn., Singapore, John Wiley & Sons Singapore Pte Ltd 2013, p. 189.

<sup>112</sup> S.M.N Islam and K.B Oh, *Applied Financial Econometrics in E-Commerce*, 1st edn., Elsevier 2003, p. 86.

<sup>113</sup> Mancuso, *Consumer Protection in E-Commerce Transactions*, pp. 1-9.

valuable asset that one party exchanges with the other for profit. This implies that transactions in e-commerce must show conformity with the requirements posed in the principles of contracts under Sharia. The principles of contracts under Sharia are aimed at protecting the rights and interests of the parties involved, while eliminating any harm that parties might face in relation to transactions and trustworthiness<sup>114</sup>. Nonetheless, Sharia Law follows an ethical code of conduct in e-commerce as well as in traditional businesses.

It is generally agreed that commercial contracts can be concluded in any way that reflects the parties' consent and is fully understood by both the buyer and seller. Moreover, a written document, signature or a verbal consent for exchange of offer corresponds to acceptance and is, therefore, considered sufficient for formulating a contract<sup>115</sup>. In light of the arguments raised by Kamali<sup>116</sup>, silence is also accepted as a valid instrument or expression of consent from the parties if the circumstantial evidence indicates that an act of silence from parties may clearly result in concluding a deal. The act of silence, however, cannot significantly be applied when it comes to e-commerce and therefore particular evidence is required from both parties to indicate their acceptance and will.

Coulson<sup>117</sup> has emphasised the fact that in no sense can Sharia law be considered a precise equivalent of contracts made under Western jurisprudence, which underpins several technicalities and certainly involves common law. Two fundamental elements are consideration and agreement. As compared to contractual law in the West, the law of contract in Sharia does not merely represent bilateral contracts, but also unilateral contracts. No consent is required from the other party involved in making the contract in order to make a unilateral contract effective or legally binding. Contract denotes a wider term in the Islamic legal system as compared to the one exercised in the EU and incorporates all the contracts that lack inclusion of consideration between the contracting parties. Coulson<sup>118</sup> has also stressed that a contract made under Sharia doctrines represents no more or less than a legal undertaking.

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<sup>114</sup> Ibid, pp. 2.

<sup>115</sup> Ibid, pp. 2-4.

<sup>116</sup> M.H. Kamali, 'Sharīah and Civil Law: Towards A Methodology of Harmonization' *Islamic Law and Society*, vol. 14, 2007, pp. 392-393.

<sup>117</sup> N.J. Coulson, *Commercial Law in the Gulf States* 1st edn, London, Graham & Trotman 1986, p. 18.

<sup>118</sup> Ibid, pp.18.

Muslims are necessarily required to abide by the rules established in Sharia in each and every aspect of their lives, including commercial ones. If viewed from a completely commercial perspective, Sharia has laid general guidelines for its followers which are universal and must not be infringed or ignored. The door for market activities, however, have been left open to be ruled in accordance with what seems to be a suitable and beneficial approach; the guidelines may be customised based upon the prevalent customs and trade practices<sup>119</sup>. The earlier phase of provides an insight into the efforts taken to regulate the commercial sector. In contrast, a need has been identified in electronic commerce to further the examination in line with appropriate Sharia rules that are required to promote the development of this new phenomenon<sup>120</sup>. In order to identify whether the contracts made in e-commerce hold a legal value or not, there are a range of conditions which must fundamentally be met. The five critical elements required for enforcement of sales contracts include content and intention to be in a legally binding contract, capacity of parties entering into the contract, an object of sale, consideration and an agreement between parties. All of these factors together combine to form a contract<sup>121</sup>.

If construed narrowly, it becomes limited to the principles contained in Quran as they remain unquestioned, valid, and true in the light of Sunna as well as in the consensus of Muslim community representatives. As argued by Yamani, the intrinsic value of Sharia does not lie in the momentary adequacy, but in its ability to cope with an ever-changing society. A well-known fact that can be highlighted here is that different rules of law originate from different environments and also ever-changing circumstances. One of the crucial guidelines that Sharia states is that a change of circumstances may bring an undeniable change in the laws. One important example of this can be provided with the application of Imam Al-Shafi's principle which lays the foundation for the Shafi'i school of thought and constitutes the most important of the four main schools influencing juristic thoughts in Sharia. A number of Al-Shafi's legal opinions changed as they made the transit from Baghdad to Egypt. In addition, the school of thought that jurists practise in Iraq is really different. Though the Quran and Sunna remain

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<sup>119</sup> Z. Osman and S. Hartini, 'E-Commerce from an Islamic Perspective', *Electronic Commerce Research and Applications*, vol.3, no.3, 2004, pp. 290-293.

<sup>120</sup> *Ibid*, pp. 291.

<sup>121</sup> A. Hasan, 'Globalisation of Islamic Financial Services and World City Networks' *Journal of Islamic Finance*, vol. 4, no. 5, 2015, pp. 1-13.

unchanged in Iraq, the only thing that varies is the environment of different Islamic countries; for example, the environment in Egypt is not the same as it is in Iraq.

### **1.7.2 The Basis and Foundations of Sharia Law**

Kaviar<sup>122</sup> has highlighted the B2C<sup>123</sup> contracts in particular as being highly vulnerable because of the weaker position they specify for consumers. The author argues that consumers face a number of difficulties, even though legal mechanisms have been put in place to help them and that protection is mostly provided for the bearers of goods and not specifically for consumers. The major dilemma that causes e-consumers to suffer is the lack of choice in the market. Moreover, consumers also lack an understanding of the contractual terms they agree online and in the event of a dispute arising, how they should resolve it. As debates regarding consumer protection have increased, so have advancements in legislation. The two categories that function to guarantee protection for e-consumers include legal guarantees and commercial guarantees. Legal guarantees provide remedies for services and goods that a consumer acquires through e-commerce and which do not conform to the contract. On the other hand, commercial guarantees are applied to protect consumers when the services and goods acquired do not conform to the express promises made by the seller for the transaction. These guarantees have been provided in Articles 2 and 3 in the draft proposal for the Directive of the EU Parliament specifically made for sale of consumer goods<sup>124</sup>.

Sharia forms an important source of legislation in a number of countries, such as the UAE, Jordan, Syria, Iran and many more. There are 1.5 billion followers of Islam in the world and this constitutes a total of 22% of the world population. There are 50 countries with a Muslim majority living under the influence of Sharia Law that is comprehensively called 'Sharia law'. The basis of Sharia is entrenched in the teaching of Mohammad [PBUH] and the Quran which formulates the sacred book of Muslims and constitutes the core book of guidance for eternity. All the Sharia laws have been derived from the book and pay deliberate attention to the protection of consumers and fairness in trade.

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<sup>122</sup> H. Kaviar, 'Consumer Protection in Electronic Contracts', *International Arab Journal of e-Technology* vol. 2, 2011, pp. 96-104.

<sup>123</sup> Business to consumer.

<sup>124</sup> G.T. Brady, 'Consumer Protection in the European Community: Hope for the Consumer or Unfulfilled Promises', *North Carolina Journal of International Law & Commercial Regulation*, vol. 23, 1997, p 155.

As highlighted by Coulson<sup>125</sup>, Islam remains the most prominent one of the five divine religions, which include Christianity, Judaism, Samaritanism, and Mandaism. In general, the meaning of Islam is to submit. Religious interpretations define Islam as a call to obey the divine teachings from God and they refute any expressions of polytheism and disbelief<sup>126</sup>. Islam has also been considered as the second largest religion in the world in terms of the number of adherents it has. According to Houssain<sup>127</sup>, the number of Muslims has significantly increased across the world and has reached an approximate count of 1.25 billion. Islam forms the final accomplished version of the original monotheistic faiths of Adam, Abraham, Jesus, Moses, and others<sup>128</sup>.

As described by Kamali<sup>129</sup>, Sharia forms a religious and moral code for laws in Islam. Sharia can be interpreted as having two different meanings. Firstly, it constitutes a pathway towards to a water source and secondly, it refers to the set of rules that are comprehensively based on Islamic teaching and provide binding regulations for both the private and general aspects of the life of an individual. Based on these definitions, it is clear that Sharia acquires a significant place in both the hearts of its adherents and formulates a legal framework that can be broadly applied for making arrangements and creating organisations in the private and public lives of individuals. As indicated by Ansari<sup>130</sup>, Sharia provides guidelines regarding all daily aspects of life, including banking, economics, politics, contracts, business, family, hygiene, sexuality and social issues. Due to the wider aspects it addresses in a unique manner, it has become a religion that is greatly researched even among nations who are not adherent to it and forms one of the three common legal systems that are applied across the world along with civil and common law<sup>131</sup>.

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<sup>125</sup> N.J. Coulson, *A History of Islamic Law*, Aldine Transaction, 2011, p. 7.

<sup>126</sup> A.N. Amir, A.O. Shuriye, and J. I. Daoud, 'Muhammad Abduh's Influence in Southeast Asia', *Middle-East Journal of Scientific Research*, vol. 13, 2013, pp. 124-138.

<sup>127</sup> H. Kettani, '2010 World Muslim Population', 8th Hawaii International Conference on Arts and Humanities, 2010, pp. 12-16.

<sup>128</sup> J.L. Esposito, *Islam and Politics*, Portland, Syracuse University Press, 1998, pp. 6-12.

<sup>129</sup> M.H. Kamali, *Shari'ah Law: An Introduction*, Oneworld Publications, 2008, p. 2.

<sup>130</sup> Z.I. Ansar, 'The Contribution of the Qur'an and the Prophet to the Development of Islamic Fiqh', *Journal of Islamic Studies*, vol. 3, no. 2, 1992, pp. 141-171.

<sup>131</sup> G.M. Badr, 'Islamic Law: Its Relation to other Legal Systems', *American Journal of Comparative Law*, vol. 26, 1977, p. 187.

As illustrated by Jannin<sup>132</sup>, Sharia does not form a single code of law, but comprises four different sources that have been derived from legal experts. These sources include the Quran, Sunna, Ijma, and Qiyas. Sunna refers to the traditions collected from the Prophet Mohammad [PBUH]. The Quran and Sunna form the two central sources, complemented by Ijma and Qiyas. Ijma refers to the consensus of Muslim Jurists, whereas Qiyas refers to legal analogy. However, conflicts are also found in different schools of thought which create some additional sources. Nonetheless, the primary sources remain these four<sup>133</sup>.

Wilson<sup>134</sup> has recognised Muslim cities as thriving centres of trade and commerce. A significant revival of business can be observed in Central Asia ever since the collapse of the Soviet Union. Central Asia, where the majority of countries adhere to Sharia laws has emerged as a key player in the global economy. Islam comprises a distinctive set of business ethics. According to the author, the Western world could learn certain rules from the Islamic economies regarding transactions, as this will help promote management efficiency especially in regard to e-commerce. The author has identified no inherent conflict between capitalism and Islam. Formulation of contracts and transactions in Sharia are based on non-interest forms of financing, a feature not widely recognised in EU laws.

Certain ambiguities prevail regarding the commercial environment in Sharia. According to Ballantyne<sup>135</sup>, Sharia is often perceived as holding weaker obligations when it comes to business, since most of the Muslim states form underdeveloped economies and there have only been five leading companies included in the list of FT Global 500 in the Islamic world. Significant legal uncertainties have actually resulted from the interaction between traditional Sharia-based laws and the law of contract applied in the EU and the UK. A number of Muslim scholars have highlighted Sharia rules that relate to consumer protection. In Sharia law, the main purpose of the supplier is to interchange terms with the consumer to benefit themselves

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<sup>132</sup> J. Hunt and A. Kahlmeje, *Islamic Law: The Sharia from Muhammad's Time to the Present*, McFarland, 2007, p. 3.

<sup>133</sup> A. Khan, 'The Reopening of the Islamic Code: The Second Era of Ijtihad', *University of St. Thomas Law Journal*, vol. 1, 2003, pp. 341-365.

<sup>134</sup> R. Wilson, 'Islam and Business', *Thunderbird International Business Review*, vol. 48, no. 1, 2006, pp 109-123.

<sup>135</sup> W. Ballantyne, 'Commercial law: The Conflict in Shari'ah and Secular Law', *Islam and Public Policy*, 1997, pp. 225-248.

and save themselves from any repulsion, harm or injury. Protecting the welfare of the individual remains the major goal that Sharia laws for consumer protection seek to achieve.

These aspects prevent foreign investors from entering into mergers and joint business endeavours with Islamic countries. Moreover, the political movements in Islam are viewed negatively by a number of foreign providers as a threat to their stability and security and also as a risk to their global position. Sharia refers to primary sources that include Islamic injunctions and yet form a religious section that provides structured values for a legal system and regulations which states may apply to people as part of their constitution. Sharia includes all types of legal regulations, including commercial law and public and civil contracts.

Contemporary writings from different Islamic economists and traders are, however, found to be effective for pursuing business including e-commerce<sup>136</sup>. According to the author, Sharia laws show greater respect for the rights of consumers and so form an essential prerequisite for consumers' protection. The laws are strengthened and congruent if applied to property that is to be inherited or to property that is bought through a contract. Online markets are considered as mechanisms which are used for executing transactions. Sharia has always regarded trading as a desirable and virtuous activity, whereby the main concern is to eliminate fraudulent activities and exploitation of consumers. Sharia emphasises the pursuit of trade through mutual consent. Contractual certainty forms an element of critical importance, since great emphasis is laid upon the elimination of gharar, which asserts that ambiguity increases the chances of abuse for online consumers<sup>137</sup>. Despite there being significant legal guidelines in place, it is important to consider why Muslim countries trade less than their Buddhist and Christian counterparts<sup>138</sup>.

No unqualified support is given for approval of markets in Sharia that are based on interest-based financing, which is seen as central to the process of entrepreneurship in the EU<sup>139</sup>. The Quran has strictly prohibited riba (interest) and most Islamic jurists have interpreted

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<sup>136</sup> S.J. Uddin, 'Understanding the Framework of Business in Islam in an Era of Globalization: A Review,' *Business Ethics: A European Review*, vol. 12, no. 1, 2003, pp. 23-32.

<sup>137</sup> R-A. Mehanna, 'International Trade, Religion and Political Freedom: An Empirical Investigation', *Global Business and Economics Review*, vol. 5, no. 2, 2003, pp. 284-296.

<sup>138</sup> Ibid, pp. 285.

<sup>139</sup> R. Hefner, 'Islam and the Spirit of Capitalism', In M.L. Stackhouse and D.P. McCann. (eds.), *On Moral Business: Classical and Contemporary Resources for Ethics in Economic Life*, Grand Rapids, Michigan, Eerdmans 1995, pp. 363-367.

riba as being equivalent to all types of interests. Alternative financial institutions have emerged in the last 50 years that strive to provide a wider range of services<sup>140</sup>. The author has witnessed an increased trend in Islamic states to use marketing methods that have been sanctioned by Islamic scholars since they are not compliant with the religious teachings.

According to Khan and Aftab<sup>141</sup>, contemporary systems of consumer protection are only in their infancy in the Muslim world, but Sharia law provides a wide scope for development, as Sharia has inherently followed comprehensive frameworks for the protection of consumers' right since its beginning. Traditionally, the regulation of markets takes place through institutions where the principle of fair weights and measures are followed; these form the standards for trading in e-commerce and provide consumers with the authority to raise complaints if feel they have been exploited<sup>142</sup>.

It forms an important principle of business ethics in Sharia that sellers must provide accurate information about the product when a deal is made. This not only applies to selling a product, but also in advertising and providing a written description<sup>143</sup>. According to the author, little work has been done in pursuing marketing from the perspective of Sharia. A value maximisation approach has been suggested, which might influence the social value of products, not merely in terms of money for the purchase, but also related to other relevant aspects that are important for consumers. Particular specifications have been made regarding advertisements. Sharia laws do not treat advertisements as merely an offer to treat as they are in the UK and the EU, but certainly an offer that a seller makes which is later negotiated to finalise the contract.

## 1.8 Theoretical Framework

The question of methodology for the production and transmission of knowledge in comparative law seems elusive. According to Morgan<sup>144</sup>, a theoretical framework is necessarily

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<sup>140</sup>. Ibid, pp. 364.

<sup>141</sup> K. Khan and S. Aftab, 'Consumer Protection in Islam: the Case of Pakistan', Australian Economic Papers, vol.39, no.4, 2000, pp. 483-503.

<sup>142</sup> I. Taymiya, *Public Duties in Islam: the Institution of the Hisbah*, translated from Arabic Mukhtar Holland, Markfield, UK, Islamic Foundation 1985, pp. 29-33.

<sup>143</sup>M. Saeed, U.A. Zafar and M. Syeda-Masooda, 'International Marketing Ethics from an Islamic Perspective: A Value-maximization Approach', *Journal of Business Ethics*, vol. 32, no. 2, 2001, pp. 127-142.

<sup>144</sup> D.L. Morgan, 'Paradigms Lost and Pragmatism Regained', *Journal of Mixed Methods Research*, vol. 1, 2007, p. 68.

required to assist the methodological design of the study. It is important for researchers to use the design of methodology to make connections between epistemological issues, whereas a theoretical framework allows researchers make pragmatic connections between research approaches incorporated in the study. Rauxloh<sup>145</sup> has highlighted the difficulties that researchers face when carrying out a comparative analysis. The author argues that comparison of laws forms an older concept especially for those that are geographically diverse, such as Sharia and EU laws. The science of comparative legal studies started to emerge in the 19<sup>th</sup> century. One particular comment that has consistently been made about comparative legal studies is that they do not incorporate any theoretical grounding<sup>146</sup>. Legrand<sup>147</sup> further asserts that comparative studies lack a foundational framework. All these accusations are indeed true<sup>148</sup>. The fact that comparative legal studies lack a theoretical framework becomes more prominent when research is conducted in the context of criminal law and procedures, and also pertaining to civil law and penalties<sup>149</sup>.

Kamba<sup>150</sup> also argues that comparative law methodology, despite being widely accepted, lacks a coherent theoretical framework. There has been no particular framework which the author can follow to undertake the research in an effective yet meaningful way. This allows researchers to choose from a framework which they deem as valuable for the research. The need for a theoretical framework cannot be excluded from the study or otherwise the handling of research becomes unavoidably critical. The author further highlights the importance of a theoretical framework by stating it is a necessary guide for researchers. A theoretical framework forms the foundation and basis of comparative legal studies. Without it, it is not possible for researchers to embrace their research with a unity of thoughts based on discrete individual items<sup>151</sup>. This theoretical aspect forms the basis which connects the common traditions of knowledge acquisition. Transmission of ideas and refinement in accumulation of

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<sup>145</sup> R. Rauxloh, *Plea Bargaining in National and International Law*, Routledge, 2012, pp. 6-7.

<sup>146</sup> J. Hodgson, 'Comparing Legal Cultures: The Comparativist as Participant Observer', 2000, p. 144.

<sup>147</sup> P. Legrand, 'Comparative Legal Studies and Commitment to Theory', *The Modern Law Review* vol. 58 1995, pp. 262-263.

<sup>148</sup> B. Puchalska-Tych and M Salter, 'Comparing Legal Cultures of Eastern Europe: The Need for a Dialectical Analysis', *Legal Studies*, vol. 16, 1996, p. 177.

<sup>149</sup> M.A. Glendon, M.W. Gordon and C. Osakwe, *Comparative Legal Traditions*, West Group, 2002, p.9.

<sup>150</sup> W.J. Kamba, 'Comparative Law: A Theoretical Framework', *International and Comparative Law Quarterly*, vol.23, no.3, 1974, pp. 485-519.

<sup>151</sup> *Ibid*, 127.

differences in Sharia and EU laws cannot be established unless a theoretical framework is followed. What distinguishes a comparative legal researcher from an ordinary legal researcher is the grounding of ideas into a comparative theory. A comparative theory cannot be followed if there is no theoretical framework within the study<sup>152</sup>.

A theoretical framework is important to integrate and structure the interpretation from different resources. The current suggested research questions and objectives make it rational to base the research on legal transplantation theory, which has been recognised as one of the leading sources of legal development<sup>153</sup>. Watson<sup>154</sup> has argued that law compiles significant rules and guidelines, which are transferrable based upon circumstances. They can be deemed as transferrable because the law and society do not share a close relationship or associations. The author also asserts that all schools of laws have emerged from adopting circumstantial changes and that one jurisdiction can acquire rules from the other, even if they initially developed from two entirely different contexts. This provides the basis for determining the ideas that are transferrable between Sharia and EU laws. In contrast, Legrand<sup>155</sup> has argued that it is not possible to borrow or import legal rules or if it is done, it can be only partial and inadequate. A general argument states that legal transplant of laws merely follows importing of foreign rules and not exactly copying or pasting<sup>68</sup>. The latter two arguments tend to limit the scope of this research. As a matter of fact, it is not possible to completely adopt the good e-commerce protection ideas from either of the selected laws, but it is important to consider the legal inspirations that both jurisdictions follow to protect consumers and to what extent they have been successful in doing so. Adopting this framework in this thesis will help the readers recognise the promulgation of principles between the selected legal frameworks and they will better be able to judge whether consumer protection law in Islamic countries or in the EU shares influences from other legal frameworks.

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<sup>152</sup> M. Van Hoecke & M. Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine' Towards a New Model for Comparative Law' *The International and Comparative Law Quarterly*, vol. 47, no. 3, 1998, pp. 495-536.

<sup>153</sup> G. G. Vasyuta, 'Jurisprudence (legal theory): A Fresh Approach to Legal Theory', *Law and Modern States*, vol. 6, 2014, pp. 1-8

<sup>154</sup> A. Watson, *Legal Transplants*, p. 44.

<sup>155</sup> P. Legrand, 'What Legal Transplants?' In D. Nelken and J. Feest (eds.), *Adapting Legal Cultures*, Hart Publishing, 2001, pp. 55-70.

Harmonisation of two different laws leads to significant problems<sup>156</sup>. There are likely to be some signs of harmonisation found between EU and Sharia law. Considering these facts and arguments, this thesis will follow a median approach. A median approach ascertains suggestions involving harmonising only the best practices together with evidence from the local context. Application of this approach has been deemed significant for affirming and justifying legal comparisons in relation to the best legal practices applied internationally and, therefore, constitutes a major source of facilitating improvements and developments in different jurisdictions<sup>157</sup>. States take a median approach when a limited range of competitive law norms is available; this is necessary to prevent torts and also to provide an implied right of action for innocent parties<sup>158</sup>. A legalistic approach is the opposite of the median approach and is applied when there is no need to integrate different views, such as economic and cultural. In this research, a median approach has been chosen since online consumer rights protection in the EU and Sharia law cannot be viewed in isolation of the cultural factors followed in the two different legal institutions<sup>159</sup>.

Cohen<sup>160</sup> has supported the median outcome rule for guiding the implementation of factual aggregation in civil suits of damages. A median approach protects researchers from a number of issues, such as inconclusive details, incompatible findings and conflicted standards of evidence. There has been a significant debate regarding theoretical frameworks followed in the field of law. The median approach allows researchers to offer a prescription for resolving aggregate claims. It is possible for the jury and judge to rank all the possible outcomes of the lawsuit to arrange legal values in a favourable manner in order to reach valid outcomes.

### **1.8.1 Transplantation Theory**

Legal transplantation has been defined as the transfer of matters and laws from one legal institution or jurisdiction into another one. The majority of the legal systems implemented are similar in what they suggest, irrespective of the sources they follow. Jurisdictions with similar

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<sup>156</sup> Legrand, What Legal Transplants? pp. 55-70.

<sup>157</sup> Ibid, pp.58.

<sup>158</sup> T.M.J Möllers and Andreas Heinemann, *The Enforcement of Competition Law in Europe*, UK, Cambridge University Press, 2007 p. 275.

<sup>159</sup> N. Jayawickrama, *The Judicial Application of Human Rights Law*, Cambridge University Press, 2002 p. 247.

<sup>160</sup> A. Cohen, 'Implementing Aggregation in Law: The Median Outcome Rule', *THE YALE LAW JOURNAL FORUM*, vol. 122, 2012, p. 258.

social and political environments are likely to have a number of aspects in common. The transfer of ideas may take place inadvertently when one or more societies synchronise with each other through certain means, for example business communication<sup>161</sup>. These possibilities have been deemed true for a number of legal systems and there is usually a transplantation of legal combinations. The composition of indigenous and transplanted laws, however, depends upon the political, historical and geographical aspects of the country<sup>162</sup>.

The matter of transferability is important for research because of its comparative and reform-oriented nature. Some researchers support the view that laws can easily be transferred. This can be asserted based on historical evidence, since a number of countries have received their laws from other jurisdictions over the course of time<sup>163</sup>. In contrast, others argue that the transfer of laws is not an easy phenomenon and mainly depends upon the similarities and differences in the social and political environments of the host and donor jurisdictions<sup>164</sup>. Comparative studies are conducted to gain inspiration from other laws and to evaluate the critical differences that enable them to perform better on a given issue. This particularly supports development of systems<sup>165</sup>. Comparison of laws permits ideas and development proposals to be scrutinised so that appropriate amendments can be made to the legal regimes if they seem necessary<sup>166</sup>.

In the current growing trend, comparative studies are conducted and after intense research, transfer of laws is allowed<sup>167</sup>. This is a transfer that is made to bring reforms and is a conscious one based on strategic perspectives. This process, however, is significantly costly and time-consuming and, therefore, is most often ignored by researchers. On the other hand, when such studies are conducted, these form an essential source for introducing legislative

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<sup>161</sup> G. Edwards, 'Legal Transplants and Economics: The World Bank and Third World Economies in the 1980S-A Case Study of Jamaica, the Republic of Kenya and the Philippines', *European. Journal of Law Reform*, vol. 14, 2007, p .243.

<sup>162</sup> Ibid, pp.243.

<sup>163</sup> T. Beck, A Demirgüç-Kunt, and R Levine, 'Law and \Finance: Why does Legal Origin Matter?', *Journal of Comparative Economics*, vol. 31, 2003, p. 659.

<sup>164</sup> W. Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' *The American Journal of Comparative Law*, vol. 43, no. 4, 1995, p. 490.

<sup>165</sup> A. Bergene, 'Towards a Critical Realist Comparative Methodology: Context-Sensitive Theoretical Comparison', *Journal of Critical Realism*, vol. 3, 2007, p. 25.

<sup>166</sup> Ibid, pp.25.

<sup>167</sup> P. Lepaule, 'The Function of Comparative Law with a Critique of Sociological Jurisprudence', *Harvard Law Review*, vol. 35, no. 7, 1922, p. 839.

reforms. This forms a preliminary stage, where it is determined whether or not the transplantation of laws may take place or if there are any other factors that are likely to prevent the laws from achieving their purpose. Comparative studies form the basis of reform-based research and consultation, which is followed by the drafting of laws for legal debates. If no comparative studies are done, this may diminish the chances of legal transplants, thus ultimately resulting in static legislatures that are not able to develop<sup>168</sup>.

Mousourakis<sup>169</sup> has highlighted a growing interest in the transferability of legal ideas in different jurisdictions. The transplantation of legal norms and institutions constitutes an important area of research; a framework that is usually applied when research is carried out in different cultures. The major purpose of using this framework is to harmonise and integrate legal processes and enhance them with transferable models that are reasonable in practice. It is important to note that the element of relativity influences the level of relationship that different jurisdictions share with their socio-cultural environment and must be taken into account when a comparative legal research method is applied. However, transplants have also been accused of being a form of betrayal by the existing systems. As cultural diversity and globalisation continue, this adds several complexities to the rules of law applied for consumer protection and therefore makes some transplants necessary.

An extensive tradition of characterising legal systems can be observed; they are mostly entrenched in cultural and social values. Transnational traditions and legal systems divisions encourage comparative law research and allow researchers to critically examine the different legal systems from their standpoint, style or orientation<sup>170</sup>. Although the framework remains critically important, transplantation of legal values requires a greater depth of research so that legal theories can be formulated into a comprehensive set of rules and regulations. The problem of classifying issues has remained critical ever since the 20<sup>th</sup> century; this creates significant difficulties for law researchers. Though the classifications have been revised in recent years,

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<sup>168</sup> J. Baker, 'Comparative Labour Law and Industrial Relations in Industrialized Market Economies', Kluwer Law International, 2004, p. 227.

<sup>169</sup> G. Mousourakis, 'Legal Transplants and Legal Development: A Jurisprudential and Comparative Law Approach', *Acta Juridica Hungarica*, vol. 54, no.3, 2013, p. 219-236.

<sup>170</sup> M.M. Siems, 'Legal Origins: Reconciling Law & Finance and Comparative Law', *McGill Law Journal*, vol. 52, 2007, p. 55.

traditions followed in different jurisdictions remain the major source of demonstrating legal realities in today's world<sup>171</sup>.

The transplantation theory refers to a core or a model that can be directly applied to institutional structures to make some crucial adoptions. The major criteria followed around the world for classification of legal systems includes derivation, common elements, originality, legal contents, as well as socio-economic factors. Zweigert<sup>172</sup> has provided insights into an important theory of legal classification that incorporates interaction between a number of factors including the historical development, legal thinking, legal institutions, interpretation of legal resources and the ideological underpinnings of a certain system. It is also important to note that the legal differences that are mostly assumed to be based on apparent differences are not always clear and usually lead to uncertainties in the findings. The given theory is an important one, since it provides insights into the development paradigms followed in different jurisdictions.

Sharia law is mostly practised in Asian and the African countries. It has been argued that the legal systems followed in these countries form a mixture of religious elements, local laws and traditions, along with transplants and impressions taken from EU countries<sup>173</sup>. Major transplants from EU law were made during the colonial period. Berkowitz et.al<sup>174</sup> has witnessed a great number of similarities between the existing legal systems, even though they belong to transnational traditions that are significantly different. Transplantation theory, therefore, may help to unravel the transplants that the EU have taken from Sharia laws or vice versa. Legal transplantation and borrowings are important to consider in comparative studies, since they help researchers to identify the underlying legal rules, doctrines and institutions that either jurisdiction has adopted from the other<sup>175</sup>.

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<sup>171</sup> M. Reimann, 'The progress and failure of comparative law in the second half of the twentieth century', *The American Journal of Comparative Law*, vol. 50, no. 4, 2002, p. 677.

<sup>172</sup> K. Zweigert, and H. Kötz, *Introduction to Comparative Law*, USA, Oxford University Press, 1992, p 98

<sup>173</sup> I. Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralisms in England, Turkey and Pakistan*, Routledge, 2016 p. 62.

<sup>174</sup> D. Berkowitz, K. Pistor, and J-F. Richard, 'Economic Development, Legality, and the Transplant Effect', *European Economic Review*, vol. 47, no. 1, 2003, p. 165.

<sup>175</sup> *Ibid*, pp.165.

It has been argued that transplantation theory may help to develop an entirely new legal system if a need arises<sup>176</sup>. However, laws resulting from the theory are centralist in nature. In order to understand the phenomenon followed in foreign laws on any particular issue, researchers are required to examine the historical and cultural contexts and also the particular case law developed over the course of time. Changes might result from colonial expansion, political influences, conquests and so on. Moreover, territorial expansion also remains one particular reason for infusing laws and developing common principles. Subjugated populations reside in a number of regions across the world and it is inevitable to prevent transplant of rules and principles to law. However, the imposition might not be direct, but may take place in an indirect manner<sup>177</sup>. This can be understood from the examples of the British and French expansion that took place during colonial times and significantly increased their tendency to adopt legal systems. This implies that local circumstances have a role in the creation of metropolitan systems. The framework allows researchers to recognise the process of legal transformation and the interruptions likely to take place if there is to be a revolutionary change regarding consumer protection in EU and Sharia law. This framework allows the researcher to identify any historical event that led to changes to Sharia and EU law regarding protection of online consumers' rights and resulted in a change of legal identities in either these laws and to observe whether they have undergone any changes to their ideological foundations.

The most radical change is arguably the socio-political one that legal systems may undergo. A country is likely to transform its legal system as a result of such transformations<sup>178</sup>. If such a change is witnessed, this shows that the legal system has moved closer to other systems or has transplanted some essential norms; this makes apparent the ideological similarities and differences in respect to the economic and socio-political structures expressed in different jurisdictions<sup>179</sup>. The appearance of social problems serves as the initiating point for comparative law researchers<sup>180</sup>, as it provokes the need to compare the different legal regimes. The question is whether there are any common features in EU and Sharia law regarding the

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<sup>176</sup> E.M. Wise, 'The Transplant of Legal Patterns', *The American Journal of Comparative Law*, vol.38, 1990, pp.1

<sup>177</sup> A. Watson, 'Legal Transplants' 1974 p. 45.

<sup>178</sup> T.R. Burns, and M. Carson, *Actors, Paradigms, and Institutional Dynamics: The Theory of Social Rule Systems Applied to Radical Reforms* Advancing Socio-economics: An Institutional Perspective, Oxford, Rowman and Littlefield, 2002, p. 145.

<sup>179</sup> Ibid, pp.145.

<sup>180</sup> S. Sarantakos, *Social Research*, Palgrave Macmillan, 2012, p. 12.

protection of consumer rights as the transactions are made online. Moreover, in what way do the two contrasting laws differ? Focusing on the outcomes in EU and the Sharia law may lead researchers to identify which of these offers more potential remedies and better protection for online consumers. It has further been argued that the existence of a common social problem is not sufficient to initiate a comparative study, but a meaningful comparison is done when there exist elements of relativity<sup>181</sup>. These elements provide the basis for researchers to compare and contrast the two different laws.

A special relationship between law and the cultural environment imposes this relativity. The level of relativity shared between the two different laws assists the process of harmonisation. Transplantation theory allows researchers to develop an understanding regarding these aspects and thus enables them to identify the basis of differences in legal principles, institutions and legal rules<sup>182</sup>. The law is of an increasingly diverse nature and the factors that exaggerate this diversity are social and cultural. The view that legal transplants are not possible has been accused of being too extreme and a betrayal of increasing cultural diversity. The desirability of legal transplants and their possibility cannot be denied. However, desirability is determined based on historical foundations. A form of analysis is particularly required that enables the researcher to strike the right balance from a contradictory perspective; transplantation theory helps achieve this.

### **1.8.2 Challenges and Limitations of the Legal Transplant Theory**

It is important to consider the limitations of transplantation theory when adopting best practices and harmonisation. These factors must necessarily be taken into account together with the e-consumer issues that users face locally or in their country of domicile to derive local solutions. This serves to mitigate the negative consequences that are likely to arise from inappropriate adoption of rules.

Legal transplant theory may give rise to confusion, since a number of metaphors and terms are used for explaining legal transfers<sup>183</sup>. For instance, the terms ‘convergence’, ‘legal

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<sup>181</sup> D. Collier, and S. Levitsky, ‘Democracy with Adjectives: Conceptual Innovation in Comparative Research’, *World Politics*, vol. 49, no.3, 1997, p. 432.

<sup>182</sup> B.Z. Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’, *Sydney Law Review*. vol. 30, 2008, p. 375.

<sup>183</sup> J. Gillespie, and P. Nicholson, (eds,) ‘*Law and development and the global discourses of legal transfers*’, UK, Cambridge University Press, 2012, p. 28.

harmonisation’, ‘borrowing’, and ‘unification’ make it difficult for the researcher to evaluate the compatibility of the legal evolution. Other terms also exist, such as ‘legal transplantation’, which is specifically used to denote transfer of legal systems and laws into host countries<sup>184</sup>. Theorists, for example, Alan Watson, have described ‘transplantation’ as referring to the technical adjustments that researchers need to show when bringing about reforms<sup>185</sup>. It has been stated that researchers/theorists must use these metaphors with great caution as they may lead to misinterpretation<sup>186</sup>. It is believed that there exists a significant degree of transferability, which can be determined through evaluating the social, political and legal conditions of the recipient countries<sup>187</sup>.

Teubner<sup>188</sup> has highlighted the term ‘legal irritant’ to underline the ambiguities and false dichotomies, which may result from using this framework; these may inadvertently cause the researcher to develop irrelevant legal metaphors<sup>189</sup>. This suggests that legal transfers cannot take the place of pre-existing legal practices and meanings, but are likely to trigger newer choices of outcomes that are mostly unpredictable. A ‘legal irritant’ may lead to conceptual shortcomings. Once the law has been transformed into a new system, the description is supplemented with a discussion of law reform, which makes the research increasingly complex and confusing<sup>190</sup>.

Too much attention is paid to descriptive metaphors when a comparative research study is analysed. Metaphors are usually only used to simplify and suggest the process of reform. Such a framework significantly lacks the power to make suggestions regarding the reforms, as to whether the chances of success are brighter than those of failure. In order to present a complete understanding, detailed criteria are required to measure and acknowledge the success of the transplant and also the endogenous contributions made to legal development. The majority of theoretical approaches, except as defined by Teubner, are strictly conditioned by

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<sup>184</sup> Ibid, pp.28.

<sup>185</sup> A. Watson, ‘From Legal Transplants to Legal Formants’, *The American Journal of Comparative Law*, vol. 43. 1995, p. 469

<sup>186</sup> G. Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies’, *The Modern Law Review*, vol. 61, no. 1, 1998, p. 13.

<sup>187</sup> O. Kahn-Freund and O. Uses, ‘Misuses of Comparative Law’, *The Modern Law Review*, vol. 37, no. 1, 1974, p. 03.

<sup>188</sup> Teubner, ‘Legal irritants’, pp. 12.

<sup>189</sup> Ibid, pp.12.

<sup>190</sup> Örüçü and Nelken, *Comparative Law*, pp. 202.

socio-legal underpinnings. Transferability of ideas is, therefore, considered by comparing legal transfers with the social conditions of the recipient countries. This makes the approach an analytical one that in turn raises questions regarding connections between culture and the law.

## **1.9 Structure of the Thesis**

The thesis will include five subsequent chapters: ‘introduction’; ‘literature review’; ‘comparison of relevant issues’; ‘discussion’; and ‘conclusion’. The thesis will develop over the course of this chapter following the differences in the EU and the Sharia e-commerce laws. Chapter 2 will be a literature review in which the basic concepts, relevant findings, and gaps in the research will be discussed. The chapter will unravel the various ideas of development based on differences in the two selected jurisdictions. Chapter 3 will provide the results based on comparison of the EU and the Sharia principles of law in e-commerce. The chapter will synthesise information selecting the critical features from both the EU and Sharia e-commerce laws and how they impact protection of consumers. Chapter 4 will discuss the results and delve deeper to explore the critical factors which must be added or eliminated to improve consumer protection and determine whether the EU laws are more promising in protection of consumers or they should adapt elements of Sharia laws. Chapter 5 will conclude the overall findings with a precise focus on search results and future implications.

## **1.10 Conclusion**

This chapter has outlined the background to the issues regarding e-commerce and consumer protection. Both the EU and Sharia Laws have been viewed distinctively to underline the potential gaps which cause e-consumers to face significant problems. Findings made in this chapter provide a rational basis for conducting research on Islamic and EU jurisdictions and comparing them in order to derive relevant guidelines for developing a uniform system of e-consumer protection and better ways through which e-commerce may thrive globally with safe and secure processes, networks and legal regimes. The chapter has also discussed different possible approaches that can be followed for comparing Sharia and EU laws. The median approach and transplantation theory remain the major focus for this research. Besides, the structural and analytical methods have been deemed useful for comparing Sharia and EU laws to protect e-consumers. It is likely that the methodology proposed will lead to reforms. If this happens, it will be advantageous for e-consumers residing in different countries (both the EU and the Islamic countries) to seek remedies in the event that they experience a bad deal online. The research may attract law-drafters and other significant authorities to make suitable legal

transplants in either of the laws to bring about cohesive regimes that are stronger and prevent consumers from facing any losses as they make e-commerce transactions.

## CHAPTER TWO: LITERATURE REVIEW

### 2.1 Introduction

The chapter will provide a detailed review of literature to illustrate the different rules and guidelines that have been in place for the protection of consumers in both the EU and Islamic states. The chapter provides insights to the work done to date and what lay behind the foundations for comparison between the selected laws. As discussed in chapter one, the purpose of this thesis is to analyse the consumer protection laws in the EU and Islamic countries. This chapter provides insights into the fundamental concepts that first need to be understood. A great deal of material is available regarding the findings made in this subject area, although there is still much to be explored. This chapter will provide knowledge regarding the jurisdictions, the fundamental principles they underpin, and why it is necessary to take into account the differences between these to promote consumers' interests.

### 2.2 Developments in Trade and Commerce

According to Budnitz<sup>191</sup>, the last 40 years have witnessed increased problems for consumers. While consumers strive to protect their rights, the financial services industry has continued to promote new services for consumers at a similar pace. The increased growth in e-commerce has opened new chapters of unfair selling, breaches of contract, and deception for consumers that contravenes the enforcement of consumer protection law. Budnitz<sup>192</sup> has identified a wide disparity of resources between those available to the e-commerce industry and individual consumers. Yet, the major issue of concern for lawmakers is to promote consumer protection through enforcing stronger laws which may viably be applied to the virtual environment of trade created by advancements in internet technology and globalisation.

It is necessary to illustrate what consumerism actually means and what role it critically plays in promoting social change. It has been argued that countries may not effectively contribute to trade unless they are socially, economically and politically stable<sup>193</sup>. It is the social

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<sup>191</sup> M.E. Budnitz, The Development of Consumer Protection Law, the Institutionalization of Consumerism, and Future Prospects and Perils, *Georgia State University Law Review*, vol. 26, no. 4, 2010, p.1147.

<sup>192</sup> Ibid, pp.1147.

<sup>193</sup> M.S. Maddi, P. Davis and J. Geraghty, 'Islamic Sharia Perspective and Legislation of Trade and Procurement Comparing with the Conventional rules', *International Public Procurement Conference*

processes that actively influence the movement of goods and services across nations with different religions, cultures and civilizations. The primary role of e-commerce laws must, therefore, focus upon the safe flow of goods among local and the other nations<sup>194</sup>. This provides a clear dimension as to how legal reforms must be structured; they must realise the significance of social change. This indicates that consumer protection in the realm of e-commerce requires development of organisational structures that can be prosecuted both with respect to the principles of litigation as well as the regulatory advocacy provided by virtue of the legislation.

Solaiman & Bilal<sup>195</sup> identified the role of consumer groups and legal protection regarding the rights of consumers in Bangladesh. Though the focus of this thesis is not on Bangladesh, the findings that these authors have made regarding the rights of electronic consumers are worth mentioning here. The authors found both of these aspects as satisfactory in fulfilling the rights of consumers, whereas the other measures were considered ineffective. The authors have put forward various recommendations which must be followed for development of consumer rights. The author has deliberately stressed adoption of a coordinated approach to resolve the issue of consumer exploitation; an infringement to consumer rights that is commonly found in different jurisdictions.

Binding<sup>196</sup> has identified three areas which specify the features of online trading as distinct from materialised trade: flow of information, flow of cash and flow of commodity. Flow of information represents trading, whereas flow of cash provides an overview for the conditions under which the trade has taken place. The flow of commodity takes place as the final state in the process of e-commerce trade. The three factors that make e-commerce unique include virtuality, unboundedness and the multiplicity of actors. All these three factors

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*IPPC*, 2014, pp. 1-7. Available from:  
<[https://www.researchgate.net/profile/Muhammed\\_Maddi2/publication/272153076](https://www.researchgate.net/profile/Muhammed_Maddi2/publication/272153076)> (accessed 21 January 2019).

<sup>194</sup> *Ibid*, pp. 3.

<sup>195</sup> M. Solaiman and A.R. Belal, 'Protection of Consumers' Rights in Bangladesh: Issues and Challenges,' *Decision*, vol. 24, no. 1, 1997, p. 131.

<sup>196</sup> K.P. Purnhagen. and J. Binding, 'Regulations on E-Commerce Consumer Protection Rules in China and Europe Compared—Same Same but Different?' *Journal of Intellectual Property, Information Technology and E-Commerce Law*, vol. 2, 2011, pp. 186-194.

influence the safety of consumers and serve to differentiate the traditional commerce trade from e-commerce<sup>197</sup>.

Flow of information must not incur any disruptions and allow consumers to follow the procedure in a transparent manner. It is the information flow that determines conditions of trading and leads to flow of the commodity. Virtuality means that consumers rely on information that has been presented to them on the website and is restricted in accessing further communication. There is no face-to-face contact, but only online inquiries.<sup>198</sup> Unboundedness characterises the nature of the virtual environment since the internet does not possess any physical boundaries and it is possible to perform the online transactions whenever a connection is available. Since it diminishes the restrictions of time and space, for both the consumers, enables the providers to present themselves as they want and in return, there are only very few options for consumers to verify the legitimacy of the providers or their products<sup>199</sup>. Multiplicity of actors refers to different actions, for example provision of an online form, sending authentication emails, contact with a salesperson and finalising the deal. It is really difficult for consumers to make negotiations since he is restricted to the knowledge that has been provided to him; consumers are able to act and react, but only within the boundaries that the seller/provider has set. There are no such options available for consumers to stretch their boundaries and bind the providers to what they want.

### **2.3 Legal Place of Consumers**

Consumer protection forms one important area in contemporary legislation that has surfaced with the emergence of technology and globalisation; it has gained significant level of attention, especially in developed countries<sup>200</sup>. According to Lande<sup>201</sup>, laws for consumer protection are specifically required to enable consumers to strengthen their position in case they come across dishonest practices from sellers at any stage of supply, production or

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<sup>197</sup> Ibid, pp.189.

<sup>198</sup> Ibid, pp. 236.

<sup>199</sup> Ibid, pp. 236.

<sup>200</sup> S. Macaulay, 'Lawyers and Consumer Protection Laws', *Law & Society Review*, vol. 14, 1979, p. 115.

<sup>201</sup> N.W. Averitt and R.H. Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law', *Antitrust Law Journal*, vol. 65, 1997, p. 716.

distribution. Stuyck<sup>202</sup> has identified consumer law as being rather a problematic concept. The law is not impartial in his view and it should focus on reinstating the power balance between sellers/business providers and consumers.

Consumer law has generally been recognised as a legal intervention that functions to improve protection for consumers. However, it remains questionable as to what extent the consumer laws developed so far have best served this aim. This is about development of appropriate strategies for consumers' protection since the provision of information is not sufficient to protect them. The question reaches to the very foundations of private law, including the freedom of contract and the contractual obligations that form binding sources for both parties. The law has also been viewed as an important element of consumer policy. Another important aspect to consider is the factors that give rise to a relationship between the EU consumer policy and the market competition policies. The term 'consumer' is treated differently across different regions. The partial nature of the consumer protection laws relies on this term, which makes it increasingly important to identify the 'consumer' who is central to the protection<sup>203</sup>.

Electronic commerce started to expand vigorously since 2000 and has undergone various developments. Indeed, it has changed that way the world conducts businesses. According to Dahiyat<sup>204</sup>, e-commerce offers enormous potential for the new emerging markets and processing transactions taking place between parties who had previously not formed contracts or knowledge exchanged information. This marks an era of a new kind of trade in which transactions are made without any physical interaction between the parties and by means of software applications. Where the process has been simplified, this has greatly increased issues of consumer protection, since direct awareness is only rarely found among online users. The emergence of electronic trade has given rise to a number of legal challenges, especially in regards to trustworthiness. E-consumers usually have to deal with false practices and unfair trading, causing them to stumble between the law and technology to find relevant solutions and remedies. The author has argued that law must not be applied as a mere form of words, but it

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<sup>202</sup> J. Stuyck, 'European Consumer Law after the Treaty of Amsterdam: Consumer Policy on or beyond the Internal Market', *Common Market Law. Review*, vol. 37, 2000, p. 367.

<sup>203</sup> *Ibid*, pp.367.

<sup>204</sup> E.A. Rahim Dahiyat, 'Consumer Protection in Electronic Commerce: Some Remarks on the Jordanian Electronic Transactions Law', *Journal of Consumer Policy*, vol, 34, 2011, p. 423.

must be enforced in a way that builds confidence among consumers, whereby sellers are also aware that if they trade through unfair practices, they will be treated severely.

Some cases have significantly shaken the foundations of e-commerce and users' trust in laws, as users have experienced low levels of security and reliability when they have entered into online contracts for trade<sup>205</sup>. It has been argued that the success of e-commerce in any state or jurisdiction largely depends upon the suitability, predictability and reliability of their legal frameworks<sup>206</sup>. This means that the legal frameworks must be suitable to cater for the requirements of different groups of the population in the country, such as EU countries with high Islamic population. Predictability corresponds to the fact that if something unfortunate happens regarding the automated system of e-commerce or the individuals dealing with it, what solutions the law provides and whether it includes provisions for the range of issues.

Therefore, it remains important to evaluate to what extent the existing frameworks have proven to be successful for rendering protection to online consumers. Effective protection is necessary to enable e-commerce to reach its full potential and consumers must feel that all their transmissions and data are effectively authenticated and safeguarded. However, if such practices cannot be established, it is likely that fewer people will choose to engage in electronic commerce, thereby leading to a stunted or stifled growth of economies.

Of the various jurisdictions, the two most highly contrasting ones are the laws applied in the EU and in Islamic countries. Both of these present distinctive features, but strive to secure the position of e-consumers. As in other countries, the countries operating with the EU law and Sharia Laws have also sought to embrace their legislation, statutes and policies with e-commerce opportunities. In order to achieve their goal, considerable reforms have been made to both the legislation and the economy in the last decade to bring the online markets in conformity with the global economy. The major achievement of these jurisdictions, according to Linarelli<sup>207</sup>, is the liberation of goods and competition practices. The UNCITRAL model of

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<sup>205</sup> J.J. Shield Jr, 'Apple, Inc. v. Superior Court: Caveat Emptor: The Future of Online Credit Card Transactions', *DePaul Business and Commercial Law Journal*, vol. 13, 2014, p. 529.

<sup>206</sup> B.T. Ward, J.C. Sipior and L. Volonino, 'Internet Jurisdiction for E-Commerce.' *Journal of Internet Commerce*, vol. 15, 2016, p. 201.

<sup>207</sup> J. Linarelli, 'The WTO agreement on government procurement and the UNCITRAL model procurement law: A view from outside the region', *Asian Journal of WTO & International Health Law & Policy*, vol. 1, 2006, p. 317.

law is applied in various countries for electronic commerce and has contributed to ensure that the electronic commerce practices are equal for both parties.

## **2.4 Consumer Definition in UK Law**

A precise overview of UK law is also necessary since many of the regulations in the EU are similar to UK law. Though they form two different jurisdictions, they can be used in reference to each other to provide a clearer view of legal regimens followed in EU countries. There have been various definitions provided in the UK law for the protection of consumers. Article 2 of the Consumer Protection Act defines consumer as any individual who shows his/her involvement in commercial practices and activities for purposes that fall beyond the scope of his/her business<sup>208</sup>. Contrarily, the section 20(6) of the Consumer Protection Act 1987 has defined a consumer as any individual who wishes to be supplied with goods for his private use or consumption. Alternatively, a consumer is any individual who wishes to be provided with certain facilities or services for any of his business purposes. Another definition provided by section 20(6) names the consumer as an individual who desires to acquire accommodation for purposes of any of his business<sup>209</sup>. It is evident from these definitions that a consumer is an individual who acts in a private capacity or might be a trader who acts in the course of his business.

## **2.5 Protection Protocols for E-Consumers**

Implementation of the law faces several delays in fulfilling the legal formalities that arise due to involvement of discrete geographical locations. As viewed by Khan & Aftab<sup>210</sup>, cases of consumer protection often involve the issue of whether the claimant is liable to seek protection or not. The need for protection of consumer protection has led different jurisdictions to revise their legislation to assure consumers' interests are protected. The author has further highlighted the fact that consumers face similar problems and issues irrespective of the state or jurisdiction they are in. The Islamic states are provided with a comprehensive framework in

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<sup>208</sup> Consumer Protection from Unfair Trading Regulations 2008, UK, s2.

<sup>209</sup> Consumer Protection Act 1987 s20.

<sup>210</sup> K. Khan and S. Aftab, 'Consumer Protection in Islam: The Case of Pakistan', *Australian Economic Papers*, vol. 39, 2000, pp. 484.

the field of commercial law, but glaring differences can be found in Sharia Law as well as in other jurisdictions around the world<sup>211</sup>.

The Malaysian case of *Niaga v NZ Wheels*<sup>212</sup> is worth considering here, in which the claimant sued the respondent. The appellant was an authorised dealer and importer of Mercedes Benz in Malaysia. In a deal with the appellant, the claimant received a car which was not suitable for his purpose and was also below the acceptable quality. Use of the car revealed functional defects. He tried to return it to the respondent but took it back on a guarantee and assurance from the respondent that no functional breakdown would happen again. The car did not start again after the three days. The claimant rejected the car this time and brought a lawsuit against the respondent, who used the Consumer Protection Act 1999<sup>213</sup> to shield himself. The claimant was of the view that the respondent had breached implied guarantees and conditions in the contract under the given Act. Though the breach was evident and the claimant succeeded in winning his case against the respondent, this case puts consumers in a vulnerable position and highlights the fact that most products seem good upon delivery, but it is only after use that the consumer is able to find any defects and at that time is left with only a few options to seek remedies. The case of e-commerce trade is the same.

Facts of the case were analysed based on the Consumer Protection Act and the Sales of Goods Act. Section 12(2) of the Sales of Goods Act<sup>214</sup> entitles the plaintiff to repudiate the contract in case of he found any condition breached. This remained the major reason why the plaintiff had the right to reject the care. This case creates an important example in Malaysia which is officially an Islamic State. Meanwhile, this case also carries its significance for the EU law since it involves the common law regimens and none of the Sharia specified legal guidelines were applied in this case.

## **2.6 Rationale for Consumer Protection Laws**

Different rationales have been applied to offer protection for consumers. A report from the EU has highlighted the weaker position of consumers as they enter into contracts for

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<sup>211</sup> Ibid, pp. 489.

<sup>212</sup> *Puncak Niaga (M) Sdn Bhd v NZ Wheels Sdn Bhd* [2012] 1 MLJ 27.

<sup>213</sup> Consumer Protection Act 1999 (Malaysia).

<sup>214</sup> The Malaysian Sales of Goods Act 1957, s12.

commercial transactions<sup>215</sup>. The report argues that consumers must be able to make informed choices regarding the goods and services they purchase. It remains increasingly important to promote and defend their interests; the laws and policies in place must be capable of mitigating the complexity that prevails in markets and complicated methods of production which cause consumers to operate in a state where they are less informed, in a weaker position and have less bargaining power. As compared to the provider, consumers have only limited choices to seek redress and therefore require adequate protection. Limitation of choices for the consumer is mainly due to social and economic reasons.

These social and economic rationales can better be understood from the study by Hernandez et al.<sup>216</sup>, which outlined socio-economic characteristics of consumers, including their gender, age and income to determine their shopping behaviours. Socio-economic characteristics restrict them from taking any actions if they suffer through a bad experience in online shopping. The only redress available to most consumers is to switch provider and shop from somewhere else online. Consumers showed different behaviours for their initial and the later purchases. Socio-economic factors impact the decision-making process of individuals as they face new experiences. It is clear that options for legal redress can only be enforced successfully if they conform to the social and economic environment of consumers. The study found online shopping was riskier for people with a lower income as compared to consumers with a higher income.

Formerly, both retailers and consumers were considered equal and neither had any powers to exercise over the other because the methods of production were quite simple. Notwithstanding, the advent of e-commerce has put great emphasis upon the role of information in making consumer policies and providing protection for them. Nowadays, the formation of more robust legal frameworks for consumer protection forms an integral need for governments and business providers to boost their competitive economy<sup>217</sup>. The level of information that consumers acquire now is undoubtedly vigorous and beneficial, but certain

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<sup>215</sup> ECC-Net, 'The European Consumer Centres Network 2007 Annual Report [website] 2007, <[http://esc-sr.sk/wp-content/uploads/2017/04/01\\_Annual\\_Report\\_ECC-Net\\_2007.pdf](http://esc-sr.sk/wp-content/uploads/2017/04/01_Annual_Report_ECC-Net_2007.pdf)> (accessed 19 January 2019).

<sup>216</sup> B. Hernández, J. Jiménez and M.J. Martín, 'Age, Gender and Income: Do They Really Moderate Online Shopping Behaviour?', *Online Information Review*, vol. 35, 2011, pp. 113-133.

<sup>217</sup> G. Howells, 'The Potential and Limits of Consumer Empowerment by Information', *Journal of Law and Society*, vol. 32, no. 3, 2005, p. 368.

limitations need to be in place to differentiate the legal positions of the consumer and the provider.

## 2.7 E-commerce in Sharia

Though e-commerce has become an acceptable medium of trade in a number of jurisdictions and has been increasing vigorously, it remains questionable whether Sharia accepts it as a form of commerce and trade or not. Zainul<sup>218</sup> has discussed this issue in great detail and has unveiled Islamic perspectives for e-commerce and the rights of both the consumers and products. E-commerce is accepted in Sharia and contains no ambiguity in this regard. However, Sharia treats e-commerce in the same way as conventional commerce. Certain rules and obligations have been aligned to apply the principles of Sharia to e-commerce. Referring to Quranic verse 62:10, it is apparent that individuals may pursue any activity on earth provided that it does not contradict the teachings of Sharia. Sharia has specified no distinction between material and spiritual actions. What is required is that all actions must obey the rules and commands from God. In other words, e-commerce in Sharia forms a religious and also a moral duty<sup>219</sup>.

Rights, in Sharia, have been defined as an exclusive power or appropriation that an individual acquires over something or the other party, where parties are expecting to gain a certain benefit. The rights of consumers that have been specified in Sharia include data protection rights, rights to privacy and security, rights to deal with transactions, rights to know the details of a product, rights to obtain information from the producer, and rights to compensation and recovery if the products delivered are not up to the standard indicated while making the contract<sup>220</sup>.

Sharia considers the welfare of individuals as of paramount importance and a central element to trading. The principle of welfare is also applied to any sources that an individual pursues for the accumulation of wealth. The striking feature, according to Zainul, that causes Sharia to stand unique is the set of rules that were laid 1400 year ago, are still in place and provide guidance regarding new changes and innovations. The religion of Islam has been

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<sup>218</sup> Zainul, Fauziah and Siti Hartini, 'E-Commerce from an Islamic Perspective', pp. 280-293.

<sup>219</sup> Ibid, pp. 285.

<sup>220</sup> K. AL-Hasan, 'Consumer Protection in Islamic Law', *Consumer Protection in Sharia & Law*, College of Sharia & Law at The University of The United Arab Emirates, December 1998, pp. 18.

broken into four main sections. Amongst these, one is the Fiqh al- Mu'amalat, which is referred as the 'Islamic Business Transactions. It is needless to say that Islam has laid down an ample set of provisions which can viably be applied for the treatment of businesses and wealth. Zainul has highlighted the smooth functions that Islam offers for commercial transactions. The major rights that Islam has provided in the course of e-commerce include veracity, accuracy, convenience, and flexibility, standardisation of contracts, cost effectiveness, and speed, among others.<sup>221</sup>

Hussain<sup>222</sup> has indicated a number of drawbacks that may arise in the field of e-commerce. These include issues of juridical authentication and gharar (uncertainty). Research conducted by the author reveals that Islam accepts the conduct of e-commerce as a way a new innovation in technology which is applied to facilitate economic transactions. This presumption is based on Sharia laws, including obligations (Wajibat), recommendations (Mandub), permissible (Mubah), forbidden (Haram), and reprehensible (Makruh). It has further been clarified that Sharia does not prohibit e-commerce, but rather encourages it assuming it as an important and a liberal way of conducting business. The only thing that mediates the parties in e-commerce is the presence of a computer and the virtual world, while other aspects are similar to face-to-face contracts. Of considerable importance is the presence of consent from both parties and the moral perspectives that increase the responsibilities of traders and the accountability they must show towards the buyers. Sharia issues, in the ambit of e-commerce, mainly arise in terms of the moral obligations that both the parties owe to each other<sup>223</sup>.

Islam encourages Muslims to trade honestly and in a manner that carries mutual benefits for the parties. Two prerequisites are specified in Islam that are applied to examine the validity of e-commerce dealings: permissibility and harmlessness. Permissibility states that the service or commodity in question complies with the Sharia Laws and principles and must not form a commodity that is forbidden in Islam. However, harmless means that the commodity or service in question is a safe one and does not pose any danger for the contracting parties or for the general public. Irrespective of the fact of whether a transaction is executed online or through

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<sup>221</sup> O. Abd AL-Baqi, *Contractual Protection for Consumer*, AL-Ma'aref Institution, second published, 2008, p. 4.

<sup>222</sup> H. Hussin, *E-Commerce: Exploring Some Issues from the Islamic Perspective*, 2002, pp. 45-71.

<sup>223</sup> M. Abu Said, *Consumer Protection in Islamic Law*, AL-Kutub AL-Ilmiyah House, 2004, p. 89.

traditional commerce, it is important to ensure that these prerequisites are fulfilled or otherwise the contract would be termed as void<sup>224</sup>.

Considering the fact that trade is commenced in e-commerce through networks and computers, it is important to take into account certain conditions to ensure the validity of e-commerce. The first thing to consider is clarity and transparency in any communication that is exchanged between parties regarding the quality, quantity and value of the product. The offer that the buyer is willing to make must be clearly established. For instance, the pictures shown of products must clearly display the product. It often happens that pictures are shown of the original products that are copied from some famous brand, but the product sold is merely an imitation of that image. This contradicts the principles of Islam and allows recovery of damage for the consumers. Moreover, the details and specifications of the product must be genuine and at fair prices. Other aspects to be considered include the mode of delivery and also the mode of payment; the seller must clearly provide all of these details to the consumer. Secondly, it is essential that the buyer receives a confirmation message. Thirdly, the seller must assure continuity in communication, which is mostly done through messages/calls or e-mail-based consultation<sup>225</sup>.

## **2.8 Business Ethics for E-Commerce in Sharia**

The basic ethical values followed in Sharia are honesty, sincerity and truthfulness. It is required that the transactions must be made honestly, truthfully and in a straightforward manner. Sharia provides no scope for cheating, telling lies, too much swearing or false advertisements. E-commerce involves persuasive behaviours where people are compelled to buy things through advertisements, which according to Galanxi<sup>226</sup> are highly prone to concealing facts, being ambiguous, and exaggerating facts. As argued by Saari<sup>227</sup>, sellers adopt a psychological approach to attract consumers and represent products in a manner that meets their emotional needs and demands. Such tricks are common and prove to be effective. These

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<sup>224</sup> Ibid, pp. 95.

<sup>225</sup> A. Mushtaq, *Business Ethics in Islam*, International Institute of Islamic Thought, 1995, p. 119.

<sup>226</sup> H. Galanxi, and F.F. Nah, 'Deception in Cyberspace: A comparison of Text-only vs. Avatar-supported Medium, *International Journal of Human-computer Studies*, vol. 65, no. 9, 2007, pp. 770-783.

<sup>227</sup> T. Saari, Ravaja, J. Laarni, M. Turpeinen, and K. Kallinen, 'Psychologically Targeted Persuasive Advertising and Product Information in E-commerce.' *6th International Conference on Electronic Commerce*, ACM, 2004, pp. 245-254.

have been applied in such a vigorous manner that they are considered as part of the online culture of trade, which is increasingly wrong. Such tricks only prove to be effective in favour of the sellers whereas they put consumers in a vulnerable position. Consumers greatly rely upon the information that is presented to them on the web to make purchasing decisions. According to Prince<sup>228</sup>, increased cases of fraudulence and misrepresentation cause consumers to lose their confidence.

## 2.9 Fraudulent Sales in Sharia

Sharia has strictly forbidden any sort of fraudulence in dealings, whether made before a purchase or after it. Sharia law has identified a number of ways in which fraudulence can exist. The most common kind of fraud that the Sharia recognises are mixing or adding of goods. This case refers to the bad intentions of the seller, where he tries to gain extra benefits through changing the product or replacing it with an inferior one. As specified by Ismail<sup>229</sup>, there have been two particular reasons why sellers perform such an act. Firstly, to increase the weight of goods; this is mainly done when the goods can be weighed or counted, such as for jewellery and, secondly, to improve the quality of spoiled or low-quality goods.

Uncertain dealings that are based on ambiguous speculations and conditions are also prohibited in Sharia . The two main conditions which the Sharia has emphasised for making transactions involve the mutual consent of the parties and cancellation of the transaction if there are signs of any fraudulent misrepresentation, or pressure on the consumer<sup>230</sup>. This is why transactions are prohibited in Sharia regarding uncertain or non-existent goods. This is prohibited because such practices may lead one party to acquire a mass of wealth, while the other (the consumers) are exploited. This can particularly be understood using the example of fruits<sup>231</sup>. Another example of such protection against fake products and fraud is selling diluted milk products.

Certain properties that are of critical importance and underpins the financial transactions for e-commerce in Sharia Law applies that all the transactions made are permissible unless

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<sup>228</sup>J.D. Prince, 'Defective Products, Fraud and Misrepresentation Claims in Minnesota', *Hamline L. Rev.* vol. 29, 2006, p. 259.

<sup>229</sup> R. Ismail, 'Risk Management Disclosure in Malaysian Islamic Financial Institutions: Pre-and Post-financial Crisis', *Journal of Applied Business Research* , vol. 29, no. 2, 2013, p. 419.

<sup>230</sup> Z. Iqbal and A. Mirakhor. 'An Introduction to Islamic finance: Theory and Practice', Singapore, John Wiley & Sons, 2011, pp. 104-117.

<sup>231</sup> Z. Al-Zubaidi, *Summarized Sahih al-Bukhari*, 1994, 580.

there is a clear justification provided that suggests otherwise. Secondly, all the transactions made must ensure justice and benefit for the parties entering into the contract. Thirdly, each transaction made must not incorporate any elements that are fundamentally prohibited in Sharia such like uncertainty (gharar), gambling (maysir), and usury (riba). Islamic Sharia involves clear guidelines that supports elimination of exploitation that may be caused to the institution of interest for any contractual party and necessitates the need of eliminating any act that inherently give rise to an exchange that is unjust for transactions<sup>232</sup>. Gharar is the term used for representing uncertainty, prevalence of excessive risks, and ignorance<sup>233</sup>. The concept of gharar might be viewed in relation with the price or object instated in the contract of exchange. Gharar can be minor or major whereby the minor is tolerable because it is nearly impossible to completely avoid it in making any type of business transaction. Contrarily, gambling or maysir refers to accumulation of wealth that is gathered by chance and might deprive the other individuals from their right. The major objective why gambling has been prohibited in Sharia is that money must be earned through making efforts and doing work and not merely by chance<sup>234</sup>.

Additionally, there have been also prescriptions provided in Sharia Laws that verify that transaction being made must fulfill the essential requirements and the conditions specified by both the contracting parties. Conditions must be in place for the subject matter which involves price and object and also the form which include placing of an offer and its subsequent acceptance. All of these factors are necessarily required to ensure that the contract being concluded is valid and enforceable. In order to establish that a certain online transaction is valid and legally binding, it is required that it must fulfill certain conditions and requirements. The first condition is of form which includes placement of an offer and its acceptance. Offer, hereby, refers to the proposal that is made initially by either of the parties. On the other hand, an acceptance refers to the statement that either of the party makes to express his consent to the terms of the offer. Muslim scholars have shown agreement to the fact that it is not necessary that an offer and acceptance must take place in written, but it may be concluded over telephone,

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<sup>232</sup> Z. Osman, and S. Hartini, 'E-Commerce from an Islamic Perspective', p. 285.

<sup>233</sup> Hasan, 'Globalisation of Islamic Financial Services and World City Networks', 2000, p 34.

<sup>234</sup> K. AL-Hasan, 'Consumer Protection in Islamic Law', *Consumer Protection in Sharia & Law*, College of Sharia & Law at The University of The United Arab Emirates, December 1998, pp. 22.

telex, and fax or also through body language of the contracting parties<sup>235</sup>. It is required that both the offer and acceptance must show significant connection with each other, must be clear, and compliant<sup>236</sup>.

In traditional commerce, contracts are made between the parties that are physically present and make sessions for negotiating the contractual terms. This constitutes a situation in which offer and acceptance is connected with each other, is clear, and consistent. Nevertheless, there can be two scenarios in which the offer and acceptance may take place in e-commerce trade<sup>237</sup>. Firstly, parties may show their presence virtually in the space despite being at different locations and there occurs offer and acceptance at the place through instant writing such as electronic communication, chatting, or teleconference. At this point, the contract finalised between parties present virtually is applicable since the ruling took place constructively at a meeting place that led to conclude the contract<sup>238</sup>. Secondly, it is not possible for parties to hear or see each other virtually or physically when an offer and acceptance take place over computers such as through using emails and websites. It has been resolved that a contract is complete when an offer is communicated to the offeree and he shows his consent and agreement to the offerer<sup>239</sup>. These rulings are based upon the decisions that classical jurists have made regarding conclusion and enforceability of the contract between parties who are absent physically such like when contracts are made through letter and messenger. Despite there prevails significant space and time intervals, meeting place in such instance is attributed as unified since both the letter and messenger constitutes a representative that acts and offers on behalf of the seller<sup>240</sup>.

Mutual consent has been given a critical importance in Sharia. It has been strictly prohibited to make a contract without mutual consent and it forms a sin to acquire someone's

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<sup>235</sup> M.A. Laldin, 'Şukūk in Various Jurisdictions: Sharī'Ah And Legal Issues' *Journal of Islamic Business and Management*, vol. 2 no. 1, 2012, pp. 32-34.

<sup>236</sup> M. Okgezen and T. Kuran, 'Between Consumer Demand and Islamic Law: The Evolution of Islamic Credit Cards in Turkey' *SSRN Electronic Journal*, vol. 20, 2015, pp. 880-882.

<sup>237</sup> A. Al-Islambouli, 'Al-Wa'Ad (Promise) in Islamic Jurisprudence and its Contemporary Application' *Journal of King Abdulaziz University-Islamic Economics*, vol. 16, no. 2, 2003, p. 9.

<sup>238</sup> N.A. Wahid and H. Furqani, 'Worldwide Development of Islamic Finance: Trends, Prospects and Challenges' *Journal of Islamic Business and Management*, vol. 3, no. 2, 2013, pp. 88-90.

<sup>239</sup> *Ibid*, pp. 89.

<sup>240</sup> M. Bhatti and M.I. .Bhatti, 'Toward Understanding Islamic Corporate Governance Issues in Islamic Finance' *Asian Politics & Policy*, vol. 2, 2010, p 29.

property without having a legal right. For making transactions, mutual consent forms an indispensable requirement without which a contract cannot be stated as complete and becomes null and void carrying no legal effects<sup>241</sup>. It is required that transaction of property must not take place without knowledge of the owner and without his consent. This clarifies that only those transactions are acceptable that are made based on free willingness and mutual consent of the parties involved. These evidences clearly suggest that all transactions conducted must be based on willingness of parties involved. If this requirement is breached due to any factor, this might render the contract as invalid. For instance, contracts formed under coercion are considered as invalid because of the absence of free will. Hence, both the offer and acceptance work as an external evidence for the consent<sup>242</sup>.

After the form, subject matter is applied which refers to the description of objective and price. This must show conformity with the legal criteria established and must appear valuable in existence, deliverable, and must precisely be determined for validity of the contract. It is also required that the object being traded must be lawful and permissible for trade in Sharia. Selling of dead animals, wine, and pork is highly impermissible because their usage is prohibited in Sharia<sup>243</sup>. Moreover, it is also required that the object being traded must have some existence and must be deliverable from one party to the other. This implies that if an object does not exist and it is not possible for the seller to deliver it, the transaction would become null and void. For example, it is not valid to sell stray birds or animals due to the fact that the seller has no possession for delivering them. It forms a crucial requirement for seller to assure that the buyer would get complete access over the object without impediments and avoid uncertainty (gharar) that might arise because of inability of seller to deliver the objects<sup>244</sup>. It is also required that both the contracting parties must have a sound knowledge of object and price so that they precisely may identify and describe them. Transactions may be invalidated if there is no or only little knowledge provided regarding the subject matter and transactions done may become invalidate because of the objects' characteristics causing parties to end up in

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<sup>241</sup> Ibid, pp. 29.

<sup>242</sup> T. Mansuri, *Islamic Law of Contracts and Business Transactions*, International Islamic University, 2007, p. 145.

<sup>243</sup> M. Elsan and M. Subaty, 'Contract Formation Using Automated Message System: Survey of Islamic Contract Law' *Arab Law Quarterly*, vol. 23, 2009, p 167.

<sup>244</sup> Ibid, pp. 167.

dispute. Parties may determine the details of subject matter either by means of description, physical viewing, or description<sup>245</sup>.

## **2.10 Legal position of consumers in Sharia Law**

The term consumer in Islamic states has been defined as per the illustrations provided in Sharia law. Jurists have defined the term ‘consumer’ as any person who buys an item with some purpose of using it<sup>246</sup>. A number of jurists have approved this definition; the laws and principles of trade in Islamic countries are therefore based on this definition of consumers. Yet, it also forms the fundamental structure of any new assumption that arises for the term ‘consumer’. According to the author, the concept of ‘halal’ and ‘haram’ forms a distinct feature of consumer laws that cannot be found in the law of any other countries apart from Islamic states. The presence of these features is a significant distinguishing feature of Sharia law. The options that consumers have for making contracts are also varied and are mainly focused on placing consumers in an advantageous position in the event of suffering a loss. Consumers are entitled to revoke the contract within a specified period of time.

According to Alhusban<sup>247</sup>, Sharia does not recognise a specific definition for the terms ‘consumer protection’, ‘consumer contract’, and ‘consumer’. The reason provided for this elimination is the complexity of concepts. The rules applied appear to be general in their implications that prohibit making of false representations, prohibition of deception, and contracts for selling. The thing that appears to be common in both the Islamic and EU jurisdiction is the weaker position for consumers when it comes to electronic contracts. However, a number of legal systems have been put in place for protecting consumers; there still remains a significant room for improvements and developments. E-consumers often face difficulties for understanding the contractual terms and thereby providers get an advantage of manipulating these terms to favour their aspects. The major things to notice is that consumers are still not provided with any legal method which may enable them assert their rights for resolution of disputes.

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<sup>245</sup> Bhatti and I. Bhatti, 'Toward Understanding Islamic Corporate Governance Issues', *Asian Politics & Policy*, vol. 2, 2010, p 45.

<sup>246</sup> M.A. Khan, 'Consumer Protection and the Islamic Law of Contract', *Islamabad Law Review*, vol. 2, no 2 2011, pp. 41-58.

<sup>247</sup> A. Alhusban, 'The Importance of Consumer Protection for the Development of Electronic Commerce: The Need for Reform in Jordan,' PhD Thesis. University of Portsmouth, 2014, p. 37.

E-commerce nurtures by utilising reliable measures undertaken in the given environment. Parties entering consumer contracts are required to show their confidence and trust towards a number of issues which validate the enforceability aspects for e-commerce contracts and transactions. Core features which are parallel in both the EU and Sharia Laws for promoting consumer rights include confidentiality of information, completeness of information, transaction security, protection provided to weaker parties, and the right to seek for remedy in the event that some non-performance has occurred. Samy<sup>248</sup> has underlined that the major objective across different jurisdictions remains the same irrespective of their sources of enforcement, since they aim to create an adequately balanced legal environment which commendably allows consumers to undertake all the possible ways of gaining security against the defined obstacles and measures that certainly regulate e-commerce transactions<sup>249</sup>.

## **2.11 Commercial Practices in Sharia-The Primary and Secondary Sources of Concern**

According to Peretz<sup>250</sup>, any scholar referring to Sharia Law and the legal codes applied finds the codes of commercial law are increasingly complex and yet strikingly different from those applied in the West. The different approach is mainly due to the source of law. Sharia provides careful consideration of commercial matters and disputes. The Prophet Mohammad [PBUH] was himself a merchant and showed increasing engagement with commercial practices. Examples from his lifetime provide significant insights into the ways he used to deal with clients, the ways and significance of contract formulation, and the binding elements within it. The Quran acquires the status of divinity that is valid and enforceable for all times. The prophet Mohammad [PBUH] acted as the role model and reflected the teachings of Sharia through his ways and actions. According to Peretz, what has been written in the Quran can be found in the actions of the Prophet. The acts he did were legitimate and authentic and set guidelines for individuals for all locations and times.

Although the Quran and Sunna form the two primary sources of concern and guidance, Ijma and Qiyas have contributed to reframe them in the main structure and a fundamental set

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<sup>248</sup> S. Ayoub, 'Territorial Jurisprudence, Ikhtilaf Al-Darayn: Political Boundaries & Legal Jurisdiction' *Contemporary Islamic Studies*, vol. 2, 2012, p. 87.

<sup>249</sup> M. Abduh, *Consumer Civil Protection in Electronic Commercial Contract*, Al-Sanhoori Library, first published, 2011, p. 10.

<sup>250</sup> D. Peretz, *The Middle East Today*, Greenwood Publishing Group, 1994, p. 39.

of rules, legislation, and judgements. A number of differences can be observed in the other secondary sources which followed in Sharia. According to Muslim jurists, the differences in Sharia law can be classified in three axes: the creator, the purpose, and the punishment and boundaries<sup>251</sup>. According to Sharif<sup>252</sup>, the first difference lies in the source of the creator; Muslims believe that God is the sole creator of laws and His creations cannot be disrupted in terms of tranquillity, stability, and security by the members of society. On the other hand, the secondary sources have reached different explanations and interpretations and so different school of thoughts have been created. Similar differences can be found in ways the issues regarding commercial matters are dealt with by Muslim jurists.

The second distinction that can be highlighted between the primary and secondary sources of Sharia laws is that the primary sources serve to strengthen society and focus on the fulfilment of its main purpose. Since the primary sources are applied for regulating day to day activities including commerce, the major purpose that the secondary sources serve is to deal with newly emerging situations and, therefore, to provide solutions based on explanations and interpretations of the primary sources<sup>253</sup>. The third distinction between the primary and secondary sources relates to the boundaries and possible extent to which the laws from both the sources can be applied cumulatively. The most important features that are disseminated in primary sources are the adaptability and flexibility in different regions and societies, as well as the contrasting ability these show to embrace change and developments over time. However, the secondary sources are time-limited and provide guidelines according to the cases and circumstances faced in the meantime<sup>254</sup>.

Both the primary and secondary sources are officially accepted and in Shari'ah law, their interpretations are widely applied by jurists to resolve disputes arising out of various circumstances and also to predict the different possible situations in which they can be implemented. The same applies to commercial disputes. When the question cannot directly be addressed from the primary sources, the application of Shari'ah is extended to include consensus from religious scholars typically termed as ulama; this is done through ijma.

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<sup>251</sup> A.L. Chua, 'Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development', *The Yale Law Journal*, vol. 108, no. 1, 1998, pp. 1-107.

<sup>252</sup> M.M. Sharif, (ed.) *A History of Muslim Philosophy. Vol. 2*, Harrassowitz, 1966, p. 7.

<sup>253</sup> W.B. Hallaq, *Shari'a: Theory, Practice, Transformations*, UK, Cambridge University Press, 2009, p. 27.

<sup>254</sup> *Ibid*, pp. 27.

According to Johansen<sup>255</sup>, Islamic jurisprudence also seeks help from the legal analogies alongside the Quran and Sunna. Ijtihad forms a process of human reasoning, in which complimentary sources are referred to raise arguments. Jurists have also formed a number of sources to facilitate reasoning in light of interpretations of the Quran and Sunna. As argued by Vogel<sup>256</sup>, ijihad and reasoning occur a variety of forms; this has given rise to disagreements among t jurists from different school of thoughts regarding the validity and rational scope of the proofs that originate from ijihad. According to Wilson<sup>257</sup>, Sharia applies strict obligations and conditions, and as a religion influences trade relationships between the parties involved. Sharia has laid a comprehensive structure for sellers as to how they must structure their business and provide fair rationale for protecting consumers' rights<sup>258</sup>.

According to Van de Ven<sup>259</sup>, Sharia has successfully covered all the aspects that a typical legal system may incorporate. The historical background of Sharia is a strong one that provides a contrasting basis of legislation formation as compared to the Western approaches. The various sources which Sharia law refers to for consumer protection are not present in EU laws. Similarities cannot be found not in terms of sources or derivation, but in terms of the application since both of these are focused on securing the position of the consumer and promoting fairness and safety so that trade may take place through whatever developments or technological means.

## 2.12 Contract Law in Sharia

Visser<sup>260</sup> has provided insights into contract law in Sharia. All financial transactions made, whether physical or online, are regulated under contract law in Sharia, which states that all contracts formulated must conform to the principles of gharar, riba, maysir, and halal activities. Despite this, are several other activities that must be taken into consideration. Gharar

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<sup>255</sup> G. Libson, 'On the Development of Custom as a Source of Law in Islamic Law', *Islamic Law and Society*, vol. 4, no. 2, 1997, pp. 131-155.

<sup>256</sup> F.E. Vogel, *Islamic Law and the Legal System of Saudi: Studies of Saudi Arabia*. Vol. 8, Brill, 2000, p. 89.

<sup>257</sup> R. Wilson, *Economics, Ethics and Religion: Jewish, Christian and Muslim economic thought*, Springer, 1997, p. 9.

<sup>258</sup> O. Ebraheem, 'Consumer Protection in Islamic Law', *Conference of Consumer Protection in Comparative Law*, United Arab Emirates, December 1998, p. 32.

<sup>259</sup> A.H. Van de Ven, R.W. Rogers, J.P. Bechara, and K. Sun. 'Organizational diversity, integration and performance', *Journal of Organizational Behavior*, vol. 29, no. 3, 2008 pp. 335-354.

<sup>260</sup> H. Visser, *Islamic finance: Principles and practice*, UK, Edward Elgar Publishing, 2013 pp. 94-100.

refers to a ban which is applied when there is a condition of uncertainty. According to the author, Gharar is applied to ensure that there remains no uncertainty regarding the characteristics of goods and that the sale is done exactly at the price which was articulated on the website and also by the date by which the seller promised to deliver. All these points are finalised as a contract is concluded. Additionally, it is crucial that the financier or seller owns the goods before they are sold online to the consumers or are given on lease. Therefore, clearly the goods must exist before they are sold to the consumers. However, the author has highlighted certain exceptions to this rule including istisna and bai'salam<sup>261</sup>.

Another aspect in which gharar is applied is the complexity in contracts<sup>262</sup>. Interdependent contracts are permitted in Sharia. It is a legal obligation that a contract must not cover more than one transaction. For instance, it is not possible for sellers to combine a lease agreement and a sales transaction agreement. If both have been concluded in one contract, they do not form a condition over each other. Such a situation becomes problematic. One particular example that can be quoted from Sharia is a murabaha transaction which incorporates two different transactions that are independent of each other. If the sale is done when prices are volatile and after entering into an online contract the client feels that he/she may find a better option and refuses to take delivery of the goods, then the seller may not lawfully sell the particular goods to the client when the seller himself if the owner and the client has undergone a change of mind. A unilateral promise that the client made to take delivery of the goods cannot be completely remedied, though it may be mitigated<sup>263</sup>.

The legal status of promises in Sharia Law is quite different from that in Western law. A promise made in Sharia Law is not equivalent to a contract nor does it amount to a contract. A promise made for buying or seller under a contract only forms a moral obligation not a legal one<sup>264</sup>. Due to the fact that a contract is not legally enforceable, it becomes riskier for the seller. However, according to the Islamic Fiqh applied in Jeddah, it has been ruled that it is obligatory for both parties to fulfil their promises made as part of the commercial transactions both in the legal and the moral sense<sup>265</sup>. Even unilateral promises incur certain liabilities for the promise.

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<sup>261</sup> A. AlMawardi, *Sultani Judgments*, Ibn Qutaiba House Press, 1989, p. 254.

<sup>262</sup> M. Obaidullah, 'Islamic Financial Services', 2005, p. 33.

<sup>263</sup> R. Almasri, *Researches in Islamic Economy*, Almaktabi House Press, 2001, p. 46.

<sup>264</sup> Visser, 'Islamic Finance', p.95.

<sup>265</sup> T. Mansuri, *Islamic Law of Contracts and Business Transactions*, International Islamic University, 2007, p. 145.

If the promisor undergoes a change in mind, the court is then entitled to force him to sell or buy the goods as per the promise made or pay the damages. Thus, it is evident that Sharia provides little space for overriding objections, which is contrary to the practical approach applied in the EU.

It is a necessary requirement in Sharia law that an offer is linked to an acceptance and that both of these are made within the same session or meeting. If the acceptance for an offer is subject to any condition, then it is not considered as an acceptance, but a counter offer<sup>266</sup>. If the parties do not reach an agreement before the meeting is ended, the offer is considered to have expired. Thomas<sup>267</sup> has provided insights into the obligations of ownership. Under Sharia law, the owner of a property is required to pay all the taxes due. If the property has been leased and the buyer discovers that there are property taxes outstanding, then he is not liable to pay the tax, similarly with insurance. Since e-commerce provides such services online, it is important to consider these laws.

### **2.13 Validity of E-Commerce Contracts in Sharia**

Contracts have been defined as agreements in Sharia that both parties enter into to fulfil their obligations arising out of the agreement, and that an offer and acceptance take place. Muslim scholars have identified four different pillars which must necessarily be fulfilled in order to formulate a contract. These include offer (ijab), acceptance (qabul), presence of two parties mutually consented to agreement with each other, and a subject matter for which expressions and communications are exchanged (sigha)<sup>268</sup>. Firstly, an offer is made by one party that opens the possibility of formulating a contract. Confirmation of this offer from a second party constitutes the acceptance. It is required that both the offer and acceptance must be placed in a clear manner for both parties when a contract is made. Sharia identifies a connection between an offer and an acceptance. Once the offer is confirmed by the other party, there must remain continuity between the offer and the acceptance. Secondly, a valid contract is said to be formulated when the parties entering into the contract are not minors, but have reached the age of puberty, and they must be of sound mind. Thirdly, the object of sale must

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<sup>266</sup> M.J. Sinke, *Halal Mortgage: Islamic Banking and Finance (Also Containing Islamic Contract Law)*, Celsus juridische uitgeverij, 2007 p. 21.

<sup>267</sup> D.A. Thomas, *Thompson on Real Property*. Vol. 3, Lexis Law Publishing, 2001, p. 67.

<sup>268</sup> M. Bandari, 'Consumer Protection in submission contracts', *Consumer Protection in Sharia & Law*, College of Sharia & Law at The University of The United Arab Emirates, December 1998, pp. 29.

constitute the matter of subject and must prove to legally halal (permissible), beneficial, in existence, in the seller's possession, and deliverable. Fourthly, both parties must clearly express their impressions to be in a contract and present their wish either through words (act) or in writing. If the contract formulated is based on all the four pillars of contracts, then it is considered as valid, legitimate and enforceable<sup>269</sup>.

## 2.14 Types of Contracts in Sharia

Sharia offers different types of contracts; however, not all of them can be applied in e-commerce. Some of these which relate to e-commerce include the Ordered Sale (Bai' Al-Salam), Deferred Sale (Bai' Muajjal), and Manufacturing Sale (Bai' Al-Istisna). Ordered Sale is a contract that is formed when parties pay the full amount in advance, although the product is to be delivered in future. This refers to online payments that are made online via credit cards, after which the contract is confirmed and the sale is to be done in the future. This kind of sale is legal in Sharia and there are verses in the Holy Quran that verify the legitimacy of such trade contracts. Regarding Ordered Sale the Prophet has ruled that ownership of the ordered products/services is established by the parties through generation of a receipt. The seller is legally bound to fulfil his promise and remains legally liable until the delivery of the goods/services take place<sup>270</sup>.

Manufacturing Sale refers to a sales contract in which the buyer places an order to the seller to create or design a certain item and enters into an agreement to pay the specified price or wage for it; the wage or price is paid in advance (a portion only) and the complete amount is paid when the product is ready and is delivered to the buyer. Manufacturing Sale is similar to an Ordered Sale since the contract is made for something that is yet not in existence, but the buyer needs to pay the price in advance. However, a Deferred Sale refers to a sales contract according to which the parties agree to defer the payment of price. This type of sales contract is legal in Sharia and can be verified with Quranic Injunctions. Sharia rules that apply to Deferred sale include the following: the subject matter must exist, the seller must own and possess the subject matter, the sales must take place in instantly in an absolute manner and

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<sup>269</sup> A. Omairat Adel, 'Consumer's Satisfaction Protection During Contract', *Consumer Protection Within The Economic Openness*, Institute of Legal & Administrative Sciences in Algeria, April 2008, pp. 424.

<sup>270</sup> T. Mansuri, *Islamic Law of Contracts and Business Transactions*, International Islamic University, 2007, p. 145.

must be rendered pending to be completed in future, the price shown must be certain, and there must not be any conditions attached<sup>271</sup>.

## 2.15 Fairness in Contract Formation

Sharia law provides extended guidelines to deal with the issue of consumer protection and views it from a variety of standpoints. The most important elements for consumer protection include mutual consent of parties, transparent dealings, fulfilment of the promises, and contracts and agreements. The significance and implications of fair transactions can be drawn from the Quran, in which verses can be found that encourage people in the Islamic community to pursue only permissible kinds of trade<sup>272</sup>. Verses 4:29 and 2:188 encourage permissible trade and argue that no traders must indulge themselves in forbidden transactions or sell goods that are inferior or fake. This is a significant point and Muslim scholars have shown their firm belief that traders must follow these rules for providing goods to consumers, whether through physical means or at a distance<sup>273</sup>. Muslim traders must, therefore, follow these directives to gain guidance regarding the relevant dimensions in which they may extend their trade.

As viewed by Dusuki<sup>274</sup>, the mutual consent of parties is considered the core element in contract formation. This enables consumers to secure their position when they are only at the initial stages of their commercial deal. Referring to the Quran (4:29), individuals must not sell a property by false methods and must not only think of themselves, but a transaction may only occur when mutual consent is present. It follows that a contract can be formulated in the presence of two crucial conditions: firstly, there is mutual consent from the parties and secondly, if there arise any signs of fraud, misstatement or pressure from either of the party, the contract can be rescinded right away.

It has also been emphasised that contracts formed must be clear and understandable to both the parties. If there arises any ambiguity or fraud in the contract, the consumer acquires the right to cancel it as a reaction. Sharia law also encourages parties to make all deals in the

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<sup>271</sup> M. Abu Lail, 'Pricing Rule in Islamic Jurisprudence', *Consumer Protection in Sharia & Law*, College of Sharia & Law at The University of The United Arab Emirates, December 1998, pp. 40.

<sup>272</sup> A. Mushtaq, *Business Ethics in Islam*, International Institute of Islamic Thought, 1995, p. 98.

<sup>273</sup> S.E. Blythe, E. 'Tehran Begins to Digitise: Iran's E-Commerce Law as a Hopeful Bridge to the World.' *Sri Lanka Journal of International & Comparative Law*, vol. 18, 2006, p. 23.

<sup>274</sup> A.W. Dusuki, and S. Bouheraoua. 'The Framework of Maqasid Al-Shari'ah and its Implication for Islamic Finance.' *Islam and Civilisational Renewal* vol. 2, no. 2, 2011, p. 316.

presence of witnesses. Witnesses are given critical importance in Sharia. If two witnesses can be found for an act or agreement, then it is considered as valid. However, the implications regarding the presence of witnesses for e-commerce trade are ambiguous and have not been discussed at any length. According to Oates<sup>275</sup>, it is for to this reason that challenging for parties to assure the acts they performed. The presence of witnesses leads to a subsequent reduction in uncertainties for parties and enables the courts to reach conclusions easily. Procedures regarding witnesses have been highlighted in the ‘debt verse’ and are enforced under Sharia law to secure the rights of consumers against deferred transactions. The debt verse has provided critical insights as to how an ideal economic climate can flourish; trust forms the integral element<sup>276</sup>.

Although a great deal of attention has been paid towards the significance of transparency and clarity in contracts, individuals are also urged to fulfil their promises towards the intended parties. Many evidence can be traced from the Quran and Sunna regarding the importance of keeping promises. According to the Quran (5:1), it is mandatory for individuals to fulfil all the obligations made within their promises. It also states that an individual must not approach the property of others’ (particularly referring to orphans), but only to take good care of it until the owner reaches the stage when he can do so by him/herself. It has been declared in the Quran that each individual will surely be questioned regarding their promises (The Quran, 17:34). According to Al-Nawawi<sup>277</sup>, there are four particular signs of a hypocrite. Firstly, he always betrays and can never be trusted. Secondly, he tells lies whenever speaks. Thirdly, he proves deceitful whenever makes a covenant. Lastly, he behaves in an evil, insulting manner whenever he quarrels. According to Ismail<sup>278</sup>, the teachings of Sharia are greatly focused on assuring fairness between both parties. Moreover, significant stress has been laid upon understanding that each party shows towards the provisions of trade and conditions in the contract.

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<sup>275</sup> B. Oates, ‘Cybercrime: How Technology Makes it Easy and What to do About it’, *Information Systems Management*, vol. 18, no. 3 2001, p. 92.

<sup>276</sup> B. Badran, *The History of Islamic Law, Property Theory and Contract*, Arabic Renaissance House Press, 1992, pp. 96-110.

<sup>277</sup> Al-Nawawi, Al-Imam Muhyiddin. *Al majmu'syarhumuhazzab*, Egypt, Dar Al-Kotob Al-Ilmiyah, 2007, p. 23 162.

<sup>278</sup> R. Ismail, ‘Risk Management Disclosure in Malaysian Islamic Financial Institutions: Pre-and Post-financial Crisis’, *Journal of Applied Business Research*, vol. 29, no. 2, 2013, p. 419.

## 2.16 Weights and Measures- The Balance for Both Quality and Quantity

Sharia law includes a number of aspects for consumer protection. One important and unique feature is the importance of precision. The level of exactness in weights and related measures are of critical importance in contract formation or when there is a trade of services and goods between parties. Sharia law strictly prohibits individuals from changing or manipulating measures and weights<sup>279</sup>. Though referring primarily to measures construed for exchange of goods taking place through physical means, this can be modified for e-commerce, as the services or goods provided must exactly represent the quality and quantity as promised in the contract. If, in fact, the buyer sells a lesser quantity or inferior quality, this is seen as fraud or misrepresentation<sup>280</sup>.

Muslim scholars have raised some arguments regarding unconditional termination of the contract<sup>281</sup>. It has been said that parties are liable to terminate the contract irrespective of the size of the fraud. A number of Muslim scholars have stated that only larger manipulations of measures and weights entitle parties to terminate the contract. In contrast, if the manipulation done is minor, then a consumer is not liable to terminate the contract<sup>282</sup>. The opinion of the majority of scholars, however, is given importance: consumers are liable to terminate the contract without identifying whether the fraud done is huge or small. This, according to Styck<sup>283</sup>, secures the position of consumers' right, but it is not obvious how it can be applied to e-commerce trade, since consumers are not in a position to terminate the contract right away. This is because the contract is formulated when the order is confirmed; however, fraud does not always become apparent at this stage, but mostly when the goods or services are delivered to the consumers. However, the most important aspect of Shari'ah law is that it provides protection for consumers and encourage trades to only pursue fair trades.

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<sup>279</sup> R. Wilson, 'Islam and Business', *Thunderbird International Business Review*, vol. 48, no. 1, 2006, pp. 109-123.

<sup>280</sup> Ibid, pp.110.

<sup>281</sup> A. Siddiqui, 'Financial Contracts, Risk and Performance of Islamic Banking', *Managerial Finance*, vol. 34, no. 10, 2008, pp. 680-694.

<sup>282</sup> H. binti Abdullah, 'Good Faith, Fair-Dealing and Disclosure Requirements in Hire-Purchase Contracts in Malaysia: Islamic and Conventional Perspectives', *Journal of Islam in Asia*, vol. 6, no. 1 2009, pp. 123-148.

<sup>283</sup> J. Stuyck, 'European Consumer Law after the Treaty of Amsterdam' p. 367.

According to Fariba<sup>284</sup>, Shari'ah law follows a hierarchical system for punishing offenders who are involved in unjust trade and fraudulent practices. If a trader repeats a similar act of cheating more than once, then the authorised person who supervises and controls the market is able to defame the trader to assure protection for consumers' rights. Moreover, Shari'ah law has also highlighted other kinds of manipulation and has prohibited adversarial brokering. Transactions that are not certain or are made against impure or spoiled products also allow consumers to raise a claim.

## **2.17 Influence of EU Laws in Commercial Practices in Sharia**

Cases that involve the issue of consumer protection gain significant attention and a prominent place in the legal agenda. It is widely discussed in governments and local and international conferences across the world. However, it has been argued that Muslim countries show less adherence to Sharia-oriented laws in terms of their derivation and implementation because of the stricter approach it applies if the consumer is not dealt with fairly<sup>285</sup>. It has further been argued that globalisation has broadened the scope of different jurisdictions as they strive to embrace the rules and standards applied in the other countries with which they trade. This has resulted in a muddled situation where conflicts arise far more often than solutions<sup>286</sup>.

Morris and Al-Dabbagh have highlighted a number of reasons why Sharia Laws for consumer protection form an important area of study in contrast to the Western approach. Firstly, Sharia laws reflect a unique combination of different stages of economic development, distribution of wealth and strictness applied in Sharia. Secondly, very little attention has been paid to a comparison of Sharia law and Western approaches. This comparison is a significant one since it includes two foundationally different legislations: one that is derived from divine<sup>287</sup> and the other that has developed and emerged out of common law and the law of mercatoria<sup>288</sup>. Though both of these legislations have been studied vigorously in regard to consumer protection, only a limited number of studies have compared them to derive some better solutions for ensuring consumer protection in the current world of globalisation, where

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<sup>284</sup> F. Zarinebaf, *Crime and Punishment in Istanbul: 1700-1800*, University of California Press, 2010, p. 56.

<sup>285</sup> D. Morris, and M. Al Dabbagh, 'The Development of Consumer Protection in Saudi Arabia', *International Journal of Consumer Studies*, vol. 28, no. 1, 2004, pp. 2-13.

<sup>286</sup> *Ibid*, pp. 7.

<sup>287</sup> Islam.

<sup>288</sup> The EU and UK.

economies greatly rely upon the development of e-commerce for prosperity. The author further argues that Islamic teaching provides a rich and robust set of guidelines which can viably be applied for executing business in trade through e-commerce, even though very few scholars have considered the quality of protection that consumers enjoy in Islamic and EU societies. A contrast of both of these may provide insights into the different ways financial markets are developing in the world and how consumer credit and monopolies are created<sup>289</sup>.

It, therefore, forms an important area of study to determine how consumer protection laws have emerged to be applied in e-commerce trade. The way, according to Morris and Al-Dabbagh, in which the Sharia Laws can be analysed is the consideration towards consumer affairs. The comparison of consumer outcomes between the two contrasting legal systems will help to establish the loopholes and advantages which either of them may adopt from the other to promote progress and mitigate their weaknesses. Development of commercial laws in the Western world is comparable to those made in Sharia. It remains increasingly important to consider and analyse both these strands of development, in the context of e-commerce trade to determine prospective plans for changes to existing e-consumer policies and for providing the basis of strategies to be adopted in the future<sup>290</sup>.

According to Zakaria and Gao<sup>291</sup>, Islamic teaching pay significant attention to adaptability to changes in world paradigms to ensure that no individuals in certain economies are left helpless. Consumers are mostly the victims of different fraudulent tricks. With the advent of e-commerce and increased globalisation, certain activities have also occurred, which have already put consumers in problematic situations; these include monopolisation of goods, fraud and misrepresentation, hiding defects in goods, and deliberate stress on consumers to believe and remain limited to whatever information the trader has provided and must not demand any further information. For these reasons, Sharia laws pay increased attention to

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<sup>289</sup> T. Mansuri, *Islamic Law of Contracts and Business Transactions*, International Islamic University, 2007, p. 19.

<sup>290</sup> O. Abd AL-Baqi, *Contractual Protection for Consumer*, AL-Ma'aref Institution, second published, 2008, p. 10.

<sup>291</sup> Z.A. Aribi, and S. Gao, 'Corporate Social Responsibility Disclosure: A Comparison between Islamic and Conventional Financial Institutions', *Journal of Financial Reporting and Accounting* vol. 8, no. 2, 2010, pp. 72-91.

protection of consumers and encourage them to follow only the permissible means of trade, which are typically referred to as 'Halal' in Sharia<sup>292</sup>.

As pointed out by Alwaneh<sup>293</sup>, teaching in Sharia encourages individuals to pursue only permissible business practices and provide increased protection for consumers if they become victims when the trade was pursued through 'Haram' means. The term 'Haram' means 'illegal' in Sharia and any contracts made in such instances are void. The author also asserts that rules in Sharia motivate individuals to act in a self-efficient manner to serve moral purposes within society. Such moral purposes always run alongside legal and commercial aspects and must not be abandoned while conducting a business or a trade. Self-efficacy has been deemed as critically important since it enables businesses to thrive, while providing consumers with a legitimate means of protecting their rights, thus eliminating the need for increased interventions from the government. According to Saeed<sup>294</sup>, little work has been done on marketing from the Islamic point of view. The author has suggested adoption of an approach that may maximise the value of products and stress the rights of consumers. In the author's view, the social perspective must be given importance for consumer protection and to secure their monetary value.

## **2.18 Misleading Advertisements in Islamic States**

Misleading advertisements form a risky situation and often compel online users to buy certain products. According to Borin<sup>295</sup>, misleading advertising plays a significant role in influencing the decision-making capability of the consumer and results in lowered consumer confidence in the market. Section 2(2) of the Control of Misleading Advertisements Regulations 1988 has defined misleading advertising as presentation of products in any way that corresponds to deception or is likely to deceive a reasonable individual whom it reaches, or if the advertisement affects their economic behaviour or is likely to injure the competitor of the party whose interests are promoted with the advertisement.

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<sup>292</sup> Wilson, 'Islam and Business', p. 113.

<sup>293</sup> S.F. Alwaneh, 'Human Motivation: an Islamic Perspective', *American Journal of Islamic Social Sciences*, vol. 15, no. 4, 1998, p. 24.

<sup>294</sup> M. Saeed, Z.U. Ahmed, and S.-M. Mukhtar, 'International Marketing Ethics from an Islamic Perspective: A Value-Maximization Approach', *Journal of Business Ethics*, vol. 32, no. 2, 2001, pp. 127-142.

<sup>295</sup> N. Borin, D.C. Cerf, and R. Krishnan, 'Consumer Effects of Environmental Impact in Product Labeling', *Journal of Consumer Marketing*, vol. 28, no. 1, 2011, pp. 76-86.

To be precise, a misleading advertisement has been defined as one that is based on false information or disseminates information in a way that manipulates the consumer through omitting relevant and necessary information for the consumer and deceptively causes him to take a decision that he otherwise would not have taken<sup>296</sup>. Fayyad<sup>297</sup> has raised concerns regarding the enactment of consumer protection regulations in the Arab legal systems, which he considers have not been working effectively. Misleading advertising is a major ploy used by traders in Syria, Qatar, Tunisia, Iraq, the UAE, Palestine, and Lebanon to make market transactions, even though Sharia Laws have highlighted the ethical way to regulate market transactions. It is the ultimate responsibility of the trader to make advertisements based on true facts and to do so in a fair manner. According to Jobst<sup>298</sup>, Sharia has provided a number of controls to guarantee the best use of advertisements for market transactions, but the legislative guidelines in Islamic countries fail to enforce them in an effective and stringent manner.

It took only a few years in the Arab states after the enactment of consumer protection regulations, for it to become apparent that they did not succeed in attaining their objectives in regard to the use of misleading information for commercial advertising in e-commerce transactions. Since regulations do not fully meet the requirements of specific rules and prohibitions to address the inherent issue of misleading advertisements, a number of parties have put forward demands to make amendments to the regulations<sup>299</sup>. Though Islamic principles seem virtually sufficient, less attention has been provided in their implementation. The rules and guidelines enforced in Arab countries fail to incorporate specific prohibitions that are necessary to prevent the deceptive practices in e-commerce trade. For Arab-based legal systems, the main focus is to evaluate individual behaviours including the transactions. This has made it increasingly difficult to consider making amendments to laws before they are accepted by a nation. Fayyad<sup>300</sup> has raised a concern regarding how the lawmakers in Islamic countries may seek advantage from European approaches without breaching Islamic rules.

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<sup>296</sup> Directive 2005/29/EC, s14.

<sup>297</sup> M. Fayyad, 'Misleading Advertising Practices in Consumer Transactions: Can Arab Lawmakers Gain an Advantage from European Insight?', *Arab Law Quarterly*, vol. 26, no. 3, 2012, p. 288.

<sup>298</sup> A.A. Jobst, 'The Economics of Islamic Finance and Securitization', *The Journal of Structured Finance*, vol. 13, no. 1, 2007, pp. 6-27.

<sup>299</sup> M. Abduh, *Consumer Civil Protection in Electronic Commercial Contract*, Al-Sanhoori Library, first published, 2011, p. 40.

<sup>300</sup> M. Fayyad, 'Misleading Advertising Practices in Consumer Transactions: Can Arab Lawmakers Gain an Advantage from European Insight?', *Arab Law Quarterly* vol. 26, no. 3, 2012, pp. 287-311.

## 2.19 Global Principles for E-Consumer Protection

E-commerce forms an important trans-border matter whose acceptance and development is directly associated with international trade solutions. The topic acquires an international importance and it is not surprising that international organisations are encouraged to adopt e-commerce regulations, which is why a number of proposals released for electronic transactions in e-commerce have been released<sup>301</sup>. According to Mahadevan<sup>302</sup>, the majority of these models relate to contract formation through electronic means. One particular proposal that can be highlighted here is the Electronic Commerce Agreement of 2000<sup>31</sup>, presented by the United Nations Economic Commission for Europe (UN/ECE) and broadly referred to as the E-Agreement. The underlying idea of this agreement provides that despite a number of legal aspects regarding electronic commerce, still there remain several issues that demand attention, mainly relating to the process of contract formation<sup>303</sup>.

## 2.20 UNCITRAL

The issue of consumer protection has been recognised in the UNCITRAL<sup>304</sup>, the OECD<sup>305</sup> and the ICC<sup>306</sup>. As argued by Clift<sup>307</sup>, not all the proposals disseminated so far have considered consumer protection in an effective manner. It is important to note that none of the proposals has proven to be a binding force. However, they provide a coherent basis for the global economy to regulate e-commerce. The UNCITRAL Model Law for e-commerce has proven to be a guide, but fails to recognise the scope of regulations which must be applied for consumer protection. The UNICTRAL Law mainly deals with the recognition of information

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<sup>301</sup> Organisation for Economic Co-operation and Development (OECD), Electronic Commerce, available from:

<http://www.oecd.org/sti/consumer/oecdguidelinesforconsumerprotectioninthecontextofelectroniccommerce1999.htm> (accessed 21 January 2019).

<sup>302</sup> B. Mahadevan, 'Business Models for Internet-based E-commerce: An Anatomy', *California Management Review*, vol. 42, no. 4, 2000, pp. 55-69.

<sup>303</sup> H. Huffmann, *Consumer protection in e-commerce*, Cape Town, University of Cape Town, 2004, P. 65.

<sup>304</sup> The United Nations Commission on International Trade Law.

<sup>305</sup> Organisation for Economic Co-operation and Development.

<sup>306</sup> International Chamber of Commerce.

<sup>307</sup> J. Clift, United Nations Commission on International Trade Law (UNCITRAL): The UNCITRAL Model Law on Cross-Border Insolvency--A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency, *The Tulane Journal of International and Comparative Law*, vol. 12, 2004, pp. 307-365.

flow that takes place in general as part of e-contract formation. It is notable that UNCITRAL can be applied to any kind of information which is exchanged as part of online commercial activities. The Model serves a twofold purpose. Firstly, it provides a set of comprehensive rules for national legislators, which they may use for the establishment of an effective legal environment to facilitate e-commerce. Secondly, it treats e-commerce transactions as equivalent to paper-based documents; this has particularly been referred to as the functional-equivalent approach<sup>308</sup>.

It has been argued that the Model Law for protection of e-consumers has been drafted without proper attention and lacks significant details or remedies for the issues that are likely to arise for consumer protection. Meanwhile, no reason has been given as to why the Model Law does not provide guidelines regarding consumer-oriented situations through restricting its scope to general provisions<sup>309</sup>. The author argues that laws applicable for consumer protection have been rendered outside of the scope of the Model Law. Another aim that the Model Law serves is to recognise consumer protection or laws that are crucial for the protection of weaker parties in the context of contract formation.

### **2.20.1 ICC**

ICC, during the 1990s, emerged as the foremost developer of ethical and self-regulatory codes for marketing exercises and advertising. ICC identified the need for development in the interactive media requirement and also for deriving principles and guidelines that can be applied for regulating the change. It broadened the scope of learning for the new technologies. ICC released a Guideline<sup>310</sup> in 1996 that was intended to serve effective recommendations. The set of guidelines was updated in 1998 and later in 2005 so that it could be applied to all types of marketing and advertising activities conducted over the internet and also for the promotion of services and goods. ICC has played a significant role in laying a basis for ethical conduct to regulate internet-based advertising and marketing activities.

Some particular guidelines that the ICC has recommended for worldwide promulgation include enhancing public confidence through making the systems more interactive; providing

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<sup>308</sup> A.B. Overby, "Will Cyberlaw Be Uniform--An Introduction to the UNCITRAL Model Law on Electronic Commerce, *The Tulane Journal of International and Comparative Law*, vol. 7, 1999, p. 219.

<sup>309</sup> *Ibid*, pp. 219.

<sup>310</sup> Guidelines on Advertising and Marketing on the Internet.

security for freedom of expression for the marketers and advertisers; minimising the need for governmental and inter-governmental regulation or legislation; meeting the expectations of consumers regarding their privacy. The guidelines are comprised of 7 Articles, which actually form the basis of legal and fair practices and lay the foundations for such rules. Among the different issues discussed, disclosure of identity forms an important one.

### **2.20.2 OECD**

OECD formulates an important Committee that represents Consumer Policy and regulates e-commerce at a broader level. It is important to note that e-commerce forms an essential element of the OECD's vision to promote sustainable economic growth. OECD has produced some increasingly important papers, including the OECD Action Plan for Economic Commerce<sup>311</sup> which has paid particular attention to the processes of consumer protection, privacy, authentication and taxation. The second paper is Guidelines for Consumer Protection in the Context of Electronic Commerce<sup>312</sup>. This is applied only to B2C and not B2B transactions in e-commerce. OECD's guidelines have been designed in a particular manner to ensure that consumers' rights were protected as they shop online and that the level of protection given must be similar to that they enjoy when purchasing from a local store or ordering through a catalogue. The guidelines provide a comprehensive framework for eliminating ambiguities and uncertainties that are usually encountered in online purchases. OECD's guidelines promise to render protection for online consumers in a more traditional manner. Consumer protection, indeed, forms an important issue in the context of e-commerce. Marossi<sup>313</sup> has argued that the inherent nature of e-commerce and also the global environment network pose explicit challenges that limit the abilities of jurisdictions or countries to adequately address the issue of consumer protection. This has made it increasingly necessary for consumers to seek consultation. According to the author, national policies must be avoided since they are more likely to impede the growth of e-commerce.

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<sup>311</sup> J. Dryden, 'A Borderless World: Realising the Potential of Global Electronic Commerce', *OECD Observer*, 1999, pp. 45-46.

<sup>312</sup> D.J. Kim, D.L. Ferrin, and H.R. Rao, 'A Trust-based Consumer Decision-making Model in Electronic Commerce: The Role of Trust, Perceived Risk, and their Antecedents', *Decision Support Systems*, vol. 44, no. 2, 2008, pp. 544-564.

<sup>313</sup> A. Marossi, 'Globalization of Law and Electronic Commerce toward a Consistent International Regulatory Framework', *8th International Conference on Electronic Commerce*, 2006, pp. 334-342.

## 2.21 The EU Approach to E-Consumer Protection

The EU has been identified as a capitalised place in the world that offers significant business opportunities for entrepreneurs<sup>314</sup>. The strength of the EU economy lies in the adherence it shows towards electronic interventions to make itself a global marketplace. According to Trubek<sup>315</sup>, the major challenge is to facilitate widespread adoption of electronic commerce. Although it forms an integral part of doing business in the EU, only minor legal frameworks have been put in place that may support the growth of the e-commerce market in the EU. The major area that requires attention in the given field is development of confidence and trust among the consumers and also among the businesspeople. This, however, does not form a task that easily can be established. In order to achieve this, a consistent and yet harmonised legal approach is required that may build security credits for consumers and raise confidence among the business partners. E-commerce participants in the EU have not yet reached the maximum limits and therefore require further interventions so that they are able to reap the full benefits of the digitised markets<sup>316</sup>. It forms an important legal endeavour to eliminate regulatory inconsistencies and to assure that a regulatory and coherent legal framework has been put in place to promote e-commerce in the EU. An electronic economy can only be fostered when there is a uniform and harmonised piece of legislation in place<sup>317</sup>.

Since the UK has remained part of the EU for a long while, it is convenient to explore the different models applied in the UK. EU countries are greatly influenced by UK law and vice versa, which provides firm reasons to incorporate this area of laws also in the thesis. Models implemented in the UK have generated vigorous responses towards advertising, manufacturing, and supplying services and goods through introducing a wider range of administrative and regulatory bodies, which have specifically been designed to tackle these

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<sup>314</sup> R. Amit and C. Zott. 'Value Creation in E-business', *Strategic Management Journal*, vol. 22, nos. 6-7, 2001, pp. 493-520.

<sup>315</sup> D.M. Trubek and L.G. Trubek, 'Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination', *European Law Journal*, vol. 11, no. 3, 2005, pp. 343-364.

<sup>316</sup> O. Hinz, H.H. Hann, and M. Spann, 'Price Discrimination in E-commerce? An Examination of Dynamic Pricing in Name-your-own Price Markets', *Management Information Systems Quarterly*, 2011, pp. 81-98.

<sup>317</sup> E. Daniel, H. Wilson and A. Myers, 'Adoption of E-commerce by SMEs in the UK: Towards a Stage Model', *International Small Business Journal*, vol. 20, no. 3, 2002, pp. 253-270.

challenges<sup>318</sup>. The Government in the UK has introduced a wide range of legislation that provides coverage for the different aspects of consumers' interests and makes them the subject of protection. Black<sup>319</sup> has appreciated the role of the British government in enacting various legislations to promote, sustain, and adjust critical features in the free market. Some important legislation includes the Unfair Terms in Consumer Regulations Act 1999, the Consumer Protection Act 1987, the Enterprise Act 2002, Sale and Supply of Goods to Consumer Regulations 2002, and the Consumer Rights Act 2015<sup>320</sup>.

The UK has established a number of departments in the field of administration which are regulated under a single government both locally and nationally; a significant uniformity and homogeneity have been maintained at both levels. As highlighted by Hellwege<sup>321</sup>, advancements and furtherance of the legislative policy can be described as an attempt towards consumer protection taken by central government. Increased supervision is done to enforce the consumer protection measures that have been specifically designed to secure the interests of the consumers while applying general market constraints<sup>322</sup>.

Consumers are also given protection against unsafe products, deceptive advertising, fraud and unfair business practices through various combinations of laws from local and national governments and through the existence of different private bodies that are legally obliged to take actions. These private and public bodies not only provide formal services for consumers, but also provide them with knowledge which they can use to understand how they may acquire protection whilst making businesses more innovative and proficient<sup>323</sup>.

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<sup>318</sup> P. Hellwege, 'Consumer Protection in Britain in Need of Reform', *The Cambridge Law Journal*, vol. 63, no. 3, 2004, pp. 712-742.

<sup>319</sup> J. Black, 'Constitutionalising self-regulation', *The Modern Law Review*, vol. 59, no. 1, 1996, pp. 24-55.

<sup>320</sup> The Consumer Rights Act came into force in 2015, replacing the Sale of Goods Act 1979, the Unfair Terms in Consumer Contracts Regulations Act 1999 and the Supply of Goods and Services Act 1982.

<sup>321</sup> *Ibid*, pp. 24-55.

<sup>322</sup> M. Lugt, 'Opportunities for, and Limits to, Harmonizing Criminal Law on Food Processing and Distribution', and Administrative Sanctions in the European Community', *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 2, no. 24, 1994, p. 311.

<sup>323</sup> S.W. Waller, J.G. Brady, R.J. Acosta and J. Fair. 'Consumer protection in the United States: An Overview', *European Journal of Consumer Law*, 2011, p. 2.

## 2.22 Law Enforcement Structures

Harvey<sup>324</sup> has outlined a number of responsibilities that the British government primarily bears in terms of consumer protection. In particular, the government aims to protect consumers through promotion of legislative policy and also by overseeing the legislation and work performed by different agencies. Trade Practices in the UK follows a decentralised kind of enforcement of law. The local trading offices acquire an exclusive jurisdiction for enforcement of laws. In contrast, the Office of Fair Trading (OFT)<sup>325</sup> could only enforce a limited number of powers<sup>326</sup>. According to Cappelletti<sup>327</sup>, government bodies increasingly follow traditional approaches to counter issues of consumer protection, instead of adopting reactive approaches which have been deemed important for resolving emerging problems in this field. Cartwright<sup>328</sup> has highlighted the need for establishing enforcement coordination to tackle these difficulties and also to mitigate concerns regarding inconsistencies. Changes are required in the traditional models to fully meet the requirements of enforcement.

The British government has set up two administrative bodies to enhance consumer protection<sup>329</sup>: the Competition and Markets Authority (CMA), which forms the ultimate authority of consumer protection in the UK and works in partnership with the Trading Standards Services (TSS) to promote consumers' interests across the UK.

CMA is the 'Competitions and Market Authority' and forms a non-ministerial department in the given field. It was established under the ERRA<sup>330</sup> to promote benefits for consumers both in the UK and outside. The main purpose of CMA is to promote fairness in dealings between the businesses and consumers<sup>331</sup>. Statutory duties of the CMA includes conducting market investigations regarding any relevant competition or issues that consumers face and

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<sup>324</sup> H.B. Wilberforce, *Law of Consumer Protection and Fair Trading*, Butterworths, 2000, p. 79.

<sup>325</sup> The OFT was scrapped in 2014 and its responsibilities have been passed to a number of different organisations such as The Competition and Markets Authority (CMA) and The Financial Conduct Authority (FCA).

<sup>326</sup> I. Ramsay, *Consumer Law and Policy*, Portland, Hart Publishing, 2007, p. 454.

<sup>327</sup> M. Cappelletti and J.A. Jolowicz, *Public Interest Parties and the Active Role of the Judge in Civil Litigation*. Milan, A. Giuffrè, Dobbs Ferry, N.Y.: Oceana Publications, 1975, p 25.

<sup>328</sup> P. Cartwright, *Crime, Punishment and Consumer Protection*, *Journal of Consumer Policy*, vol. 30, no. 1, 2007, pp. 1-20.

<sup>329</sup> Ramsay, *Consumer Law and Policy*, p. 454.

<sup>330</sup> Enterprise and Regulatory Reform Act 2013.

<sup>331</sup> L. Cristina, and M. Felisberti. 'Thermal conductivity of PET/(LDPE/Al) composites determined by MDSC', *Polymer Testing*, 2004, vol. 23, no. 6, pp.637-643.

enforcing the consumers to organise their practices pursuant to the market conditions to remove any difficulties they face in making choices in the market. CMA considers fairness as the main focus in the market<sup>332</sup>.

### **2.23 The Principle of Caveat Emptor**

As viewed by Goldring & Maher<sup>333</sup>, unfair practices are widespread in online buying and selling. The principle of ‘caveat emptor’ is commonly applied in EU countries: ‘let the buyer beware’. Although this principle forms the basis of consumer protection laws, it is difficult to state the extent to which it is enforced. The author has argued that though this principle has proven to be a relevant one for transactions in village markets, it is not appropriate or sufficiently adequate to be applied as a general rule. Just as the marketing of services and goods is done by trained business executives, there should also be a mandatory requirement to train consumers to challenge the businessmen, who persuade them to buy services and goods on conditions that run to their own advantage and to the detriment of consumers. The major purpose of consumer laws is to prevent consumers from abuse which mainly results from the superior bargaining power for the suppliers and sellers<sup>334</sup>.

Consumer laws have so far been successful in relieving the consumers from the burden of assuring that they are happy with what purchases they have made. Mykitiuk<sup>335</sup> has highlighted the rule of ‘caveat emptor’ which states that buyers bear full responsibility for any products or goods they purchase and that the seller cannot be held liable for any defects in the product. The laws for consumer protection have helped to move this presumption aside and enable consumers to live their space and utilise it to raise any objections or arguments if they are not satisfied with their purchase. The rule of ‘caveat emptor’ only allowed consumers to seek help in cases of misrepresentation or fraud which merely applied to only one area. The

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<sup>332</sup> Inderst, Roman. ‘Retail finance: Thoughts on reshaping regulation and consumer protection after the financial crisis’, *European Business Organization Law Review (EBOR)*, 2009, vol. 10, no. 3, pp. 455-464.

<sup>333</sup> J. Goldring, L. Maher, J. McKeough and G. Pearson, *Consumer Protection Law*, Sydney, Federation Press, 1998, p. 2.

<sup>334</sup> *Ibid*, p.3

<sup>335</sup> R. Mykitiuk, ‘Caveat Emptor: Direct-to-Consumer Supply and Advertising of Genetic Testing’, *Clinical & Investigative Medicine*, vol. 27, no. 1, 2004, pp. 23-32.

concept that has now emerged for consumer protection in law is far broader and covers several aspects of rights and protection for the consumers<sup>336</sup>.

According to Winn<sup>337</sup>, the availability of information has caused both sellers and buyers to stand an imbalance between the terms related to specific products and this greatly restricts the ability of consumers to gain a strong position in the marketplace. Rubin<sup>338</sup> has pointed out a significant imbalance between the availability of information that consequently results in demolition of efficiency between the parties. This argument has been supported based on the fact that a trader has a greater knowledge of the quality of the product and the timescale within which it may deteriorate than the consumer. The buyer, on the other hand, is not aware of such information and therefore pays more money for a product than it is worth. This corresponds to the availability of information that strengthens one party (the seller) but weakens the position of the other (the consumer). However, recent advancements have greatly rectified this situation. Development of e-commerce has brought about massive developments in the field of production and trading<sup>339</sup>. According to the author, these new trends are more directed to secure the position of consumers and encourage governments and lawmakers to reinforce new and enthusiastic legal regimens. The newer trends have been supported based on the fact that consumers acquire a position that seeks for mercy from the traders who are in a stronger position. The rules and laws applied in contemporary markets are well-organised and disseminate greater knowledge to the buyer.

According to Foss<sup>340</sup>, the issue of consumer protection greatly revolves around one particular feature, namely the nature of the purchase. E-commerce can be referred to as an online trade in which the consumer makes purchases in the dark; dark in the sense that he is only aware of the information that has been disclosed online. Moreover, online consumers are not aware of the actual identity of the dealer and so it is difficult for them to identify whether

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<sup>336</sup> J.K Winn, *Consumer Protection in the Age of the Information Economy*, UK, Routledge, 2016, p. 38

<sup>337</sup> *Ibid*, pp.38.

<sup>338</sup> E. Rubin, 'The Internet, Consumer Protection and Practical Knowledge', *Consumer Protection in the Age of the Information Economy*, UK, Ashgate, 2006, p. 37.

<sup>339</sup> S. Wahlen and K. Huttunen, 'Consumer Policy and Consumer Empowerment: Comparing the Historic Development in Finland and Germany', *International Journal of Consumer Studies*, vol. 36, no. 1, 2011, p. 2.

<sup>340</sup> M. Foss, 'International Consumer Purchases Through the Internet: Jurisdictional Issues Pursuant to European Law', *International Journal of Law and Information Technology*, vol. 8, 2000, p. 114.

the purchaser is trustworthy or not and whether their position in the market is genuine. Suspicion of fraud increases when the purchases are made online and consumers receive low-quality services or goods. The anonymity that online dealing provides to the seller leaves buyer uninformed and struggling to find relevant information to bring claims and evidentially prove that they have suffered a loss. According to Yehuda & Methewson<sup>341</sup>, regulation in this field will help establish the right balance between the concept of 'caveat emptor' and the obligations of the seller to provide relevant and sufficient information for the buyer.

## **2.24 Freedom to enter into the Contract- An overview of Misleading Advertisements**

One vital issue that is associated with the online trade is the freedom to enter into the contract. Though consumers' decisions are influenced by a number of factors, online traders may find many reasons and excuses to relieve themselves of consumer liabilities and render consumers wholly responsible for the loss they have suffered, since it was their choice to enter into a contract with them. One particular example that causes consumers to enter into online contracts for trade is misleading advertisements. The consumer in e-commerce is not able to see the business premises, nor can he witness the conduct of the trader; according to Rayport & Bernard<sup>342</sup>, this has a significant role in impacting the ability of consumers to analyse and assess the legitimacy and quality of goods in contrast to the description available to them. The major disadvantage that e-commerce has rendered to consumers is the inability to distinguish between true and false advertisements. Most of the time, buyers are victimised through misleading advertisements; ultimately this results in reduced confidence in e-commerce and a surge in the number of buyers seeking legal solutions for recovery of loss.

One particular issue that often arises as in the realm of contract law is the legitimate value of adverts disseminated on the website<sup>343</sup>. It remains challenging to determine whether the advert was an offer to make a legally binding contract or merely an invitation to treat. In general, advertisements made on websites are regarded as the invitation to treat and not an

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<sup>341</sup> Y. Kotowitz and F. Mathewson, 'Advertising, Consumer Information and Product Quality,' *The Bell Journal of Economics*, vol. 10, 1979, pp. 566-570.

<sup>342</sup> J.F Rayport and B.J Jaworski, *Introduction to E-Commerce*, New York, McGraw-Hill Irwin, 2004, p.52.

<sup>343</sup> D. Backer, 'Choice of Law in Online Legal Ethics: Changing a Vague Standard for Attorney Advertising on the Internet', *Fordham Law Review*, vol. 70, 2001, p. 2409.

offer. This is based on the fact that sellers may not sell what they do not actually have.<sup>344</sup> An offer forms a promise that a seller makes with the buyer to create a legally binding contract. An invitation to treat is different from an offer since it lacks an intention from the seller to be in a legally binding relationship. In e-commerce it is hard to determine whether a further bargain is possible or whether the statements made online are fixed and binding<sup>345</sup>. As per the general principle that the Law Commission in England and Wales applies to e-commerce, as soon as the consumer clicks on the option to confirm the order, this corresponds to their intention to be in a legally binding contract. Case laws established in this realm, however, have supported suppliers.

An important case is of *Grainger v Gough*<sup>346</sup> which involved an argument that the price displayed did not constitute an offer; this provided the seller with the extraordinary freedom to decide who to sell the product to. Based on these case laws, it has been construed that advertisements made online constitute an invitation to treat, unless a buyer contacts the seller. This condition was viewed in the case of *Partridge v Crittenden*<sup>347</sup>. As per the common law applied, a binding contract is not finalised in online purchases unless the consumer confirms the order. However, shopping online is riskier and there have been cases in which false advertising has led to conflicts between the consumer and the seller. The case of Kodak is a significant one in which the Kodak made a mess with consumers. The company advertised cameras at a discounted price of £100, but later realised their products. The company cancelled numerous orders from consumers leaving them stranded with no legal options.

## 2.25 Differences in Jurisdictional Laws

The extent to which EU laws are effective in providing e-consumer protection also involves the issues of jurisdictional laws. It is likely that certain products that are offered to consumers are prohibited in some jurisdictions, but not in others. There have been widely held

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<sup>344</sup> S. Christensen, 'Formation of contracts by email-is it just the same as the post?', *Queensland University of Technology Law and Justice Journal*, vol. 1, 2001, p. 22.

<sup>345</sup> M.M. Shannon, 'Keep it Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-to-Consumer E-Commerce', *Boston University International Law Journal* vol. 20, 2002, p. 125.

<sup>346</sup> *Grainger & Son v Gough*, House of Lord, [1896] A.C 325.

<sup>347</sup> *Partridge v Crittenden* (1968) 2 All ER 421.

reviews regarding how jurisdictions must be created to facilitate e-commerce.<sup>348</sup> The question that can be raised here is which jurisdiction must the court consider and which laws should be applied for consumer protection. The EU has taken significant steps to resolve this matter through generating e-commerce regulations, but these are not broad enough to provide coverage for the electronic network that is vast and spreads over various jurisdictions<sup>349</sup>. However, a balance is needed to for regulation. Too many regulatory regimes may also lead to incapability in online transactions which would not prove to be beneficial for consumer safety. In order to address the issue, UNCITRAL was created in 1996 as part of the EU Convention to form a piece of legislation that can be applied for e-commerce contracts<sup>350</sup>. Although it functions within a limited framework, it constitutes a procedure that is increasingly simple to enforce legislation beyond the limited territories. However, English Law is applied whenever a dispute arises with a citizen who does not belong to the EU.

Offers made through websites are complicated and can sometimes be rejected based on the jurisdictional guidelines of different countries. The EU Convention has paid particular attention to this matter. In general, it has been clarified that advertisements made online do not constitute an offer. As contained in Article 11 of the EU convention, contracts made online or through electronic communication are generally regarded as an invitation to treat and not an offer unless there are clear statements provided from the seller to enter into a legally binding content through accepting an offer.

## **2.26 Issues for Consumer Rights**

### **2.26.1 Validity of Contracts**

Since this thesis focuses upon misrepresentation, contract formation, and counterfeit products, it is important to consider the issues arising out of the validity of contracts. Once the validity of electronic contracts has been established, it remains important to discuss whether the contract can be made without an intervention or human knowledge. According to Lloyd<sup>351</sup>,

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<sup>348</sup> A.G. González, 'eBay Law: The legal Implications of the C2C Electronic Commerce Model', *Computer Law & Security Review*, vol. 19, no. 6, 2003, pp. 468-473.

<sup>349</sup> A.J. Cockfield, 'The Rise of the OECD as Informal World Tax Organization through National Responses to e-commerce Tax Challenges', *Yale JL & Tech.*, vol. 8, 2005, p. 136.

<sup>350</sup> C.T. Poggi, 'Electronic Commerce Legislation: An Analysis of European and American Approaches to Contract Formation', *Va. J. Int'l L.*, vol. 41, 2000, p. 224.

<sup>351</sup> I. Lloyd, *Information Technology Law*, London, Oxford University Press, 2017, p. 17.

online communications for entering into a contract are made through e-mail and the automated response generated finalises the contract. The response generated online is regarded as void for contract creation since it merely forms a response generated from machine that is programmed to generate a response when an order is placed. To date, courts have found it increasingly difficult to deal with issues of automated messages that form a characteristic feature of online purchasing. It has also been argued that automated messages have resulted from internet technology and are treated as legal agents. General rules can only be applied once the contract has been created and the acceptance has been received by the seller.

### **2.26.2 Automated Messages**

The majority of researchers have argued that a system of automated messages must exist in e-commerce. As argued by Glatt<sup>352</sup>, even the most sophisticated software is not able to take decisions on its own, but are operated as per the programming. The principal, therefore, remains responsible for using the software and is bound with the declarations made by software. The author has viewed single transactions as part of the established communication systems that serve the purpose of selling and purchasing. A counter-argument is provided by Nimmer,<sup>353</sup> according to whom electronic services are not provided to make contracts themselves, but to generate contracts on behalf of the owner. The issue of automated systems has been discussed in the Article of the EU Convention which applies that a response generated from an automated service is considered as valid, even though there is no intervention from the other party. The issue of validity has also been discussed in sections 14(1) and (2) of the Uniform Electronic Transaction.

It has been argued that an automated message does not represent acceptance<sup>354</sup>. The author has identified automated messages as one particular way of commencing fraud in e-commerce trade since they are vulnerable to cause ambiguities in mind of consumers. It is likely that users may interpret automated messages as a receipt that represents creation of a contract. If viewed from a logical aspect, the automated messages amount to creation of a

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<sup>352</sup> C. Glatt, 'Comparative Issues in the Formation of Electronic Contracts', *International Journal of Law and Information Technology*, vol. 6, no. 1, 1998, pp. 34-68.

<sup>353</sup> R.T. Nimmer, 'Electronic Contracting: Legal Issues', *J. Marshall J. Computer & Info. L.*, vol. 14, 1995, p. 211.

<sup>354</sup> T. Sandholm and V.R. Lesser, 'Issues in Automated Negotiation and Electronic Commerce: Extending the Contract Net Framework', *ICMAS*, vol. 95, 1995, pp. 12-14.

contract. According to Steven & Moore<sup>355</sup>, not all electronic agents contribute to formulate a contract, but these can be set up to receive an offer and largely depend upon the actions that the electronic agent performs. The case of Fleetpro<sup>356</sup> can be referred to here, in which liability was imposed for making an order to buy and sell cars at low prices; the court acknowledged a series of fraudulent misrepresentations against Renault. This case reveals that whenever an order is made in the system, all the subsequent steps followed are automated and cannot be imposed with liability since the actions are done by machine. When misrepresentation is evident, this gives rise to no contract being produced by an automated system.

The case of FTC v Hare<sup>357</sup> reveals how simply an internet-based scam can be made through accepting payments against services or goods and then refusing delivery to the consumer. Another conflicting situation which may occur is delivery of inferior items and entertaining no requests from consumers to exchange or refund the product. In the given case, the provider failed to deliver goods bought from an online auction. A similar case is of Cairo v CMS,<sup>358</sup> in which the contract was made through an automated system. It was held that Cairo was bound to oblige the terms since they knew all the terms when CMS sent them the letter. It can therefore be established that dealing with automated systems results in formulation of a contract on the internet. The question remains pertinent as to what legal considerations must be applied when there is an error in the price.

### **2.26.3 Electronic Communication**

This forms a critical issue which requires deliberate consideration. In online trade, contracts are made through electronic communication. It is important to investigate to what extent the contract is affected if there is a mistake in the questions asked to the consumer. Given that electronic communication has been increasing at such a significant pace, this reflects a number of advantages that electronic commerce offers as opposed to paperwork, particularly in respect of cost reduction and speed. The basic principle applied here is that an individual is bound to oblige what he/she has said verbally or in writing and may not make any excuse

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<sup>355</sup> S.O. Kimbrough and S.A. Moore, 'On Automated Message Processing in Electronic Commerce and Work Support Systems: Speech Act Theory and Expressive Felicity, *ACM Transactions on Information Systems*, vol. 5, no. 4, 1997, pp 321-367.

<sup>356</sup> Renault UK Ltd v Fleetpro Technical Services Ltd & Anor [2007] EWHC 2541 (QB).

<sup>357</sup> FTC v Hare. 5 CCH Trade Reg. Rep. 1 24.497 (M.D. Fla. 1998).

<sup>358</sup> Cairo, Inc. v. Crossmedia Services, Inc. No. C. 04-04825 JW, 2005 WL 756610.

regarding his/her mistake. Singleton<sup>359</sup> in the case of *Hartog v Colin & Shields*<sup>360</sup> established that no contract was formulated between the parties since the claimant knew that the price he received as an offer was actually a mistake. The claimant only intended to take advantage of the mistake. The case raised the question as whether a mistake becomes an operation when is known to the other party or whether it is enough that a reasonable man can easily interpret it as a mistake. As construed by Harris<sup>361</sup>, if the buyer knows that there is an error in pricing as he enters into the contract, then common law renders such contracts as void.

#### **2.26.4 Consumer Privacy**

Rodgers and Thorson<sup>362</sup> have highlighted consumer privacy as the greatest matter of concern that remains present in online marketing and advertising. Acquisition of consumer information to target a prospective group of consumers is a common practice for sellers in e-commerce to make their promotional campaigns successful. If viewed from the standpoint of consumers, collection of their personal information to formulate a better consumer targeting strategy can be interpreted as an infringement of their privacy that may adversely affect the users. This also forms a practice that causes suppliers to face negative attitudes from users. Marimoto & Macias<sup>363</sup> have identified four distinct areas that generally are considered in the context of privacy law: appropriation of likeness or name, intrusion of individual solitude, disclosure of private information, and provision of false information to the individual.

#### **2.27 Jurisdictional restrictions in Europe**

The principle of autonomy faces certain restrictions for consumers in Europe. However, the restrictions are applied in situations where a significant level of difference can be found between the parties in terms of the strength they have towards each other in negotiations. One important example that can be used to illustrate such a situation is when a product or a service

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<sup>359</sup> T. Etherton, 'Contract Formation and the Fog of Rectification', *Judiciary of England and Wales*, 2015, p.7. Available from: <https://www.judiciary.uk/wp-content/uploads/2015/04/contract-formation-and-the-fog-of-rectification-for-delivery.pdf> (accessed on 21 January 2019)

<sup>360</sup> *Hartog v Colin & Shields*, (1939) 3 All ER 566.

<sup>361</sup> J.W. Harris, 'Common Mistake in Contract', *The Modern Law Review*, vol. 32, no. 6, 1969, pp. 688-691.

<sup>362</sup> S. Rodgers and E. Thorson, (eds.), *Advertising Theory*, UK, Routledge, 2012, p. 111.

<sup>363</sup> M. Morimoto and W. Macias, 'A Conceptual Framework for Unsolicited Commercial E-mail: Perceived Intrusiveness and Privacy Concerns', *Journal of Internet Commerce*, vol. 8, no. 3-4, 2009, pp. 137-160.

is sold to the consumer, who is not able to make a refund or exchange if he/she is not satisfied with the product or the service. Therefore, consumers in Europe are only entitled to sue the vendor if they are domiciled, whereas the consumer is always able to bring claims against the vendor when both are domiciled in the same country<sup>364</sup>.

There have been arguments made in some cases regarding the geographical location from where the seller operates<sup>365</sup>. Location of the service reinforces questions regarding the website and is therefore used in jurisdictions. This, however, forms a naïve way of thinking. Bygrave & Svantesson<sup>366</sup> have argued that the location of servers does not really form a suitable criterion to determine jurisdictions. This is because the location of the server only provides limited information regarding the territory or the territories which the website covers in reality. It is also important to consider that consumers are mostly not aware of the physical location of the website from where they make purchases. If a server's geographical location is treated as a decisive order, vendors could easily avoid jurisdiction through seeking help other friendly states through simply placing their servers in states that offer only poorer regimens for the protection of consumers.

Powell<sup>367</sup> has highlighted certain particular steps that have been taken to promote uniformity and harmonisation of national rules for different states with private international laws. Adoption of multilateral treaties has proven to be the major facilitator in harmonising these laws and Europe remains the major area where harmonisation has reached its greatest extent. A number of treaties enforced in Europe contain rules that entail special provisions for consumer contracts while considering the position of consumers, which indeed remains weaker as compared to their vendors. The author indicates that prospective changes are on their way and are likely to be made by revising the treaties in order to reflect developments in the field of e-commerce. The lawmakers, however, have been facing conflicts regarding whether or not the rules should favour consumers and extend their powers in the online environment.

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<sup>364</sup> M. Foss, 'International Consumer Purchases Through the Internet: Jurisdictional Issues Pursuant to European Law', *International Journal of Law and Information Technology*, vol. 8, 2000, p. 99.

<sup>365</sup> *Compuserve, Inc v Patterson*, 89 F3d 1257, 6th Cir, 1996.

<sup>366</sup> LA. Bygrave and D. Svantesson, 'Jurisdictional Issues and Consumer Protection in Cyberspace: The View from 'Down Under'', *Conference on Cyberspace Regulation: eCommerce and Content*, Sydney, 2001, pp. 1-6.

<sup>367</sup> M.D. Powell and P.M. Turner-Kerr, 'Issues in E-Commerce - European Union', *Computer Law & Security Review*, vol. 2, no. 3, 2000, p. 16.

## 2.28 Antitrust Law and Consumer Protection

According to Averitt & Lande<sup>368</sup>, it is important that consumer sovereignty must oversee the contemporary free-market economy. The author defines consumer sovereignty as a set of social arrangements that cause the economy to generate an appropriate response to the aggregate signals of consumer demand rather than individual businesses' preferences or government directives. Instead, it must form a state of affairs which allow consumers to act like a true sovereign. Consumer sovereignty means that the consumer has the power to effectively communicate his desires and demands and has the opportunity to have them fulfilled at a reasonable price<sup>369</sup>. The concept of consumer sovereignty is wide-ranging and strives to find crucial assumptions that can be used to facilitate a proper relationship between the state and the consumer. Exercise of choice has been considered as the essence of consumer sovereignty. It corresponds to availability of different options which consumers may acquire to satisfy their own wants and desires. It is, therefore, fundamental to consumer protection.

The common purpose served by anti-trust and consumer protection laws is to facilitate sovereignty of the consumer or the consumer's choice. Two conditions are necessary for the existence of consumer sovereignty<sup>370</sup>. Firstly, a range of options must remain available to the consumer through competition and, secondly, the consumer must be given complete freedom to choose the most effective option for themselves. These two elements best provide the scope of the boundaries between consumer protection and antitrust; both of these elements are referred to as consumer sovereignty. The purpose of antitrust laws is to ensure that a level of competition remains present in the marketplace to make available a range of options for consumers. Some practices that impair availability of options for consumers include price-fixing and the anticompetitive mergers. Consumer protection law is, therefore, applied to provide consumers with significant space to make selections for themselves from the range of options available to them, whilst their important faculties remain unimpaired and secured from acts, such as deception, misrepresentation and violations. Protection of laws at both these levels is crucially required to ensure that the market economy continues to liberalise and operate in

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<sup>368</sup> N.W Averitt and R.H Lande, 'Consumer Sovereignty', p. 714.

<sup>369</sup> N.W Averitt, 'The Meaning of Unfair Acts or Practices in Section 5 of the Federal Trade Commission Act', *George ~Town Law Journal*, vol. 70.1981, pp. 71-77.

<sup>370</sup> *Ibid*, pp. 75.

an effective manner<sup>371</sup>. However, it is important to note that a practical approach is required to render legal protection for consumers, especially when the free markets are not working in an efficient manner. It is likely that various market failures may surface and give rise to issues related to consumer competition and protection.

Averitt<sup>372</sup> has supported development of a unified theory of consumer sovereignty since it would bring significant practical consequences. Firstly, it would provide simplified explanations regarding the creation of the Federal Trade Commission as to what responsibilities it bears regarding protection of consumers and issues arising in the ambit of antitrust laws. It has been deemed important to create awareness of the relationship incorporated in the two different halves of the FTC's statutory charter about identifying specific categories of cases. Moreover, development of a unified theory for antitrust laws and consumer protection would help to determine which transactions must be prosecuted on grounds of antitrust and not consumer protection.

## **2.29 Anti-Trust Competition and EU Law**

Consumer protection offered by virtue of the Unfair Trading Regulation 2008 remains one of the biggest changes to the consumer protection framework that has taken place in the last 40 years. It remains the main comprehensive framework that can viably be applied for tackling the traders and also for mitigating the loopholes present in the current legislation for consumer protection. The Regulation is based on the Unfair Commercial Practices Directive (2005/29/EC) that was enforced in 2005. The major aim of the directive was to harmonise the law for unfair trading across the EU states to bring functional improvements to the single market. It also aimed to introduce a single regulatory framework across the EU states to unify the application of laws applied for governing commercial practices. The Regulation prohibits traders from treating consumers in an unfair manner and makes engagement in unfair commercial practices a criminal offence.

Consumers are mostly not aware of antitrust laws, but if enforced effectively, these laws may help consumers save a substantial amount of money regarding the overcharges they pay. Antitrust laws are applied in the majority of states and are primarily directed to prohibit business practices that deprive consumers from acquiring the particular benefits of competition,

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<sup>371</sup> Averitt, 'The Meaning of Unfair Acts', p. 225.

<sup>372</sup> Ibid, pp. 225,

causing them to pay higher prices for inferior products and services. The legal regulatory environment of the EU is a complex one that is embedded with a number of ecosystems. Franchise specific laws are primarily applied that are interpreted as per the conventional meanings applied in relevant jurisdictions<sup>373</sup>. The main interpretations applied to analyse whether an online consumer has suffered through loss or damage include breach of contract, consumer protection, antitrust, commercial agency and restrictive covenants.

### **2.30 EU laws for Misleading Advertisements**

One major attempt taken by European legislators to protect consumers from unfair commercial practices and, in particular, misleading advertising, was Directive 2005/29/EC. This Directive includes precise details for the specific measures that must be carried out and is highly effective. It was introduced to facilitate effective functioning of the international market and also to achieve a higher level of consumer protection. Commercial practices refer to those that may promote, supply and sell products to consumers. Any act related to representation, course of conduct, omission, and commercial communication for marketing and advertising are referred as commercial practices. If such practices are conducted in a manner that is unacceptable for consumers, then unfair practices are said to be in place. The Directive is applied when a contract is made or rescinded. General prohibitions regarding commercial practices are contained in the Directive and, in particular, contain prohibitions that protect consumers from being a victim of misleading commercial practices. The Directive forbids providers to make use of misleading advertising or misleading actions that may cause consumers to reach a different decision that goes in favour of the suppliers and not really for themselves.

The Directive has set out a general critical for determining whether the practices conducted in the ambit of e-commerce are unfair and dishonest, which is strictly prohibited across the EU. Certain facts that contradict the practices for professional diligence involve those practices that involve material distortion from the provider which may disrupt behaviour of average consumers. Material distortion to the economic behaviour refers to commercial practices that impair the ability of consumers to make informed decisions, thus causing them

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<sup>373</sup> P.M. Abell, 'The Regulation of Franchising in the European Union', PhD Thesis, Queen Mary, University of London, 2011, p.122.

to make a decision which otherwise they would have not taken<sup>374</sup>. The EU member states must ensure that individuals or organisations whose legitimate interests are damaged through e-commerce transactions are able to file a lawsuit against misleading advertising and are represented by an administrative body which is able to rule on the complaints and or provide a basis for appropriate legal proceedings. When this is the case, courts in the UK and the EU are authorised to order the withdrawal of the misleading advertising or institute appropriate proceedings. Courts are also entitled to ban misleading advertising that is imminent and may bring proceedings to that end, even if there is no proof available for damage or actual loss of the intentional negligence from the advertiser.

The Directive has characterised unfair commercial practices in two main categories: misleading and aggressive practices. Aggressive practices refer to those that are likely to impair the freedom of choice or conduct for an average consumer regarding the concerned products through undue influence, coercion or harassment, causing the consumer to make a decision that otherwise would be highly unlikely for him to make. The Directive highlights four different practices that are considered to be unfair. The first one is black-listed products, which includes paralleling of similar products. This, for instance, includes promotion of products that mimic certain products that are already in the market from a particular manufacturer and deliberately mislead a consumer to believe that the product is not a copy, but a genuine one. The second category highlighted is of misleading actions and omissions. According to the provisions contained in the Directive, it is necessary that all that omissions or actions made in connection with the product must conform to the laws and practices exercised across the EU member states for misleading advertising. The Directive provides a differentiated overview for misleading actions and misleading omissions. A misleading action refers to making false statements, for instance, if a consumer is told that his/her electronic item cannot be repaired and he/she must buy a new one. Likewise, selling cell phones without mentioning that they have been reconditioned corresponds to withholding important information which must be communicated with the consumer prior to them making a purchase; this constitutes misleading information.

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<sup>374</sup> O. Bray, 'EU Sweep Interim Results: Misleading Advertising and Unfair Practices on Airline Ticket Selling Websites', *Computer and Telecommunications Law Review*, vol. 14, no. 7, 2008, p. 179.

According to Pagell and Helparin<sup>375</sup>, advertising in the majority of the EU host countries is regulated within their borders, but also includes advertisements that primarily originate outside the borders. The author has pointed to financial and accounting practices that form the foundational basis for the legal culture which is used to determine the directions in which the national regulations for advertisements can be regulated. Regulations for advertising in the UK and EU can be found in Civil law or Common law. On the other hand, other laws, such as Sharia law, considers humans more important than legal relationships.

According to Amin<sup>376</sup>, e-commerce trade is complicated in nature because of the distance-selling aspect, which gives rise to a number of challenges for consumer protection. One perennial problem that has been identified is the lack of adequate attention paid to legislative considerations of different countries. Despite the amendments made in 2007 in the Consumer Protection Act 1999 (CPA) protect the rights of consumers, it remains questionable as to how far the other pieces of legislation, including the Sale of Goods Act 1957, the Contracts Act 1950, the Electronic Commerce Act 2006, and the Anti-Pyramid Scheme Act 1993 have proven to be effective for e-consumer protection.

Social concerns for consumer protection have been increasing and so is the need to evaluate the development of laws to protect weak consumers who are not able to survive in the modern market economy. According to Oughton and Lowry<sup>377</sup>, the main justification which facilitates the need for additional protection is inequality in bargaining power. It is apparent that consumers acquire a weak bargaining position in contrast to the seller when the services and goods are provided online; consumers greatly suffer from a lack of resources and disparity of knowledge. Consumers require protection from all sorts of unfair trade practices, such as provision of substandard and defective goods and selling fraudulent products. Matters that largely prevail in e-commerce trade and put consumers in peril include: misleading indication prices, extra costs or higher shipping charges, false advertisements and false descriptions of products. E-consumers also strive to find relevant information to make their choices informed

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<sup>375</sup> R.A. Pagell and M. Halperin. *International Business Information: How to Find it, How to Use it*, Greenwood Publishing Group, 1998, p. 266.

<sup>376</sup> N. Amin, and R M. Nor, 'Online shopping in Malaysia: Legal Protection for E-consumers', *European Journal of Business and Management*, vol. 5, no. 24, 2013, p. 79.

<sup>377</sup> D. W. Oughton and J. Lowry, *Textbook on Consumer Law*, 2nd edn, 2000, p. 79.

and to reach a prudent buying decision. Laws for consumer protection must therefore, ensure fair trade competition through preventing sellers from fraudulent or unfair practices.

The sales of goods contracts can be of three types: commercial sales, consumer sales, and private sales. Commercial sales, referred as B2B, take place between a seller and a commercial buyer and are solely conducted for business purposes. A consumer sales contract (B2C) is between an individual consumer and a seller, where online purchases are made for domestic, personal or household purposes. Contracts of private sales are formed between two private individuals and form a C2C contract. The duty of good faith is applied to all of these contracts in England & Wales<sup>378</sup>, which have a common law system derived from legal statutes and judicial precedents. When there can be a general doctrine of good faith for commercial transactions found in the legal proceedings, the courts give effect to express legal obligations for good faith in contracts<sup>379</sup>. The case *Yam Seng v International Trade Corporation*<sup>380</sup> has contributed to widen the scope of agreements for recognition of implied duty of good faith.

### **2.31 Role of Social Media in Consumer Protection**

Crijins et al.<sup>381</sup> has highlighted the role of social media in empowering consumers to raise their voice. Though the legitimacy of social platforms has not been well-established regarding consumer's rights protection in e-commerce, they have proven to be highly supportive in letting consumers convey their viewpoints, arguments, suggestions and recommendations to respectable sellers and organisations. According to Heinonen<sup>382</sup>, the role that social media has played in generating awareness among online consumers regarding frauds and misrepresentation is worth considering. However, it still remains unclear how consumers should promptly convey their supportive and non-supportive feedback to organisations.

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<sup>378</sup> S. Ahmed, I. MacVay and King & Spalding International LLP, 'International Trade and Commercial Transactions in the UK (England & Wales): Overview' uk.practicallaw, 2017. Available from: <[http://International trade and commercial transactions in the UK \(England & Wales\): overview](http://International%20trade%20and%20commercial%20transactions%20in%20the%20UK%20(England%20&%20Wales):%20overview)> (accessed 21 January 2019).

<sup>379</sup> *Compass Group UK and Ireland Ltd (trading as Medirest) v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200).

<sup>380</sup> *Yam Seng v International Trade Corporation* [2013] EWHC 111 QB.

<sup>381</sup> C. Hannelore, V. Cauberghe, L. Hudders, and A.-S. Claeys. 'How to deal with Facebook Comments during a Product-harm Crisis? The Impact of a Personalized Organizational Response to Supportive Vs. Non-Supportive Comments of Consumers', 2015. Available from: <<http://hdl.handle.net/1854/LU-7061201>> (Accessed 21 January 2019).

<sup>382</sup> K. Heinonen, 'Consumer Activity in Social Media: Managerial Approaches to Consumers' Social Media Behavior', *Journal of Consumer Behaviour* vol. 10, no. 6, 2011, pp. 356-364.

Crijjins<sup>383</sup> conducted an experimental study to analyse the impacts of generic versus personalised organisational responses against non-supportive and supportive Facebook comments made by consumers. Results suggest that personalised organisational responses promote a perception that the organisation is pleased to serve the public; this has proven to be effective in reducing cynicism among consumers and builds a positive image of the organisation. This effect, however, only becomes prominent when companies adopt a personal approach to apply to the consumers when they receive non-supportive feedbacks. On the other hand, when a company replies personally to a supportive comment, this increases cynicism among consumers that detrimentally affects the reputation of an organisation.

One major dilemma that Earp<sup>384</sup> has identified related to social media is that most consumers only raise their voices on that platform and do not proceed to find a legal solution. This forms a common presumption that lawful remedies cannot be sought unless there is a huge loss suffered. For instance, if the product does not fulfil the expected criteria and does not fully meet its description, mostly non-supportive and abusive comments are made and consumers do not opt to find a legal coverage. Laudon<sup>385</sup> has argued that although there are legitimate means of seeking remedy, a culture of bringing a lawsuit against breach of trust or disappointment when purchasing is done online has not yet formed, especially in Eastern countries. Ambiguities exist and there have been insufficient studies to show the pathways for legal recovery of damages incurred in online trade.

Foxman and Kilcoyne<sup>386</sup> have defined privacy of consumer based on consumer data control and whether consumers are provided with information to exercise their due rights of privacy. The kind of contract formulated between the marketer and consumer based on personal information is termed as a social contract<sup>387</sup>. Breach of such a contract occurs when consumer information is disclosed to a third party without acquiring his/her permission or consent or when consumers are not given any opportunity to limit online dissemination of their

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<sup>383</sup> Ibid, pp.359.

<sup>384</sup> J.B. Earp, and D Baumer, 'Innovative Web Use to Learn About Consumer Behavior and Online Privacy', *Communications of the ACM*, vol. 46, no. 4, 2003, pp. 81-83.

<sup>385</sup> K.C. Laudon, and C. Guercio Traver. *E-commerce*, Pearson, 2013, p. 79.

<sup>386</sup> E. R. Foxman, and P. Kilcoyne, 'Information Technology, Marketing Practice, and Consumer Privacy: Ethical Issues', *Journal of Public Policy & Marketing* vol. 10,1993, pp. 106-119.

<sup>387</sup> T.W. Dunfee, N. Craig Smith, and W. T. Ross Jr. 'Social Contracts and Marketing Ethics', *The Journal of Marketing*, 1999, pp. 14-32.

information<sup>388</sup>. As identified by Phelps et.al<sup>389</sup>, consumers prefer to have control over the types of commercial solicitations and when and where their personal information is used by marketers. Regarding the idea of information control for consumers, the online privacy policies for consumers have been created to ensure their activities remain secure<sup>390</sup>. The author favours availability of control for consumers over marketers and interaction with advertisements on digital platforms.

## 2.32 Conclusion

This chapter has provided in-depth insights into the information provided in chapter 1 and enables the reader understand the various aspects that are fundamental to this thesis. Though the UK is not the focus of the study, it has been described precisely as a reference to laws in EU countries, since they both are very similar. To meet the learning objectives, it was necessary to define the functional context of both the Sharia and the EU laws. This chapter discussed significant literature on the various themes useful to understand the role that the Sharia law and the EU laws play in protecting rights of online consumers and the core concepts they incorporate within to lead the objective. It has discussed the basis of trade in Sharia and the EU and the way they are different to each other. This chapter defines the legal position of the consumers in both the jurisdiction and the rights that consumers secure in the Islamic and the European countries to gain protection. It has discussed the business ethics in light of Sharia law and the extent of which it is similar to the EU laws. The chapter provided an overview of the active structures that promote consumer protection in the EU laws. Different principles with reference to some important cases have been discussed to exemplify the place of consumers and the rights they reserve for creation of online contracts, fraudulence, breach of contract, or deceit. The chapter has also discussed certain ideas that do not directly link to consumer protection, but have a role in raising literacy and awareness among consumers i.e. the role of social media.

Both the EU and Islamic countries have their own laws, policies, regulations and terminologies; they are diverse and differ in the factors which they treat as priorities for

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<sup>388</sup> R.O. Mason, and M. J. Culnan, '*Ethics of Information Management*', 1995, P. 20.

<sup>389</sup> J. Phelps, G. Nowak, and E. Ferrell, 'Privacy Concerns and Consumer Willingness to Provide Personal Information', *Journal of Public Policy & Marketing*, vol. 19, no. 1, 2000, pp. 27-41.

<sup>390</sup> M. Morimoto, and W. Macias, 'A Conceptual Framework for Unsolicited Commercial E-Mail: Perceived Intrusiveness and Privacy Concerns', *Journal of Internet Commerce*, vol. 8, nos. 3-4, 2009, pp. 137-160.

consumer protection. The ideas of consumer protection are present in both of these jurisdictions. Chapter 3 will explain how far they have developed and what still needs to be done. Based on this review, it can be stated that consumer protection in both these jurisdictions is regulated based on contract formation, the information provided, and the implicit and explicit terms included in the contract.

## **CHAPTER THREE: COMPARISON OF RELEVANT ISSUES**

This chapter provides a comparison of relevant issues regarding e-consumer protection within EU and Islamic countries. It aims to provide a particular benchmark that can be applied to judge whether reforms are necessary or not, and if they are, then to what extent. The results will be compiled into different themes after conducting a comparative review; these themes will explore beyond the mere similarities and differences between the EU and Sharia laws and will discover why a reform is necessary. The chapter has been divided into two major parts: the similarities and differences, which are further elaborated with subheadings. As discussed in previous chapters, a comparison is needed in order to suggest the reforms that EU and the Sharia laws must undergo; what needs to be achieved for consumer protection and what has already been achieved. Since not every aspect of consumer law can be considered, the chapter will focus on some particular areas.

### **3.1 Similarities between EU and the Sharia Laws**

#### **3.1.1 Legal Process and Remedies for Consumer Protection**

It is well-established that production of counterfeit products must be prevented and not disseminated over the internet<sup>391</sup>. Two remedies can be found for this in Sharia and the EU law: civil and criminal remedies. The former are provided as compensation, whereas the latter are further divided into principle penalties (punishment and financial sanctions) and accessory penalties, including precautionary measures and revocation of trade.

##### **3.1.1.1 Civil Remedies**

This remedy is available for e-consumers in both EU and the Islamic countries where they can make a legal claim in court if they have faced any misrepresentation, fraud, counterfeit products or loss of money. This remedy aims to relieve the damage caused to the innocent party through paying him sufficient compensation equivalent to the loss or damage suffered. Sharia Law states that the defendant is not required to prove his intentions to cause loss. Rather, the compensation is provided against infringement of the consumer protection laws, even if the defendant is able to prove that he was not aware that such an action may breach consumer

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<sup>391</sup> A. AlGhafri, 'The Inadequacy of Consumer Protection In The UAE: The Need for Reform', PhD Thesis, University of Bedfordshire, Brunel University, 2013, p. 58.

protection regulations<sup>392 393</sup>. At this point, both Islamic and the EU legislations are concerned with the causation of actual damages; compensation becomes indispensable when the loss or damage is caused due to the defendant's actions. Civil remedies are always applied in Sharia and the EU law when consumer protection rights are infringed<sup>394</sup>. Wrongful acts must be proven; this is mainly done through considering the formulation of the contract, fairness and intentions of the parties, nature of the goods (counterfeited/flawed), and the way terms and conditions are articulated<sup>395</sup>. The basic rule followed in both jurisdictions is that if a buyer suffers through any loss due to the e-consumer trade, then he must be compensated or relieved accordingly. The three major elements required for civil claims include a wrongful act, false product description, and sale of counterfeit products and goods<sup>396</sup>.

Consumer protection law in the EU specifies civil remedies to enable sellers to show a general compliance to fair dealing. Various general and miscellaneous provisions provided in the Consumer Rights Act (2015) relate to the consolidation of legal enforcement and regulation to empower customers to seek for remedies and redress through civil proceedings if the seller breaches consumer law<sup>397</sup>. Rules for reforms further expand the scope of civil law enforcement, making it easier for consumers to challenge anti-competitive behaviours<sup>398</sup>.

In order to obtain civil remedies, it is required that the plaintiff must prove that he/she has suffered a loss because of a connection between the wrongful act and the damage suffered<sup>399</sup>. The basic rule followed is that the seller is found liable for causing damage to the consumer. In Sharia law, awarding civil damages are based on three elements<sup>400</sup>. Firstly, there must be a wrongful act; this refers to a false description, sale of counterfeit products, or provision of defective services and products. The second element is of damage and that is

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<sup>392</sup> A. Maita, 'Development of a Commercial Arbitration 'Hub in the Middle East: Case Study--the State of Qatar', 2013 p. 23.

<sup>393</sup> The UAE Civil Transactions Law 1985/5, s282.

<sup>394</sup> R. Price, and E. Al Tamimi, *United Arab Emirates Court of Cassation Judgements: 1998-2003* Vol. 27, Brill, 2005, p. 2.

<sup>395</sup> The UAE Civil Transactions Law 1985/5, s124, 282-298.

<sup>396</sup> R.J. Abisaab, 'Lebanese Shi`ites and the Marja`iyya: Polemic in the Late Twentieth Century', *British Journal of Middle Eastern Studies*, vol. 36, 2009, p. 215-239.

<sup>397</sup> Consumer Rights Act 2015, s77-80, and Schedules 5-7.

<sup>398</sup> Consumer Rights Act 2015, s81-82 and Schedule 8.

<sup>399</sup> The UAE Civil Transactions Law 1985/5, s124, 282-298.

<sup>400</sup> R. Peters, *Crime and punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century*, Cambridge University Press, 2005, p. 59.

generally assessed in terms of the loss that the plaintiff suffers through loss of material and money; it remains obligatory to prove that the loss directly results from a wrongful act. This aspect of Sharia Law can be better understood in Article 283 of the UAE Civil Transactions Law, which states that a direct harm can unconditionally be made good, but if it is consequential, then this indicates the presence of a deliberate element that has led to damage. Following the latter provision, the Dubai Court of Cassation states that it can distinguish between the amount payable for the direct loss and the consequential loss. Stronger elements of negligence are required for consequential loss and the buyer must prove that the online deal was underpinned by a malicious element<sup>401</sup>.

The third element that must necessarily be proven is the relationship between the wrongful act committed by the seller and damage suffered by the buyer; there must be a direct and clear connection to the damage suffered by the plaintiff, irrespective of whether the act constitutes a breach of contract or a crime<sup>402</sup>. It is important to note that tort damages are established when legal obligations are violated and cause the other party to suffer a loss. On the other hand, claims for contractual damages are brought when one party breaches the contractual obligations; for instance, refusal to accept the return after the specified date or failing to conform to the agreed contract.

### **3.1.1.2 Criminal Sanctions**

Two major sorts of penalties that the buyer may pursue against the seller are specified in Sharia law (referring to the UAE regulations). Cartwright<sup>403</sup> has examined the nature of criminal law doctrines in contrast to those in civil law for consumer protection. Though civil law plays an important role in protecting consumers, it suffers from various limitations that call for some strict measures. EU law focuses on criminal sanctions and primarily applies them for protecting the rights of consumers. It continues to develop new offences to respond regularly to the newer problems faced by consumers by virtue of electronic transactions. Criminal law initially deals with the course of conduct and then considers the major punishment theories to achieve a suitable one for the defendant. Criminal law principles in Islamic countries consider

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<sup>401</sup> A.Y. Rahhal, 'Entitlement to Extension of Time in Cases of Concurrent Delays under the UAE Law' PhD Thesis, The British University in Dubai (BUiD), 2013, p. 14.

<sup>402</sup> The UAE Civil Transactions Law 1985/5, s282.

<sup>403</sup> P. Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK*, Cambridge University Press, 2001, p. 63.

actua reus, but fail to determine provisions that may include omission of acts based on infringements by the offender. For instance, if the distributor omits important information regarding the service or goods, then the act remains silent even though consumer protection rights<sup>404</sup> are infringed.

The second important element is of Mens Rea, that is the presence of a moral or criminal intent. It has been defined as the intentions/will of the buyer to omit or commit an act that legally constitutes a crime<sup>405</sup>. Such intentions must provide direct effects on the law and establish contrary to the expectation of customers<sup>406</sup>. The existence of criminal intent, however, is necessary to establish that consumer protection rights have been infringed<sup>407</sup>. The author has identified the need to make amendments to Sharia Laws to reduce mens rea in consumer protection, since it has been weakening the position of e-consumers with an excessive burden of proof. It has been argued that criminal intent must not necessarily be proven, since it already exists when an act of infringement occurs.

EC Directive Regulations (2002)<sup>408</sup> and the EU's Electronic Commerce Directive (2000) also specify criminal sanctions and exceptions for e-consumer protection<sup>409</sup>. The law states that conformity with the regulations help to defend the seller from criminal prosecution; the seller must not make any changes to the deal and must provide the buyer with the expected product. If the deal is done through a transmission of network communication, for instance through email or ISP transmission, then the seller cannot be held liable for any criminal sanctions or pecuniary remedy if he did not initiate the transmission, did not select the transmission's receiver and did not make any modification to the information transferred.

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<sup>404</sup> E. Ibrahim, N. Noor, and S. Mehad, 'Fact or Fiction? Imposing Legitimacy for Trustworthy Information on the Web: A Qualitative Inquiry', *International Conference on Enterprise Information Systems*, Berlin, Heidelberg, Springer, 2008, p. 297; J. Filipe, J. Cordeiro J, 'Enterprise Information Systems, 10th International Conference, ICEIS 2008', *Lecture Notes in Business Information Processing*, vol 19. Springer, Berlin.

<sup>405</sup> UAE Penal Code.

<sup>406</sup> The UAE Penal Code 1987/3, s38.

<sup>407</sup> G. Rabah, *Qanon Hemaiyat Al-Mustahlik Al-Jadeed*, 2nd edition, Manshorat Zain, 2011, pp. 67-69.

<sup>408</sup> Directive Regulations 2002/EC, s21

<sup>409</sup> Out-Law.com, *The UK's E-Commerce Regulations*, 2013, Available from: <<https://www.out-law.com/page-431>> (accessed 22 January 2019).

### 3.1.2 The Principle of Mutual Consent

Both EU and Sharia Laws treat mutual consent as an essential requirement for enforcing a contract; this condition applies to e-consumer protection in both EU and Sharia Laws. The general test of mutual consent is applied whenever there is a question of enforceability. This forms the most common yet simplest principle in both the jurisdictions and forms a common law requirement. A review of the case *Tinn v Hoffman*<sup>410</sup> declares that communication of both the offer and acceptance form a necessary common law element. It was ruled that identical cross offers cannot lead to the creation of a contract. Although there may be a meeting of minds apparent from the offeror and the offeree in cases of cross-offers, it is an essential requirement that one party must communicate the offer with the other followed by a communication of acceptance from the other party. As provided in the case *Deutsche Genossenschaftsbank v. Burnhope*<sup>411</sup>, the element that gives validity to the contract is the intention of the parties, which is determined through the expressions made and not the actual intention that is in mind of the either of the parties. The case *Hart v Mills*<sup>412</sup> established that the contract has nothing to do with the individual intent of parties, but rather that performance of certain acts and words may be interpreted as the intent.

It is important to consider here the remedies available to consumers if an error occurs. Since consent in the online environment is through clicking on a particular icon, it is necessary to consider the situation where a consumer accidentally clicks on the icon causing the deal to be finalised. Apparently, he has shown his consent, but actually he did not. The question arises as to whether an online contract with a consent based on a mistake is legally valid or not if the consumer is able to rescind it<sup>413</sup>. Systematically, both the right of withdrawal and right of correction are present to consumers, but only if the provider allows. Here arises a situation where an electronic provider may exploit a consumer. This provides fraudulent providers with a chance to exploit consumers, whereas the honest providers offer consumers a choice to

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<sup>410</sup> *Tinn v Hoffman & Co.* [1873] 29 LT 271.

<sup>411</sup> *Deutsche Genossenschaftsbank v. Burnhope* [1996] 1 Lloyd's Rep. 113, 122.

<sup>412</sup> *Hart v. Mills* [1846] 153 E.R. 771.

<sup>413</sup> J.D. Gregory and J. Remsu, 'Error in electronic communication' in AH Boss and W Kilian (eds.) *United Nations Convention on the Use of Electronic Communications in International Contracts*, Kluwer Law International, 2008, p 23.

withdraw the deal or make a correction<sup>414</sup>. This issue is closely linked to mutual consent and sets out a situation that is potentially problematic and requires clearer legal guidelines in both EU and Sharia Laws.

Developments in EU law are recognisable and view the right of withdrawal as fundamental. Without strict rules, it is very difficult for consumers to withdraw from a contract or return an item. The EU Distance Selling Directive (97/7) is worth noting here as it provides a period of seven working days for the consumer to return the item; this is termed a cooling-off period<sup>415</sup>. The duration provided by the Directive on Consumer Rights (2014) is extended and comprises 14 days. It is notable that the majority of Islamic countries, especially in the Gulf States, do not include anything comparable.

### 3.1.2.1 Mutual Consent under the Sharia Law

A review of traditional Sharia resources suggests that Muslim jurists have not created general theories for contracts<sup>416 417</sup>. Rather, specific rules have been put in place that individualise the treatment of each contract. This leads to the conclusion that there is no theory of contract in the existing legal system<sup>418</sup>. This also suggests similarities between Sharia and Roman law since both formulate the ‘law of contracts’ and not the ‘law of contract’<sup>419</sup>. Muslim jurists have so far adopted a classical viewpoint for discussing and interpreting contracts that do not distinguish between the commercial and the civil transactions. Each of the contracts has been classified into classes and is controlled by distinctive rules accordingly. The contract of sales has been regarded as the model for other contracts<sup>420</sup>.

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<sup>414</sup> A. Abdulrahman, ‘An Evaluation of E-commerce Legislation in GCC States: Lessons and Principles from the International Best Practices (EU, UK, UNCITRAL)’, PhD Thesis, Lancaster University, 2016, p. 180.

<sup>415</sup> Ibid, p. 274.

<sup>416</sup> E.J. Powell, and S. McLaughlin Mitchell, ‘The International Court of Justice and the World's Three Legal Systems’ *Journal of Politics*, vol. 69, 2007, pp.397-415.

<sup>417</sup> S. Azhar Rosly, ‘Shariah Parameters Reconsidered’, *International Journal of Islamic and Middle Eastern Finance and Management*, vol. 3, 2010, pp. 132-146.

<sup>418</sup> J. Hermida, ‘Convergence of Civil Law and Common Law Contracts in the Space Field’, *Hong Kong LJ*, vol. 34, 2004, p. 339.

<sup>419</sup> Coulson, *Commercial Law in the Gulf States*, p. 17.

<sup>420</sup> Ibid, pp.17.

Under Sharia laws, no particular formality is required for parties to enter into contracts. Similarly, there is no order that parties need to follow to make a contract legally enforceable<sup>421</sup>. Mutual consent forms the main pillar of contract formation in Sharia Law<sup>422</sup>. In order to form a valid contract, there must be mutual consent from both the parties. A Holy verse from Quran<sup>423</sup> specifies that all trade must take place based on mutual goodwill. Sayings from the Prophet further validate this by stating that a sale is complete when the two parties depart after mutually consenting to form a contract.

Intentions, under Sharia law, must be manifested in an objective manner to make it possible for individuals to offer and subsequently accept a contract. Intention forms an internal matter according to Muslim jurists; they suggest that the intention of an individual cannot be legally recognised unless is manifested objectively. This is established through the presence of an offer and subsequent acceptance of this offer. The rule of offer and acceptance is applied in Sharia Law in the same way as it is applied in EU law. Both of these jurisdictions have viewed these elements as the only subjective ways of considering the intentions of the contracting parties. Similar to common law followed in the UK and the EU, Sharia Law also decrees that expressions made by the parties are applied to interpreting the contracts<sup>424</sup>.

It is clear that objective manifestations of intentions and the assent of the contracting parties are given importance and yet subjective mental facts<sup>425</sup> also play a role. If parties have not communicated their willingness, then they cannot claim to be in a contract. In order to form a contract, communication between the parties must be legally approved. Sharia Laws only recognise communications that are expressly stated by a person showing a deliberate capacity to complete the contract. The term 'legal capacity' refers to the minimum mental capacity that Sharia Law requires to enter into contractual relations<sup>426</sup>; for instance, minors are not regarded as being able to make contracts.

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<sup>421</sup> Al-Zarqa, *Al-Fqh al-Aslami fy Thwbh al-jdyd, al-Mdkhl al-Anzryh al-Altzam al-amh fy al-Fqhal-Aslami*, Damascus, Dar Alqalem, 2004, p. 421 (In Arabic)

<sup>422</sup> M.A. Hamid, 'Mutual Assent in the Formation of Contracts in Islamic Law', *Journal of Islamic and Comparative Law*, vol. 7, 1977, p. 42.

<sup>423</sup> *The Holy Qur'an* (Qur'an 4: 24) Surah 4, Al-Nessa.

<sup>424</sup> B. Alalayli, '*Alnt'ryh Alamh llogwd fy Alfgh Ala'slami*' Riyadh, Dar Alshwaf 2005, p. 191 (In Arabic).

<sup>425</sup> E. Farnsworth, *Farnsworth on contracts*, Vol. 2, Aspen Publishers, 2003, p. 116.

<sup>426</sup> *Ibid*, pp. 116.

A contract formed through electronic means or by electronic agents is legally correct and binding under Sharia Law and the absence of human-led interventions in the contractual process does not affect the legality of the contract. The presumption applied here is that automated programmes work automatically and autonomously. Sharia Law treats electronic agents as mere tools used for transmitting contractual relations. The communication taking place is autonomous, whether sent through an electronic agent or generated automatically. Actions made by electronic agents are considered unfair if they are not made with the acknowledgement of the operator since they do not fulfil the principle of mutual consent<sup>427</sup>. Considering the significance of mutual consent, it is evident that contracts made under duress, in a drunken state and as a joke are not legally enforceable. There is no reason to consider an online sales contract, if the element of mutual consent is missing<sup>428</sup>.

### **3.1.2.2 Mutual Consent under UK/EU Laws**

Laws in the UK and the EU also seek mutual consent as an important element for determining the enforceability of a contract. This right is provided to enable consumers to feel confident and safe. All contracts formed for online selling aim to protect the consent of consumers. For instance, they are provided with the right to negotiate and terminate the contract if they find it defective. However, if the product is not defective, then the parties are not allowed to cancel the contract, except for a legal cause or mutual consent<sup>429</sup>.

An electronic contract, whether civil or commercial, is formed by the consent of the parties. Consent, according to the above-mentioned article 1262, will be manifested by the tender of the offer and acceptance, as well as the cause of the contract<sup>430</sup>. The contract is formed, therefore, through the concurrence of wills and from that moment the contract exists. In order for the offer and acceptance to be electronic, both must be affected by electronic devices. The offer must be made through electronic means and consists of a declaration of will issued by these means by one person and addressed to another, proposing the conclusion of a particular contract. Acceptance shall be by the same means, that is by a declaration of will

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<sup>427</sup> E. Farnsworth and T. Garvin, *Farnsworth on contracts*, Vol. 1, Boston: Little, Brown, 1990, pp. 116.

<sup>428</sup> Almgrby, *MwAhb Aljlyl*, 4th ed. Beirut: Dar a'alm Alktb, 2003, p. 245 (In Arabic).

<sup>429</sup> E.M. Caudill, and P.E. Murphy, 'Consumer Online Privacy: Legal and Ethical Issues' *Journal of Public Policy & Marketing*, vol. 19, 2000, pp. 7-19.

<sup>430</sup> V.M. Correa, 'A Comparative Study of the Spanish and American Law on Breach of Promise to Marry' *Phil. LJ* 15, 1935, p. 291.

issued by the recipient of the electronic form and their acceptance of the offer. In this way, both offer and acceptance occur by electronic means<sup>431</sup>. This is established by the Law on the information society and electronic commerce of 2002 in its article 28.2. In both civil<sup>432</sup> and commercial law<sup>433</sup>, a contract is formed by the consent of the contractors; that is, by the concurrence of supply and acceptance of the object and cause that constitutes the contract. However, these precepts have not the same position when it was considered perfected the contract.

### 3.1.3 Rights to Contractual Information

Rights to information forms an essential component in both Islamic and EU consumer policies and is also important for assuring e-consumer protection<sup>434</sup>. EU law particularly emphasises the knowledge of consumers' rights, including awareness regarding unfair terms in the contract, unfair commercial practices, rights to distance purchasing and guarantee rights<sup>435</sup>. In EU law, it is supported with clarity of information, whereas in Sharia law, the concept of Gharar is applied. Gharar refers to any uncertainty, ambiguity or speculation and is strictly prohibited. Under this prohibition, any transaction made must be free from uncertainty, ambiguity or speculation. The contracting parties must be fully aware of the consideration to be exchanged as a result of the transaction. In addition, the parties should not predetermine a guaranteed gain. This is based on the principle of "uncertain gain" which, strictly interpreted, does not even allow a commitment on the part of the customer to return the principal borrowed with an additional amount on account of inflation. The basis of this prohibition is the desire to protect the weak from exploitation. Therefore, futures and options are considered anti-Islamic, as well as currency exchange operations, since prices are determined by interest differentials.

This principle forms a regulatory tool for developing EC measures and affects the economic interests of consumers in both EU and Sharia law. Both of these laws recognise the

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<sup>431</sup> L-D. Chen, and J. Tan, 'Technology Adaptation in E-commerce: Key Determinants of Virtual Stores Acceptance', *European Management Journal*, vol. 22, 2004, pp. 74-86.

<sup>432</sup> Article 1262.2 Civil Code-repealed version.

<sup>433</sup> Article 52 of the Commercial Code.

<sup>434</sup> G. Howells, and T. Wilhelmsson, 'EC Consumer Law-Has it Come of Age?', *European Law Review* vol. 4, 2003, pp. 370-372.

<sup>435</sup> M. Nardo et al., 'The Consumer Empowerment Index' *Ec.europa.eu*, 2011, Available from: <[http://ec.europa.eu/consumers/consumer\\_empowerment/docs/JRC\\_report\\_consumer\\_empowerment\\_en.pdf](http://ec.europa.eu/consumers/consumer_empowerment/docs/JRC_report_consumer_empowerment_en.pdf)> (accessed 19 January 2019).

advantages of regulatory methods<sup>436</sup>. According to Stuyck<sup>437</sup>, the transfer of clear and complete information undoubtedly forms the most fundamental right of consumers. In light of this, it can be stated that obligations regarding the transfer of information dominates consumer law in the EU member states, the UK and Sharia laws, irrespective of the striking differences in Sharia and EU jurisdictions in terms of their origin and implications.

The CJEU has also verified the significance of the information exchange for online transactions. The CJEU identifies various overlaps in the EU Directives including the ECD, the DSD and the CPUCL in terms of the ECCC<sup>438</sup>. The major reason why information obligations are given fundamental importance is to provide consumers with the ability to make informed decisions; they have a reasonable basis on which to conclude the contract<sup>439</sup>. This places consumers in a position where they are able to decide whether they should enter into a contract or not. Developments in ICT, however, have given rise to a number of requirements and challenges related to consumer protection policy<sup>440</sup>. The digital single market strategy has been introduced to mitigate the barriers that EU consumers face while using online tools and services, while it also aims to broaden the scope of opportunities available to them. This will enable consumers to perform legally, securely and conveniently<sup>441</sup>. This causes the EU Consumer Policy Strategy 2007-2013 to redefine its focus on consumer empowerment and provide them with, inter alia, real choices and correct information<sup>442</sup>.

Scholes<sup>443</sup> has highlighted the reasons behind the development of information obligations and, for instance, the significance of integrating consumer protection with the EC Treaty. The author argues that technical developments have made it increasingly difficult for customers to examine the possible impacts of services and goods they buy online. It can be stated that the

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<sup>436</sup> K E. Sørensen, 'Disclosure in EU Corporate Governance—A Remedy in Need of Adjustment?' *European Business Organization Law Review (EBOR)* vol. 10, 2009, pp. 255-256.

<sup>437</sup> Stuyck, 'European Consumer Law after the Treaty of Amsterdam', p. 367.

<sup>438</sup> Z. Vernadaki, 'Consumer Protection and the Reform of the European Consumer Acquis', *International Company and Commercial Law Review*, vol. 9, 2010, p. 316.

<sup>439</sup> *Ibid* p. 319.

<sup>440</sup> M. Donnelly, and F. White, 'The Effect of Information Based Consumer Protection: Lessons from a Study of the Irish Online Market', 2008, p. 27.

<sup>441</sup> European Commission, 'Digital Single Market' *European Commission*, 2017. Available from: <[https://ec.europa.eu/commission/priorities/digital-single-market\\_en](https://ec.europa.eu/commission/priorities/digital-single-market_en)> (accessed 22 January 2019).

<sup>442</sup> Vernadaki, p. 316-321.

<sup>443</sup> A. Nordhausen Scholes, 'Information requirements', *Modernising and Harmonising Consumer Contract Law*, Berlin: Sellier, 2009, p. 213.

information obligations have been developed to support the contracts and pre-determination of the consumer rights they owe by virtue of e-contracts<sup>444</sup>. In contrast, the EU approach has been criticised based on two grounds. Firstly, it allows even the most educated consumers to interpret information that suits their prejudices. This restricts their ability to respond rationally to the information provided<sup>445</sup>. This implies that consumers only consider information that supports their desired decision. Indeed, the sellers have good ways of manipulating customers and exploiting their weaknesses to induce them enter into online transactions.

Howells<sup>446</sup> further suggests that the EU Directives impose extensive information requirements, but only pay little attention towards the impacts. For instance, the DSD requires that consumers must be provided with a long list of information, since member states are allowed to add any additional information that suits their particular situations in the market. The author argues that the EU Directives are mostly focused on information provision and not the relevancy of information. Ramsay has also asserted that the principle of adequacy must be followed for providing information to the customers<sup>447</sup>.

Contractual information requirements are very limited in Sharia Law<sup>448</sup>. The five particular areas that apply to information requirements in Sharia Laws include information for consumer rights, insufficient information, information related to products, identity of sellers, and the technical steps that lead to finalise the transactions. There are significant ambiguities in terms of the provision of sufficient information regarding the identity of the sellers, which greatly undermines consumer protection in Sharia law<sup>449</sup>.

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<sup>444</sup> G. Howells, 'Information and Product Liability A Game of Russian Roulette?' in G. Howells, A. Janssen, R. Schulze (eds.), *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness*, Hants, Ashgate, pp. 155-170.

<sup>445</sup> G. Howells, 'The Potential and Limits of Consumer Empowerment by Information' *Journal of Law and Society*, vol. 32, 2003, p. 349, 359.

<sup>446</sup> Ibid 365.

<sup>447</sup> I. Ramsay, 'Consumer Law, Regulatory Capitalism and the New Learning in Regulation' *Sydney L. Rev.*, vol. 28, 2006, p. 9.

<sup>448</sup> V. Sundararajan, and L. Errico, Islamic financial institutions and products in the global financial system: Key issues in risk management and challenges ahead Vol. 2, International Monetary Fund, 2002 p. 54.

<sup>449</sup> A. Umar Faruq Ahmad, and M. Kabir Hassan, 'Legal and regulatory issues of Islamic finance in Australia' *International Journal of Islamic and Middle Eastern Finance and Management*, 2009, pp. 305-322.

### 3.1.4 Consumer Rights for Damaged Products

Customers are provided with certain rights if the products received are damaged or spoiled. According to EU law, the seller is responsible for any damages caused to the products from the moment they are dispatched to when they are received<sup>450</sup>. If the purchase is made in the EU and is defective or contrary to what was advertised, then the customer has the right to request a repair or exchange. The customer is also liable to receive a refund<sup>451</sup> if neither of these options is possible<sup>452</sup>; the same applies in Sharia Law. Similarly, if the delivery of the products is not made by the specified date, then the customer must notify the seller regarding the extra delivery time. For instance, if the seller informs the customer that the delivery is likely to be delayed due to issues with suppliers, then it is favourable for the customer to provide the seller with another chance to resolve the issues. However, if the seller again fails to deliver products within the agreed period of time, then the customer has the right to terminate the contract and get a refund. If the seller refuses to deliver a product by the specified date and when it is necessary to follow the specific date, then the customer may terminate the contract without giving the seller a chance to address the issue<sup>453</sup>; an example of this point is the delivery of a wedding dress bought online, since the elapse of the deadline is linked with the event. Likewise, if a particular product is ordered for Christmas and the seller fails to deliver the product, even after the end of the Christmas holidays, the customer is entitled to a refund<sup>454</sup>.

### 3.1.5 Warranties and Returns

Arvinder<sup>455</sup> has identified warranties and returns as the fundamental principle for online transactions in all jurisdictions including Sharia and UK/EU laws. Online commerce and trade cannot be pursued or termed as fair unless consumers are supported with returns and warranties. According to EU and Sharia regulations, sellers must repair, replace, make a discount or refund

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<sup>450</sup> Z. Osman, and M. Hartini, pp. 280-293.

<sup>451</sup> EU Consumer Rights Directive, 2008, s5.

<sup>452</sup> O. Ben-Shahar, and E.A. Posner, 'The Right to Withdraw in Contract Law' *The Journal of Legal Studies* vol. 40, 2011, pp. 115-148.

<sup>453</sup> C.S. Tang, 'Making Products Safe: Process and Challenges' *International Commerce Review* vol. 1, 2008, pp. 48-55.

<sup>454</sup> EU Consumer Rights Directive, 2008.

<sup>455</sup> A.P.S. Loomba, 'Evolution of Product Warranty: A Chronological Study' *Journal of Management History*, vol. 4 1998, pp. 124-125.

the amount paid if the product bought is defective or does not work as advertised<sup>456</sup>. If a product or service is purchased online or outside a commercial establishment (by telephone, mail or a home-seller), then the customer has the right to cancel and return the order within 14 days; this applies for any reason and without justification. Certain specific conditions exist to claim guarantees and return the goods<sup>457</sup>.

### **3.1.6 Warranties for Defective Products**

A two years legal warranty accompanies all products. According to the EU regulations<sup>458</sup>, customers are always entitled to a minimum guarantee of two years at no cost, regardless of whether they have purchased the product online, in a commercial establishment or by mail. This two-year warranty is a minimum right under EU law; it is possible that the national laws of the customers' country offer more protection. However, any difference with respect to EU standards should always favour the consumer. If the customer, anywhere in the EU or the Islamic world, finds a product defective or contrary to what was advertised, then it is obligatory for the seller to repair or replace it for free, or offer a discount or refund the full amount paid<sup>459</sup>. According to this general rule, the customer can only request a full or partial refund if it is not possible to repair or replace the product<sup>460</sup>.

### **3.1.7 Replacement, repair or refund of a product**

This aspect of consumer protection is exercised in both EU Sharia laws. However, the time-limits mentioned may vary across different Islamic states; provided is only valid for the EU. The two-year guarantee period starts from the date of receipt of the product<sup>461</sup>. In some EU countries the customer must report the defect to the seller within two months of the time it was discovered; otherwise he/she may lose the warranty. In the first six months after receiving the product, the customer has to show the seller that it is defective or is not as advertised. In most EU countries, customers have to prove that the defect existed already at the time of receipt

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<sup>456</sup> P. Bagheri, and K.H. Hassan, 'Access to Information and Rights of Withdrawal in Internet Contracts in Iran: The Legal Challenges' *Computer Law & Security Review*, vol. 31 2015, pp. 90-98.

<sup>457</sup> Consumer Rights Act 2015/C.15, (UK).

<sup>458</sup> Directive 2009/72/EC.

<sup>459</sup> E.A. O'Hara, 'Choice of Law for Internet Transactions: The Uneasy Case for Online Consumer Protection' *University of Pennsylvania Law Review*, vol. 153, 2005, p. 1889.

<sup>460</sup> *Ibid*, pp. 1889.

<sup>461</sup> Directive 1999/44/EC.

of the product if six months have already passed. The seller should always offer a solution<sup>462</sup>. In some EU countries customers have the right to request compensation from the manufacturer<sup>463</sup>. For instance, if a consumer online buys a laptop and after using it for a year or more, recognises that the memory is less than had been indicated, even though the problem was not detected until sometime after purchase and the laptop could still be used, the product did not conform to what was announced at the time of purchase. As a result, the customer is able to obtain a partial refund for the product at the store.

## **3.2 Differences between EU and Sharia Laws**

### **3.2.1 Differences in the regulatory options available in the UK/EU and Sharia Laws**

The codification of Sharia Law is not as strong as it is in UK and EU laws, although the underlying concepts for supporting consumers are the same. When the buying and selling takes place within the EU, every consumer is provided with similar rights including contractual information, prices and payments, value added tax (VAT), shipping & delivery, as well as warranties and returns<sup>464</sup>.

#### **3.2.1.1 Contractual Information in the EU**

Sellers must provide clear, correct and understandable information regarding services and products. Such contractual information includes characteristics of the products, the total price of products including details of surcharges and taxes (if any apply), information regarding delivery costs or any other additional costs, correct information/identity of the seller along with his contact number and postal address, and information regarding the duration as to how long the contract lasts (if applicable)<sup>465</sup>. It is not important to provide explicit information regarding some of these data if they can be acquired by the context, such as product characteristics<sup>466</sup>.

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<sup>462</sup> M J. Zuo, B. Liu, and D.N.P. Murthy, 'Replacement–Repair Policy for Multi-State Deteriorating Products Under Warranty' *European Journal of Operational Research*, vol. 3, 2003, pp. 519-530.

<sup>463</sup> D.N.P. Murthy and I. Djameludin, 'New Product Warranty: A Literature Review' *International Journal of Production Economics* vol. 3, 2002, pp. 231-260.

<sup>464</sup> A.E. Branch, *Global Supply Chain Management and International Logistics*, Routledge, 2009 p. 95.

<sup>465</sup> M. Cordera, 'E-Consumer Protection: A Comparative Analysis of EU and US Consumer Protection on the Internet' *Rutgers Computer & Tech. LJ* vol. 27 2001, p. 231.

<sup>466</sup> L.E. Gillies, *Electronic Commerce and International Private Law: A Study of Electronic Consumer Contracts* Routledge, 2016, pp. 59, 86-94.

The consumer is entitled to receive specific information when an order is made via email, online or by phone. Before a purchase is accomplished, the customer must be provided with the email address of the seller, information about certain restrictions that apply to certain countries, the rights of customers to cancel the order (a time limit is mentioned and is mostly 14 days), details of the after-sales services available to customers, information about dispute settlement mechanisms, the business registration number of the seller, the VAT identification number and professional title (where appropriate), and any professional association to which the seller<sup>467</sup> belongs.

It is important for consumers to take into account delivery expenses and other surcharges. All this mentioned information forms part of the contract unless the consumer agrees otherwise with the seller about modifying the conditions of sale. Sellers have a duty to mention information in a simple, understandable manner and must not include any terms that could be contrary to the interests of consumers<sup>468</sup>. EU law states that sellers must only include fair contractual clauses which cannot be changed or treated as 'general conditions'. This demonstrates that EU law supports the balance between consumers' rights and obligations and those of the seller/suppliers<sup>469</sup>. If any ambiguity in the language of the contractual clauses is found, then it is always interpreted in the customer's favour<sup>470</sup>.

Information exchanged prior to the formation of the contract is regarded as the cornerstone for consumer protection; the EU commission recognises this and ensures that all the Directives work towards this aim. Though it is an underlying principle in both EU and Sharia Law that these information requirements must be fulfilled, the EU directives have better embraced this requirement<sup>471</sup>. They differentiate between the information for the information requirements as per the nature and situations of the e-contracts.

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467 M.L. Rustad, 'Circles of E-Consumer Trust: Old E-America v. New E-Europe' *Mich. St. J. Int'l L.* vol. 16 2007, p. 182.

468 P. Stylianou, 'Online Dispute Resolution: The Case for a Treaty Between the United States and the European Union in Resolving Cross-Border E-Commerce Disputes' *Syracuse J. Int'l L. & Com.*, vol. 36, 2008, p. 117.

469 Z. Tang, 'An Effective Dispute Resolution System for Electronic Consumer Contracts', *Computer Law & Security Review* vol. 23 2007, pp. 42-52.

470 D. Gefen, and D.W. Straub, 'Consumer Trust in B2C E-Commerce and the Importance of Social Presence: Experiments in E-Products and E-Services' *Omega*, vol. 32, 2004, pp. 407-424.

471 DIRECTIVE 2011/83/EU.

### 3.2.1.2 Unfair Terms in EU Law

The EU Directive<sup>472</sup> defines unfairness in terms of ‘good faith’ and ‘significant imbalance’. CJEU has provided clear indications regarding the factors that must be taken into account when applying these criteria<sup>473</sup>. These broad concepts are fleshed out by the CJEU: national courts are encouraged to consider the nature of goods and services for which the contract is made, the circumstances in which the contract is concluded and the consequences of terms under national law. Some other factors that CJEU recognised later include the contractual terms, the default rules in national law that form an implied term to the contract, the drafting of the contract, and consumers’ rights that the consumer to terminate the contract<sup>474</sup>.

Howells<sup>475</sup> analysed how the Unfair Commercial Directives<sup>476</sup> and the Unfair Contract Terms direct the way to impose European standards. Both these directives include norms in open wording and safeguard clauses which make them flexible in application. Though EU laws enjoy a certain level of harmonisation supported with strong intentions from the legislator to promote higher levels of consumer protection, the CJEU takes an active part in demonstrating an EU consumer with more realistic features. Case laws from the CJEU have formed a bridge that functions to label requirements regarding transparency, fairness and informed decision-making. In all these three domains, the CJEU notices that the consumers’ attention is suboptimal, even when there is correct and comprehensive information available.

According to Howells<sup>477</sup>, the approach that CJEU has been taking is more oriented towards protection of consumers across the EU. It is important to note that all cases in the CJEU maintain a clearer distinction between the interpretation and application in terms of legitimacy. CJEU takes into account the particular constitutional legal orders for making

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<sup>472</sup> DIRECTIVE 93/13/EEC on unfair terms in consumer contracts.

<sup>473</sup> Library of the European Parliament, 'Unfair Contract Terms In EU Law Unfair Terms Directive And Common European Sales Law' *Europarl.europa.eu*, 2013. Available from: <[http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130624/LDM\\_BRI](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130624/LDM_BRI)> (accessed 20 January 2019).

<sup>474</sup> Ibid, pp. 2.

<sup>475</sup> G. Howells, and G. Straetmans. ‘The Interpretive Function of the CJEU and the Interrelationship of EU and National Levels of Consumer Protection’, *Perspectives on Federalism*, vol. 9(2). 2017.

<sup>476</sup> DIRECTIVE 2005/29/EC.

<sup>477</sup> Ibid, pp. 5.

decisions, which gradually reveal the way to develop an EU consumer protection policy that is more uniform and coherent. Since the EU suffers from insufficient legislative guidance at national level, case laws from the CJEU increasingly serve as the guiding light for national courts to establish clearly desirable common expectations.

It has been found that EU laws draw no general competence in the area of contract, but only act to contracts in terms of consumer protection relative to the internal market<sup>478</sup>. This is mainly because consumer protection competence has been granted under the Treaty<sup>479</sup> as a way of empowering a higher level of consumer protection. The directive for unfair terms<sup>480</sup> eliminates crooked practices in consumer contracts. Article 3 recognises unfair terms as those that are not individually negotiated and are contrary to good faith requirements; this remains important step to address the imbalance of rights and obligations between the contracting parties and save the consumer from facing any detriment. Terms that are not negotiated mutually and are drafted in such a way that the consumer is not able to influence its substance are unfair.

Article 4 further provides that the given Directive does not really assess unfairness in general terms, but also takes into account the nature of services and goods and the contextual factors under which they are sold<sup>481</sup>. If any ambiguity appears in the words or meanings of the term, then Article 5 supports any interpretation that favours the consumer. This clearly shows that EU law supports the consumer and in the event of an imbalance, the situation should always favour the consumer<sup>482</sup>. Unfair terms are also subjected to bring consequences. Article 6(1) nullifies unfair terms and emphasises that other terms must continue to work if possible. Article 6(2) further provides that the EU Directive must not stop protecting consumers in any Member State. If the contract is made within the EU, then the articles are binding in International law<sup>483</sup>.

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<sup>478</sup> Directive 2006/123/EC directive on services in the internal market.

<sup>479</sup> Treaty on the Functioning of the European Union, Official Journal C 326, 26/10/2012 P. 0001 – 0390.

<sup>480</sup> Council Directive 93/13/EEC on unfair terms in consumer contracts [1993] OJ L95 29–34.

<sup>481</sup> M. Dean, 'Unfair Contract Terms: The European Approach' *The Modern Law Review*, vol. 4, 1993, pp. 581-590.

<sup>482</sup> *Ibid*, pp. 584.

<sup>483</sup> R. Zimmermann, and S. Whittaker, (eds.) *Good Faith in European Contract Law*, Cambridge University Press, 2000, p. 299.

Article 7 further specifies the obligation that each Member State shares regarding the protection of consumers. This article specifies that the sellers must not use unfair terms and must not establish their own bodies of consumer protection to act before the court<sup>484</sup>. It is practically not possible for consumers to rely upon the length or complexity of the terms and conditions, since such length is often ignored and consumers are not able to interpret them<sup>485</sup>.

### **3.2.1.3 The case of Entores Ltd v Miles [1955]**

This case is important to consider since it underpins the issue of the validity of electronic contracts under EU law; indeed, it<sup>486</sup> marks the initiation of consumer protection regarding electronic contracts. The case involved issues of offer and acceptance via telex. It was not clear as to when the contract was finalised. The issue under discussion was whether to apply the postal rule or the general rule. Lord Denning LJ ruled this case and construed that when a contract is made via postal rules, it applies in all common law countries that acceptance is established as soon as the letter is posted into the box; this marks the stage at which the contract is said to be formulated. However, there is no clear rule as to when the contracts are made when the mode of communication is telephone or telex, provided that such communications are virtually instantaneous and apply different footing. Lord Denning concluded that a different rule must be established for instantaneous modes of communication that is different from the postal rule. He further suggested that such a rule must complete the process of acceptance as it is received by the intended recipient. The formulation of contracts is, therefore, established when the consumer receives confirmation from the seller. Lord Denning LJ further highlighted that establishment of such a rule should be uniformly applied in all countries.

### **3.2.1.4 Brinkibon Ltd. v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH, [1983]**

The rulings made in Entores Ltd v Miles were upheld in the given case<sup>487</sup>. In this case, telex was used to send the acceptance and the same question was raised as to where the contract was formed. The House of Lords validated the principle of instantaneous communication and included that a contract is said to be formed when the acceptance is received and not when it

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<sup>484</sup> C.M. Vazquez, 'Direct Vs. Indirect Obligations of Corporations Under International Law' *Colum. J. Transnat'l L* vol. 43, 2004, p. 927.

<sup>485</sup> *Ibid*, pp. 297.

<sup>486</sup> Entores Ltd v Miles Far East Corporation [1955] EWCA Civ 3.

<sup>487</sup> Brinkibon Ltd. v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH, House of Lord [1983] 2 AC 3.

is sent. However, Lord Wilberforce made an important point that there can be no universal rule to cover all such cases, but they must be resolved considering the intention of the parties, through incorporating sound business practice, and also by determining where risks lie.

### **3.2.1.5 Implications of case law for E-contracts**

Considering internet-based contracts, the question arises as to whether the postal rule also applies to emails or not. Two significant factors need to be considered to address this question<sup>488</sup>: instantaneousness and control. The factor of instantaneousness is linked with original rule of validity, in which acceptance leads to formulation of contracts. The validity of contracts made via instantaneous modes of communication supports the original rule, where a contract is said to be formulated as soon as delivery of the receipt is made. Delivery by post is a non-instantaneous method and so an exceptional rule is applied, which states that a contract is formulated as soon as the post is sent. The second factor, that of control, represents the ability of the sender to guarantee successful receipt of the goods.

### **3.2.2 EU policies on Consumer Protection**

Protection of consumers remains the major aim of the EU laws as provided in the Article 153 of TEC. The EU has integrated protection of consumers with the consumer's right to gain information for safeguarding their interests. Promotion of effective information regarding the goods and services online mainly forms a wider category of assuring the rights to consumers<sup>489</sup>. The thesis identifies three major drawbacks in the EU policies for consumer protection. These are linked to information and articulation, implementation, and making of law. EU laws ignore the specificity of information and consumers remained only insufficiently informed regarding their rights to access information and help. In contrast, authorities also face issues in understanding the rules resulting in compromised implementation<sup>490</sup>. The agenda that EU adopts for consumer protection creates a paradox for consumer information. Despite the consumers have access to a number of information; this does not really help them make the decision. The key objective that EU law miss here is the setting of purpose specific objectives

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<sup>488</sup> Entores Ltd v Miles Far East Corporation [1955] EWCA Civ 3.

<sup>489</sup> A. Popescu, 'Particularities of the consumers' right to information in electronic commerce', *Bucharest Academy of Economic Studies*, 2018, vol. 8, no. 2 pp. 478.

<sup>490</sup> Ibid, pp.479.

and reinforcing consumers to build their capacities and knowledge to effective market participation.

The ratio of ‘vulnerable online consumers’ may be find higher in the EU laws as compared to Sharia law states. This is due to the presence of both the physical issue i.e. misrepresentation and selling faulty products and also the moral issue i.e. financial damage<sup>491</sup>.

The general requirement of ‘balance’ and ‘good faith’ applies to EU regulations. There is a detailed list of specific conditions that are considered as abusive<sup>492</sup>. If the contractual conditions appear unfair, then the contract is not considered legally binding and neither of the parties may invoke it. Clauses that limit the employer’s liability in case of customers’ face omission or action by the employer. The seller cannot be exempted from any liability that consumers face due to damage caused because of the delivery equipment, services or facilities<sup>493</sup>.

Contractual terms considered to be abusive under EU law are not legally binding or binding on consumers. If the abusive clause is not an essential element of the contract, the rest (except for the abusive clause) is still valid. EU countries should ensure that consumers know how to exercise these rights under national law and have procedures that prevent companies from enforcing unfair terms. Throughout the EU, national administrations are responsible for ensuring compliance with European consumer protection standards. If a customer believes that a company has repeatedly breached the rules, whether in his/her own country or in another, then he/she has the right to bring a claim<sup>494</sup>.

### **3.2.3 Payments and Pricing**

Whenever a customer buys anything online, he/she must receive clear information about the total price of the products or services, including all taxes and surcharges. If the seller wants to charge a customer more for using a specific means of payment (a credit card, for example), the surcharge cannot be higher than the actual cost that the seller assumes for the treatment of

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<sup>491</sup> Gatfaoui, Sherazade, and A. Amine, What relationship strategies between "vulnerable" clients and bank advisers? .2015 No. hal-01562375.

<sup>492</sup> Caudill and Murphy, ‘*Consumer Online Privacy*’ pp. 7-19.

<sup>493</sup> L.E. Strine Jr., ‘The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face’, *Del. J. Corp. L.*, vol. 30, 2005, p. 673.

<sup>494</sup> *Ibid* pp. 686-687.

the payment<sup>495</sup>. In some countries it is prohibited to bill such surcharges. If the seller requests any additional payments, for instance gift packaging, travel insurance or express delivery, then it is important to first acquire acknowledgement from the consumer. According to EU law, companies cannot charge customers for these services unless he/she expressly chooses them<sup>496</sup>. The use of pre-selected boxes on the seller's website does not constitute express consent and customers are entitled to a refund of the total payments that they have made if a box is used without their consent. European standards require traders to inform customers of the correct and complete price before a purchase is made. Being a citizen of the EU, the seller is not liable to charge a higher price when buying products or services by your nationality or country of residence<sup>497</sup>. However, some pricing differences are justified if they are based on objective criteria that have nothing to do with nationality.

The EU pricing rules also apply when travel tickets, for example by plane or train, are bought either online or in person. This means that when a customer purchases tickets, all taxes, fees and surcharges in the final total price must be included at the start of the booking process. This will make it easier for the customer to compare prices with other tour operators. It is important for sellers to clearly mark any optional extras, such as travel insurance, as being offered on a voluntary basis<sup>498</sup>. If the customer thinks that the pricing information provided on the website is not clear, he/she must communicate with the company prior to entering into the contract.

### **3.2.4 Different Types of E-commerce Contracts and Consumer Protection**

The following forms of contract have only been addressed in reference to the EU and there has been a dearth of studies regarding Sharia Laws and different e-commerce contracts. Rather, the e-contracts and traditional contracts have uniformly been reported in Sharia law.

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<sup>495</sup> D. Petri, G. Kohout, G. Nader, and M. Mayerhofer, 'In-Application Commerce System and Method with Fraud Detection', *U.S. Patent Application*, 2011, 13/304,191.

<sup>496</sup> R-R. Duh S. Sunder, and K. Jamal, 'Control and Assurance in E-Commerce: Privacy, Integrity, and Security at eBay', *SSRN Electronic Journal*, vol. 3, 2002, p 14.

<sup>497</sup> *Ibid*, pp.14.

<sup>498</sup> H. Simon, 'Price Differentiation: The High Art', In *Confessions of the Pricing Man*, eds, Springer International Publishing, 2015, p. 125.

### 3.2.4.1 Consumer Protection for Shrink-Wrap Contracts

Some online contracts concern transactions in which consumers only discover the terms and conditions after the package is opened; for instance, the online installation of software. The major concern that makes consumers vulnerable to loss in such contracts is that they are not able to review the terms and conditions until they have paid for the software<sup>499</sup>. From the judicial point of view, it can be questioned as to whether such contracts are enforceable or not. The case of *ProCD, Inc. v Zeidenberg*<sup>500</sup> is worth considering here, which involved selling CDROM databases where the terms and conditions were enclosed within the software. The case also included the fact that the company had limited purchases for non-commercial use only. Zeidenberg, the purchaser, did not conform to the terms and sold the information to other companies. Zeidenberg claimed that he was only allowed to access the terms and conditions after purchase. The contract was considered as valid in court since the buyer was provided with the opportunity to return the software or to maintain it and therefore the buyer was bound to comply with the additional terms. This case, however, formulates a common rule that consumers must be given an option of refund if they discover a problem or a condition that does not seem to be fair for their use<sup>501</sup>.

The case *Klocek v Gateway*<sup>502</sup> is another that provides insights into shrink-wrap contracts. The case involved the sale of computers while the terms and conditions were enclosed in the packaging. The additional provisions required that the terms and conditions are considered as accepted if the buyer keeps the product for 5 days. It was held that the terms accompanying the software did not form part of the contract unless the buyer had expressly agreed to that<sup>503</sup>.

Wang<sup>504</sup> argues for the lack of consistent judicial opinions in the UK and the EU regarding shrink-wrap contracts. Nevertheless, the enforceability of contracts remains

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<sup>499</sup> P.M. Kaufman, 'Enforceability of State Shrink-Wrap License Statutes in Light of *Vault Corp v. Quaid Software Ltd*', *Cornell L. Rev.*, vol. 74, 1988, p. 222.

<sup>500</sup> *ProCD, Inc. v Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

<sup>501</sup> C. Coteanu, *Cyber Consumer Law and Unfair Trading Practices* Routledge, 2017, p. 17.

<sup>502</sup> *Klocek v Gateway, Inc., et al*, 104 F. Supp.3d 1332 (D. Kan., 2000).

<sup>503</sup> M. Rustad, *Global Internet Law*, West Academic, 2016, p. 96.

<sup>504</sup> F.F. Wang, *Law of Electronic Commercial Transactions: Contemporary Issues in the EU, US and China*, Routledge, 2014, pp. 44, 48.

uncertain unless the terms and conditions are available to the consumers and are expressly accepted by them.

### 3.2.4.2 Consumer Protection for Browse-Wrap Contracts

Most online users enter into contracts without having any specialist knowledge regarding the intention to create legally binding relationships. The question arises as to whether the contract is said to be valid if the terms and conditions are accepted only out of ignorance without any serious intention to create a contract. The EU directive for electronic commerce has not provided any substantive ruling regarding browse-wrap contracts. This specifies an area of development where the British and EU law must take an objective approach to determine the enforceability of a contract. A review of the case *Gibson v Manchester City Council*<sup>505</sup> ascertains that the intent in an individual's mind is not considered valid when formulating a contract, but what is given importance is what has been said and done. A contract is formed when all outward appearances indicate its formulation, irrespective of what the parties had in mind. An individual cannot abandon a contract by simply stating that he did not intend to make a contract when his actions or words indicate otherwise. Intentions are only specified by outward expressions; internal intentions are not given importance when the outward expressions indicate formulation of a contract<sup>506</sup>.

The case of browse-wrap contracts, however, is different since the users are not aware of the possibility of making a contract and may enter into a legal relationship when they did not intend to. MacDonal<sup>507</sup> argues that UK law does not consider the issue of contract formation for browse-wrap contracts. In comparison, the law in the US contains significant cases<sup>508</sup> which illustrate the concept of clarity regarding the terms and conditions of contracts and how necessary it is for both the buyer and the seller to take it into consideration. The second of these cases held that if contracts fail to explicitly mention the customers and acceptance occurs through only clicking the terms and conditions, or when the terms are enclosed in some location that is not easily available to the customer, then downloading the software or accessing the

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<sup>505</sup> *Gibson v Manchester City Council* [1979] 1 WLR 294.

<sup>506</sup> M. Furmston, and G.J. Tolhurst, *Contract Formation: Law and practice*, Oxford University Press, 2010, p. 15.

<sup>507</sup> E. Macdonald, 'When is a Contract Formed by the Browse-Wrap Process?', *International Journal of Law and Information Technology*, vol. 14, 2011, p. 285.

<sup>508</sup> *Specht v Netscape Communications Corporation* 306 F.3d 17 (2d Cir. 2002), and *Ticketmaster Corp. v Tickets.com, Inc.*, 2003 WL 21406289 C.D. Cal. Mar. 7, 2003.

website does not lead to contractual acceptance and, therefore, the contract formulated is not legally enforceable. In the EU and the UK, the law does not address this point specifically and so requires development.

Though contract law in the UK has not yet been developed for browse-wrap contracts, a need has been identified to create guidelines regarding the formulation of such contracts.

### **3.2.4.3 Consumer Protection for Click-Wrap Contracts**

These contracts involve issues regarding mutual consent to terms and conditions; they are non-negotiable and allow sellers to impose unfair terms. Acceptance is done through clicking a link that does not provide customers with an opportunity to look through the detailed terms and negotiations. Though the terms and conditions are disseminated on screen they disappear as soon as the customer clicks on the 'I agree' button and are not available to them for download or reading again. This practice was commonly exercised during the early stages of e-commerce and is still prevalent in various contexts<sup>509</sup>.

EU laws seem promising in this respect, since they are concerned with the predictability and certainty of transactions concluded via electronic means. EU laws have responded to the issue by establishing that terms and conditions must be made available for download. Article 3 of the Electronic Commerce Directive<sup>510</sup> states that the seller must make available the general conditions and terms of the contracts to the buyer and must give him the option to reproduce and store them<sup>511</sup>. Moreover, Article 10 of the EC Directive UK Regulation 2002 makes a number of stipulations regarding the provision of information to customers. The article establishes that the EU Member States must ensure that information is provided in a clear and comprehensive manner prior to an order being placed by the customer and a receipt of service being generated<sup>512</sup>. Yet, both the EU Directive and the UK Electronic Commerce Regulations (2002)<sup>513</sup> fail to establish clear rules as to whether compliance with the requirement can be

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<sup>509</sup> S. Hedley, *The Law of Electronic Commerce and the Internet in the UK and Ireland*, Psychology Press, 2006 p. 248.

<sup>510</sup> Directive 2000/31/EC.

<sup>511</sup> 6 Directive on Electronic Commerce [2000] OJ L 178/1–16.

<sup>512</sup> 7 The Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013.

<sup>513</sup> The Electronic Commerce (EC Directive) Regulations 2002 (UK).

established. However, requirements posed for the availability of terms and conditions enhance the legal certainty in cases of disputes that are likely to arise after conclusion of the contract.

### **3.2.5 VAT- Value Added Tax**

Payment of VAT is made in the country from where the product is bought. For purchases made as a private individual in the EU, customers only have to pay VAT once in the country where they buy the products. Customers can take home any purchases made in another EU country without having to declare anything at the border. The only condition is that the purchases are for customer's personal use or that of his/her family and are not intended for resale. If the customer suffers a loss, receives counterfeit products or those below an acceptable level of quality, then recovery of damages must not only consider the price of the goods, but also the VAT that the customer has paid.

Kazemi and Soheil<sup>514</sup> have supported the EU member states for the VAT they offer. The lowest rates are applied in Cyprus and Malta, whereas Hungary charges the highest rate, namely 27% for e-commerce trade. However, some countries exempt the tax to improve and support the online business environment. For instance, VAT is not applied in the UK if e-commerce falls under a specified limit. Imposition of VAT has greatly improved the market shares of Germany, France and the UK (61%) across the EU market.

Lalls<sup>515</sup> has discussed the underlying principles of Islamic financing that supports its financial institutions and bring value to investors. EU laws greatly differ from the Islamic frameworks of financing. The implications of tax practiced in online transactions are also increasingly different. Significant differences exist between conventional financing and Sharia laws; the viewpoint of tax is not greatly legally supported. Propositions made to the South African Income Tax Act No. 58 of 1962 recommend neutrality between conventional and Islamic finance. The author asserts that Islamic financing/VAT for online transactions has not yet developed and is subject to conventional norms.

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<sup>514</sup> A. Kazemi, and S. S. Saeedy, 'Comparative Study of Effect of E-Commerce on Tax Structure in Selected Countries: Suggestions to Improve Tax System of Iran' *International Journal of Information, Security and Systems Management*, vol. 4, no. 1, 2015, pp. 400-401.

<sup>515</sup> R.D, Lall, 'Islamic Finance Versus Conventional Finance and the Taxation Consequences' PhD Thesis, University of Cape Town, 2013, p. 3.

### 3.2.6 VAT refunds

Visitors from outside the EU are entitled to a refund of VAT on items purchased in the EU, provided that they are shown at the customs office of departure within three months of purchase, together with the corresponding return documents. These documents are usually prepared by the seller (although, as the system is voluntary, not all merchants do so). Some countries require a minimum purchase value to be able to request a return<sup>516</sup>.

### 3.2.7 Buying online in another EU Country - Special VAT Rules

Special rules may apply when products are to be delivered to an EU country other than the country of residence. VAT is not applied when pricing is above a certain level of that in the customer's country. In such a case, customers have to apply VAT in the country to which the products are delivered (VAT in the country of destination)<sup>517</sup>. The total limit of cross-border sales is established by each EU country and ranges from 35,000 or 100,000 Euros<sup>518</sup>. This means that most of the large retailers that sell online and supply their products in the EU will have to apply the VAT of the destination country<sup>519</sup>. For instance, if a customer orders a certain product from an internet marketer in the UK and realises that the price has suddenly increased. The company claims that the Belgian VAT should be applied, i.e. 6% and not 0% as in the UK. The threshold applied in Belgium is 35,000 Euros. This means that the company has sold more than € 35,000 in products to Belgium during the previous year and so should apply the Belgian VAT rate. If the company frequently sells to Belgium, then the Belgian VAT is applied to customers even if the product is shipped from the UK. In this event, the VAT charged to consumers is higher and is legally justified.

Certain VAT exceptions are applied for telecommunications, broadcasting and television services and services provided electronically; these will be charged in the country where the consumer lives (in which he/she is established, has his/ her permanent residence or usually resides) and not in which he/she has contracted the service<sup>520</sup>. These standards apply to services

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<sup>516</sup> G. Harrison, and R. Krelove, *VAT Refunds: A Review of Country Experience* (EPub) International Monetary Fund, 2005, pp. 67-76.

<sup>517</sup> I. Joumard, 'Tax systems in European Union Countries', 2001. p. 35

<sup>518</sup> Ibid, pp.35.

<sup>519</sup> S. Pfeiffer, and P. Semerad, 'Missing Trader Fraud in European VAT. No. 2013-41' (2013) Mendel University in Brno, Faculty of Business and Economics. MENDELU Working *Papers in Business and Economics*, 2013, no. 41, pp. 33.

<sup>520</sup> Ibid 87.

provided both within and outside the EU. For instance, VAT on digital content applies from the country of residence. If a person lives in Sweden and orders e-books from a Finnish online bookstore, then the supplier is liable to charge the Swedish and not the Finnish VAT.

Certain VAT exceptions are also applied for vehicles. In the case of new vehicles purchased in another EU country, VAT must be paid in the country where the vehicle (the residence vehicle) is imported and registered. This concept also applies to other -new means of transport, such as large bikes, boats and airplanes<sup>521</sup>. For VAT purposes, a new vehicle is considered to be less than 6,000 km or less than 6 months. (Used vehicle is one that is more than 6 months old and has a mileage of more than 6,000 km<sup>522</sup>.)

### **3.2.8 Shipping and Delivery**

If the customer does not take possession of his/her purchase immediately or has ordered a home delivery, the seller must deliver it within 30 days, has agreed on a different date; the extent of 30 days is only specified in EU law, not Islamic<sup>523</sup>. It is obligatory for sellers to always provide clear information about the total price of the purchase, including shipping and other related costs. However, shipping costs may vary according to the country; this principle also applies in Sharia law. For any additional cost for services offered by the seller, such as express delivery or gift packaging, explicit consent from the customer is required<sup>524</sup>. The use of pre-selected boxes on the seller's website does not constitute express consent and so the customer is entitled to the refund of all payments he/she has made. These aspects are somewhat similar in both EU and the Sharia law. The example of Amazon.com is worth considering here, as it outsources services in both Islamic and EU countries. Amazon.com complies with the Shari'ah requirement of shipping and delivery through providing sufficient information regarding the product<sup>525</sup>. This applies that shipping and delivery is integrated with the information rights of consumers.

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<sup>521</sup> Pfeiffer, and Semerad, 'Missing Trader Fraud in European VAT', p 74.

<sup>522</sup> W. Kempton, Y. Perez, and M. Petit, 'Public Policy for Electric Vehicles and for Vehicle to GridPower', *Revue d'économie industrielle*, vol. 4, 2014, pp. 263-269.

<sup>523</sup> S-J. Chen, and T-Z. Chang, 'A Descriptive Model of Online Shopping Process: Some Empirical Results' *International Journal of Service Industry Management*, 2003, pp. 556-569.

<sup>524</sup> Ibid, pp.565.

<sup>525</sup> Muhammad, Muhammad, and Khalil, p. 1233.

### 3.2.9 Additional Guarantees

Commercial establishments or manufacturers often offer their own additional trade guarantees which may or may not be included in the price of the product.

These can provide better protection, but can never replace or reduce the minimum warranty of two years which customers have in all cases according to EU regulations. Likewise, if a store sells a cheaper new product by specifying that it "has no warranty," this simply means that the buyer does not enjoy any additional coverage. Yet, the customer still has two years of free warranty if the product is defective or does not fit the advertised description<sup>526</sup>.

A commercial warranty may also shorten the two years warranty in EU law. This can be understood by considering the example of a customer who buys a hair dryer with a six months seller's warranty<sup>527</sup>, yet it stops working after eight months. Upon complaining, the seller tells him that the warranty given has expired and, therefore, the product cannot be returned. Here arises the question of whether the two-year warranty applies or not, as specified under European Consumer protection. The six-month warranty from the provider only formed an additional coverage, whereas the two-year period is still valid; the seller is entitled to return the product.

### 3.2.10 Second-hand Products

Second-hand products that customers buy from a professional seller are also covered by a two-year minimum warranty. However, products purchased from individuals or in public auctions are not covered. In some EU countries, the buyer and seller may agree on a warranty period of less than two years, but in no case less than one year, and the buyer must be informed at the time of purchase<sup>528</sup>.

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<sup>526</sup> T.B. Warrington, N.J. Abgrab, and H.M. Caldwell, 'Building Trust to Develop Competitive Advantage in E-Business Relationships' *Competitiveness Review, An International Business Journal*, 2000, vol. 10, pp. 160-168.

<sup>527</sup> R.C. Ausness, 'Replacing Strict Liability with a Contract-Based Products Liability Regime', *71 Temp. L. Rev.*, 1998, vol. 71, p. 171.

<sup>528</sup> G.N. Chattopadhyay, and D.N.P. Murthy, 'Warranty Cost Analysis for Second-Hand Products' *Mathematical and Computer Modelling*, vol. 31, 2000, pp. 81-88.

### 3.2.11 E-Commerce Provisions in the EU

Table 3.1 Table: Showing a compiled view the directives previously discussed in the Chapter 2.

93/13/EEC	This directive provides over to the Unfair Terms in Consumer Contracts. This directive tends to eliminate crooked practices in consumer contracts. Though the directive was enforced prior to the prevalence of electronic consumer contracts, it remains an important legal instrument to analyse the enforceability of the online transactions.
97/7/EC	Applies to distance contracts and associated warranties
1999/44/EC	
1999/C 30/04	Relates to some aspects of electronic trading
Directive 2000/31 / EC	Regulates certain legal aspects of all services of the information society in the internal market, which refers “in particular to electronic commerce”, so that it is given the abbreviated name of "Directive on electronic commerce". It occurs in a similar way with Law 34/2002, of July 11, on services of the society of the information and e-commerce, highlighting the reference to trade so that, in abbreviated form, it goes by the name of Law of Commerce Electronic.
Directive 2005/29/EC	Provides protection against unfair B2C commercial practices; harmonises the rules and regulations applied to protection of consumer rights against unfair commercial practices
2011/83/EU	Extends the scope of protection particularly in reference to e-commerce trade

The EU employs e-commerce directives that contain responsibilities and rules regarding the internet. These directives strive to attain a uniform system of regulators which can viably be applied to the myriad of legal issues arising across Europe due to e-commerce trading<sup>529</sup>. The directives are detailed and categorised on the basis of the content they underpin. For instance, the scope of making applications is provided under the Article 1 -3. These articles have also provided various terms, namely commercial advertising and forms of communication such as public relation activities, sponsoring, product and placement.

Establishment of the Article 3(1) of the E-commerce Directive is of particular importance as it presupposes a uniform level of legal protection for individuals residing across the EU<sup>530</sup>. Kim<sup>531</sup> has argued that creation of such a principle has resulted in the creation of a race to the bottom system for consumer protection. This is because it allows advertisers to engage in forum shopping across different states member to the EU. The author has identified such a race to the bottom as inherently detrimental for the protection of consumer rights, if viewed in light of Article 95(3) of the European Commission. The given article advocates the 'high level' of protection due to the fact that consumers can only enjoy a low level of reliance on the national level of protection that has traditionally been provided.

Wrobel<sup>532</sup> has identified this as the major reason why protection is particularly low among the Scandinavian countries. Indeed, a clear difference has been identified between the protections provided for internet consumers across different EU states. The author has also criticised the fact that that English law related to the setting of criteria for the defamatory violations and remarks for privacy has become the standard. Considering the fact that the internet offers enormous possibilities for defamatory remarks, one particular example can be England where the standards are particularly low for consumer protection. This implies that the principles applied and followed in the home country do not fully suit and respect e-commerce. The suspicion that such practices would lead to legal harmonisation of the lowest

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<sup>529</sup> M. Lehman, 'Electronic Commerce and Consumer Protection in Europe.' Santa Clara Computer & High Tech' *Santa Clara Computer & High Tech. LJ*, vol. 17, 2000, 23.

<sup>530</sup> I. Walden and J. Hörnle, *E-Commerce Law and Practice in Europe*, Elsevier, Woodhead Publishin 2001, p. 3.

<sup>531</sup> T.Y. Kim, R. Dekker and C. Heij, 'Cross-Border Electronic Commerce: Distance Effects and Express Delivery in European Union Markets', *International Journal of Electronic Commerce*, vol. 21, 2017, pp. 214-218.

<sup>532</sup> J. Sepp and R.M. Wrobel, 'Consumer Sovereignty versus Consumer Protection in Transition Countries' *International Area Studies Review* vol. 4, 2001, pp. 101-103.

common denominator have prevented commercial law in the EU from equate at a certain stage. Contrastingly, modified conflict-of-laws is mainly applied to areas wherein the illegal effects are more prominent; this constitutes a practice similar to EU antitrust laws and competition law.

Exclusion for authorisation requirements has been set forth in Articles 4 and 5 of the e-commerce directive. These apply to all e-service providers and provide general guidelines regarding the provision of information to improve transparency in businesses involved in electronic commerce. With respect to this, there have been certain parallels identified to the Directive on Distance Contracts, which were primarily developed for regulating sales orders placed via email, but now it equally applies equally to e-commerce<sup>533</sup>. The withdrawal period has been specified as seven working days, as per instated under Article 6 of the e-commerce Directive. This article is practised through permitting rescission of a contract which is otherwise binding.

The number of principles for regulating advertisements has been set forth in Articles 6 and 8 of the e-commerce directive that provides insight into commercial communication conducted electronically. Moreover, Article 7 declares that unsolicited commercial communications must appear to be clear and identifiably certain as per the receipt provided by the user; this receipt may result in banning the articulation of unsolicited emails<sup>534</sup>. The Act for Unfair Competition has provided fundamentals regarding protection from span for each consumer. It forms a matter of principle that the consumer must not defend against advertising, rather the entity responsible for advertising is required to provide clear indications that communications conducted did, in fact, form the advertisement; transparency is required to facilitate the cessation of communication removal<sup>535</sup>.

Risks of scams and copyright infringements are the highest in e-commerce and remain a source of perpetuating a considerable level of annoyance to consumers through targeting them with unwanted e-mail advertisements. It remains the primary responsibility of the advertiser to first inquire from the recipient and take consent as to whether he is willing to be contacted in

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<sup>533</sup> British Columbia Law Institute, 'Report on Relief under Legally Defective Contracts: The Uniform Illegal Contracts Act' *SSRN Electronic Journal*, 10.2139/ssrn.1418203.

<sup>534</sup> *Ibid*, 622, pp.07.

<sup>535</sup> R.E. Pereira, 'Influence of Query-Based Decision Aids on Consumer Decision Making in Electronic Commerce' *Information Resources Management Journal* , vol. 14, no. 32, 2001, pp. 34-36.

such a manner or not. The principle of *qui tacet consentire non videtur* is applied subsequently, which implies that non-answering from client is proportionate to saying no. Advertisers are required to follow this model under EU jurisprudence due to the fact that advertising in e-commerce is quite cheap and adequate regard must be paid to preserving individual privacy. An overview of the Annex for 'unsolicited commercial communication by means of electronic mail' reveals that such a legal opinion can be upheld in different EU countries, for example Germany<sup>536</sup>.

Regulations for concluding e-commerce contracts have been provided under Article 9 of the e-commerce Directive. This directive has been favoured because its acceptance no longer requires the four declarations of wills that were originally planned in DG XXIV<sup>537</sup>. The Directive has specified two declarations that are required for legally concluding the contract. The first one is the order that is made by the consumer and second is the confirmation that a seller sends to the consumer. However, obligations instated under Article 11 of the e-commerce directive provide no clear answer to the question of whether an advertisement of services or goods over the internet amounts to an invitation and referendum or not. This refers to the invitation for placing the offer by one of the parties.

Considerations for consumer protection under the Directive on Distance Contracts have been reflected in the withdrawal period, according to which consumers have the right to withdraw from door-to-door transactions within seven working days; the rule applies across the EU<sup>538</sup>. Also been extensive possibilities have been made available to consumers for correction under the Article 11(2) of the e-commerce Directive. As per the guidelines provided under Article 10(3) of the Directive, terms used in standard business and contracts must be made available to the users so that they can develop their understanding and reproduce them accordingly. The EU law for e-commerce conflicts with other foreign laws that show agreement with the legal effects and national monitoring. This forms a rule that prerequisites for consumer protection are achieved when electronic commerce is involved<sup>539</sup>.

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<sup>536</sup> M. Lehman, 'Electronic Commerce and Consumer Protection in Europe', 55.

<sup>537</sup> M. Zhou and D. Tian, 'An Integrated Model of Influential Antecedents of Online Shopping Initial Trust: Empirical Evidence in a Low-Trust Environment' *Journal of International Consumer Marketing* vol. 22, 2010, p. 166.

<sup>538</sup> J.K. Winn, 'US and EU Regulatory Competition and Authentication Standards in Electronic Commerce', *SSRN Electronic Journal* 6.

<sup>539</sup> M. Lehman, 'Electronic Commerce and Consumer Protection in Europe', p. 40.

Such rules have been derived from the EU law principles based on provisions stated in Article 6(2) of the Directive 93/13/EEC; this ascertains guidelines on Unfair Terms in Consumer Contracts. A supervisory filter is frequently applied for cleansing the effects of national provisions related to standard business conditions<sup>540</sup>. It has been argued that the majority of the standard terms used in business under foreign law are not able to pass these controls, causing European consumers to find themselves in a disadvantageous position within the Union. This particularly applies to potential suppliers in Switzerland and the US, who do not practise a similar level of control regarding the standard contractual terms as are maintained in the European Community<sup>541</sup>.

The majority of e-commerce issues arise in relation to consumer contracts. E-commerce embeds certain impossibilities and restrictions, wherein the agreement being finalised between the parties places them in a position in which they are not able to make negotiations as per their will or declare the need for changes. The EU directive 93/13/EEC has tried to protect consumers from facing any detrimental effects<sup>542</sup>. The directive provides that terms contained in the contract which cannot be negotiated individually must be attributed as unfair if they appear contrary to the good faith requirements. Moreover, if these create significant imbalances in the rights and obligations of parties entered into the contract, or pose a likelihood for consumers to face a detriment, they are deemed as unfair. The EU lawmakers consequently provide that if any unfair terms appear in a contract which has been concluded by a seller or a supplier, it must not be binding to the consumer. Moreover, a contract shall only continue to bind the parties by virtue of these terms if it is possible to continue the trade without relying on unfair terms<sup>543</sup>. EU consumer protection law provides that such Directive does not lead to create any difference in the type of conclusion the contract has provided. The issues of unfair terms, misrepresentation, deception, enforceability of contracts, the intent to be legally bound, and breach in contracts are worth considering when measuring the protection that the EU law preserves<sup>544</sup>. This, therefore, makes it necessary to verify standard terms and conditions used

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<sup>540</sup> G. Tridimas, 'A Political Economy Perspective of Judicial Review in the European Union: Judicial Appointments Rule, Accessibility and Jurisdiction of the European Court of Justice' *European Journal of Law and Economics*, vol. 18, 2004, p. 112.

<sup>541</sup> *Ibid*, pp.112.

<sup>542</sup> S. Mancuso, *Consumer Protection in E-Commerce Transactions*, p 25.

<sup>543</sup> Directive 85/577/EEC, s3,4 &5.

<sup>544</sup> *Ibid*.

by the supplier in an e-contract to bind consumers. Any terms which appear to be unfair or not in good faith as per the provisions under the Directive do not create a binding agreement.

Directive 85/577/EEC covers protection of consumers in the context of contract negotiation. This directive is mainly applied when negotiations are carried out away from the business premises. It imposes special duties on the supplier regarding information and recognises the withdrawal rights for both parties, but especially the consumers who are entering into the contract. The protection of consumer sales across EU e-commerce is regulated under contract law in reference to the provisions in Directive 97/7/EEC<sup>545</sup>, which provides consumer protection in regards to the distance contracts<sup>546</sup>. The introduction of this directive has raised harmonisation issues with Directive 85/577/EEC. Additionally, there have also been some provisions contained under Directive 2000/31/EC regarding e-commerce which also apply to the given context<sup>547</sup>. There is, however, a need to review both of these directives in reference to Directive 1999/44/EC to gain subsequent elucidation of facts which underpins associations and guarantees that consumers acquire through making distance transactions<sup>548</sup>.

Although both Directives 97/7/EC and 1999/44/EC have been reviewed by the European Commission regarding certain consumer-oriented aspects for distance contracts and associated guarantees, the Parliament and the European Council have felt the need to adopt a Directive based on consumer rights. It has also been suggested that the existing consumer directives followed in e-commerce should be merged with the door-step selling directive<sup>549</sup>. The aim of EU legislation in regards to e-commerce consumer protection is to put consumers in a similar position to buying goods and services from residential shops. This highlights the differences between an online consumer and a traditional one. The legal frameworks that the EU maintains are focused on ameliorating these differences. One significant feature in EU law is Directive 97/7/EC, which provides consumers with a number of fundamental rights to ensure a higher level of consumer protection across the EU states. This Directive applies to all consumer

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<sup>545</sup> Ibid 26.

<sup>546</sup> OJ L 144, 4.6.1997, pp. 19–27.

<sup>547</sup> OJ L 178, 8.6.2000, pp. 1–16.

<sup>548</sup> A. S. de Sousa Gonçalves, 'The E-Commerce International Consumer Contract in the European Union' Masaryk University *Journal of Law and Technology*, vol. 9, no. 5, 2015, p 67.

<sup>549</sup> K.P. Purnhagen. and J. Binding, 'Regulations on E-Commerce Consumer Protection Rules in China and Europe Compared—Same Same but Different?' *Journal of Intellectual Property, Information Technology and E-Commerce Law*, vol. 2, 2011, pp. 186-194.

contracts made over distance under the jurisdiction of the EU-Member State. The Directive has defined distance contracts concluded between buyers and sellers against provision of goods or services over a defined distance or service provision scheme run by the supplier. The supplier, however, is entitled to make exclusive use of more than one means of communication to serve the purpose of the contract<sup>550</sup>.

Consumer Protection under EU jurisdiction faces several challenges since the Directive excludes consideration of some particular types of contracts. All the contracts taking place as B2B and C2C which are finalised through automatic vending machines, commercial premises ruled automatically, contracts for financial services concluded in public auctions; all of these are excluded from the Directive<sup>551</sup>. Moreover, online auctions taking place, such as inter alia on eBay, have principally been covered in the scope of Directive 97/7/EC.

An electronic contract, whether civil or commercial, is perfected by the consent of the parties (Article 1,258 Civil Code). Consent, according to the above-mentioned article 1262, is manifested by the tender of the offer, acceptance of the offer and the cause of the contract. The perfection of the contract takes place, therefore, through the concurrence of wills and from that moment the contract exists. In order for the offer and acceptance to be electronic, both must be implemented by electronic devices. The offer must be made through electronic means: through a declaration of will issued by these means by one person and addressed to another, proposing the conclusion of a particular contract. Acceptance shall be by the same means, in the form of a declaration of will issued by the recipient of the electronic form and giving its conformity to the offer. In this way, both offer and acceptance are made by electronic means. This is established by the Law on the Information Society and Electronic Commerce of 2002 in Article 28.2. Both in civil law<sup>552</sup> and in commercial law<sup>553</sup>, the contract is formed with the consent of the contractors; that is, by the concurrence of supply and acceptance on the object and a cause that must constitute the contract. However, these precepts have not the same position when it was considered perfected the contract.

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<sup>550</sup> Directive 97/7/EC, s2(1).

<sup>551</sup> Directive 97/7/EC, s3(1).

<sup>552</sup> Article 1262.2 Civil Code-repealed version.

<sup>553</sup> Article 52 of the Commercial Code.

### **3.2.12 Fundamental Axes of Consumer Protection in Sharia**

An electronic consumer is a person who enters into various electronic contracts, which may include purchases, rents, and loans, in order to provide all the goods and services needed to satisfy his or her personal or family needs without the intention of re-marketing them and without having the technical expertise to deal with them. The concept of consumer protection in Sharia Law is based on three main axes: supervisory, legislative and educational<sup>554</sup>.

#### **3.2.12.1 The Supervisory Axis**

This ensures the safety of the supplied goods and services and conformity to the international standard specifications. Government agencies play this role mainly, in addition to the civil society organizations representing consumer protection in society, their aim being primarily to protect the consumer from fraud and fraud Commercial and misleading in all forms.

#### **3.2.12.2 Legislative axis**

This is based on the review of existing legislation to create a protective umbrella for all consumer rights.

#### **3.2.12.3 Educational Axis**

This is based on raising the awareness of the consumer and his perception of his rights and duties, which should guide his decisions and help him to achieve the greatest degree of protection. Consumer protection sites provide consumer awareness services to prevent the risks of e-commerce through online forums to share online experiences and true stories of buyers' experiences with poor goods. In addition to this, they continuously update newsletters including commercial fraud incidents and details of recent issues supported by expert opinions. These sites also provide e-mail complaints through the so-called complaints centre, as well as some pages containing information that helps consumers to avoid fraud.

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<sup>554</sup> Z. Berkem, 'Effective Supervision of Islamic Insurance According to Malaysian Experience (1984-2012)', *International Journal of Social Economics*, vol. 41, 2014, p. 1225.

### 3.2.13 Differences in the Legal Definition of Consumers

As the culture of consumption in the Arab world is still in the process of development, few jurisprudential opinions about the definition of consumers exist<sup>555</sup>. Rather, it focuses on the idea of consumption of the economy and money. However, the owners of companies are proactive in developing consumption and the diversity of goods and services. Thus, a need has arisen for the legal protection of the consumer and so it has become necessary to determine who the consumer is clearly and unambiguously. Therefore, most Arab legislations have adopted a definition of a consumer that can be relied upon to identify the target group of legal protection<sup>556</sup>. Therefore, most of the definitions have come as a summary. Leaving room for the expansion of this definition as new facts and actions emerge can be included in the concept of the consumer.

The legal definitions are diverse; they broaden the concept and have also narrowed the concept relative to particular jurisdictions. For example, Egyptian legislature in Consumer Protection Law No. 67 of 2006 defines the consumer as every person to whom a product is offered to satisfy his personal or family needs, or to be dealt with or contracted in this regard<sup>557</sup>. In contrast, the consumer legislator in Consumer Protection Law No. 1 of 2010 defines the consumer as the natural or moral person who obtains a commodity or service for the purpose of benefiting from it<sup>558</sup>. The federal law of the United Arab Emirates No. 24 of 2006 states another definition of the consumer: ‘whoever obtains a good or service - for or without payment - to satisfy his personal needs or the needs of others’<sup>559</sup>. Here the legislator includes every service or commodity whether paid or free of charge, and the Omani legislator agreed with the same definitions as in the Consumer Protection Law No. 66/2014: ‘every natural or juridical person who obtains a good or receives a service for a fee or free of charge’.

Definitions of the consumer apply to all those who wish to obtain a service or a commodity in order to satisfy their desires and personal needs, or the wishes and needs of

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<sup>555</sup> M. Ainley, A.Mashayekhi, R.Hicks, A. Rahman, and A. Ravalia, *Islamic Finance in the UK: Regulation and Challenges* London, The Financial Services Authority (FSA), 2007, p 13.

<sup>556</sup> F. Ciliberti, P. Pontrandolfo, and B. Scozzi, ‘Investigating Corporate Social Responsibility in Supply Chains: A SME Perspective.’ *Journal of Cleaner Production*, vol. 2, 2008, p.1580.

<sup>557</sup> Ibid, pp. 1585.

<sup>558</sup> Ibid, pp.1585.

<sup>559</sup> Ibid, pp. 1870.

others. Here, legal definitions have not broadened significantly within the definitions, but are limited and determined in order to define the consumer concept unambiguously.

Comparative legislation, such as French legislation, has compiled its consumer protection legislation and co-ordinated it into a single group under the French Consumption Act No. 949 of 1993, but it did not address the definition of the consumer. However, in the Ministerial Decision of 14 January 1972 regulating the declaration of prices of goods, a consumer was defined as a person 'who uses goods and services to satisfy his personal needs and the needs of dependents and not for the purpose of reselling, converting or using them in the scope of his professional activity'<sup>560</sup>. It is evident that the French legislation limits the definition of the consumer in this decision to those who seek to satisfy the needs and needs of the dependents directly without including those who consume for profit, such as buying for resale or for professional activities<sup>561</sup>.

It is clear that most Arab legislations do not address the term e-consumer because most of the consumption processes are carried out in a traditional manner; therefore, Arab legislation approaches the definition of the consumer through the goal sought and not through the means used during the creation of the contract.

Among the different Sharia Laws, the Sultanate of Oman was the first to prepare a special law for electronic transactions even before the promulgation of the Civil Transactions Law issued by Royal Decree No. 29/2013<sup>562</sup>. The Electronic Transactions Law was issued by Royal Decree No. 69/2008 and defines electronic transactions as any procedure or contract that is concluded or executed in whole or in part by electronic mail. The law also addressed many topics related to e-transactions, such as correspondence, contracts, electronic signatures and data encryption, in order to enhance the confidence of both consumer and user with regard to the reliability of electronic transactions, as well as the law on one important aspect of trade: the electronic payment method through the electronic payment gateway<sup>563</sup>.

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<sup>560</sup> J. Gibbs, K.L. Kraemer, and J. Dedrick, 'Environment and Policy Factors Shaping Global E-Commerce Diffusion: A Cross-Country Comparison' *The Information Society*, vol. 19, 2003, pp. 5-18.

<sup>561</sup> *Ibid*, pp.15.

<sup>562</sup> E. Burton, *Business and Entrepreneurship in Saudi Arabia: Opportunities for Partnering and Investing in Emerging Businesses*, John Wiley & Sons, 2016, p. 97.

<sup>563</sup> *Ibid*, 33, 56-63.

### **3.2.14 Implementation of Sharia Law**

Review of the relevant literature suggests that Sharia principles have not been codified in a comprehensive jurisdiction for implementation. Illustrations provided in the Literature Review chapter only underline the underlying rules and principles. However, their codification and practical enactment to online consumer transactions form a big question mark. In order to review their implementation in detail, a review of consumer protection laws was made for the GCC countries, which include Saudi Arabia, UAE, Qatar, Bahrain, Oman and Kuwait. Implementation of Sharia Law for e-consumer protection is highly diverse. Although the GCC countries share similar linguistics, culture, economic convergences, common legislation sources and drafting styles, the implementation of laws is not uniform and they also differ in regulatory regimes<sup>564</sup>.

#### **3.2.14.1 Consumer Protection in Saudi Arabia**

Findings suggest that Sharia principles have not been codified as they should. The legislation has not been modified to keep pace with internet usage. This was firstly recognised in 1997 in Saudi Arabia. As a result, the country has suffered from a legislative vacuum regarding electronic transactions. Introduction of the Royal Decree No M/18 in 2007 provided the Electronic Transaction law<sup>565</sup>. Moreover, the country also saw reforms regarding technological communications and the Electronic Transaction Law was introduced in 2008<sup>566</sup>.

#### **3.2.14.2 Consumer Protection in the UAE**

Legal obligations for electronic commerce in the UAE are derived from two particular sources, namely Law No 2 issued from Dubai in 2002 and the Federal Law no 1 issued in 2006. The first of these is concerned with electronic transactions. Dubai remains the first state in the Middle East to enact laws for e-consumer protection. This law is mainly entrenched in the UNCITRAL Model Law principles that the UN adopted in 1995 and exhibits a somewhat modified form of the formerly introduced principles. This law also makes derivations from the legal developments in Asian countries, for instance the Electronic Transaction Act in

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<sup>564</sup> R. Muhamad, T.C. Melewar, and S.F.S. Alwi, 'Segmentation and Brand Positioning for Islamic Financial Services', *European Journal of Marketing*, vol. 46, 2002, pp. 900-921.

<sup>565</sup> B. Alkhalidi, and B. Abdulaziz, 'The Road towards Globalization and Stability in Saudi Arabia's Economy' *European Journal of Economics and Management Sciences*, vol. 4, 2015, p. 282.

<sup>566</sup> *Ibid*, pp.282.

Singapore. The latter law, that is the Federal Law 2006, is concerned with electronic commerce and transactions and took a significantly longer time for enactment as compared to the Dubai Law<sup>567</sup>. This law provides regulations for electronic commerce in the seven Emirates and show great similarities with the Dubai Law.

### **3.2.14.3 Consumer Protection in Qatar**

Qatar is an Islamic country with a magnificent economy; it has experienced an enormous increase in electronic transactions in recent years. Although significant imports and exports have been transacted through electronic means, it took a significant while to adopt electronic commerce law in Qatar. The Amiri Decree Law No 16 was issued in 2010. Law in the country serves two major goals: it functions to regulate, organise and protect e-consumer transactions and regulates disputes arising from them.

### **3.2.14.4 Consumer Protection in Bahrain**

Bahrain remains the first Middle-East country after Dubai to pass a law to deal with electronic transactions. The law is particularly known as the Electronic Transactions Law no. 28 (2002). This remains the only piece of legislation that regulates cyberspace in the country. While this law was being passed, the other countries in the region were still in the process of drafting legislation for regulating electronic commerce and transactions.

### **3.2.14.5 Consumer Protection in Oman**

Oman is still striving to develop a strengthened law to support its economy by 2020 through e-commerce. The country has witnessed a significant shift in its legislative structure; the notions primarily followed after the enactment of the Royal Decree No 2008/69. One particular feature that this law underlines is provision for signing and writing electronic transactions. It pursues legal transactions in a way similar to traditional dealings. Article II of the Act underlines its core purpose. The law facilitates electronic transactions via electronic messages and records. It intends to remove difficulties or challenging situations that may occur during electronic transactions. It aims to remove ambiguities regarding signature and writing requirements and supports development of legal infrastructure to develop a transparent system

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<sup>567</sup> A. Abdulrahman, 'An Evaluation of E-commerce Legislation in GCC States: Lessons and Principles from the International Best Practices (EU, UK, UNCITRAL)', PhD Thesis, Lancaster University, 2016, p. 32.

of electronic transactions. It protects consumers through facilitating the exchange of electronic documents and aims to reduce fraud cases in electronic transactions. The law also establishes standards and regulations to authorise the integrity of electronic records. It also promotes the development of electronic transactions at national level across the Gulf States and the use of the electronic signature.

#### **3.2.14.6 Consumer Protection in Kuwait**

The Kuwaiti Parliament took a significantly longer time to introduce their Electronic Transactions law; its proposal was approved in 2014 and it became known as Kuwaiti Law no 20. This law is concerned with electronic transactions and addresses the basic guidelines regarding electronic signature, documents, payments and privacy and data protection.

The GCC Member States are amongst the first countries to ratify the UNCITRAL in the earliest times. The GCC Member States adopted the UNCITRAL laws for Electronic Commerce (1996), Electronic Signatures (2001), and the UN Convention for Use of Electronic Communications in International Contracts (2005). The demographic profile of these regions displays similar trends regarding e-commerce. However, it is notable that the laws in these countries have not codified the Sharia principles of consumer protection as they should have done; this has significantly reduced its efficacy compared to the best practices in the EU. The unification of laws that the EU offers is more effective than the Islamic codification of laws.

### **3.3 Conclusion**

This chapter has identified relevant issues through comparing and contrasting the EU and the Sharia laws. Firstly, it identified the similarities between the Sharia laws and the European laws for protecting online consumers. In this context, it discussed the themes related to remedies, legal processes, the principle of mutual consent, contractual information, rights for damaged products, returns and warranties, defective products, and replacement or refunds. Secondly, it identified the differences that both the Sharia and European laws encounter in terms of protecting rights of online consumers. It discussed the regulatory differences, specific policies in the EU, differences in the contracts and also payments, and pricing. VAT is an important theme in the EU laws that influence the contractual rights of consumers.

Review of a number of sources shows that the EU/UK and the Sharia Laws differ in theory but share similar aspects. The issues of mutual consent and clarity/gharar form the basis of contracts. It is also apparent that the EU has codified the legal principles effectively and

offers uniform coverage, whereas Islamic countries differ in how Sharia principles are applied, which weakens its codification and implementation. The EU law also covers a wider scope of e-commerce contracts, whereas Sharia Law deals with the fundamental issues and applies similar basic principles to traditional and the e-commerce contracts. However, both share the conviction that when there is imbalance of power between the seller and the buyer, then the law should always favour the consumer.

## CHAPTER FOUR: DISCUSSION

### 4.1 Introduction to the Chapter

This chapter will provide an in-depth analysis of the relevant issues identified in chapter 3 and the required reform based on the given options. This chapter explore a number of themes in order to justify the necessity of a future reform of both EU and Sharia Law. It is worthy note that it is not within the scope of this chapter to explore all areas of consumer law, rather it will be selective in its discussion of some potential areas. It provides a comprehensive analysis of the essential differences between Sharia and EU laws in relation to e-consumer protection. To put it clearly, it provides logical explanations regarding why both laws should function in a certain manner. In addition, this chapter combines the discussions made in both chapter 2 and chapter 3 in order to provide a rational basis of describing similarities and differences between Sharia and EU laws in relation to e-consumer protection.

### 4.2 The Underlying Principle of the EU Directives

It has been argued that UK businesses cannot escape from the terms established in the directives simply by locating their servers outside the UK<sup>568</sup>. The regulations focus upon the place where the business is established and not where the equipment is based or the state in which they apply, regardless of whether an information society service is present in the UK or other member states<sup>569</sup>. Furthermore, if the principle for the country of origin applies throughout the EEA, this proves to be beneficial for businesses, since it allows them to target consumers across all the EEA member states. To a large extent, this eliminates the need to follow rules across the 30 different countries<sup>570</sup>. However, recognition such an approach is likely to discourage consumers from shopping online across borders.

According to Chen<sup>571</sup>, the key task of the current consumer policies in the EU is to provide all citizens with free access to various bodies that protect all violated interests and

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<sup>568</sup> R. Michaels, 'EU Law as Private International Law? Reconceptualising the Country-of-Origin Principle as Vested-Rights Theory', *Journal of Private International Law*, vol. 2, 2006, p. 195-242.

<sup>569</sup> Ibid, pp. 196.

<sup>570</sup> Ibid, pp. 240.

<sup>571</sup> C. Chen, 'United States and European Union Approaches to Internet Jurisdiction and their Impact on E-Commerce', *University of Pennsylvania Journal of International Economic Law*, vol. 25, 2005, p. 423.

rights, and increase the effectiveness of all their activities. Accessibility, as well as the effectiveness of the system of consumer rights protection, can now be called the main guarantee of full satisfaction of all everyday interests of modern consumers. Thus, it can be said that the study of the essence and main aspects of the legal regulation of consumer protection is of great interest to date. All this determines the relevance of the topic.

According to Gillies<sup>572</sup>, the European Community implements policies for consumer protection in the form of the Information Society between the member states. The directives present provide coverage of a range of issues including distance selling<sup>573</sup>, unfair terms in consumer contracts<sup>574</sup>, financial services in the context of distance marketing<sup>575</sup>, and regulations for controlling the unfair commercial practices<sup>576</sup>. According to the author, each of these regulatory interventions promotes the welfare of consumers in the online environment through imposing duties of disclosure upon the foreign seller. In addition, they provide substantial legal protection to EU residents and also allow them the right of withdrawal. According to Article 3(3) of the Electronic Consumer Directive<sup>577</sup>, the European Community also seeks to provide an appropriate level of protection for EU resident consumers.

As highlighted by Gillies<sup>578</sup>, protection available for consumers with electronic contracts is three-fold. Firstly, the EU addresses the issue of recognition of judgments and the jurisdiction, inter alia, through recasting the Brussels Convention with the Brussels Regulations Recast. The DTI<sup>579</sup> in the UK highlighted the need for improvements in the judicial rules for consumer contracts. The Brussels Convention pre-dates the internet. It is clear to the judicial forces that when no case law is present, Article 13 can be applied to electronic commerce websites in particular. Articles 13-15 of the Brussels Convention were updated by Articles 15-17 of the Brussels Regulation Recast<sup>580</sup>. This was done in 2001 to provide strengthened legal rules for e-consumer contracts. Secondly, the EU community has also promoted a number of

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<sup>572</sup> Gillies, *Electronic Commerce and International Private Law*, p. 122.

<sup>573</sup> Directive 97/7/EC.

<sup>574</sup> Directive 93/13/EEC.

<sup>575</sup> Directive 2002/65/EC.

<sup>576</sup> Directive 2005/29/EC.

<sup>577</sup> Directive 2000/31/EC

<sup>578</sup> Gillies, *Electronic Commerce and International Private Law*, p. 122.

<sup>579</sup> Department of Trade and Industry (DTI) was replaced by [Department for Business, Enterprise and Regulatory Reform](#) (BERR) and [Department for Innovation, Universities and Skills](#) (DIUS) in 2007.

<sup>580</sup> Brussels Regulations Recast 2012/1215/EU, s15-17.

alternative means of resolving disputes arising in the context of consumer contracts. Gillies<sup>581</sup> argues that no such measures, however, have been implemented to date.

The third and the most significant aspect that Gillies has highlighted is the choice of legal rules in the European Community. Since the guidelines in the Rome 1 Regulation, *inter alia*, provide freedom to parties to make legal choices and the certain consumer contracts. The Rome 1 Regulation still remains the major instrument that covers the international scope and application of e-consumer protection. Article 1 of the Rome 1 Regulation remains the major resort for consumers to seek help in situations where the laws from different countries are involved<sup>582</sup>.

### **4.3 The Scope of Reforms**

European Union mainly focuses on two key issues: on the one hand, the determination of the court that has jurisdiction to settle disputes arising from such contracts, through rules on international jurisdiction; on the other hand, the determination of the applicable law. The evolution of the regulation of international consumer contracts in Europe was determined by the need to adapt the existing rules to the demands of e-commerce. This thesis tries to explain the current conflict-of-law rule and how it aims to cover international consumer contracts concluded online and the difficulties that this application carries. This thesis focuses on the issue of the applicable law. However, the research is aware of the relevance of international jurisdiction in this matter, as it will be shown below.

The two issues that mainly form the area of focus in the European Union is the determination of the court of jurisdiction for settling disputes arising from the online contracts and determining the applicable set of laws. Regulations governing the online consumer contracts made internationally in Europe are mainly determined by the need of adopting rules that are in demand for e-commerce<sup>583</sup>. Article 5 of the Rome Convention that is supposed to protect consumers remains a weaker part. Rome I Regulation is mainly responsible for protecting consumers when the contracts are made internationally. In such instance, the law of habitual residence of the consumer is applied even when there is a situation for choice-of-law

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<sup>581</sup> Gillies, p. 124.

<sup>582</sup> Rome 1 Regulation 2008/593/EC, s1.

<sup>583</sup> D. Gonçalves, A. Susana, 'The e-commerce international consumer contract in the European Union', 2015, *Masaryk UJL & Tech*, vol. 9, pp. 7.

agreement. The Article 6<sup>584</sup>, however, sets up new conditions for making easier applications in the online consumer contracts made cross-border. Nonetheless, the provisions that EU law provides for securing interests of consumers seem complicated. Despite the Rome I Regulation protects consumers and provide substantive rules, it only meets the minimum level of protection for consumers<sup>585</sup>.

The EU Commission has identified three gaps in the consumer protection policies exercised in Europe<sup>586</sup>: information, implementation and legislation. The information gap indicates insufficient understanding regarding applications and rules applied across the EU. The implementation gap indicates incorrect application and transposition of rules. This also applies to the lack of cooperation from the different stakeholders in providing sufficient cross-border coverage. It has been argued that legislation applied across the EU is aimed at improving the situation for consumers and to enable them to exploit greater e-commerce opportunities in the internal market. The legislation incorporates a number of drawbacks because it only applies to a selected number of issues, including provision of pre-contractual information and the right for consumers to withdraw from the contacts when the circumstances in which they were concluded are justifiable<sup>587</sup>. The majority of the measures applied only relate to general applications including regulation of selling of unfair contracts. Directives are the particular types of measures that are applied across the EU. Directives have been criticised for not forming an effective way of providing consumer protection because they cannot be applied directly, as transposition is required of these directives into the national laws adopted across the 27 EU Member States<sup>588</sup>.

This implies that each Member State is required to adopt legislation or make amendments to their existing legislative guidelines to put into effect the particular requirements instated under a particular directive. This process has specifically been referred to as ‘harmonisation’.

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<sup>584</sup> Rome 1 Regulation 2008/593/EC, s6.

<sup>585</sup> D. Gonçalves, A. Susana, ‘The e-commerce international consumer contract in the European Union’, 2015, *Masaryk UJL & Tech*, vol. 9, pp. 5.

<sup>586</sup> H. Wallace, *Policy-Making in the European Union*, 1st edn., London, Oxford University Press, 2015, p. 125.

<sup>587</sup> C. Knill and D. Lehmkuhl, 'The National Impact of European Union Regulatory Policy: Three Europeanization Mechanisms', *European Journal of Political Research*, vol. 41, 2002, P 256.

<sup>588</sup> J. Valant, *Consumer Protection in the EU*, European Parliamentary Research Service, 2015, p. 2. Available from:

<[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 January 2019).

The term ‘approximation’ is used in EU treaties to represent harmonisation of directives. Exercising such legislation requires each national law to make adjustments and therefore limits the direct implementation of law. There is always a further action required to be taken by Member State when a directive is needed to be given effect<sup>589</sup>. It has also been criticised that the directives adapted to date only include obligations regarding some specific aspects of consumer protection<sup>590</sup>. Moreover, considerable interaction has also been reported between the provisions applied nationally that give effect to the EU directives into respective areas in the domestic law<sup>591</sup>. In most cases, domestic rules are required to be adopted to supplement the particular rules that are required under the directives.

Purnhagen and Binding<sup>592</sup> have argued that there has been no central agency maintained in EU jurisdiction for consumer protection when transactions are made electronically. Rather, EU jurisdiction has stipulated a framework applied across the Member States and institutions which thereby formulates a network of EU Supervisory for the Member States. This supervisory network forms a remarkable feature in EU jurisdiction, which reinforces the need for consumer organisations to undertake relevant supervisory steps on behalf of the consumers. This particular feature in the EU also provides encouragement to industries operating in the realm of e-commerce through incentivising them.

Although several European agencies have been established to promote market surveillance and regulation of activities pertaining to a number of market regimes, including chemicals, food and beverages, and pharmaceuticals, EU jurisdiction lacks market surveillance measures or market specific agencies to serve the purpose of consumer protection through market surveillance in the context of e-commerce. There is no consumer surveillance mandate which may deliver supervisory services in the European e-commerce market. The purpose of surveillance, however, is only merely served through issuing warnings, such as advising

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<sup>589</sup> A. Naemah and M. Roshazlizawati, 'An Overview of E-Consumer Protection', pp. 9.

<sup>590</sup> E. Mastenbroek, 'Surviving The Deadline', *European Union Politics* vol. 4, 2003, p. 394.

<sup>591</sup> F. Damanpour and J.A. Damanpour, 'E-Business E-Commerce Evolution: Perspective and Strategy' *Managerial Finance* vol. 27, 2001, p. 17-19.

<sup>592</sup> K.P. Purnhagen. and J. Binding, 'Regulations on E-Commerce Consumer Protection Rules in China and Europe Compared—Same Same but Different?' *Journal of Intellectual Property, Information Technology and Ecommerce Law*, vol. 2, 2011, pp. 186-194.

consumers to refrain from buying counterfeit medicines over the internet<sup>593</sup>. It is also notable that although the EU generally intends to promote supervisory agencies, it pursues no significant plans for establishing agencies to monitor consumer protection in e-commerce<sup>594</sup>.

A supervisory agency is needed to suffice the point that seller has access to the consumer's jurisdiction. This is possible through having an agency there which provides a better interactive platform for the consumers to communicate with the seller. A seller cannot rely upon the website he has made considering the contextual features of consumers as the Article 15 of the Brussels I Regulation does not recognise website as the agency that seller can use to assert the jurisdiction for consumer's domicile.

#### **4.4 Threat of Counterfeit Products**

One emerging problem is the diversity in economic openness which has resulted in a drastic increase in the number of international companies. These companies provide services and goods under distinct policies and conditions; the end result is an increase in counterfeit products<sup>595</sup>. For instance, the majority of the products delivered to consumers do not meet the desired level of safety, quality and performance, thereby placing consumers in a disadvantaged position. This issue becomes potentially life-threatening when the sale involves counterfeit medicines. Distance selling<sup>596</sup>, itself, constitutes a real issue and underpins complexities for exchange and refund on defective goods. Ambiguity exists as to whether consumers may return the products if they undergo a change of mind or do not find the product to be the required standard or similar in quality as claimed by the provider<sup>597</sup>. Such a situation raises considerable concerns regarding the protection of consumer rights and requires attention from researchers to provide adequate provision.

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<sup>593</sup> E. Avgouleas and S. Degiannakis, 'Trade Transparency and Trading Volume: The Possible Impact of the Financial Instruments Markets Directive on the Trading Volume of EU Equity Markets' *International Journal of Financial Markets and Derivatives* vol. 1, 2009, pp. 120-123.

<sup>594</sup> P. Maris, 'The Liberalization and Regulation of International Financial Markets: What Particular Problems are Posed by International Financial Regulation?', *SSRN Electronic Journal*, 2009, p. 4. Available from SSRN: <<https://ssrn.com/abstract=1439756>> (Accessed 22 January 2019).

<sup>595</sup> E. Bardach and R.A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness*, 1st edn, Temple University Press, 1982, pp. 69-72.

<sup>596</sup> Directive 97/7/EC.

<sup>597</sup> E. Uribe, *Consumer Protection in Canada and the European Union*, 1st edn., Public Interest Advocacy Centre, 2009, pp. 145.

The importance of providing protection to consumers is that they are the weak party in the contract while the professionals are in the position of power. Moreover, contracts in electronic transactions are remote and the product is not the subject of contracting in the hands of the consumer<sup>598</sup>. Protection is required due to the great risks involved in the consumer process at all stages and the risks of goods and services bought in good faith<sup>599</sup>. The purpose of consumer law is to promote fair dealing among parties and prevent consumers from falling victim to consumerism. Therefore, the law must protect consumers in electronic transactions to establish the necessary mechanisms in order to restore a balance in consumer relations. Electronic transactions are not only conducted at national level, but international as well. It is important to note that international information networks do not know borders and therefore extend to all corners of the globe; this calls for unification of the international legal system<sup>600</sup>. The need to widen the scope has been identified in both Sharia and EU jurisdictions. The results show that improvement in the provision of guarantees to consumers may strengthen their legal position and rights.

A survey conducted for Consumer Empowerment revealed that 16% of the consumers who face difficulties in e-transactions seek to find help from public authorities and consumer organisation<sup>601</sup>. Another survey revealed that the major reasons why such complaints are not pursued are the inclusion of lengthy procedures, involvement of high expenses and the low likelihood of finding satisfactory solutions<sup>602</sup>. This highlights a greater potential for improvement in EU legislation by establishing a network for EU consumers to resolve their queries for cross-boundary purchases and a comprehensive mechanism for dealing with e-commerce complaints against respective traders. Despite e-commerce form, a prevalent feature of the EU culture and significant evidence of issues that consumers have faced in making transactions online, e-commerce has not been included in the top-ten sectors of complaints filed

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<sup>598</sup> Mancuso, 'Consumer Protection in E-Commerce Transactions' p. 159.

<sup>599</sup> Bagheri and Hassan, 'The Application Of The Khiyar Al-Tadlis' (Option Of Deceit) Principle in Online Contracts and E-Consumer Rights', *Mediterranean Journal of Social Sciences*, vol. 6, 2015, p. 568.

<sup>600</sup> Ibid, pp. 572.

<sup>601</sup> J. Valant, *Consumer Protection in the EU*, European Parliamentary Research Service, 2015, p. 2. Available from:

<[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 January 2019).

<sup>602</sup> Ibid, pp. 2.

on a regular basis<sup>603</sup>. This implies that consumers refrain from bringing their concerns to light because they have not been provided with accessible paradigms to help them find relevant legal help; despite the directives that have been put in place, people show only a low level of trust that they will find justice. Despite the fact that the overall incidence of e-consumers' complaints and issues is high, a significant lack of confidence has been reported among consumers.

According to Cortes<sup>604</sup>, the right to fair judicial processes has been grounded in arbitration and online dispute resolution (ODR)<sup>605</sup> mechanisms. These can be improved to provide the disputing parties with strengthened guarantees. Schiavetta<sup>606</sup> has further identified a need to introduce minimum procedural guarantees for consumers to ensure compliance with Article 6 of the ECHR<sup>607</sup>. This states that parties will be more compelled to raise legal claims if the measures sustained comply with legal standards and do not violate the right of parties to access justice. A more flexible interpretation is required to access justice in society, that is the right to participate in legal processes in public courts and the right to seek redress through the most suitable dispute resolution mechanisms must be promoted<sup>608</sup>. A fair use of the present interventions may help to increase accessibility to justice, thus making it possible for consumers to take adequate legal action to resolve their disputes. Cortes<sup>609</sup> has suggested that outsourcing ODR is necessary for resolving cross-border B2C disputes, particularly when the parties are close in terms of bargaining power.

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<sup>603</sup> Ibid, pp. 3.

<sup>604</sup> P. Cortes, 'Accredited online dispute resolution services: creating European legal standards for ensuring fair and effective processes', *Information & Communications Technology Law*, vol. 17, no. 3, 2008, p. 223.

<sup>605</sup> The Online Dispute Resolution (ODR) Platform is provided by the European Commission to help you resolve disputes with your online customers without going to court. It can be used for any contractual dispute arising from online purchases of goods or services where the trader and consumer are both based in the EU or Norway, Iceland, and Liechtenstein.

<sup>606</sup> S. Schiavetta, 'The relationship between e-ADR and article 6 of the European Convention of Human Rights pursuant to the case law of the European Court of Human Rights', *Law Technology*, vol. 37, no. 4, 2004, p. 1.

<sup>607</sup> The European Convention on Human Rights (ECHR).

<sup>608</sup> S. Donoghue, C. Van Oordt, and N. Strydom. 'Consumers' Subjective and Objective Consumerism Knowledge and Subsequent Complaint Behaviour Concerning Consumer Electronics: A South African Perspective', *International Journal of Consumer Studies*, vol. 40, no. 4, pp. 385-399.

<sup>609</sup> Ibid, pp.390.

Abernethy<sup>610</sup> has identified ODR has a legal intervention with the potential to boost e-commerce. This is a uniform system of dispute resolution which provides SMEs and large online businesses with similar services for resolution. It has been found that the existing legal basis of the guaranteeing quality is not sufficiently effective to protect consumers' rights. A lack of consultancy services has also been found. This research reveals some large gaps in civil procedures to address the rights of online consumers. A particular reform that needs to be adopted is the provision of a consultancy service, which will greatly help consumers to understand and restore their financial position and will, therefore, constitute a way to protect them from civil law liabilities<sup>611</sup>.

Electronic, international and cross-border contracts do not fall within the boundaries of a particular country. They can be commercial, civil or mixed, according to the nature of each contract and the relationship between the parties to the contract. In the absence of an agreement between the parties on the applicable law, the judge seeks to extract the implicit will by means of evidence and review the laws that are contending for the resolution of the dispute. This is to determine the law most closely related to the contract, such as the place of conclusion or the joint nationality of the contractors<sup>612</sup>. Since the writing needs to be signed by the parties to indicate their consent to the content, the signature of the electronic editor may take several forms: biometric, digital, electronic pen and others. Granting an authentic electronic signature is closely related to the degree of safety available among the concerned parties. Both legislations impose certain conditions on electronic signatures in order to generate authoritative evidence<sup>613</sup>.

Determining the challenges of legal e-commerce requires a conceptualization of the process from beginning to end in general rather than in detail. The next step is to direct a search index to draw the titles of the challenges, and then to describe the content of the challenge and the solutions to be determined. This requires an analysis of the places in law which are creating

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<sup>610</sup> S. Abernethy, 'Building Large-Scale Online Dispute Resolution & Trustmark Systems', In *UNECE Forum on ODR*, 2003, p. 2.

<sup>611</sup> A.L. Shilovskaya, L.B. Sitdikova, S.J. Starodumova, M.A. Volkova, and S.V. Khaludorova, 'The Consumers' Rights Protection in Consultancy Services: the Problems of Theory and Judicial Practice in Russian Federation', *Journal of Internet Banking and Commerce*, vol. 21, no. 4, 2016, p. 1.

<sup>612</sup> *Ibid* p. 68.

<sup>613</sup> M.H. Kamali, 'Sharīah and Civil Law: Towards a Methodology of Harmonization' *Islamic Law and Society* vol. 14, 2007, p. 396.

trouble for consumers. Institutionalising an appeal system must be the object to increase trust of consumers. There must be fully binding clauses in the contract which ascertain the liabilities of the providers in cases of fraud and if the consumers suffer a substantial loss as a result of an online deal. This approach will protect consumers from major disputes arising online, leading to a clearer interpretation of the uniform legal standards.

The e-commerce environment has its own nature and thus a digital signature is used to achieve the normal signature function. The most critical stage is the enforcement of the obligations of the contractors, the seller or the supplier of the service obliged to deliver the sale or execution of the service, and the customer obliged to meet the price. Each obligation has its own challenge. The obligation to deliver raises the problems of default, delay or delivery of a product that fails to meet the specifications of the agreement; this is similar to the situation in the field of traditional commercial activities.

The other issue that arises is related to the mode of payments. Online purchasing involves technical payment methods, including credit cards and other online tools which give rise to various challenges<sup>614</sup>. Different issues can be linked to credit card use, especially for cross-border purchasing; these include the permissibility of the credit card, its acceptance guidelines, legal impacts and the question of debt<sup>615</sup>. Moreover, consumers face the challenge of criminal activities, such as taking the number of the card and reconstructing the credit card for illegitimate purposes. Payment interventions, therefore, form a critical component to be considered in e-consumer protection laws.

In addition to these challenges, there are also some general challenges that relate to the whole e-commerce network. These, for instance, include the privacy of information and contractors exchange between the contracting parties. Exchange of information is limited by the criminal activities from hackers that give rise to jurisdictional challenges, since each country apply its own set of rules for considering the disputes. The internet environment is not really separated by geographical boundaries<sup>616</sup>. In such instance, the development of protective

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<sup>614</sup> ECC-Net, '*Fraud in Cross-Border E-Commerce*', 2017. Available from: [http://ec.europa.eu/consumers/ecc/docs/ecc-report-cross-border-e-commerce\\_en.pdf](http://ec.europa.eu/consumers/ecc/docs/ecc-report-cross-border-e-commerce_en.pdf) (accessed 22 January 2019).

<sup>615</sup> H. Amin, 'Factors Influencing Malaysian Bank Customers to Choose Islamic Credit Cards: Empirical Evidence from the TRA Model', *Journal of Islamic Marketing* vol. 4, no. 3, 2013, pp. 245-263.

<sup>616</sup> Avgouleas and. Degiannakis, 'Trade Transparency and Trading Volume', p. 122.

economic laws forms the basis of a comprehensive development process. These laws play a significant role in the economic and social development of any society, whether advanced, developing or less developed, because no country can now undertake a comprehensive economic reform without establishing or strengthening frameworks that meet local and international economic needs. This, in turn, is reflected in the development, investment and economy of the country, especially in view of the technological progress and changes taking place in the world today<sup>617</sup>.

Perhaps the most prominent parties that need legal protection in light of these developments are the consumers, as they are the weakest. This has made consumer protection a legal obsession around the world, since it is seen as the main element the movement of trade and market rely at the present time. International, regional and national efforts to develop international standards and protectionist laws for the consumer are recognized as among the most important human rights<sup>618</sup>.

National laws and international conventions for consumer protection have been identified as the weakest link applied for protection of quality of goods and services<sup>619</sup>. The economic and cognitive strength of consumers are largely excluded from legal paradigms of how to deal with the sellers<sup>620</sup>, which indicates the superiority of the latter. The major argument which forms the basis of this study is that consumers are not provided with many options to shape the deal. They are mostly the acceptors and not the developers of guarantees. This enables the sellers to apply guarantees which they feel suit their own interests.

Today, a large number of purchases are made by people on the Internet: e-commerce is developing daily. Currently, 70% of sales are carried out in the virtual world<sup>621</sup>. The same applies to the service delivery sphere; here, services are offered on the network and can be divided into those that are provided directly on the network and those that simply entice the consumer through the Internet. However, in any case, the development of internet trading is

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<sup>617</sup> Ibid p. 98.

<sup>618</sup> E.A. Kirillova, E.A. Shergunova, E.S. Ustinovich, N.N. Nadezhin, and L.B. Sitdikova. 'The Principles of the Consumer Right Protection in Electronic Trade: A Comparative Law Analysis', *International Journal of Economics and Financial Issues*, vol. 6, 2016, p. 56.

<sup>619</sup> W. Kwangmyung and H.S. Cho, 'Legal Issues and Proposed Solutions of Electronic Agents in Electronic Commerce', *International Commerce and Information Review*, vol. 13, 2011, p. 75.

<sup>620</sup> Ibid, pp.75.

<sup>621</sup> V. Savchenko, 'Future Development of E-Commerce in Russia and Germany.' PhD Thesis, University of Applied Sciences Valencia, 2015, pp.23.

unquestionable. Understanding and interpreting the law ‘On Protection of Consumer Rights’ is slightly more complicated in this area. The rules of electronic commerce have their own peculiarities of compensation for damage, return or exchange of goods, as well as warranty services for consumers, and attention must be paid to these when problems arise, referring to regulations<sup>622</sup>.

The problem of consumer protection affects a wide range of the population; this particularly applies to e-commerce. Therefore, the law presupposes the possibility of applying to the society for the protection of consumer rights if the damage is caused in connection with an online purchase.

In accordance with the results discovered, the issue of e-consumer protection can be divided into the following components:

- The ignorance of most citizens that they can apply for protection of their consumer rights, even in e-commerce.
- Recognition of the legal force of electronic transactions by law.
- The lack of judicial practice in the field of electronic commerce today.
- There is no single approach to the definition and resolution of issues in e-commerce.
- There is no settled and strict indication of the status of online stores within the framework of the "seller-buyer" relationship.

These issues exist because consumers are not able to identify the dispute resolution mechanisms particularly applied to electronic commerce. Efforts made by the European Commission is appreciable, since it has built a database with links for the ADR<sup>623</sup> and ODR providers that comply with EU law<sup>624</sup>. It is notable that the services most commonly provided to consumers are ADR, whereas the scope of ODR services is very limited<sup>625</sup>. Independent reports from the EU, however, approve the credibility of ADR in relation to the EC Recommendations<sup>626</sup>. This shows the significance of monitoring and regulating the minimum

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<sup>622</sup> Z. Karake-Shalhoub, and L. Al Qasimi. *The Diffusion of E-Commerce in Developing Economies: A Resource-Based Approach*, Edward Elgar Publishing, 2007 p. 98.

<sup>623</sup> Any method of resolving disputes without litigation.

<sup>624</sup> ECC-Net. 2017. Out of court redress. Available from: [http://ec.europa.eu/consumers/solving\\_consumer\\_disputes/non-judicial\\_redress/index\\_en.htm](http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/index_en.htm) (Accessed 20 December 2018)

<sup>625</sup> C.Hodges, Consumer Redress: Ideology and Empiricism. In *Varieties of European Economic Law and Regulation*, Springer International Publishing, 2014, pp. 793-821

<sup>626</sup> Ibid, pp.794.

standards to ensure that ADR and ODR comply with the process principles. Currently, there is no single body that takes responsibility for assuring compliance. The European Consumer Centres (ECCs) and the Euro chambers can take steps to coordinate as a single European entity and make the framework more accessible to consumers<sup>627</sup>.

An even bigger problem today is the protection of consumers' rights for transactions carried out on the internet. According to Ardic<sup>628</sup>, only a few people know that it is possible to protect their rights in exactly the same way, and therefore citizens do not apply to the society for the protection of consumers' rights. The author states that about half the customers to date have faced a problem of unfair e-commerce, but only a few reported a loss and appealed to the court. This is mainly because of the consumers' lack of access to the justice system<sup>629</sup>. In addition, regulatory responses have largely been ineffective and their framing is a daunting process for policy-makers<sup>630</sup>. According to the author, the increased effects of globalisation and technological progress suggest that governments are no longer able to develop laws in isolation from the international legal arena.

The study by Cortes<sup>631</sup> provides a basis for these findings relative to EU law. The study has identified various gaps which affect the fairness of online dispute resolution (ODR) mechanisms and their actual use in e-commerce. Currently, ODR in the EU is largely dependent upon regulations and soft laws and it lacks legislative intervention. Although electronic contracts are supported by mandatory ODR clauses, the enforceability of online awards needs to be supported by legislation and must not be left entirely to self-regulatory initiatives<sup>632</sup>. Establishing clear ODR standards requires procedural standards that may increase awareness among consumers regarding the provisions of ODR schemes. The author suggests reforms in the European directive that may support the development of ODR across

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<sup>627</sup> Ibid, pp. 811.

<sup>628</sup> O.P. Ardic, J. Ibrahim, and N. Mylenko, 'Consumer Protection Laws and Regulations in Deposit and Loan Services: A Cross-Country Analysis with a New Data Set', 2011, p. 23.

<sup>629</sup> C.E.F., Rickett, and T.G.W. Telfer, *International Perspectives on Consumers' Access to Justice*, Cambridge, Cambridge University Press, 2003, pp. 2-4.

<sup>630</sup> Ibid , pp. 4.

<sup>631</sup> Cortes, Accredited online dispute resolution services', pp. 221-237.

<sup>632</sup> Ibid, pp. 223.

the member states and provide mandatory services to enforce decisions. The issues of ‘when’ and ‘if’ must be abandoned, while the ultimate focus must be shifted towards ‘how’<sup>633</sup>.

Despite the ODR has been identified as the best possible way of resolving online consumer disputes, it faces several hurdles in terms of B2C transactions made online<sup>634</sup>. For instance, not all the jurisdictions accept ODR application. This is the major legal hurdle that this EU intervention faces regarding online dispute resolution. The other hurdles it encounters are mainly including the social, cultural, and psychological factors such as lack of internet literacy. It has been argued that the schemes that ODR provides do not sufficiently meet the needs of online consumers<sup>635</sup>. Rogers<sup>636</sup> has explained the issues in the EU law for online consumer protection with a remarkable example. Rogers states that if a person buys something in the United States using eBay and receives a product that is broken or contrary to the description, he/she is able to seek for the recourse using the same online platform. However, if the similar person has bought something from an online vendor located in Budapest and is displeased, then the recourse is not that easier. The only option he will have will be to fly to Hungary to make a claim there. This highlights a major drawback in the EU rule for protecting online consumers.

However, the ODR remains the most influential effort that UNCITRAL has made to resolve e-commerce disputes occurring cross the borders<sup>637</sup>. Nevertheless, there exists a significant lack of specific legislation regarding ODR applications both nationally and internationally<sup>638</sup>. Important steps were taken in 2013 when the European legislature introduced two measures namely the ADR (Alternative Dispute Resolution) and the directive for ODR (Online Dispute Resolution). Both these supported protection for consumers as an out-of-court settlement providing that consumers are able to adopt a straight-forward way to

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<sup>633</sup> A.R. Lodder, ‘The Third Party and Beyond: An Analysis of the Different Parties, in Particular the Fifth, Involved in Online Dispute Resolution’, *Information & Communications Technology Law*, vol. 15, no. 2 2006, pp. 143-155.

<sup>634</sup> Bygrave, A. Lee, ‘Online dispute resolution—what it means for consumers.’ *In conference on Domain Name Systems and Internet Governance*, University of New South Wales, Sydney, vol. 7, 2002, pp. 2.

<sup>635</sup> *Ibid*, pp. 2.

<sup>636</sup> Rogers, Vikki. "Managing Disputes in the Online Global Marketplace: Reviewing the Progress of UNCITRAL's Working Group III on ODR", *Disp. Resol. Mag*, vol. 19, 2012, pp. 20.

<sup>637</sup> *Ibid*, pp. 20.

<sup>638</sup> Liyanage, Kananke Chinthaka. ‘The regulation of online dispute resolution: Effectiveness of online consumer protection guidelines’, *Deakin L. Rev.*, vol. 17, 2012, pp. 251.

justice and also low-cost. It can be said that both these directives have been successful in relieving the consumer protection issues, but fail to address the cross-border problems. Yet, they both have been regarded as the weak interventions in the EU law to promote online consumer protection in e-commerce trade<sup>639</sup>.

Given the fact that time and distance impacts the affectivity of the ODR and ADR directives, here have been recent attempts made to protect online consumers through adopt the ICT enabled algorithm; this provides a more cheap, neutral, and real time effective process for resolving online disputes. These attempts in their initial phases and largely done by joint experiments of Europe and the United States. The huge success of eBay/Square Trade cannot be ignored here which remained successful in resolving 60 million online consumer disputes in 2010<sup>640</sup>. ODR still remains the major bullet point to expand horizons of online consumer protection that needs to be extended in the gulf countries, Africa, and the Asian region<sup>641</sup>. Exploring the feasibility of ODR relative to Islamic financing countries is still a matter of research with no clear conclusion<sup>642</sup>.

#### **4.5 E-Consumer Protection and the Need for Legislation**

The communications and information revolution is one of the major highlights of the current state of developments in the history of humanity due to the widespread use of the internet. These changes have resulted in the development of the concept of e-commerce c<sup>643</sup>. According to Gibbs<sup>644</sup>, electronic commerce is not limited to the sale and purchase of goods and services over the internet, but also involves a myriad of challenges since it involves extraterritorial jurisdiction. Therefore, success in the field of electronic commerce requires the creation of legal and technical mechanisms to protect consumers in a way that promotes confidence among them. It is apparent under current EU law that parties to B2C disputes must

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<sup>639</sup> Rühl, Giesela. "Alternative and Online Dispute Resolution for Cross-Border Consumer Contracts: a Critical Evaluation of the European Legislature's Recent Efforts to Boost Competitiveness and Growth in the Internal Market." 2015. *Journal of Consumer Policy* 38(4) pp.431-456.

<sup>640</sup> S. Omoola, and U. Oseni, 'Towards an effective legal framework for online dispute resolution in e-commerce transactions: trends, traditions and transitions', *IJUM Law Journal*, vol. 24, no. 1, 2016, pp. 260.

<sup>641</sup> *Ibid*, pp. 281.

<sup>642</sup> *Ibid*, pp. 281.

<sup>643</sup> Cordera, 'E-consumer protection'm p. 231.

<sup>644</sup> Gibbs, Kraemer, and Dedrick, 'Environment and policy factors shaping global e-commerce diffusion' pp. 5-18.

agree on online dispute resolution. This is very difficult for them because of the lack of trust between parties<sup>645</sup>. Cortes<sup>646</sup> argues that EU consumer law is not sufficiently developed for online dispute resolution and undermines the confidence of consumers if it is imposed on them.

According to Kaur<sup>647</sup>, the significance of protecting e-commerce lies in the progress of society. Nevertheless, the diversity of perceptions leads to several problems in electronic transactions. A number of developments in recent years have widely changed the way consumers enter into electronic contracts; this applies to both EU and Islamic countries<sup>648</sup>. Today, consumers are able to carry out all their commercial and banking transactions from home; this is an effortless process and payment can be made electronically. Electronic advances have had a great impact on the process of connecting the world to electronic networks, making it a highly interconnected cell. However, this network, as soon as it emerged, was accompanied by large waves of unexpected violations and attacks, which led to the emergence of many new forms of crime and fraud. The current issues of consumer protection operate in the areas of validity, term, quality, certification and warranty<sup>649</sup>, all of which require development and reform.

This thesis aims to analyse whether the laws established in the EU and the Sharia Laws provide sufficient legal and technical protection for e-consumers or not. The results reveal that both these jurisdictions provide a range of solutions for assuring consumer protection. However, the major consensus of e-consumer protection is based on the basic principles of contract law. According to Gillies<sup>650</sup>, the development and prosperity of e-commerce has led to the emergence of multiple legal problems that necessitate the need for legislators to find mechanisms and means of protection. Furthermore, the results reveal that systems employed in the EU and the Sharia Law are capable of enforcing the legal protection of commercial

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<sup>645</sup> The Brussels Regulations Recast 2012/1215/EU, s12; and Directive 93/13/EEC.

<sup>646</sup> Cortes, p. 221-237.

<sup>647</sup> K. Kaur, 'Consumer Protection in E-Commerce in Malaysia: An Overview' *UNEAC Asia Papers* vol. 10, 2005, p. 5.

<sup>648</sup> H. Rösler, 'Interpretation of EU Law' *Max Planck Encyclopaedia of European Private Law*, vol. 2, 2012, pp. 979-82.

<sup>649</sup> N.A. Neacsu, 'Consumer Protection in Electronic Commerce', *Bulletin of the Transylvania University of Brasov. Economic Sciences*, Vol. 9, no. 1, 2016, pp. 301-308.

<sup>650</sup> Gillies, p. 72.

transactions through the use of electronic means. This legal protection granted to users of electronic commerce means has been divided into civil and criminal protection.

#### **4.5.1 Civil Protection for Electronic Commerce**

Civil protection of every contract, whether commercial or non-commercial, is reflected in the means of guaranteeing this protection. Civil liability may affect anyone who breaches any of the obligations imposed upon him. The means of civil protection of e-commerce are reflected in e-writing (firstly) and the electronic signature<sup>651</sup>. It also involves other means of maintaining and documenting transactions. Electronic writing, like ordinary writing, also forms a way of proving that the legislator has made it equal to a paper document, whether it is required for a meeting or proof only. According to Ha<sup>652</sup>, electronic writing plays an important role and is the lead in proving other means of maintaining and documenting transaction. It is noteworthy that both the European and the Sharia Law allow electronic documentation; this approach is similar to the worldwide paradigms and constitutes a common way of securing e-consumers. However, the documentations are different and might include certain variations of legal terms. These documents are kept by the consumer and they are able to seek help from them when needed.

#### **4.5.2 Online Purchasing**

According to Peterson<sup>653</sup>, the electronic industry is playing a key role in the new global economy in the computer, telecommunications and consumer electronics industries. These three industries are now among the largest, most dynamic and growing global industries. The era of electronics is expected to achieve the greatest breakthrough and greatest boost to the world economy outside the military domain throughout history, and it is likely to represent the engine of progress for the great commercial economic blocks, including the EU, Asia, and the US.

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<sup>651</sup> Amin, and Nor, p. 81.

<sup>652</sup> H. Ha, 'Stakeholders' Views on Self-Regulation to Protect Consumers in E-Retailing', *Journal of Electronic Commerce in Organizations*, vol. 15, 2017, pp. 83-103.

<sup>653</sup> N. Petersen, 'Antitrust Law and the Promotion of Democracy and Economic Growth', *Journal of Competition Law and Economics*, vol. 9, 2013, pp. 593-636.

The most prominent products currently purchased online are books, magazines, software and computer equipment<sup>654</sup>. However, there is a high probability that it will be possible to purchase any product in the future through the Internet<sup>655</sup>. Recently, high-value products are being bought online, with many cases of consumers buying holidays, cars and even homes through direct contact<sup>656</sup>. It is also noted that many auction centres have been established and that direct contact is being used to enable customers to participate in trade and speculation directly, even for those transactions that are held in millions or billions of dollars<sup>657</sup>. However, the potential for loss or loss of money is significant, as a result of extensive fraudulent internet dealings<sup>658</sup>.

### 4.5.3 Electronic Contracts

The emergence of e-commerce and the accompanying evolution of the internet have greatly affected the legal system of traditional contracts. The so-called cross-border e-shopping and the subsequent steps to establish e-contracting, in which the consumer is not always a key actor, have emerged<sup>659</sup>. It is evident from the results of this thesis that that e-consumer protection for both the Sharia and the EU jurisdictions is based on the principle of mutual consent where fairness is promoted and misrepresentation is condemned. Unfairness may result due to misleading advertisements, provision of defective or poor-quality goods and unauthorised use of personal information. There have been a number of directives introduced in the EU and regulations in Sharia Laws to strengthen the grounds for e-consumer protection against unfair and deceptive practices. The principal requirement that both of these jurisdictions introduces is fair treatment for all consumers<sup>660</sup>.

Both jurisdictions recognise that electronic markets cannot grow unless there are regulations to address the specific requirements of consumers. Legal protection is provided at

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<sup>654</sup> T.S.H. Thompson, 'Attitudes toward online shopping and the Internet', *Behaviour & Information Technology*, vol. 21, no. 4 pp. 259-271.

<sup>655</sup> P. Pananond, 'Where Do We Go from Here? Globalizing Subsidiaries Moving Up the Value Chain', *Journal of International Management*, vol. 19, 2013, pp. 207-219.

<sup>656</sup> *Ibid* p. 218.

<sup>657</sup> B. Gavish, and C.L. Tucci, 'Fraudulent Auctions on the Internet', *Electronic Commerce Research*, vol. 6, 2006, pp. 127-140.

<sup>658</sup> *Ibid* p. 138.

<sup>659</sup> S. Yuthayotin, 'Substantive Mechanisms for Achieving Access to Justice' in *Access to Justice in Transnational B2C E-Commerce*, Springer International Publishing, 2015, pp. 107-175.

<sup>660</sup> *Ibid* pp. 119.

both the pre-contract and final stages when contracts are concluded. As argued by Bagheri and Hassan<sup>661</sup>, it is increasingly important to strengthen the position of consumers who are subjected to unfair and unusual conditions if the electronic contracts are not concluded well. Improved protection is required to mitigate the risks of security, since electronic networks are vulnerable to threats. The author has rendered protection of consumers in electronic contracting as the most important concern that needs to be discussed in a detailed manner because of the novelty of this subject. A large screen inside a small computer allows consumers to go to the desired location and view the terms of purchase, contracting and accessing the product or service designated. The emergence of large economic blocs in the electronic market alerts the need for drafting legislation based on consumer protection in electronic contracting.

It is notable that not every consumer defends his rights in this or that situation even though every second buyer is able to threaten the seller with a court action<sup>662</sup> to bring the case to a logical conclusion and defend their rights only when the damage inflicted on the consumer is considerable. In order to defend one's rights and obtain compensation from the seller, it is necessary to have evidence, use the services of a lawyer in civil cases and have a lot of patience. The manuscripts of electronic contracts remain the major source of evidence to secure protection for consumers<sup>663</sup>.

The fact is that when selling and providing services via the internet, there is not always evidence that would confirm the transaction simply because consumers are not aware as which manuscripts must be saved. Even though evidence exists, Sharia Law has not yet determined exactly which forms can act as evidence in a court<sup>664</sup>. Below is provided the list of compensation and remedies that consumers are able to recover if they have suffered from a loss.

1. A refund of the value of the purchased product, product or service.

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<sup>661</sup> P. Bagheri, and K.H. Hassan, 'Electronic Commerce, Law and Consumer Protection: Reference to Iranian Law', 2015, p. 61.

<sup>662</sup> J.B. Rule, and G. Greenleaf, (eds.) *Global privacy protection: The first generation*, Edward Elgar Publishing, 2010, pp. 19.

<sup>663</sup> Ibid pp. 176.

<sup>664</sup> A. Namazifard, A. Babak, A. Tousi, M. Aminilari, and A.A. Hozhabri, 'Literature Review of Different Contentions of E-Commerce Security and the Purview of Cyber Law Factors' In *E-Commerce in Developing Countries: With focus on e-Business (ECDC) International Conference IEEE*, 2015, pp. 1-14.

2. Compensation for moral damage; this involves payment of funds at the amount established by the court.
3. It is also necessary to identify more precisely the various problems that arise when using network services:
  - Judicial protection - the rights of consumers are defended directly during the trial.
  - Obligatory maintenance of the right of the consumer to a quality service.
  - Securing the buyer's right to preserve and secure (not disclose) the information transmitted to him, especially his personal data.
  - The right of consumers to receive complete and reliable information before signing a service agreement.
4. As part of the provision of services through the internet and in the event of the seller's failure to fulfil the obligations regarding the quality provision of services, everything is decided as follows:
  - Firstly, the consumer can, at his own discretion, appoint new terms for the provision of services and the fulfilment of obligations.
  - Secondly, he can demand a reduction in the cost of providing the services.
  - Third, he can break the contract for the provision of services.

If the seller does not go to the arranged meeting and indicates that he is not going to return the money for the services, not rendered or poorly rendered, the next step for consumers is go to court. The consideration of cases on consumer rights usually takes several weeks in Sharia jurisdiction. However, the process can be accelerated through showing e-contracts. The law considers it important and correct to conclude a contract, since it forms the only potential representation in court. According to Namazifard et al<sup>665</sup>, security of e-commerce trade in both Sharia and EU legislations forms a critical issue in information technology. Consumers with a sound knowledge of technology are able to preserve their electronic evidence. The author has highlighted the need to develop policies that can uniformly be applied to secure the privacy of consumers. Consumers must be able to prepare a secure infrastructure based on e-evidences which they may use in case of a threat. The legal ambit of e-consumer contracts requires assessment of two particular phenomena: firstly, whether the data provided for contracts is sufficient enough to secure e-consumers and secondly, whether the current provisions are successful in providing remedies for the precedents or they need to flourish.

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<sup>665</sup> Ibid, pp. 9.

## 4.6 The Global Electronic Market

Currently, a truly global electronic market is emerging. It has its origins in the significant increase in telephone traffic over the past two decades and in the growth of GSM mobile communications in recent years. At the same time, due to falling costs and increasing competition, prices have fallen sharply and data networks have expanded considerably, especially the internet<sup>666</sup>. At present, over one hundred countries are connected to the Internet<sup>667</sup>. The most recent survey shows that there are approximately 20 million "internet hosts" worldwide<sup>668</sup>. As a result of this development, communication is not only becoming a global business, it is also promoting globalization and the networking of economic activities.

The Internet community strives to rely on open standards that ensure both compatibility and competition. Open standards are particularly important in terms of hardware and software for accessing and using the internet. The electronic market reinforces the current globalization trend which has been gaining momentum as shown by world trade statistics. The share of trade in global value added has more than tripled since 1950<sup>669</sup>.

These trends have been further reinforced by a number of agreements, notably in the context of the WTO, the GATT, GATS and TRIPS agreements, which will continue to play an important role in the liberalization of trade, and also by the recent agreement on telecommunications services<sup>670</sup>. In principle, the legal framework of offline areas should be transferred to those online in order to adequately protect the public interest. However, the technical possibilities of open networks such as the internet are already testing the existing legal structures in many areas, particularly including data protection and e-consumer protection<sup>671</sup>.

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<sup>666</sup> M. Castells, M. Fernandez-Ardevol, J.L. Qiu, and A. Sey. *Mobile Communication and Society: A Global Perspective*, MIT Press, 2009, p. 114.

<sup>667</sup> S. Kiiski and M. Pohjola, 'Cross-country Diffusion of the Internet', *Information Economics and Policy*, vol. 14, 2002, pp. 297-310.

<sup>668</sup> E. Da Costa, *Global E-Commerce Strategies for Small Businesses*, MIT Press, 2016, p. 36.

<sup>669</sup> W.E. Murray, and J. Overton, *Geographies of Globalization*, Routledge, 2014, p. 59.

<sup>670</sup> A.L. Stoler, P.N. Pedersen, and S. Herreros, 'Negotiating Trade Agreements for the 21st Century', 2012, p 23.

<sup>671</sup> S.Lester, B.Mercurio, and A. Davies. *World Trade Law: Text, Materials and Commentary*, Bloomsbury Publishing, 2012 pp. 39-42.

According to Roberts<sup>672</sup>, the networked world economy requires an appropriate framework that may be applied to regulate the technical, business and legal aspects of e-commerce trade. The major aim of law in this context is to promote the interoperability of technical solutions, competition and coherent rules. However, it is not necessary for this framework to contain detailed and harmonized rules for all aspects<sup>673</sup>. Analysis made in the previous chapter makes it clear that the problems in both EU and Islamic countries are more and more related to the legal framework. It is, therefore, increasingly necessary to address these issues on a global scale, as uncertainty over the different responses to these challenges would hamper the further development of global electronic commerce.

The results reveal an urgent need for detailed solutions and priorities so that the international community can seek solutions in a thorough and coordinated manner. An exchange of information at every possible opportunity (expert panels of the Member States, forums, etc.) can facilitate the identification and resolution of problems. The EU Commission supports online activities that allow all participants to share their views in a more coordinated manner and encourages exchange of information<sup>674</sup>. It is important to share these views with policy-makers worldwide and to define the prospective roles of stakeholders in the context of e-commerce trade. According to Tang<sup>675</sup>, it is not about the creation of a new international monitoring authority or the issue of comprehensive binding rules, but rather that a forward-looking agreement should be reached on how to best tackle and solve problems together. This means developing a permanent method of e-consumer protection involving public and private interests in an appropriate way.

This could be agreed multilaterally in an international charter. This charter would:

- Provide a multilateral agreement on a coordination method to remove obstacles to the global electronic market;
- be legally non-binding;
- recognize the on-going work of existing international organizations;

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<sup>672</sup> M. Roberts, 'Thoughts on How Trade, and WTO Rules, Can Contribute to the Post-2015 Development agenda' No. ERSD-2014-07. WTO, *Staff Working Paper*, 2014 pp. 2.

<sup>673</sup> Ibid, pp. 2.

<sup>674</sup> F. Skopik, G. Settanni, and R. Fiedler, 'A Problem Shared is a Problem Halved: A Survey on the Dimensions of Collective Cyber Defense Through Security Information Sharing', *Computers & Security*, vol. 60, 2016, pp. 154-176.

<sup>675</sup> Z.S. Tang, *Electronic Consumer Contracts in the Conflict of Laws*, Bloomsbury Publishing, 2015, p. 76.

- encourage the participation of the private sector and affected social groups;
- Contribute to greater transparency in regulation.

#### **4.7 Challenges for E-Consumer Protection**

The problem of protecting consumer rights in relation to electronic commerce arises with regard to the provision of network services and affects a wide range of people<sup>676</sup>. Under a contract for the provision of network services, the supplier undertakes to provide the consumer with services to connect it to the network and ensure the possibility of using the network, while the consumer of network services undertakes to pay for the services provided. Although the EU has established a large number of directives regarding e-consumer protection, no normative act can be highlighted that particularly regulates legal relations in e-commerce trade. It is apparent that the EU relies on general contractual provisions of law for the protection of e-consumer rights.

#### **4.8 Issues commonly faced by Electronic Consumers**

The most common challenges worth considering for e-consumer protection can be concluded as below<sup>677</sup>:

- Lack of legislative recognition for electronic transactions.
- Lack of a developed practice in this field.
- Ignorance of consumers about their rights in general and about the peculiarities of using electronic means of communication for making transactions.
- The unregulated status of electronic sites as a way of interaction between consumers and sellers.
- Lack of a unified approach for solving issues in the field of electronic commerce (for example, the use of different technologies in different countries when signing an electronic document).

From the point of view of the consumer, there are several problems that arise when using network services<sup>678</sup>:

- Assurance of the consumer's right to information when concluding a service contract.

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<sup>676</sup> M. Rotenberg, and D. Jacobs, 'Updating the Law of Information Privacy: The New Framework of the European Union', *Harv. JL & Pub. Pol'y*, vol. 36, 2013, p. 605.

<sup>677</sup> C. Riefa, 'The Reform of Electronic Consumer Contracts in Europe: towards an effective legal framework?', *Lex Electronica*, vol. 14, n. 2, 2009, pp. 1-44.

<sup>678</sup> Note by the UNCTAD secretariat, Consumer protection in electronic commerce, 2017, pp. 1-17. Available from: [https://unctad.org/meetings/en/SessionalDocuments/cicplpd7\\_en.pdf](https://unctad.org/meetings/en/SessionalDocuments/cicplpd7_en.pdf) (Accessed 23 January 2019).

- Assurance of the consumer's right to quality service.
- Assurance of the consumer's right to the security of transmitted information.
- Judicial protection of consumers' rights.

In the event of non-fulfilment or improper performance of obligations in the provision of e-consumer services, the consumer is entitled to present claims, including claims for damages made to the communication operator providing services or performing work in accordance with EU law. Claims are made in writing and are subject to compulsory registration in accordance with the established procedure. For claims related to non-provision, untimely or poor-quality provision of communication services or failure to perform or improper performance of works in the field of e-commerce, consumers are required to act within a specified deadline<sup>679</sup>. This feature is completely absent in Sharia law.

Results reveal that the identified issues can be generalized for both the EU and the Sharia Laws, both of which incorporate mechanisms that guarantee protection of basic consumer rights. At the same time, it should be taken into account that the protection of consumer rights in e-commerce is carried out not only within the framework of the legislation, but also by the norms of international law, and also that the previously adopted norms of law are supplemented with new ones that reflect the specifics of e-commerce; this particularly applies to EU law. In contrast, Sharia Laws are more conservative and derive obligations from the Sharia while giving less importance to international paradigms.

A serious obstacle to effective protection of consumers' rights may be the lack of a developed practice in this area. As the most effective way to solve this problem, it is possible to propose the study of international legislation relating to e-commerce. In the current EU and the Sharia Law, such a legal possibility is fixed. Unlike Sharia law, EU law enshrines the primacy of international law. This allows the application of the norms of the international treaty of the European Union in the event that it establishes other rules on the protection of consumers' rights than those contained in the directives. According to Hafner-Burton et al<sup>680</sup>, the study of international norms makes it possible to take into account more progressive norms of law, since

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<sup>679</sup> C. Riefa, 'The Reform of Electronic Consumer Contracts in Europe: towards an effective legal framework?', p. 39.

<sup>680</sup> E.M. Hafner-Burton, D.G. Victor, and Y. Lupu, 'Political Science Research on International Law: The State of the Field' *American Journal of International Law* vol. 106, 2012, pp. 47-97.

at international level the practice of protecting consumer rights in the field of electronic commerce has advanced one step higher.

In addition, the law on e-consumer protection in both the EU and the Sharia Laws determines the rights of consumers in cases of poor performance or non-performance of services. If the provider did not start the service in time, i.e. did not provide access in accordance with the terms of the contract, or if during the rendering of the service it became evident that the service would not be delivered on time, and in the event of a delay in the provision of the service, the consumer has the right to choose between the following options<sup>681</sup>:

- Appoint a new term to the performer during which the performer must start the service and (or) complete the service and demand a reduction in the price for the provision of the service.
- Demand a reduction in the price for the provision of the service.
- Terminate the service agreement.

Consumers are owed these rights by virtue of legislation, but not all providers lead the contract to this extent. Whenever there is a delay, consumers are likely to wait without any further negotiation or simply rescind the contract. Rescission of contracts has found to be most common remedy sought by consumers seek whenever they confront any issue. Kim<sup>682</sup> has highlighted this as the major reason why e-consumers do not seek legal help and why legal frameworks have become static. The author has further determined that electronic contracts are aberrant because they can easily be drafted by providers and yet can easily be ignored by consumers. The author argues that no particular legal framework has been established that may help mitigate the confusion for consumers since most of the time consumers face difficulty in pointing out which particular version must be applied to the particular transaction<sup>683</sup>.

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<sup>681</sup> N. Amin and R. Nor, 'E-Consumer Protection in a Contract for the Sale of Goods: A Malaysian Perspective', *International Journal of Digital Society (IJDS)*, Vol. 4, Issue 2, 2013, pp. 798-805; C. Riefa, 'The Reform of Electronic Consumer Contracts in Europe: towards an effective legal framework?', p. 30-39.

<sup>682</sup> N.S. Kim, 'Situational Duress and the Aberrance of Electronic Contracts', *Chi.-Kent L. Rev* vol. 89, 2014, p. 265.

<sup>683</sup> Note by the UNCTAD secretariat, Consumer protection in electronic commerce, 2017, pp. 1-17. Available from: [https://unctad.org/meetings/en/SessionalDocuments/cicplpd7\\_en.pdf](https://unctad.org/meetings/en/SessionalDocuments/cicplpd7_en.pdf) (Accessed 23 January 2019).

Another issue that has exacerbated this problem is the excessive use of consumer contracts. According to Preston et al<sup>684</sup>, excessive use of electronic contracts has provoked a sense of habituation over-familiarity among consumers. Transactions are facilitated over websites without attention to what has been stated in the guidelines. All of this has reduced the effect of e-contracts. This has allowed the providers with an open playing-field since they know the contractual terms will not influence the buyers' decision. As consumers do not take contractual terms seriously and treat them as a mere formality, this greatly increases their vulnerability. In case of any misrepresentation of fraud, they are not able to show a contractual manuscript that speaks to defend their right. Rather, the evidence inadvertently supports the provider. These results have identified a considerable lack of legal paradigms that can be applied to assess the credibility of e-contracts. Based on these findings, it can be argued that the issue does not really lie in the legal frameworks of e-consumer protection in EU or Sharia laws, but in consumers' ignorance and lack of awareness.

EU law also allows consumers the right to demand full compensation for the losses caused to them in connection with the violation of the terms of the beginning and (or) termination of the provision of the service. Losses are reimbursed within the time limits established to meet the relevant requirements of the consumer<sup>685</sup>. Comparison of Sharia and EU law on this point reveals that consumers in both these jurisdictions are allowed to terminate the contract and seek remedies to recover their losses and rehabilitate them to the position as they used to be in prior to entering into the contract. Neither of the jurisdictions employs any framework for the breach of moral obligations. It is noteworthy that the principle of fiduciary duty (i.e. the duty of care) also applies here virtually from common law. This provides that recovery of damage is also possible if the fraud due to negligence. This allows the consumer to demand compensation in any case, in the presence of even the slightest violation of his rights<sup>686</sup>.

As a rule, a claim is made by submitting an application to the management of an organization that has violated the rights of the consumer. It often happens that the

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<sup>684</sup> C.B. Preston, 'Please Note: You Have Waived Everything: Can Notice Redeem Online Contracts', *Am. UL Rev*, vol. 64, 2014, p. 535.

<sup>685</sup> Directive 2011/83/EC (Consumer Right Directive).

<sup>686</sup> N. Amin and R. Nor, 'E-Consumer Protection in a Contract for the Sale of Goods: A Malaysian Perspective', pp.801-803.

administration refuses to receive any complaints, in which case it is necessary to send a claim by registered mail with a notice, having previously taken a copy of it. In court this will already be evidence of the fact that the defendant received the claim, which imposes on him the corresponding obligations. If all these requirements have no effect, the consumer has only one option remaining - to apply with a suit to the court. In accordance with EU law, consumers are exempted from payment of state duty for claims in defence of their rights. According to the Law on the Protection of Consumer Rights and Judicial Practice, the consumer has the right to choose the jurisdiction: he can bring an action at the place of residence, at the location of the defendant or at the place where the offence was committed.

Findings from Bagheri and Hassan<sup>687</sup> offer potential in regard to e-consumer protection in Islam. Sharia Laws underpin the principle of generosity based on which e-consumers are able to revoke their contracts and seek remedies for losses suffered. The most prominent feature in Sharia is ‘Khiyar al-Tadlis’, which is a typical term used for misrepresentation or deceit. This feature has not found to be of much importance in EU law. This option allows the disappointed parties to revoke the contract. The author argues that this is the main feature that maintains balance in Sharia law for protecting e-consumers from deception<sup>688</sup>.

- The literal meaning of Tadlis is ‘darkness and fraud’. Sharia Law applies this term when there are signs of concealing defects. Sharia Law strongly asserts misrepresentation as a crime that can be prosecuted in the civil lawsuit. From the Islamic point of view, the civil Tadlis relates to the defect, whereas the criminal Tadlis is applied for conceptualising fraud. This clear distinction has not been identified in EU law. In Sharia law, the tadlis forms a defect related to consent. In contrast, EU law does not identify it as a defect in consent, but as one present in the contract. In other words, the defect is present in the contract not because of the defect in consent of the parties, but because of a contractual condition. Below are provided the criteria used for establishing misrepresentation. There is a false statement or misrepresentation of fact when:
  - The statement was made to misguide the innocent party;
  - The statement caused the innocent party to enter into the contract

Legislation in the field of protecting the economic interests of consumers in the European Union also covers the legal regulation of those social relations that arise in the process of negotiating, concluding and executing contracts with the participation of consumers. Having studied the totality of the legislative acts of the European Union in the field of protecting the

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<sup>687</sup> Bagheri and Hassan, p. 155.

<sup>688</sup> Ibid, p. 160.

economic interests of consumers, it is significant that the legal sections can be divided into a general and special part. The general part of the legislation on protecting the economic interests of consumers is a set of legislative acts that form the legal regulation of the protection of contractual rights and economic interests of consumers in general<sup>689</sup>. These are the legislative acts concerning all spheres of public relations arising between the entrepreneur and consumers regarding transactions involving consumers<sup>690</sup>.

On the other hand, a special part of the legislation on protecting the economic interests of consumers is a set of legislative acts applied in certain areas of public relations, such as financial services, transportation services, tourism services, energy services and others. The results have considered legislative acts of the European Union, containing the rules of substantive law, which are part of the general part of EU legislation on protecting the economic interests of consumers. The only legislative act in the sphere of services which should be attributed to the general part of the legislative acts with regard to protecting the economic interests of consumers is Directive 2006/123 / EC on services in the domestic market<sup>691</sup>.

#### **4.9 Credibility of the EU Directives/Regulations**

EU Law establishes general rules for the provision of services throughout the entire Union, including services provided to consumers; this coherence of rules is absent among Islamic countries. The preamble of the 2006/123/EC Directive<sup>692</sup> define various objectives for the adoption of legislation. The major drawback of the EU rules and guidelines is the focus upon the domestic market and that it refuses to consider international guidelines. According to Ambroziak<sup>693</sup>, the report of the European Commission presents disappointing information that there are still many internal barriers to the development of cross-border provision of services in the domestic market. Thus, the main goal of Directive 2006/123/EC was to reduce the number of barriers in the domestic market for cross-border provision of services, since the

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<sup>689</sup> R.D. Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union*, Harvard University Press, 2011, p. 43.

<sup>690</sup> *Ibid* p. 65.

<sup>691</sup> W. Sauter, 'Services of General Economic Interest and Universal Service in EU Law', *European Law Review*, No. 2, 2008, pp. 1-37.

<sup>692</sup> Directive on service in the internal market.

<sup>693</sup> A.A. Ambroziak, 'Strategy for the Re-launching of the EU Internal Market in Response to the Economic Crisis, 2008-2010' *Yearbook of Polish European Studies* vol. 14, 2011, p. 14.

legislation views e-commerce services as a driver of economic growth and represents 70% of gross domestic produce and jobs in most member states.

In addition, Directive 2006/123 / EC states that it is consistent with consumer protection legislation, namely Directive 2005/29 / EC of the European Parliament and of the Council of 11 May 2005 on unfair commercial practice of enterprises towards consumers (Directive on Unfair Commercial Practices) and Regulation 2006/2004 / EC of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities authorized to oversee the application of legislation in the area of consumer protection.

The services that are regulated by Directive 2006/123 / EC can be divided into three types:

- Services provided exclusively to enterprises
- Services provided to both enterprises and consumers
- Services provided exclusively to consumers

The existence of legal norms in EU Directive 2006/123/EC regulates public relations regarding the provision of all types of these services. This, therefore, confirms the universality of this directive, as well as the correctness of the classification regarding its attribution to the general part of legislative acts in the field of protection of contractual rights and consumers' economic interests'.<sup>694</sup>

The universal directive on services covers the legal regulation of key aspects of public relations arising in the provision of services. These are stated below<sup>695</sup>:

- Information received by suppliers and recipients of services
- The possibility of receiving services remotely or through the points of one window
- The procedure allowing providers to access the provision of services, which may be established by an EU Member State
- The requirements for the provision of services, which are prohibited and subject to assessment by the Member States of the EU
- Free movement of services and seizures
- The rights of recipients of services, in particular consumers, that include provisions on non-discrimination and the prohibition of restrictions on the rights of the recipient of services by the EU Member States? and the establishment of additional rules or restrictions for the recipient of the service; conditions for the assistance of Member States to recipients of services

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<sup>694</sup> Ibid pp. 34.

<sup>695</sup> 2006/123/EC Directive, s1,2.

- Quality of services
- Cooperation of the EU Member States in the provision of services

In addition to this list of problems addressed by the Directive in the sphere of provision of services, it has been noted that atypical services provided to consumers are regulated by the special legislation of the European Union insofar as those in this act are not regulated<sup>696</sup>. Furthermore, it is necessary to consider a whole set of legislative acts, which in their content and subject of legal regulation, also refers to the general part of legislative acts for e-consumer protection. At present, after the revision of the legislation in the sphere of the economic interests of consumers, this block consists of three documents<sup>697</sup>:

- Council Directive 93/13 / EEC on unfair terms in contracts with consumers
- Directive 1999/44 / EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and related safeguards
- Directive 2011/83 / EC on consumer rights, amending the two above directives and repealing directives 97/7 / EC and 85/577 / EEC.

According to Chirita<sup>698</sup>, the 2011/83/EC directive provides the basis of harmonisation in contrast to the rules of approximation. This directive mainly aims to extend the consumer protection paradigms previously provided in the Treaty of Rome. The author has highlighted a great room for improvement in the application of this directive, since it lacks a substantial basis for unfair contracts. The scope of this thesis must be expanded in regard to e-consumer protection. The author further argues that the implementation of diverse directives have fragmented the codification of EU private law. Nevertheless, the usefulness of these codes cannot be neglected since they play a considerable role in integrating EU borders where trade barriers cease to exist.

The 93/13 / EEC directive states that more influential protection for e-consumers can be achieved through adopting uniform rules of law on unfair conditions in contracts with consumers<sup>699</sup>. EU legislation perceives consumers as the weaker party and recognises its duty to protect it consumers from ill-considered actions. In connection with this, Article 3 of 93/13

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<sup>696</sup> L. O’Leary, In *Employment and Labour Relations Law in the Premier League, NBA and International Rugby Union*, TMC Asser Press, 2017, pp. 1-18.

<sup>697</sup> G. Dannemann, and S. Vogenauer, (eds.) *The Common European Sales Law in Context: Interactions with English and German Law* Oxford University Press, 2013 p. 45.

<sup>698</sup> A.D. Chirita, ‘The Impact of Directive 2011/83/EU on Consumer Rights’, 2012, p. 2.

<sup>699</sup> Directive, Council, ‘93/13/EEC of 5 April 1993 on unfair terms in consumer contracts’ (1993) 214 OJ L 95.

/ EEC directive refers to unfair terms of the contract. This constitutes a condition that was not separately specified by the parties, and the consumer had no opportunity to influence the presence or absence of such a condition in the contract<sup>700</sup>. In addition, the 93/13 / EEC directive mentions that an indicative and non-exhaustive list of conditions that are unfair is agreed upon in the annex to Directive 93/13 / EEC. Thus, the legislator tries to facilitate work for the courts, giving characteristics to unfair conditions that may be included in consumer contracts.

In Article 6 of directive 93/13 / EEC, the mandatory rule stipulates that "unfair conditions used in an agreement concluded by the seller or supplier with the consumer are not binding for the consumer under their national law and that the contract continues to oblige the parties to fulfil the contractual conditions if it can continue to exist without unjust conditions."<sup>701</sup> This condition is the main guarantee of the protection of consumers' rights against such unfair acts of entrepreneurs as the inclusion of unfair conditions in consumer contracts.

However, application of 93/13 / EEC are not particularly directed at e-consumer contracts, since it applies to both written and oral agreements. As stated in Article 8 of the directive, the Member States have the right to adopt or maintain stricter measures to protect consumers' rights from unfair terms of contracts in comparison with the measures proposed by the directive. Thus, the directive establishes minimum consumer protection measures, which can be further increased by EU member states. It should be noted that this approach is also used in 1999/44 / EC directive and establishes minimum guarantees for consumers when purchasing consumer goods<sup>702</sup>.

Unlike the latest approach of the European Union to the approximation of legislation, which refers to 'full harmonisation', the approach that establishes minimum guarantees does not fully harmonize the legislation of member states, but only brings them under identical minimum limits. In this case, these minimum limits are set in respect of the guarantees of consumer rights. Due to the changed attitude of EU legislators towards the degree of harmonization required in the EU, directives 93/13 / EEC and 1999/44 / EC have been supplemented in directive 2011/83 / EC on consumer protection with regard to the addition to

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<sup>700</sup> Ibid., pp.01.

<sup>701</sup> Ibid, pp.01.

<sup>702</sup> H-W. Micklitz, N. Reich, and P. Rott. *Understanding EU Consumer Law*, 2009, p. 98.

Article 8 (a) of the mentioned directive. The article asserts the adoption of stricter measures than those established by the directives.

Article 8(a) of directives 93/13 / EEC and 1999/44 / EC also oblige the European Commission to communicate relevant information to consumers and sellers, including through publication on a special website. Under this article, it also forms a major obligation for the European Commission to impose tougher measures than the measures established by the directives. The 2011/83 / EC directive on consumer rights is the latest legal act in the field of protecting the economic interests of consumers, which resulted from the revision and codification of legal acts. Full harmonization has remained the objective of the activities of the institutions of the European Union in the last few years<sup>703</sup>. Indeed, they have resulted in the formation of codified, updated and revised legal acts that more clearly and extensively build up the legal regulation of the protection of economic rights and consumer interests.

Directive 2011/83 / EC, in addition to changing the provisions of Directives 93/13 / EEC and 1999/44 / EC, repeals the provisions of Directives 85/577/EEC and 97/7/EC Article 4 of Directive 2011/83 / EC establishes the conditions for the implementation of harmonization: "Member States shall not apply or adopt provisions of national law that are inconsistent with the provisions of this Directive, including more or less stringent requirements for securing a different degree of consumer protection, unless otherwise provided by this Directive ".<sup>704</sup> This approach is referred to as "complete harmonization". According to Manco<sup>705</sup>, it greatly differs from the approach adopted until the mid-1990s, in which the Community set minimum or maximum limits within which EU member states could harmonise legislation.

As highlighted by the author<sup>706</sup>, the Commission has promised to revise its proposals for the European Sales Law. The author has identified five critical issues that the EU law still fails to address regarding e-consumer protection. The first aspect concerns whether laws for online

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<sup>703</sup> G.G. Howells, and T. Wilhelmsson. *'EC Consumer Law'*, Taylor & Francis, 2017, p. 37.

<sup>704</sup> Directive, Consumer Rights, 'Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7' (2011) EC of the European Parliament and of the Council.

<sup>705</sup> R. Mańko, 'Contract Law and the Digital Single Market: Towards a New EU Online Consumer Sales Law?', 2015. Available from: <[http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/568322/EPRS\\_IDA%282015%29568322\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/568322/EPRS_IDA%282015%29568322_EN.pdf)> (accessed 22 January 2019).

<sup>706</sup> Ibid p. 16.

sales must be encoded as a directive or regulation, that is to say what would be the most suitable legal form. Secondly, if the legal form of a directive is chosen, then would a minimum harmonisation or total harmonisation constitute an appropriate choice? The current legal reforms fail to take into account the level of proportionality and principles of subsidiarity for e-commerce protection. Thirdly, it is important to specify whether the proposed legal instrument would be applied to regulating cross-border trade, or whether it would purely form an intervention for domestic online transactions. The fourth issue that needs to be addressed is related to the country of origin principle. This applies to whether online providers would be allowed to rely on domestic laws for selling consumer products abroad or would play across wider principles. The frameworks are also missing as to how the new interventions would fit with the current systems of the Brussels and Rome regulations. Lastly, the debate of legal reforms in the EU for e-consumer protection must focus upon revamping the content of directives. It is important to determine whether the tailored guidelines can be accommodated within the present directives or not. The current system of e-consumer protection fails to identify the different interests of consumers when entering into e-commerce.

According to Wilinska-Zelek<sup>707</sup>, EU institutions felt the need to standardise and harmonise laws regarding consumer protection during the 1970s. This marks the period when they began harmonisation procedures in the field of consumer protection, which was later modified to protect e-consumers too. The first program regarding consumer protection was updated in 1975, wherein the consumers were granted five basic rights which still are applied for e-consumer protection. These include the rights for health and safety protection, protection of economic interest for the consumers, privacy of information, education and fair representation. Currently, full harmonisation is applied to implementation of the directives across the EU. Wilinska-Zelek<sup>708</sup> has identified a lack of diversification and fragmentation of directive provisions across the EU member states. Considering the current state of harmonisation, it can be argued that the most complete uniformity of legislation can be achieved through harmonisation, which is increasingly similar to the result of the unification of EU law.

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<sup>707</sup> A. Wilińska-Zelek, 'Consumer Rights—New Tendencies. Considerations about Directive 2011/83/UE' *Polish Review of Social Science*, 2011, p. 6.

<sup>708</sup> *Ibid* p. 6.

According to Chirita<sup>709</sup>, the 2011/83 / EC directive does not affect legal regulation in some areas of the economic interests of consumers. It also restricts the rights of EU member states to implement national legislation. The state applies provisions of 2011/83 / EC directive in the implementation of the legal regulation of public relations in the field of distance sales. As argued by the author, such a list of exemptions erroneously creates the impression of narrow specialization of the adopted legislative act and the need to classify it as special legislation. However, when examining the list of seizures in detail, it becomes obvious that public relations, the legal regulation of which is not implemented through Directive 2011/83 / EC, are regulated by legislative acts of a specific part of the legislation on protecting the economic interests of consumers.

In general, the 2011/83 / EC directive does not make any significant changes to the provisions of the currently effective legislation. The purpose of this act is the codification and unification of those provisions that until now have been disjointed. The preamble of this directive contains a number of provisions explaining the purposes and reasons for the adoption of certain of its provisions. Such unnecessary detailing is the result of scrupulous study by the legislator of public relations and the legal acts regulating them before the implementation of their revision.

In the opinion of Micklitz<sup>710</sup>, one of the provisions of Directive 2011/83 / EC points to the attentive and detailed attitude of the European legislator to the revision of legislative acts in the field of consumer protection. This can better be understood from the preamble, which states that “the difference in the procedure for exercising the right of refusal in the member states leads to losses of sellers engaged in cross-border sales. The introduction of a unified template for the form of failure that a consumer can use should simplify the refusal procedure and introduce legal clarity. For these reasons, Member States should refrain from adding any presentation requirements to the All-Union Form Template, relating, for example, to the font size”.

Thus, having studied the practice of refusal of contracts and having seen some dissonance in the application of the provisions on the renunciation of contracts, the legislator decides to

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<sup>709</sup> Chirita, *The impact of Directive 2011/83/EU on Consumer Rights* 2012, pp. 56-82, Available from: SSRN <<https://ssrn.com/abstract=1998993>> (Accessed 22 January 2019).

<sup>710</sup> H-W. Micklitz, and N. Reich, ‘The Commission Proposal for Regulation on a Common European Sales Law (CESL)’-Too Broad or Not Broad Enough?, 2012, P. 9

unify the form of refusal for all Member States so that the consumer, as a weak party, can use this form. The consumer may fill in and send the form to the seller under the 2011/83 / EC directive. The limit specified is 14 days; this limit is considered as sufficient to recognize the consumer's withdrawal from the contract and to implement all necessary procedures without violating the rights of consumers' law.

For the time being, this directive has been identified as the most important element of the system for protecting the economic interests of consumers<sup>711</sup>. This is mainly because it contains general norms on the contractual rights of consumers which have been revised through the prism of decades of judicial practice and reflects the most modern situation of consumers in contractual relations. For the general part of the legislative acts in the field of protection of the contractual rights and economic interests of consumers, it is also necessary to refer to the 98/6 / EC directive. This was introduced on 16<sup>th</sup> February 1998 and highlights consumer protection in regard to the price of products offered to consumers<sup>712</sup>. Article 1 of the directive establishes the purpose of fixing rules for price specification for sales of goods and the unit price of goods offered by sellers for consumers. Its major purpose is to improve the quality and effectiveness of consumer information and to facilitate comparison of prices in the EU<sup>713</sup>. It also provides wider concepts for product pricing sold alone or in bulk. The 98/6 / EC directive provides that the goods must include the price per unit and / or the price of the sale of the goods. In the event that they do not coincide, both prices shall be indicated. At the same time, prices should be unambiguous, easily recognizable and readable. It is envisaged that the EU member states are obliged to independently establish sufficient and effective measures regarding the responsibility of sellers for non-compliance with these rules after their implementation in national legislation.

#### **4.10 Personal Data Processing**

Considering the fact that only individuals are consumers in the context of consumer protection in the European Union, one of the peculiarities of the legal regulation of contractual relations in this area is the need to comply with legislation on personal data when concluding

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<sup>711</sup> Ibid 6.

<sup>712</sup> K. Jamal, M. Maier, and S. Sunder, 'Enforced Standards Versus Evolution by General Acceptance: A Comparative Study of E-Commerce Privacy Disclosure and Practice in the United States and the United Kingdom', *Journal of Accounting Research*, vol. 43, 2005, pp. 73-96.

<sup>713</sup> Ibid, p. 78.

and executing contracts with the participation of consumers. Legal regulation in this area is also carried out in accordance with the 2002/58/EC directive<sup>714</sup> of 12 July 2002. This encloses guidelines on processing personal data and protecting confidentiality in the electronic communications sector. As stated in the preamble to Directive 2002/58/EC, "The Internet modifies traditional market structures by providing a common global infrastructure for providing a wide range of electronic communications services. Publicly accessible e-services via the Internet open not only new opportunities for users, but also new threats that threaten their personal data and information about their personal lives<sup>715</sup>. "

According to Beatrix Cleff<sup>716</sup>, the 2002/58/EC directive establishes mandatory measures to protect and ensure the confidentiality of personal information of users that is exchanged during the electronic purchase and remains in the collective access networks. Proceeding from the foregoing, it can be concluded that in the field of protecting the economic interests of consumers, the European Union has developed a large number of legislative acts applicable to all relations arising in connection with the conclusion of contracts with the participation of consumers. On the basis of the general part of legislative acts, the European legislators have built an integral system of special-purpose legislative acts, which represent a special part of the legislation on protecting the economic interests of consumers.

#### **4.11 The Unique Concept of an Information Society Service**

Businesses involved in online trading are certainly influenced by the e-commerce regulations that were enforced in 2002 in the UK. These regulations are the EC Directives<sup>717</sup> that were synchronised into UK law in 2000. The major purpose was to clarify and harmonise the rules of online business across Europe and empower consumers<sup>718</sup>. The information society service has been defined as any service that is provided at a distance for the purpose of

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<sup>714</sup> The Directive on Privacy and Electronic Communications.

<sup>715</sup> Directive 2002/58/EC, article 6.

<sup>716</sup> E.B. Cleff, 'Privacy Issues in Mobile Advertising', *International Review of Law Computers and Technology*, vol. 21 2007, pp. 225-236.

<sup>717</sup> Directive 2000/31/EC.

<sup>718</sup> S.M. Kierkegaard, 'E-Contract Formation: US and EU Perspective', *Shidler JL Com. & Tech.*, vol. 3, 2007 pp.12-16.

remuneration and the operations involve electronic equipment to process and store the information<sup>719</sup>.

The Department for Business, Energy and Industrial Strategy (BEIS) (2016) views e-commerce in a wider context and as more than just buying and selling online. The BEIS guidance report on Regulations states that the normally applied remuneration to the information society service does not restrict its scope to services<sup>720</sup>. The BEIS also provides coverage of the economic activities that are not directly remunerated by those who receive them, for instance, the online information providers and stakeholders of the commercial communication that allows searching, accessing and retrieving information.

The case of *Google Inc v Louis Vuitton*<sup>721</sup> is a significant one, in which the French Court of Cassation asked the CJEU whether the Google Search complies with the definition of the 'information society service'. The CJEU established that any service involved in internet referencing constitutes an information society service and stores information provided by the advertiser. It was also emphasised that any service is counted as an information society service if it evidentially complies with the service features. Another important case that the UK High Court passed to the CJEU for preliminary rulings was that of *L'Oréal v eBay* (2011)<sup>722</sup>. In this case, L'Oréal commenced litigation against the sellers on eBay for selling L'Oréal products without its consent. One particular question that the court considered in this case was the potential liability for eBay. eBay was accepted as an information society service by the court since it operates as an online market place.

#### **4.12 A Comparative View**

Under a contract for the provision of e-commerce services, the supplier undertakes to provide the consumers with services. Meanwhile, the provider also ensures that the consumer pays for the services provided. This method of exchange is similar in both the jurisdictions. Consumers in the EU and the Islamic countries have the right to quality service. They also have

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<sup>719</sup> W.H. DeLone, and E.R. Mclean, 'Measuring e-commerce success: Applying the DeLone & McLean information systems success model', *International Journal of Electronic Commerce*, vol. 9, 2004, pp. 31-47.

<sup>720</sup> F. Bélanger, and R.E. Crossler, 'Privacy in the Digital Age: A Review of Information Privacy Research in Information Systems', *MIS Quarterly*, vol. 35 2011, p. 1017-1042.

<sup>721</sup> *Google France SARL, Google Inc v Louis Vuitton Malletier SA and others*, ECJ (Grand Chamber), 23 March 2010.

<sup>722</sup> *L'Oreal SA v eBay International AG*, EU: C: 2011: 474.

the right to obtain information when concluding a contract and to be assured that all transmitted information is kept secure. Free movement of goods and services exists in the European Union (EU); the entire EU internal market is open to consumers in the member states. The wide range of options offered on the domestic market and the growing opportunities for travel encourage consumers to make more and more purchases abroad. In addition, opportunities for buying goods or services on the internet are constantly expanding<sup>723</sup>. Wolf<sup>724</sup> has recognised the EU as being somewhat biased since they only support consumer protection for national trade and not international trade<sup>725</sup>. This remains the major reason why the European nation is subjected to formal and informal trade barriers that comprise the welfare of consumers. The author argues that EU laws for e-consumer protection must remove this home bias.

However, the positive aspect highlighted for this international trade and directives is that the member states feel confident. The EU has established the European Consumer Centres Network (ECC-Net), which protects consumer rights for the member states, Iceland and Norway. The centre is regulated by the Consumer Protection Board, whose main task is to resolve cross-border consumer complaints<sup>726</sup>. The centre offers consumers a full range of services: information on consumer rights in EU member states, advice on how to behave in connection with cross-border shopping problems<sup>727</sup>, and, if necessary, resolution of specific complaints or mediation with an appropriate charge<sup>728</sup>.

Lodder<sup>729</sup> has identified an urgent need to enhance e-consumer protection in the EU. The author argues that laws across the European member states must be harmonised further. In line

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<sup>723</sup> E. Gomez-Herrera, B. Martens, & G. Turlea, The Drivers and Impediments for Cross-Border E-Commerce in the EU. *Information Economics and Policy*, vol. 28, 2014 p. 28, 83-96.

<sup>724</sup> H.C. Wolf, "Intranational Home Bias in Trade' *The Review of Economics and Statistics* vol. 82 2000, pp. 555-563.

<sup>725</sup> A. Mika, 'the home bias in trade in the European Union', Working Paper Series, European Central Bank, No.2046, 2017, p. 1. Available from: <<https://www.ecb.europa.eu/pub/pdf/scpwps/ecb.wp2046.en.pdf?e1644d6bf3875fd86db87ba7c9d49b47>> (accessed 24 January 2019).

<sup>726</sup> H.Wallace, M. Pollack, and A. Young, (eds.), *Policy-making in the European Union*, Oxford University Press, 2015, p. 58.

<sup>727</sup> "European Consumer Centres Network", EUR-Lex, 2017. Available from: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A132048>> (accessed 24 January 2019).

<sup>728</sup> H.Wallace, M. Pollack, and A. Young, (eds.), *Policy-making in the European Union*, pp. 60-62.

<sup>729</sup> A.R. Lodder, and H.W.K. Kaspersen. *eDirectives: Guide to European Union Law on E-Commerce-Commentary on the Directives on Distance Selling, Electronic Signatures, Electronic Commerce, Copyright in the Information Society, and Data Protection*, Kluwer Academic Publishers, 2002 pp. 76-98.

with other aspects of modern life, the need to satisfy e-consumer requirements as a matter of urgency is apparent. Moreover, the overall quality of the products and services rendered is also of key importance to meet the precise demands of consumers. Manufacturing firms impose conditions on consumers for the acquisition of products and services<sup>730</sup>. In addition, there is no specific system of consumer education in the EU. Analysis of modern judicial practice indicates that currently the activities of various judicial bodies do not fully meet the key tasks of protecting all consumer rights<sup>731</sup>. Furthermore, the problem of protecting the rights of the modern consumer in the whole system of constitutional human rights in the European Union is actualized by the fact that the developed range of directives, as a whole, directly refers to the threat to consumers. They only marginally create a level of security of e-consumers. However, they fail to increase the level of security in line with the emerging threats<sup>732</sup>.

The laws and principles applied in Sharia Laws are somewhat similar, but are not encapsulated in a systematic manner. The terms and principles greatly differ in their names and origins, but the concept of application remains almost same<sup>733</sup>. Both the EU and the Sharia Laws support consumers through providing them with greater rights to exercise over the provider and reinforcing them to show the power of their will. However, Sharia Law differs in terms of its application in different countries. In Saudi Arabia, for example, there are no special laws on data protection, although the right to confidentiality is enshrined in several of its laws<sup>734</sup>. In particular, the basic principle applied in Saudi Arabia maintains that all correspondence and all types of communication between the parties are strictly confidential and should not be disclosed<sup>735</sup>.

In the absence of applicable law, courts are guided by norms of Sharia law. Based on Sharia norms, a party is liable to be sued for damage caused by unlawful disclosure of personal

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<sup>730</sup> S.S.Glenn, and M.E. Malott, 'Complexity and Selection: Implications for Organizational Change'

<sup>731</sup> G. Strejcek, and M. Theil, 'Technology Push, Legislation Pull? E-government in the European Union' *Decision Support Systems* vol. 34, 2003, pp. 305-313.

<sup>732</sup> *Ibid*, p. 312.

<sup>733</sup> R. AlGhamdi, J. Nguyen, A. Nguyen, and S. Drew, 'Factors Influencing E-commerce Adoption by Retailers in Saudi Arabia: A quantitative analysis', *International Journal of Electronic Commerce Studies*, vol. 3, 2012, p. 83.

<sup>734</sup> The Basic Law of Governance 1992/A/90, Article 17; Electronic Transactions Law 2007M/18, Credit Regulations 2008/M/37, Articles 2 & 3; Anti-Cyber Crime Law 2007M/17; the Civil Status Law 1988, Articles 1,10 &11.

<sup>735</sup> *Ibid* p. 83.

information of an individual, if such disclosure has caused losses to an individual or harmed him<sup>736</sup>. In the United Arab Emirates, there are no special laws on protection of data, but the right to confidentiality has been provided in the constitution and in various laws<sup>737</sup>. The Constitution of the UAE states that an individual "is guaranteed freedom and confidentiality of correspondence, transmission of telegraphic messages and other means of communication in the accordance with the law"<sup>738</sup>. In addition, the Criminal Code provides some rights to confidentiality and protection of personal data<sup>739</sup>.

However, some associations are found prominent in Islamic countries that specifically aim to protect e-consumers. Laws in the Islamic countries work to unify efforts and expertise so that consumers are able to defend themselves. The goals of association between Islamic and EU countries have found to be similar in terms of their objectives. Both of these focus on consumer awareness and treat misrepresentation, misleading trade and deception as serious matters. Comparatively, the efforts in EU countries have found to be more vigorous. For instance, French legislation highlights five parts for the protection of consumers and conformity of products and services in terms of safety. However, great contextual basis are evident in the European culture that empowers enactment of the directives. It can be argued that the laws developed in Islamic countries, and to a lesser extent in EU countries, serve on a stand-alone basis and therefore call for a legal theory to protect consumers.

In the context of modern Arab legislation related to consumer protection, Lebanese legislation<sup>740</sup> provides that contracts concluded by the consumer at a distance and in his place of residence are subjected to greater security. In Article 55 of the law, the consumer in accordance with the provisions shall cancel his decision to buy or lease the goods and to benefit from the service<sup>741</sup>. Referring to the legislation of Iraq<sup>742</sup>, the jurisprudence defines that

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<sup>736</sup> B. Alanazi, M.G. Almeajel, 'Investor Protection and the Civil Liability for Defective Disclosures in the Saudi Securities Market: A Legal Analysis', PhD Thesis, University of Wollongong, 2012.

<sup>737</sup> The Constitution of the United Arab Emirates, 1996/1, the Civil Transactions Law 1985/5 (UAE), the Federal Law 2006/24 (UAE), and the Penal Code 1987/3 (UAE).

<sup>738</sup> The Constitution of the United Arab Emirates, 1996/1, s3 (Articles 25 & 26).

<sup>739</sup> The UAE Penal Code 1987/3, Articles 247, 278-280.

<sup>740</sup> The Lebanese Consumer Protection Law 2014/265.

<sup>741</sup> S.H. Jalali, and M. Soleimani, 'An Investigation about the Impacts of E-Commerce Adoption on Export Performance' *International Journal of Modern Management and Foresight* vol. 3, 2014, pp. 98-104.

<sup>742</sup> The Iraqi Consumer Protection Law 2010/1.

consumers are provided with a legal advantage if they want to withdraw from the contract even if the contract formed is a valid one<sup>743</sup>. This, however, is applied before the contract is concluded. Sharia Law relieves the responsibility from consumers to compensate the provider for damages incurred because of recourse.

It is clear from the definition that it was an advantage given by the legislator to the consumer. Although the Iraqi law of consumer protection is devoid of any specific texts in this regard, the Iraqi legislator does not take the same legislative steps as the French legislator in his report on the consumer's choice to withdraw from the contract<sup>744</sup>. According to Al-Bayati, the legislator in EU countries stands within the limits specified by the general rules in civil law, especially when a matter of contract law<sup>745</sup> is involved. It is possible for consumers to revoke the contract or modify their wishes.

Al-Bayati<sup>746</sup> further argues that laws in Iraq and Egypt do not show any clear option regarding this. The reason for this may be the availability of options adopted by Sharia Law: options of condition, vision, appointment and of defect. E-consumer protection in Egypt and Iraq is based on the fact that it is the responsibility of each contractor to protect the rights and interests of his own and he does not have the right to claim that he was deceived by some means or other outside the framework of the traditional theory of defects of consent when the conditions are satisfied. As a result, there is an imbalance in the contractual relationship between the consumer and the professional relationship.

Based on the findings from different Islamic states, it is clear that determines the rights of consumers as being similar to those in the EU member states, particularly in defining the scope of electronic contracts. This mechanism forms the major building block for the protection of e-consumers. Legislation in Islamic countries can be justified based on Sharia principles. Islamic countries issue laws that provide for withdrawal of the contract as it enables the consumer to avoid the damage caused by his hasty acceptance, as well as this lack of efficiency

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<sup>743</sup> A.M. Kadhim, and M.Z. Al-Taie, 'Factors Disrupting a Successful Implementation of E-Commerce in Iraq' The 4th Scientific Conference held in Baghdad 2013.

<sup>744</sup> S. Clerides, P. Davis, and A. Michis, 'National Sentiment and Consumer Choice: The Iraq War and Sales of US Products in Arab Countries' *The Scandinavian Journal of Economics* vol. 117, 2015, pp. 829-851.

<sup>745</sup> Al-Bayati, Murad, 'Reform of the Iraqi Private International Law on Transnational Online Contracting: Lessons from the EU and the USA.' PhD Thesis, Bangor University Law, 2014, p. 109

<sup>746</sup> *Ibid*, pp.109.

in technical or economic aspects. This leads to the issuance of the consent that is not informed by contracting in a way that goes against his interests<sup>747</sup>.

As stated by Devenney and Kenny<sup>748</sup>, the EU consumer acquis incorporate a stricter approach for e-consumer protection. The approach applied in EU countries presupposes a consumer is a natural person who acts for his business or profession. The authors argue that this narrow concept of e-consumer protection greatly frustrates the consumers' expectations. There are a number of consumers who still consider themselves in a similar traditional position, such as farmers. The complexity of consumer definition issues are prominent in various countries and require a more precise overview of online and offline contracts.

Analysis of e-consumer protection in the above-mentioned jurisdictions reveals that general principles are same. However, there has been a lack of analytical studies and so further studies are suggested to reveal the elemental aspects between the two jurisdictions. The regulatory patterns applied in EU and Sharia laws differ in their sources. Peculiarities in Sharia do not significantly impact the way consumers are given protection for different e-commerce contracts. This necessitates the need for protecting consumers in particular situations. On the other hand, the patterns exhibited in EU jurisdictions are much more detailed and appear prima facie. However, the distribution of law in directives has greatly fragmented the guidelines for consumers. Laws in the EU must be shaped comprehensively in an accessible manner.

The application of misrepresentation or deceit forms the major principle of e-consumer protection in both Sharia and EU laws. The principle of khiyar tadlis is found to have more potential than in EU states. It provides a greater extent and defines a wider scope of e-consumer's rights and forms the major balance between the e-consumer and the e-seller. Bagheri and Hassan<sup>749</sup> have identified the scope of tadlis in EU and UK law as broader than in Iranian law; Sharia Law only identifies an intentional tadlis, whereas the law in the EU and the UK recognise negligent and unintentional threats as well. Consequently, the legal effects of tadlis are found to be different among these systems. According to Sharia law, intentional tadlis relates to the fundamental characteristic of the contract, whether it is finalised via electronic or

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<sup>747</sup> M. Grivna, A.Ching, M. El-Sadig, T. Loney, A. Sharif, J. Thomsen, M. Mauzi, and F. Abu-Zidan, 'The Legal Framework and Initiatives for Promoting Safety in the United Arab Emirates' *International Journal of Injury Control and Safety Promotion* vol. 19, 2012, pp. 278-289.

<sup>748</sup> J. Devenney, and M. Kenny, (eds.) *European Consumer Protection: Theory and Practice*, Cambridge University Press, 2012, p. 83.

<sup>749</sup> *Ibid* pp. 161.

traditional methods. Meanwhile, the victims of deception and misrepresentation in the UK and the EU countries are able to rescind the contract and recover their damages. EU law speaks more in favour of e-consumers than sellers. It allows the insertion of exemption clauses, whereas Sharia Law implicitly recognises that the seller is able to establish the sale and is not really responsible for the defects in sold goods. This greatly makes the application *khiyar tadlis* questionable in Sharia law. Though the application of this principle forms an Islamic legal mechanism, it must be revised in contrast to the EU laws to adequately protect consumers.

As established by Mancuso<sup>750</sup>, comparison of the two jurisdictions unravels a similar pattern of e-consumer protection in terms of the rights provided to consumers. Adoption of further approaches can be necessitated considering the present rules. The origins of Sharia Laws are constant. However, their interpretation and modification can be extended to derive guidelines to meet the contemporary changes occurring in the consumers' world. It can be argued that Sharia legislators have not yet reached the extent to which guidelines are deducible from Sharia law. Case laws are relatively absent, especially in Sharia law, which corresponds to the fact that consumers do not recognise their rights and do not raise their voices to seek damages through the law. Research into legal formats may help to reveal the extent to which both these jurisdictions differ.

Based on the results, six major limitations can be highlighted for e-consumer security: issues of trust, technology acceptance, security, internet usage and contracts. The results reveal that the majority of e-commerce limitations are technical in nature, since consumers are not able to understand which guarantees favour their interest and which do not. It is reasonable to state that the EU must adopt a parallel system more inspired by the principles of Sharia. This will not dissolve EU legislation, but would serve to enhance the legal experience. In EU countries, multiculturalism is a fact and not an ideology that offers the most advanced reflection of legal ideas<sup>751</sup>. It should be explained that there are dozens of Islamic tribes in Great Britain that deal mainly with issues of family law within Muslim communities: their decisions are not

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<sup>750</sup> Ibid, pp.161.

<sup>751</sup> H. Entzinger, 'The Rise and Fall of Multiculturalism: The Case Of The Netherlands.' In *Toward Assimilation And Citizenship: Immigrants in Liberal Nation-States*, UK ,Palgrave Macmillan, 2014, pp. 59-86.

legally binding, but have value for arbitration<sup>752</sup>. This can also be applied in the context of e-commerce.

The EU is crucially a step away from a truly decisive moment. It must embrace the aspects of security, privacy and deception in a more effective manner. Strengthening data networks may remove ambiguities. It can be stated that the path that both these jurisdictions are following is towards establishment of the internet and not towards establishment of consumer security. It is apparent that EU and Sharia jurisdictions presume that building strengthened internet networks will ultimately result in improvement in consumer protection laws. This probably constitutes a wrong dimension that requires modification in favour of consumers.

Regarding the security of online information, Sharia law does not find that to be an issue that requires further developments. On the other hand, EU legislation involves the aspect of data protection, but its scope is mainly limited to credit card details. However, there is a probability that consumers' email IDs are saved on the internet which the other providers may use to allure them with their tempting deals. Through introducing new rules in the form of a comprehensive international legislation, the countries will be able to ensure improved network surveillance, where only credible providers will be able to contact consumers.

#### **4.13 The Scope for Prospective Improvements**

In general, the problems of active protection of consumer rights in the European Union are of great theoretical and practical importance, since they occupy a central place in the activities of modern specialists in various fields of knowledge. Findings from Mancuso<sup>753</sup> provide the basis for prospective developments. Mancuso studied the specifics of the Sharia and the EU laws to promote e-consumer protection. The study identifies various shortcomings and drawbacks regarding how the consumers' rights are protected in both of the jurisdictions.

The activities of electronic commerce and the emerging legal relationships in their environment raise many legal challenges to the existing legal systems in the Sharia and EU jurisdictions, which revolve around the impact of the use of electronic means in carrying out

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<sup>752</sup> M. Keshavjee, 'Islam, Sharia and Alternative Dispute Resolution: Mechanisms for Legal Redress in the Muslim Community', *IB Tauris*, vol. 6, 2013, p. 45.

<sup>753</sup> Mancuso, 'Consumer Protection in E-Commerce Transactions', pp. 27.

commercial activities<sup>754</sup>. Since the dawn of commercial activity, it has been based on the acceptance of any contract. It aims to deliver the sale materially and within a positive external activity, and ensure that the buyer either meets the price directly (in cash) or uses the tools of alternative direct payments, through commercial securities or by means of a bank transaction. To this extent, the rules regulating commercial activity, whether internal or external, and despite its development, have remained able to meet the requirements of trade regulation. Irrespective of the development of commercial services and technical services activities, communication business activities, labour relations, obligations relating to the supply, and transfer of knowledge or technology, the legal rules governing commercial activities and contracts in EU and Sharia jurisdictions have remained capable of simulating the evolving and changing reality in the world of commerce; however, this is different for e-commerce. It is apparent from the results that the difference lies not in the concept of commercial activity, but in the tools of its practice and the nature of the relationships it involves. It is important to evaluate the impact of technology and its dominant mechanisms responsible for enforcing commercial activity in the field of electronic commerce. Moreover, it is also important to analyse the necessity of the existence of electronic commerce, since this creates a new challenge to the existing legal systems in EU and Sharia jurisdictions.

The question that arises here is what legal challenges have emerged in the field of electronic commerce? The relevance of the chosen topic is due to the fact that the current existing regulatory regulation is not enough to eliminate all the problems of protecting consumers' rights when trading through the internet<sup>755</sup>. This study has highlighted problems related to consumer rights protection in the implementation of distance trade which require legislative regulation.

The mechanism of the participation of consumers in online contracts is important in the system of economic and social policy of the modern state. Domestic legislation in Sharia countries is not sufficiently developed and provides a lesser degree of consumer protection than legislation of the EU. At the same time; the development of legal regulation of distance trade is of paramount importance for Islamic countries. Keeping in view the current state of consumer protection in the EU and Islamic countries, it is important to first enhance the

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<sup>754</sup> D.S. Wall, 'The Internet as a Conduit for Criminal Activity', 2015, p. 27.

<sup>755</sup> R. Miller and F. Cross. *The Legal Environment Today: Business in its Ethical, Regulatory, E-Commerce, and Global Setting*, locNelson Education, 2012 p. 56.

integrity and validity of e-commerce transactions. Secondly, consumers must be provided with necessary protection measures so they are able to recognise any fraudulent activity and deception. Thirdly, there must be uniform frameworks of development and support for e-commerce.

According to Devenney and Kenny<sup>756</sup>, the particular issues in the field of e-commerce are related to the protection tools applied. The extent of impact lies in the information requirements for e-commerce. The crucial point to consider for e-consumer protection is the provision of contractual information, similar to that provided to traditional consumers. The authors argue that electronic consumers do not really form a weaker party, but the contractors bound with click and wrap agreements do. This calls for the need of a new definition of consumers since the traditional one only describes the consumers in a limited way.

#### **4.14 Conclusion**

This chapter has provided an in-depth analysis of the EU directives and the core legal principles that form the basis of online consumer protection in the EU laws. Findings made in chapter 3 has been integrated to clearly define the scope of reforms in both Sharia and EU jurisdictions. This chapter has discussed the prevalent threats for online consumers, and the need of more advanced regimens to protect rights of consumers. This chapter also analysed the global electronic market and highlighted various challenges that consumers face in making electronic contracts. It has effectively discussed the credibility of the EU directives and outlines the scope of development for both the laws.

Both Sharia and EU laws have found to be similar in their intent for protecting consumers in e-commerce. They both provide guidelines to recover the loss and damages for consumers if he/she has entered in an e-consumer contract. However, the guidelines contained in EU laws is more fragmented and requires to be condensed in a single comprehensive act. It is important to note that the basic guidelines for contract formation, deceit, and turbulence are applied for governing e-commerce trade. In contrast, Sharia law rejects most of the contemporary trade developments in e-commerce. However, the most important aspects that make Sharia law an effective piece of law are the concepts of intent and deception.

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<sup>756</sup> J. Devenney and Kenny, *European Consumer Protection*, 2012 p. 83.

## CHAPTER FIVE: CONCLUSION

### 5.1 Key Findings

There is no doubt that commercial advertising is one of the most important means of competition between traders and a means to attract consumers. It is assumed that the purpose of the commercial declaration is to introduce consumers to the functions and characteristics of goods and services offered in the market by describing their details and characteristics, so the commercial must have sufficient credibility. Clarity remains the hallmark requirement that gives consumers the right to make the best choice for them with a free and informed will<sup>757</sup>. However, advertising is often not clear; it may mislead the consumer by giving him/her some incorrect data or deliberately failing to mention other data, so that the consumer becomes a victim of this deception and his freedom of choice is affected. Therefore, one important aspect of consumer protection is to eliminate misleading commercial advertising.

Consumer protection in e-commerce is generating aggressive debate that emphasizes the need for advancing legislation. E-consumers are provided with two different types of guarantees: legal and commercial<sup>758</sup>. In a legal guarantee, remedies are provided for services and goods that do not conform to the contract. Commercial guarantees, on the other hand, provide remedies for services and goods that turn out contradictory to the express promises that the seller made while making the transaction. These have been highlighted in the 2nd and 3rd articles of the proposal amended for the directive in the EU parliament and in the Council on sales of consumer goods. Prima facie appears to be more fragmented in EU jurisdiction for e-commerce as compared to Sharia rules and principles. There is clearly a need for comprehensive rules to enable consumers to access a great number of legal issues and subsequent defences<sup>759</sup>. OECD<sup>760</sup> has emphasised the need for a higher level of protection that

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<sup>757</sup> H. Micklitz, and N. Reich, 'The Commission Proposal for a Regulation on a Common European Sales Law (CESL)' - Too broad or not broad enough?', *European University Institute Working Papers*, vol. 4, 2012, pp 1-99

<sup>758</sup> Ibid, pp. 1-99.

<sup>759</sup> S. Mancuso, Consumer Protection in E-Commerce Transactions, pp. 1-3.

<sup>760</sup> The Organisation for Economic Co-operation and Development.

can uniformly be applied in various jurisdictions to strengthen consumer protection in e-commerce<sup>761</sup>.

In order to create a level of confidence in electronic transactions in general, both the European and Sharia based legislations have introduced policies regarding the exchange of electronic legal data<sup>762</sup>. It is apparent that the rules in both these jurisdictions focuses mainly on electronic contracting. However, the legal requirements they posit are different. Although the new policies aim to offer increased protection at a legal level for e-contracts, this protection is weighted in particular towards the protection of suppliers and traders. Based on the findings, it can be argued that the safest parties in e-commerce are contributors who are aware of various technical methods. Consumer protection from third parties is guaranteed by independent legal texts, which are often criminal in nature.

In this regard, it should be noted that consumer protection in e-contracts is insufficient, as it is the consumer's responsibility to take technical information precautions that enhance his/her information programme and all his/her electronic transactions; in particular, he/she must protect him/herself against fraudulent circumvention by parties when making online contracts. A specialist may exploit any loophole to improve his/her own data and e-performance status. This thesis has summarized the important legal implications and issues that must be addressed to protect consumers; the majority of these are related to issues encountered in electronic contracting.

The study has focused on the specifics of the contracts of consumption made online considering both European and Sharia based legislations. A particular focus has been on the nature of the problem faced by consumers and their association with a wide technical field, which is surrounded by a number of risks that affect the consumer and the law. This thesis has been created due to the fact that Sharia law is more than 1400 years old and offers a wider scope to draw images for civil law liabilities for electronic contracting. Over the years, both Sharia law and EU Directives have created a valuable forum for civil law debate and a deeper knowledge of the wider legal community. Regarding the future of civil law, it is important to

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<sup>761</sup> OECD and the G20, Financial Consumer Protection, 2017. Available from: <<https://www.oecd.org/g20/topics/financial-sector-reform/financialconsumerprotection.htm>> (Accessed 22 January 2019); Ibid, pp. 1-3.

<sup>762</sup> E. Kirillova, E. Shergunova, E. Ustinovich, N. Nadezhin, and L. Sitdikova. 'The Principles of the Consumer Right Protection in Electronic Trade', *International Journal of Economics and Financial Issues*, vol. 16, no. 2s, 2016, p. 56.

consider the striking differences between these two laws that appear to be very different, but are exercised in a large number of countries.

## 5.2 A Comparative Review

The Sharia legal system frames the axis in which Muslims evaluate transaction behaviours. Therefore, these rules must be considered when making or amending any law before acceptance by the Muslim nation. It remains to be seen how Arab lawmakers may benefit from the European approach without breaching the eternal rules of Sharia. An overview of Sharia law, especially in the Arab states, reveals that consumer protection regulations are unable to achieve their objectives. This is particularly true for dealing with misleading advertisements and market transactions. This is mainly because the regulations are not equivalent to specific rules and prohibitions. Though Sharia law adopts strict rules for misleading advertisements, the guidelines it provides do not include specific prohibitions to control deceptive practices. On the other hand, Directive 2005/29/EC seems very clear in terms of specific measures which enable control<sup>763</sup>.

Consumer protection regulations enacted in other Arab legal systems are not much better. Misleading advertising is frequently used in market transactions in spite of the fact that Islamic ethics underlines that market transactions, including the use of advertisements, must be conducted fairly. With regard to the European approach, Directive 2005/29/EC on Unfair Commercial Practices was introduced in May 2005 with the intent to improve the functioning of the internal market and also to achieve higher-level consumer protection.

EU legislation has been criticised for its fragmentary and overly detailed nature; such features deter the progress of electronic transactions across borders. It has been recognised as necessary to introduce regulatory reforms and newer legal structures. No central agency has been constituted in the EU for consumer protection, but the member states share a network of supervisory institutions, which empower private organisations to provide the market on behalf of consumers. EU legislation incorporates several directives for e-consumer protection, but it has been argued that it might prove to be more efficient if these directives can be replaced with regulations leading to the formulation of an accessible and coherent framework for e-commerce

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<sup>763</sup> W. Sauter, 'Services of General Economic Interest and Universal Service in EU law', TILEC Discussion Paper No. 2008-017, *European Law Review*, vol. 2, 2008, pp. 1-37.

transactions<sup>764</sup>. The second reason presented to support the proposal for change suggests that actions in the EU must concentrate upon cross-border contracts and, in particular, transactions being concluded with distant parties.

Although consumer organisations in the EU are more focused upon improving specific enforcements and acts regarding e-consumer rights in general, it is necessary to define general concepts and terms, such as ‘vulnerable consumer’ and ‘energy poverty’ across the European Union. This need has been identified to bring about an improvement in the current e-commerce situation and to ensure that the EU exercises a legal framework that is highly coherent in its application for the member states<sup>765</sup>.

Likely, Islamic countries have recently shown an interest in consumer protection and many of them have enacted consumer protection laws, such as the Omani Consumer Protection Law No. 66 of 2014, the Egyptian Consumer Protection Law No. 67 of 2006, the Syrian Consumer Protection Law No. 2 of 2008, and the Iraqi Consumer Protection Law No. 1 of 2010, as well as the UAE Federal Law No. 24 of 2006 regarding Consumer Protection. However, there are other countries that apply the principles of Sharia law, but are underdeveloped in terms of the legal protection they provide for e-consumers; for instance, there is no effective law on consumer protection in Libya.

It is notable that EU directives are the same in their effects for the member states; they are exercised in a similar manner and applied uniformly. In contrast, there is a great diversity in Sharia laws and their interpretation. Indeed, the laws derived from Sharia origins do not form uniform guidelines for all Islamic countries. For instance, the laws applied in the Arab states are different from those in Iran or Malaysia. The basis and foundations of Sharia laws are no doubt very strong, but ambiguities have been found in their application. The UAE Federal Law No. 24 of 2006 regarding Consumer Protection are considered insufficient, due to the lack of sufficient legal provisions contained therein to determine consumers’ protection against misleading commercials. The scope of protection they provide against such commercials is very weak. The UAE Consumer Protection Law is designed to establish a general obligation to

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<sup>764</sup> C. Twigg-Flesner, 'A Cross-Border-Only Regulation for Consumer Transactions in the EU', New York, Springer, 2012, p. 72.

<sup>765</sup> Ibid, pp. 35.

prohibit any advertisement that would mislead the consumer and cause him/her to be mistaken about the advertised item or service.

The lawmakers in both Sharia and the European jurisdictions have done well to expand the definition of the advertiser so that it now includes every natural or legal person from the public or private sector who advertises and promotes goods or services, whether the manufacturer, the distributor, the direct seller, the lessor or the service provider<sup>766</sup>. The concept of the advertisement itself includes all forms of advertising, whether in the visual media or through publications, or catalogues, in addition to advertisements on websites, and the definition of the content of the article has been expanded to include services, in addition to goods<sup>767</sup>. Also, both legislations entitle consumers who have been harmed by any practices contrary to the provisions of the law to claim compensation for damages suffered as a result of such practices<sup>768</sup>.

The level of formalism and complex guidelines is greater in Sharia law<sup>769</sup>. This actually adds strength to the law as it enables it cover the wider and more complex aspects of consumer protection. Sharia law, thus, can be regarded as a complex one that is capable of dealing with the more complex issues of e-commerce opportunities and how sellers and consumers should behave in order to avoid any loss or threat. This creates a clear line of difference between Sharia and EU laws. Khiyar-al-Tadlis is the major point of difference that can be replicated in EU laws to improve consumer protection.

It has been argued that the legal frameworks applied in the area of e-consumer protection are highly fragmented and close to being unsatisfactory<sup>770</sup>. Such unsatisfactory conditions prevail because of inherent differences between consumer laws applied across different jurisdictions and national boundaries shared between the consumer and the trader. These boundaries deter online transactions across borders. A regulation was proposed on 25<sup>th</sup> May 2016 to increase transparency of pricing in cross-border purchasing<sup>771</sup>. This regulatory reform aims to mitigate the inconvenience that higher prices cause in cross-border delivery of parcels

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<sup>766</sup> As Directive 2011/83/EC on Consumer Rights, Article 3; and Consumer Rights Act 2015 (UK).

<sup>767</sup> Cleff, *Privacy Issues in Mobile Advertising*, pp. 225-236.

<sup>768</sup> UAE Consumer Protection Law 2006/23, article 1.

<sup>769</sup> Mancuso, *Consumer Protection in E-Commerce Transactions*, p. 6.

<sup>770</sup> *Ibid*, pp. 2-4.

<sup>771</sup> COM (2016) 285, the proposal for a regulation on cross-border parcel delivery services.

and yet forms the biggest obstacle for both the retailers and consumers who wish to buy online across the EU<sup>772</sup>. This reform introduced the option of convenient cross-border delivery of products for consumers and retailers with affordable options of return to and from the peripheral regions<sup>773</sup>.

Certain problems that prevail in Sharia law are country-specific. For example, the UAE Consumer Protection Law assumes that both commercial and consumer contracts are similar and it does not distinguish between them, which has given rise to significant ambiguities in the application of law<sup>774</sup>. Likewise, differences are particularly present in situations that render rescission of contract a lawful practice. Legislations in the underdeveloped Islamic countries do not underpin special regulations regarding consumer protection rights, but merely rely upon the general principles in Civil law for restricting and limiting the contractual relationships<sup>775</sup>. In such countries, the transactional relationship suffers through significant inequalities relative to bargaining power<sup>776</sup>.

There are a number of countries across the globe that apply the rules of Sharia, but it is noteworthy that only limited research has been conducted on e-consumer protection for e-commerce products<sup>777</sup>. Significant gaps identified have been identified in the regulatory architecture adopted in Islamic countries for providing e-consumer protection<sup>778</sup>. It is recognised that there is significant potential for collecting information based on information asymmetries from providers that cause consumers to make uninformed decisions<sup>779</sup>. , which places consumers in a vulnerable position whereby chances of their exploitation are higher. Such ambiguities in e-commerce trading have been impeding the development of the e-commerce industry. A need for evaluating the adequacy of the current legal and regulatory frameworks applied to e-consumer protection has been identified. Discussion of legal policies

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<sup>772</sup> European Commission, COM (2016) 285. Available from: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0285>> (Accessed 23 January 2019).

<sup>773</sup> Europa.eu, 'Boosting E-Commerce in the EU' *Digital Single Market*, 2017. Available from: <<https://ec.europa.eu/digital-single-market/en/policies/ecommerce>> (accessed 20 January 2019).

<sup>774</sup> Mancuso, pp. 17.

<sup>775</sup> Like the Civil Transactions Law in Oman and UAE.

<sup>776</sup> F. Khan, *Islamic Banking in Pakistan*, 1st edn.2015, pp. 59-67.

<sup>777</sup> S. Mancuso, *Consumer Protection in E-Commerce Transactions*, p. 9.

<sup>778</sup> M. Muhammad, M. Muhammad and K. Khalil, 'Towards Shari'ah Compliant Ecommerce Transactions', *Middle East Journal of Scientific Research*, vol. 15, no. 9, 2013, pp. 1229-1234.

<sup>779</sup> Mohd Nasir bin Mohd Yatim & Amirul Hafiz bin Mohd Nasir, *The Principles and Practice of Islamic Banking & Finance*, Pearson-Prentice Hall, 2008, pp. 68.

might help provide a rationale for strengthening e-commerce, whereby consumers can be provided with increased security and legal defences<sup>780</sup>.

It is important to consider that Sharia law demonstrates a high level of deliberate care towards preserving the position of consumers to their optimal benefit. Across Sharia Law, consumers are provided with the right of rescission to unilaterally rescind contracts which are required to be exercised only within a finite time-limit or otherwise it loses its significance<sup>781</sup>. Interpretation of Quranic verses demands the promotion of individual rights related to consumer protection in society<sup>782</sup>. Moreover, greater respect has been shown to preserving individual rights when entering into e-contracts.

In a new measure of its kind, Sharia legislation exhibits great flexibility to adapt and develop. Several points have been identified which EU legislation should adopt from Sharia laws. The concepts of goodwill, fairness and free consent of consumers are found to be stronger in Sharia laws<sup>783</sup>. However, the EU adopts a more vigorous approach in terms of application. Sharia law gives administrative authority to the trade industry, since the supplier in breach of law can be taken to court. The emphasis regarding contracting procedure is not very clear in Sharia laws as compared to those in the EU. Though Sharia law adopts the idea of criminal liability in a case of misleading or fraudulent misrepresentation<sup>784</sup>, no particular case can be highlighted which indicates a weaker application of laws. In addition, the Sharia laws on e-consumer protection differ from European laws in terms of the rights of consumers. In practice, consumers are only able to save their interests in a competent court if they have financial, administrative and technical capabilities that may not be available to the individual consumer.

Referring to Sharia legislations in the UAE, the study found that the concept of misleading commercial advertising is lacking and this issue has been found in the majority of Arab consumer protection laws since these laws have been adopted and copied from each other. On the other hand, some Islamic countries, have declared some issues that are misleading,

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<sup>780</sup> Ibid, p. 70.

<sup>781</sup> O.S. Olalekan, *The Relevance of Online Dispute Resolution in the Islamic Finance Industry in Malaysia* 1st edn., Ahmad Ibrahim Kuliyyah of Laws, International Islamic University Malaysia, 2015 p. 52.

<sup>782</sup> M. Venardos, *Current Issues in Islamic Banking and Finance*, 1st edn., World Scientific Publishing Company, 2010 p. 29.

<sup>783</sup> O. Ebraheem, 'Consumer Protection in Islamic Law', *Conference of Consumer Protection in Comparative Law*, United Arab Emirates, December 1998, p. 21.

<sup>784</sup> UAE Consumer Protection Law, S6 (Articles: 18-19).

including: 1) the nature of the commodity, its composition, its essential characteristics or the elements that make it up, and the quantity of these elements; 2) the origin, weight, size, expiry date, terms of use or prohibitions of such use; 3) the type of service or place agreed to be submitted or the warnings of receipt or its essential characteristics, 4) the terms of the contract and the amount of the total price and the method of payment thereof, 5) contracting<sup>785</sup>.

Some EU consumer protection laws provide an accurate definition of the concept of misleading advertising. According to Article 5 of the British Consumer Protection Act of 2008<sup>786</sup>, advertising is misleading if it contains misleading or deceptive information affecting the average consumer and would pay him/her to contract so that he/she would not have contracted for this information. Thus, British legislators set an objective criterion in which the average consumer is assumed to have an average level of caution and intelligence, which is in error and misleading as a result of the information contained in the declaration so that it affects his/her choice and pays him/her to another choice.

EU legislation also explains the intent of misleading information, which it defines as the elements that the average consumer takes into consideration when making the decision to buy the commodity, such as the characteristics and price of the commodity. European and British laws have long listed such elements as the nature of the commodity, the obligations of the consumer towards the consumer, the price and methods of calculating it, services, consumer rights regarding the possible risks and the availability of the commodity<sup>787</sup>.

In order to protect the most vulnerable consumers, who are easy prey for advertisers, EU Law requires that a commercial declaration be directed at a particular category of vulnerable consumers because of their mental or physical disability, age or simplicity, of commercial advertising in accordance with the average level of acumen enjoyed by the target group of commercial advertising<sup>788</sup>. In addition, Sharia legislators refrain from clarifying whether the omission or omission of some of the declarative statements in the Declaration may be considered misleading or not, although this is present in the British counterpart. It explicitly indicates that deception could take the form of omission and sets a standard where the omission

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<sup>785</sup> As Omani Consumer Protection Law, Article 1; UAE Consumer Protection Law, S4 (Articles: 6-7).

<sup>786</sup> The Business Protection from Misleading Marketing Regulations 2008/1276 (UK), s1 (Article 5).

<sup>787</sup> Ibid, s1 Article 3.

<sup>788</sup> Commission Delegated Regulation (EU) 2016/341.

is considered to be misleading when it responds to material or fundamental information relating to the goods or service, and leaves it to British law to judge the question of whether or not the information is considered essential.

Sharia legislation also gives consumers the right to claim compensation and does not grant them other options that are derived from the contractual relationship between the advertiser and the consumer in the event that the advertisement proves misleading, such as the right to terminate the contract or reduce the price<sup>789</sup>. Even though these issues are not guaranteed in the general rules of the contract in such a way as to provide adequate protection to the consumer, it justifies a review of their organization to ensure more comprehensive protection for the consumer.

Finally, Sharia legislators do not grant the competent administrative authority the power to impose any administrative sanctions against a supplier who commits a violation of the law<sup>790</sup>. Hence, it can be stated that consumer protection departments should be granted the authority to approve administrative fines against a supplier violating the provisions of the law, which would activate the role of the administrative authorities in protecting the consumer in particular and the wider international market as a whole.

In conclusion, it can be stated that both these jurisdictions are different in their basic concepts, the names of rules, prohibitions and legislation, but are very similar in their notions of protecting consumers. Guidelines provided in the Sharia which relate to the fundamentals of contracting and principles regarding competition law are quite clear. However, Sharia Law emphasises spiritual aspects along with physical ones and is mainly concerned with intentions to maintain peace and justice. Sharia law views competition laws as important to be invoked by the justice administrations to promote the economy and commerce of the states.

Similar concepts have also been found in EU law: like Sharia law, it also deals with the concepts of wrongful exercises, abuse of rights, legal rights and objection. However, Sharia adds some further values which subsequently enhance its rationality compared with EU laws. The notion that a person with deceptive intentions is answerable not only to the courts, but also to the God is absent in EU law. The differences mainly lie in the history of both these

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<sup>789</sup> T. Mansuri, *Islamic Law of Contracts and Business Transactions*, International Islamic University, 2007, p. 150.

<sup>790</sup> M. Abu Said, *Consumer Protection in Islamic Law*, AL-Kutub AL-Ilmiyah House, 2004, p. 123.

jurisdictions and also the basic forces that govern amendments to the laws. The issue of unfair competition forms the core of EU rules, as opposed to deceptive intentions in Sharia law. Both these jurisdictions, undoubtedly, offer firm guidelines and show developments in regard to e-commerce trade, but they have not yet established a just and fair system in which consumers may feel secure.

### **5.3 Recommendations**

Despite the above-mentioned advantages, many weaknesses and deficiencies have been found in the provisions of both Sharia and European law, which shows an urgent need to review and amend these provisions to ensure the promotion of civil protection of consumers from misleading commercials.

It is important to quote here the statement from a Swedish jurist, Thomas Carlen Wendels, ‘there can be no good principles established for jurisdiction as long as the countries have different cultures and laws’<sup>791</sup>. These comments provide suggestions for comprehensive legal mechanisms that should be implemented to resolve disputes arising from cross-border jurisdiction. The measures taken so far are not very appropriate. Sharia law appears very effective in its concepts, but differs across countries and lacks integrity. In contrast, European laws are effective in their implementation and incorporate specific prohibitions. Analysis of the literature suggests that jurisdictional rules applied in both Europe and Islamic countries, though they seem promising, have not resulted in effective protection for consumers, especially when cross-border legal disputes occur. It is apparent that disputes arise on small claims and court litigation takes longer than necessary, which proves costly for consumers. Though legal rights have been delegated to e-consumers in countries influenced by the rules of both Sharia and European legislation, it is simply not always feasible to access them.

In order to make long-term changes, it is desirable that extra-judicial organs must also be involved for quick and cheap resolution of disputes. Though EC Directives include specific provisions that encourage the establishment of such bodies, they fail to address the numerous issues arising related to the competence of these organs, their enforcement powers, placement and the medium of operation. It is important to identify the extent to which such organs may

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<sup>791</sup> L. Bygrave and D. Svantesson, 'Jurisdictional Issues and Consumer Protection in Cyberspace: The View from 'Down Under'', *Conference on Cyberspace Regulation: eCommerce and Content*, Sydney, 2001, pp. 1-6.

help to deal with internet-related disputes and also to establish boundaries for them to function in a virtual environment. Though the study has not researched these issues, they require deliberate attention.

One of the requirements of the new economic reality is to accelerate the enactment of specific legislation in order to ensure consumer satisfaction, free will and choice, away from the manipulation of producers and distributors. Both European and Sharia Laws offer modern legislation that promises adequate protection of consumers, mainly from misleading advertisements. Nevertheless, the level of protection provided varies. Sharia legislation continues to take modest steps in the area of consumer protection in general, and some consumer protection bills are still in place in some countries, such as in the Arab states.

Changes in legislation are particularly important as they must be able to serve the relevant associations and empower consumers to bring their issues to court in accordance with general rules. The requirement of interest, or so-called adversarial description, forms the major obstacle, and for that reason consumers in countries influenced by Sharia principles are entitled to file a cancellation action on behalf of consumer groups for the absence of interest or the status of the dispute. Collective actions among countries must be established in accordance with the provisions of the law. This would allow consumers suffering from the effects of misleading commercials to bring collective compensation claims for personal injury caused by misleading advertising. This would not only save money, but will also help pursue litigation-related efforts for the laws of consumption and competition.

One potential point identified is replication of *Khiyar al-Tadlis* or the equivalent core concept in the EU law. This principle would enhance the prospects for EU consumers to gain recourse against deceit. The way Sharia law treats fraud and deceit is different, as the principle of *Khiyar al-Tadlis* is directly linked with the consent i.e. defects in consent or contract-making. The presence of this particular element makes the extent of Sharia law more affluent and effective to protect online consumers.

The processes of recourse that EU law maintains are cumbersome and lack convenience for consumers, especially when the online trade is made across the borders. ODR, which is considered as by far the most reliable way of protecting online consumers, has not gained state-wide acceptance. This limits the extent to which EU law is capable of protecting online consumers. A revision of the schematic structure of the ODR is recommended as it lags behind

in meeting the needs of online consumers<sup>792</sup>. Consumer protection in the EU is mainly treated as a market promotion objective, and not solely a matter of protecting rights of consumers<sup>793</sup>. The concept of a universal consumer protection service in EU law is still in its initial stages and requires further development to make it a comprehensive piece of law for consumers residing in other states as well.

It can be said that both the ADR and ODR instruments in the EU lack binding force and therefore reinforce the need to improve existing laws and regulations<sup>794</sup>. It can further be argued that the European Union does not trust private regulations, but the guidelines for online consumer protection are much more accustomed to government interventions<sup>795</sup>. It is recommended to bring supporting regulatory models to improve the functionality of ODR as it becomes increasingly complicated with advances in the online technology. It is reasonable to state that the EU jurisdiction should undergo complex changes to produce a stable regulatory framework to make the ODR function well.

It is expected that new changes in the ODR regulatory approach would create effective developments in establishing secure methods of recourse for online consumers, that is to say they will be better able to take decisions in the complex e-commerce market. In contrast, the current obligations it creates in EU jurisdiction are vague and lead to uncertainties for online consumers. These uncertainties mostly relate to accessing the national courts and the identification of statutory and self-regulatory approaches. These problematic aspects in EU laws have undermined the confidence of online disputants since they make the average consumer believe the regulatory approaches are sufficient in terms of predictability and consistency<sup>796</sup>. This prevents them from reaching the adequate regulatory approaches. These guidelines and recommendations for development apply to both B2B and B2C platforms.

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<sup>792</sup> V. Rogers, "Managing Disputes in the Online Global Marketplace: Reviewing the Progress of UNCITRAL's Working Group III on ODR.", *Dispute. Resolution. Magazine*, No. 19, 2013, pp. 20.

<sup>793</sup> K. Cseres, 'Universal Service and Consumer Protection: A Paradigm Shift in EU Law', *European Competition and Regulatory Law Review*, 2017, vol. 4, p.292.

<sup>794</sup> K. Liyanage, 'The regulation of online dispute resolution: Effectiveness of online consumer protection guidelines', *Deakin Law Review*, vol.17, no. 2, 2012, pp. 257.

<sup>795</sup> *Ibid*, pp. 258.

<sup>796</sup> *Ibid*, pp. 258.

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