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Electronic Funds Transfer

And the Case for Consumer Protection in Ethiopia

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List of Acronyms

ATM	Automated Teller Machine
CBE	Commercial Bank of Ethiopia
EFT	Electronic Funds Transfer
NBE	National Bank of Ethiopia
NPSP	National Payment System Proclamation
POS	Point of Sale
TOCs	Terms and Conditions
MABD	Mobile and Agent Banking Directive

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Introduction

The Ethiopian banking sector lagged behind in terms of introducing modern banking such as Electronic Funds Transfer (hereinafter “EFT”) and use of modern payment instruments. The first modern banking service of withdrawing cash from Automated Teller Machines (hereinafter “ATM”) was introduced by the Commercial Bank of Ethiopia (hereinafter “CBE”) for local users of Addis Ababa in 2001.¹ Afterwards, Ethiopian banks have joined VISA membership that enables them to issue VISA card to their customers. Nonetheless, cash remains the most dominant medium of exchange whereas the household bank coverage of Ethiopia is 20%.

With introduction of Electronic Funds Transfer, customers are now able to use payment instruments that replace cash. Currently, most Ethiopian banks issue VISA electron debit cards. Using debit cards, customers can withdraw money from ATM anytime of the day and make payments at Point Of Sale (hereinafter “POS”) terminals for services or goods supplied by merchants. Similar services are available for VISA and MasterCard cardholders from other countries.

Electronic Funds Transfer with the use of payment instruments such as debit card diminishes the risks of loss or theft that are relatively common with the use of cash. Moreover, it is convenient to carry and use a card rather than a large amount of cash. It is additionally argued that modern payment system whereby funds are transferred electronically is a key factor to extend banking services to the majority of unbanked Ethiopians principally because financial institutions do not need to open offices and invest heavily in order to provide a banking service.² On the other hand, efficient and secure payment system enables the monetary policies of the government to reach the economy easily and foster investment growth and national saving.³ These are some of the benefits of EFT.

However, use of payment instruments comes with its own peculiar features and risks. Loss or theft and subsequent unauthorized use are peculiar risks of payment instruments. Unlike cash, the use of payment instruments to access one’s account in a bank depends on contractual relation with the issuer of the instruments. Banks unilaterally prepare terms and conditions (hereinafter “TOCs”) of their services without negotiation with customers on take it or leave it

¹ Worku (2010) p.4

² Travaux Préparatoires p.3

³ Ibid p.5

basis. One of the dangers of pre-formulated standard contracts concluded with a consumer is the risk of being unfair to the latter. As in any contract, the undertaking of the parties to an EFT agreement is determined principally by the terms of the contract subject to applicable laws ranging from general contract law to consumer protection legislations.

In this paper, I examine consumer protection issues concerning an EFT contract in light of applicable legal rules of Ethiopia. The objective of the thesis is hence, to analyze the legislative limit (requirements) applicable before and after an EFT contract is concluded with a consumer and to examine whether applicable legal rules are sufficient to protect consumers from unfair contract terms.

To this end, the thesis is structured as follows. The first chapter introduces regulation of EFT by elaborating definitions. Moreover, the main legal instruments of Ethiopia that are applicable to EFT contracts made with a consumer are introduced after brief summary of justifications for protecting consumers of EFT and the approaches taken by other jurisdictions. The second chapter discusses pre-contractual issues relating to TOCs of EFT. Duty of disclosure of a bank to disclose its TOCs to consumers is the first subject. Furthermore, legislative and regulatory authority of the National Bank of Ethiopia (hereinafter the “NBE” or the “Bank”) vis-à-vis terms and conditions of payment instruments is examined. TOCs of CBE for debit cards it issues, as approved by the Bank, are consulted to establish the respective rights and duties of the bank and the cardholder. The last chapter discusses the liability of consumers for EFT transactions. The first section elaborates the distinction between authorized and unauthorized EFT transactions. Liability of consumers of CBE for transactions initiated with debit cards it issued is examined. Liability of European and U.S. consumers as governed by pertinent legislations is summarized. Limitations of the liability regime of CBE are pointed out and are further looked at to ascertain whether the liability terms are unfair to consumers. Moreover, applicable legislations of the country on unfair contract terms are analyzed. Finally, findings of the thesis together with recommended measures are delivered.

1 Regulation of Electronic Funds Transfer

In this chapter terms and concepts related to the subject matter of the thesis are defined primarily on the basis of Ethiopian laws. However, definitions of other jurisdictions are employed to elaborate some terms. Moreover, the principal legal instruments of Ethiopia that regulate an EFT contract between a consumer and a bank are outlined. Additionally, justifications for consumer protection in EFT along with the approaches followed by some jurisdictions are drawn.

1.1 Definitions

1.1.1 Electronic Fund Transfer

Fund transfers or payments are broadly defined to include non-cash payments to third parties, cash withdrawals, and transfers from one account to another.⁴ Article 2(13) of the National Payment System Proclamation (hereinafter the “Proclamation” or the “NPSP”) defines funds transfer as “a means of any transfer of funds either representing an order of payment or transfer of money, which is initiated by way of instruction, authorization or order to a financial institution to debit or credit an account maintained with that financial institution and includes POS transfers, ATM transactions, direct deposits or withdrawal of funds, transfer initiated by telephone, internet, card or other devices”.

Unfortunately, the Proclamation fails to specifically define Electronic Fund Transfer. There are no other laws of Ethiopia that define EFT either. As a result, resort to literature and laws of other countries that define EFT is necessary. Generally, there are two types of EFT namely non consumer activated EFTs also known as interbank transfer of funds and consumer activated EFTs by personal account holders of banks.⁵ Electronic Funds Transfer in the U.S. is defined as “transfer of funds initiated through an electronic terminal, telephone, computer including online banking or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit a consumer’s account and may include but not limited to POS transfers, ATM transfers, direct deposits or withdrawal of funds, transfers initiated by telephone, and transfers resulting from debit card transactions, whether or not initiated through an electronic terminal”.⁶ This definition of EFT is more or less similar with the ‘funds transfer’ definition provided by the Proclamation. Hence, though the Proclamation

⁴ Geva (2003) p.208

⁵ Law of Bank Payments (2010) p.81

⁶ Regulation E §205.3(b)

fails to define EFT specifically, its definition of ‘funds transfer’ incorporates the main concept and methods of EFT. Accordingly, EFT within the context of the Proclamation can be defined as an electronic funds transfer initiated by way of instruction, authorization or order to a financial institution to debit or credit an account maintained with that financial institution which is commenced by telephone, internet or card and includes POS transfers and ATM transactions.

Here is a summary of EFT transaction process. For each EFT transaction, the sender’s instructions are typically authenticated by means of an access device such as a secret code or Personal Identification Number (hereinafter “PIN”), either alone or more usually in conjunction with a physical device, such as a card, which is inserted at a terminal.⁷ To put it in a context, a debit card transaction at a POS terminal with the use of a PIN code is first authenticated by keying in the PIN and then authorized by confirmation of the transaction and initiating the online approval by pressing the ‘OK’ key.⁸ Funds are thus, transferred electronically from the account of the payer to the payee.

1.1.2 Payment Instruments

The Proclamation defines payment instrument as “any instrument whether tangible or intangible that enables a person to obtain money, goods or service or to otherwise make payment or transfer money such as cheque, drafts and cards”.⁹ Consequently, payment instruments can be used to obtain money, make payment or transfer money. The National Bank is authorized to designate payment instruments that can be issued and determine the conditions, limitations and standards for their issuance.¹⁰

According to the definition above, cards are one type of payment instruments. A card is defined as any card or other device, including a code or any other means of access to an account that may be used from time to time to obtain or deposit money or to make payment and includes debit, credit and stored value cards.¹¹ Hence, cards may be used to obtain or deposit money or to make payments. Whereas no definition of either debit or credit cards is provided, a stored value card is defined as a prepaid card in which the record of funds can be increased or decreased.¹² In general, payment instruments are tangible or intangible

⁷ White and Islam (2008) p.9

⁸ Bank for International Settlements (2000) p.3

⁹ NPSP art 2(20)

¹⁰ Ibid art 4(2) (b)

¹¹ Ibid art 2(2)

¹² Ibid art 2(27)

instruments including cheque, drafts and cards such as debit, credit or stored value cards. As the list is indicative other payment instruments may also be covered by the rule.

The European Payment Services Directive in the Internal Market No 2007/64/EC (hereinafter the “EU Payment Services Directive”) defines payment instrument as any personalized device(s) and/ or set of procedures agreed between the payment service user and the provider and used by the user in order to initiate a payment order.¹³ On the other hand, an access device in the U.S. is defined as a card, code, or other means of access to a consumer’s account or a combination used by the consumer to initiate EFTs and may include debit card, PIN, telephone transfer and telephone bill payment codes and other means to initiate an EFT to or from a consumer account.¹⁴

Commonly, there are three main types of payment cards namely pay later cards (charge and credit cards), pay now (debit cards) and pay before (stored value card, prepaid card or e-purse).¹⁵ Often a single card has a multiple of functions as a credit, debit or ATM cards.¹⁶ Whether a card falls into one category or another is not always apparent from the card itself, therefore is necessary to consult the contract between the cardholder and the card issuer to determine the type of the card.¹⁷ Description of each type of card is made below.

A card providing an assurance of payment to a merchant accepting the card under an agreement either with the issuer or with the merchant’s bank is a credit card while a debit card facilitates access to funds in the cardholder’s deposit account.¹⁸ A card initiating payment that is facilitating access to funds in the cardholder’s account solely on the basis of information communicated electronically is an EFT debit card.¹⁹ Both credit and debit cards can be used to make payment for a purchase of goods and services by the cardholder in addition to obtaining cash from ATM or POS terminal.²⁰ Debit cardholder obtains cash directly from her bank account and may only obtain credit from the issuer where the amount is charged to an overdrawn account.²¹ On the other hand, a cardholder obtaining cash with a credit card is charged interest from the date the amount is debited from her account with the issuer.²²

¹³ Directive Art 4(23)

¹⁴ Regulation E §205.2(a)(1)

¹⁵ OECD (2002) p.8

¹⁶ Law of Bank Payments(2010) p.216

¹⁷ OECD (2002) p.8

¹⁸ Geva (2000) §6 p.7

¹⁹ Ibid

²⁰ Ibid

²¹ Ellinger’s Modern Banking Law (2011) p.593

²² Ibid p.582

Debit cards are distinguished from credit cards in that the use of a debit card results in a direct debit to the user's bank account, while the use of a credit card results in an extension of credit to the cardholder.²³ Similarly, the way credit and debit card transactions are settled is different. Settlement is an act of discharging obligations by transferring funds, securities or financial instruments between two or more parties.²⁴ Settlements by a credit cardholder can be made whether in full when the issuer submits the account or by installments with interest charge.²⁵ On the other hand, when a cardholder uses a debit card, the payment is remitted to the retailer by an electronic money transfer involving a debit of the sum concerned to the cardholder's bank account.²⁶ The transfer is whether online system like VISA electron or occur in batches sometime after the transaction (offline system).²⁷

An ATM card is used by a customer to obtain cash from ATM by typing in PIN where the customer's account with the bank is debited by the amount of the cash issued and the card can further be used to make a balance enquiry.²⁸ On the other hand, stored value cards or prepaid cards involve the storing of monetary value as digital information on a smart card or electronic purse independent of a bank account.²⁹ It is different from other systems of payment which depend on the substitution of one contractual debt for another or which involve the digital transfer of instructions to a bank to effect payment using EFT network.³⁰ While some prepaid cards, including most gift and phone cards, are usable only for purchases from a particular retailer or service provider, increasingly prepaid cards are network-branded cards which enable the cardholder to use the card at any shop or center with the card network logo.³¹

It is important to make two observations with regard to EFT initiated with the use of various types of payment instruments. First, distinction between payment instruments is paramount where the level of protection for consumers of each type of payment instrument is different. For example, in the U.S, there are two sets of laws that govern consumer rights of credit and debit cardholders.³² Though in many respects, the laws treat credit and debit cardholders the

²³ Rosenberg (2005) p.1

²⁴ NPSF art 2 (23)

²⁵ Ellinger's Modern Banking Law (2011) p.582

²⁶ Ibid p.583

²⁷ Ibid

²⁸ Ibid

²⁹ Law of Bank Payments p.265

³⁰ Ibid p.375

³¹ Rosenberg (2005) p.2

³² Truth in Lending Act implemented by Regulation Z and the Electronic Funds Transfer Act implemented by Regulation E regulate consumer protection of credit and debit cardholders respectively.

same there are two principal differences.³³ First rules regarding liability of the cardholder for unauthorized use of the card are different, with debit cardholders bearing greater risk than credit cardholders.³⁴ Additionally, the claims and defenses of the cardholder based on breach of a contract by a merchant, e.g., by supplying defective or non-conforming goods, may be asserted against a bank that issued the card by a credit cardholder but not by a debit cardholder.³⁵ The justification for the different level of protection is credit cardholders only use credit line to use their credit cards whereas a debit cardholder accesses one's asset account.³⁶

The second observation is, practically speaking, most developing countries never acquired the credit card habit because they lack the credit information and reporting systems necessary to support credit cards, and relatively few of their citizens have sufficient demonstrable income to qualify for credit.³⁷ Hence, as the "Plastic Revolution" takes hold in developing countries, it is not credit cards but debit and prepaid cards that are beginning to transform the cash economies in places like China, Brazil and southern Africa.³⁸ Ethiopia is not an exception here. Credit is limited to investments and in some cases to housing projects and is highly regulated by the government. Henceforth, it suffices to state at this point that introduction of credit card as a payment instrument in Ethiopia is far from being reality.

Having this in mind, it is no surprise that Ethiopian banks are currently issuing only debit electron cards. It is important, however, to note that stipulations in the Proclamation are applicable to all payment instruments and EFT related service alike. Nonetheless, the sections of this thesis on contractual regulation of use of payment instruments are confined to debit cards. This is primarily because the TOCs available are on the use of debit cards issued by banks. As a result, the scope of the thesis, for which contractual TOCs are primary and only sources, is limited to EFT initiated with debit cards. Unless the text refers otherwise, payment instrument and debit cards are used interchangeably throughout the discussion. It must be noted that debit cards are used to initiate EFT; hence, both terms are occasionally used interchangeably.

³³ Rosenberg (2005) p.46

³⁴ Rosenberg (2005) p.46

³⁵ Ibid p.47

³⁶ Geva (2003) p.242

³⁷ Rosenberg (2005) p.2

³⁸ Ibid

1.1.3 Consumer

The NPSP sets some rights of customers' vis-à-vis issuers of payment instruments. It does not, however, provide for definition of a 'customer'. As the Proclamation does not provide for rights of consumers, it is no surprise that it does not define 'consumer'. The Mobile and Agent Banking Directive of Ethiopia (hereinafter the "MABD"), which implements parts of the Proclamation defines a customer as an individual or entity who uses mobile and agent banking services as defined in the same.³⁹ If one adopts this definition to NPSP, a customer is an individual or entity who uses EFT services or to whom a payment instrument is issued. Similar to the Proclamation, the MABD does not define a 'consumer'. Hence, there is a need to look for the definition of 'consumer' in other pertinent legislations of the country.

The relevant legislation is the Trade Practice and Consumers' Protection Proclamation (hereinafter the "Consumer Proclamation") which defines a consumer as "a natural person who buys goods and services for her personal or family consumption and not for manufacture or resale."⁴⁰ It is irrelevant whether the price of the goods or the services is paid by the consumer or another person. This definition of consumer is endorsed for the purpose of this writing. Consequently, a consumer is a natural person who uses payment instruments to initiate EFT for her personal or family purposes. Accordingly, the thesis adopts this definition and evaluates the consumer protection issues relating to EFT in general and payment instruments in particular. As a result, unless the text implies otherwise, customers or cardholders are assumed to be consumers for the purpose of this study.

On the other hand, the EU Payment Services Directive, defines a consumer as a natural person who, in payment service contracts covered by the Directive, is acting for purposes other than her trade, business or profession while payment service user (hereinafter "user") is a natural or legal person making use of a payment service in the capacity of either payer or payee, or both.⁴¹ The U.S. Electronic Funds Transfer Act (hereinafter the "Act") defines a consumer as a natural person.⁴²

³⁹ MABD art 2.5

⁴⁰ CPP art 2(4)

⁴¹ Directive art 4(10) & (11)

⁴² Act §903(6)

1.1.4 Payment Instruments Issuers

The National Bank authorizes persons to establish and operate a payment, clearing or settlement system and issue payment instruments.⁴³ The authorization relates to both operating a system and issuing payment instruments. Hence, an operator of a system (hereinafter “operator”) can be issuer of payment instruments (hereinafter “issuer”). Financial institution or any other entity can be an operator of a system.⁴⁴ It has been noted above the Bank has the authority to designate payment instruments that can be issued. To date, only commercial banks have issued debit cards in Ethiopia. Accordingly, for this purpose of the thesis, payment instrument issuers are commercial banks. Banks and issuers of payment instruments are used interchangeably.

On the other hand, different names and definitions are provided for payment instruments issuers in the U.S. and the EU. The Act provides “financial institutions” means a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person who, directly or indirectly, holds an account belonging to a consumer.⁴⁵ The EU Payment Services Directive defines payment service providers (hereinafter “provider”) as bodies referred to in its Article 1(1) and legal and natural persons benefiting from the waiver under Article 26.⁴⁶

1.2 Regulation of EFT and Consumer Protection

1.2.1 General

The cardholder enters into contract with the card issuer and the contract serves as the primary instrument governing the cardholder’s relation with the card issuer.⁴⁷ Hence, the main legal consequences in the use of payment instruments arise from contractual terms and conditions, which are not freely negotiated by the parties but put by the issuer of the card.⁴⁸ Even though, TOCs govern the undertakings of a consumer and a bank, they are subject in some countries to specific statutory regulation whose objective is consumer protection. Examples of such legislation include the U.S. EFT Act and Regulation E and the EU Payment Services

⁴³ NPSP art 4(2) (a)

⁴⁴ NPSP art 2(18)

⁴⁵ ACT §903 (9)

⁴⁶ Directive art 4(9)

⁴⁷ OECD (2002) p 9

⁴⁸ Law of Bank Payments p.214

Directive. In contrast, the proliferation of debit and prepaid cards in developing countries has been met with regulatory inaction in most places.⁴⁹

The complex facets of EFT regulation concern the extent to which consumers need or deserve to be protected from third party fraud, faults on the part of financial institutions, and consumers' own carelessness.⁵⁰ While statutory protections may be open to interpretation by courts, they generally cannot be waived by consumers or modified without legislative action as opposed to contractual protections which can usually be modified unilaterally upon notice to the consumer.⁵¹ Broadly stating, consumer protection regulations seek to reduce uncertainties for both consumers and financial institutions regarding liabilities related to electronic payments, to provide protection against unauthorized or erroneous electronic transactions that access consumer accounts by setting guidelines to allocate liability for unauthorized transactions as well as imposing documentation and record-keeping requirements to assist consumers in detecting and remedying disputed problems.⁵²

The main justification for regulating TOCs for EFT advocates that consumers do not have the ability or sophistication to negotiate balanced liability allocation rules with financial institutions.⁵³ This is because banks formulate TOCs for their services on take it or leave it basis. Besides, the 4 or 6-digit PIN chosen by financial institutions as a cost-effective mass distribution authentication method for consumers is relatively weak.⁵⁴ A person standing behind and watching a consumer entering PIN at an ATM or POS terminal can without difficulty remember a 4 digit PIN and subsequently use the same if she manages to steal the card from the cardholder. Europol's Report on Payment Card Fraud in 2012 shows that payment card fraud is a low risk and highly profitable criminal activity which brings organized crime groups originating from the EU a yearly income of around 1.5 billion Euros.⁵⁵ This study shows the extent of the risk of unauthorized use/fraud associated with payment cards.

⁴⁹ Rosenberg (2005) p.30

⁵⁰ White and Islam(2008) p.5

⁵¹ Furletti and Smith (2005) p.4

⁵² White and Islam(2008) p.3

⁵³ Ibid p.30

⁵⁴ Ibid

⁵⁵ Europol Situation Report (2012) p.3

1.2.2. Ethiopian Laws

1.2.2.1 Consumer Proclamation

The Consumer Proclamation is applicable to all persons carrying commercial activities and to any transaction in goods and services within Ethiopia.⁵⁶Banks are business persons carrying commercial activities within the meaning of article 2(5) of the proclamation and article 5(20) of the Commercial Code of Ethiopia. The objective of the Consumer Proclamation is to protect rights and benefits of consumers.⁵⁷To this end, it provides for rights of consumers and prohibits certain acts of business persons.⁵⁸Furthermore, it establishes an autonomous federal organ named Trade Practices and Consumer Protection Authority (hereinafter the “Consumer Authority”).⁵⁹The objectives of the Consumer Authority include protection of consumers from unfair practices of business persons and taking administrative and civil measures against business or other persons violating the proclamation.⁶⁰

A consumer who uses payment instruments to initiate EFT is thus entitled to enjoy the rights enshrined in the proclamation. Moreover, consumers have the right to submit their complaints to the Consumer Authority for adjudication and be compensated for damages suffered because of transactions involving EFT.

1.2.2.2 National Payment System Proclamation

The Proclamation on National Payment System was enacted, ten years after the introduction of the first ATM by CBE, to provide rules on establishment, governance, operation, regulation and oversight of the national payment system so as to ensure its safety, security and efficiency.⁶¹The enactment of the Proclamation results in the regulation of banking services which had been unregulated for some time.

The NPSP deals with a range of EFT related matters like terms and conditions and compliant resolution procedures.⁶²The other matters regulated are sources of rights and obligations of participants of shared systems, validity of electronic data and electronic communications and presentment of images for payment such as electronic cheque. Except for the rules on the rights and obligations of participants of shared systems, the other rules are aimed at ensuring

⁵⁶ CPP art 4(1)

⁵⁷ Ibid art 3(1)

⁵⁸ Ibid art 22& 30

⁵⁹ Ibid art 31

⁶⁰ Ibid art 34 (9) &(10)

⁶¹ NPSP preamble

⁶² Ibid Part Four

electronic document and evidence are given equal value as ordinary documents. These rules are mainly intended to update the existing contract and evidence rules of the country to apply to EFT.

The NPSP does not provide for rights of consumers of EFT. Rather it prescribes duties of issuers or operators vis-à-vis their customers. Hence, customers and consumers are protected equally by the Proclamation. Issuers are required to prepare clear and standard sample TOCs in relation to EFT and stored value cards, applicable to all their customers in similar manner and make the TOCs available for their review and possible agreement.⁶³ Furthermore, requirements relating to compliant resolution that bind the issuer are provided.⁶⁴ Operators, participants and issuers of payment instruments are, thus, obliged to establish internal compliant handling procedures in relation to electronic fund transfers and stored value facilities. Besides, they are required to advise users on the procedures for lodging complaints.

In cases where the operator, participant or issuer of a payment instrument is a party to a shared system, each must resolve complaints or disputes with its customers in relation to the processing of EFT or stored value cards promptly through its internally established systems.⁶⁵ Moreover, customers may not be required to present their complaints to any other party to the shared system, or to have those complaints or disputes investigated by any other party to the shared system.

1.2.2.3 Mobile and Agent Banking Directive

The National Bank of Ethiopia enacted the MABD on the basis of Article 10(5) of the Proclamation. As its name suggests, the Directive on Mobile and Agent Banking applies to financial institutions that conduct mobile and agent banking. It defines agent banking as conduct of banking business on behalf of a financial institution through an agent using various service delivery channels as permitted under the MABD while mobile banking means performing banking activities which primarily consists of opening and maintaining mobile or regular accounts and accepting deposits and it includes performing fund transfer or cash in and cash out services using mobile devices.⁶⁶ A mobile account is an account maintained by a customer in financial institution in which debits and credits are made by virtue of EFT and

⁶³ Ibid art 19(1)

⁶⁴ Ibid art 20

⁶⁵ NPSP art 20(4)

⁶⁶ MABD art 2.2 & 2.11

which is used to conduct mobile banking activities as outlined by the Directive. (Art. 2.10 MABD)

On the other hand, a fund transfer is defined as transfer of funds from a customer's mobile or regular account to any other account or vice versa.⁶⁷ According to Article 2.4 of the MABD, cash in and cash out services refer to deposit or withdrawal of funds including payments by customers to or from their account using a variety of options including ATM. Transfer of funds and cash in and cash out services, according to the definition of mobile banking, are performed using mobile devices. Mobile device includes mobile phones, smart phones, table personal computers, POS terminals or any other similar device.⁶⁸ The list is not exhaustive. Therefore, other similar devices are included. However, I argue payment cards are not similar devices to POS terminals, table personal computers, smart phones or mobile phones. As a result, cards including debit cards fall outside the scope of the Directive.

Generally, the MABD is applicable to mobile banking activities where customers open and maintain mobile or regular account in a financial institution in order to transfer funds electronically, to deposit or withdraw funds, to make payments using a variety of mobile devices including mobile phones, smart phones, table personal computers and POS terminals. The MABD requires financial institutions providing mobile banking services to put in place policies and procedures to address customer protection and compliant redress issues. It follows the footsteps of the Proclamation, which indiscriminate between protection of the consumers and customers.

The MABD lists minimum customer protection requirements that must be included in the policies and procedures of financial institutions providing mobile banking.⁶⁹ It, among others, regulates requirements of documentation of transactions, confidentiality of customer information, duty of disclosure of terms and conditions, transparency in pricing products and services and compliant resolution procedures. The rules of the MABD bind a financial institution that provides mobile banking services whether on its own or through an agent.⁷⁰

The Proclamation rules' on rights of customers and obligations of payment instrument issuers discussed throughout this paper are applicable to mobile banking as defined in the MABD. In addition, customers of mobile banking are entitled to specific and detailed sets of rights

⁶⁷ Ibid art 2.8

⁶⁸ Ibid 2.12

⁶⁹ Ibid art 12

⁷⁰ Ibid art 4.4.1

provided in the MABD. As the MABD excludes payment cards from its scope, its rules are not applicable to debit cards. Thus, the rules of the MABD are not employed in the upcoming chapters.

2 Terms and Conditions of Payment Instruments

Banks prepare terms and conditions for the services they provide. Terms and conditions of a specific banking service regulate the rights and duties of the bank and its consumers. However, basic principle of contract dictates that the object of a contract is freely determined by the parties subject to such restrictions and prohibitions as are provided by law.⁷¹ In the context of EFT agreements between a bank and a consumer, one of the statutory requirements applicable before a contract is concluded is a duty of disclosure of terms and conditions. The essence of the duty as provided in the pertinent legislations is examined.

The second theme of the chapter is related to terms and conditions that govern the rights and obligations of issuer of payment instrument and consumer. The powers and authority of the National Bank of Ethiopia with regard to TOCs of EFT and stored value facilities are studied. In this regard, the Bank is authorized to exercise both legislative and regulatory authority by the NPSP. The legal basis for such authority of the Bank is examined. Moreover, justifications (if any) for such authority are sought. In the end, terms and conditions of CBE for VISA electron debit cards it issues are summarized together with the consumer protection concern they pose. A reference to other jurisdictions is made where relevant.

2.1 Duty of Disclosure

The Consumer Proclamation provides for a duty of disclosure of a business person. It stipulates upon request by a consumer relating to goods or services she sells, any business person must satisfactorily disclose herself and let the consumer take the information she wants.⁷² This duty applies to all business persons in Ethiopia including banks. Specific to EFT and payment instruments, duty of disclosure is provided in the NPSP. The duty requires the issuer of payment instruments to prepare clear and standard sample TOCs applicable to all its customers, and make it available for their review and possible agreement.⁷³ The three components of this duty are explained below.

2.1.1 Requirement of ‘Clarity’

Payment instrument issuers are required by the NPSP to prepare clear conditions. The legislative requirement of ‘clarity’ however, is short of explaining what factors must be

⁷¹ CC art 1711

⁷² CPP art 26(2)

⁷³ NPSP art 19(1)

considered to determine whether a given condition is clear or not. The requirement of clarity is prescribed in other jurisdictions as well. For example, in the U.S., disclosures of TOCs must be clear and readily understandable.⁷⁴ Disclosures can be made in a language other than English where they were made available in English upon the consumer's request.⁷⁵ Similarly, the EU Payment Services Directive provides the information and conditions for payment service must be given in easily understandable words and in a clear and comprehensible form, in an official language of the Member State where the payment service is offered or in any other language agreed between the parties.⁷⁶ The requirements in both instruments are wider than that of the Proclamation by placing additional qualification to 'clarity' such as 'easily understandable' or 'readily understandable'. They further regulate the 'language' that must be used in preparing terms and conditions.

Consequently, clarity of TOCs relates to the choice of language used, the manner in which the TOCs are formulated or the inclusion or omission of some terms of the agreement. In the first case, clarity may mean whether the issuer has used English instead of a local language, such as Amharic, in preparing the terms and the conditions. From a contract law point of view, preparation of TOCs in language a contracting party does not understand may affect the very validity of the contract. That is in cases where a party expresses her agreement to a contract written in foreign language without obtaining its translation or full translation, that contract may be invalidated if fundamental mistake is proven.⁷⁷ This is primarily because Ethiopian law of contract follows the theory of 'declaration of will' whereby a contract is made or completed, not by agreement of wills but by agreement of declaration of wills.⁷⁸

Further hindrances to clarity of TOCs may be posed by the use of jargon. Such use may substantially hinder the ability of the cardholder to appreciate the content of the TOCs and thereby may result in defective consent. Finally, the clarity of TOCs may be obscured by inclusion of unnecessary content or omission of important aspects of the agreement. Both cases impair the ability of the consumer to understand the contract as a whole.

Additional requirements of duty of disclosure may be imposed. In the U.S. it is required disclosures to be, in writing and in a form a consumer may keep.⁷⁹ Similarly, the EU Payment

⁷⁴ Regulation E §205.4(a)(1)

⁷⁵ Regulation E §205.4(a)(2)

⁷⁶ Directive art 41(1)

⁷⁷ Krzeczunowich (1983) p.19

⁷⁸ Ibid

⁷⁹ Regulation E §205.4(a)(1)

Services Directive requires the provider make available the user on paper or on another durable medium with the information and conditions specified in Article 42 of the Directive.⁸⁰In contrast, the Proclamation is silent in this regard.

The TOCs of the CBE for the use of VISA debit cards are prepared in English. Strikingly, the application form has both Amharic and English versions. It is hard to grasp the justification for preparing TOCs in English where the language is neither a national nor an official language of the country. To make things worse, not many Ethiopians are able to understand ordinary English documents let alone a relatively technical English TOCs. As a result, the preparation of TOCs of CBE in English language fails to meet the statutory requirement of clarity in the Proclamation. Similarly, the Consumer Proclamation's requirement 'to satisfactorily disclose oneself' is not met. On the other hand, CBE does not allow customers to keep the TOCs of debit cards.

2.1.2 Non Discrimination

The other element of duty of disclosure under the Proclamation is the payment instrument issuer must prepare standard sample TOCs applicable to all of its customers. Issuers are not allowed to discriminate among their customers. Similarly, the Consumer Proclamation prohibits a business person from unduly favoring one consumer over the other.⁸¹As a result, banks are obliged not to discriminate consumers and to prepare TOCs for payment instruments or EFT applicable to their customers alike.

2.1.3 Time of Disclosure

The issuer of a payment instrument is required to make its TOCs available to customers for their review and possible agreement.⁸²The requirement indicates that customers must be able to review the TOCs before agreeing to the contents thereof. Hence, the duty of disclosure must be observed by the issuer before the conclusion of an agreement. After reviewing the terms and conditions, a customer can either accept or decline the TOCs for EFT and stored value cards. The terms and conditions of the CBE are made available to consumers at the time when the consumer applies for VISA electron debit card. Hence, the practice of the bank is in line with the requirement of the Proclamation.

⁸⁰ Directive art 41(1)

⁸¹ CPP art 30 (16)

⁸² NPSP art 19(1)

In the U.S., required disclosure must be made at the time the consumer contracts for an EFT service or before the first EFT is made involving the consumer's account.⁸³ Similarly, the EU Payment Services Directive requires disclosure to be made in good time before the user is bound by any framework contract or offer.⁸⁴

The importance of duty of disclosure prior to conclusion of a contract cannot be overstated as it is indispensable in the formation of contract. Ethiopian law of contract has stipulations regarding consent in general and specific requirement concerning general business terms. To begin with the general rules on consent of the contracting parties, a contract is formed upon the consent of the parties who define the object of their undertakings and agree to be bound thereby.⁸⁵ Furthermore, a contract is deemed completed where the parties have expressed their agreement thereto and reserves or restrictions intended by one party shall not affect her agreement as expressed where the other party was not informed of such reserves or restrictions.⁸⁶ It follows that a contract is not deemed to be completed unless the parties have expressed their agreement to all the terms of the negotiation.⁸⁷ That is only a contracting party in this case a consumer who was given the chance to review TOCs of a payment instrument and who agrees to those afterwards is assumed to have freely given her consent to be bound thereby. Otherwise, contract law dictates that a contract is not validly formed. Specific to business contracts, it is stipulated that general terms of business applied by a party shall not bind the other party unless she knew and accepted them or they were prescribed or approved by the authorities.⁸⁸ As a result, undisclosed general terms of EFT business by a bank do not bind the consumer unless she knew and accepted them.

Hence, contract law and the National Payment System Proclamation require the payment instrument issuer to disclose its TOCs before the consumer gives her consent. The next issue is whether the duty of disclosure of TOCs goes beyond this by prescribing the minimum contents that must be disclosed to a consumer of EFT service. In both EU and U.S., financial institutions are required to make some mandatory disclosures. Financial institutions of the U.S. are required to disclose liability of consumers for unauthorized EFT, telephone number and address of the financial institution, its business days, types of transfers and limitations on frequency or dollar amount, applicable fees, rights of the consumer to documentation, a

⁸³ Regulation E §205.7(a)

⁸⁴ Directive art 41(1)

⁸⁵ CC art 1679

⁸⁶ Ibid art 1680

⁸⁷ Ibid art 1695(1)

⁸⁸ Ibid art 1686

summary of the consumer's right to stop payment of a preauthorized EFT, liability of the institution, confidentiality of consumer information and error resolution.⁸⁹ Similarly, the EU Payment Services Directive requires that information and conditions regarding the provider, the use of the payment service, charges, interest and exchange rates, communication, safeguards and corrective measures, changes in and termination of framework contract and redress be provided to the user before she is bound by a contract.⁹⁰

According to the Consumer Proclamation, a consumer has the right to get sufficient and accurate information or explanation on the quality and type of goods and services she purchases.⁹¹ Consequently, a consumer may demand sufficient and accurate information on the EFT service she is applying for. However, mandatory list of TOCs that must be disclosed to consumers before they enter into agreement is not regulated. The NPSP fails to enumerate the information that must be disclosed in TOCs of EFT service or payment instruments. The issuer exercises discretion as regards what to disclose to its customers. Though undisclosed terms of contract in principle do not bind the other contracting party, litigation costs and inconvenience may discourage a consumer from invoking this principle. A consumer may opt to accept the undisclosed TOCs rather than challenging the bank and its organized legal team. In contrast, if the important terms of the contract (based on a list provided by a pertinent statute) are disclosed to the consumer, the consumer will have the chance to agree or differ to the terms. Thus, the consumer can avoid any possible litigation hassle. One may argue that the discretion of Ethiopian banks on what to disclose is subject to oversight of the National Bank of Ethiopia which is authorized to approve TOCs of the issuer before they become available to customers. This takes us to the next subject dealing with the authority of the Bank vis-à-vis TOCs of EFT.

2.2 Authority of the National Bank of Ethiopia

The Proclamation for the Establishment of the National Bank enumerates the Bank's purposes as to maintain stable rate of price and exchange, to foster a healthy financial system and to undertake such other related activities as are conducive to rapid economic development of Ethiopia.⁹² It lists a number of powers and duties of the Bank.⁹³ One of such powers is to take steps to establish, modernize, conduct, monitor, regulate and supervise payment, clearing and

⁸⁹ Regulation E §205.7(b)

⁹⁰ Directive art 42

⁹¹ CPP art 22 (1)

⁹² NEP art 4

⁹³ NEP art 5

settlement systems. It is common for many central banks to have explicit legal authority with respect to payment and settlement systems.⁹⁴ According to the NPSP, the Bank establishes, owns and operates, participates in, regulates and supervises an integrated payment system consisting of large value funds transfer system and retail funds transfer system.⁹⁵ Likewise, it has the power to authorize others to establish and operate a system and issue payment instruments.

2.2.1 Legislative Authority

The vast authority of the National Bank of Ethiopia extends to legislative powers. On a number of matters, the Bank is authorized to enact directives. On matters relating to EFT alone the Bank has the authority to enact directives on five out of six subject matters.⁹⁶ Regrettably, the Proclamation does not provide justifications for such vast legislative and power of the Bank.

As regards terms and conditions, the Bank is authorized to prescribe by directive basic TOCs to be applicable to contracting parties in the business of EFT and stored value facilities.⁹⁷ The logical inference is that such authority of the Bank must be exercised to provide minimum rights of consumers of EFT as non-consumers are able to negotiate balanced terms and conditions. One can learn from the EU Payment Services Directive's position on this matter. It asserts that as consumers and enterprises are not in the same position, they do not need the same level of protection.⁹⁸ It carries on, while it is important to guarantee consumer's rights by provisions which cannot be derogated from by contract, it is reasonable to let enterprises and organizations agree otherwise.⁹⁹ Hence, the legislative authority of the NBE to prescribe basic TOCs of EFT must be exercised with the aim of protecting consumers who are incapable of individually negotiating TOCs of banks. Strictly speaking, the NBE has a legislative mandate to enact consumer protection directive that sets mandatory rights and duties that cannot be derogated from by a contract. The U.S. Federal Reserve Board has exercised legislative authority with the objective of consumer protection by enacting Regulation E that implements the EFT Act.

⁹⁴ Bank for International Settlement (2000) p.17

⁹⁵ NPSP art 4(1)

⁹⁶ Ibid art 19(3), 20 (2), 22 (2), 23(4) and 24(5)

⁹⁷ Ibid art 19(3)

⁹⁸ Directive Recital 20

⁹⁹ Ibid

2.2.2 Approval of Terms and Conditions

The NBE is authorized to approve TOCs and any amendments thereof before they become applicable on customers.¹⁰⁰The Proclamation is silent whether public policy concerns including consumer protection must guide the Bank in discharging its authority of approving TOCs of banks. Though the chief concerns of central banks in overseeing retail payment systems are efficiency and safety of the systems, there are also other objectives such as the exercise of responsibilities in the area of consumer protection, or the prevention of money laundering.¹⁰¹In the same way, it is proclaimed that interests of consumers including the terms and conditions' governing their relation with operators is one of the considerations that the NBE may take in issuing an authorization for operating systems.¹⁰²The stipulation is applicable on those operators (issuers of payment instruments) applying for authorization. It would have been much better if such requirement was specifically formulated in relation to approval of TOCs rather than authorization for operating a system. That way the Bank will be required to take interests of consumers when it approves TOCs of payment instruments.

Within the context of the NPSP, the striking fact is not that the Bank has the authority to approve terms and conditions of EFT. Rather it is the failure to mention whether such authority should be exercised according to an established internal procedure to ensure uniformity and to list factors that must be taken into account when the Bank approves TOCs of EFT. Apart from Art 6(4) (f) of the Proclamation discussed above, nowhere is consumer protection in general and within the context of the authority of the Bank regarding TOCs raised. Consumer protection is not one of the reasons for enacting the law either. (See the Preamble) The Bank has so far approved TOCs for debit cards. TOCs for debit cards of CBE annexed with this thesis are summarized as follows.

2.3 Terms and Conditions of CBE

Terms and conditions of CBE apply to and regulate its provision of debit cards to cardholders. The TOCs are interpreted in accordance with Ethiopian laws, mainly the Proclamation. The main contents of the TOCs are summarized below. Furthermore, analysis is made whether the TOCs are consistent with Ethiopian laws. On the other hand, legal rules of other jurisdictions that govern matters similar to those governed by the TOCs of CBE are brought up.

¹⁰⁰ NPSP art 19(2)

¹⁰¹ Bank for International Settlement (2003) p.12

¹⁰² Ibid art 6(4)(f)

2.3.1 Amendment of Terms and Conditions

The bank may amend at any time and from time to time the TOCs for debit cards. Such amendment must, however, get prior approval of the National Bank.¹⁰³ With respect to the cardholder, such amendment is done by giving notice. The notice of amendment becomes effective and binding on the cardholder on the receipt of the notice, which is seven calendar days after the date of mailing in Ethiopia. In case of personal delivery the date of issue is considered as the date of receipt. Any subsequent use of the card after such notice is deemed to constitute automatic acceptance of such amendment by the cardholder.

The time limit of seven calendar days seems to put the consumer at a disadvantage given the efficiency of the postal service. In its recent evaluation of the performance of the Postal Agency of Ethiopia, one of the standing committee of the House of the Peoples' Representatives of Ethiopia found out that the services of the Agency are marred with record of lost and damaged envelopes and packages.¹⁰⁴ The House further noted that there is increasing complaints made by customers of the Postal Agency. Even in countries where postal service is more efficient, the time limit provided for any amendment of contract is significantly longer. In the U.S. a 21 days limit is provided.¹⁰⁵ In the EU notice of change of the framework contract for payment services must be made two months before the proposed date of application.¹⁰⁶

As amendments of TOCs change the contractual undertakings of the parties, at most effort must be taken by the bank to ensure the cardholder receives the notice and get a meaningful chance to review the amended TOCs. The amendment of the contract must, therefore, follow the rules of its conclusion, which must be based on the mutual consent of the parties.¹⁰⁷ Contract law of Ethiopia prescribes that any variation of terms of contract must follow the agreement of the parties.¹⁰⁸ Similarly, as a matter of policy duty of disclosure under the Proclamation must extend to the amendment of TOCs. If NBE approves amendment of conditions per Article 19 of NPSP, the same should be applicable to the rights of the customers under the same provision.

¹⁰³ NPSP art 19(2)

¹⁰⁴ http://www.fanabc.com/index.php?option=com_content&view=article&id=4286:2013-06-29-10-17-39&catid=103:2012-08-02-12-34-36&Itemid=235

¹⁰⁵ Regulation E §205.8

¹⁰⁶ Directive art 44(1)

¹⁰⁷ Electronic Funds Transfer and Consumer Protection (1990) p.250

¹⁰⁸ CC art 1675

2.3.2 Duty of Documentation

The CBE undertakes to post an account statement to the cardholder. Such account statement may be sent to the address of the cardholder registered with the bank. The duty seems to exclude terminal receipts for transactions made with the card. Furthermore, interval of documentation whether it is every month or every quarter is not regulated.

Though duty of documentation is not regulated by the NPSP, the Consumer Proclamation obliges a business person to issue receipts to consumers in respect of goods or services she sold.¹⁰⁹ Putting it in context of EFT, the bank is obliged to issue a consumer receipts in respect of for example ATM withdrawals or POS transactions. Hence, with regard to transaction receipts, it is fair to conclude that the bank is required to issue receipts to consumers. The CBE has undertaken in its TOCs to provide periodic statement to its customers. Therefore, by the operation of legislation and contract, the bank is obliged to provide consumers both terminal receipts and periodic account statement.

In the U.S., a terminal receipt must be made available upon request at the time a consumer initiates EFT at an electronic terminal.¹¹⁰ Financial institutions must mail or deliver a statement for each monthly cycle in which an EFT has occurred but at least quarterly statement if no transfer has occurred.¹¹¹ Similar types of requirements are provided in the EU Directive.¹¹²

Duty of documentation enables a consumer to check and verify the details on the statement against the transaction receipts.¹¹³ In the absence of the duty, a consumer will not be able to track down transactions, which further enables the consumer to identify errors and unauthorized transactions made using the debit card. This is unfavorable to the consumer into ways. First, in terms of evidence, it disables a consumer to identify and prove errors or unauthorized transactions in the past. Second, without terminal receipts and periodic statement, a consumer can be hindered from preventing further errors or unauthorized transfers by notifying the bank.

¹⁰⁹ CPP art 25(1)

¹¹⁰ Regulation E § 205.9(a) (1)

¹¹¹ Ibid § 205.9(b)

¹¹² Directive art 48

¹¹³ White and Islam (2008) p.76

2.3.3 Bank Error in Records and Accounts

The terms and conditions of CBE provide that unless the bank accepts the existence of error on its part, the cardholder agrees to the amount in her account and debit and credit made to her account. Besides, the cardholder accepts the bank's records and evidence pertaining to the financial transaction made with bank as true and correct. Consider this illustration to see how this condition of CBE may affect the interests of a consumer. Recurrent power cut and Internet disconnection are common in Ethiopia. Consider ATM errors that may result from such scenario. A consumer who was given less cash than the amount she entered at ATM as a result of error but who was subsequently debited the amount of the authorized withdrawal rather than the actually withdrawn amount will have no recourse against the bank unless the bank admits there is error on its part.

2.3.4 Fees

The bank is entitled to charge and debit any bank account in respect of each cardholder such fees of registration, annual subscription and transaction charges as it may from time to time notify cardholders. Reading between the lines, this implies the bank is entitled to charge such fees from the bank account of the cardholder who will be subsequently informed of such charges.

This condition has two limitations. First, it fails to provide that notification of applicable fees must be done at the time of contracting with the cardholder. Second, it does not provide that prior notification about changes in fees be made to the cardholder. There is an apparent neglect in considering information regarding fees is an important aspect of the TOCs. As it has been noted earlier, in jurisdictions like the U.S., information regarding fees is part of the duty of disclosure which must in principle be observed before a contract is made with the cardholder. Moreover, consumers must get prior notice regarding change in fees.

2.3.5 Duty of Cardholders

Cardholders are required to exercise due care and attention to prevent the loss of and/ or use of the card or PIN by a third party. Accordingly, a positive duty of taking due care is imposed on cardholders. Furthermore, transaction instructions by the cardholder must be given in such a way that any confidential information, which is displayed by a terminal, is not disclosed to any third party. Cardholders of debit cards worldwide are largely required to exercise due care in protecting their cards and PIN to avoid loss or theft. For example, the EU Payment Services

Directive requires payment service user, in particular, as soon as she receives a payment instrument, takes all reasonable steps to keep its personalized security features safe.¹¹⁴ Such due care is important to prevent unauthorized transfer of funds using the card or the PIN by third party.

If a card is lost or stolen or if the PIN is disclosed to any unauthorized person, the cardholder is required to immediately notify the bank of such loss, theft or disclosure. Oral communication must be confirmed to the bank in writing immediately. Telephone number or web address which displays email or other address for notifying loss or theft of the card, however, is not provided in the TOCs of CBE.

2.3.6 Liability of Cardholders

The cardholder is fully liable in respect of each transaction given by the use of her card. Besides, the cardholder is liable in respect of any transaction instruction given prior to receipt by the bank of written notification of loss, theft or disclosure of the PIN or the card.

Liability of consumers is the theme of the next chapter. With regard to the other elements of the TOCs of CBE, each has been elaborated in light of consumer protection. Moreover, examination was made whether they are consistent with Ethiopian laws. The TOCs fail to address matters regarding the means to activate compliant investigation, dispute resolution procedure, daily transaction limits, and means of notification for loss or theft of the card or the PIN. Though the aim of this section is to analyze TOCs of the CBE, I have compared legislative rules of other legal systems that govern the matters covered in the terms and conditions. On a number of matters, the TOCs provide for less (no) protection of consumers compared to the legislative protection that consumers of EFT enjoy in the U.S. and the EU. The general observation is that an Ethiopian consumer's interests are not adequately addressed in the preparation of the terms and conditions of CBE. Similar observation is noted with regard to the role of the NBE in considering and promoting consumer protection when it approves TOCs of payment instrument, as the TOCs of CBE put the consumer at a disadvantage position compared to the bank on a number of matters but was nonetheless approved by the Bank.

¹¹⁴ Directive art 56(2)

3 Liability of Consumers for EFT transactions

In the previous chapter, mainly pre contractual issues relating to EFT contract concluded with a consumer have been addressed. In this chapter contractual issues of liability for EFT transactions are examined. To this end, the first section discusses the distinction between authorized and unauthorized EFT transactions. Following this distinction, liability of consumers for each type of transaction is studied. Though the focus is on liability of consumers of CBE as governed by the latter's terms and conditions, pertinent EU and U.S. legislations on liability of consumers for unauthorized EFT are summarized. Furthermore, occasional reference is made to these legislations to elaborate issues. In the third section, flaws or limitations of the liability regime under TOCs of CBE are pointed out mainly from basic contract and consumer protection law point of view. It is further examined whether the terms and conditions of CBE are unfair to the consumer. In the final section, applicable laws of Ethiopia to unfair contract terms are examined.

3.1 Authorized vs. Unauthorized Transactions

The Proclamation states that funds transfer either representing an order of payment or transfer of money is initiated by a person by way of instruction, authorization or order to financial institution to debit or credit an account maintained with that institution.¹¹⁵ In the context of transactions made with the use of payment instruments at POS or ATM, the Proclamation is clear that authorization, instruction or order must be obtained by the financial institution to initiate funds transfer and to debit an account of the cardholder maintained with that institution. As a result, without authorization of the account holder, a funds transfer cannot be initiated. However, the Proclamation fails to specifically address where an EFT transaction is considered authorized by the cardholder. It does not prescribe the form of authorization either.

U.S. and EU legislations provide for definitions of authorized/unauthorized EFT transaction. 'Unauthorized EFT transaction' in the U.S. is defined as an EFT transaction from a consumer's account initiated by a person other than the consumer without actual authority to initiate such transfer and from which the consumer receives no benefit.¹¹⁶ There are two main elements in this definition. The first is it must be someone other than the consumer who initiated the transaction without an actual authority to do so and the second is the consumer must receive no benefit from the transaction. Even where the elements of the definition are

¹¹⁵ NPSP art 2(13)

¹¹⁶ Regulation E §205.2 (m)

met, there are certain transactions excluded from the ambit of the definition.¹¹⁷The first is EFT initiated by a person other than the consumer who was furnished with the card, code, or other means of access to such consumer's account by such consumer, unless the consumer has notified the financial institution involved that transfers by such other person are no longer authorized. The second is EFT initiated with fraudulent intent by the consumer or any person acting in concert with the consumer. The last is EFT that constitutes an error committed by a financial institution. In the first case the consumer has voluntarily furnished the third party who has a lawful control of the access device but lacks authority.¹¹⁸In the second case the consumer acts fraudulently either alone or together with another person, but does not benefit from the act.¹¹⁹However, in the last scenario, an error committed by a financial institution does not render the transaction executed an authorized one and the institution shall assume full liability for such transaction.¹²⁰Effectually, any EFT transaction that falls into one of the first two categories is excluded from being considered 'unauthorized transaction'. The implication of such exclusion is that the transactions are authorized to which a consumer will be fully liable. In any case, an EFT transaction directly initiated by the consumer or one that has been initiated by a third party duly (apparently) authorized by the consumer is deemed to be an authorized transaction.

On the other hand, the EU Payment Services Directive provides that a payment transaction is considered to be authorized only if the payer has given consent to execute a payment transaction or a series of payment transactions.¹²¹It further provides that consent may be given prior to or if agreed otherwise after the execution of the payment transaction. Consent may be withdrawn by the payer no later than the point in time of irrevocability provided in the Directive.¹²²Matters regarding the form and procedure of giving consent to a payment transaction and withdrawal of such consent are governed by a framework contract agreed between the provider and user.¹²³

In the absence of consent of the payer to a payment transaction, the transaction is considered unauthorized.¹²⁴The reference to consent in the EU Payment Services Directive weakens the possibility of an implied authority and may be read to eliminate altogether the possibility of

¹¹⁷ Regulation E §205.2 (m)

¹¹⁸ Geva (2000) §6 p.86

¹¹⁹ Ibid p.90

¹²⁰ Ibid p.91

¹²¹ Directive art 54(1)

¹²² Ibid art 54(3)

¹²³ Ibid art 41(1) cum 42(2)(c)

¹²⁴ Ibid art 54(2)

an apparent authority, such as when a cardholder voluntarily delivered the card and shared the associated code with a friend or relative.¹²⁵ This is in contrast with the U.S. approach where a consumer is fully liable where she furnished the access device voluntarily to a third party who subsequently made transactions without actual authority. As a result, for each payment transaction, the payer must give consent in a manner agreed between the payer and the provider so that the transaction is considered authorized and the payer is liable for such transaction. In the absence of the consent of the payer to a payment transaction, the transaction is considered unauthorized.

There has not been a study on the extent of unauthorized transfer of funds in Ethiopia. Indeed EFT service is about a decade old and is significantly limited to main cities of Ethiopia. However, globally card fraud which is one of the major causes of unauthorized transfers has increased consistently along with card usage in recent years as number of fraudulent card transactions grew 7.2% and 12.8% respectively in 2008 and 2009, with the amount lost to card fraud totaling €4.9 billion in 2009, up from €4.4 billion in 2008 and €3.4 billion in 2007.¹²⁶ A study conducted between 2004-2007 in the EU shows that there are 10 million fraudulent transactions using payment cards in the Single Euro Payment Area per year, affecting 500 000 merchants, representing roughly €1 Billion in losses.¹²⁷ This threat may affect the consumer confidence in non-cash means of payment and ultimately the real economy.¹²⁸ Different jurisdictions have followed various approaches to regulate liability of consumers for fraudulent (unauthorized) transactions. While some enacted legislations to this effect, others have left the matter to be governed by contract and general standards. Even in those jurisdictions with consumer protection legislations, the factors considered in allocation of liability for unauthorized transactions differ. The next section begins with the discussion of liability of Ethiopian consumers of CBE as governed by the latter's terms and conditions. Subsequently, consumer legislations of EU and U.S. governing liability arising out of unauthorized EFT are summarized.

¹²⁵ Geva (2008) p.725

¹²⁶ World Payment Report p.25

¹²⁷ Commission Report p.6

¹²⁸ Ibid

3.2 Liability of Consumers

3.2.1 Unlimited Liability of Consumers for All Transactions- CBE's Terms and Conditions

The NPSP does not regulate liability of consumers for EFT transactions. Therefore, the matter is regulated by TOCs of banks as approved by the National Bank of Ethiopia. According to the approved TOCs of CBE, the rule is that a cardholder is fully liable in respect of each transaction given by the use of her card. Distinction is not made between liability for authorized and unauthorized transactions.

The cardholder is required by the TOCs to immediately notify loss or theft of the debit card or disclosure of a PIN to any unauthorized person. Ordinarily loss, theft or disclosure of a card or PIN potentially leads to unauthorized transaction. An oral communication must be confirmed to the bank in writing. Hence, it is only where the bank receives a written confirmation that the notification is considered accepted. The cardholder is liable in respect of any transaction instruction given prior to receipt by the bank of written notification of such loss, theft or disclosure. Even for those transactions that occur between the oral and written notification, it seems the cardholder is fully liable.

The TOCs do not specifically provide that the bank is liable for transactions made after notification of loss or theft of the card or disclosure of the PIN to a third party. However, the inference from the condition that the cardholder is liable for all transactions made before notification is, the bank is liable for those transactions made after notification. Though the TOCs require the cardholder to prevent loss of and/or use of the card or PIN by a third party, negligence of the cardholder which may lead to 'unauthorized' transactions is not taken as a factor to regulate liability. Neither is fraudulent act of the cardholder taken into consideration. Indeed, there is no need to consider the negligence or fraudulent act of the cardholder where she assumes full liability for each and every transaction made before notification. However, fraudulent acts of either the cardholder or other person vis-à-vis payment instruments are criminally sanctioned and severely punished with rigorous imprisonment from 2 to 15 years and fine by the NPSP.¹²⁹

Remarkably, the TOCs of CBE provide for liability of the cardholder with regard to transactions made with the use of a card. The inference here is transactions which are initiated

¹²⁹ NPSP art 35(4)-(6)

without the use of the card or with fake card which nonetheless debit the account of the consumer are out rightly excluded. The consequence is the cardholder will not be liable for those transactions made without the use of the card issued to her. In such a case, it is up to the consumer to show that the card remained under her possession and she did not use the card for the ‘alleged transactions’. However, unless the system and record of the bank shows that the transactions were made without the use of the card, proving such scenario might be extremely difficult for the cardholder. Having no access to the system of the bank and even where access is granted for example by order of a court, the cardholder may find it financially burdensome and inconvenient. It must be recalled that the cardholder has agreed under the TOCs of the bank that the records and evidence of the bank as true and correct.

3.2.2 Limited Liability of Consumers for Unauthorized Transactions

In the U.S. and the EU, a consumer is liable for all authorized transactions while liability for unauthorized transactions is shared between the financial institution and the consumer on the basis of different factors. Allocation of liability where a consumer is in the picture is, thus, regulated by legal rules in both jurisdictions. The applicable liability rules are discussed below. The purpose of the discussion is to illustrate how consumers of EFT are protected by legislations that derogate contractual terms of liability. The two jurisdictions represent different approach but a common end, consumer protection. Experiences of other jurisdictions were taken into consideration in the enactment of the NPSP.¹³⁰ Similarly, lessons can be drawn from these jurisdictions in any legislative or regulatory move to protect EFT consumers in Ethiopia.

3.2.2.1 EU

The EU Payment Services Directive provides for mandatory rules of liability where the user of the payment service is a consumer. Hence, where the user is not a consumer, the parties are free to agree that provisions of the Directive on liability will not apply in whole or in part.¹³¹ This is primarily because non-consumers are normally in a better position to assess the risk of fraud and take countervailing measures.¹³² On the other hand, Member States are allowed to introduce less stringent rules or completely waive liability of the payer in order to maintain existing level of consumer protection and promote trust in the safe usage of electronic

¹³⁰ Travaux Préparatoires p.8

¹³¹ Directive art 51(1)

¹³² Ibid Recital 35

payment instruments except where the payer has acted fraudulently.¹³³ As a result, the Directive's rules on liability represent a minimum protection of consumers in the EU and consumers may enjoy a yet better protection by national laws of Member States.

The starting point for allocation of liability for unauthorized payment transactions under the EU Payment Services Directive is that the user must be liable only for a limited amount unless she has acted fraudulently or with gross negligence.¹³⁴ Moreover, the user is not required to cover any further loss stemming from unauthorized use of a payment instrument after making notification to the provider that the instrument may have been compromised.¹³⁵ As a result, the principle is liability of a user for unauthorized transaction made before notification is limited unless there is fraud or gross negligence. There is in principle zero liability of a user after appropriate notification is made to the provider. These two general principles are supplemented by specific provisions of the Directive.

The liability regime under the Directive may be categorized into (1) pre and (2) post notification liability. Before notification of loss, theft or misappropriation of the payment instrument, the consumer bears the losses relating to any unauthorized payment transactions, up to a maximum of EUR 150, resulting from the use of a lost or stolen payment instrument.¹³⁶ Further qualification to the stipulation provides that where the consumer acted fraudulently or failed to fulfill one or more of the obligations under Article 56 of the EU Payment Services Directive with intent or gross negligence, the consumer bears all the losses relating to any unauthorized payment transactions made before notification.¹³⁷ The obligations of the user under the provision are to use the payment instrument in accordance with the terms governing the issue and use of the payment instrument and to notify the provider without undue delay on becoming aware of loss, theft or misappropriation of the payment instrument or of its unauthorized use.

A consumer is relieved from bearing any financial consequence resulting from the use of the lost, stolen or misappropriated payment instrument after notification except where she has acted fraudulently.¹³⁸ The provider is required to ensure that appropriate means are available at all times to enable the user to make notification and to provide the user with a means to prove

¹³³ Ibid Recital 34

¹³⁴ Ibid Recital 32

¹³⁵ Ibid

¹³⁶ Ibid art 61(1)

¹³⁷ Ibid art 61(2)

¹³⁸ Ibid art 61 (4)

for 18 months after notification that she has made such notification.¹³⁹The failure of the provider to observe this obligation extinguishes the liability of the consumer for the financial consequences resulting from the use of a stolen, lost or misappropriated payment instrument except where she has acted fraudulently.¹⁴⁰

According to the EU Payment Services Directive, a consumer who acted fraudulently is at all times liable for the entire amount of unauthorized payment transaction before and after notification of loss, theft or misappropriation of the payment instrument. Even in cases where the provider failed to observe its duty of providing appropriate means of notification, fraudulent user is fully liable. Besides, Member States are not allowed to establish less stringent liability rules than those of the Directive in cases where the payer has acted fraudulently.¹⁴¹Hence, the Directive's rules on liability of a fraudulent user fully harmonize national laws of the Member States.

3.2.2.2 U.S.

In the U.S., a consumer can only be held liable for unauthorized EFT within the limits of the law where three tiers of requirements are met by a financial institution.¹⁴²The first is the financial institution has provided the following disclosures to the consumer (a summary of the consumer's liability for unauthorized EFTs, the telephone number and address for reporting that an unauthorized EFT has been or may be made and the financial institution's business days). Second the access device used to make the EFT was an accepted access device. An accepted access device is a card, code or other means of access to a consumer's account that a consumer requests and receives, or signs, or uses or authorizes another to use the access device to transfer money between accounts or to obtain money, property or services; requests validation of the access device even if it was issued on an unsolicited basis; or receives an access device as a renewal or substitute for an accepted access device from either the financial institution that initially issued the device or a successor.¹⁴³ The third and the last requirement is the financial institution has provided a means to identify the user as the person authorized to use the access device. Such identification can be achieved by signature, photograph, or fingerprint or by electronic or mechanical confirmation.¹⁴⁴

¹³⁹ Ibid art 57(1)(c)

¹⁴⁰ Ibid art 61(5)

¹⁴¹ Ibid Recital 34

¹⁴² Regulation E §205.6(b)

¹⁴³ Ibid §205.2(a)(2)

¹⁴⁴ EFT Act § 909 (a)

Only where these requirements are met, consumers are held liable for unauthorized EFT within the limits of the law. Time of notification of the loss or theft of the access device by a consumer is the only factor considered in allocation of liability. Regulation E expressly prohibits the following factors as the basis for imposing greater than is permissible under it.¹⁴⁵ These are the consumer was negligent; an agreement between the consumer and financial institution provides for greater liability; or the consumer is liable for a greater amount under state law. In contrast, EFT initiated by a consumer who acted fraudulently either alone or in concert with other person is excluded from the definition of ‘unauthorized transfer’ meaning it is authorized EFT for which the consumer will be fully liable. Depending on the time of notification, the ceiling of liability for unauthorized EFT is determined as follows.¹⁴⁶

In cases of unauthorized EFT involving loss or theft of an access device liability is allocated in the following manner. If a consumer notifies the loss or theft of access device within two business days after learning of loss or theft, the maximum liability is USD 50 or a lesser total amount of the unauthorized transfer. If the consumer makes the notification after more than two business days after learning of loss or theft up to 60 calendar days after the transmittal of statement showing first unauthorized transfer made with the access device, for transfer occurring within the 60 day of period, the lesser of USD 500 or the sum of lesser of USD 50 or the amount of unauthorized transfer in first two business days and the amount of unauthorized transfers occurring after two business days. The consumer assumes unlimited liability until the financial institution is notified for all unauthorized transfers occurring after the 60-day period.¹⁴⁷

In cases of unauthorized transfer of funds not involving loss or theft of an access device, the consumer incurs no liability where she notifies the financial institution within 60 calendar days after transmittal of the periodic statement on which the unauthorized transfer first appears. If the consumer fails to notify the financial institution within the 60 days period above, there is unlimited liability for unauthorized transfers occurring 60 calendar days after the periodic statement and before notice to the financial institution.

In practice, however, the major card networks in the U.S. such as VISA and MasterCard impose obligations on their issuers to provide protections that may exceed those required by

¹⁴⁵ Regulation E 205.6(b)-2 and 205.6(b)-3

¹⁴⁶ Ibid

¹⁴⁷ Ibid

national laws and provide for ‘zero liability’ of consumers for unauthorized EFT.¹⁴⁸ Hence, consumers may enjoy better protection by card network rules than legislative rules.

Even though the approaches followed and factors considered in allocating liability differ, the ultimate goal of both the EU Payment Services Directive and the U.S. Act and Regulation E is to protect the consumer. The first step taken by the respective legal instrument is to delineate authorized transactions for which the consumer is fully liable from unauthorized transactions. Furthermore, they limit the liability of the consumer to a certain legal ceiling and allocate liability for unauthorized transfers between the consumer and the financial institution. Fraudulent acts of the consumer in both jurisdictions are punished by making the consumer liable for those transactions made with fraudulent intent.

Consumers in both jurisdictions are required to do or refrain from doing certain acts to benefit from the liability regimes. A U.S. consumer who uses an access device to initiate EFT is required to make prompt notification of loss or theft of the access device or unauthorized transaction that appears on periodic statement of the financial institution to avoid liability arising thereof. Depending on the time of notification, maximum ceiling of liability is determined. A European consumer must not fail to observe her duties under the EU Payment Services Directive with gross negligence or intent to avoid full liability arising from unauthorized transactions. Moreover, the consumer must promptly notify of loss, theft or misappropriation of the payment instrument issued to her. In both the U.S. and the EU the consumer in principle assumes no liability after notification.

On the other hand, financial institutions that issue payment instrument or provide payment service/ EFT must fulfill some obligations for the consumer to be liable for unauthorized transactions. In both the U.S. and the EU, financial institutions are required to make means of notification available for consumers. If a consumer is prohibited from making notification of loss or theft of payment instrument or unauthorized transaction due to the failure of the financial institution, liability of the consumer for losses arising out of the unauthorized transaction is waived. Moreover, financial institutions are required to put in place security features that enable them to identify a consumer and verify and authenticate the consumer’s instructions. In the U.S, unless this requirement is met by a financial institution, a consumer is not liable for unauthorized transaction whereas this is not the case under the EU Payment Services Directive.

¹⁴⁸ OECD (2002) p.17

In both the U.S. and the EU, duties or actions of both consumers and financial institutions are taken into consideration in allocation of liability. Though the aim of the pertinent legal instruments is providing for consumer protection, the consumer is required to meet some conditions to benefit from the protection of the law. Similarly, a financial institution must meet its duties so that a consumer shares losses arising out of unauthorized transactions. Arguably, allocation of liability is the result of balance of the duties of the consumer and financial institutions in both the U.S. and the EU.

3.3 Limitations of the Liability Regime of CBE

3.3.1 Authorization of Transactions

The terms and conditions of CBE make the cardholder fully liable for all transactions at all times (until notification is made) so long as the transactions are made with the use that card. The consideration for liability is not whether a given transaction was authorized by the cardholder. Rather it is whether the card issued to the cardholder was used to make the transaction. Strictly speaking, the bank is authorized by the TOCs to debit the account of the cardholder on the basis of mere use of the debit card without obtaining authorization of the cardholder. This approach completely disregards the authority a cardholder must in principle exercise with regard to payment instructions that affect one's asset account.

The issue of authorization of payment transactions is founded in the contractual relation between a bank and its customer. Fundamental principle of law dictates that a consumer who has deposited a sum of money in her account is the creditor for a money debt or a claim for repayment with regard to the issuer.¹⁴⁹ The consumer disposes of her assets by cash withdrawals at ATM or by transfers to an account of a third party at POS terminal.¹⁵⁰ By applying for a debit card, the consumer is contractually authorizing the bank to debit her account with the amount of the transaction whenever she uses the debit card to authorize payment or transfer.¹⁵¹ Without such authorization, the bank cannot debit the account of the cardholder. Importantly, any payment to an account in the hands of unauthorized third party is not equivalent to discharge of duties of the issuer.¹⁵²

¹⁴⁹ Electronic Funds Transfer and Consumer Protection (1990) p.250

¹⁵⁰ Ibid

¹⁵¹ Law of Bank Payments(2010) p .229

¹⁵² Electronic Funds Transfer and Consumer Protection (1990) p.250

While defining ‘funds transfer’, the Proclamation does stipulate that authorization must be obtained to initiate any funds transfer including POS transfers and ATM withdrawals.¹⁵³ The TOCs of CBE, hence, neglects the important element of the definition of the Proclamation i.e. ‘authorization to initiate funds transfer’. However, the Proclamation regulates ‘authorization’ within the context of EFT inadequately for at least a couple of reasons. It fails to expressly define when an EFT transaction is considered authorized for which the consumer is liable. In addition, it does not prescribe the form of ‘authorization’ or mandate the parties to EFT contract agree thereof. As in any legislation, however, other pertinent laws of the country are applicable so long as they are not inconsistent with the Proclamation.¹⁵⁴ Moreover, the TOCs of CBE provide that the contents therein are construed and its debit card facilities are regulated in accordance with Ethiopian law. As a result, in order to protect the essential right of a cardholder vis-à-vis her account, other relevant laws of the country should be applicable to determine the form of authorization.

The relevant law in this context is the Commercial Code of Ethiopia (hereinafter Commercial Code), which among others deals with negotiable instruments and banking transactions. Negotiable instruments include bill of exchange, promissory note and cheque. Let us focus on those legal rules regarding validity of cheque, which is a payment instrument like debit cards within the definition of the Proclamation (see art 2(20)). One of the requirements for validity of a cheque is, it must contain the signature of the person who draws the cheque.¹⁵⁵ In the absence of a signature of the drawer of the cheque, the instruction contained in the cheque is considered invalid for which the ‘drawer’ incurs no liability. Where a cheque bears, signatures of persons incapable of binding themselves by a cheque, forged signatures or signatures of fictitious persons, the person on whose ‘behalf’ the cheque was signed will not be liable.¹⁵⁶ Likewise, a person who signs a cheque without the authority to do so binds herself rather than the person for whom she has no power to act.¹⁵⁷ The first stipulation implies fraudulent act of a third party while the second encompasses cases where the third party has no authority (exceeds authority) to sign the cheque.

The overall effect of these stipulations is that a drawer of cheque or on whose ‘behalf’ the cheque was drawn is only liable for the instructions therein where she puts her signature on (or otherwise authorizes the instructions in) the cheque. In the absence of authorization, the

¹⁵³ NPSP art 2(13)

¹⁵⁴ NPSP art 38

¹⁵⁵ CMC art 827 cum 828

¹⁵⁶ Ibid art 838

¹⁵⁷ Ibid art 839

‘drawer’ is not liable for any instructions made in that cheque. These specific rules on validity of cheque are extension of the general requirements of signature to authorize payment instruction regarding negotiable instruments in the Commercial Code.¹⁵⁸

If one adopts these rules of the Commercial Code on negotiable instruments in general to transactions made electronically with the use of a debit card, the cardholder must be liable only for those payment instructions that she authorized and not for those transactions made with the use of her card albeit without authorization. Whether the provisions of the Commercial Code on authorization (validity) of negotiable instruments may extend to payment instruments is the authority of courts. Given the prominence of consumer protection, it is fair to adopt such interpretation. The Consumer Authority which has judicial, administrative and policy making duties has the potential to lobby and influence the interpretation argued above.

With regard to the form of authorization, there are differing approaches. In the U.S. authorization is met when the financial institution has laid a system that identifies a specific cardholder be it with signature, photograph, or fingerprint or by electronic or mechanical confirmation.¹⁵⁹ On the other hand, the EU Payment Services Directive requires authorization to be obtained in the form agreed between the user and provider.¹⁶⁰

Thus the exact form and procedure of authorization may be agreed between the bank and the cardholder or regulated by statutes. Manual signature of the cardholder for each payment instruction may be obtained especially for POS transfers. Alternatively, electronic authentication of payment instruction may be employed to obtain authorization. A debit electron card transaction at a POS or ATM can be authenticated by keying in the PIN code and authorized by confirmation of the transaction and initiating the online approval by pressing the ‘OK’ key.¹⁶¹ Effective entry of an access device or card and use of the correct code or PIN is considered as valid authentication though there are some arguments that such authentication is not equivalent to manual signature in identifying the signee.¹⁶² In any case, mere card authentication unsupported by either compliance with a security procedure or a manual signature, is incapable of creating a linkage to the customer to be made liable.¹⁶³

¹⁵⁸ Ibid arts 732(2) and 734

¹⁵⁹ EFT Act § 909 (a)

¹⁶⁰ Directive 54(1)

¹⁶¹ Bank for International Settlements (2000) p.3

¹⁶² Geva (2003) p.229

¹⁶³ Ibid p.230

3.3.2 Unfair Contract Terms

In the previous sections, protection of consumers in the EU and the U.S. in allocation of liability for unauthorized transactions has been briefed. The discussion was not aimed at comparing these jurisdictions with what we have in Ethiopia. Rather the objective was to evaluate how these jurisdictions have provided statutory protection of EFT consumers that cannot be derogated by contractual terms and conditions. Lessons can be drawn from approaches followed and experiences gained by these jurisdictions. Moreover, given the silence of the Proclamation on liability of consumers, there is a need to look for a starting point somewhere else to evaluate consumer protection in the context of liability for unauthorized EFT. Having stated this, I will point out two major factors or duties (in the context of allocation of liability) addressed by legislations in the U.S. and EU and analyze how these matters are governed by TOCs of CBE. Furthermore, I will examine the potential implications of these on consumers and determine whether the conditions are unfair.

The Consumer Proclamation does not define unfair terms of contract. Rather it lists unfair and misleading acts. The European Council Directive on Unfair Terms in Consumer Contract (hereinafter the ‘Unfair Terms Directive’) states that a contractual term which has not been individually negotiated is regarded as unfair if contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.¹⁶⁴ Furthermore, it provides that a term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of pre-formulated standard contract. CBE’s terms and conditions are not individually negotiated but are pre-formulated standard contract. Examination is made below whether the terms of CBE specifically regarding liability contrary to good faith create significant imbalance in the parties’ rights and obligations to the detriment of consumers.

3.3.2.1 Duty to Provide Means of Notification of Loss or Theft or Disclosure

The terms and conditions of CBE require the cardholder to immediately notify loss or theft of a card or disclosure of a PIN to unauthorized person. However, the bank does not undertake to provide a means of notification. An address where the cardholder can notify the loss or theft of the card along with business days of the bank are not provided in the TOCs. Even if they were included in the contract, consumers are not allowed to keep the TOCs of CBE. The bank

¹⁶⁴ EEC 93/13 art 3(1)

does not provide for a telephone number or any other means of notification on its website either.¹⁶⁵ Failure of the bank to undertake this duty can hinder a consumer from making notification or delay the time of notification. This leads to a potential risk of unauthorized use of the payment instrument pending notification to the bank. This has far reaching effect. So long as written notification is not made to the bank, the cardholder is liable for the entire amount of transactions made with the card. As a result, whether it takes days or weeks to find a way to make notification to the bank, a cardholder remains fully liable for all transactions made until the point the bank receives a written notification. There is no allocation of liability but sole liability of the cardholder at all times. As long as this is the case, the bank has no incentive to provide means of notification.

In contrast, there is a strict obligation of financial institutions to provide means of notification in both the U.S. and EU.¹⁶⁶ This obligation is heightened as it is considered as one of the factors in allocation of liability for unauthorized transactions. In the both jurisdictions, unless a financial institution fulfills this obligation, the consumer cannot be held liable for any unauthorized EFT. In a related matter, under the TOCs of CBE, the bank does not undertake to give receipt of notification of loss or theft of the debit card or disclosure of the PIN. Receipt of such notification in a durable form enables the cardholder to show/prove a notification was made and she is not liable for those unauthorized transactions made after notification. One finds such requirement in the EU Payment Services Directive.¹⁶⁷

3.3.2.2 Duty to Implement Security Features of Payment Instruments

A cardholder is usually required to keep her PIN safe and not to disclose it to anyone. By keeping the PIN or any other security feature of the payment instrument safe, the cardholder minimizes the risk of unauthorized use of the instrument by a third party. However, there are circumstances where the diligence of the cardholder in keeping the payment instrument and its security features safe is not enough to prevent unauthorized transaction. As a result, the bank must put in place security features that enable it to identify a cardholder and authenticate authorized transactions. In fact banks are in a better position to introduce and implement personal security features (of both technical and mechanical nature) of the payment instruments it issues.

¹⁶⁵ Visit <http://www.combanketh.et/EPayment/CardBanking.aspx>

¹⁶⁶ Regulation E §205.6(b) & Directive art 57(1)(c)

¹⁶⁷ Directive art 57 (1) (c)

The TOCs of CBE require the cardholder to exercise due care and attention to prevent loss or theft or use of the card, which is instrumental to minimize the risk of unauthorized use. However, the bank does not assume any obligations under the TOCs to prevent or minimize unauthorized transactions. Here is a hypothetical illustration. A consumer keeps her card safe and has not disclosed the PIN to anyone. The ATMs of the bank however, are located by side of busy roads and are built in such a way that the PIN pad is visible to a nearby standing person. There are no cameras installed at the ATM locations either. Moreover, the bank has not put in place security features that enable it to verify payment instructions made by the consumer. In this case, the consumer has exercised due care to prevent unauthorized use of her card/PIN while the bank has undertaken no measures. So long as the cardholder remains fully liable for all transactions made before notification of loss or theft of the card, the bank has no incentive to put in place security features that may require a substantial investment. CBE may practically take measures to ensure the safety and security of payment instruments it issues. However, so long as CBE does not undertake in its TOCs, the duty hinges on the will of the bank and consumers cannot invoke this duty of the bank.

The NPSP does not provide for a clear obligation of payment instrument issuers in relation to security features of payment instruments. The Travaux Préparatoires of the Proclamation, however, states safety of payment instruments aimed at preventing unauthorized transactions must be put in place by issuers. The NBE ensures that issuers of payment instruments have put in place appropriate security features upon authorization and through successive regulatory measures enumerated under Articles 5-9 of NPSP.¹⁶⁸ Specifically, the NBE takes into consideration for issuing authorization for operating a system, the technical standards or the design of a proposed system, any security procedure of the system, interests of consumers including TOCs governing their relationship with operators.¹⁶⁹

The NBE may in fact ensure that safety measures are put in place by banks issuing payment instruments. Indeed, authorization to operate a system and issue payment instruments in principle must be given after proper scrutiny of the safety features of proposed systems. However, this is a duty that an issuer undertakes or must observe to obtain authorization from a concerned regulatory authority. Consumers cannot invoke this duty as it is not part of the TOCs they agreed with the bank. Hence, in addition to the regulatory oversight, contractual terms on security features of payment instruments that can be invoked by consumers must be

¹⁶⁸ Travaux Préparatoires p.13

¹⁶⁹ NPSP art 6(4)

put in place. In any case, facilitating payments without providing adequate security must be a risk to be assumed by the financial institution which in effect means where the customer denies responsibility; the risk ought to be allocated primarily to the financial institution that chose to facilitate a transfer not reliably authenticated.¹⁷⁰

Generally, according to the TOCs of CBE the liability of the cardholder for all transactions made before notification to bank is unlimited while the bank assumes zero liability. The contractual liability of the consumer is unaffected even where the unauthorized transaction is a result of the bank's failure to provide means of notification or to implement security features of payment instruments. The fact that the cardholder is relieved of liability after notification does not change the zero liability of the bank. As a matter of principle the bank must follow the instructions of the cardholder and in this case terminate any further transactions or cancel the card. The bank is doing its job rather than sharing liability. There is substantial imbalance of duties provided in the TOCs of CBE. Any financial loss arising out of such imbalance is born by the cardholder at all times. As a result, the terms are unfair that cause contrary to good faith significant imbalance in the parties' rights and obligations to the detriment of the consumer.

3.4 Regulation of Unfair Contract Terms

In the previous section, it was concluded that the terms of CBE regarding liability are unfair to consumers on at least a couple of matters. The bank fails to assume two duties which may result in unauthorized transactions for which the consumer remains fully liable. In this section, the effect of unfair contract terms within the context of EFT under Ethiopian law is discussed. In Europe, unfair contract terms used in a contract concluded with a consumer by a seller or supplier do not bind the consumer.¹⁷¹ There are no statutory protections of consumers regarding unfair terms in the NPSP. A consumer of EFT, however, can be protected by other laws of the country. Particularly relevant are law of contract and consumer protection.

3.4.1 Consumer Protection Law

The Consumer Proclamation prohibits unfair and misleading acts of business persons. It does not define 'unfair and misleading acts' but lists them. An exhaustive list is provided in Article 30 of the proclamation. The prohibited acts mainly relate to quality and quantity of goods and services and advertised prices. Hence, the list as it stands is hardly applicable or relevant to

¹⁷⁰ Geva (2003) p.230

¹⁷¹ EEC 93/13 art 6(1)

EFT. The Consumer Proclamation, unfortunately, fails to explicitly prohibit unfair contract terms. In the opinion of the writer, preparation of terms that are not individually negotiated that are unfair to the consumer must be considered ‘unfair act’, thus, prohibited.

On the other hand, the Consumer Proclamation provides that a contract made between a consumer and a business person have no effect where its terms waive legal obligations imposed on the business person by the Consumer Proclamation or prevent the consumer from exercising her rights under the law.¹⁷²In order to invoke invalidity of the contract on the basis of this provision it must be shown that the contract’s terms waive legal obligations imposed on the business person under the Consumer Proclamation. Alternatively, it must be shown that the contract prevents the consumer from exercising her rights under the law. Rights of the consumer are defined with reference to the Consumer Proclamation and other laws of Ethiopia. As a result, a contract with a consumer is invalidated only if one of the grounds is met. In contrast, under the Unfair Terms Directive, it is sufficient to show that a contract term, contrary to the requirement of good faith, causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.¹⁷³Thus there is no obligation to prove violation of legally prescribed rights of a consumer or obligations of a business person whereas this is the case under the Consumer Proclamation.

The unfair conditions of liability of CBE do not waive the bank’s legal obligations under the Consumer Proclamation. Besides, strictly speaking they do not prevent the consumer from exercising her rights under the NPSP or the Consumer Proclamation or any other applicable law. Hence, a consumer cannot invoke Article 29 of Consumer Proclamation to request invalidation of the unfair TOCs of CBE. It is bizarre that the Consumer Proclamation prohibits a list of unfair and misleading acts but fails to regulate unfair contract terms made with a consumer. If unfair acts are prohibited, so should be unfair contract terms. Importantly, imposing unfair terms must be considered as unfair act. A consumer should not be required to prove that her legal rights are violated by contract where the terms are unfair. Unfair contract terms just like unfair and misleading acts must be prohibited by the Consumer Proclamation thus leading to invalidation of the unfair contract. Once again interpretation of the law to extend to unfair terms is the authority of Ethiopian courts.

¹⁷² CPP art 29

¹⁷³ EEC 93/13 art 3(1)

3.4.2 Law of Contract

Under contract law, a customer of CBE can challenge the validity of the unfair conditions of CBE that substantially favor the bank as unconscionable contract. Though the rule is a contract may not be invalidated on the sole ground that its terms are substantially more favorable to the other party, where justice requires such contract may be invalidated as unconscionable where the consent of the injured party was obtained by taking advantage of her want, simplicity of mind, senility or manifest business experience.¹⁷⁴ The unconscionable contract among defects of consent is an exceptional remedy and is subsidiary and may be used where the circumstances vitiating consent do not amount to an invalidating mistake, fraud or false statement, duress or reverential fear, or incapacity.¹⁷⁵

In the application of the concept of ‘unconscionable contract’ to invalidate the TOCs of CBE, regard must be taken of the duties undertaken by the cardholder and the bank and the factors that actually lead to the occurrence of unauthorized transaction. Similarly, account must be taken of the financial and administrative ability of the bank as opposed to the cardholder to bear the loss arising out of unauthorized transfers and to put in place security features to minimize incidents of unauthorized transactions. It is fair interpretation of the law of contract, unconscionable EFT contract whereby the TOCs allocate full liability to a consumer and zero liability to the bank be invalidated.

The determination of whether the TOCs of CBE as unconscionable contract (subject to invalidation) is the power courts which may consider different factors of a given case. Specific circumstances of the case including the individual characters of the cardholder such as level of education, maturity and business experience are among the factors that a court may consider in its decision. Besides, courts may consider whether the party to the contract is a consumer who must be protected from unfair and misleading acts of a business person pursuant to the Consumer Proclamation. Whereas Consumer Proclamation is applicable to all consumers of EFT, application of contract law depends on the individual character of the victim and circumstances surrounding the case.

¹⁷⁴ CC Art 1710 (1)

¹⁷⁵ Krzeczunowich p.65

Conclusion and Recommendations

Consumer protection issues that arise prior to and after the conclusion of an EFT contract have been addressed in this thesis. The following are the main findings of the thesis. The requirement of ‘clarity’ of terms and conditions’ for EFT under the Proclamation is inadequate. The requirement does not prescribe that TOCs must be readily understandable by a consumer and must be prepared in a language that the consumer understands. Additionally, it fails to oblige banks to provide consumers an EFT contract in a durable form. The effects of such failure of the NPSP were apparent in the practice of CBE, which prepared its terms and conditions in English and does not provide its consumers the TOCs in a durable form.

Issuers of payment instrument in Ethiopia have discretion as to what to disclose at the time of making the EFT contract with a consumer. Though Ethiopian contract law dictates that restrictions or undisclosed business terms do not bind the other party, specific requirements applicable to EFT contract that obliges the issuer to disclose the important aspects of the contract to a consumer are absent in the NPSP.

The legislative and regulatory powers of the NBE vis-à-vis TOCs of EFT have so far attained no significant protection for consumers. To date, the Bank has not enacted consumer protection directive pursuant to the NPSP. There are no internal guidelines that are prescribed by the NPSP that must be followed by the NBE when it discharges its authority regarding TOCs of EFT. Nor are the factors that must be considered by the NBE when it approves TOCs of EFT. The silence of the law leaves a room for arbitrary exercise of the assigned powers. The writer of this thesis was able to obtain only the TOCs of CBE. Though it is not possible to generalize the NBE’s approach on consumer protection in the context of EFT, the study of the CBE’s terms and conditions have given some insight on the matter. While summarizing the main contents of the TOCs of CBE, it was pointed out that some of them are inconsistent with pertinent Ethiopian legislations. Moreover, the conditions provide for a significantly less (or at times no) protection of consumers than provided in consumer protection legislations of the U.S. and the EU. As a result, though other banks’ TOCs may possibly provide better protection of consumers, it is probable that such protection is a result of the will of the respective bank rather than the regulatory oversight of the NBE.

The NPSP does not provide minimum set of rights of consumers of EFT. This has lead for regulation of the rights and obligations of the parties to an EFT contract entirely by the TOCs of a bank subject to the authority of the NBE. The thesis examined the TOCs of CBE, which

provide for unlimited liability of consumers for all EFT transactions. Only written notification of loss or theft of the card or disclosure of the PIN to the bank relieves the consumer from the unlimited liability. The liability regime of CBE has at least two main drawbacks. First, it neglects the essential authority of the consumer vis-à-vis one's asset account in a bank by making the consumer liable for all transactions made with a mere use of a card. Moreover, CBE's terms and conditions are unfair that create significant imbalance of rights and duties to the detriment of the consumer. Specifically, the bank abstains from contractually undertaking two important duties and the financial loss that may arise out of such abstention is totally borne by the consumer. Unfortunately, these unfair terms are approved by the NBE and casts doubt on whether the Bank considers consumer protection in the exercise of its duties.

Generally, legislative regulation of EFT in Ethiopia in the context of consumer protection is characterized by scattered rules which do not sufficiently address the issues at hand. Moreover, rights of consumers that arise from these scattered rules are uncertain and in most cases applicable by way of interpretation by courts. Failure of the NPSP to specifically address consumer interests contributes immensely for the legal uncertainty. Additionally, though the NBE is lawfully able to promote consumer protection when it approves TOCs of EFT and when it authorizes others to operate a system and issue payment instruments, the approved TOCs of CBE discussed in this thesis reveal the contrary. The thesis has proved that in the absence of clear legislative limits (even where there is regulatory 'control'), a bank may tend to prepare terms that substantially favor it and harm the interests of consumers.

The neglect of protection of consumers during the legislation of the NPSP is fairly understandable because the Consumer Proclamation, which is the first of its kind in Ethiopia, is only a year older than the NPSP. It took about 10 years to enact the NPSP after the introduction of the first ATM by CBE. In both the EU and the U.S., EFT service preceded consumer protection legislations. However, experience of these jurisdictions and more importantly the findings of the thesis are alarming that leaving the matter completely to contract pose a serious consumer protection concerns.

Introduction of new systems that are not only beneficial to the concerned parties (consumers and banks) but also to the overall economy must be supported by strong legislative and regulatory measures. It is for this reason that the Travaux Préparatoires of the NPSP states that the objective of the legislation is to promote a secure and efficient payment system that is cost efficient so as to expand financial reach of banks to the majority of unbanked Ethiopians

and to encourage saving and foster investment. In the opinion of the writer, all these objectives can only be accomplished by building consumer confidence in the new system. Legislative action is the first and major step to gain consumer confidence. We should not wait another ten years for such legislation as there is an acute need for consumer protection in the area. This can certainly be attained without a need to repeal or amend the Proclamation primarily because the NBE has legislative authority which can be validly exercised to enact a comprehensive consumer protection directive. An optimal consumer protection legislation must take due account of the specific circumstances of the country and the experiences of other jurisdictions. It was with this purpose that the pertinent legislations of the U.S. and the EU were used throughout the thesis.

The writer recommends a consumer protection legislation which sets out rights of consumers that cannot be derogated by contract. Moreover, banks must be required by legislation to disclose important aspects of the contract specifically regarding liability of consumers for unauthorized transactions, telephone number and address of the financial institution, its business days, applicable fees, rights of the consumer to documentation, a summary of the consumer's right to stop payment of a preauthorized EFT, liability of the institution, confidentiality of consumer information and error resolution. Additionally, banks should be required to provide consumers the TOCs in a durable form. Legislative distinction must be made between authorized and unauthorized EFT. Consequently, the recommended consumer protection legislation must limit the liability of consumers for unauthorized transactions to a certain legal ceiling. The ceiling must be tough enough to make consumers take all reasonable measures to prevent unauthorized transfers but fair enough not to punish consumers excessively. The average income of most consumers, the average maximum daily EFT limit imposed by banks, the likelihood of unauthorized transactions in the country and banks' safety measures regarding payment instruments are the recommended factors that must be considered in determining the maximum limit of liability of consumers for unauthorized EFT.

Though consideration of negligence of the consumer in allocation of liability for unauthorized EFT may prompt the consumer to observe her duties vis-à-vis the payment instrument (as in the EU), the litigation difficulty of who has to prove first and who should prove what may outweigh the benefit. As a result, the writer recommends consideration of only the promptness of the consumer (as in the U.S.) in making notification of loss or theft of the card or disclosure of the PIN to a third party in allocation of liability for unauthorized EFT. Alternatively, if negligence of the consumer is taken as additional consideration, procedural

safeguards that protect the consumer and address the imbalance of litigation power between the consumer and the bank must be put in place.

Table of Reference

Conventions, statutes and more

NPSP	National Payment System Proclamation of Ethiopia, Addis Ababa 2011
CPP	Consumer Protection and Trade Practices Proclamation of Ethiopia 2011
CC	Civil Code of Ethiopia, Addis Ababa 1960
CMC	Commercial Code of Ethiopia, Addis Ababa
MABD	Mobile and Agent Banking Directive of Ethiopia, Addis Ababa
NEP	Proclamation for the Establishment of the National Bank of Ethiopia, 2008
Directive	The EU Payment Services Directive 2007/64/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 November 2007 on payment services in the internal market
EEC 93/13	The European Council Directive 93/13/EEC on Unfair Terms in Consumer Contract
Act	Electronic Fund Transfer Act, 15 U.S.C. §§ 1693-1700 (1978)
Regulation E	Regulation E, 12 C.F.R. § 205 (amended 1981)
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የኢትዮጵያ ንግድ ባንክ
Commercial Bank of Ethiopia

የቪ.ኤ. ካርድ አሌክትሮን የክፍያ ካርድ ማመልከቻ ቅጽ
VISA Electron Debit Card Application Form

በኢትዮጵያ ንግድ ባንክ ደንበኞች የሚሞላ የክፍያ ካርድ የማመልከቻ ቅጽ
To be completed by client requiring Visa Electron debit card

እናስታውስ! እስካሁን በኢትዮጵያ ንግድ ባንክ ውስጥ የባንክ ሂሳብ ከሌለዎ ይህንን ቅጽ ከመሙላትዎ በፊት በአቅራቢያዎ ወደሚገኘው የኢትዮጵያ ንግድ ባንክ ቅርንጫፍ በመሄድ ሂሳብ ይክፈቱ። (ሁሉም ቀናቶች የሚሞሉት ቀን/ወር/ዓ.ም. ተብለው ነው።)

NB: If you don't hold a CBE account, please approach any nearby CBE branch and apply for an account before completing this form. (All dates should be filled in the form of DD/MM/YYYY)

ዋና አመልካች
Principal Applicant

ሙሉ ስም (አቶ/ወ/ሮ/ወ/ት/ዶ/ር/ፕሮፌ/ኢንጅ/ሌላ _____)

Full name (Mr /Mrs/Miss/Dr/Prof/Eng/Other _____)

የመታወቂያ ቁጥር

መታወቂያውን የሰጠው አካል

መታወቂያው የተሰጠበት ቀን

የግብር መለያ ቁጥር

ID No:

Issued by:

Date Issued:

TIN No:

የትውልድ ቀን

የትውልድ ቦታ

Date of Birth:

Place of Birth:

ፆታ

ወንድ

ሴት

Gender:

Male

Female

የመኖሪያ ቤት

የኪራይ

የግል

Accommodation:

Rented

Owned

የጋብቻ ሁኔታ

ያገባች

ያላገባች

ሌላ

Marital status:

Married

Single

አድራሻ

ክልል

ክፍለ ከተማ

ቀበሌ

የቤት ቁጥር

Address:

Region:

Subcity:

Kebelle:

H.no:

የመኖሪያ ቤት የስልክ ቁጥር

ተንቀሳቃሽ የስልክ ቁጥር

የቢሮ የስልክ ቁጥር

Home Tel:

Mobile Phone no:

Office Tel:

ተቀጥረው የሚሰሩበት ድርጅት

Name of the Employer:

የድርጅቱ አድራሻ

ክልል

ክፍለ ከተማ

ቀበሌ

የቤት ቁጥር

Employer Address:

Region:

Sub city:

Kebelle:

H.no:

የሥራ መደብ

ወርሃዊ ገቢ

Position:

Monthly Income:

እርስዎ ከሚያንቀሳቅሱት የባንክ ሂሳብ ጋር የሚገናኝ ተጨማሪ ካርድ ለቅርብ የቤተሰብዎ አባል የሚያስፈልገዎ ከሆነ እባክዎ ቀጥሎ ከተመለከቱት ሣጥኖች ውስጥ "የስፈልገኛል" በሚለው ምርጫ ትይዩ በሚገኘው ሣጥን ውስጥ ምልክት ያድርጉና ከዚህ በታች የተመለከተውን ቅጽ ተጨማሪ ካርድ በሚያስፈልገው አመልካች ይሞላ።

የስፈልገኛል

አያስፈልገኝም

Please indicate if you need a secondary card for your family members, which will be linked to your account: If yes, please provide Secondary applicant information below. Yes No

ተጨማሪ አመልካች
Secondary Applicant

ሙሉ ስም (አቶ/ወ/ሮ/ወ/ት/ዶ/ር/ፕሮፌ/ኢንጅ/ሌላ _____)

Full name (Mr /Mrs/Miss/Dr/Prof/Eng/Other _____)

የመታወቂያ ቁጥር

መታወቂያውን የሰጠው አካል

መታወቂያው የተሰጠበት ቀን

ID No:

Issued by:

Date Issued:

የትውልድ ቀን

የትውልድ ቦታ

ፆታ

ወንድ

ሴት

Date of Birth:

Place of Birth:

Gender:

Male

Female

የአመልካቹ አድራሻ

ክልል

ክፍለ ከተማ

ቀበሌ

የቤት ቁጥር

Applicant Address:

Region:

Subcity:

Kebelle:

H.no:

የመኖሪያ ቤት የስልክ ቁጥር

ተንቀሳቃሽ የስልክ ቁጥር

የቢሮ የስልክ ቁጥር

Home Tel:

Mobile Phone no:

Office Tel:

ተቀጥረው የሚሰሩበት ድርጅት

Name of the Employer:

የድርጅቱ አድራሻ

ክልል

ክፍለ ከተማ

ቀበሌ

የቤት ቁጥር

Employer Address:

Region:

Subcity:

Kebele:

H.no:

የሥራ መደብ

ወርሃዊ ገቢ

Position:

Monthly Income:

የባንክ ሂሳብ ዝርዝር

Account Details

ለክፍያ ካርድ የተመረጠው የባንክ ሂሳብ፤

Preferred account for your card:

የቁጠባ
Savings

ተንቀሳቃሽ
Current

ሂሳብ ቁጥር

Account No:

ቅርንጫፍ

Branch:

እባክዎ ከክፍያ ካርድ ጋር እንዲገናኝልዎ የሚፈልጉት ተጨማሪ የባንክ ሂሳብ ካለ?

Please indicate any other account to be linked to your card (if required)

የባንክ ሂሳብ ዓይነት

Type of Account:

የሂሳብ ቁጥር

Account No:

ቅርንጫፍ

Branch:

ባለካርዱ ተጨማሪ አመልካች በሂሳባቸው እንዲጠቀሙ ጠይቀው የተፈቀደላቸው እንደሆነ ማንኛውም ዓይነት በሌላኛው ወገን የሚደረግ የካርድ ክፍያን እንደሚቀበሉ ተሰማምተዋል፡፡

In case joint card application is allowed by the bank, we acknowledge that transactions being made by one of us shall be deemed to have been made by both of us.

የዋናው አመልካች ፊርማ

Signature of Principal Applicant

[Signature box]

ቀን

Date:

የሁለተኛው ካርድ አመልካች ፊርማ (ካለ)

Signature of Secondary Applicant

[Signature box]

ቀን

Date:

ለቢሮ አገልግሎት ብቻ

FOR BANK USE ONLY

Bank Branch

Balance of primary account on the date of application

Decision of Branch Manager

Other comments

Date Signature

Card Centre

Card production order

Date Signature

Card holder's Agreement

Terms and Conditions

These terms and conditions apply to and regulate the provision of debit cards by Commercial Bank of Ethiopia to cardholders as defined in this Agreement.

1. Definitions

a. In these Terms and Conditions: -

“**Bank**” means the Commercial Bank of Ethiopia, its successors and assignees.

“**Bank Account**” means, in relation to a cardholder, any account maintained by the Bank in Ethiopia, which the cardholder alone is entitled to operate in respect of which the cardholder has requested to be able to give transaction instructions.

“**Card**” means the debit card issued by the Bank at the request and in the name of the person named upon it for use of debit card facilities provided by the Bank.

“**Cardholder**” means a person to whom a debit card has been issued and whose name appears on it.

“**PIN**” means, in relation to a Cardholder, the personal identification number required to gain access in system via terminal to give a transaction instruction.

b. In these terms and conditions, unless the context requires otherwise: -

i. The word “**person**” includes both natural and legal persons.

ii. The word “**merchant**” represents a trader whereby the bank puts terminal to enable it accept cards for payment.

iii. The word “**terminal**” means any automated teller machine or point of sale terminal through which transactions instructions can be given.

iv. Words denoting one gender shall include the other genders and

v. Words denoting the singular shall include the plural and vice versa, unless the context otherwise requires.

2. Use of Card and PIN

a. A Card is not transferable and shall not be used other than by the cardholder.

- b. A Card remains the property of the bank and upon cancellation must be surrendered to the Bank.
- c. Subject to condition 2(h) below, the Bank shall be entitled to give immediate effect to the following transaction instruction in Ethiopia.
 - i. To effect a debit or credit to a Bank Account
 - ii. To display the current balance on any Bank Account upon the terminal
 - iii. To post an account statement to the cardholder
 - iv. Such other Transaction Instructions given through use of the debit card facilities from time to time made available by the Bank to the cardholder.
- d. The card may be used in Ethiopia only to withdraw cash from automated teller machines displaying an electron Visa Logo nationwide and to purchase goods and services from merchants equipped with point of sale terminals, all such withdrawals and purchases shall be debited to the cardholder's account. Where the terminal does not provide selection of Bank account(s) for withdrawal, the Bank shall be entitled to debit the cardholder's Current account and if that account has insufficient funds, the Cardholder's Savings Account. If the cardholder has more than one current or savings account the Bank shall at its discretion be entitled to select any one of the current or savings accounts to be debited.
- e. A Cardholder must exercise all due care and attention to prevent the loss of and/or use of the card or PIN by a third party. A cardholder which is a company will be fully responsible for ensuring that its PIN is only known to a person or persons of due authority within such organization, partnership, society or association, etc. Subject to this, a Cardholder must not disclose his/her/their PIN to anyone in any circumstances.
- f. If a Card is lost or stolen or if a PIN is disclosed to any unauthorized person, the Cardholder must immediately notify the Bank of such loss, theft or disclosure. Any oral communication must be confirmed to the Bank in writing immediately. The Cardholder will be liable in respect of any transaction instruction given prior to receipt by the Bank of notification (in writing) of such loss, theft or disclosure.
- g. The Bank shall not be under any liability to a Cardholder in respect of any loss arising directly or indirectly out of the refusal of any terminal to honour or accept a card upon presentation.

- h. It is the responsibility of the Cardholder to notify any beneficiary of a transfer of funds in his or her favor. The Bank is not obliged to advise to such beneficiary and accepts no liability for not doing so.

3. Acceptance of the Banks records and accounts by the cardholder

- a. Unless the Bank accepts the existence of error on its part, the Cardholder hereby agrees to the amount in his/her/their account and the debit and credit made to his account and also accepts the Banks' records and evidence pertaining to the financial transaction made with the Bank as true and correct.

- b. Thus the Cardholder hereby agrees that written as well as electronically produced evidences are admissible (acceptable in front of courts).

4. Bank Accounts

Except to the extent that these terms and conditions require otherwise, they shall not affect any other terms and conditions expressed or implied, governing any Bank Account.

5. Cancellation of Cards

- a. The Cardholder may at any time cancel this Agreement and return the card to the Bank.

- b. The Bank may at any time cancel a card without notice, without assigning any reason and without incurring any liability to the Cardholder.

6. Replacement of Cards

If a Cardholder loses or damages his card, or requires substitute or additional account number to be encoded or linked to his card, the Bank may, at its discretion, issue a replacement card with the numbers of such Bank Accounts encoded upon it or linked to it as the Cardholder may require at a fee.

7. Fees

In respect of each Cardholder the Bank shall be entitled to charge and debit any Bank Account such fees of registration, annual subscription and transaction charges as it may from time to time notify to Cardholders.

8. Liability of Cardholders

- a. Subject to condition 2(b) above, the Cardholder shall be fully liable in respect of each transaction given by the use of his Card.
- b. Transaction Instructions must be given in such a way that any confidential information, which is displayed by a terminal, is not disclosed to any third party. The Bank shall not be liable in any way for any disclosure to any third party arising out of a Transaction Instruction.
- c. If the Cardholder is a partnership the obligations of the partners shall be joint and several and these terms and conditions shall continue to bind the partnership notwithstanding any change in the constitution, name or membership of the partnership by reason of death, bankruptcy, retirement, disability or admission of new partners or the occurrence of any other event which may dissolve the partnership or otherwise affect its obligations under these terms and conditions.

9. Notice

Any notice from the Bank to any Cardholder and any Bank account statement may be sent by pre-paid post to the address of the Cardholder registered with the Bank and shall be deemed to have been received by the Cardholder seven calendar days after the date of posting in Ethiopia. In case of personal delivery the date of issue shall be considered as the date of receipt.

10. Amendment

- a. These terms and conditions may be amended at any time and from time to time by notice from the Bank to the Cardholder.
- b. Any such amendment shall be deemed to be effective and binding on the cardholder on receipt pursuant to Article 9 in this agreement shall be effective and any subsequent use of the Card shall be deemed to constitute automatic acceptance of any such amendment by the Cardholder.

11. Address of the Cardholder

The address of the Cardholder is the following and any change of this address should be notified to the Bank forthwith:

City _____ Tel. _____
Sub City _____ Woreda _____ P.O. Box _____
Kebele _____ House No. _____

Agreement shall be effective and any subsequent use of the card shall be deemed to constitute acceptance of any such amendment by the Cardholder.

12. Applicable Law

These terms and conditions shall be construed and the provision of Commercial Bank Debit Card facilities shall be regulated in accordance with the Ethiopian Law.

Date: _____

The Cardholder(s)

	<u>Name</u>	<u>Signature</u>
1.	_____	_____
2.	_____	_____

For the Bank

<u>Name</u>	<u>Signature</u>
_____	_____

Witnesses

	<u>Name</u>	<u>Signature</u>
1.	_____	_____
2.	_____	_____