

# **THE CRIMINAL SANCTIONS OF COMMERCIAL DECEPTIONS IN ETHIOPIA: COULD IT CONTRIBUTE TO THE REDUCTION OF COMMERCIAL DISPUTES?**

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## **Abstract**

*It has been contended that criminalization of commercial wrongs would chill economic activities due to the over-deterrence effect of criminal sanctions. However, a growing amount of legal literature has emerged in this area and it has indicated that deceptive commercial behaviors deserve criminal sanctions since they involve the type of wrong that characterizes criminal blameworthiness under the conventional criminal law. Particularly, criminal sanction in the form of imprisonment is viewed as a more coercive threat to deceptive commercial practice. Relying on the deterrence/rational choice theory and the empirical evidences that support it, this article contends that reliance on criminal sanction can effectively deter commercial deceptions compared to civil sanction provided under the private law. Finally, it is concluded that the severity of criminal sanctions designed to deter crimes of commercial deceptions under the Ethiopian Criminal Law could potentially contribute to the reduction of commercial disputes.*

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**Keywords:** businessperson, commercial, crimes, deception, deterrence, disputes, Ethiopia, regulatory, sanction

## **I. INTRODUCTION**

Legal scholars and economists have debated why certain wrongs deserve criminal sanctions in the form of incarceration while others only receive civil sanctions in the form of compensatory relief.<sup>1</sup> If Garry Becker and Ronald Posner were correct, civil sanctions in the form of monetary compensation are not always

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<sup>1</sup> Frances K Zemans, *Coercion To Restitution: Criminal Processing Of Civil Disputes*, 2 LAW & POL'Y Q. 81 (1980).

enough to discourage crimes unless a more efficient deterrence is opted.<sup>2</sup> As such, it is contended that commercial wrongs should be criminalized only when civil sanctions do not deter it. However, it is argued that compared to remedies under the private law, the threat of criminal sanctions under the criminal law provides a disincentive for traders to act against good business practice. For this reason, criminal law is increasingly viewed as a powerful weapon for protecting the instrumentalities that are necessary to maintain honest commercial practice. In this context, most countries increasingly use criminal law as a means to regulate commercial activities as a standard aspect of the exercise of prosecutorial authority. Particularly, the rapid expansion of government regulations imbued with criminal sanctions to pursue a wide range of social and economic goals has spurred the trend to use criminal law beyond its traditional boundaries.

On the other hand, the criminalization of commercial misconduct is viewed as the unnecessary regulation of market that operates through the indivisible hands.<sup>3</sup> It is argued that the fundamental use of criminal sanctions in the business context has shifted from protecting commerce to regulating it which more threatens than protect the economy because it may kill the entrepreneurial risk-taking that is essential for economic growth.<sup>4</sup> The classical argument provided in support of these contentions emanates from the philosophical underpinnings that criminal law is designed to punish and deter violations of public morality and hence it represents the legal system's most severe and explicit means to express moral disapproval of conduct.<sup>5</sup> In this context, the traditional boundary of criminal law as a distinctive legal scheme will be crossed due to its over-expansion into business matters that sometimes involve risks in business decisions.<sup>6</sup> Particularly, with the accelerating trend of criminal sanction for the infringement of often imprecise and uncertain regulatory standards, it is feared that the intrusion of criminal law into the business arena would affect entrepreneurship.<sup>7</sup>

Against this background, the paper normatively investigates how criminal sanctions of commercial deceptions under the Criminal Law of Ethiopia could

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<sup>2</sup> Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1215 (1985); see also Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

<sup>3</sup> George Terwilliger, *Under-Breaded Shrimp and other High Crimes: Addressing the Over Criminalization of Commercial Regulation*, 44 AM. CRIM. L. REV. 1417-1418 (2007).

<sup>4</sup> *Id.* at 1418.

<sup>5</sup> Henry M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 417 (1958). For more specific discussions see also Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct* [Part 1], 60 LAW & CONTEMP. PROBS. 23-65, at 27 n. 3 (1997).

<sup>6</sup> TERWILLIGER, *supra* note 3.

<sup>7</sup> *Id.* at 1417.

contribute to the reduction of commercial disputes. Relying on deterrence/rational choice theory, the paper tries to show how punishment of crimes of commercial deceptions under the criminal law ensures honest commercial practice by reducing deceptive acts capable of engendering commercial disputes. This scholarly paper is hoped to provide an insight into areas where applying criminal law in the commercial arena is justified in order to ensure the integrity of a market. Accordingly, the following research questions will be addressed in the meantime. The first question is what criterion could be contemplated to identify crimes of commercial deception from other crimes under the Criminal Law of Ethiopia? Second, what contending arguments could be advanced to justify the intrusion of criminal law into the business realm? Finally, could criminal sanctions of commercial deceptions provided under the Criminal Law of Ethiopia contribute to the reduction of commercial disputes?

In order to succinctly address these questions, the paper in part II deals with the conceptualizations of commercial crimes in general. It particularly sheds light on the type and nature of commercial crimes as compared to the various forms of crimes including regulatory crimes. Part III describes the desirability of applying criminal law in commercial practice and the accompanying debates of criminalization issues. Part IV provides analytical insights into how criminal sanctions of commercial deceptions contribute to the reduction of commercial disputes. Particularly, by establishing the interface between commercial crimes and commercial disputes, this part shows how the deterrence effects of criminal sanctions of crimes of commercial deceptions contribute to the reduction of commercial disputes. Part V attempts to identify and analyze the types and nature of deceptive commercial crimes within the context of Ethiopian Criminal Law. Particularly, it draws attention on how the severity of criminal sanctions under the Ethiopian Criminal Law could be consolidated as an optimal legal scheme in deterring deceptive commercial behaviors that in turn contribute to the reduction of commercial disputes. Part VI recaps major points of the paper by way of conclusion.

## II. CONCEPTUALIZATIONS OF COMMERCIAL CRIMES

Under the criminal law of different countries, dividing crimes into different categories is practiced according to their nature and degree of harmfulness.<sup>8</sup> However, it is contended that the categorization of crimes in most criminal laws

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<sup>8</sup> Stuart P. Green, *Deceit and the Classifications of Crimes: Federal Rule of Evidence 609(A)(2) and the Origins of Crimen Falsi*, 90 J. CRIM. L. & CRIMINOLOGY 1087 (1999-2000).

provides little useful information due to lack of systematic definition and subsequent conceptual overlap.<sup>9</sup> Thus, within the purview of the criminal law, commercial crimes could be taken as one area where such deficiencies are reflected. The following subsections highlight the distinguishing features of commercial crimes from other similar typologies of crimes. It also examines the commercial crimes within the context of regulatory crimes for more conceptual clarity.

### A. Defining and Distinguishing Commercial Crimes

Black's Law Dictionary generally defines commercial crime as "a crime that affects commerce".<sup>10</sup> In consonance with this legal dictionary, the term commercial crime is also used to refer to "business crime" though it is criticized for it leaves unstated whether the act is crimes against business, crimes by business or simply crimes using business structures.<sup>11</sup> It is no surprise that the offences catalogued under such umbrella terms are similarly confusing. For instance, crimes such as embezzlement, counterfeiting, forgery and extortion are specified as examples of commercial crimes.<sup>12</sup> Therefore, the conception of commercial crimes in the preceding context is inclusive of crimes committed by businesspersons and crimes committed against commerce involving either deceptions or threat of force capable of affecting commerce.

Another ambiguous but specific umbrella terms often used to refer to commercial crime is "economic crime" and "white-collar crime," both used interchangeably to refer to the former.<sup>13</sup> The term economic crime refers to "a nonphysical crime committed to obtain a financial gain or professional advantage".<sup>14</sup> According to Kitch, economic crimes consist of crimes committed by businesspersons as an adjunct to their regular business activities.<sup>15</sup> He argued that businesspersons' responsibilities give them the opportunity, for instance to commit fraud, to violate regulations directed at their areas of business activity, or to evade tax payments.<sup>16</sup> Likewise, white-collar crime, as defined by the Chamber

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<sup>9</sup> *Id.*

<sup>10</sup> BLACK'S LAW DICTIONARY 425 (9th ed. 2004).

<sup>11</sup> R. Tom Naylor, *Towards a General Theory of Profit-Driven Crimes*, 43 BRIT. J. CRIMINOLOGY 82 (2003).

<sup>12</sup> BLACK'S LAW DICTIONARY, *supra* note 10.

<sup>13</sup> NAYLOR, *supra* note 11.

<sup>14</sup> BLACK'S LAW DICTIONARY, *supra* note 10.

<sup>15</sup> Edmund W. Kitch, *Economic Crime*, in 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 670-71 (Sanford H. Kadish ed., 1983).

<sup>16</sup> *Id.*

of Commerce of the United States of America refers to “illegal acts characterized by guile, deceit, and concealment and are not dependent upon the application of physical force or violence or threats thereof”.<sup>17</sup> Therefore, despite terminological usages, the latter terms are somewhat specific as it limits the ambit of commercial crimes to those non-violent crimes committed by businesspersons.

Furthermore, some legal scholars try to provide typologies of profit-driven crimes within which commercial crimes could be contextualized in terms that are more specific. Accordingly, commercial crimes can be compared and contrasted with other typologies of profit-driven crimes such as predatory crimes and market-based crimes.<sup>18</sup> Commercial crimes within such category is conceived as crimes that are committed by legitimate entrepreneurs, investors or corporations in the process of preparing or making market exchanges in the context consisting a normal business setting.<sup>19</sup> Accordingly, commercial crimes employ illegal methods for the production and distribution of legal goods and services through superficially voluntary exchanges with hidden yet involuntary aspect of victims by virtue of the existence of fraud and other methods of deceptions that would otherwise be produced and distributed by someone else using legal methods.<sup>20</sup> The type of commercial crimes that could be enlisted as an example involves fraudulent bankruptcy, fraud against suppliers of inputs, and telemarketing scams involving deception against customers of output.<sup>21</sup>

The second profit-driven crime involves predatory crimes that are committed by the businesspersons against individuals and against the economic interest of government through the involuntary transfers of goods and services by the use of elements of threat, stealth and deception.<sup>22</sup> Hence, be it through deception or the use of force, someone makes monetary gains at the expense of another with a pretence to an exchange of value. Some of the examples of predatory crimes involve payment card fraud, bank fraud and currency counterfeiting crimes.<sup>23</sup>

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<sup>17</sup> See Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. REV. (1) 1, 111 (2004). The term “white-collar crime” was first coined by Edwin Sutherland. According to this writer, the prevalence of administrative remedies for sanctioning white-collar crimes served the business classes to protect themselves from the full force of the criminal sanctions utilized against others. Some argue that Sutherland implicitly prescribed for increased criminal prosecution of the commercial offenses regardless of their legal status. See LYNCH, *supra* note 5.

<sup>18</sup> NAYLOR, *supra* note 11, at 84.

<sup>19</sup> *Id.* at 88.

<sup>20</sup> *Id.* at 91.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 84.

<sup>23</sup> *Id.*

The third profit-driven crime includes market-based crimes that involve production and distribution of new goods and services that are inherently illegal through voluntary transfers.<sup>24</sup> In other words, it deals with illegal commodities occurring in the context of an underground network, even if that network is embedded within legal business structure.<sup>25</sup> Accordingly, market-based crimes involve regulation evasion, such as violation of the regulation on pricing, tax evasion and prohibition evasion such as prohibitions of certain drugs or goods that endangers public health.<sup>26</sup>

As indicated above, there are areas of overlap and point of distinctions between the three profit-driven crime typologies. For instance, both commercial and predatory crimes can involve elements of stealth and deception.<sup>27</sup> However, unlike commercial crimes, predatory crimes may involve the threat of force resulting in the involuntary transfer of goods and services. Similarly, like commercial crimes, market based crimes involve voluntary transfer. However, unlike commercial crimes, market based crimes involve the production and distribution of illegal goods and services that for instance endangers public health.

Generally, it is understandable how it could be difficult to find precise and water tight conceptual distinctions between commercial crimes and other profit driven crimes. However, it is evident from the definitions and conceptions that commercial crimes and the terms associated with it largely signify their typical nature as non-violent crimes characterized by deceptive commercial practices motivated by illegitimate economic gain. It is also pivotal to note how a consensus is lacking among legal scholars as to what types of crimes should precisely be collected under the umbrella of commercial crimes.<sup>28</sup>

Therefore, for the purpose of this article, it is very crucial to provide a working definition of commercial crimes before proceeding to the next section. Thus, in this paper, the term commercial crime will be used to refer to non-violent crimes mainly characterized by deceptive commercial practices committed by businesspersons against other persons in order to get illegitimate economic gain. The following section further sheds light on the debate that involves the “regulatory nature” of commercial crimes and identify whether commercial crimes are somewhat different from crimes under the conventional criminal law.

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 89.

<sup>28</sup> KITCH, *supra note* 15, at 82.

## B. Commercial Crimes As Regulatory Crimes

The term regulatory crime is often used to refer to offences lacking criminal essence as opposed to crimes such as homicide and rape that are characterized by violence under the conventional criminal law.<sup>29</sup> Though the conceptions of commercial deception is as old as the concept of commerce itself, its recent revival is associated with the growth of regulatory states and the increasing use of criminal offences in circumstances outside the traditional boundaries of criminal law.<sup>30</sup> As indicated before, commercial crimes are non-violent crimes committed in business setting in pursuit of economic advantage for oneself or somebody, which affects free market exchange. For this reason, some scholars argue that violations of regulatory crimes should not be dealt with by the criminal law, as they do not possess “criminal essence” such as the requirement of mens rea element.<sup>31</sup> For instance, Ramsay characterizes regulatory crimes as possessing “strict criminal liability” character.<sup>32</sup> In strict liability crime, the public prosecutor need only show that the accused engaged in a voluntary act or an omission to perform an act or duty that the accused was capable of performing.<sup>33</sup> In other words, strict criminal liability encompasses both offenses for which no mental state is required generally and offenses for which no mental state are required as to a particular element of the crime.<sup>34</sup> The most important issue is whether crimes involving commercial deception should generally be characterized as regulatory crimes. However, the generic characterization of regulatory crimes as devoid of moral content has been criticized for several reasons.

The first criticism emanates from conceptual ambiguities regarding the distinction between regulatory crimes and real crimes based on the criteria of moral blameworthiness of the crime involved. Coffee observed how the line between regulatory and real crimes has been crossed many times since it is hard to construct the dichotomy based on the conceptions of blameworthiness.<sup>35</sup> The most

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<sup>29</sup> P. J. Fitzgerald, *Real Crimes and Quasi Crimes*, 10 NAT. L. F. 21 (1965).

<sup>30</sup> Andrew Ashworth, *Is the Criminal Law a Lost Cause?* 116 L. Q. REV. 225 -229 (2000)

<sup>31</sup> *Id.*

<sup>32</sup> IAIN RAMSAY, CONSUMER LAW AND POLICY: TEXT AND MATERIALS ON REGULATING CONSUMER MARKETS, 356 (2nd ed, Hart: Oxford, 2007). See also Genevra Richardson, *Strict Liability for Regulatory Crime: The Empirical Research*, 110 CRIM. L. REV. 295 (1987).

<sup>33</sup> Will Thomas, *Note On Strict Liability Crimes: Preserving a Moral Framework for Criminal Intent in an intent – Free Moral World,* 110 MICH. L. REV. 650 (2012).

<sup>34</sup> *Id.*

<sup>35</sup> John C Coffee, *Does "Unlawful" mean "Criminal"? Reflections on the Disappearing Tort Crime Distinction in American Law*, 71 B. U. L. REV. 193, 193-198 (1991). See also Harry V. Ball

compelling contention against the claim that regulatory crimes are devoid of moral content arises from the jurisprudential thought of the morality to obey the law.<sup>36</sup> One of the earliest arguments for a moral obligation to obey the law was advanced by Socrates in the *Crito* (Socrate's defense of obedience to the laws of state). Condemned to death, Socrates refused to escape and live in exile in another country because he believes that he has an obligation to obey the laws of the state.<sup>37</sup> Lately, Ronald Dworkin has further advanced this thought by distinguishing between two grounds on which violation of law might be morally wrong.<sup>38</sup> Dworkin noted that it might be wrong to break a law because the act the law condemns is wrong in itself, and it might be wrong, even though the act condemned is not wrong in itself, just because the law forbids it.<sup>39</sup> The observation of Dworkin implicates that once law is passed everyone has a moral obligation to obey it. Based on such conception, Jerome Hall argues that the better usage of the term regulatory crimes is to refer to "acts that are said to be immoral because the actor knows they are legally forbidden".<sup>40</sup> It is based on such latter conception that Hall views mens rea as an intentional disregard of legal obligation.

The second criticism relates to the contention as to what constitutes the definition of regulatory crime since it is not easily discernible.<sup>41</sup> For instance, the term "regulatory" is defined as "the act or process of controlling by rule or restriction".<sup>42</sup> In strict sense of the term, if we apply this definition, all crimes could be seen as regulatory as the prohibition of homicide is as much "controlling by rule or restriction" as the prohibition on drawing a check without insufficient fund. Thus, by subjecting particular actions to criminal prohibition, governments seek to direct behavior and hence all criminal prohibitions are regulatory.<sup>43</sup> Accordingly, it is argued that any subtle downgrading of regulatory offences to quasi or non-criminal status is at odds with the clear indication of the criminality of

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and Lawrence M Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197, 233 (1965).

<sup>36</sup> George C. Christie, *On the Moral Obligation to Obey the Law*, DUKE L. J. 1311, 1326 (1990).

<sup>37</sup> See Richard Wasserstrom, *The Obligation to Obey the Law*. in ESSAYS IN LEGAL PHILOSOPHY 274 (Robert S. Summers ed., 1968).

<sup>38</sup> See GREEN, *supra* note 17, at 1573-1574.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Richard Hyde, *You Know It When You See It: A Socio-Legal Investigation into the Concept of Regulatory Crime* (2008), available at: <http://ssrn.com/abstract=1295336> (last visited Jan.20, 2014).

<sup>42</sup> *Id.*

<sup>43</sup> PATRICK DEVLIN, THE ENFORCEMENT OF MORALS, at 16 (1968).

regulatory crimes provided by the use of the “crime” signifier.<sup>44</sup> This latter argument aptly signals the criminal status of regulatory offences as a subset of larger set of ‘criminal’ offences.<sup>45</sup> Consequently, it is understandable that the conception of regulatory crime would help to explain how criminal legislations are enacted to regulate commercial behaviors without necessarily implicating the nature of the commercial crimes as devoid of moral blameworthiness. Particularly, this line of argument is more tenable given the deceptive nature of commercial crimes that characterize commercial offenders based on the intentional disregard of regulatory provisions for undue economic advantage.

### **III. THE DESIDERATA OF CRIMINAL LAW IN REGULATING COMMERCE**

Conventionally, while Criminal Law is viewed as a mechanism of social control to prevent and punish wrongdoing by the state, the private law that includes commercial law is designed to provide a forum for negotiating and setting private disputes through private settlements.<sup>46</sup> Particularly, the difference in severity and degree of coerciveness reflects the traditional role of criminal law in stating and enforcing public morality.<sup>47</sup> Put simply, in contrast to the role of private law system, it is agreed that criminal law is a reflection of moral outrage in which perpetrators are to be punished and stigmatized because they wronged society in general. However, with the emergence of complexities in business activities and regulatory states, criminal law becomes a powerful weapon for ensuring sound and healthy commercial practice — expanding the ambit of criminal sanctions.

Generally, arguments for and against the intrusion of criminal law in business arena has been occupied by two competing but equally succinct propositions. The choruses of scholars that support the intrusion of criminal law to control business conduct argue that criminal law seeks to optimize integrity of commercial transaction by devising reasonable and appropriate criminal sanctions of a magnitude sufficient to deter individuals from committing commercial crimes.<sup>48</sup> Accordingly, it is contended that criminal law plays a critical role in

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<sup>44</sup> HYDE, *supra* note 41.

<sup>45</sup> A. P. SIMESTER, APPRAISING STRICT LIABILITY, ix (2005).

<sup>46</sup> Paul H. Robinson, *The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY, n.4 693 (1993).

<sup>47</sup> ZEMANS, *supra* note 1, at 83.

<sup>48</sup> Richard A. Booth, *What is a Business Crime?* 3 J. BUS. & TEC. 127, 127 (2008).

“policing” the market place by enforcing standards capable of promoting public confidence in commercial transactions that involve fiduciary duties.<sup>49</sup>

Proponents for the increased role of criminal law in business realm support their arguments based on two premises. On the one hand, the intervention of criminal law emanates from the jurisprudential thought that acts of deception and dishonest commercial practice shares the moral condemnation comparable to the moral outrage under the conventional criminal law.<sup>50</sup> Second, given the threat of criminal sanctions such as incarceration, scholars push that criminal law can truly deter offenders of commercial crimes — the function which would be futile if civil remedies are utilized.<sup>51</sup>

On the other hand, the intrusion of the criminal law into commercial realm is vehemently opposed by the legion of commentators advancing the idea that it subjects economic activity to strict state control that would be unqualified to manage industrial and business activities.<sup>52</sup> Scholars on this score propound that misconducts in commerce are viewed as “violations of private obligations arising from the assent of parties rather than as violations of duties owed to the public.”<sup>53</sup> This view is heralded by Holmes, who in his famous work, *The Path of Law* inferred that the use of morality in contract “stinks in the nostrils of those who think it is advantageous to get as much ethics into the law as they can”.<sup>54</sup> Robinson also argues that breaking a contract may be a conduct that we seek to discourage and may justify compensation of an injured party, but such conduct does not necessarily carry the moral blameworthiness implicit in a criminal conviction.<sup>55</sup> Thus, applying criminal law to the cases of business deviants is not warrantable since criminal law represents the legal system’s most severe means to express moral disapproval of conduct.<sup>56</sup>

Consequently, it is relevant to address how these two competing interests on the role of criminal law could be balanced in a more productive and meaningful way. Firstly, despite the degree of criminalization, it is not difficult to appreciate

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<sup>49</sup> KITCH, *supra* note 15, at 82.

<sup>50</sup> TERWILLIGER, *supra* note 3, at 1419.

<sup>51</sup> See LYNCH, *supra* note 5, at 31.

<sup>52</sup> DeLong James V, *The New “criminal” Classes: Legal Sanctions and Business Managers*, 10 NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST 24 (1997)

<sup>53</sup> GREEN, *supra* note 17, at 1600.

<sup>54</sup> OLIVER W. HOLMES, *THE PATH OF THE LAW*, 12 (2009).

<sup>55</sup> Paul H. Robinson, *Moral Credibility and Crime*, ATLANTA MONTHLY, 72 (1995).

<sup>56</sup> *Id.* See also Kenneth Mann, *Punitive Civil Sanctions: The Middle ground Between Criminal and Civil Law*, 101 YALE L. J. 1795, 1863 (1992).

that there are acts of deceptive commercial practice that would have the effect of crippling the commercial system. Hence, it would be tenable to argue that criminal law serves as the essential tool for preserving the integrity of the market.<sup>57</sup> Particularly, acts such as fraud, deceit and several other commercial crimes appear to mimic the contours of criminal act<sup>58</sup> due to their deceptive nature reflecting the need for the instrumental role of criminal law. Deceptive commercial acts are deliberately committed to create harm of economic nature that a society might want to prevent. In as much as promises made in commercial negotiations reflect the moral obligation that a commercial community wants not to be disregarded, the expression that act of contract breach resulting from deceptions are much like crimes that carry the baggage of moral blameworthiness. Consequently, it is on this basis that business misconduct deserves criminal sanctions.

Secondly, despite the perceptible role of criminal law in business realm, the line between criminal activities and acceptable business judgments sometimes can be fuzzy.<sup>59</sup> It is argued that society wants its economic actors to proceed with intelligent discretion, balancing costs, and benefits.<sup>60</sup> Hence, unless strict cares are taken, criminalization may tend to destroy this balance by declaring that all mistakes are intolerable and removing all dispositions to act reasonably under unforeseen circumstances.

Thus, the effectiveness of criminal law in business realm could relate to certainty of criminal sanctions in order to obtain optimal deterrence without compromising the rule of law. In criminal law literature, however, the need for certainty of criminal standards in relation to commercial crimes is debatable. On the one hand, it is argued that uncertainty of the nature and extent of criminal sanctions in criminal law is important in ensuring compliance with the legal norms since it is difficult to calculate the cost and benefits of compliance or non-

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<sup>57</sup> TERWILLIGER, *supra* note 3, at 1419.

<sup>58</sup> Immanuel Kant's famous categorical imperative appeals to promise-making as a paradigmatic example of following the moral law. See Immanuel Kant, *Foundations of the Metaphysics of Morals*, in Lewis Beck Trans. 39-40 (1959).

<sup>59</sup> See Ellen Podgor, *Laws have Over criminalized Business Behavior*, N. Y. TIMES, Nov.10, 2013, available at <http://www.nytimes.com/roomfordebate/2013/11/10/prosecuting-executives-not-companies-for-wall-street-crime/laws-have-overcriminalized-business-behavior> (lat visited Oct. 20, 2014).

<sup>60</sup> For instance, it is claimed that criminal responsibility for breach of the duty of care in commercial transaction adversely affects business judgments made in good faith and honest belief, often termed as "the business judgment rule." See generally Lisa L. Casey, *Twenty-Eight Words: Enforcing Corporate Fiduciary Duties Through Criminal Prosecution of Honest Services Fraud*, 35 DEL. J. CORP. L. 1-96, 20 (2010).

compliance under conditions of uncertainty.<sup>61</sup> On the other hand, some argue that lack of precise information about the size and extent of criminal sanction affects discretions in business due to its over-criminalization effect.<sup>62</sup> It is contended that criminal sanctions are not well suited to situations in which there exists real doubt about whether the offense committed were being motivated by a legitimate business purpose or perpetrated against the economic interests of another person for gain.<sup>63</sup> Therefore, it is a matter of legislative choices to weigh the effects of attaching criminal sanctions to violations of highly technical or vague and unintelligible regulatory standards to serve the purpose of compliance to legal norms while at the same time ensuring due respect for the rule of law.

The last but not least point relates to whether allocation of public resources is justified to prosecute and punish commercial offences that private litigants can handle. In order to address this matter one need to look into the dichotomy of civil and criminal law. As noted before, the traditional boundaries of criminal law that justifies the use of public resources is confined to the prosecution of those crimes that affect the interests of the society.<sup>64</sup> However, the proper role of criminal law with regard to the enforcement of norms governing business have been largely driven by the rise of regulatory state that imposed new substantive legal norms on economic activities necessitating effective remedies to adequately enforce them.<sup>65</sup> One can argue that business crimes could be an economic outrage that may affect the economic interests of a society. On top of this, by labeling commercial crimes in the criminal legislations, societal harm of such crimes is a *prima facie* evidence

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<sup>61</sup> Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much*, 40 ALA. L. REV. 1143, 1160 (1988-1989). See also Craswell & Calfee, *Deterrence and Uncertain Legal Standards*, 2 J. L. ECON. & ORG. 279 (1986).

<sup>62</sup> It is noted that precision and specificity is a virtue of criminal law that is designed to deter future crime. Particularly, it is argued that vagueness in the dentition of conduct rules reduces the possibility of compliance, i.e., potential offenders may not understand what conduct is prohibited and may engage in conduct that they otherwise would avoid if the prohibition is clear. See Robinson, Paul, *Why Does The Criminal Law Care What The Lay Persons Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VIRG. L. REV. 1839, 1851 (2000).

<sup>63</sup> Tom Baker et al, *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443, 468 (2004).

<sup>64</sup> On this matter, see generally JOHN STUART MILL, ON LIBERTY 13 (1863) (stating “the only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others.”); see also JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW, 213 (2d ed. 1960) (1947) (“Harm, in sum, is the fulcrum between criminal conduct and the punitive sanction”); Paul H. Robinson, *A Theory of Justification: Societal Harm As a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266, 266–68 (1975).

<sup>65</sup> LYNCH, *supra* note 5, at 26.

that implicates the need for criminal prosecution of commercial crimes through the proper allocation of public resources.

Briefly, the need for careful regulation of business practices on the one hand and the need for alternative optimal remedies to deal with deceptive commercial practices on the other poses a big challenge to law enforcement that require them to prudently weigh the rebounding effects of criminal sanctions. The bottom line is that criminal law is designed to encourage individuals to act in certain way that also logically and technically relates to the regulation of business practice.

#### **IV. THE ROLE OF CRIMINAL SANCTIONS IN REDUCING COMMERCIAL DISPUTES**

Market activities function best where genuine and reliable information is freely available. Commercial transactions between apparently legal equals will not be enforced if they were vitiated by deliberate misrepresentation about the fundamental nature of the deal.<sup>66</sup> This section highlights the interface between commercial crimes and commercial disputes. It then provides analytical insights into how criminal sanctions of commercial deceptions contribute to the reduction of commercial disputes.

##### **A. The Interface of Commercial Crimes and Commercial Disputes**

In order to have a clear picture of how commercial disputes and commercial crimes relates to each other, it would be appropriate to set out somehow descriptive definitions of what constitutes commercial deception. The term deception is synonymous with terms like deceit or fraud that generally refers to a “dishonest behavior that is intended to make some body believe something that is not true”.<sup>67</sup> Accordingly, it could be possible to provide descriptive definition by outlining the main elements of commercial deception.<sup>68</sup> First, there is an element of deceit or of providing inaccurate, incomplete or misleading information. Second, reliance on the deceit or the information provided or omitted induces the target of the deception to part with some valuable thing that belongs to the target. Thirdly, the act of deception uses or misuses or distorts commercial systems and their legitimate instruments potentially creating a serious economic impact. The elements of the definition are indicative of the fact that a person who performs

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<sup>66</sup> TERWILLIGER, *supra* note 3.

<sup>67</sup> OXFORD ADVANCED LEARNERS DICTIONARY (New 8th ed. 2011).

<sup>68</sup> See UNCITRAL (United Nations Commission on International Trade Law), RECOGNIZING AND PREVENTING COMMERCIAL FRAUD: INDICATORS OF COMMERCIAL FRAUD 5 (United Nations, New York, 2013).

commercial deception is communicating information that intends to cause another person to believe something that is misleading as a result of which the latter is voluntarily subjected to surrender his monetary interests. Thus, the majority of dishonest commercial practices that subvert reliable information may fall under the ambit of commercial deception.

It is noted that commercial crimes are characterized by non-violence, deceptions and concealment of facts committed by businesspersons to advance economic gain. Hence, it is understandable how the definitional elements of commercial deceptions become the common denominator of both commercial crimes and commercial disputes. In other words, commercial deceptions that ignite criminal sanctions under the criminal law would also trigger commercial disputes under private law. Therefore, the relevant point is whether it is appropriate to resort to the sanctions provided under criminal law or private law in order to reduce commercial deception as a common feature of both commercial crimes and commercial disputes. As we shall see in what follows, the answer depends on how one views the effectiveness of either criminal or civil sanctions under the two legal schemes.

### **B. The Deterrence Role of Criminal Sanctions**

Criminal law theories could generally be used to explain commercial crimes “within the deterrence/rational choice framework”.<sup>69</sup> These theories are profoundly useful in examining the context of commercial crimes since commercial offenders as rational and self-interested utility-maximizers could be amenable to the threat of criminal sanction.<sup>70</sup> Therefore, a wealth of legal literature in this regard tried to treat the efficiency of criminal sanctions in deterring white-collar crimes.<sup>71</sup> However, little attempt has been made to link the relationship between the deterrence effect of criminal sanctions for commercial deceptions and the reduction of commercial disputes. Other studies such as the one conducted by Zemans, for instance, reveals that “the threat of coercion underlying the execution of remedies facilitates efficient processing of commercial disputes in the criminal justice system,”<sup>72</sup> but not in the context of deterring the dispute *per se*.

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<sup>69</sup> Raymond Paternoster and Sally Simpson, *Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime*, 30 L. & SOC. REV. 550 (1996).

<sup>70</sup> *Id.*

<sup>71</sup> See generally EDWIN H. SUTHERLAND, WHITE COLLAR CRIME (1983); Edwin H. Sutherland, *White Collar Criminality*, 5 AM. SOC. REV. 1 (1940); Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J. L. ETH. & PUB. POL. 507 (2004); and Donald J. Newman, *White-Collar Crime*, 23 L. & CONT. PROBS. 738-39 (1958).

<sup>72</sup> ZEMANS, *supra* note 1.

It is noted that commercial crimes that involves acts of fraud, misrepresentation, false pretense and falsification would also be capable of triggering commercial disputes.<sup>73</sup> Therefore, it can be premised that deterring commercial deceptions through criminal sanctions would contribute in the reduction of commercial disputes that would otherwise remain rampant if compensatory civil sanctions are applied. It is in this context that the following discussion aims to attract the attention of the readers.

Generally, the deterrence of commercial crimes involving commercial deceptions could contribute to the reduction of commercial disputes in two ways. First, as the name indicates certain kinds of behaviors in commercial transactions are prohibited and hence a trader may comply with the normative rules governing such business conduct simply because criminal sanctions has a potential deterrence effect due to its severity compared to compensatory civil sanctions. The second point relates to the “pricing of crime” as economists subscribe. It is argued that a trader decides to commit commercial crime after a calculation of the likely costs and benefits of the economic gain – the so-called the rational choice theory of law-abiding behavior. Thus, it is vital to explain these two theoretical foundations moderately to address the issue at hand.

According to the first theoretical underpinnings, criminal sanctions of commercial deceptions send a general warning to the business community that a particular behavior is unacceptable and hence punished harshly.<sup>74</sup> In this context, the use of criminal sanctions to deter commercial deceptions that has been previously reserved to the ambits of civil sanctions may help traders and corporations to adjust their behaviors up to the standards of criminal law. Specifically, the stigma of conviction may potentially reduce commercial deception since traders, corporate managers, and directors would be sensitive to criminal sanction.<sup>75</sup> Hence, these individuals would not commit crimes of commercial deception under the pain of losing occupational position, social censure from friends and family as potential negative costs.<sup>76</sup> Likewise, crimes of commercial deception would be deterred since they are “calculated, deliberative

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<sup>73</sup> Monu Bedi, *Contract Breaches and the Criminal/Civil Divide: An Inter-Common Law Analysis*, 28 GA. ST. U. L. REV. 590 (2012).

<sup>74</sup> J. Scott Dutcher, *From the Boardroom to the cellblock: The Justifications for Harsher Punishment of White-Collar and Corporate Crime*, 37 ARIZ. ST. L. J. 1304 (2006).

<sup>75</sup> William J. Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, WIS. L. REV. 703 (1967).

<sup>76</sup> PATERNOSTER & SIMPSON, *supra* note 69.

and directed to economic gain<sup>77</sup> which “would increase the salience of any perceived costs and benefits”.<sup>78</sup>

Furthermore, traders have greater stake in conventional business life style and therefore, have more to lose should their deceptive commercial behaviors be discovered. In this situation one of the traders most prized possessions placed at risk by engaging in illegal commercial practice is their good will and reputation.<sup>79</sup> However, it should be noted that given the complex nature of commercial deception and the likelihood of businesspersons to get away with their crimes, the optimal level of deterrence could be achieved by increasing enforcement efforts to increase the likelihood of detection.<sup>80</sup>

The second role of criminal sanction is that punishment of commercial deception provides disincentive to act contrary to the legal norms designed to ensure good business practice.<sup>81</sup> According to Becker, a party to the commercial transaction is a rational person who weighs the economic gain against the possibility of being caught and the price of the punishment.<sup>82</sup> Therefore, if we subscribe to Becker’s economic model, the rational trader is presumed to be profit maximizer who weighs the costs and the benefits of committing a crime and does not undertake illegal commercial practice unless the expected benefits of such illegal act exceed the expected costs. Hence, an individual trader may act quite contrary to good commercial practice if the expected net gain from such contravention equates the expected economic gain minus the expected costs (being the product of the amount of punishment and its probability).<sup>83</sup> In the same vein, another earlier and more famous economic model can also be found in Richard Posner’s writings of “*Economic Analysis of Criminal Law*”. Posner argues that the

<sup>77</sup> Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in the Enforcement of Economic Regulations*, in WHITE-COLLAR CRIME: OFFENSES IN BUSINESS, POLITICS AND THE PROFESSIONS 304 (G. Geis & R. F. Meier (eds.), 1977).

<sup>78</sup> PATERNOSTER & SIMPSON, *supra* note 69, at 550-551.

<sup>79</sup> In response to jail sentence for white collar crimes in USA context, Chambliss document the following: “Everybody gets panicky at the thought of a jail sentence.” “A jail sentence is dishonorable; it jeopardizes the reputation.” . . . These expressions are in marked contrast to the attitudes of the same men toward the imposition of fines and other monetary penalties: ‘They don’t hurt anybody . . .’ People are making enough money nowadays to pay a fine easily’. See CHAMBLISS, *supra* note 75, at 709-710.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* 709. See also John M. Ivancevich *et al.*, *Deterring White-Collar Crime*, 17 T ACAD. MGMT EXEC. 121 (2003).

<sup>82</sup> BECKER, *supra* note 2, at 169. His basic argument is that a breach is classified as a crime because it is harder to catch criminals and not all criminals will be caught; so, the penalty imposed will have to exceed actual damages (i.e., compensatory damages). *Id.* at 191-192.

<sup>83</sup> *Id.*

major function of criminal punishment is to prevent individuals from bypassing the system of voluntary, compensated exchange for the less efficient involuntary exchange exemplified by the criminal act.<sup>84</sup> Posner's economic model may help to understand how commercial crimes "generally consist of inefficient, involuntary transfers intended to bypass the voluntary market of exchange".<sup>85</sup> It is in this context that Posner propels the need to deter commercial deceptions since they represent "inefficient allocation of resources".<sup>86</sup>

Regarding the optimal form of criminal sanction, two forms of sanctions are at the disposal of the state law enforcement. Becker for instance prefers monetary compensation as an appropriate form of criminal sanction as opposed to incarceration.<sup>87</sup> It is argued that incarceration for crimes of commercial deception such as fraudulent inducement may deter too much and hence opt for civil sanctions in the form of monetary compensation.<sup>88</sup> In other words, it means that criminal prosecution in the form of incarceration may chill commercial activities since individuals may fear to enter into commercial transactions that might be susceptible to fraudulent inducement should they fail to satisfy their obligation under the agreement.<sup>89</sup> Thus, Becker advises that confinement is a sanction of last resort to be used only when the offender either will not or cannot pay an adequate fine.<sup>90</sup> Posner also noted how criminal sanctions in the form of monetary compensation might deter affluent members of society while non-affluent members of society will not be sufficiently deterred since they will not have the money to pay. Therefore, Posner advises that incarceration would be the optimal type of sanction in case where non-affluent members of the society are involved.<sup>91</sup> Yet Posner also pointed his reservation on how monetary sanctions under the traditional tort or contract law are not enough to discourage inefficient commercial

<sup>84</sup> POSNER, *supra* note 2, at 1193.

<sup>85</sup> Posner noted that fraud (false pretenses) and several others as clear example of forced exchanges. *Id.* at 1196.

<sup>86</sup> *Id.*

<sup>87</sup> John Collins Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 421 (1980).

<sup>88</sup> Geraldine S. Moehr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLOR. L. REV. 937 (2003).

<sup>89</sup> Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 L. & CONTEMP. PROBS. 31-33 (1997). The author argues that punitive civil sanctions are the most appropriate sanctions for business crimes. *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Posner concedes that this notion suggests "criminal law is designed primarily for the non-affluent; the affluent are kept in line, for the most part, by tort law." *Id.* at 1204.

behaviors due to the ineffectiveness of pricing crimes.<sup>92</sup> According to Becker and Posner, the optimality of criminal sanction in the form of incarceration is limited to the cases where offenders are unable to pay monetary compensation as an alternative sanction. Nevertheless, the problem of their theorization is that it fails to explain the optimality of criminal monetary sanctions in crimes involving commercial deception. Particularly, commercial deceptions committed by white-collar criminals may not be deterred unless criminal sanction in the form of incarceration is opted.<sup>93</sup> It can be alternatively argued that the deterrence role of such monetary sanction is futile given the economic capacity of businesspersons to set-off the price of the crime. Hence, the monetary criminal sanction becomes suboptimal thereby failing to deter crimes of commercial deception unless incarceration is opted.

Another vital issue relates to whether criminal sanction of corporate commercial deception contributes to the reduction of commercial disputes. In this regard, the standard economic approach to corporate criminal liability supports the view that imposing strict vicarious criminal liability on corporations invariably reduces corporate crime, with higher sanctions leading to less crime.<sup>94</sup> Accordingly, crimes of commercial deception is deterred efficiently if the corporation is held strictly liable for all its crimes, subject to a fine equal to the social cost of crime divided by the probability of detection.<sup>95</sup> This forces the corporation to internalize the social cost of its criminal activity.

Crimes of corporate commercial deception are committed by member of directors, managers, shareholders, and agents of the corporation to benefit themselves in pursuit of their interest as rational utility-maximizers.<sup>96</sup> Since directors and managers of corporation undertake commercial activities on behalf of the corporation, these individuals have the opportunity to commit commercial deceptions that breeds commercial disputes. In this context, directors, managers, officers and agents of the corporation who commits crimes of commercial deception risks direct individual criminal liability.<sup>97</sup> The pertinent question is if

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<sup>92</sup> Posner, *supra* note 2, at 1201.

<sup>93</sup> See Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1236 (1985).

<sup>94</sup> Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833-834 (1994).

<sup>95</sup> *Id.*

<sup>96</sup> Mark Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts*, 71 B. U. L. REV. 247 (1991).

<sup>97</sup> *Id.*

corporate commercial crime substitutes for direct criminal liability of the directors, managers and officers of the corporation, what is the necessity of referring to corporate crime *per se*? Some scholars argue that corporate commercial crime has the nature of agency cost.<sup>98</sup> In this context, crimes of commercial deceptions that would be attributable to corporations could be deterred since corporations are forced to take measures that sanction its own directors, managers, and officers in the form of indemnification or by reducing their wages. Therefore, such schemes of corporate criminal sanction in the criminal law would force corporations to sanction their directors, managers, and officers for acts of commercial deception that may in turn contribute to the reduction of potential commercial disputes.<sup>99</sup>

The last but not least point is whether there exist empirical evidences in support of the deterrence effects of criminal sanction. Empirical evidence support that if sanctions provided for commercial deception are set sufficiently high, only persons who prefer risk can be expected to commit such crimes.<sup>100</sup> However, this research finding indicates that since crimes of commercial deceptions are difficult to detect it should have to be punished more severely.<sup>101</sup> Thus, since expected punishment is smaller when the risk of detection is small, potential offenders will tend to commit crimes that are relatively more difficult to detect or prosecute. Particularly, empirical evidences support how crimes of commercial fraud, which is unlikely susceptible to detection, could be deterred if the total expected penalty equals the social costs of the fraud.<sup>102</sup>

## V. CRIMES OF COMMERCIAL DECEPTION UNDER THE CRIMINAL LAW OF ETHIOPIA

This section examines the nature and typologies of crimes of commercial deceptions under Ethiopian Criminal Law. Firstly, attempt is made to set the context within which crimes of commercial deceptions are distinguished from street crimes and regulatory crimes. Secondly, crimes of commercial deceptions that are stipulated under the Criminal Code of Ethiopia and Trade Practice and Consumers' Protection Proclamation will be examined. Thirdly, a normative

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<sup>98</sup> ARLEN, *supra* note 94, at 835.

<sup>99</sup> Michael K. Block & Robert C. Lind, *An Economic Analysis of Crimes Punishable by Imprisonment*, 4 J. LEGAL STUD. 479 (1975).

<sup>100</sup> Michael K. Block & Vernon E. Gerety, *Some Experimental Evidence on Differences between Student and Prisoner Reactions to Monetary Penalties and Risk*, 24 J. LEGAL STUD. 123 (1995).

<sup>101</sup> *Id.*

<sup>102</sup> Jonathan M. Karpoff & John R. Lott, Jr, *The Reputational Penalty Firms Bear From Committing Criminal Fraud*, 36 J.L. & ECON. 797 (1993).

analysis will be made on the role of criminal sanctions provided by the Ethiopian Criminal Law in relation to crimes of commercial deceptions and its role in the reduction of commercial disputes.

### A. Setting the Context: Commercial Crimes in Ethiopia

Commercial crimes in Ethiopia are mainly regulated under the Criminal Code and Trade Practice and Consumers' Protection Proclamation. In the Criminal Code, Book VI deals with crimes against property under which "Economic and Commercial Crime" is labeled. There are various crimes in the Criminal Code, which directly or indirectly affect commercial practice yet listed outside the umbrella title of "Economic and Commercial Crimes." Accordingly, one would be tempted to disregard criminal conducts perpetrated against commercial instruments that are dispersed in the Criminal Code. Hence, in order to provide general picture of crimes of commercial deceptions in Ethiopia, the discussion of this paper to some extent relates to the examination of these crimes.

In addition to the Criminal Code, there are various crimes of commercial deceptions stipulated under the Trade Practice and Consumers' Protection Proclamation. While this proclamation could be used to justify the criminalization of unfair trade practice, it would be insignificant to characterize commercial crimes as devoid of *mens rea*. The reason is that the general principles of Ethiopian Criminal Law require either criminal intention or negligence for a punishable offence even for petty offences.<sup>103</sup> However, this does not implicate that crimes of commercial deceptions equate the moral blameworthiness of crimes of violence such as murder, arson, and rape that do not involve the practice of dishonesty or false statement.

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<sup>103</sup> THE CRIMINAL CODE OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, Proclamation No. 414/2004, FED. NEGARIT GAZZETE, Year No, 9 May 2005 (hereinafter, CRIMINAL CODE OF ETHIOPIA). According to this Criminal Code, criminal intention refers to performance of an unlawful and punishable act with full knowledge and intent in order to achieve a given result; or being aware that his act may cause illegal and punishable consequences, commits the act regardless that such consequences may follow. A person is not convicted for what he neither knew of or intended nor for what goes beyond what he intended either directly or as a possibility. *Id.* art. 58. Criminal negligence refers to imprudence or disregard of the possible consequences of an act while aware that the act may cause illegal and punishable consequences; or it is a criminal lack of foresight or without consideration while one should or could have been aware that the act may cause illegal and punishable consequences. *Id.* art. 59. It seems that criminal code provisions of petty offence correlates to regulatory crime as such offence is punishable "when the mandatory or prohibitive provisions of a law or regulation issued by a competent authority is infringed or when a person commits a minor offence which is not punishable under the Criminal Law..." though still criminal intention and negligence is "a condition for liability to punishment". *Id.* art. 735 and art. 741(2).

The last but not least point worth mentioning is the issue that relates to the vicarious criminal liability of business organizations under the Criminal Code of Ethiopia. Business organizations in Ethiopia could be criminally liable for the illegal acts of its directors, officers, employees, and agents. To hold business organization for crimes of commercial deception, the criminal act should be committed in connection with the activity of the business organization. However, the prosecution in Ethiopia must establish that the actions of directors, managers, officers and agents of the business organization had been perpetrated with the intent of promoting the interests of these individuals by unlawful means or by violating their legal duty or by unduly using the business organization as a means.<sup>104</sup>

In general, crimes of commercial deception under the Criminal Law of Ethiopia could be characterized by deceptive practice and violation of trust that are not dependent upon the threat of physical force. In addition, these types of crimes are committed in pursuit of economic gain, benefit or advantages contrary to good business practice. The following sections subsequently examine commercial crimes that take the form of commercial deception under both the Criminal Code and Trade Practice and Consumers' Protection Proclamation.

## B. Crimes of Commercial Deceptions Under the Criminal Code

Legal scholars generally agree that commercial transactions will be hindered where deceitful commercial activities are rampant.<sup>105</sup> Hence, the role of criminal law is justified in deterring deceitful commercial practices. Generally, crimes of commercial deceptions in the Criminal Code of Ethiopia comprise range of offences that involve falsification and fraudulent trade practices. While the distinctions between commercial falsification and commercial fraud in the Criminal Code seems arbitrary, the deceptive and harmful nature of these crimes is their distinguishing feature compared to other forms of crimes that affect the proprietary interest of a certain person. While crimes of commercial fraud may involve deceptive commercial practice but it does not necessarily involve commercial falsifications.

### 1. *Crimes of Commercial Falsification*

The crimes of deceptions under the Criminal Code of Ethiopia that relates to commercial falsifications ranges from falsifications and forgery of public or

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<sup>104</sup> CRIMINAL CODE OF ETHIOPIA, *supra* note 103, art. 34(1).

<sup>105</sup> Stuart P. Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609 (A)(2) and the Origins of Crimen Falsi*, 90 J. CRIM. L. & CRIMINOLOGY 1093 (1999-2000).

private documents and measurement instruments intended for use in commercial activity. The Criminal Code prohibits the deception of another person through the falsification of official marks, weight, balances, measures or other instruments intended for use in commerce.<sup>106</sup> Businesspersons are prohibited from unlawfully or through forgery affixing a mark or imprint denoting official certification or warranty or making use of such falsified instruments. In particular, exporting, importing, purchasing, acquiring or procuring, or accepting in trust, selling or offering for sale or donating, stamps, stamped paper, marks, official weights or measures that are known to be forged or falsified is prohibited.<sup>107</sup> In addition to the above list of crimes, the Criminal Code prohibits crimes of commercial forgery and falsification capable of affecting security of commercial instruments designed to effect payments as fulfillments to commercial obligations. Accordingly, it is prohibited to use forged bill of exchange, check, promissory note, bank deposit book or other certificate of deposit in a bank, credit card or document in an institution of deposit or loan or share certificate with the intent to injure the rights or interests of another or to obtain any undue right or advantage for himself.<sup>108</sup> The Criminal Code clearly prohibits falsification, adulteration, alteration or counterfeiting of goods capable of affecting another person.<sup>109</sup> Finally, utterance of falsified, counterfeited, adulterated goods as genuine, unadulterated, or intact is punishable.<sup>110</sup> In case of negligence and failure to exercise particular circumspection or care a businessperson may be punishable with fine not exceeding ten thousand birr in the gravest cases.<sup>111</sup> Generally, it is clear to appreciate how the Criminal Code of Ethiopia normatively prohibits commercial deceptions involving false representation as to the nature, quality, quantity or value of goods or services to be delivered through falsified or forged documents that are not normally used in the type of commercial transactions to which they are intended to relate.

## ***2. Crimes of Commercial Fraud***

Commercial fraud is another genre of deception in which a person is “induced to act against his own detriment due to the misrepresentation of the truth or

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<sup>106</sup> CRIMINAL CODE OF ETHIOPIA, *supra* note 103, art. 367.

<sup>107</sup> *Id.* art. 368.

<sup>108</sup> *Id.* arts. 375 & 382(1).

<sup>109</sup> *Id.* art.391.

<sup>110</sup> *Id.* art. 392(1).

<sup>111</sup> *Id.* art. 392(2)

concealment of a material fact” by the other party.<sup>112</sup> In common law jurisdiction, the term fraud refers to a “dishonest and false statement” often used as meaning “un-conscientious dealing”.<sup>113</sup> The meaning attributed to fraudulent misrepresentation under the Criminal Code of Ethiopia also conveys similar message.<sup>114</sup> Accordingly, it refers to the commission or omission of an act that cause another person to act in a manner prejudicial to his rights in property, or those of a third person in order to obtain unlawful enrichment by using either of the following means: (a) misleading statements (b) misrepresenting status or situation (c) concealing facts despite the duty to reveal or (d) taking advantage of the person's erroneous beliefs. Thus, ranges of crimes such as drawing of check without cover; fraudulent manipulation of stock exchange transactions,<sup>115</sup> gaming in stock or merchandise,<sup>116</sup> and fraudulent acts relating to insurance<sup>117</sup> are labeled as crime involving fraud that could be categorized as crimes of commercial deceptions. Specifically, there are crimes of fraud committed against the rights in property branded under “economic and commercial crime” in the Criminal Code.

<sup>112</sup> BLACK'S LAW DICTIONARY, *supra* note 10.

<sup>113</sup> William R. Anson, *Principles of the Law of Contract*, 263(Arthur L. Corbin (ed), 3rd ed.1919).

<sup>114</sup> CRIMINAL CODE OF ETHIOPIA, *supra* note 103, art 692(1).

<sup>115</sup> *Id.* art. 694: ‘Whoever, through the facility of a stock exchange market or other market, with intent to create a false or misleading appearance of active public trading in a security or with respect to the market price of a security: a) effects a transaction in the security that involves no change in the beneficial ownership thereof; or b) enters an order for the purchase of the security, knowing that the security has been purchased by the same or different persons at substantially the same size, at substantially the same time, at substantially the same price, or an order for such purchase of the security has been or will be entered by or for the same or different persons; or c) enters an order for the sale of the security, knowing that the security has been sold by the same or different persons at substantially the same size, at substantially the same time, at substantially the same price or an order for such sale of the security has been or will be entered by or for the same or different persons is punishable, with simple imprisonment, or, in serious cases, with rigorous imprisonment not exceeding five years.’

<sup>116</sup> *Id.* art. 695: ‘Whoever, with intent to make gain or profit by the rise or fall in price of the stock goods or merchandise of a registered or unregistered company or other undertaking, whether in or outside the country, makes or signs any contract, oral or written, purporting to be for the sale or purchase of shares of stocks, goods or merchandise, without the bona fide intention of acquiring or selling such things is punishable with simple imprisonment, or, in serious cases, with rigorous imprisonment not exceeding five years.’

<sup>117</sup> *Id.* art. 698: ‘Whoever, with intent to obtain for himself or to procure for a third person an unlawful enrichment, deceives an insurance company: a) by creating the risk insured; or b) by concealing, misrepresenting, affirming or falsely declaring a fact relating to the amount, duration or beneficiaries of the insurance, in a manner affecting the interest stated in the contract, or c) in any other way commits a fraudulent act in connection with insurance activity is punishable..’

For instance, attack on another's credit,<sup>118</sup> unfair competition,<sup>119</sup> infringement of marks, declarations of origin, designs or models,<sup>120</sup> and infringement of rights relating to literary, artistic or creative works<sup>121</sup> are deceptive commercial practices perpetrated against fair trade practice.

In addition, commercial deceptions may also occur during proceedings of bankruptcy. Needless to mention it, bankruptcy proceedings serve as an important commercial and policy needs for businesses experiencing financial difficulties in which it enables traders and business organizations to restructure debt through reorganization or liquidation proceedings. However, the bankruptcy proceedings can be used as deceptive schemes that help in facilitating the improper transfer of assets through fictitious claims and misrepresentation of facts. The ranges of crimes that fall under this category include fraudulent insolvency,<sup>122</sup> fraudulent bankruptcy,<sup>123</sup> fraud in execution and fraudulent composition.<sup>124</sup> Among other

<sup>118</sup> *Id.* art. 717: 'Whoever, maliciously or with intent to cause damage, seriously injures, or compromises the credit of another by statements or imputations he knows to be false, is punishable, upon complaint, with a fine of not less than one thousand Birr, or simple imprisonment for not less than three months.'

<sup>119</sup> *Id.* art. 719: 'Whoever intentionally commits against another, an abuse of economic competition by means of direct or any other process contrary to the rules of good faith in business, in particular: (a) by discrediting another, his goods or dealings, his activities of business or by 'making untrue or false statements as to his own goods, dealings, activities or business in order to derive a benefit there from against his competitors; or b) by taking measures such as to create confusion with the goods, dealings or products or with the activities or business of another; or c) by using inaccurate or false styles, distinctive signs, marks or professional titles in order to induce a belief as to his particular status or capacity; or d) by granting or offering undue benefits to the servants, agents or assistants of another, in order to induce them to fail in their duties or obligations in their work or to induce them to discover or reveal any secret of manufacture, organization or working; or e) by revealing or taking advantage of such secrets obtained or revealed in any other manner contrary to good faith, is punishable, upon complaint, with a fine of not less than one thousand Birr, or simple imprisonment for not less than three months.'

<sup>120</sup> *Id.* art. 720: 'Whoever intentionally: a) infringes, imitates or passes off, in such manner as to deceive the public, another's mark or distinctive signs or declarations of origin on any produce or goods or their packing, whether commercial, industrial or agricultural; or b) sells or offers for sale, imports or exports, distributes or places on the market produce or goods under a mark which he knows to be infringed, imitated, passed off or improperly affixed; or c) refuses to declare the origin of produce or goods in his possession under such marks, shall be punishable with rigorous imprisonment not exceeding ten years.'

<sup>121</sup> *Id.* art. 721: "Whoever apart from cases 'punishable more severely by another provision of the this Code, intentionally violates laws, regulations or rules issued in relation to rights on literary, artistic or creative works, is punishable with rigorous imprisonment not exceeding ten years. (2) where, the act is committed negligently, the punishment shall be simple imprisonment not exceeding five years."

<sup>122</sup> *Id.* art. 725.

<sup>123</sup> *Id.* art. 727. Such fraudulent bankruptcy occurs when the debtor; a) 'either materially, whether by assigning or by destroying, damaging, depreciating or rendering useless certain property forming a

things, fraudulent insolvency involves entering into contract by intentionally concealing the fact of insolvency to third parties with the knowledge of financial incapacity to execute it. This scenario also implicates that in the absence of full awareness by one party as to the other party's true intention in the contract, the making of contractual obligation is less likely to allocate resources without making the other party worse off. Hence, though the formation of contract should be encouraged on economic grounds, the underlying intentional concealment of facts that affects the economic interest of the other party in good faith is an outrageous conduct that should justify criminal sanction to deter similar commercial malpractice in the future. Furthermore, a debtor who is adjudged bankrupt by the court of law is prohibited from intentionally disposing of his assets to the prejudice of his creditors. Similarly, a debtor who after the delivery of declaration of default is subject to proceedings by way of execution is prohibited to intentionally prejudice his creditors by reducing assets.<sup>125</sup> It is also important to note that a third party is prohibited from acting to the prejudice of the creditors by making fictitious claims in such cases.<sup>126</sup>

Generally, one can observe that the scrutiny of the Criminal Code of Ethiopia unfolds the fact that commercial crimes are perpetrated either intentional or negligently by creating untrue or false statements, confusions, inaccurate information and deceitful practices for the purpose of procuring economic advantage "contrary to the rules of good faith in business." Hence, the acts committed by businesspersons and the criminal related terms carry the stamp of moral condemnation that justifies the use of criminal sanctions.

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part of such assets; or b) fictitiously, whether by removing or concealing property, by relying on or recognizing non-existent debts or claims or by inciting a third party to make fictitious claims, or in any other manner pretending that his estate is less than it is in fact, in particular by means of incorrect accounting, falsified correspondence or a false balance sheet...’

<sup>124</sup> *Id.* art. 733(1): “Any debtor who, in order to obtain a scheme of arrangement or the ratification of a composition by the Court, misleads his creditors, the commissioner in bankruptcy or the competent authority, as to his financial position, in particular by means of incorrect or falsified accounts, correspondence or a balance sheet is punishable with simple imprisonment.” ‘Purchase of Votes’ is also prohibited: “Any debtor who, in order to obtain a favorable vote of one .of his creditors or a composition by the Court, grants or promise particular advantages: a) to that creditor or to his representative in a general meeting; or b) to a member of the administration or winding-up in a bankruptcy, is punishable with simple imprisonment not exceeding three years. (2) A third person who so acts in favor of the debtor, or any person who with the same intent causes such an advantage to be granted or promised to him, is liable to the same punishments.”

<sup>125</sup> *Id.* art.728.

<sup>126</sup> *Id.* arts. 727(3) & 728(2).

### C. Regulatory Crimes Involving Commercial Deceptions

In addition to crimes of deceptions stipulated in the Criminal Code, there are commercial crimes in regulatory legislations designed to ensure good business practices. One of such specific legislation relates to “Trade Practice and Consumers’ Protection proclamation.”<sup>127</sup> The proclamation, among other things, is enacted to ensure competitive and fair market practice among the business community; to protect consumers from misleading market conducts; and to prevent the proliferation of goods and services that endanger the health and wellbeing of consumers.<sup>128</sup> In this specific legislation, one can identify crimes of commercial deception that could be committed by businesspersons against consumers or other businesspersons. The type of commercial crimes committed by businesspersons largely involve crimes of unfair trade practices, agreements and concerted practices<sup>129</sup> with the object or effect of preventing, restricting or distorting competition, merger and unfair competition and crimes committed against consumers.<sup>130</sup> Crime of unfair trade practice involves the act of carrying on commercial activity by a businessperson or acting together with others who openly or dubiously abuse his dominant position in the market.<sup>131</sup> Such form of commercial crime is committed when a businessperson has the actual capacity to control prices or other conditions of commercial negations, or eliminate or utterly restrain competition in the relevant market.<sup>132</sup>

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<sup>127</sup> *Trade Practice and Consumers’ Protection Proclamation*, Proclamation No. 685/2010, FED. NEGARIT GAZETA 16<sup>th</sup> Year, No. 49, Addis Ababa, 16 August 2010. This Proclamation is designed to regulate all persons carrying on commercial activities and to any transaction in goods and services within the Federal Democratic Republic of Ethiopia and to the outcome of a commercial activity conducted outside Ethiopia which have the effect in Ethiopia. *See also id.* art. 4.

<sup>128</sup> *Id. See also id.* art. 3.

<sup>129</sup> Anticompetitive agreement includes mutual understanding, written or oral contract and operational procedures, whether or not legally enforceable. Likewise, concerted practice means a unified or cooperative conduct of businesspersons depicted in a way that does not look like an agreement and done to substitute individual activity. *Id.* art. 12.

<sup>130</sup> *Id.* art. 11 cum.13 (1, a).

<sup>131</sup> Some of the acts that involve abuse of dominant position in the market involve limiting production, hoarding or diverting or preventing or withholding goods from being sold in regular channels of trade; doing directly or indirectly such harmful acts, aimed at a competitor, as selling at a price below cost of production, causing the escalation of the costs of a competitor, preempt inputs or distribution channels with the view to restrain or eliminate competition; directly or indirectly imposing unfair selling price or unfair purchase price; contrary to the clearly prevalent trade practice refuse to deal with others on terms the dominant business person customarily or possibly could employ as though the terms are not economically feasible to him; without justifiable economic reasons, denying access by a competitor or a potential competitor to an essential facility controlled by the dominant business person. *Id.* arts. 5 & 8.

<sup>132</sup> *Id.* art. 6.

One can easily understand the potential effect of these types of commercial crimes in planting the seed of commercial disputes between and among businesspersons. Some of the examples of anticompetitive agreements and concerted practices involve horizontal relationships that have the object or effect of directly or indirectly fixing prices; collusive tendering; allocating customers, or marketing territories, production, or sale by quota; and agreement between businesspersons in a vertical relationship that has an object or effect of setting minimum retail price.<sup>133</sup> Unfair competition involves an act or practice carried out in the course of trade, which is dishonest, misleading, or deceptive, and harms or is likely to harm the business interest of a competitor.<sup>134</sup> Crimes of unfair competition also relates to any act that causes or is likely to cause confusion with respect to another businessperson or commercial activities offered by such businessperson. Furthermore, acts of disclosure, possession or use of information without the consent of the rightful owner of that information in a manner contrary to honest commercial practice, and any false or unjustifiable allegation that discredits another businessperson or its commercial activities including the act of comparing goods and services falsely or equivocally in the process of commercial advertisement is prohibited.<sup>135</sup> Similar to the Criminal Code, the proclamation lists deceptive commercial acts committed by businesspersons against consumers. Crimes such as false advertisements,<sup>136</sup> provision of defective goods and services,<sup>137</sup> and unfair and misleading acts<sup>138</sup> are few examples.

In general, the above discussion highlights range of deceptive commercial practices regulated outside the rubric of the Ethiopian Criminal Code. Unlike the

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<sup>133</sup> *Id.* art. 13.

<sup>134</sup> *Id.* art. 21(1).

<sup>135</sup> *Id.* art. 21(2).

<sup>136</sup> *Id.* arts. 21(2, d) & 27.

<sup>137</sup> *Id.* art. 28.

<sup>138</sup> Acts such as issuing misleading information on quality or quantity or volume or acceptance or source or nature or component or use of goods and service may have; failing to disclose correctly the newness or model or the decrease in service or the change in or re-fabrication or the recall by the manufacturer or the second hand condition of goods; describing the goods and services of another business person in a misleading way; failing to sell goods and services as advertised or advertising goods or services with intent not to supply in quantity consumers demand, unless the advertisement discloses a limitation of quantity; making false or misleading statements of price reduction; failing to meet warranty obligation entered in connection with the sale of goods and services; misrepresenting the need for repair or replacements of parts to be made to goods as though not needed; doing any act of cheating or confusing in any transaction of goods and services; preparing or making available for sale or selling goods or services that are dangerous to human health and safety or those source of which is not known or whose quality is below standards set in advance or are poisoned or have expired or are adulterated are few unfair and misleading acts. *Id.* art. 30.

Criminal Code, the sanctions provided under this proclamation also relates to measures of administrative and compensatory nature. Compared to the Criminal Code, the proclamation provides sever criminal sanction in the form of imprisonment ranging from two years to twenty years and fine penalty ranging from thirty thousand to two million Ethiopian Birr depending on the type and nature of the crime involved.<sup>139</sup> Unfortunately, the tribunal of Trade Practice and Consumers' Protection Authority is permitted only to deliver administrative and civil sanctions in order to correct commercial wrongs,<sup>140</sup> while regular courts of both the federal and regional governments shall decide on the criminal matters so indicated under the proclamation.<sup>141</sup> Having had the catalogues of commercial crimes and the accompanying criminal sanctions provided for by the criminal law, the following section moderately analyses how criminal sanctions provided for deterring commercial deceptions contributes in the reduction of commercial disputes.

#### **D. The Contribution of Criminal Sanctions in Reducing Commercial Disputes**

It is noted that the severity and certainty of criminal sanctions potentially contributes to the deterrence of commercial offenders. Particularly, given the common characteristics of commercial deceptions in triggering prosecution and private litigation, resorting to criminal sanctions can provide optimal sanctions in the reduction of commercial disputes. However, the issue is whether the criminal sanctions provided under Ethiopian Criminal Law generally deter commercial deceptions at least in its normative context. On the one hand, the criminal sanctions of deceptive commercial practices that otherwise also receives civil sanctions under the private law would send a warning message to the businesspersons that deceptive practice is not tolerated by civil sanction alone. In this regard, the examination made on the nature and features of commercial crimes under the Ethiopian Criminal Law indicates how deceptive commercial practices deserve criminal sanctions despite the existence of civil remedies under the private laws. For instance, the issuance of check as commercial instrument is used to effect the obligation of payment in lieu of cash money. In contractual terms, drawing a check without cover or sufficient fund may amount to non-performance of the obligation to payment irrespective of the knowledge or intention of the non-

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<sup>139</sup> *Id.* art. 49. Compared to the Criminal Code, this proclamation provides a severe criminal imprisonment which as noted is twice the sanction provide in the former.

<sup>140</sup> See PROCLAMATION NO. 685/2010, *supra* note 127, art. 49.

<sup>141</sup> *Id.* arts. 35 & 49.

performing party.<sup>142</sup> However, in the Criminal Code, it is a punishable offence to issue a check without cover or full cover at the time of presentment for payment.<sup>143</sup> Arguably, the intentional or negligent drawing of bad check is indicia of dishonest and fraudulent behavior, which justify criminal sanctions on both economic and moral grounds. Therefore, the normative prohibition of drawing bad check under the Criminal Code could serve as a general deterrence that could contribute in the reduction of commercial disputes that emanates from such fictitious payments.

Another instance relates to the role of criminal sanction under the Ethiopian criminal law in deterring falsification, counterfeiting and utterance of defective goods and services that is prejudicial to the interests of businesspersons and consumers. It is noted that commerce involves transaction in goods and services that should be free from defects, adulteration and counterfeiting. While remedies for the contravention of such commercial obligations could be subject to the rules of sales contract under Ethiopian Civil Code,<sup>144</sup> it may also trigger prosecution resulting in severe criminal sanctions. Accordingly, criminal sanctions could serve as an alternative form of sanction capable of discouraging non-performance of contracts thereby reducing commercial disputes. However, a breach of contract could sometimes be economically justified in case the non-performing party can compensate the other party and be better off than non-performance of the contract. In such instance, applying criminal sanctions would chill economically valuable behavior by discouraging individuals from entering into contracts that are susceptible to “efficient contractual breach”. Yet, it can be argued that commercial practices that are motivated by undue economic advantage through deceptive breach of contractual obligations should be discouraged.

On the other hand, the severity of punishments provided for commercial crimes under the Criminal Law of Ethiopia could also serve as powerful deterrence

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<sup>142</sup> Drawing a check without cover between traders is a common practice around “Merkato”. This instance show how drawing check without sufficient fund is simply used as an evidence of latter payment to commercial obligations. In the Civil Code of Ethiopia, a party may default the performance of payment or even may refuse to carry out his obligations under the contract where the other party clearly shows that he will not perform his obligations or where the insolvency of the other party has been established by the court. This legal provision shows that default in payment may occur in the course of commercial practice, which could be solved by applying rules on effect of non-performance. See CIVIL CODE OF THE EMPIRE OF ETHIOPIA, Proclamation No. 165/1960, NEGARIT GAZZETE, Gazette Extraordinary, 19<sup>th</sup> Year No.2, Addis Ababa, 5<sup>th</sup> of May 1960 (hereafter referred as Civil Code of Ethiopia), art.1770 and 1771 including other related provisions.

<sup>143</sup> CRIMINAL CODE OF ETHIOPIA, *supra* note 103, art. 693.

<sup>144</sup> For instance if a certain good does not possess the quality required for its normal use or commercial exploitation such product may be considered as a defective product. But, the commercial dispute that may arise from the defective nature of such product may be resolved through warranty rather than resorting to criminal sanctions. See CIVIL CODE OF ETHIOPIA, art. 2287- 2300.

particularly when the sanction involves incarceration. In this regard, the severe nature of criminal sanctions under the Ethiopian Criminal Law can be explained in two ways. The first severe form of criminal sanctions relates to the imposition of rigorous imprisonment on offenders of crimes of commercial deception that resembles criminal sanctions provided for violent crimes such as homicide and robbery. In this regard, while the criminal sanctions for commercial deceptions under the Criminal Code ranges from simple imprisonment of three months to rigorous imprisonment of ten years, the criminal sanctions provided under Trade Practice and Consumer Protection Proclamation ranges from the minimum of two years to the maximum of twenty years. The second criminal sanction relates a more severe penalty that combines inflated fine punishment and rigorous imprisonment. Even though Ethiopian Criminal Code provides the possibility of criminal sanctions in the form of fine penalty or imprisonment as alternative punishment, Trade Practice and Consumer Protection Proclamation provide fine penalty and imprisonment cumulatively. Hence, the writer contends that the severity of criminal sanctions provided for deterring commercial deceptions under the Ethiopian Criminal Law could serve as a potential alarm to the business community. It follows that commercial disputes that would potentially result from deceptive commercial practice could be reduced proportionately. Consequently, the preceding normative analysis provides a moderate insight into how the use of criminal sanctions primarily designed for deterring commercial deceptions under the Criminal law could also serve as a powerful weapon for the reduction of commercial disputes. In this way, the state may gear its efforts towards the criminal prosecution of commercial deceptions as an optimal form of sanction thereby reducing case backlogs in the civil courts emanating from commercial disputes.

## VI. CONCLUSION

This paper generally attempted to show how the deterrence role of sanctions of commercial deceptions under the criminal law contributes in the reduction of commercial disputes emanating from deceptive commercial practices. In the preceding discussions, it is established that though acts of commercial deception could attract civil sanctions under private laws, the threat of severe criminal sanctions under the Ethiopian Criminal Law could serve as a more optimal sanction. In this regard, it is indicated that commercial deceptions carry the moral baggage that justify the intrusion of the criminal law in the business realm in which case labeling commercial crimes as lacking moral content becomes insignificant under the Ethiopian Criminal Law.

Another issue that captured the discussion of this paper is the task of showing the causal relationships between the deterrence of deceptive commercial practices under the criminal law and the reduction of commercial disputes. In this regard, number of legal literatures has treated the role of criminal sanctions in deterring commercial crimes such as white-collar crimes. Given the dearth of legal literature that relates to the same legal issue in Ethiopian context, this paper embarked on the normative analysis of the Criminal Law to show the role of criminal sanctions in deterring deceptive commercial practices that could engender commercial disputes. The paper in this regard labored to show how the severity of criminal sanctions provided under the Criminal Law of Ethiopia could normatively contribute to the reduction of commercial disputes within the broader context of deterrence/rational choice theory. It is contended that the price of criminal punishment provided for deterring deceptive commercial practice under the Criminal Code of Ethiopia inflict sanctions of fine and incarceration on businesspersons compared to the gains from the criminal act of delivering defective goods and services. Particularly, the severity of criminal sanctions that combines fine and rigorous imprisonment of twenty years under Trade Practice and Consumers Protection Law of Ethiopia would at least normatively serve as powerful weapon to deter deceptive commercial practices.

Admittedly, though it is difficult to conclude, the price of criminal sanctions provided under the Ethiopian Criminal Law, the normative analysis and empirical evidences on the deterrence effect of criminal sanctions elsewhere implicate that the severity of penalties provided for may serve to deter deceptive commercial practice. It is based on such normative dispositions that the criminal punishment provided for commercial crime under the Ethiopian Criminal Law is viewed as a more powerful and optimal sanction for deterring commercial disputes. Finally, while this paper is not definitive in addressing all issues involved, it could however help in triggering legal scholars to undertake further investigations into the practical impacts of Ethiopian criminal law in reducing deceptive commercial practices in more pragmatic approach.