

# Legal Aspects of Multi-level Marketing (MLM) and Pyramid Schemes: Overview of the Ethiopian Legal Framework

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## Abstract

*The Multi-level marketing (also known as Network Marketing) has evolved as an alternative marketing strategy, modeled on the basic idea of the classical direct selling-the door-to-door selling. The MLM design compensates the door-to-door sellers not just for the sales they personally generate but for the sales generated by the people they recruit. This compensation scheme in MLM brought it close to pyramid scheme in design; makes it prone to abuse in the form of pyramid scheme. Indeed, it has been abusively used for operating pyramidal schemes; Regulators have been plagued with the problem of distinguishing MLM from pyramid scheme and sanctioning the misuses. No careful legal drafting is likely to provide a simple solution but reduces the perplexity in the factual analysis and enforcement decision making. The author in this article examined, using the doctrinal research method, the position of Ethiopian law regarding network marketing and how it deals with potential manipulation of network marketing for operating pyramid scheme. Ethiopian law on pyramidal scheme is drafted so generically and briefly, and without even mention of network marketing – the very mask in which pyramidal schemes operate. The researcher found out that such a design of Ethiopian law has resulted in legal uncertainty about the implication of operating MLM. Essential parametrizations of what is within the legal limit and when it is out there in the pyramid scheme are either vague or omitted. The author recommended the need for further elaborate rules on pyramid schemes and inclusion of some guiding standards on network marketing.*

**Key terms:** Direct selling, Multilevel marketing/Network marketing, pyramid(al) scheme, referral selling

## Introduction

Producers of goods and services may devise and implement various marketing approaches so as to reach their consumers. The conventional distribution channel involves a hierarchical arrangement of producers-wholesalers-store

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retailers.<sup>1</sup> Alongside this conventional distribution channel, business persons developed a practice, through time, whereby their products reach consumers where they are, without expecting them to show up and shop at the store. This marketing model is what we call direct selling which signifies, in its classic connotation, the door-to-door selling<sup>2</sup> as opposed to store retailing. Direct selling initially emerged as a short-term approach to reduce surplus inventory but it remained as a sustainable retail channel for companies to reach household consumers in their own home.<sup>3</sup> As time goes on, the classical direct selling has given rise to its variant form known as multilevel marketing (also known as “network marketing”<sup>4</sup>).

The terms multilevel marketing and network marketing are often used alternatively in the literature.<sup>5</sup> The use of the term network marketing capitalizes an aspect of the marketing system that it is based on social networks/connections of the individuals while the use of the term multilevel marketing indicates the multi-layer organizational structure of the network. Multilevel marketing is the conventional terminology in the legal literature but the term network marketing is a buzzword in the ordinary discourse. Thus, in this article both the term network marketing and multilevel marketing (MLM) are used interchangeably.

There is global surge in the direct selling industry from time to time. The statistics in 2019 depicts that direct selling in its classical sense together with the MLM as its variant form generated more than \$180 billion retail sales across the globe.<sup>6</sup> The sector provided self-employment opportunity for about 119.9 millions distributors globally, and of this about 5.4 millions are in Africa.<sup>7</sup> As

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<sup>1</sup> Jon M. Taylor, ‘When Should an MLM or Network Marketing Program Be Considered an Illegal Pyramid Scheme?’(2000), available at <http://www.pyramidschemealert.org/PSAMain/regulators/PPSdefined.pdf>, accessed 15 April, 2020,P.12.

<sup>2</sup> William W. Keep and Peter J. Vander Nat, ‘Multilevel Marketing and Pyramid Schemes in the United States: An Historical Analysis’, *Journal of Historical Research in Marketing*, Vol. 6, No. 4, (2014), available at [https://www.valueplays.net/wp-content/uploads/Keep-and-Vander-Nat\\_MLM-and-Pyramid-Schemes\\_Final.pdf](https://www.valueplays.net/wp-content/uploads/Keep-and-Vander-Nat_MLM-and-Pyramid-Schemes_Final.pdf), accessed April 16, 2020, p. 4.

<sup>3</sup> Id., p. 2.

<sup>4</sup> Taylor, *supra* note 1, pp. 5-6, 8.

<sup>5</sup> Gerald Albaum & Robert A. Peterson, Multilevel (network) Marketing: An Objective View, *The Marketing Review*, Vol. 11, No. 4, (2011), available at <https://fardapaper.ir/mohavaha/uploads/2018/09/Fardapaper-Multilevel-network-marketing-An-objective-view.pdf>, accessed April 16, 2020, p.347.

<sup>6</sup> World Federation of Direct Selling Associations, Global Direct Selling - 2019 Retail Sales, (July 1, 2020), available at <https://wfdsa.org/wp-content/uploads/2020/07/Sales-Seller-2020-Report-Final.pdf>, accessed August 17, 2020. Global sales by product category shows that wellness products constitute 36%, cosmetics and personal care 29%, and household goods 12% followed by 6% sales pertaining to clothing and accessories.

<sup>7</sup> Id.

such the industry has been acclaimed for providing great economic opportunities for individuals.<sup>8</sup> It also benefits the small- and- medium-sized enterprises to build a business with low start-up and overhead costs.<sup>9</sup>

However, despite the much acclaimed advantages the direct selling industry allegedly offers, there arose misleading market conducts that disguise themselves as direct selling. Referrals and chain referrals (pyramid schemes) are the typical misleading market conducts that tainted the direct selling industry. In particular, the MLM has been used as bullet proof mask for operating a pyramid scheme. Owing to the thin distinction between the legal MLM and the illegal pyramid scheme, regulators continued struggling to identify whether a marketing scheme is an MLM proper or a pyramid scheme.<sup>10</sup>

Pyramid scheme is characterized as unfair commercial practice and universally outlawed but, in practice, there are numerous instances of their presence in most developed countries including the United States.<sup>11</sup> With the market saturation and strengthening enforcement in the developed world, coupled with the expansion of cyber technology<sup>12</sup>, many fraudulent businesses are likely to draw their attention to the developing countries where the level of awareness on the part of consumer protection authorities and the general public is minimal.

So far, few foreign companies claiming to be operating network marketing business had experimented it in Ethiopia.<sup>13</sup> Qnet (formerly known as Gold Quest/ Quest Net<sup>14</sup>), that purports to be direct selling company but had a history

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<sup>8</sup> Id.

<sup>9</sup> Software suggest, MLM Statistics You Need to Know in 2020, (November 13, 2019), available at <https://www.softwaresuggest.com/blog/mlm-statistics-you-need-to-know/>, accessed on August 17, 2020.

<sup>10</sup> Central Bank of Sri Lanka, Danger Posed by Pyramid Schemes & Network Marketing Programs, (May, 2006) Pamphlet Series No. 4, available at [https://www.cbsl.gov.lk/sites/default/files/cbslweb\\_documents/publications/Danger%20Posed%20by%20Pyramid%20Schemes%20%26%20Network%20Marketing%20Programmes%20%282006%29.pdf](https://www.cbsl.gov.lk/sites/default/files/cbslweb_documents/publications/Danger%20Posed%20by%20Pyramid%20Schemes%20%26%20Network%20Marketing%20Programmes%20%282006%29.pdf), accessed on 6 April 2020, p.2.

<sup>11</sup> Keep and Vander Nat, *supra* note 2, p.6.

<sup>12</sup> Apart from the traditional modes of communication such as presentations, group meetings, conference calls, and brochures and the likes, MLM programs are also promoted through internet advertising, social media and company websites. U.S. Securities and Exchange Commission, 'Beware of Pyramid Schemes Posing as Multi-Level Marketing Programs' (1 October, 2013), available at [https://www.sec.gov/investor/alerts/ia\\_pyramid.htm](https://www.sec.gov/investor/alerts/ia_pyramid.htm), > accessed on 15 March 2020.

<sup>13</sup> [A]ndthree, Gold Quest et al. in Ethiopia – Beware of Scam, (10 March, 2013), <https://andthree.wordpress.com/2013/03/10/gold-quest-et-al-in-ethiopia-beware-of-scam/>, accessed on 7 April, 2020.

<sup>14</sup> Daniel Frazier, Follow-up on the News: Internet Spat Breaks Out over Qnet and Multi-level Marketing in India: Reactions to Selling a Better Life, *Forbes Asia*, (5 November, 2012), available at <http://www.forbes.com/sites/donalfrazier/2012/12/18/followup-on-the-news-internet-spat-breaks-out-over-qnet-and-multi-level-marketing-in-india/#d0f0aa778dff>, accessed 10 April, 2020.

of being labeled as pyramid scheme and sanctioned in many jurisdictions,<sup>15</sup> was operating in Ethiopia in the mid-2010s.<sup>16</sup> Few other potential suspects had been in Ethiopian market during that time.<sup>17</sup> The most recent example is the Tiens Ethiopia, a subsidiary of the Chinese based Tiens Group Co. Ltd.<sup>18</sup> The company purported to have been operating direct marketing but had faced judicial,<sup>19</sup> administrative<sup>20</sup> and public reactions<sup>21</sup> in some jurisdictions for alleged engagement in pyramid scheme. Yet it is still operating in many parts of the world.<sup>22</sup> Tiens Ethiopia had been in operation for about a decade until barred in February 2016 for engaging in pyramid scheme of sale.<sup>23</sup> It is also reported that Tiens restarted the business in Ethiopia reorganizing/renaming itself in three different companies, adopting similar marketing strategy.<sup>24</sup>

The need to protect consumers and create predictable legal environment for business persons is unquestionable. The current Ethiopian law-the Ethiopian “Trade Competition and Consumer Protection Proclamation No. 813/2013”<sup>25</sup>-prescribes the dos and don’ts for business persons, including a prohibition regarding operating pyramidal schemes.<sup>26</sup> This law nowhere explicitly addresses issues pertaining to direct marketing, either in its classical sense or the MLM version. Although this silence apparently implies tacit recognition of the legality of operating MLM, the question of how to distinguish it from a pyramidal

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<sup>15</sup> Weebly, Qnetis Banned/Shutdown in Many Countries, News Review Alert, (14 March, 2011), available at <http://newsreviewalert.weebly.com/1/post/2011/03/march-14th-2011.html>, accessed on 5 April 2020. Qnet is the main subsidiary of the QI Group of Companies which was founded in Hong Kong in 1998. The company was banned from operating in many countries for allegedly operating a pyramid scheme: Afghanistan (2008), Rwanda (2009), Iran (2005), Sri Lanka (2004), USA & Canada (2008), Syria (2009).

<sup>16</sup> [A]ndthree, *supra* note 13.

<sup>17</sup> Id.

<sup>18</sup> TIENS, available at <http://www.tiens.com/en/index.php?m=content&c=index&a=lists&catid=9>, accessed 18 April, 2020.

<sup>19</sup> A Million Dollar Scam: Tianshi International’, Fraud & Scam Alert, (14 November 2010), available at <http://fraud-scam-alert.blogspot.no/2010/11/tianshi-international-multi-million.html>, accessed on 15 April, 2020.

<sup>20</sup> Id.

<sup>21</sup> Radio Free Asia, Tibetans Protest Alleged Scam (21 October 2009, available at <http://www.rfa.org/english/news/tibet/pyramidscheme-10202009170044.html>, accessed on 10 April, 2020.

<sup>22</sup> Global TIENS, available at <http://www.tiens.com/en/index.php?m=content&c=index&a=lists&catid=14>, accessed on 3 May 2020.

<sup>23</sup> Addis Fortune, Ministry Revokes Tiens Licence, Addis Fortune, Vol. 16, No. 824, (February 14, 2016) [available at <https://addisfortune.net/articles/ministry-revokes-tiens-licence/>, accessed on 10 May 2020.

<sup>24</sup> BRANA PRESS, *Tiens Network Business Restart in Ethiopia*, (February 12, 2020), available at <https://www.branapress.com/2020/02/12/tiens-network-business-restart-in-ethiopia/>, accessed on 3 June, 2020

<sup>25</sup> Trade Competition and Consumers Protection Proclamation, Proclamation No. 813/2013, *Federal Negarit Gazette*, (2013) (herein after Proclamation No. 813/2013).

<sup>26</sup> Id., Article 22.

scheme, and other ancillary questions require an in-depth analysis of Ethiopian law. Absent legal clarity, pyramid schemes may flourish with their misleading activity or else the enforcement authorities may be hyper reactive and close possible opportunities of network marketing.<sup>27</sup>

This article strives to outline the distinction between the pyramid schemes and MLM that has been a major source of confusion. It aims at explaining the notion of pyramidal scheme of sale as an illegal marketing scheme in the Ethiopian law as opposed to MLM that operates in similar line but within the legal limit. The structure is that, following this introduction, the first section provides theoretical framework on the concept of direct marketing, MLM/network marketing, referral selling and pyramid scheme. The second section highlights the varying stands regarding MLM in different jurisdictions pertaining to the issue of whether it is maintained as a legitimate marketing scheme or rejected as illegal scam. The third dwells on the legal response in dealing with pyramid schemes and network marketing under Ethiopian law. This section commences with a highlight of the relevant Ethiopian law and then proceeds to an in-depth analysis and exposition of the law applicable to MLM and pyramid schemes. At last, a brief conclusion is provided.

## **1. Conceptual Framework to Some “Marketing Approaches”: Direct Selling, MLM/Network Marketing, Pyramidal Scheme, and Referrals.**

As noted above, various marketing approaches could be devised and implemented by business persons so as to reach their consumers. The hierarchical arrangement that involves producers-wholesalers-store retailers is conventional distribution channel but not the exclusive one. Marketing strategies designed to reach consumers at their location, without expecting consumers to show up and shop at the store, are developed through time. Direct selling (classical) evolved as typical alternative to conventional distribution channel, and others that are allegedly a form of direct selling or that disguise themselves to be a variant direct selling have also evolved.

### **1.1. Direct Selling**

The conceptual understanding of the direct selling in its classical sense does not seem to be controversial. Authors in the field summarized the genesis and

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<sup>27</sup> Kevin Thompson, Pyramid Schemes: Saving the Network Marketing Industry by Defining the Gray, available at [http://mlmhelpdesk.com/wp-content/Docs/Direct\\_Selling/MLM\\_Attorney\\_Kevin\\_Thompson\\_Pyramid-Schemes-Saving-the-network-marketing-industry-by-defining-the-gray.pdf](http://mlmhelpdesk.com/wp-content/Docs/Direct_Selling/MLM_Attorney_Kevin_Thompson_Pyramid-Schemes-Saving-the-network-marketing-industry-by-defining-the-gray.pdf), accessed on 3 May, 2020.

concept of direct selling as a marketing scheme that evolved from the selling tradition of the itinerant peddler who used to travel great distances to sell primarily unbranded products (to customers ) into direct selling salesman who goes “door-to-door” selling branded products in an increasingly urbanized environment.<sup>28</sup> The US Direct Selling Association defines direct selling as “the sale of a consumer product or service, person-to-person, away from a fixed retail location, marketed through independent sales representatives who are sometimes also referred to as consultants, distributors or other titles.”<sup>29</sup> These definitions in common point out that direct selling signifies the door-to-door selling as opposed to store retailing.<sup>30</sup> Moreover, the latter definition informs that the sales persons are independent agents rather than salaried employees, and they may take varying designations. The EU directive -Directive 2011/83/EU on consumer rights- uses the term “off-premises contracts” which is defined as “a contract concluded with the simultaneous physical presence of the trader and the consumer, *in a place which is not the business premises of the trader*, for example at the consumer’s home or workplace.”<sup>31</sup> Thus, the classical meaning of direct selling limits itself to cases where salesmen go “door-to-door” selling products to consumers. Yet in the digital era, products could be promoted and sold between persons at distance<sup>32</sup> but they may be separately regulated.<sup>33</sup>

Although direct selling, particularly in its classical sense, is globally accepted trading scheme, it is not regulated uniformly. Direct selling associations are established across the globe,<sup>34</sup> and they do provide self regulation codes of conduct. Apart from that, in most instances, the regulatory rules applying to the conventional store retailing applies. But there appears to be reasons to specifically regulate certain aspects of direct selling somehow differently than

<sup>28</sup> William W. Keep and Peter J. Vander Nat, in their joint article entitled “Multilevel Marketing and Pyramid Schemes in the United States: An Historical Analysis”, summarized the genesis and concept of direct selling, relying on Friedman’s account of direct selling. Keep and Vander Nat, *supra* note 2, p. 1; W.A. Friedman, *Birth of a Salesman: The Transformation of Selling in America*, Harvard University Press, Cambridge, (2004), cited in Keep and Vander Nat, *supra* note 2, p. 1.

<sup>29</sup> Direct Selling Association (of US), What is Direct Selling?, available at <http://www.massachusetts-top-hotels.com/directselling411com/>, accessed on 4 August, 2020.

<sup>30</sup> Keep and Vander Nat, *supra* note 2, p. 1.

<sup>31</sup> Directive 2011/83/EU of the European Parliament and of the Council of European Union on Consumer Rights, ( 25 October 2011), (amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council ) (herein after Directive 2011/83/EU), preamble Paragraph 21.

<sup>32</sup> Republic of South Africa Consumer Protection Act No 68, 2008 (herein after South African Consumer Protection Act). Section 1 of the broadly defined “direct marketing” as approaching a person, either in person or by mail or electronic communication for promoting or offering to supply goods or services or requesting the person to make a donation of any kind for any reason

<sup>33</sup> See Directive 2011/83/EU, *supra* note 31, preamble Paragraphs 20 and 21.

<sup>34</sup> World Federation of Direct Selling Associations, Member DSAs, available at <https://wfdsa.org/dsa-membership-by-country/>, accessed on 5 July 2020.

the cases of transactions in store retailing. For instance, the EU directive underscored that “in an off-premises context, the consumer may be under potential psychological pressure or may be confronted with an element of surprise, irrespective of whether or not the consumer has solicited the trader’s visit.”<sup>35</sup>

The Chinese law provides separate legislation regulating direct selling to the details.<sup>36</sup> Art.3 of the Chinese Regulations on Direct Selling Administration defined "direct selling" as “a type of business mode, in which “direct selling companies”<sup>37</sup> recruit “door-to-door salesmen”<sup>38</sup> to sell products directly to ultimate consumers (hereinafter referred to as consumers) outside the companies' fixed places of business”. Direct selling is subject to strict regulation: the companies applying to engage in direct selling need to meet certain requirements<sup>39</sup> and must get prior approval; only direct selling company and its branches may recruit door-to-door salesmen;<sup>40</sup> the door-to-door salesmen must conclude a sales contract with the company, must take vocational training and be certified by the direct selling company;<sup>41</sup> the company should clearly mark the price on the product for direct selling;<sup>42</sup> the commission to door-to-door salesmen *must drive exclusively from direct sells to ultimate consumers*, capped at a maximum of 30%; salesmen must be paid at least on a monthly basis;<sup>43</sup> a direct selling company must put into place a sound system of changing and returning of goods where door-to-door salesman requests so<sup>44</sup>(a buy-back scheme as the literature calls it).

## 1.2. Multilevel Marketing (MLM)/Network Marketing

The fundamental idea behind the MLM is claimed to have been drawn from the traditional direct selling. Besides the door-to-door selling, MLM heavily relies on social networks; selling to friends, family, co-workers and neighbors instead

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<sup>35</sup> Directive 2011/83/EU), *supra* note 31, Paragraph 21.

<sup>36</sup> The Regulations on Direct Selling Administration, the State Council Order of the State Council of the People's Republic of China, No.443, (2005)(hereinafter Chinese Regulations on Direct Selling).

<sup>37</sup> *Id.*, Article 3, paragraph 2. Companies need prior approval as the term "direct selling companies" is employed to refer to the companies which sell products by way of direct selling upon approval.

<sup>38</sup> *Id.*, Article 3, paragraph 3. The term "door-to-door salesmen" refers “to any personnel who sell products directly to consumers outside the fixed places of business.

<sup>39</sup> See *Id.*, Articles 7 and 8 cum Article 3, paragraph 2.

<sup>40</sup> *Id.*, Article 13.

<sup>41</sup> *Id.*, Articles 16 and 18(1).

<sup>42</sup> *Id.*, Article 23.

<sup>43</sup> *Id.*, Article 24.

<sup>44</sup> *Id.*, Article 25. The scheme works within 30 days as of the day of purchasing the direct selling product and on the condition that the product remains unopened.

of store retailing.<sup>45</sup> Admittedly, such direct access to potential consumers at their location is an aspect of the traditional door-to-door selling. However, MLM brings significant modifications in particular in relation to recruitment of the commissioned salesmen and the reward system.<sup>46</sup> In the conventional direct selling, the business person engaged in direct marketing recruits, trains, and supervises the door-to-door salesmen who reap commission on their sales to ultimate consumers. The MLM model shifted this task to the sales forces themselves:<sup>47</sup> each sales person recruiting new ones and creating a chain of direct and indirect recruits;<sup>48</sup> the sales persons engaged therein earn a commission from their own sales as well as from the sales generated by the direct and indirect recruits.<sup>49</sup>

This multi-level compensation scheme whereby the persons up the line are remunerated from sales of the down the lines draws its justification on account of cost effectiveness for the company;<sup>50</sup> the company is relieved off the task of recruiting, training, and supervision of new sales forces and concomitant cost. Instead, each sales person takes up this responsibility but not for free. Obviously, sales forces may not engage in that task in the absence of some incentives for their service. Theoretically, the sales forces, whether recruited by the company itself or sales forces of the company, they all are meant to retail products by reaching consumers wherever they are. Thus, MLM is conceptually a direct selling but with a multi-level compensation scheme.<sup>51</sup> The details of the compensation schemes vary among companies.<sup>52</sup>

This marketing model in its present sophisticated model has a short history but it has exploded fast.<sup>53</sup> As the model develops, many single-level direct selling companies adopted the MLM model.<sup>54</sup> Notable problems arose with such development. The MLM model created the tendency of some salespeople to

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<sup>45</sup> Keep and Vander Nat, *supra* note 2, p.4.

<sup>46</sup> *Id.*, p.5.

<sup>47</sup> Dennis W. Gaddy, *Network Marketing: A Smart Choice for Today's Entrepreneur*, available at [www.communitysuccess.org](http://www.communitysuccess.org), accessed 12 May 2020, p.5.

<sup>48</sup> Yuval Emek *et al.*, 'Mechanisms for Multi-Level Marketing', available at <http://www.eecs.harvard.edu/cs286r/courses/fall11/papers/rewards.pdf>, accessed 12 June 2020, p.2.

<sup>49</sup> Keep and Vander Nat, *supra* note 2, p. 4.

<sup>50</sup> Taylor, *supra* note 2, p. 6.

<sup>51</sup> Albaumand Peterson, *supra* note 5, p.348.

<sup>52</sup> Taylor, *supra* note 1, p.11.

<sup>53</sup> Gaddy, *supra* note 47, p. 2. It was reported that in 1945, a business person by the name Carl Rehnberg of USA pioneered the introduction of such a multi-tiered compensation plan to market his nutritional products, that allowed any Nutrilite distributor to get a 3 percent commission from a downline on top of the regular commissions from one's own sales.

<sup>54</sup> Keep and Vander Nat, *supra* note 2, p.7.



over-sell by making false product claims<sup>55</sup>, of course a problem that is not uncommon in traditional selling as well. But the opportunity of compensation derived from the sales of down line distributors led to a focus on endless recruitment of participants instead of sales to final consumers, resulting in confusion between MLM and pyramid schemes.

### 1.3. A pyramid scheme

‘Pyramid Scheme’ generally refers to a scheme<sup>56</sup> under which a person (usually known as promoter or operator) recruits one or more persons (commonly known as participants) who make a payment to get the right to recruit others and for which they receive an income.<sup>57</sup> The operator promises future rewards for each participant based on the number of people they recruit and recruits of their recruit (downlines).i.e. upline participants receive a certain portion of the monies paid by their downlines. The amount of reward for each participant depends on how far their downlines expanded in the hierarchical chain.<sup>58</sup> Thus, every participant strives for rapid expansion of his own downline so as to grab as much rewards as possible.

Unfortunately, as the recruitment structure grows, at some stage, there will be created a saturation point at which further recruitment would be virtually impossible, and the desired recoupment cannot be realized for the vast majority of the participants. Its failure at a certain stage is mathematically determined since the operator promises unlimited source of revenue for everyone in a finite

<sup>55</sup> Id., pp. 6-7.

<sup>56</sup>A ‘scheme’ refers to “a plan or program of action, especially a crafty or secret one; . . . a systematic or organized framework;” See Merriam Webster’s Collegiate Dictionary, Tenth Edition.

<sup>57</sup> Keep and Vander Nat, *supra* note 2, p.9.

<sup>58</sup> Id., p. 10. The scheme usually commences with one person (usually known as promoter or operator) who recruits a fixed number of participants (say 10) each with a fixed amount of contribution (say \$100). Each of these 10 members in turn will recruit their own recruits leading to a total of 100 new participants. As the recruitment continues, the number of participants expands rapidly “in an exponential manner at each stage,” putting too few at the apex and too many at the bottom thereby creating a pyramid resembling structure.

Levels	Participants	TNR
1 <sup>st</sup> level	1*10=10	10
2 <sup>nd</sup> level	10*10=100	110
3 <sup>rd</sup> level	100*10=1000	1110
4 <sup>th</sup> level	1000*10=10,000	11110
5 <sup>th</sup> level	10,000*10=100000	111110
6 <sup>th</sup> level	100000*10=1000,000	1111110
7 <sup>th</sup> level	1000,000*10=10,000,000	11111110
8 <sup>th</sup> level	10,000,000*10=100,000,000	111,111,110

Legend: TNR=total number of recruits.

set of income sources (recruits).<sup>59</sup> Even though the extent of losers depends on the reward system in the organization's scheme, in any case, the scheme would inevitably expose the vast majority of participants to losses. Some studies in USA concluded that approximately 99% of the participants lose their money.<sup>60</sup> It is a wealth transfer mechanism from the large majority in the bottom to the few on the top. The studies also indicated that though pyramid schemes are outlawed, their abuses are often unreported.<sup>61</sup>

Legal systems somehow differ in the conceptualization of pyramid scheme, principally in terms of scope of acts that comes within the meaning of pyramid scheme. The EU directive on unfair commercial practices generically encapsulated the idea of "[e]stablishing, operating or promoting a pyramid promotional scheme" as cases "where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products."<sup>62</sup> The consumers pay for the opportunity to fetch compensation, and that compensation is derived primarily from the participation fee of new recruit consumers, as opposed to sales to consumers. Thus, EU directive's definition of pyramid selling by and large coincides with the general description in the literature as provided in the beginning but a condensed one.

Chinese law is more elaborate and broader in its conceptualization of pyramid scheme. The

Chinese Regulation on Prohibition of Pyramid Selling offers a general description of the term "pyramid selling"<sup>63</sup> in the first place, and then the

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<sup>59</sup> For instance, if we hypothesize on the above example where one participant recruits 10 members, at the 8<sup>th</sup> level, the number of participants will exceed the total population of Ethiopia. It will take few other levels to subsume the world population, which in effect means that those at the bottom of the pyramid could not go anywhere for further recruitment. Hence, the large majority of participants at the bottom levels of pyramid scheme inevitably lose the money they paid to get in to the scheme. It is not only those at the very end of the level but several of participants in the hierarchy would be losers because the most recent recruitment layers typically do not qualify for rewards until their own downlines reach a certain stage.

<sup>60</sup> Jon M. Taylor, *Serious Problems with the FTC's Revised Business Opportunity Rule*, (hereinafter Taylor, *Serious Problems with the FTC's Revised Business Opportunity Rule*), available at [https://www.ftc.gov/sites/default/files/documents/public\\_comments/business-opportunity-rule-535221-00006/535221-00006.pdf](https://www.ftc.gov/sites/default/files/documents/public_comments/business-opportunity-rule-535221-00006/535221-00006.pdf), accessed 6 June 2020, Appendix A

<sup>61</sup> *Id.*, Appendix B.

<sup>62</sup> DIRECTIVE 2005/29/EC of the European Parliament and of the Council Concerning Unfair Business-To-Consumer Commercial Practices (Unfair Commercial Practices Directive), (11 May 2005) (herein after DIRECTIVE 2005/29/EC), Annex I, Note 14.

<sup>63</sup> Regulation on Prohibition of Pyramid Selling, Order of the State Council of the People's Republic of China No. 444, (2005) (herein after Chinese Regulation on Prohibition of Pyramid), Article 2. Article 2 defined pyramid selling as "such an act whereby an organizer or operator seeks for unlawful interests, disturbs the economic order and affects the social stability by recruiting persons, calculating and paying

Regulation has further classified pyramid selling into three types.<sup>64</sup> Article 7, on types of Pyramid Selling, provided that the following acts belong to the pyramid selling:

- (1) *An organizer or operator seeks for unlawful interests by recruiting persons to participate in pyramid selling, asking the recruiters to persuade others to participate in pyramid selling, calculating and paying remunerations (including material awards and other economic interests, the same below) to the recruiters on the basis of the number of persons a recruiter has directly or indirectly recruited in a rotating way;*
- (2) *An organizer or operator seeks for unlawful interests by recruiting persons to participate in pyramid selling and asking the recruiters to pay fees explicitly or in any disguised form like purchasing commodities for obtaining the qualification for participating in pyramid selling or recruiting others to participate in pyramid selling; and*
- (3) *An organizer or operator seeks for unlawful interests by recruiting persons to participate in pyramid selling, asking the recruiters to persuade others to participate in pyramid selling so as to form a multi-level relationship, and calculating and paying the remuneration to an upper-level promoter on the basis of the sales performance of the promoters below.*

The first paragraph in Chinese law simply depicts pyramid scheme as a chain of recruitment where the recruits obtain payment based on the number of their subsequent recruits. It failed to explicitly indicate, or implicitly presumed the very essence of pyramid scheme that the income to the operator and the other participants is generated from downline recruits. The second paragraph points to the two types of pyramid schemes: naked-pyramid schemes<sup>65</sup> and product-based ones. Naked-pyramid schemes are blatant money transfer systems where operators engage in collecting participation fee from participants joining the scheme while product-based pyramid schemes employ products as “a false front to hide the true nature of the scheme”;<sup>66</sup> the participants buy costly goods and/or services or attend expensive training seminars. The real profit is earned, not by

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remunerations to recruiters on the basis of the number of persons a recruiter has directly or indirectly recruited or the sales performance, or asking the recruiters to pay a certain fee for obtaining the qualification for participation.”

<sup>64</sup> Id., Article 7.

<sup>65</sup> Taylor, *supra* note 1, p. 6. Pyramid schemes could be naked-pyramid schemes or product-based pyramid schemes. The former is an obvious money transfer system while the latter one employs products as “a false front to hide the true nature of the scheme”-the participants buy costly goods and/or services or attend expensive training seminars..

<sup>66</sup> Id.

the sale of the product, but from the participation fee collected via the disguised products. The naked ones expose themselves to simple detection and legal action, and as such<sup>67</sup> existing pyramid schemes are product-based ones that disguise themselves as MLM.

The third paragraph provides somehow striking difference from the notion of pyramid schemes in many jurisdictions. Art. 7(3) of the Chinese Regulation abrogated any marketing scheme establishing a multi-level relationship whereby the remuneration to an upper-level promoter is calculated and paid on the basis of the sales performance of the promoters below.<sup>68</sup> Moreover, Art.3 of the Regulation on Direct Selling defines direct selling as "door-to-door" selling of products directly to ultimate consumers. This regulation has also commanded direct selling company and its branches to recruit their door-to-door salesmen, and prohibited any other entity or individual from engaging in recruitment of salesman. By so doing, Chinese law banned any marketing arrangement with multi-layer compensation scheme, without bothering to make any distinction between MLM and a pyramid scheme. Hence, the MLM schemes that are often taken as a variant of direct selling and enjoying legal protection in several jurisdictions constitute pyramid selling under the Chinese law.

#### 1.4. Referral marketing

Referral marketing is the other marketing strategy that shared certain aspects of the classical direct selling. Within the disciplines of marketing, referral represents a business model whereby persons, known as intermediaries, operate business by referring buyers to sellers, who then negotiate directly on the terms of trade.<sup>69</sup> In return, intermediaries receive referral fees for the creation of the match and/or commissions based on sales. Thus, within the disciplines of marketing economics, referral selling is positively conceived as a legitimate strategy where by products will be promoted via word of mouth. However, referral selling brings about a legal concern and takes a somewhat different notion in legal parlance. For instance, South African consumer protection law prohibited referral selling in which section 38 (1) on referral selling provided:

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<sup>67</sup> Id.

<sup>68</sup> Chinese Regulation on Prohibition of Pyramid Selling, *supra* note 63, Art. 7(3).Art. 7(3), in typifying the category of Pyramid Selling, stated that cases where, *inter alia*, an "organizer or operator seeks for unlawful interests by recruiting persons to participate in pyramid selling, asking the recruiters to persuade others to participate in pyramid selling *so as to form a multi-level relationship, and calculating and paying the remuneration to an upper-level promoter on the basis of the sales performance of the promoters below*" constitutes a pyramid selling.

<sup>69</sup> Daniele Condorelli *et al.*, Selling Through Referrals, *Journal of Economics & Management Strategy*, Vol. 27, (2018), p. 699.

*A person must not promote, offer, supply, agree to supply, or induce a consumer to accept any goods or services on the representation that the consumer will receive a rebate, commission or other benefit if—*

*(a) the consumer subsequently—*

*(i) gives the supplier the names of consumers; or*

*(ii) otherwise assists the supplier to supply goods or services to other consumers; and*

*(b) that rebate, commission or other benefit is contingent upon an event occurring after the consumer agrees to the transaction.<sup>70</sup>*

Thus, the law conceives referral selling as a sales device whereby the sellers induce the buyers to acquire goods or services by promising a rebate, commission or other benefit in return for helping the seller enter into other sales with potential customers and such benefit is contingent on the materialization of sales to these other customers. It aims at protecting consumers from undue persuasion to acquire products that they might not have procured had it not been for the speculated reward promised by the seller. A consumer expecting such reward may in turn be tempted to unduly persuade other consumers to buy goods so as to fetch the promised reward. Thus, a referral selling where the reward is contingent upon the second consumer purchasing product would be similar to single level pyramid marketing.

Nevertheless, a mere promise of reward in exchange for recommending to the supplier other potential consumers or helping the trader supply goods does not constitute the prohibited “referral selling;”<sup>71</sup> rather it is a legally acceptable strategy where by products will be promoted via word of mouth.

## **2. The Legal Treatment of MLM /Pyramid Schemes in General**

Attempts at providing conceptual distinction between pyramid schemes and MLMs succeeded only in offering a thin line of demarcation between the two. Especially product-based pyramid scheme entails inherent difficulty of distinguishing it from network marketing. Both involve a hierarchical chain of multi-level distributors backed by a promise of compensation from the downlines. Indeed, pyramid schemes do not exist *de jure* but *de facto*: they are a

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<sup>70</sup> South African Consumer Protection Act, *supra* note 32, Section 38.

<sup>71</sup> Babener & Associates, MLM Laws in 50 States, available at <https://mlmlegal.com/statutes.html>, accessed on 5 June 2020.

matter of fact born out of businesses claiming to be in network marketing; they might easily swing from legality to illegality and *vis versa* even in the same legal system depending on the rigors of enforcement authorities.

In the normative theoretical discourse, pyramid schemes are absolutely discarded while MLM has been upheld by and large. The MLM model has great appeal for most people especially for marketers who find standard distribution channels tedious and expensive. It also earned credit for providing economic opportunity for millions of sales persons participating in the scheme. However, the multi-layered compensation in MLM has been criticized as a scheme of rewards unrelated to sales but for recruitment in the same fashion as it is in pyramid schemes.

Those in defense of MLM insist on the need for multi-level compensation as an incentive to expand their sales and reach every possible customer at the peripheries. Critics negate these allegations in that the distributions scheme with endless chain of recruitment goes far beyond economic reality. And in practice, it is not uncommon to discover that allegedly MLM companies are in reality pyramid schemes.<sup>72</sup> As such, some call for banning MLM just like a pyramid scheme. For instance, Jon M. Taylor, a consumer advocate who has made significant research on the subject of pyramid schemes and MLM, articulated that:

*It appears that pyramid schemes are considered illegal .... But there is a business model that is at least as pyramidal and powerful as any illegal pyramid scheme—and in my opinion more pernicious because of its more pervasive effects. It is a phenomenon that has for the most part escaped recognition as a pyramid scheme .... Yet it costs consumers billions of dollars every year.... The business phenomenon of which I speak is multi-level marketing (MLM), more recently referred to as network marketing.<sup>73</sup>*

Others propose rectifying interventions short of abrogating MLM totally. According to Robert L. Fitz Patrick, the problem lies with the endless chain of recruitment of distributor: it is economically unrealistic and results in “intolerable capacity to mislead” due to its “unlimited income” proposition for

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<sup>72</sup> Keep and Vander Nat, *supra* note 2, p. 6.

<sup>73</sup> Taylor, *supra* note 1, pp. 7-8. Taylor has been President of Consumer Awareness Institute (in America) since 1978 (for more than 42 years). See at <https://www.linkedin.com/in/jon-taylor-12b6025/>. He has also produced a number of research outputs on the issue of pyramid schemes and MLM. His research works can be accessed from his web site: [www.mlm-thetruth.com](http://www.mlm-thetruth.com).

all.<sup>74</sup> Intervention on that aspect of MLM would be optimal approach instead of a total ban.

Pyramid schemes are outlawed universally but the legal responses in relation to MLM vary across different legal systems. MLM is rendered illegal in China.<sup>75</sup> Chinese law permitted only direct selling<sup>76</sup> and avowedly outlawed any marketing arrangement with multi-layer compensation scheme<sup>77</sup>, without bothering to make any distinction between MLM and a pyramid scheme.

In some legal systems such as the Singaporean law, the legislature opted for a functional definition of what marketing scheme or arrangement is legal and what is illegal, irrespective of its designation, the terminological differentiation between MLM and pyramid schemes taken to be wasteful endeavor and legally irrelevant. Thus, the Singaporean law states that<sup>78</sup> “[m]ulti-level marketing scheme or arrangement” has the same meaning as “pyramid selling scheme or arrangement,” and promoting or participating in such a scheme or arrangement is illegal.<sup>79</sup> Yet a marketing scheme, in spite of its apparent similarity to the prohibited ones, is exempted from the prohibition provided that it meets the operational criteria as listed subsequently in a Ministerial order.<sup>80</sup> In Canada<sup>81</sup>,

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<sup>74</sup> Robert L. FitzPatrick, Identifying “Bright Lines” for Determining Illegality of Any Multi-Level Marketing Company under Section 5 of the FTC Act: An Open Letter to the Members of the US Federal Trade Commission and Officials of the Consumer Protection Bureau, (4 July 2014), available at <https://www.truthinadvertising.org/wp-content/uploads/2016/10/Fitzpatrick-July-2014-Letter-to-FTC.pdf>, accessed on 14 June 2020, p. 5.

<sup>75</sup> Chinese Regulations on Direct Selling, *supra* note 36; cum Chinese Regulation on Prohibition of Pyramid Selling, *supra* note 63.

<sup>76</sup> Chinese Regulations on Direct Selling, *supra* note 36. Article 3 of the Regulations on Direct Selling Administration defined “direct selling” as “a type of business mode, in which “direct selling companies” recruit “door-to-door salesmen” to sell products *directly to ultimate consumers* (hereinafter referred to as consumers) outside the companies’ fixed places of business” [emphasis added]. Companies need prior approval to engage indirect selling.

<sup>77</sup> Chinese Regulation on Prohibition of Pyramid Selling, *supra* note 63, Article 7(3). Article 7(3), in typifying the category of Pyramid Selling, stated that cases where, *inter alia*, an “organizer or operator seeks for unlawful interests by recruiting persons to participate in pyramid selling, asking the recruiters to persuade others to participate in pyramid selling *so as to form a multi-level relationship, and calculating and paying the remuneration to an upper-level promoter on the basis of the sales performance of the promoters below*” constitutes a pyramid selling [emphasis added].

<sup>78</sup> Multi-Level Marketing And Pyramid Selling (Prohibition) Act ( of Singapore), (Original Enactment: Act 50 of 1973, Revised Edition 2000 available at <https://sso.agc.gov.sg/Act/MLMPSPA1973>, accessed on 27 June 2020, (herein after Multi-Level Marketing And Pyramid Selling (Prohibition) Act of Singapore), Section 2(1).

<sup>79</sup> *Id.*, Section 3(1).

<sup>80</sup> Multi-Level Marketing and Pyramid Selling (Excluded Schemes and Arrangements) Order (1st June 2000, Revised Edition 2002)( herein after Multi-Level Marketing and Pyramid Selling (Excluded Schemes and Arrangements) Order of Singapore), available at <https://sso.agc.gov.sg/SL/MLMPSPA1973-R1?DocDate=20021001&ValidDate=20021001&ProvIds=>, accessed on 27 June 2020, Section 2(1); Multi-Level Marketing and Pyramid Selling (Prohibition) Act of Singapore, *supra* note 75, Section 2(2).

the legislator maintained terminological difference and provided separate definitions and rules thereto so as to make distinction between MLM and pyramidal schemes, abrogating the latter but permitting the former as legal marketing scheme.

However, in several jurisdictions including Ethiopia,<sup>82</sup> the relevant laws simply prescribe prohibitive provisions targeting pyramidal schemes, without any reference or mention of MLM, leading to the implied conclusion that MLM or other marketing schemes that do not fall within in the prohibition are legal. They make no special rules for MLM, presuming MLM as a form of direct marketing and, in practice, the question of distinction between MLM and pyramid schemes continue to plague enforcement authorities.

### 3. The Ethiopian Law on Direct Selling/ MLM/Pyramid Schemes

Ethiopian consumer protection law was long reliant on various private laws such as the law of contract and extra contractual liability law as well as public laws including the criminal law and regulatory laws of different nature.<sup>83</sup> Separate legislation with direct recognition of consumer protection and trade competition has less than two decades of history.<sup>84</sup> The current governing law is the ‘Trade Competition and Consumer Protection Proclamation No. 813/2013.’<sup>85</sup> Power and responsibility of enforcing the legislation is vested with the ‘Trade Competition and Consumer Protection Authority under the supervision of Ministry of Trade (at federal level) and the regional offices.’<sup>86</sup> The proclamation aspires to achieve the twin objectives of protection of the business community (from anti-competitive and unfair market practices), and protection of consumers from misleading market conducts.<sup>87</sup>

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<sup>81</sup> For instance, Canadian law first defines MLM, and then described a pyramid scheme of selling as a form of MLM but it provided certain parameters for distinguishing between the two. See Competition Act (of Canada), (last amended on 9 March 2015) (herein after Canadian Competition Act), available at <<https://laws.justice.gc.ca/PDF/C-34.pdf> , accessed 20 August 2020, see generally Section 55.

<sup>82</sup> See, for instance, the Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010 (herein after Australian Consumer Law); South African Consumer Protection Act, *supra* note 32; Proclamation No. 813/2013), *supra* note 25.

<sup>83</sup> For instance, the law of contract protects consumers as contracting parties from duress and fraud. For a fairly detailed analysis of Ethiopian law on the topic, see Dessalegn Adera, The Legal and Institutional Framework for Consumer Protection in Ethiopia, Masters Thesis, Addis Ababa University, School of Graduate Studies, School of Law, (2011), see generally Chap. 2.

<sup>84</sup> The first standalone legislation was Trade Practice Proclamation No.329/2003, then replaced by the 2010 ‘Trade Practice and Consumer Protection Law Proclamation’, which in turn was replaced by the current Proclamation No. 813/2013, *supra* note 25.

<sup>85</sup> Proclamation No. 813/2013, *supra* note 25.

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

<sup>87</sup> *Id.*, see the preamble.



### 3.1. The Ethiopian Law on Direct Selling and/ or MLM

Considerable part of Proclamation No. 813/2013 is devoted to the issues of consumer protection that envisioned the relation between business persons and consumers in the course of the convention store retailing transactions.<sup>88</sup> How the Ethiopian legal framework would treat marketing schemes other than store retailing such as direct selling could not be ascertained by a mere observation of the legal stipulations. Perhaps, whether the rules have contemplated transactions other than the conventional store retailing is questionable. One may wonder if the genesis of direct selling could be traced in the Ethiopian Commercial Code or subsequent laws. The Commercial Code, in the title captioned “auxiliaries and agents”, defines and briefly regulates commercial employees, commercial travelers, commercial representatives, commercial agents, commercial brokers, and commission agents. Although activity of few of these auxiliaries gets closer to the idea of the off-business premises and unsolicited offer nature of direct marketing, none of these auxiliaries and their activities perfectly fit into the conception of the sales forces and their activities in direct marketing.<sup>89</sup>

However, in principle, business persons may innovate and apply infinite marketing strategies; that should be encouraged in so far as they refrain from engaging in misleading conducts harming consumers and fellow business competitors.<sup>90</sup> Moreover, Ethiopian law on trade competition and consumer protection has produced what the business persons have to do and must not do in the course of conducting their business activity. Undertaking direct selling or

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<sup>88</sup> Proclamation No. 813/2013 defines business persons, wholesaler, retailer, and regulates their activities including display of prices at business premises. In the same vein, the Commercial Registration and Licensing Proclamation No.980/2016 defines and regulates, definition of business person, commercial agents, etc and requires mandatory registration in commercial registry, duty to obtain trade license, and so on. The whole sprits resonated around business persons and their activities, presupposes their activities at the business premises. Nowhere has it mentioned instances of direct selling activities and distributor thereto.

<sup>89</sup> Commercial travelers and commercial representatives are persons entrusted with the task of visiting clients and offering goods or services in the name and on behalf of the trader. This brings their activity closer to the idea of the off-business premises unsolicited of offer nature of direct marketing. Yet commercial travelers and commercial representatives are defined as employees while sales forces in direct selling actually independent commissioned persons. Moreover, the clients to be visited and offered products are retailers as opposed to consumers in the case of direct selling. On the other hand, commercial agents, commercial brokers, commission agents are traders doing their own business whose enjoyment linked to commerce of other business persons and their activities does not suggest door to door selling while sales forces in direct selling actually independent commissioned selling products by off-the business premises. See generally Commercial Code Proclamation, Negarit Gazette, (1960), Articles 28-62; Commercial Registration and Licensing Proclamation No.980/2016, Articles 2 (7) & (9).

<sup>90</sup> Oya Pinar Ardic et al, Consumer Protection Laws and Regulations in Deposit and Loan Services: A Cross-Country Analysis with a New Data Set, The World Bank Research Working Paper 5536, (January 2011), available at <https://www.cgap.org/sites/default/files/CGAP-Consumer-Protection-Laws-and-Regulations-in-Deposit-and-Loan-Services-Jan-2011.pdf>, accessed 10 May 2020, p. 2.

MLM is not in the don'ts list. As far as factors that distort a fair deal and triggering government intervention do not arise, the parties to a deal-business persons and consumers-can effectuate the offer and acceptance at their own place of convenience, at the fixed business premises or off-the business premises. Accordingly, it is safe to conclude that direct selling and MLM marketing strategies are legally acceptable under Ethiopian law.

In practice as well, we do observe several street vendors everyday in every corner of towns and cities, roaming here and there selling various products including cosmetics and clothing. In most cases they do have stationary carts that changed the streets into business premises, leading to pedestrian traffic congestion and confrontation with road traffic officers and security forces. And yet their activities embed some aspect of the door to door roving in direct selling. There are also few vendors wandering from door-to-door, calling the special designations “*liwach liwach*” and “*quoralew*”, inviting consumers at home to exchange or sell limited class of products. The Covid-19 pandemic seem to have given an impetus to the expansion of door to door selling; it is not uncommon to observe these days supply of home consumption goods at villages where people live collectively such as condominium residences. Moreover, as hinted in the beginning, there had been few foreign companies including Qnet and Tiens Ethiopia that purported to be operating network marketing businesses. It is also reported that Tiens restarted the business in Ethiopia reorganizing/renaming itself in three different business persons, adopting same marketing strategy.<sup>91</sup> With increasing globalization and expansion of digital technology, leading to exchange of business practices among others, direct selling and MLM, as well as their disguised forms will get their roots into the Ethiopian business culture.

Yet, the applicable rules regarding classical direct selling and MLM are uncertain. Some jurisdictions have devised graduated consumer protection rules, distinguishing between consumers in the ordinary course of transaction on the one hand and consumers in the case of direct selling on the other hand. For instance, the EU directive<sup>92</sup> capitalized the need for more protection to consumers in business person-to-consumer relations in the case of off-premises contracts than in the case of conventional store retailing. China has also put in

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<sup>91</sup> BRANA PRESS, *Tiens Network Business Restart[sic] in Ethiopia*, (February 12, 2020), available at <https://www.branapress.com/2020/02/12/tiens-network-business-restart-in-ethiopia/>, accessed on 5 June 2020. The three suspect business persons are Richi Food Processing and Manufacturing PLC, Rise Real Trading and Wisdom Empire Trading. For details, check the video in the link.

<sup>92</sup> Directive 2011/83/EU), *supra* note 31.

place separate legislation addressing direct selling.<sup>93</sup> The absence of explicit recognition of direct selling and MLM and rules specifically regulating these marketing approaches, under Ethiopian law, results in the uniform application of the regulatory rules designed for the conventional store retailing to direct selling and MLM as well, in as far as relevant. Specifically, Article 14 to Article 22 of Proclamation No. 813/2013 governs any business persons-to-consumer relationship. Nonetheless, there are couples of the crucial matters concerning MLM/direct selling which can hardly be addressed by the mere application of the rules meant for the conventional store retailing.

Business persons operating direct selling/MLM sell their products through independent sales representatives who are usually referred to as distributors<sup>94</sup> or participants.<sup>95</sup> These distributors play essential intermediary role between the business person and final consumers while at the same time making a living for themselves. They are not employees of the business person but independent contracting parties. The relation between them mainly depends on their contractual terms. Yet distributors have weak bargaining power compared to the business person. As such some specific rules meant to protect distributors are incorporated in some jurisdictions that explicitly recognized direct selling/MLM.<sup>96</sup> Canadian law requires, for instance, that every distributor must have a buy-back guarantee or refund guarantee, exercisable on reasonable commercial terms; distributor must be clearly and fully informed, from the start, about the marketing plan including the existence of the buy-back guarantee or refund guarantee; as well as the compensation actually received or likely to be received by typical participants having regard to any relevant considerations.<sup>97</sup> The law in Singapore envisaged similar protection scheme<sup>98</sup> while Chinese law sets much more detailed and apparently more protective rules for salesmen in direct selling scheme. Legislations in other jurisdictions also set more details regulating the relation between operators and distributors of network marketing.<sup>99</sup> However, distributors of direct marketing/MLM in Ethiopia must

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<sup>93</sup> Chinese Regulations on Direct Selling, *supra* note 36.

<sup>94</sup> Direct Selling Association (of US), *supra* note 29.

<sup>95</sup> See Canadian Competition Act, *supra* note 81.

<sup>96</sup> *Id.*, Section 55(1) cum 55 (1)(1)(d); Multi-Level Marketing and Pyramid Selling (Excluded Schemes and Arrangements) Order of Singapore, *supra* note 80, Section 2.

<sup>97</sup> Canadian Competition Act, *supra* note 81, Section 55(2) cum 55 (1)(1)(d).

<sup>98</sup> Multi-Level Marketing and Pyramid Selling (Excluded Schemes and Arrangements) Order of Singapore, *supra* note 80, Section 2.

<sup>99</sup> For instance, the Taiwan MLM Act requires MLM participation agreements to contain the terms such as:

- operation plans
- qualifications to become a participant

merely count on their own contractual terms with the business person, subject to applicable contract laws.

The other matter worth mentioning under this topic is the ethical aspects of distributors of direct marketing/MLM. Two factors have led to special focus on the ethical aspects of network marketing. First, network marketing employs multilevel compensation scheme whereby the chain of recruitment creates income multiplier factor. The more one's downlines are the more rewards whereas the commission from actual sales to outside consumers remain linear or perhaps absent. Proclivity for recruitment and temptation to overstate product quality and income to new recruits are high. Second, unlike public announcement of advertisements that are subject to eye watches of the public and regulators in particular, the network marketing system relies on person to person recommendations. As such the propensity to overstate product quality and income to new recruits is by far higher thereby inviting strict stipulation and enforcement of ethical aspects of distributors.

Although Ethiopian law has provided rules against misrepresentation of products<sup>100</sup> and ethical standards in the advertisements of products,<sup>101</sup> these prescriptions are generically addressed to all marketing strategies, without addressing the special risks due to the unpublicized nature of adverts in networking marketing. Added to that, the rules directly concern the business persons,<sup>102</sup> and that there is no explicit reference to distributors. To sanction distributors involved in the mischief but defined as consumer, resort to the general rules of criminal law for their misleading engagement could be availed but still precise and direct rules of sanction in the specific legislation may achieve better results.

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- the formula, standards and reasons for an MLM company to estimate the depreciation of the goods or services returned by a participant after the cooling-off period
  - the events of default by participants and the procedure to be followed
  - the method for dealing with a participant's request to return goods or services in the event that termination or rescission of the participation agreement is attributed to the participant's breach of contract or regulations
  - Conditions and methods for the renewal of participant agreements.

See K&L Gates LLP, *Introducing the New Multi-Level Marketing Governing Act*, available at <https://www.jdsupra.com/legalnews/introducing-the-new-multi-level-marketin-55699/> accessed on 25 July 2020.

<sup>100</sup> Proclamation No. 813/2013), *supra* note 25, Article 22(1-3).

<sup>101</sup> *Id.*, Article 19.

<sup>102</sup> *Id.*, Articles 15-22. The rules of agency- acts of distributors are attributable to the operators- could be applied to discipline the business persons operating pyramidal schemes. Yet the distributors may not properly fall within that specific legislation.

### **3.2. The Ethiopian Law on Pyramid Schemes**

Proclamation No. 813/2013 has abrogated “pyramid scheme of sale” but does so just in a single sub-provision, which makes it short of clarity.<sup>103</sup> Article 22 is of special importance to the case at hand, it listed several acts business persons must not do including the prohibition of pyramid schemes.<sup>104</sup> Article 22 (6) prohibits any business person from:

*applying or attempting to apply a pyramid scheme of sale, based on the numbers of consumers, by announcing the granting of a reward, in cash or in kind, to a consumer who purchases goods or service or makes financial contribution and where other consumers through his salesmanship purchase the goods or the service or make financial contribution or enter into the sales scheme;*

The spirit of this provision is by and large similar to the foregoing discussion on pyramid schemes. The overall arrangement is that a person is induced to get in to the scheme by a promise of reward, and the reward is due on condition that he meets two cumulative requirements; he himself must pay consideration and should bring others into the system who would do the same. And a more important defining feature of the arrangement is that the reward is directly correlated with the number of consumers induced and recruited by that person. The payment of consideration by the consumer could be effected by purchase of goods or services. This predicts the product-based pyramid schemes. Consideration may also be effected by making direct financial contribution which is a case of naked- pyramid schemes. Moreover, to get the reward, the consumer owes the duty to bring other consumers. The new consumers induced and recruited “through his (consumer’s) salesmanship” may end up into two categories: those that would join the sales scheme to play same role, and those who would purchase goods or service and stay outside the network.

#### **3.2.1. Ethiopian law on pyramid scheme encompasses a broad range of illegitimate marketing strategies regardless of designation**

The concept of pyramidal scheme of sale under Ethiopian law tends to be broad; it encompasses the so called “referral selling”<sup>105</sup> and pyramid schemes in the

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<sup>103</sup> Id., Article 22(6).

<sup>104</sup> Id., Article 22. This provision provided a list of prohibited acts that supposedly harm the consumers. Operating pyramidal scheme of sale is among the list of acts that any business person must not commit.

<sup>105</sup> The rule against referral selling prohibits persuading a consumer to buy goods or services by promising future benefits contingent on the occurrence of some sales in future as a result of efforts of

usual notion that depict “a multi-level hierarchy of several levels of distributors.”<sup>106</sup>

Some jurisdictions treated referral selling separately<sup>107</sup> from pyramid scheme. Ethiopian law included “referral selling” within the general framework of the illegal pyramidal scheme, the basis for such inference being the fact that the consumers induced by the nominating consumer’s “salesmanship” need not necessarily enter into the sales scheme” but make purchases. It appears to be sales to ultimate consumers. Yet the rationale behind the law is that a salesman (the referrer) for whom a reward is promised for each purchase by others is likely to induce and mislead consumers.

That brief provision has also prohibited pyramid schemes in the usual notion that depict “a multi-level hierarchy of several levels of distributors. The nominee consumers may end up in the scheme to play the same role which signifies cases of typical pyramid scheme that involves a chain of upline and downline participants. Moreover, the pyramidal scheme of sale depicted could encompass a broad range of illegitimate marketing strategies regardless of designation in so far as their operational characteristic falls within the ambit of the description for the prohibited scheme of sale. Such a broader scope is apparently depicted by the use of the term pyramidal (pyramid like) scheme (in the Amharic version).<sup>108</sup>

### **3.2.2. Ethiopian law on pyramid scheme confuses consumers to be protected and the accomplices to be prosecuted**

In referring to persons taking part in pyramidal scheme, Ethiopian law uses the term ‘consumer’ which is defined as ‘a natural person who buys goods and services for his personal or family consumption...and not for manufacturing activity or resale.’<sup>109</sup> Couples of drawbacks are apparent in the use of the so defined term ‘consumer’ in pyramidal schemes context. In the first place, it is an oversimplification in the sense that not only natural persons but also juridical

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the consumer. Referral selling is unlawful because the consumers should be protected from undue solicitation based on future expectation for which there is no guarantee that such sales will actually eventuate or may lead to high propensity to mislead other consumers. The whole idea is to avoid undue inducement of consumers.

<sup>106</sup> Tylor, *supra* note 1, p.12.

<sup>107</sup> South African Consumer Protection Act, *supra* note 32, Sections 38&43; Australian Consumer Law, *supra* note 82, Sections 44-46&49.

<sup>108</sup> There appears to be slight variation between the English and the Amharic version. The English version reads “pyramid scheme of sale” while the Amharic version reads as “ፕራሚዳል የሽያጭ ስልጣን”, which implies “pyramidal scheme of sale.” Pyramidal implies “like pyramid” and as such the Amharic version envisions a broader range of prohibited marketing strategies. See Proclamation No. 813/2013), *supra* note 25, Article 22(6).

<sup>109</sup> *Id.*, Article 2(4).

persons may take part in pyramid schemes.<sup>110</sup> The second, and a more troubling issue, is that the indiscriminate use of the term consumer to refer both to those who would end up as ultimate consumers and also the others who culminate as (sales) intermediaries invites misconception on the status and role of the persons involved in pyramid scheme. In particular, the clause “...granting of a reward... to a consumer who purchases goods ...and where other consumers through his (the consumer’s) salesmanship purchase the goods ...” suggests dual status as a consumer and distributor. Yet the persons involved in the scheme could be consumers victimized or distributors/participants who are accomplices aiding the pyramid scheme operator and benefiting therefrom. Indeed, the use of wordings like salesmanship/distributorship in pyramid scheme, a scheme which is not a legally recognized marketing scheme, is also inappropriate. Rather, these wordings are common in legally recognizable schemes such as MLM. But in pyramid schemes, we have participants to be sanctioned and consumers to be protected from such scammers. The lack of separate section dealing with pyramid schemes and absence of rules on direct selling/MLM might have cornered the drafters in the choice of appropriate terms. Where the rules on pyramid schemes are part of the regulations on consumer protection, the reference to consumers in dealing with protection of consumers from misleading conducts of business persons is not unexpected; not just Ethiopian law, the EU directive also uses the term consumer.<sup>111</sup>

In general, persons taking part in pyramidal scheme are often lured by the expectation of making business opportunity instead of the benefits as ultimate consumer.<sup>112</sup> Thus, their designation as consumers goes out of context as it creates the wrong perception that participants in pyramid schemes are real consumers. Several jurisdictions employ the term “participant”<sup>113</sup> instead of the wording “consumer”. In jurisdictions such as Ethiopia that employ the term consumer, the end result would be apparent confusion between the consumers to be protected and the accomplices to be accused.

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<sup>110</sup> See for instance, Australian Consumer Law, *supra* note 82, Sections 44-46 & 164.

<sup>111</sup> Directive 2005/29/EC, *supra* note 62.

<sup>112</sup> Canadian Competition Act, *supra* note 81, Section 55.

<sup>113</sup> Id.; Multi-Level Marketing And Pyramid Selling (Prohibition) Act of Singapore, *supra* note 78, Section 2; Australian Consumer Law, *supra* note 82, Sections 44&45. Section 44 (1) prohibits participation in a pyramid scheme, and Section 44 (3) stipulates that “[t]o participate in a pyramid scheme is:

(a) to establish or promote the scheme (whether alone or together with another person); or  
(b) to take part in the scheme in any capacity (whether or not as an employee or agent of a person who establishes or promotes the scheme, or who otherwise takes part in the scheme).

Pretty obvious that participants in pyramid schemes are offenders to be sanctioned. Some jurisdictions, well aware of the dangers posed by participants in pyramid schemes, clearly prescribed the severe sanctions participants may face.<sup>114</sup> Art. 43(2) of Ethiopian law also sets more severe criminal penalties for “[a]ny business person” who applies or attempts to apply pyramid scheme of sale.<sup>115</sup> However, not all participants in pyramid scheme would be trapped by the narrow definition of “business person”<sup>116</sup> as stipulated art.2(5). The very definition of “business person” has circumscribed the class of persons criminally liable for engagement in pyramid scheme. Thus, participants in a pyramid scheme other than those engaged regularly so as to qualify as business persons are not subject to sanction by virtue of this legislation. To penalize those involved in pyramidal selling mischief but defined by the law as consumers, resort to the general criminal law for their misleading engagement could be availed but still precise and direct rules of sanction in the specific legislation may achieve better results.

Labeling the participants as consumers, instead of income seeking participants, has also brought another challenge to consumer protection authorities. Pyramidal schemes harm not just ultimate the consumer but also the large portion of participants as the system would phase out before the majority of participants recoup even their initial investment. Actions by consumer protection authorities sometimes face the purported defense strategy by pyramid scheme operators<sup>117</sup> that the allegedly harmed participants are not consumers but income

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<sup>114</sup> Australian Consumer Law, *supra* note 82. Section 164 -Participation in pyramid schemes:

(1) A person commits an offence if the person participates in a pyramid scheme.

Penalty:

(a) if the person is a body corporate—\$1,100,000; or

(b) if the person is not a body corporate—\$220,000.

(2) A person commits an offence if the person induces another person to participate in a pyramid scheme.

Penalty:

(a) if the person is a body corporate—\$1,100,000; or

(b) if the person is not a body corporate—\$220,000.

(3) Subsections (1) and (2) are offences of strict liability.

<sup>115</sup> Proclamation No. 813/2013, *supra* note 25, Article 43(2). It stipulates that any business person who violates Article 22(6) or (10) of this Proclamation shall be punished with a fine from 7% up to 10% of his annual turnover and with rigorous imprisonment from 3 years to 7 years. Cf. Article 43(3).

<sup>116</sup> *Id.*, Article 2(5). It states that “business person” means any person who professionally and for gain carries on any of the commercial activities designated so by law appropriate law. Note also that business person must obtain business license and must be registered in the commercial registry. See arts. 5(1) & 22 (1) &(2) of Commercial Registration and Business Licensing Proclamation No. 980/2016 (amended by the new Proclamation No. 1150/2019). Most of the time participants in pyramid schemes as well as in the legitimate MLM are part-time workers.

<sup>117</sup> FitzPatrick, *supra* note 74, p. 8.



seeking investors, thereby attempting to defy the authority's standing to act on account of the power vested in it to protect consumers.

In sum, in jurisdictions such as Ethiopia where the law labeled participants in pyramid scheme as consumers, the outcome would be confusion between the consumers to be protected and the accomplices to be prosecuted; it is up to those interpreting and applying the law to make the distinction. Thus, one who begins as consumer but joins the scheme is a participant while those end users of products harmed by participants in the pyramid scheme are consumers.

### **3.3. Distinguishing the Legal MLM and the Illegal Pyramidal Schemes under Ethiopian law**

Ethiopian law simply prescribes prohibitive provisions targeting pyramidal schemes without mentioning MLM. Yet MLM is a tacitly recognized marketing scheme that business persons can operate in Ethiopia. In light of the slippery nature of the distinction between legitimate network marketing/MLM and pyramidal schemes, what would be the defining line between the two in the context of Ethiopian law? The fact that the rule on pyramidal scheme is too brief, the lack of comparable guiding rules on MLM, coupled with the fact that the MLM business culture has not been well experimented and understood in Ethiopia would pose considerable difficulty in practice. Indeed, it is conceded that the distinctions between a legal MLM and a pyramid scheme devolve more to a "case-by-case" basis.<sup>118</sup> As the FTC (USA) once noted, 'identifying a pyramid scheme masquerading as an MLM requires a fact-intensive inquiry.'<sup>119</sup> This challenge could be eased by prescribing distinguishing criteria for the two. Under Ethiopian law, some of the features of pyramidal scheme as disguising criteria lack clarity and hence need more explanation. The major criteria adopted in Ethiopian law and/or in other jurisdictions are discussed below.

#### **3.3.1. Whether there is participation fee or not.**

The existence or absence of payment of participation fee is a common<sup>120</sup> and critical consideration to distinguish pyramid schemes from legitimate MLM. The existence of participation fee is not apparent in case of product-based pyramid schemes but in realty carried out by over pricing the products. A marketing scheme of pyramidal nature, as defined under Ethiopian law,

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<sup>118</sup> Keep and Vander Nat, *supra* note 2, p. 16.

<sup>119</sup> *Id.*, p. 15.

<sup>120</sup> Australian Consumer Law, *supra* note 82, section 44-46; Multi-Level Marketing and Pyramid Selling (Excluded Schemes and Arrangements) Order of Singapore, *supra* note 80, Section 2(c); Canadian Competition Act, *supra* note 81, section 55.

demands, among other things, the consumer to purchase goods or services or make financial contribution. It may give the wrong impression that the purchase of products even at market value by participants in the scheme may also constitute pyramid. This is problematic in the advent of marketing companies where a large portion of the revenue derives from internal consumption. The critical point is that purchase by participants must constitute a disguised payment of participation fee. A clear statement to that effect would have been advisable. Yet the phrase "...makes financial contribution" in Article 22 (6) provides a clue that in pyramid schemes there always exists a financial contribution to the operator from each subscriber, which is tantamount to payment of participation fee.

### **3.3.2. Whether the scheme concentrates on marketing of products or on compensation to be earned by participants.**

As noted in the course of discussion, MLM operates on the premise of retailing through a network of distributors, distributors recruiting new distributors to do the same. Product based pyramid schemes also apply the same logic. The question then is does the scheme promote actual sales to consumers or recruitment benefits? Does the promotion of the scheme emphasize the entitlement of participants to the supply of goods or services or their entitlement to recruitment payments? Where lie the hopes for new participants: in the opportunities from selling products or opportunities in the recruitment of others?

This can be inferred from the overall promotional scheme used by the organization but mainly from the nature of the compensation system. As the FTC articulated in the Amway case,<sup>121</sup> a compensation system that pays commissions on consummated retail sales incentivizes retail sales while rewards on mere distributor purchases incentivize distributor purchases leading to simple chain of recruitments.

A particular problem in this regard is that when a product is said to be destined to ultimate consumers? Who are ultimate consumers? This standard pertains to the relative emphasis given to sales to outside consumers (external consumption) and participants' purchases (also known as internal consumption). Uncertainty reigns in the legal jurisprudence in relation to the issue of whether an operator with limited or no sale to outsiders but all in all depends on internal consumption would qualify as a legitimate MLM or pyramid scheme. What portion of these products should ultimately be destined to whom? It is contended

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<sup>121</sup> FTC v. Amway Corp. (1979), 93 FTC 618 as cited in Keep and Vander Nat, *supra* note 2, p. 9.

that disregarding emphasis on external consumption would open the potential for ongoing recruitment to be the primary source for compensating participants, which is a typical feature of a pyramid scheme.<sup>122</sup> Competing explanations of internal consumption comes from the analogy with buying clubs, i.e., distributors enjoying a discount on products for personal use.<sup>123</sup> In USA, emphasis is placed on the presence or absence of external users for purposes of pyramid scheme analysis such as in the Koscot case.<sup>124</sup> But to what extent this has been taken seriously remained doubtful.<sup>125</sup> Indeed, some scholars noted that in reality many well-established direct selling companies in USA depends “heavily upon selling to itself”<sup>126</sup>-internal consumption. On the other hand, the Belgian Court of Appeals, in the of case Aankoop vs. Herbalife International Belgium, confirmed that internal consumption is a sufficient marketing strategy without further requirement of sales to outsiders.<sup>127</sup> The Court affirmed that ‘personal use’ of the products by the distributors is a legitimate destination of the products and for the payment of commission, and therefore, is a legitimate MLM.

Beyond the jurisprudential quandary, even where a legal system requires external consumption, MLM companies often fail to track sales outside their distribution network which exacerbates the problem. If any, the unverifiable nature of the data makes understanding the health of the industry difficult.<sup>128</sup> In conclusion, in view of all these intricacies, critical assessment of whether the

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<sup>122</sup> Id.

<sup>123</sup> Id., p. 18.

<sup>124</sup> FTC v. Koscot Interplanetary Inc. (1975), 86 FTC 1180 as cited in Id., p. 9. This case involves a case where a multilevel marketing context in which people pay fees and buy product to participate in the venture is found to be a pyramid scheme in reality. Whether there are any retail sales (product sales to people outside the MLM) and what relation exists, in practice, between such external sales and the rewards paid in connection with recruitment was the focus of the analysis. FTC concluded that if there is no relation between recruitment rewards and sales to the ultimate users outside the MLM’s network, the organization is just a perpetual recruitment chain.

<sup>125</sup> The FTC itself is quoted for contradictory statements on the issue. In the Koscot case, FTC was quoted for asserting that the absence or paucity of retail sales to ultimate users dooms an alleged MLM to be nothing but a pyramid scheme. On the other hand, in January 2004, in its advisory Opinion to direct selling associations (DSA), FTC’s statement that “...the amount of internal consumption in any multi-level compensation business does not determine whether or not the FTC will consider the plan a pyramid scheme” has come to be the focal point of MLM with internal consumption. However, the same letter further defines an illegal pyramid scheme as “a multi-level compensation system funded primarily by payments made for the right to participate in the venture”. Id.

<sup>126</sup> Keep and Vander Nat, *supra* note 2, p. 20

<sup>127</sup> R. Rajesh Babu and Pushkar Anand, Legal Aspects of Multilevel Marketing in India: Negotiating Through Murky Waters, *Official Journal of Indian Institute of Management*, Springer, Vol. 42, No. 4, (26 October 2015). In 2011, the Belgian subsidiary of a US direct selling company Herbalife ran into a legal trouble in relation to its multilevel marketing scheme. The Brussels Commercial Court ruled that the marketing scheme of Herbalife was indeed a pyramid scheme but reversed on appeal.

<sup>128</sup> Keep and Vander Nat, *supra* note 2, pp. 16- 17.

products purchased by participants are overpriced or at market value could be a vital point to stress.

As regards Ethiopian law, the relevant clue is the prohibition of the sale's scheme where the amount of reward is "based on the numbers of consumers." At first glance, it appears that Ethiopian law outlawed any sales scheme where the extent of reward correlated directly with the number of consumers. This could be a problem given that both legitimate MLM and pyramid schemes apply multilevel compensation scheme. Under normal course of things, more multilevel distributors results in more customer outreach and higher volume of sales. This may incidentally result in a situation where the amount of compensation is directly related to the number of consumers. Thus, does Ethiopian law totally ban marketing strategies with multiple compensation schemes? Does Ethiopian law ban sales scheme where a consumer/ sales person drives compensation from sales of others through his recruitment/ salesmanship? The prohibition of sales scheme setting a reward system based on the number of consumers tips us that the illegality arises where the reward is attached simply to numerical customer count ignoring the volume of marketed goods and services. In such a case, regardless of its name, the entity is nothing but a chain of recruitment. In other words, the law targets not the mere presence of multilevel compensation incentives but mere recruitment schemes in whatever disguise they appear.

So, under Ethiopian law, even where internal consumption is the only destination of products, the determinant factor should be whether the reward is directly related to consumption volume by participants or mere numerical count of participants. Is the reward merely related to the number of down lines or purchase volume by the downlines? Where consumption by participants happens to be the only or primary destination of products, this will open the opportunity for ongoing recruitment to be the primary source for compensating participants just like the typical pyramid schemes. It triggers suspicion and investigation, but not itself conclusive of existence of pyramid scheme as opposed to its being legitimate network marketing. The factual analysis should determine whether it is a simple recruitment chain or a genuine product marketing strategy

### **3.3.3. Whether there is inventory loading and lack of buy-back scheme.**

Third, inventory loading-supplying the product to a distributor in an amount that is commercially unreasonable-and lack of a buy-back scheme signifies that a person operates pyramid scheme. To ensure that MLM does not harm the

innocent distributors via inventory loading, several jurisdictions<sup>129</sup> require the MLM operators to have a buy-back scheme and clearly inform this to the participants. Or else MLM operators assume the risk of signaling being pyramid scheme. The requirement of a buy-back scheme not just a distinguishing criterion but also an essential protective standard to distributors. Even where a person attempts to operate a mere recruitment scheme, the participants unable to recruit would not be victimized. As such the operator has lessor incentive to go on for pyramidal scheme.

Ethiopian law does not stipulate such a requirement, due to the absence of explicit recognition and regulation of MLM. However, an MLM operator that practically implemented buy-back scheme may prove itself in the factual analysis, if any investigation that it is not a mere recruitment chain. For instance, in the Amway (FTC v. Amway, 1979) case, where the FTC initiated investigation for alleged Pyramid Scheme operation, the FTC agreed that Amway was not a pyramid scheme mainly due to company strategies designed to ensure retail sales that includes the refund and returning scheme.<sup>130</sup>

### 3.3.4. Other useful considerations

Scholars have also suggested several other criteria that they believe to be of helpful tests for pyramid schemes. For instance, Taylor, from the American institute of consumer awareness, listed, among others, the following as characteristics of pyramid scheme as opposed to MLM:<sup>131</sup>

*The presence of numerous levels of distributors more than is needed to get the products out to customers; the absence of demand for the products other than of distribution channel; the presence of several levels of beneficiaries upline who had nothing to do with the sale but receive as much or more total payout per sale than the distributor; indications that the products and “opportunity” cannot be sold without making exaggerated product and income claims; the products to distributors*

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<sup>129</sup> Multi-Level Marketing and Pyramid Selling (Excluded Schemes and Arrangements) Order of Singapore, *supra* note 80, Section2(1)(c)(vii); Canadian Competition Act, *supra* note 81, Section 55.1 (1)(c)&(d).

<sup>130</sup> See Alia Malek, Legal remedies: What government can do to fight pyramid schemes, (14October 2014) available at <http://projects.aljazeera.com/2014/multilevel-marketing/explainer.html>, accessed on 25 February 2016. Because of the three internal rules company, that are held to be mechanisms that incentivizing participants to actually sell the company's products to customers, Amway won the case. The three internal rules were:

1. Distributors had to buy back any unused and marketable products from their recruits upon request.
2. Distributors had to sell at wholesale or retail at least 70 percent of purchased inventory each month.
3. Distributors had to make at least one retail sale to 10 different customers each month.

<sup>131</sup> Taylor, *supra* note 1, p. 38.

*being priced at a premium; promotions like you will never have to work again.*

Over all, despite the lack of explicit rules on MLM in the Ethiopian proclamation, it is still possible to provide detailed distinguishing parameters either in the form of regulation or directives to be issued by the Ministry of Trade;<sup>132</sup> or at least some working guidelines by the ‘Trade Competition and Consumer Protection Authority could be of immense help’.

## **Conclusion**

Fuzzy conceptualization and inherent difficulty of distinguishing the various marketing programs that claims to be direct selling schemes have hampered effective enforcement of legal stipulations in the field of consumer protection. A prototype of this puzzle has been the distinction between the legal MLM (network marketing) and illegal pyramidal schemes. Pyramidal schemes as illegal arrangements and as such do not exist *de jure* but *de facto* under the guise of operating network marketing. A business entity that operates MLM at a time might easily swing from legality to illegality and *vis versa*.

The thin distinction between the two had been a headache for enforcement authorities, though not less for legislators. Discontent on the topic had led to various proposals. Some called for a ban on network marketing at the cost of missing possible opportunity while others suggested intervention in the particular design of network marketing specifically demanding restriction on unreasonable compensation from downlines and limiting recruitment chain (number of distributors) to what is economically realistic.

Few jurisdictions banned MLM totally. Most jurisdictions welcome MLM either by providing parallel rules permitting MLM and banning pyramid schemes; or by simply stipulating prohibitive provisions targeting pyramidal schemes thereby tacitly allowing MLM. Legislators have tried to set certain principal parameters for distinguishing legal network marketing from pyramidal schemes. The presence of participation fee payment by participants; compensation to participants being mainly derived from participation fee of new members instead of actual sales to ultimate users; and the absence of buy back guarantee to distributors have been taken indications of pyramidal scheme while the opposite characteristics of a business entity would make it supposedly a legal network marketing.

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<sup>132</sup> Proclamation No. 813/2013), *supra* note 25, Article 46.

Ethiopian law has abrogated pyramidal scheme but tacitly acknowledged MLM/network marketing. It has characterized pyramidal schemes but still vague. The law is silent on buy-back and refund guarantee, which is in fact a notable omission of an essential yardstick. The buy back guarantee requirement saves those at attrition and also reduces propensity of network marketers to swing to pyramidal schemes. Moreover, it confuses the consumers to be protected and the participants to be prosecuted.

The absence of parallel provisions on network marketing is a significant limitation. Not only that silence on network marketing deprives easier and comparative understanding of the puzzling notions on network marketing versus pyramid schemes but also that rules on network marketing are essential if network marketing is to flourish. The few foreign companies in Ethiopia that claimed to be network markers did not have unquestionable stories. The lack of guiding rules on how legal network marketing businesses may operate could lead to frustration for the future engagement in network marketing however genuine it might be. If network marketing is to work well, separate rules including those on protection of distributors such as buy-back and refund guarantee, strict ethical standards for distributors, etc are required. The rule on pyramidal scheme also needs further elaboration. Despite the lack of explicit rules on MLM in the Ethiopian proclamation and the brevity of the rule on pyramidal scheme, it is still possible to provide detailed rules either in the form of regulation or directives to be issued by the Ministry of Trade; or at least some working guidelines by the Trade Competition and Consumer Protection Authority could be of significant help.