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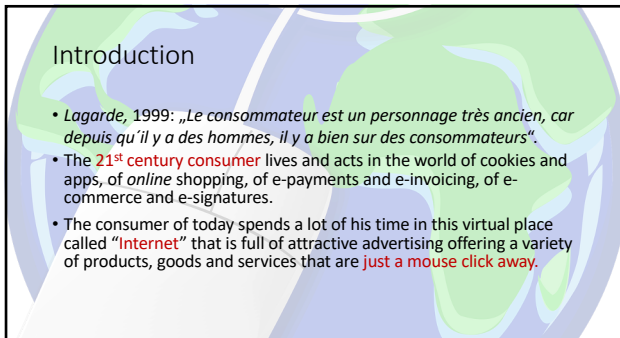
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Online consumer transactions and redress: A comparison with EU and SA consumer protection

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Introduction

- Lagarde, 1999: „Le consommateur est un personnage très ancien, car depuis qu'il y a des hommes, il y a bien sur des consommateurs”.
- The **21st century consumer** lives and acts in the world of cookies and apps, of **online shopping**, of e-payments and e-invoicing, of e-commerce and e-signatures.
- The consumer of today spends a lot of his time in this virtual place called “**Internet**” that is full of attractive advertising offering a variety of products, goods and services that are **just a mouse click away**.

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Online consumer transactions – *Risks & Issues*

- **Example:** imagine a consumer searching for the right product on the *World Wide Web*. Unaware of the threats awaiting him on the digital market, this consumer “surfs the net”, and even before entering a legal transaction **he gives his personal data** over to numerous traders whose websites he visits or registers on. In case that he **orders a product online**, not only does he have to rely on the description offered on the trader’s website, the **consumer never knows if he is going to receive what he has paid for**.



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Informed choice

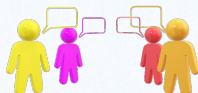


- John F. KENNEDY, *Special Message to the Congress on Protecting the Consumer Interest*:
- „*The right to be informed* - to be protected against fraudulent, deceitful, or grossly misleading information, advertising, labelling, or other practices, and to be given the facts he needs to make an informed choice.“
- Judgement of 21 April 2016, C-377/14, *Radlinger and Radlingerová*, EU:C:2016:283:
- “*information, before and at the time of concluding a contract*, on the terms of the contract and the consequences of concluding it is of *fundamental importance for a consumer*”

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EU Digital Single Market

- A *Digital Single Market Strategy for Europe*, COM(2015) 192 final:
- the “one in which the free movement of goods, persons, services and capital is ensured and where *individuals and businesses can seamlessly access and exercise online activities* under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence”



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Online Sales and Services Contract

- Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes, Article 4(1)(e):
- “*sales or service contract where the trader, or the trader's intermediary, has offered goods or services on a website or by other electronic means and the consumer has ordered such goods or services on that website or by other electronic means*”.

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Internet – The place where traders offer and consumers buy online

- **E-Commerce Directive**

- recital 21: “only requirements relating to on-line activities such as on-line information, on-line advertising, on-line shopping, on-line contracting”
- Art. 6(a) and (b): commercial communications
- Art. 6(c) and (d): promotional offers (e.g. discounts, premiums, gifts) and promotional competitions or games
- Arts. 10 and 11: form and conclusion of contracts by electronic means

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Internet – The place where traders offer and consumers buy online

- **Consumer Rights Directive**

- Arts. 2(5) and (6): domestic and cross-border sales and service contracts
- Art. 2(7): ‘distance contract’ - “any contract concluded between the trader and the consumer under an **organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer**, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded”
- Art. 6(1): pre-contractual information
- Art. 6(9): the burden of proof
- Arts. 9-16: right of withdrawal

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CJEU case law

- Judgement of 5 July 2012, C-49/11, **Content Services**, EU:C:2012:419
- Judgement of 3 September 2009, C-489/07, **Messner**, EU:C:2009:502
- Judgement of 15 April 2010, C-511/08, **Heinrich Heine**, EU:C:2010:189
- Judgement of 28 July 2016, C-191/15, **Verein für Konsumenteninformation**, EU:C:2016:612

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CJEU case law



- Judgement of 5 July 2012, C-49/11, *Content Services*, EU:C:2012:419:
- Para. 33: In a process of transmission of information, *it is not necessary for the recipient of the information to take any particular action*. By contrast, where a link is sent to a consumer, he must act in order to acquaint himself with the information in question and he must, in any event, click on that link.
- Para. 50: It should be held, therefore, that a *website such as that in question* in the main proceedings, the information on which is accessible to consumers *via a link provided by the seller, cannot be regarded as a 'durable medium'*

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Online consumer transactions –
EU Legal Framework

- Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ L 136/, 22.05.2019.
- Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, OJ L 136, 22.05.2019.
- Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.07.2019.
- Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328, 18.12.2019.

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The Digital Services Act package

- in digital sectors
herce
Other online intermediary platforms
- “As part of the European Digital Strategy, the European Commission has announced a Digital Services Act package to strengthen the Single Market for digital services and foster innovation and competitiveness of the European online environment.
 - The new **Digital Services Act package** should modernise the current legal framework for digital services by means of two main pillars:
 - the Commission would propose clear rules framing the responsibilities of digital services to address the risks faced by their users and to protect their rights
 - the Digital Services Act package would propose ex ante rules covering large online platforms acting as gatekeepers”
 - Available at: <https://ec.europa.eu/digital-single-market/en/digital-services-act-package>

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Digital services act European added value assessment

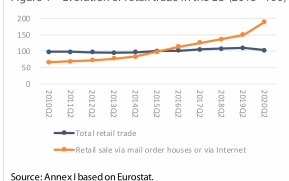
- Digital services act, European added value assessment, EPRS, October 2020:
 - "assessment identifies 22 main gaps and risks that currently affect provision of online services in the EU and proposes policy solutions to address these shortcomings"
 - number of gaps and risks that negatively impact provision of digital services in the internal market. These issues include:
 - fragmentation of national regulation within the EU
 - weak enforcement and cooperation between Member States
 - differing Member State rules on protection of consumers and businesses using digital services
 - market entry barriers
 - suggests that taking common EU action to enhance consumer protection and common e-commerce rules, as well as to create a framework for content management and curation that guarantees business competitiveness and protection of rights and freedoms, would potentially add at least €76 billion to EU gross domestic product between 2020 and 2030"
- Available at:
[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654180/EPRS_STU\(2020\)654180_EN.pdf#page14](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654180/EPRS_STU(2020)654180_EN.pdf#page14)

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Looking at the past 10 years, other Eurostat data (see Figure 1) show the development of retail trade and digital means driven retail sales.³⁴ The annual growth of the latter exceeded 14% between 2014 and 2020, whereas retail trade achieved just about 1%.

In 2019 e-commerce sales totalled approximately €621 billion with a growth expectation in 2020 of around €717 billion.³⁵ Although from 2015 to 2019 e-commerce-related retail sales increased steadily, the mid- and long-term effects of the coronavirus pandemic remain to be seen.³⁶

Figure 1 – Evolution of retail trade in the EU (2015=100)



Source: Annex I based on Eurostat.

Source available at:

[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654180/EPRS_STU\(2020\)654180_EN.pdf#page14](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654180/EPRS_STU(2020)654180_EN.pdf#page14)

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Solving a B2C Dispute: Rather Online than Offline

- Alternative Dispute Resolution Directive
 - Art. 2(1): "procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts between a trader established in the Union and a consumer resident in the Union through the intervention of an ADR entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution".
 - Art. 2(3): the goal of "harmonised quality requirements for ADR entities and ADR procedures" is to ensure that "consumers have access to high-quality, transparent, effective and fair out-of-court redress mechanisms no matter where they reside in the Union".
- Online Dispute Resolution Regulation

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Online consumer transactions –
SA Legal Framework: Relevant legislative provisions

- Duty to Inform
 - Minimum info on website (s 43 ECTA)
 - Cooling-off right/ right to cancel (s 44 ECTA; s 16 CPA)
- Plain and understandable language (s 22 CPA)
- Delivery of goods (s 19 CPA)
- Returns and Refunds (ss 20, 55 & 56).
- Unconscionable conduct and False, misleading & deceptive representations (ss 40 and 41 CPA – Unfair Commercial Practices)
- Over-selling and Over-booking (s 47 CPA)
- Unfair terms (ss 48 and 49 CPA)



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Online consumer transactions –
SA Legal Framework: Relevant legislative provisions

- Protection of Personal Information and Data Privacy
 - Problematic up to date.
 - Many loopholes.
 - Difficult to track and enforce.
 - POPI Act came into force July 2020 to address issues.
 - Align SA with other jurisdictions: EU GDPR; US California Consumer Privacy Act; India Data Privacy Law etc.
 - Personal Information of Consumer captured on website
 - Lawfully processed
 - Consumer has right to know and consent



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Online consumer transactions –
SA Legal Framework

- INSTITUTIONAL FRAMEWORK
- ICASA (Independent Communications Authority of South Africa)
 - BROADCASTING; LICENSING; ELECTRONIC COMMUNICATION; POSTAL SERVICES
 - Focus for online transactions: Service Providers of Electronic Communications (Cell phones)
 - Consumer protection
 - Quality of service (network coverage, dropped calls, line installation, activation, transfer and suspension, ADSL and mobile-number portability)
 - Billing (billing of data, voice services and international roaming services)
- CGSO (Consumer Goods and Services Ombud of SA)
 - Very broad mandate
 - Also overlap with ICASA
- NCC (National Consumer Commission)
 - Central to Consumer Protection
 - Systemic issues
- Provincial Consumer Protection Authorities
- Information Regulator (Data Privacy)
- Prescribed routes of redress in terms of section 69 of the CPA – Court last option



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Online consumer transactions – SA Legal Framework



- INDUSTRY AND SELF-REGULATION
- Advertising Regulatory Board
 - Online marketing and Social Media Marketing
- E-commerce Forum of SA (EFSA)
 - Safe.Shop Trustmark
- WASPA (Wireless Application Service Providers' Association)

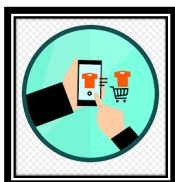
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Thank you



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