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**Vos données nous intéressent  
ou  
les risques d'être (ou ne pas être) un consommateur dans un  
environnement numérique.**

- 1. La protection des consommutilisateurs  
(GDPR & droit de la consommation)**
- 2. La protection des consommateurs (droit de  
la consommation)**
- 3. Nous sommes tous des consommateurs  
vulnérables**
- 4. Quelques observations conclusives**

# 1. Protection of online “Consumusers”: The GDPR/Consumer Law scenario

- **1.1. I’m just a visitor (everywhere I go people know the part I’m playing)**
- You are a natural person, and you visit a website:
- GDPR will apply
- Consumer Law may apply
- **1.1.1. You do not accept cookies**
  - you are only visiting (user), nothing happens to you, you are a visitor (assuming the ads surrounding you are not misleading).
- **1.1.2. You eat your cookies (accept).** Ads on the website match your interests.
- You are a consumer because you could be the victim of an UCP. Ads that could be misleading.
- Have you been informed of the fact you would be profiled? If not, this could also be misleading, even though you do not buy anything since it is enough for the practice to have a potential effect on you.



# 1. Protection of online “Consumers”: The GDPR/Consumer Law scenario



- **1.1.3. You were never asked for your consent / the request for consent was not clear**
- You did not realize you ate the cookies (and put on weight)!
- As a user you are the victim of an infringement of GDPR.
- As a consumer, you may be the victim of an UCP (unclear statement as how to accept or reject cookies may lead to an UCP; targeted advertising may lead to an UCP).
- Depending on the context you may be protected only as a user (GDPR) or as a user and a consumer, but the dividing line might be blurred.

## 2. Protection of online consumers

- 2. 1. To apply or not to apply the UCT directive
  - The safety term, a FB story:
    - "You will not post content that: is hate speech, threatening, or pornographic; incites violence; or contains nudity or graphic or gratuitous violence."



## 2. Protection of online consumers



- Directive 93/13 (UCT)
- Art. 3
- 1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
- Art. 2.
- (b) "consumer" means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession; »

## 2. Protection of online consumers

- **According to Directive 2019/2161:**
- Directive 2011/83 "shall also apply where the trader supplies or undertakes to supply digital content which is not supplied on a tangible medium or a digital service to the consumer and the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer are exclusively processed by the trader for the purpose of supplying the digital content which is not supplied on a tangible medium or digital service in accordance with this Directive or for allowing the trader to comply with legal requirements to which the trader is subject, and the trader does not process those data for any other purpose."
- => The rise of "**pseudo contracts**"?
- => **No reference made to UCT directive:** Freudian slip (Fehlleistung) unconscious subdued wish : too much of a contract Directive?
- **A consumer without contractual rights?** (Some domestic jurisdictions ruled UCT legislation applies to such situations). But you have the benefit of pre-contractual information...

## 2. Protection of online consumers



- **2.2. Online platforms (market places): who is who :**
- The *Kamenova* case (C-105/17)
- Article 2(b) and (d) of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and Article 2(2) of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, must be interpreted as meaning that **a natural person, such as the defendant in the main proceedings, who publishes simultaneously on a website a number of advertisements offering new and second-hand goods for sale can be classified as a ‘trader’, and such an activity can constitute a ‘commercial practice’, only if that person is acting for purposes relating to his trade, business, craft or profession, this being a matter for the national court to determine, in the light of all relevant circumstances of the individual case.**



# 3. All of us are vulnerable consumers



- **Time to reconsider the Gut Springenheide and Tusky / Oberkreisdirektor des Kreises Steinfurt case (C-210/96)**
- Referring to the Community legislation and case-law on the protection of consumers from misleading information, the Court has held that, in order to determine whether a statement or description designed to promote sales of eggs is liable to mislead the purchaser, in breach of Article 10(2)(e) of Regulation No 1907/90, the national court must take into account the presumed expectations which it evokes in an **average consumer who is reasonably well-informed and reasonably observant and circumspect.**

# 3. All of us are vulnerable consumers

- What does *reasonably well-informed and reasonably observant and circumspect* mean in digital surroundings?
- However, Community law does not preclude the possibility that, where the **national court** has particular difficulty in assessing the misleading nature of the statement or description in question, it **may have recourse**, under the conditions laid down by its own national law, **to a consumer research poll or an expert's report as guidance for its judgment.**

### 3. All of us are vulnerable consumers



- “Digital choice architectures are data-driven, they can collect user data continuously, allowing choice architects to learn how different users interact with the digital environment.”
- **“By constantly learning more about one’s consumers’ characteristics and their responses to particular cues, the potential for effective manipulation also grows.”**
- Helberger, Lynskey, Micklitz, Rott, Sax, Strychartz, EU Consumer Protection 2.0. Structural Asymmetries in Digital Consumer Markets, March 2021, BEUC (at p. 16) <https://www.beuc.eu/publications/eu-consumer-protection-20-structural-asymmetries-digital-consumer-markets-0>

# 3. All of us are vulnerable consumers

## Data predictive profiling:

Pardamean, Soeparno, Budiarto, Maesworo, Baurle: "Quantified Self-Using Consumer Wearable Device: Predicting Physical and Mental Health Healthcare."

Healthcare Informatics Research 2020;26(2):83-92.

Published online: April 30, 2020

DOI: <https://doi.org/10.4258/hir.2020.26.2.83>

See also the research project

"Privacy Protection for Lifestyle-Tracking Devices and Applications"

Institut des systèmes d'information (ISI) Université de Lausanne (HEC)

<http://p3.snf.ch/project-178978>

# 3. All of us are vulnerable consumers

## New consumer, new trader:

- A **Data Broker** is a business that aggregates information from a variety of sources; processes it to enrich, cleanse or analyze it; and licenses it to other organizations.



# 4. Conclusions

- 1. The combined application of GDPR and consumer law is complex: need for clarity (eg. guidelines of the EU Commission).**
- 2. The ambiguous wording of directive 2019/2161 needs to be reviewed**
- 3. Towards a specific regulation of consumers profiling? (or a regulatory approach of databrokers).**
- 4. Is globalization an obstacle to EU intervention?**