

# THE REGULATORY DEBATES

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For sound and responsive consumer and corporate laws



**the dti**

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# Is SA ready for an online consumer dispute resolution platform?

## Lessons from the European Union



Associate Professor Jacolien Barnard (Consumer Protection Law Cluster, Department Mercantile Law, University of Pretoria)

Consumer protection and mechanisms to address the needs of consumers remain key for South Africa's consumer market. Technological advancements will allow for more creative ways to serve the interests of consumers. This article looks at the Online Dispute Resolution (ODR)

web-based platform. Can an ODR platform serve as a feasible mechanism to resolve consumer disputes in a South African context?

The ODR<sup>1</sup> is a web-based platform developed by the European Commission (EC) to provide efficient redress for online consumer agreements and has been accessible to European Union (EU) consumers since February 2016 (<http://ec.europa.eu/odr>). The objective is to enable consumers and traders (businesses or suppliers) to resolve contractual disputes regarding online purchases of goods and services out of court, at a low cost, in a simple and fast way. It is the first completely web-based platform developed by the EC. Consumers are able to submit disputes in any of the 23 official languages recognised by the commission.

The platform redirects the consumer dispute to a number of quality dispute resolution bodies or authorities (referred to as ADR providers), that were recommended by the Member States to be included in the platform. Each Member State must further establish at least one national contact point that will provide consumers with assistance. The list of ADR providers must be available on the ODR platform, which has to include a link to the provider's website or homepage and other contact details.

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<sup>1</sup> Established in terms of the EU Directive on Alternative Dispute Resolution for Consumer Disputes (2013/11/EU). To assist with the correct implementation and interpretation of the ODR platform, the EU published the Regulation of Consumer ODR (524/2013). The Alternate Dispute Resolution (ADR) Directive confirms the importance of the establishment of an ODR Platform (Recital 11) and that it is an ADR mechanism (Recital 12).

The Regulation of Consumer ODR (524/2013) places certain obligations on traders that conclude online consumer transactions for the supply of goods and services. As is the case with the dispute resolution bodies, the traders must provide a link to their websites on the ODR platform. Notably, the traders have an obligation to inform consumers of all relevant dispute resolution bodies and institutions that may be approached and are applicable to the transaction. This must be done not only as part of the important general information on online traders' websites, but also as part of the service contracts concluded with consumers. Moreover, this must be done in a clear and conspicuous manner.

Interestingly, once a consumer lodges a complaint on the ODR platform, it is the responsibility of the trader to identify a particular ADR provider to assist the consumer in resolving the complaint. If the consumer agrees with the suggested ADR provider, he/she must confirm this on the platform. The dispute will then be routed to the ADR provider for resolution. If the consumer does not agree, he/she may suggest another ADR provider. If the parties (trader and consumer) do not agree on the appropriate ADR provider, the complaint will be closed on the platform after 30 days. Unfortunately, this seems to be a disadvantage of the ODR platform and will definitely influence its effectiveness. However, the contact points identified by and within the particular Member State must assist a consumer in further avenues of redress should such a situation occur. The Commission's official website provides informational videos and flowcharts to explain to consumers how the process on the ODR platform works<sup>2</sup>.



South Africa may not be ready for this platform as the level playing field of the ADR still needs better coordination and there is more that must be done on enforcement of the Consumer Protection Act.

As a future option? The ODR is an innovative tool that can be explored.

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2 ([http://ec.europa.eu/consumers/solving\\_consumer\\_disputes/non-judicial\\_redress/adr-odr/index\\_en.htm](http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/adr-odr/index_en.htm) accessed on 18/09/2016).

## Debt review: No easy way out



**Neil Roets, CEO Debt Rescue**

The process of debt review has gone from strength to strength over the years, with many initial uncertainties now resolved. However, one obstacle remains: how to exit a consumer from debt review. Prior to February 2015, there was no clear process and so the industry developed its own document, known as Form 17.4, which the debt counsellor would issue to remove a client from review. The reasons given on this document would be that the consumer voluntarily requested to be removed or the debt counsellor terminated the review due to a lack of cooperation or non-payment. However, the form wasn't a binding document and so not accepted by many.



In February 2015, the National Credit Regulator (NCR) issued *Withdrawal Guidelines* to streamline the process and give it more structure. There has, however, been some unintended consequences that restrict withdrawal from debt review due to limitations imposed. In terms of these guidelines, a consumer can only voluntarily withdraw from debt review prior to Form 17.2 being issued to credit providers by the debt counsellor. The form indicates if the consumer's application for debt review has been accepted or rejected. It is sent to credit providers within 30 business days of application for debt

review, however, in many cases, can be sent as soon as 10 business days after application. If the application is accepted, the consumer can only withdraw from debt review by having him/herself declared not over-indebted by a magistrate's court, which is an additional financial burden.

A debt counsellor cannot terminate a debt review application, but only suspend the matter if there is a lack of cooperation or non-payment. A debt counsellor then remains burdened with the maintenance of this consumer's profile, by having to receive and respond to correspondence from credit providers relating to the consumer.

A credit provider must keep the consumer under debt review on their side as well, until the consumer is declared as not over-indebted or defaults in payment. In the case where the consumer defaults, the credit provider has the right to proceed with legal action, which is obviously to the detriment of the consumer.

The question posed is: If a debt counsellor can make the initial decision to declare a consumer as over-indebted, can he/she then not also have the power to declare a consumer as not over-indebted, if there are changes subsequent to the initial application, as long as specific NCR guidelines are met?

Apart from the above, the following alternative options should be available: Firstly, due to the fact that a debt counsellor has the right to initiate the debt review process, he/she should also have the right to end the debt review process, in situations such as non-payment of the monthly debt review affordability amount or no co-operation; and secondly, as the debt review process is voluntary, the consumer should also have the right to withdraw voluntarily.

## **Can South Africa afford to compromise on ethical standards?**



### **Lekgala Morwamohube, the dti**

The 2016 Corporate Governance Index, published by the Institute of Directors in Southern Africa (IoDSA), shows that for three consecutive years South Africa has experienced declining trends in

ethics, leadership, performance and risk.<sup>3</sup> This places a high demand on public entities and large private companies to embrace regulations such as King IV to create a platform for good governance in South Africa.

The article addresses both formal and informal (self-regulation) regulatory mechanisms in the form of the Companies Act, No. 71 of 2008, and King IV to ensure South Africa keeps its good standing globally on corporate governance and ethics. Is there a clear interface between these two regulatory tools? How can the Companies Act and King IV draw from each other?

The King IV Report on Corporate Governance for South Africa 2016 was launched by IoDSA on 1 November 2016 and is anticipated to be effective on or after 1 April 2017<sup>4</sup>. The report replaces the previous editions of the King III Code and has been ushered in at a time when South Africa is facing difficult economic conditions as evidenced by depressed business, potential ratings agency downgrade, political instability, and poor ethics and leadership performance. The current state of the economy makes the King IV Report an invaluable guide on how to govern ethically. It describes corporate governance as “the exercise of ethical and effective leadership by the governing body of any type of organisation”<sup>5</sup>.

Corporate governance will no longer be viewed as a mere compliance burden because principles and practices support the realisation of intended governance outcomes<sup>6</sup>. Professor Mervyn King confirmed that the overarching objective of King IV is to make corporate governance more accessible and relevant to a wider range of organisations and be the catalyst for a shift from a compliance-based mindset to one that views corporate governance as a lever for value creation<sup>7</sup>. King IV has sector supplements for specific categories of organisations to broaden acceptance of corporate governance, and make it accessible and fit for application across sectors, organisations and entities of varying sizes, resources and complexity (in addition to the traditional audience of listed, public and large private companies)<sup>8</sup>.

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3 2016 Corporate Governance Index by Institute of Directors in Southern Africa

4 Institute of Directors in Southern Africa website <http://www.iodsa.co.za/>

5 Draft king IV report on corporate governance for South Africa 2016

6 Ibid

7 Justine Brown media Article published in City Press on 06 November 2016 accessed from <http://www.fin24.com/Economy/king-iv-emphasises-accessible-governance-20161104>

8 Harduth N and Sampson L. (2016), the review of the King IV report on corporate governance booklet published by Werksmans Attorneys



The release of the report on corporate governance for South Africa hopes to provide a stimulus for governing structures of organisations to ensure that their key stakeholders adhere to ethical standards. There is a shift in focus on the quality of people and structures in governance as well as the underlying philosophy about the importance of good governance for all types of institutions.

King IV is undeniably a critical tool for South Africa's corporate governance processes as regulated by the Companies Act. For example, Section 72 (4) and Regulation 43 of the Act requires that all listed public companies, state-owned companies and any other company that scores above 500 public interest points have Social and Ethics Committees (SECs)<sup>9</sup>. Various companies have cited challenges with understanding the mandate of SECs and confusion has arisen around discrepancies between the Companies Act and King IV principles.

The report is published at the time when the Department of Trade and Industry (**the dti**) is reviewing the Act, providing an opportunity for incorporation of the principles contained in King IV. Currently the role of the SEC is found by various companies to be expanded beyond that which is envisaged in the Companies Act (more specifically regulation 43 of the Companies Regulations, 2011). King IV envisages this expansion to be in the context of the committee's direction and oversight of the management of ethics, as well as the socially responsible aspects of the remuneration policy<sup>10</sup>.

## Fighting a losing battle against illegal online gambling?



**Bharti Daya**, the dti

The current legislative framework that governs gambling activities in South Africa, the National Gambling Act, No. 7 of 2004, allows for casinos, racing, gambling and wagering. Illegal gambling is any activity that falls outside of the provisions of the National Gambling Act, and are described in Part B of the Act. Examples include fafi, dice, animal betting, illegal casinos and online gambling<sup>11</sup>.

9 Section 72 (4) and Regulation (43) of the Companies Act 71 of 2008

10 Kleitman Y (2016) A preview of King IV, published by Corporate and Commercial Alert on March 2016

11 National Gambling Board. (2016). Socio-economic Impact of Illegal and Online Gambling in South Africa. NGB. Centurion

**the dti** has a clear position to continue the prohibition of online gambling, even though some argue for its regulation and legalisation in view of the growing prevalence and accessibility through the use of technology and smart phones. Some argue that while Government has made online gambling illegal, it is rife and growing at an unprecedented pace, to the extent that law enforcement agencies lack the capacity to deal with it. The South African Police Services (SAPS) undertakes raids, but few cases are successfully prosecuted because the alleged guilty parties are able to hire experienced senior lawyers to win their cases, enabling them to continue their operations aware of the weaknesses of the system. In the meantime, vast amounts of money leave the country, undermining the legal land-based casinos and eroding the national tax base.

While some may see online gambling as a form of entertainment, there is a darker dimension, namely its links with organised crime, human trafficking, drug trafficking, terrorism, the proliferation of illegal weapons and money laundering. According to Dr Ingo Fiedler<sup>12</sup>, organised crime needs to launder illegal profits to invest in the legitimate economy and this they do through unregulated gambling operators. According to the United Nations Office on Drugs and Crime (UNODC), global money laundering transactions are estimated at between US\$1 trillion and \$2 trillion per year and less than 1% of global illicit financial flows are currently seized by authorities. Gambling is therefore the perfect vehicle to facilitate these transactions.

What should law enforcement agencies do to curb this problem? The challenge of online gambling is complex: Whether legal or illegal, the necessary support is required for regulation. In countries where online gambling is illegal, governments use technology to block online gambling sites. Should South Africa not follow suit and use similar technology? This would confirm its position that online gambling is illegal, considering that law enforcement agencies lack capacity in terms of human and financial resources.

The complex nature of money laundering and gambling requires multifaceted, collaboration with provincial gambling boards, local and international crime intelligence agencies, the SAPS and Department of Justice. Law enforcers need to be trained and the public made aware of the pitfalls of participating in the activity.

The Gambling Act is being amended and the amendment Bill is in Parliament for finalisation.

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12 Fiedler, I. (2012). Online gambling as a game changer to Money Laundering? Institute of Law and Economics. University of Hamburg.

## Changing consumer behaviour about copyright infringement

Amanda Lotheringen, Companies and Intellectual Property Commission (CIPC)



The importance of intellectual property (IP) rights for any country's social, economic and cultural development cannot be overstated. IP protection is critical to foster innovation and stimulate economic growth and development. Without protection of ideas, businesses and individuals cannot reap the full benefits of their inventions and have little incentive to invest in further research and development. Similarly, without IP protection, artists are not fairly compensated for their works and so are unable to invest in new creations, harming cultural vitality.

The challenges facing national policymakers today are daunting. How can they improve national innovation performance? Another tricky area is how to tackle the illegal trade in counterfeit goods and piracy and enforce IP rights effectively with limited financial and human resources. While counterfeiting and piracy are a global phenomenon that requires global action, developing countries such as South Africa have to take the challenges and risks associated with this illegal trade seriously.

A recent assessment of the effectiveness of South Africa's performance in tackling counterfeiting and piracy revealed that established IP enforcement, education and awareness campaigns were not delivering the results that the CIPC (a statutory body responsible for, among other things, IP education and awareness in South Africa) was looking for.

The CIPC needed an out-of-the-box approach to complement conventional IP enforcement activities and deal with the challenges posed by today's high-tech world. To bring about lasting behavioural change, we required an approach that balanced awareness about the benefits that can flow from IP rights and a strong regulation and

protection regime (as well as the harm caused by buying and consuming counterfeit and pirated goods) with targeted enforcement measures (backed up by criminal sanctions) against unscrupulous traders in counterfeit goods.

Developing and systematically communicating a single strong message can be effective in changing behaviour. This new approach involved a shift away from traditional anti-piracy campaigns toward a new concept that we called “Be Your Own Buy your Own” (BYO<sup>2</sup>) and the birth of the IDy mascot. IDy is a diminutive of the word “IDEA” and a play on the word “identity” to indicate a unique individual or idea. The concept of IDy was coined for the protection of ideas, intellectual property and copyright.



IDy Mascot: Image supplied by CIPC

The BYO<sup>2</sup> campaign drew inspiration from the Big 5 (lion, rhino, leopard, buffalo and elephant) animal conservation campaign, which is very successful and well-known in South Africa and internationally. Just like the Big 5 animal conservation campaign, the five major areas of IP were identified, namely music, film, software, gaming and publishing. Piracy is most prevalent in these sectors, which rely heavily on copyright and trademarks to protect their wares. By introducing parallels between the need to protect the natural environment and safeguard the IP rights of inventors and creators, we began speaking a language that our target audience, the general public, could easily understand.

The BYO<sup>2</sup> campaign was effectively a public-private partnership involving the CIPC, Proudly South Africa, the South African Federation Against Copyright Theft (SAFACT) and Microsoft, which is experiencing major problems with piracy of its software and electronic games. Each partner has significant scope to promote and protect copyright-protected creations in the creative industries that are hardest hit by piracy.

The campaign uses positive IP messages that reward good behaviour and help to change consumers' views about fake products. It uses a variety of messages that appeal to the aspirations of members of the public and encourage them to do the right thing.

These messages include:

- Do your own thing
- Be an original
- Have an identity
- Be the best you can
- Be honest
- Respect your own identity

These messages are all directly relevant to building respect for IP, stimulating innovation, creating new things and supporting originality. Reminding people that ideas are the cornerstones of creativity and can generate significant social and economic benefits goes a long way in encouraging positive behaviour and discouraging piracy.

The CIPC also linked up with two of South Africa's leading universities; Stellenbosch University in the Western Cape and the University of Pretoria in Gauteng. Their students are key targets of any IP awareness campaigns that seek to build respect for IP in a community with easy access to a free high-speed internet connection.

Combined enforcement operations are actively focusing on both physical and online sales. The recent establishment of a Cyber Crime Action Group that works closely with internet service providers to serve takedown notices on pirate sites is already making an impact. Work to further strengthen collaboration among those engaged in the enforcement of IP legislation is under way, and other initiatives to identify strategic priorities to produce the desired outcomes are in the pipeline.

As the CIPC moves forward with its IP enforcement activities, data-gathering to assess the scale and socio-economic impact of counterfeiting and piracy in South Africa is a priority. Work is under way within the CIPC's Policy Analyst Department in Creative Industries to develop methodologies for that purpose.

These efforts are all focused on supporting local innovation and creativity, creating opportunities for South Africans and expanding the nation's economy.

## Executive remuneration: A thorny issue globally



### Mafedi Mphahlele, the dti

The issue of executive pay is controversial, both in South Africa and globally. The local and global economic slowdown has forced the average employee to tighten his/her belt to make his/her salary stretch, while executives are paid exorbitant salaries and bonuses.

Is enough being done to close the remuneration gap in corporate South Africa and globally? Is there enough activism around this issue and if not, why not?

Executive pay is covered in sections 30(4-6), 65 (11) and 66(9) of the Companies Act, No. 71 of 2008. The King III and King IV reports also address the issue, with King IV recommending that executive pay be “fair and reasonable<sup>13</sup>”.

The IoDSA (responsible for the King Reports) published two papers on executive pay, namely Remuneration Committee Forum Position Paper 4 of August 2015, *Linking Pay with Performance* (short- and long-term value creation), and Remuneration Committee Forum Position Paper 5 of June 2016: *Value Creation and Executive Pay*<sup>14</sup>.

The two papers recommend linking executive pay with performance that is based on value creation (innovation and efficiency) in an organisation. The IoDSA papers also recommend the establishment of a remuneration committee and policy and provide guidelines on how to set it up, what it includes and how it should be evaluated.

Deloitte’s first *EMEA 360 Boardroom Survey: Agenda Priorities across the Region* surveyed 270 respondents from Europe, the Middle East and Africa (EMEA). It reports that business performance is considered a big driver of management and executive pay. Eighty-five per cent of respondents agreed that compensation should be linked with business performance (delivery of business strategy, business performance and shareholder views). Other big companies including Ernst and Young and PwC have

13 IoDSA. (2016) King IV report. IoDSA. Johannesburg

conducted surveys on the trends in remuneration from governance, stakeholder engagement and business performance perspectives. Such surveys signal the importance of this issue.

In the United Kingdom, the high executive remuneration is one of the reasons behind the Brexit vote. It is believed that the majority of the British working class felt marginalised by the pay gaps or income inequality where executives are paid more than 140 times what their staff receive.<sup>14</sup> There is therefore a call for the British government to review executive pay. In the United States, the Securities Exchange commission made it a rule that public companies must disclose the ratio of the compensation of their CEO to the median compensation of employees.

Shareholder activism seems to feature in most of the commentaries. The IoDSA position paper says pay outcomes should be linked with shareholder value creation, which is measured by the absolute and relative appreciation in the share price and dividends, namely total shareholder return. The proposed King IV report recommends increased disclosure requirements on remuneration. It seems that remuneration practices are complicated and difficult for some shareholders to understand. The same can be said about the UK where the Prime Minister's major proposal is to 'give shareholders the annual power to veto over boardroom pay', which it is believed may not have the desired effect.<sup>15</sup>

The counterargument justifying the large executive pay cheques is that it is difficult for business to survive globalisation, competition, innovation and the age of technology. The modern executive therefore needs all the skills necessary to steer business in the right direction. Such an executive must be retained at all costs. However, the question remains: How much is enough and how much is too much? It goes without saying that people in management positions must think about the economy, and everybody, including their employees at the lowest end of the scale when making decisions about executive pay and money in general. This, it seems, is more of an ethics than compliance issue.

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14 Jessop, S and Cruise, Sinead. (2016). May's plan to curb executive pay could face hurdles. *Business Day*

15 From *the Business Day* article (see above)

## E-commerce and the sale of alcohol



### Bharti Daya, the dti

Online shopping is fast becoming popular in South Africa, however, by global standards e-commerce transactions are relatively low. A study by market research company Ipsos<sup>16</sup> revealed that 22% of South African internet users have made purchases online and 48% expect to do so in the future. Popular shopping categories online for South Africans are fashion, clothing, consumer electronics, event

tickets, and travel and transportation.<sup>17</sup> The newest category to this list is alcohol, with large retailers such as Makro moving to online sales of alcohol.

*Finweek* published an article on 8 September 2016, "From cellar to cyber: SA's fine wine is moving online"<sup>18</sup>, which tells the story of two businessmen who co-founded Port2Port, an e-tailer specialising in the sale of fine local wine, and the rapid growth of their business over the internet.

But what happens when a regulated sector such as liquor opts to do business via the internet through online purchases? Great news for the industry in terms of profits, but what about control? The alcohol industry in South Africa is highly regulated, but the sale of liquor online literally opens up a can of worms relating to the control of sales, particularly to minors.

Underage drinking is a massive challenge in South Africa and alcohol currently may only be sold to those who are 18 years of age and older. This age restriction is under review and Government is considering increasing it to 21. Professor Melvyn Freeman is in support of increasing the age limit and maintains that alcohol would have long-term effects on those between the ages of 18 to 21 - as it does on foetuses, younger children and adolescents - since the brain is still maturing. Professor Freeman is also of the

<sup>16</sup> <http://www.itnewsafrika.com/2015/03/study-reveals-that-e-commerce-is-on-the-rise-in-south-africa/> retrieved 22 December 2016

<sup>17</sup> Ibid.

<sup>18</sup> Hubbard, J. (2016). "From Cellar to CybER: SA's fine wine is moving online". *Finweek*. [www.fin24.com/finweek](http://www.fin24.com/finweek)



view that increasing the age limit is the most effective strategy for reducing drinking and related problems among youth.

Legislation requires that consumers present their IDs when purchasing alcohol, however, this is proving to be difficult to regulate and control for various reasons, including false IDs or plain disregard for the legislation by both purchasers and sellers of alcohol. When alcohol is sold online, the question raised is how do you verify the age of the purchaser? Would the sale of alcohol via the internet not exacerbate the current problem?

The US has a minimum drinking age of 21, but this is not consistent across all states and online sales of alcohol is fairly prevalent. Software is used to verify the age of the purchaser. According to a 2012 University of North Carolina Study, minors are still able to evade restrictions in spite of the measures taken by suppliers of licensing, compliance of law and age verification software. It is certainly an issue many governments struggle with.

Government, business and relevant stakeholders would have to develop an approach to ensure that policy and legislation talks to the issue of online sales of alcohol, the regulation and enforcement thereof.

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