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Articles

Marco Loos*

Double Dutch - On the role of the transparency requirement with regard to the language in which standard contract terms for B2C-contracts must be drafted

I. Introduction

The transparency requirement is firmly embedded in European consumer law. Article 14 of the Foodstuff Labelling Directive 1978¹ already required the Member States to ensure that the sale of foodstuffs would be prohibited if the trader did not provide the information she was required to supply under the Directive ‘in a language easily understood by purchasers’. A similar provision is included in Article 16(1) of the Foodstuff Labelling Directive 2000² and in Article 15(1) of the 2011 Foodstuff Labelling Regulation.³ Moreover, Article 13(2) of the 2000 Directive and Article 13(1) of the 2011 Regulation require that information pertaining to, for instance, the name under which the product is sold, the list of ingredients and the quantity thereof, any special storage conditions or conditions of use, and the name or business name and address of the manufacturer or packager, must be ‘easy to understand and marked in a conspicuous place in such a way as to be easily visible, clearly legible and indelible’ and may ‘not in any way be hidden, obscured or interrupted by other written or pictorial matter’.

These detailed provisions make clear that the transparency requirement has (at least) three aspects:

- The *presentation* of the information: the information should be presented in such a way that the consumer could not have missed it before (or when) concluding the contract.
- The *comprehensibility* of the information: the information should be worded in such a way that the consumer may understand what information is being conveyed to her.
- The *language* of the information: the information should be provided in a language (tongue) the consumer masters.

With regard to B2C contracts, several European directives apply that impose a duty of transparency on the trader. The most general duty can be found in Article 5 of the Unfair Contract Terms Directive,⁴ which requires standard contract terms to be ‘drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.’

In *Kásler*, the Court of Justice held that in order to comply with the transparency requirement in Article 5 Unfair Contract Terms Directive, the consumer must be able to ascertain the economic consequences that result from a term.⁵ According to the Court, it is on the basis of that evaluation that the consumer decides whether she wishes to be contractually bound by agreeing to the terms previously drawn up by the seller or supplier.⁶ To that extent, it is not sufficient that the term is formally and grammatically intelligible. Instead, the transparency requirement is to be interpreted broadly, the Court of Justice emphasises.⁷ Where a term is not transparent, a national court needs to consider this when it assesses the term’s unfairness under Article 3(1) Unfair Contract Terms Directive.⁸ The transpar-

ency requirement is therefore an important element in the protection of the consumer against unfair terms.

Not specifically regulated is whether the standard contract terms must be provided in the consumer’s mother tongue. In practice, legal systems differ in this respect: where some Member States allow the use of a foreign language when the contract is concluded in that language, other Member States require all contracts that are concluded with the people living within their territory to be drafted in that Member State’s language(s). It seems clear that from the perspective of the internal market, the former approach makes it easier for traders to conclude contracts cross-border than the latter approach. The question then rises whether the perspective of consumer protection could justify that standard contract terms nevertheless should be drafted in the consumer’s mother tongue.

In this paper I will therefore seek an answer to the question *to what extent Article 5 Unfair Contract Terms Directive requires the trader to draft the standard contract terms in the consumer’s mother tongue.*

In section 2, I will first discuss the various forms the transparency requirement has in European consumer law. I will show that of the three aspects of transparency identified, the element in which language (or tongue) the standard contract terms must be drafted is under-regulated in European consumer law. For that reason, this question must be dealt by the general requirement that terms must be drafted in plain and intelligible language, as follows from Article 5 of the Unfair Contract Terms Directive.

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- 1 Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer [1979] OJ L33/1.
- 2 Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs [2000] OJ L109/29.
- 3 Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 [2011] OJ L304/18.
- 4 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29.
- 5 Case C-26/13 *Kásler* [2014] ECLI:EU:C:2014:282, para 73.
- 6 Case C-96/14 *Van Hove* [2015] ECLI:EU:C:2015:262, para 41.
- 7 Case C-26/13 *Kásler* [2014] ECLI:EU:C:2014:282, para 71; Case C-96/14 *Van Hove* [2015] ECLI:EU:C:2015:262, para 40; Case C-191/15 *Amazon EU* [2016] ECLI:EU:C:2016:612, paras 65 and 68.
- 8 Case C-96/14 *Van Hove* [2015] ECLI:EU:C:2015:262, para 27; Case C-191/15 *Amazon EU* [2016] ECLI:EU:C:2016:612, paras 65 and 68.

I will then (section 3) discuss the consequences that the transparency requirement has for the language to be used in standard contract terms. As European consumer law itself does not provide for a clear answer, I will briefly look into the national laws of Germany and France to see how the matter is approached (section 4). These legal systems are selected as they offer very different answers to the question in which language standard contracts in consumer consumers must be drafted. These different answers may therefore stand for the diverging ways in which the question may be approached in Europe. In section 5 I will then provide empirical data that suggest that of these two approaches, the German approach to allow the contract terms to be drafted in the contracting language is better suited to stimulate consumers taking advantage of the internal market without them suffering from a lack of consumer protection. I will conclude with some final remarks in section 6.

II. The transparency requirement in European consumer law

In section 1 I identified three different aspects of transparency in European consumer law. The first aspect of transparency, the manner in which the information is presented, is reflected in many directives and an occasional regulation, albeit in varying words.⁹

The second aspect of transparency, the comprehensibility of the information, is also reflected in many European direc-

tives. Many directives require the contract to be drafted in 'plain and intelligible language',¹⁰ but legislation may also require information to be in 'clear and comprehensible language',¹¹ 'clearly and unambiguously',¹² or may use yet different wording.

Unlike the first two aspects of transparency, the third aspect has not been the subject of much regulation. The principal exceptions are labelling and safety legislation, which require that information and warnings are provided in a language which can easily be understood by consumers in the Member State where the goods are marketed.¹³ In addition, Member States may pose language requirements in their national law to ensure that the information that is to be provided under the Consumer Rights Directive is drafted in a language that 'is easily understood by the consumer', suggesting that the information must then be provided in the consumer's mother tongue.¹⁴ Similarly, Member States may require that a guarantee document pertaining to consumer goods that are marketed in a particular Member State is drafted in one or more specific languages, which must be from the official languages of the European Union.¹⁵ In the absence of such legislation, it seems to be up to the parties of the contract – effectively: the trader offering goods or services to the consumer – to determine in which language the information is to be provided.¹⁶

9 For instance, Article 3(2) of the 1990 Package Travel Directive (Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1990] OJ L158/59) indicates that a travel brochure must indicate information as to (e.g.) the price and the details of the package travel in a 'legible, comprehensible and accurate manner'. In addition, Article 4(2)(b) of this directive requires that all contract terms must be provided to the consumer before the conclusion of the contract 'in writing or such other form as is comprehensible and accessible to the consumer'. Articles 5(3), 6(1), 7(4), 11(1)(c), 11(3) and 19(2) of the 2015 Package Travel Directive (Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] L326/1) requires the information to be provided in the same manner. In addition, Articles 5(3) and 7(1) of the Package Travel Directive 2015 provides that, in so far as the contract is in writing, it must be 'legible'; see also Articles 7(1) and 8(1) and (2) of the Consumer Rights Directive 2011 (Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64). Given the development of new technologies, the specific rules for travel brochures have been deleted in the 2015 Package Travel Directive. Other legislation requires the information to be provided in, for instance, a 'transparent and comprehensible manner' (see Annex I under 1(b) Third Electricity Directive 2009 (Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55); Annex I under 1(b) Third Gas Directive 2009 (Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94)), in a 'clear and comprehensible manner' (Articles 4(2) and 7(3) Distance Selling Directive 1997 (Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144/19); Article 3(2) Distance Marketing of Financial Services 2002 (Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, [2002] OJ L271/16); Articles 5(1), 6(1) and 8(1) Consumer Rights Directive 2011; see also Article 13(1) Mortgage Credit Directive 2014 (Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 [2014] OJ L60/34)), or in a 'clear and prominent manner' (Article 8(2) Consumer Rights Directive 2011).

10 See Articles 4(2) and 5 Unfair Contract Terms Directive 1993; Article 6(2) Consumer Sales Directive 1999 (Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12). The same wording is used in Article 7(2) Services Directive 2006 (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36); Articles 7(1) and 8(1) Consumer Rights Directive 2011; and Article 7(1) Package Travel Directive 2015. See also Article 7(2) Services Directive regarding information to be provided by the competent authorities to both service providers and service recipients.

11 Annex A under (d) Second Electricity Directive 2003 (Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L176/37); Annex I under 1(d) Third Electricity Directive 2009; Annex I under (d) Second Gas Directive 2003 (Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L176/57); Annex I under 1(d) Third Gas Directive 2009.

12 Articles 5(2), 6 under (c) and (d), and 7(1) E-Commerce Directive 2000 (Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1).

13 Cf Article 15 Food Information Regulation 2011; Article 8(1)(b)(1) General Product Safety Directive 2001 (Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety [2002] OJ L11/4); other European directives and regulations in these areas use similar wording.

14 See Article 6(3) Consumer Rights Directive 2011.

15 See Article 6(4) Consumer Sales Directive 1999.

16 For instance, the Payment Services Directives 2007 and 2015 provide that the precontractual information and the contract terms must be provided 'in an official language of the Member State where the payment service is offered or in any other language agreed between the parties' (italics, MBML), see Articles 36(1) and 41(1) Payment Services Directive 2007 (Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC [2007] OJ L319/1); Articles 44(1) and 51(1) Payment Services Directive 2015 (Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L337/35). The Distance Marketing of Financial Services Directive 2002 even provides that the trader must indicate in which language, or languages, the contractual terms and conditions are provided and in which languages information will be communicated to the consumer, basically confirming that the decision as to the languages to be used is up to the trader, see Article 3(1)(3) under (g) Distance Marketing of Financial Services Directive 2002.

III. The language of standard contract terms under the Unfair Contract Terms Directive

Since the Unfair Contract Terms Directive does not pose specific language requirements, it is in principle up to the trader to determine the language in which she drafts her standard contract terms. There are, however, two limitations to the trader's freedom. First, a Member State – making use of the minimum harmonisation clause in the Directive – may require the terms to be drafted in that Member State's language. Second, the language chosen by the trader may not be such as to lead to the conclusion that the terms are no longer comprehensible for the average consumer targeted by the trader's commercial activity. In *Kásler*, the Court of Justice held that in order to comply with the transparency requirement in Article 5 Unfair Contract Terms Directive, the consumer must be able to ascertain the economic consequences that result from a term.¹⁷ According to the Court, it is on the basis of that evaluation that the consumer decides whether she wishes to be contractually bound by agreeing to the terms previously drawn up by the seller or supplier.¹⁸ To that extent, it is not sufficient that the term is formally and grammatically intelligible. Instead, the transparency requirement is to be interpreted broadly, the Court of Justice emphasises.¹⁹ Where the terms are not drafted in the consumer's mother tongue, there is a chance that the consumer will not understand the standard contract terms because she does not master the language in which they have been drafted. If that is the case, the consumer cannot ascertain the economic consequences of the terms and therefore cannot base her contracting decision thereupon. Whether the terms then lack transparency within the meaning of Article 5 Unfair Contract Terms Directive will depend on the circumstances of the case: in *Šiba* the Court set out that not only the unfairness test itself, but also the question whether the transparency requirement is met must be ascertained taking into account all circumstances of the case.²⁰ This implies not only that the nature of the goods and services offered to the consumer must be taken into account,²¹ but also other relevant circumstances, such as the contracting language.

Clearly, where the standard contract terms are drafted in the consumer's mother tongue, the third aspect of transparency is met. Would this be different if the contract terms are drafted in another language? If this is not the case, then the requirement of having to provide standard contract terms in the consumer's mother tongue could seriously restrict the possibility of traders offering their goods and services in a country where another language is dominant than in the country where the trader is domiciled. The Unfair Contract Terms Directive itself does not offer us much guidance here. That means that we need to see how national laws deal with the matter.

IV. Different approaches in France and Germany

In France, the standard terms incorporated in a contract with French consumers must be drafted in French. In this respect, the Unfair Terms Law Commission (*Commission des clauses abusives*) in its 2014 Recommendation pertaining to social network services contracts stated that standard contract terms that are presented to French consumers in another language than French are not understandable to the consumer, and that these terms are therefore unfair.²² Moreover, where standard contract terms are presented both in French and in the trader's language, but include a provision that in case of conflict between the language versions the

version in the trader's take precedence, then according to the Unfair Terms Law Commission such a provision is also unfair.²³ Formally, the recommendations of the Commission do not bind the courts,²⁴ but they are nevertheless often followed in practice.²⁵ In line with the second recommendation mentioned, a clause in a consumer contract with an airline giving priority to the airline's language version was considered unfair by the Paris District Court already in 2012. The court held that such a clause was contrary to a French law stating that the use of the French language was mandatory with regard to the determination, the offer, the presentation, the user guide, and the extent and the conditions for invoking the commercial guarantee, of a good or service.²⁶

Under French law, standard contract terms therefore seem to have to be drafted in the consumer's language – and in fact the whole contract seems to have to be drafted in French. Standard contract terms drafted in another language will be regarded as not understandable to a French consumer and therefore to be unfair.

In Germany, a similar question came up in a collective action case instigated by the *Verbraucherzentrale Bundesverband (vzbv)*, a consumer organisation, against WhatsApp. In Germany, WhatsApp operated a German language website through which consumers could register in order to use its messenger service. When registering, consumers had to agree to the terms of use and to the privacy policy, which were indicated by a hyperlink in German, but which were made

17 Case C-26/13 *Kásler* [2014] ECLI:EU:C:2014:282, para 73.

18 Case C-96/14 *Van Hove* [2015] ECLI:EU:C:2015:262, para 41.

19 Case C-26/13 *Kásler* [2014] ECLI:EU:C:2014:282, para 71; Case C-96/14 *Van Hove* [2015] ECLI:EU:C:2015:262, para 40.

20 Case C-537/13 *Šiba* [2015] ECLI:EU:C:2015:14, paras 33-34.

21 Case C-537/13 *Šiba* [2015] ECLI:EU:C:2015:14, paras 33-34.

22 Commission des clauses abusives. (2014). *Recommandation N°14-02, Contrats de fourniture de services de réseaux sociaux*, of 7 November 2014, under I (Lisibilité et rédaction du contrat) B (Langue des contrats), no. 2. The statement is the following:

'Considérant qu'un certain nombre de contrats de service de réseautage social sont rédigés en langue étrangère sans proposer de version française aux consommateurs; que les clauses stipulées dans de tels contrats ne sont pas compréhensibles pour l'utilisateur français; que ces clauses ne sont pas conformes au 1er alinéa de l'article L. 133-2 du code de la consommation qui dispose que « Les clauses des contrats proposés par les professionnels aux consommateurs ou aux non-professionnels doivent être présentées et rédigées de façon claire et compréhensible »; que ce procédé, en ne permettant pas un accès effectif au contenu du contrat, crée un déséquilibre significatif entre les droits et obligations des parties au contrat au détriment du consommateur ou du non-professionnel'.

The recommendation is available online at <http://www.clauses-abusives.fr/recommandation/contrats-de-fourniture-de-services-de-reseaux-sociaux-nouveau> (last visited on 1 March 2017).

23 *ibid.*, no. 3: 'Considérant que plusieurs contrats de service de réseautage social comportent une clause de traduction prévoyant la primauté de la version étrangère des conditions générales d'utilisation sur la version française en cas de conflit entre ces deux versions linguistiques; que de telles clauses ayant pour effet de rendre opposable au consommateur ou au non-professionnel un contrat dans une version qui n'est pas celle qu'il a acceptée créent un déséquilibre significatif entre les droits et obligations des parties au contrat au détriment du consommateur ou du non-professionnel'.

24 See Conseil d'Etat 16 January 2006, nos 274721–274722 (available online at <http://www.clauses-abusives.fr/wp-content/uploads/2016/05/ce060116.pdf>, last visited on 1 March 2017); see also Cass Civ 1re 13 November 1996, no 94-17369, *Bull civ* 1996 I, no 399, 279 (available online at <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007038253>, last visited on 1 March 2017). See also expressly Article R822-21 Code de la Consommation with regard to the situation where a court has asked for the Commission's advice in a specific case.

25 CMDs Pavillon, 'Private standards of fairness in European contract law' (2014) 10 *European Review of Contract Law* 98, 107 (with references to case law).

26 Tribunal de Grande Instance de Paris 31 January 2012, N° RG 09/08186 (available online at <http://www.clauses-abusives.fr/jurisprudence/contrat-de-transport-aerien-2>, last visited on 1 March 2017).

available only in English. According to the Court of Appeal in Berlin, a consumer needs not expect that she will agree to the incorporation of standard contract terms in another language, let alone to the incorporation of an extensive and complex set consisting of very many terms. The court argued that everyday English may be widespread in Germany, but this is not the case for the type of English used in legal texts, contracts and commercial documents. For that reason, the court stated, such contract terms are – irrespective of their content – to be seen as insufficiently transparent and therefore as unfair for all consumers apart from those which speak English as their mother tongue or are familiar with the technical meaning of the texts used.²⁷ In this case, the court therefore ruled that the use of the English instead of the German language constituted a breach of the transparency requirement, which led to the unfairness of all standard contract terms.²⁸

Whereas at first glance this appears to be similar to the position taken in France, the situation in Germany is, however, in fact rather different. In the WhatsApp-case, the contracting language was German – only the standard contract terms were drafted in English. Had the contracting language been English, it seems highly likely that the outcome would have been different. In Germany, the starting point is that standard contract terms should be provided in the contracting language; the use of a different language for the standard contract terms is allowed only if the party making use of such terms proves that she was entitled to expect that the other party was capable of understanding that language.²⁹ This is true also in the case of international commercial sales law, where it is accepted that standard contract terms are made available in another language than the contracting language only if the trader wishing to incorporate the standard contract terms in another language proves that the other party (or the employee negotiating the terms of the contract on behalf of that party) masters that other language. In other cases, the standard contract terms are not validly incorporated into the international commercial sales contract and can therefore not be relied on by the trader, irrespective of the content of the standard contract terms.³⁰ The breach of the transparency requirement in this respect thus translates into a failure to validly incorporate the standard terms.

In Germany, therefore, the question is rather in which language has the contract been concluded. If that language is the trader's, then by concluding the contract in that language the consumer gives the trader the impression that the consumer is sufficiently capable of understanding which obligations she takes upon herself – and the trader may rely on that.

At second glance, the differences between French and German law therefore seem to be striking. Under French law, French consumers are deemed not to be capable of concluding a contract in a foreign language. For that reason the whole contract, including the standard contract terms, must be provided in French. By contrast, German consumers that knowingly conclude a contract in another language must expect that the standard contract terms are also provided in that language. The German approach clearly better facilitates the potential conclusion of cross-border contracts as traders may offer to conclude contracts with consumers in their (the traders') own language without having to translate these terms to the mother language of the consumer contracting with them. The question rises, however, whether consumers in fact are sufficiently capable of understanding what they agree too. Is French law over-protective, or do consumers

actually understand less of the contract terms in a case where the contract is concluded in a foreign language?

V. Empirical evidence as to the language of the standard contract terms

In this section I will discuss whether empirical evidence regarding the process of online contracting can tell us anything as to whether the German or the French approach is to be preferred from the point of view of consumer protection. To that end, together with colleagues, I have conducted experiments for a study conducted on behalf of the European Commission.³¹ It should be noted, however, that we did not inquire as to the consumer's mother tongue. Instead, we have taken the language of the country where the consumer lived as a proxy for her mother tongue. This approach is in line with the approach taken in countries such as France, where the standard terms must be provided in the language of the country where the goods or services are marketed, irrespective of the question whether this is the consumer's native tongue.

Consumers typically do not read or even access standard contract terms, but simply accept the applicability of the standard terms to the contracts they conclude, irrespective of their content or of the language in which the terms are drafted. This phenomenon is confirmed in the recent study just mentioned. In this study, we developed online webstores. The purchasing scenarios indicated that the respondent had made a choice from the assortment (the purchase was the same for all respondents). On the website, respondents went through the steps of the ordering process. This part of the website functioned as in reality. That is, respondents were able to see an overview of the contents of their online 'shopping basket' and, next, completed a form with their personal information and preferences related to payment and delivery. Before placing their order, respondents were either directly provided with the standard contract terms (in the default exposure part) or had the option to click on a link to access the standard contract terms (in the free exposure part). Respondents had the option to cancel their order (e.g., if they did not agree with the standard contract terms). If they chose to cancel their order, they went back to the questionnaire and indicated why they had cancelled their order. Each webstore had two versions: a domestic and a foreign version. We varied whether the dynamic website that respondents saw was a domestic or a foreign online store. If respondents saw a domestic online store in one part of the study, they saw a foreign online store in a second part, and vice versa. The domestic webstore was in the dominant national language of

27 Kammergericht 8 April 2016, case 5 U 156/14, available at http://www.vzbv.de/sites/default/files/whatsapp_kg_berlin_urteil.pdf (last visited on 1 March 2017).

28 Since 25 August 2016, WhatsApp offers its German customers standard contract terms in German, see <https://www.whatsapp.com/legal/?l=de#-terms-of-service> (last visited on 8 March 2017).

29 Cf J Basedow, 'Comment 63 to § 305 BGB' in: *Münchener Kommentar zum BGB* (7th ed 2016); P Ulmer and M Habersack, 'Comment 101 to § 305 BGB' in: P Ulmer, HE Brandner and HD Hensen, *AGB-Recht* (11th ed, Verlag Otto Schmidt 2011); H Schmidt, 'Comment 14 to the Appendix to § 305 BGB' in: Ulmer/Brandner/Hensen 2011.

30 Cf U Schroeter, 'Comments 61-67 to Art 14 CISG' in: P Schlechtriem and I Schwenzer, *Kommentar zum Einheitlichen UN-Kaufrecht* (6th ed 2013); I Saenger, 'Comment 7 to Art 14 CISG' in: HG Bamberger and H Roth, *Beck'scher Online-Kommentar BGB* (39th ed, 2015).

31 M Elshout, M Elsen, J Leenheer, MBM Loos and JA Luzak *Study on consumers' attitudes towards Terms and Conditions (T&Cs)*. Final report 17 June 2016, submitted to the European Commission. This study is available on http://ec.europa.eu/consumers/consumer_evidence/behavioural_research/docs/terms_and_conditions_final_report_en.pdf (last visited on 1 March 2017). This report will be referred to as: Elshout/Elsen/Leenheer/Loos/Luzak (2016).

the Member State; the foreign online store was always in English (the UK site);³² for UK respondents the foreign online store was also in English, because there is no foreign language that is spoken by a majority of UK consumers. However, we indicated that the online store was Irish and displayed the currency in euros.³³ Where a respondent from one of the other Member States indicated that they did not speak English at all, they were shown the domestic online store only; they were not informed that they would not take part in a second experiment.³⁴

The first (online) experiment was conducted amongst 12,064 consumers in 12 EU Member States.³⁵ In this experiment we varied the length and complexity (but not the content) of the standard contract terms and forced consumers to scroll down through the standard contract terms before being able to conclude a contract. In this experiment, a total of 90.2 % of all consumers accepted the standard contract terms (9.8 % of consumers did not), varying from 86.5 % in Finland to 93.3 % in France. The percentages were similar irrespective of the length and complexity of the standard contract terms. Moreover, standard contract terms in the language of the foreign trader were accepted just as much as standard contract terms in the consumer's language.³⁶ Forced exposure to the standard contract terms did not lead to extensive reading thereof – even those consumers that stated that they had read and understood *all* the terms of the long and complex set of standard contract terms had taken little over 2 minutes to read 4 pages of complex legal text, which was not even double the time that consumers had spent on standard contract terms drafted in simple language and which were not longer than one page or even half a page.³⁷

We also tested whether consumers had actually read and understood the content of the standard contract terms. To this end, we put 4 questions regarding the content of the standard contract terms (on the basis of a statement which could be indicated as true or false) to them. The answer to three of these could only be found in the standard terms themselves: (1) the time needed for processing the order, (2) the duration of the cooling-off period, and (3) the applicable law. The answer to the fourth statement could also have been found in the FAQ-section of the website and pertained to whether or not delivery costs would be charged. 9,956 consumers participated in this part of the experiment. Not surprisingly, the last question was answered correctly by most consumers (68.8 %). The second question was also answered correctly by a majority of the consumers (59.0 %), but questions 1 and 3 only by 38.1 % and 36.8 %.³⁸

Since the answer to the last statement (delivery costs) could also have been found outside the standard contract terms, we excluded this statement from further analysis. We then found that comprehension scores on *foreign* online stores were in fact higher than the comprehension scores on domestic online stores. This implies that, surprisingly, consumers had better understood the content of the standard contract terms that were presented in English than the ones that were presented in their own language. Moreover, these differences could not be explained by the fact that the standard contract terms of the foreign webstores were read more often or that more time was spent on reading them – when we controlled for these effects, the differences remained the same. The effects could also not be explained by the complexity of the wording used, as the standard contract terms that were drafted in a foreign language were perceived to be more complicated than the terms that were drafted in the consumer's mother tongue – as could be expected.³⁹

In a second experiment, respondents were given the possibility to access the standard terms but were not forced to do so. From this experiment we excluded respondents that had indicated that they do not speak English; for this reason, this experiment was conducted among 9,833 consumers.⁴⁰

In this experiment, we offered some respondents a reading cue, indicating how long it would take them to read the standard contract terms; others were offered a quality cue consisting of an endorsement of a national consumer organization (for a domestic website) or a European consumer organization (for a foreign website); yet other respondent were not offered any cue. In this experiment, we found that 95.1 % of all respondents accepted the trader's standard contract terms where we had not added a reading cue or a quality cue. With a reading cue or a national consumer organization's endorsement, the acceptance rate even went up to 96.3 % and 95.7 % of all consumers. Moreover, the acceptance rate was high throughout the countries included in the study, ranging from 91.9 % (Poland) to 98.2 % (UK).⁴¹ The high acceptance rate does not mean that consumers agreed to the substance of the terms – that would require them to have read the terms. However, only 9.4 % of consumers accessed the standard terms where no reading or quality cues were offered. Adding a reading cue, such as 'it will take you 5 minutes to read these terms', led to a significant increase in the number of consumers accessing the standard terms, but even then only 19.8 % of consumers accessed the terms.⁴² Moreover, the 12 % of consumers that *did* access the terms spent little time on actually reading them: the average time spent on reading the terms varied from 24.7 seconds when no additional measures were taken, to 37.5 seconds when a reading cue was presented.⁴³

What can we learn from these two experiments with regard to the language of standard contract terms? Together, the two experiments show that most consumers will accept standard contract terms without having read them or after having read them only casually, irrespective of the tongue in which these terms are drafted and irrespective of the length and complexity of the language used. Moreover, even though consumers

32 The reason for this was that this is the best spoken or most studied foreign language in the selected Member States, see Eurostat, Statistics Explained, Foreign Language Learning Statistics, January 2016, available at http://ec.europa.eu/eurostat/statistics-explained/index.php/Foreign_language_learning_statistics (last visited 8 March 2017).

33 Elshout/Elsen/Leenheer/Loos/Luzak (2016) 115-118. In all analyses, the UK was analysed separately. The reason for this is that the domestic/foreign dimension was different in this country than for all other countries as UK respondents were only confronted with webstores and standard contract terms in English; see Elshout/Elsen/Leenheer/Loos/Luzak (2016) 69.

34 Elshout/Elsen/Leenheer/Loos/Luzak (2016) 119.

35 Financial constraints prevented that respondents from all Member States were included in the study. Based on the aim of including a wide variety of countries with respect to region, country size, and GDP/capita, the study was conducted in the following Member States: Estonia, Finland, France, Germany, Italy, the Netherlands, Poland, Romania, Slovenia, Spain, Sweden, and the United Kingdom. In total 12,064 respondents were included in the study. The samples are nationally representative in each surveyed Member State. In each country, approximately 1,000 respondents participated in the study. The survey took approximately 15 minutes to complete. See Elshout/Elsen/Leenheer/Loos/Luzak (2016) 115-116.

36 Elshout/Elsen/Leenheer/Loos/Luzak (2016) 81-82.

37 Elshout/Elsen/Leenheer/Loos/Luzak (2016) 81.

38 Elshout/Elsen/Leenheer/Loos/Luzak (2016) 74-75.

39 Elshout/Elsen/Leenheer/Loos/Luzak (2016) 75.

40 Elshout/Elsen/Leenheer/Loos/Luzak (2016) 85, 119.

41 Elshout/Elsen/Leenheer/Loos/Luzak (2016) 89-90.

42 Elshout/Elsen/Leenheer/Loos/Luzak (2016) 88. Adding a quality cue hardly had any effect in this respect.

43 Elshout/Elsen/Leenheer/Loos/Luzak (2016) 89.

will most likely find it more strenuous to be confronted with standard contract terms that are drafted in another language than the consumer's mother tongue, this does not necessarily mean that consumers would also understand these terms less well.

VI. Concluding remarks

The transparency requirement has (at least) three aspects. First, information that is to be provided to consumers should be presented in such a way that the consumer could not have missed it before (or when) concluding the contract. Secondly, that information should be worded in such a way that the consumer may understand what information is being conveyed to her. And thirdly, the information should be provided in a language that the consumer masters.

The third aspect is of course of paramount importance when it comes to cross-border contracting. However, European consumer law hardly deals with this matter, largely leaving it up to the contracting parties – effectively: to the trader – to determine in which language information is to be provided to the consumer. With regard to standard contract terms, the boundary is set by Article 5 Unfair Contract Terms Directive, which requires standard contract terms to be drafted in plain and intelligible language – which can be seen as an exponent of the second aspect of transparency. As such, this does not tell us much as to the language standard terms in which the standard contract terms are to be drafted.

In practice, legal systems differ in this respect: where some Member States (e.g. Germany) allow the use of a foreign language when the contract is concluded in that language, other Member States (e.g. France) require all contracts that are concluded with the people living within their territory to be drafted in that Member State's language(s). It seems clear that from the perspective of the internal market, the former approach makes it both easier and cheaper for traders to conclude contracts cross-border than the latter approach. The question then arises whether the perspective of consumer protection could justify that standard contract terms nevertheless should be drafted in the consumer's mother tongue. The study reported in section 5 of this paper shows that most consumers will accept standard contract terms without having read them or after having read them only casually, irrespective of the tongue in which these terms are drafted or the length or complexity of the terms. Moreover, even though consumers will find it more strenuous to be confronted with standard contract terms that are drafted in another language than the consumer's mother tongue, this does not necessarily mean that consumers would also understand these terms less well. That, in turn, suggests that a language requirement forcing traders to provide the standard contract terms in the consumer's mother tongue even if the contract itself was concluded in another language, is overly protective for consumers – and overly restrictive for traders. One could therefore be tempted to argue that imposing a language requirement

regarding the standard contract terms overly protects consumers. Moreover, requiring traders to provide their standard terms in the consumer's mother tongue may impose translation costs upon these traders. Such a requirement would then lead to a hindrance for the proper function of the internal market that could not be justified on the basis of consumer protection. In this respect an amendment of the Unfair Terms Directive banning such a requirement would seem justifiable.

However, this conclusion should be nuanced. First, the experiments only pertained to online transactions. Second, as statistically an insufficient number of UK customers master a second language, for UK respondents the 'foreign' webstore was Irish, and the standard contract terms for that foreign webstore was in English. Third, respondents from one of the other Member States that had indicated that they did not speak English at all were excluded from the second experiment. This led to the fact that of the 12,064 respondents that took part in the first experiment, only 9,833 (81.5%) could take part in the second experiment. This shows that a considerable amount of consumers do not sufficiently master a second language to conclude a contract in that language.

Therefore, instead of banning a language requirement altogether, the European legislator could consider explicitly regulating the German approach presented in this paper – in particular if the European legislator at some point would replace the Unfair Contract Terms Directive by a full harmonization directive. In this approach, consumers themselves determine whether they feel confident enough to conclude a (cross-border) contract in another language. If they do so, they indicate that they sufficiently master that language, and the trader may rely thereupon. That would mean that the trader may provide the standard contract terms in the contracting language, which would save her from having to make translation costs. If, on the other hand, the trader approaches the consumer in her mother tongue, the consumer may rely on the standard contract terms to be provided in that language as well. As effectively it is the trader that determines the contracting language, it would stand to reason that it is also the trader that bears the burden of proof that the contracting process took place in her language instead of the consumer's. In this way, ultimately the parties together are responsible for meeting the third aspect of transparency with regard to the standard contract terms. A similar approach could then be taken regarding other information requirements, such as the information that must be provided to the consumer on the basis of, for instance, the Consumer Rights Directive.⁴⁴ Such a unitary approach therefore could contribute to a fair distribution of the benefits and costs of cross-border contracting. ■

44 Article 6(6) Consumer Rights Directive 2011 currently allows Member States to introduce or maintain language requirements regarding the conclusion of off-premises and distance contracts.