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Loos, M.B.M.

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Marco B. M. Loos\*

## Standard terms for the use of the Apple App Store and the Google Play Store

### I. Introduction

Platform service providers (hereinafter also: PSPs) offer many different services. One of these is the supply of apps, music files and other forms of digital content produced and sold by app developers to consumers. In this paper I will focus on the legal relation between the platform and the consumer obtaining an app via the platform. The starting assumption is that this relation is not a sales contract<sup>1</sup> but a contract for services – which is largely unregulated at European level. In this paper I will analyse whether such platform service providers comply with existing EU legislation regarding standard terms. In this paper I will only discuss the practices of Apple offering apps through its App Store and Google offering apps via Google Play Store, as these platforms are by far the largest platforms that offer such third party digital content.<sup>2</sup>

I will first indicate (section 2) why the relation between the PSP and a consumer may be qualified as a contract, even where the consumer does not pay the platform or the app developer in money for its services. In section 3, I will discuss whether the terms and conditions used by a trader (hereinafter also: T&Cs) are incorporated into the contract in accordance with European legislation. Given the limited space available for this paper, in section 4 and 5 I will test only two types of clauses included in the T&Cs of the Apple App Store and the Google Play Store: clauses relating to the exclusion and limitation of liability (section 4) and clauses relating to international jurisdiction and choice of law (section 5). Section 6 will draw some conclusions.

### II. The contractual and commercial nature of the relation between PSP and consumer

Several European directives apply only when there is a contractual relation between a trader and a consumer. That PSPs are traders, is not likely to be controversial given the broad definition of the notion of a trader in, for instance, the Consumer Rights Directive (CRD) and the Unfair Commercial Practices Directive (UCPD), referring to any natural person or any legal person acting for purposes relating to their trade, business, craft or profession.<sup>3</sup> The Unfair Contract Terms Directive (UCTD) makes use of the notion of ‘seller or supplier’,<sup>4</sup> which however is defined in similar terms as the notion of trader in the CRD and the UCPD.

More problematic is whether these Directives also apply to services rendered without the consumer having to pay for these services in money. In order to ascertain this, I will first focus on the relation between the app developer and the consumer. Whether the UCPD is applicable to that relation

depends on whether the provision of such ‘free’ apps may be seen as a *commercial* practice, as is required by Article 2 under (d) UCPD. A commercial practice is defined as ‘any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers’, but neither the notion of ‘sale’ nor that of ‘supply’ is defined in the Directive. In the UCPD Guidance Document, the European Commission suggests a rather broad interpretation of ‘commercial transaction’: where there is no link at all with the sale or supply of goods or services the transaction is outside the scope of the Directive. However, where there is an *indirect* link, this is different. The Commission gives the example of a trader’s offer to a consumer for a free security survey of the consu-

\* Prof. Dr. M. B. M. Loos is Professor of Private Law, in particular of European consumer law, at the Centre for the Study of European Contract Law of the University of Amsterdam in the Netherlands and a member of the Board of the Ius Commune Research School. This paper is based on a presentation given during a conference on Platform Services in the Digital Single Market, organized by the University of Osnabrück on 19-20 November 2015. It builds on M. B. M. Loos & J. A. Luzak, ‘Wanted: A bigger stick. On unfair terms in consumer contracts with online service providers’, *Journal of Consumer Policy*, available online via open access since 20 October 2015 (DOI: 10.1007/s10603-015-9303-7, available also via SSRN and ResearchGate), in which paper the standard terms of Dropbox, Twitter, Facebook, and Google were analysed. This paper is referred to hereinafter as: Loos/Luzak 2015 (DOI version).

- 1 The sales contract is assumed to have been concluded between the digital content developer and the consumer, even if on some platforms, or for some digital content, the sales contract in fact is concluded directly between the platform and the consumer.
- 2 Statista indicates that in July 2015, Apple’s App Store contained 1.5 million fee-based apps and that in total 100 billion downloads were registered. Google’s Play Store then contained 1.6 million fee-based apps and 50 billion downloads. Numbers 3 and 4, Amazon Appstore and Windows Store, were said to offer 400,000 and 340,000 fee-based apps. See Statista, Statistics and facts about App Stores, available at <[www.statista.com/topics/1729/app-stores](http://www.statista.com/topics/1729/app-stores)> (last visited on 6 January 2016), and Statista, ‘Number of apps available in leading app stores as of July 2015’, available at <[www.statista.com/statistics/276623/number-of-apps-available-in-leading-app-stores](http://www.statista.com/statistics/276623/number-of-apps-available-in-leading-app-stores)> (last visited on 6 January 2016). The dominance of Google and Apple is to some extent related to the dominance of the operating systems Android (Google) and iOS (Apple) for smartphones and tablets. Netmarketshare indicates that in December 2015, 57.3% of smartphones and tablets sold worldwide make us of Android and 35.4% of iOS; for all other operating systems the combined market share is 7.3%, see Netmarketshare, ‘Mobile/ Tablet Operating System Market Share, December 2015’, available at <[www.netmarketshare.com/operating-system-market-share.aspx?qprid=8&qpcustomid=1](http://www.netmarketshare.com/operating-system-market-share.aspx?qprid=8&qpcustomid=1)> (last visited on 6 January 2016).
- 3 See Article 2 under (2) Consumer Rights Directive (Directive 2011/83/EU, OJ 2011, L 304/64) and Article 2 under (b) Unfair Commercial Practices Directive (Directive 2005/29/EC, OJ 2005, L149/22).
- 4 See Article 2 under (c) Unfair Contract Terms Directive (Council Directive 93/13/EEC, OJ 1993, L 95/29).

mer's home, the sole purpose of which is to allow the trader to persuade the consumer to buy an alarm system.<sup>5</sup> The survey therefore does have a commercial purpose. This suggests that where apps are provided without a charge in money but where the consumer's personal data is gathered for commercial purposes, the supply of the apps by the app developer to the consumer is covered by the UCPD.

A similar problem exists with regard to the applicability of the UCTD and the CRD to 'free' apps. Article 2 UCTD requires that the terms are contractual. The reference to *contractual* terms implies that the Directive can only apply if a contract has been concluded between an online seller or supplier and a consumer. Similarly, Article 2 CRD requires a contractual relation between the trader and the consumer. Neither Directive indicates what a contract is. This implies that this notion must be interpreted autonomously in accordance with the common principles of the Member States' private law systems. It is ultimately up to the Court of Justice to determine, for instance, whether the absence of any counter-performance from the part of the consumer, however small, stands in the way of the conclusion that a contract is concluded within the meaning of these Directives. However, in most cases apps are not offered for free, but rather include hidden charges:<sup>6</sup> instead of monetary payment, consumers pay with their personal data, which is collected either explicitly through registration forms, tacitly through sharing personal information on social network sites, or secretly via cookies.<sup>7</sup> Therefore, where apps are provided in exchange for such consideration, the relation between the party offering the app and the consumer is a contractual one. The recent proposal for a Directive on certain aspects concerning contracts for the supply of digital content<sup>8</sup> offers further support for this as such contracts are explicitly covered within the scope of that proposal.<sup>9</sup>

It follows, therefore, that the UCPD, the UCTD and the CRD all apply to the relation between the app developer and the trader. The subsequent question is whether the same is true for the relation between the PSP and the consumer. The answer is clearly affirmative. First, when a consumer wishes to make a purchase from the Google Play Store or Apple's App Store she must create a user account. In doing so, she must accept Google's or Apple's T&Cs, which include – amongst many other things clauses on liability, jurisdiction and choice-of-law. In other words, the T&Cs intend to regulate the relations between the consumer and Google or Apple and establish rights and obligations for the parties. This procedure applies irrespective of whether the app is offered for free or against a price in money. This implies that the consumer must conclude a contract with the PSP in order to be able to conclude a subsequent contract with the app developer. That implies that the UCTD and the CRD apply to a contract between a PSP and the consumer. Furthermore, since the relation with the PSP is a prerequisite for the conclusion of the contract with the app developer through the platform – and in many cases also the *only* possibility to obtain the app – the creation of the account is clearly linked to the subsequent conclusion of the contract with the app developer, which implies that the services of the PSP also fall within the scope of the UCPD.

In addition, other European Directives may apply as well to the relation between PSP and consumer, in particular the E-Commerce Directive<sup>10</sup> and the Services Directive.<sup>11</sup> These latter two Directives have a clear impact on the incorporation of the T&Cs of PSPs.

### III. Incorporation of Terms and Conditions (T&Cs)

#### 1. Incorporation of T&Cs under European Union law

Whether or not the supply of an app may be seen as a service within the scope of the Services Directive is unclear.<sup>12</sup> However, it is uncontested that the services of a PSP who merely facilitates the conclusion of a contract between the app developer and a consumer are governed by the Services Directive. Article 22 paragraph 1 under (f) and paragraph (4) of that Directive require the service provider to supply the contract terms 'in good time before conclusion of the contract or, where there is no written contract, before the service is provided'. The Directive does, however, not indicate whether contracts concluded by using a computer, tablet or smartphone are considered to have been concluded in writing. The E-Commerce Directive does not much help in this respect, as Article 10 paragraph 3 of that Directive merely requires traders to provide the T&Cs in such a way that allows the recipient to access, store and reproduce the terms without indicating when. In its case-law pertaining to unfair terms, the Court of Justice emphasised that consumers must be given a possibility to become acquainted with the T&Cs before the conclusion of the contract so they may base their decision whether or not to contract under the conditions set out in the T&Cs after having been able to read them.<sup>13</sup> This suggests that at least in consumer contracts the trader must always make the T&Cs available before the contract is concluded.

In the case of online contracting, the incorporation of T&Cs takes place through either click-wrapping or browse-wrapping. In case of *click-wrapping*, two different methods are applied. The first method requires the consumer to expressly accept the trader's T&Cs by clicking the relevant box or on a button before being able to establish an account or to purchase an app.<sup>14</sup> If that operation leads to the opening of a

5 European Commission, *Commission Staff Working Document, Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices*, p. 23.

6 C.J. Hoofnagle, J. Whittington, 'Free: Accounting for the costs of the internet's most popular price', 61 *UCLA Law Review* 606 (2014), pp. 608-612.

7 S. Bradshaw, Ch. Millard, I. Walden, 'Contracts for clouds: comparison and analysis of the Terms and Conditions of cloud computing services', *International Journal of Law and Information Technology* 19 (2011), p. 196; M. B. M. Loos, N. Helberger, L. Guibault, C. Mak, 'The regulation of digital content contracts in the optional instrument of contract law', *European Review of Private Law* 2011/6, pp. 750, 756-757; N. Helberger, L. Guibault, M. B. M. Loos, C. Mak, L. Pessers, B. van der Sloot, *Digital Consumers and the Law, Towards a Cohesive European Framework*, Alphen aan den Rijn: Kluwer Law International, 2013, pp. 162 ff; E. Wauters, E. Lievens, P. Valcke, 'Towards a better protection of social media users: a legal perspective on the terms of use of social networking sites', *International Journal of Law and Information Technology* 2014, pp. 10-11; Loos/Luzak 2015, (DOI version), p. 5.

8 COM(2015) 634 final.

9 See Article 3 paragraph 1 of the proposal.

10 Directive 2000/31/EC, OJ 2000, L 178/1.

11 Directive 2006/123/EC, OJ 2006, L 376/36.

12 The notion of 'services' is not defined in the Directive itself but (as follows from recital (1) of the preamble to the Directive) is deemed to mean the same as the – also undefined – notion of services under Articles 56 ff of the Treaty on the Functioning of the European Union. Typically, the notions of 'services' and 'goods' are communicating vessels in the sense that these qualifications are mutually exclusive and complement one another. There is, however, substantial uncertainty in the Member States as to the classification of digital content contracts as either contracts for the provision of goods or as contracts for the supply of goods, see Loos/Helberger/Guibault/Mak 2011, p. 732.

13 See for instance CJEU 21 March 2013, case C-92/11, ECLI:EU:C:2013:180 (RWE), point 44; CJEU 30 April 2014, case C-26/13, ECLI:EU:C:2014:282 (Kásler and Káslerné Rábai/OTP Jelzálogbank Zrt), point 70.

14 See also Chr. Riefa, *Consumer protection and online auction platforms. Towards a safer legal framework*, Farnham/Hurlington: Ashgate, 2015, p. 128.

document containing the T&Cs or if a hyperlink is provided that directly leads to such a document, and the document may subsequently be printed or saved by the consumer, then the fact that the consumer clicks on the box indicating her consent to the applicability of the T&Cs leads to their incorporation into the contract.<sup>15</sup> This method is certainly in line with both the Services Directive and the E-Commerce Directive.<sup>16</sup>

The second method of click-wrapping does not require the consumer to consent to the use of the T&Cs when the account is established or the app is purchased, but only when the consumer wishes to access (use) her account or the already purchased app. In this case the acceptance of the T&Cs takes place after the contract has been concluded and therefore would have to be interpreted as the acceptance of the consumer of an offer made by the PSP to amend the already concluded contract. However, since the consumer does not have a choice but to ‘accept’ the applicability of the T&Cs in order to be able to use the account or the app which she had already purchased and paid for, the mere clicking on the acceptance button or box, in my opinion, cannot be interpreted as having any legal relevance. Any other view would imply that the PSP would in effect be able to retroactively change the terms of the contract, which would undermine the consumer’s interest in being able to ascertain her rights and obligations under the contract before the contract is concluded. That interest was deemed to be of fundamental importance by the Court of Justice within the sphere of the UCTD.<sup>17</sup> This suggests that this second form of click-wrapping is not acceptable under European Union law.

Where the incorporation of T&Cs takes place through *browse-wrapping*, the terms and conditions are merely made accessible via a hyperlink on the website of the trader.<sup>18</sup> Contrary to the click-wrapping method the consumer does not have the possibility to actively ‘agree’ to the incorporation of the terms and conditions by actively clicking on a button or ticking a box. Instead, the consumer is deemed to assent to the terms and conditions by merely using the website when ordering the app.<sup>19</sup> It could be argued that such process may lead to a valid incorporation of the T&Cs if the consumer’s attention is expressly drawn to the reference to the T&Cs and that reference is combined with a hyperlink that directly leads to the T&Cs themselves without the consumer having to click any further, and the consumer is subsequently able to save or print the T&Cs for future reading. However, in my view the consumer cannot be expected to actively search for the T&Cs by clicking on various hyperlinks which are not clearly identifiable among other links on the website, are in a small font and do not by their name point to their significance, or only lead to the T&Cs after several subsequent clicks.<sup>20</sup>

## 2. Incorporation of Apple’s and Google’s T&Cs

Before being able to order from the App Store or from Google Play Store, the consumer must have an account with Apple or Google. Such accounts are usually created when the consumer buys an Apple computer or uses one of Google’s ‘free of charge’-services. At that time, T&Cs have to be accepted that may govern all future services and purchases. As such, it seems that the T&Cs are incorporated validly with regard to the platform services that Apple and Google offer, provided that the consumer is given an opportunity to download and save or print the terms.

It is unclear whether the acceptance of the T&Cs at that moment can lead to a valid incorporation into a contract that is concluded later, e.g. when an individual app is purchased through the platform. European Union law does not seem to stand in the way thereof – the matter is not dealt with explicitly –, but national contract law may. If national law does not allow for the incorporation of the T&Cs also in future contracts, then the traders must ensure that they are incorporated separately when these future contracts are concluded. In this respect, both Apple’s App Store and Google’s Play Store would fall short as they do not explicitly refer to the terms and conditions they use and do not require the consumer’s explicit consent. Moreover, in particular in the case of Apple’s App Store, the consumer will have difficulty in finding the T&Cs. At the very bottom of the landing page among many other links a link listed as ‘Legal’ is provided. That link leads to a page where a link is available to the policies and terms that govern Apple’s relations with its customers. On that page the consumer may click on a link to the conditions for purchases in, for instance, the App Store. Before being able to read the T&Cs, she must click on an icon representing the continent on which she lives, and then on the flag of her country. Only then the T&Cs are presented in the language of that country. That means that the consumer must click 5 times before being able to read the T&Cs. Google offers a more direct link: at the bottom of the landing site of the Google Play Store, a direct link to the relevant T&Cs is provided in the language chosen by the consumer when setting up her account. The introductory Article of these T&Cs provide that these T&Cs apply as additional terms next to the Google Terms of Service, which are made accessible through a hyperlink leading directly to those T&Cs.

<sup>15</sup> See CJEU 21 May 2015, case C-322/14, ECLI:EU:C:2015:334 (El Majdoub), points 21, 33-34, and 39.

<sup>16</sup> It should be noted that it may not be sufficient to act in this manner with regard to information contained in T&Cs that must be provided under the CRD: in CJEU 5 July 2012, case C-49/11, ECLI:EU:C:2012:419 (Content Services) – pertaining to the CRD’s predecessor, the Distance Selling Directive (Directive 97/7/EC, OJ 1997, L 144 /19) – the Court made clear that a general website cannot be classified as a durable medium through which an online service provider could fulfil its notification duties to consumers under that Directive. However, Article 8 CRD is worded in a slightly different manner that could be interpreted in such a way that the online service provider no longer needs to actively provide the information to the consumer, but is allowed to merely make that information available to her.

<sup>17</sup> See for instance CJEU 21 March 2013, case C-92/11, ECLI:EU:C:2013:180 (RWE), point 44; CJEU 30 April 2014, case C-26/13, ECLI:EU:C:2014:282 (Kásler and Káslerné Rábai/OTP Jelzálogbank Zrt), point 70.

<sup>18</sup> See also Riefa 2015, p. 129.

<sup>19</sup> Loos/Helberger/Guibault/Mak 2011, p. 735-736; N. Helberger, M. B. M. Loos, L. Guibault, C. Mak, L. Pessers, ‘Digital content contracts for consumers, *Journal of Consumer Policy* (36) 2013/1, p. 39; M. Kretschmer, E. Derclaye et al., *The relationship between copyright and contracts*, Research commissioned by the Strategic Advisory Board for Intellectual Property Policy, London (UK), July 2010, 2010/04, p. 93, available online at <webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipresearch-relation-201007.pdf> (last visited 7 January 2016).

<sup>20</sup> Whether the use of browse-wrapping leads to a valid incorporation of the T&Cs into the contract is in fact debated in many Member States, see M. B. M. Loos, N. Helberger, L. Guibault, C. Mak, L. Pessers, K. J. Cseres, B. van der Sloot, R. Tigner, *Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts*, FINAL REPORT: Comparative analysis, Law & Economics analysis, assessment and development of recommendations for possible future rules on digital content contracts, report for the European Commission, 2011, p. 66, available at <ec.europa.eu/justice/consumer-marketing/files/legal\_report\_final\_30\_august\_2011.pdf> (last visited 7 January 2016) and <csecl.uva.nl/research/projects/consumer-protection-in-relation-to-digital-content-contracts.html> (last visited 7 January 2016).

## IV. Limitation and exclusion of liability by PSPs

### 1. Limitation and exclusion clauses under European Union law

Online service providers may have valid reasons for limiting their liability against consumers. Often, online services are delivered to consumers free of charge and the provider itself is a small business that could not withhold being sued to cover potentially extensive consumers' losses. Therefore, under certain circumstances clauses limiting or excluding online service providers' liability could be justified. In this respect it is not surprising that clauses limiting or excluding liability are not unfair *per se* under European Union law.

Still, a full exclusion or broad limitation of liability, regardless of what caused the damage, regardless whether the damage was caused intentionally or through gross negligent behavior, and regardless of the type of damage sustained, will often be seen as unjustified, significantly distorting the balance between the parties' rights and obligations and, therefore, unfair under Article 3 paragraph 1 UCTD. In this respect the Annex to the Directive is relevant. Article 3 paragraph 3 UCTD refers to the Annex, which is said to contain an indicative and non-exhaustive list of terms which may be regarded as unfair. Even though the mere fact that a term is listed on this list does not, by itself, mean that the term is always unfair, in *Invitel* the Court clarified that it is, nevertheless, an essential element on which the competent court may base its assessment as to the unfair nature of that term.<sup>21</sup> In fact, in *Invitel*, *RWE* and *Kásler* the Court indicated that the national court must take the provisions of the list into account when assessing whether a contractual term is unfair.<sup>22</sup> The Court of Justice had done that itself when it assessed, in *Océano*, whether a jurisdiction clause was unfair.<sup>23</sup>

The Annex contains two clauses that are relevant with regard to limitation and exclusion of liability. Annex I, paragraph 1 under (a) Unfair Contract Terms Directive mentions as potentially unfair a clause '*excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier*' and paragraph 1 under (b) a clause '*inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations (...)*'.

Whereas it may be hard to imagine a situation where an act of a PSP may lead to the death of or personal injury of a consumer, it is easier to foresee a failure of a PSP to properly perform its services. The question is then whether and under which circumstances the exclusion or limitation of liability may be 'inappropriate'.

What seems to be typical for online service providers, including PSPs, is to include a clause in their standard terms and conditions that states that services are provided '*as is*'. The purpose of this clause is to exclude the liability of online service providers for any disturbance in the service's availability or reliability and to ascertain that the PSP gives no guarantees with regards to the provision of its services. It may depend on the applicable national law whether such a clause would be considered or presumed unfair. It seems clear, however, that there will be circumstances, in which the service may not be available to the consumer due to a fault or negligence of the PSP. It may be questioned whether a clause

limiting or excluding liability also under such conditions could withstand the unfairness test.

### 2. Limitation and exclusion clauses in Apple's and Google's T&Cs

Part C of Apple's extensive set of terms and conditions – Apple's Terms and Conditions for all available stores consist of 40 pages (Times New Roman, font 12, single line spacing) – applies to, among other services, the App Store. Under the heading 'Disclaimer of warranties; liability limitations', after first promising that Apple will exercise reasonable care and skill in providing the App Store, Apple largely excludes any kind of liability – the list of limitations and exemptions take almost a full page printed in Times New Roman 12. For instance, Apple does not warrant that the consumer may use the platform uninterrupted or error-free, and provides that it does not warrant that the platform 'will be free from loss, corruption, attack, viruses, interference, hacking, or other security intrusion which shall be events of Force Majeure, and iTunes disclaims any liability relating thereto.' Apple does accept liability, however, in cases of fraud, gross negligence, or wilful misconduct by Apple, or where Apple has caused the consumer's death or personal injury to the consumer.

The Google Play Store does not include a term on liability. However, the Google Terms of Service, which apply also to the services provided by the platform,<sup>24</sup> do contain limitation and exemption clauses, albeit much shorter than Apple's. Like Apple, Google first warrants that it will provide its services with reasonable care and skill, but 'as is'. In so far as allowed by law, all warranties are excluded and all 'indirect' losses are excluded from compensation. Moreover, to the extent permitted by law, the liability of Google, and its suppliers and distributors, is limited to the *amount* paid to Google to use the platform services – which seems to imply that liability is limited to cases where a payment in money is made and excluded in all other cases, unless the law forbids such exemptions. However, Google explicitly acknowledges that it respects consumer legislation and that the T&Cs do not limit mandatory consumer legal rights.<sup>25</sup>

From the summarized description of the exemption clauses it follows that both Apple and Google try to limit their possible liability for damage caused by their services as far as possible. Apple accepts liability in case it caused damage intentionally or through grossly negligent conduct, but not where its actions were 'merely' negligent. Google, on the other hand, states that it will respect mandatory consumer law but otherwise basically excludes all liability – if only by limiting liability to compensation of the price paid to Google in money. Unfortunately, it is difficult to predict how Member State courts will react to these far-reaching limitation and exclusion clauses, as there is no European standard as to what constitutes an *inappropriate* limitation of consumers' rights in case of non-performance.<sup>26</sup> Therefore, it will be necessary

21 CJEU 26 April 2012, case C-472/10, ECLI:EU:C:2012:242 (*Invitel*), point 26.

22 CJEU 26 April 2012, case C-472/10, ECLI:EU:C:2012:242 (*Invitel*), point 26; CJEU 21 March 2013, case C-92/11, ECLI:EU:C:2013:180 (*RWE*), points 46, 49 and 52; CJEU 30 April 2014, case C-26/13, ECLI:EU:C:2014:282 (*Kásler and Káslerné Rábai/OTP Jelzálogbank Zrt*), point 73.

23 CJEU 27 June 2000, C-240/98 u/i C-244/98, ECLI:EU:C:2000:346 (*Océano*), point 22.

24 See above, section III. 2. *in fine*.

25 See for similar techniques used by other PSPs – first excluding as much liability as possible, then acknowledging that some limitations may not be valid and then do not apply – also Riefa 2015, p. 134.

26 Bradshaw/Millard/Walden 2011, p. 210-213.

to carefully consider the unfairness of exemption clauses or of clauses limiting particular liability under each given national law. However, in my view, both Apple and Google take a substantive risk in limiting liability to the extent that they do, as the combination of limitations may lead a national court to find that the balance of rights and obligations is significantly disturbed even if the separate clauses themselves could stand the test.

## V. International jurisdiction and choice-of-law clauses in contracts with PSPs

### 1. Jurisdiction and choice-of-law clauses under European Union law

Jurisdiction and choice-of-law clauses in consumer contracts have a limited value only. In a recent paper, Luzak and I argued that, on the basis of Articles 17-19 of the Brussels I-Regulation (recast),<sup>27</sup> whenever the trader has directed its commercial activities (also) to the consumer's country and the contract falls within the scope of these commercial activities, consumers can only be sued in their home-state court, whereas they may choose to sue the trader in their own country or in the country of the trader. Moreover, as the parties may derogate from these provisions only once a dispute has arisen, a derogation of the international jurisdiction rules of the Brussels I-Regulation in standard terms is contrary to the law.<sup>28</sup>

Similarly, the Rome I-Regulation<sup>29</sup> sets limitations to choice-of-law clauses. A choice-of-law clause in standard terms may be valid if the T&Cs were validly incorporated into the contract. Moreover, under Article 6 of the Regulation, the choice of law may not deprive a consumer from the mandatory protection of the otherwise applicable law, which would be the law of his country of residence if the trader has directed its commercial activities (also) to the consumer's country and the contract falls within the scope of these commercial activities.<sup>30</sup>

### 2. Jurisdiction and choice-of-law clauses in Apple's and Google's T&Cs

Apple's T&Cs do not contain a provision on international jurisdiction. However, the terms and conditions do provide that the App Store is available to the UK consumer only when they are in the UK, and the UK consumer must agree not to use or attempt to use the App Store from elsewhere. Similarly, Dutch consumers may only use the App Store in The Netherlands, and German consumers in Germany. Moreover, the T&Cs contain corresponding choice-of-law clauses opting for English, Dutch or German law. Clearly, the personal information as to the consumer's country of residence provided by her when first establishing an account with the App Store result in international jurisdiction and choice-of-law clauses leading to the jurisdiction of the consumer's home court and the applicability of the consumer's law. This implies that Apple acts in accordance with the applicable provisions of the Brussels I- and Rome I-Regulations.

Google's approach is rather different. The T&Cs of the Google Play Store remain silent on the matters of international jurisdiction and choice of law, but the Google Terms of Service, which apply in addition to the Google Play Store T&Cs, do contain such terms. They include an international jurisdiction clause leading to competence for Californian courts and to the applicability of Californian law. However, where national law does not allow for such jurisdiction or choice-of-law clauses, Google accepts international jurisdic-

tion of the consumer's court and the applicability of the consumer's law. As Luzak and I have previously argued, Google's standard terms as such do not infringe European rules on private international law, but they are difficult to understand for an ordinary consumer – or even for the more knowledgeable 'average consumer' and as such lack transparency. This could lead a consumer to believe, for instance, that her national court is not competent to deal with a claim and for that reason to abstain from pursuing her claim. As a consequence, the clause could effectively prevent the consumer from enforcing her legal rights after all. For that reason, a national court could find these clauses to be unfair after all.<sup>31</sup>

## VI. Concluding remarks

In section 2, I argued that European consumer law legislation – in particular the Unfair Commercial Practices Directive, the Unfair Contract Terms Directive and the Consumer Rights Directive – applies also to the services of a PSP that merely offers a platform for consumers to purchase apps from an app developer. This is true not only when the PSP renders its services towards the consumer in exchange for a price, but also when these services are rendered 'free of charge'. In addition, the relationship between PSP and consumer may be governed by other European legislation, such as the E-Commerce Directive and the Services Directive.

In particular these latter Directives set requirements as to the incorporation of standard terms into the contract between PSP and consumer. It was argued that click-wrapping leads to a valid incorporation of the T&Cs only when the consumers must accept the T&Cs before concluding the contract. In contrast, in my opinion neither browse-wrapping nor click-wrapping that takes place when the consumer wishes to make use of an already established account or an already purchased app leads to a valid incorporation of standard terms. With regard to the platform services offered by Apple and Google, the consumer's explicit acceptance of the T&Cs when the account is established will lead to the incorporation of the T&Cs provided that the consumer is given an opportunity to download and save or print the terms. Whether the same applies as regards later purchases through the platform is much more controversial.

With regard to limitation and exclusion of liability, it is clear that both Apple and Google have introduced far-reaching limitations and exclusions of their liability for damage caused through their platform services, although Google tries to hide this by stating that it will not exclude liability in so far as this would be in breach of European consumer law legislation. Whether or not the limitation and exclusion clauses stand the unfairness test will differ from one country to the next, as

27 Regulation (EU) no 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), *OJ* 2012, L 351/1. The Regulation will be referred to as: Brussels I-Regulation (recast). The Regulation applies as of 10 January 2015 (art. 81 Brussels I-Regulation (recast)). Before that date, Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* 2001, L 12/1 applied, which contained the same provisions in Articles 15-17.

28 Loos/Luzak 2015 (DOI version), p. 20-21.

29 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ* 2008, L 177/6.

30 See Loos/Luzak 2015 (DOI version), p. 22-23.

31 See Loos/Luzak 2015 (DOI version), p. 21-24; see also Riefa 2015, p. 140.

national courts may have different appreciation whether the terms *inappropriately* limit consumers' rights.

National courts will also have to determine whether Google's international jurisdiction and choice-of-clauses are unfair. As with regard to liability, Google acknowledges that it will respect European Union law and that its terms do not apply in so far as these would be in conflict with European Union law. Whether or not such statement would ensure that the

terms are not regarded as unfair depends on whether a national court would find that the mere inclusion of such intransparent terms in the T&Cs would render the terms to be unfair. National courts are likely to have differing views on this. In this respect, Apple's approach is both safer and more consumer-friendly: Apple simply declares that the court is competent and the law is applicable of the country that the consumer herself has indicated as her home country when establishing her account. ■