

Validity of Choice of Law and Jurisdiction Clauses in Consumer Cloud Contracts under European Law

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List of Abbreviation

Article	Art
Bürgerliches Gesetzbuch	BGB
Business to Business	B2B
Business to Consumer	B2C
Cloud Service Providers	CSPs
Consumer Rights Directive	CRD
European Court of Justice	ECJ
General Law for the Protection of Consumers and Users	GLPCU
Infrastructure as a Service	IaaS
National Institute of Standards and Technology	NIST
National Purchase Diary	NPD
Norwegian Code on Conclusion of Agreements	NCC
Platform as a Service	PaaS
Small and Medium Enterprises	SMEs
Software as a Service	SaaS
Standard Form Contracts	SFC
Terms and Conditions	T&C
Unfair Contract Terms Act	UCT

1. Introduction

The purpose of this thesis is to analyze the validity of choice of law and jurisdiction clauses in consumer cloud contracts. As the Internet grows ever more pervasive in modern society, the Internet as an international phenomenon has become an essential instrument for commercial purposes, including the making of contracts for the supply of goods and services. Because of the worldwide nature of its operation, consumers are becoming increasingly involved in international trade, in which case the supplier and customer are located in different legal jurisdictions¹. One of the areas of online contracting that is undergoing rapid growth and drawing much attention is cloud computing services. In the most commonly cited definition of cloud computing, The National Institute of Standards and Technology (NIST) defined cloud computing “as a model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, software applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction.”²

According to recent study released by the Pew Internet and the American Life project, 69 percent of users are already taking advantage of cloud computing while many users may not be familiar with the term³. As Larry Ellison, the famous CEO of Oracle, is quoted “we have redefined cloud computing to include everything that we already do. I cannot think of anything that isn't cloud computing with all of these announcements.”⁴ However, “the shift to cloud computing, like any other major technological upheaval, has not been and will not be entirely free of legal obstacles.”⁵ For instance, jurisdiction for legal actions related to cloud computing is an area of increasing

¹ Schu, 1997, p 192

² Mell & Grance, 2011, available at <http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf>. (Visited 11.05.2014)

³ Horrigan, 2008, available at: <http://www.pewinternet.org/2008/09/12/use-of-cloud-computing-applications-and-services/> (Visited 11.05.2014)

⁴ Farber, 2008, available at http://news.cnet.com/8301-13953_3-10052188-80.html. (Visited 11.05.2014)

⁵ Andrews and Newman, 2013, p 328

concern⁶. With information being stored and available “anywhere”, who has jurisdiction over it? Whose laws apply? Most often, legal issues are properly addressed via contracts. Typically, contracts for cloud services take the form of Standard Form Contracts (SFC), and their terms are subject to substantive judicial review for fairness. Cloud Service Providers (CSPs), under their Terms and Conditions (T&C) usually protect themselves by imposing the terms, which are skewed in their favor and leave consumers alone to face the risks that are inherent to such not negotiated terms⁷. Standard form contracts that CSPs require consumers to sign in order to access services often contain clauses that state which law and court will be used in the event of a legal dispute. Typically, CSPs specify a jurisdiction compatible with their preferred legal system. In practice, this jurisdiction is where the CSP’s principal place of business is located. These types of provisions are arguably unfair, as they limit the consumers’ right to have recourse to the courts for protecting their rights.⁸ The fundamental aim of the present thesis, thus, is analyzing the validity of choice of law and jurisdiction clauses in consumer cloud contracts.

1.1. The Legal Problem

While standard form contracts provide a convenient and economical way for a consumer to purchase a cloud services, they facilitate the incorporation of unfair contract terms. Typically, contracts between CSPs and cloud consumers are not subject to effective negotiation. In such contracts, which are prepared by the CSPs in advance, CSPs have all the bargaining power and the consumer has no effective opportunity to negotiate the terms. One of those terms that is included in a cloud contract, is the choice of law and jurisdiction clause. This clause puts the consumer at a disadvantage and discourages him from suing by being compelled to bring his action before the courts in which the CSP has its principle place of business. Therefore, this term might be unfair, for the purposes of the unfair terms regime, as it deters consumers from asserting

⁶ Ward, Burke T. & Sipior, Janice C. 2010, p 335

⁷ Castro, Reed and Queiroz, 2013, p 459

⁸ Sein, 2011, p 54

their rights. Also, including such clauses in a cloud contract is contrary to the mandatory rules in the Brussels I and Rome I Regulations that restrict the parties' freedom to choose the competent court and the applicable law in consumer contracts. Hence, the present thesis is an attempt to address the aforementioned problem.

1.2. The Scope of the Thesis

The present thesis deals exclusively with the validity of choice of law and jurisdiction clause in consumer contracts which are offered on a non-negotiable basis by CSPs. The study is primarily based on European Union legal framework. However, some of the Member States' national consumer protection rules are examined to obtain a practical view. Within the EU, the jurisdiction rules are currently laid down in the Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (hereafter Brussels I Regulation)⁹. The choice of law rules are covered by Council Regulation on the Law Applicable to Contractual Obligations (hereafter Rome I Regulation)¹⁰. The legal basis for examining unfair contract terms and their consequences is created by Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts (hereafter Unfair Contract Terms Directive)¹¹. These are the main legal sources for the present thesis. The thesis is strictly focused on the choice of law and jurisdiction clause in consumer cloud contracts. Thus, its scope does not include other cloud service terms or business to business cloud contracts.

It should be noted that although the purpose of both the Regulations and the Directive is different, they provide a two tier protection system regarding choice of law and jurisdiction for a

⁹ Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 16.1.2001 L12/1

¹⁰ Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ EU 4.7.2008 L177/6

¹¹ Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, Official Journal L 095, 21/04/1993 P. 0029 – 0034

consumer as the weaker party. However, it is prudent to be aware of the degree of consumer protection that is afforded by each of them. This is why the validity of choice of law and jurisdiction clauses in consumer cloud contracts is examined under both the Regulations and the Directive.

1.3. Methodology

The study will be primarily based on the EU laws, regulations, travaux préparatoires, case law and other sources. The main aim of the thesis is to analyze the validity of choice of law and jurisdiction clauses in consumer cloud contracts. To this end, the author has selected a number of commonly used cloud services as practical examples. The T&C of five CSPs¹² will be examined with specific reference to the choice of law and jurisdiction clauses. These CSPs are publicly known, having offices and establishment in the EU. Thus, their T&C are appropriate to the subject matter of the present thesis

1.4. The Structure of the Thesis

The present thesis consists of five chapters. Chapter one introduces the topic and discusses the importance of the legal problems and the scope of the present thesis. Chapter two provides insights into the some core issues of definition as they relate to cloud computing. Chapter three firstly is intended to give the necessary background information about applicable law and jurisdiction in consumer cloud contracts. Thus, the rules on choice of law and jurisdiction contained in the Rome I and Brussels I Regulation respectively are examined. Then, since only a person who qualifies as consumer under the Directive and the Regulations can benefit from consumer protection, the concept and scope of the term ‘consumer’ in cloud context will be explored. Chapter four constitutes the main part of the thesis and analyzes the validity of

¹² Namely Adrive, Dropbox, Facebook, Google and Twitter

jurisdiction and choice of law clause in consumers' contract, which are offered on a non-negotiable basis by cloud service providers. In this chapter each element's level of unfairness is considered to be unattained in respect of choice of law and jurisdiction clauses in consumer cloud contracts. Finally, the legal consequences of unfairness will be discussed. Chapter five contains the conclusion. This chapter will take into consideration what has been discussed in the present thesis and provides some recommendations aimed at improving the protection of consumers in cloud standard form contract regarding the choice of law and jurisdiction clause.

2. What is Cloud Computing

2.1. The Definition and Benefits of Cloud Computing

The most prevalent definition of cloud computing has been published by the NIST. It defines cloud computing “as a model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, software applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction.¹³” Another useful definition of cloud computing is one provided in a 2008 by Pew Internet Study: “an emerging architecture by which data and applications reside in cyberspace, allowing users to access them through any web connected device.¹⁴” To simplify it, cloud computing is “the ability of an end user to store and access remotely located files and services over a network by means of a smart phone, computer, tablet, or other networked devices.¹⁵” It worth noting that NIST offers several essential characteristics for service to be considered “Cloud.” These features include; “on-demand self-service. The ability for the end user to sign up and receive services without the long delays that have characterized traditional IT; Broad network access. Ability to access the service via standard platforms; Resource pooling. Resources are pooled across multiple customers; Rapid elasticity. Capability can scale to cope with demand peaks; Measured Service. Billing is metered and delivered as a utility service.¹⁶”

Currently just over half of business (51%) is done using some type of cloud computing. The Mimecast Cloud Adoption Survey reveals that 74% of those who use cloud computing report

¹³ Mell & Grance, 2011, available at <http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf> (Visited 11.05.2014)

¹⁴ Horrigan, 2008, available at: <http://www.pewinternet.org/2008/09/12/use-of-cloud-computing-applications-and-services/> (Visited 11.05.2014)

¹⁵ Robison, 2010, p 1202

¹⁶ Mell & Grance, 2011, available at <http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf> (Visited 11.05.2014)

more effective use of resources, 73% report lowered cost of infrastructure and 72% report improved user experience.¹⁷ In addition, regarding consumer use of cloud, a study from ABI Research, market research and intelligence firm, predicts “revenue from consumer use of cloud-based backup/storage sites will jump from approximately \$75 million in 2009 to more than \$372 million in 2015.” Furthermore, the research found that nearly 143 million people used free or inexpensive cloud services in 2009 and predicts that number will rise to over 160 million people by the end of 2015¹⁸. According to another study from The National Purchase Diary (NPD), a market research company, “whether consumers understand the terminology of cloud computing or not, they are actually pretty savvy in their use of cloud-based applications,” said Stephen Baker, vice president of industry analysis for NPD. “They might not always recognize they are performing activities in the cloud, yet they still rely on and use those services extensively.¹⁹”

All the aforementioned studies illustrate that cloud computing is a game-changer and its impact for the practice of law is “profound and has already revolutionized almost every aspect of the business.²⁰” As it mentioned by the Economist “the rise of the cloud will profoundly change the way people work and companies operate.²¹”

Although cloud computing is not always the best fit for all customers, the following core benefits are driving rapid adoption: increased, on demand access, flexibility and elasticity, cost savings,

¹⁷ Cooter, 2010, available at http://www.cio.com/article/600524/More_Businesses_Turn_to_Cloud (Visited 11.05.2014)

¹⁸ Narain, 2010, available at: <http://it.tmcnet.com/topics/it/articles/84900-consumer-use-cloud-computing-set-grow-research.htm> (Visited 11.05.2014)

¹⁹ NPD Group, 2011, available at: https://www.npd.com/wps/portal/npd/us/news/press-releases/pr_110809/ (Visited 11.05.2014)

²⁰ Booth, 2011, p 2

²¹ Economist, 2008, available at: <http://www.economist.com/node/12411882/> (Visited 11.05.2014)

enhanced security capability²². Further, the Pew Internet and American Life Project identified a range of consumer benefits from cloud services. Convenience, preservation of data in the event of a computer failure and easier way to share data were the reasons that consumers use cloud services²³.

2.2. Cloud Service and Deployment Models

Mell and Grance identify three main service models within the broad ‘cloud’ concept: Software as a Service (SaaS), which involves providing access to and use of an end user application, such as e-mail or Google Doc; Platform as a Service (PaaS), which involves providing access to and use of tools for the development and deployment of custom applications. Google App is a good example of PaaS; and Infrastructure as a Service (IaaS), which involves providing access to and use of computer resources such as processing and storage. IaaS is ideal for customers who want to retain control over their applications and data but not infrastructure. Microsoft SkyDrive and Rackspace are good examples of IaaS.

Cloud computing can take one of several different forms. The NIST identifies four ‘deployment models’ as Private, Community, Public, and Hybrid Clouds²⁴. In Public Cloud service provider makes resources, such as applications and storage, available to the general public over the Internet. Community cloud shares infrastructure between several organizations from a specific community with common concerns. Private cloud is infrastructure operated solely for a single

²² Software and Information Industry Association (SIIA), 2011, p 9, available at http://siiia.net/index.php?option=com_docman&task=doc_download&gid=3040&Itemid=318 (Visited 11.05.2014)

²³ Horrigan, 2008, available at: <http://www.pewinternet.org/2008/09/12/use-of-cloud-computing-applications-and-services/> (Visited 11.05.2014)

²⁴ Mell and Grance, 2011, available at <http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf> (Visited 11.05.2014)

organization, and finally Hybrid cloud is a composition of two or more clouds that remain unique entities, but are bound together, offering the benefits of multiple deployment models²⁵.

2.3. Legal Challenges of Cloud Computing Technology

Cloud computing is rapidly becoming an indispensable part of people's daily life as many activities are becoming increasingly computerized, and numerous computer processes moving to web-based services. Although cloud computing offers a high level of convenience and innovation never seen before, it also leads to great legal uncertainty, partly due to outsourcing and its reliance on cross-border data hosting²⁶. One of the important legal issues arising from the cloud computing technology is related to applicable law and jurisdiction. Most often, legal issues are properly addressed via contracts.

Most of the top CSPs like Microsoft, IBM, Google and Amazon include a choice of forum and a choice of law provisions in their cloud standard form contract. A study from the Queen Mary University of London²⁷ revealed that normally, CSPs put a choice of law and jurisdiction clause in their SFC, which is compatible with their specified legal system²⁸. Such provisions can provide them a clear advantage over consumers, by for instance indicating that the courts located in California shall have exclusive jurisdiction', or that all disputes and controversies arising under the contract shall resolved pursuant to the law of the State of California²⁹. As it will be discussed

²⁵ Tech America Foundation, available at: http://cloudslg.techamerica.org/wp-content/uploads/2012/02/TAF_SLG_CC_understanding_tech.pdf (Visited 11.05.2014)

²⁶ Available at <http://www.law.hku.hk/lawtech/cloudcomputing/>

²⁷ Bradshaw, Millard and Walden, 2010, p 17

²⁸ The study found that around half of the 31 cloud providers choose the law of a particular US state. Four stated English law because it was the law of the jurisdiction where the provider was based; four stated English law for customers in Europe or EMEA; two stated that law of another EU jurisdiction for their European customers; one chose Scottish law; two the customer's local law; and three made no choice or an ambiguous one i.e. UK law

²⁹ Natsui, 2010, p 8-9

in the next chapter, those clauses are contrary to mandatory rules of Brussels I and Rome I Regulations, which restrict the parties' freedom to choose the competent court and the applicable law in consumer contracts.

3. Jurisdiction and Applicable Law in Consumer Cloud Contracts

Around the world, contracts are governed by the law chosen by the parties. In Europe, nevertheless, certain restrictions have been placed on the principle of party autonomy. When it comes to consumer contracts, “where there exists a qualified degree of difference between the parties in terms of their respective negotiating strengths”, most legal systems restrict the parties’ freedom to choose the applicable law and competent court³⁰. For instance, under Article 6 of the Rome I Regulation, in consumer cases, the default rule is that the contract shall be governed by the law of the country where the consumer has his habitual residence. Also, according to Articles 15–17 of the Brussels I Regulation, consumers can choose to bring proceedings against their contracting party either in the courts of the member state in which that other party is domiciled, or in the courts of the place where the consumer himself is domiciled³¹. These provisions reflect the fact that the consumer is presumed to be in a weaker bargaining position which requires special protection to be afforded to that party.

This chapter firstly is intended to give the necessary background information about jurisdiction and applicable law in consumer cloud contracts. Thus, the rules on jurisdiction and choice of law contained in the Brussels I and the Rome I Regulation respectively are examined. Then, since the only person who can benefit from consumer protection is one who qualifies as a consumer under the Directive and the Regulations, the concept and scope of the term ‘consumer’ in the cloud context will be explored. In law, “precise definition of the ‘consumer’ is essential in order to delimit the circle of persons entitled to extended legal protection in relations with traders whose position is stronger.³²” The typical legal definition of a consumer under EU consumer protection laws is “a natural person who is acting for purposes that are outside his trade, business or profession.³³” However, the way in which many people increasingly use cloud computing

³⁰ Bygrave and Svantesson, 2001, p 4

³¹ Brussels I Regulation, art. 15-17; Rome I Regulation, art. 6

³² Kingisepp and Värvi, 2011, p 44

³³ Brussels I regulation, art. 16; Rome I Regulation, art. 6

services, makes drawing a distinction between private and professional use more and more difficult³⁴. For example, it is common among users to use Google Doc, as a cloud service, for both storing personal files and business documents. The question is thus whether such mixed use qualifies as consumer use. Is a person to be protected as a consumer where the cloud service is purchased predominantly for private use? Or only if the business use is so limited as to be negligible in the overall context of the transaction? This chapter strives to address the aforementioned questions and to determine the jurisdiction and applicable law in a consumer cloud contract.

3.1. Jurisdiction in Consumer Cloud Contracts

3.1.1. Overview of the EU Jurisdiction Rules

Jurisdiction means the geographic area of the legal authority (i.e. courts) that will have powers to hear and judge cases. In the EU, the Brussels I Regulation, which is based on the Brussels Convention, deals with the jurisdiction of courts. The Brussels I Regulation only applies jurisdiction in civil and commercial matters³⁵. The Brussels Regulation sets out in Recital 1-2 some of the key motivating factors behind its implementation and purpose. According to this Recital, the Brussels Regulation is a “community legal instrument” implemented by regulation that is aimed at “maintaining and developing area of freedom, security and justice, in which the free movement of persons is ensured by unifying the rules of conflict of jurisdiction and rationalizing enforcement formalities³⁶.” Generally, there are three types of jurisdiction in the Brussels I Regulation: general jurisdiction, special jurisdiction and exclusive jurisdiction³⁷.

³⁴ Cunningham & Reed, 2013, p 12

³⁵ Brussels I Regulation, art. 1(1)

³⁶ Ibid, Recital 1-2

³⁷ Wang, 2010, p 35

3.1.2. General jurisdiction

Under Article 2 of the Brussels I Regulation, “persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that state³⁸.” Domicile rules within the Brussels I Regulation govern the domicile of individuals³⁹ and domicile of corporations⁴⁰. The rationale of the general rule in favor of the defendant’s domicile was considered by the ECJ in *Handte v TMCS*⁴¹. It explained that the rule reflects the purpose of “strengthening the legal protection of persons established within the Community, and rests on an assumption that normally it is in the courts of his domicile that a defendant can most easily conduct his defense.⁴²”

3.1.3. Special Jurisdiction

The Regulation provides for rules on special jurisdiction under two categories: Business to Business (B2B) contracts and Business to Consumer (B2C) contracts. Article 5 of the Brussels I Regulation derogates from the general principle contained in Article 2, which gives the claimant an opportunity to proceed against the defendant in a member state in which the defendant is not domiciled⁴³.

Article 5(1) provides that: “a person domiciled in a Member State may, in another Member State, be sued: (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question; (b) for the purposes of the rule that jurisdiction in matters relating to a contract is allocated to the courts for the place of performance of the obligation in question, the place is: in the case of the sale of goods, the place in a Member State where, under the contract,

³⁸ Brussels I Regulation, art. 2(1)

³⁹ *Ibid*, art. 57

⁴⁰ *Ibid*, art. 60

⁴¹ Case C-26/91, *Handte v TMCS*

⁴² Stone, 2006, p 46

⁴³ *Ibid*, p 47

the goods were delivered or should have been delivered; in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided.” How to ascertain “the place of performance of the obligation in question” is the focal point of how to determine special jurisdiction in B2B contract. B2B contracts are beyond the remit of this paper. Only B2C contracts fall within the scope of the present thesis and are analyzed in this section.

In EU, Articles 15–17 of the Brussels I Regulation govern the jurisdiction rules for consumer contracts. According to Article 16 of the Brussels I Regulation “consumers can choose to bring proceedings against their contracting party either in the courts of the member state in which that other party is domiciled, or in the courts of the place where the consumer himself is domiciled. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.”⁴⁴

Further, Article 17 provides that the jurisdictional rules of Article 16 can be varied under three scenarios. Firstly, a departure is allowed, “If the parties have entered into an agreement after a dispute has arisen.”⁴⁵ This implies that e-businesses cannot depart from the jurisdictional rules by inserting a choice of court agreement at the time of formation of the contract⁴⁶. Secondly, if the parties enter into a jurisdictional agreement “which allows the consumer to bring proceedings in courts other than those indicated in Article 16.”⁴⁷ Under this scenario, a choice-of-court agreement entered either before or after a dispute arises may be valid, if the agreement allows the consumer to sue in additional courts other than the courts under Article 16⁴⁸. Thirdly, a departure is permitted “when consumer and the other party to the contract, both of whom are at the time of

⁴⁴ Brussels I Regulation, art. 16

⁴⁵ Brussels I Regulation, art. 17(1)

⁴⁶ Bharat Saraf, Ashraf U. Sarah Kazi, 2013, p 132

⁴⁷ Brussels I Regulation, art. 17(2)

⁴⁸ Bharat Saraf, Ashraf U. Sarah Kazi, 2013, p 132

conclusion of the contract domiciled or habitually resident in the same Member States.⁴⁹” However, it is necessary that such an agreement is not contrary to the law of that Member State⁵⁰.

The rule of special jurisdiction for consumer contracts in Articles 15 of the Brussels I Regulation creates a “pursuing and directing” approach. According to this Article “the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State, and the contract falls within the scope of such activities.⁵¹” The notion of “pursuing or directing activities” to determine the appropriate jurisdiction in consumer contracts poses some complexity since it has not been defined by Regulation. Particularly, it might be difficult, in cloud context, to assess whether or not this criterion is met. For instance, a CSP, established in the Germany, has a website through which customers, including who located in the Member States of the EU, can buy cloud services. The question that arises is whether or not such a website can constitute a way to direct activities to those Member States?⁵²

Some scholars are of the opinion that, to provide an answer to this question, “it is necessary to assess the nature and the characteristics of the website.⁵³” The important factor to designate such nature and characteristics, which are also enshrined by the European Commission⁵⁴, rely on the distinction between passive and active website. “The former is a website that contains only advertising material and that provides mere information, while the latter allows the client to enter into an agreement with the supplier.” To interpret and designate what constitutes directing commercial or professional activities in the Member State of the consumer’s domicile, A

⁴⁹ Brussels I Regulation, art. 17(3)

⁵⁰ Bharat Saraf, Ashraf U. Sarah Kazi, 2013, p 132

⁵¹ Brussels I Regulation, art. 15(1)

⁵² Parrilli, 2009, p 133

⁵³ Ibid

⁵⁴ European Commission: Proposal for Brussels I Regulation, 1999

directing test with three elements is suggested by Michael Geist: 1) The identification of all parties' intentions according to the relevant law is vital; 2) to assess the technology that is utilized either to avoid or target the specific consumer market, and; 3) define the degree of the supplier's awareness that any particular consumer market is targeted⁵⁵. In addition, If interpret the notion in the light of Recital 19 of the Electronic Commerce Directive⁵⁶, it can be said that the place where the company pursues its economic activity constitutes its place of establishment (fixed establishment for an indefinite period)⁵⁷.

In order to address the concept of 'pursuing and directing' comprehensively the attention should be paid to the ECJ ruling in *Hotel Alpenhof GesmbH v Oliver Heller*⁵⁸, which considered whether using a website to conclude a contract warranted a finding that an activity was being 'directed' within the meaning of Article 15(1)(c). In this case, the ECJ ruled:

*The trader must have manifested its intention to establish commercial relations with consumers from one or more other Member States, including that of the consumer's domicile," and there must be "evidence demonstrating that the trader was envisaging doing business with consumers domiciled in other Member States."*⁵⁹

In this regard, the ECJ stated "such evidence does not include mention on a website of the trader's email address or geographical address, or of its telephone number without an international code.

⁵⁵ Geist, 2001, p 40

⁵⁶ 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 (Directive on electronic commerce)

⁵⁷ *Ibid*, Art 2

⁵⁸ Joined Cases C-585/08 *Peter Pammer v Reederei Karl Schluter GmbH & Co KG* and C-144/09, *Hotel Alpenhof GesmbH v Oliver Heller*.

⁵⁹ *Ibid*, para 75 and 76

Mention of such information does not indicate that the trader is directing its activity to one or more other Member States.⁶⁰ The ECJ stressed that there must be “a clear expression of the intention to solicit the custom of that state's consumers, which includes mention that it is offering its services or goods in one or more member states designated by name.⁶¹” It went on to set out a non-exhaustive list of criteria from which it could be inferred that the trader's activity was directed to the member state of the consumer:

The international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or of a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States. It is for the national courts to ascertain whether such evidence exists.⁶²

Conversely, the ECJ also pointed out:

On the other hand, the mere accessibility of the trader's or the intermediary's website in the Member State in which the consumer is domiciled is insufficient. The same is true of mention of an email address or other contact details, or of

⁶⁰ Ibid, para 77

⁶¹ Ibid, para 80 and 81

⁶² Ibid, para 93

*use of a language or a currency which are the language and/or currency generally used in the Member State in which the trader is established.*⁶³

It concluded:

In order to determine whether a trader whose activity is presented on its website or that of an intermediary can be considered to be 'directing' its activity to the Member State of the consumer's domicile, within the meaning of Article 15(1)(c) of Regulation No 44/2001, it should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader's overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with them.⁶⁴” In reaching such determination, it is for the national courts to consider whether the evidence that exists points to such a conclusion⁶⁵.”

To apply the ‘pursuing or directing’ approach to a cloud context, one might readily assume, the first condition that requires the presence of the CSP in the country of the consumer’s habitual residence is easy to meet. According to Art. 15(2) of the Brussels I Regulation “where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishments in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled

⁶³ Ibid, para 94

⁶⁴ Ibid, para 92

⁶⁵ Ibid, para 93

in that State.⁶⁶ At the moment, most of the well known CSPs have offices in the EU including Ireland, Belgium, France, Germany, Italy, Spain, etc. As a result, one might construe that since those CSPs have establishments in the Member State and provide an online shopping platform to offer cloud-based services to consumers, they are pursuing their activities in those Member States. The ECJ, nonetheless, pointed out in the Wolfgang Brenner and Peter Noller v. Dean Witter Reynolds Inc case that a branch, agency or other establishments should act as an intermediary in the conclusion or the performance of the contract between the parties⁶⁷. Thus, it might not be correct to say that those CSPs are pursuing their activities in the Member State where the consumer has his habitual residence, when it is based solely on the fact that they have an office and an online shopping platform in that Member State.

Based on the ECJ's line of reasoning, normally CSPs' activities fall outside the scope Art.15 (2) of the Brussels I Regulation and consequently a consumer might lose their protection under Brussels I Regulation. The reason can be illustrated through an example. A consumer signs up to Facebook T&C through its website. Typically, this cloud contract has been made with the Facebook parent company in California and its office in the country of the consumer's habitual residence, for instance Norway, has no role in the conclusion or the performance of the contract. According to the ECJ ruling Facebook activities do not fall within the scope of Art.15 (2) and it is not pursuing its activities in Norway because Facebook Norway does not act as an intermediary in the conclusion or the performance of the contract between the consumer and the Facebook parent company in California. This line of reasoning does not seem rational. Facebook uses a telephone number with a Norwegian international code, a Norwegian top-level domain name and provides its cloud services in the Norwegian language. These factors imply the effective and real exercise of Facebook activities in Norway. Therefore, it seems correct to say that Facebook is pursuing its activities in Norway. This scenario and line of reasoning might apply to all CSPs.

⁶⁶ Brussels I Regulation, art. 15(2)

⁶⁷ C-318/93, Wolfgang Brenner and Peter Noller v. Dean Witter Reynolds Inc

For European countries in which the CSP does not have offices it needs to establish if the second condition is fulfilled. The notion of ‘directs activities’ in the cloud environment may cause interpretation problems⁶⁸. Before going into detail it should be noted that it is for the national courts to decide whether the existing evidence points to conclusion that the CSP directs its activities to the country of the consumer’s habitual residence. Generally, one might claim most of publicly known CSPs are directing their activities. Back to the Facebook example and knowing that Facebook uses a Norwegian top-level domain name and provides its cloud services in the Norwegian language, it is apparent from Facebook overall activities that it was envisaging doing business with consumers domiciled in Norway. Consequently, it seems correct to say that the directing approach would be met in most cloud scenarios.

3.1.4. Exclusive Jurisdiction

The principle of party autonomy, which has its roots in general contract law, enshrined in Article 23 of the Brussels I Regulation⁶⁹. According to this Article, parties may enter into an agreement designating an express choice of court for disputes arise from that agreement. The ECJ has stated on several occasions that it is the main aim of Art. 23 to give effect to the parties’ free and independent will and also “to ensure that a consensus between the parties is in fact established.”⁷⁰ In certain specified situations like consumer contract, however, the Brussels I Regulation places limits upon the ability of the parties to conclude a jurisdiction agreement. Such agreements are subject to the conditions of Article 15-17 that discussed above.

⁶⁸ Wauters, Lievens and Valcke 2013, p 20

⁶⁹ Thalia Kruger, 2007, p 8

⁷⁰ Case 24/76, *Estasis Salotti di Colzani Aimo and Gianmario Colzani v. RÜWA Polstereimaschinen GmbH*, (1st sentence of the summary of the decision); Case 25/76, *Galleries Segoura SPRL v. SociétéRahim Bonakdarian*, para 6

3.2. EU Choice of Law Regime in Consumer Cloud Contracts

Next to jurisdiction, CSPs often choose the law of the jurisdiction that will apply to their contract. Twitter, for instance, states “these terms and any action related thereto will be governed by the laws of the State of California without regard to or application of its conflict of law provisions or your state or country of residence.”⁷¹

Within the EU, matters of applicable law fall under the Rome I Regulation. The Regulation establishes a difference between contracts with a choice of law provision and contracts without such a clause. The general principle of the Regulation is freedom of choice. According to article 3 of Rome I Regulation the parties may choose the applicable law. It states “a contract shall be governed by the law chosen by the parties.”⁷² Again, as with the Brussels I Regulation, there is an exception for consumer contracts, laid down in article 6. In consumer case, the default rule is that the contract shall be governed by the law of the country where the consumer has his habitual residence on fulfilment of the condition that the “other party acting in the exercise of his trade or profession, (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or (b) by any means, directs such activities to that country or to several countries including that country.”⁷³ Similarly to the Brussels I Regulation, the complication of applying the ‘pursuing or directing’ approach under the Rome I Regulation is in how to determine such activities for CSPs. In other words, when will the cloud services be regarded as the CSP’s having pursued or directed his activities to the Member State of the consumer’s domicile?

⁷¹ Twitter, Terms of Service, available at:

<https://twitter.com/tos?PHPSESSID=57a411f70b1964a2bc78b82638ba1843> (Visited 11.05.2014)

⁷² Rome I Regulation, art. 3

⁷³ Ibid, art. 6

As discussed in the section 3.1.3, in Rome I as well as Brussels I Regulation, the concept of ‘pursuing or directing’ approach has not been elucidated. Some guidance, however, has been given by the European legislator on this issue in Recital 24 of the Rome I Regulation, in which it states “it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities.” Also, “the mere fact that an Internet site is accessible is not sufficient for the scope of ‘directing’ to be applicable.” For more details regarding the concept and scope of ‘pursuing and directing activity’ look at the relevant discussion in section 3.1.3.

To conclude, if a consumer cloud contract satisfies the conditions of Article 6(1) of the Rome I Regulation, in the absence of choice, it will be governed by the law of the country where the consumer has his habitual residence. If the consumer and the CSP choose the law of the CSP’s country of residence as the applicable law for the cloud contract, the law applicable shall be that chosen by the parties. However, Article 6(2) of the Rome I Regulation provides that such a choice “may not have the result of depriving the consumer of the protection afforded to him by such provisions of the law applicable by default that cannot be derogated from by contract.”⁷⁴

3.3. The Notion of Consumer

As it clear, special protections in Brussels and Rome Regulations are provided to the consumer “as the party that is deemed to be economically weaker and less experienced in legal matters.”⁷⁵ Only persons, nonetheless, who qualify as consumers under the Regulation can benefit from consumer protection. Hence, determining the scope of the term ‘consumer’ in the cloud context is a matter of importance. The very technological nature of cloud computing challenges the definition of consumer as cloud-based services are increasingly used in a mixed capacity.

⁷⁴ Rome I Regulation, art. 6(2)

⁷⁵ C-89/91, Shearson Lehman Hutton, para 18

3.3.1. What is a consumer?

Article 2 (1) of the Consumer Rights Directive (CRD) adopted by the European Parliament defines a consumer as “any natural person who is acting for purposes which are outside his trade, business, craft or profession.⁷⁶” This definition is in line with other consumer law directives, notably the Unfair Terms Directive⁷⁷ with minor modifications. The definitions used in the Brussels I and Rome I Regulations⁷⁸ are very similar.

To clarify the notion of the consumer the regard should be given to the case law of the ECJ on the Brussels Convention. In the case of *Benincasa v Dentalkit Srl*⁷⁹, the ECJ held that a consumer is a person acting “for a purpose which can be regarded as being outside his trade or profession.⁸⁰” It was further stated therein that “only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically.⁸¹” In addition, the ECJ stipulated:

In order to determine whether a person has the capacity of a consumer, a concept which must be strictly construed, reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned”, a self-same person being capable of being “regarded as a

⁷⁶ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, OJ EU 22.11.2011 L304/64, Art 2(1).

⁷⁷ Unfair Terms Directive, Art 2(b)

⁷⁸ Brussels I Regulation, art. 15; Rome I Regulation, art. 6

⁷⁹ C-269/95, *Francesco Benincasa v. Dentalkit Srl*, para 16

⁸⁰ *Ibid*, para 15

⁸¹ *Ibid*, para 17

*consumer in relation to certain transactions and as an economic operator in relation to others.*⁸²

The wording of consumer definitions considerably diverge in Member States which “will have a detrimental effect on the internal market as such divergence undermines consumer confidence in the internal market.⁸³” For instance, in Spain, the General Law for the Protection of Consumers and Users (GLPCU), Art 3 defines the concept of consumer for the purposes of the unfair contract terms regime as “any natural or legal person who is acting for purposes which are outside a business or a profession.⁸⁴” Consumer is the person who acts for private purposes, who contracts for goods and services as the final addressee, without procuring himself to third parties, neither directly nor indirectly.⁸⁵ The Luxembourg Consumer Protection Act uses the term ‘final addressee’ (consommateur final privé) in some cases as well⁸⁶, without defining what this term means. In Norway, according to the Norwegian Code on Conclusion of Agreements of 1918 (NCC) §37 consumer is defined as “any natural person who is not primarily acting for business purposes.⁸⁷” Although, the wording of consumer definitions differs in each Member State, in essence, they exhibit a common core whereby a consumer is a natural person who has concluded a contract for a purpose outside his business or profession.

The question that needs to be addressed here is whether consumer protection is also extended to a legal person who acts for the purpose of satisfying an individual's own needs which have no bearing on his business. Recital 17 of CRD states that “the definition of consumer should cover natural persons who are acting outside their trade, business, craft or profession.” Moreover, in

⁸² Ibid, para 16

⁸³ Loos, 2009, p 4

⁸⁴ Art. 1(2) and (3) of the Law 26/1984 of July 19 on Consumer Protection

⁸⁵ Recital III of the Legislative Decree 1/2007. See also STS 5966/2012

⁸⁶ Art. 1-2 and Art. 2 No. 20 in relation to the control of unfair terms

⁸⁷ Schillig, 2013, p 52

2010, the European Commission published an unofficial note to the proposal for CRD⁸⁸ that provided some clarification regarding whether Small and Medium Enterprises (SMEs), as a legal person, can benefit from consumer rights. It stated “Member States may decide that NGOs or small businessmen not acting as consumers can benefit from the consumer rights guaranteed in the proposal. However, these NGOs or Business men should not be referred to as consumers as that would be incompatible with the definition in the proposal.⁸⁹”

It is prudent to be aware of the approach each Member States is taking regarding the protection of a natural person who is acting outside his business. In the United Kingdom under section 12(1) of the Unfair Contract Terms Act (UCTA) 1977 businesses engaged in a transaction outside their normal business purposes can claim to be dealing as a consumer. In *R & B Customs Brokers Ltd v United Dominions Trust Ltd* 43⁹⁰ the concept of dealing as a consumer under UCTA, 1977 was explored. The principle established in *R&B*, that “where a company is acting as the purchaser of goods or services, if those goods or services are not bought as an integral part of the business, the company may be acting as a consumer, was recently upheld in the Court of Appeal decision *Feldarol Foundry Plc v Hermes Leasing*⁹¹.

Further, in some Member States, SMEs have some protection. In Austria, the Czech Republic, Denmark and Belgium⁹², for instance, legal persons are treated as consumers if they act for the purpose of private use. In France, according to well-established case-law, a consumer is a (natural or legal) person concluding contracts that are not directly related with his or her profession. The leading decision in this regard was that of the Cass. Civ. of 28 April 1987⁹³. In later decisions the

⁸⁸ European Community Note, 2009, available at: http://ec.europa.eu/consumers/rights/docs/note_CDR_en.pdf (Visited 11.05.2014)

⁸⁹ *Ibid*, p 2

⁹⁰ *R & B Customs Brokers Ltd v United Dominions Trust Ltd*, [1988] 1 WLR 321

⁹¹ Ebers. the Notion of ‘Consumer’. In: EC Consumer Law Compendium. 2008, p 723

⁹² Art. 1 No. 7 of the Act of 14 July 1991 on Trade Practices and Consumer Protection (TPA)

⁹³ Cass. Civ. of 28 April 1987 (JCP 1987. II. 20893 *Juris-classeur periodique*)

Cass. Civ. pointed out “the decisive criterion for the applicability of the Consumer Code is whether the contract is directly related to the business activity.⁹⁴” Protection for businesses that conclude contracts outside of their usual field of business also exists in Bulgaria⁹⁵⁻⁹⁶. In addition, in some countries like Norway, “the concept of consumer does not encompass legal persons⁹⁷. However, where a group of people acting together conclude a contract, the individual people comprising the group may still be treated as consumers, provided the other preconditions are met and the group does not constitute a separate legal entity⁹⁸⁻⁹⁹.”

Although in the United Kingdom and the majority of Member States an SME, which contracts for a purpose outside its trade or profession, will deal as a consumer, it cannot be unambiguously said that such an SME is a consumer and will benefit from the law’s protection against unfair terms were applied. The reason comes from settled case law. For instance, in the joined cases *Cape Snc v Idealservice Srl and Idealservice MN RE Sas v OMAI Srl* the ECJ expressly stated (concerning the consumer definition of Art. 2 of the Unfair Terms Directive) that “it is thus clear from the wording of Article 2 of the Directive that a person other than a natural person who concludes a contract with a seller or supplier cannot be regarded as a consumer within the meaning of that provision.¹⁰⁰” A number of member states, for instance Germany, Finland, Italy, Netherlands and Poland follow this concept and expressly limit the scope of consumer protection provisions to natural persons.

⁹⁴ Cass. Civ. 24 January 1995, Recueil Dalloz Sirey 1995, 327-329

⁹⁵ Law on Consumer Protection, Additional Provisions, § 13 no. 1.

⁹⁶ Ebers, the Notion of ‘Consumer’. In: EC Consumer Law Compendium. 2008, p 722

⁹⁷ Ot.prp.nr.89 (1993-1994) p. 6-7.

⁹⁸ Ot.prp.nr.44 (2001-2002) p.157

⁹⁹ Schillig, 2013, p 52

¹⁰⁰ Joined cases C-541/99 and C-542/99, *Cape Snc v Idealservice Srl and Idealservice MN RE Sas v OMAI Srl*, para

To conclude, the definition of consumer under the present directives and Regulations does not seem to leave room for Member States to protect SMEs that perform outside their normal professional activities, under the notion of consumer. The author is of the opinion that the definition of consumer is not satisfactory and it would be useful to have a modification with the aim of including some SMEs in such a definition. As Hesselink stated “many advocates of consumer protection fear that extending the scope of protective rules to other vulnerable parties will reduce the level of consumer protection.¹⁰¹” But, still none of the rules that justifies protection of consumers can be regarded as appropriate for consumer contracts but not for small businesses¹⁰². They are certainly the weak party in a contractual relationship and need to be protected against one-sided contract as much as consumers. For instance, a small company that buys computing services for purposes outside its normal professional activities from big multinational companies like Google or Amazon is in a weaker bargaining position and will require protection specific to this circumstance¹⁰³.

3.3.2. Mixed Use of Cloud Services

“Distinction between the situations in which companies can be considered a consumer raises problems peculiar to the digital environment, especially in the cloud landscape.¹⁰⁴” Cloud services are often mixed in nature since the use of the same platform or software for both business and private activities is becoming more and more common¹⁰⁵. For instance, a person uses his Google Doc account to handle personal activities, and also to handle activities within the scope of his trade or profession, such as sharing documents with colleagues. Such mixed use complicates the application of consumer protection laws in many instances. Now, classification

¹⁰¹ Hesselink, 2009, p 38-39

¹⁰² Ibid.

¹⁰³ Parrilli, 2009, p 132

¹⁰⁴ Castro, Reed and Queiroz, 2013, p 474-75

¹⁰⁵ Ibid

defines whether a consumer is eligible for greater protection, or undergoes stricter regulation¹⁰⁶. Thus, the question of how mixed cloud contracts should be treated is of crucial importance.

For contracts that serve both private and business purpose, the directives at issue contain no express rule. The ECJ case *Johann Gruber v Bay Wa AG*¹⁰⁷, nonetheless, provides some assistance in this area. In *Gruber*, the ECJ addressed the question “whether the rules of jurisdiction laid down by the Brussels Convention (Now Brussels Regulation) must be interpreted as meaning that a contract relates to activities that are partly business and partly private, must be regarded as having been concluded by a consumer.¹⁰⁸”

It was established:

A person who concludes a contract for goods intended for purposes that are in part within and in part outside his trade or profession may not rely on the special rules of jurisdiction laid down in Articles 13 to 15 of the Convention, unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect.¹⁰⁹”

It went on to point out:

It is for the court seized to decide whether the contract at issue was concluded in order to satisfy, to a non-negligible extent, needs of the business of the person concerned or whether, on the contrary, the trade or professional purpose was negligible; to that end, that court must take account of all the

¹⁰⁶ Pessers, 2013, p 42

¹⁰⁷ Case C-464/01, *Johann Gruber v Bay Wa AG*

¹⁰⁸ *Ibid*, para 28

¹⁰⁹ *Ibid*, para 56

*relevant factual evidence objectively contained in the file. On the other hand, it must not take into account facts or circumstances of which the other party to the contract may have been aware of when the contract was concluded, unless the person who claims to be a consumer behaved in such a way as to give the other party to the contract the legitimate impression that he was acting for the purpose of his business.*¹¹⁰

Member states found different solutions for classifying mixed purpose use. The differentiation according to the criteria of the primary use purpose is expressly stated in the Finnish¹¹¹ and Swedish¹¹² provisions. German courts also focus on the question of whether private or business use is predominant¹¹³. In Norway, the dual use issue is addressed by looking at the intended amount for business purposes. In this case, the amount utilized for business purposes must be less than 50%¹¹⁴⁻¹¹⁵. In Austria¹¹⁶ and Belgium¹¹⁷, on the other hand, only contracts concluded exclusively for private purposes are considered consumer contract¹¹⁸.

Under current case law, even if the private element is the predominant purpose, the individual will not be a consumer if a court assesses that the degree of professional purpose is any higher than negligible. First of all, there is little clarification from the ECJ regarding what exactly

¹¹⁰ Ibid

¹¹¹ Chapter 1 § 4 of the Consumer Protection Act

¹¹² Chapter 1 sec. 2 of the Law 2005:59 on Consumer Protection on Distance Contracts and Doorstep Selling Contracts

¹¹³ OLG Naumburg judgment of 11 December 1997, NJW-RR 1998, 1351, on the applicability of the consumer credit act in relation to motor vehicle leasing

¹¹⁴ NOU-1993-27 p 111

¹¹⁵ Schillig, 2013, p 53

¹¹⁶ Article 1 (1) of the Consumer Protection Act

¹¹⁷ Article 1 (7) of the Trade Practice Act of 14 July 1991

¹¹⁸ Ebers. The Notion of ‘Consumer’. In: EC Consumer Law Compendium. 2008, p 728

constitutes negligible use. It was left to the seized court to decide. It can be argued that leaving the application of rules related to consumer contract law to the national courts by Member States, will result in “immediate divergences.¹¹⁹” Those differences would “hinder the development of the Internal Market.¹²⁰” Secondly, mixed purpose cloud contracts will result in the consumer not receiving any protection. The author is of the opinion that this is contrary to the fundamental aim of consumer protection law which is to protect the consumer “as the party that is deemed to be economically weaker and less experienced in legal matters.¹²¹” The author believes that the predominant use should be the relevant criterion in mixed purpose cloud contracts. This approach was also adopted in the Recital 17 of the CRD and its new proposal dated October 2010. Pursuant to the note of the European Commission, the contracts which are mainly for consumer use should be included within the scope of consumer protection, even if they include some elements of business use¹²². In other words, trade purpose should be so limited as not to be predominant in the overall context of the contract.

In the context of cloud computing, where often a cloud user will be engaging with a service provider in a mixed capacity, this is a helpful clarification, although it will perhaps be difficult to establish the parameters of trade purpose usage in the overall context such that consumer use can be clearly defined and quantified. CSPs may want to clarify the main purpose of use prior to contractual engagement. Typically, CSPs do not enter into negotiations with users. They provide an SFC in their website or they allow the user to use the services by just clicking the “I agree” buttons that are provided in their T&C page. Therefore, they have no additional knowledge of the capacity in which they are contracting. Thus, the only information that is helpful regarding this

¹¹⁹ Proposal for a Directive of the European Parliament and of the Council on Consumer Rights, 2008.

¹²⁰ Ibid.

¹²¹ C-89/91, Shearson Lehman Hutton, para 18

¹²² European Community Note, 2010, p 2, available at http://ec.europa.eu/consumers/rights/docs/note_CDR_en.pdf; See also Consumer Right Directive, Recital 17 and Draft for Consumer Right Directive, p 94, Article I.-1:105 (3).

issue is “details captured on the sign-up screen and the nature of the service.¹²³” Consequently Cunningham and Reed conclude that there are two possibilities:

1. Certain contracts are not likely to be purchased for consumer purposes. For instance, contracts for large volumes of processing power and storage, which could reasonably only be used for business purposes. Another example would be contracts for business only web applications, like an e-commerce optimized web server¹²⁴. This feature can be helpful in some situations. For instance, when a mechanic uses his Facebook profile mostly to advertise his services alongside his personal posts, it can be said he will lose his consumer protection because of his dual usage. The nature of the service, however, cannot be a decisive factor in determining the real purpose of the use. A person, for example, can open a Dropbox account with the high quantity of storage such as 50 Gigabytes solely for personal use, for instance storing movie or music. Thus, it cannot be said for sure that because of the nature of the service, (here 50 Gigabytes capacity,) the services will be considered as being business purposes. As it was pointed out, the nature and capacity of cloud service can be a helpful measure in clarifying the situation of the consumer in a mixed use cloud contract but it is not a determining factor.

2. Another possibility is “cloud contracts where the service might equally well be used by a consumer as by a business.¹²⁵” In this case, the CSP does not know the purposes for which the user signed up to the service. As Cunningham and Reed states, CSPs are able to discover this by asking the question as part of the sign-up process¹²⁶. They believe that if CSP does not ask, then, “it takes the risk that the user might have been acting as a consumer.¹²⁷” This can shed some light on users’ purposes and reveal useful information. However, it cannot be conclusive. The reason

¹²³ Cunningham and Reed, part I, 2013, p 18

¹²⁴ Ibid

¹²⁵ Ibid

¹²⁶ Ibid

¹²⁷ Ibid

can be clarified through an example. A user opens, for instance, a Dropbox account, and he claims in the sign-up process that he will use it for private purposes. The question arises; even if the user utilizes the cloud service primarily for personal purpose what is the guarantee that he will not use it for sharing or storing business files later? Who will monitor his activities? Some scholars are of the opinion that an important factor is the time that the user entered into the contract and “it is irrelevant if the user later decides to use the cloud service for non-consumer purposes.¹²⁸” However, the approach of the ECJ is different in this regard.

Whether a person who makes cloud contract that he concluded not for the purpose of trade which he was already pursuing but a trade to be taken up only at a future date (founding activities) is likewise a consumer, is not expressly regulated in the directives at issue¹²⁹. There are, however, some guidelines from the ECJ regarding this issue. The court in Benincasa pointed out “according to settled case-law, it follows from the wording and the function of Art. 13 Brussels Convention (Art. 15 of the Brussels I Regulation) that it affects only a private final consumer, not engaged in trade or professional activities.¹³⁰” Therefore, the ECJ decided that Art. 15 of the Brussels I Regulation is not applicable if a party has concluded a contract for future professional or business activity.

In its reasoning the ECJ stated:

The specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an

¹²⁸ Ibid, p 13

¹²⁹ C-269/95 - Francesco Benincasa v Dentalkit Srl, para 17

¹³⁰ Ibid, para 15; See also C-89/91, Shearson Lehman Hutton, para 20 and 22

*activity is in the nature of a future activity does not divest it in any way of its trade or professional character.*¹³¹

To conclude, the concept of mixed use of cloud services poses difficult challenges to consumer law. To designate the real purpose of users in a cloud computing context, the nature and capacity of the cloud service as well as details captured in the sign-up process can be beneficial, but they are not decisive. The author is of the opinion that, regarding the mixed-use dilemma in the cloud context, two factors need to be taken into account to increase the efficiency of consumer protection. First, the primary use of cloud should be considered as an important measure. The reason can be illustrated through an example. A German cloud user opens a Dropbox account to store his favorite music files and share them with his friends. One year later, he buys a recording studio and starts his small business. Sometimes through his works he needs to share a file that is related to his business with his colleagues. Since it takes some time to create a new account, he decides to use his previous Dropbox account. Meanwhile, he is still using it for storing his favorite personal music files. After two years, because of the increasing number of file sharing and downloading music files he could not save his business and became bankrupt. Again, he uses his Dropbox account just for storing and sharing personal files. This scenario can repeat itself many times during a particular period. Should the user, who used a cloud service for dual purpose, be protected under the umbrella of consumer protection law? The author believes that he should be protected. An important factor is the time that user entered into the contract. Thus, it will be irrelevant if the user later decides to use the cloud service for non-consumer purposes¹³². Second, predominant use should be the relevant criterion in mixed purpose contracts instead of merely a negligible factor. It does not seem rational to deprive a lawyer or teacher, for instance, from protection that is provided for consumers simply because he stores or shares some files related to his profession. The primary goal of consumer protection law is protecting the consumer as a weaker party. This aim would not be achieved unless a cloud user is protected against the

¹³¹ Ibid, para 17

¹³² Cunningham and Reed, part I, 2013, p 18

abuse of power by the CSPs, in cases where he utilizes the cloud service partly within and partly outside his trade, but the trade element of his usage is so limited as not to be predominant in the overall context of the cloud contract. This line of reasoning is also enshrined in Recital 17 of CRD.

Despite mandatory rules in the Brussels I and Rome I Regulations that restrict the parties' freedom to choose the competent court and the applicable law in consumer contracts, CSPs put a choice of law and jurisdiction clause in their cloud contract that is compatible with their specified legal system. Those types of provisions may be considered unfair, as it limits the consumers' right to have recourse to the courts for protecting their rights.¹³³ In the next chapter, the validity of such clause in consumer cloud contracts, which is offered on a non-negotiable basis by CSPs will be examined.

Ultimately, it should be noted that although both the Regulations and the Directive attempt to protect the consumer as the weaker party, the level of protection that is afforded by each of them is different. As it was observed, the Brussels I and Rome I Regulations exclude the consumer of his protection if the cloud contract is concluded with a CSP that does not conduct business in the Member State of the consumer's domicile. For instance, if a French consumer goes to California and buys a cloud-based service, he does not expect to be protected by the Brussels I and Rome I Regulations. If the CSP is not directing his activities to the French markets, he should not be subject to French law as the law of the country where consumer is domiciled¹³⁴. However, the consumer can be protected under the Unfair Terms Directive. The Unfair Terms Directive, which has priority over the Brussels I Regulation, affords protection to the consumer regardless of whether CSPs are commercially active in the Member State where the consumer has habitual residence. This is why the validity of choice of law and jurisdiction clauses in consumer cloud contracts is examined under the Unfair Terms Directive in the next chapter.

¹³³ Sein, 2011, p 54

¹³⁴ Garcimartín Alférez, 2008, p 74

4. Protection of Consumers against Choice of Law and Jurisdiction Clauses in Cloud Standard Form Contracts

Standard form contracts which “prepared by one party, to be signed by another party in a weaker position . . . who adheres to the contract with little choice about the terms¹³⁵” represent the vast majority of cloud agreements. As mentioned in chapter one, most CSPs include a choice of law and jurisdiction clause in their SFC, which is compatible with their preferred legal system. Good examples of these types of clauses are found in the T&C of Google¹³⁶ and Facebook¹³⁷ which provide that the laws of the State of California will apply to the contractual relation with consumers, and that the competent court will be that of Santa Clara. The companies Adrive¹³⁸ and Dropbox¹³⁹ also specify the application of California laws, but designate San Francisco as the competent court.

Consumers agree to these T&C, and contracting with CSPs through SFC in unprecedented numbers¹⁴⁰. They do not take the time to read the contract because “they do not think it will impact their individual circumstances.¹⁴¹” A survey, administered by Hillman and Rachlinski to their contracts class, consisting of 92 first-year students, confirms this claim, indicating that people generally do not read their e-standard forms. They reach out a point that “few respondents read their e-standard forms beyond price and description of the goods or services “as a general matter”. The survey also illustrates “impatience accounts most often for the failure of respondents

¹³⁵ Black's Law Dictionary, 2009, p 366

¹³⁶ Google, Terms of use, section 20.7, available at: <http://www.google.com/accounts/TOS> (Visited 11.05.2014)

¹³⁷ Facebook, Statement of Rights and Responsibilities, section 15, available at:
<http://www.facebook.com/terms.php?ref=pf> (Visited 11.05.2014)

¹³⁸ Adrive, Terms of Service, section 20, available at: <http://www.adrive.com/terms> (Visited 11.05.2014)

¹³⁹ Dropbox, Terms of Service, available at: <http://www.dropbox.com/terms> (Visited 11.05.2014)

¹⁴⁰ Barnes, 2010, p 844

¹⁴¹ Ibid, p 839

to read their forms.¹⁴²” This study brings to mind a quote by Robert Braucher, who said “we all know that if you have a page of print, whether it is large or small, which nobody is really expected to read, and you expect to agree to it, and you sort of put your head in the lion’s mouth and hope it will be a friendly lion¹⁴³”

Notably, even if consumers take the time and read the contract carefully, they are unable to amend its clauses because they are typically on take it or leave it basis and consumers have no bargaining power. Also, consumers tend to lack the technical and legal knowledge to fully understand the terms of the contract. As a result, nearly all risks are on the consumer rather than on the CSPs. The underlying assumption is that those SFCs are indeed a binding contract, resulting from the consumer’s informed assent. Consumers should, nevertheless, be protected from the enforcement of unfair contract terms. This issue is governed by Unfair Terms Directive. Article 3 (1) of the Directive provides “a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”

Due to the concern that the notion of unfairness would lack sufficient accuracy and precision to be applied in a uniform way throughout the Member States, an annex was attached to the Directive providing an ‘indicative and non-exhaustive list’ of unfair terms. According to clause 1 q of the Annex, “a term which has the object or effect of excluding or hindering the consumer’s right to take legal action, particularly by requiring the consumer to take disputes exclusively to arbitration, can be regarded as unfair.” However, in any case, Article 3 (3) of the Directive makes it clear that the examples in the Annex are only indicative and non-exhaustive list of the terms which may be regarded as unfair. Hence a case-by-case assessment has to be made in order to

¹⁴² Hillman and Rachlinski, 2002, p 445-6; See also Hillman, 2005, p 15

¹⁴³ Braucher, 1970

determine the fairness¹⁴⁴. As stated in the opinion of advocate general Geelhoed “the list thus offers a criterion for interpreting the expression unfair term.¹⁴⁵” The courts must also take into account the nature of the goods and services for which the contract was concluded, the other terms of the contract, and also all circumstances occurring at the point the contract was concluded¹⁴⁶.

Notwithstanding, Article 6 (2) of Directive 93/13/EEC on unfair terms in consumer contracts provides “the parties may not avoid the consumer protection provisions by stipulating that the law of a non-Member State applies.” As Naylor, Patrikos and Blamires stated “it is not fair for the aggrieved consumer to be forced to travel long distances and use unfamiliar procedures. Thus, terms which prevent consumers from being able to pursue legal proceedings in their local courts are likely to be considered unfair.¹⁴⁷” To consider a choice of law and jurisdiction clause in a cloud consumer contract an unfair term, it is required to satisfy the elements of an unfair term in Article 3 of the Unfair Terms Directive. There are three elements that should be met cumulatively. (I) the term has not been individually negotiated; (II) it causes a significant imbalance in the parties’ rights and obligations; (III) it is contrary to good faith, which is detrimental to the consumer. In this chapter, each element's level of unfairness is considered to be unattained in respect of choice of law and jurisdiction clauses in consumer cloud contracts.

¹⁴⁴ Unfair Terms Directive, art. 3 (1)

¹⁴⁵ Case C-478/99, Commission of the European Communities v. Kingdom of Sweden, para 29.

¹⁴⁶ Unfair Terms Directive, art. 4 (1)

¹⁴⁷ Naylor, Patrikos and Blamires, p 197

4.1. Not Individually Negotiated

A contractual term which has not been individually negotiated is one of the criteria of fairness test. As it is clear from this element, individual negotiation of a term excludes the application of the unfair terms regime; regardless of whether the term was unfair or not. One might be mindful of the circumstances when a contract or term, shall be regarded as, not individually negotiated. Art 3 (2) clarifies that a term shall always be regarded as not individually negotiated “where it has been drafted in advance and the consumer, therefore, has not been able to influence the substance of the term.¹⁴⁸” Therefore, it can be said, failure of the fairness test applies to all pre-formulated terms.

The Member States’ approach is, nevertheless, different regarding the concept of a contract or term that is not individually negotiated. For instance, the applicability of the German unfair terms regime, in general, requires that the term at issue is a ‘standard contract term.’ Bürgerliches Gesetzbuch (BGB), §305(1) defines these as “all terms pre-formulated for a multitude of contracts that one party imposes on the other. Pre-formulation for a multitude of contracts requires that the term was drafted prior to the conclusion of the contract with the intention to use it in the future for at least three separate contracts¹⁴⁹, not necessarily with different parties¹⁵⁰. What matters is the intention to use, not actual use.¹⁵¹” Further, pursuant to the Spanish GLPCU, Art 82(1) unfair terms may be only those stipulations not individually negotiated. There is, however, no statutory guidance on what constitutes individual negotiation¹⁵². The Supreme Court of Spain (STS) upheld that the notion of not being able to individually negotiate a contract implies that consumer only has two choices: he can accept the terms at the issue of the contract, or he can walk away from the conclusion. In addition, there will be no individual negotiation when the

¹⁴⁸ Unfair Terms Directive, Art 3 (2)

¹⁴⁹ BGH, 27/9/2001 – VII ZR 388/00, NJW 2002, 138

¹⁵⁰ BGH, 11/12/2003 – VII ZR 31/03, NJW 2004, 1454

¹⁵¹ Schillig, 2013, p 74

¹⁵² Schillig, 2013, p 77

business concludes contracts, with identical terms and conditions, with a variety of consumers¹⁵³⁻
¹⁵⁴.

To apply this requirement in the cloud context, it seems correct to say, the overwhelming majority of the cloud contracts are standardized and are not subject to negotiation between the parties. Cloud contracts are usually prepared by the CSP, and the cloud consumer must either accept or reject the terms of such contracts in the form provided. These terms are often offered on a take it or leave it basis. Regarding the choice of law and jurisdiction clause, the same line of reasoning can be argued. This clause is normally imposed by the CSP one-sidedly with the consumer having no opportunity at all to avoid the inclusion of such terms in the contract. Thus, it seems correct to say, since consumers are not able to influence the substance of the choice of law and jurisdiction clause in the cloud contract, such clauses are not negotiated individually and thus meet the criteria. In other words, a consumer cloud contract is presumed to be a standard form contract, unless the CSP proves otherwise.

4.2. The Concept of Significant Imbalance

The general clause according to Article 3's wording requires a significant imbalance in the parties' rights and obligations. The expression 'significant imbalance' can cause some problems in interpretation. Thus, it is ultimately worth considering what exactly constitutes 'significant imbalance' before starting the discussion about validity of a choice of law and jurisdiction clause in a cloud contract, which is not compatible with consumer domicile. As Martin Ebers said, "the issue of whether an imbalance is present in a given case, though, cannot be assessed in isolation from the surrounding legal context."¹⁵⁵ This concept also can be construed from Article 4 of Unfair Terms Directive which provides guidelines to determine whether an imbalance is

¹⁵³ STS 7981/2011, Naidoo VS Turck

¹⁵⁴ Schillig, 2013, p 77

¹⁵⁵ Ebers. Unfair Contract Terms Directive (93/13). In: EC Consumer Law Compendium. 2008, p 385

significant: “the courts must also take into account the nature of the goods and services for which the contract was concluded, the other terms of the contract and also all circumstances occurring at the point the contract was concluded.¹⁵⁶”

The ECJ, on 16 January 2014, responded to a preliminary question from a Spanish court relating to the interpretation of the term ‘significant imbalance’.¹⁵⁷ The ECJ reiterated its test from the *Mohamed Aziz v CatalunyaCaixa*¹⁵⁸ case and pointed out that in order to determine significant imbalance, the court needs to examine what rules apply, without the agreement of either side. In addition, the court should consider if a consumer is placed in a disadvantageous position in comparison. The court must not restrict the examination to only the “quantitative economic evaluation” based on a calculation of the total value of the business deal. In other words, total value equals the terms of the contract versus the expenses sustained by the consumer, covered by that particular clause¹⁵⁹. Moreover, the significant imbalance may solely result from “a sufficiently serious impairment of the legal situation of the consumer through the contractual provision denying him his legal rights or limiting their enforcement.¹⁶⁰”

To attain the requirement of significant imbalance in regards to the choice of law and jurisdiction clause in a consumer cloud contract, it might be correct to say such a clause may cause a significant imbalance in the rights and obligations of the cloud parties as it does not provide the same statutory protection to consumers as it provides to CSPs. Since consumers are not aware of the law and the court proceeding in the country, where the CSP has its principle place of business, the choice of law and jurisdiction clause normally makes consumers reluctant to sue the CSP. Such clauses are weighted in favor of the CSPs and grant them a beneficial power over

¹⁵⁶ Unfair Terms Directive, art 4 (1); See also C-472/11, *Banif Plus Bank v. Csaba Csipai and Viktória Csipai*

¹⁵⁷ C-226/12, *Constructora Principado SA v. José Ignacio Menéndez Álvarez*

¹⁵⁸ C-415/1, *Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa*

¹⁵⁹ *Ibid*, para 22

¹⁶⁰ *Ibid*, para 23

consumers. By taking advantage of consumers' weaker bargaining position, and lack of experience, CSPs attempt to shift legal risks that they are better able to bear to the consumer. It should be noted, one important issue in considering the cloud parties' relative bargaining power is whether the consumer could have gone to other CSPs and whether the alternative source used the same terms. Further, it should be considered how far it would have been practicable and convenient to go to other CSPs. If there are other CSPs from whom the relevant cloud services could be obtained then that may be significant as an indicator of whether there is an imbalance in the bargaining positions¹⁶¹. As it pointed out most of publicly known CSPs specify a jurisdiction compatible with their preferred legal system. Thus, one might say they have absolute power.

Moreover, a lack of transparency regarding the choice of law and jurisdiction clause in a consumer cloud standard form contract may cause a significant imbalance in the parties' rights and obligations. As the CSP and consumer will not usually communicate before entering into a cloud contract, the contract will not take into account specific characteristics of the consumer, such as the consumer's language and literacy skills. Thus, such clause should have not been expressed clearly in reasonably plain language¹⁶².

As Advocate General Kokott explained, "a significant imbalance does not automatically render a term unfair."¹⁶³ To ensue unfairness, the choice of law and jurisdiction clause needs to be contrary to the requirement of good faith. Someone might envisage that the function of good faith is supplement to the test of significant imbalance. It can be construed from the wording of the Directive that the two requirements are cumulative. Therefore, both must be satisfied for the choice of law and jurisdiction clause to be unfair. The concept of good faith is discussed in the next section.

¹⁶¹ MacDonald, 2006, available at: <http://uk.practicallaw.com/books/9781845920678/chapter3> (Visited 11.05.2014)

¹⁶² Middleton, 2011, p 32

¹⁶³ Advocate General Kokott, Opinion, Case C-415/11 Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa), para 72-73.

4.3. The Notion of Good faith

The directive refers to the notion of good faith at Article 3.1 as one of the criteria used to determine whether a clause is unfair. The directive requires that the significant imbalance be ‘contrary to the requirement of good faith.’ Although the notion of good faith remains unclear, some scholars tried to elucidate its concept. “Good faith is often said to be in some way connected with moral standards. It is often said that the standard of good faith basically means that a party should take the interest of the other party into account.¹⁶⁴” Cohen, for instance, is of the view that “good faith represents a necessary standard, tinged with moral considerations and the idea of normality.” Without a doubt, it is difficult to give a concrete definition of good faith. As Hesselink stated “good faith is an open norm, a norm the content of which cannot be established in an abstract way, but which depends on the circumstances of the case in which it must be applied, and which must be established through concretisation.¹⁶⁵”

The transpositions of the directive, in the Member States, illustrate the different approaches to the application of good faith as a criterion for unfairness. Although the criterion of good faith has been mentioned in several Member States¹⁶⁶, others have strongly opposed the introduction of the notion. In Belgium¹⁶⁷ and France¹⁶⁸, for instance, the legislators have chosen not to refer to the notion of good faith in this context. Instead, the criteria of ‘significant imbalance’ is considered sufficient¹⁶⁹. Some Member States use other concepts, like “honest business practices” (Denmark) or “proper morals” (Slovakia), instead of good faith¹⁷⁰. In addition, in a comparative analysis, Zimmerman and Whittaker studied the concept of good faith in 15 legal systems and

¹⁶⁴ Hesselink, 2010, p 621

¹⁶⁵ Hesselink, 2004, p 474

¹⁶⁶ Namely in Bulgaria, Cyprus, Czech Republic, Germany, Hungary, Ireland, Italy, Latvia, Malta, Poland, Portugal, Romania, Slovenia, Spain And United Kingdom.

¹⁶⁷ Article 31 Trade Practices Act

¹⁶⁸ Art. L132-1 French Code de la Consommation

¹⁶⁹ Racine, Laguionie, Tenenbaum & Wicker, 2008, p 194

¹⁷⁰ Schulte-Nölke, Twigg-Flesner & Ebers, 2008, p 228-232

applied it to 30 hypothetical cases¹⁷¹. They came to the conclusion that “the concept meant different things within a particular legal system as well as between legal systems.¹⁷²” Similarly, Lando and Beale, while accepting that “the principle of good faith and fair dealing is recognised or at least appears to be acted on as a guideline for contractual behaviour in all EC countries”, acknowledged the “considerable differences between the legal systems as to how extensive and how powerful the penetration of the principle has been.¹⁷³”

Regarding the choice of law and jurisdiction clause in a cloud contract, it is difficult to decide whether such a clause is contrary to good faith or not. Good faith must be appreciated by reference to “an overall evaluation of the interests involved.” Thus, all circumstances and terms of cloud contract should be taken into account. It can be argued, nonetheless, the choice of law and jurisdiction clause that CSPs put in their cloud contract is normally contrary to the requirement of good faith. First of all, this term might operate disadvantageously to the consumer by discouraging him from suing the CSP in his domicile.

Secondly, considering the strength of the bargaining position of the CSPs, they have the power to take advantage of the consumer’s lack of alternative and knowledge to obtain disproportionate benefits at his expense. Nowadays, CSPs are aware that many people have to use, at least, one type of cloud services like email or Facebook to communicate with their friends or family. Thus, they protect themselves by imposing the choice of law and jurisdiction clause, which is compatible with their preferred legal system and leaves consumers to face the legal risks alone.

Finally, the choice of law and jurisdiction clause does not take into account the legitimate interests of the cloud consumer, which are the possibility of choosing the applicable law and bringing proceeding against the CSP in the court of the place where he is domiciled. In the case

¹⁷¹ Zimmerman and Whittaker, 2000

¹⁷² Dean, 2002, p 776-77

¹⁷³ Lando and Beale, 1995, p 56

of disputes concerning limited amounts of money, which is normal in the cloud context, “the costs relating to the consumer’s entering an appearance could be a deterrent and cause him to forgo any legal remedy or defense.¹⁷⁴” This is contrary to reasonable standards of fair dealing. Consequently, one could claim that a choice of law and jurisdiction clause in a consumer cloud contract that is drafted in disregard and in lack of consideration of the interests of the consumer could be deemed contrary to the principles of good faith.

4.4. Competent Court to Assess Fairness of Contractual Term

An important point that is examined in this section is the question of which court has competence to determine whether a choice of law and jurisdiction clause in cloud contract, satisfies the criteria to be categorized as ‘unfair’ within the meaning of Article 3(1) of the Directive. Regarding assessing whether a contractual term is fair or not, ECJ made it clear in several cases that it is for the national court to decide. “In doing so, the national court has to take into account national legislation and the circumstances of the dispute when forming its opinion, while also observing the general criteria developed by the European Court of Justice for assessing the unfairness of standard terms.¹⁷⁵”

Ultimately, it should be noted that the assessment of the fairness of the choice of law and jurisdiction clause in a cloud contract seems to depend almost exclusively on national law. As Schillig put forward, although “the courts in different Member States may apply the standard of fairness differently even in respect of the same or similar terms, in a general and abstract way, the standards of fairness are not so different.” These similarities, however, “should not disguise the fact that when it comes to the actual application of these principles, different legal systems may come to different conclusions in respect of similar terms.” This can depend on numerous factors

¹⁷⁴ Joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial and Salvat Editores*, para 22

¹⁷⁵ C-237/02, *Freiburger Kommunalbauten*, para 21 and 22; C-137/08, *Pénzügyi Lízing Zrt. v Ferenc Schneider*, para 43-44; C-168/05, *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, para 22

like the “technicalities of the term at issue, the surrounding legal landscape as well as contractual practices and customs.”¹⁷⁶

4.5. Validity of Choice of Law and Jurisdiction Clause in a Cloud Contract

Emphasizing that the assessment of the unfair nature of a specific provision lies with the competence of the national court, the ECJ has still concluded in joined cases *Océano Grupo Editorial and Salvat Editores* that “where a jurisdiction clause is included, without being individually negotiated, in a contract between a consumer and a seller or supplier within the meaning of the Directive and where it confers exclusive jurisdiction on a court in the territorial jurisdiction of which the seller or supplier has his principal place of business, it must be regarded as unfair within the meaning of Article 3 of the Directive in so far as it causes, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.”¹⁷⁷ This jurisprudence of the ECJ was confirmed in the *Pannon* case¹⁷⁸ in which a contract for the provision of mobile telephone services stipulated that jurisdiction would be conferred to the court where the company, Pannon, had its principal place of business¹⁷⁹.

Choice of law and jurisdiction clauses, which typically are not individually negotiated in cloud standard form contracts compels the consumer to accept that the dispute can be settled only in a court of a country where CSPs have their principal place of business. But, as it has been pointed out by the ECJ in the *Shearson Lehmann Hutton* case, “the consumer must not be discouraged from suing by being compelled to bring his action before the courts in the Contracting State in

¹⁷⁶ Schillig, 2013, p 141

¹⁷⁷ Joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial and Salvat Editores*, para 24; C-137/08, *VB Pénzügyi Lízing Zrt. v Ferenc Schneider*, para 54; C-237/02, *Freiburger Kommunalbauten*, para 23

¹⁷⁸ Case C-243/08 *Pannon GSM Zrt. v Erzébet Sustikné Gyórfi*

¹⁷⁹ Wauters, Lievens and Valcke 2013, p 24

which the other party to the contract is domiciled.¹⁸⁰ It should be observed that the practice and method of protection initiated by the directive is grounded on the notion that consumers are normally in a weaker position regarding both negotiating skills and knowledge levels¹⁸¹.

To conclude, given the jurisprudence of the ECJ, the author is of the opinion that exclusive choice of law and jurisdiction clauses in the consumer cloud contract, which are offered on a non-negotiable basis by CSPs and are solely to the benefit of the CSPs, should be considered unfair under the regime of the Unfair Terms Directive. Certainly, presumption of unfairness of the choice of law and jurisdiction clause runs to the benefit of the consumer. Hence, it is necessary that the CSP carries the burden to negate this presumption of unfairness by presenting facts to the contrary. If a choice of law and jurisdiction clause in a consumer contract is assessed as unfair, it will result in that clause being void. However, this issue needs precise analysis and will be addressed further in the next section.

4.6. Consequences of Unfairness

Pursuant to Art 6(1), unfair contract terms shall not be binding on the consumer, whereas the remaining contract is left intact if capable of continued existence without the unfair term. The Directive does not clarify how the Member States shall establish the form of the non-binding nature. Ebers is of the opinion, it can take three different forms. First, absolute invalidity, where the term is void and has no effect. Second, there also exists the more flexible option which is relative nullity. According to this approach “the unfair term initially remains in force, so long as this suits the contractual partner of the user (i.e. generally the consumer), who alone can unilaterally assert its nullity.” Third, protective invalidity where nullity “can only occur to the

¹⁸⁰ Case C-89/91 Shearson Lehman Hutton Inc v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligung mbH, para 18

¹⁸¹ Joined Cases C-240/98 to C-244/98, Océano Grupo Editorial and Salvat Editores, para 25

advantage of the consumer” in the particular case at hand. Whereas, the term at issue is to be non-binding, the remainder of the contract is to be preserved¹⁸².

The ECJ first addressed the legal consequences of unfairness in Océano joint cases. The case concerned the procedural issue of whether a national court could determine of its own motion whether a term of the contract is unfair where the parties to the dispute had made no application to that effect¹⁸³. The ECJ replies:

*The protection provided for consumers by the Directive entails the national court being able to determine of its own motion whether a term of a contract (...) is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts.*¹⁸⁴

It went down to point out:

*The aim of Article 6 of the Directive, which requires Member States to lay down that unfair terms are not binding on the consumer, would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms.*¹⁸⁵

However, a study that has been undertaken by Schulte-Nölke, Twigg-Flesner and Ebers¹⁸⁶ reveals that in some Member States, such as Czech Republic and the Netherlands, unfair terms are

¹⁸² Ebers. Unfair Contract Terms Directive (93/13). In: EC Consumer Law Compendium. 2008, p 404

¹⁸³ Joined Cases C-240 to C-244/98 Océano Grupo Editorial SA v. Murciano Quintero and Salvat Editores SA v. Sánchez Alcón Prades et al, para 26; Case C-243/08 Pannon GSM Zrt. v Erzsébet Sustikné Györfi, para 28, 32; See further Case C-137/08 VB Pénzügyi Lizing Zrt v Ferenc Schneider, para 56; Case C-472/11 Banif Plus Bank Zrt v Csipai, para 23, 24; Case C-488/11 Asbeek Brusse, de Man Garabito v Jahani BV, para 35-53; Case C-397/11 Jörös v Aegon Magyarország Hitel Zrt, para. 27.

¹⁸⁴ Joined Cases C-240/98 to C-244/98, Océano Grupo Editorial and Salvat Editores, para 29

¹⁸⁵ Ibid, para 26

binding unless the consumer invokes unfairness. The author believes that this is contrary to the ruling of the ECJ in *Océano*¹⁸⁷, which the court stated that unfairness is to be determined on the court's own motion¹⁸⁸.

One of the question that is need to be addressed, regarding the consequence of unfair term(s), is whether Article 6(1) of Unfair Terms Directive allows national courts, where an unfair choice of law and jurisdiction clause is found in a consumer cloud contract, to conclude that “the contract as a whole is not binding on the consumer, if that is more advantageous to the consumer.”¹⁸⁹ It must be pointed out, under Article 6(1) “the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.”¹⁹⁰ As regards the criteria for assessing whether a cloud contract can indeed continue to exist without the unfair choice of law and jurisdiction clause, in *Pereničová and Perenič* case, ECJ held:

*Both the wording of Article 6(1) of Directive 93/13 and the requirements concerning the legal certainty of economic activities plead in favour of an objective approach in interpreting that provision the situation of one of the parties to the contract, in this case the consumer, cannot be regarded as the decisive criterion determining the fate of the contract.*¹⁹¹

Therefore, Art 6(1) cannot be interpreted as meaning that, when assessing whether a cloud contract containing an unfair choice of law and jurisdiction clause can continue to exist without

¹⁸⁶ Schulte-Nölke, Twigg-Flesner & Ebers, 2008

¹⁸⁷ See also Case C-473/00, *Cofidis SA v Jean-Louis Fredout* and Case C-168/05, *Elisa María Mostaza Claro v Centro Móvil Milenium SL*

¹⁸⁸ Howells and Schulze, 2009, p 118

¹⁸⁹ Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.*, para 25

¹⁹⁰ Unfair Terms Directive, Art 6 (1)

¹⁹¹ Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.*, para 32

such term, “the court hearing the case can base its decision solely on a possible advantage for the consumer of the annulment of the contract as a whole.¹⁹²” However, given that Member States were allowed to provide a higher level of consumer protection under national law, the Directive did not prevent Member States providing that a contract containing unfair terms may be void as a whole where this would ensure better protection of the consumer¹⁹³.

The second question is whether Art 6(1) allows national courts to revise and amend the unfair choice of law and jurisdiction clause in cloud contract in order to render it acceptable¹⁹⁴. The question was addressed by the ECJ in *Banco Español de Crédito*. The Court held:

Art 6(1) required national courts to exclude the binding effect of an unfair term as regards the consumer, without being authorised to revise the content of that term. Rather, the contract must continue in existence without any amendment other than resulting from the deletion of the unfair terms, in so far as, in accordance with the rules of domestic law, such continuity of the contract is legally possible.¹⁹⁵

A power to amend an unfair term and reduce its content to an acceptable level “would contribute to eliminating the dissuasive effect on sellers or suppliers emanating from the straightforward non-application with regard to the consumer of those unfair terms.¹⁹⁶” “Sellers and suppliers would remain tempted to use those terms in the knowledge that even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers.¹⁹⁷”

¹⁹² *Ibid*, para 33

¹⁹³ *Ibid*, para 34-35

¹⁹⁴ Schillig, 2013, p 171

¹⁹⁵ Case C-618/10 *Banco Español de Crédito SA v Calderón Camino*, para 65

¹⁹⁶ *Ibid*, para 69

¹⁹⁷ *Ibid*, para 69.

When transposing Article 6(1), the Member States have different approaches regarding the invalidity of the unfair choice of law and jurisdiction clause and the possibility of the national courts to amend such unfair term. For instance, under German law, a term found to be unfair will be invalid. “Generally, the remainder of the contract remains valid; any gaps left by the invalid clauses are to be filled by the applicable statutory default provisions.¹⁹⁸” According to the Spanish GLPCU, Art 83(1), the unfair choice of law and jurisdiction clause, is also void¹⁹⁹. The voidness of the term, however, is only a relative one; it applies only for the benefit of the consumer²⁰⁰. Art 83(2) provides that “the court which rules that such terms are void shall modify the contract and shall enjoy moderating powers regarding the rights and obligations of the parties, where the contract continues in existence, and regarding the consequences of its being ruled ineffective in the event of significant loss or damage to the consumer or user.²⁰¹” As Schillig explained, the story in Norway is different. The Norwegian NCC, §36 provides great flexibility. Where a cloud contract contains an unfair choice of law and jurisdiction clause, the contract may be “wholly or partially set aside or amended.²⁰²” The consumer may oppose amending the remainder of the cloud contract which instead will remain unchanged.

According to the travaux préparatoires, in this case the court’s power to make changes is limited to the unfair term. The rest of the contract must either remain unchanged, or it must be invalidated if it cannot be retained on an independent footing where the unreasonable part of the agreement is either set aside or modified.²⁰³⁻²⁰⁴

¹⁹⁸ Schillig, 2013, p 173

¹⁹⁹ Schillig, 2013, p 177

²⁰⁰ Cámara Lapuente S. (dir.), Comentarios a las Normas de Protección de los Consumidores - Texto refundido (RDL 1/2007) y otras leyes y reglamentos vigentes en España y en la Unión Europea, Colex, Madrid, 2011, pp.754-756.

²⁰¹ The General Law for the Protection of Consumers and Users (GLPCU), Art 83(1)

²⁰² Schillig, 2013, p 179

²⁰³ Ibid, p 179

However, it seems to be fairly clear from the Directive that the unfair choice of law and jurisdiction clause must be set aside with the remainder of the cloud contract stays in force. As the Directive provides, terms which do not comply with the requirement of fairness will not be enforceable against the consumer. Therefore, cloud consumers are not bounded by the choice of law and jurisdiction clause that CSPs put in their standard form contracts. Hence, if Dropbox, as a US CSP, for instance, provided in its cloud contracts with French consumers that in the event of dispute California laws applied and the court in which such dispute shall be heard and determined is court of San Francisco, the French consumer would not lose his right to go to the court that he is domicile²⁰⁵. Noteworthy to say, Member States are required to ensure that, “in the interests of consumers, adequate and effective means exist²⁰⁶” to prevent the continued use of the unfair choice of law and jurisdiction clause in consumer contract.

4.7. Practical Aspects of Choice of Law and Jurisdiction Clauses in a Cloud Context

The present thesis attempts to analyze the validity of choice of law and jurisdiction clauses included in the contract between consumers and CSPs. It discussed, theoretically, that those clauses causes significant imbalance in the parties’ rights and obligations and also are contrary to good faith which would cause detriment to the consumer. As a result, those clauses are unfair and should not be enforced on cloud consumers. This means, in the case of a dispute, consumers can choose to bring proceedings against CSPs either in the courts of the member state in which that CSPs is domiciled, or in the courts of the place where the consumer himself is domiciled. Also, the cloud contract will be governed by the law of the country where the cloud consumer has his habitual residence. The question here is how those rules apply in the real world. What are their impacts on consumers? Does the consumer benefit from such rules? Does it even matter?

²⁰⁴ Ot.prp.nr.89 (1993-1994) p 11

²⁰⁵ Hörnle, p 27

²⁰⁶ Unfair Terms Directive, Art. 7

There is a Norwegian student who used Google Doc, as a cloud service, to store his academic articles or files and also to share them with his classmates. One of the documents he stored is his master thesis. After one year of hard working, and exactly one week before the deadline for submitting the thesis, Google deleted the file accidentally due to some technical problems. First of all, it should be noted that Google exempted itself from any liability regarding its free cloud services under its T&C, and the consumer, in this case the Norwegian student, accepted it by clicking an “I agree” button when he started to use the cloud service. Thus, he had no right to complain and Google was not liable. However, let’s assume that Google did not protect itself by exempting itself from such liabilities. The student wanted to sue Google in Norway. He was aware, based on the European legal framework and ECJ case law, the laws of the country where he has his habitual residence would apply to his contractual relationship with Google, and the competent court would be the courts of the place where he was domiciled.

However, there is a clause in Google T&C, which provide that the laws of the State of California will apply to the contractual relationship with consumers, and that the competent court will be that of Santa Clara. Despite the fact that he gave his consent for Google’s T&C, he knew that “where a jurisdiction clause is included, without being individually negotiated and where it confers exclusive jurisdiction on a court in the territorial jurisdiction of which the seller or supplier has his principal place of business, it must be regarded as unfair.” Consequently, he was not bound by such a clause.

He tried to sue Google in Norway due to deletion of his master thesis. He went to a lawyer for advice about how best to seek compensation or other redress. The lawyer, however, made him aware that the claim would end up winning nothing. Even if he sued Google in Norway and Google were ordered to pay compensation, for instance 5000 NOK, and then the judgment were to be enforced against Google in Norway, probably after several years, what truly would he gain? Is it worth going through all these long and complex processes for such compensation even if the

consumer wins? The author is of the opinion, it is not. In reality, normally, disputes arising from the contractual relationship between consumers and CSPs do not involve a large amount of money or compensation. Although the ECJ pointed out in different cases “consumer must not be discouraged from suing by being compelled to bring his action before the courts in the Contracting State in which the other party to the contract is domiciled,” it seems consumers are already reluctant to sue the CSPs. Some might think the reason comes from the fact that consumers are not aware of the legislation that protects them. The truth is, consumers do not think the result of litigation with the CSP will impact their individual circumstances immensely. Ultimately, the author believes the choice of law and jurisdiction clauses is a matter of importance. However, he is of the view, in practice, it will not affect consumers enormously in the cloud context.

5. Conclusion

Standard form contracts that has been unilaterally drafted by CSPs, have profound implications for consumer protection. The consumer who signs these pre-formulated cloud contracts to use the cloud services neither read them nor have the power to negotiate their terms. Normally, CSPs under their terms of services protect themselves by imposing the terms, which are unevenly balanced in their favor and leave consumers alone to face the risks that are inherent to such not negotiated terms²⁰⁷. Standard form contracts that CSPs ask consumers to sign for the provision of services often has clauses in them which determine which court and law will be used in the case of a dispute. Typically, CSPs specify a jurisdiction and choice of law compatible with their specified legal system, which in practice this jurisdiction is where the provider has its principal place of business. The present thesis strived to analyze the validity of such clauses in consumer cloud contracts, which are offered on a non-negotiable basis by cloud service providers.

The present thesis concludes, while the assessment of the unfair nature of a specific provision lies with the competence of the national court, pursuant to the jurisprudence of the ECJ, an exclusive choice of law and jurisdiction clause in the consumer cloud contract, which is offered on a non-negotiable basis by CSPs, should be considered unfair under the regime of the Unfair Terms Directive. In addition, it concluded, such unfair clauses, which do not comply with the requirement of fairness should not be enforced against the consumer and must be set aside with the remainder of the contract stays in force. The reason has been pointed out by the ECJ in different cases as follow: “Consumer must not be discouraged from suing by being compelled to bring his action before the courts in the Contracting State in which the other party to the contract is domiciled.”²⁰⁸

²⁰⁷ Castro, Reed and Queiroz, 2013, p 459

²⁰⁸ Case C-89/91 Shearson Lehman Hutton Inc v TVB, para 18

Moreover, the present thesis concludes that consumers have a two tier protection system regarding choice of law and jurisdiction. One of them is provided by the Brussels I and Rome I Regulations and another is provided by the Unfair Terms Directive. It was illustrated in this thesis that the Brussels I and Rome I Regulations exclude the consumer of his protection if the cloud contract is concluded with a CSP that does not conduct business in the Member State of the consumer's domicile. However, the Unfair Terms Directive, which has priority over the Brussels I Regulation²⁰⁹, affords protection to the consumer regardless of whether CSPs are commercially active in the Member State where the consumer has his habitual residence. Consequently, consumers have a higher level of protection under the Unfair Terms Directive.

This thesis concludes by making three recommendations aimed at improving the protection of consumers in cloud standard form contract regarding the choice of law and jurisdiction clause.

First, system of consumer protection is based on the idea that the consumer is in a weaker position, as regards both his “bargaining power and his level of knowledge.”²¹⁰ Consequently, special protection is provided by the Unfair Terms Directive and the Brussels I and Rome I Regulations to consumers alone. The definition of ‘consumer’ under the present directives and Regulations does not seem to leave room for Member States to protect SMEs, acting outside their normal professional activities, under the notion of consumer. The author is of the opinion that the definition of consumer is unsatisfactory and that it would be useful to have a modification with the aim of including some SMEs in such a definition. Actually, none of the rules that justifies protection of consumers can be regarded as appropriate for consumer contracts but not for small businesses. They are certainly the weak party in a contractual relationship and need to be protected.

²⁰⁹ Brussels I Regulation, art. 67

²¹⁰ Joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial and Salvat Editores*, para 25

Second, the way in which many people increasingly use cloud computing services, makes drawing a distinction between private and professional use more and more difficult²¹¹. For example, it is common among users to use Google Doc, as a cloud service, to store both personal files and business documents. Under current case law, even if the private element is the predominant purpose, the individual will not be a consumer if a court assesses that the degree of professional purpose is any higher than negligible. The result is that an individual who purchases cloud services for dual purposes, for instance, using his Dropbox account for both storing personal files and sharing documents with colleagues, shall not be considered a consumer and forgoes consumer protections. This is contrary to the fundamental aim of consumer protection law, which is protecting the consumer “as the party that is deemed to be economically weaker and less experienced in legal matters.”²¹² The author is of the opinion that, regarding mixed use dilemma in the cloud context, two factors need to be taken into account to increase efficiency of consumer protection. First, the primary use of cloud should be considered an important measure, making it irrelevant that the user later decides to use the cloud service for non-consumer purposes²¹³. Second, predominant use should be considered a relevant criterion in mixed purpose contracts rather than negligible factor. It seems irrational to deprive a lawyer or teacher, for instance, from protection that is provided for consumer on the basis that he stores or share some files related to his profession. The primary goal of consumer protection law is protecting the consumer as a weaker party. This aim would not be achieved unless a cloud user, who utilizes the cloud service partly within and partly outside his trade, but the trade purpose, is so limited as not to be predominant in the overall context of the cloud contract, be protected against the abuse of power by the CSPs.

Third, as it was observed, there are numerous significant deviations in the application of fairness test in the Member States. Also, there are different approaches in the Member States regarding

²¹¹ Cunningham & Reed, 2013, p 12

²¹² C-89/91, Shearson Lehman Hutton, para 18

²¹³ Cunningham & Reed, 2013, p 18

the consequences of unfair terms. The author is of the opinion that those differences would have a detrimental effect on the internal market and hinder its development. Actually, it would undermine consumer confidence in the internal market. The author believes that to achieve more effective consumer protection, uniform rules of law in the matter of unfair terms need to be adopted. This is also enshrined in Recital 10 of Unfair Terms Directive²¹⁴

²¹⁴ Unfair Terms Directive, Recital 10

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