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Legal Liability Issues of Mobile Application Relationships in Europe

Liability of mobile application distributors towards developers and end-users with regards to developers' stance as consumers

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1. Introduction

The replacement of classical cellular phones with smartphones brought about the boom of mobile applications, software designed to function on mobile operating systems as well as other portable devices. Some mobile applications are a part of the mobile operating systems, for instance an apple smartphone, namely an iPhone, which utilizes mobile operating system IOS, come with several mobile applications, like Camera, Calculator, Find my Friend applications, installed in the device prior to purchase.

A numerous amount of applications are marketed through mobile application distribution platforms, such as App Store in Apple's, Google Play Store in Samsung Android devices' cases. Developers of the applications place their applications on distribution platforms by virtue of mobile application dealing between him and the distributors, distribution platform operators. By such virtue, the end-users, users of smartphones, obtain the opportunity to get to know, and download the applications for free or for a purchase fee.

A typical mobile distribution relationship consists of three electronic contracts; the distribution agreement, the EULA (hereafter termed as EULAs) and the terms of services. All of the three contracts are concluded via Internet. Pursuant to the Electronic Commerce Directive[1], mobile application distribution services constitute "information society services"[2]. Consequently, distributors providing the services are to be classified as "information society service" providers[3].

Conforming to a statistical study, the number of worldwide mobile application downloads is expected to surpass 224 billion by 2016[4]. Considering that the distributors of mobile ap-

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[1] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000
[2] Electronic Commerce Directive art.2(a) adopts art. 1(2) of Directive 98/34/EC's definition of information society services, namely as "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services".
[3] Electronic Commerce Directive art.2(a) and (b)
[4] Statista (2013)

plication distribution platforms were launched a short while ago[5], the mentioned displays the pace, in which mobile applications became popular. Indeed, nowadays, mobile application transactions have become as frequent as day-to-day purchases of food or hygienic products.

Nevertheless, while defects in the latter goods have been made subject to countless litigation processes, defects in mobile applications or damages caused thereby are hardly made subject to legal actions. Although, according to a survey, more than half of mobile application users experience a problem[6]. Therefore, mobile application transactions are far from having satisfactory results for the majority of end-users.

The basic failures common to all mobile application end-users are bugs, errors, crashes, slowness and, in mobile interaction with real word (MIRW)[7] applications' case, problems with features related to global positioning service (GPS), compass, camera and network connection, namely failures related to technical functionality[8]. Additionally end-user experience dissatisfaction may result from the content, interaction experiences, compatibility, overall usefulness, customer service or privacy features[9].

A reason for European end-users' hesitation in starting a litigation process regarding defects in mobile applications might be the monetary insignificance of the losses caused by applications. However for MIWR applications utilizing GPS services, the lack of adequate information, may lead to substantial damages, even fatal consequences.

The dissatisfaction in user experiences regarding mobile applications, need not always arise from a certain defect in the digital good itself which can be controlled by the end-user. In certain situations, the manner of marketing/distribution of an application, too, can cause some complications in user experience. For instance, the dissatisfaction regarding technical

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[5] Apple App Store and Google Play were established in 2008 while Amazon Appstore was launched in 2011.
[6] Compuware (2012) p. 6
[7] Salo(2013) p.1113
[8] Salo(2013) p.1118
[9] *ibid.*

functionalities, compatibility and content may result from the mobile application distributors' delay in approving the update thereof, without which updates cannot be transmitted to end-users.

On this wise, the liability situations, especially arising as a result of distributors' actions constitute a legal controversy with regards to mobile application relationships. Mobile application distributors, typically, make use of disclaimer of warranties in addition to indemnification clauses to deny all responsibility from any action they take, be it against developers or end-users.

Therefore, when applied literally, mobile application contracts bring about seemingly unfair situations for both developers and end-users. This may, as well, constitute a further reason to consumers' reservations with respect to taking an action against unsatisfactory mobile applications and services thereof.

The coming chapters will discuss the related situation with regards to distributors' denial of responsibility thereof.

The majority of the mobile application distributors are based in the U.S., where with pursuance to contractual freedom principle, the consumer law offers minimum protection. On this wise, distributors' adoption of the above mentioned rather farfetched exemption clauses may be grounded on a possible assumption of the other contractual parties' stances as consumers would not change the agreed terms of a contract.

 European consumers, however, are granted a better protection against such terms, since the European Union regulates protection of consumers via mandatory rules that have priority with regards to contractual freedom. Notwithstanding, as defects in mobile applications are not commonly brought before the courts, to what extend the protection of European consumer acquis is applicable to mobile apps, is yet to be determined by jurisprudence. Correspondingly, mentioned will be dealt in the discussion hereafter.

Having said that, regarding their relationships with developers, it is likely that distributors presuppose that at least the majority of developers are non-consumers. For that reason, the

consequences of the seemingly unfair liability terms, in contracts they offer to the developers, might have been overlooked by distributors. The validity of mentioned presumption will also be further assessed in following chapters.

This paper assess to what extend the European Union law, particularly the consumer acquis, permits the aforementioned auspicious position of the distributors. On this wise, the discussion will focus on how and whether the liability situations, of all mobile application relationship actors, change when developers are classified as consumers according to European consumer acquis.

1.1. Derivation of topic of dissertation

Supposing a mobile application distributor does not take the preventive measures to protect its distribution platform against online attacks, when a mobile application and it's end-users are impaired as a result of a general attack on the platform, the fault thereof is evidently the distributor's. On this wise, an online attack aiming a distribution platform as a whole might render some applications inaccessible, impede the in application payment systems or may result to some data protection infringement. Therefore, the losses suffered thereof might be substantial for both developers and end-users, thusly rendering the allocation of liability crucial.

However, due to contractual freedom, liability in contractual obligations can be transferred regardless of the culpable party. Accordingly, the majority of mobile application distribution agreements have clauses which transfer all responsibility of distributors to developers. Hence, the distribution contracts, including all that is focused on by this paper, designate the developer to be accountable to end-users in cases such as the above mentioned.

Aforesaid may be legally valid in the USA, where most of the distributors are founded[10], nevertheless some jurisdictions, like European Member States', hold such seemingly unfair terms unenforceable with regards to consumers.

Hence, the importance of classifying a developer as consumer emerges in situations where the unfair liability terms he/she had agreed burdens him/her responsible from another person's actions, which he/she has no control over. For in such situations, designating the developer as consumer renders the relationship between him and the distributor as a consumer transaction. In Europe, consumer transactions are controlled via mandatory terms regulated by legal instruments, such as the Unfair Terms Directive. The provisions of the said Directive prevents the powerful parties of a contract, distributors in the topic at hand, from abusing their dominant situations, namely by holding unfair liability terms unenforceable.

Classifying developers as consumers affects also the legal validity of their dealing with end-users. An end-user license agreement (hereafter EULA) between a consumer end-user residing in European territory and a mobile application developer, who is not a consumer, is subject to European consumer protection. On the other hand, EULAs contracted with non-consumer developers would constitute C2C agreements, and thusly fall out of the scope of consumer law. This, evidently, deprives end-users from certain protection while bringing about a broader assessment of unfairness regarding the terms of service agreements between them and distributors.

This paper assesses the liability issues in similar situations, according to the European law, where the damage is brought about by the faulty actions of the distributor, examining how the liability situation changes according to the stance of the developer as a consumer. On this wise, the following chapters will demonstrate the struggle of balancing the relevant interests in constituting the contractual freedom and protecting the weak.

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[10] As stated under Apple Info visited at http://www.apple.com/about/, and About Google visited at https://support.google.com/googleplay/answer/6034670?p=about_play&rd=1&hl=en-GB

1.2.   Legal basis

The subject matter of this paper congregates around two central legal issues. The first of these issues considers mobile application developers' position as a consumer in the contractual relationship between them and the distributors. The second one deals with the unfairness of the liability clauses regarding the whole mobile application distribution relationship.

Prior to an explanation of the mentioned issues, the relevance of European consumer law as regards to mobile application contract should be examined. The Rome I Regulation of the European Parliament on the applicable law to contractual obligations designates the law of the countries in which consumers habitually reside, as applicable to consumer contracts[11]. On this wise, the Regulation demands the professionals to either pursue their activities in or direct them to consumers' country of habitual residence, for it to be the governing law[12].

To this extend, when a consumer, who resides within the territory of the European Union, enters into an agreement with a mobile application distributor or the developer, the contractual relationship thereupon is governed by European consumer acquis. Consequently, discussion in the following chapters assumes the consumer party of the contract at hand to be a habitual residence in Europe.

European law regulates rules regarding consumer contracts via several directives. The most recent directive is the Consumer Protection Directive[13], which replaces the directives on the distance contracts[14] and contracts negotiated away from business premises[15]. Relevance of

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[11] Rome I Regulation art 6(1)
[12] Rome I Regulation art 6(1)(a) and (b)
[13] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council
[14] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts
[15] Council Directive of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (85/577/EEC)

the mentioned Directive, with regards to liability clauses in mobile distribution contracts, arises concerning the designation of a party thereof as consumer.

The notion of "consumer" in European consumer acquis is defined in a, rather, inconsistent manner. In the course of time, consumer definitions provided by various directives, before the Consumer Protection Directive, have become inadequate to Web 2.0. environments. Thusly, being prepared recently, Consumer Protection Directive is expected to demonstrate European law makers' intentions regarding definition of consumer in the era of e-commerce. Therefore, this paper will take account of the mentioned Directive's consumer definition, together with several uncertainties thereof, while designating, especially, mobile application developers' stance as consumers.

The above mentioned designation of developers as consumers has many effects on mobile application distribution agreements, one of which is the enforceability of their terms. The Unfair Terms Directive[16] regulates the mentioned enforcement issues about standard terms of consumer contracts. Hence, the liability clauses of mobile distribution agreements, for as much as they are consumer contracts, would also be subject to the rules of Unfair Terms Directive. Accordingly, the assessment hereafter will give special consideration to the requirements and provisions of the said Directive.

Following chapters will explain that mobile distributors constitute information society service operators, providing hosting services in addition to cloud services in several levels. Said renders the rules of Electronic Commerce Directive also applicable to contracts distributors conclude with end-users and developers. In such wise, when assessing the liability situation in mentioned agreements, the Directive's liability rules, namely safe harbour regulations, too, will be considered.

Today, launching a mobile application distribution platform is as easy as launching a website, hosting some mobile software. Accordingly, there are countless platforms providing

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[16] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

mobile application distribution services, be it operating system-native or third-party platforms[17]. However, owing to practical reasons, this paper will focus solely on Apple's App Store, Google Play Store and Amazon App Store. To this extend, agreements provided by mentioned platforms are taken as samples to the contracts and terms assessed in this paper.

As explained in the previously, the rules constituting the legal basis to this paper are germane to European Union Community law. The discussion generated hereafter is established on the general instruments of the European Union law, such as directives and regulations, rather than the individual application of the Member States thereof. Therefore, the judicial reaction to the same situation, discussed in the paper, may vary from Member State to Member State. The regulation in the different member states falls outside the scoop of this paper.

1.3. Legal context

Despite the many opportunities it suggests regarding businesses, clients and start-ups, the electronic commerce also presents many legal challenges. In the internet it is not always possible to designate when, where and by whom an action is taken. On this wise, the deterritorialisation[18], detemporalisation[19], dematerialisation[20] and depersonalisation[21] in the electronic environments bring about many controversies regarding the forming of electronic contracts, for instance the disputes on what constitutes an offer of an acceptance.

Protection of consumer from unfair clauses forms one of the fundamental areas of electronic commerce law. The widespread use of internet has converted the purchasing needs and habits of consumers. Accordingly, their protection has become one of the central struggles of European law makers with regards to electronic commerce. The Internet compels consumers agree to an increasing amount of terms, be it by a click wrap format to purchase a

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[17] Wikipedia (2015)
[18] Hoeren (2005) p. 48
[19] Hoeren (2005) p. 50
[20] Hoeren (2005) p. 47
[21] Hoeren (2005) p. 51

goods, product or a browse wrap format to navigate in a website. By this way, consumers are exposed to more standard terms every day, increasing the chances for them to agree more to seemingly unfair clauses, large enterprises force on them by making use of their lack of knowledge or bargaining power.

Another ambiguity, produced especially by the deterritorialisation aspect of electronic commerce, concerns jurisdiction and applicable law[22]. The situation may look clearer in relation to the large enterprises making use of jurisdiction and governing law clauses incorporated in standard terms they provide to customers. Likewise, the majority of the mobile application distributors, too, use such jurisdiction clauses[23]. However, when the other party of the contract is a consumer residing in a different jurisdiction then the designated, said clauses might generate inequitable results. The terms discussed by this paper are only some of the many such terms.

At the same time, the advent in user generated content in the Internet rendered liability issues, such as the responsibility of intermediaries from third party infringements, one of the highly regulated issues regarding the electronic commerce. Whereas a separate liability dispute, concerning the aforementioned intermediaries and other electronic commerce service providers, arises regarding the enforceability of the unfair disclaimers utilized by them.

The mobile application relationship constitutes a sub-category to the electronic commerce. Similarly, since the contracts, governing the mentioned relationship, are concluded via electronic means, they classify as electronic contracts. Therefore, abovementioned issues prevail also in mobile application relationships' cases. Especially concerning the implications of mobile applications like health apps, liability issues thereof tend to have colossal effects.

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[22] Rodríguez (2010) p.2
[23] IOS Developer Program License Agreement art. 15.10, Google Play Developer Distribution Agreement art. 15.7, Amazon App Distribution and Services Agreement art.13

Another contemporaneous matter in mobile applications concerns is the data protection rules, especially of Europe. Any damage incurring by end-users with relation to data protection may amount to substantial losses and liabilities. Therefore, in likely cases designation of liability constitutes a place of grave importance.

Designation of a party of a contractual relationship is particularly important with regards to jurisdiction and applicable law issues, as regulations on these issues assigns exceptional rules to consumer contracts. However, as the said regulations constitute procedural law, the criterion adopted by said rules to designate a party as consumer is not the same with the benchmarks taken in the topic at hand.

Data protection law concerns data subject rather than the consumer, still the aim of both data protection and consumer protection rules are the same, namely to protect the weak. Furthermore, one of the most contemporary issues regarding data protection in Europe is the consumer privacy, which rendered designation of a person as a consumer of critical importance. Withal, the following discussion concerns neither the data protection, nor jurisdiction complications in mobile applications. On this wise, this paper examines the liability issues in mobile application contracts with relation to the European consumer acquis.

1.4. Outline of the main part

The debate of following chapters regarding above cited matters will be preceded by chapter 2.1., which will give a basic explanation of mobile application relationship in addition to parties and contracts thereof.

Subsequently, chapter 2.2. will discuss the relevant interests in the mobile application relationship in, with a specific focus to consumers' interests in protection against unfair terms. Chapter 2.3. will assess whether mobile application developers can be classified as a "consumer" in European consumer acquis.

Following in chapter 2.4., the liability issues in mobile application relationships will be analysed, classifying them in two sub-chapters; chapters 2.4.1 and 2.4.2, depending on whether developers' stances as consumers. Whereas, the sub-sections of chapters 2.4.1 and

2.4.2 will assess the liability situations particularly to each contract governing the relationships between parties of mobile application dealings, namely the distribution, end-user license and terms of service agreements. Mentioned assessment will hinge on the consequences of the Unfair Terms Directive regarding distributors' liability from the losses arising from their own actions in addition to the applicability of a favourable treatment with regards to developer who cannot be classified as consumers.

2. Liability Issues in Mobile Application Relationships

This chapter will assess the liability situation in mobile application relationships, particularly focusing on the accountability of mobile application distributors from the damages caused by their actions. On this wise, the subsequent chapter will give a general overview to the current situation in the mentioned relationship. In the following chapter, relevant interests concerning the allotment of responsibility in mobile application relationships will be stated. Finally, chapter 2.4. will discuss the allotment of liability with regards to developers situation as a consumer according to European law.

2.1. Mobile application contracts and legal situation of the parties of mobile application relationships

Mobile application programs are software that processes data[24] in order to perform a group of coordinated functions, tasks and activities for the end-user. Mobile applications can be categorised under native, mobile web, hybrid applications with regards to their platform types[25]. Native apps are specific to a given operating system, such as IOS or Android[26]. Mobile web applications, on the other hand, are device neutral and can rather be defined as mobile versions of web pages, accessed only through web-browsers[27]. Hybrid applications, which constitute a significant majority, consist of primary content coded in a Web language

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[24] Pcmag.com (2015)
[25] Clutch.co (2015)
[26] *ibid.*
[27] *ibid.*

which can access some device functionality[28]. Unlike mobile web applications, some of the native applications and most of the hybrid ones can be purchased or downloaded through mobile distribution platforms. Some distribution platforms are native to the major mobile operating systems, whereas others are third-party platforms that are alternative to the former type.

Mobile applications are typically not developed by the distributors themselves but rather placed on the market by virtue of the mobile application software development contracts. Parties to the said are mobile application software developer and the mobile application distributor.

The mobile software platforms are frequently termed as "distributors". Indeed, similarly to Amazon[29], Google Play describes its services as "distribution"[30] in the Google Play Development Distribution Agreement[31]. Nevertheless, classifying a contract between mobile application platforms and mobile application software developers as a distribution agreement is not in compliance with the main features of a distribution relationship.

In a distribution relationship, the supplier receives a payment from the distributor in exchange to the products subject to the agreement[32]. By this virtue, the distributor gains ownership rights to the products, thusly becoming entitled to sell them in its own behalf. The mobile app development contracts, however, envisage no payment duty for the distributor. Moreover, the majority of the distributors, such as Google Play, retain from acquiring any rights or titles[33] from the developer. In other words, unlike distributors in distribution contracts, the mobile app distributors do not resell the apps marketed in their platform since they do not buy them from the app developers primarily.

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[28] Clutch.co (2015)
[29] Amazon App Distribution and Services Agreement Distribution Schedule art. 3 (a)
[30] Google Play Developer Distribution Agreement art. 1.1, 2.1 and 5.2
[31] Turke (2014)
[32] Martin (2015)
[33] Google Play Developer Distribution Agreement art. 4.1

As is emphasized by Apple's IOS Developer Program License Agreement[34], the mobile app development contracts rather resemble agency contracts. An agency relationship arises where the agent has the express or implied consent to act on behalf of the principal, in effecting legal relations with third parties[35]. Black's Law Dictionary defines agency as "every relation in which one person acts for or represents another by latter's authority"[36]. Indeed, by virtue of the distribution agreements, developers authorize distributors to market the apps on their behalf, creating a fiduciary relationship.

On the other hand, the mobile app development dealings are commonly devoid of distinctive features of agency relationships. In agency, agents agree to act under the direction[37] or control[38] of principals. Mobile application distribution contracts, however, do not foresee any obligations for distributors to act as directed by developers. On the contrary, the majority of the mobile app development contracts entitle the distributors to market the mobile app under distributors' sole discretion. For instance, in addition to limiting the usage of any APIs[39] that are not documented by Apple[40], Apple obliges IOS developers to use Apple's developing software[41]. Furthermore, coupled with its ban on marketing the mobile app in other app stores[42], Apple's reservation of its right to determine, on its sole discretion, whether the mobile app will be placed on App Market[43] signifies that Apple makes the final decision about marketing the mobile app, not its developer. Similarly, Amazon secures its right to determine whether to distribute the mobile app on its sole discretion[44]. Likewise, Google too maintains a significant control over the apps Google Play distributes[45]. Google

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[34] IOS Developer Program License Agreement art. 3.1 and Schedule 1 art . 1.1
[35] Scottish Law Commission (2009) p.23
[36] Black(1968) p.84
[37] Rasmusen (2001) p.4
[38] *ibid.*
[39] Orenstein (2000)
[40] IOS Developer Program License Agreement art. 3.3.11
[41] IOS Developer Program License Agreement art. 5.1
[42] IOS Developer Program License Agreement art. 3.2 (g), Schedule 1 art. 2.1 and 2.2; Copytrans.net (2015)
[43] IOS Developer Program License Agreement art. 6.5 (a) (b), 7.1; Copytrans.net (2015)
[44] Amazon App Distribution and Services Agreement art.6, Distribution Schedule art. 2(a)
[45] Turke (2014)

decides how to display the mobile apps[46], reserves its right to remove the app from the store[47] and even from the end-user devices[48]. As seen, contrarily to the nature of agency contracts, mobile app distributors are far from acting under the direction or control of developers, on the contrary it is usually the developers who act under the control of the distributors.

Even though it is not expressly named in the development contracts as such, the mobile application distributors can preferably be referred to as electronic commerce (e-commerce) intermediaries[49]. Internet intermediaries are intermediaries bringing together or facilitating transactions between third parties, occasionally aggregating supply and demand[50] in electronic markets[51]. E-commerce intermediaries are internet intermediary platforms that do not take title to the goods being sold[52]. Accordingly, a distributor, as an e-commerce intermediary, connects end-users, buyers, and developers, suppliers, to enable a transaction between them[53], namely the purchase of an application, in distribution platforms, in other words application stores.

Rather than intermediaries like wholesalers, cooperatives, travel and insurance agencies[54], mobile app distributors stand closer to virtual marketplaces[55], such as internet retailers and auction platforms that sell third party products to its customers. Similarly to the latter, the distributors provide both information and matching services by making it known that a given app is on sale, identifying preferences of the end-users via categorical placement and providing means for the end-user to assess the quality and technological characteristics of an application, reputation of the developer[56]. Nevertheless, since it is mobile application

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[46] Google Play Developer Distribution Agreement art. 4.8
[47] Google Play Developer Distribution Agreement art. 7.2
[48] *ibid.*
[49] Perset (2010) p.9
[50] Perset (2010) p.15
[51] Perset (2010) p.9
[52] Perset (2010) p.12
[53] *ibid.*
[54] Bailey(1997) p.2
[55] Perset (2010) p.15
[56] *ibid.*

distributors determining whether to market an application or not, they are in better control of the products they market than a typical auction platform. As will be explained, said fact renders liability claims against mobile app distributors more powerful.

Together with their services regarding marketing of the mobile applications and providing access to them, distributors also provide cloud computing services. Cloud computing is an arrangement, whereby computing resources are provided on a flexible basis that allows for rapid and seamless allocation on demand[57] that enables the service receiver to obtain applications from any location via Internet[58] . On this wise, distributors provide a cloud service in both platform as a service (PaaS) and software as a service (SaaS) levels to developers, while the cloud service they provide to end-users are solely in SaaS level.

PaaS level cloud service providers provide platforms for developing and deploying software applications[59], which is exactly what distributors supply to developers.

The SaaS level cloud service providers, on the other hand, supply the software and storage for data thereof. Distributors enable end-users and developers to access mobile applications regardless of the location, on this wise they host the mobile applications on their cloud spaces. In this respect, in Schedule 1 of IOS Developer Program License Agreement, Apple stresses the fact that it provides hosting services to developers and end-users[60] in addition to permitting developers to use its cloud services for the purpose of storage and retrieval of key value data[61], other documentation and end-user data storage[62].

When a mobile application is purchased through a distribution platform by an end-user, there is a trihedral contractual relationship lying under to govern the law of the purchase. The relationship between end-users and developers are governed by end-user license agreements. On the other hand, dealings between mobile application distributors and de-

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[57] Hon(2014) p.3
[58] Chan(2012) p.2
[59] Catteddu(2009) p.2
[60] IOS Developer Program License Agreement Schedule 1 art.1.2.(b), 3.1
[61] IOS Developer Program License Agreement Attachment art. 4.1.3
[62] IOS Developer Program License Agreement Attachment art. 4.1.4

velopers are determined by virtue of agreements regulating the manner in which distribu-tors are to provide their services in addition to the requirements developers and their appli-cations should satisfy to be served so. Apple names the agreement it utilizes to regulate the mentioned relationship as Developer Program Licensing Agreement whereas Google clas-sifies the same as a Developer Distribution Agreement. Amazon, on the other hand utilizes the term App Distribution and Services Agreement. Despite the said variation this paper refers to the said type of contracts as distribution agreements. Meanwhile, mobile applica-tion end-users' utilization of the distributors' services is subject to the terms and service agreements provided by the distribution platforms.

All three types of contracts listed above, are provided in standard term contracts, to which developers or end-users agree to by a click-wrap format. Since these contracts are provided by distributors and developers, said implies that the liability clauses therein reflects the interests of the provider of the services or goods in question.

The majority of the distribution contracts make use of an indemnification[63] clause, a dis-claimer of warranty[64] and a limitation of liability[65] clause in order to minimize the risk of accountability.

On this wise, the indemnification clause in 11th article of Apple's IOS developer Program License Agreement states;

> *"To the extent permitted by applicable law, You agree to indemnify and hold harm-less, and upon Apple's request, defend, Apple, its directors, officers, employees, in-dependent contractors and agents (each an "Apple Indemnified Party") from any and all claims, losses, liabilities, damages, taxes, expenses and costs, including without*

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[63] IOS Developer Program License Agreement art. 11; Google Play Developer Distribution Agreement art. 13; Amazon App Distribution and Services Agreement art.9
[64] IOS Developer Program License Agreement art. 13; Google Play Developer Distribution Agreement art. 11; Amazon App Distribution and Services Agreement art.11
[65] IOS Developer Program License Agreement art. 14; Google Play Developer Distribution Agreement art. 12; Amazon App Distribution and Services Agreement art.11

limitation, attorneys' fees and court costs (collectively, "Losses"), incurred by an Apple Indemnified Party and arising from or related to any of the following…"

Accordingly, the same agreement asserts;

"Apple shall have no responsibility for the installation and/or use of any of the Licensed Applications by any end-user. You shall be solely responsible for any and all product warranties, end- user assistance and product support with respect to each of the Licensed Applications." [66]

"You shall be solely responsible for, and Apple shall have no responsibility or liability whatsoever with respect to, any and all claims, suits, liabilities, losses, damages, costs and expenses arising from, or attributable to, the Licensed Applications and/or the use of those Licensed Applications by any end-user, including, but not limited to…" [67]

Additionally, Apple impels[68] developers to incorporate following terms in their EULAs;

"You and the end-user must acknowledge that the EULA is concluded between You and the end-user only, and not with Apple, and You, not Apple, are solely responsible for the Licensed Application and the content thereof. The EULA may not provide for usage rules for Licensed Applications that are in conflict with, the App Store Terms of Service as of the Effective Date (which You acknowledge You have had the opportunity to review)."[69]

Moreover, Apple make use of the following terms in order to prevent any developer claims;

"The Apple Software or services may contain inaccuracies or errors that could cause failures or loss of data and it may be incomplete … Apple and its licensors reserve

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[66] IOS Developer Program License Agreement art.5.1
[67] IOS Developer Program License Agreement art.5.2
[68] IOS Developer Program License Agreement art.3.2
[69] IOS Developer Program License Agreement Schedule 1 Exhibit B art.1

the right to change, suspend, remove, or disable access to any Services (or any part thereof) at any time without notice. In no event will Apple or its licensors be liable for the removal of or disabling of access to any such Services. Apple or its licensors may also impose limits on the use of or access to certain Services, or may remove the Services for indefinite time periods or cancel the Services at any time and in any case and without notice or liability. You expressly acknowledge and agree that use of the apple software, security solution, and any services is at your sole risk and that the entire risk as to satisfactory quality, performance, accuracy and effort is with you. The apple software, security solution, and any services are provided "as is" and "as available", with all faults and without warranty of any kind, and apple, apple's agents and apple's licensors (collectively referred to as "apple" for the purposes of sections 13 and 14) hereby disclaim all warranties and conditions with respect to the apple software, security solution, and services, either express, implied or statutory, including without limitation the implied warranties and conditions of merchantability, satisfactory quality, fitness for a particular purpose, accuracy, timeliness, and non-infringement of third party rights. ... Should the apple software, security solution, or services prove defective, you assume the entire cost of all necessary servicing, repair or correction. Location data as well as any maps data provided by any Services or software is for basic navigational purposes only and is not intended to be relied upon in situations where precise location information is needed or where erroneous, inaccurate or incomplete location data may lead to death, personal injury, property or environmental damage. Neither Apple nor any of its licensors guarantees the availability, accuracy, completeness, reliability, or timeliness of location data or any other data or information displayed by any Services or software."[70]

"To the extent not prohibited by applicable law, in no event will apple be liable for personal injury, or any incidental, special, indirect, consequential or punitive damages whatsoever, including, without limitation, damages for loss of profits, loss of da-

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[70] IOS Developer Program License Agreement art.13

ta, business interruption or any other commercial damages or losses, arising out of or related to this agreement, your use or inability to use the apple software, security solution or services, digital certificates, or your development efforts or participation in the program, however caused, whether under a theory of contract, warranty, tort (including negligence), products liability, or otherwise, even if apple has been advised of the possibility of such damages, and notwithstanding the failure of essential purpose of any remedy. In no event shall Apple's total liability to You under this Agreement for all damages (other than as may be required by applicable law in cases involving personal injury) exceed the amount of fifty dollars ($50.00).[71]

By this virtue, the distributors attempt to ensure that developers bear the sole responsibility regarding any loss or damage that result from the mobile application in question[72]. The extended indemnification clauses burden developers with holding distributors unaccountable for any possible claim. Developers, meanwhile, are not granted any such easement of liability[73].

Furthermore, disclaimer of warranty clauses denote "as is" and "as available" principles of the distribution services[74]. Mentioned principles imply that the distributors do not guarantee any aspect of the service or goods provided, together with denying any responsibility in the event of failure to provide such services.

As for the limitation of liability clauses, the general tendency of development agreements is to deny all liability of any kind[75]. Additionally, some distributors, such as Apple, set a monetary cap to their liability, $50 USD in Apple's case[76], for all damages in any event. Validity of said caps according to European law, along with the effectiveness of the listed clauses, will be discussed hereafter.

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[71] IOS Developer Program License Agreement art.14
[72] Google Play Developer Distribution Agreement art.4.6, 4.7
[73] IOS Developer Program License Agreement art. 11; Turke(2015)
[74] IOS Developer Program License Agreement art. 13; Google Play Developer Distribution Agreement art.13
[75] IOS Developer Program License Agreement art. 14; Google Play Developer Distribution Agreement art.12
[76] IOS Developer Program License Agreement art. 14

Moreover, by virtue of development agreements, distributors maintain a significant control over the mobile applications' both before[77] and after their purchase[78]. On this wise, distributors reserve their rights to remove and prevent access to mobile applications and deny any liability considering damages this action would cause.

Regarding the relationship between distributors and end-users, the terms of service agreements, thereupon, typically attempt to render distributors immune from any responsibility by firstly, transferring the liability to developers and secondly, placing limitation of liability clauses. Accordingly, said contracts stress that EULAs are to govern solely application purchases, parties of which are developers and end-users[79]. By this way, distributor platforms place themselves out of the application purchase relationship, thusly being exempted from any liability that may incur by the parties.

However, Apple allocates itself as the third party beneficiary of EULAs and reserves its right to enforce the EULA[80]. Assessed together with its disclaimer of warranty clauses, the mentioned suggests that Apple accepts only the benefits of but no responsibilities from EULAs. The imbalance, created by the said situation and its consequences will be discussed by the successive chapters.

As to the licensing relationship between developer and end-user, developers utilize EULAs to regulate the purchase of a mobile application and the relationship thereof. Mobile applications are proprietary software that is subject to copyright protection. Being the author thereof, the developer of a mobile application has the exclusive proprietary right to reproduce, communicate to public and distribute the software[81]. On this wise, the developer of the mobile application executes his right to distribution of the copyrighted software by virtue of licensing agreements, in other words the EULAs. Correspondingly, EULAs regulate

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[77] Google Play Developer Distribution Agreement art.4.8
[78] Google Play Developer Distribution Agreement art.7.2; Turke(2015)
[79] Google Play Terms of Service art.2; Amazon App Store for Android Terms of Use art.3.3(vii); Apple App Store Terms and Conditions "license of mac app store and app store products"
[80] Apple app store terms and conditions "License of Mac App Store and App Store Products"
[81] Information Society Directive art.2, 3, 4

the rights and obligations of the licensee, the end-user, and the licensor, the developer. In most distributors' cases, such as Apple and Amazon, distributors provide a standard/default EULA by their development agreements[82] or terms of services[83]. By their development agreements, both Apple[84] and Amazon[85] compel developers to adopt EULAs that are consistent with the standard/default EULA provided. Said obligation displays distributors' dominating power over the mobile application relationship since they claim to have the authority to designate the terms of an agreement they are not a party of. Mentioned supply of default EULA sets the minimum EULA terms for developers while informing end-users about minimum licensing terms. Additionally default EULAs generally include terms emphasizing that distributor is in no event liable or responsible from any aspect of the mobile application and their purchases[86].

2.2. Policy considerations

Frederick Schiller denoted the objective of law in a memorable quote, namely as "Law is the protector of the weak.". On this wise, despite regulating dealings of the equals, contract law as well sets some mandatory rules, ratio legis of which is to help and protect the weaker party[87].

Consumer law is one of the areas that is densely regulated by the mandatory rules protecting the weak party. This is due to the substantial imbalance between parties[88] of consumer contracts. Consumers tend to be less informed in legal matters in addition to having less bargaining power[89]. In other words, as a consequence of limited information and time, consumers lack sophistication[90], leading to their weaker position against professionals. Follow-

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[82] IOS Developer Program License Agreement Exhibit B
[83] Amazon App Store for Android Terms of Use art.3.3
[84] IOS Developer Program License Agreement Schedule 1 art. 2.1, 3.2
[85] Amazon App Distribution and Services Agreement Distribution Schedule art.4(a)
[86] IOS Developer Program License Agreement Schedule 1, Exhibit B art.5, 6; Amazon App Store for Android Terms of Use art.3.3(vii)
[87] Schoenmakers (2014) p.3
[88] Schoenmakers (2014) p.3
[89] 1975 Council Resolution on consumer protection Annex I.A.
[90] DiMatteo (2012) p.223

ing the same rationale, the directives[91] and policy papers[92] of the European Commission had set the protection of consumer as the foundation of the European consumer law.

With the escalation of smart phone technologies, mobile applications become more pertinent to the everyday lives of the people. In due course, as the mobile applications started to be used more frequently, private people and businesses started to depend more on mobile applications. Said dependence increased the revenues, of distributors, drawn from mobile application purchases, regarding paid applications, and advertisement services, regarding free applications.

With respect to the mentioned benefits enjoyed by distributors, typically, they would be expected to undertake responsibility from the satisfaction of end-users from the goods purchased, namely the mobile applications. Contradictorily, apart from accepting being held responsible for the quality of mobile applications, the distributors, even, deny any liability even from their own actions during the services they offer. On this wise, distributors make use of the distribution agreements between them and the developers, as well as the terms of service agreement governing their relationships with the end-users, to prevent any lawful claims against themselves, and usually direct all of them to the developers.

Some smartphone system software does not accept applications purchased through other distributor platforms to run on their systems. Besides, the majority of the distributors provide their services under practically similar terms. Therefore, an end-user or a developer has no practical choice regarding the liability clauses he/she is served with. When groups of people with weaknesses regarding legal or technological knowledge and bargaining power are concerned, it becomes clear that such people should be favoured against mentioned unfair situations, to which they are forced to agree via terms of contracts they, in most cases, do not even read before accepting. Accordingly, the expedient situation distributors en-

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[91] Such as the Consumer Protection Directive and the Unfair Terms Drective
[92] Council Resolution of 14 April 1975 ona a preliminary programme of the European Economic Community for a consumer protection and information policy

joy by virtue of standard contractual terms freeing them from any liability should, in some cases, be limited by mandatory rules designated to protect the weak.

As the following chapters will demonstrate, a possible designation of developers or end-users as consumers would render European consumer acquis applicable to the mobile application relationship at hand. The above cited limitations to distributors' advantageous situation would, by this virtue, be regulated by the mandatory rules of the consumer law.

However, in some instances, non-consumer end-users and developers can, as well, be in a weaker position. In this context, this paper also examines the extent to which aforementioned limitations would be valid to hold the distributor at the least liable from their own actions in addition to the liability situations where the mandatory rules would not be applicable.

Truly, even if the European consumer acquis does not categorize them as consumers[93], small and medium enterprise developers or end-users, usually undergo similar deficiencies regarding legal knowledge and bargaining power. Subsequent chapters will discuss whether small and medium enterprise developers can be protected against the large enterprise distributors since the nature of the ratio legis of the consumer protection, namely protecting the weak, essentially, does not validate such a discrimination against them just because they are not natural persons.

An end-user of the mobile application relationship is usually the party that does not have comprehensive information about the nature or the value of the commodity traded[94], namely the mobile application. Typically, an end-user would have no effect whatsoever on the terms and conditions of the service it receives from the mobile application distributor, no more on the End-User License Agreement between him/her, as the licensee, and the developer, as the licensor.

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[93] See Chapter 2.3
[94]Schoenmakers (2014) p.4

Likewise, mobile application developers, too, commonly stand on the weaker end of the contractual relationship. Unlike an end-user however, being the creator of the technology, the developers are ordinarily informed of the nature of the commodities traded. On the other hand, most mobile developers have no more legal knowledge or bargaining power, regarding the consequences of the terms they are served by the distributor, than an end-user.

Compared to an average developer, mobile application distributors provide a better guarantee for the end-users in the case of damages caused by mobile applications distributed through the distributors' platform.

Firstly, due to regulations on the subject, most of the mobile software distributors have a representative branch in the territory of European Union. For that reason, jurisdiction wise, it is easier for the damaged end-user to start a litigation process against the distributor compared to a developer, which can be any natural or legal person in any place in the world. Hence, an ability to hold the distributor liable in some damages can free the end-user from a significant burden of litigation costs.

Secondly, with estimated worldwide revenue of $ 45.37 billion U.S. dollars[95] in 2015, there is no doubt about the economical magnitude of the mobile application market. As the biggest actor of the mobile software industry, distributors enjoy increasing amount of revenues each year. In Apple App Store's case, the distributor saw revenue of $ 3 billion US dollars in 2013[96], which has escalated to $ 4.5 billion US dollars in 2014[97]. On the other hand, the majority of mobile application developers do not generate such high levels of income. Thus, unlike distributors, a developer may not have the sufficient means for compensating a rightful claim of loss. In some situations, a damaged end-user may not be able to compensate his/her loss from the developer, in spite of having the right to claim it. For this reason, in order to guarantee them an indemnification, it seems beneficial for consumer end-users to place some of the liability on the distributors.

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[95] Gartner; Techcrunch (2015)
[96] Apple.com (2014)
[97] Vincent (2015)

Furthermore, not all developers are professionals seeking a high income from the mobile application they create. Some developers are natural persons that are interested in creating and able to create mobile applications, who merely want to share their creation with the society. If applied strictly, the liability clauses of typical mobile software contracts would create a significant legal and economic risk for developers who are not aiming economical gain. Said may discourage them from creating and sharing the software, which, for the sake of innovation, would clearly not be desired.

As matters stand, in typical mobile software dealings, a preferential treatment to end-users and developers against the distributors, would be in accordance with general disposition of consumer law, namely protection of the weak. In the matter of liability, said preferential treatment shows itself as holding the extended disclaimers of liability of mobile distribution contracts unenforceable.

2.3. Notion of "consumer"

The fundamental rationale for all contract laws is the private autonomy, namely the freedom to conclude contracts and determine its contents[98]. Such freedom is also the basis to the European law[99]. Nonetheless, in response to inequality in bargaining power and lack of knowledge in consumer contracts, European consumer law regulates some mandatory rules as an exception to the said principle.

Particularly with the Unfair Terms Directive, the European consumer law attempts to ameliorate the disproportion of contractual power between large enterprises and consumers by invalidating standard terms in consumer contracts that cause consumers significant disadvantage[100].

As presented by the preceding chapter, mobile app distributors have preponderant roles over developers and end-users. Accordingly, the issue of liability arising from mobile ap-

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[98] DiMatteo (2012) p.223
[99] CCBE(2008) p. 38
[100] Unfair Terms Directive art.3

plications, too, has been regulated by and in favour of distributors. In some cases, said situation causes an imbalance between the parties, to the disadvantage of either the end-user or the developer. Therefore, in Europe, the explained imbalance between rights and obligations[101] of developers and end-users in liability clauses of mobile application contracts can bring about their rescission by virtue of the Unfair Terms Directive.

However, as the Unfair Terms Directive is germane to consumer contracts, for the Directive to be applicable, the party contracting with the distributor must be a consumer. On this wise, designating the party contracting with the distributor in a mobile application contract as consumer may cultivate to a result that have been meticulously avoided by app stores, namely the shifting of liability on them in certain cases.

2.3.1. Notion of "consumer" in European consumer acquis

The definition of consumer designates to whom the protection is entitled to. In mobile application developers' case that corresponds to what extend developers and end-users would be protected against distributors' abuse of their power in the app development relationship.

The notion of consumer in consumer acquis of European law constitutes a mottled[102] picture as a result of diverse wordings in various directives[103]. The notions of consumer and professional are defined in several directives[104], be it current or abolished, in a manner that serves only the scope of the directives in question[105]. Nevertheless a majority of current European directives[106] agree in defining the consumer as a natural person who, in transactions covered by the directive, is acting for purposes which are outside his trade, business

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[101] Ec.europa.eu(2015)

[102] Kingisepp(2011) p.46
[103] Schoenmakers (2014) p.38
[104] Kingisepp(2011) p.45
[105] Manko(2013) p.1
[106] Kingisepp(2011) p.45

or profession[107]. From this definition two central characteristics[108] of an European consumer can be deduced;

- being a natural person, and

- acting for purposes which are outside some kind of business, commercial or trade activity[109]

As will briefly be explained hereafter, said characteristics result in the exclusion of businesses concluding atypical contracts, semi and medium enterprises, charitable and religious organisations from the ambit of protection, while creating some uncertainties about the dual purpose dealings[110].

Both Consumer Protection and Unfair Terms Directives define consumer as a "natural" person[111]. Unlike the Unfair Terms Directive, which envisages a minimum harmonisation, Consumer Protection Directive requires full harmonisation[112]. Nonetheless, with its recital 13, the Consumer Protection Directive expressly allows the Member States to extend the application of the Directive to legal persons or natural persons not covered by the Directive[113]. Similarly, Member States are entitled to extend the scope of unfair terms protection as The Unfair Terms Directive adopts minimum harmonisation[114].

Correspondingly, ECJ jurisprudence, too, has interpreted the notion of consumer to be strictly limited to natural persons[115].

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[107]Consumer Sales Directive, Unfair Terms Directive; Electronic Commerce Directive, Distance Financing Contracts Directive; Payment Services Directive; Consumer Credit Directive
[108] Kingisepp(2011) p.45
[109] *ibid.;* consumer study_part pg 715 para 3, 49, 27
[110] Ebers(2008) p. 716
[111] Consumer Protection Directive art.2(1); Unfair Terms Directive art.2(b)
[112] Consumer Protection Directive Recital 5
[113] Consumer Protection Directive Recital 13, 20
[114] Unfair Terms Directive Recitals p.2
[115] Cape Snc. and OMAI Srl. v. Idealservice Srl. paragraph 16; Ebers(2008) p. 724;Bertrand v. Paul Ott KG; Shearson Lehmann Hutton Inc. v. TVB mbH.; Schoenmakers (2014) p.45, 46, 47; Hondius(2006) p.95

When dealing with large companies, legal persons like small and medium size enterprises, charitable and religious organisations may not possess stronger bargaining powers or information on legal matters than natural persons[116]. Likewise, in some situations, legal persons not acting in pursuit of their situations might have a weaker position and thusly need protection[117]. Hence, when the aim of consumer protection is concerned, there seems to be no reason to exclude the mentioned legal persons from the scope of protection. However, the strict limitation of consumer definition to natural persons denies such vulnerable parties protection[118] that is initially aimed to favour the weak.

On this wise, as is stressed by the Greek academics, a teleological interpretation[119] of consumer definition would lead to an application that is more compatible with the aim of the regulations.

In like manner, the second characteristic, which requires the natural person to be acting outside professional purposes, generates several complications in practice. The Unfair Terms Directive demands the natural person to be acting for purposes outside trade, business and profession in order to be included into its scope of protection. The Consumer Rights Directive adds "craft" to the said excluded purposes. The rationale behind the said requirement can be seen as preventing merchants from using technical requirements of consumer law to avoid fulfilling their duties by invalidating B2B contracts[120]. The negative wording lets borderline situations, such as individuals purchasing goods in their own names but for a charity, to be included in the consumer definition[121]. Nevertheless, in the case of hybrid consumers and dual-purpose transactions the notion of consumer in European consumer acquis proves to be ambiguous.

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[116] Hondius(2006) p.95
[117] Schoenmakers (2014) p.44
[118] Ebers(2008) p. 725
[119] Ebers(2008) p. 722
[120] Winn(2006) p. 186
[121] Riefa(2009) p.4

As a result of the widespread use of online platforms like eBay, the categorization of hybrid consumers[122] became crucial. The definition of consumer covers the cases where consumers make financial profit[123] however precludes purchases purpose of which is to immediately resell the goods where several such transactions are carried out in relatively short period of time[124]. Online intermediaries enable people who simply use the Internet to offer some unwanted items for sale as well as people who buy goods with a view of reselling them[125]. In the latter situation, the purpose of the transaction may be designated as being inside the trade or business of the seller but the fine line, setting hybrid consumers apart from professionals, is not always clear, hence requiring a case by case investigation. Thusly, a clarification by European law makers of the notion of "trade, business, craft and profession" in accordance with the online environments seems to be needed.

Another particularly controversial area is mixed or dual-purpose transactions, concluded for both personal and professional purposes[126]. The 17th Recital of the Consumer Protection Directive designates dual-purpose contracts as being in the scope of the protection of the Directive when the professional purpose is not predominant[127]. While some writers criticize the Directive's regulation of dual-purpose transactions by recitals rather than by consumer definition[128], there is no doubt that the reference to the said primary purpose principle contributes to the clarification of the ambiguity on the subject[129]. The Unfair Terms Directive has no remark regarding dual-purpose transactions, but the general view of European scholars' supports said approach as the reasons for protecting consumers prevails where the consumer is not acting to a great extent within professional sphere[130].

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[122] Riefa(2009) p. 18
[123] Hondius(2006) p.94
[124] Riefa(2009) p.4
[125] Riefa(2009) p. 18
[126] Manko(2013) p.2
[127] Consumer Protection Directive Recital 17
[128] Schoenmakers (2014) p.25

[130] Herre(2001) p.5

ECJ jurisprudence, having rendered slightest professional purpose a reason to exclude the person from consumer definition in Gruber case[131], tends to interpret the notion of "purposes outside trade, business and profession" narrowly[132]. However, since said jurisprudence concerned solely the procedural law, validity of aforementioned interpretation in substantive law is questionable[133]. Additionally, as the Consumer Protection Directive has recently entered into force[134] the affect of its 17th Recital on ECJ's interpretation of mixed purpose transactions is yet to be seen.

Another issue prevailing especially in e-commerce transactions case is to what extend consumers should identify themselves[135]. In a German case, dealing with a consumer who acted like an enterprise, the German Supreme Court decided that, in such situations, the consumer cannot be protected according to consumer acquis[136]. Notwithstanding, it is not clearly worded in European instruments whether the professionals dealing with consumers should be subjectively aware of the consumers' situations. Having said that, European consumer acquis requires solely the presence of a consumer contract, rather than any subjective knowledge of the fact. Therefore, it would be safe to say that, within the borders of good will and fair dealing, the presence of a consumer as a party, according to objective criteria[137], is enough for the consumer law to be applicable to a transaction.

2.3.2. Mobile application developers' stance as consumer

Mobile app development agreements do not designate the identity of the developer. In other words, any individual or legal person can be a developer, independently from the purpose, be it business or private. The consequence of a developer's being consumer is that, it designates whether the development contract can be classified as a consumer transaction or not. As is explained before, only in the case of consumer transactions, mandatory rules of

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[131] Johann Gruber v. Bay Wa AG
[132] Schoenmakers (2014) p.61; Patrice Di Pinto; Francesco Benincasa v. Dentalkit Srl.
[133] Ebers(2008) p. 727; Schoenmakers (2014) p.68
[134] The Consumer Protection Directive enters into force on 14 June 2014 according to article 28(1) thereof.
[135] Hondius(2006) p.94
[136] *ibid.*
[137] Schulze(2002) p.134

consumer acquis can be applied to contracts in order to favour the consumer. The direct implications of said notion on mobile application development relationship, exclusively on liability issues, will be discussed in the following chapters.

It seems to be accurate to classify developers in four groups in order to examine their stance as consumers in development contracts. To this extend, the first category to be examined is natural person developers who act for private purposes, or rather purposes outside business, trade or profession. Since any person who has adequate skills can create a mobile application to use in his/her everyday life, such developers have recently become rather easy to come by.

Assuming that such developers do not designate a price for the app, in other words offer the app free of charge, they would certainly be compatible with consumer definition of European consumer acquis.

On this point, the Consumer Protection Directive's consumer definition, which excludes purposes within one's craft may seem to be suggesting a rather dubious nature. Nevertheless considering the term "craft" to include past time activities and hobbies would constrict the scope of consumer protection to the point of nonexistence. Thus, it would be pertinent to regard the developer acting for private purposes to be operating outside craft purposes as well.

In the case where the developers in this category designate a price for the app, they should still be considered as consumers since, as is mentioned above, mere incidental profit do not hinder the natural person from being a consumer. In fact, the purposes of such a developer are more clearly out of profession, trade or business in this case than a consumer selling one unwanted item in eBay, who is commonly regarded as a consumer.

By virtue of the rapid innovation of internet technology, mostly in the sphere of digital commerce, traditional consumers increasingly morphed into producers of their own prod-

ucts or services using semi-professional equipment[138]. This brought about the expansion of the term "prosumer"[139] , a fusion of the words consumer and producer or professional, in online environment[140]. The situation is similar in mobile application practices as any person who has relevant knowledge about the usage of application development kits (ADKs) would be able to develop and market an app via one of the many distributing platforms. On this wise, natural person developers who occasionally develop mobile apps for monetary purposes, could be categorized as a prosumers. The question of whether prosumers can benefit from the privileges granted to consumers can only be answered by a close examination of the term profession, trade or business. Many European Member States[141], take "profit-organisation-frequency" criteria as the benchmark to designates whether a party can be classified as professional or not. Nevertheless, as these criteria is not expected to be met cumulatively[142], prosumer developers, who would be meeting at least the profit criterion, namely the intention to make economical gain, constitute professionals within the meaning of European consumer acquis.

Another problematic situation herein is the stance of natural person developers who act in dual purposes. Any tech savvy person can develop an app to organise his/her daily life, which would include his/her work appointments alongside private ones. As explained above, European consumer acquis, recognises the possibility of mixed purpose transactions to be classified as consumer contracts. Thusly, in some cases natural persons developing partly with professional aims could as well be categorized as consumers.

A second category would be natural person developers who are regularly developing mobile apps and relevant software to market them in order to make financial profit. Pursuant to the second characteristic of consumer definition, such developers would be considered

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[138] Loos(2011) p.41
[139] *ibid.*
[140] Pierson(2012) p.2
[141] For instance France, Finland, Hungary.
[142] Loos(2011) p.42

outside the notion of consumer as they would be regarded operating within business purposes.

As for the legal person developers, the dubious nature of applicability of the consumer notion does not lie within those who act in the ambit of their profession, but rather in legal person developers, whose profession, trade or business has no link with developing applications.

With Idealservice case[143], ECJ stated clearly that only natural persons could be consumers in relation to Unfair Terms Directive. The Court demonstrated same approach in Oceano case. Concerning the mentioned case the Court rendered the protection of the Directive to be applicable to only a specific category of persons, on the grounds that it is an exception to the principle of contractual freedom. The Court went on to explain that, legal persons and companies are not seen as weaker parties as they are economically strong, adequately experienced in legal matters, powerful and better organised[144].

However, when applied to mobile application distribution relationships, said proposition of ECJ may overestimate some categories of developers. Majority of the charitable organisations, today, make usage of mobile applications for various reasons. Most of these organisations, who are legal persons, do not operate on profit purposes, do not have an organisation regarding mobile app development and do not develop apps frequently. For that cause, dislodging them from the ambit of the protection granted to weaker parties would be unfair, given the fact that they experience same disadvantages with other persons, accepted to be consumers. Indeed, in the UK[145], some legal person developers in mentioned situations are entitled to protection against unfair contract terms, by virtue of the Unfair Contract Terms Act.

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[143] Cape Snc. and OMAI Srl. v. Idealservice Srl. Paragraph 16, 17
[144] Devenney(2012) p.125
[145] Ebers(2008) p. 725

As matters stand, according to European consumer acquis, especially the Unfair Terms and Consumer Protection Directives, some mobile application developers can be classified as consumers in their dealings with distribution platforms. As will be explained hereafter, said stance of developers' affects not only their contractual relationship with distributors; but the whole mobile application relationship.

2.4.   Liability issues in mobile application contracts

This chapter examines the allotment of liability in situations where the developer cannot be deemed culpable for a damage, caused by an aspect of his mobile application , which had incurred by the end-user or the developer himself.

As explained before, by virtue of their decisive power over the contracts of mobile application dealings, distributors enjoy a dominant situation over the relationship thereof.

For instance, Apple's IOS Developer Program Licence Agreement requires developers to submit their applications and relevant updates, including security bugs, to a test, result of which determines whether or not the software will be published and therefore marketed in App Store[146]. The said, concurrently, grants Apple the right to reject developers' request for distribution of their software "for any reason"[147]. Similarly, by virtue of its App Distribution and Services Agreement, Amazon denies any obligation to distribute an application[148]. Likewise, Google Play Developer Distribution Agreement maintains Google's right to display the application and change their placement in the platform at its sole discretion[149]. Additionally, distributors usually reserve their rights to block, disable and remove any application from their platforms at their sole discretions[150], refraining from any obligation of prior notice and liability thereof.

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[146] IOS Developer Program License Agreement art.6.1.
[147] IOS Developer Program License Agreement art.6.5(b)
[148] Amazon App Distribution and Services Agreement art.6, Distribution Schedule art.6
[149] Google Play Developer Distribution Agreement art.4.8
[150] Google Play Developer Distribution Agreement art.7.2; Amazon App Distribution and Services Agreement art.6; IOS Developer Program License Agreement art.8

Accordingly, when a developer develops an update, such as a security bug, to his mobile application and submits it to Apple for approval[151], he loses the control over the situation. From the said point on, Apple has the sole discretion to determine when and if the update will be published. During the time interval between the submission of a security update and approval of it by Apple, end-user security rests in Apples hand[152]. On this wise, presuming the lack of the aforementioned update caused damage to an end-user in the time period between the developers submission and distributors approval, it would be unjust to denounce the developer faulty.

Moreover, constituting an information society service provider within the meaning of Electronic Commerce Directive, mobile application distributors are subject to Directive's safe harbour rules. Pursuant to aforementioned, to avoid liability, distributors have to expeditiously remove any unlawful third party content hosted by them, namely the mobile applications, upon acquisition knowledge thereof[153]. Despite its wide field of implementation, Electronic Commerce Directive provides no clarification to what constitutes gaining of knowledge[154] or expeditiousness[155]. In other words, since the directive does not establish a notice and take down regime[156], distributors, like other information service providers, have no legal security with regards to when they can be rendered liable. The mentioned obligates the service providers to respond even the most implausible notices of infringement with removal. In such manner, a mobile app distributor, too, would respond to a notice of infringement about a mobile application with displacement of it from the store. The question of liability in such cases rise when the mobile application is indeed not unlawful and an end-user suffers damage because of the removal, since holding the developer responsible, in this instance, would be inequitable.

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[151] According to article 6.1 of IOS Developer Program License Agreement
[152] Copytrans.net (2015)
[153] Electronic Commerce Directive art.14
[154] Bistrocchi(2002) p.123
[155] Van Eecke(2009) p.19
[156] Bistrocchi(2002) p.123

Contrarily to the authority bestowed upon, with corresponding indemnification and disclaimer of warranty clauses, mobile application contracts liberate the distributors from any liability including for the damages caused by their own actions, while burdening the developers with responsibility thereof. The imbalance between interests of the parties, thereof, is apparent insomuch that, in cases similar to above illustrated, it can be deemed as being unfair.

Nonetheless, since the principle of contractual freedom dictates that parties are free to determine the contents of a contract[157], even such unfairness would be permitted when parties agree thereto. However, the consumer law regulates exceptions to the said principle via its mandatory rules aiming to protect consumers. Here, the applicability of consumer regulations to a contract suggests a critical role with regards to enforceability of unfair clauses. On this wise, as the European consumer acquis requires presence of a consumer contract, specification of one contractual party as a consumer becomes critical in the case of mobile application distributors providing services in the territory of the European Union.

Thusly, following subsections will analyse the variability of effectiveness of mobile application contracts' liability clauses, in other words accountability of distributors, with regards to European consumer acquis' applicability to the contracts at hand, namely whether a developer can be classified as a consumer or not .

2.4.1   When the developer is a consumer

As explained in the previous chapter, according to European consumer acquis, in cases where he is a natural person acting outside professional purposes the mobile application developer can be identified as a consumer. In addition to having particularly visible affects on the distribution agreement, such an identification changes the liability situation in the whole mobile application relationship.

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[157] Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DFCR)(2009)p.1236

Firstly, classifying the developer as a consumer would render the distribution contract a B2C agreement, namely a consumer contract. In such wise, the distribution contract enter in the scope of European consumer acquis, and therefore, the Unfair Terms Directive.

Furthermore, the designation of a developer as a consumer changes the forcefulness issues of EULAs they utilize against consumer end-users in Europe. After all, said would render the EULA a C2C agreement, which would discard them from the scope of Unfair Terms Directive. In other words, in such instances, the end-users would be bound by EULA terms as protection of European consumer acquis does not apply to agreements that are not consumer contracts.

In such manner, subsections of this chapter will examine the liability situations regarding three mobile application contracts', namely the contracts between developers, distributors and end-users, developers of which can be classified as consumers.

2.4.1.1. Liability in mobile application distribution agreements contracted with consumer developers

As is cited formerly, the liability situation in mobile application relationships between distributors and developers is regulated by virtue of disclaimer and indemnification terms developers. Thusly, only means a law system can affect the liability situation thereof would be the partly or wholly invalidation of mentioned terms. Along these lines, the Unfair Terms Directive, which regulates the invalidation of unfair terms in consumer contracts, would be the body of European Law that would have the most significant effect on the liability situations in a distribution agreement. On this wise, the question arises regarding the unfairness of the liability clauses.

The Directive designates three cumulative criteria for a term to be unfair, ascribing only such terms not binding on the consumer[158], which are;

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[158] Unfair Terms Directive art.6

- The term should not be individually negotiated, and

- The term should cause significant imbalance between the parties contrary to good faith, and

- The situation should be to the detriment of consumer.[159]

In order to concretize the ambiguity of the terms "significant imbalance" and "good faith", the Court of Justice of the European Union (CJEU) has set several benchmarks for the Member State courts to take into account. Among these are, nature of the goods and services, consequences of the national provisions that is to be implemented in the event of invalidation and circumstances attending the conclusion of contract[160].

Mobile application distribution contracts are typically presented to developers in the form of non-negotiated click-wrap agreements, provided on a take it or leave it basis[161]. In other words, parallelly to the fist criterion of the Directive, developers cannot substantively influence the content of the contract between him/her and the distributor[162].

The distribution agreements typically contain various exclusion and indemnification clauses[163]. When interpreted together with clauses of other agreements forming the mobile application relationship, mentioned terms burden developers with the responsibility of distributors' actions while preventing any attribution of liability to the distributor.

The former chapters exemplified some situations, such as the late approval of a security bug or the wrongful removal of the application from the platform, where the damage would generated by the distributors' actions. When the terms of distribution agreements applied literally on the situation, it is developers who should compensate the losses incurring by the

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[159] Unfair Terms Directive art.3
[160] Manko(2013) p.3
[161] Manko(2013) p.1
[162] Loos(2011) p.84
[163] IOS Developer Program License Agreement art.13, 14; Google Play Developer Distribution Agreement art. 11, 12, 13; Amazon App Distribution and Services Agreement art.9, 11

end-users. Considering the mentioned situation, significance of the imbalance in the obligations of parties, created by liability terms of distribution agreements, is apparent.

All contract law systems regulate exemptions from liability to contractual parties in the event of a force majeure, establishing on the idea that, no person should be held responsible from circumstances that cannot be controlled or prevented by him. When an end-user claims the losses incurring by him from the developer, he uses his rights as governed by the EULA. In the event that the losses in question are indeed caused by the actions of distributor, the developer, actually, happens to be held responsible to the other party of the contract for damages generated by a third party. Considering the abovementioned general approach of contract law systems, any such obligation on the consumer developers would, evidently, be against the requirement of good faith, especially when the consumers are compelled to agree such terms by virtue of standard term agreements they "agree" through a click-wrap format.

For the reasons explained, the extensive liability disclaimers and indemnification clauses of distribution agreements are likely to comply with the criteria set by the Unfair Terms Directive , insomuch as the developers thereof are consumers. In other words such clauses are likely to be invalidated by mandatory rules of Member States regulated by reason of the Unfair Terms Directive.

Majority of the distribution contracts make use of limitation of liability terms in order to avoid liability[164]. Apple expressly denies any liability, including personal injury, even in the case of negligence by Apple[165]. Such exclusions of liability are listed as the first of the seventeen items in the grey list of unfair terms annexed to the Unfair Terms Directive[166].

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[164] Google Play Developer Distribution Agreement art.11 ; Amazon App Distribution and Services Agreement art.11
[165] IOS Developer Program License Agreement art.14
[166] Unfair Terms Directive Annex art.1(a)

A further common feature of the liability clauses in distribution agreements is the fact that they hold distributor unaccountable in all cases, including any sort of failure of service[167] and non-performance, regardless of their preventability. Moreover, Apple's IOS Developer Program Licensing Agreement reserves Apple's right to cease providing any sort of service without notice[168]. Terms of this kind, as well, are amongst the indicative examples to unfair terms in Unfair Terms Directive's grey list.

Withal, since the grey list of the Directive does not create a presumption about unfairness of a term[169], designation of liability clauses' validity would require a further assessment of the above listed criteria while taking the principles set by CJEU into account. Accordingly, when above listed features of liability clauses are considered together with the nature of the distribution service and the forenamed apparent imbalance between parties, such clauses seem to be satisfying the conditions set both by the Directive and the CJEU.

Furthermore, either via court decisions or through official documents, several Member States recognised similar liability disclaimer terms in various digital contracts as unfair. Indeed, an Italian report on the subject classified clauses aiming to limit providers' liability for system dysfunctions as unfair[170]. Likewise Finland rendered similar warranty terms, excluding guaranties for quality, defects, good functioning or providing the services fit for the purposes of the contract, as unfair disclaimers[171].

In France, AOL case held AOL's term of service agreement's disclaimer of all liability, for service interruptions, errors and other failures, unfair, thusly unenforceable[172]. Among

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[167] IOS Developer Program License Agreement art.13; Google Play Developer Distribution Agreement art.11 ; Amazon App Distribution and Services Agreement art.11

[168] IOS Developer Program License Agreement art.13

[169] Manko, *Unfair contract terms in EU law: Unfair Terms Directive and Common European Sales Law* (2013) p.3

[170] Loos(2011) p.94

[171] *ibis.*

[172] Winn(2006) p. 182; Winn, *The Impact of EU Unfair Contract Terms Law on U.S. Business-to-Consumer Internet Merchants* (2006) p.15

many others, French courts also rendered AOL's cap on liability, which is equal to six months of fees, unfair.[173]

In a likely fashion, the guidance to UK's Unfair Contract Terms Act (UCTA) stresses service providers' obligation to take reasonable care in any of its dealings with consumers while characterizing terms that could relieve the supplier from such obligations unfair[174]. The same guidance recognizes that, in order for a contract to be equally binding on both parties, each party should be entitled to a full compensation where the other fails to honour its obligations, in addition to finding clauses having an effect to the contrary open to claims of unfairness[175].

Evidently, according to the Unfair Terms Directive, liability clauses of distribution agreements are likely to be invalidated by the courts of Member States. On this point, the dispute arises regarding allocation of liability in the case of an invalidation.

According to the Directive, while the unfair term itself should not be binding on the consumer[176], the whole contract remains valid, so long as this is possible without the offending clause, regarding the legal nature of the contract[177]. Nevertheless, the Directive does not offer any clearance as to what should fill in the gap of the invalidated term. Although, as the general approach of the contract laws of European Member States suggests, when an express term in a contract is invalidated by operation of law, the gap that has formed is filled with an implied term. Accordingly, rules designated by the contract law of the country whose law governs the agreement should replace the invalidated unfair term. Therefore, Each party of the contractual relationship would be responsible from their faults, namely

[173] Winn, *The Impact of EU Unfair Contract Terms Law on U.S. Business-to-Consumer Internet Merchants* (2006) p.16
[174] Office of Fair Trading of the United Kingdom(2008) p.21; Winn, *The Impact of EU Unfair Contract Terms Law on U.S. Business-to-Consumer Internet Merchants* (2006) p.19
[175] Office of Fair Trading of the United Kingdom(2008) p.23, Winn, *The Impact of EU Unfair Contract Terms Law on U.S. Business-to-Consumer Internet Merchants* (2006) p.11
[176]Unfair Terms Directive art.6(1)
[177] Ebers, *Unfair Contract Terms Directive* (2008) p.406

mal performance, without any exception. In other words, in event of an invalidation of lia-
bility terms, everybody would be accountable of their own culpa.

The above overview suggests that, in the case of distribution agreements, since the exemp-
tion of liability and indemnification clauses are likely to be invalidated, distributors would
be responsible of their faults, namely any damages caused by their actions, such as non-
performance or failure to fulfil its contractual obligations.

Practically, the abovementioned would have two implications;

- If an action of the distributor causes damage to an end-user, distributor would be li-
  able, and

- If the distributor fails to perform its obligations with reasonable care, damaging the
  developer, the developer would be entitled to compensation.

For instance, supposing a developer creates an app, distributed by Apple via its App Store,
which provides an agenda that records hearing times, dates and places for lawyers, the IOS
Developer Program License Agreement grants Apple the right to remove the app from app
store at its sole discretion and without liability thereof. Thereupon, if Apple removes the
mentioned application upon an unfounded notice of infringement, said removal would, pos-
sibly, damage both the developer and the end-user. On this wise, a lawyer end-user of the
application would be prevented from accessing his professional agenda which would lead
to a professional loss. According to IOS Developer Program Licensing Agreement, none-
theless, Apple would not be liable from any of the mentioned losses[178] insomuch that, it
would be the developer who is accountable for the end-user`s losses. Nevertheless, as ex-
plained before, in the case of a consumer developer, the liability clauses thereof would be
invalidated by virtue of the Unfair Terms Directive. Consequently, the distributor would be
liable from the losses incurring by the developer and the end-user.

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[178] IOS Developer Program License Agreement art.13, 14

2.4.1.2. Liability in end-user license agreements contracted with consumer developers

The EULAs, similarly to distribution agreements, usually consist of boilerplate standard terms that are provided to end-users via click-wrap format. On this wise, when an end-user is a consumer, clauses of the EULA may be subject to unfairness test and consequently be invalidated. The aforementioned may result to a false security in end-users, who might expect the other party of the contract, namely the developers, to be professional, not consumer.

Nonetheless, the application of the Unfair Terms Directive is contingent upon the agreement's being a consumer contract. A consumer contract should be concluded between a consumer and a professional. In other words, terms of a contract can only be invalidated on the grounds of unfairness when the contract is a B2C contract.

Therefore, in the cases where developers are consumers, end-users are deprived of the protection of the Unfair Terms Directive, rendering them bound by EULAs in entirety, including the seemingly unfair clauses, insomuch as they are compatible with the rules of the contract laws of Member States.

Having said that, it should also be stressed that the mentioned situation, regarding end-users who cannot exercise their consumer rights, has several consequences regarding the applicability of the liability clauses of terms of service agreements between the end-user and the distributor. Accordingly, the following chapter will assess the issues thereof .

2.4.1.3. Liability in terms of service agreements contracted with consumer developers

The contractual relationships between mobile application distributors and end-users are determined by virtue of pre-formulated terms of service agreements. Commonly, in order to be able to use the services offered by the mobile application distributor, namely to purchase an app, end-users need to have an account in the distribution platform. During registration processes of the mentioned accounts, end-users are offered a click or browse wrap

agreement, namely the terms of services. It is not possible for an end-user to acquire an account without agreeing to the terms of services. Additionally, the terms of service clauses hardly vary, from distributor to distributor, in main characteristics. As is explained in former chapters, they all include clauses, denying any liability of distributors and designating it as the sole agent or intermediate between the licensor, developer, and licensee, end-user. As matters stand, end-users are, practically, forced to agree to the terms of services they are "offered".

Here, the problem emerges when end-users are denied any remuneration for the damages they may suffer through a mobile application. As is previously explained, when a developer is a consumer, disclaimer clauses of the EULA, typically waiving liability of the developer entirely, would be valid. Since terms of service agreements, also, make use of similar waiver of liability clauses, in an attempt to free distributors from liability, the verbatim implementation of the said contracts would leave damaged end-users without any chance to seek relief.

For instance, Apple requests developers, using Apple Maps Services in their applications, to embed a disclaimer in the EULAs they provide with relation to them[179]. As the name suggests, Apple Maps Services are controlled and provided by Apple. Therefore, Apple is responsible for its Maps Services' accuracy. Accordingly, when an erroneous information in Apple Maps Services, embedded in a mobile application of a consumer developer, causes damage to a consumer end-user, the EULA and terms of service agreements thereof prevent the end-user from claiming any compensation from any party of the relationship. On this case, developer's liability constitutes liability of an information society services provider's liability from third party products. Had the developer not been a consumer, the terms of EULA exempting him/her from liability in such instances would be invalidated by

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[179] IOS Developer Program License Agreement art. 3.3.15 impels developers to use the disclaimer, namely "*Your use of this real time route guidance application is at your sole risk. Location data may not be accurate.*"

virtue of unfair terms protection. But, as presence of a non-consumer developer renders the EULA a C2C agreement, unfair terms protection regarding consumers would not be applicable to the case at hand, thusly validating the disclaimer of liabilities thereof. All in all, in this situation, a word for word implementation of the disclaimers of terms of services agreement would bring about an evident unfairness to the disadvantage of damaged end-user, particularly with regards to the culpability of Apple in the given situation.

For reasons given, mentioned pre-formulated terms generate a significant imbalance to the detriment of the end-users, who does not have any other option than agreeing to such seemingly unfair clauses. Therefore, in mentioned situations, application of Unfair Terms Directive may render exemption clauses of terms and service agreements invalid. Consequently, by operation of law, the distributor becomes liable from the damages caused by its actions.

Conforming to the Electronic Commerce Directive, mobile platforms can be classified under hosting intermediaries[180]. The Directive adopts a horizontal approach, ergo it's safe harbour rules can be applied to all content and all kind of infringements, be it a criminal offence or an economical damage[181]. To this extend, in mobile application relationships' case, the Directive's safe harbour rules can be relevant to distributors' liability in damages incurring by the end-user. The adverse interpretation of mentioned would suggest that distributors can be held liable in cases that do not satisfy the regulated criteria of Electronic Commerce Directive's safe harbour clauses. Pursuant to the Directive, distributors are to be excused from liability in certain cases[182]. In addition to article 14's criteria of no actual knowledge and action in the case of it, the Recital 42 of the Directive designates another criterion for a hosting intermediary's exemption from liability. On this wise, the Recital holds that, in order to be exempted from liability, the hosting services should not be active[183], that is to say the activity of the intermediary should be solely technical in nature.

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[180] Center for Democracy and Technology(2012) p.19; Electronic Commerce Directive art.14
[181] Electronic Commerce Directive Recital 17; Center for Democracy and Technology(2012) p.18
[182] Electronic Commerce Directive art.14
[183] Center for Democracy and Technology(2012) p.20

The CJEU elucidated the Recital's aforementioned criterion in Google Adwords[184] and eBay[185] cases. In the Google Adwords case, the Court stressed the relevance of the role played by the provider in drafting of a commercial message[186], in addition to the neutrality requirement for providers in order to benefit from safe harbour exemptions. Thereupon, the Court interpreted neutrality as hosting provider's lack of knowledge or control over the data it stores in both Google and eBay cases[187].

The eBay cases examined operation of online marketplaces in the light of the Directive's safe harbour rules[188]. The Court held online marketplaces, which set terms of services for both end-users and sellers, as befitting to safe harbour provisions. Notwithstanding, the Court also discussed some factors pushing the provider away from the safe harbour[189], such as the situations where the provider gives assistance to the sellers, optimising the presentation of the offers for sale or promoting offers[190]. Additionally, in the same decision, the Court particularized providers' content investigations, undertaken on their own initiatives, as endangering unawareness criteria of the Directives safe harbour rules, which demands the provider to have no knowledge on the infringement[191].

Mobile application distributor platforms can be analogised to online merchants like eBay[192]. Pursuant to Court's abovementioned benchmarks, mobile application distributors tend to abandon their neutral position seeing that the mobile applications are marketed in a manner determined in distributors' sole discretion. Furthermore, distributors risk being deemed to have undertaken an investigation of their own initiative, forasmuch as they screen all applications before allowing them in their distribution platforms[193] in addition to

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[184] Google Inc. v. Louis Vuitton Malletier SA et al.
[185] L'Oreal SA et al. v. eBay AG et al.
[186] Google Inc. v. Louis Vuitton Malletier SA et al. paragraph 118
[187] Google Inc. v. Louis Vuitton Malletier SA et al. paragraph 114, Center for Democracy and Technology(2012) p.20, L'Oreal SA et al. v. eBay AG et al. paragraph 113
[188] Center for Democracy and Technology(2012) p.21
[189] Center for Democracy and Technology(2012) p.21
[190] L'Oreal SA et al. v. eBay AG et al. paragraph 116
[191] L'Oreal SA et al. v. eBay AG et al. paragraph 120
[192] Center for Democracy and Technology(2012) p.22
[193] Center for Democracy and Technology(2012) p.23

their control over both the APIs and toolkits used to build the applications[194]. Thence, according to the criteria laid by the CJEU, mobile application distributors would typically be deemed ineligible to be exempted from liability, for their role in mobile application development relationships exceed the passiveness barrier of Recital 42.

Truly, in cases where both of the parties of a contract are private persons but one of them is represented by a professional as commercial agent etc., the involvement of the professional agent could lead to a situation where the other private person is in the same need of a protection akin to B2C relationships'[195]. Following the ideas along these lines, Sweden and Denmark regarded such contracts as consumer transactions, in some cases, holding the professional agent responsible together with the private person principle[196].

Since they are not between an agent acting in behalf of a person and another person, the mentioned seems not to be applicable to mobile application distribution platforms' terms of services agreements directly. On the other hand, all mobile application purchases would result to a contract that is concluded via an agent, namely the distributor. Thus, even if the aforementioned issue regarding agency seems not to be anent to the terms of service agreement themselves, regarding the overall relationship, said approach, concerning agents' liability in the dealings, should also held applicable to them. In such manner, when the developers are consumers, some Member States designate distributors accountable from end-users' losses, despite the exemption clauses in terms of service agreements.

2.4.2. When the developer is not a consumer

In the event where developers are not consumers, the liability issues in mobile application distribution relationships showcase a different situation than the abovementioned. This fundamentally derives from the fact that, in this case, the nature of the contract between developer and distributor changes to B2B. Said deprives developer from the protection of

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[194] *ibid.*
[195] Herre(2001) p.10
[196] *ibid.*

Unfair Terms Directive, consequently affecting the liability balance in the whole relation-ship.

Following sub-chapters will discuss the allocation of liability in contractual relationship between non-consumer developers, distributors and end-users.

2.4.2.1. Liability issues in mobile application distribution agreements contracted with non-consumer developers

As an intermediary facilitating electronic commerce and providing internet retail services without taking the title to the goods[197], mobile application distribution services were previously classified as being likely to agency relationship. On this wise, distributors constitute intermediate between the licensor developer and the licensee end-user.

In an agency relationship, agents are normally not expected to carry the risks. All the same, depending on the agency relationship, it is clear that the principle would be entitled to a redress if the agent causes damage to the principle. Said right to redress would also emerge in the cases where a developer has to compensate the end-user's damages, brought about by the distributor. However, in the mentioned situations, the liability clauses of distribution agreements come into operation, preventing any such developer claims of remedy.

When a developer cannot be classified as a consumer, the distribution contract between the developer and the distributor constitutes a B2B agreement. The idea of fair practice thereof dictates that each contracting party takes responsibility for its own risks and does not unduly attempt to transfer them to other parties. Yet, European law provides no regulation regarding unfair contract terms in B2B agreements. In Europe, the contract law of the Member State, law of which is applicable to the agreement at hand[198], governs B2B dealings. As

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[197] Perset (2010) p.9

[198] With pursuance to Rome I Regulation art. 3(1) and 4(1), if the parties have not designated a law to govern the contract, the gap there of is filled with thw law of closest connection.

its primary principle is contractual freedom, the contract law holds the parties free to determine the content of the contract[199].

As all contract law systems are established on the principle of contractual freedom, in mobile application distribution relationships, granted that the developer is not a consumer, the distribution agreement would be valid as it is agreed upon, including the seemingly unfair liability terms thereof.

The question here emerges, with regards to whether the mandatory rules of European unfair terms acquis can be applicable to unfair terms of such distribution agreements. The party that makes use of the standard terms, the distributor in the case at hand, enjoys a rather broad range of information advantages, namely the advantages of knowing precisely what the contract consists of[200]. These advantages are more apparent in the circumstances where the other party to the contract is a consumer or a small-medium enterprise[201]. As the former situation is already covered by the consumer acquis, the controversy, here, arises regarding the advantageous position of standard term user distributors, when the other party to the contract is a small-medium enterprise developer. The distributor, as a standard terms contracts user, utilizes its superior bargaining powers in order to impose the unfair terms, such as the liability clauses, on the developer, who, in small-medium enterprise developers' case, can be enduring similar constraints to any consumer. Accordingly, in some cases relating to small-medium enterprises', interests in protecting the consumer against standard terms contracts do prevail. Indeed, Nordic countries, Germany[202], Portugal, Estonia, Austria, Hungary, Lithuania, Netherlands, Slovenia and the UK have followed a similar approach by rendering judicial review of all unfair terms, including the terms in B2B agreements, possible. Hence, the liability clauses of distribution agreements may, too, be invalidated in several Member States, insomuch as they hold the developer inequitably responsi-

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[199] Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Referance (DFCR)(2009)p.48
[200] IOS Developer Program License Agreement art.6.5
[201] IOS Developer Program License Agreement art. 7.1
[202] Ebers, Unfair Contract Terms Directive (2008) p.376; Manko, Unfair contract terms in EU law: Unfair Terms Directive and Common European Sales Law (2013) p.

ble from the distributor's actions. In a similar approach, such unfair transfers of risk, which burdens a party with compensating faults of the other[203], are listed amongst unfair B2B practices by the Green Paper on subject[204].

On the other hand, given the governing law of the contract, does not adopt such an extensive approach to the Unfair Terms Directive, the liability terms of the distribution agreements would be enforceable. This would hold developer liable from any damage incurring by the end-user caused by the mobile application. Correspondingly, the absolute implementations of liability clauses of distribution agreements deprive developers of the right to claim redress from distributors, regarding damages generated by the latter.

On the other hand, if the Member State had extended the scope of the Unfair Terms Directive to include B2B terms, liability clauses of distribution agreements would, presumably, be rendered unfair, thence unenforceable, particularly with respect to situations, where, the distributor tries to shift risk by virtue of liability and indemnification clauses.

2.4.2.2. Liability issues in end-user license agreements contracted with non-consumer developers

The fundamental impact of a developer's stance as a consumer on its relationship with the consumer end-user is that, it renders the EULA a B2C agreement. The European consumer acquis grants consumers significant protection regarding agreements contracted between the consumer and a trader, namely the B2C contracts[205]. The mentioned protection is the most apparent in unfair standard terms' case, for the consumer acquis renders them unenforceable against consumers.

Particularly the liability clauses of EULAs, attempting to regulate an "as is" basis for the application purchases, seemingly meet the requirements of the Unfair Terms Directive's criteria for a term's invalidation. As previously explained, mobile application EULAs typi-

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[203] Green Paper on Unfair Trading Practices p.19; European Commission, DG Internal Market(2014) p.34
[204] Green Paper on Unfair Trading Practices
[205] Consumer Protection Directive art.3(1); Unfair Terms Directive art.1(1)

cally consist of standard terms, which make use of extended disclaimers of liability, designating the developer immune from any responsibility. Such clauses create significant imbalance between the rights and obligations of the developer and the end-user since they deprive the end-user of the right to claim most of the damages. Consequently to the European consumer acquis, therefore, the liability disclaimers of EULAs are likely to be invalidated[206]. On these circumstances, contract law would govern the liability claims. In such wise, the developer would be liable from the damages he caused to the end-user.

2.4.2.3. Liability issues in terms of service agreements contracted with non-consumer developers

Concerning end-users, distributors undertake several roles. First thereof is the agent between the end-user and the developer, followed by the cloud service provider and the hosting intermediate. Thusly, this chapter will discuss the liability issues between the distributor and the end-user, with regards to each role of the distributor.

As a cloud service provider, the distributor undertakes the obligation to provide the end-user the SaaS[207] services, namely the provision of a platform for storage and utilization of mobile applications. In other words, the distributor is obliged to provide the storage, for software, the end-user purchases, and relevant data, created by the end-user through or within the software, in addition to providing the end-user access to them. Accordingly, when the distributor removes a mobile application from its distribution platform or disables the application, it would be in default of its cloud service obligations, and thusly in breach of the contract.

The terms of service agreements, attempt to dismiss the distributors liability in aforementioned breaches. Moreover, the terms of services transfer such liability to the developer, who is a third party to cloud service provision relationship. At the first glance, said seems not to be significantly unfair regarding the end-user. Although, since it compels the end-

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[206] Unfair Terms Directive art.3(1)
[207] Hon(2014) p.3

user to seek a remedy from the developer, instead of the distributor, such a transfer of liability can sometimes create unnecessary burden to the damaged. By way of explanation, expecting the end-user to seek redress from a developer, which is mostly either a natural person or a small-medium size enterprise, renders the compensation process of an already damaged end-user even harder.

Firstly, when compared to mobile application distributors, which are big enterprises enjoying million dollars of yearly revenues, developers suggest a rather feeble source of remedy for the end-users.

Furthermore, by reason of several regulations, such as data protection rules, distributors are compelled to have a branch in the territory of the Europe Union, which renders them easier to commence a litigation against, compared to developers who can be based in anywhere in the world.

Consequently, when litigation costs and durations are considered, mentioned transfer of liability seems to be creating significant imbalance between the obligations and rights of the end-user and the distributor. So, in pursuance to the Unfair Terms Directive, such liability clauses are likely to be invalidated; thereupon holding the distributor liable from the damages caused by it's removal or disabling of an application. In accordance with the said, when the distributor removes an app from its platform upon an unfounded notice of infringement, the end-used suffering loses therefrom would be entitled to seek remedy directly from the distributor itself.

As a general rule, the agency relationship exempts the agent from any responsibility, concerning the damages emerging from or during the performance, late performance or non-performance of the contract. Here, the issue emerges when the end-user suffers losses caused by the agent distributor. Regarding the mobile application license purchase relationship, the distributor does not constitute a party, namely the distributor is a third party to the said dealing in particular. On this wise, end-user's losses occurring in relation to a mobile application but resulted from the actions of the distributor, should be classified as a tort, not a contractual default. Nevertheless, the liability clauses of terms of service agreements

avert such tort claims and, similarly to all other kinds of losses, burden the developer instead. Thence, the abovementioned explanation on the unfairness of such clauses would be also valid regarding the agency role of the distributor. In this direction, as exemption and transfer of liability clauses would be unenforceable, when the distributor performs its obligations as an agent poorly, for instance when it does not approve the security bug updates timely, the distributor would directly be liable, to the end-user, from the losses incurring by him.

Finally, considering the hosting intermediate role of the distributor, the issues thereof constitutes the hosting intermediaries liability from third party content. Regarding mobile application relationships, the mentioned indicates distributors' liability to end-users from the mobile applications they host in their platforms. The Electronic Commerce Directive regulation and distributor's stance thereupon was explained previously regarding the liability issues in the relationship between the developer and the distributor. Pursuant to liability exemption rules of the Electronic Commerce Directive, since they are not likely to fulfil the criteria of passive intermediate, distributors cannot benefit from the designated safe harbours. Therefore, distributors can be held liable from damages end-users suffer through an unlawful or faulty mobile application.

Again, the liability disclaimers of terms of service agreements hinder end-users from seeking compensation from distributors. On this case, however, what constitutes the matter of discussion is the losses generated by not distributors, but the third party content. Consequently, in such cases, the former unfairness assessment fails to suggest a strong ground for invalidation of such terms. In other words, when the hosting provider role of the distributor is considered, the liability disclaimers of terms of service agreements seems to remain enforceable, namely continuing to prevent the end-user from compensating his losses from the distributor.

3. Conclusion

The discussion above demonstrated the significant effects of the European consumer acquis, especially the Unfair Terms Directive, on the allocation of liability in mobile application relationships.

On this wise, it is safe to suggest that, the manner of implementation of the mobile application contracts in Europe varies significantly from its counterparts in, particularly, the USA. Contrarily to law of the latter, European law, leaves distributors a relatively narrower field to enjoy their dominant power over the complete mobile application relationship.

The sole circumstance that the terms of the mobile application contracts could be implemented literally is when all parties of the dealings are non consumers. Supposing one party of the mobile application relationship constitutes a consumer within the meaning of European consumer acquis, the Unfair Terms Directive interferes in the contractual relationship. Results of the mention interference are particularly distinct when examined with relation to developers' position as consumer. On this wise, previous chapters explained that, in pursuance to the European consumer acquis, a natural person developer, acting outside the scope of his profession, business, craft or trade, constitutes a consumer.

EULAs may regulate a relationship seemingly germane to developers and the end-users, although, actually even the terms of the said agreements are previously formulated by the distributors. According to distribution agreements, developers do not have to prepare their own EULAs to serve the end-users. In the absence of a new EULA the draft EULAs provided by distributors come into force. Still, even if developers choose to supply their own EULAs, the new EULAs have to be compatible with distributors' draft EULAs. Therefore, all three mobile application contract terms are, in essence, designated by distributors. Accordingly the terms thereof safeguards distributors' best interests. Likewise, the liability clauses governing the mobile application relationships, too, expressly favour the distributors, liberating them from any form of liability by virtue of indemnification, disclaimer of warranty and limitation of liability clauses. Additionally, mobile application contracts designate developers liable from any losses incurring by the end-users.

Thusly, the above chapters assessed the unfairness and therefore enforceability of liability rules of mobile application agreements, with regards to the stance of developer as consumer.

Regarding mobile application distribution relationships, in the case of a consumer developer, the liability rules holding developer liable from damages generated by the distributor are likely to be invalidated in Europe by virtue of the Unfair Terms Directive. Unfair terms in B2B agreements is not harmonised by the European acquis, however some Member States extend the protection bestowed upon the consumers, to include some legal persons like small-medium enterprises or charity organisations. Therefore, the liability issues in distribution relationships, the developer of which are not consumers varies, depending on the Member State governing it.

As to the EULAs, when the developer is a consumer, the end-users cannot benefit from the unfair terms protection regardless of their stance of consumers. The cited stems from the fact that, in such instances, the EULAs constitute C2C agreements and therefore does not qualify for the assessment of unfairness of the European consumer acquis. However, since the mentioned deprives the consumer end-users from rights they are granted against professionals, it may render the exemption of liability clauses in terms of service agreements between them and distributors unfair. Following these lines, clauses in terms of service agreements that designates distributors unaccountable from any aspect of the mobile application relationship may as well be invalidated, thusly allowing the damaged end-users to seek remedy directly from the distributors, especially with regards to damages generated by distributors. As to the liability issues in terms of service agreements, between distributors and consumer end-users, if the developer is not a consumer, the liability of distributors from damages caused by their own actions depend on which aspect of the service provided is concerned. In other words, if the liability concerns the cloud or agency services provided by the distributor, and the distributor is culpable thereof, the transfer of liability on the developers is likely to be deemed unfair for the end-user, as directing claims to developer entails significant litigation cost and lowers the end-user's chances to receive a remedy. Nevertheless, regarding distributors' liability from damages not generated by them, the

transfer of liability terms thereof seem not to be satisfying the significant imbalance criterion of Unfair Terms Directive, thusly preventing the invalidating effect of the Directive. Consequently, in instances where the losses are not caused by the distributor, terms of service agreement's liability rules, holding developer responsible, are enforceable.

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