



E-Commerce Regulation and Trader Compliance:
A Comparative and Empirical Inquiry

Thesis submitted to the Faculty of Law at the University of Oxford
for the degree of Doctor of Philosophy in Law

by

Felix Pflücke

Brasenose College

Trinity Term 2021
c. 92,100 Words

Abstract

This thesis examines both the European Union and national rules governing e-commerce consumer transactions, and empirically investigates whether 300 traders from four countries (France, Germany, the Netherlands, and the United Kingdom) comply with these rules. By examining whether traders actually comply with their legal obligations, the thesis seeks to understand how consumer rules work in practice and determine factors of compliance. The thesis first maps the legal obligations of e-commerce traders under the national rules implementing the Unfair Contract Terms Directive, E-Commerce Directive, and Consumer Rights Directive. The second part investigates whether the 300 simulated e-commerce transactions comply with the 35 selected legal obligations (10,500 assessments). The ambition of the thesis is to define and measure the levels of compliance and to test four hypotheses: (H₁) traders do not comply in full with their legal obligations; (H₂) large traders are more likely to be compliant compared to SMEs; (H₃) traders that are older are more likely to be compliant compared to companies that were incorporated more recently; (H₄) traders that base their terms and conditions on pre-drafted standard contract terms are more likely to be in compliance with the selected legal obligations. Based upon the findings, the thesis offers targeted and actionable policy recommendations, in an attempt to promote an evidence based approach to regulating consumer contracts.

Please do not cite from this thesis without the author's prior consent
felix.pflucke@law.ox.ac.uk

Acknowledgements

First and foremost, I thank my supervisors Dorota Leczykiewicz and Stephen Weatherill for their intellectual guidance, kindness, and generosity of time I will never forget. They were a source of inspiration and also motivation to develop my ideas further. My examiners at the MPhil and transfer, Birke Häcker and Christian Twigg-Flesner, and confirmation, Birke Häcker and Vanessa Mak, provided robust checks on the direction of the DPhil and its content.

In addition, I want to thank the convenors of the Institute of European and Comparative Law Lunchtime Seminar Series, the Comparative Law Discussion Group, and the Socio-Legal Studies Discussion Group for the invaluable co-events with the EU Law Discussion Group and the Empirical Legal Studies Discussion Group. The Max Planck Institute for Comparative and International Private Law, The Queen's College, St Peter's College, Somerville College, and Mansfield College provided a home outside of Brasenose and the Law Faculty. I also gratefully acknowledge the financial and academic support of the Friedrich Naumann Foundation, Oxford Law Faculty, and Brasenose College.

My time in Oxford has also immensely benefitted from the intellectual input, support, and guidance from a number of colleagues, teachers, and friends. In particular I thank Jeremias Adams-Prassl, Nick Bamforth, Tom Boeckstein, Riccardo De Giorgi, Julie Dickson, Max-Sebastian Dovi, Isabel Ebert, Horst Eidenmüller, Stefan Enchelmaier, Adrian Foerster, Catalina Goanta, Liane Huttner, Michal Krenz, Hafsteinn Dan Kristjánsson, Gerd Lutz, Poorna Mysoor, Julian Nowag, Céline Penant, David Sargent, Felix Tann, Johannes Ungerer, Tyler VanderWeele, Barend van Leeuwen, Gijs van Dijck, Josef Weinzierl, Jan Zgalski, the Brasenose HCR, and my students. Thanks to all of you.

The greatest thank you, of course, is to my parents Annette and Wolfgang Pflücke, my grandparents Roswitha and Günter Kittel, and my partner Madeleine Mahoux for their kind and loving support. This thesis is dedicated to you.

Contents

Abbreviations	vi
Cases Cited	viii
Legislative Materials Cited	xii
List of Tables	xxix
1. Introduction	1
1.1. Setting the Scene	1
1.2. Objectives and Methodology	2
1.3. Scope of Inquiry and Limitations	4
1.4. Structure of the Thesis	5
2. Unfair Terms Control	9
2.1. The Unfair Terms Directive as the Cornerstone of the European Consumer Acquis	9
2.2. Unfair Terms Control on the European Union Level	12
2.3. Unfair Terms Control on the National Level	21
2.4. The Annex to the Unfair Terms Directive as the Benchmark of Unfairness	43
2.4.1. Limitation of Liability in Case of Death or Personal Injury	45
2.4.2. Exclusion or Limitation of Compensation in Case of Total or Partial Non-Performance	51
2.4.3. One-Sided Compensation for Cancellation	57
2.4.4. Excessive Compensation	61
2.4.5. One-Sided Changes to the Contract	66
2.4.6. One-Sided Changes to the Product	71
2.4.7. Price Variations	74
2.4.8. One-Sided Interpretation of the Contract	77
2.4.9. One-Sided Compliance with Obligations	80
2.4.10. Transfers of Contracts to other Traders under Less Favourable Conditions	82
2.4.11. Limitation of Rights to Legal Action	84
2.5. Conclusion	91

3. Mandatory Disclosures and Substantive Consumer Rights	94
3.1. Introduction	94
3.2. The E-Commerce Directive	95
3.2.1. Information and Formal Requirements	98
3.2.2. Comparative Notes on the Implementation	105
3.3. The Consumer Rights Directive	108
3.3.1. Mandatory Disclosures and Substantive Rights	115
3.3.1.1. Information Requirements	115
3.3.1.2. Formal Requirements	117
3.3.1.3. Right of Withdrawal	119
3.3.1.4. Passing of Risk	125
3.3.1.5. Delivery	126
3.3.1.6. Alternative and Online Dispute Resolution	127
3.3.2. Comparative Notes on the Implementation	129
3.4. Conclusion	129
 4. Research Design	 131
4.1. Introduction	131
4.2. Hypotheses	132
4.3. Defining and Measuring Compliance: Dependent Variables	138
4.4. Possible Factors of Compliance: Independent Variables	148
4.5. Data Collection	151
4.6. Data Analysis	154
4.7. Inter-Rater Agreement	156
4.8. Methodological Challenges and Conclusion	158
 5. Empirical Examination of E-Commerce Consumer Transactions	 160
5.1. Introduction	160
5.2. Hypotheses Tests	161
5.2.1. Hypothesis One: Non-Compliance with Consumer Rights	161
5.2.2. Hypotheses Two to Four: Factors of Non-Compliance	165
5.3. Compliance with Consumer Rights	169
5.3.1. Unfair Contract Terms	170
5.3.2. Mandatory Disclosures	177

5.3.3. Right of Withdrawal	184
5.3.4. Passing of Risk	191
5.4. Additional Observations	192
5.5. Conclusion	195
 6. Policy Recommendations	 196
6.1. Introduction	196
6.2. Promoting Compliant Pre-Drafted Standard Contract Terms	197
6.3. Supporting Small and Medium-Sized Enterprises	216
6.4. Increasing Access to Justice by Promoting Online Dispute Resolution	220
6.5. Conclusion	227
 7. Conclusion	 229
7.1. Introduction	229
7.2. Summary of the Argument	229
7.3. Implications of the Thesis and Questions that Remain Unanswered	235
7.4. Conclusion	236
 Appendix	 237
Appendix 1 Independent Variables	237
Appendix 2 Dependent Variables	246
Appendix 2.1 Dependent Variables X1-Y4	246
Appendix 2.2 Dependent Variables Z1a-Z1i	251
Appendix 2.3 Dependent Variables Z2a(i)-Z4	256
Appendix 2.4 Dependent Variables Additional Observations	261
 Bibliography	 268

Abbreviations

AC	The Official Law Reports Appeal Cases
AfP	Zeitschrift für das gesamte Medienrecht - Archiv für Presserecht
AGB	Allgemeine Geschäftsbedingungen (terms and conditions)
AGB-Gesetz	Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen 1976 (German Law on Standard Business Terms)
AI	Artificial Intelligence
B2B	Business-to-business
B2C	Business-to-consumer
BGH	Bundesgerichtshof (German Federal Court of Justice)
BTW	Belasting over de toegevoegde waarde (value-added tax)
BW	Burgerlijk Wetboek (Dutch Civil Code)
BGB	Bürgerliches Gesetzbuch (German Civil Code)
CA	Cour d'appel (Court of Appeal in France)
Cass civ	Chambre civile de la Cour de cassation (Civil Chamber of the French Court of Cassation)
CCI	Chambre de commerce et d'industrie (French Chamber of Commerce)
CCS	Crown Commercial Services
CESL	Common European Sales Law
CISG	United Nations Convention on Contracts for the International Sale of Goods
CJEU	Court of Justice of the European Union
CMA	Competition and Markets Authority (UK)
COM	European Commission
CRA 2015	UK Consumer Rights Act 2015
CRD	Consumer Rights Directive 2011/83/EU
DSD	Distance Selling Directive 97/7/EC
EC	European Community
ECD	E-Commerce Directive 2000/31/EC
ECHR	European Convention on Human Rights
ECLI	European Case Law Identifier
EEC	European Economic Community
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuche (Introductory Act to the German Civil Code)
EU	European Union
HR	Hoge Raad (Dutch Supreme Court)
HRA	Handelsregister Abteilung A (German Company Register A)
HRB	Handelsregister Abteilung B (German Company Register B)
IHK	Industrie- und Handelskammer (German Chamber of Industry and Commerce)
Incoterms®	International Commercial Terms
KWK	Kamer van Koophandel (Dutch Chamber of Commerce)

NJW N	Neue Juristische Wochenschrift
ODR	Online Dispute Resolution
ADR	Alternative Dispute Resolution
OJ	Official Journal of the European Union
OLG	Oberlandesgericht (Higher Regional Court in Germany)
OLS	Ordinary Least Squares Test
PECL	Principles of European Contract Law
PHR	Parquet bij de Hoge Raad (Procurator General Office of the Dutch Supreme Court)
RCS	Registre du commerce et des sociétés (French Company Registry)
SME	Small and medium-sized enterprises
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TMG	Telemediengesetz (German Telemedia Act)
UCTA	UK Unfair Contract Terms Act 1977
UCTD	Unfair Contract Terms Directive 93/13/EEC
UKHL	UK House of Lords
UKSC	United Kingdom Supreme Court
UPICC	Principles of International Commercial Contracts
UWG	Gesetz gegen den unlauteren Wettbewerb (German Act against Unfair Competition)
VAT	Value-added tax
VPN	Virtual private network
WLR	Weekly Law Reports

Cases Cited

European Union

- Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v Rocío Murciano Quintero; Salvat Editores SA v José M. Sánchez Alcón Pradès, José Luis Copano Badillo, Mohammed Berroane, Emilio Viñas Feliú* [2000] ECLI:EU:C:2000:346 10, 17, 85
- Case C-144/99 *Commission of the European Communities v Kingdom of the Netherlands* [2001] ECLI:EU:C:2001:257 23, 34
- Case C-478/99 *Commission of the European Communities v Kingdom of Sweden* [2002] ECLI:EU:C:2002:281 16, 44
- Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter and Ulrike Hofstetter* [2004] ECLI:EU:C:2004:209 15, 17, 62
- Case C-464/01 *Johann Gruber v BayWa AG* [2005] ECLI:EU:C:2005:32 110
- Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECLI:EU:C:2006:675 18
- Case C-243/08 *Pannon GSM Zrt v Erzsébet Sustikné Győrfi* [2009] ECLI:EU:C:2009:350 14, 17, 18, 85
- Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECLI:EU:C:2009:615 18, 85
- Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Rosalba Alassini v Telecom Italia SpA (C-317/08) and Filomena Califano v Wind SpA (C-318/08) and Lucia Anna Giorgia Iacono v Telecom Italia SpA (C-319/08) and Multiservice Srl v Telecom Italia SpA (C-320/08)* [2010] ECLI:EU:C:2010:146 226
- Case C-137/08 *VB Pénzügyi Lízing Zrt. v Ferenc Schneider* [2010] ECLI:EU:C:2010:659 14, 85
- Case C-76/10 *Pohotovost' s.r.o. v Iveta Korčková* [2010] ECLI:EU:C:2010:685 15, 61
- Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* [2012] ECLI:EU:C:2012:242 15, 66
- Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* [2013] ECLI:EU:C:2013:164 15, 62, 86
- Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* [2013] ECLI:EU:C:2013:180 66, 71, 74, 77

Case C-488/11 <i>Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV</i> [2013] ECLI:EU:C:2013:341	13
Case C-26/13 <i>Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt</i> [2014] ECLI:EU:C:2014:282	16, 19, 67
Case C-342/13 <i>Katalin Sebestyén v Zsolt Csaba Kővári, OTP Bank, OTP Faktoring Követeléskezelő Zrt, Raiffeisen Bank Zrt</i> [2014] ECLI:EU:C:2014:1857	86
Case C-143/13 <i>Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA</i> [2015] ECLI:EU:C:2015:127	67
Case C-348/14 <i>Maria Bucura v SC Bancpost SA</i> [2015] ECLI:EU:C:2015:447	66
Case C-377/14 <i>Radlinger Radlingerová Ernst Georg Radlinger and Helena Radlingerová v Finway a.s.</i> [2016] ECLI:EU:C:2016:283	62
Joined Cases C-154/15, C-307/15 and C-308/15 <i>Francisco Gutiérrez Naranjo v Cajasur Banco SAU; Ana María Palacios Martínez v Banco Bilbao Vizcaya Argentaria SA (BBVA); Banco Popular Español, SA v Emilio Irles López, Teresa Torres Andreu</i> [2016] ECLI:EU:C:2016:980	17
Case C-498/16 <i>Maximilian Schrems v Facebook Ireland Limited</i> [2018] ECLI:EU:C:2018:37	110
Joined Cases C-96/16 and C-94/17 <i>Banco Santander v Mahamadou Demba, Mercedes Godoy Bonet and Rafael Ramón Escobedo Cortés v Banco de Sabadell SA</i> [2018] ECLI:EU:C:2018:643	62
Case C-430/17 <i>Walbusch Walter Busch GmbH & Co. KG v Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV</i> [2019] ECLI:EU:C:2019:47	121
Case C-590/17 <i>Henri Pouvin, Marie Dijoux v Électricité de France (EDF)</i> [2019] ECLI:EU:C:2019:232	10
Joined Cases C-70/17 and C-179/17 <i>Abanca Corporación Bancaria SA v Alberto García Salamanca Santos and Bankia SA v Alfonso Antonio Lau Mendoza and Verónica Yuliana Rodríguez Ramírez</i> [2019] ECLI:EU:C:2019:250	19
Case C-266/18 <i>Aqua Med sp. z o.o. v Irena Skóra</i> [2019] ECLI:EU:C:2019:282	10, 85
Case C-649/17 <i>Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Amazon EU Sàrl</i> [2019] ECLI:EU:C:2019:576	116

Case C-260/18 <i>Kamil Dziubak and Justyna Dziubak v Raiffeisen Bank International AG</i> [2019] ECLI:EU:C:2019:819	19
Case C-18/18, <i>Eva Glawischnig-Piesczek v Facebook Ireland Limited</i> [2019] ECLI:EU:C:2019:821	224
Case C-380/19 <i>Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Deutsche Apotheker- und Ärztebank eG</i> [2020] ECLI:EU:C:2020:498	128

France

Cass civ (1) 14 May 1991, no 89-20999	26
Cass civ (1) 1 February 2005, no 01-16.733	62
Cass civ (1) 6 December 2017, no 16-14974	83
CA Douai 28 February 2019, RG no 16-05841	68
CA Rennes 8 March 2019, RG no 15-09167	46
Cass civ (1) 11 December 2019, no 18-21164	46

Germany

BGH NJW 1985, 621	75
BGH NJW 2006, 3633	101
OLG Hamburg AfP 2008, 511	101
BGH NJW-RR 2009, 1641	69
BGH NJW 2011, 1954	59
BGH NJW-RR 2015, 738	48
BGH NJW 2018, 2042	53

The Netherlands

HR 14 June 2002, ECLI:NL:HR:2002:AE0659 (<i>Bramer/Colpro</i>)	36
HR 8 October 2010, ECLI:NL:HR:2010:BM9615	180
HR 21 September 2012, ECLI:NL:HR:2012:BW6135 (<i>Bouwbedrijf Van Marrum/Wolff</i>)	36

HR 8 February 2013, ECLI:NL:HR:2013:BY4600	180
HR 13 September 2013, ECLI:NL:HR:2013:691	37
PHR 23 May 2014, ECLI:NL:PHR:2014:1900	70
Gerechtshof Arnhem-Leeuwarden 25 August 2015, ECLI:NL:GHARL:2015:6249	60
Rechtbank Rotterdam 14 March 2018, ECLI:NL:RBROT:2018:2779	48
PHR 5 April 2019, ECLI:NL:PHR:2019:346	76
Rechtbank Rotterdam 3 June 2020, ECLI:NL:RBROT:2020:5566	49
Rechtbank Amsterdam 29 June 2020, ECLI:NL:RBAMS:2020:3087	60

United Kingdom

<i>Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd</i> [1915] AC 79	64
<i>Director General of Fair Trading v First National Bank plc</i> [2001] UKHL 52, [2002] 1 AC 481	41
<i>Cavendish Square Holding BV v Talal El Makdessi and ParkingEye Ltd v Beavis</i> [2015] UKSC 67, [2015] 3 WLR 1373	41, 64, 65

Legislative Materials Cited

European Union

Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy [1975] OJ C92/1	11
Council Directive (EEC) 85/577 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31 (Doorstep Selling Directive)	22, 108, 124
Proposal for a Council Directive on unfair terms in consumer contracts [1990] COM 322 final OJ C243/2	19
Article 2	19
Annex	19
Council Directive (EEC) 93/13 of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29 (Unfair Contract Terms Directive)	4, 9, 10, 11, 12, 19, 20, 21, 22, 24, 27, 38, 47, 61, 77, 79, 87, 93, 108, 131, 140, 158, 172, 209, 229, 230
Recital 1	9
Recital 6	9
Recital 7	9
Recital 10	12, 13
Recital 16	13
Recital 19	12, 13, 15
Article 1(2)	12, 13
Article 2(b)	12
Article 2(c)	12
Article 3	17, 45, 51, 57, 61, 66, 73, 74, 77, 78, 80, 81, 82, 84, 88, 91, 92, 172, 205, 230
Article 3(1)	13, 27, 28
Article 3(2)	31
Article 3(3)	43
Article 4	172, 230
Article 4(1)	14, 27, 28
Article 4(2)	12, 13, 15
Article 5	16, 40
Article 6(1)	17, 210
Article 6(2)	31
Article 8	19, 22, 172

Article 8a (introduced by Directive 2011/83/EU)	20, 23
Article 9	19
Article 10(1)	13, 22
Annex	24, 43, 44, 57, 59, 89, 91, 172
Point 1(a) of the Annex	45, 46, 47, 48, 49, 51, 141
Point 1(b) of the Annex	44, 47, 51, 52, 53, 55, 56, 141, 205
Point 1(c) of the Annex	45
Point 1(d) of the Annex	57, 59, 60, 61, 141
Point 1(e) of the Annex	44, 61, 62, 63, 64, 66, 91, 141
Point 1(f) of the Annex	45
Point 1(g) of the Annex	45
Point 1(h) of the Annex	45
Point 1(i) of the Annex	45
Point 1(j) of the Annex	66, 67, 68, 69, 70, 71, 72, 91, 141
Point 1(k) of the Annex	71, 72, 73, 142
Point 1(l) of the Annex	74, 75, 76, 77, 91, 142
Point 1(m) of the Annex	77, 78, 79, 142
Point 1(n) of the Annex	45
Point 1(o) of the Annex	80, 81, 82, 142
Point 1(p) of the Annex	82, 84, 142
Point 1(q) of the Annex	84, 85, 87, 88, 90, 91, 142
Point 2 of the Annex	12, 13, 45, 68
Directive (EC) 97/7 of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144/19 (Distance Selling Directive)	95, 108, 110, 116, 118, 121, 124
Article 2(3)	110
Article 4	95
Article 5	95
Article 6(1)	121, 122, 187
Commission, ‘Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal’ (1998) COM 586 final OJ C30/4	97
Directive (EC) 98/34 of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations [1998] OJ L204/37	
Article 1(2)	96

Directive (EC) 1999/44 of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12 (Consumer Sales and Guarantees Directive)	4, 108, 158, 209, 212
Article 5(3)	125
Directive (EC) 2000/31 of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1 (E-Commerce Directive)	4, 94, 95, 96, 97, 98, 105, 129, 131, 144, 209, 229, 231
Recital 4	97
Recital 7	96
Recital 17	96
Recital 18	96
Article 1	96
Article 2(d)	96
Article 3	96
Article 5	95, 98
Article 5(1)	98, 99, 102
Article 5(1)(d)	96, 99, 145, 180, 201
Article 5(1)(e)	95
Article 5(1)(f)	95
Article 5(1)(g)	96, 102, 145, 180, 204
Article 9	95
Article 10	95, 98
Article 10(1)	98, 103
Article 10(1)(a)	96, 103, 145, 182
Article 10(1)(d)	96, 104, 105, 111, 144, 145, 181
Article 10(4)	99
Article 14(1)(b)	224
Article 15	224
Article 21	97
Article 22	98
Article 24	97
Section 1	95
Section 2	95
Section 3	95
Section 4	95
Commission Recommendation (EC) 2003/361 of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises [2003] OJ L124/36	
Annex Article 2	149

Directive (EC) 2005/29 of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC and Regulation (EC) No 2006/2004 [2006] OJ L149/22 (Unfair Commercial Practices Directive)	24, 25
Annex 1	24
Council Directive (EC) 2006/112 of 28 November 2006 on the common system of value added tax [2006] OJ L347/1	
Article 9(1)	102, 175
Article 14	102
Article 215	103
Directive (EC) 2008/52 of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3 (Mediation Directive)	226
Commission, ‘Proposal for a Directive of the European Parliament and of the Council on Consumer Rights’ (2008) COM 614	20
Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6 (Rome I)	87
Article 6(1)	87, 174, 200, 202, 204, 210, 213
Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (CESL)’ COM (2011) 635 final	109, 210
Part III	210
Directive (EU) 2011/83 of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC and repealing Council Directive 85/577/EEC and Directive 97/7/EC [2011] OJ L304/64 (Consumer Rights Directive)	4, 11, 76, 94, 95, 108, 111, 112, 113, 115, 117, 123, 129, 145, 184, 212, 229, 231
Recital 11	109
Recital 13	112, 218
Recital 14	112
Recital 16	110
Recital 17	110
Recital 19	109
Recital 20	109

Recital 21	109
Recital 44	124
Article 2(1)	110
Article 2(2)	110
Article 2(3)	109
Article 2(7)	109
Article 2(8)	109
Article 2(10)	117, 182
Article 3(1)	109
Article 3(2)	109
Article 3(3)	109
Article 3(4)	112
Article 4	111
Article 5(1)	112
Article 5(3)	112
Article 6	115
Article 6(1)	117, 118
Article 6(1)(a)	116, 118, 146, 182
Article 6(1)(b)	116, 118, 146, 182
Article 6(1)(c)	116, 146, 181
Article 6(1)(d)	116, 181
Article 6(1)(e)	116, 117, 118, 146, 182
Article 6(1)(f)	116
Article 6(1)(g)	116, 126, 146, 181, 202, 293
Article 6(1)(h)	116, 118, 121, 146, 178, 181, 201, 203
Article 6(1)(i)	116, 117
Article 6(1)(j)	116, 181
Article 6(1)(k)	116, 181
Article 6(1)(l)	78, 116, 146, 180, 205
Article 6(1)(o)	118
Article 6(1)(p)	118
Article 6(1)(p-s)	116
Article 6(1)(t)	116, 127, 148, 177, 201, 202, 205, 220, 224
Article 6(6)	117
Article 6(7)	111, 112
Article 6(8)	111, 112, 117
Article 6(9)	117
Article 7(4)	112
Article 8	117
Article 8(1)	117, 146, 182

Article 8(2)	118
Article 8(3)	118
Article 8(4)	118
Article 8(6)	112
Article 8(7)	119
Article 8(7)(a)	119
Article 8(7)(b)	119
Article 8(9)	117
Article 8(10)	117
Article 9	119, 147
Article 9(1)	119, 146, 147, 185, 189, 203
Article 9(2)(b)	119, 147, 189
Article 9(2)(b)(i)	119, 147, 189
Article 9(2)(b)(ii)	119
Article 9(2)(b)(iii)	119
Article 9(3)	112
Article 10(1)	121
Article 10(2)	121
Article 11(1)	124
Article 11(1)(a)	121
Article 11(1)(b)	121
Article 11(3)	121
Article 11(4)	121
Article 12(a)	122
Article 13	186
Article 13(1)	122, 147, 185, 186, 201, 203, 204
Article 13(2)	120, 122, 147
Article 13(3)	122, 186
Article 14	122
Article 14(1)	120, 122, 147, 176, 189, 203
Article 14(2)	120, 122
Article 15	122
Article 15(2)	122
Article 16	119
Article 16(b)	120
Article 16(c)	120
Article 16(d)	120
Article 16(e)	120
Article 16(f)	120
Article 16(g)	120
Article 16(h)	120
Article 16(i)	120

Article 16(j)	120
Article 16(k)	120
Article 17(1)	109
Article 18	109, 126, 192
Article 18(1)	76, 126
Article 18(2)	126
Article 18(3)	126
Article 18(4)	126
Article 20	109, 125, 149, 191
Article 23	111
Article 24	111
Article 25	111, 192, 210
Article 28(1)	114
Article 29	112
Article 32	20, 23
Annex I	121, 178
Consolidated Version of the Treaty on European Union [2012] OJ C 326/13 (TEU)	
Article 5	196
Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU)	
Article 2(2)	196
Article 4(1)	196
Article 4(2)	196
Article 114	10, 196, 208
Article 169	10
Charter of Fundamental Rights of the European Union [2012] OJ C326/391	226
Article 47	226
Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1 (Brussels I Regulation (Recast))	86
Article 17(1)	87
Article 17(2)(c)	87
Article 18(2)	87, 174, 205
Article 19	87
Section 4	86
Directive (EU) 2013/11 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No	127

2006/2004 and Directive 2009/22/EC [2013] OJ L165/63 (Directive on Consumer ADR)	
Article 6	127
Article 7	127
Article 8	127
Article 8(e)	127
Article 9	127
Article 10	127
Article 10(2)	128
Article 11	127
Article 13	127, 128, 224
Regulation (EU) 524/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L165/1 (Regulation on Consumer ODR)	127
Article 5	127
Article 14	127, 177, 224
Article 14(1)	128, 220
Directive (EU) 2015/1535 of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services [2015] OJ L241/1	
Article 1(1)(b)	96
Article 4	115
Annex	96
Regulation (EU) 2017/2394 of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 [2017] OJ L345/1	208
Directive (EU) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1	211, 212
Article 4	212
Directive (EU) 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L136/28	211, 212
Article 3	212
Article 4	212
Article 17	212

Article 18	212
Directive (EU) 2019/2161 of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L328/7 (Omnibus Directive)	115, 211, 212
Article 1	212
Article 4(5)	212
Article 7	115
Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C384I/1 (European Union (Withdrawal) Act 2018)	4
Section 6(4)	41
France	
Loi n° 78-22 of 10 January 1978 (<i>relative à l'information et à la protection des consommateurs dans le domaine de certaines opérations de crédit</i>)	25
Loi n° 78-23 of 10 January 1978 (<i>sur la protection et l'information des consommateurs de produits et de services</i> , also referred to as ‘Loi Scrivener 1’)	11, 21, 25
Loi n° 79-596 of 13 July 1979 (<i>relative à l'information et à la protection des emprunteurs dans le domaine immobilier</i>)	25
Loi n° 88-14 of 5 January 1988 (<i>relative aux actions en justice des associations agréées de consommateurs et à l'information des consommateurs</i>)	26
Loi n° 93-949 of 26 July 1993 (<i>relative au code de la consommation</i>)	26
Loi n° 95-96 of 1 February 1995 (<i>concernant les clauses abusives et la présentation des contrats et régissant diverses activités d'ordre économique et commercial</i>)	26
Code de la consommation [26 July 2005]	
Article L121-20	123

Loi n° 2008-776 of 4 August 2008 (<i>modernisation de l'économie</i>)	26
Loi n° 2014-344 of 17 March 2014 (<i>relative à la consommation</i>)	114
Décret n° 2014-1061 of 17 September 2014 (<i>relatif aux obligations d'information précontractuelle et contractuelle des consommateurs et au droit de retractation</i>)	114
Code de la consommation [2015] Article L132-1 (now Article L212-1)	28
Ordonnance n° 2016-301 of 14 March 2016 (<i>relative à la partie législative du code de la consommation</i>)	114
Décret n° 2016-884 of 29 June 2016 (<i>relatif à la partie réglementaire du code de la consommation</i>)	26, 114
Loi n° 2018-287 of 20 April 2018 (<i>ratifiant l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations</i>)	26
Code civil [2019] Article 1127-1 no 1 Article 1127-1 no 3 Article 1170 Article 1171	104 105, 144 27 27
Code de la consommation [2019] Article L111-2 Article L212-1	67, 87, 140 99, 103 27, 28, 42, 43, 46, 52, 57, 62, 67, 72, 74, 78, 80, 82, 88, 140, 144, 230
Article L212-1(3) Article L224-76 Article R111-2 no 1(c) Article R111-2 no 1(e) Article R212-1	28 105, 129, 144, 231 99 103 28, 43, 46, 140, 144, 230
Article R212-1 no 3 Article R212-1 no 4 Article R212-1 no 5 Article R212-1 no 6	29, 68, 72, 74, 75, 143 78, 143 80, 143 52, 143

Article R212-1 no 7	52, 143
Article R212-1 no 9	58
Article R212-1 no 12	88, 143
Article R212-2	25, 28, 42, 140, 230
Article R212-2 no 2	57, 58, 143
Article R212-2 no 3	62, 143
Article R212-2 no 5	82
Article R212-2 no 6	29, 46, 47, 67, 68, 143
Article R212-2 no 9	88, 143
Article R212-2 no 10	88, 143
Article R212-3	29, 45, 68
Article R212-3 no 1	29
Article R212-3 no 2	29
Article R212-4	29, 45, 68
Article R212-4 no 3	72, 75
Article R212-4 no 4	68

Germany

Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen of 9 December 1976 (AGB-Gesetz)	11, 21, 30
§ 11 Nr. 7	48
§ 12	31
§ 24a	31
Gesetz zur Änderung des AGB-Gesetzes und der Insolvenzverordnung of 19 July 1996	31
Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (Unterlassungsklagengesetz, short UKlaG) [2002]	31
§§ 1ff	31
Bürgerliches Gesetzbuch (BGB) [8 December 2004]	
§ 355 of the BGB	123
Gesetz zur Umsetzung der Verbraucherrechterichtlinie und zur Änderung des Gesetzes zur Regelung der Wohnungsvermittlung vom 20 September 2013, (27.09.2013) Bundesgesetzblatt Teil 1, 3642-3670	114
Bürgerliches Gesetzbuch (BGB) [2019]	25, 31, 52, 59, 78, 140, 144, 175
§ 123	30
§ 138	30

§ 242	30
§ 278	47
§ 288	175
§§ 305-310	31
§ 305 Nr. 1	34
§ 305c	33
§ 306	47
§§ 307-309	32, 33, 53
§ 307	32, 33, 42, 78, 79, 140
§ 307 Nr. 1	32, 33
§ 307 Nr. 2	33
§ 307 Nr. 3	32
§ 308	25, 32, 33, 34, 42, 43, 140, 144, 230
§ 308 Nr. 4	69, 72, 143
§ 308 Nr. 7	58, 143
§ 308 Nr. 7 lit. a	59
§ 308 Nr. 7 lit. b	59
§ 308 Nr. 7(a)	32
§ 309	25, 32, 33, 34, 43, 47, 83, 140, 230
§ 309 Nr. 1	75, 76, 143
§ 309 Nr. 2	81, 143
§ 309 Nr. 2 lit. a	81
§ 309 Nr. 2 lit. b	81
§ 309 Nr. 3	52, 143
§ 309 Nr. 5	58, 59, 63, 143
§ 309 Nr. 5 Nr. 5 lit. a	58
§ 309 Nr. 5 Nr. 5 lit. b	58
§ 309 Nr. 6	58, 59, 63, 143, 175
§ 309 Nr. 7	45, 48, 59, 78, 79, 143
§ 309 Nr. 7 lit. a	47, 48
§ 309 Nr. 8	52, 53, 78, 79, 81, 143
§ 309 Nr. 8 lit. a	53, 81
§ 309 Nr. 8 lit. b	53, 79, 81
§ 309 Nr. 10	83, 143
§ 309 Nr. 10 lit. a	83
§ 309 Nr. 10 lit. a	83
§ 309 Nr. 12	88, 89, 144
§ 309 Nr. 12 lit. b	89
§ 309 Nr. 14	88, 89, 144
§ 310	33
§ 310 Nr. 1	45
§ 310 Nr. 2	33, 45
§ 310 Nr. 4	33, 45

§ 312i(1) Nr. 2	104, 105
§ 343	63
§ 649	59
Einführungsgesetz zum Bürgerlichen Gesetzbuche (EGBGB)	
[2019]	
Article 246c Nr. 1	104
Article 246c Nr. 4	105
Gesetz gegen den unlauteren Wettbewerb (UWG) [2019]	101
Handelsgesetzbuch [2019]	
§ 14	100
Handelsregisterverordnung [2019]	
§ 1	100
§ 3	100
§ 3(3)	100
Telemediengesetz (TMG) [2019]	
§ 5(1) Nr. 4	100
§ 5(1) Nr. 6	103
Umsatzsteuergesetz [2019]	
§ 27a	103
The Netherlands	
Burgerlijk Wetboek (BW) [1992]	34
Articles 6:231-6:247	11
Kamerstukken II, 1998/1999, 26 470, nr. 3 and 5	35
Burgerlijk Wetboek [31 October 2007]	
Article 7:46d	123
Kamerstukken II, 2012/2013, 33 520, nr. 3	114
Burgerlijk Wetboek (BW) [2019]	
Article 3:305a	22, 140, 144
Article 6:89	92
Article 6:89	180
Articles 6:91-6:94	63, 64, 143
Article 6:92(2)	64
Article 6:94	64
Article 6:227b Nr. 1(a)	104

Article 6:227b Nr. 1(d)	105
Article 6:230b Nr. 2	101
Article 6:230b Nr. 4	103
Articles 6:231-6:247	35
Article 6:233	35, 36, 37
Article 6:233(a)	35, 36, 42, 48, 55, 60, 70, 76, 140, 230
Article 6:235	36, 37
Article 6:236	35, 37, 45, 140, 230
Article 6:236(a)	54, 143
Article 6:236(b)	54, 81, 143
Article 6:236(c)	54, 81, 143
Article 6:236(d)	79, 143
Article 6:236(e)	83, 143
Article 6:236(f)	55
Article 6:236(i)	70, 76, 143
Article 6:236(k)	89, 144
Article 6:236(n)	89, 144
Article 6:231	36
Article 6:237	25, 35, 36, 37, 42, 45, 48, 49, 140, 144, 230
Article 6:237(b)	54, 143
Article 6:237(c)	55, 70, 73, 143
Article 6:237(f)	48, 60, 143, 143
Article 6:237(g)	55, 143
Article 6:237(i)	60, 63, 64, 143
Article 6:245	37
Article 6:247	37
Article 6:248	36, 37
Article 7:23	180

Handelsregisterwet 2007 [2019]

Article 9(a)	101
--------------	-----

United Kingdom

Unfair Contract Terms Act 1977 (UCTA 1977)	15, 21, 38, 39, 42
Section 1(1)	39
Section 2	42
Section 2(4)	39
Section 3(3)	39
Sections 5-7	42
Section 7(4A)	39
Schedule 2	38

Unfair Terms in Consumer Contracts Regulations 1994 Regulation 3	38, 39 39
Unfair Terms in Consumer Contracts Regulations 1999 Regulation 5	39, 40 39
Consumer Protection (Distance Selling) Regulations 2000 Regulation 11	123
Electronic Commerce (EC Directive) Regulations 2002 Regulation 6(1)(d) Regulation 6(1)(g) Regulation 9(1)(a) Regulation 9(1)(d)	101 103 104 105
Companies Act 2006 Section 1066	102
Companies (Trading Disclosures) Regulations 2008 Section 7(1) Section 7(2)	102 102
The Consumer Rights (Payment Surcharges) Regulations 2012	114
Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 Section 29(1) Section 35(5)	114 175 176
Legal Notice No.175 of 2013: Contract and Tort Act (Amendment) Regulations 2013	114
Legal Notice No.176 of 2013: Consumer Protection (Unfair Trading) Act 2008 (Amendment) Regulations 2013	114
Legal Notice No.177 of 2013: Consumer Rights on Contract Regulations 2013	114
Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015 Section 25(1) Section 25(2)	102 102

The Consumer Rights Act 2015	39, 40, 64, 74, 77, 90, 134, 136, 140, 144
Part 2	40
Section 31	24, 40, 41, 42, 43, 56, 90, 91, 140, 143, 230
Section 31(1)	55, 90
Section 31(2)	56, 90
Section 31(5)	56
Section 61	24, 42
Section 61(4)	39
Section 62	42, 50, 51, 56, 61, 65, 70, 73, 77, 79, 82, 84, 90, 92, 140, 176, 230
Section 62(4)	40, 65
Section 62(5)	40
Section 62(8)(d)	50
Section 63 (1)	40
Section 63 (2)	40, 41, 50
Section 64	40
Section 65	24, 40, 41, 42, 43, 49, 50, 51, 140, 143, 230
Section 65(3)	49
Section 65(4)	49
Section 65(5)	50
Section 66 (1)(a)	50
Section 66 (1)(b)	50
Section 66 (2)	50
Section 66 (3)	50
Section 66 (4)	50
Section 68	40
Schedule 2	40, 42, 56, 79, 82, 140, 144, 230
Schedule 2 Part 1	24, 41
Schedule 2 Part 1(1)	50, 51, 143
Schedule 2 Part 1(2)	56, 143
Schedule 2 Part 1(4)	61, 143
Schedule 2 Part 1(5)	65, 143, 176
Schedule 2 Part 1(6)	65, 143, 176
Schedule 2 Part 1(11)	70, 143
Schedule 2 Part 1(12)	70, 143
Schedule 2 Part 1(13)	73, 143
Schedule 2 Part 1(14)	76, 143
Schedule 2 Part 1(15)	76, 143
Schedule 2 Part 1(16)	79, 80, 143
Schedule 2 Part 1(18)	82, 143

Schedule 2 Part 1(19)	84, 143
Schedule 2 Part 1(20)	90, 144
Schedule 2 Part 2	45
Schedule 3	41
Schedule 3, subsection 2	41
Schedule 3, subsection 3	41

International and Soft-Law Instruments

The United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980 (CISG)	193, 194, 233
Preamble	194
Article 1	194
Article 2	194
Article 6	194
 The Principles of European Contract Law (PECL), Parts I and II [2002] and Part III [2003]	 209
 The Principles of International Commercial Contracts (International Institute for the Unification of Private Law, Rome, 2016) (UPICC)	 209
 Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (European Convention on Human Rights, as amended Protocol No 15 on 1 August 2021) (ECHR)	 226
Article 6	226

List of Tables

Table 1	Compliance Scale	139
Table 2	Levels of Non-Compliance Unfair Contract Terms	140
Table 3	Dependent Variables and Compliance Scale Unfair Contract Terms Directive	141
Table 4	Dependent Variables of the National Rules Implementing the UCTD	143
Table 5	Dependent Variables and Compliance Scale E-Commerce Directive	145
Table 6	Dependent Variables and Compliance Scale Consumer Rights Directive	146
Table 7	Overview Independent Variables	151
Table 8	Overall Levels of Trader Compliance	161
Table 9	Number of Instances of Non-Compliance per Trader (Part I)	163
Table 10	Number of Instances of Non-Compliance per Trader (Part II)	163
Table 11	Effects of Instances of Non-Compliance and Probability of Non-Compliance	168
Table 12	Instances of Non-Compliance by Legal Category	169
Table 13	Number of Unfair Contract Terms per Trader	171
Table 14	Non-Compliances with Unfair Contract Terms	171
Table 15	Instances of Unfair Contract Terms by Legal Category	173
Table 16	Number of Instances of Non-Compliance with Mandatory Disclosures per Trader	179
Table 17	Instances of Non-Compliance with Mandatory Disclosures	183
Table 18	Levels of Compliance with Right of Withdrawal	185
Table 19	Instances of Non-Compliance and Levels of Compliance with Right of Withdrawal	187
Table 20	Length of Right of Withdrawal	188

Table 21	Number of Instances of Non-Compliance with Right of Withdrawal per Trader	190
Table 22	Instances of Non-Compliance by Standard Contract Terms Providers and Traders	206
Table 23	Top 10 Instances of Non-Compliance by SMEs and Large Enterprises	217
Table 24	Trader Compliance and Trader Willingness to Take Part in ODR	222

Chapter 1

Introduction

1.1 Setting the Scene

A study of the European Commission published in 2017 revealed that the demand for purchasing goods online has been increasing significantly within the European Single Market.¹ In this study, over half of the respondents regularly purchased goods online, but only 12.6 percent of these consumers were aware of their basic statutory rights in online transactions.² In addition, merely 53.5 percent of the e-commerce traders that participated in the study could identify the basic rights of consumers.³ This lack of awareness makes consumers particularly vulnerable to traders that do not comply with EU and national consumer protection standards. The European Commission has therefore carried out another study which measured compliance of e-commerce traders with a handful of applicable consumer protection rules, detecting multiple compliance issues.⁴ Several academic studies have also gone beyond the mainly doctrinal discussion and focused on

¹ Commission, ‘Consumer Conditions Scoreboard – Consumers at home in the Single Market’ (European Commission, October 2017) available at <http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=45983> accessed 3 September 2020, 91 (Figure 61).

² *ibid* 18-19. The basic statutory rights included in the study concerned ‘unsolicited products, faulty product guarantees and cooling-off periods’.

³ *ibid* 22.

⁴ Commission, ‘Online shopping: Commission and Consumer Protection authorities urge traders to bring information policy in line with EU law’ (European Commission, 31 January 2020) available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_156> accessed 12 August 2020.

how consumer law operates in practice.⁵ However, these studies have either focused only on a limited number of consumer rights, did not take into account national law, or did not focus on distances sale of goods contracts.⁶ The present thesis therefore attempts to fill this gap in the literature by examining whether traders comply with all applicable rules governing business-to-consumer e-commerce transactions at the EU and national level, and also seeks to determine possible factors affecting trader compliance.

1.2 Objectives and Methodology

It has been suggested in the previous Section that the scholarly discussion has been primarily doctrinal and there is consequently only very little empirical evidence on trader compliance in business-to-consumer e-commerce transactions. This thesis therefore attempts to assess how e-commerce business-to-consumer transactions are regulated and whether traders actually comply with the underlying rules. It also seeks to provide evidence

⁵ Examples of doctrinal work which focused on the EU's competence to enact consumer protection legislation or the benefits and shortcomings of further harmonisation in EU consumer contract law include Stephen Weatherill, *EU Consumer Law and Policy* (2nd ed, Edward Elgar Publishing 2013); Kathleen Gutman, *The Constitutional Foundations of European Contract Law: A Comparative Analysis* (Oxford University Press 2014); Giovanni de Cristofaro and Alberto de Franceschi (eds), *Consumer Sales in Europe: After the Implementation of the Consumer Rights Directive* (Intersentia 2016); Hein Kötz, *European Contract Law* (2nd edn, Oxford University Press 2017).

Other approaches have also been used, for instance examining the law and economics of the harmonisation process, see for example Ariel Porat, 'The Law and Economics of Mistake in European Sales Law' (2013) 50(Special Issue) *Common Market Law Review* 127; Alexander J Wulf, *Institutional Competition between Optional Codes in European Contract Law: A Theoretical and Empirical Analysis* (Springer Publishing 2014).

However, there have only been a handful of empirical studies on trader compliance, see for instance Marco Loos and Joasia A Luzak, 'Wanted: a Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers' (2016) 39(1) *Journal of Consumer Policy* 63; Aashish Srivastava, 'The New EU Consumer Rights Directive: An Empirical Study on Compliance Issues by E-Tailers' (2017) 32(4) *Journal of Business Law* 282; Mary Donnelly and Fidelma Whit, 'Digital content and consumer protection: An empirical study of supplier compliance with consumer information obligations' (2019) 35(6) *Computer Law & Security Review* 1.

⁶ Chapter 4.2 of the present thesis examines this in greater detail.

on possible factors that affect trader compliance. These factors will be hypothesised in Chapter 4 by surveying the empirical studies which have already been carried out.

The thesis proposes to measure trader compliance by carrying out 300 simulated e-commerce transactions in four countries: France, Germany, the Netherlands, and the United Kingdom. Traders' websites will be assessed for compliance with selected consumer law rules. The method used to collect the data and determine trader compliance is content analysis. Content analysis is a qualitative method⁷ and commonly used in the social sciences to gather data from texts, for instance judgments,⁸ or generated texts, for example interviews.⁹ Several scholars have observed a sharp increase in empirical projects using this approach to address law-in-action issues.¹⁰ The method suits the objectives of the present thesis, as the sampled traders' websites are the source to gather the data which is then used to assess trader compliance. As a result, the rules that apply to e-commerce transactions need to be examined before the present study's research design can be fully formulated.¹¹

⁷ See generally Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 941-942.

⁸ See for instance, Mark A Hall and Ronald F Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96(1) *California Law Review* 63; James Goudkamp and Donal Nolan, 'Contributory Negligence in the Twenty-First Century: An Empirical Study of First Instance Decisions' (2016) 79(4) *Modern Law Review* 575; Gijs van Dijck, 'The Ordered Apology' (2016) 37(3) *Oxford Journal of Legal Studies* 562; Rowena Vasquez-Sosas, 'The Language of Agreement: A Content Analysis of Employment Contracts' (2017) 12(2) *Journal of Humanities and Social Science* 2279.

⁹ See for instance, Urszula Jaremba and Elaine Mak, 'Interviewing Judges in the Transnational Context' (2014) 4(2) *Law and Method* 1.

¹⁰ Research trends in empirical legal research have been examined in Frans Leeuw, 'Empirical Legal Research: The Gap between Facts and Values and Legal Academic Training' (2015) 11(2) *Utrecht Law Review* 19; Gijs van Dijck, Shahar Sverdlov, and Gabriela Buck, 'Empirical Legal Research in Europe: Prevalence, Obstacles, and Interventions' (2018) 12(2) *Erasmus Law Review* 105; Maryam Salehijam, 'The Value of Systematic Content Analysis in Legal Research' (2018) 23(1) *Tilburg Law Review* 34.

¹¹ Chapter 4 provides a detailed account of the study's research design.

1.3 Scope of Inquiry and Limitations

The nature of this thesis requires that the scope is clearly defined. The first limitation narrows down the scope of the present thesis to e-commerce business-to-consumer sales contracts. Different rules apply to business-to-business and provision of service contracts, making a limitation based on the nature of contracts of fundamental importance. The second limitation concerns the selection of legal provisions. Not all consumer protection rights can be included in the thesis. The focus is limited to the rules regulating e-commerce sales, that is the national rules implementing the Unfair Contract Terms Directive,¹² the E-Commerce Directive,¹³ and Consumer Rights Directive.¹⁴ The thesis thereby excludes the Consumer Sales and Guarantees Directive as it deals with warranty issues and commercial guarantees.¹⁵ This limitation is, however, remedied by means of a discussion section, which includes additional observations that are made during the compliance assessment phase. The third and final limitation relates to the territorial scope of the study. It would be unrealistic to include all the European Union Member States. Four Member States were therefore selected for the empirical study: France, Germany, the Netherlands, and the United Kingdom. The data was collected in September 2019, which means that at the time of writing, the United Kingdom was still part of the European Union and the EU's New Deal for Consumers was not yet in force.¹⁶ The EU's New Deal for Consumers does not

¹² Council Directive (EEC) 93/13 of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29 (Unfair Contract Terms Directive).

¹³ Directive (EC) 2000/31 of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1 (E-Commerce Directive).

¹⁴ Directive (EU) 2011/83 of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC and repealing Council Directive 85/577/EEC and Directive 97/7/EC [2011] OJ L304/64 (Consumer Rights Directive).

¹⁵ Directive (EC) 1999/44 of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12 (Consumer Sales and Guarantees Directive).

¹⁶ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ

form part of the core inquiry, but is addressed in Chapter 6 ‘Policy Recommendations’. The influences of Brexit on UK and EU consumer contract law are still unclear at the time of writing, and any issues relating to the UK’s withdrawal from the EU are not addressed in the present thesis.

Narrowing down the scope of the project also means that several issues will remain uncharted. As explained above, this study investigates compliance with the implementing rules of only three Directives. It is possible that the e-commerce traders complied with all the other European Union or national legal rules in place, but not with the ones selected for this study. Another limitation relates to the scope of the project, as not all EU Member States are included in this study. There are therefore no data on the remaining Member States. The third constraint under which this study has been carried out concerns the sample size: not all e-commerce traders in the four Member States were included, but only 300 from the five most dominant industries. Several issues therefore remain uncharted and provide room for future research projects.¹⁷

1.4 Structure of the Thesis

The present Chapter has set the scene and introduced the research project. It discussed the gap in the existing literature and the contribution that this thesis seeks to make. The Chapter then outlined the need for this empirical study and explained why content analysis has been chosen as the method for determining trader compliance. Several methodological choices and limitations of the study were also outlined, for example concerning the sample size. This Section of Chapter 1 provides a roadmap of the thesis.

C384I/1; Commission, ‘A New Deal for Consumers’ (Communication) COM (2018) 183 final.

¹⁷ Further questions that remain unanswered are addressed in Chapter 7.3.

Chapter 2 provides an overview of how unfair contract terms are controlled at the European Union and national level. It assesses the rationale, the scope, the level of harmonisation, and the substantive legal rules implementing the Unfair Contract Terms Directive's general test of fairness (Articles 3 and 4 of the Directive). In the next step, the Chapter considers each of the potentially unfair terms listed in the Annex to the Directive that fall within the scope of the present study. Firstly, on the European Union level, it examines the most relevant case law of the Court of Justice. Secondly, on the national level, it investigates how each jurisdiction transposed the list of potentially unfair terms into national law. It will be revealed that the Member States have developed different approaches to control unfair terms and that these different levels of consumer protection must be reflected in the empirical research design.

The third Chapter moves on to examine the consumer protection rights derived from the national implementation of the E-Commerce Directive and the Consumer Rights Directive. This Chapter starts by pointing to a shift in the European Union legislator's approach to consumer regulation, that is the development of enacting maximum harmonisation instruments instead of minimum harmonisation ones. Whilst the rules under the minimum harmonisation E-Commerce Directive are examined on the European Union and national level (concerning information and formal requirements), the rights and obligations stemming from the maximum harmonisation Consumer Rights Directive are only analysed on the EU level. The reason for this is that the Member States cannot enact stricter rules than those provided for under the Consumer Rights Directive, except for the optional rules of the Directive which fall outside the scope of the present study. In addition, the rules of the Consumer Rights Directive leave no discretion in its implementation to the Member States.

Building on the two doctrinal Chapters, Chapter 4 sets out the research design of the study, that is the methods that will be used to define and measure compliance with EU and

national consumer rules. In the first step, the four hypotheses are formulated and arguments put forward as to why they are being tested: the H₁ hypothesis claims that e-commerce traders fail to comply in full with their legal obligations; the remaining hypotheses assess whether the company's size (H₂), the company's age (H₃), and the use of pre-drafted terms provided by public or semi-public authorities (H₄) affect compliance. All the selected consumer rights examined in the previous two Chapters are translated into 35 dependent variables and possible factors of compliance, such as the company's size, are translated into independent variables. The Chapter then presents the methods used to collect and analyse the data, including the inter-rater agreement which ensures the reliability and validity of the empirical part of the study. The final Section reflects upon some of the methodological challenges.

The fifth Chapter scrutinises the collected data and seeks to answer the four hypotheses using descriptive statistics and regression models. This hypothesis testing is the focus of the first two subsections. The Chapter then discusses the level of trader compliance with the consumers' substantive rights using descriptive statistics, providing exact numerical data on the levels of compliance with each right. The Chapter concludes with a discussion section, which allows for additional wider observations, for instance about violations of consumer protection rules that fall outside of the scope of the present study, but which may repay examination in further research.

The purpose of the sixth Chapter is to translate the empirical findings into targeted and actionable policy recommendations for the relevant stakeholders, that is the European Union institutions, the national legislators, and e-commerce trader and consumer organisations. These recommendations are limited to the empirical findings of the study and are thus situated within the context of the consumer law and policy debate taking place in the European Union and the four national jurisdictions. By no means are they intended

to present an exhaustive list of necessary reforms in the European Consumer Contract Law Acquis.

The seventh and final Chapter concludes this thesis. It summarises the main arguments, outlines potential implications of the thesis, provides questions that remain unanswered, and makes some concluding remarks.

Chapter 2

Unfair Terms Control

2.1 The Unfair Terms Directive as the Cornerstone of the European Consumer Acquis

The Unfair Contract Terms Directive 93/13/EEC is seen by many scholars as the first piece of EU consumer sales law that manifestly harmonised the substantive content of contracts.¹

One of the main functions of the Unfair Contract Terms Directive is the control of standard terms, that is terms that are not individually negotiated. By prohibiting unfair terms in consumer standard form contracts, the Directive aims to remove ‘frontiers’ in the internal market,² strengthen the position of consumers,³ and increase competition and choice for consumers.⁴ According to the Court of Justice, controlling standard terms is required as

¹ cf Hugh Collins, ‘Good Faith in European Contract Law’ (1994) 14(2) *Oxford Journal of Legal Studies* 229-230; Hugh Beale, ‘Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts’, in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford Clarendon Press 1995) 231-233; Michael Schillig, ‘Inequality of Bargaining Power Versus Market for Lemons: Legal Paradigm Change and the Court of Justice's Jurisprudence on Directive 93/13 on Unfair Contract Terms’ (2009) 33(3) *European Law Journal* 336ff; Paolisa Nebbia, ‘Unfair Contract Terms’ in Christian Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law* (Cambridge University Press 2010) 216-217; Stephen Weatherill, *EU Consumer Law and Policy* (2nd edn, Edward Elgar Publishing 2013) 145-146; Norbert Reich, Hans-Wolfgang Micklitz, Peter Rott, and Klaus Tonner, *European Consumer Law* (2nd edn, Intersentia 2014) 129-130; Jacobien W Rutgers, ‘Unfair Terms in Consumer Contracts’ in Louise Gullifer and Stefan Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (Hart Publishing 2014) 279-280; Catalina Goanta, *Convergence in European Consumer Sales Law: A Comparative and Numerical Approach* (Intersentia 2016) 53-57.

² Recital 1 of Directive 93/13/EEC.

³ Recital 6 of Directive 93/13/EEC.

⁴ Recital 7 of Directive 93/13/EEC.

‘the consumer is in a weak position vis-a-vis the seller or supplier, as regards both his bargaining power and his level of knowledge’.⁵ In addition to the weak bargaining position, empirical legal evidence suggests that consumers do not read standard terms when they enter into B2C transactions.⁶ Mindy Chen-Wishart notes that policing unfair terms ensures that the proffering party has no ‘free hand to smuggle in highly subversive terms’, which in turn increases the likelihood of informed consent and protects the institution of contract.⁷

Before and after its adoption, the Unfair Contract Terms Directive faced heavy criticism and was only accepted by the European Parliament and Council in 1993 — after almost two decades of debate.⁸ The discussion before its adoption concerned not only the content but also the constitutional basis that should be used to introduce such a consumer protection instrument.⁹ The problems caused by and after the Directive’s adoption had partly to do

⁵ Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v Roció Murciano Quintero; Salvat Editores SA v José M. Sánchez Alcón Pradès, José Luis Copano Badillo, Mohammed Berroane, Emilio Viñas Feliú* [2000] ECLI:EU:C:2000:346, paragraph 25. The Court of Justice has since then included this phrase in almost all cases concerning the fairness assessment of contract terms, see for example two recent cases, Case C-590/17 *Henri Pouvin, Marie Dijoux v Électricité de France (EDF)* [2019] ECLI:EU:C:2019:232; Case C-266/18 *Aqua Med sp. z o.o. v Irena Skóra* [2019] ECLI:EU:C:2019:282.

⁶ Oren Bar-Gill and Omri Ben-Shahar, ‘Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law’ (2013) 50(Special Issue) *Common Market Law Review* 109-110; Yannis Bakos, Florencia Marotta-Wurgler, and David R Trossen, ‘Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts’ (2014) 43(1) *Journal of Legal Studies* 31-33.

⁷ Mindy Chen-Wishart, ‘Regulating Unfair Terms’ in Louise Gullifer and Stefan Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (Hart Publishing 2014) 129-130.

⁸ Paolisa Nebbia, *Unfair Contract Terms in European Law: A Study in Comparative and EC Law* (Hart Publishing 2007) 7-8.

⁹ There was no explicit legislative basis for consumer protection prior to the adoption of the Maastricht Treaty, which introduced what is now Article 169 of the Treaty on the Functioning of the European Union. The Unfair Contract Terms Directive was not based on this provision but on the predecessor to Article 114 of the TFEU (harmonisation of laws in order to improve the functioning of the internal market), and a debate on the EU’s competence to legislate in consumer law in pursuit of the internal market project broke out. However, the importance of consumer protection in the EU’s legal system gained further momentum years later, in the Lisbon Treaty: Article 38 of the Charter of Fundamental Rights was made formally binding, which explicitly refers to consumer protection as an

with the fact that some Member States had already implemented earlier proposals put forward at the Paris summit in 1975.¹⁰ The issue was not only that the UCTD was partly redundant but also that it conflicted with some of the existing national laws.¹¹ This tension could be observed especially in countries that already had rules that control unfair terms in standard form contracts, such as France,¹² Germany,¹³ the Netherlands,¹⁴ and the United Kingdom.¹⁵ As the examination of the national implementing rules will show, in certain situations these Member States provide a higher level of protection than that required by EU consumer law. The Unfair Contract Terms Directive introduced only minimum standards of consumer protection, which leaves space for stricter national rules.¹⁶

objective of the Union's policies. See for example Stephen Weatherill, 'Competence and European Private Law' in Twigg-Flesner (n 1) 58ff; Stephen Weatherill, 'Consumer Policy' in Gráinne de Búrca and Paul Craig (eds), *Evolution of EU Law* (Oxford University Press 2011) 848-849; Weatherill (n 1) chapter 1 and 145-146; Stephen Weatherill, 'Article 38 Consumer Protection' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) [38.01ff]; Dorota Leczykiewicz, 'Regulatory Cost, the Consumer, and the EU Constitutional Framework' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016) part III.

¹⁰ Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy [1975] OJ C92/1.

¹¹ cf Hugh Beale, 'Unfair Contracts in Britain and Europe' (1989) 42(1) Current Legal Problems 197; Edwoud H Hondius, 'The Reception of the Directive on Unfair Terms in Consumer Contracts by Member States' (1995) 3(2) European Review of Private Law 241; Mario Tenreiro, 'The Community Directive on Unfair Terms and National Legal Systems: The Principle of Good Faith and Remedies for Unfair Terms' (1995) 3(2) European Review of Private Law 273; Hugh Collins, 'The Directive on Unfair Contract Terms: Implementation, Effectiveness, and Harmonization' in Hugh Collings (ed), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Kluwer Law International 2008) 1ff.

¹² Loi n° 78-23 of 10 January 1978 (*sur la protection et l'information des consommateurs de produits et de services*, also referred to as 'Loi Scrivener 1').

¹³ Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen of 9 December 1976.

¹⁴ Articles 6:231-6:247 BW (of 1992).

¹⁵ Unfair Contract Terms Act 1977.

¹⁶ For instance, the adoption of the maximum harmonisation Consumer Rights Directive 2011/83/EU forced Malta to lower the consumer protection standard concerning the right

The discussion in this Chapter focuses on the control of unfair standard contract terms on the EU and national level. Section 2.2 discusses the rules and EU case law of the Unfair Contract Terms Directive. Section 2.3 examines the substantive control mechanisms in four Member States – France, Germany, the Netherlands, and the United Kingdom. The discussion in Section 2.4 turns in more detail to the list of potentially unfair contract terms contained in the Annex to Directive 93/13/EEC and explores how the Member States have transposed this list into national law. Whether the levels of protection differ between the four chosen Member States is of particular interest in this Section. This is because the national divergences must be scrutinised before the empirical examination of contracts can take place, as otherwise, the study would fail to provide an accurate account of the levels of compliance.

2.2 Unfair Terms Control on the European Union Level

All kinds of sales and service contracts are covered by the Unfair Contract Terms Directive. The scope of the Directive limits its application to cross-border and domestic contracts that have not been individually negotiated (Article 3(2) of Directive 93/13/EEC) between sellers or suppliers and consumers (Article 1(1) of Directive 93/13/EEC).¹⁷ The scope of application is further narrowed down in Recitals 10 and 19, Articles 1(2) and 4(2), and in Point 2 of the Annex to Directive 93/13/EEC, but only Articles 1(2) and 4(2) affect the scope of the present study.¹⁸ The two provisions exclude contract terms reflecting statutory

of withdrawal, see Rebekah Tanti-Dougall, 'Implementation of the Consumer Rights Directive: Malta' (2014) 3(3) *Journal of European Consumer and Market Law* 187. For an examination of the implications of full harmonisation, see for instance Vanessa Mak, 'Full Harmonization in European Private Law: A Two-Track Concept' (2012) 20(1) *European Review of Private Law* 213.

¹⁷ Articles 2(b) and 2(c) of Directive 93/13/EEC define the terms 'consumer' and 'seller or supplier'.

¹⁸ The Directive on Unfair Terms in Consumer Contracts does not apply to: 'contracts relating to employment, contracts relating to succession rights, contracts relating to rights

rules (Article 1(2)), and the main subject matter and adequacy of the price from the fairness assessment, ‘in so far as these terms are in plain intelligible language’ (Article 4(2)). Despite these limitations in the Directive’s application, the scope of the instrument can be described as fairly broad; it even includes residential tenancy agreements.¹⁹ There is also a temporal limit included in the Directive and the rules only apply to contracts concluded after 31 December 1994 (Article 10(1) of Directive 93/13/EEC).

The central element of the Unfair Terms Directive is the unfairness test under Articles 3 and 4, complemented by a list of terms which ‘may be regarded as unfair’ (Annex to the Directive). The so-called general clause is contained in Article 3(1) of the Directive, establishing a four limbed test to assess whether a contractual term is unfair: the contract clause must be (1) non-individually negotiated, (2) contrary to the requirement of good faith, (3) cause a significant imbalance in the parties’ rights and obligations, and (4) to the detriment of the consumer. Three open-ended terms (‘good faith’, ‘significant imbalance’, and ‘detriment’) are contained in the test, but are not further defined in the Directive.²⁰

under family law and contracts relating to the incorporation and organization of companies or partnership agreements’ (Recital 10); ‘insurance contracts, the terms which clearly define or circumscribe the insured risk and insurer’s liability’ (Recital 19); and ‘contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member State or the Community are party, particularly in the transport area’ (Article 1(2)). Furthermore, the ‘[a]ssessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language’ (Article 4(2)). Point 2 of the Annex states that the potentially unfair clauses do not apply to financial service (a, b, and c), contracts of indeterminate duration (b), and price-indexation clauses (d). Nonetheless, Member States may enact stricter rules. cf Micklitz (n 1) 136-140.

¹⁹ Case C-488/11 *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV* [2013] ECLI:EU:C:2013:341. Micklitz (n 1) 133.

²⁰ Recital 16 of the Directive provides some guidance on the application of the good faith principle. In the assessment, ‘an overall evaluation of the different interests involved’ must take place, taking into account the bargaining power of the parties, ‘whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer’. Furthermore, the good faith principle ‘may be satisfied where [the trader] deals fairly and equitably with the other party whose

Catalina Goanta suggests that the EU legislator most likely envisaged that the national courts would contribute to the harmonisation of such norms by referring unclear terms of the Directive to the Court of Justice via the preliminary reference procedure.²¹ A by-product of defining the test in more detail for particular circumstances is further harmonisation of the law and further restrictions on national regulatory and judicial autonomy. Stephen Weatherill labels this form of harmonisation ‘the “Europeanisation” through case law’.²²

According to the Court’s case law, when assessing whether there is a ‘significant imbalance’, the national courts must take into account the nature of the goods and the surrounding circumstances, including all relevant contract terms and additional documents which form part of the contract (Article 4(1) of the Directive).²³ The definition of ‘significant imbalance, to the detriment of consumers’ provided in *Freiburger*

legitimate interests [the trader] has to take into account’. For a detailed discussion on the good faith principle in European Contract Law, see for example Collins (n 1); Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press 2000).

²¹ Goanta (n 1) 57.

²² Weatherill (n 1) 151-152 and 156. For instance, Stephen Weatherill, Walter van Gerven, and Jan Smits predicted the harmonisation through case law shortly after the adoption of the Unfair Contract Terms Directive, see Stephen Weatherill, ‘Prospects for the Development of European Private Law through Europeanisation in the Court of Justice’ (1995) 3(2) *European Review of Private Law* 307; Walter van Gerven, ‘The Case-law of the European Court of Justice and National Courts as a Contribution to the Europeanisation of Private Law’ (1995) 3(2) *European Review of Private Law* 367; Jan M Smits, ‘A European Private Law as a Mixed Legal System: Towards a *Ius Commune* through the Free Movement of Legal Rules’ (1998) 5(4) *Maastricht Journal of European and Comparative Law* 328.

²³ Case C-243/08 *Pannon GSM Zrt v Erzsébet Sustikné Győrfi* [2009] ECLI:EU:C:2009:350, paragraph 39; Case C-137/08 *VB Pénzügyi Lízing Zrt. v Ferenc Schneider* [2010] ECLI:EU:C:2010:659, paragraph 42.

*Kommunalbauten*²⁴ and *Pohotovost*²⁵ has been confirmed in the CJEU case *Catalunyacaixa*²⁶:

‘the concept of “significant imbalance”, to the detriment of the consumer, must be assessed in the light of an analysis of the rules of national law applicable in the absence of any agreement between the parties, in order to determine whether, and if so to what extent, the contract places the consumer in a less favourable legal situation than that provided for by the national law in force. To that end, an assessment of the legal situation of that consumer having regard to the means at his disposal, under national law, to prevent continued use of unfair terms, should also be carried out’

The Court went on in *Catalunyacaixa* and defined the term ‘contrary to the requirement of good faith’:

‘in order to assess whether the imbalance arises “contrary to the requirement of good faith”, it must be determined whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations.’²⁷

The Court of Justice also confirmed its earlier ruling in *Invitel*, where it established that the Member States courts had to take into account the guidelines provided by the CJEU when interpreting the good faith principle.²⁸ However, as pointed out earlier, the national courts must not take into account the definition of the subject matter, and the price/quality ratio, as long as the terms are in plain, intelligible language (Article 4(2) of the Directive).²⁹ The

²⁴ Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter and Ulrike Hofstetter* [2004] ECLI:EU:C:2004:209, paragraph 21.

²⁵ Case C-76/10 *Pohotovost’ s.r.o. v Iveta Korčková* [2010] ECLI:EU:C:2010:685, paragraph 59.

²⁶ Case C-415/11 *Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* [2013] ECLI:EU:C:2013:164.

²⁷ *ibid* paragraph 76.

²⁸ Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* [2012] ECLI:EU:C:2012:242, paragraph 22. Dorota Leczykiewicz, ‘Private regulation, compliance and reviewability of contracts’ in Roger Brownsword, Rob AJ van Gestel, and Hans-Wolfgang Micklitz (eds), *Contract and Regulation: A Handbook on New Methods of Law Making in Private Law* (Edward Elgar Publishing 2017) 353-354.

²⁹ The Recitals to the Directive provide further details, in particular Recital 19: ‘whereas the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms; whereas it follows, inter alia, that in

Court of Justice laid down in *Kásler*³⁰ that plain, intelligible language not only means ‘formally and grammatically intelligible’³¹ but that the ‘contract sets out transparently the reason for and the particularities’ of the term.³² Compliance with the transparency requirement is ensured through the *contra proferentem* principle, a doctrine which establishes that ambiguous terms are interpreted in favour of the consumer (Article 5 of the Directive).³³

In *Commission of the European Communities v Kingdom of Sweden*, the Court of Justice found that formal implementation of the list of potentially unfair terms contained in the Directive’s Annex was not required by the Directive.³⁴ However, the Court explained that Member States must ‘choose a form and method of implementation that offer a sufficient guarantee that the public can obtain knowledge of it.’³⁵ The Court concluded in paragraph 23 that it sufficed if the list contained in the Annex to the Directive had been taken into account in the ‘preparatory work’, which ensures that the public, so consumers and traders, can access the list (paragraph 24).³⁶ Contract terms corresponding to those contained in the list of potentially unfair terms in the Directive’s Annex were indirectly reviewed by the Court of Justice when it used the list of terms to interpret the general test of unfairness

insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer’s liability shall not be subject to such assessment since these restrictions are taken into account in calculating the premium paid by the consumer’.

³⁰ Case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt* [2014] ECLI:EU:C:2014:282.

³¹ *ibid* paragraph 71.

³² *ibid* paragraph 73.

³³ Stephen Weatherill, ‘Empowerment is not the only fruit’ in Leczykiewicz and Weatherill (n 9) 212-214; Stephen Weatherill, *The Internal Market as a Legal Concept* (Oxford University Press 2017) 160-161.

³⁴ Case C-478/99 *Commission of the European Communities v Kingdom of Sweden* [2002] ECLI:EU:C:2002:281.

³⁵ *ibid* paragraph 22.

³⁶ cf Micklitz (n 1) 158; Weatherill (n 1) 149-150.

under Article 3 of the Directive. In addition to defining the general criteria of the unfairness test, the Court may also exceptionally declare a term unfair where the circumstances of the case leave no room for doubt.³⁷ The Court's treatment of these terms contained in the Annex to the Directive introduces *de facto* prohibitions of unfair contract terms on the EU level.³⁸ National courts must take these CJEU cases into account when assessing the (un)fairness of terms in standard form consumer contracts.³⁹

Article 6(1) of Directive 93/13/EEC deals with the effects of recognising terms as 'unfair', requiring the Member States to introduce provisions into their national laws which declare unfair terms non-binding upon consumers. The Court of Justice clarified that the provision 'must be interpreted as meaning that a contractual term held to be unfair must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer.'⁴⁰ Generally speaking, consumers do not need to contest such provision when they enter the contractual relationship; unfair terms are at no time binding upon them.⁴¹ There are, however, exceptional circumstances in which the Court has accepted that a

³⁷ Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v Rocío Murciano Quintero; Salvat Editores SA v José M. Sánchez Alcón Pradès, José Luis Copano Badillo, Mohammed Berroane, Emilio Viñas Feliú* [2000] ECLI:EU:C:2000:346; Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter and Ulrike Hofstetter* [2004] ECLI:EU:C:2004:209.

³⁸ I will examine some of the Court of Justice cases concerning the provisions in the Annex to the Directive in Section 2.4.

³⁹ cf Weatherill (n 1) 156-158; Hans-Wolfgang Micklitz and Norbert Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51(3) Common Market Law Review 771ff; Peter Rott, 'Unfair Contract Terms' in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar Publishing 2016) 292ff.

⁴⁰ Joined Cases C-154/15, C-307/15 and C-308/15 *Francisco Gutiérrez Naranjo v Cajasur Banco SAU; Ana María Palacios Martínez v Banco Bilbao Vizcaya Argentaria SA (BBVA); Banco Popular Español, SA v Emilio Irlés López, Teresa Torres Andreu* [2016] ECLI:EU:C:2016:980, paragraph 61.

⁴¹ Case C-243/08 *Pannon GSM Zrt v Erzsébet Sustikné Györfi* [2009] ECLI:EU:C:2009:350.

consumers may remain bound by such a clause. One instance of that is where a national procedural provision precludes the review of a potentially unfair contract term.⁴² In the CJEU case *Asturcom Telecomunicaciones SL*,⁴³ a Spanish consumer contested neither an arbitration clause nor the consequent final arbitration award, and, under these circumstances, of unusual inattentiveness, the principle of *res judicata* operating in national law prevented the consumer from challenging the unfair term. The case would have ended differently only if Spanish procedural law required a review in similar domestic situations, as this would trigger the application of the principle of equivalence.⁴⁴

However, this is exceptional: normally the Court expects the consumer interest to prevail over obstacles caused by national procedural law. In an earlier CJEU case *Mostaza Claro*,⁴⁵ where the unfair term was challenged in the arbitral proceedings, the Court allowed the consumer to challenge the arbitral findings. Even though it was too late to challenge the arbitral findings under Spanish law, the Court took the side of the consumer, emphasising that ‘the aim of the Directive is to strengthen consumer protection’.⁴⁶ National courts are also required to evaluate of its own motion whether potentially unfair terms are included in the contract.⁴⁷ The Court’s willingness to protect consumers is reflected in another very

⁴² See generally, Anthony Arnall, ‘The Principle of Effective Judicial Protection in EU law: an Unruly Horse?’ (2011) 36(1) *European Law Review* 51.

⁴³ Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECLI:EU:C:2009:615. cf Martin Ebers, ‘From *Océano* to *Asturcom*: Mandatory Consumer Law, Ex Officio Application of European Union Law and Res Judicata’ (2010) 18(4) *European Review of Private Law* 823; Weatherill (n 1) 158.

⁴⁴ cf Arnall (n 42) 53-55, 65-66.

⁴⁵ Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECLI:EU:C:2006:675.

⁴⁶ *ibid* paragraph 37. Stephen Weatherill, *Law and Values in the European Union* (Oxford University Press 2016) 180-181, 359-361.

⁴⁷ Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECLI:EU:C:2006:675, paragraph 38; Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECLI:EU:C:2009:615, paragraph 59; Case C-243/08 *Pannon GSM Zrt v Erzsébet Sustikné Győrfi* [2009] ECLI:EU:C:2009:350, paragraph 35.

creative and context-specific CJEU-made rule: national courts may set aside the unfair contract term and replace it with national provisions where the contract is otherwise not capable to continue, but only where the invalidity of the unfair term would expose the consumer to particularly unfavourable consequences.⁴⁸

The combination of open-ended norms and the non-binding and non-exhaustive list of potentially unfair terms might create a hotchpotch in the national contract laws, but the matter is made more complicated again as a result of the fact that the Directive is a minimum harmonisation instrument (Article 8 of Directive 93/13/EEC). Member States may opt for a higher level of protection and enact provisions which render certain clauses automatically unfair.⁴⁹ The initial proposal for the UCTD included a ‘black list’,⁵⁰ *id est* a list of terms which are regarded as unfair in all circumstances, but it was not adopted due to the lack of political support.⁵¹ Similarly, the 2008 proposal for the Consumer Rights

Vanessa Mak, ‘Two levels, one standard? The multi-level regulation of consumer protection in Europe’ in James Devenny and Mel Kenny (eds), *European Consumer Protection: Theory and Practice* (Cambridge University Press 2012) 24-26.

⁴⁸ Case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt* [2014] ECLI:EU:C:2014:282, paragraphs 76-85. Vanessa Mak, *Legal Pluralism in European Contract Law* (Oxford University Press 2020) 162. See also two more recent judgments, Joined Cases C-70/17 and C-179/17 *Abanca Corporación Bancaria SA v Alberto García Salamanca Santos and Bankia SA v Alfonso Antonio Lau Mendoza and Verónica Yuliana Rodríguez Ramírez* [2019] ECLI:EU:C:2019:250, paragraphs 56-64; Case C-260/18 *Kamil Dziubak and Justyna Dziubak v Raiffeisen Bank International AG* [2019] ECLI:EU:C:2019:819, paragraphs 46-56, 63-68.

⁴⁹ Article 9 of Directive 93/13/EEC obliges the Commission to report to the Council on the implementation of the Unfair Contract Terms Directive. cf Micklitz (n 1) 163.

⁵⁰ Proposal for a Council Directive on unfair terms in consumer contracts [1990] COM 322 final OJ C243/2, in particular Article 2 of the Proposal and Annex to the Proposal. See generally, Hans Erich Brandner and Peter Ulmer, ‘The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission’ (1991) 28(3) *Common Market Law Review* 647.

⁵¹ Especially the Council was not in favour of introducing a ‘black list’, see Official Journal of the European Communities, Volume 36, No C 21/97 (25 January 1992). There has also been an academic debate relating the creation of a European-wide ‘black list’ of unfair contract terms, see for example Hans-Wolfgang Micklitz, ‘Reforming European Unfair Terms Legislation in Consumer Contracts’ (2010) 6(4) *European Review of Contract Law* 347; Daniela Caruso, ‘Black Lists and Private Autonomy in EU Contract Law’ in Dorota

Directive was not adopted. That proposal would have turned the Directive on Unfair Terms in Consumer Contracts into a maximum harmonisation instrument,⁵² but, as a result of political opposition to this change, the finally adopted Consumer Rights Directive introduced only a requirement that the Member States report on the implementation of Directive 93/13 to the European Commission (now Article 8a Directive 93/13/EEC).⁵³ Despite these failed attempts to enact further harmonised rules to control unfair terms, the UCTD established a common mechanism to control unfair contract terms by introducing a general test of unfairness, the Directive introduced a common definition of standard term, and it also contributed to the development of the transparency principle.

The nature of the Unfair Contract Terms Directive makes an examination of the national implementing rules indispensable. I will discuss below how France, Germany, the Netherlands, and the United Kingdom have dealt with the obligation stemming from Articles 3 and 4 of the Directive, and whether their approach is compatible with these obligations and the case law of the Court of Justice.

Leczykiewicz and Stephen Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart Publishing 2013).

⁵² Proposal for a Directive of the European Parliament and of the Council on Consumer Rights (2008) COM 614. For a deeper discussion on the minimum versus maximum harmonisation debate, see for example Stephen Weatherill, *Contract Law of the Internal Market* (Intersentia 2016) chapter 6; Simon Whittaker, 'Unfair Contract Terms and Consumer Guarantees: the Proposal for a Directive on Consumer Rights and the Significance of "Full Harmonisation"' (2009) 5(3) *European Review of Contract Law* 223.

⁵³ Article 32 Consumer Rights Directive 2011/83/EU. cf Weatherill (n 1) 160. The Member State notifications can be accessed on the European Commission's website: Commission, 'Notifications under Article 8a of Directive 93/13/EEC' (European Commission, 31 May 2019) available at <https://ec.europa.eu/info/notifications-under-article-8a-directive-93-13-ee_en> accessed 4 July 2020. The content of the notifications will be discussed in the following Section (Chapter 2.3).

2.3 Unfair Terms Control on the National Level

The discussion in this Section focuses on the control of unfair standard contract terms in France, Germany, the Netherlands, and the United Kingdom. This Section examines three key issues: (1) the national rules prior to the adoption of and subsequent changes made under the Unfair Terms in Consumer Contracts Directive (1993) in the Member States; (2) the current national legislative and judge-made rules; (3) comparative observations, highlighting convergences and divergences among the four countries.

As mentioned before, Germany, the United Kingdom, and France implemented similar rules to those later introduced by the Directive, in 1976,⁵⁴ 1977,⁵⁵ and 1978⁵⁶ respectively. These national consumer protection measures were discussed at the Paris Summit in 1972, where the EU Member States expressed their willingness to strengthen and coordinate measures of consumer protection.⁵⁷ Despite the Member States' affirmations at the Summit and their efforts in enacting such rules at the national level, it took two decades to adopt the Directive on Unfair Terms in Consumer Contracts (1993). The length of the legislative debate can be partly blamed on the sensitive nature of the Directive.⁵⁸ After all, the Directive harmonised substantive consumer contract rules⁵⁹ and, according to Stephen Weatherill, also 'challenges contractual autonomy', which he argued was a lot more

⁵⁴ Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen of 9 December 1976.

⁵⁵ Unfair Contract Terms Act 1977.

⁵⁶ Loi n° 78-23 of 10 January 1978 (*sur la protection et l'information des consommateurs de produits et de services*; 'Loi Scrivener 1').

⁵⁷ Bulletin of the European Communities, 'Statement from the Paris Summit 19 to 21 October 1972' (October 1972, No 10) Luxembourg: Office for official publications of the European Communities, paragraph 6 (Social Policy).

⁵⁸ cf Weatherill (n 1) 6, 145-146.

⁵⁹ As pointed out earlier in Weatherill (n 1); Beale (n 11); Hondius (n 11); Tenreiro (n 11); Collins (n 11).

contested than existing EU consumer protection measures, such as the Doorstep Selling Directive 85/577/EEC.⁶⁰

Although there were national rules concerning unfair terms in standard contracts dating back to the 1970s, most Member States had to amend the national rules that pre-dated Directive 93/13/EEC. And the Member States were slow to transpose the Directive into their national contract laws. For instance, France, Germany, the Netherlands, and the United Kingdom did not implement the Directive on Unfair Terms in Consumer Contracts on time. The Netherlands implemented the Directive only in 1999, the deadline being 31 December 1994.⁶¹ The reasons for the delay in the implementation vary between the Member States, but there are three possible explanations for the delay. First and foremost, the Member States believed that their national contract laws already contained the consumer rights enshrined in the Directive; the minimum harmonisation character of the Directive allowed for more stringent rules,⁶² and did not force the Member States to lower the level of protection.⁶³ Another explanation is that the Directive's open-ended norms, such as 'fairness' and 'good faith', were partly unknown in the national contract laws.⁶⁴ These two explanations are, in the Dutch context, substantiated by the omission to transpose the *contra proferentem* rule and the principle of transparency into the Dutch Civil Code.⁶⁵

⁶⁰ cf Weatherill (n 1) 144.

⁶¹ Article 10(1) of Directive 93/13/EEC. Goanta (n 1) 224.

⁶² Article 8 of Directive 93/13/EEC.

⁶³ Hondius (n 11) 242. Hondius argued that most Member States had higher 'standards of consumer protection than the Directive'.

⁶⁴ Goanta (n 1) 55-57.

⁶⁵ Ewoud H Hondius, 'Unfair Contract Terms and the Consumer: ECJ Case Law, Foreign Literature, and Their Impact on Dutch Law' (2016) 24(3/4) European Review of Private Law 462-463.

The case ultimately ended up in the Court of Justice,⁶⁶ where the ‘Netherlands Government has stated that the aims sought by the Directive could be attained through a schematic interpretation of the provisions of Netherlands law’.⁶⁷ The Court of Justice disagreed with that argument, holding that implementing the Directive in such a form ‘cannot achieve the clarity and precision needed to meet the requirement of legal certainty’.⁶⁸ There is consequently an obligation to implement each provision of the Directive, except for the Annex, into national law.

The previous Section of this Chapter has already highlighted several failed attempts to amend or replace the Unfair Contract Terms Directive. Only minor changes have been introduced by the Consumer Rights Directive: it inserted a provision into the Unfair Contract Terms Directive that obliges the Member States to report to the Commission national provisions that go further than the minimum harmonisation rules of the Directive (Article 8a of Directive 93/13/EEC).⁶⁹ France, Germany, the Netherlands, and the UK have notified the Commission under this provision that their national rules go beyond the required standard of the Directive. France has reported that its ‘[n]ational law also covers the unfairness of individually negotiated contract terms and contains a list of terms considered unfair in all circumstances (*id est* a black list) and a list of terms considered unfair unless it is proven that they are fair (*id est* a form of grey list).’ In the case of Germany, the Commission website states that ‘[n]ational law contains two black lists of standard contract terms considered unfair.’ The Dutch have notified the Commission that their ‘[n]ational law contains a list of contract terms considered unfair in all circumstances

⁶⁶ Case C-144/99 *Commission of the European Communities v Kingdom of the Netherlands* [2001] ECLI:EU:C:2001:257.

⁶⁷ *ibid* paragraph 20.

⁶⁸ *ibid* paragraph 21.

⁶⁹ Article 32 of the Consumer Rights Directive 2011/83/EU.

(*id est* black list) and a list of contract terms which may be considered unfair, *id est* a form of grey list. The list has been extended beyond that included in the UCTD.’ Lastly, the United Kingdom has provided the following information: ‘[n]ational law does not go beyond the minimum standard of the UCTD. However, the indicative list in the Annex to the UCTD has been extended.’⁷⁰

Before the Chapter will examine and compare the national rules concerning unfair contract terms, the terms ‘indicative-list’, ‘grey list’, and ‘black list’ need to be clarified. Only ‘indicative’ and ‘black’ lists are defined by EU Law. The Annex to the Unfair Contract Terms Directive contains an ‘indicative-list’, that is a list of terms which may be considered unfair. A ‘black list’ can be found in the Unfair Commercial Practices Directive 2005/29/EC: Annex 1 to the Directive lists ‘commercial practices which are in all circumstances considered unfair’. There is no common definition of a ‘grey list’ on the EU-level and the use of this term is often misleading. For instance, Mindy Chen-Wishart labelled Schedule 2 Part 1 of the Consumer Rights Act 2015 as a ‘grey list’.⁷¹ This is in my view incorrect. The list in the 2015 Act is merely indicative, *id est* there is a suspicion of unfairness, and also non-exhaustive like the list contained in the Annex to the Unfair Contract Terms Directive. Therefore, Schedule 2 Part 1 of the Consumer Rights Act 2015 falls within the category of an ‘indicative-list’. In addition, the UK’s notification to the European Commission is imprecise, since the Consumer Rights Act 2015 goes beyond the minimum standard of the Directive. In particular, the Act applies to individually negotiated terms (Section 61) and contains ‘black-listed’ contract terms in Sections 31 and 65; certain contract terms are also automatically invalid at common law. Equally, the notification of

⁷⁰ Commission (n 53).

⁷¹ Mindy Chen-Wishart, *Contract Law* (6th edn, Oxford University Press 2018) 421. At page 421, Chen-Wishart refers to Schedule 2 Part 1 as a ‘grey list’, while at page 446, Chen-Wishart refers to Schedule 2 Part 1 as ‘the list of indicatively unfair terms’.

the German government to the European Commission that the BGB contains two ‘black lists’ is incorrect. This Chapter will reveal that the BGB contains only one ‘black list’ (see § 309 of the BGB), while § 308 of the BGB resembles in character the mechanism of a ‘grey list’ like Article R212-2 of the Code de la consommation and Article 6:237 of the BW. Broadly speaking, terms contained in these ‘grey lists’ are presumed to be unfair with limited judicial discretion. Although § 308 BGB is slightly stricter than the French and Dutch ‘grey lists’, the German provision still grants some discretion to the courts. However, ‘black lists’ under the EU-wide definition of the Unfair Commercial Practices Directive allow for no judicial discretion. The Chapter will therefore refer to § 308 BGB as a ‘grey list’.

The following Sections will look at all four jurisdictions and assess the extent to which the national laws go beyond the rules of the Directive. This examination will lay the foundation for the upcoming compliance assessments with the potentially unfair contract terms listed in the Annex to the Unfair Contract Terms Directive.

France

In the 1960s and 1970s, the French legislator introduced statutory provisions specifically dealing with consumer-trader relations into the French Civil Code. The most far-reaching reform were the enactments of the *lois Scrivener* in 1978 and 1979,⁷² where the loi n° 78-23 prohibited certain clauses in consumer contracts.⁷³ The *lois Scrivener* also installed the

⁷² Loi n° 78-22 of 10 January 1978 (*relative à l'information et à la protection des consommateurs dans le domaine de certaines opérations de crédit*); loi n° 78-23 of 10 January 1978 (*sur la protection et l'information des consommateurs de produits et de services*); loi n° 79-596 of 13 July 1979 (*relative à l'information et à la protection des emprunteurs dans le domaine immobilier*).

⁷³ See generally, Hélène Bricks, *Les Clauses Abusives* (Librairie générale de droit et de jurisprudence 1982) chapter 1; Nebbia (n 8) 6-9; Claire-Marie Pégliion-Zika, *La notion de clause abusive* (Librairie générale de droit et de jurisprudence 2018) 4-7.

Commission on Unfair Clauses (*Commission des clauses abusives*) to compile a list of unfair clauses to be included in the regulatory provisions. Until the *Cour de cassation* judgment in 1991,⁷⁴ French courts could only declare contract terms unfair in case they were included as examples of unfair clauses in the regulatory provisions, drafted by the administration.⁷⁵ Several legislative reforms also shaped the French approach of policing unfair terms, especially in 1988,⁷⁶ 1993,⁷⁷ 1995⁷⁸, 2008,⁷⁹ and 2016,⁸⁰ and 2018.⁸¹ In the

⁷⁴ Cass civ (1) 14 May 1991, no 89-20999.

⁷⁵ Simon Whittaker and Reinhard Zimmermann, ‘Good faith in European contract law: surveying the legal landscape’ in Whittaker and Zimmermann (n 20) 36-37.

⁷⁶ Loi n° 88-14 of 5 January 1988 (*relative aux actions en justice des associations agréées de consommateurs et à l'information des consommateurs*). See generally, Geneviève Viney, ‘Un pas vers l'assainissement des pratiques contractuelles: la loi du 5 janvier 1988 relative aux actions en justice des associations agréées de consommateurs’ (1988) *Juris-Classeur périodique*, édition Entreprise 3355.

⁷⁷ Loi n° 93-949 of 26 July 1993 (*relative au code de la consommation*). See generally, Michel Trochu, ‘Les clauses abusives dans les contrats conclus avec les consommateurs’ (1993) *Recueil Dalloz* 316.

⁷⁸ Loi n° 95-96 of 1 February 1995 (*concernant les clauses abusives et la présentation des contrats et régissant diverses activités d'ordre économique et commercial*). See generally, Alain Bénabent, ‘Clauses Abusives: le droit français et ses réactions à la directive européenne’ (1995) 3(2) *European Review of Private Law* 211; Michel Testud, ‘La transposition en droit interne de la directive communautaire sur les clauses abusives’ (1996) 13 *Dalloz Affaires* 372; Hélène Davo, ‘Clauses Abusives: loi du février 1995 transportant la directive 93/13/CCE en droit français’ (1997) 5(2) *European Review of Private Law* 157. Further details on this far-reaching reform and the surrounding academic debate are provided in Abbas Karimi, *Les clauses abusives et la théorie de l'abus de droit* (Librairie Generale de Droit et de Jurisprudence 2001); Anne-Marie De Matos, *Les contrats transfrontières conclus par les consommateurs au sein de l'Union européenne* (Presses Universitaires d'Aix-Marseille 2001); Elise Poillot, *Droit européen de la consommation et uniformisation du droit des contrats* (Librairie Generale de Droit et de Jurisprudence 2006).

⁷⁹ Loi n° 2008-776 of 4 August 2008 (*modernisation de l'économie*). See generally, Dalloz, *Commentaire Code de la consommation* (Dalloz 5 February 2020) chapter 2.3.

⁸⁰ Décret n° 2016-884 of 29 June 2016 (*relatif à la partie réglementaire du code de la consommation*). See generally, Romain Loir, ‘Les nouvelles définitions du professionnel, du consommateur et du non-professionnel’ (2016) 27 *Juris-Classeur périodique*, édition Entreprise 1042; Philippe Stoffel-Munck, ‘The Revolution in Unfair Terms’ in John Cartwright and Simon Whittaker (eds), *The Code Napoléon Rewritten: French Contract Law after the 2016 Reforms* (Hart Publishing 2017) 150-152.

⁸¹ Loi n° 2018-287 of 20 April 2018 (*ratifiant l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*),

most recent reforms in 2016 and 2018, the French legislator introduced two provisions which require that contract terms do not ‘deprive a debtor’s essential obligation of its substance’ (Article 1170 of the Code civil) and that terms in standard form contracts ‘which create a significant imbalance in the rights and obligations of the parties to the contract are deemed not written’ (Article 1171 of the Code civil).⁸² Article 1170 is of general application, including for instance individually negotiated terms, while Article 1171 states that it only covers standard contract terms (*contrats d’adhésion*) that do ‘not concern either the main subject matter of the contract nor the adequacy of the price for the performance’.⁸³ Articles 1170 and 1171 therefore fall within the scope of the empirical part of this thesis which assesses trader compliance in B2C e-commerce transactions, but the general test under Article L212-1 of the Code de la consommation in connection with the regulatory provisions are more precise and stricter, and thus serves as *lex specialis*.⁸⁴ It will thus be the focus of the present inquiry.

Article L212-1 of the Code de la consommation transposes almost word-for-word the content of the general test of the Unfair Contract Terms Directive (Articles 3(1) and 4(1) of the Directive). Like the Directive, Article L212-1 applies only to B2C contracts and to terms that do not define ‘the main object of the contract or to the adequacy of the price or the remuneration for the good sold or the service offered, provided that the clauses are

in particular Article 7. See generally, Jean-Denis Pellier, ‘L’ordonnance portant réforme du droit des contrats, du régime général et de la preuve des obligations enfin ratifiée !’ (2018) Dalloz actualité 30 April 2018.

⁸² Philippe Stoffel-Munck notes that Article 1170 is shaped by the case law of the Cour de cassation, while Article 1171 is influenced by French consumer contract law, in particular Article L212-1 of the Code de la consommation. Stoffel-Munck (n 80) 147-148, 150-156.

⁸³ Stoffel-Munck (n 80) 148-149, 157-158.

⁸⁴ It is unclear whether this might change over time due to an increase in case law or further legislative changes.

written in a clear and understandable way.’⁸⁵ One major difference between Article L212-1 and the Directive is that the French provision applies also to individually negotiated contracts.⁸⁶ In addition, the French provision makes no explicit reference to good faith;⁸⁷ Article L212-1 of the Code de la consommation is also a legislative provision (*disposition législative*) and grants the administration the power to draft regulatory provisions which list unfair terms. Article L212-1 therefore provides the legal basis for the two regulatory provisions (*disposition réglementaire*, here *décret en Conseil d’État*) containing the *liste noire* and *liste grise*. The *liste noire* (Article R212-1 of the Code de la consommation) contains examples of contract terms that are unfair under all circumstances. The *liste grise* (Article R212-2 of the Code de la consommation) operates under the presumption of unfairness, which does not impose an outright prohibition, but shifts the burden of proof that terms are not unfair on traders.⁸⁸ The court assesses the trader’s evidence that the clause is not unfair under the general test (Article L212-1 of the Code de la consommation). However, the court declares the contract term unfair where the trader fails to submit evidence.⁸⁹ The consequence of the extensive nature of the two lists is that it marginalises the role of the general test of unfairness under Article L212-1. This assessment is further

⁸⁵ Article L212-1(3) of the Code de la consommation resembles the content of Article 3(1) and 4(2) of the Unfair Contract Terms Directive 93/13/EEC.

⁸⁶ cf François Collart Dutilleul and Philippe Delebecque, ‘Introduction: Le droit spécial des contrats’ in François Collart Dutilleul and Philippe Delebecque, *Contrats civils et commerciaux* (11th edn, Dalloz 2019) [12].

⁸⁷ Formerly Article L132-1 Code de la consommation (before the 2016 reform). Xavier Lagarde, ‘Qu’est-ce qu’une clause abusive?’ (2006) 80(6) *Juris-Classeur périodique*, édition générale 255-259; Simon Whittaker, ‘Clauses abusives et garanties des consommateurs: la proposition de directive relative aux droits des consommateurs et la portée de l’"harmonisation complète"' (2009) *Recueil Dalloz* 1152; Stoffel-Munck (n 80) 150-152.

⁸⁸ It is not possible to contractually shift the burden of proof (*charge de la preuve*) onto consumers (Article R212-1 no 12 of the Code de la consommation).

⁸⁹ Jérôme Julien, *Droit de la consommation* (2nd edn, Librairie générale de droit et de jurisprudence 2017) 296-299.

supported by the fact that the *Cour de cassation* has delivered fewer than fifty rulings since the enactment of the general test.⁹⁰

Several exceptions apply to the two lists and are outlined in Article R212-3 and Article R212-4 of the Code de la consommation. Most of these exceptions fall outside of the scope of the present study: Article R212-3 no 1 and Article R212-4 paragraphs 1 and 2 apply to financial services; Article R212-3 no 2 applies to the purchase or sale of foreign currency, traveller's checks, or international money orders; Article R212-4 paragraph 3 applies to contracts of indefinite duration. Only Article R212-4 paragraph 4 is of interest. The provision allows traders to unilaterally modify the contract terms, contrary to Article R212-1 no 3 and Article R212-2 no 6, where technical developments require such modifications. Nonetheless, Article R212-4 paragraph 4 provides that such a contract term should not affect the price, the quality, nor the characteristics of the good.

In addition to the two lists in the Code de la consommation, there are also various lists of potentially unfair terms ('indicative lists'), separate for specific sectors, which are drawn up by the Commission on Unfair Clauses (*Commission des clauses abusives*).⁹¹ This illustrates the strong role of the administration in controlling contractual terms for fairness, although the role of the judiciary significantly increased through introduction of the general test of unfairness (1993 and 1995 reform).⁹²

The French 'grey list' and 'black list' are not merely indicative as the Directive's Annex and thereby go further than what is required by the Unfair Contract Terms Directive. Consequently, unfair contract terms can be declared void under three mechanisms: the

⁹⁰ Stoffel-Munck (n 80) 152.

⁹¹ Examples can be found at the website of the Commission on Unfair Clauses: Commission des clauses abusives, 'Contrats de fourniture de gaz et d'électricité' (Commission des clauses abusives, July 2020) available at <http://www.clauses-abusives.fr/theme_recommandation/eau-electricite-gaz-gpl/> accessed 20 July 2020.

⁹² Stoffel-Munck (n 80) 151-152.

general test of unfairness; the *liste grise* ('grey list' character); and the *liste noire* ('black list' character).

Germany

In 1976, the German legislator decided to introduce the Act Concerning the Regulation of the Law of Standard Business Terms (AGB-Gesetz)⁹³ to protect consumers from unfair standard contract terms.⁹⁴ Prior to the adoption of the AGB-Gesetz, unfair contract terms were controlled through the general duty to perform a contract in good faith (*Leistung nach Treu und Glauben*) contained in § 242 of the BGB and the related case law.⁹⁵ The AGB-Gesetz codified the judge-made rules, introducing a 'grey list' (*Klauselverbote mit Wertungsmöglichkeit*) and a 'black list' (*Klauselverbote ohne Wertungsmöglichkeit*) as well as a general test of unfairness (*Inhaltskontrolle*) into German law.⁹⁶ The 1976 reform constitutes the basis of the existing control mechanisms and only minor substantive changes were made in 1996 and 2002.

⁹³ Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen of 9 December 1976.

⁹⁴ For a detailed article-by-article commentary, see for instance Peter Ulmer, Hans Erich Brandner, and Horst-Diether Hensen (eds), *Kommentar zum Gesetz zur Regelung des Rechts der allgemeinen Geschäftsbedingungen* (Verlag Dr. Otto Schmidt KG 1982); Manfred Wolf, Norbert Horn, and Walter Lindacher (eds), *AGB-Gesetz* (C.H. Beck 1984).

⁹⁵ Also §§ 123 (voidability on the grounds of deceit or duress) and 138 (legal transactions contrary to public policy; usury) of the BGB; Entwurf eines Gesetzes zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz) of 5 August 1975, page 10. For an account of the judge-made rules prior to the AGB-Gesetz, see for example Jochen Neumann-Wedekindt, *Inhaltskontrolle allgemeiner Geschäftsbedingungen, dargestellt an Vertragsabschlussklauseln* (Dissertation at the Faculty of Law at the University of Münster 1968); Lorenz Fastrich, *Richterliche Inhaltskontrolle im Privatrecht* (C.H. Beck 1992).

⁹⁶ See for example Günther Stein, *Zum Spannungsverhältnis der Kontrollverfahren aufgrund des AGB-Gesetzes und § 242 BGB* (Duncker & Humblot 1982); Peter Josef Witte, *Inhaltskontrolle und deren Rechtsfolgen im System der Überprüfung allgemeiner Geschäftsbedingungen* (Dissertation at the Faculty of Law at the University of Münster 1983); Georg Kippels, *Die Inhaltskontrolle von allgemeinen Geschäftsbedingungen im kaufmännischen Geschäftsverkehr nach § 9 Abs. 2 AGB-Gesetz unter besonderer Berücksichtigung der Klauselverbote der §§ 10 und 11 AGB-Gesetz* (Hundt Verlag 1990).

Two additional provisions had to be introduced into the AGB-Gesetz in 1996 to ensure compliance with the Unfair Contract Terms Directive – the implementation deadline being 31 December 1994.⁹⁷ The first provision dealt with the conflict of law rule (§ 12 of the AGB-Gesetz), implementing Article 6(2) of the Directive. The second provision of the 1996 reform introduced a special regime for consumer contracts (§ 24a of the AGB-Gesetz), reflecting Article 3(2) of the Directive.⁹⁸

Six years after the 1996 reform, in 2002, the German law of obligations was reformed (*Schuldrechtsreform*), and the provisions from the AGB-Gesetz were included in the BGB and the Unterlassungsklagengesetz (UKlaG).⁹⁹ Since the 2002 reform, §§ 305-310 of the BGB – book 2 division 2 on ‘drafting contractual obligations by means of standard business terms’ – concern the regulation of standard contract terms; §§ 1 ff of the UKlaG

⁹⁷ Gesetz zur Änderung des AGB-Gesetzes und der Insolvenzverordnung of 19 July 1996.

⁹⁸ Norbert Reich, ‘The implementation of Directive 93/13/EEC on unfair terms in consumer contracts in Germany’ (1997) 5(2) *European Review of Private Law* 167-169; Georg Borges, *Die Inhaltskontrolle von Verbraucherverträgen* (Dunckler & Humblot 2000) 15-18; Irene Tilmann, *Die Klauselrichtlinie 93/13/EWG auf der Schnittstelle zwischen Privatrecht und öffentlichem Recht* (C.H. Beck 2003) 17-21.

⁹⁹ Gesetz zur Modernisierung des Schuldrechts of 26 November 2001. For further details on the legislative background, see Reinhard Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (Oxford University Press 2005) 30-35. Birke Häcker notes that the fear of some scholars that the reform might create new problems has not materialised. Instead, the reform of the BGB is now perceived as an overall success. Birke Häcker, ‘*La Troisième Jeunesse du Code Civil: A German Lawyer Looks at the Reform of French Contract Law*’ in Cartwright and Whittaker (n 80) 390-391.

accommodate the procedural rules.¹⁰⁰ The 2002 reform, through § 307 Nr. 1 of the BGB (*Transparenzkontrolle*), implemented also the Directive's transparency principle.¹⁰¹

§§ 307 to 309 of the BGB are concerned with the substantive control of contractual terms which supplement or derogate from statutory provisions (§ 307 Nr. 3). Standard contract terms falling within the scope of § 309 (*Klauselverbote ohne Wertungsmöglichkeit*) are unfair and ineffective without the possibility of evaluation,¹⁰² whereas contract terms falling within § 308 (*Klauselverbote mit Wertungsmöglichkeit*) are considered unfair and ineffective but are subject to judicial evaluation. Paolisa Nebbia points out that the German legislator still provides the judiciary with the necessary flexibility in their assessment, for instance by including terms such as 'unreasonably high' (see § 308 Nr. 7(a)).¹⁰³ Terms falling within § 308 of the BGB are presumed unfair but undefined standards (*unbestimmte Rechtsbegriffe*) like 'unreasonably high' require context-specific, judicial evaluation (*umfassende Interessenabwägung*).¹⁰⁴ However, in case a contract term is assessed under § 308, including an evaluation of undefined standards, but not considered unfair, no additional re-evaluation of such contract term takes

¹⁰⁰ The details of the subsequent changes have been examined in Reiner Schulze and Hans Schulte-Nölke (eds), *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts* (Mohr Siebeck 2001); Thomas M J Möllers, 'European Directives on Civil Law The German Approach: Towards the Re-codification and New Foundation of Civil Law Principles' (2002) 10(6) *European Review of Private Law* 777; Jan Peter Teubel, *Rücktrittsrecht und AGB-Kontrolle nach der Schuldrechtsreform* (Duncker & Humblot 2018).

¹⁰¹ Steffi Nobis, *Missbräuchliche Vertragsklauseln in Deutschland und Frankreich: Zur Umsetzung der Klauselrichtlinie 93/13/EWG des Rates* (Nomos 2005) 215-240; Tim Gero Joppich, *Die Kodifikation des Transparenzgebots in § 307 BGB* (Peter Lang 2008) 1-17.

¹⁰² Wolfgang Wurmnest, '§§ 307-309' in Wolfgang Krüger (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 2 – Schuldrecht Allgemeiner Teil 1 §§ 241-310* (8th edn, C.H. Beck 2019) BGB § 309 [1ff].

¹⁰³ Nebbia (n 8) 25.

¹⁰⁴ The test in § 307 of the BGB is used as the benchmark for the judicial evaluation of undefined standards contained in § 308.

place under the general test (§ 307).¹⁰⁵ Only contract terms which fall outside of the scope of §§ 308 and 309 are assessed under the general test (*Inhaltskontrolle*) laid down by § 307.¹⁰⁶ The general test of unfairness in § 307 provides that clauses become ineffective (*unwirksam*) ‘if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract’ (§ 307 Nr. 1). A term is to ‘unreasonable disadvantage’ the consumer where it is unclear and incomprehensible (§ 307 Nr. 1), is not compatible with other statutory provisions, (§ 307 Nr. 2(1)), or limits essential contractual rights and duties jeopardising the purpose of the contract (§ 307 Nr. 2(2)). Consumers are also not bound by contract terms which are unusual and surprising in light of the circumstances (§ 305c).¹⁰⁷

§ 310 provides exceptions for situations where §§ 307 to 309 do not apply to, for instance in contracts for the sale of energy or water (Nr. 2). These exceptions fall outside the scope of the present study.¹⁰⁸

¹⁰⁵ Mathias Wendland, ‘Vorbemerkung zu §§ 307-309’ in Gerald Mäsch and others (eds), *Staudinger BGB - Buch 2: Recht der Schuldverhältnisse: §§ 305-310; UKlaG (AGB-Recht 1 und Unterlassungsklagengesetz)* (18th edn, Sellier / de Gruyter 2019) BGB Vorbem zu §§ 307–309 [20-23].

¹⁰⁶ As pointed out earlier, § 242 of the BGB contains a general requirement to act according to the requirements of good faith. Concerning the control of standard terms, § 242 applies only where §§ 305-310 do not apply. Wurmnest (n 102) BGB Vor § 307 [11]. For a detailed account, see generally Dirk Looschelders, Dirk Olzen, and Gottfried Schiemann, *Staudinger BGB - Buch 2: Recht der Schuldverhältnisse: §§ 241-243* (Sellier / de Gruyter 2019) BGB § 242.

¹⁰⁷ *ibid* 243; Wurmnest (n 102) BGB § 307 [1-7]; Phillip Hellwege and Lucinda Miller, ‘Control of Standard Terms’ in Gerhard Dannemann and Stefan Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford University Press 2013) 441-442.

¹⁰⁸ § 310 Nr. 2 of the BGB: ‘Sections 308 and 309 do not apply to contracts of electricity, gas, district heating or water suppliers for the supply of electricity, gas, district heating or water from the supply grid to special customers to the extent that the conditions of supply do not derogate, to the disadvantage of the customer, from orders on general conditions for the supply of standard-rate customers with electricity, gas, district heating and water. Sentence 1 applies with the necessary modifications to contracts for the disposal of sewage.’

§ 310 Nr. 4 of the BGB: ‘This division does not apply to contracts in the field of the law of succession, family law and company law or to collective agreements and private-sector works agreements or public-sector establishment agreements. When it is applied to

In light of the aforementioned, it can be concluded that the German test to control contract terms under the lists in §§ 308 and 309 of the BGB goes beyond the level of protection envisaged by the Unfair Contract Terms Directive. Concerning the scope of the rules, the German provisions apply, like the Directive, only to non-negotiated contract terms (§ 305 Nr. 1).¹⁰⁹

The Netherlands

Unlike France, Germany, and the UK, the Netherlands only introduced provisions specifically dealing with unfair contract terms in standard contracts in their new Civil Code (*Burgerlijk Wetboek*) in 1992.¹¹⁰ After intense academic criticism of the way in which the Dutch legislator had transposed the Directive into national law,¹¹¹ followed by an infringement proceeding brought by the European Commission, which ended up before the Court of Justice of the European Union,¹¹² these rules were amended in November 1999

employment contracts, reasonable account must be taken of the special features that apply in labour law; section 305 (2) and (3) must not be applied. Collective agreements and private-sector works agreements or public-sector establishment agreements are equivalent to legal provisions within the meaning of section 307 (3).’

¹⁰⁹ A different test applies for business-to-business transactions according to § 310 Nr. 1 of the BGB, but most of the unfair terms listed in §§ 308-309 provide an indicative effect (*Indizwirkung*). See for example, Harry Schmidt, ‘Klauselverbote ohne Wertungsmöglichkeit’ in Stefan Ernst and others (eds), *AGB-Recht: Kommentar* (12th edn, Otto Schmidt Verlag 2016) BGB § 308 Nr. 1 [16], § 308 Nr. 3 [18]; Matthias Lehmann and Johannes Ungerer, ‘Save the “Mittelstand”: How German Courts Protect Small and Medium-Sized Enterprises from Unfair Terms’ (2017) 25(2) *European Review of Private Law* 313; Georg Maier-Reimer, ‘AGB-Recht im unternehmerischen Rechtsverkehr – Der BGH überdreht die Schraube’ (2017) 70(1) *Neue Juristische Wochenschrift* 1.

¹¹⁰ The rules prior and after the reform have been analysed in Ewoud H Hondius, ‘De rechtspositie van de consument naar nieuw burgerlijk recht’ (1991) 5 *Tijdschrift voor Consumentenrecht* 325; Ewoud H Hondius, ‘Non-implementation of the Directive on Unfair Contract Terms: the Dutch case’ (1997) 5(2) *European Review of Private Law* 193.

¹¹¹ *ibid* (Hondius in 1997) 194-196.

¹¹² Case C-144/99 *Commission of the European Communities v Kingdom of the Netherlands* [2001] ECLI:EU:C:2001:257. See for example Marco Loos, ‘Veroordeling Nederland wegens niet-omzetting Richtlijn oneerlijke bedingen’ (2001) 2(9) *Nederlands Tijdschrift voor Europees Recht* 242; Jan M Smits, ‘Nogmaals de richtlijn oneerlijke

and June 2004.¹¹³ The main points of concern were the non-implementation of the *contra proferentem* rule and of the principle of transparency. Both concerns were taken into account in the 1999 reform.¹¹⁴

Nowadays, the relevant provisions can still be found in Articles 6:231-6:247 of the BW. The Dutch Civil Code contains a general test of unfairness in Article 6:233(a) of the BW which is complemented by a ‘black list’ (*zwarte lijst*) in Article 6:236 of the BW and ‘grey list’ (*grijze lijst*) in Article 6:237 of the BW. Terms that fall within the ‘black list’ are automatically unfair, while terms that fall within the ‘grey list’ are presumed to be unfair unless the trader can prove that they are not unfair. Whether the evidence submitted by traders is sufficient to prove that the term is not unfair must be assessed under the general clause (Article 6:233(a) of the BW).¹¹⁵ In case the contract term is not covered by either the ‘grey’ or ‘black’ list, the term is assessed under general test (Article 6:233 of the BW):

‘(a) if, given the nature and other content of the contract, the manner in which the general conditions have come about, the mutually identifiable interest of the parties and the other circumstances of the case, it is unreasonably onerous for the other party;

bedingen: Nederland veroordeeld wegens gebrekkige implementatie’ (2001) Weekblad voor Privaatrecht, Notariaat en Registratie 853; Mark Wissink, ‘Nederland veroordeeld wegens onvolledige omzetting van de richtlijn oneerlijke bedingen – Noot bij HvJ EG 10 mei 2001, C-144-99, Commissie/Nederland’ (2002) 16(4) Nederlands Tijdschrift voor Burgerlijk Recht 152; Caroline Cauffman, Michael Faure, and Ton Hartlief, *Harmonisatie van het consumentencontractenrecht in Europa: consequenties voor Nederland* (Boom Juridische Uitgevers 2009).

¹¹³ Goanta (n 1) 63.

¹¹⁴ Kamerstukken II, 1998/1999, 26 470, nr. 3 and 5. cf Martijn W Hesselink, ‘Codification and Europeanisation in the Netherlands’ in Stefan Vogenauer and Stephen Weatherill (eds), *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice* (Hart Publishing 2006) 43-45. The *contra proferentem* rule was introduced by Article 6:238(2) of the BW; the principle of transparency by Articles 6:231 and 6:238 of the BW. cf Goanta (n 1) 63.

¹¹⁵ Bart H Krans, Carel JJM Stolker, and Lodewijk W Valk (eds), *Tekst & Commentaar Burgerlijk Wetboek – Online Naslagwerk* (30 August 2021 edn, Wolters Kluwer 2021) BW Art 6:233 [2e]; Tjeerd GG Raijmakers, ‘Art. 237 – Burgerlijk Wetboek Boek 6’ in Sjoerd P Bakker and others (eds), *Sdu Commentaar Vermogensrecht – Online Naslagwerk* (1 June 2021 edn, Sdu 2021) BW Art 6:237 [2]; Carla H Sieburgh, *Asser 6-III Algemeen overeenkomstenrecht* (15th edn, Wolters Kluwer 2018) [492-493].

(b) if the user has not offered the other party a reasonable opportunity to become acquainted with the general conditions’¹¹⁶

The Dutch Supreme Court (*Hoge Raad*) emphasised in *Bouwbedrijf Van Marrum/Wolff* that the courts always have to assess the circumstances of the case before declaring a term voidable (*vernietigbaar*) under Article 6:233(a) of the BW.¹¹⁷ In this particular case, the Dutch Supreme Court corrected an error of law by the Court of Appeal because they merely examined the circumstances that are also present in all similar cases, *de facto* treating the clause as a ‘black-listed’ provision. It is worth mentioning that unlike in the case of Article 6:237, the burden of proof is on the consumer under the general test.¹¹⁸

It is apparent that the test in Article 6:233 of the BW does not refer to good faith. Instead, the Dutch Civil Code contains a provision specifically requiring traders to act in good faith in Article 6:248 (*redelijkheid en billijkheid*). In 2002, the Dutch Supreme Court clarified that there is a ‘two-track system’ which means that Article 6:248 applies alongside Article 6:233.¹¹⁹ The difference between the two provisions is their scope, as Article 6:233 applies only to terms and conditions.¹²⁰ Article 6:231 specifically excludes individually negotiated contracts and contract terms governing the main subject matter that are formulated clearly

¹¹⁶ Translation by Sascha Hardt and Nicole Kornet (eds), *The Maastricht Collection: Selected National, European and International Provisions from Public and Private Law* (4th edn, Europa Law Publishing 2015) 348.

¹¹⁷ HR 21 September 2012, ECLI:NL:HR:2012:BW6135 (*Bouwbedrijf Van Marrum/Wolff*), paragraph 3.4. Krans, Stolker, and Lodewijk (n 115) BW Art 6:233 [2d]; Pieter TJ Wolters, ‘Regels over de werking van de redelijkheid en billijkheid? Een analyse van de rechtspraak van de Hoge Raad’ (2013) 8(9) *Maandblad voor Vermogensrecht* 251-252.

¹¹⁸ *ibid* (HR); Krans, Stolker, and Lodewijk (n 115) BW Art 6:233 [2e]; Tjeerd GG Raijmakers, ‘Art. 233 – Burgerlijk Wetboek Boek 6’ in Bakker (eds) (n 115) BW Art 6:233 [2.3].

¹¹⁹ HR 14 June 2002, ECLI:NL:HR:2002:AE0659 (*Bramer/Colpro*), paragraph 3.7. *ibid* (Raijmakers) BW Art 6:233 [2.1]; Sieburgh (n 115) BW Art 6:233 [485].

¹²⁰ Article 6:231(a) of the BW.

and intelligibly from the scope of Article 6:233.¹²¹ Further exceptions to the application of Article 6:233 can be found in Articles 6:235, 6:245, and 6:247 of the BW.¹²² Contract terms that fall outside of the scope of Article 6:233 can thus be examined under the general good faith provision (Article 6:248). Terms and conditions of B2C e-commerce transactions clearly fall within the scope of Article 6:233 in connection with Articles 6:236 and 6:237, which means that Article 6:248 is excluded from the compliance assessments in the present thesis.

The general test under Article 6:233, together with the duty to interpret national law in light of the Unfair Contract Terms Directive, has been regarded to provide sufficient protection to consumers.¹²³ Furthermore, the Dutch ‘grey list’ and ‘black list’ go beyond what is required by the Directive. With regards to the *ratione personae*, the Dutch rules, unlike the Directive, protect not only consumers but also apply to companies with fewer than fifty employees (Article 6:235(b) of the BW).

¹²¹ cf Sieburgh (n 115) [486].

Jans Smits noted in 2002 that 6:248 is of general application and that 6:233 of the BW serves as *lex specialis*, Jan M Smits, ‘Non-Performance and Remedies in General’ in Danny Busch and others (eds), *The Principles of European Contract Law and Dutch Law: A Commentary* (Kluwer Law 2002) 345. As shown above, the Dutch Supreme Court further clarified the relationship of the provisions in the same year, *id est* that their application differs in scope and that Article 6:233 is not stricter than Article 6:248. Raijmakers (n 118) BW Art 6:233 [1, 2.1]. Consequently, only Article 6:233 of the BW is taken into account to assess trader compliance because the thesis focuses on terms and conditions.

¹²² cf Sieburgh (ibid).

¹²³ See for example HR 13 September 2013, ECLI:NL:HR:2013:691; Hondius (n 105) 194; Charlotte Pavillon, ‘Beter consumentenrecht: naar een scherpere consumentvriendelijke onredelijk bezwarend-norm’ (2011) 63(8) *Nederlands Tijdschrift voor Burgerlijk Recht* 439; Marco Loos and RRM de Moor, ‘Hoge Raad 13 september 2013, ECLI:NL:HR:2013:691’ (2013) 11(6) *Tijdschrift voor Consumentenrecht en Handelspraktijken* 262; Ewoud H Hondius, ‘Algemene voorwaarden’ in *Monografieën BW: Consumentenrecht* (2nd edn, Kluwer 2013) 27ff; Goanta (n 1) 63; Chantal Mak, ‘Artikel 6:233 BW – Hoe de doorwerking van Europees consumentenrecht tornt aan het systeem van het Nederlandse privaatrecht’ in Friso van de Pol and others (eds), *Vijftig weeffouten in het BW: Een ode aan het Burgerlijk Wetboek, ter ere van zijn 25-jarig bestaan* (Ars Aequi Libri 2017) 255ff.

The United Kingdom

The Unfair Contract Terms Act 1977 was the first statutory instrument in the United Kingdom that dealt directly with the control of unfair terms. The instrument provided a more coherent regime of controlling standard terms than the ones used by the common law, which was based on enforceability rules and contractual construction.¹²⁴ However, the Act was criticised at a very early stage: Norman Palmer and David Yate criticised the UCTA 1977 on the basis that the rules can be circumvented by using duty-defining, rather than liability-excluding, clauses.¹²⁵ In addition, Hugh Beale criticised the reasonableness test in the Act as uncertain,¹²⁶ a deficiency which was addressed in subsequent years, for instance by Schedule 2 (Guidelines for Application of Reasonableness Test) of the Unfair Contract Terms Act 1977.¹²⁷ Another point of criticism levelled against the UCTA 1977 was that the name of the Act is a ‘misnomer’ because it only covers certain contracts; at the same time its scope goes beyond contract law, for instance concerning ‘business liability’.¹²⁸

The Unfair Contract Terms Directive 93/13 was implemented through the Unfair Terms in Consumer Contracts Regulations 1994, providing provisions specifically dealing with

¹²⁴ The rules prior and shortly after the Act have been examined in Horton Rogers and Matthew Clarke, *The Unfair contract terms act 1977* (Sweet & Maxwell 1978); Peter Thompson, *Unfair Contract Terms Act 1977* (Butterworths 1978); Hugh Beale, ‘Unfair Contract Terms Act 1977’ (1978) 5(1) *British Journal of Law and Society* 114.

¹²⁵ Norman Palmer and David Yates, ‘The Future of the Unfair Contract Terms Act 1977’ (1981) *Cambridge Law Journal* 108.

¹²⁶ Hugh Beale, ‘Unfair Contracts in Britain and Europe’ (1989) 42(1) *Current Legal Problems* 197.

¹²⁷ See generally, John Adams and Roger Brownsword, ‘The Unfair Contract Terms Act: A Decade of Discretion’ (1988) 104 *Law Quarterly Review* 94; Elizabeth MacDonald, ‘Exclusion Clauses: the Ambit of s 13(1) of the Unfair Contract Terms Act 1977’ (1992) 12 *Legal Studies* 277; Elizabeth MacDonald, ‘UCTA Thirty Years On’ in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (Oxford University Press 2007) 154.

¹²⁸ Len S Sealy argued that the Act might create a ‘separate body of “commercial law”’. One example he provided regarding the Act’s scope was that the Act distinguishes between ‘written standard-term’ and ‘international supply’ contracts. Len S Sealy, ‘Unfair Contract Terms Act 1977’ (1978) 37(1) *The Cambridge Law Journal* 15-17.

consumer contracts and leading to a consumer-specific regime.¹²⁹ The 1994 Regulation was repealed in 1999,¹³⁰ and the Unfair Terms in Consumer Contracts Regulations 1999 replaced with the Consumer Rights Act 2015. Before the adoption of the Consumer Rights Act, the 1994/1999 Regulations applied in conjunction with the UCTA to consumer contracts, while B2B contracts were governed only by the UCTA.¹³¹ Regarding consumer contracts, the major difference between the instruments was that the Regulations applied only to contract terms that were not individually negotiated, while the UCTA was of general application.¹³² Nowadays, the Unfair Contract Terms Act applies only to B2B contracts,¹³³ whereas the Consumer Rights Act applies to B2C contracts.¹³⁴

¹²⁹ See generally, Elizabeth MacDonald, 'Mapping the Unfair Contract Terms Act 1977 and the Directive on Unfair Terms in Consumer Contracts' (1994) *Journal of Business Law* 441; Anne de Moor, 'Common and Civil Law Conceptions of Contract and European Law of Contract: The Case of the Directive on Unfair Terms in Consumer Contracts' (1995) 3(2) *European Review of Private Law* 257; Chris Willett, 'The Directive on Unfair Terms in Consumer Contracts and its implementation in the United Kingdom' (1997) 2 *European Review of Private Law* 223; Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61(1) *Modern Law Review* 11.

¹³⁰ Unfair Terms in Consumer Contracts Regulations 1999. For an overview, see Elisabeth MacDonald, 'The Emperor's Old Clothes: Unincorporated Clauses, Misleading terms and the Unfair Terms in Consumer Contracts Regulations' (1999) 58(2) *Cambridge Law Journal* 413; Susan Bright, 'Winning the Battle Against Unfair Contract Terms' (2000) 20(3) *Legal Studies* 331; Susan Bright, 'Unfairness and the Consumer Contract Regulations' in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (Oxford University Press 2007); Chris Willett, 'General Clauses and the Competing Ethics of European Consumer Law in the UK' (2012) 71(2) *The Cambridge Law Journal* 412.

¹³¹ The overlap between the instruments caused a discussion about further reform and unification. A summary of the academic and legislative debate is provided in Elizabeth Macdonald, 'Unifying Unfair Terms Legislation' (2004) 67(1) *The Modern Law Review* 69.

¹³² Regulation 3 of the Unfair Terms in Consumer Contracts Regulations 1994; Regulation 5 of the Unfair Terms in Consumer Contracts Regulations 1999; Section 1(1) of the Unfair Contract Terms Act 1977 (original version, as enacted). *ibid* 71.

¹³³ See Sections 2(4), 3(3), and 7(4A) of the UCTA 1977.

¹³⁴ See Section 61(4) of the CRA 2015. cf Paula Giliker, 'The Consumer Rights Act 2015 – a bastion of European Consumer Rights' (2017) 37(1) *Legal Studies* 78; Andrew Burrows, *A Casebook on Contracts* (6th edn, Hart Publishing 2018) chapter 6; Nils Jansen, 'Unfair Contract Terms' in Nils Jansen and Reinhard Zimmermann (eds), *Commentaries*

Part 2 of the Consumer Rights Act 2015 regulates contractual terms. Under this regime, potentially unfair contract terms can be declared void under two mechanisms: the general test complemented by an indicative list and by Sections 31 and 65. The general test (Section 62(4) and (5) of the CRA 2015, also Section 64 of the CRA 2015) and the indicative and non-exhaustive list of potentially unfair terms (Section 63 (1) and (2) in conjunction with Schedule 2 of the CRA 2015) transposes the text of the Directive, but additional examples of potentially unfair contract terms are provided in Schedule 2 of the CRA.¹³⁵ The general test of the CRA 2015 also provides the same wording of the Unfair Terms in Consumer Contracts Regulations 1999, so the case law interpreting the 1999 Regulation applies also to the Consumer Rights Act 2015.

The starting point of the unfairness assessment is Section 62(5):

‘Whether a term is fair is to be determined—
(a) taking into account the nature of the subject matter of the contract, and
(b) by reference to all the circumstances existing when the term was agreed
and to all of the other terms of the contract or of any other contract on which
it depends.’

In the next step, it needs to be assessed whether the contract term ‘contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer’ (Section 62(4)). In that assessment, courts are not permitted to take into account the ‘main subject matter of the contract’ or the ‘appropriateness of the price payable under the contract’ (Section 64). As shown earlier on in this Chapter, the general test of unfairness has been further defined by

on *European Contract Laws* (Oxford University Press 2018) 920-922; Simon Whittaker, ‘Distinctive Features of the New Consumer Contract Law’ (2017) 133 *Law Quarterly Review* 47.

¹³⁵ See also the implementation of the transparency requirement (Article 5 of Directive 93/13) into UK law (Section 68 of the CRA 2015), for instance in Chris Willett and Martin Morgan-Taylor, ‘Recognising the limits of transparency in EU consumer law’ in James Devenney (ed), *European Consumer Protection: Theory and Practice* (Cambridge University Press 2012).

the Court of Justice, and, consequently, UK courts have to take these guidelines into account.¹³⁶

Contract terms which fall within the scope of the list of potentially unfair terms provided in Schedule 2 Part 1 of the CRA 2015, must still be assessed under the general test (see Section 63(2)). It is worth adding that most unfair terms cases are reviewed by the Competition and Markets Authority and other ‘regulators’ (listed in Schedule 3, subsection 8) and not the courts.¹³⁷ These ‘regulators’ can for instance investigate complaints (Schedule 3, subsection 2) and apply for injunctions (Schedule 3, subsection 3).

Concerning the indicative list contained in Schedule 2 Part 1, the UK legislator has decided against ‘gold-plating’, that is to not go beyond the rules of the Directive, for instance by enacting a ‘grey’ or a ‘black’ list. However, in several instances UK law goes beyond the standard of the UCTD. Section 31 provides a list of contractual obligations for

¹³⁶ According to Anson’s Law of Contract, the two most important English cases concerning the meaning of ‘fairness’ have been *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2002] 1 AC 481 and *Cavendish Square Holding BV v Talal El Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67, [2015] 3 WLR 1373. The two cases did not concern the CRA 2015, but the earlier examined 1994 and 1999 Regulations. Applying the fairness test in *ParkingEye*, the Court emphasized the context-specific nature of the assessment, in this case the ‘regulatory framework which determines how and in what circumstances it may be enforced’ [111]. Jack Beatson, Andrew Burrows, and John Cartwright, *Anson’s Law of Contract* (30th edn, Oxford University Press 2016) 224.

The two cases followed the CJEU guidelines that have been examined earlier, see Chapter 2.2. Concerning the UK’s withdrawal from the European Union, Pavlos Eleftheriadis points out that the ‘Supreme Court of the UK is not “bound” by any retained EU case law’ according to Section 6(4) of the European Union (Withdrawal) Act 2018. He also notes that exceptions apply to Northern Ireland, and that the current regime might change over time. Pavlos Eleftheriadis, ‘Eleven Types of post-Brexit EU Law’ (Oxford Business Law Blog, 8 January 2021) available at <<https://www.law.ox.ac.uk/business-law-blog/blog/2021/01/eleven-types-post-brexit-eu-law>> accessed 30 January 2021.

¹³⁷ The Competition and Markets Authority provides a guidance document on the regulation of unfair contract terms, see Competition and Markets Authority, ‘Unfair Contract Terms Guidance: Guidance on the unfair terms provisions in the Consumer Rights Act 2015’ (Competition and Markets Authority, 31 July 2015) available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf> accessed 26 July 2020.

which traders cannot limit their liability under all circumstances. Equally, Section 65 provides that any terms which limit trader liability in case of death or personal injury are invalid. Sections 31 and 65 originated in the UCTA 1977 and strongly resemble in character the mechanism of ‘black lists’ used in France, Germany, and the Netherlands.¹³⁸ Besides the two statutory provisions, some common law rules may equally provide consumers with a higher level of protection than under the Directive, for instance concerning penalty clauses and assignment. Nonetheless, it needs to be noted that these are the only contractual terms which are always unenforceable in the United Kingdom. Another instance where the UK rules go beyond the Directive’s standard is the scope: the Consumer Rights Act 2015 also applies to individually negotiated terms (Section 61).

Comparative Observations

The examination of the national rules implementing the Unfair Contract Terms Directive has revealed that all four Member States have implemented the rules contained in the Directive, including the indicative and non-exhaustive list of potentially unfair terms contained in the Annex to the Directive. However, the method of implementation has varied. On the national level, three mechanisms of controlling standard consumer contracts for fairness were identified: (1) a term may be regarded unfair under the general test;¹³⁹ (2) a term is presumed unfair under a ‘grey list’ with limited judicial discretion;¹⁴⁰ (3) a term is considered unfair without the possibility of judicial (re-)evaluation (*id est* ‘black-

¹³⁸ Section 2 of the UCTA 1977 replicates Section 65 of the CRA 2015; Sections 5 to 7 of the UCTA 1977 replicate Section 31 of the CRA 2015.

¹³⁹ Article L212-1 of the Code de la consommation; § 307 of the BGB; Article 6:233(a) of the BW; Section 62 in connection with Schedule 2 of the Consumer Rights Act 2015.

¹⁴⁰ Article L212-1 in connection with Article R212-2 of the Code de la consommation; § 308 of the BGB; Article 6:237 in connection with Article 6:233(a) of the BW.

listed’).¹⁴¹ There are minor but very important differences between the national ‘grey lists’. Unlike the French and Dutch ‘grey lists’, which presume unfairness and shift the burden of proof that the terms are not unfair on traders, the German ‘grey list’ takes a more neutral approach. Terms falling within the ‘grey list’ of § 308 of the BGB are presumed unfair but undefined standards like ‘unreasonably high’ require context-specific, judicial evaluation. The different standards of consumer protection among the four jurisdictions entail also different levels of judicial control. In France, Germany, and the Netherlands, the adoption of ‘grey’ and ‘black’ lists marginalised the role of the general test, leaving little discretion left for judges in assessing whether contract terms are unfair. Another observation is that some national rules are broader in scope, for instance the French and Dutch rules apply also to B2B contracts and the UK and French rules apply also to individually negotiated contracts. The following subsection will investigate what level of protection the four jurisdictions offer in relation to the potentially unfair terms listed in the Directive’s Annex, which will be used to assess trader compliance in the empirical part of the thesis.

2.4 The Annex to the Unfair Terms Directive as the Benchmark of Unfairness

As mentioned earlier in this Chapter, the Annex to the Unfair Contract Terms Directive provides a list of terms that ‘may be regarded unfair’.¹⁴² Importantly, the list was designed to be an indicative and non-exhaustive list of unfair terms which defines the general test of unfairness in the Directive. However, over time, the list has become an important and integral part of the assessment process of unfair contract terms. It resembles the widely used technique of introducing lists, be they ‘indicative’, ‘grey’, or ‘black’, that define a

¹⁴¹ Article L212-1 in connection with Article R212-1 of the Code de la consommation; § 309 of the BGB; Article 6:236 of the BW; Sections 31 and 65 of the Consumer Rights Act 2015, penalty clause doctrine and assignment.

¹⁴² Article 3(3) of Directive 93/13/EEC.

general clause. The indicative list in the Unfair Contract Terms Directive's Annex provides guidance for national courts to carry out the unfairness test as envisaged by the European legislator. It has been established in the previous Section that the terms contained in the list become more than just mere guidance when they are either implemented into national law as 'black' or 'grey' lists, or rendered 'unfair' (not meeting the good faith standard) by the Court of Justice. All national codes now contain the general clause and the Member States have implemented the indicative list either entirely or partly into their national codes.¹⁴³

Generally speaking, defining a general clause with a list of unfair terms brings certain advantages, and it is likely to enhance legal certainty.¹⁴⁴ Consumers and traders know which terms are likely to be deemed unfair, which may also result in less litigation. However, a clause not contained in the list may be still considered unfair.¹⁴⁵ Thus, a contract free of terms included in the lists is not necessary free of 'unfair' contract terms. Moreover, many of the terms included in the Directive's Annex are ambiguous adding to the legal uncertainty. For instance, the use of terms such as 'inappropriately' (Point 1(b)), 'inadequate performance' (Point 1(b)), or 'disproportionally' (Point 1(e)).¹⁴⁶ It is thus of outmost importance to examine the CJEU's case law, as well as whether and to what extent national law contains provisions addressing the unfair terms listed in the Directive's Annex. Such an assessment is indispensable before the empirical examination of consumer standard form contracts can take place.

This part of Chapter 2 examines the European Union and national provisions and cases relating to the potentially unfair clauses contained in the indicative list of the Annex to the

¹⁴³ See Chapter 2.3.

¹⁴⁴ Micklitz and Caruso (n 51).

¹⁴⁵ Case C-478/99 *Commission of the European Communities v Kingdom of Sweden* [2002] ECLI:EU:C:2002:281, paragraph 20.

¹⁴⁶ cf Jansen and Zimmermann (n 134) 958.

Directive. Not all the provision of the Annex are considered, but only the ones that apply to e-commerce consumer sales. Points 1(c),¹⁴⁷ (f),¹⁴⁸ (g),¹⁴⁹ (h),¹⁵⁰ (i),¹⁵¹ and (n)¹⁵² of the Annex to the Directive fall outside of the scope of the present study. Equally, the exceptions under Point 2 of the Directive's Annex are not taken into account because they are concerned with transferable securities or financial services. Chapter 2.3 has reviewed the national rules implementing the Unfair Contract Terms Directive, including the national exceptions. It has been revealed that the German,¹⁵³ Dutch,¹⁵⁴ and UK¹⁵⁵ exceptions are not relevant for the present study because these exceptions do not apply to e-commerce consumer transactions. Only one of the French exceptions falls within the scope and will be taken into account in this Chapter.¹⁵⁶

2.4.1 Limitation of Liability in Case of Death or Personal Injury

Article 3 of Directive 93/13/EEC in connection with Point 1(a) of the Annex to the Directive lists clauses as potentially unfair which exclude or limit the liability of traders or

¹⁴⁷ This Point is concerned with the provision of services and not sale of goods.

¹⁴⁸ *ibid.*

¹⁴⁹ This Point is concerned with contracts of indeterminate duration.

¹⁵⁰ This Point is concerned with contracts of fixed duration.

¹⁵¹ This Point is of a more practical nature: 'irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract'.

¹⁵² This Point also falls outside of the defined scope: 'limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality'.

¹⁵³ §§ 309 Nr. 7 and 310 Nr. 1, 2, and 4 of the BGB.

¹⁵⁴ Articles 6:236 and 6:237 of the BW.

¹⁵⁵ Schedule 2 Part 2 of the Consumer Rights Act 2015.

¹⁵⁶ Articles R212-3 and R212-4 of the Code de la consommation, only Article R212-4 applies to the present study.

their suppliers in case of death or personal injury of the consumer, resulting from the trader's or the supplier's act or omission. The wording of the provision suggests that any form of exclusion or limitation of liability in case of death or personal injury may be regarded as unfair, as long as the liability results from an act or omission of the trader or supplier. The national courts have not referred such a scenario under the preliminary reference procedure to the Court of Justice of the European Union, and, since there is no interpretation on the EU level of Point 1(a) of the Directive's Annex, the provision remains indicative.

France

Article L212-1 in connection with Article R212-1 no 6 of the Code de la consommation render clauses automatically unfair ('black list') which limit or exclude liability to compensate the consumer where the trader does not fulfil their contractual obligation (*limitation de responsabilité*). This means a contractual term restricting the trader's liability will be deemed unfair under all circumstances, leaving no discretion to the courts.¹⁵⁷ A recent case of the Court of Cassation (*Cour de cassation*) confirmed that traders cannot limit the amount of compensation, *id est* they cannot impose a cap on the amount of damages that consumers can claim.¹⁵⁸ In addition, traders may not reduce the amount of damages owed to consumers below the value of the actual damage.¹⁵⁹

The French provision is stricter and provides a higher level of protection for consumers than Point 1(a) Annex of Directive 93/13/EEC because there is no need to carry out an assessment under the general test when Article R212-1 no 6 of the Code de la

¹⁵⁷ Julien (n 89) 313-314; Jean-Denis Pellier, *Droit de la consommation* (2nd edn, Dalloz 2018) 126-129.

¹⁵⁸ Cass civ (1) 11 December 2019, no 18-21164. Jean-Denis Pellier, 'Retour sur les clauses noires' (2019) Dalloz actualité 24 December 2019.

¹⁵⁹ Recently applied and confirmed in CA Rennes 8 March 2019, RG no 15-09167.

consommation applies: the term is automatically unfair and ineffective.¹⁶⁰ The French provision is also wider, as, unlike the Directive, Article R212-1 no 6 encompasses liability not only for death or personal injury, but it covers damage suffered by consumers in the event where traders fail to fulfil any of their obligations. The French regulatory provision is so broadly formulated that it also covers Point 1(b) of the Annex to Directive 93/13/EEC (see Chapter 2.4.2).

Germany

The Directive's scenario where a contract terms limits trader liability in case of death or personal injury of the consumer falls within § 309 Nr. 7 lit. a of the BGB. According to this provision, terms which have the objective of limiting or excluding liability for negligent or intentional fault which cause injury to life, body or health, are automatically unfair.¹⁶¹ German courts do not need to evaluate terms falling within the scope of § 309 of the BGB (*Klauselverbote ohne Wertungsmöglichkeit*), and, as in all unfair terms cases, consumers are not bound by clauses that are unfair.¹⁶²

While the scope of § 309 Nr. 7 lit. a and Point 1(a) of the UCTD's Annex is the same, the German provision is stricter as it renders clauses allowing traders to limit their liability always unfair. This means that the German legislator opted for a higher level of consumer protection than envisaged by the Directive. Assuming that the Directive's Annex sets an EU-wide standard, this has not always been the case. Before the adoption of the Unfair Contract Terms Directive in 1993, German law contained a provision on the limitation of

¹⁶⁰ Julien (n 89) 299, 314; Alain Bénabent, *Droit des Obligations* (17th edn, Librairie générale de droit et de jurisprudence 2018) 160-161.

¹⁶¹ The liability of suppliers of traders can equally not be limited (see also § 278 of the BGB). Mark-Oliver Mackenrodt, *Technologie statt Vertrag? Sachmangelbegriff, negative Beschaffenheitsvereinbarungen und AGB beim Kauf digitaler Güter* (Mohr Siebeck 2015) 144, 274.

¹⁶² § 306 of the BGB.

liability (*Freizeichnung von der Haftung*) in case of death or personal injury (§ 11 Nr. 7 of the AGBG). The AGBG provision had a more limited scope than the subsequently adopted Point 1(a) of the Directive's Annex because it covered only cases of *culpa lata*, so gross negligence (*grobe Fahrlässigkeit*), or *dolus*, so intent (*Vorsatz*), and not of *culpa levis*, that is slight negligence (*einfache Fahrlässigkeit*).¹⁶³ Nonetheless, the German courts concluded that a clause limiting trader liability in cases of slight negligence, should also be considered unfair and consequently ineffective (*unwirksam*).¹⁶⁴ § 309 Nr. 7 lit. a of the BGB has codified this development.¹⁶⁵

The Netherlands

A provision covering the content of Point 1(a) Annex of Directive 93/13/EEC can be found in letter (f) of the *grijze lijst* ('grey list') contained in Article 6:237 of the Burgerlijk Wetboek. Article 6:237(f) provides that any contract term which limits or excludes the trader's obligation to pay statutory damages (*wettelijke verplichting tot schadevergoeding*) is presumed unfair when the term is unreasonably onerous (*vermoed onredelijk*).¹⁶⁶ Whether the term is unreasonably onerous must be assessed under the general test of unfairness (Article 6:233(a)).¹⁶⁷ In a recent case, a Dutch lower court found a clause

¹⁶³ In addition to the exceptions mentioned earlier in this Section, § 309 Nr. 7 lit. a of the BGB does not apply to 'transport and tariff rules, authorised in accordance with the Passenger Transport Act [Personenbeförderungsgesetz], of trams, trolley buses and motor vehicles in regular public transport services' (§ 309 Nr. 7 of the BGB).

¹⁶⁴ Wurmnest (n 102) BGB § 309 Nr. 7 [2-4].

¹⁶⁵ See for instance BGH NJW-RR 2015, 738. Christensen in Ernst (n 109) BGB § 309 Nr. 7 [5-8].

¹⁶⁶ Krans, Stolker, and Valk (n 115) BW Art 6:237 [4(c)]; Raijmakers (n 115) BW Art 6:237 [3.1].

¹⁶⁷ The operation of the general test and the 'grey list' have been examined in Chapter 2.3 *The Netherlands*. An example where a lower court applied the test cornering Article 6:237(f) is Rechtbank Rotterdam 14 March 2018, ECLI:NL:RBROT:2018:2779, paragraph 2.5.

limiting liability unreasonably onerous because the proffering party was insured against such risks.¹⁶⁸ It is worth noting again that Article 6:237 provides that the burden of proof (*bewijslast*) lies with the trader.

Another observation is that the Dutch legislator does not explicitly provide that the clause must limit liability of an act or omission causing death or personal injury. The provision is of a more general nature, *id est* it provides a wider scope, encompassing the protection envisaged by Point 1(a) of the Directive's Annex.¹⁶⁹ Consequently, the provision in the Dutch Civil Code provides for a higher level of protection for consumers – the Dutch provision is wider and stricter – than Point 1(a). However, the level of protection is not as high as in countries where such terms are unfair under all circumstances, *id est* 'black-listed'.

The United Kingdom

Section 65 of the Consumer Rights Act 2015 declares clauses where traders exclude or restrict negligence liability in cases of death or personal injury of consumers unenforceable.¹⁷⁰ Personal injury encompasses 'any disease and any impairment of physical or mental condition' (Section 65(3)). Section 65(4) also defines negligence as a breach of:

- '(a) any obligation to take reasonable care or exercise reasonable skill in the performance of a contract where the obligation arises from an express or implied term of the contract,
- (b) a common law duty to take reasonable care or exercise reasonable skill,
- (c) the common duty of care imposed by the Occupiers' Liability Act 1957 or the Occupiers' Liability Act (Northern Ireland) 1957, or
- (d) the duty of reasonable care imposed by section 2(1) of the Occupiers' Liability (Scotland) Act 1960.'

¹⁶⁸ Rechtbank Rotterdam 3 June 2020, ECLI:NL:RBROT:2020:5566, paragraph 4.17.

¹⁶⁹ Jacob Hijma, 'Validity: Art. 4:110-4:119' in Busch (n 121) 216.

¹⁷⁰ cf John Cartwright, 'Information Obligations and Disinformation of Consumers: English Law Report' in Gert Straetmans (ed), *Information Obligations and Disinformation of Consumers* (Springer Publishing 2019) 120.

In addition, subsection (5) states that it is irrelevant:

- ‘(a) whether a breach of duty or obligation was inadvertent or intentional, or
- (b) whether liability for it arises directly or vicariously.’

The effect of Section 65 is that such contract terms are unenforceable, making it *de facto* a ‘black-listed’ term. Section 66 contains a number of exceptions where Section 65 does not apply, such as those concerning insurance (Section 66 (1)(a)), creation or transfer of an interest in land (Section 66 (1)(b)), discharge or indemnity (Section 66 (2)), Damages Scotland Act 2011 (Section 66 (3)), and liability of an occupier of premises, in some circumstances (Section 66 (4)). These exceptions do not apply to e-commerce consumer sales transactions.

It needs to be emphasised that Section 65 is a *lex specialis* provision and operates independently from the general test under Section 62.¹⁷¹ In case the trader’s clause falls outside the scope of Section 65, there is a more general rule contained in Schedule 2 of the 2015 Act. However, unlike Section 65, Schedule 2 Part 1(1) covers strict liability, that is an act or omission of the trader.¹⁷²

In terms of the standard of consumer protection, because Section 65 of the Consumer Rights Act 2015 renders such limitation clauses unenforceable, it should be regarded as going beyond the envisaged standard of the Unfair Contract Terms Directive. Schedule 2 Part 1(1) uses the same wording as the Directive and keeps the indicative nature of the list of terms. Consequently, whether a contract term resembling Schedule 2 Part 1(1) is unfair must be assessed under the general test (Section 62).¹⁷³

¹⁷¹ Sections 62(8)(d) and 63(2) of the Consumer Rights Act 2015.

¹⁷² Ewan McKendrick, *Contract Law* (8th edn, Oxford University Press 2018) 474.

¹⁷³ The operation of the general test and indicative list have been examined in Chapter 2.3 *The United Kingdom*.

Comparative Observations

All four legal systems protect consumers from terms limiting trader liability as provided in the Annex to the Directive, which is demonstrated by them banning such clauses. Such clauses are automatically unfair in France, Germany, and in the United Kingdom (under Section 65 of the Consumer Rights Act 2015). In the Netherlands, traders have to prove that such terms are not unfair in light of the surrounding circumstances. It has been established that it is extremely unlikely that such clauses would be accepted as fair by Dutch courts. In case of the United Kingdom, a distinction must be drawn between terms falling under Section 65 and those to which the general test in Section 62 in connection with Schedule 2 Part 1(1) of the Consumer Rights Act 2015 will apply. In the former case, the terms will be unenforceable, whereas in the latter it will be within the discretion of the courts to render them unenforceable. The examination of the national laws has revealed that all four legal systems provide either the same or more generous protection than Article 3 in connection with Point 1(a) of the Directive's Annex.

2.4.2 Exclusion or Limitation of Compensation in Case of Total or Partial Non-Performance

Article 3 in connection with Point 1(b) of the Annex to Directive 93/13/EEC provide that contractual clauses may be considered unfair where:

‘[a clause is] inappropriately excluding or limiting the legal rights of the consumer vis-a-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him’

The national courts have not yet asked the Court of Justice to interpret the general test of unfairness in light of Point 1(b) of the Directive's Annex. Consequently, there is no interpretation available on the EU-level, granting more discretion to the Member States.

France

As mentioned and examined in the previous Section of the present Chapter (see Chapter 2.4.1), the obligations of traders contained in Article L212-1 in connection with Article R212-1 no 6 of the Code de la consommation (*limitation de responsabilité*) covers the issue of consumer compensation in the case of total or partial non-performance.¹⁷⁴ In addition, French law prohibits contractual clauses which allow traders to restrict consumers right to terminate the contract in the case of trader non-performance (Article R212-1 no 7). The provisions are consequently wider and also stricter (because they are included in a ‘black list’) than Point 1(b) of the Directive’s Annex.

Germany

Contractual clauses excluding or limiting compensation in case of total or partial non-performance of traders are always unfair according to § 309 Nr. 8 of the BGB in conjunction with §§ 309 Nr. 3 and Nr. 7 lit. b of the BGB. §§ 309 Nr. 3, Nr. 7 lit. b, and Nr. 8 deal with various forms of contractual duties: the right to set off a claim (Nr. 3); the exclusion or limitation of liability for damages (Nr. 7 lit. b); and other exclusions of liability for breaches of contractual duties (Nr. 8). All three provisions are stricter, *id est* contained in the ‘black list’ (*Klauselverbote ohne Wertungsmöglichkeit*), and are also more precise than the provision in the Directive’s Annex.

Point 1(b) Annex of the Directive lists the possibility to set off a debt as an example of a right which cannot be limited. A German provision transposing this is § 309 Nr. 3 of the BGB (*Aufrechnungsverbot*), but the German provision is more precise than the Directive. The Directive provides that consumer can set off ‘any claim’, whereas the BGB requires

¹⁷⁴ Julien (n 89) 313-314; Pellier (n 157) 126-129.

that the claim ‘is uncontested or has been finally and non-appealably established’.¹⁷⁵ Another provision which transposes parts of Point 1(b) is Nr. 7 lit. b, prohibiting clauses which allow traders to limit or exclude liability for damages caused by gross negligence (*grobes Verschulden*) breach of statutory duties.¹⁷⁶ The third provision transposing parts of Point 1(b) of the Directive’s Annex is § 309 Nr. 8, which contains other rights that cannot be limited by the trader’s terms and conditions. Nr. 8 lit. a, protects consumers from clauses which exclude the right to free oneself from the contract (*Ausschluss des Rechts, sich vom Vertrag zu lösen*).¹⁷⁷ Further prohibited clauses are provided in Nr. 8 lit. b: exclusion and referral to third parties (aa); limitation to cure (bb); expenses for cure (cc); withholding cure (dd); cut-off period for notice of defects (ee); and making limitation easier (ff).

It is unlikely that a clause falling within the scope of Point 1(b) Annex of Directive 93/13/EEC would not be covered by one of the three provisions.¹⁷⁸ However, in such a scenario, consumers could rely on the general clause contained in § 307 of the BGB.¹⁷⁹ Considering the broad scope of the provisions, it is, however, extremely unlikely that consumers have to rely on this default option.¹⁸⁰ The German provisions therefore go beyond the Directive – the scope is wider and the terms covered by Point 1(b) would be rendered ‘unfair’ by the BGB.¹⁸¹

¹⁷⁵ Wurmnest (n 102) BGB § 309 Nr. 3 [3-4]; Schäfer in Ernst (n 109) BGB § 309 Nr. 3 [2a-2c].

¹⁷⁶ Wurmnest (n 102) BGB § 309 Nr. 7 [3-4]; Christensen in Ernst (n 109) BGB § 309 Nr. 7 [6-7].

¹⁷⁷ Wurmnest (n 102) BGB § 309 Nr. 8 [4]; Christensen in Ernst (n 109) BGB § 309 Nr. 8 [1-3].

¹⁷⁸ Wurmnest (n 102) BGB § 309 Nr. 3 [3-4].

¹⁷⁹ BGH NJW 2018, 2042.

¹⁸⁰ Christensen in Ernst (n 109) BGB § 309 Nr. 8 [3]; Wurmnest (n 102) BGB § 309 Nr. 3 [3-4], § 309 Nr. 7 [3-4], § 309 Nr. 8 [4].

¹⁸¹ *ibid.*

The Netherlands

The Dutch Civil Code does not provide one specific provision regulating clauses which have the objective to exclude or limit the compensation in case of total or partial non-performance of traders. This scenario is regulated by several, very specific provisions. Three out of the seven relevant provisions are contained in the *zwarte lijst* ('black list') of Article 6:236 of the BW, the remaining four provisions are contained in the *grijze lijst* ('grey list') of Article 6:237 of the BW.

The first provision which will be examined in the *zwarte lijst* is Article 6:236(a). According to this provision, terms are prohibited when they deprive consumers entirely and unconditionally of the right to demand performance of traders.¹⁸² Under Article 6:236(b), clauses which exclude or restrict consumers right to dissolve (*bevoegdheid tot ontbinding*) the contract are always unfair.¹⁸³ The third provision, Article 6:236(c), prohibits contractual terms which exclude or restrict the consumer's statutory rights, including to allow traders to fully or partially suspend performance.¹⁸⁴

A more general provision can be found in the *grijze lijst*. Article 6:237(b) lists clauses as presumably unfair which allow traders to deviate from the reasonable expectation (*redelijke verwachting*) of consumers.¹⁸⁵ The provision provides that the statutory obligations of traders are used as the benchmark to assess whether the reasonable

¹⁸² Krans, Stolker, and Valk (n 115) BW Art 6:236 [4(a)]; Tjeerd GG Raijmakers, 'Art. 236 – Burgerlijk Wetboek Boek 6' in Bakker (n 115) BW Art 6:236 [4.1].

¹⁸³ Krans, Stolker, and Valk (n 115) BW Art 6:236 [4(a)]; Raijmakers (n 182) BW Art 6:236 [4.1].

cf Ruth Sefton-Green, 'Case Studies' in Ruth Sefton-Green (ed), *Mistake, Fraud and Duties to Inform in European Contract Law* (Cambridge University Press 2009) 300-301.

¹⁸⁴ Krans, Stolker, and Valk (n 115) BW Art 6:236 [4(a)]; Raijmakers (n 182) BW Art 6:236 [4.1].

¹⁸⁵ Krans, Stolker, and Valk (n 115) BW Art 6:237 [4(b)]; Raijmakers (n 115) BW Art 6:237 [3.1].

expectations of consumers are met. Another provision covering the content of Point 1(b) is Article 6:237(c), which requires traders to prove that a clause allowing traders to provide a performance deviating essentially from the promised performance is not unfair; traders must also allow consumer to dissolve the contract.¹⁸⁶ Traders are equally not allowed to limit their obligation to pay statutory damages under Article 6:236(f) (see Chapter 2.4.1). The last provision creates a presumption that terms that exclude or limit the right to offset a debt or grant traders more far-reaching rights to settle are unfair (Article 6:237(g)).¹⁸⁷ The evidence put forward by traders to prove that such a terms are not unfair according to the Dutch ‘grey list’ needs to be assessed under the general test (Article 6:233(a)).

The provisions of the *Burgerlijk Wetboek* address both the right to demand performance and the right to damages in case of total or partial non-performance. On the whole, the Dutch provisions are wider and also go beyond the indicative nature of the Directive’s list. Contractual clauses caught by Point 1(b) are either automatically unfair and ineffective (‘black-listed’) or require traders to prove that such clauses are not unfair (‘grey-listed’).

The United Kingdom

According to Section 31(1) of the Consumer Rights Act 2015, contractual clauses are invalid and not binding on consumers when traders limit or restrict their liability concerning:

- ‘(a) section 9 (goods to be of satisfactory quality);
- (b) section 10 (goods to be fit for particular purpose);
- (c) section 11 (goods to be as described);
- (d) section 12 (other pre-contract information included in contract);
- (e) section 13 (goods to match a sample);

¹⁸⁶ Krans, Stolker, and Valk (n 115) BW Art 6:237 [4(b)]; Raijmakers (n 115) BW Art 6:237 [3.1]

The provision and respective case law will be examined at a later stage, see Chapter 2.4.5 ‘One-Sided Changes to the Contract’.

¹⁸⁷ Krans, Stolker, and Valk (n 115) BW Art 6:237 [4(d)]; Raijmakers (n 115) BW Art 6:237 [3.1].

- (f) section 14 (goods to match a model seen or examined);
- (g) section 15 (installation as part of conformity of the goods with the contract);
- (h) section 16 (goods not conforming to contract if digital content does not conform);
- (i) section 17 (trader to have right to supply the goods etc);
- (j) section 28 (delivery of goods);
- (k) section 29 (passing of risk).'¹⁸⁸

Furthermore, Section 31(2) states that contract terms are not binding on consumer when these terms:

- ‘(a) exclude or restrict a right or remedy in respect of a liability under a provision listed in subsection (1),
- (b) make such a right or remedy or its enforcement subject to a restrictive or onerous condition,
- (c) allow a trader to put a person at a disadvantage as a result of pursuing such a right or remedy, or
- (d) exclude or restrict rules of evidence or procedure.’¹⁸⁹

In addition, exemption clauses which may fall outside the scope of Section 31 ‘may be regarded as unfair’ according to the general test complemented by the list of potentially unfair terms in Schedule 2 Part 1(2) of the Consumer Rights Act 2015. This provision transposes almost word-for-word Point 1(b) of the Annex to Directive 93/13/EEC.¹⁹⁰ Consequently, terms containing exemption clauses falling outside of Section 31 are not automatically unfair. Like all other potentially unfair terms listed in Schedule 2, they need to be examined under the general test of unfairness (Section 62 of the Consumer Rights Act 2015).

¹⁸⁸ Section 31(3) provides that Section 31(1) includes any exclusion or restriction of liability which prevents an obligation or duty to arise or limit its extent.

¹⁸⁹ However, Section 31(1i) and Section 31(2) ‘so far as it relates to liability under section 17, do not apply to a term of a contract for the hire of goods’ (Section 31(5)). cf Cartwright (n 170) 119-120.

¹⁹⁰ Ewan McKendrick notes that the term ‘inappropriately’ has not been defined by the UK courts, see McKendrick (n 172).

Comparative Observations

All four jurisdictions have enacted provisions which prohibit terms excluding or limiting compensation in the event of total or partial non-performance of traders. Such clauses are always unfair in France and Germany. In the Netherlands and the UK, it depends whether the contract clause falls within the scope of the ‘black-listed’ provisions. Otherwise, such clauses are presumed unfair under the ‘grey list’ in the Netherlands or are assessed in light of the general test of unfairness in the UK. Another observation is that the German and Dutch provisions are on its own much narrower than the provision contained in the Directive’s Annex, but the combined coverage of the provisions is the same.

2.4.3 One-Sided Compensation for Cancellation

According to Article 3 in connection with Point 1(d) of the Annex to Directive 93/13/EEC, traders may not:

‘retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract’

The Court of Justice has not been yet asked by the national courts to rule on any issues relating to one-sided compensation clauses in light of Point 1(d).

France

One-sided compensation clauses (*dédit*) fall within the scope of Article L212-1 in connection with Article R212-2 no 2 of the Code de la consommation. The French regulatory provision provides the same content as Point 1(d) of the Directive’s Annex, but, unlike the Directive, the French rule contains a specific provision on deposits.¹⁹¹ In addition, Article R212-2 no 2 is included in the *liste grise* (‘grey list’). The list operates under the presumption of unfairness, which does not impose an outright prohibition, but

¹⁹¹ Julien (n 89) 313-316; Pellier (n 157) 126-129.

shifts the burden of proof on traders. Consequently, Article R212-2 no 2 is wider and stricter than the Directive.¹⁹²

Germany

The content of Point 1(d) of the Directive's Annex is reflected in § 308 Nr. 7 of the BGB and §§ 309 Nr. 5 and Nr. 6 of the BGB. The first provision is contained in the 'grey list' (*Klauselverbote mit Wertungsmöglichkeit*): § 308 Nr. 7 of the BGB deals with the reversal of contracts (*Abwicklung von Verträgen*). While § 309 Nr. 5 deals with lump-sum claims for damages (*Pauschalierung von Schadensersatzansprüchen*) and § 309 Nr. 6 with penalty clauses (*Vertragsstrafen*).¹⁹³ Whether a clause will be deemed to be unfair with or without evaluation depends in which category a claim falls.

§ 309 Nr. 5 of the BGB regulates contractually agreed lump-sums. A lump-sum is unfair where it exceeds the damages expected to be paid by the consumer under normal circumstances (*gewöhnlichen Lauf der Dinge*) or the customarily occurring reduction in value of the product (*gewöhnlich eintretende Wertminderung*) (Nr. 5 lit. a). Moreover, Nr. 5 lit. b prohibits lump-sums where the consumer is not expressly permitted to demonstrate that damage or reduction in value has taken place (*Schaden oder eine Wertminderung*) or that the damage or reduction is significantly less than the lump-sum claim (*wesentlich niedriger als die Pauschale*).¹⁹⁴

Another provision which might be invoked by consumers is § 309 Nr. 6 of the BGB. According to this provision, contractual penalties in the case of non-acceptance

¹⁹² Such terms are always unfair ('black list') in case traders secretly cancel the contract and withhold sums paid by consumers (Article R212-1 no 9 of the Code de la consommation). The provision is of a more practical nature and is consequently not taken into account for assessing trader compliance in the present study.

¹⁹³ Fuchs in Ernst (n 109) BGB § 309 Nr. 6 [5-10].

¹⁹⁴ Fuchs in Ernst (n 109) BGB § 309 Nr. 5 [5-9]; Wurmnest (n 102) BGB § 309 Nr. 5 [1-3].

(*Nichtabnahme der Leistung*) or late acceptance of the performance (*verspätete Abnahme der Leistung*), payment default (*Zahlungsverzug*) or consumers freeing themselves from the contract (*Lösung vom Vertrag*) are prohibited.¹⁹⁵

If the contractual term does not fall within the scope of §§ 309 Nr. 5 and Nr. 6 of the BGB, the term can be assessed under § 308 Nr. 7 of the BGB.¹⁹⁶ The provision requires that contract terms must not contain a clause, which in the case of the reversal or termination of the contract requires the consumer to pay an ‘unreasonably high remuneration for enjoyment or use of a thing or a right or for performance rendered’ (Nr. 7a) or ‘unreasonably high reimbursement of expenses’ (Nr. 7b). As discussed in Chapter 2.3, the courts have the power to evaluate whether the sum is ‘unreasonably high’ (*unangemessen hoch*) in the circumstances of the case, weighing the overall interests of the parties (*Gesamtabwägung der Interessen der Vertragspartner*). According to the German Federal Court of Justice, the benchmark for assessing whether a compensation clause is unreasonable depends on the amount of compensation a trader could claim under applicable statutory provisions (for instance § 649 of the BGB).¹⁹⁷ The provision in the Directive’s Annex only requires that the sum is equivalent to what consumers could claim where the trader breaches the contract.

It follows that the provisions in the BGB are stricter and wider than the indicative provision contained in than Point 1(d) of the Annex to Directive 93/13/EEC.

¹⁹⁵ Fuchs in Ernst (n 109) BGB § 309 Nr. 6 [5-10]; Wurmnest (n 102) BGB § 309 Nr. 6 [1-3].

¹⁹⁶ Schmidt in Ernst (n 109) BGB § 308 Nr. 7 [4-5c]; Wurmnest (n 102) BGB § 308 Nr. 7 [2-3].

¹⁹⁷ BGH NJW 2011, 1954.

The Netherlands

Dutch law does not contain a specific provision regulating one-sided compensation for cancellation clauses, but there are two provision in the *grijze lijst* ('grey list') which fulfil a similar function. Article 6:237(f) of the BW declares clauses unfair when a contract term frees traders wholly or partly of a statutory obligation to pay damages.¹⁹⁸ Article 6:237(i) governs situations where a penalty is imposed on the consumer in case the contract is terminated for any other reason than the consumer failing to fulfil their obligations, for example the cancellation of the contract.¹⁹⁹ Such clauses are only regarded as fair if the compensation is a reasonable sum (*redelijke vergoeding*) for the loss suffered by traders or profit of which traders have been deprived; there must also be a legitimate interest to impose such a fee.²⁰⁰

The Dutch provisions consequently cover the content of Point 1(d) of the Directive's Annex, but Articles 6:237(f) and (i) are stricter since these provisions are contained in the 'grey list'. In case they fall within the 'grey list', traders have to prove that such a clause is not unfair; in the light of Article 6:237(i), traders have to provide the amount of actual damage suffered. The traders' evidence is then subject to the test of the general clause under Article 6:233(a).

¹⁹⁸ This provision has been examined earlier, see Chapter 2.4.1 'Limitation of Liability in Case of Death or Personal Injury'.

¹⁹⁹ Krans, Stolker, and Valk (n 115) BW Art 6:237 [5(a)]; Raijmakers (n 115) BW Art 6:237 [3.2].

²⁰⁰ See for instance a recent case by a Dutch lower court, Rechtbank Amsterdam 29 June 2020, ECLI:NL:RBAMS:2020:3087. In this case, the court emphasised that the most favourable estimation for loss or lost profits prevails and found that the trader could not provide sufficient evidence that they sustained a third-percent loss. However, in an earlier case at the Court of Appeal in Arnhem-Leeuwarden, the proffering party could successfully prove that it sustained a thirty-percent loss. The trader provided evidence of their loss, in this case the annual return statements, and, furthermore, before inserting such a clause into their terms and conditions, the trader has contacted a consumer organisation to assess whether such a clause is unfair. Based on all the evidence of the proffering party, the court found the clause is not unreasonably onerous. See Gerechtshof Arnhem-Leeuwarden 25 August 2015, ECLI:NL:GHARL:2015:6249.

The United Kingdom

The Consumer Rights Act also contains a provision that deals with one-sided compensation clauses. Schedule 2 Part 1(4) of the Consumer Rights Act 2015 transposes Point 1(d) of the Annex to Directive 93/13/EEC, and the standard does not differ from the one provided under the Directive. One-sided compensation clauses are likely to be unfair but need to be assessed under the general test contained in Section 62.

Comparative Observations

The examination of the national rules has revealed that the French, German, and Dutch provisions are stricter and more precise than Point 1(d) of the Annex to Directive 93/13/EEC. The UK's provision provides the same standard as the Directive, *id est* the indicative provision is assessed under the general test of unfairness. All four jurisdictions therefore protect consumers from one-sided compensation clauses.

2.4.4 Excessive Compensation

Contractual terms requiring consumers who fail to fulfil their obligations to pay a 'disproportionately high sum in compensation' may be regarded unfair according to Article 3 in connection with Point 1(e) of the Annex to Directive 93/13/EEC. The Court of Justice has been confronted with such an excessive compensation clause in *Pohotovost*.²⁰¹ The contractual clause concerned late payment in a credit agreement and provided an annual interest rate of 91.25 percent. In light of Article 3 in connection with Point 1(e), the Court held:

'[...] a disproportionately high sum in compensation, is to be regarded as unfair in the light of all the circumstances attending the conclusion of the contract [...]'²⁰²

²⁰¹ Case C-76/10 *Pohotovost' s.r.o. v Iveta Korčková* [2010] ECLI:EU:C:2010:685.

²⁰² *ibid* paragraph 60.

Whether the contract can still continue without the unfair term is therefore a matter for the national courts;²⁰³ the Court of Justice thereby reaffirmed *Freiburger Kommunalbauten*.²⁰⁴ A more substantive ruling was delivered in *Banco Santander*, where a disproportionately high sum in compensation was defined as ‘a rate exceed[ing] by more than two percentage points the ordinary interest rate provided for in that agreement.’²⁰⁵ The rulings on excessive compensation clauses by the Court of Justice ultimately limit the national judicial and regulatory autonomy.

France

Article L212-1 in connection with Article R212-2 no 3 of the Code de la consommation deals with penalty clauses (*clause pénale*) like Point 1(e) of the Annex to the Directive.²⁰⁶ There is only one minor difference, namely that the French provision requires the penalty payment to be manifestly disproportionate (*manifestement disproportionné*) and not just disproportionate. In practice, there appears not to be a difference.²⁰⁷ However, unlike in the

²⁰³ *ibid* paragraph 61.

Regarding excessive compensation clauses, the court reached the same conclusion in two additional cases concerning late payment interests as well as in a cases on cumulative effects of contractual sanctions. For late payment, see Case C-415/11 *Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* [2013] ECLI:EU:C:2013:164; Joined Cases C-96/16 and C-94/17 *Banco Santander v Mahamadou Demba, Mercedes Godoy Bonet and Rafael Ramón Escobedo Cortés v Banco de Sabadell SA* [2018] ECLI:EU:C:2018:643.

Concerning cumulative effects, see Case C-377/14 *Radlinger Radlingerová Ernst Georg Radlinger and Helena Radlingerová v Finway a.s.* [2016] ECLI:EU:C:2016:283.

²⁰⁴ Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter and Ulrike Hofstetter* [2004] ECLI:EU:C:2004:209.

²⁰⁵ Joined Cases C-96/16 and C-94/17 *Banco Santander v Mahamadou Demba, Mercedes Godoy Bonet and Rafael Ramón Escobedo Cortés v Banco de Sabadell SA* [2018] ECLI:EU:C:2018:643, paragraph 71.

²⁰⁶ Julien (n 89) 313-316; Pellier (n 157) 126 -129.

²⁰⁷ See for instance Cass civ (1) 1 February 2005, no 01-16.733.

Directive, excessive compensation clauses are presumed unfair ('grey list') and the burden is on traders to prove that the clause is not unfair.²⁰⁸ The court will then assess whether such a term is unfair by taking into account the surrounding circumstances.

Germany

In Germany, excessive compensation claims (§ 309 Nr. 6 of the BGB) and agreements on lump-sums (§ 309 Nr. 5 of the BGB) are unfair under all circumstances. Both provisions have already been examined in this Chapter.²⁰⁹ The two German provisions are more context-specific and together also broader than Point 1(e) of the Directive's Annex. Furthermore, terms falling within their scope are always unfair without the possibility of a different judicial assessment. Consumers can have the sum reduced under § 343 of the BGB, while traders can, of course, claim compensation for their reasonable expenses.²¹⁰

The Netherlands

The content of Point 1(e) is reflected in Article 6:237(i) and Articles 6:91-6:94 of the BW.²¹¹ The former covers contractual penalties concerning the termination of the contract other than for consumers failing to fulfil their obligations.²¹² It has been established that compensation clauses are only regarded as fair when consumers failed to fulfil their obligations and the compensation is a reasonable sum (*redelijke vergoeding*) for the loss suffered by traders or profit of which traders have been deprived. Contractual penalties

²⁰⁸ Julien (n 89) 313-316; Pellier (n 157) 126-129.

²⁰⁹ See the previous Section, Chapter 2.4.3 'One-Sided Compensation for Cancellation'.

²¹⁰ Wurmnest (n 102) BGB § 309 Nr. 6 [2-3].

²¹¹ Krans, Stolker, and Valk (n 115) BW Art 6:237 [5(a)]; Raijmakers (n 115) BW Art 6:237 [3.2].

²¹² This provision has been examined in the previous subsection (see Chapter 2.4.3).

which are imposed in other situations are covered by Articles 6:91-6:94 of the BW. These provisions presume that penalty clauses are unfair that go beyond statutory damages (Articles 6:92(2) and 6:94 of the BW). Article 6:237(i) and Articles 6:91-6:94 are therefore broader and stricter than Point 1(e) of the Directive's Annex.

The United Kingdom

Penalty clauses are not enforceable at common law.²¹³ At a first glance, this offers stronger protection for the consumer than is provided by the Consumer Rights Act 2015, as it always prevents the consumer being bound by such a clause. However, this advantage is diminished by the difficulty the consumer may face in proving that the contract term is a penalty clause. A penalty clause is found where there is no legitimate interest in deterring the contractual breach. In such circumstances, reliance on such a term is being taken to be as an 'exorbitant' or 'unconscionable' alternative to common law damages.²¹⁴ With regard to what constitutes an exorbitant sum, Chen-Wishart argues that in the light of *ParkingEye Ltd* it must be 'very substantially more than necessary to deter the breach' so the 'parties have a generous margin of error'.²¹⁵ There is plenty of room for a trader to seek to show a legitimate interest in relying on the clause to deter the breach rather than claim damages, in which case the clause stands.²¹⁶ Under the Consumer Rights Act, by contrast, the starting

²¹³ See the most recent judgment of the UK Supreme Court, *Cavendish Square Holding BV v Talal El Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67, [2015] 3 WLR 1373. cf Hans-Wolfgang Micklitz, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (Cambridge University Press 2018) 64-66.

²¹⁴ Chen-Wishart (n 71) 564-567; Jonathan Morgan, 'The Penalty Clause Doctrine: Unlovable but Untouchable' (2016) 75(1) *The Cambridge Law Journal* 12-13.

²¹⁵ *ibid* Chen-Wishart 566.

²¹⁶ The case amended the four tests outlined in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, and has been described as one of the most important English cases in the last century. According to Roger Halson, the biggest change to the common law rule on penalty clauses has been that it 'now places emphasis upon the justifying interest of the party seeking to enforce the clause' and whether it is proportionate in the circumstances of the case. He also suggests that it will be sufficient to apply the

point is the protection of the consumer as a weaker party. As Lord Neuberger pointed out, the general test, now Section 62 of the Consumer Rights Act 2015,²¹⁷ ‘is significantly more favourable to the consumer than would be applied by a court in this country under the penalty doctrine.’²¹⁸

In addition to the penalty clause doctrine, penalty clauses may be considered unfair under Schedule 2 Part 1(6) of the Consumer Rights Act 2015. The provision transposes, once again, almost word-for-word the Directive into UK law. In addition, Part 1(5) of Schedule 2 prohibits terms which require a disproportionately high sum in compensation ‘where the consumer decides not to conclude or perform the contract’. Contract clauses which fall within Schedule 2 Part 1(5) and (6) must still be assessed under the general test of Section 62 of the Consumer Rights Act 2015.

‘genuine pre-estimate of loss’ test, *id est* whether the sum is a genuine pre-estimate of the loss in case the breach occurs, in less complex cases, for example simple damage clauses in standard form contracts. Roger Halson, *Liquidated Damages and Penalty Clauses* (Oxford University Press 2018) 32, 71-72.

²¹⁷ UK Supreme Court, *Cavendish Square Holding BV v Talal El Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67, paragraph 303 (Lord Neuberger): ‘Article 3(1) of the Directive is the counterpart to regulation 5(1) and is identically worded.’ The provision of the Unfair Terms in Consumer Contracts Regulations 1999 is now included in the Consumer Rights Act 2015, see Section 62(4).

²¹⁸ *ibid* paragraph 309 (Lord Neuberger): ‘That test is significantly more favourable to the consumer than would be applied by a court in this country under the penalty doctrine. Whereas the starting point at common law is that parties should be kept to their bargains, and it is for those objecting that a clause is penal to establish its exorbitant nature, the starting point of the Directive is that the consumer needs special protection, and it is for the supplier to show that a non-core term which is significantly disadvantageous to the consumer, as compared with the ordinary operation of the law without that term, is one which the supplier can fairly assume that the consumer would have agreed in individual negotiations on level terms. The burden is on the supplier to adduce the evidence necessary to justify that conclusion.’ The harmonisation of European Private Law has also an impact on the wider common law world, see Birke Häcker, ‘Divergence and Convergence in the Common Law — Lessons from the *Ius Commune*’ (2015) 131 *Law Quarterly Review* 424.

Comparative Observations

The Court of Justice has interpreted Article 3 in the light of Point 1(e) of the Directive's Annex, and, as a result, there is an EU-wide standard regulating penalty clauses. However, the examination of the Court of Justice cases has revealed that the rules do not apply to e-commerce sales but only to financial services. Consumers are protected from penalty clauses on the national level: in the UK, through the indicative list of potentially unfair terms or as part of the penalty clause doctrine; in France and the Netherlands, through 'grey lists'; and in Germany, through a 'black list'. All four jurisdictions have rules that are stricter than the Directive.

2.4.5 One-Sided Changes to the Contract

Contractual clauses which allow traders to change terms unilaterally and without a valid reason mentioned in the contract may be considered unfair in light of Article 3 in connection with Point 1(j) of the Annex to Directive 93/13/EEC. National courts have submitted several preliminary references to the Court of Justice concerning price variation clauses.²¹⁹ In *Nemzeti Fogyasztóvédelmi Hatóság* the Court established that in order for price variation clauses to be effective, such clauses must be 'set out in plain, intelligible language and, as the case may be, whether consumers have a right to terminate the contract.'²²⁰ The Court went further in *RWE Vertrieb AG*²²¹ and established a four limb test for price variation clauses in gas contracts: (1) price variation clauses must meet the

²¹⁹ Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* [2012] ECLI:EU:C:2012:242; Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* [2013] ECLI:EU:C:2013:180; Case C-348/14 *Maria Bucura v SC Bancpost SA* [2015] ECLI:EU:C:2015:447.

²²⁰ *ibid* (*Nemzeti*) paragraph 31.

²²¹ Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* [2013] ECLI:EU:C:2013:180.

requirements of good faith, balance, and transparency;²²² (2) it must be assessed whether such a term is actually unfair in the circumstances of the case;²²³ (3) such a clause must be included for a valid reason, and, in particular, consumers must be able to foresee such a clause, on the basis of clear, intelligible criteria, prior to the conclusion of the contract;²²⁴ (4) and that consumers must have an effective right to terminate the contract.²²⁵ Point three and four of the CJEU's test further defines Point 1(j), *id est* a price variation clause must be included for a valid and foreseeable reason and consumers must be granted the right to free themselves from the contract. The universal nature of this test stems from the fact that the CJEU has applied it also in other situations, for example in cases concerning price variation clauses in exchange rate conversions for mortgage loans²²⁶ and unilateral changes of interest rates.²²⁷ Thus, the Court has restricted the discretion of the national legislators and courts.

France

The French Consumer Code prohibits unilateral contract changes (*modifications unilatérales*) by traders.²²⁸ According to Article L212-1 in connection with Article R212-2 no 6 of the Code de la consommation, clauses allowing for one-sided changes to the

²²² *ibid* paragraph 47.

²²³ *ibid* paragraph 48.

²²⁴ *ibid* paragraph 55.

²²⁵ *ibid*.

²²⁶ Case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt* [2014] ECLI:EU:C:2014:282.

²²⁷ Case C-143/13 *Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA* [2015] ECLI:EU:C:2015:127.

²²⁸ Julien (n 89) 325-326; Dalloz, *Code de la consommation – annote & commenté* (24th edn, Dalloz 2020) 215.

contract are presumed unfair.²²⁹ A more specific regulatory provision is Article R212-1 no 3 of the Code de la consommation, which prohibits ('black list') traders to modify the clauses of the contract relating to its duration, the characteristics, and the price of the goods.²³⁰ The two regulatory provisions are not only more precise than Point 1(j) of the Annex to the Directive, but also provide a higher level of protection: (1) a clause allowing for one-sided changes (*modifications unilatérales*) is either presumed unfair ('grey list') or automatically unfair ('black list'); (2) a clause allowing for one-sided changes can never be justified under French law, unless the clause falls within the exception listed in the following paragraph.²³¹

Several exceptions apply to Articles R212-1 no 3 and R212-2 no 6. The only exception that applies to the provisions in this context permits contractual modifications linked to technical developments (Article R212-4 no 4). The reasons for this exception are provided in the provision, namely that such changes do not result in an increase in price, deterioration in quality, or a change of characteristics. Thus, changes permitted by Article R212-4 no 4 can be made when such justifications are envisaged by the contract terms. While the other exceptions listed in Article R212-3 and Article R212-4 are covered by Point 2 of the Annex to the Directive, the exception created by Article R212-4 no 4 is not. An exception that takes into account technical developments is a forward-looking response to the growing influence of digitisation in e-commerce sales and expansion of digital services more broadly. An example of a technical development in the light of Article R212-4 no 4 could be a software update.²³²

²²⁹ CA Douai 28 February 2019, RG no 16-05841.

²³⁰ Julien (n 89) 313-314; Bénabent (n 160) 160-163.

²³¹ Pellier (n 157) 127. Jacques Mestre, 'Clause de modification unilatérale' in Frédéric Buy and others (eds), *Les principales clauses des contrats d'affaires* (2nd edn, Librairie générale de droit et de jurisprudence 2018) 515-520.

²³² *ibid* Mestre; Dalloz (n 228) 217.

Germany

§ 308 Nr. 4 of the BGB deals with the unilateral reservation to modify the contract terms (*Änderungsvorbehalt*).²³³ The German provision is very similar to Point 1(j) of the Annex to Directive 93/13/EEC. On the substantive level, there is, however, one very minor difference. Point 1(j) provides that traders may alter the terms of the contract if they provide a valid reason previously specified in the contract. § 308 Nr. 4 prohibits traders from altering the contract ‘unless the agreement of the modification or deviation can reasonably be expected of the other party to the contract when the interests of the user are taken into account’. Whether it is ‘reasonable’ (*zumutbar*) in the circumstances of the case is subject to judicial assessment (*umfassenden Interessenabwägung*).²³⁴ The German Federal Court of Justice held that clauses allowing for a deviation are unfair where traders could have indicated that there might be a need for modification already at the time of the conclusion of the contract.²³⁵ Consequently, traders have to demonstrate that a modification of the contract terms is of considerable interest (*erhebliches Interesse*), for instance in case such a modification is unavoidable (*unvermeidbar*). The German Federal Court of Justice has also held that modification clauses are fair if they benefit consumers.²³⁶ § 308 Nr. 4 of the BGB covers the content of Point 1(j), but, due to the characteristics of the German ‘grey list’, it is stricter than the Directive’s Annex.

The Netherlands

As discussed in Chapter 2.4.2, clauses which allow traders to offer a performance that deviates essentially from the contract (*wezenlijk van de toegezegde prestatie afwijkt*) are

²³³ Wurmnest (n 102) BGB § 308 Nr. 4 [1-3].

²³⁴ Schmidt in Ernst (n 109) BGB § 308 Nr. 4 [1, 3a-3c].

²³⁵ BGH NJW-RR 2009, 1641. *ibid* (Schmidt) BGB § 308 Nr. 4 [9].

²³⁶ *ibid*.

unfair, unless consumers are allowed to free themselves from the contract Article 6:237(c) of the BW. There is also a *lex specialis* provision in Article 6:236(i) of the BW concerning a unilateral modification of the price, which will be examined at a later stage.²³⁷ Both provisions go beyond the indicative nature of the Directive's Annex: clauses which fall within the scope of Article 6:236(i) are automatically unfair and ineffective, while clauses falling within the scope of Article 6:237(c) are presumed to be unfair, the trader retaining the possibility of proving that the clause is not unfair in the circumstances of the case (Article 6:233(a)).²³⁸ It follows that the Dutch provisions are narrower than Point 1(j) and in rare cases there may be a need to assess terms in the light of the general test.²³⁹

The United Kingdom

Schedule 2 Part 1(11) of the Consumer Rights Act 2015 uses exactly the same wording as Directive's Annex. In addition, Schedule 2 Part 1(12) lists clauses which allow for unilateral changes of the characteristics of the subject matter as potentially unfair. Contract terms falling within the scope of either provision must pass the general test of Section 62. There is no apparent divergence between Schedule 2 Part 1(11) of the CRA 2015 and the provision contained in the Directive's Annex.

Comparative Observations

The national courts have submitted multiple preliminary references to the Court of Justice concerning contract clauses allowing for unilateral modification of the contract. The Court

²³⁷ See Chapter 2.4.7, 'Price Variations'.

²³⁸ AC van Schaick, 'Contents and Effects' in Busch and others (n 121) 270..

²³⁹ This was also confirmed by the Attorney General of the Dutch Supreme Court who clarified that the Dutch 'grey list' and 'black list' do not cover all of Point 1(j) of the Annex to Directive 93/13/EEC. In case a provision falls outside of the scope of the two lists, it must be assessed under the general test. PHR 23 May 2014, ECLI:NL:PHR:2014:1900, paragraph 3.26.

has interpreted the general test of unfairness in light of Point 1(j) of the Annex to Directive 93/13/EEC on several instances. For instance, traders must comply with the requirements of the four limb test of *RWE Vertrieb AG*²⁴⁰ when they include price variation clauses in their terms. It has been established that the threshold to meet these requirements is high. Clauses allowing for one-sided changes to the contract are also addressed on the national level, but it is worth noting again that the national courts have to take into account the case law of the Court of Justice. While all four jurisdictions have provisions specifically dealing with clauses allowing for unilateral changes of the contract terms, the level of protection on the national level differs: the UK has a general test of unfairness that is used in conjunction with the indicative list; Germany uses a ‘grey list’; and France and the Netherlands use a mixture of a ‘grey list’ and a ‘black list’. The French exception allowing traders to unilaterally change the contract terms in light of technological advancement, as long as it does not affect the quality and price of the goods, is likely to be accepted as a valid reason for a unilateral change of the contract in the other jurisdictions as well. This is in line with the Court of Justice case *RWE Vertrieb AG*, where the Court of Justice held that a one-sided change to the contract terms can be justified by transparently including a valid and foreseeable reason in the contract and allowing consumers to terminate the contract.²⁴¹

2.4.6 One-Sided Changes to the Product

Point 1(k) of the Annex to Directive 93/13/EEC states that a contract term may be unfair where traders ‘alter unilaterally without a valid reason any characteristics of the product or service to be provided’. Point 1(j) is the general provision (one-sided changes to contract),

²⁴⁰ Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* [2013] ECLI:EU:C:2013:180.

²⁴¹ *ibid* paragraph 55.

while Point 1(k) serves as *lex specialis*. There are several judgments of the Court of Justice on Point 1(j) but none on Point 1(k).

France

Article L212-1 in connection with Article R212-1 no 3 of the Code de la consommation covers contractual clauses allowing for changes to the characteristics of the product. The French legislator opted for a higher level of protection and included such clauses in the *liste noire* ('black list').²⁴² This leaves no discretion to the courts and renders such clauses invalid. Traders can, however, invoke Article R212-4 no 3, which allows traders to modify the terms of the contract linked to technical developments, but only where it does not lead to an increase of the price, to a deterioration in quality, or change of the characteristics of the product.²⁴³ It is unlikely that a clause allowing for one-sided changes to the product fulfils the requirements of Article R212-4 no 3, since the nature of such a clause is that it affects the characteristics of the product.

Germany

The 'grey list' (*Klauselverbote mit Wertungsmöglichkeit*) of the German Civil Code entails a provision which deals with unilateral changes to the characteristics of the product. § 308 Nr. 4 of the BGB is broader, as it encompasses both Point 1(j) and Point 1(k), and also stricter ('grey list' character) than Point 1(k) of the Annex to the Directive.²⁴⁴ § 308 Nr. 4

²⁴² Julien (n 89) 313-316; Pellier (n 157) 126-129.

²⁴³ Dalloz (n 228); Bénabent (n 160) 160-163.

²⁴⁴ Schmidt in Ernst (n 109) BGB § 308 Nr. 4 [3a-3c]; Wurmnest (n 102) BGB § 308 Nr. 4 [2-3].

has already been examined in the previous Section of this Chapter, dealing with one-sided changes to the contract.²⁴⁵

The Netherlands

Article 6:237(c) of the BW presumes that contractual clauses are unfair in case terms allow traders to deviate from the performance agreed with consumers, unless consumers have the right to free themselves from the contract.²⁴⁶ The Dutch provision is stricter as it does not allow for a justification and such clauses allowing for unilateral changes of the characteristics of the goods are always presumed to be unfair ('grey list'). Article 6:237(c) is also broader than Point 1(k) since it not only encompasses the unilateral alteration of the characteristics of the goods, but a deviation from the entire contractually agreed performance.

The United Kingdom

Schedule 2 Part 1(13) of the Consumer Rights Act 2015 transposes almost word-for-word the text of the provision in the Directive's Annex. Contract terms falling within the scope of this provision need to be assessed under the general test (Section 62), in particular the term 'valid reason' which is not defined in the Act nor case law.

Comparative Observations

No preliminary reference has been submitted to the Court of Justice concerning the interpretation of Article 3 in connection with Point 1(k) of the Annex to Directive. On the national level, France prohibits ('black list') clauses allowing for unilateral changes of the

²⁴⁵ See Chapter 2.4.5, 'One-Sided Changes to the Contract'.

²⁴⁶ This provision has been examined earlier, see Chapter 2.4.5 'One-Sided Changes to the Contract'.

product. Germany and the Netherlands have included these terms in their ‘grey lists’, and, in the UK, such clauses are assessed under the general test taking into account the indicative Annex to the CRA. It has already been mentioned in the previous Section of this Chapter that the French exception, allowing for unilateral changes due to technological developments, not affecting the price and quality of the good, would most likely be accepted in the other three jurisdictions as well.²⁴⁷

2.4.7 Price Variations

A contract term may also be considered unfair where the price of the goods is to be determined at delivery or where the price can be increased without allowing consumers to withdraw from the contract (Article 3 in connection with Point 1(l) of the Annex to Directive 93/13/EEC). The national courts have been very active in referring cases dealing with price variation clauses to the CJEU. These cases have been explored earlier in this Chapter and the examination has revealed that these CJEU decisions establish an EU-wide prohibition (‘black list’ character). As a result, contract clauses which allow traders to set the price at the time of delivery or at a later stage without granting consumers the possibility to withdraw are considered unfair, unless these clauses pass the four limb test of *RWE Vertrieb AG*.²⁴⁸

France

The French Consumer Code regulates price variation clauses through Article L212-1 in connection with Article R212-1 no 3 of the Code de la consommation.²⁴⁹ The regulatory

²⁴⁷ See Chapter 2.4.5 ‘One-Sided Changes to the Contract’. In particular, see Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* [2013] ECLI:EU:C:2013:180.

²⁴⁸ *ibid* (*RWE Vertrieb AG*) paragraphs 47, 48, 55..

²⁴⁹ Julien (n 89) 313-316; Pellier (n 157) 126-129.

provision is broader, prohibiting all price changes, and is also stricter, as clauses attempting to increase the price are always unfair under the *liste noire* ('black list').²⁵⁰ However, one of the aforementioned exceptions applies to Article R212-1 no 3. According to Article R212-4 no 3, traders are allowed to modify the terms of the contract linked to technical developments, but only where it does not increase the price, leads to a deterioration in quality, or change of the characteristics. The consequence is that traders can modify some parts of the contract, but, among other things, traders are not allowed to increase the price. It is therefore extremely unlikely that traders could rely on the exception in Article R212-4 no 3.

Germany

Price increases at short notice (*kurzfristige Preiserhöhung*) are prohibited by § 309 Nr. 1 of the BGB. Any clauses leading to an increase in price within four months of the conclusion of the contract are considered unfair. It includes *Tagespreisklauseln*, so prices that depend on the current value but not in case of continuing obligations (*Dauerschuldverhältnisse*).²⁵¹ § 309 Nr. 1 of the BGB is not only more precise than Point 1(l) Annex of Directive 93/13/EEC, but also provides better protection for consumers. Under the German provision, such clauses are automatically unfair, regardless of whether traders provide for a right to withdraw or whether the price is not excessive.²⁵² Furthermore, unlike in the Directive, a prohibition to increase the price within four-month is provided in

²⁵⁰ Dalloz (n 228) 216; Bénabent (n 160) 160-163.

²⁵¹ § 309 Nr. 1(2) BGB. See for instance, BGH NJW 1985, 621.

²⁵² Fuchs in Ernst (n 109) BGB § 309 Nr. 1 [4-10]; Wurmnest (n 102) BGB § 309 Nr. 1 [2-6].

§ 309 Nr. 1, which is up to three months longer than the provision contained in the Consumer Rights Directive 2011/83.²⁵³

The Netherlands

Price variation clause are also always unfair in the Netherlands. Article 6:236(i) of the BW prohibits clauses ('black list') which allow traders to increase the agreed price within three months after the conclusion of the contract.²⁵⁴ Similar to the provision in the Directive's Annex, traders may only include such a clause in case they provide that consumers are entitled to free themselves from the contract when traders rely on this term.²⁵⁵ Article 6:236(i) is therefore more precise and stricter than Point 1(l) of the Directive's Annex.

The United Kingdom

In the United Kingdom, price variations clauses are listed as potentially unfair by Schedule 2 Part 1(14) and Part 1 (15) of the Consumer Rights Act 2015. Under Schedule 2 Part 1(14), clauses 'may be considered unfair' when the terms give traders the discretion to determine the 'price payable under the contract after the consumer has become bound by it, where no price or method of determining the price is agreed when the consumer becomes bound'. Schedule 2 Part 1(15) provides that a clause 'may be unfair' where a contractual term allows traders to increase the price without giving consumers the right to cancel the contract 'if the final price is too high in relation to the price agreed when the contract was

²⁵³ Goods need to be delivered within thirty days, otherwise consumers can free themselves from the contract according to Article 18(1) of the Consumer Rights Directive 2011/83/EU. See Chapter 3.3.1.5 of this thesis for further details.

²⁵⁴ Krans, Stolker, and Valk (n 115) BW Art 6:236 [5(b)]; Raijmakers (n 182) BW Art 6:236 [4.4]. Both commentaries note that price changes after three months are still subject to review under the general test (Article 6:233(a)).

²⁵⁵ This was also emphasised by the Attorney General at the Dutch Supreme Court in PHR 5 April 2019, ECLI:NL:PHR:2019:346, especially paragraph 6.11.1.

concluded'. The courts have the power to determine whether such clauses are unfair under the general test (Section 62). The examination has shown that the two provisions in Schedule 2 transpose Point 1(1), thus the level of consumer protection under the CRA and the Directive is the same.

Comparative Observations

Price variation clauses are regulated by CJEU case law and national statutory provisions. The French, German, and Dutch provisions are all stricter ('black list'); the German and Dutch rules are also more precise, only allowing for an increase in the price, respectively, four months and three months after the conclusion of the contract. National judges also have to take into account the case law of the Court of Justice, in particular the four limb test of *RWE Vertrieb AG*.²⁵⁶

2.4.8 One-Sided Interpretation of the Contract

Article 3 in connection with Point 1(m) of the Annex to the Directive 93/13/EEC lists terms as potentially unfair that are:

'giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract'

Otherwise, traders would have full discretion in deciding whether the goods are in conformity with the contract. This is another example of a one-sided term that is to the detriment of consumers and may be considered unfair. The Court of Justice has not been asked by the national courts to interpret the general test of unfairness in light of Point 1(m) of the Directive's Annex. However, the Consumer Rights Directive, which is a maximum harmonisation instrument, requires that traders inform consumers about 'the existence of a

²⁵⁶ Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* [2013] ECLI:EU:C:2013:180, paragraphs 47, 48, 55. See Chapter 2.4.5 'One-Sided Changes to the Contract'.

legal guarantee of conformity of goods'.²⁵⁷ This provision falls within the category of mandatory disclosures and creates a positive obligation for traders.

France

Article 3 and Point 1(m) of the Directive's Annex are replicated in French law by Article L212-1 in connection with Article R212-1 no 4 of the Code de la consommation.²⁵⁸ The wordings used in the Directive and in the provision in the French Consumer Code are the same. The only difference is that clauses that allow for one-sided interpretation (*pouvoir d'interprétation*) of contractual terms are automatically unfair (included in the 'black list') under the French provisions.

Germany

Contractual clauses which allow traders to determine the conformity of goods or grant them the exclusive right to interpret the contract are prohibited by several provisions in the BGB. Unlike the Directive, the BGB lays down a series of much more precise traders' obligations prohibiting traders from limiting the legal guarantees enjoyed by consumers. In case of a dispute, consumers could rely on §§ 309 Nr. 7 and Nr. 8 of the BGB, and, by default, on the general clause in § 307 of the BGB.²⁵⁹ Nr. 7 concerns clauses which exclude or limit liability for injury to life, body or health and in case of gross fault, which has already been explored before.²⁶⁰ Nr. 8 has been examined in Chapter 2.4.2 and concerns clauses which exclude or limit liability for breaches of other obligations (*sonstige Haftungsausschlüsse*

²⁵⁷ Article 6(1)(l) of the Consumer Rights Directive 2011/83/EU. The provision is further examined in Chapter 3.3.1.1.

²⁵⁸ Julien (n 89) 313-316; Pellier (n 157) 126-129.

²⁵⁹ Christensen in Ernst (n 109) BGB § 309 Nr. 7 [6-8], § 309 Nr. 8 [3].

²⁶⁰ See Chapter 2.4.1 and Chapter 2.4.2.

bei Pflichtverletzung), in particular defects (lit. b).²⁶¹ The German provisions are more precise than Point 1(m), and consumers enjoy a higher level of protection when such clauses fall within § 309 Nr. 7 or Nr. 8 BGB. In any event, consumers will not be subject to a lower standard, as the general test (§ 307 of the BGB) ensures that the level of protection is the same as the one envisaged by the Directive.²⁶²

The Netherlands

Article 6:236(d) of the BW prohibits clauses which allow traders to assess whether they have fulfilled all of their obligations.²⁶³ As a result, Article 6:236(d) is much broader than Point 1(m), since the Dutch provisions covers the interpretation of all trader obligations and not merely the interpretation of the conformity of goods or the terms of the contract. In Dutch law, such terms are included in the ‘black list’, rather than in an indicative list, as in the Directive.

The United Kingdom

Schedule 2 Part 1(16) of the Consumer Rights Act 2015 transposes word-for-word the text of Point 1(m) of the Annex to the Directive. As mentioned above, all terms listed in Schedule 2 are only ‘potentially’ unfair and need to be assessed, in each case, under the general test of unfairness (Section 62).

²⁶¹ Christensen in Ernst (n 109) BGB § 309 Nr. 8 [1-3]; Wurmnest (n 102) BGB § 309 Nr. 8 [4-5].

²⁶² Christensen in Ernst (n 109) BGB § 309 Nr. 8 [33ff]; Wurmnest (n 102) BGB § 309 Nr. 8 [4].

²⁶³ Krans, Stolker, and Valk (n 115) BW Art 6:236 [4(a)]; Raijmakers (n 182) BW Art 6:236 [4.1].

Comparative Observations

Contractual terms allowing traders to exclusively interpret the contract or allowing traders to determine whether the goods supplied are in conformity with the contract are always unfair in France, Germany, and the Netherlands. In the UK, such clauses are assessed under the general test in connection with Schedule 2 Part 1(16).

2.4.9 One-Sided Compliance with Obligations

Contract clauses allowing for one-sided compliance with obligations by traders may be regarded unfair according Article 3 in connection with Point 1(o) of the Annex to the Directive 93/13/EEC. This is the case where the trader obliges the consumer to fulfil their obligation even though the trader is not performing theirs. The Court of Justice has not been asked by the national courts to interpret the general test of unfairness in light of Point 1(o).

France

In France, Article L212-1 in connection with Article R212-1 no 5 of the Code de la consommation (*exception d'inexécution*) transposes Point 1(o) of the Annex to the Directive. While the wording of the French provision is the same as in the Annex, the French provision provides for a higher level of protection because the term is contained in the *liste noire* ('black list').²⁶⁴ This leaves no discretion to the judge, which means that clauses allowing for one-sided compliance with the contract are deemed unfair under all circumstances.

²⁶⁴ Julien (n 89) 313-316; Pellier (n 157) 126-129.

Germany

§ 309 Nr. 2 and § 309 Nr. 8 of the BGB regulate contract clauses concerning one-sided compliance with obligations. § 309 Nr. 2 provides that the consumer's right to refuse performance (*Leistungsverweigerungsrecht*) cannot be excluded or limited (Nr. 2 lit. a), nor can the right to retention of the consumer be excluded or limited (Nr. 2 lit. b).²⁶⁵ § 309 Nr. 8 lit. a prohibits clauses which exclude the right of consumers to free themselves from the contract in case the trader breaches one of their duties, except for defective goods. Nr. 8 lit. b further lists further rights consumers have concerning defective goods (see Chapter 2.4.2).²⁶⁶ The German provisions are consequently wider and stricter than Point 1(o) of the Annex to the Directive.

The Netherlands

One-sided compliance with obligations clauses fall within the scope of Article 6:236(b) and Article 6:236(c) of the BW.²⁶⁷ Article 6:236(b) prohibits clauses which exclude or restrict the right of consumers to dissolve the contract, while Article 6:236(c) prohibits clauses which exclude or restrict the trader's obligation to perform the contract according to the statutory provisions in the BW. The Dutch provisions are together wider and also stricter (because they are included in the 'black list') than Article 3 in connection with Point 1(o).

²⁶⁵ Schäfer in Ernst (n 109) BGB § 309 Nr. 2 [3-5]; Wurmnest (n 102) BGB § 309 Nr. 2 [2].

²⁶⁶ Christensen in Ernst (n 109) BGB § 309 Nr. 8 [3]; Wurmnest (n 102) BGB § 309 Nr. 8 [4].

²⁶⁷ The provisions have been examined in Chapter 2.4.5.

The United Kingdom

Schedule 2 Part 1(18) of the Consumer Rights Act 2015 transposes word-for-word the text of Point 1(o) of the Annex to the Directive. Terms included in Schedule 2 must be assessed under the general test of unfairness (Section 62).

Comparative Observations

Contractual terms allowing for one-sided compliance with obligations are considered unfair under all circumstances in France, Germany, and the Netherlands. The UK does not go beyond the standard of the Directive and such terms must be assessed under the general test and Schedule 2 Part 1(18).

2.4.10 Transfers of Contracts to other Traders under Less Favourable Conditions

According to Article 3 in connection with Point 1(p) of the Directive's Annex, clauses that allow traders to transfer their rights and duties in cases where this reduces the guarantees for consumers without their consent may be considered unfair. The Court of Justice has not been yet asked by the national courts to consider such a scenario.²⁶⁸

France

Article L212-1 in connection with Article R212-2 no 5 of the Code de la consommation reproduces almost word-for-word Point 1(p) of the Annex to the Directive.²⁶⁹ Nonetheless, consumers enjoy an even higher level of protection under French law due to the reversed burden of proof ('grey list'). To show that the term is not unfair, traders need to prove that

²⁶⁸ cf Jansen in Jansen and Zimmermann (n 134) 961.

²⁶⁹ Julien (n 89) 313-316; Pellier (n 157) 126-129; Bénabent (n 160) 160-163.

the assignment of the contract (*cession de contrat*) is not likely to lead to a reduction in consumer rights and that the consumer has willingly and knowingly consented to it.²⁷⁰

Germany

§ 309 Nr. 10 of the BGB deals with a change of the other party to the contract (*Wechsel des Vertragspartners*). The provision provides that the change is allowed in case the trader provides the name of the third party to the consumer (§ 309 Nr. 10 lit. a) and where the consumer has the right to withdraw from the contract (§ 309 Nr. 10 lit. b).²⁷¹ The German provisions are not only stricter, as clauses falling within the scope of § 309 are always unfair ('black list'), but also more precise than the provision in the Annex, which merely requires that the change of the other party to the contract does not lower without the consumer's consent the legal guarantees.²⁷²

The Netherlands

Article 6:236(e) of the BW prohibits clauses which allow traders to transfer their obligations under less favourable conditions for consumers to other traders, unless consumers have the right to free themselves from the contract at any time or the clause provides for mergers and acquisitions of companies.²⁷³ The Dutch provision provides the

²⁷⁰ See for instance a recent judgment of the *Cour de Cassation* on the assignment of contracts: Cass civ (1) 6 December 2017, no 16-14974. Dalloz (n 228) 216.

²⁷¹ cf Dominik Klimke, *Die Vertragsübernahme* (Mohr Siebeck 2010) 243-244.

²⁷² Habersack in Ernst (n 109) BGB § 309 Nr. 10 [3-4]; Wurmnest (n 102) BGB § 309 Nr. 10 [2-4].

²⁷³ Krans, Stolker, and Valk (n 115) BW Art 6:236 [4(b)]; Raijmakers (n 182) BW Art 6:236 [4.2].

cf also Steven Bartels, 'Substitution of New Debtor: Transfer of Contract' in Danny Busch and others (eds), *The Principles of European Contract Law and Dutch Law: A Commentary II* (Kluwer Law International 2006) 135-136.

same legal requirements as Point 1(p) of the Directive's Annex, but is stricter ('black list' character).

The United Kingdom

Schedule 2 Part 1(19) of the Consumer Rights Act 2015 transposes Point 1(p) of the Directive's Annex. It needs to be assessed in court whether a clause allowing traders to transfer their obligations to other traders under less favourable conditions would pass the unfairness test under Section 62 of the Consumer Rights Act 2015. Hugh Beale and Wolf-Georg Ringe, and Ewan McKendrick point out that such an assessment under the general test is not required. Under the law of assignment, it is not possible to transfer contractual obligations to another party without the consent of the other contracting party.²⁷⁴ Such terms would thus be ineffective unless the consumer consents to the transfer.

Comparative Observations

Clauses which allow for the transfer of contracts to other traders under less favourable conditions for consumers are ineffective in Germany, the Netherlands, and the UK, while in France, traders must prove that it is not unfair to include such a clause in the contract. All jurisdictions mandate that consumers must be able to free themselves from the contract in case of a transfer of the contract to a third party.

2.4.11 Limitation of Rights to Legal Action

Article 3 in connection with Point 1(q) of the Annex to the Directive 93/13/EEC provides that consumers must have a right to redress. Contract terms 'may be considered unfair'

²⁷⁴ Hugh Beale and Wolf-Georg Ringe, 'Transfer of Rights and Obligations' in Gerhard Dannemann and Stefan Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford University Press 2013) 523-526; McKendrick (n 172) 477.

when such terms exclude or hinder consumers to take legal action or exercise legal remedies, especially by:

- ‘[1] requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions,
- [2] unduly restricting the evidence available to [consumers] or
- [3] imposing on [consumers] a burden of proof which, according to the applicable law, should lie with another party to the contract.’

The Court of Justice indicated that jurisdiction clauses are unfair when such clauses require the consumer to appear in front of a court situated a long way from the consumer’s domicile and consequently make it difficult for the consumer to take part in the proceedings.²⁷⁵ In *Océano*, the CJEU ruled that the general test of unfairness interpreted in light of Point 1(q) covers also domestic jurisdiction clauses, where it ‘may make it difficult for [consumers] to enter an appearance’,²⁷⁶ emphasising the relevance of costs and distance in relation to the price of the goods in assessing the term’s fairness.²⁷⁷ Such an evaluation also applies to contract terms that refer to national statutory provisions concerning the jurisdiction in consumer disputes.²⁷⁸

The CJEU has had a chance to look also at arbitration clauses and remedies. One of the relevant cases is *Asturcom Telecomunicaciones SL*,²⁷⁹ examined earlier in this Chapter (see Chapter 2.3). In *Asturcom*, a consumer contested neither an arbitration clause nor the consequent final arbitration award, and, under these circumstances, of unusual

²⁷⁵ Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v Roció Murciano Quintero; Salvat Editores SA v José M. Sánchez Alcón Pradès, José Luis Copano Badillo, Mohammed Berroane, Emilio Viñas Feliú* [2000] ECLI:EU:C:2000:346; Case C-243/08 *Pannon GSM Zrt v Erzsébet Sustikné Győrfi* [2009] ECLI:EU:C:2009:350; Case C-137/08 *VB Pénzügyi Lízing Zrt. v Ferenc Schneider* [2010] ECLI:EU:C:2010:659. cf Leczykiewicz (n 28) 354.

²⁷⁶ *ibid* (*Océano*) paragraph 22.

²⁷⁷ *ibid* paragraph 24.

²⁷⁸ Case C-266/18 *Aqua Med sp. z o.o. v Irena Skóra* [2019] ECLI:EU:C:2019:282.

²⁷⁹ Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECLI:EU:C:2009:615.

inattentiveness, *res judicata* under national law prevented the consumer from challenging the unfair term. The Chapter has already emphasised that this is rather exceptional, and, under normal circumstances, the Court expects the consumer interest to prevail over obstacles created by national procedural law. In another case, the Court ruled that a contract clause which required consumers to exclusively submit their claims to a permanent arbitration tribunal and against whose decisions is no judicial remedy under domestic law needed to be assessed for unfairness taking into account ‘all of the circumstances surrounding the conclusion of that contract’.²⁸⁰ National courts must especially:

‘verify whether the clause at issue has the object or effect of excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy; and take account of the fact that the communication to the consumer, before the conclusion of the contract at issue, of general information on the differences between the arbitration procedure and ordinary legal proceedings cannot alone rule out the unfairness of that clause.’²⁸¹

Similarly, contract clauses restricting available remedies may be considered unfair, and national courts have to assess ‘to what extent, the term in question derogates from the rules applicable in the absence of agreement between the parties, so as to make it more difficult for the consumer, given the procedural means at his disposal, to take legal action and exercise rights of the defence.’²⁸²

In addition to the CJEU-made rules outlined above, consumers are protected from ‘unfair’ jurisdiction clauses also by Regulation (EU) 1215/2012 on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (‘Brussels I Regulation (Recast)’).²⁸³ Section 4 of the Brussels I Regulation (Recast) regulates

²⁸⁰ Case C-342/13 *Katalin Sebestyén v Zsolt Csaba Kővári, OTP Bank, OTP Faktoring Követeléskezelő Zrt, Raiffeisen Bank Zrt* [2014] ECLI:EU:C:2014:1857.

²⁸¹ *ibid* paragraph 36.

²⁸² Case C-415/11 *Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* [2013] ECLI:EU:C:2013:164, paragraph 75.

²⁸³ Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1. See for example, Lorna E Gillies, ‘Recent developments in the approximation of EU private

jurisdiction over consumer contracts. The Regulation applies to business-to-consumer contracts (Article 17(2)(c) of the Regulation) where consumers act outside of their trade or profession (Article 17(1) of the Regulation). Traders may not bring a claim against the consumer outside of their domicile (Article 18(2) of the Regulation). According to Article 19, the parties can depart from these rules by an agreement:

- ‘(1) which is entered into after the dispute has arisen;
- (2) which allows the consumer to bring proceedings in courts other than those indicated in this Section; or
- (3) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.’

Another European Union instrument is Regulation (EC) 593/2008 (‘Rome I’) which regulates choice of law clauses. Article 6 of the Rome I Regulation provides that the law of the consumer’s habitual residence applies in case of B2C contracts.²⁸⁴ Consequently, through Regulation (EC) 593/2008 and Regulation (EU) 1215/2012, as well as the case law relating to Directive 93/13/EEC,²⁸⁵ there are *de facto* prohibitions on the EU level concerning contract terms which restrict the consumer’s right to redress.

France

Limiting the consumer’s right of redress is prohibited by the French Consumer Code (*Code de la consommation*). The Code contains three provisions which correspond to Point 1(q) of the Directive’s Annex. The first provisions prohibits (‘black list’) clauses which impose

international laws: towards mutual trust, mutual recognition and enhancing social justice in civil and commercial matters’ in Twigg-Flesner (n 39).

²⁸⁴ See for instance, Laura Maria van Bochove, ‘Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law’ (2014) 7(3) Erasmus Law Review 147.

²⁸⁵ Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

the burden of proof on consumers (*charge de la preuve*), even though it is legally on traders (Article L212-1 in connection with Article R212-1 no 12 of the Code de la consommation).²⁸⁶ Article L212-1 in connection with Article R212-2 no 10 states that clauses are presumed unfair ('grey list') when they eliminate or hinder the consumer's right to take legal action or access remedies, including by demanding from them to enter a non-regulated ADR or offer ADR exclusively. Furthermore, contractual clauses allowing for the restriction of evidence (*modes de preuve*) are presumed unfair ('grey list') under Article L212-1 in connection with Article R212-2 no 9. The French provisions transpose the rights enshrined in Article 3 in connection with Point 1(q) of the Annex to the Directive, but, unlike the Directive, the French provisions are not merely indicative. Instead, French law either presumes that such clauses unfair according to the *liste grise* ('grey list') or considers them always unfair under the *liste noire* ('black list').

Germany

The German Civil Code prohibits contract clauses which limit access to justice. § 309 Nr. 14 of the BGB deals with the waiver to enter in litigation (*Klageverzicht*). Nr. 14 prohibits clause which require consumers to first submit their claims to arbitration before they can legally challenge it, which is much stricter than the Directive. Point 1(q) of the Directive's Annex only covers clauses which force consumers to exclusively enter into 'arbitration not covered by legal provisions'.²⁸⁷ Furthermore, § 309 Nr. 12 of the BGB deals with the second part of Point 1(q) of the Annex, that is the one relating to terms restricting evidence available to consumers and placing the burden of proof (*Beweislast*) on consumers.²⁸⁸ Nr.

²⁸⁶ Julien (n 89) 313-316; Pellier (n 157) 126-129; Bénabent (n 160) 160-163.

²⁸⁷ Fuchs in Ernst (n 109) BGB § 309 Nr. 14 [7]; Wurmnest (n 102) BGB § 309 Nr. 14 [4-5].

²⁸⁸ Habersack in Ernst (n 109) BGB § 309 Nr. 12 [5-6]; Wurmnest (n 102) BGB § 309 Nr. 12 [2-3].

12 lit. b further states that the reversed burden of proof includes asking consumers to confirm certain facts, unless this concerns the receipt of goods.

§§ 309 Nr. 12 and Nr. 14 are stricter than the provision in the Directive's Annex, as these provisions are contained in a 'black list'.

The Netherlands

Dutch law equally prohibits terms that restrict the right of redress. Article 6:236(n) of the BW declares clauses unfair in situations in case consumers are asked to attend arbitration, unless consumers are given one month after such a term is invoked to bring a claim with the competent national court.²⁸⁹ Article 6:236(k) of the BW treats clauses as unfair which exclude or limit the right of the other party to provide evidence or changes the burden of proof (*bewijslast*) to the disadvantage of the consumer, particularly when such clauses require consumers to confirm the quality of the performance owed to them or placing the burden of proof on consumers that the lack of performance of the trader can be attributed to them.²⁹⁰ The Dutch rules are consequently much more precise than the one in the Directive's Annex, and, furthermore, these provision are not merely indicative as they are contained in the *zwarte lijst* ('black list').

²⁸⁹ Krans, Stolker, and Valk (n 115) BW Art 6:236 [7(d)]; Raijmakers (n 182) BW Art 6:236 [4.6]. Furthermore, Raijmakers notes that the provision only covers arbitration clauses since the reform in 2015. Whether to include arbitration clauses in letter (n) was discussed in Vesna Lazic, 'Arbitration Law Reform in the Netherlands: Formal and Substantive Validity of an Arbitration Agreement' in Sjef van Erp and Lars van Vliet (eds) *Netherlands Reports to the Seventeenth International Congress of Comparative Law* (Intersentia 2006) 136-138.

²⁹⁰ Krans, Stolker, and Valk (n 115) BW Art 6:236 [7(a)]; Raijmakers (n 182) BW Art 6:236 [4.6].

The United Kingdom

In the United Kingdom, clauses restricting remedies available to consumers may be regarded unfair in the light of the general test in conjunction with Schedule 2 Part 1(20) of the Consumer Rights Act 2015. The 2015 Act transposes, once again, word-for-word the Directive into UK law. Contractual clauses are, however, invalid according to Section 31(2) in case such clauses:

- ‘(a) exclude or restrict a right or remedy in respect of a liability under a provision listed in [Section 31] subsection (1),
- (b) make such a right or remedy or its enforcement subject to a restrictive or onerous condition,
- (c) allow a trader to put a person at a disadvantage as a result of pursuing such a right or remedy, or
- (d) exclude or restrict rules of evidence or procedure.’

Lit. (a) refers to Section 31(1) which bans traders from excluding or limiting their liability concerning: the goods to be of satisfactory quality (a), to be fit for particular purpose (b), to be as described (c), to match a sample (e), to match a model seen or examined (f), not conforming to contract if digital content does not conform (h); other pre-contract information included in contract (d); installation as part of conformity of the goods with the contract (g); trader to have right to supply the goods etc (i); delivery of goods (j); and passing of risk (k). Traders are consequently prohibited from including terms which limit availability of a remedy or restrict enforcement of the above rights (Section 31(2)(a)) or impose a restrictive or onerous condition (Section 31(2)(b)), put consumers at a disadvantage when they pursue such a right or remedy (Section 31(2)(c)) or exclude or restrict rules of evidence or procedure (Section 31(2)(d)). The rules contained in Section 31 of the Consumer Rights Act 2015 are stricter and more precise than Point 1(q) of the Directive’s Annex. Clauses that fall outside the scope of Section 31 are assessed under the general test (Section 62 of the Consumer Rights Act 2015 in connection with Schedule 2 Part 1(20)).

Comparative Observations

All four Member States provide very context-specific and precise provisions which go beyond the Directive and the CJEU case law. The French provisions replicate Point 1(q) of the Annex but offer a higher level of protection because the relevant terms are either automatically unfair and ineffective ('black list') or presumed to be unfair ('grey list'). In the UK, such clauses are always not binding on the consumer where they restrict the consumer rights contained in Section 31 of the CRA 2015. Clauses relating to the right to take legal action are assessed under the general test. The German and Dutch legislator have also enacted stricter rules, rendering clauses restricting the right of redress unfair and ineffective under all circumstances.

2.5 Conclusion

This Chapter has first examined in detail the implementing obligations arising from the Unfair Contract Terms Directive. The inquiry has then focused almost entirely on assessing whether the terms included in the non-exhaustive and indicative list included in the Annex to the Unfair Terms Directive can be considered unfair on the EU and national level. It has been revealed that the Court of Justice has interpreted the general test under Article 3 of the Directive in a way which has harmonised the national judicial practice.²⁹¹ The Member States' laws frequently also go beyond the envisaged indicative nature of the Directive's Annex. All four jurisdictions have enacted statutory provisions which render some of the terms listed in the Annex 'unfair', excluding the application of the general test of unfairness.²⁹² France, Germany, the Netherlands, and the United Kingdom all follow a

²⁹¹ With regard to the selected potentially unfair terms, see Points 1(e), (j), (l), and (q) of the Annex to the UCTD.

²⁹² This supports also the argument of Hondius who claimed that the Member States mostly provided for stricter rules prior to the enactment of the Directive. Hondius (n 11) 242.

relatively similar pattern. Each jurisdiction, as required by Article 3 of the Directive, has a general test under which clauses can be rendered unfair. Furthermore, these jurisdictions included lists into their statutory provisions, which may be either ‘indicative’, ‘grey’, or ‘black’. As a result of the extensive use of ‘grey lists’ and ‘black lists’ in France, Germany, and the Netherlands, courts have little discretion in rendering (or not rendering) certain contract terms unfair. The unfair terms lists in France are even regularly updated by the Commission on Unfair Clauses (*Commission des clauses abusives*). On the contrary, only a handful of contract terms are always unfair in the United Kingdom, allowing for a high degree of judicial discretion. However, like in the other three jurisdictions, the discretion of judges in the UK is limited by statutory provisions (Section 62 of the Consumer Rights Act 2015) and domestic and EU case law. Another UK peculiarity is that there have been few cases concerning unfair terms in court because the Competition and Markets Authority and other regulators have the power to investigate such cases.²⁹³ Administrative enforcement of consumer contract law also exists in France²⁹⁴ and the Netherlands,²⁹⁵ but not in Germany.²⁹⁶ In practice, most unfair terms are either challenged and then removed

²⁹³ McKendrick (n 172) 477-480. A more detailed account of the enforcement practices in the United Kingdom can be found in Christine Riefa and Chris Willett, ‘Enforcement and Effectiveness of Consumer Law in the UK’ in Hans-Wolfgang Micklitz and Geneviève Saumier (eds), *Enforcement and Effectiveness of Consumer Law* (Springer Publishing 2018).

²⁹⁴ Sabine Bernheim-Desvaux and Patricia Foucher, ‘L’effectivité du droit français de la consommation’ in Micklitz and Saumier (ibid) 289-291, 293-297. Hans-Wolfgang Micklitz notes that the French Unfair Terms Commission (*Commission des clauses abusives*) is the key actor in policing unfair contract terms in France, Micklitz (n 213) 132-134.

²⁹⁵ In the Netherlands, the Authority for Consumers and Markets (*Autoriteit Consument & Markt*) or other sector specific regulators have the power to investigate whether traders are using unfair terms. According to Vanessa Mak, the regulators closely collaborate with the Dutch Consumer Organisation (*Consumentenbond*), and can bring a claim on behalf of consumers in the form of collective redress under Article 3:305a of the BW. Vanessa Mak, ‘Enforcement and Effectiveness of Consumer Law: The Netherlands’ in Micklitz and Saumier (n 293) 394-399, 402-405.

²⁹⁶ Consumer and trader organisations as well as private parties can challenge unfair contract terms and, if necessary, take traders to court. Further details are provided in Maurice Nürnberg, *Die Durchsetzung von Verbraucherrechten: Eine rechtsvergleichende*

by traders before they end up in court or are resolved in the lower courts. Consequently, as shown in the previous Sections, there is only little case law in the four jurisdictions. Nonetheless, the examination of the rules implementing the Unfair Contract Terms Directive offers sufficient detail to measure trader compliance with these rules.

Analyse der Verbraucherrechtsdurchsetzung in Frankreich, den Niederlanden und Deutschland (Nomos 2020), who compares the German approach with the French and Dutch approach.

The German Federal Ministry for Economic Affairs and Energy has published a report in 2018 on the potential benefits of administrative enforcement of consumer (contract) law, Rupprecht Podszun, Christoph Busch, and Frauke Henning-Bodewig, ‘Behördliche Durchsetzung des Verbraucherrechts? Darstellung und Systematisierung von Möglichkeiten und Defiziten der privaten Durchsetzung des Verbraucherschutzes sowie Einbeziehung der Kartellbehörden zu dessen Durchsetzung’ (Bundesministerium für Wirtschaft und Energie, February 2018) available at <https://www.bmwi.de/Redaktion/DE/Publikationen/Studien/behoerdliche-durchsetzung-des-verbraucherrechts.pdf?__blob=publicationFile&v=13> accessed 12 December 2020. An English summary of the report is provided in Rupprecht Podszun, Christoph Busch, and Frauke Henning-Bodewig, ‘Consumer Law in Germany: A Shift to Public Enforcement?’ (2019) 8(2) *Journal of European Consumer and Market Law* 75.

Chapter 3

Mandatory Disclosures and Substantive Consumer Rights

3.1 Introduction

This Chapter maps the legal obligations which are to be imposed on e-commerce traders in the implementation of the E-Commerce Directive 2000/31 and Consumer Rights Directive 2011/83, and determines whether these rules fall within the scope of the empirical inquiry of the present thesis. Section 3.2 examines how France, Germany, the Netherlands, and the United Kingdom have implemented the information and formal requirements of the minimum harmonisation E-Commerce Directive. The discussion in Section 3.3 explores the mandatory disclosures and substantive consumer rights contained in the Consumer Rights Directive. The primary focus of this Section is on the rules enshrined in the Directive, as it is a maximum harmonisation instrument and Member States cannot deviate from the Directive's standard. Finally, the Chapter observes that only minor divergences exist between the four jurisdictions with regards to the implementing laws of the E-Commerce Directive, but the relevance of each minor divergence to the empirical analysis is elucidated once again. The Chapter concludes the doctrinal part of the thesis setting out the rights that consumers enjoy in e-commerce transactions which will be used in the following Chapters to assess trader compliance.

3.2 The E-Commerce Directive

The E-Commerce Directive deals with a variety of legal issues: Section 1 regulates establishment and information requirements (Articles 4 to 5); Section 2 commercial communications (Articles 6 to 8); Section 3 contracts concluded by electronic means (Articles 9 to 11); Section 4 liability of intermediary service providers (Articles 12 to 15). Only Sections 1 and 3 apply to e-commerce consumers sales transactions, for instance that electronic contracts must be given equivalent status to contracts concluded on paper.¹ In addition to redefining the treatment of online contracts, the Directive has also introduced new information and formal requirements that traders must comply with. These new disclosure requirements have complemented existing rules in Articles 4 and 5 of the Distance Selling Directive 97/7/EC.² The minimum harmonisation Distance Selling Directive 97/7/EC has since been repealed and replaced by the maximum harmonisation Consumer Rights Directive 2011/83/EU. Mandatory disclosures covered by the Consumer Rights Directive are subsequently not examined in this Section of Chapter 3, but in the one that follows (Section 3.3). Information and formal requirements which fall outside of the scope of the study are not considered either.³

Only four of the E-Commerce Directive's information and formal requirements are not covered by the Consumer Rights Directive. The two information requirements place an obligation on traders to permanently and visibly display their public trade or register

¹ Article 9 of Directive 2000/31/EC.

² Directive (EC) 97/7 of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144/19 (Distance Selling Directive). Aurelio Lopez-Tarruella, 'A European Community Regulatory Framework for Electronic Commerce' (2001) 38(6) Common Market Law Review 1356-1357.

³ For instance, e-commerce traders do not fall within activities that 'are subject to an authorization scheme' (Article 5(1)(e) of Directive 2000/31/EC) nor regulated professions (Article 5(1)(f) of Directive 2000/31/EC).

3. MANDATORY DISCLOSURES AND SUBSTANTIVE CONSUMER RIGHTS

number and VAT number on their websites.⁴ The two formal requirements require traders to provide consumers with guidance on how to conclude the contract as well as the languages available for the contract conclusion.⁵ Directive 2000/31/EC is a minimum harmonisation instrument and the rules thus need to be examined on both the European Union level and national level, as Member States are allowed to introduce stricter national rules.⁶

Another noteworthy characteristic of the Directive is its broad and far-reaching scope. The Directive applies to all information service providers.⁷ This includes e-commerce traders as their service is remunerated, carried out from a distance by electronic means, and provided on individual request.⁸ Selling goods online is also explicitly listed as a potential activity of an information service provider.⁹ The E-Commerce Directive furthermore applies to both business-to-consumer and business-to-business transactions,¹⁰ reflecting the Directive's ambition to 'lay down a clear and general framework to cover certain legal aspects of electronic commerce in the internal market'¹¹ and to 'ensure that electronic

⁴ Article 5(1)(d) of Directive 2000/31/EC and Article 5(1)(g) of Directive 2000/31/EC.

⁵ Article 10(1)(a) of Directive 2000/31/EC and Article 10(1)(d) of Directive 2000/31/EC.

⁶ Article 3 of Directive 2000/31/EC. Arno R Lodder, 'Directive 2000/31/EC on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market' in Arno R Lodder and Andrew Murray (eds), *EU Regulation of E-Commerce* (Edward Elgar Publishing 2017) 30-32.

⁷ Article 1 of Directive 2000/31/EC outlines the objectives and scope of the instrument. Andrej Savin, *EU Internet Law* (2nd edn, Edward Elgar Publishing 2017) 45-49.

⁸ Directive 2000/31/EC does not define 'information society services' but Recital 17 of the Directive refers to Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC (now Article 1(1)(b) of Directive 2015/1535/EU). The limitations set out in Annex I to Directive 2015/1535/EU do not affect e-commerce traders.

⁹ Recital 18 of Directive 2000/31/EC.

¹⁰ Article 2(d) of Directive 2000/31/EC. Further limitations are defined in Article 1 subsections 4 to 6 of Directive 2000/31/EC, but they do not fall within the scope of the present study.

¹¹ Recital 7 of Directive 2000/31/EC.

commerce could fully benefit from the internal market'.¹² The instrument thus applies horizontally, that is to say beyond e-commerce sales, as it provides a legal framework for almost all online transactions.¹³ It has laid the foundation for various other legal instruments, for instance regulating electronic signatures or copyright.¹⁴ Andrej Savin notes that this 'flexible structure' allows the instrument to adapt to future challenges.¹⁵ The mandated reviews of the E-Commerce Directive by both the European Commission¹⁶ and independent bodies, such as the Copenhagen Economics Institute,¹⁷ have also been positive.¹⁸

¹² Recital 4 of Directive 2000/31/EC.

¹³ The European Commission presented its first framework proposal for a Directive in 1997, responding to the increase of online transactions and the subsequent need for the regulation of e-commerce. One year later, the first legislative proposal for the Directive was put forward by the European Commission, and, after a Parliament-Council navette, the final draft was approved on 8 June 2000 (Article 24 of the E-Commerce Directive). Commission, 'A European Initiative in the sector of Electronic Commerce' (1997) COM 157 final - not published in the Official Journal of the European Union; Commission, 'Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal' (1998) COM 586 final OJ C30/4.

¹⁴ Lopez-Tarruella (n 2) 1339-1340; Stephen Weatherill, 'The Regulation of E-Commerce under EC Law: The Distribution of Competence between Home States and Host States as a Basis for Managing the Internal Market' in Henk Snijders and Stephen Weatherill (eds), *E-commerce Law: National and Transnational Topics and Perspectives* (Kluwer Law International 2003) 14-16; Lodder (n 6) 16-17.

¹⁵ Savin (n 7) 71-72.

¹⁶ Commission, 'First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)' COM (2003) 702 final.

¹⁷ Copenhagen Economics, 'Study on the economic impact of the electronic commerce Directive' September 2007; ULYS consortium, 'Study on Liability of Internet Intermediaries' (2007). Both studies are available via the European Commission website: Commission, 'Studies – 2007' (European Commission, 24 March 2017) available at <<https://ec.europa.eu/digital-single-market/en/news/archive-e-commerce-directive-what-happened-and-its-adoption>> accessed 4 November 2019.

¹⁸ Article 21 of Directive 2000/31/EC, which requires that the Commission reviews the instrument regularly.

Member States were required to implement the Directive by 17 January 2002,¹⁹ but Germany is the only jurisdiction included in the present study that implemented the Directive on time.²⁰ Although France, the Netherlands, and the United Kingdom failed to implement the Directive within the provided time limit, the Directive has eventually been implemented in these three countries.²¹ Despite the slight delay, the implementation of the E-Commerce Directive has been carried out relatively smoothly compared to the Unfair Contract Terms Directive, as discussed in the previous Chapter.

3.2.1 Information and Formal Requirements

In the Directive, one centrally important distinction lies between the information requirements (Article 5) and formal requirements (Article 10): under Article 5, the prescribed information must be displayed permanently and visibly on the traders' websites,²² while the formal requirements under Article 10 must only be met before the contract's conclusion.²³ Further to that, while Article 5 is of general application, Article 10 does not apply to 'contracts concluded exclusively by exchange of electronic mail or by

¹⁹ Article 22 of Directive 2000/31/EC.

²⁰ Only Austria, Germany, and Luxemburg implemented the Directive on time. Commission, 'National transposition measures communicated by the Member States concerning: Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')' (European Commission, 2019) available at <<https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32000L0031>> accessed 10 October 2019.

²¹ *ibid.* According to the European Commission's database, Germany implemented the E-Commerce Directive in November and December of 2001, the United Kingdom in August 2002, the Netherlands in 2004, and France only in 2004 and 2005.

²² Article 5(1) Directive 2000/31/EC. Lodder (n 6) 33; Dominik Lubasz and Monika Namysłowska, 'Directive 2000/31/EC: Article 5 General information to be provided' in Reiner Schulze and Dirk Staudenmayer (eds), *EU Digital Law: Article-by-Article Commentary* (Bloomsbury 2020) ECD Article 5 [1].

²³ Article 10(1) Directive 2000/31/EC. Lodder (n 6) 43-45.

equivalent individual communications’.²⁴ E-commerce traders typically do not individually communicate with consumers, making such a limitation irrelevant for the present study.

This Section examines how France, Germany, the Netherlands, and the United Kingdom have implemented the four pre-contractual information and formal requirements selected for this study. Member States are allowed to deviate from the minimum harmonisation E-Commerce Directive; it is therefore crucial to assess whether traders are held to different standards in these four Member States.

Public Trade or Register Number

The first legal requirement against which trader compliance will be assessed in the empirical part of the thesis concerns the display of the traders’ public trade or register numbers. E-commerce traders are required to display their trade or public register identification number on their website,²⁵ where it must be ‘easily, directly and permanently accessible’.²⁶

French traders are obliged to provide either their company (*registre du commerce et des sociétés*) or trade register number (*répertoire des métiers*) on their website.²⁷ The company registration number can be obtained from the registrar (*greffe*) of the local commercial court,²⁸ whereas the trade registration number is assigned by the Chamber of Skilled Trades

²⁴ Article 10(4) Directive 2000/31/EC. Lodder (n 6) 45.

²⁵ Article 5(1)(d) of Directive 2000/31/EC. Lodder (n 6) 36; Lubasz and Namysłowska (n 22) ECD Article 5 [36].

²⁶ Article 5(1) of Directive 2000/31/EC. Lodder (n 6) 33; Lubasz and Namysłowska (n 22) ECD Article 5 [51-54].

²⁷ Article L111-2 in connection with Article R111-2 no 1(c) of the Code de la consommation. Jérôme Julien, *Droit de la Consommation* (2nd edn, Librairie générale de droit et de jurisprudence 2017) 116; Thomas Piazzon, ‘L’information et la désinformation des consommateurs: Rapport français’ in Gert Straetmans (ed), *Information Obligations and Disinformation of Consumers* (Springer Publishing 2019) 166-168.

²⁸ Direction de l’information légale et administrative, ‘Recherche sur les entreprises immatriculées au registre du commerce et des sociétés (RCS)’ (Direction de l’information

3. MANDATORY DISCLOSURES AND SUBSTANTIVE CONSUMER RIGHTS

and Crafts (*Chambres de Métiers et de l'Artisanat*) to enterprises operating in one of the regulated professions.²⁹ According to the French regulatory provision, e-commerce traders need to obtain a company registration number, 'RCS' for short, and display it on their website to identify themselves, which includes the name of the authorising commercial court.

Similar to the French approach, Germany also has separate registers for industry and commerce (*Industrie- und Handelskammer*) and skilled crafts (*Handwerkskammer*). However, § 5(1) Nr. 4 of the Telemediengesetz outlines that traders must display their official registration number on their websites. Different registers exist for trades, clubs, partnerships, and cooperatives.³⁰ Typically, e-commerce traders need to have a trade registration number (*Handelsregisternummer*).³¹ Depending on their legal form, it is abbreviated with HRA or HRB.³² A German company with limited liability (*Gesellschaft mit beschränkter Haftung*) can be found in the latter HRB register.³³ Traders must acquire such number at their local district court (*Amtsgericht*).³⁴ The only exceptions are micro

légale et administrative, 2019) available at <<https://www.service-public.fr/professionnels-entreprises/vosdroits/R19859>> accessed 4 October 2019.

²⁹ Chambres de Métiers et de l'Artisanat, 'Le portail des Chambres de Métiers et de l'Artisanat: Immatriculation au Répertoire des métiers' (Chambres de Métiers et de l'Artisanat, 2020) available at <<https://www.artisanat.fr/porteur-de-projet/lancer-mon-activite/immatriculation-au-repertoire-des-metiers>> accessed 5 October 2020.

³⁰ Matthias Hartmann, 'Telemedienrecht' in Artur-Axel Wandtke (ed), *IT-Recht und Medienstrafrecht* (2nd edn, De Gruyter 2011) 56-58; Jan Müller-Broich, *Telemediengesetz* (Nomos 2012) TMG § 5 [11]; Markus Messinger, *Rechtsunsicherheiten bei internationalen elektronischen Handelsgeschäften* (Mohr Siebeck 2014) 293.

³¹ Portal of the Justice Authorities of the Federal and State Governments, 'Gemeinsames Registerportal der Länder' (Portal of the Justice Authorities of the Federal and State Governments, 2019) available at <https://www.handelsregister.de/rp_web/mask.do> accessed 4 October 2019.

³² § 3 of the Handelsregisterverordnung.

³³ § 3(3) of the Handelsregisterverordnung.

³⁴ § 14 of the Handelsgesetzbuch; § 1 of the Handelsregisterverordnung.

3. MANDATORY DISCLOSURES AND SUBSTANTIVE CONSUMER RIGHTS

companies (*Kleingewerbebetriebe*) and private corporations (*Gesellschaft bürgerlichen Rechts*), which do not necessarily need to be registered.³⁵ All other traders need to display the trade registration number including the name of the registry on their website.³⁶ The German Federal Court of Justice (*Bundesgerichtshof*) clarified that providing the information in the contact details or legal notice of the trader's website is sufficient.³⁷

The Dutch implementing provision also requires traders to display their public register number on their website (*Kamer van Koophandel Nummer*).³⁸ This number is automatically allocated to registered traders by the Dutch Chamber of Commerce (Article 9(a) of the *Handelsregisterwet* 2007) as they manage the commercial register (*Handelsregister*).³⁹

The United Kingdom transposed the Directive's requirement that traders need to display their registration number on their websites through Regulation 6(1)(d) of the Electronic

³⁵ § 3 of the *Handelsregisterverordnung*.

³⁶ OLG Hamburg AfP 2008, 511, where the trader failed to provide their trade registration number and the details of the relevant supervisory authority (as selling real estate is subject to an authorisation scheme) on their website. The Court found that the TMG applies to all commercial information service providers (*sämtliche kommerziellen Telemediendienste*), but failing to comply with the two aforementioned information requirements is not an automatic breach of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*, short UWG). cf Dirk Wüstenberg, 'Immer wieder Online-Impressum – Die Rechtsprechung seit der UGP-Richtlinie bis und die Rechtslage insbesondere ab Juni 2013' (2013) 9(11) *Verbraucher und Recht* 407.

³⁷ BGH NJW 2006, 3633. cf Sandra V Wagner, *Verbraucherschutz bei Vertragsschluss im Internet: ein Vergleich zwischen englischem und deutschem Recht* (De Gruyter 2010) 118-119.

³⁸ Article 6:230b Nr. 2 of the *Burgerlijk Wetboek*. Arno R. Lodder, Mark GA Egeler, and Wanda EL van Kerkvoorden, *Cyber Law in the Netherlands* (Kluwer Law International 2016) [251].

³⁹ Kamer van Koophandel, 'KVK-nummer: alles wat je moet weten' (Kamer van Koophandel, 2020) available at <<https://www.kvk.nl/informatiebank/kvk-nummer-alles-wat-je-moet-weten/>> accessed 5 October 2019.

3. MANDATORY DISCLOSURES AND SUBSTANTIVE CONSUMER RIGHTS

Commerce (EC Directive) Regulations 2002.⁴⁰ As in the Netherlands, every incorporated company is automatically allocated a registration number.⁴¹

It follows from this examination that only minor divergences reflecting technical differences exist in the four jurisdictions. All jurisdictions require traders to display their public register or trade number on their website, including the name of the issuing authority. French and German traders need to provide the name of the local court where their company is registered. On the contrary, UK traders only need to provide the nation in which they are registered: England and Wales, Scotland, or Northern Ireland. As there is only one central company register in the Netherlands, these distinctions do not exist, and as such there is no requirement to publicly display information regarding locality.

VAT Number

Traders are also obliged to display their value-added tax (VAT) identification number on their website.⁴² Like the requirement to display the trade register number, the VAT number must be ‘easily, directly and permanently accessible’.⁴³ VAT identification numbers are allocated to all legal persons in the European Union that carry out an economic activity,⁴⁴ including supply of goods.⁴⁵ E-commerce traders are consequently allocated a VAT

⁴⁰ Mark Turner, Mary Traynor, and Herbert Smith, ‘E-Commerce Directive – UK Implementation’ (2002) 18(6) Computer Law & Security Report 399. The requirement to display the registration number has been replicated in Section 7(1) and (2) of the Companies (Trading Disclosures) Regulations 2008, and Section 25(1) and (2) of the Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015.

⁴¹ Section 1066 of the Companies Act 2006.

⁴² Article 5(1)(g) of Directive 2000/31/EC. Lodder (n 6) 36; Lubasz and Namysłowska (n 22) ECD Article 5 [44-45].

⁴³ Article 5(1) of Directive 2000/31/EC. Lodder (n 6) 33; Lubasz and Namysłowska (n 22) ECD Article 5 [51-54].

⁴⁴ Article 9(1) of Directive 2006/112.

⁴⁵ Article 14 of Directive 2006/112.

number, which consists of a country code, for instance ‘NL’ for the Netherlands, and an individually allocated number.⁴⁶

All four jurisdictions have transposed this information requirement for traders and no substantive differences can be observed: French traders need to provide the *N° TVA intracommunautaire*;⁴⁷ German traders need to provide either the VAT registration number (*Umsatzsteueridentifikationsnummer*) or business identification number (*Wirtschaftsidentifikationsnummer*);⁴⁸ Dutch traders must provide their *belasting over de toegevoegde waarde* number, in short BTW;⁴⁹ and traders in the United Kingdom must display their value-added tax number on their website.⁵⁰

Guidance on Contract Conclusion

Article 10(1)(a) of the E-Commerce Directive introduces an obligation for traders to provide guidance on how consumers conclude a contract on their website.⁵¹ Traders must do so before consumers place their order.⁵² In practice, traders need to provide this

⁴⁶ Article 215 of Directive 2006/112.

⁴⁷ Article L111-2 in connection with Article R111-2 no 1(e) of the Code de la consommation. Julien (n 27) 116.

⁴⁸ § 5(1) Nr. 6 of the TMG in connection with § 27a Umsatzsteuergesetz. Hartmann (n 30); Müller-Broich (n 30) TMG § 5 [15]; Messinger (n 30) 293; Stefan Kolb, *Die Übergangsregelung der Richtlinie über unlautere Geschäftspraktiken* (Mohr Siebeck 2015) 121, 293.

⁴⁹ Article 6:230b Nr. 4 of the BW. Lodder, Egeler, and Wanda (n 38) [251].

⁵⁰ Regulation 6(1)(g) of the Electronic Commerce (EC Directive) Regulations 2002. Turner, Traynor, and Smith (n 40) 399.

⁵¹ Christian Twigg-Flesner, Reiner Schulze, and Jonathon Watson, ‘Protecting rational choice: information and the right of withdrawal’ in Geraint Howells, Iain Ramsay, and Thomas Wilhelmsson (eds), *Handbook of Research on International Consumer Law* (2nd edn, Edward Elgar Publishing 2018) 115; Esther Arroyo Amayuelas, ‘Directive 2000/31/EC: Article 10 Information to be provided’ in Schulze and Staudenmayer (n 22) ECD Article 10 [3, 5].

⁵² Article 10(1) of Directive 2000/31/EC.

3. MANDATORY DISCLOSURES AND SUBSTANTIVE CONSUMER RIGHTS

information to consumers once they have expressed their intention to purchase something on the website, for example by placing an item in their ‘basket’.⁵³ At this stage, the next steps must be outlined on the website, for instance delivery and payment options, or the possibility to review the order. The French,⁵⁴ German,⁵⁵ Dutch,⁵⁶ and UK⁵⁷ implementing rules do not go beyond the level of protection of the Directive.

Language Requirement

Another requirement under the Directive is that traders have to offer all information required by both the E-Commerce Directive and Consumer Rights Directive in the languages in which contracts may be concluded (Article 10(1)(d) of Directive 2000/31/EC).⁵⁸ Otherwise, consumers would find it difficult to enter into the contractual relationship or seek redress, for instance where the description of the goods is in another language than the terms and conditions. However, Article 10(1)(d) of Directive 2000/31/EC

⁵³ Lodder (n 6) 43-44.

⁵⁴ This requirement applies to B2B and B2C transactions, Article 1127-1 no 1 of the Code civil. Geoffray Brunaux, ‘La protection dépendante du contexte contractuel’ in Natacha Sauphanor-Brouillaud and others, *Les contrats de consommation: Règles communes* (2nd edn, Librairie générale de droit et de jurisprudence 2018) [734].

⁵⁵ § 312i(1) Nr. 2 of the BGB in connection with Article 246c Nr. 1 of the EGBGB. Messinger (n 30) 294; Christiane Wendehorst, ‘§ 312i Allgemeine Pflichten im elektronischen Geschäftsverkehr’ in Franz Jürgen Säcker and others (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (8th edn, C.H. Beck 2019) BGB § 312i [69-70].

⁵⁶ Article 6:227b Nr. 1(a) of the BW. Lodder, Egeler, and Wanda (n 38) [253].

⁵⁷ Regulation 9(1)(a) of the Electronic Commerce (EC Directive) Regulations 2002. Turner, Traynor, and Smith (n 40) 400-401. Donal Nolan, ‘Offer and Acceptance in the Digital Age’ in Andrew Burrows and Edwin Peel (eds), *Contract Formation and Parties* (Oxford University Press 2010) 84-86.

⁵⁸ Twigg-Flesner, Schulze, and Watson (n 51) 5, 11; Savin (n 7) 55-56; Lodder (n 6) 44; Esther Arroyo Amayuelas, ‘Directive 2000/31/EC: Article 10 Information to be provided’ in Schulze and Staudenmayer (n 22) ECD Article 10 [8-11].

should not be understood as a requirement for traders to offer the possibility of concluding a contract in more than one language.⁵⁹

France,⁶⁰ Germany,⁶¹ the Netherlands,⁶² and the United Kingdom⁶³ have implemented the language requirement into their national laws. France is the only country that goes beyond the minimum standard of the Directive, explicitly requiring traders operating in France to provide the contract terms in the state's official language.⁶⁴

3.2.2 Comparative Notes on the Implementation

The examination of the national rules implementing Directive 2000/31/EC revealed that the four Member States generally do not go beyond the standard of the Directive. Only France has decided to enact stricter rules concerning the language requirement contained in Article 10(1)(d) of the Directive, obliging traders to provide the contract terms in French as a minimum. There is also no case law to date by the Court of Justice of the European Union concerning the four trader obligations found in Articles 5 and 10 of Directive 2000/31/EC. Nonetheless, the laws of the four jurisdictions offer sufficient detail for the

⁵⁹ Wendehorst (n 55) [78].

⁶⁰ Article L224-76 of the Code de la consommation. The French legislator has decided to extend the scope of the provision to B2B contracts, see Article 1127-1 no 3 of the Code civil. Mustapha Mekki, 'France – The French Reform of Contract Law: The Art of Redoing Without Undoing' (2017) 10(1) Journal of Civil Law Studies 233; Brunaux (n 54).

⁶¹ § 312i(1) Nr. 2 of the BGB in connection with Article 246c Nr. 4 of the EGBGB. Messinger (n 30) 294; Wendehorst (n 55) [75-78].

⁶² Article 6:227b Nr. 1(d) of the BW. Lodder, Egeler, and Wanda (n 38) [253].

⁶³ Regulation 9(1)(d) of the Electronic Commerce (EC Directive) Regulations 2002. Turner, Traynor, and Smith (n 40) 400-401.

⁶⁴ See the provisions and literature in footnote 60. For a general discussion on language requirements in consumer contracts, see for instance Simon Whittaker, 'The Language or Languages of Consumer Contracts' (2006) 8 Cambridge Yearbook of European Law 229; Geraint Howells, Bevan Marten, and Wolfgang Wurmnest, 'Language of Information, Contract, and Communication' in Gerhard Dannemann and Stefan Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford University Press 2013).

3. MANDATORY DISCLOSURES AND SUBSTANTIVE CONSUMER RIGHTS

empirical assessment of how traders need to implement the pre-contractual information and formal requirements.

[This page was intentionally left blank]

3.3 The Consumer Rights Directive

The Consumer Rights Directive is a maximum harmonisation Directive which has fully aligned certain rules concerning the provision of goods and services in distance and off-premises consumer contracts, such as the right of withdrawal or information and formal requirements. The Directive repealed and replaced the Doorstep Selling Directive⁶⁵ and the Distance Selling Directive⁶⁶ and added new substantive rules to the European Consumer Acquis. The CRD also slightly amended the Unfair Terms Directive⁶⁷ and the Consumer Sales and Guarantees Directive.⁶⁸ In the original proposal of the European Commission, the Directive was also meant to replace the Unfair Terms Directive and the Consumer Sales and Guarantees Directive and thus replace the minimum harmonisation Directives with a maximum harmonisation instrument. This ambitious proposal would have unified the consumer laws of the EU Member States even further,⁶⁹ but the initiative failed due to

⁶⁵ Council Directive (EEC) 85/577 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31 (Doorstep Selling Directive).

⁶⁶ Directive (EC) 97/7 on the protection of consumers in respect of distance contracts [1997] OJ L144/19 (Distance Selling Directive).

⁶⁷ Council Directive (EEC) 93/13 on unfair terms in consumer contracts [1993] OJ L95/29 (Unfair Terms Directive).

⁶⁸ Directive (EEC) 99/44 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12 (Consumer and Guarantees Sales Directive).

⁶⁹ Hans-Wolfgang Micklitz and Norbert Reich, 'Crónica de una muerte anunciada: The Commission proposal for a "Directive on consumer rights"' (2009) 46(2) *Common Market Law Review* 471ff; Kathleen Gutman, *The Constitutional Foundations of European Contract Law: A Comparative Analysis* (Oxford University Press 2014) 32-36; Klaus Tonner, 'From the Kennedy Message to Full Harmonising Consumer Law Directives: A Retrospect' in Kai Purnhagen and Peter Rott (eds), *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz* (Springer Publishing 2014) 703-705; Joasia A Luzak and Vanessa Mak, 'The Consumer Rights Directive' in Arthur S Hartkamp and others (eds), *De invloed van het Europese recht op het Nederlandse privaatrecht* (Kluwer 2014) 70-72.

political objections in the European Parliament and Council.⁷⁰ The same fate was met by the Common European Sales Law,⁷¹ the proposal for which was withdrawn in 2015.⁷²

The Directive's scope is vertical and non-sectoral, which means that the implementing rules must apply to all B2C distance⁷³ and off-premises⁷⁴ contracts concerning the provision of goods and services.⁷⁵ The *lex specialis* rule for specific sectors further limits applicability of the Directive (Article 3(2)), with the effect that any provision of sectoral EU instruments prevails over the Directive. In addition, certain sectors, such as healthcare and social services, are entirely excluded from the scope of the Directive.⁷⁶ There are, however, no limitations concerning e-commerce sales. With regards to the Directive's

⁷⁰ For an overview of the debates in the legislative process, see Stephen Weatherill, 'The Consumer Rights Directive: How and why a quest for "coherence" has (largely) failed' (2012) 49(4) Common Market Law Review 1286-1290.

⁷¹ Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (CESL)' COM (2011) 635 final.

⁷² See for instance Hugh Beale, 'Art. 66-68: The Sources of Contract Terms Under the CESL' in Aurelia Colombi Ciacchi (ed), *Contents and Effects of Contracts-Lessons to Learn From The Common European Sales Law* (Springer Publishing 2016) 75-81.

⁷³ Article 2(7) of Directive 2011/83/EU: "'distance contract" means any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded'. According to Recital 20 of the Directive, the instrument applies to contracts concluded through traditional and electronic means.

⁷⁴ Article 2(8) of Directive 2011/83/EU.

⁷⁵ Martijn Hesselink notes that the scope of the Directive 'paved the way toward relatively autonomous consumer contract law', see Martijn W Hesselink, 'Toward a Sharp Distinction between b2b and b2c? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive' (2010) 18(1) European Review of Private Law 77.

⁷⁶ Article 3(3) of Directive 2011/83/EU. Although outside the scope of the present study, the material scope of the Consumer Rights Directive covers also the supply of goods that are of public interest: water, electricity, gas, and district heating (Recitals 11, 19, and 21 and Articles 2(3) and 3(1)). However, the Directive's rules on delivery (Article 18) and passing of risk (Article 20) do not apply 'to contracts for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, of district heating or the supply of digital content which is not supplied on a tangible medium' (Article 17(1) of Directive 2011/83/EU).

definition of traders and consumers, the instrument has adopted very similar definitions to the ones contained in the Distance Selling Directive.⁷⁷ According to Stefan Grundman and Klaus Tonner, the EU legislator has addressed the dual-use problem, that is to say whether a consumer acts in a private or commercial capacity, by adopting an even broader definition than the one offered by the Court of Justice in the *Gruber*⁷⁸ case.⁷⁹

⁷⁷ The Distance Selling Directive did not use the term traders. Instead, the Directive used the term supplier (Article 2(3) of the Distance Selling Directive). The definitions in the Consumer Rights Directive are more precise. Recital 16 of Directive 2011/83/EU explicitly provides that the definition of trader does not affect the laws on legal representation of the EU Member States. And since the Directive is not intended to introduce general consumer law principles, its definitions will apply only within the Consumer Rights Directive regime.

Article 2(1) of Directive 2011/83/EU: “consumer” means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession’. See also Recital 17 of the Directive.

Article 2(2) of Directive 2011/83/EU: “trader” means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive’.

⁷⁸ Case C-464/01 *Johann Gruber v BayWa AG* [2005] ECLI:EU:C:2005:32, paragraph 54: ‘A person who concludes a contract for goods intended for purposes which are in part within and in part outside his trade or profession may not rely on the special rules of jurisdiction laid down in Articles 13 to 15 of the Convention, unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect.’

⁷⁹ Stefan Grundmann, ‘The EU Consumer Rights Directive: optimizing, creating alternatives, or a dead end?’ (2013) 18(1) *Uniform Law Review* 103-104; Klaus Tonner, ‘The Consumer Rights Directive and its Impact on Internet and other Distance Consumer Contracts’ in Norbert Reich and others (eds), *European Consumer Law* (2nd edn, Intersentia 2014) 397.

Stefan Grundmann voices his concerns about the uncertainty around the new consumer/trader distinction, especially regarding the term ‘predominant’ trade purpose contained in Recital 17 of Directive 2011/83/EU: ‘The definition of consumer should cover natural persons who are acting outside their trade, business, craft or profession. However, in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person’s trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer.’ Consumers, however, fall outside the scope of the Directive in cases where the purpose of the transaction becomes predominantly professional after the (here service) contract is concluded, Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited* [2018] ECLI:EU:C:2018:37, paragraphs 36-38.

3. MANDATORY DISCLOSURES AND SUBSTANTIVE CONSUMER RIGHTS

The most important feature of the Directive is its imperative nature. Consumers cannot waive rights they derive from the national rules which implement the Directive: contractual clauses that directly or indirectly restrict the statutory rights of consumers are at no time binding.⁸⁰ This provision of the Consumer Rights Directive demonstrates the protective nature of the legal instrument, where the European legislator tried to close every possible loop-hole.⁸¹ Like all EU consumer contract law instruments, Directive 2011/83/EU leaves the enforcement⁸² and imposition of penalties for non-compliance to national authorities,⁸³ but the rules under they operate at the domestic level remain subject to EU law principles like effectiveness, proportionality, and dissuasive effect.

It has already been pointed out that the Consumer Rights Directive provides for a targeted full harmonisation standard, which does not allow the Member States to opt for a lower or higher level of protection. The Directive, however, contains several options which allow the Member States to deviate from the rules of the CRD.⁸⁴ The options concern off-premise sale of goods and service contracts,⁸⁵ contracts concluded by telephone,⁸⁶ and other scenarios,⁸⁷ which all fall outside the scope of the empirical enquiry of the present study

⁸⁰ Article 25 of Directive 2011/83/EU.

⁸¹ Weatherill (n 70) 1306.

⁸² Article 23 of Directive 2011/83/EU.

⁸³ Article 24 of Directive 2011/83/EU.

⁸⁴ Article 4 of Directive 2011/83/EU.

⁸⁵ Articles 3(4), 7(4), and 9(3) of Directive 2011/83/EU.

⁸⁶ Article 8(6) of Directive 2011/83/EU.

⁸⁷ Articles 6(7), 6(8), and 5(3) of Directive 2011/83/EU.

Article 6(7) allows Member States to maintain or introduce language requirements concerning the contractual information duties. The possibility of introducing a language requirement has been examined with regard to the E-Commerce Directive (Article 10(1)(d) of Directive 2000/31/EC).

Article 6(8) grants Member States the option to impose additional information requirements to the extent that such a possibility exists under Directive 2000/31/EC on electronic commerce and Directive 2006/123/EC on the services in the internal market. National

and are thus not examined further.⁸⁸ Despite these regulatory choices, the common-place practice of opting for a higher level of protection – known as gold-plating, which is permitted under EU minimum harmonisation Directives – is restricted by the Directive's maximum harmonisation nature.⁸⁹ Nonetheless, Member States can enact (stricter) rules if they fall outside the material scope of the Directive. For instance, Member States can extend the scope of the Directive to B2B scenarios.⁹⁰ For the purpose of the present study, all information and formal requirements as well as substantive rights of consumers are only examined on the EU level, as the Member States are not allowed to deviate from these rules in the context on which this thesis focuses.

information requirements introduced in addition to the ones contained in the E-Commerce Directive are not considered because it would not allow for a comparison of the levels of compliance between the four Member States.

Article 5(3) allows Member States to exclude the information and formal requirements contained in Article 5(1) from day-to-day transactions which are immediately performed.

⁸⁸ France is the only jurisdiction included in the present study which has adopted all of the options contained in the Directive in the most favourable way for consumers. Guillaume Busseuil, 'Implementation of the Consumer Rights Directive: France' (2014) 3(4) *Journal of European Consumer and Market Law* 271-272; Christoph Busch, 'Implementation of the Consumer Rights Directive Germany' (2014) 3(2) *Journal of European Consumer and Market Law* 119-120; Joasia A Luzak and Vanessa Mak, 'Implementation of the Consumer Rights Directive: The Netherlands' (2014) 3(2) *Journal of European Consumer and Market Law* 127-128; Christian Twigg-Flesner, 'Consumer Sales in the United Kingdom after the Implementation of the Consumer Rights Directive' in Giovanni de Cristofaro and Alberto de Franceschi (eds), *Consumer sales in Europe: after the implementation of the Consumer Rights Directive* (Intersentia 2016) 195-196.

⁸⁹ Article 29 of Directive 2011/83/EU requires that Member States report the 'use of any of the regulatory choices referred to in Article 3(4), Article 6(7), Article 6(8), Article 7(4), Article 8(6) and Article 9(3)' to the European Commission.

Additional deviations and inconsistencies in the implementation of the Directive's options in other Member States have been put forward by Giovanni de Cristofaro, see Giovanni de Cristofaro, 'After Implementing Directive 2011/83/EU in the Member States: Are the National Provisions on Consumer Contracts Really Harmonised? Some Critical Remarks' (2014) 3(4) *Journal of European Consumer and Market Law* 217-223.

⁹⁰ Recitals 13 and 14 of Directive 2011/83/EU. Tonner (n 79) 400-401.

3. MANDATORY DISCLOSURES AND SUBSTANTIVE CONSUMER RIGHTS

Prior to the adoption of the Consumer Rights Directive, only minimum harmonisation instruments were enacted to regulate e-commerce distance sales.⁹¹ The option of adopting stricter rules had been used by some Member States.⁹² However, the European Commission clarified in its strategy papers that it would continue to issue proposals for maximum harmonisation instruments to govern at-distance and off-premises contracts in order to facilitate cross-border trade.⁹³ This shift towards the use of maximum instead of minimum harmonisation Directives has been highly controversial. Stephen Weatherill observes that creating one standard of consumer protection leaves no room for national regulatory innovation, which in his view subsequently limits local autonomy and choice.⁹⁴ More general criticism levelled against the Directive and the current approach in European Contract Law concerns their failure to take into account empirical evidence, such as the findings of behavioural law and economics.⁹⁵ Several academics have questioned the approach taken concerning mandatory disclosures.⁹⁶ In the view of Christoph Busch, the

⁹¹ Catalina Goanta conducted an empirical study on the converging effects of the EU's harmonisation policies, for instance concerning the national implementation of the Distance Selling Directive, Catalina Goanta, *Convergence in European Consumer Sales Law: A Comparative and Numerical Approach* (Intersentia 2016) 271.

⁹² This Section will provide further details on the level of consumer protection prior to the adoption of the Consumer Rights Directive 2011/83/EU.

⁹³ Commission, 'Consumer Policy Strategy 2002-2006' (2002) COM 208 final; Commission, 'EU Consumer Policy Strategy 2007-2013' (2007) COM 99 final.

⁹⁴ Weatherill (n 70) 1316-1317.

⁹⁵ See for instance Horst Eidenmüller, 'Why Withdrawal Rights?' (2011) 7(1) *European Review of Contract Law* 18-22; Joasia A Luzak, 'To Withdraw Or Not To Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking Into Account Its Behavioural Effects on Consumers' (2011) 37(1) *Journal of Consumer Policy* 91-93; Elizabeth Hall, Geraint Howells, and Jonathon Watson, 'The Consumer Rights Directive – An Assessment of its Contribution to the Development of European Consumer Contract Law' (2012) 8(2) *European Review of Contract Law* 164-166.

⁹⁶ See for instance Christoph Busch, 'The future of pre-contractual information duties: from behavioural insights to big data' in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar Publishing 2016) 239-240; Geneviève

evidence seems to be divided on how consumers process information and whether mandatory disclosures lead to more informed decisions. Busch also questions whether the current pre-contractual information system is fit for purpose in light of a ‘trend towards more personalisation’.⁹⁷

The final version of the proposal for the Directive was adopted on 25 October 2011 with a deadline for implementation into national law by 13 June 2014.⁹⁸ France,⁹⁹ Germany,¹⁰⁰ the Netherlands,¹⁰¹ and the United Kingdom¹⁰² all implemented the Consumer Rights

Helleringer and Anne-Lise Sibony, ‘European Consumer Protection Through the Behavioral Lense’ (2017) 23(3) *The Columbia Journal of European Law* 617-619.

⁹⁷ *ibid* (Busch).

⁹⁸ Article 28(1) of Directive 2011/83/EU.

⁹⁹ Loi n° 2014-344 of 17 March 2014 (*relative à la consommation*); Décret n° 2014-1061 of 17 September 2014 (*relatif aux obligations d’information précontractuelle et contractuelle des consommateurs et au droit de retractation*); Ordonnance n° 2016-301 of 14 March 2016 (*relative à la partie législative du code de la consommation*); Décret n° 2016-884 of 29 June 2016 (*relatif à la partie réglementaire du code de la consommation*). Carole Aubert de Vincelles, ‘Consumer Sales in France after the Implementation of the Consumer Rights Directive’ in de Cristofaro and Franceschi (n 88); 59-60; Busseuil (n 88) 270–274.

¹⁰⁰ Gesetz zur Umsetzung der Verbraucherrechtlinie und zur Änderung des Gesetzes zur Regelung der Wohnungsvermittlung vom 20 September 2013, (27.09.2013) Bundesgesetzblatt Teil 1, 3642-3670. Martin Schmidt-Kessel, ‘Consumer Sales in Germany after the Implementation of the Consumer Rights Directive’ in de Cristofaro and Franceschi (n 88) 74-77, 83; Busch (n 88) 119–122.

¹⁰¹ Kamerstukken II, 2012/2013, 33 520, nr. 3. Marco Loos, ‘Consumer Sales in the Netherlands after the Implementation of the Consumer Rights Directive’ in de Cristofaro and Franceschi (n 88) 110-112; Luzak and Mak, (n 88) 127–129.

¹⁰² Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013; The Consumer Rights (Payment Surcharges) Regulations 2012; Legal Notice No.175 of 2013: Contract and Tort Act (Amendment) Regulations 2013. Legal Notice No.176 of 2013: Consumer Protection (Unfair Trading) Act 2008 (Amendment) Regulations 2013. Legal Notice No.177 of 2013: Consumer Rights on Contract Regulations 2013; The Consumer Rights Act 2015. Twigg-Flesner (n 88) 196-198, 204-205; Paula Giliker, ‘The Transposition of the Consumer Rights Directive into UK Law: Implementing a Maximum Harmonization Directive’ (2015) 23(1) *European Review of Private Law* 9-11; Christian Twigg-Flesner, ‘Consolidation rather than codification – or just complication? The UK’s Consumer Rights Act 2015’ (2019) 27(1) *Zeitschrift für Europäisches Privatrecht* 170ff.

Directive into national law and did so on time.¹⁰³ The Consumer Rights Directive will soon be revised as part of the Commission's New Deal for Consumers,¹⁰⁴ and the Member States are required to transpose the new Directive 2019/2161/EU by 28 May 2022.¹⁰⁵ The New Deal for Consumer is consequently addressed after the compliance assessment part of the thesis (Chapter 5) because traders were not bound by these rules at the time of carrying out that assessment (Chapter 6 Policy Recommendations).

3.3.1 Mandatory Disclosures and Substantive Rights

The Consumer Rights Directive has further harmonised existing and also introduced new mandatory disclosures and substantive consumer rights. Traders must comply with the national rules implementing the Directive's information and formal requirements in the pre-contractual phase, whereas consumers can only rely on the substantive rules once the contract is concluded. This Section examines how the Consumer Rights Directive's consumer contract rules operate and determines whether these rules fall within the scope of the present study.

3.3.1.1 Information Requirements

Traders are required to make certain information available to consumers in distance contracts. Article 6 of the Consumer Rights Directive includes an exhaustive list of specific

¹⁰³ Commission, 'National transpositions by Member State' (European Commission, 2020) available at <<https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32011L0083>> accessed 20 October 2020.

¹⁰⁴ Commission, 'A New Deal for Consumers' (Communication) COM (2018) 183 final. Article 4 of Directive (EU) 2015/1535 of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services [2015] OJ L241/1.

¹⁰⁵ Article 7 of Directive 2019/2161/EU.

information that must be set out in a ‘clear and comprehensible manner’ on traders’ websites. In an e-commerce distance contract, traders have to provide consumers with the main characteristics of the goods,¹⁰⁶ the identity of the trader,¹⁰⁷ the geographical address,¹⁰⁸ the total price of the goods or services inclusive of taxes,¹⁰⁹ the costs for the use of distance communication,¹¹⁰ the payment arrangements, delivery and performance,¹¹¹ the conditions of the rights of withdrawal (including a model withdrawal form),¹¹² the costs for returning the goods,¹¹³ and the existence of a legal guarantee of conformity of goods.¹¹⁴ There are also several information requirements that apply only to contractual situations which are not covered by the present study.¹¹⁵

¹⁰⁶ Article 6(1)(a) of Directive 2011/83/EU.

¹⁰⁷ Article 6(1)(b) of Directive 2011/83/EU.

¹⁰⁸ Article 6(1)(c) and (d) of Directive 2011/83/EU. Article 6(1)(c) states that traders have to provide their ‘telephone number, fax number and e-mail address, where available’. The Court of Justice recently clarified that traders can provide any form of ‘communication capable of satisfying the criteria of direct and effective communication’, so not only the three options provided in the Directive, see Case C-649/17 *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Amazon EU Sàrl* [2019] ECLI:EU:C:2019:576, paragraph 53.

¹⁰⁹ Article 6(1)(e) of Directive 2011/83/EU.

¹¹⁰ Article 6(1)(f) of Directive 2011/83/EU.

¹¹¹ Article 6(1)(g) of Directive 2011/83/EU.

¹¹² Article 6(1)(h), (j), and (k) of Directive 2011/83/EU.

¹¹³ Article 6(1)(i) of Directive 2011/83/EU.

¹¹⁴ Article 6(1)(l) of Directive 2011/83/EU. Evelyne Terryn and Joyce Vandenbulcke, ‘Directive 2011/81/EU: Article 6 Information requirements for distance or off-premises contracts’ in Schulze and Staudenmayer (n 22) CRD Article 6 [24ff].

David Kästle-Lamparter, ‘Art 2:403: Information Requirements for Distance and Off-premises Consumer Contracts’ in Nils Jansen and Reinhard Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press 2018) Art. 2:403 [12-20], who contrasts the information requirements of the Distance Selling Directive and E-Commerce Directive with the ones in the Consumer Rights Directive, and notes that the obligations for traders are almost identical.

¹¹⁵ Article 6(1)(p-s) of Directive 2011/83/EU. Article 6(1)(t) of the Directive falls within the scope of the present and is discussed in detail in Section 3.3.1.6 of this Chapter.

Consumers are provided with a remedy in cases where traders fail to provide some of the information required under Article 6. For instance, consumers do not bear any additional costs should a trader fail to indicate the total price of the goods, as required by Article 6(1)(e), or the costs of returning the goods, as required by Article 6(1)(i).¹¹⁶ The Directive also places the burden of proof on traders.¹¹⁷

It should be noted that other sectoral instruments, such as the E-Commerce Directive, take precedence when it comes to the regulation of information and formal requirements (*lex specialis*).¹¹⁸ Nonetheless, Member States are not allowed to adopt any additional pre-contractual information and formal requirements when implementing the Consumer Right Directive into national law (Article 8(10) of the Directive).¹¹⁹ The compliance assessments will therefore only take into account the above mentioned provisions.

3.3.1.2 Formal Requirements

The Directive's formal requirements place an obligation on traders to display the information under Article 6(1) in a certain manner to consumers.¹²⁰ The first legal requirement is that traders have to provide the information to consumers 'in a way appropriate to the means of distance communication used in plain and intelligible language', *id est* a durable medium.¹²¹ Traders have to provide consumers with certain

¹¹⁶ Article 6(6) of Directive 2011/83/EU.

¹¹⁷ Article 6(9) of Directive 2011/83/EU. Weatherill (n 70) 1292-1295; Grundmann (n 79) 108-111.

¹¹⁸ Article 6(8) of Directive 2011/83/EU and Article 8(9) of Directive 2011/83/EU.

¹¹⁹ Weatherill (n 70) 1295; Grundmann (n 79) 111-112.

¹²⁰ Article 8 of Directive 2011/83/EU.

¹²¹ Article 8(1) in connection with Article 2(10) of Directive 2011/83/EU. Evelyne Terryn and Joyce Vandenbulcke, 'Directive 2011/81/EU: Article 6 Information requirements for distance or off-premises contracts' in Schulze and Staudenmayer (n 22) CRD Article 6 [22].

3. MANDATORY DISCLOSURES AND SUBSTANTIVE CONSUMER RIGHTS

information prior to conclusion of the contract,¹²² that is the characteristics of the goods,¹²³ the identity of the trader,¹²⁴ the total price of the goods or services inclusive of taxes,¹²⁵ and the conditions of the rights of withdrawal.¹²⁶ Moreover, traders must make consumers ‘aware in a clear and prominent manner, directly before the consumer places his order, of’¹²⁷ the characteristics of the goods,¹²⁸ and the total price of the goods or services inclusive of taxes.¹²⁹ Additional information requirements contained in the Directive but falling outside the parameters of the present study are those relating to the duration of the contract¹³⁰ and ‘the minimum duration of the consumer’s obligations under the contract’.¹³¹ In addition, traders are required to inform consumers of any applicable delivery restrictions and all possible forms of payment at the beginning of the purchase process.¹³² A further formal requirement mandates that the confirmation of the conclusion of the contract must be sent to consumers on a durable medium within a reasonable period of time, which is

¹²² Article 8(4) of Directive 2011/83/EU.

¹²³ Article 6(1)(a) of Directive 2011/83/EU.

¹²⁴ Article 6(1)(b) of Directive 2011/83/EU.

¹²⁵ Article 6(1)(e) of Directive 2011/83/EU.

¹²⁶ Article 6(1)(h) of Directive 2011/83/EU. Evelyne Terryn and Joyce Vandenbulcke, ‘Directive 2011/81/EU: Article 6 Information requirements for distance or off-premises contracts’ in Schulze and Staudenmayer (n 22) CRD Article 6 [24ff].

¹²⁷ Article 8(2) of Directive 2011/83/EU.

¹²⁸ Article 6(1)(a) of Directive 2011/83/EU.

¹²⁹ Article 6(1)(e) of Directive 2011/83/EU. David Kästle-Lamparter, ‘Art 2:405: Formal and Additional Requirements for Distance Consumer Contracts’ in Nils Jansen and Reinhard Zimmermann (n 112) Art. 2:405 [2-6], who examines the formal requirements in distance consumer contracts, including a comparison between the former rules of the Distance Selling Directive and the new ones contained in the Consumer Rights Directive.

¹³⁰ Article 6(1)(o) of Directive 2011/83/EU.

¹³¹ Article 6(1)(p) of Directive 2011/83/EU.

¹³² Article 8(3) of Directive 2011/83/EU.

defined as any time before the delivery of the goods.¹³³ Compliance with delivery and contract confirmation requirements will not be assessed in the present study, as to do so would necessitate the purchase of the goods in question.

3.3.1.3 Right of Withdrawal

Assessing trader compliance with the right of withdrawal involves the investigation of fulfilment by them with a series of independent obligations. First and foremost, consumers enjoy a 14-day ‘cooling off’ period in which they can decide to keep the goods or not.¹³⁴ The withdrawal period begins to run on the day where ‘the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the good’.¹³⁵ But in cases where the consumer has ordered multiple goods together, the cooling-off period starts with the delivery of the last item.¹³⁶ The same applies where purchased goods consist of multiple lots or pieces.¹³⁷

Consumers also do not have to justify their decision or be required to bear any costs of withdrawal.¹³⁸ Traders are, however, allowed to charge consumers where they have opted for ‘a type of delivery other than the least expensive type of standard delivery offered by

¹³³ Article 8(7) of Directive 2011/83/EU. That confirmation should include all information required by Article 6(1) of the Directive, unless it was provided to the consumer in advance (Article 8(7)(a) of Directive 2011/83/EU). Weatherill (n 70) 1295; Tonner (n 79) 404-406.

In certain cases, the confirmation of the consumer’s consent and acknowledgment needs to be attached in accordance with Article 16 of the Consumer Rights Directive (Article 8(7)(b) of Directive 2011/83/EU).

¹³⁴ Article 9 of Directive 2011/83/EU.

¹³⁵ Article 9(2)(b) of Directive 2011/83/EU.

¹³⁶ Article 9(2)(b)(i) of Directive 2011/83/EU.

¹³⁷ Article 9(2)(b)(ii) of Directive 2011/83/EU. However, the rules differ for regular deliveries. In this case, the clock starts ticking as soon as the first good arrives, see Article 9(2)(b)(iii) of Directive 2011/83/EU.

¹³⁸ Article 9(1) of Directive 2011/83/EU.

3. MANDATORY DISCLOSURES AND SUBSTANTIVE CONSUMER RIGHTS

the trader’,¹³⁹ where the trader has stipulated in their terms that the consumer will bear the costs of returning the goods,¹⁴⁰ and/or additionally ‘for any diminished value of the goods resulting from the handling of the goods other than what is necessary to establish the nature, characteristics and functioning of the goods.’¹⁴¹ The Member States are also not allowed to extend the scope of the statutory right of withdrawal to situations where: the price of the goods is dependent on fluctuations in the financial market;¹⁴² the goods are specified or personalised for the consumer’s needs;¹⁴³ the goods are liable to deteriorate or expire rapidly;¹⁴⁴ the goods are sealed and not suitable for return;¹⁴⁵ the goods are due to their nature inseparably mixed with other items;¹⁴⁶ the goods are alcoholic beverages;¹⁴⁷ the goods have been specifically requested and installed;¹⁴⁸ audio or video recordings and computer software have been unsealed by the consumer;¹⁴⁹ the goods are newspapers, periodicals or magazines with the exception of the supply of subscription contracts;¹⁵⁰ and goods purchased at public auctions.¹⁵¹ These situations do not affect the scope of the present study.

¹³⁹ Article 13(2) of Directive 2011/83/EU.

¹⁴⁰ Article 14(1) of Directive 2011/83/EU.

¹⁴¹ Article 14(2) of Directive 2011/83/EU. Caroline Cauffman, ‘The Consumer Rights Directive Adopted’ (2012) 19(1) *Maastricht Journal of European and Comparative Law* 215-216.

¹⁴² Article 16(b) of the Directive 2011/83/EU.

¹⁴³ Article 16(c) of the Directive 2011/83/EU.

¹⁴⁴ Article 16(d) of the Directive 2011/83/EU.

¹⁴⁵ Article 16(e) of the Directive 2011/83/EU.

¹⁴⁶ Article 16(f) of the Directive 2011/83/EU.

¹⁴⁷ Article 16(g) of the Directive 2011/83/EU.

¹⁴⁸ Article 16(h) of the Directive 2011/83/EU.

¹⁴⁹ Article 16(i) of the Directive 2011/83/EU.

¹⁵⁰ Article 16(j) of Directive 2011/83/EU.

¹⁵¹ Article 16(k) of Directive 2011/83/EU.

3. MANDATORY DISCLOSURES AND SUBSTANTIVE CONSUMER RIGHTS

Traders are furthermore required to inform consumers about the right of withdrawal prior to or at the time of purchase and they also have to provide a withdrawal form.¹⁵² An example of how such a withdrawal form should look like is contained in Annex I to the Consumer Rights Directive, but traders are allowed to provide their own form or an electronic option on their website.¹⁵³ Consumers in turn must use the withdrawal form¹⁵⁴ or ‘make any other unequivocal statement setting out [their] decision to withdraw from the contract’.¹⁵⁵ In case of a dispute, consumers will have to prove that they have exercised their right of withdrawal in accordance with Article 11 of the Directive.¹⁵⁶ Traders’ failure to inform consumers about the right has a number of far-reaching consequences. Most importantly, the ‘cooling-off’ period is extended to 12 months from the end of the statutory withdrawal period.¹⁵⁷ However, should traders inform consumers of their right of withdrawal within the 12 months, the withdrawal period expires within 14 days from the day the consumer was informed.¹⁵⁸ Another consequence of failing to provide the information is that the trader will have to bear the risk of the value of the goods

¹⁵² Article 6(1)(h) of Directive 2011/83/EU. Traders are not required to display the model withdrawal form in case the ‘means of distance communication [...] allows limited space or time to display the information’, for instance contracts concluded by telephone, Case C-430/17 *Walbusch Walter Busch GmbH & Co. KG v Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV* [2019] ECLI:EU:C:2019:47, paragraph 46. Evelyne Terryn and Joyce Vandenbulcke, ‘Directive 2011/81/EU: Article 6 Information requirements for distance or off-premises contracts’ in Schulze and Staudenmayer (n 22) CRD Article 8 [21].

¹⁵³ Article 11(3) of Directive 2011/83/EU.

¹⁵⁴ Article 11(1)(a) of Directive 2011/83/EU.

¹⁵⁵ Article 11(1)(b) of Directive 2011/83/EU.

¹⁵⁶ Article 11(4) of Directive 2011/83/EU.

¹⁵⁷ Article 10(1) of Directive 2011/83/EU.

¹⁵⁸ Article 10(2) of Directive 2011/83/EU. This idea of providing for a remedy in case of a failure on the part of the trader to notify the consumer is not novel. The Distance Selling Directive already provided for such a remedy, but limited the maximum withdrawal period to three months (Article 6(1) of Directive 97/7/EC).

3. MANDATORY DISCLOSURES AND SUBSTANTIVE CONSUMER RIGHTS

diminishing¹⁵⁹ and cover the costs of returning the goods to them if they failed to stipulate that consumers were liable for the cost of returning the goods.¹⁶⁰

The consumer's withdrawal from the contract has three far-reaching effects. Firstly, the cancellation terminates the obligations of the parties to perform the contract,¹⁶¹ including any ancillary contracts.¹⁶² Secondly, the consumer has to send back the goods within a 14-day period after the decision to withdraw was communicated to the trader.¹⁶³ The third effect is that the trader is required to reimburse the consumer within 14 days from the day of withdrawal, using the same method as for the payment.¹⁶⁴ The trader, however, only has to reimburse the consumer once they have received the returned goods or been given proof of their return, unless the trader states in their terms that they will collect the goods themselves.¹⁶⁵ As mentioned above, the trader is not obliged to fully reimburse the consumer in all circumstances.¹⁶⁶

Prior to the adoption of the Consumer Rights Directive, different withdrawal periods existed at the national level. Under the minimum harmonisation Distance Selling Directive, the Member States were allowed to enact more generous withdrawal periods, that is in this

¹⁵⁹ Article 14(2) of Directive 2011/83/EU.

¹⁶⁰ Article 14(1) of Directive 2011/83/EU.

¹⁶¹ Article 12(a) of Directive 2011/83/EU.

¹⁶² Article 15 of Directive 2011/83/EU. Like the withdrawal rules governing the main contract, the termination of ancillary contracts may not incur any costs for consumers, unless one of the previously discussed exceptions in Article 13(2) or 14 of the Directive apply. Member States are allowed to provide more detailed rules on the termination of ancillary contracts, see Article 15(2) of Directive 2011/83/EU. Weatherill (n 70) 1300-1301.

¹⁶³ Article 14(1) of Directive 2011/83/EU.

¹⁶⁴ Traders may only opt for a different method in case consumers agreed to it and are not liable to a fee, see Article 13(1) of Directive 2011/83/EU.

¹⁶⁵ Article 13(3) of Directive 2011/83/EU.

¹⁶⁶ Articles 13(2) and 14 of Directive 2011/83/EU.

case more than seven days.¹⁶⁷ The maximum harmonisation nature of the Consumer Rights Directive does not allow for more stringent rules on the national level.¹⁶⁸ One consequence of the new rules under the Consumer Rights Directive is that it forced Malta and Slovenia to reduce their statutory withdrawal period from 15 to 14 days.¹⁶⁹ However, the withdrawal period did increase in most of the European Union Member States, including in France (previously seven calendar days),¹⁷⁰ the Netherlands (previously seven working days),¹⁷¹ and the United Kingdom (previously seven working days).¹⁷² German law already provided a two-week withdrawal period, which increased to one month where the information on withdrawal rights had been provided to consumers only after the contract's conclusion.¹⁷³

¹⁶⁷ Article 6(1) of Directive 97/7/EC.

¹⁶⁸ Weatherill (n 70) 1317, who notes that the 'pursuit of "coherence" in Europe must be weighed against the virtue of local autonomy and the value of regulatory experimentation.' For an assessment of the advantages and disadvantages of full harmonisation in EU consumer law, Stephen Weatherill, 'Maximum versus Minimum Harmonization: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market' in Niamh Nic Shuibhne and Laurence W Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A. Usher* (Oxford University Press 2012) 185-189.

¹⁶⁹ Hans Schulte-Nölke and Andreas Börger, 'Distance Selling Directive (97/7)' in Hans Schulte-Nölke, Christian Twigg-Flesner, and Martin Ebers (eds), *EC Consumer Law Compendium: The Consumer Acquis and its transposition in the Member States* (Sellier European Law Publishers 2009) 346-347; Rebekah Tanti-Dougall, 'Implementation of the Consumer Rights Directive: Malta' (2014) 3(3) *Journal of European Consumer and Market Law* 187-189.

¹⁷⁰ Article L121-20 Code de la consommation (version of 26 July 2005). Schulte-Nölke and Börger argued that the old French rules were in breach of the rules of the Directive because seven 'jours francs' equal seven calendar days, excluding Sundays and public holidays. *ibid* (Schulte-Nölke and Börger) 346-347.

¹⁷¹ Article 7:46d of the BW (version of 31 October 2007). Jan M Smits, 'Epistemology and Methodology of Comparative Law' in Mark van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing 2004) 237; Schulte-Nölke and Börger (n 169) 346-347.

¹⁷² Regulation 11 of the Consumer Protection (Distance Selling) Regulations 2000. Schulte-Nölke and Börger (n 169) 346-347.

¹⁷³ § 355 of the BGB (version of 8 December 2004). Boris Schinkels, 'Der Kommissionsentwurf einer Verbraucherrechte-Richtlinie und seine Sprengkraft für § 355 BGB' (2009) 64(15/16) *Juristen Zeitung* 774.

3. MANDATORY DISCLOSURES AND SUBSTANTIVE CONSUMER RIGHTS

All the technical rules surrounding the withdrawal right have also been harmonised by the Consumer Rights Directive,¹⁷⁴ which means that Member States may not provide for any other requirements. The Directive is designed to simplify the withdrawal process (Article 11(1) of the Directive) and offer legal certainty to both traders and consumers (Recital 44 of the Directive).¹⁷⁵

It follows that the new rules governing the statutory right of withdrawal provide consumers with more generous and harmonised rules. As pointed out by Stephen Weatherill, the Directive has also codified some of the case law on the Distance Selling Directive and Doorstep Selling Directive, thereby increasing legal certainty.¹⁷⁶ The contribution of the Consumer Rights Directive to the harmonisation of the technical rules of the right of withdrawal has also been noted.¹⁷⁷ All these rules are now aligned and provide a strong remedy for consumers. Traders nonetheless have the option to provide consumers with longer withdrawal periods. From a business standpoint, withdrawal rights make ‘economic sense when the buyer most efficiently learns of a product through use or inspection at home and the product either does not depreciate rapidly or does depreciate but in a fashion that can be easily measured and compensated for.’¹⁷⁸ Such differences between products might be reflected in the data-set of the present study.

¹⁷⁴ Schulte-Nölke and Börger (n 169) 347-351.

¹⁷⁵ Cauffman (n 141) 215-216.

¹⁷⁶ Weatherill (n 70) 1295-1298.

¹⁷⁷ Schulte-Nölke and Börger (n 169) 345-347, 349-351.

¹⁷⁸ Omri Ben-Shahar and Eric A Posner, ‘The Right to Withdraw in Contract Law’ (2011) 40(1) *Journal of Legal Studies* 145. Daniel Krähmer and Roland Strausz argue that the mandatory withdrawal rights provide a level-playing field between e-commerce traders and traditional stores, Daniel Krähmer and Roland Strausz, ‘Optimal Sales Contracts with Withdrawal Rights’ (2015) 82(2) *The Review of Economic Studies* 784-785. However, the question whether the statutory withdrawal right corrects the information asymmetry in business-to-consumer distance contracts remains unanswered, as some behavioural evidence questions whether consumers really benefit from a cooling-off period, Eidenmüller (n 95) 7-9; Luzak (n 95) 91.

3.3.1.4 Passing of Risk

Another substantive consumer right places the risk of loss or damage to goods before delivery on traders.¹⁷⁹ According to the Directive, the risk passes to consumers when they, or a third party indicated by them other than the carrier, have acquired physical possession of the ordered goods. If the consumer commissioned the carrier, the risk passes to the consumer as soon as their commissioned carrier takes possession of the goods.¹⁸⁰ However, traders are not legally obliged to inform consumers about their rights concerning the passing of risk.¹⁸¹

Rules on the passing of risk did not exist on the European Union level prior to the adoption of the Directive.¹⁸² Consumers only had a right to have the goods delivered without any faults¹⁸³ and the Directive has thus added further harmonised rules to the European Consumer Contract Acquis.¹⁸⁴ However, traders are not required to include the information contained in Article 20 in their terms and conditions, but they have to do it faithfully in case they include a provision governing the passing of risk.

¹⁷⁹ Article 20 of Directive 2011/83/EU.

¹⁸⁰ Weatherill (n 70) 1305; Grundmann (n 79) 118-119; Luzak and Mak (n 69) 90.

¹⁸¹ See the Directive's information and formal requirements in Section 3.3.1.1 and 3.3.1.2 of this Chapter.

¹⁸² Thomas R fner, 'Art 18:307: Passing of Risk in a Consumer Sales Contract' in Zimmermann and Jansen (n 112) Art. 18:307 [3-11], who provides a historical and comparative account concerning the rules on passing of risk in consumer sales contracts.

¹⁸³ Article 5(3) of Directive 1999/44/EC.

¹⁸⁴ Stefan Wr bka, *European Consumer Access to Justice Revisited* (Cambridge University Press 2015) 181.

3.3.1.5 Delivery

Another substantive part of the contract which is regulated by the Directive is the delivery time. It has been established above that traders are not only required to provide consumers with an estimated delivery date,¹⁸⁵ but are by default also obliged to transfer the ‘physical possession or control of the goods’ to consumers within 30 days of conclusion of the distance contracts.¹⁸⁶ Nonetheless, this is not a legal requirement because consumers and traders may agree on a longer delivery period. Consumers are only allowed to terminate the contract if the trader fails to deliver the goods within an additional time period. In any case, consumers may terminate the contract immediately if the trader refuses to deliver the goods, the agreed delivery date is essential in the circumstances, or where the consumer informs the trader of a specific date prior to ordering the goods.¹⁸⁷ Traders failing to comply with the above rules are obliged to reimburse consumers upon the termination of the contract.¹⁸⁸ In this situation, national remedies for recourse may apply, in accordance with Article 18(2) of the Consumer Rights Directive.¹⁸⁹

It follows that Article 18 provides consumers with a strong remedy, but it would be impossible to verify trader compliance unless one would actually order goods online. This consumer right is consequently not taken into account in the empirical examination. Further observations on delivery times are nonetheless provided in the discussion section of Chapter 5.¹⁹⁰

¹⁸⁵ Article 6(1)(g) of Directive 2011/83/EU.

¹⁸⁶ Article 18(1) of Directive 2011/83/EU.

¹⁸⁷ Article 18(2) of Directive 2011/83/EU. Grundmann (n 79) 119; Christina Markou, ‘Directive 2011/83/EU on Consumer Rights’ in Lodder and Murray (n 6) 226-227.

¹⁸⁸ Article 18(3) of Directive 2011/83/EU.

¹⁸⁹ Article 18(4) of Directive 2011/83/EU. Weatherill (n 70) 1305.

¹⁹⁰ Chapter 5.4 of the present thesis provides further observations on issues that fall outside the scope of the study.

3.3.1.6 Alternative and Online Dispute Resolution

Traders may offer consumers the possibility of resolving a dispute via Alternative Dispute Resolution or Online Dispute Resolution, but traders have to inform consumers of its existence and the method of accessing it.¹⁹¹ Further details on consumer ADR and ODR are provided in the Directive on Consumer ADR¹⁹² and the Regulation on Consumer ODR.¹⁹³ Providing for ADR or ODR is, however, not a pre-contractual requirement according to the Consumer Rights Directive.¹⁹⁴ Instead, Regulation (EU) 524/2013

¹⁹¹ Concerning ADR, Article 6(1)(t) of Directive 2011/83/EU in connection with Article 13 of Directive 2013/11/EU. As for ODR, Article 6(1)(t) of Directive 2011/83/EU in connection with Article 14 of Regulation (EU) 524/2013.

¹⁹² Directive (EU) 2013/11 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L165/63 (Directive on Consumer ADR). The Directive on Consumer ADR came into force in July 2013 and Member States had to set up an ADR infrastructure by July 2015. The Directive requires the ADR institution to hear and decide on the complaint within a ninety-day period (Article 8(e) of Directive 2013/11/EU), allowing the case to be settled more quickly than in court. To be recognized as an ADR institutions, the ADR providers need to fulfil six requirements: (1) they need have expertise, be independent and impartial (Article 6 of Directive 2013/11/EU); (2) they need to be transparent (Article 7 of Directive 2013/11/EU); (3) the work should be done effectively, where consumer disputes need to be resolved within a ninety-day period (Article 8 of Directive 2013/11/EU); (4) the proceedings should be fair (Article 9 of Directive 2013/11/EU); (5) respect the principles of liberty, meaning that consumers are only bound by the decision if they consented to it (Article 10 of Directive 2013/11/EU); and (6) legality, meaning that consumers cannot waive their mandatory rights under European Union and national law (Article 11 of Directive 2013/11/EU). See generally, Naomi Creutzfeldt, 'Alternative Dispute Resolution for Consumers' in Michael Stürner, Fernando Gascón Inchausti, and Remo Caponi (eds), *The Role of Consumer ADR in the Administration of Justice: New Trends in Access to Justice under EU Directive 2013/11* (Sellier European Law Publishers 2015) 3ff.

¹⁹³ Regulation (EU) 524/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L165/1 (Regulation on Consumer ODR). The Regulation on Consumer ODR placed an obligation on the European Commission to set-up an ODR mechanism through which traders and consumers can solve their dispute online (Article 5 of Regulation (EU) 524/2013). The European Commission has implemented this requirement by launching the ODR online platform, see Commission, 'Online Dispute Resolution - Resolve your online consumer problem fairly and efficiently' (European Commission, 2020) available at <<https://ec.europa.eu/consumers/odr/main/?event=main.home.show>> accessed 6 December 2020. Creutzfeldt (ibid).

¹⁹⁴ Article 6(1)(t) of Directive 2011/83/EU.

mandates that traders display an electronic link to the European Commission's Online Dispute Resolution platform on their website.¹⁹⁵ This allows traders and consumers to submit their claims to a certified institution that provides Alternative Dispute Resolution or Online Dispute Resolution. Both ADR and ODR co-exist with regular redress mechanisms and are seen as accessible, fast, and cost-efficient mechanisms compared to legal proceedings in court.¹⁹⁶ Taking part in either ADR or ODR is optional, so neither traders nor consumers can be forced to take part in out-of-court proceedings.¹⁹⁷ The optional nature of the dispute resolution mechanism can be seen as the Achilles' heel of the current system and consumers might consequently not be offered access to them in a dispute. The empirical part of the thesis thus not only examines compliance with the trader's obligation to display the link to the Commission's ODR platform in their terms and conditions,¹⁹⁸ but additionally measures whether traders are willing to take part in ODR.¹⁹⁹

¹⁹⁵ Article 14(1) of Regulation (EU) 524/2013. Pablo Cortés, *The law of consumer redress in an evolving digital market: upgrading from alternative to online dispute resolution* (Cambridge University Press 2017) 132-137.

¹⁹⁶ For a general overview of the ODR and ADR regime on the EU and national level, see for instance Pablo Cortés, 'The New Landscape of Consumer Redress: The European Directive on Consumer Alternative Dispute Resolution and the Regulation on Online Dispute Resolution' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 17ff.

¹⁹⁷ Article 10(2) of Directive 2013/11/EU.

¹⁹⁸ Case C-380/19 *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Deutsche Apotheker- und Ärztebank eG* [2020] ECLI:EU:C:2020:498, where the Court of Justice confirmed that traders are required to display the hyperlink to the ODR platform in their general terms and conditions (according to Article 13 of Directive 2013/11/EU), and that it 'is not sufficient in that respect that the trader either provides that information in other documents accessible on his website, or under other tabs thereof, or provides that information to the consumer in a separate document from the general terms and conditions, upon conclusion of the contract subject to those general terms and conditions' (paragraph 36).

¹⁹⁹ The present study will also track instances where traders referred to other ODR platforms. Another development has been that some e-commerce traders introduced their own platform Online Dispute Resolution schemes. For example, eBay, one of the largest e-commerce platforms and also most established ODR provider, allows traders and consumer to resolve their disputes on their platform, without going to court, and without paying a fee. Louis F Del Duca, Colin Rule, and Kathryn Rimpfel, 'eBay's De Facto Low

3.3.2 Comparative Notes on the Implementation

The previous Section has revealed that the Consumer Rights Directive introduced new substantive rules and increased the level of protection for consumers. For instance, the period for the right of withdrawal has been increased from a seven-day period to 14 days in France, the Netherlands, and the UK. And for the first time, harmonised rules concerning the passing of risk have been introduced on the EU level.

3.4 Conclusion

This Chapter has examined the trader obligations contained in national rules implementing the E-Commerce Directive and Consumer Rights Directive which will be used to assess trader compliance. It has considered the E-Commerce Directive and how it would operate on the national level on the grounds that Member States are allowed to deviate from the minimum harmonisation instrument. Only minor technical differences and one divergence between the national implementing law and the Directive have been detected. France has been identified as the only examined jurisdiction to go beyond the standard of the E-Commerce Directive by imposing a requirement on traders to provide the terms and conditions in French as a minimum.²⁰⁰

The Consumer Rights Directive has only been analysed on the European Union level because the instrument is a maximum harmonisation Directive and the options allowing Member States to diverge from the Directive fall outside of the scope of the present study.

This Chapter concludes the first part of the thesis examining the rules applicable to e-commerce transactions which will be used to assess trader compliance.

Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers' (2014) 6 Yearbook on Arbitration and Mediation 204.

²⁰⁰ Article L224-76 of the Code de la consommation.

[This page was intentionally left blank]

Chapter 4

Research Design

4.1 Introduction

At the heart of this thesis lies the empirical investigation into the levels of compliance of electronic commerce traders with consumer protection rules. The last two Chapters have provided the foundation for the empirical part of the thesis by exploring the rules of the three selected Directives, but the national provisions implementing the Directives were only examined in the case of the minimum harmonisation Unfair Contract Terms Directive 93/13/EEC and the E-Commerce Directive 2000/31/EC. The present Chapter is concerned with the thesis's research design, more specifically, that is how the levels of compliance are defined, measured, and analysed. In Chapter 1, I have already addressed the objectives and methods used, *id est* the use of content analysis and its limitations. In this Chapter, I focus on why I chose certain definitions and interpretations, how I intend to confirm or reject the hypotheses, and how I intend to translate the empirical findings into policy recommendations. Setting out the research design is indispensable. It not only concretises the scope of the study, but also reveals some of its methodological challenges. There is another reason why an in-depth engagement with the methodology is necessary, which has to do with the nature of this study. Empirical legal research requires full transparency on why and how data is collected and which technique is used for its analysis.

This Chapter begins by introducing the hypotheses and expected findings of the study, and makes references to previous studies. It then gives a step-by-step explanation of the methodology that has been applied to collect and interpret the data. The first

methodological subsection discusses how the consumer rights and the objective characteristics of the simulated purchases are to be translated into dependent and independent variables. The dependent variables are the rights of the consumer under EU and national law. The independent variables are possible factors of compliance, including, but not limited to, the size of each trader's enterprise and their incorporation date. The present Chapter also deals with how the data have been generated. Because there was no existing data set available at the time my DPhil research started, I have created a data set by simulating 300 e-commerce consumer purchases in four jurisdictions: France, Germany, the Netherlands, and the United Kingdom. After describing how the empirical and deductive data set has been created, the Chapter outlines the techniques for the data analysis, that is to say the measurement of the levels of compliance, the statistical tools used, and the visualisation of the findings. This Section also explains the inter-rater agreement testing process. This test ensures validity and reliability of the study and improves the robustness of the research design. Finally, the Chapter concludes by reflecting upon some of the methodological challenges of this study.

4.2 Hypotheses

The thesis puts forward several hypotheses and expectations. These are grounded in the wider academic debate and are intended to fill the gap in the existing consumer contract law literature. I have collected the data in order to determine the levels of compliance in the sampled contracts (H_1) and to investigate the subsequent correlation between the compliance levels and such factors as the size of the trader's company (H_2), the incorporation date of the trader's enterprise (H_3), and the use of standard contract terms that are drafted and provided by public or semi-public organisations (H_4). The hypotheses are defined in the following paragraphs.

H₁ Non-Compliance Hypothesis

Research on compliance has shown that contract terms are biased to the advantage of e-commerce traders.¹ All three studies examining compliance with European Union obligations use content analysis to gather the data; all three studies have also referred to the consumer rights on the EU level and not the national level. For instance, Loos and Luzak have scrutinised the terms and conditions of four online service providers (Google, Twitter, Facebook, and Dropbox) and have assessed whether these providers comply with seven consumer rights under the Unfair Contract Terms Directive. The scope of that study is different from the one carried out in the present thesis because Loos and Luzak focus on service contracts and not on sale of goods. Another substantial difference is that the authors did not evaluate the terms and conditions against all consumer rights under the Directive and did not take into account national law. Srivastava, as well as Donnelly and Whit, on the other hand, scrutinised compliance of online sales in light of the Consumer Rights Directive, but included only a subset of the rights taken into account by the present thesis. All three studies are also much smaller in terms of sample size, *id est* number of traders, but, most importantly, these studies neither investigate the causes of compliance nor do they cover the rights consumers have under national law. In addition to the aforementioned academic studies, the European Commission has carried out an EU-wide study to determine trader compliance with the right of withdrawal, the minimum two-year legal guarantee, the

¹ See Marco Loos and Joasia A Luzak, 'Wanted: a Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers' (2016) 39(1) *Journal of Consumer Policy* 63; Aashish Srivastava, 'The New EU Consumer Rights Directive: An Empirical Study on Compliance Issues by E-Tailers' (2017) 32(4) *Journal of Business Law* 282; Mary Donnelly and Fidelma Whit, 'Digital content and consumer protection: An empirical study of supplier compliance with consumer information obligations' (2019) 35(6) *Computer Law & Security Review* 1.

Similar evidence has emerged in the United States, see Florencia Marotta-Wurgler, 'Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements' (2008) 5(3) *Journal of Empirical Legal Studies* 447.

obligation to disclose the full purchase price on the website, make reference to ODR, and to comply with the Geo-blocking Regulation.² It is consequentially of interest to establish whether e-commerce traders comply in full with the 35 obligations stemming from the rules implementing the three selected European Union instruments. In light of the surrounding academic literature and examined empirical evidence, the first hypothesis that will be verified in this thesis is:

‘E-commerce consumer contracts do not comply in full with the selected legal obligations stemming from the national rules implementing the Unfair Contract Terms Directive, the E-Commerce Directive, and the Consumer Rights Directive.’

H₂ Company Size Hypothesis

A recent study by the Competition and Markets Authority on the familiarity of businesses in the United Kingdom (N=1,250) with the Consumer Rights Act 2015 has revealed that company size has an overall positive influence on awareness of obligations, *id est* the larger a company the more aware they are of the consumer rights contained in the CRA 2015.³ Nonetheless, merely 19 percent of large businesses were familiar with the Consumer Rights Act 2015. Loos and Luzak provide additional evidence concerning compliance of large enterprises with the Unfair Contract Terms Directive, where Facebook, Twitter, Google,

² Commission, ‘Online shopping: Commission and Consumer Protection authorities urge traders to bring information policy in line with EU law’ (European Commission, 31 January 2020) available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_156> accessed 12 August 2020.

³ Competition and Markets Authority/IFF Research, ‘Unfair Contract Terms Research’ (Competition and Markets Authority, 19 October 2016) available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/561518/UK_businesses__understanding_of_unfair_terms_in_consumer_contracts__IFF_Research_.pdf> accessed 29 April 2020, 40. A smaller study on rights awareness was also conducted by the European Commission, Commission, ‘Consumer Conditions Scoreboard – Consumers at home in the Single Market’ (European Commission, October 2017) available at <http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=45983> accessed 3 September 2020.

and Dropbox were found to use service terms that ‘would unlikely pass the Directive’s unfairness test’.⁴ However, their sample consisted only of these four large enterprises. According to a policy paper of the European Commission, larger companies are ‘more likely to receive complaints’.⁵ However, their study has failed to determine whether that is due to more instances of non-compliance or merely due to their size. Adding to the debate about trader compliance within the European Union, Marotta-Wurgler has investigated whether in the United States there was a correlation between the trader’s market share and the quality of their terms and conditions, establishing no significant correlation.⁶ The empirical evidence seems to be divided on this issue, but suggests that larger traders are more aware of their legal obligations. Further research is necessary to determine the role of company size in ensuring compliance, hence the second hypothesis:

‘Large e-commerce traders are more likely to be compliant with the selected consumer protection rights compared to small and medium-sized enterprises.’

H₃ Incorporation Date Hypothesis

It seems intuitive that traders that have been in business for longer should have fewer violations compared to recently incorporated enterprises, because they have more experience and expertise in their trade. However, it could be equally argued that traders who are longer in business use outdated terms. The question whether company age affects compliance has also been explored in existing research. For instance, the Competition and Markets Authority included company age as an independent variable in their Unfair Contract Terms Study from October 2016.⁷ However, the CMA researchers capped the age

⁴ Loos and Luzak (n 1) 88.

⁵ Commission (n 3) 57.

⁶ Florencia Marotta-Wurgler, ‘Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements’ (2008) 5(3) *Journal of Empirical Legal Studies* 471, 474-475.

⁷ Competition and Markets Authority/IFF Research (n 3) 20-21. Nonetheless, it is worth noting that besides the size of the enterprise, the frequency of review of the terms and

variable only at 999 years. This might explain why they did not receive statistically robust results which could be included in the report's final discussion section.⁸ The analysis carried out in this thesis will verify the claim that company age influences compliance. In order to carry out this verification effectively, the incorporation date will be capped at 30 years, as it is unlikely that traders were involved in online sales before 1989.⁹ The same test will be carried out without capping the company age. The third hypothesis of the empirical examination is therefore:

‘E-commerce traders that have operated on the market for a longer time are more likely to be compliant with the consumer rights selected in this study compared to companies that were incorporated more recently.’

H₄ Pre-Drafted Terms Hypothesis

Pre-drafted standard terms and conditions are sometimes provided by public or semi-public bodies, as recommended by the European Commission in 2001¹⁰ and reinforced in 2003¹¹ and 2004.¹² Traders that use these pre-drafted standard terms should in theory be in

conditions has also been found to increase the familiarity with the Consumer Rights Act 2015, Competition and Markets Authority/IFF Research (n 3) 55-56.

⁸ Florencia Marotta-Wurgler has provided statistical evidence that company age might influence compliance in standard terms. She has capped the company age variable at 25 years, see (n 6) 458. In addition, see Florencia Marotta-Wurgler, ‘Are “Pay Now, Terms Later” Contracts Worse for Buyers? Evidence from Software License Agreements’ (2009) 38(2) *The Journal of Legal Studies* 334-336.

⁹ See generally, Commission, ‘The European Digital Single Market: Its Role in Economic Activity in the EU’ (European Commission, 2015) available at <<https://ec.europa.eu/jrc/sites/jrcsh/files/JRC98723.pdf>> accessed 22 November 2019, 6ff. John Fernie, Leigh Sparks, and Alan McKinnon, ‘Retail logistics in the UK: past, present and future’ (2010) 38(11) *International Journal of Retail & Distribution Management* 894ff.

¹⁰ Commission, ‘European Contract Law’ (Communication) COM (2001) 398 final, paragraph 56.

¹¹ Commission, ‘A more coherent European contract law - An action plan’ (Communication) COM (2003) OJ C63/1.

¹² Commission, ‘European Contract Law and the revision of the acquis: the way forward’ (Communication) COM (2004) 651 final, paragraph 2.2.3.

compliance with all applicable consumer protection rules.¹³ It is interesting whether empirical data can confirm this claim. However, it is not possible to determine how many traders based their terms on pre-drafted terms before the data collection. Equally, those with respect to which it is possible to establish that they had used the pre-drafted terms may not have done it faithfully, *id est* they may have changed them to some degree, for example in order to provide for a higher level of protection. Thus, the first stage of the evaluation will be to determine whether pre-drafted standard terms have been used in the case of a particular online contract. This will be done through comparison of the sampled set of terms to pre-drafted standard terms available online. In this way, both the number of traders using pre-drafted standard terms and the scale of the changes will be determined. As soon as a trader bases even small parts of their terms and conditions on pre-drafted ones, such as the structure, the trader's terms will be counted as being based on pre-drafted terms. Additional observations on the terms used by traders who relied on pre-drafted terms will be included in a qualitative way (see Chapter 6.2). This allows for a more case-by-case approach, and it will be interesting to see where traders depart from terms pre-drafted by public or semi-public organisations. Further details concerning the data collection process will be outlined later, in Chapter 4.5. The fourth and final hypothesis is:

‘E-commerce traders that base their terms and conditions on pre-drafted standard contract terms are more likely to be in compliance with the selected legal obligations.’

¹³ See generally, Jens Karsten and Ali R Sinai, ‘The Action Plan on European Contract Law: Perspectives for the Future of European Contract Law and EC Consumer Law’ (2003) 26(2) *Journal of Consumer Policy* 168-169; Ulf Bernitz, ‘The Commission’s Communications and Standard Contract Terms’ in Stefan Vogenauer and Stephen Weatherill (eds), *The harmonisation of European contract law: implication for European private laws, business and legal practice* (Hart Publishing 2006) 189-190; Giuditta Cordero-Moss, ‘Standard contract terms as an alternative to legislation’ in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar Publishing 2016).

4.3 Defining and Measuring Compliance: Dependent Variables

Dependent variables will be used to investigate whether the consumer contracts comply with the rights selected in the present study. The legal obligations stemming from the national rules implementing the three Directives are divided into 35 dependent variables. Each of the variables represents one right of the consumer in a business-to-consumer online purchase. The variables are grouped into several categories: unfair contract terms; information and formal requirements, including the rules governing access to alternative or online dispute resolution; right of withdrawal; passing of risk.

I have developed a compliance scale to measure the levels of compliance of the contracts with the rules selected in this study (Table 1 below). Determining the levels of compliance is key for the statistical analysis. The compliance scale ranges from one to four. A score of one means that the provision in the contract has a lower standard than the applicable rules. A score of two implies that the contract is silent, so it does not address the consumer right at stake. A score of three stands for the same standard as in the applicable rules. A score of four means that a higher standard is provided. It needs to be emphasised that the score variables used are not intended to be evaluative. The numbers are only used as value-neutral variables in order to make the levels of compliance visible.

The compliance scale has to reflect the nature of the legal obligations, as traders' duties are both positive and negative. Positive duties require that traders act, for example to provide certain information. Negative duties, on the other hand, require that traders refrain from doing something, such as inserting an unfair contract term into their terms and conditions. As a result, not including a certain term in a contract might result in a score of one (non-compliance) in case of a positive obligation, but a score of two (silence) in the case of a negative obligation.

Table 1 Compliance Scale

Compliance Scale	Implications for Dependent Variable	Exceptions
1	The trader is not in compliance with this rule	1.4 in case of omissions. Finer distinctions in case of unfair contract terms (Table 2 below)
2	The trader does not provide information concerning this rule	In case of a positive duty to inform, a score of 1.4
3	The trader complies with this rule	
4	The trader provides a higher standard than required by this rules	Sometimes not possible

The compliance scale is adapted to each legal scenario (Tables 3 to 6). A good example are mandatory disclosures, where traders have a positive duty to provide certain information: it is for instance not possible to provide a higher level of protection, while at the same time an omission counts as non-compliance. It is worth adding that this scale does not measure how far traders deviate from the particular rule, *id est* it is not possible to obtain a lower compliance score because of two violations of one consumer right. There is also no further subdivision of the levels of compliance: one non-compliance is enough for a score of one. Traders may also provide a contract term that goes beyond the statutory obligations, which justifies the need for an additional variable: score of four.

However, with respect to the rules prohibiting unfair contract terms, even finer distinctions are drawn. Chapter 2 has established that the nature of the national rules requires such a differentiation. This is because there exist three levels of unfairness: (1) a term may be regarded as unfair under the general test; (2) a term is presumed unfair under a ‘grey list’ with limited judicial discretion; (3) a term is considered unfair without the possibility of judicial (re)evaluation (*id est* ‘black-listed’). These diverging levels must be reflected in the empirical analysis. Otherwise, the study would ignore the intentions of the national legislators, who provided for a hierarchy of norms, *id est* they gave each legal

scenario a different weight. The compliance scale takes these differences into account, and further subcategories are introduced, namely scores of 1.1 to 1.3 (Table 2).

Table 2 Levels of Non-Compliance Unfair Contract Terms

Category	Definition	Jurisdictions
1.1	‘General test’: contract terms need to be assessed in court. Contract terms falling within the scope of the Directive’s Annex are suspected to be unfair	France (Article L212-1); Germany (§ 307); the Netherlands (Article 6:233(a)); the UK (Section 62 in connection with Schedule 2)
1.2	‘Grey list’: terms are presumed to be unfair with limited judicial discretion	France (Article L212-1 in connection with Article R212-2); Germany § 308); the Netherlands (Article 6:237 in connection with Article 6:233(a))
1.3	‘Black list’: such terms are always unfair with no judicial discretion	France (Article L212-1 in connection with Article R212-1); Germany (§ 309); the Netherlands (Article 6:236); the UK (Sections 31 and 65; penalty clause doctrine and assignment) EU (invalid jurisdiction and choice of law clauses)

Notes: The French rules are contained in the Code de la consommation; the German rules in the BGB; the Dutch provisions in the BW; and the UK rules in the CRA 2015. See Chapter 2.3 and Chapter 2.4 for a detailed examination of the national differences.

The following tables will present the selected consumer rights (dependent variables) and their corresponding scores. As mentioned above, the compliance scale (or scoring system) will be adapted to every dependent variable.

Unfair Contract Terms Directive

In Table 3 below, a trader needs to score 22 points to be fully in line with the underlying rules, and, in addition, a score of one must never be attained. The rules governing unfair terms do not confer a positive obligation upon traders but a negative one, which means that

traders must not include an unfair term in their standard terms. Silence is tracked separately from compliance, but for the empirical examination it is considered to fall within the category of compliance (score of three). As mentioned before, violations are further subcategorised into three categories (see Table 2). Table 4 provides how each Member States addresses the unfair terms scenarios selected for the study, which is used to track lower standards (score of one) and compliance (*id est* same standard, score of three).

Table 3 Dependent Variables and Compliance Scale Unfair Contract Terms Directive

Dependent Variables	Article (Annex 1)	Text of the Directive	Compliance Scale
<i>Unfair Contract Terms</i>			
X1	(a)	[E]xcluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier	1 = lower 2 = silence 3 = same
X2	(b)	[I]nappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him	1 = lower 2 = silence 3 = same
X3	(d)	[P]ermitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract	1 = lower 2 = silence 3 = same
X4	(e)	[R]equiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation	1 = lower 2 = silence 3 = same
X5	(j)	[E]nabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract	1 = lower 2 = silence 3 = same

X6	(k)	[E]nabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided	1 = lower 2 = silence 3 = same
X7	(l)	[P]roviding for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded	1 = lower 2 = silence 3 = same
X8	(m)	[G]iving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract	1 = lower 2 = silence 3 = same
X9	(o)	[O]bliging the consumer to fulfil all his obligations where the seller or supplier does not perform his	1 = lower 2 = silence 3 = same
X10	(p)	[G]iving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement	1 = lower 2 = silence 3 = same
X11	(q)	[E]xcluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract	1 = lower 2 = silence 3 = same

Notes: The text of the Directive has been adapted to the requirements of the study.

Table 4 Dependent Variables of the National Rules Implementing the UCTD

Dependent Variables	CJEU Case Law	France	Germany	The Netherlands	The United Kingdom
X1	No	Article R212-1 no 6	§ 309 Nr. 7 lit. a	Article 6:237(f)	Section 65 Schedule 2 Part 1(1)
X2	No	Article R212-1 no 6 and no 7	§ 309 Nr. 8 of the BGB in connection with §§ 309 Nr. 3 and Nr. 7 lit. b	Articles 6:236(a), (b), and (c) Articles 6:237(b), (c), (f) and (g)	Section 31 Schedule 2 Part 1(2)
X3	No	Article R212-2 no 2	§ 308 Nr. 7 §§ 309 Nr. 5 and Nr. 6	Articles 6:237(f) and (i)	Schedule 2 Part 1(4)
X4	Yes	Article R212-2 no 3	§§ 309 Nr. 5 and Nr. 6	Article 6:237(i) Articles 6:91-6:94 of the BW	Penalty clause doctrine Schedule 2 Part 1(5) and (6)
X5	Yes	Article R212-1 no 3 Article R212-2 no 6	§ 308 Nr. 4	Article 6:236(i) Article 6:237(c)	Schedule 2 Part 1(11) and (12)
X6	No	Article R212-1 no 3	§ 308 Nr. 4	Article 6:237(c)	Schedule 2 Part 1(13)
X7	Yes	Article R212-1 no 3	§ 309 Nr. 1	Article 6:236(i)	Schedule 2 Part 1(14) and (15)
X8	No	Article R212-1 no 4	§§ 309 Nr. 7 and Nr. 8	Article 6:236(d)	Schedule 2 Part 1(16)
X9	No	Article R212-1 no 5	§§ 309 Nr. 2 and Nr. 8	Article 6:236(b) and (c)	Schedule 2 Part 1(18)
X10	No	Article R212-2 no 5	§ 309 Nr. 10	Article 6:236(e)	Assignment Schedule 2 Part 1(19)

X11	Yes	Article R212-1 no 12 Articles R212-2 no 9 and no 10	§§ 309 Nr. 12 and Nr. 14	Article 6:236(n) and (k)	Section 31 Schedule 2 Part 1(20)
-----	-----	--	-----------------------------	--------------------------------	--

Notes: The French rules are contained in the Code de la consommation; the German rules in the BGB; the Dutch provisions in the BW; and the UK rules in the CRA 2015. Article R212-1 and Article R212-2, § 308, Article 6:237, and Schedule 2 must be read in connection with the national general test of unfairness, see Table 2. For a detailed examination of the national differences, see Chapter 2.3 and Chapter 2.4.

E-Commerce Directive

A trader needs to achieve 12 points in the information and formal requirements section (Table 5 below) to be in line with the underlying rules. In addition, a trader must never receive a score of one. The information and formal requirements place a positive duty upon traders. An omission of such a disclosure is automatically in breach of the consumer protection rules, and so receives a score of one. Under these circumstances, traders cannot obtain a higher score, as the traders either provide all the required information or fail to do so. All rules implementing the outlined standard in Table 5 have been examined in Chapter 3. The Chapter has established that the national rules implementing the Directive differ only on a technical level. Only France has decided to enact stricter rules concerning the language requirement,¹⁴ obliging traders to provide the contract terms in French.¹⁵ Consequently, the national rules are only used to interpret the obligations contained in the Directive for the empirical assessment and an additional Table pointing out the national divergences is not necessary.

¹⁴ Article 10(1)(d) of Directive 2000/31/EC.

¹⁵ For B2C contracts, Article L224-76 of the Code de la consommation. For B2B contracts, Article 1127-1 no 3 of the Code Civil. Further details are provided in Section 3.2.1 (*Language Requirement*) of this thesis.

Table 5 Dependent Variables and Compliance Scale E-Commerce Directive

Dependent Variable	Article	Text of the Directive	Compliance Scale
<i>Information and Formal Requirements</i>			
Y1	5(1)(d)	[W]here the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register	1 = lower 3 = same
Y2	5(1)(g)	[W]here the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (2)	1 = lower 3 = same
Y3	10(1)(a)	[T]he different technical steps to follow to conclude the contract	1 = lower 3 = same
Y4	10(1)(d)	[T]he languages offered for the conclusion of the contract	1 = lower 3 = same

Notes: The text of the Directive has been adapted to the requirements of the study.

Consumer Rights Directive

A trader needs to achieve 33 points in the information and formal requirements section, including the ADR/ODR section, to be fully in line with the underlying rules (Table 6 below). Traders also need to achieve 18 points in the remaining categories. Additionally, a trader must never receive a score of one. Similarly to the consumer rights examined in the previous table, the information and formal requirements have to be complied with and an omission of a disclosure is automatically a violation of these requirements. The remaining requirements are ‘optional’ in the sense that there is no positive obligation to include a term that deals with a given issue but the traders that choose to do, need to comply with the provisions.

Table 6 Dependent Variables and Compliance Scale Consumer Rights Directive

Dependent Variable	Article	Text of the Directive	Compliance Scale
<i>Information and Formal Requirements</i>			
Z1a	6(1)(a)	The main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services. [displayed before consumers place their order (Article 8(2))]	1 = lower 3 = same
Z1b	6(1)(b)	The identity of the trader, such as his trading name.	1 = lower 3 = same
Z1c	6(1)(c)	The geographical address at which the trader is established or the geographical address and identity of the trader on whose behalf he is acting.	1 = lower 3 = same
Z1d	6(1)(e)	The total price of the goods or services inclusive of taxes. [displayed before consumers place their order (Article 8(2))]	1 = lower 3 = same
Z1e	6(1)(g)	The arrangements for payment [...]	1 = lower 3 = same
Z1f	6(1)(g)	[...] the time by which the trader undertakes to deliver the goods [...]	1 = lower 3 = same
Z1g(i)	6(1)(h)	Where a right of withdrawal exists, the conditions, time limit and procedures for exercising that right in accordance with Article 11(1) [CRD] [...]	1 = lower 3 = same
Z1g(ii)	6(1)(h)	[...] as well as the model withdrawal form set out in Annex I (B) [CRD].	1 = lower 3 = same
Z1h	6(1)(l)	A reminder of the existence of a legal guarantee of conformity for goods. [i.e. with national rules]	1 = lower 3 = same
Z1i	8(1)	With respect to distance contracts, the trader shall give the information provided for in Article 6 (1) [CRD] or make that information available to the consumer in a way appropriate to the means of distance communication used in plain and intelligible language. In so far as that information is provided on a durable medium, it shall be legible.	1 = lower 3 = same
<i>Right of Withdrawal</i>			
Z2a(i)	9(1)	The consumer has a 14 days period to withdraw from distance [...] contract [...]	1 = lower 2 = silence 3 = same 4 = higher

Z2a(ii)	9(1)	[...] without giving any reason.	1 = lower 2 = silence 3 = same
Z2b	9(2)b	[I]n the case of sales contracts, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the goods.	1 = lower 2 = silence 3 = same 4 = higher
Z2c	9(2)b(i)	[I]n the case of multiple goods ordered by the consumer in one order and delivered separately, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the last good.	1 = lower 2 = silence 3 = same 4 = higher
Z2d	9, 13(2), 14(1)	The right of withdrawal may not incur any costs unless the consumer has expressly opted for a type of delivery other than the least expensive type of standard delivery offered by the trader. The consumer shall only bear the direct cost of returning the goods unless the trader has agreed to bear them or the trader failed to inform the consumer that the consumer has to bear them.	1 = lower 2 = silence 3 = same 4 = higher
Z2e	14(1)	Unless the trader has offered to collect the goods himself, the consumer shall send back the goods or hand them over to the trader or to a person authorised by the trader to receive the goods, without undue delay and in any event not later than 14 days from the day on which he has communicated his decision to withdraw from the contract to the trader.	1 = lower 2 = silence 3 = same 4 = higher
Z2f	13(1)	The trader shall reimburse all payments received from the consumer, including, if applicable, the costs of delivery without undue delay and in any event not later than 14 days from the day on which he is informed of the consumer's decision to withdraw from the contract in accordance with Article 11. The trader shall carry out the reimbursement referred to in the first subparagraph using the same means of payment as the consumer used for the initial transaction, unless the consumer has expressly agreed otherwise and provided that the consumer does not incur any fees as a result of such reimbursement.	1 = lower 2 = silence 3 = same 4 = higher

<i>Passing of Risk</i>			
Z3a	20	In contracts where the trader dispatches the goods to the consumer, the risk of loss of or damage to the goods shall pass to the consumer when he or a third party indicated by the consumer and other than the carrier has acquired the physical possession of the goods. [...]	1 = lower 2 = silence 3 = same 4 = higher
Z3b	20	[...] However, the risk shall pass to the consumer upon delivery to the carrier if the carrier was commissioned by the consumer to carry the goods and that choice was not offered by the trader, without prejudice to the rights of the consumer against the carrier.	1 = lower 2 = silence 3 = same 4 = higher
<i>ADR or ODR</i>			
Z4	6(1)(t)	Where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it. [i.e. the link to the ODR platform of the European Commission]	1 = lower 3 = same

Notes: The text of the Directive has been adapted to the requirements of the study.

4.4 Possible Factors of Compliance: Independent Variables

The independent variables are the objective characteristics of the contractual relationship, namely the size and age of the trader's enterprise as well as whether the trader based their terms and conditions on standard contract terms drafted and provided by public or semi-public organisations. Factors such as these may have an impact on compliance. From a statistical viewpoint, the independent variables will also serve as control variables in the statistical analysis in Chapter 5. In the next subsection (Chapter 4.5), I shall give details of the data collection and analysis that I have carried out to determine these three variables for each trader.

The traders have been categorised into small and medium-sized enterprises and large enterprises. According to the European Commission, a trader is considered to be a large enterprise when the annual turnover is over 50 million Euros or the annual balance sheet

total is not exceeding 43 million Euros.¹⁶ In addition to this, the Commission has identified the number of employees as another indicator of large enterprises, namely where companies have more than 250 employees. These three categories have been used because each trader's market share is unknown, as is how much of the annual turnover is earned with online sales. Therefore, using the rough company size of a trader is a good indicator of the financial means of an enterprise. A trader falls within the category of SMEs by default where no company data can be obtained, since large traders' company data are publicly available. Large enterprises have to be registered with the national authorities and are possibly even listed at the stock exchange. By contrast, smaller traders might not be required to register their company or disclose their annual turnover publicly. Overall, the study covers 182 SMEs and 118 large enterprises (see Table 7).¹⁷ The distribution of the company size seems similar among France, Germany, and the UK, whereas the Netherlands has around half the number of large enterprises compared to the other three jurisdictions. Similarly, there are fewer large companies selling sport equipment compared to the other four products.

Moreover, the traders' date of incorporation (age) has been recorded, and, additionally, the age has been capped at 30 years, since it is unlikely that any enterprise had a strategy

¹⁶ Annex Article 2 of the Commission Recommendation (EC) 2003/361 of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises [2003] OJ L124/36. When the data was collected in September 2019, the conversion rate for Euros into GBP was around 1.13.

¹⁷ The raw data (screenshots) on the size and age of the traders can be accessed via the following link (Part 2 Company Size and Age): <https://www.dropbox.com/sh/4qws8jjbddphsln/AAAsv7GiKE4048sQwUxB1dmwa?dl=0>. The final data concerning the independent and dependent variables is attached in print (Appendix). The data from the websites has been copied into a separate document (Dataset) and is attached in the Dropbox; all personal information of the 300 traders has been removed. The Dropbox link including the raw data will be available until the examination of the DPhil is completed, but both the Appendix and Dataset will be available beyond the examination process. Please contact the author in case of technical difficulties: felix.pflucke@law.ox.ac.uk.

for online sales in the 1980s.¹⁸ Without capping the age, the average age is around 20 years. The overall average age capped at 30 years is lower, around 16 years. Traders selling sport equipment are significantly younger compared to the traders selling the other four products. Another observation is that the traders selling print media are trading the longest when looking at the average age, but when the age is capped at 30 years, book sellers come only second (see Table 7 below).

Pre-drafted terms and conditions are only used by Dutch traders and not by any trader in France, Germany, and the United Kingdom. Several German traders have included relatively similar provisions on the statutory notice concerning the right of withdrawal (*Widerrufsbelehrung*). However, this alone is not sufficient to include them in the pre-drafted terms category, as this is a legal requirement. The 56 Dutch traders which have based their contract terms on pre-drafted terms and conditions are 14 large enterprises and 42 SMEs. The statistical model has to take into account the fact that only Dutch traders are using pre-drafted terms. Otherwise, the model would merely provide data on 56 Dutch traders versus French traders, German traders, UK traders, and the remaining 19 Dutch traders.

¹⁸ See for example, Fernie (n 9). Florencia Marotta-Wurgler has also capped the company age around the year 1990, Marotta-Wurgler (n 1) 458.

Table 7 Overview Independent Variables

	Large Enterprises	SMEs	Average Age	Average Age (Capped at 30 Years)	Use of Pre- Drafted Terms
<i>Country</i>					
France	33	42	20.17	17.12	0
Germany	34	41	18.29	15.09	0
The Netherlands	16	59	19.64	15.56	56
The United Kingdom	35	40	21.22	16.75	0
<i>Industry</i>					
Electronics	33	27	19.35	16.42	13
Fashion	29	31	21.68	17.88	8
Sport Equipment	11	49	13.93	13.57	9
Home Decor	24	36	20.49	15.60	13
Print Media	21	39	24.82	17.32	13
<i>Company Size</i>					
Large Enterprise			26.09	20.11	14
SME			15.44	13.35	42
Total	118	182	19.89	16.18	56

Notes: Number of SMEs by default: overall (45); France (2); Germany (22); the Netherlands (13); the United Kingdom (8). Number of businesses without identifiable age: overall (18); France (0); Germany (13); the Netherlands (3); the United Kingdom (2). Average age in years and until 2019. All numbers are rounded to the nearest two decimal places.

4.5 Data Collection

The brief survey of the academic literature on trader compliance has revealed that there are no empirical studies of whether the consumer contracts actually used in online transactions are in conformity with all the EU and national rules regulating e-commerce sales. Consequently, there are no pre-existing data on the levels of compliance for e-commerce consumer contracts. I therefore hand-collected the raw data in the form of actual consumer contracts by simulating 300 online purchases, cancelling the transaction right before the order was placed, within two weeks in September 2019.

The operational population consists of 300 online purchases sampled from four jurisdictions, so 75 purchases per country: France, Germany, the Netherlands, and the United Kingdom. For this simulation, I selected goods-selling traders from five industries:

electronics, sport equipment, print media, fashion, and home decor. These goods were very popular among consumers when the data were gathered.¹⁹ I counted parent companies and subsidiaries as separate entities.

Before beginning the sampling, I drafted a data collection manual which stipulated the following three measures to limit the sample bias. The first measure in the manual was to delete all cookies on the computer on which the sample was taken. The second measure was to use a proxy and change the IP address to the capital of the jurisdiction for which the sample was being collected.²⁰ The manual's third measure was to search for the selected goods which traders typically sold in their market (phones, books, clothes, sport equipment, and furniture) and to enter this in the native language of the country. For example, when I collected my data for the United Kingdom, I entered 'buy (insert good) online' into the search engine Google. Again as per the manual, I chose the first 15 hits, ignoring sponsored listings. I then simulated an online purchase on each website for the pre-selected product and stopped the process immediately before the confirmation of the order. This step was included in the manual to ensure compliance with some of the information and formal requirements. The procedure outlined in the manual also required me to sample the terms and conditions for each simulated purchase, and to choose a similar product from the trader where an identical product was not available.

The present study is interested in the patterns of (non-)compliance and thus differentiates different levels of compliance: lower standards, silence, compliance, and higher standards.

¹⁹ Eurostat, 'E-commerce statistics for individuals - Figure 4: Online Purchases, EU28, 2018' (Eurostat, 2019) available at <https://ec.europa.eu/eurostat/statistics-explained/index.php/E-commerce_statistics_for_individuals#Most_popular_online_purchases> accessed 29 August 2019.

²⁰ The provider Hola! VPN was used to change the IP address. Hola VPN Limited, 'Safely access worldwide content' (Hola VPN Limited, 2019) available at <<https://hola.org/>> accessed 29 August 2019.

In consequence, in order to verify the formulated hypotheses and to uncover the reasons for the different levels of compliance, the study uses content analysis (see Chapter 1.2), *id est* the study of texts. I therefore scrutinised the terms and conditions of the e-commerce traders and saved them as PDFs. In addition, I investigated the payment mechanisms, the time of delivery, and the characteristics of the goods on the website, taking screenshots as evidence. I obtained the company size and date of incorporation from the respective national registries: in France from the Chamber of Commerce (*Chambre de commerce et d'industrie*); in Germany from the Ministry of Justice and Consumer Protection (*Ministerium für Justiz und Verbraucherschutz*);²¹ in the Netherlands from the Chamber of Commerce (*Kamer van Koophandel*); and in the United Kingdom from the UK Companies House. The information came from the most recent annual return in each assessment. In case I could not obtain the relevant data from the aforementioned sources, I examined the websites of the selected traders or other reliable sources, such as Statista or major news outlets.

I obtained the data on the use of terms and conditions pre-drafted by public or semi-public authorities by comparing the traders' terms with each other and searching for specific clauses contained in these terms online. A variety of providers were detected in this way.²² I determined the overlap between each trader's terms and the pre-drafted terms and the resulting observations will appear in Chapter 5 and Chapter 6.2.

²¹ The Ministry of Justice and Consumer Protection coordinates the register (*Gemeinsames Registerportal der Länder*).

²² See for example Industrie- und Handelskammer (IHK) Schleswig-Holstein, 'Aufbau eines rechtssicheren Online-Shops' (IHK Schleswig-Holstein, 2017) available at <https://www.ihk-schleswig-holstein.de/blob/swhihk24/servicemarken/serviceleistungen/broschueren/1373948/7235c012267d902ad67dd243d271fdac/Broschuere_Aufbau_eines_rechtssicheren_Onlineshops-data.pdf> accessed 9 April 2019. Thuiswinkel Organisatie, 'Algemene Voorwaarden Thuiswinkel' (Thuiswinkel Organisatie, 2017) available at <<https://www.thuiswinkel.org/consumenten/wat-is-thuiswinkel-waarborg/algemene-voorwaarden-thuiswinkel>> accessed 9 April 2019. Chambre de commerce et d'industrie (CCI) de Paris Ile-de-France, 'Modèle-type de conditions générales' (CCI Paris Ile-de-

The raw data are temporarily attached in a Dropbox file and the compliance and independent variable data are attached to the final thesis in print (see Footnote 17 and 24).

4.6 Data Analysis

To acquire the relevant data from the operational population, I used content analysis (see Chapter 1.2). This technique is becoming increasingly popular among empirical legal scholars and forms an integral part of qualitative and experimental legal research.²³

As mentioned before in this Chapter, I coded the consumer rights examined in Chapter 2 and 3 and transferred them into dependent variables. I matched each dependent variable with the relevant contract term and attributed the levels of compliance, *id est* points from

France, 2014) available at <<https://www.entreprises.cci-paris-idf.fr/web/reglementation/contrats-modeles/commerciaux/conditions-generales-de-vente-entre-professionnels>> accessed 9 April 2019. Crown Commercial Services (CCS), ‘Guidance: short form terms and conditions’ (CCS, 31 July 2015) available at <<https://www.gov.uk/government/publications/short-form-terms-and-conditions>> accessed 9 April 2019.

²³ Shari Seidman Diamond and Pam Mueller have scrutinised 60 law review journals published between 1998 and 2008. They found a sharp increase in the use of empirical legal methods, accounting for almost half of the methodologies used. See Shari Seidman Diamond and Pam Mueller, ‘Empirical Legal Scholarship in Law Reviews’ (2010) 6 Annual Review of Law and Social Science 581. The increase and importance of this kind of scholarship was for example also pointed out in Anne-Lise Sibony, ‘Data and arguments: empirical research in consumer law’ in Hans-Wolfgang Micklitz, Anne-Lise Sibony, and Fabrizio Esposito (eds), *Research Methods in Consumer Law: A Handbook* (Edward Elgar Publishing 2018).

Examples of recent empirical studies using content analysis include: Mark A Hall and Ronald F Wright, ‘Systematic Content Analysis of Judicial Opinions’ (2008) 96(1) California Law Review 63; James Goudkamp and Donal Nolan, ‘Contributory Negligence in the Twenty-First Century: An Empirical Study of First Instance Decisions’ (2016) 79(4) Modern Law Review 575. Urska Sadl and Henrik Palmer, ‘Can Quantitative Methods Complement Doctrinal Legal Studies? Using Citation Network and Corpus Linguistic Analysis to Understand International Courts’ (2017) 30(2) Leiden Journal of International Law 327; Gijs van Dijck, ‘The Ordered Apology’ (2017) 37(3) Oxford Journal of Legal Studies 562; Adam Chilton and Mila Versteeg, *How Constitutional Rights Matter* (Oxford University Press 2020); Jan Zgliniski, *Europe’s Passive Virtues: Deference to National Authorities in EU Free Movement Law* (Oxford University Press 2020).

one to four. In order to ensure transparency, the raw data can be found in a Dropbox folder attached virtually to this thesis.²⁴

I used a literal approach to interpret the websites' terms and conditions, as this represents the only objective means of interpreting the contracts. The main reason for this is that the contracts are not individually negotiated and the contractual text is therefore of central importance to consumers. The sampled contract terms did also not give rise to any serious issues of interpretation. In order to ensure that I had drafted the dependent variables and their compliance scale in such a way, so as not to rely on my own discretion as coder, I carried out an inter-rater agreement test, which will be discussed in the following Section. Due to this process, there is very little discretion left in applying the 35 selected rules. This can be illustrated by using the example of one of the mandatory disclosures: traders either provide their geographical address or fail to do so. As subsection 4.3 has illustrated, the consumer rights concerning unfair terms are not that straightforward and much finer distinctions must be drawn.

In Chapter 5, I shall use descriptive statistics to verify the non-compliance hypothesis (H_1). Several tables will be used to demonstrate with which legal scenarios the instances of non-compliance occurred. For the correlation analysis, I shall use RStudio to determine whether the levels of non-compliance are influenced by the company's size (H_2), the company's age (H_3), and the use of pre-drafted terms and conditions (H_4). The Ordinary Least Squares or Linear Least Squares (OLS) and the Binary Logistic Regression analysis will be used for the correlation test. Whether the three hypothesised factors in H_2 - H_4 are making compliance 'more likely' is therefore determined by assessing the traders' instances of non-compliance (OLS) and the probability of non-compliance (Binary Logistic Regression), that is full compliance versus at least some non-compliance. The OLS will be

²⁴ The raw data is available online via Dropbox (Part 1 Trader Websites and Terms Raw Data), see footnote 17.

used together with a Binary Logistic Regression to determine the overall levels of correlation.²⁵ Therefore, both a linear and logistic probability method will be used to measure whether there is a correlation between the instances of non-compliance and the independent variables. The independent variables will also serve as the control variables in the statistical model.

4.7 Inter-Rater Agreement

The inter-rater agreement, also referred to in the literature as inter-coder reliability or concordance, is ensured in this study through the Cohen's Kappa Coefficient Test.²⁶ The test provides and improves the level of reliability, that is the reproducibility, of an empirical study by measuring the degree of consensus between two appointed raters. This test can for instance detect defects in the variables or scale. It was chosen because of its uniqueness, as it also takes into account the possibility that a rater picked a score by chance. Two independent raters were appointed and each provided with eight randomly selected consumer contracts (two contracts from each jurisdiction).²⁷ Both were given an introduction to the project, provided with a training exercise, and equipped with a coding manual. The raters were invited to develop the coding manual further, including the dependent variables, before it was used. This process was repeated until no further

²⁵ For a general overview and comparison of the two methods, see for example John Pohlman and Dennis Leitner, 'A Comparison of Ordinary Least Squares and Logistic Regression' (2003) 103(5) *Ohio Journal of Science* 118-125.

²⁶ See for example Neil J Salkind in 'Reliability of Scores' in Neil J Salkind (eds), *Encyclopedia of Research Design* (SAGE 2010); Thomas Benesch, *Schlüsselkonzepte zur Statistik* (Springer Publishing 2012) 59-60. A good example of how the test is applied in practice: Gijs van Dijck, 'Victim-Oriented Tort Law in Action: An Empirical Examination of Catholic Church Sexual Abuse Cases' (2018) 15(1) *Journal of Empirical Legal Studies* 142.

²⁷ The two raters are: Tom Boekestein, Supervisor of EU Law, Faculty of Law and Pembroke College, University of Cambridge, tlb35@cam.ac.uk; Jan Zgliniski, Assistant Professor of Law, LSE Law Department, J.Zgliniski@lse.ac.uk. Both speak the required languages and have a strong background in European Union and comparative law.

alterations were made. They were invited to analyse the eight contracts separately after the coding manual was drafted.

The data set and coding manual have been adapted since the MPhil study. It is nonetheless important to draw upon the findings from 2018 and to reflect on the methodological challenges when carrying out the Cohen's Kappa Test. In the MPhil, the following results were produced when applying the Cohen's Kappa Coefficient Test. The average agreement level was 90.1 percent or 0.86 (Cohen's kappa).²⁸ This result proved that the dependent variables and their scales were drafted in a very clear and comprehensive way. On the tenth occasions the raters did not have the same score, one of the raters marked the contract as being silent on the issue. This might have been the case because the contracts were very lengthy and the rater may therefore have missed the phrase. The test was thus repeated with different contracts, but this time, the relevant passages were already inserted in the spreadsheet and the raters only had to apply the compliance scale. With this approach, an agreement level of 100 percent or 1.00 (Cohen's kappa) was achieved.

The same approach was consequently used for the present study, *id est* inserting the relevant passages for the raters. The raters have been assigned the same eight contracts, and, like in the MPhil study, an agreement level of 100 percent or 1.00 (Cohen's kappa) was achieved. The reliability, *id est* that the same results would be reproduced under these conditions, and validity, *id est* that the study measured what it attempted to measure, of the empirical results are therefore ensured.²⁹

²⁸ Average agreement levels above 0.85 on the Cohen's kappa scale are considered to be very good, cf Salkind, Benesch, and van Dijk (n 26).

²⁹ cf Lee Epstein and Andrew D Martin, 'Quantitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 905-908.

4.8 Methodological Challenges and Conclusion

The final Section of Chapter 4 provides some reflections on the methodological challenges that have influenced the research design. The process of collecting and analysing the data was a time-intensive process. Changes to the processes were introduced in light of the MPhil viva, the transfer examination, and as a result of the inter-rater agreement tests. Despite methodological challenges that any project of a similar character would face, methodological issues so far have not gained much attention in the literature. I discuss these challenges and the practical solutions adopted in the present study below for the benefit of other researchers interested in pursuing similar projects.

The first methodological challenge was the selection of underlying rules. Not all consumer protection rules were included in this study and the reasons for including or not including particular rules had to be provided. For example, initially, I had also wanted to include the rules stemming from the Consumer Sales Directive 1999/44/EC. These rules were ultimately not selected because they are concerned with commercial guarantees and not with standard terms as such. Other rules were not selected for the study because compliance with them could not be verified unless the goods were actually purchased.

Another challenge was to determine the levels of harmonisation among the selected rules and devise an approach that would operationalise them into dependent variables. This was particularly difficult with regard to the Unfair Contract Terms Directive. The national legislators had intentionally established a hierarchy of norms and the different modes of rendering terms ‘unfair’. The empirical part of the thesis had to take this into account. Non-compliance with the national rules implementing the Unfair Contract Terms Directive 93/13/EEC had to be categorised into three variables. This approach evolved over time and thanks to the solution now adopted in the thesis much finer distinctions could be drawn from the findings.

The final challenge was defining the size of the dataset and the selection of the jurisdictions. One of the dominating factors is time. Hand-compiling and analysing the dataset was a time-intensive process, requiring a total of 11,400 assessments in this study: 35 legal scenarios times 300 simulated transactions (10,500 assessments), plus three independent variables per transaction (900 assessments). Examining several jurisdictions with different rules and languages adds further to the workload.

These challenges have shaped the research design and addressing them ultimately improved the robustness of the present study.

Chapter 5

Empirical Examination of E-Commerce Consumer Transactions

5.1 Introduction

The previous three Chapters have examined the content of the European Union and national consumer protection rules that fall within the scope of the present study (Chapters 2 and 3) and how compliance with these rules can be accurately measured (Chapter 4). The present Chapter presents the results of the statistical analysis carried out on the basis of the data collected by examining 300 traders' compliance with the selected consumer rights (11,400 observations including the independent variables). The findings made on the basis of the collected data are used to verify the four hypotheses described in Chapter 4. As explained therein, both descriptive and statistical methods have been used. Section three of the present Chapter then provides details on compliance with each of the 35 selected consumer rights and discusses the detected patterns of non-compliance. The fourth section contains additional observations, for instance concerning violations of consumer protection rules that fall outside the scope of the study.

5.2 Hypotheses Tests

The data generated by carrying out compliance assessments are first used to examine the H_1 hypothesis which claims that e-commerce traders fail to comply in full with their legal obligations. The same data are used in the second subsection to assess whether the company's size (H_2), the company's age (H_3), and the use of pre-drafted terms provided by public or semi-public authorities (H_4) affect compliance.

5.2.1 Hypothesis One: Non-Compliance with Consumer Rights

The H_1 hypothesis, that e-commerce traders do not comply in full with the 35 selected consumer protection rules, is tested with descriptive statistics. The descriptive analysis uses tables which quantify the overall levels of compliance and the number of instances of non-compliance per trader. Determining the instances of non-compliance per trader is of particular importance because the hypothesis argues that traders fail to comply in full with the legal obligations selected for the present study.

Table 8 Overall Levels of Trader Compliance

	(1) Lower	(2) Silence	(3) Same	(4) Higher
<i>Country</i>				
France	6.67% (n=175)	31.50% (n=827)	60.30% (n=1583)	1.52% (n=40)
Germany	2.40% (n=63)	28.23% (n=741)	68.38% (n=1795)	0.99% (n=26)
Netherlands	6.86% (n=180)	29.10% (n=764)	63.16% (n=1658)	0.88% (n=23)
United Kingdom	14.63% (n=384)	29.68% (n=779)	54.78% (n=1438)	0.91% (n=24)
<i>Industry</i>				
Electronics	6.38% (n=134)	27.19% (n=571)	65.52% (n=1376)	0.90% (n=19)
Fashion	6.52% (n=137)	29.76% (n=625)	62.57% (n=1314)	1.14% (n=24)
Sport Equipment	9.14% (n=192)	31.62% (n=664)	57.86% (n=1215)	1.38% (n=29)
Home Decor	7.24% (n=152)	28.05% (n=589)	63.33% (n=1330)	1.38% (n=29)
Print Media	8.90% (n=187)	31.52% (n=662)	59.00% (n=1239)	0.57% (n=12)
<i>Company Size</i>				
Large	5.62% (n=232)	27.94% (n=1154)	65.06% (n=2687)	1.38% (n=57)
SME	8.95% (n=570)	30.72% (n=1957)	59.45% (n=3787)	0.88% (n=56)
Total	7.64% (n=802)	29.63% (n=3111)	61.66% (n=6474)	1.08% (n=113)

Notes: Percentage per category (independent variable) and rounded to two decimals places. Frequencies in brackets. There are 75 traders per Member State and 60 traders per industry. 118 traders are large enterprises and 182 traders are SMEs (45 by default). In total, there are 300 hundred traders.

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

In absolute numbers, the total of 802 instances of non-compliance were detected on the 300 e-commerce websites (Table 8, model (1), Total). On average, this amounts to 2.67 violations per trader or 7.64 percent of all the compliance assessments that were carried out for the study (N=10,500). It follows that from the 10,500 compliance assessments that were carried out, around 92.36 percent (n=9,698) of assessments did not identify a violation of the relevant rules (Table 8, model (2-4), Total). In 61.66 percent (n=6474) of assessments the issue was governed by contract terms in compliance with the rules, while in the case of 29.63 percent (n=3111) of the assessments the contract was silent on the relevant issue. In 1.08 percent (n=113) of assessments a higher level of protection was identified.

However, the investigation of compliance by trader revealed that the vast majority of traders had at least one or more instance of non-compliance (see Table 9 below). More precisely, the empirical examination showed that 80.67 percent (n=242) of the 300 simulated e-commerce consumer transactions contained at least one or more instance of non-compliance (Table 9, models (2-5), Total). This means that merely 19.33 percent (n=58) of traders complied in full with the selected consumer rights (Table 9, model (1), Total). As shown in Table 9, 16 percent of e-commerce traders had one instance of non-compliance, 23.67 percent had two instances, 11.67 percent had three instances, and 29.33 percent had four or more violations. 10 traders (3.33 percent) had nine or more violations: 1 large enterprise and 8 SMEs from the United Kingdom; 1 SME from Germany (Table 10, model (10)).¹

¹ See the Appendix and Dataset attached in in print to this thesis. The German trader had 10 violations (see trader number 119). 2 UK traders had 9 violations (see trader number 239 and 273), 4 UK traders had 10 violations (see trader number 247, 270, 285, and 297), and 3 UK traders had 11 violations (see trader number 237, 275, and 287).

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

Table 9 Number of Instances of Non-Compliance per Trader (Part I)

	(1) None	(2) One	(3) Two	(4) Three	(5) Four
<i>Country</i>					
France	16.00% (n=12)	21.33% (n=16)	25.33% (n=19)	13.33% (n=10)	10.67% (n=8)
Germany	54.67% (n=41)	26.67% (n=20)	12.00% (n=9)	2.67% (n=2)	1.33% (n=1)
Netherlands	4.00% (n=3)	13.33% (n=10)	50.67% (n=38)	13.33% (n=10)	12.00% (n=9)
UK	2.67% (n=2)	2.67% (n=2)	6.67% (n=5)	17.33% (n=13)	18.67% (n=14)
<i>Industry</i>					
Electronics	30.00% (n=18)	11.67% (n=7)	26.67% (n=16)	5.00% (n=3)	15.00% (n=9)
Fashion	28.33% (n=17)	11.67% (n=7)	25.00% (n=15)	10.00% (n=6)	10.00% (n=6)
Sport Eq.	15.00% (n=9)	13.33% (n=8)	18.33% (n=11)	15.00% (n=9)	10.00% (n=6)
Home Decor	16.67% (n=10)	26.67% (n=16)	21.67% (n=13)	11.67% (n=7)	8.33% (n=5)
Print Media	6.67% (n=4)	16.67% (n=10)	26.67% (n=16)	16.67% (n=10)	10.00% (n=6)
<i>Company Size</i>					
Large	27.97% (n=33)	21.19% (n=25)	21.19% (n=25)	9.32% (n=11)	11.02% (n=13)
SME	13.74% (n=25)	12.64% (n=23)	25.27% (n=46)	13.19% (n=24)	10.44% (n=19)
Total	19.33% (n=58)	16.00% (n=48)	23.67% (n=71)	11.67% (n=35)	10.67% (n=32)

Notes: Percentage per category (independent variable) and rounded to two decimals places. Frequencies in brackets. There are 75 traders per Member State and 60 traders per industry. 118 traders are large enterprises and 182 traders are SMEs (45 by default). In total, there are 300 hundred traders.

Table 10 Number of Instances of Non-Compliance per Trader (Part II)

	(6) Five	(7) Six	(8) Seven	(9) Eight	(10) Nine or more
<i>Country</i>					
France	5.33% (n=4)	5.33% (n=4)	1.33% (n=1)	1.33% (n=1)	0.00% (n=0)
Germany	1.33% (n=1)	0.00% (n=0)	0.00% (n=0)	0.00% (n=0)	1.33% (n=1)
Netherlands	4.00% (n=3)	1.33% (n=1)	1.33% (n=1)	0.00% (n=0)	0.00% (n=0)
UK	12.00% (n=9)	12.00% (n=9)	12.00% (n=9)	4.00% (n=3)	12.00% (n=9)
<i>Industry</i>					
Electronics	1.67% (n=1)	5.00% (n=3)	1.67% (n=1)	0.00% (n=0)	3.33% (n=2)
Fashion	6.67% (n=4)	1.67% (n=1)	3.33% (n=2)	1.67% (n=1)	1.67% (n=1)
Sport Eq.	10.00% (n=6)	6.67% (n=4)	5.00% (n=3)	3.33% (n=2)	3.33% (n=2)
Home Decor	1.67% (n=1)	3.33% (n=2)	3.33% (n=2)	1.67% (n=1)	5.00% (n=3)
Print Media	8.33% (n=5)	6.67% (n=4)	5.00% (n=3)	0.00% (n=0)	3.33% (n=2)
<i>Company Size</i>					
Large	2.54% (n=3)	2.54% (n=3)	3.39% (n=4)	0.00% (n=0)	0.85% (n=1)
SME	7.69% (n=14)	6.04% (n=11)	3.85% (n=7)	2.20% (n=4)	4.95% (n=9)
Total	5.67% (n=17)	4.67% (n=14)	3.67% (n=11)	1.33% (n=4)	3.33% (n=10)

Notes: Percentage per category (independent variable) and rounded to two decimals places. Frequencies in brackets. There are 75 traders per Member State and 60 traders per industry. 118 traders are large enterprises and 182 traders are SMEs (45 by default). In total, there are 300 hundred traders.

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

The number of instances of full compliance vary, sometimes even significantly, between countries, industries, and company sizes (Table 9, model (1)). The lowest level of full compliance was observed among traders based in the United Kingdom. Only 2.67 percent, so 2 out of 75 UK traders, complied in full with their legal obligations. Even in Germany, the most compliant jurisdiction in the present study, only 54.67 percent (41 out of 75 traders) of traders were in full compliance. Industry compliance varied between 6.67 percent among the Print Media enterprises, that is 4 out of 60 traders, and 30 percent among the Electronics enterprises, that is 18 out of 60 traders. Compliance among companies of different sizes varied between 13.74 percent for SMEs, 25 out of 182 traders, and 27.97 percent for large enterprises, 33 out of 118 traders. Despite the significant differences between the three categories, no jurisdiction, industry, or company size was in full compliance.

In conclusion, the descriptive analysis revealed that the overall levels of compliance were high (92.36 percent of all compliance assessments, Table 8). However, 80.67 percent (n=242) of all traders had at least one or more instance of non-compliance (Table 9 and 10, Total). The null hypothesis, that e-commerce traders are *fully* compliant with the 35 selected consumers protection rights, is therefore rejected, and the first hypothesis (H₁), that traders do not comply in full with their legal obligations, can be confirmed.² The empirical findings also confirm the earlier studies which measured trader compliance, but, as discussed in Chapter 4.2, their scope differed from that of the present study.³

² Further observations concerning the levels of compliance with each consumer right are addressed in section 5.3 of this Chapter.

³ cf Marco Loos and Joasia A Luzak, 'Wanted: a Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers' (2016) 39(1) Journal of Consumer Policy 63; Aashish Srivastava, 'The New EU Consumer Rights Directive: An Empirical Study on Compliance Issues by E-Tailers' (2017) 32(4) Journal of Business Law 282; Mary Donnelly and Fidelma Whit, 'Digital content and consumer protection: An empirical study of supplier compliance with consumer information obligations' (2019) 35(6) Computer Law & Security Review 1.

5.2.2 Hypotheses Two to Four: Factors of Non-Compliance

The previous Section has revealed that the vast majority of traders failed to comply in full with their legal obligations. This Section presents data relating to factors that were hypothesised as potentially contributing to non-compliance.⁴ The factors selected for assessment were the company's size (H₂), the company's age (H₃), and the use of pre-drafted terms prepared by public or semi-public authorities (H₄). As discussed in Chapter 4, the three hypotheses need to be addressed jointly because the independent variables, that is the company's age, company's size, use of pre-drafted terms, and compliance per jurisdiction, also serve as control variables in the Ordinary Least Squares and Binary Logistic Regression models. The Ordinary Least Squares (model (1) in Table 11) has assessed whether the instances of non-compliance per trader affect compliance, whereas the Binary Logistic Regression (model (2) in Table 11) has used the probability of non-compliance, that is full compliance versus at least some non-compliance.⁵ Both tests have revealed very similar results and are consequently discussed jointly. The results of the statistical tests are reported in Table 11 below.

The H₂ hypothesis claims that large enterprises are more likely to be compliant than small and medium-sized enterprises. The coefficient in model (1) on the company size variable is estimated to be positive at the 1 percent level of significance and at the 5 percent level of significance in model (2). Values of statistical significance at the 1 or 5 percent level are a very strong indicator that the findings are unlikely observed by chance.⁶ And in this case, the results indicate that SMEs had on average more violations with the consumer protection rules than large enterprises (model (1)) and were less likely to be compliant

⁴ For further details, see Chapter 4.2.

⁵ Further details on these test and why they have been selected are provided in Chapter 4.6

⁶ This means that there is only a 1 or 5 percent risk that it has been observed by chance, which in turn means that the confidence level is at 99 percent and 95 percent respectively.

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

(model (2)). This finding rejects the null hypothesis, that it is SMEs are more likely to be compliant, and confirms the company size hypothesis (H_2), that it is large enterprises are more likely to be compliant than small and medium-sized enterprises.⁷

The third hypothesis (H_3) claims that e-commerce traders which have operated on the market for a longer time are compliant to a greater degree than companies that were incorporated more recently. The hypothesis has been tested once with the company age variable uncapped and then the second time with the variable capped at 30 years. No statistical difference has been detected between capping or not capping the company age. Therefore, only the results of the uncapped company age are reported in Table 11. In either statistical test (model (1) and (2)), company age has not statistically affected non-compliance. The third hypothesis (H_3), that the company's age is a factor of compliance, can thus not be confirmed.⁸

Surprisingly, the traders' use of terms pre-drafted by public or semi-public authorities (H_4) does not statistically affect compliance, once the effect of the trader's origin has been accounted for. The fourth hypothesis is consequently not confirmed.⁹ It is nonetheless worth mentioning that, although not at a statistically significant level, model (1) suggests

⁷ This confirms the findings of the UK Competition and Markets Authority's study on the awareness of trader about the consumer rights contained in the Consumer Rights Act 2015. The study revealed that company size has an overall positive influence on awareness of obligations, see Competition and Markets Authority/IFF Research, 'Unfair Contract Terms Research' (Competition and Markets Authority, 19 October 2016) available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/561518/UK_businesses_understanding_of_unfair_terms_in_consumer_contracts__IFF_Research_.pdf> accessed 29 April 2020, 40.

⁸ Competition and Markets Authority could also not establish any statistical significance in their study, see *ibid* 20-21.

⁹ The four jurisdictions have been included as control variables. The level of compliance is compared to German traders because they were the most compliant. French, Dutch, and UK traders had on average more instances of non-compliance compared to German traders (see Table 11, model (1)); German traders were also found to be more likely to comply with their legal obligations (see Table 11, model (2)).

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

from an effect size perspective that e-commerce traders that base their terms and conditions on pre-drafted standard contract terms prepared by public or semi-public authorities have on average fewer violations compared to traders who do not. However, again from an effect size perspective, model (2) suggests that traders using pre-drafted terms have a higher probability of non-compliance than traders who draft their own terms. Although there is no statistical significance at the usual levels, the results, nevertheless, could suggest two scenarios: (1) the pre-drafted terms already contained provisions which were in breach of consumer protection standards (although on average fewer than traders who drafted their own); or (2) that traders using them had collectively failed to implement them faithfully on their websites. Both options will be examined in Chapter 6.2.

It follows that a company's size is statistically affecting compliance, while a company's age or the use of terms pre-drafted by (semi-)public authorities is not of statistical significance. Further details on the instances of non-compliance with each consumer right are provided in the subsequent section and the wider implications of the findings on consumer contract law are discussed in the next Chapter.

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

Table 11 Effects of Instances of Non-Compliance and Probability of Non-Compliance

Independent Variable	Dependent Variable	
	Instances of Non-Compliance <i>Ordinary Least Squares</i> (1)	Probability of Non-Compliance <i>Binary Logistic Regression</i> (2)
Company Size (SME)	1.250*** (0.222)	0.800** (0.396)
Company Age (Uncapped)	0.003 (0.006)	0.003 (0.012)
Use of Pre-Drafted Terms	-0.705 (0.463)	2.040 (1.264)
Control Variable France	1.612*** (0.293)	2.093*** (0.416)
Control Variable NL	1.870*** (0.465)	2.232*** (0.810)
Control Variable UK	4.407*** (0.294)	4.053*** (0.769)
Constant	-0.035 (0.273)	-0.883** (0.419)
Observations (N)	282	282
R ²	0.509	
Adjusted R ²	0.498	
Log Likelihood		-92.651
Akaike Information Criterion		199.303
Residual Standard Error	1.696 (df = 275)	
F Statistic	47.444*** (df = 6; 275)	

*p<0.1; **p<0.05; ***p<0.01

Notes: The observations dropped from 300 traders to 282 due to missing values; the age variable was impossible to obtain for thirteen German traders, three Dutch traders (two used pre-drafted terms), and two UK traders. 118 traders are large enterprises and 164 traders are SMEs. Only Dutch traders (n=56) have used pre-drafted terms and the effect of a trader's origin has been accounted for. Control variables show likelihood of non-compliance compared to German traders.

5.3 Compliance with Consumer Rights

A closer look at the data has revealed that 60.60 percent (n=486) of the 802 detected violations concerned mandatory disclosures, 21.95 percent (n=176) unfair contract terms, 16.58 percent (n=133) the consumers' right of withdrawal, and 0.87 percent (n=7) the rules governing the passing of risk (Table 12, Total). The data also suggests that traders, regardless of their origin, industry, or company size, struggled the most with mandatory disclosures. This is followed, except in Germany, by the right of withdrawal, unfair contract terms, and the passing of risk.

The exact levels of (non-)compliance with each consumer right are examined in this Section. Patterns but also individual instances where traders failed to comply with consumers protection standards are discussed, by examining and referring to the compliance assessments attached to this thesis (see Appendix and Dataset).

Table 12 Instances of Non-Compliance by Legal Category

	(1) Unfair Contract Terms	(2) Mandatory Disclosures	(3) Right of Withdrawal	(4) Passing of Risk
<i>Country</i>				
France	14.29% (n=25)	71.43% (n=125)	13.71% (n=24)	0.57% (n=1)
Germany	9.52% (n=6)	79.37% (n=50)	11.11% (n=7)	0.00% (n=0)
Netherlands	31.67% (n=57)	55.56% (n=100)	12.78% (n=23)	0.00% (n=0)
United Kingdom	22.92% (n=88)	54.95% (n=211)	20.57% (n=79)	1.56% (n=6)
<i>Industry</i>				
Electronics	31.34% (n=42)	52.24% (n=70)	15.67% (n=21)	0.75% (n=1)
Fashion	21.17% (n=29)	59.85% (n=82)	18.25% (n=25)	0.73% (n=1)
Sport Equipment	15.63% (n=30)	64.58% (n=124)	18.75% (n=36)	1.04% (n=2)
Home Decor	23.68% (n=36)	57.24% (n=87)	17.11% (n=26)	1.97% (n=3)
Print Media	20.86% (n=39)	65.78% (n=123)	13.37% (n=25)	0.00% (n=0)
<i>Company Size</i>				
Large Enterprise	25.86% (n=60)	57.76% (n=134)	14.66% (n=34)	1.72% (n=4)
SME	20.35% (n=116)	61.75% (n=352)	17.37% (n=99)	0.53% (n=3)
Total				
	21.95% (n=176)	60.60% (n=486)	16.58% (n=133)	0.87% (n=7)

Notes:

(1) Percentage per category (independent variable) and rounded to two decimals places. Frequencies in brackets. There are 75 traders per Member State, 60 traders per industry. 118 traders are large enterprises and 182 traders are SMEs (45 by default). In total, there are 300 hundred traders.

(2) Model (1) are dependant variables X1-X11. Model (2) are Y1-Y4; Z1a-Z11; Z4. Model (3) are Z2a(i)-Z2f. Model (4) are Z3a and Z3b. See Chapter 4.3 for further details.

5.3.1 Unfair Contract Terms

A total of 176 instances of non-compliance were detected in the 3300 compliance assessments in search for unfair contract terms, as defined in Chapter 2 (Table 12, model (1)). Substantial differences were once again observed between the jurisdictions, industries, and company sizes. Out of 3300 compliance assessments (with 825 assessments per jurisdiction), only 6 instances of unfair terms were found in Germany (0.73 percent), 25 in France (3.01 percent), 57 in the Netherlands (6.91 percent), and 88 in the United Kingdom (10.67 percent). The number of unfair terms by industries varied between 4.39 percent in Fashion (29 out of 660 compliance assessments) and 6.36 percent in Electronics (42 out of 660 compliance assessments), and 4.62 percent for large companies (60 out of 1298 compliance assessments) and 5.79 percent for SMEs (116 out of 2002 compliance assessments).

At a first glance, the overall number of unfair terms seems low. Only 8.34 percent out of the 300 traders' websites contained two or more unfair contract terms (Table 13, Total). However, only 52 percent of all traders had no unfair contract term on their websites. The greatest differences were observed among jurisdictions. Only 21.33 percent of UK traders had no unfair term on their websites compared to 92 percent of German traders.

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

Table 13 Number of Unfair Contract Terms per Trader

	(1) None	(2) One	(3) Two	(4) Three	(5) Four
<i>Country</i>					
France	66.67% (n=50)	33.33% (n=25)	0.00% (n=0)	0.00% (n=0)	0.00% (n=0)
Germany	92.00% (n=69)	8.00% (n=6)	0.00% (n=0)	0.00% (n=0)	0.00% (n=0)
Netherlands	28.00% (n=21)	68.00% (n=51)	4.00% (n=3)	0.00% (n=0)	0.00% (n=0)
UK	21.33% (n=16)	49.33% (n=37)	22.67% (n=17)	4.00% (n=3)	2.67% (n=2)
<i>Industry</i>					
Electronics	45.00% (n=27)	45.00% (n=27)	6.67% (n=4)	1.67% (n=1)	1.67% (n=1)
Fashion	58.33% (n=35)	35.00% (n=21)	6.67% (n=4)	0.00% (n=0)	0.00% (n=0)
Sport Eq.	63.33% (n=38)	26.67% (n=16)	8.33% (n=5)	0.00% (n=0)	1.67% (n=1)
Home Decor	51.67% (n=31)	40.00% (n=24)	5.00% (n=3)	3.33% (n=2)	0.00% (n=0)
Print Media	41.67% (n=25)	51.67% (n=31)	6.67% (n=4)	0.00% (n=0)	0.00% (n=0)
<i>Company Size</i>					
Large	55.93% (n=66)	38.14% (n=45)	5.08% (n=6)	0.85% (n=1)	0.00% (n=0)
SME	49.45% (n=90)	40.66% (n=74)	7.69% (n=14)	1.10% (n=2)	1.10% (n=2)
Total	52.00% (n=156)	39.67% (n=119)	6.67% (n=20)	1.00% (n=3)	0.67% (n=2)

Notes: Percentage per category (independent variable) and rounded to two decimals places. Frequencies in brackets. There are 75 traders per Member State and 60 traders per industry. 118 traders are large enterprises and 182 traders are SMEs (45 by default). In total, there are 300 hundred traders. Total of 11 Unfair Contract Terms scenarios.

Table 14 Non-Compliances with Unfair Contract Terms

	(1) Violation 'General Test'	(2) Violation 'Grey-List'	(3) Violation 'Black-List'	Overall
<i>Country</i>				
France	0.00% (n=0)	0.00% (n=0)	100.00% (n=25)	25
Germany	0.00% (n=0)	0.00% (n=0)	100.00% (n=6)	6
Netherlands	0.00% (n=0)	7.02% (n=4)	92.98% (n=53)	57
UK	12.50% (n=11)	0.00% (n=0)	87.50% (n=77)	88
<i>Industry</i>				
Electronics	9.52% (n=4)	7.14% (n=3)	83.33% (n=35)	42
Fashion	3.45% (n=1)	0.00% (n=0)	96.55% (n=28)	29
Sport Equipment	13.33% (n=4)	3.33% (n=1)	83.33% (n=25)	30
Home Decor	5.56% (n=2)	0.00% (n=0)	94.44% (n=34)	36
Print Media	0.00% (n=0)	0.00% (n=0)	100.00% (n=39)	39
<i>Company Size</i>				
Large	1.67% (n=1)	1.67% (n=1)	96.67% (n=58)	60
SME	8.62% (n=10)	2.59% (n=3)	88.79% (n=103)	116
Total	6.25% (n=11)	2.27% (n=4)	91.48% (n=161)	176

Notes: Percentage per category (independent variable) and rounded to two decimals places. Frequencies in brackets. There are 75 traders per Member State and 60 traders per industry. 118 traders are large enterprises and 182 traders are SMEs (45 by default). In total, there are 300 hundred traders. The level of protection varies between the Member States, see Tables 2 to 4 in Chapter 4.

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

Another difference between the jurisdictions concerns the nature of the violations. As explained in Chapters 2 and 4, different techniques to controlling unfair terms exist in the four jurisdictions, as the Unfair Contract Terms Directive is only a minimum harmonisation instrument and Member States are allowed to enact stricter rules.¹⁰ The Directive contains a general test of fairness which is complemented by a non-exhaustive and indicative list of potentially unfair contract terms.¹¹ France, Germany, and the Netherlands police unfair terms with a general test complemented by ‘grey lists’, that is by creating a presumption that a term included in a ‘grey list’ is unfair and limiting the judicial discretion on the matter, and by ‘black lists’, that is by declaring terms included in the ‘black list’ as void and thus precluding any judicial discretion. However, the content and extent of the lists varies significantly between the three jurisdictions, as it has been shown in Chapters 2 and 4. Conversely, the UK controls unfair terms with a general test of fairness accompanied by an indicative list of potentially unfair terms, and also several statutory and common law prohibitions which resemble in character a ‘black list’. The different standards of consumer protection between the jurisdictions also explains why the compliance assessments have not detected any violations with the general test in France, Germany, and the Netherlands. These three jurisdictions have included the potentially unfair terms included in the Annex to the Unfair Contract Terms Directive in their ‘grey lists’ and ‘black lists’, thus limiting the need to rely only on the general test. One consequence of the different standards is that the results presented in Table 14 do not allow for a direct comparison between the jurisdictions, industries, and company size, and thus makes a more nuanced examination of the data necessary.

¹⁰ Article 8 of the Unfair Contract Terms Directive 93/13/EEC.

¹¹ Articles 3 and 4 in connection with Annex I to the Unfair Contract Terms Directive 93/13/EEC.

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

Table 15 Instances of Unfair Contract Terms by Legal Category

	X1	X2	X3	X4	X5	X6	X7	X8	X9	X10	X11	Overall
<i>Country</i>												
France	0	0	0	0	0	0	0	0	0	0	25	25
Germany	0	0	0	2	0	0	0	0	0	0	4	6
Netherlands	2	1	0	1	0	0	0	0	0	0	53	57
UK	2	0	0	3	4	3	1	0	0	22	53	88
<i>Industry</i>												
Electronics	2	1	0	1	2	2	0	0	0	4	30	42
Fashion	1	0	0	0	1	0	0	0	0	6	21	29
Sport Equipment	1	0	0	2	1	1	1	0	0	3	21	30
Home Decor	0	0	0	3	0	0	0	0	0	5	28	36
Print Media	0	0	0	0	0	0	0	0	0	4	35	39
<i>Company Size</i>												
Large Enterprise	1	1	0	1	0	0	0	0	0	9	48	60
SME	3	0	0	5	4	3	1	0	0	13	87	116
<i>Non-Compliance</i>												
‘General Test’	0	0	0	3	4	3	1	0	0	0	0	11
‘Grey List’	2	1	0	1	0	0	0	0	0	0	0	4
‘Black List’	2	0	0	2	0	0	0	0	0	22	135	161
Total	4	1	0	6	4	3	1	0	0	22	135	176

Notes:

(1) Frequencies of unfair contract terms. There are 75 traders per Member State, 60 traders per industry. 118 traders are large enterprises and 182 traders are SMEs (45 by default). In total, there are 300 hundred traders.

(2) X1 limitation of liability in case of death or personal injury. X2 exclusion or limitation of compensation in case of total or partial non-performance. X3 one-sided compensation for cancellation. X4 excessive compensation. X5 one-sided changes to the contract. X6 one-sided changes to the product. X7 price variations. X8 one-sided interpretation of the contract. X9 one-sided compliance with obligations. X10 transfer of contracts to other traders under less favourable conditions. X11 limitation of rights to legal action.

The empirical findings presented in Table 15 suggest that the 176 violations concerned 8 out of the 11 selected scenarios of (potentially) unfair terms and that most of the detected unfair contract terms concerned a small number of obligations. The vast majority of unfair terms were invalid jurisdiction or choice of law clauses (Table 15, X11). These clauses attempted to deprive consumers of their right to bring a claim at their habitual residence and also to rely on their national consumer protection rules.¹² Although consumers are not

¹² See Chapter 2.4.11 of this thesis. The observation confirms the findings of Marco Loos and Joasia Luzak, Loos and Luzak (n 3) 85-86.

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

bound by such clauses, such a high number of violations is alarming. A good illustrative example of an in compliant jurisdiction clause is the contract term of a Dutch trader which provided its terms and conditions partly in Dutch and partly in English. The English version provided that the contract was exclusively governed by Spanish law and disputes could only be resolved by the courts of Barcelona, unless the customer was a consumer. In this case, the trader accepted that customers could submit their claim at their habitual residence in Spain. The Dutch version provided almost the exact same content, but allowed customers to go to court at their habitual residence, so not only in Spain. Even if these clauses were interpreted in favour of the trader's compliance, that is to say by only taking into account the content of the Dutch clause, consumers would only be able to rely on Spanish law, which is a clear breach of the consumers' rights, as indicated by dependent variable X11.¹³

The second most common type of unfair contract terms which were found in the traders' standard terms concerned the transfer of rights and obligations (variable X10). As shown in Table 15, all 22 violations occurred in the United Kingdom. This means that almost one third of all UK traders' contracts had such a clause in their terms and conditions. It has been pointed out in Chapter 2, that according to the common law doctrine of assignment, consumers are not bound by these clauses.¹⁴

Six clauses allowing traders to charge consumers a disproportionately high amount of compensation in case consumers fail to fulfil their contractual obligations (variable X4) were detected. These findings were made in the terms and conditions of two German

¹³ Trader 175 (X11), see the Dataset attached to this thesis. Such clauses were also found by Loos and Luzak (n 3) 82-84. Invalid choice of law clauses are contrary to Article 6(1) of the Regulation (EU) 593/2008 (Rome I); invalid jurisdiction clauses are in breach of Article 18(2) of the of the Regulation (EU) 1215/2012, also referred to as Brussels I Regulation (Recast) Further legal context is provided in Chapter 2.4.11 of the present study.

¹⁴ See Chapter 2.4.10.

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

traders,¹⁵ one Dutch trader,¹⁶ and three UK traders.¹⁷ The clauses of the German and UK traders yield particularly interesting results. In Germany, such clauses are generally in breach of § 309 Nr. 6 of the BGB. Traders are, however, allowed to charge interest in case consumers fail to pay for the delivered goods.¹⁸ The BGB caps the interest rate at five percentage points above the basic rate of interest in business-to-consumer contracts and at nine percentage points above the basic rate of interest in business-to-business contracts.¹⁹ All German traders in the study complied with the latter requirement. Clauses where traders charged consumers to return the goods were found in the United Kingdom. For instance, trader 275 not only failed to provide the correct withdrawal period (seven days instead of 14), but also required consumers to get written permission prior to returning the goods and to pay 25 percent of the purchase price as a penalty. Trader 256 would also charge a 25 percent ‘handling & restocking’ fee. Another, though less clear, clause was found in the terms and conditions of Trader 274. Here, the trader charged consumers an up to 25 percent ‘restocking fee’. The exact percentage does not matter in this case, as traders cannot charge consumer in case of a return.²⁰ However, the consumer must pay to return the goods unless the trader’s terms provide otherwise or in case the trader has failed to inform the consumer

¹⁵ Trader 119 and Trader 124.

¹⁶ Trader 162.

¹⁷ Trader 256, Trader 274, and Trader 275.

¹⁸ See for instance Trader 183.

¹⁹ § 288 of the BGB. See generally, Christian Ernst, ‘§ 288’ in Wolfgang Krüger (ed), *MünchKommBZurBGB* Band 2 – *Schuldrecht Allgemeiner Teil* 1 §§ 241-310 (8th edn, C.H. Beck 2019) BGB § 288 [1-5].

²⁰ Article 9(1) of Directive 2011/83/EU, implemented in the United Kingdom by Section 29(1) of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

of the cost.²¹ The question is whether such a term is a penalty clause. As stated earlier (Chapter 2.4.4), a penalty clause exists where there is no legitimate interest in deterring the contractual breach and the clause is therefore being used as an exorbitant or unconscionable alternative to common law damages. Traders have a generous margin of error, so it seems very unlikely that it is a penalty clause. Instead, Section 62 of the Consumer Rights Act 2015 in connection with Schedule 2 Part 1(5) and (6) of the Act applies and it is extremely likely that the UK courts would set aside such a clause.

A number of violations were detected concerning variable X1 (n=4), that is the traders limitation of negligence liability in case of death or personal injury of consumers,²² variable X5 (n=4), that is clauses allowing traders to unilaterally modify the contract,²³ and variable X6 (n=3), that is one-sided compensation for cancellation clauses.²⁴ One violation was found concerning clauses excluding or limiting the consumer's compensation in case of total or partial non-performance of the trader (variable X2) and one price variation clause (variable X7).²⁵

In conclusion, the examination of trader compliance with unfair terms has revealed that traders struggled the most with providing only the permitted jurisdiction and choice of law clauses (variable X11) and clauses which would allow traders to transfer their rights and obligations to third parties (variable X10). Both scenarios accounted for 89.20 percent (157 out of 176) of the identified unfair contract terms in the present study. Another discovery was that traders based in the United Kingdom had the greatest number of unfair terms on

²¹ Article 14(1) of Directive 2011/83/EU, implemented in the United Kingdom by Section 35(5) of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

²² See Chapter 2.4.1.

²³ See Chapter 2.4.5.

²⁴ See Chapter 2.4.6.

²⁵ See Chapter 2.4.2 and Chapter 2.4.7.

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

their websites. The same applied to traders in Electronics and small and medium-sized enterprises. Overall, merely 52 percent of all 300 traders (n=156) had no unfair contract term on their websites, however, the overall level of non-compliance at 5.33 percent is reasonably low (176 unfair contract terms out of 3300 compliance assessments).

5.3.2 Mandatory Disclosures

This Section explores the findings concerning the instances of non-compliance with the 15 selected mandatory disclosures, including details on whether traders provided the required information incorrectly or failed to provide it. Out of 4500 compliance assessments which were carried out regarding mandatory disclosures alone, 486 instances of non-compliances (94 violations and 392 omissions) and 4014 compliances were detected (Table 16, Total; Table 17, Overall).

Overall, 28.67 percent of all traders complied with all examined mandatory disclosures (Table 16, model (1)). 66.67 percent of German traders complied in full compared to only 8 percent of UK traders. Substantial differences were as well observed between the industries, 41.67 percent compliance in Electronics versus 15 percent in Print Media, and between large enterprises (39.83 percent) and SMEs (21.43 percent).

The greatest number of instances of non-compliance occurred in relation to the requirement to display the link to the European Commission's Online Dispute Resolution platform (variable Z4). As discussed in Chapter 3.3.1.6, traders are allowed to opt-out of ODR, but they are legally required to provide a link to the Commission's platform and also their business email address.²⁶ As shown in Table 16, more than half (52.67 percent) of all 300 traders failed to comply with this mandatory requirement (n=158), although the number is much lower in Germany (13.33 percent, so 10 out 75). A closer look at the data revealed

²⁶ Article 6(1)(t) of Directive 2011/83/EU in connection with Article 14 of Regulation (EU) 524/2013.

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

that 110 traders failed to provide the link on their websites, while 48 traders did so incorrectly (Table 17, model (Z4)).²⁷ The 48 traders which incorrectly provided the information requirement merely referred to a national or industry ODR body and not the European Commission's ODR platform. Referring only to a national or industry body is highly problematic in cross-border disputes, as consumers might not even speak the national language.

The second most frequent type of non-compliance with mandatory disclosures concerned the traders' failure to provide a withdrawal form on their websites (Table 17, model (Z1g(ii))).²⁸ An example of how a model withdrawal form should look like can be found in the Annex to the Consumer Rights Directive 2011/83/EU, but traders can draft their own forms or provide an electronic alternative. As illustrated in Table 17, 86 traders failed to provide such a form on their websites, including almost half of all UK traders (37 out of 75) and more than one third of all French traders (27 out of 75).

²⁷ This confirms the findings of the European Commission's study where nearly 45 percent of traders failed to comply with this information requirement, Commission, 'Online shopping: Commission and Consumer Protection authorities urge traders to bring information policy in line with EU law' (European Commission, 31 January 2020) available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_156> accessed 12 August 2020.

²⁸ Article 6(1)(h) of Directive 2011/83/EU. See Chapter 3.3.1.1.

Table 16 Number of Instances of Non-Compliance with Mandatory Disclosures per Trader

<i>Country</i>	(1) None	(2) One	(3) Two	(4) Three	(5) Four	(6) Five	(7) Six	(8) Seven
France	25.33% (n=19)	20.00% (n=15)	34.67% (n=26)	9.33% (n=7)	5.33% (n=4)	4.00% (n=3)	1.33% (n=1)	0.00% (n=0)
Germany	66.67% (n=50)	14.67% (n=11)	13.33% (n=10)	1.33% (n=1)	1.33% (n=1)	1.33% (n=1)	0.00% (n=0)	1.33% (n=1)
Netherlands	15.00% (n=11)	56.00% (n=42)	18.67% (n=14)	5.33% (n=4)	2.67% (n=2)	2.67% (n=2)	0.00% (n=0)	0.00% (n=0)
United Kingdom	8.00% (n=6)	21.33% (n=16)	10.67% (n=8)	20.00% (n=15)	24.00% (n=18)	13.33% (n=10)	2.67% (n=2)	0.00% (n=0)
<i>Industry</i>								
Electronics	41.67% (n=25)	30.00% (n=18)	13.33% (n=8)	5.00% (n=3)	5.00% (n=3)	5.00% (n=3)	0.00% (n=0)	0.00% (n=0)
Fashion	33.33% (n=20)	28.33% (n=17)	20.00% (n=12)	10.00% (n=6)	5.00% (n=3)	1.67% (n=1)	1.67% (n=1)	0.00% (n=0)
Sport Equipment	20.00% (n=12)	23.33% (n=14)	21.67% (n=13)	11.67% (n=7)	15.00% (n=9)	6.67% (n=4)	0.00% (n=0)	1.67% (n=1)
Home Decor	33.33% (n=20)	30.00% (n=18)	16.67% (n=10)	6.67% (n=4)	6.67% (n=4)	5.00% (n=3)	1.67% (n=1)	0.00% (n=0)
Print Media	15.00% (n=9)	28.33% (n=17)	25.00% (n=15)	11.67% (n=7)	10.00% (n=6)	8.33% (n=5)	1.67% (n=1)	0.00% (n=0)
<i>Company Size</i>								
Large Enterprise	39.83% (n=47)	30.51% (n=36)	15.25% (n=18)	6.78% (n=8)	5.93% (n=7)	1.69% (n=2)	0.00% (n=0)	0.00% (n=0)
SME	21.43% (n=39)	26.37% (n=48)	21.98% (n=40)	10.44% (n=19)	9.89% (n=18)	7.69% (n=14)	1.65% (n=3)	0.55% (n=1)
Total	28.67% (n=86)	28.00% (n=84)	19.33% (n=58)	9.00% (n=27)	8.33% (n=25)	5.33% (n=16)	1.00% (n=3)	0.33% (n=1)

Notes: Percentage per category (independent variable) and rounded to two decimals places. Frequencies in brackets. There are 75 traders per Member State and 60 traders per industry. 118 traders are large enterprises and 182 traders are SMEs (45 by default). In total, there are 300 hundred traders.

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

Another alarming level of non-compliance was detected with the requirement to remind consumers of the existence of a legal guarantee of conformity of goods (Table 17, model (Z1h)).²⁹ 81 traders failed to comply with this mandatory disclosure: 80 traders omitted to include the reminder on their websites and one Dutch trader stipulated that consumers automatically waived their statutory rights in case they failed to report the non-conformity within 5 days of delivery.³⁰

Traders are also required to display their VAT number on their websites (variable Y2).³¹ 77 traders breached this requirement, 50 alone in the United Kingdom (Table 17, model (Y2)). Out of the 77 traders which failed to comply with this requirement, 26 traders failed to provide the country code, that is for instance NL for the Netherlands, and 51 traders had not included their VAT number at all on their websites. 223 traders had correctly displayed the VAT number on their websites.

Turning to the requirement concerning the display of traders' register number on their websites (variable Y1).³² 34 traders failed to comply with this requirement, 24 of which were traders from the United Kingdom. 18 out of these 34 traders failed to include the

²⁹ Article 6(1)(l) of Directive 2011/83/EU. See Chapter 3.3.1.1.

³⁰ The trader relied on Article 6:89 and Article 7:23 of the BW, although five days seem quite short for a reasonable period to inspect the goods. Therefore, it seems that it breached the consumer protection right covered by dependent variable Z1h. The Dutch Supreme Court (*Hoge Raad*) has ruled in 2010 that all the circumstances of the case must be taken into account to determine whether a period is reasonable, including the expertise and relationship of the parties (HR 8 October 2010, ECLI:NL:HR:2010:BM9615, paragraph 3.4). The assessment is thus always context specific; in the case of financial services, the Dutch Supreme Court ruled that even three years is a reasonable period because of the ongoing client-consumer relationship (HR 8 February 2013, ECLI:NL:HR:2013:BY4600). cf Jacob Hijma, 'HR 08-02-2013, ECLI:NL:HR:2013:BY4600' (2014) *Nederlandse Jurisprudentie* 497.

In the European Commission's study (n 27), over a third of traders did not inform consumers about their statutory rights concerning conformity of goods.

³¹ Article 5(1)(g) of Directive 2000/31/EC. See Chapter 3.2.1.

³² Article 5(1)(d) of Directive 2000/31/EC. See Chapter 3.2.1.

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

registration number on their websites, while 16 traders did so incorrectly; 266 traders complied with this requirement (Table 17, model (Y1)). All 16 traders that incorrectly provided the information failed to indicate in which register they were listed. This omission has far reaching consequences in case of a dispute, making it extremely difficult to establish or verify the identity of traders.

Another surprise was that 35 traders did not provide the estimated delivery time, out of which more than half of the traders (n=19) were based in France (Table 17, model (Z1f)).³³

Traders also failed, although not so significantly, to comply with 5 additional mandatory disclosures. 4 traders failed to include their address on their websites (Table 17, model (Z1c)),³⁴ 3 traders failed to inform consumers of their right of withdrawal and 1 trader stated that consumers had no right of withdrawal (Z1g(i)),³⁵ and 4 traders failed to provide any payment options on their websites, which means that consumers would presumably only find out how they can pay for their goods after purchasing them (Table 17, model (Z1e)).³⁶ Another 2 traders provided vital parts of their terms and conditions in a different language than the remaining parts of the contract (Table 17, model (Y4)).³⁷ For instance, one French trader included the ODR clause only in English in the terms and conditions.³⁸ Another trader, based in the Netherlands,³⁹ provided the entire website in Dutch but most of the terms and conditions in English. Importantly, the right of withdrawal and rules on trader liability were not provided in Dutch. As mentioned earlier (Chapter 5.3.1), it is of even

³³ Article 6(1)(g) of Directive 2011/83/EU. See Chapter 3.3.1.1.

³⁴ Article 6(1)(c) and (d) of Directive 2011/83/EU. See Chapter 3.3.1.1.

³⁵ Article 6(1)(h), (j), and (k) of Directive 2011/83/EU. See Chapter 3.3.1.1.

³⁶ Article 6(1)(g) of Directive 2011/83/EU. See Chapter 3.3.1.1.

³⁷ Article 10(1)(d) of Directive 2000/31/EC. See Chapter 3.2.1.

³⁸ Trader 39, see the Dataset attached to this thesis.

³⁹ Trader 175, see the Dataset attached to this thesis.

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

greater concern that the choice of law clause differed between the Dutch and English version. The English version provided that the contract was exclusively governed by Spanish law and disputes could only be resolved by the courts of Barcelona, unless the customer was a consumer. In this case, the trader accepted that customers could submit their claim at their habitual residence in Spain. The Dutch version provided almost the exact same content but allowed customers to go to court at their habitual residence, so not only in Spain.⁴⁰ Lastly, one trader failed to provide even their trading name (Table 17, model (Z1b)).⁴¹

All 300 traders, nonetheless, complied with 4 of the 15 information and formal requirements. These requirements concerned the technical steps to conclude the contract (Table 17, model (Y3)),⁴² the main characteristics of the goods (Table 17, model (Z1a)),⁴³ the total price of the goods inclusive of taxes (Table 17, model (Z1d)),⁴⁴ and to provide the contract information on a durable medium (Table 17, model (Z1i)).⁴⁵

Overall, compliance with the 15 mandatory disclosures was high. In absolute terms, 10.8 percent (486 out of 4500) of the compliance assessments concerning disclosures were instances of non-compliance (Table 17, Overall). And as shown in Table 17, 94 of the 486 instances of non-compliance were violations, that means traders provided the information incorrectly, while 392 instances of non-compliance were omissions. However, merely 28.67 percent of all traders complied in full with the mandatory disclosures (Table 16,

⁴⁰ Trader 175 (X11), see the Dataset attached to this thesis.

⁴¹ Article 6(1)(b) of Directive 2011/83/EU. See Chapter 3.3.1.1.

⁴² Article 10(1)(a) of Directive 2000/31/EC. See Chapter 3.2.1.

⁴³ Article 6(1)(a) of Directive 2011/83/EU. See Chapter 3.3.1.1.

⁴⁴ Article 6(1)(e) of Directive 2011/83/EU. See Chapter 3.3.1.1.

⁴⁵ Article 8(1) in connection with Article 2(10) of Directive 2011/83/EU. See Chapter 3.3.1.2.

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

model (1)), which is even lower in the UK (8 percent), the Print Media industry (15 percent), and among SMEs (21.43 percent).

Table 17 Instances of Non-Compliance with Mandatory Disclosures

<i>Country</i>	Y1	Y2	Y3	Y4	Z1a	Z1b	Z1c	Z1d	Z1e	Z1f	Z1g(i)	Z1g(ii)	Z1h	Z1i	Z4	Overall
France	0	17	0	1	0	0	0	0	3	19	0	27	16	0	42	125
Germany	8	5	0	0	0	1	1	0	0	8	2	5	10	0	10	50
Netherlands	2	5	0	1	0	0	0	0	1	3	1	17	12	0	58	100
United Kingdom	24	50	0	0	0	0	3	0	0	5	1	37	43	0	48	211
<i>Industry</i>																
Electronics	7	13	0	0	0	0	1	0	1	1	1	11	8	0	27	70
Fashion	3	18	0	1	0	0	0	0	2	5	0	14	15	0	24	82
Sport Equipment	11	14	0	1	0	1	1	0	1	7	0	22	25	0	41	124
Home Decor	8	17	0	0	0	0	1	0	0	6	1	15	13	0	26	87
Print Media	5	15	0	0	0	0	1	0	0	16	2	24	20	0	40	123
<i>Company Size</i>																
Large Enterprise	10	28	0	0	0	0	0	0	1	9	1	20	23	0	42	134
SME	24	49	0	2	0	1	4	0	3	26	3	66	58	0	116	352
<i>Non-Compliance</i>																
Violation	16	26	0	2	0	0	0	0	0	0	1	0	1	0	48	94
Omission	18	51	0	0	0	1	4	0	4	35	3	86	80	0	110	392
Total	34	77	0	2	0	1	4	0	4	35	4	86	81	0	158	486

Notes:

- (1) There are 75 traders per Member State and 60 traders per industry. 118 traders are large enterprises and 182 traders are SMEs (45 by default). In total, there are 300 hundred traders.
- (2) Violation, i.e. trader has incorrectly provided information, results in score of 1. Omission, i.e. trader has failed to display the information, results in score of 1.4. Overall "lower" score.
- (3) Y1 company registration number. Y2 VAT number. Y3 technical steps to conclude contract. Y4 languages offered for conclusion of contract.
- (4) Z1a main characteristics of the goods. Z1b trading name. Z1c geographical address. Z1d total price of goods inclusive of taxes. Z1e arrangements for payment. Z1f time by which the trader undertakes to deliver the goods. Z1g(i) conditions for right of withdrawal. Z1g(ii) model withdrawal form. Z1h reminder of the existence of a legal guarantee of conformity of goods. Z1i information provided on durable medium. Z4 providing the hyperlink to the European Commission's Online Dispute Resolution Platform.

5.3.3 Right of Withdrawal

The previous Section has already examined the traders' obligation to inform consumers of their right of withdrawal and include a withdrawal form on their websites. The focus of this Section is on how faithfully the 300 traders have implemented each obligation of the right of withdrawal. Unlike the two right of withdrawal provisions contained in the mandatory disclosure Section, traders are not required to provide all details about the right of withdrawal on their websites. However, in case traders do address it, they have to comply with the provisions or provide a higher standard for consumers.

As shown in Table 18, 133 out of 2100 compliance assessments, that is 6.33 percent, have detected a lower level of protection. The most significant differences were again observed between the four jurisdictions. The UK traders have accounted for the most instances of non-compliance with the consumers' right of withdrawal (15.05 percent), which is more than the French (4.57 percent), German (1.33 percent), and Dutch traders (4.38 percent) combined. Differences between the industries and company sizes were present, but not as substantial. On average, the difference was around 3.5 percentage points between Electronics (5.00 percent) and Sport Equipment (8.57 percent), and Large Enterprises (4.12 percent) and SMEs (7.77 percent). In 5.38 percent of all compliance assessments, traders provided a higher standard for consumers than required by the national rules implementing the Consumer Rights Directive 2011/83/EU.⁴⁶

⁴⁶ See Chapter 3.3.1.3.

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

Table 18 Levels of Compliance with Right of Withdrawal

	Lower	Silence	Same	Higher
<i>Country</i>				
France	4.57% (n=24)	27.81% (n=146)	60.00% (n=315)	7.62% (n=40)
Germany	1.33% (n=7)	7.24% (n=38)	86.48% (n=454)	4.95% (n=26)
Netherlands	4.38% (n=23)	17.52% (n=92)	73.71% (n=387)	4.38% (n=23)
UK	15.05% (n=79)	35.24% (n=185)	45.14% (n=237)	4.57% (n=24)
<i>Industry</i>				
Electronics	5.00% (n=21)	17.62% (n=74)	72.86% (n=306)	4.52% (n=19)
Fashion	5.95% (n=25)	21.43% (n=90)	66.90% (n=281)	5.71% (n=24)
Sport Eq.	8.57% (n=36)	25.71% (n=108)	58.81% (n=247)	6.90% (n=29)
Home Decor	6.19% (n=26)	19.52% (n=82)	67.38% (n=283)	6.90% (n=29)
Print Media	5.95% (n=25)	25.48% (n=107)	65.71% (n=276)	2.86% (n=12)
<i>Company Size</i>				
Large	4.12% (n=34)	18.89% (n=156)	70.10% (n=579)	6.90% (n=57)
SME	7.77% (n=99)	23.94% (n=305)	63.89% (n=814)	4.40% (n=56)
Total	6.33% (n=133)	21.95% (n=461)	66.33% (n=1393)	5.38% (n=113)

Notes:

(1) Percentage per category (independent variable) and rounded to two decimals places. Frequencies in brackets. There are 75 traders per Member State and 60 traders per industry. 118 traders are large enterprises and 182 traders are SMEs (45 by default). In total, there are 300 hundred traders.

(2) Overall 2100 compliance assessments, 525 per jurisdiction, 420 per industry, 826 per large companies, 1274 per SMEs.

(3) 7 dependent variables have been included: Z2a(i) 14-day withdrawal period. Z2a(ii) withdrawal without giving any reason. Z2b definition when withdrawal period commences. Z2c definition when withdrawal period commences in case multiple goods are ordered. Z2d withdrawal may not incur any costs. Z2e 14-day period to send back goods. Z2f 14-day period to reimburse consumer.

Violations with the right of withdrawal occurred with all 7 requirements selected for the study, but a closer look at the data has revealed that the most instances of non-compliance concerned a small number of legal obligations (Table 19, Lower). The greatest number of violations were detected in the context of the traders' obligation to reimburse consumers within 14 days (71 out of 133 violations)⁴⁷ and the 14-day statutory withdrawal period (34 out of 133 violations).⁴⁸ These two provisions alone accounted for almost 80 percent of all violations of the right of withdrawal (105 out of 133 violations). And this pattern was not

⁴⁷ Article 13(1) of the Consumer Rights Directive 2011/83/EU; dependent variable Z2f.

⁴⁸ Article 9(1) of the Consumer Rights Directive 2011/83/EU; dependent variable Z2a(i).

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

only reflected in the overall results, but also in each jurisdiction, except for Germany, industry, and company size.

Two patterns were observed among the 71 traders' which have failed to comply with the consumers' right to get reimbursed within '14 days from the day on which [they are] informed of the consumer's decision to withdraw from the contract'.⁴⁹ The most common form of non-compliance was that traders stated that they would only reimburse consumers once they have received back the goods and had time to inspect them. Consumers have a right to get reimbursed as soon as they provide evidence about the return of the goods to traders.⁵⁰ The remaining violations of the right of withdrawal concerned the time traders have to reimburse consumers. Some traders provided that they might take up to 30 days to reimburse consumers, which is another clear breach of the national rules implementing Article 13 of the Consumer Rights Directive.

⁴⁹ Article 13(1) of the Consumer Rights Directive 2011/83/EU; dependent variable Z2f.

⁵⁰ Article 13(3) of Directive 2011/83/EU.

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

Table 19 Instances of Non-Compliance and Levels of Compliance with Right of Withdrawal

	Z2a(i)	Z2a(ii)	Z2b	Z2c	Z2d	Z2e	Z2f	Overall
Instances of Non-Compliance								
<i>Country</i>								
France	7	0	1	0	0	1	15	24
Germany	0	0	0	1	1	1	4	7
Netherlands	7	0	2	0	0	1	13	23
United Kingdom	20	6	6	1	4	3	39	79
<i>Industry</i>								
Electronics	8	1	2	0	0	2	8	21
Fashion	5	1	2	0	0	1	16	25
Sport Equipment	7	0	2	2	2	2	21	36
Home Decor	6	1	0	0	3	1	15	26
Print Media	8	3	3	0	0	0	11	25
<i>Company Size</i>								
Large Enterprise	9	2	1	1	1	1	19	34
SME	25	4	8	1	4	5	52	99
Total	34	6	9	2	5	6	71	133
Levels of Compliance								
Lower	34	6	9	2	5	6	71	133
Silence	3	74	15	162	83	85	39	461
Same	172	220	276	136	212	195	182	1393
Higher	91	n/a	0	0	0	14	8	113

Notes:

(1) There are 75 traders per Member State and 60 traders per industry. 118 traders are large enterprises and 182 traders are SMEs (45 by default). In total, there are 300 hundred traders.

(2) Violation, *id est* trader has incorrectly provided information, results in score of 1. Omission, *id est* trader has failed to display the information, results in score of 1.4. Overall 'lower' score.

(3) Overall 2100 compliance assessments, 525 per jurisdiction, 420 per industry, 826 per large companies, 1274 per SMEs.

(3) Z2a(i) 14-day withdrawal period. Z2a(ii) withdrawal without giving any reason (higher score not possible: n/a). Z2b definition when withdrawal period commences. Z2c definition when withdrawal period commences in case multiple goods are ordered. Z2d withdrawal may not incur any costs. Z2e 14-day period to send back goods. Z2f 14-day period to reimburse consumer.

Two patterns were detected in the examination of compliance with the statutory withdrawal period (variable Z2a(i)).⁵¹ The first pattern was compliance with outdated legislation, namely the (at least) 7-day withdrawal period which was imposed by Article 6(1) of the Distance Selling Directive 97/7/EC (Table 20, 7 days). On a positive note, the other pattern that has been observed was that more traders provided for a higher level of

⁵¹ Article 9(1) of Directive 2011/83/EU.

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

protection than a lower one (Table 20, More than 14 days). In particular, traders in France provided a longer withdrawal period (37.33 percent), as well as traders in the Home Decor industry (40.00 percent),⁵² and the large enterprises (39.83 percent). 6 traders provided consumers with as long as 100 days to return the goods (Table 20, Notes (2)).

Table 20 Length of Right of Withdrawal

	Invalid	7 days	10 days	14 days	More than 14 days
<i>Country</i>					
France	4.00% (n=3)	5.33% (n=4)	0.00% (n=0)	53.33% (n=40)	37.33% (n=28)
Germany	2.67% (n=2)	0.00% (n=0)	0.00% (n=0)	65.33% (n=49)	32.00% (n=24)
Netherlands	5.33% (n=4)	4.00% (n=3)	1.33% (n=1)	65.33% (n=49)	24.00% (n=18)
United Kingdom	18.67% (n=14)	8.00% (n=6)	0.00% (n=0)	45.33% (n=34)	28.00% (n=21)
<i>Industry</i>					
Electronics	13.33% (n=8)	0.00% (n=0)	0.00% (n=0)	60.00% (n=36)	26.67% (n=16)
Fashion	6.67% (n=4)	1.76% (n=1)	0.00% (n=0)	60.00% (n=36)	31.67% (n=19)
Sport Equipment	3.33% (n=2)	8.33% (n=5)	0.00% (n=0)	53.33% (n=32)	35.00% (n=21)
Home Decor	5.00% (n=3)	5.00% (n=3)	1.76% (n=1)	48.33% (n=29)	40.00% (n=24)
Print Media	10.00% (n=6)	6.67% (n=4)	0.00% (n=0)	65.00% (n=39)	18.33% (n=11)
<i>Company Size</i>					
Large Enterprise	6.78% (n=8)	1.69% (n=2)	0.00% (n=0)	51.69% (n=61)	39.83% (n=47)
SME	8.24% (n=15)	6.04% (n=11)	0.55% (n=1)	60.99% (n=111)	24.18% (n=44)
Total	7.67% (n=23)	4.33% (n=13)	0.33% (n=1)	57.33% (n=172)	30.33% (n=91)

Notes:

(1) Length with right of withdrawal is dependent variable Z2a(i). There are 75 traders per Member State and 60 traders per industry. 118 traders are large enterprises and 182 traders are SMEs (45 by default). In total, there are 300 hundred traders.

(2) More than 14 days includes: 6 X 15 days. 12 X 16 days. 5 X 21 days. 2 X 28 days. 53 X 30 days 2 X 31. 1 X 44 days. 2 X 60 days. 2 X 90 days. 6 X 100.

(3) Invalid not automatically means that it is a violation. Instead traders either failed to provide the correct starting date (violation; n=9), explicitly excluded right of withdrawal (violation; n=4), or simply provided that consumer have a statutory right of withdrawal without providing any further details (compliance; n=10).

⁵² This confirms the proposition of Omri Ben-Shahar and Eric A Posner who argued that withdrawal rights make ‘economic sense when the buyer most efficiently learns of a product through use or inspection at home and the product either does not depreciate rapidly or does depreciate but in a fashion that can be easily measured and compensated for’, see Omri Ben-Shahar & Eric A. Posner, ‘The Right to Withdraw in Contract Law’ (2011) 40(1) Journal of Legal Studies 145.

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

Turning to the remaining 5 violations, which accounted for 28 out of 133 instances of non-compliance with the consumers' right of withdrawal. 9 traders incorrectly provided the starting date of the withdrawal period (variable Z2b),⁵³ 2 traders provided it incorrectly in a situation where multiple goods had been ordered (variable Z2c),⁵⁴ 6 traders required consumers to justify their decision when withdrawing from the contract (variable Z2a(ii)),⁵⁵ 5 charged consumers for their withdrawal, and 6 traders gave consumers fewer than 14 days to return the goods (variable Z2e).⁵⁶

A breakdown of the instances of non-compliance by trader revealed that overall 70 percent of traders had no violation with the consumers' right of withdrawal (Table 21, model (1)). Compliance, however, substantially varied between the jurisdictions, the industries, and between large enterprises and SMEs. The highest level of compliance was observed in Germany (92 percent), Electronics (76.67 percent), and among the large enterprises (77.97 percent). Conversely, the lowest level of compliance was detected in the UK (37.33 percent), in the Sport Equipment industry (58.33 percent), and among the SMEs (64.84 percent). Another important finding is that the UK traders accounted for all instances with the highest number of violations, that is three or more violations (Table 21, models (4)-(6)).

⁵³ Article 9(2)b of Directive 2011/83/EU.

⁵⁴ Article 9(2)b(i) of Directive 2011/83/EU.

⁵⁵ Article 9(1) of Directive 2011/83/EU.

⁵⁶ Article 14(1) of Directive 2011/83/EU.

Table 21 Number of Instances of Non-Compliance with Right of Withdrawal per Trader

	(1) None	(2) One	(3) Two	(4) Three	(5) Four	(6) Five
<i>Country</i>						
France	73.33% (n=55)	21.33% (n=16)	5.33% (n=4)	0.00% (n=0)	0.00% (n=0)	0.00% (n=0)
Germany	92.00% (n=69)	6.67% (n=5)	1.33% (n=1)	0.00% (n=0)	0.00% (n=0)	0.00% (n=0)
Netherlands	77.33% (n=58)	14.67% (n=11)	8.00% (n=6)	0.00% (n=0)	0.00% (n=0)	0.00% (n=0)
United Kingdom	37.33% (n=28)	38.67% (n=29)	12.00% (n=9)	8.00% (n=6)	1.33% (n=1)	2.67% (n=2)
<i>Industry</i>						
Electronics	76.67% (n=46)	15.00% (n=9)	5.00% (n=3)	3.33% (n=2)	0.00% (n=0)	0.00% (n=0)
Fashion	70.00% (n=42)	25.00% (n=15)	1.67% (n=1)	1.67% (n=1)	0.00% (n=0)	1.67% (n=1)
Sport Equipment	58.33% (n=35)	30.00% (n=18)	8.33% (n=5)	1.67% (n=1)	0.00% (n=0)	1.67% (n=1)
Home Decor	70.00% (n=42)	18.33% (n=11)	10.00% (n=6)	1.67% (n=1)	0.00% (n=0)	0.00% (n=0)
Print Media	75.00% (n=45)	13.33% (n=8)	8.33% (n=5)	1.67% (n=1)	1.67% (n=1)	0.00% (n=0)
<i>Company Size</i>						
Large Enterprise	77.97% (n=92)	16.10% (n=19)	5.08% (n=6)	0.85% (n=1)	0.00% (n=0)	0.00% (n=0)
SME	64.84% (n=118)	23.08% (n=42)	7.69% (n=14)	2.75% (n=5)	0.55% (n=1)	1.10% (n=2)
Total	70.00% (n=210)	20.33% (n=61)	6.67% (n=20)	2.00% (n=6)	0.33% (n=1)	0.67% (n=2)

Notes: Percentage per category (independent variable) and rounded to two decimals places. Frequencies in brackets. There are 75 traders per Member State and 60 traders per industry. 118 traders are large enterprises and 182 traders are SMEs (45 by default). In total, there are 300 hundred traders.

5.3.4 Passing of Risk

Trader compliance with rules governing the passing of risk was assessed with two variables. According to the first variable (Z3a), traders are liable for the risk of loss of or damage to the goods before consumers, or a third party indicated by them, have acquired physical possession of the goods. The second variable (Z3b) provides an exception to the first variable (Z3a), that is when consumers have commissioned their own carriers.⁵⁷ In this case, the risk passes to consumers at the time their commissioned carrier takes possession of the goods. As pointed out in the previous two Chapters, traders are not required to include this information on their websites, but they are not allowed to provide for a lower standard in their terms and conditions.

Almost all traders complied with the first variable governing the passing of risk. 155 addressed the passing of risk issue in their terms by including the correct information, 138 were silent, and 7 traders provided the information incorrectly. The 7 violations occurred in France (n=1) and the United Kingdom (n=6). No patterns were detected in terms of the violations' distribution across the industries and the company sizes: 3 violations were observed in Home Decor, 2 in Sport Equipment, 1 in Electronics, and 1 in Fashion. The French trader in breach was a large enterprise (out of 33) and the 6 UK traders in breach were 3 (out of 35) large enterprises and 3 (out of 40) SMEs. Importantly, no trader failed to comply with the second requirement: 7 traders stated it correctly and 293 traders did not address it at all in their terms and conditions. The prevalence of silence is, however, no surprise, as it is typically traders that commission the carrier, not consumers.

The traders' clauses which were non-compliant with the first passing of risk rule provided that the risk passes to consumers prior to delivery, for instance at the time the order is placed or when the goods are shipped. Including either of the clauses in the terms

⁵⁷ The former scenario is dependent variable Z3a and the latter Z3b (Article 20 of the Consumer Rights Directive 2011/83/EU), see Chapter 3.3.1.4.

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

and conditions is not allowed and consumers are, because of the imperative nature of the rules implementing the Consumer Rights Directive, at no time bound by it.⁵⁸ As stated earlier (Chapter 3.3.1.4), the Consumer Rights Directive has fully harmonised the rules on the passing of risk and it seems that the six UK traders and the one French trader had not updated their terms and conditions since the implementation of the Directive's rules into national law.

5.4 Additional Observations

This subsection steps outside the formal bounds of this thesis and puts forward a number of additional observations that were made during the compliance assessment process, which although interesting, were not addressing directly any of the hypotheses. These observations concerned violations of other consumer protection rules, not included in the present study. However, some of them provided illustrations of more general trader behaviour. This Section mentions the four most interesting additional observations.

The first additional observation made concerns the delivery time of goods. It has been revealed in the previous Section of this Chapter that 35 traders failed to provide any delivery date (Table 17, model (Z1f)). What has been left undiscussed is the exact time by which traders aim to deliver the goods. As examined in Chapter 3.3.1.5, Article 18 of the Consumer Rights Directive 2011/83/EU provides that traders must transfer the physical possession of the goods to consumers within 30 days. However, consumers and traders can agree that the delivery date could exceed 30 days so the obligation to deliver within 30 days becomes mandatory only if no such stipulation had been made. Despite the fact that traders could take as long as 30 days if the terms were silent on the issue, almost all the 300 traders,

⁵⁸ Article 25 of the Consumer Rights Directive 2011/83/EU.

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

except for one Dutch trader, provided for a delivery period shorter than 30 days.⁵⁹ The vast majority of traders promised to deliver the goods the following day, some even offered same day delivery.

Two potential scam websites were also detected in the dataset. The two websites pretended to be traders based in the United Kingdom, but the two shops are most likely based in Hong Kong and failed to comply with very basic UK and EU consumer law rules.⁶⁰ Several online reviews suggested that these shops sell counterfeit items and that the goods are shipped from outside the United Kingdom, mostly from Hong Kong. These claims could not be verified, but there seems to be strong evidence that the two traders operate a scam business and are based outside of the UK.⁶¹

The third observation concerns commercial guarantees, which consumers can purchase irrespective of their statutory rights. In theory, these guarantees offer consumers additional rights in case the goods become faulty or damaged after the statutory guarantee period has expired. Some traders were found to offer guarantees which merely reflected the consumers' statutory rights and thus were a bad bargain for consumers.

Another observation has been that dozens of traders excluded the application of the United Nations Convention on Contracts for the International Sale of Goods, also referred to as CISG or the Vienna Convention.⁶² The harmonised CISG framework has the ambition

⁵⁹ Trader 207 provided a delivery date of 6-8 weeks, see the Appendix (2.4) and Dataset attached to this thesis.

⁶⁰ Trader 237 and Trader 239, see the Dataset attached to this thesis.

⁶¹ The emergence of bad faith actors in e-commerce is a global problem and requires further international initiatives, see for instance Gail Pearson, 'Further Challenges for Australian Consumer Law' in Claudia Lima Marques and Dan Wei (eds), *Consumer Law and Socioeconomic Development: National and International Dimensions* (Springer Publishing 2017) 303-305.

⁶² The United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980.

5. EMPIRICAL EXAMINATION OF E-COMMERCE CONSUMER TRANSACTIONS

to reduce transaction costs in international trade,⁶³ and thus applies in cross-border⁶⁴ and business-to-business transactions.⁶⁵ Traders operating in countries that have ratified the Convention are automatically bound by the CISG unless they explicitly opt out.⁶⁶ Almost all European Union Member States are party to the Vienna Convention, including France, Germany, and the Netherlands.⁶⁷ The United Kingdom has not acceded to the Convention and it is very unlikely that the UK will do so in the near future.⁶⁸ This might explain why only one UK trader has explicitly excluded application of the CISG.⁶⁹ Overall, none of the 300 traders have explicitly opted into the CISG, some only by default, and dozens of traders, in particular German ones, have excluded the application of the Vienna Convention.

⁶³ Preamble of the United Nations Convention on Contracts for the International Sale of Goods 1980.

⁶⁴ Article 1 of the United Nations Convention on Contracts for the International Sale of Goods 1980.

⁶⁵ Article 2 of the United Nations Convention on Contracts for the International Sale of Goods 1980.

⁶⁶ Article 6 of the United Nations Convention on Contracts for the International Sale of Goods 1980.

⁶⁷ The CISG is in force in France since 1 January 1988, in Germany since 1 January 1991, and in the Netherlands since 1 January 1992. United Nations, 'Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)' (United Nations Commission on International Trade Law, 20 April 2021) available at <https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status> accessed 20 April 2021.

⁶⁸ Reasons for and against the UK's accession have been discussed in Benjamin Hayward, Bruno Zeller, and Camilla Baasch Andersen, 'The CISG and the United Kingdom—Exploring Coherency and Private International Law' (2018) 67(3) *International & Comparative Law Quarterly* 607.

⁶⁹ Trader 288 (X11), see the Dataset attached to this thesis.

5.5 Conclusion

This Chapter has tested the hypotheses that traders are not fully compliant with their legal obligations (H^1) and the proposition that factors such as the company's size (H^2), the company's age (H^3) or the use of terms pre-drafted by public or semi-public organisations (H^4) influence compliance. The first hypothesis, that traders are not fully complying with their legal obligations, has been confirmed with descriptive statistics, as 80.67 percent (242 out of 300) of the simulated e-commerce consumer transaction contained at least one or more instance of non-compliance (Table 9, models (2-5), Total). The Ordinary Least Square and Binary Logistic Regression tests in Section 2 have revealed that SMEs had on average more violations with the consumer protection rules than large enterprises (Table 11 model (1)) and were less likely to be compliant (Table 11 model (2)). However, the statistical tests (Table 11) could not establish any statistically significant correlation between (non-) compliance and the company's age or the use of pre-drafted terms and conditions. Another finding has been that the traders' origin significantly affected compliance, with UK traders being more likely not to comply compared to German (most compliant), French (second most compliant), and Dutch (third most compliant) traders. Section 3 has provided further details about the level of trader compliance by consumer right. Out of 802 instances of non-compliance, 60.60 percent ($n=486$) concerned mandatory disclosures, 21.95 percent ($n=176$) unfair contract terms, 16.58 percent ($n=133$) the consumers' right of withdrawal, and 0.87 percent ($n=7$) the rules governing the passing of risk (Table 12, Total). Section 4 has offered a few additional observations, concerning other violations that had been found on the traders' websites but fell outside the scope of the present study. Overall, the compliance assessments and statistical tests have revealed some interesting patterns of non-compliance, which will be translated into targeted and actionable policy recommendations in the following Chapter.

Chapter 6

Policy Recommendations

6.1 Introduction

The compliance assessments carried out for the present thesis have revealed that merely 58 out of the 300 e-commerce traders, that is 19.33 percent, were fully compliant.¹ The empirical examination has not only shed light on the levels of trader compliance, but also detected patterns of (non-)compliance. For instance, the statistical tests have revealed that large companies are more likely to be compliant than SMEs. On the other hand, the age of the company and the use of standard contract terms drafted and provided by public or semi-public authorities have been shown, from a statistical viewpoint, not to affect compliance.²

The ambition of this Chapter is to translate the empirical findings of the study into targeted and actionable policy recommendations. These recommendations are situated within the context of the consumer contract law of the European Union and the four national jurisdictions covered by the present study, but are by no means intended to constitute an exhaustive list of necessary reforms in the European Consumer Contract Law Acquis. All policy recommendations put forward in this Chapter are based on the findings of the thesis or similar studies in the field, comply with the EU's principles of conferral, subsidiarity and proportionality,³ and build on existing proposals or laws on the EU and national level.

¹ Table 9 in Chapter 5.

² Table 11 in Chapter 5.

³ Article 5 of the TEU; Articles 2(2), 4(1) and (2), and 114 of the TFEU. For an overview of the EU's competence in consumer contract law, see for example Stephen Weatherill, *EU Consumer Law and Policy* (2nd ed, Edward Elgar Publishing 2013) 15-24; 'Finding the

The Chapter first explores the idea of promoting the use of compliant standard contract terms pre-drafted by public and semi-public organisations. This Section examines the levels of compliance of e-commerce traders which have based their terms and conditions on pre-drafted standard contract terms and investigates why most of these traders still failed to comply in full with their legal obligations. The Chapter then turns to the issue of higher levels of non-compliance among small and medium-sized enterprises. Instances where SMEs failed to comply are considered and recommendations are put forward for solutions which would improve their compliance. Finally, the Chapter discusses the idea of increasing access to justice for consumers by granting consumers the option to resolve their dispute via Online Dispute Resolution without allowing traders to opt out. All policy recommendations are addressed to the relevant stakeholders, that is the EU legislator, the Member States, and other groups, such as e-commerce trader or consumer organisations. The Chapter is, however, not exploring the possible influences of Brexit on UK or EU consumer contract law, as not only would this go beyond the scope of inquiry of the thesis, but it is also still too early to determine any future developments.⁴

6.2 Promoting Compliant Pre-Drafted Standard Contract Terms

The dataset of the present study has revealed that standard contract terms which are drafted and provided by public or semi-public organisations were only used by traders based in the Netherlands. 56 out of 75 Dutch traders based their terms and conditions on standard contract terms provided by four semi-public organisations.⁵ The most commonly used

Internal Market in the Treaty’ in Stephen Weatherill, *The Internal Market as a Legal Concept* (Oxford University Press 2017).

⁴ Possible scenarios are for instance discussed in Horst Eidenmüller, ‘Collateral Damage: Brexit’s Negative Effects on Regulatory Competition and Legal Innovation in Private Law’ (2018) 26(4) *Zeitschrift für Europäisches Privatrecht* 868.

⁵ Table 7 in Chapter 4.

standard terms were drafted by *Thuiswinkel* (n=32).⁶ Other standard terms used by traders of the present study were provided by the *Stichting Webshop Keurmerk* (n=20),⁷ the *Centrale Branchevereniging Wonen* (n=3),⁸ and one by the International Chamber of Commerce⁹ (Incoterms®).¹⁰

A closer look at the data collected in the present study on the use of pre-drafted standard contract terms by Dutch traders suggests that large enterprises are more likely to use them (87.5 percent, that is 14 out of 16 traders) than SMEs (71.19 percent, that is 42 out of 59 traders). 12 large enterprises based their terms on *Thuiswinkel*, one on *Centrale*

⁶ Thuiswinkel Organisatie, ‘Algemene Voorwaarden Thuiswinkel’ (Thuiswinkel Organisatie, 1 June 2014) available at <<https://www.thuiswinkel.org/veilig-online-shoppen/wat-is-thuiswinkel-waarborg/algemene-voorwaarden-thuiswinkel/>> accessed 22 May 2021. This is the latest published version of pre-drafted standard contract terms provided by the *Thuiswinkel Organisatie*, which were drafted in collaboration with the organisation *Coördinatiegroep Zelfreguleringsoverleg* (Coordination Group on Negotiation for Self-Regulation) in 2014. This organisation was founded in 1996 to liaise between industry and consumer organisations, act as a self-regulation body for traders, and most importantly increase consumer confidence in e-commerce transactions, cf Esther van Schagen, ‘The Draft Common Frame of Reference and Multilevel Governance’ (2010) 1(3) *Edinburgh Student Law Review* 92-93; Franziska Weber and Christopher Hodges, ‘The Netherlands’ in Christopher Hodges, Iris Benöhr, and Naomi Creutzfeldt-Banda (eds), *Consumer ADR in Europe* (Hart Publishing 2012) 152-153.

⁷ Stichting Webshop Keurmerk, ‘Algemene Voorwaarden voor Webshops’ (Stichting Webshop Keurmerk, 1 June 2014) available at <<https://www.keurmerk.info/nl/home/gratis-algemene-voorwaarden/>> accessed 22 May 2021. Exactly like the *Thuiswinkel* standard terms, the standard terms provided by *Stichting Webshop Keurmerk* were drafted in collaboration with the consumer organisation *Coördinatiegroep Zelfreguleringsoverleg* in 2014.

⁸ Centrale Branchevereniging Wonen, ‘Download de CBW-erkende voorwaarden’ (Centrale Branchevereniging Wonen, 31 December 2019) available at <<https://www.cbw-erkend.nl/garanties-wonen>> accessed 22 May 2021. The *Centrale Branchevereniging Wonen* published new pre-drafted standard contract terms which are in use since 1 January 2020, but the study only takes into account the previous set of terms used by traders which are included in the present study’s dataset.

⁹ The trader specifically referred to and used the Incoterms® 2010, in particular the Delivered at Place (DAP) Incoterms®, available at: International Chamber of Commerce, ‘What are Incoterms® rules?’ (International Chamber of Commerce, 2020) available at <<https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-2020/>> accessed 22 May 2021.

¹⁰ See the Appendix of the present thesis.

Branchevereniging Wonen, and one on Incoterms, whereas 20 SMEs based their terms on *Thuiswinkel*, 20 on *Stichting Webshop Keurmerk*, and two on *Centrale Branchevereniging Wonen*.

However, the 56 Dutch traders which based their terms on pre-drafted standard contract terms were, from a statistical viewpoint, not more likely to be compliant than traders which drafted their own terms.¹¹ Nonetheless, the first statistical test in Table 11 suggested from an effect size perspective that e-commerce traders which based their terms and conditions on standard contract terms prepared by public or semi-public authorities had on average fewer violations compared to traders who did not.¹² The second test in Table 11 has, however, revealed that traders which used pre-drafted terms had a higher probability of non-compliance than traders who drafted their own terms.¹³ As mentioned in the previous Chapter, this might suggest that the pre-drafted terms already contained provisions which were in breach of consumer protection standards, although they had on average fewer violations than traders who drafted their own terms. Alternatively, it might be that traders using the pre-drafted terms had collectively failed to implement them faithfully on their websites. It is therefore crucial to additionally assess whether the original standard contract terms drafted and provided by public or semi-public organisations complied with the consumer protection rights selected for the present study.

Thuiswinkel

The first standard contract terms which are examined here were drafted and provided by *Thuiswinkel*. These terms were particularly popular among large enterprises (12 out of 14 traders which used pre-drafted terms), but were also used by almost half of SMEs (20 out

¹¹ Table 11 in Chapter 5.

¹² Table 11 model (1).

¹³ Table 11 model (2).

of 42 traders). Traders which based their terms on *Thuiswinkel*'s standard contracts terms violated in total five consumer rights, which have overall accounted for 59 instances of non-compliance (Table 22 below). The violations concerned choice of law clauses and the consumer's right of withdrawal, as well as a failure to provide the hyperlink to the EU Commission's Online Dispute Resolution platform, to provide consumers with the right of withdrawal form, and to display the company's registration number on the trader's website.

Examining the original version of the *Thuiswinkel* standard contract terms showed that they contained two instances of non-compliance. The first one concerned the choice of law clause in the pre-drafted standard contract terms, which stated that exclusively Dutch law applies.¹⁴ Consumers can rely on the law of their habitual residence and such a clause is unlikely to stand should consumers be based outside of the Netherlands.¹⁵ *Thuiswinkel*'s choice of law clause has been adopted by 31 out of 32 traders who used the pre-drafted terms.¹⁶ The clause should thus be corrected and state: consumers based in the European Union can rely on the law of their habitual residence. The second instance where *Thuiswinkel* failed to respect one of the selected consumers rights is their failure to include a term that informs consumers about the existence of the EU Commission's Online Dispute Resolution platform. Traders are not required to take part in ODR, but they must inform

¹⁴ 'Op overeenkomsten tussen de ondernemer en de consument waarop deze algemene voorwaarden betrekking hebben, is uitsluitend Nederlands recht van toepassing.' [Only Dutch law applies to agreements between the trader and the consumer including to these general terms and conditions] Article 17(1) of *Thuiswinkel* (n 6).

¹⁵ Article 6(1) of the Regulation (EC) 593/2008 (Rome I), included in dependent variable X11 of the present study. Further legal context is provided in Chapter 2.4.11 of the present study.

Traders which had used this clause in their terms all shipped within but also outside the Netherlands. Incompliant choice of law clauses were also found in the empirical study conducted by Loos and Luzak on consumer service agreements, Marco Loos and Joasia A Luzak, 'Wanted: a Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers' (2016) 39(1) *Journal of Consumer Policy* 85-86.

¹⁶ Trader 180 excluded this clause from their terms, that is to say being silent on it.

consumers of the existence of the European Commission's platform and also display the hyperlink to the platform.¹⁷ *Thuiswinkel*, however, only provided the hyperlink to their own ODR and ADR system (*Geschillencommissie Thuiswinkel*) and explained how consumers can access their ODR and ADR procedure.¹⁸ Failing to provide the aforementioned information on the EU's ODR platform is another clear violation of a consumer protection rule. But despite the error in *Thuiswinkel*'s standard contract terms, 7 out of 32 traders correctly referred to the EU's ODR platform.

Three consumer rights were violated because traders failed to faithfully implement *Thuiswinkel*'s pre-drafted standard terms and conditions. The first instance concerned a trader which failed to include their company registration number on the website.¹⁹ Another instance was where a trader failed to faithfully implement *Thuiswinkel*'s pre-drafted terms concerning the consumer's right of withdrawal. Trader 180 provided in their terms that consumers would only get reimbursed after 30 days. Consumers, however, have a right to get reimbursed within 14 days.²⁰ The third instance concerns the traders' obligation to provide a model withdrawal form on their websites.²¹ The Annex to the *Thuiswinkel* terms and conditions provides such a model withdrawal form. Almost all traders which used *Thuiswinkel*'s terms have included such a form on their website, only two traders failed to do so.²²

¹⁷ Article 6(1)(t) of Directive 2011/83/EU; dependent variable Z4 of the present study.

¹⁸ *Thuiswinkel* (n 6) Article 17 (*Geschillen*).

¹⁹ This is required according to Article 5(1)(d) of Directive 2000/31/EC; dependent variable Y1. Trader 206.

²⁰ Article 13(1) of Directive 2011/83/EU; dependent variable Z2f in this study.

²¹ Article 6(1)(h) of Directive 2011/83/EU; dependent variable Z1g(ii).

²² Traders 174 and 180. The study could not verify whether consumers are provided with such a withdrawal form should customers actually purchase goods.

It follows that only the violations regarding the choice of law issue and the mandatory disclosure concerning the EU's ODR platform can be attributed to *Thuiswinkel*. All three remaining violations occurred because traders had failed to faithfully implement *Thuiswinkel's* standard terms and conditions. Nonetheless, the two violations in the pre-drafted standard contract terms accounted for 55 out of 58 instances of non-compliance.

Stichting Webshop Keurmerk

The second most popular standard contract terms were provided by *Stichting Webshop Keurmerk* which were used exclusively by SMEs (20 out of 42 SMEs which used pre-drafted terms). Traders which based their terms on these pre-drafted standard terms violated four mandatory disclosures and three consumer rights concerning withdrawals (Table 22 below).

Similarly to *Thuiswinkel*, the terms pre-drafted and provided by the *Stichting Webshop Keurmerk* stated that exclusively Dutch law applies,²³ and their terms also only referred to their own ODR and ADR system (here *Geschillencommissie Webshop*).²⁴ Most traders had adopted these two provisions, which together resulted in 34 instances of non-compliance (Table 22).

In addition to the above mentioned violations, six consumer rights were violated because traders failed to faithfully implement the pre-drafted standard contract terms of *Stichting Webshop Keurmerk*: one trader omitted the payment arrangement on their website;²⁵ two

²³ Article 6(1) of Regulation (EC) 593/2008 (Rome I); dependent variable X11.

5 traders which used *Stichting Webshop Keurmerk's* terms and conditions had not included such a clause. Traders 177, 187, 192, 264, and 265.

²⁴ *Stichting Webshop Keurmerk* (n 7) Article 17 (*Geschillen*). As pointed out earlier, this is a clear breach of Article 6(1)(t) of Directive 2011/83/EU; dependent variable Z4.

One trader had also correctly provided the link to the EU's ODR platform (Trader 190).

²⁵ Article 6(1)(g) of Directive 2011/83/EU; dependent variable Z1e. Trader 192.

traders failed to provide the estimated delivery date of the goods;²⁶ five traders failed to provide the model withdrawal form;²⁷ three traders failed to correctly provide the consumers right of withdrawal (14-day period);²⁸ one trader incorrectly provided that the consumer had to return the goods within 10 days, even though consumers have up to 14 days;²⁹ and six traders provided that consumers would not get reimbursed within the statutory 14-day period, but only within 30 days.³⁰

34 out of 52 instances of non-compliance can thus be attributed directly to the pre-drafted terms and conditions provided by the *Stichting Webshop Keurmerk*, while the remaining 18 violations can be attributed to the fact that the particular traders had failed to faithfully implement the pre-drafted terms and conditions.

Centrale Branchevereniging Wonen

Three traders used the terms and conditions provided by the *Centrale Branchevereniging Wonen*. The *Centrale Branchevereniging Wonen*'s terms complied almost in full with the selected consumer rights; they only failed to include a model withdrawal form in their terms or its Annex (Table 22 below).³¹ But unlike *Thuiswinkel* and *Stichting Webshop Keurmerk*, the *Centrale Branchevereniging Wonen* did not include such a choice of law clause in their terms and traders who used them did not include it out of their own motion on their

²⁶ Article 6(1)(g) of Directive 2011/83/EU; dependent variable Z1f. Traders 191 and 192.

²⁷ Article 6(1)(h) of Directive 2011/83/EU; dependent variable Z1g(ii). Traders 169, 177, 187, 192, and 212.

²⁸ Article 9(1) of Directive 2011/83/EU; dependent variable Z2a(i). One trader provided 10 days (Trader 205) and two 7 days (Traders 187 and 224).

²⁹ Article 14(1) of Directive 2011/83/EU; dependent variable Z2e. Trader 205.

³⁰ Article 13(1) of Directive 2011/83/EU; dependent variable Z2f. Traders 177, 186, 187, 194, 224, and 225.

³¹ Nonetheless, two out of three traders had a model withdrawal form on their websites (Traders 203 and 210), only trader 209 had not included one as required by Article 6(1)(h) of Directive 2011/83/EU; dependent variable Z1g(ii).

websites.³² Instead, the *Centrale Branchevereniging Wonen's* standard terms correctly provided that consumers based in the European Union can rely on the laws of their habitual residence.³³ *Centrale Branchevereniging Wonen's* terms included also a hyperlink to the EU's ODR platform, which as it has been explained above, was missing from the terms of the other two providers of pre-drafted terms.³⁴ Some of the traders, however, failed to faithfully implement the *Centrale Branchevereniging Wonen's* terms: one trader failed to provide their VAT number³⁵ and another trader incorrectly provided that they would only reimburse customers withdrawing from the contract once they have received back the goods, even though consumers have the right to get reimbursed within 14 days of sending proof that they have returned the goods.³⁶ Consequently, only one out of three consumer rights violations can be attributed to the *Centrale Branchevereniging Wonen's* terms.

Incoterms®

One trader used the Incoterms® Deliver at Place (DAP) provided by the International Chamber of Commerce.³⁷ Incoterms® are very different than the pre-drafted terms examined above, as Incoterms® deal with different legal issues and traders can include or exclude them. Incoterms® Deliver at Place (DAP) govern the delivery of goods, namely that the seller is in charge of arranging the delivery at the consumers' address and that the risk of loss or damage to the goods transfers from seller to buyer as soon as the goods are

³² Neither did one of the three traders violate Article 6(1) of the Regulation (EC) 593/2008 (Rome I); dependent variable X11.

³³ *Centrale Branchevereniging Wonen* (n 8) Article 22.

³⁴ All traders had correctly implemented it.

³⁵ Trader 209 violated Article 5(1)(g) of Directive 2000/31/EC; dependent variable Y2.

³⁶ Trader 203 breached Article 13(1) of the Consumer Rights Directive; dependent variable Z2f.

³⁷ International Chamber of Commerce (n 9).

delivered.³⁸ This demonstrates that Incoterms® do not have the ambition to govern the entire contractual relationship, but only certain areas, such as the delivery phase.

The trader which made use of the Incoterms® had two unfair contract terms on their website and furthermore failed to comply with two mandatory disclosures (Table 22 below).³⁹ Incoterms® DAP, however, do not address these particular issues and thus the instances of non-compliance can not be attributed to the International Chamber of Commerce, but directly to the trader.

³⁸ World Trade Press, *Incoterms 2010: A Comprehensive Guide to the INCOTERMS 2010* (World Trade Press 2010) 24-25.

³⁹ Trader 152: the first unfair contract term concerned dependent variable X2, that is not allowing the consumer to off-set a debt, which is contrary to the national rules implementing Article 3 in connection with Point 1(b) Annex to the Directive 93/13/EEC. The second unfair term concerned a jurisdiction clause: the trader included a clause that consumers could only bring a claim at the local court in Groningen, which is in breach of Article 18(2) of the of the Regulation (EU) 1215/2012 (dependent variable X11 of the study). The trader also failed to inform consumers of the existence of a legal guarantee of conformity for goods (Article 6(1)(l) of Directive 2011/83/EU; dependent variable Z1h) and the methods of accessing the EU's ODR platform (Article 6(1)(t) of Directive 2011/83/EU; dependent variable Z4).

Table 22 Instances of Non-Compliance by Standard Contract Terms Providers and Traders

	Unfair Terms	Mandatory Disclosures	Right of Withdrawal	Passing of Risk
<i>Thuiswinkel</i>	1	1	0	0
Traders	1 (n=31)	3 (n=27)	1 (n=1)	0 (n=0)
<i>Stichting Webshop Keurmerk</i>	1	1	0	0
Traders	1 (n=15)	4 (n=27)	3 (n=10)	0 (n=0)
<i>Centrale Branchevereniging Wonen</i>	0	1	0	0
Traders	0 (n=0)	2 (n=2)	1 (n=1)	0 (n=0)
Incoterms® Delivery at Place	0	0	0	0
Traders	2 (n=2)	2 (n=2)	0 (n=0)	0 (n=0)

Notes:

(1) Consumer rights violated and instances in bracket, subdivided by legal category and standard contract terms providers and traders which made use of them.

(2) Number of traders which based their terms on pre-drafted standard contract terms (total of 56 (N)) by provider: *Thuiswinkel* (n=32); *Stichting Webshop Keurmerk* (n=20); *Centrale Branchevereniging Wonen* (n=3), and Incoterms® by the International Chamber of Commerce (n=1).

(3) Dependent variables which traders failed to comply with (instances in bracket):

Thuiswinkel traders: X11 (n=31), Y1 (n=1), Z1g(ii) (n=1), Z2f (n=1), Z4 (n=25).

Stichting Webshop Keurmerk traders: X11 (n=15), Z1e (n=1), Z1f (n=2), Z1g(ii) (n=5), Z2a(i) (n=3), Z2e (n=1), Z2f (n=6), Z4 (n=19).

Centrale Branchevereniging Wonen traders: Y2 (n=1), Z1g(ii) (n=1), Z2f (n=1).

Incoterms® Delivery at Place trader: X2 (n=1), X11 (n=1), Z1h (n=1), Z4 (n=1).

(4) Dependent variables which providers of pre-drafted terms failed to comply with:

Thuiswinkel: X11, Z4.

Stichting Webshop Keurmerk: X11, Z4.

Centrale Branchevereniging Wonen: Z1g(ii).

(5) X2: contract terms inappropriately excluding or limiting the legal rights of consumers in case of total, partial, or inadequate performance by traders or suppliers; X11: contract terms excluding or hindering consumers to take legal action (e.g. unfair choice of law clauses); Y1: providing the trade register number; Y2: providing the VAT number; Z1e: providing the arrangements for payment; Z1f: providing the delivery time; Z1g(ii): providing a model withdrawal form; Z1h: providing a reminder of the existence of a legal guarantee of conformity of goods; Z2a(i): consumers have 14 days to withdraw from distance contracts; Z2e: consumers have 14 days to return the goods after they have communicated their decision to withdraw from the contract; Z2f: traders have to reimburse consumer after 14 days of being informed of the latter's decision to withdraw from the contract; Z4: providing the hyperlink and method to access the EU's ODR platform. Further details on each variable are provided in Chapter 4 as well as on the legal context in Chapters 2 and 3.

Observations on Pre-Drafted Terms and Conditions and Its Implementation

The examination of trader and provider compliance suggests that more instances of non-compliance (91 out of 118) can be attributed to the providers of pre-drafted terms than to the traders who had used them. Their pre-drafted terms contained a high number of consumer rights violations and the number of traders who failed to faithfully implement the terms and conditions is significantly lower (27 out of 118).⁴⁰ These findings confirm one of the earlier observations in Chapter 5. There, the empirical data suggested that the pre-drafted terms already contained provisions which were in breach of consumer protection standards, although on average fewer than traders who fully drafted their own terms. The second observation from Chapter 5, that traders' incompliance is the result of them failing to faithfully implement the pre-drafted terms, is therefore rejected.⁴¹

Policy Recommendations

The European Commission first proposed the wider use of standard contract terms pre-drafted and provided by public or semi-public organisations in the early 2000s.⁴² In theory, this approach allows traders to use standard terms which are fully compliant with all legal obligations, while it upholds the contractual freedom of traders at the same time. Traders are still allowed to tailor these terms to their needs, for instance by adopting only parts of the pre-drafted terms or modifying them. Traders may also draft their own terms and conditions. What the European Commission's proposals have not focused on is how compliance of these pre-drafted terms is to be ensured, as well as their correct

⁴⁰ Table 22 above.

⁴¹ Both observations were put forward in Chapter 5.2.2.

⁴² Commission, 'European Contract Law' (Communication) COM (2001) 398 final, paragraph 56; Commission, 'A more coherent European contract law - An action plan' (Communication) COM (2003) OJ C63/1; Commission, 'European Contract Law and the revision of the acquis: the way forward' (Communication) COM (2004) 651 final, paragraph 2.2.3.

implementation. Consumers might be misled into believing that such pre-drafted standard contract terms are fully compliant because of the public or semi-public provenance. As shown earlier in this part of the Chapter, the pre-drafted standard terms themselves contained consumer rights violations, and, additionally, a number of traders failed to faithfully implement these pre-drafted terms. The policy recommendations in this Section therefore put forward proposals which attempt to increase compliance of pre-drafted standard contract terms and also ensure that traders implement such pre-drafted terms correctly.

Ensuring compliance of pre-drafted standard terms and their correct implementation by traders are both within the competence of the Member States. The European Commission can propose new substantive rules,⁴³ but also, as it has done, coordinated enforcement actions within the EU.⁴⁴ The Commission itself could therefore publish standard contract terms which comply with the strictest national consumer protection rules in the EU's Single Market. These standard terms could be published as a soft-law instrument and serve as an alternative to further harmonisation of the national contract laws.⁴⁵ Taking the strictest national rules would be necessary because not all consumer rules have been harmonised

⁴³ However, the Commission has to stay within the limits of Article 114 of the TFEU. For a general historical account of the European Commission's competence to harmonise national (consumer contract) laws, see for instance Weatherill (n 1) chapter 3.

⁴⁴ For instance, Regulation (EU) 2017/2394 of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 [2017] OJ L345/1.

⁴⁵ Jens Karsten and Ali R Sinai argue that 'models' should be drawn up for every jurisdiction and monitored accordingly. They also highlight the relevance of consumer organisations and their potential involvement in drafting and providing such terms, Jens Karsten and Ali R Sinai, 'The Action Plan on European Contract Law: Perspectives for the Future of European Contract Law and EC Consumer Law' (2003) 26(2) *Journal of Consumer Policy* 168-169. Similar proposals of framework legislation and non-binding measures as opposed to complete harmonisation were discussed at the time, see for instance Josef Drexler, 'Community Legislation Continued: Complete Harmonisation, Framework Legislation or Non-Binding Measures – Alternative Approaches to European Contract Law, Consumer Protection and Unfair Trade Practices?' (2002) 13(6) *European Business Law Review* 557.

and the Member States are allowed to adopt stricter rules.⁴⁶ However, the European Commission dismissed such a proposal in 2005 as in their view using the strictest national rules might make its model standard contract terms less attractive for traders.⁴⁷ Another shortcoming of this approach was highlighted by Giuditta Cordero-Moss, who argued that the main problem would be the diverging rules on contractual interpretation.⁴⁸ In her view, even transnational instruments, such as the Principles of European Contract Law (PECL)⁴⁹ and the Principles of International Commercial Contracts (UPICC),⁵⁰ could not resolve this issue,⁵¹ as they ‘do not contribute considerably to a harmonised standard of interpretation.’⁵² She has argued that Incoterms® could be an alternative to providing pre-drafted standard contract terms, as they operate independently from the national general

⁴⁶ Especially with regard of the Unfair Contract Terms Directive 93/13/EEC and E-Commerce Directive 2000/31/EC, see Chapter 2 and Chapter 3.2 of this thesis. The minimum harmonisation Consumer Sales and Guarantees Directive 1999/44/EC is replaced and repealed by a maximum harmonisation Directive under the Commission’s New Deal for Consumers which is discussed further below.

⁴⁷ The European Commission also argued that these standard terms require constant updates, and that the ‘complexity and need for constant review’ as well as the general maintenance for a website providing standard contract terms would be very costly, which is why the Commission ultimately abandoned this idea. Commission, ‘First Annual Progress Report on European Contract Law and the Acquis Review’ (Report) COM (2005) 456 final, paragraph 4.1; Ulf Bernitz, ‘The Commission’s Communications and Standard Contract Terms’ in Stefan Vogenauer and Stephen Weatherill (eds), *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice* (Hart Publishing 2006) 190.

⁴⁸ Giuditta Cordero-Moss, ‘Standard contract terms as an alternative to legislation’ in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar Publishing 2016) 489, 495-502.

⁴⁹ The Principles of European Contract Law (PECL), see Ole Lando and Hugh Beale (eds), *Principles of European Contract Law Parts I and II* (Kluwer Law International 2000); Ole Lando, Eric Clive, André Prüm, and Reinhard Zimmermann (eds), *Principles of European Contract Law Parts III* (Kluwer Law International 2003).

⁵⁰ The Principles of International Commercial Contracts (International Institute for the Unification of Private Law, Rome, 2016).

⁵¹ Cordero-Moss (n 48) 503-505.

⁵² Cordero-Moss (n 48) 506.

contract laws. In my view, this benefit is, however, non-existent in B2C contracts because consumers can always rely on national law in case of a dispute;⁵³ any contractual clauses attempting to restrict or exclude this are not binding on consumers.⁵⁴ In addition to adopting pre-drafted standard contract terms, one could propose an instrument which would also exhaustively govern issues of contractual interpretation, such as a European Civil Code.⁵⁵ Earlier proposals of such a project, the Proposal for a Common European Sales Law (CESL),⁵⁶ failed due to political opposition, even when it was suggested that it should be adopted as an optional instrument.⁵⁷ The optional CESL would have fully harmonised all the rules governing e-commerce, including contractual interpretation,⁵⁸ but only should

⁵³ Article 6(1) of Regulation (EC) 593/2008 (Rome I).

⁵⁴ For instance Article 25 of Directive 2011/83/EU and Article 6(1) of Directive 93/13/EEC.

⁵⁵ This would be necessary for consumer contracts, but, of course, not for business-to-business contracts, as they can simply adopt INCOTERMS®.

⁵⁶ Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (CESL)’ COM (2011) 635 final.

⁵⁷ For background information on the Common European Sales Law, Weatherill (n 1)197-199.

It is, however, worth noting that the European Parliamentary Research Service estimates that the long-term opportunity costs of trade within the Single Market is between 183 and 269 billion Euros annually. The researchers identified the lack of harmonisation of the rules concerning online and distance sales as one of the main barriers, European Parliamentary Research Service, ‘The Costs of Non-Europe in the Single Market: Free Movement of Goods’ (European Parliamentary Research Service, September 2014) available at <http://www.europarl.europa.eu/EPRS/EPRS_STUDY_536353_CoNE_Single_Market_I.pdf> accessed 3 November 2020, 7ff.

⁵⁸ Part III of the Common European Sales Law, see generally Gerard McMeel and Hans Christoph Grigoleit, ‘Interpretation of Contracts’ in Gerhard Dannemann and Stefan Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford University Press 2013) 369-372; Stefan Vogenauer, ‘Interpretation’ in Nils Jansen and Reinhard Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press 2018).

traders decide to opt in.⁵⁹ It would have also provided traders with greater choice,⁶⁰ but, as pointed out earlier in the thesis, another attempt to adopt the Common European Sales Law seems, from a political viewpoint, very unlikely; it's also not clear whether Article 114 of the TFEU supports the adoption of such an instrument.⁶¹ Instead, the European Commission went ahead with its (more conventional) New Deal for Consumers.⁶² Recently adopted Directive 2019/770/EU and Directive 2019/771/EU are maximum harmonisation

⁵⁹ cf Richard Epstein, 'Harmonization, heterogeneity and regulation: CESL, the lost opportunity for constructive harmonization' (2013) 50(Special Issue) Common Market Law Review 207.

⁶⁰ See for instance, Karsten and Sinai (n 45) 170; Jan M Smits, 'Party choice and the Common European Sales Law, or: How to prevent the CESL from becoming a lemon on the law market' (2013) 50(Special Issue) Common Market Law Review 51; Host Eidenmüller, 'What can be wrong with an option? An optional Common European Sales Law as a regulatory tool' (2013) 50(Special Issue) Common Market Law Review 69.

Christian Twigg-Flesner proposed a (mandatory) B2C cross-border-only regulation in the EU's Single Market, which according to Stephen Weatherill would limit the spillover effect of EU measures into domestic affairs and protect national regulatory autonomy, Christian Twigg-Flesner, *A Cross-Border-Only Regulation for Consumer Transactions in the EU: A Fresh Approach to EU Consumer Law* (Springer Publishing 2011) 26ff; Weatherill (n 1) 81-82.

⁶¹ As pointed out in Chapter 3.3 the CESL would have further unified the EU consumer contract rules, but its proposal as well as the first and more ambitious proposal of the Consumer Rights Directive were withdrawn. Nonetheless, empirical evidence on trader preference indicated that traders favoured further harmonisation of consumer contract rules, Stefan Vogenauer and Stephen Weatherill, 'The European Community's Competence to Pursue the Harmonisation of Contract Law—an Empirical Contribution to the Debate' in Vogenauer and Weatherill (n 47) 132-133.

⁶² Commission, 'A New Deal for Consumers' (Communication) COM (2018) 183 final.

Directive (EU) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1; Directive (EU) 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L136/28; Directive (EU) 2019/2161 of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L328/7 (Omnibus Directive). For further background information on the New Deal for Consumers, Mateusz Grochowski, 'European Consumer Law after the New Deal: A Tryplich' (2020) 39(1) Yearbook of European Law 387-395.

instruments,⁶³ but are not as ambitious as the Common European Sales Law: Directive 2019/770/EU harmonises rules regarding digital content and services; 2019/771/EU has repealed and replaced the minimum harmonisation Consumer Sales and Guarantees Directive 1999/44/EC. Directive 2019/2161/EU also only amended the Unfair Terms Directive 93/13/EEC with respect to the rules on penalties (Article 1 of Directive 2019/2161/EU) and introduced information requirements for contracts concluded on online marketplaces (Article 4(5) of Directive 2019/2161/EU). Despite being less ambitious than the CESL, the three Directives will significantly increase the level of harmonisation of the Member State's consumer contract laws. However, one fundamental issue which remains unresolved is that the three Directives have not addressed the earlier issue of apparent divergences in contractual interpretation, although, as shown in Chapter 2, there is significant harmonisation concerning the fairness assessment of contract terms through Court of Justice case law.⁶⁴

Making pre-drafted standard terms and conditions which adopt the strictest national rules accessible seems therefore the best option. Most importantly, the Commission's concern that opting for the strictest standard disincentivises its use is not applicable anymore, as the playing field has changed in recent years. The Member States' consumer

⁶³ Article 4 of Directive 2019/770/EU; Article 4 of Directive 2019/771/EU. Stephen Weatherill notes that Directive 2019/771/EU 'harmonises *some* matters according to the maximum harmonisation model', however, the Directive also contains several limitations regarding the material scope as well as options, like in the Consumer Rights Directive 2011/83/EU, and other minimum provisions (especially Articles 3, 17, and 18 of Directive 2019/771/EU). He argues that this preserves at least some diversity at the national level, and the choice of the 'model of harmonisations' shows the sensitive nature of harmonising consumer contract law. Stephen Weatherill, 'Is maximum harmonisation a myth? The story of Directive 2019/771 on contracts for the sale of goods' (2021) 16(2) *Revue européenne de droit de la consommation* 239-241.

⁶⁴ For a detailed examination on divergences regarding contractual interpretation, see for instance Jacques H Herbots, 'Interpretation of Contracts' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar Publishing 2012) 421ff; Hein Kötz, *European Contract Law* (2nd edn, Oxford University Press 2017) 91ff.

contract laws have been significantly harmonised, for instance in relation to such matters as the consumers' right of withdrawal, or the rules governing the passing of risk.⁶⁵ The only remaining concern over this approach would be the diverging rules regarding contractual interpretation, including of the potentially unfair contract terms. As shown in Chapter 2, the national judicial practice of how unfair contract terms are controlled has been significantly aligned through CJEU case law and the examination of the national rules implementing the Unfair Terms Directive has revealed that there is also considerable overlap among the four Member States. However, some significant differences remain and they were also not addressed by the New Deal for Consumer. The most pragmatic solution would be to simply leave the legal issues covered by the national rules implementing the Unfair Contract Terms Directive out of the pre-drafted terms. Traders are not required to include the information included in these provisions in their terms and conditions and EU consumers can by default rely on the law of their habitual residence.⁶⁶ The pre-drafted standard contract terms could thus only cover the terms that are required by the mandatory information and formal requirements, including the rules surrounding the right of withdrawal.

It follows that the European Commission, national authorities, or consumer and trader organisations could draft and provide standard contract terms which take the strictest national standard as their benchmark.⁶⁷ This would be particularly beneficial in cross-border transactions and could complement or even be an alternative to further harmonisation on the EU level.⁶⁸ It has been shown that such terms are already widely

⁶⁵ See Chapter 3 of this thesis.

⁶⁶ Article 6(1) of the Regulation (EU) 593/2008 (Rome I).

⁶⁷ Ulf Bernitz notes that pre-drafted standard contract terms are unlikely to breach EU competition rules (Article 101 of the TFEU, ex Article 81 of the EC Treaty), unless these standard terms contain terms such as index clauses. Bernitz (n 47) 186.

⁶⁸ Fabrizio Cafaggi examined different forms of self-regulation regarding standard contract terms. He distinguished between standard terms that would substitute or complement

available in all four jurisdictions included in the present study (Chapter 4.5). However, Dutch traders were the only ones actually using them (Chapter 4, Table 7). To date, there is also no data whether such pre-drafted standard contract terms are available in all the remaining Member States; nor is there any reliable information on their quality. The latter is of particular importance, as the pre-drafted standard contract terms sampled for the present study were not fully compliant with the relevant consumer protection rules (Table 22 above). It is surprising that these terms, pre-drafted by semi-public organisations, did not comply in full, considering the involvement of consumer and trader representatives as well as academics in their preparation.⁶⁹ In many Member States, membership in such industry organisations is compulsory, so the question arises whether providers of standard contract terms should also ensure that traders correctly implement⁷⁰ and regularly update them.⁷¹ Further regulatory powers could thus be transferred to these semi-public organisations. Alternatively, these organisations could ensure that their members comply with any legal obligations. Franziska Weber and Christopher Hodges examined how

existing legislation or that would be more sector specific, Fabrizio Cafaggi, ‘Self-Regulation in European Contract Law’ in Hugh Collins (ed), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Kluwer Law International 2008) 93ff.

⁶⁹ There have been other instances where this happened before in the Netherlands, Esther van Schagen, ‘“Better” Enforcement of EU Consumer Law: Exploring Responsive Enforcement’ in Esther van Schagen and Stephen Weatherill (eds), *Better Regulation in EU Contract Law: The Fitness Check and the New Deal for Consumers* (Hart Publishing 2019) 152-154.

⁷⁰ As shown in Chapter 5, many traders also went beyond the required legal standard, which should of course be encouraged by these semi-public organisations.

⁷¹ The frequency of how often traders review their terms and conditions was found to be of particular importance, Competition and Markets Authority/IFF Research, ‘Unfair Contract Terms Research’ (Competition and Markets Authority, 19 October 2016) available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/561518/UK_businesses_understanding_of_unfair_terms_in_consumer_contracts__IFF_Research_.pdf> accessed 29 April 2020, 40. Several traders of the present thesis have also referred to outdated legislation, such as the 7-day right to withdraw under the Distance Selling Directive (Chapter 5.3.3).

Thuiswinkel operates and have found that their members are required to adopt the standard contract terms drafted by *Thuiswinkel*.⁷² *Thuiswinkel*'s members are also independently audited for compliance before they are even allowed to join their organisation and its members are then subject to an annual compliance check-up.⁷³ The Dutch approach could thus serve as a good model of self-regulation for other jurisdictions. The only issue was that these pre-drafted terms contained some consumer rights violations. Compliance of pre-drafted standard contract terms and their correct implementation could be generally ensured through the deployment of artificial intelligence, for instance the one introduced by the CLAUDETTE program at the European University Institute.⁷⁴ CLAUDETTE allows users to check whether a contract term can be considered unfair, although the programme still requires significant input before it could replace legal professionals.⁷⁵ Deploying AI to examine whether traders faithfully implement pre-drafted terms would not be as ambitious as the CLAUDETTE programme, as one could simply detect divergences by comparing the pre-drafted standard contract with the trader's terms and conditions. National enforcement and consumer organisations could also make use of such technology in the

⁷² Weber and Hodges (n 6) 152.

⁷³ *ibid*.

⁷⁴ European University Institute, 'CLAUDETTE: Machine Learning Powered Analysis of Consumer Contracts and Privacy Policies' (European University Institute, 2019) available at <<http://claudette.eui.eu/>> accessed 23 May 2021.

For further information on the software programme, see Hans-Wolfgang Micklitz, Przemyslaw Palka, and Yannis Panagis, 'The Empire Strike Back: Digital Control of Unfair Terms of Online Services' (2017) 40 (3) *Journal of Consumer Policy* 367ff; Vanessa Mak, *Legal Pluralism in European Contract Law* (Oxford University Press 2020) 146-149.

⁷⁵ Vanessa Mak detected several inaccuracies in the CLAUDETTE software, *ibid* 181.

Unfair contract terms found in the empirical examination of the present thesis were also not picked up as unfair by the software.

future, but it seems that they will have to continue to manually assess trader compliance for the time being.⁷⁶

6.3 Supporting Small and Medium-Sized Enterprises

The descriptive analysis in Chapter 5 has revealed that 27.97 percent of large enterprises had complied in full with their legal obligations compared to 13.74 percent of SMEs (Table 9, Chapter 5.2.1). This pattern was also confirmed in the statistical analysis, which showed that SMEs had on average more violations with the consumer protection rules than large enterprises (Table 11 model (1)) and were overall less likely to be compliant (Table 11 model (2)).⁷⁷ The most instances of non-compliance for SMEs and large enterprises occurred with mandatory disclosures, which was followed by unfair contract terms, the right of withdrawal, and the passing of risk (Table 12, Chapter 5.3). This pattern was also reflected in the list of the top ten instances of non-compliance, although the order and quantity of violations between SMEs and large enterprises was different (Table 23 below). The findings in Table 23 show that traders struggled with the same legal obligations regardless of the company size.

⁷⁶ These organisations could then take collective enforcement action under the new Omnibus Directive 2019/2161/EU which is part of the EU's New Deal for Consumers, see for example Hilde K Ellingsen, *Standing to Enforce European Union Law before National Courts* (Hart Publishing 2021) 191-193.

⁷⁷ Table 11 and the interpretation of its findings are in Chapter 5.2.2.

Table 23 Top 10 Instances of Non-Compliance by SMEs and Large Enterprises

	Z4	X11	Z1g(ii)	Z1h	Z2f	Y2	Z1f	Z2a(i)	Y1	X10
<i>SME</i>	116	87	66	58	52	49	26	25	24	13
	X11	Z4	Y2	Z1h	Z1g(ii)	Z2f	Y1	X10	Z1f	Z2a(i)
<i>Large</i>	48	42	28	23	20	19	10	9	9	9

Notes:

(1) 118 traders are large enterprises and 182 traders are SMEs (45 by default). In total, there are 300 hundred traders.

(2) X10: contract terms allowing traders to transfer their rights and obligations to third parties; X11: contract terms excluding or hindering consumers to take legal action (e.g. choice of law clauses); Y1: providing the trade register number; Y2: providing the VAT number; Z1f: the providing delivery time; Z1g(ii): providing a model withdrawal form; Z1h: providing a reminder of the existence of a legal guarantee of conformity of goods; Z2a(i): consumers have 14 days to withdraw from distance contracts; Z2f: traders have to reimburse consumer after 14 days of being informed of the latter's decision to withdraw from the contract; Z4: providing the hyperlink and method to access the EU's ODR platform. Further details on each variable are provided in Chapter 4 as well as on the legal context in Chapters 2 and 3.

Policy Recommendations

The empirical findings of the present study are not surprising. SMEs lack expertise and resources to comply with all legal requirements, especially in cross-border transactions.⁷⁸ Stephen Weatherill has argued that SMEs and consumers benefit the most from harmonised rules in the EU's Single Market, but also suggested that traders will most likely favour an optional EU instrument over mandatory rules.⁷⁹ SMEs might therefore be willing to adopt

⁷⁸ cf Catalina Goanta, *Convergence in European Consumer Sales Law: A Comparative and Numerical Approach* (Intersentia 2016) 124.

⁷⁹ Stephen Weatherill, 'Competence and European Private Law' in Christian Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law* (Cambridge University Press 2010) 68-69.

This view was also expressed by Hugh Beale with regards to B2B transactions, who has argued that SMEs might be willing to pay higher transaction costs in favour of higher protection, see Hugh Beale, 'The Role for European Contract Law: Uniformity or

pre-drafted standard contract terms which take the strictest national rules as a benchmark. This would allow SMEs to be in full compliance with all the legal obligations, while only marginally increasing their transaction costs.⁸⁰ There has also been an academic debate about the possibility of treating SMEs differently in B2C and B2B transactions.⁸¹ As discussed in Chapter 3.3, the EU legislator included optional provisions in the Consumer Rights Directive 2011/83/EU, which allow Member States to adopt stricter rules for certain situations, including to extend the Directive's level of protection to SMEs.⁸² Guido Alpa argued that for the sake of consistency, SMEs should also be treated differently in transactions with consumers.⁸³ In my view, this would lead to further inconsistencies in the European Consumer Contract Law Acquis, and thus possibly create further confusion among SMEs and decrease consumer confidence.⁸⁴ The empirical evidence has also

Diversity?' in Francisco de Elizalde (ed), *Uniform Rules for European Contract Law?: A Critical Assessment* (Hart Publishing 2018) 25-26.

⁸⁰ It has been pointed out in the previous Section that the divergences between Member States are marginal after the adoption of the Consumer Rights Directive and the EU's New Deal for Consumers. Issues of interpretation are unlikely to occur when the pre-drafted terms only focus on the required legal obligations as discussed in the previous Section.

⁸¹ See for instance, Marco Loos and Ilse Samoy, 'The Position of Small and Medium-Sized Enterprises in European Contract Law: An Introduction' in Marco Loos and Ilse Samoy (eds), *The Position of Small and Medium-Sized Enterprises in European Contract Law* (Intersentia 2014) 3-6; Matthias Lehmann and Johannes Ungerer, 'Save the "Mittelstand": How German Courts Protect Small and Medium-Sized Enterprises from Unfair Terms' (2017) 25(2) *European Review of Private Law* 313ff; Beale (n 79) 25-26; Mak (n 74) 110-111.

⁸² Preamble 13 of Directive 2011/83/EU.

⁸³ Guido Alpa, 'Towards a European Contract Law' in Reiner Schulze and Jules Stuyck (eds), *Towards a European Contract Law* (Sellier European Law Publishers 2011) 30-31.

⁸⁴ It is worth mentioning that the European Commission suggested that it might choose to exclude micro-enterprises from the scope of application of future legislative measures, in cases where applying the rules to them would not be proportionate. Commission, 'Minimizing regulatory burden for SMEs: Adapting EU regulation to the needs of micro-enterprises' COM (2011) 803 final, paragraph 4. This was for instance done in the Commission's Regulatory Fitness and Performance exercise, Commission, 'Regulatory Fitness and Performance (REFIT): Results and Next Steps' COM (2013) 685 final, paragraph 2.1.

suggested that SMEs struggled with the same legal obligations as large enterprises (Table 23 above). The only difference was the quantity of the instances of non-compliance, so providing pre-drafted standard contract terms and conditions which comply with the strictest national rules in the EU's Single Market would very likely have the biggest impact in increasing not only SMEs' but also the overall levels of compliance. In the light of the evidence presented in the previous Section, this approach is also more realistic than attempting to adopt a new version of the (optional) Common European Sales Law.⁸⁵ It therefore follows that providing SMEs with pre-drafted standard terms that are frequently updated, available in all EU languages, and accompanied by guidance notes,⁸⁶ would not only lead to higher compliance levels, but most likely also increase the willingness of SMEs to engage in cross-border transactions in the first place. The European Commission's Executive Agency for Small and Medium-Sized Enterprises already included the provision of guidance and support of SMEs in understanding EU legislation as a core priority in their Competitiveness of Enterprises and Small and Medium-Sized Enterprises programme which was launched from 2014-2020.⁸⁷ SMEs can access information on rules governing cross-border transactions via the Commission's 'Your Europe Business Portal'. The pre-drafted terms could be for instance provided to SMEs through this portal.

⁸⁵ Although at least 78 percent of SMEs provided in a number of surveys that they would be willing to use such an optional instrument in cross-border transactions, Alexander J Wulf, *Institutional Competition Between Optional Codes in European Contract Law: A Theoretical and Empirical Analysis* (Springer Publishing 2014) 80-84.

⁸⁶ See the previous Section of this Chapter for further details.

⁸⁷ Commission, 'COSME - Europe's programme for small and medium-sized enterprises' (Commission, 2021) available at < https://ec.europa.eu/growth/smes/cosme_en > 20 May 2021.

6.4 Increasing Access to Justice by Promoting Online Dispute Resolution

The final policy recommendation concerns increasing access to justice through Online Dispute Resolution. Most business-to-consumer contracts are low-value transactions and consumers are thus less likely to take disputes to court.⁸⁸ ODR may provide a cheap and efficient remedy where a trader has failed to comply with their legal obligations. The main concern about the current EU ODR regime is that traders are only required to provide a hyperlink to the platform and explain the methods of accessing it, but traders do not need to subject themselves to the regime.⁸⁹ In the present study, 52.67 percent of traders (158 out of 300) failed to inform consumers of the existence and possibility to resolve disputes via the European Commission's ODR platform.⁹⁰ Compliance with this mandatory disclosure requirement has varied significantly between the jurisdictions, industries, and traders of different size.⁹¹ Among the four jurisdictions, Germany was most compliant (86.67 percent), followed by France (with 44 percent), the United Kingdom (with 36 percent), and the Netherlands (with 22.67 percent).⁹² Among the five industries, Fashion was most compliant (60 percent), closely followed by Home Decor (56.67 percent) and Electronics (55 percent); Print Media (33.33 percent) and Sport Equipment (31.67 percent)

⁸⁸ Pablo Cortés and Fernando Esteban de la Rosa therefore even proposed the introduction of a global Online Dispute Resolution system, Pablo Cortés and Fernando Esteban de la Rosa, 'Building a global redress system for low-value cross-border disputes' (2013) 62(2) *The International and Comparative Law Quarterly* 407ff.

⁸⁹ Traders can choose to opt out from the EU's ODR scheme. Article 6(1)(t) of Directive 2011/83/EU in connection with Article 14(1) of Regulation (EU) 524/2013.

⁹⁰ Table 24 (model (1) Total). As pointed out in Chapter 5, this confirms a study by the European Commission which revealed that nearly 45 percent of traders failed to comply with this requirement, Commission, 'Online shopping: Commission and Consumer Protection authorities urge traders to bring information policy in line with EU law' (European Commission, 31 January 2020) available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_156> accessed 12 August 2020.

⁹¹ Table 24 (model (2)).

⁹² Table 24 (model (2) Country).

were the least compliant.⁹³ Finally, large enterprises (64.41 percent) were found to be more compliant with this obligation than SMEs (36.26 percent).⁹⁴

Another worrying trend was that 39.44 percent (56 out of 142) of traders which complied with the disclosure requirement had opted out of the EU's ODR scheme⁹⁵ and only 4 traders had expressly opted in.⁹⁶ Surprisingly, 89 traders provided in their terms and conditions the method for accessing a national ODR provider;⁹⁷ 73 of which provided that they were willing to resolve any disputes using this national provider.⁹⁸ These observations show that traders are interested in resolving their Disputes via ODR, although significant differences were observed between the Member States. In particular, as many as 53.33 percent of Dutch traders and 34.67 percent of French traders were willing to resolve their Disputes via Online Dispute Resolution, compared to only 6.67 percent of German traders and 2.67 percent of UK traders.⁹⁹ Interest in ODR by industry was relatively constant between 26.67 percent and 28.33 percent; it only dropped to 13.33 percent in the case of Sport Equipment.¹⁰⁰ Similarly, interest in ODR was at almost the same rate between large enterprises (24.58 percent) and SMEs (24.18 percent).¹⁰¹ In total, 16 different national ODR providers were referred to by traders.¹⁰²

⁹³ Table 24 (model (2) Industry).

⁹⁴ Table 24 (model (2) Company Size).

⁹⁵ Table 24 (model (3)).

⁹⁶ Table 24 (model (4)).

⁹⁷ Table 24 (model (5) Total).

⁹⁸ Table 24 (model (6) Total).

⁹⁹ Table 24 (model (6) Country).

¹⁰⁰ Table 24 (model (6) Industry).

¹⁰¹ Table 24 (model (6) Company Size).

¹⁰² Table 24 (Notes (3)).

Table 24 Trader Compliance and Trader Willingness to Take Part in ODR

	(1) Failed to Provide it	(2) Provided it	(3) Provided it but Opt-Out	(4) Provided it and Opt-In	(5) Provided National ODR	(6) Opt-In National ODR
<i>Country</i>						
France	42	33	0	0	37	26
Germany	10	65	49	3	5	5
The NL	58	17	2	0	41	40
The UK	48	27	2	1	6	2
<i>Industry</i>						
Electronics	27	33	12	0	21	16
Fashion	24	36	12	2	20	17
Sport Eq.	41	19	7	1	9	8
Home D.	26	34	12	1	22	16
Print Media	40	20	10	0	17	16
<i>Company Size</i>						
Large	42	76	29	1	39	29
SME	116	66	24	3	50	44
Total	158	142	56	4	89	73

Notes:

(1) Model (1): traders which have failed to display the hyperlink to the EU Commission's ODR platform and methods of accessing it (dependent variable Z4 of the study); model (2) traders complied with dependent variable Z4; model (3) traders provided the required information but opted out of the EU's ODR scheme; model (4) traders provided information and opted into the EU's ODR scheme; model (5) traders provided a hyperlink and how to access ODR of a national provider; model (6) traders provided information about national ODR scheme and indicated their willingness to take part in ODR proceedings with a national provider.

(2) There are 75 traders per Member State and 60 traders per industry. 118 traders are large enterprises and 182 traders are SMEs (45 by default). In total, there are 300 hundred traders and 16 national ODR providers. The French national ODR providers referred to were: Fédération du e-commerce et de la vente à distance (provided: 24; provided and opt-in: 21); Médiateur du Commerce Coopératif et Associé (provided: 1); Centre de Médiation et de Cyber-Services de Règlement Amiable des Huissiers de Justice MEDICYS (provided: 5; provided and opt-in: 2); Fédération du Commerce et de la Distribution (provided: 1); TELECOM le Médiateur des Communications Électroniques (provided: 1); Centre de médiation de conciliateurs de justice CM2C (provided: 1); Association des médiateurs européens (provided: 1; provided and opt-in: 1); MEDIATION-NET(provided: 3; provided and opt-in: 2). The German national ODR providers referred to were: Allgemeine Verbraucherschlichtungsstelle beim Zentrum für Schlichtung e.V. (provided: 3; provided and opt-in: 3); janoFair (provided: 2; provided and opt-in: 2). The Dutch national ODR providers referred to were: Geschillencommissie Thuiswinkel Organisatie (provided: 27; provided and opt-in: 26); Geschillencommissie Stichting Webshop Keurmerk (provided: 12; provided and opt-in: 12); Geschillencommissie Centrale Branchevereniging Wonen (provided: 2; provided and opt-in: 2). The UK national ODR providers referred to were: RetailADR (provided: 3; provided and opt-in: 2); Consumer Ombudsman (provided: 1); Furniture Ombudsman (provided: 2).

Policy Recommendations

Online Dispute Resolution can be a fast and cost-efficient option to resolve a dispute, especially in low-value and cross-border B2C cases.¹⁰³ It is therefore worrying that the vast majority of traders have failed to provide the link to the EU's ODR platform or opted out of the scheme. The question which remains unanswered is why traders referred to a national ODR provider of their choice and not to the EU's ODR platform. It could be that the traders were simply unaware of the EU's platform, as a study by the European Commission pointed out that almost 40 percent of traders were unaware of the possibility of resolving disputes via an out-of-court mechanism.¹⁰⁴ Other shortcomings of the current regime have been highlighted by Pablo Cortés. He has observed that EU's ODR platform puts the burden to provide the email address of the trader on the consumer, the consumer is not contacted by the platform should traders opt out of ODR, and ODR proceedings can only take place if the trader replies to the platform's email.¹⁰⁵ It is unclear whether these issues have been addressed in the meantime, but if not, these and further observations about the efficacy of the EU's ODR mechanism should be taken into account when making the platform more user-friendly and rolling it out at scale.

¹⁰³ A recent European Commission study highlighted that high costs of litigation reduced access to justice; the Commission also provided concrete numbers of costs of litigation (including small-value claims) by Member State, see Commission, 'The 2021 EU Justice Scoreboard' (Communication) COM (2021) 389 final, 20-22.

Alternatives to ODR are collective redress or enforcement action by national authorities, but both have a much higher threshold for consumers.

¹⁰⁴ Commission, 'Consumer Conditions Scoreboard – Consumers at home in the Single Market' (European Commission, October 2017) available at <http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=45983> accessed 3 September 2020, 66 (Figure 42)

¹⁰⁵ Pablo Cortés, 'The New Landscape of Consumer Redress: The European Directive on Consumer Alternative Dispute Resolution and the Regulation on Online Dispute Resolution' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 33-34.

In the present thesis, most traders failed to provide the method of accessing the EU's ODR platform and only 4 out of 300 traders provided that they were willing to resolve disputes via this platform. Opting out of the EU's platform is perfectly legal, as long as traders provide a hyperlink to the EU's platform, state that they opt out of the EU's scheme, and provide a hyperlink and description of how to access a nationally regulated ODR or ADR provider.¹⁰⁶ The recommendation therefore first focuses on gathering empirical data on why traders choose their national ODR platforms over the EU's platform. Such a study is not in existence at the time of writing. This could be done via a survey and the EU's ODR platform could then be improved in the light of its findings. Another development in recent years has been that some platforms, for instance eBay, developed their own ODR schemes.¹⁰⁷ Such mechanisms can resolve disputes between traders and consumers at a fingertip, including a direct enforcement action by the platform.¹⁰⁸ This form of platform

¹⁰⁶ Concerning ADR, Article 6(1)(t) of Directive 2011/83/EU in connection with Article 13 of Directive 2013/11/EU. As for ODR, Article 6(1)(t) of Directive 2011/83/EU in connection with Article 14 of Regulation (EU) 524/2013.

¹⁰⁷ As discussed in Chapter 3.3.1.6, see for instance Louis F Del Duca, Colin Rule, and Kathryn Rimpfel, 'eBay's De Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers' (2014) 6 Yearbook on Arbitration and Mediation 204.

¹⁰⁸ Platforms are also required to remove any illegal listings or content on their website as soon as they become aware of it (Article 14(1)(b) of the E-Commerce Directive 2000/31/EC). There is, however, no general duty to monitor a website for illegal content under the E-Commerce Directive nor are Member States allowed to introduce such a requirement (Article 15 of Directive 2000/31/EC). Surprisingly, the Court of Justice provided in *Glawischnig-Piesczek* that there can be a positive duty to monitor a website for illegal content containing identical or equivalent information. The Court also clarified that such content must be removed from the website globally, sparking a public outcry about its implications on non-EU citizens, especially regarding free speech on social media. In case of e-commerce platforms, this obligation could be for instance disabling access to a fraudulent trading account on an e-commerce platform like eBay. Case C-18/18, *Eva Glawischnig-Piesczek v Facebook Ireland Limited* [2019] ECLI:EU:C:2019:821. See for instance, Tobias Lutzi, *Private International Law Online: Internet Regulation and Civil Liability in the EU* (Oxford University Press 2020) paragraphs 2.21-2.22, 2.37, 2.54, 6.04; Aleksandra Kuczerawy and Clara Rauchegger, 'Court of Justice Injunctions to remove illegal online content under the eCommerce Directive: *Glawischnig-Piesczek*' (2020) 57(5) Common Market Law Review 1495ff.

governance can be seen as another useful tool in resolving disputes, as long as it does not infringe on consumer protection rights, in which case it would undermine the authority of states and their independent judiciary.¹⁰⁹

In conclusion, the empirical observations revealed that most traders failed to comply with the mandatory disclosure rules regarding the method for accessing the EU's ODR platform and that only 4 out of 300 traders opted into the scheme. There is compelling evidence that ODR should be made mandatory for small-value claims or that consumers should be given the final say whether they prefer to enter into ODR instead of the regular court proceedings.¹¹⁰ Neither ADR nor ODR is mandatory in e-commerce consumer contract disputes in France, Germany, the Netherlands, and the UK at the time of writing.¹¹¹

¹⁰⁹ See for example, Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions that Shape Social Media* (Yale University Press 2018) chapter 8.

¹¹⁰ See also the discussion in Stefan Wrba, *European Consumer Access to Justice Revisited* (Cambridge University Press 2015) 95-97; Pablo Cortés, 'Enforcing EU Consumer Policy More Effectively: A Three Pronged Approach' in Sara Drake and Melanie Smith (eds), *New Directions in the Effective Enforcement of EU Law and Policy* (Edward Elgar Publishing 2016) 222-223; Michael Stürner, 'ADR and Adjudication by State Courts: Competitors or Complements?' in Michael Stürner, Fernando Gascón Inchausti, and Remo Caponi (eds), *The Role of Consumer ADR in the Administration of Justice: New Trends in Access to Justice under EU Directive 2013/11* (Sellier European Law Publishers 2015) 18-20; Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press 2019) 187-189; Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (Oxford University Press 2017) 159-162.

Vanessa Mak argues that the data gathered from ODR proceedings could also shape future legislation, as it provides detailed data on consumer and trader behaviour. Mak (n 74) 150.

¹¹¹ For an overview of the out-of-court redress landscape in the four jurisdictions, see for example, Sabine Bernheim-Desvaux and Patricia Foucher, 'L'effectivité du droit français de la consommation' in Hans-Wolfgang Micklitz and Geneviève Saumier (eds), *Enforcement and Effectiveness of Consumer Law* (Springer Publishing 2018); Emmanuel Guinchard, 'The Implementation of the Consumer ADR Directive in France' in Cortés (n 105); Roa Miquel, 'The Implementation of the Consumer ADR Directive in Germany' in Cortés (n 105); Vanessa Mak, 'Enforcement and Effectiveness of Consumer Law: The Netherlands' in Micklitz and Saumier; Eline Verhage, 'The Implementation of the Consumer ADR Directive in the Netherlands' in Cortés (n 105); Christine Riefa and Chris Willet, 'Enforcement and Effectiveness of Consumer Law in the UK' in Micklitz and Saumier.

Making ODR or ADR mandatory is not a novel idea, for instance the implementation of the Mediation Directive in Italy made it mandatory to enter mediation in cross-border and domestic civil cases before proceedings before a court could take place (between 2009 and 2012).¹¹² Several years later, the rule was found to be unconstitutional and was limited in scope. After the reform, parties in certain legal disputes concerning low-value claims, such as low-value claims arising from traffic accidents, B2C contracts, and insurance disputes, have to attend at least one introductory mediation session before they are allowed to start legal proceedings in a court. According to the data obtained by Sue Prince, almost 60,000 mediations took place in the first three months of 2014 and around half of the disputes were settled.¹¹³ A legal assessment of such a measure by the Court of Justice of the European Union as well as on the national level, in Germany and in the United Kingdom, found that mandatory ADR would be in conformity with Article 6 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union.¹¹⁴

¹¹² Directive (EC) 2008/52 of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3 (Mediation Directive). Sue Prince, ‘Access to Court? “Encouraging” Consumers to Use Court-Connected Mediation in Small Claims and Other Cases’ in Cortés (n 105) 86-88. Additional examples from other jurisdictions are provided in the same book.

¹¹³ *ibid.*

¹¹⁴ Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Rosalba Alassini v Telecom Italia SpA (C-317/08) and Filomena Califano v Wind SpA (C-318/08) and Lucia Anna Giorgia Iacono v Telecom Italia SpA (C-319/08) and Multiservice Srl v Telecom Italia SpA (C-320/08)* [2010] ECLI:EU:C:2010:146. Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (European Convention on Human Rights, as amended Protocol No 15 on 1 August 2021) (ECHR). Charter of Fundamental Rights of the European Union [2012] OJ C326/391. Concerning the compliance with the ECHR and EU law, Iris Benöhr, *EU Consumer Law and Human Rights* (Oxford University Press 2013) 196-199.

Regarding the UK, Civil Justice Council, ‘Compulsory ADR’ (Civil Justice Council, June 2021) available at <<https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report-1.pdf>> accessed 15 June 2021.

6.5 Conclusion

This Chapter sought to translate the empirical findings of the thesis into targeted and actionable policy recommendations. Three policy recommendations were examined in the light of the empirical findings of the present study. The first policy recommendation concerned the use of standard contract terms that are drafted and provided by public or semi-public organisations. The study found that most instances of non-compliance can be attributed to the providers of pre-drafted standard terms and only a handful of violations to traders that failed to faithfully implement them. It was observed that in order to positively contribute to levels of compliance, these pre-drafted terms must be free from any breaches of consumer protection rules, frequently updated, and implementation by traders must be regularly monitored, for example through a self-regulation scheme like the one in the Netherlands. The second policy recommendation addressed the fact that SMEs were found to be less likely to comply with their legal obligations. The empirical evidence suggested that SMEs struggled with the same legal obligations as large enterprises, only the quantity of violations was higher among SMEs. It was observed that pre-drafted terms would benefit SMEs the most. The third and final recommendation focused on the fact that most traders had failed to provide the hyperlink to the EU's ODR platform and only 4 out of 300 traders provided that they are willing to resolve disputes with their customers via the EU's platform. Another observation was that traders referred to national ODR providers, which meant that they preferred to choose a national provider over the EU's ODR platform. It was consequently proposed that further empirical evidence, for instance in form of a survey, need to be carried out in order to understand why traders opted out of the EU's ODR platform but opted into a national ODR scheme. In addition, it was suggested that ODR

Michael Stürner suggests that it would be in compliance with the German constitution (Article 20(3) of the Grundgesetz) and the Court of Justice case law (see joined cases above), Stürner (n 110) 19.

should be mandatory in e-commerce consumer disputes or that consumers should have at least the final say on whether they want to resolve their dispute online.

Chapter 7

Conclusion

7.1 Introduction

This Chapter concludes the thesis and provides a summary of the main findings, outlines some of the implications of the thesis, addresses questions that remain unanswered, and then offers some concluding remarks.

7.2 Summary of the Argument

The thesis explored how e-commerce business-to-consumer transactions are regulated in the European Union and in four selected European jurisdictions, and whether traders actually comply with the underlying rules.

Chapter 1 first briefly reviewed the academic landscape and outlined that a study which measures levels and factors of compliance did not yet exist. The Chapter outlined why content analysis is the most suitable methodology to determine the levels of trader compliance. It also provided explanations for further methodological choices made in the project and outlined the different limitations of the present study, especially concerning the size of the dataset. Only 300 traders from four jurisdictions as well as merely 35 applicable national rules implementing the Unfair Contract Terms Directive 93/13/EEC, the E-Commerce Directive 2000/31/EC, and the Consumer Rights Directive 2011/83/EU were included in the study, leaving other traders, jurisdictions, and rules out of the picture.

The second and third Chapters provided doctrinal accounts of the consumer protection rights derived from the implementation of the three selected Directives and, where relevant,

its implementation into national law. Chapter 2 focused on the implementation of the minimum harmonisation Unfair Contract Terms Directive 93/13/EEC. The Chapter examined how the general test used in the Directive (Articles 3 and 4) operates on the European Union and national level. A number of national nuances were detected among the rules that implemented the Directive; a discovery which has significantly shaped the research design of the empirical part of the thesis. The doctrinal examination revealed that there are different approaches to controlling unfair contract terms for unfairness in the jurisdictions under examination. One key observation has been that, unlike in France,¹ Germany,² and the Netherlands,³ the UK does not have a list of terms which are either presumed unfair ('grey list' character) or unfair under all circumstances ('black list' character). Instead, contract terms are assessed in the UK mainly under the general test of fairness, which, like in the Directive, is supplemented by an indicative list of potentially unfair terms.⁴ In addition to this general test, a number of contract terms, such as penalty clauses and assignment,⁵ are unfair because of common law rules or other statutory provisions.⁶ An additional observation has been that a number of terms are also unfair under the Court of Justice case law.⁷ These different regulatory techniques to controlling unfair contract terms significantly shaped the research design of the study, which divided the levels of unfairness into three categories: (1) a term may be regarded as unfair under the

¹ Article L212-1 in connection with Articles R212-1 and R212- of the Code de la consommation.

² §§ 308-309 of the BGB.

³ Article 6:233(a) in connection with Articles 6:236 and 6:237 of the BW.

⁴ Section 62 in connection with Schedule 2 of the Consumer Rights Act 2015.

⁵ See Chapters 2.4.4 and 2.4.10 of the present thesis.

⁶ Sections 31 and 65 of the Consumer Rights Act 2015. See Chapters 2.4.1 and 2.4.11.

⁷ See Chapters 2.4.4, 2.4.5, 2.4.7, and 2.4.11.

general test; (2) a term is presumed unfair under a ‘grey list’ with limited judicial discretion; (3) a term is considered unfair without the possibility of (re)evaluation (‘black-listed’).

Chapter 3 focused on the rights consumers derive from the national rules implementing the minimum harmonisation E-Commerce Directive and maximum harmonisation Consumer Rights Directive. The Section on the E-Commerce Directive examined whether the Member States had decided to go beyond the Directive’s level of protection. Only France opted for a higher standard regarding the language requirement, requiring traders to provide the terms and conditions always at least in French.⁸ Other, smaller, observations, were also made and included in the compliance assessment. Unlike the Section on the E-Commerce Directive, the part of the Chapter exploring consumer rights of the Consumer Rights Directive has focused only on the EU-level. Member States are not allowed to deviate from the Directive’s standard, so examining how the national rules implemented the instrument would not offer any practical benefits to assessing trader compliance.⁹ The Section did, however, point out the increased level of harmonisation after the adopting of the Directive, in particular regarding mandatory disclosures and withdrawal rights; rules governing the passing of risk did not even exist on the EU level.

Chapter 4 turned to the study’s research design. It explained that the study would use empirical methods to verify four hypotheses. H₁ hypothesis claimed that e-commerce traders fail to comply in full with their legal obligations; H₂₋₄ argued that the company’s size (H₂), the company’s age (H₃), and the use of pre-drafted terms provided by public or semi-public authorities (H₄) affects compliance. The Chapter then outlined how compliance

⁸ Article L224-76 of the Code de la consommation, see Chapter 3.2.1 (*Language Requirement*) of this thesis.

⁹ The optional provisions allowing the Member States to deviate from the Directive’s standard were not found to be applicable to the present study.

with the 35 selected rules would be measured and why this is the correct way of carrying out the assessment.

The fifth Chapter has examined the four hypotheses using both descriptive and statistical methods. The first hypothesis (H_1), that traders do not comply in full with their legal obligations, was confirmed. 80.67 percent of all traders had at least one or more instance of non-compliance.¹⁰ The second, third, and fourth hypotheses were examined jointly in an Ordinary Least Squares and Binary Logistic Regression model.¹¹ H_2 , that large enterprises are more likely to be compliant than SMEs, was confirmed in both statistical tests (at the 1 and 5 percent level of statistical significance). H_3 , that older companies are more compliant than younger ones, and H_4 , that traders using standard contract terms that are provided and drafted by public or semi-public organisations are more compliant, were not confirmed. The data on H_4 suggested that traders using pre-drafted terms had on average fewer violations than trader who drafted their own terms, but also that traders using them actually had a higher probability of non-compliance, a finding which has been examined further in Chapter 6. Section 5.3 moved away from the hypothesis testing and provided a fuller account of the manner in which particular consumer rights were violated by traders. It was observed that most instances of non-compliance concerned mandatory disclosures (60.60 percent), followed by unfair contract terms (21.95 percent), the right of withdrawal (16.58 percent), and the passing of risk (0.87 percent).¹² A closer look at the data showed that only 52 percent of all traders had no unfair contract term on their website,¹³ and that most of the detected unfair terms were incompliant choice of law and jurisdiction clauses.¹⁴ Even more

¹⁰ That is 242 out of 300 traders, see Table 9 and 10, Total.

¹¹ Table 11.

¹² Table 12.

¹³ Table 13.

¹⁴ Table 15 model (X11).

surprising were the findings with regards to mandatory disclosures: only 28.67 percent of all traders complied with all legal requirements. This number was even lower in the United Kingdom – at only 8 percent. The greatest number of instances of failure to comply with mandatory disclosures concerned the requirement to display the hyperlink to the EU’s Online Dispute Resolution platform, provide a model withdrawal form, remind consumers of the existence of a legal guarantee concerning the conformity of goods, and display the VAT number.¹⁵ Compliance with the consumers’ right of withdrawal was again a bigger problem in the UK: 15.05 percent of assessments carried out on UK traders detected violations compared to an average of 6.33 percent.¹⁶ However, when it comes to the length of the right of withdrawal, 30.33 percent of traders provided consumers with more time than the 14-day statutory period.¹⁷ And overall, 70 percent of traders had not violated any provision relating to the consumers’ right of withdrawal; the lowest score was observed in the UK (37.33 percent) and the highest in Germany (92 percent). Finally, how the contractual terms regulated the passing of risk was examined. Only 7 out of 300 traders violated the underlying consumer protection rules and no pattern explaining these instances was detected.¹⁸ The Chapter concluded with a Section containing additional observations on trader compliance, including a discussion of detected violations of consumer protection rules that fell outside the scope of the present study, or of other trader preferences, such as that a high number of traders opted out of the CISG.

The empirical findings were translated into targeted and actionable policy recommendations in Chapter 6. This Chapter explored three policy recommendations which are likely to have the biggest impact on trader compliance. The first recommendation

¹⁵ Table 17.

¹⁶ Table 18.

¹⁷ Table 20.

¹⁸ Chapter 5.3.4.

examined the wider use of standard contract terms that are drafted and provided by public or semi-public organisations. Such terms were available in all four jurisdictions, but only Dutch traders had been found to use them (56 out of 75 Dutch traders). The Chapter looked into one of the additional observations in Chapter 5 that traders using pre-drafted terms had on average fewer violations but were at the same time more likely to be in breach of consumer protection standards. Chapter 6 examined possible reasons for this and revealed that three of the four pre-drafted contract terms themselves breached consumer protection rules. In addition, this could not be attributed to traders failing to faithfully implement these terms because such conduct was detected only in very few instances. The policy recommendations therefore focused on how to increase compliance of pre-drafted standard contract terms and ensure their correct implementation. The European Commission, national authorities, or semi-public actors could provide pre-drafted standard contracts complying with the strictest national rules, which traders could optionally use. This approach is the most reasonable way of addressing the issue of non-compliance, especially considering the lack of political appetite for a European Civil Code in recent years. Several shortcomings were, nonetheless, highlighted, especially possible issues regarding different standards of contract interpretation at the national level. It was argued that pre-drafted standard terms should include all those mandatory information required under EU law. This would address the problem of diverging rules on contract interpretation. Compliance of and with these pre-drafted terms could also be achieved by introducing more self-regulation mechanisms, as it is the case in the Netherlands. The second policy recommendation focused on SMEs, given the fact that they had been found to be less compliant than large enterprises. SMEs and large enterprises struggled to comply with almost the exact same legal provisions; only the quantity of violations was higher in the case of SMEs.¹⁹ Providing

¹⁹ Table 23.

SMEs with pre-drafted standard contract terms that are fully compliant with the strictest national rules was proposed as having the biggest likely impact on compliance, while not significantly increasing transaction costs. It was also found to be the least intrusive solution, as some academics have proposed less restrictive rules for SMEs. It was argued that introducing different rules for SMEs would undermine consumer confidence and lead to further confusion among traders and consumers. The third and last policy recommendation focused on increasing consumers' access to justice through mandatory Online Dispute Resolution. Under the current regime, traders can simply opt out of the EU's ODR scheme. Only 4 out of 300 traders provided that they are willing to resolve any issues through the EU's ODR platform: 158 failed to comply with the requirement to provide the hyperlink to the platform, while 56 explicitly opted out.²⁰ Another interesting observation was that 73 traders stated that they were willing to resolve disputes via a national ODR provider of their choice.²¹ This shows that there is at least some interest to resolve disputes via ODR on the side of traders, which in turn suggests that the EU's ODR platform is (for unknown reasons) not competitive enough. It was therefore suggested to either make ODR mandatory or only grant the final say on resolving disputes via ODR to consumers. Otherwise, consumers are deprived of their right to access justice online.

7.3 Implications of the Thesis and Questions that Remain Unanswered

The thesis has both substantive and methodological implications. As discussed in the previous Section, the empirical evidence revealed several interesting observations concerning the levels of trader compliance and factors underlying it. These observations have been translated into targeted and actionable policy recommendations, which have both

²⁰ Table 24.

²¹ *ibid.*

academic and practical use. The thesis attempted to advocate for an evidence based approach in the regulation of consumer contracts and inspire future law-in-action studies.

The methodology of the present study has also contributed to the academic discussion on how compliance should be empirically measured. In particular, no other study addressed how national divergences should be empirically measured at the time of writing. The methodology could therefore be used by other scholars to address issues that fell outside of the scope of the inquiry. Several issues that remain uncharted have already been examined in Chapter 1. First and foremost, the present thesis focused only on four jurisdictions and there is no evidence on whether the same findings would be made in other jurisdictions, in different industries (only the five biggest were included), or with regard to different rules. The thesis could also not investigate all possible factors of non-compliance and instead selected only a few that made most sense given the existing literature. Further research projects could focus on the above outlined issues and base their methodology on the research design of the present study.

7.4 Conclusion

This thesis sought to contribute to the debate on the harmonisation of European Consumer Contract Law by providing new empirical insights on trader compliance and possible factors of their (non-)compliance. However, the thesis not only attempted to add further evidence to the existing body of scholarship, but to also lay the groundwork for future empirical projects in this field.

Appendix

Appendix 1 Independent Variables

Trader Number	Country	Industry	Company Age (No Cap)	Company Age (Capped at 30 Years)	Company Size	Use of Pre-Drafted Terms and Provider
1	France	Electronics	25	25	Large	Not Used
2	France	Electronics	20	20	Large	Not Used
3	France	Electronics	65	30	Large	Not Used
4	France	Electronics	27	27	Large	Not Used
5	France	Electronics	22	22	Large	Not Used
6	France	Electronics	21	21	SME	Not Used
7	France	Electronics	6	6	SME	Not Used
8	France	Electronics	19	19	Large	Not Used
9	France	Electronics	19	19	SME	Not Used
10	France	Electronics	7	7	SME	Not Used
11	France	Electronics	23	23	Large	Not Used
12	France	Electronics	1	1	SME	Not Used
13	France	Electronics	19	19	Large	Not Used
14	France	Electronics	28	28	Large	Not Used
15	France	Electronics	21	21	Large	Not Used
16	France	Fashion	61	30	Large	Not Used
17	France	Fashion	2	2	SME	Not Used
18	France	Fashion	17	17	SME	Not Used
19	France	Fashion	64	30	Large	Not Used
20	France	Fashion	45	30	Large	Not Used
21	France	Fashion	31	30	Large	Not Used
22	France	Fashion	31	30	Large	Not Used
23	France	Fashion	28	28	Large	Not Used
24	France	Fashion	5	5	SME	Not Used
25	France	Fashion	22	22	SME	Not Used
26	France	Fashion	20	20	Large	Not Used
27	France	Fashion	33	30	Large	Not Used
28	France	Fashion	12	12	Large	Not Used
29	France	Fashion	48	30	Large	Not Used
30	France	Fashion	19	19	SME	Not Used
31	France	Sport Equipment	16	16	SME	Not Used
32	France	Sport Equipment	2	2	SME	Not Used
33	France	Sport Equipment	3	3	SME	Not Used
34	France	Sport Equipment	11	11	SME	Not Used
35	France	Sport Equipment	2	2	SME	Not Used
36	France	Sport Equipment	6	6	Large	Not Used
37	France	Sport Equipment	11	11	SME	Not Used
38	France	Sport Equipment	21	21	SME	Not Used
39	France	Sport Equipment	8	8	SME	Not Used
40	France	Sport Equipment	9	9	SME	Not Used

41	France	Sport Equipment	12	12	SME	Not Used
42	France	Sport Equipment	16	16	SME	Not Used
43	France	Sport Equipment	20	20	Large	Not Used
44	France	Sport Equipment	13	13	SME	Not Used
45	France	Sport Equipment	11	11	SME	Not Used
46	France	Home Decor	29	29	Large	Not Used
47	France	Home Decor	28	28	Large	Not Used
48	France	Home Decor	20	20	SME	Not Used
49	France	Home Decor	20	20	Large	Not Used
50	France	Home Decor	1	1	Large	Not Used
51	France	Home Decor	24	24	SME	Not Used
52	France	Home Decor	2	2	Large	Not Used
53	France	Home Decor	16	16	Large	Not Used
54	France	Home Decor	9	9	SME	Not Used
55	France	Home Decor	5	5	SME	Not Used
56	France	Home Decor	21	21	SME	Not Used
57	France	Home Decor	14	14	SME	Not Used
58	France	Home Decor	17	17	Large	Not Used
59	France	Home Decor	38	30	SME	Not Used
60	France	Home Decor	1	1	SME	Not Used
61	France	Print Media	49	30	Large	Not Used
62	France	Print Media	9	9	SME	Not Used
63	France	Print Media	10	10	SME	Not Used
64	France	Print Media	9	9	Large	Not Used
65	France	Print Media	6	6	SME	Not Used
66	France	Print Media	13	13	SME	Not Used
67	France	Print Media	19	19	SME	Not Used
68	France	Print Media	32	30	SME	Not Used
69	France	Print Media	7	7	SME	Not Used
70	France	Print Media	20	20	Large	Not Used

71	France	Print Media	60	30	Large	Not Used
72	France	Print Media	62	30	SME	Not Used
73	France	Print Media	5	5	SME	Not Used
74	France	Print Media	18	18	SME	Not Used
75	France	Print Media	27	27	SME	Not Used
76	Germany	Electronics	11	11	Large	Not Used
77	Germany	Electronics	20	20	SME	Not Used
78	Germany	Electronics	15	15	Large	Not Used
79	Germany	Electronics			SME	Not Used
80	Germany	Electronics	11	11	Large	Not Used
81	Germany	Electronics	11	11	Large	Not Used
82	Germany	Electronics	11	11	Large	Not Used
83	Germany	Electronics	21	21	Large	Not Used
84	Germany	Electronics	17	17	SME	Not Used
85	Germany	Electronics	10	10	SME	Not Used
86	Germany	Electronics	6	6	SME	Not Used
87	Germany	Electronics	13	13	SME	Not Used
88	Germany	Electronics	12	12	Large	Not Used
89	Germany	Electronics			SME	Not Used
90	Germany	Electronics	27	27	Large	Not Used
91	Germany	Fashion	8	8	Large	Not Used
92	Germany	Fashion	5	5	Large	Not Used
93	Germany	Fashion	7	7	SME	Not Used
94	Germany	Fashion	2	2	Large	Not Used
95	Germany	Fashion			SME	Not Used
96	Germany	Fashion			SME	Not Used
97	Germany	Fashion	1	1	SME	Not Used
98	Germany	Fashion	31	30	Large	Not Used
99	Germany	Fashion	33	30	Large	Not Used
100	Germany	Fashion	11	11	Large	Not Used
101	Germany	Fashion	26	26	SME	Not Used
102	Germany	Fashion	59	30	Large	Not Used
103	Germany	Fashion	27	27	Large	Not Used
104	Germany	Fashion	22	22	Large	Not Used
105	Germany	Fashion	47	30	Large	Not Used
106	Germany	Sport Equipment	3	3	SME	Not Used
107	Germany	Sport Equipment	1	1	SME	Not Used
108	Germany	Sport Equipment	33	30	Large	Not Used
109	Germany	Sport Equipment	8	8	SME	Not Used
110	Germany	Sport Equipment			SME	Not Used
111	Germany	Sport Equipment	7	7	Large	Not Used
112	Germany	Sport Equipment	8	8	Large	Not Used
113	Germany	Sport Equipment			SME	Not Used
114	Germany	Sport Equipment	15	15	SME	Not Used
115	Germany	Sport Equipment			SME	Not Used

116	Germany	Sport Equipment			SME	Not Used
117	Germany	Sport Equipment	5	5	SME	Not Used
118	Germany	Sport Equipment	34	30	Large	Not Used
119	Germany	Sport Equipment			SME	Not Used
120	Germany	Sport Equipment	16	16	SME	Not Used
121	Germany	Home Decor	1	1	Large	Not Used
122	Germany	Home Decor	10	10	Large	Not Used
123	Germany	Home Decor	70	30	Large	Not Used
124	Germany	Home Decor	15	15	SME	Not Used
125	Germany	Home Decor			SME	Not Used
126	Germany	Home Decor	67	30	Large	Not Used
127	Germany	Home Decor	5	5	SME	Not Used
128	Germany	Home Decor	9	9	SME	Not Used
129	Germany	Home Decor	23	23	Large	Not Used
130	Germany	Home Decor	17	17	SME	Not Used
131	Germany	Home Decor	7	7	SME	Not Used
132	Germany	Home Decor	11	11	Large	Not Used
133	Germany	Home Decor	29	29	Large	Not Used
134	Germany	Home Decor	7	7	SME	Not Used
135	Germany	Home Decor	5	5	SME	Not Used
136	Germany	Print Media	5	5	Large	Not Used
137	Germany	Print Media	5	5	Large	Not Used
138	Germany	Print Media	20	20	SME	Not Used
139	Germany	Print Media	4	4	Large	Not Used
140	Germany	Print Media	26	26	SME	Not Used
141	Germany	Print Media	18	18	Large	Not Used
142	Germany	Print Media	41	30	Large	Not Used
143	Germany	Print Media	8	8	SME	Not Used
144	Germany	Print Media	17	17	SME	Not Used
145	Germany	Print Media			SME	Not Used

146	Germany	Print Media			SME	Not Used
147	Germany	Print Media			SME	Not Used
148	Germany	Print Media	24	24	SME	Not Used
149	Germany	Print Media	12	12	SME	Not Used
150	Germany	Print Media	84	30	SME	Not Used
151	Netherlands	Electronics	10	10	Large	Thuiswinkel Organisatie
152	Netherlands	Electronics	13	13	Large	INCOTERMS DAP
153	Netherlands	Electronics	19	19	SME	Thuiswinkel Organisatie
154	Netherlands	Electronics	28	28	Large	Thuiswinkel Organisatie
155	Netherlands	Electronics	17	17	Large	Thuiswinkel Organisatie
156	Netherlands	Electronics	11	11	SME	Stichting Webshop Keurmerk
157	Netherlands	Electronics	12	12	Large	Thuiswinkel Organisatie
158	Netherlands	Electronics	8	8	SME	Thuiswinkel Organisatie
159	Netherlands	Electronics	5	5	SME	Thuiswinkel Organisatie
160	Netherlands	Electronics	6	6	SME	Thuiswinkel Organisatie
161	Netherlands	Electronics	3	3	SME	Stichting Webshop Keurmerk
162	Netherlands	Electronics	20	20	SME	Not Used
163	Netherlands	Electronics	35	30	SME	Thuiswinkel Organisatie
164	Netherlands	Electronics	40	30	Large	Thuiswinkel Organisatie
165	Netherlands	Electronics	20	20	SME	Not Used
166	Netherlands	Fashion	3	3	SME	Not Used
167	Netherlands	Fashion	32	30	SME	Not Used
168	Netherlands	Fashion	10	10	SME	Stichting Webshop Keurmerk
169	Netherlands	Fashion	5	5	SME	Stichting Webshop Keurmerk
170	Netherlands	Fashion	17	17	SME	Not Used
171	Netherlands	Fashion	8	8	SME	Not Used
172	Netherlands	Fashion	3	3	SME	Thuiswinkel Organisatie
173	Netherlands	Fashion	67	30	SME	Not Used
174	Netherlands	Fashion	14	14	SME	Thuiswinkel Organisatie
175	Netherlands	Fashion			SME	Not Used
176	Netherlands	Fashion	13	13	SME	Not Used
177	Netherlands	Fashion	12	12	SME	Stichting Webshop Keurmerk
178	Netherlands	Fashion	43	30	Large	Thuiswinkel Organisatie
179	Netherlands	Fashion	23	23	SME	Stichting Webshop Keurmerk
180	Netherlands	Fashion			SME	Thuiswinkel Organisatie

181	Netherlands	Sport Equipment	19	19	SME	Not Used
182	Netherlands	Sport Equipment	3	3	SME	Not Used
183	Netherlands	Sport Equipment	10	10	Large	Thuiswinkel Organisatie
184	Netherlands	Sport Equipment	1	1	SME	Thuiswinkel Organisatie
185	Netherlands	Sport Equipment	28	28	SME	Not Used
186	Netherlands	Sport Equipment	11	11	SME	Stichting Webshop Keurmerk
187	Netherlands	Sport Equipment	3	3	SME	Stichting Webshop Keurmerk
188	Netherlands	Sport Equipment	9	9	SME	Not Used
189	Netherlands	Sport Equipment	32	30	SME	Not Used
190	Netherlands	Sport Equipment	1	1	SME	Stichting Webshop Keurmerk
191	Netherlands	Sport Equipment	25	25	SME	Stichting Webshop Keurmerk
192	Netherlands	Sport Equipment	8	8	SME	Stichting Webshop Keurmerk
193	Netherlands	Sport Equipment	39	30	SME	Stichting Webshop Keurmerk
194	Netherlands	Sport Equipment	19	19	SME	Stichting Webshop Keurmerk
195	Netherlands	Sport Equipment	7	7	SME	Not Used
196	Netherlands	Home Decor	1	1	Large	Thuiswinkel Organisatie
197	Netherlands	Home Decor	14	14	SME	Stichting Webshop Keurmerk
198	Netherlands	Home Decor	41	30	SME	Thuiswinkel Organisatie
199	Netherlands	Home Decor	8	8	SME	Thuiswinkel Organisatie
200	Netherlands	Home Decor	15	15	Large	Not Used
201	Netherlands	Home Decor	13	13	Large	Not Used
202	Netherlands	Home Decor	45	30	Large	Thuiswinkel Organisatie
203	Netherlands	Home Decor	29	29	Large	Centrale Branchevereniging Wonen
204	Netherlands	Home Decor	6	6	SME	Stichting Webshop Keurmerk
205	Netherlands	Home Decor	7	7	SME	Stichting Webshop Keurmerk
206	Netherlands	Home Decor			SME	Thuiswinkel Organisatie
207	Netherlands	Home Decor	19	19	SME	Thuiswinkel Organisatie
208	Netherlands	Home Decor	14	14	SME	Stichting Webshop Keurmerk
209	Netherlands	Home Decor	27	27	SME	Centrale Branchevereniging Wonen

210	Netherlands	Home Decor	13	13	SME	Centrale Branchevereniging Wonen
211	Netherlands	Print Media	45	30	Large	Thuiswinkel Organisatie
212	Netherlands	Print Media	5	5	SME	Stichting Webshop Keurmerk
213	Netherlands	Print Media	9	9	SME	Thuiswinkel Organisatie
214	Netherlands	Print Media	5	5	SME	Thuiswinkel Organisatie
215	Netherlands	Print Media	24	24	SME	Thuiswinkel Organisatie
216	Netherlands	Print Media	38	30	SME	Not Used
217	Netherlands	Print Media	2	2	SME	Thuiswinkel Organisatie
218	Netherlands	Print Media	54	30	Large	Thuiswinkel Organisatie
219	Netherlands	Print Media	93	30	SME	Thuiswinkel Organisatie
220	Netherlands	Print Media	97	30	Large	Thuiswinkel Organisatie
221	Netherlands	Print Media	4	4	SME	Not Used
222	Netherlands	Print Media	5	5	SME	Thuiswinkel Organisatie
223	Netherlands	Print Media	43	30	SME	Thuiswinkel Organisatie
224	Netherlands	Print Media	16	16	SME	Stichting Webshop Keurmerk
225	Netherlands	Print Media	10	10	SME	Stichting Webshop Keurmerk
226	UK	Electronics	10	10	Large	Not Used
227	UK	Electronics	67	30	Large	Not Used
228	UK	Electronics	47	30	Large	Not Used
229	UK	Electronics	25	25	SME	Not Used
230	UK	Electronics	91	30	Large	Not Used
231	UK	Electronics	16	16	Large	Not Used
232	UK	Electronics	19	19	Large	Not Used
233	UK	Electronics	7	7	Large	Not Used
234	UK	Electronics	2	2	SME	Not Used
235	UK	Electronics	32	30	Large	Not Used
236	UK	Electronics	16	16	Large	Not Used
237	UK	Electronics	11	11	SME	Not Used
238	UK	Electronics	1	1	SME	Not Used
239	UK	Electronics			SME	Not Used
240	UK	Electronics	4	4	SME	Not Used
241	UK	Fashion	30	30	SME	Not Used
242	UK	Fashion	11	11	Large	Not Used
243	UK	Fashion	13	13	Large	Not Used
244	UK	Fashion	7	7	SME	Not Used
245	UK	Fashion	17	17	Large	Not Used
246	UK	Fashion	11	11	SME	Not Used
247	UK	Fashion	7	7	SME	Not Used
248	UK	Fashion	3	3	SME	Not Used
249	UK	Fashion	16	16	Large	Not Used
250	UK	Fashion	1	1	SME	Not Used
251	UK	Fashion	38	30	Large	Not Used
252	UK	Fashion	18	18	SME	Not Used

253	UK	Fashion	25	25	Large	Not Used
254	UK	Fashion	27	27	Large	Not Used
255	UK	Fashion	23	23	Large	Not Used
256	UK	Sport Equipment	9	9	SME	Not Used
257	UK	Sport Equipment	18	18	Large	Not Used
258	UK	Sport Equipment	22	22	Large	Not Used
259	UK	Sport Equipment	18	18	SME	Not Used
260	UK	Sport Equipment			SME	Not Used
261	UK	Sport Equipment	16	16	SME	Not Used
262	UK	Sport Equipment	12	12	SME	Not Used
263	UK	Sport Equipment	27	27	SME	Not Used
264	UK	Sport Equipment	24	24	Large	Not Used
265	UK	Sport Equipment	31	30	Large	Not Used
266	UK	Sport Equipment	13	13	SME	Not Used
267	UK	Sport Equipment	27	27	SME	Not Used
268	UK	Sport Equipment	7	7	SME	Not Used
269	UK	Sport Equipment	16	16	SME	Not Used
270	UK	Sport Equipment	6	6	SME	Not Used
271	UK	Home Decor	11	11	Large	Not Used
272	UK	Home Decor	9	9	SME	Not Used
273	UK	Home Decor	2	2	SME	Not Used
274	UK	Home Decor	13	13	SME	Not Used
275	UK	Home Decor	18	18	Large	Not Used
276	UK	Home Decor	33	30	Large	Not Used
277	UK	Home Decor	51	30	Large	Not Used
278	UK	Home Decor	5	5	SME	Not Used
279	UK	Home Decor	14	14	SME	Not Used
280	UK	Home Decor	8	8	SME	Not Used
281	UK	Home Decor	109	30	SME	Not Used
282	UK	Home Decor	37	30	Large	Not Used
283	UK	Home Decor	13	13	SME	Not Used

284	UK	Home Decor	14	14	SME	Not Used
285	UK	Home Decor	16	16	SME	Not Used
286	UK	Print Media	31	30	Large	Not Used
287	UK	Print Media	15	15	SME	Not Used
288	UK	Print Media	7	7	Large	Not Used
289	UK	Print Media	61	30	Large	Not Used
290	UK	Print Media	15	15	Large	Not Used
291	UK	Print Media	4	4	Large	Not Used
292	UK	Print Media	9	9	SME	Not Used
293	UK	Print Media	11	11	Large	Not Used
294	UK	Print Media	27	27	Large	Not Used
295	UK	Print Media	11	11	Large	Not Used
296	UK	Print Media	48	30	SME	Not Used
297	UK	Print Media	20	20	SME	Not Used
298	UK	Print Media	14	14	SME	Not Used
299	UK	Print Media	12	12	SME	Not Used
300	UK	Print Media	70	30	Large	Not Used

Appendix 2 Dependent Variables

Appendix 2.1 Dependent Variables X1-Y4

Trader Number	X1	X2	X3	X4	X5	X6	X7	X8	X9	X10	X11	Y1	Y2	Y3	Y4
1	2	2	2	3	2	2	3	3	2	2	1.3	3	3	3	3
2	2	2	2	3	2	2	3	3	2	2	3	3	3	3	3
3	2	2	3	3	2	2	2	3	2	2	1.3	3	3	3	3
4	2	2	2	3	3	2	3	3	2	2	3	3	3	3	3
5	2	2	2	2	3	3	3	3	2	2	3	3	3	3	3
6	2	2	2	3	2	3	2	2	2	2	1.3	3	3	3	3
7	2	2	2	3	3	2	2	3	2	2	1.3	3	3	3	3
8	2	2	2	3	3	2	2	3	2	2	3	3	3	3	3
9	2	2	2	2	3	2	2	3	2	2	3	3	3	3	3
10	3	2	2	3	3	2	3	3	2	2	1.3	3	3	3	3
11	2	2	2	2	3	2	2	3	2	2	3	3	3	3	3
12	2	2	2	3	3	2	3	3	2	2	1.3	3	3	3	3
13	2	2	2	3	3	2	3	3	2	2	3	3	3	3	3
14	2	2	2	2	2	2	3	3	2	2	3	3	1.4	3	3
15	2	2	2	3	2	2	3	3	2	2	3	3	3	3	3
16	2	2	2	3	2	2	3	3	2	2	3	3	3	3	3
17	2	2	2	3	3	2	3	2	2	2	1.3	3	1.4	3	3
18	2	2	2	3	2	2	2	3	2	2	3	3	3	3	3
19	2	2	2	2	3	2	2	3	2	2	3	3	1.4	3	3
20	2	2	2	2	3	2	3	3	2	2	3	3	3	3	3
21	2	2	2	2	3	3	3	3	2	2	1.3	3	3	3	3
22	2	2	2	2	3	2	3	3	2	2	3	3	3	3	3
23	2	2	2	3	3	3	3	3	2	2	3	3	1.4	3	3
24	2	2	2	3	3	2	3	3	2	2	3	3	3	3	3
25	2	2	2	2	3	2	3	3	2	2	3	3	3	3	3
26	2	2	2	3	3	2	3	3	2	2	3	3	3	3	3
27	2	2	2	3	2	2	3	3	2	2	1.3	3	3	3	3
28	2	2	2	2	3	3	2	3	2	2	3	3	1.4	3	3
29	2	2	2	3	3	2	2	3	2	2	3	3	3	3	3
30	2	2	2	2	2	2	2	2	2	2	1.3	3	3	3	3
31	2	2	2	3	3	2	2	3	2	2	3	3	3	3	3
32	2	2	2	3	3	2	2	3	2	2	2	3	3	3	3
33	2	2	2	3	2	2	3	3	2	2	2	3	3	3	3
34	2	2	2	2	3	2	3	2	2	2	2	3	3	3	3
35	2	2	2	3	3	2	2	2	2	2	2	3	3	3	3
36	2	2	2	2	2	2	2	3	2	2	3	3	3	3	3
37	3	2	2	2	2	2	2	2	2	2	3	3	3	3	3
38	2	2	2	3	2	2	3	3	2	2	2	3	3	3	3
39	2	2	2	3	3	2	2	2	2	2	3	3	3	3	1
40	2	2	2	2	3	2	3	2	2	2	1.3	3	3	3	3
41	2	2	2	2	2	2	3	2	2	2	3	3	1.4	3	3
42	2	2	2	3	3	2	2	3	2	2	1.3	3	1.4	3	3
43	2	2	2	3	3	2	3	3	2	2	3	3	3	3	3
44	2	2	2	2	3	2	2	2	2	2	2	3	1.4	3	3
45	2	2	2	3	3	2	3	3	2	2	2	3	3	3	3
46	2	2	2	2	2	2	2	3	2	2	2	3	1.4	3	3
47	2	2	2	2	3	2	3	3	2	2	1.3	3	3	3	3
48	2	2	2	3	3	2	3	3	2	2	1.3	3	3	3	3
49	2	2	2	3	3	2	3	3	2	2	1.3	3	3	3	3
50	2	2	2	2	2	2	2	2	2	2	3	3	3	3	3
51	2	2	2	3	3	2	2	3	2	2	3	3	3	3	3
52	2	2	2	2	2	2	3	3	2	2	3	3	3	3	3
53	2	2	2	2	3	2	2	3	2	2	3	3	3	3	3

54	2	2	2	2	2	2	3	3	2	2	3	3	1.4	3	3
55	2	2	2	2	2	2	2	3	2	2	2	3	3	3	3
56	2	2	2	2	2	2	3	3	2	2	2	3	3	3	3
57	2	2	2	2	3	3	3	3	2	2	3	3	3	3	3
58	2	2	2	2	3	2	2	3	2	2	3	3	1.4	3	3
59	2	2	2	2	3	2	3	3	2	2	3	3	1.4	3	3
60	2	2	2	2	3	2	3	3	2	2	3	3	3	3	3
61	2	2	2	3	2	2	2	3	2	2	3	3	1.4	3	3
62	2	2	2	3	2	2	2	2	2	2	1.3	3	1.4	3	3
63	2	2	2	3	3	2	3	3	2	2	1.3	3	1.4	3	3
64	2	2	2	3	2	2	3	3	2	2	1.3	3	3	3	3
65	2	2	2	3	2	2	2	3	2	2	3	3	3	3	3
66	2	2	2	2	3	2	3	3	2	2	1.3	3	3	3	3
67	2	2	2	2	2	2	3	3	2	2	1.3	3	3	3	3
68	2	2	2	2	2	2	3	2	2	2	3	3	3	3	3
69	2	2	2	3	3	2	3	3	2	2	1.3	3	3	3	3
70	2	2	2	2	2	2	2	2	2	2	3	3	3	3	3
71	2	2	2	3	3	2	3	3	2	2	2	3	3	3	3
72	2	2	2	3	3	2	3	3	2	2	1.3	3	3	3	3
73	2	2	2	3	3	2	2	2	2	2	1.3	3	1.4	3	3
74	2	2	2	2	2	2	3	2	2	2	1.3	3	1.4	3	3
75	2	2	2	2	3	2	3	3	2	2	1.3	3	3	3	3
76	3	3	2	3	2	2	3	2	2	2	3	3	3	3	3
77	3	3	2	3	2	2	2	2	2	2	3	3	3	3	3
78	3	2	2	3	2	2	3	2	2	2	3	3	3	3	3
79	3	2	2	2	2	2	2	2	2	2	3	1.4	3	3	3
80	3	2	2	3	2	2	3	2	2	2	3	3	3	3	3
81	3	2	2	3	2	2	3	2	2	2	3	3	3	3	3
82	3	2	2	3	2	2	3	2	2	2	3	3	3	3	3
83	3	2	2	3	2	2	3	2	2	2	3	1.4	1.4	3	3
84	3	2	2	3	2	2	3	2	2	2	1.3	3	3	3	3
85	2	2	2	3	2	2	3	2	2	2	2	3	3	3	3
86	3	2	2	3	2	2	3	2	2	2	3	3	3	3	3
87	3	2	2	3	2	2	2	2	2	2	3	3	3	3	3
88	3	2	2	3	2	2	3	2	2	2	3	3	3	3	3
89	2	3	2	3	2	2	3	2	2	2	3	3	3	3	3
90	3	2	2	3	2	2	3	2	2	2	3	3	3	3	3
91	2	2	2	3	2	2	3	2	2	2	2	3	3	3	3
92	2	2	2	3	2	2	3	2	2	2	2	3	3	3	3
93	3	2	2	3	2	2	3	2	2	2	3	3	3	3	3
94	2	3	2	3	2	2	3	2	2	2	3	3	3	3	3
95	2	2	2	2	2	2	2	3	2	2	2	3	1	3	3
96	2	2	2	3	2	2	2	2	2	2	2	3	3	3	3
97	2	2	2	3	2	2	3	2	2	2	2	3	3	3	3
98	2	2	2	3	2	2	3	2	2	2	2	3	3	3	3
99	3	3	2	3	2	2	3	2	2	2	3	3	3	3	3
100	2	2	2	3	2	2	3	2	2	2	3	3	3	3	3
101	2	2	2	3	2	2	3	2	2	2	2	3	3	3	3
102	2	2	2	3	2	2	2	2	2	2	2	3	3	3	3
103	3	2	2	2	2	2	2	2	2	2	2	3	3	3	3
104	2	2	2	3	2	2	3	2	2	2	2	3	3	3	3
105	3	2	2	2	2	2	2	2	2	2	2	3	3	3	3
106	3	2	2	3	2	2	3	2	2	2	3	3	3	3	3
107	3	2	2	2	2	2	2	2	2	2	3	3	3	3	3
108	2	2	2	3	2	2	3	2	2	2	2	3	3	3	3
109	3	2	2	3	2	2	3	2	2	2	3	3	3	3	3
110	2	2	2	3	2	2	2	2	2	2	2	1.4	3	3	3
111	2	2	2	3	2	2	3	2	2	2	3	3	3	3	3
112	2	2	2	3	2	2	3	2	2	2	3	3	3	3	3

113	3	2	2	3	2	2	3	2	2	2	3	3	3	3	3
114	3	2	2	3	2	2	2	2	2	2	3	3	3	3	3
115	3	2	2	3	2	2	3	2	2	2	3	1.4	3	3	3
116	3	2	2	3	2	2	3	2	2	2	3	3	3	3	3
117	3	2	2	3	2	2	2	2	2	2	3	1	3	3	3
118	3	2	2	3	2	2	3	3	2	2	3	3	1.4	3	3
119	2	2	2	1.3	2	2	2	2	2	2	2	1.4	1.4	3	3
120	3	3	2	3	2	2	3	2	2	2	3	3	3	3	3
121	3	2	2	3	2	2	3	2	2	2	3	3	3	3	3
122	3	2	2	3	3	2	3	3	2	2	3	1	3	3	3
123	2	2	2	3	2	2	3	2	2	2	2	3	3	3	3
124	3	2	2	1.3	2	2	3	2	2	2	3	3	3	3	3
125	2	2	2	3	2	2	2	2	2	2	1.3	3	3	3	3
126	3	3	2	3	2	2	3	2	2	2	3	3	3	3	3
127	2	2	2	3	2	2	3	2	2	2	3	3	3	3	3
128	3	3	2	3	2	2	3	2	2	2	3	3	3	3	3
129	2	2	2	3	2	2	3	2	2	2	2	3	3	3	3
130	3	2	2	3	2	2	3	2	2	2	3	3	3	3	3
131	2	2	2	3	2	2	3	2	2	2	3	3	3	3	3
132	2	2	2	3	2	2	3	2	2	2	3	3	3	3	3
133	3	3	2	3	2	2	3	2	2	2	1.3	3	3	3	3
134	3	2	2	3	2	2	3	2	2	2	3	3	3	3	3
135	2	2	2	3	2	2	2	2	2	2	3	3	3	3	3
136	3	3	2	3	2	2	3	2	2	2	3	3	3	3	3
137	2	2	2	3	3	2	2	2	2	2	3	3	3	3	3
138	3	2	2	3	2	2	3	2	2	2	2	3	3	3	3
139	3	2	2	3	2	2	2	2	2	2	2	3	3	3	3
140	3	2	2	3	2	2	3	2	2	2	3	3	3	3	3
141	3	2	2	3	2	2	3	2	2	2	1.3	3	3	3	3
142	2	2	2	3	2	2	3	2	2	2	3	3	3	3	3
143	3	3	2	3	2	2	3	2	2	2	3	3	3	3	3
144	2	2	2	3	2	2	3	2	2	2	2	3	3	3	3
145	3	3	2	3	2	2	2	2	2	2	3	1.4	1.4	3	3
146	2	2	2	3	2	2	2	2	2	2	2	3	3	3	3
147	2	2	2	3	2	2	2	2	2	2	3	3	3	3	3
148	2	2	2	3	2	2	2	2	2	2	2	3	3	3	3
149	2	2	2	3	2	2	3	2	2	2	3	3	3	3	3
150	2	2	2	2	2	2	3	2	2	2	2	3	3	3	3
151	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
152	3	1.2	2	3	2	2	2	3	2	2	1.3	3	3	3	3
153	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
154	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
155	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
156	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
157	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
158	2	2	2	3	2	2	3	2	2	2	1.3	3	3	3	3
159	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
160	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
161	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
162	1.2	2	2	1.2	2	2	3	2	2	3	3	3	3	3	3
163	2	2	2	3	2	2	3	2	2	2	1.3	3	3	3	3
164	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
165	2	2	2	3	2	2	3	2	2	2	3	3	3	3	3
166	2	2	2	2	3	2	2	2	2	2	3	3	3	3	3
167	2	2	2	2	2	2	3	2	2	2	2	3	3	3	3
168	2	2	2	3	2	2	3	2	2	2	1.3	3	3	3	3
169	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
170	2	2	2	3	2	2	3	2	2	2	2	3	3	3	3
171	3	2	2	2	2	2	3	2	2	2	1.3	3	1	3	3

172	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
173	2	2	2	3	2	2	2	2	2	2	2	3	1.4	3	3
174	2	2	2	3	2	2	3	2	2	2	1.3	3	3	3	3
175	3	2	2	2	2	2	3	2	2	2	1.3	3	1	3	1
176	2	2	2	2	3	3	3	2	2	2	1.3	3	3	3	3
177	2	2	2	3	3	3	3	2	2	2	3	3	3	3	3
178	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
179	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
180	2	2	2	2	3	3	3	2	2	2	2	3	3	3	3
181	1.2	2	2	2	2	2	3	2	2	2	1.3	3	3	3	3
182	3	2	2	3	2	2	3	2	2	2	3	3	3	3	3
183	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
184	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
185	3	2	2	3	2	2	2	2	2	2	1.3	3	3	3	3
186	2	2	2	3	2	2	3	2	2	2	1.3	3	3	3	3
187	2	2	2	3	2	2	3	2	2	2	2	3	3	3	3
188	2	2	2	2	2	2	2	2	2	2	2	1.4	1.4	3	3
189	2	2	2	3	2	2	2	2	2	2	1.3	3	3	3	3
190	2	2	2	3	2	2	3	2	2	2	1.3	3	3	3	3
191	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
192	2	2	2	3	2	2	3	2	2	2	2	3	3	3	3
193	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
194	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
195	2	2	2	2	2	2	2	2	2	2	2	3	3	3	3
196	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
197	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
198	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
199	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
200	2	2	2	2	2	2	2	2	2	2	2	3	3	3	3
201	2	2	2	2	2	2	3	2	2	2	2	3	3	3	3
202	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
203	2	2	2	2	2	2	2	2	2	2	2	3	3	3	3
204	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
205	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
206	2	2	2	3	3	2	3	2	2	2	1.3	1.4	3	3	3
207	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
208	2	2	2	3	2	2	3	2	2	2	1.3	3	3	3	3
209	3	2	2	3	2	2	3	2	2	2	3	3	1.4	3	3
210	3	2	2	3	2	2	3	2	2	2	3	3	3	3	3
211	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
212	2	2	2	2	2	2	3	2	2	2	1.3	3	3	3	3
213	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
214	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
215	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
216	2	2	2	3	3	2	3	2	2	2	3	3	3	3	3
217	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
218	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
219	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
220	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
221	2	2	2	2	2	2	2	2	2	2	2	3	3	3	3
222	2	2	2	3	2	2	3	2	2	2	1.3	3	3	3	3
223	2	2	2	3	3	2	3	2	2	2	1.3	3	3	3	3
224	2	2	2	3	2	2	3	2	2	2	2	3	3	3	3
225	2	2	2	3	2	2	3	2	2	2	2	3	3	3	3
226	2	2	2	2	2	3	3	3	2	2	3	3	3	3	3
227	2	2	2	2	2	2	2	2	2	2	2	1	1	3	3
228	3	2	2	2	3	3	3	2	2	2	1.3	3	1	3	3
229	2	2	2	2	2	2	3	2	2	2	1.3	1.4	1.4	3	3
230	3	2	2	3	3	3	3	3	2	2	1.3	3	3	3	3

231	3	2	2	2	3	2	2	2	2	1.3	3	1	1.4	3	3
232	3	3	2	2	3	3	3	3	2	2	3	3	1	3	3
233	3	2	2	2	3	3	2	2	2	2	1.3	3	3	3	3
234	3	2	2	2	3	3	3	2	2	1.3	1.3	3	1	3	3
235	3	2	2	2	3	3	3	3	2	1.3	1.3	3	1.4	3	3
236	3	2	2	2	2	2	2	2	2	2	1.3	3	1	3	3
237	2	2	2	2	1.1	1.1	3	3	2	2	1.3	1.4	1.4	3	3
238	1.3	2	2	2	3	2	2	2	2	2	3	3	3	3	3
239	2	2	2	2	3	2	2	2	2	2	1.3	1.4	1.4	3	3
240	3	2	2	2	1.1	1.1	2	2	2	1.3	1.3	3	1.4	3	3
241	3	2	2	2	3	2	3	3	2	2	3	1.4	1.4	3	3
242	2	2	2	2	2	3	3	3	2	2	3	3	3	3	3
243	3	2	3	3	3	3	3	3	2	1.3	3	3	3	3	3
244	3	2	2	2	1.1	3	3	2	2	2	1.3	3	1.4	3	3
245	3	2	2	2	2	3	3	3	2	3	1.3	1	1.4	3	3
246	3	2	3	3	2	2	3	3	2	1.3	1.3	3	1	3	3
247	3	2	2	2	3	2	3	2	2	2	1.3	3	1.4	3	3
248	3	2	2	2	2	3	3	3	2	1.3	3	3	3	3	3
249	3	2	2	2	3	2	3	3	2	1.3	3	3	1	3	3
250	3	2	2	2	2	3	3	3	2	2	3	1.4	1.4	3	3
251	2	2	2	2	3	2	3	3	2	2	1.3	3	1	3	3
252	3	2	2	2	2	2	3	2	2	2	1.3	3	3	3	3
253	2	2	2	3	3	2	3	3	2	1.3	1.3	3	3	3	3
254	1.3	2	2	2	2	2	2	3	2	2	3	3	1	3	3
255	3	2	2	2	3	2	3	2	2	1.3	1.3	3	1	3	3
256	3	2	2	1.1	3	2	3	3	2	2	1.3	1	3	3	3
257	2	2	2	2	3	3	2	3	2	2	1.3	3	3	3	3
258	2	2	2	3	3	2	2	2	2	2	1.3	1	1.4	3	3
259	3	2	2	2	3	3	3	2	2	1.3	1.3	3	1	3	3
260	2	2	2	2	3	2	3	2	2	2	2	1.4	1.4	3	3
261	2	2	2	2	2	2	3	3	2	2	2	3	1.4	3	3
262	2	2	2	3	3	2	2	2	2	2	2	3	1.4	3	3
263	3	2	2	2	2	2	3	2	2	2	1.3	1	3	3	3
264	3	2	2	3	3	2	3	3	2	3	1.3	3	3	3	3
265	3	2	2	3	3	2	3	3	2	1.3	1.3	3	3	3	3
266	3	2	2	2	1.1	1.1	1.1	2	2	3	1.3	3	3	3	3
267	2	2	2	2	2	2	3	3	2	2	2	3	3	3	3
268	3	2	2	2	3	3	3	3	2	1.3	1.3	1.4	1.4	3	3
269	2	2	2	2	2	2	3	3	2	2	2	3	1.4	3	3
270	2	2	2	2	2	2	2	2	2	2	2	1	1	3	3
271	3	2	2	2	3	3	3	3	2	2	1.3	1	3	3	3
272	2	2	2	2	3	2	3	3	2	2	1.3	1	1	3	3
273	3	2	2	2	3	2	3	3	2	1.3	1.3	1	1.4	3	3
274	3	2	2	1.1	3	2	2	3	2	1.3	1.3	3	1	3	3
275	3	2	2	1.1	2	3	3	2	2	1.3	1.3	1	3	3	3
276	3	2	2	2	3	2	3	3	2	2	1.3	3	1	3	3
277	3	2	2	2	3	2	2	3	2	2	1.3	1	1.4	3	3
278	3	2	2	2	3	3	3	3	2	1.3	1.3	3	1	3	3
279	3	2	2	2	3	2	3	2	2	2	1.3	3	1	3	3
280	2	2	2	2	3	3	3	3	2	2	2	1	1	3	3
281	3	2	2	2	3	3	3	3	2	2	1.3	3	1.4	3	3
282	2	2	2	3	3	3	3	2	2	2	1.3	3	1.4	3	3
283	2	2	2	2	3	3	3	3	2	2	1.3	3	3	3	3
284	2	2	2	2	3	3	3	3	2	2	3	3	1	3	3
285	3	2	2	3	2	2	3	3	2	1.3	1.3	3	1.4	3	3
286	3	2	2	2	3	3	3	3	2	2	1.3	3	1	3	3
287	2	2	2	2	3	2	2	2	2	1.3	1.3	1.4	1.4	3	3
288	3	2	2	2	3	3	3	3	2	1.3	1.3	3	1	3	3
289	3	2	2	3	2	2	3	2	2	2	1.3	3	1.4	3	3

290	3	2	2	2	3	2	2	2	2	2	1.3	1	3	3	3
291	3	2	2	2	3	3	3	2	2	2	3	3	3	3	3
292	2	2	2	3	3	3	3	3	2	1.3	1.3	3	3	3	3
293	2	2	2	2	3	3	3	2	2	2	1.3	3	3	3	3
294	2	2	2	2	2	3	3	2	2	2	1.3	3	3	3	3
295	3	2	2	2	2	3	3	3	2	2	1.3	3	3	3	3
296	2	2	2	2	2	2	2	2	2	2	2	3	1	3	3
297	3	2	2	2	2	2	2	2	2	2	1.3	1.4	1.4	3	3
298	2	2	2	2	2	3	3	2	2	2	1.3	3	1.4	3	3
299	2	2	2	2	2	3	3	2	2	1.3	1.3	1.4	1.4	3	3
300	3	2	2	2	3	3	3	2	2	2	1.3	3	1	3	3

Appendix 2.2 Dependent Variables Z1a-Z1i

Trader Number	Z1a	Z1b	Z1c	Z1d	Z1e	Z1f	Z1g(i)	Z1g(ii)	Z1h	Z1i
1	3	3	3	3	3	3	3	3	3	3
2	3	3	3	3	3	3	3	3	3	3
3	3	3	3	3	3	3	3	3	3	3
4	3	3	3	3	3	3	3	3	3	3
5	3	3	3	3	3	3	3	3	3	3
6	3	3	3	3	1.4	1.4	3	1.4	1.4	3
7	3	3	3	3	3	3	3	1.4	3	3
8	3	3	3	3	3	3	3	3	3	3
9	3	3	3	3	3	3	3	3	3	3
10	3	3	3	3	3	3	3	1.4	3	3
11	3	3	3	3	3	3	3	3	3	3
12	3	3	3	3	3	3	3	1.4	3	3
13	3	3	3	3	3	3	3	3	3	3
14	3	3	3	3	3	3	3	3	3	3
15	3	3	3	3	3	3	3	1.4	3	3
16	3	3	3	3	3	3	3	3	3	3
17	3	3	3	3	1.4	1.4	3	1.4	1.4	3
18	3	3	3	3	3	3	3	3	3	3
19	3	3	3	3	1.4	3	3	3	3	3
20	3	3	3	3	3	3	3	1.4	3	3
21	3	3	3	3	3	3	3	3	3	3
22	3	3	3	3	3	3	3	3	3	3
23	3	3	3	3	3	3	3	3	3	3
24	3	3	3	3	3	3	3	3	3	3
25	3	3	3	3	3	1.4	3	3	3	3
26	3	3	3	3	3	3	3	3	3	3
27	3	3	3	3	3	3	3	1.4	3	3
28	3	3	3	3	3	3	3	1.4	3	3
29	3	3	3	3	3	1.4	3	3	3	3
30	3	3	3	3	3	3	3	3	1.4	3
31	3	3	3	3	3	3	3	1.4	3	3
32	3	3	3	3	3	3	3	3	3	3
33	3	3	3	3	3	3	3	1.4	3	3
34	3	3	3	3	3	3	3	3	1.4	3
35	3	3	3	3	3	3	3	3	1.4	3
36	3	3	3	3	3	3	3	3	3	3
37	3	3	3	3	3	3	3	3	1.4	3
38	3	3	3	3	3	3	3	1.4	3	3
39	3	3	3	3	3	3	3	3	1.4	3
40	3	3	3	3	3	1.4	3	1.4	1.4	3
41	3	3	3	3	3	3	3	1.4	1.4	3
42	3	3	3	3	3	3	3	1.4	3	3
43	3	3	3	3	3	3	3	3	3	3

44	3	3	3	3	3	3	3	1.4	1.4	3
45	3	3	3	3	3	3	3	1.4	3	3
46	3	3	3	3	3	3	3	3	3	3
47	3	3	3	3	3	1.4	3	1.4	3	3
48	3	3	3	3	3	1.4	3	1.4	3	3
49	3	3	3	3	3	1.4	3	3	3	3
50	3	3	3	3	3	3	3	3	1.4	3
51	3	3	3	3	3	3	3	1.4	3	3
52	3	3	3	3	3	3	3	3	3	3
53	3	3	3	3	3	3	3	3	3	3
54	3	3	3	3	3	3	3	3	3	3
55	3	3	3	3	3	3	3	3	3	3
56	3	3	3	3	3	1.4	3	3	3	3
57	3	3	3	3	3	3	3	3	3	3
58	3	3	3	3	3	3	3	3	3	3
59	3	3	3	3	3	1.4	3	3	3	3
60	3	3	3	3	3	3	3	3	3	3
61	3	3	3	3	3	1.4	3	3	3	3
62	3	3	3	3	3	3	3	1.4	1.4	3
63	3	3	3	3	3	3	3	3	3	3
64	3	3	3	3	3	3	3	1.4	3	3
65	3	3	3	3	3	1.4	3	3	3	3
66	3	3	3	3	3	1.4	3	3	3	3
67	3	3	3	3	3	3	3	3	3	3
68	3	3	3	3	3	3	3	1.4	1.4	3
69	3	3	3	3	3	1.4	3	1.4	3	3
70	3	3	3	3	3	1.4	3	3	1.4	3
71	3	3	3	3	3	3	3	3	3	3
72	3	3	3	3	3	1.4	3	3	3	3
73	3	3	3	3	3	1.4	3	1.4	1.4	3
74	3	3	3	3	3	1.4	3	1.4	1.4	3
75	3	3	3	3	3	1.4	3	1.4	3	3
76	3	3	3	3	3	3	3	3	3	3
77	3	3	3	3	3	3	3	3	3	3
78	3	3	3	3	3	3	3	3	3	3
79	3	3	3	3	3	3	3	1.4	3	3
80	3	3	3	3	3	3	3	3	3	3
81	3	3	3	3	3	3	3	3	3	3
82	3	3	3	3	3	3	3	3	3	3
83	3	3	3	3	3	3	3	3	3	3
84	3	3	3	3	3	3	3	3	3	3
85	3	3	3	3	3	3	3	3	1.4	3
86	3	3	3	3	3	3	3	3	3	3
87	3	3	3	3	3	3	3	3	3	3
88	3	3	3	3	3	3	3	3	3	3
89	3	3	3	3	3	3	3	3	3	3
90	3	3	3	3	3	3	3	3	3	3
91	3	3	3	3	3	3	3	3	3	3
92	3	3	3	3	3	3	3	3	3	3
93	3	3	3	3	3	3	3	3	3	3
94	3	3	3	3	3	3	3	3	3	3
95	3	3	3	3	3	3	3	3	1.4	3
96	3	3	3	3	3	3	3	3	1.4	3
97	3	3	3	3	3	3	3	3	3	3
98	3	3	3	3	3	3	3	3	3	3
99	3	3	3	3	3	3	3	3	3	3
100	3	3	3	3	3	3	3	3	3	3
101	3	3	3	3	3	3	3	3	3	3
102	3	3	3	3	3	3	3	3	3	3

103	3	3	3	3	3	3	3	3	1.4	3
104	3	3	3	3	3	3	3	3	3	3
105	3	3	3	3	3	3	3	3	3	3
106	3	3	3	3	3	3	3	3	3	3
107	3	3	3	3	3	1.4	3	3	1.4	3
108	3	3	3	3	3	3	3	3	3	3
109	3	3	3	3	3	3	3	3	3	3
110	3	3	3	3	3	3	3	3	3	3
111	3	3	3	3	3	3	3	3	3	3
112	3	3	3	3	3	3	3	3	3	3
113	3	3	3	3	3	3	3	3	3	3
114	3	3	3	3	3	3	3	3	3	3
115	3	3	3	3	3	3	3	3	3	3
116	3	3	3	3	3	3	3	3	3	3
117	3	3	3	3	3	1.4	3	3	3	3
118	3	3	3	3	3	3	3	3	3	3
119	3	1.4	1.4	3	3	3	3	1.4	1.4	3
120	3	3	3	3	3	3	3	3	3	3
121	3	3	3	3	3	3	3	3	1.4	3
122	3	3	3	3	3	3	3	3	3	3
123	3	3	3	3	3	3	3	3	3	3
124	3	3	3	3	3	3	3	3	3	3
125	3	3	3	3	3	3	3	3	3	3
126	3	3	3	3	3	3	3	3	3	3
127	3	3	3	3	3	3	3	3	3	3
128	3	3	3	3	3	3	3	3	3	3
129	3	3	3	3	3	3	3	3	3	3
130	3	3	3	3	3	3	3	3	3	3
131	3	3	3	3	3	3	3	3	3	3
132	3	3	3	3	3	3	3	3	3	3
133	3	3	3	3	3	3	3	3	3	3
134	3	3	3	3	3	3	3	3	3	3
135	3	3	3	3	3	3	3	3	3	3
136	3	3	3	3	3	3	3	3	3	3
137	3	3	3	3	3	3	3	3	3	3
138	3	3	3	3	3	3	3	3	3	3
139	3	3	3	3	3	1.4	3	3	1.4	3
140	3	3	3	3	3	3	3	3	1.4	3
141	3	3	3	3	3	3	3	3	3	3
142	3	3	3	3	3	3	3	3	3	3
143	3	3	3	3	3	3	1.4	1.4	3	3
144	3	3	3	3	3	1.4	3	3	3	3
145	3	3	3	3	3	1.4	3	1.4	3	3
146	3	3	3	3	3	1.4	3	3	3	3
147	3	3	3	3	3	3	3	3	3	3
148	3	3	3	3	3	1.4	3	3	3	3
149	3	3	3	3	3	1.4	3	3	3	3
150	3	3	3	3	3	3	1.4	1.4	1.4	3
151	3	3	3	3	3	3	3	3	3	3
152	3	3	3	3	3	3	3	3	1	3
153	3	3	3	3	3	3	3	3	3	3
154	3	3	3	3	3	3	3	3	3	3
155	3	3	3	3	3	3	3	3	3	3
156	3	3	3	3	3	3	3	3	3	3
157	3	3	3	3	3	3	3	3	3	3
158	3	3	3	3	3	3	3	3	3	3
159	3	3	3	3	3	3	3	3	3	3
160	3	3	3	3	3	3	3	3	3	3
161	3	3	3	3	3	3	3	3	3	3

162	3	3	3	3	3	3	3	3	1.4	3
163	3	3	3	3	3	3	3	3	3	3
164	3	3	3	3	3	3	3	3	3	3
165	3	3	3	3	3	3	3	3	3	3
166	3	3	3	3	3	3	3	1.4	1.4	3
167	3	3	3	3	3	3	3	3	1.4	3
168	3	3	3	3	3	3	3	3	3	3
169	3	3	3	3	3	3	3	1.4	3	3
170	3	3	3	3	3	3	3	3	3	3
171	3	3	3	3	3	3	3	1.4	1.4	3
172	3	3	3	3	3	3	3	3	3	3
173	3	3	3	3	3	3	3	3	3	3
174	3	3	3	3	3	3	3	1.4	3	3
175	3	3	3	3	3	1.4	3	1.4	1.4	3
176	3	3	3	3	3	3	3	3	3	3
177	3	3	3	3	3	3	3	1.4	3	3
178	3	3	3	3	3	3	3	3	3	3
179	3	3	3	3	3	3	3	3	3	3
180	3	3	3	3	3	3	3	1.4	3	3
181	3	3	3	3	3	3	3	3	1.4	3
182	3	3	3	3	3	3	3	3	1.4	3
183	3	3	3	3	3	3	3	3	3	3
184	3	3	3	3	3	3	3	3	3	3
185	3	3	3	3	3	3	3	3	3	3
186	3	3	3	3	3	3	3	3	3	3
187	3	3	3	3	3	3	3	1.4	3	3
188	3	3	3	3	3	3	3	1.4	1.4	3
189	3	3	3	3	3	3	3	1.4	1.4	3
190	3	3	3	3	3	3	3	3	3	3
191	3	3	3	3	3	1.4	3	3	3	3
192	3	3	3	3	1.4	1.4	3	1.4	3	3
193	3	3	3	3	3	3	3	3	3	3
194	3	3	3	3	3	3	3	3	3	3
195	3	3	3	3	3	3	3	1.4	1.4	3
196	3	3	3	3	3	3	3	3	3	3
197	3	3	3	3	3	3	3	3	3	3
198	3	3	3	3	3	3	3	3	3	3
199	3	3	3	3	3	3	3	3	3	3
200	3	3	3	3	3	3	3	1.4	3	3
201	3	3	3	3	3	3	1.4	3	3	3
202	3	3	3	3	3	3	3	3	3	3
203	3	3	3	3	3	3	3	3	3	3
204	3	3	3	3	3	3	3	3	3	3
205	3	3	3	3	3	3	3	3	3	3
206	3	3	3	3	3	3	3	3	3	3
207	3	3	3	3	3	3	3	3	3	3
208	3	3	3	3	3	3	3	3	3	3
209	3	3	3	3	3	3	3	1.4	3	3
210	3	3	3	3	3	3	3	3	3	3
211	3	3	3	3	3	3	3	3	3	3
212	3	3	3	3	3	3	3	1.4	3	3
213	3	3	3	3	3	3	3	3	3	3
214	3	3	3	3	3	3	3	3	3	3
215	3	3	3	3	3	3	3	3	3	3
216	3	3	3	3	3	3	3	1.4	3	3
217	3	3	3	3	3	3	3	3	3	3
218	3	3	3	3	3	3	3	3	3	3
219	3	3	3	3	3	3	3	3	3	3
220	3	3	3	3	3	3	3	3	3	3

221	3	3	3	3	3	3	3	1.4	1.4	3
222	3	3	3	3	3	3	3	3	3	3
223	3	3	3	3	3	3	3	3	3	3
224	3	3	3	3	3	3	3	3	3	3
225	3	3	3	3	3	3	3	3	3	3
226	3	3	3	3	3	3	3	3	3	3
227	3	3	3	3	3	3	3	3	1.4	3
228	3	3	3	3	3	3	3	1.4	1.4	3
229	3	3	3	3	3	3	3	1.4	3	3
230	3	3	3	3	3	3	3	3	3	3
231	3	3	3	3	3	3	3	3	3	3
232	3	3	3	3	3	3	3	3	3	3
233	3	3	3	3	3	3	3	3	3	3
234	3	3	3	3	3	3	3	3	3	3
235	3	3	3	3	3	3	3	3	3	3
236	3	3	3	3	3	3	3	3	3	3
237	3	3	1.4	3	3	3	3	1.4	3	3
238	3	3	3	3	3	3	3	1.4	1.4	3
239	3	3	3	3	3	3	1	3	1.4	3
240	3	3	3	3	3	3	3	1.4	3	3
241	3	3	3	3	3	3	3	3	1.4	3
242	3	3	3	3	3	3	3	3	3	3
243	3	3	3	3	3	3	3	1.4	3	3
244	3	3	3	3	3	3	3	3	1.4	3
245	3	3	3	3	3	3	3	3	1.4	3
246	3	3	3	3	3	3	3	1.4	3	3
247	3	3	3	3	3	3	3	1.4	1.4	3
248	3	3	3	3	3	3	3	3	3	3
249	3	3	3	3	3	3	3	3	3	3
250	3	3	3	3	3	3	3	3	3	3
251	3	3	3	3	3	3	3	3	3	3
252	3	3	3	3	3	3	3	3	1.4	3
253	3	3	3	3	3	1.4	3	3	3	3
254	3	3	3	3	3	3	3	3	1.4	3
255	3	3	3	3	3	3	3	3	3	3
256	3	3	3	3	3	3	3	1.4	3	3
257	3	3	3	3	3	1.4	3	1.4	1.4	3
258	3	3	3	3	3	1.4	3	3	1.4	3
259	3	3	3	3	3	3	3	3	3	3
260	3	3	3	3	3	3	3	3	1.4	3
261	3	3	3	3	3	3	3	1.4	1.4	3
262	3	3	3	3	3	3	3	3	1.4	3
263	3	3	3	3	3	3	3	1.4	1.4	3
264	3	3	3	3	3	3	3	1.4	1.4	3
265	3	3	3	3	3	3	3	3	3	3
266	3	3	3	3	3	3	3	3	1.4	3
267	3	3	3	3	3	3	3	3	3	3
268	3	3	3	3	3	3	3	1.4	1.4	3
269	3	3	3	3	3	3	3	1.4	1.4	3
270	3	3	3	3	3	3	3	1.4	1.4	3
271	3	3	3	3	3	3	3	3	3	3
272	3	3	3	3	3	3	3	1.4	3	3
273	3	3	3	3	3	3	3	1.4	1.4	3
274	3	3	3	3	3	3	3	1.4	1.4	3
275	3	3	3	3	3	3	3	1.4	1.4	3
276	3	3	3	3	3	3	3	3	1.4	3
277	3	3	3	3	3	3	3	1.4	1.4	3
278	3	3	3	3	3	3	3	1.4	3	3
279	3	3	3	3	3	3	3	3	1.4	3

280	3	3	3	3	3	3	3	1.4	1.4	3
281	3	3	3	3	3	3	3	3	3	3
282	3	3	3	3	3	3	3	1.4	1.4	3
283	3	3	3	3	3	3	3	3	1.4	3
284	3	3	3	3	3	3	3	1.4	1.4	3
285	3	3	1.4	3	3	1.4	3	1.4	1.4	3
286	3	3	3	3	3	3	3	1.4	3	3
287	3	3	3	3	3	1.4	3	1.4	1.4	3
288	3	3	3	3	3	3	3	3	3	3
289	3	3	3	3	3	3	3	1.4	1.4	3
290	3	3	3	3	3	3	3	3	1.4	3
291	3	3	3	3	3	3	3	3	1.4	3
292	3	3	3	3	3	3	3	3	3	3
293	3	3	3	3	3	3	3	1.4	1.4	3
294	3	3	3	3	3	3	3	1.4	1.4	3
295	3	3	3	3	3	3	3	1.4	3	3
296	3	3	3	3	3	3	3	1.4	1.4	3
297	3	3	1.4	3	3	3	3	1.4	1.4	3
298	3	3	3	3	3	3	3	1.4	1.4	3
299	3	3	3	3	3	3	3	1.4	1.4	3
300	3	3	3	3	3	3	3	1.4	1.4	3

Appendix 2.3 Dependent Variables Z2a(i)-Z4

Trader Number	Z2a(i)	Z2a(ii)	Z2b	Z2c	Z2d	Z2e	Z2f	Z3a	Z3b	Z4
1	4	3	3	3	3	4	3	3	2	3
2	4	3	3	3	3	3	3	2	2	3
3	3	3	3	3	3	3	3	3	2	3
4	3	3	3	3	3	3	3	3	2	3
5	4	2	3	3	2	3	3	3	2	3
6	3	2	3	2	3	2	2	2	2	1.4
7	4	3	3	2	3	3	1	2	2	1
8	4	2	3	3	3	1	3	3	2	3
9	3	2	3	3	2	3	3	2	2	3
10	3	3	3	2	3	2	3	3	2	1.4
11	3	2	3	3	2	3	3	3	2	3
12	3	2	3	3	2	3	3	2	2	3
13	3	3	3	3	3	3	3	3	2	3
14	1	3	1	2	2	3	3	3	2	1
15	3	2	3	2	3	3	3	3	2	1.4
16	3	3	3	3	3	3	3	2	2	3
17	3	3	3	2	3	3	1	3	2	1.4
18	3	3	3	2	3	3	3	2	2	3
19	3	2	3	3	2	4	3	3	2	3
20	3	2	3	2	2	2	3	3	2	3
21	4	3	3	2	2	3	3	2	2	3
22	4	3	3	3	2	3	3	2	2	3
23	3	3	3	2	3	3	3	3	2	3
24	3	2	3	2	3	3	3	2	2	3
25	3	2	3	2	2	3	2	2	2	1
26	1	2	2	2	2	3	3	2	2	3
27	3	3	3	2	3	3	3	2	2	3
28	4	3	3	2	2	4	3	3	2	3
29	4	3	3	2	3	3	1	2	2	3
30	4	3	3	3	2	4	2	2	2	3
31	3	3	3	2	3	2	4	3	2	1.4
32	4	3	3	2	3	2	4	2	2	1.4
33	4	3	3	2	3	3	1	2	2	1.4

34	4	3	3	2	2	3	4	2	2	1.4
35	3	3	3	2	3	3	1	2	2	1.4
36	4	3	3	3	2	3	3	2	2	3
37	3	3	3	3	2	3	3	2	2	3
38	4	3	3	2	3	2	1	2	2	1.4
39	4	3	3	2	3	2	3	2	2	3
40	4	2	3	2	2	4	1	3	2	1.4
41	3	2	3	2	2	2	1	2	2	1.4
42	1	3	2	2	3	4	1	2	2	1.4
43	3	2	3	2	3	3	3	2	2	1.4
44	1	2	3	2	2	2	2	2	2	1.4
45	4	2	3	2	3	3	2	3	2	1.4
46	4	2	3	3	2	2	3	1	2	1.4
47	3	2	3	2	2	3	3	3	2	1.4
48	3	2	3	2	3	2	3	3	2	1.4
49	4	3	3	3	3	3	3	3	2	3
50	3	3	3	2	2	3	3	3	2	3
51	4	3	3	3	3	3	3	2	2	1.4
52	4	3	3	3	2	4	3	3	2	1.4
53	4	2	3	3	2	4	3	2	2	3
54	3	3	3	3	2	3	3	3	2	1
55	3	3	3	2	2	3	1	2	2	3
56	1	2	2	2	2	3	1	3	2	1.4
57	4	3	3	3	2	3	3	3	2	1
58	3	2	3	2	2	2	3	3	2	1
59	3	2	3	2	2	2	3	3	2	1
60	4	3	3	2	2	3	1	2	2	3
61	3	2	3	2	3	3	3	2	2	3
62	4	2	3	2	3	2	4	2	2	1.4
63	3	3	3	2	3	2	1	2	2	1.4
64	4	3	3	3	3	3	3	3	2	1
65	3	3	3	2	3	3	3	3	2	1
66	3	2	3	2	2	3	3	2	2	1.4
67	3	3	3	2	2	3	1	2	2	1
68	1	2	3	2	2	2	1	2	2	1.4
69	4	3	3	2	3	3	3	2	2	1.4
70	3	3	3	2	2	3	3	2	2	3
71	3	3	3	3	3	3	3	2	2	1.4
72	3	2	3	2	3	3	3	2	2	1
73	1	2	3	2	3	2	2	2	2	1.4
74	3	2	3	2	2	3	3	2	2	1.4
75	3	2	3	2	2	3	2	2	2	1
76	3	3	3	3	3	3	3	3	2	3
77	3	3	3	2	3	3	3	3	2	3
78	3	3	3	3	3	3	3	2	2	3
79	3	2	3	2	3	3	2	3	2	3
80	3	3	3	3	3	3	3	3	2	3
81	4	3	3	3	3	3	3	3	2	3
82	3	3	3	3	3	3	3	2	2	3
83	4	3	3	3	3	3	3	3	2	3
84	3	3	3	3	3	3	3	2	2	3
85	4	3	3	3	3	3	3	2	2	3
86	3	3	3	3	3	3	3	3	2	3
87	3	3	3	3	3	3	3	2	2	3
88	4	3	3	3	3	3	3	2	2	3
89	3	3	3	2	3	2	1	2	2	3
90	3	3	3	3	3	3	3	2	2	3
91	4	3	3	3	3	3	3	3	2	1
92	4	3	3	3	3	3	3	2	2	3

93	4	3	3	3	3	3	3	2	2	3
94	3	3	3	3	3	3	3	2	2	3
95	4	3	3	2	3	3	3	2	2	3
96	3	3	3	3	3	3	3	2	2	1.4
97	3	3	3	3	3	3	3	2	2	3
98	3	3	3	3	3	3	3	3	2	3
99	4	3	3	2	3	3	3	2	2	3
100	3	3	3	3	3	3	3	3	2	3
101	3	3	3	2	3	3	3	3	2	3
102	4	3	3	3	3	3	3	3	2	3
103	4	3	3	3	3	3	3	2	2	3
104	4	3	3	3	3	3	3	3	2	3
105	3	3	3	3	3	3	3	3	2	3
106	4	3	3	3	3	3	3	2	2	3
107	4	3	3	3	3	3	3	2	2	1.4
108	4	3	3	3	3	3	3	3	2	3
109	3	3	3	3	3	3	3	3	2	3
110	3	3	3	2	3	3	3	3	2	3
111	3	3	3	3	3	3	3	3	2	3
112	3	3	3	1	3	3	3	3	3	3
113	3	3	3	2	3	3	3	3	2	3
114	3	3	3	3	3	3	3	3	2	3
115	3	3	3	3	3	3	3	3	2	3
116	3	3	3	3	3	3	3	3	3	3
117	3	3	3	2	3	3	3	2	2	3
118	3	3	3	3	3	4	1	2	2	1.4
119	4	2	3	2	1	1	2	2	2	1.4
120	3	3	3	3	3	3	3	2	2	3
121	4	3	3	3	3	3	3	3	2	3
122	3	3	3	3	3	3	3	3	2	3
123	4	3	3	3	3	3	3	3	2	3
124	4	3	3	3	3	3	3	2	2	3
125	3	3	3	3	3	3	3	3	2	3
126	3	3	3	3	3	3	3	3	2	3
127	4	3	3	3	3	4	1	3	2	3
128	3	3	3	3	3	3	3	2	2	3
129	4	3	3	3	3	3	3	2	2	3
130	4	3	3	3	3	3	3	3	2	3
131	4	3	3	3	3	3	3	3	2	3
132	4	3	3	3	3	2	1	3	2	3
133	3	3	3	3	3	3	3	3	2	3
134	3	3	3	3	3	3	3	3	2	3
135	3	3	3	3	3	3	3	2	2	3
136	3	3	3	3	3	3	3	3	2	3
137	3	3	3	2	3	3	3	2	2	1.4
138	3	3	3	2	3	3	3	2	2	3
139	3	3	3	3	3	3	3	2	2	3
140	3	3	3	3	3	3	3	2	2	3
141	3	3	3	2	3	3	3	2	2	3
142	3	3	3	3	3	3	3	2	2	3
143	2	2	2	2	2	2	2	3	2	3
144	3	3	3	2	3	3	3	2	2	3
145	3	3	3	2	3	3	3	2	2	1.4
146	3	3	3	2	3	3	3	2	2	1
147	3	3	3	2	3	3	3	2	2	3
148	3	3	3	2	3	3	3	2	2	1
149	3	3	3	3	3	3	3	2	2	3
150	2	2	2	2	2	2	2	2	2	1.4
151	4	3	3	3	3	3	3	3	2	1

152	4	2	3	2	3	3	4	2	2	1.4
153	4	3	3	3	3	3	3	3	2	1
154	3	3	3	3	3	3	3	3	2	1
155	4	3	3	3	3	3	3	3	2	1
156	3	3	3	3	3	3	3	3	2	1
157	3	3	3	3	3	3	3	3	2	3
158	3	3	3	3	3	3	3	3	2	1.4
159	3	3	3	3	3	3	3	3	2	1
160	3	3	3	3	3	3	3	3	2	1
161	3	3	3	3	3	3	3	3	2	1
162	3	2	3	2	3	3	3	2	2	1.4
163	4	3	3	3	3	3	3	3	2	1.4
164	4	3	3	3	3	3	3	3	2	1
165	3	3	3	3	3	3	3	3	2	3
166	1	2	2	2	3	2	2	2	2	1.4
167	3	2	3	2	3	2	1	3	2	3
168	3	3	3	3	3	3	3	3	2	1
169	3	3	3	3	3	3	3	3	2	1
170	4	2	3	2	3	3	3	2	2	3
171	3	3	3	2	2	2	1	3	2	1.4
172	3	3	3	3	3	3	3	3	2	1
173	4	3	3	3	3	2	4	2	2	1.4
174	3	3	3	3	3	3	3	3	2	1.4
175	4	3	3	2	2	2	1	2	2	3
176	1	2	3	2	2	2	1	2	2	1.4
177	3	3	3	3	2	2	1	3	2	1.4
178	3	3	3	3	3	3	3	3	2	1
179	3	3	3	3	3	3	3	3	2	1
180	3	3	3	3	2	2	1	3	2	1.4
181	3	3	3	2	3	2	2	3	2	1.4
182	4	2	3	2	2	3	3	2	2	3
183	4	3	3	3	3	3	3	3	2	1
184	3	3	3	3	3	3	3	3	2	1
185	3	3	3	2	3	2	3	3	2	1.4
186	3	3	3	2	2	2	1	3	2	1.4
187	1	3	3	2	2	2	1	3	2	1.4
188	3	2	3	2	2	2	2	2	2	1.4
189	3	3	3	2	2	2	1	2	2	1.4
190	4	3	3	2	3	4	3	3	2	3
191	3	3	3	3	3	3	3	3	2	1
192	3	3	3	2	2	2	3	3	2	1.4
193	4	3	3	3	3	3	3	3	2	1
194	3	3	3	2	3	2	1	3	2	1
195	1	2	1	2	3	2	2	2	2	1.4
196	4	3	3	3	3	3	3	3	2	3
197	4	3	3	3	3	3	3	3	2	1
198	3	3	3	3	3	3	3	3	2	3
199	4	3	3	3	3	3	3	3	2	1
200	3	3	3	2	3	2	4	2	2	1.4
201	2	2	2	2	2	2	2	2	2	3
202	4	3	3	3	3	3	3	3	2	1
203	3	3	3	2	2	3	1	2	2	3
204	3	3	3	3	3	3	3	3	2	1
205	1	3	3	2	3	1	4	3	2	1
206	4	3	3	3	3	3	3	3	2	3
207	3	3	3	3	3	3	3	3	2	1
208	3	3	3	2	2	2	2	3	2	1.4
209	3	3	3	3	3	3	3	3	2	3
210	3	3	3	3	3	3	3	3	2	3

211	3	3	3	3	3	3	3	3	2	1
212	3	3	3	2	2	2	3	3	2	1.4
213	3	3	3	3	3	3	3	3	2	1
214	3	3	3	3	3	3	3	3	2	3
215	3	3	3	3	3	3	3	3	2	1
216	1	2	1	2	3	2	2	2	2	1.4
217	3	3	3	3	3	3	3	3	2	3
218	3	3	3	3	3	3	3	3	2	1
219	3	3	3	3	3	3	3	3	2	1
220	3	3	3	3	3	3	3	3	2	1
221	3	2	3	2	3	2	2	2	2	1.4
222	3	3	3	3	3	3	3	3	2	1.4
223	3	3	3	3	3	3	3	3	2	3
224	1	3	3	2	3	2	1	3	2	1.4
225	3	3	3	2	3	2	1	3	2	1.4
226	3	3	3	3	3	3	3	3	3	3
227	4	2	3	2	2	3	2	2	2	1.4
228	1	2	2	2	2	2	2	3	3	1.4
229	3	3	3	2	2	3	1	3	3	1.4
230	1	2	2	2	3	3	1	2	2	1.4
231	3	2	3	3	3	2	3	2	2	1.4
232	3	3	3	2	3	4	1	3	2	3
233	3	3	3	3	2	2	1	1	2	3
234	3	3	3	2	3	3	2	3	2	3
235	1	2	2	2	2	2	2	3	2	3
236	1	3	2	2	2	3	1	2	2	3
237	1	3	1	2	3	1	2	3	2	1.4
238	1	3	2	2	2	2	2	2	2	1.4
239	1	1	2	2	2	3	1	3	2	1.4
240	3	2	3	2	2	3	3	3	2	1.4
241	3	3	3	2	2	3	1	2	2	1.4
242	4	3	3	3	3	3	3	2	2	3
243	3	3	3	3	3	3	3	2	2	3
244	3	3	3	2	2	2	2	2	2	1.4
245	3	2	3	2	2	3	1	3	2	3
246	3	3	3	2	3	2	2	2	2	1.4
247	1	1	1	2	2	1	1	2	2	1.4
248	3	3	3	3	3	3	3	2	2	3
249	3	3	3	2	3	3	1	3	2	3
250	1	2	1	2	2	2	1	1	2	1.4
251	4	3	3	2	2	2	1	3	2	3
252	3	2	3	2	2	2	1	2	2	1.4
253	3	2	3	2	3	3	1	3	2	3
254	4	3	3	2	2	4	2	2	2	1.4
255	3	3	3	2	3	2	2	3	2	1.4
256	1	2	3	2	1	2	1	3	2	1.4
257	3	2	3	2	2	2	2	2	2	1
258	3	2	3	2	3	3	1	2	2	1.4
259	3	3	3	3	3	3	3	2	2	3
260	3	3	3	2	2	2	3	2	2	1.4
261	4	2	3	2	2	2	1	1	2	1.4
262	3	3	3	2	3	2	1	3	2	1.4
263	1	2	3	2	3	2	1	3	2	1.4
264	3	2	3	2	2	3	2	3	2	1.4
265	4	3	3	3	2	2	2	2	2	3
266	3	3	3	2	3	3	1	2	2	1.4
267	4	3	3	2	3	2	1	2	2	1.4
268	4	2	3	2	2	4	1	2	2	1.4
269	4	3	3	2	3	3	1	1	2	1.4

270	1	3	1	1	2	1	1	3	2	1.4
271	4	3	3	2	3	2	1	3	2	3
272	3	3	3	2	3	2	1	2	2	1.4
273	1	2	3	2	3	2	1	2	2	1.4
274	3	2	3	2	1	2	3	3	2	1.4
275	1	1	3	2	1	2	2	1	2	1.4
276	3	3	3	2	3	2	2	3	2	3
277	3	3	3	2	3	2	2	1	2	1
278	3	3	3	3	3	3	3	3	2	3
279	4	3	3	2	3	3	3	2	2	3
280	3	2	3	2	3	3	1	2	2	1.4
281	4	3	3	2	3	3	1	2	2	3
282	1	2	2	2	3	2	1	3	2	1.4
283	4	3	3	2	3	2	1	3	2	3
284	3	2	3	2	1	2	1	2	2	3
285	1	3	3	2	3	3	1	3	3	1.4
286	4	1	3	2	2	2	1	2	2	1.4
287	1	1	1	2	2	2	2	2	2	1.4
288	4	2	3	2	3	3	3	3	2	3
289	4	3	3	2	3	2	1	2	2	1.4
290	3	3	3	3	3	3	3	2	2	3
291	4	3	3	3	3	3	3	2	2	3
292	4	3	3	2	3	3	3	3	3	3
293	3	2	3	2	3	2	2	3	2	1.4
294	4	3	3	2	3	2	1	2	2	1.4
295	4	3	3	2	3	3	2	2	2	1.4
296	1	3	2	2	2	2	2	2	2	1.4
297	1	1	1	2	2	2	1	2	2	3
298	4	3	3	2	3	2	1	2	2	1.4
299	3	2	3	2	3	2	3	2	2	1.4
300	1	2	3	2	2	2	1	3	2	1.4

Appendix 2.4 Dependent Variables Additional Observations

Trader Number	Withdrawal Period	ODR: Opt-in/Provided/Opt-out/Failed	Other ODR body?	'Compliance' with Delivery Requirement
1	15	Provided	Opt-in FEVAD	4
2	15	Provided	Opt-in FEVAD	4
3	14	Provided	Provided FEVAD	4
4	14	Provided	Opt-in FEVAD	4
5	30	Provided	Provided FCD	4
6	14	Failed	n/a	2
7	14 - 16	Failed	Provided MCCA	4
8	14 - 16	Provided	Opt-in FEVAD	4
9	14	Provided	Opt-in FEVAD	4
10	14	Failed	n/a	2
11	14	Provided	Opt-in FEVAD	3
12	14	Provided	Opt-in MEDICYS	4
13	14	Provided	Provided FCD	4
14	Invalid	Failed	Provided TELECOM	4
15	14	Failed	n/a	4
16	14	Provided	Opt-in FEVAD	4
17	14	Failed	n/a	4
18	14	Provided	n/a	4
19	14	Provided	Opt-in FEVAD	4
20	14	Provided	Opt-in FEVAD	4
21	30	Provided	Opt-in FEVAD	4

22	14 - 16	Provided	Provided MEDICYS	4
23	14	Provided	Opt-in FEVAD	4
24	14	Provided	Opt-in MEDICYS	4
25	14	Failed	Opt-in FEVAD	2
26	Invalid	Provided	Opt-in FEVAD	4
27	14	Provided	n/a	4
28	30	Provided	Provided FEVAD	4
29	30	Provided	Opt-in FEVAD	2
30	15	Provided	Opt-in FEVAD	4
31	14	Failed	n/a	4
32	30	Failed	n/a	4
33	14 - 16	Failed	n/a	4
34	30	Failed	n/a	4
35	14	Failed	n/a	4
36	30	Provided	n/a	4
37	14	Provided	n/a	4
38	14 - 16	Failed	n/a	4
39	14 - 16	Provided	n/a	4
40	15	Failed	n/a	2
41	14	Failed	n/a	4
42	Invalid and 7 days but no starting date	Failed	n/a	4
43	14	Failed	n/a	4
44	7	Failed	n/a	4
45	14 - 16	Failed	n/a	4
46	15	Failed	n/a	4
47	14	Failed	n/a	2
48	14	Failed	n/a	3
49	15	Provided	Opt-in FEVAD	2
50	14	Provided	n/a	4
51	30	Failed	n/a	4
52	21	Failed	n/a	4
53	30	Provided	Opt-in FEVAD	4
54	14	Failed	Provided MEDICYS	4
55	14	Provided	Provided CM2C	4
56	Invalid	Failed	n/a	3
57	14 - 16	Failed	Opt-in FEVAD	4
58	14	Failed	Provided MEDICYS	4
59	14	Failed	Opt-in AME	2
60	14 - 16	Provided	n/a	4
61	14	Provided	Opt-in FEVAD	2
62	14 - 16	Failed	n/a	4
63	14	Failed	n/a	4
64	14 - 16	Failed	Opt-in FEVAD	4
65	14	Failed	Provided MEDIATION-NET	2
66	14	Failed	n/a	2
67	14	Failed	Opt-in MEDIATION-NET	4
68	7	Failed	n/a	4
69	14 - 16	Failed	n/a	2
70	14	Provided	n/a	2
71	14	Failed	n/a	4
72	14	Failed	Opt-in FEVAD	2
73	7	Failed	n/a	2
74	14	Failed	n/a	4
75	14	Failed	Opt-in MEDIATION-NET	2
76	14	Opt-out	n/a	4
77	14	Opt-out	n/a	4

78	14	Opt-out	n/a	4
79	14	Opt-out	n/a	4
80	14	Opt-out	n/a	4
81	30	Opt-out	n/a	4
82	14	Opt-out	n/a	4
83	30	Opt-out	n/a	4
84	14	Opt-out	n/a	4
85	30	Provided	n/a	4
86	14	Provided	n/a	4
87	14	Opt-out	n/a	4
88	90	Opt-out	n/a	4
89	14	Provided	n/a	4
90	14	Opt-out	n/a	4
91	100	Failed	n/a	4
92	100	Opt-out	n/a	4
93	60	Opt-out	n/a	4
94	14	Opt-out	n/a	4
95	30	Provided	n/a	4
96	14	Failed	n/a	4
97	14	Provided	n/a	4
98	14	Opt-out	n/a	4
99	30	Opt-out	n/a	4
100	14	Opt-out	n/a	4
101	14	Opt-in	Opt-in Allgemeine Verbraucherschlichtungsstelle (beim Zentrum für Schlichtung e.V.)	4
102	30	Opt-out	n/a	4
103	30	Opt-out	n/a	4
104	30	Opt-out	n/a	4
105	14	Opt-out	n/a	4
106	100	Opt-out	n/a	4
107	100	Failed	n/a	2
108	30	Opt-out	n/a	4
109	14	Opt-out	n/a	4
110	14	Opt-in	Opt-in Allgemeine Verbraucherschlichtungsstelle (beim Zentrum für Schlichtung e.V.)	4
111	14	Opt-out	n/a	4
112	14	Provided	n/a	4
113	14	Provided	n/a	4
114	14	Opt-out	n/a	4
115	14	Provided	n/a	4
116	14	Provided	n/a	4
117	14	Provided	n/a	2
118	14	Failed	n/a	3
119	30	Failed	n/a	4
120	14	Opt-out	n/a	4
121	30	Opt-out	n/a	4
122	14	Provided	n/a	4
123	30	Opt-out	n/a	4
124	30	Opt-out	n/a	4
125	14	Opt-out	n/a	4
126	14	Opt-out	n/a	4
127	30	Opt-out	n/a	4
128	14	Opt-out	n/a	4
129	30	Opt-out	n/a	4
130	30	Opt-out	n/a	4
131	30	Opt-out	n/a	4
132	30	Provided	n/a	4

133	14	Opt-out	n/a	4
134	14	Opt-in	Opt-in Allgemeine Verbraucherschlichtungsstelle (beim Zentrum für Schlichtung e.V.)	4
135	14	Provided	n/a	4
136	14	Opt-out	n/a	4
137	14	Failed	n/a	4
138	14	Opt-out	n/a	4
139	14	Opt-out	n/a	2
140	14	Opt-out	n/a	4
141	14	Opt-out	n/a	4
142	14	Opt-out	n/a	4
143	Not Provided	Opt-out	n/a	4
144	14	Opt-out	n/a	2
145	14	Failed	n/a	2
146	14	Failed	Opt-in janoFair	2
147	14	Opt-out	n/a	4
148	14	Failed	Opt-in janoFair	2
149	14	Opt-out	n/a	2
150	Not Provided	Failed	n/a	4
151	30	Failed	Opt-in Geschillencommissie Thuiswinkel	3
152	31	Failed	n/a	4
153	31	Failed	Opt-in Geschillencommissie Thuiswinkel	4
154	14	Failed	Opt-in Geschillencommissie Thuiswinkel	4
155	30	Failed	Opt-in Geschillencommissie Thuiswinkel	4
156	14	Failed	Opt-in Geschillencommissie Webshop	4
157	14	Provided	n/a	4
158	14	Failed	n/a	4
159	14	Failed	Opt-in Geschillencommissie Thuiswinkel	4
160	14	Failed	Opt-in Geschillencommissie Thuiswinkel	4
161	14	Failed	Opt-in Geschillencommissie Webshop	4
162	14	Failed	n/a	4
163	30	Failed	n/a	3
164	30	Failed	Opt-in Geschillencommissie Thuiswinkel	4
165	14	Provided	n/a	3
166	Invalid	Failed	n/a	4
167	14	Provided	Provided Geschillencommissie Thuiswinkel	4
168	14	Failed	Opt-in Geschillencommissie Webshop	4
169	14	Failed	Opt-in Geschillencommissie Webshop	4
170	30	Opt-out	n/a	4
171	14	Failed	n/a	4
172	14	Failed	Opt-in Geschillencommissie Thuiswinkel	4
173	30	Failed	n/a	4
174	14	Failed	n/a	4
175	30	Provided	n/a	3
176	7	Failed	n/a	4
177	14	Failed	n/a	4
178	14	Failed	Opt-in Geschillencommissie Thuiswinkel	4

179	14	Failed	Opt-in Geschillencommissie Webshop	4
180	14	Failed	n/a	3
181	14	Failed	n/a	4
182	44	Opt-out	n/a	4
183	30	Failed	Opt-in Geschillencommissie Thuiswinkel	4
184	14	Failed	Opt-in Geschillencommissie Thuiswinkel	4
185	14	Failed	n/a	4
186	14	Failed	n/a	4
187	7	Failed	n/a	4
188	14	Failed	n/a	4
189	14	Failed	n/a	4
190	30	Provided	Opt-in Geschillencommissie Webshop	4
191	14	Failed	Opt-in Geschillencommissie Webshop	3
192	14	Failed	n/a	3
193	30	Failed	Opt-in Geschillencommissie Webshop	4
194	14	Failed	Opt-in Geschillencommissie Webshop	4
195	Invalid	Failed	n/a	4
196	30	Provided	Opt-in Geschillencommissie Thuiswinkel	4
197	30	Failed	Opt-in Geschillencommissie Webshop	4
198	14	Provided	Opt-in Geschillencommissie Thuiswinkel	4
199	30	Failed	Opt-in Geschillencommissie Thuiswinkel	4
200	14	Failed	n/a	4
201	Not Provided	Provided	n/a	4
202	100	Failed	Opt-in Geschillencommissie Thuiswinkel	4
203	14	Provided	n/a	4
204	14	Failed	Opt-in Geschillencommissie Webshop	4
205	10	Failed	Opt-in Geschillencommissie Webshop	4
206	30	Provided	Opt-in Geschillencommissie Thuiswinkel	4
207	14	Failed	Opt-in Geschillencommissie Thuiswinkel	6-8 weeks
208	14	Failed	n/a	4
209	14	Provided	Geschillencommissie Wonen	4
210	14	Provided	Geschillencommissie Wonen	4
211	14	Failed	Opt-in Geschillencommissie Thuiswinkel	4
212	14	Failed	n/a	4
213	14	Failed	Opt-in Geschillencommissie Thuiswinkel	4
214	14	Provided	Opt-in Geschillencommissie Thuiswinkel	4
215	14	Failed	Opt-in Geschillencommissie Thuiswinkel	4
216	Invalid	Failed	n/a	4
217	14	Provided	Opt-in Geschillencommissie Thuiswinkel	4
218	14	Failed	Opt-in Geschillencommissie Thuiswinkel	4
219	14	Failed	Opt-in Geschillencommissie Thuiswinkel	4
220	14	Failed	Opt-in Geschillencommissie Thuiswinkel	4
221	14	Failed	n/a	4

222	14	Failed	n/a	4
223	14	Provided	Opt-in Geschillencommissie Thuiswinkel	4
224	7	Failed	n/a	4
225	14	Failed	n/a	4
226	14	Provided	n/a	4
227	21	Failed	n/a	4
228	Invalid	Failed	n/a	4
229	14	Failed	n/a	4
230	Invalid	Failed	n/a	4
231	14	Failed	n/a	4
232	14	Provided	n/a	3
233	14	Provided	n/a	4
234	14	Provided	n/a	4
235	No Right	Provided	n/a	4
236	Invalid	Provided	n/a	4
237	Invalid	Failed	n/a	4
238	Invalid	Failed	n/a	4
239	No Right	Failed	n/a	4
240	14	Failed	n/a	4
241	14	Failed	n/a	4
242	100	Provided	n/a	4
243	14	Provided	n/a	3
244	14	Failed	n/a	4
245	14	Provided	n/a	4
246	14	Failed	n/a	3
247	Invalid	Failed	n/a	4
248	14	Provided	n/a	4
249	14	Opt-out	n/a	3
250	Invalid	Failed	n/a	4
251	30	Opt-in	Opt-in RetailADR	4
252	14	Failed	n/a	4
253	14	Provided	n/a	2
254	90	Failed	n/a	4
255	14	Failed	n/a	4
256	7	Failed	n/a	4
257	14	Failed	Provided Consumer Ombudsman	2
258	14	Failed	n/a	2
259	14	Provided	n/a	3
260	14	Failed	n/a	4
261	28	Failed	n/a	4
262	14	Failed	n/a	4
263	7	Failed	n/a	4
264	14	Failed	n/a	3
265	60	Provided	Opt-in RetailADR	4
266	14	Failed	n/a	4
267	30	Failed	n/a	4
268	30	Failed	n/a	4
269	30	Failed	n/a	4
270	Invalid	Failed	n/a	4
271	30	Provided	n/a	4
272	14	Failed	n/a	4
273	7	Failed	n/a	4
274	14	Failed	n/a	4
275	7	Failed	n/a	4
276	14	Provided	Provided RetailADR	4
277	14	Failed	Provided Furniture Ombudsman	4
278	14	Provided	n/a	4
279	28	Provided	n/a	4

280	14	Failed	n/a	4
281	21	Opt-out	n/a	4
282	Invalid	Failed	n/a	4
283	30	Provided	n/a	4
284	14	Provided	Provided Ombudsman	3
285	7	Failed	n/a	2
286	30	Failed	n/a	4
287	Invalid	Failed	n/a	2
288	30	Provided	n/a	4
289	21	Failed	n/a	4
290	14	Provided	n/a	3
291	30	Provided	n/a	4
292	30	Provided	n/a	4
293	14	Failed	n/a	4
294	21	Failed	n/a	4
295	30	Failed	n/a	4
296	Invalid	Failed	n/a	4
297	Invalid	Provided	n/a	4
298	30	Failed	n/a	4
299	14	Failed	n/a	4
300	7	Failed	n/a	4

Bibliography

- Adams J and Brownsword R, 'The Unfair Contract Terms Act: A Decade of Discretion' (1988) 104 *Law Quarterly Review* 94
- Alpa G, 'Towards a European Contract Law' in Schulze R and Stuyck J (eds), *Towards a European Contract Law* (Sellier European Law Publishers 2011)
- Arnulf A, 'The Principle of Effective Judicial Protection in EU law: an Unruly Horse?' (2011) 36(1) *European Law Review* 51
- Arroyo Amayuelas E, 'Directive 2000/31/EC: Article 10 Information to be provided' in Schulze R and Staudenmayer D (eds), *EU Digital Law: Article-by-Article Commentary* (Bloomsbury 2020)
- Aubert de Vincelles C, 'Consumer Sales in France after the Implementation of the Consumer Rights Directive' in de Cristofaro G and de Franceschi A (eds), *Consumer sales in Europe: after the implementation of the Consumer Rights Directive* (Intersentia 2016)
- Bakos Y, Marotta-Wurgler F, and Trossen DR, 'Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts' (2014) 43(1) *Journal of Legal Studies* 1
- Bar-Gill and Ben-Shahar O, 'Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law' (2013) 50(Special Issue) *Common Market Law Review* 109
- Bartels S, 'Substitution of New Debtor: Transfer of Contract' in Busch D and others (eds), *The Principles of European Contract Law and Dutch Law: A Commentary II* (Kluwer Law International 2006)
- Beale H, 'Unfair Contract Terms Act 1977' (1978) 5(1) *British Journal of Law and Society* 114
- 'Unfair Contracts in Britain and Europe' (1989) 42(1) *Current Legal Problems* 197
- 'Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts', in Beatson J and Friedmann D (eds), *Good Faith and Fault in Contract Law* (Oxford Clarendon Press 1995)
- and Ringe WG, 'Transfer of Rights and Obligations' in Dannemann G and Vogenauer S (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford University Press 2013)
- 'Art. 66-68: The Sources of Contract Terms Under the CESL' in Colombi Ciacchi A (ed), *Contents and Effects of Contracts-Lessons to Learn From The Common European Sales Law* (Springer Publishing 2016)
- 'The Role for European Contract Law: Uniformity or Diversity?' in de Elizalde F (ed), *Uniform Rules for European Contract Law?: A Critical Assessment* (Hart Publishing 2018)
- Beatson J, Burrows A, and Cartwright J, *Anson's Law of Contract* (30th edn, Oxford University Press 2016)
- Ben-Shahar O and Posner EA, 'The Right to Withdraw in Contract Law' (2011) 40(1) *Journal of Legal Studies* 115
- Bénabent A, 'Clauses Abusives: le droit français et ses réactions à la directive européenne' (1995) 3(2) *European Review of Private Law* 211

- Benesch T, *Schlüsselkonzepte zur Statistik* (Springer Publishing 2012)
- Benöhr I, *EU Consumer Law and Human Rights* (Oxford University Press 2013)
- Bernheim-Desvaux S and Foucher P, 'L'effectivité du droit français de la consommation' in Micklitz HW and Saumier G (eds), *Enforcement and Effectiveness of Consumer Law* (Springer Publishing 2018)
- Bernitz U, 'The Commission's Communications and Standard Contract Terms' in Vogenauer S and Weatherill S (eds), *The harmonisation of European contract law: implication for European private laws, business and legal practice* (Hart Publishing 2006)
- Borges G, *Die Inhaltskontrolle von Verbraucherverträgen* (Dunckler & Humblot 2000)
- Brandner HE and Ulmer P, 'The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission' (1991) 28(3) *Common Market Law Review* 647
- Bricks H, *Les Clauses Abusives* (Librairie générale de droit et de jurisprudence 1982)
- Bright S, 'Winning the Battle Against Unfair Contract Terms' (2000) 20(3) *Legal Studies* 331
- 'Unfairness and the Consumer Contract Regulations' in Burrows A and Peel E (eds), *Contract Terms* (Oxford University Press 2007)
- Brunaux G, 'La protection dépendante du contexte contractuel' in Sauphanor-Brouillaud N and others, *Les contrats de consommation: Règles communes* (2nd edn, Librairie générale de droit et de jurisprudence 2018)
- Bulletin of the European Communities, 'Statement from the Paris Summit 19 to 21 October 1972' (October 1972, No 10) Luxembourg: Office for official publications of the European Communities
- Burrows A, *A Casebook on Contracts* (6th edn, Hart Publishing 2018)
- Busch C, 'Implementation of the Consumer Rights Directive Germany' (2014) 3(2) *Journal of European Consumer and Market Law* 119
- 'The future of pre-contractual information duties: from behavioural insights to big data' in Twigg-Flesner C (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar Publishing 2016)
- Busseuil G, 'Implementation of the Consumer Rights Directive: France' (2014) 3(4) *Journal of European Consumer and Market Law* 270
- Cafaggi F, 'Self-Regulation in European Contract Law' in Collins H (ed), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Kluwer Law International 2008)
- Cartwright J, 'Information Obligations and Disinformation of Consumers: English Law Report' in Straetmans G (ed), *Information Obligations and Disinformation of Consumers* (Springer Publishing 2019)
- Caruso D, 'Black Lists and Private Autonomy in EU Contract Law' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart Publishing 2013)
- Cauffman C, 'The Consumer Rights Directive Adopted' (2012) 19(1) *Maastricht Journal of European and Comparative Law* 212
- Faure M, and Hartlief T, *Harmonisatie van het consumentencontractenrecht in Europa: consequenties voor Nederland* (Boom Juridische Uitgevers 2009)

Centrale Branchevereniging Wonen, 'Download de CBW-erkende voorwaarden' (Centrale Branchevereniging Wonen, 31 December 2019) available at <<https://www.cbw-erkend.nl/garanties-wonen>> accessed 22 May 2021

Chambre de commerce et d'industrie (CCI) de Paris Ile-de-France, 'Modèle-type de conditions générales' (CCI Paris Ile-de-France, 2014) available at <<https://www.entreprises.cci-paris-idf.fr/web/reglementation/contrats-modeles/commerciaux/conditions-generales-de-vente-entre-professionnels>> accessed 9 April 2019

Chambres de Métiers et de l'Artisanat, 'Le portail des Chambres de Métiers et de l'Artisanat: Immatriculation au Répertoire des métiers' (Chambres de Métiers et de l'Artisanat, 2020) available at <<https://www.artisanat.fr/porteur-de-projet/lancer-mon-activite/immatriculation-au-repertoire-des-metiers>> accessed 5 October 2020

Chen-Wishart M, 'Regulating Unfair Terms' in Gullifer L and Vogenauer S (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (Hart Publishing 2014)

— *Contract Law* (6th edn, Oxford University Press 2018)

Chilton A and Versteeg M, *How Constitutional Rights Matter* (Oxford University Press 2020)

Civil Justice Council, 'Compulsory ADR' (Civil Justice Council, June 2021) available at <<https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report-1.pdf>> accessed 15 June 2021

Collins H, 'Good Faith in European Contract Law' (1994) 14(2) *Oxford Journal of Legal Studies* 229

— 'The Directive on Unfair Contract Terms: Implementation, Effectiveness, and Harmonization' in Collings H (ed), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Kluwer Law International 2008)

Commission des clauses abusives, 'Contrats de fourniture de gaz et d'électricité' (Commission des clauses abusives, July 2020) available at <http://www.clauses-abusives.fr/theme_recommandation/eau-electricite-gaz-gpl/> accessed 20 July 2020

Commission, 'A European Initiative in the sector of Electronic Commerce' (1997) COM 157 final - not published in the Official Journal of the European Union

— 'European Contract Law' (Communication) COM (2001) 398 final

— 'Consumer Policy Strategy 2002-2006' (2002) COM 208 final

— 'A more coherent European contract law - An action plan' (Communication) COM (2003) OJ C63/1

— 'First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)' COM (2003) 702 final

— 'European Contract Law and the revision of the acquis: the way forward' (Communication) COM (2004) 651 final

— 'First Annual Progress Report on European Contract Law and the Acquis Review' (Report) COM (2005) 456 final

— 'EU Consumer Policy Strategy 2007-2013' (2007) COM 99 final

- ‘Minimizing regulatory burden for SMEs: Adapting EU regulation to the needs of micro-enterprises’ COM (2011) 803 final
 - ‘Regulatory Fitness and Performance (REFIT): Results and Next Steps’ COM (2013) 685 final
 - ‘The European Digital Single Market: Its Role in Economic Activity in the EU’ (European Commission, 2015) available at [≤https://ec.europa.eu/jrc/sites/jrcsh/files/JRC98723.pdf>](https://ec.europa.eu/jrc/sites/jrcsh/files/JRC98723.pdf) accessed 22 November 2019
 - ‘Consumer Conditions Scoreboard – Consumers at home in the Single Market’ (European Commission, October 2017) available at [<http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=45983>](http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=45983) accessed 3 September 2020
 - ‘A New Deal for Consumers’ (Communication) COM (2018) 183 final
 - ‘National transposition measures communicated by the Member States concerning: Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')’ (European Commission, 2019) available at [<https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32000L0031>](https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32000L0031) accessed 10 October 2021
 - ‘Notifications under Article 8a of Directive 93/13/EEC’ (European Commission, 31 May 2019) available at [<https://ec.europa.eu/info/notifications-under-article-8a-directive-93-13-eeec_en>](https://ec.europa.eu/info/notifications-under-article-8a-directive-93-13-eeec_en) accessed 4 July 2020
 - ‘Online shopping: Commission and Consumer Protection authorities urge traders to bring information policy in line with EU law’ (European Commission, 31 January 2020) available at [<https://ec.europa.eu/commission/presscorner/detail/en/IP_20_156>](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_156) accessed 12 August 2020
 - ‘National transpositions by Member State’ (European Commission, 2020) available at [<https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32011L0083>](https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32011L0083) accessed 20 October 2020
 - ‘Online Dispute Resolution - Resolve your online consumer problem fairly and efficiently’ (European Commission, 2020) available at [<https://ec.europa.eu/consumers/odr/main/?event=main.home.show>](https://ec.europa.eu/consumers/odr/main/?event=main.home.show) accessed 6 December 2020
 - ‘COSME - Europe’s programme for small and medium-sized enterprises’ (Commission, 2021) available at [< https://ec.europa.eu/growth/smes/cosme_en>](https://ec.europa.eu/growth/smes/cosme_en) 20 May 2021
 - ‘The 2021 EU Justice Scoreboard’ (Communication) COM (2021) 389 final
- Competition and Markets Authority, ‘Unfair Contract Terms Guidance: Guidance on the unfair terms provisions in the Consumer Rights Act 2015’ (Competition and Markets Authority, 31 July 2015) available at [≤https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf>](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf) accessed 26 July 2020
- and IFF Research, ‘Unfair Contract Terms Research’ (Competition and Markets Authority, 19 October 2016) available at [<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/561518/UK_businesses__understanding_of_unfair_terms_in_consumer_contracts__IFF_Research_.pdf>](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/561518/UK_businesses__understanding_of_unfair_terms_in_consumer_contracts__IFF_Research_.pdf) accessed 29 April 2020

Copenhagen Economics, 'Study on the economic impact of the electronic commerce Directive' September 2007

Cordero-Moss G, 'Standard contract terms as an alternative to legislation' in Twigg-Flesner C (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar Publishing 2016)

Cortés P, 'Enforcing EU Consumer Policy More Effectively: A Three Pronged Approach' in Drake S and Smith M (eds), *New Directions in the Effective Enforcement of EU Law and Policy* (Edward Elgar Publishing 2016)

— and de la Rosa FE, 'Building a global redress system for low-value cross-border disputes' (2013) 62(2) *The International and Comparative Law Quarterly* 407

— 'The New Landscape of Consumer Redress: The European Directive on Consumer Alternative Dispute Resolution and the Regulation on Online Dispute Resolution' in Cortés P (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016)

Creutzfeldt N, 'Alternative Dispute Resolution for Consumers' in Stürner M, Gascón Inchausti F, and Caponi R (eds), *The Role of Consumer ADR in the Administration of Justice: New Trends in Access to Justice under EU Directive 2013/11* (Sellier European Law Publishers 2015)

Crown Commercial Services (CCS), 'Guidance: short form terms and conditions' (CCS, 31 July 2015) available at <<https://www.gov.uk/government/publications/short-form-terms-and-conditions>> accessed 9 April 2019

Dalloz, *Code de la consommation – annoté & commenté* (24th edn, Dalloz 2020)

— *Commentaire Code de la consommation* (Dalloz 5 February 2020)

Davo H, 'Clauses Abusives: loi du février 1995 transportant la directive 93/13/CCE en droit français' (1997) 5(2) *European Review of Private Law* 157

de Cristofaro G, 'After Implementing Directive 2011/83/EU in the Member States: Are the National Provisions on Consumer Contracts Really Harmonised? Some Critical Remarks' (2014) 3(4) *Journal of European Consumer and Market Law* 217

— and de Franceschi A (eds), *Consumer Sales in Europe: After the Implementation of the Consumer Rights Directive* (Intersentia 2016)

De Matos AM, *Les contrats transfrontières conclus par les consommateurs au sein de l'Union européenne* (Presses Universitaires d'Aix-Marseille 2001)

de Moor A, 'Common and Civil Law Conceptions of Contract and European Law of Contract: The Case of the Directive on Unfair Terms in Consumer Contracts' (1995) 3(2) *European Review of Private Law* 257

Del Duca LF, Rule C, and Rimpfel K, 'eBay's De Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers' (2014) 6 *Yearbook on Arbitration and Mediation* 204

Direction de l'information légale et administrative, 'Recherche sur les entreprises immatriculées au registre du commerce et des sociétés (RCS)' (Direction de l'information légale et administrative, 2019) available at <<https://www.service-public.fr/professionnels-entreprises/vosdroits/R19859>> accessed 4 October 2019

- Donnelly M and Whit F, 'Digital content and consumer protection: An empirical study of supplier compliance with consumer information obligations' (2019) 35(6) *Computer Law & Security Review* 1
- Drexel J, 'Community Legislation Continued: Complete Harmonisation, Framework Legislation or Non-Binding Measures – Alternative Approaches to European Contract Law, Consumer Protection and Unfair Trade Practices?' (2002) 13(6) *European Business Law Review* 557
- Dutilleul FH and Delebecque P, 'Introduction: Le droit spécial des contrats' in Dutilleul FC and Delebecque P, *Contrats civils et commerciaux* (11th edn, Dalloz 2019)
- Ebers M, 'From *Océano* to *Asturcom*: Mandatory Consumer Law, Ex Officio Application of European Union Law and Res Judicata' (2010) 18(4) *European Review of Private Law* 823
- Eidenmüller H, 'Why Withdrawal Rights?' (2011) 7(1) *European Review of Contract Law* 1
- 'Collateral Damage: Brexit's Negative Effects on Regulatory Competition and Legal Innovation in Private Law' (2018) 26(4) *Zeitschrift für Europäisches Privatrecht* 868
- 'What can be wrong with an option? An optional Common European Sales Law as a regulatory tool' (2013) 50(Special Issue) *Common Market Law Review* 69
- Eleftheriadis P, 'Eleven Types of post-Brexit EU Law' (Oxford Business Law Blog, 8 January 2021) available at <<https://www.law.ox.ac.uk/business-law-blog/blog/2021/01/eleven-types-post-brexit-eu-law>> accessed 30 January 2021
- Ellingsen HK, *Standing to Enforce European Union Law before National Courts* (Hart Publishing 2021)
- Epstein L and Martin AD, 'Quantitative Approaches to Empirical Legal Research' in Cane P and Kritzer H (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010)
- Epstein R, 'Harmonization, heterogeneity and regulation: CESL, the lost opportunity for constructive harmonization' (2013) 50(Special Issue) *Common Market Law Review* 207
- Ernst C, '§ 288' in Wolfgang Krüger (ed), *MünchKommBürgerlG Band 2 – Schuldrecht Allgemeiner Teil 1 §§ 241-310* (8th edn, C.H. Beck 2019)
- Ernst S and others (eds), *AGB-Recht: Kommentar* (12th edn, Otto Schmidt Verlag 2016)
- European Parliamentary Research Service, 'The Costs of Non-Europe in the Single Market: Free Movement of Goods' (European Parliamentary Research Service, September 2014) available at <http://www.europarl.europa.eu/EPRS/EPRS_STUDY_536353_CoNE_Single_Market_I.pdf> accessed 3 November 2020
- European University Institute, 'CLAUDETTE: Machine Learning Powered Analysis of Consumer Contracts and Privacy Policies' (European University Institute, 2019) available at <<http://claudette.eui.eu/>> accessed 23 May 2021
- Eurostat, 'E-commerce statistics for individuals - Figure 4: Online Purchases, EU28, 2018' (Eurostat, 2019) available at <https://ec.europa.eu/eurostat/statistics-explained/index.php/E-commerce_statistics_for_individuals#Most_popular_online_purchases> accessed 29 August 2019
- Fastrich L, *Richterliche Inhaltskontrolle im Privatrecht* (C.H. Beck 1992)
- Fernie J, Sparks L, and McKinnon A, 'Retail logistics in the UK: past, present and future' (2010) 38(11) *International Journal of Retail & Distribution Management* 894

- Giliker P, 'The Transposition of the Consumer Rights Directive into UK Law: Implementing a Maximum Harmonization Directive' (2015) 23(1) *European Review of Private Law* 5
- 'The Consumer Rights Act 2015 – a bastion of European Consumer Rights' (2017) 37(1) *Legal Studies* 78
- Gillespie T, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions that Shape Social Media* (Yale University Press 2018)
- Gillies LE, 'Recent developments in the approximation of EU private international laws: towards mutual trust, mutual recognition and enhancing social justice in civil and commercial matters' in Twigg-Flesner C (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar Publishing 2016)
- Goanta C, *Convergence in European Consumer Sales Law: A Comparative and Numerical Approach* (Intersentia 2016)
- Goudkamp J and Nolan D, 'Contributory Negligence in the Twenty-First Century: An Empirical Study of First Instance Decisions' (2016) 79(4) *Modern Law Review* 575
- Grundmann S, 'The EU Consumer Rights Directive: optimizing, creating alternatives, or a dead end?' (2013) 18(1) *Uniform Law Review* 98
- Guinchard E, 'The Implementation of the Consumer ADR Directive in France' in Cortés P (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016)
- Gutman K, *The Constitutional Foundations of European Contract Law: A Comparative Analysis* (Oxford University Press 2014)
- Häcker B, 'Divergence and Convergence in the Common Law — Lessons from the Ius Commune' (2015) 131 *Law Quarterly Review* 424
- 'La Troisième Jeunesse du Code Civil: A German Lawyer Looks at the Reform of French Contract Law' in Cartwright J and Whittaker S (eds), *The Code Napoléon Rewritten: French Contract Law after the 2016 Reforms* (Hart Publishing 2017)
- Hall E, Howells G, and Watson J, 'The Consumer Rights Directive – An Assessment of its Contribution to the Development of European Consumer Contract Law' (2012) 8(2) *European Review of Contract Law* 139
- Hall MA and Wright RF, 'Systematic Content Analysis of Judicial Opinions' (2008) 96(1) *California Law Review* 63
- Halson R, *Liquidated Damages and Penalty Clauses* (Oxford University Press 2018)
- Hardt S and Kornet N (eds), *The Maastricht Collection: Selected National, European and International Provisions from Public and Private Law* (4th edn, Europa Law Publishing 2015)
- Hartmann M, 'Telemedienrecht' in Wandtke AA (ed), *IT-Recht und Medienstrafrecht* (2nd edn, De Gruyter 2011)
- Hayward B, Zeller B, and Andersen CB, 'The CISG and the United Kingdom—Exploring Coherency and Private International Law' (2018) 67(3) *International & Comparative Law Quarterly* 607
- Helleringer G and Sibony AL, 'European Consumer Protection Through the Behavioral Lense' (2017) 23(3) *The Columbia Journal of European Law* 607

- Hellwege P and Miller L, 'Control of Standard Terms' in Dannemann G and Vogenauer S (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford University Press 2013)
- Herbots JH, 'Interpretation of Contracts' in Smits JM (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar Publishing 2012)
- Hesselink MW, 'Codification and Europeanisation in the Netherlands' in Vogenauer S and Weatherill S (eds), *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice* (Hart Publishing 2006)
- 'Toward a Sharp Distinction between b2b and b2c? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive' (2010) 18(1) *European Review of Private Law* 57
- Hijma J, 'Validity: Art. 4:110-4:119' in Busch D and others (eds), *The Principles of European Contract Law and Dutch Law: A Commentary* (Kluwer Law 2002)
- 'HR 08-02-2013, ECLI:NL:HR:2013:BY4600' (2014) *Nederlandse Jurisprudentie* 497
- Hola VPN Limited, 'Safely access worldwide content' (Hola VPN Limited, 2019) available at <<https://hola.org/>> accessed 29 August 2019
- Hondius EH, 'De rechtspositie van de consument naar nieuw burgerlijk recht' (1991) 5 *Tijdschrift voor Consumentenrecht* 325
- 'The Reception of the Directive on Unfair Terms in Consumer Contracts by Member States' (1995) 3(2) *European Review of Private Law* 241
- 'Non-implementation of the Directive on Unfair Contract Terms: the Dutch case' (1997) 5(2) *European Review of Private Law* 193
- 'Algemene voorwaarden' in *Monografieën BW: Consumentenrecht* (2nd edn, Kluwer 2013)
- 'Unfair Contract Terms and the Consumer: ECJ Case Law, Foreign Literature, and Their Impact on Dutch Law' (2016) 24(3/4) *European Review of Private Law* 457
- Howells G, Marten B, and Wurmnest W, 'Language of Information, Contract, and Communication' in Dannemann G and Vogenauer S (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford University Press 2013)
- Industrie- und Handelskammer (IHK) Schleswig-Holstein, 'Aufbau eines rechtssicheren Online-Shops' (IHK Schleswig-Holstein, 2017) available at <https://www.ihk-schleswig-holstein.de/blob/swhihk24/servicemarken/serviceleistungen/broschueren/1373948/7235c012267d902ad67dd243d271fdac/Broschuere_Aufbau_eines_rechtssicheren_Onlineshops-data.pdf> accessed 9 April 2019
- International Chamber of Commerce, 'What are Incoterms® rules?' (International Chamber of Commerce, 2020) available at <<https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-2020/>> accessed 22 May 2021
- Jansen N, 'Unfair Contract Terms' in Jansen N and Zimmermann R (eds), *Commentaries on European Contract Laws* (Oxford University Press 2018)
- Jaremba U and Mak E, 'Interviewing Judges in the Transnational Context' (2014) 4(2) *Law and Method* 1
- Joppich TG, *Die Kodifikation des Transparenzgebots in § 307 BGB* (Peter Lang 2008)

- Julien J, *Droit de la Consommation* (2nd edn, Librairie générale de droit et de jurisprudence 2017)
- Kamer van Koophandel, ‘KVK-nummer: alles wat je moet weten’ (Kamer van Koophandel, 2020) available at <<https://www.kvk.nl/informatiebank/kvk-nummer-alles-wat-je-moet-weten/>> accessed 5 October 2019
- Karimi A, *Les clauses abusives et la théorie de l'abus de droit* (Librairie Generale de Droit et de Jurisprudence 2001)
- Karsten J and Sinai AR, ‘The Action Plan on European Contract Law: Perspectives for the Future of European Contract Law and EC Consumer Law’ (2003) 26(2) *Journal of Consumer Policy* 159
- Kästle-Lamparter D, ‘Art 2:403: Information Requirements for Distance and Off-premises Consumer Contracts’ in Jansen N and Zimmermann R (eds), *Commentaries on European Contract Laws* (Oxford University Press 2018)
- ‘Art 2:405: Formal and Additional Requirements for Distance Consumer Contracts’ in Jansen N and Zimmermann R (eds), *Commentaries on European Contract Laws* (Oxford University Press 2018)
- Katsh E and Rabinovich-Einy O, *Digital Justice: Technology and the Internet of Disputes* (Oxford University Press 2017)
- Kippels G, *Die Inhaltskontrolle von allgemeinen Geschäftsbedingungen im kaufmännischen Geschäftsverkehr nach § 9 Abs. 2 AGB-Gesetz unter besonderer Berücksichtigung der Klauselverbote der §§ 10 und 11 AGB-Gesetz* (Hundt Verlag 1990)
- Klimke D, *Die Vertragsübernahme* (Mohr Siebeck 2010)
- Kolb S, *Die Übergangsregelung der Richtlinie über unlautere Geschäftspraktiken* (Mohr Siebeck 2015)
- Kötz H, *European Contract Law* (2nd edn, Oxford University Press 2017)
- Krähmer D and Strausz R, ‘Optimal Sales Contracts with Withdrawal Rights’ (2015) 82(2) *The Review of Economic Studies* 762
- Krans BH, Stolker CJJM, and Valk LW (eds), *Tekst & Commentaar Burgerlijk Wetboek – Online Naslagwerk* (30 August 2021 edn, Wolters Kluwer 2021)
- Kuczerawy A and Rauchegger C, ‘Court of Justice Injunctions to remove illegal online content under the eCommerce Directive: Glawischnig-Piesczek’ (2020) 57(5) *Common Market Law Review* 1495
- Lagarde X, ‘Qu'est-ce qu'une clause abusive?’ (2006) 80(6) *Juris-Classeur périodique, édition générale* 255
- Lando O and Beale H (eds), *Principles of European Contract Law Parts I and II* (Kluwer Law International 2000)
- Lando O, Clive E, Prüm A, and Zimmermann R (eds), *Principles of European Contract Law Parts III* (Kluwer Law International 2003)
- Lazic V, ‘Arbitration Law Reform in the Netherlands: Formal and Substantive Validity of an Arbitration Agreement’ in van Erp S and van Vliet L (eds) *Netherlands Reports to the Seventeenth International Congress of Comparative Law* (Intersentia 2006)

- Leczykiewicz D, 'Regulatory Cost, the Consumer, and the EU Constitutional Framework' in Leczykiewicz D and Weatherill S (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016)
- 'Private regulation, compliance and reviewability of contracts' in Roger Brownsword, van Gestel RAJ, and Micklitz HW (eds), *Contract and Regulation: A Handbook on New Methods of Law Making in Private Law* (Edward Elgar Publishing 2017)
- Leeuw F, 'Empirical Legal Research: The Gap between Facts and Values and Legal Academic Training' (2015) 11(2) *Utrecht Law Review* 19
- Lehmann M and Ungerer J, 'Save the "Mittelstand": How German Courts Protect Small and Medium-Sized Enterprises from Unfair Terms' (2017) 25(2) *European Review of Private Law* 313
- Lodder AR, 'Directive 2000/31/EC on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market' in Lodder AR and Murray A (eds), *EU Regulation of E-Commerce* (Edward Elgar Publishing 2017)
- Egeler MGA, and van Kerkvoorden WEL, *Cyber Law in the Netherlands* (Kluwer Law International 2016)
- Loir R, 'Les nouvelles définitions du professionnel, du consommateur et du non-professionnel' (2016) 27 *Juris-Classeur périodique*, édition Entreprise 1042
- Loos M, 'Veroordeling Nederland wegens niet-omzetting Richtlijn oneerlijke bedingen' (2001) 2(9) *Nederlands Tijdschrift voor Europees Recht* 242
- and de Moor RRM, 'Hoge Raad 13 september 2013, ECLI:NL:HR:2013:691' (2013) 11(6) *Tijdschrift voor Consumentenrecht en Handelspraktijken* 262
- and Samoy I, 'The Position of Small and Medium-Sized Enterprises in European Contract Law: An Introduction' in Loos M and Samoy I (eds), *The Position of Small and Medium-Sized Enterprises in European Contract Law* (Intersentia 2014)
- and Luzak JA, 'Wanted: a Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers' (2016) 39(1) *Journal of Consumer Policy* 63
- 'Consumer Sales in the Netherlands after the Implementation of the Consumer Rights Directive' in de Cristofaro G and de Franceschi A (eds), *Consumer sales in Europe: after the implementation of the Consumer Rights Directive* (Intersentia 2016)
- Looschelders D, Olzen D, and Schiemann G, *Staudinger BGB - Buch 2: Recht der Schuldverhältnisse: §§ 241-243* (Sellier / de Gruyter 2019)
- Lopez-Tarruella A, 'A European Community Regulatory Framework for Electronic Commerce' (2001) 38(6) *Common Market Law Review* 1356-1357
- Lubasz D and Namysłowska M, 'Directive 2000/31/EC: Article 5 General information to be provided' in Schulze R and Staudenmayer D (eds), *EU Digital Law: Article-by-Article Commentary* (Bloomsbury 2020)
- Lutzi T, *Private International Law Online: Internet Regulation and Civil Liability in the EU* (Oxford University Press 2020)
- Luzak JA, 'To Withdraw Or Not To Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking Into Account Its Behavioural Effects on Consumers' (2011) 37(1) *Journal of Consumer Policy* 91
- and Mak V, 'Implementation of the Consumer Rights Directive: The Netherlands' (2014) 3(2) *Journal of European Consumer and Market Law* 127

- and Mak V, ‘The Consumer Rights Directive’ in Hartkamp AS and others (eds), *De invloed van het Europese recht op het Nederlandse privaatrecht* (Kluwer 2014)
- MacDonald E, ‘Exclusion Clauses: the Ambit of s 13(1) of the Unfair Contract Terms Act 1977’ (1992) 12 *Legal Studies* 277
- ‘Mapping the Unfair Contract Terms Act 1977 and the Directive on Unfair Terms in Consumer Contracts’ (1994) *Journal of Business Law* 441
- ‘The Emperor’s Old Clauses: Unincorporated Clauses, Misleading terms and the Unfair Terms in Consumer Contracts Regulations’ (1999) 58(2) *Cambridge Law Journal* 413
- ‘Unifying Unfair Terms Legislation’ (2004) 67(1) *The Modern Law Review* 69
- ‘UCTA Thirty Years On’ in Burrows A and Peel E (eds), *Contract Terms* (Oxford University Press 2007)
- Mackenrodt MO, *Technologie statt Vertrag? Sachmangelbegriff, negative Beschaffensvereinbarungen und AGB beim Kauf digitaler Güter* (Mohr Siebeck 2015)
- Maier-Reimer G, ‘AGB-Recht im unternehmerischen Rechtsverkehr – Der BGH überdreht die Schraube’ (2017) 70(1) *Neue Juristische Wochenschrift* 1
- Mak C, ‘Artikel 6:233 BW – Hoe de doorwerking van Europees consumentenrecht tornt aan het systeem van het Nederlandse privaatrecht’ in van de Pol F and others (eds), *Vijftig weeffouten in het BW: Een ode aan het Burgerlijk Wetboek, ter ere van zijn 25-jarig bestaan* (Ars Aequi Libri 2017)
- Mak V, ‘Full Harmonization in European Private Law: A Two-Track Concept’ (2012) 20(1) *European Review of Private Law* 213
- ‘Two levels, one standard? The multi-level regulation of consumer protection in Europe’ in Devenny J and Kenny M (eds), *European Consumer Protection: Theory and Practice* (Cambridge University Press 2012)
- ‘Enforcement and Effectiveness of Consumer Law: The Netherlands’ in Micklitz HW and Saumier G (eds), *Enforcement and Effectiveness of Consumer Law* (Springer Publishing 2018)
- *Legal Pluralism in European Contract Law* (Oxford University Press 2020)
- Markou C, ‘Directive 2011/83/EU on Consumer Rights’ in Lodder AR and Murray A (eds), *EU Regulation of E-Commerce* (Edward Elgar Publishing 2017)
- Marotta-Wurgler F, ‘Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements’ (2008) 5(3) *Journal of Empirical Legal Studies* 447
- ‘Are “Pay Now, Terms Later” Contracts Worse for Buyers? Evidence from Software License Agreements’ (2009) 38(2) *The Journal of Legal Studies* 309
- Mateusz Grochowski, ‘European Consumer Law after the New Deal: A Tryptich’ (2020) 39(1) *Yearbook of European Law*
- McKendrick E, *Contract Law* (8th edn, Oxford University Press 2018)
- McMeel G and Grigoleit HC, ‘Interpretation of Contracts’ in Dannemann G and Vogenauer S (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford University Press 2013)
- Mekki M, ‘France – The French Reform of Contract Law: The Art of Redoing Without Undoing’ (2017) 10(1) *Journal of Civil Law Studies* 223

- Messinger M, *Rechtsunsicherheiten bei internationalen elektronischen Handelsgeschäften* (Mohr Siebeck 2014)
- Mestre J, 'Clause de modification unilateral' in Buy F and others (eds), *Les principales clauses des contrats d'affaires* (2nd edn, Librairie générale de droit et de jurisprudence 2018)
- Micklitz HW, 'Reforming European Unfair Terms Legislation in Consumer Contracts' (2010) 6(4) *European Review of Contract Law* 347
- and Reich N, 'Crónica de una muerte anunciada: The Commission proposal for a "Directive on consumer rights"' (2009) 46(2) *Common Market Law Review* 471
- and Reich N, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51(3) *Common Market Law Review* 771
- Palka P, and Panagis Y, 'The Empire Strike Back: Digital Control of Unfair Terms of Online Services' (2017) 40 (3) *Journal of Consumer Policy* 367
- *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (Cambridge University Press 2018)
- Miquel R, 'The Implementation of the Consumer ADR Directive in Germany' in Cortés P (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016)
- Möllers TMJ, 'European Directives on Civil Law The German Approach: Towards the Recodification and New Foundation of Civil Law Principles' (2002) 10(6) *European Review of Private Law* 777
- Morgan J, 'The Penalty Clause Doctrine: Unlovable but Untouchable' (2016) 75(1) *The Cambridge Law Journal* 11
- Müller-Broich J, *Telemediengesetz* (Nomos 2012)
- Nebbia P, *Unfair Contract Terms in European Law: A Study in Comparative and EC Law* (Hart Publishing 2007)
- 'Unfair Contract Terms' in Twigg-Flesner C (ed), *The Cambridge Companion to European Union Private Law* (Cambridge University Press 2010)
- Neumann-Wedekindt J, *Inhaltskontrolle allgemeiner Geschäftsbedingungen, dargestellt an Vertragsabschlussklauseln* (Dissertation at the Faculty of Law at the University of Münster 1968)
- Nobis S, *Missbräuchliche Vertragsklauseln in Deutschland und Frankreich: Zur Umsetzung der Klauselrichtlinie 93/13/EWG des Rates* (Nomos 2005)
- Nolan D, 'Offer and Acceptance in the Digital Age' in Burrows A and Peel E (eds), *Contract Formation and Parties* (Oxford University Press 2010)
- Nürnberg M, *Die Durchsetzung von Verbraucherrechten: Eine rechtsvergleichende Analyse der Verbraucherrechtsdurchsetzung in Frankreich, den Niederlanden und Deutschland* (Nomos 2020)
- Palmer N and Yates D, 'The Future of the Unfair Contract Terms Act 1977' (1981) *Cambridge Law Journal* 108
- Pavillon C, 'Beter consumentenrecht: naar een scherpere consumentvriendelijke onredelijk bezwarend-norm' (2011) 63(8) *Nederlands Tijdschrift voor Burgerlijk Recht* 439

- Pearson G, 'Further Challenges for Australian Consumer Law' in Marques CL and Wei D (eds), *Consumer Law and Socioeconomic Development: National and International Dimensions* (Springer Publishing 2017)
- Pégliion-Zika CM, *La notion de clause abusive* (Librairie générale de droit et de jurisprudence 2018)
- Pellier JD, 'L'ordonnance portant réforme du droit des contrats, du régime général et de la preuve des obligations enfin ratifiée !' (2018) *Dalloz actualité* 30 April 2018
- *Droit de la consommation* (2nd edn, Dalloz 2018)
- 'Retour sur les clauses noires' (2019) *Dalloz actualité* 24 December 2019
- Piazzon T, 'L'information et la désinformation des consommateurs: Rapport français' in Straetmans G (ed), *Information Obligations and Disinformation of Consumers* (Springer Publishing 2019)
- Podszun R, Busch C, and Henning-Bodewig F, 'Behördliche Durchsetzung des Verbraucherrechts? Darstellung und Systematisierung von Möglichkeiten und Defiziten der privaten Durchsetzung des Verbraucherschutzes sowie Einbeziehung der Kartellbehörden zu dessen Durchsetzung' (Bundesministeriums für Wirtschaft und Energie, February 2018) available at <https://www.bmwi.de/Redaktion/DE/Publikationen/Studien/behoerdliche-durchsetzung-des-verbraucherrechts.pdf?__blob=publicationFile&v=13> accessed 12 December 2020
- 'Consumer Law in Germany: A Shift to Public Enforcement?' (2019) 8(2) *Journal of European Consumer and Market Law* 75
- Pohlman J and Leitner D, 'A Comparison of Ordinary Least Squares and Logistic Regression' (2003) 103(5) *Ohio Journal of Science* 118
- Poillot E, *Droit européen de la consommation et uniformisation du droit des contrats* (Librairie Generale de Droit et de Jurisprudence 2006)
- Porat A, 'The Law and Economics of Mistake in European Sales Law' (2013) 50(Special Issue) *Common Market Law Review* 127
- Portal of the Justice Authorities of the Federal and State Governments, 'Gemeinsames Registerportal der Länder' (Portal of the Justice Authorities of the Federal and State Governments, 2019) available at <https://www.handelsregister.de/rp_web/mask.do> accessed 4 October 2019
- Prince S, 'Access to Court? "Encouraging" Consumers to Use Court-Connected Mediation in Small Claims and Other Cases' in Cortés P (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016)
- Reich N, 'The implementation of Directive 93/13/EEC on unfair terms in consumer contracts in Germany' (1997) 5(2) *European Review of Private Law* 165
- Micklitz HW, Rott P, and Tonner K, *European Consumer Law* (2nd edn, Intersentia 2014)
- Riefa C and Willett C, 'Enforcement and Effectiveness of Consumer Law in the UK' in Micklitz HW and Saumier G (eds), *Enforcement and Effectiveness of Consumer Law* (Springer Publishing 2018)
- Rogers H and Clarke M, *The Unfair contract terms act 1977* (Sweet & Maxwell 1978)
- Rott P, 'Unfair Contract Terms' in Twigg-Flesner C (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar Publishing 2016)

- Rüfner T, 'Art 18:307: Passing of Risk in a Consumer Sales Contract' in Jansen N and Zimmermann R (eds), *Commentaries on European Contract Laws* (Oxford University Press 2018)
- Rutgers JW, 'Unfair Terms in Consumer Contracts' in Gullifer L and Vogenauer S (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (Hart Publishing 2014)
- Sadl U and Palmer H, 'Can Quantitative Methods Complement Doctrinal Legal Studies? Using Citation Network and Corpus Linguistic Analysis to Understand International Courts' (2017) 30(2) *Leiden Journal of International Law* 327
- Salehijam M, 'The Value of Systematic Content Analysis in Legal Research' (2018) 23(1) *Tilburg Law Review* 34
- Salkind NJ in 'Reliability of Scores' in Salkind NJ (eds), *Encyclopedia of Research Design* (SAGE 2010)
- Savin A, *EU Internet Law* (2nd edn, Edward Elgar Publishing 2017)
- Schillig M, 'Inequality of Bargaining Power Versus Market for Lemons: Legal Paradigm Change and the Court of Justice's Jurisprudence on Directive 93/13 on Unfair Contract Terms' (2009) 33(3) *European Law Journal* 336
- Schinkels B, 'Der Kommissionsentwurf einer Verbraucherrechte-Richtlinie und seine Sprengkraft für § 355 BGB' (2009) 64(15/16) *Juristen Zeitung* 774
- Schmidt-Kessel M, 'Consumer Sales in Germany after the Implementation of the Consumer Rights Directive' in de Cristofaro G and de Franceschi A (eds), *Consumer sales in Europe: after the implementation of the Consumer Rights Directive* (Intersentia 2016)
- Schulte-Nölke H and Börger A, 'Distance Selling Directive (97/7)' in Schulte-Nölke H, Twigg-Flesner C, and Ebers M (eds), *EC Consumer Law Compendium: The Consumer Acquis and its transposition in the Member States* (Sellier European Law Publishers 2009)
- Schulze R and Schulte-Nölke H (eds), *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts* (Mohr Siebeck 2001)
- Sealy LS, 'Unfair Contract Terms Act 1977' (1978) 37(1) *The Cambridge Law Journal* 15
- Sefton-Green R, 'Case Studies' in Sefton-Green R (ed), *Mistake, Fraud and Duties to Inform in European Contract Law* (Cambridge University Press 2009)
- Seidman Diamond S and Mueller P, 'Empirical Legal Scholarship in Law Reviews' (2010) 6 *Annual Review of Law and Social Science* 581
- Sibony AL, 'Data and arguments: empirical research in consumer law' in Micklitz HW, Sibony AL, and Esposito F (eds), *Research Methods in Consumer Law: A Handbook* (Edward Elgar Publishing 2018)
- Sieburgh CH, *Asser 6-III Algemeen overeenkomstenrecht* (15th edn, Wolters Kluwer 2018)
- Smits JM, 'A European Private Law as a Mixed Legal System: Towards a *Ius Commune* through the Free Movement of Legal Rules' (1998) 5(4) *Maastricht Journal of European and Comparative Law* 328
- 'Nogmaals de richtlijn oneerlijke bedingen: Nederland veroordeeld wegens gebrekkige implementatie' (2001) *Weekblad voor Privaatrecht, Notariaat en Registratie* 853
- 'Non-Performance and Remedies in General' in Busch D and others (eds), *The Principles of European Contract Law and Dutch Law: A Commentary* (Kluwer Law 2002)

- ‘Epistemology and Methodology of Comparative Law’ in van Hoecke M (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing 2004)
- ‘Party choice and the Common European Sales Law, or: How to prevent the CESL from becoming a lemon on the law market’ (2013) 50(Special Issue) *Common Market Law Review* 51
- Srivastava A, ‘The New EU Consumer Rights Directive: An Empirical Study on Compliance Issues by E-Tailers’ (2017) 32(4) *Journal of Business Law* 282
- Stein G, *Zum Spannungsverhältnis der Kontrollverfahren aufgrund des AGB-Gesetzes und § 242 BGB* (Duncker & Humblot 1982)
- Stichting Webshop Keurmerk, ‘Algemene Voorwaarden voor Webshops’ (Stichting Webshop Keurmerk, 1 June 2014) available at <<https://www.keurmerk.info/nl/home/gratis-algemene-voorwaarden/>> accessed 22 May 2021
- Stoffel-Munck P, ‘The Revolution in Unfair Terms’ in Cartwright J and Whittaker S (eds), *The Code Napoléon Rewritten: French Contract Law after the 2016 Reforms* (Hart Publishing 2017)
- Stürner M, Inchausti FG, and Caponi R (eds), *The Role of Consumer ADR in the Administration of Justice: New Trends in Access to Justice under EU Directive 2013/11* (Sellier European Law Publishers 2015)
- Susskind R, *Online Courts and the Future of Justice* (Oxford University Press 2019)
- Tanti-Dougall R, ‘Implementation of the Consumer Rights Directive: Malta’ (2014) 3(3) *Journal of European Consumer and Market Law* 187
- Tenreiro M, ‘The Community Directive on Unfair Terms and National Legal Systems: The Principle of Good Faith and Remedies for Unfair Terms’ (1995) 3(2) *European Review of Private Law* 273
- Terryn E and Vandenbulcke J, ‘Directive 2011/81/EU: Article 6 Information requirements for distance or off-premises contracts’ in Schulze R and Staudenmayer D (eds), *EU Digital Law: Article-by-Article Commentary* (Bloomsbury 2020)
- Testud M, ‘La transposition en droit interne de la directive communautaire sur les clauses abusives’ (1996) 13 *Dalloz Affaires* 372
- Teubel JP, *Rücktrittsrecht und AGB-Kontrolle nach der Schuldrechtsreform* (Duncker & Humblot 2018)
- Teubner G, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences’ (1998) 61(1) *Modern Law Review* 11
- Thompson P, *Unfair Contract Terms Act 1977* (Butterworths 1978)
- Thuiswinkel Organisatie, ‘Algemene Voorwaarden Thuiswinkel’ (Thuiswinkel Organisatie, 1 June 2014) available at <<https://www.thuiswinkel.org/veilig-online-shoppen/wat-is-thuiswinkel-waarborg/algemene-voorwaarden-thuiswinkel/>> accessed 22 May 2021
- ‘Algemene Voorwaarden Thuiswinkel’ (Thuiswinkel Organisatie, 2017) available at <<https://www.thuiswinkel.org/consumenten/wat-is-thuiswinkel-waarborg/algemene-voorwaarden-thuiswinkel/>> accessed 9 April 2019
- Tilman I, *Die Klauselrichtlinie 93/13/EWG auf der Schnittstelle zwischen Privatrecht und öffentlichem Recht* (C.H. Beck 2003)

- Tjeerd GG Raijmakers, 'Art. 233 – Burgerlijk Wetboek Boek 6' in Sjoerd P Bakker and others (eds), *Sdu Commentaar Vermogensrecht – Online Naslagwerk* (1 June 2021 edn, Sdu 2021)
- 'Art. 236 – Burgerlijk Wetboek Boek 6' in Sjoerd P Bakker and others (eds), *Sdu Commentaar Vermogensrecht – Online Naslagwerk* (1 June 2021 edn, Sdu 2021)
- 'Art. 237 – Burgerlijk Wetboek Boek 6' in Sjoerd P Bakker and others (eds), *Sdu Commentaar Vermogensrecht – Online Naslagwerk* (1 June 2021 edn, Sdu 2021)
- Tonner K, 'From the Kennedy Message to Full Harmonising Consumer Law Directives: A Retrospect' in Purnhagen K and Rott P(eds), *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz* (Springer Publishing 2014)
- 'The Consumer Rights Directive and its Impact on Internet and other Distance Consumer Contracts' in Reich N and others (eds), *European Consumer Law* (2nd edn, Intersentia 2014)
- Trochu M, 'Les clauses abusives dans les contrats conclus avec les consommateurs' (1993) *Recueil Dalloz* 316
- Turner M, Traynor M, and Smith H, 'E-Commerce Directive – UK Implementation' (2002) 18(6) *Computer Law & Security Report* 396
- Twigg-Flesner C, *A Cross-Border-Only Regulation for Consumer Transactions in the EU: A Fresh Approach to EU Consumer Law* (Springer Publishing 2011)
- 'Consumer Sales in the United Kingdom after the Implementation of the Consumer Rights Directive' in de Cristofaro G and de Franceschi A (eds), *Consumer sales in Europe: after the implementation of the Consumer Rights Directive* (Intersentia 2016)
- Schulze R, and Watson J, 'Protecting rational choice: information and the right of withdrawal' in Howells G, Ramsay I, and Wilhelmsson T (eds), *Handbook of Research on International Consumer Law* (2nd edn, Edward Elgar Publishing 2018)
- 'Consolidation rather than codification – or just complication? The UK's Consumer Rights Act 2015' (2019) 27(1) *Zeitschrift für Europäisches Privatrecht* 170
- Ulmer P, Brandner HE, and Hensen HD (eds), *Kommentar zum Gesetz zur Regelung des Rechts der allgemeinen Geschäftsbedingungen* (Verlag Dr. Otto Schmidt KG 1982)
- ULYS consortium, 'Study on Liability of Internet Intermediaries' (2007), available at: Commission, 'Studies – 2007' (European Commission, 24 March 2017) available at <<https://ec.europa.eu/digital-single-market/en/news/archive-e-commerce-directive-what-happened-and-its-adoption>> accessed 4 November 2019
- United Nations, 'Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)' (United Nations Commission on International Trade Law, 20 April 2021) available at <https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status> accessed 20 April 2021
- van Bochove LM, 'Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law' (2014) 7(3) *Erasmus Law Review* 147
- van Dijck G, 'The Ordered Apology' (2016) 37(3) *Oxford Journal of Legal Studies* 562
- 'Victim-Oriented Tort Law in Action: An Empirical Examination of Catholic Church Sexual Abuse Cases' (2018) 15(1) *Journal of Empirical Legal Studies* 142

- Sverdlov S, and Buck G, ‘Empirical Legal Research in Europe: Prevalence, Obstacles, and Interventions’ (2018) 12(2) *Erasmus Law Review* 105
- van Gerven W, ‘The Case-law of the European Court of Justice and National Courts as a Contribution to the Europeanisation of Private Law’ (1995) 3(2) *European Review of Private Law* 367
- van Schagen E, ‘The Draft Common Frame of Reference and Multilevel Governance’ (2010) 1(3) *Edinburgh Student Law Review* 74
- ‘“Better” Enforcement of EU Consumer Law: Exploring Responsive Enforcement’ in van Schagen E and Weatherill S (eds), *Better Regulation in EU Contract Law: The Fitness Check and the New Deal for Consumers* (Hart Publishing 2019)
- van Schaick AC, ‘Contents and Effects’ in Busch D and others (eds), *The Principles of European Contract Law and Dutch Law: A Commentary* (Kluwer Law 2002)
- Vasquez-Sosas R, ‘The Language of Agreement: A Content Analysis of Employment Contracts’ (2017) 12(2) *Journal of Humanities and Social Science* 2279
- Verhage E, ‘The Implementation of the Consumer ADR Directive in the Netherlands’ in Cortés P (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016)
- Viney G, ‘Un pas vers l’assainissement des pratiques contractuelles: la loi du 5 janvier 1988 relative aux actions en justice des associations agréées de consommateurs’ (1988) *Juris-Classeur périodique*, édition Entreprise 3355
- Vogenauer S, ‘Interpretation’ in Jansen N and Zimmermann R (eds), *Commentaries on European Contract Laws* (Oxford University Press 2018)
- and Weatherill S, ‘The European Community’s Competence to Pursue the Harmonisation of Contract Law—an Empirical Contribution to the Debate’ in Vogenauer S and Weatherill S (eds), *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice* (Hart Publishing 2006)
- Wagner SV, *Verbraucherschutz bei Vertragsschluss im Internet: ein Vergleich zwischen englischem und deutschem Recht* (De Gruyter 2010)
- Weatherill S, ‘Prospects for the Development of European Private Law through Europeanisation in the Court of Justice’ (1995) 3(2) *European Review of Private Law* 307
- ‘The Regulation of E-Commerce under EC Law: The Distribution of Competence between Home States and Host States as a Basis for Managing the Internal Market’ in Snijders H and Weatherill S (eds), *E-commerce Law: National and Transnational Topics and Perspectives* (Kluwer Law International 2003)
- ‘Competence and European Private Law’ in Twigg-Flesner C (ed), *The Cambridge Companion to European Union Private Law* (Cambridge University Press 2010)
- ‘Consumer Policy’ in de Búrca G and Craig P (eds), *Evolution of EU Law* (Oxford University Press 2011)
- ‘Maximum versus Minimum Harmonization: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market’ in Shuibhne NN and Gormley LW (eds), *From Single Market to Economic Union: Essays in Memory of John A. Usher* (Oxford University Press 2012)
- ‘The Consumer Rights Directive: How and why a quest for “coherence” has (largely) failed’ (2012) 49(4) *Common Market Law Review* 1279

- *EU Consumer Law and Policy* (2nd ed, Edward Elgar Publishing 2013)
- ‘Article 38 Consumer Protection’ in Peers S and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014)
- ‘Empowerment is not the only fruit’ in Leczykiewicz D and Weatherill S (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016)
- *Contract Law of the Internal Market* (Intersentia 2016)
- *Law and Values in the European Union* (Oxford University Press 2016)
- *The Internal Market as a Legal Concept* (Oxford University Press 2017)
- ‘Is maximum harmonisation a myth? The story of Directive 2019/771 on contracts for the sale of goods’ (2021) 16(2) *Revue européenne de droit de la consommation* 217
- Weber F and Hodges C, ‘The Netherlands’ in Hodges C, Benöhr I, and Creutzfeldt-Banda N (eds), *Consumer ADR in Europe* (Hart Publishing 2012)
- Webley L, ‘Qualitative Approaches to Empirical Legal Research’ in Cane P and Kritzer H (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010)
- Wendehorst C, ‘§ 312i Allgemeine Pflichten im elektronischen Geschäftsverkehr’ in Säcker FJ and others (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (8th edn, C.H. Beck 2019)
- Wendland M, ‘Vorbemerkung zu §§ 307-309’ in Mäsch G and others (eds), *Staudinger BGB - Buch 2: Recht der Schuldverhältnisse: §§ 305-310; UKlaG (AGB-Recht I und Unterlassungsklagengesetz)* (18th edn, Sellier / de Gruyter 2019)
- Whittaker S, ‘The Language or Languages of Consumer Contracts’ (2006) 8 *Cambridge Yearbook of European Law* 229
 - and Zimmermann R, ‘Good faith in European contract law: surveying the legal landscape’ in Zimmermann R and Whittaker S (eds), *Good Faith in European Contract Law* (Cambridge University Press 2000)
 - ‘Clauses abusives et garanties des consommateurs: la proposition de directive relative aux droits des consommateurs et la portée de l’"harmonisation complète"' (2009) *Recueil Dalloz* 1152
 - ‘Unfair Contract Terms and Consumer Guarantees: the Proposal for a Directive on Consumer Rights and the Significance of “Full Harmonisation”’ (2009) 5(3) *European Review of Contract Law* 223
 - ‘Distinctive Features of the New Consumer Contract Law’ (2017) 133 *Law Quarterly Review* 47
- Willett C, ‘The Directive on Unfair Terms in Consumer Contracts and its implementation in the United Kingdom’ (1997) 2 *European Review of Private Law* 223
 - ‘General Clauses and the Competing Ethics of European Consumer Law in the UK’ (2012) 71(2) *The Cambridge Law Journal* 412
 - and Morgan-Taylor M, ‘Recognising the limits of transparency in EU consumer law’ in Devenney J (ed), *European Consumer Protection: Theory and Practice* (Cambridge University Press 2012)

- Wissink M, ‘Nederland veroordeeld wegens onvolledige omzetting van de richtlijn oneerlijke bedingen – Noot bij HvJ EG 10 mei 2001, C-144-99, Commissie/Nederland’ (2002) 16(4) *Nederlands Tijdschrift voor Burgerlijk Recht* 152
- Witte PJ, *Inhaltskontrolle und deren Rechtsfolgen im System der Überprüfung allgemeiner Geschäftsbedingungen* (Dissertation at the Faculty of Law at the University of Münster 1983)
- Wolf M, Horn N, and Lindacher W (eds), *AGB-Gesetz* (C.H. Beck 1984)
- Wolters PTJ, ‘Regels over de werking van de redelijkheid en billijkheid? Een analyse van de rechtspraak van de Hoge Raad’ (2013) 8(9) *Maandblad voor Vermogensrecht* 249
- World Trade Press, *Incoterms 2010: A Comprehensive Guide to the INCOTERMS 2010* (World Trade Press 2010)
- Wrbka S, *European Consumer Access to Justice Revisited* (Cambridge University Press 2015)
- Wulf AJ, *Institutional Competition between Optional Codes in European Contract Law: A Theoretical and Empirical Analysis* (Springer Publishing 2014)
- Wurmnest W, ‘§§ 307-309’ in Krüger W (ed), *MünchKommBZB* (8th edn, C.H. Beck 2019)
- Wüstenberg D, ‘Immer wieder Online-Impressum – Die Rechtsprechung seit der UGP-Richtlinie bis und die Rechtslage insbesondere ab Juni 2013’ (2013) 9(11) *Verbraucher und Recht* 407
- Zgliniski J, *Europe's Passive Virtues: Deference to National Authorities in EU Free Movement Law* (Oxford University Press 2020)
- Zimmermann R, *The New German Law of Obligations: Historical and Comparative Perspectives* (Oxford University Press 2005)
- and Whittaker S (eds), *Good Faith in European Contract Law* (Cambridge University Press 2000)