

# Social Networking Sites' Terms of Use

## Addressing Imbalances in the User-Provider Relationship through Ex Ante and Ex Post Mechanisms\*

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### A. Introduction

- 1 Legislative instruments that impose information obligations on market actors when offering products and services or closing transactions with users currently exist at various levels and in different sectors. The idea underpinning these legal obligations is that informed users or consumers will make the right choices, and by doing so, will serve not only their own personal interests, but also promote wider public policy objectives (healthy food, green energy, safe investments, privacy-friendly information services, etc.). However, the idea of an informed user does not take into account the heterogeneity of the users nor individual preferences or behavioural constraints. This finding is reflected in the Terms of Use (ToU) of a Social Network Site (SNS), which are meant to inform the user about the rights and responsibilities that membership of such a network entails. Research suggests that these ToU are rarely read by users before agreeing to them. Also, even if users were to actually read the ToU, they would probably not be able to correctly assess the possible implications of these documents. Despite their legal duty to draft contract terms in plain and intelligible language, or obtain “informed” consent for the processing of personal data, market actors continue publishing highly unattractive and complex terms of service or privacy policies which rarely take into consideration the various needs and rights of different types of users.
- 2 Aside from issues regarding the lack of awareness and understanding of ToU, an analysis of several provisions of ToU of SNS has shown that there is cause to be concerned about the imbalance of rights and responsibilities between the SNS provider and its users.<sup>1</sup> It is likely that certain clauses (e.g. with regard to the transfer of copyright or exemption of liability) will not be upheld before European courts, based on consumer protection arguments (e.g. because they “*cause[...] a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer*”; Article 3 of the Unfair Terms Directive).
- 3 On the basis of contract or consumer rights legislation, users may challenge an SNS provider in court when they feel that their rights are being violated. However, a single user will often not be inclined to start a procedure because such procedures are time-consuming and expensive. Also, consumer claims often have a small value in comparison to the resources of the companies that they want to bring to court. Hence, the imbalance between the effort and cost and the result will often discourage consumers from starting judicial action. It is therefore the aim of this paper to assess how this situation can be remedied. We will examine whether an *ex post* remedy such as the use of collective redress mechanisms may provide a solution for consumers or users who want to act upon certain consequences of the imbalanced ToU of SNS providers. Next to this judicial option, we will assess whether we can consider a new manner of establishing standard

contracts in a consumer environment. We will focus on whether alternative *ex ante* mechanisms may be a solution to provide users with more balanced ToU. An example is the use of pre-approved contracts where an independent third party will assess and approve or disapprove of the use of a company's ToU. If approved, the ToU are valid for a certain amount of time and immune for judicial action. Another illustration of this approach is where consumer and business organisations negotiate standard contracts that create an equal balance between business and users' interests. We will also address whether there are possibilities to take into account SNS users' individual values or preferences in such standard contracts.

## I. Ex Post: Collective Redress Mechanisms

- 4 The value of goods or services in consumer contracts is often low in comparison to business contracts. It is therefore argued that consumers often do not seek redress because of the small value of the claim and the expensive and time-consuming litigation, which results in an imbalance between the efforts and the expected compensation. A study commissioned by the European Commission on consumer experiences and consumer redress showed that consumers are aware of their rights and that they do have some knowledge about the existence of redress mechanisms.<sup>2</sup> An individual court proceeding was the mechanism that most consumers recognised. Although they considered it to be beneficial because of the legally binding decision, most of them were also wary to start such a procedure because they perceived it as expensive and time-consuming. Consumers indicated they would use it only in the most serious cases.<sup>3</sup> To improve access to justice, Member States and the European Union itself have been developing other mechanisms such as collective action, alternative dispute resolution (ADR) and small claims procedures. However, alternative or online dispute resolution<sup>4</sup> and small claims procedures<sup>5</sup> require action from individual users and are currently still very much theoretical options with regard to SNS ToU. Yet, depending on the developments in SNS, this could change in the (near) future, making them viable redress options for users.
- 5 At the moment there is no coherent legal definition of collective redress in the Member States or at the EU level. The Commission's Communication of June 2013 describes the concept as follows:
 

*Collective redress is a procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action. Collective redress facilitates access to justice in particular in cases where the individual damage is so low that potential claimants would not think it worth pursuing an individual claim. It also strengthens the negotiating power of potential claimants and contributes to the efficient administration of justice, by avoiding numerous proceedings concerning claims resulting from the same infringement of law.*<sup>6</sup>
- 6 The European consumer organisation BEUC (*Bureau Européen des Unions de Consommateurs*) defines the concept more simply as "a legal procedure enabling many victims of the same harm or loss to obtain compensation by way of a single group application to court".<sup>7</sup>
- 7 The concept of collective action is not new, and probably the most well-known is the class action system of the USA.<sup>8</sup> With regard to SNS, several class actions have been filed in recent years. In April 2011, for instance, a lawsuit was filed in California with regard to the ToU of Facebook. On 26 August 2013, the case was settled and confirmed by the Court, whereby Facebook agreed to (a) establish a \$20 million dollar settlement fund and (b) amend its Statement of Rights and Responsibilities which governs the use of its site and to implement additional mechanisms giving users more information about and control over how their names and portraits are used in connection with the feature of 'Sponsored Stories'.<sup>9</sup> In the aftermath of this case, Facebook announced on 29 August 2013 that it would update its Statement of Rights and Responsibilities and its Data Use Policy.
- 8 In the EU, several Member States have adopted a form of collective action that can be divided into three broad categories:<sup>10</sup> group actions, representative actions and test procedures. In group actions, an exactly defined category of persons will bring an action to enforce their individual claims together, in one procedure, in accordance with specific rules designed for such purpose.<sup>11</sup> In a representative collective action, an organisation, a state authority or an individual on behalf of a group can start a procedure. In contrast to the collective action, the individuals that are represented are not part of the procedure.<sup>12</sup> Lastly, in a test procedure, an individual claim is tested that makes it a precedent for future similar cases.<sup>13</sup>
- 9 In total, 17 Member States have installed a collective redress procedure.<sup>14</sup> In the context of its Consumer Policy Strategy 2007-2013, the Commission ordered two studies: one on consumer evaluation of available redress mechanisms<sup>15</sup> and the other which evaluated the effectiveness and efficiency of collective redress mechanisms in the EU.<sup>16</sup> These studies show that they are not widely used and that they tend to be very different, resulting in diverse results. A comparative study found that a considerable heterogeneity exists within the three broad categories (*supra*), which implies that essential features of collective actions are regulated in diverging ways.<sup>17</sup> Overall, the studies and consultations of the Commission showed that

*the vast majority of the existing collective redress mechanisms tend to have some elements that work, and some that do not. Almost all existing collective redress mechanisms have some added value compared to individual judicial redress and alternative dispute resolution schemes. But their efficiency and effectiveness could be improved. The mechanisms have been applied in relatively few cases.*<sup>18</sup>

- 10 A briefing paper of DG for Internal Policies for the European Parliament in 2011 came to the same conclusion and stated that “[t]hese differences point to disparities between the accessibility of collective redress to European consumers in different countries and sectors. European consumers are confronted with a complex legal patchwork of solutions which are applied by some Member States but not by others.”<sup>19</sup>
- 11 Several Member States have introduced a mechanism that permits consumer organisations to start a legal procedure on behalf of the collective interests of consumers. For instance, in France, Article L421-1 of the *Code de la Consommation* (Consumer Code) stipulates that “Duly declared associations whose statutory object specifies the protection of consumer interests may, if they are approved for this purpose, exercise the rights conferred upon civil parties in respect of events directly, or indirectly, prejudicing the collective interest of consumers”. This implies that only recognised consumer organisations can start a court procedure. In 2004, the French consumer organisation *Union Fédéral de Consommateurs* (UFC) challenged the ToU of the Internet service provider AOL France. The Court judged that 31 of the 36 clauses were in breach of French law.<sup>20</sup> One of the provisions deemed illegal by the UFC was a clause whereby the client had to indemnify AOL France for all complaints and costs, including and without limitation of the reasonable legal fees. The court classified this provision as too broad because it did not define ‘reasonable costs’ and it did not give the possibility to determine the costs for the client. The ToU of AOL France also contained a cap on its own liability equal to the last six months of fees paid by the user. This was judged illegal by the court because it was in breach of the *Code de la Consommation*, which stipulates that it is inappropriate to exclude or limit the consumer’s legal rights in respect of the business or another party in the event of total, or partial, failure to perform, or defective performance by the business of any one of the contractual obligations. In March 2014, the French consumer organisation *Que Choisir?* filed a lawsuit with the *Tribunal de Grande Instance* in Paris with regard to the ToU of Google, Facebook and Twitter, and their privacy policies in particular.<sup>21</sup> The judgment is expected later this year.
- 12 In Germany, certain consumer organisations can start a judicial procedure under Article 1 of the *Unterlassungsklagengesetz* for infringing standard contract terms and practices that infringe consumer protection legislation, excluding data protection regulation. A new draft bill would extend this
- competence to claims under data protection laws.<sup>22</sup> Only qualified consumer organisations may make use of this article:
- associations with legal personality for the promotion of commercial interests, insofar as their membership includes a considerable number of businesses marketing goods or commercial services of the same or a similar type on the same market, insofar as their staffing, material and financial resources enable them actually to perform the interest promotion functions laid down in their statutes.*<sup>23</sup>
- 13 However, the *Verbraucherzentrale Bundesverband e.V.* (VZBV), a non-governmental organisation that acts as an umbrella for 41 consumer organisations,<sup>24</sup> has successfully challenged several data protection terms. This was only possible if the privacy policy of the company could be considered part of the general ToU.<sup>25</sup> With regard to SNS in particular, the VZBV challenged several clauses of the ToU of Facebook. The Berlin District Court found the following terms to be invalid: the copyright license, the use of the name and profile picture in connection with advertising and commercial content, the vagueness in the wording of the termination clause (“violates the letter or spirit of this Statement, or otherwise creates risk or possible legal exposure for Facebook”).<sup>26</sup> In November 2013, the Berlin regional court declared 25 clauses of Google’s ToU unlawful, including the liability clause, the term that stipulated that the company reserved the right to check, change and delete all data submitted in their services; the right to directly access a device in order to remove applications; as well as the right to completely cease to provide functions and features at their will.<sup>27</sup>
- 14 In Belgium, certain consumer organisations also may start a representative action on behalf of an unidentified group of people in order to defend collective consumers’ interests. For instance, the consumer organisation *Test Aankoop* sued Apple over its one-year warranty policy. *Test Aankoop* claimed it was in contradiction with European law that demands a two-year warranty for consumer electronics. In response to the claim that was filed, Apple changed its policy, now giving two years of warranty for its products.<sup>28</sup>
- 15 In the last decade, the European Commission has taken several steps to adopt a coherent approach towards collective redress mechanisms. In its Consumer Policy Strategy 2007-2013, the Commission stressed the importance of consumer redress:
- If consumers are to have sufficient confidence in shopping outside their own Member State and take advantage of the internal market, they need assurance that if things go wrong they have effective mechanisms to seek redress. Consumer disputes require tailored mechanisms that do not impose costs and delays disproportionate to the value at stake.*<sup>29</sup>

- 16 The studies in this domain (*supra*) showed that the situation in the EU was unsatisfactory (*supra*).<sup>30</sup> As a follow-up on the Green Paper, a consultation paper was published in 2009, presenting a first working analysis of the impact of policy options designed in the light of the replies to the Green Paper and inviting stakeholders to provide further information.<sup>31</sup>
- 17 In February 2012, the European Parliament adopted the resolution “Towards a Coherent European Approach to Collective Redress” in which it welcomed the Commission’s efforts to establish a coherent European approach to collective redress but at the same time stressed that the Commission “*must respect the principles of subsidiarity and proportionality with regard to any proposal that does not fall within the exclusive competence of the Union*”.<sup>32</sup>
- 18 In June 2013 the Commission adopted a package of three documents: a Communication,<sup>33</sup> a Recommendation<sup>34</sup> and a proposal for a Directive on competition damages.<sup>35</sup> The Recommendation states that all Member States should install collective redress mechanisms and take the necessary measures that are set out in this Recommendation and at the latest two years after its publication. Furthermore, Member States should ensure that the collective redress procedures are fair, equitable, timely and not prohibitively expensive. The goal of the Commission is not to harmonize but “*to list some common, non-binding, principles that Member States should take into account when crafting such mechanisms*”.<sup>36</sup> The package of the Commission has been received with mixed results, with questions raised as to whether this truly is a step forward in the collective redress process.<sup>37</sup> According to Hodges, the package of proposals “*reveals severe political compromises and serious fault lines*”.<sup>38</sup> He acknowledges that the rights of all parties are respected, that it provides some robust safeguards against abusive litigation and that economic incentives to bring speculative claims. However, he considers the Recommendation’s list of safeguards to be porous and unenforceable. Moreover, the key factors that affect collective litigation are controlled at the national level. In his view, the package will not achieve a level playing field and continued diversity will promote forum shopping between jurisdictions.<sup>39</sup> For Stadler, an important gap is “*the failure to provide clear rules for cross-border cases*”.<sup>40</sup>
- 19 Given the current fragmented situation, it seems that using a collective redress mechanism to enforce their rights is not an obvious choice for European SNS users. Not all Member States have already introduced such procedures; even in Member States that have, the procedures seem to be underused. Up until now, there have been just a few cases against SNS that were introduced by consumer organisations, mainly in Germany and France (*supra*). The underuse of collective redress mechanisms in an

SNS environment may be attributed to a general lack of awareness, not only for individual consumers but also for consumer organisations. Because of the ‘free’ nature of the services and the fact that the negative impact of certain terms is not directly tangible, both users and consumer organisations may feel that action is not immediately necessary nor possible. However, given the impact and pervasive nature of SNS on daily life, we feel that both individual users and consumer organisations should be made aware of the importance of taking action in this field in case of infringements on fundamental rights, such as privacy or consumer rights. In addition, the fact that major SNS are established outside the EU<sup>41</sup> makes it more difficult to start proceedings against these companies. Within the EU, disputes with a cross-border element are subject to the Brussels I Regulation, which lays down the rules for the jurisdiction and enforcement in civil and commercial matters.<sup>42</sup> The purpose of the Regulation is to facilitate the recognition and enforcement of judgments among Member States for internal market purposes.<sup>43</sup> In principle, when an SNS is established outside the EU, the Regulation is not applicable.<sup>44</sup> The revision of the Brussels I Regulation has resulted in Regulation No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which came into force as of 1 January 2013 and will be implemented as of 10 January 2015.<sup>45</sup> Of importance is Article 18 (1): “*a consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled*.”<sup>46</sup> This means that a consumer, as of the beginning of 2015, can bring a company that only has offices outside the EU before the courts of his domicile on the basis of Article 18.<sup>47</sup> However, the Regulation does not take into account the possibility of collective action implying, according to certain scholars, that a concentration of claims can only be brought in the court of the domicile of the defendant.<sup>48</sup> According to Tang, the reason can be found in the fact that at the time of writing the Regulation, “*there was no consideration to provide any special jurisdiction rules for this type of action*.”<sup>49</sup> This makes it very difficult to start a collective procedure against an SNS in a cross-border dispute. In sum, at the moment, the use of collective redress mechanisms to enforce SNS users’ rights is still confronted with various obstacles.

## II. Ex Ante: Pre-approved, Negotiated and Interactive Contracts

- 20 Given the reluctance of users to go to court if their rights are violated, the lack of awareness and questions about the practical implementation of ex post remedies to SNS-related issues, it may be

argued that other mechanisms should be introduced to protect users' interests. In this section we will assess the option of *ex ante* remedies – mechanisms that entail an intervention before the user has to agree to the ToU. First, we examine the introduction of pre-approved contracts by a public authority or private interest groups, sometimes referred to as administrative control;<sup>50</sup> second, we discuss the option of model form contracts that are negotiated by consumer and business interest groups.

## 1. Pre-approval of contracts

- 21 The idea to introduce a certain control by a third party with regard to consumer contracts is not a new one. Already in 1970 in the USA, Arthur Leff proposed a type of direct governmental quality control.<sup>51</sup> While Leff advocated a statutory mechanism, other US scholars favoured an administrative intervention. For instance, Kaplow and Shavell suggested the idea of a legal body – possibly a regulatory agency – writing standard form contracts and even making it mandatory in certain settings.<sup>52</sup> Bates was of the opinion that “a system of administrative regulation that certifies the validity of terms in form contracts (...) constitutes a better solution than one that depends on litigation (...).”<sup>53</sup> Gillette followed this line of reasoning and considered a procedure that lets consumers and sellers submit a contract to an administrative agency that would be able to evaluate the validity of the provisions in that contract.<sup>54</sup>
- 22 Becher has developed an extensive model of pre-approved contracts and based it on the idea of allowing third parties to review and approve standard contracts.<sup>55</sup> The purpose of this system is to ensure that consumer contracts are drafted fairly and efficiently. He considers such an approval a quality certification, indicating that an approved contract meets both substantive (fairness, efficiency, cognitive biases) and procedural (font, colour, language, etc.) standards.<sup>56</sup> Companies could get an approval for the whole contract or for part of the contract. The system would be voluntary, so incentives for companies to submit their contracts for approval are necessary. A possible incentive could be the immunisation against future claims if the contract were approved. The following aspects could be taken into account: the duration of the immunity; the scope of the immunity (which claims will be basically excluded from discussion when approved); the kind of evidence that is allowed and required in order to challenge the ordinary meaning of approved terms, etc.<sup>57</sup> Gillette calls this immunisation a “safe harbour”.<sup>58</sup>
- 23 Becher finds that this would relieve consumers from their “theoretical duty to read the fine print”, economising their time and directing their attention to crucial or problematic contracts that are not pre-approved and that could include problematic terms.<sup>59</sup>
- 24 Although he finds that the system has many advantages, he also isolates several issues that have to be taken into account. First, he finds allowing partial approval of terms necessary. This is because consumers are a heterogeneous audience, and what might seem fair for some consumers may not be for other consumers. Also, companies will need incentives, and an “all-or-nothing” regime will likely have limited success. He argues that companies would rather accept the flexible framework of partial approval. For consumers, providing a system of “all-or-nothing” would make things simpler: they would not have to survey contracts and read non-approved parts. Second, he assesses how the contract can be approved by the independent third party: binary, meaning approved or not, or by grading contracts. Becher prefers the binary option for several reasons, such as the difficulties in reaching a consistent manner of evaluating and grading the contracts and in who will do the grading, the party responsible for approving the contract or a consumer organisation.
- 25 It is possible to make the pre-approval of contracts a mandatory system. However, Becher sees different reasons to keep it voluntary, such as the significant resources that would be needed for an independent third party and a possible violation of the freedom to contract when pre-approval would be mandatory and the (probably) fierce opposition by interest groups that represent business interests. Given the network effects of SNS,<sup>60</sup> we may assume that a dominant SNS provider is less likely to have an incentive to draft user-friendly ToU. In that case, a voluntary system may not be the ideal solution. Given that the reasons for opposing a mandatory system may indeed be valid, a middle course could be a co-regulatory system, which provides incentives for the providers to join the system but still attributes enough leeway for the concrete implementation and enforcement.
- 26 Finally, Becher takes into account some challenges and anticipates criticism his model may raise. He first addresses the issue of institutional identity. The system should be able to provide strong incentives to sellers to use it; hence, resources must be provided to optimise its functioning and enforcement capabilities. Becher prefers a central institution backed by governmental funds, but acknowledges that because of the drawbacks, this system has other options such as non-profit organisations that should be looked into as well. A second issue that is raised is whether a new institution is really necessary, or whether an already existing organisation could also be an option. The use of an existing organisation could significantly reduce costs and benefit from the expertise and knowledge already available. Becher proposed the US Federal Trade Commission (FTC),

an independent agency with the objective to protect consumers, as a possibility.<sup>61</sup> In Europe, consumer organisations at the national level or European level (such as BEUC) could take up this role.

- 27 An implementation of the pre-approval of contracts can be found in Israel. In 1964, a regulatory system was established in which standard contracts were regulated directly through legislation and whereby a dual layer of judicial and administrative control was established.<sup>62</sup> Individuals and businesses can submit a contract for approval. If a term is invalidated, this does not affect the validity of other terms in the contract or the enforceability of the contract as a whole.<sup>63</sup>
- 28 However, the success of the system is limited. The 1964 law generated only sixty submissions. Therefore, the system was revised in 1982 with the purpose of increasing incentives for sellers. Despite the improvements, the success remains low. Gillette contends that the reasons for limited success are not clear and may not be transferable to other states.<sup>64</sup> However, both Becher and Gillette point to the risk of free-riding.<sup>65</sup>
- 29 This risk of free-riding may exist because, once approved, contracts may be readily available to other parties who have not contributed to the process of obtaining approval.<sup>66</sup> Gillette considers the submission by a trade organisation a possible alternative to avoid the free-riding problem.
- 30 Other risks that may be identified are related to cost, more specifically that this cost would be passed on to consumers.<sup>67</sup> In the case of SNS, which are offered to users on a 'free' basis, we may wonder how a transfer of cost would be calculated. An option may be that users will be subjected to more advertisements. Becher disagrees that cost will be problematic and is of the opinion that the "*significance of the problems associated with the Standard Form Contracts cannot easily be exaggerated, especially when keeping in mind the more vulnerable groups of consumers*". Creating such a system would promote trust and confidence between companies and consumers and would reduce transaction costs for companies and increase public confidence. According to Becher, however, for companies, the instalment of such a system would reduce some expenses and increase profits. And though it may result in higher prices, consumers may avoid provisions that they do not know how to evaluate correctly. Finally, as the mechanism would be voluntary, if a consumer does not want to pay the higher price, he or she still can choose to use the products or services of a company that does not have an approved contract and which offers a lower price.
- 31 Another objection could be the fact that since all companies will offer the same set of approved terms, consumers would be denied the possibility

of 'shopping' for different terms. However, this argument assumes that consumers actually do shop for contract terms, which is something that is questionable, for instance in the case of SNS.

- 32 Luth points to incentives for consumers, in particular whether a contract's sign of approval, like a quality label, will be something users will base their decision on. Individual terms may not be a relevant feature for a user, but the overall quality of the ToU might be. However, because of network effects (supra), SNS markets often contain a dominant player. So even when there is a SNS that is more user-friendly in its ToU and privacy policy, it might not make sense to users to be a part of that network when all their friends are members of another SNS with less user-friendly terms.

### III. Negotiated contracts

- 33 Another ex ante mechanism is the negotiating of standard terms that would eventually result in a model form contract. Consumers, including SNS users, could be involved in the drafting process, for instance through consumer organisations,<sup>68</sup> in this way also aiming to concretise participatory policy-making objectives that have been put forward at the European level.<sup>69</sup> According to Luth, this policy option would have the "*potential of improving quality of terms beyond the level of excluding onerous terms*". Also, information and expertise of both businesses and consumer groups may be used to come to a real understanding about the terms in consumer contracts.<sup>70</sup> The idea in itself is not new. Based on experiences in the Netherlands and Sweden, in 2000 the European Commission considered the possibility to encourage the establishment of systems that "*encourage the negotiation and discussion of terms with the professionals*".<sup>71</sup> These kind of negotiated model contracts could be subject to self- or co-regulation.<sup>72</sup>
- 34 Examples of this approach can be found in the Nordic Countries – Norway, Sweden, Finland and Denmark – which have installed a special state authority to enforce consumers' collective interests: the Consumer Ombudsman.<sup>73</sup> According to Viitanen, a typical feature of the Nordic system of consumer protection is the "*frequent use of preventive actions in the supervision of marketing and standard terms*". He distinguishes three instruments: advance opinions, marketing guidelines and negotiations with trade organisations concerning standard terms. The purpose of these instruments is to avoid infringements of law by informing traders and by negotiating with them. In addition, these instruments are not prescribed by law, but have been created through practice over the years.<sup>74</sup> The Nordic Ombudsmen can start negotiations in several branches of business with the respective

trade organisations. For the traders, there is the advantage that the Consumer Ombudsman is less likely to take actions against negotiated contract terms. For consumers, these negotiations could add provisions which improve consumers' contractual position compared to standard terms that were used before or even compared to the mandatory consumer contract law provisions.<sup>75</sup>

- 35 According to Viitanen, there are several positive elements about the Nordic approach. First, the only task of Consumer Ombudsman is the enforcement of consumer protection. This means that this body has been able to focus all available resources on consumer protection without the fear that the fulfilment of other tasks would get the upper hand. Second, the wide use of preventive actions and persuasion has been very successful, and most traders have been more willing to co-operate. He considers the main reason for this willingness in the possibility of hard law sanctions when persuasion fails: *"without the possibility to use hard law sanctions if necessary, the persuasive methods would not be so successful as they have been now in practice"*.<sup>76</sup>
- 36 In the Netherlands, the Social and Economic Council (SER) provides business and consumer organisations with an open framework to negotiate balanced ToU. One of the statutory tasks of the SER is to *"promote desirable trends in business and industry"*.<sup>77</sup> To achieve this goal, the SER encourages business and consumer organisations to start negotiations over ToU that are satisfactory for both parties. This is a self-regulatory process which ideally leads to the establishment of Consumer Complaints Boards composed of representatives of business and consumers.
- 37 A business organisation or consumer organisation can take the initiative to start negotiations about the ToU in a particular sector. If a bilateral agreement is reached, the business is allowed to use the standard clause of the SER which precedes the ToU.<sup>78</sup> This provision states that the terms were negotiated with the *Consumentenbond*, the general Dutch Consumer's organisation within the framework of the SER.<sup>79</sup> The number of sector consumer organisations that are involved in the negotiations is increasing.<sup>80</sup> In the framework of this mechanism, on the one hand, consumers know that the ToU for a particular sector have been carefully considered, hence strengthening their legal position. Businesses, on the other hand, have ToU that generate trust with consumers. In addition, balanced ToU may help to avoid conflicts between consumers and businesses.<sup>81</sup> For the government, this kind of mechanism has the advantage that its only task is to create the basic framework in which the system will operate.<sup>82</sup>
- 38 Luth finds several advantages with the mechanism of negotiated contracts.<sup>83</sup> First, the fact that both consumers and businesses are represented in the negotiations would allow for competing interests to be taken into account in the final model contract. Second, if these contracts have been negotiated under fair procedures, it can be expected that the terms will be fair and sensitive to the particular interests of the stakeholders. Third, because consumers have a voice in the negotiation through a representative, this should generate standard terms that are more likely to correspond to consumer preferences than one-sided ToU would. However, ensuring representativeness may involve some technical, financial and organisational assistance. Fourth, when consumers are given the chance to influence the content of standard terms, the quality of the ToU may rise. Finally, enforcement costs of regulatory agencies and courts to guarantee that companies use fair contract provisions will be lower.
- 39 A drawback of the system could be that starting negotiations and adopting negotiated contracts will be more costly in expense and effort for companies for whom it is cheaper to adopt low-quality ToU. Nonetheless, Luth<sup>84</sup> finds some incentives that can persuade companies. First, the drafting costs of ToU would be diminished because of the negotiated contract. Costs are also saved because the terms of the negotiated standard form contract are less likely to be challenged in court and even if they were challenged, the chances of being upheld by the judge are higher. Second, a negotiated contract provides predictability and certainty about the legal validity of the terms. Third, it can be regarded as a token of consumer friendliness and could enhance trust between consumers and companies. Within the same context, reputation and public goodwill could also be an important incentive for companies to adhere to the negotiated standard contract. Finally, from a business perspective, because these contracts have been negotiated by representatives of the sector, companies may rely on the fact that these documents have been developed with business interests in mind as well.
- 40 The attraction of negotiated ToU could be boosted by making the process of negotiation and obtaining the approved model not too costly and strenuous on the part of the companies. However, when the terms are easy to obtain and not all companies that use them have contributed to the negotiations, there is, again, the risk of free-riding. Therefore, Luth proposes a kind of funding mechanism for these negotiations in order to avoid free-riders. Another mechanism that could strengthen the use of negotiated terms is the enhancement of enforcement against one-sided and onerous provisions. In addition, companies could be granted a more favourable position when confronted with a claim against the model ToU, giving them a higher chance to win a dispute when they stick to a model form contract and resulting in lower legal costs.

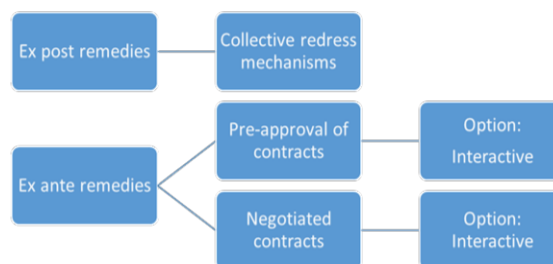
## IV. The use of interactive contracts

41 A point of criticism that is voiced with regard to pre-approved or negotiated contracts is that consumers will no longer have a chance to shop for different contracts. A way of responding to this critique may be found in the use of interactive contracts. The idea is that this kind of contract will take the form of a standardised contract, but that certain parts of the agreement can be modulated by the users.<sup>85</sup> These modular provisions will be pre-drafted by the company. The drafting party has to decide which terms have to be customisable. For instance, an SNS could specify to its users where to store their personal data, the applicable law of the contract or the license conditions for the user's intellectual property.<sup>86</sup> The seller may provide these customisations for free or at a cost and must decide which will be the default setting for each modular provision. Finally, the seller must draft its interactive contract in such a way that it invites consumer interaction. If possible, the seller may also submit its contract for approval with a third party, or negotiate balanced terms with consumer organisations (*supra*).

42 According to Chen, the use of interactive contracts allows for the avoidance of efficiency losses that sellers and users may experience when using completely standardised agreements.<sup>87</sup> For instance, in the case of a standard contract, and in particular in the case of a pre-approved or negotiated contract, a user that is willing to pay more for a specific provision cannot do this because the terms are non-negotiable. With an interactive contract, the seller is able to offer terms that are more desirable for a user – for instance, a lower price for a shorter warranty period. Since it is known that users usually do not read ToU (*supra*), interactive contracts may provide an incentive to actually do so. ToU are traditionally offered on a take-it-or-leave-it basis, and users may feel that they have no control. In this way, users who want to shop for terms and care about what is in the ToU can exert some form of control over the contract they are agreeing to.<sup>88</sup>

43 An objection to this kind of contracts is the cost. Devising an adjustable contract that is properly drafted will take time and effort and will hence be more expensive than traditional ToU. As Chen states: “attorneys must consider all the different variations in provisions and how these provisions will interact with each other when combined in various ways”.<sup>89</sup> Sellers also have to be careful to make the contract not too customisable. Users may not be given too much choice. Research has suggested that a choice overload may lead to frustration and demotivation.<sup>90</sup> Factors that influence the actual interactivity of the contract are the way the customisable terms are presented<sup>91</sup> and the degree to which users interact with each other. With regard to the latter, SNS allow users to

easily communicate amongst each other about the ToU and their modularity, letting the few users that actually do read the ToU easily contact others and express their thoughts on these terms.<sup>92</sup>



### 1.1. The role of consumer organisations

44 Given the heterogeneity and differences in preferences, organisations that represent users and consumers might be best placed to defend and promote their interests, also in the SNS environment. This would allow the voice of users being heard when SNS draw up ToU. In general, these organisations have better access to resources and expertise than individual consumers. They can also provide information and advice and can take preventive or ex post measures, like starting a collective redress procedure.



45 However, there are some elements that have to be taken into account. It is argued that consumer participation in the EU is limited and outweighed by the influence of business interest groups.<sup>93</sup> In addition, although consumer organisations express consumers' interests, their impact on policy is sometimes considered to be limited and their membership is relatively small.<sup>94</sup> Consumer interests themselves may be very diverse as the consumer group is large and diverse to start with. Correspondingly, differences between consumer organisations may result in various focus points between the organisations. The existence of multiple organisations which each have their own



area of expertise could make it very difficult to cooperate and could result in the lack of a coherent consumer voice, which could force regulators to approach a large number of organisations in order to obtain the correct consumer input. Another issue that consumer organisations are confronted with is the lack of resources. This is aggravated by the disparity with business organisations.<sup>95</sup> In order to succeed in their tasks, according to Dayag-Epstein, consumer organisations should be properly trained, properly funded and cooperate with fellow consumer organisations, not only nationally but also with other countries or on a European level. In certain legal systems, a public authority might be better or equally suited to represent consumers' interests. For instance, in the Nordic countries the Ombudsmen negotiate with trade organisations because consumer organisations in these regions are rather weak. Which party would be best placed to defend consumers will depend on the institutional arrangements and existence of competent consumer organisations in the respective legal systems.<sup>96</sup>

- 46 Yet SNS often operate on a global level, making it difficult for national initiatives to succeed in improving SNS users position vis-à-vis SNS providers on a general level. We believe that European and international organisations that advocate consumer rights, such as the BEUC or Consumers International,<sup>97</sup> could play an important part in putting these concerns on the European policy agenda on the one hand, and that the European Commission could take up a mediating role between these organisations and large SNS, such as Facebook, on the other hand.

## B. Conclusion

- 47 It is a general phenomenon that SNS users have a lack of awareness about and understanding of the ToU they have agreed to when creating a profile. In addition, it is possible that (parts of) these agreements may not be enforceable under European law, because they create a significant imbalance between SNS providers and their users. In this paper we assessed several mechanisms that could help to restore this imbalance.
- 48 First, there are ex post mechanisms which can be used after an issue has arisen. The most obvious one is starting a legal procedure before a court. However, because of the relatively low value of consumer claims in comparison to the costs and efforts of a judicial procedure, most consumers do not act upon complaints they may have. There are different mechanisms that try to provide alternatives to traditional individual legal proceedings, such as collective redress mechanisms. Our analysis has shown that while these mechanisms may seem

promising, they are still in their infancy, in many cases fragmented and not adapted (enough) to cross-border disputes. In addition, awareness of users and consumer organisations about these ex post mechanisms should be increased first and foremost. First, users need to be aware that they have rights and that they can actually take action when they feel that their rights have been infringed by SNS providers. Second, users need to be aware that there are different redress mechanisms that they can use. A long-term and sustainable awareness strategy should be created by the EU or national governments, in cooperation with consumer organisations, to inform users about their rights. This approach could also prove helpful with regard to other consumer protection issues where the interests of consumers are at stake.

- 49 We have also taken into account the option of ex ante schemes, which take a part of the responsibility away from the users and transfer it to the service providers and third parties such as consumer organisations.
- 50 We have discussed, first, pre-approved and, second, negotiated contracts, which may incorporate users' interests by introducing business and consumer organisations in the contract-making process. However, both mechanisms may suffer from the free-riding problem and the issue of cost. Pre-approving or negotiating will take more effort and will likely be more costly than using standard ToU that are readily available. Furthermore, there is the possibility that consumers, once aware of the existence of this type of contract, will never read ToU again because they think they are signing a user-friendly agreement each time. When not all companies in a certain sector adhere to the system, and users assume they are part of this negotiated agreement, they risk ending up with a contract that does not take the consumers' interests seriously. This implies that awareness-raising of users should be an important priority. The use of pre-approved and negotiated contracts may be criticised because it does not provide users with an opportunity to shop around for better terms. An interesting alternative may be the use of interactive contracts that allow for a certain amount of customisation. These contracts may also use pre-approved or negotiated contract terms whereby both the default terms and the modular terms can be discussed. This will allow for ToU that are balanced in the default as well as in the customised setting. Moreover, it gives users the opportunity to choose terms that reflect the values that are important to them (e.g. high or lower level of privacy). In order to decide whether such a system could be feasible in an SNS environment, more social/behavioural and legal research is necessary as well as a thorough and realistic cost-benefit analysis of the various systems.

51 To conclude, we have stressed that awareness-raising of users is a key issue, both for ex ante and ex post mechanisms. In addition, incentives should be created for SNS providers to adopt more user-friendly terms in general and, for instance, to submit them to an approval or negotiation process. To achieve this, supranational pressure, for instance from the European Commission, will be more effective than fragmented national initiatives. Action at the EU level would also lead to a more harmonised approach, and hence more legal certainty for users. Next to the Commission, consumer organisations and other civil society organisations that represent users' interests also have an important role to play in generating awareness about rights and obligations of SNS users and taking action when these rights are at stake.

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