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The 'No-Reading Problem' of Consumer Law

by Melvin Tjon Akon¹

Introduction

The purpose of this note is to revisit the 'no-reading problem' of consumer law, *i.e.* the fact that most consumers do not (fully) read the terms and conditions (T&Cs) of contracts prior to acceptance². The author discusses the phenomenon, the role of consumer attitudes and the main regulatory responses. As attitudes are an important determinant of readership, the author suggests that attitudes could have a more prominent role in EU consumer policy.

I Most consumers do not read contracts

It is common knowledge that most consumers do not read the T&Cs of contracts prior to acceptance, especially if those contracts are standard-form contracts³. For example, multiple academic studies indicate that less than 10% of consumers read the T&Cs⁴. In a pan-European study, the European Commission found that 60% of consumers do not (fully) read T&Cs⁵. The estimates vary by contract category. Readership rates are higher for mortgages and car rentals than for electricity⁶, which are in turn higher than for transactions on peer platforms and software purchases⁷.

II Many consumers have attitudes that discourage readership

There are several potential causes of the no-reading problem⁸. This note highlights one potential cause: consumer attitudes. The theory of planned behavior, a seminal psychological framework, has been useful in explaining how attitudes affect readership. According to this theory, a person's behavior is driven by intention, which in turn depends on three factors: attitude towards the behavior, the subjective norm (perceived social pressure to perform the behavior) and perceived behavioral control (ability to change the outcome⁹). Common attitudes towards T&Cs are:

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1. **The costs of reading the T&Cs, in terms of time or effort, do not outweigh the benefits**¹⁰. On the one hand, they are often considered long and complex¹¹, such that reading them is perceived as costly¹². On the other hand, the benefits are considered small, because some consumers (a) really want the product or service despite the T&Cs' content¹³, or (b) believe they have little to no power to negotiate an amendment to the T&Cs (perceived lack of control¹⁴). Also, some consumers believe that T&Cs barely differ among competitors, such that comparing T&Cs is fruitless¹⁵.
2. **The social norm is that very few consumers read the T&Cs, therefore there is no reason to read them.** If consumers believe that not reading T&Cs is the social norm, they are less incentivized to read the T&Cs themselves¹⁶.
3. **Consumer laws and good reputation protect consumers against unfair contract provisions.** Some consumers harbor the inaccurate beliefs that consumer laws protect them against all unfavorable T&Cs, which may be related to the fact that many consumers lack awareness of their statutory rights¹⁷. Other consumers focus more on the seller's reputation: they simply trust a seller with a good reputation not to insert unfair T&Cs¹⁸.
4. **The bulk of the T&Cs are unlikely to apply, therefore it is not necessary to read them.** Some consumers underestimate the likelihood of an event in which a contractual clause would be applicable and therefore believe that reading the contract is not necessary¹⁹.
5. **I do not care about T&Cs.** Some consumers are simply indifferent, apathetic, not interested or otherwise not 'engaged'²⁰. The degree of engagement or attention may also depend on the phase in the purchasing journey. A consumer may be less willing to read T&Cs right before providing payment details during checkout and more willing at an earlier stage (e.g. when comparing products²¹).

The point here is not to discuss the reasonableness of these attitudes, but that consumers who have these attitudes tend not to read T&Cs. They find themselves intentionally in a state of ignorance²² and may even have wholly inaccurate beliefs about the content of the T&Cs²³, with potentially adverse economic consequences.

III Not reading contracts may have real economic consequences

T&Cs apply if they are in conformity with applicable contract and consumer law provisions. Contract law assumes understanding of duly provided T&Cs and provides a person is bound to a contract when consenting to the terms²⁴. Consumer law does not deviate from this principle. The average consumer is assumed to understand the economic consequences of entering into contracts with professionals²⁵. While some provisions are 'blacklisted' as they are considered unfair in all circumstances as they are unbalanced

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to the detriment of the consumer, T&Cs that significantly favour the seller's interests are not unfair *per se* and may survive *ex post* judicial review²⁶. Thus, not reading T&Cs could lead to negative economic consequences for the consumer²⁷.

IV Attitudes do not have a prominent role in EU consumer policy

The EU legislator has responded to the no-reading problem with several regulatory measures. First, EU legal acts impose linguistic and formatting requirements on contract language to facilitate processing by consumers (see table for examples). The Court of Justice of the European Union plays an important role in policing simplified disclosures by interpreting these norms in particular instances²⁸.

EU Legal Act	Rule	Luxembourg Consumer Code (LCC)
Directive 2011/83/EU [consumer rights]	Article 6.1: precontractual information in 'clear and comprehensible manner'	Article L. 222-3 (1)
Directive 2008/48/EC [credit agreements]	Article 10.2: – information in agreement in 'clear and concise manner' Standard European Consumer Credit Information form	Article L. 224-11 (2)
Directive 93/13/EEC [unfair terms]	Article 4.2: contractual terms in 'plain intelligible language'	Article L. 211-2 (1)
Directive (EU) 2015/2302 [package travel],	Article 7.4: pre-contractual and contractual informations 'a clear, comprehensible and prominent manner'	Article L. 225-3 (3)
Directive (EU) 2019/771 [contracts for the sale of goods]	Article 17.2: 'The commercial guarantee statement shall be expressed in plain, intelligible language'.	Article L. 212-11 ²⁹

Second, standardized precontractual disclosures have been introduced to facilitate the awareness of the key terms of the agreement prior to signing³⁰. Finally, the EU legislator considers education and awareness programmes as important means that empower consumers to better understand contracts. Education and awareness are key pillars of EU consumer programmes³¹ and Member States are required to promote measures that support consumer education and awareness of their rights³². EU executive bodies have made steps towards implementing these programmes. For example, the EC plans to stimulate 'lifelong consumer education and awareness raising, for people at all stages of life from school onwards' in its strategic vision on consumer policy³³. The European Innovation Council and SMEs Executive Agency

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(EISMEA), is tasked with implementing the EU consumer programmes³⁴. The European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA) have published materials with the aim to educate consumers and stimulate readership³⁵. In Luxembourg, several programmes have been set up by the Ministry of Consumer Protection and the Financial Sector Supervisory Commission (CSSF)³⁶.

V The effectiveness of policy (also) depends on consumer attitudes

It is difficult to assess to which extent these regulatory measures have a positive impact on readership. To test the impact of simplified contract language, one could rely on qualitative survey studies or lab studies, but causal relationships are hard to establish and the findings of those research designs do not generalize well to real-world behaviours of consumers³⁷. Assessing disclosure effectiveness presents similar obstacles. Consequently, some scholars strongly support disclosure recommend further simplification, personalisation or optimization, informed by insights from cognitive psychology³⁸, while other scholars believe that disclosures are wholly ineffective or lead to information overload³⁹. Finally, the effectiveness of education and awareness programmes has been debated⁴⁰. In general, disclosure is only effective when recipients pay attention, have the capacity to interpret it and are willing to incorporate it in their decisions⁴¹. While they do not affect capacity, consumer attitudes can greatly influence attention and willingness to read⁴². Some sectorial policy frameworks already explicitly address attitudes, especially in the financial sector. For example, the EU financial competence framework that is being developed in the context of the Capital Markets Union action plan, is based on the OECD-INFE financial competences framework which explicitly incorporates consumer attitudes to support consumer decision-making⁴³. DG FISMA stresses that the financial competence framework should include attitudes and in fact, national supervisors already use attitudes⁴⁴ to tailor EU initiatives to their jurisdictions⁴⁵. There are also signs that attitudes are considered in competences frameworks, outside the financial sector, for example as an aspect of literacy⁴⁶.

EU policy efforts should consider consumer attitudes

The 'no-reading problem' is a persistent feature of consumer contracting behaviour. This note calls attention to the role of consumer attitudes in the matter. A more prominent role of attitudes in respect of T&Cs in EU consumer law and policy could be part of its solution.

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- 1 Attorney-at-law (New York, 2016). This comment is written on personal title.
 - 2 The term has been borrowed from Ian Ayres and Alan Schwartz, 'The No-Reading Problem in Consumer Contract Law' (2014) 66 Stanford Law Review 545.
 - 3 Ayres and Schwartz (n 2). Standard-form contracts are the norm in consumer contracts, Wayne R. Barnes, Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3), 82 Wash. L. Rev. 227 (2007).

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- 4 Caroline Cakebread, 'You're not alone, no one reads terms of service agreements', (Business Insider, 15 November 2017) ([link](#)), citing a Deloitte study that reported 10% ([link](#)); Rebecca Smithers, 'Terms and Conditions: not reading the small print can mean big problems' (The Guardian, 11 May 2021) ([link](#)) and Which?, 'Consumers leave online terms and conditions unread', (20 May 2011) ([link](#)), citing a Skandia study that reported 7%; Yannis Bakos, Florencia Marotta-Wurgler and David R. Trossen, Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts, *The Journal of Legal Studies*, Vol. 43, No. 1 (January 2014), pp. 1-35, reporting 1% for software contracts.
- 5 European Commission, Eurobarometer infographic 'Unfair Clauses' ([link](#)).
- 6 Ipsos London Economics and Deloitte, 'Second consumer market study on the functioning of the retail electricity markets for consumers in the EU', September 2016, p 34 ([link](#)), reports that only 57% of consumers read the T&Cs.
- 7 OECD Directorate for Science, Technology and Innovation, *Improving online disclosures with behavioural insights* (STI Policy Note, April 2018) 3 ([link](#)). However, even within a contract category, readership rates diverge. For example, mortgages are more often read than credit agreements.
- 8 Obviously, other reasons may also impact readership. For example, consumers may simply lack time, or are 'time poor' (Bakos et al (n 2)). The underlying mechanism is time poverty, see e.g. Laura M. Giurge, Ashley V. Whillans & Colin West, 'Why time poverty matters for individuals, organisations and nations', *Nature Human Behaviour* volume 4, pages 993–1003 (2020); Johannes Haushofer and Ernst Fehr, 'On the psychology of poverty', *Science* 344, 862 (2014). A discussion of these reasons is beyond the scope of this note.
- 9 Icek Azjen, 'The theory of planned behavior', 50 *Organizational behavior and human decision processes* 179 (1991); Ecorys, University of Amsterdam, Tilburg University, GfK, *Study on consumers' attitudes towards Terms and Conditions (T&Cs)*, Final report, March 2016, chapter 2, and literature cited therein.
- 10 Ecorys (n 9); OECD (n 7); Shmuel Becher and Esther Unger-Avirem, 'The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction', 8 *DePaul Business & Commercial Law Journal* 199 (2010).
- 11 Uri Benoliel & Shmuel I. Becher, 'The Duty to Read the Unreadable', 60 *Boston College Law Review* 2255 (2019); Heather Daiza, 'Wrap contracts; how they can work better for business and consumers', 54 *California Western Law Review* (2018). It would be interesting to see how technology (e.g. browser extensions or websites that parse documents and summarize content or highlight red flags, see e.g. Jessica Gyun, 'What you need to know before clicking 'I agree' on that terms of service agreement or privacy policy', *USA Today (EU edition)*, 28 January 2020 ([link](#)) may drastically alter the perception of costs.
- 12 Bakos et al (n 4). Lack of time is a common cost constraint. On the underlying issue of time poverty, see e.g. Laura M. Giurge, Ashley V. Whillans & Colin West, 'Why time poverty matters for individuals, organisations and nations', 4 *Nature Human Behaviour* 993 (2020); Johannes Haushofer and Ernst Fehr, 'On the psychology of poverty', *Science* 344, 862 (2014).
- 13 See for the consumer credit context, e.g. Abbye Atkinson, 'Rethinking Credit as Social Provision', *Stanford Law Review* Vol 71, 2019, 1152.
- 14 Ecorys (n 9); OECD (n 7); Shmuel Becher and Unger-Avirem (n 10).
- 15 Ecorys (n 9)
- 16 Ecorys (n 9).

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- 17 See e.g. observations of consumer organisations in European Commission, *Report on the application of Directive (EU) 2015/2302 of the European Parliament and of the Council on package travel and linked travel arrangements*, COM(2021) 90 final, par. 3.2.
- 18 Victoria Plaut and Robert Bartlett, 'Blind consent? A social psychological investigation of non-readership of click-through agreements', 36 *Law and Human Behaviour* 293, and literature cited therein.
- 19 This belief is also known as the optimism bias. See e.g. Christine Jolls and Cass Sunstein, 'Debiasing Through Law', 35 *The Journal of Legal Studies* 199 (2006).
- 20 Ecorys (n 9), 23; Dan Awrey, Paul Davies, Luca Enriques, Jeffrey N. Gordon, Colin Mayer, and Jennifer Payne, *Principles of financial regulation* (Oxford University Press 2016) 402-404.
- 21 Ecorys (n 9).
- 22 Some authors consider that this behaviour is at times in line with economic rationality. See for example Melvin Aron Eisenberg, 'The Limits of Cognition and the Limits of Contract', 47 *Stanford Law Review* 211 (1995), who terms this state 'rational ignorance'.
- 23 Ecorys (n 9).
- 24 Article 1108 of the Luxembourg Civil Code. This principle exists in many EU jurisdictions and is also known as *pacta sunt servanda*. See e.g. Reinhard Zimmerman, *The Law of Obligations - Roman Foundations of the Civilian Tradition*, 576 et seq; Geraint Howells, Christian Twigg-Flesner and Thomas Wilhelmsson, *Rethinking EU Consumer Law*, p 113; Johanna Niemi, 'Personal insolvency', in: Geraint Howells and Thomas Wilhelmsson (eds.), *Handbook of Research on International Consumer Law* (2nd Edition, Edward Elgar Publishing 2018) 369.
- 25 Court of Justice of the European Union, Case C-776/19, *BNP Paribas Personal Finance* [2021] ECLI:EU:C:2021:470, para 64.
- 26 See Article L. 211-3 Luxembourg Consumer Code (LCC). General terms and conditions must comply with the Book 2, Title 1, Chapter 1 LCC (*General conditions*) and Article 1135-1 of the Luxembourg Civil Code. Also, some sector-specific regulations prohibit specific clauses, but a discussion of these rules is beyond the scope of this note.
- 27 The European Commission warns consumers of the same. See European Commission, Factsheet 'Consumers' attitudes towards Terms and Conditions Source', June 2016 ([link](#)).
- 28 See for example Court of Justice of the European Union, Case C-26/13, *Kásler and Káslerné Rábai* [2014] ECLI:EU:C:2014:282, paras 71 and 72, in which the standard of 'plain, intelligible language' criterion of Directive 93/13/EEC has been interpreted requiring grammatical and substantive transparency.
- 29 These provisions implement the Directive's predecessor, Directive 1999/44/EC.
- 30 See for example Recital 22 and Article 14 Directive 2014/17/EU; Article 5(1) Directive 2008/48/EC. One could call this mechanism 'staged disclosure', see e.g. Council of the European Union, Progress Report regarding a proposal for a directive on consumer credits (2021/0171), 19 November 2021, pars. 32-33.
- 31 See Recital 8 and Article 3(2)(d) of Regulation (EU) 2021/690 of 28 April 2021 establishing a programme for the internal market, competitiveness of enterprises, including small and medium-sized enterprises, the area of plants, animals, food and feed, and European statistics (Single Market Programme) ([link](#)). Previously, the EU adopted separate consumer programmes, see e.g. Regulation (EU) 254/2014 of 26 February 2014 on a multiannual consumer programme for the years 2014-20 ([link](#)).

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- 32 Article 6 Directive 2014/17/EU; Recital 26 Directive 2008/48/EC ; Recital 10 Regulation (EU) 1169 /2011 ; Regulation (EC) 66/2010 ; Directive 2014/92/EU.
- 33 Communication from the Commission to the European Parliament and the Council, 'New Consumer Agenda - Strengthening consumer resilience for sustainable recovery' COM(2020) 696 final, p 17 ([link](#)).
- 34 EISMEA, 'Single Market Programme' ([link](#)).
- 35 EBA Factsheet 'Key tips to protect yourself when choosing online or mobile banking services ([link](#)); ESMA, 'Get Ready To Invest' ([link](#)).
- 36 See for example, Ministry for Consumer Protection, 'Ech kann dat och' (an online banking training for senior citizens), 21 September 2021; National Financial Education Strategy elaborated by the Financial Consumer Protection Committee of the CSSF and approved by the Ministry of Finance; Lëtzfïn (a platform with digital tools to promote financial education in Luxembourg, such as a budget management app to raise awareness) www.letzfïn.lu
- 37 See for some studies, FTC, 'Putting Disclosures to the Test' (Staff summary, November 2016).
- 38 Ecorys et al (n 8); OECD (n 8); George Loewenstein, Cass Sunstein and Russell Golman, 'Disclosure: Psychology Changes Everything' (2014) 6 Annual Review of Economics 391.
- 39 See for example, Omri Ben-Shahar and Carl Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press 2014); Cass Sunstein, *Too Much Information: Understanding What You Don't Want To Know* (MIT Press 2020).
- 40 See for an overview in the financial education space, Tim Kaiser, Annamaria Lusardi, Lukas Menkhoff and Carly Urban, 'Financial education affects financial knowledge and downstream behaviors', *Journal of Financial Economics* ([online 3 October 2021](#)).
- 41 Rand Corporation, *Effective Disclosures in Financial Decision Making – Final Report* (RR-1270-DOL, July 2015) [here](#); Stephen Breyer, *Regulation and its reform*, Harvard University Press 1982) p 164.
- 42 See section II. For example, one study found that pessimistic beliefs drive disclosure inattention and limit disclosure's effectiveness, helping explain deposit stickiness. See Paul D. Adams, Stefan Hunt, Christopher Palmer & Redis Zaliauskas, *Testing the Effectiveness of Consumer Financial Disclosure: Experimental Evidence from Savings Accounts*, *Journal of Financial Economics*, volume 141, Issue 1, July 2021, Pages 122-147 [here](#).
- 43 European Commission, 'Action 7 - Empowering citizens through financial literacy' ([link](#)).
- 44 DG FISMA, 'Report on the results of the feasibility assessment for the development of a financial competence framework in the EU' ([link](#)).
- 45 EBA Report on Financial Education 2019-2020, EBA/Rep/2020/12, page 16-17 ([link](#)).
- 46 The Council has recommended a European reference framework for key competences of lifelong learning. The literacy competence specifically addresses attitudes, see [Council Recommendation](#) of 22 May 2018 on key competences for lifelong learning, Annex.

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