

WRIT OF SUMMONS

Today, 15 January 2022, at the request of

CLAIMANT, Mr. Horatio Munk, Kleinestraat 1, Nijmegen , The Netherlands

In the case against

RESPONDENT, The Star Maker Insurance, Grotestraat 1, Amsterdam, The Netherlands

I:

1. served a writ on the latter address and left a copy with/to:
2. summoned to appear in person or represented by an attorney at the hearing of the District Court;
3. gave notice to respond to the claim to be formulated below, orally or in writing and stating reasons, no later than at that hearing
4. announced that if RESPONDENT does not answer or request a postponement no later than at the said hearing, Court will give him a default and will allow the claim, unless the formalities prescribed for the summons have not been complied with and/or the claim appears to him to be unlawful or unfounded.
5. announced that if RESPONDENT does appear, he will not be charged court fees.

FACTS

1. On 15 January 2021, CLAIMANT, then a 2nd year economics student at Radboud University, was about to leave for a skiing holiday in the French Alps. While reading the news, CLAIMANT learnt that, under a newly enacted French law, all holiday skiers were required to be insured for civil liability and personal accidents. Alarmed by the unexpected news, CLAIMANT consulted the first insurance comparison website prompted by Google. Through a hyperlink on this comparison website, CLAIMANT was directed to an app of RESPONDENT, which he instantly downloaded on his smartphone. Having installed the app, CLAIMANT chose the option 'login with Google'. The app requested access to CLAIMANT's Google Calendar, where the details of the upcoming trip to France were registered. Specifically, CLAIMANT's flight to France was scheduled for the next day, 16 January 2021. CLAIMANT gave the app access to his Google Calendar. Furthermore, by consenting to install the app, CLAIMANT gave RESPONDENT access to the following data:

- Model of the smartphone on which the app was installed;
- Battery level of the smartphone;
- Data produced by the smartphone's motion sensors.

Within the app, Horatio made use of the option 'chat to us live!'. The following is a transcript of the chat that took place on the app:

Paulo: Hello! I am Paulo from Star Maker Insurance. I am available 24/7 to answer all of your questions!

Horatio Munk: I need a civil liability and personal accidents insurance.

Paulo: Sure! For what period do you need the insurance?

Horatio Munk: Starting from tomorrow, for a week.

Paulo: I see you have planned a ski holiday. We do offer insurance packages for winter sports.

2. At this point, the chat was interrupted by the following push notification on CLAIMANT's telephone: "Battery level: 4%. Estimated battery life: 15 minutes". CLAIMANT found the message stressful. He opened RESPONDENT's app again, to resume the chat function. The motion sensor of the smartphone detected a quicker typing pace. The chat continued as follows:

Horatio Munk: Are you still there?

Paulo: Yes. No stress – Paulo never leaves this app! I can offer international insurance coverage for a week of winter sports, starting from tomorrow. You can view the details and accept the offer at this link. However, this offer is only valid for 15 minutes. If the time-limit expires, open a new chat with

Paulo. We cannot guarantee that the same contractual conditions will be available. It was great to chat with you! You can access, review, download and/or delete the chat log here.

CLAIMANT clicked on the link and accepted the offer.

LEGAL GROUNDS

1. RESPONDENT violated a legal obligation to inform CLAIMANT that RESPONDENT made use of an AI system within the chat function of the app

- 1.1. AI systems that interact with humans are rising in popularity, but they bring their unique set of risks as it can be difficult to distinguish when one is interacting with a human and when with a computer. Such confusions can negatively affect consumers decision-making (both accidentally and willingly) as part of an unfair commercial practice. In the latter scenario, the chatbots are often primarily "*intended to change (customers) behaviour, especially toward spending more money*".¹ For this reason, the AI Act establishes the right to know whether one interacts with a chatbot or a human. Such transparency enables maximally informed decisions and allows individuals to step back from potentially unwanted situations.² Art. 52 AI Act imposes a transparency obligation on chatbots that need to be "*designed and developed in such a way that natural persons are informed that they are interacting with an AI system, unless this is obvious from the circumstances and the context of use*".
- 1.2. CLAIMANT fell into the trap of RESPONDENT's app, which was designed to pressure and manipulate CLAIMANT into buying RESPONDENT's insurance (see issue 3). In this process, CLAIMANT was deprived of transparency, and its ability to make a fully informed decision was hindered. RESPONDENT's practices are not compatible with EU law, and CLAIMANT will establish that (1) RESPONDENT was obliged to inform CLAIMANT that it interacted with an AI system (2) CLAIMANT was not informed that it interacted with an AI system, (3) the fact that CLAIMANT interacted with an AI system was not obvious from the circumstances and the context of use.

RESPONDENT was obliged to inform CLAIMANT that it interacted with an AI system

- 1.3. RESPONDENT programmed the chatbot Paulo and actively used it to profit from its insurance business. Therefore, it should be RESPONDENT that is responsible for any non-conformity of Paulo with the AI Act. However, RESPONDENT suggested that it "*is not a 'provider', but a 'user' within the meaning of the AI Act because it has not developed the AI technology on which Paulo is based*" and as such should not be held liable for the breach of the AI Act.³ Contrary to this assertion, CLAIMANT will establish that RESPONDENT is a 'provider' in the meaning of the AI Act.
- 1.4. It is true that Art. 52 AI Act provides an obligation to ensure chatbot transparency for 'providers'. AI Act also defines 'provider' in Art. 3(2) as follows: "*'provider' means a natural or legal person, public authority, agency or other body that **develops** (emphasis added) an AI system or that has an AI system developed with a view to placing it on the market or putting it into service under its own name or trademark, whether for payment or free of charge*".
- 1.5. Art. 3(1) AI Act also contains a definition of an AI system: "*'artificial intelligence system' (AI system) means software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions,*

¹ Alex Engler, 'The case for AI transparency requirements' (*Brookings*, 22 January 2020) <<https://www.brookings.edu/research/the-case-for-ai-transparency-requirements/>> accessed 6 December 2021.

² Explanatory Memorandum, Proposal for a Regulation of The European Parliament and of The Council Laying Down Harmonised Rules On Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, COM/2021/206 [2021] 5.2.4.

³ PO1 p.5.

recommendations, or decisions influencing the environments they interact with'. The techniques and approaches listed in the Annex I are '*machine learning*', '*logic and knowledge based approaches*' and '*statistical approaches, Bayesian estimation, and search and optimisation methods*'. Therefore, to establish that RESPONDENT is a 'provider', we need to determine that it 'developed' the chatbot Paulo by using at least one of the methods listed in the Annex I.

- 1.6. Chatbot Paulo is based on the GPT-3 text generating system provided by the OpenAI company.⁴ OpenAI provides an API that allows developers to program the GPT-3 into concrete applications.⁵ The GPT-3 can be programmed for many different purposes and is currently used in over 300 apps across varying categories and industries.⁶ Therefore GPT-3 is only a building block that cannot be used for end-user applications in its stock version as programmed by OpenAI. It is essential that GPT-3 is further programmed by developers, which turns GPT-3 into a usable computer game, market survey site, search engine or chatbot. GPT-3 can be programmed in one of two ways. First, by machine learning when developers input phrases or sentences in the form of prompts and GPT-3 generates responses in the form of text completions that attempt to match the context or pattern of prompts. The inputs and responses can then be further modified. And second, by logic approaches that allow developers to directly create new text completions and program different functions such as searches, classifications, answers and files. Using these methods and their combination, the GPT-3 is programmed by developers into its final form.⁷
- 1.7. When programming a chatbot, this is the stage where a developer can input how it wants the chatbot to introduce itself. Therefore, the developers can program chatbots in a way that is compliant with any transparency rules such as the AI Act and program in messages such as "I am a chatbot". This approach is logical as OpenAI provides its services for customers worldwide.⁸ Therefore, it is convenient for the raw GPT-3 to be neutral without any transparency features. It is upon the developer to program in these features based on where it wants to use the final application. This allows to increase the transparency in places like the EU and decrease in areas without comparable AI regulation. This neutrality is crucial as GPT-3 is used not only for creating chatbots that might require transparency but also in computer games or search engines where the message "I am a chatbot" would not make any sense. Thus, a developer that uses services of OpenAI and programmes GPT-3 into a chatbot is a 'provider' in the meaning of the AI Act and is responsible for programming in the transparency requirements.
- 1.8. RESPONDENT is a legal person that used the API of OpenAI and programmed GPT-3 using machine learning and/or logic approaches into the chatbot Paulo. RESPONDENT then put Paulo into service and used it in its insurance app. This makes RESPONDENT a 'provider' in the sense of the AI Act. Therefore, RESPONDENT had the ability and according to Art. 52 AI Act also an obligation to program Paulo "*in such a way that natural persons are informed that they are interacting with an AI system, unless this is obvious from the circumstances and the context of use*".

CLAIMANT was not informed that it interacted with an AI system

- 1.9. Art. 52 AI Act mandates that when interacting with chatbots, "*natural persons are informed that they are interacting with an AI system*". Such information shall be provided in a clear and understandable way, as the primary focus of the AI Act is to equip a person with information that they are interacting

⁴ PO1 p.5.

⁵ OpenAI and Ashley Pilipiszyn 'GPT-3 Powers the Next Generation of Apps' (OpenAI 25 March 2021) <<https://openai.com/blog/gpt-3-apps/>> accessed 13. December 2021.

⁶ Ibid.

⁷ 'OpenAI-Documentation-API reference' <<https://beta.openai.com/docs/api-reference/introduction>> accessed 13. December 2021.

⁸ 'OpenAI-About' <<https://openai.com/about/>> accessed 13. December 2021.

with a chatbot from the beginning of the conversation.⁹ This interpretation is in line with current European soft law instruments. The most prominent instrument is the Code of Practice on Disinformation that was agreed by online platforms, leading social networks, advertisers, and advertising industry in cooperation with the EU Commission. It calls for "*clear marking systems and rules for bots to ensure their activities cannot be confused with human interaction*".¹⁰ This Code establishes industry-specific practices that should be followed in interpreting the AI Act to achieve a unified approach to chatbot transparency. Therefore, for a chatbot to be compliant with the AI Act and achieve the required level of transparency, it needs to be clearly marked as a chatbot.

1.10. A clearly marked chatbot needs to immediately display a message containing the word 'chatbot' to the person it interacts with. This approach still allows businesses to have substantial freedom to individualise the disclosure to best suit their needs. A study conducted for International Conference on System sciences showed that disclosure paired with other individualised information "*can fully compensate the loss of trust caused by chatbot disclosure and mimic a situation as if chatbot identity would not have been disclosed*".¹¹ An example of such a message that balances fully transparent disclosure with the business interest of keeping trust is: "*I am a chatbot. Due to my high efficiency I am able to find the best offer for you.*"¹² Therefore, it is easy to comply with the transparency obligation established by the AI Act, and it can be done in a way that has a minimal effect on the providers business.

1.11. RESPONDENT, thus, cannot be excused as it did not even attempt to incorporate a similar message that would clearly mark Paulo as a chatbot. The introductory message only states: "*Hello! I am Paulo from Star Maker Insurance. I am available 24/7 to answer all of your questions!*".¹³ No information regarding Paulo being a chatbot or not being a human is included anywhere in the conversation or in the app. This is in the breach of Art. 52 AI Act as CLAIMANT was not informed that it interacts with an AI system

Information that CLAIMANT interacted with an AI system was not obvious from the circumstances and the context of use

1.12. As stated above, the primary intent of the AI Act is to establish a clear marking system that would distinguish a chatbot from a human. However, Art. 52 AI Act allows for an exception when the information that an individual interacts with a chatbot is '*obvious from the circumstances and the context of use*'. This exception should be interpreted narrowly as it needs to comply with the principles of transparency and clarity underlying the Art. 52 AI Act and it was demonstrated that it is easy to comply with the marking system that mitigates any potential for confusion and avoids risks of potential disputes such as this one.

1.13. The AI Act is consistent with the existing EU consumer protection¹⁴ and one of its goals is to provide protection of rights and legal certainty for consumers.¹⁵ A consumer is generally defined in EU law as a '*natural person who is acting for the purposes which are outside his trade, business and profession*'.¹⁶

⁹ ibid 5.2.4.

¹⁰ Code of Practice on Disinformation (20 September 2018) <<https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation>> accessed 12 December 2021.

¹¹ Nika Mozafari, Welf H. Weiger and Maik Hammerschmidt, 'Resolving the Chatbot Disclosure Dilemma: Leveraging Selective Self-Presentation to Mitigate the Negative Effect of Chatbot Disclosure' (54th International Conference on System Sciences, Hawaii, January 2021) 2921.

¹² Ibid 2919.

¹³ PO1 p. 3.

¹⁴ Explanatory memorandum (n 2) 1.2.

¹⁵ Explanatory memorandum (n 2) 2.4.

¹⁶ Jana Valant, 'Consumer protection in the EU: Policy overview' (European Parliamentary Research Service, September 2015) 4.

Therefore if a chatbot interacts with a consumer, the AI Act shall be interpreted in accordance with the established European approach to consumer protection.

- 1.14. In order to provide a uniform interpretation of EU law and achieve legal certainty, the concept of 'average consumer' was established.¹⁷ 'Average consumer' can be defined differently based on the category of goods or services it engages with.¹⁸ When considering everyday goods or services directed at the general public, the ECJ defined 'average consumer' as someone '*who is reasonably well informed and reasonably observant and circumspect, whose degree of attention must be regarded as average*'.¹⁹
- 1.15. To further clarify the standard of 'average consumer', the ECJ points out several factors that can affect consumers attention. One of them is a product's price, as a high price means a higher level of consumer attention.²⁰ Therefore, consumers are not expected to pay a particularly high attention to inexpensive goods for everyday consumption.²¹ Similarly, there is a correlation between the frequency of a product being purchased and the information needed for the consumer not to be confused.²² This means that if a consumer purchases a product or sees an information for the first time his attention and overall ability to understand this information is lowered.
- 1.16. CLAIMANT is a consumer as it is a natural person that acted outside of its trade, business or profession when obtaining insurance from RESPONDENT, the Star Maker Insurance company.²³ When CLAIMANT opened RESPONDENT's app and started interacting with Paulo, it was the first time it conducted any service from RESPONDENT. Purchasing travel insurance is by itself not an unusual or expensive service, therefore, CLAIMANTS attention towards the product itself is on the lower side of scales of an 'average consumer'. However, the attention towards interaction with Paulo was even lower as it was only a means of getting to the final product. 'Average consumer' would focus more on the conditions of the final product and would only briefly consider information about the person or chatbot it interacts with. Therefore, the threshold for 'average consumer' to consider Paulo an 'obvious chatbot' is set up high.
- 1.17. Paulo and CLAIMANT exchanged several messages that seemed like a normal human conversation. When reading the message "*Hello! I am Paulo from Star Maker Insurance. I am available 24/7 to answer all of your questions!*"²⁴ the most attention is given to the first sentence, which seems like a genuine introduction of RESPONDENT's employee. The fact that 24/7 availability is mentioned does not equal the conclusion that Paulo is a chatbot. It can be seen as a joke intended to highlight the high quality of RESPONDENT's services, and it would not be unreasonable to think that RESPONDENT has enough employees that it is available to guarantee customer services at all times. Equally, the phrase "*Paulo never leaves this app!*" can be interpreted as a joke about RESPONDENT's high quality of service – or terrible working conditions. Especially when it is accompanied by a phrase "*No stress*" which emphasises light tone or exaggeration of the original message.²⁵ It would also be reasonable for an 'average consumer' to glance over these phrases and not to think about all their possible meanings as the primary focus is on the merits of the insurance offer. Therefore, for CLAIMANT as an 'average consumer' it was not obvious from the circumstances and the context of the conversation with Paulo that it interacted with a chatbot.

Conclusion on issue 1

¹⁷ Rasmus Dalgaard Laustsen, *The Average Consumer in Confusion-based Disputes in European Trademark Law and Similar Fictions* (Springer 2020) 6.

¹⁸ Case C-342/97 Lloyd Schuhfabrik Meyer v. Klijsen Handel BV [1998].

¹⁹ Case T-145/14 Adidas v. OHIM [2015]; see also: Case T-53/15 Credentis v. OHIM [2016].

²⁰ Case C-373/90 X(Nissan) [1992].

²¹ Case T-581/13 Polo Club v. OHIM [2015].

²² Case C-51/93 Meyhui v. Schott Zwiesel Glaswerke [1994].

²³ PO1 p.3.

²⁴ PO1 p.3.

²⁵ PO1 p.4.

- 1.18. RESPONDENT is a 'provider' in the sense of the AI Act as it programmed the chatbot Paulo by using machine learning and/or logic approaches. As a provider, RESPONDENT had an obligation to inform CLAIMANT that Paulo is a chatbot. RESPONDENT failed this obligation as Paulo was not marked as a chatbot, nor did it send any message that it is a chatbot. For an average consumer, it would not be obvious that Paulo is a chatbot from the conversation between CLAIMANT and Paulo nor from RESPONDENT's app. Therefore, RESPONDENT breached Art. 52 AI act by failing to inform CLAIMANT that RESPONDENT made the use of an AI system within the chat function of the app.
- 2. RESPONDENT has violated Article 6(1)(b) of the GDPR by accessing and processing CLAIMANT's smartphone model information; CLAIMANT's smartphone battery level, and the motion sensors. These data were not necessary to conclude the insurance contract.**

Unlawful access and processing data concerning the smartphone model

- 2.1. The decision to access and process the data of CLAIMANT's smartphone model violated the principle of lawful data processing under Article 5 GDPR. This measure set out key principles on how any processing of personal data should be conducted.

The relevant principles

- 2.2. Article 5(1)(c) of the GDPR enshrines the data minimisation principle, which stipulates that personal data shall be processed in a way that is relevant and limited to what is necessary to achieve the purpose. In addition, personal data should be processed only if the purpose of the processing could not reasonably be fulfilled by other means, pursuant to recital 39 of the GDPR.

Application of the above principles to the present case

- 2.3. A smartphone model or device ID is a unique 16-byte number stored on the mobile device that identifies every individual smartphone or tablet. It can be used to identify individual devices, geographic location, and assess the behavior of the smartphone owner. In addition, the app which has access to a smartphone model can track user interactions after installation.
- 2.4. In the present case, RESPONDENT obtained the data concerning the smartphone model instantly upon the app installation on CLAIMANT's device. The model of a smartphone is considered as personal data because it can be used to 'identify a specific device or app on that device' in the same manner as cookies and IP addresses. As such, this data matches the definition of personal data under Article 4(1) of the GDPR. Moreover, the overall operation by the Respondent fulfills the definition of processing under Article 4(2) GDPR.
- 2.5. The Respondent did not provide any acknowledgement or request any consent to constitute a legitimate ground on processing the personal data before accessing to a smartphone model. As the consent has neither been informed nor requested to the Claimant, it is obvious that no valid consent was obtained under GDPR article 6(1)(a).
- 2.6. Furthermore, the purpose of the interaction between claimant and respondent is to conclude an insurance contract. It is reasonable and proportionate to require adequate personal data to be used in relation to the purposes. However, the conclusion of the contract can be executed regardless of a smartphone model information. Obtaining and processing smartphone model is irrelevant, unnecessary, and there is insufficient evidence to indicate how it can help to achieve RESPONDENT's aims. This, therefore, constitutes a violation of the data minimisation principle laid down in article 5(1)(c) of the GDPR.
- 2.7. For all the above reasons, it is submitted that the retrieval and processing information on smartphone models does not have any legitimate basis. RESPONDENT did not process CLAIMANT's personal data legally as provided in article 5(1) GDPR, consequently violating the data minimisation principle under article 5(1)(c) GDPR.

Unnecessary access to battery level and smartphone's motion sensors

2.7. RESPONDENT assessed and used irrelevant and unnecessary personal data in a consumer-abusive manner. This violated a lawful processing under article 6(1)(b) of the GDPR.

Application of the above principles to the present case

2.8. The Battery Status API which allows current battery level to be queried can be used as a short term identifier to track the device. By combining information on the smartphone model, the battery level, and other identifying features used to fingerprint a device, RESPONDENT can identify the identity of CLAIMANT. As such, it falls within the definition of processing under Article 4(2) GDPR.

2.9. Moreover, the aforementioned data which has been accessed and processed by RESPONDENT is irrelevant and not necessary to perform any contractual obligation between the parties. RESPONDENT did not need any information on battery level and smartphone motion sensors to conclude the insurance contract. Thus, this processing does not fall into the scope of a legal processing under Article 6(1)(b) of the GDPR in a similar manner as the processing of information about the smartphone model.

2.10. Through the app, RESPONDENT obtained access to CLAIMANT's battery status and data generated from the smartphone's motion sensors. It also appeared that RESPONDENT failed to provide any method to allow CLAIMANT to deny access to the data. Therefore, no legitimate consent was given from the Claimant under GDPR article 6(1)(a) in this case.

Conclusion on issue 2

2.11. In light of the circumstances illustrated above, RESPONDENT has unlawfully processed CLAIMANT's data, under article 6(1)(b) GDPR.

3. Manipulation of CLAIMANT's behaviour Violation of the AI Act

3.1. In the AI act, a clear reference to prohibited artificial intelligence practices is stated in Article 5. Art. 5 contains several requirements to be fulfilled, which consist of the following criteria:

- i. An AI system needs to be put into service on the market.
- ii. The AI system deploys subliminal techniques beyond a person's consciousness.
- iii. The AI system, through the use of these subliminal techniques, materially distorts a person's behaviour.
- iv. This change in behaviour is likely to cause that person or another person physical or psychological harm.

3.2. Firstly, in this situation there is (and in no contradiction to what is mentioned in point 1) the case that there is an AI system that is being actively used by respondent to communicate with claimant. This coincides with what is defined as an AI system in article 3(1), as the system clearly generated outputs in the form of conversation and advice on purchasing of insurance contracts. This AI system is deployed in service of respondents insurance website. Thus the criterion i. is fulfilled.

3.3. Secondly, the AI system deploys subliminal techniques beyond a persons consciousness. This is also given, as the respondents AI system made great use of the battery percentage and motion sensors to act on the apparent stress that claimant was under during the conversation. Based on the remaining 15 minutes of battery life, the AI system constructed a limited time offering, thus restricting claimants freedom of choice and coercing claimant to accept the offer in a rapid manner, without having sufficient time to consider the offer and make an informed choice about it. This is expedited by the fact that respondents AI system included a disclaimer to the contents of the offer, especially in the

contractual conditions. Even though this disclaimer may not intend to distress claimants choice further, a reasonable person may be inclined to believe that a later offer may not be as advantageous in terms of price or conditions as a later one may be after the 15 minute timer had elapsed. By reasoning of opposites, why would the AI deem it otherwise necessary to inform claimant of the possible change in conditions, if the offer remained the same either way.

- 3.4. Furthermore, the deployed techniques of the AI system worked beyond claimants consciousness, as the collected motion sensor and battery data were paramount to the way the AI communicated with claimant. Despite the data collection being agreed to when installing the app, claimant never knew when such collected data would be utilised and in what way. This renders the subliminal factor of the techniques a certainty. Proof of this is provided when the AI detected a stressful typing pattern in the motion sensors and started its sentence with “no stress” indicating that the AI was aware of the data being provided to it, and using it in the direct communication with claimant
- 3.5. Thirdly, the AI system, through said subliminal techniques, materially distorted the persons behaviour. As mentioned before, despite the AI responding with ‘no stress’, the AI in fact did employ a counter tactic to influence claimants freedom of choice. Both the aforementioned constraint of time, limitedness of the offer, as well as the suggestion of different conditions outside of the 15 minute timeframe of the offer, suggest that the AI was actively seeking to distort the claimants options and thought process. In the interest of the aforementioned factors, claimant was unable to rationally consider all options, and acted under stress due to the notification of low battery percentage as well as a common pressure exerted due to the impending issues that may occur if claimant was unable to acquire the required insurance package for his destination country of France. It can therefore be said without a doubt that the AI system had a material influence on the behaviour, which was mainly influenced under pressure and stress, which the AI used to its advantage to incentivise the purchase of the insurance product.
- 3.6. The fourth criteria is also fulfilled, as claimants influence of choice by the AI had caused a great level of stress and psychological discomfort. This suffices the criterion of psychological harm as stated in the fourth criteria. The psychological harm arose from the change of behaviour of the AI’s influence, as the aforementioned factors of time limit, limitation in offer conditions and overall communication with claimant in this time of stress expedited his inability to choose the insurance package that would serve his needs best. Due to lack of comparison or sufficient offer of alternatives, the AI essentially propagated the insurance package of its choosing as the only option that claimant would have. Instead of giving claimant the space and opportunity for choice, it opted to make use of the already existing stress levels of claimant to abuse the position of vulnerability that he was in. this resulted in a form of increased stress and discomfort, which can only be traced back to the influence of the AI in the sale of the insurance package.
- 3.7. It can therefore be concluded that respondent violated article 5 of the EU AI Act.

Violation of EU and national consumer Law

- 3.8. The Unfair Commercial Practices Directive stipulates in its chapter 2 section 2 a range of Aggressive commercial practices. Especially Article 9 lists for a violation of good commercial practices the following:
“In determining whether a commercial practice uses... undue influence, account shall be taken of:
a)
d) The exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product”
- 3.9. Notwithstanding the actions of the AI, the directive refers to the trader in article 2(a) as the natural or legal person who in essence wishes to sell its product to a consumer. In this case respondent fulfils

such a criterion. As has been mentioned previously, the choice of purchase of the insurance product of claimant was influenced by a restriction in choice, time, ability to properly review the offer and the insinuations used by the AI to communicate a false representation of its practices. In essence, the trader exploited the fact that claimants journey to France was soon to happen, as well as his low battery percentage to impair claimants judgement. This can be considered a specific circumstance within the meaning of article 9(d) of the directive. The trader, in this case respondent is aware of this circumstance through data such as the motion sensor data, google calendar data, and battery percentage of claimants phone, provided to it through the app. The offer of respondent to claimant was tailored to the collected data and the situation he was under, and used to construct an offer which was both limited in time, as well as options and freedom of choice. This influenced the consumers decision with regard to the product as mentioned in art 9(d) as the conditions of the offer only lasted for 15 minutes, and can thus be considered a unique product offering which is restricted in customisability, and time of acceptance. In essence the due stress and pressure contributed to such an influence and thus fulfils the criteria of being considered an aggressive commercial practice.

- 3.10. In relation to the AI Act's article 5 wording of criterion iii: the fact that the AI system, through the use of these subliminal techniques, materially distorts a person's behaviour, is also reflected in the wording of article 5 of the Unfair Commercial Practices Directive. Especially under article 5(2)b, the description of a material distortion of economic behaviour with regard to the product of the average consumer is closely connected to that of article 5 AI Act. Heroin the same reasoning which is used to establish a fulfilment of criteria iii. also applies to article 5 of the Directive. Without falling into repetition, the choice to go with the insurance package which was proposed by respondent, was heavily influenced by the aforementioned factors and thus contributes to a change in economic behaviour of claimant through abusing the limited time constraint and stress to respondents advantage of sale of its insurance product. As article 5(1) states, unfair commercial practices are strictly prohibited, and thus an instant violation and classification as an unfair commercial practice is established.
- 3.11. The Unfair Commercial Practices Directive is implemented in the Dutch Civil Code in its Book 6 article 193g. In addition to what is stated in the Directive, Article 193g under g states explicitly that a claim of a limited time offering, or special offering conditions apply, which is used to push the consumer to immediately decide on a product without giving them the opportunity to take an informed decision, is considered to be an unfair commercial practice. This directly relates to the situation as mentioned previously, where the battery percentage of claimant has lead the AI to construct an offering which was both limited in time and limited in applicability of contractual conditions. this has forced claimants hand, by limiting his opportunity to consider the offering, and fearing a possibility of less favourable contractual conditions, if he were to conclude the contract after the initial acceptance time for the first contract had elapsed. Since this condition is fulfilled, article 193g considers this as a 'blacklist' offence, wherein there is no debate on whether the practice is unfair or not. It is directly presumed that if such a practice is proven, it is unfair and thus violates the law.
- 3.12. Furthermore, if the question of burden of proof should arise, article 193j under 1 states that if claimant makes a complaint under art 193g, it is upon respondent to prove that such a claim is unfounded. For the sake of completeness, it must also be stated that for aggressive commercial practices article 193h of the Dutch Civil Code is a mirrored image of article 9 of the directive and has thus also been violated under the same reasoning as has been mentioned previously for article 9 of the directive.

Conclusion on Issue 3

- 3.13. It can therefore be concluded that in terms of EU consumer law, both article 9(d) and 5(2)b of the Unfair Commercial Practices Directive have been violated. Furthermore, Dutch consumer laws have also been violated as per article 193g under g and 193h of the Dutch Civil Code.

4. CLAIMANT has suffered damage and is entitled to compensation

Liability ('aansprakelijkheid')

4.1. Respondent has violated the GDPR and AI Act and has unlawfully manipulated claimant's behaviour. The latter results from a violation of article 9(d) and 5(2)(b) of Unfair Commercial Practices Directive (as implemented in Dutch law) and the violation of article 6:193g and 6:193h of the Dutch Civil Code. This unlawful behaviour is the basis for respondent's liability ('aansprakelijkheid') via article 6:162 of the Dutch Civil Code ('onrechtmatige daad', or 'tort' in English), while the GDPR itself, in article 82, enshrines a right to receive compensation for infringement of the Regulation. In order to determine the damages and the resulting compensation, it first needs to be examined if there are damages, and what kind of damages there are in the meaning of the Dutch Civil Code (DCC). Secondly, once the damages have been ascertained, investigation of a causal link between the damages and the violation will be necessary (art. 6:98 DCC). Finally, once the liability of respondent has been determined, it is also necessary that the damages can be reasonably attributed to respondent.

Is there a right to compensation?

- 4.2. In the Dutch (civil) legal system, the damages that can be compensated are damages that consist of financial loss or other disadvantages ('ander nadeel'), also known as immaterial damages (art. 6:95 DCC). An example of compensation for immaterial damages is compensation for the psychological suffering resulting from an accident. These are not purely financial damages, but can, under certain circumstances, be compensated. For specifically the infringement of the GDPR, art. 82 GDPR gives claimant the right to pursue compensation for material or non-material damage resulting from the infringement of the Regulation. In light of (a lack of) case law of the Court of Justice of the European Union relating to 'damages' in a European sense, a broad interpretation of 'damages' may be necessary to fully take into account the objectives of the GDPR and to guarantee its full effectiveness. However, the GDPR does not mention what 'damages' exactly means, nor has the Court of Justice explained the concept of 'damages' within European Law. For this reason, we will need to look at the Dutch meaning of damages, 'schade', and, if necessary, interpret it in accordance with European Law to provide effective redress.
- 4.3. In this case, claimant has suffered stress and psychological discomfort resulting from respondent's unlawful behaviour. This is not a financial loss, but can be qualified as other damages ('ander nadeel', art. 6:106 DCC). Specifically paragraph one, subsection b of art. 6:106 DCC is relevant in this case: 'The injured person has a right to fair compensation for damages that do not consist of financial loss [...] if the damages consist of bodily harm, damage to his honour or reputation, or has otherwise suffered personal harm.' The category of 'or has otherwise suffered personal harm' ('persoonsaantasting op andere wijze') is relevant in this case. This category can be further divided into (i) psychological harm ('geestelijk letsel') and (ii) personal harm without psychological harm (though psychological harm can still be involved, albeit to a lesser degree).
- 4.4. In the judgment of the 15th of March 2019, the Supreme Court of the Netherlands clarified the second category. The Supreme Court repeated that there can also be personal harm without psychological harm involved. The nature and gravity of the infringement and the consequences for the injured party can result in the qualification of 'personal harm' having been done to the claimant. It is not necessary that the infringement is the violation of a fundamental right, nor does the infringement of a fundamental right lead to the conclusion that there is personal harm. Also relevant is that the nature and gravity of the infringement can lead to such obvious consequences for the injured party, that personal harm can be assumed. In principle, concrete data will be necessary to substantiate these claims, unless the consequences of the infringement are obvious. The concrete data in this case can be found in more detail in issues 1 through 3, where the different violations and infringements are

detailed. Among other things, the infringement led to stress and psychological discomfort: CLAIMANT was not able to sufficiently consider the insurance offer, which led to stress and sleepless nights during the skiing holiday. As a result, CLAIMANT suffered psychological damages. Furthermore, as a result of the unfair business practices by respondent, claimant lost control of his personal data, which led to a violation of the GDPR. One of the main objectives of the GDPR is giving the data subject control of their personal data. Therefore, because this principle has been violated, there has been de facto a severe violation. This loss of control leads to the obvious consequence of the need to compensate the damages suffered by CLAIMANT.

- 4.5. It is important to not be too strict with this 'EBI-formula' elaborated by the Dutch Supreme Court. The judge will need to interpret 'damages' and the right to compensation in accordance with the aim and objectives of the GDPR and AI Act – i.e. protecting the personal data of natural persons and protecting against the misuse of AI systems – in order for there to be effective redress. The principle of effectiveness requires Member States to not render claims based on EU law impossible in practice or excessively difficult to enforce. Claimant requests compensation on the basis that European law has been violated. Therefore, a strict interpretation of damages ('schade') in the meaning of the Dutch civil code, which could possibly lead to no compensation being granted to claimant, would not lead to effective redress.
- 4.6. For this reason, the damages claimant suffered are eligible for compensation (art. 6:95 DCC).

Causal link ('causaal verband')

Conditio sine qua non and attribution according to reasonableness ('toerekening naar redelijkheid')

- 4.7. Conditio sine qua non is the simplest link in the causal chain: would there still have been damages, if there was no infringement/violation on the part of RESPONDENT? This question can be answered with a simple 'no'. If RESPONDENT did not unlawfully make use of CLAIMANT's data and stress, there would have been no damages. CLAIMANT would then have been able to make a more informed decision regarding the insurance offer and would not have suffered stress and discomfort resulting from the manipulation.
- 4.8. In light of the Kone judgment, the requirement of a causal link between the infringement and the immaterial damages claimant suffered should not be interpreted too strictly in order not to diminish the effect of the GDPR. For example, art. 82 explicitly mentions that any 'person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.' Being too strict with the causal link will lead to a paper tiger: the law will look threatening, but will be almost unenforceable. Enforcement of this right to receive compensation for the immaterial damage that CLAIMANT has suffered is important to dissuade RESPONDENT and other companies from using the same business practices. Therefore, the damages can be reasonably attributed to respondent.
- 4.9. Further factors that can also be relevant for the question if the damages can be reasonably attributed to respondent are the following.
- The foreseeability of the consequences of the infringement: RESPONDENT should have known that its use of chatbot and personal data could lead to damages.
 - The closeness of the infringement and the damages: there is a direct causal link between the infringements and the damages.
 - The objective of the standard of protection: the purpose with which the standard of protection was created determines the scope of protection of this standard and, consequently, whether the attribution of the damage suffered is justified. As noted above, specifically the GDPR gives the right to compensation.

- The nature of the activity: the damages were caused through RESPONDENT's business practices, which are aimed at turning a monetary profit.
- The nature of the damages: CLAIMANT has suffered immaterial damages because of RESPONDENT's unlawful behaviour.

In conclusion, the damages are eligible for compensation and can be reasonably attributed to RESPONDENT.

Loss estimation ('schadebegroting')

4.10. CLAIMANT requests RESPONDENT to compensate the damage he suffered in the amount of €5.000,00. The court shall assess the damages in the manner most appropriate to its nature. If the extent of the damages cannot be precisely determined, it shall be equitably estimated (art. 6:97 DCC). In case of immaterial damages, present in this case, the damages will be estimated in regards to fairness ('billijkheid'). The court will need to make the theoretical comparison between the situation without any damage-causing events and the current situation; what would the situation have been in that case and has there been granted compensation in similar cases? In conducting this assessment, the court should consider (among other factors) that CLAIMANT suffered psychological harm for an extended period of time, and was thus unable to enjoy his ski holiday, for a period of approximately a month. Furthermore, CLAIMANT has no specific (legal) knowledge of how to protect and enforce his privacy-related rights, while RESPONDENT is a complex organization with knowledge of the law and a responsibility to adhere to it. However, RESPONDENT has failed to react to CLAIMANT's requests to settle this dispute amicably.

Conclusion on issue 4

4.11. The damages that CLAIMANT suffered are eligible for compensation. There is a causal link between the infringement and the damages suffered. The damages suffered can be reasonably attributed to RESPONDENT. All requirements for compensation of immaterial damages have been fulfilled. For this reason, CLAIMANT should be awarded the requested €5.000,00 in compensation. This compensation is not to be seen as punitive damages nor as purely symbolic compensation, but as rightful compensation for the infringements. Without compensation, there would be no effective redress of EU law violations.

In light of the above, CLAIMANT puts forth the following

Prayer for relief

CLAIMANT asks the court to:

1. Declare that RESPONDENT has acted unlawfully, for all of the reasons stated above;
2. Order RESPONDENT to compensate the damage that CLAIMANT has suffered as a consequence of RESPONDENT's unlawful behaviour, in the amount of € 5.000,00, or in a different amount to be quantified by the Court;
3. to pay the costs of these proceedings, within fourteen days after the date of the judgment, and - should payment of the legal costs not take place within the set term - to increase this with the statutory interest on the legal costs from the said term of payment, all this to be provisionally enforceable to the extent possible.

The Bailiff _____.