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Master's Thesis

The Theoretical and Practical Issues of Control of Unfair Terms in Digital Services

Teorinės ir praktinės nesąžiningų sąlygų skaitmeninėse paslaugose kontrolės problemos

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ABSTRACT AND KEY WORDS

This work examines the nature of unfair terms and how they are regulated in digital services under the Unfair Contract Terms Directive (UCTD). The main goal of this study it to identify the current theoretical and practical issues which exist in terms of controlling unfair terms in the digital landscape. It also involves exploring how Artificial Intelligence (AI) can help identify and handle these contractual provisions. Besides, the study explores the difficulties that prevent fairness and transparency in digital agreements. As a result, the main findings and proposals are presented to improve the legal framework and ensure it adapts to the demands of the digital era.

Key words: consumer, digital service provider, AI, transparency, personal data, harmonisation, indicative list.

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LIST OF ABBREVIATIONS

AI	Artificial Intelligence
CJEU	Court of Justice of the European Union
DSP	Digital Services Provider
DSDC	Digital Content and Digital Services Directive
EU	European Union
EUCFR	Charter of Fundamental Rights of the European Union
ToS	Terms of Service
T&C	Terms and Conditions
UCTD	Unfair Contract Terms Directive

INTRODUCTION

Relevance of the topic. The digital world has completely changed how services are offered. This has also reshaped the agreements that govern these interactions. Online platforms have become a central part of everyday life. Accordingly, with their rise, online contract terms have become more common, often differing significantly from traditional contract terms. These differences between traditional contract terms and online contractual provisions are not just technical. The latter brings unique challenges, particularly in ensuring fairness and protecting consumers. Nowadays, the Unfair Contract Terms Directive (UCTD) is the key legal framework in the European Union (EU) that deals with unfair terms in consumer contracts. However, this directive was created at a time when digital services and online platforms did not exist in the way they do today. This raises important questions about its ability to address the challenges of today's digital transactions. Therefore, it is important to explore whether there are theoretical and practical problems in controlling unfair terms in digital services and, if they exist, to identify them. This approach makes it possible to identify weaknesses in the current legal framework and propose ways to improve it.

The Object of this thesis is to explore unfair terms in digital services, with a focus on their nature, characteristics, and how they are regulated under the current legal framework, particularly the UCTD. It also addresses challenges associated with digital services and online platforms in comparison to traditional contracts.

The aim of this thesis is to reveal the theoretical and practical problems in the control of unfair terms in digital services and to address these challenges by proposing practical solutions. The goal is to improve the legal framework to ensure it can effectively respond the demands and challenges of today's digital world.

The tasks of this thesis are 1) to examine the current legal framework, mainly focusing on the UCTD, while also taking into account relevant provisions from other regulations or directives where applicable. This involves analyzing any changes or developments made to improve the regulation of unfair terms in digital services; 2) To analyze unfair terms in digital services by examining their nature and characteristics, with a focus on their impact on consumers; 3) To analyze the relevant case law to understand the interpretation and enforcement of the UCTD.

Methods:

Review of scientific doctrine – is conducted to examine key legal and doctrinal concepts, such as the nature of unfair terms, personal data, counter-performance, minimum harmonisation, and transparency.

Document analysis is used to evaluate Court of Justice of the European Union (CJEU) case law related to the UCTD and EU legal acts. It is also applied to reveal the gaps in the existing framework, with the goal of developing effective solutions to address these issues.

The Linguistic Research Methodology is used to interpret and clarify the concept, scope and objectives of the UCTD in the context of controlling unfair terms in digital services.

Qualitative Research method is used to identify the main theoretical and practical problems in controlling unfair contract terms in digital services and to explore consumer perceptions of unfair contractual provisions in digital service contracts.

Originality: This thesis provides a valuable contribution to the study of the control of unfair terms in digital services. Different from most studies, which tend to examine unfair terms in a general context, this paper mainly focuses on the digital landscape. This is an area that has not yet been fully explored. Furthermore, this thesis provides an in-depth analysis of the CJEU case law and relevant literature. Besides, consumers are interviewed as part of the qualitative research to gain a deep understanding of the challenges they experience in the digital landscape relating to unfair terms. This approach revealed gaps in the current legal framework and offered solutions to address those drawbacks and promote fairness in digital service contracts. Consequently, this thesis offers significant ideas for academics for further research.

Main Sources: During the research for the master's thesis, a wide range of sources were explored, including case law from the CJEU, EU legal acts, books, academic journals, and many others. These sources were key to addressing the research question and achieving the goals of the thesis. In exploring the framework of the UCTD and its role in addressing unfair terms in digital services, Caterina Gardiner's book, "Unfair Contract Terms in the Digital Age: The Challenge of Protecting European Consumers in the Online Marketplace," is one of the main references. In this work, she examines the framework of the UCTD and

how this directive applies to online contracts. Furthermore, she examines whether the UCTD is effective in the process of dealing with the problems that come with digital contracts today. In this regard, another valuable source was the case law of the CJEU, which offered important interpretations of the application and scope of the UCTD. The thesis also places significant attention on the harmonisation of the UCTD, in this context Hans-W.Micklitz's work, "Reforming European Unfair Terms Legislation in Consumer Contracts." was a valuable source for this research. In this study, the author examines the challenges of establishing a unified standard to regulate unfair contractual provisions across EU member states. He also highlights the difficulties in ensuring consistent case law due to the unique laws and traditions of each country. Additionally, while exploring the idea of data being used as a form of payment, the academic article "Data as Counter-Performance: What Rights and Duties Do Parties Have?" by Axel Metzger was very significant. In this article, the author explores the legal impacts of recognizing data as a form of payment in contracts with the main focus on the rights and obligations of both consumers and suppliers. Additionally, the academic article "Wanted: a Bigger Stick on Unfair Terms in Consumer Contracts with Online Service Providers" by Marco Loos and Joasia Luzak was very informative and valuable to understand the types of unfair contractual provisions which are used by online service providers. In this article, they discuss the importance of challenging these terms in court and recommend methods such as ex officio reviews by national courts. They outline that these actions could harmonise practices among online service providers and improve legal certainty for consumers and traders. Additionally, the academic article: "CLAUDETTE: An Automated Detector of Potentially Unfair Clauses in Online Terms of Service" by Marco Lippi, Przemysław Pałka, Giuseppe Contissa, and their co-authors was very important in terms of understanding how AI can be used to address unfair terms in digital services. This article also provides valuable information on CLAUDETTE. This is an AI tool which was designed to identify unfair clauses in online services.

1 FAIRNESS, TRANSPARENCY, AND CONSUMER PROTECTION: AN IN-DEPTH ANALYSIS OF THE UCTD

1.1 The Aim and Scope of the UCTD

The unfair contract terms directive (UCTD) suggests protection to consumers against contract terms which have been drafted in advance in all kinds of business-to-consumer agreements. Accordingly, it can be regarded as the key tool to achieve fairness in the Internal Market. This directive is based on the idea that consumers are in a weaker position compared to traders in terms of knowledge and bargaining powers (Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen VZW v Susan Romy Jozef Kuijpers, 2018). Therefore, this directive aims to target situations in which the parties are unequal regarding contract terms, such as imbalances in information, expertise, or bargaining power. Specifically, Article 6 Paragraph I of the UCTD establishes that unfair contract terms are non-binding to create a fair balance between contracting parties. The directive aims to protect consumers by removing unfair terms and recognizes that they are often in a weaker position (Juan Carlos Sánchez Morcillo María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria, SA, 2014). This fundamental purpose of the UCTD becomes especially clear when the CJEU interprets it as replacing the formal balance which was established by the agreement between the parties' rights and obligations, to create a true balance that restores equality between the contractual parties (Elisa María Mostaza Claro v Centro Móvil Milenium SL, 2006).

The UCTD has dual objectives; firstly, it approximates national laws to establish the internal market to protect consumers against unfair terms. The second goal is to ensure strong and effective protection for consumers against unfair contract terms that sellers or suppliers have not individually negotiated. The CJEU has emphasised that this directive plays an important role in the EU's broader goals. It helps the EU fulfil its responsibilities to improve the quality of life and increase living standards across the community (Elisa María Mostaza Claro v Centro Móvil Milenium SL , 2006).

The UCTD applies to contracts in which one party is a seller or supplier, and the other party is a consumer, as defined in Article 2 of the UCTD. This directive is mainly designed to protect consumers in contracts with businesses. EU member states have the freedom to expand these protections further if they decide. In other words, the directive establishes a foundational standard for consumer protection. Each member states retains the discretion to extend these protections to additional types of contracts as well, such as agreements between two businesses or between two consumers if they determine it to be advantageous.

Pursuant to Article 2 of the UCTD, a consumer must be a natural person, whereas a seller or supplier may be either a legal or natural person (Anon., 1993). It is crucial to emphasize that to determine whether a party qualifies as a consumer or a seller and supplier, it is essential to assess the balance of power between the parties within the specific contractual context. As previously mentioned, the primary indicators include imbalances in information, knowledge, expertise, and bargaining power. Furthermore, the classification of a consumer is objective, and it embodies the notion of the counterparty's relatively weaker position in relation to the seller or supplier. Consequently, a consumer's superior knowledge, experience or expertise does not preclude an individual from being recognized as a "consumer" under the UCTD (Henri Pouvin and Marie Dijoux, v Electricité de France (EDF), 2019). To determine whether a natural person engaged in business or trade qualifies as a consumer, seller or supplier, it is very important to assess whether the relevant contract is connected to their professional activities. Accordingly, any natural or legal person may be regarded as a seller or supplier if the contract relates to their professional undertakings, including those conducted for public purposes or in the public interest (Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen VZW v Susan Romy Jozef Kuijpers., 2018). Accordingly, individualized assessment of the specific agreement involved is necessary to determine whether an individual qualifies as a "consumer" or a "seller" or "supplier", taking into account the nature and purpose of the contract.

Consequently, the UCTD is a very important tool that ensures consumers in the EU are treated fairly in their contracts with businesses. It is built on the idea that consumers often have less knowledge and experience than traders, which makes them a "weaker party". The directive seeks to ensure fair agreements and protect consumers from being unfairly treated. This creates a fairer marketplace where everyone can trust businesses more and improve life in the EU.

1.2 Protection Framework of the UCTD: Criteria for Assessing Unfair Terms

In compliance with Article 2 Paragraph (a) alongside Article 3 Paragraph (1) of the UCTD, only contract terms that have not been individually negotiated fall within the scope of the UCTD (Anon., 1993). Provisions regarding the burden of proof concerning whether a specific contract term has been individually negotiated are outlined in Article 3 of the UCTD. The UCTD establishes that it is permissible to review contract terms that have not been individually negotiated to assess whether they are unfair (Tenreiro, 1995, pp. 275-276). Furthermore, the question of whether individual negotiations have occurred regarding a specific contract term is a matter of fact to be evaluated by the national courts.

Article 3 (1) of the UCTD outlines the criteria that courts should apply when determining the fairness of a contract term. The assessment focuses on two key criteria: (1) whether the term was not individually negotiated, and (2) whether it violates the principle of good faith by creating a significant imbalance in the rights and obligations of the parties (Anon., 1993). However, in accordance with article 3 paragraph (2) of the UCTD, a contract term that has been prepared "in advance", such as in a pre-formulated standard contract, is always considered not to have been individually negotiated. Furthermore, as stated in Article 3, paragraph (2), the burden of proof lies with the seller or supplier to demonstrate that a standard contractual term was individually negotiated. Furthermore, the individual negotiation of certain parts or specific elements of a term does not indicate that the remaining terms of the contract have also been individually negotiated.

It is relevant to highlight that core terms which define the primary focus of the agreement or address the adequacy of remuneration and price relating to the services or goods supplied in exchange, are exempt from the unfairness test, provided these terms are drafted in plain and understandable language (Anon., 1993). However, the concept of a core term should be interpreted narrowly (Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt, 2014). Core terms typically refer to clauses that establish the fundamental obligations of the parties, which define the overall structure of the contract (Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc), 2010). Clearly, clauses that are merely supplementary to those defining the essence of the contractual relationship cannot be considered core terms (Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt, 2014).

As discussed above, Article 3, Paragraph (1) of the UCTD outlines the criteria for the court to assess whether a term is unfair (Anon., 1993). Furthermore, this article provides that the requirement of good faith and the presence of a significant imbalance in the rights and obligations of the parties are closely interconnected. Good faith is closely related to assessing whether a contractual term is consistent with fair and equitable market practices while taking into account the consumer's legitimate interests. Furthermore, about the unfairness test, the standard of good faith examines whether a trader could expect that a consumer would have agreed to such a clause in the contract during the individual negotiations (Constructora Principado SA v José Ignacio Menéndez Álvarez, 2014). Also, to determine whether a term significantly disadvantages the consumer, it is important to evaluate how much it diverges from the legal provisions that would otherwise apply. As for the significant imbalance, the examination is necessary for the assessment of a significant imbalance to distinguish how a contractual term impacts the obligations and

rights of the respective parties. In order to establish whether an imbalance exists between the obligations and rights of the parties, it is essential to consider all relevant grounds and circumstances of the case at the time when the contract was concluded (Anon., 1993). Accordingly, member states are required to consider all terms of the agreement while determining the unfairness of specific terms (Banif Plus Bank Zrt v Csaba Csipai, Viktória Csipai, 2013).

Consequently, the analysis illustrates that the UCTD establishes principles in order to ensure that contractual provisions, especially those which are not individually negotiated, are fair and do not place consumers in an unfair position. This directive recognises the principle of good faith and requires the courts to determine if certain contractual provisions are fair and respect the rights of consumers. Furthermore, the UCTD requires the service providers to prove that clauses were individually negotiated. It ensures strong protection for consumers. These measures, which are granted by UCTD, promote fairness, transparency and trust in contracts.

1.3 Enforcing Fairness: Sanctions and Consumer Protection in the UCTD

Article 4 Paragraph I is the main provision in the UCTD's framework to protect consumer rights. In accordance with this article, if a term is deemed unfair, it is no longer binding on the consumer (Anon., 1993). This article includes the mandatory provisions through which the UCTD seeks to address the imbalance between the contractual parties. Undoubtedly, the UCTD, with this article, aims to establish a fair and effective balance within the contractual relationship because protecting consumers and their rights against unfair contractual terms under the UCTD is an issue of public interest (SC Raiffeisen Bank SA v JB and BRD Groupe Société Générale SA v KC, 2020). As stated earlier, this article is compulsory which means that it is enforceable on all parties and authorities, and in accordance with this article, no deviations or exceptions are permitted. In order to prevent substantial imbalance against the consumer, any consequences or sanctions which are imposed because of the consumer's failure to meet contractual obligations must be estimated in relation to the importance of the consumer's duties and the seriousness of their non-compliance (Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa), 2013). In particular, these sanctions should be fair and proportionate to the specific circumstances of the breach.

It is important to note that the CJEU has developed two significant approaches in its case law. The first approach establishes that national courts are required to assess unfair

terms on their initiative (Océano Grupo Editorial SA v Roció Murciano Quintero, 2000). A key question which should be considered is, what is the purpose behind the obligation which was established by the CJEU. The primary purpose of this obligation is for the courts to go beyond the formal balance of rights and obligations between the contractual parties, and instead of that, the court should establish a genuine balance that ensures true fairness between the contractual parties (Elisa María Mostaza Claro v Centro Móvil Milenium SL, 2006). The second approach, on the other hand, examines the influence of a term when it is found to be unfair. In these situations, the term does not carry any binding impact on the consumer, that means that the national court must disregard this unfair term entirely (Banco Español de Crédito SA v Joaquín Calderón Camino, 2012). The idea of unfair contractual terms which are not binding for consumers can be represented through different legal frameworks at the domestic level, however, the protection guaranteed by the UCTD should be maintained. In accordance with Article 4, paragraph (1) of the UCTD, any term which is found to be unfair should be treated in a way as if it never existed, ensuring it has no impact on the consumer (Anon., 1993). It is essential to note that the non-binding nature of unfair contract terms comes directly from the UCTD, without any prior requirement on declaration of unfairness or invalidity from a court. Nevertheless, when a contractual term is checked by the court on its initiative, it is very important for the court to notify the parties who are involved in the agreement that the court deems the specific clause unfair. there is no doubt that the court must also give the parties the opportunity to contest this decision (Dirk Frederik Asbeek Brusse, Katarina de Man Garabito v Jahani BV, 2013).

In conclusion, Article 4 Paragraph I play a key role in protecting consumers from unfair contract terms. This article ensures that such terms have no legal effect and create balance between consumers and businesses. To this, it should be highlighted that the CJEU also directs national courts to actively evaluate and remove unfair terms from the contracts in order to ensure that the unfair terms do not harm consumers, the “weaker parties”.

1.4 Transparency Under the UCTD

After the discussion of Article 3 of the UCTD in the previous chapters, this paper will now focus on the transparency requirement, which is one of the UCTD's requirements.

The UCTD offers a minimal legal framework to regulate informational obligations within the unfair contract terms system (Wiewiórowska-Domagalska, 2024, p. 427). The transparency principle aims to lower the burden on consumers when reviewing terms. This helps consumers make informed decisions, improve their overall welfare, and ensure businesses are held accountable in the market (Gardiner, 2022, p. 77). Furthermore, in the

context of the internal market, transparency rules aim to encourage competition between suppliers. This helps improve the quality of additional contractual provisions. Besides, the UCTD's transparency requirement aims to achieve more than just clarity for individual consumers. It also seeks to enhance transparency across the market as a whole (Micklitz, 2014, p. 145). It is often argued that the requirement to make contract terms clear and accessible should remain a key part of standard terms regulation. Furthermore, the way a contract is formed and its terms are expressed directly influences what the parties expect from the agreement (Willett, 2007, p. 77). It is very important to meet transparency requirements because when contractual provisions are transparent, consumers can protect their interests and compare offers from different traders (Farkash, 2015). In this regard, even if most consumers do not read the contractual provisions, the transparency principle ensures that individuals can still safeguard themselves.

The UCTD's transparency standards apply to various kinds of contractual provisions which are covered by its scope and have not been individually negotiated. Sellers or suppliers are required to be transparent when they use contract terms which have not been individually negotiated with the consumers. Specifically, following Article 4 Paragraph (2) and Article 5 of the UCTD, the contractual terms should be written in plain and understandable language. Consumers should be given a meaningful chance to read and understand the contract terms before agreeing to the agreement. The CJEU has noted that the transparency principle should be understood in a wide sense and that simply being clear and grammatically correct does not ensure a term meets the transparency standards (Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt, 2014). Specifically, the sellers or suppliers should write terms in a way which will allow the average consumer, who is reasonably aware and knowledgeable, to clearly understand what likely effects the clause might have for them (Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt, 2014). In this case, the consumer is not assumed to have legal expertise.

In accordance with the UCTD, transparency standards serve three key purposes. First, any contract terms which are not written in clear and simple language must be understood in the consumer's favor (Commission of the European Communities v Kingdom of Spain, 2004). Second, if the primary subject of the contract or the fairness of the price and payment terms are not clearly stated, these terms may be open to court examination (Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios, 2010). As for the third function, if a seller or supplier fails to meet transparency standards, this can be a factor in evaluating whether a contract term is unfair and could even suggest that the term is fundamentally unfair (Verein für Konsumenteninformation v Amazon EU Sàrl, 2016).

Regarding the interpretation of the transparency principle, the CJEU stated that national courts are responsible for evaluating whether particular contract terms are clear. In this case, they should also consider each case's unique context (Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter and Ulrike Hofstetter, 2004). This also applies to the determination of whether a contract term is part of the core content of the agreement or if it addresses fairness in price and compensation (1993, n.d.). Accordingly, the national court has the power to make the final decision on the unfairness of a particular contractual provision. In some cases, the CJEU has established clear guidance regarding the unfairness of specific contract clauses (Verein für Konsumenteninformation v Amazon EU Sàrl, 2016). National courts can establish more detailed criteria to assess whether specific contractual provisions are fair. However, these criteria must be in compliance with the methodology which was established by the CJEU. When national courts evaluate whether contractual provisions align with the transparency principle, they must verify that consumers have been provided with the relevant information (Ruxandra Paula Andriciuc and Others v Banca Românească SA, 2017).

Considering the information discussed above, it could be concluded that transparency rules are essential to ensure fairness in agreements, especially for contractual provisions which have not been individually negotiated. Furthermore, in accordance with the UCTD, terms must be clear, fair, and transparent to protect consumers from unfair provisions. The CJEU has made it clear that national courts must review these terms and decide if they meet the transparency standards. It ensures that consumers are treated fairly.

2 MINIMUM HARMONISATION UNDER THE UCTD: CHALLENGES IN CONTROLLING UNFAIR TERMS IN DIGITAL SERVICES

2.1 The Role of Harmonisation in Strengthening the UCTD

This chapter explores if the harmonisation of the UCTD is necessary. The directive applies broadly to all consumer agreements, including the agreements made and carried out online. This directive adopts a minimum harmonisation standard (Anon., 1993), which allows the countries to enhance consumer protection beyond the established baseline. Undoubtedly, this leads to diverse approaches across regions. About this, the question arises: why was this approach chosen in the first place? The purpose of establishing a baseline for consumer protection through European Union member states was to encourage competitive dynamics among different jurisdictions.

In this regard, it is relevant to highlight that the concept of minimum harmonisation does not just refer to the legal provisions of the UCTD. It also includes how the CJEU interprets them. Specifically, the evaluation of unfair contract terms by member states relies on various reasons, including the specific circumstances in which the terms are applied, the state's legal framework and many others. Also, as part of its evaluation, the courts of member states must take into account the national laws that would come into effect if no agreement had been made between the parties in order to determine whether the contract places the consumer at a disadvantage compared to the protections offered by national legislation. Therefore, this approach can create inconsistencies in case laws. Furthermore, because national legislation varies across the member states, the results of the unfairness test will inevitably vary between the contracting states as well. Accordingly, a significant drawback of this method of regulating contractual provisions is the inability to establish widely accepted guidelines and applicable rules. It also poses significant challenges to ensure consistency and uniformity in determining the concept of unfairness across the EU.

As mentioned above, national courts are responsible for determining whether specific contracts contain unfair terms. However, in recent years, the CJEU has had the opportunity to develop key foundational principles for applying the unfairness test. This creates the possibility that in the future, the rules and standards for determining unfairness could become more harmonised, which will lead to a more consistent approach across the European Union.

The following chapters examine the unfairness standard under the UCTD and its application through relevant case law. Furthermore, the indicative list of unfair terms will also be addressed, with the key issues that exist in this regard. Additionally, the chapters

explore whether the harmonisation of the UCTD is necessary and present practical solutions to improve the clarity and consistency of the framework for unfair terms at the EU level.

2.2 Challenges in UCTD Enforcement and Interpretation

The UCTD is designed to guarantee both substantive and procedural fairness. This goal is accomplished by the evaluation of contractual provisions based on the general rule which is outlined in Article 3 of the Directive and requirement of the transparency. As previously discussed, Article 3 provides a standard for evaluating fairness that considers both the process of creating the terms and whether the terms themselves are fair. Furthermore, Article 4 Paragraph I of the UCTD establishes that the evaluation of contractual terms should be done with a broader perspective. Specifically, it requires considering factors such as the type of goods or services involved, the moment when the agreement was made, and any relevant conditions around contract formation. Furthermore, the review much include an analysis of all provisions within the agreement and any other contract it may be linked to. Furthermore, Article 4 Paragraph II of the UCTD introduces provisions that guarantee the exclusion of the core terms; this topic will be explored in detail in the following chapters. Additionally, the principle of transparency is outlined in Article 5 of the UCTD. This principle, along with its interpretation in relevant case law, will also be thoroughly analysed in the upcoming chapters.

The unfairness test under the UCTD is outlined in Article 3, which introduces the concepts of “good faith” and “significant imbalance.” There is ongoing debate about how “good faith” should be understood and whether these two ideas should be evaluated separately. Furthermore, the principle of good faith is very familiar in countries with civil law systems, unlike in common law systems (Collins, 1994, p. 249). The CJEU has provided guidance on how the unfairness test should be interpreted. However, it has clarified that national courts have the power to evaluate each case to determine whether specific contractual terms are compatible with the principle of “good faith.” Specifically, the CJEU noted that it can only provide guidance on the general principles which are set by the EU legislation to determine what constitutes unfair terms (Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter and Ulrike Hofstetter, 2004). Furthermore, the CJEU was asked to provide a preliminary opinion on whether certain contractual provisions fell under the definition of “unfair” as outlined in Article 3 Paragraph I of the UCTD. In this case, the court determined that under Article 4

of the UCTD, all relevant factors at the time the contract was made must be considered when evaluating whether a term is unfair. This means that national law must be taken into account. The CJEU could not decide how the general principles of the Directive apply to a specific contractual provision (Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter and Ulrike Hofstetter, 2004). In this context, it can be argued that this approach is reasonable since the CJEU cannot rule on specific cases due to the separation of responsibilities under the preliminary ruling procedure (Micklitz, 2014, p. 778).

The CJEU's case law on unfairness views the ideas of "significant imbalance" and "good faith" as somewhat interconnected. It also emphasises that "good faith" requires considering the interests of both the supplier and the consumer (Commission, 2019, p. 6). In the Aziz v Caixa d'Estalvis de Catalunya case, the CJEU explained that to decide if a term creates a "significant imbalance," the national court should look at what the national law would say if the parties had not agreed on that term. This allows the court to determine whether the agreement puts the consumer at a disadvantage compared to the protections provided by national law (Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa), 2013). It is important to mention that the CJEU has consistently applied this method to evaluate a "significant imbalance" in various cases (Constructora Principado SA v José Ignacio Menéndez Álvarez, 2014). For instance, in Constructora Principado SA v Menedez Alvarez, in this case, the court additionally ruled that to determine whether a "significant imbalance" exists, one cannot rely solely on a financial comparison between the overall value of the agreement and the costs imposed on the consumer by the clause. Conversely, a "significant imbalance" can result from a substantial disadvantage to the consumer's legal position as established by national law. This may occur if the consumer's rights under the contract are restricted, if exercising those rights is made more difficult, or if it adds an extra obligation that is not included in the applicable national rules (Constructora Principado SA v José Ignacio Menéndez Álvarez, 2014).

In the Aziz v Caixa d'Estalvis case, the concept of "good faith" was also brought into focus. The CJEU explained that to determine whether an imbalance arises contrary to the requirement of "good faith", the court of member states must consider whether a seller or supplier, who acts honestly and fairly, could have expected that the consumer would have accepted the term in question during the direct agreement negotiations. Furthermore, the CJEU established a new test, known as the "possible agreement test", which requires a broad evaluation of the parties' interests. This evaluation relies on the perspective of a "reasonable supplier standard" in order to determine if the consumer would have willingly

accepted the term in question (Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa), 2013). The Aziz case establishes that "good faith" is an objective standard which is based on whether the contractual provision reflects fair market practices and takes into account the consumer's interests. It is fundamentally tied to achieving an equal balance of the consumer's and supplier's rights and duties (Commission, 2019).

While the UCTD establishes the principles for identifying unfair contractual provisions, national courts have the responsibility to evaluate each case and determine whether a specific contractual provision can be considered "unfair". This has caused significant inconsistencies in case law across the EU, which are further increased by the differences in how member states enforce the directive. Specifically, Article 7 of the UCTD requires member states to implement efficient measures to prevent the use of unfair contractual provisions (Rott, 2018, p. 265). This directive sets the framework for consumer protection. However, it does not establish a uniform method of enforcement across the EU. Instead, it leaves the responsibility for enforcement to individual member states, which allows them to follow their legal systems and procedures (Norbert Reich, 2014, p. 159). This approach enables each country to design and manage its legal enforcement mechanisms in line with its own national systems and traditions. Accordingly, it can be concluded that this led to different enforcement systems in each member state, some more effective than others (Rott, 2018, p. 280). Based on the analysis above, this raises the question of whether this inconsistent approach could ultimately provide an advantage to Digital Services Providers (DSPs). To address this question, it is helpful to refer to Recital 3 of the Consumer Protection Cooperation Regulation, where it is recognised that ineffective enforcement of cross-border violations, especially in the digital market, makes it easier for businesses to avoid penalties by moving to another country within the EU.

Concerning the different enforcement mechanisms which exist between the EU member states and the EU law approach, which allows the DSPs to adapt their Terms and Conditions (T&Cs) based on the applicable national law, it will be relevant to highlight that this may encourage DSPs to comply with national unfairness standards to a greater or lesser extent, depending on how effective the enforcement mechanisms are in each respective state. Specifically, in countries with stricter enforcement systems, DSPs are far less likely to include unfair contract terms in their agreements because the risk of being caught and penalized is much higher. On the other hand, in member states with weaker enforcement, DSPs can exploit gaps in the law, giving them more room to add unfair terms to their contracts without consequences. Accordingly, in addition to the differences in how unfair

contract terms are regulated, procedural issues add another layer of complexity when it comes to implementing the UCTD.

2.3 The Role of Grey Lists and Blacklists in Addressing Unfair Terms

In Article 3 Paragraph (3), the UCTD provides a reference to a list of examples of terms that may be viewed as unfair. This list is indicative and non-exhaustive. The non-exhaustive nature of the Annex allows national laws to expand the list or adopt language that enforces stricter criteria. It is crucial to outline that in *Commission v Sweden* (Commission of the European Communities v Kingdom of Sweden , 2002), the CJEU established that If a clause appears on the indicative unfair terms list, it does not automatically mean that this term should be considered or assumed as unfair; furthermore, terms which are not included on this list, these clauses can still be deemed as unfair, and their unfairness must be estimated following the general criteria outlined in this paper's earlier chapters. The CJEU has highlighted that this list is important when deciding if a term is unfair. It is an important tool for judges to determine whether a contractual provision is unfair (Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt , 2012). The value of this list was also highlighted in the 2019 Commission Guidance, which emphasised the importance of this list. It explains that the Annex helps EU member states to work together more effectively to address unfair terms. This list also supports enforcement authorities in carrying out both formal and informal enforcement actions (Commission, 2019). I believe this list is important because it provides clearer examples of the types of terms that are likely to be considered unfair. This makes it easier for contractual parties, such as consumers and service providers, to know what to expect. Furthermore, it is relevant to highlight that the CJEU has been relying on the indicative list more frequently in its decisions. This brings more clarity and further clarifies how the terms in this list should be understood (Geraint Howells, 2018).

The indicative list in the UCTD is important. However, its application and legal status differ across EU member states. Therefore, this inconsistency makes it harder to establish a uniform standard across the EU. Additionally, the UCTD does not contain a blacklist of terms that are always deemed unfair. Each member state has the authority to establish its own blacklist of unfair terms and incorporate it into its legislation. However, this context does not give any guarantees that every member state will create this kind of list. Particularly, there can be some countries which do not adopt the blacklist of unfair terms in their legislation. In this context, it should be noted that blacklists and grey lists

provide stronger legal clarity than Indicative lists because they help consumers better understand their rights and procedures while motivating service providers to amend their contractual provisions to meet legal requirements (CCM, 2017, pp. 76-77). Therefore, I believe countries must incorporate blacklists and grey lists into their legislation.

Over the years, the UCTD has remained largely unchanged, and its indicative list now feels outdated. Specifically, the way businesses operate has changed so much over time, especially with the rise of digital technologies, which have completely transformed how good and services are offered and consumed. When the UCTD was first drafted, the marketplace was far simpler and was operating in an offline environment. However, nowadays, the digital economy dominates. Therefore, I believe that UCTD should be updated. Specifically, the clauses in the Annex need to be reviewed and updated.

As digital contracts often modify traditional clauses to fit online interactions, it is important to distinguish unfair contract terms that have been adapted for the digital context from genuinely new terms specifically created for digital markets. Although the digital landscape has its own specific attributes, DSPs can still incorporate conventional unfair terms into their agreements, even within a digital landscape. Although these terms are not completely new, their application and effects in the online sphere may differ from those in more traditional contexts. Moreover, the unique features of online marketplaces may lead to the emergence of entirely new and original unfair terms. Additionally, online agreements may include flexible terms that are updated periodically without explicit notice to the consumers. These specific aspects have enabled the introduction of new and specialized contractual provisions particular to the digital setting. It is widely acknowledged that identifying new unfair contractual provisions presents significant challenges for various reasons. A primary reason is that the digital landscape is continually evolving. This constant progression gives the digital landscape unique characteristics that support ongoing change and adaptation.

Specific skills are requested to assess the fairness of the contractual provisions; however, in most cases, the consumers lack the necessary knowledge and insights, which makes it challenging for them to investigate and address possible concerns fully. Furthermore, the absence of transparency and accessible language in this agreement can be deemed as another challenge which limits consumers' ability to understand their rights and recognise any potentially unfair terms fully. Furthermore, every digital platform creates conditions and terms specifically designed for its business practices. Consequently, the differences in contract terms which exist today make it challenging to establish consistent standards for the procedure of assessing fairness across the online services industry.

A recent analysis for the European Parliament's Committee on Legal Affairs also emphasises the need to update and review the list of terms, particularly for digital services. It suggests that new terms need to be added to the blacklist and grey list in order to ensure fairer practices and stronger protection for consumers (Luzak, 2021).

There are various opinions on how the indicative list should be revised. Some scholars believe that its status should be placed on the grey list in order to ensure stronger enforcement. For instance, the original 2008 proposal for the consumer rights directive proposed to change the list from being purely indicative to something more concrete and enforceable. The proposal aimed to give the list more legal weight, which makes this list a stronger tool for identifying and addressing unfair contractual provisions. It was also suggested that the list must be unified. Therefore, countries would be unable to add new contractual provisions or modify the language of the clauses which were already included in the list. Meanwhile, the authors of the analysis referenced above suggest that the current indicative list should be transformed into a blacklist (Luzak, 2021). This would ensure that any clauses in contracts between the DSPs and consumers that appear on this blacklist would automatically be regarded as unfair in all situations. In accordance with the findings of this report, since DSPs conduct businesses throughout the EU, a standardised list would guarantee legal certainty. Furthermore, it will offer better protection for consumers and create fairer competition for DSPs across the region.

I agree that converting the indicative list into a grey list is a step in the right direction. A grey list, in addition to the current lists of member states, can improve enforcement. This is particularly important in cross-border cases, where consistency and clarity are often lacking. Such an approach provides a clearer framework to identify potentially unfair terms. At the same time, it allows national authorities the flexibility to address their countries' unique legal and cultural contexts. However, I do not believe that full harmonisation of the grey list is the right solution. Specifically, while harmonisation may bring more uniformity, it risks ignoring the significant differences in legal systems and contractual practices across member states. These differences reflect each state's diverse legal, economic and social realities (Micklitz, 2010, p. 32). Accordingly, I consider that a "one size fits all" approach may weaken consumer protection instead of strengthening it. Besides, I do not support the idea of turning the indicative list into a blacklist. Particularly, while blacklist is effective in identifying unfair contractual terms, many of these clauses currently included in the indicative list are not suitable for this purpose. These clauses often need careful evaluation because their fairness depends on the specific circumstances of each case.

Accordingly, converting the indicative list into a grey list would be much better. However, it does not mean that adoption of the blacklist is not necessary. Before discussing the importance of adopting the blacklist, it is worth noting that the original proposal for the UCTD included both a blacklist and an indicative list. However, in the final version of the UCTD, the blacklist did not appear because member states did not manage to reach an agreement on that.

The biggest challenge used to be the differences in their legal systems. However, many member states have now incorporated blacklists into their national laws. The European Commission has emphasised that a blacklist of unfair terms is important because they help national courts to identify unfair contractual provisions (Commission, 2019). The most significant benefit of a blacklist is that the terms included in the blacklist are deemed unfair under all conditions; therefore, it directs attention to the unfair terms themselves rather than the parties involved or the context in which they are used. This approach guarantees more clarity for national courts and makes eliminating such terms from the contract easier. Therefore, this paper suggests that a unified blacklist across all EU member states would be an effective tool to address unfair terms in digital contracts.

To conclude, this paper suggests formulating a blacklist of unfair terms within the UCTD to develop the effectiveness of this directive. Taking into account, the fact that there is a wide range of case law as well as available examples which can be used to support such a list, it is recommended that the UCTD should incorporate a blacklist of unfair terms that are always considered unfair alongside the grey list of unfair terms, now known as the indicative list of unfair terms. This would offer more explicit standards and promote a fairer landscape for the consumers. In recent years, consumer organisations such as The European Consumer Organization, in their reports from 2021 (Organisation, 2021, pp. 14-15), 2022 (Organisation, 2022) and 2023, have advocated creating a Blacklist of unfair terms within the UCTD as well. The main aim of the latter mentioned blacklist is to address the unfair terms that are found in the digital landscape.

3 AI IN DIGITAL CONTRACTS: A PATH TO FAIRNESS

3.1 AI for Controlling Unfair Terms in Digital Services

This chapter examines the importance of AI and its ability to identify situations where online service providers fail to fulfil their legal responsibilities. Specifically, it explains AI's ability to automatically review documents to determine unfair contractual provisions. It also highlights the important role the technology plays in this regard, to protect consumers in the digital age.

Terms of Service (ToS), often called terms and obligations, are agreements that define the relationship between consumers and service providers. In accordance with the law, there are unfair terms if the contractual provisions have not been subject to individual negotiations; it must violate the principle of good faith, which creates a significant imbalance in the rights and responsibilities of the parties, placing the consumer at a disadvantage (Anon., 1993). Even though using unfair contract terms is unlawful, the service providers still include them in their ToS. Therefore, this raises the question of what mechanisms or resources are available to consumers to safeguard themselves against unfair contract terms.

The UCTD established two tools to address unfair contractual provisions: individual control and abstract fairness control. Individual control occurs when a consumer challenges a contract term in court. If the court determines that the term is unfair, it will rule that the clause is unenforceable against the consumer (Anon., 1993). Despite this fact, most consumers are unlikely to pursue legal action for such disputes. Therefore, in order to address this gap, abstract fairness control was introduced. Specifically, in every EU Member State, organisations are empowered to undertake legal actions to seek a declaration that specific terms in consumer contracts are declared unfair. In relation to this, it is relevant to mention that the implementation of abstract control varies significantly across Member States. To illustrate, the extent of involvement by consumer protection organisations differs, and some jurisdictions impose penalties for the inclusion of unfair contractual provisions, while others do not, in countries like Belgium, Estonia, Italy, the Czech Republic, Germany, Hungary, Portugal, Malta, Spain, Slovenia, Slovakia and the United Kingdom, consumers can claim compensation or damages through general civil law or contract law (Schulte-Nölke H, 2008, p. 271). However, a common feature among all member states is that there is always a designated authority with the significant power to challenge agreements containing unfair terms. Although legal mechanisms are in place to prohibit the use of

unfair contract terms, they have not been effective in fully addressing this issue (Loos M, 2016), such terms are still commonly found in the ToS of online platforms.

I believe one of the main issues here is the financial resources. Specifically, when consumers are aware of their rights and want to take legal action, the financial imbalance between the average consumer and a typical service provider creates a major obstacle for ordinary consumers. As mentioned above, consumer protection organisations have the right to step in and take legal action in accordance with the abstract control. However, they often do not have enough resources to address every instance of unfair practices. Accordingly, AI has been suggested as a valuable tool to support organisations and empower consumers in the process of fighting against unfair contractual provisions. These tools can automatically find unfair contractual provisions in the ToS. This makes things clearer and easier for people to challenge (Lippi M, 2019).

A theoretical framework has been proposed to explain what legal professionals need to do before initiating proceedings to evaluate the fairness of contractual terms. These responsibilities involve: 1. locating and selecting documents, 2. reviewing the documents to distinguish contractual provisions that might be unfair, 3. analysing those clauses in detail to decide if they are fair, and 4. preparing the necessary files and starting the legal process. Researchers have focused on the second step to simplify it by using machine learning. With this, it is possible to identify terms that could be unfair (Micklitz HW, 2017, p. 119). This automatically allows the legal professional to focus on the highlighted clauses, which makes the whole process more efficient and effective.

Accordingly, there is the question of why it is essential to focus specifically on the second step, which is about reviewing the documents to distinguish potential unfair clauses. In my opinion, there are several reasons for this. First and foremost, it is crucial that competent authority, such as a national court, determines whether a term is unfair. This ensures that both the consumer and the digital service provider receive a clear and straightforward explanation of why certain terms are considered unfair. Also, this kind of transparency is a fundamental aspect of the process to build trust. Furthermore, it is important to highlight that to define the contractual provisions as unfair, it is essential to prove that these clauses create an imbalance in the rights and responsibilities of both parties. For example, if a service provider adds hidden fees in the contract, a government body might take the case to court to see if these fees are unfair to consumers. In the same way, organisations might question rules that charge penalties for canceling a service. Specifically, they can argue that these rules put too much pressure on consumers and give unfair benefits to the service providers. There is no doubt that in all of these cases, it is very

important to evaluate the fairness in detail. Specifically, to determine whether a clause is unfair, it requires to examine the whole context in which the clause is used.

As mentioned above, AI has been suggested as an effective tool to support organizations and empower consumers. Alongside other suggestions, the CLAUDETTE Project has the aim to protect consumers, which can be implemented by using AI to automate the review of online agreements and privacy policies (Anon., n.d.). Its main goal is to assess whether these documents are compatible with EU regulations on consumer rights and data protection.

3.2 The Role of CLAUDETTE in Controlling Unfair Terms

The CLAUDETTE project is designed to assist individuals and consumer protection groups in evaluating consumer contracts and privacy policies (Lippi, 2019, p. 136). It relies on machine learning, specifically supervised learning techniques. The project creates a classifier using a well-made dataset. It includes examples of contractual terms which can be labelled as fair, possibly unfair, or clearly unfair.

CLAUDETTE was developed using a dataset of 50 terms of agreement. These contracts were reviewed by legal experts who identified potentially unfair contractual provisions and categorised them. The selection of contracts focused on agreements from leading platforms with significant global impact. The annotated terms in the training set were used to show the system how legal rules relate to different types of languages. This allowed CLAUDETTE to understand how to classify specific terms and decide whether they are unfair. The training process helped the system learn to make judgments similar to the examples it was trained in. The training helps the system develop its own understanding of unfairness, which it then uses to classify new terms. Furthermore, even though there is a limited database, the CLAUDETTE project demonstrated the ability to detect potentially unfair clauses while evaluating new documents. The training dataset was later expanded to contain 100 contracts.

In the context of CLAUDETTE, it should be noted that eight key categories of potentially unfair clauses have been identified in accordance with the existing legal framework. These include: 1. unilateral right of service provider to amend the ToS; 2. jurisdictional clauses requiring disputes to be resolved in a country other than the consumer's own 3. limitations on the provider's liability 4. the enforcement of foreign laws 5. the assumption of consumer consent simply through the use of service 6. the provider's right to terminate the agreement without consumer input; 7. mandatory arbitration clauses

as a prerequisite for legal action and 8. the provider's authority to remove consumer content without notice (Marco Lippi, 2019, p. 119). These categories illustrate common practices that are widely adopted by online service providers today. Regarding the CLAUDETTE project, it is important to emphasise that the methodology for applying machine learning to detect potentially unfair clauses concentrated on two key aims: 1. Identifying unfair contractual provisions to evaluate if a clause is potentially unfair, and 2. grouping unfair contractual provisions to assign them to specific categories, such as unilateral termination of the agreement, contract modification and others.

The CLAUDETTE project includes a user-friendly web platform, which is a publicly accessible tool. Consumers can submit text, allowing the system to examine it. The system highlights the outcome, flags sentences that may contain potentially unfair clauses, and indicates the specific category of each clause. Accordingly, once the results are obtained, consumers will know whether specific contractual terms may be deemed unfair.

Based on the discussion above, it is clear that CLAUDETTE is a very important tool for consumers as well as consumer protection organizations because it helps them to identify unfair contractual provisions. Nevertheless, it is very important to acknowledge that the CLAUDETTE has limitations and needs improvement. One significant drawback, in my view, is that sometimes, CLAUDETTE misinterprets contractual provisions because of the complexity of the legal language. Furthermore, it faces challenges in the process of distinguishing fair and unfair terms, particularly in cases where the criteria for such distinctions are ambiguous or not well-defined. In contrast, humans rely on their intuition which was developed through experience, and they have the advantage of understanding the full context of a situation or agreement. This means humans are not just interpreting words in isolation, but they can also consider the bigger picture. Humans can also explain their reasoning by referring to standards, principles or rules drawn from real cases. Most AI systems, including CLAUDETTE, need to improve their ability to explain decisions (Finale Doshi-Velez, 2017, p. 4). Therefore, to address this, the paper suggests improving AI systems to make them more transparent, interpretable and explainable. Specifically, the CLAUDETTE should be designed to include relevant details about the contractual environment and should be equipped with datasets of legal precedents as well, relating to the fairness of contractual provisions. These changes could help the AI to make better interpretations and avoid errors.

Besides, CLAUDETTE struggles to explain its findings clearly. Many academic scholars have widely discussed this topic (Leilani H Gilpin, 2018, p. 80). CLAUDETTE can identify a contractual provision that might be deemed unfair; however, this system

cannot provide consumers with explanations on why these concrete clauses are unfair. There is no doubt that this is a huge issue because the lack of clear information about user rights leaves consumers unaware and creates opportunities for service providers to hide important details and include unfair terms in the agreements (Edith G Smit, 2014, p. 18). Accordingly, this paper suggests improving AI systems to ensure they can explain the reasoning behind their conclusions. One approach which was explored by academic scholars is to use an end-to-end memory network model (Sainbayar Sukhbaatar, 2015, p. 2440). This approach helps the system classify terms while using a collection of legal insights from experts to provide context. This makes its decisions clearer and easier to understand.

Furthermore, the CLAUDETTE system is primarily designed to function in English, which limits its applications for non-English contracts. However, for instance, in the EU, there are 24 official languages. Therefore, I consider that any solution that aims to raise consumer awareness or to protect them, must be developed to maintain the accuracy across all these languages. This is very important for individuals and consumer protection organizations because they often face challenges to understand different languages. Consequently, this paper suggests improving the CLAUDETTE system in the future to enable this system to estimate contracts in different languages.

In conclusion, using unfair contract terms is against the law; however, service providers still include them in their ToS. Individuals, as well as consumer protection organizations, can take legal action against online service providers. However, in most cases, individuals and consumer protection organizations do not have enough resources to address every instance of unfair practices. Therefore, AI has been suggested as a valuable tool to support organizations and consumers in the process of fighting against unfair contractual provisions. This paragraph discussed the CLAUDETTE Project as one of the useful AI tools to protect consumers; however, the limitations of this project were also revealed in this paper, such as its inability to function in multiple languages, provide explanations for its results, and handle the challenges of interpreting complex legal language. Therefore, improvements are needed to address these limitations, which would make CLAUDETTE as a powerful tool to protect consumers.

4 "FREE" DIGITAL CONTRACTS AND PERSONAL DATA AS PAYMENT: A FAIRNESS PERSPECTIVE UNDER THE UCTD

4.1 Introducing the Issue: Fairness and Personal Data Under the UCTD

This chapter examines "free" digital agreements, where consumers share their personal data in place of making a monetary payment for services. It also explores the notion of personal data as Counter-Performance and why the contractual provisions of data policies should still be subject to the fairness test under the UCTD.

Nowadays, domestic judicial bodies rely on the UCTD to evaluate the fairness of data policies in "free" digital agreements. These agreements offer digital services not in return for money but for the individual's personal data (Metzger, 2017, p. 2). The UCTD identifies specific data policy terms as unfair to safeguard consumer privacy (Natali Helberger, 2017, p. 1429). As discussed in the earlier chapters, Article 4, Paragraph II of the UCTD includes the rules for terms that are not subject to the unfairness test. This specifically applies to the terms that deal with the price or the main subject of the agreement. In 2019, the Digital Content and Digital Services Directive (DSDC) was adopted to address gaps in consumer protection in the digital age. This directive clarified that digital agreements come with obligations, and DSPs cannot bypass their legal responsibilities by requiring consumers' personal data in place of monetary payment (Dix, 2017, p. 3). Accordingly, DSPs could potentially use the adoption of the DSDC to their advantage. Specifically, they might rely on the provisions of Article 4 Paragraph II of the UCTD to exclude legal review of their data policy terms.

The DSDC Directive establishes that the rights and obligations of traders and consumers apply not only to monetary digital agreements but also to situations where consumers give personal data or other information instead of money to access digital content (Council, 2019). The DSDC makes it clear that when consumers provide personal data in place of digital services, it is considered a transaction which is covered by this directive. However, there are two specific conditions where this does not apply. The first is when the personal data is used only to deliver the digital services or content. As for the second one, it is when the DSP processes personal data only to fulfil legal obligations. In either situation, the DSP cannot use the personal data for any purpose other than what is specified (Council, 2019).

Furthermore, the DCSD intentionally refrains from using the term "counter-performance" in relation to personal data. Also, the words "in exchange" are excluded. This approach was adopted to avoid suggesting that the directive promotes agreements where

consumers trade or commercialise their personal data. However, in order to demonstrate that data and services are exchanged, Article 16 of Paragraph III of the DSDC is relevant. It outlines that in agreements where no monetary payment is involved, DSPs must stop using any data or content provided by the individual after the contract has ended. In the following paragraphs, the arguments will be presented as to why the contractual provisions of data policies should still be subject to the fairness test under the UCTD.

4.2 Measuring the Economic Value of Personal Data; Market Valuation Methods and Individuals' Valuation Methods

Personal data is becoming more like money in many transactions because it holds economic value and can be exchanged, purchased and sold (William D. Eggers, 2013, p. 19). However, unlike monetary payments, it is hard to put a precise value on personal data. Additionally, strict laws make it harder to trade or exchange personal data freely. This raises important questions about how personal data's economic and legal values are interconnected.

As mentioned above, the process of determining the economic value of personal data is a challenging task. Nowadays, there is no international approach that can be used to calculate its worth. However, the existing methods can be divided into two main categories: The first category is based on market valuation, while the second focuses on how people personally value their own personal data (OECD, 2013).

The first group includes four main approaches: using market prices for data, examining the financial benefits of each data record, comparing the costs of personalised and non-personalized advertisements and calculating the costs linked to data breaches (Philipp Hacker, 2017). On the other hand, the second group includes two approaches: carrying out economic experiments or surveys to find the value directly and figuring out how much people are willing to pay to keep their data safe (Alessandro Acquisti, 2016, pp. 444-447). In relation to this, it is important to highlight that there is no perfect method which can be used to determine the value of personal data. In other words, each approach comes with its own limitations.

Specifically, every technique has its drawbacks, which also include mistakes in measurement and biases. Accordingly, the best approach which can be used to determine the value of personal data is to use a combination of methods while recognising that these techniques can only provide rough results. These approaches will be examined with the relevant examples in the following paragraphs.

The financial results per data record method are relatively simple to calculate. It works by dividing a company's total market value, annual revenue, or net income by the number of data records it owns. This provides an estimate of the financial value attributed to each record. For example, Meta's annual revenue in 2023 was USD 134,902 billion (Meta Platforms, 2024), and it had about 3.98 billion monthly active users (MAUs) that year (Anon., 2023). In accordance with this method, the value of personal data per user comes out to approximately USD 31,38 per year. Similarly, in order to estimate the average annual revenue per user for X (formerly Twitter) in 2023, we can follow the same calculation technique. In this case, X's annual revenue is approximately USD 3.4 billion (Reiff, 2024), and MAUs as of 2023 are 541.56 million monthly active users (Jay, 2024). Accordingly, the value of personal data per user comes out to approximately USD 6.28 per user.

As for the Market-based valuations of data, it offers a simple way to understand the value of personal data. These valuations are split into prices from legal and illegal markets. It should be acknowledged that, Professional data brokers run legal markets. They often act as though their work is legal despite the fact that some of their practices might not completely follow EU data protection rules.

The third approach looks at the price difference between personalised and non-personalized ads to estimate the value of allowing personal data to be tracked. For example, in 2023, the monthly value of personal data for each Facebook user can be calculated by first dividing the annual ad revenue, which is USD 131.9 billion (Dixon, 2024), by 12 to get the monthly ad revenue. This amount is then divided by the total number of MAUs. In this case, the total number of MAUs is 3.065 billion (Dixon, 2024). In accordance with this calculation, the value of each user's data is estimated to be USD 3.59 per month.

The last market valuation method estimates the economic value of data. It uses the costs associated with a data breach per record as a reference. Nonetheless, these costs do not directly represent the actual value of the data because they also account for additional expenses, such as the potential harm to the company's reputation (OECD, 2013).

When it comes to the second category of the existing methods to determine the economic value of personal data it includes the two approaches that are used to assess how people value their personal data. These approaches have similar problems. The process of determining how much a person is willing to pay to protect their data faces the same criticisms as calculating the cost of a data breach. Both approaches use the harm as an indirect way to guess the actual value of data (OECD, 2013). In contrast, surveys and experiments offer a clearer way to understand how much people personally value their data.

Based on the information discussed above, it can be concluded that market valuation methods are more suitable for the assessments of personal data value. It can be explained by the fact that they provide a more consistent measure of the value of personal data compared to the methods which are based on individual valuations. Nevertheless, these methods have a major drawback; specifically, accurate information about the market value of personal data is often difficult to obtain. While estimates can be made, they are usually inaccurate due to the limitations of the techniques applied. Furthermore, it should be highlighted that these methods are rarely accessible to consumers.

4.3 A Rationale against the Exclusion of Data Policy Terms from the Unfairness Test

In the earlier paragraphs, it was mentioned that DSPs may attempt to use the provisions of DSDC alongside Article 4 Paragraph II of the UCTD to argue that their data policy terms should be exempt from judicial review. This chapter examines the reasons why data policy terms should remain subject to the fairness test.

The UCTD excludes certain types of terms from the process of being estimated for unfairness. Specifically, it does not apply to the contractual provisions which define the main subject matter of the agreement. The CJEU has clarified that these contractual provisions are the main elements which form the foundation of the contract (Jean-Claude Van Hove v CNP Assurances SA , 2015). In relation to this, the CJEU has stated that in order to determine whether a term is part of the "main subject matter of the contract" it requires a comprehensive analysis. It involves the estimation of the term's purpose, its role within the overall framework of the contract, and the legal context in which the agreement exists. This approach ensures that the term is evaluated based on its importance and role within the specific contract (Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt, 2014).

The second category relates to the balance between what is provided and what is received. Particularly whether the price reflects the value of the goods or services, which is also outside the scope of the UCTD's review, in accordance with article 4, paragraph II of the UCTD, the fairness of the price or payment contractual provisions can only be reviewed if those terms are unclear or not transparent. The following chapters will explore these exclusions and the relevant arguments around them in detail, with a particular focus on why personal data should not be left out of the fairness test.

4.4 Challenging Personal Data Exclusion: Adequacy of Price in UCTD

In accordance with Article 4, paragraph II of the UCTD, the contractual provisions regarding the price and remuneration are not subject to unfairness review because they represent a form of exchange. The main reason courts do not get involved in checking if prices or remuneration are fair is the belief that markets are more effective at determining appropriate prices (Wurmnest, 2019). However, this idea breaks down to where data acts as a form of payment. Specifically, different from monetary transactions, personal data does not provide consumers with clear signs that could effectively shape the balance between market supply and demand (Wurmnest, 2019).

Furthermore, for the average consumer, it is so simple to understand the price of a product or service when the price is stated in monetary terms. However, determination of the value of personal data is far more challenging for them. In this context, an important question arises as to why this situation exists. In contrast to money, there is no clear guide or list which determines a market price for information like a person's date of birth or place of birth or any other personal information (J, 2016). The worth of consumer data relies heavily on the company that owns it (G, 2018). Furthermore, companies can increase the value of their data by buying information from third parties and combining it with what they already have (J, 2016). Accordingly, this paper suggests that the "fairness of price or payment" should not be an acceptable justification to exclude data policy terms from fairness control. Specifically, as mentioned above, personal data has an economic value. However, unlike traditional agreements where money is the standard form of payment, these exchanges relating to personal data do not operate under the same market rules. The concept of excluding such contractual provisions from judicial oversight is based on the assumption that market forces naturally set the price of goods or services, making regulation unnecessary (Hans Erich Brandner, 1991). However, since the market for personal data is fundamentally different from traditional monetary transactions, the arguments used to justify the exclusion of price and remuneration from fairness control are irrelevant in the context of personal data. Therefore, data policy terms should be subject to fairness control under Article 4 Paragraph II of the UCTD.

Besides, personal data should not be considered equivalent to money because Article 8 of the Charter of Fundamental Rights of the European Union (EUCFR) recognizes the right to data protection as a fundamental right. However, this article does not clearly state that personal data cannot be bought or sold (Radin, 1987). In this context, it is important to highlight the view of the European Data Protection Supervisor (EDPS), who points out

that even though a market for personal data exists much like the market for live human organs, it does not mean that this type of market should be supported through legislation. Additionally, fundamental rights cannot be turned into tradeable items, even if the person to whom the data belongs agrees to the transaction (Supervisor, 2017). Therefore, it can be argued that even though Article 8 of the EUCFR does not explicitly forbid the commercialisation of the right to data protection, this does not automatically suggest that its economic use is permissible.

As discussed earlier, in common practice, personal data often serves as a form of payment, which is provided by consumers in exchange for access to digital services. However, due to its unique nature, personal data cannot be regarded as equivalent to money because it does not only have economic value. It also represents a fundamental right which is guaranteed by the EUCFR. In contrast, money is not a fundamental right, and it only has economic value. Therefore, applying the unfairness test to data policy contractual provisions is not just about protecting consumers' economic interests, but it is also about safeguarding their fundamental rights. Consequently, if the control of personal data is exempted from the unfairness test, it would ignore the characteristics of personal data.

Considering the above discussions and the arguments presented against the exclusion of personal data from the fairness control, which is guaranteed by Article 4 Paragraph II of the UCTD, it can be concluded that personal data should not be regarded as an ordinary form of payment. Furthermore, the exceptions which are stated in Article 4 Paragraph II of the UCTD should not be used in the context of digital service agreements that are offered in exchange for personal data.

4.5 Challenging the Exclusion of Personal Data from UCTD Review: A Discussion on Main Subject Matter

In accordance with Article 4 Paragraph II of the UCTD, the exclusion of core contractual provisions from judicial review is based on two conditions. One of them is the terms that define the main subject matter of the agreement. However, in the beginning, the European Commission's initial proposal was different. Specifically, it permitted all contractual provisions within the consumer contracts, including the core of the agreements, to be subject to judicial evaluation for fairness. In this regard, a very interesting opinion exists from German scholars Ulmer and Brandner. They stated that if judicial review were allowed on the core terms, it would go against the principles of a free-market economy (Ulmer, 1991).

In a free market, it is the parties' responsibility to decide the key aspects of an agreement. Core terms must be determined through negotiation, not legal intervention. But why is this important? This is important because If courts were allowed to review whether the contractual provisions were fair, it could weaken the free market economy. For example, consumers might stop putting effort into finding the best deals because they would know that later, it would be possible to amend the terms by the judicial body. There is no doubt that this would take away the motivation for businesses to compete by offering better conditions and this would harm the market's function. Contrary to the core terms, consumers often ignore supplementary contractual provisions. These provisions do not address the primary subject of the contract but instead concern other aspects of the agreement. Therefore, in general, consumers do not make well-informed choices about these terms, and competition among the sellers and suppliers fails to provide adequate protection. For this reason, it is very important to enable the courts to assess these contractual provisions. In conclusion, contractual provisions that consumers generally consider important, the terms which are prioritised by the consumers, should be excluded from judicial review (Schillig, 2011). However, external intervention is essential for terms that are ancillary provisions because consumers typically ignore these terms during the negotiation phase (Schillig, 2011).

Considering the above discussion, it is important to consider whether the arguments usually made about main subject contractual provisions apply to situations when personal data is used as payment. In this case, the situation with data policies is not the same. These policies are represented to consumers in a way that leaves no room for negotiation. The consumers' only option is to accept the policies as they are. Furthermore, most users do not read the data policies of DSPs. They often have little understanding of how much data is being gathered and how it will be used in the future. Because of this, anything that goes unread by consumers cannot play a key role in their decision to agree to an agreement.

In conclusion, terms related to data policies are not more significant than the ancillary terms, also, they are not getting more attention during the process of concluding the contract. Furthermore, most consumers do not have the ability to evaluate the worth of their personal data, and although privacy remains a priority for them, there is little to no comparison or focus on the quality of data policies. Therefore, these arguments highlight the need to assess data policies based on the fairness test, which is guaranteed by Article 4 Paragraph II of the UCTD.

4.6 The Role of Transparency in Reviewing Terms Related to Personal Data

As discussed in the chapters above, the UCTD sets out the rules to ensure clear communication in contracts as part of its unfairness control mechanism. It requires that contracts must be written in simple and clear language. Furthermore, consumers must have an opportunity to review all contractual provisions. After reviewing, if there were any ambiguous terms, they should be interpreted in the consumer's favour. Additionally, the principle of transparency appears in Article 4, paragraph II of the UCTD as well. The provision of this article prevents an unfairness review for terms related to the core subject of the contract or the adequacy of the price or payment, provided these contractual provisions are presented transparently (Josipović, 2024). However, if the transparency requirement is not met in this kind of situation, the control of fairness becomes applicable.

The CJEU identifies three main goals for transparency requirements in its case law. The first goal is to connect transparency with the criteria used to determine whether a term is unfair (Commission, 2000). The second aim is to safeguard consumers by ensuring they have the information needed to make informed and logical decisions (Commission, 2000). The third goal is to exempt the clearest and most significant contractual provisions from being reviewed for unfairness (Commission, 2000). Regarding transparency requirements, it is important to highlight that this principle plays a crucial role in several ways. They allow individuals to understand the context of the agreement, evaluate different choices which are available in the market (Lapuente, 2020, pp. 77-78), make informed and rational decisions (Schaub, 2017, p. 25), and enhance their capability to stand up for their rights. Besides, the transparency principle extends beyond linguistic or structural clarity (Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt, 2014). It is based on the approach that consumers are often at a disadvantage situation compared to the traders, especially when it comes to knowledge and understanding (Bogdan Matei, Ioana Ofelia Matei v SC Volksbank România SA,, 2015). Furthermore, in order to evaluate whether a contractual provision is expressed in a clear and understandable manner, national courts are required to consider all applicable EU regulations that establish duties for businesses, and which are relevant to the agreement in question. Therefore, the transparency principle should be understood in a practical way (Francisco de Elizalde, 2018, p. 11), focusing on whether an average individual can interpret the financial result of the specific contractual provisions (Maria Bucura v SC Bancpost SA, 2015). Consumers must have the ability to clearly predict the financial effects of the contractual clause. In this regard, the court draws a distinction between "formal" transparency, which relates to the use of precise language,

and “substantive” transparency, which guarantees that individuals can completely comprehend the future implications and responsibilities tied to the terms (lapuente, 2020, pp. 77-78).

Following the discussion above, it is evident that language that is only formally clear does not fulfil transparency requirements. In the context of personal data, it is apparent that data policy terms are frequently drafted as standardised provisions. Additionally, the value of personal data can change because it depends on the specific situation, which makes it very hard for consumers to make well-informed decisions based on the contractual provisions. In relation to this, it should be noted that DSPs claim the right to use, share and process consumers’ data but often fail to provide clear details about how this is done. Therefore, without clear details about how their personal data is used, consumers find it difficult to understand and predict how this could affect their privacy in the future. Consequently, even if courts determine that data policy terms related to personal data qualify as core terms, the principle of transparency could still act as an important safeguard. However, the process of identifying whether these terms are core and then evaluating their transparency in each specific case could create ambiguity and inconsistencies in court decisions. It could also potentially lead to delays in legal proceedings. Therefore, the most appropriate solution in this case is that data policy provisions should not classified as core terms, and they should be subjected to a fairness review as outlined in Article 4 Paragraph II of the UCTD.

5 QUALITATIVE DATA ANALYSIS: INTERVIEW FINDINGS

5.1 Research Methodology and Data Collection

Consumers in the digital world experience both unique benefits and challenges compared to those in traditional offline settings. While the digital environment often provides greater choices and convenience, it can also limit options in less visible ways. Despite these differences, consumers, whether online or offline, still expect fairness in their interactions with service providers. However, the constantly evolving nature of the digital world gives the DSPs far more opportunities to include unfair terms in their contracts more easily, often exploiting gaps in consumer knowledge and imbalances in power. Accordingly, this makes monitoring and controlling unfair terms in digital services far more complex than in offline settings. This report explores how consumers perceive unfair terms in digital service contracts, the challenges they face, and the strategies they use in order to address these issues. By analyzing these experiences, the study aims to identify the key theoretical and practical challenges in controlling unfair contract terms in digital services. This study aims to provide recommendations to address these challenges. This, in turn, aims to advance the control of unfair terms in digital services and enhance consumer protection.

This study adopted a qualitative, exploratory research design to identify the key theoretical and practical issues in controlling unfair contract terms in digital services and investigate consumer perceptions of unfair terms in digital service contracts. A qualitative approach was selected because it enables a deeper understanding of participants' experiences and perspectives. A total of 50 participants, all of whom were EU citizens, were interviewed for this research. Participants were selected using a purposive sampling method to ensure a diverse range of perspectives. This inclusion criterion required that all participants be users of digital services and have previous experience interacting with digital service contracts. It should be noted that the participants ranged in age from 18 to 55 years and had different levels of familiarity with digital platforms. This diversity ensured a mix of perspectives, including insights from younger, more experienced users and older participants with less digital experience.

For this research, a set of structured interview questions was prepared to cover important topics, including awareness of unfair terms, the ability to recognise them, obstacles to taking action, perceptions of service providers and potential solutions. Additionally, ethical approval for the study was obtained before data collection began. Even though the sample size is suitable for qualitative research, this study has some limitations.

Specifically, the findings may not fully reflect the broader EU consumer population. Furthermore, since the study relies on self-reported data, participants' responses may be shaped by their memory and individual perceptions. The following chapter will present the results, findings and recommendations.

5.2 Research Findings and Proposed Solutions

The first part of the interviews aimed to understand consumers' awareness of unfair terms. Specifically, why they choose to read or ignore terms and conditions and whether they have ever noticed clauses they felt were unfair. Furthermore, participants were asked how they typically learn about their rights as consumers. The next section presents the key findings from these interviews.

The interviews revealed that most consumers have limited awareness of unfair terms in digital contracts. Specifically, when it comes to reading T&Cs, most consumers admitted that they rarely read them. As one interviewee noted: ***"I just scroll to the bottom and click 'agree.'"*** Following these responses, it became clear that understanding why consumers tend to ignore terms and conditions was essential. Concerning this, two-thirds of the participants explained that these documents are overly long and take too much time to read. One participant simply stated, ***"They are far too long to read properly."*** As for the rest of the interviewees, the technical and complex language made the content difficult for them to understand. Several participants also shared a sense of resignation, feeling that these contracts are non-negotiable and reading them would not make any difference. As one interviewee mentioned: ***"Even if I read the terms, what choice do I have? I either agree or lose access to the service."*** Accordingly, many consumers feel they have no real choice, and the convenience of just clicking "agree" to use the service makes it easy for them to skip reading the terms altogether.

Additionally, many consumers rely on easily accessible sources, such as social media and online searches, in order to gain information about their rights. Besides, most of them see traditional legal advice as too expensive. As one participant explained***: "I usually look for information on Google or forums because legal advice is costly and not always easy to access."*** Another interviewee shared, ***"I tend to learn from social media or YouTube videos since it is free and straightforward, though I am not always sure how accurate it is."*** This reliance on informal and often inconsistent sources shows that many consumers do not have access to reliable and affordable legal guidance. As a result, they remain uninformed or misinformed about their rights. Therefore, they often do not have the

information they need to recognise and challenge unfair contractual provisions in digital service contracts.

Accordingly, the results reveal a clear problem: many consumers are unaware of unfair terms in contracts. Specifically, when consumers do not take the time to understand their rights, they can easily end up at a disadvantage without even realizing it. This lack of knowledge often causes consumers to agree to terms without fully understanding their impacts. This gives companies the chance to include clauses that may not work in the consumers' best interests. Therefore, consumers can find themselves stuck with unfavourable contractual terms. However, there is a reasonable explanation for why consumers often skip reading these agreements. Specifically, T&Cs are typically too long, filled with complex language, and take a considerable amount of time to go through. Therefore, making the effort feel like more trouble than it's worth. Furthermore, many consumers noted that they often have no real choice but to accept the terms because there is typically no opportunity to negotiate the T&Cs. Alternatively, it can be argued that reading the T&Cs is still important. If consumers take the time to go through them, they will be able to identify any terms they find unfavorable. This allows them to explore other options and, in some cases, find competitors which will offer them better and fairer conditions. Besides, consumers are protected against unfair contract terms under the UCTD. This directive states that any term which is considered unfair is not legally binding. However, if consumers do not read the terms and conditions, they may not even realize that unfair terms exist. Consequently, consumers miss the opportunity to challenge or address these terms. This shows that ignoring T&Cs can be costly because it leaves consumers unaware of potentially unfair terms. Following the analysis above, a key practical issue in controlling unfair terms in digital services has been identified. While the UCTD provides a theoretical solution by declaring unfair terms non-binding, the practical challenge remains. Specifically, many consumers do not engage with these terms. Therefore, they often fail to notice or challenge clauses that could be unfair.

To address this issue, this paper proposes two practical solutions to help consumers better understand and evaluate the fairness of T&Cs. The first solution is to raise awareness. Instead of expecting consumers to study long T&Cs, the focus should be on helping them about their rights and the main risks buried in the T&Cs. In this regard, governments, consumer protection groups and NGOs have an important role in helping consumers better understand their rights. This can be achieved by creating informative resources that will be easily accessible to consumers. The second solution is to improve transparency. This involves making T&Cs simple, clear, and easy for everyone to understand. It can be

implemented if the governments adopt the appropriate regulations which demand from the service providers to have simpler and clearer T&Cs. That way, consumers can quickly find the key information without getting lost or frustrated. Accordingly, if consumers are made more aware and T&Cs are made more transparent, they will have the tools to make informed decisions. This approach can help resolve the practical challenges identified above regarding the control of unfair terms in digital services.

The second part of the interviews focused on the challenges people face when deciding whether to act after finding unfair terms in T&Cs. Out of 50 participants, only 10 had come across such situations. Most of them said they did not take any action because hiring a lawyer was too expensive. During the interview, one consumer mentioned: ***"Hiring a lawyer costs more than it's worth, so I just let it go."*** Others described feeling powerless when faced with the legal complexity of challenging these terms. When asked how the situation could be improved, two keys' suggestions emerged. Many participants said affordable legal help would make a huge difference. As one interviewee shared, ***"If I could afford a lawyer, I would not hesitate to challenge those terms."*** Others suggested that AI tools could make things easier. ***"If there were an AI tool that showed me which terms are unfair and what I could do about them, I would feel a lot more confident."***

In accordance with the above discussion, it is clear that this research revealed another practical issue regarding the control of unfair terms in digital services. Therefore, to address this issue, the paper suggests two solutions to improve the control of unfair contractual provisions in digital services. First, governments should provide more funding to organisations which offer free legal support. This would make sure that people are not put off by the high cost of legal help and can still challenge unfair terms when they need to. Second, AI tools that detect unfair terms need to be improved. Although systems like CLAUDETTE can spot potential unfair terms, they do not explain them in a way that makes sense to the average person. Accordingly, if AI tools were improved, they could not only point out unfair terms but also explain clearly why those terms are unfair. This would give consumers the confidence to deal with these issues on their own.

CONCLUSIONS AND PROPOSALS

1. The thesis revealed that minimum harmonisation applies not only to the provisions of the UCTD but also to how the CJEU interprets them. Furthermore, to evaluate whether a contract places the consumer at a disadvantage compared to the protections provided by national legislation, member state courts must consider their respective national laws. Since national laws vary across EU member states, the outcomes of unfairness tests also differ from one country to another. Undoubtedly, this approach created inconsistencies in the case law. Consequently, in order to address these inconsistencies, this paper suggests adopting a maximum harmonisation approach. This would establish a uniform standard across the EU.

2. The thesis emphasised the importance of adopting grey lists and blacklists into the UCTD to improve its effectiveness and provide stronger consumer protection. Specifically, this paper suggests adopting a unified blacklist across all EU member states. A blacklist would help national courts to identify unfair contractual provisions more effectively. Additionally, the thesis suggests converting the UCTD's existing indicative list into a grey list, which would include terms that are presumed unfair unless proven otherwise. Furthermore, unlike the blacklist, the full harmonisation of the grey list is not recommended because a "one size fits all" approach may not be effective as it could end up reducing consumer protection instead of improving it. Consequently, having both a blacklist and a grey list would create clearer standards making it simpler for courts to evaluate whether contract terms are fair.

3. The study revealed the importance of AI in identifying situations where online service providers fail to meet their legal obligations. Specifically, AI is a valuable tool which can be used to support organisations and consumers to deal with unfair contractual provisions. This is very important because consumer protection organisations and individuals often do not have enough resources to address every instance of unfair terms. Furthermore, this paper discussed the CLAUDETTE project as a useful AI tool for reviewing and identifying unfair contractual provisions. The study also revealed the drawbacks of this project. For instance, CLAUDETTE cannot function in different languages and provide clear explanations for its results. Accordingly, to address these gaps, further improvements are necessary. These improvements increase CLAUDETTE's effectiveness and its roles.

4. The study revealed that even though personal data is treated like money in many transactions, it should not be considered as "Counter-performance." Additionally, it is discussed why data policy terms should not be excluded from the fairness test under Article

4 Paragraph II of the UCTD. Specifically, personal data has economic value, and it is also a fundamental right which is protected by the EUCFR. Therefore, personal data is not only a tradable asset like money. Different from the personal data, money only has economic value. Therefore, applying the unfairness test to data policy contract terms is not just about protecting consumers financially but it is also about protecting their fundamental rights. Consequently, if personal data were excluded from the unfairness test, it would ignore the nature of personal data. Furthermore, arguments about the main subject of a contract should not apply when personal data is treated as payment because the data policies are usually presented to consumers as non-negotiable. The consumers do not have a choice or control over the terms. They are often left with no choice but to accept data policies as they are. Additionally, most users do not read these policies and do not have information of how much data is collected or how it will be used in the future. This study suggests that data policy terms should not be considered more important than ancillary terms. Therefore, they should not be excluded from the unfairness test under the Article 4 Paragraph II of the UCTD. In this regard, even if courts decide that contractual provisions related to personal data qualify as core terms, the principle of transparency can still act as an important protection tool. However, to determine whether the terms qualify as core terms and evaluate their transparency on a case-by-case basis can be challenging. Consequently, this study proposes that data policy provisions should not be considered as core terms, and they should be subjected to fairness review in accordance with Article 4 Paragraph II of the UCTD.

5. The thesis revealed the theoretical and practical issues in controlling unfair terms in digital services by exploring consumers' perceptions of unfair terms in digital service contracts and the challenges they face. Specifically, many consumers are unaware of unfair terms in contracts because they often ignore T&Cs due to their complexity. While the UCTD protects consumers against unfair contractual provisions, this protection becomes meaningless if consumers remain unaware of the potentially unfair terms. Accordingly, they miss the chance to challenge these terms. This creates significant practical problems in controlling unfair terms in digital services. To address this problem, this paper proposes two solutions. The first is to raise consumer awareness about the importance of T&Cs and the risks of unfair terms. The second is to improve the transparency of the T&Cs by adopting laws that require DSPs to present them in simpler and clearer language. The second practical issue is the high cost of legal services. To address this, two solutions are proposed. First, governments should invest more money in free legal support to make it accessible to everyone. Second, AI tools designed to detect unfair terms in contracts should be further developed and improved.

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III. CASE LAW

1. CJEU

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SUMMARY

The Theoretical and Practical Issues of Control of Unfair Terms in Digital Services

Gvantsa Ichkiti

This thesis provides an in-depth analysis of the nature of unfair terms, their regulation in digital services under the UCTD, and the main theoretical and practical problems regarding the control of these terms in digital services. This research is based on an analysis of current legal frameworks, relevant scientific literature, case law, and interviews conducted as part of this study.

This study reveals that minimum harmonisation of the UCTD creates inconsistencies in case law, as courts in member states must apply national law to evaluate specific cases. Therefore, this paper suggests establishing a uniform standard across the EU by adopting a maximum harmonisation approach. Furthermore, the thesis highlights the crucial importance of adopting a grey list and a fully harmonised blacklist, as these would create clearer standards and make it simpler for national courts to evaluate whether contractual provisions are fair. Additionally, the study analyses the importance of AI and outlines that it is a very important tool for reviewing unfair terms in digital services; however, it still requires further development. Besides, the thesis examines the nature of personal data. It reveals that personal data cannot be considered "counter-performance" and should not be excluded from the review under Article 4 Paragraph II of the UCTD. Lastly, the thesis examines consumers' perceptions of unfair terms in digital contracts and the challenges they face. The analysis of relevant EU legal acts, decisions from the CJEU, and legal doctrine regarding the control of unfair terms in digital services enables the identification of existing drawbacks in legal frameworks and the most effective ways to address them.