Introduction to *Unfair Contract Terms in the Digital Age*

Since its adoption in 1993, the Unfair Contract Terms Directive\(^1\) (UCTD) has been a key element of the European Union’s consumer protection regime, providing a harmonised framework for the promotion of fairness and balance in standard form consumer contracts. The UCTD was viewed as a highly significant development in the timeline of European consumer protection law. Its implementation brought about far-reaching changes to the national contract laws of many Member States. For the first time, the law moved beyond simply regulating the bargaining process and established rules to evaluate the substantive fairness of the contract terms themselves. As a result of its introduction, all EU Member States were required to enact a minimum set of measures to protect consumers entering standard form contracts, including transparency control and a requirement to ensure that any unfair terms are not binding on consumers. The UCTD is among the oldest of the EU consumer protection instruments and, perhaps now more than ever, it is feeling its age. Recent years have brought about enormous change in the landscape of consumer contracts. Digitalisation and globalisation, the intertwined phenomena of the first decades of the twenty-first century, have driven this transformation, and give rise to implications for the protection of European consumers that could not have been envisaged when the UCTD was introduced.

First, digitalisation and the associated dematerialisation of transactions have resulted in distinct additional procedural burdens for consumers entering standard form contracts. Today’s consumers are accustomed to clicking through websites for the purchase of all kinds of everyday products and services. Online terms and conditions are often long, complex and difficult to locate. Consumers habituated to online contract formation methods may not realise the significance of the legal terms or may indeed not be aware of the existence of binding terms at all. The electronic environment may also provide potential for traders to exploit consumers’ cognitive biases using strategies to encourage consumers to click through contracts without taking notice of the terms. The UCTD pre-dates the advent of e-commerce, and although its pro-

visions are principles-based and technology-neutral, the transparency controls have not been tested, nor are they well understood in the context of online presentation of standard terms.

Second, the globalisation associated with digital technology has facilitated the opening of vast new markets for traders, in which to offer their products and services. This has resulted in the growing presence of multinational companies using online business models across the whole of the EU market. Many of these companies, including international social media service providers, technology giants and large-scale retailers, exert huge power and control over markets and attract billions of users worldwide. A further recent phenomenon is the remarkable pace of growth of the platform economy and the proliferation of companies using platform business models in multiple sectors such as retail, travel, home delivery services, transportation and social media. These companies are also attracting large numbers of users across the EU and in many cases, the power they exert extends beyond control over markets, also directly impacting consumers and the wider society.

The size and reach of many mass-market operators have implications for European consumers in relation to unfair terms control. Research shows that there is a significant level of non-compliance with the UCTD in online

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2 The phrase ‘platform economy’ is a loose term that can signify several different types of platform models such as platforms mediating work, retail platforms and a wide variety of service-providing platforms. The platform creates the online network that facilitates digital interactions between users. See Martin Kenney and John Zysman, ‘The Rise of the Platform Economy’ (2016) 32(3) Issues in Science and Technology 61.

3 A PricewaterhouseCoopers (PwC) study commissioned by the European Commission reports that the collaborative economy in Europe was worth €28 billion in 2015 and refers to a separate study suggesting that by 2025, five prominent collaborative economy sectors could generate global revenues of $335 billion. See Robert Vaughan and Raphael Daverio, ‘Assessing the Size and Presence of the Collaborative Economy in Europe’ (April 2016) PWC UK available at https://op.europa.eu/en/publication-detail/-/publication/2acb7619-b544-11e7-837e-01aa75ed71a1.

4 For example, according to a 2019 Eurostat survey, 21 per cent of EU citizens used collaborative economy platforms to arrange accommodation provided by another individual, and 8 per cent of EU citizens used platforms intended to arrange transportation between individuals. See Eurostat data available at https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20200205-1.

5 See Commission, Expert Group for the Observatory on the Online Platform Economy, Uncovering Blindspots in the Policy Debate on Platform Power (Final Report 3 March 2021). The report emphasises that platform power is more than just market power as it also challenges societies and individuals at large, with digital platforms extending their influence into sectors that raise considerations of public policy and societal infrastructure.
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This non-compliance relates to both the transparency requirements and to the presence of terms that would likely be considered unfair and unenforceable under the Directive’s unfairness test. The presence of such terms in mass-market contracts is likely to have a chilling effect, with consumers mistakenly believing that they are legally enforceable, and being deterred from seeking legal redress. Even if the consumer understands that the terms may be unfair and unenforceable, there are many barriers to individual litigation, and these are multiplied in cross-border cases. The percentage of consumers purchasing goods and services online has increased rapidly over the years since the introduction of the UCTD and continues to increase. The Covid pandemic has caused a dramatic shift in consumer behaviour, with many consumers increasingly making use of the internet for working, shopping and social interaction, thus significantly accelerating the rate of digitalisation. Consumers now have access to more markets and are more willing to shop across borders within the EU. While there have been great benefits for consumers associated with the digital transformation, there is also increased risk of exposure of consumers to unfair practices including unfair terms and lack of transparency in online con-

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8 According to a Eurostat survey, the percentage of people aged 16 to 74 who shop online almost doubled from 32 per cent in 2009 to 60 per cent in 2019. See https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20200420-2.


10 A Report on Consumer Attitudes to Cross-Border Trade and Consumer Protection produced on behalf of the European Commission in 2018 (part of a series of reports produced since 2006 within the EU Consumer Programme) finds that most EU consumers shop online within their own country (63 per cent). A more limited number shop across borders inside the EU (28.3 per cent) or outside the EU (18.4 per cent). The results show that the proportion of consumers making online purchases cross-border inside the EU has increased compared to 2016 by 9.1 percentage points.
tracts. With the expansion of cross-border trade and the increasing presence of multinational businesses, each using its own standard terms and conditions, any infringement of the provisions of the UCTD can potentially impact upon millions of consumers across the EU. This raises public policy considerations that go beyond the individual parties to the contract. It highlights the difficulty of balancing private law concerns about justice between the parties, and the regulation of contracts in the public interest; and reveals the tension at the heart of the UCTD between its use as an effective remedy in individual cases, and its use to monitor the market to eliminate widespread use of unfair terms.

Against the backdrop of the digital transformation and accompanying globalisation, this book asks whether the UCTD can effectively meet the challenges posed by the changed consumer contracting environment and assesses ways to ensure optimum protection of the collective interests of EU consumers from the risks posed by the presence of unfair terms in mass market online contracts. The solution lies partly in measures seeking to improve consistency of decision-making and to allow for a recognised EU standard of fairness to emerge, thereby also allowing decisions of courts and administrative bodies to have wider impact. But beyond its substantive provisions, there is also a need to assess gaps in the UCTD’s enforcement framework and to consider measures that might provide for more efficient and effective pan-European enforcement. With the problem increasingly having a transnational dimension, the book proposes a renewed focus on a cross-border cooperative enforcement approach coordinated at EU level through a European Mediator for unfair terms. The book also calls for detailed guidelines to help concretise the transparency principle of the UCTD and to clarify how it applies in relation to website terms and conditions; and for the promotion and monitoring of transparency in online contracts to become a feature of the cooperation and preventive control measures undertaken at EU level.

The book proceeds in three parts. Part I begins with an analysis in Chapter I of legal theories on standard form contracts and the rationale for regulatory intervention. This provides useful context for introducing the background to the adoption of the UCTD in Chapter 2 and establishes a basis for the discussion of competing rationales of the UCTD and the contradictions and compromises underlying its scheme. The UCTD is largely based on the consumer model of fairness control that strives to protect the consumer as the weaker party to the transaction and redress the imbalance between the contracting parties. This rationale requires a contextual application of the unfairness test that examines the circumstances of the individual case, thus ruling out a purely abstract assessment that might allow for generally applicable principles to emerge. Even in collective litigation, where the unfairness assessment is of necessity undertaken at a more abstract level, in most Member States decisions are only binding on the parties to the case. This means that the wider effects of
any decision are limited, for example as regards whether the decision can be applied to prohibit the use of the same types of terms in similar contracts with other consumers.

Chapter 3 examines the nature of the unfairness assessment under the UCTD, and analyses the case law of the Court of Justice of the European Union (CJEU) that provides guidance on the meaning of the concepts of good faith and significant imbalance as part of that assessment. The case law confirms that the unfairness test necessitates a comparison of the impugned term with the background rules of national law and further, the CJEU has emphasised that it is for the national court to make the decision as to unfairness taking into account the national legal context. In these circumstances, and given the minimum harmonisation character of the UCTD, there are significant challenges associated with arriving at a uniform approach to the application of the unfairness test. This chapter explores measures that could be adopted in order to encourage consistency in decision-making, to allow for some general principles to be established that might allow for a coherent, more uniform approach to the standard of unfairness. Such measures include a revival of the CLAB Europa database, the possibility of adopting a fully harmonised blacklist of terms that would be considered automatically unfair in all Member States, and the possibility of a revised and strengthened grey list of terms. The measures discussed in this part are aimed at allowing for precedent and common principles to emerge and to create potential for decisions to have wider impact beyond the confines of the parties to litigation. Achieving more certainty as to the unfairness standard is also important in order to assist administrative bodies with collective and preventive enforcement efforts, and for the development of an EU-wide system of preventive cooperation on enforcement, which is discussed in Part III.

Part II examines the transparency principle of the UCTD and assesses its effectiveness to protect the online consumer. The transparency principle should play a central role in regulating the issues arising in online presentation of terms but there is little understanding of how the transparency requirements apply in this context. Chapter 4 traces the development of the transparency principle under the UCTD, including an examination of the important gap-filling jurisprudence of the CJEU. The Court’s interpretation has recast the transparency principle, converting it from a mere procedural control linked to the contracting process, to something much broader, encompassing a positive information duty on suppliers, and a requirement to provide information in a way that allows consumers to understand the legal and economic conse-

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quences of agreeing to contract terms. This transformation has important implications for the practical application of the transparency requirements in the context of the modern online marketplace. The broad interpretation of transparency is clearly aimed not just at restoring balance between parties but also at ensuring market transparency to enable consumers to compare offers in the market. Nevertheless, there is still a high degree of uncertainty as to the functions and scope of the transparency principle, and as to the meaning of the requirement of ‘plain and intelligible language’. This has resulted in inconsistency among Member States as regards both transposition of the provisions and practical application of the controls. This part calls for guidance to help shape and concretise the transparency principle of the UCTD, particularly as it applies to online transactions.

Chapter 5 examines the specific difficulties encountered by consumers in the online environment, including the problems associated with notice and consent in click-wrap and browse-wrap contracts, the length and complexity of online terms and conditions, and the structure and design of websites that often exacerbate the traditional ‘no-read’ problem associated with consumer standard form contracts. This chapter also explores how it may be possible to improve readership and understanding of online terms and conditions and discusses academic commentary relating to the use of framing techniques, visualisation, and use of technology to reduce and simplify information and present it in ‘smarter’ ways and in ways that take into account the growing scholarship relating to how consumers behave and react to information in the online environment.

Part III turns to the issue of enforcement, and the problems of tackling widespread and cross-border use of unfair terms, affecting the collective interests of EU consumers. The book examines evidence consisting of the EU Commission’s own investigations and external academic empirical studies, which suggest that the existence of legal regulation of unfair terms may have little impact on the behaviour of online suppliers. Chapter 6 discusses the issue of collective enforcement under the Directive, including an examination of the Directive on Representative Actions and the impact of the recently

14 Above (n. 6) and see discussion in Chapter 7.
adopted Modernisation Directive. Having discussed the limitations of collective litigation, the book advocates the use of *ex ante* positive enforcement strategies involving existing cooperation mechanisms between the EU Commission and public administrative agencies of the Member States. Chapter 7 examines the potential of the CPC Network (established under the Consumer Protection Cooperation Regulation\(^1\)) (CPC Regulation), as a tool for enforcement of the UCTD. Recommendations are made as to how procedures under the CPC Regulation could be used to promote and improve transparency in online contracts; and to monitor the online market for unfair terms. Other potential initiatives are also discussed such as the creation of a European Mediator for Unfair Terms and the establishment of a forum involving institutionalised cooperation with various stakeholders that would enhance the CPC network’s activities, allowing it to build an information base and to collect market-specific information and set priorities for enforcement. Overall, this Part suggests that if the UCTD is to meet the challenge of protecting EU consumers in the digital age, there must be a renewed and strengthened focus on enforcement efforts that cross national boundaries, and that this effort must be coordinated at EU level. An approach centred around a positive model of enforcement using the CPC framework offers the best opportunity to begin to eliminate unfair terms and promote transparency in mass market online contracts for the benefit of European consumers.
