

Update the Unfair Contract Terms directive for digital services

KEY FINDINGS

This study analyses common terms in contracts of digital service providers, indicating when they could significantly distort the balance between the parties' rights and obligations to the detriment of consumers and should, therefore, fall within the scope of the Unfair Contract Terms Directive. Further, the study discusses the particularities of the assessment of online transparency of terms of digital service providers and sanctions they could face if they breach the current consumer protection framework. Recommendations are made to improve the effectiveness of this framework by: introducing a black and grey list of unfair terms, strengthening current sanctions, and introducing new obligations for digital service providers.

Background

The Unfair Contract Terms Directive (UCTD) was adopted in 1993 before digital services became prevalent in modern society and prior to big data further exacerbating the contractual imbalance between digital service providers (DSPs) and consumers. Digital services have been defined in Article 2(2) Modernisation Directive (MD) as services that allow consumers to create, process, store or access data in digital form, or allow sharing of or any other interaction with data in digital form uploaded or created by consumers or other users of those services. These are, therefore, services accessed and provided in the online environment.

As the UCTD is a minimum harmonization directive and DSPs often provide their services cross-border, the current European framework against unfair contract terms may not be an effective consumer protection tool when consumers conclude contracts with DSPs. As a result of the Member States offering more consumer protection than what the UCTD provides for, DSPs may be confronted with a different assessment of unfairness in different Member States, creating an uneven level playing field for DSPs. The complex and varied national rules regarding unfair terms may also hinder the enforcement of the UCTD for national and cross-border enforcement agencies and consumer organizations.

Given the fact that the UCTD framework was developed for the offline world, this Study examines whether it is necessary to amend the UCTD to, on the one hand, improve consumer protection online against unfair contract terms of DSPs and, on the other hand, to provide more legal certainty to DSPs as to what terms and conditions are considered fair.



Aim

Despite previous attempts to revise the UCTD framework, e.g. during the works on the Consumer Rights Directive (CRD), the first change to it was introduced only in the past year, through the Modernisation Directive (MD). This change is limited to increasing the effectiveness of the UCTD sanctions and facilitating the enforcement of unfairness in the Member States.

This Study aims to propose measures increasing the effectiveness of the UCTD framework in the provision of digital services. To that effect, the Study presents an overview of commonly encountered terms used by digital service providers and evaluates whether they may cause a significant imbalance, contrary to good faith, in the parties' rights and obligations to the detriment of consumers. Where this is indeed the case, such terms could be considered unfair. This evaluation is conducted on the basis of the review of academic literature, case law, policy documents, news items reporting consumer problems with various digital service providers, as well as the study of actual terms of selected DSPs.

Key findings

The Study presents an overview of commonly encountered terms used by DSPs. It shows that many of these terms may indeed cause a significant imbalance, contrary to good faith, in the parties' rights and obligations to the detriment of consumers. In addition, the Study draws the attention to the fact that the assessment of unfairness may currently be hindered due to: 1) the UCTD framework having been adopted differently in the Member States as a result of its minimum harmonisation character; 2) no mention of online practices in the preamble to the UCTD and of how its general clauses could be applied to such practices; 3) an indicative-only list of possible unfair terms in the Annex to the UCTD; 4) the list of possible unfair terms not addressing issues commonly encountered in the digital world.

Amongst the problematic terms are terms having the object or effect of:

- misleading consumers as to the nature of the contract and statutory rights following from it (e.g. terms suggesting that: the contract is concluded for the provision of digital content rather than of digital services; a DSP acts in a non-professional capacity; the consumer protection framework does not apply);
- allowing DSPs to retain the collected personal data when consumers do not conclude a contract or the DSP terminates the contract or allowing DSPs to collect more personal data throughout the performance of the contract than what parties have originally agreed to, without the DSP notifying consumers about the change of the contract and giving them an option to terminate the contract;
- creating the impression that digital services are provided for free, where consumers are paying for the service with their personal data, time or attention;
- preventing consumers from withholding their performance;
- exempting the DSP from liability: 1) for consumers' damage caused by any illegal content posted on the DSP's website, if the DSP was informed of that content and did not remove it within a reasonable time, after which time the damage has occurred; 2) for consumers' damage caused intentionally or through gross negligence; 3) by creating the impression that services are provided "as is";
- allowing DSPs to modify terms, including price, where the contract does not provide a valid reason for the change of terms or the DSP did not inform consumers of the change with reasonable notice before the change was applied, or the consumer has not been informed about the option to and was not given a reasonable time to terminate the contract after having been informed of the change;
- hindering the consumers' use of the right of withdrawal;
- providing DSPs with a unilateral right to suspend the performance or terminate a contract, when the consumer's behaviour does not objectively justify this;

- preventing DSPs from making the data available to consumers after the termination of the contract, within reasonable time after the consumer has requested the termination;
- prohibiting or penalising negative reviews;
- preventing consumers from being able to contact a human contact point with their complaints and questions;
- infringing consumers' rights and data protection principles from the GDPR;
- creating an impression with consumers that their right to pursue judicial enforcement of their rights is limited or even excluded (e.g. by requiring arbitration; derogating from Brussels I Regulation (recast); by misinforming consumers as to their right to rely on the mandatory consumer protection of the country of their residence);
- discriminating against consumers as a result of the personalisation of such terms;
- limiting or excluding the access to digital services, if consumers do not give an explicit consent to the sharing of personal data in the scope exceeding what is needed for the provision of a digital service, including as a counter-performance for the provision of digital services;
- providing DSPs with a license to use the user-generated content unless this has been brought specifically to the consumers' attention at the moment of the contract's conclusion and has been individually, separately and explicitly accepted by consumers; and
- forming a no-survivor clause.

In the Study we elaborate on each of these types of terms and justify why they could be always or almost always considered unfair in consumer contracts. In the next paragraph we present our recommendations on how consumers could be protected against such terms drafted by DSPs.

It is important to note here that the Study shows that the contractual imbalance online will not be remedied simply by amending the UCTD. However, we conclude that the strengthening of the effectiveness of the UCTD framework could be achieved but only through the simultaneous revision of the UCTD, as well as the adjustment of certain obligations of DSPs in other EU consumer protection acts, e.g. in the CRD or in the forthcoming Digital Services Act.

Recommendations

In this Study, we recommend that the current indicative list of potentially unfair terms be turned into a black list of terms that under all circumstances should be considered unfair if these terms are included in a contract between a consumer and a DSP. This will provide better consumer protection, offer more legal certainty to DSPs, and help create a level playing field between DSPs.

In addition, we have identified several terms, listed in the paragraph on key findings, that currently are being used by DSPs that, in our view, are always or almost always unfair when used in contracts concluded with consumers, but that are not reflected or can only indirectly be linked to items on the current indicative list. We recommend that these terms should be placed on a black list of forbidden terms or on a grey list of terms presumed to be unfair if these terms are used in a contract with a DSP. Whether or not these lists should also be applied to other service providers than DSPs or other online traders, is of course a matter for political debate but is not discussed in this Study. We also recommend strengthening the sanction for the DSP's use of blacklisted terms by adding a paragraph to Article 6 UCTD. This paragraph should provide that where a DSP has used a blacklisted term, courts should be allowed to terminate the whole contract if this sanction is more advantageous for the consumer than merely removing the unfair term from the contract.

A third series of recommendations pertain to the conclusion of contracts and the incorporation of terms and conditions. First, we recommend that Article 1(i) of the Annex to the UCTD is re-drafted in order to explicitly mention that placing a hyperlink to terms and conditions somewhere on the DSP's website is insufficient to provide a 'real opportunity' of consumers being able to become acquainted with them before the conclusion of the contract. Instead, DSPs should have an obligation to draw the consumers' attention to such a hyperlink and they should have the burden of proof that this has, indeed, occurred. Consequently, it could be presumed that a disclosure of terms and conditions through a hyperlink, without the consumer having to tick a box or otherwise having to express consent explicitly, is non-transparent. This would be a rebuttable presumption.

Second, we recommend adopting an explicit prohibition of contracts being concluded by consumers providing a tacit consent online, which would disallow DSPs to rely on such contract types as browse-wrap. This will be achieved if DSPs are obliged to explicitly and clearly inform consumers that their action will lead to the contract's conclusion, before any such action occurs, and to ask for an explicit consumer's consent at that moment for the contract's conclusion. The consent could only be valid if consumers were given a real opportunity to read terms and conditions of the contract, prior to giving their consent, as well.

Third, we recommend obliging DSPs to promote transparency of online terms and conditions, of the mandatory consumer protection rules, and of the application of automated decision-making mechanisms. These information obligations could be added to the forthcoming Digital Services Act or a further revision of the CRD could be considered.

Finally, we would suggest the introduction at EU level of default rules regarding limitation of data storage for DSPs. Such rules would require DSPs to remove the collected consumer data within reasonable time from the moment such data becomes unnecessary for the provision of their services. Not regulating this on the EU level, will likely lead to the adoption of different time limits by the Member States, further contributing to the legal uncertainty on the market for the provision of digital services. Moreover, if the Member States do not adopt such rules and the contractual terms leaving the data storage open-ended or unreasonably long are considered unfair, the annulment of such terms would have detrimental consequences to consumers.

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