Article

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Digitized Terms: The Regulation of Standard Contract Terms in the Digital Age

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Abstract: Digital transformation is also transforming standard contract terms. With the emergence of online platforms, supported by algorithmic data analysis and self-enforcing technologies, platform terms are becoming increasingly common. The article argues that this type of terms differs from traditional standard terms in a number of ways, and it considers whether the existing unfair contract terms regime is still appropriate. The regulatory tools once developed for standard terms in bilateral agreements – transparency requirements, fairness review, and restrictions on contracting around – seem inadequate to meet the new challenges of digital transformation. In order to preserve – or rather recreate – the architecture of choice for private contracts, the paper argues for a new regulatory strategy: In order to strike the right balance between protecting private autonomy and avoiding significant imbalances, the regulatory objective should be to ensure the impartiality of platforms by focusing on the structural conditions of their rule-making.

Keywords: Unfair Contract Terms Directive; online platforms; algorithmic data analysis; self-enforcing technologies; fitness check of EU consumer law

Résumé: La transformation numérique transforme également les clauses contractuelles types. Avec l'émergence des plateformes en ligne, soutenues par l'analyse algorithmique des données et les technologies d'auto-application, les clauses des plateformes deviennent de plus en plus courantes. L'article fait valoir que ce type de clauses diffère des clauses standardisées traditionnelles à plusieurs égards, et il examine si le régime actuel des clauses contractuelles abusives est toujours approprié. Les outils réglementaires autrefois développés pour les clauses standardisées dans les accords bilatéraux – exigences de transparence, contrôle de l'équité et restrictions sur la conclusion de contrats – semblent inadaptés pour répondre aux nouveaux défis de la transformation numérique. Afin de préserver – ou plutôt de recréer – l'architecture

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de choix pour les contrats, l'article plaide en faveur d'une nouvelle stratégie de régulation : Afin de trouver un juste équilibre entre la protection de l'autonomie privée et la prévention des déséquilibres importants, l'objectif réglementaire devrait être de garantir l'impartialité des plateformes en se concentrant sur les conditions structurelles de l'élaboration de leurs règles.

Zusammenfassung: Die digitale Transformation verändert auch die Allgemeinen Geschäftsbedingungen. Mit dem Aufkommen digitaler Plattformen, die von algorithmischer Datenanalyse und selbstdurchsetzenden Technologien unterstützt werden, finden Plattformbedingungen immer mehr Verbreitung. Der Beitrag zeigt, dass sich dieser Typus von Klauseln in verschiedener Hinsicht von herkömmlichen Geschäftsbedingungen unterscheiden. Er analysiert, ob die bestehenden Regelungen zur Kontrolle missbräuchlicher Vertragsklauseln noch angemessen sind. Die Regulierungsinstrumente, die einst für Geschäftsbedingungen in bilateralen Verträgen entwickelt wurden – Transparenzanforderungen, Inhaltskontrolle und Beschränkungen der Vertragsgestaltung – drohen für die neuen Herausforderungen des digitalen Wandels ungeeignet zu sein. Mit dem Ziel, inhaltliche Gestaltungsfreiheit für private Verträge zu erhalten oder sogar neu zu schaffen, plädiert der Beitrag für eine neue Regulierungsstrategie: Um die richtige Balance zwischen dem Schutz der Privatautonomie und der Vermeidung ungerechtfertigter Ungleichgewichte zu finden, sollte die Regulierung darauf abzielen, die Unparteilichkeit der Plattformen zu gewährleisten, indem sie sich auf die strukturellen Bedingungen von deren Regelsetzung konzentriert.

1 Introduction[1]

The regulation of unfair contract terms is at the heart of European private law. Thirty years ago, when the Council Directive 93/13/EEC on unfair terms in consumer contracts (UCTD) was adopted,[2] this area of law was still considered to be pointillistic,

1 This article builds on – and extends – a chapter on 'Digitizing Defaults: Methods and Mechanisms of Generating Default Rules in the Digital Age' in the forthcoming volume on 'Default Rules in Private Law' edited by B. Häcker and J. Ungerer (Oxford, Hart Publishing, forthcoming). Some of the thoughts have been presented at the Law Faculty of the European University Institute in Fiesole on 13 March 2023 as well as at the International Workshop 'Default Rules in Private Law' at Brasenose College, University of Oxford, on 24 March 2023. I wish to thank all discussants and participants for their very helpful comments. All remaining errors are my own.

2 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJEU* 1993 L 95/29.

with its selective rules resembling a few (albeit increasingly numerous) islands in the sea of private law.[3] Since then, much has changed. The importance of the area of law has increased massively, not only as a result of many new directives, regulations, and other legislative projects but also as a result of the rich and complex case law on the UCTD. Whereas rulings by the European Court of Justice were rare in the early days, the number of cases has risen rapidly over the last 15 years.[4] Today, the Directive is considered to be the most frequently dealt with European private law instrument. Not only has it been a catalyst for major legal reforms in some Member States, tackling serious economic grievances and situations of structural imbalances, but it has also advanced EU private law by providing uniform interpretations of its key concepts and shaping legal instruments of cross-sectoral relevance: Its aim is nothing less than to strike a balance between private autonomy and contractual fairness. This fundamental goal of the Directive becomes particularly evident when the European Court of Justice understands it as aiming 'to replace the formal balance which the [contract] establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them'.[5]

Nevertheless, on its 30th birthday, the UCTD is once again at the centre of legal policy debate. Recently, for example, *Matthias Lehmann* and *Danny Busch* have diagnosed that the Directive was flawed from the outset and that these flaws have become more apparent over time, with the result that the extensive case law of the Court of Justice has failed to provide clarity.[6] As a remedy, they propose replacing the Directive with a Regulation, which they believe would speed up the completion of the Single Market, improve competition and increase consumer choice.[7] This article also highlights the need for reform, but the focus is on the substance, not the form, of the legislative act. The core argument is that the world has changed fundamentally over the last 30 years, particularly as a result of technological developments. Due to digital transformation, the Single Market objective is increasingly focused on and

3 In this sense H. Kötz, 'Gemeineuropäisches Zivilrecht', in *Festschrift for Zweigert* (Tübingen: Mohr Siebeck, 1981) 481, 483; see also F. Rittner, 'Das Gemeinschaftsprivatrecht und die europäische Integration' (1995) *JuristenZeitung* 849, 851.

4 Some, therefore, speak of a 'revival' of the Directive: H.-W. Micklitz/N. Reich, 'The Court and the Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51 *Common Market Law Review* 771.

5 CJEU of 26 October 2006, C-168/05, *Mostaza Claro*, EU:C:2006:675, para 36, and, more recently CJEU of 17 May 2022, C-725/19, *Impuls Leasing România*, EU:C:2022:396, para 40. In more detail: M. Hesselink, 'EU private law injustices', (2022) 41 Yearbook of European Law 83, 107 et seqs.

6 M. Lehmann/D. Busch, 'Plädoyer für eine Klauselverordnung' (2023) *JuristenZeitung* 640, 641–643.

7 *Ibid* 643–646.

translated into the development of a Digital Single Market, removing virtual borders, increasing digital connectivity, and facilitating consumer access to cross-border online content.[8] Digital transformation, it is argued, is also transforming standard terms and needs to be reflected in their substantive regulation.[9] This focus is very much in line with the European Commission's current fitness check of EU consumer law and its aim to ensure that the UCTD, among others, is fit for the digital age.[10]

The emergence of online platforms, supported by algorithmic data analysis and self-enforcing technologies, is increasingly replacing traditional standard terms with platform terms (discussed in Section 2 below). These two types of standard terms differ in a number of ways, in particular because platform terms are not drafted by the contractual partner but are provided by the platform as a third party. This article examines whether the existing unfair contract terms regime is still appropriate for such digitised terms. The regulatory tools once developed for standard terms in bilateral agreements – transparency requirements, fairness review, and restrictions on contracting around – seem no longer adequate to meet the challenges of digital transformation (see below, Section 3). In order to preserve – or rather restore – the architecture of choice for private contracts, the article argues for a new regulatory strategy. To strike the right balance between protecting private autonomy and avoiding significant imbalances, the regulatory objective should be to ensure the impartiality of platforms by focusing on the structural conditions of their rule-making (see below, Section 4). In addition to discussing restrictions on conflicted rule makers, the article builds on the model of the Data Governance Act and its data altruism provisions to propose regulatory instruments that privilege trustworthy rule makers. These instruments promise to provide a regulatory framework that enhances trust in impartial rulemaking while taking advantage of digital platforms' access to the data needed to generate platform terms that mimic market preferences.

8 At the policy level, the European Commission had already concretized its '*Strategy for a Digital Single Market for Europe*' in 2015, based on the '*Digital Agenda for Europe*' published in 2010: See COM (2015) 192 final and COM (2010) 245 final.

9 With a similar starting point but a different thrust (focusing on questions of enforcement): C. Gardiner, *Unfair Contract Terms in the Digital Age* (Cheltenham: Edward Elgar, 2022).

10 Following a public consultation that ended in February 2023, the final version of the fitness check has been announced for mid-2024; for more information, see https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law_en.

2 Digitizing Standard Terms

Almost 30 years ago, at the time when the UCTD was adopted, Nicholas Negroponte predicted that 'everything that can be digitized will be digitized'.[11] Today, it is becoming increasingly clear that standard terms are also being digitised: Digital transformation is transforming the way standard contract terms are used and how they work. Online platforms are one of the main technological drivers: They provide alternative regulatory infrastructures based on the standard terms and conditions of these platforms (see Section 1 below). If combined with artificial intelligence and machine learning technologies, data collection and analysis enable learning processes that work much faster and more effectively than conventional legal instruments like default rules and bilateral standard terms (see below, Section 2). Moreover, smart technologies provide tools that can not only anticipate, mitigate and resolve contractual risks of all kinds, but also provide for mechanisms of automatic enforcement that functionally resemble and partially replace judicial enforcement (see below, Section 3).

2.1 Platform (Dis-)Intermediation

In supply chains, digital transformation is replacing traditional intermediaries with new forms of distribution: Direct, peer-to-peer contracts between suppliers and buyers are becoming more common, with intermediation instead taking place on online platforms. Unlike the intermediaries who used to take ownership of the traded goods, these digital marketplaces do not have to become parties to the supply contract themselves, but merely mediate these contracts.[12] The so-called platform economy and the sharing economy, based on online platforms such as AirBnB, BlaBlaCar and Uber, are key features of the digital economy.[13] Due to their diversity, online platforms are difficult to define. Some authors describe them as marketplaces where providers offer intermediation services based on data

11 N. Negroponte, *Being Digital* (New York: Alfred A Knopf, 1995).

12 In more detail: F. Möslein, 'Art. 1 Platform Regulation', in R. Schulze/D. Staudenmayer (eds), *EU Digital Law* (2nd ed, Baden-Baden: Nomos, 2024) para 1. From an economic perspective, network effects are an important driver of platform businesses, allowing platforms to choose between different pricing and non-pricing strategies, see P. Belleflamme & M. Peitz, *The Economics of Platforms* (Cambridge: Cambridge University Press, 2021).

13 Cf, for instance: B. Devolder, *The Platform Economy* (Antwerp: Intersentia, 2018); N.M. Davidson, M. Finck and J.J. Infranca, *The Cambridge Handbook of the Law of the Sharing Economy* (Cambridge: Cambridge University Press, 2018).

processing,[14] while others focus on the Internet as a technical connection.[15] By creating digital structures that allow two groups of users (suppliers and customers) to meet and transact with each other, online platforms form a central pillar of digital markets. They enable consumers to find online information and allow businesses to exploit the advantages of e-commerce.[16] However, they raise widely discussed competition and private law questions, for instance about their responsibility in relation to illegal or harmful content or products hosted in the frame of their operation.[17] As a centerpiece of Europe's digital strategy, the Digital Markets Act (DMA) has recently been adopted.[18] It aims to ensure fair behavior by large online platforms that act as gatekeepers in digital markets.[19] In addition, the Regulation on Platform-to-Business relations (P2B Regulation) has been enacted in 2019 in order to ensure the transparency of, and trust in, the online platform economy in business-to-business relations.[20]

From the perspective of the UCTD, the characteristic feature of online platforms is that transactions are governed by the respective platforms' terms, in addition to – or even in place of – State-made contract law. Platforms provide the framework 'that shapes the way in which supply and demand are matched, in which products are perceived, and hence in which a vast number of individual contracts are formed'.[21] Platforms typically operate as marketplaces with a triangular structure where users

14 R. Podszun, *Empfiehlt sich eine stärkere Regulierung von Online-Plattformen und anderen Digitalunternehmen?* (Munich: C H Beck, 2022) 10.

15 G. Wagner, 'Haftung von Plattformen für Rechtsverletzungen' (2020) 4 *Gewerblicher Rechtsschutz und Urheberrecht (GRUR)* 329.

16 European Commission, *Commission Staff Working Document: Online Platforms*, SWD (2016) 172 final, 1; more extensively OECD, An Introduction to Online Platforms and Their Role in the Digital Transformation (Paris, 2019).

17 Cf on the one hand, for instance: J. Valente, *From Online Platforms to Digital Monopolies Technology, Information and Power* (Leiden: Brill, 2021); and on the other hand: F. Maultzsch, 'Contractual liability of online platform operators' (2018) 14 *European Contract Law Review* 209.

18 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJEU 2022 L 265/1.

19 In more detail: H. Schweitzer, 'The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair: A Discussion of the Digital Markets Act Proposal' (2021) 3 *Zeitschrift für Europäisches Privatrecht* 503; R. Podszun, P. Bongartz and S. Langenstein, 'The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers' (2021) 2 *Journal of European Consumer and Market Law* 60.

20 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, *OJEU* 2019 L 186/57; cf, in particular, recital 3.

21 S. Grundmann and P. Hacker, 'Digital Technology as a Challenge to European Contract Law' (2017) 13 *European Review of Contract Law* 255, 273 *et seq*.

must first conclude a user contract with the platform to be subsequently able to conclude contracts between themselves.[22] As part of this user contract, they agree to the platform's terms and conditions.[23] Their regulatory content, however, typically extends beyond the bilateral relationship between the user and the platform and has a profound impact on the individual transactions between the users.[24] By this means, online platforms largely substitute the conventional default rules of contract law with their own, private rules: In fact, they act 'as *de facto* "lawmakers" for the platform environment'.[25] The so-called platform law is developing into an autonomous normative order of digital platforms, based in particular on standard contract terms.[26]

As opposed to the traditional mode of application of standard terms, these indirect effects of online platform terms do not fit well with the rules of the UCTD as they do not form part of 'contracts concluded between a seller or supplier and a consumer' (Article 1 para 1): To market partners, the platform is a third party.[27] Platforms also call the applicability of other consumer law rules into question: As opposed to bank lending, for instance, peer-to-peer lending is not subject to regulatory safeguards such as bank deposit guarantee schemes, and it is unclear whether respective lenders are protected by the rules on consumer credit contracts.[28] Generally speaking, the emergence of the platform economy modifies the regulatory framework within which transactions occur. Online platforms substitute their own platform terms for the otherwise applicable default rules, thereby affecting the sophisticated governance mechanism of

22 C. Twigg-Flesner, 'Online Intermediary Platforms and English Contract Law', in P. Davies and T. Cheng-Han (eds), *Intermediaries in Commercial Law* (Oxford: Hart, 2022) 171–192.

23 See, for instance C. Riefa, *Consumer Protection and Online Auction Platforms* (London: Routledge, 2016) 50.

24 V. Mak, 'Private Law Perspectives on Platform Services' (2016) 5 *Journal of European Consumer and Market Law* 19, 20–23.

25 Grundmann and Hacker, n 21 above, 274; similar H. Schweitzer, 'Digitale Plattformen als private Gesetzgeber' (2019) *Zeitschrift für Europäisches Privatrecht* 1; L. Kumkar, 'Plattform-Recht revisited' (2022) *Zeitschrift für Europäisches Privatrecht* 530, 530.

26 F. Bassan, *Digital Platforms and Global Law* (Cheltenham: Edward Elgar, 2021) 110 *et seq*; M. Land, 'The Problem of Platform Law: Pluralistic Legal Ordering on Social Media', in P. Berman (ed), *The Oxford Handbook of Global Legal Pluralism* (Oxford: Oxford University Press, 2020) 974; O. Lobel, 'The law of the platform' (2016) 101 *Minnesota Law Review* 87, 93 *et seq*.

27 V. Hatzopoulos, *The Collaborative Economy and EU Law* (Oxford: Hart Publishing, 2018) 44 *et seq*.

28 In detail: F. Möslein and C. Rennig, 'Anleger- und Verbraucherschutz bei Crowdfunding-Finanzierungen', in F. Möslein and S. Omlor (eds), *FinTech-Handbuch* (2nd ed, Munich: C H Beck, 2021) 505; M. Ebers and B. Quarch, 'EU Consumer Law and the Boundaries of the Crowdfunding Regulation', in P. Ortolani and M. Louisse (eds), *The EU Crowdfunding Regulation* (Oxford: Oxford University Press, 2021) 83.

knowledge production characterized by the interaction between public and private rule-making.[29] Platforms substitute the conventional legal framework of private autonomy by their own, private rules, at least in part.[30]

2.2 Contractual Personalisation

In addition to enabling online platforms, digital technologies provide tools for handling large amounts of data. They enable data analytics aimed at discovering useful information, drawing conclusions, and supporting decision-making by transforming and modelling data on a large scale.[31] The two phenomena are linked because the underlying data often originate from platforms. It may include preferences of market participants, for example for contract terms. Artificial intelligence and machine learning enable dynamic adjustments based on data about supply and demand, competitor activity, and delivery schedules.[32] While practices of algorithmic pricing are among the most widely discussed manifestations of this technological development,[33] the same technological means also allow algorithmic adjustments to other contractual clauses, in particular dynamic adaptions of platform terms. Online platforms are therefore in a position to use data analytics to dynamically adjust or even personalize their terms and conditions. However, personalized contractual terms do not fit easily into the regulatory scheme of the UCTD. It does not even seem clear whether they have been 'drafted in advance' within the meaning of Article 3 para 2 UCTD or whether they fall outside the scope of the Directive. There has been little discussion of this issue so far: Even though platforms have much better access to the necessary data than legislators, at least in the field of contract law, the focus of the legal debate has been on personalized law rather than on personalized terms.[34]

29 In more detail on this mechanism: Möslein, n 1 above, Section 2.

30 Similar Grundmann and Hacker, n 21 above, 274.

31 Cf for instance A. Zobaa and T. Bihl, *Big Data Analytics in Future Power Systems* (London: Routledge, 2018) 57 *et seq*.

32 Briefly, for example, P. Rott, 'A Consumer Perspective on Algorithms', in L. de Almeida, M. Cantero Gamito, M. Durovic and K. Purnhagen (eds), *The Transformation of Economic Law: Essays in Honour of Hans Micklitz* (Oxford/Portland: Hart, 2021) 43.

33 See, for instance, M. Grochowski, A. Jabłonowska, F. Lagioia and G. Sartor, 'Algorithmic Price Discrimination and Consumer Protection: A Digital Arms Race?' (2022) *Technology and Regulation* 36.

34 C. Sunstein, 'Impersonal Default Rules versus Active Choices versus Personalized Default Rules: A Triptych' (2012) *Regulatory Policy Program Working Paper* RPP-2012-17; A. Porat and L. Strahilevitz, 'Personalizing Default Rules and Disclosure with Big Data' (2014) 112 *Michigan Law Review* 1417; cf also C. Busch and A. de Franceschi (eds), *Algorithmic Regulation and Personalized Law* (Munich: C H Beck, 2021).

In any event, algorithmic capabilities to personalize interactions with consumers to exploit information asymmetries and consumer biases raise fundamental private autonomy concerns.[35] The digital technologies of data analytics and artificial intelligence enable algorithmic agents to replace human choice in contractual transactions and decisions.[36] But if technological devices have an impact on contractual decisions, private autonomy may be at risk. The challenge for any regulatory assessment is to understand the differences between human and machine decision-making in order to assess the impact on private autonomy.[37] Rulemakers are considering regulatory strategies to avoid discriminatory or unfair algorithmic decisions, notably in the context of the European AI Act Proposal.[38] However, if algorithmic data analysis is redefining the way markets operate, it seems necessary to reflect these new risks of unfair contract terms in its specific regulation, rather than leaving them (largely) outside its scope.

2.3 Self-Enforcement

Digital technologies also provide alternatives to legal enforcement by enabling private parties to impose or exclude certain actions by technological means. The use of data and connected devices can be restricted, for example by preventing smart locks from opening if rent is not paid. As a consequence, the technological infrastructure replaces legal mechanisms, and a 'lex cryptographica' emerges.[39] Smart technologies operate as a mechanism of automatic enforcement that functionally resembles and partially replaces judicial enforcement. In particular, blockchain and distributed ledger technologies allow for the design of so-called smart contracts: Smart contracts are self-executing agreements written in code on the blockchain.[40] Because such agreements can be automated by computers and are enforceable through the

35 G. Wagner and H. Eidenmüller, 'Down by Algorithms?' (2019) 86 *The University of Chicago Law Review* 519.

36 M. Gal, 'Algorithmic Challenges to Autonomous Choice' (2018) 25 *Michigan Telecommunications & Technology Law Review* 59; L. Scholz, 'Algorithms and Contract Law', in W. Barfield (ed), *Cambridge Handbook of the Law of Algorithms* (Cambridge: Cambridge University Press, 2019) 141.

37 For an introductory overview, see J. Turner, *Robot rules* (Basingstoke: Palgrave, 2019) 39–80.

38 COM (2021) 206 final.

39 P. de Filippi and A. Wright, *Blockchain and the Law* (Harvard: Harvard University Press, 2018) 49 *et seq*; cf also F. Möslein and S. Grundmann, 'Vertragsrecht und Innovation – Gedanken zur Gesamtarchitektur', in *id* (eds), *Vertragsrecht und Innovation* (Tübingen: Mohr Siebeck, 2020) 5, 46.

40 Extensively F. Möslein, 'Smart Contracts im Zivil- und Handelsrecht' (2019) 183 *Zeitschrift für das gesamte Wirtschafts- und Handelsrecht* 254; see also *id*, 'Legal Boundaries of Blockchain Technologies: Smart Contracts as Self-Help?', in A. de Franceschi *et al* (eds), *Digital Revolution – New challenges for Law* (Munich: C H Beck, 2019) 313.

tamper-proof execution of software code, they take on tasks traditionally assigned to legal institutions.[41] While distributed ledger technologies offer alternative, digital mechanisms for contract enforcement, their relationship to the legal sphere is still unclear.[42] If the enforceability of (personalised) platform terms is ensured on such a technological basis, the legal regulation of unfair contract terms runs the risk of being rendered meaningless. At the very least, self-execution shifts the burden of litigation to the other party.[43] In a recent, controversial decision the German Federal Court of Justice ruled that a standard contract term was invalid because it allowed the lessor of a car battery to remotely block the recharging option after the extraordinary termination of the rental agreement: According to the court, the fact that the lessee can only continue to use the battery (and thus the separately purchased electric car) after successfully claiming the transfer of use in court creates a significant imbalance.[44] Technology-based self-enforcement thus places the UCTD in a delicate tension with smart contracts. On the one hand, its fairness control could significantly limit the legal admissibility of smart contracts, but on the other hand, these legal limits threaten to become irrelevant as smart contracts make their enforceability more burdensome. The recently adopted ELI Principles on Blockchain Technology, Smart Contracts and Consumer Protection attempt to strike a balance by postulating in Principle 18 lit d that in the case of self-enforceable unfair terms, consumers shall be entitled to immediate redress by way of re-coding of the smart contract.[45] What the Principles do not explain, however, is how such a remedy could effectively be enforced. The explanatory notes state somewhat apodictically that 'any problems arising as a consequence of this will have to be solved by the applicable law in light of the *acquis communautaire*'.[46]

41 Similar, for example, K. Werbach and N. Cornell, 'Contracts ex machina' (2017) 67 *Duke Law Journal* 313.

42 From a civil law perspective, cf F. Möslein, 'Smart Contracts and Civil Law Challenges: Does Legal Origins Theory Apply?', in I. Chiu and G. Deipenbrock (eds), *Routledge Handbook on FinTech and Law – Regulatory, Supervisory, Policy and other Legal Challenges* (London: Routledge, 2021) 27.

43 Möslein, n 40 above, 254.

44 Bundesgerichtshof, Judgment of 26 October 2022, XII ZR 89/21, (2022) *Neue Juristische Wochenschrift (NJW)* 3575; in more detail, for example, M. Beurskens, 'Akkusperre aus der Ferne' (2023) *Recht Digital (RDi)* 1; K. Duden, 'Funktionssperren und digitale Sachherrschaft' (2023) *Neue Juristische Wochenschrift (NJW)* 18; A.-M. Kaulbach, 'Digitale Fernsperrung einer Fahrzeugbatterie' (2023) *Zeitschrift für Wirtschaftsrecht (ZIP)* 343.

45 European Law Institute (ed), *Principles on Blockchain Technology, Smart Contracts and Consumer Protection* (Vienna: European Law Institute, 2023) 18.

46 European Law Institute, n 45 above, 50.

3 Regulating Standard Terms

Overall, the digital transformation of standard terms challenges the tried and tested regulatory model of the UCTD in various respects. Whereas platform terms are arguably not part of 'contracts concluded between a seller or supplier and a consumer' (Article 1 para 1 UCTD) but are provided by a third party, and personalized terms may not be 'drafted in advance' (Article 3 para 2 UCTD), technological self-enforcement threatens to create significant imbalances (Article 3 para 1 UCTD). However, digitized terms raise more than just issues of interpretation of the UCTD. Compared to the self-made law once analysed by Hans Großmann-Doerth,[47] digitized terms pose additional, fundamentally different challenges. The regulatory tools that were developed for standard terms in bilateral agreements are arguably not sufficient for these new regulatory architectures.[48]

3.1 Transparency Obligations

A key regulatory tool of standard term regulation is the requirement of transparency. Article 5 UCTD provides that standard terms shall 'always be drafted in plain, intelligible language'. While the maxim that 'sunlight is the best disinfectant' forms the basis of market-based regulation in general,[49] the so-called information model based on transparency is paradigmatic for large parts of European private law.[50] The potential – and limitations – of this information model have long been at the heart of the debate on the regulation of standard terms.

The European legislator has adopted the same regulatory approach in the broader context of digital legislation: the P2B Regulation refers to transparency in its title and makes it one of its main regulatory objectives (cf Article 1 para 1). In particular, its Article 3 requires providers of online intermediation services to ensure transparency in various different respects. However, it is doubtful whether

47 H. Großmann-Doerth, *Selbstgeschaffenes Recht der Wirtschaft und staatliches Recht* (Freiburg: Wagner, 1933), reprinted in U. Blaurock, N. Goldschmidt and A. Hollerbach (eds), *Das selbstgeschaffene Recht der Wirtschaft – Zum Gedenken an Hans Großmann-Doerth* (Tübingen: Mohr-Siebeck, 2005).

48 Cf Kumkar, n 25 above, 557.

49 L. Brandeis, 'What Publicity Can Do', in *id*, *Other People's Money And How The Bankers Use It* (New York: Frederick A Stokes, 1914) 92.

50 See, for instance, S. Grundmann, W. Kerber and S. Weatherill, 'Party Autonomy and the Role of Information in the Internal Market – An Overview', in *id* (eds), *Party Autonomy and the Role of Information in the Internal Market* (Berlin: de Gruyter, 2021) 3, 18; S. Grundmann, 'The future of contract law' (2011) 7 *European Review of Contract Law* 490, 521.

the regulatory instrument of transparency will be sufficient to preserve private autonomy in the face of digitized standard terms.[51] While transparency rules can help to overcome information asymmetries and promote informed choices, they prove ineffective when restrictions on private autonomy have other causes. In particular, such rules cannot counteract the increasingly coercive nature of platform conditions resulting from network effects, behavioral correlations, and self-enforcing mechanisms.[52] They can therefore only serve as an effective regulatory tool if there is either a choice between different platform terms or, alternatively, a chance to negotiate different terms. Otherwise, transparency rules will not be sufficient to achieve the regulatory objective, but can at best be used as an additional instrument to complement broader regulatory strategies. After all, an informed decision requires the existence of choice in the first place.

3.2 Fairness Review

Another, more intrusive regulatory tool to deal with standard terms is the judicial control of their fairness. According to Article 3 para 1 UCTD 'a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract'. Article 6 para 1 UCTD provides that such term shall not be binding.

This regulatory strategy is also being applied in the broader digital context. Like transparency, fairness is one of the regulatory objectives of the P2B Regulation (cf Article 1 para 1) and is also mentioned in its title. Article 8 explicitly refers to the standards of good faith and fair dealing, but only in relation to very specific contractual terms and situations (such as retroactive changes to terms and conditions). The broader provision on standard terms in Article 3, on the other hand, does not explicitly refer to fairness in its para 1 lit a, but instead focuses on transparency. The regulatory instrument of fairness review is therefore not very strongly articulated in the P2B regulation, probably because in most jurisdictions, judicial review of standard terms is considered to be justified only in B2C relations. Exceptionally, however, there may be 'a case for a special control of P2B terms and conditions based on the established rationale for controlling general terms and conditions in contract

51 Similar Schweitzer, n 25 above, 12.

52 Extensively Möslein, n 1 above, Section 4.1. b.

law' even in the B2B context, namely where a platform has become a gatekeeper.[53] Some authors, therefore, argue in favor of judicial fairness review in the context of the P2B Regulation, despite the absence of an explicit provision.[54]

In contrast to the P2B Regulation, Article 13 of the proposed Data Act (DA Proposal) explicitly provides for a fairness test.[55] The rule is aimed at contractual terms that concern 'the access to and use of data or the liability and remedies for the breach or the termination of data related obligations'. It does not only protect consumers but also includes standard terms that are imposed on (at least certain) enterprises. Similar to the regulatory approach of the UCTD, unfair contractual terms are declared non-binding (cf Article 13 para 1 DA Proposal). Moreover, the Data Act does not simply refer to the general principles of good faith and fair dealing, but specifies fairness by means of a black and grey list in paras 3 and 4, again similar to the UCTD.[56] In contrast to that Directive, however, the more general yardstick for fairness is 'good commercial practice in data access and use' (cf Article 13 para 2 DA Proposal), rather than legal default rules.[57] The subject matter of data access and use is simply not yet sufficiently covered by such rules: 'Up to now, neither model terms nor default rules suitable for the implementation of mandatory access rights are sufficiently developed'.[58]

In this way, the provision illustrates a much more fundamental problem for the fairness control of digitized standard terms in general: Whereas default rules typically serve as a yardstick for assessing deviating standard terms,[59] their relevance decreases significantly with the increasing prevalence of 'platform law'. Taken together, online platforms, supported by algorithmic data analysis and self-executing

53 H. Schweitzer and F. Gutmann, 'Unilateral Practices in the digital market: An overview of EU and national case law, e-Competitions Unilateral practices in the digital market' Concurrences 15 July 2021, art N° 101045, 13 at https://www.concurrences.com/en/bulletin/special-issues/unilateral-practices-in-the-digital-market/new-article-no101045 (last visited 11 August 2023); see also C. Twigg-Flesner, 'The EU's Proposals for Regulating B2B Relationships on online platforms – Transparency, Fairness and Beyond' (2018) 7 *Journal of European Consumer and Market Law* 222, 223.

54 See, for instance, F. Graf von Westphalen, art 3, in C. Busch (ed), *P2B-VO* (Munich, C H Beck, 2022) para 60 *et seq*.

55 COM (2022) 68 final.

56 Cf L. Specht-Riemenschneider, 'Der Entwurf des Data Act' (2022) Beilage *Multimedia und Recht* 809, 822; T. Gerpott, 'Vorschlag für ein europäisches Datengesetz' (2022) 4 *Computer-Recht* 271, 278.

57 M. Hennemann and B. Steinrötter, 'Data Act – Fundament des neuen EU-Datenwirtschaftsrechts' (2022) 21 *Neue Juristische Wochenschrift* 1481, 1485.

58 A. Metzger and H. Schweizer, 'Shaping Markets: A Critical Evaluation of the Draft Data Act' (2023) 1 *Zeitschrift für Europäisches Privatrecht* 42, 65.

59 More extensively Möslein, n 1 above, Section 4.1. b.

technologies, have the potential to replace State-created default rules by platform terms.[60] This tendency could be further accelerated by other contemporary developments, some of which are related to digital transformation. For instance, the heteronomous efficacy of default rules is more limited in transnational private law transactions which are at least facilitated by digital technologies, in particular by globally operating online platforms.[61] In addition, technological innovations may have the effect that the regulatory models provided by the legislator no longer reflect the changed reality or are no longer fit for purpose because they do not address certain issues raised by these innovations.[62] Such innovations are often driven by digital transformation. Until recently, for example, the law of sales did not offer any suitable default rules for payment with data.[63]

Contrary to what Article 13 DA Proposal seems to suggest, the regulatory solution cannot be to replace default rules with good commercial practices across the board. In a digital environment, such practices can only develop in the face of the structural risks of digital transformation outlined above. Because of these risks, emerging commercial practices will not be able to provide a neutral, balanced benchmark against which terms can be effectively measured. In addition, self-enforcing technologies reduce judicial control over standard terms; by providing alternative mechanisms for enforcing platform terms, these technologies reduce the need to go to court.[64] Both because of the impending lack of a fairness standard and because of these enforcement deficits, fairness review does not promise to be an appropriate regulatory tool for dealing with digitized standard terms.

60 Similar M. Grochowski, 'Default Rules Beyond a State: Special-Purpose Lawmakers in the Platform Economy', in S. Grundmann and M. Grochowski (eds), *European Contract Law and the Creation of Norms* (Cambridge: Intersentia, 2021) 227.

61 F. Möslein, 'Dispositive Regeln im transnationalen Privatrechtsverkehr: Same, but different?', in G.-P. Calliess (ed), *Transnationales Recht: Stand und Perspektiven* (Tübingen: Mohr Siebeck, 2014) 155.

62 F. Möslein, *Dispositives Recht – Zwecke, Strukturen und Methoden* (Tübingen: Mohr-Siebeck, 2011) 441–449.

63 More extensively: H. Grigoleit and T. Winkelmann, 'Technische Innovation und Vertragsrecht', in Möslein und Grundmann (eds), n 39 above, 101; see also C. Langhanke and M. Schmidt-Kessel, 'Consumer Data as Consideration' (2015) 4 *Journal of European Consumer and Market Law* 218; S. Lohsse, R. Schulze and D. Staudenmeyer (eds), *Data as Counter-Performance – Contract Law 2.0?* (Baden-Baden: Nomos, 2020).

64 Similar M. Rudanko, 'Smart Contracts and Traditional Contracts: Views from Contract Law', in M. Corrales Compagnucci, M. Fenwick and S. Wrbka (eds), *Smart Contracts: Technological, Business and Legal Perspectives* (London: Bloomsbury Publishing, 2021) 59, 75.

3.3 Opt-Out Restrictions

An even more intrusive regulatory approach would be to generally restrict deviations from default rules, irrespective of the substantive content (and, in particular, the fairness) of the standard term in question. Such a strategy of 'regulating opt-out'[65] amounts to a tightening of the altering rules, in particular by requiring that alterations be based on an explicit agreement between the parties to the exchange contract. This would exclude any spill-over of platform terms into the contractual relationships of the platform users. In a (roughly) comparable manner, Article 5 UCTD prohibits deviations by standard terms that are not drafted in plain, intelligible language: Unintelligible terms cannot alter default rules, regardless of their substantive content. A similar 'clarity-requiring altering rule'[66] could be applied to trilateral situations on digital platforms, based on the argument that alterations are not sufficiently intelligible when provided for in platform terms. The alterations, it could be argued, are not sufficiently intelligible to the two parties when they bilaterally agree on the exchange contract.

Such a restriction would effectively prohibit platform law. Platform terms would no longer be able to supplement the exchange contracts concluded on that platform. However, a complete exclusion of the contractual freedom of platform operators seems questionable against the background of the constitutional guarantee of private autonomy.[67] It would not only affect significantly unbalanced platform terms but would also restrict impartial platform operators.[68] It could even hamper the platform economy, in particular with regard to transactions for which legal default rules do not provide an adequate solution. Filling such gaps with good commercial practices could have a counterproductive regulatory effect if such practices are themselves dictated by platform terms. In any case, European law does not provide for such far-reaching restrictions. Instead, the P2B Regulation confines itself to requiring that platform terms be made available at all times (cf Article 3 para 1 lit b):[69] Instead of restricting altering rules, the rule-maker opted for a simple requirement of transparency of platform terms.

65 I. Ayres, 'Regulating Opt Out: An Economic Theory of Altering Rules' (2021) 121 *Yale Law Journal* 2032.

66 *Ibid* 2072 *et seq*.

67 Schweitzer, n 25 above, 7.

68 Similar Schweitzer, n 25 above, 9 (with a plea for a differentiated regulatory approach).

69 Extensively on this provision Graf von Westphalen, n 54 above, para 177–181; cf also Twigg-Flesner, n 53 above, 226.

4 Regulating Rule-Makers

Against this backdrop, there is a justified call for the development of a new, flexible, and differentiated civil law regime for the future:[70] It must take into account the legitimate function of platform regulation, as well as the additional constraints that the specific digital patterns of regulation place on the formal balance that contracts establish between the rights and obligations of the parties (the so-called 'Richtigkeitsgewähr').[71] Given that, according to the European Court of Justice, the fundamental objective of the UCTD is to replace this balance with an effective balance that restores equality between these parties,[72] nothing less than a fundamental reform of this Directive is required to meet the challenges of digitised standard terms.

The reform needs to aim at striking the right balance between protecting the private autonomy (also) of platform operators on the one hand and avoiding significant imbalances in platform terms on the other, while also recognizing that default rules are increasingly failing as a fairness standard.[73] The latter constraint suggests that the focus of regulation should no longer be on the fairness of terms, as is currently the case under the Unfair Terms Directive's rules on judicial review of bilateral standard terms. Rather than focusing on the content of the terms, future regulation should focus on the platforms as the rule makers. Standard terms set not by the two parties to the exchange contract, but by the platform as a third party, are not necessarily unfair.[74] In certain circumstances, platform terms may even outperform standard rules in completing incomplete contracts, because platform operators have better access than the legislator to the data needed to reflect the parties' preferences.[75] However, a necessary condition for 'good' platform terms is that the operator of the platform can in fact be seen to be impartial. There are two different regulatory approaches that can ensure impartiality: either imposing restrictions on rule-makers who are potentially subject to a conflict of interest or, alternatively, privileging rule-makers who appear to be trustworthy. Both regulatory strategies are already being applied in European Data Law so that they would only have to be transferred to the regulation of standard terms.

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70 Cf, in particular, Schweitzer, n 25 above, 12; see also Möslein, n 1 above, Section 5.

71 This notion, famous in German jurisprudence, goes back to W. Schmidt-Rimpler, 'Grundfragen einer Erneuerung des Vertragsrechts' (1941) 147 *Archiv der civilistischen Praxis (AcP)* 130, 132 *et seq*.

72 Reference above, n 5.

73 Similar Möslein, n 1 above, Section 5.

74 Cf Schweitzer, n 25 above, 9.

75 In fact, data technology could ultimately replace the invisible hand of the market with comprehensive knowledge of the preferences of market participants, ushering in what has been called the 'age of surveillance capialism': S. Zuboff, *The Age of Surveillance Capitalism* (New York: PublicAffairs, 2019).

4.1 Limiting Conflicts of Interests

The regulatory approach of limiting the regulatory competence of platforms subject to a conflict of interest faces the difficulty of concretizing this vague requirement. On the one hand, market power could be used as an indicator, but is itself difficult to determine. Even the rules on standard terms in the P2B Regulation are not linked to this criterion, although concerns about the dependence on large, powerful platforms clearly influenced their adoption.[76] Instead, the regulation applies across the board to all companies, regardless of any market power threshold.[77] On the other hand, conflicts of interest are particularly likely to arise on so-called dual-role platforms where the platform operators themselves – or persons associated with them – are also participants on that platform.[78] If platform operators themselves act as sellers on the platform (along with independent sellers), it is obvious that they have an interest in formulating terms that are favourable for sellers rather than for buyers.[79] Such dual-role platforms are self-interested when defining the platform law.[80] They cannot be considered to be impartial, even with regard to those platform transactions where only independent parties interact. Due to the potential conflict of interest between the roles of rule-maker and market participant, neutral and balanced platform conditions are unlikely to emerge. Market participants cannot be expected to trust these terms.

A variety of legal rules on conflicts of interest can potentially serve as a model for regulation. For instance, Article 8 of the European Crowdfunding Service Providers for Business Regulation (ECSPR) provides rules on conflicts of interests of providers who operate or manage digital platforms in order to provide crowdfunding services by matching business funding interests of investors and project owners (cf Article 2 para 1 lit a, d, and e ECSPR). The various requirements that Article 8 ECSPR imposes on crowdfunding service providers include a ban on participating in crowdfunding offers on their platform (para 1), restrictions on project ownership by related parties (para 2), the obligation to maintain and operate effective internal rules to prevent conflicts of interest (para 3 and 4), and various disclosure obligations (para 4–6).[81] While this

76 S. Naumann/A. Rodenhausen, 'Die P2B-Verordnung aus Unternehmenssicht' (2020) 4 *Zeitschrift für Europäisches Privatrecht (ZEuP)* 768, 774 *et seq*.

77 Möslein, n 12 above, para 14.

78 C. Busch, 'Towards a "New Approach" for the Platform Ecosystem: A European Standard for Fairness in Platform-to-Business Relations' (2017) 6 *Journal of European Consumer and Market Law* 227.

79 L. *Khan,* 'Amazon's Antitrust Paradox' (2017) 126 *Yale Law Journal* 710, 780.

80 Schweitzer, n 25 above, 9 *et seq*.

81 More extensively on this provision: D. Pereira Duarte, 'Intermediation risk and conflicts of interest', in E. Macchiavello (ed), *Regulation on European Crowdfunding Service Providers for Business: A Commentary* (Cheltenham: Edward Elgar, 2022) 136.

provision is primarily concerned with the operation of a platform rather than with its rule-making, it nevertheless illustrates the general principle that platform operators subject to conflicts of interest are subject to legal constraints. Similar restrictions should apply with regard to standard terms,[82] for example by declaring them non-binding if provided by a conflicted platform operator, or at least by excluding the spill-over effects of platform terms on the exchange contracts concluded on the platform. Whereas such restrictions would reach too far if they applied as a general rule, they seem entirely appropriate under the condition of a conflict of interest.

4.2 Promoting Trustworthiness

Restrictions on conflicted platform operators may help to prevent particularly dubious platform terms that are likely to be unfair, but they do not promote good commercial practice. By declaring platform terms to be non-binding, they even create contractual gaps that need to be filled in the absence of appropriate default rules. To promote gap-filling rules, an additional regulatory mechanism is needed that encourages the emergence of balanced terms. Rather than sanctioning conflicted rule-makers, such a regulatory instrument should privilege rule-makers who appear to be particularly trustworthy. Such an approach would take advantage of the fact that platforms are, in principle, particularly well placed to design rules that mimic the market, as they have access to data on market participants' preferences that is usually unavailable to the legislator.[83] Default rules have traditionally provided a sophisticated mechanism for managing knowledge production, but they are becoming less functional as a result of the current digital transformation.[84] A regulatory instrument that promotes private regulatory knowledge could therefore prove beneficial in restoring the interaction between public and private rule-making, in order to recreate the legal infrastructure necessary for the well-functioning of private autonomy.

However, it is challenging to design provisions that privilege trustworthy rule makers, both in terms of their scope of application and the nature of the privilege. The Data Governance Act (DGA) provides some regulatory guidance.[85] Its rules on

82 In a similar vein Schweitzer, n 25 above, 11.

83 See A. Moazed and N. Johnson, *Modern Monopolies: What It Takes to Dominate the 21st Century Economy* (New York: City, Saint Martin's Griffin, 2016) 125 ('The Visible Hand'); cf also Zuboff, n 75 above.

84 In more detail: Möslein, n 1 above.

85 Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act), *OJEU* 2022 L 152/1.

data altruism aim to promote specific, particularly trustworthy intermediaries.[86] Even if the provisions of Article 15 *et seq*. DGA concern data intermediaries and not platforms as rule makers, knowledge production is a common denominator: Both are characterized by the use of data, and the common regulatory challenge is the need to define criteria for distinguishing and privileging intermediaries that can be considered particularly trustworthy. In order to qualify as a trustworthy organization, Article 16 DGA requires, in particular, that legal entities be established to achieve objectives of general interest and to operate on a non-profit basis.[87] Similar criteria, albeit with some adjustments, could be applied to platforms. Economic incentives are the main driver of significant imbalances in platform terms. If platforms aim to be particularly attractive to one of the two sides of the market, their terms tend to be unbalanced. When profit orientation is excluded, this incentive is removed. To ensure that the actual operation of the platform remains commercially attractive, the rules could, for example, allow the task of rule-making to be outsourced to independent not-for-profit bodies. In addition to the requirement to meet general interest objectives, dominant platforms should be excluded from the regulatory privileges: Market dominance, even if it is not based on a profit motive, severely restricts the regulatory choices available to platform users.[88]

The DGA also provides much less guidance in terms of the regulatory privileges that can be granted. While the DGA grants them only in relation to data access and collection, the privileges of trusted platforms should aim at strengthening their rules. On this basis, balanced terms could evolve into a market standard of good commercial practice. For instance, the terms of trusted rule-makers could benefit from an exemption from fairness review under the UCTD. While the Directive was originally tailored to asymmetric relationships between the two contracting parties (cf recital 2 UCTD), such a relationship does not exist in trilateral platform constellations, after all. Significant imbalances may still occur, but they are unlikely to evolve if the platform is trustworthy in accordance with the mentioned criteria. In the absence of incentives to discriminate between platform users, the likelihood of fair platform conditions is good enough to exempt them from the UCTD. Such an exemption would, in turn, encourage platform terms that are better suited than traditional default rules to fill the gaps in incomplete platform contracts. Digital technologies give platform operators better access to the data needed to reflect

86 See, for instance, B. Steinrötter, 'Datenaltruismus' (2021) 2 *Zeitschrift für Datenschutz* 61; more generally on the rules on data intermediaries: M. Hennemann and L. von Ditfurth, 'Datenintermediäre und Data Governance Act' (2022) 27 *Neue Juristische Wochenschrift* 1905.

87 In detail M. Hennemann, art 16 DGA, in L. Specht/M. Hennemann (eds), *Data Governance Act* (Baden-Baden: Nomos, 2023) para 9 *et seq*.

88 For a similar reasoning cf Möslein, n 1 above.

parties' preferences and 'mimic efficient arrangements'[89] than the legislator itself could possibly have.[90]

5 Conclusions

Standard contract terms are increasingly digitized. Online platforms provide regulatory infrastructures that can be combined with algorithmic data analysis and self-enforcing technologies, thereby enabling regulatory learning processes that work faster and more effectively than traditional legal instruments such as default rules and bilateral standard terms. Future regulation of standard terms must take advantage of this superior knowledge without underestimating the risks of digitized terms. The regulatory tools of the current UCTD (transparency requirements, fairness review, and opt-out restrictions) are increasingly inadequate to meet these new challenges of digitized terms, because they are tailored to standard terms in bilateral agreements. While these findings may also underpin the European Commission's current digital fitness check,[91] they point to a very fundamental need for legal reform. An architecture of choice for private contracts requires an entirely new regulatory strategy. In order to strike the right balance between protecting private autonomy and avoiding significant imbalances, the regulatory objective should be to ensure the impartiality of platforms by focusing on the structural conditions of their rule-making rather than trying to assess the substantive content of their terms. If the focus is increasingly on the situation of the rule maker rather than on the content of the rules, this change in perspective ultimately leads back to the roots of the regulation of standard terms. At least in German law, the control of standard terms once began with (and was initially limited to) monopoly situations.[92] To this day, economic or social power still plays a role, for example, in the judicial review of the statutes of associations whose members depend on the membership.[93]

89 O. Ben-Shahar and J. Pottow, 'On the Stickiness of Default Rules' (2006) 33 *Florida State University Law Review* 651.

90 Similar, again Möslein, n 1 above.

91 Reference n 10 above.

92 Reichsgericht, Judgment of 6 December 1933, I 177/33, (1933) 143 *Entscheidungen des Reichsgerichts in Zivilsachen (RGZ)* 20; in more detail, for example, L. Raiser, *Das Recht der Allgemeinen Geschäftsbedingungen* (Hamburg: Hanseatische Verlagsanstalt, 1935) 280 *et seq.*

93 See, for instance, Landgericht Memmingen, Judgment of 28 Juli 2021, 13 S 1372/20 (2021) *Neue Juristische Wochenschrift – Rechtsprechungs-Report Zivilrecht (NJW-RR)* 1560, para 42; cf also Bundesgerichtshof, Judgment of 24 October 1988, II ZR 311/87, (1989) *Neue Juristische Wochenschrift (NJW)* 1724, 1726. More generally on the relevance of private power in private law cf the contributions in F. Möslein (ed), *Private Macht* (Tübingen: Mohr Siebeck, 2016).

On the occasion of the 30th anniversary of the directive, and in view of digitized terms, it is worth recalling the experience of this jurisprudence, which is, by the way, already celebrating its 90th anniversary this year: Congratulations, UCTD, and all the best on your way back to the roots and back to the digital future!