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Increasing Competitiveness through a Revised Information Model, Implementation Tools, AI and Other Modern Technologies

Response of the European Law Institute

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Increasing Competitiveness through a Revised Information Model, Implementation Tools, AI and Other Modern Technologies

Response of the European Law Institute to the Public Consultation on the Consumer Agenda 2025–2030 and Action Plan on Consumers in the Single Market

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The European Law Institute

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I. Introduction

Recent years have been marked by the unprecedented development of consumer *acquis communautaire*. This process has been fuelled by the idea of ensuring a high level of consumer protection within the EU, as required by Article 169 Treaty on the Functioning of the European Union (TFEU), but also represents a response to a rapidly changing market, especially in the context of technological advancements and a growing recognition of environmental issues.

The proliferation of consumer *acquis* has translated into an increased number of legal acts (the exact number of which is difficult to assess) and an increased number of cases decided by the Court of Justice of the European Union (CJEU). The architecture of EU law does not reflect the structure of a traditional legal system; this has its repercussions when it comes to the way in which legal acts are drafted and applied in Member States (MS). EU law consists of an accumulation of often overlapping acts in similar fields, which is due to a variety of reasons.

First, many legal acts have adopted a horizontal approach, often with full harmonisation, where sectorial legislation was already partly in place and this has produced a multilayered legislative structure, creating coordination difficulties and challenges in their application. A typical example is the coexistence of the horizontal Unfair Contract Terms Directive (UCTD) and Unfair Commercial Practices Directive (UCPD), which apply alongside sectoral rules on credit contracts, timeshare or sales.

Second, the building blocks of the *acquis* are directives and regulations, which rely on different legal mechanisms when it comes to their application at national level. As such, each has positive elements and drawbacks. On the one hand, directives, even those based on full harmonisation, enable a more harmonious integration of EU concepts into MS legal systems. However, the diversity of ways in which the intended result can be achieved makes it difficult for the European Commission to ensure proper enforcement of EU law. When the CJEU is asked to intervene, it likewise faces challenges in maintaining coherence, especially where MS courts use the preliminary reference tool to achieve further (national) aims. This process creates additional disruption. On the other hand, regulations may be more effective in introducing EU concepts into MS, but as their complexity grows, they increasingly trigger the need to introduce adaptation measures at national level to ensure that their effects are well integrated within domestic legal systems.

Third, the EU's power to regulate arises only within the competences established by Treaties, whereas MS retain their competences in other areas and remain responsible for ensuring the effective application of EU law at national level. The resulting lack of consistency and the fragmentation of the consumer *acquis* have long been recognised as undesirable.[1]

Recent years, however, have also been marked by the rapidly increasing importance of the Court of Justice's case law. The CJEU fills lacunae, clarifies inconsistencies and is the driving force behind many significant developments within the consumer *acquis*. This phenomenon can be seen in particular in relation to the UCTD[2] – a Directive that was enacted more than 30 years ago and which has become the source of more than 200 judgments that reshaped the playing field for businesses in the EU[3].

Both legal acts and the case law of the Court of Justice have contributed to the amassing of information

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1 Communication from the Commission to the Council and the European Parliament on European Contract Law, COM(2001) 398 final; Communication from the Commission to the European Parliament and the Council a More Coherent European Contract Law an Action Plan, COM(2003) 68 final.

2 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29.

3 For an overview of the CJEU cases delivered on the basis of the UCTD see: European Review of Private law, Volume 32, issue 3, 2024, with the editorial 'The ECJ on the Unfair Contract Terms Directive' by A Wiewiórowska-Domagalska, F De Elizalde, T Josipović.

duties and significantly increased the pressure on businesses to implement measures to comply with such duties[4]. The need to comply with information duties is not a purely formal requirement — it is linked to the expansive power of the UCTD and the case law of the CJEU related to it, as will be outlined below.

In light of these and other aspects elaborated on below, ELI recommends that the Consumer Agenda 2025–2030 and Action Plan on Consumers in the Single Market should be influenced by the following three main ideas: (1) transforming the information model; (2) simplifying implementation through ex-ante tools and best practices; (3) using AI and other modern technologies to increase the effectiveness of enforcement.

[4] A Wiewiórowska-Domagalska, 'Lost in information – The Transparency Dogma of the Unfair Contract Terms Directive', European Review of Private Law, 2024 (3) pp 423 – 460.

II. Current challenges in consumer law

Following an assessment of the impact of consumer law on businesses (1), we turn to the central issue of risk allocation in the contractual context (2), before examining the nature of possible intervention (3).

1. The impact of consumer regulations

Information duties were gradually introduced in **consumer law** to rebalance the relationship between the trader and the consumer.[5] Traditionally, two features differentiate consumers from traders: disparities in access to information and imbalance in negotiating power. The idea behind the attempt to eliminate the informational imbalance was that a well-informed consumer might play a more prominent (or active) role in the market, especially by not concluding contracts with professionals who offer inferior quality goods or services, or who do not refrain from unfair terms or practices. This is linked to the 'change of behaviour' paradigm. The imbalance of negotiating power has been addressed indirectly through more effective procedural rights (small claims procedures, representative actions, alternative dispute mechanisms), through withdrawal rights, rules on non-conformity, as well as legislation on unfair contract terms and practices.

The normative information model is now at the core of EU legislation as regards consumer law.[6] Information duties relate to both the pre-contractual and the post-contractual phases, and in some instances, even information duties during performance. These information duties were developed mainly around the main idea that *the more informed a consumer is, the more transparent the market and the safer transactions will be*. Once consumers are well-informed, they should be able to rationally decide what to do and thus play their role as market equalisers. This myth of a transparent market[7] and of rationally behaving consumers has been like a mantra over the past few years. However, little empirical research has confirmed the assumptions underlying it.[8]

In 2021, a report produced by the German Council of Experts for Consumer Issues (*Sachverständigenrat für Verbraucherfragen* (SVRV)) rather shows the contrary. This Report demonstrates empirically how limited the impact of information is on consumers, at least in the digital world.[9] On the one hand, digital literacy is not widespread amongst consumers but varies considerably, depending on different criteria.[10] On the other hand, information does not necessarily reach the consumer at the right moment, in the appropriate form and with the appropriate content. Reflection is therefore

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5 P Pichonnaz, *Chapter 5: The Transformation of information duties*, in: Hans-W Micklitz/Ch Twigg-Flesner (ed), The Transformation of European Consumer Law, Hart Publishing, Bloomsbury 2023, p 81–104, esp 85.

6 See eg T Wilhelmsson, G Howells and H-W Micklitz, 'European Consumer Law', in: M Bussani and F Werro (eds), European Private Law: A Handbook, vol I (Carolina Academic Press et al, 2009) 245, 270–273; R Schulze/F Zoll, *European Contract Law,* 3rd edn (Beck, Hart and Nomos, 2021) 109–112.

7 P Pichonnaz, Informed Consumer or Informed Parties: Towards a General Information Duty?, Revue européenne de droit de la consommation (EJCL/REDC) 2023/2, Is consumer law obsolete?, p 273 seq; Ch Wendehorst, Rechtsdurchsetzung im Verbraucherrecht – materiellrechtliche Aspekte, 21 ÖJT Band II/1, p 31.

8 P Pichonnaz, *Chapter 5: The Transformation of information duties*, in: Hans-W Micklitz/Ch Twigg-Flesner (ed), The Transformation of European Consumer Law, Hart Publishing, Bloomsbury 2023, p 86. In the context of financial decisions, see: V MAK & J BRASPENNING, Errare humanum est: Financial Literacy in European, Journal of Consumer Policy (2012) 35, p 307–332. M van Rooij, A Lusardi, R Alessie, *Financial literacy and stock market participation, NBER Working Paper* 13565, 2007; M van Rooij, A Lusardi, R Alessie, *Financial literacy and retirement planning in The Netherlands*, DNB Working Paper No 231/2008, M van Rooij, A Lusardi, R Alessie, *Financial literacy, retirement preparation and pension expectations in the Netherlands. DNB Working Paper* 289, 2011; A Lusardi, OS Mitchell, 'Financial literacy and retirement preparedness: evidence and implications for financial education', *Business Economics* 42, 2007; RF Disney, J Gathergood, *Financial literacy and indebtedness: new evidence for UK consumers*, *University of Nottingham Working Paper* 2011. <http://ssrn.com/abstract=1851343; J Gathergood, 'Self-control, financial literacy and consumer over-indebtedness', 33. *Journal of Economic Psychology* 2012, pp 590–602>.

9 See, in particular, Sachverständigenrat für Verbraucherfragen (SVRV) (ed), *Gutachten zur Lage der Verbraucherinnen und Verbraucher 2021* (Sachverständigenrat für Verbraucherfragen, 2021) 393–399 and proposals 399–402.

10 Sachverständigenrat für Verbraucherfragen, *Gutachten,* 281–302.

needed on the limits of information duties and how they may be potentially transformation.

In recent years, **information duties have shown their limits** when it comes to achieving the aims for which they were introduced. First, in consumer law, information is targeted at the '*average consumer*', as introduced by the Unfair Commercial Practices Directive (UCPD) of 2005[11] in recital 18: '[…] this Directive takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice'. The concept was then used again in recital 4 of the then Directive 2011/83/EU (CRD),[12] as affirmed in many cases of the CJEU.[13] As expressed in recital 18 of UCPD, the 'average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case law of the Court of Justice, to determine *the typical reaction of the average consumer* in a given case'. Although not statistical, the 'average consumer' test remains *objective*, or even normative, as it does not take into consideration the specificities of any single consumer.[14] First, there is a pragmatic reason for the approach, as mass-contracting does not allow for traders to perform a differentiated analysis of every potential contractual partner. Second, there is a dogmatic reason, as the notion of 'vulnerable consumer', crafted by recitals 18–19 UCPD, deals with vulnerable consumers, ie 'where *certain characteristics such as age, physical or mental infirmity or credulity* make consumers particularly susceptible to a commercial practice or to the underlying product and the economic behaviour only of such consumers is likely to be distorted by the practice *in a way that the trader can reasonably foresee*'.[15] However, even in relation to those consumers, it was decided to apply the objective approach, calibrated through the notion of the 'average consumer' of the relevant group. Recital 19 UCPD explains that 'it is appropriate to ensure that [vulnerable consumers] are adequately protected by assessing the practice from the perspective of the average member of that group'.

There is, however, a certain trend in the literature toward lowering the objective standard of the average consumer in certain contexts, on the assumption that consumers in these areas are particularly vulnerable.[16] This trend sits uneasily with the objective test of an average consumer but may be explained by the increasing understanding of the limited effectiveness of information duties

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[11] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, 11.6.2005, p 22–39.

[12] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64 ('Consumer Rights Directive' (CRD)).

[13] Established case law since Case C-210/96 *Gut Springerheide* ECLI:EU:C:1998:369, para 31, and even more recently Case C-179/21 *Victorinox* ECLI:EU:C:2022:353, para 41 (emphasis added): 'In those circumstances, the weighing up of a high level of consumer protection and the competitiveness of enterprises, as set out in recital 4 of Directive 2011/83, must lead to the conclusion that the trader is required to provide the consumer with pre-contractual information on the manufacturer's commercial guarantee only where the legitimate interest of the average consumer, *who is reasonably well informed and reasonably observant and circumspect*, to a high level of protection must prevail in the light of his or her decision whether or not to enter into a contractual relationship with that trader.' See also Case C-249/21 *Fuhrmann-2* ECLI:EU:C:2022:269, para 33.

[14] See also the comparative analysis of the 'average consumer' as a benchmark for information duties, in G Straetmann, Information Obligations and Disinformation of Consumers, in: G Straetmann (ed), Information Obligations and Disinformation of Consumers, Springer 2019, 13–29, as well as the 16 national reports.

[15] See also on 'the Sick, the Elder and the Young', G Straetmann, Information Obligations and Disinformation of Consumers, in: G Straetmann (ed), Information Obligations and Disinformation of Consumers, Springer 2019, 26–29.

[16] Micklitz/Oehler/Piorkowsky/Reisch/Strünck, Der vertrauende, der verletzliche oder der verantwortungsvolle Verbraucher? Plädoyer für eine differenzierte Strategie in der Verbraucherpolitik. Stellungnahme des Wissenschaftlichen Beirats Verbraucher- und Ernährungspolitik beim BMELV (2010) p 1 seq; N Reich, Leitbilder des europäischen Verbraucherrechts – Funktionale Differenzierung vs. Zunehmende Individualisierung? in Kohte/Absenger (Hrsg), Menschenrechte und Solidarität im internationalen Diskurs (2015) p 326 seq (332 seq); N Reich, 'Vulnerable Consumers in EU Law' in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law* (Hart Publishing, 2016), 139; Ch Wendehorst, Rechtsdurchsetzung im Verbraucherrecht – materiellrechtliche Aspekte, 21 ÖJT Band II/1, p 28 seq; P Pichonnaz, *Chapter 5: The Transformation of information duties*, in: Hans-W Micklitz/Ch Twigg-Flesner (ed), The Transformation of European Consumer Law, Hart Publishing, Bloomsbury 2023, p 89.

and findings from *behavioural research* that have shown that the average consumer standard is largely at odds with empirical evidence.[17]

At the same time, however, the CJEU has increased the scope of information duties, as it appears, for example, in relation to the UCTD. In many cases, the CJEU has underlined the importance of *substantive transparency*, first and foremost with non-negotiated clauses.[18] To illustrate this, one can cite the well-known *Andriucic* case, which mentions the following:[19]

> *the requirement of transparency of contractual terms … cannot be reduced merely to their being formally and grammatically intelligible, but that must be understood in a broad sense.*

This means that the transparency requirement must be viewed as:[20]

> *requiring also that the contract should set out transparently the specific functioning of the mechanism to which the relevant term relates and the relationship between that mechanism and that provided for by other contractual terms, so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it.*

The transparency requirement is therefore a substantive one, which implies that the objectively perceived consumer is able to understand the legal and economic consequences of those terms, a test which is then applied, as a legal fiction, to the specific party to the contract. This implies envisaging a consumer with a certain level of maturity and understanding, potentially also grouping consumers into (objective) categories to consider different levels of comprehension. This approach has a direct impact on the 'average consumer' model, as a normative test, but also on the scope of the information and explanations which traders must give to consumers. Such an approach also carries the risk of increasing uncertainties for traders in assessing their (contractual) risks. This has been a significant aspect of contracts concluded in the financial sector in particular.[21]

The information model has, however, shown **limits and drawbacks:**[22]

1° *Information is often insufficient to protect consumers, given the impossibility of negotiation*. When contracts are concluded on a 'take-it-or-leave it' basis, information cannot empower consumers. This is evident in relation to standard terms and conditions; one might see this as a reason why the CJEU developed the substantive transparency requirement in relation to the UCTD. However, further information does not increase bargaining power where it is lacking.

2° *Information is often totally disregarded* or at least not processed thoroughly,[23] which is again often due to the understanding that this will not rebalance the

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[17] A-L Sibony/G Helleringer, 'EU Consumer Protection and Behavioural Sciences: Revolution or Reform?' in An Alemanno and A-L Sibony (eds), *Nudge and the Law: A European Perspective* (Bloomsbury, 2015), p 214; K Purnhagen and E Van Herpen, 'Can Bonus Packs Mislead Consumers? A Demonstration of How Behavioural Consumer Research Can Inform Unfair Commercial Practices Law on the Example of the CJEU's Mars Judgment' (2017) 40 *Journal of Consumer Policy* 217 (with an experiment based on Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln eV v Mars GmbH* ECLI:C:1995:224, [1995] ECR I-1923 ; also P Pichonnaz, *Chapter 5: The Transformation of information duties*, in: Hans-W Micklitz/Ch Twigg-Flesner (ed), The Transformation of European Consumer Law, Hart Publishing, Bloomsbury 2023, p 87.

[18] CJEU Judgment of 20 September 2017, *Andriucic and Others*, C186/16, EU:C:2017:703, para 44 and the case law cited.

[19] Case C-186/16 *Andriucic* ECLI:EU:C:2017:703, para 44.

[20] Case C-186/16 *Andriucic* ECLI:EU:C:2017:703, para 45.

[21] More than 500,000 initiated in Poland in relation to consumer credit contracts, indexed or denominated in CHF were based on a violation of transparency duty, as enshrined in art. 4.2 of UCTD.

[22] See P Pichonnaz, *Chapter 5: The Transformation of information duties*, in: Hans-W Micklitz/Ch Twigg-Flesner (ed), The Transformation of European Consumer Law, Hart Publishing, Bloomsbury 2023, p 90 seq; Ch Wendehorst, Rechtsdurchsetzung im Verbraucherrecht – materiellrechtliche Aspekte, 21. ÖJT Band II/1, p 29–36 ; see also, eg, the empirical analysis by Sachverständigenrat für Verbraucherfragen, 399–402; see also the quite critical view of the EU as being too protective of consumers in G Howells, 'Europe's (Lack of) Vision on Consumer Protection' in in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law* (Hart Publishing, 2016), p 442; H Unberath/A Johnston, 'The Double-Headed approach of the CJEU Concerning Consumer Protection' (2007) 44 *CML Rev* 1237.

[23] See P Pichonnaz, *Chapter 5: The Transformation of information duties*, in: Hans-W Micklitz/Ch Twigg-Flesner (ed), The Transformation of European Consumer Law, Hart Publishing, Bloomsbury 2023, p 90 seq.

lack of negotiating power. Moreover, behavioural sciences have shown that the more complex information is, the more likely it will be disregarded by the addressee.[24] Consumers simplify decisions, for example by ignoring insignificant-seeming price structures or components and taking mental shortcuts[25] (heuristics). This means that when prices are complex, and in particular when they are multi-dimensional rather than one-dimensional, consumers experience problems in choosing the most advantageous option.[26]

3° *Information does not necessarily trigger rational decision-making*: findings from the behavioural sciences have also shown that consumers act based on imperfect rationality due to systematic biases,[27] and that even rational apathy may lead consumers not to choose the best solution in the market.[28] This is a widespread phenomenon, not only caused by exceptional situations.

4° *Text is more difficult to process than images, but information is usually given in text form*: the success story of social media suggests the fact that more information should be accompanied by images.[29] Eco-labelling and eco-design also support the idea that pictograms might be more effective than text.[30]

5° *Information as nudges*:[31] behavioural economics has also shown that information may be presented in such a way that it may even nudge consumers towards certain decisions, even in cases where the substance of the information ought, in principle, to dissuade them.[32] This, of course, leads to the well-known tension between consumer protection and consumer autonomy of will.

As suggested elsewhere,[33] the information model should therefore be revisited (see below).

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[24] O Bar-Gill, *Seduction by Contract, Law, Economics, and Psychology in Consumer Markets* (Oxford University Press, 2012); O. Bar-Gill, 'Consumer Transactions' in E Zamir and D Teichman (eds), *The Oxford Handbook of Behavioural Economics and the Law* (Oxford University Press, 2014), p 465–490; E Zamir/D Teichman, *Behavioural Law and Economics* (Oxford University Press, 2018), p 281–324; see also YM Atamer/P Pichonnaz, 'Control of Price Related Terms in Standard Form Contracts, General Report' in YM Atamer/P Pichonnaz (eds), *Control of Price Related Terms in Standard Form Contracts* (Springer International Publishing, 2019), p 3, esp 5 ff.

[25] A-L Sibony/G Helleringer, 'EU Consumer Protection and Behavioural Sciences: Revolution or Reform?' in A Alemanno and A-L Sibony (eds), *Nudge and the Law: A European Perspective* (Bloomsbury, 2015), p 213; M Santos Silva, *Nudging and Other Behaviourally Based Policies as Enablers for Environmental Sustainability*, 2022 Laws 11, no 1: 9 (<https://doi.org/10.3390/laws11010009>; available in open access here: <https://www.mdpi.com/2075-471X/11/1/9>).

[26] O Bar-Gill, 'The Law, Economics And Psychology of Subprime Mortgage Contracts' (2009) 94 *Cornell Law Review* 1073, esp 1120; J Baron/T Wilkinson-Ryan, 'Conceptual Foundations: A Bird's-Eye View' in J Teitelbaum and K Zeiler (eds), *Research Handbook on Behavioural Law and Economics* (Edward Elgar, 2018) 36 ff (hyperbolic discounting).

[27] J Baron/T Wilkinson-Ryan, 'Conceptual Foundations: A Bird's-Eye View' in J Teitelbaum and K Zeiler (eds), *Research Handbook on Behavioural Law and Economics* (Edward Elgar, 2018), p 36 ff (hyperbolic discounting).

[28] O Bar-Gill, 'Consumer Transactions' in E Zamir and D Teichman (eds), *The Oxford Handbook of Behavioural Economics and the Law* (Oxford University Press, 2014), p 465–490; E Zamir/D Teichman, *Behavioural Law and Economics* (Oxford University Press, 2018), p 281–324; see also YM Atamer/P Pichonnaz, 'Control of Price Related Terms in Standard Form Contracts, General Report' in YM Atamer/P Pichonnaz (eds), *Control of Price Related Terms in Standard Form Contracts* (Springer International Publishing, 2019), p 5 ff.

[29] P Pichonnaz, *Chapter 5: The Transformation of information duties*, in: Hans-W Micklitz/Ch Twigg-Flesner (ed), The Transformation of European Consumer Law, Hart Publishing, Bloomsbury 2023, p 92.

[30] Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel [2009] OJ L27/1; Directive 2009/125/EE of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products [2009] OJ L285/10; on 30 March 2022 the EU Commission published a Proposal for a Regulation establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC (COM(2022) 142 final), especially Arts 14 and 15 on 'labels'; see on this also V Mehnert/H-W Micklitz, *The Interplay between Ecodesign and Consumer Sales Law*, in: M Santos Silva *et al.* (eds), Routledge Handbook on Private Law and Sustainability, Routledge, 2024, p 351–365.

[31] R Thaler/C Sunstein, *Nudge* (Yale University Press, 2008); A Scholes, 'Behavioural Economics and the Autonomous Consumer' (2012) 14 *Cambridge Yearbook on European Legal Studies* 297; A-L Sibony/G Helleringer, 'EU Consumer Protection and Behavioural Sciences: Revolution or Reform?' in A Alemanno and A-L Sibony (eds), *Nudge and the Law: A European Perspective* (Bloomsbury, 2015), p 7; M Santos Silva, *Nudging and Other Behaviourally Based Policies as Enablers for Environmental Sustainability*, 2022 Laws 11, no. 1: 9 (<https://doi.org/10.3390/laws11010009>; available in open access here: <https://www.mdpi.com/2075-471X/11/1/9>); see also the forthcoming ELI Innovation Paper entitled *A Framework for Good Green Nudging,* 2025.

[32] M Santos Silva/T G Garcia-Micó, Cooling-Off Hot Deals: A Plea for Green Sludge in Distance Sales Contracts, in Santos Silva *et al* (eds), Routledge Handbook on Private Law and Sustainability, Routledge, 2024, p 366–396.

[33] P Pichonnaz, *Chapter 5: The Transformation of information duties*, in: Hans-W Micklitz/Ch Twigg-Flesner (ed), The Transformation of European Consumer Law, Hart Publishing, Bloomsbury 2023, p 93 seq.

2. Implicit transfer of risk through the UCTD

More information does not necessarily create greater protection for consumers when they conclude contracts. It does, however, trigger specific risk allocations. Under the influence of CJEU case law, in particular that linked to the transparency requirement (formal and substantive),[34] where traders do not provide sufficient, correct, clear and adequately transparent contract terms, the contractual risk allocation is modified, often drastically.

First, an *ex post* elevation of transparency duties translates into a reduced possibility to apply the unfairness control exception enshrined in Article 4(2) UCTD.[35] Second, transparency has become an integral part of the unfairness control mechanism[36], so the evaluation as to whether a term is unfair must consider transparency requirements.[37]

Goods and services providers experience difficulties in assessing, *ex ante*, whether they will meet the requirements set by the CJEU, as they evolve (normally increasing) with the development of case law. The extent of the explanation which should be given in order to meet the substantive transparency requirement is often a difficult question to answer. This is even more significant as there is no effective time limit for establishing the unfairness of terms; a time limit only exists for performing contractual duties,[38] and for restitution claims where the contract cannot continue to exist, but, pursuant to the equivalence principle, only as long as this applies equally to national and European cases.[39]

3. Nature and challenges of the evolving legal framework

The UCTD goes back to 1993, a time when the style of drafting of directives did not include a clear definition of the interactions with MS legislation. This is expressed by Article 6 UCTD, which leaves the establishment of the consequences of unfairness of terms to the MS, without giving a clear indication as to the aim to be achieved or the limits of judicial intervention.

More recent EU legislation has, partly and indirectly, been influenced by the UCTD. For example, the DSA deals with standard terms in its Article 14;[40] this Act applies directly to Member States, whereas the comparable Article 5 UCTD is a directive which has to be transposed by Member States. Formal requirements differ slightly between provisions, creating uncertainties for businesses operating online; furthermore, it is unclear whether the substantive transparency requirements developed under Article 5 UCTD apply to Article 14 DSA.

The CJEU strives towards ensuring a dynamic evolution of the legislative framework. Decisions affecting different levels of legislation (directives and regulations) may also produce uncertainties for enforcement authorities, which may call for a more harmonised approach.

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[34] CJEU judgement of 30 April 2014, *Kásler and Káslerné Rábai*, C26/13, ECLI:EU:C:2014:282, paras 70–72, Case C-186/16 *Andriucic* ECLI:EU:C:2017:703, para 44–45.

[35] CJEU, Judgment of 3 March 2020, *Gómez del Moral Guasch v. Bankia SA*, C-125/18, EU:C:2020:138, para 45; CJEU, judgment of 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid*, C484/08, EU:C:2010:309, para 32; CJEU, Judgement of 30 April 2014, *Kásler and Káslerné Rábai*, C26/13, EU:C:2014:282, para 41.

[36] See A Wiewiórowska-Domagalska, 'Lost in information – The Transparency Dogma of the Unfair Contract Terms Directive', European Review of Private Law, 2024 (3) pp 423 – 460.

[37] CJEU, Judgment of 3 March 2020, *Gómez del Moral Guasch v. Bankia SA*, C-125/18, EU:C:2020:138, para 46; CJEU, judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C26/13, EU:C:2014:282, para 71.

[38] CJEU, Judgement of 13.03.2025, Case C-230/24, *MF v Banco Santander, S.A.*, EU:C:2025:177, para 29.

[39] CJEU, Judgement of 13.03.2025, Case C-230/24, *MF v Banco Santander, S.A.*, EU:C:2025:177, para 31-33; and CJEU, Judgement of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C224/19 and C259/19, EU:C:2020:578, para 84.

[40] Article 14 DSA states that 'information shall include information on any policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making and human review, as well as the rules of procedure of their internal complaint handling system. *It shall be set out in clear, plain, intelligible, user-friendly and unambiguous language, and shall be publicly available in an easily accessible and machine-readable format*. Furthermore, providers of intermediary services shall inform the recipients of the service of any significant change to the terms and conditions'.

III. Towards a more effective framework

To improve competitiveness, and to reduce regulatory and administrative burdens for businesses and citizens, whilst maintaining fundamental European values, we propose a three-fold approach: (1) transforming the information model; (2) simplifying implementation; and (3) making greater use of new technologies and AI.

1. Transforming the information model

The information model upon which the current EU consumer regulation is based should undergo a transformation that would follow from a better understanding of the limits of its effectiveness and its drawbacks. As regards regulatory tools, the new information model should explore opportunities offered by the market standardisation, and, in relation to the provision of information duties and enforcement, it should make use of the opportunities brought about by new technologies.

1.1. Reducing the cornucopia of information duties

The CRD[41] has more than 20 information requirements. Similarly, the Digital Content Directive (DCD)[42] and the Sales of Goods Directive (SGD),[43] to mention a few, include a cornucopia of information obligations. Evidently, some information duties are central to describing the content of the contract or technicalities of its conclusion. Such information, however, would be provided by traders with or without information duties. As such, they are not part of the information model or of its criticism.[44] Other information duties are aimed at improving consumer decision-making and, indirectly,[45] the transparency of the market.[46] These information duties often relate to the allocation of risks between the parties, ancillary rights and duties, data protection issues, pre-conflict procedures or the enforcement of rights.

Given that the latter information duties[47] do not increase consumer knowledge in practice, because information is often not read by consumers,[48] and even when it is, it rarely produces the expected effects, it would be beneficial **to reduce and streamline such information duties**.[49] Article 10(3) Credit Agreements for Consumers Directive (CCD2)[50] aims to bring all information duties together, setting the format and the consequences if this cannot be achieved (see Article 10(4) CCD2). While the list of information duties remains very lengthy, the duties have at least been streamlined and standardised.

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41 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64 ('Consumer Rights Directive' (CRD)).

42 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1.

43 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L136/28 (SGD).

44 Ch Wendehorst, Rechtsdurchsetzung im Verbraucherrecht – materiellrechtliche Aspekte, 21 ÖJT Band II/1, p 29–30.

45 As this information is given to the consumer, it is not necessarily known to the public at large, or only indirectly, where disputes arise and this information is finally read by the affected consumer.

46 For such distinctions, see eg Ch Wendehorst, Rechtsdurchsetzung im Verbraucherrecht – materiellrechtliche Aspekte, 21 ÖJT Band II/1, p 30–31.

47 O Bar-Gill/O Ben-Shahar, 'Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law', (2013) 50 *CML Rev* 109, esp 113.

48 See, eg, the analysis done for the European Commission, 'Special Eurobarometer 487a' (n 48) 2, 16: 'The majority (60%) read privacy statements on the Internet – although they are more likely to do so partially (47%) than fully (13%)'.

49 Among others, also P Pichonnaz, *Chapter 5: The Transformation of information duties*, in: Hans-W Micklitz/Ch Twigg-Flesner (ed), The Transformation of European Consumer Law, Hart Publishing, Bloomsbury 2023, p 93 seq; Ch Wendehorst, Rechtsdurchsetzung im Verbraucherrecht – materiellrechtliche Aspekte, 21 ÖJT Band II/1, p 33 seq

50 Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers and repealing Directive 2008/48/EC, OJ L, 2023/2225, 30.10.2023.

It is also with this in mind that, in the UK, insurance companies now present information in a simpler format, with a summary of the main points. Consumer insurance policies must be accompanied by an overview showing coverage (green ticks) and exclusions (red crosses). The idea is that this concise information may induce more consumers to make more informed and suitable choices.

However, even if the number of information duties is reduced, many of them will remain, in particular those that specify and to identify goods and services.[51] Other types of information may be given as a means of attracting consumers (publicity measures), creating legitimate expectations and triggering consequences based on Article 7(1)(d) SGD and Article 8(1)(b) DCD, for example.

1.2. Revisiting the timing of information duties

Information duties are varied in nature; sometimes they serve to describe goods and services, their specificities and qualities; other times they concern rights and duties. Regardless of what function they fulfil, they all currently have to be included in the contract as they are designed to ensure that the consumer is aware of their rights (eg withdrawal rights; modification of the contract, or the right to compensation) deriving from the contract or legislation. Yet it would be more appropriate to provide such information (again) when the consumer is likely to invoke those rights, rather than solely upon the conclusion of the contract. As contractual clauses, they would necessarily still need to be integrated into the contract, without, however, a need to highlight them at this stage.

Nowadays, with the development of new technologies, it has become easier to provide relevant information after the conclusion of the contract, more specifically when the consumer needs specific information. Therefore, all information that a party requires when a breach of obligations or modification of the contract occurs should be automatically given at that time, even if such information was included in the contract in the first place, as a contractual clause. The new paradigm should comprise '*duties to inform when information is needed* ' in a way that is effective and enables the rapid and easy enforcement of those rights. Such implementation may vary according to the market sector or the type of activity (eg offline/online).[52] This is already the case, for example, with airlines, which email customers appropriate links to request compensation in case of delay. Therefore, for post-contractual information, one might envisage chatbots and appropriate technological means to automatically generate and send such information to consumers.[53]

1.3. Visualising the content of information duties

As images might communicate more efficiently and effectively than text, some information could be conveyed visually. This may in particular be the case for pre-contractual information duties aimed at protecting consumers or at least nudging their choices. Decisions related to eco-labelling is a good example of nudging the consumer towards more environmentally-friendly products.[54]

Pre-contractual information aimed at informing consumers about shifts of risk could also be given through pictograms. For example, a 'no-liability for

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[51] Art 10 para 3 CDD2 is a good example of information which would be given even if it did not appear in the Directive.

[52] P Pichonnaz, *Chapter 5: The Transformation of Information Duties*, in: Hans-W Micklitz/Ch Twigg-Flesner (ed), The Transformation of European Consumer Law, Hart Publishing, Bloomsbury 2023, p 95; Ch Wendehorst, Rechtsdurchsetzung im Verbraucherrecht – materiellrechtliche Aspekte, 21 ÖJT Band II/1, p 35.

[53] P Pichonnaz, *Chapter 5: The Transformation of Information Duties*, in: Hans-W Micklitz/Ch Twigg-Flesner (ed), The Transformation of European Consumer Law, Hart Publishing, Bloomsbury 2023, p 94–95.

[54] Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel [2009] OJ L27/1; Directive 2009/125/EE of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products [2009] OJ L285/10; on 30 March 2022 the EU Commission published a Proposal for a Regulation establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC (COM(2022) 142 final), especially Arts 14 and 15 on 'labels'; M Santos Silva, *Nudging and Other Behaviourally Based Policies as Enablers for Environmental Sustainability*, 2022 Laws 11, no 1: 9 (<https://doi.org/10.3390/laws11010009>) (available in open access here: <https://www.mdpi.com/2075-471X/11/1/9> (page 6).

slight negligence' clause or 'automatic renewal of a contract in the absence of timely cancellation' could be expressed in pictograms. These should be complemented by rules or standard contract terms, which would explain with a sufficient level of detail what those clauses mean in practice.

1.4. Establishing clear consequences for violations of information duties

Article 6 UCTD has been regarded as equivalent to national public order provisions.[55] Therefore, its breach could be invoked at any time and any stage of the judicial process, with potentially severe consequences for businesses. Given the extreme increase of the significance of information duties, triggered by CJEU case law developed since the enactment of the UCTD,[56] it might be justified to review more systematically the consequences of absent or inadequate information for the unfairness assessment.

EU law seldom deals with the consequences of violations of information duties. Traditionally, it provides for the right to withdraw where they were not informed about that right. Such right has been streamlined in more recent EU legislation (Article 10 CRD).[57] Normally, remedies for violating information duties are left to the discretion of MS, which is the case of Article 6 UCTD, Article 44 CCD2, or Article 13 UCPD. The UCTD stands out in this respect; indeed, the CJEU has developed refined case law on the specific legal consequences of violations of information duties.

Therefore, it might be justified to revisit the requirements of the unfairness control under the UCTD, and, more importantly, to coordinate the treatment of violations of information duties as envisaged in Article 4(2), Article 5 and Article 3(1) UCTD, on the one hand, and to specify the consequences of Article 6 UCTD, on the other hand.

1.5. Towards a new information paradigm

One could, therefore, suggest **a three-level information model**, which may consist of the following steps:[58]

1° *Fundamental information provided for the conclusion of the contract*: this should be provided at the outset, including through pictograms, and focus on the risks of concluding the contract or on the shift of specific risks to the consumer.

2° *Further information when required*: consumers should receive general and specific information at a later stage, when required for performing some aspects of the contract. This could be the case, for example, in the event of a contract modification, when consumers should receive information about the consequences thereof and their right to withdraw from the contract.

3° *Granular information in a medium allowing efficient enforcement*: this stage consists of more detailed information, to be given when and where needed, and employing a medium that allows for efficient enforcement, for example, providing information on how to notify the non-conformity of goods or claim damages, again when needed.[59]

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[55] CJEU judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C154/15, C307/15 and C308/15, EU:C:2016:980, paragraphs 54 and 55 and the case law cited; CJEU Judgment of 3 July 2025, *Wizkier*, C582/23, EU:C:2025:518, para 37.

[56] See A Wiewiórowska-Domagalska, 'Lost in information – The Transparency Dogma of the Unfair Contract Terms Directive', European Review of Private Law, 2024 (3) pp 423–460.

[57] P Pichonnaz, *Chapter 5: The Transformation of information duties*, in: Hans-W Micklitz/Ch Twigg-Flesner (ed), The Transformation of European Consumer Law, Hart Publishing, Bloomsbury 2023, p 101; expressing still some criticisms, Ch Wendehorst, Rechtsdurchsetzung im Verbraucherrecht – materiellrechtliche Aspekte, 21 ÖJT Band II/1, p 42–45.

[58] P Pichonnaz, *Chapter 5: The Transformation of information duties*, in: Hans-W Micklitz/Ch Twigg-Flesner (ed), The Transformation of European Consumer Law, Hart Publishing, Bloomsbury 2023, p 100 and P Pichonnaz, *Informed Consumer or Informed Parties: Towards a General Information Duty?*, Revue européenne de droit de la consommation (EJCL/REDC) 2023/2, Is consumer law obsolete?, p 267–281, in part. p 280 seq.

[59] Of course, selective disclosure may be manipulative, see ELI Innovation Paper, *Framework for Good Green Nudging*, 2025, commentary of Principle 6 'Autonomy'.

2. Simplifying implementation through ex-ante tools and best practices

Due to its horizontal character and the huge impact it has on the functioning of the market, special attention should be paid to the operation of the UCTD. In this regard, one could envisage the implementation of a pre-use analysis of contract terms to mitigate risks for consumers and businesses. Such *ex-ante* evaluation could greatly contribute to creating a fair and effective market environment for consumers and businesses.

It is undeniable that courts often play a pioneering role in ascertaining problem areas. It might be useful, however, for the EU regulator to examine whether a more effective and predictable approach for businesses could be ensured by an *ex-ante* analysis, which would not necessarily replace, but reduce, the need for *ex-post* scrutiny by courts, especially as the effect of *ex-post* analysis is not always very clear.[60] AI applications, such as Claudette, have also been used to assess *ex-ante* the unfairness of standard terms or data privacy policies.[61]

There are several different schemes that could be considered. In Italy in particular, administrative organs play a role in assessing the unfairness of standard terms *before they are used*, which increases legal certainty for business.[62] Another option could be for representatives of both sides of the market (consumers and traders), with the possible participation of a public institution, assessing the unfairness of the standard contract terms before their adoption. A comparative analysis has shown that this *ex-ante* assessment might be a promising path to follow in the future.[63]

Introducing such an approach could also help in establishing standardised best practices and contractual clauses, thereby supporting businesses in need of more certainty. The key issue to resolve would be the legal implications of such an assessment for subsequent unfairness control by the courts. Possible solutions range from no legal effect, through to presumptions of fairness for pre-approved clauses, reversal of the burden of proof, or event exclusion from unfairness control altogether.

Similar best practices could also be developed in **pre-litigation stages,** where consumers and traders may benefit from standardised (initial) solutions, addressing recurring issues. De-judicialisation and de-juridification trends have led to the development of compliance management,[64] while early assessments or best practices proposals, potentially supported by AI tools, may help to enhance implementation, while reducing burdens for businesses.

3. Effective enforcement through AI and other modern technologies

Use of modern technologies, in particular AI at pre-litigation stages, in the implementation of rights through out-of-court settlement mechanisms, or even in certain aspects of law enforcement should be developed and promoted. In this regard, one of

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[60] YM Atamer/P Pichonnaz, 'Control of Price Related Terms in Standard Form Contracts, General Report' in YM Atamer/P Pichonnaz (eds), *Control of Price Related Terms in Standard Form Contracts* (Springer International Publishing, 2019), p 56.

[61] See for Claudette: <http://130.136.9.51/claudette/> (last accessed 18.8.2025) and for Claudette GDPR, <http://130.136.9.51/claudette_GDPR/> (last accessed 18.8.2025); M Lippi/ P Pałka/G Contissa *et al*, CLAUDETTE: an automated detector of potentially unfair clauses in online terms of service, Artificial Intelligence Law 27, 117–139 (2019), <https://doi.org/10.1007/s10506-019-09243-2>.

[62] M. Graziadei, *Control of Price Related Terms in Standard Form Contracts in Italy,* in YM Atamer /P Pichonnaz (eds), *Control of Price Related Terms in Standard Form Contracts* (Springer International Publishing, 2019), p 451 seq; YM Atamer/P Pichonnaz, 'Control of Price Related Terms in Standard Form Contracts, General Report' in YM Atamer/P Pichonnaz (eds), *Control of Price Related Terms in Standard Form Contracts* (Springer International Publishing, 2019), p 19–20.

[63] YM Atamer/P Pichonnaz, 'Control of Price Related Terms in Standard Form Contracts, General Report' in YM Atamer/P Pichonnaz (eds), *Control of Price Related Terms in Standard Form Contracts* (Springer International Publishing, 2019), p 55–56.

[64] H-W Micklitz/G Saumier, Enforcement and Effectiveness of consumer law, General Report, in: H-W Micklitz/G Saumier (eds), Enforcement and Effectiveness of Consumer Law, Springer 2018, p 35–36; see also the 37 national reports on this matter in H-W Micklitz/G Saumier (eds), Enforcement and Effectiveness of Consumer Law, Springer 2018, p 49–717.

the most important issues is to distinguish between AI as a facilitator of specific technical/administrative tasks (summarising documents, providing initial advice, diagnosing problems), that do not fall within the scope of judicial decision-making, and AI as a substitute for the court system, performing substantive adjudicatory functions. The latter undoubtedly poses significant challenges, due to its potential impact on human rights and fundamental freedoms, and the requirement of human supervision (Article 14 AI Act).

First, pre-litigation stages could be more efficient through AI and digitalised solutions.[65] Standardised (initial) solutions, based on a collection of recurring issues and datasets of predefined settlement strategies might also help reduce the number of disputes and enhance implementation of rights. This, however, would only be suitable in cases where pre-existing solutions are already in place.

Second, out-of-court settlements through AI mechanisms already exist in online platforms (such as Amazon, eBay). The DSA and DMA impose obligations on online platforms to implement the use of these tools. Directive 2013/11/EU ensures that EU consumers and businesses in the have access to quality-certified alternative dispute resolution entities; similarly, Article 21 DSA provides for a comprehensive out-of-court settlement mechanism, and Article 6(12) DMA also imposes an alternative dispute settlement mechanism. All these strategies may, at least partly be implemented through digital and AI technologies.

Also, it is possible, and advisable, to identify areas where modern technologies may facilitate the process of law enforcement with greater efficiency, while preserving fundamental values. There are several areas where increased effectiveness through technological-driven mechanisms could be considered.

First, one can think of small claims procedures. Many of these, imposed by the EU Regulation,[66] concern monetary claims pursued through simplified procedures with a quasi-automatic and formal character. The effectiveness of such procedures could easily be enhanced through specific technologically-driven mechanisms, be it through digitalised courts or AI-assisted decision tools.

Second, from a point of view of EU law enforcement, a great opportunity arises with regards to the enforcement of the EU Regulation on compensation and assistance to passengers in cases of cancellation or long delay of flights.[67] Not only could its enforcement be designed in a fully digitalised procedure, but it could also be strengthened through automation and AI-driven mechanisms.[68] In this area, the even more progressive idea of self-executing contracts could also be explored.

Third, judicial assistance could be supported by algorithms and AI enhanced tools in cases jurisprudence is already well established or where there are a large number of cases to be resolved. Adjudication in practice often de facto amounts to applying standardised solutions. Pilot initiatives in this direction are already underway in Germany[69] and are about to be tested in Poland.[70] Fully automated assistance for judges could be envisaged, for example, in the calculation of costs, or the arithmetical settlement of mutual

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65 On enforcement in pre-digital times, see already H-W Micklitz/G Saumier, Enforcement and Effectiveness of consumer law, General Report, in: H-W Micklitz/Genevieve Saumier (eds), Enforcement and Effectiveness of Consumer Law, Springer 2018, p 10–17, 22–23.

66 Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure – consolidated text of 14 June 2017, OJ L 199, 31.7.2007, p 1.

67 Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, *OJ L 46, 17.2.2004, p 1–8.*

68 Pilot projects in this area are already being conducted in Spain.

69 Pilot projects: FRAUKE – pilot software for civil courts in mass proceedings; extracts relevant data from cases and provides the decision-maker with appropriate text modules for issuing a ruling; OLGA supports judges in categorising cases in mass proceedings to streamline the decision-making process; it assists judges in appeals against manufacturers of cars; the software analyses the challenged ruling of the first instance court, as well as the positions of the parties in the appeal's justification.

70 Pilot project 'Digital Assistant of a Judge' – a tool, which will support judges in issuing a ruling in mass cases relating to CHF consumer credits.

performances.[71] The UK Digital Justice System project[72] may serve as a source of inspiration.

AI should, however, be applied in further cases. Nevertheless, human oversight will have to be ensured in a meaningful way in all instances. This will require further analysis and development, which should enable actors to implement useful systems that are both effective and consistent with fundamental rights in the future.

[71] A calculator that will allow automatic settlement of performances of the parties is a part of the Digital Assistant of the Judge Project.

[72] See on the Digital Justice System, recently Sir Geoffrey Vos, The Digital Justice System – an engine for resolving disputes, p 11 seq, keynote speech at International Forum on Online Dispute Resolution (ODR), Greenwich University, 30 April 2025, available at: <https://www.judiciary.uk/speech-by-the-master-of-the-rolls-the-digital-justice-system-an-engine-for-resolving-disputes/> (last visit: 7 August 2025).

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