The importance of the protection of micro enterprises in B2B international commercial contracts.

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THE IMPORTANCE OF THE PROTECTION OF MICRO ENTERPRISES IN B2B INTERNATIONAL COMMERCIAL CONTRACTS

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DEDICATION

This thesis is dedicated to God Almighty, the giver of life, strength and hope.

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ABSTRACT

This thesis examines the growing disparity in the application of the doctrine of freedom of contract in international commercial contracts because of the need to protect perceived weaker parties.

Using the qualitative doctrinal legal research and adopting an interdisciplinary approach to enquiry, it weighs the current protection available to micro enterprises against the vast protection given to consumers in international commercial contracts under the relevant EU Directives and Regulations; and English law (pre and post BREXIT). It examines the extent consumer protection laws can be applied to micro enterprises. It argues that, like consumer contracts, the bargaining position of micro enterprises in international business-to-business contracts can vary quite significantly.

The research suggests a need for re-orientation regarding the notion that business parties are on an equal footing and that it is not the position of the law to interfere with commercial terms. A holistic piece of legislation designed to protect weaker parties, particularly micro enterprises, from the pitfalls of freedom of contract in international commercial business to business contracts is desirable. It concludes by recommending ways in which micro enterprises can benefit from consumer protection, such as an inventive approach to legal interpretation.

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Dedication

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Glossary of terms

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GLOSSARY OF TERMS

BEIS -	Department for Business, Energy and Industrial Strategy
CRA -	Consumer Rights Act 2015
EC -	European Commission
EUPILLAR -	European Union Private International Law: Legal Application in Reality
MB2B -	Business to Business vertical relationships involving micro enterprises
PECL -	Principles of European Contract Law
SME –	Small Medium Enterprises
TFEU -	Treaty on the Functioning of the European Union
UCPD -	Unfair Commercial Practices Directive
UCTA -	Unfair Contracts Terms Act
UTCCD -	Unfair Terms in Consumer Contract Directive
WIPO -	World Intellectual Property Organization
WTO –	World Trade Organisation

Chapter 1 : Introduction

1.0 Introduction

This chapter provides the introduction, background, aim, objectives, the methodology of the research and highlights its contribution to knowledge. The background presents an overview of the problem and the rationale for the study. Our Background portrays a unique set of enterprises, despite its unquestionable importance, yet receives less than adequate attention regarding regulatory protection against unfair terms. For clarity, this chapter further defines the basic terminologies used throughout this thesis.

1.1 Background

In this thesis, "MB2B" means Business to Business vertical relationships involving micro enterprises. Simply put, a micro enterprise dealing with a larger enterprise.

Regardless of the principles of freedom of contract and party autonomy, over time, legislators have recognised the need to protect certain categories of parties in commercial contracts and have established objective rules that favour those weaker parties and/or restrict party autonomy. Common examples of parties perceived to be weaker in international commercial contracts are consumers[1], employees[2], commercial agents[3], patients[4], third parties[5] and insurers[6]. This thesis appeals for

[1]Treaty on functioning of the European Union, Art 114; 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'); Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts; 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.

[2]Treaty on functioning of the European Union, Art 153; Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

[3] Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents.

[4] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare;

[5] Article 8 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[6] Opinion of the European Economic and Social Committee on 'The European Insurance Contract' (2005/C 157/01)

greater protection for micro enterprises in the context of protective legislations, similar to those granted to consumers under the relevant Directives and Regulations.

The importance of micro enterprises cannot be overemphasised; they represent around 93.3% of all enterprises and 93.2% of all SMEs in the EU-28 non-financial business sector (NFBS), generating 20.8% of NFBS value-added and 29.7% of NFBS employment[7]. Their economic, social, environmental, and developmental impact on the growth of any nation is vital. As will be seen from our discussion in chapter 2, most micro enterprises operate with limited funds, possess limited products, provide a narrow range of services, suffer from information asymmetry, and, amongst other shortcomings, often lack adequate knowledge of every aspect of the business.

The internalisation of SMEs generally has been at the forefront of the agenda of the European Commission due to the recognition that effective exploitation of international markets has proven to be a significant contributor to the recent growth of many EU SMEs.[8] A significant majority of micro enterprises (an average of 79% across Europe) are either currently involved or interested in transacting with other businesses internationally.[9] Unfortunately, micro enterprises wishing to transact with larger enterprises are faced with various obstacles that interfere with their ability to trade, particularly internationally with other businesses. These barriers may be non-contract related like taxation or practical issues such as language barriers or means of delivery; some are indeed contractual or legal issues such as those related to the contract law applied in such transactions, jurisdiction in case of a dispute, or onerous obligations contained within the contract.[10]

[7] European Commission, Annual Report on European SMEs 2020/2021: Digitalisation of SMEs, SME Performance Review (Contract number: EASME/COSME/2020/SC/001), Final Report of July 2021. https://ec.europa.eu/docsroom/documents/46062 accessed 21 October 2021

[8] Ibid

[9] Gallup organization 2011, 'European contract law business to business transactions' (Analytical Report 2011 Hungary) <http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_320_en.pdf> accesed 4 April 2019, 8

[10] Fabio Bortolotti, *Drafting and Negotiating International Commercial Contracts*, (2nd edition, ICC Publication No.743E, 2010) 11

International commercial transactions often come with inherent difficulties. Entwined within the difficulties are risks associated with the substantive law, and the adequacy of redress in cases of dispute and enforcement. In analysing the consequences of governing law and jurisdiction provisions in international commercial contracts, Hartley[11] highlighted that such provisions affect the procedure to be adopted, the cost recoverable, and the method of obtaining evidence. Adopting a pre-emptive approach will usually mean that a business may incur a huge transactional cost. Huge transactional costs would be not only unfavourable to micro enterprises, but also likely to have an unfavourable impact on international trade in the internal market and a lack of confidence in international transactions.[12]

Another critical factor to remember is that it is simply risky to litigate in certain jurisdictions. Many lawyers feel that "judges in some countries are biased, corrupt, inordinately slow moving or plain incompetent".[13] One could imagine an inexperienced sole trader (a micro enterprise) confronted with the risky combination of a foreign jurisdiction clause, a foreign governing law provision coupled with unfavourable substantive provisions. The implications of these provisions will be profound for any business let alone one lacking sophistication. Even for a lawyer who does not have specific knowledge and experience of international transactions, it may be challenging to identify and assess a number of sophisticated issues that might not arise when dealing with domestic contracts.

The UK Office of National Statistics comparing data from Business Demography shows that over half of micro enterprises die within five years of incorporation.[14] It is safe to assume from the Euro statistics that the situation is not much different in other

[11] Trevor Hartley, International Commercioal Litigation: Text, Cases and Materials on Private International Law, (2nd edition, Cambridge University Press, 2015) 6

[12] Lorna Richardson, 'The DCFR, anyone?', (The Law Society of Scotland Journal), (20/01/14) <http://www.journalonline.co.uk/Magazine/59-1/1013494.aspx> accessed 25 May 2018

[13] Trevor Hartley, *Choice of court agreements under the European and international instruments* (OUP, 2013) 8

[14] Office for National Statistics 'Data from Business Demography' <https://www.ons.gov.uk/businessindustryandtrade/business/activitysizeandlocation/bulletins/businessdemography/2017> accessed 4 October 2018

countries in Europe[15]. However, this figure is likely to have been underestimated because the data utilised do not include sole traders and other micro enterprises who are not eligible for VAT. The European Commission has identified that for SMEs generally, the differences between national laws, particularly relating to contracts, is one of the problems that hinder international trade[16] , and an inadequate legal environment is considered as one of the reasons for this alarming death rate.[17]

No doubt, it is quite unusual to find parties having equal bargaining powers, and the essence of the market system is for parties to take advantages of the needs of another party.[18] However, taking advantage of another party due to their vulnerability regardless of whether it is a consumer or a business should be considered unfair[19]. In *Watford Electronics Ltd v Sanderson CFL*,[20] the claimant, the seller of electronic components, bought bespoke integrated software from the defendant, a software supplier. The agreement, which was based on the defendant's standard terms which contained clauses that purported to (i) exclude liability for any claims for indirect losses however arising; (ii) limit the defendant's liability in any event to the contract sum paid for the software and (iii) contain an entire agreement clause that stated that 'no statement or representation made by either party had been relied upon by the other in agreeing to enter into the contract'.

After installation, the software failed to operate satisfactorily. Following a review of the system by the defendant, the claimant purchased a new piece of hardware from the defendant with further bespoke amendments, to resolve the difficulties with the system, but the modified system continued to perform unsatisfactorily. In a proceeding for a claim for damages, the trial court concluded that the

[15] Business demography statistics, 'Enterprise survival rate' <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Business_demography_statistics#Enterprise_survival_rate> accessed 9 April 2019

[16] EC (2001) communication from the commission to the council and the European parliament on the European contract law, 398; EC (2011); Cross border transactions: EC publishes expert group's feasibility study on European Contract law" < http://europa.eu/rapid/press-release_IP-11-523_en.htm> accessed on 3 April 2019

[17] Gallup organization 2011, 'European contract law business to business transactions' (Analytical Report 2011 Hungary) < http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_320_en.pdf>, accesed 4 April 2019, 6

[18] Peter Nygh, *Autonomy in international contracts* (OUP, 1999) 139

[19] Rick Bigwood, *Exploitative contracts* (OUP, 2003) 203

[20] *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696

aforementioned clauses in the agreement were unreasonable in their entirety and could therefore not be relied upon by the defendant due to the Unfair Contract Terms Act 1977 and the Misrepresentation Act 1967.

On appeal, it was held that the question of whether it was fair and reasonable to include the terms, had to be considered in relation to both contractual terms. The clauses were to be construed in conjunction with the entire agreement clause on the basis that the parties had intended that their whole agreement was to be contained or incorporated in the documents which they had signed. In the circumstances of this case, where the terms had been agreed by two business parties, both the terms limiting direct and indirect loss were fair and reasonable terms to have been included in the contract.

Taking unfair advantage of a weaker party regardless of the commercial nature of the transactions should be discouraged. Total respect for freedom of contract in MB2B contracts can be a potent tool in the hands of a more powerful contracting party.[21] Ultimately, the stronger party could undermine the weaker party's access to justice by imposing unfair terms, including governing law provisions and jurisdiction terms unfavourable to the weaker party.

In contrast to this position, Sec 306a of the German Civil Code expressly prohibits circumvention. Thus protection would apply even if contractual terms are circumvented by other constructions or provisions in the contract. Moreover, the reasonableness of such provisions is often tested. For example, Sec 307 directs that standard terms are ineffective, were contrary to good faith, they unreasonably disadvantage the other party. The presumption of unreasonable disadvantage is made where the relevant provision is either incompatible with essential principles of statutory provision, or it limits significant rights or duties inherent in the nature of the

[21] Ole Lando, *The conflicts of law of contracts: General Principles*, (Nijhoff, 1984) Vol 189, 293

contract to such an extent that the achievement of the purpose of the contract is jeopardised.

Generally, in the absence of fraud or other vitiating elements which are generally considered serious,[22] freedom of contract in commercial contracts involving businesses is often respected. Perhaps, restrictions on freedom of contract similar to those of consumer contracts should be extended to contracts showing a clear inequality of bargaining power between the parties - parties such as micro enterprises in MB2B contracts.

Despite consultations with businesses that have indicated that unfair terms are a major issue in MB2B transactions,[23] surprisingly, cases based on unfair contract terms in MB2B contracts have hardly been tested before the courts. This is perhaps due to the unwavering refusal to review such claims in their own right, particularly relating to such terms. This rejection is highlighted by the courts in cases such as *Re Golden Key*[24] where Arden LJ, stated that 'unless the contrary appears, the court must assume that the parties to a commercial document intended to produce a commercial result, and the court must thus take into account the commerciality of rival constructions'.

> The court's function is to ensure procedural fair play: the Court is the umpire to be appealed to when a foul is alleged, but the Court has no substantive function beyond this. It is not the court's business to ensure that the bargain is fair or to see that one party does not take undue advantage of another or impose unreasonable terms by virtue of a superior bargaining position. Any superiority in bargaining power is itself a matter for the market to rectify.[25]

[22] *BV Nederlandse Industrie van Eiprodukten v Rembrandt Enterprises* [2019] EWCA Civ 596
[23] ECN Report on competition-law enforcement and market-monitoring activities by European competition authorities in the food sector, (May 2012) 117; EUBusiness, 'European Business Test Panel' <https://www.eubusiness.com/topics/sme/ebtp/> accessed 5th June 2018; Consultation on Directive 2006/114/EC concerning misleading and comparative advertising and on unfair commercial practices affecting businesses.
[24] [2009] EWCA Civ, 636 [28]
[25] P.S Atiyah, *The rise and fall of freedom of contract* (Oxford:Claredon, 1979) 404

Kaplow argues that "Emphasizing the concept of fairness is likely to reduce benefits, and the precise application of the concept of fairness may incline towards intervention, although it could harm both parties."[26] Arguably, a blunt distinction between the role of the courts, the law, and the market in MB2B commercial contracts should be discouraged. These three institutions often have a complementary purpose and work hand in hand. The courts and the law have been known to intervene when the market system fails and the market system responds to the courts and the law. Therefore the law must attach a great amount of importance to economic rules. According to Xuhu,[27] The science of economics hammers at the exploitation of assets, wealth creation, and circulating conditions; it is a factor that must be considered in the enactment of laws and rules. "When we turn to the market and other economic systems, efficiency obtains the priority, whereas a large amount of inequality is acknowledged."[28] The courts and the law should be interested in the economic advantages and hazards of various market vices. Otherwise, there is a risk that these vices will weaken the meaning of fairness and may lead to poor efficiency in the legal order.

Currently, businesses are left to pursue claims under a different and sometimes inadequate route such as unconscionability, economic pressure, good faith, public policy, etc. It can be argued that principles such as unconscionability, economic pressure and good faith are present in the substantive laws of many national legal systems and such principles in some way or form help to regulate unfairness. However, It is important to point out that some of these principles are not an independent legal concept that can unilaterally prove contractual unfairness. And in some legal systems, some of these principles are not recognised. For example, English law do not recognise the concept of good faith.[29] Despite the glimpse of hope

[26] Louis Kaplow and Steven Shavell, *Fairness* versus *Welfare* (Law Press, Beijing, 2007) 237
[27] Ghestin et al. *Traité de droit civil Introduction générale* (2004), 80 in Xuyu Hu, "Equality of bargaining power in contracts for international liner shipping", (Sept 2018) WMU Journal of Maritime Affairs, 17, 3, 365
[28] Arthur M Okun, *Equality and efficiency-significant choice* (trans: Benzhou W), (2nd edn. Huaxia Publishing House, 1999) 86
[29] Gerard McMeel, 'Foucault's Pendulum: Text, Context and Good Faith in Contract Law', (2017) Current Legal Problems, 70, 1, 366; *Interfoto Picture Library v Stiletto Visual Programmes Ltd* [1988] 1 All ER 348; MSC Mediterranean Shipping Company S.A. v Cottonex Anstalt [2016] EWCA Civ 789

that the English Courts were open to the idea that the duty of good faith can be generally implied in commercial contracts,[30] recent decisions have returned to the orthodox view that English law do not recognise any general duty of good faith in commercial contract.[31] In fact, an English jurist argued that the duty to act in good faith is inherently inconsistent with the adversarial nature of contracting and there is the danger of judicial arbitrariness and the requirement for fair elasticity[32]. Lately, this concept of good faith has been labelled redundant and ambiguous.[33]

A review of the first Consumer Policy Programme in the EU[34], which can be considered one of the key policy documents informing consumer protection, highlights a number of reasons why the protection of consumer's economic interests and redress is essential. Clause 7 and 19 (i) states that purchasers of goods or services should be protected against the abuse of power by the seller, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts.

The literal interpretation of the general wording of clause 19 (1) could see a business at risk of abuse of power falling into that category. Consequently, in line with this literal interpretation, until the mid-1980s, the EU adopted a flexible approach as to the matter of competence, which may suggest that the need to improve the internal market is a valid reason for awarding protection to categories of parties lacking bargaining power or having difficulty with accessing justice[35]

[30] Yam Seng PTE Ltd v International Trade Corporation Ltd [2013] EWHC 111 (QB); Bristol Groundschool Limited v Whittingham [2014] EWHC 2145 (Ch); D&G Cars Ltd v Essex Police Authority [2015] EWHC 226 (QB)

[31] Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd. [2013] EWCA Civ 200; MSC Mediterranean Shipping Company S.A. v Cottonex Anstalt [2016] EWCA Civ 789

[32] Marietta Auer, 'Good Faith: A Semiotic Approach' (2002) 10 European Review of Private Law, 2, 279

[33] Opinion of the Economic and Social Committee on the 'Report from the Commission on the implementation of council Di-rective 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJEC 20 April 2001 C-116/117, para 4.2.3.

[34] Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ C 1975, 92/2. <https://publications.europa.eu/en/publication-detail/-/publication/26d73eca-e878-4d14-8d1b-0c6fdc73b323/language-en> accessed on 24 April 2019

[35] I. Loos, M. B. M., & Samoy, I. *The position of small and medium-sized enterprises in European contract law*. (Ius commune: European and comparative law series; No. 121, Cambridge: Intersentia. 2014) 2

Furthermore, Clause 32 recognised that consumers needed advice and support regarding complaints, injury, breach or damage resulting from the purchase or use of defective goods or unsatisfactory services. Therefore, consumers should be entitled to proper redress for such injury or damage by means of swift, effective and inexpensive procedures. The consumer movement and policy protection have worked under the assumption that businesses are largely sophisticated, giving little or no consideration to SMEs,[36] particularly micro enterprises. Since the mid-1980s, the scope of protection afforded to consumers has grown enormously, and the nature of the respective protection has evolved in style and vigour. As part of this evolution, the concept of "average consumer" developed.

An average consumer is assumed to be reasonably "well informed", "observant" and "circumspect".[37] However the issue as to how well-informed the average consumer must be to be "reasonably well-informed" has been the bane of some national courts.[38] In the recent English case of *R (CityFibre Ltd) v Advertising Standards Authority*,[39] the High Court ruled that the "average consumer" is not expected to be well-informed about every feature of the product or service being advertised.

In spite of the general notion that the average consumer is reasonably well informed, the principal Directives dealing with unfair terms and practices: Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Directive 2005/29/EC and Directive 2011/83/EU apply to consumer contracts only. For example, Articles 5, 6, 7, 8 and 9 of Directive 2005/29/EC (Unfair Commercial Practices Directive) protects consumers from unfair terms, misleading and aggressive commercial practices which are either capable of distorting economic behaviour, causing or likely to cause a consumer to take a transactional decision that otherwise would not have been taken.

[36] S McGregors 'Consumers transactions with SMEs : implications for consumer scholars' 29 international journal of consumer studies, 2

[37] Consumer Protection from Unfair Trading Regulations 2008; *Office of Fair Trading v Purely Creative Ltd & 8 Ors* [2011] EWHC

[38] Rossella Incardona Æ Cristina Poncibo, 'The average consumer, the unfair commercial practices directive, and the cognitive revolution' J Consum Policy (2007) 30:21–38; case C-342/97, *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel BV*., judgement of the Court of 22 June 1999, I-3819.

[39] [2019] EWHC 950 (Admin)

Whilst some EU member states have extended the application of these legislations to businesses as well as consumers, these national laws are often fragmented and insufficient in protecting micro enterprises. The ECJ reiterated in *The Republic v Patrice di Pinto*[40] that a non-consumer could not benefit from the European consumer protection Directives however, member states may choose to award similar protection to such non-consumers as they deem fit.

In addition to the above Directives, specific protective rules also exist in a number of EU Regulations in relation to contractual obligations. The principal regulations are: The Rome I Regulation which governs the choice of law in the European Union (Rome I); the Brussels I Regulation[41] on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast). For example, Recital 23 to the Rome I provides that: 'As regards contracts concluded with parties regarded as being weaker, those parties should be protected by the conflict of law rules that are more favorable to their interest than the general rule.'

Additional or alternative means of redress is usually available to consumers, particularly in the area of e-commerce. Top operators like PayPal, eBay, Amazon;[42] regulators like the Financial ombudsman service, Solicitors Regulation Authority, etc will usually provide initial means of redress to consumers. This is not to say that consumers do not deserve or require the level of protection provided under the law. Rather, this thesis submits that the Legislators and Courts have adopted a liberal approach to consumer protection as opposed to micro enterprises. Lando remarks that 'the situation of the "small" professional, the farmer, the fisherman, the shopkeeper, the artisan, etc., is mostly the same as that of the consumer'.[43]

[40] Case C-361/89.
[41] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)
[42] Janahi, Wafa,' Party autonomy and small business protection in cross-border commercial contracts under EU private international law : a critical analysis of the Brussels I and Rome I regulations', (PhD thesis, University of Bristol 2015), 5
[43] Ole Lando, 'Liberal, Social and "Ethical" Justice in European Contract Law', (2006) Common Market Law Review, 43, 829.

It would be wrong to indicate that no protection exists for businesses under the current European regime. Rather the issue at hand is the adequacy of the current rules and their shortfalls. A quick survey of the current regime shows a number of laudable policies and some form of protection that weaker businesses (including micro enterprises) can benefit from either in the form of rules available under the competition law, sectoral legislation, cross-sectorial legislation, and specific policies.

Regarding the assumed protection afforded under relevant Competition law, one might think that rules curbing abuse of dominant position cannot be strange in this day and age, and such rules should be able to protect micro enterprises from unfair terms. Many countries have such provisions included in their respective competition act, and the notion of abuse of dominance is a fundamental aspect of European Competition Law. The European Competition law, notably in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), prohibits anti-competitive agreements and concerted practices between undertakings. Unfortunately, it rarely contains a provision which can regulate unfair terms as its target is anti-competitive behaviour by undertakings.[44] Consequently, certain issues relating to unfair terms or unfair practices are outside the scope of the EU competition law.

Micro enterprises can enjoy the benefits of cross-sectorial legislation like the Directive on Late Payments in Commercial Transactions,[45] and Commercial Agents Directive[46] when dealing with non-SMEs; the Misleading and Comparative Advertising Directive[47]

[44] C-280/06 *ETI SpA and Others*, EU:C:2007:775, para 38 - "Undertaking" within the meaning of Article 101 TFEU is "any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed."
[45] Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (recast) aimed at improving the situation of SMEs experiencing delays and other problems in their relations with other businesses and public administrations.
[46]Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (86 / 653 / EEC), aimed at effecting the co-ordination of laws between European member states relating to self-employed commercial agents.
[47] Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising which aims to protect traders against misleading advertising and its consequences.

and the E-Commerce Directive[48] generally. Like specific Directives particular to consumers only, the Directives 2011/7/EU and 86/653/EEC are targeted at SMEs generally[49]. Hence, like a medium enterprise with 249 employees, a micro enterprise will enjoy the same benefit afforded to SMEs generally under the above Directives. Despite the clear objectives of these cross-sectorial legislations, these directives do not treat SMEs as a distinct group for regulatory purposes.

For the first time, in 2018, a Proposal for a Directive of the European Parliament and the Council on unfair trading practices in business-to-business relationships in the food supply chain was introduced based on Article 43(2) TFEU. The explanatory memorandum highlighting the rationale for the proposal stated that "agricultural producers are particularly vulnerable to unfair trading practices as they often lack bargaining power that would match that of their downstream partners that buy their products". The proposal, which translated into Directive (EU) 2019/633 of the European Parliament and the Council of 17 April 2019 on unfair trading practices in business to business relationships in agricultural and food supply chain prohibits certain trading practices and restricts for the first time at the EU level, not only what is agreed between businesses in their contract, but also the ways in which a contract is made, varied or terminated within food supply chains. The Directive amongst other objectives provided a list of prohibited UTPs against SMEs by non-SMEs who buy food products.

Interestingly, the intervention by EU legislators in the food supply chain B2B contracts was necessary due to the importance of this type of supply chain transaction to the European economy. For instance, research showed food supply chain affects the citizen's daily life who spend around 14% of their household expenditure on food and in the year 2008 that real food prices increased by over 6.7%.[50] It should be

[48] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.
[49] see Article 1 and Recital 6 and 7 of Directive 2011/7/EU and Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents.
[50] Eurostat 2012 'Europe in figures Eurostat yearbook 2012 ' https://ec.europa.eu/eurostat/documents/3217494/5760825/KS-CD-12-001-EN.PDF accessed 14 January 2019

emphasised that the retail market monitoring exercise highlighted that unfair trading practices exist within various retail sectors.[51] The European Parliament has also recognised that it was necessary to see beyond the agro-food industry and urged the Commission to take necessary action.[52] Over a decade ago, in the Single Market Act, the European Commission expressed its intention to launch an initiative to combat Unfair trading practices in B2B transactions.[53]

Shortly after the Proposal for a Directive on unfair trading practices in business-to-business relationships in the food supply chain, the EU published a Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services which translated into the 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. This Regulation aims to ensure a fair and predictable legal environment for users including businesses, preventing the current legal fragmentation in the digital single market thereby safeguarding trust and confidence.[54]

A good number of EU policies and soft laws seek to offer protection for weaker parties and incentives for micro enterprises. Notable examples of such policies and soft law instrument include the Common Frame Reference (an academic text prepared by the Study Group and Acquis Group with the intention of providing a guideline for the development of a harmonised European private law particularly law of contract), the Small Business Act (A framework for the EU policy on small and medium-sized enterprises (SMEs) which aims to improve the approach to entrepreneurship in Europe, simplify the regulatory and policy environment for SMEs, and remove the

[51]Retail market monitoring report 'Towards more efficient and fairer retail services in the internal market for 2020' (COM(2010) 355, 5 July 2010)
[52] ECN Report on competition-law enforcement and market-monitoring activities by European competition authorities in the food sector, (May 2012) 117
[53] European Commission Consultation on Directive 2006/114/EC concerning misleading and comparative advertising and on unfair commercial practices affecting businesses.;
[54] Explanatory Memorandum, Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, Brussels, 26.4.2018 COM(2018) 238 final, 2018/0112 (COD) 3

remaining barriers to their development), the Principles of European Contract Law (PECL). These policies and soft law instrument though commendable are non-mandatory due to their soft laws nature.

With regard to national domestic rules, policies, legislation; and the scope of their national competition rules, the concern is more about the fragmentation and adequacy of their seemingly equivalent provisions in regulating unfairness. It is worth considering if the protection at this level addresses all the types of issue relating to unfairness. One should not overlook the helpful contributions of domestic voluntary and non-voluntary organisations which exist under different jurisdictions. For example, the UK Chartered Institute of Credit Management recently removed and suspended seventeen businesses for failing to pay their supplier on time.[55]

Clearly, recent developments show a recognition of the gross disparity between the obligations of parties in B2B relations, which may give one party an unjustifiable, excessive advantage over the other party and question the willingness of legislators to protect weaker parties. It is therefore beneficial to strike while the iron is hot; the right opportunity to make a case for micro enterprises is now. After all, micro enterprises are the major employers of labour in the EU, and majority operate in a diverse range of the market. Moreso, the EC also acknowledges that micro enterprises deserve more attention and could benefit from a simple approach tailored to their needs.[56] At this time of fast-changing judicial landscape and the dire effect of Covid 19 around the world, it is important to ensure that micro enterprises have the confidence to deal with other businesses. Whilst recent UK High Court ruling in *Canary Wharf (BP4) T1 Ltd and others ("CW") v European Medicines Agency ("EMA")* [57] states that Brexit cannot be regarded as a "force majeure" event, it is likely that Covid 19 can be seen as a force majeure event. Thus micro enterprises should be able to avoid liability

[55] CICM - Chartered Institute of Credit Management : Quarterly update https://www.cicm.com/quarterly-update-17-businesses-removed-suspended-prompt-payment-code-failing-pay-suppliers-time/ accessed 13th June 2019.
[56] Clause 2.1.1 of Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: Review of the "Small Business Act" for Europe COM(2011) 78 final pg
[57] [2019] EWHC 335 (Ch)

if they are unable to fulfill some of their obligation timely, due to the Pandemic. What other dangers loom around the corner of this uncertainty awaits to be discovered.

1.2 Aim, Research Question and Objectives of the Research Project

1.2.1. Aim of the Research

The research will consider the concept of freedom of contract and party autonomy; examine the rationale for the protection of weaker parties; and analyse the current regulatory regime on the protection of weaker parties in European contract law whilst seeking to demonstrate why micro enterprises in MB2B contracts, should fall under the category of weaker parties and therefore require regulatory protection.

1.2.2 Research Question

Regardless of the doctrine of freedom of contract, should micro enterprises enjoy consumer like protection in international MB2B commercial contracts?

1.2.3 Objectives of the Research

a) Analyse the concept of freedom of contract and the difference in its application in B2B and Business to Consumer (B2C) contracts.

b) Examine the rationale for the protection of weaker parties under EU private international law.

c) Investigate the current protection available to micro enterprises under relevant domestic laws.

d) Evaluate the current regime for the protection of weaker parties under the Rome I, Brussels Recast, Directive 93/ 13/EEC, Directive 2005/29/EC, Directive 2011/7/EU, Directive 2006/114/EC and EU Competition Law

e) Demonstrate why micro enterprises should benefit from some of the protective rules afforded to consumer contracts.

1.3 Research Methodology

Methodology has been defined simply as the overall approach to the entire process of research.[58] There are three widely accepted methods: qualitative, quantitative and mixed method.[59] The quantitative method is a number based method used to test the relationship between variables,[60] while the qualitative method explores a phenomenon.[61] The mixed method is a combination of both methods.[62] Qualitative findings are developed from three kinds of data, namely, in-depth, open-ended interviews; direct observation; and written documents.[63] This research will adopt the qualitative method.

The terminology "qualitative method" in this thesis can be confusing due to the interdisciplinary nature of the research, so it is necessary to quickly point out that there is no fixed accepted way of carrying out qualitative research and the way often depends on a number of factors. Such factors include: (i) beliefs about the nature of the social world (ontology); (ii) the nature of knowledge and how it can be acquired (epistemology); (iii) the purpose and goals of the research; (iv) the characteristics of the research participants; (v) the audience for the research; (vi) the funders; and (vii) the positions and environments of the researchers themselves.[64] Differences in the mix of these factors have led to numerous variations in approaches to qualitative research.[65]

1.3.1 Methodology adopted

Qualitative doctrinal and non-doctrinal research are two of the most commonly used research methodologies in law. Doctrinal research is research into the law and legal

[58] Jill Collis and Roger Hussey, *Business Research: A Practical Guide for Undergraduate and Postgraduate Students* (3rd edn, Palgrave Macmillan 2009).
[59] John W Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (4th edn, Sage 2013).
[60] Alison Jane Pickard, *Research Methods in Information* (2nd edn, Facet Publishing 2013).
[61] Norman K Denzin and Yvonna S Lincoln, *The SAGE Handbook of Qualitative Research* (4th edn, Sage 2011).
[62] Norman Blaike, *Designing Social Research: The Logic of Anticipation* (2nd edn, Polity Press 2010).
[63] Michael Quinn Patton, *Qualitative Research and Evaluation Methods* (3rd edn, Sage 2002) 4; Martyn Hammersley, *What is Qualitative Research?* (Bloomsbury 2013).
[64] Rachel Ormston, Liz Spencer, Matt Barnard and Dawn Snape, Eds, 'Qualitative Research Practice: A Guide for Social Science Students and Researchers' <http://jbposgrado.org/icuali/Qualitative%20Research%20practice.pdf> accessed 9 June 2017
[65] Ibid

concepts[66] while non-doctrinal research is that which adopts methods derived from other disciplines in order to generate empirical data that answers research questions.[67]

According to Cotterrell,

> "All the centuries of purely doctrinal writing on law have produced less valuable knowledge about what law is, as a social phenomenon, and what it does than the relatively few decades of work in sophisticated modern empirical socio-legal studies"[68].

In recent years, pure doctrinal analysis has been labelled 'intellectually rigid", "inflexible and inward-looking"[69] and thus an inadequate approach of understanding law and its operation. Instead, many have encouraged an interdisciplinary approach to the study of law; hence methods such as Legal realism, socio-legal studies, empirical legal research, critical legal studies as new approaches to international law have emerged.

New Legal Realism explores a realist approach to law and how actors use and apply the law to test questions such as how does the law operate in practice or how the law evolves.[70] Unlike Dworkin's interpretative theory which deals with positive and natural theories, Legal realism concentrates on how the law works and its evolution in the social and political context,[71] and may utilise the approach of pragmatic problem-solving.[72] Unfortunately, new Legal Realism as a methodological for

[66] Terry Hutchinson, 'Defining and Describing What We Do; Doctrinal Legal Research' (2012) 17 Deakin L Rev 83, 84.
[67] Salim Ibrahim Ali, Dr Zuryati Mohammed Yusoff and Zainal Amin Ayub, 'Legal Research of Doctrinal and Non Doctrinal' (2017) 4(1) International Journal of Trend in Research & Development 493; Geoffrey Wilson, 'Comparative Legal Scholarship' in Michael McConville and Wing Hong Chui, *Research Methods for Law* (1st edn, Edinburgh University Press 2007).
[68] R. Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (OUP, 1995) 296.
[69] Mike McConville and Wing Hong Chui (eds) Research Methods for Law (2nd edition, Edinburgh University Press) 5; P. Goodrich, 'Of Blackstone's Tower: Metaphors of Distance and Histories of the English Law School' in P. B. H. Birks (edn), Pressing Problems in Law. What are Law Schools For? (vol. 2, OUP, 1996) 59.; D. W. Vick, 'Interdisciplinary and the Discipline of Law' (2004) 31 Journal of Law and Society, 164.
[70] Gregory Shaffer, "The New Legal Realist Approach to International Law", (2015) Leiden Journal of International Law, 28
[71] R. Dworkin, "Law's Empire" in Gregory Shaffer, "The New Legal Realist Approach to International Law", (2015) Leiden Journal of International Law , 28, 191
[72] V Nourse and G. Shaffer, 'Empiricism, Experimentalism, and Law: Toward a Dynamic New Legal Realism,' (2014) 67 Southern Methodist University Law Review 101

international law "does not address the conceptual question of what is law in the abstract, or what is the relation of law to morals…". [73] As this research adopts a more empirical and pragmatic approach whilst testing the foundation and rationale of relevant legal theories including investigating the relationship of the law to morality and fundamental rights, legal realism will not be an effective methodology for this thesis.

Critical legal studies also referred to as Critical Legal theory is an approach that posits that the law is essentially connected with social issues, especially suggesting that the law has always been known to hold inherent social biases. It believes that the law supports a power dynamic that favours people and businesses that are historically wealthy or privileged and fails to protect or support businesses and people that are less privileged or with limited capital. Therefore, the object of critical legal studies is to disrupt the existing protocol, critique the status quo and the institutions we live in, to bring changes that are considered fair and equitable.[74]

As much as the theory questions the fundamental values of society whether in business or law, it does not drive immediate change which is what my thesis sought to achieve. For instance, my work is not looking at expanding theoretical knowledge, the need to extend legal protection to micro enterprises which is the core aim of my study is to all intent and purposes a present call, especially with the extent of damages that the global pandemic has had and could have on these enterprises. Furthermore, given that the disruptive changes that critical legal studies scholars expect are often based on individual or subjective dynamics, there is always the problem to be had in finding a one-size-fits-all strategy to legal problems. In fact, as Tushnet opined, the most plausible explanation why people identify with critical legal studies is because it serves as a political safety net for 'a group of people on the left who share the project of supporting and extending the domain of the left in the legal academy.'[75] This

[73] Gregory Shaffer, "The New Legal Realist Approach to International Law", (2015) Leiden Journal of International Law, 1

[74] Paul Baumgardner, *Critical Legal Studies and the Campaign for American Law Schools: A Revolution to Break the Liberal Consensus* (Palgrave Macmillian, 2021); Legal Information Institute: Cornell Law School, 'Critical Legal Theory' < https://www.law.cornell.edu/wex/critical_legal_theory> accessed 2nd February 2022

[75] Mark Tushnet, 'Critical Legal Studies: A Political History' (1991) 100 (5), Yale Law Review, 1516-1517.

however is not to agree that everybody on the left identifies with the theory. With critical legal studies often deployed by proponents to fit personal experiences, it is often a certainty that the expectation of a fair and ideal situation can hardly become practical as what is good to one may be bad for others. Consequently, adopting the critical legal studies is as good as critiquing hot air without fundamentally shifting the goal post. In other words, critical legal theory rarely instigates practicable changes in the status quo, it mainly speaks to the ambitious aspirations of a few over the collective interest of many.

This research will adopt qualitative legal doctrinal research methodology together with a socio legal approach to enquiry.

1.3.2 Justification of Methodology

The qualitative method will be adopted as the research involves examining primary and secondary data in the form of written documents which will not be subjected to rigorous quantitative analysis. One advantage of the legal doctrinal research approach is that it helps analyse the law or legal doctrine and how it is applied. As the aim of doctrinal research is to answer the question 'what is the law?',[76] a qualitative legal doctrinal research methodology seems to be the most appropriate for the nature of this research which is mainly library-based. It will examine the law of the protection of weaker parties in international commercial transactions and draw on the theoretical work to consider whether there is appropriate legislation in place to protect micro enterprises in international MB2B contracts. Also, relevant decisions of the Court of Justice of the European Union ("CJEU"), Opinion of Advocate Generals, decisions of Member States Courts, existing academic authorities, and the legislative background of the European Union private international instruments on Jurisdiction as well as Governing law will be analysed.

[76] Paul Chynoweth, Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Blackwell, 2008) 30.

Due to the interdisciplinary nature of the subject matter, the research will adopt a socio-legal approach to inquiry. A socio-legal study is an interdisciplinary approach to analyse the law, legal phenomena, and relationships between them and wider society.[77] Therefore this research goes beyond an analysis of the law or legal doctrine and how it is applied; it probes further into economic and business disciplines in analysing these discussions. Both theoretical and empirical work is included, and perspectives and methodologies are drawn from the humanities as well as the social sciences. Socio-legal study recognise that the law does not operate in vacuum and therefore, a black letter approach would be insufficient and wider factors needs to be considered.[78] Law like economics should be a bag of tools, a way of analysing problems. According to Coarse:

> "..no doubt at all that in studying the legal system, the use of these [economic] tools can be very helpful – and has been..... contracts are the major means by which one firm interrelates with another firm, or one organization interrelates with the consumer. They are, in effect, the neurons of the economic system"[79]

Lawyers, like economist should study any system with all its interrelationships as often times, one part impinges on the other, all operating to form a total system.

Although it is generally agreed that Interdisciplinary or socio-legal research methods enriches legal discussions by providing both a theoretical and conceptual framework whilst also generating empirical evidence to answer relevant research questions[80]; writers like Jones[81] opine that such approaches are a "threat" to the identity of legal

[77] Reza Banakar, Max Travers (eds) *Theory and Method in Socio-Legal Research* (Hart Publishing, 2005) 12
[78] UWE ASC LLM "Research Methods: Socio-Legal Methodology" < https://uweascllmsupport.wordpress.com/2017/01/23/researchmethods-sociolegal-methodology/> accessed 4th January 2022
[79] Ronald H. Coase, "Why Economics Will Change" (2015) Man and the Economy 2, 2, 114- 115; Hal R. Varian, "A New Economy With No New Economics," The New York Times, January 17, 2002. <https://www.nytimes.com/2002/01/17/business/economic-scene-if-there-was-a-new-economy-why-wasn-t-there-a-new-economics.html> accessed 3rd March 2022
[80] A. Bradney, 'Law as a Parasitic Discipline' in Mike McConville and Wing Hong Chui (eds) *Research Methods for Law* (2nd edition, Edinburgh University Press, 2017) 5; R. Banakar and M. Travers (eds), *Theory and Method in Socio-legal Research* (Oxford: Hart Publishing, 2005).
[81] G. Jones, "'Traditional" Legal Scholarship: A Personal View' in P. B. H. Birks (edn), *Pressing Problems in Law. What are Law Schools For?* (vol. 2) (Vol 2. OUP, 1996) 59

discipline because of the increasing number of sociolegal studies which borrow concepts, theories and research methods from non-law disciplines. No doubt, infusing doctrinal methodology with approaches drawn from the social sciences or humanities gives a best of both worlds as it provides an actual liberal education and allows for a more intellectual debate of the law and its operation in the real sense.

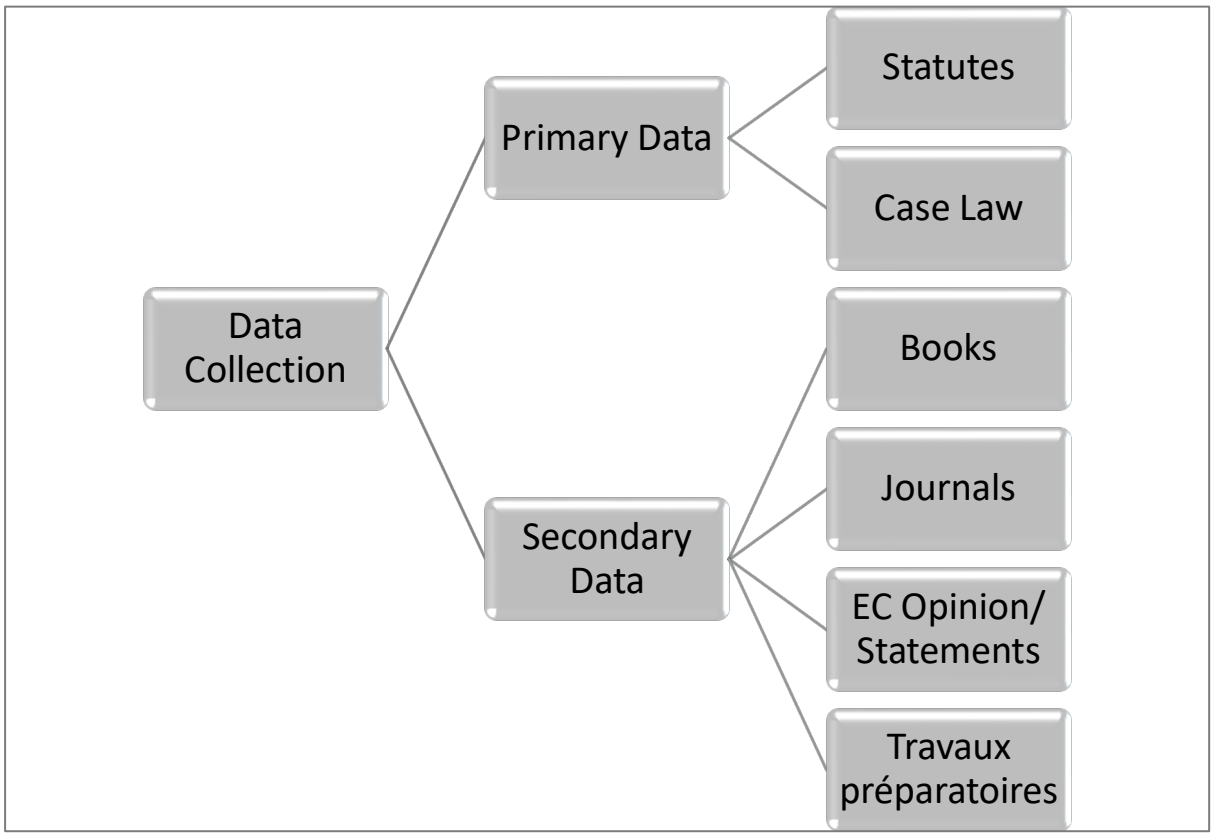
Furthermore, it has been established that understanding the philosophical approach in any research is pertinent to selecting the appropriate design. In this case, the researcher's underpinning philosophy is interpretivism. Interpretivism involves interpreting elements of the study; thus, an interpretivist integrates human interest in the study and supports qualitative analysis over quantitative analysis. Interpretivist study usually focuses on the meaning and may employ multiple methods in order to reflect different aspects of the issue or, in this case, provide practical solutions to problems relating to barriers that interfere with the ability of micro enterprises to trade internationally with other businesses.

Where relevant, the research uses economic theories to test contract law theories and assess the two's relevance to justify or question why certain legal theories have not received stronger support. For example, we will consider the concept of power and its effect on contractual terms. In addition, legal theories relating to relevant private international law concepts, particularly on freedom of contract, protection of weaker parties, will enrich our discussions. Ultimately, this thesis attempts to show that the position of micro enterprises is often overlooked in MB2B contracts and invites the EC to entertain what some will consider a radical thought; that the survival rate and growth of micro enterprises will be greatly improved by an explicit doctrine or regulation that controls unfair terms in favour of micro enterprise in MB2B contracts.

The literature in some of the aspects of this area of law is very robust and will provide background information on the current regime for the protection of weaker parties in international commercial transactions and the attitude of the courts with regard to interfering in the contractual relationship of the parties in B2B contracts. Thus, this

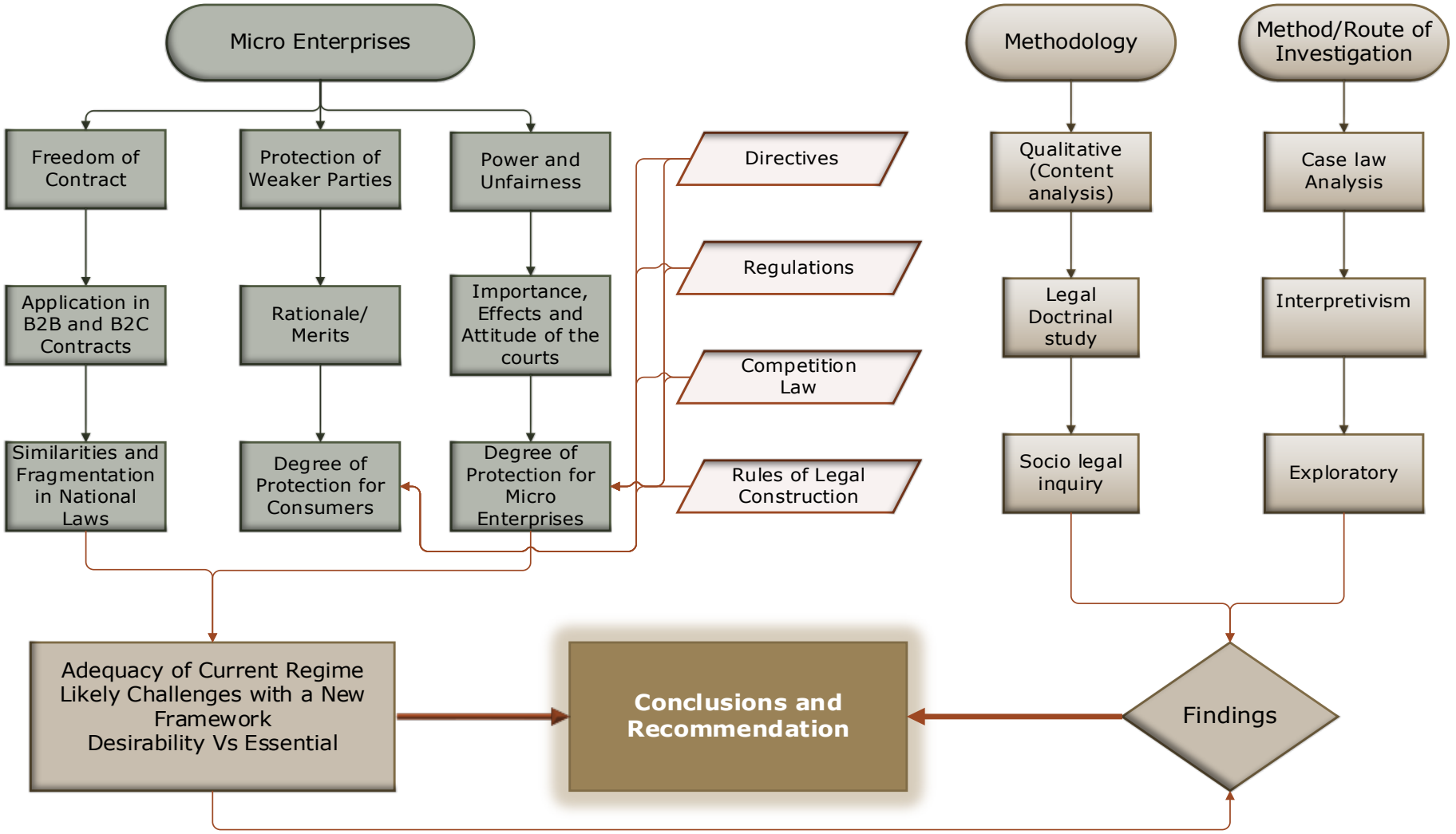
desk-based research will critically analyse case law, relevant regulations, relevant statutes, conventions, and relevant civil procedure rules. The research will use the appropriate analogical, deductive and inductive reasoning to analyse the primary and secondary data shown in figure 1 below.

Figure 1: Data Collection



Source: Author generated.

Figure 2: Research Design



Source: Author generated.

1.4 Justification for Principal Case Study: UK, France and Germany.

Although this research is not comparative, it highlights similarities, differences and draws examples from three main jurisdictions in Europe. These principal jurisdictions are United Kingdom (UK), Germany and France. Reference to UK in this thesis will mean English law (as applied in England and Wales). UK here does not include Scotland or Northern Ireland which has their own legal systems. This thesis focuses on English law rather than Scottish law or the Laws of Northern Ireland due to the overwhelming amount of economic activities in places such as London.

It is pertinent to clarify that the UK left the European Union on the 31st of January 2020 following a referendum held in June 2016 where 52% of voter decided to leave the EU. Notwitstanding that the UK is no longer part of the EU, EU case laws determined prior to the exit date is still relevant. EU laws were applicable in the UK until the 31st of December 2020 ("the transition period"). During the transition period, the UK continued to apply and implement EU law that falls within the scope of the withdrawal agreement.

After that date, the relevance of legislation depends on the extent of their transposition into UK domestic laws. The relevance of case laws and legislations will also be determined by the prescription of individual laws. Pursuant to section 6 of The European Union (Withdrawal) Act 2018 as amended by the European Union (Withdrawal Agreement) Act 2020, the UK courts and tribunals cease to be bound by principles laid down by the Court of Justice of the European Union, or any decisions made by that court, after the end of the transition period, subject to the provisions of the Withdrawal Agreement.

Although there is the creation of retained EU law to provide legal continuity in the UK, these would be retained EU law, as far as that law is unchanged on or after the end of the transition period, and as far as is relevant to it, is to be interpreted in line with retained case law. More so, following a consultation issued by the UK Ministry of Justice on the departure from retained EU case law by UK courts and tribunals published on 2nd July 2020, the government published a response which shows that 56% of respondents were not in favour of the power to depart from retained EU case law being extended beyond

the UK Supreme Court and the High Court of Justiciary in Scotland. [82] This response seems contrary to the government's initial desire to allow greater swift development of retained EU law after the transition period.

Furthermore, the European Commission regularly updates stakeholders in different sectors on the interrelationship between UK and EU Law. For example, the recent notice regarding Company Law states that the UK will be a third country after the transition period, and EU company law will no longer apply to the UK.[83] In addition, on 1st January 2021, the UK acceded to the WTO's Government Procurement Agreement (GPA) in its own right.[84]

It is expedient to clarify that this thesis considers the English law before the transition period and the current position to date. It does not pre-empt or provide a study of what English law will look like in future. Thus, if one is looking for a thesis or monograph on comparative analysis of English law pre and after Brexit, this thesis does not serve that purpose. However, it considers the Ministry of Justice published guidance on Cross-border civil and commercial legal cases, which describes the rules that apply to jurisdiction, recognition and enforcement of judgments, special European procedures and applicable law post Brexit.[85]

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[82] Government Response to the consultation on the departure from retained EU case law by UK courts and tribunals, Presented to Parliament by the Lord Chancellor and Secretary of State for Justice by Command of Her Majesty, October 2020 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/926811/departure-eu-case-law-uk-courts-tribunals-consultation-response.pdf> accessed 06 November 2020

[83] Notice To Stakeholders, Withdrawal of the United Kingdom and EU Rules On Company Law <https://ec.europa.eu/info/sites/info/files/notice-to-stakeholders-brexit-company-law_en.pdf> accessed 9 October 2020; Guidance on how Brexit affects the CMA's powers and processes for competition law enforcement, merger control and consumer protection law enforcement during the Transition Period, towards the end of that period, and after it ends is available on <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864371/EU_Exit_guidance_CMA_web_version_final_---2.pdf> accessed 2 November 2020

[84] World Trade Organisation, UK to join government procurement pact in its own right in the new year 07/10/2020 <https://www.wto.org/english/news_e/news20_e/gpro_07oct20_e.htm> accessed 19th October 2020; World Trade Organisation, "UK and Switzerland confirm participation in revised government procurement pact" https://www.wto.org/english/news_e/news20_e/gpro_02dec20_e.htm

[85] Guidance: Cross-border civil and commercial legal cases: guidance for legal professionals from 1 January 2021, Published 30 September 2020 <https://www.gov.uk/government/publications/cross-border-civil-and-commercial-legal-cases-guidance-for-legal-professionals-from-1-january-2021/cross-border-civil-and-commercial-legal-cases-guidance-for-legal-professionals-from-1-january-2021> accessed 1 October 2020

The rationale for choosing the above jurisdictions can be summarised as follows: Firstly, The aforementioned jurisdictions are the location of major economic activities in the world. Centres like London, Paris and Berlin are well known economic centres around the world and serves as a conduit for various commercial transactions involving micro enterprises and other enterprises.

Secondly, the principal domestic legislation of the above-mentioned jurisdictions relevant to this research is available in the public domain. A credible source of these legislations is the World Intellectual Property Organization (WIPO) which provides translated copies of legislations such as the German Civil Code, France Civil Code etc. In addition, academic journals relating to these countries are also readily accessible in the public domain.

In addition, the University of Aberdeen Library possesses the EUPILLAR (European Union Private International Law: Legal Application in Reality) database, which amongst other things, interprets case law relating to European private international law instruments from other jurisdictions such as Germany etc.[86]

Thirdly, Germany and France are two of the top five economies in the EU; and the UK, France, and Germany are three of the six strongest economies in the world.[87] Fourthly, the population of these countries are quite significant compared to other countries in Europe, and the likelihood of more micro enterprises being situated in these countries is non-negligible.

Lastly, the geography of these countries is also a significant factor. Germany borders about nine countries which includes countries like Denmark, Austria, Switzerland and France. The ease of business due to this mobility is an encouraging aspect for any micro enterprise that require significant access to other markets.

[86] Cross-Border Litigation in Europe: Private International Law Legislative Framework, National Courts and the Court of Justice of the European Union < https://www.abdn.ac.uk/law/research/eupillar.php> accessed 1st October 2020
[87] Investopedia, The Top 20 Economies in the World <https://www.investopedia.com/insights/worlds-top-economies/> accessed 12 November 2020

Aside from the jurisdictions mentioned above, the research where relevant mentions and draws examples from other jurisdictions.

1.5 Originality and Contribution to Knowledge

The concept of "originality" is discipline dependent and originality in the field of law has been a highly controversial one amongst academia. [88] According to Kissam, in order to be original, the work has to be more than a mere summary of the statutory provisions or a line of cases;[89] something new should be suggested.

A considerable amount of research has been conducted in the field of SMEs generally[90]. A large number of social sciences research explores the survival of micro enterprises with regards the personal characteristics of the owner-manager, the physical and human capital and know how[91], the organisational ecology[92] and the financing perspective.[93]

Similarly, the survival rate of the small enterprises has been measured according to variables related to age of the owner, his/her education or experience, and the level and

[88] Richard A. Posner, "Legal Scholarship Today" (2001) 115 Harvard Law Review 1314; Deborah L Rhode "Legal Scholarship" (2002) 115 Harvard Law Review 1327; Joshua Guetzkow and Michele Lamont, "What is originality in the Humanities and Social Sciences?" (2004) 69 (2) American Sociology Review, 190

[89] Phillip C Kissam, "The evaluation of legal scholarship" (1998) 63 Wash L Rev 222

[90] Garengo et al., 2011; Ates, A., Garengo, P., Cocca, P. and Bititci, U. 'The development of SME managerial practice for effective performance management', (2013) Journal of Small Business and Enterprise Development, 20(1), 28–54.; Laforet, S. and Tann, J. 'Innovative Characteristics of Small Manufacturing Firms' (2006) Journal of Small Business and Enterprise Development, 13, 363-380. Raffaella Cagliano, Kate Blackmon, Chris Voss 'Small firms under MICROSCOPE: International differences in production/operations management practices and performance', (2001) Integrated Manufacturing Systems, 12(7), 469–482.; Wessel, G. and Burcher, P. 'Six sigma for small and medium-sized enterprises', (2004) The TQM Magazine, 16(4), 264–272; Youssef, M. A., Mohamed, Z., Sawyer, G. and Whaley, G. L. 'Testing the impact of integrating TQM and DFM on the ability of small to medium size firms to respond to their customer needs', (2002) Total Quality Management, 13(3), 301–313. Cagliano and Spina, 'A comparison of practice-performance models between small manufacturers and subcontractors' (2002) International Journal of Operations & Production Management 22(12):1367-1388; Ghobadian, A. & Gallear, D. N., 'Total quality management in SMEs,' (1996) Omega, Elsevier, vol. 24(1), 83-106; Shea, J. and Gobeli, D. 'TQM: the experience of 10 small businesses', (1995) Business Horizons, 38(1), 71-77; M Kumar, M. 'Six sigma implementation in UK manufacturing SMEs: an exploratory research' (Doctoral dissertation, University of Strathclyde 2010); Laforet, S. and Tann, J. 'Innovative characteristics of small manufacturing firms', (2006) Journal of Small Business and Enterprise Development, 13(3), 363-380; Matten, D. and Moon, J. 'Corporate social responsibility', (2004) Journal of Business Ethics, 54(4), 323–337.

[91] Audretsch, D., & Keilbach, M. 'Does entrepreneurship capital matter?' (2004) Entrepreneurship: Theory & Practice, 28(5), 419–429.; Tristan Boyer and Re ´gis Blazy, Born to be alive? The survival of innovative and non-innovative French micro-start-ups' (2014) Small Bus Econ 42:669–683

[92] Caliendo, M., & Kritikos, A. 'Start-ups by the unemployed: characteristics, survival and direct employment effects' (2010) Small Business Economics, 35, 71–92.; Shane, S. 'Why encouraging more people to become entrepreneurs is bad public policy' (2009) Small Business Economics, 33, 141–149;

[93] Bru ¨derl, J., Preisendo ¨rfer, P., & Ziegler, R. 'Survival chances of newly founded business organizations' (1992) American Sociological Review, 57(2), 227–242.; Louise Gullifer, "The financing of Micro -Businesses in the UK: The current position and the way forward", Paper No.17/2021 (March 2021) Legal Studies Research Paper Series.

nature of the financial commitment of it owners.[94] Some studies even go further to explore the gender and ethnicity aspects and show that male entrepreneurs have a higher survival rate than female entrepreneurs;[95] whilst others show a relationship between survival and the ethnicity of the entrepreneur.[96] For example studies by Dadzie and Cho indicate that belonging to a minority group is unfavorable to the survival of a micro enterprise[97]

However, little literature exists on micro enterprises, specifically due to the difficulties of data collection[98]. SMEs are generally referred to as the backbone of the economy albeit research has shown that micro enterprises are the most common kind of SMEs , and their importance cannot be overemphasized. Representing over 93% of all enterprises in the non-financial sector and employing about 86.5 million people in Europe,[99] this unique group of enterprises can be referred to as the lifeline of any society.

Since there has been a certain amount of work on small enterprises and SMEs, this research is original as it deals with micro enterprises. Currently, around 100 EU legal acts contain a reference to the SME definition, and this research highlights the challenges of treating Micro enterprises as Small enterprises or SMEs in general. Due to their distinct characteristics and importance, such a subsumed classification can often result in inadequate provision being made for them under the law.

Worryingly, the research into legal issues that affect the growth of the micro enterprise has received insufficient consideration, particularly in relation to their protection as

[94] Bates, T. 'Entrepreneur human capital inputs and small business longevity' (1990) Review of Economics & Statistics, 72(4), 551–559.; Pfeiffer, F., & Reize, F. 'Business start-ups by the unemployed - an econometric analysis based on firm data' (2000) Labour Economics, 7(5), 629–663.

[95] Mun ˜oz-Bullo ´n, F., & Cueto, B. 'The sustainability of start-up firms among formerly wage-employed workers.' (2011) International Small Business Journal, 29(1), 78–102

[96] Taehyun, A. 'Racial differences in self-employment exits' (2011) Small Business Economics, 36, 169–186.; Cooper, A., Gimeno-Gascon, F., & Woo, C. 'Initial human and financial capital as predictors of new venture performance' (1994) Journal of business venturing,9(5),371–395.;.

[97] Dadzie, K., & Cho, Y. 'Determinants of minority business formation and survival: An empirical assessment' (1989) Journal of Small Business Management, 27(3), 56–61

[98] Guven Gurkan Inan, 'Understanding the Development of the Organisational Capabilities in Micro Manufacturing Enterprises', (PhD Thesis, Heriot-Watt University, 2016), 1

[99]European Commission, Annual Report on European SMEs 2020/2021: Digitalisation of SMEs, SME Performance Review (Contract number: EASME/COSME/2020/SC/001), Final Report of July 2021. https://ec.europa.eu/docsroom/documents/46062 accessed 21 October 2021

weaker parties in B2B contracts. Few cases have ever appeared before the courts concerned with unfair dealing in B2B contracts. This does not mean that the vast majority of cases between business parties are fair; instead, it means that this is an area worth researching.

To the best of my knowledge, to date, no literature has examined in depth the possibility of protection for micro enterprises as weaker parties in MB2B contracts. Wafa Janahi,[100] in her thesis titled "Party autonomy and small business protection in cross-border commercial contracts under EU private international law: a critical analysis of the Brussels I and Rome I regulations", examined the protection of small businesses in B2B standard form contracts under the Rome 1 and Brussels I Regulation. As a matter of necessity, this present thesis will touch on the Rome I Regulation and the Brussels I Regulation. More importantly, this thesis also explores possible protection under competition law, relevant directives, and the rules of legal construction.

Unlike Wafa Janahi, this thesis amongst other things adopts an economic analysis of law considering the law is fluid, debatable, inveterately normative, and can benefit from guidance from academics who study economics and human behavior.[101] As such this thesis explores the work of not only legal scholars but also economists, and hybrids. This thesis disagrees with the standard position that “it is not the court's business to ensure that the bargain is fair or to see that one party does not take undue advantage of another or impose unreasonable terms by virtue of a superior bargaining position. Any superiority in bargaining power is itself a matter for the market to rectify”.[102]

This thesis argues that a blunt distinction between the role of the courts, the law, and the market in MB2B commercial contracts should be discouraged. These three institutions often have a complementary purpose and should work hand in hand. The courts and the

[100] Janahi, Wafa,’ Party autonomy and small business protection in cross-border commercial contracts under EU private international law : a critical analysis of the Brussels I and Rome I regulations’, (PhD thesis, University of Bristol 2015)
[101] Richard A. Posner, “On the Receipt of the Ronald H. Coase Medal: Uncertainty, the Economic Crisis, and the Future of Law and Economics”, (2010) American Law and Economics Review, 267
[102] P.S Atiyah, *The rise and fall of freedom of contract* (Oxford:Claredon, 1979) 404

law have been known to intervene when the market system fails and the market system responds to the courts and the law. Therefore, the law must attach a great amount of importance to economic rules.

The research builds upon studies and consultations albeit only in certain sectors where issues such as payment or specific trading practices have been identified to be problematic, (such as the food supply chain or issues of late payment leading to the late payment directive). On a national level, in the UK, the Law Commission and the Scottish Law Commission[103] as far back as the year 2005 recognised the need to protect micro enterprises[104] and recommended that they "be given powers to challenge any non-core, standard term of a contract...".[105] Unfortunately, this proposal is yet to be adopted, and no legislation based on the work of the law commission has been put before the UK parliament.[106]

The initial flickering of interest appears to have been extinguished by issues that are deemed more important. Thus, legal jurists and scholars in the last decade have focused extensively on e-commerce and online contracting. This thesis strives to awaken the spirit behind such a proposal and similar consultations, rekindling the fire and demonstrating why such actions are necessary. Therefore, It aims to demonstrate why micro enterprises in MB2B contracts should fall under the category of weaker parties and therefore be entitled to regulatory protection.

Although few prior research suggests that many protective rules are contained in various national competition acts or unfair commercial practices legislation, this research will show how they are often restrictive, inadequate or limited in application. For the benefit

[103] Unfair Terms In Contracts, Report on a reference under section 3(1)(e) of the Law Commissions Act 1965, Law com No 292 Cm 6464, 2005, <https://www.scotlawcom.gov.uk/files/2512/7989/6621/rep199.pdf> accessed 9 April 2017, 67

[104] Although the term "Small businesses" is used throughout the document, art 5.35 states..we have therefore confined protection to those normally categorised as "micro" businesses, namely those with nine or fewer employees....As a matter of terminology, we have decided to use the term "small business" throughout this Report and in the Draft Bill, rather than the more technical phrase, "micro" business. 86

[105] Unfair Terms In Contracts, Report on a reference under section 3(1)(e) of the Law Commissions Act 1965, Law com No 292 Cm 6464, 2005, <https://www.scotlawcom.gov.uk/files/2512/7989/6621/rep199.pdf> accessed 9 April 2017, 85

[106] Janahi, Wafa,' Party autonomy and small business protection in cross-border commercial contracts under EU private international law : a critical analysis of the Brussels I and Rome I regulations', (PhD thesis, University of Bristol 2015)

of micro enterprises, this research suggests a new approach to the application of freedom of contract and party autonomy in international MB2B contracts, a new way to interpret relevant regulations in cases involving micro enterprises and the need for appropriate measures for their protection as weaker parties.

The issues raised here are of considerable interest not only to academia and the international community but also to international commercial litigators and transactional lawyers. Ultimately, this thesis, provides a holistic assessment of the current level of protection for micro enterprises and demonstrates why micro enterprises in MB2B contracts, should fall under the category of weaker parties and therefore in need of regulatory protection.

It is envisaged that by reviewing the current regulatory regime on the protection of weaker parties, the research will inform policy making by identifying gaps, highlighting areas of improvement and suggesting a new approach to the application of freedom of contract and party autonomy in international MB2B contracts; a new way to interpret relevant regulations in cases involving weaker parties and the need for adequate regulation for the protection of weaker parties. It is expected that this thesis will not only inform policy but will form the basis of future work on micro enterprises and be beneficial to these enterprises.

Though the scope of this thesis is international commercial contracts, franchise contracts, insurance contracts, agency and distribution contracts are hereby excluded from its scope. One will note that the franchisee, as well as the insured, are regarded as weaker parties under the Recast owing to the recognition that information asymmetry is recognised in their relationships.[107]

[107] J Zimmerman, 'Restriction on forum selection clauses in franchise and the federal arbitration act' (1998) 51 vanderbilt law review 761; J Buchan, 'Consumer protection for franchisees of failed franchisors: is there a need for statutory intervention? ' (2009) Queens land university of technology law and justice journal, 9, 232 where franchisee was discribed as business consumer.

1.6 Outline of Chapters

This thesis contains eight chapters, including the introduction and conclusion.

Chapter 2 provides an overview of micro enterprises, the commercial reality of modern times and argues for increased protection. First, it discusses how enterprises are classified and the importance of such classification. It then looks at the several definitions of Micro enterprises, highlighting the inconsistency in the various definitions and drawing out the imperfections of the most acceptable definition – EC Recommendation of 6 May 2003. Secondly, it explores the distinct characteristics of micro enterprises and what differentiates them from small enterprises and/or SMEs. Thirdly, it goes on to summarise the role of micro enterprises in economic growth. Fourthly, it investigates the commercial reality of the modern business environment and the implication of treating micro enterprises as a sub-category of small enterprises or the broad category of SMEs. It concludes by accentuating the need for the continued success of micro enterprises.

Chapter 3 provides a background to the research by exploring fundamental legal and economic concepts such as Freedom of Contract, Economic Power, Unfairness and the Rationale for the protection of weaker parties in International commercial contracts. It begins with the history of the doctrine of Freedom of Contract and Party autonomy by tracing the evolution of the doctrine of freedom of contract under common law and the civil law system; and party autonomy under the European law. Secondly, It examines the mode of legal encroachment on these doctrines, comparing them with the traditional nature of legal encroachment. Thirdly, it analyses the rationale for the protection of weaker parties in commercial transactions, looking into the concept of morality and contract law; and the interrelationship between fundamental rights and the protection of weaker parties. Fourthly, it considers the concept of economic power and the notion of unfairness in commercial contracts. It does this by highlighting relevant economic theories and applying it to commercial relationships involving Micro enterprises; it then goes further to discuss what is considered unfair in some legal systems using extensive but relevant case laws and the procedural aspect of unfairness. Fifthly, it discusses the distinction between consumer and business and the dichotomy in the application of the

doctrine of freedom of contract whilst also drawing out the similarity between micro enterprises and consumers from the perspective of the economist. Finally, it concludes by examining the possibility of protection using the rules of construction in the interpretation of unfairness in favour of micro enterprises.

Chapter 4 examines the Relevance of Consumer Directives in the protection of Micro Enterprises and the extent of their implementation under Domestic Laws. This chapter focuses mainly on Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, and Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices. Firstly, It discusses relevant provisions of the above Directives and discusses their relevance to micro enterprises. Secondly, it then goes on to consider the significance of the distinction between standard terms and individually negotiated terms in contracts made in the Directive and its implication for micro enterprises. Thirdly, it considers the extent of the Implementation of relevant directives in National Legal systems using a case study of UK (pre and post Brexit), France and Germany domestic Legal systems. It then considers further protection available in these national legal systems to Micro enterprises against unfair terms. Finally, it concludes by demonstrating the disparity in the treatment of unfairness in B2B relationship and the need for uniformity.

Chapter 5 investigates the jurisdictional issues and the current protection available to micro enterprises under Private international law. Firstly, it highlights the Jurisdiction Rules applicable to international commercial transactions. Secondly, it examines the extent of protection available to Micro enterprises looking into the relevant provisions of the Brussels I Regulation (Recast) in the absence of a jurisdiction agreement. It looks into the operations of Art 4 of the recast and the significance of the place of performance under Art 7. Thirdly, it examines the validity of jurisdiction agreement under the Recast and its implication for micro enterprises. It also examines the scope of Art 25 and its effect on different types of jurisdiction agreements. Fourthly, it explores the relevance of consumer jurisdictional rules in the protection of Micro enterprises. Fifthly, it discusses the interrelationship between the Recast and the Post BREXIT English jurisdiction rules. It

concludes by highlighting the dire effect of unfavourable jurisdiction clauses on micro enterprises.

Chapter 6 discusses Governing law issues and the current protection of Micro enterprises under Private International law. Firstly, it investigates the function of governing law provisions under the Rome I Regulation (Rome I). Secondly, it examines the extent of protection available to Micro enterprises under the Rome I Regulation in the absence of a choice of Governing law. Thirdly, it examines the position of a Micro Enterprise in the case of an unfavorable Governing law provision. Thus, it considers the extent mandatory rules enhance the courts' role in addressing imbalances between contracting parties and the operation of Article 3 and Art 9 with a special focus on Mandatory rules and overriding mandatory principles. Fourthly, it concludes by examining the relevance of governing law rules of consumer protection to Micro Enterprises.

Chapter 7 considers the adequacy of competition law in regulating unfairness. Firstly, it discusses the concept of abuse of dominance and the notion of unfairness under the EU Competition law. After this, the focus then shift to the relevance of consumer protection rules under EU competition law to Micro enterprises. Secondly, it reviews the current protection contained under relevant cross-sectorial legislations such as the Late Payment Directive and the Misleading and Comparative Advertising Directives. Thirdly, it discusses current protection available under sectorial legislation by considering the scope and rationale behind the first B2B directive regulating unfair trading practice in the food supply chain. It then concludes with an appraisal of the Directive on unfair trading practices in business-to-business (B2B) relationships in the food supply chain and its implications for other sectors.

Chapter 8 highlights the Research Findings and provides Recommendations. It goes further to examine the limitations of this research and considers the potential problems in a regulatory framework for protection of micro enterprises. It weighs the importance

of commercial bargaining against strict adherence to freedom of contract for micro enterprises. It concludes by providing a summary of discussions.

1.7 Conclusion

We see that although the concept of freedom of contract forms the axiom of most national legal systems, there are disparities in the application of this doctrine to B2B parties. Such disparities may result in practices that deviate from good commercial conduct or those contrary to good faith and fair dealing to be unilaterally imposed on micro enterprises in B2B contracts.

Bearing in mind that the European Union is generally not authorised to introduce private law regulation, it can do so on the legal basis of the relevant Article of the treaty of the functioning of the European Union if its objects are the improvement of conditions for the establishment and functioning of the internal market.[108] A finding of disparity amongst national contract law and the inherent obstacle to the exercise of fundamental freedoms or of distortions of competition is sufficient justification.[109]

Legislation which addresses practice which imposes an unjustified advantage or disproportionate transfer of economic risk by one business to a micro enterprise is paramount.

[108] Treaty on the Functioning of the European Union, article 100a
[109] C-376/98 *Germany v Parliament & Council* [2000] ECR I-8419, para 84

Chapter 2: Micro Enterprises in the EU and England: An argument for increased protection.

2.0 Introduction

The importance of micro enterprises in economic growth cannot be overemphasized; research has shown that micro enterprises are the most common kind of SMEs. As of July 2021, micro enterprises represent around 93% of all enterprises and 93.2% of all SME in the EU-27 non financial business sector (NFBS), generating 18.7 % of NFBS value added and 29.2% of NFBS employment.[110] Micro enterprises are generally viewed as part of small enterprises or small and medium enterprises (SMEs). However, due to their distinct characteristics and importance, such a subsumed classification can often result in inadequate provision being made for them under the law.

This Chapter provides an overview on micro enterprises, the commercial reality of modern times and argues a case for increased protection. First, it discusses how enterprises are classified and the importance of such classification. It then looks at the several definitions of Micro enterprises, highlighting the inconsistency in the various definitions and drawing out the imperfections of the most acceptable definition – EC Recommendation of 6 May 2003. Secondly, it explores the distinct characteristics of micro enterprises and what differentiates them from small enterprises and/or SMEs. Thirdly, it goes on to summarise the role of micro enterprises in economic growth. Fourthly, it investigates the commercial reality of the modern business environment and the implication of treating micro enterprises as a sub-category of small enterprises or the broad category of SMEs. It concludes by accentuating the need for the continued success of micro enterprises.

[110]SME statistics with SME Annual Report - 2020/2021 https://ec.europa.eu/docsroom/documents/46062 accessed 21 October 2021; see relatively similar figures in th EU28 in European Commission, Annual Report on European SMEs 2018/2019: Research & Development and Innovation by SMEs (Contract number: EASME/COSME/2017/031), Final Report of November 2019.

2. 1 Classification of Enterprises

There is an increasing interest in the classification of enterprises as it may determine what benefits such an enterprise enjoys. In *Calestep, SL v European Chemicals Agency (ECHA)*,[111] the applicant, Calestep, SL, sought to register two substances in 2010 under Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH). The applicant indicated that it was a 'small' enterprise during the registration procedure and thus was entitled to receive a reduction of the fee due for any application for registration under Article 6(4) of Regulation No 1907/2006. Article 13(4) of Regulation No 340/2008 provides that, where a person who claims to be entitled to a reduction or a fee waiver cannot demonstrate that it is entitled to such a reduction or waiver, the ECHA is to levy the full fee or charge as well as an administrative charge. Consequently, following an unsatisfactory exchange of documentation, the ECHA decided that the applicant was regarded as a medium enterprise and therefore was not entitled to the reduction of the fee for small enterprises and imposed an administrative charge of EUR 14, 500. The applicant brought an action against the ECHA in the General Court on 18 February 2013, on the redetermination of classification of its company. That action was dismissed on the basis that the action is manifestly lacking any foundation in law.

Historically, enterprises are classified according to their size, i.e small, medium and large companies. However, in recent decades, there has been a recognition of another category of business, often referred to as micro enterprises. It is expedient to mention that micro enterprises are generally seen as a sub-category of small enterprises. Some of the analysis here would consider them as part of this broad group, but they will mostly be considered as distinct from the small enterprises.

[111] Case T-89/13 *Calestep, SL v European Chemicals Agency*, Order of the General Court (Sixth Chamber) of 16 September 2015.

2.1.1 Benefits and Importance of Classification

Apart from EU subsidies available to different categories of enterprise, under various national laws certain benefits are available to SMEs, small enterprises or micro enterprises. These benefits range from free information or advice; tax-breaks; access to subsidised or guaranteed funds to establish these enterprises and/or public funds.[112]

In the UK, some of the benefits enjoyed by SMEs generally include start-up loans at low interest rates; access to a business mentor through a government scheme;[113] SME Growth loans;[114] Small Business relief rate;[115] tax breaks for investors investing in small enterprises;[116] income and capital gains tax relief for SMEs under the Enterprise Investment Scheme;[117] Enterprise Finance Guarantee which uses a government guarantee to encourage additional lending to viable SMEs to boost liquidity;[118] the privilege of exercising best judgement and to base their VAT taxation and accounting decision on a single piece of information;[119] and research and development aid.[120]

Similarly, in France, certain benefits often referred to as 'incentives, grants or subsidies' are only available to small or micro enterprises. They include government and regional development grants or local communities' grants. One of the attractive benefits for a micro enterprise is the *Fonds de Revitalisation Economique* which is aimed at businesses

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[112] Lundström Anders and Stevenson Lois, *Entrepreneurship Policy: Theory and Practices*, (ISEN International Studies in Entrepreneurship, Springer, 2005), 42

[113] Gov.UK, 'Apply for a Start Up Loan for your business' <https://www.gov.uk/apply-start-up-loan> accessed 12th June 2018; British Business Bank, 'Business mentoring' <https://www.startuploans.co.uk/mentoring/> accessed 12 June 2018

[114] Ibid

[115] Gov.UK, 'Small business rate relief' <https://www.gov.uk/apply-for-business-rate-relief/small-business-rate-relief> accessed 13 June 2018

[116] These Tax breaks includes: Research and development tax credit, Enterprise Investment scheme under the Seed Enterprise Investment Scheme and Enhanced Capital Allowance.

[117] Gov.UK, 'Use the Enterprise Investment Scheme (EIS) to raise money for your company' <https://www.gov.uk/guidance/venture-capital-schemes-apply-for-the-enterprise-investment-scheme>accessed 13 June 2018

[118] Gov.UK, 'Understanding the Enterprise Finance Guarantee' <https://www.gov.uk/guidance/understanding-the-enterprise-finance-guarantee> accessed 13 June 2018

[119] Indirect taxes, HMRC Guidance Note 18 January 2016, <www.gov.uk/government/publications/vat-supplying-digital-services-to-private-consumers> accessed 15 September 2018. Unlike larger enterprises, UK micro - enterprises, below the current UK VAT registration threshold registered for the VAT Mini One Stop Shop (VAT MOSS), using best judgment can base their "customer location" VAT taxation and accounting decisions on one piece of information, such as the billing address provided by the customer or information provided to them by their payment service provider.

[120] Finance Act 2016, sec 48. For the purposes of the Research & Development relief calculation for SMEs, the calculation allows an SME to discount any aid which represents a notional amount which could be claimed under the large company R&D relief when calculating whether or not they are under the state aid cap for R&D SME relief.

with no more than five employees setting up in development zones.[121] For SMEs in general, there is a reduced corporate tax rate, tax credit, subsidised or interest free loan, government guarantees and an exemption from paying additional social security contribution.[122] On the other hand, certain obligations are placed on larger enterprises. For example, from 31 March 2015, companies with between 50 and 300 employees must prove that they have implemented an industry-specific agreement, a company-wide agreement or an action plan relating to 'intergenerational contracts'. Otherwise, they will be subjected to a fine.[123] These companies are also obligated 'to establish a committee on health, safety and working conditions and train its members'.[124] A micro enterprise can be considered to be exempted from such obligations which could be potentially onerous.

In Germany, some of the benefits enjoyed by small businesses are access to credit facilities; availability of public loans with very attractive terms and conditions such as low interest rates, long maturities and initial grace period; subordinated loans; investment capital; and advice.[125] Small businesses may receive a subsidy rate of between 20 and 30 percent of eligible project costs.[126]

The above benefits and more serve as an attraction for a micro enterprise. Illustrating this, it is recorded that in 2002, public funding given to small businesses in the UK exceeded that given to either universities or the police force.[127] The classification of

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[121] Grants are of around €3,000 and must be claimed within the first year of operation < http://www.entreprendre-en-guyane.fr/cid147687/le-fonds-de-revitalisation-economique.html?pid=10096> accessed 13 June 2018

[122] Delloitte, 'Doing Enterprise in France', (January 2014), <https://www2.deloitte.com/content/dam/Deloitte/fr/Documents/Pages/International%20Services%20Group/Deloitte_Doing-enterprise-in-france-gb_janvier2014.PDF> accessed 12 June 2018, 64

[123] Ibid, 23

[124] France Country Commercial Guide, 'France - 9.2-Labor Policies and Practices', <https://www.export.gov/article?id=France-Labor>. Accessed 17 July 2018

[125] Germany Trade and Invest (GTAI), 'Investment Guide to Germany' <https://www.gtai.de/GTAI/Navigation/EN/Invest/investment-guide.html> accessed 13 June 2018; 'Financial support and funding for your business' <https://www.muenchen.de/rathaus/wirtschaft_en/enterprise-development/finance-funding.html#gtai> accessed 13th June 2018

[126] GTAI, Facts & Figures, 'Incentives in Germany: Supporting your investment project', (Issue 2018) <https://www.gtai.de/GTAI/Content/EN/Invest/_SharedDocs/Downloads/GTAI/Brochures/Germany/facts-figures-incentives-in-germany-en.pdf?v=12> accessed 14th June 2018

[127] David J. Storey, 'Understanding the Small Enterprise Sector: Reflections and Confessions' in: Braunerhjelm, Pontus (ed.) *20 Years of Entrepreneurship Research - from small business dynamics to entrepreneurial growth and societal prosperity.* (Swedish Entrepreneurship Forum 2004) 23

enterprises is also important for research, in the preparation of statistics, monitoring the progress of specific sectors, providing thresholds for imposition of tax, determining the eligibility of public support or state aid, and benchmarking against other economies and between regions within an economy.[128] Aldic et al,[129] in their study of SME lending, noted that in the absence of a standard definition of SME, it is extremely difficult to perform a cross-country analysis of SME data.

Over the decades, the criteria for classification of enterprises have always been dependent on the definition of companies given by various national laws, institutions, and industries. This definition is important to ensure that appropriate support measures are given to enterprises who genuinely need them.

2.1.2 Definition of Micro Enterprises and/or Small Enterprises

The definition of micro enterprises has been the subject of ongoing debate as there is no universally accepted definition.[130] Divergence in the definition of enterprises can be seen in national laws, rules of international institutions, industries and even within a particular industry. One of the first major attempts to define small enterprises was the UK Bolton Committee Report,[131] a Committee set up in 1969 to inquire into small enterprises. The Committee issued its report in 1971 after a postal survey of 35,000 small enterprises. Amongst other achievements, the Report sets out the foundation for a strategy for small business support in the UK, the appointment of a minister specifically for small enterprises in 1972, as well as a controversial attempt to define 'small firms'.[132]

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[128] 'Effective Policies for Small Enterprise: A Guide for the Policy Review Process and Strategic Plans for Micro, Small And Medium Enterprise development support' <https://www.unido.org/sites/default/files/2009-04/Effective_policies_for_small_enterprise_0.pdf> accessed 15 June 2018

[129] Oya Pinar Ardic, Nataliya Mylenko, Valentina Saltane, 'Small and Medium Enterprises A Cross-Country Analysis with a New Data Set', (2011) Policy Research Working Paper 5538

[130] G Pobobsky, 'Small and Medium Enterprises and Labour Law, (1992) International Labour Review. Vol. 131, No. 6 cites a study of the International Labour Organization, which identifies over 50 definitions in 75 countries with considerable ambiguity in the terminology of SMEs used.

[131] Bolton Report 1971. Report of the Committee of Enquiry on Small Firms. HMSO: London.

[132] Robert Blackburn, 'Small Enterprises in the UK: From Hard Times To Great Expectations', (Paper Presented to The 22nd Japanese Annual Small Enterprise Society (JASBS), National Annual Conference, Senshu University Kawasaki City Japan, October 2002) 10

The Bolton Committee highlighted that 'small firms' could not be adequately defined in terms of assets, turnover, output or any other arbitrary single quality, nor would the definition be appropriate throughout the economy. Therefore, it defined small business in terms of 'economic definition' and 'statistical definition'. While the economic (qualitative) definition would consider the characteristics of the firm; the statistical (quantitative) definition would consider placing an upper limit on the appropriate measure used for a given trade. This definition was based on the industry, number of employees and turnover or the number of vehicles owned. Thus, the definition of small businesses differed from sector to sector.

Table 2.1 Bolton Committee Definitions of Small Firm

Sector	**Definition**
Manufacturing	200 employees or fewer
Construction	25 employees or fewer
Mining and Quarrying	25 employees or fewer
Retailing	Turnover of £50,000 or fewer
Miscellaneous	Turnover of £50,000 or fewer
Services	Turnover of £50,000 or fewer
Motor Trades	Turnover of £100,000 or fewer
Wholesale Trades	Turnover of £200,000 or fewer
Road Transport	Five vehicles or fewer
Catering	All excluding multiples and brewery–managed houses.

Source: Bolton Report 1971[133]

Although it would appear that the Bolton Report took a hint from the small business administration (founded by the US government in 1953 to provide intermediate to long term loans to small firms), which defined small business by industry sector within each

[133] National archives, 'Small and Medium Enterprise (SME) – Definitions' <http://webarchive.nationalarchives.gov.uk/+/http://www.dti.gov.uk/SME4/define.htm> accessed 5 June 2018

main business category, these economic and statistical definitions were the subject of enormous controversy. Storey[134] asserts that the Bolton Report's economic and statistical criteria are incompatible and that the statement that a small business is 'managed by its owners or part-owners in a personalised way, and not through the medium of a formal management structure' is not reflective of its definition of a manufacturing firm which it defines as having 200 employees or fewer.

Notably, from the above table, there is no single definition or single criterion of 'small firm' but rather four different criteria: number of employees, turnover, ownership and assets. Thus, it can be argued that the definition is too complex to allow for comparisons between countries or over time as it identifies different upper limits of employees and different upper limits of turnover for the different sectors.[135] Tonge[136] claims that statistical definitions based on monetary units also make comparisons difficult as appropriate index numbers need to be constructed to account for changes in figures; and according to Dunne and Hughes,the employee-based criteria are simply unrealistic.

Other studies which attempted to define small enterprises in the UK are the Wilson Committee[137] and the Macmillan Committee.[138] These studies were less popular than the Bolton Committee as they attempted to distinguish between small enterprises and larger enterprises according to how they were financed, such as through bank loans and use of trade creditors as opposed to raising capital from the public.[139]

Several schools of thought also emerged with various definitions of what enterprises should be. It is often recognised that due to the heterogeneity of small enterprises, it may be necessary to modify the various definitions according to the contexts in which the small enterprise is being examined. Osteryoung and Newman[140] proposed that SMEs

[134] David J Storey, *Understanding the small enterprise sector*. (London: International Thomson Enterprise Press, 1994).
[135] Ibid
[136] Jane Tonge, 'A Review of Small Business Literature Part 1: Defining The Small Business', (2001) Manchester Metropolitan University Business School Working Paper Series, =3 12
[137] Wilson committee report (Cmnd 7937,1979) led by Harold Wilson
[138] Macmillan Committee report (Cmnd 3897, 1931) led by Harold Macmillan
[139] Colin Barrow, *The essence of Small Businesses*, (Prentice Hall Europe 1998), 4
[140] J.S Osteryoung and D. Newman, 'What is a Small Business?' (1993). The Journal of Small Business Finance, 2(3), 219

generally should be defined as 'entities which are not publicly traded', and their owners had to personally guarantee any existing funding. Recklies[141] suggested a similar definition, highlighting that one such definition was used by the United States Congress which defined an SME as a 'small entity whose capital is independent and does not occupy a dominant market position'.[142]

One version of the qualitative definition is contained in the International Financial Reporting Standard for Small and Medium-sized Entities (IFRS for SMEs), which described SMEs as entities that 'do not have public accountability and publish general purpose financial statements for external users'.[143] Other writers have suggested criteria such as initial capital amount, net asset, invested capital, return, total number of goods produced, their value and industrial classification, combined with such indicators as number of employees and added value.[144]

In February 1996, the European Commission (EC) implemented a guideline for the definition of SMEs - Recommendation 96/280/EC of 3 April 1996. The guideline was prescribed for use by all Member States, the European Investment Fund and the European Investment Bank. It allowed for existing SME definitions in community programmes to be used until 31 December 1997. Further to that, in 2003, the EC released a new Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (2003/361/EC – "the 2003 Recommendation") in place of the 1996 recommendation to provide a common reference framework for the definition of SMEs.[145] One distinct feature of the 2003 Recommendation is the express

[141] D. Recklies, "Small Business – Size as a Chance or Handicap"; <http://www.themanager.org/resources/Small%20Business.htm> accessed 30 June 2018

[142] Maria-Mădălina Buculescu (Costică) 'Harmonization process in defining small and medium-sized enterprises. Arguments for a quantitative definition versus a qualitative one'. (2013), Journal of Theoretical and Applied Economics Volume XX No. 9(586), 103-114

[143] 'IFRS for SMEs' <http://eifrs.ifrs.org/eifrs/sme/en/IFRS%20for%20SMEs_Standard_2015.pdf> accessed 16 July 2018

[144] L.J Filion, 'Free trade: The need for a definition of small business', (1990) Journal of Small Business and Entrepreneurship, 7, 2, Jan-March, 33; Hauser, 'A qualitative definition of SME' , Institute für Mittelstandsforschung, Bonn, Germany, SBS Expert Meeting "Towards better Structural Enterprise and SME Statistics" OECD, Statistics Directorate 3-4 November 2005 La Muette Room 4, <https://www.oecd.org/sdd/enterprise-stats/35501496.pdf> accessed 14 July 2018

[145] Commission communication Model declaration on the information relating to the qualification of an enterprise as an SME (2003/C 118/03)

permission for Member States to adapt the definition where required for administrative purposes.

Article 2 of the Annex to the 2003 Recommendation states that staff headcount and financial ceilings determine the classification of enterprises. Therefore, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million, while a micro enterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million.

Table 2.2 EC Definition of Micro and Small Enterprises

EC Recommendation of February 1996	Micro business	1 – 9 employees.
	Small companies	Fewer than 50 employees; and
		Annual turnover not exceeding 7 million or annual balance sheet total not exceeding EUR 5 million; and
		Conforms to the criterion of independence under art 3 of the recommendation.
EC Recommendation of 6 May 2003	Micro Companies	Fewer than 10 employees; and
		annual turnover and/or annual balance sheet total does not exceed EUR 2 million
	Small Companies	Fewer than 50 employees; and
		Annual turnover and/or annual balance sheet total does not exceed EUR 10 million.

Source: Author generated

The literal interpretation of Art 2 of the Annex to the 2003 Recommendation suggests that the number of employees' criteria and the financial ceiling criteria are to be viewed as cumulative. The financial ceiling criteria in itself can be seen as either cumulative or alternative.[146] Therefore, an enterprise will fall into a category if it meets either the turnover or balance sheet ceiling and the employee criteria. In *Dalmine SpA v European Commission*,[147] a case relating to Commission Decision 2003/382/EC of 8 December 1999 regarding a proceeding under Article 81 of the EC Treaty, the Commission restated that Dalmine was not a small or a medium-sized undertaking under the Commission Recommendation 96/280/EC of 3 April 1996 (which applied then). The courts did not have information as to the number of persons employed by Dalmine or the balance sheet total. However, the court noted that the company's turnover for 1998 was more than 10 times higher than the ceiling laid down in the EC recommendations.[148] Consequently, the court dismissed the appeal on the basis that the Commission had not erred in its finding as all the undertakings to which the contested decision was addressed were large companies. In addition, the fine of EUR 10.8 million imposed on Dalmine represented only around 1.62% of its worldwide turnover in 1998.

Having in mind the rationale of the decision of the court in *Dalmine,* which is working on the available information (company turnover), it would seem illogical for the court to consider the criterion of the number of employees in isolation (where there is no information on the amount of turnover or assets), particularly for some enterprises in the financial sector. Companies in financial sectors are known to deal with a large amount of assets and have a high turnover whilst having few employees.

Unlike the Bolton Report, EC definitions do not vary according to sector. As we have identified above, sectoral definitions based on number of employees, turnover, assets etc may lead to inconsistency in the classification of companies because while in one sector

[146] Case T-111/08 *MasterCard and Others v Commission*, ECR, EU:T:2012:260, Para 139 of the judgement of the general Court (Seventh Chamber) states that the alternative nature of a condition is usually indicated by the conjunction 'or'.
[147]Case T-50/00 *Dalmine SpA v European Commission*, ECLI:EU:T:2004:220, [2004] ECR II-2395, [2004] All ER (D) 146 (Jul)
[148] Ibid, para [285] and [286]

a company is small, in another it may well pass as a medium-sized company in another sector.

Analogous to the 2003 Recommendation, the UK Department of Trade and Industry[149] and the World Bank adopted the following definitions respectively: micro enterprises having 0-9 employees, small enterprises having 0-49 employees; micro enterprises having fewer than 10 employees with an annual turnover of less than USD 100,000 and total balance sheet less than USD 100,000; small enterprises having fewer than 50 employees; annual turnover less than USD 3 million and total balance sheet less than USD 3 million.

By contrast, the Organization for Economic Co-operation and Development (OECD) provided a more detailed categorisation by dividing micro enterprises into 'small micro' enterprises having between 1 and 4 employees and 'micro entities' having between 5 and 19 employees. It further defines small businesses as having between 20 and 99 employees. The OECD did not subsume micro enterprises into small businesses.[150]

Currently, around 100 EU legal acts contain a reference to the SME definition.[151] In reality, this definition is a benchmark for determining the eligibility criteria under a number of EU policies such as structural funds, research and innovation, state aid etc. The 1996 Recommendation and the 2003 Recommendation has received their share of criticism. In fact, its total balance sheet criterion is the most criticised. Hauser[152] argues that although total assets include fixed assets, intangible assets and accrued expenses, not all these components are taken into consideration in all the economies. Moreso, critics have claimed that the employee criteria will reduce the incentives for efficient firms to grow large. For example, in France, it is believed that some small companies avoid hiring a

[149] National archives, 'Small and Medium Enterprise (SME) – Definitions' <http://webarchive.nationalarchives.gov.uk/+/http://www.dti.gov.uk/SME4/define.htm> accessed 5 June 2018

[150] Fitch Directorate general for external policies of the Union European in Maria-Mădălina Buculescu (Costică) 'Harmonization process in defining small and medium-sized enterprises. Arguments for a quantitative definition versus a qualitative one'. (2013), Jornal of Theoretical and Applied Economics Volume XX No. 9(586), 106

[151] <http://eurlex.europa.eu/search.html?qid=1490016917243&text=2003/361/EC&scope=EURLEX&type=quick&lang=en&DTS_SUBDOM=EU_LAW_ALL&FM_CODED=CONS_TEXT> accessed 5 July 2018

[152] Hauser, "Towards better Structural Business and SME Statistics", SBS Expert Meeting (2005).
OECD, Statistics Directorate; see also Gibson, van der Vaart, 'Defining SMEs: A less imperfect way of defining Small and Medium Enterprises in Developing Countries', Brookings Global Economy and Development, September 2008

fiftieth employee due to the strict regulatory compliance required from firms with 50 or more employees, which do not apply to small enterprises. These enterprises have more difficulties laying off workers and are required to report more detailed statistics of their organisation to the government and organize and fund works councils. It is believed that the desire to avoid these onerous requirements has left France with a disproportionate number of smaller enterprises compared to Germany and the US.[153]

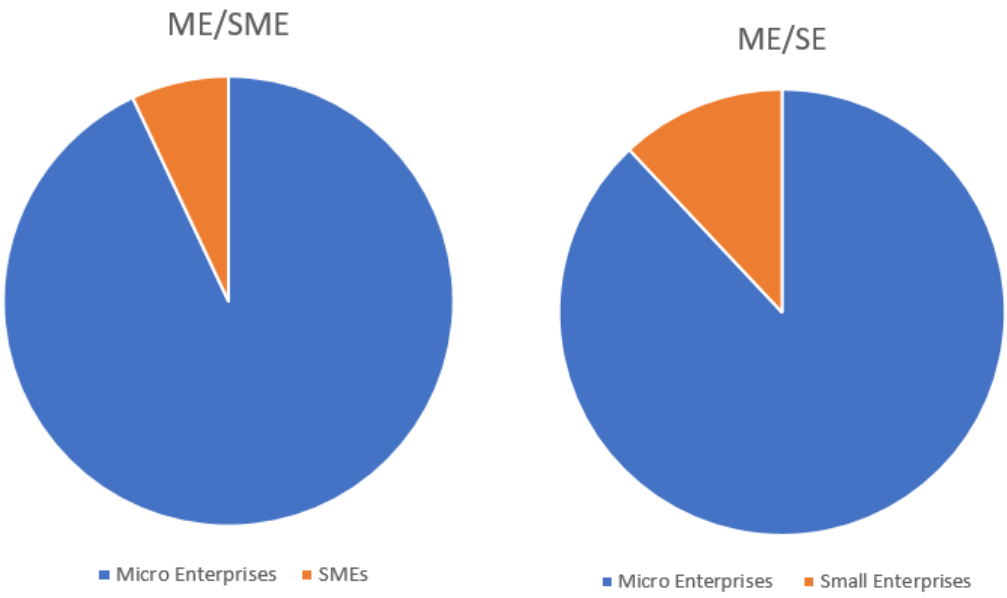
Bearing in mind the significance and consequences of the classification of companies, BusinessEurope evaluated the 2003 EU SME definition in 2012[154] and submitted that the SME definitions contained in the 2003 Recommendation were pragmatic and workable for addressing a variety of issues that impacts SMEs. However, In June 2017, the EC released an inception impact assessment on the revision of SME definitions with an indicative planning date of the first quarter of 2019. The assessment considered the implementation reports prepared in 2006 and 2009; the evaluation conducted in 2014 following consultation with Member States; reports of the European Investment Bank, the European Investment Fund and other business stakeholders. One of the issues raised was the potential amendments of the existing financial thresholds (annual turnover and balance sheet total) set out in the 2003 Recommendation. Although the report suggested that an update of the thresholds was not yet warranted, the Commission noted that compound developments in productivity and inflation have been significant, and after 14 years, there was a need to re-assess the adequacy of these thresholds.[155]

Following this impact assessment, a public consultation on the review of the SME definition was held between 6 February 2018 and 6 May 2018 to consider the option of either no change to the Recommendation or a targeted intervention to retain the SME definition, but update it in line with economic developments, and improve the user-friendliness and legal certainty it provides to most enterprises.[156] As at 26th November

[153] American Economic Association, 'Why so many French firms are stuck at 49 employees', (November 28, 2016), <https://www.aeaweb.org/research/charts/french-firms-50-employees> accessed 1 June 2018
[154] Business Europe, 'Revision of the EU Definition of SMEs', (Position Paper of 7 November 2017)
[155] Inception Impact Assessment, 'Revision of the EU SME Definition', (08/06/2017)
[156] 'Public consultation on the review of the SME definition' <https://ec.europa.eu/info/consultations/public-consultation-review-sme-definition_en> accessed 2nd July 2018

2020, there has not been a revision which reflects the above public consultation but rather the EC published a user guide to SME definition.[157] This guide explains how to determine whether an enterprise qualifies as an SME in four steps. Given the current climate, it is understandable why the proposed update is yet to be fully implemented.

Figure 2.1: Employee and Financial Criteria



Source: Author Generated

As shown from the data and definitions in the 2003 Recommendation represented in the chart above, the number of micro enterprises in the EU is significantly more than small enterprises and SMEs generally. Research also shows that there is an overwhelming majority of them across the world. Inadequate consideration has therefore been given to micro enterprises under the 2003 Recommendation. There is a need for a clear delimitation of micro enterprises from other categories of enterprises with a different regulatory regime.

[157] European Commission, SME Definition - user guide 2020 available on https://ec.europa.eu/docsroom/documents/42921

In view of the fact that the 2003 Recommendation serves mainly as a guideline, the divergence in the definition of enterprises continues in national laws. For instance, in the UK, Sec 382 (3) of the Companies Act 2006,[158] which regulates company law including the classification of companies, states that the qualifying condition of a small enterprise as a company is that in any year it satisfies two or more of the following requirements: turnover no more than GBP 5.6 million; balance sheet total no more than GBP 2.8 million and number of employees no more than 50.

In France, the Economic Modernisation Act 2008 and the French Commercial Code (the French Company Act)[159] adopted the definitions in the 2003 Recommendation. However, Article L 123-16 prescribes that two out of three criteria need to be met: the total of their balance sheet, the net amount of their turnover or the average number of permanent employees during the financial year.

One will notice that the requirement of "any two or more" conditions under English law and French law is inconsistent with the wording of Annex 2 of the 2003 EC Recommendation, which highlights that the employee criteria is a pre-requisite and either one of the requirements of turnover and balance sheet. What is more?, one would see from our discussions later in 2.4.1 on the interpretation of the headcount criteria provided under the 2003 EC Recommendation that persons included in the headcount vary depending on the situation, national context and a range of factors. Therefore, it is clear that regardless of the current 2003 EC Recommendation, while a company with 50 employees falls under the category of small enterprise in the UK, such a company will be classed as a medium-sized company in another country like France. Likewise, a micro enterprise definition as "one that employs ten or fewer with a turnover of EUR 2 million or less and a net asset value of EUR 2 million" in Ireland[160] is inconsistent with the definition of micro enterprises in France. Consequently, a micro enterprise in Ireland is a small enterprise in France.

[158] Companies Act 2006, s 382; see also Small Enterprise, Enterprise and Employment Act 2015, s 33 for similar definition of small and micro enterprises.
[159] Article L. 225-21-1
[160] *Copymoore Ltd and others v Commissioners of Public Works of Ireland*, [2016] IEHC 709, para 114

The divergence in definitions is also seen in different industries and even within a particular industry. Beck et al conducted a survey of 91 banks in 45 countries in which they asked banks to provide their own definition of SMEs in relation to sales, assets or employees indicators. The survey showed that 85% of banks defined SMEs in terms of annual sales of between USD 100,000 and 20 million.[161] Although SMEs are commonly defined as registered businesses with fewer than 250 employees, their definitions vary from country to country and even bank to bank.[162] While it may appear that the definition is clear under most EU instruments, the same cannot be said of respective domestic laws and industries. A uniform definition will help enhance consistency and effectiveness of relevant policies across the EU.

2.2 Distinct Characteristics of Micro Enterprises

Art 1 of the Annex to 2003 EC Recommendation defines an enterprise as:
… any entity engaged in an economic activity, irrespective of its legal form. This includes, in particular, self-employed persons and family businesses engaged in craft or other activities and partnerships or associations regularly engaged in an economic activity.

This definition shows that 'economic activity' is the determining factor of an enterprise and not its legal form. Moreover, a myriad of case law shows the reluctance of the courts to interfere in business to business relationships regardless of the nature of the enterprise concerned.[163] For example, the UK Court of Appeal's decision in *CGL v RBS*[164] confirms that the courts will not create a common law right of action to allow small companies to hold banks to the standards which the regulator has imposed on the banks. Such decisions put businesses in a situation where they would be better protected if they had entered into a contract in their own name rather than their business name. The

[161] Thorsten Beck, Asli Demirgüç-Kunt, María Soledad Martínez Pería, 'Bank Financing for SMEs around the World Drivers, Obstacles, Business Models, and Lending Practices', Policy Research Working Paper 4785, 24
[162] Oya Pinar Ardic, Nataliya Mylenko, Valentina Saltane, 'Small and Medium Enterprises A Cross-Country Analysis with a New Data Set', (2011) Policy Research Working Paper 5538
[163] Roger Brownsword, *Contract Law: Themes for the Twenty-first Century*, (2nd edn, OUP) 43-44.
[164][2017] EWCA Civ 1073

distinction which the regulators have drawn between 'private persons' and 'non-private persons' is illogical as it bears no relation to the size or sophistication of 'non-private persons' such as micro enterprises.[165]

Micro enterprises are, in most respects, not different from private persons. For the purposes of this chapter, the peculiar characteristics of micro enterprises which distinguish them from other businesses and which liken them to private persons in relation to contracting will be summarised in five categories: Structure, Finance, Liability, Market Niche, and Vulnerability.

2.2.1 Structure

The Department for Business, Energy & Industrial Strategy, in its statistical release in November 2019, stated that there are an estimated 5,824,500 small businesses in the UK, of which 4,457,820 had no employees.[166] Data for France also shows that in 2018, from a total of 691,200 companies founded that year, 308,300 self-employed companies were founded.[167] Considering that majority of businesses did not employ anyone aside from the owner, it is safe to assume that entrepreneurs, sole traders, partnerships consisting of owner/managers only and companies comprising of one employee director are the most common types of enterprises.

Often, the most sophisticated organisational structure found in micro enterprises is a flat structure consisting of two levels: the workers and the owner-manager[168]. A review conducted by Stainforth reveals that the major reasons why micro enterprises choose to undergo the formal process of incorporation are: to limit their liability, enhance their credibility and provide a formalised structure.[169]

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[165] David Mcilroy and Nathan Webb, 'Unexpected, illogical and unfair: the distinction between who can and who cannot sue for breaches of financial services rules' (2017) 9 JIBFL, 548

[166] National Statistics, 'Business population estimates for the UK and regions' (2019 statistical release) <https://www.gov.uk/government/publications/business-population-estimates-2019/business-population-estimates-for-the-uk-and-regions-2019-statistical-release-html> accessed 27 November 2020

[167] Statista, 'Total number of micro-enterprises created in France in 2018, by line of business' <https://www.statista.com/statistics/993319/number-micro-enterprises-creation-business-line-france> accessed 30 November 2020

[168] Billie Nordmeyer, 'Typical Organizational Structure of a Small Business', <https://yourbusiness.azcentral.com/typical-organizational-structure-small-business-1415.html> accessed 11 October 2018

[169] Paul Stainforth, Covering the key developments in tax, Tax Journal, Issue 1300, 2, 1

Statistics from the Institute for Family Business show that two out of every three UK enterprises are family business.[170] Germany's top 500 family businesses alone contribute nearly 43% of Germany's GDP.[171] The definition of family business can be difficult to ascertain except when simply comparing them with non-family business. It has been argued that family business relationship changes according to the structure and size of enterprise.[172] Gersick et al[173] approve any definition which reflects the three dimensional view of a family business: ownership, management and business cycle. For Westhead and Storey[174], a family firm must fulfil at least three of the following four requirements, namely: having undergone an inter-generation transition; having more than 50% of shareholding owned by a family group and/or those companies where more than 50% of family members are involved in the day to day management; and where the enterprise speaks of itself as family business. For our purpose, Family business can be simply defined as "one in which family members dominate the ownership and management of a firm, and perceive their business as a family business".[175] The issue of ' family business' raises another apparent anomaly.[176] Anomalies such as their life expectancy, succession strategies, management and conflict which is beyond the scope of this thesis.

Previous research shows that smaller enterprises often focus on a niche market, unlike larger enterprises who tend to offer a variety of products and services to a diversity of clients.[177] Some other research suggests that micro enterprises are often more flexible than larger enterprises as they do not have a large amount of capital locked into particular

[170] Institute for family business,<https://www.ifb.org.uk/advocacy/about-family-business/> accessed 18 July 2018
[171] David Bain, 'Top 500 German Family Businesses – the economy most dependent on family enterprises' <https://www.famcap.com/top-500-german-family-businesses-the-economy-most-dependent-on-family-enterprises/> accessed 25 November 2020
[172] P G Holland and W B Boulton, 'Balancing the "family" and the "business" in family business', Business Horizon, March-April (1984) 16-21, 16
[173] K.E Gersick, J.A Davies, ME McCollom Hampton and I Lansberg 'Generation to Generations: Lifecycle of Family Business' (1997) Harvard Business School Press.
[174] P Westhead and D Storey, 'Training Provisions and development of small and medium sized enterprises', (1997) Research Report No26. London HMSO.
[175] Robert N. Lussier, Matthew C. Sonfield, 'Micro" versus "small" family businesses: a multinational analysis' (2015) JSBED, 22, 3, 381
[176] Sarah Brown, 'Protection of the Small Business as a Credit Consumer: Paying Lip Service to Protection of the Vulnerable or Providing a Real Service to the Struggling Entrepreneur?' (2012) CLWR 41, 1, 59
[177] D. Recklies, 'Small Business – Size as a Chance or Handicap'; <http://www.themanager.org/resources/Small%20Business.htm> accessed 30 June 2018

technologies or distribution networks which makes them better equipped to respond quickly to market opportunities.[178] This flexibility can be argued to be both a blessing and a curse considering that lack of investing large amounts in technologies or distribution network can hinder growth.

It has been highlighted that a core of small enterprises, particularly micro enterprises, is required to build and maintain the sustainability of the social, economic, cultural and environmental development of communities.[179] Micro enterprises often operate in local settings motivated by personal, quality of life and community goals. Some of them are in business for the alternative lifestyle rather than for profit.[180] Salary substitute firms like lifestyle firms are not motivated primarily by profit or driven by profit margins.

Although some micro enterprises are rooted in the community, on the high street, on the outskirts, or even the farm, consumers and clients find larger enterprises more trustworthy because they are believed to have better systems in place.

The heterogeneous structure of micro enterprises usually means that most owners of micro enterprises take complete responsibility for their business. Unlike larger enterprises that may have different decision-making levels, the way decisions are made on strategic issues is quite different. This contrast in decision-making practices is partly due to the effect of size but also to the limited resources for engaging professional advice.

Consequently, the nature of the decision undertaken by micro enterprise is often determined by the personality of its owner, and his knowledge. This position negates the requirement for a centralised control regarding decision making. Growth in such situations can be perceived as challenging, due to the lack of decentralization and a

[178] Robert Bennett, *Strategies for delivering growth and staying profitable* (2nd edition , Financial times professional Ltd, 1998) 11

[179] R. Helen Samujh, 'Micro-businesses need support: survival precedes sustainability' (2011) Corporate Governance, 11, 1 ,15-28

[180] Lesley Roberts, (ed) *The importance of micro-businesses in European tourism in Rural tourism and recreation: Principles to practice'*, (Derek Hall, 2001) 198

dilution of the direct decisional power of the owner manager.[181] Unlike larger enterprises which are likely to have several level of decision making with checks and balances, the death or survival of the enterprise is less likely to be dependent on the personality characteristics or traits of a single individual.

As a result of the narrow structure of decision making, one will often find that some owners of micro enterprises wear many hats. Where professional services are not outsourced, they are often the manager, accountant, payroll officer, legal and commercial officer amongst many job roles. Because of their possible lack of expertise in many of these roles, these owners spend days trying to find correct information or mastering formulas which can often lead to mistakes which then either takes time or money to correct or in extreme cases, leading to their death.

Unlike larger enterprises, most owners of micro enterprises will pay income tax on business profits on their personal income tax returns.[182] For those micro enterprises who choose to register as a company in the UK, they are liable for Corporation Tax rate of 19% for non-ring fence profits just like larger enterprises[183] , although tax relief may vary depending on size, profit or income. In France, Small enterprises particularly the "Société A Responsabilité Limitée" (an incorporated enterprise or the UK equivalent of private limited liability company) has the option of either paying corporate tax or income tax (if company is less than five years old and has fewer than 50 employees).[184]

Human capital plays an important role in the growth of an enterprise. Factors such as schooling professional or managerial experience as well as previous entrepreneurship are vital in developing know-how as well as access to external resources. Prior research in West Germany shows that, in general, every second new entrepreneur previously

[181] Hutchinson, R. W. 'The capital structure and investment decision of the small owner-managed firm: some exploratory issues' (1995) Small Bus. Econ. 7(3), 231–239.
[182] Income Tax (Trading and Other Income) Act 2005, Part 9
[183]Gov.UK, 'Rates and allowances for Corporation Tax' <https://www.gov.uk/government/publications/rates-and-allowances-corporation-tax/rates-and-allowances-corporation-tax> accessed 9 April 2021
[184] Set up in France, 'Legal tax services' <https://www.set-up-in-france.org/services/legal-tax-services?gclid=Cj0KCQjw9NbdBRCwARIsAPLsnFb8aWJA1G0fCTDH5s2ZJBHaSxeFuPOa1fT7Tie7yTsa8USh_lRms2kaAmR0EALw_wcB> accessed 4 October 2018

worked in the same branch.[185] The research demonstrated that entrepreneurs are more likely to set up larger enterprises when they have previous experience in self employment or long professional and previous sectoral experience as well as management experience. Previous research also suggests that habitual entrepreneur and owner managers often succeed in starting another business due to their growing network and their ability to recognise business opportunities.[186] It is therefore pertinent that existing micro enterprises succeed in order to grow.

Various research into entrepreneurial behaviour, owner manager and behavioural pattern in small enterprises suggest that it is often difficult to disconnect the personality characteristics or traits of these owners with the success or failure of the enterprise. McClelland[187] argues that key characteristics such as having a drive for achievements, self-confidence, risk taking or a locus of control can determine the survival of an enterprise. Thus, variables associated with personal characteristic and human capital have a huge and sustainable impact on the survival of micro enterprises.

Information asymmetry is seen to increase the risk of liability. A previous study has observed that information asymmetry is considerably higher in micro enterprises than that for larger enterprises.[188] Micro enterprises, like any other enterprise are required to engage in good environmental practices such as health and safety and operational practices such as payroll accountability. The cost of complying with such good practices for micro enterprises can be proportionally greater when compared to other larger enterprises.

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[185] Friederike Welter, 'Who Wants To Grow Up? - Growth Intentions and Growth Profiles of (Nascent) Entrepreneurs In Germany', (2001) Babson College-Kauffman Foundation Entrepreneurship Research Conference June 14-16, 2001, Jönköping, <https://www.researchgate.net/profile/Friederike_Welter/publication/38173322_Who_wants_to_grow_growth_intentions_and_growth_profiles_of_nascent_entrepreneurs_in_Germany/links/54f48a950cf2f28c1361dbf0.pdf> accessed 7 December 2019.

[186] Ibid

[187] David McClelland, 'Achievement Motivation' < https://www.businessballs.com/improving-workplace-performance/david-mcclelland-achievement-motivation-4043/#toc-3> accessed 29 October 2018; Tristan Boyer and Re´gis Blazy, 'Born to be alive? The survival of innovative and non-innovative French micro-start-ups, Small Bus Econ' (2014) 42:670

[188] K Jõeveer, 'What do we know about the capital structure of small firms?' (2013) Small Bus. Econ. 41(2), 479–501

2.2.2 Financing

Like most private persons, micro enterprises are mainly funded from the personal savings of owners, small loans from financial institutions, and gifts or loans from friends and family members. Larger enterprises are most likely to attract funding from investors and venture capital firms and raise money by selling shares to the public and through the sale of corporate bonds. Larger enterprises frequently use internal financing via retained earnings or asset sales. This seems to be less of an option for micro enterprises.

Larger enterprises are more likely to diversify and have a lesser risk of financial distress leading to a higher debt capacity for larger enterprises in comparison with a micro enterprise[189]. Research suggest that as an enterprise grows in size, they often switch their use of leverage from short term to long-term debt because pecking order theory indicates that smaller enterprises are persuaded to mainly use short-term debt to avoid liabilities and control associated with long-term debt.

A significant amount of research into SMEs show a positive relationship between the size of an enterprise and long term debt. Authors like Daskalakis and Thanou;[190] and Ramalho and Da Silva[191] highlights a positive relationship between the size of an enterprise and its total debt. However Bellettre[192] finds no significant relation between the size of an enterprise and its long-term debt. Considering the overwhelming position indicating the positive relationship vis a vis studies which shows the negative relationship between the size of an enterprise and its short-term debt,[193] it is safe to imply that the smaller the enterprise, the weaker its capital structure. After all, an enterprise's growth improves its

[189] R. Rajan, and L. Zingales, 'What do we know about capital structure? Some evidence from international data' (1995) The J. Finance, 50(5), 1421–1460.
[190] N. Daskalakis and E Thanou, 'Capital structure of SMEs: to what extent does size matter?' (2010) SSRN Electronic Journal, <https://www.researchgate.net/publication/228252813_Capital_Structure_of_SMEs_To_What_Extent_Does_Size_Matter> accessed 22 April 2020.
[191] J.J.S Ramalho and J.V Da Silva, 'A two-part fractional regression model for the financial leverage decisions of micro, small, medium and large firms' (2009) Quantitative Finance, 9, 5, 621–636.
[192] I. Bellettre, 'Les choix de financement des très petites entreprises (The financing choice of very small enterprises) (2010). PhD Thesis. Lille, France: Université du Droit et de la Santé - Lille II. in Van Hoang, T.H., Gurău, C., Lahiani, A. et al. 'Do crises impact capital structure? A study of French micro-enterprises' (2018) Small Bus Econ 50, 181–199.
[193] G. Hall, P. Hutchinson and N. Michaelas, 'Industry effects on the determinants of unquoted SMEs' capital structure' (2000) Int. J. Econ. Bus. 7,3, 297; N. Michaelas, F Chittenden and P Poutziousris, 'Financial policy and capital structure choice in UK SMEs: empirical evidence from company panel data'. (1999). Small Bus. Econ., 12, 2, 113–130.; Van Hoang, T.H., Gurău, C., Lahiani, A. et al. 'Do crises impact capital structure? A study of French micro-enterprises' (2018); Small Bus Econ 50, 181–199; Myers, S. 'Determinants of corporate borrowing' (1977) J. financ. econ., 5, 2, 147–175.

opportunities to finance its working capital from its internal funds and a lower perceived risk usually facilitates access to long-term debt.

Unlike larger enterprises, micro enterprises are less likely to seek alternative external financing such as trade credit or non-bank loans or market-based funding due to the lack of adequate collateral. For Micro enterprises, short-term debt is generally used to finance their working capital, and they can have difficulties to immediately pay their providers.[194] This high dependence on bank loans exposes micro enterprises to changes in the financial sector.[195] A survey conducted in 2013 shows that at least 30% of micro and small enterprises in the EU ranked access to finance as their most pressing issue compared to only around 20% of larger companies.[196]

Usually, an enterprise experiencing growth sends a positive signal to lenders and thus should obtain easier access to debt. Frankly, debt providers, by default consider micro enterprises as riskier and therefore validly increase the interest rates to justify the level of risk incurred. Unfortunately, the higher interest rate may scare away the micro enterprise, who then have to search for other alternative funding sources. Thus, one will notice that mostly enterprises who have no other financing options remain in the debt market and are forced to accept an interest rate that is higher than it should be.[197] Asides having very few limited options, the highly centralised perspective of a large number of micro enterprises affect the financial choices made and can often reflect a specific order of preference.[198]

Although there is no universal theory of debt-equity,[199] Contingency theory shows that the relationship between equity and debt is specific to each enterprise, and it is

[194] Seidman, K. F. *Economic development finance*. (Thousand Oaks: Sage, 2005).
[195] C Artola, and V. Genre 'Euro Area SMEs under Financial Constraints: Belief or Reality?' (2011) CESifo Working Paper No. 2650.
[196] Orçun Kaya And Oliver Masetti , 'Small- And Medium-Sized Enterprise Financing And Securitization: Firm-Level Evidence From The Euro Area', (Wiley Online Library, Published 12 June 2018)
[197] Thi Hong Van Hoang & Călin Gurău & Amine Lahiani & Thuy-Luu Seran, 'Do crises impact capital structure? A study of French micro-enterprises' (2018) Small Bus Econ. 50,185; S.A Ross, 'The determination of financial structure: the incentive-signalling approach' (1977) The Bell Journal of Economics, 8(1), 23–40.
[198] R.W Hutchinson, 'The capital structure and investment decision of the small owner-managed firm: some exploratory issues' (1995) Small Bus. Econ, 7,3, 231–239.
[199] S.C Myers, 'Capital structure' (2001) J Econ Perspect, 15, 2, 81.

determined by a number of factors, such as size, asset structure, level of profitability, opportunities for growth, availability and cost of leverage, and the level of certainty/ uncertainty etc.[200] In addition, the equity option may not apply to most micro enterprises since most of them consist of owner managers and sole proprietors and are largely unregistered.

Moreso, intangible assets such as goodwill, brand recognition, patents, trademarks, and customer lists are usually not appropriate as collateral for bank debts due to their intangible nature. Tangible assets, therefore, becomes very relevant as larger enterprises with more collateral enjoy easier access to debt.[201] Previous studies into SME capital structure during crises including that of Thi Hong Van Hoang et al[202] which researched the position of French micro enterprises indicate that enterprises with tangible assets were issued more long term debt.[203] During the French crisis, the level of information asymmetry between borrowers and lenders was significantly high due to the market unpredictability[204].

Consequently, in order to improve credit access for SMEs generally, in 2014, the European Central Bank (ECB) and the Bank of England (BoE) proposed a joint initiative for the revitalization of securitization. Securitization is the process of taking an illiquid asset, or group of assets, and through financial engineering or transforming it (or them) into a security.[205] Securitization would function as a credit risk transfer mechanism for banks and free up bank capital to create new lines of credit. Securitization is also seen as a capital relief tool so that banks can lend and securitize the loans they make to SMEs. Kaya

[200] P Proença, R.M.S Laureano, and L.M.S Laureano, 'Determinants of capital structure and the 2008 financial crisis: evidence from Portuguese SMEs'. (2014) Procedia – Social and Behavioral Sciences, 150, 182–191

[201] M Frank, and V.K Goyal, 'Tradeoff and pecking order theories of debt in B. Espen Eckbo (Ed.) *Handbook of Empirical Corporate Finance* (Amsterdam: Elsevier/North Holland, 2008) Vol 2, 135.

[202] Thi Hong Van Hoang and others, "Do crises impact capital structure? A study of French micro-enterprises" (2018) J Small Bus Econ 50,193

[203] Steve C Lim, Antonio J Macias, and Thomas Moeller, 'Intangible assets and capital structure' (2014) <http://www.baylor.edu/business/finance/doc.php/231371.pdf> accessed 22 April 2020.; P. Proença, R.M.S Laureano, and L.M.S Laureano 'Determinants of capital structure and the 2008 financial crisis: evidence from Portuguese SMEs'. (2014) Procedia – Social and Behavioral Sciences, 150, 182–191.; W.K Muijs, 'The Impact of the financial crisis on the determinants of capital structure: Evidence from Dutch listed firms'. (2015) <https://essay.utwente.nl/67498/> accessed 22 April 2020.

[204] D. Van der Wijst, *Financial structure in small business, theory, tests and applications* (1989, Berlin: Springer-Verlag).

[205]Chris Gallant, 'What is securitization?' <https://www.investopedia.com/ask/answers/07/securitization.asp> accessed 5 October 2018

and Masetti[206] analysed the effectiveness of this securitization and whether SMEs are less likely to be credit-constrained when securitization activity is high. They concluded that securitization issuance reduces the probability that SMEs face either direct or indirect forms of credit constraints.

Another financial limitation for micro enterprises who are VAT registered is that they can be disadvantaged under the current regulatory framework, which allows members states to set up their exemptions threshold, subject to a maximum turnover of €85,000.[207] Consequently, in order to simplify the VAT compliance burden for micro enterprises and SMEs with annual turnover of under €2m, the European Commission has developed a proposal for a special VAT scheme for small enterprises.[208] Under the proposed VAT scheme, member states would be given greater flexibility to apply a range of reduced rates between zero and 15%, subject to an overall average of 12%; a new list specifically excluding certain products from reduced rates would replace those in the current framework;. SMEs below a €2m revenue threshold would qualify for simplified registration, and record keeping and a new exemption would apply to companies operating in more than one member state with a turnover below €100,000.

Some of the legal and administrative amendments proposed by the European Parliament's Economic and Monetary Affairs Committee includes the creation of a one-stop-shop for filing VAT returns in other member states; creation of an online portal for claiming exemption in other member states; removal of the proposed requirement for annual VAT returns for small businesses; removal of the requirement for VAT-exempt small businesses to file VAT returns; harmonisation of VAT registration thresholds by setting out upper and lower limits; and introduction of the proposed changes from 1 January 2020 (rather than 1 July 2022 as proposed by the Commission). [209]

Prior research has shown that employees of micro enterprises are more worried about their financial future than those in larger enterprises. Overall, more than one in ten

[206] Ibid
[207] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax
[208]Paul Stainforth, 'Covering the key developments in tax', (11th May 2018) Tax Journal, 1398, 2, 3
[209] Simon's Tax Intelligence 'News in brief' (6 September 2018) 35

employees believe they will be unable to afford to retire, but this proportion is higher among micro enterprises. More importantly, this research shows that employees of micro and small enterprises currently expect to retire at 68, two years higher than the average. Twice the number of employees of micro enterprises expect to carry on working into their seventies than do nationally (4%)".[210]

This limitation of resources and financial position of micro enterprises can often result in difficulty securing highly qualified and experienced staff. The owners usually do not have enough money to afford the salaries of such experienced staff or the cost of training and education to develop workers or to provide an attractive workplace retirement plan. On the other hand, even where some micro enterprises can afford to recruit highly qualified and experienced staff, such staff are often not attracted to these enterprises.

Apart from concerns about the future, it is believed that most employees prefer to work in larger enterprises due to the need for job security and better regulatory protection for them. For instance, in the UK, Regulation 4 of the Equality Act 2010 (Equal Pay Audits) Regulations 2014, which prevents discrimination regarding terms and conditions of employment between men and women, grants certain exemptions for existing micro enterprises and new businesses.

Due to the fact that most micro enterprises cannot adequately exploit economies of scale and do not have resources to draw on, it is more difficult to survive when trading conditions become challenging, and they are more susceptible to takeovers during this difficult time compared to their larger rivals.[211]

The uncertainty of income for micro enterprises and the risk of losing their entire capital investment liken them more to private persons than other types of enterprises,

[210] Charles Cotton, 'Beat the rush' Pensions World, 44, 6, June 2015, 21

[211] Robert Blackburn, 'Small Enterprises in the UK: From Hard Times To Great Expectations', (Paper Presented to The 22nd Japanese Annual Small Enterprise Society (JASBS), National Annual Conference, Senshu University Kawasaki City Japan, October 2002) 10

particularly where such investments threaten their quality of life until they are well established.

2.2.3 Liability

We have already established that the majority of micro enterprises are established as sole proprietorships or partnerships. Therefore, unlike larger enterprises, most micro enterprises have unlimited liability for business debts. Like the UK Companies Act, the Commercial Code, which is the French Company Act, also prescribes that a sole trader (called an 'entreprise individuelle') is liable for all the debts and damages caused by his business.[212] Larger enterprises are established mostly as private corporations or, in few cases, public limited liability companies hence have limited liability for business debts. The UK Companies Register Activities 2020 to 2021 confirms that since 2004 private limited companies have consistently accounted for over 96% of all corporate body types.[213]

In addition to the challenges of personal liability for most micro enterprises, there are many statutory requirements under a number of domestic legislations that may be somewhat challenging for some micro enterprises. For instance, there is a legal requirement of automatic pension enrolment since 2018 for companies in the UK regardless of whether they employ one thousand employees or just one employee. Although this requirement is very important for an employee, it may be sometimes burdensome for employers such as micro enterprises. This is not to say the UK government has not put in place some measure to help these enterprises. Indeed, measure such as provision of a Pension schemes newsletters published by HMRC which contains updates and guidance on pension schemes,[214] a £500 pensions advice allowance

[212] Delcade, Avocats & Solicitors, 'Liability of company directors and sole traders in france' <https://www.delcade.com/legal-news/labour-law-social-relations/liability-company-directors-sole-traders-france/> accessed 21 July 2018; Partnership Act 1890, Sec 9

[213] Official Statistics, 'Companies register activities 2020 to 2021', (Published 24 June 2021) <Companies register activities: 2020 to 2021 - GOV.UK (www.gov.uk)> accessed 09 March 2022

[214] Gov.UK, <https://www.gov.uk/government/collections/hm-revenue-and-customs-pension-schemes-newsletters> accessed on 8 October 2018

for individuals;[215] and a new income tax and NIC exemption for the first £500 of the cost of financial advice relating to pensions where the advice is arranged by the employer[216] is admirable. It is the adequacy of these measures that is in question.

A report by Aegon and the Confederation of British Industry (CBI) in March 2018 shows that nearly half (49 per cent) of employers generally require greater clarity around the regulations for providing pension information in the workplace. The report further confirms that more than half (56 per cent) of employers believe the government should extend the tax exemption for employer-arranged pension advice to more than £500. Moreover, the cost of external pension advice varies from £75 to £350 per hour depending on the nature of the situation.[217] It is therefore believed that the current amount of £500 is unlikely to meet the pension planning needs of most micro enterprises.

Unlike most enterprises, micro enterprises in some jurisdictions can occasionally enjoy more relaxed legislative frameworks in the forms of exemptions. For example, In France, Micro enterprises are not obligated to publish their accounts as there is no auditor control as per the *Observatoire du financement des entreprises 2014*.[218]

2.2.4 Vulnerability

There appears to be some assumptions regarding the strength and expectations of enterprises generally. Unfortunately, there can be a significant gap between expected behaviour and the reality, particularly for micro enterprises.

Micro enterprises are as vulnerable as private persons due to their size, lack of expertise and bargaining power. A piece of empirical research conducted involving 40 small enterprises in the UK shows that only a minority of them had professional legal input into

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[215] HM Treasury, 'Consultation outcome Introducing a Pensions Advice Allowance: consultation' <https://www.gov.uk/government/consultations/introducing-a-pensions-advice-allowance/introducing-a-pensions-advice-allowance-consultation> accessed 11 October 2018.

[216] Simon's Tax Intelligence 'Budget Summary'. (Budget Issue, 24 March 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/513073/OOTLAR_complete_for_publication.pdf> accessed 18 September 2018

[217] CBI, <http://www.cbi.org.uk/news/the-cbi-aegon-guide-to-pension-engagement/> accessed 18 September 2018

[218] Observatoire du financement des entreprises 'Rapport sur le financement des TPE en France (2014) <http://www.economie.gouv.fr/files//files/directions_services/mediateurducredit/pdf/RAPPORTOFE_financement_des_TPE_en_France__juin_2014.pdf> accessed 28 June 2018.

their contracts and the ones which did not have such input considered themselves to be contractually vulnerable.[219] In addition, small enterprises stated that their perceived legal problems included 'inadequacies in contractual arrangements including trading on others' unfavourable terms' and 'the high cost of legal advice and representation'.[220]

The attitude of the UK courts to these problems is best encapsulated in the two judgments set out below. In *CJS Eastern Limited*, there was an appeal by the company against penalties totalling GBP 81,000 (fixed penalty of 28,500 plus discretionary penalties of 52,500) for the failure to submit monthly returns under the Construction Industry Scheme. The appellant argued that the penalty was disproportionate as the company was a 'tiny micro-business with less than 10 employees' and its 2010-11 profit was GBP 95,000, which was 'the best year ever'. At 81,000, the penalty was over 85% of the company's annual profit. The tribunal held that the fixed penalties were correct regardless of the status of the company, but the discretionary penalties of 56,500 would be set aside as excessive. The tribunal also held that it was unable to consider the issue of proportionality.[221]

In *Finch v Lloyds TSB Bank Plc*,[222] Omnia-Chem Ltd had entered into a fixed rate loan with Lloyds. When the company came to repay the loan, it discovered that the loan agreement contained a clause under which it was liable to pay a break costs amounting to more than GBP 1.5 million, which would prevent the company from re-financing. Because the company was unable to refinance, it went into administration. The company argued that the break cost clause was a 'concealed time bomb' which allowed the bank to charge the company a cost of 'an unascertainable and potentially huge kind under the Bank's own hedging arrangements', and the Bank had failed to advise the company. The court held that the bank had no duty to draw the clause to the company's attention. However, the court added that the circumstances in which the Bank would be under 'a duty to provide voluntary advice which may be contrary to its commercial best interest … would have to

[219] P. Lewis, 'Small Firms and Their Difficulties with Contractual Relationships: Implications for Legal Policy' (2004) 33 Comm L World Rev 81, 83.
[220] Law Commission, Unfair Terms in Contracts (Law Com CP No 166, 2002) para 5.28.
[221] [2015] UKFTT 213 (TC) para 112
[222] [2016] EWHC 1236 (QB)

be "exceptional" and markedly different from the conventional relationship of banker and customer'.

One will notice from the above judgements that the issue of proportionality or size of an enterprise is often not in question, and the expectation is clear regardless of the vulnerability of the enterprise.

Nayak and Greenfield[223] show that a fundamental requirement such as business planning is almost completely absent in micro enterprises. Greenbank's[224] research (in the accounting, building and printing sector) supports this assertion with his study showing that only 20% of surveyed micro enterprises had a business plan, and those that had business plans had them because they were required by organisations such as banks. Moreso, only 30% of those with business plans continued to plan. Formal market research was also lacking in most micro enterprises, with many of them relying on information gathered informally over the years. Considering that a business plan is an essential strategic tool for enterprises, the lack thereof further aggravates this vulnerability.

Family and friends are a major source of advice at business inception.[225] Greenbank's study shows that only 45.5 per cent of micro enterprises sought external advice or help from banks, accountants or solicitors before start-up. However, this may no longer be the case considering the free advice services provided under some national policies such as the UK. Data on the number of micro enterprises who utilise such services would be helpful.

Furthermore, a UK Intellectual Property Office report shows a worrying lack of awareness, particularly among micro enterprises, regarding their intellectual property (IP). Identifying

[223] A Nayak and S Greenfield, 'The use of management accounting information for managing micro enterprises' in A Hughes and D.J Story (Eds) *Finance and the small firm* , (Routledge London 1994)
[224] Paul Greenbank, 'Micro business start-ups: challenging normative decision making?' (2000) Marketing Intelligence & planning 18, 4, 207
[225] S Hogarth- Scott, K Watson and N Wilson, "Do small businesses have to practice marketing to survive& grow?' (1996) Marketing intelligence & planning 14, 1, 6-13

unregistered IP rights such as copyrights can prove quite difficult for some micro businesses and even with registered IP rights, the situation is not better off.[226]

What is more? Keeping abreast with legislation is crucial to enable compliance. More importantly, for enterprises unable to seek professional help, understanding, interpreting, and applying the law is needed to fully comply with relevant legislation. Research from Intuit accounting solutions reveals that only 33% of micro-enterprises claimed to be able to accurately describe the legislation and how it would affect them.[227] This lack of knowledge and awareness is not better off in relation to the relatively new Data Protection Act 2018.[228] No doubt, an accurate summary document together with free, accessible advice services would be a helpful tool for these enterprises.

The issue of inadequacy of time is very prevalent amongst micro enterprises. Prior interviews conducted among micro enterprises shows that all interviewees described their problems relating to lack of time. The uncertainty and unpredictability of daily work contributed to this problem as they had no control of their time. Many worked longer hours than expected to achieve normal productivity. Some others saw themselves as "vulnerable and defenceless in relation to a faceless and unconcerned bureaucracy". [229] Moreso, a number of them showed a sense of isolation and had a fear of failure.[230]
In addition, micro enterprises are more likely to lack systematic Occupational health and safety management and the first report from the Safe Small and Micro Enterprises (SESAME) project (EU-OSHA, 2016) reveals that these enterprises have often expressed problems managing occupational safety and health and consequently may experience inadequate health and safety conditions. The resulting outcome is likely work-related injuries, loss of life or poor working environment with long term health implications[231]

[226] Emma Flett and Jennifer F. Wilson, 'Banking on IP: a call for action from the UK Intellectual Property Office' (2014) 5 JIBFL 303, 305
[227] Rich Preece, 'Cloud control' – Pay & Benefits, May 2016, 21, 22
[228] Guide to the General Data Protection Regulation (GDPR), < https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/> accessed 28 October 2018
[229] R. Helen Samujh, 'Micro-businesses need support: survival precedes sustainability' (2011) Corporate Governance, 11, 1, 19
[230] Ibid
[231] Safety and health in micro and small enterprises in the EU. https://publications.europa.eu/en/publication-detail/-/publication/fd7e7a90-ff3a-11e7-b8f5-01aa75ed71a1/language-en/format-PDF/source-77553036 accessed 4 June 2018

In recognition of some of these major challenges of micro enterprises, organisations such as the Office of the Data Protection Commissioner have developed guidance document to assist micro enterprises in putting in place appropriate technical and organisational security measures in order to safeguard personal data they are processing.[232]

Lately, there is a noticeable trend in national laws towards extending protection beyond consumer. For instance, the UK government has been discussing the possibility of, and to what extent the consumer level of sale of goods protection should apply to small enterprises.[233] It is therefore not surprising that some individual legislations now acknowledge that micro enterprises are no less different from consumers in certain situations. Under the Rule 2.7.3 of the UK 'Dispute Resolution: Complaints' section of the Financial Services Handbook, an eligible complainant must be a person that is either a consumer, micro-enterprise, charity or trustee of a trust. Also, like consumers, the Financial Ombudsman Service's jurisdiction is available to micro enterprises.

As of 2011, the UK government announced that in order to reduce the regulatory burden micro enterprises and start-ups would be exempt from new domestic regulations for a period of three years. However, apart from the compulsory equal pay audits, business transfers and services provisions,[234] micro enterprises were covered by most regulations during and after that period. The government argued that this was because the new regulations introduced had reduced, rather than increased, the burden on these enterprises.[235]

On the international level, the report of the Committee on the Internal Market and Consumer Protection in its EU Green Paper on the Review of Consumer Acquis recognise that 90% of enterprises in Europe are micro enterprises and that 48% of them are

[232] Personal Data Security Guidance for Microenterprises under the GDPR, <http://gdprandyou.ie/wp-content/uploads/2018/03/Microenterprises-GDPR-Final-1.pdf> accessed 15 September 2018.
[233] Department for Business, Innovation and Skills, 'Protection of small business when purchasing goods and services: Government response to the call for evidence', February 2016
[234] From 31st July 2014, Special provisions apply to micro enterprises involved in business transfers which allows them to inform and consult directly with employees where there is no trade union or appropriate representatives in place.
[235] Jessica Corsi, 'Y is there a problem?' 164 NLJ 7623, 10

prepared to trade across border, but only 29% actually do so[236]. The command paper also recognises that individual entrepreneurs and micro enterprises generally find themselves in a similar situation like consumers when they buy certain goods or services. The question of whether or not these enterprises should benefit from consumer protection was also being considered by the European commission.[237]

These distinct characteristic are mainly peculiar to micro enterprises, which means that treating micro enterprises as a subcategory of small enterprises or SMEs is that they are seen and counted like legal units and are therefore treated equally even though they have a completely different character and different types of ownership.

2.3 The Role of Micro Enterprises in Economic Growth

The contributions of micro enterprises were first recorded over 4,000 years ago when bankers loaned money at interest.[238] These enterprises flourished in almost all ancient cultures, like those of the Greeks, Arabs, Babylonians and Romans.[239] Today, the contribution of micro enterprises to economic growth and development has been acknowledged by jurists, analysts, economists and even the press/media.

The EC often refers to SMEs generally as the 'real economic engines' which contribute to a great extent to the economic growth of the EU. As at January 2021, micro enterprises in the UK constituted 95% of businesses in the private sector; [240] in France, they constitute 95.5% of enterprises according to the EC, 2021 SBA Fact Sheet – France; in Germany, the constitute 82% of all enterpises according to the EC, 2021 SBA Fact Sheet – Germany and micro enterprises in the EU are approximately 93% of enterprises.[241]

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[236] Green Paper on the Review of the Consumer Acquis (2007/2010(INI)) Para 1 (a) and 1 (d)

[237] Commission of the European Communities, Brussels, 8.2.2007, COM(2006) 744 final, 15 Para 4.1.; Green Paper, on the Review of the Consumer Acquis (2007/2010(INI))

[238] Edward Bursk, *The World of Business* (New York: Macmillan, 1963) 1 - 2

[239] Colin Barrow, *The essence of Small Businesses,* (Prentice Hall Europe 1998) 1

[240] Georgina Hutton, Matthew Ward, 'Business Statistics' (House of Commons Library, Briefing Paper Number 06152, 21 December 2021 <https://commonslibrary.parliament.uk/research-briefings/sn06152/ > accessed 10 February 2022. In France, they constitute 95.5% of enterprises according to the EC, 2019 SBA Fact Sheet – France. In Germany, the constitute 82% of all enterpises according to the EC, 2019 SBA Fact Sheet – Germany.

[241] European Commission, Annual Report on European SMEs 2020/2021: Digitalisation of SMEs, SME Performance Review (Contract number: EASME/COSME/2020/SC/001), Final Report of July 2021.

The contributions of micro enterprises can be broadly categorised into two key impact areas: economic and development, social and environmental.

2.3.1 Economic Impact and Development

Until the 1970s, economic development was mainly realised through mass production in large enterprises. From that time to the present, perhaps due to technological advancements, there has been an increasing drift towards downsizing in these enterprises and thus considerably increased the importance of smaller enterprises.[242]

Undoubtedly, two major contributions of micro enterprises today are that they generate income for the nation and significant job creation. Gallagher et al[243] published a UK data on business sector contribution between 1982 and 1991. The data shows that micro enterprises had the highest net job creation rates with a weaker performance from enterprises of 20-49 employees. Table 2.3 below compares the number of enterprises and employment contribution and value added in 2021 in the EU non-financial business sector.

Table 2.3: SMEs and large enterprises: size, employment, and value added in in the EU-27 non-financial business sector

[242] R. Lèbre La Rovere, 'Small and medium enterprises and IT diffusion policies in Europe'. (1998) Journal of Small Bus. Econ. 11. 1-9.

[243] 'Small Businesses, Job Creation And Growth: Facts, Obstacles And Best Practices' <https://www.oecd.org/cfe/smes/2090740.pdf> accessed 26 July 2018

	Micro SMEs	Small SMEs	Medium-sized SMEs	All SMEs	Large enterprises	All enterprises
Enterprises						
Number	21,044,884	1,282,211	199,362	22,526,457	40,843	22,567,300
%	93.3%	5.7%	0.9%	99.8%	0.2%	100.0%
Value added						
Value in € million	1,179,476	1,071,196	1,087,613	3,338,286	2,956,544	6,294,829
%	18.7%	17.0%	17.3%	53.0%	47.0%	100.0%
Employment						
Number	36,988,539	25,313,006	20,130,548	82,432,093	44,358,284	126,790,377
%	29.2%	20.0%	15.9%	65.0%	35.0%	100.0%

Source: Eurostat, National Statistical Offices, DIW Econ

Notably, SMEs account for the majority of the increase in value added (over 60%) in the year 2020 In particular, Micro enterprises caused an increase of over 20% in comparison to other SMEs. The growth in the SME contribution is largely due to micro SMEs.

Where jobs are created in rural areas, micro enterprises also serve as a vehicle for rural development.[244] It is important to highlight that even where jobs are not created, micro enterprises are an engine of economic stability, particularly in fragile sectors by sustaining

[244] Glenn Muske and others, 'Small Businesses and the Community: Their Role and Importance Within a State's Economy', Journal of extension, February 2007, 45, 1

their business. Successful micro enterprises allow owners to remain in their abode and sometimes creates opportunities for immigration.[245]

The volatility of the micro enterprise is best encapsulated by the reaction of several governments to shield these enterprises from the dire impact of the recent Covid 19 pandemic. During this period, governments around the world imposed lockdowns, travel restrictions, border shutdowns etc. Such protective measures, although important in curbing the exponential spread of the Covid 19 virus, hindered the opening and operation of most enterprises and slowed down trading. Moreso, social distancing, travel restrictions and self-isolation led to a reduced workforce and practically meant most micro enterprises who delivered face to face services were redundant. Moreover, a subsequent tiered system of coronavirus restrictions on commercial activity and on individuals' rights of movement and assembly in some parts of the world like England also resulted in business uncertainty for most micro enterprises.

This disruption in the supply chain gave rise to huge concerns, particularly for micro enterprises. Nicola et al records that during this time, as a precautionary measure, UK banks and high street lenders require up to 40% deposits for approval of new mortgages.[246] Micro enterprises and SMEs are said to have experienced a greater decline in business activity compared to larger enterprises. A survey of 5,800 small enterprises conducted in the United States not only shows a mass layoff and closures but also find that many small enterprises were financially unstable; these enterprises were unsure of the likely duration of Pandemic related disruptions and majority of these enterprises planned to seek some form of funding.[247]

Similarly, WTO foretold in April 2020 that the impact of the Pandemic on the international trade would be "severe" with immediate impact on economic output and international

[245] D Kirkby and A Watson, *Small Firms and Economic Development in Developed and Transition Economies*, (Ashgate, Aldershot, 2003) 193; Glenn Muske and others, 'Small Businesses and the Community: Their Role and Importance Within a State's Economy', Journal of extension, February 2007, 45

[246] Maria Nicola and others "The socio-economic implications of the coronavirus pandemic (COVID-19): A review" International Journal of Surgery Volume 78, June 2020, 189

[247] Alexander W. Bartik and others "How Are Small Businesses Adjusting to COVID-19? Early Evidence from a Survey" <https://www.nber.org/papers/w26989> accessed 21 May 2020

trade; one that is likely to exceed that of the 2008–2009 financial crisis. It predicted that trade would fall steepest in sectors with complex value chains and services trade.[248] Subsequent WTO's report in June 2020 manifests these prediction with statistics showing a decline in trade volumes of around 18.5% in the second quarter.[249] Admittedly, these effect are historically significant and affects not only micro enterprises ; albeit capable of having a more dire impact on the growth of the micro enterprise due to the pandemic triggering a "mutually reinforcing triple shock"[250] in demand, supply and trade.

Consequently, the help and support offered by most countries include loans, other forms of funding and protective legislation. One of the protective legislation is the UK Corporate Insolvency and Governance Act 2020which makes the existing insolvency scheme flexible and temporarily suspends parts of insolvency law to protect companies from aggressive creditor action. The Act also will ease some filing and AGM requirements and suspends the period during which a company's directors could incur personal liability for wrongful trading with effect from 1 March to 30 June 2020. Such protective legislation would reduce certain pressures on micro enterprises in the short term.

The UK announced a £330bn package of emergency loan guarantees to help those in financial difficulty,[251] including a £9bn scheme to support up to 3.8 million self-employed workers hit by coronavirus,[252] and a further £20bn of fiscal support were issued in attempts to save UK businesses.[253] More importantly, the UK government announced a

[248] World Trade Organisation, 'Trade Statistics And Outlook: Trade set to plunge as COVID-19 pandemic upends global Economy WorldThe COVID-19 pandemic and international trade'(Press/855, Press Release, 8 April 2020) <https://www.wto.org/english/news_e/pres20_e/pr855_e.pdf > accessed 6 November 2020; https://publications.parliament.uk/pa/cm5801/cmselect/cmintrade/286/28604.htm accessed 6 November 2020

[249] World Trade Organisation, 'Trade falls steeply in first half of 2020' , (Press/858, Press Release, 22 June 2020) <https://www.wto.org/english/news_e/pres20_e/pr858_e.htm?> accessed 6 November 2020

[250] The COVID-19 pandemic and international trade < https://publications.parliament.uk/pa/cm5801/cmselect/cmintrade/286/28604.htm> accessed 10th October 2020

[251] Gov.UK, 'Support for those affected by COVID-19' <https://www.gov.uk/government/publications/support-for-those-affected-by-covid-19/support-for-those-affected-by-covid-19> accessed 22 May 2020; BBC News, 'Chancellor Unveils £350bn Lifeline for Economy', (17 March 2020) <https://www.bbc.com/news/business-51935467> accessed 22 May 2020

[252] Beth Rigby, 'Coronavirus: Billions set aside to help the UK economy - now comes the hard part', Sky News 2020 <https://news.sky.com/story/coronavirus-billions-set-aside-to-help-the-uk-economy-now-comes-the-hard-part-11964304> accessed 20 May 2020

[253] The package of measures includes: Deferring VAT and Income Tax payments, Coronavirus Job Retention Scheme, A Statutory Sick Pay relief package for SMEs, 12-month business rates holiday for all retail, hospitality, leisure and nursery businesses in England, Small business grant funding of £10,000 for all business in receipt of small business rate relief or rural rate relief, Coronavirus Business Interruption Loan Scheme offering loans of up to £5 million for SMEs through the

new "fast-track" loan scheme for small businesses. This scheme enabled micro enterprises to borrow between £2,000 and £50,000 within days after completion of a short, standardised online application. Under this scheme, which was launched on 4th May 2020, no fees or interest is payable for the first 12 months of the loan, and no repayment is due during this period. The government also provided lenders with a 100% guarantee for approved loans.

A UK Coronavirus Job Retention Scheme, which was succeded by the Job Support Scheme aimed to assist employers facing lower demand over the winter months due to the pandemic.[254] The UK government also extended its support measures for businesses. Thus, UK Coronavirus Business Interruption Loan Scheme , the Bounce Back Loan Scheme, the Future Fund scheme[255] where the government will provide convertible loans ranging from £125,000 to £5 million to certain UK-based high growth innovative companies, subject to at least equal match funding from private investors and the COVID-19 Corporate Financing Facility were all extended.

In addition, the Bank of England cut interest rates to 0.1%, to reduce the effects of the pandemic as well as maintaining the confidence of unnerved investors. The UK government also promised to pay 80% of the salary cost of staff, up to £2500 per month who their employer retains.[256]

Similarly, in Germany, the state development bank (KfW) made available €500bn in loans to help companies affected by the pandemic.[257]. Consequently, on March 13th 2020, the German parliament passed the "law on the crisis-related temporary improvement of the regulations for short-time work allowance" (*Gesetz zur befristeten krisenbedingten*

British Business Bank, Grant funding of £25,000 for retail, hospitality and leisure businesses with property with a rateable value between £15,000 and £51,000, The HMRC Time To Pay Scheme.

[254] Gov.UK, 'Support for businesses and self-employed people during coronavirus' <https://www.gov.uk/government/collections/coronavirus-job-retention-scheme> accessed 10 December 2020;

[255] Gov.UK, 'Guidance: Apply for the coronavirus Future Fund' https://www.gov.uk/guidance/future-fund accessed 25 May 2020.

[256] BBC News, UK to Pay Wages for Workers Facing Job Losses, (2020 Mar 20) https://www.bbc.com/news/business-51982005 accessed 22 May 2020

[257] Channel News, 'Germany unleashes biggest post-war aid package against virus' <https://www.channelnewsasia.com/news/business/germany-unleashes-biggest-post-war-aid-package-coronavirus-12536540> accessed 20 May 2020

Verbesserung der Regelungen für das Kurzarbeitergeld), which gives companies access to state funded short term work allowance to compensate employees who fall ill or are unable to work due to the Pandemic.[258] Unlike the UK, which provided 80% funding (up on to 1st November 2020), the compensation for the partial loss of remuneration is 60% of the net pay difference or in the amount of 67 % of the net pay difference for employees with at least one dependent child.[259]

France, amongst other ways, adopted a more qualified approach in its support for businesses. A solidarity fund (*fonds de solidarité*) was created to help small enterprises in hardship with the level of support dependent on individual circumstances. However, to qualify for such funds, the enterprise must show that it has either suffered a business loss of at least 50% of its turnover or has been ordered to close by an administrative order valid between 25th September to 30th November. [260] Furthermore, additional grants such as *aide complémentaire forfaitaire* of up to €10,000 through the regional council, was available to enterprise who employ at least one employee on a permanent or fixed contract.[261] Tax delays and delays in payment of social security were also allowed to support cash balances; existing tax and social security arrears recovery procedures were suspended.[262]

Although the level of support vary from country to country, without this commendable support shown to micro enterprises, there is no doubt that majority of these enterprises will be in severe crises.

[258] COVID-19 update: Germany to give easier access to state-funded short-time working allowance | orrick - global employment law group – JDSupra <https://www.jdsupra.com/legalnews/covid-19-update-germany-to-give-easier-36702/> accesses 20 May 2020

[259] Ibid

[260] French-property.com, 'Covid-19 – Hardship Grants for Small Businesses' <https://www.french-property.com/news/french_business/covid_19_small_business_financial_support/> accessed 10 December 2020

[261] CCI-Paris-Ile-De-France Enterprises, <https://www.entreprises.cci-paris-idf.fr/web/reglementation/nos-produits/docpratic/actualites-juridiques/coronavirus-covid-19-aide-complementaire-region-ile-de-france> accessed 7 December 2020

[262] French property.com, 'Covid-19 – Hardship Grants for Small Businesses' <https://www.french-property.com/news/french_business/covid_19_small_business_financial_support/> accessed 10 December 2020

2.3.2 Social and Environmental Impact

The clear connection between family and the society is a topic that needs no debate. According to the Institute for Family Business, two-thirds of enterprises in the UK are family owned (4.8 million), and just 16,000 are medium and large businesses; the others are micro or small enterprises. These types of businesses are also not unknown in Germany, where they are usually collectively referred to as the '*Mittelstand*'. They make up to 98 percent of Germany's exporting companies and employ two-thirds of its workforce.[263]

Research shows that apart from the economic impact of family businesses, these enterprises tend to survive over generations due to their sustainable outlook and ability to adapt to the modern world. They also uphold strong family values, instilling them in their day to day work, which gives the opportunity of passing these values on to the next generation[264] and sometimes, to their employees.

In addition to these strong values, they are known to have low staff turnover, a sustainable approach to investment, the ability to avoid excessive debts, show a willingness to embrace responsible capitalism, are committed to the local communities in which they operate, and often contribute to local projects.[265]

Regardless of whether they are a family business or not, micro enterprises are part of the lifeblood of local communities. They are known to local residents and provide local employment to people with lower skill levels or poor qualifications or to people who require flexible working arrangements.[266] They tend to have a social impact in economically deprived areas. They often represent the local character of a place,

[263] Paul Ames, 'German support for small enterprise has kept its economy thriving', Global post, (September 11, 2013, 10:00 AM) UTC < https://www.pri.org/stories/2013-09-11/german-support-small-enterprise-has-kept-its-economy-thriving> accessed 10 July 2018

[264] Institute for family business, 'About family business' < https://www.ifb.org.uk/advocacy/about-family-business/> accessed 10 July 2018

[265] Paul Ames, 'German support for small enterprise has kept its economy thriving', Global post, (September 11, 2013, 10:00 AM) UTC < https://www.pri.org/stories/2013-09-11/german-support-small-enterprise-has-kept-its-economy-thriving> accessed 10 July 2018

[266] V Middleton, *The importance of micro-businesses in European tourism in Rural tourism and recreation: Principles to practice* (Derek Hall, 2001,199)

reflecting its special values and culture, and are likely to inspire young people in these communities.[267]

In addition, corporate social responsibility (CSR) is becoming increasingly important for all companies regardless of size due to the pressures of environmentalists, social reformers and activists. For micro enterprises, CSR is an opportunity to be ethical and at the same time improve competitiveness.[268]

As the importance of micro enterprises in economic, social and enviromental development has been recognised, support, policies and investment made for their success is usually considered necessary. In the UK, a number of public sector organisations offer business support to SMEs. They include: the Queen's Award for Enterprise, UK Trade & Investment (UKTI), Tools for Business (.gov website), Manufacturing Advisory Service, British Business Bank, MentorSME, and Innovate UK.[269]

Generally, the number of small enterprises in Europe has more than doubled in the last decade. As one would expect the monies used for supporting them can be quite considerable especially in the light of competing claims for public funds. Some authors have justified the need for such a scale of expenditure to address the market failure; without this expenditure there would be fewer and worse-paid jobs, a lower level of income or wealth, less innovation, more unemployment etc.[270]

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[267] Ibid

[268] Paul Burns*, Entrepreneurship and small business: Start up, Growth and Maturity* (4th edn, Palgrave, 2016) 4

[269] Small Enterprise Survey 2014: SME employers, (Bis Research Paper Number 214 March 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/414963/bis-15-151-small-enterprise-survey-2014-sme-employers_v1.pdf> accessed 7 July 2018

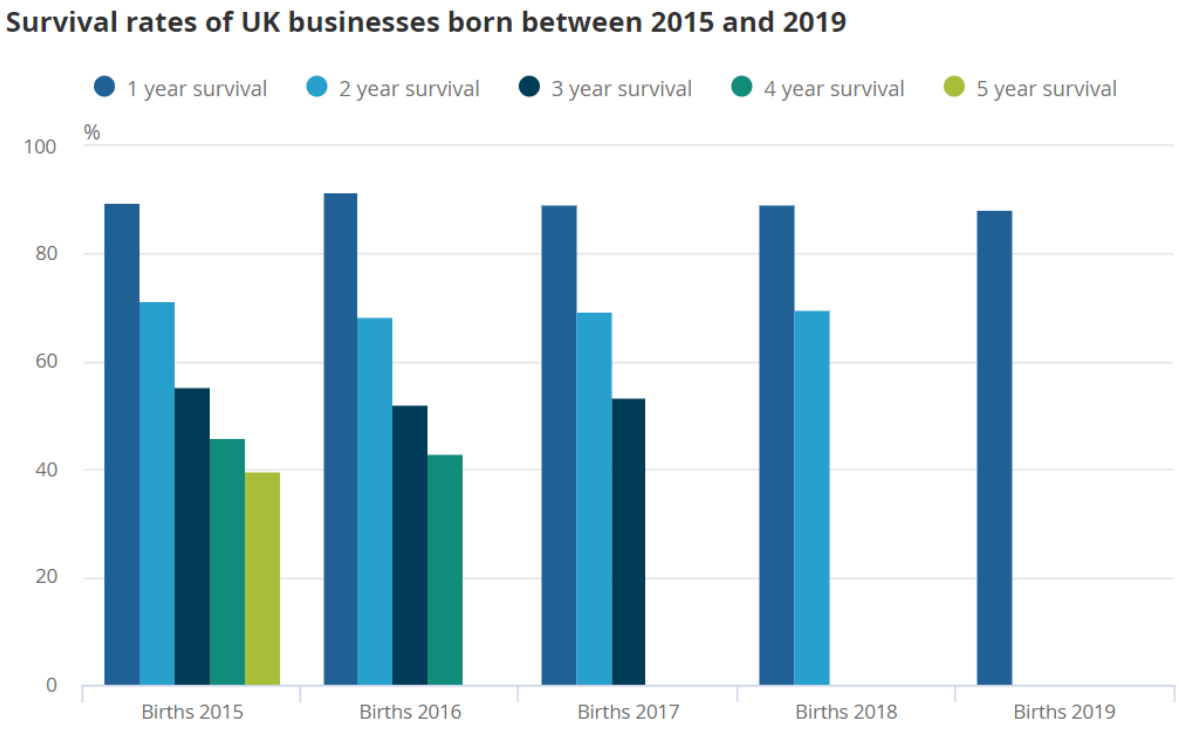
[270] David J Storey, *Understanding the small enterprise sector*. (London: International Thomson Enterprise Press 1994) 23; Giorgio Calcagnini and Ilario Favaretto (Eds.) *The Economics of Small Businesses: An International Perspective* (2011, Springer publishing service) 115*; Paul Gordon Dickinson, '*SMEs and the business reality of criminality (the case of Estonia)' *(2014) Journal of Financial Crime 21(1), 68*

Despite the level of business empowerment, there is inadequate regulatory empowerment and protection for micro enterprises. An appropriate legal climate is a critical factor in developing and sustaining micro enterprises. According to Marek[271]:

"A series of factors influence the competitiveness of small- and medium-sized enterprises, amongst which one of the most important is the legal environment of business operations, and not only in the sense of creating favourable conditions for economic activity but also of ensuring the stability of valid regulations."

An unfavourable or inadequate legal environment can be considered as one of the reasons for the death rate of micro enterprises. The following table which shows the five year survival rate for businesses born in 2015 was 39.6%.

Table 2.4 Business Survival Rates



Source: Office for National Statistics – Data from Business Demography[272]

[271] Miroslaw Marek, 'The 31st International Small Business Conference' (September 2004, Warsaw)

[272] Office of National Statistics, "Business demography, UK: 2020" <https://www.ons.gov.uk/businessindustryandtrade/business/activitysizeandlocation/bulletins/businessdemography/2020> acessed 3 March 2022

Although the above data measure only firms that are VAT/PAYE registered and many micro enterprises are not, it still shows that over half of applicable micro enterprises created end up winding up.

2.4 Micro Enterprises and the Commercial Reality

The commercial reality of the rigid classification of companies in today's modern world may create a number of complex problems. Some of these problems stem from the ever-changing nature of employment relationships and financial linkages between legal entities. Consider a scenario where company X has four employees working between 35 and 60 hours a week, five employees working between 12 and 25 hours, two trainees, two volunteers who receives travel and other subsistence costs, one agency worker, one member of staff on a contract for service and an unpaid family member who is reimbursed for expenses only and believes he will one day own the business. Will company X meet the number of employees' criteria for micro enterprises under the 2003 Recommendation?

The different issues raised in the above scenario will be discussed first before delving into discussions relating to financial linkages between legal entities.

2.4.1 Number of Employees: The Headcount Criteria

Article 5 of the Annex to the 2003 Recommendation provides that the headcount of an enterprise corresponds to the number of annual work units (AWU). As a starting point, the explanatory notes[273] on the types of enterprises taken into account for calculating the headcount and financial amount list categories of workers included in the headcount. They are: employees of the enterprise, persons working for the enterprise being subordinate to it and considered to be employees under national law; owner-managers; partners engaging in a regular activity in the enterprise and benefiting from financial advantages from the enterprise. It is important to note that apprentices or students

[273] European Commission, 'User guide to the SME Definition', Ref. Ares (2016)956541 - 24/02/2016

engaged in vocational training with an apprenticeship or vocational training contract are excluded in the headcount.[274] The literal interpretation of Annexe 5 above appears to be a mismatch of different relationships, with the definition of "employee" effectively referred back to existing national definitions of this term; a definition which may vary according to different member states. For example, contrary to the status of "employee" granted to partners engaging in a regular activity in the enterprise and benefiting from financial advantages from the enterprise, the UK Partnership Act 1890 suggests that such a worker cannot be an employee because it is not possible for an individual to be an employee of himself and his co-partners.[275]

Moreso, "employees" are generally believed to have better rights than "workers". "Workers" in turn are more likely to have better rights than "self-employed persons". Categories of workers who are believed to be vulnerable, provided with the least rights and often subject to exploitation includes agency workers, casual workers, sessional workers, homeworkers etc[276]

As we would see, the legal tests for classifying employment relationships applied in some jurisdictions like the UK is often flawed due to new and sometimes complex ways of working particularly for self-employed persons. Outdated employment norms from the 18th or 19th century can be inefficient. Whether the law of contract is suitable for analysing the more complex and diverse employment relationship has always been in contention.

2.4.1.1 Full Time Vs Part Time Employment

Section 230 (1) and (2) of the UK Employments Rights Act 1996 defines employee as "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment. (2).. "contract of employment" means

[274] Art 5 of Annex of Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (2003/361/EC)
[275] Partnership Act 1890, s 1; *Ellis v Joseph Ellis & Co* [1905] 1 KB 324; *Cowell v Quilter Goodison and QG Management Services* [1989] IRLR 392; *Tiffin v Lester Aldridge LLP* [2012] IRLR 391
[276] Sam Middlemiss, *Employment Law in Scotland*, (2nd Edition, February 2015, Bloomsbury Professional)

a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".

It is interesting to point out that despite the definition of "employee" stated in the UK Employment Rights Act 1996, sec 23 of the UK Employment Relations Act 1999 grants power to the secretary of state to extend the employment right beyond employees or workers. Although there are no known cases where this power has been exercised, this power can grant employment rights to non-employees.

To calculate headcount, para II of the above explanatory notes states that one AWU corresponds to one full time worker or person working on its behalf during the entire reference year. The question will then be, how many hours of work per week will be full time? There is no prescribed amount of hours in the UK that constitutes full time as this would usually be dependent on the employment contract, although it is widely recognised that full time work is considered above 35 hours.[277] This is not the case in Germany where a minimum of 40 hours is prescribed as fulltime,[278] yet 35 hours per week or 1,607 hours per year is considered full time in France.[279] Therefore, in the above scenario, while the five employees working between 35 and 60 hours per week can be seen as working full time in the UK and France, this may be untrue in Germany if they are working fewer than 40 hours.

For some part-time employees, the guideline seems straightforward and prescribes for a fraction of the full time equivalent although it is arguable why an employee working 60 hours a week cannot be seen as working one full time and more for the purposes of calculating AWU. Some part time working can often raise a number of legal issues particularly when it differs from the "standard model" of full-time, permanent or direct employment (commonly referred to as atypical work). The term "Atypical workers"

[277] <https://www.gov.uk/part-time-worker-rights> accessed 7th June 2018

[278] Germany Trade and Investment, 'Investment Guide' <https://www.gtai.de/GTAI/Navigation/EN/Invest/Investment-guide/Employees-and-social-security/terms-of-employment.html accessed 8th June 2018>; *Arbeiterwohlfahrt Der Stadt Berlin E V V. Bötel* [1992] IRLR 423

[279] Delloitte, 'Doing Enterprise in France', (January 2014), <https://www2.deloitte.com/content/dam/Deloitte/fr/Documents/Pages/International%20Services%20Group/Deloitte_Doing-enterprise-in-france-gb_janvier2014.PDF> accessed 12 June 2018, 30

generally cover workers on zero hour's contract, those working for an agency or those who are self-employed (with some overlap between these groups). Recently, the UK has seen a significant increase in the number of workers on zero hour contracts, a development partly driven by technological advancement, cultural change, increased desire for flexibility[280] or as a safeguard against possible hardship. The fundamental issue in question for these types of workers is whether or not they are employees or persons working on its behalf, and for our purposes, included in the headcount as they still benefit from a generous amount of employment rights such as (redundancy, unfair dismissal etc) like a regular employee.

Moreover, we have seen that many statutory instruments and formal reports extend employment rights to presumed non employees. At the international level is the Report of 9 June 2010 (2009/2220(INI)) on atypical contracts, secured professional paths, flexicurity and new forms of social dialogue which deals with part-time and temporary work relationships for the purpose of developing a flexible form of work while seeking to achieve a new degree of harmonisation in social law. The objective of this report is not to affect employment status of individuals but instead to achieve a balance between flexibility and job security.[281]

The Temporary Agency Workers Directive (2008/104/EC) seeks to afford agency workers equal treatment with those workers directly employed by the user undertaking and address unnecessary restrictions and prohibitions on the use of agency work. In the UK, there is the National Minimum Wage Act 1998 (Sec 1), which dictates a minimum wage across the United Kingdom from workers over 25years regardless of employment status;

[280] Stephen Clarke (ed), *Atypical' day at the office: Tackling the problems of 'atypical' work, in Work in Brexit Britain: reshaping the nation's labour market,* (Resolution Foundation, 2017) 65

[281] See Common Principles of Flexicurity, adopted by the Council on 5 and 6 December 2007 and approved by the Brussels European Council of 14 December 2007 (Council doc 16201/07). See also the Commission communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, entitled 'Towards Common Principles of Flexicurity: More and better jobs through flexibility and security' (COM(2007) 359 final of 27 June 2007).

These legislations extend the rights that have been associated with employment to other categories of workers over the years. Some of these rights contribute to the legal test for determining employment in certain situations.

2.4.1.2 Apprentice Vs Employee

Whether a trainee can be considered an employee for the purposes of the 2003 Recommendation would be determined by whether or not they are considered an apprentice or not. In the English case of *Ronald James Hodges v Amanda Sue Hodges*,[282] in an attempt to determine whether a jockey was an employee or apprentice, the employment tribunal considered a number of factors:

> the contractual provisions governing the relationship of the parties;
>
> the degree of control exercised by the employer;
>
> the obligation of the employer to provide work;
>
> the obligation on the employee to do the work;
>
> duty of personal service;
>
> the provision of tools, equipment, instruments, etc;
>
> the arrangements made for tax, national insurance, VAT, statutory sick pay;
>
> the opportunity to work for other employers;
>
> other contractual provisions, including holiday pay, sick pay, notice, fees, expenses, etc;
>
> the degree of financial risk and the responsibility for investment and management;
>
> whether the relationship of being self-employed is a genuine one or an attempt to avoid modern protective legislation;
>
> and the number of assignments, the duration of the engagement, and the risk of running bad debts.[283]

[282] Case Reference Number: (LON/98/288)

[283] BSM (1257 Ltd) v Secretary of State for Social Services [1978] ICR 894; Global Plant Ltd v Secretary of State for Health and Social Security [1971] 3 All ER 385; Window & Door Services and Molloy v Revenue and Customs Commissioners, SpC 733 JL; Nethermere (St Neots) Ltd v Taverna and Gardiner [1984] IRLR 240 (CA); Stevedoring and Haulage Services Ltd v Fuller (2001, IRLR 627); Ahmet v Trusthouse Forte Catering Ltd) IDS Brief 250; Stevenson v Delphi Diesel Systems Ltd (2003, ICR 471); Ready Mixed Concrete Ltd (South East) v Ministry of Pensions and National Insurance) [1968] 2QB 497; Willy Scheiddegger Swiss Typewriting School (London) Ltd v Ministry of Social Security) (1968) 5KIR 65; Davis v New England College of Arundel [1977] ICR6; WHPT Housing Association Ltd v Secretary of State for Social Services [1981] ICR 737; Tyne and Clyde Warehouses Ltd v Hamerton [1978] ICR 661; Market Investigations Ltd v Minister of Social Security [1969] 2QB 173; Young and Woods Ltd v West [1981] IRLR 201*Hall v Lorimer* [1994] IWLR 209 (CA); *Autoclenz v Belcher* [2011] IRLR 820

The tribunal noted inter alia that in this particular case although the trainer's consent was required to any jockey ride, the degree of control was limited. Also, the contractual provisions were wholly consistent with the jockey being either self-employed or employed by a third party. The tribunal admitted that the test was not of great assistance in this case, and there was no single factor that could determine the status of apprenticeship.[284]

Over two decades after the decision in *Hodges*, the position regarding apprentices is still unsettled. For example, in *Flett v Matheson*,[285] Mr Flett commenced work with an employer in 2002. Nine months later, he signed a tripartite 'individual learning plan' agreement under the electrical industry's modern apprenticeship training scheme. Upon dismissal, he claimed that he had been working under an apprenticeship contract and was therefore entitled to damages for breach of contract as laid down by the Court of Appeal in *Dunk v George Waller & Son Ltd*.[286] He sought damages to the amount of GBP 50,000 for the period of his training and consequential losses sustained as a result of not being able to be trained.

The Employment Appeal Tribunal (EAT) upheld the tribunal's decision that he was not employed under a contract of apprenticeship. The EAT highlighted that a 'modern tripartite apprenticeship arrangement is clearly distinct from the traditional concept of apprenticeship'. The EAT agreed that Dunk-type damages would be applicable where there was an obligation on the employer to train, teach and enable qualifications; and on the employee to attend, receive training and work for the same period, with or without a deed of indenture, but this was not the case here. However, the tribunal was wrong to hold that Mr Flett was also not employed under a contract of employment.

The application of the principles in cases like *Hodges* and *Dunk* to those engaged in a modern training programme can be quite confusing. Today, it is very common to find an employment-like training programme in some companies. In the UK, these trainees are

[284] Para 2.36
[285] [2005] IRLR 412 ; see also *Lee v Chassis & Cab Specialists Ltd* - [2011] All ER (D) 178 (Feb)
[286] [1970] 2 QB 163

sometimes referred to as graduate trainees/apprentice. In this arrangement, the trainee is often treated as an official employee of the company. The training programme is usually for a fixed period of time and trainees may be retained under full time employment after this period subject to performance.

It is safe to assume that graduate trainees can be regarded as employees as they are no better than experienced employees during their probationary period. It is, however, important to highlight that, unlike graduate trainees, professional trainees such as trainee solicitors and trainee doctors whose training programmes are a requirement for an award or qualification may not be treated as employees. This is because their training programme is likened more to vocational training, without which the trainee is unable to qualify for a certification.

2.4.1.3 Volunteer Vs Employee

The situation regarding an apprentice can be as complex as that of volunteers due to the nature of their engagement. In *Melhuish v Redbridge Citizens Advice Bureau*,[287] a Citizens Advice Bureau volunteer was not given an employment contract and had no entitlement to holiday pay, sick pay or notice. There were no disciplinary or grievance procedures applicable, but he attended training courses and received travel expenses. When his work came to an end, he claimed unfair dismissal. The tribunal rejected his claim, and the EAT dismissed his appeal based on the precedent set by *South East Sheffield Citizens Advice Bureau v Grayson*.[288] The latter case was decided on the ground that there was no reciprocal obligation or contract for service, and the existing guideline did not constitute an obligation on the volunteer to do work. The fact that the volunteer took part in training programmes was not enough consideration when compared to remuneration. According to the EAT, in this case, remuneration is the 'fundamental of any contract of employment'.

The position is much clearer in France, where there is a standard requirement for an apprenticeship, ie persons between the ages of 16 to 25 on a work-study contract

[287] [2005] IRLR 419; see also *X v Mid Sussex Citizens Advice Bureau*, [2012] UKSC 59; [2013] 1 All E.R. 1038
[288] [2004] IRLR 353

alternating academic training at an apprentice training centre (centre de formation d'apprentis) and vocational training in a company.[289]

2.4.1.4 Agency Worker Vs Employee

Although it may seem clear that an agency worker is not an employee of the end user, his or her tenure of engagement may sometimes create confusion even for a court. In *Franks v Reuters Ltd*,[290] Mr Franks, an agency worker, had been working for a client for six years. In a case of unfair dismissal, the Court of Appeal held that the length of assignment was significant and he had effectively been integrated into the employer's organisation. However, the court gave a caveat that length of service would not always mean that there was an implied contract.

Another crucial element for determining whether a person is an employee is that the employer ultimately controls what the employee does. In the case of *Dacas v Brook Street Bureau (UK) Ltd,*[291] the claimant worked at a local authority hostel for six years. She had obtained the job through the defendant's employment agency, to whom the authority had contracted out recruitment. She entered into a written 'Temporary Worker Agreement' which provided, inter alia, that it 'shall not give rise to a contract of employment between the defendant and the temporary worker, or the temporary worker and the client'. The Court of Appeal held that the employment tribunal had correctly concluded that the express contract between the defendant and the claimant was not a contract of service. However, despite the express clause to the contrary, there was an implied contract of employment between the council and the claimant.

In Germany, agency work is heavily regulated, and the position is quite clear. It is a requirement for an employer to obtain a licence from the unemployment agency to lease employees to customers. If the agency does not have the licence, the work the employee,

[289]Delloitte, 'Doing Enterprise in France', (January 2014), <https://www2.deloitte.com/content/dam/Deloitte/fr/Documents/Pages/International%20Services%20Group/Deloitte_Doing-enterprise-in-france-gb_janvier2014.PDF> accessed 12 June 2018, 23

[290] [2003] IRLR 423

[291] [2004] IRLR 358

does through the agency for the customer automatically creates an employment relationship between the employee and the customer.[292]

In recognition of the varying rights of agency workers in national legal systems, the EU introduced the Temporary Agency Workers Directive which was implemented in the UK in October 2011 by the Agency Workers Regulation.[293] Temporary agency workers are now afforded equal treatment in relation to pay, holidays, duration of working time, breaks, rest etc. as if they were employed directly by the user undertaking.[294] Although the Directive does not affect the employment status of workers, Art 1 (3) and Art 5 (2-4) allow member states to apply exemptions after consulting with social partners and to include derogations or a qualifying period for the enjoyment of these rights.

In the case of *Moran and ors v Ideal Cleaning Services Ltd and Anor*,[295] the appellants were employed by Ideal Cleaning Services but placed with the respondent - Celanese Acetates Ltd. The relevant workers had worked for between 6 to 25 years before they were made redundant. They claimed that the Agency Workers Regulations (AWR) applied to them and was therefore entitled to similar basic working conditions and redundancy pay as if they had been a direct employee of the respondent. The tribunal dismissed their claim and the tribunal's decision was upheld by the EAT clarifying that the (AWR) will not apply to agency workers who are indefinitely placed with an end user.

Given this orientation, it is worth considering situations, for good business reasons, where an employer will prefer an open-ended contract or have the need to integrate non employees into its company in order to train or manage them in the same way as its employees. Moran's case above shows how easy it is for potential atypical workers to be excluded from regulatory protection due to the manner in which work is carried out or the duration.

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[292] Pascal R. Kremp, Employment and employee benefits in Germany: Overview <https://uk.practicallaw.thomsonreuters.com/35033433?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1#co_anchor_a256790> accessed 18 October 2018

[293] Agency Work Regulations, SI 2010/93

[294] Article 5(1)

[295] UKEAT/0274/13/DM

Leighton and Wynn believes that many relationships operate effectively, but others are characterised by abuse of bargaining power leading to involuntary acceptance of the work pattern and imposition of apparent employment status.[296] Thus some employees have little or no choice in accepting work contracts or instructions which place them indefinitely with an end user.

2.4.1.5 Contract for Service Vs Employment

A joint statement of the European federations confirms that a growing percentage of the work force can be described as independent /self-employed/ freelance/ casual workers – a whole range of terms that denote an increasingly common employment reality.[297]

According to Mummery LJ in in *Dacas v Brook Street Bureau (UK) Ltd*:

> "The development of 'complex employment relationships', which flourish on the theoretical freedom of the people in the labour market to make contracts of their choice, has added to the difficulty of deciding whether an individual, doing paid work for another, does so under a contract of service…"[298]

Persons under a contract for service are not usually considered employees but may qualify as "persons working on its behalf". It has been established that one of the tests for distinguishing contract of service from contract of employment is personal performance.[299] The Court of Appeal held in the case of *Express and Echo Publications Ltd v Tanton*[300] that a driver's contract which allows for delegated work could not be a contract of employment.

In contrast, in *MacFarlane and anor v Glasgow City Council*[301] the EAT held that the employment tribunal had erred in law in its decision because the gym instructors could

[296] Patricia Leighton and Michael Wynn, 'Classifying Employment Relationships—More Sliding Doors or a Better Regulatory Framework?' (2011) 40 Ind Law J, 1, 5, 6

[297] Joint Statement of the European Federations representing cultural and creative Collective Representation of Freelance Workers in the Media/Entertainment/Creative Sector – "Trying to Shed Some Light on a Grey Area"-2010 http://www.scenaristes.org/pdfs/freelance.pdf accessed 25 October 2018

[298] Mummery LJ in Dacas v Brook Street Bureau (UK) Ltd [2003] IRLR 190.

[299] *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1

[300] [1999], IRLR, 36

[301] [2001] IRLR 7

arrange for a substitute to attend on their behalf if they were unable to attend, subject to approval. That right was inconsistent with the existence of the contract of employment. The 2018 English Supreme Court decision in *Mullins v Smith*[302] shows that a person engaged under an agreement that purported to make him an independent contractor can actually be classed as a worker for the purposes of claims brought under the Employment Rights Act 1996, the Working Time Regulations 1998 and the Equality Act 2010.[303]

Similarly, in France, independent workers are not considered employees and are not bound by the French Labor code or collective bargaining[304] agreements. Rather, they work within the scope of their contract (*contrat d'entreprise*). They are required to register with social security scheme for non-employees and pay the necessary social security contribution.[305]

It can be argued that legal developments including recent policy in the EU and some member states affording greater protection to self-employed persons have made the line of the legal test for determining employment status more blurry. For instance, the 2010 EC Directive 2010/41/EU on equal treatment for self-employed persons emphasises that self-employed persons or their spouse and partner is entitled to basic statutory maternity leave and pay. Historically, basic holiday entitlement and maternity rights is seen as one of the employment rights available to employees only and have formed part of the rationale for deciding employment in some case laws.

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[302] [2018] UKSC 29

[303] See also recent decisions such as *Pimlico Plumbers v Smith* [2017] IRLR 323; *Uber BV, Uber London Ltd, Uber Britannia Ltd v Aslam, Farrar and ors* (UKEAT/0056/17/DA)

[304] Article 28 of the Charter of Fundamental Rights of the European Union sets out the "Right of collective bargaining and action" as follows: "Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action."

[305] Philippe Desprès, France: The "Independent Worker" and "Employee" Status, <http://www.mondaq.com/france/x/40464/employee+rights+labour+relations/The+Independent+Worker+and+Employee+Status> accessed 18 October 2018

2.4.1.6 Unpaid Family Worker Vs Employee

A family business is a popular form of enterprise in the UK. The top 100 family businesses in the UK have a total combined turnover of GBP 185 billion and collectively employ 374,828 people.[306] In relation to family members working without remuneration and under no written contract of employment, it is important to bear in mind that a contract of employment can be written, oral or implied.[307] Therefore, the relevant issues should not be that the remuneration test was not fulfilled but whether there was an intent to create a legally binding relationship, degree of control, provision of capital, level of risk, or other profit sharing arrangement or any other legal test for determining employment relationship have been met.

It is trite law that the nature of the contractual relationship is not determined by the will expressed by the parties or the title given to their agreement, but by the conditions under which the work is done.[308] The extent to which a court or tribunal can examine the parties' negotiations to accurately interpret a contract has been considered in a number of cases. In *Carmichael v National Power*,[309] the tribunal considered the advert as well as the conduct of the parties in order to determine the meaning of the written contract. The tribunal will often interpret the terms of the contract in light of the facts and circumstances at the time.[310]

Although the remuneration test was not passed in *Nethermere (St Neots) v Taverna and Gardiner*, the test of mutuality of obligation or control test in determining the status of employment suggests that if there is a genuine obligation on the employer to provide work or pay, and the supposed employee to accept any work provided, then the relationship will constitute a contract of employment.[311]

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[306] FBU, 'Britains Largest Family Firms' <http://www.familybusinessunited.com/news/britains-largest-family-firms/> accessed 3 July 2018

[307] Employment Rights Act 1996, S 230 (1)

[308] *Mengelle vs. Groupe Envergur,* French Supreme Court, July 12, 2005;

[309] [1999] UKHL 47

[310] *Beattie v Age Concern* EAT/580/06.

[311] [1984] IRLR 240; *Cotswold Developments Construction v Williams* [2006] IRLR 181

The exact nature of the relationship and obligations owed by each party to the other has been categorised differently in different cases.[312] In *McCarron v McCarron*,[313] the court considered a case involving a deceased farmer who engaged the services of a family member (the claimant) for 16 years without a remuneration. The initial discussions which took place between the claimant and the deceased in relation to remuneration were as follows:

> Deceased: 'I suppose you're wondering about some compensation for your work.'
> Claimant: 'I suppose I will not be forgotten.'
> Deceased: 'Well you will be a rich man after my day.'

The claimant argued that the deceased entered into an agreement with him to remunerate him for the work done on the farm by leaving to him all of his lands and so was entitled to the relief claimed on the basis of a proprietary estoppel arising from the statements of intention made by the deceased and the actions of the claimant made in reliance of those statements. Although it was clear that the claimant had a variety of other commitments from time to time, he gave evidence of his continuing involvement on behalf of the deceased. The judge upheld the claim of the claimant based on contract.

Indeed, every case has to be considered on its own merits, and the court will examine every aspect of the relationship with no single factor being the determining factor. Ultimately, in response to the question on the status of Company X, there is no clear cut answer. Its status will depend in which country Company X is registered and the nature of each relationship regardless of the label.

2.4.2 Financial Linkages

The 2003 Recommendation introduced methods to calculate the financial threshold in order to gain full insight into the economic position of different types of enterprises and

[312] *Clark v Oxfordshire HA* [1998] IRLR 125, para 41; *Little v BMI Chiltern Hospital* (UKEAT/0021/09/DA); *Pola v The Crown* (Health and Safety Executive) [2009] EWCA Crim 655
[313] [1997] 2 ILRM 349

to exclude fake SMEs from enjoying the benefits of SMEs.[314] The three types of enterprises described by Article 3 of the Annex to the 2003 Recommendation are: autonomous enterprises, partner enterprises and linked enterprises.

In summary, an autonomous enterprise is an enterprise which either is completely independent or holds less than 25% (capital or voting rights) in another enterprise and/or another enterprise holds less than 25% in the enterprise. An enterprise may still be considered as autonomous where the 25% threshold is reached or exceeded by any of the following investors although each investor may have a stake of no more than 50% and they must not be linked to one another: (a) public investment corporations, venture capital companies, individuals or groups of individuals with a regular venture capital investment activity who invest equity capital in unquoted businesses ('business angels'), provided the total investment of those business angels in the same enterprise is less than EUR 1.25 million; (b) universities or non-profit research centres; (c) institutional investors, including regional development funds; (d) autonomous local authorities with an annual budget of less than EUR 10 million and fewer than 5,000 inhabitants.

These exceptions to the definition of autonomous enterprises ensure holdings by the above investors do not result in the enterprises being partner enterprises. This is intended to play a positive role in enterprise start-up and financing because mutually beneficial linkages are pertinent in investment and development.

A partner enterprise is an enterprise that is not linked but where one of them holds (either on its own or in combination with other enterprises with which it is linked) 25% or more of the capital or voting rights in the other. For the purposes of calculation of a partner enterprise, the ceiling tests are applied to figures based on the accounts of the enterprise after inclusion of a proportion of the figures from the accounts of any partner enterprise.

[314] The new SME definition: User guide and model declaration, Enterprise and Industry Publications, <http://www.eusmecentre.org.cn/sites/default/files/files/news/SME%20Definition.pdf> accessed 5 July 2018

A linked enterprise is an enterprise with any of the following connections with each other: (a) majority of shareholders' or voting rights; (b) a right to appoint or remove the majority of administrative, management or supervisory bodies of another enterprise; (c) the right to exercise a dominant influence over another enterprise pursuant to a contract or its memorandum or articles of association; (d) an enterprise, which is a shareholder in or member of another enterprise, controls alone, under an agreement with other shareholders in or members of that enterprise, a majority of shareholders' or members' voting rights in that enterprise. For the purposes of calculations, all the amounts included in the accounts of the linked enterprises, irrespective of the degree of control, are aggregated.

It is important to note that there is a presumption that no dominant influence exists if the investors do not involve themselves directly or indirectly in the management of the enterprise in question, without prejudice to their rights as stakeholders. This presumption has been criticised for having little value as:

> "... venture capital investors will almost always involve themselves at least indirectly in the management of their investee companies. Indeed, as well as such investors wishing to provide some safeguards for their investments, investee companies often want to have venture capital involvement in their management, since, for example, venture capital representatives on boards can bring a great deal of experience and expertise to young companies".[315]

The test of dominant influence should be seen as day-to-day management as opposed to occasional, strategic management.[316]

Another major criticism of the description of linked enterprises is that it does not take into consideration the nature of various financial investments. All portfolio companies invested in by a single fund can be categorised as linked enterprises if the investment exceeds the threshold. The position is particularly challenging for micro enterprises due

[315] James Hill and Simon Court, 'Small Is Beautiful' – Taxation, 26 Jun 2003, 343
[316] Ibid

to the restricted nature of their funding. Therefore, there is the risk that micro enterprises who are not in the strict sense members of a group are treated as such simply because they sourced capital from a private equity fund[317] or have access to significant additional resources (e.g. because it is owned by, linked to or partnered with a larger enterprise), and therefore will be denied the benefits offered to other similar businesses as they fail to qualify for SME status.[318]

A court recently annulled two ECHA administrative decisions involving the SME definition in the 2003 Recommendation, particularly relating to the independence of enterprises.[319] The Court considered a charge levied following an ECHA check of the company's size; SMEs benefit from reduced fees under the REACH Regulation. The court noted that the ECHA had wrongly interpreted Article 6 of the Annex to the 2003 Recommendation and unduly denied Crosfield and K-Chimica (a company with less than 20 employees) the benefit of the reduced REACH registration fee for small enterprises. The ruling highlighted that the relevant articles were not formulated in a clear way and could lead to granting SME status to fake SMEs.

The court further highlighted that the challenges of dealing with costly and/or complex EU regulations are principally the same for all enterprises. The consequences of this could be an artificial increase in the number of SMEs and large enterprises designing corporate structures such as immediate empty shell special purpose companies to unjustly benefit as SMEs.

Ultimately, seventeen years of implementing the 2003 Recommendation has proven that a number of concepts require clarification. There is a need to clarify practical the application of the 2-year rule (Article 4.2) in case of spin-offs.

[317] European private Equity Ventures Association, "EVCA's comments on the current EU SME definitions" 10th Feb 2009,< https://www.investeurope.eu/media/22807/09-02-10-evca_Comments_EU_SME_Definition.pdf> accessed 10th July 2018
[318] User guide to the SME Definition, European Commission Ref. Ares(2016)956541 - 24/02/2016, 4
[319] T-675/2013 *(K-Chimica)* and T-587/14 *(Crosfield)*; ECHA/NI/14/15

In addition, the data to be used in determining the status of a company would be those relating to the latest approved accounting period and calculated on an annual basis.[320] Therefore, it may well be that a company is theoretically an SME at the end of its approved accounting year but in practice, a large enterprise (which continues to enjoy the benefits of SMEs) for another 11 months because it has engaged more staff and/or increased its financial threshold in the current financial year or vice versa.

2.5 Conclusion

Micro enterprises are important drivers of economic growth and development, employment, income, innovation and productivity. The above discussions and analysis set out the foundations for the rest of this thesis as they re-affirm the importance of micro enterprises and their distinctive characteristics, which makes them a peculiar class of enterprise.

By exploring the various definitions of small enterprises generally, it was determined that the most acceptable definition is itself imperfect. The discussions on the distinct nature of micro enterprises and the data on their death rates show that these enterprises are very vulnerable and need help, particularly in their formative years. The implication of treating micro enterprises as a sub-category of small enterprises or a broad category of SMEs is that it deprives these enterprises of the protection which they would have benefited from if described as distinct, like 'consumers', 'employees' or 'agents'.

We have shown a line of flawed cases which focuses on the legal aspects of the employment relationship, having little regard for the economic, managerial and organisational aspects. Although it may be overambitious at this point to propose a uniform law of civil obligation relating to micro enterprises, a rational and comprehensive regulatory protection would be beneficial.

[320] Art 4

In the light of the uncontroversial importance of these enterprises, it is therefore important that they have information on how to make realistic market assessments, seek professional advice, and gain financial support and confidence when dealing with consumers, and more importantly, adequate regulatory protection when dealing with larger businesses particularly across borders.

The next chapter will consider the limitations for weaker parties in International B2B commercial contracts.

Chapter 3: International B2B commercial contracts: the limitations for weaker parties.

3.0 Introduction

Certain principles and doctrines form the bedrock of contract law in most legal systems. Two of such fundamental principles are freedom of contract and party autonomy. Other concepts such as the protection of weaker parties, though relatively modern, are fundamental principles also embedded in the contract law of a number of legal systems. To better appreciate the aim of this thesis, which is to demonstrate why micro enterprises in international MB2B commercial contracts should benefit from the regulatory protection afforded to weaker parties regardless of the doctrine of freedom of contract, it is necessary to explore the history, definition, and rationale of relevant concepts as a background.

Therefore this Chapter provides a background to the research by exploring fundamental legal and economic concepts such as Freedom of Contract, Economic Power, Unfairness and the Rationale for the protection of weaker parties in International B2B commercial contracts. It begins with the history of the doctrine of Freedom of Contract and Party autonomy by tracing the evolution of the doctrine of freedom of contract under common law and the civil law system; and party autonomy under European law. Secondly, It examines the mode of legal encroachment on these doctrines, comparing them with the traditional nature of legal encroachment. Thirdly, it analyses the rationale for the protection of weaker parties in commercial transactions looking into the concept of morality and contract law; and the interrelationship between fundamental rights and the protection of weaker parties. Fourthly, it considers the concept of economic power and the notion of unfairness in commercial contracts. It does this by highlighting relevant economic theories and applying it to commercial relationships involving Micro enterprises; it then goes further to discuss what is considered unfair in some legal systems using extensive but relevant case laws and the procedural aspect of unfairness. Fifthly, it discusses the distinction between consumer and business and the dichotomy in the application of the doctrine of freedom of contract whilst also drawing out the similarity between micro enterprises and consumers from the perspective of the

economist. It concludes by examining the possibility of protection using the rules of construction in the interpretation of unfairness in favour of micro enterprises.

3.1 The doctrines of Freedom of Contract and Party Autonomy

The concept of contract as a legal act can be said to have developed from the 'will theory' because parties to an agreement are seen to make agreements as per their own terms and will, and such a union of wills is worthy of respect[321] hence, the limited role of intervention of the law and the court in private contracts.[322] Fixed at the core of the objective of the 'will theory' is that the essence of a right consists of opportunities for the right-holder to make normatively significant choices relating to the behaviour of someone else[323].

Freedom of contract is a widely accepted principle in the law of contract and enables parties to agree on the terms and conditions that will govern their contractual relationship,[324] and the courts will, in the absence of a vitiating factor, give effect to the terms of that contract.[325] The doctrine of freedom of contract grants contracting parties the creative power to act as private legislators in their contractual process.[326] This principle is an old one and forms the axiom of the contract law of most legal systems.

On the other hand, party autonomy is a principle that allows parties to an international contract the power to agree on the substantive law that governs their contract and the law governing jurisdiction, subject to certain parameters and limitations.[327] Party autonomy, a widely accepted principle, like freedom of contract, has evolved in many

[321]Thomas Atkins Street, *The History and Theory of English Contract Law (Beard Books,* 1999) 53; Peter Jaffey, "A new version of the reliance theory", <https://bura.brunel.ac.uk/bitstream/2438/4166/1/Reliance%20theory%20of%20contract.pdf.> accessed 16 May 2019, 29

[322] Harry N Scheiber (ed), *The state and freedom of contract*, (Stanford University Press, 1998) 92; James Gordley, *The philosophical origins of modern contract doctrine*, (Oxford, 1991); Siti Aliza Alias and Zuhairah Ariff Abdul Ghadas, "Inequality of Bargaining Power and the Doctrine of Unconscionability: Towards Substantive Fairness in Commercial Contracts",(2012) AJBAS, 6(11): 331,

[323] Matthew H. Kramer, "On the Nature of Legal Rights" (2000) Camb. Law J., 59, 474

[324] Peter Nygh, *Autonomy in International Contracts* (Clarendon Press 1999) 10

[325] *Calcutta and Burmah Steam Navigation Co Ltd v De Mattos* (1863) 32 LJQB 322 at 328; *Vita Food Products v Unus Shipping Co Ltd* [1939] UKPC 7; *Suisse Atlantique Société D'armement Maritime SA v NV Rotterdamsche Kolen Centrale (*1967) 1 AC 361.

[326] Isaiah Berlin, '"Liberty", in Four Essays on Liberty' (1969) cited in Reshma Korde, 'Good Faith and Freedom of Contract' (2000) UCL Juris Rev 1.

[327] Symeon C. Symeonides*, Codifying Choice of Law Around the World: An International Comparative Analysis,* (Oxford Scholarship Online, June 2014) 111; Mo Zang "Contractual choice of law in contracts of adhersion and party autonomy" (2008) Akron law review, 41, 6; *Vita food products inc v Unus Shipping* (1939) AC 277

ways since the 16th century and can be seen as the conflict of law aspect of freedom of contract.[328] As this doctrine is premised on freedom of contract and considered an aspect of freedom of contract, this thesis refers to the term "freedom of contract" to include party autonomy.

3.1.1 Evolution of Freedom of Contract

Some writers believe that the concept of freedom of contract was not developed until the eighteenth century.[329] Attiyah pointed out in his historical narrative of the development of freedom of contract that in England, before the year 1770, the powers of both the King and the parliament were unstable, the main political power was in the hands of the aristocracy, and although trade and commerce were blooming, the industry was yet to be sophisticated.[330] Thereafter, during the period between 1770–1870, with the development of the free market and the ideals of political economists came the evolution of contractual principles, including the doctrine of freedom of contract.

Parry[331] argues that the freedom and sanctity of a contract can be directly traceable to early religious and ecclesiastical associations, and their protection by the then Court of Chancery (court of conscience) is due to the recognition of their importance to international merchants. Prior research suggests that even at the early period of formative years in English law, freedom of contract was not alien to the lawyers of the 16th century. Consequently, a person who broke a promise would be liable in an action of assumpsit.[332] In fact, Baker, in his assertive review of Attiyah, pointed out that "all the features of contract theory associated with the period after 1770 were present in the law long before."[333]

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[328] David Mcclean and VeronicaRuiz Abou-Nigm, *The conflict of law,* (Sweet and Maxwell, 2012*) 344;* Mo Zhang, "Party Autonomy and Beyond: an international perspective of contractual choice of law" 20 Emory Int'l L. Rev.(2006) 511, 2; Peter Nygh, *Autonomy in international contracts*, (OUP, (1999) 3; J Kuiper, *EU Law and Private International law: The interrelationship in contractual obligations* (Boston: Martnus Nighoff, 2012) 44

[329] Maria Rosaria Marella, "The Old and the New Limits to Freedom of Contract in Europe" (2006) Eur Review of Contract Law 2(2), 257

[330] P. S. Atiyah*, The Rise and Fall of Freedom of Contract* (Oxford Scholarship Online 2012) 12- 13

[331] Sir David Hughes Parry, "The Sanctity Of Contracts In English Law", (1959) The Hamlyn Lectures Tenth Series, London Stevens & Sons Limited, 7

[332] James Gordley, *The Philosophical origins of modern contract doctrine*, (Claredon Press, oxford, 1991) 2

[333] J. H Baker, "Review of Attiyah , Rise and Fall", (1980), Mod. Law Rev. 43, 4, 467-469

Early case law records that it was argued in *Browning v. Beston*[334] that "the agreement of the minds of the parties is one thing the law respects in contracts, and such words as express the assent of the parties, and have substance in them, is sufficient". It is true, however, that though freedom of contract may pre-date the eighteenth century, as we will see from various case laws below, the eighteenth century in England witnessed dramatic changes in the courts' treatment of contractual disputes and the application of freedom of contract.

Unlike common law legal systems as in England, civil law was based on the Roman text of the *corpus iuris civilis* of the emperor Justinian which was in force in most parts of continental Europe before the civil codes were enacted.[335] Although the *corpus iuris civilis* contained particular rules and general maxims, it hardly provided any systematic doctrine. This is not to say that basic principles such as freedom of contract, duress, fraud, etc were not recognised; Roman jurists gave relief in such situations but formulated no general doctrine.[336] Recognising that the lack of an explicit legal doctrine of such fundamental importance may lead to legal uncertainty, a small group of theologians and jurists in the 16th and early 17th centuries attempted to synthesize the Roman legal texts with the moral theology of Thomas Aquinas. Legal historians posited that the concept and doctrines of private law developed by them and their successors form the basis of contract law, one of which is the doctrine of freedom of contract.[337]

Also, freedom of contract was enshrined in the 1804 French Civil Code,[338] which provides that agreements lawfully entered into by parties take the place of law in respect of those contracting parties. With the enactment of the Civil code in France, a radical shift was noticed in the way French lawyers conceived and interpreted the element of consent in a contractual relationship. The new approach became centered on the principle of the *autonomie de la volonte*; contract as self-regulation stemming from the parties

[334] (15S5) 1 Plowden 131, 140-141, Sir William Holdsworth
[335] James Gordley, *The Philosophical origins of modern contract doctrine*, (Claredon Press, oxford, 1991) 1
[336] Ibid, 2
[337] Ibid, *3*
[338] Art 1134

intentions.[339] The principle of freedom of contract is further reiterated in the new French Code[340]. Some jurists even consider the restatement of this principle as the first substantive rule (in the contract section) under the new French code, with a clear title, as symbolic of the significance of this principle.[341]

A contract is seen as a legal transaction that comes into existence by way of a declaration of wills. In German law, although a declaration of will (*willenerklarung*) is an important characteristic of private law,[342] the German Civil Code (BGB), which came into force on 1 January 1900, made no reference to freedom of contract or other fundamental contract law concepts. Zimmermann[343] asserts that the BGB is not doctrinaire in spirit and outlook because its drafters felt no need to "provide authoritative definitions for fundamental concepts" nor saw the need to determine questions of legal construction. Art 2 (1) of the Basic Law for the Federal Republic of Germany (as amended up to Act of July 13, 2017) , however, iterates the freedom of parties to enter into contractual and non-contractual relationships insofar as this does not violate the rights of others or offend against the constitutional order or moral law.

Apart from the wide recognition of this principle in various national legal systems, several international law instruments also recognise its importance. This doctrine is a substantive provision under the Principles of European Contracts Law;[344] the UNIDROIT Principles of International Commercial Contracts 2016;[345] Vienna Convention for International Sales of Goods,[346] etc. Even where there are no express provisions relating to freedom of contract,

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[339] John Bell, Sophie Boyron and Simon Whittaker, *Principles of French law*, (2nd edition, Oxford, 2007) 297

[340] New article 1102 *Ordonnance no 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations.* Translated by John Cartwright, Bénédicte Fauvarque-Cosson and Simon Whittaker <http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf> accessed 21 April 2018

[341] Rowan, Solene "The new French law of contract". (2017) Int'l & Comp. L.Q. ISSN 0020-5893; Alexis Downe, "The Reform of French Contract Law: A Critical Overview", Revista da Faculdade de Direito – UFPR, Curitiba, vol. 61, 1, jan./abr. 2016,43 – 68 < https://revistas.ufpr.br/direito/article/view/46003> accessed 25 April 2018

[342] Gerhard Robbers, *An Introduction to German Law*, (Auflage 1998) 203

[343] Reinhard Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives*, (Oxford Scholarship Online, 2012) 24

[344] Article 1:102 of No. IV.1.1 of the Principles of European Contract Law 2002.: provides that:
(1) Parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles.
(2) The parties may exclude the application of any of the Principles or derogate from or vary their effects, except as otherwise provided by these Principles.

[345] Article 1.1

[346] Article 6

this basic principle of contractual freedom is usually recognised by provisions that allow contracting entities to exclude the application of a law or derogate from an otherwise applicable law or vary the effect of any of its provisions.

The question of how absolute freedom of contract is has been a central issue for centuries. Regardless of the agreed position that contracts represent a subjective meeting of the minds: *consensus ad idem*, the scope, extent of the application and the exceptions to the doctrine of freedom of contract has developed differently over the years in different jurisdictions.

Neil Cohen,[347] drawing upon teachings from Isaiah Berlin's Four Essays on Liberty,[348] distinguishes between two freedoms of contract. i.e. the positive freedom of contract, which means that parties are free to create a binding agreement reflecting their free will and the negative freedom of contract, which means that parties are free from the obligations so long as the binding contract has not been concluded. Absolute freedom of contract suggests the ability to enter into a contract without any legal restriction on the contractual provisions or bargains the parties can agree. Cohen[349] and Duncan[350] pointed out that although men are legally free to contract, they are not economically or socially free. The idea of absolute freedom of contract seems elusive, but a legal system guided by freedom will only allow limited intervention based on good reason. Freedom to contract must surely imply some choice or room for bargaining.[351]

According to Collins,[352]

> "[A] system of law committed to freedom of contract must reject controls over the fairness of contracts …, the principle of freedom to select the terms must prohibit intervention designed to redress the balance of obligations. At most, the law can

[347] Nili Cohen, *Pre Contractual Duties: Two Freedoms and the Contract to Negotiate* in Jack Beatson and Daniel Freidman (eds) *Goodfaith and fault in contract law*, (OUP, 2001) 25
[348] Isaiah Berlin, *Four Essays on Liberty* (OUP, 1969) 118
[349] M Cohen, "The Basis of Contract" (1933) 46 Harv L Rev 553, 562
[350] Kennedy Duncan, "Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power" (1981-1982) 41 Md L Rev 563, 568.
[351] Suisse Atlantique Société d' Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1967] 1 AC 36
[352] Hugh Collins, *The Law of Contracts* (4th edn, Butterworths, 2003) 270-271.

> scrutinize minutely the procedures leading up to the contract to ensure that the freedom of the parties was not restricted by pressure, fraud, abuse of a position of trust and other factors which interfer with the voluntariness of the consent".

From an economic perspective, predictability and certainty are important elements in international commercial transactions. Consequently, one will understand the rationale behind the argument that restricting freedom of contracts in commercial transactions is undesirable. However, for the greater good, predictability and certainty should be considered within certain boundaries. Therefore, in contracts involving weaker parties, where there is evidence of unequal power, the importance of predictability should be minimal.[353]

Indeed, no system of law would legitimize or encourage the use of fraud, duress or any other unlawful practices in its private law system. Undoubtedly, the challenge for any system of law is identifying and justifying the eradication of practices which are currently lawful but which have the effect of negatively affecting a particular class of the society; a case of justice versus fairness. A classic example will be drawing the line between economic duress and tough commercial bargaining. In *CTN Cash and Carry Ltd v Gallaher Ltd*,[354] a concept of a lawful act of duress was considered. However, the Court of Appeal was quick to point out that any extension of the doctrine of duress to encompass 'lawful act of duress' in a commercial context would be a radical move with far-reaching implications. Lord Justice Steyn explained: "Can lawful pressure count? this is a difficult question, because…the judges must say what pressures…are improper as contrary to prevailing standards. That makes the judges…the arbiters of social evaluation." Indeed, a "lawful act of duress" or any other concept that allows for a non-interventionist approach would introduce a substantial and undesirable element of unfairness in commercial transactions.

[353] Dan Stavensson, *Private International Law and the internet* (Alphen aan den Rijn: Kluwer Law International, 2007) 65- 70
[354][1993] EWCA Civ 19, [1994] 4 All ER 714

According to Domat and Pothier,[355] the French motto *Liberté, égalité, fraternité* shows that the freedom to govern oneself lies at the heart of republican thinking and they believe that freedom of contract should only be subject to *ordre public* (public order). In French contract law, the doctrine of freedom of contract is principally subject to the overriding needs of *ordre public* and this needs were perceived to be fairly narrow.[356] Portalis argues that "a man who deals with another ought to be watchful and sensible, he ought to look out for his own interest, obtain appropriate information and not neglect what is useful. The function of the law is to protect us from other people's fraud, but not to dispense us from using our own reason"[357]

Whilst most of the aforementioned jurists have adopted a minimalist approach regarding exceptions to this doctrine, the line between when someone acts with or without reasoning can often be a blurred one. In the absence of fraud or other vitiating elements, it is often difficult to determine the factors underlying any contest or negotiation leading to "agreement" of the contractual terms.

Freedom of contract can be charged with two roles: First, being the need to contract free of the regulations of the relationships between the parties and precluding any external controls; the second, is the need to entrust the contract with the task of corrective and distributive justice, protection of persons, and of efficient allocation of resources.[358] The role of private law has never been about resolving the private interest for the parties own good but more importantly, resolving them in a way that suits public interest.[359] Public policy often plays a vital role in determining the scope and extent of application of the freedom of contract. The manner in which public policy is used to support or oppose the freedom of contract can be often confusing. In the English case of *Egerton v Earl*

[355] J,de Domat, Les lois civiles dans leur ordre naturel (first published 1689-94) and R J Pothier Traite des obligations (first published in 1761) in John Bell, Sophie Boyron and Simon Whittaker, *Principles of French law*, (2nd edition, Oxford, 2007) 296
[356] John Bell, Sophie Boyron and Simon Whittake, *Principles of French Law*, (2nd edn, OUP, 2007) 296
[357] J.E.M Portalis, Discours prelminaire sur le projet de Code civil in John Bell, Sophie Boyron and Simon Whittake, *Principles of French Law*, (2nd edn, OUP, 2007) 296
[358] Stephen Smith, "Future Freedom and Freedom of Contract" (1996) 59 Modern Law Review, 167, ; Curtis Bridgeman, "Liberalism and Freedom from the Promise Theory of Contract" (2004) Modern Law Review, 683; Guido Alpa, "Party Autonomy and Freedom of Contract Today" (2010), 21 Eur. Bus. L. Rev. 119, 120
[359] Steve Hedley, "Is Private Law Meaningless?" (2011) Current Legal Problems 64 (1), 89

Brownlow,[360] Pollock CB in considering a challenge to the terms of a trust on the basis that it offends public policy, the court held that a contract is void if contrary to public policy even though the parties may have a genuine interest in the matter or an apparent right to deal with the subject matter.

Conversely, in *Re Brightlife Ltd,*[361] Hoffmann J rejected an argument that public policy required restrictions on the choice by the parties. He considered that since there was nothing which precluded the parties from stipulating in their agreement that a floating charge would crystalise into a fixed charge on the giving of notice by the charge holder, the chargee, by giving notice exercising its right to do so, effectively converted its floating charge into a fixed one prior to winding- up. It therefore followed that the fixed charge had priority over preferential creditors the Customs and Excise who had no priority under s 614(2) (b) of the 1985 Act.

In the 16th and 17th century, the doctrine of freedom of contract often overrode basic contractual principles such as consideration or privity of contract. For example, in *Dutton v Poole,*[362] a son promised his father who was about to fell timber to raise money for his daughter that he would pay £1,000 to his sister. It was held that the contract was enforceable by the sister. Chief Justice Scroggs considered that the "consideration of affection" from father to children and vice versa is sufficient to create a legal or contractual relationship and the wishes of the parties should be respected. Similarly, Lord Mansfield CJ, in *Hawkes v Saunders*[363] opined, "where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration. [As if a man promise] to pay a just debt, the recovery of which is barred by Stat Limitations…".

[360] (1853) 4 HL Cas 1, 8 State Tr NS 193
[361] [1987] Ch 200 at 214-215
[362] (1677) T Raym 302
[363] (1782) 1 Cowp 289, 98 ER 1091

The reverence for the doctrine of freedom of contract continued to grow in the early 19th century.

> "if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract".[364]

Similarly, in *Hall v Wright*,[365] the plaintiff brought an action for breach of promise to marry against the defendant. The defendant argued that after the engagement he had become afflicted with a dangerous bodily disease that made him incapable of marriage without great danger to life. The Court of Queen's Bench rejected his plea and the Exchequer Chamber held that "a party cannot set up as an excuse for the breach of a promise to marry that the performance of the conjugal duties would be dangerous to his life." However the plea disclosed no good evidence to the plaintiff's claim for damages.

By the 20th century, the court's attitude to freedom of contract began to change. The law had begun to tilt from freedom of contract towards contractual justice by weighing the application of this principle against the oppression of weaker parties.[366] Patrick Atiyah commented:

> "We have a prima facie [contract] rule, and we have a loophole, a method of escape which the judge may use if he feels the prima facie rule leads to injustice. It is impossible to be certain of the legal position in advance. And the reason is surely the result of the move away from principle toward pragmatism."[367]

Historic principles of private international law such as the "proximity principle" contained in the 1980 Rome Convention and "spatial connecting factors" under the Brussels

[364] *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 44 LJ Ch 705;
[365] (1859) EB & E 765, 29 LJQB 43
[366] *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284.
[367] P.S Atiyah, "From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law" (1980) 65 Iowa L. Rev 1249, 1257.

Convention became inadequate to achieve justice[368]. In its place came new theories akin to those in national substantive laws which are considered more pragmatic[369]. Theories such as as "functional approach" which is more content oriented and overriding mandatory rules of the forum and third states are now contained in current versions of the regulations.[370]

Some legal systems now empower designated authorities with power to ensure that all businesses comply with competition rules and consumer protection rules. For instance, in the UK, there was the former office of fair trade whose functions is now within the remit of the Competition and Markets Authority and the Financial Service Authority.[371]

The ECJ also recently affirmed that freedom of contract to enter into settlement agreements does not mean that parties have the right to agree on terms that infringe competition rules[372] In a recent case, Moore-Bick LJ and Underhill LJ[373] both agreed, as follows:

"... The governing principle, in my view, is that of party autonomy. The principle of freedom of contract entitles parties to agree whatever terms they choose, subject to certain limits imposed by public policy of the kind to which Beatson LJ refers. The parties are therefore free to include terms regulating the manner in which the contract can be varied, but just as they can create obligations at will, so also can they discharge or vary them, at any rate where to do so would not affect the rights of third parties".

[368] A Anton, *Private international law* (3rd edition, Edinburgh: w green /Thomson reuters, 2011) 36-54; Mahmood Bagheri "Conflicts of law, Economic Regulations and Corrective/Distributive Justice", (2007) Univ. Pa. J. Int. Law, 28, 136-138

[369] Symeon C. Symeonides "Rome II and Torts Conflict: A Missed Opportunity" (2008) Am J Comp Law 56, 10; Th.M. de Boer "Facultative choice of law: procedural status of choice of law rules and foreign law", (1996) Recueil des cours 257, 295

[370] Paul Beaumont, Peter McEleavy *Anton Private international law* (3rd edition, Edinburgh: W green /Thomson reuters, , 2011)

[371] Gov.UK, "Office of Fair Trading has closed", <https://www.gov.uk/government/organisations/office-of-fair-trading> accessed 14 March 2019

[372] *Teva UK Ltd and others v European Commission*, T-679/14 para 172

[373] *Plantation Holdings (FZ) LLC v Dubai Islamic Bank PJSC* , [2017] EWHC 520 (Comm) Moore-Bick LJ at [119] and [120]

3.1.2 The Encroachment on Freedom of Contract

Legal encroachment on the freedom of contract is believed to be as a result of a number of factors such as morality,[374] basic rights,[375] religion,[376] and public policy.[377] Moreover, the impact of morality, rights, religion and public policy on contracts is ever evolving.

Traditionally, the nature of legal encroachment ranges from: (i) a limitation or restriction on certain types of contract. For example, by a statute passed in 1664 during the reign of Charles II, a maximum of £100 was recoverable in a gaming or wagering contract irrespective of the terms of the contract.[378] (ii) the invalidation of certain types of contract. For example, the then Sunday Observance Act, 1677[379] invalidated contracts made on Sunday or performed on Sunday, prescribing a penalty of 5s with a clear expression that any contract which is contrary to statute is considered illegal and unenforceable; and (iii) invalidating contracts which are against public policy, for example, contracts which are proven by evidence to be indecent or painful to third parties[380] or contract for the payment of money for blood or organs which would appear to be illegal in most legal systems as the commodification of such items is said to bring about a devalue of life.[381]

In modern times, it is less about making immoral contracts but more about immoral practices in allocating responsibilities and the performance of the contract. Not surprisingly, unlike the nature of traditional encroachment, in modern times, there is a

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[374] P.S Atiyah, *Promises, Morals and Law*. (Claredon Press. Oxford, 1981). See also examples in Margaret Jane Radin, "Market Inalienability" *(1987)* Harvard Law Review, 100, No. 8, 1849, 1884 where the author agues that commodification of sexual services such as prostitution is inconsistent with human flourishing based on the notion of human relating to each other as unique beings should be valued by their intellectual, emotional, social strengths and contribution.

[375] For example, The Manitoba Commission's report on human tissue (1986) <http://www.manitobalawreform.ca/pubs/pdf/archives/66-full_report.pdf>111 accessed 26 May 2018, Report contended that commerce in human organs poses severe risk of coercion, deteriorating the standard to testing, coealth defects which in turn increases danger to both the donor and donee.

[376] Nick Spencer, "Religion and Law: an introduction" (2012) <https://www.theosthinktank.co.uk/cmsfiles/archive/files/Religion%20and%20Law%20FINAL.pdf> accessed 18 July 2019

[377] *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 44 LJ Ch 705

[378] Blakey, G. Robert, 'Gaming, Lotteries, and Wagering: The Pre-Revolutionary Roots of the Law of Gambling' (1985), Scholarly Works, Paper 260.

[379] Now repealed by section 1(1) of, and Part IV of the Schedule to, the Statute Law (Repeals) Act 1969; *Smith v Sparrow* (1827) 4 Bing 84, 5 LJOS 80, 12 Moore CP 266, 130 ER 700;
Gaming Act 1845, Sec 18; *Ellesmere v. Wallace* [1929] 2 Ch. 1.

[380] Hawking J. in *Carlill v. Carbolic Smoke Ball Co*.[1892] 2 Q.B. 484, 491-492.

[381] Margeret Jane Radin, 'Market inalienability' <https://jwcwolf.public.iastate.edu/Papers/Radin.pdf> accessed on 23rd January 2019, 175

shift away from types of contracts to the type of contracting parties involved. Consequently, consumers in B2C contracts started to benefit from judicial protection regardless of the doctrine of freedom of contract. For example, English Courts will intervene where a consumer signs up to unfair provisions in a contract; or enters into a contract without independent advice; or where his bargaining powers are weakened by ignorance; or under undue influence.[382]

Moreover, a whole range of Directives and Regulations has evolved over the years providing great protection for consumers in B2C contracts. For example, where terms contained in consumer contracts are not drafted in plain, intelligible language or where there is a doubt in the meaning of a term, the interpretation most favourable to the consumer is usually applied.[383] The provisions of these Directives and Regulations serve as limitations to the doctrine of freedom of contract, offering great protection to the consumer and are discussed in detail in chapter 5 of this thesis.

Similar to the position taken by national contract law, a number of soft law instruments identify that although there is a general assumption that contracting parties know what is in their best interests, *stat pro ratione voluntas*, there is a need to protect those contracting parties who are weaker regardless of whether they are businesses or consumers. Accordingly, Article 3.2.7 of UNIDROIT Principles of International Commercial Contracts 2016 (PICC) permits a party to avoid a contract where there is a gross disparity between the parties' obligations, which gives one party an unjustifiably excessive advantage at the time of concluding the contract. A similar provision exists under Article 4.109 of the Principles of European Contract Law (PECL). Article 4.110 of the PECL extends this right, subject to certain exceptions, to unfair terms in standard contracts which cause a significant imbalance in the parties' rights and are contrary to the requirements of good faith and fair dealing.

[382] National Westminster Bank Plc v Morgan [1985] AC 686; Earl of Ayesford v Morris (1873) 8 Ch App 484; Clark v Malpas (1862) 4 De GF & J 401; Fry v Lane (1888) 40 Ch D 312; *Lloyds Bank Ltd v Bundy [1975] QB 326 at 339, [1974] 3 All ER 757 at 765* , CA, obiter per Lord Denning MR (for the decision in this case see para 296 note 20). See also again Lord Denning in *Arrale v Costain Civil Engineering Ltd* [1976] 1 Lloyd's Rep 98 at 102; *Levison v Patent Steam Carpet Cleaning Co Ltd [1978] QB 69 at 78-79, [1977] 3 All ER 498 at 502-503.*

[383] Art 5 of Council Directive 93/ 13/EEC of 5 April 1993 on unfair terms in consumer contracts

The PECL contain a general clause which invalidates contracts which are contrary to fundamental principles in the laws of member states[384] or where the performance of such a contract is illegal. Unfortunately, the PICC and PECL are only soft laws and have no binding legal effect. Supporters of legislative action in regulating unfairness in contracts would claim that only hard law is adequately effective to address such an intricate phenomenon as unfairness and unfair trading practices. Opponents would argue that such an intervention would harm the freedom of parties.[385] It appears seemingly modish to entertain a strict adherence to freedom of contract for businesses in general.

The benefits of the PECL to both B2C and B2B relations are not usually reflected in some national legal systems due to its non-binding nature. The English courts, for example, are reluctant to fill in the gaps in B2B relations as it would in B2C relationships. In *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited*[386], the Supreme Court narrowed the role of implied terms highlighting that terms will only be implied if necessary to make a contract coherent or workable. Therefore, micro enterprises in MB2B contracts should not assume that, like consumers, the court will adopt the most favourable term or adopt a common sense interpretation when the contract is coherent and workable but unfavourable to it. Further buttressing this point, Arden LJ, in *Re Golden Key,*[387] stated that 'unless the contrary appears, the court must assume that the parties to a commercial document intended to produce a commercial result, and the court must thus take into account the commerciality of the rival constructions'.

3.2 Divergence in the Nature of Encroachment on Freedom of Contract in the EU and England

The exceptions to the doctrine of freedom of contract are sometimes different amongst countries within the European Union. Some of these differences can be an outright substantive difference in the law or a difference in the interpretation or application of

[384] Principles of European Contract Law, Article 15:101
[385] Rupert Jackson, "Review of Civil Litigation Costs", Final report (2010), The Stationery Office, 78,130- 131, 200,
[386][2015] UKSC 72
[387] [2009] EWCA Civ, 636 [28] ; *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619

these exceptions. In different jurisdictions, some of these exceptions are usually contained in different headings under different theories, such as the validity of contract, formation, or dispute resolution. They sometimes act as specific, predictable rules under certain jurisdictions; some other jurisdictions hide them under vague concepts such as unconscionability, unfairness, economic pressure, good faith, public policy etc.[388]

Having said that, noticeably in most legal systems, certain uniform limitations or restrictions often apply. Doctrines such as mistake, duress, fraud, and misrepresentation[389] usually produce the effect of nullifying or vitiating a contract and can be regarded as exceptions to freedom of contract. In *Galloway v Galloway*, the court held that where parties to an agreement make a mutual mistake of fact, which is material to the existence of an agreement, the agreement is void. In the same light, in *Pao On v Lau Yiu Long,* Lord Scarman provided that for a contract to be void on grounds of duress, "there must be coercion of will such that there was no true consent …. it must be shown that the contract was not a voluntary act". In *Avon Insurance plc v Swire Fraser Ltd*[390] the court ruled that the test to apply is whether or not the statement is "substantially correct".

The aforementioned doctrines, though notable exceptions to the freedom of contract, will not form the basis of our discussions as they have a clear legal test in most jurisdictions. Rather our discussion will consider those vague concepts, which may be capable of varying interpretation or concepts for which little or no clear legal tests exist.

3.2.1 Good faith

The concept of good faith requires a duty on the contracting parties to act fairly. The good faith requirements may operate based on (i) the existing standard of fair dealing

[388] Matthias E. Storme, 'Freedom of contract: Mandatory and Non Mandatory Rules in European Contract Law' <https://www.law.kuleuven.be/personal/mstorme/Storme-Juridica.pdf> accessed 11 May 2018, 3

[389] Scriven Bros v Hindley & Co, [1913] 3 KB 564, 83 LJKB 40; Galloway v Galloway (1914) 30 TLR 531; Pao On v Lau Yiu Long [1979] 3 WLR 435 established the test for finding such an illegitimate breach as: (1) coercion; (2) absence or presence of protest; (3) adequacy of alternative; (4) independent advice provided; Barton v Armstrong (1976) AC 104; Universal Tankerships of Monrovia v ITWF (1983), Lord Selborne LC in Earl of Aylesford v Morris (1873) LR 8 Ch App 484 at 490–491, [1861–73] All ER Rep 300 at 302–303*Felthouse v Bendley*, (1862) 11 Cb (NS) 869, EWHC CP J35

[390] [2000] 1 All ER (Comm) 573; *JEB Fasteners Ltd v Marks Bloom & Co* [1983] 1 All ER 583.

recognised in a particular contracting setting, (ii) the standard of fair dealing that are dictated by critical morality of co-operation or (iii) Michael Bridges[391]' "visceral justice" which is a sort of judicial license where judges react inexplicitly to the merits of a situation and conclude cases accordingly, all in the name of good faith.[392] One can argue that freedom of contract under contract law is generally subject to the requirements of good faith and fair dealing.[393] However, good faith is not an independent legal concept which can unilaterally prove contractual unfairness and in some jurisdictions, only applies where there is an express provision in the contract.[394]

In contrast to civil law jurisdiction such as France,[395] English law has no specific role for good faith in the construction of contracts.[396] In civil law jurisdictions, this concept is important in regulating and appraising the activity of contracting parties. Lord Bingham, in the case of *Interfoto Picture Library v Stiletto Visual Programmes Ltd,* pointed out that:

> "In many civil law systems, and perhaps in most legal systems outside the common law, the law of obligations recognizes and enforces an overriding principle that in making and carrying out contracts, parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table'. It is, in essence, a principle of fair and open dealing".

Some English jurists argue that the duty to act in good faith is inherently inconsistent with the adversarial nature of contracting and there is the danger of judicial arbitrariness and the requirement for fair elasticity. Parties involved in contract negotiations inherently want to pursue their own interest and secure the best deal. Therefore, good faith only

[391] Michael Bridges, 'Does Anglo Canadian contract law need a doctrine of good faith' (1984) 9 Canadian JBL 385.
[392] H.G Beale, W.D Bishop & M.P Furston, *Contracts, cases and Manterials*, (5th edition, 2008) 287
[393] French Civil Code, Article 1104: "Agreements lawfully entered into have the force of law for those who have made them. They may be revoked only by their mutual consent, or for causes allowed by law. They must be performed in good faith".
[394] P Mankowski, 'Just how free is a free choice of law in contract in the EU?' (2017) J. Priv. Int. Law, 13, 2, 233.
[395] French Civil Code, Article 1134.
[396] Gerard McMeel, 'Foucault's Pendulum: Text, Context and Good Faith in Contract Law', (2017), Current Legal Problems, Vol. 70, No. 1, 366

applies where there is an express provision in the contract.[397] In the English case of *Walford v Miles,*[398] notwithstanding the express provision of good faith, the court denied any obligation to contract on good faith. Lord Ackner held that an agreement to negotiate in good faith was unworkable in practice because while negotiations were in existence, either party was entitled to withdraw from those negotiations at any time and for any reason. Such an agreement was uncertain and had no legal content. Countering the above decision, Lord Longmore in *Petromec v Petroleo*[399] highlighted, albeit *obiter,* that good faith should be enforceable if there is an expressed obligation in the contract.

Despite the difference in the application of the doctrine of good faith in different legal systems, Article 1.201 of PECL prescribes that "each party must act in accordance with good faith and fair dealing, and the parties may not exclude or limit this duty. In this light the ECJ recently ruled that General Court was allowed to find that trade mark was applied for in bad faith following unsuccessful collaboration discussions between parties.[400]

The question for our purposes remains: will the concept of good faith benefit micro enterprises in MB2B contracts? To be able to answer this question, it is necessary to understand the functions of the doctrine. Under German law, numerous contractual liability theories[401] have emerged from the doctrine of good faith (*Treu and Glauben*), has developed into a "judicial oak" that overshadows the contractual relationship between parties.[402] This doctrine fulfills three basic functions: it forms the legal basis of interstitial law making by the judiciary, it forms the basis of legal defenses in private lawsuits, and it provides a statutory basis for reallocation of risk in private contracts. More importantly, the doctrine has been used to create new causes of action where none existed in statutory law[403]

[397] Peter Mankowski, 'Just How Free Is a Free Choice of Law in Contract in the EU?' (2017) J. Priv. Int. Law 13(2), 233.
[398] [1992] 2 A.C. 128
[399] EWHC 127 (Comm); EWCA Civ 150
[400] *Outsource Professional Services Ltd v EUIPO* (Case C-528/18 P)
[401] German Civil Code, Sec 242
[402] Werner F Ebke and Bettina M Steinhauer 'The Doctrine of good faith in German Contract Law' in Jack Beatson and Daniel Freidman (eds) *Goodfaith and fault in contract law*, (OUP, 2001) 171; *New Balance Athletics, Inc v Liverpool Football Club and Athletic Grounds Ltd* [2019] EWHC 2837
[403] Jack Beatson and Daniel Freidman (eds) *Goodfaith and fault in contract law*, (OUP, 2001) 173

Arguably, a concept that ensures that a party takes into consideration the legitimate interest and expectations of a weaker party should be desirable. However, we again see the below arguments of some economists, which come into play. It has been argued that this concept is very unattractive because it presupposes a set of vague moral standards against which parties are judged and would call for difficult inquiries into a party's state of mind[404]. Because the concept controls substantial matters including the remedial regime in the contract, it impacts on the autonomy of the parties which contradicts the principle of freedom of contract.[405] With this level of scepticism, there is little doubt why this concept has been labelled redundant and ambiguous.

It is recognised that each party in a B2B transaction tries to achieve the best bargain at the expense of the other party and consequently, negotiating by a standard of good faith is likely not going to be in the interest of one or both of the parties. Albeit, a narrow approach, at the very least to the application of good faith in cases involving micro enterprises should be encouraged. The House of Lords introduced into Scotland this protection available to cautionary wives in *Smith v Bank of Scotland.*[406]

The dangers of determining how narrow the approach to the contractual legal requirement of good faith would require, may lead to debate. A useful starting point is the words of Lord Bingham in *Director General of Fair Trading v First National Bank plc*[407] where he suggested an objective and procedural standard test if a consumer was unfairly taken advantage of in situations where there is a 'significant imbalance' between the parties. This approach should be considered in MB2B transactions involving micro enterprises.

[404] All Answers ltd, 'Timeload Ltd Versus British Telecommunications' (Lawteacher.net, May 2019) <https://www.lawteacher.net/free-law-essays/commercial-law/timeload-ltd-versus-british-telecommunications-commercial-law-essay.php?vref=1> accessed 18 May 2019

[405] Privy Council in the case of *Union Eagle Ltd v Golden Achievement Ltd* [1997] UKPC 5

[406] *Smith v Bank of Scotland* [1998] Lloyd's Rep Bank 62, [1997] 2 FLR 862; G L Gretton, 'Sexually transmitted debt' (1997) SLT News 195; Mathias Siems, 'No Risk, No Fun? Should Spouses Be Advised Before Committing to Guarantees? A Comparative Analysis' (2002) Eur. Rev. Priv. Law, 10, 509-528

[407] [2001] UKHL 52

3.2.2 Reasonableness

Reasonableness is often used in conjunction with good faith and fairness. The term "reasonableness, could mean different things in different contexts. It could be seen as an assessment of the behaviour of the parties generally to the transaction or relationship.[408] The test is how an "archetypal other" contracting party would behave under similar circumstances.[409] The question of what is reasonable or fair can be asked in connection with the contractual terms or relating to the performance of a contract. It could also be asked when assessing the likely impact that a contract, trade custom or course of dealing will potentially have on a specific party such as consumers.[410]Often used to judge terms, the validity of exclusion terms and terms which restrict negligence claims in the law of tort, the standard of reasonableness also applies to specific implied terms in the transfer of goods in B2C transactions, or in the exclusion of liability, in some, B2B contract terms.[411]

The requirement of reasonableness in negotiating contractual terms is expressly stated in the Engish unfair contract terms Act (UCTA 1977) and the PECL. Article 1:302 of PECL directs that reasonableness is to be judged in the context of the nature and purpose of the contract, relevant circumstances, custom and practices of the particular trade using the standard of persons acting in good faith and in the same situation as the parties would consider to be reasonable. Unfortunately, it does not apply to international supply contracts.[412]

Schedule 2 of UCTA in providing a guideline for the test of reasonableness considers the following: (i) the bargaining strength of the parties, taking into account alternative

[408]Boris Kozolchyk, 'Drafting Commercial Practices and the Growth of Commercial Contract Law', (2013) 30 Ariz. J. Int'l & Comp. L. 426

[409] Boris Kozolchyk, The Law of Commercial Contracts in a Comparative and Economic Development Perspective Ch. XXII

[410] Boris Kozolchyk, "Drafting Commercial Practices and the Growth of Commercial Contract Law", 30 Ariz. J. Int'l & Comp. L. 423, 476 (2013). 427

[411] See *Photo Production Ltd. v Securicor Transport Ltd*. [1980] AC 827; *George Mitchell (Chesterhall) v Finney Lock Seeds* [1983] AC 803 (decided under the s 55 of the Sale of Goods Act then in force and applying a slightly different reasonableness test); *Stewart Gill Ltd. v Horatio Myer & Co Ltd*. [1992] Q.B. 600 and *Smith v Eric Bush* [1990] 1 AC 381. *Zockoll Group Ltd v Mercury Communications Ltd*. [1999] CA 8 Jul 1997

[412] Simon Lewis, 'Room for interpretation: Section 3 of UCTA revisited' https://www.lexology.com/library/detail.aspx?g=de63884b-3c84-4429-8d29-0c5e35ad9591 accessed 24 July

means by which the customer's requirements could have been met; (ii) whether the customer received an inducement to agree to the term, or whether he had the opportunity of entering into a similar contract with other persons but without having to accept a similar term; (iii) whether the customer knew of, or ought reasonably to have known of the existence and extent of the term; (iv) in cases of non-compliance with a term which excludes or restricts liability, whether it was reasonable at the time of contract to expect that compliance would be practicable; or (v) whether goods were manufactured, processed or adapted to the special order of the consumer.

The English Courts have not indicated or suggested that size is an indication or has any relevance to the bargaining strength of the parties. This position would have helped alleviate concerns micro enterprises may have in relation to reasonableness. For contractual terms, the test of reasonableness under UCTA is whether the term in question is a fair and reasonable one, having regard to the circumstances that were, or ought reasonably to have been, in the contemplation of the parties when the contract was made.[413] Encouragingly, the onus of proving that a term satisfies the requirement of reasonableness is on the party seeking to affirm that it is reasonable. Consequently, a micro enterprise can raise the unreasonableness of a clause, and it is for the other party to show that the clause is, in fact, reasonable.[414]

The UCTA has been criticized for only preventing the parties to a contract from excluding liability for certain matters. It fails to impose a general prohibition on unfairness in contracts.[415] As we would see from further discussions of UCTA in Chapter 4, the statutory regime for Consumers contracts relating to unfair terms under the Consumer Rights Act 2015 does not require the reasonableness test to render unfair terms invalid.

[413] UCTA, S 11(1)

[414] Christian Twigg-Flesner, "The Implementation of the Unfair Contract Terms Directive in the United Kingdom" Contemporary Issues in Law/ Volume 8/Issue 3, 8 February 2008/Articles/The Implementation of the Unfair Contract Terms Directive in the United Kingdom – (2008) 8(3) CIL 240

[415] Simon Lewis, "Room for interpretation: Section 3 of UCTA revisited" https://www.lexology.com/library/detail.aspx?g=de63884b-3c84-4429-8d29-0c5e35ad9591 accessed 24 July 2019

3.3 Rationale for the protection of weaker parties.

The notion of protection of the weaker party is not new in contract law. Traditional contract law has mostly been concerned with addressing the imbalance of power through concepts such as good faith, public policy, good morals, etc. This imbalance of power is usually recognised to exist between two distinct categories of parties such as minors and an adult; the poor and the wealthy; the uneducated and the well informed.

Some writers believe that the readiness of the law to protect weaker parties, particularly in the area of contract law, has existed for a long time. Zimmermann[416] cites examples of the *Senatus Consultum Vellaeanum*, (a text emanating from the Senate in the Ancient Rome), the *Laesio Enormis* of Roman law (which allows a contract to be rescinded if the consideration is lower than a certain sum) and the Aedilitian edict (issued in the early part of the 2nd century BC) which was akin to modern day consumer protection[417].

In the middle ages, commercial financial transactions were restricted by the prevention of usury (the practice of lending money at unreasonably high rates of interest) and specific regulations aimed at addressing the potential harm in the legal concept that permitted contracting parties the right to rescind an agreement if the price of exchange is less than a certain sum.[418] Identifying that borrowers tend to be desperate when in need of urgent monies, policies protecting such parties from outrageous interest rates were deemed necessary. Later, in 1893, the approach to usury was extended to other forms of contract.[419]

In English law, there existed a court of equity (or Chancery) separate from common law. As opposed to common law, the court of equity based its judgments on principles of

[416]Reinhard Zimmermann, "Consumer Contract Law and General Contract Law: The German Experience" Current Legal Problems (2005) 58, 1, 415

[417] R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (paperback edn., 1996), 311

[418] H Kellenbenz, 'Preisbindung', in Handwörterbuch zur deutschen Rechtsgeschichte, vol. III (1984), cols 1886ff. Generally on the devices used in medieval and early modern Europe to provide what would today be called 'consumer' protection, see W Schuhmacher, Verbraucher und Recht in historischer Sicht (1981), 11ff

[419] Reinhard Zimmermann, "Consumer Contract Law and General Contract Law: The German Experience" Current Legal Problems (2005) 58, 1, 428

equity, thus providing redress where no satisfactory laws exist. For example, equity intervenes to guard against unconscionable bargains.[420] Following the Judicature Reforms of 1873 and 1875, a procedural fusion of these two bodies of law ended the institutional separation, equity is now administered concurrently with common law.

To address market failures, modern contract law seeks to protect identified weaker parties by restricting freedom of contract.[421] It is argued that this imbalance cannot be corrected only by substantive law but also procedural and private international law.

With regard to contracts having an international element, the Brussels Convention as far back as 1968 recognised the concept of weaker parties.[422] In accordance with Art 17, agreements conferring jurisdiction shall have no legal force if they are contrary to the provisions of Article 12 or 15, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16. Like the Brussels convention, Brussels I regulation also provides protective rules for consumers, insurers, etc by restricting jurisdiction agreements. Recital 13 clearly states "in relation to insurance, consumer contracts, and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests". The current version of the Brussels – the Recast provides a more comprehensive detail of the protection granted to consumers, insurers, employees, etc. Recital 18 mirrors the provisions of Recital 13 of the Brussels I regulation, and to ensure maximum protection for these weaker parties, certain rules of jurisdiction are applied regardless of the defendant's domicile[423]

Similarly, Rome Convention and the Rome Regulation on the law applicable to contractual obligations[424] contained general rules in favour of weaker parties. Recital 23

[420] *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125
[421] Hugh Collins, *The law of contract* (4th edition, (CUP, 2008) 30; O Lando and B Hoffman (eds), *European private international law of obligations: Acts and Documents of an international colloquim on the European preliminary draft convention on the law applicable to contractual and non contractual obligation* (Tubingen: Mohr, 1975)12; V Lazic, "Procedural justice for weaker parties in cross border litigation under the EU regulatory scheme" (2014) 10 Utrecht law review, 100
[422] See Art 12 (3) in relation to Insurance; Art 15 (3) in relation to buyer and seller or borrower and lender
[423] Recast, Recital 14. See Chapter 6 for detailed discussion
[424] See Art 3 of 1980 Rome Convention on the law applicable to contractual obligations; see Art 3 of The Rome I Regulation (Regulation (EC) No 593/2008) of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

of Rome I provides, "as regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict-of-law rules that are more favourable to their interests than the general rules". Consequently, Article 6(2) of the Rome I Regulation offers additional protection to consumers.

In the 1980s, Lando drew attention to weaker parties other than consumers who may need special protective rules. Lando's weaker parties included not only micro enterprises but small businesses generally, whether operated by individuals, partnerships or companies.[425] Peter Nygh[426] also identified categories of non consumers that were left without protection under the conflict of laws in force at that time. They included small investors, lessees, and guarantors. Since then, weaker parties have evolved to include tenants, patients[427], employees, hire purchasers etc[428] but not micro enterprises.

It is often unclear what the rationale is for protecting certain categories of parties and not others who may in other regards be viewed as weaker parties. It appears that consumers are protected regardless of whether or not there is an imminent risk. According to Giesela:

> ' A survey of the legal instruments enacted in recent years shows that European lawmakers protect a variety of presumably weaker parties from party autonomy without regard to whether any actual risk emanates from the choice of law and choice of forum dimensions of the party autonomy in a specified case.'[429]

This statement suggests that identified weaker parties are protected regardless of whether or not there is an imminent risk to them. Thus, it is sometimes unclear what the rationale is for protecting certain categories of parties and not others who may in other

[425] Ole Lando, *The conflict of laws of contract: general principles*, (Brill | Nijhoff, Leiden | Boston, 1984) 294
[426] Peter Nygh, *Autonomy in international contracts*, (OUP, 1999) 165
[427] Pieter Brulez, "C*reating a consumer law for professionals: Radical Innovation or consolidation of national practices".* < https://core.ac.uk/download/pdf/34579512.pdf> accessed 5 April 2019, 3
[428] Ewoud Hondius "The protection of weaker parties in a harmonised European contract law: a synthesis" (2004) J. Consum. Policy 27, 245; B Lurger, "The social side of contract law and the new principle of regards and fairness" in Arthur S. Hartkamp and others (eds) *Towards a European civil code* (4th edn, the Hague: Kluwer Law International) chapter 15; H Micklitz (ed), The many concepts of social justice in European Private Law (Cheltenham: Edward Elgar, 2011) 140
[429] Giesela Ruhl, 'Party Autonomy in Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency' in E Gottschalk and others (eds), *Conflict of Laws in a Global World* (CUP 2007) 340.

regards be viewed as weaker parties. These categories of parties obtain protection merely because they belong to the relevant category regardless of whether the other contracting party is in a more precarious situation. For example, Article 6(4) of the Rome 1 outlines categories of contract which will not benefit from protection[430] such as a consumer in a contract for the supply of services where the place of supply is exclusively in a country other than that in which he has his habitual residence; a contract of carriage other than a contract relating to package travel; and a contract relating to a right in rem in immovable property or a tenancy of immovable property.

Arguably, some of these exceptions are addressed under different directives however, this vagueness in the rationale for protection, coupled with ambiguity in the definition of consumer under both the Rome I and Recast, have resulted in a myriad of cases reaching the courts. In *Johann Gruber v Bay Wa AG*[431], the national court of Austria asked for clarification of whether or not a consumer contract which has a dual purpose is covered by the special rules of jurisdiction laid down in Articles 13 to 15 of the Brussels Convention, now Articles 17 to 19 of the Recast. The ECJ held inter alia that the consumer contract was excluded from the protection as part of the building was used for business.[432] The protection under this clause will not apply even if the predominant use is individual as long as the professional use is not negligible.[433]

In an effort to understand why the law chooses to protect certain categories of parties, authors have developed theories that explain the basis for the protection of weaker parties. Tang[434] believes that the protective rules are based on the philosophy that consumers are in a weaker position relative to a company in a contract and thus require the conflict of laws rules to be weighted in their favour. She argues that requiring consumers to sue abroad may lead to procedural difficulties, which may eventually mean

[430] Ibid
[431] C-464/01 Johann Gruber v Bay Wa AG [2005] ECR I-439.
[432] C-464/01 Johann Gruber v Bay Wa AG [2005] ECR I-439; see also C-150/77 *Société Bertrand v Paul Ott KG* [1978] ECR I-431, paras 14, 15 and 16; C-89/91 *Shearson Lehman Hutton Inc v TVB* [1993] ECR I-139, para 13; C-269/95 *Benincasa v Dentalkit Srl*: [1997] ECR I-3767, para 12; C-99/96 *Mietz v Intership Yachting Sneek BV* [1999] All ER (D) 428, para 26; and C-96/00 *Gabriel* [2002] ECR I-6367.
[433] C-464/01 Johann Gruber v Bay Wa AG [2015] ECR I-439, para 41.
[434] Zheng Sophia Tang, 'Private International Law in Consumer Contracts: A European Perspective' (2015) J Priv Int L 226.

they are deprived of justice. Giesela[435] asserts that consumers, passengers and insurance policy holders are often misinformed or poorly informed, and the cost of obtaining information for them is often disproportionate to the benefit of such information. For Giuliano and Lagarde,[436] there is usually a vulnerability factor as a result of the economic and social dependence of one party on the other, which may lead to one party being compelled to accept the other's terms.

Notably, while Tang and Giesela highlight the jurisdiction issues and the information asymmetry, Giuliano and Lagarde focus more on economic and social vulnerability. Some behavioural academics also believe that a proportion of consumers underestimate or disregard the likelihood of an unfavourably perceived event occurring and are therefore at a mental and intellectual disadvantage which often puts them at risk of accepting terms too quickly without adequate information.[437]

Some of the recurring factors in the above theories are vulnerability, economic disadvantage, information asymmetry and weak bargaining position. Arguably, these factors are also likely to occur in a contractual relationship in MB2B international contracts to the same extent as in B2C contracts. As one would expect, a newly formed micro enterprise with one or two employees, in its early stage of growth, will not only be vulnerable when dealing with a large company, particularly when it is unable to afford expensive legal advice but can also be disadvantaged if required to sue abroad.

3.3.1 Morality, Contracts and the Protection of Weaker Parties.

No doubt, ethical as well as social and economic problems have greatly influenced the regulation of private contracts. In the early formative period of the development of modern contract law, there are signs that laws were developed in accordance with moral

[435] Giesela Ruhl, 'Party Autonomy in Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency' in E Gottschalk and others (eds), Conflict of Laws in a Global World (CUP 2007) 153.
[436] M Giuliano and P Largarde, 'Report on the Convention on the Law Applicable to Contractual Obligations' (1980) <http://aei.pitt.edu/1891/> accessed 13 March 2018.
[437] Neil D Weinstein, 'Unrealistic Optimism about Susceptibility to Health Problems' (1987) J. Behav. Med. 10, 481.

principles. Strangely enough, research shows that in medieval times, there was a very thin line between "sin", "crime", and "breach of contract", and the obligation of religion and the law to regulate these matters was usually indistinguishable.[438]

Consequently, despite the general acceptance of basic contractual principles, we see that a number of rules have evolved over time to shield certain categories of parties perceived to be weaker. Accordingly, parties such as consumers, employees, the insured,[439] etc., have been seen as 'weaker parties' and, therefore, need regulatory protection.

The law is usually an image of morality. In its principal doctrines and ideas, law and morality were mostly congruent.[440] Such attitudes as seen under common law; notably in the manner in which judges made law had developed over the years with morality as a guiding principle rather than strict adherence with the legal text. For example, the English court in 1677 held that a sister could enforce a contract between her father and her brother.[441]

Explicit reference can also be found in some domestic legislation. Art 2 (1) and (2) of the Basic Law for the Federal Republic of Germany provides certain limitations to parties ability to contract. Therefore, contracts that violate a statutory prohibition or are immoral are considered void. Furthermore, immoral contracts are void by virtue of § 138(1) of the Civil Code which provides: "A legal transaction is void if it is contrary to good morals." Beale et al[442] posit that the German Courts adapted BGB in line with moral standards such as good faith (sec 242) and undue advantage (sec 138) to reflect evolving circumstance and to fill in the gaps.

[438] Sir David Hughes Parry, *The Sanctity Of Contracts In English Law*, (The Hamlyn Lectures Tenth Series, London Stevens & Sons Limited 1959), 7
[439] See cases such as C-191/15 *VKI v Amazon* [2017] 2 WLR 19; Case C-397-403/01, *Pfeiffer and others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835.
[440] P.S Atiyah, *Promises, Morals and Law* (Claredon Press. Oxford 1981) 1
[441] *Dutton v. Poole* (1677) 2 Lev. 210, 211-212; *Abbhi v Slade (trading as Richard Slade And Company)* [2019] EWCA Civ 2175)
[442] Hugh Beale, Arthur Hartkamp, Hein Kotz and Denis Tallon, *Cases. Materials and Text on Contract Law, (*Hart Publishing, 2002) 10

The term "immoral" is anything which contravenes the sense of decency of someone who possesses an understanding of what is just and equitable.[443] Case law shows that immorality includes, but is not confined to, sexual immorality.[444] Contracts in restraint of trade and contracts which oppressively restrict a person's independence or economic freedom have also been held to be immoral and thus void.[445] One may ask, is it immoral to choose not to protect micro enterprises in MB2B contracts?; why should contract doctrine change or update its paradigm to benefit Micro enterprises?. After all, some writers believe that "[c]ontract law has neither a complete descriptive theory, explaining what the law is, nor a complete normative theory, explaining what the law should be".[446]

This question no doubt touches on the foundation of private international law, which is the freedom of parties to contract and the binding nature of contracts. Unlike an ordinary consumer who has no time to read contractual terms and probably would not understand the terms if he reads them, a higher standard is expected from business parties. Similar to a consumer, a micro enterprise. If he understands the terms and objects to them, he will probably be told to take it or leave it, and if he then moved to another party, the result would probably be the same.

It is pertinent to bear in mind the peculiar nature of micro enterprises as discussed in chapter 2 and our position that only hard law is adequately effective to address such an intricate phenomenon as unfairness and unfair trading practices. The right question should be can the micro enterprises' interest be best served by protective rules and the answer is in the affirmative.

3.3.2 The interrelationship between fundamental rights and the protection of weaker parties.

[443] Pieck, Manfred "A Study of the Significant Aspects of German Contract Law," (1996) Annual Survey of International & Comparative Law; 3, 1,7, 112-113
[444] Pearce v Brooks (1866) LR 1 Ex 213
[445] Ibid 112
[446] Schwartz, Alan and Scott, Robert E., "Contract Theory and the Limits of Contract Law" (2003) 113 Yale L. J. 541, 2

There is often a link between fundamental rights and the protection of weaker parties. One will find that frequently the protection of weaker parties can be based on the rights guaranteed by the constitution or linked directly with statutes guaranteeing basic fundamental rights. Article 6 (2) of the Treaty European Union provides that the Union shall respect fundamental rights. This provision is usually reflected in national contract law and forms the guiding principles of domestic courts.

The fundamental rights guaranteed by the constitution or statutes not only affect the orientation of persons to private law but often serve as the legal basis and legitimacy for the protection of parties. This is one of the principal reasons for the move toward the codification of contract law even in the face of arguments that considerable leeway must be preserved for contract law itself and that constitutional law must not meddle with the details of private law.[447]

Private law has never been only about resolving private interest for the parties' own good; it has also been about resolving them in a way that complies with the public interest. Contract law principles such as good faith or good morals reflect the readiness of domestic courts and the national legal system to extend fundamental rights to contracts.[448]

Article 38 of the Charter of Fundamental Rights of the European Union provides that Union policies shall ensure a high level of consumer protection, which in the researcher's opinion has been relatively done. Article 47 also grants the right to an effective remedy and to a fair trial. The right to an effective remedy entails having "the possibility of being advised, defended and represented", and the right to appear before an "independent and impartial tribunal" or "hearing within a reasonable time". The article also prescribes that Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

[447] Miklós Király , "Book Reviews & Notices: Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union" – (2003) Unif. L. Rev. 8(3), 787

[448] Olha Cherednychenko, 'Fundamental Rights, Contract Law and the Protection of the Weaker Party', (2007) <https://dspace.library.uu.nl/bitstream/handle/1874/20945/full.pdf> accessed 3 February 2018, 6

The concept of effectiveness, as highlighted by the ECJ, implies that national rules of procedure should not make it impossible or excessively difficult for consumers to exercise rights conferred by EU law.[449] It is trite law that legal aid is not available for business parties in civil matters. For micro enterprises, access to justice and remedies can be impaired.

Heavy transactional costs often result from dealing with contracting internationally. Such costs could include information cost, search cost where the contract is silent on jurisdiction or governing law, compliance cost,[450] expenses of litigation cost,[451] as well as cost of pursuing legal claims. Such cost has been argued to have more impact on micro enterprises than larger enterprises[452] as it is often believed that to some extent micro enterprises are repeat players who incur repeat transactional costs[453]

In addition, Micro enterprises face a number of difficulties when trading internationally, chief of which are: language barriers which could make communication difficult, even where the service of a translator is sought, this can be a huge financial cost. There are also difficulties in agreeing on the foreign choice of law including finding out the meaning or implications of substantive provisions in such foreign choice of law. It is also very likely that there will be formal requirements such as registration, licensing, after-sales maintenance or tax liabilities as a result of the transaction. Cultural differences may often

[449] C-34/13 *Kušinová*, paragraphs 63 – 65 and C-169/14 *Sanchez Morcillo*, paragraph 35.
[450] Gary Low, "The (Ir) Relevance of Harmonization and Legal Diversity to European Contract Law: A Perspective from Psychology" (2009) European Review of Private Law, 18, 2, 288
[451] Helmut Wagner, "Economic Analysis of Cross Border Legal Uncertainty: The example of the European Union" (2004) Discussion Paper No. 371, <https://www.fernuni-hagen.de/hwagner/download/371-maastricht_181004_final_vers.pdf accessed 20 July 2019> 5-8
[452] European Commission (2008) putting small businesses first: Europe is good for SMEs, SMEs are good for Europe, Ref. Ares(2014)76474 – 15/01/2014, 13; Pablo Cortes, *Online Dispute Resolution for Consumers in European Union* (Taylor and Francis, 2010), 16
[453]Adam E Kerns " The Hague Convention and Exclusive Choice of Court Agreements: An Imperfect Match" (2006) 20 Temple Int'l & Comp. L. J. 509, 5, 13; Hesselink, Martijn W., SMEs in European Contract Law: Background Note for the European Parliament on the Position of Small and Medium-Sized Enterprises (SMEs) in a Future Common Frame of Reference (CFR) and in the Review of the Consumer Law Acquis (July 5, 2007). Centre for the Study of European Contract Law Working Paper No. 2007/03. Available at SSRN: https://ssrn.com/abstract=1030301 or http://dx.doi.org/10.2139/ssrn.1030301, pg 23; N Solvay and C Reed, *The Internet and Dispute Resolution: Untangling the Web* (New Law Journal Press, 2003) 4-19;

create problems with international delivery of services.[454] These difficulties is capable of preventing effective access to justice for micro enterprises contrary to fundamental rights.

3.4 Economic Power in Contractual Relationship and Notion of Unfairness

The notion of power is a complex one in most areas of business, politics, strategy, human relationships and even contracts. The study of power is based on the assumption that all actors and all relationships possess power, albeit in different proportions.[455] Despite the popular position that almost all relationships and interactions between actors can be explained by the concept of power,[456] "power" has no universally accepted definition or scope[457].

Rogers describes power as the ability of a person to influence others;[458] Foucault argues that power "is a way in which certain actions modify others";[459] Hobbes perceived power as an individual's means of creating some future good;[460] Parsons claims that power is possessed by one person or group.[461] Without getting into the debate of which definition seems right or wrong, one can deduce from the definitions that power has a capacity to secure and direct the activities of others and exists when put into action. In fact, Emerson maintains that "to have a power advantage is to use it"[462], hence making no distinction between possessing power and utilising that power.

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[454] European Commission (2011) "European Contract Law in Business to Business Transactions: Analytical Report" <http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_320_en.pdf>, 15

[455] Daniel D. Barnhizer, "Inequality of Bargaining Power", (2005) U. Colo. L. Rev. 76,139, 141; Andrew Cox, 'Transactions, Power and Contested Exchange: Towards a Theory of Exchange Business Relationships' (2007) I.J.P.M. 1,1-2, 38.

[456] Hawley A. "Community power and urban renewal success" (1963) Am. J. Sociol., 68 (4), 422

[457] Michel Foucault, "The subject and the power" (1982) critical inquiry, 8, 4, 777; Wrong, D. H*., Power: its forms, bases and uses.* (Oxford: Blackwell, 1979.); Stephen Lukes, *Power: a radical view*. (2nd edn, Palgrave Macmillan, 2005.).; Mark Haugaard, *Power: A reader* (Manchester University Press., 2002.) .

[458] Mary Rogers, "Instrumental and Infra-resources: The Bases of Power" (1974) Am. J. Sociol. 79, 6, 1418.

[459] Michel Foucault, "The subject and the power" (1982) critical inquiry, 8, 4, 788.

[460] Hobbes, T., (2010) "Chapter X: of power, worth, dignity, honour and worthiness". In: Shapiro,I., ed. *Leviathan: or the matter, forme, and power of a common-wealth ecclesiasticall and civill*. New Haven, CT: Yale University.

[461] Talcot Parsons, *Sociological theory and modern society.* (New York: Free Press, 1967).

[462] Emerson, R. M., "Power-dependence relations". (1962) Am. Sociol. Rev., 27, 1, 391; Barry Barnes, *The nature of power*. (Chicago: University of Illinois Press., 1988.)

3.4.1 Economic Power and bargaining position

The effect of power in a contractual relationship may differ from power in politics. Some legal and economic scholars argue that power affects price, but not other terms in the contract[463]. Conversely, some argue that bargaining power affects both price and non price terms.[464] One compelling argument by the latter camp is that non price terms often feels like price terms in the sense that they stipulate a "price" that the other party must pay on either the occurrence of an event or as a condition of the contract. For example, consider the inclusion of a one-sided clause which directs a party to maintain a certain level of insurance with an indemnity to principal provision. Such a clause which is often contained in a standard form contract, is one of the "price" to be paid by the insuring party.

Furthermore, research shows that economic power also impacts the development, negotiation, formation, and preservation of B2B relationships.[465] The relative power of each party affects that party's willingness to collaborate, their level of commitment to the contractual relationship, how they deal with conflict, communication exchange, processes, overall behaviour and perhaps, the satisfaction derived from the transaction.[466] Consequently, "Contract terms are always the results of the interaction of bargaining power in the market".[467]

Economics and legal scholars have identified that a number of variables may determine where power resides in contract negotiations (regardless of whether they are consumers or businesses) which then greatly affects the outcome of transactions. These variables include the relative strength of the individual negotiator (such as their skills, personality,

[463] Robert E. Scott & Jody S. Kraus, *Contract Law and Theory* (4th ed. Lexis Nexis Matthew Bender; 2007) 58-60

[464] Albert Choi and George Triantis, "The Effect of Bargaining Power on Contract Design", (2012) Va. L. Rev., 98, 8, 1667; Ian Ayres and Robert Gertner, "Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules", (1992) 101 Yale L.J. 729, 733; Jason S Johnston, "Strategic Bargaining and the Economic Theory of Contract Default Rules", (1990) 100 Yale L.J. 615, 621-22, 625;

[465] Kähkönen and Lintukangas, "Dyadic relationships and power within a supply network context". (2010), O.S.C.M, 3 (2), 59-69.

[466] Wilkinson, I.,"Power, conflict, and satisfaction in distribution channels-an empirical study" (1981) Int. J. Phys. Distrib. Logist. Manag., 11, 7, 20 – 30.; Benton, W. C. and Maloni, M.. "The influence of power driven buyer/seller relationships on supply chain satisfaction" (2005). J. Oper. Manag., 23, 1, 1-22.; Nyaga, G. N., Lynch, D. F., Marshall, D. and Ambrose, E.,. "Power asymmetry, adaptation and collaboration in dyadic relationships involving a powerful partner (2013) J. Supply Chain Manag., 49 (3), 42.

[467] Xuyu Hu, "Equality of bargaining power in contracts for international liner shipping", (2018) WMU J. O.M.A, 17, 3, 348

training, and negotiation styles); where applicable, the existing relationship between the negotiating parties; prior experience, previous dealings, knowledge and previous outcomes, particularly in relation to understanding the other party; status, and power relations.[468] These variables can occur at any stage in the contracting process.

In addition, dependence or perceived dependence in contractual relationships often affect the lack of power or the perceived vulnerability of an enterprise. For micro enterprises, this may be influenced by a number of factors, such as the number of suppliers/customers, its degree of subcontracting, the inventory levels, and the number of preventive activities. The level of dependence or perceived dependence is also influenced by knowledge or lack thereof, social, technical, economic, and other dependencies. Therefore, the higher the dependence the higher the level of perceived vulnerability.[469]

Power asymmetries which may be evidenced by market asymmetry or information asymmetry, are usually considered some of the principal ways of identifying inequality in bargaining position.[470] Power asymmetry simply connotes that there will be a weaker party who will be disadvantaged in relation to the stronger party. Where significant asymmetry exists in bargaining power, the party with greater power may abuse its power to the disadvantage of the weaker party. Thus, such contracts are not being signed based on "genuine" agreement since, in essence, it would mean yielding to a legal relationship formulated by others.[471] Inequality also largely depends on the bargaining power of the contracting parties vis a vis another, the peculiar circumstances at the time of concluding a contract, and/or the nature of the contract.

[468] Henrik Agndal, "Current trends in business negotiation research: An overview of articles published 1996-2005", https://swoba.hhs.se/hastba/papers/hastba2007_003.pdf accessed 6 April 2018

[469] Göran Svensson, "A typology of vulnerability scenarios towards suppliers and customers in supply chains based upon perceived time and relationship dependencies",(2002) J. Phys. Distrib. Logist. Manag., 32, 3, 168; Go¨ran Svensson, "Vulnerability in business relationships: the gap between dependence and trust", (2004) J.B.I.M, 19, 7, 469

[470] Vincenzo Roppo, 'From Consumer Contracts to Asymmetric Contracts: a Trend in European Contract Law?' (2009) E.R.C.L, 5,3, 311

[471] Zweigert K, Kotz H "The freedom and coersiveness in contract laws— a study on the conclusion of contracts" (trans: Xianzhong S).(1998) In: Huixing L (ed) "Civil and commercial law review", Law Press, Beijing, 9, 268

Unsurprisingly, information asymmetry is considered a basis for limiting the application of party autonomy in respect of consumers, employees and insured.[472] "Information asymmetry" usually refers to a situation where each party to the transaction is differently informed. As a result, one party has access to better or more information than the other. For example, unfamiliarity with contractual provisions can be seen as one category of information asymmetry. One can assume that usually, the contract drafter would be better informed about the terms of the contract than the other party to the contract.

Hesselink[473] notes that larger enterprises are more likely to take advantage of smaller enterprises due to their bargaining power and possible information asymmetry, where one party possesses more information on both the subject matter of the contract and the legal consequences of the terms of the contract than the other. Information asymmetry on its own is not an issue except that the disadvantaged party cannot overcome them or only at an extreme cost.[474]

3.4.2 Notion of unfairness

Theoretically, the idea of unfair terms seems to be fairly straight forward in relation to relevant Directives and Regulation, but in practice, a myriad of case law shows the complexity and variants of what is considered unfair in various national legal systems.

A list of commercial practices which are considered unfair is detailed in relevant Directives and Legislation. Annex 1 of the UCPD contains examples of commercial acts which should be considered unfair and directs member states to adhere to the guidelines. The UTCCD further itemise an indicative but not exhaustive list of unfair terms. A review of the illustrative examples of unfair provisions in the above Directives includes terms limiting or excluding certain liabilities or inappropriately limiting or excluding the legal rights of the consumer generally. Unlike Annex 1 of the UCPD, this list is informative and not

[472] Uglgesa Grusic "Jurisdiction in complex contracts under the Brussels I regulation" (2012) J. Priv. Int. Law, 7, 18

[473] Martijn W Hesselink, "Towards a sharp distinction between B2B and B2C? On consumer, commercial and general contract law after the consumer rights directive", (2009) Centre for the Study of European Contract Law, Working Paper Series, No. 2009/06 33-4

[474] S Grundmann "Information, Partry Autonomy and Economic Agents in European Contract Law" (2002) C.M.L.R, 39, 279

compulsory, therefore, where the term exists, the claimant still has to prove that such provisions create a significant imbalance in the parties rights and obligations.[475]

3.4.2.1 Substantive provisions and Unfairness

Moral and social expectations of what is fair and just permeates legal and economic relationships. Although unfairness in contracts is usually regulated through a normative and objective doctrine, differences in legal systems often create uncertainty for micro enterprises. The PECL cites examples of unfair terms which could take the form of rules restricting penalty clauses; rules protecting reliance even when it deviates from the intention of the parties; general norms relating to illegality; the rule restricting exemption clauses; the rule restricting agreements concerning prescription; and contracts for an indefinite period.[476]

National laws often differ in their notion of unfairness. For example, in common law jurisdictions such as English law, it is unlawful to exclude liability for death or personal injury in commercial contracts generally. In *Goodlife Foods Ltd v Hall Fire Protection Ltd* the court held with respect to the purported exclusion of liability for death or personal injuries that this was prohibited by s 1(1) of the Unfair Contracts Term Act 1977 and hence of no effect and the question of the reasonableness of the remaining part of the clause was decided on that basis. In addition, under English Law, one cannot limit or exclude liability for death or personal injury caused by negligence, liability for fraud, or strict liability otherwise, the whole clause could be unenforceable. Similarly, if the 'penalty' sum is too high, and not a genuine pre-estimate of the actual loss, there is the risk that the clause becomes unenforceable because it will be a 'penalty clause' and whether a clause is 'penal' depends on the circumstances at the time of contracting, not at the time of the breach[477].

[475] Sophie Vigneron, The Implementation of The Standard Contract Terms Directive In France, <http://www.secola.org/vortraege/prague/IV-2Vigneron.pdf> accessed 5 May 2018, 9

[476] Art. 9:509 (2); Article 2:102; Art 15:101; Art. 8:109; Art. 14:601; Art. 6:109 respectively

[477] *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co. Ltd* [1915] A.C. 847; *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67

While theoretically, unfairness is clearly visible in certain situations, sometimes it is heavily disguised. Consider that a situation may arise of built-in obsolescence in industrial design i.e. where a manufacturer deliberately designs a product with a limited useful life with the intention that such a product becomes non-functional after a period of time. This situation is not considered unfair under the UCPD as long as the consumer is informed of this under Art 7, even where the consumer was notified in the small print and he purchased the item unknowingly, such a consumer may benefit from the provisions of the Consumer Sales and Guarantees Directive[478] within two years. If the same product is sold to a micro enterprise because the UCPD and CSGD does not apply, they run a huge risk of financial loss, particularly if the product is not covered by the Ecodesign Directive.[479]

Clearly, the issue of price has a huge economic impact on a business. Thus, European private law instruments and case law suggest that courts can assess the fairness of and justification of prices between parties. Consequently, prices which show no reasonable relation to the economic value of the contract will qualify as an abuse under competition law.[480] However, the test for determining whether a price is fair or not is a complex one. Factors such as the overall cost plus profit as well as non cost factors are all taken into consideration. Jones highlighted that despite Article 102 of the TFEU expressly prohibiting the imposition of unfair prices by dominant undertakings and ECJ's decision in this respect, there has been relatively little enforcement against such conduct in the EU.[481]

More worryingly, in an ever-changing landscape characterised by the need to protect consumers, fundamental principles of contract law are becoming very uncertain in B2B contracts. The recent UK Supreme Court case of *Cavendish Square Holding BV v*

[478]Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees. In its proposal of 9 December 2015 for a Directive on online and other distance sales of goods the Commission proposed to apply the reversed burden of proof during the entire legal guarantee period of two years. Such a rule would strengthen the consumer protection under the legal guarantee and would give incentives to produce higher quality and more durable products.
[479] Directive 2009/125/EC
[480]case 27/76 *United Brands v Commission* (1976); *Flynn and Pfizer v Competition and Market Authority* [2018] CAT 11
[481] Alison Jones, "Establishing Unfairly High Prices: The Implications of the CAT's Judgment in Flynn and Pfizer v Competition and Market Authority" (2018) Bio-Science Law Review 17,1, 19; Alison Jones & Brenda Sufrin, *EU Competiton Law – Text, Cases, and Materials,* (4th edn, OUP, 2011) 535.

Makdesssi[482] reformulated the long-standing fundamental rule against penalty clauses laid down in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*[483]. The court considered the test in Dunlop's case as 'ancient, haphazardly constructed edifice' that had not 'weathered well' which required, at the very least, to be 'reconstructed', if not 'demolished'. The "true test" for a penalty is whether the provision in question is a 'secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation'[484].

By virtue of the new decision, penalties only need to be a legitimate commercial interest as opposed to the test of deterrence and genuine pre-estimate of loss. In the same light, in *ParkingEye Ltd v Beavis*,[485] where a defendant was charged for overstaying the maximum free period at a car park operated by the claimant operator, the county court judge held that the operator could recover the charge. However, on Appeal, the Civil Division dismissed the appeal and held that there was no contract between the parties which allowed the application of the rules about contractual penalties to invalidate the provision under which the trial judge had held the defendant liable.

To provide a theoretical context for how the courts regulate unfairness, it is important to bear in mind certain contract theories, in particular, the classical view of contract as a subjective "meeting of minds" despite the inherent nature of individuals to compete for economic self-interest.

In the English case of *Photo Production Ltd v Securicor Transport Ltd*[486] The claimants (a company which owned a factory) entered into a contract for the supply of security services with the defendants (a security company). One night, an employee of the defendant lit a small fire which got out of control. The factory and its contents valued at £615,000 were completely destroyed. The claimant sued the defendants for damages

[482] [2015] UKSC 67
[483] [1915] AC 79
[484] See para 32
[485] UKSC 2015/0116
[486] [1980] 1 All ER 556

based on vicarious liability but the defendants contended, inter alia, an exception clause in the contract which provided that under no circumstances were the defendants to be 'responsible for any injurious act or default by any employee … unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the defendants'; nor for any loss suffered by the claimants through fire or any other cause, except solely attributable to the negligence of the defendant's employees acting within the course of their employment. The trial judge held that the defendants were entitled to rely on the exemption clause. The Court of Appeal reversed this decision, holding that there had been a fundamental breach of the contract by the defendants, which precluded them from relying on the exception clause.

On appeal to the House of Lords, Lord Diplock asserted that the question whether an exception clause applied when there was a fundamental breach or any other breach turned on the construction of the contract as a whole, including any exception clauses. There is no rule of law by which an exception clause in a contract could be deprived of effect due to a breach of contract (whether fundamental or not) or by which an exception clause could be eliminated regardless of the terms of the contract because the parties were free to agree to whatever exclusion or modification of their obligations they chose. Though the defendants were in breach of their implied obligation to operate their service with due and proper regard to the safety and security of the plaintiffs' premises, the exception clause was clear and unambiguous and protected the defendants from liability, and parties were free to reject or vary both their primary obligations and also any secondary obligations to pay damages arising from breach of a primary obligation.[487]

3.4.2.2 Party Autonomy and Unfairness.

For international contracts, unfair terms transcend substantive provisions such as liability clauses. Governing law and jurisdiction provisions have an autonomous character and are therefore considered a distinctive subject matter from the rest of the contract.[488] As

[487] see p 560 b to d, p 561 c to f, p 565 b, p 566 c to e, p 567 f g, p 568 a h and p 570 a to d

[488] C- 269/95 *Benincasa* [1997] ECR-1-3767 para 29; C- 159/97 *Tranporti Castelli spedzioni internaZionali SpA v Hugo Trumpy SpA* [1999]

the invalidity of the terms contained in a contract does not invalidate the governing or jurisdiction provisions in the contract, it is true to say that unfairness can arise as a result of these provisions, just as with the substantive provisions in the contract.

Governing law regulates the interpretation, performance, the consequences of a breach of obligations or of the nullity of contract, as well as the various ways of extinguishing obligations and prescription and limitation of actions.[489] Larger enterprises, in a bid to evade mandatory rules of the law of the country that will otherwise have applied, insert onerous or inconvenient governing laws and jurisdiction clauses in their contracts.[490] Camarote[491] cites an example of a stronger party choosing a governing law of the country with a shorter limitation period for causes of action than those applied under the governing law of the weaker party's home state which is the place of performance (likely to have been the applicable law in the absence of a governing law clause).

Arguably, no contractual terms (including governing law and limitation of liability provisions can be as detrimental to the power balance between the contracting parties as jurisdiction clauses. One will understand that a jurisdiction clause that makes the court not easily accessible to a weaker party due to cost implications or other factors creates a barrier against any legal action being taken against a stronger party.[492] Commencing proceedings in a foreign country will usually entail travel expenses and litigation costs that micro enterprises will wish to avoid.

There are various reasons why the governing law provisions can be seen as less important and have limited influence on the outcome of the litigation. Firstly, while the governing law determines the substantive law to be applied, Jurisdiction provisions impact on the

[489] Rome I Regulation, Art 12 (1)
[490] C Walsh, "The Uses and Abuses of Party Auitonomy in International Contracts" (2010) Univ. N. B. Law J. 60, 30
[491] J camarote, "Comment: A little more contract Law with my contracts please: The need to apply unconscionability directly to choice of law clauses" (2009) <https://scholarship.shu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1015&context=shlr> accessed 4 July 2019, 628; J Spigelman, "International Commercial Litigation: An Asian Perspective" (2007) Hong Kong Law Journal, 37, 871
[492]Dan Jerker B Svantesson "The choice of law convention: How will it work in relation to the internet and e commerce?" (2009) J. Priv. Int. Law, 5, 517

procedure to be adopted, cost recoverable and the method of obtaining evidence.[493] Stavensson[494] highlighted that

> "..There is no doubt that talented company lawyers who construct the choice of forum clauses will be able to identify forums with laws that not only provide them with favourable liability limitations but also party autonomy of the kind that would uphold the unfair choice of forum clauses. In other words, a stronger party designating a forum would not choose a forum with laws that would hold their choice to be invalid. This can certainly lead to injustice."

For Pontier,[495] justice in international law depends on both the substantive and choice of law rules. This research supports the position of Pointer and emphasise that issues of contractual liability, governing law as well as jurisdiction are important particularly for micro enterprises.

3.5 Poles Apart? B2C and B2B commercial relationships.

3.5.1 The distinction between Consumer and Business.

The definition of Consumer under a number of Directives is often clear and unambiguous. For example, article 2b of UTCCD defines consumer as "any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, enterprise or profession". Article 2a of UCPD defines consumer as "any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession". Falsely claiming or misrepresenting a trader as a consumer or that a trader is not acting for purposes related to his trade, craft or profession is expressly prohibited under No 22 of Annex I of the UCPD.

[493] Trevor Hartley, *International Commercioal Litigation: Text, Cases and Materials on Private International Law,* (Second edition, CUP, 2015) 6

[494] D Stavensson, Private International Law and the internet (Alphen aan den Rijn: Kluwer Law International, 2007) 263

[495] J Pontier "The justification of choice of law: A liberal- political theory as a critical and explanaotory model and the field of international consumer transactionas an example" (1998) 45 Netherlands international law review, 389

In *Cape Snc v Idealservice Srl*,[496] the ECJ noted that consumers "must be interpreted as referring solely to natural persons" under the relevant Directives. Similarly, in *Francesco Benincasa v Dentalkit SrL*.[497] The court stated that a strict interpretation should be adopted in relation to consumers under the then Article 13 of the Brussels Convention now revised Article 17 of the Recast, and the subjective nature of the person in relation to the contract was not to be taken into consideration. Moreso, the ECJ recently ruled in *Condominio di Milano v Eurothermo SpA*[498] that "commonhold association" which is recognised as neither a natural nor a legal person under the Italian law cannot have consumer status under Unfair Contract Terms Directive.

Notwithstanding the seemingly clear definition of consumers in the relevant directives, complexity often exists due to the ambiguity in the definition of consumer under both the Rome I and Recast. In particular, the problem of contracts for dual purposes has resulted in a myriad of cases reaching the courts. In *Johann Gruber v Bay Wa AG,* the national court of Austria asked for clarification on whether or not a consumer contract that has a dual purpose is covered by the special rules of jurisdiction laid down in Articles 13 to 15 of the Brussels Convention, now Articles 17 to 19 of the Recast. The ECJ held inter alia that the consumer contract was excluded from the protection as part of the building was used for enterprise. The protection under this clause will not apply even if the predominant use is individual as long at the professional use is not negligible. Furthermore, Recital 17 of Directive 2011/83/EU, in providing clarity on the categorisation of a consumer in contracts with dual purposes, provides that a person can only be regarded as a consumer where the predominant purpose of the contract is outside the person's trade.[499] This position is also confirmed in a number of national court rulings.

Consumers are often seen as a special class of persons requiring regulatory protection against businesses regardless of whether the consumer is dealing with a sole trader or a

[496] Case 541/99 *Cape Snc v Idealservice Srl* [2001] ECR 1-9049 (ECJ).
[497] (Case C-269/95) ECR I-3767; see also *Petruchová v Fibo Group Holdings Ltd* (Case C-208/18
[498] Case C-329/19
[499] Recital 17 also defined Consumer as natural persons who are acting outside their trade, enterprise, craft or profession. See also for various definition of consumers Art 1 (2) a of Directive 87/102/EEC; Article 1(e) Directive 98/6/EC; Article 1(2)(a) Directive 1999/44/EC; Art 2 (d) of Directive 2002/65/EC;

large enterprise. One will notice that protection is also not granted to a consumer who is dealing with another consumer regardless of the sophistication of the other consumer. This statement should not be mistaken to cover hidden B2C sales where persons who appear to be consumers (traders or acting on behalf of traders) sells to consumer. Thus, in determining whether a seller is a trader or qualifies as consumer, regard should be had to different criteria, such as the number, quantity and frequency of transactions; the seller's sales turnover, the motive behind the purchase (personal use or to resell or to make profit).[500]

Consumers are a diverse community.[501] Anyone can be a consumer as long as they act in a specific role, i.e. for private use, and they are natural person. Therefore, an engineer in a contract for the purchase of equipment or a law professor in the purchase of a holiday home is as much a consumer as an uneducated and uninformed person in the same transaction. Some authors have tried to distinguish between consumers and have introduced the concept of the "protection-worthy consumer",[502] which establishes parameters to the concept of consumer notion.

As opposed to consumers, EU law confers a broader meaning to traders, which includes both natural and legal persons as long as they carry on gainful activity. [503] Art 2 of the UCPD defines "Trader" as any natural or legal person, regardless of whether they are privately or publicly owned or acting through any other person as long as they are acting for purposes relating to their trade, business, craft or profession.[504] Public authorities carrying out commercial activities qualify as traders. Regardless that an enterprise is structured as a non-profit is immaterial in assessing whether it qualifies as a trader.[505]

[500] Commission staff working document, Guidance on the implementation and application of Directive 2005/29/EC 0n unfair commercial practices. (Com 2016, 320 final), Brussels 25.5.2016, 31

[501] T. Bourgoignie, 'Characteristics of Consumer Law' (1992) J. Consum. Policy 14, 3, 300.

[502] Howells G, Ramsay I, Wilhelmsson T "Consumer law in its international dimension" In Howells G, Ramsay I, Wilhelmsson T (eds) *Handbook of research on international consumer law*. (Edward Elgar Cheltenham, 2010) . 10–13; Ben€ohr I, *EU consumer law and human rights*. (OUP, 2013) 16–17; Ramsay I, *Consumer law and policy: Text and materials on regulating consumer markets*, (3rd edn. Hart, Oxford 2012) 33–34; Weatherill S (2012) Consumer protection. In: Smits JM (ed) *Elgar encyclopedia of comparative law*, (2nd edn. Edward Elgar, Cheltenham, 2012) 237

[503] Case C-105/17 , *Komisia za zashtita na potrebitelite V Evelina Kamenova*

[504] Article 2 of Directive 2011/83/EU

[505] C-59/12 *BKK Mobil Oil Körperschaft des öffentlichen Rechts v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV*

Moreover, the fact that the "action of the professional concerned took place on only one occasion and affected only one single consumer is immaterial in this context". [506]

The question of whether a person who is yet to conduct economic activity but plans to can be regarded as a consumer has not been addressed under the consumer *acquis*. Whilst the Directive on distance marketing of financial services clearly regards such persons as consumers, the Court of Justice states that such a person does not enjoy consumer protection under EU private international law.[507]

In recent years, international marketing literature[508] have introduced the concept of consumer affinity which reflects a country-specific favorable feelings toward particular foreign countries. Earlier literature reflected similar related concepts such as "emotional attachments". Mathews et al. clarify that "emotional attachment" can be slightly different from other correlated constructs such as brand attitude favorability, satisfaction, and involvement.[509] These concepts postulate that feelings affect decisions and that consumers' preferences, product evaluations, and buying intentions are not only based on tangibles such as price, brand name, quality or terms. Bowlby[510] asserts that emotional attachment toward a particular referent affect how a person interacts with the referent. A persons' emotional attachments to another person or object predicts their commitment to such relationship.[511] Lange et al, defines commitment as the extent to which a person

[506] C-388/13 *Nemzeti Fogyasztóvédelmi Hatóság v UPC Magyarország kft*, paragraphs 41, 42 and 60.
[507] Rafał Mańko, "The notion of 'consumer' in EU law" Library Briefing, Library of the European Parliament http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI(2013)130477_REV1_EN.pdf 2
[508] Eva M. Oberecker and Adamantios Diamantopoulos, "Consumers' Emotional Bonds with Foreign Countries: Does Consumer Affinity Affect Behavioral Intentions?" (2011) J. Int. Mark., 19, 2, 45; Schifferstein, H. N. J., & Zwartkruis-Pelgrim, E. P. H. "Consumer-product attachment: Measurement and design implications". (2008) Int. J. Des., 2, 3, 1-13; Desmet, P. M. A., & Hekkert, P. P. M. "The basis of product emotions" In W. Green & P. Jordan (Eds.), *Pleasure with products: Beyond usability* (London: Taylor & Francis, 2002) 61-68; Norman, D. A., *Emotional design: Why we love (or hate) everyday things*. (New York: Basic Books, 2004); Zajonc, Robert B. "Feeling and Thinking: Preferences Need no Inferences," (1980), American Psychologist, 35, 2, 155
[509] Thomson, Matthew, Deborah J. MacInnis, and C. Whan Park, "The Ties That Bind: Measuring the Strength of Consumers' Emotional Attachments to Brands," (2005) J. Consum. Psychol. 15, 1, 78
[510] John Bowlby, *The Making & Breaking of Affectional Bonds*, (Brunner routledge, 1979) 126
[511] Drigotas, S. M., & Rusbult, C. E. "Should I stay or should I go? A dependence model of breakups" (1992) J. Pers. Soc. Psychol., 62; Rusbult, C. "A longitudinal test of the investment model: The development (and deterioration) of satisfaction and commitment in hetrosexual Involvements". (1983) J. Pers. Soc. Psychol., 45, 172–186

views a relationship from a long-term viewpoint and readiness to remain in the relationship even in times of difficulties.[512]

One other impact of emotional attachment is the willingness to pay a price premium. A research conducted by Mathews et al shows that consumers who are mildly emotionally attached are willing to pay from approximately half to double the average price in the category.[513] In addition, a person who is emotionally attached is likely to be satisfied with the object.[514] Moreso, the concept of consumer affinity in international marketing literature shows that preferences for domestic or foreign products are not only based on economic concerns like price or reliability but on a person's feelings toward a particular country.[515]

One can argue that like a consumer, a micro enterprise can be emotionally attached to a product, supplier or country and can have a preference based on affinity regardless of the contractual terms. A counter argument can be that emotional attachments is usually likely to develop after multiple interactions,[516] and a diligent micro enterprise should have picked up on such unfair terms at the initial stages of the transaction. Thus, unless unfair provisions are introduced after multiple interactions, such terms should not be seen as unreasonable. Case law highlights that evidence of previous dealings is relevant in B2B contracts but not B2C unless where actual or constructive knowledge of the terms is established, and the consumer parties assent to them.[517]

[512] Van Lange, P. A. M., Rusbult, C. E., Drigotas, S. M., & Arriaga, X. B. "Willingness to sacrifice in close relationships" (1997) J. Pers. Soc. Psychol., 72, 1373–1396.
[513] Thomson, Matthew, Deborah J. MacInnis, and C. Whan Park, "The Ties That Bind: Measuring the Strength of Consumers' Emotional Attachments to Brands," (2005) J. Consum. Psychol., 15, 1,88
[514] Ibid, 79
[515] Riefler, Petra and Adamantios Diamantopoulos, "Consumer Animosity: A Literature Review and a Reconsideration of Its Measurement," (2007) Int. Mark. Rev., 24, 1, 87–119.; Verlegh, Peeter W.J. "Home country Bias in Product Evaluation: The Complementary Roles of Economic and Socio Psychological Motives," (2007) J. Int. Bus. Stud., 38, 3, 361–73.
[516] Thomson, Matthew, Deborah J. MacInnis, and C. Whan Park, "The Ties That Bind: Measuring the Strength of Consumers' Emotional Attachments to Brands," (2005) J. Consum. Psychol., 15, 1, 79
[517] Compare *McCutcheon v David MacBrayne Ltd*, [1964] 1 All ER 430 and *William Teacher & Sons Ltd v Bell Lines Ltd*, 1991 SCLR 130 at 132, 1991 SLT 876 at 877.

Svensson[518] considers the notion of perceived vulnerability, which is founded on the established link between perceived trust and perceived dependence in B2B relationships as well as B2C relationships. The object or cue that could triggers such a feeling can be a place.[519] Dependence in B2B contractual relationships leads implicitly to the necessity for trust between companies.[520] The level of perceived trust is influenced by such causes as the dependability/ reliability, honesty, competence, the buyer/ seller orientation, and the friendliness in dyadic business relationships. Therefore, the gap between perceived dependence and perceived trust is assumed to have an impact on the perceived vulnerability in business relationships towards suppliers and customers.

Some writers have considered the idea of a small businessman to be classed as a consumer in certain transactions[521]. This idea is not unjustifiable due to the nature of these enterprises. We have established that a significant majority of micro enterprises are sole traders, enterpreneurs, partnerships and unregistered companies. Whether or not the aforementioned enterprises qualify as natural persons is determined by their legal personality or lack therof. Indeed, it is justifiable to say that Micro enterprises bear a resemblance to consumers because of their limited experience[522], information asymmetry, cognition[523], and resources. To extend the status of consumers to micro enterprises in general might be asking for too much due to wide variety of consumer related protection. Consequently, this research advocates for this extension in relation to unfair terms in international commercial transactions.

[518] Go¨ran Svensson, "Vulnerability in business relationships: the gap between dependence and trust", (2004) J.B.I.M, 19, 7, 469.
[519] Thomson, Matthew, Deborah J. MacInnis, and C. Whan Park, "The Ties That Bind: Measuring the Strength of Consumers' Emotional Attachments to Brands," (2005) J. Consum. Psychol., 15, 1, 78
[520] Go¨ran Svensson, "Vulnerability in business relationships: the gap between dependence and trust", (2004) J.B.I.M, 19, 7, 470
[521] Sarah Brown, "Protection of the Small Business as a Credit Consumer: Paying Lip Service to Protection of the Vulnerable or Providing a Real Service to the Struggling Entrepreneur?" C.L.W.R 41, 1, 59, 5
[522] Martijn W Hesselink, "Towards a sharp distinction between B2B and B2C? On consumer, commercial and general contract law after the consumer rights directive", (2009) Centre for the Study of European Contract Law, Working Paper Series, No. 2009/06 33; J honle, *Cross border internet dispute resolution* (CUP, 2009) 31
[523] Larry Garvin, "Small business and the false dichotomies of contract law" (2005) Wake forest L. Rev., 40, 313

3.5.2 The Dichotomy in the Application of the Doctrine of Freedom of Contract Between B2B and B2C Contracts: Examples from English Courts.

The dichotomy between B2B contracts and B2C contracts in respect of legislative and judicial interference is clear under European contract law and national legal systems. A number of Directives,[524] Regulations[525] and a myriad of cases highlight this contrast[526].

In the B2C case of *Thornton v Shoe Lane Parking*[527], the plaintiff, a consumer, drove into an automatic car park where a notice "All cars parked at owner's risk" was displayed outside together with the charges. Having driven further into the car park, a ticket came out of the machine which the plaintiff accepted and he was later taken up by a machine to the floor above where he parked. The plaintiff looked at the ticket to confirm the time and observed that the ticket contained some wording that he allegedly did not read. The wording provided that the ticket is issued subject to conditions displayed on the premises. Apart from the notice displayed at the entrance, other conditions were displayed around the carpark, which the plaintiff was unable to see since he did not drive or walk around the car park. One of the conditions is a provision exempting the owner/defendant from liability for car damage and injury to customers whilst in the car park. Unfortunately, an accident occurred in which the plaintiff was severely injured. The trial judge ruled for contributory negligence and awarded the plaintiff half the damages. The defendant appealed on the ground that they were protected from liability under their supposed contract with the plaintiff. On appeal, it was held that for the plaintiff to be bound by the exemption clause, the defendant must show that the plaintiff knew about the clause or

[524] 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')

[525] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) and Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement Of Judgments in Civil and Commercial Matters (Recast)

[526] Roger Brownsword, *Contract Law: Themes for the Twenty-first Century*, (2nd edn, OUP) 43-44.

[527] [1971] 2 QB 163

that the defendant had drawn his attention to it. The defendant, therefore, lost the appeal as he was unable to show this.

Conversely, in the B2B case of *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd,*[528] Ipswich Plant Hire, the defendant hired a crane by telephone from British Crane Hire Corporation, the plaintiff. After the delivery of the crane, the plaintiff sent their terms and conditions of hire to the defendant. The terms included an indemnity clause stating the defendant would be responsible for and indemnify it for, any costs arising out of the use of the crane. The defendant did not sign or return the form to the plaintiff and when the crane sank into the marshes through no negligence on the part of the defendants, they refused to indemnify the plaintiff for the cost of recovering it. The defendant argued that the contract was made orally as the terms were not supplied until after delivery of the crane, and therefore the plaintiff could not seek to incorporate terms into the agreement after the crane had been delivered. The defendant also relied on their failure to sign and return the form as evidence that these additional terms had not been agreed.

It was held that since the bargaining power of the defendant was equal to that of the plaintiff, and it was invariably the custom in the trade for such contracts to be governed by the supplier's terms, the plaintiffs were entitled to conclude that the defendants were accepting the crane on their terms. The conditions can therefore be incorporated into the contract based on the common understanding of the parties, and accordingly, the plaintiffs' claim succeeded.[529]

To probe a little further, it is worth noting the statements by Lord Denning in both cases. He noted in *Thornton's* that in a case of an automatic parking system, the act of the customer in causing the ticket to be issued is an irrevocable step and so the contract is concluded at that point and conditions cannot thereafter be incorporated into the contract.[530] Accordingly, the terms of the contract are those contained near the ticket machine. In contrast, Lord Denning observed in *British Crane Hire Corp*, that:

[528] [1975] QB 303
[529] See p 1062 a b g and j to p 1063 b f and g and p 1064 c and j to p 1065 c
[530] see p 689 d to f and p 693 f,

"... it is clear that both parties knew quite well that conditions were habitually imposed by the supplier of these machines: and both parties knew the substance of those conditions... In these circumstances, I think the conditions on the form should be regarded as incorporated into the contract. I would not put it so much on the course of dealing, but rather on the common understanding which is to be derived from the conduct of the parties'[531].

Similarly, in *L'Estrange v F Graucob Ltd*,[532] the plaintiff purchased an automatic slot machine for her cafe (for the purpose of her trade) from the defendant and signed a sales agreement, containing in ordinary print the general terms of the contract, and in small print certain special terms, one of which was 'any express or implied condition, statement, or warranty, statutory or otherwise not stated herein is hereby excluded' which the plaintiff allegedly did not read. The machine failed to work satisfactorily and the plaintiff brought an action for breach of an implied warranty that the machine was fit for purpose. The defendants were held to be protected by the clause. Scrutton LJ, said: "When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not."

In the B2C case of *McCutcheon v David MacBrayne* Ltd,[533] McCutcheon arranged for his car to be delivered to the defendant shipping company for carriage to the mainland. The company's usual practice was to ask the consignor to sign a risk note, exempting them from liability in case of negligence. However, owing to an oversight, McCutcheon was issued a receipted invoice only and was not asked to and did not sign a risk note. He had shipped similar goods in a similar manner and signed such notes in the past. The ship sank because of the company's negligent navigation and the car was lost. In an action for damages, the company relied on the exemption clause contained in the terms and

[531] [1975] QB 303 at 311, [1974] 1 All ER 1059 at 1062, CA, per Lord Denning MR.
[532] [1934] 2 KB 394, 103 LJKB 730, [1934] All ER Rep 16, 152 LT 164
[533] [1964] 1 All ER 430

conditions. The company further relied on the conditions exhibited in its office, on board the ship and on the invoice which state that goods are carried subject to conditions specified on sailing bills and notices. The company also contended that because of previous dealings, the conditions of carriage were incorporated in the contract. McCutheon contended that although he knew that conditions of some kind existed, he had never read the displayed conditions or any risk notes which he had signed.

It was held that the clause had not been incorporated into the contract. McCutheon could not be bound by a clause on the basis of a previous course of dealing when he did not have knowledge of the specific term. Previous dealings are only capable of importing a term into a later contract where actual or constructive knowledge of the terms is established, and the parties assent to them. McCutcheon was therefore successful in his claim.

In light of the above case, it is interesting to look back at the unsuccessful arguments of the defendants in the *British Crane Hire Corp Ltd*'s case. The argument was that contractual terms which were not supplied at the time of concluding the contract orally should not be incorporated into the contract and the failure to sign and return the form should be seen as unacceptance of the terms of the contract. Suppose the defendant had been in a weak bargaining position, or if he was a consumer, would the court have reached a different decision? I would assume so. For in *Hollier v Rambler Motors (AMC) Ltd,*[534] Lord Denning MR remarked: "The plaintiff was not of equal bargaining power with the garage company which repaired the car". It was held that the defendants were liable to the plaintiff for their negligence because (i) three or four transactions in the course of five years is insufficient to establish a course of dealing; the clause on the 'invoice' form stating "The Company is not responsible for damage caused by fire to customers' cars on the premises' could not, therefore, have been incorporated in the oral contract made between the parties; (ii) alternatively, on the footing that a course of dealing had been established and the clause consequently incorporated in the contract, the words of the

[534] [1972] 2 QB 71. At 1061 - 1062

clause were not sufficiently plain to exclude liability for negligence; although as bailees defendants could only be liable in negligence, if they were seeking to exclude liability for negligence they ought clearly to have conveyed that it was liability for negligence which was being excluded. The words used were susceptible to a construction which would regard them as a mere statement in the nature of a warning that if a fire did occur at the garage which damaged the car and it was not caused by the negligence of the garage then the owner of the garage was not responsible.

In *William Teacher & Sons Ltd v Bell Lines Ltd*,[535] a B2B case involving similar facts. Lord Marnoch opines:

> ''I see no reason in principle why... one party should not be led reasonably to conclude that the other party has satisfied himself as to the content of conditions frequently referred to in the course of prior dealings and has, by inference, accepted them as being applicable to a subsequent contract'

One will notice the distinction in the treatment of previous dealings and the expectation of the courts with regard to B2C and B2B contracts. Where the conditions are destructive of the consumer's rights, it must be shown that adequate steps were taken to draw his attention to those terms. Traces of the assumption that B2B is on an equal footing can be seen in the attitude of the court to "previous dealings". Evidence of previous dealings is usually considered knowledge in B2B while three or four pieces of evidences of previous dealings are insufficient in cases of B2C to prove knowledge of the terms, actual and not constructive, and assent to them'

We see that legal construction of words and phrases has become a common technique in resolving issues of interpretation in contracts, usually in favour of consumers and other weaker parties. A similar method is desirable for the benefit of micro enterprises in MB2B international contracts, particularly where a term has been validly incorporated. A rule of

[535] Lord Marnoch in *William Teacher & Sons Ltd v Bell Lines Ltd* 1991 SCLR 130 at 132, 1991 SLT 876 at 877.

legal construction where adopted could render a clause ineffective or, at worst, less potent. This is particularly relevant to unfair terms.

Arguably, an inappropriate use of the rules of legal construction may create a risk of uncertainty which is undesirable in commercial contracts, and this method can be "artificial". However, according to Atiyah, one major advantage of rules of legal construction is that it is extremely flexible and provides a leeway for the 'suffocating grip' of precedent.[536]

In the absence of adequate legislative controls on unfair terms in micro enterprises contracts, courts are forced to adopt a more interventionist approach in contracts particularly where one business abuses its dominant position by including harsh terms that put the other business at disadvantage. In *St Albans City & District Council v International Computers Ltd,* [537] a computer company contracted to supply a database for the community charge register to a local authority. The firm's standard terms and conditions limited its liability to £100,000. Due to an error in the computer software, the authority's population figures were overstated and the community charge rate was set too low. Although a limitation clause was included in a contract, the court adopted 'a protectionist attitude towards the local authority which is in a distinct position and is arguably in greater need of protection than a large public limited company'.[538]

Art 1188 of the French civil code provides that a contract is to be interpreted according to the common intention of the parties rather than stopping at the literal meaning of its terms. Thus, where this intention cannot be discerned, a contract is to be interpreted in the sense which a reasonable person placed in the same situation would give to it.

Contra proferentem rule is one of the commonly adopted rules in contract law which allows any clause considered to be ambiguous to be interpreted against the interests of

[536] PS Atiyah, 'Judicial Techniques in the Law of Contract' (originally published in (1967–1968) 2 Ottawa LR 337) and revised and re-printed in Essays on Contract (Clarendon 1986; paperback edn, 1988) 269
[537][1996] 4 All ER 481 (CA), [1995] FSR 686).
[538] Jill Poole, *Casebook on Contract Law* (13th edn, OUP, 2016) 288

the party that introduced, created, or requested the clause. Unfortunately, this rule has its limitations which includes the prerequisite for ambiguity.

Recent court decisions reflect the fact that the plain meaning of words is likely to be the starting point for respecting the parties freedom of contract even if this results in an unfair bargain for one of the parties. In *Arnold V Britton and others,*[539] *a case* relating to the service charge payable on caravans on a leisure park, under various leases. Although all leases contained provisions relating to the payment of a service charge of £90, earlier leases made such provision subject to compound interest of 10% every 3 years while later leases contained provisions making such payments subject to 10% compound interest each year. The caravan owners argued that to interpret the lease literally would result in unfairness and there was an implied term that the service charge provision should be as the other properties.

In a majority of 4-1, the Supreme Court held interalia that clear and certain language should not be disregarded in favour of perceived "commercial common sense"; "The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language"[540].

When compared with the position in France,. Article 1188 of the French Civil code provide that: "One must in agreements seek the common intention of the contracting parties, rather than stop at the literal meaning of the words". Under German law, legal transactions which show a clear disproportion in value and parties obligations or those tainted by the exploitation of distress, gullibility or inexperience of the disadvantaged party are rendered void[541]

[539] [2015] UKSC 36
[540] Para 19
[541] § 138 II BGB; R. Zimmermann,"Modernising the German law of obligations?" in P Birks and Pretto (eds), *Themes in Comparative law in Honour of Bernard Rudden* (OUP, 2002) 148.

3.6 Conclusion

Traditional contract law have been pervaded by maxims such as caveat emptor, pacta sunt servanda and freedom of contracts. These well-known concepts connotes that a contract reflects the intention of the parties and this should be respected. Therefore, where a party enters a contract on his own freewill, he must accept the consequences even where they entail hardship subject to the principles of good faith, good moral etc.

Modern reforms to contract law aims to correct this notion by adjusting traditional contract law to mirror the evolutions of modern society particularly the recognition of the inequality of contracting parties and the need to protect weaker parties. Generally, legislators have recognised the need to protect certain categories of parties in commercial contracts and have established objective rules that favour those weaker parties and/or restrict party autonomy.[542] The most common example of a class of party perceived to be the weaker party in international commercial contracts is consumers.

We have shown that one of the principal reasons for the protection of weaker parties is the inequality in bargaining position between contracting entities. Many authors have highlighted that this inequality on bargaining position is not only peculiar to B2C relationships[543]. A number of B2B contracts also exhibit this trait. Several factors can determine who is in a more advantageous position in terms of contracting and therefore enjoying dominance. According to Hesselink,[544] in B2B relationships unequal bargaining is commonplace. Small businesses are often more vulnerable than consumers because their contracts do not target consumption, the stakes tend to be far higher. Strongly

[542] Laura Maria Van Bochove, 'Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law' (2014) 3 Erasmus L Rev 147.

[543] M Miller "contract law, party sophistication and the new formalism" (2010) Missouri L. Rev., 75, 495; R Bigwood, *Exploitative contracts* (OUP, 2003) 362; H Beale "Exclusion and Limitation Clauses in Business contracts: Transparency'" in A Burrows and E peel (eds) *Contract terms* (OUP, 2009) 159; J Mallor, "Unconscionability in contracts between merchants", (1987) south western law journal 40, 1065; B Morant, "The quest for bargains in an age of contractual formalism" (2003) Strategic initiatives for small business law 237; D Barnhizer "Inequality of bargaining power" (2005) 76 University of Colorado Law Review, 139

[544] Martijn W. Hesselink "Towards a sharp distinction between B2B and B2C? On consumer, commercial and general contract law after the consumer rights directive" Centre for the Study of European Contract Law Working Paper Series No. 2009/06, 33; Marcus Moore, "Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability" (2018) 134 Law Q Rev, 263; Katalin Judit Cseres, "Comparing Laws in the Enforcement of EU and National Competition Laws". European (2010) J. Leg. Stud. 3, 1, 214; Michael Schillig, "Inequality of bargaining power versus market for lemons: legal paradigm change and the Court of Justice's jurisprudence on Directive 93/13 on unfair contract Terms"(2008) Eur. Law Rev., 33

agreeing with the above position, we have explored relevant protection provided to weaker parties in B2B contracts under the European regime.

The guarantee of protection for consumers regardless of terms in a contract already implies a redistribution of benefits from the stronger party (business) to the weaker party (consumer) and raises the question as to the extent of the application of freedom of contract. Such protection is deemed necessary and prevalent in most legal systems in Europe.

We have seen that the law embodies a social, economic, and ideological tool, which has the potential to offer protection for certain persons. A system, which at best recognises micro enterprises in such a category or at least creates distinct protective rules, will be beneficial.

The next chapter will consider the relevance of Consumer Directives in the protection of Micro Enterprises and the Protection of Micro enterprises under Domestic Laws.

Chapter 4: **The Relevance of Consumer Directives in the protection of Micro Enterprises and the Protection of Micro enterprises under Domestic Laws.**

4.0 Introduction

Maximum harmonisation of provisions relating to unfair practices would undoubtedly result in eliminating some of the risk derived from the fragmentation of rules contained under various national legal systems. Thus, the UTCCD and the UCPD aims at harmonising different national practices relating to unfair terms and practices. However, as these Directives, like any other Directive, do not apply at the national level but only prescribe the objectives to be achieved, the goal of harmonisation is questionable.

This chapter examines the Relevance of Consumer Directives relating to unfair terms in the protection of Micro Enterprises and the extent of their implementation under Domestic Laws. This chapter focuses mainly on UTCCD and the UCPD. It discusses relevant provisions of the above Directives and discusses their relevance to Micro enterprises. Secondly, it considers the significance of the distinction between standard terms and individually negotiated terms in contracts made under the Directive and its implication for Micro enterprises. Thirdly, it deliberates the extent of the Implementation of relevant Directives in National Legal systems using a case study of English (pre-Brexit), French and German domestic legal systems. It then goes on to consider further protection against unfair terms available in these national legal systems to Micro enterprises. It concludes by demonstrating the disparity in the treatment of unfairness in B2B relationships and the need for uniformity.

4.1 Directives Regulating Unfair Terms under the European Regime

Statutes generally have played an essential aspect in regulating consumer contracts in an effort to protect them as weaker parties. The principal Directives regulating unfair terms are UTCCD and the UCPD. In addition, some laws confer broad powers on the courts to

remedy the unfairness in the relationship between these parties. [545] These powers range from an order for repayment of sums paid, reducing or discharging any sum payable by the debtor or power to alter the terms of the agreement.[546]

Aside from the UTCCD and the UCPD, several Directives have evolved at the European Union level to protect consumers in commercial contracts. Notable examples includes, Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, 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.

Like some EU Regulations, several conflict rules are contained in various Directives; an overwhelming majority of Community laws are also included in Directives.[547] In recognition of these, provisions like Art 23 of the Rome I gives effect to some general laws contained in community laws. The lack of uniform rules in EU contract law for controlling unfairness is further complicated by the inconsistent treatment of unfairness in different national legal systems. Principles relating to consumer protection were initially left to member states. The European Parliament and Commission subsequently raised concerns

[545] McKendrick Ewan, Contract Law, (11th edition, Palgrave Macmillan, 2015) 305
[546] Consumer Credit Act 1974, Section 140B
[547] Helmut Heiss, "Party Autonomy: The Fundamental Principle in European PIL of Contracts" in Franco Ferrari Stefan Leible,(eds) *Rome I Regulation The Law Applicable to Contractual Obligations in Europe* (European Law Publishers, 2009) 5

about the divergence in national contract law. It was pointed out that such divergence will often have a detrimental impact on international trade, create inconsistencies, gaps, overlaps in EU legislation, and result in a high transactional cost for traders. Coarse posit that If transaction cost is lowered, there is likely to be more rearrangements, thereby causing more productivity in the economic system. In fact, Transaction costs, is "the factor upon which the productivity of the economic system depends". More so, transaction costs depend, on the working of the legal system amongst other factors.[548]

This argument is equally relevant to Micro enterprises. For micro enterprises, it goes without saying that the extent of the application of the doctrine of freedom of contract is a matter of enduring concern. The implications of recent developments in contract law, particularly on freedom of contract, could have a huge impact on these enterprises' survival. Therefore, leaving the protection of Micro enterprise at the level of member state shifts too much power over restriction of freedom of contract toward bodies that may not be democratically legitimated, such as courts in civil law systems, certain other governmental bodies, or non-governmental organisations.

4.1.1. 93/13/EEC - Unfair Terms in Consumer Contracts Directive (UTCCD)

UTCCD applies to all B2C contracts that have not been individually negotiated, such as pre-formulated standard terms. Art 3 (1) stipulates that a term that has not been individually negotiated is considered unfair if it is contrary to good faith and causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer. *In Aziz v Catalunyacaixa,*[549]a case arose concerning the validity of certain terms of a mortgage loan agreement entered into by the parties. The ECJ, on request for a preliminary ruling relating to the interpretation of the UTCCD, considered the meaning of "significant imbalance" and "contrary to good faith". It was held that significant imbalance must be assessed by comparing the provision to the applicable national law had the term not been agreed by the parties. Whether or not the significant imbalance is contrary to

[548] Ronald H. Coase, "Why Economics Will Change" (2015) Man and the Economy, 2, 2, 116

[549] *Aziz v Caixa d´Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*: CJEU 14 March 2013, Case C-415/11 (Aziz).

good faith should be determined by whether the seller or supplier, dealing fairly and equitably, could reasonably assume the consumer would have agreed to the term if it had been negotiated.

A list of commercial practices which are considered unfair is detailed in relevant Directives and legislation. Furthermore, in determining the unfairness of a contractual provision, case law showing evidence that a particular commercial practice has been previously labelled unfair is a relevant factor in determining whether a provision is unfair. However, such case law does not affect the validity of the contract under Article 6(1) of the Directive.[550]

Having regard to the principle of contractual freedom, under the UTCCD, the test of fairness is not extended to the core provisions in the contract, i.e. the subject matter or the assessment of price and remuneration so far as those terms are written in plain, intelligible language.[551] In the joined cases of *Profi Credit Polska S.A. v QJ and others*,[552]AG Hogan opined that the interest rate and fixed fee provisions of a loan could not be assessed for unfairness under the Directive 93/13/EEC because it represents the main subject matter and set the price payable. Going further, he stated that the fact that a lender failed to explain the details of each fee charged did not mean that the lender had failed the transparency requirement.

Unfairness in commercial relationships may appear in a number of ways. One way is to execute unfair terms in the contract, including terms relating to the subject matter. Another way is when a stronger business entity abuses its position even if contractual terms seem fair. Moreso, Art 4 (1) prescribes that assessment of unfairness in contracts should take into account the nature of goods and services, bearing in mind all the circumstances attending the conclusion of the contract. Notwithstanding this principle, some cases have come before the court seeking to invalidate price terms or the subject matter in commercial contracts on the basis of unfair terms. For example, the UK

[550] Case C-453/10 *Pereničová and Perenič*, para 46
[551] Unfair Terms Directive, Art 4 (2); Case C-484/08 (*Caja de Madrid*), [2010] ECR I-4785.
[552] C-84/19, C-222/19 and C-252/19

Supreme Court in the *Office of Fair Trading v Abbey National plc and others*[553] reversed the decisions of the High Court and the Court of Appeal by ruling that the Office of Fair Trading is not entitled to assess the fairness of bank charges under Reg 6(2) of the Unfair Terms in Consumer Contracts Regulations 1999 which implements Art 4(2) of the UTCCD.

In situations where one party's freedom is reduced to either accepting the whole contract (including unfair provisions) or rejecting it because he has no say on the terms as the other party drafted it, such contracts cannot be said to have been fairly negotiated. One of the challenges that a Micro enterprise may face arises where he fears that the commercial relationship could be terminated if he complains; what is often referred to as the "fear factor" (where the weaker party fears that the commercial relationship may be terminated in the event of unco-operation or complaint on its part).[554] In fact, a Micro enterprise may not read or be willing to negotiate such unfavorable terms in order to maintain the perception of cooperation and easiness. Another issue is that a weaker party may fear that attempting to review or negotiate standard contracts will reveal information they would rather not make public; information such as ignorance or ineptitude or just difficult to serve and satisfy.[555]

The protection provided to consumers under UTCCD permits the national court to solely determine whether a term in a contract is unfair or not. Thus, whether a term is unfair depends on the context in the national law and is a matter for the national court to entertain. [556] National courts are able to assess fairness of its own motion despite the consumer not having raised the issue of fairness;[557] or not connected to the term in dispute.[558] Although "Member States may not adopt stricter rules than those provided for

[553] [2009] UKSC 6; [2010] 1 A.C. 696,

[554] EU Parliament Briefing on Internal Market And Consumer Protection, "Unfair Trading Practices in the Business-to-Business Food Supply Chain", 4; Shmuel I. Becher, "Behavioral Science and Consumer Standard Form Contracts", (2007) 68 1 L\L. . REV. 117, 157-160.

[555] Lucian A. Bebchuk & Richard A. Posner, "On,-Sided Contracts in Competitive Consumer Markets", (2006) 104 MicH. L. REv. 834

[556] Case 240/98*, Océano Grupo Editorial SA v Roció Murciano Quintero*; [2000] ECR 1-04941 (ECJ); *Freiburger Kommunalbauten* ECJ 1 April 2004, Case C-237/02; Case C-34/18, *Ottília Lovasné Tóth v ERSTE Bank Hungary Zrt*

[557] Case C-419/18, *Profi Credit Polska*

[558] Case C-511/17, *Lintner v UniCredit Bank Hungary Zrt*

in the Directive, even in order to achieve a higher level of consumer protection,"[559] the ECJ held that supplementary rules of national law are always exempt from a fairness assessment under the UCCTD and rejected the Advocate General's recommendation that courts should assess whether the lawmakers had intended that the supplementary rules should establish a reasonable balance between parties to the relevant contract.[560]

For example, Article 6(1) of UTCCD provides that unfair terms in consumer contracts are not binding on the consumer. National courts also have the powers to hold that a consumer contract should survive the deletion of such unfair terms.[561] Article 7 requires Member States to establish conditions that allow organisations with a legitimate interest in protecting consumers to challenge unfair terms.

The ECJ recently considered the extent to which a consumer can waive the rights granted under the UTCCD. It was held that a consumer could indeed waive accrued rights provided they have been fully informed of those rights and do so freely (in this case, accrued rights in respect of an unfair floor rate in a mortgage transaction) however, waiver of future rights is not permitted.[562]

Due to the extensive powers granted under the UCCTD, extending the protections available to consumers under this Directive to Micro enterprises seems illogical. The ability to determine the inherent fairness of commercial terms, whether or not connected to the dispute, would create huge and undesirable commercial uncertainty. However, specific provisions which allow Micro enterprises to challenge unfair terms and a list of prohibited commercial practices should be encouraged.

[559] Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium, and Galatea BVBA v Sanoma Magazines Belgium NV,* Judgment of 23 April 2009, paragraph 52.
[560]Case C-81/19 , *NG & OH v SC Banca Transilvania SA*
[561] Case C-260/18, *Dziubak and another v Raiffeisen Bank International AG*, EU:C:2019:405
[562] XZ v Ibercaja Banco SA (Case C 452/18)

4.1.2 2005/29/EC Unfair Commercial Practices Directive (UCPD)

The UCPD has a broad scope of applications (it covers the entire B2C transactions, whether offline or online) and represents an all-embracing piece of EU legislation regulating unfair practices in B2C commercial transactions regardless of whether they occur within or outside any contractual relationship.[563] The UCPD applies irrespective of the channel or device used to implement the practice, whether before, during or after the transaction has taken place[564] and according to Art 2 (c), applies to all types of consumer contracts covering both goods and services. It is not only contrary to the UCPD to incorporate unfair terms, it is also unfair to seek to enforce it[565]

According to Art 1 of the UCPD, "the purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests". To ensure the highest degree of legal certainty for consumers, the UCPD offers a certain level of protection to consumers and advocates the fundamental rights and principles in the Charter of Fundamental Rights of the EU.[566] Unfair terms under the UCPD include practices which are misleading and aggressive; undue delay; false impression; psychological pressure; misleading information; misleading omission; unclear and misleading language; act which are contrary to good faith and which has the potential of distorting the average consumer's transactional decision; and other prohibited list of unfair commercial practices.[567]

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[563] UCPD, Recital 13

[564] UCPD, Art 3

[565] *Office of Fair Trading v Ashbourne Management Services Ltd* [2011] EWHC 1237 (Ch).

[566] UCPD, Recital 25

[567] Art 6 and 7; Hungarian Court Decision No K. 27.272/2014, Administrative and Labour Court of Gyor.; Art 8 and 9; Supreme Court of Bulgaria, 3 November 2011, 15182/2011, VII d: http://www.sac.government.bg/court22.nsf/d6397429a99ee2afc225661e00383a86/4ade3b5386f5ef2cc225793b003048b3?OpenDocument. PS1268 - TELE2-ostruzionismo migrazione, Provv. n. 20266 del 03/09/2009 (Bollettino n. 36/2009); PS1700 - Tiscali-ostruzionismo passaggio a TELECOM, Provv. n. 20349 del 01/10/2009 (Bollettino n. 40/2009).; PS9042 - Esattoria-Agenzia Riscossioni. Provvedimento n. 24763, 22 January 2014.; DKK – 61 – 10/07/DG/IS; Krajsky sud v Presove, 27 October 2011, 2Co/116/2011. ; Article 6; The Court clarified some elements of the relationship between the Directive in the Pereničová and Perenič case,; Art 7; Art 7 (4), Recital 14, Article 5(1)(c) of the e-Commerce Directive; Prague City Court, 11 May 2015, Bredley and Smith vs Czech Trade Inspection Authority. According to Art 7(2), failure to identify the commercial intent of a commercial practice is regarded as a misleading omission, where this failure is likely to cause an

Although the UCPD is an important piece of legislation regulating unfair terms, where there is a conflict between the provisions of UCPD and other Community rules regulating particular aspects of unfair commercial practices, the latter prevails and applies to those particular aspects.[568] The UCPD is complementary to other EU legislation regulating specific aspects of unfair commercial practices; hence it can fill the gaps in other EU laws and apply only to the extent that there are no specific community rules or EU legislation regulating specific aspects of unfair commercial practices.[569] Though this position appears necessary to maintain coherence, the protection offered to consumers under this Directive is somehow limited to the extent that there is no specific sectoral legislation at the community level.

Art 2(d) defines 'business-to-consumer commercial practices' as "any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers". It does not deal with situations where a business purchases products from consumers except where a link is established between the sale of that product by a consumer to the business and the promotion, sale or supply of another product to the consumer.[570]

Thus national measures primarily aimed at protecting competitors' interests fall outside the scope of the UCPD however, the UCPD covers national measures with the dual aim of protecting consumers and competitors.[571] The provision that a commercial practice is unfair if it is contrary to the requirements of professional diligence and materially distorts or is likely to materially distort the economic behaviour of the average consumer, or of the average member of the group is targeted to protect consumers only.[572] This is a self-

average consumer to take a transactional decision; Case C-220/98 Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group. [2000] ECR I-00117, para 29.; Art 5 (2); Annex 1

[568] UCPD, Art 3 (4)

[569] UCPD, Recital 10

[570] For example Trade-in agreements. Case *Webuyanycar* - CRE-E/25631, 28 March 2011, https://www.gov.uk/cma-cases/we-buy-any-car-unfair-practices-by-trader-offering-vehicle-buying-service

[571] C-304/08, *Plus Warenhandelsgesellschaft*

[572]UCPD, Art, 5 (2); Decision no. RWA-25/2010, *Prezes Urzędu Ochrony Konkurencji i Konsumentów, Delegatura w Warszawie*, 28 December 2010, Eko-Park S.A.

standing criterion and requires no additional cumulative test necessary to find a practice to be in breach of any of the specific categories of unfair practices in Articles 6 to 9 or Annex I to the UCPD.

One EC study of consumer vulnerability across key markets[573] researched the often ambiguous concepts of "average consumer" and "vulnerable consumers" developed by the ECJ. This study which focuses mainly on the UCPD (which describes the average consumer as "reasonably well informed, observant and circumspect"), examined the understanding and application of these concepts amongst member states and concluded that these concepts have different meanings under various national legal systems.

According to Recital 18 of the UCPD, the average consumer test is not a statistical test. Therefore, national courts can solely determine whether a practice can mislead an average consumer by taking into account the presumed consumers' expectations.[574] In England, the High Court of Justice stated that the term 'average consumer' relates to 'consumers who take reasonable care of themselves, instead of the ignorant, careless or over-hasty' but highlighted that one could not assume that the average consumer will read the small print on promotional documents.[575]

Among other findings, the study shows that the average consumer, as represented by the median consumer response per indicator, feels quite informed about prices, declares that he/she reads a communication from the internet but admits to having only glanced over it or skim-read it. It also notes that he/she does not rely on information from advertisements only, sees him/herself as quite careful in dealing with people and in making decisions, is not very willing to take risks and disagrees that promotions report objective facts. He/she is able to correctly identify the meaning of concepts such as KWh, megabytes/per second and interest rates and accurately answer questions measuring

[573] Study on consumer vulnerability in key markets across the European Union (EACH/2013/CP/08) <http://ec.europa.eu/consumers/consumer_evidence/market_studies/vulnerability/index_en.htm> accessed 4 June 2018

[574] Case C-210/96 *Gut Springenheide and Tusky v Oberkreisdirektor Steinfurt* [1998] ECR I-4657, para 31, 32, 36 and 37. See also Case C-220/98, *Estée Lauder Cosmetics GmbH & Co. ORG, v Lancaster Group GmbH*, opinion of Advocate General Fennelly, para 28.

[575] *Office of Fair Trading v Purely Creative Ltd* [2011] EWCH 106 (Ch)

basic computational abilities and credulity. One can only wonder that the above suggests that the average Consumer is quite knowledgeable and able to make good transactional decisions irrespective of special rules.

However, considering that when presented with complex offers in behavioural experiments, the median consumer was unable to select the best deals, the European Commission was quick to mention that the majority of the aforementioned indicators reflect the self-reported average – as opposed to objective measures – of the concepts of being "well-informed", "observant" and "circumspect" and should, therefore, be construed with caution and that the above report is likely to have been influenced by behavioural bias such as consumer overconfidence[576].

The ECJ held *that […] it is possible that because of linguistic, cultural and social differences between the Member States a trademark which is not liable to mislead a consumer in one Member State may be liable to do so in another.'* [577] Arguably, like consumers, the characteristics of "average" will depend both on the situation and how these characteristics are measured.

Before the coming into effect of UCPD, comparative advertising was considered under the ambit of Directive 84/450/EEC by virtue of Directive 97/55/EC, which regulated both B2C and B2B contracts. Bernitz[578] argues that it is difficult how comparative advertising, which is considered unfair under the Misleading and Comparative Advertising Directive (MCAD), can avoid being misleading and unfair to consumers. The distinction between B2B and B2C relating to unfair commercial practices seems unreasonable from an economic perspective considering the likely domino effect of one on the other as unfair commercial practice in B2B relations would likely filter down to the consumer. Likewise,

[576] Consumers' behavioural biases – in particular over-confidence – are highlighted in the study on consumer vulnerability in key markets across the EU ((EACH/2013/CP/08)) and widely documented in relevant literature (e.g. P. Lunn, and S. Lyons, 'Behavioural Economics and „Vulnerable Consumers": A Summary of Evidence', (2010) Economic and Social Research Institute (ESRI); Kahneman,D., Slovic, P., and Tversky, A. (Eds.) *Judgement Under Uncertainty: Heuristics and Biases.* (Cambridge University Press, 1982).

[577] Case C-313/94 *F.lli Graffione SNC v Ditta Fransa* [1996] ECR I-06039, para 22.

[578] Ulf Bernitz, Caroline Heide-Jørgensen (eds), *Marketing and Advertising Law in a Process of Harmonisation,* (Bloomsbury,2017) 173

unfair commercial practices in B2C would inevitably affect B2B competition. In addition, unfair commercial practices in B2B relationships can negatively influence consumers' decision-making in vertical B2C transactions. Moreso, Recital 6 acknowledges that commercial practices which directly harms consumers' interest can indirectly harm the economic welfare of legitimate competitors.

According to the UCPD, "transactional decision" means "any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting".[579] Such decisions cover a variety of decisions made by the consumer before and after the purchase. According to the ECJ, such decisions include whether or not to purchase an item or service, how to purchase and under what terms that purchase should be made.[580]

Adapting the above definition for our purpose, a transactional decision made by a micro enterprise not only includes whether or not to make a purchase but will also include any decision made about the acceptable cost to be incurred by the enterprise, the level of value appropriation (profit) and other expected benefits from the relationship.

Notably, some transactional decisions may have no legal or contractual consequence under national legal systems such as a decision to entertain a sales presentation, which is often regarded as an invitation to treat in jurisdictions such as English Law. However, most transactional decisions often have legal and economic implications. Consequently, pre-contract decisions which could be as trivial as travels to a meeting or as major as a decision to sign a contract often have huge legal and contractual implications for micro enterprises.

We have established how contract negotiation reacts with contractual power. Consequently, if the agreed terms of the contract become more generous to the larger

[579] UCPD, Art 2k

[580] Case C-281/12 *Trento Sviluppo srl, Centrale Adriatica Soc. Coop. Arl v Autorità Garante della Concorrenza e del Mercato*, 19 December 2013, para 35, 36 and 38.

enterprise due to the enterprise possessing the market power, this could significantly affect the expected relationship and the riskiness of the underlying contract.[581]

The decision of the courts in cases such as *Johann Gruber v Bay Wa AG* and *Cape Snc v Idealservice Srl* have shown that the boundaries between B2C contracts and B2B contracts are carefully guarded in European law,[582] and it is not a matter of bargaining power. In the current environment where enterprises regardless of size are under extreme pressure to advance the best likely outcomes of each transaction,[583] there has to be a compromise (often by the weaker party) in cases of the mutually conflicting interests of business parties.

Consumers generally are protected from unfair terms and unfair commercial practices, which lead to a transactional decision. Some special consumers are also offered additional special protection under Art 5 (3) UCPD. Consumers who meet the requirements of one of the groups listed in Article 5(3) is ensured a higher level of protection than *'the average consumer'* referred to in Article 5(2).

Compellingly, the special category of consumers under Art 5 (3) UCPD, which are provided with a higher level of protection, are "consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity…". Where characteristics such as mental or physical disability, age or other vulnerabilities make a consumer more predisposed to certain practices, or their economic behaviour is likely to be distorted by these characteristics, it is only reasonable that special protection is provided.[584]

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[581] Kislaya Prasada,1, Timothy C. Salmonb, "Self Selection and market power in risk sharing contracts", (2013) J Econ Behav Organ. 90, 72; Srivastava, J. and Chakravarti, D., "Channel negotiations with information asymmetries: contingent influences of communication and trustworthiness reputations" (2009) J Mark Res, 46 (4), 557-572.; J. Ramsay, "Serendipity and the realpolitik of negotiations in supply chains" (2004) Int. J. Supply Chain Manag, 9 (3), 219-229.

[582] Vincenzo Roppo, 'From Consumer Contracts to Asymmetric Contracts: a Trend in European Contract Law?' (2009) 5(3) ERCL 307.

[583] U. Herbst, M. Voeth, and C. Meister, "What do we know about buyer-seller negotiations in marketing research? A status quo analysis." (2011). Ind. Mark. Manag., 40 (6), 967-978.

[584] UCPD, Recital 19; Another example of the recognition of this special class of consumers can be found in Recital 2 of the council directive 2003/54/EEC on the rules for internal market in electricity which adopts the term "small and vulnerable customers" to refer to its target group

Research from the European Commission's study on consumer vulnerability across key markets tries to reconcile the definition of "vulnerable consumers." It attempts to establish a broad definition comprising five dimensions that makes a person more susceptible to marketing practices. The study defines the "vulnerable consumer" as: *"A consumer, who, as a result of socio-demographic characteristics, behavioral characteristics, personal situation or market environment: Is at higher risk of experiencing negative outcomes in the market; Has limited ability to maximise his/her well-being; Has difficulty in obtaining or assimilating information; Is less able to buy, choose or access suitable products; or Is more susceptible to certain marketing practices."*

The concept of 'credulity' protects those consumers who for any reason may more readily believe particular claims or likely to be influenced by a specific commercial practice. This concept is neutral and circumstantial; therefore, any consumer could qualify as a member of this group. The study of consumer vulnerability[585] shows that people failing a credulity test are more likely than others to have difficulties choosing deals. More importantly, persons who consider themselves credulous feel more vulnerable and are unlikely to complain when facing problems.

It is pertinent to note that consumer vulnerability is multi-dimensional, and characteristics such as gender, age, or health can increase vulnerability in some areas and not others. The report shows that the majority of consumers show signs of vulnerability in at least one dimension, one-third of consumers show signs of vulnerability in multiple dimensions while less than a fifth of the consumers interviewed show no signs of vulnerability at all.[586]

It is interesting to consider whether such characteristics can apply to micro enterprises. Bearing in mind that micro enterprises include sole traders, entrepreneurs, partnerships, self-employed and unregistered organisations, it can be argued that the state of mind or vulnerability of the owner-managers represents the state of mind of that enterprise. It is therefore worth exploring the five dimensions which have been identified by the

[585] Ibid

[586] EC Green Paper On Unfair Trading Practices in the business-to-business food and non-food supply chain in Europe, COM (2013) 37 final

European Commission's study on consumer vulnerability across key markets and apply these to micro enterprises to determine the extent of its relevance.

4.1.2.1 Higher risk of experiencing negative outcomes in the market

A study conducted on businesses by Mathews and Scott[587] explains the divergence in response to environmental uncertainty. The research indicated that small enterprises experience significantly greater human and time related constraints than larger enterprises. Storey,[588] in his book titled "Understanding the small business sector" highlighted that the key factor which differentiates small enterprises from large ones is the greater amount of uncertainty and dynamism within their external environment.

Micro enterprises conduct their operations in increasingly unsettled environments with limited human and financial resources. Because the majority of micro enterprises operate with limited capital and low market share, this results in a lack of market power which further increases environmental uncertainty.[589] It is therefore not surprising that they are often affected by the policies and operations of larger enterprises.[590] Economics posit that the combination of low market share and having a limited portfolio of products and services means that an enterprise lacks the needed power to alter market demand and is consequently exposed to major economic fluctuations.[591]

Moreover, the inherently small size (number of employees and turnover) of micro enterprises can often be a constraint to the owner-managers. Limited financial and human resources translate into insufficient or determinate power to affect market share and the large enterprise competitor.[592] The effect of this constraint is so dire that it often impacts their decision-making. As uncertainty creates a sense of instability, micro

[587] C.H Mathew & S.G Scott "Uncertainty and planning in small and entrepreneurial firms: An empirical assessment" (1995) J. Small Bus. Manag., 33

[588] D.J Storey. *Understanding the small business sector*. (London: Routledge, 1995).

[589] P. Westhead, & D Storey, "Management training and small firm performance: why is the link so weak?" (1996) Int. Small Bus. J., 14, 13-24.

[590] C.B Schrader, C.L Mulford, & V. L. Blackburn. "Strategic and operational panning, uncertainty, and performance in small firms". (1989) Journal of Small Business Management, 27, 70-75.; Lee, G. "Strategic management and the smaller firm". (1995). Small Business and Enterprise Development, 2, 158-64.

[591] Chris Gore, Kate Murray and Bill Richardson, *Strategic decision-making* (London: Cassell. 1992).

[592] Ibid; Terri Byers & Trevor Slack "Strategic Decision-Making in Small Businesses Within The Leisure Industry", (2001) J. Leis. Res., 33:2, 124

enterprise owners doubt the benefits and validity of strategic management and other decision making. Consequently, the feeling of constraint in dealing with environmental pressures and being unable to influence many greatly impact their growth and survival.

Micro enterprises like consumers are unlikely to review agreements thoroughly or even understand their implications. Even where they are educated, they lack the economic power to negotiate better terms.[593] Unlike larger enterprises which usually have legal departments and/or access to private funded sophisticated lawyers, micro enterprises lack the resources necessary to acquaint themselves with the law of foreign countries.[594]

4.1.2.2 Has limited ability to maximise his/her well-being

Recently, more entrepreneurs have opened up about their experience of anxiety, depression, and mental health issues. In an online post titled "When Death Feels Like a Good Option[595]," the author wrote about his suicidal thoughts following a failed startup in 2001. Sean Percival, the co-founder of the children's clothing startup, also posted a piece titled "When It's Not All Good, Ask for Help" on his website.[596] Previously, these enterprises have adopted a "fake it or make it approach," making it difficult to recognise the pressures of running a business. The number of people with mental health issues has not improved over the years, and research shows that worries about finance is one of the major triggers. Having sole responsibility for the company's success or failure can be a big deal.[597] Ilya Zhitomirskiy, 22year-old co-founder of Diaspora took his life and lately, Jody Sherman, aged 47, founder of Ecomom also committed suicide. These deaths have reignited discussions about entrepreneurship and mental health.[598]

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[593] William J. Woodward Jr. "Constraining Opt-Outs: Shielding Local Law and Those It Protects from Adhesive Choice of Law Clauses" (2006) 40 Loy. L.A. L. Rev. 9, 64; Hugh Beale " The CESL Proposal: An Overview" (2013) Juridica International, 20, 27

[594] Jane P. Mallor "Unconscionability in Contracts between Merchants" (1986) SMU Law Review, 40, 4, 1075; J Hornle, *Cross Border Internet Dispute Resolution* (CUP, 2009) 29; D Staudenmayer "The Commission Communication on European Contract and the Future Prospects" (2002) Int Comp Law Q ., 51, 676

[595] Ben Huh, "When Death Feels Like A Good Option" <https://medium.com/@benhuh/when-death-feels-like-a-good-option-b55d477d6215> accessed 30 June 2019

[596] Ruth Gwily, "The Psychological Price of Entrepreneurship", <https://www.inc.com/magazine/201309/jessica-bruder/psychological-price-of-entrepreneurship.html> accessed 26 June 2019

[597]Mental health and small business owners, <https://www.headsup.org.au/your-mental-health/mental-health-and-small-business-owners> accessed 30 June 2019

[598]Ruth Gwily, The Psychological Price of Entrepreneurship, <https://www.inc.com/magazine/201309/jessica-bruder/psychological-price-of-entrepreneurship.html> accessed 26 June 2019

It can be argued that in the absence of capacity in contract law, a contract is void or voidable depending on the knowledge of the other party to the contract. In the relatively recent case of *Fehily v Atkinson*[599], the court clarified that in order to have mental capacity, a person should be capable of understanding the 'nature of the transaction' or the 'nature and effect of that particular transaction' or the 'nature of the contract' or general 'nature of what he is doing'. More importantly, the law does not prescribe any tangible standard of sanity as requisite for the validity of contracts. Instead, it prescribes that the parties must have 'soundness of mind' which has been interpreted to mean the ability to "absorb, retain, understand, process and weigh information" relating to the key features and effect of the transaction and its alternatives if explained in plain terms.[600]

Unfortunately, the test does not require the person to be capable of comprehending every element of the transaction. There is a distinction between the key features of a transaction, and its ancillary, incidental or procedural aspects.[601] The essential element was to understand the key features. For a micro enterprise, knowledge and understanding of the ancillary effects or procedural aspects of a transaction is as crucial as the general nature of the transactions, if not more.

Previously, under English law, a company's capacity was restricted by its objects contained in the company's constitution. If a company acts beyond its objects, it has acted beyond its capacity (ultra vires) and the effect often results in the contract being void[602]. This is no longer the case as new companies no longer need to register their object.[603] For the benefit of third parties who have dealt in good faith with the company, sec 39 (1) of the Companies Act 2006 provides that the validity of an act cannot be questioned on the ground of capacity by reason of anything in the company's constitution.

[599] [2016] EWHC 3069 (Ch), [2017] Bus LR 695
[600] See para 90, 99- 102 of judgement in *Fehily V Atkinson; Banks v Goodfellow* (1870) LR 5 QB 549
[601] See para 101 of judgement in *Fehily V Atkinson*
[602] *Ashbury Railway Carriage and Iron Co v Riche* (1875) LR 7 HL 653
[603] Companies Act, sec 31

UK statistics on mental health issues indicate that 5.9 in 100 people suffer from a generalised anxiety disorder, 3.3 in 100 people suffer from depression, and 7.8 in 100 people suffer from mixed anxiety and depression.[604] Because these conditions are often undiagnosed[605] the prima facie presumption that parties have the capacity to contract is not helpful for micro enterprises in this position.

4.1.2.3 Has difficulty in obtaining or assimilating information

Schwartz and Wilde explaining the potential negative effects of information asymmetry particularly those found in standard form contracts describe scenarios such as where (i) Consumers can be uninformed about the risks associated with specific contractual terms which means they are unable to accept them genuinely, (ii) consumers can be oblivious of the range of prices and contractual terms that are available in the market making them accept poor bargains, (iii) Consumers may not understand the legal implications of their contracts because they have not read them.[606]

Micro enterprises are prone to suffer information asymmetry in the above manner that Schwartz and Wilde describe above. In B2B contracts, parties might not have the same level of information regarding the transaction, leading to unfair terms by a stronger party towards its weaker counterpart. These enterprises also can accept poor bargains because they do not know any better. In these cases, businesses may exploit their ignorance if the law fails to protect them.

While they may be more likely to have read the contractual terms, it is more unlikely that they have understood the terms or their implications if they have not sought legal and financial advice. Larger enterprises also have an incentive to exploit their ignorance by adopting onerous terms and offering them on a 'take it or leave it basis'. It is not unusual

[604] Mind UK, "Mental health facts and statistics" <https://www.mind.org.uk/information-support/types-of-mental-health-problems/statistics-and-facts-about-mental-health/how-common-are-mental-health-problems/#.XRji_2fsaUk> accessed 10 February 2019.

[605] Sharifa Z. Williams, Grace S. Chung, and Peter A. Muennig, "Undiagnosed depression: A community diagnosis", SSM Popul Health. 2017 Dec; 3: 633–638. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5769115/> accessed 10 February 2019.

[606] Alan Schwartz & Louis L. Wilde, "Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Securily Iteriests", (1983). VA. L. RE. 69, 1387, 1389

to have a larger enterprise issuing their standard conditions, inserting their national laws as the governing law, incorporating jurisdiction clauses that favours them, on a take it or leave it basis. These clauses could be considered as the determinant for victory in cases of conflicts.[607]

4.1.2.4 Is less able to buy, choose or access suitable products

Larger enterprises are more likely to be repeat players and thereby gain experience from repeat transactions. Conversely, micro enterprises are more likely to make less frequent B2B transactions than larger enterprises. Some commentators argue that some firms, as repeat players, gain legal expertise, making them more capable than others to assess the appropriate content of contracts.[608]

For Micro enterprises, their decisions or choices are often constrained by factors such as limited time and the desire to retain control of their business. These enterprises have been shown to make immediate decisions motivated by emotions and personal motivations, often made in quick response to ever-changing circumstances.[609]

With limited human/ financial resources and low market share, small firms and their owners are vulnerable to economic fluctuations in the complex and turbulent external environment that often characterizes this sector.[610]

4.1.2.5 Is more susceptible to certain marketing practices

As theorised by Simon[611] and Tribe,[612] the concept of rationality is that of 'calculated' or 'instrumental' action, where a person's behavior is reasonable and logical. Rationality is a

[607] M Zhang "Party Autonomy and beyond: An International Perspective of Contractual Choice of law" (2006) Emory Int. Law Rev. 20, 9; L Usunier "Regulating the Jurisdiction of Courts in International Litigation Towards a global answer in Civil and Commercial Marters (2007) 7 Yearbook of Private International law, 561; S Vogenauer Regulatory Competition Through Choice of Contract Law and the Choice of Forum in Europe: Theory and Evidence" (2013) Eur. Rev. Priv. Law, 21, 13; EC COM "Proposal for Regulation of the European Parliament and the Council on the Law Applicable to non contractual obligations (Rome II)" (2003) 68 final, 30

[608] Robert A. Hillman, "Rolling Contracts", (2002) Fordham L. Rex., 71, 743, 751

[609] Terri Byers and Trevor Slack, "Strategic Decision-Making in Small Businesses Within The Leisure Industry", (2001) J Leis Res ., 33:2, 130

[610] Westhead, P., & Storey, D. "Management training and small firm performance: why is the link so weak?" (1996) Int. Small Bus. J., 14, 13-24.

[611] H. A Simon, "Rationality as process and product of thought". (1978) Journal of the American Economic Association, 68, 1-16.; H. George. J. Rice, "Strategic Decision Making in Small Business" (1983) J. Gen. Manag, 9, 1

[612] Tribe, L. H. "Technology assessment and the fourth discontinuity: The limits of instrumental rationality". (1973) South. Calif. Law Rev., 46, 617-60.

concept of fundamental importance to economists, who equate individual rational behavior with "utility maximization", i.e., the choice of that alternative for which the greatest utility is expected.[613]

Simon's theory on rationality is premised on the fact that decisions in small enterprises are influenced by the "manager's personal characteristics, emotions, limited cognitive capacities, time constraints, and imperfect information".[614] Likewise, Muth's concept of rationality is a normative rule which emphasizes the final desired result rather than the process of rationality itself[615]. Consequently, like consumers, the personal objectives of their owners often restrict choices capable of decreasing their control of the enterprise,[616] and owner-managers find it difficult to make rational decisions, as any attempt at rationality is shaped by the manager's emotions and previous experiences.

Micro enterprises are more likely to be personally liable for their debts. It is not unusual to have their owners mortgage their homes, draw down on savings, or use their personal credit. They cannot self insure as effectively as larger enterprises or effectively spread their risk across their transactions. Where they borrow from a bank, they may need to guarantee the loan with their personal assets.[617] Thus, the career aspirations and personal motivations of many micro enterprises are often those of "independence and autonomy, rather than profits and growth."[618] The yearning to remain one's own boss and the desire for continued independence may be more imperative than profit maximization, and this is often reflected in their decision making.[619] Rather than making long term or strategically oriented decisions, adaptive decisions are usually made in response to environmental contingencies or personal circumstances such as current trends.

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[613] J. W. Dean, & M.P Sharfman. "Procedural rationality in the strategic decision-making process". (1993) J. Manag. Stud. 30, 588.
[614] H. A. Simon, *Administrative Behavior*. New York: Free Press (1945)
[615] Harinder singhl, "When Are Expectations Rational? Some Vexing Questions And Behavioural Clues" (1986) J. Behav. Exp. Econ., Elsevier, vol. 15(1-2), 191
[616] D.J Storey, *Understanding The Small Business Sector* (London: Routledge, 1995).
[617] Larry Garvin, "Small business and the false dichotomies of contract law" (2005) 40 wake forest law review, 306-307
[618] Gray, C. "Growth orientation and the small firm" in K. Caley, E. Chell, F. Chittenden, and C. Mason (Eds.) *Small Enterprise Development: Policy and Practise in Action* (London: Paul Chapman Publishing, 1992) 61; Lee, G. "Strategic management and the smaller firm" Small Business and Enterprise Development, 2, 158-64.
[619] Chris Gore, Kate Murray and Bill Richardson, Strategic decision-making (London: Cassell. 1992)

Moreso, Government policies, competitors, suppliers or changing economic conditions have a greater impact on micro enterprises than their larger counterparts.[620] Hence, freedom of contract is often twinned with the danger of creating undesired obligations, in which case public policy and laws can assist while not constraining the contracting parties.

4.2 The Distinction Between Standard Terms and Individually Negotiated Contracts Under the Directives and Its Implication For Micro Enterprises

Whether a B2B contract is standard form contract or individually negotiated appears to be the benchmark for judicial intervention in matters of unfair terms in the contract. Therefore, it is pertinent to discuss the meaning of the term "standard terms" as this term is often confusing and has been subject to a number of legal debates.

Lord Diplock in *Schroeder Music v Macauley*[621] noted that the phrase 'standard form' contract is possible of two meanings. One is the industry standard contracts which are of ancient origin. Here the terms by which a mercantile transaction is to be carried out are set out. The standard clauses in these contracts have been settled over the years in negotiation by representatives of the commercial parties involved and have been widely adopted because experience has shown that they facilitate the conduct of trade. The second is the enterprise standard terms, where the same presumption does not apply as the terms have not been the subject of negotiation between the parties to it or have they been approved by any organisation representing the interests of the parties.

Case law suggests that the industry standard terms are not written standard terms of either party but rather a bespoke standard terms of an industry organisation.[622] A written

[620] Terri Byers & Trevor Slack "Strategic Decision-Making in Small Businesses Within The Leisure Industry", (2001) J Leis Res., 33:2, 130
[621] (1974) 1 WLR 1308, 1316
[622] *Hadley Design Associates v City of Westminster* [2003] EWHC 1717 *(TCC) and Yuanda (UK) Co Limited v WW Gear Construction Limited* [2011] Bus LR360

standard term of business means "pre-existing written terms intended to be adopted more or less automatically in all transactions without any significant opportunity for negotiation and which are therefore not varied from transaction to transaction."[623] Arguably, if a party adopts a third party or industry's written terms, then such terms may qualify as written standard terms as long as this is clearly demonstrated by express statement or practice. The same principle applies where practices or decisions directly or indirectly fix purchase price or other trading terms, such as where a group of companies or associations agree on standard conditions to be adopted by all its members.[624]

No uniform definition of standard form contract has been adopted by legal systems. Under German law, Sec 305 (1) of civil code defines standard term as "all contract terms pre-formulated for more than two contracts which one party to the contract (the user) presents to the other party upon the entering into of the contract. It is irrelevant whether the provisions take the form of a physically separate part of a contract or are made part of the contractual document itself, what their volume is, what typeface or font is used for them and what form the contract takes. Contract terms do not become standard business terms to the extent that they have been negotiated in detail between the parties."

The UK Unfair Contract Terms Act 1977, which only applies where parties have entered into a contract on enterprise's written standard terms, provides no definition for the expression "written business terms of business". Thus, in contrast to German law, under English law, there is no requirement for terms to be adopted for more than two contracts to be considered as standard.

French contract law has a special name for this type of contract, that is 'contrat d'adhésion.' This term recognises that strong parties draft standard form contracts to

[623] Womble Bond Dickinson, "Room for interpretation: Section 3 of UCTA revisited" 31st March 2016< https://www.lexology.com/library/detail.aspx?g=de63884b-3c84-4429-8d29-0c5e35ad9591> accessed 20 November 2019
[624] Art.81(1)(a) EC.

which weaker parties have no choice but comply.[625] It has been argued that adhensive contracts and the scale of economy are complementary and form powerful tool which does not necessarily lead to joint results.[626] Kessler suggested that contracts of adhesion should not be viewed as contracts as they are not the result of a bargaining process, but he recognised that courts would inevitably do so.

The Court in *African Export-Import Bank and Others v Shebah Exploration & Production Company Limited and Others*[627] considered what level of negotiation is required for a contract to be deemed to be negotiated if a third party's written terms are adopted. In this case, the standard document in question was a syndicated Facility Agreement which the Loan Market Association recommended. The defendants argued that this negotiated document constituted the claimants' written standard terms of business. The Court of Appeal confirmed a High Court summary judgment that lenders that presented an industry standard facility agreement to a borrower, and then negotiated those terms, were not dealing on written standard terms of business for the purposes of the UCTA.

If Section 3 of UCTA had been successfully raised, the reasonableness of certain provisions of the contract would have become an issue. Written standard terms remain standard despite negotiation relating to amendments to the proposed contract as long as the terms remain "effectively untouched" at the end of such negotiations.[628] The claimants were able to prove that they did not use standard forms regularly and the document was negotiated and agreed on a transaction by transaction basis. Moreso, there was no indication that the claimants refused to negotiate nor that the negotiations had left the document "effectively untouched" as required to satisfy the test in *St Alban's* case.

As shown above, the level or extent of negotiation is not a matter of concern to the courts but rather if the terms were effectively untouched. Thus, this provision is not thoroughly

[625] Sophie Vigneron, 'The Implementation of the Standard Contract Terms Directive in France, <http://www.secola.org/vortraege/prague/IV-2Vigneron.pdf> accessed 7th September 2018
[626] Friedrich Kessler 'Contracts of Adhesion-Some Thoughts about Freedom of Contract' 43 Colum. L. REx: (1943) 633
[627] [2017] EWCA Civ 845
[628] *St Albans City Council v ICL Limited* [1996] 4 All ER481CA.

protective of the consumer, much less a micro enterprise. Worryingly, a party who negotiates or agrees to "a lesser evil" while assuming that this is the best-case scenario achievable can no longer contest the reasonableness of the provision. Thus, it is worth considering the possibility of extending this provision to include individually negotiated terms. Certainly, this will be on a case by case basis and should be heavily fact based.

It is widely accepted that standard form contracts are drafted in advance by one party (or on his behalf) and presented to the other party on a "take it or leave it" basis.[629] Such documents often contain terms that are more favourable to the drafter. Generally, the recipient of a standard term, particularly a micro enterprise, faces two peculiar market failure: that such a micro enterprise is unlikely to fully understand the meaning of all contractual terms and therefore unable to efficiently exercise his right to choose while considering other available options;[630] and where he is able to exercise this right effectively, he often lacks the power to adequately secure a favourable term due to an inequality of bargaining power.

For a micro enterprise, who is the recipient of a standard term contract, the costs of understanding and negotiating standard terms or the cost of engaging a lawyer to review these terms may exceed the benefits or profitability of the transaction. This would not be the case for a party who initiates the standard terms as such terms are familiar to such a party and such transactions are likely to be repeat transactions. Undoubtedly, the inherent nature of these standard form contracts and unfairly negotiated contracts mean that the form giver is usually at the favourable end due to this asymmetry.

Kessler opines that commercial parties that draft standard form contracts are commonly associated with strong bargaining and market power, at times even with monopolies.[631]

[629] Edith R. Warkentine, "Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts" (2008) Seattle Univ. Law Rev. 31, 470
[630] Paolisa Nebbia, Standard form contracts between unfair terms control and competition law, (2006) E.L. Rev. 31, 1, 103; Melvin A. Eisenberg, "The Limits of Cognition and the Limits of Contracts", (1995) 47 STAN. L. REV 211,243
[631] Kessler, Friedrich Kessler, Contracts of Adhesion -Some Thoughts about Freedom of Contract, 43 COLUM. L. REx: (1943) supra note 10, at 632

Realistically, standard forms are used to reduce negotiation costs; hence, larger business or a supplier is unlikely to find it worth altering his standard terms to satisfy one customer, unless the latter is particularly important (has superior bargaining power)[632]and as such individual negotiation of such terms will be likely unwelcomed.

Negotiation of terms is more relevant in B2B relations than in B2C relationships considering that consumer contracts are rarely negotiated. Notwithstanding, some authors have argued that Consumers should be protected regardless of whether or not the contract was individually negotiated. This argument would have little impact on consumer contracts but rather more significant to micro enterprises since a contract can be negotiated but not negotiated effectively.

It is rare in any negotiation that the bargaining powers of the parties are equal. The principle of freedom of contract should be maintained, however, not at the detriment of protecting a weaker party in MB2B vertical relationships involving micro enterprise. A micro enterprise may not be able to effectively assess the impact of its commitments when compared with sophisticated larger enterprises having the technical expertise.

One can argue that some micro enterprises make repeated transactions and can, therefore, develop expertise in their field. It can also be said that some consumers also make repeated transactions too and are protected anyway. Moreover, making repeated transactions doesn't always mean that one is aware of the full risk or all the potential pitfalls.

It has also been argued that small enterprises are not always in the weaker position in B2B contracts. Svantesson[633], gives an example of a small supplier selling essential items for the production of the large company. In response, it is not actually a question of if all

[632] Paolisa Nebbia, Standard form contracts between unfair terms control and competition law, E.L. Rev. 2006, 31(1), 103
[633] Dan Jerker B Svantesson "The choice of law convention: How will it work in relation to the internet and e commerce?" (2009) J. Priv. Int. Law 5, 525

micro-enterprises are weaker parties in MB2B transactions but if a majority or at the least an average micro enterprise can be considered weak.

Considering the amount of influence a micro enterprise usually has even in contracts that are theoretically open to negotiation, this research recommends that unfair terms in negotiated contracts should be regulated, particularly where there is a presumption that one commercial party is in a vulnerable position and the other party is aware of this position. The above recommendation should either be taken holistically or considered on a case by case basis. Having said that, legislation which enables such micro enterprises to bring an appropriate action in an appropriate place regardless of whether it is standard form or individually negotiated is recommended.

4.3 The Protection of Microenterprises under Domestic Law: A case study of UK, France and Germany national Legal systems.

Like most Directives, the provisions are a minimum standard, and therefore some implementing legislation set up a higher level of protection, including extending its provisions to limited B2B commercial relations. Seven countries have taken this opportunity and have extended its provisions to B2B. Those countries are Austria; Sweden; Denmark; France; Germany; Italy; and Belgium.[634]

Moreso, some national legislation do extend the definition of consumers to micro enterprises in some instances. This is not outside their powers, as demonstrated by the ECJ decision in *The Republic v Patrice di Pinto*, where two questions were put before the ECJ namely: can the Doorstep Sales Directive apply to a trader, who had been canvassed in

[634] § 1(1) of the Federal Act amending the 1984 Federal Act against Unfair Competition; Section 1 of the Marketing Practises Act (2008:486); (The Marketing Practices Act, Consolidated Act no. 58 of 20 January 2012 as amended by section 33 of Act no. 1231 of 18 December 2012, section 5 of Act no. 1387 of 23 December 2012 and section 1 of Act no. 378 of 17 April 2013); Belgium has extended the scope of its legislation to B2B transactions only for certain banned practices listed in Annex I. (Cf. Article L. 121-1, I and III and L. 121-1-1 of the Consumer Code), Cf. Section 3 of the Act against Unfair Competition (UWG) <http://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.html#UWGengl_000P3>, (See Article 19 of the Consumer Code as amended by Article 7, co.2 of Decree-Law 1/2012, converted with amendments into Law March 24, 2012, n. 27), (Chapter 4 of Loi du 6 avril 2010 relative aux pratiques du marché et à la protection du consommateur)

connection with advertising the sale of his business, on the basis that he would be as 'unprepared' as a consumer in this position?; and if he was unprotected by the Directive, were Member States precluded from extending their national regulation to allow for such protection? In response to the issues raised, the ECJ held respectively that the definition of consumers in relation to the Directives could not extend to a person acting in the course of their business, including the sale of that business; and that Member States are free to extend their protection if they wished.

As member states have the right to define and prescribe the procedural mechanisms by which persons can enjoy protection, it is helpful to consider the extent of the definition of consumers under some national law and the current protection available to Micro enterprises under these domestic legislations.

4.3.1 English Law

Under English law, there are two statutory regimes regulating unfair terms. The first through the common law doctrines which had evolved through case-law; and statutory framework introduced by the Unfair Contract Terms Act 1977 (UCTA) which now applies to business contracts and, in limited circumstances, to private contracts between individuals. The second being the Consumer Rights Act 2015 (CRA), which applies principally to Consumers.

Under UCTA, the protection in the English Sales of Goods Act 1979, the Supply of Goods and Services Act 1982 and the Supply of Goods (Implied Terms) Act 1973, which relates to goods conforming with description, being of satisfactory quality and fit for purpose, or performance being carried out with reasonable care and skill can be excluded in B2B contracts where they satisfy the reasonableness test. (previously discussed in chapter 3.2.2 of this thesis) However, Under the CRA, the extensive protection which is available to Consumers against unfair terms cannot be avoided by establishing reasonableness. For example, the requirement for goods to be fit for purpose does not only mean suitable

for everyday use but also fit for any particular purpose which the consumer has advised the seller.

While some of the provisions of UCTA are general in nature and apply to all,[635] other provisions operate differently depending on the type of contract under consideration.[636] UCTA applies to a number of contractual terms although it focuses mainly on clauses that seek to limit or exclude liability in B2B contracts. Moreso, Sec 10 prohibits the use of a secondary contract to exclude or restrict liability which cannot be excluded or restricted under the main contract. Unfortunately, UCTA will only apply where parties have entered into a contract on written standard terms of enterprise and will not apply to negotiated contracts.

The recent case of *Commercial Management (Investments) Ltd v Mitchell Design and Construct Limited and another*[637] reflects on one of the complexities of this Act. Here, the court considered the application of UCTA to a set of construction subcontract terms that have not been fully incorporated into a contract and provided guidance as to how the reasonableness of such clauses should be assessed. The court held that the terms of the subcontract agreement need not be fully incorporated for UCTA to apply. However, Clause 12 (d), which sets a 28days time limit in which claims can be brought had not been validly incorporated. If it had, UCTA would apply as it constituted written terms of business, and the clause would have failed the reasonableness test due to the difficulty of compliance.

As UCTA pertains to clauses limiting or excluding liability, other complex clauses that can create unfairness would therefore not be covered. For example, in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd,* UCTA could not apply as the unfair provision in

[635] e.g., s 2 on negligence liability
[636] See s 4 on unreasonable indemnity clauses applicable only to consumer contracts. Others operate differently depending on whether the contract is a business or a consumer contract (e.g. ss 6/7 on excluding the terms implied by the legislation on the sale and supply of goods).
[637] [2016] EWHC 76

question concerned a penalty clause and not a term limiting or excluding liability. Penalty clause was generally void at common law, and consequently, Lord Birmingham addressed the duty of good faith and held that onerous provisions need to be notified to the consumer.

This is not to say that there are no other means by which a party can claim redress or seek to void the contract. For example, the English law doctrine of frustration allows the courts to discharge a contract in other to ease the severity of absolute obligation. There is no exhaustive list of events considered frustrating events however events such as impossibility of performance, frustration of purpose, government intervention etc have qualified as frustrating events. [638]

The English Court in the recent case of *Canary Wharf (BP4) T1 Ltd and others ("CW") v European Medicines Agency ("EMA")* considered the legal effect of Brexit on a commercial contract. Here, there was a dispute over a 25-year lease of the headquarters of EMA, a body of the EU, at Canary Wharf, London. The lease was entered into in 2014 and has no break clause. After the Brexit vote, EMA relocated to Amsterdam and notified CW in writing that they were treating the contract as frustrated and therefore free from future obligations of the contract. CW applied to the High Court for a declaration that the contract still stood.

The court rejected EMA's argument regarding frustration as a result of supervening illegality and common purpose. The court also rejected the argument that Brexit meant it would no longer be lawful for EMA to retain the premises and pay rent pursuant to the lease, as EMA would be acting ultra vires. The court opined that EMA still had the legal capacity to deal with immovable property in the UK even after BREXIT. In addition, it was held that the EU self-induced the legal effects of Brexit on EMA (EU legislating in 2018 that the EMA was required to leave London for Amsterdam) and as such was a "self-induced frustration" (EMA being an emanation of the EU) could not be a valid reason for bringing the contract to an end.

[638] *Taylor v. Caldwell* [1863] 3 B&S 826; *Appleby v Myers* [1867] LR 2 CP 651

This limitation of the UCTA is not commendable or helpful, particularly for commercial parties such as a micro enterprise in B2B contracts because a good number of provisions is capable of tilting the scales in favour of a more superior party. In addition to the UCTA, the Consumer Protection from Unfair Trading Regulations 2008 implement the UCPD. It introduces a general prohibition against unfair commercial practices, specific prohibitions against misleading and aggressive practices and a blacklist of 31 practices that will be deemed unfair in all circumstances. On the other hand, the now-repealed Unfair Terms in Consumer Contracts Regulations 1999 implemented the UTCCD into domestic law. This repealed legislation is now superseded by the CRA.

Under English law, provisions that allowed consumers to include non-individuals where the goods are of a type ordinarily supplied for private use or consumption[639] have been amended by virtue of the Consumer Rights Act 2015. Thus a sole proprietor will not enjoy the status of a consumer in a transaction which may be one-off as long as it is made in the course of his trade, enterprise or profession. Moreso, the common law, has been criticised for its limited control over unfair terms. As such, where these terms are validly incorporated, they can be relied upon and a larger enterprise can get away with including unfair terms, avoid liability, and not meet the statutory requirements as long as the reasonableness test is met.

4.3.2 French law

Considering the often confusing terminology of “Micro enterprise” in France, it is expedient to clarify that French law distinguishes micro enterprises' status for business structure and for tax regime. Since January 2015, a relatively new micro enterprise regime meant that a business can set up as small business, self-employed or freelance in France (Loi Pinel). This new micro-enterprise regime, merges the old auto-entrepreneur and micro-enterprise systems. We will not be considering “freelance” in France under our discussion, considering that some freelancers are able to choose to work through a

[639] UCTA, Sec 12; *R & B Customers Brokers Ltd v UDT Finance Ltd* [1987] EWCA Civ 3

system called *portage salarial* or join a workers' co-operative as an alternative to setting up their own business.[640] Moreso, working as a micro enterprise is not a legal business structure but rather a tax status.

There are two forms of legal business structure in France namely: sole trader (enterprise individuelle); and company (société), such as an EURL, SARL, SA and SAS. Most micro enterprises will be classed as *Entreprise Individuelle* which is someone running a business as a sole trader rather than as a limited company although some micro enterprise can be a company (société).

Some of the incentives for setting up a business as a micro-entreprise in France are the ease of registering the company and the simplicity of running such an enterprise. For example, the tax and accounting requirements are simplified, and taxes and social charges can be made online. More importantly, unlike jurisdiction such as England, the French system shields most micro enterprises from the consequences of unlimited liability. A qualifying micro enterprise who makes a "déclaration d'insaisissabilité" will benefit from protection for their home and other assets from being seized by creditors in the event of financial difficulties. Therefore, the scheme provides sole trader status with a form of limited liability. A business can be set up under the micro-entreprise regime if certain thresholds are met. These threshold includes a turnover below EUR 82,200 for a business engaging in the buying and re-sale of goods/materials or the setting up of a restaurant or bar or furnished accommodation. A threshold below EUR 32,900 a year if delivering services or a 'professional' (professions liberals).[641]

The Adage *'qui dit contractuel, dit juste'* ('what is contractual is fair') forms the basis of the French Civil Code of 1804 which promotes freedom of contract based on the equality of contracting parties.[642] Thus, the statute regulating unfair terms was not adopted until 10 January 1978 - the Scriver Act, which regulated the protection and information of

[640] Expatica, "Becoming a freelance or self-employed worker in France" <https://www.expatica.com/fr/employment/self-employment/becoming-a-freelance-or-self-employed-worker-in-france-445986/> accessed 15 February 2020
[641] EIRL.fr, What is EIRL? <www.eirl.fr> accessed 27 Juy 2020
[642] Sophie Vigneron, "The Implementation Of The Standard Contract Terms Directive In France", <http://www.secola.org/vortraege/prague/IV-2Vigneron.pdf> accessed 7 September 2018

consumers of goods and services.[643] The 1978 Scrivener Act contained a somewhat complex definition of unfair terms and was reinforced by a 1988 Act which allowed consumer groups to bring an action against professionals to suppress unfair terms in standard form contracts. The Act regards terms as unfair if it was imposed by an abuse of economic power and gives an excessive advantage to a stronger party. The Cour de Cassation usually assumed that a term was imposed by an abuse of economic power if there was an excessive advantage.[644]

In 1991, the Cour de Cassation explicitly empowered judges to assess the validity of unfair terms for the benefit of consumers. Lately, various types of unfair terms in French law are contained in: the list stated in the annex to the directive, lists enacted by the government by virtue of the Scrivener Act and the list developed by the Commission des Clauses Abusive (unfair terms commission). This list together contains over fifty unfair terms in different contracts but is merely informative.[645]

In France, while businesses are regulated by the Economic Modernisation Act 2008 and the French Commercial Code, consumer law has been concentrated in a separate act - *Code de la Consommation* since 1993. Hence, most provisions of unfair terms relating to consumers are contained in the 1993 Code.[646] In February 1995, a statute, which implemented the UTCCD was passed and superseded relevant parts of the Consumer code. While recognising the overarching principle in the 1993 code; that contracts should be interpreted in favour of the consumer, the 1995 Act afforded greater protection for consumers against unfair terms and applies to negotiated terms, non-negotiated terms and contractual provisions enacted by government departments. Moreso, the 1995 Act excludes the concept of good faith as a criterion for assessing unfair terms.[647]

[643] Eva Steiner, *French Law: A Comparative Approach* (2nd edition OUP) 216
[644] Sophie Vigneron, "Implementation of the Unfair Contract Terms Directive in France" (2008) CIL, 8, 3, 115
[645] Ibid
[646] Martijn W. Hesselink "Towards a sharp distinction between B2B and B2C? On consumer, commercial and general contract law after the consumer rights directive", Centre for the Study of European Contract Law, Working Paper Series No. 2009/06. 6; Sophie Vigneron, "The Implementation Of The Standard Contract Terms Directive In France," (2008) CIL 8, 3, 106
[647] Ibid, 107

As opposed to the 1993 code, and like the UCTA in the UK, the 1995 Act is wider in its application. It embraces a broader definition of consumer as it applies to legal persons as well as professionals contracting outside their trade. [648] The concept of "non professional" included legal persons such as micro enterprises. Accordingly, in March 2005, the Cour de Cassation distinguished the concepts of consumer and non professionals. While it was bound by the ECJ definition of consumers, it stated that the concept of 'non-professional' is beyond the scope of the directives but within the scope of the 1995 Act.[649]

There are two main distinction between the Directive and the 1995 Act. Firstly, the scope of application of the Act; unlike the Directive, the Act covered both negotiated and non-negotiated terms and to contractual provisions enacted by Government department.[650] Secondly, to the control of contractual terms that have a regulatory origin. French law applies Article 6 and Annex I, restricted to the misleading practices section of the UCPD to B2B transactions exclusively.[651]

Following the recent reforms to French contract law,[652] a clause creating a 'significant imbalance' between the parties' rights and obligations may be considered void by the courts and unenforceable. However, this does not apply to the subject matter of the contract or to the adequacy of the price.[653] Matters such as the adequacy of price is only assessed in exceptional case such as lesion (burdensome contract).

[648] Section L. 132-1 of the Consumer Code applies to legal persons and professionals contracting outside their trade.
[649] Cass. 1re civ., 15 March 2005 [2005] Bulletin I case 135, 116 https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007051036 accessed 8 September 2018
[650] Section L. 132-1 para. 4
[651] Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC On Unfair Commercial Practices, 10
[652] Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations.
[653] Clifford Chance, 'French Contract Law Reform' (Briefing note, February 2016) <https://www.cliffordchance.com/briefings/2016/03/french_contract_lawreformclientbriefing.html> accessed 10 March 2018.; Horst Eidenmuller, 'Justifying Fair Price Rules in Contract Law' (2015) ERCL 11, 3, 221.

The 1995 Act, like the Directive, upholds the principle that the courts should not assess the economic efficiency of a contract as the determination of price is dependent on market competition instead of individual negotiation between the parties.[654] Unfortunately, this is not always the case as price determination can depend on individual negotiation, particularly for bespoke or small-scale transactions.

There has been a clamour for a significant level of protection for some legal persons such as charities and small businesses.[655] In the latter part of the 20th century, regardless of ECJ decisions such as *Cape Snc v Idealservice Srl* and *Francesco Benincasa v Dentalkit SrL*, several EU member states extended the definition of consumers to include micro enterprises who deal with goods and services outside their usual field of business regardless of the fact that the goods or services is intended to be used for business purposes. The determining factor being "outside its usual field of business." No doubt, some member states now include legal persons in their definition of consumers where they acquire goods or services for private use or act as end-users. The destination criterion - end-user was once prevalent in France and still exists in Greece and Spanish legal systems. Instead, France adopted a parallel notion of 'non-professional' to grant consumer protection to legal persons in certain cases.[656]

Originally, case law highlighted that French courts agree that activities fall outside the usual course of business when those transactions are conducted on an irregular basis and do not constitute an integral part of the business. The French courts then considered whether or not the "person" acquiring/dealing with the goods or services is specialised in this area, thus replaced the destination criterion with a specialisation criterion.[657] This approach led to fierce jurisprudential and doctrinal debates. Moreso, the ECJ rejected the

[654] Sophie Vigneron, "The Implementation of the Unfair Contract Terms Directive in France" (2008) 8(3) CIL, 8, 3, 113
[655] Ibid, 105
[656] Rafał Mańko, "The notion of 'consumer' in EU law" Library Briefing, Library of the European Parliament http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI(2013)130477_REV1_EN.pdf accessed 9 July 2019
[657] Cass. civ. 28 April 1987, D. 1988, 1; Cass. civ. 25 May 1992, D. 1992, 401; Cass. civ. 25 May 1992, D. 1992, 401; Cass. civ. 20. October 1992, CCC 1993, 21.

specialisation criteria, particularly in consumer transactions.[658] Consequently, the Cour de Cassation in 1995 established that the specialisation criteria solely is an inefficient criterion and instead held that a natural person can only be considered a natural person in a specific transaction, where that transaction has no direct link with the professional activities of that person.[659] English courts have always adopted a restrictive interpretation to the notion of "usual field of business," thereby eliminating the idea of consumers for businesses unless in exceptional circumstances or merely incidental cases[660]

According to Paisant, one reason why the former French law focused on a combination of criteria is the assumption that business parties dealing outside of their primary business always find themselves in a weaker position, particularly when acquiring goods or services from an experienced supplier.[661] Mazeaud argues that such assumptions may be too "categorical and that in practice, a large non-specialised acquirer does find itself in a stronger economic position than a small specialised supplier.[662] This thesis opines that whilst a company acting outside of its main business does not always find itself in a disadvantageous position, the size of the company, particularly where the company involved is micro is a contributory factor.

The French government recently modified and reformed the law of obligations contained in the 1804 French Civil Code. This reform introduces a concept of i*mpre´vision* in Article 1195 which empowers judges after a mandatory renegotiation to amend or terminate the contract if it becomes "excessively onerous" due to unforeseen contingency. This new

[658] C-361/89, Di Pinto , ECR 19991, 1-1189; G. Howells, "Consumer cocnep"ts for a European Code", in R. SaruLZE (ed.) New Features in Contract Law, (Miinchen, sellier.european law publishers, 2007), 121-122.

[659] See Cass. civ. 24 January 1995, D. 1995, 327; Cass. civ. 21 February 1995, CCC 1995, 84. See also Cass. civ. 5 November 1996, CCC 1997, 9; Cass. civ. 15 May 2005, Bult civ. 2005, I, m. 135; Pieter Brulez, *Creating a Consumer Law for Professionals: Radical Innovation or Consolidation of National Practices,* (2012) <SSRN-id2294941.pdf> accessed 8 February 2020, 7

[660]*Court of Appeal, R&B Customs Broker Ltd, v United Dominions Trust Ltd* [1988] 1 All ER 847; *Rasbora Ltd v. JCL Marine Ltd* [1977] 1 Lloyd's Rep 645; M. Chen-Wishart, *Contract law*, (OUP, 2010) 466; L Koffman and E. Macdonald, *The Law of Contract*, (OUP, 2010) 217-219.

[661] G. Paisant, "Essai sur la notion de consommateur en droit positif", JCP 1993, I, 3655 in Pieter Brulez, Creating a Consumer Law for Professionals: Radical Innovation or Consolidation of National Practices?) <SSRN-id2294941.pdf> accessed 8 February 2020, 8

[662] D. MAZEAUD, "Droit commun du contrat et droit de la consommation", in X., Melanges Calais-Auloy, Parijs, Dalloz, 2004, 707 in Pieter Brulez, Creating a Consumer Law for Professionals: Radical Innovation or Consolidation of National Practices?) <SSRN-id2294941.pdf> accessed 8 February 2020, 8

concept is incomparable with any precise doctrine under common law. Arguably, neither the English concept of frustration as discussed above nor Force majeure lead to the same consequence and so are incomparable. The power for a court to amend a contract is uncommon under English law as the English courts would either uphold or discharge a contract.

This provision can be favourable to a Micro enterprise. For instance, where a Micro enterprise agrees to supply a large enterprise with specialised goods or service. The net value of the contract to the large enterprise is the difference between the value and the price, whereas the net benefit to the Micro enterprise is the difference between the price and costs of performance. Thus, it can be argued that in the event of unforeseen contingencies, the value of performance significantly exceeds the price to render the performance unreasonable.

Undoubtedly, this economic principle that allows for judicial intervention can be seen as unattractive due to unpredictability of economic transactions and if it fails to enhance competition due to its ability to either discharge or adjust the promisor's obligations. [663] On the other hand, it can be argued to be an attractive benchmark that demonstrates the kind of rules that would enhance the competitiveness of the market and the type of rules that commercial parties may prefer in international transactions.

In cases of unforeseen contingencies, the contractual surplus is greatly diminished due to excessively onerous performance, and renegotiation requires an allocation of losses rather than surplus. Behavioural economists argue that in comparison to negotiators who bargain over surplus, negotiators, when bargaining over losses, tend to make less compromise, find fewer collaborative solutions and often fail to reach an agreement.[664]

[663] T. Lutzi, 'Introducing Imprevision into French Contract Law – A paradigm shift in comparative perspective', in S. Stijns and S. Jansen (eds.), The French Contract Law Reform: a Source of Inspiration?, p. 111.; Mitja Kovac, "Frustration of purpose and the French Contract Law reform: The challenge to the international commercial attractiveness of English law? (2018) 25 MJECL, 3, 289; Catherine Pédamon 'The paradoxes of the theory of imprévision in the new French law of contract: a judicial deterrent? '(2017) Amicus Curiae,m 112, 10

[664] M.H. Bazerman, T. Magliozzi and M.A. Neale, 'The Acquisitions of an integrative Response in a Competitive Market', (1985), 34 Organizational Behavior and Human Performance, 199; M.A. Neale and M.H. Bazerman, "Cognition and Rationality in Negotiation" and M.A. Neale, V.L. Huber and G.B. Northcraft, 'The Framing of Negotiations: Context versus Task Frames', 39 (1987) Organ. Behav. Hum. Decis. Process. (1987), 228–241.

Moreso, re-negotiations are costly, cause hold-ups, and may not achieve the desired objective.[665] According to Wilkinson, renegotiation could also lead to some level of extortion, moral hazard, reduce the overall good faith of the parties, and induce opportunism.

Loss aversion and the urge to maximize gains are inherent in any stage of negotiation or re-negotiation. Renegotiation can often tilt the scale of contractual power and shift bargaining position from the initially stronger party to the weaker party, thereby balancing the contractual power. Conversely, it can shift the contractual power to the detriment of the weaker party.

The consequences of a failed negotiation and time are two determining factors of a party's negotiation position. The longer the time, the increase in the opportunity costs of re-negotiation. These costs could be direct costs such as Solicitors fees, interest rates on capital or indirect costs such as opportunities foregone to contract with other parties or, in extreme cases, the cost of destructive behaviour. According to Kovac,[666] "[A]s time goes by, the cooperation surplus may shrink, but not necessarily in a symmetric way. Hence, the party that has least to lose (and those are usually non-performing parties in unforeseen contingencies settings) is in the strongest, superior bargaining position (ceteris paribus) and can extract rents and unjustified gains."

The requirement for renegotiation before judicial intervention may mean that parties would put their best foot forward, knowing the court could discharge or amend their contract. Amending certain terms of the contract could preserve the original or intended rights and obligations of the parties, solve the issue of excessive losses and surplus and curb any opportunistic renegotiation.

[665] H.E. Jackson et al., *Analytical Methods for Lawyers* (Foundation Press, 2003) 437; N. Wilkinson, *An Introduction to Behavioral Economics* (Palgrave Macmillan, 2008). 58; . D. Kahneman and T. Amos, 'Prospect Theory: An Analysis of Decision under Risk', (1979) Econometrica, 47, 263–291; T. Amos and D. Kahneman, 'Loss Aversion in Riskless Choice: A Reference-Dependent Model', (1991) Q J Econ 106, 1039–1061

[666] Mitja Kovac, "Frustration of purpose and the French Contract Law reform: The challenge to the international commercial attractiveness of English law?" (2018) 25, MJECL ,3, 289

It has been argued that judges are incapable of understanding complex analysis, equations, and formulas underlying several commercial contracts and thus should not be entrusted with adjusting these contracts or making economic decisions, particularly where they do not have the training or relevant information to make such decisions.[667] No doubt, some judges have the necessary training and expertise to carry out this function. However, where they do not, some judges can call on expert testimonies to understand the underlying formulas or economic consequences of reaching a particular decision.

4.3.3 German Law

The German Civil Code 1900 (Bürgerliches Gesetzbuch - BGB) was the principal legislation regulating civil matters. The BGB was reformed by the Modernization of the Law of Obligations Act[668] due to the need to implement the European Consumer Sales Directive. The reformed BGB not only implements the Directive but also attempts to incorporate a number of special statutes aimed at protecting consumers, thereby harmonising general contract law and consumer contract law.[669] Consequently, consumer law is now contained in the Civil code *BGB* after years of regulating this through separate acts i.e. the AGBG.[670]

German law extends the protection against unfair terms to contracts of all types.[671] Sec 308 of the German civil code titled "Prohibited clauses with the possibility of evaluation" prohibits specific clauses in standard terms by rendering them ineffective. These include such provision relating to reservation of unreasonably long period for the acceptance or rejection of an offer or rendering performance; or reservation of the right to revoke or modify the agreement; fictitious declarations, etc.

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[667] J.M. Buchanan, 'Good Economics – Bad Law', (1974) Virginia Law Review 60, 483–492.

[668] R Zimmermann, 'Modernizing the German Law of Obligations?', in Peter Birks and Arianna Pretto (eds), *Themes in Comparative Law in Honour of Bernard Rudden* (OUP, 2002), 265

[669] Reinhard Zimmermann, "Consumer Contract Law and General Contract Law: The German Experience" (2005) 58 Current Legal Problems 1, 417

[670] Martijn W. Hesselink "Towards a sharp distinction between B2B and B2C? On consumer, commercial and general contract law after the consumer rights directive", Centre for the Study of European Contract Law Working Paper Series No. 2009/06. 6

[671] C. von Bar, E. Clive, H. Schulte-Nölke et al. (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)* Outline Edition, Munich, Sellier, 2009) 10.

In addition, Section 309 titled "Prohibited clauses without the possibility of evaluation" renders certain standard terms ineffective even to the extent that a deviation from the statutory provisions is permissible. According to Sec 306 (2) German Civil code, such terms include Price increases at short notice; Prohibition of set-off; waiver of warning notice; Exclusion of liability for injury to life, body, or health and in case of gross fault, etc. Where such terms have become ineffective or not incorporated as part of the contract, those terms are determined by the relevant statutory provisions. Similarly, contracts which take an undue advantage of a person either by exploiting their distress, inexperience, lack of judgment or weakness of will are considered usurious and void under German law. [672]

The aforementioned French theory of impre´vision has a counterpart in German law, albeit different in a few ways. Firstly, unlike the French approach, which provides unqualified discretion on judges to either amend or discharge the contract, Article 313 BGB titled "Interference with the basis of the transaction" highlights the hierarchy between these two remedies, i.e. contract amendment before the discharge of the contract. Secondly, there is no requirement for continuous performance during renegotiation under Art 313. This requirement has been the subject of enormous controversy.

Furthermore, German law also extends protection against unfair contract terms to B2B contracts under the German Civil Code when the contractual terms have not been individually negotiated. Micro enterprises are protected against surprising and ambiguous clauses in standard term contract under Section 305c German Civil Code. Thus, terms which are so "unusual that the other party to the contract with the user need not expect to encounter them, do not form part of the contract." The interpretation of such standard terms are resolved against the user.

[672] Civil Code, Sec 138(2)

4.4 Conclusion

Commercial contracts rarely regulate all aspects of parties conduct. In fact, contracts are sometimes so complex that one or more of the parties do not fully understand the terms or their implications. Increased concentration and the vertical integration of various market participants across Europe have resulted in structural changes in the organisation of supply chains. These structural changes have in turn contributed to a state of considerably different levels of economic disparity and bargaining power in individual trade relationships between the parties in the supply chain which then sometimes result in abuses of such differences or unfair trading practices.

Directives is a principal example of national mandatory provision of EU origin which are usually mandated to be implemented into domestic laws. However, the application and scope of individual directives regulating unfair terms vary from member state to member state thereby making it difficult to effectively predict the outcome of judicial decisions. The uncertain nature of freedom of contract has resulted in abuse in B2B contracts.

Moreover, the UCPD cannot be said to have fully achieved its objectives in ensuring the maximum protection to consumers, not to mention micro enterprises. In fact, research shows that enforcement has been an issue. Consequently, it has been recognised that enforcement activities should be a vital area of focus in other to achieve legal certainty and protection for consumers.[673] As such the Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules came into effect. Also, the UCPD was updated to reflect that contractual aspect; therefore, a breach of the UCPD also has contractual implications.[674]

[673] EC, Communication from the Commission to the European Parliament, the council and the European Economic and Social Committee on the application of the Unfair Commercial Practices Directive COM(2013) 138 final, 14.3.2013. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0138&from=EN accessed 16 August 2018

[674] European Commission, Commission Staff Working Document Guidance On The Implementation/Application Of Directive 2005/29/EC On Unfair Commercial Practices Brussels, 25.5.2016, SWD(2016) 163 final

No doubt, the list under annexe I helps customers, traders and even enforcers to identify certain practices which would be unfair and provides a high level of certainty in commercial transactions regarding such specific practices. Also, enforcers are able to sanction traders as a result of a breach of the blacklisted commercial practices. Without such list, there would have been the need to assess the likely impact of such commercial practice on an average consumer's economic behavior on a case by case basis.
Yet, in most national legal systems, there remains a tension between approach adopted by consumer law and private autonomy and the fundamental principles of legal equality. In recent times, there has been an increasing recognition that micro enterprises are as vulnerable to the cruelties of contractual power in the same manner as consumers are in their dealings with large enterprises. Consequently, several national consumer protection rules now partly protect these categories of enterprises.[675]

We have also shown that the distinction between standard and individually negotiated terms appears to be the benchmark for protection in most legal systems. These provision could be beneficial to micro enterprises but for limitation in the distinction between standard terms and individually negotiated contracts under the Directives and in some jurisdictions. Where protection is applicable to both negotiated and standard terms, it affords a greater degree of protection to weaker parties.

The next chapter will consider the current Protection of Microenterprises under Private International law with regards Jurisdictional Issues.

[675] Ingeborg Schwenzer and Claudio Marti Whitebread, 'International B2B Contracts – Freedom Unchained?' (2015) <https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1104&context=jlia> accessed 8 March 2018.

Chapter 5: Jurisdictional Issues: Current Protection of Microenterprises under Private International law.

5.0 Introduction

An unfair jurisdiction clause can have the effect of rendering protective rules offered to a weaker party in his home state meaningless as "*Different legal systems provide different solutions to different legal problems. The following are just a few examples where the law may differ from State to State: whether or not commercial parties owe good faith obligations; the availability of specific performance as a contractual remedy; the enforceability of agreed sums for breach; and the length of time permitted to bring proceedings under relevant statutes of limitations*.[676]

This chapter investigates the jurisdictional issues and the current protection available to micro enterprises under Private international law. Firstly, it highlights the Jurisdiction Rules applicable to international commercial transactions. Secondly, it examines the extent of protection available to Micro enterprises looking into the relevant provisions of the Brussels I Regulation (Recast) in the absence of a jurisdiction agreement. It looks into the operations of Art 4 of the recast and the significance of the place of performance under Art 7. Thirdly, it examines the validity of jurisdiction agreement under the Recast and its implication for micro enterprises. It also examines the scope of Art 25 and its effect on different types of jurisdiction agreements. Fourthly, it explores the relevance of consumer jurisdictional rules in the protection of Micro enterprises. Fifthly, it discusses the interrelationship between the Recast and the Post BREXIT English jurisdiction rules. It concludes by highlighting the dire effect of unfavourable jurisdiction clauses on micro enterprises.

[676] . Hayward, "Is Arbitral Justice Blind? The Conflict of Law and International Commercial Arbitration"- http://afia.asia/2017/03/is-arbitral-justice-blind-the-conflict-of-law-and-internationalcommercial-arbitration/ - accessed on 03/08/2018.; L Usunier, "Regulating Jurisdiction of courts in international litigation toward a global answer in civil and commercial matters" (2007) 7 year book of private international law, 560

5.1 Jurisdiction Rules

Party autonomy forms the axiom of the European system of conflict of law.[677] Parties generally have the freedom to choose the court that will resolve any disputes that arise out of their transactions. Where the parties fail to choose the court either because the possibility of making an express choice has been overlooked or they simply did not agree, jurisdiction is regulated by the Brussels I Regulation (Recast), the Hague Convention,[678] and the Lugano convention[679] if the defendant is domiciled in an EU member state (except Denmark). For Jurisdiction Agreements, the Recast applies when the designated court is in an EU state; the Lugano applies when it is in an EFTA – Lugano state (Iceland, Norway or Switzerland), and Hague 2005 applies when it is in a contracting state to the convention and to English law post BREXIT.

5.1.1 2007 Lugano convention

The 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is considered a parallel convention to the Brussels Regulation[680] as its purpose was to extend the system under the then Brussels Convention to the EFTA countries, and it applies between all member states and Norway, Switzerland and Iceland.

Although courts in EU member states are not obliged to take account of the decisions on the Lugano Convention, Protocol 2 on the Uniform Interpretation of the Lugano Convention places an obligation on the court of each contracting party, when applying or interpreting the convention, to pay due account to the principles laid down by any relevant decision by the courts of other contracting parties.[681] Furthermore, Art 64 (1) of

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[677] Rome I Regulation, Recital 11; Brussels I Regulation, Recital 19.

[678] Concluded on 30 June 2005 and signed by the European Community on 1 April 2009. The Origin of the Hague 2005 can be traced to an American Initiative for the judgement, recognition convention with European countries. It was later decided to aim for a worldwide convention to be negotiated through the Hague conference on Private International law. The Hague 2005 which is applicable in business to business transactions was hoped to be as successful as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. see Trevor Hartley, international Commercial Litigation (Cambridge University Press, 2009) 156

[679] The original Lugano convention 1988 was modelled on the 1968 Brussels Convention, signed at Swiss city of Lugano on 16th September 1988.

[680] David Hill, *Private International Law*, (Edinburgh University Press, 2014) 24

[681] PROTOCOL N° 2 on the uniform interpretation of the Convention <https://curia.europa.eu/common/recdoc/convention/en/c-textes/lug02-idx.htm> accessed 3 April 2017

the Lugano Convention states that the Convention will not prejudice the application by EU members of the instruments listed in Art 64 (1).

On 2 April 2020, the UK applied for re-admittance to the Lugano Convention. According to articles 70 and 72.3 of the Convention, a unanimous acceptance by the Contracting States is needed. In addition, the ECJ decided[682] that as such accession relates to the external competence of the European Union, the European Union should decide on the UK's request for accession. Whilst some individual member states gave their approval, on 1 July 2021, a notification was issued to the contracting states to the Convention of the EU's refusal to give its consent to the UK's accession to the Lugano Convention. The notification stated that the EU is not "in a position to give its consent to invite the United Kingdom to accede to the Lugano Convention." [683]

As the Lugano Convention has been labeled "an inferior instrument" because it operates under an earlier and less effective iteration of the Brussels Regulation,[684] our discussions will be based mainly on the latest iteration of the Brussels Regulation (Recast) and Hague 2005.

5.1.2 The Convention on Choice of Court Agreements (Hague 2005)

The Convention on Choice of Court Agreements (Hague 2005) applies in international disputes to all exclusive jurisdiction agreements for civil or commercial matters, which were concluded after the Convention came into force in the Member State of the chosen court. The Convention deals with both jurisdictional issues and the recognition and enforcement of judgments.

[682] see the Lugano Opinion, 1/03 of 2006

[683] Federal Department of Foreign Affairs FDFA, Notification to the Parties of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, concluded at Lugano on 30 October 2007https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autres-conventions/Lugano2/20210701-LUG_en.pdf

[684] European Union Committee, *Brexit: justice for families, individuals and businesses?* (HL Paper 134) <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldeucom/134/134.pdf>accessed 24 March 2017,(17th Report of Session 2016–17) 4

Hague Convention 2005 offers a degree of certainty to international B2B contracts by providing a framework of rules regulating jurisdiction agreements in civil and commercial matters and the ensuing recognition and enforcement of any judgment given by that chosen court. Post BREXIT, the UK has signed up to the Hague Convention 2005 in its own right.[685] The interrelationship between this approach and the existing rules governing jurisdiction in the EU27 is discussed in section 5.5 below.

The Hague Convention is restrictive in its application as it only governs the validity and effectiveness of exclusive jurisdiction agreements in civil and commercial matters and does not apply to consumer contracts, employment contracts, family law matters, and wills and succession.[686] The Hague 2005 prevails over the jurisdiction rule of the Brussels 1 Regulations (Recast) unless both parties are EU residents or come from third states not a contracting state to Hague 2005.

The EU27 is a regional organisation member of the Hague 2005. According to Art 26 (6), the Convention will not affect the application of the rules of a Regional Economic Integration Organisation, that is, a Party to the Convention state.

5.1.3 Brussels I Regulation (Recast)

By way of analogy, it is helpful to clarify that the issue of domicile in relation to consumers is quite different for businesses. While a consumer is more likely to have a single domicile, businesses may have more than one domicile for the purpose of Jurisdiction. Under the Recast, a business can be domiciled in up to three EU Member States simultaneously, or be domiciled both within and outside the EU. Thus a business domicile can be determined by (i) its statutory seat; (b) central administration; or (c) principal place of business.[687]

[685] The Law Society, Choice of court agreements after Brexit, https://www.lawsociety.org.uk/en/topics/brexit/choice-of-court-agreements-after-brexit accessed 4 February 2021
[686] Hague 2005, Art 2
[687] Brussels Recast, Art 63 (1)

5.2 The extent of protection available to Micro enterprises under the Recast in the absence of choice.

Art 4 (1) of the Recast provides general rules on jurisdiction regarding persons domiciled in a member state. It provides that "Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State." This *actor sequitur forum rei* principle, at first glance, may seem like this provision applies to both B2C and B2B contracts as long as the parties are domiciled in a member state. However, the provision is subject to other specific rules in the regulation. For instance, Art 7 and Art 10 which provide for special jurisdiction rules in certain matters and Art 17 – 19 which provide specific jurisdiction rules for consumer contracts. Hence, the rule can be said to apply mainly to businesses.

The general provision of article 4 can be beneficial to micro enterprises in respect of an action brought against them. As per our discussions on transactional cost, it is safe to assume that often the cost of litigating in a party's country of domicile will appear to be far less than the cost of litigating in a foreign jurisdiction. However, considering that claims regarding commercial parties can go, either way, it is not always the case that a micro enterprise will be the defendant on every occasion. In fact, the impact of this provision is more challenging where the micro enterprise is the claimant. The cost and hardship of litigating in another jurisdiction can sometimes discourage a person from making a claim.

Recital 16 of the Recast highlights that in addition to the defendant's domicile, alternative grounds of jurisdiction based on the close connection between the court and the action are relevant. The application of jurisdiction rules under the Recast is also subject to Art 25, which gives effect to jurisdiction agreements.

We note that the jurisdiction determines the procedural law to be applied in cases of dispute, such as the disclosure of the parties' respective documents and the remedies available to the parties. For example, under English law, the Civil Procedure Rules direct that parties make full disclosure, including those documents damaging to a party's own

case. This salient principle, which may be a determinant of the outcome, may not be required under some domestic legislation. The procedural rule also affects the mode of examination in chief, the cross-examination, and the pre-trial which may not apply in civil law systems. Furthermore, equitable remedies such as injunctions or other remedies such as damages, and specific performance may not exist in other jurisdictions outside the common law legal system.[688]

Furthermore, language barrier can often be a problem in submitting to the jurisdiction of a foreign member states, particularly if that country's governing law is applied. Whilst it will appear that the means of a translator or machine translation is always utilised, the effectiveness and accuracy of such translation can often be an issue. Problems can often arise from the structural and lexical differences between languages, multiword units like idioms and collocations and there is also the general problems of ambiguity in some cases.[689] Language barriers together with its incidental cost are likely to add to the expense of the proceedings and it can mean that the foreign party feels one step removed from the proceedings.[690]

Another effect of jurisdiction which is often overlooked by academics due to its subjective assessment is the "home court advantage" - a term which is more recognised in sports but arguably has the same emotional effect in litigation. The familiarity of a party's own court system, local judges, language as well as the environment can create a feeling of confidence. Aside from confidence, travel costs and the overall cost of bringing or defending an action vary enormously between jurisdictions.

Jurisdiction can also have a huge impact on transactional cost including the award of this following a decision on the matter. In common law jurisdictions such as England, the general rule is that the unsuccessful party pays the winner's costs.[691] Such rules may not apply in other jurisdictions. Thus, jurisdiction rules which offer greater flexibility to micro

[688] Nathalie Burn, "More than just boilerplate" 154 NLJ 932
[689] Translation Problems, <https://www1.essex.ac.uk/linguistics/external/clmt/MTbook/PostScript/ch6.pdf> 105
[690] Nathalie Burn, "More than just boilerplate" 154 NLJ 932
[691] Civil Procedure Rules 1998, 44.3 (2)

enterprises regardless of whether they are defendants or claimants; or rules which are targeted at ensuring access to justice in reasonable time and at a reasonable cost will be more beneficial to micro enterprises.

The question then remains can micro enterprises benefit from special jurisdiction rules? According to Art 7 (a) in contractual matters, a person domiciled in a Member State may be sued in another Member State in the courts for the place of performance of the obligation in question. Art 7 (b) further prescribes a guideline for determining the place of performance where there is no express agreement to the contrary. For sale of goods or delivery of services, it is the place in a Member State where such good/services were delivered or ought to have been delivered. In *Car Trim GmbH v Keysafety Srl,*[692] the ECJ clarified the provision of Art 7 as the place where the goods are or should have been physically handed over to the buyer at their final destination. Consequently, a micro enterprise who delivers goods or performs service in its country of domicile could benefit from the special rules regarding the place of performance. Thus, some of the special or alternative jurisdiction rules under Art 7-9 allow a person to choose whether to commence an action in the court of the member state of the defendant's domicile or the courts of another member state having a jurisdictional basis.

5.3 Validity of Jurisdiction agreements under the Recast

A jurisdiction agreement, which can also be referred to as choice of court agreement, can be defined as an agreement by which parties agree which court or courts will have jurisdiction to adjudicate any dispute that may arise between them;[693] or any dispute that has arisen. Any such agreement or clause forming part of a contract is treated as an agreement independent of the other provisions of the contract.[694] Hence, their validity cannot be contested solely on the ground that the contract is invalid.[695] According to

[692] Case C-381/08

[693] Lexis PSL, "Jurisdiction agreements—types and interpretation" <https://www.lexisnexis.com/uk/lexispsl/disputeresolution/document/393750/5DWT-0XS1-F18B-8075-00000-00/Jurisdiction_agreements_types_and_interpretation> accessed 24 July 2019

[694] Brussels Recast, Art 25 (5)

[695] Brussels Recast, Art 25 (5)

Briggs, "There is no distinction between a contract to sell and a contract to sue."[696] Jurisdiction agreements that prescribe where litigation should occur have a dual nature; it acts as a private law contract and has a procedural effect.[697]

According to Hartley,[698] difficulties exist despite the strong arguments for giving effect to jurisdiction provisions, for example, whether the weaker party will receive a fair trial. Moreso, jurisdiction agreements could be used to evade the mandatory rules of a country that would otherwise have had jurisdiction although not the mandatory rules of the forum. Where the governing law coincides with the chosen jurisdiction, the mandatory rules of another country might not be applied.[699]

The formal validity of jurisdiction agreements is dealt with under Article 25 of the Recast unless the agreement is null and void.[700] Article 25 applies to all commercial contracts regardless of the nature of the subject matter or the status of the parties. Issues relating to consensus, including substantive validity are governed by the application of national law of the chosen governing law. Therefore, national courts apply national rules when the formation of consent is in question.[701]

Although Beaumont and McEleavy suggest that "Union law could, in theory, be a better solution to the question of validity than a reference to national law."[702] The pro-unification and pro-jurisdiction standpoint of the EU are probably owed to the need to harmonise the requirements for a valid jurisdiction agreement while also respecting the Member State law on the conclusion of contracts.[703] In this light, Recital 20 of Recast provides that in determining whether a jurisdiction agreement in favour of a court or the courts of a

[696] Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP 2008) 195.
[697]Trevor Hartley, *Choice of Court Agreements under the European and International Instruments* (OUP, 2013) 4
[698] Trevor Hartley, international Commercial Litigation (Cambridge University Press, 2009) 187
[699] *The Hollandia (Morviken).* [1983] 1 A.C. 565
[700] Dickinson, A Dickinson, "Surveying the Proposed Brussels I bis Regulation: Solid Foundations but Renovation Needed" (2010) 12 Yearbook of Private International Law , 301
[701] Heidelberg Report, "Report on the Application of Regulation Brussels I in the Member States" (Study JLS/C4/2005/03 Final Version September 2007), <http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf> accessed 21 August 2019, para 376
[702] PR Beaumont and PR McEleavy, *Anton's Private International Law* (W Green, 3rd edn, 2011), 8.108.
[703] Tena Ratkovic´ and Dora Zgrabljic´ Rotar, "Choice of Court Agreements under the Brussels I Regulation (Recast)" (2013) J. Priv. Int. Law, 9, 2, 255

Member State is null and void as to its substantive validity, that question should be decided in accordance with the law of the Member State or the court(s) designated in the agreement, including the conflict-of-law rules of that Member State.

For businesses generally, jurisdiction agreements ensure the predictable and effective resolution of disputes while minimising the possibility of multiple proceedings. However, Jurisdiction agreements can grant jurisdiction to a court that would otherwise not have had jurisdiction or deprive a court that would otherwise have had jurisdiction to entertain such matters, thus having a prorogation and derogation effect.[704] Hence, a jurisdiction agreement, which is unfavourable to a micro enterprises, is valid as long as the requirement of Art 25 are met.

Jurisdiction agreement may be exclusive, non-exclusive or hybrid.

5.3.1 Exclusive Jurisdiction Agreements

Exclusive jurisdiction agreements nominate one court with "exclusive" jurisdiction for each or both parties, excluding all of the otherwise competent courts for each party and oblige each party to litigate in its or the nominated court.[705]

As such an exclusive jurisdiction agreement by restricting the parties to the chosen court is capable of excluding the other options a micro enterprise may have had to litigate in any other competent court including its domestic court and this can have a negative effect on its access to justice. On the other hand, an exclusive jurisdiction agreement provides a micro enterprise with some form of comfort as a result of the foreseeability or legal certainty that any dispute would be resolved in the agreed forum.

Exclusive jurisdiction agreements of the court of a Member State fulfilling the requirement of Article 25 of the Recast take precedence and therefore oust the

[704] Z Tang, "Exclusive Choice of Forum Clauses and consumer contracts in E Commerce" (2005) 1 J. Priv. Int. Law, 237
[705] C-23/78, *Meeth v Glacetal; Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, para 21.

jurisdiction of the courts of the defendant's domicile under Article 4 and the special jurisdiction provisions in Articles 7 and 8 of the Recast.[706] Jurisdiction agreements are presumed exclusive unless the contrary is agreed by the parties.[707]

A unique type of exclusive agreement is what Keys and Marshall[708] refer to as the non uniquely exclusive agreement. This type of jurisdiction agreement which nominates two or more courts with "exclusive" jurisdiction for both parties, may appear to offer more significant choices to micro enterprises. However, this type of exclusive agreement is questionably exclusive since it provides the parties with a choice of forum. A fundamental requirement for exclusivity suggests that each party is to bring a proceeding in a chosen court to the exclusion of all other courts[709]. However, it has been argued that this type of agreement should be enforceable as the choice of more than one court "clearly exclude the jurisdiction of any other courts for both parties"[710]

Thankfully, Art 31(2) of the Recast provides a protective cover which substantially limits the chances of a court not chosen to rule on either the validity or the application of an exclusive jurisdiction agreement if the chosen court has been seised.

5.3.2 Non Exclusive Jurisdiction Agreements

Non-exclusive jurisdiction, according to Briggs, simply means that the jurisdiction agreement is not of the 'fully, bilaterally and immediately exclusive type.'[711] Consequently, disputes are to be commenced in the courts of a jurisdiction but without prejudice to the right of either party to commence a dispute in another jurisdiction, if appropriate. The challenge with a jurisdiction agreement nominating more than one forum is that the value

[706] Case C-25/76 *Galaries Segoura Sprl v Socite Rahim Banakdarian* [1976] ECR 1851 at [1]; Case C-351/89 *Overseas Union Insurance* [1991] ECR 1-3317; Case C-24/76 *Estasis Salotti di Colzani Aimo et Gihanmario Colzani v Ruwa Polstereimaschinen* Gmb [1976] ECR 1831 at [7*];*

[707] Brussels Recast, Art 25 (1)

[708] Mary Keyes & Brooke Adele Marshall, "Jurisdiction agreements: exclusive, optional and asymmetrical", (2015) J. Priv. Int. Law, 11, 3, 346

[709] *Sherdley v Nordea Life & Pension SA* [2012] EWCA Civ 88; [2012] Lloyd's Rep IR 347 paras 7, 60–66.

[710] R Brand and P Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Materials* (CUP, 2008), 17.

[711] Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP, 2008), para 4.19.

of such jurisdiction agreements in reducing uncertainty and clarifying the scope for jurisdictional disputes is diminished[712] since it creates the likelihood that related proceedings can be commenced in two courts if either party chooses to invoke "exclusive" jurisdiction of a different court.

For micro enterprises, such agreements achieve some level of adaptability to the extent that there is a forum, but there is also the flexibility of bringing an action elsewhere if needed. This agreement possibly also has the problem of uncertainty for the micro enterprise, particularly if the alternative jurisdiction is unnamed. Like exclusive agreements, non-exclusive jurisdiction agreements are subject to the general rules for establishing jurisdiction and resolving conflicts of jurisdiction under the Recast.[713]

There is a different variant of non-exclusive jurisdiction agreements which appears not to be covered under Art 25. The type of non-exclusive jurisdiction agreement regulated by Art 25 is the standard non-exclusive jurisdiction agreement that nominates more than one court as having "exclusive" jurisdiction. As discussed above, the standard non-exclusive jurisdiction agreements do not oblige both parties to litigate in the nominated forum.[714] The variant of non-exclusive agreement, which appears not to be regulated under Art 25 and can be problematic, is the hybrid jurisdiction agreement which is also referred to as the asymmetric jurisdiction agreement or the unilateral optional agreement.

5.3.3 Hybrid Jurisdiction Agreements

These agreements can be distinguished by their one-sided character. Usually, one party is obligated by the jurisdiction provision, thereby submitting to the exclusive jurisdiction of a chosen court, while the other party has no such obligation or at best submits to the jurisdiction of the selected court non-exclusively.[715] Such jurisdiction clauses are common

[712] Mary Keyes & Brooke Adele Marshall, "Jurisdiction agreements: exclusive, optional and asymmetrical", (2015) J. Priv. Int. Law, 11, 3, 356
[713] Brussels Recast, recital 22, Art 29(1).
[714] *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2003] 2 Lloyd's Rep 571 , paras 37, 52.
[715] R Fentiman, *International Commercial Litigation* (OUP, 2nd edn, 2015), para 1.11.

in international financial agreements and can be justified as a risk management strategy.[716] But they are also known in other commercial transactions.

A jurisdiction agreement cannot logically be both exclusive and non-exclusive simultaneously,[717] still such jurisdiction agreements contain exclusivity regarding one party and non-exclusivity in respect of the other party. Such agreements indicate with certainty the jurisdiction in which the option holder, usually the stronger party in the contractual relationship, can be expected to defend a proceeding[718] while enabling it to bring proceedings in another jurisdiction that will more favourably resolve its claims. Unfortunately, the non-option holder, usually the weaker party, has no flexibility in bringing or defending proceedings. For such an enterprise, there is certainty as to where he can commence proceedings but uncertainty as to which jurisdiction it can be expected to defend an action. [719]

Surprisingly, there is a divergence in the approach taken by different national legal systems to these type of jurisdiction agreements. English law sees these agreements as legitimate and enforceable,[720] while French courts have repeatedly rejected these agreements and consider them unenforceable.[721]

Art 31 (2) of the Recast protects parties from the derogative effect of an exclusive choice of a Member State court by excluding it from the lis pendens rule by virtue of the *Gasser*[722] case, which gives priority to the court chosen in an exclusive jurisdiction agreement. This exception will "apply for most jurisdiction agreements" because exclusivity is

[716] Ibid
[717] Mukarrum Ahmed, A Comparative Study of the Fundamental Juridical Nature, Classification and Private Law Enforcement of Jurisdiction and Choice of Law Agreements in the English Common Law of Conflict of Laws, the European Union Private International Law Regime and the Hague Convention on Choice of Court Agreements, (2015) A thesis presented for the degree of Doctor of Philosophy in Law at the University of Aberdeen, 87
[718] *Bouygues Offshore SA v Caspian Shipping Co* (No 3) [1997] 2 Lloyd's Rep 493, 503.
[719] Mary Keyes & Brooke Adele Marshall "Jurisdiction agreements: exclusive, optional and asymmetrical", (2015) J. Priv. Int. Law, 11, 3, 364
[720] *Ocarina Marine Ltd v Marcard Stein & Co [1994] 2 Lloyd's Rep 524; Armadora Occidental SA v Horace Mann Insurance Co* [1977] 1 WLR 520; *Dubai Electricity Co v Islamic Republic of Iran (The "Iran Vojdan")* [1984] 2 Lloyd's Rep380; *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd* [2013] EWHC 1328 (Comm); [2013] 2 All ER 898.
[721] *ICH v Crédit Suisse*, Cass civ, 1ère, 25.03.2015, No 13-27264; *Rothschild case* (Cass. 1. Civ, 26 September 2012
[722] C-116/02 *Erich Gasser GmbH v MISAT Srl.*

presumed.[723] However, agreements showing a clear derogation from exclusivities, such as hybrid jurisdiction agreements and standard non-exclusive jurisdiction agreements, are less likely than exclusive agreements to lead to a stay of proceedings. Thus, the lis pendes rule, which protects the jurisdiction of the court first seized where there is conflicting exclusive jurisdiction agreement or where a court designated in an exclusive jurisdiction agreement has been seised first, will apply.[724]

Another criticism of these type of jurisdiction agreement is that they are contrary to Article 6 of the European Convention on Human Rights ('ECHR'), which promotes equal access to justice.[725] This Article emphasises a party's right to a fair hearing within a reasonable time by an impartial tribunal. This right would be infringed, particularly if the consequence of restricting a party's choice of forum is to force them into a court where they are unlikely to receive substantial justice.[726] Conversely, It has been argued that "equal access to justice" is unrealistic where each party is presumed to be on an equal footing as in B2B transactions and that why should agreements entered into in good faith be regarded as infringing a party's rights.[727]

While these counter-arguments are understandable, they are not entirely excusable. As we have previously established, such presumption does not take into account the commercial realities of complex international commercial transactions involving micro enterprises. Regardless of whether these types of agreements infringe a party's rights, any agreement that gives discretion to a stronger commercial party, particularly where to bring an action against a micro enterprise, undermines legal certainty and access to justice of a micro enterprise and should be discouraged.

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[723] C Heinze, "Choice of Court Agreements, Coordination of Proceedings and Provisional Measures in the Reform of the Brussels I Regulation" (2011) Rabels Zeitschrift 581, 589.
[724] Brussels Recast, Recital 22(2)
[725] Mukarrum Ahmed, *A Comparative Study of the Fundamental Juridical Nature, Classification and Private Law Enforcement of Jurisdiction and Choice of Law Agreements in the English Common Law of Conflict of Laws, the European Union Private International Law Regime and the Hague Convention on Choice of Court Agreements,* (2015) A thesis presented for the degree of Doctor of Philosophy in Law at the University of Aberdeen, 88
[726] ECHR, 27 October 1993, *Dombo Beheer BV v Netherlands*, [33]; ECHR, 23 October 1996, *Ankerl v Switzerland,* [38]; *Mauritius Commercial Bank Limited v Hestia Holdings Limited and Sujana Universal Industries Limited* [2013] EWHC 1328 (Comm), [43]
[727] *OT Africa Line Ltd v Hijazy (The Kribi)* (No 1) [2001] 1 Lloyd's Rep 76, [42].

As you would see from our discussions on English Jurisdiction agreements post BREXIT in section 5.5 below, these hybrid jurisdiction agreements are outwith the scope of the Hague Convention,[728] which requires that a jurisdiction agreement must be exclusive irrespective of the procedural positions of the parties.[729] As highlighted above, this research opine that these agreements should be incompatible with the Recast as well as some national laws as evidenced by French case law such as *Rothschild*.[730] It should also be noted that the French courts recently refined their approach to asymmetric jurisdiction agreements in *Apple Sales International v eBizcuss,*[731] ruling this time that the clause is enforceable.

Contrary to this view, Ahmed argues that asymmetric non-exclusive jurisdiction agreements are in principle compatible with Article 25 of the Recast"[732] as the Recast makes provision for "allowing claimants a fettered or limited choice of venue or forum shopping." However, such agreements will be invalid if the substantive law of the primary court imposes strict requirements of mutuality on contractual terms.[733] Thus, the validity of such agreement largely depends on the substantive law of the chosen forum, including its private international law rules.[734]

A Jurisdiction agreement is generally designed to increase predictability and to reduce the cost of litigation. However, a hybrid agreement is widely agreed to have the potential for

[728] T Hartley and M Dogauchi, "Explanatory Report on the Convention of 30 June 2005 on Choice of Court Agreements" (Hague Conference on Private International Law, 2005) <http://www.hcch.net/index_en.php?act=publicationsdetails&pid=3959&dtid=3> accessed 5 October 2017 para 106
[729] Hague 2005, Art 3
[730] *Ms X v Banque Privee Edmond de Rothschild Europe (Societe)* Cass civ, 1ere, 26.9.2012, No 11-26.022, [2013] ILPr 12; *ICH (Societe) v Credit Suisse (Societe)* Cass civ, 1ere, 25.3.2015, No 13-27.264, [2015] ILPr 39;
[731] Apple Sales International v eBizcuss Cass. 1ere Civ, 7.10.2015, No. 14-16.898.
[732] M Ahmed, 'The Legal Regulation and Enforcement of Asymmetric Jurisdiction Agreements in the European Union' (2017) 28(2) European Business Law Review, 13
[733] Mukarrum Ahmed, *A Comparative Study of the Fundamental Juridical Nature, Classification and Private Law Enforcement of Jurisdiction and Choice of Law Agreements in the English Common Law of Conflict of Laws, the European Union Private International Law Regime and the Hague Convention on Choice of Court Agreements,* (2015) A thesis presented for the degree of Doctor of Philosophy in Law at the University of Aberdeen, 84
[734] Jan Strnad, 'Determining the Existence of Consent for Choice-of-Court Agreements under the Brussels I-bis Regulation' (2014) 14, The European Legal Forum 113, 117-118

allowing torpedo actions.[735] Moreover, Briggs has highlighted the ambiguous relationship between Articles 25 and 31[736] when applied to *Meeth v Glacetal* clauses.[737]

The concept of justice plays an essential role in identifying the nature and function of EU private international law. Wafa argues that the rules of EU private international law are mainly driven by principles of distributive justice which may be accompanied by some consideration of corrective justice (as an exception).[738] Whereas, national private law is structured by principles of corrective justice that may be complemented by considerations of distributive justice.[739] The concept of distributive justice treats each person with equal concerns and respects the freedom of each party to make something valuable of his life by introducing laws and policy to reflect these two principles.[740] While corrective justice is concerned with the reversal of wrongs or the undoing of transactions. It may be overreaching to ask for a review of the function of EU private international law to focus mainly on corrective justice; however, consideration can be given to certain categories of parties in need of corrective justice such as micro enterprises in MB2B international commercial transactions.

5.4 The Relevance of Jurisdictional rules of consumer protection to Micro Enterprises

With regard to jurisdiction, the Recast gives the consumer a choice of fora. Whereas a consumer can only be sued in the courts of the member state in which the consumer is

[735] Mukarrum Ahmed, *A Comparative Study of the Fundamental Juridical Nature, Classification and Private Law Enforcement of Jurisdiction and Choice of Law Agreements in the English Common Law of Conflict of Laws, the European Union Private International Law Regime and the Hague Convention on Choice of Court Agreements*, (2015) A thesis presented for the degree of Doctor of Philosophy in Law at the University of Aberdeen, 89

[736] A Briggs, *Private International Law in English Courts* (Oxford University Press, 2014) para 4.350; F Garcimartin, "Lis Pendens and Exclusive Jurisdiction", in A Dickinson and E Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press, 2015), paras 11.50– 11.53

[737] Case 23/78.

[738] Mukarrum Ahmed, *A Comparative Study of the Fundamental Juridical Nature, Classification and Private Law Enforcement of Jurisdiction and Choice of Law Agreements in the English Common Law of Conflict of Laws, the European Union Private International Law Regime and the Hague Convention on Choice of Court Agreements,* (2015) A thesis presented for the degree of Doctor of Philosophy in Law at the University of Aberdeen, 31

[739] Ralf Michaels and Nils Jansen, 'Private Law Beyond the State? Europeanization, Globalization, Privatization' (2006) 54 Am. J. Comp. Law 843, 848;

[740] Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 2-4; John Rawls, *A Theory of Justice* (Harvard University Press 1971) 53,

domiciled,[741] the other party can be sued by the consumer either in the courts of the member state where that party is domiciled or in the courts of the member state where the consumer is domiciled.[742] Moreover, a jurisdiction agreement cannot deprive a consumer of the protection granted by the rules of Recast. Except where the agreement (i)is entered into after the dispute has arisen; (ii) permits the consumer to commence proceedings in any court other than those mentioned above; or (iii) where both the consumer and the business are domiciled in the same member state at the time of finalising the contract, the agreement confers jurisdiction on that member state and such agreement is not contrary to the law of the relevant member state. [743]

Therefore, Jurisdiction clauses in consumer contracts are rendered almost redundant unless it complies with the requirements of Art 19 and 25. For enterprises, regardless of size, there is the risk of unfavourable jurisdiction agreements and its dire effect. Legislators should be more concerned about the knock on effect of an unprotective regime for micro enterprises to consumers.

In Lokman *Emrek v Vlado Sabranovic,*[744] on request for a preliminary ruling from the Landgericht Saarbrücken on Art 15 (1)(c) of Brussels Regulation[745] (now Art 17 (1) (c) of the Recast)[746] on whether a causal link is required between the commercial or professional activity directed to the Member State of the consumer's domicile via an Internet site and the conclusion of the contract with that consumer. The ECJ held that requiring any additional condition for the application of Art 16 (now Art 18 Recast) is contrary to the objective of consumer protection.

[741] Recast, Art 18(2); Lugano 2007, Art 16 (2)
[742] Recast, Art 18(1); Lugano 2007, Art 16 (1)
[743] Recast, Art 19;
[744] Case C-218/12; see also C-190/11 *Daniela Mühlleitner v Ahmad Yusufi and Wadat Yusufi*
[745] Which provides " in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities"
[746] in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

The law usually pursues a typological approach to consumers as it affords protection to one contracting party who is presumed weaker or at a specific disadvantage vis a vis the other party.[747] A review of recent legal instruments enacted shows that European lawmakers offer protection to a number of 'presumably weaker parties from party autonomy without regard to whether any actual risk emanates a specified case.'

5.5 The interrelationship between the Recast and the Post BREXIT English jurisdiction rules.

Post-BREXIT, the English Courts is in the same position as any other courts of a non-member state, so far as the EU27 is concerned. Post-Brexit, as both the UK and the EU 27 have signed up to the Hague Convention 2005, the English Courts and the EU27 will be required to uphold exclusive jurisdiction that falls within the Convention's scope. The question of when did the convention come into force in the UK has been a subject of controversy. This question has become important following the EU Notice, which states that the Hague Convention will apply between the EU27 and UK effective after the Convention enters into force in the UK, as a party in its own right to the Convention, which is 1 January 2021.

Browne and Watret argue that this position is contrary to the UK declaration which accompanied its delivery of the instrument of accession, which states "the United Kingdom considers that the 2005 Hague Convention entered into force for the United Kingdom on 1 October 2015 and that the United Kingdom is a Contracting State without interruption from that date". This position is in line with the Ministry of Justice Guidance which confirms that the Hague Convention 2005" will continue to apply to the UK (without interruption) from its original entry into force date when the EU became a signatory to the convention (1st October 2015).[748]

[747] Reinhard Zimmermann, "Consumer Contract Law and General Contract Law: The German Experience", (2005) Current Legal Problems 58, 1, 418

[748] Oliver Browne and Tom Watret, "What Rules Will Apply to Jurisdiction and the Enforcement of Judgments After Brexit? Part Two" <https://www.latham.london/2020/10/what-rules-will-apply-to-jurisdiction-and-the-enforcement-of-judgments-after-brexit-part-two/> accessed 2 February 2021; Mukarrum Ahmed, 'BREXIT and English Jurisdiction Agreements: The Post-Referendum Legal Landscape', (2016), 27, Eur. Bus. Law Rev., 7, 989-998

The UK's position is unequivocal. Considering there was no break in the membership of the UK, the Hague convention can be said to "come into force" in the UK from the 1st of October 2015 by virtue of its then membership of the EU; and is effective between the UK and EU 27 from the 1st January 2021 after its exit from the EU and its signatory in its own right.

The Hague Convention 2005 takes precedence over the Brussels Recast, where there is a conflict unless both parties to the jurisdiction agreement in question are domiciled in the EU. Thus, where a micro enterprise enters into an exclusive Jurisdiction agreements in favour of English courts, this will remain valid vice versa in the EU27. If the English court is seised in a case regarding a Member state's exclusive jurisdiction agreement, Article 6 of the Hague Convention should regard the elected forum.

Unfortunately, this legal certainty is not available to micro enterprises who enter into a non exclusive agreement because according to Article 1, the Hague Convention 2005 only applies to exclusive Jurisdiction agreements, so non-exclusive jurisdiction agreements are not covered under the convention. Article 3(a) defines exclusive Jurisdiction agreement as that which designate for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts while Non-exclusive Jurisdiction according to Article 22(1) as that which designate "a court or courts of one or more Contracting States."

While the position of jurisdiction agreement that fall within the scope of the Hague 2005 is clear, jurisdiction agreements which fall outside the scope of Hague 2005 are of great concern. Different scholars express different opinions as to whether asymmetric agreements are exclusive or non exclusive. An overwhelming majority opine that

asymmetric agreements are non exclusive and therefore fall outside the scope of the Hague 2005.[749]

English courts have traditionally enforced asymmetric jurisdiction clauses[750] and English Courts often boast of the strengths of its law and jurisdiction which is often noted for its flexibility, breadth and discretion.[751] .[752] Under common law jurisdictions, non exclusive jurisdiction agreements are simply one factor in the *forum non conveniens* inquiry.[753] [754] except where the weak party has been forced to agree to a designating court where he will not receive a fair trial or where the chosen court undergoes a significant change after the agreement is made.[755]

Some jurists believe that English courts will uphold jurisdiction agreements in favour of other courts, including Member States, that fall outside the scope of the Hague Convention 2005, due to its respect for the parties intentions.[756] Worryingly, Art 33 (2) and 34 (2) of the Recast allows the courts of a member state to refuse to stay proceedings in favour of the Court of a non-member State first seised under certain circumstances. These circumstances include where proceedings in that court is unlikely to be concluded within a reasonable time. The concept of reasonableness or reasonable time can be quite

[749] Piraeus Court of First Instance nr. 3106/2019, <https://conflictoflaws.net/2020/first-contact-of-greek-courts-with-the-2005-hague-choice-of-court-convention/> accessed 28 January 2021; *Etihad Airways PJSC v Prof. Dr. Lucas Flother* [2019] EWHC 3107 (Comm). para. 217; Trevor Hartley and Masato Dogauchi, "Explanatory Report on the 2005 HCCH Choice of Court Agreements Convention", 37.

[750] *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588, 592F-594G (CA*); Mauritius Commercial Bank Limited v Hestia Holdings Limited and Sujana Universal Industries Limited* [2013] EWHC 1328 (Comm);

[751] The Law Society, ' England and Wales: A world jurisdiction of choice' <https://www.lawsociety.org.uk/campaigns/england-and-wales-global-legal-entre#:~:text=In%20December%202019%2C%20we%20launched,as%20a%20seat%20of%20arbitration> accessed 5 February 2021

[752] *BAT Industries Plc v. Windward Prospects Ltd* [2013] EWHC 4087 (Comm); *Scott v. West & Mackie v Baxter* [2012] EWHC 1890 (CH); *Apple Corps Ltd v. Apple Computers Inc* [2004] EWHC 768 (Ch); *Tryg Baltica International (UK) Ltd v. Boston Compania de Seguros* [2004] EWHC 1186; *Marconi Communications International Ltd v. PT Pan Indonesia Bank TBK* [2005] EWCA Civ 422; *Bank of Baroda v. Vysya Bank Ltd* [1994] C.L.C. 41; *Gan Insurance Co Ltd v. Tai Ping Insurance Co. Ltd* [1999] 2 All ER (Comm) 54

[753] Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) para 5.39.

[754] *The Fehmarn* [1958] 1 WLR 159, pp 161-2 (CA)

[755] *Carvalho v Hull Blyth Ltd* [1979] 1 WLR 1228; [1979] 3 All ER 280

[756] M. Ahmed, P. Beaumont, "Exclusive choice of court agreements: some issues on the Hague Convention on choice of court agreements and its relationship with the Brussels I Recast, especially anti-suit injunctions, concurrent proceedings and the implications of Brexit", (2017) 13 JPIL 386; Oliver Browne and Tom Watret, What Rules Will Apply to Jurisdiction and the Enforcement of Judgments After Brexit? Part Two <https://www.latham.london/2020/10/what-rules-will-apply-to-jurisdiction-and-the-enforcement-of-judgments-after-brexit-part-two/ > accessed 2 February 2021*; Gulf International Bank BSC v Aldwood* [2019] EWHC 1666 (QB)

fluid. Thus, the Courts of Members states can overturn English jurisdiction clauses falling outside the scope of the Hague Convention.

The jurisdictional rules of the Brussels Recast allow for defendants to be sued in the Courts of their Member states. According to Art 63 (1), a company is domiciled at the place where it has its (a) statutory seat; (b) central administration; or (c) principal place of business. This position differs under English law, which views foreign companies carrying out business in England as present in the jurisdiction and thus capable of being sued there.

National jurisdiction rules sometimes vary from one member state to another. The English common law rules on jurisdiction are broader than the Recast. For instance, the Courts have an inherent jurisdiction to transfer, dismiss or stay a proceeding under the doctrine of forum non conveniens to the most appropriate forum.[757] In determining the appropriate forum, the court takes into consideration factors such as whether there is another forum where justice can be done at considerably less expense and inconvenience and whose jurisdiction the defendant is also amenable. Moreso, the stay must not deprive the claimant of a judicial or legitimate advantage he would have had if the jurisdiction of English Courts was invoked.[758]

Some national jurisdiction rules such as those of France and Germany grant jurisdiction against non-EU defendants. Sec 23 of the German Civil code grants claimants with habitual residence in Germany the right to bring an action in German courts against foreign persons or companies with assets in Germany without any additional requirements. Such a provision protects domestic claimants. Similarly, French jurisdiction rules allow a claimant to sue the defendant either in the court of the defendant's domicile

[757] *Spiliada Maritime Corpn v Cansulex Ltd, The Spiliada* [1987] AC 460, [1986] 3 All ER 843, HL. *Australian Commercial Research and Development Ltd v ANZ McCaughan Merchant Bank Ltd* [1989] 3 All ER 65; *Bank of Credit & Commerce Hong Kong Ltd (in liquidation) v Sonali Bank* [1995] 1 Lloyd's Rep 227. RA Brand, "Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments" (2002) 37 Texas International Law Journal 467.
[758] *MacShannon v. Rockware Glass Ltd*., [1978] A.C. 795, 812 (H.L) (Lord Diplock).

or in the court of the place of performance, i.e where the goods where delivered or service was provided, depending on the subject matter of the contract, regardless of where the defendant is actually domiciled.

Thus, French courts can excercise jurisdiction over defendants domiciled in a non EU state as far as the delivery of the goods or the provision of service takes place in France. There is nothing wrong in national jurisdiction rules improving access to justice for claimants, both weaker parties and micro enterprises. It ultimately ensures that these weaker parties are not deprived of the protection offered to them by EU law.

As such, English Courts would be able to award damages in cases of breach of jurisdiction agreements. Damages for breach of exclusive jurisdiction agreements is trite law under the English common law.[759] This award may be extended to cover consequential losses, unrecovered costs, or the claimant's costs which resulted from the breach of the jurisdiction agreement. The English Courts have shown considerable discretion, particularly by way of penalty. In the recent case of *Wales (t/a Selective Investment Services) v CBRE Managed Services Ltd and another,*[760] the Court imposed costs penalty on a successful defendant for their failure to engage in mediation. This discretion was exercised under CPR 44.2. Similarly, the Court of Appeal rejected a jurisdiction challenge and upheld the grant of summary judgment in proceedings claiming damages for the commencement of Italian proceedings in breach of exclusive English jurisdiction clauses:[761]

Browne and Watret[762], suggest a possible method of resolving these issues is "for the UK and EU to make reciprocal declarations that the Hague Convention 2005 applies to non-exclusive jurisdiction agreements as well as exclusive jurisdiction agreements" as per art

[759] *Ellerman Lines Ltd v Read and Others* [1928] 2 KB 144; *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG ("the Alexandros T")* [2013] UKSC 70; *Barclays Bank v ENPAM* [2016] EWCA Civ 1261
[760] [2020] EWHC 1050 (Comm); *Union Discount Co Ltd v. Zoller* [2002] 1 WLR;
[761] *Barclays Bank Plc v Ente Nazionale di Previdenza ed Assistenza Dei Medici e Degli Odontoiatri* [2016] EWCA 1261.
[762] By Oliver Browne and Tom Watret, 'What Rules Will Apply to Jurisdiction and the Enforcement of Judgments After Brexit? Part Two' By Latham & Watkins LLP on October 9, 2020 <https://www.latham.london/2020/10/what-rules-will-apply-to-jurisdiction-and-the-enforcement-of-judgments-after-brexit-part-two/> accessed 24 January 2021

22 of the Hague 2005. Pending the time these issues are resolved, Arbitration clauses might be considered as a more certain option because the recognition and enforcement of arbitral awards is governed by the New York Convention 1958 and is unaffected by Brexit.

5.6 Conclusion

Persons domiciled in a member state can be sued in the courts of that member states according to article 4 (1) of the Brussels recast. Consequently, this article can promote access to justice for microenterprises where there are the defendants in a particular case but not where they are the claimants unless in compliance with article 7 (1) (place of performance).

It has been shown that jurisdiction and governing law clauses in a standard form contract do not reflect party autonomy because they lack real autonomy in cases of inequality of bargaining position.[763] Zang[764] argues that freedom of parties should only be upheld where parties have the opportunity to determine the terms by mutual consent, particularly for contracts between parties with unequal bargaining power.

The primary justifications for enforcement of an agreement is that it increases predictability, decrease the costs of litigation, promotes efficiency, reduces the potential for multiple proceedings and simplifies the resolution of jurisdictional disputes. Unfortunately, for a stronger party, it could also provide them with the luxury of a domestic court;[765] Unilateral optional agreements is a good example of this.

[763] W Woodward "Constraining opt outs: shielding local law and those it protects from adhensive choice of law clauses" (2006) 40 loyola L.A.Rev 9, 58

[764] M Zang "contractual choice of law in contracts of adhersion and party autonomy" (2008) 41 akron law review, 139

[765] Tena Ratkovic´ And Dora Zgrabljic´ Rotar, "Choice-of-Court Agreements under the Brussels I Regulation (Recast)" (2013) J. Priv. Int. Law, 9, 2, 245; Mary Keyes & Brooke Adele Marshall, "Jurisdiction agreements: exclusive, optional and asymmetrical", (2015) Priv. Int. Law, 11,3, 377

The Brussels Recast has been criticized for being unfair to micro enterprises in their engagement with consumers and larger enterprises. Its rules are ill suited to some low cost and asymmetric contracts.

Article 25 of the Recast regulates the validity of jurisdiction agreements, in terms of formal requirements while substantive validity of a jurisdiction agreement is governed by the law of a member state whose courts are chosen. Worryingly, Art 25 of the Recast allows a party with stronger bargaining power to impose its will on the weaker party either through standard terms contracts or introducing more favourable jurisdiction provisions.[766]

The next chapter will consider the current Protection of Microenterprises under Private International law with regards governing law Issues.

[766] S Vogenauer, "Regulatory Competition Through Choice of Contract Law and the Choice of Forum in Europe: Theory and Evidence" (2013) 21 Eur. Rev. Priv. Law, 23

Chapter 6: **Governing Law Issues: The Current Protection of Microenterprises Under Private International Law.**

6.0 Introduction

Unlike jurisdiction rules which are mainly procedural, the governing law is substantive in nature. Substantive law determines the interpretation, performance, conclusion, variation of the contract, and the settlement of disputes. Consequently, legal uncertainty becomes one of the major risks of international commercial transactions, as laws differ from country to country. The global integration of markets, particularly in the EU, has resulted in the increased involvement of micro enterprises in international transactions,[767] and the last few decades have shown a trend in the preference for micro enterprises to engage in international transactions despite its potential risks.

This Chapter discusses Governing law issues and the current protection of Micro enterprises under Private International law. Firstly, it investigates the function of governing law provisions under the Rome I Regulation (Rome I). Secondly, it examines the extent of protection available to Micro enterprises under the Rome I Regulation in the absence of a choice of Governing law. Thirdly, it examines the position of a Micro Enterprise in the case of an unfavorable Governing law provision: It considers the extent mandatory rules enhances the role of the courts in addressing imbalances between contracting parties and the operation of Article 3 and Art 9 with a special focus on Mandatory rules and overriding mandatory principles. Fourthly, It concludes by examining the relevance of governing law rules of consumer protection to Micro Enterprises.

6.1 Governing law Rules

Jurisdictional rules and governing law rules are two separate issues under the principles of international law. The jurisdiction rules contained under the Recast can operate independently from the governing law rules under the Rome I. Consequently, the governing law applicable to a particular contract does not necessarily have to be that of

[767] Julia Horne, C*ross border internet dispute resolution* (Cambridge University press, 2009) 23-24

the country where the court is situated. Having said that, though they are two separate issues, governing law and jurisdictions rules could overlap. Governing law rules may sometimes select the forum (*lex fori*).[768] Another situation may arise when mandatory laws apply irrespective of the applicable forum or where the mandatory rules require applying a particular law of the forum. Moreover, the domestic rule of the *lex fori* supersedes and negates a governing law pointing to an otherwise applicable foreign law.[769]

Governing law in contracts can achieve three functions, namely, a "supplementary function", i.e. filling contractual gaps with default rules; an "interpretative function", i.e. defining the meaning of ambiguous or vague contractual provisions and a "restrictive function",, i.e. voiding contractual clauses that are contrary to mandatory rules[770] albeit this restrictive function is reserved to overriding mandatory rules irrespective of the governing law, mainly if the parties specifically chose this law.

Under the European principles of international law, an international contract can be said to be a contract having an "international element". Components of a contract such as the parties and place of delivery can be classified as international elements if it involves foreign parties or has international implications.[771] What amounts to an "international element" can vary quite significantly in any given case. Case law suggests that this may include the international nature of the market, the use of international forms of documentation, or the existence of related contracts entered into in another jurisdiction.[772]

In *Dexia Crediop*, the English Court of Appeal overturning the initial ruling, dismissing an Italian counterparty's attempt to avoid liability under an English law-governed ISDA

[768] Adrian Briggs, *The Conflict of Laws,* (3rd edition, OUP, 2013) 189. Examples include divorce, distribution of assets in an insolvency, and liability for tort.
[769] Ibid, *Laws*, 189
[770] Sixto Sanchez- Lorenzo, 'Choice of law and overriding mandatory rules in international contracts after Rome 1', (2010) Yearbook of Private International Law, 12, 67
[771] International law office, 'Contracts with an International Element Have Choice of Applicable Law' <https://www.internationallawoffice.com/Newsletters/Company-Commercial/Bulgaria/PI-Partners/Contracts-with-an-International-Element-Have-Choice-of-Applicable-Law?redir=1> accessed 3 August 2019.
[772] *Dexia Crediop SPA v Comune di Prato* [2017] EWCA Civ 428

Master Agreement based on the continued applicability of mandatory Italian laws affecting the capacity and enforceability of financial agreements. The two counterparties in the case were Italian, the contract was signed in Italy, payments were to be made in Italy, and the local authority was defending the banks claim based on local Italian laws. In addition, the Court of Appeal noted that the ISDA master agreement is a standard international document used in international finance; the particular ISDA used was the multi-currency version, not the single currency; the language used by the parties was English despite it not being their first language; and the routine nature of the back-to-back arrangements was made by Dexia with banks outside Italy.[773]

Rome Convention, the Rome I Regulation on the law applicable to contractual obligations and Rome II Regulation[774] on the law applicable to non-contractual obligations are the principal pieces of legislation regulating governing law in the EU. As the scope of our research is commercial contracts, only the Rome I Regulation and Rome Convention will be relevant in our discussion. The Rome Convention was superseded by the Rome I Regulation for all member states except Denmark.

Notably, Brexit does not affect the drafting of governing law clauses or how governing law is determined. The instruments which currently determine governing law, the Rome I (on the law applicable to contractual obligations), have been implemented in UK domestic law by the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/834) which was further amended by SI 2020/1574) applies to determine applicable law in relation to contractual or non-contractual obligationspost-Brexit.

[773] In *Banco Santander Totta SA v Companhia de Carris de Ferro De Lisboa SA* [2016] EWCA Civ 1267 two additional factors was identified namely: the right for one party to assign its rights under the contract to a party outside of Portugal and the necessity of involving a non-Portuguese bank in the transaction.
[774] Regulation (EC) No 864/2007

6.2 The position of a Micro Enterprise in the case of unfavorable Governing law provision.

We have established that parties generally have the power to choose the governing law of their contract without the need to establish a relationship and/or proximity of the contract to the law chosen. However, this power to choose is subject to a number of qualifications mainly due to the need to protect the reasonable expectations of parties in certain contracts. Ultimately, the universal application rule provides that any law specified by the regulation shall apply whether or not it is the law of a Member State[775] or the governing law chosen by the parties.

6.2.1 Mandatory Rules

One principal provision which displaces a governing law provision and can potentially limit the power of a larger business to impose unfair governing law provision on a micro enterprise is "Mandatory rules" contained in Art 3 (3) of Rome I. Mandatory rules can be domestic rules which cannot be derogated from by agreement,[776] such as national contract law regulating unfair terms or international rules which are overriding.[777] This clause directs that where all other elements relevant to the situation are located in a country other than that chosen by the parties, such a choice will not prejudice the application of the other country's mandatory rules, which cannot be derogated from by agreement. Mandatory rules are not aimed at invalidating governing law provisions in international B2B contracts but rather overrides specific rules which run contrary to the relevant law. In a scenario where a micro enterprise based in England enters into a contract with a larger enterprise based in England. If the governing law is German law, the mandatory rules prescribe that English law will apply as well as German law and where there is a discrepancy in both laws, the English law prevails as this is the law manifestly connected to the contract. In contrast, if some of the elements are connected to more than one Country, then Art 3 (3) will not apply.

[775] Rome I Regulation, Art 2
[776] Rome I Regulation, Recital 15, Art 3 (3), Art 3 (4)
[777] Art 9

Mandatory rules principle under Art 3 is usually argued to protect weaker parties generally. Buxham contends that this provision "enhances the role of the courts in addressing imbalances between contracting parties."[778] For example, governing law provisions or non exclusive governing law provision in domestic contracts are often presumed to be so rare that it raises suspicion of abuse of bargaining power.[779] Although mandatory rules may protect micro enterprises by safeguarding the application of relevant mandatory rules, it also respects the reasonable expectation of the parties by allowing the law of a validly selected choice to regulate the contract in parallel, thus upholding the requirement of commercial certainty and freedom of contract.

Driven by the need to ensure predictability and legal certainty, the English Court of Appeal clarified that Article 3(3) of the Rome Convention (similar to Art 3 (3) Rome I) does not override the chosen law where there is an international element to the contract.[780] Art 3(3) provisions are a limited exception to freedom of contract and should, therefore, be construed narrowly. The phrase used in the provision 'other elements relevant to the situation' went wider than all elements relevant to the contract.[781] The court highlighted in *Dexia*, that parties ought to know where they stand in contracts regarding the possibility of mandatory rules overriding their chosen law without them having to compare the facts of one case to another closely. In a case relating to an employment contract, the EAT held that a clause granting "Scottish courts and tribunals" exclusive jurisdiction in an employment contract of an employee working in Equatorial Guinea is a relevant factor in determining the closeness of connection to the UK.[782]

[778] Buxbaum, Hannah, 'Mandatory Rules in Civil Litigation: Status of the Doctrine Post-Globalization'" (2008). Articles by Maurer Faculty. 23 https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1290&context=facpub accessed 24th January 2020.

[779] Volker Behr, 'Rome I Regulation: A mostly unified private international law of contractual relationships within most of the European union')2011, Journal of Law And Commerce, 29, 269

[780] *Banco Santander Totta SA v Companhia de Carris de Ferro De Lisboa SA* [2016] EWCA Civ 1267 and *Dexia Crediop SPA v Comune di Prato* [2017] EWCA Civ 428

[781] Legal Ease with Lexis®PSL 'In the Name of God and Profit: Rome I Mandatory Law Provisions Narrowly Construed' (2017) Journal of International Banking and Financial Law, 8, 526

[782] *Hexagon Sociedad Anonima v Hepburn* UKEATS/0018/19.

Arguably, reference to legal system under the Rome I should not necessarily have to be a national legal system; it can be an international document like the incoterms. However, it has been argued that contrary to the intentions of Recital 13 of the Rome I, Art 3 of the Rome I permit only a national law to be chosen by the parties. Art 3 of the Rome 1 follows the logic of the Rome Convention. This restriction has been criticised for preventing a balance between private and public interest[783] and is reflected in a number of international instruments such as the UNIDROIT Principles which advise that "[P]arties who wish to choose the Principles as the rules of law governing their contract are well-advised to combine such a choice of law with an arbitration agreement".

Furthermore, Art 3 (4) provides that

> "where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement."

Interestingly, since Art 3(4) subjects the chosen governing law of a non-EU member state to the mandatory rules of EU law contained in the Directives, Regulations and other laws, this article will be irrelevant if the chosen governing law is that of an EU member state, even if such a state is yet to implement a relevant directive into its national law.[784] That said, such cases may be covered by Art 9 (2), which emphasises the significance of the overriding mandatory provision of the law of the forum. Art. 3 (4) of the Rome I recognises rule at Community level corresponding to those of Art. 3 (3) of Rome I at a national level.[785] The reasoning being that if mandatory rules of national law cannot be substituted by the rules of a chosen governing law, so must the mandatory Community rules not be

[783] Sixto Sánchez Lorenzo, 'Choice of Law and Overriding Mandatory Rules in International Contracts after ROME I' (2010) Yearbook of Private International, 12, 70

[784] Case- 184/12 *United Antwerp maritime Agencies (Unamar) NV v NAVIGATION MARITIME Bilgare* [2014] 1 lloyds Rep 161

[785] Solomon, "The Private International Law of Contracts in Europe: Advances and Retreats", (2008) Tulane Law Review 82, 1729;

substituted by the chosen governing law of a third country.[786] The fact that a micro enterprise is resident in the EU or the place of performance is in the EU is insufficient for qualifying for protection under Art 3 (4). Granting parties the power to choose a governing law that affords no protection to weaker parties is inconsistent with the reasoning underlying the community legislation[787]

The cumulative effect of Art 3 is that it prevents, to an extent, the issue of fraudulent evasion of the law by a stronger party in the contract, allowing protection contained not only in the mandatory provisions in the domestic law of a legal system but also community law and binding international provisions. Consequently, it can be argued that regardless of the choice of governing law, the mandatory laws of a micro enterprises' country will apply if there are elements relevant to the situation which connects the contract with its country. On the other hand, the mandatory laws of a jurisdiction other than that of the agreed governing law can also apply (to the disadvantage of the micro enterprise) in relation to a contract 'where all the other elements relevant to the situation at the time of the choice are connected with another country'.

Where protective mandatory rules exist to protect micro enterprises in international B2B contracts at the domestic level, the scope or extent of its provisions will be as interpreted in line with the domestic courts of the forum. For example, Art 6:247 of the Dutch civil code in regulating B2B contracts with an international element irrespective of the governing law would apply only if both parties are domiciled in Netherlands. Thus, in this case, a micro enterprise is unlikely to benefit from mandatory provisions due to this provision if one of the parties is not domiciled in the Netherlands.

This argument by no means downplay the importance of the law in safeguarding the reasonable expectation of the parties or the significance of party autonomy rather this argument seeks to show more clearly the extent of protection available to micro

[786] Helmut Heiss, Party Autonomy: The Fundamental Principle in European PIL of Contracts in Franco Ferrari Stefan Leible,(eds) Rome I Regulation The Law Applicable to Contractual Obligations in Europe (European Law Publishers, 2009) 4

[787] C-381/98 Ingmar [2000] ECR 1-9305 [para 69]

enterprises in MB2B international commercial contracts which at best is partial. No doubt, Art 3(3) will be very effective in deterring unfair governing law provisions in domestic contracts.

Rome I regulation does not determine which rules or international law are mandatory but instead recognises mandatory rules set out in various national legal systems and submits the relationship between the parties to the appropriate legal system. Consequently, for a micro enterprise to benefit from a mandatory provision, it first must recognise its existence, its scope of application and then raise this as applicable to the issue at hand. Oftentimes, the existence and ability to establish the scope of a mandatory provision is often tricky. Particularly where there is no express provision to the content or the aims of the rules.[788] Thus, mandatory rules do not automatically offer protection for micro enterprises, particularly where such rules are those of a country unfamiliar to or disadvantageous to the enterprise.

6.2.2 Overriding Mandatory Rules

Overriding mandatory rules restrict the principle of party autonomy regardless of the terms of the governing law clause. The concept of 'overriding mandatory rules is distinct from 'provisions which cannot be derogated from by agreement' and should be construed more restrictively.[789] Whilst domestic mandatory rules are designed to apply to contracts that are manifestly linked to a single country, particularly in the law, which will be applicable in the absence of choice, overriding mandatory rules are designed to protect the public interest and addresses the law regardless of the law applicable to the contract.

Art 9 generally restricts party autonomy in favour of the overriding principles of the law of the forum and the place of performance of the contract in certain situations. Article 9(2) of Rome I upholds the overriding mandatory provisions of the law of the forum (i.e.

[788] P Piroddi, "The French Plumber, Subcontracting and the internal market" (2008) 10 year book of private international law, 601
[789] Recital 37

the place where the dispute is being heard) irrespective of the law that would otherwise be applicable. Unlike Art 3 (3) and Art 4, this provision applies where a choice of governing law has been made as well as in the absence of choice. Thus, this provision could benefit a micro enterprise as this relates to overriding mandatory provisions of the forum, including unfair terms and other contractual principles.

Some authors argue that Art 9 (2) does not cover mandatory principles of the forum, which are designed to protect weaker parties in contracts. Bisping[790] discards the idea of dealing with protective rules in private law as international mandatory rules in the sense of Art 9. In fact, Krammer[791]disapproves of treating protective rules in private law as international mandatory rules. Wafa opines that national mandatory rules transposed as a result of relevant directives can be considered overriding rules under Art 9.[792] Conversely, Kuipers[793] argues that not all of such provisions can be considered as overriding mandatory provisions.[794] For example, case law shows that some domestic courts opine that art 17 – 19 of directive 86/653/EEC on commercial agents do not have an overriding effect to the extent that they are applicable irrespective of governing law.[795]

It is widely believed that national mandatory rules of the forum have an overriding effect by virtue of art 9 (2), and this would protect micro enterprises and other weaker parties

[790] Christopher Bisping, consumer protection and overriding mandatory rules in Rome 1 Regulation in J Devenney and M Kenny (eds) European Consumer Protection: Theory and Practice (Cambridge University press, 2012) 239-56 <https://www.cambridge.org/core/books/european-consumer-protection/consumer-protection-and-overriding-mandatory-rules-in-the-rome-i-regulation/54B9521768CFF7A50570B6E799B637A7/core-reader> accessed 7 February 2020

[791] Xandra E. Krammer, "The interaction between rome 1 and mandatory EU Private rules - EPIL and EPL: communicating vessels?" in P. Stone and Y. Farah, *Research Handbook on EU Private International Law*, (Edward Elgar, 2015), 248-284.; Christopher Bisping, consumer protection and overriding mandatory rules in Rome 1 Regulation in J Devenney and M Kenny (eds) *European Consumer Protection: Theory and Practice* (Cambridge University press, 2012) 239-56 <https://www.cambridge.org/core/books/european-consumer-protection/consumer-protection-and-overriding-mandatory-rules-in-the-rome-i-regulation/54B9521768CFF7A50570B6E799B637A7/core-reader> accessed 7 February 2020.

[792] Jahani Wafa, *Party autonomy and small business protection in cross-border commercial contracts under EU private international law : a critical analysis of the Brussels I and Rome I regulations,* (2015) Thesis Submission for the award of PhD, University of Bristol, 185; Sixto Sanchez- Lorenzo, "Choice of law and overriding mandatory rules in international contracts after Rome 1", (2010) Yearbook of Private International Law, 12, 77

[793] J kupiers, *EU Law and Private International law: the interrelationship on contractual obligations* (Boston, Martinus Nijhoff, 2012) 187

[794] H Verhagen, "The Tension between Party Autonomy and European Union Law: Some Observations On Ingmar Gb Ltd V Eaton Leonard Technologies Inc" (2002) 135 Int Comp Law Q, 1, 151

[795] Courts of cessation, 28 November 2000, no 98-11.335; distrcict court Arnhem (Netherlands)of 11 july 1999, netherland international privaatercht, vol 10, 1992, p 100

in B2B contracts.[796] Where domestic legislations do not design an overriding mandatory character in its substantive rules protecting weaker parties such as micro enterprises, such entities do not benefit from the Art 9 (2). Consequently, if a micro enterprise domiciled in Germany (where prostitution is legal and regulated) enters into a contract for prostitution to be delivered in France (where such a contract is illegal since April 2016), Art 9 (3) applies the overriding mandatory principles of French law as it relates to the legality of the performance of the contract.

Art 10 (1) and (2) of Rome I provide that the existence and validity of a contract, including its terms, shall be determined by the law which would govern it under this Regulation if the contract or term were valid. Not forgetting that Rome 1 excludes jurisdiction and arbitration agreements from its material scope,[797] the above provision only applies to governing law and as such a party cannot rely on these circumstances in relation to a jurisdiction agreement.[798] However, to establish lack of consent, a party may rely on the law of the country in which he has his habitual residence, if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the specified law. Hence by virtue of this provision, a micro enterprise could rely on his domestic law under Article 10(2) of Rome I in order to contest the validity of a governing law provision but not a jurisdiction agreement imposed by the other party's standard terms.

Considering that in the absence of choice of governing law, a valid jurisdiction agreement can be a strong indication that the parties imply that the law of the chosen forum will apply, this is not always the case. Recently, an English court ruled that English jurisdiction clause did not imply a choice of English law,[799] stating that Article 3 sets a high threshold

[796] James Fawcett and others, *International sale of goods in conflict of law*, (oxford university press, 2005) 779
[797] Rome 1 Regulation, Art 1 (2) e; A Kerns, "The Hague Convention and Exclusive Choice of Court Agreement: An Imperfect Match" (2006) 20 Temple Int. Comp. Law J., 522; Zheng Tang, *Jurisdiction and Arbitration Agreement in international Commercial Law* (London: Routledge, 2014) 57
[798] Zheng Tang "The Interrelationship of European Jurisdiction and choice of law contracts in contracts" (2008) J. Priv. Int. Law, 46
[799] *GDE LLC and another v Anglia Autoflow Ltd* [2020] EWHC 105 (Comm)

and should only be seen as achieved where parties have explicitly demonstrated the choice of a governing law.

It is only logical to assume that contracting parties wish to ensure consistency between their choice of a governing law clause and choice of jurisdiction clause. Disregarding this assumption because the clauses have not been validly incorporated could result in dire consequences for the parties. Where a foreign law is applied in the chosen jurisdiction, expert evidence needs to be produced, there is an increase in the cost of litigation when compared with the application of domestic law and there is the risk that the court may incorrectly apply the foreign law. Moreso, a choice of governing law for commercial contracts can often play a decisive role in the allocation of jurisdiction for some international commercial contracts.

According to Mankowski, Jurisdiction agreements can be used as a technique to evade the application of the mandatory rules of an otherwise competent court, particularly when the chosen forum is that of a non EU member state.[800] Applying different rules regarding the validity of governing law provisions and jurisdiction provisions has been said to be partial and inconsistent.[801] More importantly, this may cause legal uncertainty, ambiguity, and unjust results. Therefore, to achieve fairness, consistency and legal certainty in international commercial transactions, one might agree that similar governing law provisions should regulate the validity of both jurisdiction and governing law agreements.[802]

6.3 The extent of protection available to Micro enterprises under the Rome I in the absence of Choice

A party's inability to choose a governing law could be as a result of the parties or their legal representatives inability to reach an agreement due to conflicting interest; or an

[800] P Mankowski "Commercial Agents under European Jurisdiction Rules: The Brussels 1 Regulation plus the procedural consequences Ingmar" (2008) 10 yearbook of Private International law, 19, 55.
[801] Zheng Tang "The Interrelationship of European Jurisdiction and choice of law contracts in contracts (2008) J. Priv. Int. Law, 46-8
[802] Ibid

oversight on the part of the parties perhaps due to the urgency in which the contract was finalised; and at times, the choice of a governing law is just rendered invalid or ineffective.[803]

Art 4 of Rome I prescribes the governing law in the absence of choice and is designed to cover most categories of a commercial contract without prejudice to the special rules governing contracts of carriage and individual employment contracts. These contracts are divided into eight, with a rule for each type. For our purposes, contracts for the sale of goods/ provisions of services shall be governed by the law of the country where the seller/ service provider has his habitual residence.[804] For distribution contracts, the governing law is the law of the country where the distributor has his habitual residence;[805] For sale of goods by auction, where such a place can be determined, it is the law of country where the auction takes place.[806]

Where a contract cannot be classed as being one of the eight specified types or where its elements fall within more than one of the specified types, it would be governed by law the party required to effect characteristic performance of the contract.[807] Article 4 (3) of Rome I provides an escape clause where another country is ”manifestly more closely connected” to the country other than those indicated in Art 4 (1) and 4 (2), the law of the country that is manifestly more closely connected would apply. In the same light Art 4 (4) prescribes that if the governing law cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.

The term "characteristic performance" under Art 4 (2) is neither defined in the Rome convention nor the Rome I regulation however prior research shows that the term evolved from Swiss literature and was developed from the practices of the Swiss Federal

[803] Chukwuma Okoli, The Significance of the Place of Performance in Commercial Contracts Under the European Union Choice of Law Rules, Dissertation submitted in Luxembourg to obtain the degree of Docteur De L’université Du Luxembourg En Droit, 15
[804] Rome I Regulation, Art 4 (1) a
[805] Rome I Regulation, Art 4 (1) f
[806] Rome I Regulation, Art 4 (1) g
[807] Recital 19 Rome, Art 4 (2)

Tribunal.[808] The Tribunal suggest that there are obligation mandatory upon one of the contracting parties which is peculiar to that particlular type of contract in issue, or which characterises the nature of the contract.[809]

Another practice has further explained the term by creating a precise system of characteristic obligations which arises from various forms of contract. As such the explanatory report of the Rome Convention[810] provide examples of characteristic performers in a series of different contract types. For example, in banking contract, the law of the country of the banking establishment with which the transaction is made will normally govern the contract and in the case in a commercial contract of sale, the law of the vendor's place of business will govern the contract.

This term defines the connecting factor of the contract "from the inside, and not from the outside by elements unrelated to the essence of the obligation such as the nationality of the contracting parties or the place where the contract was concluded."[811] The concept of characteristic performance can also be viewed from the purpose which the "legal relationship involved fulfils in the economic and social life of any country," [812] thereby linking the contract to the social and economic setting of which it will form a part.

While pinpointing the characteristic performer in unilateral contracts can often be straightforward, identifying the characteristic performer in reciprocal contracts (where there is a counter-performance) can be quite challenging. The explanatory report clarifies that the payment of money is not a characteristic performance but rather the performance for which such payment is made. There are however other forms of counter-performance in commercial transactions such as a chain or mutual obligation transactions.

[808] Kurt Lipstein, "Characteristic Performance - A New Concept in the Conflict of Laws in Matters of Contract for the EEC," (1981) Northwest. J. Int. Law Bus., 3, 405
[809] Judgment of Jan. 29, 1970, BGE 96 II 79, 89.
[810] The Explanatory Report by Guiliano and Lagarde O J 1980 C 282/4.
[811] Mario Giuliano, and Paul Lagarde, Report on the Convention on the law applicable to contractual obligations, Official Journal C 282 , 31/10/1980
[812] Ibid

The concept of characteristic performance have also been criticised for the following:
(i) the term is as vague as the principles it aims to supersede (such as "closest connection", "proper law", "hypothetical intention" etc) and that several requirements must be ascertained by determining for each of them the characteristic obligation.[813]
(ii) it can often be difficult to know the characteristic performer. For example in smart contracts processed anonymously via a blockchain. As such, it will be necessary to have recourse to the law of the country that it is most closely connected to, which should be applied where the determination of the characteristic performer of the contract is impossible.[814] (iii) there is a considerable difference between the the economic function of a contract and its social or sociological function.[815] Thus, a norm which heavily depends on the function of the relationship or obligation is ill-conceived because while the former is absolute, the latter is variable ;[816] (iv) the crux of certain types of obligation cannot be easily ascertained by standard process, moreso, the criterion for determining characteristic performance is ill-defined.[817]

Interestingly, only the place of habitual residence (or the central administration or place of business) of the party providing the essential performance or the party liable to perform is decisive in locating the contract.

Under the Rome Convention, characteristic performance is only presumed to give effect to the proximity rule while under the Rome I, the concept is merely secondary as it gives priority to strict prescriptions given for the eight types of contracts under Art 4 (1). It is only where the contract does not fall into these eight types or the elements fall within more than one of such contracts that the habitual residence of the characteristic

[813] UgoVillani, 'The Role of the Characteristic Performance from the Rome Convention to the "Rome I" Regulation on the Law Applicable to Contracts' <https://www.studisullintegrazioneeuropea.eu/Scarico/Abstract%200310.pdf> accessed 24 February 2021
[814] Ibid
[815] Lando, von Hoffmann & Siehr (eds.)(, General Report, European Private International Law of Obligations 8-10 (1975); UgoVillani, 'The Role of the Characteristic Performance from the Rome Convention to the "Rome I" Regulation on the Law Applicable to Contracts' <https://www.studisullintegrazioneeuropea.eu/Scarico/Abstract%200310.pdf> accessed 24 February 2021; Kurt Lipstein, Characteristic Performance - A New Concept in the Conflict of Laws in Matters of Contract for the EEC, (1981) Northwest. J. Int. Law Bus., 3, 409
[816] Kurt Lipstein, "Characteristic Performance - A New Concept in the Conflict of Laws in Matters of Contract for the EEC" (1981) Northwestern Journal of International Law & Business, 3, 409
[817] Richardson, "Nicky "The Concept of Characteristic Performance and the Proper Law Doctrine," (1989) Bond Law Review, 1, 2, Article 9.

performer comes into play. Hence, "Rome I" Regulation is more interested in ensuring legal certainty for the parties with regards governing law.[818]

Okoli[819] argues that in the absence of choice, the governing law of the place of performance should be applied as far as possible. In his arguments, he considered that issues of governing law are often concerned "with matters of performance", issues of interpretation, the consequences of a total or partial breach of obligations, the assessment of damages and others provided for under Article 12(1) of Rome I would also be related to the place of performance.[820]

According to Okoli, there is no logic between Article 7 of Recast (which gives significance to the place of performance of an obligation) and Article 4 of Rome I considering that in the former, the place of performance is given absolute significance in determining proximity however in the latter the significance of the place of performance is quite marginal. This thesis does not agree with the logic that the "place of performance would better satisfy the requirement of proximity for choice of law in commercial contracts, when compared to the habitual residence of the characteristic performer, or indeed any other connecting factor".[821] Arguably, for the benefit of weaker parties such as a micro enterprise, particularly where it is the characteristic performer, the current Art 4 (2) offers more protection, Moreso, Art 4 (3) and 4 (4) affords adequate flexibility where the contract is manifestly closely connected or most closely connected to another country.

Unlike the meaning of domicile under the Recast,[822] the habitual residence of a company under Rome 1 is its place of central administration (except for natural persons acting in the course of his business activity whose habitual residence will be the place of business).

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[818] UgoVillani, 'The Role of the Characteristic Performance from the Rome Convention to the "Rome I" Regulation on the Law Applicable to Contracts' <https://www.studisullintegrazioneeuropea.eu/Scarico/Abstract%200310.pdf> accessed 24 February 2021

[819] Chukwuma Okoli, *The Significance of the Place of Performance in Commercial Contracts Under the European Union Choice of Law Rules*, Dissertation submitted in Luxembourg to obtain the degree of Docteur De L'université Du Luxembourg En Droit, 20

[820] Rome I Regulation, Art 12 (2)

[821] Chukwuma Okoli, The Significance of the Place of Performance in Commercial Contracts Under the European Union Choice of Law Rules, Dissertation submitted in Luxembourg to obtain the degree of Docteur De L'université Du Luxembourg En Droit, 264

[822] Rome I Regulation, Art 63 (1)

Moreso, governing law rules in the absence of choice varies from jurisdiction rules under Art 7 of the recast, which prescribes that jurisdiction in the absence of choice should be that of the place of performance.

Notably, issues of jurisdiction and governing law are theoretically different and have distinct processes in European private international law. Whilst generally Rome I calls for the application of the law of a single jurisdiction, the Recast may provide for the possibility of alternative fora.[823] On the other hand, they are a homogenous set regulating civil and commercial obligations as they exclude similar issues from their scope of application. Tang,[824] in considering the interrelationship between governing law and jurisdiction rules, emphasised the overlap between these two fields by highlighting the similarities between jurisdiction and governing law in the area of classification and party autonomy and the likely influence one might have on the other.[825] Recital 7 of Rome I provides that the substantive provisions and scope of Rome I should be consistent with the Brussels Regulation (the previous version of the Brussels Regulation in force at the time of the enactment of Rome I Regulation). Furthermore, a presumption of governing law can sometimes be made from a choice of an exclusive jurisdiction (*qui elegit iudicem elegit ius*).[826]

According to Article 12(2), in the case of defective performance, regard should be had to the law of country of the place of performance to determine the manner of performance and the steps to be taken. Considering that this Art 12 (2) distinguishes between the substantive provision governed by the lex causae and the mode of performance governed by the law of the place of performance, Art 12 is therefore capable of leading to a split in the governing law.[827] While this provision is clear enough and allows for predictability, its effects can be detrimental to a micro enterprise particularly where the place of performance does not coincide with its country of domicile.

[823] Interaction Between Brussels I Bis, Rome I And Rome II <https://www.era-comm.eu/Visegrad/kiosk/pdf/speakers_contributions/116DT35_Grajdura_interaction.pdf> accessed 20 September 2019
[824] Zheng Tang, "The Interrelationship of European Jurisdiction and Choice of Law in Contract" (2008) 4 J. Priv. Int. Law 35.
[825] Ibid, 58-9.
[826] Rome I Regulation, Recital 12
[827] *East West Corporation v DKBS AF 1912 & Ors* [2002] EWHC 83 (Comm) [64]; Giuliano. M and Lagarde. P, Report on the Convention on the Law Applicable to Contractual Obligations [1980] OJ C282, 33.

Art 4 (1) and (2) of Rome I is aimed at achieving predictability and legal certainty in disputes as the EC saw the need to move from reliance on presumptions which was the hallmark of Art 4 of the Rome Convention, to fixed rules.[828] Article 4 (3) provides an escape clause i.e an exception to the rules contained in Article 4(1) and 4(2) Rome I. This provision grants the court of member states some degree of discretion by assigning matters which have a close connection to a specific legal system. The court is concerned with the "circumstances as a whole not simply with the pointers to a potential governing law.[829] Further, in cases where the governing law cannot be determined, the governing law according to Art 4 (4) is the law of the country "most closely connected".

While Article 4(3) displaces the applicable rules in Article 4(1) and (2) in favor of the country that is manifestly more closely connected with the contract, Article 4(4) is concerned with locating the law of the country that has the closest connection with the contract without concerning itself with displacing the applicable rules in Article 4(1) and 4(2).[830] To determine the law of the country more closely connected under Art 4(3) and (4), regard should be had to any existence of other contracts having a very close relationship.[831] Notably, Swiss practice also allowed an exception to be made in favor of a legal system having a closer connection, albeit research shows that such cases are rare.[832]

Unlike the Recast, Rome I prescribes a number of "complex combinations of specific choice of law rules, residual choice of law rules, and escape clauses" and the law of the closest connection to determine the governing law. Most often, this combination results in the application of the habitual residence of the party required to effect the

[828] Proposal for a Regulation of the European Parliament and the Council on the Law applicable to Contractual Obligations (Rome I), December 15, 2005, COM (2005) 650 final, 5.
[829] C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687 [42], [43], [45], [46], [48], [49]; *Lawlor v Mining and Construction Mobile Crushers Screens Ltd* [2012] EWHC 1188 [53]
[830] *Mackie v Baxter and Others* [2012] EWHC 1890 (Ch) [10]–[11]; PR Beaumont and PE Mc Eleavy, *Private International Law by AE Anton* (W Green, 3rd edn, 2011) 483–87.
[831] Rome I Regulation, Recital 20 and 21
[832]Kurt Lipstein, Characteristic Performance - A New Concept in the Conflict of Laws in Matters of Contract for the EEC, (1981) Northwest. J. Int. Law Bus., 3, 414

characteristic performance.[833] A few complex contracts such as transfer of shares, intellectual property contracts, some joint ventures or where the characteristic performer is difficult to identify will fall under the ambit of clause 4(3) or 4 (4).[834] Hence, where these combinations do not result in the application of the law of habitual residence of the micro enterprises, this can be unfavourable to the micro enterprise.

Unfortunately, there are no established criteria under Rome I to determine what constitutes a "manifestly more closely connected"[835] or whether the test is "one of inferior or superior connection".[836] Case law shows the extent of uncertainty and lack of clarity on how this escape clause could be interpreted. In *BNP Paribas SA v Anchorange Capital Europe LLP,*[837] the court appears to have deliberately placed a high hurdle in the way of a party seeking to displace the primary rule.[838] The German courts in *Societe Nouvelle des Papeteries v Machinefabriek*[839] adopted the "inferior test" (which is also often referred to as the "strong presumption approach") and held that deviation would only be allowed where the country identified by the presumption "has no real significance".

As opposed to the principle of proximity, the need for legal certainty in determining the governing law in the absence of choice is apparent in the provisions of Art 4, particularly regarding escape clauses.[840] A rule that protects micro enterprises in B2B ought not only to be precise and to a large extent foreseeable so that the weaker party can decide whether or not to make that choice, but also give some form of advantage to the weaker party. The existence of provisions which prevent the courts from applying the governing law of one country when the contract is "manifestly more closely connected" with another is good but does not entirely meet this criterion.

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[833] Giesela Rühl, "The Law Applicable to Smart Contracts, or Much Ado About Nothing?" <https://www.law.ox.ac.uk/business-law-blog/blog/2019/01/law-applicable-smart-contracts-or-much-ado-about-nothing> accessed 15 September 2019

[834] *Apple Corps Limited v Apple Computers Incorporated* [2004] 2 CLC 720 [46]–[56].

[835] Zheng Tang, "Law Applicable in the Absence of Choice: The New Article 4 of the Rome I Regulation" (2008) MLR 785, 798.

[836] Richard Fentiman, *International Commercial Litigation* (OUP, 2010) 221

[837] [2013] EWHC 3073 (Comm) 641.

[838] Jack Fraser, "Escape From Uncertainty: Article 4(3) Rome I Regulation" (2017) 7 Southampton Student L Rev 10, 11

[839] (Hoge Raad, 25 September 1992) NJ 750. See case overview at <https://wuecampus2.uni-wuerzburg.de/moodle/pluginfile.php/1197365/mod_resource/content/0/1.%20BOA.pdf> accessed 13 September 2019

[840] Interaction Between Brussels I Bis, Rome I And Rome II <https://www.era-comm.eu/Visegrad/kiosk/pdf/speakers_contributions/116DT35_Grajdura_interaction.pdf> accessed 20 September 2019

Article 3(1) Rome I places a high threshold for implying a governing law. The term 'clearly demonstrated' by the terms of the contracts or the circumstances of the case suggest that in the absence of express terms, compelling evidence that the parties intended to choose a particular governing law is key. Therefore, encouraging a broader range of connecting factors such as the place of payment and the object of the contract, any reference to a foreign law in other provisions of the contract, or reference to a foreign currency may work more in favour of micro enterprises in MB2B transactions.

These factors could be grounds for disregarding the presumption of characteristic performance, particularly in justifying the deployment of the escape clauses. A good example of the attitude of the courts regarding implying the governing law amongst other substantive provisions is seen in the English courts. Under the common law, terms could be implied based on a previous course of dealings, an express choice of law in a related transaction, or a reference to particular rules in a statute to imply a choice of law.[841]

Rome I thus offers some degree of protection to a micro enterprise in B2B by providing a more favourable governing law particularly when the substantive rules of that national legal system contain protective rules for the weaker enterprise. However, the need for legal certainty and foreseeability could be relaxed to favour micro enterprises.

The failure of Rome 1 to consider non national law as the governing law of a contract has been criticized heavily by writers. Some argue that a choice of a non-national law will not prevent the intervention of public interests in contracts by means of public policy contained in Article 16 of the Rome Convention or Article 21 of the "Rome I" Regulation; or by means of overriding mandatory rules under Article 7 of the Rome Convention or Article 9 of the "Rome I" Regulation.[842]

[841] Chukwuma Samuel Adesina Okoli And Gabriel Omoshemime Arishe, "The Operation of the Escape Clauses in the Rome Convention, Rome I Regulation and Rome II Regulation" (2012) 8 J. Priv. Int. Law, 3, 524

[842] Sixto Sanchez- Lorenzo, 'Choice of law and overriding mandatory rules in international contracts after Rome 1', (2010) Yearbook of Private International Law, 12, 70; Adrian Briggs A., Agreement on Jurisdiction and Choice of Law, (OUP, 2008) 384-385

Arguably, if Article 3 of the Rome 1, as well as the Rome Convention, allowed for a choice of non-national law as a governing law, a balance between private and public interest would always be possible. Briggs draws out the irony in the fact that Article 3 empowers contracting parties to choose the law of a state even not connected with the contract and also allows a wide dépeçage, but yet does not permit a choice of non national law such as the UNIDROIT Principles as the applicable law.[843] Parties should be able to choose a law that is efficient and receptive to their commercial interest regardless of whether it is a national law or not. International arbitration, for example, allows for a choice of non national law. ICC Award no 7375/1996 of 05-06-1996 allows for UNIDROIT principles to be applied as governing law as long as they are considered to be a representation of generally accepted rules and principles. Reference to Lex Mercatoria does not automatically empower arbitrators and judges to apply non-national law. Instead, it allows for a detailed justification of those rules, most likely on the ground that those rules are generally accepted in international trade.[844]

Furthermore, the Public policy exception under Art 21 of the Rome I protects the fundamental interest, human rights and general rules of public international law.[845] As opposed to overriding mandatory rules where the mandatory rules of the forum automatically apply to the contract, public policy exception can prevent the application of a foreign law where such law is manifestly incompatible with the public policy of the forum.

[843] Adrian Briggs A., Agreement on Jurisdiction and Choice of Law, (OUP, 2008) 384-385; see also Recital 13 of the Rome I (incorporation by reference of a non-national law).
[844] Michael Bonell, "The UNIDROIT Principles and Transnational Law", in: The Practice of Transnational Law, (The Hague, 2001) 29.; K.P Berger, "International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts" (1998) Am. J. Comp. L. 129
[845] J Fawcett, *International sale of Goods in Conflict of law* (OUP, 2005) 765

6.4 The Relevance of governing law rules of consumer protection to Micro Enterprises

The protection given to consumers under the Rome 1 is mainly prescribed in Art 6, which proposes specific laws that can be applied to consumer contracts. Recital 23 to the Rome I provides that: 'As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict of law rules that are more favorable to their interest than the general rule.'. So, regardless of the provision of Art 3 of the Rome I which emphasises the freedom of choice, Article 6 of the Rome I acts as a *lex specialis* to Article 3. Thereby imposing the law of habitual place of residence of the consumer to the contract regardless of the choice of governing law in so far as the other party pursues commercial activities in that country or, by whatever means, direct such activities to that country and the contract falls within the scope of such activities.

Furthermore, Article 6(2) limits the effect of a choice of governing law by specifying that a choice of law cannot deprive a consumer of the protection of a mandatory law which would be applicable in the absence of choice.[846] Thus, Article 6(2) prevents parties from contracting out of consumer protection measures. Domestic courts nonetheless apply consumer protection legislation of the forum where this is also the consumer's country of residence through the principles of mandatory provisions.

Protected parties such as Consumers under the Rome 1 can manage their expectations when contracting internationally as any dispute is assigned to their domestic courts. The benefit of a domestic jurisdiction will be beneficial for micro enterprises as a familiar jurisdiction may likely improve confidence and promote growth. A micro enterprise that finds itself in a situation where the chosen law would have been applicable law in the

[846] See also Recital 25 to the Rome I which provides that consumers should be protected by rules of the country of their habitual residence and this cannot be derogated from by agreement.

absence of choice under the Regulation would no doubt be lucky, but this is not always the case.

Micro enterprises already have enough challenges with international commercial contracts. For example, in B2C contracts, an enterprise, regardless of size, must familiarise itself with the mandatory rules in the consumers' country of residence. This act has been criticised for discouraging micro enterprises from engaging in e-commerce.[847] Consumers are automatically and indisputably presumed to be the weaker parties and therefore obtain protection solely by virtue of belonging to that "class" even when they are actually not weaker than their counterparts. On the other hand, protection is refused to micro enterprises mainly because they do not belong to that particular "class" even when, in reality, they are in a precarious situation when contracting with other businesses.

Aside consumers, the Rome 1 also provides for special rules for non consumers such as insurance policy holders, franchisees, distributors who come across asymmetries in their dealings with stronger businesses.

6.5 Conclusion

The governing law that applies to an international B2B commercial contract is one of considerable significance. Parties are likely to take measures to settle disputes amicably (thus avoiding litigation) when they can predict or know what law governs their

[847] P Cortes, *Online Dispute Resolution for Consumers in the European Union* (London Taylor and Francis, 2010) 26; J Oren, "International Jurisdiction Agreement over Consumer Contracts in E-Europe" (2003) Int Comp Law Q ., 671; Martijn W. Hesselink, 'SMEs in European Contract Law Background: Note for the European Parliament on the Position of Small and Medium sized Enterprises (SMEs) in a future Common Frame of Reference (CFR) and in the Review of the Consumer Law Acquis', (2007), Centre for the Study of European Contract Law Working Paper No. 2007/03, 22; European Commission Com (2009) 557, Communication from the Commission on Cross Border Business to Consumer e -Commerce in the EU, 5; Gillies (2008) Electronic Commerce and International Private Law: A study of Electronic Consumer Contracts (Farnham: Ashgate 94

commercial contracts. It is also common for parties to settle as soon as a decision regarding jurisdiction is made.[848]

We have highlighted that according to Art 12 of Rome I, governing law not only relates to the law that will be applied in cases of contractual dispute but also affects the interpretation of the contract, prescription and limitation of actions, performance of the contract, consequences of breach of obligations or nullity of the contract. Though issues of jurisdiction and governing law are separate issues, we have seen how jurisdiction agreements can serve as an indicator when considering if a choice of governing law has been clearly demonstrated. The incoherence between the Recast and Rome I in the application of party autonomy, also further complicates protection for weaker parties. There is a necessity for some coherence between jurisdiction rules and governing law rules. We have seen that protecting the defendant is the substantive role of the Recast while Rome I seeks to apply the law which is most apt for the particular circumstances.

Under the Rome I, parties are free to choose the law applicable to their contract subject to certain limitations. There is no requirement for a connection with the country whose law has been chosen however the chosen governing law will not exclude the application of provisions of the law of the relevant country which cannot be derogated from by agreement and where the relevant country is a Member State of the EU, the chosen governing law (other than that of a Member State) will not prejudice the application of provisions of EU Community law, or that of the forum, which cannot be derogated from by agreement.

Where parties have failed to choose a governing law for whatever reason, the applicable governing law is determined in accordance with Article 4 of the Rome I which often, in most commercial contracts, is the seller/service provider's place of habitual resident. For

[848] P. Rogerson, "Problems of the Applicable Law of the Contract in the English Common Law Jurisdiction Rules: The Good Arguable Case" (2013) 9 J. Priv. Int. Law, 387, 393; B. Hayward, *Conflict of Laws and Arbitral Discretion - The Closest Connection Test* (OUP, 2017) 38-9 [para. 1.78-9].

contracts not covered by Art 4 or which falls into more than one element, the governing law is the law of the habitual place of the party required to effect the characteristic performance of the contract.

Art 4 (3) and 4 (4) introduces an overriding principle of the closest connection in cases to Art 4 (1) and 4 (2) as well as other residual cases not falling within the ambit of the rules. As such in the absence of choice, if a micro enterprise's country is manifestly most closely connected with the contract, then his domestic law will apply. This degree of court's discretion has been said to increase the risk of uncertainty in cross-border transactions.[849]

The next chapter will consider the current Protection of Microenterprises under Private International law with regards Competition law and relevant B2B Directives.

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Chapter 7: **The adequacy of EU Competition law and EU Directives in regulating unfair terms in B2B contracts.**

7.0 Introduction

It would be erroneous to suggest that no protective B2B legislation beneficial to micro enterprises currently exists at the European level, albeit a number of directives aim at protecting the "customer" regardless of whether they are consumers, micro enterprises or even large enterprises. For example, Advertising Directive, E-commerce Directive, Product Liability Directive, Insurance Directive, Credit Transfer Directive, Package Travel Directive e.t.c. In other instances, there are B2B legislation targeted at enterprises in general for the ultimate benefit of the consumer or restricting competition.

This chapter considers the adequacy of competition law in regulating unfairness because most terms and commercial practices which are not regulated within the scope of relevant Directives or other secondary EU law are likely to be regulated under competition law.

Firstly, it discusses the concept of abuse of dominance and the notion of unfairness under the EU Competition law. After this, the focus then shifts to the relevance of consumer protection rules under EU competition law to Micro enterprises. Secondly, it reviews the current protection contained under relevant cross-sectorial legislations such as the Late Payment Directive and the Misleading and Comparative Advertising Directives. Thirdly, it discusses current protection available under sectorial legislation by considering the scope and rationale behind the first B2B Directive regulating unfair trading practices in the food supply chain. It then concludes with an appraisal of the Directive on unfair trading practices in B2B relationships in the food supply chain and its implications for other sectors.

7.1 The adequacy of EU Competition law in regulating unfair terms in B2B contracts.

As one of the principal aims of competition law is the smooth operation of the market "free from any encumbrances", it has been argued that competition law is sometimes

seen as standing in contrast to regulation.[850] Regulation can be seen as an intentional and targeted intervention in the market in order to control and monitor the behaviour of market participants; therefore, the ability of competition law to control market players should lead to more coherence within the various branches themselves.[851]

Generally, contract law regulates the legal/contractual relationship between parties, whilst competition law is mainly concerned with the external effects of such relationships. Regardless of the warning that any undue links between the jurisprudence of competition law and the interpretation of private law instrument are likely to lead to an undesirable blending of two separate branches of law, Competition law in EU still enjoys a "genuine constitutional status" and exerts an interest on all other areas.[852] Competition law serves as a regulatory instrument which controls specific market players. It is not only aimed at ensuring free competition but also to a large extent, influences the private relationship between parties. Thus, competition law, particularly when combined with public policy, determines the extent to which parties can express their freedom to contract thereby validating or invalidating the substance or part of their transactions or its entirety.[853] Competition law deals with the relationship between private persons,[854] businesses or consumers.

B2B disputes can be decided on the basis of competition law as parties can derive rights from the provisions of Articles 101 and 102 of the TFEU. According to Maher, competition law is "both a constraint on the freedom of contract and a device through which such freedom is protected [...]".[855] However, in *the Bronner,*[856]AG Jacobs held that the freedom of contract constitutes an essential element of free trade and that a careful balancing will

[850] Imelda Maher; 'Regulating Competition', in: C. Parker et al., (Eds.), Regulating Law (OUP, 2004) 187
[851] Armin Lambertz, "The Role of Competition Law in Regulatory European Private Law", (2013) MaRBLe Research Papers, Vol 4 : Europeanisation of Private Law , 305
[852]Ibid
[853] Ibid, 299
[854] Francesco A. Schurr, 'What Role Does Competition Law Play in the Genesis of a Harmonised European Private Law'. (2008) Revue Juridique Polynésienne 14, 8 <https://www.victoria.ac.nz/law/research/publications/about-nzacl/publications/nzacl-yearbooks/yearbook-13,-2007/Schurr.pdf> accessed 7 September 2019
[855] Imelda Maher; 'Regulating Competition', in: C. Parker et al., (Eds.), *Regulating Law* (OUP, 2004) 205.
[856]C-7/97 *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co*.

always be required before competition policy should override this freedom.[857] Moreso, Directive 2014/104/EU[858] on damages for antitrust breaches lays down principles which ensure that any citizen or business who has suffered harm as a result of infringement of competition law can effectively claim full compensation for that harm. In the UK, the Enterprise Act 2002 (Share of Supply) (Amendment) Order 2020 enables the Secretary of State to intervene in mergers involving companies conducting specified activities relating to military or dual-use goods which are subject to export control, advanced materials, etc on public interest grounds. As such the Competition and Markets Authority can assess mergers under competition grounds where revised, reduced jurisdictional tests are satisfied.

Article 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") are the core provisions of EU competition law. Regulation 1/2003,[859] however, prescribes the legal framework for implementing competition rules provided in Articles 101 and 102 TFEU.

Art 101 provides:

"1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings[860], decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

[857] Opinion of Mr Advocate General Jacobs in C-7/97 *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungsund Zeitschriftenverlag GmbH & Co. KG, Mediapring Zeitungsvertriebsgesellschaft mbH & Co. KG & Mediaprint Anzeigengesellschaft mbH & Co. KG* [1998] ECR I-07791 at 53.

[858] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance

[859] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance)

[860] "Undertaking" is an EU competition law concept which describes an entity engaged in economic activity. Case C-41/90, *Höfner & Elser v. Macroton GmbH* 1991 E.C.R. I-1979, 21.

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,

- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

Art 102 provides that

"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts"

On face value, it would appear that Art 101 interalia outlaws anti-competitive agreements which are likely to distort trade while Art 102 prohibits various types of abusive practices (including the imposition of unfair terms) by dominant undertakings. However, the provisions of Art 101 do not apply to agreements which meet certain requirements: namely agreements producing specific benefits or those which afford consumers a fair share of benefits or agreements which do not hinder competition.[861] Consequently, as Article 101 principally deals with collusive behaviour by two or more undertakings and agreements having an anti-competitive object or effect such as cartels and prohibited mergers, this research will dwell mainly on Art 102. Moreso, the EC revamped its approach to vertical agreements by adopting a broad block exemption and publishing guidelines.[862] Many vertical agreements are now compatible with Art 101 either because their impact on competition is de minimis, or they satisfy the overarching block exemption condition.[863] It is worthwhile examining the key features of the provisions of article 102 and the extent to which it protects micro enterprises in B2B contracts.

7.1.1 Abuse of Dominance

Article 102 does not define "abuse" but simply provides non exhaustive examples of abusive conduct. It is therefore often confusing to identify when certain conduct is abusive if such conduct goes beyond or differs from the examples; the standard of harm or what triggers the application of Art 102.[864] Precedents from case law are not entirely

[861] TFEU, Art 101 (3)
[862] [2000] OJ C291/1 Initially in 1999, reviewed in May 2010
[863] Alison Jones and Brenda Sufrin, *EU Competition Law, Text , cases and Material*, (5th edn, OUP, 2014)
[864] Case 6/72 *Europemballage Corp and Continental Can Co Inc v Commission* [1973] ECR 215, [26].

helpful in this situation, considering the ECJ is not legally bound by precedents.[865] To identify the clear criteria to be used in abuse of dominance/monopolisation cases, a new approach to 'abuse' in Article 102 is needed. With clear, predictable standards in place, compliance with the laws is very likely to improve as companies would be better able to police themselves.[866]

The concept of abuse is an objective one which suggests that intention is not necessarily required but rather that which is capable of hindering competition or the growth of competition. The burden of proving that a particular situation constitutes an infringement of Article 102 is on the Commission. However, the dominant undertaking is obligated to raise any plea of objective justification in support of its arguments before the conclusion of an administrative procedure."[867] This is so even where a micro enterprise is dealing with a company in a dominant position. Justifications such as the protection of commercial interests,[868] efficiencies which benefits the consumer,[869] technical or commercial constraints and public interests[870] can be raised and considered as valid justifications.

Prior research suggests that defining abusive conduct by reference to specific types of market behaviour may result in various options such as the universal approach (one size fits all); the non-universal approach (different legal tests for different forms of conduct); the effect-based approach; or the form-based approach.[871] Østerud submits that defining abusive conduct by reference to its likely economic effects may create more legal certainty. EU competition law reforms such as reform of the systems governing horizontal

[865] A Arnull, 'Owning up to Fallibility: Precedent and the Court of Justice' (1993) 30 Common Market Law Review 247, 248, 262.
[866] OECD, 'Roundtable on Competition Policy' in Eirik Østerud, 'EU Competition Law – Abuse of Dominance (Article 102 TFEU)' <https://www.uio.no/studier/emner/jus/jus/JUS5310/h13/undervisningmateriale/abuse-of-dominance-(2).pdf> accessed 13 September 2019, 10
[867] Case T-201/04, *Microsoft v Commission*
[868] Case 27/76, *United Brands v Commission*
[869] Case C-95/04, *British Airways v Commission*
[870] Case C-209/10, *Post Danmark*
[871] Eirik Østerud, "EU Competition Law – Abuse of Dominance (Article 102 TFEU)" <https://www.uio.no/studier/emner/jus/jus/JUS5310/h13/undervisningmateriale/abuse-of-dominance-(2).pdf> accessed 13 September 2019, 10; Competition and Markets Authority v Flynn Pharma Ltd and others [2020] EWCA Civ 339

cooperation agreements and technology transfer agreements[872] have reflected a shift from the form-based approach to rules based on the economic effects of the conduct in order to emphasise the EC's view that the central goal of the EU competition rules should be the protection of competition in the market as a means of enhancing consumer welfare.[873] The European Commission has been criticised for adopting a formalistic approach instead of an economic effects-based approach in the application of Article 102 TFEU.[874] It has been argued that in order to protect competition, Article 102, protects weaker parties in situations showing an imbalance in the bargaining powers of the parties.[875] This statement is however not completely correct as Article 102 only offers protection in cases where the superior party is in a dominant position within the internal market or in a substantial part of it.

There are four ways that an undertaking can abuse its dominance in the market namely: imposing unfair pricing or trading conditions,[876] limiting production/market/technical developments,[877] discriminating between trading partners[878] or making contracts with extra obligations.[879] "Dominant position" can be assessed *de novo* in terms of the product market or the relevant geographical market whether domestic or EU wide. As a rule of thumb, a company is unlikely to be in a dominant position if it has a market share of 40%. In *Hoffmann – La Roche v Commission,* it was held that "dominant position" did not apply to oligopolistic markets where a small number of businesses hold market power. In fact,

[872] Commission Regulation 772/2004, 2004 O.J. (L 123/11) and Guidelines on the Application of Article 81 [now 101] of the EC Treaty to Technology Transfer Agreements, 2004 O.J. (C 101/2).
[873]Alison Jones, "The journey toward an effects-based approach under Article 101 TFEU— The case of hardcore restraints", The Antitrust Bulletin: Vol. 55, No. 4/Winter 2010, 784; Philip Lowe, "Consumer Welfare and Efficiency—New Guiding Principles of Competition Policy?" (13th Int'l Conference on Competition and 14th European Competition Day, Mar. 27, 2007).
[874] R. O'Donoghue and J Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart Publishing, 2013) 67; E.M. Fox, "Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness" (1986) 61 Notre Dame Law Review 981, 1004; J. Kallaugher and B. Sher, "Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse under Article 82" (2004) 25 ECLR, 5, 263; D. Waelbroeck, "Michelin II: A Per Se Rule Against Rebates by Dominant Companies?" (2005) 1 J. Competition Law Econ., 1, 149; A. Jones and B. Sufrin, *EU Competition Law* (4th edn, OUP, 2011) 281.
[875] Francesco A. Schurr, 'What Role Does Competition Law Play in the Genesis of a Harmonised European Private Law'. Revue Juridique Polynésienne 14, 2008, 13. <https://www.victoria.ac.nz/law/research/publications/about-nzacl/publications/nzacl-yearbooks/yearbook-13,-2007/Schurr.pdf> accessed 11 August 2019.
[876] C-226/84, *British Leyl,and V Commission* [1986] EUECJ C-226/84
[877] Case 238/87, *Volvo V Eric Veng* ECLI:EU:C:1988:477
[878] Case T-219/99 *British airways V Commission* (2004) ECLI:EU:T:2003:343
[879] Case 85/76 *Hoffman la Roche V Commission* (1979) ECLI:EU:C:1979:36

relatively few companies are in a dominant position.[880] Consequently, a micro enterprise which faces unfair terms whose counter party is not in a dominant position has little or no reliance on Art 102. Dominance can be as a result of market product,[881]market geography[882] or time, particularly for seasonal products. Some other case law suggest that it isn't necessarily a case of having more than 50% but rather a huge difference between the relevant company's share and the company below it. In this case, the British Airways commission had 40%, and the next biggest competitor which was Virgin had only 5% of the market share.[883]

Because Competition law outlaws abusive conducts such as the application of different conditions to same transactions, directly or indirectly imposing unfair prices, and the imposition of unconnected supplementary obligations,[884] it is widely believed to be aimed at ensuring a level playing field for market participants.[885] As such, the proficiency of transactions is not assessed from the perspective of the parties irrespective of their size but from the market as a whole.[886] Consequently, freedom of contract involving non dominant undertaking in MB2B transactions which appears beneficial to competition is likely to have long term detriment such as causing reduced competition.

7.1.2 The concept of Unfairness/Fairness in EU Competition Law

The concept of abuse is grounded in the notion of fairness;[887] the notion of fairness/unfairness in competition law has been a controversial one.[888] Several authors

[880] Slaughter and May, "An Overview of EU Competition Rules" <https://www.slaughterandmay.com/media/64569/an-overview-of-the-eu-competition-rules.pdf> accessed 12 September 2019
[881]Case 27/76, *United Brands V Commission* (1978) ECLI:EU:C:1978:22
[882]Case No IV/30.178, *Napier Brown-British sugar* (1988)
[883] Case T-219/99 British airways V Commission
[884] TFEU, Article 102 (d)
[885] Giuliano Amato, *Antitrust and the Bounds of Power*. (Oxford: Hart Publishing, 1997) 2
[886] Lewis T. Evans & Neil C. Quigley, 'Contracting, Incentives for Breach, and the Impact of Competition Law'. (2000) World Competition 23, 2, 82
[887] MN Berry, 'The Uncertainty of Monopolistic Conduct: A Comparative Review of Three Jurisdictions' (2001) 32 Law and Policy in International Business 263, 310,
[888] TB Leary, 'Freedom as the Core Value of Antitrust in the New Millennium' (2000) 68 Antitrust Law Journal 545; KG Elzinga, 'The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?' (1977) 125 Univ. Pa. Law Rev., 1191; T Calvani, 'Rectangles and Triangles: A Response to Mr Lande' (1989) 58 Antitrust Law J., 657; EM Fox, 'The Modernization of Antitrust: A New Equilibrium' (1981) 66 Cornell L. Rev., 1140; RH Lande, 'Wealth Transfers as the Original and Primary

are of the opinion that the principle of "fairness" and "justice" are extraneous to competition law as "the lion eats the deer".[889] Even when the objective is acknowledged, 'fairness' is lower in the priority chain, certainly lower than 'efficiency' and preventing consumer harm. [890]

Lang argues that the term "unfair" as used in Art 102 simply means "exploitative".[891] Arguably, "exploitation" is a more straight forward term in the law of contract. Exploitation is usually understood as taking excessive benefit or unfair advantage of a weaker party's position which is commonly manifested in a disparity in consideration.[892] Legal precedents suggest that to determine whether an act by its nature is injurious to competition, regard must be given to the text of the provisions, its objectives, and the economic and legal context. [893]Fairness should not be given a non-market related moral implication. Suppose fairness is seen as nothing more than "culture specific variations of occidental codified customs". In that case,[894] member states may use such open ended interpretation to establish their own rules and to narrow down the freedom of market communication. [895]

Gerber distinguishes between two forms of fairness in competition law namely: vertical and horizontal. The vertical form of fairness concerns the abuse of economic power by a seller to the disadvantage of a buyer (consumer) while horizontal fairness concerns the abuse of economic power to harm competitors such as where a stronger party uses power to prevent competitors from accessing the market or frustrates the weaker parties

Concern of Antitrust: The Efficiency Interpretation Challenged' (1982) 34 Hastings Law J. 65; FM Scherer, 'Efficiency, Fairness and the Early Contributions of Economists to the Antitrust Debate' (1990) 29 Washburn Law J. 243;

[889] M van der Woude, 'Unfair and Excessive Prices in the Energy Sector' in CD Ehlermann and M Marquis (eds), *European Competition Annual 2007: A Reformed Approach to Article 82 EC* (Oxford, Hart Publishing, 2008) 617

[890] J Almunia, "Converging Paths in Unilateral Conduct' speech at the ICN Unilateral Conduct Workshop" (Brussels, 3 December 2010) 3 in Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic approach* (Hart Publishing, 2012) 148

[891] JT Lang, "Fundamental Issues Concerning Abuse under Article 82 EC" paper presented at Annual Competition Policy Conference (Oxford, Regulatory Policy Institute, July 2005)

[892] DCFR, Article II. – 7:207.

[893] Case C-501/06 P, *GlaxoSmithKline Unlimited v. Commission*; *IAZ Int'l Belgium and Others v. Commssion*, (1983) E.C.R. 3369, 25, Case C-209/07, *Competition Authority v. Beef Industry Dev. Soc'y Ltd*. (BIDS), 2008 E.C.R. I-8637, 16 & 21; Article 101(3)

[894] Hans-W. Micklitz , Norbert Reich, Peter Rott, *Unfair Commercial Practices And Misleading Advertising, Understanding EU Consumer Law* (Intersentia, 2009) 83 -84

[895] Ibid

capacity to compete. A distinction between forms of fairness could result in a different interpretation of this concept. Fairness towards competitors goes against the ethos of competition law which protects competition and not competitors and therefore fairness becomes undesirable. [896]

Both forms of fairness are relevant and important for the survival of micro enterprises in international commercial transactions. While the vertical form of fairness appears to be covered under Art 102, the horizontal form of fairness is elusive. The concept of fairness should be broad enough to cover harm. Notably, specific sectors such as the agriculture sector in the EU are excluded from the scope of EU competition law.[897] Micro enterprises could also be treated differently in MB2B international commercial transactions under competition law provisions.

Unlike the economic concepts relating to anti competitive agreements such as cartels, the economic concept of unilateral conduct such as isolated cases in individual contracts is under developed. Consequently, it is often difficult to determine the fairness or unfairness of isolated events of unilateral conduct in competition law. [898] Rules regulating unilateral conduct are equally important as such rules help *interalia* to ensure that the markets are open and fair, they promote innovation, and in line with the overarching objective of the EU, ensure that no harm is done to consumers. Unfortunately, the need for fairness can often clash with other objectives such as 'efficiency' or "preventing consumer harm".[899] It has been argued that inadequate consideration of efficiencies and other pro-competitive effects of dominant undertakings' practices could discourage investment and innovation and lead to pro-competitive effects.[900]

[896] DJ Gerber, "Fairness in Competition Law: European and US Experience" presented at a conference on Fairness and Asian Competition Laws (Kyoto, 5 March 2004) 6 in Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic approach* (Hart Publishing, 2012) 149

[897] TFEU, Article 42 (ex-36 TEC); R. Whish & D. Bailey, *Competition Law* (OUP, 2011) 168.

[898] Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic approach* (Hart Publishing, 2012)

[899] J Almunia, 'Converging Paths in Unilateral Conduct' speech at the ICN Unilateral Conduct Workshop (Brussels, 3 December 2010) 3 in Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic approach* (Hart Publishing, 2012) 148

[900] J. Killick and A. Komninos "Schizophrenia in the Commission's Article 82 Guidance Paper: Formalism Alongside Increased Recourse to Economic Analysis" (2009) (February-I) Global Competition Policy

Article 9 of Regulation 1/2003 allows member states to implement rules which pursue other legitimate objectives besides protecting competition. This position has been subject to a number of criticisms, mainly that certain practices which may have no effect on competition may be labeled unfair under national legal systems.[901] No doubt, many countries [902] have relevant provisions included in their respective competition act. The issue is more about the fragmentation and adequacy of these provisions in regulating unfairness. What is more, a number of countries have enacted seemingly equivalent provisions outside their competition act in an attempt to regulate unfairness. There is a danger that this fragmentation and divergence in what is labeled unfair may, in turn, lead to legal uncertainty in international commercial contracts.

There is always the need to balance the EU's interests in free competition and national interests to maintain fair and honest competition.[903] As member states are not precluded from applying stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings, some member states have passed laws which go beyond the provisions of Art 102 in the form of economic dependence rules rather than "dominance".[904] This is not to say that many jurisdictions do not have very similar provisions to Article 102 TFEU however quite a number of domestic legislation show significant differences in the list of prohibited practices apart from those based on the example of Article 102.[905] Furthermore, several jurisdictions have separate provisions on refusal to deal or provisions explicitly prohibiting exclusions or predatory pricing.[906]

It may be helpful to draw attention to the fact that the EU competition law was primarily based on Austria and Germany's Ordoliberal thought which had as its aim i*nteralia*, the

[901] Hanns Ullrich, "Anti-Unfair Competition Law and Anti-Trust Law: A Continental Conundrum?" (2005) European University Institute Working Paper Law No. 2005/01, 8.
[902] UK Competition Act 1998, section 18; Article L 420-2 par. 2 of the French Commercial Code. See also Article 442-6 par. 1 sanctioning economic dependence abuses as restrictive trade practices before civil courts.; Article 12 of the Portuguese Competition Act (Law No 19/2012 of 8 May); Section 20 of the German Gesetz gegen Wettbewerbsbeschränkungen (GWB)
[903] Hanns Ullrich, "Anti-Unfair Competition Law and Anti-Trust Law: A Continental Conundrum?' (2005) European University Institute Working Paper Law No. 2005/01, 8.
[904]Mark-Oliver Mackenrodt, Beatriz Conde Gallego, Stefan Enchelmaier (Eds), *Abuse of Dominant Position: New Interpretation, New Enforcement, Mechanisms? (*Springer, 2008) 55- 56
[905] For example see Germany and France
[906] PranveraKëllezi, BruceKilpatrick, PierreKobel (Eds) *Abuse of Dominant Position and Globalization & Protection and Disclosure of Trade Secrets and Know-How* (Springer International publishing, 2017) 5

protection of persons from the abuse of economic power. [907] In addition, fairness in competition forms one of the fundamental pillars of the EC Treaty of 1958.[908] It can be argued that unfairness, particularly where micro enterprises are involved, should either be regulated under European competition law by means of special rules or be exempted from EU competition law.

7.1.3 The relevance of Consumer Protection under EU Competition Law to Micro Enterprises.

For the ultimate benefit of consumers, most terms and commercial practices which are not regulated within the scope of the UCPD, UCCTD or other secondary EU law are likely to be regulated under competition law. Though competition law runs at a market structure level by controlling of prohibiting conducts that are likely to distort competition, it is also able to analyse whether an agreement has an anti competitive effect and indirectly impact the consumer. By addressing market failures which appears to be "external" to the consumer leads to an objective ability of the market to provide sufficient options.[909]

Competition law ensures consumer protection by indirect means "by encouraging firms "to innovate by reducing slack, putting downward pressure on costs and providing incentives for the efficient organisation of production." [910] In fact, one of the core objectives of Art. 101(3) TFEU is to ensure that consumers receive a fair piece of the resulting benefit produced by an otherwise restrictive agreement. Art 12 of TFEU further spells out that "consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities."[911] The General Court in *Association belge des consommateurs test-achatsASBL v. Commission* emphasised that consumer

[907] Flavio Felice and Massimiliano Vatiero, "Ordo and European Competition Law" http://www.siecon.org/online/wp-content/uploads/2013/09/Felice-Vatiero.pdf accessed 21 September 2019
[908] See Preamble of Treaty of Rome (EEC)
[909] Paolisa Nebbia, Standard form contracts between unfair terms control and competition law, (2006) E.L. Rev. 31, 1, 103
[910] Cm. 5233 (2001), para.1
[911] See also Art. 38 of the Charter of Fundamental Rights of the European Union, which determines that EU policies ought to ensure a high level of consumer protection, equally invoked by the Court.

protection is an issue that essentially should be taken into consideration in the implementation of any EU law and policy.[912]

Moreso, the control on unfair terms operates between Enterprises and Consumers and aims to ensure that the Consumer's ability to negotiate or choose is not impeded, nor the transaction constitutes an unfair advantage to the Business. This can be said to be a direct form of control of B2C transactions with the aim at ensuring fairness for the consumer.[913] Case law also shows that individuals, as well as competitors, are protected within the scope of the EU competition law.[914]

EU competition law reforms in the last decade have reflected amongst other aspects such as introducing leniency programmes, an increase in the rights and participation of private stakeholders in the enforcement of EU competition law, by bolstering private enforcement.[915] Hence, like other legal entities, Consumers can initiate complaint before the commission or national competition authorities and participate in the relevant administrative procedure.[916] Thereby holding both legitimate and sufficient interest.[917] Aside the Consumer's right in the enforcement and deterrent of companies in the infringement of competition rules, Consumers also have the right to sue for damages before national courts.[918]

The issue of who is a Consumer under EU competition law can be quite confusing as there are conflicting views as to whether a consumer is merely a final consumers or includes

[912] CaseT-224/10, *Association belge des consommateurs test-achatsASBL v. Commission*, judgment of 12 Oct. 2011, nyr, para 43.
[913] Paolisa Nebbia, Standard form contracts between unfair terms control and competition law, (2006) E.L. Rev. 31, 1, 103
[914] C-453/99 *Courage v. Crehan* [2001] ECR I-6297; C-295/04 to C-298/04 *Vincenzo Manfredi et al. v. Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6297
[915] White Paper on modernization of the Rules implementing Articles 81 and 82 of the EC Treaty, Commission programme No. 99/027, O.J. 1999, C 132/1.
[916] Art. 27(1) and (3) of Regulation 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. 2002, L 1/1 and Arts. 6 and 13 of Regulation 773/2004 of 7 Apr. 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, O.J. 2004, L 123/1.
[917] Art. 27 of Regulation 1/2003, and Arts. 6 and 10–14 of Regulation 773/2004, 18,
[918]Case C-453/99, *Courage*, [2001] ECR I-6297, para 26. Joined Cases C-295-298/04, *Manfredi v. LloydAdriatico Assicurazioni SpA and Others*, [2006] ECR I-6619; Case C-199/11, Otis NV, judgment of 6 Nov. 2012, nyr

enterprises which are the immediate buyers of the relevant goods or services, in which case a micro enterprise may enjoy protection.[919]

A significant number of literature and the numerous case law discussed in chapter 3 strongly reflects that consumers are assumed to be the final consumers. However, competition law makes no clear distinction between the final consumer and intermediate consumers.[920] No doubt, the real situation of the final consumer and the intermediate consumer is often distinct.[921] This thesis agree that the competition law notion of "consumer" should not be reduced to final consumer but rather should include intermediate consumers like some micro enterprises.

The Commission Notice on the application of Article 81(3) EC[922] states that the notion of 'consumers' covers direct or indirect users of the products covered by the agreement, which includes persons who use relevant products as an input, wholesalers, retailers and final consumers. Thus, consumers within the meaning of Article 81(3) EC can be said to be "the customers of the parties to the agreement (e.g. buyers of industrial machinery) as well as subsequent purchasers.

Legislations like EU Regulations and Directives favouring final consumers often do not consider particular factual circumstances or whose welfare is in jeopardy when offering a restricted interpretation of Consumers. No doubt competition law recognises that the distinction between intermediate purchaser and final consumer is vital for antitrust cases, particularly where harm has not been suffered directly by the final consumers. The

[919] Case C-53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] I-04609, [20]; Joined Cases C-468/06 to C-478/06 *Sot Lelos Kai and others v GlaxoSmithKline AEVE Farmakeftikon Proïonton* [2008] I-07139, [23]; Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] I-04529, [19].

[920] Guidance on the Commission's enforcement priorities in applying Article 82 (EC) to abusive exclusionary conduct by dominant undertakings, O.J. 2009, C 45/19, See also Guidelines on the application of Article 81(3), O.J. 2004, C 101/97, clause 84. See e.g. Report by the economic advisory group for competition policy on "An economic approach to Article 82 July 2005, <ec.europa.eu/dgs/competition/economist/note_eagcp_july_05.pdf> accessed 21 July 2017, 8.

[921] Katalin J. Cseres and Joana Mendes, "Consumers' access to EU Competition Law Procedures:
Outer and Inner Limits" (2014) Common Mark. Law Rev., 51, 486; Joined Cases T-213 & 214/01, *Österreichische Postsparkasse*, [2006] ECR II-1601, paras. 110–119.

[922] Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty (Text with EEA relevance) Official Journal C 101 , 27/04/2004 P. 0097 – 0118; see similar definition in Communication from fhe Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements.

economic definition of consumer welfare does not make a distinction between different types of Consumers or prescribe how to assess tradeoffs amongst consumers on diverse product or geographic markets but rather describes consumer as a purchaser of goods or a services.[923] Furthermore, the establishment of consumer welfare in law also avoids an "end user" interpretation of a consumer.

John Galbraith's theory of countervailing power asserts that the power of a seller is best checked by putting economic power in the hands of the buyer. A strong buyer is able to extract surplus from the supposed "bigger" seller, push the seller to lower prices and consequently pass this benefit to the final consumer in the form of low prices.[924] This theory recognises the preliminary transactions which happen before goods reach the final consumer. If the relationship between larger enterprises and micro enterprises is not checked, then this flows to the end user-consumer; thus, the law cannot afford to focus mainly on end-users.

Both Consumers and SMEs have been identified as potential claimants affected by anticompetitive behaviour.[925] Competition law which focuses mainly on end-user welfare means that abuses taking place along a supply chain is immuned from antitrust investigation, unless a actual impact on final consumers can be established. Thus, the Commission's conditional link between Consumers' access to both public and private enforcement of competition law is justified in cases of vertical restraints and abuse of dominance but not in horizontal agreements.[926] This enforcement mechanism would ensure corrective justice by awarding compensation for harm suffered as well as a means of a deterrent from anti competitive behaviour. [927]

[923] Victoria Daskalova, Consumer Welfare in EU Competition Law: What Is It (Not) About? (2015) 11 Comp. L. Rev, 1, 138
[924] Julian Maitland-Walker, 'Buyer power' (2000) 21 Eur. Compet. Law Rev (Quarterly), 3, 170; Alan Overd, 'Buyer Power' (2001) 22 Eur. Compet. Law Rev (Quarterly) 6, 249; A Pera and V Bonfitto 'Buyer Power in Anti-trust Investigations: A Review' (2011) Eur. Compet. Law Rev. (Quarterly) 32, 414.
[925] Barry J Rodger, "Private enforcement and collective redress: The benefits of empirical research and comparative approaches", (2012) Competition Law Review, 8, 1–6.; Peyer, "Private antitrust litigation in Germany from 2005 to 2007: Empirical evidence", (20120 J. Competition Law Econ. 8, 331–359.
[926]Katalin J. Cseres and Joana Mendes, "Consumers' access to EU Competition Law Procedures: Outer and Inner Limits" (2014) Common Mark. Law Rev., 51, 500
[927] Becker and Stigler, "Lawenforcement, malfeasance, and compensation of enforcers", (1974) 3 J. Leg. Stud. , 1–18.

7.2 The Protection of Microenterprises under Private international law Directives - Cross Sectorial Legislations

To sustain economic growth of SMEs generally, a number of cross sectoral legislations have been put in place by the EC. While some of these Directives are targeted at SMEs in general, others can also be beneficial to micro enterprises. For example, the Directive 2006/123/EC on services in the internal market which aims at ensuring a competitive market in services to enable SMEs and others to take full advantage of the internal market and the Directive 2014/55/EU on e-invoicing which aims at giving e-invoices equal status to paper ones. Of direct relevance to our discussions are specific directives which are targeted at SMEs such as the Late Payments Directive and the Misleading and Comparative Advertising Directive.

7.2.1 Late Payment Directive (2011/7/EU)

One of the deterrents of international trade for micro enterprises is the problem of late payment and differences in payment conditions which affect the competitiveness of the business.[928] In 2015, SMEs were owed a total of £225 billion in late payments.[929]The Late Payment Directive is aimed at combating late payment in commercial transactions to foster the competitiveness of SMEs. It applies to all payments made in commercial transactions.[930]

Accordingly, Article 3(3) of this Directive introduces interest for late payment after the SME has fulfilled its obligations by reference to the date following the fixed date of payment or where there is no fixed date, 30 calendar days from the date of receipt of invoice, or receipt of goods/services or acceptance verification of the goods. Where such interest becomes payable in commercial transactions, the creditor is entitled to a minimum of EUR 40 and recovery costs.[931] Furthermore, a fixed date of payment must

[928] See the Explanatory Memorandum to the European Commission's Proposal for a European Parliament and Council Directive combating late payment in commercial transactions of 25 March 1998, COM (1998) 126 final, 2.
[929] Zurich Insider, SMEs owed £225bn from late payments, (January 2016) < https://publications.parliament.uk/pa/cm201719/cmselect/cmbeis/807/80709.htm> accessed 4 january 2019
[930] Directive (2011/7/EU), Art 1 (1) and (2)
[931] Directive (2011/7/EU), Art 6

not exceed 60 calendar days unless otherwise expressly agreed in the contract and not grossly unfair to the creditor within the meaning of Art 7.[932] Art 7 deals with unfair terms and practice and provides that a contractual provision relating to payment or compensation is unenforceable if it gives rise to a claim for damages or is grossly unfair. To ascertain what is grossly unfair, all circumstances of the case should be considered, including the nature of goods or service, bad faith, or any objective basis from deviation from the statutory rate of interest.

Considering that late payment for micro enterprises is likely to lead to issues of cash flow and reduction in profit, the protection offered by this directive is laudable. Regardless of contrary provisions contained in the contract, the assurance that in cases of dispute, the court will declare any such unfair provision unenforceable or replace such provision with the statutory default rules should provide some comfort.

Unfortunately, the spirit of the late payment directive, though implemented in various member states, is often disregarded in practice. A study by the UK BEIS[933] shows that several companies still have long payment terms. For example, WHSmiths have standard payment terms of between 90 days to 120days; Boots UK have standard payment terms of between 75 days to 120 days, Holland and Barrett has a standard payment terms of 90 days. In addition, the Federation of Small Businesses[934] shows that over one third of small suppliers have had their payment terms increased over the previous 2 years, 12% of SMEs surveyed had been asked for a discount for prompt payment, 7% for retrospective discounting, 6% for a fee to remain on a suppliers list and 3% had experienced a discount being applied after goods and services had been supplied. The above practices show the breath of unfair practice resulting from payment terms and a legislation that merely provides for late payment is insufficient to deal with the pressures of the modern business environment.

[932] Directive (2011/7/EU), Art 3 (5)
[933] House of Commons, "Business, Energy and Industrial Strategy Committee Small businesses and productivity" (Fifteenth Report of Session 2017–19 HC) <https://publications.parliament.uk/pa/cm201719/cmselect/cmbeis/807/807.pdf> accessed 26 September 2019
[934] Federation of Small Businesses, "Chain Reaction: Improving the Supply Chain Experience for Smaller Firms", (June 2018) 47.

7.2.2 The Misleading and Comparative Advertising Directive

'Misleading advertising' means "*any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor."*[935] While Comparative advertising," *is any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor*".[936] It is not necessary to name a competitor in order for an advertisement to qualify as a comparative advertisement.[937]

The Misleading and Comparative Advertising Directive[938] applies mainly in B2B transactions, although comparative advertising also applies to advertisement directed at consumers. The aim of this Directive is to protect traders against misleading advertising and its attendant consequences. It, therefore, lays down conditions by which comparative advertising is permitted.[939] No doubt, advertising, regardless of whether or not it induces a contract, has an impact on the economic welfare of micro enterprises. [940] More importantly, fundamental rules regulating the form and content of comparative advertising need to be uniform.

According to Art 3, to determine if an advertisement is misleading, regard should be had to all its features and any specific information which relates to the characteristics of the goods and services, the price, the nature, attributes and the rights of the advertiser.
Unlike misleading advertisement, comparative advertising is permitted provided some conditions are met. For example, according to Art 4, it is not misleading; if it compares goods or services meeting the same needs or intended for the same purpose; or it objectively compares one or more material, relevant, verifiable and representative

[935] Directive 2006/114/EC, Art 2b
[936] Directive 2006/114/EC, Art 2c
[937] Lewis Silkin, Comparative advertising, < Comparative%20Advertising%20Oct%202012%20(1).pdf> accessed on 4 September 2019.
[938] Directive 2006/114/EC
[939] European Commisssion, "Misleading and comparative advertising directive" <https://ec.europa.eu/info/law/law-topic/consumers/unfair-commercial-practices-law/misleading-and-comparative-advertising-directive_en> accessed 24 September 2019.
[940] 2006/114/EC, Recital 4

features, which may include price; or if it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, the goods, services, activities or circumstances of a competitor. For products with designation of origin, it relates in each case to products with the same designation; it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products; it does not present goods or services as imitations or replicas of goods or services bearing a protected trademark or trade name; it does not create confusion among traders, between the advertiser and a competitor or between the advertiser's trademarks, trade names, other distinguishing marks, goods or services and those of a competitor.

Notably, under English law, the Business Protection from Misleading Marketing Regulations 2008, which implement the above directive, operates in the realm of public law. Therefore, infringement does not give rise to any private rights for micro enterprises and is enforceable by public authorities. However, misleading marketing may result in an action in contract under the doctrine of misrepresentation.[941]

Therefore, it is safe to assert that the protection offered to micro enterprises under this Directive is limited to advertising practices only and does not generally address other potentially harmful trading practices between businesses.

7.3 The Protection of Micro enterprises under Private international law Directives - Sectorial legislations.

Sectorial legislation may also specifically seek to protect micro enterprises or weaker parties from the pitfalls of certain types of unfair trade practices. No doubt, certain provisions of EU law, particularly on "clarity" , "honesty", "not misleading" and "acting professionaly" such as those contained in the Markets in Financial Instruments

[941] HM Government, "UK Government response to the European Commission's Green Paper on unfair trading practices in the business to business food and non-food supply chain" 5

Directive[942] or Online Platform Regulation which aims at promoting fairness and transparency for business users of online intermediation services[943] also apply to micro enterprises. However, our focus is mainly on legislation which is targeted at protecting weaker parties by prohibiting unfair trading practices. Hence the emphasis will be on the first and only existing sectorial legislation targeted at weaker parties and consider how relevant this can be in other sectors.

7.3.1 Directive on unfair trading practices in business-to-business (B2B) relationships in the food supply chain.

An intervention in the food supply chain sector was necessary due to the importance of this type of supply chain transaction to the European economy. Food supply chain affects the citizens' daily life who spend around 14% of their household expenditure on food. Research showed that in the year 2008 that real food prices increased by over 3%. Value added in agriculture has decreased from 2014 onwards (in 2016 - 4% lower).[944] The introductory statement relating to the reason for and objectives of this Directive[945] clearly states that "smaller operators in the food supply chain are more prone to face unfair trading practices due to their, in general, weak bargaining power in comparison to the large operators in the chain."

Hence one of the principal aims of Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices (UTPs) in business-to-business relationships in the agricultural and food supply chain is to regulate the terms in B2B contracts, the way in which such a contract is made, varied and terminated. Indeed, smaller businesses like micro enterprises are very prone to UTPs in any supply chain or commercial transaction due to their bargaining power.

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[942] Directive 2014/65/EU

[943] Regulation (EU) 2019/1150

[944] The Food Supply Chain, <https://ec.europa.eu/agriculture/sites/agriculture/files/statistics/facts-figures/food-chain.pdf> accessed 28 September 2019

[945] Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain, COM/2018/0173 final - 2018/082 (COD) https://www.eumonitor.eu/9353000/1/j4nvhdfdk3hydzq_j9vvik7m1c3gyxp/vkngbj81w2p5 acessed 3 July 2020

Notably, the Directive differs slightly from the final proposal, which was published in 2018. Firstly, the scope of protection under the proposal was "limited to SME suppliers in the food supply chain thereby not interfering with the commercial relationships of large players who are less likely to be affected by UTPs or who can be expected to countervail undue pressure to "suffer" UTPs"[946] whereas, the directive goes further to protect non SMEs which are producers having an annual turnover below 350 million euros[947]. Secondly, the scope of the Directive has been expanded to include certain services that are ancillary to the sale of agricultural and food products.[948] Thirdly, the list of UTP listed under the proposal has been enlarged. Consequently, retaliation or threats by buyers against suppliers of delisting products, stopping services, reducing the amount of products ordered now constitute UTPs and are therefore prohibited.[949]

Arguably, the largest number of businesses is involved in agriculture,[950] therefore this Directive can be said to apply to a significant number of micro enterprises. Considering that not all businesses are involved in agriculture, other micro enterprises should be protected. From the first identified difference between the final proposal and the Directive discussed above, one will note that the need to avoid interference in commercial relationships has been given limited priority due to the consequence of non interference.

7.3.2 Lessons from the Directive on unfair trading practices in business-to-business (B2B) relationships in the food supply chain.

Other than peculiar situations relating to perishable goods, a significant number of examples of unfair trading practices under this Directive is equally relevant to micro enterprises in international commercial transactions outside the food supply chain industry. Misuse of confidential information, unilateral or retrospective change to the

[946] Recital 2 – Proportionality, 6
[947] Directive (EU) 2019/633, Recital 9
[948] Directive (EU) 2019/633, Recital 13
[949] Directive (EU) 2019/633, Recital 25
[950] The Food Supply Chain, <https://ec.europa.eu/agriculture/sites/agriculture/files/statistics/facts-figures/food-chain.pdf> accessed 28th September 2019.

contract, claims for contribution to marketing cost, payment to secure or retain contracts, retaliation or threat thereof are good examples of practices equally applicable to micro enterprises in other sectors.

The EC fact sheet[951] describes unfair trading practices in B2B as practices that "deviate from good commercial conduct and are contrary to good faith and fair dealing. They are usually imposed unilaterally by one trading partner on another". This statement suggests that standard form contracts are a key challenge to micro enterprises generally due to their lack of adequate bargaining power.

SMEs have been reported to lack the legal resources to challenge contractual terms.[952] The fear of commercial retaliation as well as the financial risks involved in challenging unfair terms often hinder a micro enterprise's ability to query unfair substantive provisions. It is therefore imperative that suitable protective legislation is put in place to enable micro enterprises thrive.

7.4 Conclusion

We have seen that variations exist time and time again in legal systems and legal cultures in the treatment of B2B and B2C relationships. In particular, a large number of statutory instruments have evolved over the years to protect certain consumers in B2C international commercial transactions in European private international law. Despite the tension between the approach utilised by consumer contract legislation and the fundamental principles of freedom of contract, legal equality and private autonomy, there is a strong justification for this approach.

[951] European Commission "Fact Sheet, Tackling unfair trading practices in the food supply chain" https://europa.eu/rapid/press-release_MEMO-18-2703_en.htm accessed 29th September 2019

[952] House of Commons, "Business, Energy and Industrial Strategy Committee Small businesses and productivity" <https://publications.parliament.uk/pa/cm201719/cmselect/cmbeis/807/807.pdf>, 37 accessed 13 October 2019

While SMEs have been granted derogations in areas such as taxation and company law[953] and have received favourable treatment under the competition rules regarding EU's state aid policy, competition law is of little help in the area of unfair terms, particularly in relation to non dominant undertakings under Art 102 or unilateral conduct by such undertakings.

We have also seen that enforcement is also a major issue in relation to Directives targeted at protecting weaker parties. Member states have to adopt addition means of monitoring and ensuring that the current protection available is achieving its aim. Competition law to some extent can be useful in dealing with unfair practices just like Directive and Cross-sectorial legislations.

[953] Small And Medium-Sized Enterprises, Fact Sheets on the European Union -2019 <http://www.europarl.europa.eu/ftu/pdf/en/FTU_2.4.2.pdf> accessed 5 April 2019

Chapter 8: **Summary, Findings and Recommendation.**

8.0 Introduction

In the nineteenth century, diversity in national legal systems, differences in domestic private international law rules articulated in the codification movements,[954] coupled with the restatements of national sovereignty, led to the classification of private international law as purely national law.[955] One of the implications of this strict classification was the complexity and lack of uniformity of rules governing legal theories such as "fairness", "justice", and "protection of weaker parties".

The need to harmonise these rules amongst other objectives led to the rejection of this classification in modern contract law. The European private international law now performs the public function of directing the regulatory authorities of its member states and the "distribution of adjudicatory power among the member states".[956] Seen as one alternative to the harmonisation of different national legal systems, the principle of subsidiarity[957] and the ability of EU private international law to direct the regulatory authority of Member States can efficiently accomplish the coordination of different national laws and norms while also preserving the legal and cultural heritage of Member States.[958]

EU Member States retain the right to define the procedural means by which individuals can effect these rights. Owing to the principles of direct effect and the primacy of EU law, the autonomy of member states can be said to be significantly limited where such rights stem from the Union legal order. Some academics consider this autonomy, at best procedural competence rather than procedural autonomy of Member States[959]

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[954] Neil Walker, *Intimations of Global Law* (CUP, 2015) 108.

[955]Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (CUP, 2009) 40-52; 71.

[956] Anna Gardella & Luca G Radicati Di Brozolo, "Civil Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction" (2003) 51 Am. J. Comp. Law 611, 614.

[957] Consolidated Version of the Treaty on European Union [2012] OJ C 326/18, art 5(3).

[958] Mukarrum Ahmed, *A Comparative Study of the Fundamental Juridical Nature, Classification and Private Law Enforcement of Jurisdiction and Choice of Law Agreements in the English Common Law of Conflict of Laws, the European Union Private International Law Regime and the Hague Convention on Choice of Court Agreements,* (2015) A thesis presented for the degree of Doctor of Philosophy in Law at the University of Aberdeen, 28

[959] Armin Lambertz, "The Role of Competition Law in Regulatory European Private Law", MaRBLe Research Papers, Vol 4 (2013): Europeanisation of Private Law , 297

The question of whether the complexity mentioned above, relating to rules governing legal theories such as “fairness”, “justice”, and “protection of weaker parties”, which was the result of diversity in national legal systems, has been effectively resolved under EU private international law is beyond the scope of this thesis; however, the efforts made at harmonising these rules is commendable.

This final chapter highlights the Research Findings, Limitations and provides Recommendations. It further examines the potential problems in a regulatory framework for the protection of micro enterprises and the possibility of transmitting results to other countries outside the EU. It weighs the importance of strict adherence to freedom of contract against the desire for flexibility in the case of micro enterprises. It concludes by providing a summary of the discussions.

8.1. Restatement of the objectives and reflection on conclusions from individual chapters.

This thesis aims to demonstrate why micro enterprises in MB2B contracts should fall under the category of weaker parties and therefore require regulatory protection. To achieve this aim, it set up a number of objectives, namely to:

a) Analyse the concept of freedom of contract and the difference in its application in B2B and B2C contracts.

b) Examine the rationale for the protection of weaker parties under EU private international law.

c) Investigate the current protection available to micro enterprises under relevant domestic laws.

d) Evaluate the current regime for the protection of weaker parties under the Rome I, Brussels Recast, Directive 93/13/EEC, Directive 2005/29/EC, Directive 2011/7/EU, Directive 2006/114/EC and EU Competition Law

e) Demonstrate why micro enterprises should benefit from some protective rules afforded to consumer contracts.

This thesis has argued that the protection of Micro Enterprises in MB2B international commercial contracts is of considerable importance to their survival and the market as a whole. On this basis, the central proposal in the thesis is that the European legislator and national legislators should recognise Micro enterprises as a distinct unit and explicitly create special rules for Micro enterprises which are more favourable to them in vertical business relationships.

To set out the foundation for this thesis, Chapter 2 provides an overview of micro enterprises and the commercial reality of modern times. By investigating how enterprises are classified, this chapter highlights the importance of such classification. It emphasises that the implication of treating micro enterprises as a sub-category of small enterprises or a broad category of SMEs is that it deprives these enterprises of the protection that they would have benefited from if described as distinct, like 'consumers', 'employees' or 'agents'. It then looks at the several definitions of Micro enterprises, showing the inconsistency in the various definitions and drawing out the imperfections of the most acceptable definition – EC Recommendation of 6 May 2003. It was highlighted that due to lack of uniformity in the definition of "employee" under various national legal systems, a micro enterprise in Germany may not be a micro enterprise in France or the UK. This chapter then goes further to explore the distinct characteristics of micro enterprises and what differentiates them from small enterprises and/or SMEs. For example, the majority of micro enterprises are established as sole proprietorships or partnerships. Therefore, unlike larger enterprises, most micro enterprises have unlimited liability for business debts. In addition, their distinctive characteristics, makes them more akin to consumers in some respect. It was also shown that often, Micro enterprises are as vulnerable as private persons due to their size, lack of expertise and bargaining power. It summarises the role of micro enterprises in economic growth using statistical data that accentuates that Micro enterprises are important drivers of economic growth, development, employment, income, innovation, and productivity. Lastly, this chapter investigates the commercial reality of the modern business environment. Using the data on business demography, it highlighted the alarming death rate of micro enterprises and previous research where Micro enterprises stated that their perceived legal problems comprised

inadequacies in contractual arrangements, including trading on others' unfavourable terms and ‘the high cost of legal advice and representation. This chapter concludes by emphasising the need for the continued success of micro enterprises.

Chapter 3 provides a background to the research by exploring fundamental legal and economic concepts such as Freedom of Contract, Economic Power, Unfairness and the Rationale for the protection of weaker parties in Private international law. It begins with the history of the doctrine of Freedom of Contract and Party autonomy by tracing the evolution of the doctrine of freedom of contract under common law and the civil law system; and party autonomy under European law. Based on historical analysis, it establishes how the concept of freedom of contract has evolved over time. According to Parry, in common law systems, the freedom and sanctity of contract can be directly traceable to early religious and ecclesiastical associations and their protection by the then Court of Chancery (court of conscience), while according to Gordley, in civil laws systems, it is based on the Roman text of the corpus iuris civilis of the emperor Justinian which was in force in most parts of continental Europe before the civil codes were enacted. This chapter then examined the mode of legal encroachment on these doctrines, comparing them with the traditional nature of legal encroachment. Clearly, the assumption that parties in B2B contracts understand and accept the legal terms they have contracted lies at the heart of traditional contract law and forms the basis of freedom of contract in most legal jurisdictions. A review of the policy document behind the first Consumer Policy Programme in the EU shows that one of the principal reasons for the protection of weaker parties is the inequality in bargaining positions between contracting entities. Considering the effect of unequal bargaining position on weaker parties, modern reforms to contract law aim to correct the strict notion of freedom by adjusting traditional contract law to mirror the evolutions of contemporary society, particularly the recognition of the inequality of contracting parties and the need to protect weaker parties such as consumers. This chapter argues that this assumption should also be questioned, particularly in relation to micro enterprises. Authors like Hesselink have highlighted that this inequality of bargaining position is not only peculiar to B2C but also B2B contracts. It highlights that Inequality of bargaining power arises

where parties stand on a relatively unequal footing regarding the degree of personal freedom and degree of personal empowerment they possess ahead of the contracting process. Indeed, inequality of bargaining power is not enough to make a contract void or voidable; however, inequality of bargaining power creates the potential for exploitative dealing,[960] particularly against micro enterprises. Moreso, Inequality in bargaining positions can be as a result of various factors. For example, a significant difference in the size or turnover of the parties involved, just as in the case of a micro enterprise dealing with a large enterprise or due to the economic dependency between one business party and another or substantial sunk costs already incurred by one of the parties (such as high upfront investments).[961] The notion of inequality in bargaining positions has been a matter of controversy. Traditionally, the bargaining position of contracting parties, regardless of whether they are in a B2C or B2B relationship, was not a question for inquiry by the courts. However, in recent times, the position is not so straightforward as it can be argued that the courts now tend to balance the notion of contractual justice against the doctrine of freedom of contract, particularly concerning some parties such as consumers in B2C transactions.

This chapter then analyses the rationale for the protection of weaker parties in commercial transactions, looking into the concept of morality and contract law; and the interrelationship between fundamental rights and the protection of weaker parties. It was submitted that the law embodies a social, economic, and ideological tool which has the potential to offer protection for certain persons. Consequently, legislators have recognised the need to protect specific categories of parties in commercial contracts and have established objective rules that favour those weaker parties and/or restrict party autonomy. In addition, this chapter considers the concept of economic power and the notion of unfairness in commercial contracts. It does this by highlighting relevant economic theories and applies them to commercial relationships involving Micro enterprises; it states that economic power impacts the development, negotiation,

[960] Marcus Moore "Why does lord denning's lead Ballon Intrigue us still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability" (2018) 134 Law Q Rev, 265

[961] Green Paper, On Unfair Trading Practices In The Business-To-Business Food And Non-Food Supply Chain In Europe, Brussels, 31.1.2013, COM(2013) 37 final, 6

formation, and preservation of B2B relationships. The relative power of each party affects that party's willingness to collaborate, their level of commitment to the contractual relationship, how they deal with conflict, communication exchange, processes, overall behaviour and, at times, the satisfaction derived from the transaction. While discussing what is considered unfair in some legal systems using extensive but relevant case laws and the procedural aspect of unfairness, this chapter shows that issues of contractual liability, governing law as well as a jurisdiction are important, particularly for micro enterprises. In addition, it discusses the distinction between consumer and business and the dichotomy in the application of the doctrine of freedom of contract whilst also drawing out the similarity between micro enterprises and consumers from the perspective of the economist. It has been pointed out that the most common example of a class of party perceived to be the weaker party in international commercial contracts is consumers, and as such, consumers have benefited from special rules in commercial contracts and judicial protection. A review of relevant case laws from the English courts shows that there is a limited room for judicial protection using the rules of construction in the interpretation of unfairness in favour of micro enterprises.

Chapter 4 examines the Relevance of Consumer Directives in the protection of Micro Enterprises and the extent of their implementation under Domestic Laws, focusing mainly on UCCTD and UCPD. Having explored various vital provisions, it was argued that due to the extensive powers granted under the UCCTD, extending the protections available to consumers under this Directive to Micro enterprises seems illogical. The UCPD, on the other hand would have been a good starting point except for its potential to be redundant where there is a conflict between the provisions of UCPD and other Community rules regulating particular aspects of unfair commercial practices. So as to buttress the point on the vulnerability of micro enterprises, it stated the five dimensions highlighted by the European Commission's study on consumer vulnerability across crucial markets and tested these dimensions on an average Micro enterprise. It was shown that micro enterprises could be as vulnerable as a consumer in most aspects. It then went on to consider the significance of the distinction between standard terms and individually negotiated terms in contracts made under the Directive and its implication for micro

enterprises. Here, it discussed the unhelpful criteria of terms remaining "effectively untouched" for determining whether a term is negotiated. Considering that the extent of negotiation is not a matter of concern, but rather if the terms were effectively untouched, it was argued that this position is not thoroughly protective as a party who negotiates or agrees to a lesser evil while assuming that this is the best-case scenario achievable can no longer contest the reasonableness of the provision.

Furthermore, it considered the extent of the Implementation of relevant directives in National Legal systems using a case study of the UK (pre and post Brexit), France and Germany's domestic Legal systems and considers further protection available in these national legal systems to Micro enterprises against unfair terms. Under English law, it was pointed out that UCTA has been criticized for only preventing the parties to a contract from excluding liability for certain matters, and it fails to impose a general prohibition on unfairness in contracts. Moreover, for contractual terms, the test of reasonableness under UCTA is whether the term in question is a fair and reasonable one, having regard to the circumstances that were, or ought reasonably to have been, in the contemplation of the parties when the contract was made. Unfortunately, the English Courts have not indicated or suggested that size is an indication or has any relevance to the bargaining strength of the parties. This position would have helped alleviate concerns micro enterprises may have about reasonableness. In addition, unlike jurisdictions such as England, the French system shields most micro enterprises from the consequences of unlimited liability. A qualifying micro enterprise that makes a "déclaration d'insaisissabilité" will benefit from protection for their home and other assets from being seized by creditors in the event of financial difficulties. In February 1995, a statute, which implemented the UTCCD, was passed and superseded relevant parts of the Consumer code. The 1995 Act afforded greater protection against unfair terms and applies to negotiated terms, non-negotiated terms and contractual provisions enacted by government departments. More so, the 1995 Act excludes the concept of good faith as a criterion for assessing unfair terms. German law extends the protection against unfair terms to contracts of all types and extends protection against unfair contract terms to B2B contracts under the German Civil Code when the contractual terms have not been

individually negotiated. As such, Micro enterprises are protected against surprising and ambiguous clauses in standard term contract under Section 305c German Civil Code. Thus, terms that are so unusual that the other party to the contract do not expect to encounter them do not form part of the contract. In fact, the interpretation of such standard terms are resolved against the user.

In addition, it was shown that In B2C contracts, consumers are granted the right to redress either in the form of a discount, right to damages or right to terminate in respect of a variety of unfair commercial terms or practices, including misleading and aggressive marketing. These rights are not only granted under the UCPD and various consumer protection legislation[962] but under various legal systems such as English common law and equitable doctrines. Worryingly, this degree of judicial protection is lacking in B2B contracts as the inequality of bargaining power is seen as a relative idea. As a result, the decision of the court to interfere with the contract is usually based on unconscientious conduct by the stronger party or procedural unfairness and not solely on the grounds that the transaction is unfair or imprudent.[963] Finally, this chapter concludes by demonstrating the disparity in the treatment of unfairness in B2B relationships and the need for uniformity.

It highlights that the legal principles governing the abuse of superior bargaining power differ amongst member states and is contained under varying statutes. In Germany, majority of these principles are contained in their national competition law whilst French law regulates such abuses through their commercial law.[964] Under English law, Schedule 2 of the Unfair Contracts Terms Act makes the bargaining strength of the parties a

[962] See for example Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) as amended by the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870)).; Unfair Commercial Practices Directive (European Parliament and Council Directive (EC) 2005/29 (OJ L149, 11.6.2005, p 22), implemented by the Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277; Consumer Rights Act, 2015; Consumer Credit Act 1974;see English Unfair Contract Terms Act 1977; French Consumer Law of 2014 which amended the consumer code.

[963]Strydom v Vendside Ltd [2009] EWHC 2130 (QB) at [36], [2009] All ER (D) 135 (Aug) at [36].; Kalsep Ltd v X-Flow BV (2001) Times, 3 May, [2001] All ER (D) 113 (Mar).; Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd [1985] 1 All ER 303, [1985] 1 WLR 173; Hart v O'Connor [1985] AC 1000, [1985] 2 All ER 880, PC; Boustany v Pigott (1995) 69 P & CR 298, PC; Irvani v Irvani [2000] 1 Lloyd's Rep 412 at 425, CA. *Fineland Investments Ltd v Pritchard* [2011] EWHC 113 (Ch), [2011] 06 EG 102 (CS), [2011] All ER (D) 18 (Feb).

[964] Armin Lambertz, "The Role of Competition Law in Regulatory European Private Law", MaRBLe Research Papers, Vol 4 (2013): Europeanisation of Private Law, 302

relevant factor to be considered in determining unfair exemption clauses. For B2B contracts, such exemption clauses must be contained in a standard form contract.

Chapter 5 investigates the jurisdictional issues and the current protection available to micro enterprises under Private international law. As a starting point, it highlights the Jurisdiction Rules applicable to international commercial transactions. It was stated that jurisdiction determines the procedural law to be applied in cases of dispute; the procedural rule also affects the mode of examination in chief, the cross-examination, and the pre-trial, which may not apply in civil law systems. The procedural rule also affects equitable remedies such as injunctions or other remedies such as damages and specific performance, which may not exist in other jurisdictions outside the common law legal system. In addition, it was argued that language barrier can often be a problem in submitting to the jurisdiction of a foreign member states, particularly if that country's governing law is applied. Problems can often arise from the structural and lexical differences between languages, multiword units like idioms and collocations, and there is also the general problem of ambiguity in some cases. The effectiveness and accuracy of such translation can often be an issue. This chapter then examined the extent of protection available to Micro enterprises looking into the relevant provisions of the Brussels I Regulation (Recast) in the absence of a jurisdiction agreement. Looking into the operations of Art 4 of the recast and the significance of the place of performance under Art 7, it was argued that the general provision of article 4 could be beneficial to micro enterprises in respect of an action brought against them. However, the impact of this provision is more challenging where the micro enterprise is the claimant. The cost and hardship of litigating in another jurisdiction can sometimes discourage a micro enterprise from making a claim. It was also noted that some of the special or alternative jurisdiction rules under Art 7-9 allow a person to choose whether to commence an action in the court of the member state of the defendant's domicile or the courts of another member state having a jurisdictional basis. It was argued that these provisions do not affords a great degree of protection for micro enterprises in MB2B contracts because they are dependent on specific situations. This chapter then discusses the validity of Jurisdiction agreement under the Recast and its implication for micro enterprises. It examined the

scope of Art 25 and its effect on different types of jurisdiction agreements and submitted that because Jurisdiction agreements can grant jurisdiction to a court that would otherwise not have had jurisdiction or deprive a court that would otherwise have had jurisdiction to entertain such matters, jurisdiction agreements which meet the requirement of Art 25 are valid notwithstanding the terms being detrimental to a micro enterprise.

Furthermore, it explores the relevance of consumer jurisdictional rules in the protection of Micro enterprises. Unlike micro enterprises, consumers have a choice of fora - whereas a consumer can only be sued in the courts of the member state in which the consumer is domiciled, the other party can be sued by the consumer either in the courts of the member state where that party is domiciled or in the courts of the member state where the consumer is domiciled. Moreover, a jurisdiction agreement cannot deprive a consumer of the protection granted by the rules of Recast unless in limited cases. It submitted that a similar level of protection is desirable for micro enterprises. This chapter concludes by looking into the interrelationship between the Recast and the Post BREXIT English jurisdiction rules. It was highlighted that Post-Brexit, as both the UK and the EU 27 have signed up to the Hague Convention 2005, the English Courts and the EU27 will be required to uphold exclusive jurisdiction that falls within the Convention's scope. It was argued that, unfortunately, this legal certainty is not available to micro enterprises who enter into a non exclusive jurisdiction agreement because, according to Article 1, the Hague Convention 2005 only applies to exclusive Jurisdiction agreements, as such non-exclusive jurisdiction agreements are not covered under the Convention.

Chapter 6 discusses Governing law issues and the current protection of Micro enterprises under Private International law. It starts by investigating the function of governing law provisions under Rome I. It was argued that governing law that applies to an international B2B commercial contract is one of considerable significance as parties are likely to take measures to settle disputes amicably (thus avoiding litigation) when they can predict or know what law governs their commercial contracts. It highlighted that governing law not only relates to the law that will be applied in cases of contractual dispute but also affects

the interpretation of the contract, prescription and limitation of actions, performance of the contract, consequences of breach of obligations or nullity of the contract. Though issues of jurisdiction and governing law are separate issues, it was shown how jurisdiction agreements could serve as an indicator when considering if a choice of governing law has been clearly demonstrated. It argued that the incoherence between the Recast and Rome I in the application of party autonomy also further complicates protection for weaker parties. There is a necessity for some coherence between jurisdiction rules and governing law rules. It was shown that protecting the defendant is the substantive role of the Recast, while Rome I seeks to apply the law which is most apt for the particular circumstances. While examining the extent of protection available to Micro enterprises under the Rome I Regulation in the absence of a choice of Governing law, it was argued that although the requirement of Article 4 (1), which prescribes the applicable law to specific contract types, is clear, Art 4 (2) which prescribes the applicable law not falling within the ambit of Art 4 (1) can be problematic. It was argued that as the term "characteristic performer" is not defined under the Rome Convention or the Rome I, it can often be challenging to know the characteristic performer in complex commercial arrangements. This chapter then considers the position of a Micro Enterprise in the case of an unfavourable Governing law provision. Thus, it evaluated the extent mandatory rules enhance the courts' role in addressing imbalances between contracting parties and the operation of Article 3 and Art 9 with a special focus on Mandatory rules and overriding mandatory principles. Here it was submitted that because Article 3(1) Rome I places a high threshold for implying a governing law. The term 'clearly demonstrated' by the terms of the contracts or the circumstances of the case suggests that in the absence of express terms, compelling evidence that the parties intended to choose a particular governing law is key. Therefore, encouraging a broader range of connecting factors such as the place of payment and the object of the contract, any reference to foreign law in other provisions of the contract, or reference to a foreign currency may work more in favour of micro enterprises in MB2B transactions. These factors could be grounds for disregarding the presumption of characteristic performance, particularly in justifying the deployment of the escape clauses. It was highlighted that one principal provision which displaces a governing law provision and can potentially limit the power of a larger business to impose unfair

governing law provision on a micro enterprise is “Mandatory rules” contained in Art 3 (3) of Rome I. It was shown that mandatory rules might protect micro enterprises by safeguarding the application of relevant mandatory rules; it also respects the reasonable expectation of the parties by allowing the law of a validly selected choice to regulate the contract in parallel. It was submitted that the cumulative effect of Art 3 is that it prevents, to an extent, the issue of fraudulent evasion of the law by a stronger party in the contract, allowing protection contained not only in the mandatory provisions in the domestic law of a legal system but also community law and binding international provisions. Moreso, overriding mandatory rules under Art 9 are designed to protect the public interest and address the law regardless of the law applicable to the contract. This chapter concludes by examining the relevance of governing law rules of consumer protection to Micro Enterprises. Regardless of the provision of Art 3 of the Rome I, which emphasises the freedom of choice, Article 6 of the Rome I acts as a lex specialis to Article 3. Thereby imposing the law of habitual place of residence of the consumer to the contract regardless of the choice of governing law in so far as the other party pursues commercial activities in that country or, by whatever means, direct such activities to that country and the contract falls within the scope of such activities. Furthermore, Article 6(2) limits the effect of a choice of governing law by specifying that a choice of law cannot deprive a consumer of the protection of a mandatory law that would be applicable in the absence of choice. Thus, Article 6(2) prevents parties from contracting out of consumer protection measures. Protected parties such as Consumers under the Rome 1 can manage their expectations when contracting internationally as any dispute is often assigned to their domestic courts. It was submitted that the benefit of a domestic jurisdiction would be beneficial for micro enterprises as a familiar jurisdiction may likely improve confidence and promote growth. A micro enterprise that finds itself in a situation where the chosen law would have been applicable law in the absence of choice under the Regulation would undoubtedly be lucky, but this is not always the case.

Chapter 7 considers the adequacy of competition law in regulating unfairness. It was submitted that while SMEs have been granted derogations in areas such as taxation and company law and have received favourable treatment under the competition rules

regarding EU's state aid policy, competition law is of little help in the area of unfair terms, particularly in relation to non dominant undertakings under Art 102 or unilateral conduct by such undertakings. Article 102 does not define "abuse" but simply provides non exhaustive examples of abusive conduct. It is therefore often confusing to identify when certain conduct is abusive if such conduct goes beyond or differs from the examples; the standard of harm or what triggers the application of Art 102. It was submitted that if there are clear, predictable standards in place, compliance with the laws is very likely to improve as companies would be better able to police themselves. Article 102, have been said to protect weaker parties in situations showing an imbalance in the bargaining powers of the parties. This statement is however not completely correct as Article 102 only offers protection in cases where the superior party is in a dominant position within the internal market or in a substantial part of it. This chapter then discusses the notion of unfairness under the EU Competition law. It was shown that unfairness in commercial relationships may appear in a number of ways. One way is to execute unfair terms in the contract, including terms relating to the subject matter. Another way is when a stronger business entity abuses its position even if contractual terms seem fair. It can be argued that unfairness, particularly where micro enterprises are involved, should either be regulated under European competition law by means of special rules or be exempted from EU competition law. After this, the focus then shift to the relevance of consumer protection rules under EU competition law to Micro enterprises. Art 12 of TFEU further spells out that "consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities." The General Court in Association *belge des consommateurs test-achatsASBL v. Commission* emphasised that consumer protection is an issue that essentially should be taken into consideration in the implementation of any EU law and policy. Moreso, the control on unfair terms operates between Enterprises and Consumers and aims to ensure that the Consumer's ability to negotiate or choose is not impeded, nor the transaction constitutes an unfair advantage to the Business. This can be said to be a direct form of control of B2C transactions with the aim of ensuring fairness for the consumer. It was submitted that if the relationship between larger enterprises and micro enterprises is not checked, then this flows to the end user-consumer; therefore, the law cannot afford to focus mainly on end-users.

Furthermore, this chapter reviews the current protection contained under relevant cross-sectorial legislations such as the Late Payment Directive and the Misleading and Comparative Advertising Directives. It was highlighted that one of the deterrents of international trade for micro enterprises is the problem of late payment and differences in payment conditions which affect the competitiveness of the business. Considering that late payment for micro enterprises is likely to lead to issues of cash flow and reduction in profit, the protection offered by this directive is laudable. Regardless of contrary provisions contained in the contract, the assurance that in cases of dispute, the court will declare any such unfair provision unenforceable or replace such provision with the statutory default rules should provide some comfort. Unfortunately, it was shown that the spirit of the late payment directive, though implemented in various member states, is often disregarded in practice. A study by the UK BEIS shows that several companies still have long payment terms. The Misleading and Comparative Advertising Directive applies mainly in B2B transactions, although comparative advertising also applies to advertisement directed at consumers. The aim of this Directive is to protect traders against misleading advertising and its attendant consequences. It, therefore, lays down conditions by which comparative advertising is permitted. No doubt, advertising, regardless of whether or not it induces a contract, has an impact on the economic welfare of micro enterprises. More importantly, fundamental rules regulating the form and content of comparative advertising need to be uniform. Therefore, it was submitted that the protection offered to micro enterprises under this Directive is limited to advertising practices only and do not generally address other potentially harmful trading practices between businesses. This chapter then discusses current protection available under sectorial legislation by considering the scope and rationale behind the first B2B directive regulating unfair trading practice in the food supply chain. It then concludes with an appraisal of this Directive and its implications for other sectors. The introductory statement relating to the reason for and objectives of this Directive clearly states that "smaller operators in the food supply chain are more prone to face unfair trading practices (UTPs) due to their, in general, weak bargaining power in comparison to the large operators in the chain." Indeed, smaller businesses like micro enterprises are very

prone to UTPs in any supply chain or commercial transaction due to their bargaining power. Other than peculiar situations relating to perishable goods, a significant number of examples of unfair trading practices under this Directive are equally relevant to micro enterprises in international commercial transactions outside the food supply chain industry.

This thesis has achieved its aim by demonstrating that Micro Enterprises are weaker parties and require favourable legislation when dealing with larger enterprises in international commercial contracts. It has been shown that often, where protection exists for micro enterprises, it does not apply by virtue of their status but rather because they are the party in a specific situation. We have also seen that enforcement is also a major issue in relation to Directives targeted at protecting weaker parties. Pending the time when appropriate protection is offered to Micro enterprises, National authorities have to adopt additional means of monitoring and ensuring that the current protection available is achieving its aim.

8.2 Recommendations

This thesis has argued that the protection of Micro enterprises in MB2B international commercial contracts is of considerable importance to any economy. On this basis, the proposed recommendations below are made in addition to those contained in the body of this thesis.

8.2.1 Micro Enterprise: a more tailored approach.

We have established in chapter 2.1 that Micro enterprises are often generally classed as small enterprises or SMEs. The main problem with adopting a partisan description of SMEs is that it unjustly views legal units as one, thereby mainly treating them equally even though they are entirely different in sizes, ownership and character. Micro enterprises, in particular, should not be subsumed in the category of SMEs but rather identified as a distinct legal unit, namely “Micro Enterprises”.

As shown from statistical data in Chapter 2, the number of micro enterprises in the EU is significantly more than small enterprises and SMEs generally. Research also shows an overwhelming majority of them across the world. Inadequate consideration has been given to micro enterprises under the relevant Regulations. There is a need for a clear delimitation of micro enterprises from other categories of enterprises with a different regulatory regime. The recognition of micro enterprises as a legal unit will ensure that their peculiar limitations and challenges are recognised and that corresponding adequate protection is put in place for them.

Furthermore, In view of the fact that the 2003 Recommendation serves mainly as a guideline, the divergence in the definition of enterprises continues in national laws. It is imperative that any resulting legislation contains a standard definition of a Micro enterprise as what is currently existing is a recommendation. We have shown that this has resulted in a non standard definition even across Europe. Chapter 2.4 highlights that the literal interpretation of Art 2 of the Annex to the 2003 Recommendation suggests that the number of employees' criteria and the financial ceiling criteria are to be viewed as cumulative. The financial ceiling criteria in itself can be seen as either cumulative or alternative. However, different member states have different views regarding this requirement's cumulative and alternative nature.

8.2.2 The hard way, the only way.

According to the public consultation held on the TOP10, most burdensome legislative acts for SMEs,[965] unfair commercial practices, legal redress and disputes relating to consumer protection form some of the onerous legislative provisions for micro enterprises. This should not come as a surprise as some micro enterprises are, by their nature, akin to consumers themselves.

Now, more than ever, it is imperative that active measures be put in place regarding favourable legislation for micro enterprises. Undoubtedly, one of the after effects of the Covid-19 pandemic will be the requirement to implement preventative health measures

[965] EC, Top ten burdensome legislatice acts for SMEs, http://ec.europa.eu/DocsRoom/documents/10036/attachments/1/translations, accessed 4 Feb 2017

in the workplace and a new system of working. These preventive measures, though important, will result in an increase in operating expenses for micro enterprises that continue to operate. Where micro enterprises are forced into a fight or flight mode, it is likely that they begin to over assess the risk of trading internationally, and this risk could be transferred to the consumers; this would be undesirable. We have shown that the concept of "unfairness is such a complex phenomenon, and only hard law would be effective in regulating unfairness for the benefit of micro enterprises.

> "The only way to rectify our reasonings is to make them as tangible as those of the Mathematicians, so that we can find our error at a glance, and when there are disputes among persons, we can simply say: Let us calculate ["calculemus"], without further ado, to see who is right."[966]

Legal certainty, no doubt, is essential and legal certainty is often the most cited reasoning or justification for the doctrine of precedent in common law systems.[967] Hard law will ensure that the rules are clear and foreseeable and guarantee those who are subject to them behave in a manner to avoid a breach or legal conflict and to make clear predictions of their chances in case of litigation.

Regardless of the general nature of Art 352 of the Treaty on the Functioning of the European Union (TFEU), the European Union has no general power to legislate; rather, it must find legal grounds under specific provisions for adopting any EU act.[968] For example, Art 114 of the TFEU allows for adopting measures by a qualified majority in the Council of Ministers in other to establish and ensure the functioning of the internal market. The relatively new EU Consumer Protection Co-operation Regulation,[969] which aims to promote the EU-wide cooperation mechanism for consumer protection by empowering

[966] M.G Navarro "On Fuzziness and Ordinary Reasoning" (2013) In Roy Andrew Partain, "Comparative Contract Law: Methodologically Human Or Artificially Intelligent?" <https://ir.lib.hiroshima-u.ac.jp/files/public/4/49793/20201016114808421443/HLJ_44-1_118.pdf> accessed 27 July 2021, 210

[967] Magdalena Pfeiffer, Legal certainty and predictability in international succession law, Journal of Private International Law ,Volume 12, 2016 - Issue 3, =567; Scarman L.J.: "Consistency is necessary to certainty – one of the great objectives of law" (Farrell v Alexander [1976] QB 345, 371).

[968] Miklós Király, The Rise and Fall of Common European Sales Law, eltelawjournal_2015_2 pg 35

[969] Regulation (EU) 2017/2394 (applies from 17th January 2020) replaces the Consumer Protection Co-operation Regulation (2006/2004/EC)

national authorities to better enforce consumer rights, including in the digital environment, can be a good template for the development of a regime which protects Micro enterprises in MB2B commercial contracts. Like the above Regulation, the European Commission will coordinate the cooperation amongst national authorities to ensure that rights or any relevant legislation are applied and enforced in a steady manner across the Single Market.

An alternative would be an extension of some consumer legislation regarding unfair commercial practices to micro enterprises. In this situation, greater flexibility would be required. UCPD would appear to be more amenable as the rules on unfair commercial practices are less comprehensive than those of UTCCD, thereby leaving more room for flexibility and contextualization.

8.2.3 Freedom of contract: inventive approach to legal interpretation

There have been arguments that EU legislation should regulate B2B contracts, particularly SMEs, where there is an imbalance of bargaining power.[970] The report of the Committee on the Internal Market and Consumer Protection in its EU Green Paper on the Review of Consumer Acquis recognise that 90% of enterprises in Europe are micro enterprises and that 48% of them are prepared to trade across border, but only 29% actually do so.[971] The command paper also recognises that micro enterprises often find themselves similar to consumers when buying certain goods or services. As it is justifiable to say that Micro enterprises bear a resemblance to consumers because of their size, limited experience, information asymmetry, cognition and resources, relevant exceptions to the doctrine of absolute freedom of contract and special rules similar to those of consumers would be preferable. However, extending the status of consumers to micro enterprises, in general, seems unreasonable due to the wide variety of consumer-related protection. Therefore, this thesis advocates for this extension in relation to unfair terms in international commercial transactions.

[970]Vincenzo Roppo, 'From Consumer Contracts to Asymmetric Contracts: a Trend in European Contract Law?' (2009) E.R.C.L, 5,3, 311

[971] Commission of the European Communities, Brussels, 8.2.2007, COM(2006) 744 final Green Paper, on the Review of the Consumer Acquis, Para 4.1,15,

The option of enabling judicial discretion in MB2B commercial contracts is another form of flexibility. This thesis has shown that legal construction of words and phrases has become a common technique in resolving issues of construction in contracts, usually in favour of consumers and other weaker parties. A similar method is desirable for the benefit of micro enterprises in MB2B international contracts, particularly where a term has been validly incorporated. A rule of legal construction where adopted could render a clause ineffective or, at worst, less potent. No doubt, case law can also play a part in reforming the doctrine of Freedom of Contract for micro enterprises. For example, the ECJ recently considered the scope of the duty of national court to assess fairness of consumer terms of its own motion even where these terms are not in dispute.[972]

Arguably, inappropriate use of the rules of legal construction may create a risk of uncertainty which is undesirable in commercial contracts, and this method can be "artificial". However, according to Atiyah, one major advantage of rules of legal construction is that it is extremely flexible and provides a leeway for the 'suffocating grip' of precedent.

8.2.4 Special Protection for Micro enterprises under the Recast in the absence of choice.

This thesis highlights in chapter 5.2 that jurisdiction not only determines the procedural law to be applied in cases of dispute but can also determine the extent of remedy or award. Moreso, Jurisdiction has a massive impact on transactional cost, provides a home-court advantage to one party and exposes the effects of a language barrier.

The general provision of Article 4 of the Recast can be beneficial to micro enterprises only in respect of an action brought against them but not the reverse case. Jurisdiction rules which offer greater flexibility to micro enterprises regardless of whether they are defendants or claimants; or rules which are targeted at ensuring access to justice in

[972] *Lintner v UniCredit Bank Hungary Zrt* (Case C-511/17) ECLI EU:C:2020:188

reasonable time and at a reasonable cost will be more beneficial to micro enterprises. Special jurisdiction rules which guarantees a choice of forum for the micro enterprise preferable. Like art 18 (1), a micro enterprise should be able to choose whether to bring an action against a larger enterprise either in the courts of its member state or in the courts for the place where the micro enterprise is domiciled.

8.2.5 A rethink of standard and negotiated terms

This thesis show in chapter 4.2 that the distinction between standard and individually negotiated terms appears to be the benchmark for protection under relevant Directives and in most legal systems. These provisions could be beneficial to micro enterprises but for limitation in the distinction between standard terms and individually negotiated contracts. Written standard terms remain standard despite negotiations relating to amendments to the proposed contract as long as the terms remain "effectively untouched" at the end of such negotiations.

The level or extent of negotiation is not a matter of concern but rather if the terms were effectively untouched. Thus, this provision is not thoroughly protective of the consumer, much less a micro enterprise. Worryingly, a party who negotiates or agrees to "a lesser evil" while assuming that this is the best-case scenario achievable can no longer contest the reasonableness of the provision.

Considering the amount of influence a micro enterprise usually has even in contracts that are theoretically open to negotiation, this research recommends that unfair terms in negotiated contracts should be regulated where there is a presumption that one commercial party is in a vulnerable position and the other party is aware of this position. Thus, it is worth considering the possibility of extending the provisions relating to standard terms to include individually negotiated terms in MB2B commercial contracts.

The above recommendation should be taken holistically or considered on a case by case basis. Having said that, legislation that enables micro enterprises to bring an appropriate

action in an appropriate place regardless of whether it is standard form contract or individually negotiated terms is recommended.

8.2.6 Regulating unfair Substantive Provisions

The principles of European private law do not define, create, or regulate substantive rights and obligations of the parties. Instead, it is a procedural law specifying the jurisdiction and ways of determining which substantive law will be applicable. Writers such as Zweigert argue that as social values influence only substantive legal issues, the Rome 1 and Recast are free from social influences.[973] No doubt, these regulations have evolved over time. That traditional opinion was due to the perception that contract law seeks to achieve conflicts justice[974](concerned with forms and structure) instead of material justice[975](concerned with content and results), and thus early versions of the regulations did not focus on protective rules.

Matters relating to consensus, including substantive validity, are governed by the application of national law of the chosen governing law. Infringement of substantive rights such as unfairness can only be achieved by substantive rules; therefore, it has been argued that the Principles of EU private international law do not offer substantive protection but only offers procedural protection.

Wafa argues that protection of small businesses should be first generated at the level of EU substantive law on the basis that "principles of international law is no longer a national law in terms of its source, … so its rules should be more compatible with the norms established under EU substantive law than with those contained in the national contract laws of member states". This thesis agrees with the statement that protection should be at the level of EU substantive law but propose a different argument for this conclusion.

[973] K Zweigert "Some reflections on the Sociological Dimensions of Private International law: Or what is the Justice in Conflict of Laws" (1973) 44 university of colorado law review 290

[974] Th.M. de Boer "Facultative choice of law: procedural status of choice of law rules and foreign law", (1996) Recueil des cours 257, 292

[975] Mahmood Bagheri "Conflicts of law, Economic Regulations and Corrective/Distributive Justice", (2007) Univ. Pa. J. Int. Law, 28, 121

The issue of regulating unfair terms cannot be left entirely in the hands of member states due to the risk of fragmentation. Moreso, without a push or direction, states usually adopt a careful and often laid back approach to legislative intervention among businesses. For instance, the UK's Market Research recently held a public consultation to inquire into issues faced by micro enterprises when transacting with other businesses in non-regulated sectors, particularly regarding contract negotiation and awareness of their legal rights and protection.[976] A proposed guidance to larger enterprises dealing with micro enterprises was considered. Although the proposed guidance is noted to potentially help in promoting transparency, improve the business culture and ease some of the challenges faced by small enterprises, a facilitative rather than a prescriptive approach was considered to be more favourable because of the need to ensure that the expectations placed on businesses are not onerous.

According to Storme, "Harmonisation does not equal uniformity." It is, therefore, more important to seek ways of organising this diversity in a predictable manner and within certain parameters without eliminating this diversity.[977] Whilst this statement is understandable, without uniformity, there is the risk of arbitrariness which could result from vague norms.

Prescribing best practice, wordings or templates would not entirely provide context for the expected compliance standards, but rather a more targeted intervention in the protection of Micro enterprises is required. A practical solution to achieving legal certainty within the EU would be to harmonise protection among all EU member states, but the withdrawal of the draft Common European Sales Law after all the preparatory work and the Commissions statement that time was not ripe for promulgation of an optional instrument as a contract law regime shows that this may not be a receptive idea.[978] The alternative, no doubt, would be to regulate unfair terms in international commercial

[976] Department for Business innovation and Skills "Protection for micro businesses in non—regulated sectors response form" https://www.mrs.org.uk/pdf/BIS%20-%20Response%20to%20Consultation%20on%20Protection%20for%20Micro-businesses%20(2016).pdf accessed 26 July 2021

[977] Matthias E. Storme, "Freedom of contract: Mandatory and Non Mandatory Rules in European Contract Law". https://www.law.kuleuven.be/personal/mstorme/Storme-Juridica.pdf accessed 11 May 2018, 1

[978] Miklos Kiraly, "Rise and fall of the common European Sales Law" https://eltelawjournal.hu/rise-fall-common-european-sales-law/ accessed 20 July 2019, 4

contracts at the EU substantive level. European private international law can no doubt direct the regulatory authorities of its member states and can competently accomplish the coordination of different national laws and norms while also preserving the legal and cultural heritage of Member States.

Furthermore, aside the Rome I and Recast Regulations, substantive issues relating to Unfair terms under EU law can be addressed under an EU Directive instead of a Regulation. A minimum requirement in the standard of protection against unfairness should be introduced for the benefit of Micro enterprises to eliminate or drastically reduce the occurrence of such practices, which are likely to have a negative impact on the economy. The minimum harmonisation method of Directives allows Member States to adopt or maintain rules which, at the minimum, meet the requirement, and some member states often go beyond the requirements listed in the Directive.

Justice in international commercial law should not only be procedural protection but also substantive, and regarding governing law rules. It has shown that the law embodies a social, economic, and ideological tool which has the potential to offer protection for certain persons. A system, which at best recognises micro enterprises in such a category or at least creates distinct protective rules, will be beneficial.

8.2.7 Favourable substantive provision

A universal concept similar to the French idea of Improvision contained in Article 1195 (as discussed in chapter 4.3) is desirable for Micro enterprises, and such concept can be incorporated in a suitable Directive. So as not to undermine legal certainty and risk of the unpredictability of commercial transactions, this concept should be adopted with a few requirements.

Firstly, the requirement of “excessively onerous performance” should be clearly defined. Like Art 6.111 of the PECL, the power to make a price adjustment or amendments to basic contractual terms should not be only on the basis that the costs of performance increase

to a level where it exceeds the initial net value of performance or mere inflation. Rather, where the cost of performance becomes infinite, significantly excessive or where, performance is totally useless. Thus, where after concluding a contract, an unforeseen contingency arises which causes a significant drop in a micro enterprises' performance value to nil whilst the price or value of the contract remains the same, the courts ought to have the power to intervene to validate an excuse of performance, failing which such micro enterprise would be in breach of performance of the contract.

It can be argued that adopting this approach for micro enterprises discriminates against other forms of B2B relationships by not being open to all businesses which suffer from real bargaining power disparities or are in a precarious situation. Although this argument has some merit, it is not entirely persuasive. Usually, legislators adopt a categorical approach to the protection of weaker parties; thus, this approach will inevitable lead to the critic that persons in such category enjoy protection only by being member of a certain group regardless of whether they or their counterpart is actually in the precarious position. Moreover, the law has intervened to regulate unfair provisions to effectively balance the inequality of bargaining power and ensure optimal protection for consumers; this protection could be extended to micro enterprises.

The need for contracts to be upheld is not being downplayed. It is acknowledged that arbitrary excuses of performance can offer incentives for opportunistic behaviour or generate serious moral risk, or, at best, discourage damage mitigation. Also, there is the risk of having a domino effect such as an increase in transaction costs or insurance risk being assigned to a party who is not the superior risk bearer which is opposed to the concept of wealth maximization, which suggests that the risk of insurance should be shifted to the party who is in the better position to prevent the risk from occurring or where the risk is insurable, one who bears the lower cost of insurance than the other party. Thus, the excuse for performance should only be on the basis that the cost of the contract has become totally useless for the micro enterprise and not merely because performance has become less valuable. Without the right of renegotiation or excuse of

performance, where performance for the micro enterprises has become nil, there is likely to be no way of avoiding catastrophic losses, and such micro enterprises are likely to go under. Moreso, micro enterprises lack the motivation to mitigate damages and can also overinvest in performance reliance.[979]

Secondly, certain commercial contracts should be excluded from their scope. Contracts that inherently bear risk by their nature should be excluded. As such, where the risk forms part of the contract or where there is an express or implied allocation of risk, it is only fair that such contracts should be enforced regardless. It is logical that a prudent Micro enterprise will insure or take other appropriate measures regarding such contracts.

Thirdly, so as not to distort the basic requirements of mitigating losses, contributory contingency should be considered as an exception. Where the contingency is due to the fault of the micro enterprise, then an amendment or excuse for the performance of such a contract should not be granted. This will ensure that micro enterprises err on the side of caution by curtailing their reliance investments, mitigating loss and deters opportunism.

Fourthly, unlike the French law position, a clear hierarchy between contract amendment and discharge is necessary as the lack of this hierarchy provides the courts with absolute discretion. As opposed to German Jurisprudence, Discharge should be seen as an initial remedy and Contract amendment as the secondary choice. Contract adjustment would be reasonable where either party has made reasonable, significant related investments or where one party has completed performance (except for payment of monies due under the contract). Any adjustment should adequately share the risk whilst reflecting the current market conditions.

No doubt, in the event of contract adjustment, the question of how the price would be adjusted to reflect current market circumstances may arise. There is a notion that the

[979] Alan Sykes, "The Doctrine of Commercial Impracticability in a Second-Best World" (1990) Journal of Legal Studies J. Leg. Stud., 19, 63; Victor Goldberg, "Impossibility and Related Excuses", (1988) J INST THEOR ECON. 144, 100-116

price at this adjustment stage should depend on the original transaction; a suggestion of an equal split of the ex ante profits; this relates to the empirical findings regarding the strong influence of the reference points of the transaction on people's conception of 'fair' outcomes.[980] Bar-Gill and Ben-Shaker[981] suggest that a post equal split of profits and losses would achieve also ex post proportional division of new surplus and the corresponding loss. Regardless, of whether supplus and loss is divided ex ante or ex post, various studies show that "equal split' is often the most 'fair' one.[982]

Where the law offers micro enterprises the right to discharge, the stronger party may likely offer a contract adjustment or price adjustment as the cost for the stronger party may presumably be much lower than the loss that would result from discharging the contract. Another option will be to discharge the contract and award reasonable reimbursement of reliance expenditures.

8.2.8 Better knowledge and awareness for Micro enterprises

It is imperative that better awareness regarding international commercial transactions be given to micro enterprises. Such awareness will help these enterprises gain the knowledge and skills needed to make informed decisions. The EC needs to engage in positive risk awareness, adopt key mitigation that minimises unfairness and empower micro enterprises to boost confidence and trade.

8.3 Potential problems in a regulatory framework for protection of micro enterprises

This research challenges the current level of freedom of contract in international MB2B commercial transactions. This does not relate to the freedom of parties to enter into a contract but rather the freedom from legal interference with a contract once agreed. It is this latter aspect that conceals the important fact that most times, when a micro

[980] D. Kahneman, L. Knetsch and R.H. Thaler, "Fairness as a Constraint on Profit Seeking: Entitlements in the Market" (1986) Am Econ Rev 76, 728–741.

[981] O. Bar-Gill and O. Ben-Shakar, 'Threatening an "irrational" breach of contract', in F. Parisi et al. (eds.), The Law and Economics of Irrational Behavior (Stanford University Press, 2005).

[982] Allan Gibbard, *Wise Choices, Apt Feelings* (Harvard University Press, 1990), 262–263; D. Kahneman, L. Knetsch and R.H. Thaler, 'Fairness as a Constraint on Profit Seeking: Entitlements in the Market', (1986) Am Econ Rev 76 ; J. Ochs and A. Roth, 'An Experimental Study of Sequential Bargaining', (1989) Am Econ Rev, 79 ; W. Guth, R.Schmittberger and B. Schwartz, 'An Experimental Analysis of Ultimatum Bargaining', (1982) J Econ Behav Organ, 3

enterprise contracts or seemingly strike a bargain with a larger enterprise, it is likely that there is no real freedom of contract, practically because the micro enterprise is obliged to take the contract as is, or negotiate within certain parameters or leave it. No doubt, freedom of contract must surely imply some choice or room for bargaining. As Cohen[983] posited, to put no restriction on freedom to contract will logically lead to contract of slavery. The decreasing gap between classical economic theories and the realities of the 21st century has shown that the law can be adapted to fit the rapid development of commerce.

While it is crucial to protect micro enterprises, it is vital to consider the question, at what cost? Firstly, some authors argue that it is onerous for large enterprises to determine the size of their clients, particularly when trading internationally or transacting via electronic means.[984] This additional obligation which may result from offering special rules to micro enterprises, may be unattractive. I argue that determining the size or other relevant information about the client is usually considered paramount for diligent businesses in modern times. In fact, most successful businesses consider this due diligence which is embedded in most commercial transactions, as a matter of policy or good practice.

Secondly, it has been argued that not all micro enterprises are weak, it is difficult to actually determine which party is weak, and a blanket protection is unlikely to achieve the aim of protection of weaker parties[985]. Hondius[986] suggest that there is a plausible reason why non-consumers are not afforded similar protection as consumers; this is because it is difficult to distinguish between those enterprises that are worthy of similar protection as consumers and those that are not. Honduis further assert that in 2006 legislators attempted to do this but found no convincing criteria to draw the line between these enterprises. In response, this argument is, at best, convenient. As it has been shown that

[983] B. Cohen, "The basis of contracts" (1933) 46 Hav law review 553, 586

[984] F Simoes, "SMEs in the common European sales law" in M Loos and I Samoy (Eds) The Postion of Small and Medium Sized Enterprises in European Contract law, (Cambridge; Intersentia, 2014) 13; see also Janahi, Wafa,' Party autonomy and small business protection in cross-border commercial contracts under EU private international law : a critical analysis of the Brussels I and Rome I regulations', (PhD thesis, University of Bristol 2015) 76

[985] Janahi, Wafa,' Party autonomy and small business protection in cross-border commercial contracts under EU private international law : a critical analysis of the Brussels I and Rome I regulations', (PhD thesis, University of Bristol 2015) 76

[986] E.H. Hondius, 'The notion of consumer: European Union versus Member States', (2006) Sydney Law Review, 95–96.

several studies, including chapter 2 of this thesis, draw numerous comparisons between consumers and micro enterprises; and highlight the distinction between micro enterprises and their larger counterparts. Thus, micro enterprises are clearly distinguishable from other enterprises and should be offered protection.

Thirdly, another likely argument would be why should a micro enterprise enter into an unfavourable contract unless it is for an essential service such as those in the nature of public utility or unless there are no rival competitors, in which case such situations are dealt with under competition law. The answer to this will be to point out the inadequacy of competition law in regulating unfairness, as discussed in chapter 7 of this thesis. Moreso, this argument fails to consider the character of modern economic environment and that the continued ability to trade is a vital aspect of economic growth.

Fourthly, one can argue that if very attractive legislations and incentives are provided to Micro enterprises, this may create a mindset where these enterprises do not want to grow due to these incentives. For example, in France, it is believed that some small companies avoid hiring a fiftieth employee due to the strict regulatory compliance required from firms with 50 or more employees, which does not apply to small enterprises.[987] While this argument is plausible, some other enterprises will be willing to grow. In fact, prior research in West Germany shows that, in general, every second new entrepreneur previously worked in the same branch. The research demonstrated that entrepreneurs are more likely to set up larger enterprises when they have previous experience in self employment or long professional and previous sectoral experience as well as management experience. Also, previous research suggests that habitual entrepreneurs and owner managers often succeed in starting another business due to their growing network and their ability to recognise business opportunities.[988] It is therefore pertinent that existing micro enterprises succeed in order to grow.

[987] American Economic Association, 'Why so many French firms are stuck at 49 employees', (November 28, 2016), <https://www.aeaweb.org/research/charts/french-firms-50-employees> accessed 1 June 2018

[988] Friederike Welter, Who Wants To Grow Up? - Growth Intentions and Growth Profiles of (Nascent) Entrepreneurs In Germany, 2001 Babson College-Kauffman Foundation Entrepreneurship Research Conference June 14-16, 2001, Jönköping, <https://www.researchgate.net/profile/Friederike_Welter/publication/38173322_Who_wants_to_grow_growth_intentions_

Fifthly, the issue of protection of a certain category of enterprises raises a policy question. The development of the protection of weaker parties under European contract law has been piecemeal. Legislators have often adopted a sectoral approach in regulating relevant issues relating to consumer protection by enacting relatively narrow directives that cover only specific situations.[989] Aside the UCCTD and UCPD, the Consumer Rights Directive[990] , which applies to B2C contracts whether on premises, off premises or distance, aims at improving specific B2C Internal Market by providing a higher level of consumer protection and reducing risk in international contracts.

Sixthly, Some jurists argue that the principal aim of the EU has always been "to safeguard the level of demand in the internal market and not so much the protection of the consumers, even in B2C contracts."[991] While it may be correct that the establishment of the internal market does not automatically protect consumers in a contractual transaction, Article 169 and Art 12 of the treaty on the Functioning of the European Union expressly state consumer protection is one of the aims of the European Union. Unfortunately, this is not the case for Micro enterprises despite the EC having noted that

and_growth_profiles_of_nascent_entrepreneurs_in_Germany/links/54f48a950cf2f28c1361dbf0.pdf> accessed 7 December 2019.

[989] Jakob Søren Hedegaard and Stefan Wrbka, "The Notion of Consumer Under EU Legislation and EU Case Law: Between the Poles of Legal Certainty and Flexibility", in M. Fenwick, S. Wrbka (eds.), *Legal Certainty in a Contemporary Context: Private and Criminal Law Perspectives*, (Springer, 2016) 70

[990] 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, entered into force 13th June 2014

[991] Pieter Brulez, "Creating a consumer law for professionals: Radical Innovation or Consolidation of Natioanal practices?" < https://lirias.kuleuven.be › retrieve> accessed 5th January 2020; Green Paper on the Review of the Consumer Acquis COM (2006) 744 final, Brussels, 8 February 2007, 5-6; . Martijn Hesselink, "SMEs in European contract law - Background note for the Eurapean Parliament on the position of small and medium-sized enterprises (SMEs) in a future Common Frame of Reference (CFR) and in the review of the consumer law acquis - Final version - 5 July 2007, 13-14; Martijn Hesselink, "European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?", (2007) Eur. Rev. Priv. Law 328-330; H. Collins, "Good Faith in European Contract Law", (1994) Oxf. J. Leg. Stud.1994, 236-238; A. Verbeke, Negotiating (in the shadow of a) European Private Law, Tilburg Institute of Comparative and Transnational Law Working Paper no. 2008/9, October 2008, 9-11.; S. Grundmann, "The Structure of European Contract Law", European Review of Private Law 2001, 5220-521; M. Hesseunk, "SMEs in European contract law - Background note for the European Parliament on the position of small and medium-sized enterprises (SMEs) in a future Common Frame of Reference (CFR) and in the review of the consumer law acquis" - Final version - 5 July 2007, 13-14, <http:ljwww.pedz.uni-mannheim.de/daten/edz-ma/ep/07/EST17293.pdf>; Green Paper on the Review of the Consumer Acquis COM (2006) 744 final, Brussels, 8 February 2007, 5-6; H. Collins, "Good Faith in European Contract Law", (1994) Oxf. J. Leg. Stud., 236-238; S. Grundman, "The Structure of European Contract Law", (2001) Eur. Rev. Priv. Law , 5220-521; TFEU, Art 169.

> "some businesses, such as individual entrepreneurs or small businesses, may sometimes be in a similar situation as consumers when they buy certain goods or services, which raises the question whether they should benefit to a certain extent from the same protection provided for consumers."[992]

It is widely accepted that the protection afforded to consumers under both the directives and regulations do not extend to enterprise regardless of whether or not they are micro enterprises.
Moreso, the recent Enforcement and Modernisation Directive[993] obligate member states to introduce powers to fine traders up to 4% of the trader's annual turnover for any breach of consumer protection law.

However, after these analytical discussions, one may wonder whether this should strictly remain the case. The possibility of extending consumer protection rules to micro enterprises and non specialized businesses have been heavily critiqued by authors such as Blurez,[994] who highlights that legal protection in B2B contracts should only be limited to procedural unfairness and the law should not interfere in contracts merely because there is an inequality of bargaining position but rather only if such position is abused.

Taking this firm approach would be detrimental to weaker parties such as micro enterprises, particularly considering that “abuse“ in relation to unfair terms can be very hard to prove. To this effect, a few cases have ever appeared before the courts dealing with abuse of inequality in bargaining positions or unfair dealing in B2B contracts. Does this mean that the vast majority of cases between business parties are fair? This deficiency in case law is thought-provoking and emphasises the practical importance of this research.

[992] Green Paper on the Revision of the Consumer Acquis of 2007
[993] Directive (EU) 2019/2161 of the European Parliament and of the Council amending Council Directive 93/13/EEC (unfair contract terms), Directive 98/6/EC (price indication), Directive 2005/29/EC (unfair commercial practices) and Directive 2011/83/EU (consumer rights)
[994] Pieter Brulez, Creating a Consumer Law for Professionals: Radical Innovation or Consolidation of National Practices? 10

It has been identified that one of the key obstacles to combating unfairness is overcoming the problems which arise from the fear factor. Arguably, one of the functions of the law is to make statements rather than directly control behaviour.[995] If this is true, then protective rules developed for MB2B contracts will, at the minimum, affect social norms and deter large enterprises from taking undue advantage of smaller enterprises. No doubt, some cases may be trivial and too diverse to encourage legislative intervention, but the imperative need of micro enterprises to be protected still remains and must be tackled if the law is to perform its proper function.

It can also be argued that Judges should not have the economic duty to assess financial terms or make economic decisions as to the economic efficiency of a contract as the determination of the price depends on market.[996] Such arguments are overstated and take for granted the critical notion of unequal bargaining power, which is highly problematic in the context of a competitive market.[997] No doubt, some judges have the necessary training and expertise to carry out this function. Where they do not, judges can call on expert testimonies to understand the underlying formulas or economic consequences of reaching a particular decision. According to Partain, computers today need not "understand the law, so long as they can receive the necessary data to complete the forms."[998]

No doubt, the issues raised here can be seen as one of equity vs equality. Micro enterprises take a huge risk in setting up businesses in the midst of sizeable competitors and without the prospect of significant protection or rewards. A favourable regulatory regime could be one incentive to take such risks or explore international business opportunities.

[995] Cass R Sunstein, 'On The Expressive Function Of Law' (1996) Columbia Law Review 2021; Eric Posner, 'The Regulation of Groups: The Influence of Legal and Non Legal Sanctions on Collective Action' (1996) 63 University of Chicago Law Review 133; Lawrence Lessig, 'The Regulation of Social Meaning' (1995) 62 University of Chicago Law Review 944.
[996] Sophie Vigneron, "The Implementation of the Unfair Contract Terms Directive in France" (2008) 8 CIL, 3 113
[997] R Posner Economic Analysis of Law (2nd edn, 1977) pp 84–88; Trebilcock 'The Doctrine of Inequality in Bargaining Power: Post-Benthamite Economics in the House of Lords' (1976) 26 Univ Toronto LJ 359.
[998] Roy Andrew Partain, "Comparative Contract Law: Methodologically Human Or Artificially Intelligent?" <https://ir.lib.hiroshima-u.ac.jp/files/public/4/49793/20201016114808421443/HLJ_44-1_118.pdf> accessed 27 July 2021, 210

The often heard argument in commercial law is for certainty or predictability. Lord Mansfield's statement in *Vallejo v Wheeler*[999] is perhaps the most frequently cited one.

> "In all mercantile transactions, the great object should be certainty: and therefore, it is of more consequence that a rule should be certain than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon."

Furthermore, Lord Bingham noted that: "The importance of certainty and predictability in commercial transactions has been a constant theme of English commercial law at any rate since the judgment of Lord Mansfield CJ in *Vallejo v Wheeler* and has been strongly asserted in recent years".[1000] Similarly, Lord Hoffman alluded to "a sound practical intuition that the law of contract is an institution designed to enforce promises with a high degree of predictability."[1001]

Supporters of legislative action in regulating unfairness in contracts could claim that only hard law is adequately effective to address such an intricate phenomenon as unfairness, and opponents would argue that such an intervention would harm parties' freedom.[1002] Arguably, the courts should not replace an actual agreement with a presumed agreement, and no 'equitable consideration' should permit courts to vary a commercial contract. However, adopting such a rigid approach would be detrimental to weaker parties and restricting the doctrine of freedom of contracts in MB2B commercial transactions is a fair price to be paid to encourage weaker parties such as micro enterprises to participate in international trade.

The unfairness of a governing law clause or jurisdiction law can be seen as both a substantive and procedural issue.[1003] This thesis has shown the inadequacies of the available protection under the Rome I, Recast and relevant Directives. In addition, the huge expenses of litigating in a foreign jurisdiction may lead to a weaker party

[999] Vallejo v Wheeler (1774) 1 Cowp. 143, 153; 98 E.R. 1012, 1017.
[1000] *Golden Strait Corporation v Nippon Yusen Kubishka Kaisha* (The Golden Victory) [2007] UKHL 12 at [23]
[1001] *Chartbrook Ltd. v Persimmon Homes Ltd*. [2009] UKHL 38 at 37
[1002] Rupert Jackson, "Review of Civil Litigation Costs", Final report (2010), The Stationery Office, 78,130- 131, 200,
[1003] Jonathan Hill, *Crossborder Consumer Contracts* (OUP, 2008) 193

abandoning its claim,[1004] thereby making the stronger party less likely to be sued. It has also been shown that the law saw the need to provide relief in cases where there had been an exercise of illegitimate or undue pressure through a number of doctrines. Specific rules offering protection for micro enterprises against unfairness are very desirable.

Moreover, we have shown that agreeing the terms of a contract, including the governing law and jurisdiction, is mainly a negotiation process and considering parties often have unequal status and bargaining powers, the stronger commercial party may insist on more favourable terms. It is also not unusual to find parties agreeing to a contract without fully understanding the extent of their obligation. In some cases, the performance of the service has commenced before the contract is in effect. Without specific knowledge and experience in international transactions, it may be difficult for a micro enterprise to identify and assess a number of sophisticated issues which might not arise when dealing with domestic contracts. Therefore, unfair terms introduced by stronger parties exercising bargaining power that is not regulated are likely to undermine the economic viability of the transaction.

8.4 Limitations of Research, Transmission and Areas of future work

It is imperative that any thesis acknowledge its limitations, explore the possibility of transmission to other countries or sectors. In doing this, areas of future work can be determined.

8.4.1 Limitation of the Research

The economic analysis of the law in this thesis is both positive and normative because it is not only important to describe economic phenomena but to discuss the value of economic fairness and what it ought to be. This analytical approach employs inter-disciplinary dynamics and thus enriches our discussion of the law. The method deployed in the analysis is more pragmatic than theoretical, one might be accused of favouring the

[1004] Felix Sparka, *Jurisdiction and arbitration clauses in maritime transport documents, a comparative analysis* (London springer, 2010) 6; James Zimmerman, "Restriction on forum selection clauses n Franchise Agreements and the Federal Arbitration Act: Is State Law Preempted?" (1998) Vanderbilt Law, 51, 3, 760

common law approach that prizes pragmatic solutions over theoretical analysis, conceptualism and European continental style abstraction. Thus, it might be useful to clarify and justify why this thesis adopts more of a pragmatic approach than one of theory. In the words of Schwartz and Scott,[1005] "*Contract law has neither a complete descriptive theory, explaining what the law is nor a complete normative theory, explaining what the law should be.*" Hence, a pragmatic approach analysis of the law provides more practical insight into the current issues.

This thesis discusses current legislation, existing case law and academic authorities. Furthermore, it examines relevant case law from the CJEU, relevant Member State Courts and the Opinion of Advocate Generals elaborately. The practical implication of this is that it saves time and costs for the reader while also making the law more concrete in the mind of the reader. No doubt there is a disproportionate references to case law from other jurisdictions like France and Germany due to limitations regarding data collection. However, formal translation of relevant statutes as contained in World Intellectual Property Organization website was utilised. Attempts were made to utilise the University of Aberdeen EUPILLAR database without much success.

This thesis is written in English language, and the sources utilised are also written in English. It can be argued that a piece of work that considers other legal systems other than English law should consider other literature written in other languages. However, this thesis reviewed various works of foreign authors, albeit written in English. It is submitted that this thesis will be a good piece of work for scholars who write in languages other than English to add comparative insights to the relevant topic. Moreso, the English language is a widely spoken and written language in the European Union.

The special rules which favour presumed weaker parties such as consumers in European private International law mirror those contained in sophisticated national legal systems.

[1005] Alan Schwartz and Robert Scott. " Contract Theory and the Limits of Contract Law" (2003) Yale Law Journal, 113, 2

Some of these principles reflect the influence of various areas of law.[1006] Critical legal theorists such as Durkheim and Weber reflect on the ideological power of law to reinforce social hierarchies. These theorists assert that in order to achieve fairness in contracts, measured by equal bargaining positions between the parties, the socio-economic context must change. Campbell, Macneil, Kennedy, Austen-Baker, as well as neo-liberals such as Friedman, recognise that contractual exchanges are composed of both competitive and cooperative elements. Like cooperation, fairness and its implicit and explicit regulation through judicial doctrines are intrinsic to contract.[1007] There have been functional amendments of private law due to the economisation of private law in Europe, and the growing recognition of the influence of general principles of European Union law on private law.[1008]

8.4.2 Transmission: Relevance of research to other countries, particularly developing countries

This research is relevant to developing countries as the growth and development of these countries are significantly dependent on the success of micro enterprises. SMEs comprise of about 90% of enterprises in the private sector in developing countries. They create over 50% of jobs in the private sector. In Africa, for example, SMEs alone provide an estimated 80 per cent of jobs across the continent. Sub-Saharan Africa has over 44 million SMEs, almost all of which are micro enterprises.[1009]

Some of the recommendations in this thesis could be transmitted to other legal systems outside the EU, including developing countries. For example, it is paramount that Micro enterprises, regardless of their domicile, be recognised as a distinct units. This is one of the core recommendations made in this thesis. Unfortunately, with regards regulatory protection, whilst developed economies may be more receptive of this recommendation,

[1006] J Dolinger "Evolution of principles for resolving conflicts in the field of contracts and torts" (2000) 283 Recueil des cours 237

[1007] Rosalee S Dorfman, "The Regulation of Fairness and Duty of Good Faith in English Contract Law: A Relational Contract Theory Assessment",http://1neaqn120jll48xd411i5uav.wpengine.netdna-cdn.com/files/2013/09/Fairness-English-Contract-Law_Dorfman.pdf accessed 3 March 2019

[1008] Hans-W. Micklitz, "The Visible Hand of European Regulatory Private Law: The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation". European University Institute Working Paper Law No. 2008/14, 47

[1009] CSIS Briefs, Supporting Small and Medium Enterprises in Sub-Saharan Africa through Blended Finance, Centre for strategic and International studies, July 7, 2021

it is acknowledged that this may be a challenge for developing countries. Unlike most developed countries, where amendments or improvements to the inadequacies in the current protective legislation will be required, developing countries must first establish or empower the institutional structures that will support the enforcement of laws to provide a guarantee for protection.

The effectiveness of the implementation of protective legislation for micro enterprises will depend on the working of the relevant legal system, the enforcement of rights, the foreseeability and predictability of legal decisions, the political system, educational system, amongst others. The interrelationship between these systems has been highlighted in this thesis. As such various practitioners from the legal, economic and social systems should be enlisted to help understand how each sector can help research how their legal and economic system actually operates, improve on its weaknesses and support one another in the protection of micro enterprises.

Moreso, the protection of micro enterprises in developing countries can depend on institutional or political factors. The increasing role of large businesses in financing politics around the world can sometimes create a fusion between politics and business.[1010] This fusion can, in turn, cloud the judgement of legislative authorities who are more likely to favour businesses who have provided support or where they have a vested interest. Also, low income and weak rule of law, amongst other factors, drive corruption.

It has been shown that variations exist time and time again in legal systems and legal cultures in the treatment of B2B and B2C relationships. In particular, a number of statutory instruments have evolved over the years, even in developing countries, to protect consumers in B2C commercial transactions. Despite the tension between the approach utilised by consumer contract legislation and the fundamental principles of freedom of contract, the protection of consumers is often justified.

[1010] Vineeta Yadav, *Political Parties, Business Groups, and Corruption in Developing Countries,* (OUP ,2011);

In the light of the uncontroversial importance of these enterprises, it is therefore imperative that at least general, non-political recommendations in this thesis are adopted. As such, access to affordable capital is key, as it has been highlighted that without sufficient working capital, these enterprises are unable to invest and grow. Furthermore, ensuring that Micro enterprises have information on how to make realistic market assessments, seek professional advice, gain confidence when dealing with larger businesses, and, more importantly, adequate regulatory protection when dealing with larger businesses, particularly across borders, is important.

8.4.3 Area for future research

It is important to monitor and assess the short and long term impact of the Pandemic on Micro enterprises: New research is evolving, and there are fresh data sets regarding the impact of the Pandemic on Micro enterprises. A research conducted by a UK organisation called Simply Business, into the impact of Covid-19 on UK small businesses highlighted that out of the 1,206 small enterprise owners interviewed, more than four in every five small enterprise owners stated that the Covid 19 pandemic has negatively impacted their mental health and 61% of them have had serious financial concerns at some stage during the pandemic. The research shows that, on average, SMEs have lost £15,673 each, and the cost is only going to increase as total losses are expected to reach £22,461.

8.5 Conclusion

Although parties generally are allowed to agree the terms of their contract and under the rules of Private international law to choose their governing law and their jurisdiction clauses, thereby avoiding legal uncertainty and huge transactional cost. Sophisticated enterprises with strong bargaining power are more likely to have the legal expertise, knowledge and experience with negotiating and dealing with foreign law.[1011] This situation is slightly different for micro enterprises. In the absence of fraud or other vitiating elements, it is often difficult to determine the factors underlying any contest or

[1011] Hugh Beale " The CESL Proposal: An Overview" (2013) Juridica International, 20, 26

negotiation leading to "agreement" of the contractual terms. Moreso, a larger enterprise most likely can foresee the subsidiary application of a particular national law or at least that gaps can always be filled through the applicable law in the absence of choice.

Legal and economic scholars have always argued that where contracts are made in a competitive market, the law has no basis for intervening in contractual terms.[1012] For Atiyah, the function of the court is to ensure procedural fair play and has no substantive function beyond this. "It is not the Court's business to ensure that the bargain is fair or to see that one party does not take undue advantage of another, or impose unreasonable terms by virtue of superior bargaining position.".[1013] According to Wang, "The exertion of the autonomy function of private laws must take the freedom and equality of the parties and the accompanying free competition and equality of opportunity as premises; only in this way can the validity of the contract content be guaranteed…"[1014]

Equality of economic power does not always equate to equality of contractual rights and vice versa. Negotiation between businesses is seen as utopia when in reality, contractual parties rarely have the same level of bargaining power. If substantial differences exist in the bargaining power of the two parties, "this amounts to the exercise of the unofficial government of some by others via private law,"[1015] which will result in one party's freedom and the other party's subordination. Consequently, strict adherence to the principles of freedom of contract in MB2B transactions would simply amount to the stronger party imposing its will on the weaker party.

Negotiating parties should "meet each other on a footing of social and approximate economic equality".[1016] No matter how agreeable the parties are at the time of agreeing the contract when a dispute arises, they are very likely to exploit any uncertainties and weaknesses in the contractual terms of the agreement, including jurisdiction

[1012] Shmuel I. Becher, "Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met" (2008) Am. Bus. Law J., 45, 4, 724

[1013] P.S Atiyah, *The rise and fall of freedom of contract* (Oxford:Claredon, 1979) 404

[1014] Wang, *General principles of the civil law*. (China University of Political Science and Law Press, Beijing, 2009) 247

[1015] Schwartz A, Karl N., Llewellyn and the origin of contract theory. In: Klaus JS, Wal SD (eds) *The Jurisprudential Foundations of Corporate and Commercial Law* (trans: Haijun J,. Beijing University Press, Beijing) 41

[1016] Friedrich Kessler, "Contracts of Adhesion -Some Thoughts about Freedom of Contract", (1943) 43 COLUM. L. REx: 629 - 630

agreements.[1017] Economists have considered the concept of fairness in competitive market environment. Several economic models agree that all persons are solely pursuing their material self-interest with little regard for "social" goals.[1018] According to Fehr et al., "in a competitive experimental market with complete contracts, in which a well-defined homogeneous good is traded, almost all subjects behave as if they are only interested in their material/monetary payoff".[1019] Conflicting evidence also exists which suggests that behaviour is affected by a fairness motive[1020] and bilateral bargaining experiments show that a number of persons do not care solely about material payoffs[1021]

Over the last few decades, economists have paid considerable attention to investigations of the ultimatum game[1022] and the theoretical standard prediction based on maximization of the monetary payoff (responders accepting the smallest possible offer and proposers offering the minimum possible offer). Some experiments with ultimatum games show that players are typically not simply maximizing their monetary payoff. Instead, responders frequently *reject* offers they perceive as *unfair,* and proposers anticipate this by offering a substantial share, usually with modal and median offers between 40 and 50 per cent.

Smith suggested that the best economic benefit can usually be accomplished when persons act in their self-interest. According to him, "It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their

[1017] Mary Keyes & Brooke Adele Marshall "Jurisdiction agreements: exclusive, optional and asymmetrical", (2015) J. Priv. Int. Law 11, 3, 361

[1018]Smith, Vernon L., and Arlington W. Williams, "The Boundaries of Competitive Price Theory: Convergence Expectations and Transaction Costs," in L. Green and J. H. Kagel, eds*., Advances in Behavioural Economics*, Vol. 2 (Norwood, NJ: Ablex Publishing Corporation, 1990); Roth, Alvin E., Vesna Prasnikar, Masahiro Okuno-Fujiwara, and Shmuel Zamir, "Bargaining and Market Behavior in Jerusalem, Ljubljana, Pittsburgh, and Tokyo: An Experimental Study," (1991), American Economic Review, 89, 1068; Kachelmeier, Steven J., and Mohamed Shehata, "Culture and Competition: A Laboratory Market Comparison between China and the West," (1992), J Econ Behav Organ , 19, 145; Guth, Werner, Nadege Marchand, and Jean-Louis Rulliere, "On the Reliability of Reciprocal Fairness-An Experimental Study," (1997) Discussion Paper, Humboldt University Berlin

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own interest".[1023] Regardless of the bewildering variety of evidence on whether persons are intrinsically fair or not, the probability that persons are generally not always fair is not negligible.

It has been argued that a business which incorporates unfair terms in their contracts will lose potential customers to other competitors.[1024] It is therefore not in the stronger party's best interest to include unfair terms and offer them on a take-it-or-leave-it basis. This statement seems right in a competitive market where all enterprises are confident and reasonably informed of alternatives. Nevertheless, market assumptions and the potential solution might not be a sufficient answer to the danger of unfairness in MB2B contracts.

It has been suggested in various areas that an effective solution to legal certainty within the EU would be to harmonise protection among all EU member states.[1025] Yes, there was an hesitation by the EC regarding the harmonisation of contract law, as seen in the withdrawal of the CESL, notwithstanding all the time and resources invested in the preparatory work. However, taking into consideration the evolving consequences of the current climate on micro enterprises, the time seems right to re-assess this position.

This thesis demonstrates that the current protection available to Micro enterprises in international B2B commercial contracts is inadequate and should be replaced by clear, consistent principles that reflect these enterprises' economic position. Creating an environment that allows suitable legislative protection would help these enterprises to thrive.

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