

Is it Fair to Sell Your Soul?

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Marco Loos & Joasia Luzak, *Wanted: A Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers* (Ctr. for the Study of European Contract Law, Working Paper No. 2015-01, 2015), available at [SSRN](#).

The reliance of online service providers on lengthy terms of service or related documents is easily mocked. When I teach this topic, I can choose to illustrate the topic with the selling of souls, in [cartoon](#) or [written](#) form, point to the absurd [length](#) of the policies of popular sites, and highlight [experiments](#) that call us out on our love of the I Accept button. But behind the mirth lie a number of serious legal issues, and the recent working paper by [Marco Loos](#) & [Joasia Luzak](#) of the University of Amsterdam tackles some of them.

Loos & Luzak work at the Centre for the Study of European Contract Law, and their particular concern is with the European Union's 1993 [Unfair Contract Terms Directive](#). They point out that although the gap between typical terms and policies and the requirements of the Directive is often pointed to, it is rarely studied in detail. In their thorough study, the authors examined the instruments used by five well-known service providers, and evaluated them against the Directive's stipulation that mass terms (those not individually negotiated with the consumer) be 'fair'.

The detailed paper, full of examples from the policies of the services under review (Dropbox, Facebook, Twitter and Google), covers topics including modification and termination of the agreement, as well as how liability is managed. Despite the focus of the work being the UCT Directive, the analysis is also linked with developments in related fields of law, such as the gradual expansion through Court of Justice of the EU (CJEU) decisions of the 'consumer' provisions of the Brussels Regulation on jurisdiction. The authors save particular criticism for the lack of clarity in how terms are drafted.

Importantly, the paper also tackles the preliminary question of whether the statements we know and love actually fall within the scope of the Directive, which is about contracts and about consumers. They challenge the assumption that 'free' services are excluded, but do note that in some cases more detail on the actual use of an account may be necessary in order to be certain that the Directive is applicable.

What Loos & Luzak have done here also contributes to debates on consent, rights and technology. In data protection and in consumer law, much depends on assumptions about information – what must be provided, how it informs decisions, and what legal options are available to the end user. One cannot doubt the skill that goes into drafting some of the examples that are cited in this paper, but the authors are right to call for greater study and vigilance – particularly on the part of national consumer authorities. They hope that if the CJEU is faced with appropriate questions in future years, the result might be a gradual raising of consumer protection standards. Indeed, this might well have implications across the world – as Jack Goldsmith and Tim Wu discussed regarding earlier data protection disputes in their 2006 book, *Who Controls The Internet?* – and of course other agencies, such as the [FTC](#) and the [Australian Privacy Commissioner](#), are interested in these issues. So, this recent work on common clauses and legal requirements for fairness should interest European and non-European audiences alike.

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