

Fairness around the world

# Fairness in contract law

## 1) Fairness is protected indirectly – freedom of contract delivers fair results by facilitating bargaining

- Regulate to facilitate bargaining: P2B Regulation
- Anti-discrimination law: equal opportunities
- Inequality of bargaining power (civil law more protective than common law)

## 2) When fairness is protected directly, this is often **done via rules, not standards**

- E.g. Unfair Commercial Practices Directive (black list); Data Act (grey list)
- No efficiency defence

## 3) In rare moments contract law allows judges to use a standard to determine fairness

- Fairness is protected absent complex cost benefit analysis designed to minimize type 1 errors, it safeguards rights of weaker parties to a contract
- Fairness is not individualised (the reasonably circumspect consumer) – type 2 errors emerge

# Fairness in the DMA – not so new perhaps

## DMA (2023)

Recital: 33: unfairness should relate to **an imbalance between the rights and obligations** of business users where the gatekeeper obtains a **disproportionate advantage**

## Unfair Terms in Consumer Contracts Directive (1993)

Art 3(1): “A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a **significant imbalance in the parties’ rights and obligations** arising under the contract, to the detriment of the consumer.”