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Personal Data Commodification and the Doctrine of Immoral Contracts: A Critical Legal Analyses of the 'Consent or Pay' Model in the Portuguese Legal Framework

Dissertation to obtain the Master's Degree in Law, in the speciality of Business Law and Technology

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March 2025

Anti-plagiarism Statement

I, Polina Oleksandrivna Popovych, hereby declare that the dissertation 'Personal Data Commodification and the Doctrine of Immoral Contracts: A Critical Legal Analyses of the 'Consent or Pay' Model in the Portuguese Legal Framework' is exclusively the result of my own independent research and work. All sources that have been referenced in the preparation of this dissertation have been properly acknowledged and referenced. I am aware that the use of unacknowledged materials and sources constitutes a serious ethical and disciplinary breach.

Polina Oleksandriva Popovych

Acknowledgements

This endeavour would not have been possible without the guidance, support, and advice of my supervisor, Professor Fabrizio Esposito, whose challenging voice has made a lasting impact and pushed me to improve and grow. I am grateful for his time, expertise, and valuable feedback throughout this process.

A special thanks to the WhatNext.Law centre, who generously provided knowledge and expertise and to whom I extend my gratitude for the financial support provided through a scholarship during six months of my dissertation.

I am grateful to my family's unconditional love and encouragement. Their continuous support and belief in my academic pursuits have been instrumental in my success. I also want to thank Afonso, who has always believed in me and have been my anchor and source of strength. I am deeply grateful for his presence in my life.

Lastly, I want to express my gratitude to NOVA School of Law for the incredible master's in business law and technology. Over the past two years, I have had the privilege of learning from exceptional professors who have not only shared their knowledge but also inspired me in countless ways. I am truly grateful for the lessons, the knowledge, and the passion they have instilled in me.

General Notes

Citation: All legal citations and references in this dissertation are formatted according to the OSCOLA (Oxford University Standard for Citation of Legal Authorities). The dissertation is written in British English.

Number of Characters: The body of the dissertation, including spaces and notes, contains a total of 194.585 characters.

Abstract

In today's digital economy, personal data has become a key asset, generating new market dynamics, transforming business models and consumer experiences. It fosters innovation by enabling targeted advertising and data-driven decisions, shifting from traditional advertising to personalized experiences. Amidst the growing reliance on personal data, a notable controversy surrounds Meta's 'Consent or Pay' model, which requires users to choose between consenting to data processing for targeted advertising or paying a subscription fee for an ad-free experience, raising significant ethical and legal concerns. These concerns have sparked growing scrutiny over whether the model complies with data protection laws, consumer rights, and contract law, underscoring the urgent need for legal evaluation.

A crucial point of dispute, led by the European Data Protection Supervisor (EDPS), is whether personal data can be treated as a commodity or a counter-performance, given its intrinsic link to fundamental rights. The EDPS further challenges the legitimacy of data-for-service exchanges, implicitly engaging with the doctrine of immoral contracts as a potential legal basis for rejecting such models.

This dissertation critically examines whether 'Consent or Pay' models can be classified as immoral contracts under Portuguese law. By analysing traditional legal theories and case law on immoral contracts, it assesses whether these models should be categorically prohibited or evaluated on a conditional basis. The research evaluates the balance between protecting personal data as a fundamental right and accommodating the economic realities of digital markets.

This research aims to shed light on the legal implications of Meta's 'Consent or Pay' model within the Portuguese legal system, while also adding to the broader discourse on data governance and the future of data-driven business models.

Keywords: Consent or Pay – Pay or Okay – Personal Data – Commodity – Immoral Contracts – Data Exchanges – European Data Protection Supervisor – Consumer Law – Illegal Contracts – Online Platform

Resumo

Na economia digital atual, os dados pessoais tornaram-se um ativo chave, gerando novas dinâmicas de mercado, transformando modelos de negócios e experiências dos consumidores. Eles fomentam a inovação ao permitir publicidade direcionada e decisões baseadas em dados, mudando da publicidade tradicional para experiências personalizadas. No meio desta crescente dependência dos dados pessoais, uma controvérsia notável envolve o modelo 'Pagar ou Consentir' do Meta, que exige que os utilizadores escolham entre consentir com o processamento de dados para publicidade direcionada ou pagar uma taxa de subscrição para uma experiência sem anúncios, levantando significativas preocupações éticas e legais. Estas preocupações têm gerado um crescente escrutínio sobre se o modelo cumpre as leis de proteção de dados, direito dos consumidores e direito contratual, sublinhando a necessidade urgente de uma análise legal.

Um ponto crucial de disputa, liderado pelo Autoridade Europeia para a Proteção de Dados (EDPS), é se os dados pessoais podem ser tratados como uma mercadoria ou uma contraprestação, dado o seu vínculo intrínseco aos direitos fundamentais. O EDPS desafia ainda a legitimidade das trocas de dados por serviços, envolvendo implicitamente a doutrina dos contratos imorais como uma potencial base legal para rejeitar tais modelos.

Esta dissertação examina criticamente se os modelos 'Pagar ou Consentir' podem ser classificados como contratos imorais ao abrigo da lei portuguesa. Ao analisar teorias jurídicas tradicionais e jurisprudência sobre contratos imorais, avalia se estes modelos devem ser categoricamente proibidos ou avaliados numa base condicional. A pesquisa avalia o equilíbrio entre a proteção dos dados pessoais como um direito fundamental e a acomodação das realidades económicas dos mercados digitais.

Esta pesquisa visa esclarecer as implicações legais do modelo 'Pagar ou Consentir' do Meta no sistema jurídico português, enquanto contribui para o discurso mais amplo sobre a governação de dados e o futuro dos modelos de negócios baseados em dados.

Palavras-chave: Consentir ou Pagar – Bem Económico – Contratos Imorais – Trocas de Dados – Autoridade Europeia para a Proteção de Dados – Direito do Consumidor – Contratos Ilegais – Plataforma Online – Dados Pessoais

Introduction

Personal data has become a key asset in today's digital economy, powering business models, shaping consumer experiences, driving innovation, and helping companies grow through targeted advertising and data-driven decisions. Therefore, this shift has led to the creation of new market dynamics, where personal data has become a valuable commodity for advertisers and third-party services, and the methods by which it is monetized have evolved from traditional advertising models to data-driven, personalized experiences.

Among the most controversial recent developments in this field is Meta's implementation of a 'Consent or Pay' model, which offers users a binary choice: either consent to data processing for targeted advertising purposes or pay a subscription fee for an ad-free experience, without behavioural advertising. This model has sparked a significant legal debate within the European Union (EU), particularly regarding its compatibility with data protection regulations, consumer rights, and contractual immorality. One of the most notable critics, the European Data Protection Supervisor (EDPS), contends that Meta's 'Consent or Pay' model undermines fundamental rights, and that personal data cannot be equated with money or any other form of counter-performance because it is linked to a fundamental right and cannot be considered a commodity. Additionally, the EDPS draws a parallel between data-for-service exchanges and the sale of live human organs, implicitly engaging with the doctrine of immoral contracts as a legal basis for opposing the model.

Accordingly, central to this discussion is the question of whether and how these models, which involve the exchange of personal data for services, should be categorized as immoral contracts under Portuguese law. This dissertation seeks to address this question by examining whether 'Consent or Pay' models should be analysed in a categorical or conditional manner, based on traditional theories and case law concerning immoral contracts. The research evaluates the balance between protecting personal data as a fundamental right and accommodating the economic realities of digital markets.

The dissertation is structured as follows: Chapter 1 provides an overview of the 'Consent or Pay' model and its implementation by Meta, situating it within the broader legal and policy landscape of digital markets. Chapter 2 examines the key legal frameworks governing data protection, consumer rights, and contract law in the EU, focusing on their relevance to the evaluation of 'Consent or Pay' models, addressing the debate of personal data as a commodity. Chapter 3 explores the concept of immoral contracts in Europe and Portugal, comparing the EDPS's intrinsic prohibition with the approaches to immoral contracts found in the Portuguese case law. Finally, the conclusion summarizes the key findings of the research.

On that account, the main objective of this research is to address the following research question: Is a contract where users exchange their data for access to a service an immoral contract under Portuguese law?

By answering this question, this study aims to provide clarity on the legal treatment of Meta's 'Consent or Pay' model within the Portuguese legal order, contributing to ongoing discussions on the future of data governance in digital markets and data driven business models.

Chapter 1: The Problem: The Debate around 'Consent or Pay' Models

1. Background

The first chapter introduces the ongoing debate surrounding 'Consent or Pay' models within the EU, using Meta as a central case study to illustrate the legal complexities involved. At the heart of this discussion is the General Data Protection Regulation (GDPR) and its stringent requirements for valid consent. Meta's business model has come under scrutiny for potentially undermining data protection, consumer and competition law rules. This chapter sets the foundations for analysing whether 'Consent or Pay' models align with the EU legal framework.

Following several media reports[1] to actual implementation, in November 2023, Meta Platforms Ireland (Meta) began asking users of Facebook and Instagram to either consent to the processing of their personal data for advertising purposes or pay a fee to eliminate the use of personal data for advertising and avoid being shown advertisements.[2] Consequently, in the EU, the European Economic Area (EEA) and in Switzerland, all platform users were required to choose between these two options. This model is called 'Consent or Pay' or 'Pay or Okay'[3] and consists of a model where a controller (e.g. Meta) offers data subjects (e.g. Instagram or Facebook platform users) at least two choices to gain access to the online platform services that the controller provides. The choices consist between either consenting to the processing of their personal data for a specified purpose in order to access the online platform or choose to pay a fee and gain access to

[1] Sam Schechner, 'WSJ News Exclusive | Meta Plans to Charge $14 a Month for Ad-Free Instagram or Facebook' (*WSJ*, 3 October 2023) <https://www.wsj.com/tech/meta-floats-charging-14-a-month-for-ad-free-instagram-or-facebook-5dbaf4d5> accessed 16 September 2024; Dan Milmo, 'Facebook and Instagram Users in Europe Can Pay for Ad-Free Versions' *The Guardian* (30 October 2023) <https://www.theguardian.com/technology/2023/oct/30/meta-facebook-instagram-europe-pay-ad-free> accessed 16 September 2024.

[2] When subscribing via the mobile version of Facebook/Instagram the monthly fee of one account is 12.99€, or 9.99€ when subscribing via the desktop version and each additional account costs 8 € or 6 € respectively, but only if the consumer links these accounts in Meta's 'Account Center', which entails additional processing of personal data across Meta's services. A consumer with both a Facebook and Instagram account on a mobile device, who does not want their personal data to be combined and used across these platforms, must pay €25.98 per month or €311.76 per year. See: 'Facebook and Instagram to Offer Subscription for No Ads in Europe' (*Meta*, 30 October 2023)<https://about.fb.com/news/2023/10/facebook-and-instagram-to-offer-subscription-for-no-ads-in-europe/> accessed 23 September 2024.

[3] These two expressions seem to be used interchangeably.

the online platform without their personal data being processed for that specified purpose. Currently, different variants of the ‘Consent or Pay’ model are available on the market, varying according to several criteria, that we are going to explain next.[4] According to *Pay or Consent Status quo on the European Market*, there are different distinguishing criteria that can differentiate models based on how they balance user choice, privacy, and service offerings.[5] Each criterion reflects a different aspect of the user experience, data handling, and subscription flexibility. To mention a few of them, the first criterion pointed out is that paid services can range from basic ad-free content to more extensive offerings. A different one is the varying tracking and advertising freedom, from minimal to complete, shaping how the experience is. Another one is the cross-site access: the benefits of a subscription can be extender or not, beyond a single website, offering more value.[6]

This serves to understand that Meta’s Consent or Pay model is not the first one to ever exist. Several other models have previously been implemented by service providers, particularly by news websites and newspapers, such as Spiegel. This model, therefore, is not entirely new nor isolated, as it is based on an already existing business model in the digital market.

This model in general, along with Meta’s specific case, is involved in a legal debate and is subject to controversy. However, before delving into the debate, it is important to provide some background on the matter.

As is widely known, Meta provides the social networking service Facebook. Additional social networking platforms, such as Instagram and WhatsApp, are operated by other entities within the Meta group. Essentially, Meta's business model consists of personalized advertising based on the creation of detailed profiles of its users. When users sign up for Facebook or Instagram, they directly provide data to Meta. Additionally, data from users is collected through the social network services provided by the Meta group, as well as from third-party websites and apps, linking such data to the users’ accounts. This aggregated view of the data allows Meta to draw detailed conclusions about users' preferences and interests. Meta’s services are monetized by charging advertisers who

[4] David Pfau, ‘Pay or consent Status quo on the European market’ (April 2024) <https://www.bvdw.org/wp-content/uploads/2023/10/PUR-Modelle-bvdw_20231004-en.pdf> accessed 23 September 2024 Furthermore, consent or pay models have previously been implemented by service providers, particularly by news websites and newspapers.
[5] ibid.
[6] ibid.

want to promote their products, services, and content to platform users.[7] In this way, Meta's intermediation capabilities enable their business users to target advertisements to their preferred audience with a high degree of specificity. Consequently, users access the platforms without monetary payment and are exposed to ads that are often personalized.[8] Essentially, a contract is formed between the user and the service provider, where the user exchanges either money or personal data in return for the provision of digital services.[9]

According to articles 5(1)(b) and 6(1) of the GDPR – the primary data protection and privacy law in the European Union – a valid legal ground must exist for the processing of personal data. According to article 6(1), several legal grounds exist for the processing personal data, some of them being legitimate interest, the data subject's consent, compliance with a legal obligation or performance of a contract, among others. The initial phase of this study was triggered in 2018, the year that the GDPR took effect, when Meta processed the data of its users for advertising purposes based on a contract that users enter when they sign up to Facebook and accept the general terms of use, therefore using article 6(1)(b) as a legal ground (the performance of a contract). The issue began with a complaint lodged by a data subject, represented by the non-profit NOYB - European Centre for Digital Rights. The complaint was initially filed with the Austrian Supervisory Authority (AT SA) and subsequently transferred to the Irish Supervisory Authority (IE SA), as Meta IE's main establishment is in Ireland. The IE SA conducted an inquiry and issued a Draft Decision, which was shared with other Concerned Supervisory Authorities (CSAs) across the European Economic Area (EEA). Several CSAs, including those from Austria, Germany, Spain, Finland, France, Hungary, Italy, the Netherlands, Norway, and Sweden, raised objections to the Draft Decision. The objections were primarily about the reliance on Article 6(1)(b) GDPR for processing personal data for behavioural advertising. Therefore, the European Data Protection Board (EDPB) was asked to

[7] 'Understanding Facebook's Business Model' (*Meta*, 24 January 2019) <https://about.fb.com/news/2019/01/understanding-facebooks-business-model/> accessed 27 September 2024; 'Online Platforms and Digital Advertising Market Study' (*GOV.UK*, 1 July 2020) <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study> accessed 27 September 2024.

[8] 'Online Platforms and Digital Advertising Market Study' (n 7).

[9] However, the notion of personal data as a commodity remains to some degree controversial. This issue will be further discussed and analysed in detail in Chapter 2.

pronounce on whether Meta IE could rely on Article 6(1)(b) GDPR as a legal basis for processing personal data for behavioural advertising.[10]

The EDPB concluded that Meta IE could not rely on Article 6(1)(b) GDPR for processing personal data for behavioural advertising. The EDPB found that behavioural advertising is not necessary for the performance of the contract between Meta IE and Instagram or Instagram users. The EDPB emphasized that the main purpose for which users use Facebook is to communicate with others, and for Instagram, it is to share photos and videos, not to receive personalized advertisements. Therefore, the processing of personal data for behavioural advertising could not be considered necessary for the performance of the contract.

Later, the EDPB also had the opportunity to provide an opinion on the legal basis of legitimate interest, as outlined in Article 6(1)(f) of the GDPR, for processing personal data for behavioural advertising by Meta.[11] In this opinion, the EDPB concluded that Meta IE could not rely on Article 6(1)(f) GDPR for processing personal data for behavioural advertising. The EDPB found that Meta IE had not demonstrated that its legitimate interests in processing personal data for behavioural advertising outweighed the fundamental rights and freedoms of data subject.

Paramount among the developments was the Court of Justice of the European Union's (CJEU) landmark decision in *Meta v Bundeskartellamt*, issued on 4th of July 2023.[12] The CJEU decision imposed strict requirements for the combined personalised processing of personal data of Facebook users collected by Meta within Facebook and as off-Facebook data ('Social Network Data'), including about sensitive personal data, which essentially prohibited Meta to use the legal grounds of a performance of a contract and legitimate interest to process personal data for advertising purposes. Moreover, with this decision,

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[10] 'Binding Decision 4/2022 on the Dispute Submitted by the Irish SA on Meta Platforms Ireland Limited and Its Instagram Service (Art. 65 GDPR) | European Data Protection Board' <https://www.edpb.europa.eu/our-work-tools/our-documents/binding-decision-board-art-65/binding-decision-42022-dispute-submitted_en> accessed 18 September 2024; 'Binding Decision 3/2022 on the Dispute Submitted by the Irish SA on Meta Platforms Ireland Limited and Its Facebook Service (Art. 65 GDPR) | European Data Protection Board' <https://www.edpb.europa.eu/our-work-tools/our-documents/binding-decision-board-art-65/binding-decision-32022-dispute-submitted_en> accessed 25 September 2024.

[11] 'Urgent Binding Decision 01/2023 Requested by the Norwegian SA for the Ordering of Final Measures Regarding Meta Platforms Ireland Ltd (Art. 66(2) GDPR) | European Data Protection Board' <https://www.edpb.europa.eu/our-work-tools/our-documents/urgent-binding-decision-board-art-66/urgent-binding-decision-012023_en> accessed 25 September 2024.

[12] Meta Platforms Inc and Others v Bundeskartellamt [2023] ECJ Case C-252/21.

the CJEU confirmed the legitimacy and core function of 'Consent or Pay' models given that users may be offered an equivalent alternative which does not involve such data processing operations, in return, this alternative is 'to be offered, if necessary for an appropriate fee' (paras 150).

This pivotal ruling by the CJEU stems from a decision made on 6 February 2019 by the Bundeskartellamt, Germany's Federal Cartel Office (FCO), in the Meta case.[13] The Bundeskartellamt found that Meta held a dominant position in the social network market and had abused this dominance. The abuse involved requiring users to consent to the merging of data from Meta's various services and third-party sources as a condition for using Facebook. The authority concluded that Meta lacked a valid legal basis under the GDPR for this data combination, leading to exploitative abuse under Section 19(1) of the German Competition Act. As a result, Meta appealed the Bundeskartellamt's decision to the Düsseldorf Higher Regional Court. The Higher Regional Court in Düsseldorf, ruled, in August 2019, in Meta's favour during interim proceedings, asserting that the case concerned a data protection issue rather than a competition matter. However, in June 2020, the German Federal Court of Justice, on appeal, supported the Bundeskartellamt, classifying Meta's behaviour as abusive.

The case reached the CJEU through a preliminary reference from the Higher Regional Court in Düsseldorf during the proceedings on the merits on 22 April 2021, under Article 267 of the Treaty on the Functioning of the European Union (TFEU). The OLG Düsseldorf posed several questions to the CJEU, highlighting: 1) the national competition authority's ability to enforce GDPR provisions; 2) weather the collection of personal data based on the ground of necessity for the performance of the contract under Article 6(1)(b) of the GDPR or on the ground of the pursuit of legitimate interests under Article 6(1)(f) of the GDPR was lawful for purposes of advertising and offering personalised content and advertising, network security, product improvement and continuous, seamless use of all of its group products in its terms of service.[14]

[13] 'Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources' (*Bundeskartellamt*)<https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html> accessed 20 September 2024.

[14] Case C-252/21: Request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Germany) lodged on 22 April 2021 — Facebook Inc and Others v Bundeskartellamt (ECJ).

To be more precise, in its decision, the CJEU's concluded that the necessity of fulfilling a contract with the user could justify the processing under Article 6(1)(b) GDPR, but only if the processing is objectively essential. This applies when the primary purpose of the contract cannot be achieved without the data processing. The CJEU raised concerns about whether personalized content or the uninterrupted use of services within the Meta group meet the criteria of Article 6(1)(b) GDPR, although this determination must ultimately be verified by the national court. The CJEU acknowledges the usefulness of personalised content for users, however states that it 'does not appear to be necessary in order to offer that user the services of the online social network' (para.102). Additionally, it was stated that Facebook's personalized advertising cannot be considered a 'legitimate interest' for processing the relevant data under Article 6(1)(f) of the GDPR.

Another significant aspect of this ruling is that the CJEU affirmed the authority of competition authorities in a Member State to investigate and penalize GDPR violations when companies misuse their dominant market position. In situations involving breaches of data protection, these authorities are obligated to consult with the relevant data protection supervisory authority. Ultimately, a company in a dominant market position needs to meet the criteria of voluntary consent. To ensure this voluntariness, the company must offer users an equivalent alternative to its data-driven business model, particularly for advertising purposes, tailored to its market power. This alternative 'are to be offered, if necessary for an appropriate fee' (paras 150). Clearly, this decision of the CJEU has important implications for both antitrust as well as data protection dimensions.

Consequently, in November 2023, Meta introduced its 'Consent or Pay' model by giving users and data subjects the choice between two offers: a data-intensive, no-cost model on one side, and a less data-intensive, fee-based model on the other. As already said, the second option means that there is no advertising personalization whatsoever. It is evident from what we have seen so far that Meta's 'Consent or Pay' model engages multiple distinct legal realms, including data protection law, competition law, and consumer law, each governing aspects such as data protection, market fairness, and consumer rights, thus illustrating the multifaceted regulatory challenges posed by such models.

Having explored the origins and context of the debate surrounding Meta's 'Consent or Pay' model, we now turn our attention to the actual debate and arguments surrounding it.

In the following section, we will explore the legal debate in greater detail, emphasising the role of consent in 'Consent or Pay' models.

2. The Role of Consent in 'Consent or Pay' Models

Building on the previous exploration of the topic's background and context, we now shift our focus to the legal debate surrounding 'Consent or Pay' models. In this next section, we will examine the legal debate in greater detail, with a special emphasis on the key role consent plays in data protection frameworks.

The General Data Protection Regulation (GDPR), according to Articles 6 and 7, establishes consent as one of the primary legal bases for processing personal data. The emphasis on consent is due to the European Union's (EU) commitment to empower individuals and give them control over their personal data. Generally, the EU seeks to ensure that consent is freely given, informed, specific, and unambiguous, thus protecting individuals from being unfairly pressured into agreeing to terms that may not align with their preferences or understanding.

In the Meta v Bundeskartellamt case, the Court of Justice of the European Union (CJEU) determined that a company in a dominant market position can obtain consent under data protection law that is considered free, meaning that it needs to meet the criterion of voluntariness (para. 147). However, to ensure this voluntariness, the company must provide users with 'an equivalent alternative' to a business model that relies on the collection and use of personal data, particularly for advertising purposes, which must be tailored to its specific market power. This alternative can be offered 'for an appropriate fee.'[15] As we have already seen, this led Meta to introduce a new framework, known as the 'Consent or Pay' model, in November 2023. Opinions differ among experts and EU organisations regarding the compatibility of 'Consent or Pay' models within the European Union's legal framework.

In November 2023, the European Consumer Organisation (BEUC), supported by 19 independent consumer organisations, filed a complaint [16] with the Consumer Protection Cooperation Network (CPC) on grounds that Meta was engaging in unfair commercial

[15] *Meta Platforms Inc and Others v Bundeskartellamt* (n 16).

[16] Not all the BEUC members participated in this. The members participating in this action are: Асоциация Активни потребители (Bulgaria), dTest (Czech Republic), Forbrugerrådet Tænk (Denmark), UFC-Que Choisir (France), EKPIZO & KEPKA (Greece), Adiconsum (Italy), Latvijas Patērētāju interešu aizstāvības asociācija (Latvia), Vartotojų aljansas (Lithuania), Consumentenbond (Netherlands), Forbrukerrådet (Norway), Federacja Konsumentów & Fundacja Konsumentów (Poland), Spoločnosť ochrany spotrebiteľov (S.O.S.) Poprad (Slovakia), ZPS (Slovenia), Asufin & CECU (Spain), Sveriges Konsumenter (Sweden), Union Luxembourgeoise des Consommateurs (Luxembourg).

practices in multiple ways.[17] BEUC's 'Assessment of Meta's new paid-subscription model from a consumer law perspective' presented several arguments as to why, from the standpoint of consumer law, Meta's practice constitutes an unfair, deceptive, and coercive practice. Some of the claims used were the combination of the newsfeed lock's persistence[18], the information provided, the limited options available and the required compulsory choice of the user in order to continue to use the service.[19] Some of the relevant EU provisions infringed by Meta are said to be Article 5 of Directive 2005/29/EC (Unfair Commercial Practices Directive)[20] regarding the prohibition of unfair commercial practices, as well as Articles 6 (Misleading actions), 7 (Misleading omissions), 8 (Aggressive commercial practices) and 9 (Use of harassment, coercion and undue influence) of the same legislative document. Article 5 of the Directive 93/13/EEC (Unfair Contract Terms Directive) is also put forward in the discussion.[21]

In 2024, eight consumer groups from the BEUC network submitted complaints to their national data protection authorities against Meta, alleging that the company violates GDPR principles of fair processing, data minimization, and purpose limitation. Furthermore, they argue that Meta lacks a valid legal basis for its extensive data collection from Facebook and Instagram users, as the options it presents do not enable users to provide freely given and informed consent.[22] The Consumer Protection Cooperation Network issued a letter expressing concerns that Meta's 'Consent or Pay' model could violate EU consumer law, explicitly the Unfair Commercial Practices Directive (UCPD) and the Unfair Contract Terms Directive (UCTD). This action was coordinated by the European Commission and led by the French Directorate General for Competition,

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[17] 'Choose to Lose with Meta | BEUC' <https://www.beuc.eu/choose-to-Lose-with-Meta> accessed 25 September 2024.

[18] This refers to the situation in Meta's case, where, under the 'Consent or Pay' model, the social media feed becomes unresponsive and fails to refresh or load content due to the requirement to choose between consenting or paying. Only when the user selects one of the provided options can they refresh the feed and regain access to the app's full functionalities as before.

[19] 'An Assessment of Meta's New Paid-Subscription Model from a Consumer Law Perspective' <https://www.beuc.eu/reports/assessment-metas-new-paid-subscription-model-consumer-law-perspective> accessed 25 September 2024.

[20] 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') (Text with EEA relevance) 2005.

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

[22] 'Consumer Groups Launch Complaints against Meta's Massive, Illegal Data Processing behind Its Pay-or-Consent Smokescreen' <https://www.beuc.eu/press-releases/consumer-groups-launch-complaints-against-metas-massive-illegal-data-processing> accessed 25 September 2024.

Consumer Affairs and Fraud Prevention. This coordinated action aims to evaluate Meta's practices under EU consumer law, adding to the existing EU and national procedures concerning this model.[23]

Several non-governmental organisations, notably NOYB, oppose this model, arguing that in reality, 'most people simply have no choice but to accept the exploitation of their data, when confronted with a fee.' Additionally, they raise the concern that, if 'Consent or Pay' models are legitimised, the approach will dangerously spread.[24]

The European Data Protection Board (EDPB), a major player in this matter, did not remain silent. Due to the submission of a request from the Norwegian supervisory authority, Datatilsynet, along with the Dutch supervisory authority and the Hamburg supervisory authority, an opinion on these practices was adopted by the EDPB at the end of January 2024: the Opinion '08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms'.[25] This opinion focuses on models where the choice involves processing of personal data for behavioural (targeted) advertising in the context of 'Consent or Pay' models, specifically when a large online platform serves as the relevant controller. The EDPB states that if large online platforms only present users with a binary choice between consenting to the processing of personal data for behavioural advertising purposes and paying a fee, then in most cases, 'it will not be possible' for them to comply with the requirements for valid consent according to the GDPR.

The EDPB takes the view that an alternative without behavioural advertising, offered free of charge, must be provided to data subjects, as it is in this context that the data subject enjoys real and genuine freedom of choice when asked to consent to the processing of their personal data (the EDPB calls it the 'Free Alternative Without Behavioural Advertising'). Therefore, whether or not a free alternative is provided will be a particularly important factor in assessing the validity of the data subject's consent. The

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[23] 'Commission and National Authorities Take Action against Meta' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3862> accessed 25 September 2024.

[24] '28 NGOs Urge EU DPAs to Reject "Pay or Okay" on Meta' <https://noyb.eu/en/28-ngos-urge-eu-dpas-reject-pay-or-okay-meta> accessed 25 September 2024.

[25] 'Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms | European Data Protection Board' 8 <https://www.edpb.europa.eu/our-work-tools/our-documents/opinion-board-art-64/opinion-082024-valid-consent-context-consent-or_en> accessed 25 September 2024.

EDPB proceeds to explain that valid consent must be freely given, informed, specific and unambiguous. Additionally, several criteria must be analysed for consent to be considered freely given, including the absence of detriment, imbalance of power, conditionality, and granularity. Overall, the EDPB concludes that the consent collected by large online platforms under 'Consent or Pay' models related to behavioural advertising can only be considered valid if these platforms can demonstrate, in accordance with the principle of accountability, that all the requirements for valid consent are met. However, given the current structure of the model, which offers a binary choice, this is deemed to be a challenging task.

José Antonio Castillo Parrilla and Jorge Morais Carvalho raise some doubts about the EDPB's 'Free Alternative Without Behavioural Advertising'.[26] They state that, while striving for a digital environment free from micro-segmentation and surveillance capitalism is important, this approach poses risks and social harm in the short, medium, and long term. They question whether combating these issues can be achieved by restricting consumers' ability to economically utilize their personal data. The digital economy fundamentally relies on the economic exploitation of both personal and non-personal data, yet there has been insufficient exploration of how personal data can be economically leveraged. Additionally, in response to the EDPB's recall of the 2020 criterion and the EDPS's 2017 stance that personal data cannot be treated as a marketable good, along with the broad interpretation of 'harm,' they argue that the standards for determining whether consent is freely given are set so high that, in practice, any business model relying on the economic exploitation of personal data as a commodity would be nearly impossible to implement.

The German Association for the Digital Economy (BVDW) generally supports 'Consent or Pay' models, arguing that they support the exercise of genuine choice by users and access to valuable online services regardless of the economic means of the data subjects', rejecting the claim that these models turn privacy into a luxury rather than a fundamental right.[27] They argue that a balance, which appropriately and effectively considers the rights and needs of all parties involved (data protection and data-driven business models)

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[26] José Antonio Castillo Parrilla and Jorge Morais Carvalho 'Pay or Ok'. Paying with Personal Data under Directive 2019/770: A Comparative View between Spain and Portugal' (*CIJ*) <https://cij.up.pt/en/red/previous-editions/ldquopay-or-okrdquo-paying-with-personal-data-under-directive-2019770-a-comparative-view-between-spain-and-portugal/> accessed 29 September 2024.
[27] David Pfau (n 4).

needs to be found. It is said that the right to privacy and data protection are not absolute and need to be balanced with the fundamental right to conduct business (Article 16 of the EU Charter), despite often being presented as inviolable and absolute. Furthermore, it should be noted that the legislator explicitly provides for the commercialization of data, with the German data strategy serving as an example. The criterion of imbalance of power is considered particularly questionable, as the CJEU expressly acknowledges that the dominant market position of a service provider is irrelevant to the validity of consent in relation to the 'Consent or Pay' model. Another viewpoint shared by BVDW is that user acceptance of tracking and ad-free subscriptions remains low, primarily because users favour personalized ads and free services. This reluctance highlights potential issues with the 'Consent or Pay' model, as it might incentivize providers to rely on intrusive advertising tactics, which could undermine the value of high-quality, personalized advertising that enhances user experience.[28]

[28] ibid.

Chapter 2: Consumer Rights and Data Protection - Brief Legal Overview

In today's economy, the substantial economic value of personal data is indisputable. Today, personal data functions as a crucial economic resource, with its collection, analysis, and use significantly contributing to market value and competitive dynamics.[29] Given this context, consumer protection and personal data security have become top priorities for European lawmakers, as evidenced by initiatives such as the 2015 Digital Single Market strategy, the 2018 New Deal for Consumers, and the 2020 European Data Strategy and European Union (EU) Digital Strategy. Increasingly, consumers also recognize that when a digital service —such as social media, games or online platforms — do not charge a direct monetary fee, they are not necessarily 'free'.[30] This topic has elicited diverse opinions in the legal realm, with some asserting that personal data functions as a counter-performance, while others, notably the European Data Protection Supervisor (EDPS), argue against this characterization. This directly impacts Meta's 'Consent or Pay' model, that sees itself contextualized within several branches of European Union law. Against this background, this chapter particularly focuses on consumer law, referencing the Digital Content Directive (DCD), the Unfair Contract Terms Directive (UCTD), and the Unfair Commercial Practices Directive (UCPD), as well as data protection law, specifically the General Data Protection Regulation.

1. The Digital Content Directive

The 2015 Digital Single Market strategy and the 2018 New Deal for Consumers led to the creation of the Directive (EU) 2019/770, widely known as the Digital Content Directive,[31] which explicitly recognizes the role of consumers' personal data in contractual relationships and ensures the applicability of European Consumer Law standards to business models that do not involve monetary payment. Largely in response to the increasing use of digital contracts and to mitigate the legal uncertainties consumers

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[29] Teresa Scassa, 'The Shifting Value of Personal Data' (*Centre for International Governance Innovation*) <https://www.cigionline.org/articles/the-shifting-value-of-personal-data/> accessed 27 February 2025.
[30] Wendy CY Li, Nirei Makoto and Yamana Kazufumi, 'Value of Data: There's No Such Thing as a Free Lunch in the Digital Economy' [2019] Discussion papers <https://ideas.repec.org//p/eti/dpaper/19022.html> accessed 20 November 2024.
[31] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.

face when entering them, particularly in cases of incorrect or defective digital content, the European legislator introduced the Digital Content Directive. This directive aims to contribute to the proper functioning of the internal market, reduce legal uncertainties and strengthen consumer trust and protection within the digital environment by, for the first time, including contracts for the supply of digital content and digital services within its scope. It seeks to update traditional consumer law by introducing remedies applicable to contracts involving the exchange of personal data. Therefore, the DCD grants protection not only to consumers who pay with their money for digital content and services, but also to those accessing digital content and services upon supplying their personal data.

Number 1 of Article 3 of the DCD is clear regarding the scope of application – it shall apply to any contract where the trader supplies or undertakes to supply digital content or a digital service to the consumer and the consumer pays or undertakes to pay a price. The Directive also applies when the vendor supplies or undertakes to supply digital content or a digital service to the consumer and the consumer provides or undertakes to provide personal data to the vendor. This article equating the permission to process personal data with the payment of a price has generated significant controversy. While some support this perspective, others argue that personal data cannot be exchanged for services. We will now address this debate, focusing the discussion on the conceptualization of personal data as a counter-performance/commodity.

Critics of this comparison argue that treating the processing of personal data as equivalent to the payment of a monetary price could lead to the commodification and explicit commercialisation of a fundamental right. Among the main critics, the EDPS expressed its opposition to the wording of the Directive while it was still in proposal form, as noted in Opinion 4/2017 and later Opinion 8/2018.[32] The EDPS observed that, although there is value in extending the Directive's applicability to include these so-called 'free' services, it expressed profound doubts on the fact that the concept of personal data was being referred as a 'counter-performance' and on whether individuals can 'pay' with their

[32] 'Contracts for the Supply of Digital Content | European Data Protection Supervisor' <https://www.edps.europa.eu/data-protection/our-work/publications/opinions/contracts-supply-digital-content_en> accessed 23 November 2024; European Data Protection Supervisor, 'EDPS Opinion on the Legislative Package "A New Deal for Consumers"' <https://www.edps.europa.eu/data-protection/our-work/publications/opinions/edps-opinion-legislative-package-new-deal-consumers_en> accessed 23 November 2024.

personal data.[33] The EDPS argued that within the EU, personal data, given its fundamental nature, cannot be regarded as a consumer's contractual counter-performance *in lieu* of money, thereby advising against the treatment of personal data as a mere economic asset. It defends that treating personal data as a commodity undermines the fundamental rights of the right to privacy and data protection (as enshrined in Article 8 of the Charter of Fundamental Rights of the EU and Article 16 of the Treaty on the Functioning of the European Union) and reduces personal data to a mere economic asset, which is contrary to the principles of the GDPR.

In its argumentation, the EDPS stated that 'There might well be a market for personal data, just like there is, tragically, a market for live human organs, but that does not mean that we can or should give that market the blessing of legislation. One cannot monetise and subject a fundamental right to a simple commercial transaction, even if it is the individual concerned by the data who is a party to the transaction.'[34] In addition, the EDPS highlighted the absence of a clear definition of 'consideration' and 'compensation' in the context of personal data that could lead to confusion and legal uncertainty. The EDPS also highlights that consumers often do not fully understand privacy policies, which are typically vague and lack clarity, making it difficult for them to comprehend the implications of providing their data as a 'counter-performance'. The EDPS stresses that personal data should not be equated with money, as consumers are generally unaware of its value and potential uses. Additionally, the EDPS points out the challenges in calculating the economic value of personal data for the right of withdrawal and refund, complicating the legal framework. Thus, the EDPS seems to have adopted a stance that is effectively prohibitive regarding the economic exploitation of personal data, grounded in its characterisation as a fundamental right.

As a result, what seemed to be purely cosmetic adjustments were implemented by the European legislator to remove the term 'counter-performance' in the final version of the Directive, along with all references to the concept of providing personal data as a counter-performance.

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[33] In the proposal's text, the consumer's granting of access to personal data was explicitly characterized as 'counter-performance other than money.'

[34] It is important to note that a labour contract inherently involves the exchange of significant personal freedoms for monetary compensation. This demonstrates that such transactions are not unprecedented. 'Contracts for the Supply of Digital Content | European Data Protection Supervisor' (n 37).

Subsequently, in Opinion 8/2018 the EDPS suggested modifications to the proposed definitions of a 'contract for the supply of digital content which is not supplied on tangible medium' and a 'digital service contract' to prevent any explicit or implicit comparison between the provision of personal data and the payment of a price, refraining from any references to personal data from these definitions.[35]

In the final version, in compliance with the opinion of the EDPS, the Directive was adjusted to accommodate some of the suggestions and concerns raised by the EDPS. Against this background, it is important to shift our attention to the final version of Recital 24 of the DCD, which is currently in force

This Recital recognizes that there are digital services and digital content that are supplied in situations where the consumer does not pay a price but gives their personal data, that these services are already a 'considerable part of the market' and 'while fully recognising that the protection of personal data is a fundamental right and that therefore personal data cannot be considered as a commodity', the Directive should nonetheless apply to protect the consumers in said contract. So personal data cannot be considered an economic asset, but in cases ***where*** they are (when they serve as a condition for access to content and services), the provisions of the DCD and consumer contract rules must apply. This means that, functionally, personal data is a counter performance that simply cannot be explicitly recognized as such. As José Antonio Castillo Parrilla notes, "counter-performance" is thus treated just as the "Word-That-Cannot-Be-Pronounced."[36]

Article 3 of the Directive outlines two situations: (a) when a trader provides or agrees to provide digital content or services in return for payment, and (b) when the provision of digital content or services is made in exchange for the consumer's personal data. While both scenarios are covered by the Directive, case (a) is explicitly categorized as a 'contract,' whereas case (b) is generally referred to as a case 'where' the supply takes place. Despite this difference in phrasing, the substantive treatment of both cases is consistent, as the Directive ensures remedies for non-conformity apply equally to both.[37]

[35] 'EDPS Opinion on the Legislative Package "A New Deal for Consumers" (n 32).

[36] José Antonio Castillo Parrilla, '"A-Palavra-Que-Não-Pode-Ser-Pronunciada" – Pagar Com Dados Pessoais Em Portugal e Em Espanha' (30 June 2023) <https://novaconsumerlab.novalaw.unl.pt/a-palavra-que-nao-pode-ser-pronunciada-pagar-com-dados-pessoais-em-portugal-e-em-espanha/> accessed 17 November 2024.

[37] Chiara Iorio, 'Legal Issues Concerning the Circulation and Processing of Data in the Digital Age' [2022] European Journal of Privacy Law & Technologies

In Portugal, the DCD and Directive (EU) 2019/771, which regulates aspects related to contracts for the sale of goods, known as the Sale of Goods Directive (SGD),[38] were transposed into Portuguese domestic law through Decree-Law No. 84/2021 of 18 October.[39] This legal instrument applies to all contracts for the sale of goods between a trader and a consumer, regardless of whether the transaction takes place online, in a physical store, or through another sales channel. Notably, the simultaneous transposition of both the DCD and the SGD within a single legislative instrument merits attention. Therefore, we will undertake a short analysis of the transposition of these Directives into the Portuguese legal system.

According to Article 3 number 1 of Decree-Law No. 84/2021, the Decree-Law applies to both types of contracts, specifically covering: (a) contracts for the sale of goods between consumers and professionals, including contracts for the supply of goods to be manufactured or produced; (b) goods supplied under a contract for work or other service provision, as well as the leasing of goods, with necessary adaptations; and (c) digital content or services incorporated into or interconnected with goods, provided with the goods under a sales contract, regardless of whether the digital content or services are supplied by the professional or a third party.

Additionally, as stated in number 3 Article 3, the decree-law also applies to contracts for the supply of digital content or services where: a) The professional supplies or commits to supplying digital content or services to the consumer, and the consumer pays or commits to paying the respective price. b) The professional supplies or commits to supplying digital content or services to the consumer, and the consumer provides or commits to providing personal data to the professional, except when the personal data is exclusively processed by the professional for the supply of the digital content or services in accordance with the decree-law or to comply with the legal requirements to which the professional is subject, without processing the data for any other purposes. c) The digital

<https://universitypress.unisob.na.it/ojs/index.php/ejplt/article/view/1709> accessed 24 November 2024. This consistency is also supported by recital nº.31 of Directive (EU) 2161/201914, that states the ‘similarities’ and the ‘interchangeability’ of paid digital services and digital services provided in exchange for personal data, and therefore states that they should be subject to the same rules under that Directive.

[38] Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods (2019) OJ L136/28 <https://eur-lex.europa.eu/eli/dir/2019/771/oj> accessed 10 December 2024.

[39] Decree-law no 84/2021 <https://diariodarepublica.pt/dr/detalhe/decreto-lei/84-2021-172938301> accessed 10 December 2024.

content or services are developed according to the consumer's specifications. d) The material support is used exclusively as a means of providing the digital content. However, Chapter II of the Decree-Law does not apply to the latter contracts involving the supply of digital content or services where personal data is provided as a form of payment. This exclusion of Chapter II from contracts involving the supply of digital content or services where personal data is provided as a form of payment is justified for reasons related to the fundamental differences between physical goods and digital content and services. Correspondingly, for digital services and content contracts, Chapter III applies.

First, in Section I of each of these Chapters, we can see that the subjective and objective requirements of Articles 6 and 7, which refer to physical goods, are very similar to the requirements of Articles 28 and 29 concerning contracts for the supply of digital content and services. The differences are adapted to the nature of the contract's subject matter, whether it is physical or digital, following the same underlying logic. An example of this is point (d) of Article 6, which establishes that an objective requirement is that goods must be provided with all updates, as stipulated in the sales contract, for them to be compliant with the contract. Point (d) of Article 28 establishes the digital content or services are compliant with the contract when updated according to what is stipulated in the contract. This distinction reflects the requirements and expectations for maintaining the conformity and functionality of physical goods versus digital content and services, however, with the same underlying logic.

Additionally, we can verify that Article 9 (incorrect installation of goods) corresponds, with the necessary adaptations, to Article 30 (incorrect integration of digital content or services) and Article 11 (third-party rights restricting the use of goods) to Article 31 (third-party rights restricting the use of digital content or services).

Moving on to the analysis of Sections II of Chapter II and III, in contracts for goods, , in the case of non-conformity of goods, the consumer has the right to restoration of conformity through repair or replacement of the goods; a proportional reduction of the price; or termination of the contract.[40] The consumer can choose between the restoration of conformity by repair or replacement of the goods, unless the chosen remedy is impossible or disproportionate.[41] The price reduction must be proportional to the decrease

[40] Article 15 Decree-Law No. 84/2021.
[41] Article 15 (2) and Article 18 Decree-Law No. 84/2021.

in value of the goods.[42] Contract termination is possible if the non-conformity is severe or if repair or replacement is not carried out within a reasonable time, among other reasons.[43] With respect to contracts of digital content or services, the consumer has the right to restoration of conformity; a proportional reduction of the price; or termination of the contract.[44] The professional must restore the conformity of the digital content or services at no additional cost, within a reasonable time, and without significant inconvenience to the consumer.[45] If restoring conformity is impossible or disproportionate, among other reasons, the consumer may opt for a price reduction or contract termination.[46] The price reduction can be chosen by the consumer whenever digital content or services are provided in exchange for payment, and must be proportional to the decrease in value of the provided digital content or services to the consumer, compared to the value they would have if they were in conformity.[47] Contract termination is possible if the non-conformity is not minor.[48]

As can be observed, both regimes provide consumers with similar fundamental rights in case of non-conformity, including restoration of conformity, price reduction, and contract termination. However, for digital services, contract termination is only possible if the non-conformity is not minor, while for goods, contract termination is allowed in cases of severe non-conformity or if repair/replacement is not carried out within a reasonable time.

Pertaining to professional responsibility in contracts for goods, the professional is responsible for any non-conformity that appears within three years from the delivery of the goods.[49] The burden of proof that the non-conformity existed at the time of delivery lies with the professional for two years. As for digital services, the professional is responsible for any non-conformity that exists at the time of supply that appears within one year or that occurs during the continuous supply period.[50] In continuous supply contracts, the professional is responsible throughout the duration of the contract. The

[42] Article 15 (5) and Article 19 Decree-Law No. 84/2021.
[43] Article 15 (4) and Article 20 Decree-Law No. 84/2021.
[44] Article 35 Decree-Law No. 84/2021.
[45] Article 35 (3) Decree-Law No. 84/2021.
[46] Article 35 (4) Decree-Law No. 84/2021.
[47] Article 35 (5) Decree-Law No. 84/2021.
[48] Article 35 (7) Decree-Law No. 84/2021.
[49] Article 12 (1) Decree-Law No. 84/2021.
[50] Article 33 (2) Decree-Law No. 84/2021.

burden of proof that the digital content or service was in conformity lies with the professional for one year from the time of supply.

Both regimes establish the professional's responsibility for non-conformity, with specific timeframes for the burden of proof. The main difference lies in the timeframes: for digital services, the period is one year, while for goods, the period is two years.

Regarding fines, penalties, and sanctions, the Portuguese Food and Economic Safety Authority (ASAE) and Institute of Public Markets, Real Estate, and Construction (IMPIC, I.P.) are responsible for enforcing provisions on both goods and digital services.[51] Violations in both cases are punishable by fines, with attempts and negligence also subject to penalties under the Economic Offenses Legal Regime (RJCE).[52]

Not only do the two directives form a single legislative framework, but the two regimes also appear quite similar in their legal treatment. Both provide comparable rights for consumers in the event of non-conformity, establish the professional's responsibility with specific timeframes for the burden of proof, and outline equivalent sanctioning regimes. As seen, the primary differences are due to the nature of the goods in questions, the timeframes for the burden of proof, and the specific conditions governing contract termination. Based on the above analysis of Decree-Law No. 84/2021 concerning the transposition of Directives (EU) 2019/770 and 2019/771 into a single legislative framework, it appears that this transposition does not adequately reflect the EDPB's stance against the treatment of personal data as a commodity. The EDPB has consistently argued that personal data cannot be commodified, emphasizing the need for stringent data protection measures. However, in transposing Directives (EU) 2019/770 and 2019/771, Portugal has integrated both directives into a unified legislative framework, thereby not distinguishing between the treatment of personal data and other digital goods and services.

[51] Article 47 Decree-Law No. 84/2021.
[52] Article 48 Decree-Law No. 84/2021.

2. The General Data Protection Regulation

Harmonization on data protection law began in 1995 with the Directive 95/46/EC. This harmonization was significantly reinforced in 2016 with the adoption of the Regulation (EU) 2016/679 - General Data Protection Regulation, the legislative framework that remains in force today. The GDPR constitutes the most comprehensive regime in the European Union for the regulation of the right to data protection, furnishing a comprehensive regulatory framework for safeguarding data subjects' rights and governing the processing of personal data. The GDPR provides a dual approach encompassing both the protection of natural persons regarding the processing of their personal data and rules related to the free movement of personal data throughout the EU Member States.[53] The GDPR refers to the protection of rights and freedoms of natural persons, and particularly to the right to data protection. The specific content of this right is defined by the protective instruments provided for in the GDPR. The data subject, the individual whose personal data is being processed, entitles certain rights relating to the processing of their personal data, such as: the right to transparency; the right to be informed; the right to access; the right to rectification; the right to restrict the processing; the right to data portability; the right to erasure; the right not to be subject to automated individual decision-making, including profiling and the right to object on the processing of their personal data.[54]

As said, the GDPR provides a dual approach encompassing both the protection of natural persons regarding the processing of their personal data and rules related to the free movement of personal data throughout the EU Member States. Therefore, personal data is being protected both as an aspect of one's identity and as an economic good subject to circulation.[55] By ensuring uniform rules, the GDPR also pursues the economic interest related to the free movement of personal data, [56] such as 'the proper functioning of the internal market'[57] and this free movement of personal data shall not be restricted or

[53] Article 1(1) GDPR.
[54] CHAPTER III 'Rights of the data subject' GDPR.
[55] Milena Mursia and Carmine Andrea Trovato, 'The commodification of our digital identity' (*Filodiritto*, 31 May 2021) <https://www.filodiritto.com/commodification-our-digital-identity> accessed 24 November 2024.
[56] Recitals 9-1 GDPR.
[57] Recital 13 GDPR.

prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data.[58]

By interpreting the fundamental right to data protection in light of the GDPR, it should be balanced with fostering freedom of economic initiative and to conduct a business, which are explicitly protected in the EU legal system, as well as the development of new services necessary to ensure the pluralism and competitiveness of the digital single market.[59] Therefore, the right to data protection, even though being a fundamental right, is not absolute in the sense that it must be balanced with other fundamental rights and interests.[60] Indeed, according to Recital 4 of the GDPR, while the right to data protection should be 'designed to serve mankind', 'it must be (...) balanced against other fundamental rights, in accordance with the principle of proportionality'. Looking at Recital 4, the rights that one must have in mind when referring to this balance, are the fundamental right to the respect for private life (which also includes the principle of autonomy, self-determination and informational self-determination) and the freedom to conduct a business (which also includes the freedom of contract).[61]

3. The Unfair Commercial Practices Directive

Adopted in 2005, the Unfair Commercial Practices Directive constitutes a foundational element of EU consumer protection law, designed to shield consumers from misleading, deceptive, and aggressive business practices, empowering them to make informed decisions when entering contracts. It applies to unfair business-to-consumer commercial practices, as stipulated in Article 5, and governs conduct before, during, and after a commercial transaction in relation to a product (Article 3(1)), serving as the primary EU

[58] Article 1(3) GDPR.

[59] Garante per la protezione dei dati personali 'Relazione annuale 2019' <https://www.garanteprivacy.it:443/home/docweb/-/docweb-display/docweb/9428236> accessed 24 November 2024.

[60] Trovato (n 46).

[61] See 'Explanations Relating To The Charter Of Fundamental Rights' (2007/C 303/02), where, Article 16 Charter freedom to conduct a business also covers the freedom of contract. 'Study on the Essence of the Fundamental Rights to Privacy and to the Protection of Personal Data; This balance must be made for it to respect the 'essence' of the fundamental right to the protection of personal data, established in Article 52(1) of the Charter of Fundamental Rights of the EU. However, there still seems to be no clear delimitation nor consensus in the EU on the notion of 'essence'. Problems regarding the exact content of the EU fundamental right to personal data protection persist to this day. - European Data Protection Supervisor' <https://www.edps.europa.eu/data-protection/our-work/publications/papers/2023-11-08-study-essence-fundamental-rights-privacy-and-protection-personal-data_en> accessed 24 November 2024.

legislation governing unfair commercial practices.[62] The directive also includes a ‘blacklist’ of practices that are considered unfair in Annex I. Misleading practices include providing false information or omitting crucial details that could influence a consumer's decision-making process. Aggressive practices involve coercion, harassment, or undue influence that impairs the consumer's freedom of choice. By setting these standards, the directive aims to foster consumer confidence and promote fair competition within the internal market. Overall, the UCPD plays a vital role in protecting consumers from unethical business practices and ensuring a level playing field for businesses across the EU.

The European Commission notes that marketing products as ‘free’ without informing consumers of how their preferences, personal data, or user-generated content will be used could, in certain cases, qualify as a misleading practice.[63] Additionally, the Directive considers it a misleading omission if a company does not disclose the commercial intent behind a practice (unless it is evident from the context).[64] Therefore, a company could violate this provision if it fails to inform consumers that their ‘free’ app collects personal data.

On 29 March 2021, with decision no. 2631, the Italian *Consiglio di Stato* resolved a legal dispute involving Facebook regarding allegations of unfair commercial practices.[65] Facebook was accused of failing to provide users with clear, sufficient, and therefore misleading information regarding the commercial exploitation of their personal data. Upon registration, users were informed that the service was free of charge but were not adequately notified that their data would be utilized for purposes such as targeted advertising. Facebook was also alleged to have employed practices that exerted undue influence on users to secure their consent for the commercial use of their personal data. The methods employed for obtaining consent were designed in a manner that made refusal unnecessarily challenging, thereby creating a coercive environment. Such practices were

[62] European Commission 'Unfair Commercial Practices Directive' <https://commission.europa.eu/law/law-topic/consumer-protection-law/unfair-commercial-practices-and-price-indication/unfair-commercial-practices-directive_en> accessed 20 November 2024.
[63] Commission Staff Working Document Guidance on The Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices SWD (2016) 163 final, 25 May 2016.
[64] Article 7 (2) UCPD.
[65]Consiglio di Stato, Sez. VI, judgment no 2631/2021 (29 March 2021) <http://www.dirittodeiservizipubblici.it/sentenze/sentenza.asp?sezione=dettsentenza&id=6869> accessed 24 November 2024.

characterized as aggressive, as they compromised users' freedom of choice and their ability to make fully informed and voluntary decisions.

In its defence, Facebook contended that users did not pay a monetary price for using Facebook, and therefore, the concept of a commercial transaction did not apply. The company argued that personal data, being a fundamental right, is not an economic commodity (being extra commercium) and cannot be exchanged for services, referencing the 24th recital of Directive 2019/770, which recognizes personal data as a fundamental right and not a tradable commodity. Therefore, the service was free because the exchange of personal data did not constitute a form of payment and thus exempt from consumer law and regulations against unfair commercial practices. Ironically, this argument echoes the position in the European Data Protection Supervisor's Opinion (n. 4/2017), explained above.

The decision no. 2631 was an appeal against a ruling by a Regional Administrative Tribunal (TAR). In the Sentence of the TAR for Lazio n. 260/2000 it was decided that Facebook's practice was likely to make the consumer make a transactional decision they would have not taken otherwise. The key question in this decision revolves around whether personal data can be a counter-performance or payment like money. This classification carries significant practical implications: if personal data is considered a counter-performance, the exchange qualifies as a contractual arrangement.[66] In the judgment of the TAR for Lazio n. 260/2000, confirmed by *Consiglio di Stato's* decision no. 2631, the court considered proven that the practice was likely to make the consumer take a transactional decision they would have not taken otherwise. One reason for that was that Facebook's practice of providing an unclear and incomplete information notice during the user registration phase was considered misleading. The Italian Competition Authority (AGCM) found that the claim "Iscriviti. È gratis e lo sarà per sempre" (Sign up. It is free and always will be) on Facebook's homepage did not clearly inform users about the collection and commercial use of their data. This lack of transparency was deemed misleading because it did not allow consumers to understand that their data would

[66] Donato Maria Matera 'Personal Data as Counter-Performance and Consumer Protection. An Unfair Commercial Practices Italian Decision' (NOVA Consumer Lab 2 June 2021) <https://novaconsumerlab.novalaw.unl.pt/personal-data-as-counter-performance-and-consumer-protection-an-unfair-commercial-practices-italian-decision/> accessed 24 November 2024.

be used for commercial purposes, which constituted a counter-performance for the service offered by Facebook. The court supported AGCM's finding that the information provided by Facebook was neither clear nor immediate. The claim of 'gratuità' (free) was incomplete because it did not disclose the commercial use of user data, likely misleading consumers into believing that no counter-performance was required. The court noted that the information about the commercial use of data was not clearly and immediately perceivable by the average consumer. It is important to note that the court acknowledged that user data has significant economic value, as Facebook's revenue is primarily derived from online advertising based on user profiling (constituted the entire turnover of Facebook Ireland Ltd. and 98% of Facebook Inc.'s turnover). This economic value of data was considered a form of counter-performance, making the service not entirely 'free' as claimed. The court emphasized that the consumer should be informed about this economic exchange to make an informed decision, in this case, registering in the platform.

Additionally, the importance of transparency and completeness of information in consumer protection was highlighted. The court referred to the European Commission's guidelines and previous AGCM decisions, which stated that personal data and user-generated content have economic value. Therefore, consumers must be informed about the commercial use of their data to make a conscious economic choice. The court rejected Facebook's argument that the issue was solely a matter of privacy regulation. It stated that consumer protection and privacy regulations are complementary, each imposing specific informational obligations. The court found no incompatibility between the two sets of regulations, reinforcing the need for clear consumer information about the commercial use of data. The court noted that the protection of personal data as a fundamental right does not exclude its economic exploitation, which requires transparency and clear information to consumers. The court concluded that the misleading practice of not informing users about the commercial use of their data was likely to affect their transactional decisions. By not providing adequate information, Facebook prevented consumers from making an informed choice, thus constituting an unfair commercial practice.

In sum, the court stated that the 'capitalisation' of personal data, a typical feature of digital market economies, 'requires operators to comply, in the related commercial transactions, with those obligations of clarity, completeness and non-deceptiveness of information provided for by the legislation for the protection of the consumer, who must be made aware of the exchange of services that underlies the adhesion to a contract for the use of a service, such as the use of a social network'.[67]

Essentially, it was decided that Facebook's representation of its service as 'free' constituted an unfair commercial practice, which breached EU Directive 2005/29/EC. The judges clarified that consumer protection and privacy laws (as outlined in Regulation (EU) 2016/679) are not in opposition but instead offer complementary, multi-dimensional protection. This approach strengthens consumer rights by broadening the scope of remedies available in cases involving the processing of personal data and effectively raises the standard of consumer protection by extending applicable remedies to situations where data handling is involved.[68]

The Court emphasized that Facebook's failure to clearly disclose the commercial use of personal data violated consumer protection regulations, particularly under the Italian Consumer Code. The judgment underlined that the company's approach to obtaining user consent was problematic, as it was neither transparent nor sufficiently clear about the data usage for commercial purposes. The court highlighted that when a user withdraws their data, certain services are lost, demonstrating that Facebook's services are not truly free but are exchanged for personal data for commercial gain.

When addressing the issue of the non-commercial nature of personal data, *Consiglio di Stato* states that, even if personal data is to be considered non-commercial (Facebook's argument), *Consiglio di Stato* notes that the monetisation of personal data occurs unconsciously when companies use it for commercial profiling. This exploitation happens without the user's full awareness, often due to misleading information in the terms of use. So, while acknowledging the appellant's argument regarding the non-commercial nature of personal data, it highlights a critical distinction: the commercial exploitation of personal data by third parties. It points out that personal data can be monetised unconsciously by users when companies collect and use this data for commercial profiling

[67] Consiglio di Stato, no 2631/2021 (n 65).
[68] ibid. Donato Maria Matera (n 66).

and marketing purposes. This exploitation often occurs without the user's full awareness or informed consent, as users may not fully understand the extent to which their data will be used for commercial activities. It focuses on the exploitation of personal data by companies, which often happens without the user's full knowledge. The GDPR provides a broad scope for the protection of personal data, extending to any form of human or automatic interaction with such data. However, *Consiglio di Stato* argues that recognising the absolute speciality of data protection law would lead to the exclusion of other legal disciplines, which is unreasonable.[69] It was then added that the reproach directed at the professional would consist of not having informed the user, who in this case was transformed into a "consumer," at the moment when they make their data available in order to use the services offered by Facebook companies for free. This should have been done before the operation, during which the user remains convinced that the benefits associated with accessing the platform are free. Therefore, the user cannot recognize and realize that in exchange for the advantage, an automatic commercial profiling occurs, which is not clearly and immediately indicated at the time of the first access, as an inevitable consequence of making the data available.

As said earlier, the Digital Content Directive had already legally recognized the role of personal data as a counter-performance in exchange for digital content and digital services. However, this Italian decision goes further, reinforcing that personal data can be treated as a form of payment in commercial transactions. It also highlights the legal obligation for companies to adhere to consumer protection laws when personal data is used as a form of payment, ensuring that consumers' rights are upheld. It reinforces the principle that personal data, when exchanged for digital content and services, must be treated with the same level of scrutiny and protection as monetary transactions, and any failure to comply with these provisions can result in significant penalties for the companies involved. It bridges the gap between data protection and consumer law, offering a clearer legal framework of how these two areas interact. Thus, acknowledging the commercial nature of data provides stronger safeguards for the data subject. This recognition aligns with the evolving nature of digital transactions where data is often exchanged for services. The reasoning in Decision No. 2631 by the *Consiglio di Stato* diverges from the European Data Protection Supervisor's (EDPS) stance, which firmly

[69] Consiglio di Stato, no 2631/2021 (n 65).

rejects the commodification of personal data. The EDPS emphasizes stringent data protection measures, arguing that personal data cannot be treated as a tradeable commodity, a stance not reflected in the arguments supporting the decision.

4. The Unfair Contract Terms Directive

Adopted in 1993, the Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts or Unfair Contract Terms Directive, represents a significant component of EU consumer protection law, providing a framework for assessing the fairness of contractual terms and protecting consumers from unfair practices. This directive applies specifically to contracts between businesses and consumers (B2C contracts), addressing standard terms that are not individually negotiated. Its primary objective is to prevent businesses from imposing unfair terms on consumers, thereby ensuring that contract terms remain transparent and balanced. Article 3(1) of the UCTD establishes the definition of unfair terms in consumer contracts, ensuring that contract terms are fair and not detrimental to consumers. Article 6(1) addresses the consequences of unfair terms, stipulating that such terms are non-binding on the consumer, promoting fairness in contractual agreements.

Case C-237/02 (*Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Hofstetter*) provides a valuable opportunity for analysis within this context, particularly when compared with Meta's 'Consent or Pay' model, as it introduces an innovative perspective, which will be elaborated upon in the following discussion.[70]

The *Freiburger Kommunalbauten* case dealt with the interpretation of unfair terms in consumer contracts under the Unfair Terms in Consumer Contracts Directive. In this judgment, the Court of Justice of the European Union (CJEU) was asked to interpret whether a contractual term requiring full payment for a building before construction progress, secured by a bank guarantee, was unfair under Article 3(1) of Council Directive 93/13/EEC. The term deviated from the standard payment terms typically expected in construction contracts, where payment is usually due upon completion or progress of the

[70] *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Ludger Hofstetter and Ulrike Hofstetter* [2004] ECJ Case C-237/02.

work. The CJEU ultimately decided that it was for the national court to determine the fairness of the term, considering the specific circumstances of the case.

The analysis of the *Freiburger* judgment and Meta's 'Consent or Pay' model from the perspective of derogation to a contractual default involves examining how these cases address deviations from standard contractual arrangements. In the Freiburger case, the issue was a contractual term requiring full payment for a building before construction progress, while in Meta's case, the focus is on the shift from a traditional service-for-money contract to a barter model where users' data is exchanged for services.

The qualification of a barter contract is justified looking at Portuguese contract law, namely the Portuguese civil code. Traditionally, contracts by which goods are exchanged are qualified as contracts for barter. A barter contract involves the exchange of goods or services between two parties without the use of money. Each party agrees to provide a good or service in return for another good or service of equivalent value. So, in these contracts the counter performance is not expressed in the obligation to pay a price, but to provide a good in exchange for the good that that party hopes to receive.[71]

In Portuguese law, a barter contract is today an atypical, unnamed contract, as it does not have specific regulation in Portuguese national law since the Civil Code of 1966.[72] Today, in a barter or exchange contract ('contrato de troca ou permurta'), the reference regulation must be sought, with appropriate adaptations, in the sale contract.[73] Therefore, today, the rules of the sale contract apply to this legal transaction, by virtue of the provisions of Article 939 of the Portuguese Civil Code, as long as they are not incompatible with it.

Under EU law, there is no definition of a barter contract. As a proxy of national laws of Member States in the EU, the Draft Common Frame of Reference (DCFR) could be a useful instrument.[74] It is dedicated to sales contracts and is based on the Principles of

[71]Marco B.M. Loos 'Sales Law in the DCFR, Law Review' <https://internationallawreview.ro/article/sales-law-in-the-dcfr> accessed 8 December 2024.
[72]Acórdão Do Supremo Tribunal de Justiça Processo nº. 6998/13.1TBBRG.S1<https://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/557fa34cf784f21780257ed90031c5a8?OpenDocument> accessed 8 December 2024.
[73]ibid. Acórdão Do Supremo Tribunal de Justiça, Processo nº. 07A2761 <https://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/171777f01a6d9159802573df00410a56?OpenDocument> accessed 8 December 2024.
[74] The DCFR is a comprehensive academic document that aims to harmonize and unify private law across the European Union. It provides a set of principles, definitions, and model rules intended to serve as a foundation for the development of a coherent and consistent body of European private law, facilitating cross-border legal transactions and enhancing legal certainty within the EU. The DCFR has not been

European Law on Sales (PELS). The DCFR contains a provision regarding barter contracts in Article IV.A.–1:203 (Contract for barter) and states that each party is considered to be the buyer with egard to the goods that they are to receive under the contract and the seller with respect to the goods that they are to transfer. It is important to have in mind that in many EU legal systems, the rules on sales contracts are applied with appropriate adaptations.

In the *Freiburger* case, the term was challenged as being unfair because it required the purchaser to pay the full price before any construction progress, potentially placing the consumer at a disadvantage. Regarding the balancing of interests, Freiburger Kommunalbauten and the German Government argued that the bank guarantee provided by the builder mitigated the risks for the consumer, making the term fair. Conversely, Mr. and Mrs. Hofstetter argued that the term upset the balance of mutual obligations and was contrary to good faith. The CJEU ultimately decided that it was for the national court to determine the fairness of the term, considering the specific circumstances of the case. The Court emphasized that the assessment should take into account the nature of the goods or services, the circumstances attending the conclusion of the contract, and the consequences of the term under the applicable national law. The Freiburger judgment highlights the importance of assessing derogations from standard contractual terms on a case-by-case basis. The decision underscores that deviations from default terms must be evaluated for their fairness, considering the overall balance of rights and obligations between the parties.

Meta's 'Consent or Pay' model involves a shift from the traditional service-for-money contract to a barter model where users' data is exchanged for access to services. This model requires users to either consent to data processing for personalized advertising or pay a fee to use the service without personalized advertising. The model raises questions about the fairness and proportionality of requiring users to choose between consenting to data processing or paying a fee. The assessment involves whether this derogation from the default model of monetary contracts to a barter model complies with the UCTD's

formally adopted as binding law by the European Union or its member states. However, it has influenced legal scholarship, legislative proposals, and judicial decisions to some extent. Some national courts and European institutions may refer to the DCFR as a persuasive authority or a source of guidance in interpreting and developing private law. While it has not achieved widespread formal application, it has contributed to the ongoing dialogue and efforts toward harmonizing private law within the EU.

principles of fairness. Specifically, the focus may be on whether consumers are sufficiently informed about the terms and implications of the barter model (e.g., use of personal data as counter-performance) or weather the terms of the barter arrangement are fair and not exploitative or imbalanced in favour of the company.

Applying the principles of proportionality and legal innovation to Meta's 'Consent or Pay' model, it can also highlight the importance of balancing the interests of both traders and consumers. The principle of proportionality requires that any legal measure should not be more restrictive than necessary to achieve its objective.[75] In the context of Meta's 'Consent or Pay' model, this means assessing whether the requirement for users to either consent to data processing or pay a fee is a proportionate measure to achieve the goal of protecting user privacy while allowing Meta to operate its business model. If the 'Consent or Pay' model is found to be a proportionate measure, it can protect consumers' privacy rights while allowing Meta to innovate and offer its services in a competitive market. This approach ensures that the measure is not overly restrictive and that both parties' interests are considered.

Esposito's concept of legal innovation as a non-zero-sum game can be applicable to the 'Consent or Pay' model.[76] According to Esposito, legal innovation does not necessarily result in a zero-sum game where one party's gain is another party's loss. Instead, it can create scenarios where both parties benefit, or at least, one party benefits without harming the other. This concept is particularly relevant in the context of balancing the interests of traders and consumers. In Meta's 'Consent or Pay' model, users are given a choice between consenting to data processing or paying a fee. Applying the zero-sum-game, in Meta's perspective, if users consent to data collection, Meta benefits by monetising their

[75] Takis Tridimas, 'The Principle of Proportionality' in Robert Schütze and Takis Tridimas (eds), 'Oxford Principles Of European Union Law: The European Union Legal Order' *Volume I* (Oxford University Press 2018) <https://doi.org/10.1093/oso/9780199533770.003.0010> accessed 14 December 2024. Vasiliki Kosta, 'The Principle of Proportionality in EU Law: An Interest-Based Taxonomy' (Social Science Research Network, 9 April 2019) <https://papers.ssrn.com/abstract=3368867> accessed 14 December 2024.

[76] Fabrizio Esposito, 'The Structural Transformation of European Private Law: A Critique of Juridical Hermeneutics' European Law Review (2024); A zero-sum game is a concept in game theory and economic theory that mathematically represents a situation involving two competing entities, where one party's gain is equivalent to the other party's loss. In this framework, the advantage acquired by one participant is equivalent to the disadvantage incurred by the other, resulting in a net benefit of zero across the system. In contrast, a non-zero-sum scenario refers to a situation where the aggregate gains and losses of the interacting parties are not necessarily balanced, allowing the total net outcome to be either positive or negative. This framework permits outcomes where all participants can simultaneously benefit or incur losses, or where one party's gain does not equate to another's loss. The parties that are engaged in a non-zero-sum conflict have some complementary interests and can have some interests that are completely opposed.

data through targeted advertising, a key revenue stream; and if users opt to pay for a subscription, Meta secures direct revenue, potentially diversifying its income sources. In either scenario, Meta 'gains' while maintaining its user base. However, looking at the user's perspective, users who prioritise cost-free access can continue using the online platform by consenting to data collection, which for some may not represent a significant 'loss' if they perceive their collected data and use as an acceptable trade-off; and users who do not want to have their data being used for personalised advertising, that do not wish to see personal ads or for any other reason of their choice, can pay the subscription fee to avoid data sharing, thus retaining both their access to the platform and not sharing their personal data. Here, both groups of users retain the ability to use Meta's services in a manner aligned with their individual preferences, avoiding an outright loss.

Applying the zero-sum-game, by offering this choice, Meta can potentially benefit from reduced regulatory burdens and increased user trust. At the same time, consumers benefit from having control over their data and the option to use the service without personalized advertising, if they wish so. This approach underscores the potential for innovative legal arrangements that benefit both parties, or at least, benefit one and not harm another, fostering a competitive market environment.

Chapter 3: Immoral Contracts in the Context of the European Data Protection Supervisor's Position on 'Consent or Pay' Data Exchanges

The European Data Protection Supervisor's (EDPS) *Opinion 4/2017 on the Proposal for a Directive on Certain Aspects Concerning Contracts for the Supply of Digital Content* (the Opinion), emphasizes that personal data should not be treated as a counter-performance in transactions.[77] This stance was underpinned by the recognition that personal data is intrinsically linked to fundamental rights, specifically the right to privacy and data protection, as enshrined in Article 8 of the European Charter of Fundamental Rights and Article 16 of the Treaty on the Functioning of the European Union (TFEU). The Opinion states that while there might be a market for personal data, just as there is a market for live human organs, this does not mean that such markets should be legitimized by legislation. The trade of live human organs is a common example of an immoral contract, as it commodifies human life and dignity, leading to exploitation and ethical as well as legal violations.[78]

This comparison underscores the intrinsic wrongness of commodifying personal data, similar to the objections about the commodification of human organs. By making this analogy, the EDPS emphasizes that personal data, like human organs, should never be subject toa commercial transactions, as doing so would undermine the fundamental rights and ethical principles that protect personal data. The EDPS's view on the trade of personal data in this case can be interpreted as treating it as an immoral contract, as it commodifies fundamental rights, particularly the right to privacy and data protection. Therefore, it is useful to analyse it from the perspective of immoral contracts.

This chapter will begin by introducing the concept of immoral contracts from a European perspective, looking into European legal instruments such as the Draft Common Frame of Reference (DCFR) for reference. It will also draw from relevant academic literature in

[77] 'EDPS Opinion on the Legislative Package 'A New Deal for Consumers' (n 32).
[78] Carmel Shalev, 'Limiting Commodification: International Law and Its Challenges' in Jean-Daniel Rainhorn and Samira El Boudamoussi (eds), *New Cannibal Markets : Globalization and Commodification of the Human Body* (Éditions de la Maison des sciences de l'homme 2015) <https://books.openedition.org/editionsmsh/10803> accessed 24 February 2025; Roberto Andorn 'Buying and Selling Organs: Issues of Commodification, Exploitation and Human Dignity', Journal of Trafficking and Human Exploitation (JTHE) (2017) <https://www.uitgeverijparis.nl/nl/reader> accessed 24 February 2025.

Europe on immoral contracts in order to provide a comprehensive overview of this concept.

Following this theoretical framework, the chapter will delve into an analysis of the concept of immoral contracts from a Portuguese law perspective, examining pertinent case law to illustrate how Portuguese courts have applied the theories of immoral contracts. This analysis will set the stage for a detailed exploration of the European Data Protection Supervisor's (EDPS) position on the exchange of personal data, which draws an analogy to the market for human organs, thereby highlighting the intrinsic wrongness of commodifying personal data.

The chapter aims to provide a thorough understanding of the dimensions of treating personal data as a commodity within the context of immoral contracts. It will identify and discuss specific situations in Portuguese law where contracts are deemed legally immoral and compare them to data exchanges in the Meta's 'Consent or Pay' model and the EDPS's point of view.

1. Immoral Contracts - a European Perspective

Immoral contracts are defined as legal actions or agreements that are typically deemed invalid or unenforceable since they violate societal norms and ethical principles. As stated by Aurelia Colombi Ciacchi, the most ancient known sources mentioning this concept go back to the second century Roman jurists Gaius and Julianus.[79] These jurists formulate specific examples of agreements that do not create obligations because their object or purpose is contrary to good morals. One specific example in questions is the stipulation of a penalty for failing to institute a certain person as heir. This example presents to be particularly important to our case since it links the concept of good morals with the respect for what contemporary scholars would call the private autonomy, personal autonomy, and/or self-determination of the obligee, in its specific manifestation as freedom of will.[80]

Immoral contracts are generally considered void or unenforceable as they contravene fundamental principles of morality and public policy upheld in a specific place at a specific time. The complexity arises from the fact that relative concepts of immorality (such as good morals and public order) can vary significantly across different national systems due to their unique historical, cultural, and social traditions.[81] These traditions shape legal definitions, social attitudes, and approaches to governance, resulting in unique legal and moral landscapes across nations. These concepts are the so-called 'indeterminate concepts', which can be defined as concepts whose content and scope are imprecise, further characterised by their malleability.[82] Furthermore, what is deemed immoral at present may be regarded as moral in the future, and conversely, what is considered moral today may come to be seen as immoral over time.

While European Union (EU) law includes certain rules that render contracts void, such as Article 101 TFEU on cartels, no European legal instrument provides general provisions on the illegality or immorality of contracts. As a result, the Court of Justice of the EU has addressed issues concerning the interpretation of Union law impacting contract validity

[79] Aurelia Colombi Ciacchi, Chantal Mak and Zeeshan Mansoor (eds), 'Immoral Contracts in Europe' (Intersentia 2020) <https://www.cambridge.org/core/books/immoral-contracts-in-europe/BA5381E5A2BE0A231DF703547888C1C9> accessed 19 January 2025.
[80] ibid.
[81] ibid.
[82] Teresita Rendón Huertas Barrera, 'La interpretación viciada de los Conceptos Jurídicos Indeterminados' (2016) 4 Revista Jurídica Derecho 111; Carlos Proença, 'Conceitos Indeterminados e Figuras Afins' Revista do Tribunal de Contas N.º 6 (2023) <https://revista.tcontas.pt/edicoes/rtc_2023_06/rtc-2023-06__estudo-02.pdf> accessed 18 January 2025.

considering good morals and public policy. Although the European judiciary has been cautious about interfering with national definitions of contractual morality, legal scholars have explored avenues for harmonising contract law.[83] Notably, the Lando Commission pioneered the Principles of European Contract Law (PECL), which served as a model for judicial and legislative development and a foundation for further harmonisation. The PECL also influenced the academic Draft Common Frame of Reference (DCFR), developed by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), with support from the European Commission. As explained in the previous chapter, the DCFR is a proposal by the European Commission aimed at harmonizing private law across the EU. It provides a set of common principles and rules to guide the development of laws related to contracts, torts, and property, promoting consistency and legal certainty. While not legally binding, the DCFR serves as a reference for future EU legal reforms and helps facilitate cross-border transactions within the EU.

In the DCFR, the provisions most relevant to this analysis are found in Section 3: 'Infringement of Fundamental Principles or Mandatory Rules', specifically 'II.–7:301: Contracts Infringing Fundamental Principles' and 'II.–7:302: Contracts Infringing Mandatory Rules'. This section covers matters commonly categorized under illegality and immorality, emphasizing the legal consequences of breaches of fundamental principles or mandatory rules. The underlying premise is that certain contracts or agreements, even in the absence of defects in consent or intention, may nonetheless be deemed so problematic—whether on public policy grounds or due to their contravention of essential legal norms—that they warrant being declared void or voidable.

The DCFR Model Rules II.–7:301: 'Contracts Infringing Fundamental Principles' and II.–7:302 'Contracts Infringing Mandatory Rules' establish distinct legal standards. II.–7:302 applies exclusively to contracts that breach mandatory rules without involving any fundamental principles, whereas II.–7:301 applies only when a contract violates a fundamental principle. In cases where a contract violates both a mandatory rule and a fundamental principle, the latter—being the more serious breach—takes precedence.[84] Under Model Rules II.–7:301, once the contract is found to be contrary to the fundamental

[83] Ciacchi, Mak and Mansoor (n 79).
[84] Christian von Bar, Eric Clive, and Hans Schulte-Nölke (eds), 'Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)' Study Group on a European Civil Code and Research Group on EC Private Law <https://www.law.kuleuven.be/personal/mstorme/european-private-law_en.pdf> accessed 11 February 2025.

principles, the court has no discretion in determining its legal consequences: such a contract is deemed entirely without effect, irrespective of the parties' intentions or awareness. By contrast, Model Rules II.–7:302 deals with less important violations of the law, allowing for a more flexible judicial approach. allowing for a more flexible judicial approach. This rule permits an assessment of factors such as the severity of the infringement and the surrounding circumstances, to determine the appropriate outcome.[85] When assessing the consequences of illegality under Model Rule II.–7:302, the first consideration is whether the breached mandatory rule itself prescribes specific consequences. If the rule explicitly renders the contract void or stipulates that no such consequence follows, courts must adhere to that determination. This provision also extends to contracts imposing undue restraints on individual liberty—such as excessively long contractual obligations or restrictive covenants—notably in relation to the right to work or restraints of trade. Furthermore, it applies to contracts contravening generally accepted norms of family life and sexual morality as well as those interfering with the administration of justice (e.g., champertous agreements in England or pacta de quota litis in other jurisdictions). [86]

It is important to highlight that the wording of Model Rules II.-7:301 is deliberately formulated to bypass the divergent national interpretations of concepts such as immorality, public policy, public order, and *bonos mores* by referencing a broad concept of fundamental principles shared across the European Union, including those derived from EU law. Therefore, this provision seeks guidance in European human rights documents rather than national conceptions of morality. By doing so, it seeks to circumvent the variations in national legal frameworks concerning concepts of immorality, public policy, public order, and *bonos mores*, by invoking a necessarily broad idea of fundamental principles of law found across Europe. Guidance as to these fundamental principles may be obtained from such documents as the EC Treaty (e.g. in favour of free movement of goods, services and persons, protection of market competition), the European Convention on Human Rights (e.g. prohibition of slavery and forced labour (art. 3), and rights to liberty (art. 5), respect for private and family life (art.

[85] Hector Lewis MacQueen, 'Illegality and Immorality in Contracts: Towards European Principles' (Social Science Research Network, 24 April 2014) <https://papers.ssrn.com/abstract=2430751> accessed 11 February 2025.

[86] It is added that situations covered by the rules on vices of consent or unfair contract terms are excluded from the scope of the present Article. DSFR (n 8).

8), freedom of thought (art. 9), freedom of expression (art. 10), freedom of association (art. 11), right to marry (art. 12) and peaceful enjoyment of possessions (First Protocol, art. 1)) and the European Union Charter on Fundamental Rights (which includes many of the rights already mentioned and adds such matters as respect for personal data (art. 8), freedom to choose an occupation and right to engage in work (art. 15), freedom to conduct a business (art. 16), right to property (art. 17), equality between men and women (art. 23), children's rights (art. 24), rights of collective bargaining and action (art. 28), protection in the event of unjustified dismissal (art. 30), and a high level of consumer protection (art. 38).[87]

Despite the existence of the DCFR at the European Union level, the interpretation of concepts such as good morals and public order remains largely decentralised. Each Member State retains its own understanding of these principles, rooted in its unique legal traditions, cultural values, and societal norms. Such differences highlight the complexity of applying uniform standards across the EU while respecting local autonomy. Consequently, the interplay between EU-wide regulations and national interpretations creates a dynamic landscape that demands careful navigation to ensure compliance and cohesion.[88]

Another dimension to this discussion is explored in Aurelia Colombi Ciacchi's *Immoral Contracts in Europe*, which provides a robust foundation for the examination of morally dubious contractual agreements across diverse legal systems.[89] The book scrutinizes twelve cases of morally dubious contracts, alongside the legal responses from twenty-eight jurisdictions. These cases, while predominantly fictitious, are inspired by actual litigations adjudicated by courts. The legal responses to the cases are grounded in real-world judicial reasoning.[90] The comparative analysis of the jurisdictions' responses aims to identify commonalities and divergences, thereby elucidating the potential existence of a shared normative common core concerning immoral contracts. A key insight for our investigation emerging from this analysis is the identification of a taxonomy that categorizes immoral contracts into two distinct types: categorical prohibitions and conditional prohibitions.

[87] ibid.
[88] DCFR (n 8).
[89] Ciacchi, Mak and Mansoor (n 79).
[90] ibid.

Categorical prohibitions are underpinned by fundamental ethical, moral, or legal principles that regard the prohibited conduct as intrinsically wrong or harmful. This form of prohibition is absolute and non-negotiable, reflecting a normative consensus that certain actions or behaviours should never be permitted under any circumstances. In contrast, the rationale behind a conditional prohibition is based on the understanding that certain actions or behaviours are not inherently wrong or harmful in all contexts but may become problematic or unacceptable under specific conditions. This approach introduces a degree of flexibility, allowing for context-sensitive assessments that balance competing interests and enable the law to adapt to varying circumstances and intentions. [91] Next, we will show how, through this nuanced taxonomy, the book contributes to the understanding of how different legal systems can navigate the complex interplay of immoral contracts.

Based on each case of the book, it is evident that, depending on the jurisdiction, the same case may be classified as either categorical or conditional, depending on the traditions and considerations specific to each legal system. There are cases with a greater degree of similarity in their outcomes than others; however, all cases, to some extent, can be regarded as either categorical or conditional. Having surrogate motherhood contracts as an example, while some countries categorically prohibit such contracts, deeming them intrinsically wrong, others adopt a more nuanced, conditional approach, allowing for context-sensitive assessments.[92] This dichotomy not only highlights the diversity of legal reasoning across jurisdictions but also invites a deeper exploration into how different societies navigate the intricate interplay of morality and legality in the realm of surrogacy. In several European jurisdictions, the prohibition on surrogate motherhood contracts is categorical. This means that these contracts are considered intrinsically wrong or harmful, and thus, they are absolutely prohibited without any exceptions. The countries that fall under this category include Austria, Belgium, France, Italy, and Spain.[93] In Austria, surrogacy contracts are void due to the illegality of the contract matter or violation of good morals. Austrian law generally seeks to prohibit surrogacy contracts, reflecting a normative consensus that such contracts are intrinsically wrong. In Belgium, surrogacy

[91] Francisco José Infante Ruiz and Francisco Oliva Blánquez, 'Contracts Contrary to Fundamental Principles and Mandatory Rules of European Contract Law' (2022) InDret <https://raco.cat/index.php/InDret/article/view/399941> accessed 2 March 2025. Rossella Esther Cerchia, 'A Comparative Viewpoint on Illegal Contracts: In Favor of Flexibility and Proportionality' (2021) 21 Global Jurist 447.
[92] Ciacchi, Mak and Mansoor (n 79).
[93] ibid.

contracts are regarded as contrary to public policy and good morals, making them illegal and void. In France, surrogacy is explicitly forbidden by law, and such contracts are considered null and void. The prohibition is underpinned by the principles of the inviolability of the human body and the inalienability of legal status. In Italy, surrogacy contracts are void for the unlawfulness of the object, which is both illegal and impossible. In Spain, surrogacy contracts are null and void as per the Assisted Human Reproduction Technologies Act (Law 14/2006, of 26 May, LRHA).[94]

In contrast, some countries adopt a conditional prohibition approach, where surrogacy contracts are not inherently wrong but may become problematic under specific conditions. These countries include Cyprus and Greece. In Cyprus, surrogacy arrangements are legalised under specific conditions, such as the absence of economic consideration and the requirement for prior authorisation. In Greece, surrogacy contracts may be valid if they meet specific statutory requirements, such as the absence of financial benefit and court authorisation.[95] The prohibition in these two countries is conditional, reflecting a balance between competing interests. In the case of Portugal, prior to 2018, surrogacy was allowed on an exceptional basis and under strict conditions, such as the absence of payment and the use of gametes from at least one of the beneficiaries. This prohibition was thus conditional, allowing for flexibility in certain contexts. However, in a 2018 judgment the Constitutional Court declaration the unconstitutionality of the 2016 amendments, and the previous legal framework became applicable, and surrogacy again became prohibited under any circumstance. As of now, the issue of surrogacy in Portugal continues to face a regulatory deadlock, despite the approval of the corresponding law at the end of 2021. The measure remains unenforced due to the lack of specific regulations, preventing it from being put into practice, making it illegal under any circumstances until its specific regulation.[96]

In countries with a categorical prohibition, the legal reasoning is based on fundamental ethical, moral, or legal principles that regard surrogacy contracts as intrinsically wrong.

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[94] ibid.
[95] ibid.
[96] Patrícia Carvalho, 'Gestação de substituição ainda sem regulamentação. 'Estamos à espera há mais de dois anos' (*PÚBLICO*, 10 February 2025) <https://www.publico.pt/2025/02/10/sociedade/noticia/gestacao-substituicao-regulamentacao-espera-ha-dois-anos-2121726> accessed 12 February 2025; 'Nascimento, adoção e gestação de substituição em Portugal - gov.pt' <https://www2.gov.pt/cidadaos-europeus-viajar-viver-e-fazer-negocios-em-portugal/direitos-dos-cidadaos-e-das-familias-entre-paises-da-uniao-europeia/nascimento-adocao-e-gestacao-de-substituicao-em-portugal> accessed 12 February 2025.

For instance, in France, the prohibition is based on the principles of the inviolability of the human body and the inalienability of legal status. These principles reflect a normative consensus that surrogacy contracts should never be permitted under any circumstances. In contrast, countries with a conditional prohibition approach the issue with a degree of flexibility. In Cyprus, for example, the legal framework allows surrogacy under specific conditions, such as the absence of economic consideration and prior authorisation. This approach recognises that surrogacy is not inherently wrong but may become problematic and wrong under certain conditions. The conditional prohibition allows for context-sensitive assessments that balance competing interests, such as the rights of the surrogate mother and the intended parents.

The distinction between categorical and conditional prohibitions on immoral contracts highlights the varying approaches of different legal systems in navigating this thematic. A country that considers surrogacy contracts categorically immoral reflects a strong normative consensus that such contracts are intrinsically wrong and harmful, warranting an absolute prohibition. On the other hand, a country that adopts a conditional prohibition approach recognises that surrogacy contracts are not inherently wrong but may become problematic under specific conditions. This approach introduces flexibility, allowing for context-sensitive assessments that balance competing interests and adapt to varying circumstances and intentions. The coexistence of these differing approaches underscores the diversity of legal reasoning and ethical considerations across jurisdictions.

Expanding on this point, the twelve cases discussed in the book will be classified as either categorical or conditional in the context of Portuguese law. By analysing the operative rules and descriptive formants of each case, it can be concluded that Cases 1, 5, 7, 8, 9, and 10 are categorical, while Cases 2, 3, 4, 6, 11, and 12 are conditional in the Portuguese legal system. This classification aims to deepen the understanding of immoral contracts within this jurisdiction and provide possible insights into new cases that may not have been specifically addressed by the twelve cases discussed.

2. Analysis of Portuguese Law on Contractual Legal Immorality

Portugal is an example of the inclusion of a general clause of 'good morals' in its civil code (Article 280/2), which historically developed from Romanist and/or German models (literally in Portuguese 'good customs', corresponding to the Latin *contra bonos mores*, which means against good morals).[97] The relevant articles on this matter are Article 81, Article 280, 281 and 334 of the Portuguese Civil Code. Article 81 in its number 2 is clear that 'any voluntary limitation on the exercise of personality rights is null if it is contrary to the principles of public order.' Article 280 in its number 2, states that 'a transaction is void if it is contrary to public order or offensive to good morals.' A contract or other legal transaction being void means that it does not produce the legal effects it purports to produce. Article 281 states that 'if only the purpose of the legal transaction is contrary to the law or public order, or offensive to good morals, the transaction is void only when the purpose is common to both parties'. Therefore, Article 280 number 2 relates to the legality/illegality of the content/object of the legal transaction and Article 281 to the legality/illegality of its purpose. Additionally, a legal transaction cannot be subject to a condition that is contrary to the law or public order, or offensive to good morals, therefore being void (Article 271 Portuguese Civil Code). Article 334 regulates the 'abuse of rights' and states that 'the exercise of a right is unlawful when the holder clearly exceeds the limits imposed by good faith, good customs, or the social or economic purpose of that right'.

The concepts of these legal provisions, by their very nature, are often indeterminate, vague, and flexible, and as such, their application must adhere to principles of rationality and objectivity in order to prevent the risks of arbitrary decision-making and legal uncertainty, while ensuring the uniformity essential to the rule of law.[98] Even in areas of perceived judicial discretion, judicial decisions remain bound by legal norms and cannot be not entirely discretionary. As Jorge Morais de Carvalho states, just like the concept of public order, the concept of good morals is indeterminate and must be concretized by the applicators of the law, in order to verify to what extent it constitutes a limitation of the

[97] Ciacchi, Mak and Mansoor (n 79).
[98] Carlos Proença (n 82).

private autonomy of the parties.[99] Therefore, these indeterminate concepts, should be rendered specific by decision-makers based on the facts of each case.[100]

The following section presents an analysis of Portuguese case law on immoral contracts. Before examining the relevant judicial decisions, it is essential to outline the methodology used for case selection. For this study, only decisions from the Supremo Tribunal de Justiça (STJ) were considered, as it represents the highest judicial instance in Portugal, rendering final and authoritative rulings. The research was conducted using the Portuguese online case law database of the decisions from the STJ, where the terms *bons costumes* (good morals) and *ordem pública* (public order) were employed as search criteria. The search for *ordem pública* yielded 149 decisions, while *bons costumes* returned forty-four decisions. Cases referencing Articles 281 and 280(1) of the Portuguese Civil Code were excluded from the selection process, as they fall outside the specific scope of this research. Additionally, of the 149 decisions analysed, approximately half pertained to 'international public order.' However, as the focus of this study is on Portuguese public order, only those relevant to the latter were considered.

Since 2001, the court's decisions have only been available in highly summarized form, which does not provide access to the facts or the reasoning underlying the court's rulings. Consequently, decisions issued before that year were not taken into account due to this lack of substantive information.

The vast majority of cases that appeared concerned contractual matters. To provide a comprehensive and broad perspective on judicial reasoning concerning immoral contracts within the Portuguese legal framework, an effort was made in order to include a diverse range of cases from different areas of law, mostly highlighting, however, cases on contract law. Finally, the selected cases are categorized into two subsections—good morals and public order—to facilitate a clearer and more structured analysis.

[99] Jorge Morais Carvalho, 'Os Contratos De Consumo - Reflexão sobre a Autonomia Privada no Direito do Consumo' (Faculdade Nova de Direito, 2011).
[100] António Menezes Cordeiro, *Tratado de Direito Civil Português* (vol. I , Almedina 2000)

2.1 SUBSECTION: GOOD MORALS

Delving deeper into the matter, 'good morals' are associated with a socially accepted moral idea, generally understood to mean that a transaction offensive to good morals is one that involves immoral acts as its object.[101] The invalidity of a legal transaction due to the violation of good morals is ultimately the invalidity for breaching a minimum,[102] in the words of Carneiro da Frada, of an 'ethical-legal minimum'.[103] Good morals are not identified with the law (meaning legislative acts – Article 112 of the Portuguese Constitution), nor with public order (an emanation of *ius publicum*). They are the values and fundamental principles of the legal system (therefore referenced in the Constitution) both at the internal level and at the international level, but through its domestic recognition (Article 8 of the Portuguese Constitution), unfolding later on an infraconstitutional level.[104] It is further stated that, although good morals are not law, they must have legal validity, under the penalty of inflating the Law with moralistic visions of behaviours or preferences (e.g., sexual or religious orientation, eugenics, etc.) – morality (noun) and moralism (adjective) are quite distinct concepts. And this validity essentially derives from the Constitution, at the internal level, and from the platform of human rights, at the international level, under penalty of both being reduced to a 'mere piece of paper', corresponding instead to a normative and social project of life in society.

Hugo Ramos Alves argues that, to interpret whether the concluded transaction is offensive to good morals, one of the criteria is the balance of performances, when it is an onerous contract (Article 237 of the Civil Code). Additionally, a mere imbalance is not enough; it must be excessive or severe, which will require the interpreter-applicator to evaluate not only the content of the contract but also the conditions of its conclusion.[105] This author adds that, as a guiding criterion, the interpreter-applicator may resort to criteria based on market standards, namely, the price obtained in a comparable but perfectly competitive market.

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101 Pires De Lima e Antunes Varela, *Código Civil Anotado*, (volume I, 4th edition, Coimbra Editora)

102 Manuel de Andrade, *Teoria Geral da Relação Jurídica - Facto Jurídico, em especial Negócio Jurídico* (Vol II Almedina 2003).

103 Original portuguese expression 'mínimo ético-jurídico' from Manuel Carneiro da Frada, *Teoria da confiança e responsabilidade civil* (Livraria Almedina 2004) p 164-174.

104 Acórdão Do Tribunal Da Relação Do Porto, (2018), Processo nº. 8/17.7T8GDM.P1 <https://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/db759c3495a2b531802584040036b4ed?OpenDocument> accessed 18 January 2025.

105 Hugo Ramos Alves, 'Vulnerabilidade e assimetria contratual', Vol LXII 1 Lisbon Law Review (2021).

The first case law that is worth looking at is the Supreme Court of Justice (STJ) case of 10 December 2024, process number 8790/18.8T8LRS.L1.S1.[106] In this decision, the contract in question involved the sale of a property by the claimant to the defendant, for twelve thousand euros, formalised by public deed on 23 December 2014. [107] Additionally, a lease agreement was entered into whereby the claimant would pay a monthly rent of 300 euros. The plaintiff claimed that the sale contract was, in fact, a fiduciary transfer in guarantee to secure the repayment of a loan of five thousand euros granted by the defendant, and that the property should be retransferred to her upon fulfilment of the obligation. This agreement was not formalised in writing. The claimant also argued that the contract was usurious and therefore voidable, as it was entered into in a situation of economic necessity, with the defendant obtaining a disproportionate benefit.

The court of first instance ('tribunal de primeira instância') and the Lisbon Court of Appeal ('Tribunal da Relação de Lisboa') both dismissed the action, not recognising the nullity of the contracts and an appeal has been lodged. STJ concluded that there was insufficient evidence of simulation or of a discrepancy between the declared intention and the real intention of the parties to deceive third parties. Furthermore, the allegation of usury was not substantiated with concrete facts.

The court emphasised that nullity for violation of good morals can only be declared in exceptionally serious cases, which was not demonstrated.[108] It was clarified that the transaction offensive to good morals is, essentially, one that involves immoral acts, which may be immoral in themselves or repugnant to the moral conscience solely due to the connection established between them and the performance of the other party. [109]

Usurious transactions are generally voidable, but in extremely severe cases that offend good morals, they must be considered null from the outset, according to Article 280/2 of

[106] Acórdão do Supremo Tribunal de Justiça, (2024) Processo n.º 8790/18.8T8LRS.L1.S1 <https://juris.stj.pt/8790%2F18.8T8LRS.L1.S1/UMBN4bTI_pejnaTYxt2kxRk_tso?search=vlAwSzNsH8B28SHwfr8> accessed 17 January 2025.

[107] ibid.

[108] In the summary of the decision as well as througout the court's argumentation was stated that '*VI – O negócio ofensivo dos bons costumes é, essencialmente, o que tem por objeto atos imorais, podendo estes ser imorais em si mesmos ou repugnar à consciência moral apenas pelo nexo que se cria entre eles e a prestação da outra parte.*' ibid.

[109] The court stated that '*O princípio de que o negócio usurário é, tão só, anulável só poderá ser derrogado em casos excecionalmente graves, em que o preenchimento dos pressupostos ou dos requisitos do art. 282º deva representar-se como ofensa aos bons costumes, no sentido do art. 280º do CCivil — logo, de nulidade do negócio jurídico.*' ibid.

the Portuguese Civil Code. This means that in situations of severe usury, the law imposes a stricter sanction to protect the ethical and moral standards of society. In this Judgment, STJ examined whether the contract is null for being offensive to good morals. What was stated in the case is that the contrariety to good morals cannot be invoked without reference to the violated ethical or moral principle, which did not happen in this case. The exploitation of someone else's weakness or their subjection to situations or practices commonly understood as unacceptable can constitute indications of the violation of a fundamental ethical or moral principle. In the case at hand, the appellant failed to prove, neither that it was a commonly understood case nor (much less) that it was an exceptionally severe case, which would give rise to the nullity of the contract.[110]

Another case quite similar to this one is process number 456/15.7T8ESP.P1.S1 of 30 june 2021, where B (claimant) initiated eviction proceedings against A (defendant) for non-payment of rent on a property A allegedly sold to B in 2011.[111] B's action was based on the assertion that A had not fulfilled her obligations under the lease agreement, which included paying rent. A contested B's claims by arguing that the contract of sale was not genuine. She alleged that the contract was simulated and that, in reality, it was a loan agreement with a guarantee. According to the defendant, the true intention behind the contract was to secure a loan she had taken from the claimant, and the sale was merely a facade to serve as collateral for the loan. A claimed that B had taken advantage of her emotional and economic fragility to appropriate the property. The defendant also claimed that the contract was null and void for violating good morals, constituting usury, and that the claimant unjustly enriched himself at her expense by purchasing the property for a price much lower than its market value. A argued B exploited her financial and emotional vulnerability, asserting the contract was void for violating good morals, constituting usury, and resulting in unjust enrichment due to the property being sold below market value.

The court of first instance analysed A's allegations and considered that, although the transaction was executed during a period of economic and financial crisis, this alone did

[110] There was not enough evidence, neither was the allegation of usury substantiated with concrete facts. Ibid.
[111] Acórdão Do Supremo Tribunal de Justiça, (2021) Processo n.º 456/15.7T8ESP.P1.S1 <https://juris.stj.pt/ecli/ECLI:PT:STJ:2021:456.15.7T8ESP.P1.S1.B8?search=2VLyByJMBG4sEOcH5n> accessed 15 February 2025.

not mean that the transaction violated good morals.[112] The court highlighted that many property owners, during financial crises, encumber or alienate their assets, including through payment in kind. Furthermore, the court noted that the promise of sale contract allowed A to repurchase the property, indicating a reasonable business conduct incompatible with the violation of good morals. The difference in value between the initial sale price (€70,000.00) and the value stipulated in the promise of sale contract (€72,800.00) was considered within the common business parameters of the real estate market, not constituting usury.

The court concluded that there was insufficient evidence that B had taken advantage of A's situation in a usurious manner. The difference in value and the terms of the contract did not indicate conduct violating good morals. The court decided that the legal transaction between the parties did not result in unjust enrichment and that the transactions corresponded to the real will of the parties, with no unjust enrichment. In terms of applying the concept of good morals, the court considered that the allegation of usury was not proven and that the terms of the transaction were reasonable and within common business parameters. The decision was confirmed by the Court of Appeal, which also found no indications of simulation or exploitation of A's fragile situation by B. Thus, the court ruled in favour of B, validating the sale contract and rejecting A's allegations.

In 2020, the Supreme Court of Justice issued a judgment where two contracts were scrutinised: the first being a loan agreement with a mortgage and the second being a property sale agreement.[113] The court determined that the loan agreement celebrated between the claimant and the defendant was null and void due to its violation of good morals. It was established that the loan amount declared in the deed was €23,080,000, whereas the actual amount loaned was €10,000,000. Furthermore, despite the presence of a clause stipulating that no remunerative interest would accrue, the reality was that it was an onerous loan, with the remunerative interest concealed within the amount of capital to be repaid, resulting in an effective interest rate exceeding 130% per annum. Consequently, this exorbitant effective interest rate directly contravened the minimum ethical-legal standards of societal life, thereby rendering the contract null and void for

[112] ibid.
[113] Acórdão Do Supremo Tribunal de Justiça, (2020) Processo nº. 25001/13.5T2SNT.L1.S1 <https://juris.stj.pt/ecli/ECLI:PT:STJ:2020:25001.13.5T2SNT.L1.S1?search=IeZFCm9ETaZFfwngwCQ> accessed 25 January 2025.

violating good morals, in accordance with Article 280, paragraph 2, of the Civil Code. With respect to the property sale agreement, the court identified that its common purpose for both parties was to extinguish a debt arising from the loan agreement. Thus, the agreement was intended to extinguish a debt amounting to €23,080,000, of which €13,080,000 corresponded to concealed remunerative interest, in a manner that defrauded both the legal prohibition of usurious interest and the prohibition of acts reserved by law to banking entities. The purpose of this contract patently clashed with the minimum ethical-legal standards of societal life, and therefore, for its disregard of good morals, the contract was declared null and void, in accordance with Article 281 of the Civil Code.

Another case that is worth mentioning is case 2150/22.3T8TVD.L1.S1 of 9 of July 2024.[114] The case concerns the succession incapacity of a defendant acquitted of aggravated homicide due to mental illness. The defendant killed his father, D, and pregnant sister, E, in November 2020, and was deemed criminally irresponsible due to an irreversible psychiatric disorder. Following his acquittal, DD's siblings, A and B, sought to declare the defendant unworthy of inheritance, citing Article 2034 of the Civil Code and the principle of abuse of rights (Article 334). They argued that, despite the acquittal, his actions should prevent him from inheriting his father's estate. The court of first instance ruled that the list in Article 2034 of the Civil Code is exhaustive and could not be applied by analogy. Since the defendant was not convicted of intentional homicide, the court declared his succession incapacity based on the abuse of rights doctrine (Article 334). It argued that allowing the defendant to inherit after killing his father would violate ethical, moral, and societal values. Both the Court of Appeal and the Supreme Court of Justice upheld the decision.

The court's decision rested on fundamental ethical principles, rejecting the idea that a person who has killed could inherit from their victim. The ruling emphasized that such an inheritance would violate the constitutional principle of absolute protection of the right to life (Article 24), which is a matter of public policy. The notion that an heir could benefit from the death of the person they killed is legally and ethically repugnant, shocking, and offensive to society's sense of justice. This decision reflected society's profound aversion

[114] Acórdão Do Supremo Tribunal de Justiça, (2024) Processo n.º 2150/22.3T8TVD.L1.S1 <https://juris.stj.pt/2150%2F22.3T8TVD.L1.S1/2CCgRZPvmGXRrZVRdRmZcHoNgDU?search=lBCDVGv731fyegOzEQ0> accessed 13 February 2025.

to the idea that an heir could benefit from a death they themselves caused, even if deemed criminally irresponsible.

Another instance to highlight is a case from 21 of march 2013.[115] In the case in question, the plaintiff, A, filed a lawsuit against B and C, alleging that, by deed dated November 5, 1991, the second defendant, in his capacity as the plaintiff's attorney, sold several properties to the first defendant for a total price of 3,900,000$00, a value that was at least twenty times lower than the market value of the properties. The plaintiff claimed that the second defendant abused the powers of representation conferred upon him, resulting in a sale that was offensive to good morals. The first defendant registered the properties in her name, and the deed was executed by the second defendant's wife, who was the sole manager of the first defendant. The plaintiff requested the declaration of nullity or annulment of the sale, or, alternatively, its ineffectiveness.

The court had to decide whether the contract of sale was null, voidable, or ineffective. Nullity was alleged based on the offense to good customs, according to Article 280 of the Civil Code, while ineffectiveness was alleged based on the abuse of powers of representation, according to Articles 268 and 269 of the Civil Code.

The court found that the defendants colluded to transfer the plaintiff's properties at an unjustifiably low price, aiming to harm the plaintiff's partners for personal gain. The second defendant abused the powers granted by a power of attorney, acting against the plaintiff’s interests. The court also noted deliberate actions to defraud the plaintiff’s partners, including the structure of the first defendant’s company, which was controlled by the second defendant and his wife. The court considered that the sale of the properties for a price twenty times lower than the real value was an offense to good morals. Good morals were defined as non-legal conduct norms that reflect the dominant moral rules of a particular era. Additionally, the court argued that the transaction was offensive to good morals because the second defendant, in collusion with the first defendant, whose manager was his wife, took advantage of the power of attorney to transfer the plaintiff's properties to the defendant for a scandalously low price, aiming to harm the plaintiff's partners for their own benefit. Public order was mentioned as a concept that approximates

[115] Acórdão Do Supremo Tribunal de Justiça, (2013) Processo n.º 637/1999.L1.S1 - Jurisprudência - STJ’ <https://juris.stj.pt/ecli/ECLI:PT:STJ:2013:637.1999.L1.S1.26?search=yt74Gn3FTFFHP1VMArU> accessed 15 February 2025.

the end contrary to the law, representing the set of general principles that govern the legal system. However, the decision focused more on the offense to good morals than on public order.

A further case to consider is from the year 2005 and involves A – the claimant, which filed a lawsuit against B – the defendant, to annul a corporate resolution passed at a general meeting on February 27, 1997.[116] The resolution approved the sale of a business establishment and a property to C and D, for significantly less than their real value. The claimant alleged that this resolution would result in the dissipation of the defendant's assets and harm its corporate position, violating the company's social pact, whose objective is to generate profits. The claimant proposed a higher value for the sale, but its proposal was rejected by the defendant, and the resolution was approved by 99.48% of the share capital, with the claimant voting against.

The court ruled that the corporate resolution did not align with the company's social purpose of generating profits and harmed the claimant's corporate position. The decision, confirmed by the Supreme Court of Justice, followed jurisprudence considering the sale of assets for less than half their value as offensive to good morals (Ac.STJ of 3/2/2000). Resolutions causing significant harm to the company or minority shareholders for the benefit of majority shareholders or third parties are contrary to good morals. The court found the sale of assets below their real value to be contrary to common justice and business ethics, emphasizing the need to protect good morals to prevent abuse by majority shareholders. The nullity of the resolution was declared based on the offence to good morals, demonstrating the importance of this concept in evaluating the validity of corporate resolutions. In conclusion, the court denied the appeal, confirming the decision of the Porto Court of Appeal that declared the impugned resolution null and void, with *ex tunc effect*, based on the violation of good morals.

[116]Acórdão Do Supremo Tribunal de Justiça, (2005) Processo n.º 05B3320 <https://juris.stj.pt/ecli/ECLI:PT:STJ:2005:05B3320.9F?search=GAIuQpjlJ7e4qroA_tg> accessed 15 February 2025.

2.2 SUBSECTION: PUBLIC ORDER

Attempting to define the indeterminate concept of 'public order', in the words of Mota Pinto, public order is understood as the set of fundamental principles underlying the legal system, which the State and society are substantially interested in ensuring prevail and which have such strong relevance that they must prevail over private agreements.[117] The scope of public order should be determined by reference the function of promoting or protecting a collective, common, or community interest. If there is no collective, common, or community interest, a violation of public order should be considered excluded.[118]

Knowing what these 'fundamental principles' of our legal system are, is truly the question. However, this is a matter in which we can only provide examples and not a catalogue. Accordingly, as João Baptista Machado explains, these imperative legal norms and principles, by which internal public order is constituted, are, for example, the norms that establish the fundamental rules of economic organisation, those that aim to ensure the security of legal commerce and protect third parties, those that safeguard the integrity of individuals and the independence of the human person and protect the weak and incapable, those that pertain to the organisation of the family and the status of individuals, aiming to satisfy a general interest of the community, etc.[119] Internal public order cannot be identified with the entirety of imperative legal norms, as the Civil Code itself distinguishes between a violation of the law and an offence against public order. Thus, the concept of public order cannot be understood so broadly that it becomes synonymous with the set of imperative norms of the legal system, under penalty of its individuality being compromised in the face of a simple contravention of the law. Also, it is important to give the note that the violation of the law may not involve any offence against a principle of public order. Also, Hugo Ramos Alves such as other Portuguese authors, views invoking the violation of public order as a measure of last resort, only to be used when the minimum ethical-social standard is breached. He argues that the violation of public order is reserved for extreme cases, where the inequity is evident.[120]

[117] Pires de Lima e Antunes Varela (n 101).
[118] Acórdão Do Supremo Tribunal de Justiça, (2019) Processo n.º 261/14.8TBVCD.P1.S1<https://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/bf4cca44585d3b2d802583f50050c8e5?OpenDocument> accessed 22 January 2025.
[119] João Baptista Machado, 'Lições de Direito Internacional Privado'(3rd edition, Almedina, 1999)
[120] Hugo Ramos Alves (n 105).

Further building on the concept, the judgement of the Supreme Court of 15 March 2023, process number 1936/15.0T8VFX-R.L1.S1, explains that public order represents a value complex that must in any case be preserved within the community. It already results from fundamental principles, primarily those of human dignity, but also others that represent the foundations of social life. It seeks to ascertain whether, in the application to the specific case, a result is reached that is inadmissible before the fundamental principles of the Portuguese legal order. It aims to verify whether the legal transaction, even when applying specific legal rules, does not lead to a result that is not tolerable in our community. There is a general reservation of the legal order as a whole, which prevents, through the use of its rules, reaching results that, in concrete terms, are incompatible with the fundamental principles that animate it.[121]

In the decision of 19 August 2024, the Supreme Court of Justice considered that a clause in the contract, which established compensation of €22,000.00 as a penalty clause, was disproportionate. This penalty clause was seen as excessively burdensome and punitive, especially considering that the monthly remuneration of the contract was only €290.31. The disproportionality of this clause violated the principles of the prohibition of abuse of rights, proportionality, and the prohibition of punitive damages in civil matters, all of which are deducible from the concept of public order – Article 280(2) of the Civil Code.[122]

In another relevant case of the STJ of 28 of September 2023, Ubiwhere, Lda. (Plaintiff) and Edubox, S.A. (Defendant) entered into four service contracts. The Plaintiff provided the agreed services, but the Defendant did not pay the due amount, resulting in a debt of €306,270.44.[123] The parties signed documents where they declared that the projects were completed and operational, and waived the right to take action against the other party for any issue related to the contracts. The Defendant claimed that the services were performed

[121]Acórdão Do Supremo Tribunal de Justiça, (2023) Processo n.º 1936/15.0T8VFX-R.L1.S1 <https://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/86adb2d0c9a8b35280258973004eb885?OpenDocument> accessed 19 January 2025.
[122]Acórdão Do Supremo Tribunal de Justiça (2024) Processo nº. 997/22.0T8VLG.P1.S1 <https://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/c2f9245c4b3afb3380258b9e005e884d?OpenDocument> accessed 25 January 2025.
[123]Acórdão Do Supremo Tribunal de Justiça, (2023) Processo n.º 137123/16.0YIPRT.P1.S1<https://juris.stj.pt/137123%2F16.0YIPRT.P1.S1/jfivHWHfyk7Pr5Bq8TcvOCArEro?search=cgfHcegM48QHLss000Y> accessed 16 February 2025.

defectively and did not pay the invoices, leading the Plaintiff to file a lawsuit to collect the debt.

The Court examined the validity of the waiver clause contained in the ‘signed documents in light of the principle of public order. The Plaintiff argued that the clause was null and void for being offensive to public order, among other reasons. The Plaintiff contended that the clause violated these principles by preventing access to justice and effective judicial protection. However, the Court concluded that the clause was not offensive to public order. It argued that the waiver of the right to take action referred to specific and individualised issues, specifically related to the completion and acceptance of the projects described in the contracts, and not to a general waiver of the right to take action. The Court emphasised that the clause did not prevent the parties from going to court for other issues not covered by the specific waiver. Furthermore, the Court considered that both parties were able to go to court to defend their points of view, which demonstrates that the principle of guaranteeing access to justice and effective judicial protection was not violated. The Court's decision was based on the interpretation of the parties' declarations and the application of the principles of good faith and balance of performances, concluding that the waiver clause was not null and void for being offensive to public order.

A further noteworthy case is process number 24537/11.7T2SNT-B.L1.S1 of 2022.[124] In the case in question, Banco Santander Totta, S.A. entered into an interest rate swap contract with M., SA on 6 July 2007. This contract was secured by a promissory note signed by the defendant company and endorsed by its representatives. M., SA claimed that the swap contract was null and void for being purely speculative and not linked to any underlying financial operation, in addition to being executed without proper information about the risks involved.

The Supreme Court of Justice analysed the swap contract in light of the principle of public order, concluding that it was null and void. The Court considered that an interest rate swap contract without a remote cause and with a purely speculative purpose is null for several reasons. Firstly, the STJ invoked Article 280(1) of the Civil Code, which deals

[124] Acórdão Do Supremo Tribunal de Justiça, (2022) Processo n.º 24537/11.7T2SNT-B.L1.S1<https://juris.stj.pt/ecli/ECLI:PT:STJ:2022:24537.11.7T2SNT.B.L1.S.75?search=cgfHcegM48QHLss000Y> accessed 16 February 2025.

with the nullity of legal transactions for being contrary to the law. The Court understood that pure speculation, without an underlying financial operation that justifies the assumption of risk, violates the principle of limiting and abolishing business activities aimed at pure speculation, as provided for in Article 99(c) of the Portuguese Constitution. This constitutional principle aims to combat speculative activities that do not contribute to the common good and can generate social and economic disutilities. Furthermore, the STJ considered that pure speculation is not an activity deserving of legal protection, as it does not contribute to the common good and can generate risks and disproportions in the economy. This analysis was based on Article 280(2) of the Civil Code, which deals with the nullity of legal transactions for being contrary to public order. The Court highlighted that public order includes the principles and values that inform the political, economic, and social organisation of society, as enshrined in the programmatic part of the Constitution. Therefore, a swap contract that exclusively aims at speculation, without a remote cause, is contrary to public order and consequently null and void.

In another case regarding the application of the concept of public order, process number 1480/18.3T8LSB-A.L1.S1, A and B, after their divorce, disputed the allocation of the family home. A claimed that she left the house due to assaults by B, living since then in precarious conditions and facing financial difficulties while continuing to pay the house instalments. B, on the other hand, argued that he was the main owner of the house and had contributed more towards the instalments.[125] The first instance court denied A's request, but the Court of Appeal reversed the decision, granting her the house in exchange for paying rent to B.

The concept of public order played a crucial role in the court's decision. Public order, in this context, refers to the need to protect fundamental rights and the dignity of individuals, especially in situations of domestic violence. The court considered that granting the house to A, a victim of violence, was in line with the principles of public order, which aim to ensure effective protection for victims and promote social justice. The court applied the concept of public order by considering B's conduct, who was convicted of domestic violence, as a relevant factor in the decision to grant the house to A. The decision took into account the need to protect the victim of domestic violence and ensure her safety and

[125] Acórdão Do Supremo Tribunal de Justiça, (2021) Processo n.º 1480/18.3T8LSB-A.L1.S11480/18.3T8LSB<https://juris.stj.pt/ecli/ECLI:PT:STJ:2021:1480.18.3T8LSB.A.L1.S1.8B?search=loOvjKnD6mYSlp2aIGA> accessed 16 February 2025.

well-being. B's conduct was seen as incompatible with the values of a just and equitable society and granting the house to A was considered a necessary measure to ensure the protection of her fundamental rights. Furthermore, the court recognised that A's situation of need, living in precarious conditions and continuing to pay the house instalments, justified granting the house in her favour. The decision reflected the importance of protecting the victim and ensuring her safety and well-being, aligning with the principles of public order and good morals.

In another case worth mentioning, dated 30 May 2019, the issue at hand was also the violation of public order, this time due to the infringement of the personality rights of the children involved, specifically the rights to image and privacy.[126] The case in question involves the participation of minors in a television programme of the 'reality show' type and the subsequent broadcasting of episodes depicting their intimate lives and behaviours. The Public Prosecutor's Office filed a special action for the protection of personality against the companies responsible for the programme, alleging violation of the children's image rights and privacy.

The instrumentalization of people, especially children, for commercial or entertainment purposes, is seen as a direct violation of the principle of human dignity, in this case, the dignity of the children. Similarly, personality rights, including the right to image and the right to privacy, are concretisations of human dignity. Public order protects these rights against any form of offence or threat, regardless of the consent given by the legal representatives of the minors. This decision emphasises that the voluntary limitation of these rights is null if it is contrary to the principles of public order, which was is this case determined. Public order also protects the inviolability of private life, especially concerning the public exposure of intimate and personal aspects.

The court's decision considered that the broadcasting of scenes revealing the intimate lives of the children, such as tantrums, aggressions, and partial nudity, constitutes a serious violation of their privacy and dignity. Public order is a normative concept that protects the fundamental values and principles of the legal system, essential for social coexistence and the public good. The violated values and principles mentioned are

[126] Acórdão Do Supremo Tribunal de Justiça (2019) Processo nº.336/18.4T8OER.L1.S1 <https://juris.stj.pt/ecli/ECLI:PT:STJ:2019:336.18.4T8OER.L1.S1.97?search=_hPdx-Y-yMOT0UxUjPM> accessed 25 January 2025.

considered fundamental to public order and are non-derogable, ensuring the protection of children's fundamental rights against any form of instrumentalization or exploitation.

In the last case worth examining, dated 31 of January 2017, the claimant filed a lawsuit against the defendants, requesting the annulment of the testamentary conditions imposed by the deceased, the father of those involved.[127] The father's will included the creation of a commercial company to manage properties, with specific conditions for the transfer and management of the assets. The claimant argued that these conditions were legally impossible and contrary to the law. The Court of First Instance and the Court of Appeal considered the conditions null for violating imperative legal provisions. The defendant appealed, but the Supreme Court of Justice confirmed the nullity of the conditions, highlighting that they violated public order and the free circulation of goods. STJ applied and elaborated on the concept of public order by considering that the conditions imposed in the will violated the principle of free circulation of goods, a fundamental principle of public order in the Portuguese legal system. The court cited a doctrine that emphasizes that the free disposal of goods is an essential attribute of property and a rule of interest and public order. The imposition of conditions that create practical obstacles to the free circulation of goods, such as the creation of a company with specific statutes and the prohibition of alienation, was considered contrary to public order. The court highlighted that the interest of the de cujus in maintaining the properties within the family, although understandable, could not override the principle of free circulation of goods, which is essential for the modern legal-economic system. Furthermore, the court emphasized that such conditions compromised the right of inheritance division, an inalienable and non-disposable right, reinforcing the idea that public order protects not only the free circulation of goods but also the fundamental rights of heirs. Thus, the application of the concept of public order was central to the decision to consider the testamentary conditions null and void, ensuring the protection of the fundamental principles of the Portuguese legal system.

[127] Acórdão Do Supremo Tribunal de Justiça, (2017) Processo n.º 258/10.7TCGMR.G1.S1 <https://juris.stj.pt/ecli/ECLI:PT:STJ:2017:258.10.7TCGMR.G1.S1.05?search=XgSvSxq3xGqSppONGMA> accessed 16 February 2025.

3. EDPS's Position on Data Exchanges – a Categorical or a Conditional Prohibition?

Against this background, a comprehensive evaluation of the European Data Protection Supervisor's (EDPS) position on data exchanges is necessary to determine whether it adopts a categorical or conditional approach to the concept of immoral contracts.

In *Opinion 4/2017 on the Proposal for a Directive on Certain Aspects Concerning Contracts for the Supply of Digital Content*, the EDPS emphasized that personal data is intrinsically linked to the fundamental right to privacy and data protection, as enshrined in Article 8 of the Charter of Fundamental Rights of the European Union and Article 16 of the Treaty on the Functioning of the European Union.[128] The Opinion states that personal data cannot be equated to money or any other form of counter-performance because it is related to a fundamental right and cannot be considered a commodity. It is defended that the right to the protection of personal data cannot be reduced to simple consumer interest, and personal data cannot be considered as a mere commodity.

The EDPS makes a significant comparison to underscore the ethical implications of treating personal data as a counter-performance. In the Opinion, the EDPS draws a parallel between the market for personal data and the market for live human organs. It states that 'there might well be a market for personal data, just as there is, tragically, a market for live human organs.'[129] However, the existence of such markets 'does not mean that they should be given the blessing of legislation.' The EDPS warns against any provision introducing the idea that people can pay with their data the same way as they do with money.

The parallel is drawn since the sale of human organs treats the human body as a commodity, violating the principle of human dignity. Due to the fundamental ethical violations involved, the prohibition on organ markets is best understood as categorical rather than conditional. It is based on principles of dignity, non-exploitation, and justice, making it universally impermissible. This analogy to live human organs used by the EDPS seems to be used to illustrate the intrinsic wrongness of commodifying personal

[128] EDPS, 'Opinion 4/2017 on the Proposal for a Directive on Certain Aspects Concerning Contracts for the Supply of Digital Content' (2017) <https://www.edps.europa.eu/sites/default/files/publication/17-03-14_opinion_digital_content_en.pdf> accessed 26 February 2025.

[129] ibid.

data, similar to the commodification of human organs. The EDPS asserts that one cannot monetize and subject a fundamental right to a simple commercial transaction, even if it is the individual concerned by the data who is a party to the transaction.

The EDPS's position demonstrates a clear inclination towards a categorical prohibition of treating personal data as a commodity or counter-performance. This perspective reflects a position that the protection of personal data should never be compromised under any circumstances, aligning with the concept of a categorical prohibition.[130]

[130] In EDPS' opinion 8/2018, the EDPS stated that 'While it appears to have become normal for personal data to be sought after as a commodity to be accumulated and monetized in the provision of digital, such practices should not gain any sort of de jure endorsement or recognition in a legislative act of the EU', adding that 'Such a provision would be incompatible with the Charter, and itcould have the effect of further entrenching unfairness and exacerbating imbalances', 'EDPS Opinion on the Legislative Package "A New Deal for Consumers" (n 32), para 9.

4. Analyses of Portuguese Case Law on Immoral Contracts – Categorical or Conditional Prohibitions?

The following section will examine the Portuguese case law previously discussed, focusing on the principles of good morals and public order, to assess whether the cases in question are categorical or conditional. The judicial reasoning will be analysed in detail to understand how the categorical and conditional prohibitions are applied on a case-by-case basis.

When a case is decided categorically, these prohibitions are absolute and reflect a fundamental consensus that certain conduct is inherently wrongful, harmful, or contrary to fundamental law concepts, such as good morals or public order. In this approach, the legal system does not entertain arguments that attempt to justify or excuse the conduct based on context or intent, leaving no room for contextual justification. On the other hand, a case decided recognizes that an action may not be intrinsically immoral but can become problematic under certain circumstance. These cases are decided based on a variety of factors such as the surrounding circumstances, intentions, and potential consequences, balancing the performances/interest of the parties involved. These prohibitions are not rooted in an absolute and intrinsic condemnation of the act itself but rather in the potential for harm, exploitation, or public detriment under the specific conditions of the case. This approach allows for judicial discretion, enabling courts to assess the broader context, weigh competing interests, and determine whether enforcement would contravene public policy or good morals or not.[131]

[131] Ruiz and Blánquez (n 91). Cerchia (n 91).

4.1 ANALYSIS OF CASES ON GOOD MORALS

Following the structure of the cases presented, the first one to be analysed is case dated 10 of December 2024, process number 8790/18.8T8LRS.L1.S1.[132] To remember, this case revolves around a property sale and lease agreement, which the claimant argued was a fiduciary transfer in guarantee to secure a loan and claimed the contract was usurious and voidable due to economic necessity and disproportionate benefit to the defendant. In this case, the STJ concluded that there was insufficient evidence of simulation or a discrepancy between the declared intention and the real intention of the parties to deceive third parties. Additionally, the allegation of usury was not substantiated with concrete facts. The court emphasized that nullity for violation of good morals can only be declared in exceptionally serious cases, which was not demonstrated in this instance. The court's decision was grounded in the principle that transactions offensive to good morals must involve acts that are either immoral in themselves or repugnant to the moral conscience due to their connection with the performance of the other party.

In this case, the court's decision aligns more closely with a conditional decision. In this case, there was not enough proof and concrete evidence of exceptionally severe usury or a clear violation of good morals, which was not provided by the claimant was required. The court's approach was context-sensitive, considering the specific circumstances and the lack of substantiated facts to support the claim of usury and moral violation.

The STJ's emphasis on the need for concrete evidence and the context-specific assessment of the alleged usurious nature of the contract indicates a conditional prohibition. The court acknowledged that usurious transactions are generally voidable and, in extremely severe cases, null from the outset. However, it required a demonstration of the severity and the violation of a fundamental ethical or moral principle, which was not evident in this case. Therefore, the decision in this case is based on the principle of a conditional decision. The court's approach allowed for a nuanced assessment of the specific circumstances, requiring concrete evidence to substantiate the claims of usury and moral violation. This decision reflects the flexibility and adaptability of the law in addressing complex legal

[132] Acórdão do Supremo Tribunal de Justiça, (2024) Processo n.º 8790/18.8T8LRS.L1.S1 <https://juris.stj.pt/8790%2F18.8T8LRS.L1.S1/UMBN4bTI_pejnaTYxt2kxRk_tso?search=vlAwSzNsH8B28SHwfr8> accessed 17 January 2025.

scenarios, balancing competing interests, and ensuring that only exceptionally severe cases result in the nullity of contracts for being offensive to good morals.

The second case mentioned was process number 456/15.7T8ESP.P1.S1 of 30 june 2021, where B (claimant) initiated eviction proceedings against A (defendant) for non-payment of rent on a property A allegedly sold to B in 2011.[133] The court of first instance analysed A's allegations and concluded that the transaction, executed during a period of economic and financial crisis, did not inherently violate good morals. The court noted that many property owners encumber or alienate their assets during financial crises, including through payment in kind. The promise of sale contract, which allowed A to repurchase the property, was seen as indicative of reasonable business conduct, incompatible with the violation of good morals. The difference in value between the initial sale price (€70,000.00) and the value stipulated in the promise of sale contract (€72,800.00) was considered within common business parameters of the real estate market, not constituting usury.

The court emphasized the necessity for concrete evidence to substantiate claims of usury and moral violation. The defendant failed to provide sufficient proof that the claimant had taken advantage of her situation in a usurious manner. The court considered the economic climate, noting that financial crises often compel property owners to liquidate assets under unfavourable conditions. This recognition reflects the court's application of a flexible legal standard, therefore categorical, rather than an absolute prohibition. Additionally, the court assessed the promise of sale contract, which allowed A to repurchase the property, interpreting it as an indication of legitimate business conduct rather than predatory lending.

The third case pertained two contracts: a loan agreement with a mortgage and a property sale agreement. The court determined that the loan agreement between the claimant and the defendant was null and void due to its violation of good morals. The deed declared a loan amount of €23,080,000, while the actual amount loaned was €10,000,000. Despite a clause stipulating no remunerative interest, the loan was onerous, with the remunerative interest concealed within the capital to be repaid, resulting in an effective interest rate

[133] Acórdão Do Supremo Tribunal de Justiça, (2021) Processo n.º 456/15.7T8ESP.P1.S1 <https://juris.stj.pt/ecli/ECLI:PT:STJ:2021:456.15.7T8ESP.P1.S1.B8?search=2VLyByJMBG4sEOcH5nk> accessed 15 February 2025.

exceeding 130% per annum. Regarding the property sale agreement, the court identified that its common purpose for both parties was to extinguish a debt arising from the loan agreement. The agreement aimed to extinguish a debt amounting to €23,080,000, of which €13,080,000 corresponded to concealed remunerative interest.

Firstly, the Supreme Court of Justice decided the matter in a conditional way, focusing on the specific circumstances surrounding the loan and property sale agreements. The court did not issue a prohibition on all loan agreements or property transactions. Not all loan agreements would automatically violate good morals or legal principles. It was the exorbitant interest rate—which exceeded 130% per annum—that made this particular loan agreement problematic. If the loan had adhered to appropriate interest rates and transparency, it could have been deemed legally valid. This conditional reasoning suggests that the loan agreement, in and of itself, was not inherently wrong, but the high-interest rate and misrepresentation made it unlawful in this case. Thus, the court applied a context-sensitive assessment—the loan was legal under normal conditions but became illegal because of the specific circumstances involved. Secondly, the court did not condemn all property sale contracts. It focused on this specific contract, which was mainly meant to cancel a debt that included hidden usurious interest. If the property sale had been for a legitimate reason, without trying to get around the legal limits on interest, it might have been considered valid. Thus, the court's reasoning reflects conditional prohibitions.

The fourth case is case number 2150/22.3T8TVD.L1.S1.[134] The case concerns the succession incapacity of a defendant acquitted of aggravated homicide due to mental illness, who killed his father, D, and pregnant sister, E, in November 2020, and was deemed criminally irresponsible due to an irreversible psychiatric disorder. The court's determination that the defendant's actions, despite his criminal irresponsibility, rendered him unworthy of inheritance reflects a categorical prohibition. This case highlighted that the principle that a person who has killed should not benefit from the death of their victim is absolute and non-negotiable. This stance is grounded in the fundamental ethical and moral principle that such an inheritance would violate the constitutional principle of absolute protection of the right to life (Article 24). The court's decision was based on this intrinsic immorality. Secondly, the court's reliance on the abuse of rights doctrine (Article

[134] Acórdão Do Supremo Tribunal de Justiça, (2024) Processo n.º 2150/22.3T8TVD.L1.S1 <https://juris.stj.pt/2150%2F22.3T8TVD.L1.S1/2CCgRZPvmGXRrZVRdRmZcHoNgDU?search=lBCDVGv731fyegOzEQ0> accessed 13 February 2025.

334) to declare the defendant's succession incapacity further underscores the categorical nature of the decision. The doctrine of abuse of rights is applied to prevent actions that, while legally permissible, are ethically and morally unacceptable. By invoking this doctrine, the court emphasized that allowing the defendant to inherit would be legally and ethically repugnant, shocking, and offensive to society's sense of justice. This reflects a fundamental ethical and moral principle that such actions are always unacceptable, regardless of the specific circumstances.

The next and fifth decision is the case from 21 March 2013, where the plaintiff, A, filed a lawsuit against B and C, alleging that the second defendant, acting as the plaintiff's attorney, sold several properties to the first defendant for a price significantly lower than their market value, can be analysed to determine whether it is based on a categorical or conditional prohibition. This court's decision was not based on an absolute principle that all transactions involving significant price disparities or power of attorney abuses are void per se. Instead, the ruling was grounded in specific circumstances: the deliberate collusion between the defendants, the structural manipulation of the company, and the extreme undervaluation of the properties. These factors, taken together, rendered the transaction contrary to good morals in this particular case.

The court engaged in a contextual analysis rather than an absolute one, examining how the abuse of power, fraudulent intent, and market manipulation interacted to produce an unjust result. This indicates that the immorality of the contract was not intrinsic but rather contingent on the specific conditions under which it was executed. Furthermore, the court's reference to dominant moral norms of a particular era reinforces the idea that its decision was informed by historical and social context, rather than a timeless and universally applicable legal principle. This flexibility aligns with the characteristics of a conditional prohibition, which allows for context-sensitive assessments to balance competing legal and moral considerations. Thus, while the court ultimately nullified the contract for violating good morals, its reasoning aligns more closely with a conditional prohibition. The decision was based on an evaluation of circumstantial factors rather than an absolute rejection of all similar transactions, distinguishing it from a categorical decision.

The last and sixth case on good morals is process number 05B3320 from the year 2005.[135] The case involves the claimant, A, filing a lawsuit against the defendant, B, to annul a corporate resolution passed at a general meeting on February 27, 1997. The resolution approved the sale of a business establishment and a property to C and D for significantly less than their real value. The claimant alleged that this resolution would result in the dissipation of the defendant's assets and harm its corporate position, violating the company's social pact, whose objective is to generate profits. The claimant proposed a higher value for the sale, but its proposal was rejected by the defendant, and the resolution was approved by 99.48% of the share capital, with the claimant voting against.

While the court declared the corporate resolution null due to its violation of good morals, the reasoning it employed indicates that the immorality of the act was assessed in relation to specific contextual factors rather than being deemed inherently impermissible in all circumstances. A categorical prohibition would require the court to establish that any corporate resolution approving the sale of assets below market value is intrinsically wrongful and void regardless of the context. However, the court did not adopt this absolute approach. The decision was not based on an immutable legal principle but rather on the extent of financial harm caused and the particular motivations behind the resolution.

The court's reasoning focused on the detrimental impact of the resolution on the claimant’s corporate position, the unjust enrichment of the majority shareholders or third parties, and the deviation from the company's social purpose of generating profits. This suggests that the declaration of nullity was dependent on the degree of undervaluation and the consequences of the decision, rather than an absolute rule that all undervalued transactions are invalid. Had the resolution been approved with a less severe undervaluation, or had it not disproportionately benefited certain shareholders at the expense of others, the outcome might have been different.

Moreover, the court explicitly emphasized that corporate resolutions violating common justice and business ethics may be void when they result in significant harm to the company or minority shareholders. This language reflects a balancing approach rather

[135] Acórdão Do Supremo Tribunal de Justiça, (2005) Processo n.º 05B3320 <https://juris.stj.pt/ecli/ECLI:PT:STJ:2005:05B3320.9F?search=GAIuQpjlJ7e4qroA_tg> accessed 15 February 2025.

than an absolute prohibition. The assessment was rooted in whether the resolution aligned with corporate ethics and justice, rather than a rigid legal principle that all undervalued asset sales must always be invalidated. The decision rested on an analysis of circumstantial factors, including the extent of undervaluation, the harm inflicted, and the broader corporate implications, rather than an absolute and non-negotiable legal principle. This makes the prohibition in this case a conditional one, as it leaves open the possibility that similar resolutions could be upheld under different circumstances.

4.2 ANALYSIS OF CASES ON PUBLIC ORDER

The first analysed case related to public order is decision number 997/22.0T8VLG.P1.S1 where the STJ considered that a clause in the contract, which established compensation of €22,000.00 as a penalty clause, was disproportionate since it was seen as excessively burdensome and punitive, especially considering that the monthly remuneration of the contract was only €290.31.[136]

This decision adheres to the principle of a conditional prohibition rather than a categorical one. While the court invalidated the penalty clause for violating public order, its reasoning was based on an assessment of proportionality rather than an absolute and non-negotiable legal principle. The court's decision was contingent upon a contextual evaluation of the penalty's proportionality relative to the contract's monthly remuneration. The ruling highlighted that the penalty of €22,000.00 was excessive when compared to the monthly remuneration of €290.31, making it an unjustifiable burden on the obligated party. This demonstrates a case-by-case approach rather than a rigid prohibition applicable to all penalty clauses. The court's reliance on the principles of abuse of rights, proportionality, and the prohibition of punitive damages in civil matters indicates a balancing test rather than an automatic nullification. Had the penalty been lower or reasonably aligned with the contractual obligations, the clause might not have been struck down. This suggests that similar penalty clauses could be upheld if they meet the requirements of fairness and proportionality, reinforcing the conditional nature of the prohibition. The key factor in the decision was the excessive and punitive nature of the penalty in relation to the

[136]Acórdão Do Supremo Tribunal de Justiça (2024) Processo nº. 997/22.0T8VLG.P1.S1 <https://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/c2f9245c4b3afb3380258b9e005e884d?OpenDocument> accessed 25 January 2025.

contractual obligations, leaving room for different outcomes in cases where penalties are proportionate and justifiable.

The second case dated 28 of September 2023, Ubiwhere, Lda. sought to collect a debt from Edubox, S.A. for services rendered under four contracts. Edubox, however, refused to pay, citing defective performance. [137] The dispute centred on a waiver clause in signed documents, which Edubox argued prevented legal action. The court ruled that the clause was not offensive to public order, as it applied only to specific issues and did not block access to justice.

The court analysed whether the clause unduly restricted access to justice or prevented effective judicial protection. The court concluded that the waiver applied only to specific and individualized issues—namely, the acceptance of the completed projects—rather than constituting a blanket denial of legal recourse. This contextual evaluation aligns with a conditional prohibition, where the legality of a contractual provision depends on its actual implications rather than an intrinsic, non-negotiable rule. Furthermore, the court examined the principle of good faith and balance of performances to determine whether the waiver clause unfairly disadvantaged either party. The fact that both parties retained access to judicial remedies for other contractual disputes reinforced the court's reasoning that the clause did not fundamentally undermine public order.

The third case ruled that an interest rate swap contract without a remote cause and with a purely speculative purpose is null and void due to its inherent contradiction with fundamental legal and constitutional principles. The decision in process number 24537/11.7T2SNT-B.L1.S1 of 2022.

The ruling established that speculative financial contracts, lacking an underlying financial justification, inherently violate public order as defined in Article 280(2) of the Civil Code. Additionally, the Court invoked Article 99(c) of the Portuguese Constitution, which aims to limit and prevent business activities based solely on speculation, reinforcing that such practices do not contribute to the common good and, therefore, are undeserving of legal protection. The Court underscored that speculative financial transactions without an economic or social justification, represent an unacceptable risk to economic stability and

[137] Acórdão Do Supremo Tribunal de Justiça, (2023) Processo n.º 137123/16.0YIPRT.P1.S1<https://juris.stj.pt/137123%2F16.0YIPRT.P1.S1/jfivHWHfyk7Pr5Bq8TcvOCArEro?search=cgfHcegM48QHLss000Y> accessed 16 February 2025.

public welfare. This demonstrates that the prohibition was absolute, independent of the specific circumstances surrounding the contract or the extent of the parties' knowledge and consent. Therefore, the decision is based on a categorical prohibition, as it reflects a normative consensus that speculative contracts of this nature should never be permitted under any circumstances.

In the fourth case, process number 1480/18.3T8LSB-A.L1.S1, A and B, after their divorce, disputed the allocation of the family home. A claimed that she left the house due to assaults by B, living since then in precarious conditions and facing financial difficulties while continuing to pay the house instalments. B, on the other hand, argued that he was the main owner of the house and had contributed more towards the instalments.

In this case, the court's decision aligns more closely with the principle of a conditional decision. The court did not categorically declare that the allocation of the family home should always favour the victim of domestic violence without considering the specific circumstances. Instead, it required a detailed examination of the particular facts of the case, including A's precarious living conditions, her financial difficulties, and her continued payment of the house instalments. The court also considered B's conduct and his conviction for domestic violence as relevant factors in its decision.

The fifth case involves the participation of minors in a television programme of the 'reality show' type and the subsequent broadcasting of episodes depicting their intimate lives and behaviours.[138] The Public Prosecutor's Office filed a special action for the protection of personality against the companies responsible for the programme, alleging violation of the children's image rights and privacy.

The central premise of the decision is that the voluntary consent of legal representatives cannot override the intrinsic protections afforded to the minors involved, particularly in the context of exploitation for entertainment purposes. While one could argue that, under specific conditions, the broadcasting of minors' lives may not constitute an infringement of rights, this particular case emphasizes the irreducible protection of human dignity—particularly when children are concerned. The public order in question here is not merely concerned with balancing competing interests but with upholding a foundational ethical

[138] Acórdão Do Supremo Tribunal de Justiça (2019) Processo nº.336/18.4T8OER.L1.S1 <https://juris.stj.pt/ecli/ECLI:PT:STJ:2019:336.18.4T8OER.L1.S1.97?search=_hPdx-Y-yMOT0UxUjPM> accessed 25 January 2025.

standard that prohibits certain behaviours outright, such as the commercialization of private, intimate moments without regard for their inherent harm.

The court's ruling rejects the idea that the exploitation of children for entertainment can be deemed acceptable under any condition, thus cementing its status as a categorical decision. Therefore, the principle that protects the minors in this case cannot be overridden or compromised by consent or commercial considerations, as it is directly tied to immutable moral and legal standards, marking the case as a crucial demonstration of the categorical prohibition of exploitation in the name of public order.

The sixth case is dated 31 of January 2017, where the claimant filed a lawsuit against the defendants, requesting the annulment of the testamentary conditions (that included the creation of a commercial company to manage properties, with specific conditions for the transfer and management of the assets), imposed by the deceased, the father of those involved.[139] The core issue at stake here revolves around the testamentary conditions set by the deceased, which created legal and practical obstacles to the free circulation of goods. While the testator’s desire to maintain the property within the family was understandable, the court’s reasoning reflects a nuanced balancing of interests, where public order and the free disposal of property ultimately take precedence.

The decision hinges on the notion that the imposition of conditions should not restrict the essential and non-negotiable right of heirs to freely manage or alienate property. This reflects a conditional approach, wherein the law permits certain limitations on property rights under specific contexts, provided they do not unduly hinder fundamental societal values. The court rightly acknowledged that the testator's intentions, while not inherently wrongful, violated the broader principle of the free circulation of goods, a cornerstone of the legal system and public order. It is not the testament itself that is categorically impermissible, but rather the specific conditions that clash with fundamental legal principles. The court's reliance on the concept of public order, therefore, is not absolute but conditional, in that it applies only to circumstances where the conditions violate overarching principles like the free movement of goods and the non-disposable nature of inheritance rights. Thus, the court’s reasoning reflects a clear conditional framework,

[139] Acórdão Do Supremo Tribunal de Justiça, (2017) Processo n.º 258/10.7TCGMR.G1.S1 <https://juris.stj.pt/ecli/ECLI:PT:STJ:2017:258.10.7TCGMR.G1.S1.05?search=XgSvSxq3xGqSppONGMA> accessed 16 February 2025.

where the intentions of the deceased were weighed against societal values, ensuring that testamentary freedom cannot override essential legal principles that serve the public good.

From what can be examined, generally the Portuguese case law on immoral contracts appears to focus more on a conditional approach. This conclusion is drawn from the detailed analysis of the cases provided, where the courts often consider the specific circumstances and context before arriving at a decision. The case law reflects the flexibility and adaptability of the legal system in addressing complex scenarios. Courts balance competing interests and ensure that only exceptionally severe cases result in the nullity of contracts for being offensive to good morals.

From the analysed Portuguese cases we observe that categorical prohibitions apply to contracts that contradict fundamental constitutional or legal principles inherently; that violate human dignity, or another constitutionally protected right in a way that cannot be justified under any circumstances. In contrast, conditional prohibitions apply when the legitimacy of the contract depends on contextual factors, there is a need for balancing fundamental rights, rather than automatic invalidation and there is an assessment of factors on a case-by-case basis.

5. Rethinking Data Exchanges in Meta's 'Consent or Pay' Model: Conditional Immorality

The European Data Protection Supervisor's (EDPS) position on the trade of personal data aligns closely with the concept of immoral contracts under Portuguese law, as both frameworks emphasize the protection of fundamental rights and ethical principles. According to Portuguese law, particularly Articles 280 and 281 of the Civil Code, contracts are considered void if they are contrary to public order or offensive to good morals.

The EDPS's emphasis on the intrinsic wrongness of commodifying personal data fits well within the Portuguese legal framework, which in some cases, categorically prohibits contracts that infringe on fundamental rights and public order. Both the EDPS and Portuguese law recognize the necessity of protecting individuals from exploitation and upholding the integrity of fundamental rights. This shared perspective reinforces the alignment of the EDPS's position with the concept of immoral contracts in Portuguese law.

As was discussed in point 4.3, the comparison between Meta's 'consent or pay' model and a 'market for live human organs' frames the commodification of personal data as a categorical prohibition, kin to the absolute ban on organ sales. The sale of human organs falls under a categorical prohibition because it violates the core principles of human dignity and the non-commercialization of the human body. Unlike contracts that may be deemed conditionally immoral due to an imbalance in performances, the sale of live human organs is intrinsically impermissible, regardless of the price, the consent of the parties, or the contractual conditions. The prohibition is absolute, meaning that no adjustment in terms can make such a transaction legally acceptable. Such markets are fundamentally impermissible regardless of the circumstances, contractual conditions, or parties' consent.

The application of categorical prohibitions to data exchanges in Meta's model requires careful reconsideration within the broader scope of Portuguese contract law, particularly when compared to conditional prohibitions. Portuguese case law offers a nuanced understanding of immoral contracts—distinguishing between acts that are categorically immoral and those that may require contextual analysis in order to be declared immoral.

As we already know, this distinction is crucial to the legal reasoning that shapes the application of immorality in contractual relationships.

The European Data Protection Supervisor's (EDPS) position on the trade of personal data aligns closely with the concept of immoral contracts under Portuguese law, as both frameworks emphasize the protection of fundamental rights and ethical principles. According to Portuguese law, particularly Articles 280 and 281 of the Civil Code, contracts are considered void if they are contrary to public order or offensive to good morals. The EDPS's emphasis on the intrinsic wrongness of commodifying personal data fits well within the Portuguese legal framework, which in some cases, categorically prohibits contracts that infringe on fundamental rights and public order. Both the EDPS and Portuguese law recognize the necessity of protecting individuals from exploitation and upholding the integrity of fundamental rights. This shared perspective reinforces the alignment of the EDPS's position with the concept of immoral contracts in Portuguese law.

Banco Santander Totta (2022) is an exemplary case where the court adopted a categorical approach. The case involved a speculative financial contract that was found to lack a legitimate economic purpose and posed a substantial risk to economic stability. The court concluded that such speculative contracts are inherently harmful and should be nullified, as they carry a fundamental risk to the public interest. In the 30 May 2019 case regarding the exploitation of children’s image rights, the court also adopted a categorical approach. The fundamental rights of the child, in this case, took precedence over any contractual freedom, reinforcing the idea that some actions are categorically immoral and cannot be legitimized through consent or financial compensation. In contrast, the 28 September 2023 ruling on waiver clauses and the 31 January 2017 ruling on testamentary conditions provide examples where contracts were evaluated through a conditional lens. In both cases, the courts did not automatically invalidate the contracts but assessed their context and impact on public order or good morals. Specifically, in the waiver clause case, the court found that waiver clauses restricting legal access could be valid in certain circumstances, provided the clause did not unreasonably infringe upon a party’s fundamental rights. This case demonstrates that not all immoral contracts are inherently and absolutely void. The court opted to adjust or evaluate the contract based on fairness and proportionality, which aligns with the conditional approach.

Applying this distinction, an absolute prohibition on data-for-service exchanges would presuppose that personal data is intrinsically inalienable, much like bodily organs – the position defended by the EDPS. However, while the EDPS likens data commodification to the sale of human organs, this analogy seems flawed and overly rigid under Portuguese legal reasoning, for several key reasons.

Personal data, unlike human organs, is not exhausted or depleted upon exchange. The act of sharing data does not, by itself, commodify the individual or reduce their inherent dignity. Personal data protection is undeniably a fundamental right under the EU Charter and the GDPR, but this right is subject to exceptions and limitations, particularly in the context of proportionality and necessity. Unlike the absolute nature of human rights prohibiting human organ trade, the exchange of personal data can be regulated, ensuring that the transaction respects individual autonomy and privacy while fostering innovation in digital markets.

Additionally, users have control over their data and are protected through a robust regulatory framework, including the GDPR, which, along with a broader legal framework that includes the Digital Content Directive and the Data Act,[140] among others, ensures that data exchanges operate within conditions of fairness and proportionality rather than being inherently exploitative or coercive. The vast regulatory EU framework (that is also appliable in Portugal)—GDPR, Data Act, and consumer protection laws—demonstrates that data protection operates through a nuanced web of legal safeguards, ensuring that performance imbalances are corrected without the need for an absolute prohibition. This reinforces the idea that the morality of data exchanges should be assessed through the relationship of performances rather than an outright ban, making conditionality, not categorical prohibition, the appropriate legal lens. Conditional immorality provides the

[140] This provision establishes that when companies exchange data for monetary compensation, such compensation must be reasonable and non-discriminatory. It calls for clear guidelines on determining a fair price for data and introduces a framework for data transactions that takes into account both the economic value of the data and the rights of the individuals providing it. While the Data Act primarily addresses business-to-business (B2B) transactions, it enshrines a fundamental principle: compensation for data must be non-discriminatory, reasonable, and proportionate. A crucial requirement of Article 9 is that the European Commission must develop guidelines for calculating fair pricing in data exchanges between data holders and data recipients. This requirement could have significant implications for the debate surrounding the 'Consent or Pay' model, particularly if its principles are extended by analogy to business-to-consumer (B2C) transactions.

flexibility to adapt the contract's terms in ways that maintain fairness, transparency, and respect for user rights.

Moreover, a categorical prohibition of Meta's Consent or Pay model would neglect the complexity of digital markets and the need to balance consumer autonomy, data protection rights and the freedom of initiative. Just as the STJ rejected a rigid interpretation of public order in the waiver clause case, Portuguese law generally avoids absolute bans on economic transactions unless there is a clear, unavoidable and exceptionally severe violation of fundamental rights and principles. In the Banco Santander Totta ruling, the court categorically invalidated the swap contract because it was purely speculative and lacked a legitimate economic justification. By contrast, digital services operate in a market-driven ecosystem where the monetization of personal data is a key economic factor, much like how contractual negotiations require assessments of equivalence, fairness, and balance of performances. A conditional approach allows for a more nuanced legal response that accommodates both consumer protection and innovation.

Portuguese contract law, rooted in principles of freedom of contract and good faith, generally permits exchanges unless they lead to severe and clear exploitation, imbalance, or coercion. Outright prohibiting data exchanges in Meta's Consent or Pay model would disregard the flexibility inherent in contract and consumer law as well as data protection regulations. Instead, courts and regulators should assess whether the financial alternative to data processing is reasonable, ensuring that users are not coerced into surrendering their privacy rights due to an exorbitant or inaccessible cost, which can only be done though a conditional analyses.

Thus, while public order and fundamental rights must be safeguarded, a categorical prohibition on data-for-service exchanges seems inconsistent with the Portuguese legal tradition, which favours conditional prohibitions based on fairness, proportionality, and individual autonomy. The better approach, in line with Portuguese case law and legal framework, is to examine these transactions under a conditional framework, ensuring that personal data exchanges comply with legal principles without imposing an absolute ban that disregards economic realities and contractual freedoms. It provides a more balanced response that ensures the protection of personal data without disregarding the balancing of interests of the parties, the economic realities, and the contractual freedoms in play.

Conclusion

This dissertation aimed to address the following research question: Is a contract where users exchange their data for access to a service an immoral contract under Portuguese law?

To reach this goal, the research adopted a structure composed of three Chapters. Chapter 1 explores the legal debate on 'Consent or Pay' models in the European Union (EU), using Meta as a case study. The model raises concerns about compliance, valid consent, and broader legal and ethical issues under consumer and contract law. This chapter lays the groundwork for assessing whether such models align with the EU legal framework.

Chapter 2 focused on the analyses of Meta's 'Consent or Pay' model through key legislative instruments, including the Digital Content Directive (DCD), the General Data Protection Regulation (GDPR), the Unfair Commercial Practices Directive (UCPD), and the Unfair Contract Terms Directive (UCTD). Additionally, this chapter highlighted the economic value of personal data, and the legal complexities involved in its use as a counter-performance in contracts.

Starting with the DCD, the first legal document analysed, and beginning with Article 3(1), which applies to contracts where digital content or services are exchanged for either money or personal data. This dual protection sparked controversy, as the European Data Protection Supervisor (EDPS) opposed treating personal data as a commodity. However, functionally, it serves as counter-performance, even though the legal framework does not explicitly recognize it as such. In Portugal, Decree-Law No. 84/2021, which transposes Directives (EU) 2019/770 and 2019/771, reinforces this debate. In Portugal, these directives were transposed into one, and essentially align in consumer rights and sanctions, failing therefore to reflect the EDPB's opposition of treating personal data as a tradable commodity.

Next, we looked into the GDPR. Under this legal instrument, personal data is protected both as part of one's identity and as an economic good subject to circulation. While data protection is a fundamental right, it must be balanced with economic freedoms, business interests, and the need for a competitive digital market, meaning it is not absolute, as it must be balanced with other fundamental rights and interests. When analysing the UCPD, the focus was on Decision No. 2631 by the *Consiglio di Stato.* The Italian decision confirms that personal data can serve as a form of payment in commercial transactions, requiring companies to follow consumer protection laws. It emphasizes that personal data exchanges must be treated with the same scrutiny as monetary transactions, with non-compliance leading to significant penalties. Once again, this diverges from the EDPS' stance, which firmly rejects the commodification of personal data.

Within the framework of the UCTD, the next section examined Meta's "Consent or Pay" model through the *Freiburger Kommunalbauten* case, comparing traditional payment terms with data-for-services. This case highlights fairness, proportionality, and the role of national courts. In Meta's case, the focus is on the shift from a traditional service-for-money contract to a barter model where users' data is exchanged for services. In this Chapter it was also emphasized that, in the case of Meta's 'Consent or Pay' model, innovative legal arrangements can create fair, mutually beneficial contracts using proportionality and non-zero-sum game principles.

Moving forward, Chapter 3 delves into the concept of immoral contracts, particularly in the context of the EDPS's position on data exchanges. The EDPS categorically opposes the commodification of personal data, drawing an analogy to the market for human organs to highlight the intrinsic wrongness of treating personal data as a commodity. This perspective aligns with the principles of good morals and public order under Portuguese law, which also categorically prohibits contracts that infringe on fundamental rights and ethical standards.

However, the analysis of Portuguese case law reveals a more nuanced approach, often employing conditional prohibitions that consider the specific circumstances and context of each case. Portuguese courts tend to favour conditional immorality, assessing the morality of contracts based on the relationship of performances and the broader context. This approach allows for a more flexible and context-sensitive evaluation.

Unlike human organs, the sale of which is fundamentally impermissible, personal data is not inherently exhausted upon exchange, nor does its trade necessarily violate human dignity. Instead, data protection operates within an extensive EU regulatory framework—including the GDPR, the DCD, the Data Act, among others—designed to ensure fairness, proportionality, and the protection of the user and consumer rights without necessitating an outright ban on data exchanges.

Differently from the absolute nature of human rights prohibiting human organ trade, the exchange of personal data can be regulated, ensuring that the transaction respects individual autonomy and privacy while fostering innovation in digital markets. A rigid prohibition of such models would overlook the complexities of digital markets, consumer autonomy, contractual freedom, and innovation.

Besides, this dissertation asserts that personal data is increasingly treated as a commodity, supported by a legislative framework in both the EU at large and specifically in Portugal, which contrasts the EDPS's view. Furthermore, from the perspective of immoral contracts in relation to the 'Consent or Pay' model, the findings of this research do not argue in favour of a categorical prohibition of such models within the Portuguese legal system. Instead, this dissertation advocates for a nuanced and conditional approach, which aligns more closely with the Portuguese case law decisions and application on immoral contract. This approach offers a balanced that safeguards personal data protection without disregarding the balancing of interests of the parties involved, the economic realities, and the contractual freedoms at play.

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