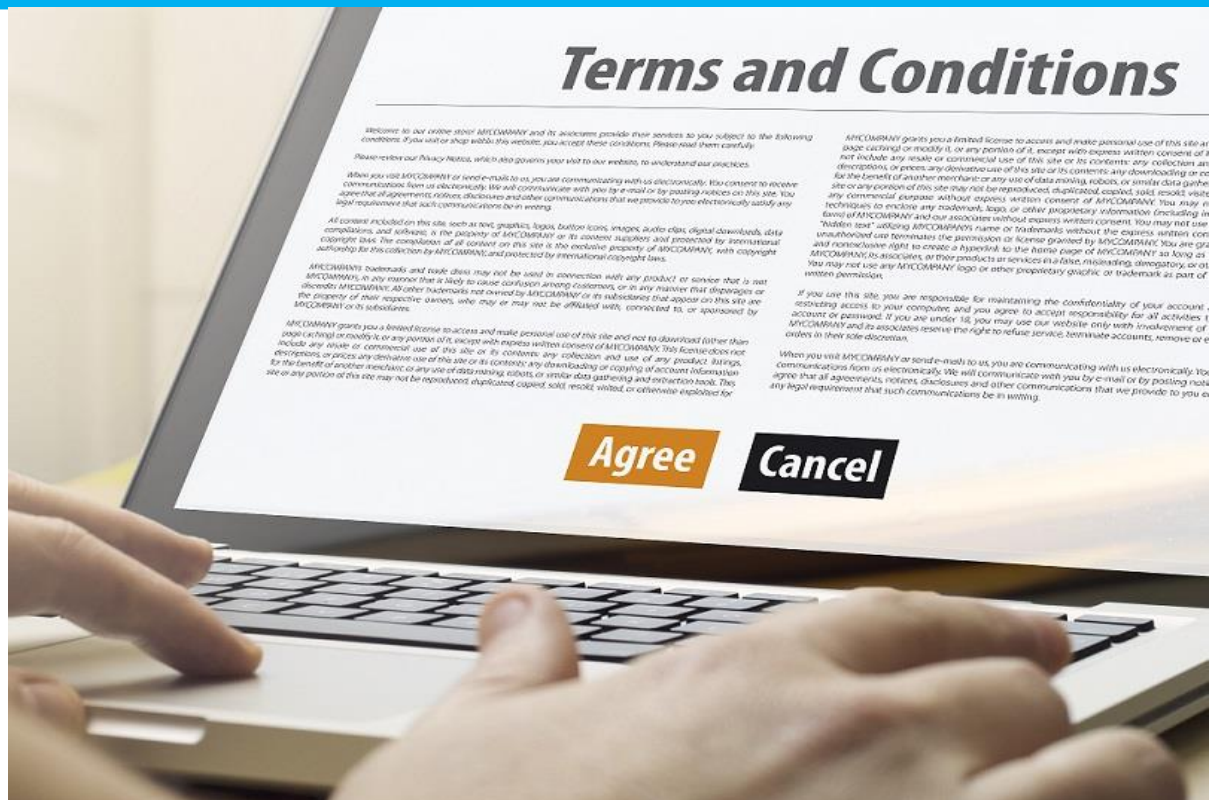# Master Thesis European Master in Law & Economics

The Impact of Branding on Boilerplates: A Law and Economics Analysis of Standard-Form Contracting

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Number of words: 12.960

Abstract

How is it possible that a company like Apple is able to offer extraordinary one-sided and self-serving boilerplates to its customers while enjoying tremendous brand equity? This thesis analyzes if branding influences the one-sidedness of boilerplates in online consumer contracts. The effects of five prime indicators of brand equity (brand value, brand revenue, marketing/advertising, brand awareness, and brand reputation) on the one-sidedness of standard forms are examined. Besides, the effects of the five branding-related factors on the length and complexity of boilerplates are investigated. To understand the role of boilerplates and the prevalence of one-sided terms, the thesis first develops a theoretical framework based on traditional, behavioral, and Austrian law and economics. Subsequently, this thesis provides a comprehensive empirical analysis of the one-sidedness of the boilerplates of the 100 most valuable brands in the world by virtue of an ordinal logistic regression. The results show that brand value, brand revenue, and marketing/advertising have a significant positive effect on the one-sidedness of standard forms. Conversely, no significant relationship has been found between branding and the length or complexity of boilerplates. Accordingly, the thesis finds that brands with stronger brand equity can impose more one-sided terms in consumer contracts than brands with weaker brand equity. Therefore, the thesis concludes by proposing that additional funding for consumer organizations is needed to enable them to closely monitor the boilerplates of firms with strong brand equities, and, if necessary, instigate legal proceedings to counteract one-sided and unfair terms. All with the purpose of enhancing consumer protection vis-à-vis the seller in online consumer contracts and safeguarding consumers' safety-of-expectations when clicking "I agree".

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Acknowledgements
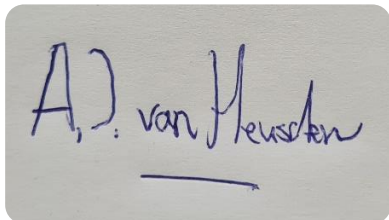
Authorship declaration

I hereby declare and confirm that this thesis is entirely the result of my own work except where otherwise indicated. I acknowledge the supervision and guidance I have received from Professor Pierre Garello. This thesis is not used as part of any other examination and has not yet been published.

12th of August 2020

Adrianus van Heusden

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Chapter 1: Introduction

1.1. Origin of the study

Contract law usually assumes that parties read contracts before signing them. In the real world, very few people do so.[1] This creates a strong incentive for self-interested drafters to insert one-sided and inefficient terms. Apart from the fact that this leads to unfair outcomes, it also leads to economic inefficiencies and market distortions. This could clearly be seen in the financial market during the financial crisis. Consumer mortgages and loans were mostly governed by the terms that were imposed by financial firms. In the end, the terms turned out to be excessively onerous and unfair. After evaluating the financial contracts, it was found that the financial industry was able to impose these one-sided contracts, because of its more dominant bargaining position vis-à-vis the customer.[2] Similar developments have been observed in the e-commerce industry. Despite the existence of American and European unfair terms legislation, unfair contractual clauses are prevalent in the boilerplates of online firms. There is a considerable number of online platforms operating which deliberately draft documents that are excessively long and lack transparency. Conducting an abstract control of each one of them exceeds the current (financial) capabilities of consumer organizations. As a result, contracts containing unfair terms continue to be in use. This raises questions about the bargaining position of consumers vis-à-vis dominant e-commerce firms. More specifically, what enables these firms to impose one-sided terms in consumer contracts, and why are consumers accepting these terms?

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[1] De Geest, G, "Signing without reading" in Encyclopedia of Law and Economics: Basic areas of law (Alain Marciano and Giovanni Battista Ramello eds., 1st edn, Springer 2015), p. 2.

[2] Melecky, M., & Rutledge, S. (2011). Financial consumer protection and the global financial crisis. *MPRA Paper No. 28201*. Retrieved from https://mpra.ub.uni-muenchen.de/28201/. Last accessed on June 28, 2020.

1.2. Aim of the research

Accepting standard forms has become a matter of seconds and practically no one knows the contents of the boilerplate when clicking "I agree". Accordingly, an incentive has been created for firms to impose one-sided terms and this is widely acknowledged in the extant law and economics literature. However, there exists a clear knowledge gap when it comes to research regarding the ability of firms to impose more one-sided terms when their brand becomes more powerful, popular, and valuable. The relationship between branding and boilerplates remains a blind spot for the extant literature on stand-form contracting. Therefore, this research endeavors to fill up this gap by conducting research specifically focused on the impact of branding on boilerplates. The interdisciplinary nature of the problem, namely, marketing and consumer law, requires an interdisciplinary approach. Consequently, a law and economics approach is adopted to analyze the economic and legal part of the problem.

1.3. Central research question and corresponding sub-questions

This research aims to answer the following central research question:

"Does branding influence the one-sidedness of boilerplates in online consumer contracts?"

To be able to answer the central research question, the analysis will be divided into several sub-questions.

Theoretical sub-questions:

1. What does traditional law and economics postulate about unfair contract terms?
2. What does behavioral law and economics contribute to the explaining of the one-sidedness of standard forms?

3. What does the Austrian School of Economics propound about one-sided boilerplates?

4. What factors are considered relevant in determining a brand's equity?

Empirical sub-questions:

1. What branding-related factors have a significant effect on the one-sidedness of standard forms?

2. Do branding-related factors influence the length and complexity of standard forms significantly?

1.4. Relevance

Nowadays, all products and services that are being offered on the online marketplace come with their own boilerplate containing essential information regarding the roles of the buyer and the seller. Yet, to the author's knowledge, no prior research has been conducted on the relationship between branding and standard forms. Accordingly, this research endeavors to contribute to the extant literature on standard-form contracting by placing a specific focus on the role of branding. By doing so, the research also tries to open a new research direction in the field of law and economics, namely, the influence of marketing on consumer contracts and law. This could hopefully trigger scholars to instigate further research and, in due course, this could greatly benefit consumer protection legislation.

1.5. Methodology

The research will take a multidimensional approach combining a theoretical and empirical analysis. First, a comprehensive analysis of the extant literature in the field of standard terms and conditions will be conducted. Principally, two main economic paradigms will be scrutinized, namely, the traditional and the behavioral law and

economics paradigm. Yet, to enrich the multidimensionality of the theoretical framework, a third economic paradigm will be discussed based on the Austrian School of Economics. Thereafter, an overview of previous empirical research on the validity of these paradigms will be presented. Subsequently, the research will focus on the new avenue of research in standard-form contracting, namely, the influence of branding on contract terms. To provide support for this new avenue of research, empirical analysis is indispensable. Hence, a quantitative study will be conducted which will examine the relationship between branding-related factors and the one-sidedness of contract terms in boilerplates. In this way, this thesis will endeavor to present a solid theoretical framework complemented with empirical research to analyze the impact of branding on standard-form contracting in a comprehensive and justifiable way.

1.6. Scope of research

This research will specifically focus on the transactions between businesses and consumers, i.e. business-to-consumer contracts (B2C). The rationale behind this is twofold. Firstly, the lion's share of legislation regarding standard terms applies to consumer contracts. Secondly, the effect of an unequal bargaining position, consumer versus online firm, in negotiating standard forms is of particular interest. Thus, further analysis of consumer-to-consumer or business-to-business contracts will fall outside the scope of the research.

Furthermore, this research will focus on the new digital economy, more specifically, e-commerce. The emergence of online shopping is particularly interesting, because, on the one hand, consumers' consent can be given quicker than ever before (one-second click – "I agree") and, on the other hand, the digital economy has made companies more powerful than ever before (e.g. Apple and Amazon). Accordingly, only the boilerplates that are offered by companies through online websites will be analyzed.

Chapter 2: Theoretical framework

2.1. Traditional law & economics of unfair contract terms

In this research, the term traditional law and economics encompasses the neoclassical economic paradigm complemented with insights from information economics.

2.1.1. Neoclassical economics and standard terms

According to the neoclassical view, the standardization of contracts is welcomed based on the efficiency benefits it generates. Neoclassical economics asserts that interfirm competition and reputation concerns will ensure that efficient terms will be offered in the market, that is to say, terms that maximize the mutual benefit of the buyer and the seller.[3] Besides, it postulates that the voluntary nature of the exchange guarantees that parties will negotiate efficient terms resulting in larger potential profits for both parties.[4] Nevertheless, the use of standard terms has attracted harsh criticism, due to its lack of actual assent. The take-it-or-leave-it nature of standard terms indicates that the seller has an inequitable degree of control over the bargaining process.[5] For this reason, standard form contracts have been referred to as contracts of adhesion as early as the 1940s.[6] However, neoclassical economics has responded to this criticism by positing three main economic defenses.

2.1.1.1. Reduced transaction costs

The standardization of contracts has led to substantial cost savings because rather than drafting up individual terms for each contract separately, one boilerplate can be created

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[3] Luth, H. A. (2010). *Behavioural economics in consumer policy: The economic analysis of standard terms in consumer contracts revisited* (Doctoral dissertation, Erasmus School of Law), p.133.

[4] Posner, R. A., & Rosenfield, A. M. (1977). Impossibility and related doctrines in contract law: An economic analysis. *The Journal of Legal Studies*, *6*(1), p. 89.

[5] Katz, A. W. (1998). Standard form contracts. *The new Palgrave dictionary of economics and the law*, p.1.

[6] Kessler, F. (1943). Contracts of adhesion--Some thoughts about freedom of contract. *Columbia Law Review*, *43*(5), 629-642.

that applies to all transactions. As a result, there is a sizeable decrease in negotiation costs and contract drafting costs. Consequently, lower transaction costs lead to lower prices, which in the end benefit the consumer.[7]

2.1.1.2. Competition induces efficiency

Due to competitive pressure, firms are induced to draft terms that correspond to the preferences of consumers. If the contractual needs of the consumers are not met adequately, the firm will lose clientele.[8]

Nonetheless, it could be argued that the firm will be able to exploit the group of customers that does not read standard terms and, therefore, stays loyal to the firm. However, neoclassical economics affirms that an informed minority of consumers that does read standard forms is capable of disciplining the market, albeit the majority of consumers does not read the standard forms. Pursuant to intense competition, firms cannot afford to lose the marginal consumer and solely retain inframarginal consumers.[9] In practice, this means that the firm cannot lose term-conscious consumers that are willing to shop elsewhere if better terms are offered. Accordingly, firms will adopt efficient terms to retain marginal term-conscious consumers, and this will also benefit the inframarginal term-unconscious consumers.[10] Thus, the informed minority can discipline the market, which leads to more efficient standard term contracts.[11]

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[7] Epstein, R. A. (2007). The neoclassical economics of consumer contracts. *Minn. L. Rev.*, *92*(3), p. 816.

[8] Priest, G. L. (1981). A theory of the consumer product warranty. *The Yale Law Journal*, *90*(6), p. 1347.

[9] Hylton, K. N. (2003). *Antitrust law: Economic theory and common law evolution*. Cambridge University Press, p. 3.

[10] Schwartz, A., & Wilde, L. L. (1978). Intervening in markets on the basis of imperfect information: A legal and economic analysis. *U. Pa. L. Rev.*, *127*(3), p. 639.

[11] Goldman, L. (1992). My Way and the Highway: The law and economics of choice of forum clauses in consumer form contracts, NW. *UL Rev*, *86*(1), p. 716.

2.1.1.3. Duty to read

The neoclassical perspective strongly emphasizes the freedom of contract principle. This principle offers parties the freedom to decide to enter or not to enter a contract as they see fit. It is assumed that parties will only enter into a contract when it is mutually beneficial.[12] Applying this principle to standard terms, it could be argued that the buyer would not enter into the contract if the terms would be detrimental to its welfare. To determine the benefits of the terms, the buyer has a duty to read the terms of the contract. Accordingly, if the buyer assents to the contract, it automatically implies that he or she has read the terms and that the contract has been validly concluded.[13]

2.1.2. Signing-without-reading problem

By relying on the duty to read, the neoclassical approach assumes an ideal world in which all people read the standard terms before concluding a contract. In the real world, the opposite is true, very few people do read the standard terms.[14] Nevertheless, even though the buyer did not comply with its duty to read, it will be without prejudice to its assent covering all terms in the contract. The buyer will be bound to the contract, regardless of its actual contentment with the terms in the contract.[15] Therefore, the question arises why buyers do not "simply" read the terms before concluding the contract.

2.1.2.1. Rational apathy

The decision to not read is economically justifiable and rational. Consumers make a rational cost-benefit analysis when they decide to read or not to read the terms. Reading standard forms is time-consuming and, given the concept of opportunity costs, time is

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[12] Trebilcock, M. J. (1997). *The limits of freedom of contract*. Harvard University Press, p. 15-22.

[13] Rakoff, T. D. (1983). Contracts of adhesion: An essay in reconstruction. *Harvard Law Review*, *96*(6), p. 1190.

[14] De Geest (n 1), p. 2.

[15] Barnett, R. E. (2002). Consenting to form contracts. *Fordham L. Rev.*, *71*(3), p. 635.

money.[16] Standard forms are highly complex and lengthy, which increases the costs associated with reading them.[17] Besides, the boilerplate is offered on a take-it-or-leave-it basis, which directly indicates to the consumer that further negotiation or examination is without merit. Accordingly, it can be concluded that the consumer gains very little from reading the boilerplate, whereas it can generate significant transaction costs.[18]

Especially, in the world of e-commerce, where products and services can be bought in a couple of minutes and consent can be given in a fraction of seconds (clicking "I agree"), reading lengthy and complex boilerplates is additionally onerous.[19] Hence, consumers remain rationally ignorant, because the costs of reading standard terms outweigh the benefits associated with it.

2.1.2.2. Abuse of rational apathy

Since the firms realize that consumers do not read the standard terms, they will be incentivized to insert one-sided and inefficient terms into the contract.[20] If the firm conducts a high number of transactions, the insertion of one-sided terms, which redistribute wealth from the consumer to the seller, can be highly profitable.[21]

Besides, firms will know that consumer shopping for alternative terms will not take place, because that would mean that consumer needs to incur even more transaction costs for

[16] Vandenberghe, A. S. (2010). The role of information deficiencies in contract enforcement. *Erasmus L. Rev.*, *3*(1), p.88.

[17] Ayres, I., & Schwartz, A. (2014). The no-reading problem in consumer contract Law. *Stanford Law Review, 66*(3), p.549-550.

[18] Ben-Shahar, O. (2009). The myth of the 'opportunity to read in contract law'. *European Review of Contract Law*, *5*(1), p.18.

[19] Hillman, R. A. (2005). Online boilerplate: Would mandatory website disclosure of e-standard terms backfire. *Mich. L. Rev.*, *104*(5), p. 840-842.

[20] De Geest (n 1), p. 2.

[21] Armstrong, M. (2008). Interactions between competition and consumer policy. *Competition Policy International*, *4*(1), p. 120.

the sake of comparing boilerplates.[22] Consequently, the abuse of rational apathy can take place on a market level.

2.1.3. Information economics and standard terms

The information economics paradigm has complemented the neoclassical paradigm by emphasizing the role of information asymmetry. Information asymmetry leads to adverse selection on the boilerplate market, which can explain the one-sidedness of standard forms.

2.1.3.1. Lack of information

A direct consequence of the signing-without-reading problem is that consumers lack essential information about the contract, which leads to the same market failures as in the case of asymmetric information regarding the quality of goods.[23] For a seller, the benefits it can gain from examining a contract term significantly outweigh the benefits that a consumer can gain, thus, the seller will be better informed about the contract terms than the consumer.[24]

2.1.3.2 Adverse selection

Consumers are unaware of the quality of the contract terms because they sign without reading. Thus, consumers will take alternative product attributes into account, whereby the price is the most eminent one. Similar to the market for lemons, competition will focus on price rather than quality.[25] Consequently, based on the premise that terms remain unobserved by consumers, the sellers' incentive to draft high-quality and consumer-

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[22] Luth (n 3), p. 143.
[23] Vandenberghe (n 16), p. 88.
[24] Gillette, C. P. (2011). Standard form contracts. In *Encyclopedia of Law and Economics*. Edward Elgar Publishing Limited, p. 118.
[25] Akerlof, G. A. (1978). The market for "lemons": Quality uncertainty and the market mechanism. In *Uncertainty in Economics*, 235-251.

friendly terms will disappear.[26] On an industry-wide level, the overall quality of standard form contracts will go down for the sake of low-price competition, thereby leading to a so-called "flea market" situation. In such a situation, competition on contract quality disappears, so, consumers will be offered low prices, but they will be allocated the absolute minimum amount of rights.[27]

2.2. Behavioral law & economics of unfair contract terms

Behavioral economics postulates that certain consumer biases and heuristics will further exacerbate the problems associated with the duty to read and the consumers' ability to discipline the market. Behavioral economics argues that psychological phenomena can explain why consumers do not read terms, why they are not able to evaluate contracts correctly, and how sellers can manipulate consumers.[28]

2.2.1. Consumer biases and heuristics

Behavioral economical literature has discovered numerous biases that influence consumer decision-making. The three behavioral propositions that are most relevant to standard-form contracting will be highlighted. Firstly, the information overload phenomenon. The consumer has cognitive limitations and it cannot, therefore, process all relevant information.[29] Due to the overload of information in standard forms, consumers are inclined to focus on a few components, namely, the most salient ones, such as price and other conspicuous product attributes.[30] As a result, firms will discover what product

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[26] Goldberg, V. P. (1974). Institutional change and the quasi-invisible hand. *The Journal of Law and Economics*, *17*(2), p. 486-487.

[27] Schäfer, H. B., & Leyens, P. C. (2010). Judicial control of standard terms and European private law. *Economic Analysis of the DCFR, The work of the Economic Impact Group within CoPECL, Berlin, and New York: Sellier–de Gruyter*, p. 105.

[28] Becher, S. I. (2007). Behavioral science and consumer standard form contracts. *La. L. Rev.*, *68*(1), p. 120.

[29] Becher, S. I., & Zarsky, T. Z. (2007). E-contract doctrine 2.0: standard form contracting in the age of online user participation. *Mich. Telecomm. & Tech. L. Rev.*, *14*(1), p. 312.

[30] Korobkin, R. (2003). Bounded rationality, standard form contracts, and unconscionability. *The University of Chicago Law Review, 70*(4), p. 1225-1226.

features are salient and which ones are non-salient based on consumer feedback. Accordingly, the firm will compete on the salient attributes, whereas the non-salient ones are disregarded at the expense of the consumer. Standard terms form precisely one of the product attributes that is non-salient in the consumer's buying decision.[31]

Secondly, consumers are limited in their ability to evaluate prospects of future risks and uncertainty.[32] The terms in the boilerplates cover unpleasant situations in which the contract is not respected by one of the two parties. In the majority of the cases, these risks do not materialize and, therefore, consumers regard these contingencies as having a low probability risk. Accordingly, consumers tend to neglect these terms, which is described as the low probability neglect.[33]

Thirdly, the self-commitment bias compels consumers to accept the terms even though they are opposite to their preferences.[34] Standard terms are normally placed at the end of the shopping process and this causes consumers to attach less importance to the terms and continue with the order. Two psychological phenomena can explain this. In the first place, the sunk cost effect induces consumers to continue with the ordering process, because they have already invested time and effort into the process. The reason for this is that consumers do not want to waste time and effort and they want to maintain their self-esteem regarding previous actions.[35] In the second place, cognitive dissonance causes a feeling among consumers to commit to the contract because they want to avoid conflicting evidence or ideas. As a result, people will tend to devalue evidence that undermines their ex-ante choice, which persuades them to commit to their choice, albeit the consumer

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[31] Id, p. 1206-1207.
[32] Becher (n 29), p. 313.
[33] Eisenberg, M. A. (1995). The limits of cognition and the limits of contract. *Stanford Law Review*, *47*(2), p. 223-224.
[34] Becher (n 28), p. 179.
[35] Korobkin, R. B., & Ulen, T. S. (2000). Law and behavioral science: Removing the rationality assumption from law and economics. *Calif. L. Rev.*, *88*(4), p. 1124-1126.

would have been persuaded not to sign if it would have received the information at the initial stage of the decision process.[36]

2.2.2. Sellers' manipulation

The prevalence of consumer biases and heuristics enables sellers to exploit them. Firstly, standard forms are strategically drafted with a high degree of complexity, substantial length, and a great deal of legal jargon. Due to the cognitive limitation of the consumer, these boilerplates will be disregarded, which enables sellers to insert one-sided terms to their own benefit.[37] Secondly, firms know that consumers are unable to assess all relevant product attributes (salient and non-salient) and that they experience great difficulty in determining the cost and benefits of future use. For this reason, firms will provide consumers with abundant information about the product's attributes, whereas use-pattern information is neglected, albeit the latter would significantly help consumers in making a balanced choice.[38]

2.3. Austrian School of Economics perspective on unfair contract terms

The Austrian School of Economics proposes an alternative economic paradigm to analyze markets, which simultaneously pinpoints the weaknesses of the neoclassical approach. Likewise, the Austrian paradigm can provide valuable insights into the analysis of contract law and, more specifically, standard-form contracting.[39]

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[36] Whitford, W. C. (1973). The functions of disclosure regulation in consumer transactions. *Wis. L. Rev.*, *1973*(2), p.426

[37] Eisenberg (n 33), p. 241-243.

[38] Bar-Gill, O. (2012). *Seduction by contract: Law, economics, and psychology in consumer markets.* Oxford University Press.

[39] Wonnell, C. T. (1985). Contract law and the Austrian school of economics. *Fordham L. Rev.*, *54*(4), 507-543.

2.3.1. The knowledge problem

The Austrian approach emphasizes the importance of knowledge in the market. Not solely by stating that there is no perfect knowledge in the market, but also by stressing the dispersion of knowledge among numerous individuals in society.[40] Knowledge is dispersed because each individual possesses concrete and unique knowledge of the particular circumstances of time and place, and no central authority or planner can obtain all this information.[41] The Austrian argument states that only the pricing mechanism can embody the knowledge of numerous people and disclose the relevant information to the market participants.

Accordingly, it could be argued that the pricing mechanism will inform consumers about the degree of quality of contract terms since high-quality contracts will be offered for premium prices, whereas low-quality contracts will be offered for low prices.[42]

2.3.2. Theory of entrepreneurial discovery

The Austrians oppose the neoclassical tenet of perfect equilibria by emphasizing the role of entrepreneurial discovery. Rather than having perfect information in the market, entrepreneurs are constantly looking for new profitable ventures and potential trade gains that were hitherto not realized.[43] In this way, through the dynamic process of competition, the entrepreneurial discovery contributes to a more efficient (not perfect) resource allocation.[44] Correspondingly, if most of the firms offer low-quality contract terms because they want to exploit consumers, the entrepreneurial profitability of doing the

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[40] Hayek, F. A. (1973). *Law, legislation, and liberty: A new statement of the liberal principles of justice and political economy*. Chicago, III: University of Chicago Press, p. 216.

[41] Hayek, F. A. (1945). The use of knowledge in society. *The American Economic Review*, *35*(4), 519-530.

[42] Wonnell (n 39), p. 533.

[43] Kirzner, I. M., & Sautet, F. (2006). The nature and role of entrepreneurship in markets: Implications for policy. *Mercatus Policy Series Policy Primer*, *4*(1), p. 25.

[44] Wandel, J. (2012). Competition and antitrust policy: An Austrian economics perspective. *Progress in Economics Research*, p. 51.

same diminishes. Instead, entrepreneurs could see an opportunity in offering high-quality contract terms to cater to another group of consumers in the market which does value higher-quality terms. This will contribute to the stabilization of contract quality in the market.

2.3.3. Safety-of-expectations doctrine

The Austrian paradigm acknowledges that the standardization of contracts has been detrimental to the principle of freedom of contract.[45] It is evident that there has not been a full meeting of minds, because "firms know full well that their forms will not generally be read, let alone understood"[46]. For this reason, Austrians disfavor the enforcement of non-salient terms in standard forms and they are in favor of the safety-of-expectations approach[47]. The rationale behind this approach is that the law clearly states the facts on which the individual may count, which enables it to predict the consequences of its actions, and what the individual will be held responsible for.[48]

Applying this rationale to standard term contracts, Austrians argue that only those terms which a consumer can reasonably expect in the course of business are binding in the contract. Only when a consumer makes an active entrepreneurial choice to include additional terms, these can be seen as binding.[49] In this way, the desire to unify knowledge and decision-making can be pursued.[50]

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[45] Wonnell (n 39), p. 530.
[46] Slawson, W. D. (1984). The new meaning of contract: the transformation of contract law by standard forms. *U. Pitt. L. Rev.*, *46*(1), p. 27.
[47] Garello, P. (2003). The breach of contract in French law: between safety of expectations and efficiency. *International Review of Law and Economics*, *22*(4), 409.
[48] Id.
[49] Wonnell (n 39), p. 534.
[50] Garello (n 47), p. 413.

2.4. Need for intervention

The various paradigms offer different perspectives on the merits of standard forms. Likewise, the approaches have conflicting views on the need for intervention in the market.

2.4.1. Neoclassical perspective

Neoclassical economics is critical of government intervention and prefers a laissez-faire approach. To specify, the neoclassicists promulgate that the allocation of risks between the buyer and the seller is more efficiently done by the market participants than by courts or other institutions.[51] The market is more apt to generate fair and efficient standard terms through the processes of competition and reputation building in the market.[52]

Besides, the neoclassicists argue that in practice sellers will be reluctant to abuse consumers through standard terms because more effective and less risky strategies can be created to yield profits, e.g. by focusing on product attributes such as price and quality.[53]

Lastly, if the standard in the market is that boilerplates are one-sided to the favor of sellers, this still indicates efficiency according to the neoclassicists. To clarify, one-sided terms deter buyers from acting opportunistically, i.e. exploiting consumer-friendly terms. Sellers, on the other hand, are less inclined to act opportunistically because of reputational constraints, thus, the market allocates the risks efficiently even if imposing one-sided terms is the norm.[54]

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[51] Rakoff (n 13), p. 1204.

[52] Johnston, J. (2006). The return of bargain: An economic theory of how standard-form contracts enable cooperative negotiation between businesses and consumers. *Michigan Law Review, 104*(5), p. 858-859.

[53] Baird, D. G. (2006). The boilerplate puzzle. *Michigan Law Review, 104*(5), p. 937.

[54] Bebchuk, L. A.; Posner, R. A. (2006). One-sided contracts in competitive consumer markets. *Michigan Law Review, 104*(5), p. 830.

2.4.2. Information economics perspective

Information economics asserts that the existence of asymmetric information and adverse selection justifies government intervention.[55] In addition, the provision of information to consumers is regarded as being essential to increase social welfare.[56] Therefore, three possible regulatory interventions are recommended.

Principally, mandatory disclosure. Firms should be obligated to provide consumers with their boilerplates before any particular transaction so that consumers can read and compare boilerplates before making a purchase. In the world of e-commerce, this could be done by posting the standard terms on the website without the necessity to start an order process. This will enable consumers to become better informed and it will deter questionable practices on the side of the seller.[57]

Secondly, setting default rules. Default rules allow parties to depart, but they are likely to be followed rather than diverged from.[58] The government can set customer-friendly default rules. This can help to reduce transaction costs and if the default turns out to be inefficient in a certain industry, parties are able to contract around it. Conversely, mandatory rules concerning the content of boilerplates are likely to be inefficient because they disregard industry-specific circumstances and knowledge.[59]

Thirdly, mandatory substantive intervention. To prevent the flea market situation which results from adverse selection, a minimum standard quality level for boilerplates should be set.[60] This would enable courts to struck out terms based on the fairness of their

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[55] Luth (n 3), p. 163.
[56] Id, p. 164.
[57] Hillman (n 19), p. 838-839.
[58] Ben-Shahar, O., & Pottow, J. A. (2005). On the stickiness of default rules. *Fla. St. UL Rev.*, *33*(3), p. 680.
[59] De Geest (n 1), p. 224.
[60] Luth (n 3), p. 160.

content, i.e., how onerous they are for the consumer. Accordingly, consumers do not need to read boilerplates anymore, because they are assured that the form will not contain unfair terms.[61] An example of this mechanism is the European regulation of standard forms with black and grey lists which indicate what terms are void by nature and what terms are deemed unfair unless it is proven by the seller that they are fair.[62]

2.4.3. Behavioral perspective

Behavioral law and economics doubts the effectiveness of information duties, as proposed by information economics, and consumer vigilance, as described by neoclassical economics.[63] Firstly, as a result of psychological phenomena such as information overload and limited cognitive ability, consumers fail to read and assess standard forms.[64] Therefore, more disclosure without attention to the presentation will likely aggravate this problem, because the limited psychological capacities of the consumer will render the extra information ineffective.[65] Secondly, due to the self-commitment bias and biased risk perceptions, behavioralists argue that consumer vigilance will not be sufficient to discipline the market.[66]

Consequently, the behavioral perspective emphasizes the importance of debiasing consumers' decision-making. For this reason, policy measures that are solely aimed at enabling consumers to read the boilerplates are deemed insufficient.[67]

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[61] Gillette, C. P. (2004). Rolling contracts as an agency problem. *Wis. L. Rev.*, *2004*(2), p. 716-717.

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

[63] Faure, M. G., & Luth, H. A. (2011). Behavioural economics in unfair contract terms. *Journal of Consumer Policy*, *34*(3), p. 350.

[64] Id., p. 346-348.

[65] Jolls, C., Sunstein, C. R., & Thaler, R. (1998). A behavioural approach to law and economics. *Stanford Law Review*, *50*(1), p. 1533-1534.

[66] Luth (n 3), p. 172-173.

[67] Becher, S. I., & Unger-Aviram, E. (2009). The law of standard form contracts: Misguided intuitions and suggestions for reconstruction. *DePaul Bus. & Comm. LJ*, *8*(3), p. 226.

Three prominent behavioral proposals are worth mentioning. First of all, rather than providing more information, consumers should be provided with less and clearer information. By highlighting the most important terms and presenting the boilerplate in plain and intelligible language, consumer understanding of the terms will effectively increase.[68]

Moreover, the use of a credible signal of quality, such as ratings or labels, could stimulate sellers into drafting higher quality contract terms to attract consumers.[69] The rationale behind this is based on the economic concept of signaling, whereby sellers voluntarily convey information about themselves to inform the consumers about the quality of their product.[70]

Finally, involving consumers or consumer organizations in the drafting process of standard forms could increase the quality of boilerplates and the mutual satisfaction of the buyer and the seller. Besides, the idiosyncrasies of each industry can be taken into account and no general imposed rules are required.[71]

2.4.4. Austrian perspective

In principle, Austrians believe that freedom of contract will lead to an increasingly efficient economy and it should, therefore, be warranted.[72] The continuous process of accumulating knowledge is vital and consumers should, thus, be in the position to learn the value of their actions through effective feedback.[73]

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[68] Loos, M. (2015). Transparency of Standard terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law. *Eur. Rev. Private L.*, *23*(2), p. 184.

[69] Ben-Shahar (n 18), p. 28-33.

[70] Connelly, B. L., Certo, S. T., Ireland, R. D., & Reutzel, C. R. (2011). Signaling theory: A review and assessment. *Journal of Management*, *37*(1), p. 40.

[71] Braucher, J. (2007). US Influence with a Twist: Lessons about unfair contract terms from US software customers. *Australian Competition and Consumer Law Journal*, *15*(1), p. 16.

[72] Wonnell (n 39), p. 542.

[73] Sowell, T. (1980). *Knowledge and decisions*. New York: Basic Books, Inc., p. 110-111.

In practice, this means that by concluding transactions with different firms, consumers will learn which terms they regard as value-increasing and which ones as value-decreasing. Nevertheless, in the field of standard terms, Austrians argue that people cannot be fully left to their entrepreneurial judgment, because this would disregard the knowledge problem on the side of the consumers.[74] Accordingly, they propose that contract law should counteract the ambiguity in expectations by warranting the safety-of-expectations doctrine. This means, contract law should only enforce the terms that can be reasonably expected by the consumer and these expectations will be commensurate with the state of knowledge at a certain point in time.[75]

It must be noted that the Austrians strongly oppose government intervention because they assert that the central authority does not possess all the necessary knowledge to intervene adequately.[76] In fact, state regulation will detract from efficient outcomes over time, and, therefore, the development of contract terms should be left in the hands of the market.[77] In essence, the Austrian argue in favor of freedom of contract combined with the protection of legitimate expectations.[78]

2.5. Previous empirical research

The use of standard forms has been highly debated by virtue of theoretical analyses. However, limited empirical research has been conducted to determine if the problems associated with the use of boilerplates actually occur in practice. Fortunately, some valuable empirical research has been conducted on the consumers' ability to discipline the market and the prevalence of one-sided terms in consumer contracts.

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[74] Wonnell (n 39), p. 533.
[75] Unger, R. M. (1983). The critical legal studies movement. *Harvard law review*, *96*(3), p. 627-628.
[76] Hayek (n 41), p. 524.
[77] Wonnell (n 39), p. 541.
[78] Garello (n 47), p. 420.

2.5.1. Consumers' ability to discipline the market

It has been found that less than 5% (4,4%[79] and 0.2%[80]) of all consumers read boilerplates in consumer contracts. The most common reasons that were found for not reading boilerplates are trust in the company[81], the length of the form[82] and impatience[83]. Accordingly, the theory of the informed minority, which states that a minority of readers would be able to discipline the market, does not seem to hold in practice. The minimum amount of readers to discipline the market, which is approximated at one-third of all consumers[84], is not even remotely met.

To specify, the one-third criterion is based on the theoretical model by Schwartz and Wilde who demonstrate that if one-third or more of the consumers do comparative shopping, the observed price distribution of the good clusters around the competitive price. Conversely, if less than one-third of the consumers do comparative shopping, the seller can impose monopolistic prices, because of the lack of competition. Likewise, they find that the one-third criterion applies for contract terms, namely, if less than one-third of the consumers read the terms, the seller can maintain a monopolistic term structure (i.e. one-sided in favor of the seller).[85]

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[79] Stark, D. P., & Choplin, J. M. (2009). A license to deceive: Enforcing contractual myths despite consumer psychological realities. *NYUJL & bus.*, *5*(2), p. 617

[80] Bakos, Y., Marotta-Wurgler, F., & Trossen, D. R. (2014). Does anyone read the fine print? Consumer attention to standard-form contracts. *The Journal of Legal Studies*, *43*(1), p. 1.

[81] Id, p. 31.

[82] Stark (n 79), p. 657.

[83] Hillman, R. A. (2005). On-line consumer standard-form contracting practices: A survey and discussion of legal implications. *Cornell Legal Studies Research Paper*, (05-012), p. 2.

[84] Schwartz (n 10), p. 661; Goldman (n 11), p. 719.

[85] Schwartz (n 10), p. 652-653, 661.

2.5.2. Prevalence of one-sided terms in consumer contracts

It has been discovered that standard forms, in general, do contain terms that are specifically tilted in favor of the seller.[86] Besides, over time the average contract has become increasingly pro-seller, whereby the length of the contract has increased as well.[87] Moreover, evidence has been found that sellers offer certain warranties on their website, which are later on disclaimed in the boilerplate.[88] Lastly, sellers generally do not comply with disclosure duties that have been imposed by regulatory authorities or courts, i.e. less than 6% of the sellers have legally enforceable standard forms on their website.[89]

2.6. New avenue: the influence of marketing on contract terms

The influence of marketing on standard-form contracting has been underdeveloped in the extant literature and to the author's knowledge, no empirical research has been conducted on the specific influence of branding. However, this new avenue of research deserves further attention because, as will be described below, several scholars have already acknowledged the importance of brand dominance on a firm's ability to manipulate consumers.

2.6.1. Firms' power to manipulate consumers

It turned out that in the software industry firms can impose one-sided terms due to the fact there are no realistic alternatives for certain platforms or applications.[90]

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[86] Marotta-Wurgler, F. (2007). What's in a standard form contract? An empirical analysis of software license agreements. *Journal of Empirical Legal Studies*, *4*(4), 677-713; Marotta-Wurgler, F. (2011). Some realities of online contracting. *Supreme Court Economic Review*, *19*(1), 11-23.

[87] Marotta-Wurgler, F., & Taylor, R. (2013). Set in stone: Change and innovation in consumer standard-form contracts. *NYUL Rev.*, *88*(1), p. 240.

[88] Hillman, R. A., & Barakat, I. (2008). Warranties and disclaimers in the electronic age. *Yale JL & Tech.*, *11*(1), p.1.

[89] Mann, R. J., & Siebneicher, T. (2008). Just one click: The reality of internet retail contracting. *Colum. L. Rev.*, *108*(4), p. 998.

[90] Braucher (n 71), p. 19.

If consumers believe that there is no alternative available, they do not even read the standard terms and they feel compelled to accept the boilerplate.[91]

A prominent example of the power of branding is Apple. Apple has one of the most one-sided and ingenious rights-deletion schemes of all companies.[92] Despite this, the brand's popularity is sky-high, and the brand's financial value has been continuously increasing. This raises one of the biggest unanswered questions in the field of standard-form contracting. How can a firm with a "grotesque" boilerplate obtain consistently high satisfaction scores and consumer loyalty?[93]

This research posits that the positive brand associations that consumers have about, for example, Apple, due to its state-of-the-art and highly sought-after product attributes, make them neglect the legal implications of the boilerplate. Consequently, it is plausible to assume that a firm with a stronger brand will be able to draft more one-sided contract terms than a firm with a weaker brand.

2.6.2. Factors influencing the brand of a firm

To determine the influence of branding on consumer contracts, it is vital to identify which factors indicate the power of the brand. Numerous factors have been identified in the extant literature, however, the concept of brand equity seems to be of unequivocal importance to measure the strength of brands in the market place.[94] Correspondingly, five factors have been identified as prime indicators of brand equity, namely, brand value,

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[91] Howells, G. (2005). The potential and limits of consumer empowerment by information. *Journal of law and society*, *32*(3), p. 358.

[92] Radin, M. J. (2012). *Boilerplate: The fine print, vanishing rights, and the rule of law*. Princeton University Press, p. 86.

[93] Ben-Shahar, O. (2013). Regulation Through Boilerplate: An Apologia. *Mich. L. Rev.*, *112*(6), p. 897-898.

[94] Fahy, J., & Jobber, D. (2015). *Foundations of Marketing*. McGraw-Hill Education, chapter 6.

brand revenue, marketing/advertising, brand awareness, and brand reputation.[95] Accordingly, these five factors will be employed for the empirical analysis concerning the impact of branding on the one-sidedness of boilerplates.

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[95] Id. Supported by: Kotabe, M., & Helsen, K. (2015). *International Marketing*. Wiley, p. 296-308; Chu, S., & Keh, H. T. (2006). Brand Value Creation: Analysis of the Interbrand-Business Week Brand Value Rankings. *Marketing Letters*, *17*(4), 323-331; Malik, M. E., et al. (2013). Importance of Brand Awareness and Brand Loyalty in Assessing Purchase Intentions of Consumer. *International Journal of business and social science*, *4*(5), p. 167.

Chapter 3: Research methodology

3.1. Data collection methodology

To analyze the impact of branding on the one-sidedness of boilerplates, a quantitative analysis needed to be conducted. Due to the lack of previous empirical research in this field, the dataset for this research has been manually built. In other words, no existing database has been used or adapted for the sake of the analysis.

3.1.1. Research sample

The sample included the 100 most valuable firms of 2019 according to Forbes.[96] This ranking has been specifically chosen to focus on firms with strong brand equity and evident dominance. Comparing firms with broad differences in brand equity, for example, comparing Coca-Cola with a local online electronics shop, would significantly increase the presence of omitted variable bias. To specify, it is plausible to assume that the 100 most valuable firms all have somewhat comparable access to legal, marketing, and financial expertise. Conversely, the same degree of access cannot be assumed for small and medium online enterprises. By focusing on the 100 most valuable firms in terms of brand equity, the effect of an increase in brand equity on the one-sidedness of boilerplates can be analyzed more robustly and justifiably.

Furthermore, the decision to analyze 100 companies is also based on the recommended minimum of observations in statistics. To clarify, 10 observations per independent (explanatory) variable are the bare minimum for reliable analysis, yet 20 observations are preferred.[97]

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[96] Forbes (2019). The world's most valuable brands. Retrieved from https://www.forbes.com/powerful-brands/list/. Last accessed on July 5, 2020.

[97] Harrell Jr, F. E. (2015). *Regression modeling strategies: with applications to linear models, logistic and ordinal regression, and survival analysis.* Springer, p. 72-73.

Accordingly, based on the finding in section 2.6.2. that five factors needed to be employed to analyze the impact of branding on the one-sidedness of boilerplates, a sample of 100 firms was chosen to safeguard the reliability of the dataset.

Lastly, there was a deliberate choice to solely use Forbes' 2019 ranking rather than multiple years rankings. Firms' websites only present the consumer with the latest version of standard terms, which are the boilerplates of 2020. Online boilerplates of previous years are by most companies deleted to prevent confusion. Therefore, a longitudinal analysis was not feasible. Noteworthy, the Forbes' 2020 ranking was not available at the time of the research.

3.1.2. Measuring one-sidedness, length, and complexity

The main variable of interest is the one-sidedness of boilerplates, and, to determine the required values an extensive analysis of boilerplates was conducted. First, the 100 online boilerplates of the chosen firms were collected from the corresponding websites. In essence, the flagship product or service of the brand was chosen (e.g. iPhone from Apple) and the order process was followed until the general terms and conditions needed to be accepted. The offered boilerplate was downloaded and subsequently used for the analysis.

Some firms offered a variety of services (e.g. Mastercard) and in such cases, the standard form of the most prominent consumer product/service on the website (e.g. basic credit card) was chosen for the analysis. If any doubt arose about the representativity of the form for the entire firm, several forms of the firm were compared to identify significant differences, and subsequently, the most comprehensive form was chosen.

Thereafter, a bias index needed to be constructed to classify the one-sidedness of the terms. Fortunately, Professor Marotta-Wurgler has pioneered in developing such an

objective measure to determine if a term is biased in favor of the buyer or the seller.[98] Her index was based on the idea of scoring contract terms as being pro-seller or pro-buyer compared to an objective default (article 2 of the Uniform Commercial Code). Marotta-Wurgler's index inspired the methodology of this research and an adaptation of the approach was employed.

To specify, the European Unfair Contract Terms Directive (93/13/EEC) was used as the default, in particular, the annex which enumerates the seventeen terms that can be classified as unfair. Hence, the 100 boilerplates were individually compared with the annex of the European directive. In case a term in the boilerplate could be considered as an equivalent of one the terms in the annex, the term would get a point, thereby indicating that it could be regarded as unfair. By adding the total amount of points, the degree of one-sidedness could be established. Pro-buyer terms were not considered, because the European Directive solely governs unfair terms and, therefore, the degree to which a term could be seen as pro-buyer could not be objectively measured. For the sake of the feasibility of the analysis, the one-sidedness of terms was divided into five classes (see table 1). The division was inspired by the American consumer initiative "Terms of Service; Didn't Read"[99], which assigns a score with a badge ranging from class A (the fairest terms) to class E (the unfairest terms).

In addition, the length and complexity of the boilerplates needed to be determined. The length of the boilerplates could be determined by means of an automated word count. To measure complexity, the Flesch-Kincaid readability score was employed, which indicated the difficulty to comprehend the text based on a scale from zero to a hundred.[100]

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[98] Marotta-Wurgler (n 86), p. 677-713.

[99] Terms of Service; Didn't Read (2020). Retrieved from https://tosdr.org/classification.html. Last accessed on July 5, 2020.

[100] Inspired by Marotta-Wurgler (n 87), p. 253.

A higher score indicated easier texts, whereby a text with a value between 60 and 80 should be feasible to understand for a 12- to 15-year-old. The Flesch-Kincaid score is based on the following formula: 206.835 - 1.015 x (words/sentences) - 84.6 x (syllables/words). Hence, the complexity of each boilerplate could be manually calculated by virtue of this formula.

Table 1: Classification of one-sidedness boilerplates

Class	Score	Explanation
Class A	0 – 1	The fairest boilerplate – no or solely one unfair contract term has been found.
Class B	2 – 3	Relatively fair boilerplate – two to three unfair contract terms have been found. Room for improvement.
Class C	4 – 5	Quasi-fair boilerplate – four to five unfair contract terms have been found. Reconsideration is needed to balance one-sidedness.
Class D	6 – 7	Relatively unfair boilerplate – six to seven unfair contract terms have been found. Terms are disproportionally favored to the benefit of the seller.
Class E	≥ 8	The unfairest boilerplate – eight or more unfair terms have been found. Serious concerns about the one-sidedness are justified.

3.1.3. Measuring branding-related factors

To begin with, the brand value and brand revenue for each of the 100 most valuable brands could be collected using the data provided by Forbes. Next, the marketing/advertising expenses needed to be retrieved for each company. To find these

expenses, the annual reports of 2019 of all companies were examined. In certain reports, these expenses fell under the category marketing, whereas in other cases it fell under the category advertising. Notably, some companies had a consolidated annual report with the parent company (e.g. Corona is a subsidiary of AB InBev), in these instances the portion of sales that could be attributed to the company of interest was also used to determine the share of the marketing budget (e.g. 15% of total sales equals 15% of the marketing budget).

Thereafter, brand awareness needed to be calculated. To measure it, however, costly data collecting techniques such as surveys, interviews, or questionnaires need to be conducted. This information is not online freely available for all 100 examined companies and, therefore, an alternative has been used. It has been found that social media activity is an adequate and modern alternative to measure brand awareness.[101] In particular, by examining the amount of Facebook followers, an accurate picture of consumers' brand awareness and purchase intention can be drawn.[102] Due to the feasibility and simplicity with which the amount of Facebook followers can be determined for each brand and the validity of the measurement, this approach has been adopted to assess brand awareness.

Lastly, the brand reputation of each firm needed to be determined. Yet, this valuation is highly subjective because it indicates how the brand is perceived by customers, stakeholders, and the market. Contrary to brand value, which comprises the financial amount a brand is worth, brand reputation is an intangible asset for a company. For this reason, the brand reputation points of the website Ranking The Brands (RTB) has been

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[101] Alamsyah, A., Sofyan, E., Aprilliyanti, B. E., & Aini, V. N. (2017). Top Brand Alternative Measurement Based on Consumer Network Activity. *Advanced Science Letters*, *23*(4), 3813-3816.

[102] Hutter, K., Hautz, J., Dennhardt, S., & Füller, J. (2013). The impact of user interactions in social media on brand awareness and purchase intention: the case of MINI on Facebook. *Journal of Product & Brand Management*, *22*(5), 342-351.

used.[103] RTB assigns firms a certain amount of reputation points based on an analysis of all branding-related rankings that are published around the world. The higher the amount of RTB points, the stronger the brand reputation.

3.2. Data analysis methodology

The research is based on a cross-sectional analysis, which means that data from multiple entities (100 firms) has been collected at one point in time (the year 2020).

3.2.1. Model

The basic regression specification of the model is:

$$\text{One-sidedness} = A0 + B1\text{BrandValue} + B2\text{BrandRevenue} + B3\text{Marketing/Advertising} +$$
$$B4\text{BrandAwareness} + B5\text{BrandReputation} + E$$

Additionally, two adaptations to the model have been developed, whereby length and complexity were used as the dependent variables.

3.2.2. Regression analysis

Since the dependent variable one-sidedness has been classified into five classes, which have a clear ordering from fairest to unfairest, a simple regression was unfeasible. The dependent variable could not be treated as an interval variable because the differences between the categories have no meaning. To clarify, Class B could not be interpreted as being twice as good as class D. The dependent variable is ordinal and, therefore, a more complex analysis was required. The ordinal regression model appears to be preferable because it allows for the analysis of the effects of various independent variables on an ordinal dependent variable.

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[103] Ranking the Brands (2020). Retrieved from https://www.rankingthebrands.com/The-Brands-and-their-Rankings.aspx?catFilter =0&nameFilter=M. Last accessed on July 6, 2020.

The analysis is based on the use of odds, which indicate the effect of an increase or decrease in one unit of the independent variable on the odds that the value of the dependent variable will be increased or decreased.

The ordinal regression model can be performed by using different statistical methods, however, based on the distribution of the dependent variable (non-normality), the ordered logistic and the ordered probit model are most appropriate.[104] The mutual differences between the two methods are minimal and both lead to practically the same inferences. Nevertheless, the interpretation of the ordered logistic model is significantly more straightforward than the one of the ordered probit model. To specify, the logistic function enables the interpretation of odds ratios, which means that the coefficients of the logistic regression can be converted into odds ratios by virtue of exponentiation. The probit models, on the other hand, makes use of z-scores, which require a more elaborate interpretation of the results. For this reason, the ordered logistic model has been chosen for the empirical analysis.

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[104] Moore, D.S., McCabe, G.P., Craig, B., Alwan, L., & Duckworth III, W. (2011). *The Practice of Statistics for Business and Economics,* 3rd edn, New York, NY: Freeman, chapter 17.

Chapter 4: Research outcomes

By virtue of an ordinal logistic regression, the effects of five branding-related factors on the one-sidedness of boilerplates could be examined. In addition, two linear regressions have been conducted to see the effects of the same factors on the length and complexity of boilerplates. For the latter two dependent variables, a linear regression was feasible, because the variables were continuous instead of ordinal.

4.1. Descriptive statistics

Table 2 presents the descriptive statistics regarding the one-sidedness of the 100 boilerplates that have been analyzed. Table 3 provides the summary statistics of the length, complexity, and the five branding-related factors of the examined boilerplates. From these tables, it is possible to make severable observations. First of all, the majority of all boilerplates are one-sided in favor of the seller. Only 10% of all examined boilerplates could be regarded as completely fair, whereas the biggest percentage (32%) of all boilerplates are highly unfair (class E). Secondly, the average length of a boilerplate is 7149 words with a complexity of 52,7 Flesch-Kincaid points. To put this in perspective, the average reading rate of American adults is 250-300 words per minute[105], thus, reading the average boilerplate would take between 24 and 29 minutes. Besides, a Flesch-Kincaid score between 50 and 60 means that the text is fairly difficult to read and can be compared to an article in a quality magazine, which approximately 54% of Americans will be able to read,[106] thereby not taking the legalese into account. Lastly, table 3 demonstrates that even though all investigated companies belong to the list of 100 most valuable companies in the world, the mutual differences in financial and brand power are substantial.

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[105] Bailey, R. W., & Bailey, L. M. (1999). Reading speeds using RSVP. User Interface Update–February 1999.
[106] Flesch, R. (2011). *The Art of Readable Writing: With the Flesch Readability Formula.* Harper & Row, p. 149-150.

Table 2: Descriptive statistics for the one-sidedness of boilerplates

One-Sidedness	Class	N (obs.)	Marginal Percentage
of the	Class A	10	10%
Boilerplate	Class B	12	12%
	Class C	20	20%
	Class D	26	26%
	Class E	32	32%
	Valid observations	100	100%
	Missing	0	0%
	Total observations	100	100%

Table 3: Descriptive statistics for length, complexity, and branding-related factors

Case Processing Summary			
Variable	Mean	Minimum	Maximum
Length (words)	7149	1258	29020
Complexity (Flesch-Kincaid Score)	52,7	33,2	69,4
Brand Value (billions of US dollars)	23,3	8,0	205,5
Brand Revenue (billions of US dollars)	60,69	5,1	348,5
Marketing/Advertising (billions of US dollars)	3,850	0,028	20,630
Brand Awareness (millions of followers)	19,125	0,3	214,8
Brand Reputation (RTB points)	45	0	396

4.2. Validity of the model

To check the validity of the model, three statistical tests have been performed, which provide prima facie evidence that the model is fit for the analysis. A full elaboration on the mathematical justification of the statistical models falls outside the scope of the research. Therefore, only the essential information about the statistical outcomes will be discussed.

First of all, table 4 provides the model fitting information, which reveals the statistical significance of the model. In essence, it assesses whether the null hypothesis, which states

that the predictor variables have no explanatory power (equal to zero), should be rejected or not. When the significance level in the table is lower than 0.05, the null hypothesis can be rejected, and it can be assumed that the model is statistically significant. In this case, the significance level is 0,000, which implies that the model is appropriate for further analysis.

Table 4: Model Fitting Information

Model Fitting Information				
Model	-2 Log Likelihood	Chi-Square	Df	Sig.
Intercept Only	304,287			
Final	115,882	188,406	5	,000
Link Function: Logit				

Furthermore, the predictive power of the model needs to be evaluated, which indicates how well the outcomes are predicted by the model. Normally, an R-squared test would suffice, however, since the relationship between the independent variables and the dependent variable is not linear, an alternative test is needed. Three tests have been highlighted in advanced statistics to determine an (ordinal) logistic regression model's predictive power, namely, the Cox and Snell, Nagelkerke, and McFadden tests.[107] There is no unambiguous threshold that dictates significant predictive power, yet as can be seen from table 5, the Pseudo R-square tests generate values from 69.1% to 89.1%, which in marketing research is regarded as being acceptable to substantial.[108]

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[107] Allison, P. D. (2014). Paper 1485-2014 Measures of Fit for Logistic Regression. Retrieved from https://support.sas.com/resources/papers/proceedings14/1485-2014.pdf. Last accessed on July 9, 2020.
[108] Sarstedt, M., & Mooi, E. (2014). *A concise guide to market research*, 2nd edn, Springer, p. 211.

Table 5: Pseudo R-Square test

Pseudo R-Square	
Cox and Snell	,848
Nagelkerke	,891
McFadden	,691
Link Function: Logit	

Lastly, the ordinal logistic regression requires a specific test, which checks the consistency of the odds, also known as, the proportional odds assumption. This assumption is key to the interpretation of the results because if it does not hold, the results of the model cannot be interpreted directly and a comparison with several support models is needed. The assumption states that there should be constant proportionality, which means that the slopes of each variable in the analysis stay the same across different logit equations. By virtue of the test of parallel lines, it is possible to check if the assumption holds for the model. If the p-value of the test is higher than the significance level of 0.05, the null hypothesis holds, and the ordinal logistic regression model can be further utilized for the analysis. Table 6 demonstrates the results of the test and a significance level of 0,337 has been found, which means that the null hypothesis is not rejected.

Table 6: Test of Parallel Lines

Test of Parallel Lines				
Model	-2 Log Likelihood	Chi-Square	Df	Sig.
Null Hypothesis	115,882			
General	99,186	16,696	15	,337
Link Function: Logit				

4.3. Interpretation of the outcomes

Table 7 presents the outcomes of the ordinal logistic regression. The interpretation of the results requires additional explanation because the log-odds estimates cannot be interpreted in the same way as the estimates from a linear regression model. The estimate provides information about the sign of the effect (positive or negative), but its magnitude cannot be directly interpreted. The estimates equal log-odds, which means that they should be converted into proportional odds for further interpretation. This can be done by exponentiating the value, whereby a result lower than one indicates a negative effect and a value higher than one a positive effect. Finally, by subtracting the outcome with one and multiplying by 100, the outcomes can be expressed in percentages.

4.3.1 Brand value

The independent variable brand value has a p-value (sig.) of 0.000, which indicates that it has a significant effect (0.000 < 0.05) and it can be further interpreted. The estimate has a positive value of 0,180, which means that brand value has a positive effect on the one-sidedness of a boilerplate. By exponentiating the value, the magnitude can be interpreted, which leads to a result of 1.197 ($e^{0.180} = 1.197$). This proportional odds ratio has a percentual equivalent of 19.7% (1.197 – 1 multiplied by 100). Accordingly, the interpretation of the variable can be formulated as follows; when the brand value of a company increases by one billion US dollars, the odds of having a class E (the unfairest) boilerplate are increased by 19.7% compared to having a fairer class boilerplate (class A – class D), given that all other variables remain the same (ceteris paribus). The same proportion applies for all other classes, which is to say, the proportional odds assumption indicates that this percentage also holds when class D is compared to classes A-C, and so on.

By looking at the data, this finding can be confirmed, because if the brand value of a random company with an alternative class boilerplate (A-D instead of E) increases by one billion US dollars, the 19.7% increase in the odds of having an unfairer boilerplate still holds.

4.3.2. Brand revenue

Brand revenue can also be further interpreted because the variable's p-value is lower than the significance level (0.000 < 0.05). The estimate shows a value of 0.162 log-odds, which means that brand revenue has a positive effect on the one-sidedness of a boilerplate. Exponentiating the value leads to a proportional odds ratio of 1.176. Since the value is bigger than one, the positive effect of brand revenue on the one-sidedness can be confirmed. Converting the proportional odds ratios into percentages gives a percentage of 17.6. Hence, when the variable brand revenue increases by one billion US dollars, the odds of having a class E boilerplate are increased by 17.6% compared to having a fairer class A to D boilerplate, ceteris paribus.

4.3.3. Marketing/Advertising

The variable marketing/advertising is also significant because the corresponding p-value is lower than the significance level (0.008 < 0.05). The estimate depicts a value of 0.230 log-odds, which suggests that marketing/advertising has a positive effect on one-sidedness. The exponentiated value of 1.259 is higher than one, which means that the positive effect can be affirmed in terms of proportional odds. Transforming the proportional odds into percentages results in a percentage of 25.9. Thus, when the marketing/advertising budget increases by one billion US dollars, the odds of having a class E boilerplate are increased by 25.9% compared to having a fairer boilerplate of the other classes, ceteris paribus.

4.3.4. Brand awareness and brand reputation

The analysis demonstrated that brand awareness and brand reputation do not have a significant effect on the one-sidedness of a boilerplate. The p-values are respectively 0.649 and 0.359, which are considerably higher than the significance level of 0.05. The fact that the p-values are higher than the significance level means that the null hypothesis cannot be rejected. The null hypothesis holds that the value is not significantly different from zero, and, therefore, no statistically significant relationship exists between the independent and the dependent variable. Accordingly, the results cannot be further interpreted and no assessment of their relationship with the one-sidedness of boilerplates can be made.

4.3.5. Length and complexity

Two additional analyses have been conducted to examine the impact of the branding-related factors on the length and complexity of boilerplates. The results can be found in tables 8 and 9 in the appendix. In short, no significant effect has been found at all. This means that branding-related factors do not have a significant impact on the length and complexity of boilerplates. This is a plausible result because it can be argued that the length and complexity of a boilerplate are the results of industry-specific idiosyncrasies rather than branding-related factors. For example, it can be argued that the boilerplate of a healthcare company like CVS is more complex and longer than the boilerplate of a clothing company like H&M, due to the differences in risks with which the companies are confronted in the industry.

Table 7: Outcomes of the ordinal logistic regression

		Estimate	Std. error	Sig.	95% C.I.
		Dependent Variable Y = One-Sidedness of Boilerplate			
		Parameter Estimates			
Threshold	Y = 1	3,257	,825	,000	1,641- 4,873
	Y = 2	5,298	,947	,000	3,442 - 7,153
	Y = 3	9,628	1,472	,000	6,383 -12,153
	Y = 4	16,296	2,534	,000	11,330 - 21,262
Location	Brand Value (billions of US dollars)	,180	,045	,000	,092 - ,269
	Brand Revenue (billions of US dollars)	,162	,025	,000	,113 - ,212
	Marketing/Advertising (billions of US dollars)	,230	,087	,008	,059 - ,401
	Brand Awareness (millions of followers)	-,007	,016	,649	-,039 - ,025
	Brand Reputation (RTB points)	,010	,011	,359	-,012 - ,032
		Link Function: Logit			

Chapter 5: Conclusions and recommendations

By virtue of a theoretical analysis of the extant literature on standard-form contracting complemented with an empirical study focused on the impact of branding on the one-sidedness of boilerplates, the central research question and the corresponding sub-questions could be answered. In total six sub-questions were asked that would contribute to the answering of the central research question. Accordingly, seven research outcomes can be presented.

5.1. Answers to the central research question and sub-questions

Research outcome 1: Traditional law and economics postulates that based on neoclassical economics standard forms are desirable because they reduce transaction costs and competition in the market will induce efficiency. Thus, no government intervention is needed, and consumers should adhere to their duty to read. Yet, information economics argues that this approach disregards the signing-without-reading problem. In essence, information economics emphasizes that there are information asymmetries on the standard form market, which lead to adverse selection. Consequently, government intervention is needed through mandatory disclosure, the setting of default rules, and mandatory substantive intervention.

Research outcome 2: Behavioral economics points out the weaknesses in the traditional law and economics approach by emphasizing the prevalence of consumer biases and heuristics that impede rational decision-making. Correspondingly, the seller can manipulate the consumer, and therefore, behavioral economics argues in favor of government intervention with a focus on debiasing consumers' decision-making. This can be done by providing less and clearer information to the consumer rather than more, the introduction of quality certificates based on ratings and labels, and lastly, involving consumers or consumer organizations in the drafting of standard forms.

Research outcome 3: The Austrian School of Economics stresses the existence of a knowledge problem, which implies that the market participants are better able than a central authority to arrive at a more efficient allocation of resources. Besides, the role of entrepreneurial discovery is highlighted since it leads to a dynamic competition process, which will also lead to a more efficient allocation of resources. Accordingly, the Austrians argue in favor of the freedom of contract principle, whereby no government intervention is needed. However, they acknowledge that the consumer cannot be completely left to its entrepreneurial judgment, because that would neglect the knowledge problem on the side of the consumer. Consequently, the Austrians promulgate the safety-of-expectations doctrine. Based on this doctrine, contract law should only enforce the terms that can be reasonably expected by the consumer, which will protect the legitimate expectations of consumers, and subsequently, will lead to more predictable and efficient outcomes in the market.

Research outcome 4: When it comes to determining the strength of a brand, the concept of brand equity is of pivotal importance for the measurement. Five prime indicators have been found in the extant literature that provide an accurate assessment of a brand's equity. These indicators include brand value, brand revenue, marketing/advertising, brand awareness, and brand reputation.

Research outcome 5: By virtue of the empirical analysis, the branding-related factors that significantly influence the one-sidedness of boilerplates could be identified. The factors brand value, brand revenue, and marketing/advertising have a significant positive effect on the one-sidedness of boilerplates. Thus, firms with higher brand value, brand revenue, or marketing/advertising budget are more likely to have unfairer and lower-class boilerplates. Notably, brand awareness and brand reputation did not have a significant effect on the one-sidedness of boilerplates.

Research outcome 6: In addition, the impact of the branding-related factors on the length and complexity of standard forms has been examined. In short, no significant relationship between branding and the length or complexity of standard forms could be found. The length and complexity of the boilerplates are arguably determined by the idiosyncrasies of the industry in which the brand operates rather than by branding-related factors.

Final research outcome: Combining the insights that were gained by answering the sub-questions, a comprehensive and informed answered can be given to the central research question: *"Does branding influence the one-sidedness of boilerplates in online consumer contracts?"*

Yes, this research affirms that branding does influence the one-sidedness of boilerplates in consumer contracts. In particular, brand value, brand revenue, and marketing/advertising have a positive significant effect on the one-sidedness of boilerplates. Hence, it can be concluded that when one of these factors has a substantial value, it is highly likely that the brand will have a more one-sided boilerplate in favor of the seller.

This result is in accordance with the developments that we have seen in the financial market. The stronger the bargaining power of one of the two parties, the more likely it is that the stronger party will impose one-sided terms in its own favor. This also explains one of the biggest conundrums concerning standard forms. How is it possible that a company like Apple is able to offer exceedingly onerous boilerplates while maintaining such strong brand equity? In short, the latter allows for the former. The non-saliency of contract terms is overridden by the saliency of the brand's product attributes. Apple's highly desired product attributes make consumers neglect the onerous legal terms in the boilerplate and subsequently Apple is able to capitalize on this.

5.2. Policy proposal

To enhance consumer protection, it is vital to acknowledge that the new policy proposal should endeavor to create a level playing field between the consumer and the seller to combat unequal bargaining power. Pursuant to the analysis of previous empirical research, it has been found that the market is unable to solve this problem by itself. Therefore, this research argues that in the case of standard forms there is a role for government intervention to solve this problem. The American and European unfair terms regulations should be maintained as the foundation for control on the fairness of boilerplates. The regulations are the embodiment of the Austrian safety-of-expectations approach, which is highly desirable to protect the legitimate expectations of consumers when entering into a contract with a firm. Besides, they offer leverage to consumers and consumer organizations to initiate legal proceedings against companies that violate the regulations. Nevertheless, this research has demonstrated that especially strong brands can impose one-sided firms. Therefore, this research recommends that the government should offer additional funding to consumer organizations which should be specifically used for the scrutinization of the boilerplates of the most dominant online firms. The additional resources will enable the organizations to instigate proceedings, among which class actions, with the goal of actually making a change in the one-sidedness of boilerplates.

Yet, one could argue that consumers or lawyers could start legal proceedings themselves against companies with unfair boilerplates. However, this overlooks the prospective gains and losses that the individual faces when initiating a lawsuit. The private costs are significantly higher than the private benefits that the individual can gain, which leads to rational apathy. Therefore, legal proceedings need to be stimulated on a higher level,

which means, funding consumer organizations to start class actions on behalf of all the consumers.

Finally, by adopting this policy proposal it remains possible to rely on contract law as an effective ex-post mechanism rather than introducing additional ex-ante regulation, which as could be seen in this research is not truly effective in controlling the unfairness of boilerplates.

5.3. Recommendations for future research

Primarily, this research has emphasized the importance of the relationship between branding and standard forms. Accordingly, the first recommendation would be that the relationship between the field of marketing and contract/consumer law should be further investigated. Furthermore, future research is recommended with a specific focus on branding-related factors that have not been included in this research. Lastly, future research is encouraged that will specifically focus on the identified trade-off that a consumer faces between its desire to buy a product from a strong brand like Apple and its simultaneous relinquishment of contractual rights to the benefit of the seller. Consequently, this is where the Austrian safety-of-expectations doctrine comes into the picture again, namely, consumer insights and expectations are essential for the development of adequate and effective consumer policy.

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Appendix

Table 8: Impact of branding on the length of the boilerplate

Dependent Variable Y = Length of Boilerplate					
Coefficients					
	Unstandardized		Standardized		
Model	B	Std. Error	Beta	T-score	Sig.
Constant	7129,546	870,794	-	8,187	,000
Brand Value (Billions of US dollars)	4,971	36,247	,027	,137	,891
Brand Revenue (billions of US dollars)	16,863	10,484	,191	1,608	,111
Marketing/Advertising (billions of US dollars)	-83,243	155,781	-,075	-,534	,594
Brand Awareness (millions of followers)	-22,944	19,003	-,128	-1,207	,230
Brand Reputation (RTB points)	-7,990	15,899	-,089	-,503	,616

Table 9: Impact of branding on the complexity of the boilerplate

	Dependent Variable Y = Complexity of the Boilerplate				
	Coefficients				
	Unstandardized		Standardized		
Model	B	Std. Error	Beta	T-score	Sig.
Constant	53,008	1,275	-	41,581	0,000
Brand Value (Billions of US dollars)	,029	,053	,112	,551	,583
Brand Revenue (billions of US dollars)	-,005	,015	-,036	-,295	,769
Marketing/Advertising (billions of US dollars)	-,132	,228	-,082	-,578	,565
Brand Awareness (millions of followers)	,016	,028	,060	,559	,578
Brand Reputation (RTB points)	-,011	,023	-,085	-,468	,641