VII. Unfair Terms for Data Access and Use between Enterprises (Art. 13)

Chapter IV ('Unfair Terms Related to Data Access and Use Between Enterprises', Art. 13) addresses unfair contractual terms in data sharing contracts (only) between businesses, where unequal bargaining power[537] might be used to impose unilaterally a contractual term on another enterprise. If found to be unfair, such a term will not be binding (Art. 13(1)).[538]

Despite far-reaching amendments in the course of the legislation, the basic structure of Art. 13 has not changed. The provisions include absolute and relative clause bans recognisable from the Unfair Terms Directive (and national law, e.g. Sec. 308, 309 German Civil Code).[539] However, Art. 13 is limited to the unfairness of terms and, unlike the Unfair Terms Directive, does not deal with the transparency of contract terms (as known from Unfair Terms Directive).[540]

With regard to the temporal scope of application, Art. 13 generally applies to contracts that are concluded 20 months after the Data Act comes into force (Art. 50(5)).

Personal Scope

In the draft version of the Commission proposal, the scope of Art. 13 was limited to micro, small or medium-sized enterprise as defined in Article 2 of the Annex to Recommendation 2003/361/EC.[541] It was assumed that the Data Act would not see any need for protection in contracts between large(r) companies.[542] This gave rise to follow-up questions, such as wheth-

537 Cf. rec. 58.
538 Cf. in detail on Art. 13 DA Hennemann, M. in: Lohsse, S. / Schulze, R. / Staudenmayer, D. (ed.), Private Law and the Data Act, Nomos 2024 (forthcoming).
539 Council Directive 93/13/EEC.
540 Cf. Staudenmeyer, D., *EuZW* 2022, 596 (602) arguing that, consequently, there is no control of the main subject matter even if this subject matter is drafted in an opaque way.
541 Commission, COM(2022) 68 final Explanatory Memorandum, p. 15.
542 Staudenmeyer, D., *EuZW* 2022, 596 (600).

er the unfairness test also would apply if the imposing party were itself a micro, small or medium-sized enterprise. This raised the consequential question of the protective purpose of an unfairness test between two small companies.[543]

The legislator therefore refrained from implementing the original limitation in the final version. Art. 13 therefore applies to *any* enterprise. One possible explanation for this quite radical change could be the criticism raised early that the protection of companies in the area of data trading does not depend on the size of the company, but on the degree of data dependency, so a possible imbalance is not related to the size of a company.[544]

Consumers, however, are excluded from Art. 13.[545] The fact that Art. 13 does not apply to the benefit of consumers is partly explained by the already comprehensive protection provided by the Unfair Terms Directive and the respective national provisions on standard terms control.[546] Art. 1(9) also states that the Data Act "complements and is without prejudice to Union law which aims to promote the interests of consumers and ensure a high level of consumer protection, and to protect their health, safety and economic interests, in particular Directives 93/13/EEC, 2005/29/EC and 2011/83/EU".

Material Scope

Art. 13 applies (only) to contracts between companies relating to the access and use of data (Art. 1(2)(c)). The provision is not limited to contractual relationships under the Data Act. Rather, the title and the open wording of Art. 13(1) indicate that all data-related contracts between enterprises are covered.[547] Moreover, all *data-related* obligations are included – from the generation of data to the transfer of data to third parties.[548]

543 Weizenbaum Institute for the Networked Society, Position paper regarding Data Act, 2022, pp. 14 et seq.
544 Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 46 n. 125.
545 Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 48 n. 129.
546 Bomhard, D. / Merkle, M., *RDi* 2022, 168 (173).
547 Cf. also Hennemann, M. in: Lohsse, S. / Schulze, R. / Staudenmayer, D. (ed.), Private Law and the Data Act, Nomos 2024 (forthcoming).
548 Schwamberger, S., *MMR-Beil.* 2024, 96 (97).

This goes along with rec. 60 which states that the rules of Art. 13 should apply only to those elements of a contract that are related to making data available. That refers to contractual terms concerning access to and use of the data as well as liability or remedies for breach and termination of data related obligations. Other parts of the contract that have no connection to the provision of data remain unaffected.

As laid down above, the relationship between Art. 13 and Art. 8 is debated.[549] According to the concept of Art. 4 et seq., contractual relationships are established between all parties involved. Users enter contractual relationships with the data holder (Art. 4) and, where applicable, with third parties (Art. 5). Third parties have contractual relationships with the user and the data holder. The respective conclusion that Art. 8 and 13 always apply in parallel is also underpinned by Art. 8(1). The provision stresses that third-party access should fulfil the requirements of Art. 8 et seq. *and* Chapter IV.

Unilaterally Imposed

Art. 13 provides a fairness test for contractual terms that have been *imposed unilaterally*. Art. 13(6) explains (more or less) what this exactly refers to. A term shall be considered to be unilaterally imposed if it has been brought into the contract by one contracting party and the other contracting party has not been able to influence its content despite an attempt to negotiate it. Rec. 59 underlines the importance of contractual freedom as an essential concept in B2B-relations. It states that not all contractual terms shall be subject to an unfairness test, but only to those terms that are unilaterally imposed. In contrast, a term that is "simply provided by one party and accepted by the other enterprise or a term that is negotiated and subsequently agreed in an amended way between contracting parties should not be considered as unilaterally imposed". It therefore might be possible to argue that Art. 13 can be excluded via a simple accept button that must be pushed by the other party.[550]

This setting gives rise to numerous delimitation questions. At what point is an attempt to negotiate sufficient? Does one have to communicate expressly that negotiations do take place? Is, for example, the business

549 See above sub VI. 3.
550 Wiebe, A., *GRUR* 2023, 1569 (1575).

response to an offer: "After careful consideration, I agree to your terms" an attempt to negotiate?[551]

The second sentence of Art. 13(6) establishes a burden of proof rule according to which the imposing party must prove that the condition was not imposed unilaterally. This may defuse[552] the questions raised above in practice. However, it is unclear how it would be possible for the imposing party to prove that the other party did not attempt to negotiate the terms.[553] This does potentially run counter to the goal to protect the legally less well-informed companies.[554] In addition, there will be formal or strategic attempts during the negotiation process to escape the scope of the chapter.[555] It is further unclear whether and how Art. 13 applies to global multilateral data agreements; the term and the concept of "unilateral imposition" do not fit in this context.[556]

Mandatory Provisions

By way of clarification, Art. 13(2) provides that contractual terms that reflect mandatory provisions of Union law which would apply if the contractual terms did not regulate the matter, should not be considered unfair and therefore fall outside the scope of application.

Subject Matter of the Contract

Art. 13(8) clarifies that Art. 13 does not apply to contractual terms defining the main subject matter of the contract, i.e., those terms that define the

551 It is precisely this situation that rec. 59 has not considered.
552 Schwamberger, S., *MMR-Beil.* 2024, 96 (98).
553 Hennemann, M. / Steinrötter, B., *NJW* 2022, 1481 (1485).
554 Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 45 n. 122.
555 Cf. in this regard Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 45 n. 126; Podszun, R., Der EU Data Act und der Zugang zu Sekundärmärkten am Beispiel des Handwerks, 2022, pp. 56 et seq.
556 Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 107.

specific performance[557] or to the adequacy of the price, as against the data supplied in exchange.[558]

Further Aspects

Lastly, Art. 13(6) clarifies that "the party that supplied the contested term may not argue that the term is an unfair contractual term".

According to Art. 13(9), the parties of a contract addressed by Art. 13 shall not exclude the application of Art. 13, derogate from it, or vary its effects.

It is to be added that during the legislative process there was a proposal to include another paragraph that provided for the establishment of guidelines on reasonable prices by the Commission. The provision would have stated:

> "Within 12 months from the entry into force of this Regulation, the Commission shall by means of implementing acts further develop guidelines on the reasonable prices for the compensation for data sharing and measures to prevent and mitigate data market distortion practices provided in Chapters III and IV".[559]

However, the proposal was ultimately not accepted.

Unfairness

If found to be unfair, a term will not be binding (Art. 13(1)). Art. 13(7) clarifies in this regard that other contractual terms shall stay binding when the unfair contractual term is severable from these other terms. To determine the unfairness of a clause, the criteria of Art. 13(4) serves as a "black (clauses) list"[560] and Art. 13(5) serves a "grey (clauses) list"[561]. In addition, Art. 13(3) provides a kind of general clause.

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557 ECJ ECLI:EU:C:2014:282 = *EuZW* 2014, 506 – Kásler (C-26/13); CEJ ECLI:EU:C:2015:127 = *GRUR Int.* 2015, 471 – Matei (C-143/13).

558 The clarifying half-sentence "nor to the adequacy of the price, as against the data supplied in exchange " was proposed by Council Presidency 2022/0047(COD) – 13342/22, p. 49.

559 ITRE PE739.548, pp. 96 et seq.

560 Gerpott, T., *CR* 2022, 271 (278); Staudenmeyer, D., *EuZW* 2022, 596 (598).

561 Staudenmeyer, D., *EuZW* 2022, 596 (598).

General Unfairness Provision

According to Art. 13(3), a contractual term is unfair if it is of such a nature that its use grossly deviates from good commercial practice in data access and use, contrary to good faith and fair dealing. It is not entirely clear whether a deviation from good commercial practice and a contrast to good faith and fair dealing must occur cumulatively. However, the wording suggests that this is not the case.[562] The language versions are not the same, for example the German version of the Data Act contains the word "oder" (= or).

Specific criteria for a 'good business practice' and a 'gross deviation' from it are not provided and remain unclear.[563] Also, it is questionable what the provision to define 'good' business practice actually is.[564] According to rec. 63, the black and grey lists discussed below can serve as a yardstick when assessing whether a term falls under the general provision of Art. 13(3). Model contract terms according to Art. 41 can also be used for this purpose in future (cf. rec. 62). One present option for interpretation could be found in the ALI-ELI Principles for a Data Economy,[565] which in Principles 7 et seq., contain provisions on contractual data transfer, as well as the "Default rules for data provision contracts" currently being developed by UNCITRAL[566].[567]

'Black' List

A contractual term is unfair according to Art. 13(4) if its object or effect is to "exclude or limit the liability of the party that unilaterally imposed the term

562 Cf. in this sense only Wiebe, A., *GRUR* 2023, 1569 (1575); in contrast Schwamberger, S., *MMR-Beil.* 2024, 96 (98), assuming that a significant deviation from good commercial practice leads to a breach of good faith.

563 BDI Stellungnahme zum Legislativvorschlag des EU-Data Act, 2022, pp. 17 et seq.; Weizenbaum Institute for the Networked Society, Position paper regarding Data Act, 2022, p. 14.

564 Cf. Staudenmeyer, D., *EuZW* 2022, 596 (599).

565 ALI-ELI Principles for a Data Economy: Data Rights and Transactions, 2022, https://principlesforadataeconomy.org/the-project/the-current-draft/.

566 UNCITRAL, Default rules for data provision contracts (first revision) https://documents-dds-ny.un.org/doc/UNDOC/LTD/V23/064/75/PDF/V2306475.pdf?OpenElement.

567 Schwamberger, S., *MMR-Beil.* 2024, 96 (100).

for intentional acts or gross negligence" (Art. 13 (4)(a)). Further, a term is unfair if it excludes the remedies available to the party upon whom the term has been unilaterally imposed in case of non-performance of contractual obligations, or the liability of the party that unilaterally imposed the term in case of breach of those obligations (Art. 13 (4)(b)). At last, a term that gives the party that unilaterally imposed the term the exclusive right to determine whether the data supplied are in conformity with the contract or to interpret any contractual term is unfair (Art. 13 (4)(c)). Despite the fact that Art. 13(4)(a) refers to liability, the provision does not establish a reference for liability.[568]

'Grey' List

In contrast, Art. 13(5) contains criteria that only indicate unfairness which can be rebutted in the case at hand. A term is therefore presumed unfair if it inappropriately limits "remedies in case of non-performance of contractual obligations or the liability in the case of a breach of those obligations, or extend the liability of the enterprise upon whom the term has been unilaterally imposed" (Art. 13 (5)(a)). The provision is sometimes understood as a future ban on 'as is'-clauses, which would lead to an obligation to contractually guarantee data quality.[569]

A term is further presumed to be unfair if the imposing party unilaterally obtains access to the other party's data and this access harms the other party (Art. 13 (5)(b)). A term shall also not prevent or restrict the party on whom the term is imposed and who has provided the data from making appropriate use of that data (Art. 13 (5)(c)). For example, this could include a buy-out of the user by the data holder.[570]

The party on whom the term has been imposed may also not be prevented from terminating the contract within a reasonable period of time (Art. 13 (5)(d)). Equally, a term shall not allow the imposing party to terminate the contract within an unreasonably short period of time, taking into account any realistic possibility for the other party to party to switch to another comparable service and the financial disadvantage caused by the

568 BDI Stellungnahme zum Legislativvorschlag des EU-Data Act, 2022, p. 18.
569 Bomhard, D. / Merkle, M., *RDi* 2022, 168 (173). Differently, Hennemann, M. in: Lohsse, S. / Schulze, R. / Staudenmayer, D. (ed.), Private Law and the Data Act, Nomos 2024 (forthcoming).
570 Wiebe, A., *GRUR* 2023, 1569 (1575).

financial disadvantage caused by the termination, unless there are serious grounds (Art. 13(5)(f)). Furthermore, the party on which the term has been imposed may not be prevented from obtaining a copy of the data provided during the term of the contract or for a reasonable period after the end of the contract (Art. 13(5)(e)).[571]

Lastly, a term may not permit the imposing party to unilaterally change the agreed price or essential conditions relating to the data provided, unless the imposing party is simultaneously given a right of termination in this event (Art. 13(5)(g)). However, according to the provision, terms that provide for the unilateral modification of the conditions of an indeterminate contract by the imposing party are possible if the contract also provides a valid reason for the imposing party to notify the other party of the changes within a reasonable period of time and for the other party to terminate the contract free of charge in this case.

Picking up the idea that users should be able to decide whether they are willing to "sell" data only to the contracting party, i.e., sharing data exclusively with the contracting party and getting compensation for that, one (not successful) proposal has been to change and extend the wording of Art. 13(5)(c) to:

> „prevent the party upon whom the term has been unilaterally imposed from using the data contributed or generated by that party, including data transmitted from a connected product, as defined under Article 3(2a), during the period of the contract, or to limit the use of such data to the extent that that party is not entitled to use, extract, access or control such data or exploit the value of such data in a proportionate manner, unless it has presented that party with an explicit choice between concluding the agreement without limitation to its rights and the option to be compensated proportionately in exchange for foregoing those rights".[572]

The effectiveness of Art. 13(4) and (5) is doubted by some commentators.[573] It is noteworthy that the cases regulated in Art. 13(4) have only a rudiment-

571 It was proposed to further refine the wording "copy of the data", having the debate about the scope of Art. 15(3) GDPR in mind, cf. Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 108.

572 ITRE PE739.548, p. 94.

573 Staudenmeyer, D., *EuZW* 2022, 596 (598).

ary reference to data such as Art. 13(4)(c), which speaks of the agreed data quality. Further data reference is contained in Art. 13(5)(b), (c), (d) and (g). In summary, the prohibitions on clauses are rather vague. The model contract terms provided for in Art. 41 by the Commission can and will be helpful in the interpretation of terms in the future (cf. rec. 62).[574]

Enforcement

Unfair terms are not binding according to Art. 13(1). The provision presumes private enforcement which is regulated by the Data Act only to a limited extent.[575] The private enforcement approach is, however, also supported by the non-derogability of Art. 13 according to Art. 13(9).[576] However, the parallel structure of Art. 37 et seq. to Art. 77 et seq. GDPR is sometimes seen as an argument in favour of public enforcement (only).[577]

574 Hennemann, M. / Steinrötter, B., *NJW* 2022, 1481 (1485).
575 Cf. Schwamberger, S., *MMR-Beil.* 2024, 96 (100).
576 Cf. Schwamberger, S., *MMR-Beil.* 2024, 96 (100).
577 Cf. Schwamberger, S., *MMR-Beil.* 2024, 96 (100).