IV. SME-Exemption (Art. 7), Product Design, Service Design, and Informational Duties (Art. 3)

Chapter II ('Business to Consumer and Business to Business Data Sharing', Art. 3-7) increases the options for consumers and businesses to access data generated by the products or related services they own, rent or lease.[113]

1. Exemption of Micro and Small Enterprises; Mandatory Nature (Art. 7)

Art. 7(2) stipulates the mandatory nature of the user's rights under Chapter II while also providing exemptions for micro-, small- and medium-sized enterprises (SMEs) (Art. 7(1)).

Definition of Enterprise

According to Art. 2(8) the notion of an enterprise refers to a natural or legal person which in relation to contracts and practices covered by the Data Act is acting for purposes which are related to that person's trade, business, craft or profession. The definition for 'enterprise' is both relevant in the context of privileges and exemptions afforded to micro, small, or medium-sized enterprises (Art. 7-9 and 13-14; cf. the respective definition under Art. 2 of the Annex to Recommendation 2003/361/EC) as well as in other respects. Art. 8(3) refers to enterprises as a category of data recipients, Art. 13 as the contractual counterpart, and Art. 49(1)(d) as beneficiaries under Art. 5 whose exclusion should be evaluated (likely beyond gatekeepers within the meaning of the DMA, which are already barred from receiving data pursuant to Art. 5(2)(c)).

113 Commission, COM(2022) 68 final Explanatory Memorandum, p. 14.

Exemption of Micro and Small Enterprises

Art. 7(1) stipulates that "the obligations of [Chapter II] shall not apply to data generated by the use of products manufactured or related services provided by (…) micro or small enterprises".[114] Respective enterprises shall "not have partner enterprises or linked enterprises[115] which do not qualify as a micro or small enterprise" and should not be "subcontracted to manufacture or design a connected product or to provide a related service".

The exemption stipulated by Art. 7(1) is rather unclear.[116] The norm may be read in that way that micro and small enterprises shall not have the burden to fulfil the Art. 3-6. However, the norm does only point to the products and services itself (and not to the enterprises). Furthermore, the exemption also seems to cover scenarios where bigger enterprises – as data holders – use the products / services of micro and small enterprises. Rec. 37 sheds some light on this question. It becomes clear that respective enterprises do not have duties according to Art. 3(1):

> "Given the current state of technology, it is overly burdensome to impose further design obligations in relation to products manufactured or designed and related services provided by micro and small enterprises. That is not the case, however, where a micro or small enterprise is sub-contracted to manufacture or design a product. In such situations, the enterprise, which has sub-contracted to the micro or small enterprise, is able to compensate the sub-contractor appropriately."

Furthermore, respective enterprises do not fall under the personal scope of Art. 4 and 5 if they are manufacturer of a product or provider of a service. However, respective enterprises may be covered in other scenarios as rec. 37 spells out

> "A micro or small enterprise may nevertheless be subject to the requirements laid down by this Regulation as data holder, where it is not the manufacturer of the product or a provider of related services."

114 Cf. the respective definition in Art. 2 Annex to Recommendation 2003/361/EC.
115 Cf. the respective definition in Art. 3 Annex to Recommendation 2003/361/EC.
116 A proposal to delete or at least to modify Art. 7 was made by Max Planck Institute for Innovation and Competition, Position Statement, 2022, pp. 35 et seq. n. 96.

Exemption of medium-sized enterprises

Art. 7(1) Sentence 2 offers the same exemption for "medium-sized enterprises" (Art. 2 Annex to Recommendation 2003/361/EC) "that meet the threshold of that category for less than one year or that where it concerns products that a medium-sized enterprise has been placed on the market for less than one year".

Mandatory Nature

According to Art. 7(2) "[a]ny contractual term which, to the detriment of the user, excludes the application of, derogates from or varies the effect of the user's rights under this Chapter shall not be binding on the user." A respective general rule is far from doubt; especially with regard to an Economics perspective.[117] The rule applies to any contractual term – deviating to the detriment of the user – including the contract to buy or lease the product. Thus, it could be understood that even the seller or lessor is obliged to ensure the protection of the user's rights by the data holder.[118]

2. Product Design, Service Design (Art. 3(1))

According to Art. 3(1) connected products (cf. Art. 2(5)) shall be designed and manufactured, and related services (cf. Art. 2(6)) shall be designed and provided, in such a manner that product data and related service data, including the relevant metadata necessary to interpret and use the data, are, by default, easily, securely, free of charge, in a comprehensive, structured, commonly used and machine-readable format, and, where relevant and technically feasible, directly accessible to the user. Art. 1(4) highlights that connected products and related services might also encompass virtual assistants (as defined in Art. 2(31)) "insofar as they interact with a connected product or related service". The provision shall facilitate the user's access to the data generated by the product.[119]

117 Cf. also below VI. 2.
118 Schmidt-Kessel, M., *MMR-Beil.* 2024, 75 (77).
119 Cf. Metzger, A. / Schweitzer, H., *ZEuP* 2023, 42 (52); Schmidt-Kessel, M., *MMR-Beil.* 2024, 75 (78).

Rec. 20 states correctly that "not all data generated by products or related services are easily accessible to their users" and that "there are often limited possibilities for the portability of data generated by products connected to the internet".[120] Due to that fact Art. 3(1) ensures in technical terms "that users of a product or related service in the Union can access, in a timely manner, the data generated by the use of that product or related service and that those users can use the data, including by sharing them with third parties of their choice".[121] By enabling "data access by default", Art. 3(1) creates the technical basis for an effective exercise of the rights under Art. 4 et seq. vis-à-vis data holders.[122] Art. 2(13) defines the data holder as a legal or natural person who has the right or obligation, in accordance with this Regulation, applicable Union law or national legislation implementing Union law, to use and make available data, including, where contractually agreed, product data or related service data which it has retrieved or generated during the provision of a related service.

The access option shall simplify, for example, "switching between data processing services and to enhance the interoperability of data and data sharing mechanisms and services in the Union".[123] To allow developers to respond to the "far-reaching"[124] requirements of Art. 3(1), the obligation shall only apply to connected products and the services related to them placed on the market after 12 September 2026 (Art. 50).[125]

Personal Scope

The wording of Art. 3(1) does not make entirely clear what the relationship between Art. 3(1) and the underlying contract is as well as who is to be obliged by the provision.[126] In particular, rec. 24 explicitly refers only to the information obligations pursuant to Art. 3(3). With regard to the obligation under Art. 3(1), a distinction should correctly be made between connected

120 Rec. 19.
121 Rec. 5.
122 Cf. rec. 24; Metzger, A. / Schweitzer, H., *ZEuP* 2023, 42 (52); Schmidt-Kessel, M., *MMR-Beil.* 2024, 75 (78); Hennemann, M. / Steinrötter, B., *NJW* 2022, 1481 (1483).
123 Rec. 5.
124 Kerber, W., *GRUR-Int.* 2023, 120 (125).
125 The regulation in Art. 50 was a reaction to the criticism, among others, in the BDI Stellungnahme zum Legislativvorschlag des EU-Data Act, 2022, p. 12.
126 Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 30 n. 74.

products and related services. For connected products, only the manufacturer can guarantee compliance with Art. 3(1) regarding the production and design of products.[127] Sellers or lessors are not able to technically design the products if they are merely distributors and not manufacturers themselves. In contrast, providers of related services can regularly monitor compliance with Art. 3(1) themselves.

Material Scope

The Data Act addresses "product data and related service data, including the relevant metadata necessary to interpret and use the data". Correspondingly, rec. 15 states that the Data Act applies to product data and related service data.[128] According to Art. 2(15) 'product data' means data generated by the use of a connected product, that the manufacturer designed to be retrievable, via an electronic communications service, physical connection or on-device access, by a user, data holder or a third party, including, where relevant, the manufacturer. Art. 2(16) defines 'related service data' as data representing the digitisation of user actions or of events related to the connected product, recorded intentionally by the user or generated as a by-product of the user's action during the provision of a related service by the provider. Pursuant to Art. 2(2) 'metadata' means a structured description of the contents or the use of data facilitating the discovery or use of that data. Supplementary rec. 15 describes different scenarios all of which are covered:

(1) "data recorded intentionally or data which result indirectly from the user's action"
(2) "data about the connected product's environment or interactions"
(3) "data on the use of a connected product generated by a user interface or via a related service", which covers "all data that the product generates as a result of such use, such as data generated automatically by sensors and data recorded by embedded applications, including applications indicating hardware status and malfunctions"

127 Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 30 n. 74 and Wiebe A., *GRUR* 2023, 1569 (1571) generally regard the manufacturer as the one obligated; Assion, S. / Willecke, L., *MMR* 2023, 805 (807) as well as Schmidt-Kessel, M., *MMR-Beil.* 2024, 75 (79) focus without distinction on the actual seller, lessor and service provider.

128 Cf. also above III. 2.

(4) "data generated by the connected product or related service during times of inaction by the user", e.g. when the product is in stand-by or switched off
(5) "data which are not substantially modified, meaning data in raw form"
(6) "data which have been pre-processed for the purpose of making them understandable and useable prior to subsequent processing and analysis"
(7) pre-processed data also covers the relevant metadata, "including its basic context and timestamp, to make the data usable, combined with other data"

In particular: Derived Data

It was furthermore highly disputed whether and to what extent "derived and inferred data" has to be made accessible.[129] The Draft Opinion of the Committee on Civil Liberties, Justice and Home Affairs (LIBE) advocated in this regard.[130] The Council Presidency explicitly denied such a broad access[131] and was able to prevail. Rec. 15 now states:

> "By contrast, information inferred or derived from such data, which is the outcome of additional investments into assigning values or insights from the data, in particular by means of proprietary, complex algorithms, including those that are a part of proprietary software, should not be considered to fall within the scope of this Regulation and consequently should not be subject to the obligation of a data holder to make it available to a user or a data recipient, unless otherwise agreed between the user and the data holder."

Rec. 15 adds that this could also cover intellectual property rights, which is why the derived data should rightly not be included in the scope of the regulation.

129 Cf. Krämer, J., Improving The Economic Effectiveness of the B2B and B2C Data Sharing Obligations in the Proposed Data Act, CERRE, 2022, p. 23: Max Planck Institute for Innovation and Competition, Position Statement, 2022, pp. 10 et seq. n. 20 et seq.
130 LIBE PE737.389, p. 31. Cf. also Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 11 n. 25.
131 Council Presidency 2022/0047(COD) – 15035/22, p. 11.

Mechanisms of Access

The numerous requirements for data accessibility of Art. 3(1) are rather vague in terms of content.[132] It has been partly argued that Art. 3(1) is to be understood more as a general principle and less as an enforceable claim.[133] In fact, Art. 3(1) itself does not provide a right of access.[134]

First and foremost, it is discussed whether and to what extent the Data Act allows a mere *in-situ* access of the user.[135] Partly, it was strongly argued with reference to rec. 22 the Act does not oblige the data holder to actually transmit the data in question, but under all circumstances may restrict its obligation to offering practically an interface only.[136] Others point to the difference between the *access by design*-obligation of Art. 3 and the access right of Art. 4(1). Whilst Art. 3(1) shall be regarded as the general rule, Art. 4(1) – a rule that would otherwise not be necessary – shall offer a right to access that goes beyond *in-situ*.[137]

Rec. 21 states that when designing a product or connected service, it is important to ensure that, in the case of multiple contracting parties on the user side, each user[138] should be able to benefit equally from the measures of facilitated data access.[139] Regarding a product that is typically used by several persons, this includes, for example, the possibility of creating separate user accounts for individual users (which can be used by all users, if necessary).[140] This also ensures individual data management. Thereby, Art. 3(1) seeks to lay the foundation for Art. 4(1) and (5) Sentence 2.

Rec. 21 also refers to the fact that data shall be "granted to the user on the basis of a simple request mechanism granting automatic execution and not

132 Gerpott, T., *CR* 2022, 271 (275).
133 Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 85; for enforcement issues, see below.
134 Grapentin, S., *RDi* 2023, 173 (177).
135 Cf. Max Planck Institute for Innovation and Competition, Position Statement, 2022, pp. 26 et seq. n. 65 et seq.
136 See especially Specht-Riemenschneider, L., *MMR-Beil.* 2022, 809 (815 et seq.).
137 Pointing to the open formulation of Art. 4(1) Podszun, R. / Pfeifer, C., *GRUR* 2022, 953 (957); cf. also Max Planck Institute for Innovation and Competition, Position Statement, 2022, pp. 26 et seq. n. 66 and p. 32 n. 79. See – in contrary – Specht-Riemenschneider, L., *MMR-Beil.* 2022, 809 (815).
138 Council Presidency 2022/0047(COD) – 15035/22, p. 13.
139 Cf. rec. 21.
140 Rec. 21; this is also the direction of the proposal by Specht-Riemenschneider, L., *MMR-Beil.* 2022, 809 (815).

requiring examination or clearance by the manufacturer or data holder".[141] Furthermore, the data is to be made available free of charge.

The restriction "relevant and technically feasible" is irritating.[142] Rec. 22 only mentions therefore that "direct" availability refers to availability from an on-device data storage as well as from a remote server.[143] In line with the MPIIC, it is not clear why the reservation ("where relevant and technically feasible") refers only to "direct" accessibility and not to easy, safe, free of charge and comprehensive accessibility in a structured, commonly used and machine-readable format.[144]

The Council Presidency's proposal to include the words "in a structured, commonly used and machine-readable format"[145] made it into the final version. This is to be welcomed, as it ensures that users can make use of the information provided.[146] With this in mind, it is of particular relevance that the user can (technically) 'read' and 'understand' the data provided.

Enforcement

It remains unclear to what extent and against whom private enforcement measures in the event of non-compliance are possible. *Metzger* and *Schweitzer* rightly point to the fact that private enforcement on the basis of unfair competition law could be possible.[147]

3. Information Duties

Art. 3(2) and Art. 3(3) stipulates numerous information duties that must be considered before concluding a contract for a connected product or the

141 Rec. 21.
142 See also Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 30 n. 73.
143 Rec. 22.
144 Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 30 n. 73.
145 Council Presidency 2022/0047(COD) – 13342/22, p. 40; LIBE PE737.389, p. 31; ITRE PE732.704, p. 33.
146 Unfortunately, the proposal of the LIBE Draft Opinion (LIBE PE737.389, p. 31) to design products in such a way that data subjects can directly exercise their rights under Art. 15 et seq. GDPR did not make it into the final version of the Data Act.
147 Metzger, A. / Schweitzer, H., *ZEuP* 2023 42 (52).

provision of a related service. Respective duties shall effectuate the access rights of Art. 4 and 5.[148] Art. 3(2) is targeted at a contract to purchase, rent or lease a connected product. A contract for the provision of a related service is regulated by Art. 3(3). This separation is not convincing. The two paragraphs do not substantially differ. Both paragraphs are therefore discussed together, before differing details are highlighted.

Personal Scope

Art. 3(2) explicitly addresses the "the seller, the rentor or the lessor, which can be the manufacturer" of a connected product.[149] This is reasonable and consistent, as the information duty must (only) be fulfilled vis-à-vis the user before concluding a contract, so that only the user's contractual partner can be obliged to provide information.[150]

Art. 3(3) does not specify who exactly is obliged to provide the information.[151] Rec. 24 merely concretises this to the effect that, the information obligation "before concluding a contract for the provision of a related service should lie with the prospective data holder, independently of whether the data holder concludes a contract for the purchase, rent or lease of a connected product." This concept is suboptimal, as the data holder will not always be identical to the contractual partner.[152] For reasons of practicability, only the contractual partner should be obliged to provide the information.[153]

The contractual partner is in both cases responsible for the actual provision. The content of the information given will typically been provided by the manufacturer beforehand – to the user's contractual partner and – in practical terms – also to all intermediate instances.[154] According to the wording, the information duties also apply in c2c-relationships, for example in a non-commercial resale of a smart product. Whether this was

148 Cf. Metzger, A. / Schweitzer, H., *ZEuP* 2023 42 (53).
149 Cf. rec. 23; in the original proposed version (COM(2022) 68 final) Art.3(2) did not specify who exactly is obliged to provide the information; cf. also Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 31 n. 77.
150 Cf. also Specht-Riemenschneider, L., *MMR-Beil.* 2022, 809 (817); Schmidt-Kessel, M., *MMR-Beil.* 2024, 75 (79).
151 Cf. Schmidt-Kessel, M., *MMR-Beil.* 2024, 75 (79).
152 Cf. already Metzger, A. / Schweitzer, H., *ZEuP* 2023, 42 (53).
153 Also Schmidt-Kessel, M., *MMR-Beil.* 2024, 75 (79).
154 Cf. also Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 31 n. 77.

the legislator's intention is highly questionable. In such situations, neither the data holder nor the primary contractual partner of the non-commercial re-seller can be held liable for the provision of the information.[155]

According to Art. 7(1), the information duties do not apply for data generated by the use of products manufactured or related services provided by enterprises that qualify as micro or small enterprises, as defined in Art. 2 of the Annex to Recommendation 2003/361/EC, provided those enterprises do not have partner enterprises or linked enterprises as defined in Art. 3 of the Annex to Recommendation 2003/361/EC which do not qualify as a micro or small enterprise and where the micro and small enterprise is not subcontracted to manufacture or design a product or provide a related service.[156] This exception is particularly useful for small(er) companies.[157]

General Requirements for Providing Information

Art. 3(2) and Art. 3(3) are only referring to a *provision* of information. The contractual partner of the user is not obliged to ensure that the information is actually acknowledged, read or understood by the user.

Rec. 24 sheds light on the purpose of the information duties by referring to the fact that these duties are intended to "provide transparency over the data generated and to enhance the easy access for the user". First, the information duties shall counter the fear of losing 'control' over the one's "own" data[158].[159] At the same time, the user should be given the opportunity to consider the underlying contractual agreement.[160]

Art. 3(2) and Art. 3(3) merely state that the information must be provided before the contract is concluded. Neither in Art. 3(2) and Art. 3(3) nor in the recitals any further references are given with regard to a specific timing. In any case, it would at least be useful to provide the information not just before the conclusion of the contract, but at a time before the

155 Cf. Max Planck Institute for Innovation and Competition, Position Statement, 2022, pp. 31 et seq. n. 77.

156 A different view, which is not compatible with the wording of Art. 7(1), is held by Hartmann, B. / McGuire, M. / Schulte-Nölke, H., *RDi* 2023 49 (58).

157 Ebner, G., *ZD* 2022, 364 (367).

158 Commission, Special Eurobarometer 487a "The General Data Protection Regulation", 2019, p. 39.

159 Ebner, G., *ZD* 2022, 364 (367).

160 Cf. Ebner, G., *ZD* 2022, 364 (367); Hennemann, M. / Steinrötter, B., *NJW* 2022, 1481 (1483).

contract is finalised[161] that guarantees a substantial reflection of the conclusion of the contract. Due to the various settings covered by the Act, it is, however, not possible to specify a general time period.

According to rec. 24, the user should also be informed if the "information changes during the lifetime of the connected product or the contract period for the related service, including" cases in which "the purpose for which those data are to be used changes from the originally specified purpose".[162] However, it is questionable how the lifetime of certain products is to be determined. In any case, it should only be based on an average lifetime to be determined objectively and not on the individual lifetime of the individual product. In this respect, the determination of a general period of approximately five years could be appropriate. With regard to the duration of the contract period for the related service, there are no obstacles in this respect. Changes in the corresponding information are subject to notification throughout the entire duration of the contract.

According to the wording of Art. 3(2) ("purchase, rent or lease"), one might argue that the information duty only applies in cases of a contract with a *monetary consideration*.[163] Cases in which products are handed over entirely without monetary consideration should be rare, but nevertheless cannot be excluded. It was therefore already rightly mentioned that this wording of Art. 3(2) leaves room for avoiding the information duty when products are provided at no cost[164], for example in the case of a free trial use of a product. Needless to say, that the information in Art. 3(2) is, however, relevant, after all, when using the product, regardless of whether a contract with a monetary consideration has been concluded. At least, if instead of a monetary payment the generated data is actually constituting the counter-performance (according to the prevailing understanding[165] data can constitute consideration[166]), the threshold "purchase, rent or lease" is met – and Art. 3(2) applies. The same applies to the information obligation under Art. 3(3) for a contract for the provision of a related service.

161 Ebner, G., *ZD* 2022, 364 (367).
162 This amendment was proposed by the Council Presidency 2022/0047(COD) – 15035/22, p. 14.
163 Cf. Bomhard, D. / Merkle, M., *RDi* 2022, 168 (173).
164 Bomhard, D. / Merkle, M., *RDi* 2022, 168 (173).
165 Cf. Art. 3(2) Digital Content Directive and Sec. 327 German Civil Code.
166 Alternatively, the conclusion of a data use agreement according to Art. 4(13).

Rec. 24 adds further that "it is, in any case, necessary that the user is able to store the information in a way that is accessible for future reference and that allows the unchanged reproduction of the information stored."

According to Art. 3(2) and Art. 3(3) the information must be provided in a clear and comprehensible manner. These formal requirements lag far behind what is required by Art. 12(1) and (7) GDPR.[167] This is unfortunate. Insights from a behavioural economic analysis of Art. 12-14 GDPR and of privacy notices based thereon in particular point to the fact that relevant information must be communicated in a short and concise manner and in a way that is easy to comprehend.[168] Otherwise, there is a high probability that the information will either not be read by their addressees or might be misunderstood in terms of content.[169] Therefore, a wording similar to Art. 12(1) GDPR as well as a provision of information in a short and meaningful way, for example by using icons, keywords or certificates[170] (comparable to Art. 42 et seq. GDPR) would have been appropriate for Art. 3(2) and Art. 3(3).[171]

Rec. 24 nevertheless points out that "the information obligation could be fulfilled, for example by maintaining a stable […] URL on the web, which can be distributed as a web link or QR code, pointing to the relevant information, which could be provided by the seller, the rentor or the lessor […] to the user before concluding the contract for the purchase, rent or lease of a connected product". This reference is a step in the right direction. However, when using these methods, it must be considered that users might not reach out to the information 'behind' the link. In conclusion, it can therefore be stated that the provision of information via "media break" is generally permissible, but should be viewed critically from the user's perspective.

At best, Art. 3(2) and (3) would have been designed in a way that encourages (in digital environments) the use of electronic information systems,

167 Ebner, G., *ZD* 2022, 364 (367); also Steinrötter, B., *GRUR* 2023, 216 (224 et seq.).
168 Ebner, G., Weniger ist Mehr?, 2022, pp. 104 et seq.
169 Cf. Gerpott, T., *CR* 2022, 271 (275); Ebner, G., Weniger ist Mehr?, 2022, pp. 111 et seq.
170 Gerpott, T., *CR* 2022, 271 (275).
171 Cf. for further options (e.g., implementing an obligation to explain the non-use of icons) Ebner, G., Weniger ist Mehr?, 2022, p. 321 pointing to § 161 German Stock Corporation Act (AktG).

such as PIMS[172] or privacy bots[173].[174] They offer the most effective way of tackling one's *information overload*.[175] For the development, establishment and implementation of PIMS or privacy bots, incentives must be created in general, not just in the provisions of the Data Act. However, the establishment of PIMS would be particularly useful in the context of the Data Act.[176]

The current design of Art. 3(2) and Art. 3(3), however, will not lead to a significantly different presentation of information compared to Art. 13 GDPR. The contractual partners will also use the methods known from the GDPR, such as multi-layered-notices[177] or one-pagers, to provide the notices in accordance with Art. 3(2) and Art. 3(3).

Rec. 24 underlines the "obligation to provide information does not affect the obligation for the controller to provide information to the data subject pursuant to Art. 12, 13 and 14 [GDPR]". Consequently, this means that the information of Art. 3(2) and Art. 3(3) must be communicated in addition to that of Art. 13 GDPR.[178] Even if the relation to Regulation (EU) 2019/1150 (P2B-Regulation)[179] is not explicitly mentioned, it can be assumed that Art. 3(2) applies in addition to Art. 9(2) Regulation (EU) 2019/1150.[180]

In order to avoid any confusion among data subjects, it is important to provide the information under Art. 3(2) and Art. 3(3) explicitly separated from that under Art. 13 GDPR.[181] Nevertheless, it is to be expected that the 'new' data (protection) notices will be equated by laypersons with those

172 For further information to PIMS see Efroni, Z. / Metzger, J. / Mischau, L. / Schirmbeck, M., *EDPL* 2019, 352 (357 et seq.); Specht-Riemenschneider, L. / Blankertz, A. / Sierek, P. / Schneider, R. / Knapp, J. / Henne, T., *MMR-Beil.* 2021, 25 (27); Kollmar, F. / El-Auwad, M., *K&R* 2021, 73 (77 et seq.); Richter, F., *PinG* 2017, 122 (123); Kettner, S. / Thorun, C. / Vetter, M., Wege zur besseren Informiertheit, 2018, p. 83.

173 For further information to privacy bots see Nüske, N. / Olenberger, C. / Rau, D. / Schmied, F., *DuD* 2019, 28 (29); Geminn, C. / Francis, L. / Herder, K., *ZD-Aktuell* 2021, 05335.

174 Cf. Gerpott, T., *CR* 2022, 271 (275).

175 Cf. Ebner, G., Weniger ist Mehr?, 2022, pp. 137 et seq.

176 See in detail Ebner, G., *ZD* 2022, 364 (367).

177 After all, the German courts now explicitly allow the use of these "multi-layered-notices", cf. Ebner, G., *ZD* 2023, 282 (285 et seq.).

178 Hennemann, M. / Steinrötter, B., *NJW* 2022, 1481 (1483); Bomhard, D. / Merkle, M., *RDi* 2022, 168 (174); Ebner, G., *ZD* 2022, 364 (367); Specht-Riemenschneider, L., *ZEuP* 2023, 638 (663).

179 Regulation (EU) 2019/1150 of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services.

180 Gerpott, T., *CR* 2022, 271 (275).

181 Ebner, G., *ZD* 2022, 364 (367); following this Steinrötter, B., *GRUR* 2023, 216 (224).

of Art. 13 and 14 GDPR and, at worst, perceived as equally annoying[182].[183] As it is the case with existing privacy notices, there is a high risk of an *information overload* and a *click and forget*-behaviour.[184]

The Different Informational Elements in Detail

Art. 3(2) specifies in four, Art. 3(3) in nine letters several notices which must "at least" be communicated to the user before the conclusion of a corresponding contract. Using the words "at least" is not ideal as it leaves room for further 'unnamed' information duties.[185] Since the words "at least" were unfortunately not deleted in the legislative process for the Data Act (unlike that of the GDPR[186]) unnamed information obligations may potentially come into play. In this respect, there are numerous possibilities for further informational elements which are likely to depend primarily on the respective product or service. Despite the legal uncertainty caused by this, contractual partners should be very reluctant to provide unnamed information. For "usual cases", the canon of mandatory information duties is to be regarded as sufficient. In general, when assessing what information (still) needs to be communicated, the risk of one's *information overload* must always be taken into account.

The Different Informational Elements of Art. 3(2)

According to Art. 3(2) at least the following information shall be provided to the user before concluding a contract for the purchase, rent or lease of a *connected product*.

According to Art. 3(2)(a) the user shall receive information regarding the type, format and estimated volume of product data which the connected product is capable of generating. The notice is generally useful because not all users will know exactly what data a product collects.[187] The user can

182 Cf. Roßnagel, A., *DuD* 2016, 561 (563).
183 Ebner, G., *ZD* 2022, 364 (367).
184 Hennemann, M. / Steinrötter, B., *NJW* 2022, 1481 (1483); Bomhard, D. / Merkle, M., *RDi* 2022, 168 (173); Ebner, G., *ZD* 2022, 364 (367).
185 See in detail Ebner, G., *ZD* 2022, 364 (368).
186 Cf. Art. 14 GDPR in Commission, COM(2012) 11 final.
187 Metzger, A. / Schweitzer, H., *ZEuP* 2023 42 (53); for further details to information asymmetries see Ebner, G., Weniger ist Mehr?, 2022, pp. 45 et seq., 168.

also assess the intensity of data generation by the product or related service. Rec. 24 states that "this could include information on data structures, data formats, vocabularies, classification schemes, taxonomies and code lists, where available […]".

However, this list could tempt to communicate too much information (which is not necessarily useful for the users). It should not be interpreted in such a way that all information mentioned in it must always be provided. Instead, the contracting parties should primarily use Art. 3(2)(a) as a guide.

The type of the data can be easily presented (e.g., via icons) and divided into categories. When creating categories, it is important not to create categories that are too detailed or too broad. The depth of detail of the categorisation is up to each contractual partner and depends on the type of data processing.

The information regarding the format of the data can ultimately be described in one or two words (e.g.: "*format: pdf*").

The "estimated volume" refers to the amount of data that the connected product is capable of generating. However, the determination will depend above all on the user's behaviour and might therefore be difficult to communicate (in advance). Conceivable are abstract references to values within the scope of average use, which could be briefly described.[188] Nevertheless, the added value of this information for users is questionable.

According to Art. 3(2)(b) the user shall be provided with the information whether the connected product is capable of generating data continuously and in real-time. This information can be easily visualised with icons and allows conclusions about the volume of data generation. One might indeed interpret the wording in such a way that information can be omitted if the data is generated neither continuously nor in real time. However, this would be contrary to the purpose and a correct understanding of the wording ("whether"). Therefore, it must also be stated that these practices do not occur.

According to Art. 3(2)(c) the user must be informed whether the connected product is capable of storing data on-device or on a remote server, including the intended duration of retention. With regard to the exact content of the information on the duration of retention, the principles developed for Art. 13(2)(a) GDPR can be used as a guideline. In any case, the beginning and the duration of the storage should be specified as precisely as

188 Ebner, G., *ZD* 2022, 364 (368).

possible (i.e. in hours, days, weeks and years, depending on the processing situation).[189] The information regarding the retention period does not make sense at least for cases within the scope of the GDPR, because this information is already provided via Art. 13(2)(a) GDPR.[190] In these cases, one note should be sufficient as long as it indicates that it refers to both Art. 13(2)(a) GDPR and Art. 3(2)(c) Data Act.

According to Art. 3(2)(d) the user needs to know how she or he may access, retrieve, or where relevant, erase the data, including the technical means to do so, as well as their terms of use and quality of service. Rec. 24 adds that this includes information on the "terms of use and quality of service of application programming interfaces or, where applicable the provision of software development kits". The extensive mentioning in rec. 24 already indicates the high relevance of the right of access to data (Art. 4(1))[191] and the corresponding information. The information enables users to "access the access" of the generated data. It thereby provides and increases transparency for the users about what data is collected[192] and in which way it is accessible.[193] In this respect, it is necessary to provide an abstract reference to the existence of the right of access, retrieval and deletion on the one hand and to their concrete execution on the other hand ("including the technical means to do so"). For example, it would make sense to provide a brief reference and a link or QR-Code that leads to a corresponding portal of the contractual partner of the user.[194] Especially with regard to the terms of use and the quality of service, it is important to ensure that users are not overloaded with too much information to avoid an *information overload*.

The Different Informational Elements of Art. 3(3)

According to Art. 3(3) at least the following information shall be provided to the user before concluding a contract for the provision of a *related service*.

189 Ebner, G., Weniger ist Mehr?, 2022, pp. 193 et seq.
190 Incidentally, a reference to the storage period and the deletion concept should have been avoided as well, since the relevance in this respect is less high for non-personal data and unnecessarily threatens the risk of *information overload*.
191 Hennemann, M. / Steinrötter, B., *NJW* 2022, 1481 (1485).
192 Rec. 23.
193 Rec. 5.
194 Ebner, G., *ZD* 2022, 364 (368); see also Ebner, G., *ZfDR* 2023, 299 (304).

Pursuant to Art. 3(3)(a) the user shall receive information regarding the nature, estimated volume and collection frequency of product data that the prospective data holder is expected to obtain and, where relevant, the arrangements for the user to access or retrieve such data, including the prospective data holder's data storage arrangements and the duration of retention. The regulation combines elements of Art. 3(2)(a) and Art. 3(2)(c). The use of the word "nature" is inconsistent in view of Art. 3(2)(a). In this respect, a drafting mistake is likely. "Nature" is to be interpreted as "type".[195] In this respect and with regard to the "estimated volume", reference can be made to the above. The collection frequency should be communicated as accurately as possible at the time the information is provided. With regard to the modalities to access or retrieve data, as well as the data holder's data storage and retention policy, reference can be made to the above (Art. 3(2)(c)).

According to Art. 3(3)(b) the user must be informed about the nature and estimated volume of *related service data* to be generated, as well as the arrangements for the user to access or retrieve such data, including the prospective data holder's data storage arrangements and the duration of retention. In contrast to Art. 3(3)(a), Art. 3(3)(b) explicitly addresses related service data. The informing actor is therefore advised to make a clear distinction between product data and related service data when providing the information.

According to Art. 3(3)(c) the user needs to know whether the prospective data holder expects to use readily available data itself and the purposes for which those data are to be used, and whether it intends to allow one or more third parties to use the data for purposes agreed upon with the user. It is very surprising that the regulation only explicitly addresses "readily available data" as defined in Art. 2(17). The data holder will already know at the time of providing the information whether he wants to use data that will be available later. The value of the reference to the intention to use by the manufacturer supplying the product or by the service provider remains unclear. In the event of an intended use of non-personal data (for example) by the seller, a separate data licence agreement with the user is required pursuant to Art. 4(13) Sentence 1. In this respect, the user might be aware of the provider's own use.[196] However, this is not the case if the agreement

195 This was already argued for Art. 3(2)(a) of the commission draft (COM(2022) 68 final), see Ebner, G., *ZD* 2022, 364 (368).

196 See already Ebner, G., *ZD* 2022, 364 (368).

pursuant to Art. 4(13) Sentence 1 is concluded after the information has been provided.

In contrast, the fact that the data is passed on to third parties, just like the purposes of use, can have a decisive influence on the user's decision to conclude a contract. Therefore, they should be communicated in any case.[197] Insofar as the data generated is personal data, there may be duplications with Art. 13(1)(c) and (e) GDPR at the time of collection. However, since the data subject already received the relevant information due to Art. 3(2)(d), there could be no need to inform them again in accordance with Art. 13(4) GDPR. It should be noted, however, that unlike Art. 13(1)(e) GDPR, Art. 3(2)(d) does not require the naming of specific recipients or categories. In this respect, the information in Art. 13(1)(e) GDPR can have an independent value in addition to Art. 3(2)(d).[198] If the provider is also the controller in terms of the GDPR, it is advisable for the controller to already provide information about specific recipients or at least categories of recipients in the information pursuant to Art. 3(2)(d). The purposes of use could be clearly displayed with icons, which would make it much easier for users to receive information.[199]

According to Art. 3(3)(d) the user shall be provided with information on the identity of the prospective data holder, such as its trading name and the geographical address at which it is established and, where applicable, other data processing parties. Notices regarding the identity of the data holder contains information "such as its trading name and the geographical address at which it is established". At least in the context of Art. 13 GDPR, it is the established opinion that the summonable address, consisting of (trade) name and geographical address, is the most important identity feature.[200] The words "such as" are actually redundant in this respect.[201] The identity must in fact be described as precisely as possible.[202] Therefore, legal persons should be named with the legal form suffix and natural persons

197 With a corresponding proposal to amend the wording Council Presidency 2022/0047(COD) – 13342/22, p. 40; ITRE PE732.704, p. 34.

198 Ebner, G., *ZD* 2022, 364 (368).

199 See in detail Ebner, G., *ZfDR* 2023, 299 (307 et seq.).

200 Cf. Ehmann, E. / Selmayr, M. / Knyrim, R., DS-GVO, 3rd ed. 2024, Art. 13 n. 44 „postalische Anschrift muss als Minimum wohl in jedem Fall genannt werden".

201 In order to prevent inconsistencies and attempts at circumvention, the "such as" should have been deleted, cf. Ebner, G., *ZD* 2022, 364 (368).

202 At least for Art. 13 GDPR Article 29 Data Protection Working Party, WP 260 – Guidelines on transparency under Regulation 2016/679, 31.

with their first name, surname and address.[203] In case there are also other processing parties, their trading name and geographical address must also be mentioned.

According to Art. 3(3)(e) the user must be aware of the means of communication which make it possible to contact the prospective data holder quickly and to communicate with the data holder efficiently. Due to the close connection of the notices in Art. 3(3)(d) and (e), they could also have been combined in one paragraph. In the context of Art. 13(1)(a) GDPR, accessibility by telephone and electronic means have emerged as the most relevant contact options.[204] In this respect, telephone hotlines, online contact forms and e-mail addresses are ideal as "quick" and "effective" communication tools.[205]

According to Art. 3(3)(f) the user needs to know how he or she can request that the data are shared with a third-party, and, where applicable, the end of the data sharing. The wording "where applicable" indicates that a reference to the right to end data sharing is only required if data sharing is already taking place or is at least intended. However, this approach is not entirely convincing, since it is already of considerable relevance – for the decision to share data – to know that the sharing can also be ended at any time. In addition, at the time the information is provided, permission to share the data will not have been granted yet in most cases. Therefore, it should always be informed about the existence of both rights. As in the case of Art. 3(2)(c) (and Art. 3(3)(a) and (b)), the user must be informed, on the one hand, about the abstract existence of the right to share data as well as the right to end data sharing and, on the other hand, about its concrete exercise.[206] Practicable ways of dealing with both Art. 3(2)(c) and Art. 3(3)(f) have yet to emerge in practice. However, also in the context of Art. 3(3)(f), it is advisable to briefly explain the content of the right to

203 At least for Art. 13(1)(a) GDPR Schwartmann, R. / Jaspers, A. / Thüsing, G. / Kugelmann, D. / Schwartmann, R. / Schneider, A., DS-GVO, 2nd ed. 2020, Art. 13 n. 35.

204 Article 29 Data Protection Working Party, WP 260 – Guidelines on transparency under Regulation 2016/679, 31; Paal, B. / Pauly, D. / Paal, B. / Hennemann, M., DS-GVO BDSG, 3rd ed. 2021, Art. 13 n. 14.

205 Ebner, G., *ZD* 2022, 364 (369); Ehmann, E. / Selmayr, M./ Knyrim, R., DS-GVO, 3rd ed. 2024, Art. 13 n. 44; Auernhammer, H. / Eßer, M., DS-GVO, 7th ed. 2020, Art. 13 n. 24.

206 Ebner, G., *ZD* 2022, 364 (369).

share as well as the right to end the sharing and then provide a link to a corresponding portal through which data share can be initiated.[207]

According to Art. 3(2)(g) the user shall be informed about his or her right to lodge a complaint alleging an infringement of the provisions of Chapter II with the competent authority designated pursuant to Art. 37. As in the context of Art. 13(2)(d) GDPR, the current wording of lit. g raises the question of whether the regulation only requires information on the existence of the right to lodge a complaint or also the naming of a specific competent supervisory authority referred to in Art. 37.[208] Even if the Hungarian data protection authority made a contrary decision[209], it seems favourable that the providing party does not have to designate a specific competent authority. This is already necessary because it will not always be possible to name a competent authority before the contract is being concluded.[210] Ultimately, the wording of lit. g can also be interpreted in such a way that the words "with the competent authority designated pursuant to Art. 37" are to be concluded in the actual notice.[211]

According to Art. 3(3)(h) the user must be informed whether a prospective data holder is the holder of trade secrets contained in the data that is accessible from the connected product or generated during the provision of a related service, and, where the prospective data holder is not the trade secret holder, the identity of the trade secret holder. According to Art. 2(19) "trade secret holder" means a trade secret holder as referred to in Article 2, point (2) of Directive (EU) 2016/943. "Trade secret", therefore, means information which meets all the requirements of Art. 2(1) Directive (EU) 2016/943 (cf. Art. 2(18)). Lit. h generally applies only if the data likely to be accessed by the user contain a trade secret. If the data holder is the owner of the trade secret, only this must be confirmed. If a third party is the owner of the trade secret, its identity must be stated as described above (Art. 3(3)(d)). Generally, the value added of lit. h for the user is questionable.

According to Art. 3(3)(i) the user shall receive information regarding the duration of the contract between the user and the prospective data holder, as well as the arrangements for terminating such an agreement. This

207 Ebner, G., *ZD* 2022, 364 (369).
208 Cf. Ebner, G., *ZD* 2022, 364 (369).
209 The decision can be found at https://www.naih.hu/files/NAIH-2020-2000-hatarozat.pdf, see especially p. 8.
210 See already for Art. 13(2)(d) GDPR Bräutigam, P. / Schmidt-Wudy, F., *CR* 2015, 56 (61).
211 Ebner, G., *ZD* 2022, 364 (369).

refers to the agreement according to Art. 4(13) Sentence 1. The meaning of lit. i may be disputed, since in case of doubt the agreement is concluded after the information according to Art. 3(3). Individual arrangements on the duration of the agreement can therefore not be known at the time of the information according to Art. 3(3)(i). Information about the concrete duration of the agreement is insofar not possible. However, this might not be the case for standard contracts. In this respect, the exact duration of the agreement as well as any conditions to which the duration is linked and the termination modalities must be described in detail. With regard to the termination modalities, a reference to the minimum contract term (if any) and to form requirements (e-mail, verbal, etc.) should be adequate.

Waivability

The information obligations guarantee the transparency of the data generated, enhance easy access for the user[212] and thus also form the basis for the effective exercise of their rights. Taking into account these important functions, the information duties of Art. 3(2) and Art. 3(3) may not be waived.

Enforcement

In the event of an infringement of Art. 3(2) or Art. 3(3), the validity of the contract remains unaffected.[213] If the manufacturer, seller or lessor concludes a contract, the infringement of Art. 3(2) or Art. 3(3) may be categorised as a lack of conformity of the product. This applies in any case in the context of consumer contracts, see Art. 7(1)(d) of the Sales of Goods Directive. Furthermore, there is much to suggest that an infringement is also regarded as lack of conformity of the product in b2b-relationships. According to Art. 8(1)(b) Digital Content Directive, an infringement can also be seen as deception in the contract negotiations. In Germany, at least, private enforcement by competitors should be possible on the basis of the principles of unfair competition law.[214]

212 Cf. rec. 24.
213 Hennemann, M. / Steinrötter, B., *NJW* 2022, 1481 (1483).
214 Appropriate Metzger, A. / Schweitzer, H., *ZEuP* 2023 42 (55).

In addition, natural persons must also have an opportunity to enforce their right to the provision of information. In this respect, it can be argued that Art. 3(2) and Art. 3(3) already provide the necessary statutory basis. In Germany, at least a claim under Sec. 823 para. 2, Sec. 249 para. 2 German Civil Code in conjunction with Art. 3(2) or Art. 3(3) would also be an option. In addition, a claim under Sec. 280 para. 1, Sec. 311 para. 2, Sec. 241 para. 2 German Civil Code (*culpa in contrahendo*) in conjunction with Sec. 249 para. 1 German Civil Code is also conceivable.[215]

This notwithstanding, natural persons and legal persons have in the event of infringements of Art. 3(1) pursuant to Art. 38(1) the right to lodge a complaint, individually or, where relevant, collectively, with the relevant competent authority in the member state of their habitual residence, place of work or establishment if they consider that their rights under this Regulation have been infringed.

215 Cf. in the context of Art. 13 GDPR already Ebner, G., Weniger ist Mehr?, 2022, pp. 155 et seq. with further evidence.