

## DA.127 Right vs holder to fair sharing

Authors: Winfried Veil

Last update: 2023-08-06 15:12:38 | By: Winfried Veil

Created at: 2023-08-05 23:24:49

### Art. 8 (1) Data Act - Trialogue Agreement

Where, in business-to-business relations, a data holder is obliged to make data available to a data recipient under Article 5 or under other Union law or national legislation adopted in accordance with Union law, it shall agree, with a data recipient the modalities for making the data available and shall do so under fair, reasonable and non-discriminatory terms and in a transparent manner in accordance with the provisions of this Chapter and Chapter IV.

### Art. 13 Data Act - Trialogue Agreement

#### Unfair contractual terms unilaterally imposed on another enterprise

1. A contractual term, concerning the access to and use of data or the liability and remedies for the breach or the termination of data related obligations which has been unilaterally imposed by an enterprise on another enterprise, shall not be binding on the latter enterprise if it is unfair.

1a. A contractual term *which reflects mandatory provisions of Union law or provisions of Union law, which would apply if the contractual terms did not regulate the matter*, is not to be considered unfair.

2. 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.

3. In particular, a contractual term is unfair for the purposes of paragraph 2, if its object or effect is to:

- (a) exclude or limit the liability of the party that unilaterally imposed the term for intentional acts or gross negligence;
- (b) exclude the remedies available to the party upon whom the term has been unilaterally imposed in

the case of non-performance of contractual obligations or the liability of the party that unilaterally imposed the term in the case of a breach of those obligations;

(c) give 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 term of the contract.

4. A contractual term is presumed unfair for the purposes of paragraph 2 if its object or effect is to:

(a) inappropriately limit the remedies in the 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 imposed;

(b) allow the party that unilaterally imposed the term to access and use data of the other contracting party in a manner that is significantly detrimental to the legitimate interests of the other contracting party, in particular *when such data contains commercially sensitive data or are protected by trade secrets or by intellectual property rights*;

(c) prevent the party upon whom the term has been unilaterally imposed from using the data contributed or generated by that party 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, capture, access or control such data or exploit the value of such data in an adequate manner;

(cb) prevent the party upon whom the term has been unilaterally imposed from terminating the agreement within a reasonable time period;

(d) prevent the party upon whom the term has been unilaterally imposed from obtaining a copy of the data contributed or generated by that party during the period of the contract or within a reasonable period after the termination thereof;

(e) enable the party that unilaterally imposed the term to terminate the contract with an unreasonably short notice, taking into consideration the reasonable possibilities of the other contracting party to switch to an alternative and comparable service and the financial detriment caused by such termination, except where there are serious grounds for doing so;

(ea) enable the party that unilaterally imposed the term to substantially alter the price stipulated in the contract or any other substantive condition related to the nature, format, quality or quantity of the data to be shared, without a valid reason which is specified in the contract and without the right of the other party to terminate the contract in case of such alteration. This shall not affect terms by which the party that unilaterally imposed the term reserves the right to unilaterally alter the terms of a contract of an indeterminate duration, provided that there is a valid reason specified in that contract, that the party that unilaterally imposed the term is required to inform the other contracting party with reasonable notice, and that the other contracting party is free to terminate the contract at no cost in the case of such an alteration.

5. A contractual term shall be considered to be unilaterally imposed within the meaning of this Article if it has been supplied by one contracting party and the other contracting party has not been able to influence its content despite an attempt to negotiate it. The contracting party that supplied the contractual term bears the burden of proving that that term has not been unilaterally imposed. The party that supplied the contested term may not argue that the term is an unfair term.

6. Where the unfair contractual term is severable from the remaining terms of the contract, those remaining terms shall remain binding.

7. This Article does not apply to contractual terms defining the main subject matter of the contract nor to the adequacy of the price, as against the data supplied in exchange.

8. The parties to a contract covered by paragraph 1 shall not exclude the application of this Article, derogate from it, or vary its effects.