EU Regulation on Unfair and Non-transparent Terms in B2B Contracts

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The article analyses EU rules on unfair and non-transparent terms in B2B contracts. These rules increasingly make use of legal standards rather than specific rules. The article makes the point that this development is driven by a need for regulating new contract types for which it is difficult to delimit problematic terms. It concludes that the EU legislator should be cautious of using legal standards to regulate unfair and non-transparent terms since such standards are not sufficiently precise to be applied in conjunction with national rules.

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1. Introduction

Freedom of contract is the overarching rule for B2B contracts under Danish law. Companies are free to conclude contracts with *unfair* and *non-transparent* terms if they find it commercially valuable. A business relationship may have long-term benefits that justify its unfair terms. Similarly, the uncertainty caused by non-transparent terms may constitute such a small risk compared to the total value of the contract that amendment is not commercially viable.[1]

The freedom to conclude contracts with unfair and non-transparent terms is not, however, absolute. Danish law as well as EU law contain mandatory rules that limit freedom of contract in B2B relations. The Danish rules on unfair terms apply to B2B contracts generally, whereas the EU rules on unfair and non-transparent terms solely apply to specific types of contracts. The fragmented EU rules make up a patchy picture, which is exacerbated by the fact that the rules have been adopted at different points in time with a change in the rules' form in 2019.

The present article offers a comprehensive analysis of the mandatory EU rules restricting freedom of contract in B2B relations. The aim is to identify similarities across various kinds of contracts and to explain, how and why the legislative format has changed. Moreover, the article discusses guidelines for future regulation.

2. EU rules adopted prior to 2019

2.1 The Commercial Agents Directive (1986)

2.1.1 The scope of the rules

The Commercial Agents Directive[2] harmonises the Member States' legislation on agreements between commercial agents and their principals i.e. agreements pursuant to which a self-employed intermediary (the commercial agent) undertakes to negotiate the sale or the purchase of goods on behalf of the principal or to negotiate and conclude such transactions on behalf of and in the name of the principal.[3] Most commercial agents work exclusively for a single principal and correspondingly invest time and resources in that specific collaboration.[4] Consequently, commercial agents are often in a weak position vis-à-vis the principal when the contract terminates.[5] As a consequence, the Commercial Agents Directive includes mandatory rules limiting the parties' freedom of contract in relation to termination of the contract.[6]

Articles 3 and 4 of the Commercial Agents Directive also impose mandatory obligations on the commercial agent and the principal. Articles 3 and 4 are, however, broadly formulated to such an extent that they can only be interpreted in the context of the specific agreement.[7] Accordingly, it is difficult to identify any specific restriction of the parties' contractual freedom besides a prohibition against disloyal conduct.[8]

2.1.2 The rules' form and effect

The mandatory rules of the Directive stipulate a specific legal position and prohibit the parties from derogating from such position through agreement. By way of example, Article 15 (implemented

1 Mads Bryde Andersen, Praktisk aftaleret [Practical contract law], 5th ed., Gjellerup 2019, p. 134f.

2 Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents.

3 Commercial Agents Directive Art 1(2). For an elaboration of the definition, see Bent Iversen, Handelsagenten og eneforhandleren [The commercial agent and the exclusive distributor], 5th ed., 2013, Jurist- og Økonomforbundets Forlag, p. 37ff.

4 Vincenzo Roppo. From Consumer Contracts to Asymmetric Contracts: a Trend in European Contract Law? European Review of Contract Law, vol. 5, no. 3, 2009, p. 311.

5 Roppo 2009, p. 311.

6 Art 15 (termination) as well as Art 17 and Art 18 cf. Art 19 (indemnification and damages).

7 Report of the Danish Law Commission (in Danish: *Betænkning*) 1988 1151 p. 52f.

8 Iversen 2013, pp. 72 and 77 as well as Jørgen Lykkegård, Handelsagentloven med kommentarer [The Commercial Agents Act with commentary], 3rd ed., Jurist- og Økonomforbundets Forlag, 2020 pp. 71 and 82.

in § 22 of the Danish Commercial Agents Act) sets out specific notice periods for contracts concluded for an indefinite period. Moreover, Article 15 explicates that the parties cannot agree on shorter notice periods. Neither the Commercial Agents Directive nor the Danish Commercial Agents Act explicitly state what the consequence is if a contractual term violates § 22 of the Danish Commercial Agents Act. The legal consequence of this must be that the term in question is invalid and replaced by the statutory notice period.[9]

2.2. The Software Directive (1991) and the Database Directive (1996)

2.2.1 The scope of the rules

The Software Directive[10] grants copyright protection to computer programs constituting the author's own intellectual creation.[11] Similarly, the Database Directive[12] grants copyright protection to original databases as well as *sui generis* protection to databases in which a substantial investment has been made.[13] Both Directives stipulate the scope of the right holder's exclusive rights as well as a number of exceptions, i.e. lawful acts that can be performed without infringement of the exclusive rights. Several of the exceptions apply to lawful users, who are often licensees in software license contracts or database license contracts. Parties cannot derogate from the exceptions through agreement. Accordingly, right holders cannot prohibit lawful users from performing certain acts considered fair by the legislator. The Directives thereby prevent right holders from abusing their exclusive rights.[14]

2.2.2 The rules' form and effect

The mandatory rules[15] in the Software Directive and the Database Directive are structured in the same way as the mandatory rules in the Commercial Agents Directive. These rules stipulate a specific legal position and prohibit the parties from derogating from such position through agreement. To illustrate, Article 5(2) of the Software Directive states that the person who has the right to use a computer program may make a backup copy, if this is necessary to use the program and that the contract cannot exclude this right. Article 8 adds that contractual terms contrary to Article 5(2) are null and void. Article 5(2) and Article 8 have been implemented in Danish law through § 36(1)(2) of the Danish Copyright Act. Accordingly, terms contrary to § 36(1)(2) of the Danish Copyright Act are null and void with the result that the copyright holder cannot bring an action against a person who has created a lawful backup copy.[16]

2.3 Directive on combating late payment in commercial transactions (2011)

2.3.1 The scope of the rules

The Directive on combating late payment in commercial transactions[17] applies to virtually all B2B contracts,[18] in contrast to the Commercial Agents Directive, the Software Directive, and the Database Directive. Yet, it only restricts contractual freedom in regard to terms "*... relating to the date or period for payment, the rate of interest for late payment or the compensation for recovery costs ...*".[19] The parties are free to agree on all other contractual terms. Among other things, the rules prevent the debtor from excluding the creditor's right to interest on late payments as such exclusions may reduce the debtor's incentive to pay on time.[20]

2.3.2 The rules' form and effect

The Directive on combating late payment in commercial transactions requires Member States to ensure that contractual terms, which are *grossly unfair* to the creditor are either unenforceable or give rise to claims for damages.[21] Additionally, the Directive specifies that contractual terms which exclude (i) default interest and/or (ii) compensation for recovery costs are always considered grossly unfair.[22]

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9 Mads Bryde Andersen, Grundlæggende aftaleret [Basic contract law], 5th ed., Gjellerup 2021, p. 466f. Kristian Torp, Ulovlige aftaler [Unlawful contracts], Djøf Forlag 2023, p. 250. Both Bryde Andersen and Torp discuss contract terms violating mandatory rules at a general level. Iversen 2013, p. 152 and Lykkegård 2020, p. 166 specifically state that the statutory notice period applies to agreements within the scope of the Danish Commercial Agents Act.

10 Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs. The Directive of 2009 replaces Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, but the provisions dealt with in the present article are identical in both versions of the Directive cf. also Annex II to the Directive of 2009.

11 Software Directive Art 1(3).

12 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

13 Database Directive Art 3 and Art 7.

14 Software Directive Recitals 13 and 14.

15 Software Directive Art 5(2) and (3) cf. Art 8 (backup copies and reverse engineering) as well as Art 6 cf. Article 8 (decompilation). It is disputed whether Art 5(1) also impose a mandatory restriction on the parties' contractual freedom cf. Henrik Udsen, IT-ret [IT law], 5th ed., Ex Tuto Publishing 2021, p. 148, as well as Thomas Riis and Jens Schovsbo, Aftalefrihed og præceptivitet i EU-ophavsretten [Freedom of contract and mandatory provisions in EU copyright law] in Jens Schovsbo (ed.) Informationsretsaftaler [Information rights agreements], Ex Tuto Publishing, 2024, p. 198ff. In the Database Directive the mandatory restrictions are found in Art 6(1) cf. Art 15, and Art 8 cf. Art 15 (usage rights).

16 Kim Frost, Aftaleretlige implikationer af reverse engineering, U.2003B.81.

17 Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions.

18 Directive on combating late payment in commercial transactions Art 1(2).

19 Directive on combating late payment in commercial transactions Art 7(1).

20 Directive on combating late payment in commercial transactions Recital 12.

21 Directive on combating late payment in commercial transactions Art 7(1).

22 Directive on combating late payment in commercial transactions Art 7(2) and (3).

With these provisions, the Directive establishes a legal standard rather than stipulating a specific legal position and prohibiting the parties from derogating from such position through agreement. It is supplemented by the other provisions in the Directive, which establish a mandatory framework for when default interest can be claimed, the size of the default interest as well as the size of compensation for recovery costs.[23] Thereby, the parties' contractual freedom is *de facto* tightly restricted. Essentially, this regulatory approach is identical to the approach in the three Directives mentioned above in sections 2.1. and 2.2.

The Danish legislator was of the opinion that § 36 of the Danish Contracts Act already provided that terms grossly unfair to a contracting party could be set aside,[24] however, § 36 of the Danish Contracts Act does not ensure that the "grossly unfair" contractual terms are held unenforceable in all cases.[25]

The Danish Act on Interests[26] therefore explicitly stipulates that parties cannot exclude such terms through agreement. Terms to this effect are consequently null and void. The EU Commission has published a proposal for a Regulation, which shall replace the Directive. In this proposal, the general prohibition against "grossly unfair terms" has been removed and replaced by a list of specific terms that are always considered null and void,[27] which is presumably more in line with the current state of the law. The proposal is, however, at its first reading in the Council and its final form is thus still uncertain.[28]

2.4 EU Competition law (1957)

2.4.1 The scope of the rules

EU competition law[29] restricts companies' freedom to conclude anticompetitive contracts. Article 102 TFEU prohibits abuse of a dominant position within the internal market or in a substantial part of it, if the abuse affects trade between Member States. The Court of Justice of the EU ("CJEU") has adopted a broad interpretation of both the condition that the abuse must relate to "the internal market or a substantial part of it"[30] and the condition that it must "affect trade between Member States".[31] The threshold for applying Article 102 TFEU is therefore low.[32] Moreover, the Danish Competition Act to a large extent mirrors EU competition law.[33]

An abuse of dominant position occurs e.g. if the dominant undertaking (directly or indirectly) imposes unfair purchase prices or other unfair trading conditions.[34] Article 102 TFEU therefore applies to dominant undertakings' contractual practices.

2.4.2 The rules' form and effect

Article 102 TFEU does not specify the concept of "unfair trading conditions". The provision sets out a legal standard rather than stipulating a specific legal position and prohibiting the parties from derogating from such position through agreement. Yet, Article 102 TFEU only applies to anticompetitive harms.[35] Accordingly, the requirement of anticompetitive harm specifies the legal standard and can be said to constitute the yardstick for unfairness.[36]

If a term is commercially unfair, but not anticompetitive, it will not be covered by Article 102 TFEU.[37] Article 102 TFEU does not explicitly stipulate what the consequence is, if a term violates the prohibition contained in the provision. Presumably, the party

23 Directive on combating late payment in commercial transactions Art 3 and Art 6.

24 This was concluded when implementing Art 3(3) of Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, which was replaced by Art 7(1) of the current Directive. See point 4.6.1. in the general comments to the proposal for an amendment of the Danish Law on Interests 2001-2002 No. 74.

25 Report of the Danish Law Commission (in Danish: *Betænkning*) 2012 1535, pp. 74f. and 88.

26 The Danish Law on Interests § 1(4) and § 9a(3).

27 Proposal for a Regulation of the European Parliament and of the Council on combating late payment in commercial transactions COM(2023) 533 final Art 9(1).

28 See https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:52023PC0533 (accessed 2 July 2025).

29 The main provisions in EU competition law are Art 101 and Art 102 TFEU, which can be traced to Art 85 and Art 86 of the Treaty establishing the European Economic Community of 1957 (commonly known as the Treaty of Rome).

30 Case C-179/90, *Merci convenzionali porto di Genova v Siderugica Gabrielli* ECLI:EU:C:1991:464, para 15, Case C-163/99, *Portuguese Republic v Commission* ECLI:EU:C:2001:189, para 63, Case C-77/77, *Benzine En Petroleum Handelsmaatschappij and others v Commission* ECLI:EU:C:1978:141 (the latter concerning a "modest share of the market").

31 Case 27/76, *United Brands v Commission* ECLI:EU:C:1978:22, para 201, Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission* ECLI:EU:C:1983:313, paras 103-105.

32 Robert O'Donoghue and Jorge Padilla, The Law and Economics of Article 102 TFEU, 3rd ed., Hart Publishing 2020, pp. 260 and 1108.

33 See section 3 of the general comments to the proposal for a Danish Competition Act 1996-1997 No 172.

34 Art 102(a) TFEU.

35 O'Donoghue and Parilla 2020, p. 1032.

36 There is not much case law on unfair trading conditions cf. O'Donoghue and Parilla 2020, p. 1031. See, however, Case C-333/94 P, *Tetra Pak v Commission,* ECLI:EU:C:1996:436 and Case C-385/09 P, *Der Grüne Punkt – Duales System Deutschland v Commission* ECLI:EU:C:2009:456.

37 Case C-52/07, *Kanal 5 and TV4 v Föreningen Svenska Tonsättares Internationella Musikbyrå* ECLI:EU:C:2008:703, para 41.

contracting with the dominant undertaking can claim that the unfair term is invalid as Article 102 TFEU has direct effect.[38]

2.5 Characteristics of the EU rules adopted prior to 2019

2.5.1 Contract types covered by the rules

Most of the contract types covered by the rules adopted prior to 2019 are characterised by (i) one party being in a stronger bargaining position, and (ii) such party being able to relatively easily leverage this bargaining position to impose unfair contractual terms. Systematically imposed unfair contractual terms may lead to fewer contractual transactions and increased prices, which can be harmful to the internal market. This line of reasoning is why the EU legislator has restricted the parties' contractual freedom.

An exception is the rules in the Directive on combating late payment in commercial transactions. These rules have not been adopted to counteract inequal bargaining power, but rather to prevent payment default, which can also harm the internal market.[39]

2.5.2 The rules' form and effect

The above-examined rules are characterised by stipulating a specific legal position and prohibiting the parties from derogating from such position through agreement. They are therefore specific by clearly delimiting when contractual terms can be contested as unfair and set aside.

An exception to this legislative approach is the prohibition according to EU competition law against a dominant undertaking's imposition of unfair trading conditions, but this legal standard is specified by the requirement of an anticompetitive harm. Accordingly, it is relatively clear when a contractual term is covered by the prohibition.

3. EU rules adopted after 2019

3.1 Platform-to-Business Regulation (2019)

3.1.1 The scope of the rules

The Platform-to-Business Regulation ("P2B Regulation")[40] was adopted in 2019 to ensure a competitive and transparent online platform economy,[41] by regulating, *inter alia*, the contractual relationship between "online intermediation services"[42] and "business users".[43]

An online intermediation service usually enables businesses (business users) to sell retail goods (e.g. clothes or shoes) or services (e.g. accommodation or flights) to consumers.[44] If the online intermediation service unilaterally determines the terms and conditions applicable to the business user's use of the online intermediation service, those terms and conditions must comply with certain requirements.

Whether the terms and conditions are unilaterally determined depends on "*...an overall assessment, for which the relative size of the parties concerned, the fact that a negotiation took place, or that certain provisions thereof might have been subject to such a negotiation and determined together by the relevant provider and business user is not, in itself, decisive*" cf. Article 2(10) of the P2B Regulation. The definition is not very precise; however, it can be inferred that an individually negotiated term will not automatically fall outside the scope of the Regulation. This indicates a broad of scope of application.

The P2B Regulation presumes that online intermediation services in most cases have a stronger bargaining position vis-à-vis business users, and the Regulation was enacted to address this issue.[45] Even though this presumption prompted the enactment of the Regulation, it applies to all online intermediation services regardless of size and bargaining strength.[46]

3.1.2 The rules' form and effect

Article 3(1) of the P2B Regulation stipulates five requirements, which the terms and conditions concluded between an online intermediation service and its business users must satisfy.[47] Article 3(1)(a) states that the terms and conditions must be '*... drafted in plain and intelligible language*'. It follows from Article 3(3) that *"Terms and conditions, or specific provisions thereof, which do not comply with the requirements of paragraph 1 ... shall be null and void*". In addition, Recital 20 of the P2B Regulation specifies that "null and void" means that the terms must be "*... deemed to have never existed, with effects erga omnes and ex tunc*".

The rules apply directly in Danish law as they form part of a Regulation.[48] A business user can therefore claim that a contractual

38 Ulf Bernitz, The Sanction of Voidness Under Article 82 EC and its Relation to the Right to Damages in Ezrachi (ed.) Article 82 EC: Reflections on its Recent Evolution, Hart Publishing 2009, p. 188. O'Donoghue and Parilla 2020, p. 1208. The CJEU seemed to reach the same conclusion early on cf. Case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro v Zentrale zur Bekämpfung unlauteren Wettbewerbs* ECLI:EU:C:1989:140, para 45. The direct effect of art. 102 TFEU follows from Art. 1(3) of Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

39 Directive on combating late payment in commercial transactions Recital 3.

40 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

41 P2B Regulation Recital 2.

42 As defined in the P2B Regulation Art 2(1).

43 As defined in the P2B Regulation Art 2(2).

44 P2B Regulation Recital 11 (on e-commerce marketplaces).

45 P2B Regulation Recital 2.

46 See the definition in the P2B Regulation Art 2(2). Small online intermediation services are exempted from some of the obligations in Art 11 and Art 12 cf. Art 11(5) and Art 12(7).

47 P2B Regulation Recital 2.

48 Art 288 TFEU.

term is invalid, if the term is not drafted in plain and intelligible language.

The effect of non-compliance with Article 3(1) is different from the effect of non-compliance with other obligations in the P2B Regulation. Member States are required to ensure the enforcement of most obligations in the Regulation cf. Article 15. In Denmark, this is mainly ensured through the Competition Council's[49] competence to issue orders to online intermediation services, cf. § 7 of Act No. 740 of 30 May 2020 on the enforcement of the Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services.

The requirement in Article 3(1)(a) can therefore be considered a transparency requirement because a contractual term's non-transparency *in itself* renders it invalid. The provision is special by tying invalidity to non-transparency. In contrast, the other rules assessed in this article tie invalidity to unfairness. A similar transparency requirement does not exist elsewhere in Danish law nor in EU law.

Article 5 of the Directive on unfair terms in consumer contracts[50] does stipulate that contractual terms offered to consumers in writing must be drafted in plain, intelligible language. According to the case law of the CJEU, Article 5 shall, however, solely be understood as a rule of interpretation according to which the non-transparent nature of a term is an argument in favour of the term's unfairness (and unfair terms in consumer contracts can be set aside as invalid cf. Article 6 of the Directive).[51] The CJEU has also stated that the non-transparent nature of a term does not in itself render the term unfair.[52]

The P2B Regulation's transparency requirement is therefore a novelty. It is natural to assess non-transparent terms together with unfair terms as a company is most likely to claim that a term is non-transparent if the term is also perceived as being unfair.

The transparency requirement has far-reaching consequences if interpreted literally, because a non-transparent term can be set aside as invalid with effect *ex tunc*, even though the term cannot be set aside as unfair under national rules nor EU rules. National courts are presumably prevented from relaxing or amending the non-transparent term as the Recitals of the P2B Regulation clearly state that a non-transparent term shall be null and void with effect *ex tunc*. This also aligns with the CJEU's case law on non-transparent terms in consumer contracts, according to which national courts can set unfair terms aside, but not relax nor amend them.[53] It can be argued that the CJEU will adopt a similar interpretation in relation to the transparency requirement, since the requirement aims to counteract unequal bargaining power, just as the Directive on unfair terms in consumer contracts does.

A business user can therefore challenge a non-transparent limitation of liability as invalid with effect *ex tunc* pursuant to the P2B Regulation's transparency requirement. In such a case, the contract will no longer contain a limitation of liability. Such a legal result is highly controversial as many online intermediation services presumably are offered as standard services at a (relatively) low price, which is often counterbalanced by limitations of liability.[54]

The transparency requirement contained in the P2B Regulation must be classified as a legal standard due to its wording.

3.2 The Data Act (2023)

3.2.1 The scope of the rules

The Data Act[55] regulates various parts of the data market. For the present purposes it is, however, only relevant to examine Article 13,[56] which prohibits unfair terms concerning "*... access to and the use of data or liability and remedies for the breach or the termination of data related obligations ...*" insofar as these terms have been unilaterally imposed.[57]

Article 13 applies to contractual terms in which the main obligation is the supply of data.[58] These can be termed *data contracts* i.e. a specific type of IT contract under which the customer purchases or licenses data with the purpose of using the data to develop data-driven technologies (such as machine learning applications).

Article 13 also applies to contractual terms where the supply of data is an ancillary obligation. This is often the case in contracts regulating access to and use of software as the customer's use of the software is likely to generate data.[59]

49 In Danish: *Konkurrencerådet.*

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

51 Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési* ECLI:EU:C:2012:242, para 30, Case C-191/15, *Verein für Konsumenteninformation v Amazon* ECLI:EU:C:2016:612, para 68, Case C-621/17, *Gyula Kiss v CIB Bank,* ECLI:EU:C:2019:820, para 49, Case C-395/21, D.*V. v M.A.* ECLI:EU:C:2023:14, para 52.

52 Case C-395/21, D.*V. v M.A.* ECLI:EU:C:2023:14, para 52.

53 Case C-26/13, *Árpad Kásler v OTP Jelzálogbank* ECLI:EU:C:2014:282, para 79, Case C-421/14, *Banco Primus SA v Jesús Gutiérrez Garcia* ECLI:EU:C:2017:60, para 71.

54 Within software license contracts it is, in particular, common practice that standard services provided at a low price are subject to extensive limitations of liability cf. Henrik Udsen, IT-kontraktret [IT contract law], 2nd ed., Ex Tuto Publishing 2020, p. 487f.

55 Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act).

56 I have also analysed Art 13 in Nine Riis, Art. 13, in EU Data Law: A Commentary on the Data Governance Act and the Data Act, Paul De Hert et al. (eds.), Edward Elgar Publishing (forthcoming), as well as the proposal for Art 13 in Nine Riis, Datakontrakter i erhvervsforhold [Data contracts in business relationships] in Jens Schovsbo (ed.) Informationsretsaftaler [Information rights contracts], Ex Tuto Publishing 2024, p. 71ff.

57 Data Act Art 13(1).

58 These can be described as "data contracts". For an elaboration of the definition, see Nine Riis, Defective Data? A comparative analysis of quality and usability obligations in B2B data contracts, University of Copenhagen 2025, p. 17f.

59 Riis 2024, p. 78. Data can also be generated when software is hosted cf. Udsen 2020, p. 361f.

The prohibition in Article 13 is based on the presumption that data markets have high barriers to entry, which lead to markets with a small number of strong market actors who are able to unilaterally impose unfair terms.[60] A term is considered unilaterally imposed under Article 13 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.*" cf. Article 13(6). The party imposing the term bears the burden of proving that it was not unilaterally imposed[61] and must therefore prove either (i) that the non-imposing party failed to negotiate the term, or (ii) that the term was negotiated and subsequently amended.

3.2.2 The rules' form and effect

Article 13(3) stipulates a general unfairness test,[62] according to which a 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*". In addition, Article 13(4) sets out several terms that are always considered unfair and Article 13(5) sets out several terms that are presumed to be unfair.

Some of the terms presumed to be unfair address data-specific issues. For example, a term is presumed to be unfair if its object or effect is to *"prevent the party upon whom the term has been unilaterally imposed from using the data provided or generated by that party during the period of the contract ..."*.[63] Some of the other terms presumed to be unfair are of a more general nature, i.e. they do not address data-specific issues. For instance, a contractual term is presumed to be unfair, if its object or effect is to "*inappropriately limit remedies in the case of non-performance of contractual obligations or 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"*.[64]

Article 13 is a legal standard, although the standard is somewhat specified by the lists of terms always considered unfair and presumed unfair. If a term is unfair under Article 13, it is not binding on the non-imposing party.[65] The non-binding nature of a contractual term must be assessed according to national law.[66]

3.3 The Due Diligence Directive (2024)

3.3.1 The scope of the rules

The Due Diligence Directive[67] was adopted in 2024 and is not yet implemented into Danish law.[68] The Directive requires companies with more than 1,000 employees and a net worldwide turnover of EUR 450,000,000[69] to prevent and mitigate the adverse impact their operations and the operations of their business partners exert on human rights and the environment.[70]

Specifically, the Directive requires Member States to ensure that companies take appropriate measures to identify and assess actual and potential adverse impacts arising from their operations[71] and to prevent or mitigate these impacts.[72] As part of the prevention and mitigation measures, companies must, where appropriate, among other things, "*... seek contractual assurances from a direct business partner that it will ensure compliance with the company's code of conduct and, as necessary, a prevention action plan ...".*[73]

When a company concludes contractual assurances with small and medium-sized enterprises, the terms must be fair, reasonable and non-discriminatory.[74] The same obligation applies to the contractual assurances a company must conclude with its business partners in cases where a negative impact must be brought to an end.[75] Accordingly, the Directive regulates contracts pursuant to which a company covered by the Directive obliges its business partners to comply with its codes of conduct and action plans. The aim is to prevent larger companies from passing considerable compliance burdens on to small and medium-sized enterprises.[76]

60 Data Act Recital 2. For an elaboration on the characteristics of data markets, see Riis 2024, p. 87f.

61 Data Act Art 13(6), second sentence.

62 Data Act Art 13(3).

63 Data Act Art 13(5)(c).

64 Data Act Art 13(5)(a). See also Riis (2024), p. 90.

65 Data Act Art 13(1).

66 See the Data Act Recital 9.

67 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation 2023/2859.

68 In February 2025, the EU Commission put forward two proposals for amending the Directive, see Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements COM(2025) 80 final as well as Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements COM(2025) 81 final. Yet, the proposed amendments do not impact the rules analysed in the present article.

69 Due Diligence Directive Art 2(1)(a). Art 2 also stipulates other ways in which a company can fall within the scope of the Directive.

70 Due Diligence Directive Art 1(1)(a).

71 Due Diligence Directive Art 8.

72 Due Diligence Directive Art 10.

73 Due Diligence Directive Art 10(2)(b).

74 Due Diligence Directive Art 10(5).

75 Due Diligence Directive Article 11(3)(c) and Art 11(6).

76 Due Diligence Directive Recital 69. Similarly, Maria Edith Lindholm Gausdal and Ole Hansen. Implementering af bæredygtighedskrav i kommercielle aftaleforhold – kontraktlige udfordringer og bevægelser mod tilpasning [Implementation of sustainability requirements in commercial agreements – contractual challenges and moves towards adaptation], Juristen 2023, No. 5/6, p. 231.

3.3.2 The rules' form and effect

The Due Diligence Directive contains general rules demanding fair terms in contrast to Article 13 of the Data Act, which prohibits unfair terms. The question is, however, whether the rules in the Directive can be characterised as fairness *requirements*.

In contrast to the P2B Regulation and the Data Act, the Due Diligence Directive does not explicitly stipulate that terms, which do not comply with its rules, are invalid. Accordingly, it does not seem appropriate to characterise the Directive's rules as fairness requirements. Member States are, however, required to designate supervisory authorities to enforce the rules of the Directive,[77] and these authorities must, at least, have the competence to order a company to cease any infringements of the rules.[78] In addition, the supervisory authorities must be able to impose pecuniary penalties for infringements of the Directive.[79]

The Danish supervisory authority[80] will therefore be able to issue an order requiring a company to amend its contractual assurances to be fair, reasonable and non-discriminatory. Furthermore, the company risks incurring penalties for non-compliance with the rules (presumably fines,[81] although this depends on the Danish implementation).

The rules therefore limit companies' freedom to conclude contracts with unfair terms, even though the rules do not themselves render the unfair terms invalid. The rules must be characterised as legal standards, like the P2B Regulation's transparency requirement and the Data Act's prohibition of unfair terms.

3.4 Characteristics of the EU rules adopted after 2019

The contract types covered by the rules adopted after 2019 are – like the contract types covered by the rules adopted prior to 2019 – characterised by one party being in a stronger bargaining position than the other party and thereby being in a position to impose unfair or non-transparent contractual terms. The rules adopted after 2019 make use of legal standards to assess whether a term is unfair or non-transparent. This contrasts with the rules adopted prior to 2019, which use specific legal rules.

4. General reflections about the EU regulation

4.1 From specific legal rules to legal standards

The common denominator for the contract types covered by the EU rules on unfair or non-transparent terms is that one party is in a stronger bargaining position than the other, which can easily be leveraged to impose unfair or non-transparent contractual terms. As such practice can harm the internal market, the EU legislator has adopted rules, which limit the parties' contractual freedom.

Despite this common denominator, there is a fundamental difference in *how* the rules restrict the parties' freedom of contract. The rules adopted prior to 2019 set forth specific legal rules and prohibit parties from derogating from such position through agreement. In contrast, the rules adopted after 2019 use legal standards to assess whether a contractual term is unfair or non-transparent. This difference indicates that the EU regulation on unfair and non-transparent terms is moving towards an increased use of legal standards.

This conclusion is not without reservations as the proposal for a Regulation on combating late payment in commercial transactions (proposed after 2019) sets out a specific legal position and prohibits the parties from derogating from such position through agreement, even though the final form of the Regulation remains uncertain. Moreover, even if the Regulation is adopted in its current form, legal standards will still dominate the rules adopted after 2019.

4.2 The quality of legal standards

The advantage of using legal standards over specific rules is that legal standards can cover a wide range of different situations. The disadvantage is that the interpretation of the legal standard inevitably is surrounded by a degree of uncertainty as the legal standard always leaves the person applying the law a certain degree of discretion.[82] It is the prerogative of the legislator to decide if the advantages of using legal standards outweigh the disadvantages.

In this regard, Knoph (1939) states that the uncertainty (and thus the disadvantage) of using legal standards is reduced if the legal standard is clearly formulated[83] and used in a homogeneous legal culture.[84] The standard should be clearly formulated to ensure clarity over the considerations safeguarded by the standard as well as over the yardstick used to assess the specific case.[85] Homogeneity in the legal culture means that the persons applying the law should have a relative uniform understanding of how the conflicting considerations the standard safeguards are weighed against each other.[86] The two quality parameters influence each other; accordingly, an unclear legal standard necessitates a homogeneous legal culture, whereas a clearly formulated standard can function in a more heterogenous culture.

Below, it is discussed to what extent the EU legal standards regulating unfair and non-transparent terms satisfy the two quality parameters.

77 Due Diligence Directive Art 24.

78 Due Diligence Directive Art 25(5)(a).

79 Due Diligence Directive Art 25(5)(b) cf. Art 27.

80 As the Directive is not yet implemented into Danish law, a specific supervisory authority has not been designated at the time of writing.

81 Due Diligence Directive Art 27(1) and (2).

82 Ragnar Knoph, Rettslige standarder [Legal standards9, Grøndahl & Søn 1939, p. 20.

83 Knoph 1939, p. 26.

84 Knoph 1939, p. 28, who, however, formulates it the following way: "*... legal standards demand more of the legal culture than specific rules and should not be used unless the legal system is solid and stable ...*" (my translation from Norwegian to English).

85 Knoph 1939, p. 26.

86 Knoph 1939, p. 28.

4.2.1 The formulation of the EU legal standards

4.2.1.1 The P2B Regulation

The exact content of the P2B Regulation's transparency requirement is not specified except in a single Recital stating that "*Terms and conditions should not be considered to have been drafted in plain and intelligible language where they are vague, unspecific or lack detail on important commercial issues and thus fail to give business users a reasonable degree of predictability on the most important aspects of the contractual relationship*".[87]

The Recital does not specify the transparency requirement very much, and it is therefore difficult for online intermediation services to know how they should draft their terms and conditions to comply with the requirement. The uncertainty is exacerbated – at least in Danish law – by the fact that it is legitimate for companies to conclude contracts with non-transparent terms in B2B relations as the cost of regulating all terms in detail often is disproportionate to the value of the contract.[88]

Failure to comply with the transparency requirement leads to the non-transparent term being set aside as invalid with effect *ex tunc*. The uncertainty surrounding the transparency requirement therefore poses a significant risk to online intermediation services of all sizes, as common terms such as limitations of liability may be set aside solely due to their non-transparent nature.

4.2.1.2 The Data Act

The broad prohibition against unfair terms in Article 13 of the Data Act is somewhat specified by the lists of terms always considered unfair and presumed unfair. The lists' contribution to the provision's clarity is, however, weakened by the fact that several of the terms presumed unfair are common in B2B contracts under Danish law. By way of example, Article 13(5)(a) states that terms which "inappropriately" limit remedies or liability, are presumed unfair. Under Danish law, it is common practice to limit both remedies and liability in B2B contracts.[89]

The EU Commission is obliged to develop and recommend non-binding model contractual terms on data access and use pursuant to Article 41 of the Data Act. These model terms may qualify the content of the unfairness standard in Article 13.[90] The current draft of the model terms (published in April 2025[91]) contains many provisions drafted in a broad language.[92] The provisions are likely phrased this way, because the terms must cover many different sectors and must be able to function in conjunction with national contract law in 27 different Member States. Nevertheless, the broadly phrased provisions impose very open-ended obligations on the parties, and it is therefore difficult to see how the model terms can contribute to the assessment of unfairness in specific cases. It is therefore uncertain how Article 13 of the Data Act shall be interpreted in individual cases.

4.2.1.3 The Due Diligence Directive

The Due Diligence Directive does not clarify how "fair, reasonable and non-discriminatory" contractual assurances shall be understood. The wording resembles the so-called "FRAND terms", which are well known within patent and competition law.[93] It is difficult to see what FRAND terms have in common with the Due Diligence Directive's contractual assurances. FRAND terms are required, *inter alia*, when a patent holder licenses "standard essential patents" to ensure that the patent holder does not abuse its monopoly to the detriment of society.[94]

Like the Data Act, the Due Diligence Directive obliges the EU Commission to adopt non-binding model contractual terms.[95] The model terms have the potential to qualify the legal standard, but this necessitates that the terms (which have not yet been published) are not as broadly phrased as the similar model terms developed under the Data Act.

4.2.2 Homogeneous legal culture

The legal culture in the EU is not homogeneous when it comes to regulation of unfair and non-transparent contractual terms.

First, EU contract law is fundamentally different from national contract law in the various EU Member States.[96] The EU rules governing specific contractual relationships have been adopted to address specific barriers in the internal market. Accordingly, the rules do not form a coherent legal field based on theories of "will" and "reliance" etc. As a result, it is difficult to identify common contractual considerations, which can be used to interpret broad legal standards.[97]

87 P2B Regulation Recital 15.

88 Bryde Andersen 2019, p. 134f.

89 Torsten Iversen, Obligationsret 2. del [The law of obligation], 5th ed., Jurist- og Økonomforbundets Forlag 2019 p. 354. Mads Bryde Andersen, Lærebog i obligationsret I [Textbook on the law of obligation], 5th ed, Karnov Group 2020, p. 460.

90 Data Act Recital 62.

91 Final Report of the Expert Group on B2B data sharing and cloud computing contracts, 2025. The report was provided to those, who had registered for a series of webinars held by the EU Commission in April 2025, cf. https://digital-strategy.ec.europa.eu/en/events/data-act-webinars-consultation-draft-mcts-and-sccs (accessed 2 July 2025).

92 See, for example, Annex IV: Model Contractual Terms for contracts for voluntary sharing of data between Data Sharers and Data Recipients, section 10.2 on "Non-performance".

93 Olga Kokoulina, FRAND commitments in technical standards and standard essential patents, in Jens Schovsbo (ed.) Informationsretsaftaler [Information rights contracts], Ex Tuto Publishing 2024, p. 255f.

94 Kokoulina 2024, p. 259f.

95 Due Diligence Directive Art 18.

96 Martijn Hesselink, Contract theory and EU Contract Law in Christian Twigg-Flesner, Research Handbook on EU Consumer and Contract Law, Edward Elgar 2016, p. 519. Reinhard Zimmermann, Comparative Law and the Europeanisation of Private Law in Mathias Reimann and Reinhard Zimmermann (eds.) The Oxford Handbook of Comparative Law, 2nd ed., Oxford University Press 2019, p. 561f.

97 Zimmermann 2019, p. 561.

Second, the regulation of unfair and non-transparent terms varies significantly between Member States. In one end of the spectrum, Germany occupies a dominant role with its extensive regulation on unfair terms,[98] structured like Article 13 of the Data Act i.e. with a general unfairness test and a list of exemplified unfair terms.[99] In Ireland, at the other end of the spectrum, unfair terms in B2B relations are not subject to codified legislation, but can be addressed by the courts through common law rules.[100]

The Nordic EU Member States (Denmark, Sweden and Finland) are probably placed somewhere in the middle of the spectrum. According to § 36 of the uniform Nordic Contracts Acts unfair contract terms may be amended or set aside with a view to the circumstances at the conclusion of the contract, the content of the contract as well as subsequent circumstances. These criteria have been specified through an extensive case law.[101]

National courts have different starting points when assessing unfairness. The same applies to the assessment of non-transparency; Danish law, for example, does not require terms in B2B contracts to be transparent. In contrast, such a requirement exists (partially) in German law.[102] Given the imprecise nature of the EU legal standards, there is a high risk that the standards will be interpreted differently in each Member State.

The CJEU may be able to mitigate such differences if presented with case law of a certain quantum. But at the end, the standards are interpreted by national courts in light of the facts of each case. The CJEU only articulates the aspects that should be considered when interpreting the standard.[103] This case law may therefore only create a limited amount of clarity. It should, however, be noted that the CJEU has been relatively specific when interpreting the unfairness test in the Directive on unfair terms in consumer contracts[104] as evidenced by its most recent decisions.[105]

4.2.3 Summary

In general, it is difficult to argue that the EU legal standards regulating unfair and non-transparent terms are clearly formulated and form part of a homogenous EU legal culture. The uncertainty created by the vague formulation of the standards is exacerbated by the absence of a common EU contract law as well as the variance in the Member States' national regulation of unfair and non-transparent terms. Consequently, the standards are at high risk of being interpreted differently in the Member States, thereby creating legal uncertainty.

This conclusion only relates to EU rules on unfair and non-transparent terms and cannot automatically be transferred to EU legal standards in other areas, e.g. in data protection law where it does not necessarily create the same issues, as data protection law to a much greater extent forms a coherent field of EU law.[106]

4.3 The reason for the increased use of legal standards

The pressing question is *why* the EU regulation on unfair and non-transparent contractual terms in B2B relations moves towards an increased use of legal standards when these standards do create legal uncertainties.

If we look more closely at the rules adopted after 2019, they all seem to regulate *new* contract types. Contractual relations between online intermediation services and business users have in earnest become common the last 10 years, as more people purchase goods and services online.[107] Similarly, the increase in the amount of digital data has created a market for B2B data trade, the like of which did not exist previously.[108] The mandatory requirements that the Due Diligence Directive imposes on companies likewise create new contractual relationships between the companies covered by the Directive and their business partners.[109] Accordingly, these three pieces of legislation all address contracts types that were not widely known previously. When regulating new contract types, the legislator may find it challenging to use specific legal rules as a sufficient base of experience to delimit problematic contractual terms that do not necessarily exist.[110] Legal standards are a viable alternative as legal standards address a wide range of different situations.

Even if the increased use of legal standards is driven by a need to regulate new contract types, it can nevertheless be said that it is excessive for the EU legislator to restrict party autonomy, given the insufficient base of experience of problematic contractual terms. Freedom of contract is a fundamental principle in all EU Member

98 See, for example, Mathias Lehmann and Johannes Ungerer, Save the 'Mittelstand': How German Courts Protect Small and Medium-Sized Enterprises from Unfair Terms, European Review of Private Law, vol. 25, no. 2, 2017, pp. 313-336.

99 §§ 305-310 BGB. Some of the terms listed only apply to consumer contracts, but it is recognised that these have an indirect effect in B2B contracts as well cf. Markus Stoffels, AGB-Recht, 5th ed., C.H. Beck 2024, section 956ff.

100 Cliona Kelly, Contract Law in Ireland, Kluwer Law International 2021, section 445ff.

101 Lennart Lynge Andersen, Aftalelovens § 36 – fra kontraktfrihed til urimelighedskontrol [Section 36 of the Contracts Act – from freedom of contract to unfairness review], Ex Tuto Publishing 2018, p. 277ff. Bryde Andersen 2021, p. 482ff.

102 § 307(1), second sentence BGB.

103 Case C-415/11, *Mohamed Aziz v Caixa d'Estalvis de Catalunya* ECLI:EU:C:2013:164, para 66.

104 Peter Rott, Unfair contract terms in Christian Twigg-Flesner (ed.) (2016) p. 297 with reference to Case C-92/11, *RWE Vertrieb v Verbraucherzentrale Nordrhein-Westfalen* ECLI:EU:C:2013:180, para 55.

105 Case C-699/23, *FG v Caja Rural de Navarrra* ECLI:EU:C:2025:297, para 67, Case C-749/23, *innogy Energie v QS* ECLI:EU:C:2025:405, para 43, Case C-6/24 and C-231/24, *Abanca Corporación Bancaria v WE and VX* ECLI:EU:C:2025:333, para 37. Differently Case C-365/23, *SIA v C and others* ECLI:EU:C:2025:192, paras 79-87.

106 Hanne Marie Motzfeldt, Grundlæggende databeskyttelsesret, Djøf Forlag, 2022, p. 27.

107 Christoph Busch, Hans Schulte-Nölke, Aneta Wiewiórowska-Domagalska, Fryderyk Zoll. The Rise of the Platform Economy: A New Challenge for EU Consumer Law? Journal of European Consumer and Market Law, vol. 5, no. 1, 2016, p. 3f.

108 Riis 2024, p. 71f.

109 On the development from voluntary requirements to mandatory requirements, see Gausdal and Hansen 2023, p. 225ff.

110 Knoph 1939 also states that legal standards are particularly relevant in "*(...) times of unrest and breaking of new ground, when everything is in flux and nothing seems certain"* (my translation from Norwegian to English) cf. p. 26.

States and should only be restricted if there are compelling reasons to do so.

For these reasons, the EU legislator should not have introduced the post-2019 regulation on unfair and non-transparent terms until there was a better basis for delimiting the problematic terms. The reason why it chose to be proactive in this regard can probably be found in the geopolitical situation.

In recent years, there has been a political desire to prevent non-European companies from gaining strong positions in certain markets,[111] as the lawmaker is fearful of the risk that such companies will not respect European values.[112] This argument is particularly strong in relation to the P2B Regulation and the Data Act, because large American tech companies occupy strong positions in the digital sector. This may also explain why the form of the rules changed in 2019, where Ursula von der Leyen's first EU Commission (2019-2024) made it a political priority to strengthen European values and ensure that these values shape global markets.[113]

4.4 Guidelines for future regulation

To a certain extent, it is appropriate to use legal standards to proactively regulate new contract types as chosen by the EU legislator. In spite of this, the uncertainty caused by the use of legal standards to regulate unfair and non-transparent terms should not be underestimated. There is a risk that such legal uncertainty may cause increased transaction costs, e.g. when market players draft terms and conditions to meet the P2B Regulation's transparency requirement or the Due Diligence Directive's rules on fair, reasonable and non-discriminatory contractual assurances.

Moreover, the Data Act's prohibition of unfair terms may raise the cost of data. To take an example, it may be unclear to what extent the supplier's liability can be limited. If the supplier cannot reduce its risks through limitations of liability, such risks are likely to be reduced through increased prices instead.

In the future, the EU legislator should be cautious of using legal standards to regulate unfair and non-transparent terms in B2B relations. Legal standards should be the exception and if used, the EU legislator should make a considerable effort to formulate the standards as precisely as possible. This is necessary due to the different ways the Member States regulate unfair and non-transparent terms.

5. Conclusion

The analysis of the EU rules on unfair and non-transparent contractual terms in B2B contracts shows that the rules apply to contract types where one party has a stronger bargaining position that can easily be leveraged to impose unfair or non-transparent contractual terms.

The rules restrict the parties' contractual freedom in two different ways, as rules adopted prior to 2019 stipulate a specific legal position and prohibit the parties from derogating from such position through agreement, whereas the rules adopted after 2019 use legal standards.

The increased use of legal standards is problematic, because the standards are not precise, and because the Member States regulate unfair and non-transparent terms very differently. Accordingly, the standards are at high risk of being interpreted differently in the individual Member States, which can lead to legal uncertainty.

Therefore, the legislator should be cautious of using legal standards to regulate unfair and non-transparent terms.

111 Communication from the Commission, A New Industrial Strategy for Europe COM(2020) 102 final, p. 1.

112 Communication from the Commission, A New Industrial Strategy for Europe COM(2020) 102 final, p. 1.

113 Political Guidelines for the next European Commission 2019-2024, available at https://op.europa.eu/da/publication-detail/-/publication/62e534f4-62c1-11ea-b735-01aa75ed71a1 (accessed 2 July 2025) pp. 16 and 19.