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Data Act & cloud switching: How does the Data Act impact contractual relationships?

In brief:

The Data Act introduces far-reaching obligations for cloud providers from 12th September 2025, with the aim of significantly simplifying transitions by customers to other cloud providers or to the customers' own IT infrastructure. Chapter VI of the Data Act compels cloud providers to eliminate all commercial, technical, and contractual obstacles on such transitions. These provisions have substantial implications for both new and existing contracts in the cloud sector.

This article is part of a multi-part series dedicated to the EU Data Act (Regulation (EU) 2023/2854). The Data Act will apply from the 12th September 2025. In this blog series, we explain various aspects of the Data Act, including the provisions of Chapter VI on switching between data processing services, commonly referred to as 'cloud switching'. We focus on the impact that Chapter VI has on the drafting of contracts.

1. Scope

The obligations under Chapter VI apply to data processing services within the meaning of Art. 2(8) Data Act, i.e. digital services that provide customers with 'ubiquitous and on-demand network access to a shared pool of configurable, scalable and elastic computing resources of a centralised, distributed or highly distributed nature'. This therefore covers various 'as-a-service' services (SaaS / PaaS/ AIaaS / IaaS, etc.), i.e. almost all cloud services. However, Art. 31(1) and (2) Data Act grant partial exemptions for cloud services that are either tailored to the specific needs of an individual customer or provided as a trial version.

The provisions of Chapter VI of the Data Act apply to all contracts concluded after 12th Septem-ber 2025 as well as to existing contracts concluded before that date, as Art. 50 Data Act does not provide for any transitional arrangements for existing contracts. Therefore, all obligations under Art. 23 et seq. Data Act apply in full to both new and existing cloud contracts.

2. Overview: Provisions of the Data Act on cloud switching with relevance for contracts

In order to avoid so-called 'lock-in effects' and to strengthen the position of cloud customers vis-à-vis cloud providers, Chapter VI contains a number of obligations for cloud providers that affect contractual agreements:

a. General obligation to remove obstacles

(Art. 23 Data Act)

According to Art. 23 Data Act, cloud providers must remove contractual barriers which prevent their customers switching to a data processing service of another provider covering the same service type or to ICT infrastructure on their own premises. Specifically, according to Art. 23(2)(a) and (b) Data Act, contractual barriers must be removed which prevent the customer from terminating the contract with the cloud provider after a maximum notice period of two months and after the successful completion of the switching process, and from concluding new contracts with another cloud provider. Art. 23 Data Act acts as a kind of 'general clause' which is specified in more detail by the further provisions of Chapter VI.

b. Minimum requirements for contracts (Art. 25 Data Act)

Art. 25 Data Act stipulates detailed minimum requirements for cloud contracts. The provision not only prohibits the creation or maintenance of contractual obstacles, but also expressly requires the inclusion of certain clauses:

Right to switch

According to Art. 25(2)(a) Data Act, the cloud contract must contain clauses that enable the customer to switch to a third-party data processing service upon request or to transfer all exportable data and digital assets to on-premises ICT infrastructure without delay. In particular, the clauses must provide for an obligation on the part of the cloud provider to assist the customer in the execution of the switching process, an obligation to maintain the continuity of the custom-er's business operations, an obligation to provide information regarding known risks to the uninterrupted provision of services, and a duty of care on the part of the cloud provider for the security of the switch.

Obligations to inform and support

The cloud contract must also contain clauses on various information and support obligations, through which the cloud provider must facilitate for its customers as smooth and informed a transition as possible. The clauses to be concluded require the cloud provider to actively participate in the customer's transition.

The obligations to inform encompass the provision of information on the lists of categories of data and digital assets that can be ported during the switching process (Art. 25(2)(e) Data Act). In addition, cloud providers must provide a list of data categories that are specific to the internal functioning of the cloud service and therefore

cannot be transferred if there is a risk of breaching the cloud provider's trade secrets (Art. 25(2)(f) Data Act). Therefore, cloud providers must not only adapt their contracts accordingly, but also clearly clarify internally which categories of data are covered in the event of a switch so that they can comply with their contractual obligations to inform.

The support obligations include an obligation on the part of the cloud provider in the cloud contract to support the customer's exit strategy (Art. 25(2)(b) Data Act). The exact scope of this support obligation is not clear, but it at any rate includes the provision of information (Recital 95 to the Data Act).

Notice period and compensation in the event of early termination

Of particular importance is the maximum 'notice period' (more accurately: 'notification period') of two months for cloud contracts, which, pursuant to Art. 25(2)(d) Data Act, must be foreseen in the contract and within which the cloud provider must initiate the switching process. The Data Act does not prohibit the agreement of fixed contract terms, i.e. it is still possible to conclude a cloud contract with a term of several years. However, termination due to cloud switching must be possible at any time, even during the fixed contract term.
This requirement poses enormous challenges for cloud providers and will force them to rethink their business models and pricing.

The Data Act stipulates that it is possible to agree on compensation for early termination in the form of a severance payment ('early termination penalties' pursuant to Art. 29(4) Data Act). However, these must be proportionate (Recital 89 to the Data Act). As a rule, however, cloud providers are unlikely to currently provide for compensation payments for early termination in their existing contracts, as a statutory termination right has not existed until now. Cloud providers must therefore react quickly to adapt their contracts. In particular, it should be examined whether existing contracts can be adjusted on the basis of contractually agreed variation clauses or whether the requirements for a contract adjustment due to a disruption of the basis of the transaction (as foreseen in Germany by Section 313(1) of the German Civil Code, for example) are met.

Specification of the switching process

Art. 25 Data Act also contains an obligation on cloud providers to include clauses in the cloud contract specifying the specific implementation of the switch. These include, in particular, maximum transition periods for implementing the switch (Art. 25(4) Data Act), minimum deadlines for data retrieval (Art. 25(2)(g) Data Act) and provisions governing the customer's choice of the form of the switch (Art. 25(3) Data Act). The requirements for the contractual design of the switching process are the subject of a separate article in this blog series.

c. Contractual transparency obligations (Art. 28 Data Act)

Under the Data Act, cloud providers are required to describe the technical, organisational and contractual measures they have taken to prevent international government access to or transfer of non-personal data held in the EU, where such access/transfer would create a conflict with EU law or national law. This description must be provided on a website (Art. 28(1) Data Act), and the website must be specified in the contract (Art. 28(2) Data Act). In addition, cloud providers must specify in their cloud contracts the jurisdiction to which the ICT infrastructure used is subject (Art. 28(1)(b) Data Act).

d. Gradual abolition of switching charges (Art. 29 Data Act)

To avoid lock-in effects, the Data Act provides for the 'withdrawal', i.e. the prohibition, of the agreement and imposition of switching charges. 'Switching charges' encompass all fees required for support with cloud switching (as per Art. 2(36) Data Act). From 12th January 2027 at the latest, cloud providers will no longer be allowed to impose switching charges. Until that date, only 'reduced' switching charges may be imposed that do not exceed the costs incurred by the cloud provider. It follows that corresponding agreements in cloud contracts would also not be permissi-ble. Furthermore, when drafting contracts, cloud providers must ensure that any severance payments included in the cloud contract for early switching before the end of the minimum contract term are not disproportionately high and therefore to be classified as hidden switching charges.

3. Key Take Aways

The provisions in Chapter VI of the Data Act provide for significant restrictions on the freedom of contract. Cloud providers must critically review their standard contracts and revise them if necessary, but they must also be prepared for conflicts in connection with existing contracts. The right to ‘cloud switch’ does not exist by operation of law; it must be drafted into contracts in accordance with the detailed provisions of the Data Act. In addition, the customer's right of termination, which must be regulated by contract, and the prohibition on the imposition of switching charges may have an impact on pricing. Particular attention should be paid to the careful wording of provisions on severance payments in the event of early termination and on the specific effects of the switch request on the contract. Cloud providers should therefore ensure in the short term that contracts are amended accordingly and that the effects of the Data Act are also sufficiently taken into account in their business strategy.