

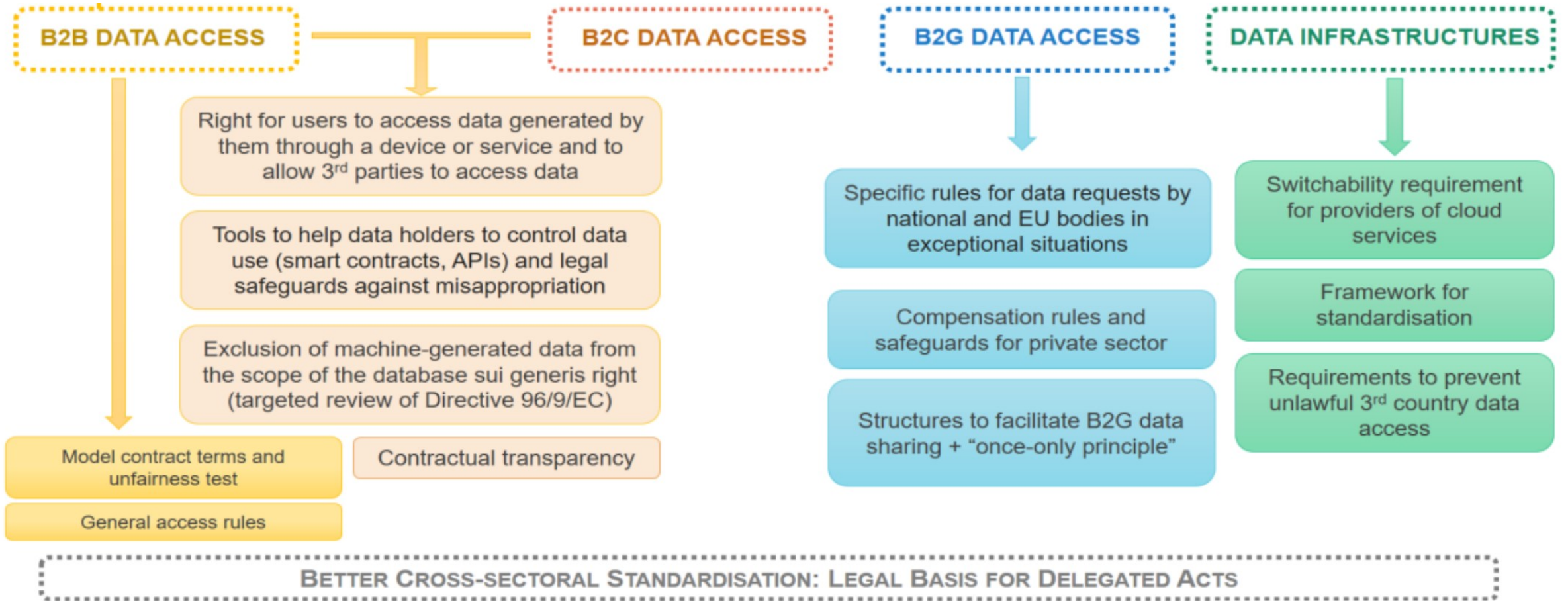
Session 2

SaaS, IaaS & AIaaS – Making
Sense of the Data Act's Cloud
Switching Rules.

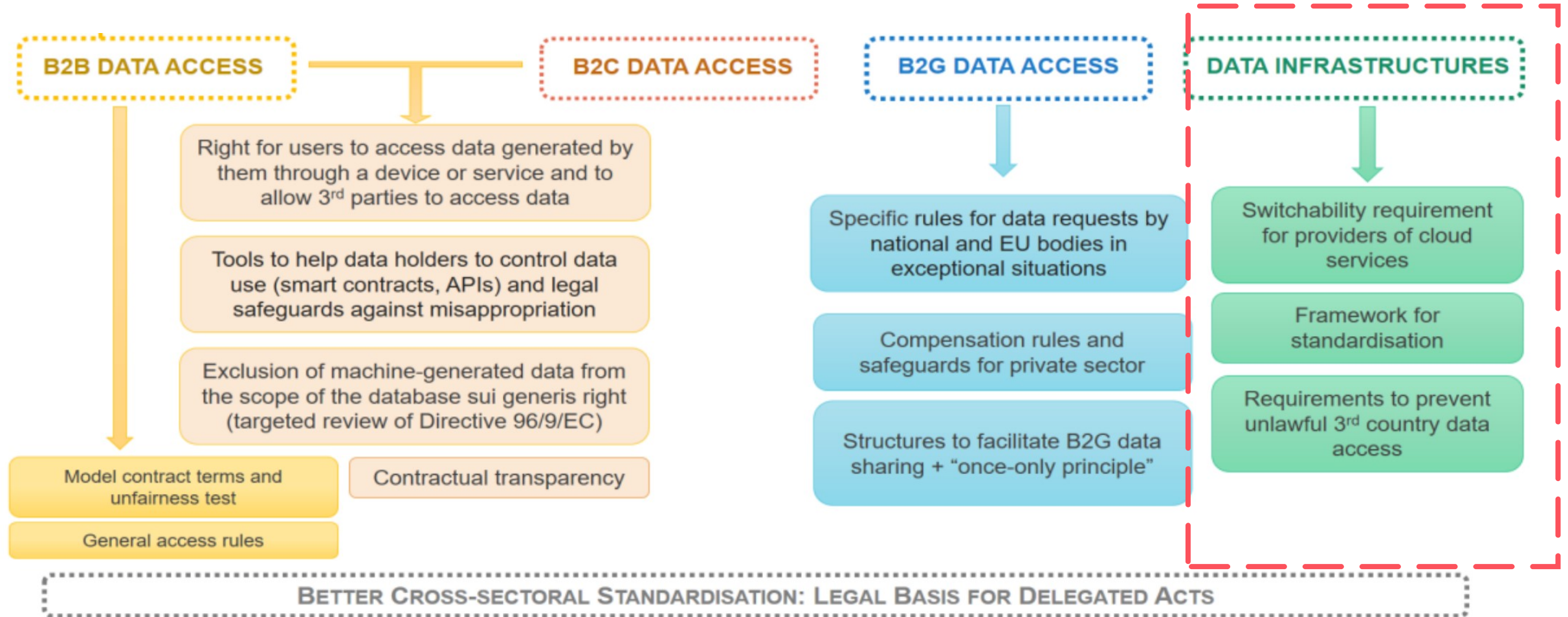


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Data Act: Overview



Data Act: Switching between Data Processing Services



Objectives of switching provisions

- ❑ Making it easier for customers to switch between “data processing services”
 - ❑ Reduce vendor lock-in
 - ❑ Enhance competition between cloud providers that provide their services in the EU
- ❑ Tackling issues relating to non-personal international data transfers

In-scope: Data Processing Service Providers

"Data processing services"

„a digital service that is provided to a customer and that enables 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 that can be rapidly provisioned and released with minimal management effort or service provider interaction“

- Are cloud services in scope?
- What kind of cloud services are in scope?

Switching: Data Processing Services

Background of the Definition

→ US-National Institute for Standards and Technology („NIST“)

- Data Act's definition of data processing services based on NIST's definition of „*cloud computing*“ from 2011:
 - “*a capability provided to the customer to use the provider's applications running on a cloud infrastructure. The applications are accessible from various client devices through either a thin or thick client interface, such as a web browser, or a program interface.*”
 - Intentionally very wide, covering not only classical cloud services, but also other cloud-based services, such as , SaaS and any future cloud business models

Data Processing Services

Recital 81 - Examples

„Three typical delivery models“:



IaaS (Recital 81):

- hosting

SaaS (Recital 81):

- Software solutions accessible via the Internet / app / browser
- Application, data, servers, storage managed by third parties

AI-as-a-Service (AIaaS) = SaaS

- Customers get on-demand AI capabilities that they can scale up or down as needed.

Data Processing Services

Software-as-a-Service (SaaS) – ALL solutions in scope?

Question: Every SaaS – solution in scope?

Out-of-the-box SaaS solution	(Heavily) Customized SaaS	Custom-built SaaS
Standardised, off-the-shelf SaaS solutions	Services tailored through time-intensive pre-contractual and contractual negotiations and technical customisation.	Services where the majority of main features are specifically developed for an individual customer <u>or</u>
No or only minimal adaptation	The majority of features and functionalities are adapted to the specific needs of the customer	not offered at broad commercial scale via the provider's service catalogue

Data Processing Services

Elements of the Definition (Recital 80)

1 Customer → B2C & B2B

Ubiquitous:

2 “Computing capabilities **provided over the network and accessed through mechanisms** promoting the use of **heterogeneous thin or thick client platforms** (from web browsers to mobile devices and workstations)”

Rapidly provisioned and released

3 Includes “the capability of the customer of the data processing service to **unilaterally self-provision computing capabilities**, such as server time or network storage, **without any human interaction** by the provider of data processing services could be described as requiring minimal management effort and as entailing minimal interaction between provider and customer.”

Shared pool

4 “Those computing resources that are **provided to multiple users** who share a common access to the service, but where the **processing is carried out separately for each user**, although the service is provided from the same electronic equipment”

6

Scalable

“Computing resources that are **flexibly allocated** by the provider of data processing services, **irrespective of the geographical location of the resources**, in order to **handle fluctuations in demand**”

7

Elastic

“Those computing resources that are **provisioned and released according to demand** in order to rapidly increase or decrease resources available depending on workload”

8

Centralised, distributed or highly distributed

- Distributed: “those computing resources that are **located on different networked computers** or devices and which communicate and coordinate among themselves by message passing”
- Highly distributed: “data processing services that **involve data processing closer to where data are being generated or collected**, for instance in a connected data processing device”

Cloud switching: Data Processing Services

Elements of the Definition (Recital 80)

„Rapidly provisioned and released“ & „Scalable“ ??

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Cloud switching: Data Processing Services

Elements of the Definition (Recital 80)

Rapidly provisioned and released & Scalable

Interpretation uncertain:

➤ Opinion A -- limited scope:

- SaaS - solution must be **immediately usable** with minimal effort
- ➔ Heavy customization or substantial integration work excludes SaaS - solution from Data Act's scope

➤ Opinion B - broad scope:

- Integration work is common for SaaS services
- Focus: ability to flexibly allocate resources **after** initial setup / integration.
- Heavily customized = in-scope

SaaS: Out-of-the box vs. tailored solutions

Out-of-the-box SaaS solution	Heavily-Customized SaaS → “Custom-made” SaaS (EU Commission’s “Digital Omnibus” proposal)	Custom-built
Standardised, off-the-shelf SaaS solutions	Services tailored through time-intensive pre-contractual and contractual negotiations and technical customisation.	Services where the majority of main features are specifically developed for an individual customer
No or only minimal adaptation	The majority of features adapted to the specific	not offered at broad commercial scale via the provider’s service catalogue
Subject to full scope of Chapter VI of Data Act (including switching and interoperability requirements) (Recital 81 EU Data Act)	Proposed “lighter” regime <u>Chapter VI obligations</u> for <u>before 12 September 2025</u> (e.g. obligation to reduce/remove switching and egress charges). Does not apply to IaaS models.	<ul style="list-style-type: none"> ➤ Art. 31 Data Act! ➤ Limited Scope: ➤ Prohibition of switching charges does not apply ➤ Limited interoperability obligations (open interface)

EU Council Presidency’s revised draft of Digital Omnibus dated 15 April 2026.

Switching data processing services

Key contractual terms concerning switching (Art. 25 Data Act)

Problem: “Early termination”- right of Customer in fixed-term contracts?

- *Initiation of cloud switching by customer (B2B & B2C): notice period of 2 months only!*
- Switching should be completed by the end of the transition period, which starts after the end of the notice period
- Transition period:
 - by default: max. 30 calendar days
 - Extension possible: up to max. 7 months, if Provider can prove that a shorter transition period of would be technically unfeasible

→ Commercial Impact!

Data Processing Service

Switching: Low (Scenario A) vs. High (Scenario B) Technical Complexity

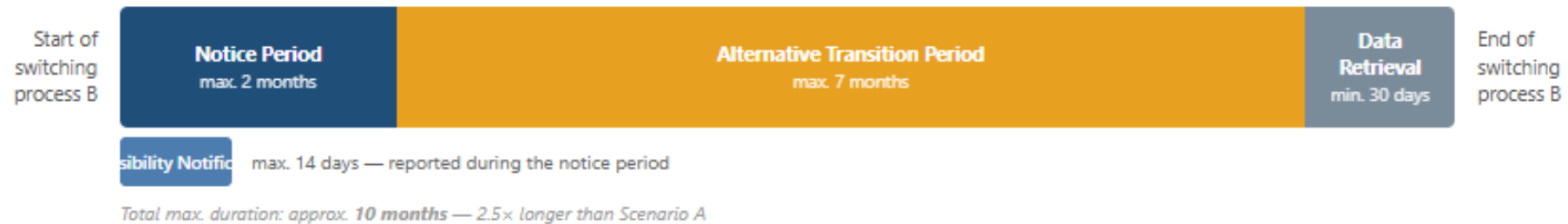
Scenario A · Low Complexity

Switching process — technically feasible



Scenario B · High Complexity

Switching process — technically *not* feasible



0 2 months 4 months 6 months 8 months 10 months

← shared time scale (both scenarios plotted proportionally) →

■ Notice Period (max. 2 months) ■ Transition / Alternative Transition Period ■ Data Retrieval Window (min. 30 days)

■ Infeasibility Notification (max. 14 days, within notice period)

Early termination fees / penalties: Proportionate & not hinder switching

Switching data processing services

Further Obligations for Providers

- Specification of all categories of data / digital assets that can be ported, at min. all “exportable data”
 - Input/output data, **metadata** (directly/indirectly) generated by customer’s use of service, personal & **non-personal data**
 - **Not in scope:** data protected by IP rights, data qualifying as “**trade secrets**”
- Transfer of all such data, at min. “exportable data”, upon termination
- Guarantee” of full erasure
- **Infrastructure providers (including IaaS):**
 - Facilitate the transition process by providing functions, appropriate information, documentation, **technical support** and, where necessary, tools.
- **Other providers (including PaaS and SaaS):**
 - provide **open interfaces** free of charge to facilitate switching process, and enable portability and interoperability
 - adhere to published **open interoperability standards** or enable data export in common, machine-readable formats.
 - **EU Commission: Development of standards and specifications for interoperability**

International Data Flows: Obligations

Safeguards for non-personal data (Art. 32)

Providers of data processing services

prevent (as far as possible) any international data transfer or governmental access, where this would create a conflict with EU or member state law

Free Flow of Non-Personal Data Regulation
11/2018

Third-country judgments ordering transfer or access

only recognised if mutual legal assistance treaty in place or if decision based on rule of law principles

(guidance to be provided by the “European Data Innovation Board” pursuant to 29 DGA)

In case a third-country judgment is recognised

addressees to provide the minimum amount of data permissible

Customers to be informed of any third-country transfer or access request

prior to complying with request

except insofar as request serves law enforcement purposes



Personal data: Art. 13, 14 GDPR (Info), Art. 44 et seq. GDPR (Adequacy decisions, SCCs, “Schrems II”)

What happens in case of incompliance?

- **Customer (individual/company): Right to lodge a complaint** with
 - Competent authority in the EU member state of habitual residence / place of work / establishment
 - **Penalties („effective“, „proportionate“ and „dissuasive“)**
 - EU member set out concrete penalty range (GDPR like)
 - Penalties to be enforced by competent authority
- **Competent authority for entities in scope of Data Act:**
- Establishment principle (main establishment)
 - If not established in EU: legal representative to be appointed

Administrative Fines (Data Processing Services Obligations)

Selected Member States

Germany

(Bundesrat approval pending)

- Generally: up to EUR 100,000
- But: the fine must exceed any economic advantage gained

Finland

- Entities: up to 2% of annual turnover
- Individuals: up to 2% of taxable income, capped at EUR 2,000

Malta

- If significant market effect: up to 5% of annual turnover
- Otherwise: up to EUR 350,000 per infringement or EUR 12,000 per day of non-compliance

Ireland

(Proposal)

- Entities: up to 4% of EU annual turnover
- Individuals: up to EUR 500,000

Netherlands

Up to EUR 1,1 Mio or 10% of annual turnover – whichever is higher

Sanction levels and calculation methods differ significantly across Member States.

Why cloud providers need to take this into account now

- Understand commercial impact on contracts, e.g. fixed-term contracts
- Structure contracts appropriately
- Repaper existing contracts
- Know your data:
 - What is “exportable data”?
 - Which data is protected by IP rights?
 - Which data qualifies as “trade secret”?
 - Which data is specific to internal functioning of service, qualifies as trade secret and carries inherent risk of breach of trade secrets?
 - What are your switching / porting procedures, methods and formats
- Pay attention to publication of interoperability standards / national legislation

Questions?

Thank you!

