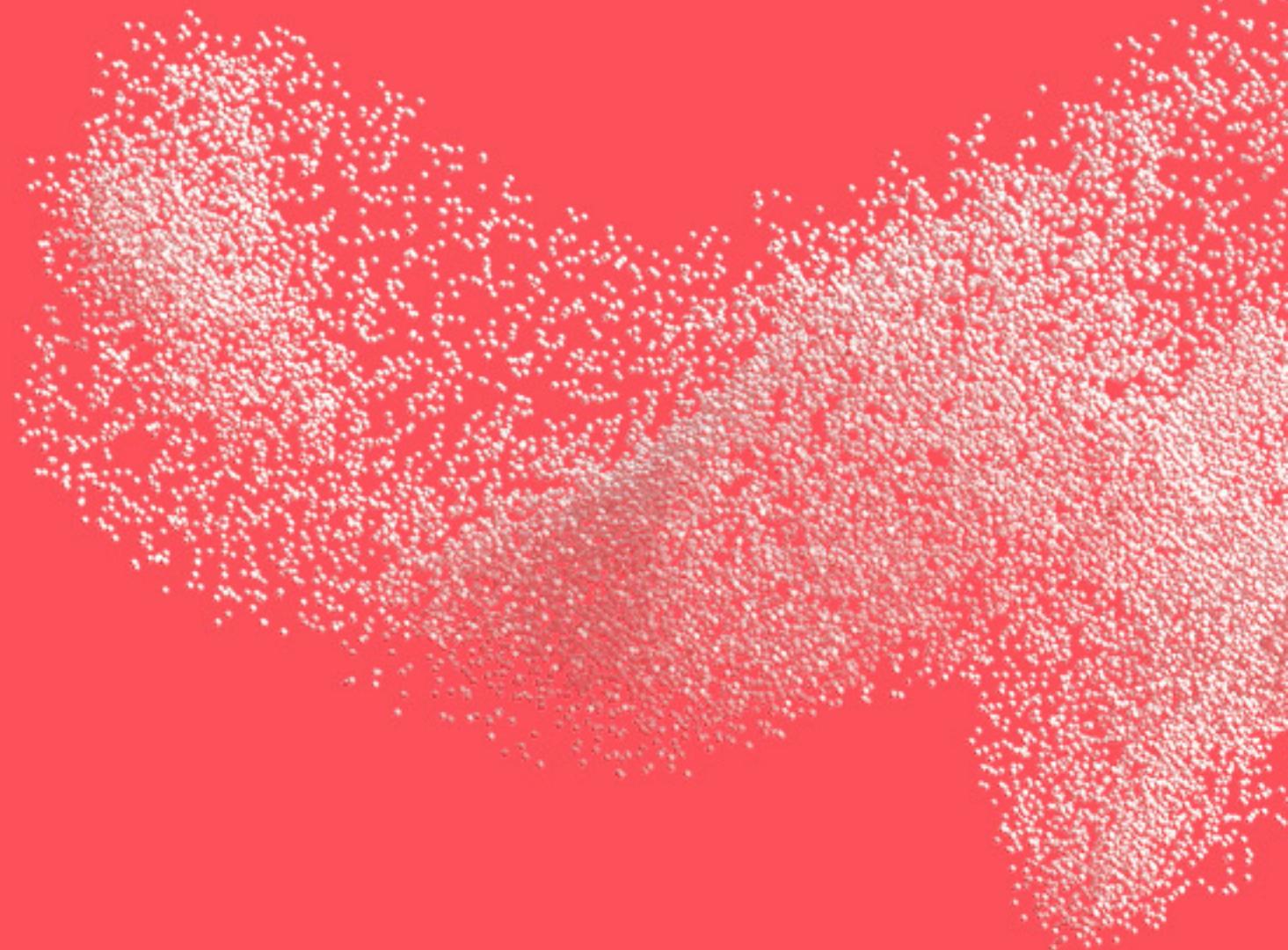


The Data Act in Practice – Cloud Switching at a Glance

Ariel Nachman
Christopher Götz, LL.M. (New York)

10 December 2025



EU Data Act: Entry into force & applicability

§

Regulation

Entry into force:

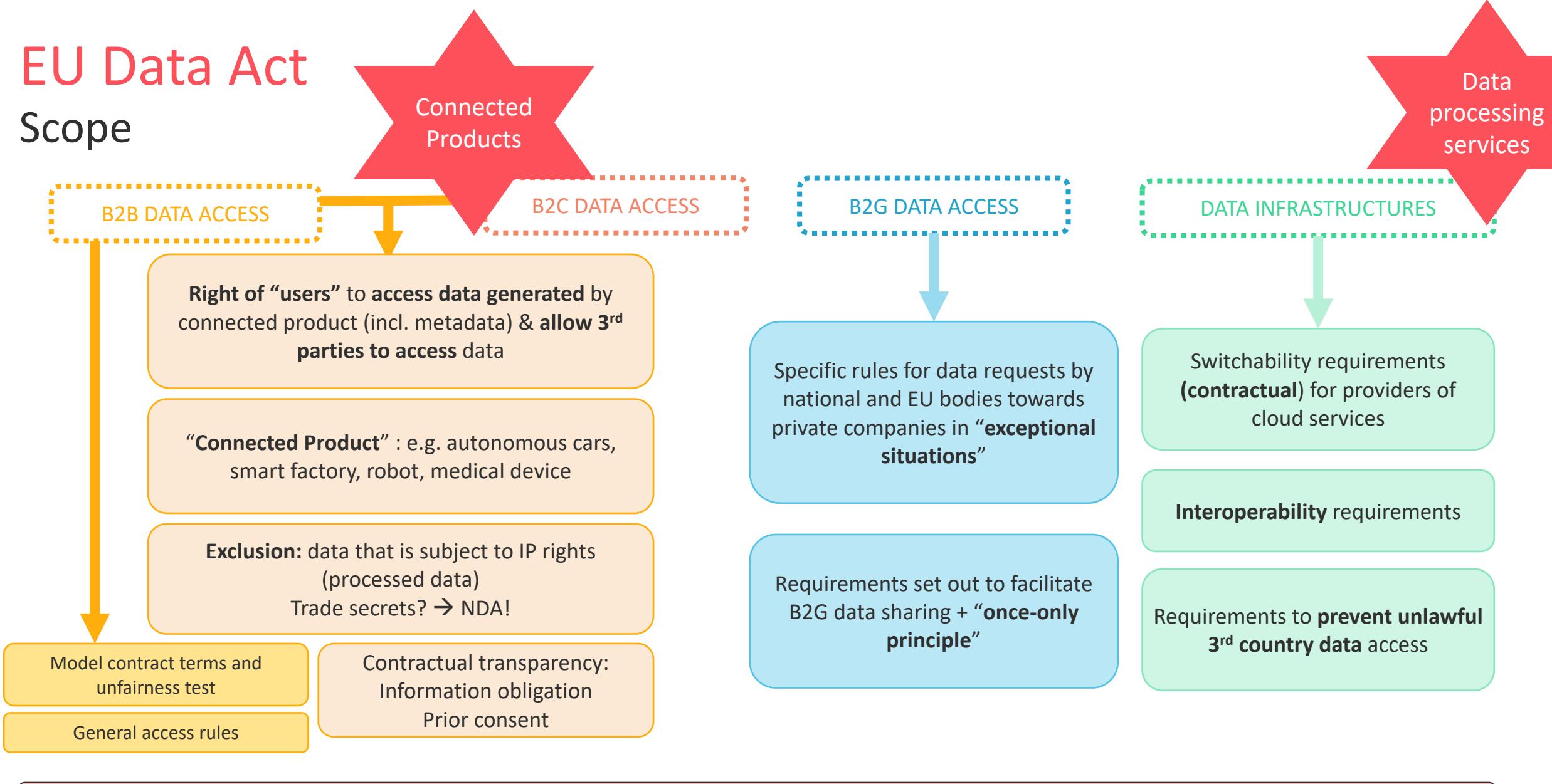
January 2024

Applicability:

12 September 2025

EU Data Act

Scope



Data Act: Extraterritorial Effect

Suppliers in a country outside the EU



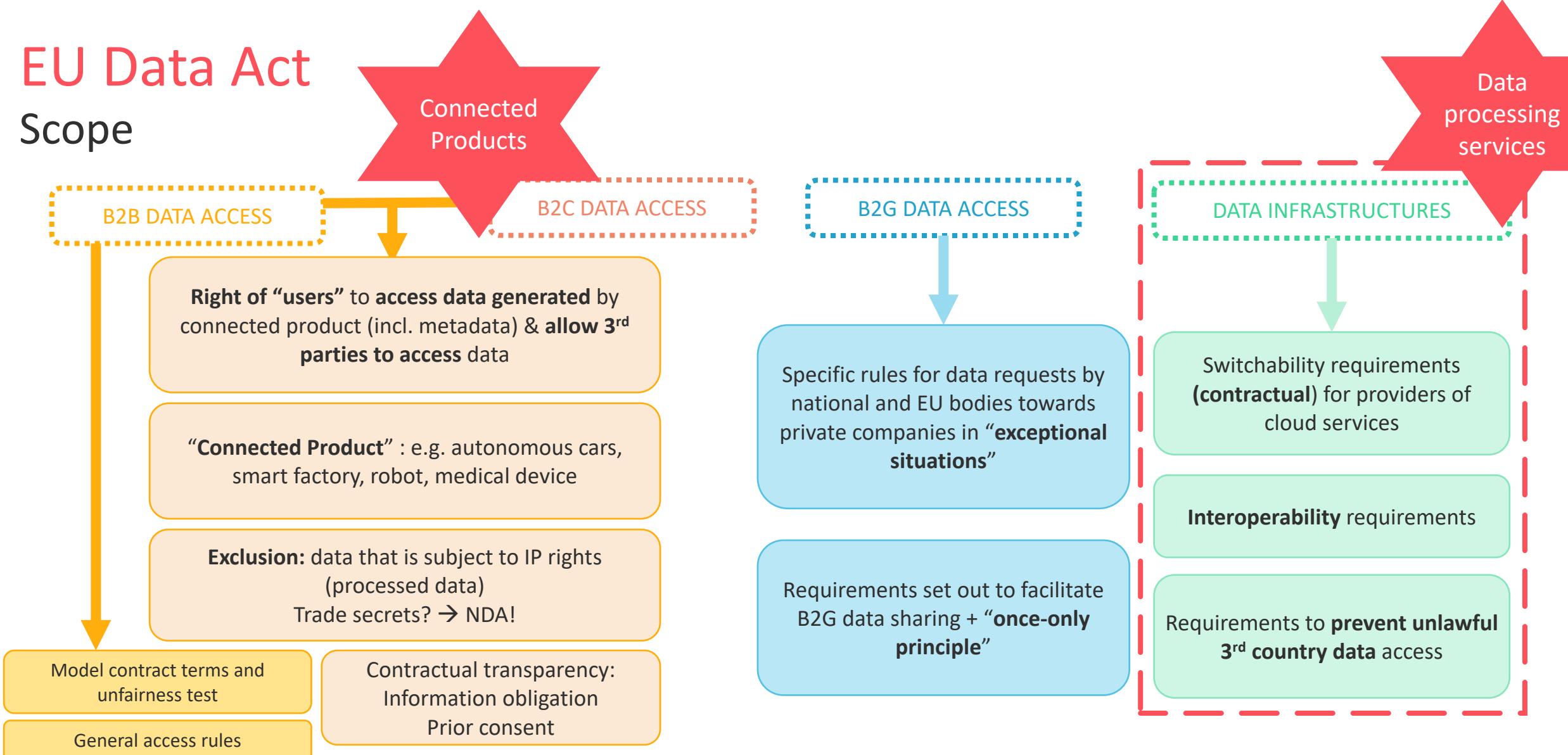
Connected
Products / Data
Processing Service
offered in the EU

EU market



EU Data Act

Scope



BETTER CROSS-SECTORAL STANDARDISATION: LEGAL BASIS FOR DELEGATED ACTS

Cloud switching: Data Processing Services

ACC Israel

Objective

Removal of commercial, technical, and contractual barriers to switching.

Easy switching for customers between data processing service providers / use multiple services from different providers at the same time.

Cloud switching: Data Processing Services

ACC Israel

Definition (Art. 2(8) Data Act)

→ "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*“

➤ Broad Definition!

Cloud switching: Data Processing Services

ACC Israel

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:
 - NIST's definition of SaaS: *“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**

Cloud switching: Data Processing Services

ACC Israel

Definition's Broader Regulatory Influence

The **definition** of "data processing service" in the Data Act is **increasingly used** (sometimes in adapted form) in **other legal acts and regulatory guidelines**, e.g:

- NiS2 Directive
 - incorporates comparable terminology; "*cloud computing services*" to harmonise cybersecurity obligations
- Germany's Federal Financial Supervisory Authority (BaFin) Cloud Outsourcing Guideline
 - "Cloud computing": Similar to the Data Act's definition
 - Ensures alignment with EU-wide standards for IT and cloud service management.
- European Banking Authority (EBA) Guidelines on Outsourcing Arrangements
 - refer to cloud and data processing services, drawing on definitions that mirror those in the Data Act

Cloud switching: Data Processing Services

ACC Israel

Elements of the Definition

*„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**“*

Cloud switching: Data Processing Services

ACC Israel

Elements of the Definition (Recital 80)

1

Customer → B2C & B2B

2

Ubiquitous:

*“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”*

3

Rapidly provisioned and released

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.”*

4

Shared pool

*“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”*

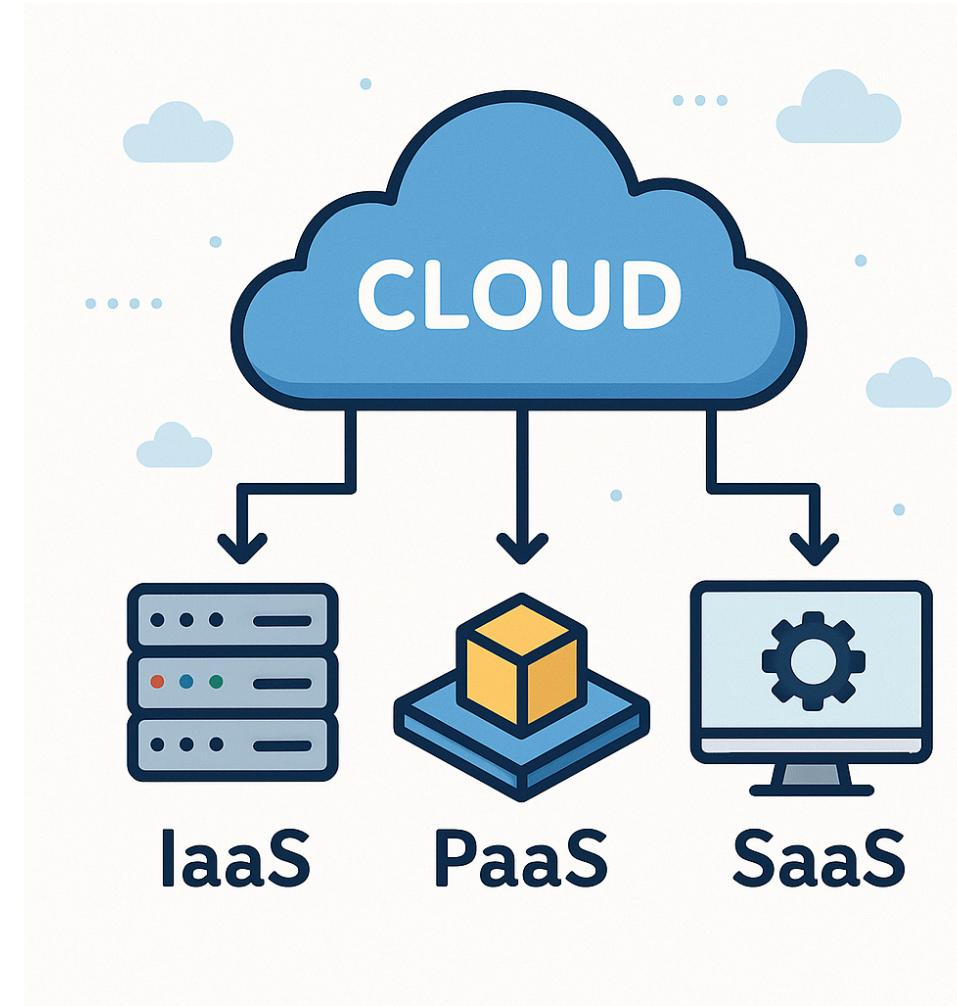
8

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”*

Data Processing Services

Examples (Recital 81)



IaaS: e.g. hosting

SaaS:

- Software solutions made available via the Internet
- Companies from a wide range of industries offer SaaS solutions
- AlaaS

Cloud switching: Data Processing Services

ACC Israel

Elements of the Definition (Recital 80)

1

Customer → B2C & B2B

2

Ubiquitous:

"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")

3

Rapidly provisioned and released

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."

4

Shared pool

*"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"*

16

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

ACC Israel

Elements of the Definition (Recital 80)

Rapidly provisioned and released & Scalable

Interpretation uncertain:

- Restrictive interpretation: The service must be immediately usable with minimal effort; substantial integration work would exclude the service from the Data Act's scope.
= supported by recent EU Commission FAQs and the Data Act's objective to reduce lock-in and promote competition

- Broad interpretation: Some integration work is common and does not exclude a service; the focus is on the ability to flexibly allocate resources after initial setup.
= Supported by the NIST definition and the intention to cover a wide range of cloud models / Digital Omnibus

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

Out-of-the-box SaaS solution	Custom-made (EU Commission's suggestion in its "Digital Omnibus")	Custom-built (Art. 31 Data Act)
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 usable for others without further adaptation. ➤ Distinct from "custom-built"	not offered at broad commercial scale via the provider's service catalogue
Always subject to the full scope of Chapter VI of the Data Act, including switching and interoperability requirements	Proposed "lighter" regime: <u>Exemption from most Chapter VI obligations for contracts concluded before 12 September 2025</u> (except for the obligation to reduce/remove switching and egress charges). Does not apply to IaaS models.	➤ Prohibition of switching charges does not apply ➤ Very limited interoperability obligations (open interface)

Obligations

Key Contractual Provisions:

- Initiation of cloud switching by customer (B2B & B2C): notice period of 2 months.
- Mandatory transitional period of max 30 days, extendable to max 7 months if technically unfeasible.
- Exhaustive specification of data and applications included in (and excluded from) the switch
- Minimum data retrieval period of 30 days from end of transitional period
- Disclosure of all data, including metadata, upon termination
- “Guarantee” of full erasure

Cooperation, Information and Transparency obligations:

- Good faith cooperation
- Information on switching and porting procedures, methods and formats, as well as restrictions and technical limitations
- Online register of all data structures and formats, as well relevant standards and open interoperability specifications, in which exportable data are available

Data Act: Switching data processing services

ACC Israel

Interoperability Obligations

Technical requirements:

- 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.

European Commission: Development of standards and specifications for interoperability

Switching charges:

- From 12 Jan. 2027: switching charges completely removed.
- Since 11 Jan 2024 until 12 Jan 2027: providers may impose reduced switching charges.

Termination
Fees affected?

1

ETSI (European Telecommunications Standards Institute) published its report ETSI TR 104 410, offering **standardisation proposals** to support Article 33 of the Data Act, which focuses on **interoperability requirements for data processing services**.

2

The report underscores the importance of **common technical and semantic standards** such as NGSI-LD, SAREF and oneM2M, to enable seamless data exchange across platforms.

3

Additionally, ETSI recommends **introducing quality and trust metrics**, including accuracy, integrity, and bias, to ensure reliable and trustworthy data sharing.

What happens in case of incompliance?

- Right (individual & company!) to lodge a complaint with
 - competent authority in the member state of habitual residence / place of work / establishment
- Penalties (effective, proportionate and dissuasive)
 - EU member states shall set out penalties
 - 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

National Implementation in Germany: Status and Key Features

ACC Israel

- On 20 October 2025, the German Federal Cabinet adopted the governmental draft bill for the national implementation of the EU Data Act.
- The draft law refrains from “gold-plating”
 - No additional national requirements beyond the EU Data Act.
- Federal Network Agency has already published guidance and seems to have set up a **portal for complaints** already (to be activated once the law enters into force).

National Implementation in Germany: Fines and Sanctions

ACC Israel

- **Coercive Fines:**
up to €500,000
- **Sanctions:**
 - Gatekeepers:
 - ✓ general maximum: €5 million
 - ✓ gatekeepers with worldwide turnover > €250 million: up to 2% of worldwide turnover or €5 million, whichever is higher
 - Connected Products: up to €500,000
 - Data Processing Services: up to €100,000.

➤ **Fines can go way beyond the aforementioned thresholds: fines must exceed any economic advantage gained, even above statutory maximums!**

Fines in other EU member states

ACC Israel

Examples

Country	Fines	Law adopted / draft
Netherlands	Up to €1,030,000 or 10% of annual turnover	National law adopted
Malta	Up to 5% of annual turnover if significant market effect; otherwise €350,000 per infringement and/or €12,000 per day;	National law adopted
Finland	Up to 4% of EU-wide turnover (previous financial year)	Governmental draft published
Czech Republic	Up to €20 million or 4% of global annual turnover	Framework law proposed

➤ All EU member states are obliged to implement the Data Act!

Why cloud providers need to take this into account now

ACC Israel

- Structure / repaper contracts appropriately.
- Pay attention to
 - the publication of interoperability standards by the Commission with regards to cloud services.
 - national legislation on penalties for violations of the Data Act.

Contact persons

Ariel Nachman
Simmons & Simmons, Milan

Lawyer | Partner | Head of Israeli Desk
Digital Business

DD +44 20 7825
Mobile +39 34 73474192
E ariel.nachman@simmons-simmons.com

Via Tommaso Grossi 2
20121 Milano



Christopher Götz, LL.M. (New York)
Simmons & Simmons, Munich

Lawyer & Attorney-at-Law (New York) | Partner
Digital Business

DD +49 89 2080 7763 32
Mobile +49 151 1624 4050
E christopher.goetz@simmons-simmons.com

Lehel Carré
Thierschplatz 6
80538 Munich





simmons-simmons.com

Strictly Private and Confidential

© Simmons & Simmons LLP and its licensors. All rights asserted and reserved. This document is for general guidance only. It does not contain definitive advice. Simmons & Simmons LLP is a limited liability partnership registered in England & Wales with number OC352713 and with its registered office and principal place of business at Citypoint, 1 Ropemaker Street, London EC2Y 9SS. It is authorised and regulated by the Solicitors Regulation Authority and its SRA ID number is 533587. The word "partner" refers to a member of Simmons & Simmons LLP or one of its affiliates, or an employee or consultant with equivalent standing. A list of members and other partners together with their professional qualifications is available for inspection at the above address.