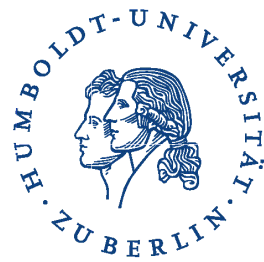


GRUR Expert Round Table – EU Data Act

## **Fairness in data sharing contracts**

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# **‘Fairness’ in the Impact Assessment**



- Fairness in B2B contracts plays a central role in the Impact Assessment**
  - \* Option 1: Enhance fairness, competitiveness and trustworthiness through codes of conduct on switching and porting**
  - \* Option 2: Fairness test for B2B standards clauses to prevent abuse of contractual imbalances**
  - \* Option 3: Fairness test for individually negotiated contracts to prevent abuse of contractual imbalances**
- Concept of fairness is not further specified**
  - \* Main source not published:**  
***European Commission (2021, forthcoming), Study on model contract terms, fairness test in B2B data sharing and cloud contracts and data access rights, ICF.***

# Option 1

## 5.2. Description of the policy options

### *Policy Option 1 – Non-binding measures encouraging wider and more efficient data sharing, use and processing among stakeholders*

To enhance fairness, competitiveness and trustworthiness of the EU market for data processing services, the Commission would encourage industry to present significant improvements to the existing Codes of Conduct on switching and porting in the cloud, answering better to the interests of cloud users. This would be supplemented by the adoption of voluntary standard contractual clauses to define and promote ‘switchability’<sup>110</sup>. The codes of conduct should be enlarged in scope to also incorporate measures on costs and technical interoperability. Any action on interoperability would remain non-binding. To raise trust in data processing services, voluntarily standard contractual clauses could be deployed to create a market standard on the specific legal, technical and operational safeguards that providers could implement to mitigate risks of experiencing conflict of law associated with the use of non-EU headquartered data processing providers.

# Option 1


**- Encouraging Codes of Conduct + standards terms**

**\* Promoting Codes of Conduct**



8.12.2021

Metzger




The UK's independent authority set up to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals.

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[Executive summary](#)

[Navigating the data sharing code](#)

[About this code](#)

[Data sharing covered by the code](#)

[Deciding to share data](#)

[Data sharing agreements](#)

[Data protection principles](#)

[Accountability](#)

[Fairness and transparency in data sharing](#)

[Lawfulness](#)

[Lawful basis for sharing personal data](#)

[Security](#)

[The rights of individuals](#)

[Law enforcement processing](#)

[Due diligence](#)

[Sharing personal data in](#)

### Information Commissioner's foreword

In 2011 the ICO published its first Data Sharing Code; in the intervening period the type and amount of data collected by organisations has changed enormously, as has the technology used to store and share it, and even the purposes for which it is used. It is imperative that we keep up to date with these developments through this new code.

As the UK Information Commissioner, I know that data is one of modern society's greatest assets. Ready access to information and knowledge, including about individual citizens, can lead to many economic and social benefits, including greater growth, technological innovations and the delivery of more efficient and targeted services.

We have written this Data Sharing Code to give individuals, businesses and organisations the confidence to share data in a fair, safe and transparent way in this changing landscape. This code will guide practitioners through the practical steps they need to take to share data while protecting people's privacy. We hope to dispel many of the misunderstandings about data sharing along the way.

I have seen first-hand how proportionate, targeted data sharing delivered at pace between organisations in the public, private and voluntary sectors has been crucial to supporting and protecting the most vulnerable during the response to the COVID-19 pandemic. Be it through the shielding programme for vulnerable people, or sharing of health data in the Test and Trace system. On a local and national level, data sharing has been pivotal to fast, efficient and effective delivery of pandemic responses.

Utilising the data we collectively hold and allowing it to be maximised properly will have economic benefits. Data sharing that engenders trust in how personal data is being used is a driver of innovation, competition, economic growth and greater choice for consumers and citizens. This is also true in the sphere of public service delivery where efficient sharing of data can improve insights, outcomes and increase options for recipients.

This code demonstrates that the legal framework is an enabler to responsible data sharing and



# Option 1

## **- Encouraging Codes of Conduct + standards terms**

- \* Promoting Codes of Conduct**
- \* 'Switchability', costs and technical interoperability**
- \* Voluntary usage of standard terms**
- \* Transparency for other market participants, regulators and academia**
- \* Specify B2B principles of Commission guidance of 2018? (transparency, minimised data lock-in, etc.)**
- \* Include elements from ALI-ELI Principles for a Data Economy?**
- \* Default rules as an additional element?**
- \* Smart contracts?**
- \* How to reach non-EU headquarter providers?**

# Option 2

## *Policy Option 2 – Rules on controlled data sharing with predictability on how data will be used*

### **To prevent abuse of contractual imbalances:**

- In addition to the model contract terms described under PO1, a contractual fairness test for B2B data sharing contracts limited to not individually negotiated contract terms<sup>111</sup> would prohibit unilaterally imposed unfair contractual terms. Model contracts terms and fairness tests are two different but complementary instruments<sup>112</sup>. The contractual fairness test would address all data sharing agreements, including where co-generated data is being shared.
- Product manufacturers and service providers would have transparency obligations to specify in their agreements with customers what data is likely to be generated by the product and the services and how it can be accessed by users of products and services. SMEs would be exempt from these obligations.



# Option 2

## - Fairness test for standard terms

- \* **Different justifications for testing standard terms:**
  - Older concept: protection of weaker party, imbalance of bargaining power
  - More recent concept: Akerlof market ('lemons')
  - Controversy over testing of B2B standard terms - only with clear indication for market failure
- \* **Testing standard terms in B2B-contracts?**
  - Protecting SMEs? Farmers? Other sectors?
  - B2B access to data - Akerlof market? Favourable conditions might be competitive advantage
  - What kind of clauses are unfair? Deviations from the Code of Conducts under Option 1?

# Option 3

*Policy Option 3 – Framework for opening up access to data to more innovative businesses and to public sector bodies in case of a clear public interest*

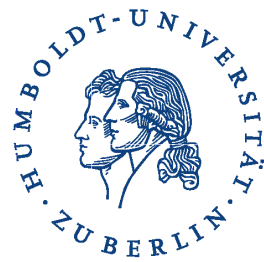
**To prevent abuse of contractual imbalances:**

- In addition to the voluntary model contract terms (as under PO1) the proposal would contain a fairness test (as under PO2), which would apply to all contractual terms on data access and use, i.e. also where the terms are individually negotiated.

# Option 3

## **- Fairness test for individually negotiated contracts**

- \* Justification for intervention is unclear**
  - Imbalance of bargaining power?**
  - Evidence for market failure has not been presented**
  - Is testing of contracts the appropriate means if parties do not enter into transactions?**
- \* What standards of fairness?**
  - Protecting SMEs? Farmers? Other sectors?**
  - Which scenarios constitute an imbalance of powers?**
  - Mezzanine level between competition law and freedom of contract? Example: Art. 6 h), I) DMA**



Brussels, 15.12.2020  
COM(2020) 842 final

2020/0374 (COD)

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on contestable and fair markets in the digital sector (Digital Markets Act)**

(Text with EEA relevance)

{SEC(2020) 437 final} - {SWD(2020) 363 final} - {SWD(2020) 364 final}

8.12.2021

Metzger

## *Article 6*

### *Obligations for gatekeepers susceptible of being further specified*

1. In respect of each of its core platform services identified pursuant to Article 3(7), a gatekeeper shall:
  - (h) provide effective portability of data generated through the activity of a business user or end user and shall, in particular, provide tools for end users to facilitate the exercise of data portability, in line with Regulation EU 2016/679, including by the provision of continuous and real-time access ;
  - (i) provide business users, or third parties authorised by a business user, free of charge, with effective, high-quality, continuous and real-time access and use of aggregated or non-aggregated data, that is provided for or generated in the context of the use of the relevant core platform services by those business users and the end users engaging with the products or services provided by those business users; for personal data, provide access and use only where directly connected with the use effectuated by the end user in respect of the products or services offered by the relevant business user through the relevant core platform service, and when the end user opts in to such sharing with a consent in the sense of the Regulation (EU) 2016/679; ;

# Conclusions

- **Contract law may contribute to make more data in the EU usable to support sustainable growth and innovation**
- **Justification for strong intervention is doubtful**
  - \* **Conceptionally + empirically, see also 'Summary Report'**
  - \* **Insufficient transactions may not be cured by fairness test**
  - \* **Mandatory access rights (Drexl) → FRAND**
- **Regulator should trigger transactions**
  - \* **Codes of conduct, standard terms (Option 1) preferable for the time being**
  - \* **Default rules should be considered as part of Option 1 or 2**