

Data Act – What impact on European SaaS startups and scaleups? France Digitale’s request for clarification

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As stated by the European Commission¹, the Data Act was introduced to give users access and control over data coming from their connected devices (IoT) or held in the cloud. France Digitale welcomes the Data Act’s ambition of putting an end to unfair contractual conditions and abusive vendor lock-in, especially in the cloud market, while also increasing legal certainty.

To our regret, however, **little more than a month after the entry into force of the Data Act, the interpretation of the regulation is far from clear** - and this, despite the welcome publication of official FAQs by the Commission².

Indeed, a certain reading³ of the regulation suggests that the Data Act applies to European Software-as-a-Service (SaaS) startups and scaleups (which are neither IoT nor cloud providers and which therefore are not the primary target of the new rules⁴). This, in turn, would challenge the existing fixed-term, renewable contracts their business model is based on.

In France alone, SaaS companies are the number one job creators in the startup ecosystem: in December 2024 they employed some 80 000 people (directly and indirectly), up 4.1% from the previous year⁵. Leading European scaleups in this field include France Digitale’s members Brevo, Mirakl, Potoroom, Ringover, Skeepers and many more.

Extending the scope of the Data Act to SaaS companies like the ones cited above could lead to **unwanted and unforeseen side effects on their competitiveness**, especially vis-à-vis non-EU competitors selling to customers outside of the Single Market. It would also negatively impact their ability to attract investors, finance innovation, and sustain the very business model that allows them to hire talents across the continent.

We gather below the questions and concerns of European SaaS startups and scaleups regarding the application of the Data Act:

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¹ <https://digital-strategy.ec.europa.eu/en/policies/data-act>

² <https://digital-strategy.ec.europa.eu/en/library/commission-publishes-frequently-asked-questions-about-data-act>

³ <https://www.twobirds.com/da/insights/2025/the-data-act-what-mandatory-switching-rights-mean-for-fixed-term-saas-models>

⁴ <https://digital-strategy.ec.europa.eu/en/library/impact-assessment-report-and-support-studies-accompanying-proposal-data-act>

⁵ motherbase.ai

1) SCOPE (ART. 2): SaaS companies operating independently of cloud infrastructure providers should remain outside of the scope of the Data Act

The first source of concern of European SaaS startups and scaleups is understanding whether the Data Act applies to them.

SaaS companies are neither cloud nor IoT providers: they sell software through a subscription (rather than a license) model. The question is therefore whether they fall in the Data Act definition of “data processing service”.

Art. 2(8) Data Act defines data processing services as “*digital services that are provided to a customer and that enable 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*”.

Recital 80 breaks down the elements of this definition, while keeping a technologically neutral and functional approach: the definition covers any digital service provided to a customer for data processing purposes, regardless of who owns or operates the underlying infrastructure.

The Commission [FAQs](#) further specify that “Articles 23-32 and 34-35 of the Data Act apply to providers of data processing services. The definition of a data processing service is laid down in Article 2(8) and mirrors common definitions **of cloud computing services**. The concept is designed to cover the popular delivery models - Infrastructure as a Service (IaaS), Platform as a service (PaaS) and **Software as a Service (SaaS)** - while also remaining open to technological innovation”.

This broad definition of “data processing service” seems therefore to make no distinction between SaaS services offered directly by cloud providers and those offered by third parties, like startups and scaleups. In practice, however, these actors are distinct.

While the Data Act has the stated aim of improving conditions in the cloud market, such wording raises a fundamental question: **Does the Data Act apply to SaaS offered directly by the cloud providers or also SaaS by third parties?**

This clarification is essential, as applying its provisions to all SaaS companies would extend the scope of the Data Act to the thousands of European startups and scaleups that are *customers* of cloud providers and sell SaaS solutions independently from them.

2) CONTRACTUAL TERMS CONCERNING SWITCHING (ART. 25): The Data Act should explicitly preserve the fundamental principle of fixed-term contracts

IF the Data Act also applies to SaaS companies operating independently of cloud infrastructure providers, this raises a number of questions on their ability to rely on auto-renewal and multi-year subscription contracts to sustain their business.

How does the business model of SaaS startups and scaleups work?

The business model of SaaS companies is based on selling software through subscriptions with auto-renewal or multi-years contracts, rather than one-time licenses. Customers pay regularly (monthly or annually) to use the service, creating recurring revenue.

This recurrence, measured by MRR (Monthly Recurring Revenue) or ARR (Annual Recurring Revenue), lies at the core of the model because it ensures financial predictability and sustainable growth as well as investment in innovation.

Investors particularly value ARR as it reflects customer loyalty and long-term business stability. Moreover, this model encourages companies to focus on customer satisfaction and retention, since every churn directly reduces ARR. Ultimately, ARR serves as a key performance indicator, guiding decisions on subscription growth, customer churn, and upselling opportunities.

However, when SaaS companies lose the ability to reliably forecast their ARR, it undermines investor confidence and puts at risk future investments in particular into R&D and innovation. More broadly, European startups and scaleups depend on predictable growth to sustain their valuation.

In light of this business model, the obligations related to contractual terms by providers of “data processing services” in art. 25 Data Act are a source of concern.

In particular, art. 25(2)(c) establishes that contracts shall include *“a clause specifying that the contract shall be considered to be terminated and the customer shall be notified of the termination, in one of the following cases:*

- (i) where applicable, upon the successful completion of the switching process;*
- (ii) at the end of the maximum notice period referred to in paragraph (d), where the customer does not wish to switch but to erase its exportable data and digital assets upon service termination”.*

Art. 25(d) adds that contracts shall include *“a maximum notice period for initiation of the switching process, which shall not exceed two months;”.*

These two provisions seem to suggest that all contracts may be terminated within two months, which is incompatible with fixed-term contracts SaaS companies rely on.

At the same time, Recital 89 seems to explicitly allow fixed-term contracts: "[...] Nothing in this Regulation prevents a customer from compensating third-party entities for support in the migration process or parties from agreeing on contracts for data processing services of a fixed duration, including proportionate early termination penalties to cover the early termination of such contracts, in accordance with Union or national law. In order to foster competition, the gradual withdrawal of the charges associated with switching between different providers of data processing services should specifically include data egress charges imposed by a provider of data processing services on a customer. Standard service fees for the provision of the data processing services themselves are not switching charges. Those standard service fees are not subject to withdrawal and remain applicable until the contract for the provision of the relevant services ceases to apply. [...]".

In light of these elements the fundamental question is therefore: **Are fixed-term contracts still allowed under the Data Act, as suggested by recital 89?**

Should this not be the case, the consequences would be massive. The contractual changes required by the Data Act would make it impossible for startups and scaleups to accurately forecast Annual Recurring Revenue (ARR), undermining the SaaS business model and, as a result, weaken SaaS startups and scaleups' capacity to attract investment and sustain their market valuation.

Imposing these rules on SaaS startups and scaleups would also be disproportionate: the main aim of these rules is to enable cloud switching and data portability, which SaaS startups and scaleups already provide to their customers.

How do SaaS startups and scaleups enable switching?

SaaS companies have a strong incentive to make their clients as autonomous as possible. The more self-sufficient users are, the lower the support and maintenance costs for the provider, thanks to the industrialization and automation of processes. This operational efficiency is a core advantage of the SaaS model. As a result, most SaaS platforms are designed to give customers broad autonomy in managing and exporting their own data, offering built-in tools and interfaces that allow them to retrieve information independently, without requiring manual intervention from the provider. This approach not only reduces operating costs but also reinforces transparency and trust between the SaaS company and its clients.

Art. 25 (3) further establishes that "The contract referred to in paragraph 1 shall include clauses providing that the customer may notify the provider of data processing services of its decision to perform one or more of the following actions upon termination of the maximum notice period referred to in paragraph 2, point (d):

- (a) switch to a different provider of data processing services, in which case the customer shall provide the necessary details of that provider;
- (b) switch to an on-premises ICT infrastructure;
- (c) erase its exportable data and digital assets."

These obligations raise a number of questions on how customers' right of termination shall operate in practice, in particular:

- **Does the Data Act create a general right of termination, or only a conditional right — for instance, when a customer wishes to switch providers or request the deletion of its data?**
- **Must the customer justify its termination request in such cases?**
- **And if the customer neither switches providers nor provides a justification, can the provider refuse termination?**

3) GRADUAL WITHDRAWAL OF SWITCHING CHARGES (ART 29): the scope and calculation of early termination penalties should be clarified

Art. 29(4) establishes that *"Before entering into a contract with a customer, providers of data processing services shall provide the prospective customer with clear information on the standard service fees and early termination penalties that might be imposed [...]".*

This raises a legitimate **concern about the legal enforceability and fairness of introducing penalties retroactively or without prior disclosure**. If penalties were not previously mentioned in the contract or general terms and conditions, their application could be challenged on several grounds:

- Lack of prior information: Clients must be informed of all financial consequences at the time of contract formation. Introducing penalties later could be seen as unfair or abusive.
- Transparency requirement: The Data Act and other EU regulations (like the Digital Services Act) emphasize clear, accessible, and upfront disclosure of all terms, especially those with financial impact.
- Barrier to exit: If penalties are applied in a way that discourages termination or switching providers, they may be considered a barrier to exit, which is explicitly prohibited under the Data Act.
- Implementation risk: Without a clear contractual basis, enforcing such penalties could expose the provider to legal disputes or reputational risks.

Even if penalties can be introduced, **it is unclear how they should be calculated**. As indicated by Recital 89, early termination penalties must be "proportionate", but this notion remains up to interpretation.

Legal doctrine identifies two main approaches: The broad approach allows the provider to recover all remaining fees until the initial contract term, preserving SaaS recurring revenue (ARR) even if the client leaves early.

The strict approach, more consistent with the Data Act's spirit and Article 23, limits penalties to the actual net loss, after deducting avoided costs (e.g. hosting, support).

- **Which approach to penalties should be retained in practice?**

- **Does the notion of proportionality mean that the service provider has the right to apply a penalty amount equal to the committed value (licenses + consumables) for the remaining duration of the contract?**

The case of success-based pricing

For some SaaS startups and scaleups, a large part of the pricing is success-based, making it difficult to anticipate or quantify the revenue that would have been earned if the client had not switched.

This raises a practical issue: how to calculate a fair penalty when a significant portion of income depends on unpredictable transaction volumes?

In such situations, the success-fee component may need to be excluded from any penalty calculation, since it is non-anticipable and speculative leaving only the fixed, committed portion of the contract as a possible reference for assessing loss.

Moreover, it is also unclear which fees may be accounted for:

- **What happens if these fees are included in an annual package or not clearly separated?**
- **Is it safe to assume that such early termination penalties will not be considered barriers to exit?**
- **Can specific development fees be retained, or must they be reimbursed in the event of early termination?**
- **Is it possible to include in the penalties the cost of personalized development that were offered or discounted at the time of contract execution?**

The case of usage-based pricing

Several SaaS startups and scaleups operate on a combination of license fees and usage-based assets. The annual fee for accessing the solution remains fixed, regardless of whether the client fully utilizes their allocated assets during the year.

However, the Data Act introduces a new challenge: what happens if a client decides to terminate the agreement after having already consumed all their available assets for the year?

In such a scenario, the client would have benefited from the full value of the solution, based on predictable usage, under an annual pricing model.

Yet, the Data Act may require SaaS startups and scaleups to reimburse part of the fees, as retaining the full annual amount could be interpreted as a barrier to contract termination, which is discouraged under the regulation. How can the rights and legitimate interest of the two parties be respected in this case?



About France Digitale: Founded in 2012, France Digitale is the largest startup association in Europe, bringing together over 2000 startups and investors (venture capitalists and business angels). The association's goal is to help build Europe's future tech champions by raising the voice of those who innovate to change the face of the world.

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