

Multi-Cloud Services:

OFCOM and European Commission Diverge on Proposed Measures to Regulate the Cloud Infrastructure Market

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Telecoms Sector Group



OFCOM and European Commission Diverge on Cloud Infrastructure Market

On 14th July, the European Council confirmed that the draft compromise text for the European Data Act ("EU Data Act") was agreed by the Permanent Representative Committee following the agreement reached between the European Parliament and the Council of the EU on 28th June. The EU Data Act aims to boost the EU's data economy by, among other things, unlocking industrial data (and optimising its accessibility and use), facilitating switching between cloud and edge services and fostering a competitive and reliable European cloud services market.

In a related development, OFCOM has provisionally proposed to refer the cloud infrastructure services market to the Competition and Markets Authority to carry out a market investigation. OFCOM published its initial findings as part of its market study into public cloud services. The initial conclusions were that there were features of the cloud infrastructure services market that impeded competition in the UK (and that the market for cloud infrastructure services is currently heavily concentrated in the UK with AWS and Azure being the pre-eminent providers).

In this article, we assess some of OFCOM's main findings in respect of the cloud infrastructure services market, what the potential impact would be of OFCOM's proposed interventions and how the EU's Data Act is likely to impact switching between cloud infrastructure providers.

Market features impeding multi-cloud strategies

OFCOM highlighted three features of the cloud infrastructure market that have the potential to make it more difficult for customers to switch and use multiple cloud infrastructure providers:

- **Data Transfer ("egress") fees** – charges that customers pay to transfer their data out of a cloud provider's infrastructure;
- **Technical restrictions on interoperability** – practices adopted by the major infrastructure providers that result in considerable effort required by customers to reconfigure their applications and data to work on alternative cloud infrastructure platforms; and
- **Committed spend discounts** – OFCOM argues that the structure of these discounts can incentivise a customer to remain with a single cloud infrastructure provider.

What approaches are OFCOM and the European Commission taking in terms of market interventions?

Data Transfer Fees

OFCOM proposed three potential market interventions in respect of data transfer fees:

- **Equalise data transfer fees with other charges:** one idea OFCOM proposed is to set data transfer charges at a rate that is no higher than the price of internal data transfers within a particular cloud service (with the objective that customers would face the same cost for a data transfer whether they are moving data between clouds or within the cloud infrastructure of a single provider);
- **Place price controls on data transfer fees "at cost":** under this proposed approach cloud providers would be able to recover the costs of providing the infrastructure and management associated with transferring a customer's data (customers who transfer the most data would be charged in accordance with their usage rather than being subsidised by others); and

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- **Prevent providers from charging for data egress:** an additional idea that is under consideration is an outright prohibition on providers charging for data egress activities (similar measures to prevent or reduce data egress fees are being considered by the Dutch competition authority and under Article 25 of the EU Data Act – see discussion below). However, this proposal may cause significant adverse impacts as providers would need to recover the costs of providing data transfer services from other charges leading to a potential "waterbed" effect on those other charges.

Article 25 of the EU Data Act proposes a gradual removal of data transfer charges from the market (with no charges being recoverable once three years has elapsed from the EU Data Act coming into effect). Until that time, providers may levy reduced charges in respect of the switching process provided that the charges do not exceed the costs incurred by the provider of data processing services that are directly linked to the switching process.

The European Commission will also have the power to adopt delegated acts (in accordance with Article 38 of the EU Data Act) in order to introduce a monitoring mechanism for the Commission to monitor switching charges imposed by data processing service providers on the market to ensure that the withdrawal of switching charges happens within three years of the EU Data Act coming into effect.

Technical restrictions on interoperability

One of the issues OFCOM highlighted was that some larger players had deployed proprietary cloud technologies when building upon open-source software and open standards. In some instances, providers had initially built their cloud services on open cloud technologies (e.g. open standards and open APIs) but then tweaked them (for example, changing some parts of the APIs, or changing certain features or functionalities) with the result that customers using these services had to rewrite some of their code if they wished to switch cloud providers.

OFCOM proposed three potential interventions in respect of interoperability:

- **Requirements for providers to be more transparent about the interoperability of their services:** this may include requiring the major providers to provide documentation to explain the compatibility of their cloud infrastructure services with open source software;
- **Requirements to make first-party services easier to interoperate with third-party services:** this includes a requirement to make the individual elements of a provider's cloud infrastructure services available to use with those of other providers. There may also be a further requirement for cloud providers to "open up" their cloud infrastructure services by opening up the APIs and/or protocols associated with them; and
- **Standardisation of cloud technologies:** OFCOM has highlighted that the lack of standardised cloud technologies associated with interoperability and application and data portability has been a barrier to switching and integrating multiple clouds. The high-level proposal is to increase support for existing industry standards and open-source software and potentially mandate the use of specific standards (although this is fraught with risk and it is not clear which technical aspects of cloud infrastructure services ought to be subject to standardisation).

Article 26 of the EU Data Act proposes a two-tier classification system whereby certain providers¹ are only required to provide functional equivalence when a customer switches to a new provider. Providers that do not fall within this first category are required to:

- make open interfaces publicly available and free of charge;
- ensure compatibility with open interoperability specifications or European standards for interoperability that are identified in accordance with Article 29(5) of the EU Data Act; or
- where the open interoperability specifications or European standards referred to above do not exist for the service type concerned, at the request of the customer, export all data generated or co-generated, including the relevant data formats and data structures, in a structured, commonly used and machine-readable format.

¹ Providers of data processing services that concern scalable and elastic computing resources limited to infrastructural elements such as servers, networks and the virtual resources necessary for operating the infrastructure, but that do not provide access to the operating services, software and applications that are stored, otherwise processed, or deployed on those infrastructural elements.

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These provisions appear, at first glance, to be a welcome step-forward in terms of interoperability of cloud infrastructure services. However, it is not clear as to which cloud infrastructure providers would fall within the first category (i.e. those providers that do not provide access to the operating services, software and applications that are stored, otherwise processed, or deployed on cloud services infrastructure).

The EU Data Act also proposes minimum contract terms relating to switching:

- clauses allowing the customer, upon request, to switch to a data processing service offered by another provider or to port all data, applications and digital assets generated directly or indirectly by the customer to an on-premise system, within a mandatory maximum transition period of 30 calendar days, during which the data processing service provider shall:
 - assist and complete (where technically feasible) the switching process; and
 - ensure full continuity in the provision of the respective functions or services,
- an exhaustive specification of all data and application categories exportable during the switching process, including, as a minimum, all data imported by the customer at the inception of the service agreement and all data and metadata created by the customer and by the use of the service during the service period including, but not limited to, configuration parameters, security settings, access rights and access logs to the service; and
- a minimum period for data retrieval of at least 30 calendar days, starting after the termination of the transition period that was agreed between the customer and the service provider.

Committed Spend Discounts

Committed Spend Discounts involve a customer agreeing to spend a certain amount of money on a cloud provider's products over a set period of time. By way of example, since 2009 AWS has offered a pricing model called "reserved instances" whereby, in exchange for an upfront commitment of between one to three years, customers can obtain savings of between 30% to 70% on cloud services bills (when compared to the existing on-demand rates). This has obvious commercial advantages and means that a customer's use of EC2 can extend

beyond short-term projects. Reserved instances can be paid upfront fully, partially or in arrears with the level of savings varying with the increase in up-front commitment.

In addition, a customer could also decide to benefit from AWS Savings Plans which require a commitment in terms of minimum spend per hour over a period of a number of years. Any spend that is within the minimum committed amount will be charged at a significant discount (typically between 65-70%) whereas any spend in excess of the minimum committed amount is charged at on-demand rates.

One intervention OFCOM considers is to seek to prohibit or restrict certain discount structures where there is a risk that these discount structures are distorting competition. However, there is a recognition that these discount structures are generally a positive feature of markets as they can promote competition between providers and have some positive efficiency outcomes (e.g. they help providers to achieve scale and promote investment certainty).

The views of cloud infrastructure providers are that committed spend discounts give them more certainty in terms of investment decisions relating to planning and acquiring necessary data centre capacity and infrastructure, and thereby provide a better customer experience at lower expense by reducing data centre hardware costs, improving operational efficiencies, and lowering power consumption.

What are the next steps?

OFCOM's provisional view is that a market investigation reference is the most appropriate tool to address its concerns in relation to the potentially anti-competitive features that are summarised above. OFCOM will issue a final decision on a market investigation reference alongside its market study final report which will be published no later than 5 October 2023.



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