SKW Schwarz

Cloud Switching in German SaaS Contracts

Guidance for International SaaS Providers

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Executive Summary

International SaaS providers operating in Germany must align their contractual terms with the Data Act and German law by focusing on data portability, defensible fee models and clearly structured exit provisions. Statutory rules and market standards, although they deviate from international contractual practice, are regularly required once a certain contract volume is reached and are supported by court decisions.

1. Market Context for International Providers

German SaaS contract negotiations have changed materially for international providers. Global standard terms increasingly meet resistance from sophisticated German customers, in particular where they do not sufficiently reflect mandatory requirements of German contract law and established market practice. Customers expect a credible, operationally viable and contractually anchored exit concept. In practice, the treatment of fees remains the most sensitive issue.

2. Applicability of the Data Act to SaaS

The cloud switching rules of the EU Data Act apply to providers of data processing services. The statutory definition is broad and refers to on-demand network access to a shared pool of configurable, scalable and elastic computing resources that can be rapidly provisioned and released with minimal management effort or provider interaction.

Many SaaS offerings are likely to fall within scope, in particular standard multi-tenant solutions that continuously store and process customer data on an ongoing basis. In borderline cases, qualification depends on the operational characteristics of the service and the way computing resources are made available to the customer. From a practical and legal perspective, certain SaaS models might justify a differentiated assessment. Under the Data Act, the regulatory focus lies on data portability and switching capability, not on functional equivalence or product portability.

3. Fees under the Data Act: Switching Charges and Early Termination Fees

The Data Act draws a clear distinction between switching charges and early termination fees. Switching charges relate to the switching process itself, in particular data export and technical transition support. From 12 January 2027 onwards, providers must not impose switching charges. Until then, reduced charges may apply, but they must be limited to costs directly linked to the switching process and remain transparent.

The Data Act has applied since 12 September 2025. The phase-out mechanism for switching charges is defined by the Data Act as part of a transitional regime. In practice, providers should ensure that any switching-related charges applied since the application date are defensible on a direct cost basis.

Early termination fees remain legally possible but face increasing scrutiny in German contract practice. German customers increasingly challenge termination mechanisms that are primarily designed to secure future turnover or that assume continued contract performance as a given, in particular where such mechanisms conflict with German principles of contractual fairness and proportionality.

Early termination models based on a fixed percentage of remaining contract value are therefore increasingly challenged. German market practice expects a clear distinction between revenue expectations and recoverable investments. Termination fees are more likely to be accepted where they compensate for identifiable, non-amortized costs incurred in reliance on the agreed minimum term.

4. German Market Practice and Unfair Terms Control

Under German law, international providers face a particular challenge due to the statutory regime of unfair terms control, which is strictly applied by German courts also in B2B settings (§§ 305 et seq. German Civil Code). Termination clauses that primarily function as lock-in mechanisms rather than compensation for concrete economic exposure therefore risk of being invalid and unenforceable.

German market practice reflects this approach. Termination fees are accepted where they reflect genuine, non-amortized investments, such as discounted minimum terms, upfront onboarding or customer-specific implementation efforts. Flat penalties tied to remaining contract value are increasingly rejected. Data export in structured and commonly used formats is expected as part of an operationally workable exit process and not to be monetized separately.

Invalid standard terms are void without replacement. Where fee mechanisms for switching charges and early termination fees are not clearly separated, the invalidity of one element may affect the enforceability of the overall fee structure. This reinforces the need to structure switching and termination fees as legally independent and robust mechanisms.

In practice, this increases the importance of clearly distinguishing Data Act related switching obligations from termination related compensation mechanisms and of structuring fee clauses so that each element remains enforceable on a standalone basis.

5. Existing SaaS Contracts and Renewal Practice

The Data Act does not automatically rewrite existing contracts. Renewals and extensions are, however, key trigger points for alignment discussions. Customers regularly seek to reflect Data Act switching concepts in updated terms. Long-term contracts, particularly those extending beyond 12 September 2027, are increasingly reviewed against Data Act fairness requirements, taking into account German concepts of contractual balance and reasonableness. Providers who address cloud switching proactively tend to reduce friction and avoid ad hoc renegotiations.

6. Contracting Takeaways for International SaaS Providers

Explicit cloud switching provisions: German SaaS agreements increasingly require explicit cloud switching provisions rather than reliance on general termination rights. Customers in Germany expect a clear contractual narrative that explains how switching operates in practice and how regulatory requirements under the Data Act are implemented.

Data exit as the regulatory baseline: Cloud switching is, at its core, a data exit concept. Data export constitutes the regulatory baseline and must apply independently of the reason for termination and any associated termination fee. Mandatory switching services should therefore be defined narrowly and limited to what is required for data portability, with structured data export and basic transition support forming part of the core obligation, while complex migrations into third-party systems or extensive data transformations are addressed separately as optional professional services.

Fee discipline: Switching-related charges should be limited to demonstrable direct costs during the transitional phase and structured to fall away in line with the prohibition from 12 January 2027. Early termination fees should be clearly separated from switching obligations and designed to compensate concrete economic exposure, such as non-amortized onboarding or implementation efforts, rather than to secure future revenue or replicate remaining contract value.

Structural clarity: Cloud switching provisions are best anchored in a dedicated contractual section or annex. This supports a coherent and transparent exit concept without overloading core commercial terms and helps ensure consistency across Legal, Sales and Product.

Key Takeaway

International SaaS providers regularly face challenges when aligning global standard terms with Data Act requirements, German AGB control and established market practice. Our IT practice advises international SaaS providers on reviewing and adapting SaaS contracts, structuring compliant term sheets and addressing cloud switching issues in German customer negotiations.

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