



# Cloud Legal Considerations

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A brief examination of some of the legal considerations relating to the delivery of Cloud Services or Managed Services. This briefing provides a Top Ten of areas for consideration and questions to ask broken down for both service providers and customers.

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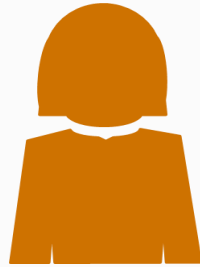
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# Clarifying your Thoughts? Before you begin ...

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## Service Provider

- 1) Why do we want to provide a Cloud or Managed Service?
- 2) What commercial gain are we seeking?
- 3) What legal risks will we be assuming?
- 4) How will we address the risks my potential customers will perceive?



## Customer

- 1) Why do we want to engage a Cloud or Managed Service Provider?
- 2) What commercial gain are we seeking?
- 3) What legal risks does the Cloud or Managed Service present?
  - Location of my data
  - Security of my data
  - Integrity of my data
  - Business continuity
  - Compliance
  - ...

# #1 – SUPPLIER DUE DILIGENCE

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## Service Provider

Questions to ask yourself & prepare for:

- Who actually are we? What is our ownership structure? Have we explained this well enough for potential customers?
- Where are we incorporated? Can we produce this easily?
- How deep are our pockets? Are we insured? To what level?
- What is our jurisdictional accountability?
- Do we have any sub-contracts? Are we priming for someone else? Have we a comprehensive list of all out third party agreements? Have we checked their insurances?
- Have we got references? Are they willing to talk and meet with potential customers? What are they likely to say about our services?
- Should we engage external legal counsel or retain internally? What if the customer engages counsel – am we prepared for that?



## Customer

Questions customers often ask of Cloud or Manager Service Providers:

- Who actually are you?
- Where are you incorporated?
- How deep are your pockets?
- What is your jurisdictional accountability?
- Do you have sub-contracts? Are you simply priming for someone else?
- What is your ownership structure?
- Have you references? Can we speak to your references?
- Should we engage external legal counsel for:
  - A legal opinion?
  - To develop guarantees?
  - To understand what other comfort items we should consider?

## #2 – CONTRACTUAL TERMS

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### Service Provider

Questions to ask yourself & prepare for:

- Should we prepare standard terms and conditions? Am we willing to move on these at all? What are the implications if we do so?
- What level of capability should we offer for customers to self-service?
- How much flexibility am we willing to offer in terms of terminations?
- What warranties should we offer?
- Have we worked out a specific set of service levels? Are they appealing? Will they resonate?
- What data security obligations should we take on?
- Have we a robust disaster recovery plan? Are my business continuity capabilities tested and proven? How often should we test my recovery and continuity capabilities?
- Will we offer complete usage flexibility? Up and down?
- Have we planned and costed sufficient exit support? Have we documented what this is? Should we standardise this?



### Customer

Questions customers often ask of Cloud or Manager Service Providers:

- Cloud is now a commodity service, even some managed services are commodity – what does this mean for me? Do we have to accept standardised/commoditised terms?
- What level of control and flexibility do we need to retain?
- What capability do we have to achieve change or modification? Do we have enough stick?
- If we need to can we get out easily?
- What warranties are they offering?
- What service levels?
- What level of liability?
- Have they sufficient data security capabilities?
- What are their disaster recovery and business continuity plans?
- Are they truly offering Cloud flexibility or is it a managed service where the only way is up?
- What exist planning have they undergone? How much help will we get to transition out?

# #3 – COUNTERPARTY RISK

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## Service Provider

Questions to ask yourself & prepare for:

- Is our service fully described? Are our third parties reputable? Have we identified the entirety of the supply chain? Do we understand all the links, integrations and hand-offs?
- Do we fully understand any flow ups? Have we fully flowed down all the appropriate requirements and terms?
- Do we have answers when asked why, how, who and what they do?
- Can we clearly articulate what happens if we are taken over? Is it our intent to sell?
- How are tenancies segregated? Is it demonstrable that cross-contamination or data mingling cannot occur? Are our processes and procedures clear and published?



## Customer

Questions customers often ask of Cloud or Manager Service Providers:

- Who is actually providing the Cloud or Managed service? Have they subcontractors? Are those subcontractors clear on their obligations?
- Are they flowing my terms down to their subcontractors?
- Are they likely to want to flow terms up from the subcontractor to me?
- In either case do we really care?
- What happens if my third party is purchased? Or divested? What happens to my rights and their obligations then?
- Is it a concern to me if my direct competitors also acquire services from my service provider? For instance, what propensity is there for data to be accidentally mingled?

## #4 – AUDIT & COMPLIANCE

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### Service Provider

Questions to ask yourself & prepare for:

- Are we compliant with the DPA act? Can we demonstrate how we have implemented in accordance with the guidelines?
- What is our position on taxation? Especially for ecommerce? Have we a position? Can we articulate it?
- How can we comply to evidentiary requests? What forensic processes and procedures are in place? Can we act swiftly for competition investigations? What impact could a raid have across our customer base? Can we articulate them?
- What is our standard data retention policy? Can we deviate from this? Have we built the necessary flexibility?
- Are we monitoring for money laundering? Do we need to have an AML policy?



### Customer

Questions customers often ask of Cloud or Manager Service Providers:

- Is the service provider compliant with:
  - DPA
  - Tax
  - Competition
  - Our data retention requirements
  - National security
  - Anti-Money Laundering (AML)
- Do they have any jurisdictional exposures?
- Can we know precisely where our data is? Who precisely can have access to it?
- Can our regulators access what they need efficiently and effectively?
- Can they demonstrate these things?

# #5 – INSURANCES

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## Service Provider

Questions to ask yourself & prepare for:

- Have we adequate insurance provision?
- Who is it with?
- Does it cover data loss?
- Does it cover other third party claims?
- Does it account for multi-tenanted services?



## Customer

Questions customers often ask of Cloud or Manager Service Providers:

- Are we adequately covered & insured?
- How does a Cloud or Managed Service provision impact our insurance coverage? Does it affect it?
- Is the Cloud or Managed Service provider adequately covered? Do they have coverage for data loss?
- Are they covered for third party claims arising from use of the Cloud or Managed service?
- Do they have coverage for other risks?



## #6 – INTEROPERABILITY

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### Service Provider

Questions to ask yourself & prepare for:

- Have we any provision for Cloud or Managed Service interoperability?
- Can this be achieved easily or with major effort?
- Is it subject to change control or is it something we want to offer openly?
- Is our technology implementation capable of doing this?
- Is it supportable?
- Is it going to become a “must have” in the future?
- Will it enhance our stickiness or reduce it?
- Will it enhance our appeal to new customers?
- If we are enabling it how are we doing it? Have we adequately documented and described this aspect of the service?



### Customer

Questions customers often ask of Cloud or Manager Service Providers:

- Can the service interoperate easily or at all with our systems? How is this achieved?
- Can other partner organisations leverage our Cloud or Managed Services provision?
- What if they have a Cloud – can the two Cloud be linked?
- Is being able to interoperate between Clouds going to be important to us?
- Does our contract support interoperability?

# #7 – VENDOR LOCK-IN

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## Service Provider

Questions to ask yourself & prepare for:

- How flexible are we on exiting the service?
- Have we developed a standard exit plan?
- Have we adequately documented this and do we make it clear to prospective consumers that we have it?
- Are we willing to help their new provider? To what extent?
- Do we test exit plans?
- What is our experience of exit to date? Do we have references for the efficacy of exit support?
- Are we worried about ‘wounded animals’?
- How do we link exit planning to change management?



## Customer

Questions customers often ask of Cloud or Manager Service Providers:

- How easily could we exit the Cloud or Managed Service?
- What planning has the service provider put into this? Do they have a standard approach? Is it priced into the service or is it extra? What boundaries have they put on it?
- Has the service provider produced an exit plan? Does it hold water? What are the demarcations? Do we have sufficient access and capability to execute the plan?
- Will the service provider work with our new provider?
- Can the service provider execute on the plan?
- Will the plan be regularly tested?
- How will the plan be integrated into change management as the service changes over time?
- Will this be tested?

# #8 – DATA SECURITY

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## Service Provider

Questions to ask yourself & prepare for:

- What precisely are our processes, procedures and technology implementations to support the DPA processor requirements? Are they documented?
- Should/do we subscribe to external audits, tests or certifications of our capabilities?
- What help do we provide controllers to understand their obligations?
- Can we demonstrate the effectiveness of our implementation?
- Do we enable controllers to access logs and records when they need to or constantly?
- What support do we provide to controllers regulators? Have we references for this? Will they talk or meet with prospective customers?



## Customer

Questions customers often ask of Cloud or Manager Service Providers:

- Does the vendor comply with the DPA?
- Have they adequate processes and procedures in place for:
  - Unauthorised processing
  - Unlawful processing
  - Destruction of data
  - Damage to data
  - Access controls
- Can they demonstrate these processes?
- Have they ever been hacked?
- Do they support or instigate regular ethical hacking?
- As a controller are we comfortable with the service providers processing capabilities?
- What guarantees are in place by the processor? Can they provide the requisite documentation?

# #9 – DATA RETENTION

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## Service Provider

Questions to ask yourself & prepare for:

- How are we/have we implemented data retention?
- How long can we retain data?
- How easily can retained data be retrieved?
- What processes are available? Is there self-service for archived data or is it manual?
- Have we documented our implementation sufficiently?
- Do we understand sector differences in retention requirements? Can we meet the needs of these sectors?



## Customer

Questions customers often ask of Cloud or Manager Service Providers:

- Do we understand and have we documented why we require data retention?
- Have we isolated specific requirements for our:
  - Transactional record keeping
  - Customers' contractual requirements
  - Dispute resolution
  - Forensics
  - Compliance
  - Industry regulation
  - Competition oversight
- Can these requirements be met by the service provider?
- How are they meeting these requirements?
- What medium do they use?
- What are their data loss mitigation strategies?

# #10 – DATA LOCATION

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## Service Provider

Questions to ask yourself & prepare for:

- Are we supplying an EEA compliant service?
- Are we local to our country?
- Are we fully compliant with the DPA requirements?
- Can we demonstrate this?
- Have we fully documented data location decision, procedures, processes and technologies?



## Customer

Questions customers often ask of Cloud or Manager Service Providers:

- The DPA is clear that “personal data shall not be transferred to a country outside of the EEA unless that country provides an adequate level of protection for the rights and freedoms of data subjects” - Do we understand precisely where, location wise, the service provider keeps data?
- Does it involve exporting of data?
- Have they carried out EU/EEA testing of that country?
- Why has the service provider chosen to export the data?
- Are they flexible on the location – could they comply to locate data within our country?

## Further Reading

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[http://www.ico.org.uk/for\\_organisations/data\\_protection/topic\\_guides/online/~media/documents/library/Data\\_Protection/Practical\\_application/cloud\\_computing\\_guidance\\_for\\_organisations.ashx](http://www.ico.org.uk/for_organisations/data_protection/topic_guides/online/~/media/documents/library/Data_Protection/Practical_application/cloud_computing_guidance_for_organisations.ashx)

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