

FGO

DSC – Data flows and rights of use

1 Introduction¹

- 1.1 Recognising that information (data) will be at the core of the DSC, this note outlines ways to approach data – including data use – under the DSC, covering intellectual property rights, confidentiality and data privacy and security.² The details would need to be developed if this approach is adopted.³ This note considers some possible ways of approach, but it is not exhaustive; and others could be considered.
- 1.2 The DSC will address the data flow-associated rights and obligations arising between Customers (Transporters, Shippers) and the CDSP. So, for example, the DSC is not expected to address the position as between Customers (which will continue to be governed by Paragraph 5 (*Information and Confidentiality*) of Section V (*General*) of the UNC in the normal way).

2 Data types

- 2.1 DCS data flows largely concern the following data types:
- (a) **Services Data** (these are data processed in line with the Services Description – so, any data processed by the CDSP for the purpose of *providing* – or processed by any Customer for the purpose of *receiving* – any of the Services set out in the Services Description) – examples include:
 - (i) supply point data;
 - (ii) MPRNs;
 - (iii) metering data;
 - (iv) volume data
 - (v) end user data (postal addresses, other contact details, etc.);
 - (b) **Contract Data** (these are contract management, reporting and governance data) – examples include:
 - (i) performance data;
 - (ii) CDSP charges billing data;
 - (iii) periodic and specific reports generated by the CDSP;
 - (iv) minutes of governance meetings;
 - (c) **Party Data** (these are data (not being Services Data or Contract Data) that "belong" (whether owned by or licensed) to a party to the DSC – including a party's corporate data, back office data and similar data, also including personal data of a party's staff (names and roles) who are involved in implementing the DSC (although such personal data are less likely to be of biographical significance):
 - (i) **Customer Data** (these are Party Data of a Customer);

¹ As its subject matter is legal in nature, we recommend this paper is reviewed by each Customer's legal team.

² Such matters are currently addressed in Part 5 of the ASA.

³ *General DSC liabilities, including limits and exclusions, are the subject of a separate paper.*

- (ii) **CDSP Data** (these are Party Data of the CDSP) – for example, these include third party data (so, data received from anyone other than Customers, which are processed by the CDSP for (among other things) the purpose of performing its obligations and exercising its rights under the DSC).

3 Rights of use

3.1 Intellectual property – ownership and licensing

- (a) Inevitably, with lots of data flowing under the DSC, questions will arise around intellectual property, including: *who "owns" – or has other rights to use – which data?*

- (b) **Services Data:**

Services Data may be provided (or otherwise processed) by or on behalf of⁴ a Customer to the CDSP; or by or on behalf of the CDSP to one or more Customers.

Regardless of whether it concerns Agency Services⁵ or Direct Services⁶:

- (i) the CDSP will not acquire any IPR or other rights in such data (even if the CDSP creates new data in the process), except as provided under (ii) and (bb) below;
- (ii) so that the CDSP can do its job, each relevant Customer will grant the CDSP a licence wide enough to use such data for the purposes of performing any of its obligations and exercising any of its rights under the DSC over time;⁷
- (iii) as between Customers, IPR "ownership" and related rights in Services Data are determined by the Code.

However, in the case of *Direct Services* only – to the extent the CDSP produces new data in the performance of its obligations or exercise of its rights under the DSC, as between Customers and the CDSP:

- the CDSP will acquire the relevant IPR in those data;
- so that each Customer can do its job, the CDSP will grant each relevant Customer a licence wide enough to use such data for the purposes of performing any of its obligations and exercising its rights under the DSC (or the Code).

- (c) **Contract Data**

Regardless of whether it concerns Agency Services or Direct Services:

⁴ Such as by any third parties.

⁵ Agency Services are services where Customers' obligations under the Code are performed by the CDSP on their behalf.

⁶ Direct Services are: (1) services where Customers no longer have obligations under the Code, but the CDSP now directly required by the Code to perform on its own account (even though not party to the Code); and (2) general contract services. For Direct Services, the Code does not apply, but the same principles will be followed.

⁷ Including, for example, the creation of Contract Data.

- (i) as between the Customers and the CDSP – all IPR in such data will be owned by the CDSP;
 - (ii) relevant Customers will receive a sufficiently wide licence to use those data for the purposes of performing their DSC obligations and exercising DSC rights.
- (d) **Party Data:**
- (i) Customer Data:
 - (aa) as between the Customers and the CDSP, all IPR in such data will be owned by the relevant Customer;
 - (bb) to the extent the relevant Customer is able to grant such rights (and the rights are necessary), the CDSP will receive a sufficiently wide licence to use any such data for the purposes of performing its DSC obligations and exercising its DCS rights.
 - (ii) CDSP Data
 - (aa) as between the Customers and the CDSP, all IPR in such data will be owned by the CDSP;
 - (bb) to the extent CDSP is able to grant such rights (and the rights are necessary), relevant Customers will receive a sufficiently wide licence to use those data for the purposes of performing their DSC obligations and exercising their DSC rights.

3.2 Confidentiality

- (a) In respect of **Services Data:**
 - (i) provision of services by the CDSP inherently involves the CDSP disclosing, submitting and otherwise processing Services Data between Customers (and in some cases third parties), in line with the Code and/or the relevant part(s) of the DSC Services Description. Although confidentiality obligations will technically apply to the Services Data, use of such data (within the service definition) by the CDSP will be considered permitted use (but ordinarily, confidentiality obligations would apply to use of Services Data *outside* the service definitions);⁸
 - (ii) use by Customers of such data:
 - (aa) as between Customers and the CDSP – is not subject to any confidentiality obligations;
 - (bb) as between Customers – is covered by the confidentiality provisions in the Code.

⁸ More specific provision will be needed in respect of bespoke services, which cannot be framed in a way that would require the CDSP to disclose to one Customer data that are confidential to another Customer.

- (b) In respect of **Contract Data**:
 - (i) as between each Customer and the CDSP, provided the CDSP or the relevant Customer (as appropriate) performs its obligations under the DSC (or under the Code) in accordance with the DSC (or the Code), use of such data is permitted, meaning that there are no confidentiality provisions restricting the use of such data;⁹
 - (ii) as between Customers – the Code addresses confidentiality.
- (c) In respect of **Party Data** – confidentiality provisions apply in the usual way.¹⁰

3.3 Privacy and security

- (a) The provisions in relation to data privacy and security could potentially apply to data within any of the Services Data, Contract Data or Party Data.
- (b) As data privacy and cyber security are two of the biggest operational risks to businesses today, the DSC will include appropriate data privacy and security provisions, which (to the extent practicable) will take into account the relevant provisions in the ASA (currently Clause 16) – but updated to reflect requirements developed during the ASA's life of the past 11 years.¹¹
- (c) We will also endeavour to "future-proof" the DSC in light of the EU General Data Protection Regulation that has recently been adopted and will come into force on 25 May 2018. The GDPR is the biggest overhaul of EU data protection for 20 years and will replace the current Data Protection Directive (and the UK Data Protection Act) with a single set of harmonised rules that will apply directly across the EU.
- (d) The GDPR introduces a significant number of new and more robust obligations on companies handling personal data. In particular, data processors now take on direct compliance risk, as both data controllers *and* data processors will be directly regulated by the GDPR; meaning that the currently distinction between the two (which informs who has primary compliance responsibility) is expected to become less important and joint liability will need to be addressed in the DSC.

END

⁹ But again – if, for example, a party discloses data it should not have or otherwise acts outside the scope of the DSC, confidentiality provisions will apply in the usual way.

¹⁰ Including in line with TPD 5.1 – 5.5 and the Utilities Act.

¹¹ Subject also to the outcome of the separate paper on liabilities under the DSC.