

Proposal for right to reclaim data from bankrupt cloud computing providers

by

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Introduction

On October 9 2012 a bill was introduced to Parliament that provides for a right to reclaim intangible and non-fungible movable assets from a bankrupt company.

According to the explanatory memorandum, the proposed bill is intended to allow for the recovery of data from a bankrupt provider of distance IT services or cloud computing solutions. Once passed, the law will provide greater certainty as to the consequences of the bankruptcy of a cloud computing provider for the data in its possession.

Separable assets

The bill provides that the intangible assets in question must be 'separable' from other intangible assets upon the commencement of bankruptcy proceedings. In the cloud context, this means that the data must be capable of being separated from other data in the cloud service provider's IT environment. The explanatory memorandum seems to indicate that the separation of data can also be performed or ordered by the trustee in bankruptcy and thus after the commencement of bankruptcy proceedings. In other words, the requirement that the data be separable at the beginning of bankruptcy does not mean that the data must be separated at that point in time. Hopefully, this point will be clarified in the legislative process. However, in order to avoid problems in future, it is recommended to provide for segregation or ring-fencing of data. The regulation on IT outsourcing in the financial sector requires such segregation from the outset of the outsourced data storage arrangement.

Data recovery costs

The bill further stipulates that data recovery costs must be borne by the claimant (eg, the cloud customer). In order to avoid a dispute on this point, it is recommended that the costs be determined contractually in advance. The explanatory memorandum specifies that such costs include data separation costs.

Other applications

The term 'intangible movable assets' is not restricted to cloud data. Thus, a person that has commissioned a third party to develop a computer program could, in the event of the developer's bankruptcy, also seek to recover all information pertaining to preparation of the program, provided that the commissioning party is the holder of the program's IP rights (including preparatory works), on the basis of the contract between the parties.

Comment

In general, the introduction of a right to recover data held by a third party is an excellent initiative. However, this is only one step in the right direction. The same

right should be introduced for other winding-up or insolvency-related scenarios. Other issues should also be addressed, such as the extent to which the trustee in bankruptcy could refuse to return the intangible assets (eg, in the case of a payment default of the customer seeking the recovery of the assets).