

2-3 May 2024

# Standards as Contract Law – MCT

## Panel 3: Standards and contracts - Examples from digitalization and beyond

### INTERNATIONAL CONFERENCE

**New Developments in the World of Standards: Law, Private Governance, and the Reconfiguration of Transnational Markets**

**Teresa Rodríguez de las Heras Ballell**

*Professor of Commercial Law, Universidad Carlos III de Madrid*

*Member of the EU Expert Group on B2B Data Sharing and Cloud computing contract, EU Commission*

[teresa.rodriiguezdelasheras@uc3m.es](mailto:teresa.rodriiguezdelasheras@uc3m.es)



1.- Unleashing the full potential of data: Data Act

2.- MCT in the Data Act

3.- MCT and un-/fairness

3.1. Why unfairness risk in B2B Data sharing

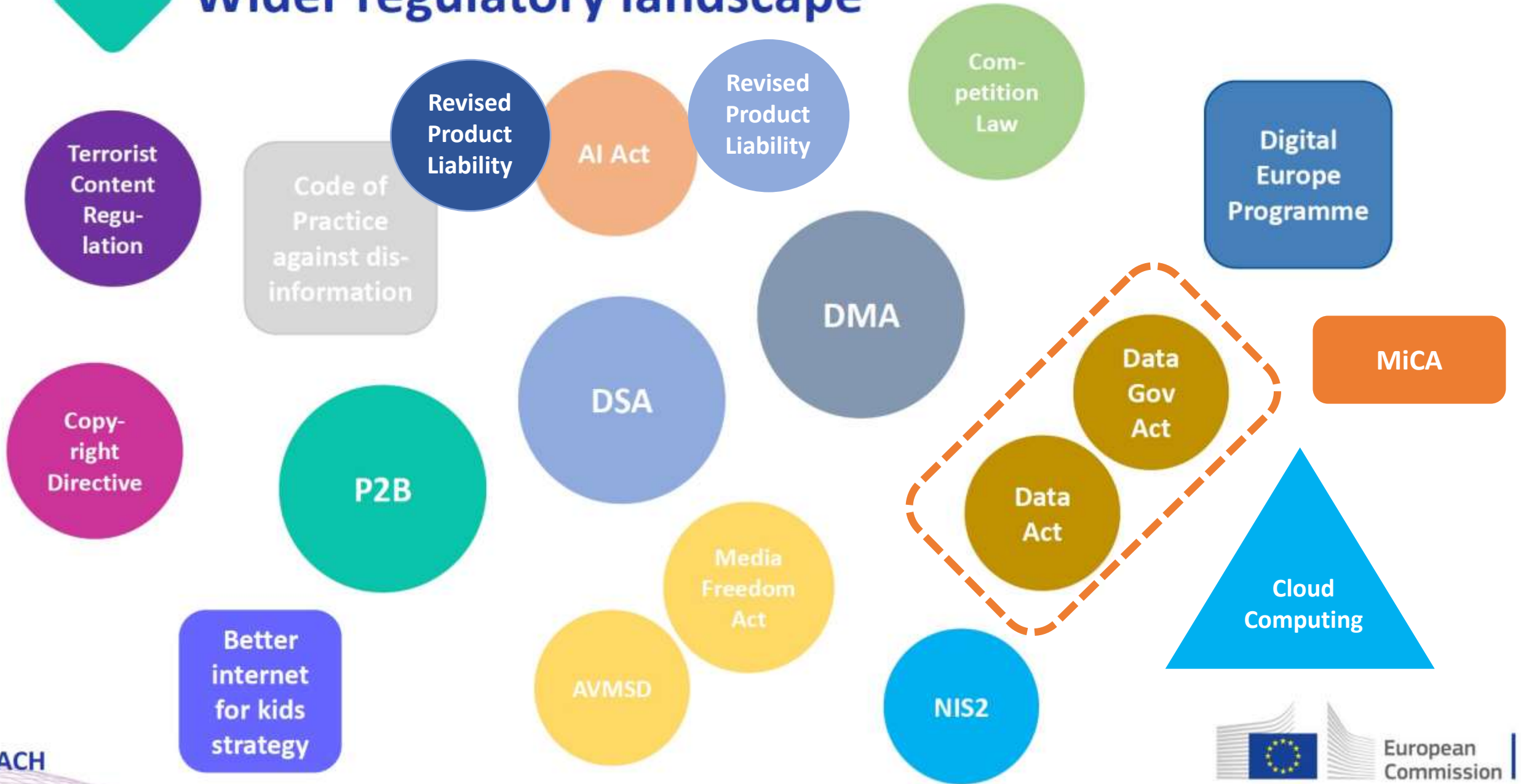
3.2. How MCT deal with unfairness: possible roles and limitations

3.3. Key decisions in drafting MCT

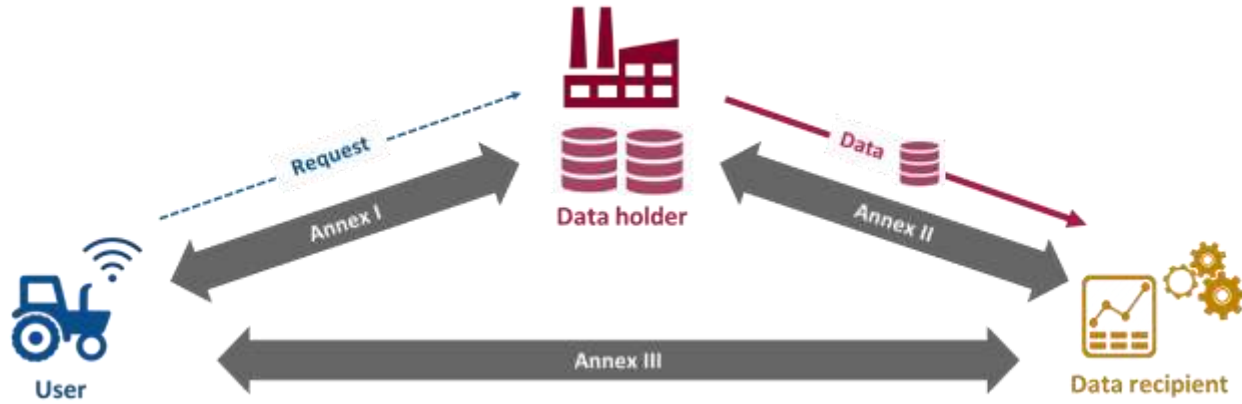
4.- Standardization of contract making



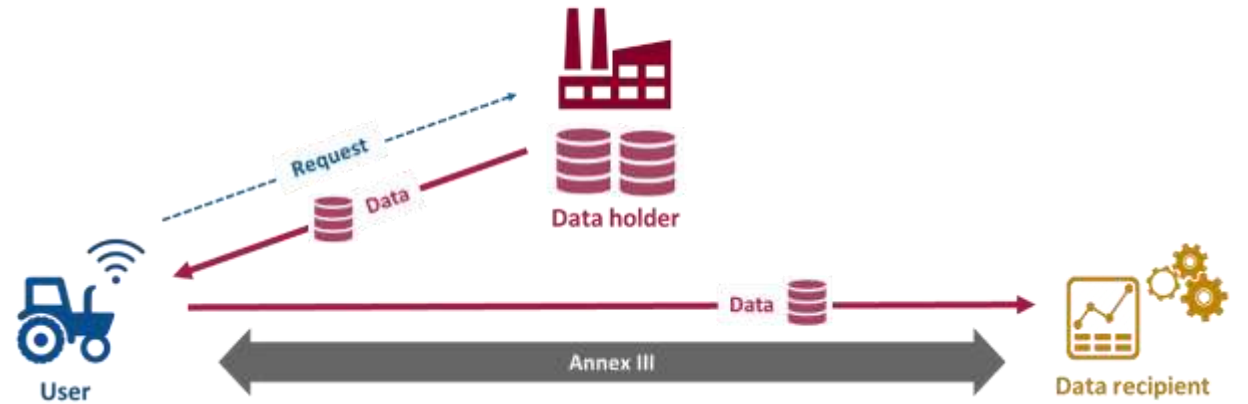
# Wider regulatory landscape



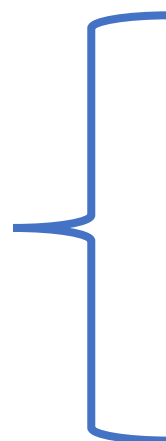
### Trilateral data sharing scenario (mandatory for data holder)

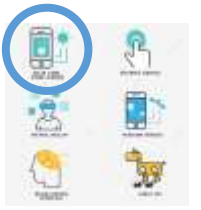


### Retrieve-and-transfer via Article 4



### Bilateral (voluntary) data sharing scenario





## 2.- MCT in the Data Act

### *Article 41*

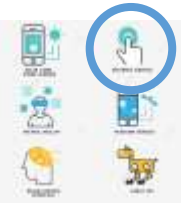
#### **Model contractual terms and standard contractual clauses**

The Commission, before 12 September 2025, shall develop and recommend non-binding model contractual terms on data access and use, including terms on reasonable compensation and the protection of trade secrets, and non-binding standard contractual clauses for cloud computing contracts to assist parties in drafting and negotiating contracts with fair, reasonable and non-discriminatory contractual rights and obligations.

*Recital (111)* In order to help enterprises to draft and negotiate contracts, the Commission should develop and recommend non-binding model contractual terms for business-to-business data sharing contracts, where necessary taking into account the conditions in specific sectors and the existing practices with voluntary data sharing mechanisms



**Expert Group on B2B data sharing and cloud computing contracts (E03840)**



## 3.- MCT and unfairness

### 3.1. Why unfairness risk in B2B Data sharing

*Study on model contract terms and fairness control in data sharing and in cloud contracts and on data access rights\**

Fairness  
problems

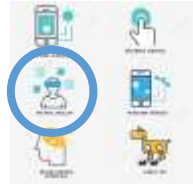
#### Market failures

*lack of competition, data monopoly situation, gatekeeping-enabling value chain, non-disputable ecosystems/markets*

#### Transaction costs

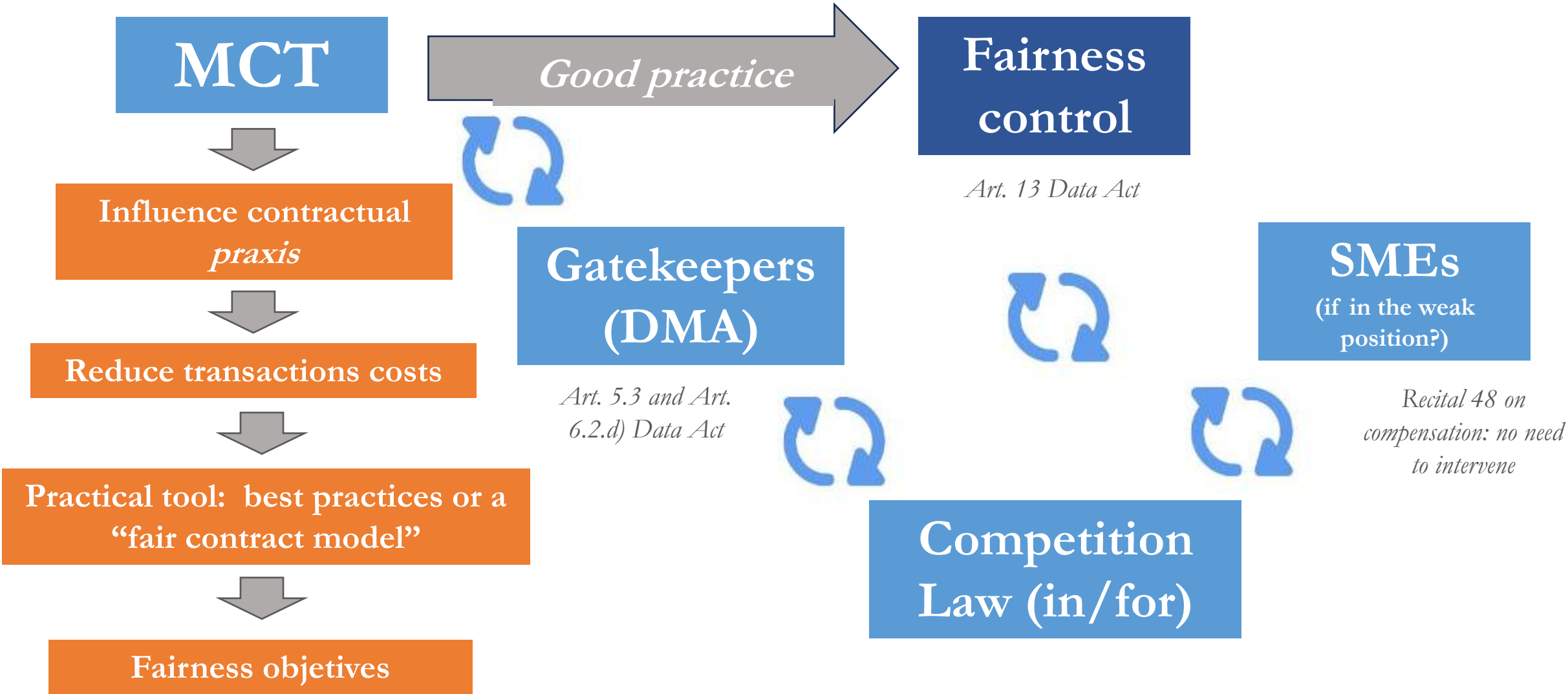
*searching, negotiating, drafting, expertise, valuation, monitoring, performing, termination*

Fairness challenge: role in the data ecosystem *over* economic size



### 3.- MCT and unfairness

#### 3.2. How MCT deal with unfairness: possible roles and limitations





### 3.- MCT and unfairness

#### 3.3. Key decisions in drafting MCT

---

MCT

---

MCT



Law

---

MCT



Agreements

---





### 3.- MCT and unfairness

#### 3.3. Key decisions in drafting MCT

MCT

Non-/**Binding** character – incentives  
**Imbalanced** negotiating power – unilaterally imposed

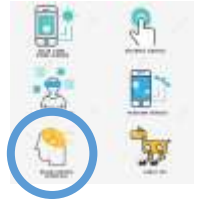
MCT ↔ Law

Beyond legal provisions  
Presumption/Assessment of fairness: **judicial review**  
Private autonomy and MCT: **global** fairness of the agreement

MCT ↔ Agreements

MCT solely for data-related issues or for all clauses  
A set of clauses or an **entire** contract (*miscelanea?* final provisions?)  
Risk of **non-jurisdiction-sensitive** clauses  
Alternative drafting options? **Optional** clauses  
Order of **precedence** – data clauses and others

MCT and evasion of **legal characterization**



## 4.- Standardization of contract making: MCT + fairness control

1). Scope of the data sharing agreement

1.1. Data

1.2. Conformity

2). Modalities of data sharing

2.1. Modalities

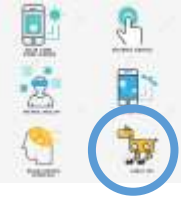
2.2. Performance

3). Exclusions and prohibited practices

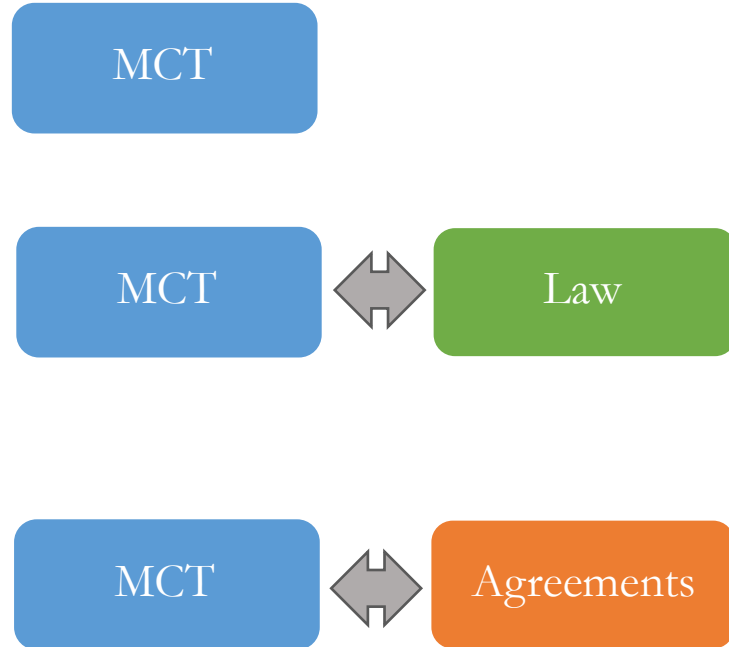
4). Liability and warranties

5). Termination

- (a). inappropriately **limit remedies** in the case of non-performance;
- (b) allow the party imposing the term to access and use the data of the other contracting party in a manner that is significantly **detrimental** to its legitimate interests, in particular commercially sensitive data or are protected by trade secrets or by IP rights;
- (c) prevent the party from **using the data** provided or generated by that party during the period of the contract, or to limit the use of such data **in an adequate manner**;
- (d) prevent the party from **terminating the agreement within a reasonable period**;
- (e) prevent the party from obtaining a **copy of the data** provided or generated by that party during the period of the contract or within a reasonable period afterwards;
- (f) enable the party imposing the term to terminate the contract at **unreasonably short notice**, considering switch to an alternative and comparable service and financial detriment, unless serious grounds therefor;
- (g) enable the party imposing the term to substantially **change the price** or any other substantive condition related to the nature, format, quality or quantity of data, where no valid reason and no right of the other party to terminate the contract in the case of such a change is specified in the contract.



## Findings and points for discussion



A). MCT as a practical tool to help parties (SMEs): transactions costs and experience

B). MCT as good commercial practices

C). MCT and the legislative fairness test: presumption and judicial review

D). MCT as standardization of contract making: the risk of eluding legal characterization

2-3 May 2024

## INTERNATIONAL CONFERENCE

# New Developments in the World of Standards: Law, Private Governance, and the Reconfiguration of Transnational Markets

**Teresa Rodríguez de las Heras Ballell**

*Professor of Commercial Law, Universidad Carlos III de Madrid*

*Member of the EU Expert Group on B2B Data Sharing and Cloud computing contract, EU Commission*

[teresa.rodriiguezdelasheras@uc3m.es](mailto:teresa.rodriiguezdelasheras@uc3m.es)