



EU Cloud Computing Strategy: *How will it impact your business?*

The recently released EU Cloud Computing Strategy will impact business both within and outside the EU much more than many anticipate. The devil is in the detail so tricky surprises may be hidden in a seemingly innocent text. Below are some elements of the strategy that we believe are most relevant to businesses. However, before exploring these proposals further, we should mention some figures on the tangible benefits that cloud computing can bring to Europe. It is estimated that cloud computing can bring €162 billion to the European economy by 2020 as well as 3.8 million jobs. These are certainly encouraging numbers in light of the current economic climate – and it is definitely worth all necessary efforts to ensure that the strategy is a success.

DATA PROTECTION/TRANSFER OF PERSONAL DATA TO THIRD COUNTRY:

These are probably the biggest sources of concern amongst cloud users. Clarification of applicable law (as operators currently face 27 partly diverging national legislative frameworks) and how international data transfers are regulated is paramount. The key problem with data transfer in the cloud space is that there is a lack of any stable location of data within the cloud providers' network and this means that it is hard to know, in real time, where data is located, stored or transferred.

To address these concerns, the Cloud strategy refers to the current review of the Data Protection Directive, which foresees a single set of rules to apply across EU member states and the Article 29 WP opinion of 1 July 2012 (WP196). The latter body raises a number of concerns in regard to data protection in the cloud space (e.g. lack of control over personal data, insufficient information on how, where and by whom data is being processed). It emerges from these texts that the applicable law would be the jurisdiction of the member state where the cloud controller (i.e. the customer) contracting the cloud computing services has its main establishment (and not the law of the member state where the cloud computing provider is located).

ISSUES THIS PAPER WILL ANALYSE:

- Data protection
 - > Applicable law
 - > Transfer of personal data
- Standards
- Copyright
- Model contract terms and conditions
- Energy
- Public procurement
- International dialogue
- SMEs



IMPACT OF CLOUD COMPUTING BY 2020:

- €162 billion to the European economy
- 3.8 million jobs

As far as transfer of personal data is concerned: the review of the Data Protection Directive foresees a mechanism that would facilitate such transfers and at the same time guarantee high protection. Free flow of personal data to countries located outside the EEA would be possible only if that country provides an adequate level of data protection. Otherwise safeguards must be put in place. Binding Corporate Rules (which constitute a code of conduct for companies which transfer data within their group) and Safe Harbour arrangements (policy agreements established between the US and the EU to regulate the way that US companies export and handle the personal data of European citizens) can both be useful instruments to ensure adequate data protection outside the EEA. The Commission states that standard contractual clauses applicable to transfer of personal data to third countries need to be adapted, as needed, to cloud services. Also, national Data Protection Authorities are called upon to approve Binding Corporate Rules for cloud providers.

Implications: The Commission will work with cloud providers to establish a new "code of conduct" that "would support a uniform application of data protection rules". The code could be put before the Article 29 Working Party for scrutiny. The Working Party's endorsement would ensure legal certainty and coherence between the code of conduct and EU law.

It is in the interest of cloud providers to be part of the process that will determine this code of conduct to tackle any concerns that the Article 29 Working Party has/might still have in the future.



STANDARDS: Cloud users could be afraid of possible cloud vendors' lock-in and the subsequent lack of interoperability. Also, independent and trusted certification is desired to guarantee that the key characteristics of good standards are met (e.g. interoperability, data portability, reversibility). While standards for cloud technology exist already, the Commission is keen to have additional standards setting initiatives as well as a good system for compliance certification.

Of interest, some parts of the industry have warned the EU not to create European standards which are not aligned with standards outside of the EU. The foreseen risk is that other regions will create their own standards as well. On the contrary, internationally harmonised standards with open specifications are claimed to be the best way to address the global nature of cloud.

Implications: Specifically, the EU has asked ETSI to coordinate work with stakeholders to identify by 2013 a detailed map of the necessary standards (inter alia for security, interoperability, data portability and reversibility). Also, with the support of ENISA and other relevant bodies, the EU would seek to develop new EU-wide voluntary certification schemes in the area of cloud computing, including certification schemes that enable businesses to review cloud providers' data protection compliance and publish a list of those schemes by 2014.

Market driven and industry-led solutions are the standards that industry always asks for. If you are involved in cloud standard setting, it would be advantageous to be part of this process with ETSI and ENISA to ensure that your thinking on standards is embraced and/or you can quickly adapt your standards on the basis of the outcome of the discussions.

WHAT IS ARTICLE 29 DATA PROTECTION WORKING PARTY?

The Article 29 WP was set up under the Directive 95/46/EC.

It has advisory status to the Commission on questions of data protection and acts independently.

It is composed of:

- a representative of the supervisory authority (ies) designated by each EU country;
- a representative of the authority (ies) established for the EU institutions and bodies;
- a representative of the European Commission.

COPYRIGHT: Cloud raises a number of enforcement and IP protection questions (e.g. liability for illegal content stored and distributed over the cloud, licensing questions). Copyright levies are amongst the questions to be resolved. These are meant to compensate rights holders for private copies made of their work and are usually applied to DVD players, PCs, printers, MP3s, blank CDs and DVDs. The issue of copyright levies is extremely controversial; decades of debate, compromise and conflict have not brought about a workable solution on how to deal with copyright levies in Europe. Cloud computing will add a layer of complexity to the discussion because cloud technology will allow users to store data on remotely located computers. As there is no limit to memory capacity in cloud computing, in principle, consumers could create an unlimited number of copies. The question that then arises is: should copyright levies be applied on the cloud?

The strategy does not attempt to solve this tricky issue (a draft version of the strategy said that cloud services should not be covered by private copyright levies) but rather refers to the outcome of current mediating discussions between stakeholders, led by former European Commissioner Mr Vitorino, where the group is trying to explore possible approaches to harmonise the methodology used to impose levies. The EU will then assess whether there is a need to clarify the scope of private copying exception and the applicability of levies in the cloud.

Implications: *Depending on which side of the debate you are on (are you a collecting society, a cloud vendor, a consumer electronics company), you might argue in favour of or against the application of copyright levies on the cloud. The outcome of the current mediation process is of utmost importance as this will influence the steps that the Commission will take afterwards.*



THE "VITORINO GROUP":

- Set up by Communication "A Single Market for Intellectual Property Rights" (May 2011, COM(2011) 287 – Action 8)
- Aim: brokering stakeholder agreement on private copying levies.

MODEL CONTRACT TERMS AND CONDITIONS: Enterprises across all sectors (pharma, chemicals, transport etc) might use cloud technology to store company and/or client data. Unfortunately, current cloud computing contracts can be complex, uncertain and the client (even large companies) might have little negotiating power. While the Common European Sales Law already provides useful references to address some of the problems around cloud contracts, the EU recognises that further work is necessary. In particular, clarification is needed around data preservation after termination of the contract, data disclosure and integrity, data location and transfer, ownership of the data and direct and indirect liability.

Implications: With the collaboration of stakeholders, the EU will develop model terms for cloud computing service level agreements between cloud providers and professional cloud users. It will also task an expert group (including industry) to develop *by the end of 2013* safe and fair contract terms and conditions for consumer and small firms. The ultimate aim of this exercise is to standardise key contract terms and conditions to promote best practice contract terms.

Whether your company is a buyer or seller of cloud technology, a contract will have to be stipulated between the two sides. It will be therefore important for you to be part of the expert group and cooperate with the EU to share your views on what should be part of the final contract terms and conditions.



ENERGY: Cloud computing is/has the potential to be a green technology. For example, cloud providers can build data centers (where cloud data is stored) that use low-energy servers and green energy. This is an easier action compared to ensuring millions of individual computer users make green choices. Having said that, some claim that many existing data centres are hugely un-green, using carbon intensive energy sources such as coal. This is an open challenge that the EU addresses in its strategy.

Implications: To encourage the carbon efficiency of cloud computing, the EU will work with industry to create harmonized metrics for the energy and water consumption and carbon emissions of cloud services *by 2014*.

If your company has expertise in developing these kind of metrics and/or in the environmental aspects of the cloud overall, it should be part of this process. Also, if your company is a cloud provider, you will be called upon to agree on these metrics.

PUBLIC PROCUREMENT: The public sector has, even in this difficult economic climate, a strong buying power and the cloud strategy suggests a way to harness this power. In order to do so, the EU will set up the European Cloud Partnership (ECP) which will bring together public procurement authorities and industry to identify cloud computing requirements and develop specifications for IT procurement. The European Cloud Partnership will work under the guidance of a Steering Board (members will act in their personal capacity and will be appointed by Commissioner Kroes). This body can consult industry, experts, academics, government.

Implications: *The European Cloud Partnership will basically define pre-commercial procurement actions so that the cloud commercial offer in Europe is adapted to European needs (interoperable, safe, secure and green being key characteristics of such offer). This partnership will be launched in 2013.*

If your company is a cloud provider and if you are interested in selling your cloud products to European Public Authorities, you might want to get involved in the ECP right from the start. Having your voice heard in this phase and/or understanding how this debate will evolve will be beneficial as your final commercial offer will need to be based on pre-requirements that match European needs.

INTERNATIONAL DIALOGUE: As a matter of fact, the biggest cloud providers are all American companies (Intel, Oracle, Microsoft, Google, Amazon) and there are just a few European operators (SAP, Spotify, ARM). The Commission memo attached to the cloud strategy states that the aim of the strategy is “building a new industry to better compete against the US in particular”. So one might say that the EU is declaring battle against the super power of cloud computing. However, the strategy itself has a more nuanced approach and recognises that given the global nature of cloud, a reinforced international dialogue is needed.



The Commission refers in particular to potential roles of the WTO and OECD as multilateral fora where cloud computing should be discussed. Among the issues to be raised in international discussions is sharing experiences, to carry out joint technological development, and for legal changes to stimulate a more efficient and effective cloud roll-out. Equally, it underlines the importance of international bilateral dialogues too. The US, Japan and India are singled out as the main countries for such dialogues. Data protection, liability of intermediaries, standards and operability requirements, and application of tax law to cloud services will need to be addressed.

Implications: *Cloud technology means that data should be able to flow across international borders. As a consequence, governments should not make separate rules for cloud computing but rather align privacy and security rules either in international or bilateral talks. So far, it seems that industry has been united in asking for international coordination and a more coherent approach from the EU (instead of individual lines of action). If your company shares the value of a global approach, now is the time to voice your support for this open dialogue.*

SMEs: It is oftentimes overlooked that more than 99% of all European businesses are SMEs. They are the true back-bone of the European economy and are primarily responsible for wealth and economic growth as well as drivers of innovation and R&D. Cloud technology is especially important for SME growth. Thanks to cloud-based solutions SMEs would benefit from huge cost savings in IT budgets (lower costs for software and hardware). They will be able to compete with much larger players and expand more easily into new markets, and if they are located in remote and rural areas they will be able leverage the cloud to access other markets (as well as avoiding relocation as employees could continue working from these regions).



Implications: *All benefits for SMEs are mentioned above. The EU strategy measures outlined in this paper will hopefully dissipate some of the concerns that have postponed the take up of cloud technology by SMEs. Having said that, SMEs will have access to cloud only if national barriers are dismantled and true harmonization of the digital single market takes place. If your company is an SME, you should definitely follow developments of the cloud measures and ascertain how these measures will help your business in practice.*

Fleishman-Hillard will be following closely all developments with future EU Cloud Computing proposals and will assist different industry sectors in helping to shape the outcomes.

For more information

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