Round Table
Who do you Trust with your Data in the cloud?

OpenForum Academy
Report

ROUND TABLE 2: Who do you Trust with your Data in the Cloud?

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Disclaimer

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Foreword

The OpenForum Academy organized two Breakfast Round Tables on “Putting the 'Open' into Open Innovation” for Cloud computing on the 15th and 23rd of May.

The debates come as the European Commission is putting the final touches to its long-awaited cloud computing strategy for Europe. The EU recognises that it needs to become not only cloud-friendly, but cloud-active, if it is to take full advantage of the benefits cloud computing offers. This is especially true for Europe's public sector. We believe this is the right moment to debate the merits of a pro-competitive cloud computing environment that is both global and open.

This report summarizes the discussion that took place during the second round table, titled ‘Who do you Trust with your Data in the Cloud?’ The speakers looked at some of the main threats to an open, global cloud and highlighted the risks arising from assumptions and misconceptions about government access to data, protective regulation and interoperability issues. In the discussion that followed the right mix of intervention was assessed, along with recommendations on the way forward for Europe and the role that the European Commission could play.

Cloud Computing is global; protectionist interventions, creation of obstacles at national/regional level, or local solutions (e.g. the European Cloud) will undermine the potential benefits for Europe. Less is more when it comes to intervention and a one-size-fits-all policy is not likely to be effective. Europe should refrain from protecting European vendors through public procurement and it should promote dynamic competition. The EC should let the market play and apply a light-touch approach to its regulation when needed.

There is significant confusion and it is evident that more clarification and harmonization of the legal framework is necessary. Nevertheless, Europe should compete on its merits and not on misconceptions, such as the beliefs around government access to data in the US and the EU.
Speakers

Christopher Wolf, Winston Maxwell - Director of Hogan Lovells’ Privacy and Information Management practice group, and Partner Hogan Lovells Paris

Maurits Dolmans - Partner at Cleary Gottlieb Steen & Hamilton LLP, London and Brussels focusing on IP and competition law within the ICT market.

Professor Dr. Claudia Loebbecke, M.B.A. - Director, Dept. of Business, Media and Technology Management, University of Cologne.

Moderator: Graham Taylor, CEO of OpenForum Europe.

Rapporteur: Dr. Efthymios Altsiadias, KU Leuven - Research Group Marketing
Graham Taylor introduced the Open Forum Academy (OFA) and this year’s focus to put the ‘open’ back into the ‘Open Innovation’ tagline by emphasizing the openness part of it. The Cloud is a potential great example of open innovative working, an enormous opportunity for the market that does, however, come with significant challenges. The European Commission (EC) has taken a good start, seeing its role more to ensure that Europe is not just cloud friendly but cloud-active and putting the emphasis on pragmatism, rather than pursuing a European cloud. Mr. Taylor noted that the areas OFA believes to be more important coincided to those identified in the IDC report. Jurisdiction areas and the data aspects, which are unsurprisingly top priorities, are touched in this roundtable.

Christopher Wolf and Winston Maxwell presented a summary of their recent white paper1. In his introduction, Mr. Wolf referred to Vice President Vivian Reading’s objections to the promotion of an EU cloud that relied on scare tactics concerning the USA PATRIOT Act. The paper is a response to the growing belief that the US government has greater access to personal data in the cloud then other governments, which originated mostly from assumptions / misconceptions around the Patriot Act; a belief that, as this comparative study shows, is simply incorrect. Every country examined under this study vests authority in the government to require a service provider to disclose customer data. In some jurisdictions under study there is a real potential of personal data being disclosed voluntarily by service providers if asked by the government, contrary to the US regime where US law specifically protects data from voluntary turnover. Mr. Wolf noted that the Patriot Act did not create invasive new mechanisms; it expanded existing methods and retained constitutional and statutory checks. The most invasive mechanisms (e.g. the National Security Letters) are limited to non-personal non-content data. Data privacy and protection is and should be a priority for all stakeholders, but it should not lead to decisions on choosing cloud provider been made on false assumptions.

Mr. Maxwell confirmed that for US providers voluntary cooperation in turning over personal data to governments is unthinkable. He commented that over the last 10 years the US was criticized about the lack of a horizontal, all-encompassing law that deals with business treatment of personal data. Although this is true, it is often overlooked that the US has a body of laws protecting the individuals against government access to private data which is as much, if not more, developed then that of other European countries (e.g. France). Mr. Wolf gave a number of real-life

examples to showcase that voluntary turnover of personal information to the government in the US is against the law.

**Mr. Maurits Dolmans** talked about whether competition law cases in the IT sector contain lessons for regulation of cloud computing, and whether the EU should foster a European cloud by favouring European service suppliers.

Cloud computing potentially creates significant benefits for users because it removes the complexities of IT ownership from the company’s organization. About eighty percent of new functionality is created for the Cloud, improving speed of deployment and efficiencies of scale, and giving rise to network effects creating important worldwide opportunities for innovative developers including open source developers.

EU policy should aim to increase consumer welfare and to create a robust European IT sector. This requires interoperability, data portability and open and fair procurement practices, as well as avoiding overregulation or protectionism. Looking at a dozen cases under EU competition law from 1984 onwards, relating to interoperability, data portability and standard-setting, Mr. Dolmans concludes that there is no need for a European regulation imposing interoperability, because:

- on-dominant firms tend to have market based incentives to be interoperable with as many complementary products as possible, and to allow data portability, to improve the attractiveness of their platform;

- In situations when there is dominance and lock-in, competition law can effectively protect and maintain or create interoperability and data portability.

Older competition cases show the cost of excessive intervention: they tended to protect static competition by rivals engaging in imitation, whereas the history of the IT sector shows that the real source of competition is radical innovation from unexpected new types of products. Compared to the old, the more recent cases in the area of abuse of dominance and merger control tend to be more effective, because they protect dynamic competition (competition through innovation). Notably, the new cases are limited and targeted in their intervention. Competition law can also be used to maintain the openness of standards. A drawback may be that the EC may not have enough capacity to deal with all cases, requiring either increased resources or a better allocation of cases and coordination with national competition authorities and courts.
Mr. Dolmans tentatively concluded that market forces are adequate to foster interoperability, data portability and standards, and that competition law can curb situations where dominant firms abuse their position. It is not a good idea to impose a one-size-fits-all regulation for interoperability or data portability or standardization. A careful standard policy instead of an over-reaching one can be very helpful, as the GSM example showed, where a targeted and nuanced standards policy in Europe (with the EU acting as coordinator rather than regulator) helped create a vibrant mobile telecommunications sector.

The IDC report identifies a number of barriers to widespread adoption of Cloud computing by European users, and the EC is thinking of legislation on some of these problems. In certain areas, regulation may be helpful, like a workable and not-too-fundamentalist system of privacy data protection, better allocation of jurisdiction, clear rules about liability and security, and harmonized or unified IP laws. But laws in this sector almost always run behind technological developments; mandating a particular solution might hold back technological development rather than promoting it. But regulation should not overreach, and should be complemented by softer rules, like coordination of open industry standard setting and principles for security certification of service suppliers, and especially open procurement principles that allow various suppliers to compete regardless of their origin and technology. Open source suppliers should not be excluded.

Calls for EU regulation that would favor European Cloud Service suppliers in Government procurement, or that lock in users to a specific technology, should be resisted. Protectionism would lead to less competition with all the negative consequences that come with it: higher prices and reduced innovation. It could also run afoul of the WTO Treaties on Trade in Services, Technical Barriers to Trade, and Government Procurement. These all prohibit discrimination and require non-discrimination of service suppliers and equality of opportunity. The EC has already committed itself to not allow the introduction of protectionism measures in the Joint EU and US Communication to WTO on Trade Principles for ICT Services, of 13 July 2011. It is now important that Europe stays on this path and does not engage in protectionism or allow the use of public procurement in order to favor European vendors as opposed to taking the best services at the best price.

Prof. Dr. Claudia Loebbecke provided a non-legal, economic perspective. The cloud is here and for sure it will not go away. However, there is still no common understanding of what we mean by "the cloud" (legal/policy vs. economic/market view). The economic perspective suggests distinguishing providers' and users' arguments. In terms of cloud policy, there is no "one-size-fits-all", but in general less is more.
Cloud computing will lead to global roll-outs; increasingly successful players will sell globally. Global cloud services will be based on standards – regulated or de-facto. Once standardized, cloud services will become more or less commoditized. Resulting lower profit margins need to be built into business models and innovations. On top of global standardized cloud services, there will be numerous additional innovative cloud services. Large and small players (micro-multinationals) will offer these innovations and will benefit from the business opportunities in the cloud. The EC should let the market play; de facto standards will develop. The faster the cloud playing field will grow, the more successful cloud providers will come up with cloud service innovations and creative business models on top of the standards. Especially for young start-ups, there is little to gain, but much to lose from laws and regulations that might restrict their entrepreneurial spirit (in providing and using cloud services).

There is no need to worry about cloud adoption. Cloud users range from large multinationals to individual users at home. As soon as they are convinced of the advantages from the cloud, they will adopt. Referring to her study ("Assessing Cloud Readiness at Continental AG"), Prof. Loebbecke pointed to the drive with which also large multinationals jump early onto the cloud bandwagon. And SMEs often adopt even faster. SMEs are more flexible; they have less constraints resulting from legacy systems and see business options beyond their "pre-cloud" radar screen. To all user companies and even to private users, interoperability across regions and countries, but also across providers is crucial. Single market cloud solutions will not succeed, the minimum is the European playing field. Finally, Prof. Loebbecke noted that user companies cannot just sit and wait if they want to take full advantage of cloud options. They will need to change their own organizational setups (e.g., existing IT departments, appropriate business models and processes). In order to help user companies to become organizationally ready; the EC should keep thresholds and barriers for organizational change as low as possible. The EC should strive for EU-wide settings that avoid national or regional legislation.
Discussion

Disclaimer: These comments were taken from the general part of the meeting and do not necessarily represent any of the speakers’ views or those of their organisations.

- It was suggested throughout the presentations that less is more with regard to intervention and that we should let the market lead. Equivocally, the IDC report advocates that more clarification and harmonization of the legal framework is needed. How do we achieve the right balance and what should the European Commission do?

There is a lack of understanding and certainty in these areas; it should be understood that special rules in Europe about data should not interfere with the selection of cloud provider and that data can be protected worldwide.

The IDC report reveals the significant confusion with regard to applicable law; the EC is already initiating a programme that aims to reduce the uncertainty. The proposed regulation holds on to the concept that the transfer of data internationally has to be closely regulated and that’s difficult to manage in the cloud, promoting cloud providers to create a “European” cloud provider for their customers. For B2B cloud services, the providers claim to have the technology to implement a European Cloud where the data never leaves the EU borders. This, however, strips numerous benefits, also in terms of data security. Offering a European Cloud based on the notion that the data is insulated from privacy and data security violations could be false and deceptive. We should nevertheless trust the European users enough that they will prefer the best offer. Users don’t want to be limited in their selection, they like to have this possibility and legislation should not deprive them.

Many of the barriers to the adoption of the cloud as indicated also in the IDC report are very difficult to be regulated (e.g. trust), and if one needs to do so, this should be with a light touch and mostly in the cases where the market fails. The cloud is not happening because the EC took an interest in it, but because there is demand. A significant part of the argued necessity for intervention is based on myth and poor understanding. Governments could lead the way through procurement. European policy should reduce country level barriers and let the providers flourish similar to what the US is doing.

As the cloud infrastructure services get commoditized, there’s a lot of potential for Europe at the service level. The success of US cloud providers stems from the fact that people wanted to use their services at those price levels and not because of any regulation. Europe needs to establish a culture of innovation and entrepreneurship, well educated work force, access to financial markets that are fluid and efficient, stable laws that don’t over-regulate and stable institutions that enforce these laws in a
consistent and uniform manner, and that is a role that the commission might take.

- According to the discussion so far, and contrary to what the IDC report claims, the biggest beneficiaries are SMEs. In terms of the EC, who should be the audience?

One needs to be careful on what is measured, as for example it is generally easier to find and survey larger companies and this might create a bias in the resulting reports. With regard to SMEs, the cloud had a very important impact on the IT start-ups; the modern entrepreneur no longer needs the amount of initial IT investment that she needed before the cloud.

- How can Europe create more value, where is the opportunity for Europe?

Europe should compete on the merits and don’t compete on misconceptions. These misconceptions can affect both experts and less advanced cloud users and more education at all levels is necessary to lift them. CIOs in many cases do not have the necessary knowledge to grasp all the potentially crucial issues and could get their companies “locked-in”, as vendors and providers are not willing to reveal these weaknesses.

In the European cloud partnership it will not be surprising if we see purely European industrial consortia, which could, however, be a positive thing for competition.

- It is clear that we don’t want strong intervention so what is it that we want the EC to do?

The EC should aim to lower national barriers, specialties and jurisdictions on all different fronts, as everyone, including SMEs, would benefit. Politicians should help enforce existing rules (e.g. interoperability rules) to the benefit of the smaller players.

Europe should make sure that the Member States stick to the procurement rules without discrimination and play a role as a facilitator for self-certification for security compliance with privacy rules, other regulatory systems and industry led standards.

The EC should focus on the Digital Agenda, e.g. inexpensive connectivity (through 4G) and e-government that will help cloud uptake by reducing IDC identified barriers.
The officials should blow the whistle on the cloud providers who use fear, uncertainty and doubt to claim that a local cloud can insulate data from unwanted access.

The EC should not be afraid to be transparent on all these issues; education can play an important role to empower the user to safeguard their own data.
Short Speaker Bios

Christopher Wolf, Hogan Lovells - Christopher Wolf is a director of Hogan Lovells’ Privacy and Information Management practice group. He has deep experience in the entire range of international, US and EU privacy and data security laws, including financial and health information privacy laws. He is the founding editor and lead author of the first Practising Law Institute (PLI) legal treatise on privacy and information security law. He is the founder and co-chair of a think tank devoted to emerging privacy issues, the Future of Privacy Forum. He holds a J.D. magna cum laude from Washington and Lee University School of Law, 1980.

Winston Maxwell, Hogan Lovells - Winston Maxwell is a partner at Hogan Lovells and one of the leading media, communications and data protection lawyers in France. He is a member of the Bars in New York and Paris. His practice covers three principal area: telecommunications and Internet, media and entertainment, data protection and privacy. Some of his recent representative experience includes data protection advice to multinationals in the deployment of comprehensive compliance programs in Europe, as well as advising international telecommunications providers and customers on cloud computing contracts and regulations. He holds a J.D. from Cornell University Law School, 1985.

Maurits Dolmans, Cleary Gottlieb - Maurits Dolmans is a partner at Cleary Gottlieb, and a member of the Bars in New York, Rotterdam and Brussels. His practice focuses on EU, UK, and international competition law, as well as EU regulatory, and EU intellectual property law. He appeared in proceedings before the EU Commission and the EU courts, national courts and national competition authorities of several Member States, and ICC and NAI arbitrations. Some of his recent public cases involve EU clearance for Google’s acquisition of Motorola, UK OFT clearance for Google’s acquisition of Beatthatquote, successful closure of a range of complaints against IBM for alleged abuse of dominance. He holds an LL.M. degree from Columbia University in 1985 and a Master of Laws from the Rijks Universiteit Leiden in The Netherlands in 1984.

Prof. Dr. Claudia Loebbecke, University of Cologne - Claudia Loebbecke holds the Chair of Business, Media and Technology Management and is Director of the Department of Media and Technology Management at the University of Cologne. In 2011, she won the prestigious global Research Competition of the ‘Society for Information Management’ (www.simnet.org) for her study ‘Assessing Cloud Readiness’ with Dr. T. Thomas and T. Ullrich (both Continental AG). Her research focuses on business models and management aspects of digital and creative goods and on the innovative use of new media, information, and telecommunication technologies covering aspects such as electronic business, knowledge management, and new organizational forms. She holds a Masters (1990) and a Ph.D. (1995) in Business Administration, both from the University of Cologne, Germany, and an M.B.A. from Indiana University, Bloomington, Indiana, USA (1991).