

# CCBE Response Consultation from the European Commission concerning Trusted Cloud Europe

28 May 2014

## Introduction

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

The CCBE has some general observations with regard to the [final report](#) by the Steering Board of the European Cloud Partnership *Establishing a Trusted Cloud Europe* ("the Report").

The CCBE welcomes the opportunity to give its opinion on the Report and appreciates all of the efforts made by the European Cloud Partnership to deal with problems related to cloud computing. In common with other businesses, lawyers see the many advantages offered by cloud computing for delivering fast, economic, reliable and flexible solutions and are keen to make use of the cloud. However, the regulatory environment in which lawyers operate tends to hamper their ability to make full use (and, indeed, in some instances, any use) of the Cloud for professional purposes.

First, there are the requirements of the data protection directive, especially the difficulties entailed in transmitting data outside the EEA, bearing in mind the lower standards of data protection which often apply in jurisdictions outside the EEA. A particular concern is the practice of cloud service providers to reserve to themselves the right to store data anywhere in the world, combined with the number of major cloud service providers who may be subject to the long arm provisions of US or other foreign (i.e. non-EEA) jurisdictions. Second, there are the professional and deontological rules affecting lawyers which place a high obligation on them to maintain professional secrecy and/or client confidentiality.

Accordingly, for a number of years, cloud computing has been at the top of the agenda of the CCBE, both because of its many significant potential benefits, but also because of the above mentioned questions of data protection, professional obligations of confidentiality and other professional and regulatory obligations incumbent on lawyers. To this end, the CCBE adopted in 2012 a set of [guidelines](#) to make lawyers more mindful of the various risks associated with cloud computing and to assist them in making informed technology decisions. More recently, the CCBE also published a [Comparative Study on Governmental Surveillance of Lawyers' Data in the Cloud](#).

Lawyers as well as other professional users, would like to have access to a cost effective, trustworthy and reliable service that makes it possible for them to keep up with the latest technological trends in the IT industry. It is not only a question of saving on technology costs and improving business efficiency, but also a question of giving the best quality of service to their clients. Clients rely more and more on the use of cloud services and on the latest technical applications based on cloud services by design. Therefore, whether they like it or not, lawyers cannot ignore the trend towards cloud services.

However, on the basis of its own experience as well as that of its member Bars and Law Societies, the CCBE agrees that a fully effective and enthusiastic take up by lawyers of cloud computing generally is greatly hindered by the current lack of trust in cloud services. If a client has to choose between best security of client-lawyer communications and constant access to the same, in most cases they will choose security. In any event, this is not a matter wholly governed by client preferences, as lawyers and their regulatory bodies have legal and professional duties to provide the highest level of protection to client data and confidential client information.

### **CCBE comments on the Report**

In light of these introductory comments, which are themselves based on the CCBE's own experience, it can be seen that there are certain issues that are not adequately dealt with in the Report.

1) As discussed above, the regulatory environment in which the legal sector operates may inhibit the enthusiastic take up of cloud computing services by lawyers. Indeed, the legal sector is very strongly affected by the problems of cloud computing. However, lawyers or their professional bodies are relatively impotent on their own to have any significant effect on the general trend in cloud computing. With a very few exceptions, lawyers do not have the bargaining power even to attempt to negotiate the variation of any of the standard terms offered by most cloud service providers; and where those terms include a right to store data outside the EEA, this can effectively prevent the use of such a cloud service. It is not feasible for all but the biggest law firms to have their own private cloud, nor is likely that individual lawyers and law firms will have enough buying power, even through pooled procurements, to sustain a special category of "lawyer compliant" cloud services.

2) Furthermore, given that lawyers have very strict obligations on preserving the confidentiality of communications with the client, even if cloud service providers restrict their liability for example, for breach of confidentiality, most lawyers are not able to do the same towards their clients.

3) What emerged clearly from the CCBE's study on Governmental Surveillance of Lawyers' Data in the Cloud was that statutory protection of lawyer-client communications against government access is not as strong in the cloud environment as in the physical premises of the lawyer. As a consequence lawyers serve their clients best when they do not expose their clients' data to risks of different practices regarding the protection of such information. This considerable difference in protecting lawyer-client communications will rightly not be altered by the adoption of the proposed data protection regulation.

4) If a lawyer wants to use any cloud service, he or she may have to seek the client's prior and express approval to enable that to be done (if the client is in a position to give such an approval at all). Neither is this desirable from the perspective of selling legal services, nor (and more importantly) does it properly respect the legitimate interests of clients.

5) Professional bodies are also not in a position to grant a waiver to lawyers (even assuming such could be possible), because the issue of which cloud service provider should be used is not only a technical question of data location, but is also a legal question of jurisdiction. As pointed out above, in the event that the relevant cloud service providers were mandated by the law of the jurisdiction to which the cloud service provider is subject to give access to data or confidential information, lawyers could find themselves exposed without any contractual provisions which could be relied upon against the service provider, even though the giving of such access were inconsistent with the obligations of the lawyer to his client.

It is apparent that legal regulatory bodies will not be able to harmonise the fragmented national laws and practices (especially of extra-EEA states) which create such an anomaly.

6) In short, it is not realistic to expect from certain professional bodies such as the CCBE that they could be able to "ensure that their guidelines and policies are at least cloud neutral (i.e. enable cloud services.)" (page 17 of the Report). Individual lawyers are subject to the law of their member state and the obligations of their relevant professional body (which, in turn, operates subject to national laws), and as long as national law is not cloud neutral, there is hardly anything that the professional bodies will be able to do.

7) It is also important to highlight that the order of the actions in the Report (pages 23-24) are not appropriate to break a vicious circle of different regulators waiting for each other. The section in the Report regarding actions to be undertaken by Member States is too gently phrased to be effective: *"alignment, reform and harmonization of legal frameworks and policies may be appropriate in some cases"* (page 18). It requires to be emphasised that this is not enough: barriers to the adoption of cloud services are substantially derived from European law and the laws of the Member States. There is really no point in *"collecting best practices"* and drafting a *"flexible common framework"*, trying to build *"systematic consensus"* through consultations (page 14) in sectors where cloud computing services are inhibited by law.

8) We recommend that consensus building that targets Member States, professional bodies and cloud users should start straight away and not only at the beginning of 2015, to ensure optimal benefits from previous deliverables, e.g. safe and fair cloud contract terms, or consultations to ensure acceptance of the latter.

## **Conclusion**

The CCBE expresses its thanks for the opportunity to contribute its views on this subject. It stands ready and willing to assist further in any way which would serve to ensure that client-lawyer communications are protected with the same rigour in the cloud environment as in the "real world" regardless of the member state in which a lawyer is based.