Review of the SWIPO Public Consultation on a Code of Conduct for Switching and Portability of data related to Software as a Service (SaaS).

A. Summary

The consultation makes the case for saying that a code of conduct can be successful in developing the data economy, by improving data portability and migration for customers when switching between cloud service providers. This may be true but only if it reflects what the industry can sign up and does not become too onerous to comply with in practice. CIF supports the approach outlined in the consultation but would emphasise that more attention may need to be given to questions of commercial confidence, and recognition of the way that contractual provisions on "Exit" have governed data migration processes up until now. There appears to be no recognition within the consultation of such "Exit" provisions. We would recommend that the principles suggested should reflect what such contractual provisions usually set out and should therefore follow already existing modern commercial practice. It is not clear within the consultation if this is the case.

B. Background

1. The SWIPO working group Consultation suggests a draft Code of Conduct (Code) to assist Cloud Service Customers (CSC) when transferring data from one Cloud Service Provider (CSP) to another. The consultation recognises the importance of the free flow of data as being essential to a competitive data economy in the European Digital Single Market. However a free flow of data requires that CSCs should be able to port their data from one CSP to another with greater certainty and in a more straightforward manner than is maybe the case at the moment. In this context we recognise that the consultation is preparing the software industry to move down a path well-trodden in other sectors where the question of switching has already been addressed historically.

2. To address the difficulty of different CSPs providing different types of services to CSCs the consultation proposes a Code which if followed will allow for much greater standardisation to apply to the entire switching process. At the heart of this Code is the concept of transparency. The Code introduces the concept of the "outgoing CSP". The Code obliges the outgoing CSPs to provide certain information in a standardised format to the CSC, which they will then be able to share with the incoming CSP. The theory is that this will allow for a much more straightforward data migration exercise as each of the three parties in the process will have sight of each-others' data migration protocols and standards than would otherwise be the case. With this degree of transparency between the outgoing and incoming CSPs and the CSC data migration and portability from one CSP to another should become a much more straightforward exercise.

C. Commercial Confidence

3. Let's first take the issue of "Confidentiality". The draft consultation paper outlines very clearly that ensuring pre-contractual information (in the form of answers to the template questions set out in the Annexes to the consultation paper) does not require public disclosure and may be done in strict confidence. However, this does raise the question whether CSPs would be prepared to sign up to an NDA or a similar legal instrument to ensure such information is not shared more widely and this should be raised once the final consultation document is received.

4. The Code has at its heart the concept of transparency which is to be read as being without prejudice to confidentiality. Many CSPs will quite rightly not want to share certain information about the way in which they manage, store and process data on the basis that divulging such information compromises commercial confidence. The consultation addresses this concern by explicitly emphasizing that NDA's between the CSC and the outgoing and incoming CSPs may be used to ensure that commercially sensitive information does not become public.

5. However it is not clear within the industry that NDAs can offer sufficient protection in this context. We would recommend that the consultation opens up the question of protecting commercial confidence and we would ask that it may be made at the very least a requirement of the Code. The consultation should reflect this as a position to be adopted. CSPs will need confidence in the process proposed by the code of conduct and will need assurance that commercially sensitive information about the way in which they manage data as a CSPs is not shared with competitor CSPs.

Exit Planning

6. The Code if adopted will trespass across how data porting has been managed historically in a contractual context. In many bespoke ICT contacts, under which cloud services are often one of many services being provided, "Exit" schedules are negotiated and inserted to determine what happens at the expiry of these contracts. These Schedules usually set out the requirements of the service provider on exit to ensure a seamless transition to any new provider. If CSPs sign up to the Code then what has previously been managed by contractual negotiation will in future become a standardised publicly known legal process against which all contractual provisions for managing data migration will be measured, (in terms of who does what, how and when).

7. But is this a desirable outcome for the industry? The consultation should offer up the option for CSPs to state they should remain free to contract with each-other on their own terms and opt out of the Code where one or both CSPs choose to do so. The other option should also be explicitly stated: that all CSPs should sign up to the adoption of the Code to govern modern commercial practices in data migration and portability. As a consultation it will be important to consult on each position.

D.   Structure of the Consultation

8. After providing some background and introductory remarks the consultation under the section entitled: "Service switching and data porting principles" the consultation sets out the rationale and principles behind the approach summarised out above. The Code is drafted in such a way as to be future proofed against future technological advancements. The Code is not intended to be a standalone document and interacts with the following documents which are all complimentary to each other:

- SWIPO Code of Conduct Scope and approach;
- SWIPO Code of Conduct Common technology;
- SWIPO Code of Conduct Common legal aspects; and
- SWIPO Code of Conduct Common governance.

  Several key players in the CSP community are represented in the SWIPO working group, including Google, Amazon, Atos and Microsoft. The success of the Code will depend on their willingness to comply with whatever is eventually agreed upon after the consultation has finished.

Principles and Rationale

9. The working group recognises that transferring data from one CSP to another is never a straight forward process and requires a considerable amount of communication between the data exporter and data importer. However, efficient migration and the safe portability of data are fundamental from a CSC user experience and breeds trust in the sector.

10. The draft consultation outlines two of the most common scenarios which it considers would benefit from the Code as follows:

Scenario 1

A transfer of data from one CSP to another where services and features are broadly similar.

Scenario 2

A transfer of data from one CSP to another where the services have contrasting features which may not be supported by the other provider.

11. In both scenarios the consultations envisages Data Exporters and Data Importers having certain requirements. The suggested principles for Data Exporters (the outgoing CSP) to comply with are as set out below:

Number	Principles applicable to Data Exporters
1	The CSP shall have and specify an explicit and structured process for DATA export. The CSP should include data management considerations (eg snapshots and incremental approaches and bandwidth assessment) and any relevant timescales, notice requirements and customer contact procedures (contact points, escalation etc). The process and documentation shall cover technical, contractual and licensing matters such that they are sufficient to enable porting and switching
2	The CSP shall specify any vendor imposed or enforced obligations on customers before exporting DATA can commence
3	The CSP shall specify any known post contractual license fees or other liabilities, for example patent and licensing fees covering use of derived data or data formats or claims and cases that are ongoing
4	The CSP shall specify any required tools incurring additional fees for DATA export.
5	The CSP shall specify any vendor provided tools that are available to assist the export process and any fees associated with those tools. The CSP may specify any 3rd party tools.
6	The CSP shall specify whether or not the customer can be completely autonomous in exporting DATA ie , the CSC does not need any other party to perform this task
7	The CSP shall specify which DATA, including derived data (e.g. computed field values, graphics, visualizations) can be exported from the service.
8	The CSP shall specify what, if any, security audit related DATA is available for export (e.g. logs of user interactions with the cloud service that could be needed for security analysis and for supervisory request).
9	The CSP shall specify which DATA standards or formats are recommended, used or available for data exporting (e.g. CSV, SQL, JSON, XML, Avro).
10	The CSP shall provide documentation on the format and structure of the exported DATA including where it can sourced and under what terms if from a 3rd party source (including open or industry standard formats or exchanges (e.g. Open Financial Exchange format). As per 1 above this must be sufficient to enable porting and switching

12. The suggested principles above could be quite onerous for CSPs to comply with especially those that contain within them a commercial obligation greater than is the current market norm when carrying out Data export in the current market. We would suggest that principle 3 in particular may be difficult for CSPs to comply with notwithstanding the use of the word "known" in this context.

13. The principles for Data Importers (the incoming CSP) seem to be less problematic and reflect better current market norms.

E.   Conclusion

14. The draft consultation would appear to be a positive step for CSPs which will open up the market and encourage cooperation between CSPs in order to order to provide an enhanced CSC experience. We believe the consultation should pay greater attention to questions of commercial confidence and already existing data migration process as governed by contractual negotiations on Exit. The consultation should also raise the question of when the code should and should not apply between companies who have signed up to it.

Cloud Industry Forum
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