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EVERYTHING MATTERS

Cloud Computing Legal issues

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Cloud computing & the law

Infrastructure as a Service
- Data storage
- e.g. Amazon S3

Platform as a Service
- Application development
- e.g. Google App Engine

Software as a Service
- Applications
- e.g. Zoho.com

Legal impact?

Cloud computing: legal challenges

Liability

Applicable law

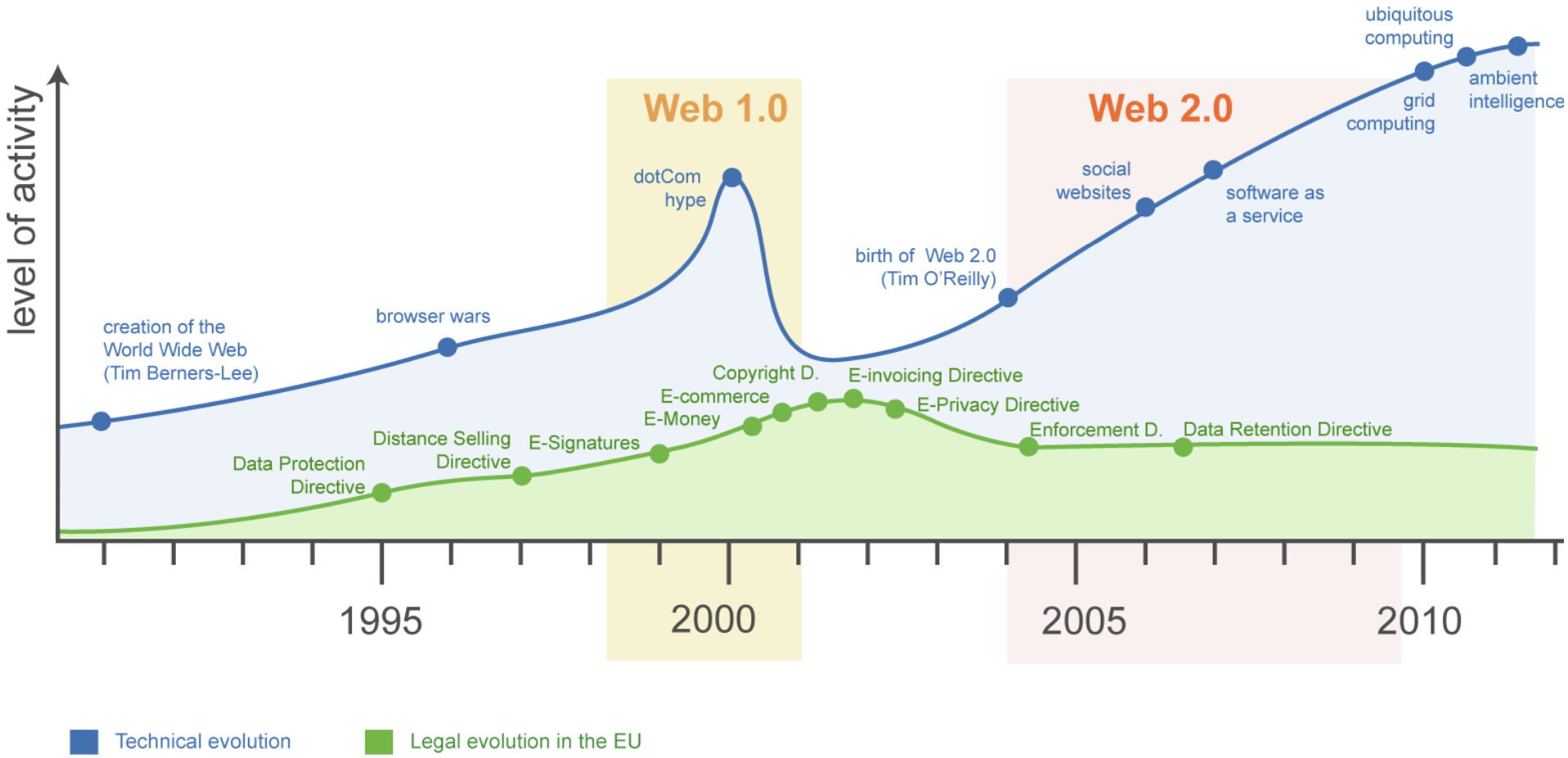
Compliance

Data protection

Copyright

Data portability

Current EU legal framework



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1. Personal data protection

Privacy and data protection

- Applicable laws
  - EU Directive 95/46/EC
  - National transpositions
    - e.g., the Belgian Act of 8 December 1992
  - Adopted in pre-Internet area, when centralised and limited processing was the rule
- EU rules are substantially more restrictive than rules from other countries (particularly US)

Privacy and data protection

- Cloud computing exposes the age, formality and complex application of the current laws
  - Many legal issues are not yet resolved
  - Reform of the current rules in the pipeline, but not for tomorrow
- Three examples of problems:
  - Who is controller?
  - Which law is applicable?
  - Transfer outside of EU?

“Data controllers” and “data processors”

- Legislation makes fundamental distinction between:
  - **data controller**: party that defines the purpose and the means of the processing
  - **data processor**: “dumb performer”
- Distinction is crucial to know who is responsible
- Data controller is liable towards the “data subjects”
- Data controller must choose appropriate data processors, and must seek adequate contractual protection from them

Data protection issues in the cloud

- Severe issues when applied in cloud computing context:
  - both customer and — particularly — the hosting provider define the “means” of the processing
  - statutory assumption that the controller is entirely in control of the processing
  - cloud computing is all about reducing the level of direct control, while EU legislation is all about keeping control of data
  - what about “sub-processors”?

Applicable data protection law

- An EU Member State's national law will apply when:
  - establishment of EU-based controller located in its territory processes personal data
  - controller outside EU uses "equipment" within territory

- Applied to cloud computing:
  - using EU-based data centre = becoming subject to the very strict EU data protection rules?
  - most authorities interpret "equipment" in an extremely broad way (even browser cookies)

Transfer of data outside EU

- Principle: no transfer of data to countries outside the EU that do not offer an “adequate level of protection”
  - only Switzerland, Argentinia and Canada
- Exceptions:
  - ask permission from every “data subject” involved
  - if transfer is *necessary* to execute contract with the data subjects
  - for US: subscribing to “safe harbour list”
  - “Binding Corporate Rules”
  - European Commission’s model agreement

Transfer of data outside EU

- In practice:
  - only use cloud provider with data centre within EU
    - e.g. Amazon EC2: choice of location (US East, US West or Ireland)
  - or make sure that model agreement is concluded with the cloud provider

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2. Contracting issues

Small contract, big liability?

- Cloud computing services offer low barrier to entry and easy scaling possibilities
  - "click-wrap agreements" are legally enforceable!
- Many publicly available cloud computing contracts limit liability of hosting provider to a level that is not in line with the potential risk
- Cloud computing contracts resemble typical software licenses, although potential risk is much higher

Example

*We and our licensors **shall not be responsible for any service interruptions**, including, without limitation, power outages, system failures or other interruptions, including those that affect the receipt, processing, acceptance, completion or settlement of any payment services. (...)*

*Neither we nor any of our licensors **shall be liable to you for any direct, indirect, incidental, special, consequential or exemplary damages**, including, but not limited to, damages for loss of profits, goodwill, use, data or other losses (...)*

Other contractual issues

- **Vendor lock-in**
  - There is no general legal requirement for a vendor to provide you with data export facilities. Everything depends on your contractual agreement.
- **Unilateral termination possibilities**
  - Cloud provider often reserves the right to unilaterally terminate its service provision
- **Involvement of multiple parties**
  - no single point of contact

Other contractual issues

- **Auditing requirements**
  - many contracts impose auditing possibilities that include physical inspection
  - how can these auditing requirements be complied with when geographically decentralised cloud services are used?
- **Applicable law & competent court**
  - if outside own country, any litigation can become prohibitively expensive
- What happens in case of **bankruptcy** of the provider?

Service Level Agreement

- Important in any service contract, crucial in a cloud computing context
- Points of attention:
  - How is the availability calculated by the provider?
    - *e.g. 10 outages of 6 minutes versus 1 outage of 1 hour*
  - Independent measurement of performance?
  - Are service credits the "sole remedy"?

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3. Liability for illegal data

Liability of cloud provider for illegal content

- In many jurisdictions, cloud providers can be held liable for the illegal data they may be hosting
- eCommerce Directive (2000/31/EC) introduced special liability protection for hosting providers:
  - no *liability* for services that "consist of" the storage of electronic information
  - under the condition that the provider has no knowledge or awareness of illegal nature...
  - ...and removes or blocks illegal data when it does gain knowledge or become aware of illegal nature ("notice and takedown")

Liability of cloud provider for illegal content

- Issues:
  - special protection is focused on **storage**, and does not take into account **processing** activities
  - significant amount of (particularly French) case law does not offer protection when services do not consist *exclusively* of storage activities
  - liability protection does not prevent so-called injunctions, which can be as costly and time-consuming
  - no standard notice-and-takedown procedure
- Reform in the pipeline?

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4. Compliance issues

Compliance issues

- IaS
  - Data retention obligations
  - Tax related storage requirements
  - Labour law related storage requirements
  - etc.

- SaaS
  - electronic invoicing legislation
  - ecommerce legislation
  - electronic signature legislation
  - etc.

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