

Legal considerations of cloud computing

Concerns, contracting, compliance

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Topics for the session

- Legal concerns
 - Data Protection
 - TUPE
 - E-disclosure
- Contracting concerns
- Mitigating risk
- Service provider study
- Experiences and questions

Legal concerns: Data Protection (1)

Overview

- The Players
- Data Subject
 - Individual who the personal data is about
- Data Controller
 - Decides what the data will be used for and how
 - Carries statutory burden of compliance under DPA
- Data Processor
 - Processes data on Data Controller's behalf
 - Comes into compliance framework through contract
 - No direct statutory duty under DPA

Legal concerns: Data Protection (2)

Highly relevant for cloud-based services

- Requirements on data controllers. 8 principles:
 - 1st principle. Personal data must be fairly and lawfully processed
 - 7th principle. Personal data to be kept secure
 - 8th principle. Personal data not to be transferred outside the European Economic Area unless adequate protection
- Penalties
 - £500,000 for serious breaches

ICO code of practice

Specifically contemplates cloud services

- ICO code of practice June 2010: “Personal Information Online Code of Practice”
- Available on ICO website
- Specific guidance for customers and suppliers
- Non-binding but carries evidential weight
- Good practice to comply

ICO code of practice: customers

Customers should...

- ensure written contract in place (electronic ok)
- confirm suppliers only process customer personal data on instructions
- check supplier's capacity to recover from technological / procedural failure
- check complaints redress procedure – compensation?
- check supplier's security track record
- gain supplier assurances re data standards
- ensure supplier sends regular data back-ups

ICO code of practice: suppliers

Suppliers should...

- give written guarantees re security arrangements
- confirm will only process customer personal data on customer instructions
- guarantee staff training and vetting
- explain complaints redress procedure
- give assurances re data standards
- give customer regular data back-ups

Legal concerns: Other

E-disclosure and TUPE

- E-disclosure
 - access to material for litigation
 - cloud-stored documents deemed “under control” of customer
- TUPE
 - entry to the cloud agreement
 - exit from the cloud agreement
 - 50% rule of thumb
 - consider and cater for

Contracting concerns (1)

Commoditised services – supplier standard terms

- Minimal performance/service level commitments
- Wide exclusions of liability, inadequate remedies
- No or inadequate service credits
- Low liability caps, no or inadequate indemnities
- Little awareness of EU DP obligations and inadequate restrictions/commitments
- Data could be held anywhere in in the world

Contracting concerns (2)

Commoditised services – supplier standard terms

- Minimal or no backup commitments
- Minimal security commitments
- Often non-UK legal jurisdiction
- No control over subcontracting

Mitigating legal risks – customers (1)

Negotiated contract

- Negotiated liability provisions
- Negotiated jurisdiction clause
- Data locations specified, data protection terms and restrictions negotiated
- Data backup and retrieval requirements specified



Mitigating legal risks – customers (2)

Negotiated contract

- Security specifications set out
- Service levels and service credits negotiated
- Subcontracting policed
- Customisation specified and priced
- TUPE dealt with
- Change control and exit provisions

Mitigating legal risks – customers (3)

Summary

- Do the legal risks mean I can't accept online standard terms from a cloud service provider?
- Generally, avoid packaged/commoditised services, and focus cloud plans on more bespoke services with negotiated contracts

Cloud Legal Project

Academic findings by Queen Mary's University

- Project evaluate legal issues in cloud computing
- 30 cloud service providers' TCs analysed
- Findings summarised:
 - Choice of law – 50pc US law, 10pc no law at all, 30pc English, EU.
 - All legal remedies excluded (as long as legal)!
 - Unilateral termination / variation rights
 - Silent on where data held / ultimate sub-processor
 - data retention post-termination

Experiences of cloud negotiations

- Our experiences
- Your experiences

Closing thoughts & Questions





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