

Legal aspects of cloud computing

Belrim Events

Cloud Computing - Revolution or Nightmare?

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- 1. *What is Cloud computing?***
2. Cloud from a regulatory perspective
3. Cloud from a contractual perspective
4. Policy initiatives
5. Some general rules of thumb

1. What is cloud computing?

- ***No legal definition***

- Access to applications and data via intermediaries who offer services over the Internet

- Exists already, but:
 - scalability
 - economies of scale
 - somewhere in the cloud

1. What is cloud computing?

- "Cloud computing" in simplified terms can be understood as the storing, processing and use of data on remotely located computers accessed over the internet.
 - This means that users can **command almost unlimited computing power on demand**, that they do **not have to make major capital investments** to fulfil their needs and that they can get to their **data from anywhere with an internet connection**.
 - Where the World Wide Web makes information available everywhere and to anyone, cloud computing makes **computing power available everywhere and to anyone**.

[European Commission, "Unleashing the Potential of Cloud Computing in Europe", Sept. 2012, p2.]

1. What is cloud computing?

- "a model for enabling convenient, **on-demand** network access to a **shared pool** of configurable computing resources ... that can be **rapidly provisioned** and released with minimal effort or service provider interaction"

[NIST (2009), US National Institute for Standards and Technology.]

- "Cloud computing consists of a set of technologies and service models that focus on the **Internet-based use** and delivery of IT applications, processing capability, storage and memory space."

[WP29 Opinion on cloud computing, WP196 (2012)]

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1. What is cloud computing?



Instant tech provisioning, service driven, over the internet

1. What is cloud computing?

- No legal definition
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- ***Exists already, but:***
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1. What is cloud computing?

Already keen users, without necessarily realising it



1. What is Cloud computing?
2. ***Cloud from a regulatory perspective***
3. Cloud from a contractual perspective
4. Policy initiatives
5. Some general rules of thumb

2. Cloud from a regulatory perspective

Infrastructure as a Service

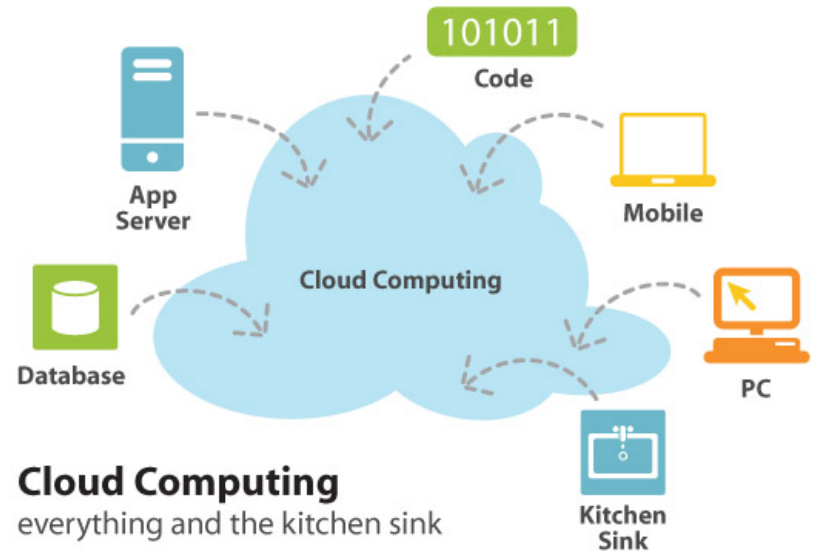
- Data storage
- e.g. Amazon S3

Platform as a Service

- Application development
- e.g. Google App Engine

Software as a Service

- Applications
- e.g. Zoho.com



Legal impact?

2. Cloud from a regulatory perspective

Directors

- Data security 48%
- Operational risk 40%
- Company reputation 40%
- M&A transactions 37%
- Investor relations 30%
- Executive compensation 30%
- SEC/regulatory compliance 28%
- Disaster recovery 27%
- Internal controls 26%
- Global business expansion 26%

General Counsel

- Data security 55%
- Operational risk 47%
- Management of outside
- legal fees 38%
- Company reputation 35%
- Disaster recovery 35%
- E-discovery 33%
- FCPA 30%
- Global business expansion 29%
- Internal controls 26%
- Executive compensation 26%

Source: <http://www.fticonsulting.com/global2/media/collateral/united-states/legal-risks-on-the-radar.pdf>

- **No specific cloud legislation**

- But:
 - General laws of obligations (Belgian Civil Code)
 - Rules applicable to named contracts?
 - Consumer law
 - Law indicating applicable law and competent courts
 - Privacy legislation
 - eCommerce legislation
 - etc.

2. Cloud from a regulatory perspective

- General laws of obligations (Belgian Civil Code)
 - concluding the contract
 - non-performance of the contract
 - proving an obligations
 - transfer of obligations
 - etc.

- Rules applicable to named contracts?
 - sales contract
 - services contract
 - lease contract
 - etc.

2. Cloud from a regulatory perspective

- Consumer law
 - distance contracts (right to withdraw)
 - contracts for a determined period of time
 - information obligations
 - applicability of T&C by reference in a standard document
 - applicable law and competent courts

- Law indicating applicable law and competent courts
 - cloud is almost always cross-border
 - many companies established in U.S.
 - applicable law often that of the seat of the cloud provider

2. Cloud from a regulatory perspective

- Privacy legislation
 - processing of "personal" data – for EU: Directive 95/46/EC
 - data controller and data processor
 - transfer of personal data to third countries
 - many interpretation difficulties: recognized by WP 29
 - coming: Privacy Regulation

- eCommerce legislation

Article 29 Working Party Opinion (Privacy)

- 1 July 2012, Opinion 196
- key messages –
 - conduct a full risk assessment first
 - degree of lock in?
 - data location?
 - security?
 - data use?
 - extent of data retention?
- Status of 'recommendations'

2. Cloud from a regulatory perspective

- **Conclusion:** fragmented and no general framework.
- DLA Piper is currently conducting a European Comparative Study for the European Commission regarding cloud contract regulations applicable in the EU Member States and U.S.
- As a result, relation between the parties will often be regulated in a contract

1. What is Cloud computing?
2. Cloud from a regulatory perspective
- 3. *Cloud from a contractual perspective***
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3. Cloud from a contractual perspective

- Importance
 - Absence of clear regulatory framework
 - Cloud computing services offer low barrier to entry and easy scaling possibilities
 - “click-wrap agreements” are legally enforceable!

3. Cloud from a contractual perspective

- Some topics to be discussed:
 - contract structure
 - qualification of the contract
 - nature of the obligations
 - service levels
 - payment
 - term, suspension and termination
 - audit
 - exit
 - security, protection and loss of data
 - liability

3. Cloud from a contractual perspective

- Contract structure:
 - often standard contracts with general terms and conditions
 - "short" contracts vs long contracts

5. SERVICE LEVEL AGREEMENTS. Cloud Service Level Agreements are located at <http://www.rackspace.com/cloud/legal/sla>. The terms there are incorporated herein by reference as to the applicable Services.

- embedded contractual clauses should be notified and be approved by the contractual party in advance
- Qualification of the contract:
 - depends on the services/product provided (see IaaS vs PaaS vs IaaS)
 - relevance: application of the specific regulations on certain named contracts (e.g. the rules on hidden defects for sales contracts or warranty on consumer goods)

3. Cloud from a contractual perspective

- Nature of the obligations
 - obligation of means vs. obligation to achieve a result
 - difficult to assess if not specified
 - "commercially reasonable efforts", "with due diligence", etc.
- Service levels
 - e.g. availability, response time, etc.
 - contra: "as is" clause
 - important: measurement, reporting, excluded events, consequence of non-achievement
 - service credits (penalty clause or fixed compensation for lesser value)

3. Cloud from a contractual perspective

- Payment
 - "pay per use"
 - right to modify applicable charges
- Term, suspension and termination

6. TERM. The initial term for each Order begins on the date we make the Services available for your use and continues for the period stated in the Order. If no period is stated in the Order, then the initial term shall be one month. Upon expiration of the initial term, the Order will automatically renew for successive renewal terms of one month each, unless and until one of us gives the other a written notice of non-renewal prior to the expiration of the initial term, or then-current renewal term, as applicable. You must follow Rackspace's non-renewal process accessible from the Rackspace Cloud control panel to give an effective notice of non-renewal.

- term (determined or undetermined)
- suspension (ENAC-exception or force majeure), but possible to agree
- termination for convenience
- termination for cause
- Audit
 - practical problems (where to audit?)

- *Immediately upon our notice to you in accordance with the notice provisions set forth in Section 15 below if: (i) you attempt a denial of service attack on any of the Services; (ii) you seek to hack or break any security mechanism on any of the Services or we otherwise determine that your use of the Services or the Amazon Properties poses a security or service risk to us, to any user of services offered by us, to any third party sellers on any of our websites, or to any of our or their respective customers or may subject us or any third party to liability, damages or danger; (iii) you otherwise use the Services in a way that disrupts or threatens the Services; (iv) you are in default of your payment obligations hereunder and there is an unusual spike or increase in your use of the Services; (v) we determine, in our sole discretion, there is evidence of fraud with respect to your account; (vi) you use any of the AWS Content (as defined in Section 6.1) or Marks (as defined in Section 6.2) other than as expressly permitted herein; (vii) we receive notice or we otherwise determine, in our sole discretion, that you may be using AWS Services for any illegal purpose or in a way that violates the law or violates, infringes, or misappropriates the rights of any third party; (viii) we determine, in our sole discretion, that our provision of any of the Services to you is prohibited by applicable law, or has become impractical or unfeasible for any legal or regulatory reason; or (ix) subject to applicable law, upon your liquidation, commencement of dissolution proceedings, disposal of your assets, failure to continue your business, assignment for the benefit of creditors, or if you become the subject of a voluntary or involuntary bankruptcy or similar proceeding.*

3. Cloud from a contractual perspective

- Exit
 - transition of data stored in the cloud to a new service provider ("vendor lock-in")
 - practice

- Security
 - security (e.g. physical access to data center, logical security e.g. against hacking, etc.)

4.5. Return of Your (Content) Data.

Your are solely responsible for guarding, securing and retrieving your Data from the Website. Upon 30 days after Termination, Showpad is entitled to delete all your data.

Upon request by You made within 30 days after the effective date of termination of a Purchased Services subscription, Showpad will make available to You a file of Your Contact Data in comma separated value (.csv) format along with attachments in their native format. After such 30-day period, Showpad will no longer have the obligation to maintain or provide any of Your Contact Data and shall thereafter, unless legally prohibited, delete all of Your Contact Data in its systems or otherwise in its possession or under its control.

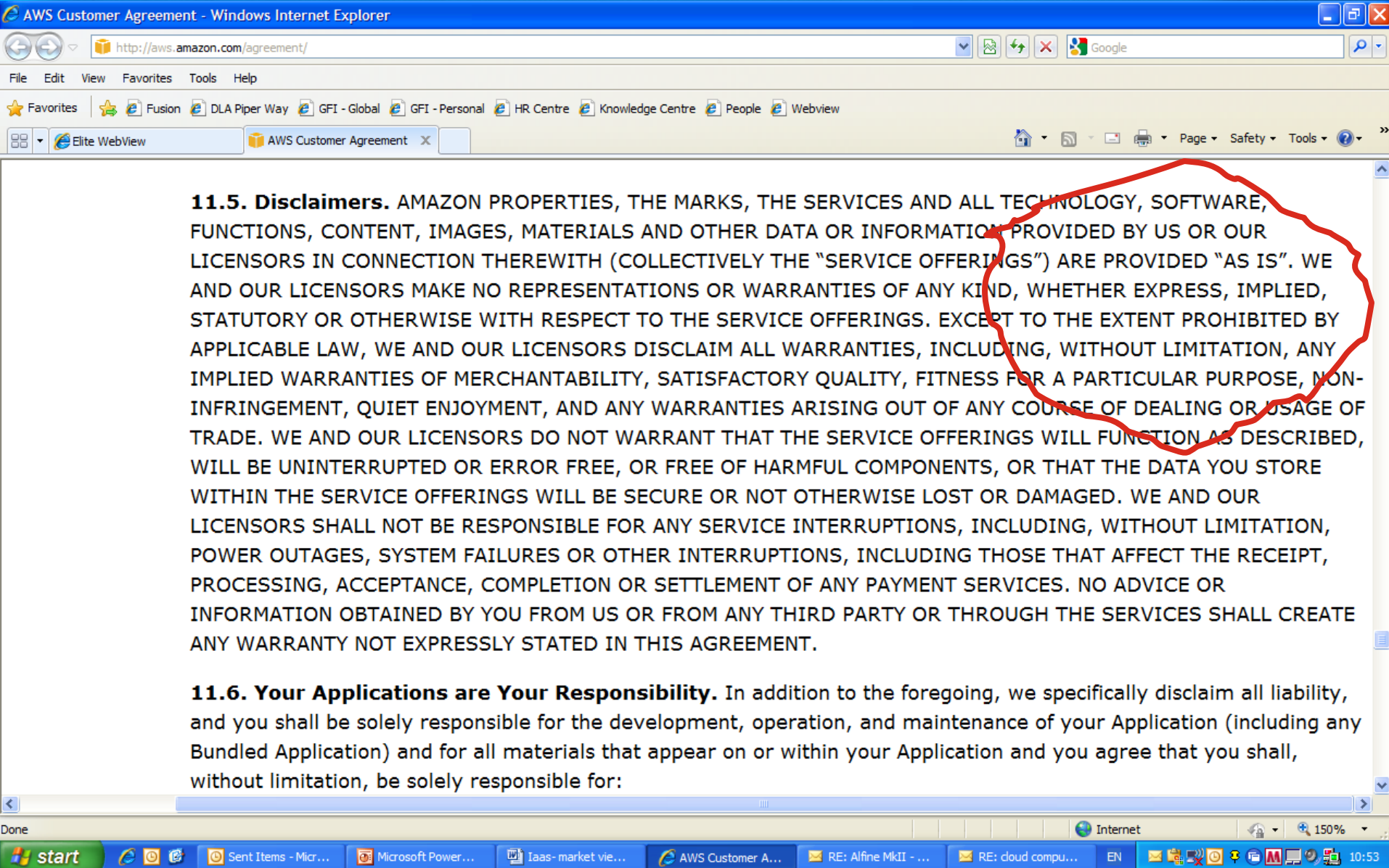
- **4.2. Our Protection of Your Data.** We shall maintain appropriate administrative, physical, and technical safeguards for protection of the security, confidentiality and integrity of Your Data. We shall not (a) modify Your Data, (b) disclose Your Data except as compelled by law in accordance with Section 8.3 (Compelled Disclosure) or as expressly permitted in writing by You, or (c) access Your Data except to provide the Services and prevent or address service or technical problems, or at Your request in connection with customer support matters.
- **4.3. Your Responsibilities.** You shall (i) be responsible for Users' compliance with this Agreement, (ii) be responsible for the accuracy, quality and legality of Your Data and of the means by which You acquired Your Data, (iii) use commercially reasonable efforts to prevent unauthorized access to or use of the Services, and notify Us promptly of any such unauthorized access or use, and (iv) use the Services only in accordance with the User Guide and applicable laws and government regulations. You shall not (a) make the Services available to anyone other than Users, (b) sell, resell, rent or lease the Services, (c) use the Services to store or transmit infringing, libelous, or otherwise unlawful or tortious material, or to store or transmit material in violation of third-party privacy rights, (d) use the Services to store or transmit Malicious Code, (e) interfere with or disrupt the integrity or performance of the Services or third-party data contained therein, or (f) attempt to gain unauthorized access to the Services or their related systems or networks.

3. Cloud from a contractual perspective

- Liability
 - context
 - direct limitations (exclusion of certain forms of damage, financial cap of liability, limitation to issue claims, qualification of fault, etc.)
 - indirect limitations (nature of the obligation, service credit with limits, limiting warranties and "as is" service provision, force majeure, etc.)

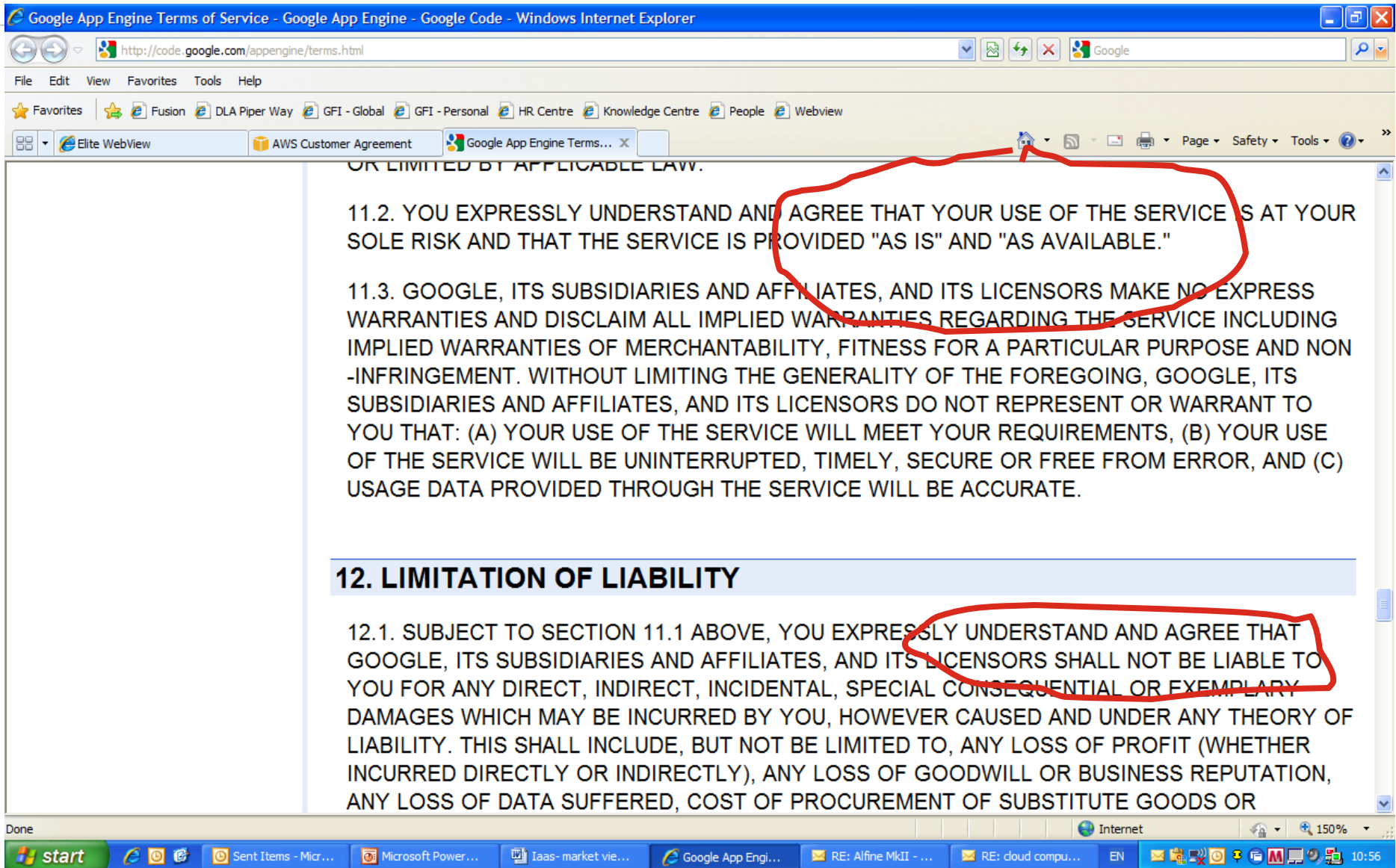
*We and our licensors **shall not be responsible for any service interruptions**, including, without limitation, power outages, system failures or other interruptions, including those that affect the receipt, processing, acceptance, completion or settlement of any payment services. (...)*

*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 (...)*



11.5. Disclaimers. AMAZON PROPERTIES, THE MARKS, THE SERVICES AND ALL TECHNOLOGY, SOFTWARE, FUNCTIONS, CONTENT, IMAGES, MATERIALS AND OTHER DATA OR INFORMATION PROVIDED BY US OR OUR LICENSORS IN CONNECTION THEREWITH (COLLECTIVELY THE "SERVICE OFFERINGS") ARE PROVIDED "AS IS". WE AND OUR LICENSORS MAKE NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE WITH RESPECT TO THE SERVICE OFFERINGS. EXCEPT TO THE EXTENT PROHIBITED BY APPLICABLE LAW, WE AND OUR LICENSORS DISCLAIM ALL WARRANTIES, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, QUIET ENJOYMENT, AND ANY WARRANTIES ARISING OUT OF ANY COURSE OF DEALING OR USAGE OF TRADE. WE AND OUR LICENSORS DO NOT WARRANT THAT THE SERVICE OFFERINGS WILL FUNCTION AS DESCRIBED, WILL BE UNINTERRUPTED OR ERROR FREE, OR FREE OF HARMFUL COMPONENTS, OR THAT THE DATA YOU STORE WITHIN THE SERVICE OFFERINGS WILL BE SECURE OR NOT OTHERWISE LOST OR DAMAGED. 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. NO ADVICE OR INFORMATION OBTAINED BY YOU FROM US OR FROM ANY THIRD PARTY OR THROUGH THE SERVICES SHALL CREATE ANY WARRANTY NOT EXPRESSLY STATED IN THIS AGREEMENT.

11.6. Your Applications are Your Responsibility. In addition to the foregoing, we specifically disclaim all liability, and you shall be solely responsible for the development, operation, and maintenance of your Application (including any Bundled Application) and for all materials that appear on or within your Application and you agree that you shall, without limitation, be solely responsible for:



OR LIMITED BY APPLICABLE LAW.

11.2. YOU EXPRESSLY UNDERSTAND AND AGREE THAT YOUR USE OF THE SERVICE IS AT YOUR SOLE RISK AND THAT THE SERVICE IS PROVIDED "AS IS" AND "AS AVAILABLE."

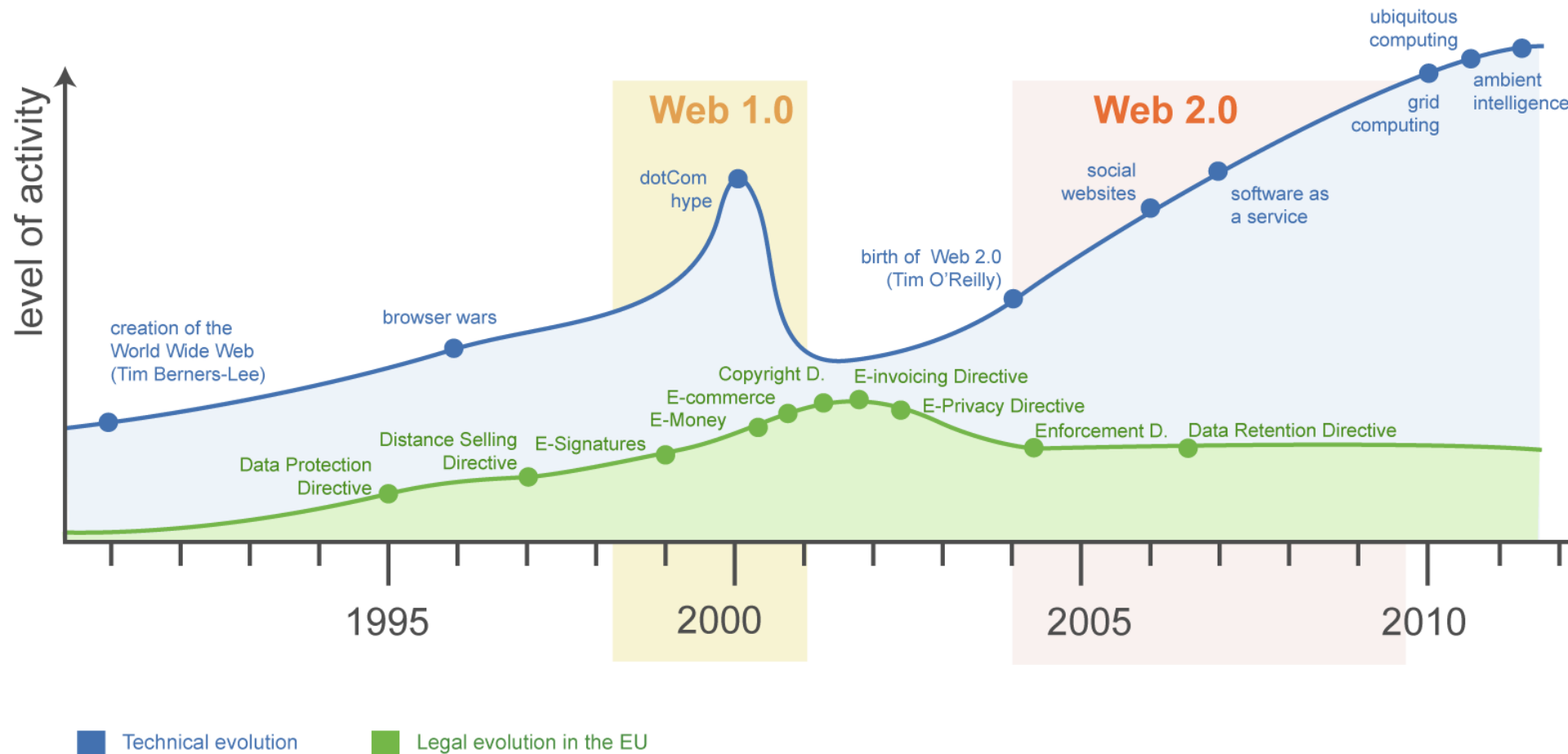
11.3. GOOGLE, ITS SUBSIDIARIES AND AFFILIATES, AND ITS LICENSORS MAKE NO EXPRESS WARRANTIES AND DISCLAIM ALL IMPLIED WARRANTIES REGARDING THE SERVICE INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, GOOGLE, ITS SUBSIDIARIES AND AFFILIATES, AND ITS LICENSORS DO NOT REPRESENT OR WARRANT TO YOU THAT: (A) YOUR USE OF THE SERVICE WILL MEET YOUR REQUIREMENTS, (B) YOUR USE OF THE SERVICE WILL BE UNINTERRUPTED, TIMELY, SECURE OR FREE FROM ERROR, AND (C) USAGE DATA PROVIDED THROUGH THE SERVICE WILL BE ACCURATE.

12. LIMITATION OF LIABILITY

12.1. SUBJECT TO SECTION 11.1 ABOVE, YOU EXPRESSLY UNDERSTAND AND AGREE THAT GOOGLE, ITS SUBSIDIARIES AND AFFILIATES, AND ITS LICENSORS SHALL NOT BE LIABLE TO YOU FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL CONSEQUENTIAL OR EXEMPLARY DAMAGES WHICH MAY BE INCURRED BY YOU, HOWEVER CAUSED AND UNDER ANY THEORY OF LIABILITY. THIS SHALL INCLUDE, BUT NOT BE LIMITED TO, ANY LOSS OF PROFIT (WHETHER INCURRED DIRECTLY OR INDIRECTLY), ANY LOSS OF GOODWILL OR BUSINESS REPUTATION, ANY LOSS OF DATA SUFFERED, COST OF PROCUREMENT OF SUBSTITUTE GOODS OR

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Current EU legal framework



Europe

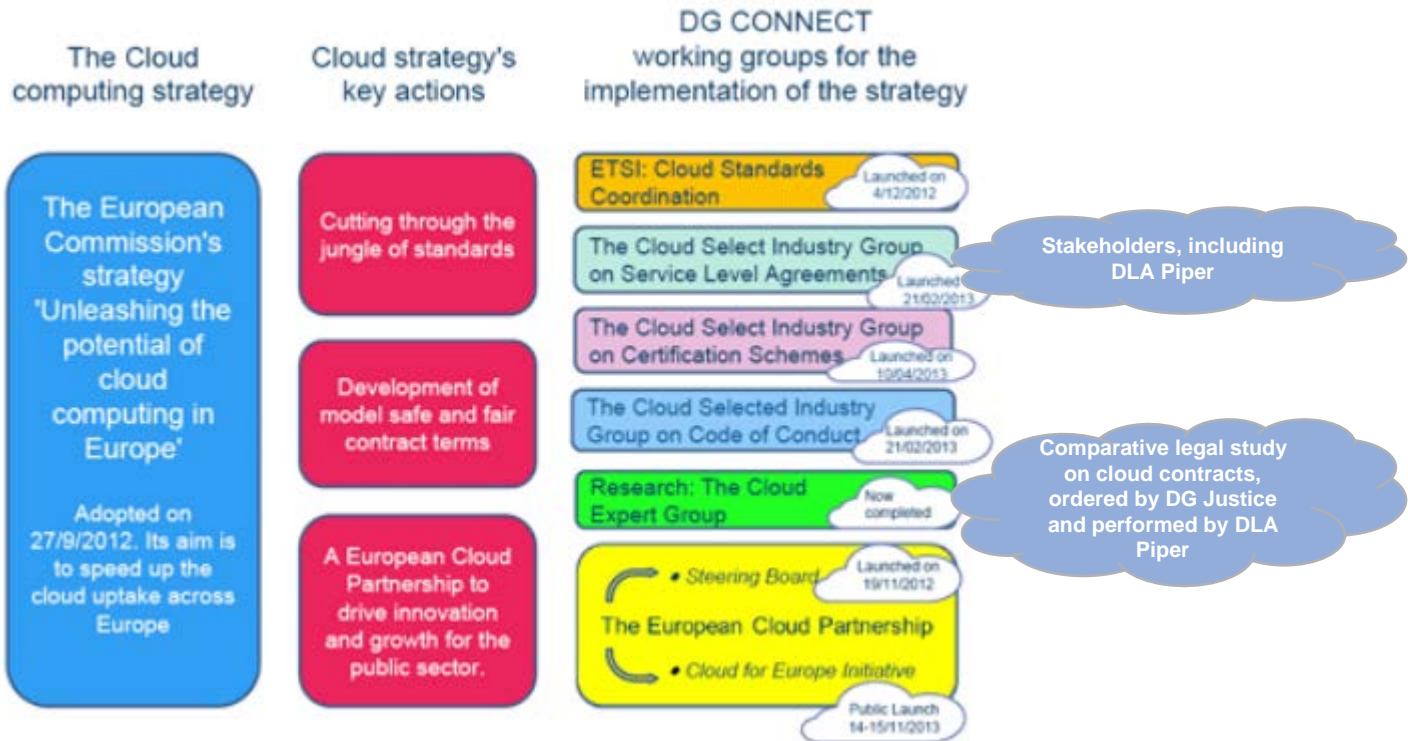
- strategy of the European Commission for "Unleashing the Potential of Cloud Computing in Europe" (2012), outlining:
 - action to create 2.5 million new European jobs, annual boost of €160 billion to the European Union GDP by 2020 and **speed up and increase the use of cloud computing** across all economic sectors
- Three actions to be undertaken:
 - Action 1: Cutting through the Jungle of Standards
 - standards for security, interoperability, data portability; coordinated by the European Telecommunications Standards Institute (**ETSI**)
 - certification schemes that indicate compliance with standards; **C-SIG on certification schemes** (with support of ENISA)

- Action 2: Safe and Fair Contract Terms and Conditions
 - model terms for cloud SLA between providers and professional users:
C-SIG on SLA
 - Participants: Oracle, Numergy, IBM, Salesforce, Amazon, Telecom Italia, Atos, Euro CIO, Eurocloud, Skyscape, Dell, QMWL and other universities, **DLA Piper**
 - Work with industry to agree a code of conduct for cloud computing providers to support a uniform application of data protection rules: **C-SIG on Code of Conduct**
 - propose to consumers and SME European model contract terms and task an expert group for this purpose
 - basis for this task will be a comparative study on cloud computing contracting legislation in all EU Member States and US, ordered by DG Justice and currently performed by **DLA Piper**

4. Policy initiatives

- Action 3: Establishing a European Cloud Partnership (ECP) to drive innovation and growth from the public sector
 - public sector as largest buyer of IT services
 - ECP will bring together industry expertise and public sector users to work on common procurement requirements

4. Policy initiatives



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5. Some general rules of thumb

- No legal definition of cloud computing
- General rules apply
 - dependent on the type of cloud service
 - not always very clear which rules and how they would apply
 - If you offer cloud: be aware of consumer legislation
 - If you take cloud: be aware of privacy legislation
- General contract legislation and named contracts
 - often non-mandatory, therefore...
 - contractual relation!
- Cloud contracts are often low-barrier
- Several topics to bear in mind (liability, data portability, exit assistance, warranties, etc.)
- Coming: policy initiatives (EU-driven)

Thank you for your attention!

Any questions?

For further information, please contact antoon.dierick@dlapiper.com