

BUSINESSEUROPE



Noerr

LEGAL ISSUES OF DIGITALISATION IN EUROPE

MEASURES TO EFFECTIVELY HELP COMPANIES
ADVANCE THEIR DIGITAL STRATEGIES





Who we are

BusinessEurope is the leading advocate for growth and competitiveness at European level, standing up for companies across the continent and campaigning on the issue that most influence their performance. A recognised social partner, we speak for all-sized enterprises in 34 European countries whose national business federations are our direct members.



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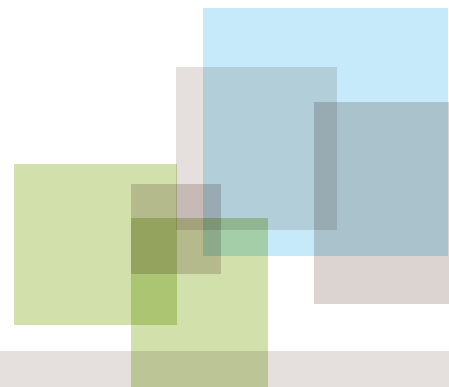
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INTRODUCTION

Between March and April 2017 Noerr LLP in partnership with BusinessEurope, has conducted an inquiry on legal problems digital businesses across European Member States face when taking advantage of digital technologies to elevate their businesses. At the European level, the creation of a true Digital Single Market with the objective of building a European Data Economy is an important priority for the EU, for example, effective cross-border free flow of data should be realised. European companies are also increasingly picking up on digital developments and are beginning to incorporate digital business models to make full use of i.e. data and data analytics.

This report, therefore, aims at:

1. Assessing the maturity level of digitalisation among European companies
2. Providing recommendations to the public debate on the legal topics and digital developments that are currently most relevant for companies in Europe

Europe needs a common legal framework that allows businesses to compete globally, as opposed to a patchwork of individual national solutions. This report addresses the legal challenges companies are currently facing in Europe and provides recommendations based on an analysis of the answers to our survey.

29 September 2017



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How this Survey was executed

BusinessEurope together with the European law firm Noerr LLP conducted research on the legal challenges of businesses face when digitalising their operations in Europe. Based on the answers provided by business experts across Europe, this report evaluates whether the existing national and European legal framework sufficiently supports and encourages the use of innovative technologies, applications and business models of the digital economy, with a special focus on emerging issues surrounding:

- Data ownership & Access
- Free flow of data
- Liability
- The Cloud

We have consulted Board members, Executives, Vice Presidents and Directors of companies across the continent to receive a consolidated view of the European industry on how the European legal framework should be shaped to accompany the latest digital developments.

Between March and April 2017 190 business leaders and managers from 20 different countries participated in our online survey. They expressed views and practical experience on current challenges companies face when implementing their digital strategies and the legal measures which would effectively help them to advance their digital strategy.

Most of the responding companies (34%) were large, generating more than €1 billion in revenue during the past fiscal year. Further, 7% generated between €500 million and €1 billion, 13% between €50 million and €500 million, and 33% generated less than €50 million¹. With respect to the sectors concerned, most participants belong to the manufacturing sector (39%). The Technology, Media & Telecommunications (TMT) sectors make another 26%, Financial Services 10%, and Professional Services 10%. Another 5% to Energy & Utilities, and Tourism, Transportation & Logistics, respectively. Sectors which are currently only at the starting point of digital transformation had a lower response rate. Despite the PropTech developments in Real Estate and the various concepts of how technology is influencing consumer buying habits, Construction & Real Estate make only 3%, Wholesale & Retail 2% and the Public Sector 1% of respondents².

¹13% of respondents did not know their revenue class.

²Rounding errors





KEY FINDINGS

- 1** Businesses prefer contractual solutions to coordinate data ownership, access and liability.
- 2** Where businesses feel regulation is necessary to coordinate data access, ownership, liability and the cloud, it should be on a European instead of national level basis.
- 3** A right of production related to the data producer still needs further evaluation in relation to existing legal frameworks.
- 4** Further development of the law through judicial decisions is not seen as a suitable solution for the fast-moving environment of digital technologies.
- 5** Businesses are cautious with respect to the cloud and cloud location. They clearly want to be able to choose the country or region in which their data is stored.
- 6** Businesses want their data to move freely across the EU and demand an end to national data localisation.
- 7** E-person liability plays an indirect role in the perception of businesses to regulate liability. Pragmatic solutions are required.
- 8** Artificial Intelligence (AI), autonomous processes and robotics are technologies in their early practical beginnings. Liability issues relate to software defects and smart products.

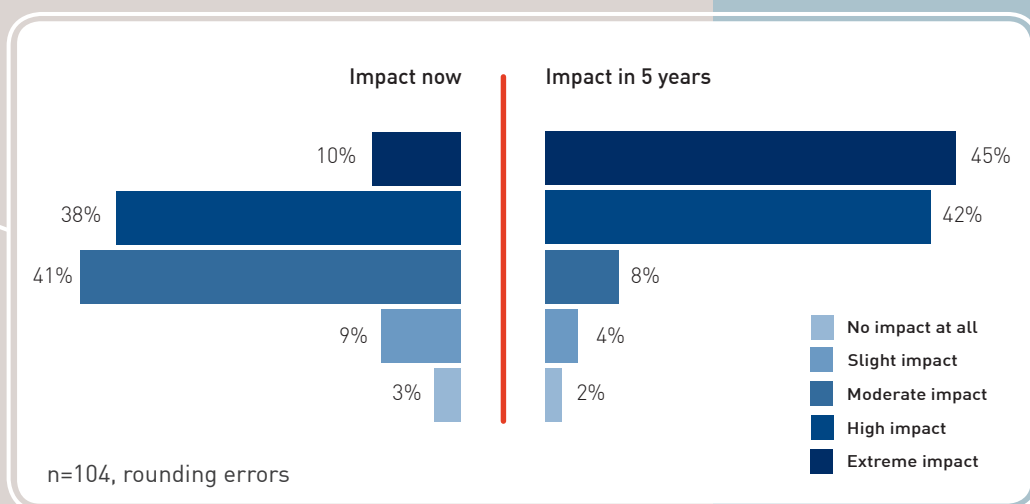


ADOPTION OF DIGITALISATION

Digitalisation will reach and change 90% of the surveyed companies in the next five years

While we assume that companies who responded to our survey are more advanced than the average companies when it comes to the development of their digital capabilities, the majority of respondents currently assess the impact of digitalisation on their business model as moderate to high. However, almost 90% of respondents think that digitalisation will impact their business highly or even extremely within the next five years.

How do you rate the impact of digitalisation on your company/business model? Now and in 5 years.



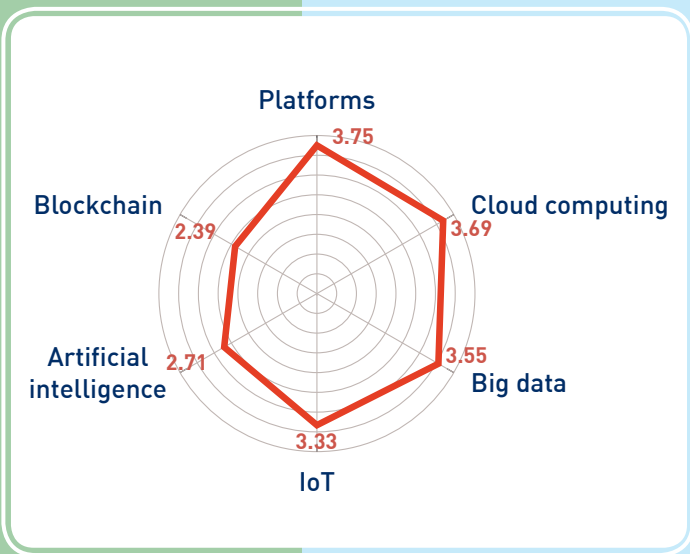
Despite that, only very few companies established a dedicated responsibility at the highest executive levels, such as a Centre of Excellence (18%) or a Chief Digital Officer (18%) to oversee the advancing digitalisation through a central coordination unit.

Companies have responded to the digital disruption in various ways and while most firms are right in the middle of the transition, they have already made adjustments in how they do business. Half of the companies have already implemented four or more strategies to accompany digitalisation, such as

- Digitalisation of processes (77%)
- Implementation of digital technologies (77%)
- Internal development of digital capabilities (69%)
- Acquisitions to gain digital capabilities (39%)
- Reorganisation of value-added chain (34%)
- Expansion of company/business portfolio (29%)



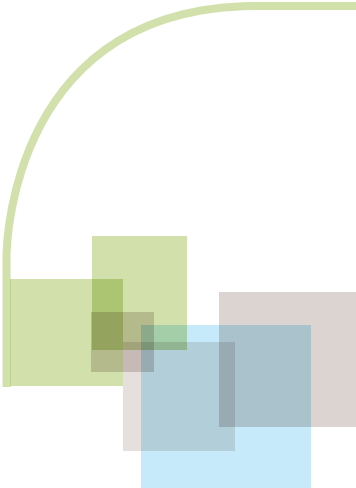
When asked which technologies or business models have the most impact on their company, the highest number of responses yield platforms, cloud computing and big data, followed by Internet of Things (IoT) and artificial intelligence. Impact here seems to follow maturity levels of technologies. The blockchain technology is currently only of minor relevance to the surveyed businesses in Europe. The only industries which are above average affected by the blockchain technology are Technology, Media and Telecom (TMT), and Energy and Utilities. Interestingly, the Financial Services industry does not feel impacted by blockchain very much.



Which technologies/business models have the most impact on your company?

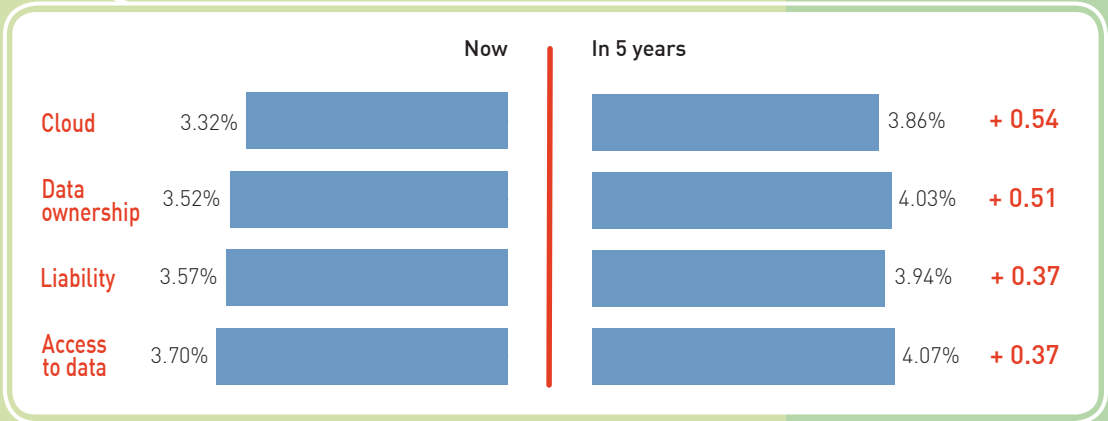
n=100-121
scale 1-5: not at all, slightly, moderately, very, extremely

Some of the most important legal issues to companies are currently data access, liability, data ownership and the cloud. Within the next five years, business leaders assume that the relevance of cloud and data ownership will gain the most in relevance and will then have a very important influence on how companies do business. Overall, data ownership and access to data are the most important legal issues in the future.



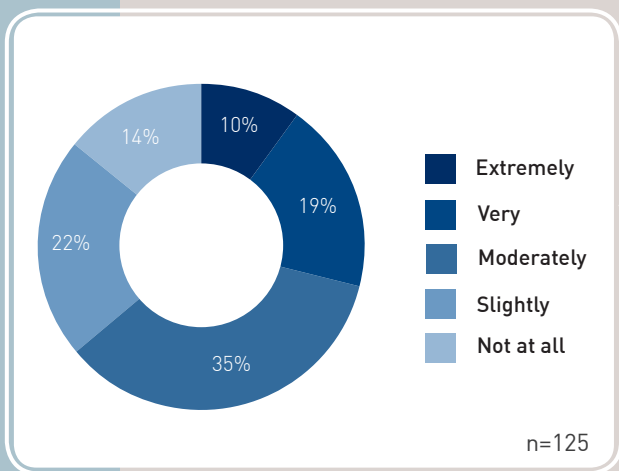


How important are the following legal issues to your company/business model? Now and in 5 years.



n=120-125
scale 1-5: not at all, slightly, moderately, very, extremely

Although issues like the cloud, data ownership, liability and access to data are the topics that business leaders are confronted with, less than a third of the surveyed companies significantly involve their legal department in the strategic planning of digitalisation. While 64% of the study participants involve their legal department in the strategic planning to some degree (moderately, very and extremely), 14 % of respondents even say that the legal involvement in strategic planning is obsolete.



Is your legal department involved in the strategic planning of digitalisation?

LEGAL ISSUES AND OBSTACLES

Where companies see a need for action

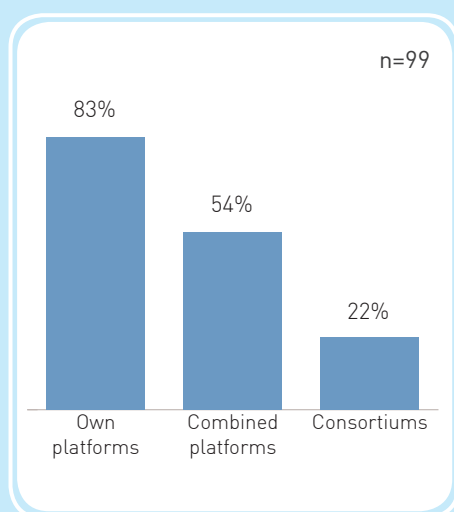
With its communication on the European Data Economy, the European Commission addresses big data issues as an important part of the Digital Single Market. The use of non-personal data poses a great business opportunity to the EU's economy. For European businesses to grow, "data needs to be continuously accessible and able to move freely within the single market"³.

Data Ownership & Access

Currently, a legal concept of data ownership for non-personal data does not exist. The general practice is to establish agreements on the rights on data as this is an area where change happens continuously and rapidly and private agreement provides the necessary flexibility. Three out of four of the surveyed companies currently identify data ownership as a factor in realising their business model. Having ownership of data is even expected to become a very important legal and strategic element to every company by 2022.

As 96% of study participants already make use of (big) data on a regular basis, big data has assumed a permanent place in companies. In detail, big data usage focuses on the following areas:

- 79% use existing data for strategic business decisions (Data Analytics).
- 78% use data for the improvement of products and services.
- 64% use data to improve marketing and sales.
- 48% use data for predictive maintenance.



How do you generate and aggregate the data?

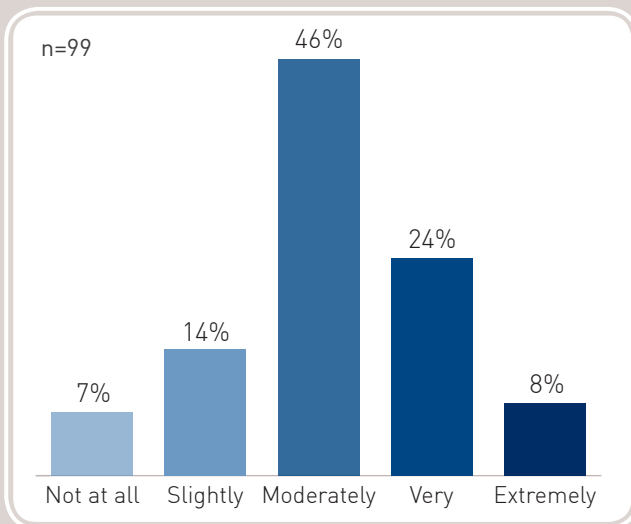
³ European Commission: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: «On the Mid-Term Review on the implementation of the Digital Single Market Strategy». 10.05.2017, p.9.



Only 4% of respondents do not exploit the potential of big data at all.

91% of those companies who offer data business services target offers to B2B customers and 45% to B2C customers. Whereby the companies, for the most part, maintain their own platforms to generate and aggregate the data (83%), combined platforms or consortiums are used more scarcely (54%, 22%). Consortiums are almost always linked with own or combined platforms. Interoperability between different platforms seems to exist at least in half of the responding companies, which fosters user-friendliness and will enhance innovation in the long run.

There are very diverse views on whether the European regulatory framework covers all aspects of data ownership and supports company business models. While 32% think that the EU legislation sufficiently regulates data ownership, 21% believe there are weaknesses. The assessment of appropriate coverage of EU legislation seems to decrease with the importance of data ownership to realise a company's business model. The diverse views on whether the European regulatory framework covers all aspects of data ownership appear to be inversely related to how much the companies are affected by it.



In order to realise your business model: does the European regulatory framework cover all aspects of data ownership?

In order to encourage the free flow of and access to data the EU Commission is evaluating the creation of a new "Data Producer's Right" for non-personal and anonymised data⁴. We asked business leaders whether this concept would solve ownership and access issues and help them realise their business model.



⁴ European Commission: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: "Building a European Data Economy". 10.01.2017, p. 13.



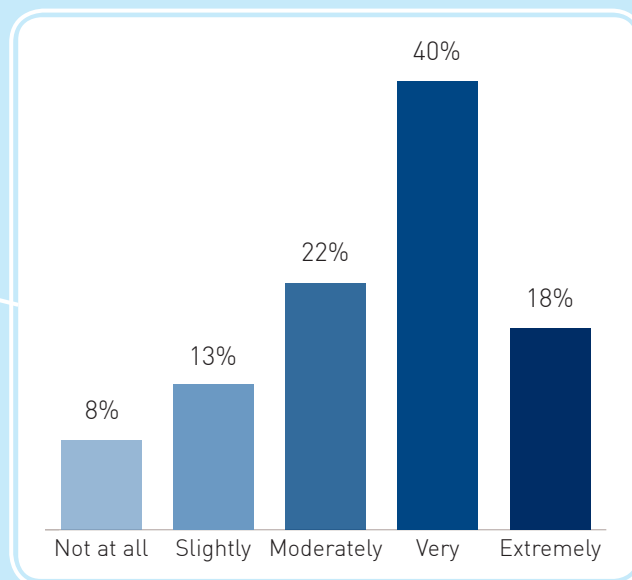
Currently, 47% think that such a data producer's right still needs further assessment. 31% are in favour of the idea of identifying the "data producer" as the owner or long-term user of a device and thereby grants them the right to use and disclose data.

Supporters of this concept are mostly small companies with revenues below €50 million. 21% however fully oppose this approach, often because such a right would limit the flexibility for parties to define terms of management of data and agree upon them through contracts. From an investment perspective, it is crucial that businesses can use and protect the data they produce as they see fit, in order to be able to develop new products, find innovative solutions and get a return on investment, this is currently possible within existing contractual and intellectual property frameworks.

In compensation for granting a "Data Producer's Right", the European Commission believes that data **access** could be **permitted** for specific purposes, e.g. for public interest, specific purposes and FRAND terms (fair, reasonable and non-discriminatory)⁵.

The overwhelming part of companies currently rely on national law provisions to claim data access (83%). Rarer basis for access are antitrust law (4%) and unfair competition rules (9%).

Is data access an issue to your company in order to realise your business model?



Free flow of data

To ensure the free flow of data between EU member states and their industries, the European Commission is proposing an effective and trustworthy principle of free movement of data within the EU.

⁵ European Commission: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: "Building a European Data Economy". 10.01.2017, pp. 12-13.





Data localisation requirements, entailing the storage and processing of data within specific territories, would only be justified in limited cases, such as for national security purposes.⁶ This proposition seems to be in line with the opinion of the consulted business leaders as cross-border access to data has become a very or even extremely important issue to 58% of the surveyed companies in order to realise their business model.

The big data business models, which the surveyed companies are offering or building are:

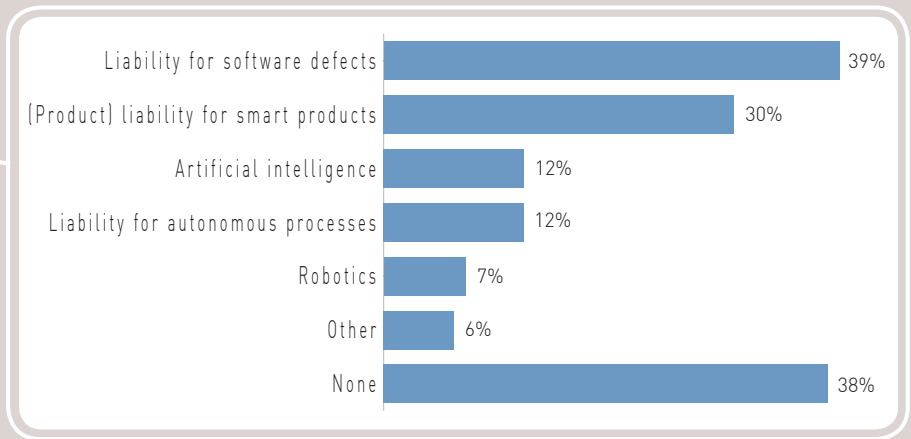
- Data analytics as a service (58%)
- Tools provider (44%)
- Data aggregation (43%)
- Information as a service (40%)
- Data supply (32%)
- Data enrichment (30%)
- Data facilitators (28%)
- Data brokerage (22%)
- None (14%)

A large part of respondents still face legal issues or obstacles, which relate to legal insecurity and the fact that national regulation is often unclear. Problems range from restrictions to cross-border data flows, data protection and the inconsistent implementation of the new GDPR in various EU Member States, unclarity on access and ownership of data, and forced localisation of data. Those companies who do not see any legal obstacles predominantly manage access to data through contractual clauses.

*“Too many different national laws, views, or bases which an international company has to comply with.”
– Respondent*

⁶ European Commission: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: “On the Mid-Term Re-view on the implementation of the Digital Single Market Strategy”. 10.05.2017, p. 10.

Does your company assume liability for one or more of the following aspects?



Liability

Liability is an issue to 62% of the surveyed companies. While 38% do not assume liability for any of the given aspects, 39% assume liability for software defects, 30% (product) liability for smart products, 12% for artificial intelligence and autonomous processes, and 7% for robotics.

The importance of liability for software defects is not really a current trend. This topic has been a major issue for those liable (and also for insurers) in all industries with programmable elements for decades. The fact that its significance is still high reflects the yet existing latent risk of software being prone to errors, it is also an indicator of the consequential damage which may result from software defects. However, it is indeed a new trend in digitalised industrial products that the product liability risk for smart products is increasingly coming into focus. Products which depend on connectivity lead in the event of error to a potential infection of entire connected product chains. However, it is to be expected that this new technical risk scenario will be manageable in the mid-term with existing statutory provisions.

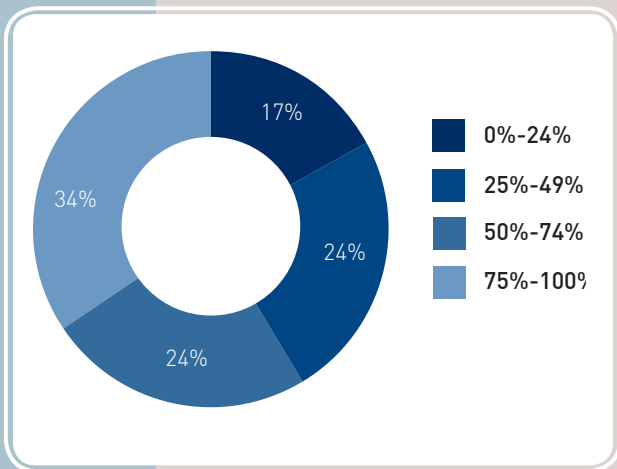
In contrast, respondents currently do not associate artificial intelligence, machines acting autonomously and the entire issue of robotics with a particularly significant threat potential in terms of liability. While these topics are commonly subject to legal and policy discussions, they are not high on the agenda of industry players.

Respondents largely base the distribution of liability on contractual provisions (79%) and product liability rules (62%). Fewer respondents report relying on tort law (29%) as the basis for their digital business models. The current regulation of liability is perceived as adequate to cover companies' needs and most respondents expressed the view that liability for the digital business models is currently sufficiently or adequately regulated: almost three quarters of respondents say this legal issue is very or even extremely regulated and 24% think that their companies' liability requirements are at least slightly covered by the current legislation. Only 5% said that liability issues are not covered at all.

Cloud

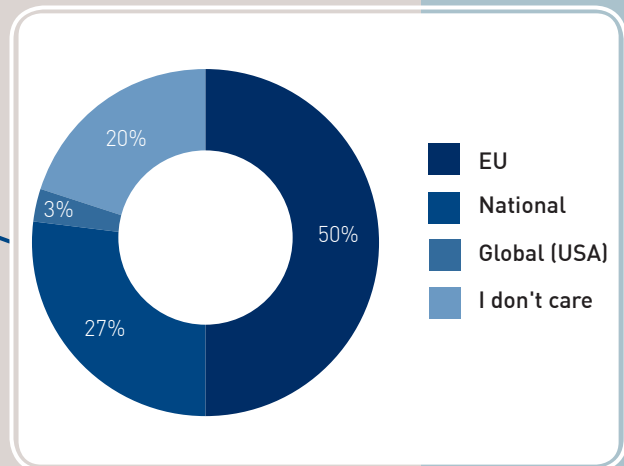
Cloud solutions provide a huge degree of democratisation of hosting space. Small and medium-sized companies can use the same software services as large companies. In the past, large companies had a bigger IT advantage. With clouds, hosting space is cheap, and it is available “off the shelf” and in all sizes. Even very small companies can provide high-quality handling of processes and deliver standardised products such as platform as a service (PAAS), software as a service (SAAS), or infrastructure as a service (IAAS).

41% of surveyed companies already use more cloud services than on-premise software. In this relation, business leaders make it very clear that they want to be able to choose the country in which their data is stored or processed. The ability to select a country or region is a very or extremely important feature to 68% of the respondents. While 27% prefer their cloud provider to be located in their own jurisdiction, 50% want their provider to be located in the EU. Whereas most business leaders have a clear preference, 20% do not care where their provider is located. Only 3% prefer their cloud provider to be located globally such as the US.



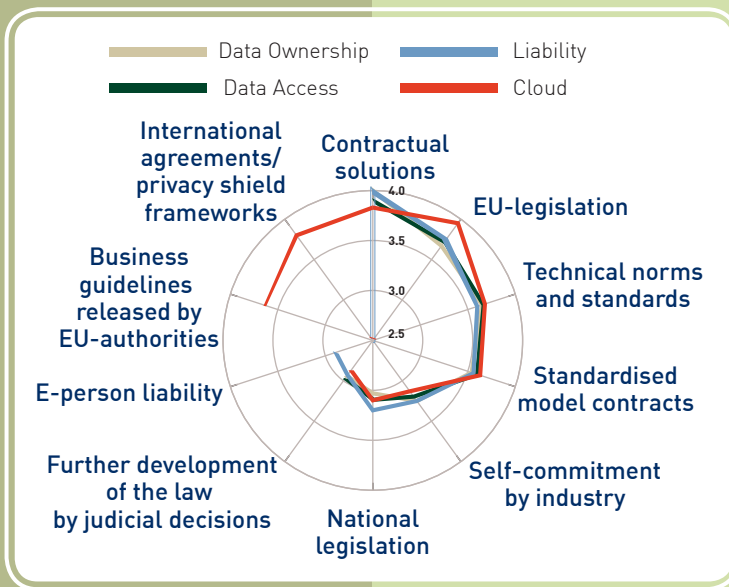
What is the proportion of cloud services in comparison to on-premise software in your company at the moment?

Where do you prefer your cloud provider to be located?



BEST PRACTICES

What companies need to implement their digital strategies



In order to implement your digital strategy, which regulatory measures, if any, would you prefer to coordinate...?

n=75-96,
scale: 1-5
(strongly disagree – strongly agree)

Contractual Solutions

It is strikingly clear that companies prefer contractual solutions to coordinate data ownership over EU legislation and technical norms and standard. This is true for data ownership as well as data access. In both cases, companies rely on the allocation of rights to data granted by the freedom of contract. Contractual solutions always have the advantage of being able to provide custom-made solutions. Companies also confide in contractual solutions when it comes to allocating liability in case of a plurality of parties or complex value chains. While the European Commission is assessing “whether initiatives are needed to foster fair and balanced access to, and use of, data”⁷, the surveyed companies clearly state, that they prefer to coordinate data ownership and access in a business-to-business context rather on contractual basis only.

EU legislation

Where respondents indicate need for legislation, the preference is for EU-level regulation over national ones. With regard to the cloud, EU legislation is even first choice to coordinate related issues over international agreements/privacy shield frameworks, which are ranked third. Probably because companies assume that only regulation on an international level guarantees equality of competition.

⁷ European Commission: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: “On the Mid-Term Re-view on the implementation of the Digital Single Market Strategy”. 10.05.2017, p. 11.



This also applies to companies located outside the EU zone, such as the US – as is the case with the General Data Protection Regulation (GDPR) regarding the marketplace principle.

Technical norms, standards and model contracts

Technical norms, standards and model contracts are also seen as possible albeit less prioritised solutions to the legal challenges of implementing digital services. Given the EU's excellent experience with the new approach concept in its industrial policy since the mid-1980s, splitting of tasks between law and technical standardisation, this comes as no surprise. Industry will be able to develop practical solutions with the necessary commitment.

Less preferred regulatory measures

Companies are sceptical that self-commitment by industry, national legislation, business guidelines released by national authorities or development of the law by judicial decisions can provide an appropriate legal framework. Self-commitment has no general binding effect and case law is unable to cope timely with the development of digital technologies.

The introduction of E-person liability, a new legal entity to complement individuals and enterprises, is also not seen as a preferred solution to address liability challenges. In this regard, both, legal experts and politicians are discussing legal aspects which seem to be of no preference to industrial practice.

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