



## **LESI Committee Form**

*Update for the 2020 IMDM – May 17, 2020*

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<b>Committee Name</b>	European Committee (the “EurCom”)
<b>Chairs and Vice Chairs</b>	José Miguel Lissén (Chair) Alexander Haertel (Vice-chair)

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### **Initiative No. 1 follow-up on the European Commission’s strategy on non-personal data**

#### **1. Background. The Goals of the EU legislature**

On 19 February 2020, the European Commission (the “Commission”) published a communication on an European Strategy for data<sup>1</sup> (the “Communication” or simply the “ECC”) for policy measures and investments with regard to data economy for the coming five years.

The ECC starts with the assumption that as the volume of data produced in the world and its impact on various sectors of economy and the society are growing rapidly and that this opportunity for development has to be seized., The aim is to create a single European data space, open to data from across the world, where data are secure and businesses have easy access to an almost infinite amount of high-quality industrial data, boosting growth and creating value. The EU should become a “leading role model for a society empowered by data”.

To reach those objectives, the ECC will focus on creation of sectoral European data pools, foster government-to-business, and business-to-business data sharing by means of legislative changes and investments. Regarding the remuneration that the organisations contributing data would receive, the ECC contemplates that they would get a return “in the form of increased access to data of other contributors, analytical results from the data pool, services such as predictive maintenance services, or licence fees”.

The challenges that need to be overcome include, among others, not enough data available for innovative re-use, imbalances in market power in relation to access and use of data and problems on both supply and demand side of cloud infrastructure.

The Commission plans to invest €2 billion in a High Impact Project (first implementation phase planned for 2022) consisting in creating European Data Spaces and federated cloud infrastructures, which is aimed to benefit the European data-intensive companies, as well as to support European companies and the public sector in the digital transformation. The concept of creating European Data Spaces means establishment of EU-wide common, interoperable data spaces in strategic sectors (such as manufacturing, environment, mobility, health, finance, energy, agriculture, public administration), enabling Big Data analytics and machine learning, which will allow to overcome legal and technical barriers to data sharing across organizations, as well as across sectors, and will foster such data flows.

The Commission also aims to interconnect the already existing European trustworthy cloud infrastructures, which, along with planned investments, shall lead to providing widespread access to such technology for private sector, including SMEs.

The Commission undertakes to create a cloud service marketplace for EU users from both public and private sector (Q4 2022), provided that all providers offering services therein comply with EU

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<sup>1</sup> Brussels, 19.2.2020 COM(2020) 66 final Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions on A European strategy for data.

standards with regard to data protection, security, data portability, energy efficiency and market practice. These standards are planned to be compiled beforehand in a (self-)regulatory rulebook (Q2 2022).

## **2. Legislative initiatives**

In this context and to achieve said objectives, the Commission plans to launch the following legal initiatives:

- (i) The first priority should be proposing a legislation for the governance of the common European data spaces (Q4 2020).
- (ii) The next initiative consists in adoption of an Implementing act on high-value data sets (Q1 2021) under the Open Data Directive, which aims to provide the private sector, especially the SMEs, with high-quality public sector data for free, in machine-readable format and through standardized APIs.
- (iii) In 2021 the EC envisages to implement a Data Act, which will foster, among others, business-to-government and business-to-business data sharing, as well as will facilitate voluntary data sharing.
- (iv) The ECC contemplates the possibility of revising the IPR framework (Database Directive, Trade Secrets Protection Directive), as well as the need for further guidance on the compliance of the data sharing arrangements with the EU competition law.
- (v) Moreover, the ECC recognizes the need to analyze the accumulation of vast amounts of data by Big Tech companies and its impact on the imbalances in bargaining power (Q4 2020).
- (vi) The ECC also undertakes to implement actions focused on empowering individuals to enforce their rights related to the data they generate, including rights envisaged in the GDPR, with a special focus on the portability right.
- (vii) There are also numerous measures targeted at, among others, halving the current gap of 1 million digital specialist in the EU and providing broadly understood education on digital skills and data.

## **3. Why are those initiatives relevant to LES members and what can we do?**

The actions and legislative measures announced in the Communication will directly affect data-intensive companies, including sectors such as ICT, e-commerce, health, banking, etc., and also businesses for which traditionally data was not a crucial asset.

European data spaces shall be created for sectors such as manufacture, energy or agriculture. By means of example, according to the ECC, the potential value of non-personal data in manufacturing sector may reach €1,5 trillion. Moreover, the Commission aims at activating businesses, including SMEs, in terms of digital transformation based on data, by facilitating them access to data pools and relevant infrastructure, which could change the way in which they have operated till now.

It shall be noted that the R&D and scientific community might be directly benefited from the planned initiatives, especially given the potential possibility to exploit the high-quality government-held information. In general, the changes proposed by the Commission undoubtedly present a great opportunity for the companies, which might benefit from the potential access to information created by their competitors, as well as companies from other sectors.

The growth of the data economy as envisaged by the EC and the substantial increase of data flows within and across sectors, will most likely result in a development of a data licensing business. For the entities that create data on a big scale, offering licenses may constitute an additional or alternative source of income. At the same time, smaller players such as SMEs might save substantial costs by acquiring a license instead of producing data themselves.

Data will become a commonly transferred and licensed intangible asset, forming part of the portfolio of rights alongside with intellectual property rights. The current legislation on intellectual property might be amended. New forms of intellectual property might be created to tackle the challenges of the data economy. Access to sets of data might be made compulsory. The issues that might be raised

during the consultations include, among others, the conditions for the grant of licenses on data (How far should the legislature go? Should they be granted on FRAND terms? Who is legitimated to set the FRAND terms? How should the royalties be calculated? Should the rules be the same for private and public sector?

#### **4. Actions carried out by the European Committee**

4.1. Identification of two LES members who will act as liaison between the EurCom and the Commission. The LESI's representatives designated to this effect are Jean-Christophe Troussel [Jean.Christophe.Troussel@twobirds.com](mailto:Jean.Christophe.Troussel@twobirds.com) and Emmanuel Gougé [Emmanuel.Gougé@pinsentmasons.com](mailto:Emmanuel.Gougé@pinsentmasons.com).

4.2. Setting up a group of LES members with an interest to follow-up with this initiative. The involved on the initiative. Such group will be composed by the following LES members: Maria Jose Huertas Jimenez <mj.huertasjimenez@gmail.com>; Javier Fernández-Lasquetty Quintana <JFL@elzaburu.es>; Dan Berg Geary [DBG@bechbruun.com](mailto:DBG@bechbruun.com); Dario Paschetta [dario.paschetta@studiofrignani.com](mailto:dario.paschetta@studiofrignani.com); Alexander Haertel [haertel@katheraugenstein.com](mailto:haertel@katheraugenstein.com); Peter Bolger [pbolger@lkshields.ie](mailto:pbolger@lkshields.ie); Bruno Vandermeulen <bruno.vandermeulen@outlook.com>; Wouter Pors <Wouter.Pors@twobirds.com>; GOUÉ Emmanuel [Emmanuel.Gougé@pinsentmasons.com](mailto:Emmanuel.Gougé@pinsentmasons.com) (the "Working Group").

4.3. A summary of the ECC has been drafted and distributed among the Working Group members.

#### **5. Actions to be carried out by the European Committee**

As the Communication does not include detailed information on the timeframe for legislative changes and the information available therein in most of the cases indicates only the quarter, during which the specific instrument shall be adopted, the suggested course of action is to monitor the legislative initiatives undertaken at EU level.

Contributions should be submitted during the public consultation phase and reflect the standpoint and concerns of IPR stakeholders and licensing professionals. The EurCom shall take actions to identify all the legislative initiatives to be undertaken, the conditions for participation at the public consultation stages and to identify the EU officials in charge of each initiative.

### **Initiative No. 2 FRAND Initiative**

#### **1. Content**

EurCom pursues an updated edition of its San Diego workshop in 2020 on the topic of FRAND. FRAND is a global topic which is on one hand side shaped by industry and the standard setting organisations and the parties in licence negotiations. On the other hand FRAND is highly debated in litigation in various courts and sometimes even with other authorities. The case law has tremendous effect on the way licence negotiations are conducted. EurCom wants to publish a paper in Les Nouvelles which shall showcase these effects and highlight the common grounds. We are of course aware that those common grounds are very industry specific. This will however not pose a significant problem as most of the discussion is done in the mobile phone sector. With the licence negotiations for 5G currently being concluded and conducted it is worthwhile to find the most common principles that industry as well as courts and authorities have applied so far. This approach distinguishes itself from previous publications which have usually highlighted only the differences of each jurisdiction. Currently the aim is to have a group of maybe 6 authors who will gather their thoughts and put together a publication.

#### **2. Potential Participants**

At the moment the EurCom is looking for specific contributors.

Matteo Sabatini of Ericsson has signalled his willingness to participate.

Through the High Tech Committee we are trying to get Sonja London of Nokia to participate (or present someone equally suitable)

We have also asked Prof. Cotter (US) for a contribution.

In the Asian region we have contacted Nongfang Zhu (King Wood Mallesons) to participate and maybe recommend someone from industry who may be willing to share the Asian view.

In Europe we have asked a few people to contribute as well (currently reaching out to Tom Oliver of Powell Gilbert and Jonas Block who are both very knowledgeable on FRAND).

### **3. Further Timeline**

The final list of contributors shall be ready by end of May.

The current timeline to prepare a first draft is Mid July/Beginning of August, so that we are aiming at a publication in Autumn.

Report completed by José Miguel Lissén and Alexander Haertel on 8 May 2020.