Position Paper

European Cybersecurity Certification Scheme for Cloud Services (EUCS)

April 2024

Executive Summary

AFME responds to the latest version of the draft EUCS scheme, widely circulated, albeit unofficially, at the beginning of April 2024. In light of the limited opportunity for formal industry feedback, we wish to highlight a number of views at this stage, which build upon AFME's June 2023 and March 2023 position papers. In doing so, we acknowledge that the ECCG has made considerable effort to redress the widespread concern over the inclusion of localisation (immunity to non-EU law) requirements within this technical scheme. We welcome the direction of travel but urge the ECCG to go further and completely remove all such political elements.

AFME reaction to latest publicly available draft EUCS, April 2024

AFME understands the latest draft of the EUCS no longer contains three of the proposed localisation (immunity from non-EU law) provisions, namely:

- The cloud service to be operated and maintained from the EU, with all CSC data stored and processed inside the EU.
- Only employees based in the EU to be permitted access to CSC data, whether direct or indirect.
- CSPs to be required to locate their global headquarters within the EU, if they are handling "sensitive" data.

We loudly welcome this decision, which could otherwise have resulted in major detrimental impact for market choice, especially were the scheme ever to be mandated as may happen under the proposed Cyber Resilience Act. The removal of these overtly political factors from a technical scheme will ensure a sharper focus on cyber safeguards and controls, while avoiding any potential unintended consequences for operational resilience.

We would however also recommend that the remaining requirement on 'Primacy of EU Law' criteria be applied only to Cloud Service Customers based in the EU (CSCs). CSCs contract for cloud service on an enterprise-wide basis. CSCs based in the EU will consequently contract through their EU entity and under EU law for the receipt of cloud services that are provided across all the jurisdictions in which the CSC operates.

Non-EU CSCs, on the other hand, will contract under the governing law of their home jurisdiction for the receipt of cloud services across the jurisdictions in which the CSC operates globally, which may include its businesses in the EU. Where a non-EU CSC has EU affiliates subject to EU law and regulation, they would include EU-specific terms, in the form of addenda or otherwise, in their contracts (covering matters such as: GDPR compliance, outsourcing regulatory matters, and so on) in order to ensure that the CSC's receipt of services from the CSP complies with applicable EU law. These provisions are enforceable and would be upheld by foreign courts despite a non-EU governing law provision. If a CSC is required to apply an EUCS assurance level to a contract with its CSP, an addendum would be included within the contract, even if the contract was

governed by a non-EU law. A non-EU CSC therefore can apply all elements of the EUCS criteria without moving the governance of its contract to an EU Member State legal system.

Were the governing law requirement to remain as-is in the EUCS, it is likely that non-EU CSCs would be forced to amend their contracts to include an addendum making resolution of any dispute or matter of contractual construction for their EU-based subsidiaries subject to EU law, whilst preserving non-EU law as the governing law for their overarching contract. Contracts that are governed by two or more jurisdictions significantly increase the legal and operational risk to a CSC should there be a breach of contract claim. For example, for a cross-border dispute impacting multiple entities within a CSC organisation, which governing law and venue should apply? Litigation practices and requirements differ according to each jurisdiction and could materially change the ability for a CSC to predict the outcome of legal proceedings. In addition, if a non-EU party were to elect an EU governing law, they may struggle to achieve their choice of jurisdiction as their arguments could carry less weight to a counterparty in negotiation absent a meaningful business nexus to a single EU Member State. By contrast, the CSPs will likely argue to contract according to the Member State in which their EU offices are established (to which a CSC may not have legal experience). The result could be the CSC having to maintain contracts across a range of EU legal systems, significantly advantaging the CSP over the CSC in any given dispute.

The Primacy of EU Law criteria as it stands could result in a non-EU CSC being forced to litigate outside of the jurisdiction in which the majority of its businesses utilizing the CSP's services, and relating to the contractual breach, are based. Litigation practices and legal precedent in differing legal systems can also materially change the outcome of proceedings, for example, covering matters such as whether data and documents are privileged, the interpretation of performance standards (such as good faith or reasonable endeavours obligations), whether indemnities are recognised and upheld, and the formulae for calculation of damages. All of this reduces legal certainty for the CSC and therefore acts as a barrier to the use of cloud in the EU.

Non-EU CSCs have legal and risk teams that are trained in the jurisdiction of their home office and will face substantial disadvantage in relation to their CSPs in disputes, especially if a CSC is a small or medium enterprise with minimal capacity to hire additional internal resources or procure outside counsel. All enterprise contracts should be predicated on a single governing legal system that retains the ability of a non-EU CSC to contract freely.

CSCs with their primary place of business in the EU are unlikely to be impacted by these considerations. However, were other jurisdictions to introduce similar requirements, those EU CSCs operating outside of the EU would face the same substantial legal and operational risks. The Primacy of EU Law criteria runs counter to the EU's Rome II Regulation which allows businesses operating in the EU to contract according to the governing law of their choice in civil and commercial matters. **We strongly support the application of the Primacy of EU Law criteria to be applied to EU CSCs-only.**

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