



iLINC

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(Part 1)

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iLINC Policy Briefs

Regulatory Barriers In The Start-Up Ecosystem

The iLINC Survey
Conclusions &
Policy Recommendations



iLINC
ICT Law Incubators
Network

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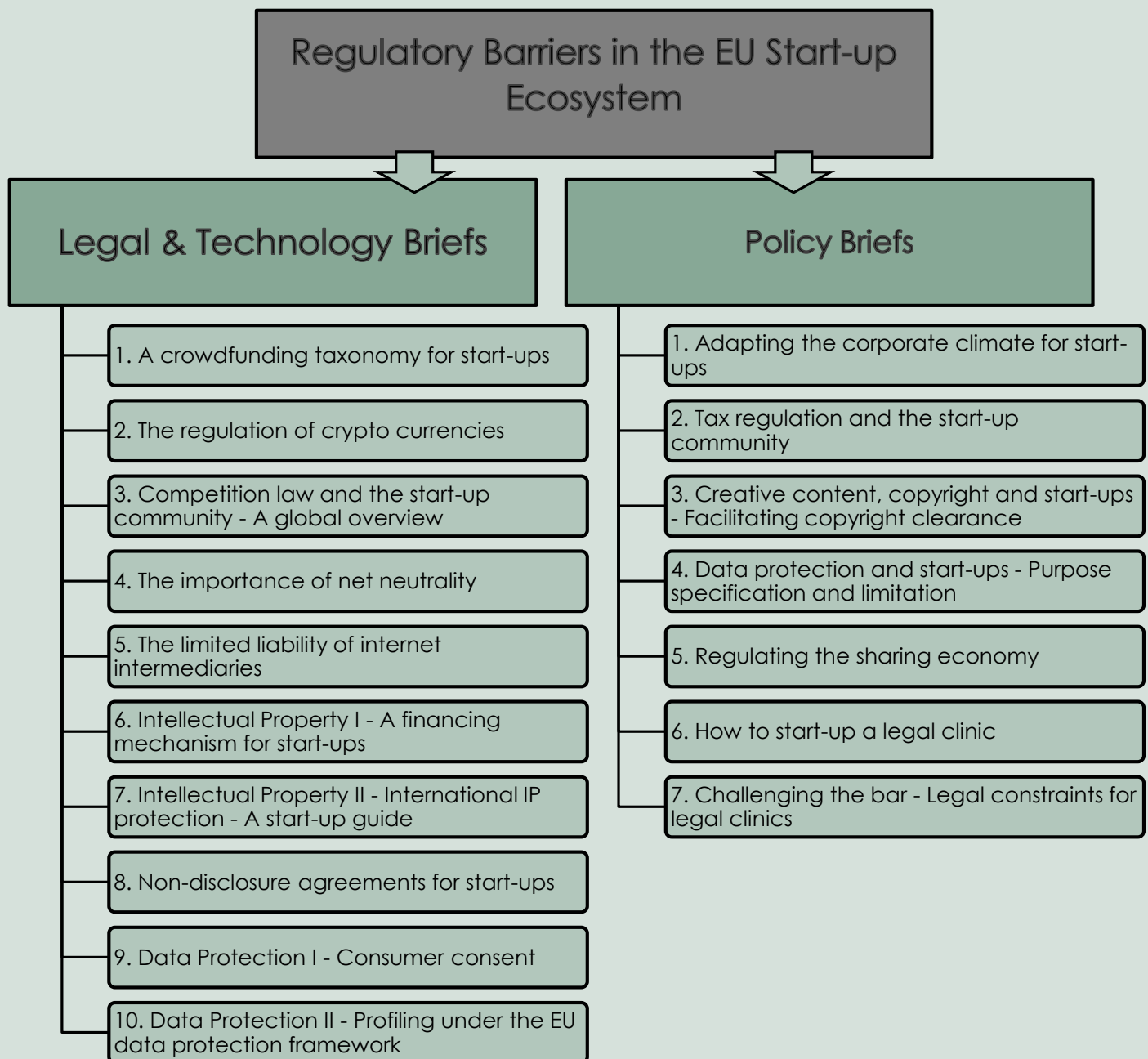
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The iLINC Thought Leadership Programme

The **iLINC Thought Leadership Programme** crystallises the thinking of the iLINC Network on a number of key legal issues and challenges that are relevant for the ICT start-up community. The main objective of this programme is to be the 'iLINC voice', to help catalyse regulatory change and to help build legal awareness through the ICT innovation ecosystem. The 'Regulatory Barriers in the Start-up Ecosystem' brief acted as an evolving document throughout the span of the iLINC project. As our understanding of start-up communities increased, our knowledge could be funnelled into the creation of the iLINC legal and technology briefs and policy briefs.

Legal and Technology briefs have been developed specifically for ICT start-ups to help develop their awareness on key legal issues, many of which have a strong technology component. Examples include the legal challenges associated with crowdfunding and the importance of net neutrality.

Policy briefs have been prepared with the aim of improving legislation to help ICT start-ups to realise their full potential. These are directed at everyone (and not just policy makers) who has a roll to play in designing an innovation-friendly, start-up environment.



The iLINC thought leadership diagram – An overview of the contents of these documents and why these topics were chosen can be found as an annex to this document.

This Policy Brief aims to provide policy makers an overview of the European start-up environment. In particular, this document will focus on the legal challenges start-ups face in the digital environment and identifies those legal obstacles that matter most to digital starters. The results presented in this document are based on the iLINC survey. This survey was developed within the framework of the iLINC project and has gathered information from approximately 100 start-ups currently active within the EEA.ⁱ Although these figures should not be considered 100% representative, they do provide a good indicator of the legal mind-set of the start-up communities. In order to enhance our research, additional sources have been consulted. In some instances, we have combined our figures, with figures received from the Humboldt Institute for Internet Gesellschaft.ⁱⁱ We could also draw upon our experience as a network of law incubators: through our many conversations with start-ups, we have gained expertise with relation to the legal challenges of the start-up community. Statistical research has been further complemented with information from various start-up news sources, such as start-up manifestos.

I. Introduction and outline of the Policy Brief.

This policy brief discusses the legal challenges of digital start-ups. By identifying those areas that start-ups have difficulties with, policy makers should be able to better anticipate the needs of these small digital undertakings. It should also provide policy makers with an overview of legal areas for which start-up communities should be consulted when regulatory reforms are planned. This goal will be achieved by first providing a general overview of the start-up market (Section 2). In this section, the active industries and financial situation of start-ups will be analysed. This background information is necessary to frame the legal challenges of start-ups. This analysis is followed by an extensive overview of the various legal questions start-ups are confronted with (section 3). Section 4 will detail how digital starters tackle regulatory issues. In particular, we will analyse whether or not start-ups seek professional legal advice. As a summary conclusion, policy recommendations will be formulated to increase legal awareness among start-ups. In section 5 our knowledge of the digital environment will be taken to the European level. In particular, this section will discuss the cross-border barriers towards digital innovation. This section will also conclude with a number of policy recommendations. The final section will outline a number of trends that are likely to affect the

current regulatory framework. Although some of these trends are still nascent and do not necessitate acute regulatory action, policy recommendations will be defined in order to ensure the inclusion of start-ups in the reform process. As an addendum, this policy brief will outline the policy issues as identified by the start-up communities themselves.

II. The Start-Up Market

The 'entrepreneurial explosion' is no longer confined to Silicon Valley; rather we are witnessing a global expansion of start-up activities. Most major cities now feature a growing start-up community: they house accelerators, co-working spaces and of course an active number of start-ups.ⁱⁱⁱ London, Berlin, Amsterdam and Paris are leading start-up cities within Europe.^{iv} But why did so many promising start-ups enter the market? In a recent study, Compass.co discerned four reasons that could account for the recent rise of digital starters^v:

1. Start-ups can now be built for thousands, rather than millions of dollars.
2. A higher resolution venture finance industry
3. Entrepreneurship developing its own management science
4. Increased speed of consumer adoption of new technology.

These four elements seem to have provided an excellent breeding ground for start-ups to mushroom.

The following sections will take a closer look at the EU start-up environment. In order to make a correct assessment of the legal challenges of digital start-ups, we will first discuss the industries start-ups are active in and provide background information on their financial situation. A better understanding of the business environment will facilitate the identification of legal challenge areas and need for legal advice.

Business Diversity

For start-ups, innovation is key. As a consequence, the start-up environment shows great diversity. Even though similar business ideas can be found, solutions developed by start-ups to tackle similar problems are multiple and varied. Still, a common thread can be found: the majority of start-ups encountered by iLINC network partners would be described as *tech* start-ups, i.e. they develop highly technological products. Indeed, on average, 89 percent of European start-ups have at least one tech founder.^{vi} Moreover, their products are often offered or implemented through *digital*

means. Hence most tech start-ups are digital start-ups. Digital start-ups do not necessarily produce physical products; rather their core activity consists of the development of soft- or hardware, whereby physicality – if present - is merely the conduit for a technical innovation.

Considering the diversity encountered in practice, it is rather surprising that 60 percent of start-ups participating in our survey consider themselves to be active in the ICT/media sector (figure 1). The remaining 40 percent are unevenly spread across a high variety of industries (financial, healthcare, retailing, manufacturing, retail and others). Looking at the individual business descriptions given by start-ups though, these figures may be misleading. The descriptions provided show a higher level of divergence, with more active industries represented.

The high percentage of ICT/Media start-ups could be attributed to the means used by start-ups when

noticed as well. Both industries are underrepresented in this chart.^{vii}

Financial Homogeneity

Start-ups may show great diversity, their financial situation seems rather homogenous. Our figures indicate that roughly 40 percent of start-ups have no current revenue stream or income and 30 percent of them have a revenue stream of 30.000€ or less. 20 percent of start-ups have a revenue stream higher than 30.000€ and 10 percent earn more than 100.000 €. High earning start-ups are rare: only 5 percent of start-ups currently earn more than 500.000 €. In other words, the majority of start-ups has either no income or makes less than 30k. Of course, this should not be too surprising. Start-ups are in the process of starting a business. During the start-up phase it is quite normal that little revenue is generated. They are still in the process of developing a product or getting ready for their product launch. However, these figures do illustrate the importance of external funding.

The budget available to start-ups is limited. Without additional funding start-ups may enter into debt, especially if the seed and start-up phase is R&D intensive. Start-ups therefore need access to capital in order to compensate for their lack of income. Most start-ups actively look for external funding. According to our survey 67 percent of start-ups have received funding through grants, 57 percent through loans and 64 percent of start-ups have sought equity funding, such as venture capital, angel and crowdfunding. 42 percent of start-ups have found funding through other channels, such as bootstrapping.

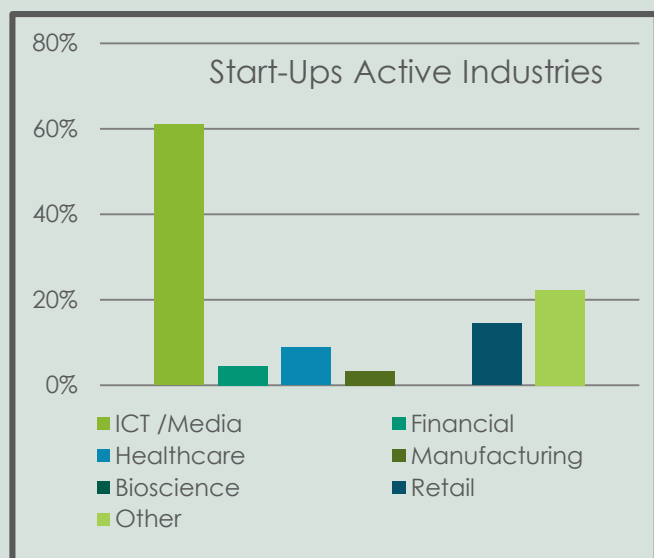


Figure 1: Active Industries; Source: iLINC Start-Up Survey

developing or marketing their products. A strong reliance on ICT and media technologies can be discerned. Additionally, it may not always be as easy for start-ups to pinpoint the exact industry they are active in as their business activities show convergence and overlap. For example, a start-up may develop a social media platform and consider this platform to be its core business, but supplement this with additional business models, such as offering retailers access to the back-end of a platform in order to achieve a greater connection with end-users. Start-ups also showcase great flexibility. In recent years a boom of the digital health and FinTech sectors could be

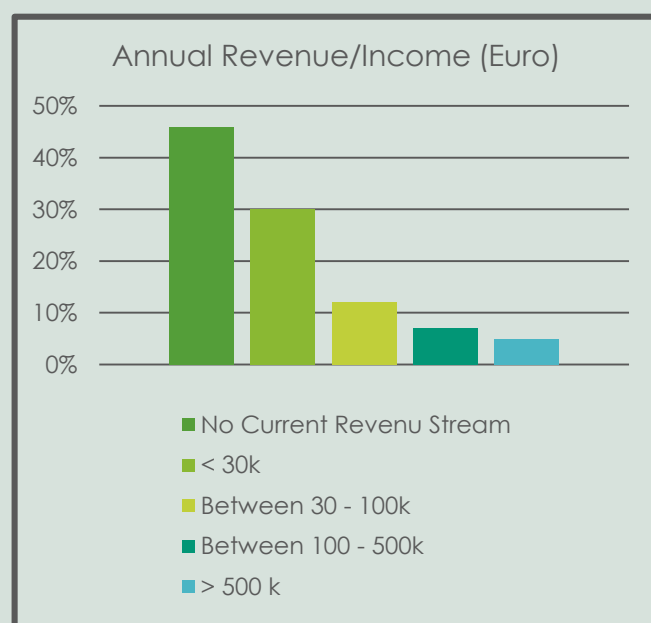


Figure 2: Annual Revenue/Income of start-ups; Source: iLINC Start-Up Survey

III. Legal Challenges of Start-Ups

One of the main goals of the iLINC start-up survey was to establish the legal challenge areas of digital start-ups. In this section we will further assess the understanding of start-ups with regard to the regulatory environment governing their business. This legal analysis will conclude with a final chapter in which we will discuss whether start-ups have indeed sought legal counselling with relation to these challenges. In the subsequent chapter we will assess whether start-ups face cross-border regulatory challenges in relation to these legal domains.

1. Encountered Legal Domains

In order to determine the most pressing areas, it is first and foremost necessary to outline the legal areas digital start-ups encounter while performing their core activities (figure 3). In general, most start-ups encounter multiple legal areas throughout the various stages of development. Indeed, approximately half of the participating start-ups encountered the following legal domains:

- Privacy and Data Protection
- Electronic Communications
- E-Commerce
- Non-Disclosure Agreements
- Contract and Consumer Law
- Terms and Conditions
- Corporate Structure and Transactions
- Intellectual Property Rights
- Other legal areas, such as tax and employment law.

Some start-ups indicated that they have ran into all of these domains. The iLINC network does like to stress that these are the areas encountered as *perceived by start-ups*. Even though a brief explanation was provided to start-ups concerning each legal domain, they may have had difficulty in grasping the full scope of the domains. The lack of legal awareness among start-ups - which we will elaborate upon later in this brief – may already be indicated in figure 3. For instance, only 46 percent of start-ups claim to have encountered legal issues concerning their corporate structure or corporate transactions. However, all start-ups will require to incorporate their business, which is regulated on the national level. Nevertheless, three main legal areas stand out: privacy and data protection, intellectual property rights and terms and conditions. As we will see later, these areas are also deemed most important by start-ups when it comes to legal advice.

Of course, some overlap naturally exists between the encountered legal domains. Considering the prevalence of innovation in the digital environment, intellectual property rights are deemed necessary as a protection mechanism for innovation. To ensure protection and safeguard confidentiality in relation to the innovation, start-ups often look into non-disclosure agreements as well. Even though the usefulness of non-disclosure agreements is debatable, start-ups nonetheless enquire law firms and legal clinics concerning the draft of confidentiality agreements.

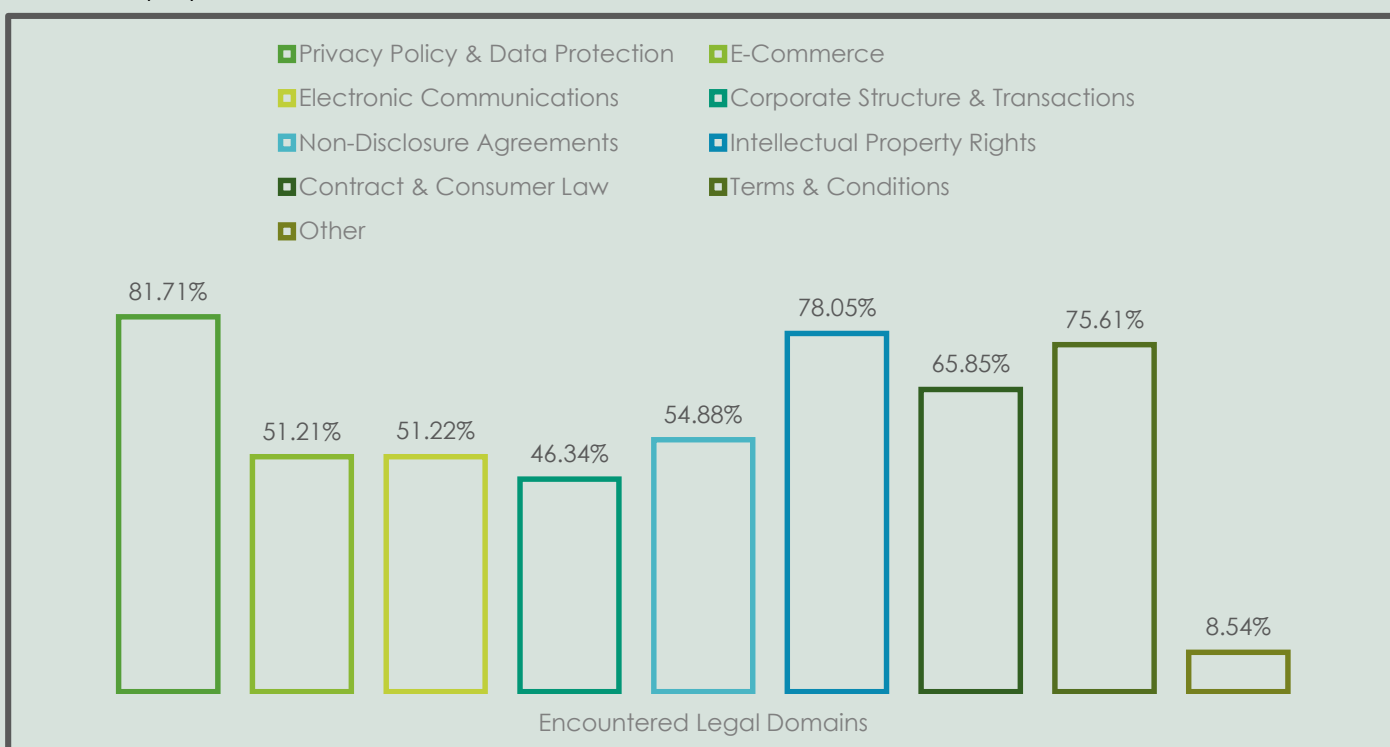


Figure 3: Encountered Legal Domains; Source: iLINC Start-Up Survey

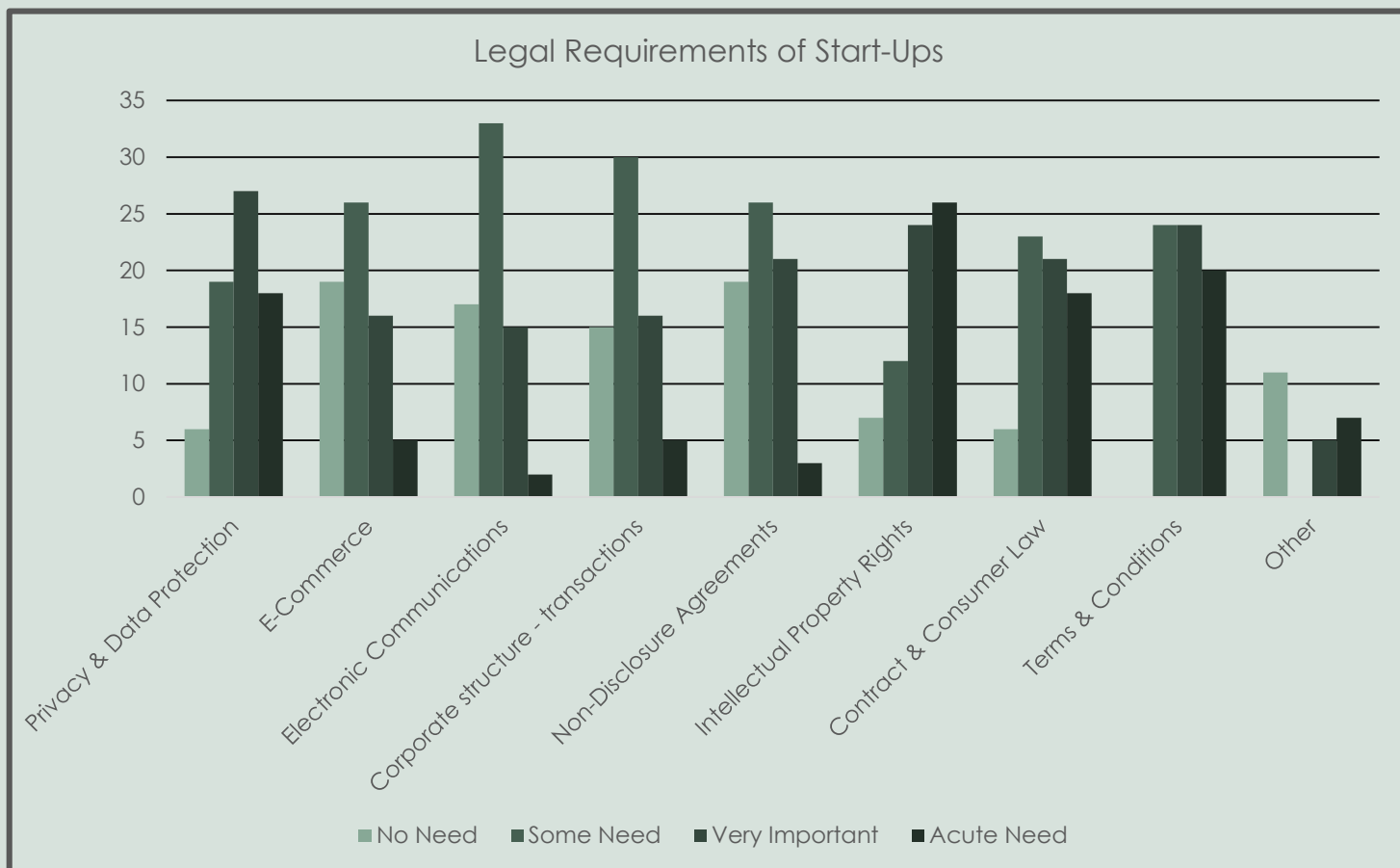


Figure 4: Legal Requirements of Start-Ups; Source: iLINC Start-Up Survey

2. Perceived Importance of Legal Domains

The iLINC survey also gauged start-ups' perceived importance of the legal domains encountered. Even though most start-ups are confronted with a diverse set of legal areas, not all areas are considered equally important. Perceived importance has been estimated by start-ups' need for legal advice (Figure 4). Indeed, if start-ups consider legal advice to be most acute for a given legal area, one can assume that this legal domain is perceived as more important.

Here we also notice that the three previously mentioned domains, i.e. privacy and data protection, intellectual property rights and terms and conditions, play a key role. Most likely it is exactly because start-ups feel that they encounter these domains the most, that they also deem those areas to be the most important. At least, start-ups consider the need for legal advice in these areas to be most pressing. iLINC experience nevertheless shows that start-ups require assistance in a wide variety of legal topics. Therefore, it may be relevant to further elaborate upon the relevance of the various legal domains for start-ups.

- **Data** is considered the raw material for innovation. Indeed, data serves many purposes and data collected from end-users or

third parties is often relied upon. For example, data can be analyzed in order to further enhance the core product or to offer end-users a tailored experience. Consequently, many start-ups feel the need to receive advice related to data protection legislation as they want data collection to happen in a legally compliant manner. Privacy legislation, which receives more and more media attention, is on start-ups' radar.

- The dominance of **Intellectual Property Rights** (IPR) is unsurprising as well. Most digital start-ups perceive their IP portfolio as a mechanism to stay ahead of competitors. Intellectual Property Rights play an important role in both the monetization (e.g. licensing and market branding) and securitization of their innovation. If innovation is left unprotected, competitors can freely copy a start-up's valuable idea. Moreover, legal protection also increases the value of start-ups with investors.
- Every undertaking whether active online or offline and irrespective of whether services are provided to consumers or other undertakings has encountered contracts, and thus requires, a solid understanding of **contract law**. If the

end-user is a consumer, **consumer law** will also be taken into account.

- Even though **'Terms & Conditions'** is not a legal domain as such, but rather a condensed rendering of obligations imposed by other regulatory domains, including data protection, IPR, contract and consumer law, start-ups consider the need for good 'terms and conditions' indispensable. Start-ups realize that these conditions contain important legal requirements and also serve a protective purpose. Moreover, the presence of terms and conditions on every website and digital platform, has made start-ups aware of this necessity.
- Although digital start-ups stated that they **encounter electronic communications law**, the main reason why there is ultimately less need to obtain legal advice in this area may be the following: electronic communications regulation is primarily aimed at creating a level playing field, whereby legal obligations mainly target the natural monopolists of the last century. There is thus less need for ICT start-ups to take into account this legal domain as the obligations imposed do not take aim at them. Rather, the regulation aims to protect these start-ups. This legislation is nonetheless important for ICT start-ups as it informs start-ups of their rights, e.g. concerning net-neutrality.
- The need for legal advice in **E-commerce** legislation is considered less pressing. Still, this is an important field of law. Many digital start-ups fulfil an intermediary role in the digital environment. The EU E-commerce framework governs their liability as it has imposed a limited liability regime. Moreover, the FinTech industry is booming, which also requires start-ups to have a good understanding of the legal framework governing online payments etc.
- **Corporate Law** is an integral part of the early start-up phase as start-ups will look to incorporate their business. Nevertheless, it seems that corporate law is perceived more important as soon as start-ups start gaining more annual revenue.

3. Readiness for Future Regulatory Changes

The iLINC start-up survey also aimed to assess start-ups' readiness for regulatory changes. Technological advancements are rapidly increasing and are likely to outpace the current

legal regime. Indeed, most areas covered by the survey will undergo regulatory changes in the near future: the general data protection regulation, the now to be implemented consumer rights directive, the planned copyright reform, the accepted connected continent proposal... This does not only apply to those areas that were deemed most important to start-ups; other areas are likely to be revised as well.

The results from the iLINC survey were rather alarming. Even though 36 percent of participating start-ups considered themselves somewhat prepared for future, this figure is still low. Only 13 percent of start-ups felt they were very well prepared. On the opposite side, 21 percent of start-ups felt not at all prepared for future changes. What seems most worrisome however, is that 31 percent of participating start-ups do not know about future changes about to occur. In other words, most start-ups are developing products oblivious to the legal framework. This lack of legal understanding can severely damage the business prospective: once the product launches it may be too late to reverse the non-compliant components.

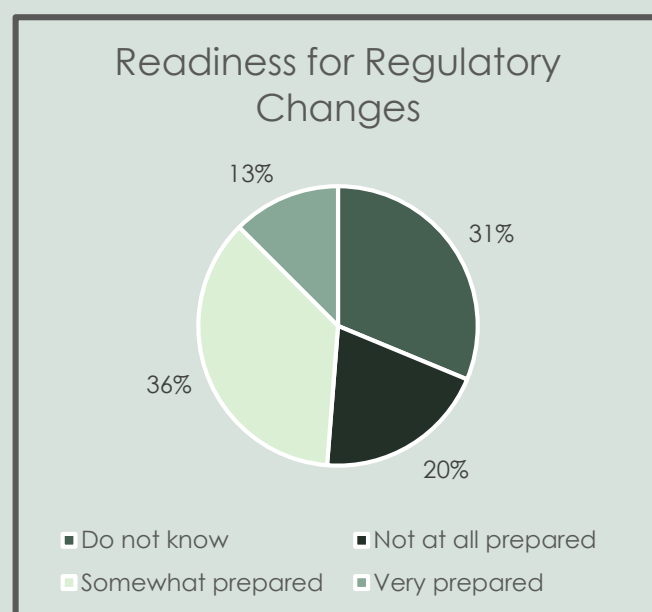


Figure 5: Readiness for Regulatory Changes; Source: iLINC Legal Start-Up Survey.

4. Recurring legal themes in the encountered legal domains

Considering start-ups' lack of legal knowledge, they found it difficult to articulate their legal problem areas. Even though start-ups were asked to do so, very few start-ups actually provided a clear answer on this topic. Rather, start-ups have a vague idea of what they should worry about. This means that most often, legal issues will be discovered once the start-up has interacted with a legal professional. The following section provides an overview of the legal challenges faced by start-ups, as encountered by legal clinics. This is by no means an exhaustive list, rather a list of common legal questions asked to legal clinics within the iLINC network.

The iLINC network recognizes that it is difficult to deduce policy recommendations from the mere observation that start-ups need guidance in certain legal areas. Indeed, it is not because start-ups need assistance in legal areas that the legal framework needs to be changed. Nevertheless, the list provided within this section may grant additional insight as to what the problem areas for start-ups are. Taking these challenges as a basis, a deeper understanding concerning true legal barriers may be derived.

Even though this list is structured using the themes as presented by the start-up survey, overlap may exist between the questions. For instance, we have chosen to categorise an agreement on intellectual property assignment under the header intellectual property, even though in essence it is a matter of contract law.

I. Corporate Structure and Transactions

1. The incorporation of a business is often one of the first enquiries of start-ups. Rather than operating as a sole proprietor or operating from an oral partnership agreement, start-ups are advised to incorporate their business as soon as possible. However, start-ups require legal assistance as to what business structure is best suited for their activities. For instance, what would be the consequences of a given structure with relation to liability?
2. Start-ups often have humble beginnings. What may have started as a project among friends, soon turns into a proper business. It is important for start-ups to have a clear view of the structure of the company, the responsibilities that are shared and the allocation of shares. Although start-ups may not be aware of this,

investors often look into the structure of a company. Indeed, well-structured organisations, with proper liability and share allocation, present less risk.

3. Start-ups seeking additional funds or start-ups in the process of seeking external investment from business angels or venture capitalists may require the drafting of investor contracts. These contracts can serve a twofold purpose. First, start-ups may want to include confidentiality clauses in order to safeguard their intellectual property. This, however, is often not advisable. Second, investors, in turn for their investment, often want part of the ownership of the business, such as through equity or convertible stock. Through investor contracts, start-ups want to ensure that their position or creative control is not entirely jeopardized when in search of funding.

II. Contract and Consumer Law

1. Start-ups are protective of their innovation and are often reluctant to share their idea with employees or investors. In order to protect their confidential information, start-ups often enquire concerning the draft of non-disclosure agreements. These agreements can be especially useful at an early stage when collaborating with potential business partners – although it is ill-advised to present an NDA to potential investors. When entering into effective collaboration, start-ups want to implement a certain level of confidentiality into their contracts through confidentiality clauses.
2. It is not unheard of that start-ups copy the Terms and Conditions of other websites. They need assistance in understanding the reasoning behind these conditions and the necessary clauses to be put in them. This is important as the terms and conditions set out the expectations and rights of the start-ups' end-user. Start-ups need to take into account consumer law. Terms and conditions should also contain clauses on third party rights (if present) and applicable law and jurisdiction.
3. Start-ups require assistance concerning service level agreements (SLAs) on two levels. First, the start-up may offer a service to their end-users or third parties. In this scenario they need counselling in drafting SLAs to determine their liability in case of non-performance. Second, start-ups may depend on services provided by

others, e.g. cloud storage. Start-ups must understand this third party's SLA to assess possible repercussions.

III. Privacy and Data Protection

1. According to article 8 of the European Charter of Fundamental Rights, data must be processed fairly, for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Most common for start-ups is to acquire the consent of their end-user as a legal basis for their processing activities. Such consent also increases trust and transparency. Start-ups need guidance on the mechanisms that need to be implemented in order to safeguard. Moreover, informed consent is a necessity when tracking users via cookies.
2. Profiling, both on the individual and group level, may play an intrinsic role in a business plan of a digital starter. It can help in improving services as well as the overall performance of the undertaking. While an easy access to increasingly sophisticated data mining systems and cheap data storage make profiling an attractive option for a start-up to determine business priorities, data protection legislation must be respected. Start-ups must have guidance on the legal limits of profiling.
3. It is not unlikely for a start-up to partner with other undertakings. Cloud storage may be provided by a third-party. A start-up may also provide services to a business client. When both parties generate and share data, there must be a clear understanding as to who the original owner of the data is. Additionally, start-ups must be made aware of data transfer requirements: will data be stored in the EU or transferred to non-EU countries?

IV. Electronic Communications

Electronic communications law is rarely tackled at start-up clinics. For instance, out of 50 start-up requests received by the KU Leuven ICT Law Incubator, only one start-up required legal advice specifically in relation to electronic communications regulation. Questions may relate to:

1. The applicable law when using telecom resources from various countries.

2. The protection of the customer in case a contracted telecom operator does not provide the necessary services.
3. The legal position of over-the-top content providers.

V. E-Commerce

1. Many start-ups act as an intermediary in the online environment. They offer their end-users a platform. These start-ups do not necessarily engage directly with their users. For intermediary service providers it is important to determine their potential liability for legal infringements by their end-users. For start-ups it is important to know whether they benefit from the limited liability regime as set out by the 2000 E-commerce directive.

VI. Intellectual Property Rights

1. Given the importance of intellectual assets, a start-up will often seek to protect his intellectual creations. A legal clinic or professional will then ascertain what protection mechanism would be best suited for the innovation. For instance, in a rapidly developing sector it may be ill-advised to launch an expensive patent application knowing the invention is merely incremental. In other words, start-ups need guidance on the different types of protection mechanisms and the formal protection requirements.
2. In some instances start-ups may want to assign intellectual property, i.e. transfer the ownership of IP from one person to another. This may be the case when the IP has been developed with a partner who wishes to leave the company. This assignment requires a formal agreement between both partners.
3. Start-ups may build upon intellectual property of others, whether as part of a partnership or not. In these instances, start-ups often wonder the limits of using other person's IP and the consequences of having used that IP. This often requires an assessment of the relationship between background and foreground IP. In sectors reliant on software, the relationship that needs to be assessed is the relationship between proprietary and open source software.

4. Start-ups may also have more specific questions relating to intellectual property, such as the use and protection of Application Programming Interfaces (APIs) and crawling techniques.

VII. Other

A. Health and Medical Law

1. Start-ups that develop applications that can be used in the medical sector wonder whether their health application should be considered a medical device under EU legislation.

B. Financial Law

1. Start-ups offering new types of services in the financial sector should be made aware of the legal requirements set out by the various EU directives. Legal obligations may be derived out of their function as a third party payment provider or issuers of electronic money.
2. Start-ups may also be informed concerning the lack of a unified legal framework concerning cryptocurrencies and potential consequences thereof in the various Member States.

C. Migration Law

1. In a digital age, the working environment is not restricted by national boundaries. Start-ups may want to hire foreign nationals. For instance, a start-up idea may have started on an Erasmus trip or foreign employees may be more attractive due to their expertise in a certain technological area. In these cases, migration law may have to be considered in order for start-ups to determine what the best visa would be for a future employee.

D. Employment Law

1. Entrepreneurs may have started a business 'on-the-side', i.e. they are under employment with another firm. This may require an assessment of their current working position in order to determine what they can or cannot do.
2. Start-ups may wish to expand and hire additional personnel. At this point, a start-up requires a formal employment agreement in order to establish the mutual relationship between employer-employee: What does the start-up require from the employee? In turn,

what will be the employee's remuneration and what are his or her rights?

3. A work relationship is not merely governed by the formal employment contract. Like any other business, a start-up will have to take into account various working regulations implemented at both the national and international level. These also impact the business as they may detail the maximum a start-up should expect from his employees, for instance with relation to working hours.

E. Tax Law

1. Start-ups need to pay taxes. Especially since the introduction of the new VAT directive, start-ups need additional guidance. For purchases made in the digital environment, the new VAT regime details that the level of tax that needs to be paid depends upon the legislation of the country of the consumer.

IV. Understanding the Regulatory Environment – Legal Awareness – General Observations

Having ascertained the regulatory challenges, both national and international, of start-ups, we will now assess whether start-ups have sought the legal counselling necessary to overcome these barriers. First, we will assess start-ups' general understanding of the regulatory environment. Following this analysis, we will investigate whether or not start-ups effectively seek advice.

I. General understanding of the regulatory environment

Our survey indicates that start-ups are developing a better understanding of the regulatory environment governing their businesses. Roughly 60 percent of start-ups feel that they begin to understand the legal environment. 26 percent of start-ups consider themselves to have a good understanding of the legal environment. Only 16 percent have little or no understanding of the legal issues affecting them. Moreover, our figures show that a thumping majority of start-ups would indeed like to know more about the legal issues that may impact their business.

Even though start-ups are at least developing a better understanding of the legal issues affecting their business, true legal knowledge is still lacking. When these figures were compared with those start-ups already having engaged in legal counselling, the numbers are slightly more positive. In instances where legal counselling was sought, 36 percent of start-ups felt that they had a good

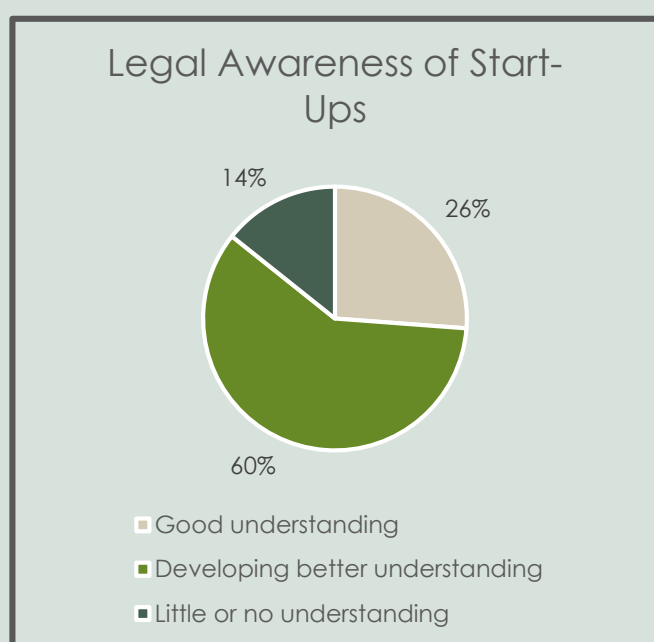


Figure 6: Legal awareness of start-ups; Source: iLINC Start-Up Survey (84 start-ups responded)

understanding of the legal issues affecting them and 55 percent were developing a better understanding. However, upon having received legal counselling, only 8 percent of start-ups indicated to have little or no understanding of their legal issues. Consequently, obtaining legal advice does help start-ups in understanding their regulatory environment.

II. Start-ups and Legal Counselling

Obtaining legal advice has an undeniable positive effect on start-ups' understanding of the regulatory environment. Yet, how many start-ups do indeed seek professional legal counselling? This question was linked to the perceived importance of start-ups of legal advice. 56 percent of responding start-ups had obtained legal advice. Start-ups that had not yet obtained legal advice, did not refute the importance of advice though.

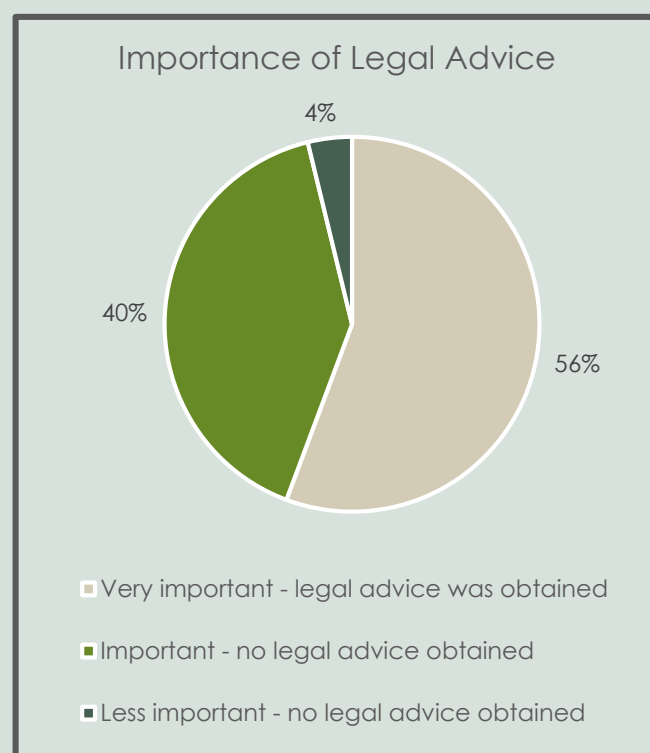


Figure 7: Importance of legal advice; Source: iLINC Start-Up Survey (79 start-ups responded)

Similar results were found by the HIIG legal clinic (see figure 5). The HIIG has asked start-ups participating in their clinic program to indicate whether or not they had obtained legal advice prior to attending the clinic sessions. Their results found that the majority of start-ups seek legal advice through secondary channels, such as template and friends.

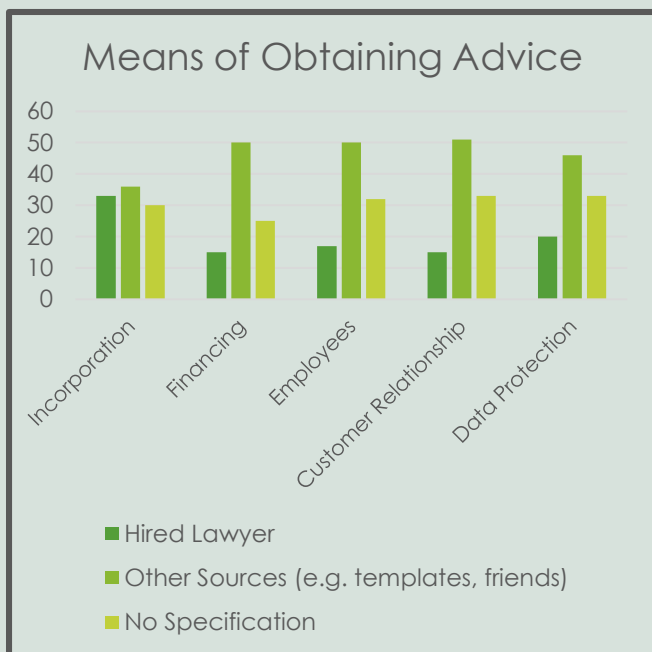


Figure 8: Means of obtaining legal advice; Source HIIIG Legal Clinic (99 start-ups responded)

These figures are rather alarming. They indicate that roughly half of the start-ups develop their product without having consulted someone with legal knowledge. One might argue that legal advice is not crucial during the development stage, as contracts are not yet needed. However, the importance of legal advice in the development stage is not to be underestimated, as early confirmation whether the business project would be legally compliant once the product has launched can make or break a project. Understanding the legal obstacles ahead of product launch allows start-ups to assess the legal risks of their product. Once the product has hit the market it may be difficult to revert the production process in an effort to be legally compliant.

One might assume that once start-ups start generating revenue they may be more inclined to actually seek legal advice. Surprisingly, our survey indicates that even when start-ups have started generating income they do not necessarily solicit legal counselling. Indeed, 50 percent of start-ups without current income have sought legal advice. A 10 percent increase can be discerned once a start-up starts earning income: approximately 60 percent of start-ups generating revenue under 30.000€ have sought legal advice. This figure remains roughly the same (55 percent) for starters with an income between 30.000€ and 100.000€. Once start-ups generate more than 100.000€, legal advice acquisition is more likely: 66 percent. Yet, this increase remains rather modest. A true difference can be noticed for start-ups having

generated more than 500.000€. All the responding start-ups within this category did obtain legal advice.

These figures illustrate that even if start-ups start generating revenue, there seems to be little incentive to actually seek legal counselling. Advice will only be sought at the moment the corporation has gained a critical mass, i.e. once their revenue stream reaches 500.000€. In other words, the level of income does not necessarily have an impact on start-ups' legal service acquisition.

III. Reasons for not obtaining legal advice

As indicated above, start-ups consider legal advice to be important. Our survey also shows that start-ups are very well aware of the risks of not having obtained legal advice. Start-ups believe that their company could suffer financially and would be more likely to fail if no legal advice were to be obtained. Additionally, they fear that their company would become less attractive to potential funders if legal risks would be present. Furthermore, start-ups are aware that an early focus on legal issues would save time: during later development stages they would be able to concentrate on other business priorities, such as marketing.

Why then do start-ups not seek legal advice? Some participating start-ups indicated that even though they do not have a legal advisor, they do attend legal lectures or seek for advice online. Others simply stated that they do not know what advice they should get first. Start-ups also have difficulty finding the right legal expert. Furthermore, legal advice may simply not be a priority of the start-up in question.

The main reason for not obtaining advice is budgetary however: start-ups do not have the budget to obtain good and affordable legal advice. Indeed, 90 percent of start-ups have indicated that the cost of legal advice is the main reason that has prevented them from receiving legal advice and that additional budget for legal advice would be useful. Important to note is that no start-up found legal advice to be not beneficial. Of those start-ups seeking legal advice, the majority did receive legal advice from a legal advisor specialising in dealing with start-ups (66 percent). They did not however receive a special deal for legal services as a start-up: only 15 percent of those who had obtained legal advice received a special or fixed fee deal.

5. Policy Recommendations: Increase Legal Awareness among Start-ups

Our figures indicate that start-ups lack legal awareness. The Humboldt Institute's legal clinic confirms this conclusion. They found that of the 187 legal issues discovered by their legal clinic, 55 were not identified before the clinic session. Nevertheless, legal compliance has been identified by start-ups as an important success factor.

As a consequence, start-ups, when developing their innovation, often do not take into account the relevant legal framework in a sufficient manner. In highly innovative fields, this observation is particularly troublesome considering the fact that within those fields there is interplay between various legal domains. For instance, start-ups utilising crawling techniques may focus on data protection legislation, without considering the intellectual property framework.

Raising awareness concerning the legal framework serves many purposes. *First*, legal awareness raises the protection of both the start-up as well as the end-user. Start-ups are less likely to be subject to liability. The end-user is protected and trust is increased. Even though a start-up may feel that legal requirements hinder the innovative character of their business, start-ups could be made aware of the importance of the law. Legal knowledge allows them understand that legal obligations have a societal function. *Second*, if start-ups want to change the legal environment, they must build an understanding of the underlying governing

principles. Without understanding this, start-up communities will have difficulty in substantiating their claims for reform.

- 1) *Universities should be stimulated to establish legal clinics as these can (partly) mitigate the lack of legal awareness among start-ups. Legal clinics serve a twofold purpose: a) they provide start-ups a cost-friendly alternative to professional legal counselling and b) they give students a practical hands-on learning experience during their education. Moreover, figures from the ILINC survey illustrate that most start-ups are supportive of legal clinics and would likely participate in their programs*
- 2) *The academic and private sector should cooperate in setting up alternative channels to reach start-ups with legal information. Legal clinics cannot fulfil all demand, and as already demonstrated, only half of start-ups seek professional legal counselling. Consequently, many start-ups are currently operating without taking adequate account of the law. Most start-ups will be unable to seek on-going professional legal advice due to budgetary reasons. Start-up toolkits, e.g. key contract templates, by law firms, or the organization of legal workshops specifically targeting start-ups, can facilitate the transfer of legal information to start-ups.*
- 3) *Law firms could be stimulated in providing fixed or special deals for beginning undertakings.*

4) *Legal actors, such as law faculties, law firms, legislators and regulators, and start-up communities should strive towards establishing a mutual understanding between the legal and technological environment.*

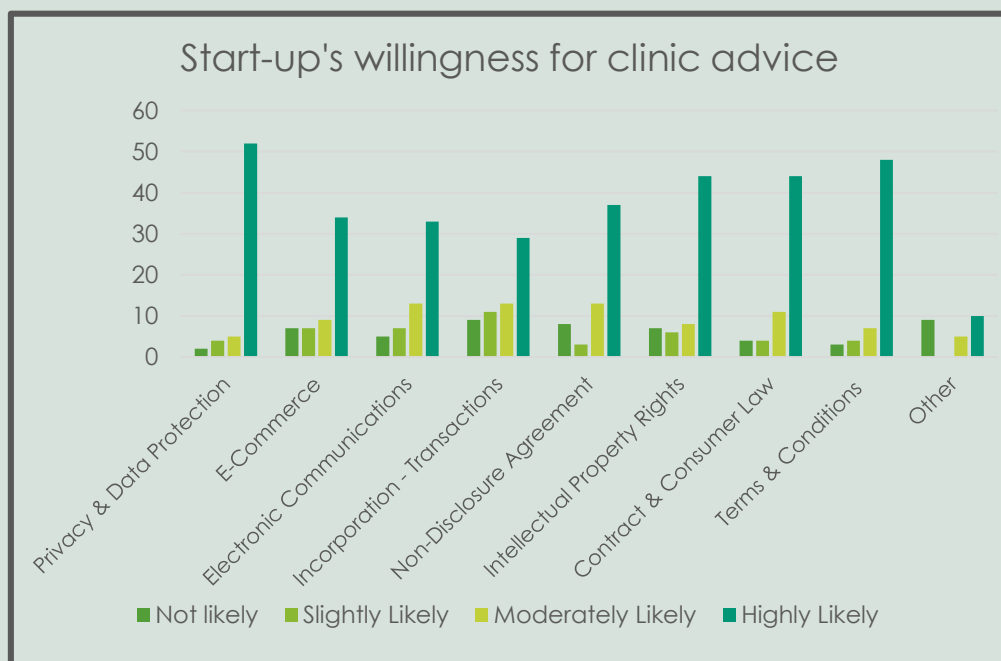


Figure 9: Start-ups and Clinic Advice; Source: iLINC Start-Up Survey

V. Cross-Border Legal Barriers

The iLINC survey confronted start-ups with the question whether they had encountered legal problems due to jurisdictional boundaries. 41 percent of the responding start-ups found that this was indeed the case, 30 percent did not yet encounter such difficulties and 29 percent did not know whether this was the case or not. The percentage of start-ups that did feel they encountered jurisdictional boundaries is rather high. Indeed, cross-border operability is important for digital start-ups, who have the Internet as their main playground. The survey did not require start-ups to specify whether they were active on a cross-border level or not. Considering the general lack of legal awareness, one could assume that start-ups would have a tough time defining cross-jurisdictional boundaries. Taking into account the particular business nature of start-ups and based upon the regulatory challenges detected above, this section aims to identify the key legal cross-border barriers.



Figure 10: Cross-border barriers; Source: iLINC Start-Up Survey

I. Why Cross-Border Legal Barriers Limit Start-ups' Success

The reduction of cross-border legal barriers is of particular importance to start-ups. Start-ups have a different business model than traditional small-and medium sized undertakings. Start-ups often have a pre-defined goal and high aspirations. The key components to start-ups' success have been aptly phrased by the co-founder of Berlin-based marketing application AppLift Kaya Taner.^{viii} He considers the success of digital start-ups to depend upon three factors: the business model of the start-up and the scalability thereof, the market size and the velocity. For digital start-ups these factors are indeed important. Moreover, the regulatory

environment plays a key role in how a start-up could successfully achieve these factors.

Scalability: Scalability is the ability of a start-up to multiply its revenue with a minimal incremental cost.^{ix} A start-up is ready to scale when a proven product has been developed and when the business model has had success and is now ready to expand to new geographic markets.^x

Market Size: The EU has a strong position in the global trade of commercial goods and services.^{xi} In 2013, the EU was the biggest market in terms of important and export.^{xii} The EU market size is potentially bigger than that of the US and other regions. In principle, the EU should thus be a good starting environment for start-ups.

Velocity: Velocity refers to the speed at which a start-up can deploy. In a digital environment, speed should not be underestimated. Technology moves fast and digital undertakings are required to adapt fast to changes in the digital ecosphere. Start-ups need to anticipate market change and react quickly.

In light of these three key factors towards success, it is rather obvious that cross-border jurisdictional conflicts may have a tremendous impact on scalability, market potential and velocity. In particular, having to take into account a patchwork of 28 different Member States' legislation can be more than burdensome. Legal compliance, although necessary, reduces the speed at which a start-up is able to deploy when 28 different laws need to be taken into account. This also reduces scalability: in principle, a legal compliance check is necessary if one wishes to expand to other Member States. Even if the product and business model have been proven, the law acts as a barrier to scale. In turn, the market potential of a start-up could decrease if this de-incentivizes start-ups to expand to other markets.

The iLINC network does acknowledge that it is impossible for the European legislator to cater all regulatory reforms to the wishes of start-ups. Drafting policy necessitates a careful balancing act, whereby a variety of stakeholders need to be taken into consideration. Moreover, the EU should respect the principle of subsidiarity and Member States should be able to retain sovereignty. Yet, in some areas the EU legislator has already chosen to intervene through the implementation of harmonising measures. Some of the legal aspects that are hindering the development of start-ups could be mitigated by further intensifying this harmonisation. Even though such measures have

been taken for the majority of legal areas start-ups struggle with, harmonization remains limited if achieved through the implementation of Directives. Without clear interpretative rules, fragmentation will continue to exist. Concepts could be further clarified or interpreted by the Courts. Yet, this approach takes time and the occasion to actually clarify certain key notions may not present itself. In an ever evolving technological landscape such as the ICT sector, this may lead to a perpetual state of 'out datedness'.

Another option would be to provide uniform interpretation of certain regulatory concepts or principles through advisory boards, such as the article 29 Working Party. Legal uniformity should ultimately benefit every undertaking that wishes to remain active within the EU. Policy makers could also implement contractual standards: templates that will be accepted across the EU. Here, we would like to refer to the efforts that are being made in the area of consumer law and cloud contracting, more specifically the introduction of a common European sales law.

The following section outlines a number of key areas for start-ups that could benefit from a unitary, pan-European approach. Although this list is non-exhaustive, topics were chosen because they could be addressed via regulatory changes. This is why we elaborate on crowdfunding and not alternative financing mechanisms, such as business incubators and accelerators: crowdfunding currently requires a strong legal framework.

I. Contract and Consumer Law

EU consumer legislation has been fully harmonized within the EU through the introduction of Consumer Rights Directive 2011/83/EU.^{xiii} This directive instilled maximum harmonisation on certain aspects of contract and consumer law, in particular with regard to pre-contractual information and the right to withdrawal. This maximum harmonisation approach should benefit start-ups as pre-contractual obligations and the right to withdrawal form an integral part of one's terms and conditions. The iLINC network lauds the accompanying 'optional model' for the provision of consumer information about digital products.^{xiv}

Despite these maximum harmonisation efforts, consumer contract legislation nevertheless remains fragmented across EU Member States. For instance, several domains of consumer law are governed by a minimum ruleset, such as the Consumer Sales Directive (1999/44/EC)^{xv} and the Unfair Contract Terms Directive (93/13/EEC).^{xvi}

More importantly however, no specific rules exist with relation to the non-conformity of digital content products.^{xvii} This is an area still governed entirely by Member States legislation. The perspective of the online trader has been recognized however by the Commission in its Digital Single Market strategy. Furthermore, according to Regulation 593/2008, a business directing its activities to consumers in another Member State, has to comply with the contract law of the targeted Member State.

On the business to business level, contract law is also governed by Member State legislation. Transaction costs can be particularly high for small undertakings, start-ups included. Differences in contract law and additional transaction costs result in complexity, which in turn dissuades traders, SMEs in particular, in pursuing cross-border transactions.^{xviii}

II. Intermediary Liability and Online Platforms

Many start-ups fulfil an intermediary role in the digital environment. In many instances, start-ups provide a platform as a service. They act as a mediator and facilitator for their end-users who use the 'intermediary' platform as a means to offer goods and services. The 2000 E-Commerce Directive aimed to ensure the economic viability of intermediary services by implementing a limited liability regime. This was deemed necessary as it was recognized that intermediary actors should not be held responsible for illegal conduct of their end-users. Unfortunately, the Directive is showing its age. The exemption regime provided only applies to three specific types of information society services: mere conduit, caching and hosting.

However, in a rapidly developing technological arena, start-ups are no longer easily categorised. The liability exemptions are still relevant today. Still, jurisprudence diverges at the national level. Notice-and-takedown procedures remain fragmented as well. This disparity ultimately creates legal uncertainty and can negatively impact innovation. Even though online platforms should not be entirely exempt from responsibility – the availability of illegal content online must be addressed - clarity must be provided as to the applicability of the exemptions on online businesses.

III. Value Added Tax

Following the introduction of the new VAT regime, VAT liability for digital products is now determined by the country where the product is bought and no longer by the place of supply. Digital start-ups are likely to feel this impact. Because they offer

digital goods, they must take into account the VAT legislation of 28 member countries. This has increased the overall compliancy costs of small online undertakings. According to the Digital Single Market strategy, the compliance cost small online businesses face when trading in another EU country is estimated at 5000€ annually for each Member State where it wishes to supply. This places a heavy burden on start-ups, who as mentioned earlier, lack financial means. The effectiveness of the current regulatory VAT framework could therefore benefit from additional simplification measures.

IV. Privacy and Data Protection

As stated earlier, data is considered by many the raw material for their activities. Start-ups nevertheless have to take into account the legislation of 28 Member States. Even though Directive 95/46/EC harmonized the European regulatory framework, divergence remains. Data protection legislation is an ever-evolving field. As technology progresses so does our understanding of data protection. Our notion of what data protection entails is continuously challenged by the rapid advancements made in the technological field, such as machine learning and data mining. As a consequence, Member States have interpreted several key concepts differently. Without uniform interpretation start-ups are left in the dark. Moreover, the lack of guidance on how certain protection requirements should be implemented, may result in the infringement of the data subject's data protection rights.

For instance, even though Directive 95/46/EC stipulates that consent must be "free, specific and informed", Member States do not deal uniformly with the matter^{xix}. Some laws emphasize the need for consent to be 'manifestly' free, specific and informed, by including "unambiguous" in the very definition of consent (Portugal, Spain and Sweden)^{xx}. Italian and German laws require consent to be in writing; however deviation is allowed in the online environment: consent can be given by a mouse-click.^{xxi} France, Ireland and the UK do not define "consent". However, in France, consent for the processing of data is valid if it amounts to a "freely given, specific and informed indication of the wishes" of the data subject. In the UK, implied consent seems possible for non-sensitive data. Irish law requires consent to be given explicitly, yet implied consent suffices in circumstances where the purpose for data processing can be clearly understood and is well-defined. As a result of this divergence, consent validly obtained under the law of one country, may very well be considered insufficient for

subsequent data processing activities in another country, even if that country belongs to the EU/EEA^{xxii}.

V. Territoriality of Copyright

Intellectual property rights are territorial in nature. The rights granted to a creative or industrial invention will be governed by each separate territory in which protection was sought. The territoriality of copyright may be of particular importance. For start-ups relying on third-party creative content, marketing possibilities are limited as they must take into account 28 different copyright legislations. This negatively impacts their business on 2 ways. First, a consumer buying creative content via a digital channel in his home country, is restricted from accessing that content while travelling, unless the license for that country has been secured as well. Second, a start-up wishing to provide services on a pan-European level must secure the required license in all 28 Member States, which raises transaction costs.

In addition, the majority of copyright exceptions provided for by the EU Copyright Directive were optional for Member States to implement. The resulting disparity may make the performance of certain activities, relying on these exceptions more difficult. This may be the case for text and data mining activities.

VI. Crowdfunding

At an early stage, ICT start-ups primarily require funding and capital to make their desktop ideas reality. Crowdfunding has become an increasingly popular method of capital acquisition: whereas start-ups may fail to receive funding from traditional sources, such as banks, private equity houses and angel investors, the crowd can invest directly into projects or undertakings they truly believe in.^{xxiii} The importance of crowdfunding as an alternative financing mechanism should not be underestimated: traditional sources may be reluctant to provide funds to high-risk undertakings and the supply of venture capital remains limited in Europe.^{xxiv} In addition, the crowd remains open to everyone, whereas competition in the investment market can be very high – competition is also high when start-ups try to enter into incubation programs.

Regulatory fragmentation nevertheless remains a key hurdle for crowdfunding projects within Europe. National laws allow for local crowdfunding industries to grow, yet fragmentation reduces the potential market size and leaves little room for scale^{xxv}. Because the European financial directives are interpreted differently across member states,

the emergence of a healthy European crowd fund industry is currently unlikely^{xxvi}. A pan-European position is missing as there is too little cross-border engagement between the national financial services regulators. Additionally, EU Member States legislation often differentiates among crowdfunding models (equity, lending and donations or rewards). Consequently, legal uncertainty may prevent start-ups from obtaining the necessary funds.

VII. Cryptocurrencies

By simplifying transactions and by preventing the user to enter personal payment details, end users can be motivated to use virtual money. Hence, the introduction of a virtual currency for virtual goods could generate additional revenue for young start-ups. The possibility to earn extra virtual currency could also lock in users. Moreover, virtual currencies could be an important tool within the app market and advertising industry when designing strategies to reap benefits of the virtual goods market^{xxvii}. The implementation of virtual money, and cryptocurrencies in particular, as a payment mechanism may thus provide European digital start-ups an advantageous position.^{xxviii} However, there is still considerable confusion as to what the exact legal status of cryptocurrencies is.

Countries such as Belgium, France, Cyprus, Denmark, Netherlands, Portugal, Spain and the UK have no specific legislation on cryptocurrencies, yet warnings have been made concerning the potential dangers involved with them.^{xxix} In Germany, bitcoins are considered units of value having the function of private means of payment within private trading exchanges or they are substitute currencies that are used as a means of payment in multilateral trading transactions on the basis of legal agreements of private law.^{xxx} In its current state, German authorities do not require bank supervisory licensing for the giving, acceptance or mining of bitcoins. Nevertheless, licensing could become necessary under various circumstances, including the creation or maintenance of a market in bitcoins.^{xxxi}

The prudent attitude of policymakers is understandable, as virtual currencies are still in an infancy stage. Yet, policy makers are aware of the risks these payment mechanisms entail. There may be a reluctance of start-ups to enter the market as long as they do not know if, and which, new legislation will be implemented.

IX. Harmonization Matters - The Importance of the Digital Single Market Strategy

Most of the legal areas discussed above are currently under review. Indeed, the European Commission has reaffirmed its commitments to address these issues in its 2015 Digital Single Market Strategy. The impact of regulatory measures on start-ups has been expressly recognized, which has not always been the case in the past: the recently introduced VAT regime targeted, among others, global internet giants, but did not take into account the multitude of small EU start-ups. The Digital Market Strategy has taken an important step in recognizing that, even though policy makers must keep pace with rapid innovation, start-ups and web entrepreneurs are particularly vulnerable and strongly affected by ill-adapted regulatory measures.^{xxxii}

The three pillars upon which the digital single market strategy rest – being a) better access for consumers and businesses to digital goods and services across Europe, (b) shaping the right environment for digital networks and services to flourish and c) creating a European Digital Economy and society with growth potential – sound promising for start-ups. Indeed, harmonization measures in the fields of contract law (whether B2C or B2B), copyright and data protection will likely stimulate cross-border activities. The effects on the start-up success factors, i.e. scalability, market potential and velocity, are likely to be positive. The key points of the Digital Market Strategy must now materialise and be further strengthened.

It may be of importance to note that start-up organisations, COADEC in particular, have raised concerns with regard to some of the intended goals of the Digital Market Strategy.^{xxxiii} In particular, they worry that the Commission's vision may increase regulatory burdens on online intermediaries and platforms. Nevertheless, a call concerning the role of online platforms will be launched in 2016, thus no immediate plans are apparent. COADEC has also questioned the Commission's goal to level the playing field in the telecom sector, which may hurt innovative messaging and VoIP start-ups. COADEC hopes that the intent of the Commission is to lower the burden on telecom operators rather than increasing the regulation for over-the-top service providers.

Policy Recommendations

to increase competition with the US, from which most online trades emanate.^{xxxiv}

1) The European legislator should commit further to the introduction of harmonizing measures in an effort to achieve a true digital single market and to reduce the barriers to digital innovation.

- 1) Establish a common European Sales Law for consumer and business transactions, facilitating cross-border trade through the introduction of a uniform set of contract laws, applicable in all Member States.
- 2) Provide a clear regulatory framework with regard to the operation of online platforms.
- 3) Aim towards the further harmonization of the other key legal areas for start-ups: privacy and data protection and intellectual property rights in particular.
- 4) Simplify the tax and VAT regime for digital content.
- 5) Provide clarity concerning and aim towards uniform measures relating to the regulatory framework governing alternative financing mechanisms, such as crowdfunding.

2) National legislators and courts should strive at a uniform application of the key concepts of EU legislation. A uniform interpretation of regulatory concepts or principles could be provided by EU advisory boards, such as the article 29 Working Party.

- 1) Important regulatory reforms should be accompanied with guidance documents to allow for a smoother implementation of legal requirements, but also to increase legal understanding and awareness among parties involved.

3) Legislators and regulators should engage more with start-ups during the preparatory process of new laws or regulations. Start-ups differ from 'traditional' SMEs. They should take into account start-ups' key success factors: scalability, market potential and velocity.

4) EU Member States and The European Commission should further promote digital start-ups both in access to capital and visibility

Specific policy recommendations have also been made by the iLINC network in relation to the regulatory framework governing legal clinics, taxes, copyright, the sharing economy, the principle of purpose specification and limitation in data protection, and the corporate environment.

VI. Future Trends

When regulatory reforms are planned, one should also consider the future technological environment. The impact of ICT advancements can hardly be predicted adequately. The only certainty is that technological changes will increase at a rapid pace. Even though law can guide practice, in reality technical evolution will most likely guide law. Our legal frameworks risk to be outpaced and ill-equipped to address the challenges brought forth by future technological evolution. Nevertheless, legal principles are necessary, as they benefit society as a whole. If legal principles are to stimulate innovation, whilst still preserving a sound environment in which mores are adhered, there will be an increasing need to adjust laws in time and even to pro-actively seek solutions to future legal conundrums. If the goal is to reduce the legal barriers towards innovation, it is important for legal professionals, but also for students, to be made aware of future trends that may cause legal shifts. It is still unclear how future trends will alter the legal landscape. As a consequence, it is quite difficult to pinpoint the exact impact they might have on current legal challenge areas. The following, non-exhaustive list, identifies upcoming trends that are likely to impact the legal framework in which digital start-ups operate.

I. Future of Mobility

The car industry is probably one of the most traditional industries in Europe. As the economy strives towards consumer empowerment and aims to increase personal experience, the car industry will follow. In the near future, the mobile industry will be characterized by an increasing trend towards personal or freight mobility as the preferred method of travel. Mobility will become integrated and combined with intelligent and smart technologies^{xxxv}.

The future of mobility is likely to affect our current understanding of product liability and liability in general. Considering the many interwoven actors in the development cycle of automated cars for instance, it will become hard to determine who should be held responsible when traffic incidents occur: the car manufacturer, the software developer or the owner of the car?

Connected car services bring along major privacy concerns and data protection legislation does not yet provide a clear-cut answer to some of the simpler questions. For instance, it is already quite complicated to determine who the data subject will be: the one driving the car or the registered owner of the vehicle? Given the likely co-operation between car manufacturers, software engineers

and telecom operators during the production phase of connected cars, it is equally difficult to establish data ownership.

II. Bricks and Clicks

The term 'bricks and clicks' exemplifies the new era of commercial activity. The term is a reference to the traditional 'bricks and mortar' business model. In a digital environment however, goods and services are no longer traded through the traditional retailer environment. During recent years, growth rates in mature markets have begun to slow down. Sustainability thus requires retailers to expand their borders to meet new growth targets.^{xxxvi} Up until now, expansion efforts have focused on new brick-and-mortar store openings. But by the year 2025, it is expected that bricks and clicks will become the retailing norm of the future, with every retailer having an online identity as well as a brick and mortar presence.

An increase of online commercial activities, is likely to impact consumer and contract law. The dependency on online frameworks and lack of physical buffer will surely require a coherent framework concerning digital content delivery.

III. Connectivity and Convergence

The Internet has started a verified revolution. The internet has become more and more structured, creating an interconnected ecosystem for those who have access to an internet connection. New and current technologies will unlock innovative applications influencing our communication and economy. The future is one of connectivity and convergence^{xxxvii}, and studies indicate that this trend will continue, with 5 billion Internet users and 80 Billion Connected devices worldwide by 2020.^{xxxviii} Most of these trends have already materialized. Often referred to as the Collaborative or Sharing Economy, interconnectivity has enabled a social economy whereby human and physical assets are shared worldwide through the collaboration between individuals (e.g. airBnB).

The collaborative economy enables an increased interaction between consumers. Peer-to-peer business models will become more prevalent. The 'brand', i.e. start-up, will act as the platform and will enable end-users to share physical or intangible assets among each other. However, due to the increased interaction between end-users, it will be increasingly difficult to separate 'consumer' from 'trader'. The definition of the latter determines who should apply consumer protection rules and who should ultimately be held liable for the infringement thereof. Nevertheless, as end-user interaction increases, the distinction between 'trader' and 'consumer' will become increasingly blurry.

Additional guidelines will therefore be necessary to ensure consumer safety, but also to increase transparency among users of peer-to-peer networks. The current application of consumer protection legislation does not allow an easy answer to certain questions. Should the platform operator, for instance, still be considered the trader in peer-to-peer networks, as he only acts as a facilitator among users? And if so, in what circumstances should he be held liable for non-compliance by users within the network, given the fact that within these peer-to-peer situations, the end-user may act as the immediate counterparty.

Additionally, peer-to-peer networks may enter markets governed by sectoral regulations. Uber and the taxi industry. This raises questions as to what legislation should effectively be applied and whether this regulatory inequality should be addressed by leveling the playing field.

IV. Data Mining

The global Big Data market is expected to generate a revenue of over 122 billion dollars by 2025^{xxxix}. As a result, big data analytics is one of the main emerging industries of the future. Especially in the marketing sector big data can be considered the Holy Grail, as it allows marketers to target customers precisely and efficiently. In a connected world, the precision and relevance of service delivery will most likely increase due to efficient use of location and time data. Even though the term 'Big Data' may disappear from the future lexicon, the underlying principle, i.e. the use of increased computational power and advanced data mining techniques to analyze large data sets in an effort to identify patterns and subsequently substantiate economic, social, technical and legal claims.^{xl}

Due to the increased importance of data as a driver for innovation, the data subjects must have full awareness as the purposes for which data will be collected and to whom it may be disclosed. As more and more data relatable to individuals will be collected, the data subject must also have the ability to access that data in order to ascertain the accuracy and completeness thereof. Additionally, the data subject must have a right to correct that information.

Although the proposed EU Data Protection regulation intends to implement additional safeguards against Big Data abuse, the underlying principles are under continuous strain. Advanced data mining techniques exert pressure on the ex-ante data protection mechanisms, such as anonymization and the principles of purpose

specification and limitation. For instance, how can a start-up specify the purpose of his data mining activities, when the exact goal of data mining is to find new uses for data? Similarly, as data sets grow, links between data can be more easily discovered, pressuring the feasibility of true anonymity.

Even though data analytics can serve as a catalyst for value-added services, the individual's right to self-determination may be at risk. Even though most end-users are aware of the existence of targeted advertising, the exposure thereof may have an impact on our subconscious. The access to data by governments may invoke dystopian images, but brands and commercial operators may, through big data analytics, influence our behavior as well, which may lead to so called brand totalitarianism. Therefore future regulation may have to take into account psychological studies to determine the instances where big data knowledge could be applied and how this could be done without exposing us to potential risk. In other words, the regulation of profiling measures should be taken into close regard.

Even though start-ups prefer consent as the basis for their data processing activities, the notion among start-ups that consent is 'the way to go' may have to be abandoned. Indeed, it seems that the average knowledgeable individual will no longer be capable to grasp what happens with the data he is putting on the net. Should we increase the obligations of the controller, or should citizens be made more aware of their Internet habits?^{xli}

V. 3D Printing

Even though 3D printing has been around for quite some time, it has become a billion euro industry and forecasts indicate a tremendous market growth for the coming years.^{xlii} 3D printing is promising as it can be utilized in a variety of industries. Even though 3D printing is very cost-intensive, start-ups are not limited to the core printing activity to capitalize on this trend.^{xliii} Platforms can be set-up to share 3D content files. Likewise, a start-up can serve as an intermediary connecting end-users to 3D printing facilities.

Of course, 3D printing is likely to affect our understanding of intellectual property legislation. For instance, what is the most effective protection method for 3D designs? Second, the enforcement of intellectual property rights is challenged as 3D printing now allows piracy to enter the physical world.

Additional questions arise with regard to product liability. Who should be held liable for the

malfunctioning of a 3D printed object: the individual who designed the initial 3D file or the company controlling the 3D printer? Start-ups may also face intermediary liability when they act as the conduit between end-users and 3D printing hubs.

Conclusion

It is not our intention to judge how EU policy approaches should shift in light of these future trends. At least, not in a substantive manner. However, the trends described above may give some indication on how the legal environment will evolve, or even how the legal environment should evolve. At its current state, the legal rules in Europe seem incapable of dealing in a sufficient manner with the difficulties that lay ahead.

All trends highlighted above have the capacity to influence the law in many different ways. Technology also seems to affect all areas of law: financial law, e-commerce, intellectual property law and privacy and data protection... In other words, new technologies will impact the legal challenge areas that matter most to start-ups.

Even though it is too early to provide specific policy recommendations, technological advancements will necessitate regulatory measures to be taken. Before taking concrete regulatory steps, policy makers should make a detailed impact assessment. Start-ups are at the forefront of technological developments and regulatory changes are likely to affect them the most: as stated earlier, start-ups are vulnerable to ill-adopted regulatory reforms. Taking into account the necessity for start-ups to scale quickly to other markets, EU action should aim towards uniformity. In a letter to Vice-President of the European Commission for the Digital Market Andrus Ansip, 'Allied For Startups', a worldwide network of advocacy organizations with a focus on improving the policy environment for start-ups, urged caution with regard to the regulation and creation of new laws for each (new) technology in the digital environment.^{xiv} They consider that in order to foster innovative and evolving companies within Europe, it is key to avoid the imposition of strict horizontal regulation, which may apply differently to each start-up and may thus place additional burdens on entrepreneurs seeking to scale up.^{xiv} New technologies impact industries differently. Therefore, the implementation of horizontal measures may not always be desirable. This does not mean that regulation should not be imposed on new technologies: legal gray zones – which admittedly could be to the benefit of start-ups as well – should be addressed.

There is a clear role for the EU to ensure consistency in the way legal frameworks develop within Europe. Building fertile soil for innovative entrepreneurs surely requires more than laws – it also depends on the educational context, financial incentives, cultural context, social environment, etc. – but the importance of robust and coherent legal rules are not to be underestimated. By investing in the modernization of existing rules and ensuring a level playing field throughout Europe, the EU can increase legal certainty for all parties involved. When preparing legislative initiatives or reforms, the EU should be keen to have all voices – not only established actors, but also smaller entrepreneurs with limited financial means – represented in the policy debate.

Also through EU supported initiatives like the ICT law clinics, new generations of (law) students are stimulated to think pro-actively about the appropriate legal setting for a climate of dynamism and innovation in Europe. They will be better trained (and ICT start-ups better equipped) to tackle tomorrow's societal challenges.

Policy Recommendations

- 1. When technological developments necessitate the modification of the current regulatory environment, policy makers should proceed with caution. A thorough impact assessment should be conducted, taking into account those players who are at the forefront of these developments, i.e. start-ups. Start-ups are more likely to be negatively impacted by ill-adopted regulatory reforms.*
- 2. When adopting new legislation, policy makers should strive towards legal uniformity and consistency where possible.*
- 3. New technologies impact industries differently. The implementation of horizontal measures may therefore not always be desirable.*

VII. Addendum - Policy issues as identified by start-ups

During the span of the iLINC project, start-ups made sure their voices were heard. Indeed, whereas up until 2013, start-ups did not unify their thoughts on policy changes, this changes under the auspices of Neelie Kroes (at that time Vice-President for the Digital Agenda). On 2 September 2013, the European Leaders Club^{xlvi}, an independent group of founders in the field of tech entrepreneurship, presented the European Start-Up Manifesto,^{xlvii} which outlines a 5-point, 22-action plan to stimulate entrepreneurship.^{xlviii} The manifesto kick-started a number of similar national initiatives.^{xlix} These manifestos cover more than just the legal challenges; they also include economic and educational barriers. Therefore it is important to highlight the key action points these documents outline as they do provide suggestions on how to unblock digital barriers. Moreover, some of the themes covered in these documents, seem to align with iLINC research and have also been covered by the iLINC Policy Briefs.

The aim of all the start-up manifestos has been to raise awareness among policy makers concerning the various challenges start-ups face in the digital environment. The various start-up manifestos that have been published over the past 2 years share several commonalities. Although the interpretation of policy issues differs across the various manifestos, in general, **the following major themes can be discerned: 1) digital skills 2) access to talent 3) access to capital and investment, 4) the facilitation of incorporation, 5) the availability of data and 6) legal simplification.** The following section will briefly cover these themes. The latter theme (legal simplification) has already been elaborated on in this policy brief, so will not be discussed in further detail. By taking these action points into consideration, policy makers, both on the national and EU level, could further contribute to the European entrepreneurial environment.

1) Digital Skills

Start-ups require employees that are digitally skilled. The importance of digital skills and expertise has also been recognized by the European Commission in its Digital Single Market Strategy for Europe.ⁱ Another key factor in fostering digital innovation, is to ensure that teachers are confident and able to educate students concerning the digital environment. However, within the context of the start-up environment, education takes on a very specific form. Even though, education should lead students to a better understanding of the

data-driven market-place by offering courses in computer programming, education should also motivate the entrepreneurial spirit of the population. This could include the encouragement of students to start their business before graduation or to learn student or the teaching of students on how to find customers rather than a job.

2) Access to Talent

Once skills have been created in the digital single market, one has to ensure that these skills are applied in an efficient manner: skills must be utilized to their full potential. For start-ups access to skills means that the right skills should be deployed at the right moment. Although start-ups may benefit of easier hiring and firing capabilities, the iLINC network believes it is above all necessary to develop a system in which start-ups know who they hire, without there needing to be a fast 'firing' process.

In the digital environment, one must also take into account to borderless nature of the internet. Electronic communication enables parties to set-up virtual work environments. Therefore, cross-border hiring must be facilitated.

On a more fundamental level, start-ups fear a European brain drain. Although 4 European cities are currently in the top 10 global start-up hubs, start-ups often choose to migrate to Silicon Valley at a later stage.ⁱⁱ Therefore, start-ups have asked policymakers to take the necessary steps in order to ensure talent remains in the EU. This could also be established by promoting start-up activities and enable entrepreneurship as a viable business opportunity in the EU.

3) Access to Capital and Investments

Even though start-ups are active in high growth sectors, at the start-up stage, little revenue is actually generated. According to the iLINC survey, approximately half of start-ups does not have a revenue stream. Indeed, most start-ups need external funds in order to survive or develop their idea. However, according to the European Start-up manifesto, venture capital investment is declining within the EEA, having approximately halved since 2008.ⁱⁱⁱ Moreover, according to the manifesto, the aggregate decline in later stage investment is even steeper. Thus, even though access to capital is necessary, investment is currently lacking. The difficulty of raising finance within the EU has also been recognized by the European Commission in its Digital Market Strategy. Venture capital raising remains limited in Europe and lags behind the US by a factor of seven.ⁱⁱⁱⁱ Due to regulatory fragmentation the cross-border flow

of venture capital investments is difficult. As a consequence, successful ventures have

4) The Facilitation of Incorporation

Digital start-ups aim towards rapid deployment, growth and scalability. This characteristic does not easily translate into the traditional corporate mould. Additionally, start-ups must be given room to experiment: the pace at technology develops and advances requires tremendous flexibility. Furthermore, failure is a key component of the start-up ethos. Start-ups must learn to fail. More often than not, an entrepreneur will face failure before reaching his first success.^{liv}

Due to these traits, the current corporate climate, which is still very much based upon traditional business paradigms, is not adapted to the start-up reality. Rather, a structure is needed that takes into account the necessity for start-ups to experiment as well as the high failure rate. Perhaps the requirements were most aptly and simply stated within the Spanish start-up manifesto: start-ups need a stable and effective legal framework to facilitate the creation, management and closing of companies.^{lv} Only then will the EU market be able to stimulate creativity and digital opportunities.

5) Open Data

Within the information society, data thrives innovation. Start-ups have found new ways of utilising data in order to offer better and more innovative products to their end-users.

According to European start-ups one major source of data still remains untapped: government data. The Leaders Club believes that opening up government data has the ability to boost the creation of new businesses and further stimulate the development of innovative data-driven products. At the same time, the dependence on central government can be reduced. Moreover, opening up government data has the added benefit of increasing trust and transparency in public institutions.

VIII. ILINC RECOMMENDS - SUMMARY

- Universities should be stimulated to establish legal clinics as these can (partly) mitigate the lack of legal awareness among start-ups. Legal clinics serve a twofold purpose: a) they provide start-ups a cost-friendly alternative to professional legal counselling and b) they give students a practical hands-on learning experience during their education. Moreover, figures from the ILINC survey illustrate that most start-ups are supportive of legal clinics and would likely participate in their programs
- The academic and private sector should cooperate in setting up alternative channels to reach start-ups with legal information. Legal clinics cannot fulfil all demand, and as already demonstrated, only half of start-ups seek professional legal counselling. Consequently, many start-ups are currently operating without taking adequate account of the law. Most start-ups will be unable to seek on-going professional legal advice due to budgetary reasons. Start-up toolkits, e.g. key contract templates, by law firms, or the organization of legal workshops specifically targeting start-ups, can facilitate the transfer of legal information to start-ups.
- Law firms should be stimulated in providing fixed or special deals for beginning undertakings.
- Legal actors, such as law faculties, law firms, legislators and regulators, and start-up communities should strive towards establishing a mutual understanding between the legal and technological environment.
- The European legislator should commit further to the introduction of harmonizing measures in an effort to achieve a true digital single market and reduce barriers to digital innovation.
 1. Establish a common European Sales Law for consumer and business transactions, facilitating cross-border trade through the introduction of a uniform set of contract law, applicable in all Member States.
 2. Provide a clear regulatory framework with relation to the operation of online platforms.
- 3. Aim towards the further harmonization of the other key legal areas for start-ups privacy and data protection and intellectual property rights in particular.
- 4. Simplify the tax and VAT regime for digital content.
- 5. Provide clarity concerning and aim towards uniform measures relating to the regulatory framework governing alternative financing mechanisms, such as crowdfunding.
- National legislators and courts should strive at a uniform application of the key concepts of EU legislation. A uniform interpretation of regulatory concepts or principles could be provided by EU advisory boards, such as the article 29 Working Party.
 1. Important regulatory reforms should be accompanied with guidance documents to allow for a smoother implementation of legal requirements, but also to increase legal understanding and awareness among parties involved.
- Legislators and regulators should engage more with start-ups during the preparatory process of new laws or regulations. Start-ups differ from 'traditional' SMEs. They should take into account start-ups' key success factors: scalability, market potential and velocity.
- EU Member States and the European Commission should further promote digital start-ups both in access to capital and visibility to increase competition with the US, from which most online trades emanate.
- When technological developments necessitate the modification of the current regulatory environment, policy makers should proceed with caution. A thorough impact assessment should be conducted, taking into account those players that are on the forefront of these developments, i.e. start-ups. Start-ups are more likely to be negatively impacted by ill-adopted regulatory reforms.
- When adopting new legislation, policy makers should strive towards legal uniformity and consistency where possible.

- New technologies impact industries differently. The implementation of horizontal measures may therefore not always be desirable.

ILINC is the European Network of Law Incubators. Its main objective is to facilitate the provision of free legal support to start-ups while, at the same time, offering postgraduate law students the opportunity to engage in professional practice in the fast-moving and highly exciting world of technology start-ups.

Visit us on our website:

<https://www.ilincnetwork.eu/>

Our core partners:



ⁱ Approximately 100 start-ups participated in the iLINC survey.

ⁱⁱ The HIG results were collected from approximately 100 start-ups.

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Annex I: Overview of ILINC Legal and Technology Briefs

1. A Crowdfunding Taxonomy for Start-Ups

Crowdfunding has become an attractive means for start-ups to acquire the necessary funds for their projects. Whereas start-ups may fail to receive funding from traditional sources, such as banks, private equity houses and angel investors, the crowd can invest directly into projects or undertakings they truly believe in. Indeed, traditional sources may be reluctant to provide funds to high-risk undertakings. Moreover, the supply of venture capital remains limited in Europe. Furthermore, more and more start-ups have become active in the operation of crowdfunding platforms themselves. Whether a start-up operates a crowdfunding platform or aims to collect funds through such a network, both activities may be subject to regulation. Much depends upon the type of crowdfunding. This brief aims to provide digital start-ups with a taxonomy of crowdfunding types. The regulatory environment highly depends upon the type of crowdfunding a start-up is engaged in. For instance, some crowdfunding models may require a start-up to draft a prospectus.

2. The Regulation of Virtual and Crypto Currencies

Virtual commerce is one of the top emerging industries. Within this rising commercial environment, virtual and cryptocurrencies create new opportunities when it comes to payment transactions. These currencies facilitate user anonymity, wide transferability and high independence. By simplifying transactions and by preventing users to enter personal payment details, end users can be motivated to use virtual money. Hence, the introduction of a virtual currency for virtual goods could generate additional revenue. The possibility to earn extra virtual currency could also lock in users. Moreover, virtual currencies could be an important tool within the app market and advertising industry when designing strategies to reap benefits of the virtual goods market.² There is quite a lot of confusion however, as to what the exact regulatory framework of crypto currencies is. This legal brief aims to guide start-ups through the complex regulatory environment governing payment transactions. It will take a look at the current and future European legal environment and member state and foreign initiatives. This brief will focus on cryptocurrencies in particular.

3. Competition Law and the Start-Up Community

Competition law aims to govern efficient market participation by ensuring a level-playing-field. Although often linked to big corporations, this field of law may be of considerable importance to start-ups. On the one hand competition law can be used as a weapon against anti-competitive behaviour of established, market participants. On the other hand, start-ups themselves may be subject to competition law. This legal brief aims to guide start-ups towards a better understanding of the major concepts governing competition law.

4. Net Neutrality

Net Neutrality, the principle that all data should be treated equally on the internet, is of utmost importance to start-ups. Although the EU Connected Continent Proposal plans to introduce net neutrality on a pan-European level, its exact scope remains undetermined. As long as EU-wide legislation is absent, Member States are currently free to decide themselves on how to approach the subject. For start-ups, the position of the Member State vis-à-vis net neutrality could be a decisive factor in choosing both place of establishment and roll-out location.

5. Limited Liability of Internet Intermediaries

Within the online environment, start-ups often times fulfil an intermediary role. An important question on start-ups' minds is whether they can be subject to liability claims as a result of the conduct of their end-users. For instance, what would happen if the user of an online video platform would upload copyrighted content without consent of the copyright owner? Start-ups may not always be aware of illegal end-user activity, why then, should they be held responsible? The European legislator has introduced several limitations to the liability of intermediary service providers. This document aims to present start-ups a concise overview of the limited liability regime concerning internet intermediaries as set out by the 2000 EU E-commerce Directive. This brief also includes case reports with relation to hyperlinking services, video platforms and file-sharing services.

6. IP I – A Financing Mechanism for Start-Ups

Within the Information Society, the value of a start-up does not depend on its physical assets. On the contrary, intangible assets, such as intellectual property (IP) are crucial elements for start-ups when they wish to establish a competitive market position. In the start-up stage, the value of IP is potentially higher than any other business asset. Moreover, IP creates opportunities, both from a marketing and financing perspective. IP can generate income through licensing, the sale or commercialization of IP-protected products. Additionally, the smart and efficient use of IP can enable a start-up to increase its market share or to raise profit. Furthermore, investors are on the look-out for valuable intellectual assets. If intellectual assets enjoy legal protection, their quality is secured, which in turn minimizes the investor's risk. This legal protection is granted by Intellectual Property Rights (IPR): they provide their owner the exclusive right over the use of his creation during a limited period of time.

7. IP II – International IP Protection

Intellectual Property Rights (IPR) are governed by the principle of territoriality: the exclusive right will only grant protection for the territory in which it was obtained. Start-ups seeking protection in multiple territories will thus have to file for protection multiple times. Consequently, the transaction costs for those seeking protection can be quite high. Start-ups must therefore carefully assess where they will apply for protection. This requires a balancing act, taking into account the overall cost and market advantages related to obtaining protection. Still, start-ups can make use of several registration systems that facilitate the obtaining of IPR and lower the costs involved. This brief aims to outline these simplified registration methods.

8. Non-disclosure agreements for start-ups

Start-ups value their business idea and intellectual property. Therefore, it is indispensable that start-ups ensure the confidentiality of their business information and trade secrets. However, in order to translate the idea into a successful business and bring the product to market, start-ups will invariably need to disclose their information with investors, suppliers, consultants and even new employees. For that reason start-ups are confronted with a challenging balancing act between keeping the business idea confidential and promoting the business amongst third parties in order to grow the business. Evidently, start-ups need to restrict the amount of people they share their idea and value proposition with. If that's not feasible, start-ups should invest some time into drafting a non-disclosure agreement ('NDA') or a confidentiality agreement as it offers the possibility of protecting the information of being divulged further than anticipated. This brief highlights some of the key aspects that need to be taken into account when talking about and drafting NDAs. For instance, start-ups are highly advised to refrain from using NDAs when approaching investors

9. Data Protection I - Consumer Consent

Start-ups often consider data to be the raw material for innovation. Many start-ups process data they have collected from their end-users. In order to protect the data subject however, start-ups must have a legitimate basis to perform these processing acts. Considering the importance of consumer trust, start-ups may want to obtain consent from their end-users for these activities. Indeed, using consent as the basis for processing activities, ensures transparency towards the end-user, as he himself will have to decide whether or not he is okay with the processing activity. The purpose of this legal brief is to give an overview of the application of consent as a ground for the processing of personal data.

10. Data Protection II – Profiling under the EU Data Protection Framework

Understanding one's customers is the key of any successful business that focuses on providing personalised and targeted services. Start-ups are not an exception in this regard. Indeed, establishing customers' profiles, or in other words "profiling", may play an intrinsic role in a business plan of a new endeavour. It can even help to improve services as well as the overall performance of the company. While an easy access to increasingly sophisticated data mining systems and cheap data storage make the profiling an attractive option for business, it should be noted that this practice is subject to the EU data protection framework, consisting of the EU Data Protection Directive and the E-privacy Directive. This brief will provide guidance on the applicable legal framework for the profiling activities. ILINC recommends this brief to be read in tandem with the iLINC Legal & Technology brief concerning consumer consent.

Annex II: Overview of iLINC Policy Briefs

1. How to Start-Up a Legal Clinic: Key Considerations

This policy brief is aimed at those universities who plan to set up their own legal clinic. There is no one, 'ultimate' incubator model. Therefore and rather than providing target recommendations, universities may want to take into account the key considerations formulated within this brief.

2. Challenging the Bar:

Legal clinics serve a real market and societal purpose. Yet, setting up a clinic can be an extremely arduous task, not only from an organizational point of view. One of the key barriers relates to the questions: what constitutes legal advice and what are the implications thereof? This Policy Brief addresses these themes and hopes to convey the following messages: a) legal clinics serve an important societal and educational purpose and b) legal clinics should be allowed to perform their activities. In particular, iLINC believes that the provision of legal advice should not be monopolised by lawyers or bar associations and should remain open to alternative service providers, such as legal clinics.

3. Adapting the Corporate Climate for Start-Ups

Digital start-ups aim towards rapid deployment, growth and scalability in an ever-changing technological environment. In order to be truly efficient, corporate law should take into account this need for flexibility. The rigidity of the current legal framework is apparent on two levels: the incorporation of the start-up and the start-up's ability to hire and fire personnel. On both levels, legal flexibility may be necessary to ensure that start-ups reach their full potential.

4. Tax Regulation and the Start-Up Community

Digital start-ups have limited funds. Nevertheless, even at an early stage, taxes need to be paid. This could drain valuable resources early on. Additionally, EU digital start-ups worry about the rising compliance costs due to the newly implemented VAT regime. The introduction of tax relief could provide start-ups adequate breathing space during the first years of development and could positively affect third-party investment. Sharing best practices among Member States and benchmarking national tax laws could improve the overall efficiency of such regimes.

5. Creative Content, Copyright and Start-Ups – Facilitating Copyright Clearance

Online media start-ups active within the creative industries need to procure the license to the creative works they wish to exploit. Within the European Union, the rights clearance of creative works, such as music or audio-visual content, can be arduous however, especially for ventures who wish to operate on a pan-European level. First, the territorial nature of the exclusive right requires start-ups to take into account the copyright laws of all Member States in which they wish to exploit a creative work. Second, due to licensing agreements, which are often granted on a territorial basis, the relevant rights to a single work can be scattered among various right holders across nations. Therefore the transaction costs related to rights clearance can be quite high. In addition, territoriality can make it difficult for European media start-ups to scale up in the digital environment. As a consequence, European start-ups are at an immediate disadvantage against undertakings based in the United States, such as Netflix, which due to their immediate, large audience base, can gain enough experience and revenue before they enter the fragmented European market.

6. Regulating the Sharing Economy

The sharing economy has enormous growth potential and is a driver for innovation. Unfortunately, the current legal framework lacks clarity. Moreover, regulatory interventions of local governments usually consist of the application of existing, stringent and sometimes outdated legislation. Such intervention insufficiently takes into account the sharing economy's innovative properties. iLINC recommends policy makers to take into account the specific nature of the sharing economy before taking action.

7. Start-ups and Data Protection – Purpose Specification and Limitation

Start-ups often face the challenge of meeting two fundamental requirements provided for by European data protection law. First, the requirement to specify the purpose of their processing operations the moment personal data is collected by them ('purpose specification'); and, second, the requirement that the collected data must not be processed further in a way that is incompatible with the initially specified purpose ('purpose limitation').¹ In particular, Start-ups have difficulties specifying the purpose because they often do not know their final product or service (and sometimes have not even finished their business model) when they commence collecting data. This brief thus focuses on the criteria, which assist start-ups to comply with the two requirements as well as comply with specific regulation instruments transposing these requirements in the private sector and, simultaneously, meeting a need for openness toward innovation as well as legal certainty.*



iLINC

Deliverable 1.2

“Policy White Paper”

(Part 2)

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POLICY BRIEFS

A policy guide on selected legal topics

The iLINC Thought Leadership Programme crystallises the thinking of the iLINC Network on a number of key legal issues and challenges that are relevant for the ICT start-up community. Find the 'iLINC voice' that helps to catalyse regulatory change and to build legal awareness through the ICT innovation ecosystem.

Policy briefs have been prepared with the aim of improving legislation to help ICT start-ups to realise their full potential. These are directed at everyone (and not just policy makers) who has a roll to play in designing an innovation-friendly, start-up environment.

The iLINC Network

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Adapting The Corporate Climate For Start-Ups



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Digital start-ups aim towards rapid deployment, growth and scalability in an ever-changing technological environment. In order to be truly efficient, corporate law should take into account this need for flexibility. The rigidity of the current legal framework is apparent on two levels: the incorporation of the start-up and the start-up's ability to hire and fire personnel. On both levels, legal flexibility may be necessary to ensure that start-ups reach their full potential.

Corporate Concerns

Making the shift from the 'garage to global' mentality to the corporate mind-set isn't easy for digital start-ups. Yet, even at an early stage, start-ups are confronted with corporate legislation. According to our iLINC survey, **50 percent of digital start-ups require legal assistance in the fields of corporate and corporate transactions law.** However, as start-ups often cannot afford professional legal advice, crucial legal questions concerning their corporate structure remain unanswered. **Raising awareness and simplifying the legal framework** would allow start-ups to develop a better understanding of corporate requirements.

However, in order to boost the digital market, policy makers must also take into account the particularities of the start-up scene. **Digital start-ups often aim towards rapid deployment, growth and scalability.** Additionally, the pace at which technological advancements are made, requires start-ups to be able to quickly adjust their business operations: the ability to **experiment is key.** This need to scale and experiment differentiates digital start-ups from small businesses who usually tend to have a fixed path. However, the corporate structures available to start-ups do not always allow for this flexibility. Thus, in a digital environment characterised by change, legal requirements based upon traditional business notions may fast become an unwelcome hindrance to creativity.

Recommendation 1: Corporate policies should focus towards facilitating the key elements to start-up success: rapid deployment, growth, scalability and experimentation.

This policy brief focuses on two aspects of the corporate environment: the incorporation and the ability to hire and fire personnel.

The Initial Start-up Phase

Digital start-ups claim that the process of incorporating a business is still too time-consuming. Start-ups have therefore called upon policymakers

to facilitate the creation and maintenance of digital ventures in the EU.

Every Member State has their own set of corporate legal entities that can be chosen for incorporation. For start-ups there may be similar go-to options (e.g. limited liability), but every structure should at least be considered, e.g. from a tax perspective. The current confusion - due to the abundance of choice - should be mitigated. One of the suggestions made by start-ups to resolve this key issue is the introduction of a new legal entity catered specifically to digital entrepreneurship at its early stages: **an e-corporation.**

Investors have promoted the idea of a unified 'corporation' status as well as it would not only simplify the start-up process, but due to the standardisation of processes, **cross-border investments would be made much easier**¹.

To truly foster the entrepreneurial spirit, policy makers should also consider the following aspects that impact a start-ups success.

- **CAPITAL:** Most legal entities require a minimal amount of capital. Considering the limited budget of digital starters, the introduction of a start-up oriented e-corporation would preferably require **a low minimum capital threshold:** most start-ups either have no funds or a revenue stream below €50k. Moreover, as a business can now be run from a single computer, some start-ups argue whether there is still need for capital requirements at all.
- **FAILURE:** One key aspect to keep in mind is that a start-up's road to success is paved with failure. 'Learn to fail' is an often heard start-up motto. Thus, businesses should not be only easy to create, but should also be **easy to shut down.** This would keep entrepreneurs motivated when facing failure: failure should be considered part of the learning process and should encourage start-ups to adapt, rather than quit.

Recommendation 2: Consider a simplified pan-European e-corporation status for start-ups, enabling quick incorporation.

Recommendation 3: The minimum capital requirements for incorporation could be lowered.

Recommendation 4: Failure is an integral part of a start-up's road to success. Start-ups may benefit from the ability to quickly shut down their businesses.

Share Best Practices

In recent years, several Member States have, through the introduction of new legislation, facilitated the start-up process. Member States could share their best practices in order to achieve a higher level of entrepreneurship. Moreover, the EU encourages its member countries to meet certain targets in order to ensure quick start-up possibilities. Two EU member states could serve as an example: Portugal and Latvia.

The 'On the Spot Firm' – Portugal

According to the World Bank Group "Doing Business²", Portugal ranks among the top 10 countries to start-up a business in the world, even topping the charts in Europe. Entrepreneurship is heavily promoted in Portugal. The ranking system is an important indicator for entrepreneurs of how start-up friendly a regulatory environment may be as it aims to show how easy or difficult it is for a local entrepreneur to open and run a small to medium-size business when complying with relevant regulations.

In recent years, Portugal has made it easier to set up a business by allowing company founders to choose the amount of minimum capital. Paid-in capital contributions can also be made one year after a company's creation. The requirement to report the setting up of a business to the Ministry of Labour has also been eliminated.

However, starting up a business is primarily facilitated through the one-stop-shop 'Empresa na Hora'. This 'On the Spot Firm' initiative was introduced in Portugal to kick-start fast-track entrepreneurialism. Through this program, setting up an undertaking in Portugal is made quite easy. The procedure takes on average 37 minutes, requiring the completion of a single form and costing about 360 euros. The service can also be accessed online (Empresa Online).³ This enables entrepreneurs to set-up a company through the Internet in 1 to 2 days. Although not pan-European, the Portuguese 'Empresa na Hora' system showcases how a simplified start-up process could be implemented.

Gradual Simplification – Lithuania²

Ranked the 11th country in the world out of 189 countries, Lithuania is, next to Portugal, the second-easiest country to start-up a business in the EU according to the World Bank's "Doing Business Rankings". In 2014, Lithuania was still ranked 19th in the world, indicating that new regulatory measures have facilitated the process of starting-up a business. In recent years, Lithuanian authorities have implemented the following measures to make the start-up process easier: introducing an online registration for limited liability companies, eliminating the notarization requirement for

incorporation documents, creating a new form of limited liability company with no minimum capital requirement and eliminating the need to have a company seal and speeding up VAT registration at the national State Tax Inspectorate.

Hiring and Firing

Digital start-ups need to be able to swiftly adapt to the ever-changing technological landscape. **Start-ups deploy skills when and where they are needed.** If no longer crucial, employees merely slow-down the growth process. However, the necessity to quickly adjust to emerging technologies is reflected in a start-up's hiring practice. Hiring staff may be considered too risky as the financial consequences of a skill mismatch may prove to be detrimental. In order to foster a truly competitive environment, **one option could be to make it easier for start-ups to fire their employees.** Firing fast is often considered integral to the start-up lean ethos: any part of the enterprise that does not have an added value for the final product or customer should be eliminated. **However, the moral component should not be forgotten: policy makers should therefore promote start-up network frameworks that allow start-ups to find the right skills from the outset.** The Start-up Europe Manifesto has suggested some potential alternatives in this regard as well.⁴ According to the manifesto, **universities could make their curriculum more 'digital' in order for graduates to acquire basic digital skills. Additionally, students could be given support in finding part-time work experience, summer jobs and internships.** Indeed, such mechanisms could reassure future employers. Moreover, these internships could be performed at start-ups and they could even become an integral part of the student curriculum.

Recommendation 6: Policymakers could enable start-ups to faster hire and fire personnel, but should also help start-ups in finding the right talent from the outset, e.g. through establishing start-up networks.

Recommendation 7: Promote the introduction of 'digital' courses in universities and support students in finding 'digital' work experiences.

Cross-Border Hiring

The digital environment has changed the way a business is usually operated: **digital start-ups are no longer bound by the confines of a physical establishment.** Web conferencing tools, such as Skype and WebEx, facilitate cross-border collaboration.

Considering these developments, cross-border hiring must be facilitated, taking into account the technological nature of the start-up workspace. Although the EU labour market enables free movement of workers, hiring can still be complex. Start-ups would greatly benefit from a **simplified framework** enabling them to **hire outside their respective home countries, without being required to set-up a local subsidiary.**

Recommendation 8: As the online environment facilitates cross-border co-operation, the practice of hiring cross-border talent should be facilitated as well.

A Pan-European Visa

Additional difficulties arise when start-ups try to hire people from non-EEA countries: visas must be acquired and minimum wages, potentially sector-specific, have to be ensured.

The manifesto for entrepreneurship and innovation to power growth in the EU suggests that one way to turn Europe in the easiest place for highly-skilled talent to start a company would be the introduction of **a pan-European visa**.⁴ Such a visa would **make it easier for non-EU start-ups to start a business in Europe. Additionally, EU companies would have easier access to non-EU talent.**

Recommendation 9: Hiring talent outside the EU could be made easier, for instance through the introduction of a pan-European Visa.

iLINC Recommends

- Corporate policies should focus towards facilitating the key elements to start-up success: rapid deployment, growth, scalability and experimentation.
- Consider a simplified pan-European e-incorporation status for start-ups, enabling quick incorporation.
- The minimum capital requirements for incorporation could be lowered.
- Failure is an integral part of a start-up's road to success. Start-ups may benefit from the ability to quickly shut down their businesses.
- When drafting employment policies, consider the start-up's hiring environment to be global.
- Policymakers could enable start-ups to faster hire and fire personnel, but they should also

help start-ups in finding the right talent from the outset, e.g. through establishing start-up networks.

- Promote the introduction of 'digital' courses in universities and support students in finding 'digital' work experiences.
- As the online environment facilitates cross-border co-operation, the practice of hiring cross-border talent should be facilitated as well.
- Hiring talent outside the EU could be made easier, for instance through the introduction of a pan-European Visa.

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Tax Regulation and the Start-Up Community



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Digital start-ups have limited funds. Nevertheless, even at an early stage, taxes need to be paid. This could drain valuable resources early on. Additionally, EU digital start-ups worry about the rising compliance costs due to the newly implemented VAT regime. The introduction of tax relief could provide start-ups adequate breathing space during the first years of development and could positively affect third-party investment. Sharing best practices among Member States and benchmarking national tax laws could improve the overall efficiency of such regimes.

Why Consider Start-up Tax Relief?

If digital start-ups are considered to be a driver for innovation, adequate space is needed for these technology enabled businesses to grow. Some national tax regimes however, may already suffocate promising ventures at an early stage.

The iLINC survey indicates that digital start-ups have limited funds available and that acquiring the necessary funds to develop technologies can be difficult. Nevertheless, even at a start-up stage taxes have to be paid. This may drain much needed funds during early development. Favourable tax policies at the seed-stage could nonetheless benefit high-growth and high-job generating sectors. iLINC therefore recommends policymakers to consider tax relief for start-ups as this would have an immediate, positive effect on their available budget.

Recommendation 1: Member States should consider the implementation of favourable tax regimes for the start-up sector.

The need for tax benefits is also a recurring theme in the various start-up manifestos, both from the start-up's and investor's perspective.

The Entrepreneur's Perspective

Tax exemptions would allow start-ups to direct their money and attention to the development of their idea and business. A 2007 EU Study has shown that tax compliance costs constitute one of the most important elements in general regulatory compliance costs.² The reduction of tax compliance costs could improve the start-up ecosystem: **complex tax legislation and reporting procedures place a heavy burden on newly found ventures who, due to their limited resources and experience, often face higher compliance costs.**³

The Investor's Perspective

Tax relief could incentivize the reallocation of funds to sectors that would otherwise be deemed too high-risk. Only half of the European unicorns have reached a sale or IPO, compared with two-thirds in the United States. Digital Single Market Vice-President Andrus Ansip agrees that this may

suggest the European environment to be more challenging for technology investments. Many EU start-ups currently seek funding outside the EU. However, this may require the start-up to move to the country where the funds come from. In other words, a lack of investment incentives may give rise to a digital brain drain.

“Positive discrimination of SMEs, and in particular of high-growth businesses, will increase the capital efficiency of investments performed at these early stages, especially in the first years of its creation.”
– The Start-up Investors Manifesto

Balance

A balancing act will still be required: “The benefits of introducing reduced corporate tax rates for specific firms need to be weighed against the potentially increased costs in terms of tax compliance and possible disincentives to grow.”⁷

Recommendation 2: If Member States do employ tax discrimination, the procedure to benefit should be start-up friendly, i.e. have low compliance costs.

Tax Relief in Europe:

Recommendation 3: Exchanging best practices among Member States and benchmarking national tax laws could improve the efficiency of national EU tax schemes.

After the crisis, many Member States introduced changes to the tax base in order to increase competitiveness, stimulating investment and entrepreneurship.

Member States have already introduced tax measures in order to boost entrepreneurial activity and investment in small unquoted companies, while other Member States expanded on their existing tax incentives for early stage undertakings.

The following EU countries may serve as an example for other Member States who wish to introduce a tax shelter for start-ups. These systems may stimulate entrepreneurship through investment relief (UK), start-up tax breaks (Latvia) or through both (Italy). In Belgium, a specific start-up tax shelter system is in the works. iLINC does not favour one tax regime over the other. The implementation of tax relief is very much dependent from Member State to Member State. Nevertheless, **sharing best practices could provide valuable insight on how to best regulate taxes in the start-up environment.**

United Kingdom

London is one of the world's leading start-up capitals. In the Start-up Europe Manifesto, **the EU start-up community has referred to the UK's Enterprise Investment Scheme (EIS) and Seed Enterprise Investment Scheme (SEIS) as a potential tax relief**

model to stimulate investment in high-risk companies. The EIS aids smaller higher-risk trading companies in raising finance, offering up to 30% in tax relief for those investors purchasing new shares in qualified companies. Similarly, the SEIS is designed to help small, early stage undertakings raise equity finance by offering tax relief to individual investors who purchase new shares in those companies at a 50% rate.

Latvia

The Latvian Chamber of Commerce and Industry developed the 'Think Small First' initiative to counteract the economic crisis. The initiative promoted the creation of a special tax rate and simplified the existing accounting system. In 2010, Latvia instated the Micro-Enterprise Tax Law, which introduced a flat tax rate of 9% for micro businesses. The initiative was awarded the Grand Jury Prize during the 2013 European Enterprise Promotion awards. The introduction of the 'micro-enterprise' concept has enabled Latvia's rapid economic growth within the EU.

Italy

In Italy, tax measures were implemented to facilitate the growth and emergence of innovative start-ups. Start-ups with an intensive research and development process are subject to more favourable tax treatment. Furthermore, tax breaks for investments made by companies and individuals were introduced to benefit the private equity market. **Fiscal benefits are even higher when investments are made in start-ups with a social goal** or start-ups that develop high value technological products in the energy sector.

Belgium

The Belgium government's 'Start-Up Plan' will launch a **start-up specific tax regime**. Fiscal incentives will be introduced to **encourage both start-up and digital investments, stimulate crowdfunding and facilitate hiring**. A tax shelter will be implemented to attract investors. The investment incentive will consist out of a tax reduction on the investor's personal income. The digital investment scheme is aimed at start-ups themselves, and would encourage start-ups to invest in digital assets, such as e-payment methods and cybersecurity. Crowdfunding, under certain circumstances, would be more appealing due to the implementation of tax exemptions. Finally, hiring employees should be more attractive as labour costs would be reduced during the first years of development.

Start-ups and the newly adopted VAT regime

Digital start-ups worry about the consequences the newly adopted VAT regime may have on their business. Due to the new VAT regulation, VAT

liability for digital products is now determined by the country where the product is bought, rather than the place of supply. This means that start-ups offering digital goods must now take into account the VAT regimes of the 28 member countries. Digital start-ups fear that this may place a heavy burden on their shoulders. They feel that they are being penalised, while businesses offering physical goods remain unaffected.

"The government should be making it easier for start-ups and freelancers to sell across Europe, but the new VAT rules may do the opposite. It's vital that the government looks again at what it can do to protect sole traders and small businesses from the burdensome impact of these changes." - Guy Levin, COADEC⁶

This concern may not be entirely unfounded. The recently adopted VAT regulation was drafted six years ago and was aimed to avoid global companies, such as Google and Amazon, from paying fewer taxes in tax-friendly countries as Luxembourg and Ireland. Since then, the digital landscape has changed however. A recent survey organised by Nesta suggests that a great majority of **start-ups consider the changes in VAT regulations as a significant inhibitor to cross-border activities**. Numerous start-ups feel that regulatory changes, such as the VAT rules, have been implemented without their consultation.

Even though, the VAT mini-one-stop-shop (MOSS) allows start-ups to account for the VAT due via a web-portal in the Member State of their establishment, for start-ups selling digital products this isn't optional and they will have to register with a MOSS, regardless of their turnover. Recent EU figures indicate that the current VAT regime has increased compliance costs considerably. **Online businesses who wish to trade in other EU countries face an annual compliance cost of 5000€ for each Member State in which they wish to provide their goods or services.**¹²

The need to simplify current VAT arrangements has now been recognized by the European Commission as well. **Nevertheless, the efficiency of simplification measures is dependent on the inclusion of start-ups, and digital start-ups in particular, in the drafting process.**

Recommendation 4: When drafting future simplified VAT arrangements, the voice of start-ups must be taken into account, as well as the potential impact of these measures on digital entrepreneurship.

iLINC Recommends

- Member States should consider the implementation of favourable tax regimes for the start-up sector.
- If Member States do employ tax discrimination, the procedure to benefit from it should be start-up friendly.
- Exchanging best practices among Member States and benchmarking national tax laws could improve the efficiency of national EU tax schemes.
- When drafting future tax legislation, the voice of start-ups must be taken into account, as well as the impact this legislation may have on digital entrepreneurship.

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Creative Content, Copyright And Start-Ups Facilitating Copyright Clearance



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Online media start-ups active within the creative industries need to procure the license to the creative works they wish to exploit. Within the European Union, the rights clearance of creative works, such as music or audio-visual content, can be arduous however, especially for ventures who wish to operate on a pan-European level. First, the territorial nature of the exclusive right requires start-ups to take into account the copyright laws of all Member States in which they wish to exploit a creative work. Second, due to licensing agreements, which are often granted on a territorial basis, the relevant rights to a single work can be scattered among various right holders across nations. Therefore the transaction costs related to rights clearance can be quite high. In addition, territoriality can make it difficult for European media start-ups to scale up in the digital environment. As a consequence, European start-ups are at an immediate disadvantage against undertakings based in the United States, such as Netflix, which due to their immediate, large audience base, can gain enough experience and revenue before they enter the fragmented European market.

Online media start-ups active in the creative industries must secure the license for the works they wish to exploit. Obtaining the relevant licenses can be an onerous task however, especially for media service providers who wish to operate on a multi-territorial basis. Copyright adheres to the principle of territoriality, which dictates that Member States have no competence to impose legal obligations on activities that occur outside their national borders.¹ As a consequence, media platforms need to take into account the laws of all Member States where the works will be made available. Additionally, start-ups face difficulties in tracing the relevant right holder, both on the national and pan-European level. The copyrights to a single work are often 'split up' among national and international rights holders and collective management organisations. In some sectors, rights are scattered even before the work is created as a result of pre-financing agreements, which are often also conditioned upon territorial exclusivity. Therefore, **the transaction costs involved in copyright clearance can be very high. This not only discourages new undertakings from starting their**

own digital media platforms, these difficulties also limit the dissemination of Europe's cultural heritage.

Copyright complexity severely limits the position of the EU's creative economy and has put media service providers at a disadvantage against US competitors. US based undertakings only have to take into account one federal copyright law.² This combined with the national US market having a large national audience, enables US media companies to reach a critical mass much faster. Although Spotify is a leading example of a global, European digital media platform, no EU alternative exists for Netflix.

I. Further promotion of identification standards

Recommendation 1: The use of identification standards and interoperability between identification standards should be further encouraged in order to enable fast discoverability of copyrighted works.

Creative works may contain many rights bearing components. This is particularly the case for audio-visual works where multiple authors are involved. Even though copyright laws try to remedy the issues related to co-authorship by automatically transferring the rights of audio-visual works to the producer, fragmentation continues to exist as a result of pre-financing, licensing or distribution agreements. **As a result, copyright users do not only need to identify the rights bearing components but also the relevant rights owners.**

Identification standards facilitate this search to some degree. Standard identifiers are numbering or metadata systems that allow the identification of a copyrighted work. In order to truly streamline copyright clearance it is necessary to adopt these standard identifiers where they exist. Although policymakers should not focus on mandating one identifiers' use over the other, leaving the choice to organizations to use that identifier that best fits their business interests, it should encourage creators to at least implement these identifiers. Additionally, **the standards should be made interoperable.** The promotion of standard identifiers was also one of pledges following the European Union's Licensing for Europe stakeholder dialogue.³ In order to simplify the discoverability and licensing of copyrighted works, the further advancement of standard identifiers must be encouraged.

Most identifiers nevertheless remain a 'dumb number. They act purely as an identifier, without providing any information on who actually owns the copyright. **Therefore, the use of identification standards is best complemented with systems that do allow the accurate attribution of ownership.**

II. Copyright Databases and hubs

Recommendation 2: EU Member States and EU policy makers should encourage the development of industry led data bases that enable the discovery of copyright ownership.

Recommendation 3: The European Commission should explore the possibility of a network of copyright data bases, in which licensing mechanisms are already present.

In order to truly facilitate licensing and decrease transaction costs of service providers, rights users must be able to rapidly and accurately track the copyright owners of creative works. **Industry efforts are needed in order to establish data bases concerning copyright ownership.**

Several EU-funded projects already strive towards easing the licensing process by creating databases of copyrighted works' metadata, including ownership, such as the UK Copyright Hub initiative.⁴ Databases could also be made interoperable. Primarily aimed at high volume, low monetary value transactions, the UK Copyright Hub would go one step beyond a mere ownership database however. The ultimate goal of the Copyright Hub would be to create a platform that also allows rights owners to license their works directly to the users of the platform. If implemented correctly, a network of copyright hubs would of course tremendously decrease transaction costs. Verification and dispute resolution procedures would increase their efficacy and ensure adequate right holder protection.

To stimulate the creation of metadata databases, Hugenholtz and Hargreaves argue that the EU could provide regulatory incentives to make metadata, such as copyright ownership available.² This motivation may consist of having collective management organisations making their metadata publicly available. According to Hugenholtz and Hargreaves another incentive could be to condition the legal protection of digital rights management upon the making available of metadata to a designated entity. Right holders could also have a formal obligation to submit metadata to a database or entity, which they argue wouldn't be too hard to do in a digital environment.

Nevertheless a balancing act will be required. The privacy and moral rights of authors must be considered as well. Therefore, copyright databases shouldn't be made mandatory, but rather exist on an **opt-in basis**.

III. Alternative Licensing Mechanisms

Recommendation 4: The European legislator should further explore the possibility of alternative, multi-territorial licensing schemes. Special care should be given to the particularities of the different creative industries, especially with relation to financing. One should also respect the exclusive rights of the copyright holder, for instance by providing opt-out mechanisms.

The European Commission has explored the idea of implementing or encouraging alternatives to the traditional practice of granting licenses on a territorial basis. Some argue that the promotion of multi-territorial licensing mechanisms would alleviate the problems currently faced service providers.

The European directive on collective management of copyright introduced a multi-territory licensing passport for the online use of musical works. Following this regime certain collective rights management organisations can now grant multi-territory licenses. However, the exact impact of the directive still remains undetermined. Another option would be to combine copyright with a country of origin principle, whereby the license would only have to be obtained in the place of establishment of the copyright user. With relation to the audiovisual sector, the Dutch government has argued in favour of a linguistic license. Rather than dividing the EU along national borders, the market could be divided by language. Languages cross borders and their speakers often find themselves outside their own linguistic area: language-based licenses would allow the distribution throughout the EU of an original or dubbed version of an audiovisual work. Of course, the ultimate licensing solution would be the introduction of a single EU copyright title or copyright code. Alternatively, the collective management of copyright could be further encouraged: collective management organisations can act as a one-stop-shop for transnational rights clearance.

Nevertheless, the efficacy of these alternate licensing schemes remains difficult to predict. Although it is necessary to further explore these alternatives, the rights of the copyright holder must be adequately protected and respected. Therefore, alternate licensing schemes should provide copyright owners with an opt-out mechanism - unless the lack thereof wouldn't infringe upon his exclusive rights. **Moreover, territorial licensing often seems part and parcel to**

the financing of many creative productions. This is a reality that should be taken into account as well.

IV. Facilitate Portability

Recommendation 5: The European legislator should introduce right clearance and licensing alternatives or copyright exceptions to enable the portability of media services.

As copyright must be cleared for all Member States where content will be offered to the public, **the territoriality of copyright currently disables consumers to listen, watch or read their content when travelling abroad.** Geo-blocking denies users access to their content. This also inhibits the establishment of true pan-European media services. Moreover, for consumers who have paid for a service, this is often perceived as an unforgivable inconvenience. **Therefore, further initiatives must be taken to ensure portability of media services, for instance through the implementation of a copyright exception.** For example, once it is established that consumers have paid a subscription fee, they could be allowed to watch the media they paid for in other countries. As mentioned above, the introduction of copyright exceptions must be done with due care: policy makers should take into account the financing mechanisms of the industries involved.

The limits of copyright solutions

The difficulties that pan-European online media platforms face should not solely be ascribed to licensing and copyright clearance complexity. **Indeed, one of the main barriers inhibiting the success of pan-European service providers is the cultural and linguistic fragmentation present within Europe.** In the audiovisual sector for instance, it appears that many on-demand providers target the national audience, rather than aiming to provide one set of works on a cross-border basis. Addressing copyright complexity will not resolve cultural fragmentation.

iLINC Recommends

- The use of identification standards and interoperability between identification standards should be further encouraged in

order to enable fast discoverability of copyrighted works.

- EU Member States and EU policy makers should encourage the development of industry led data bases that enable the discovery of copyright ownership.
- The European Commission should explore the possibility of a network of copyright data bases, in which licensing mechanisms are already present.
- The European legislator should further explore the possibility of alternative, multi-territorial licensing schemes. Special care should be given to the particularities of the different creative industries, especially with relation to financing. One should also respect the rights of the copyright holder, for instance by providing opt-out mechanisms.
- The European legislator should introduce right clearance and licensing alternatives or copyright exceptions to enable the portability of media services.

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Data Protection And Start-Ups Purpose Specification & Limitation



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Start-ups often face the challenge of meeting two fundamental requirements provided for by European data protection law. First, the requirement to specify the purpose of their processing operations the moment personal data is collected by them ('purpose specification'); and, second, the requirement that the collected data must not be processed further in a way that is incompatible with the initially specified purpose ('purpose limitation').¹ In particular, Start-ups have difficulties specifying the purpose because they often do not know their final product or service (and sometimes have not even finished their business model) when they commence collecting data. This brief thus focuses on the criteria, which assist start-ups to comply with the two requirements as well as comply with specific regulation instruments transposing these requirements in the private sector and, simultaneously, meeting a need for openness toward innovation as well as legal certainty.*

By Maximilian von Grafenstein

Purpose specification and limitation between openness to innovation and legal certainty

The determination of purposes being legally relevant and how precisely relevant purposes must or, vice versa, how broadly they may be specified is of the highest relevance, not only for the data controller, but also for the individual concerned.

On the one hand, the broader the purpose may be specified, the fewer the principle of purpose limitation restrains the scope of action from the side of the controller in relation to the data. On the other hand, the principle of purpose specification shall enable, in particular, individuals to estimate their risks caused by the processing of data related to them. The principle of purpose limitation shall exclude potential risks that the individuals could not foresee on the basis of the purposes specified.² Both principles must therefore balance the opposing interests of data controllers and the individuals concerned.

Despite the importance of these principles, there is almost no reliable criteria that helps to determine the purposes and their compatibility. This leads to legal uncertainty for both data controllers and individuals concerned. Data controllers cannot be sure whether or not their specified purposes meet the principle of purpose specification and to what extent they are allowed to process the data. The individuals concerned cannot estimate their risks because they are often overwhelmed by either too specific or too broad purposes.

Purpose specification is determined by all fundamental rights and not only by Art. 7 ECFR

One reason for this legal uncertainty is the unclear concept of protection of the right to privacy and the right to data protection under Article 7 and 8 European Charter of Fundamental Rights. So long as both rights commonly refer to the term 'personal data' as the exclusive reference determining the scope of application, they pose a risk to substitute the other, more specific, fundamental rights.

The reason for the broadness of scope of application is that social interaction is progressively based on the processing of personal data - in the course of increasing digitization. For example, while decisions concerning an employee previously fell under the right to engage in work provided for by Article 15 ECFR or leading to discrimination possibly infringed the right of non-discrimination in Article 21 ECFR, these decisions today are increasingly based on data processing that falls under the right to privacy and data protection under Article 7 and 8 ECFR. This leads to the situation that the diversity of risks of social interaction is less and less covered by the variety of specific fundamental rights of freedom and equality but instead under one single (common) fundamental right of privacy and data protection.²

In practice, this unclear concept of protection results in a unclear situation where neither data controllers nor the individuals concerned are able to appropriately estimate the divergence of risks caused by the ubiquity of data processing and, consequently, answer the question of how to specify or understand the related purposes.

One essential step for the solution of this problem is to consider the right to data protection in Article 8 ECFR not as exclusively connected with the right to privacy under Article 7 ECFR but also as serving to protect the other fundamental rights. In doing so, the other fundamental rights serve, vice versa, beside the right to privacy under Article 7 ECFR, as the legal scale in order to assess the risks of the specific data processing.³ The substantial guarantees provided for by all fundamental rights specifically endangered by the processing consequently determines which of the purposes are legally relevant and how precisely they must or how broadly they may be specified.

Consent as a (dynamic) protection instrument

The consent given by the individual concerned is a protection instrument transposing the principles of purpose specification and purpose limitation on the private sector. Even if the consent equally exists beside any other legitimate basis provided for by law, in practice it often plays a predominant role. In light of this, there should be three particular aspects stressed in this brief:

First, many legal scholars consider consent invalid as a whole if the purposes specified in it are too broad or vague.⁴ Such a consideration leads to the uncertain situation where any further data processing based on the consent might be seen as illegal, irrespective of the degree of risk caused by the specific data processing operation. In light of the fact that data controllers, particularly, start-ups are not able to pre-determine all possible future purposes, such an understanding unnecessarily conflicts with the start-ups' need for openness toward innovation. The reason is that such an understanding primarily focuses on the moment the personal data is collected, instead of restraining the scope of action of data controllers at a later stage in order to protect the individuals concerned.

Therefore, instead of considering the given consent invalid as a whole, it would be more effective to take the specific purpose provided for by the consent as starting point in order to determine, in light of the circumstances of the particular case, which data processing is covered by this purpose and which processing is not. A data processing operation which only slightly endangers specific fundamental rights of individuals allows broader purposes than operations, which bear higher risks for the individuals' rights of privacy, freedom or equality.

Second, the dynamic understanding of the legal effects of purposes specified in the individual's consent is flexible and thus fits the need for open innovation processes, particularly, in relation to startups. However, with respect to the requirement of 'purpose limitation', **using the consent as a basis for the data processing also leads to restrictions!** As mentioned above, on the European level, purpose limitation does not require the identity of the initial purpose and the purpose of the further data processing (but only that it is not incompatible). In contrast, once the purpose is specified within the consent form, it is likely that there is no room left to change purposes in this regard. The reason for this is that the consent is mainly considered as a

contractual or quasi-contractual agreement between the data controller and the individual concerned. Such an agreement does, in principal, not allow that one party unilaterally deviates from what is agreed upon.⁵ If the data controller uses the consent, thus, it is strictly bound to the purposes specified in the consent.

In summary, even if the dynamic understanding of the legal effects of a purpose specified in the consent gives flexibility, it principally is more restrictive than a legal provision authorizing the data processing. These considerations imply that authorizing legal provisions not only allow purpose compatibility (instead of strict purpose identity) but also that this compatibility assessment does in general apply to all stages of the data processing and does not primarily focus on the moment the data is collected.

Standardized purposes providing for legal certainty

In any case, as long as data controllers, such as start-ups, have to specify their purposes on a case-by-case basis, neither the individual's consent nor another legitimate basis provide for sufficient legal certainty. The reason for this is that individuals have to verify, again and again, what data controllers want to actually do in light of the purposes they have specified. **Vice versa, data controllers must determine, time and time again, how to formulate their purposes and whether their further data processing operations are compatible with those purposes or not.** This situation does not only overwhelm the individuals concerned, but also hinders data controllers, in particular, start-ups to set up lean and scalable processes.

One solution for this lack of legal certainty can be to standardize and certify, at least, most common purposes. The reasoning behind this idea is that standards not only serve, in practice, to enhance technical interoperability but also trust amongst parties. **Users of standards can trust that certain criteria are met, given the requirements (control and sanction mechanisms included) of the standardization and certification process.** Such procedures should be **adapted to the needs of data controllers and individuals in order to set up standards and certificates for purposes of data processing.** The same is possible for the tests of purpose compatibility being frequently applied in practice.

On the basis of such standards, it is even possible to implement those purposes on a technical level by means of privacy-by-design. Standardization of

purposes means that the **purposes are sufficiently formalized in order to leave their application up to machines**. In the future, individuals could thus set up via their personal devices by default which kind of processing for which purposes they consent to. **Such a kind of consent** would not appear in written form (with hundreds of legal clauses) but **could visualize the stream of data and its meaning in a form that individuals can intuitively understand**.

Policy recommendations for the General Data Protection Regulation

Considering current regulatory efforts towards the adoption of a general data protection regulation, this policy brief – and unlike other briefs produced by the iLINC network – suggests concrete, textual recommendations for the proposed regulation. In light of the above analysis, this policy brief recommends the following changes – highlighted in green – in the text of the General Data Protection Regulation (GDPR).⁶:

Article 1 – Subject matter and objectives

1. This Regulation lays down rules relating to the protection of individuals with regard to the processing of personal data and rules relating to the free movement of personal data.

2. This Regulation protects (...) fundamental rights **of privacy**, freedom **and equality** of natural persons **by guaranteeing their** right to the protection of personal data.

Recital 25:

Consent should be given unambiguously by any appropriate method enabling a freely-given, specific and informed indication of the data subject's wishes, either by a written, oral or other statement or by a clear affirmative action by the data subject signifying his or her agreement to personal data relating to him or her being processed. This could include ticking a box when visiting an Internet website or any other statement or conduct which clearly indicates in this context the data subject's acceptance of the proposed processing of their personal data. Silence or inactivity should therefore not constitute consent. Where it is technically feasible and effective, the data subject's consent to processing may be given by using the appropriate settings of a browser or other application. Consent should cover all processing activities carried out for the same purpose or purposes. When the processing has multiple purposes, unambiguous consent should be granted for all of the processing purposes. **The**

determination of the purpose should refer to the context of later data processing with respect to its risks for (the execution of) his or her fundamental rights of privacy, freedom or equality. If the data subject's consent is to be given following an electronic request, the request must be clear, concise and not unnecessarily disruptive to the use of the service for which it is provided.

Recital 30:

Any processing of personal data should be lawful and fair. It should be transparent for the individuals that personal data concerning them are collected, used, consulted or otherwise processed and to which extent the data are processed or will be processed. The principle of transparency requires that any information and communication relating to the processing of those data should be easily accessible and easy to understand, and that clear and plain language **and/or visual representation** is used. This concerns in particular the information of the data subjects on the identity of the controller and the purposes of the processing and further information to ensure fair and transparent processing in respect of the individuals concerned and their right to get confirmation and communication of personal data being processed concerning them. (...)

Recital 41:

Personal data which are, **be it at the time of their collection or any later phase of processing**, by their nature, particularly sensitive (...) in relation to fundamental rights **of privacy, freedom or equality**, deserve specific protection as the context of their processing may create important risks for the fundamental rights **of privacy, freedom or equality**. These data should also (...)

Recital 46:

The principle of transparency requires that any information addressed to the public or to the data subject should be easily accessible and easy to understand, and that clear and plain language **and/or visual representation** is used. This information could be provided in electronic form, for example, when addressed to the public, through a website. This is in particular relevant where in situations, such as online advertising, the proliferation of actors and the technological complexity of practice makes it difficult for the data subject to know and understand if personal

data relating to them are being collected, by whom and for what purpose. Given that children deserve specific protection, any information and communication, where processing is addressed (...) to a child, should be in such a clear and plain language that the child can easily understand.

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Recital 49:

The information in relation to the processing of personal data relating to the data subject should be given to them at the time of collection, or, where the data are not collected from the data subject, **or, where the processing of data subsequently causes a risk for the individual's fundamental rights of privacy, freedom or equality**, within a reasonable period, depending on the circumstances of the case. Where data can be legitimately disclosed to another recipient, the data subject should be informed when the data are first disclosed to the recipient. Where the origin of the data could not be provided to the data subject because various sources have been used, the information should be provided in a general manner.

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* This policy brief was contributed by Maximilian von Grafenstein LL.M. (Alexander von Humboldt Institute for Internet and Society).

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Regulating The Sharing Economy



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The sharing economy shows enormous growth potential.¹ As sharing platforms enter existing markets, policy makers need to make important decisions on how to regulate these new market entrants. If left unregulated, sharing economy platforms may have an unfair competitive advantage over traditional players who need to uphold existing regulation. Yet, the imposition of existing regulation may also disincentive new actors of entering the market, ultimately stifling innovation.

The Sharing Economy and Start-Ups

The term 'sharing economy' refers to the transformation of the traditional market place towards distributed networks in which underutilized assets are shared or exchanged among peers on a consumer-to-consumer level. This exchange of goods and services takes place via online platforms that facilitate human connectivity. The focus hereby mainly lies on the physical assets that are being shared and not the delivery of a service. The latter would be referred to as the on-demand economy: the platform matches a customer's needs with a service provider. Sharing also means that property does not change hands, but is provided on a temporary basis, which makes the sharing economy also different from the rental market. Although the underlying principles of the sharing economy aren't revolutionary, technological developments have reduced transaction costs and have enabled 'sharing' to take place at a much larger scale.

As an economic-technological phenomenon, fuelled by ICT developments, growing consumer knowledge, increasing ethical awareness proliferation of collaborative web communities and the Sharing Economy is a veritable breeding ground for the entrepreneurial spirit.³ Moreover, the required resources are relatively low.⁴ **Start-ups benefit from the uptake of this new mega-trend as**

it offers them new opportunities in a wide variety of markets, covering a wide range of transactions.

Perhaps the most well-known operator within the shared market space is San Franciscan based undertaking Airbnb. Nevertheless, European start-ups, such as Peerby and Blablacar, have begun developing their 'shared' alternatives as well. The

This policy brief does not aim to solve all 'sharing economy' conundrums, rather it will try to formulate some guiding principles that could aid governments when choosing to regulate the shared market space.

Innovative Properties

The collaborative economy is yet to reach its full potential. Proponents of the sharing economy refer to the following advantages as arguments in favour of the sharing movement:

SUSTAINABLE: Underutilized assets, such as cars, furniture or unused property in general, can be put to more productive use.

COMPETITIVE: As the market is open for anyone to enter, the consumer or business has more alternatives to consider, thus stimulating competition.

COST EFFICIENT: Online Sharing Economy platforms provide automated connection tools that instantly link peers and facilitate the access to goods and services. Transaction costs are thus lowered.

DISRUPTIVE: Ultimately, a shift towards collaborative consumption has the potential to reshape and re-imagine existing market structures and businesses.

Recommendation 1: Consider the added value of the Sharing Economy and the active role of start-ups within it.

How the Collaborative Economy Exerts Its Influence

Consumer Protection

- Consumer protection is built from the idea that the weaker party should be protected from the stronger one. In the Sharing Economy, a weaker party is not necessarily present. Does consumer law then apply? And who should abide the law?

Licenses and Certificates

- Traditional markets may require professional actors to acquire a license or certificate, e.g. in the taxi and banking industry. Actors within the Sharing Economy are not subject to licenses as they usually provide services on a non-professional basis. But could a recurring sharing act become a professional activity and when?

Insurance

- Insurance is both a necessity and a hindrance to the sharing economy. As the harm and remedy of are hard to determine, Sharing Economy platforms depend on insurance to alleviate the risk. The availability of insurance also increases consumer trust. For start-ups however, offering insurance can be an expensive affair.

Planning Regulations

- By designating areas for certain purposes (industrial, residential), planning laws are essential in the structuring and use of land. Within the Sharing Economy some types of land are now used for multiple activities which do not always fit their designated purpose. Should planning permissions be revised for the Sharing Economy? How can underused land be put into more productive use?

Why regulate the sharing economy?

Recommendation 2: Regulators and legislators should assess the potential harm of new peer-to-peer models in order to determine the need for regulatory action, such as the enforcement of existing laws.

Even though the Sharing Economy has advantages, it may also cause harm. Consumers may be more prone to scams or fraud in a peer-to-peer environment. Sharing economy platforms may also give rise to network effects and lock-in. In turn, monopolies may manifest itself. As a consequence thereof, data of users may also become concentrated into the hands of one single party, raising privacy concerns.

In addition, and if left unregulated, some peer-to-peer markets may endanger public health and safety. Whereas traditional service providers may need a license, the sharing economy has no such requirements. From an economic perspective, traditional players may regard these new, sometimes unregulated markets as anti-competitive. These are all legitimate concerns and may justify regulatory action.

However, **the harm of the sharing economy may not always be easily determinable.** Before imposing regulation, one must first determine what the potential harm of a new peer-to-peer model may be. If no harm can be detected or if regulatory action would be disproportional to the harm, regulation may not be necessary at all. Of course, business operators may provide additional services other than the offering of a platform, which may be subject to different regulation.

The difficulty in determining the harm and remedy in the sharing economy is a reason why insurance is crucial to the evolution of these new sharing sectors. For instance, end-users may want additional security before sharing certain goods. Insurance may not prevent harm, but can remedy it. The current uncertainty accompanying the sharing economy may deter insurance companies to provide securities.⁵ Nevertheless, the presence of insurance could already mitigate certain harms.

How to Regulate the Sharing Economy

Recommendation 3: Policy makers should provide more clarity concerning the legal principles governing the sharing economy.

Once it has been established that peer-to-peer services may cause harm, the question then becomes how should these new business models be regulated? In general, digital technologies

have made it increasingly difficult to determine which legislation should be applied where and when. **There's lack of clarity concerning existing legislation and how it should be adapted to the sharing economy.** Therefore, many sharing start-ups currently operate in what they consider to be a legal grey area. Clarity is needed concerning the fundamental principles governing the sharing economy.

Consumer protection for instance has been developed to protect the consumer, i.e. the weaker party, from the professional trader. However, as the sharing economy connects peers, it may not always be clear for consumers to whom they should direct their complaints and exert their consumer rights.

Imposing existing legislation?

Recommendation 4: Rather than imposing existing regulation on sharing economy actors, policy makers may have to re-assess the current regulatory framework. Smart regulation may require the rethinking of existing regulation: in light of new technological developments does the current regulatory framework still fit its initial purpose?

The main problem lies not in regulating the sharing economy as such. Indeed, regulation ensures safety and quality. Rather, the problem lies in the type of regulation that is being chosen to deal with sharing economy.

A logical first step of many local governments has been to impose existing regulatory regimes on these new service models (oftentimes resulting in bans or penalties for non-compliance). Both horizontal (e.g. consumer protection) and sectoral (e.g. taxi regulation) rules have been applied.

However, **the imposition of existing regulation could discourage people from participating in the sharing economy.**

- Start-ups - even if they act only as a 'sharing facilitator' - realise that they are the most visible counter-party and are likely to be subject to legal intervention.
- Sharers may fear that they will be considered as professional actors.

This could ultimately have a chilling effect and without these actors, the sharing economy ceases to exist, disabling the advantages of the sharing economy.

The imposition of sectoral regulation can be linked to the sharing economy's disruptive effect in markets that traditionally belonged to long-established and regulated market players: in areas that were usually the terrain of professionals, anyone can enter the fray. As these actors are regulated, why shouldn't newcomers be? **There is validity in the argument that traditional players would have a competitive disadvantage if the sharing economy alternatives would be left unregulated. However, choosing to impose existing regulation on alternative service providers may inhibit the market's innovative properties.** Sectoral regulation can be stringent and complex and start-ups may not have the means to ensure legal compliance. Therefore **policy makers should choose for smart regulation, taking into account the dynamic technological environment. Regulators should rethink existing (sector specific) regulation in the light of new developments. In particular, the question should be asked whether the current regulatory framework still fits its intended purpose.**

Of course, certain regulatory frameworks will have to be upheld by new actors regardless of the active sector. For instance, if data is being collected, there is no reason to allow exemptions to the regulatory requirements resulting from current data protection legislation.

The European Level

Recommendation 5: To ensure uniformity on an EU-wide level, the European legislator could formulate minimum standards in order to address the safety and quality concerns related to sharing economy models.

Considering the importance of growth and in order to ensure competitiveness on a global scale, there should be some coherence on how the sharing economy is regulated: a local approach could lead to divergence, denying start-ups the possibility to scale-up fast.

Although the sharing economy is a horizontal concept that influences many sectors, common elements are present. These common issues could be dealt with on an EU-wide level, for instance through the formulation of a set of recommendations, e.g. **minimum safety and quality standards.** Minimum safety and quality standards could be considered as an alternative for regulatory frameworks that have been developed from traditional business paradigms, such as consumer protection. A 'strong versus weak party' approach does not easily translate to

a 'sharing' environment where the participating actors are peers. In these instances, minimum safety and quality requirements could provide guidance and ensure adequate protection to those involved.

Trust

Recommendation 6: Increase trust in the sharing economy and online transactions in general.

Trust is a key element in determining the future success of the sharing economy. Studies have shown that it is a decisive factor in both the decision of an individual to opt for a sharing alternative and the likelihood to choose for this alternative again.⁴ Having minimum safety and quality standards is likely to increase trust. Granting trust certificates to those undertakings that have shown to respect these standards could be considered too.⁴

End-users could also be empowered in determining trust among platforms. The implementation of peer-to-peer rating systems should be encouraged. Peer ratings have a signalling effect for the quality of the service and they also serve as ex-ante consumer protection.

iLINC Recommends

- Consider the added value of the sharing economy and the role of start-ups within it.
- Legislators and regulators should assess the potential harm of new peer-to-peer models in order to determine the need for regulatory action, such as the enforcement of existing laws.
- Policy makers should provide more clarity concerning the legal principles governing the Sharing Economy.
- Rather than imposing existing regulation on sharing economy actors, policy makers may have to re-assess the current regulatory framework. Smart regulation may require the rethinking of existing regulation: in light of new technological developments does the current regulatory framework still fit its initial purpose?
- To ensure uniformity on an EU-wide level, the European legislator could formulate minimum standards in order to address the safety and

quality concerns related to sharing economy models.

- Increase trust in the sharing economy and online transactions in general.

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How To Start-Up A Legal Clinic Key Considerations



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University-based law incubators (“Law Clinics or Legal Clinics”) are university hubs in which law students provide (free) legal advice to digital start-ups. Legal clinics serve a twofold purpose. First, they provide law students with much needed practical experience during the education phase. Second, they provide start-ups with much needed legal advice, which start-ups wouldn’t be able to afford otherwise. Indeed, iLINC research indicates that digital start-ups often have insufficient funds to access professional legal counselling. Legal clinics can offer them a low-cost alternative. This policy brief is aimed at those universities who plan to set up their own legal clinic. There is no one, ‘ultimate’ incubator model. Therefore and rather than providing target recommendations, universities may want to take into account the key considerations formulated within this brief. Each point described hereunder relates to an important aspect of the well-functioning of the legal incubator. iLINC recommends this document to be read in conjunction with the iLINC WP2 Service Model Deliverable. This deliverable elaborates further upon the points discussed within this brief.

I. The Legal Clinic

Clinical legal education, ‘learning by doing the types of things that lawyers do’¹ is a concept which has been enshrined in the education of US law students for many years² through the post-graduate quasi-professional qualification, *Juris Doctor*. However, in the United Kingdom and Western Europe, legal education has historically centred on traditional lectures, with lecturers presenting theoretical legal concepts to students. Institutions have therefore placed less emphasis on students developing important legal skills such as communicating with clients, interviewing clients, counselling clients, professional conduct and ethics within the legal profession, negotiation, litigation, practical legal research and management of legal work. Skills which have been identified as fundamental lawyering skills.

Legal clinics enable law students to develop these skills during their education. Moreover, clinics also serve a societal purpose. Start-ups often do not have the necessary funds to acquire professional legal counselling. Legal clinics offer them a low-cost alternative.

II. Client Selection

Access for clients to legal clinics is extremely important. However, clinics often choose to restrict access to a certain number of clients. The reasons for this are:

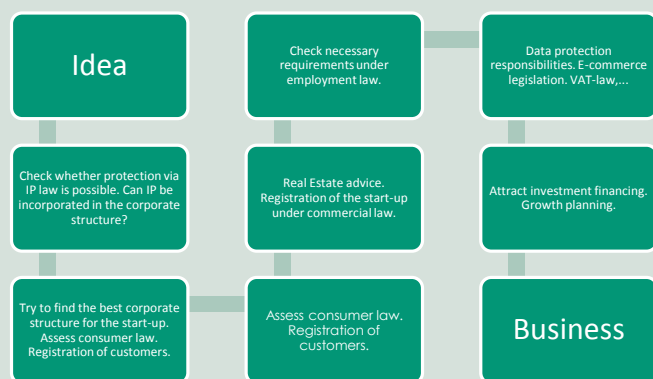
- The client’s legal issue is not of educational benefit to the students;
- The clinic does not have capacity to deal with all enquiries and therefore some clients have to be signposted elsewhere;
- There isn’t the requisite expertise in-house (by supervision) or from students to deal with the client’s legal issue adequately;
- The legal clinic is conflicted and therefore cannot act in line with professional obligations;
- Indemnity insurance provides that the legal clinic works with clients of a particular size (either in monetary or life-cycle terms);
- The client is out of the catchment area of the legal clinic;
- The legal clinic is only operates during certain hours during a week and/or times during the year (e.g. term-time), which limits availability.

Most clinics within the iLINC network indicate that they are oversubscribed with clients, which demonstrates the need for legal clinics providing commercial, intellectual property and regulatory advice.

III. Choosing the right service delivery model

One of the first elements that will need to be determined, is the service delivery model the clinic will employ. Legal clinic experience shows that start-ups tend to prefer a more personal approach, especially during the early stages of development. Therefore, one-to-one consultations are to be preferred. Additionally, continuity is key. On-going legal counselling, specifically catered towards the start-up, not only seems to benefit the advice received, it also serves the start-up business ethos. Digital start-ups often experiment with new ideas and business models. Consequently, their legal questions will most likely evolve during the early stages of development. Therefore, they are more appreciative of service delivery systems that follow this evolution.

Still, this shouldn’t discourage clinics from experimenting with other service delivery models. For instance, some universities are located in remote areas, which may make it difficult for start-ups to travel. One alternative is to provide advice through an online portal or website. However, bear in mind that advice can become outdated quickly and requires frequent updating.



The 'Idea to Business' model may be one of the various ways to provide incoming start-ups with advice. Starting from an idea, continuous one-on-one advice throughout the development stage may eventually end in the start-up being a fully-fledged business.

IV. The Legal Environment

There is no one, ultimate clinic model. The iLINC Network houses a wide variety of legal clinics, all having different service delivery models. The service model does not only depend upon the accessibility to start-ups or start-ups' demands. Much will be determined by the university's legal tradition and the Member States' legal framework.

The type of advice that can be provided may be limited by statutory acts. Some Member States only allow members of the bar to provide legal advice. A legal clinic should thus be reflective of what will be considered 'legal advice' under national laws.

V. Insurance

All legal advice that is provided through each delivery model requires some form of professional indemnity insurance, as students are generally not qualified lawyers and therefore do not hold a practising certificate (or equivalent) or professional indemnity insurance.

There are multiple ways in which a legal clinic can be insured:

- Indemnity insurance under an existing (university) policy;
- A separate (university) indemnity insurance policy for the legal clinic
- Indemnity insurance of a law firm that supervises legal clinic work (i.e. lawyers draft clinic advice on law firm headed paper); or
- Insurance provided by a third sector pro bono organisation

Most legal clinics that provide bespoke legal advice have their own professional indemnity insurance coverage. Nevertheless, insurance for clinic activities could also be secured through other means. For instance, some clinics work closely together with law firms, who read and revise the students' advice. Participating clinic students could be registered as a trainee or intern at the law firm. The students would then effectively fall under the indemnity and liability regime of the involved law firm.

VI. Payment for Advice?

Even though most start-ups would be willing to pay for the services of law clinics, most legal clinics provide their services for free. Indeed, the budget of start-ups is often quite limited and extra costs are a deterring factor. Especially during the first years of building a clinic, ensuring a steady influx of start-ups is crucial. Keeping costs low is one way to guarantee this.

The willingness to pay is related to the annual revenue of the start-up. Therefore, law clinics could implement a gradual cost structure, taking into account the current revenue stream of start-ups. An interesting alternative is to put a donate button on the start-up clinic's website.

VII. Promotion of Clinic Services

Although clinics serve a real, societal purpose, the iLINC survey shows that start-ups are rather unfamiliar with both the meaning and the philosophy of legal clinics. Considering that little is known about legal incubators, it is necessary to provide adequate information to the outside world. The online world provides ample opportunities to raise awareness concerning legal incubators' activities.

Social media are important in this regard as they provide an excellent means to keep in touch with your target audience. Promotion via start-up channels can be quite useful as well. The start-up community is generally very enthusiastic about the services offered by legal clinics. Start-up hubs and incubators are more than willing to promote clinics through their network. Moreover, teaming up with these players provides the start-ups with added value.

VIII. Improving the Clinic

As is the case with start-ups, legal clinics also have to go through an evolution process. Although there is often no difficulty in recruiting and retaining clients during the advising process, this doesn't mean the services provided cannot be improved. Asking all partners involved for their feedback is a

direct means to know where service delivery can be improved or adjusted.

Feedback from Start-Ups

- Measure the impact that the legal clinic's advice has had on the start-up or entrepreneur in terms of growth, revenue and stability;
- Contact clients to invite them to future legal events and appointments;
- Receive feedback on the legal clinic's performance;
- Receive feedback on the students' performance.

Feedback from Students

- Measure the work load of the students that provide start-up advice;
- How do students perceive the interaction with start-ups, law firms?
- Receive feedback on the legal clinic's performance.

Although students and start-ups are the most integral components of a legal clinic, other parties, such as faculty staff or partnering law firms may be involved in a clinic's operations. Their feedback could be valuable as well – this of course depends on their level of participation.

IX. Make Use of the University Environment

The university environment allows legal clinics to play a pro-active role in stimulating interdisciplinary thinking. Legal clinics should create a synergy between law and technology. Due to their position, most universities have a vast knowledge

data-base: this knowledge can directly feed into the provision of advice. Moreover, close interaction with other faculties and departments allows legal clinics bridging the gap between law and technology through close interaction.

This interaction may furthermore be necessary: law students will not be able to predict or anticipate future change without general knowledge of future ICT developments. If advice is to be given in a pro-active manner, an understanding of how technology can impact the legal framework is important. Laws will be ill-equipped when certain future technologies arise and it will not always be easy to translate traditional legal principles to the digital environment.

However current law students are the law makers of the future. Make use of the interaction that is possible between the different faculties. Scientists, philosophers, engineers, etc. All these parties can have valuable input on how the legal framework might look like in the future. Interdisciplinary thinking will become necessary in a setting where laws are increasingly outdated due to technological progress.

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2. See William V. Rowe, Legal Clinics and Better Trained Lawyers- A Necessity, 11 ILL L. Rev. 591 (1917) and John H. Wigmore, THE LEGAL CLINIC, 12 Illinois Law Review (1917), 35-38

Challenging The Bar Legal Constraints For Legal Clinics



iLINC
ICT Law Incubators
Network

Digital start-ups are developing a better understanding of their legal surroundings. Yet, at the initial start-up phase, knowledge concerning the applicable legal framework is lacking. Additionally, early starters are less likely to anticipate regulatory changes. This is highly problematic. The majority of digital start-ups are active in the ICT and Media sector, two areas where regulatory changes are on the horizon: the long-awaited data protection regulation, the proposed revision of the payment services directive, the intended copyright reform, the planned common European sales law, etc. However, due to limited resources, start-ups are often unable to pay for professional legal advice. Therefore legal clinics, i.e. students providing free legal advice, serve a real market and societal purpose. Yet, setting up a clinic can be an extremely arduous task, not only from an organizational point of view. One of the key barriers relates to the questions: what constitutes legal advice and what are the implications thereof? This Policy Brief addresses these themes and hopes to convey the following messages: a) legal clinics serve an important societal and educational purpose and b) legal clinics should be allowed to perform their activities. In particular, iLINC believes that the provision of legal advice should not be monopolised by lawyers or bar associations and should remain open to alternative service providers, such as legal clinics.

I. The Added Value of Legal Clinics

The Legal Needs of Start-ups

The services offered by legal clinics address a veritable market need. **Our research indicates that, even though start-ups are developing a better understanding of their legal surroundings, many start-ups, especially those having little revenue or no turn-over, lack legal awareness.** Moreover, these start-ups are also **less likely to anticipate regulatory changes.** Consequently, digital start-ups are often in need of qualitative legal advice. First, the tech industry undergoes rapid changes and transforms constantly. For start-ups, this often results in uncertainty concerning their legal surroundings. The end-result is a patchwork of legal grey zones. Although this could be interpreted as both a blessing and a curse, legal advice is often needed in order to effectively navigate across legal ambiguities. Second, technological developments are often greeted with regulatory initiatives. Similarly to technology, law evolves as well. It is imperative for start-ups to have a good understanding of future changes, as it may impact

the legality of their business models. This seems particularly true within the fields of ICT and Media Law.

The need for adequate and qualitative legal advice has also been recognized by the start-up community. Of the 80 start-ups participating in our iLINC survey, around 90% wish to know more about potential legal obstacles and 95% consider legal advice very important. Almost all start-ups participating in our survey also perceive legal compliance as a crucial element to their success. Start-ups which lack legal guidance fear that: a) their business may suffer financially and is more likely to fail (58%) and b) they would be less attractive to potential funders (41%). Moreover, receiving legal advice would allow them to once again regain focus on other business priorities (47%). Nevertheless, the willingness and awareness of ICT start-ups of potential legal boundaries did not necessarily entail that they had actually sought legal counselling.

The Importance of Legal Clinics...

The majority of start-ups participating in our survey have sought legal advice (51%). Yet, considering that 100% of participating start-ups deem legal advice as important/very important, this number remains rather low. In the majority of cases, when advice was given, this was done on an ad-hoc basis. Presumably, the main reason why start-ups seek ad-hoc, rather than on-going advice, is a budgetary one: on-going advice tends to be far more expensive. For start-ups not having received any legal advice, budgetary considerations were also a root cause. Whether this is purely a perception of start-ups or actually grounded in truth remains undetermined by our survey. **Nevertheless, it does appear that 'cost' is the main determining factor when seeking legal counselling.** Moreover, when advice was given to start-ups, the majority of start-ups had to pay the standard rate, with only 18% receiving a special fee for start-ups. Given that many start-ups did not obtain legal advice due to the monetary aspect, it appears that many start-ups will not seek legal advice within the first stages of their development, or, if they do get advice, will only be able to pay on an ad-hoc basis, which often negatively affects the quality of advice given. Indeed, start-ups have to continuously adapt to the changing technological environment. This means that their legal needs may alter drastically over short periods of time.

The Market Gap

By providing start-ups a cost-friendly alternative to legal advice and students a practical learning experience, legal clinics fulfil both a market and educational gap. The establishment of university-based legal clinics should therefore be further promoted.

This clear need for legal advice, but the inability to obtain, qualitative, on-going advice, has created a market gap, which legal clinics can fill. Above all, legal clinics serve both a societal and educational purpose. Therefore, most legal clinics provide their services either for free or at a minimal fee. Consequently, legal clinics can also serve a real market purpose: they give free legal advice, aiding start-ups who can't afford professional legal counselling, whilst also providing law students with a solid, practical learning experience. Moreover, through interaction with the start-ups, **legal clinics raise technological awareness and equip students with a digital skill-set**. The need for digital skills has long been considered a major goal of the European Commission.

II. Legal Constraints

The Importance of the 'Legal Advice' Qualification

Legal clinics are not law firms, nor should they be. Whereas a law firm is a business, a university, above all, serves an educational purpose. However, many clinics face challenges because the services they present could be qualified as 'legal advice'. In some countries, this qualification may have severe consequences. The legal definition of what constitutes legal advice could prevent the roll-out of university-based clinics because:

- In some instances, legal advice can only be provided by qualified lawyers. Thus students and universities are excluded from certain types of legal counselling services.
- The provision of 'legal advice' is often governed by local bar associations. Their guidelines must be taken into account by legal clinics. As legal clinics may be considered by some to be in competition with professional lawyers, the position of the bar on clinics may not always be welcoming.

Jurisdictional Differences – Country Report

Although not all-encompassing, this section of the policy brief aims to outline the jurisdictional

differences with regard to the legal constraints faced by legal clinics in the EU. This comparison among Member States will allow us to discern the major legal barriers of university-based incubators. This will ultimately enable us to draw some general conclusions and formulate policy recommendations - The information used for this part of the policy brief has been provided by iLINC's Core and Active Network Partners. Some countries however do not have a legal framework concerning the provision of legal advice. This makes it difficult to determine whether or not legal advice can be given by third-parties.

I. Belgium

The Belgian Judicial code makes a distinction between first-line and second-line legal aid.

First-line legal aid refers to legal aid that is offered in the form of practical information, legal information, a first legal opinion or a referral to a specialized authority or organization.

Second-line legal aid has been defined legal aid that is offered to a natural person in the form of a detailed legal opinion, aid whether or not in the context of legal proceedings, or aid in a lawsuit, including representation in court.

Even though the judicial code assumes that only lawyers are able to provide second-line legal aid, in practice, such aid does not require any specific legal qualification. There is one exception though: **only lawyers shall have the right to plead in any court, barring the exceptions provided for by law.**

The Belgian legal environment allows university-based clinics to perform all the necessary incubator activities. Indeed, only the right to plead in court is exclusively reserved to qualified lawyers. However, to our knowledge, no clinic performs this type of service yet.

II. United Kingdom

The UK Legal Services Act of 2007 refers to legal advice as a 'legal activity.' A further distinction is made between reserved and unreserved legal activities.

The **reserved activities** are closely related to the public function of a lawyer. They should be understood as: i) the exercise of a right of audience, ii) the conduct of litigation, iii) reserved instrument activities, iv) probate activities, v) notarial activities and vi) the administration of oaths.

Unreserved legal activities are defined as any other legal activity which consists out of: i) the

provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes and ii) the provision of representation in connection with any matter concerning the application of the law or any form of resolution of legal disputes.

Under the Legal Services Act 2007 it is an offence for a person to carry out a reserved legal activity unless that person has been entitled to perform that activity. This requires the service provider to obtain an entitlement in relation to the relevant activity. Those entitlements are issued by an approved regulator, such as the Law Society or the General Council of the Bar. In other words, in order for one to perform reserved legal activities, one has to be authorised to do so.

Unreserved legal activities can be performed by any person, even by individuals who don't have a formal legal qualification or reserved title. However, all unreserved legal activities remain subject to consumer and competition law.

The English and Welsh legal framework seems encouraging to the establishment of legal clinics. First, there is legal clarity as to the activities that can only be carried out by authorised individuals. Second, the provision of general legal counselling is not monopolised, instead the unreserved activities can be performed by every individual, including students, as long as consumer and competition law is taken into account. It therefore provides a climate in which legal clinics can thrive. Indeed, start-ups often required services that would be qualified as unreserved legal activities, such as the draft of a privacy policy or terms & conditions.

III. Germany

In Germany, the legitimacy of specific legal services is governed by the German Legal Services Act. **A legal service has been defined as a service that is provided to a third person who requires the legal assessment of a concrete, particular case. A person who intends to present such a service is required to be a fully qualified lawyer.** A law student can become a fully qualified lawyer after having passed a state examination and being formally admitted into practice.

The qualification of advice as a 'legal service' requires a case-by-case assessment, and should not be based on the totality of services offered. Thus legal clinics will always have to consider whether or not the advice granted, falls under the definition of 'legal service', even if the clinic grants assistance in other areas.

Crucial to the assessment is whether the advice relates to a particular, concrete situation. For instance, MOOCs do not constitute a 'legal service', as they target a broader audience concerning general legal questions. Similarly, one could argue that drafting and providing standardised contracts does not constitute a legal service.

However, legal clinic advice often relates to a concrete question. Indeed, this is often the main goal of a university-based clinic: assist start-ups that have a particular, legal query. As a consequence, the traditional clinic model, in which students guide start-ups, is not in compliance with the German Legal Services Act.

Therefore, German legal clinics are required to seek alternative service models.

- Instead of one-to-one consultations, a clinic could opt for a one-to-many or many-to-many consultations. The public nature of these sessions does not allow to answer a particular question, rather general instructions could be given.
- Clinic sessions could be construed as not to give concrete advice, for instance through the standardisation of service provision. Such an approach could result in start-ups obtaining the necessary tools that enable them to understand their concrete legal problem themselves.
- Legal clinics could also offer start-ups a risk assessment. Rather than examining a particular legal question of start-ups, the risk underlying a start-up's activity could be analysed and weighed. Still, such a risk assessment can't become too concrete. Instead, referral could be made to all relevant corresponding laws.

Although the above-mentioned options do provide German-based legal clinics alternatives to guide start-ups, it is often the case that these solutions are to the detriment of digital starters, who receive less substantial advice.

IV. Israel

In Israel, the **provision of legal advice and legal opinions** are prime examples of **unique activities** that are to be **performed by lawyer only**, according to article 20 of the Israeli Bar Association Law.

Legal advice has been defined as the process of giving a concrete legal response to a question. A

lawyer should lead this process. **University based clinics are required to have a lawyer appointed in order to fulfil the majority of clinic services.** Students are responsible in assisting the lawyer of the clinic. The provision of legal advice can include the writing of legal opinions and drafting position papers. In some cases, the clinics do assist in litigation, when the clinic's lawyer believes that the incident may lead to a significant and important legal change.

In addition, the clinic's staff engaged in providing lectures on various topics that do not necessarily constitute legal advice, also fall under the supervision of the clinic's lawyer.

Clinic activity is mainly being limited due to constraints implemented by the Israeli Bar Association Law and the Israeli Legal Ethics Rules. According to the legal framework, **students** - that are not yet lawyers – **are not allowed to offer legal insight. They may only do so under the guidance of the lawyer.** Additionally, charging payment or any refund of courts' reliefs is prohibited, and therefore cannot be considered as a potential source for the clinic's budget.

V. Portugal

In accordance with Portuguese law, legal advice is defined as **any activity involving the interpretation and application of legal rules requested by a third party. This wide interpretation of what constitutes legal advice, in itself is constraining.** Moreover, the Portuguese bar is considered to be rather conservative. Furthermore, there is no tradition of legal clinics and clinical education in Portugal. The main constraints for university-based legal incubators are:

- The wide interpretation of legal advice made by the Portuguese Bar
- The lack of any legal provision with relation to legal clinics
- The law requires that the creation and functioning of a legal advice bureau has to be approved by an ordinance of a Government member responsible for Justice.
- The provision of free legal counselling must be defined by a protocol between the Ministry of Justice and the Bar.
- The Portuguese law on the access to the Law only protects individuals, thus excluding for-profit organizations and legal persons from acquiring a right to free legal aid.

- The Bar has restricted the location of legal advice offices. For instance, law offices should best avoid ground floors or malls.
- The Bar has restricted the provision of electronic legal advice, limiting virtual clinic advice opportunities.

VI. Spain

The Spanish legal environment is particularly difficult to assess and requires some additional background information and exposition.

In Spain, **the legal profession seems to be in dire straits, with many lawyers claiming it is hard to make a living.**¹ Access to the profession was very easy until 2014. Therefore Spain has an extremely high number of lawyers (285 per 100.000 inhabitants). Most of the lawyers work solo or share facilities with few other lawyers.²

Given these circumstances, **Spanish lawyers are understandably wary of anything that could divert a possible source of revenues.** One could also easily imagine there to be a heavy reluctance of universities to start a legal clinic. Only the few big law firms may consider a free legal clinic for start-ups as a long-term investment to gain promising clients and recruit young lawyers.

The Legal Environment

According to Article 6 of the *Estatuto de la Abogacía* and Article 542 of the *Ley Orgánica del Poder Judicial*, the name and function of a lawyer is exclusively reserved to law graduates that represent a client in court or grant legal advice.

Little literature is available with regard to the exclusive nature of legal advice. As a consequence, it is also difficult to assess the legality of the free provision of legal services by students. This uncertainty remains even if it were to be expressly communicated that the advice was not given by actual lawyers. Moreover, Law Societies and Law Schools have a long history of collaborating based upon mutual respect and *bona fide* behaviour in the fields of competition. The preservation of this relationship is to the interest of all parties involved.

The provision of free legal advice for start-ups under the patronage of a Law School and provided by students, if not illegal, would very probably be seen by lawyers and their societies as an aggressive policy that could endanger the status quo of current collaborations. And even more so if these services are advertised in any way.

This problem could be solved or at least soothed if:

- Law Schools are not the entrance door for potential clients, that is, start-ups looking for advice; that requires the Law Schools to adopt a less central role and to put in place a softer coordination.
- Every student is formally enrolled as an apprentice or intern of a lawyer or law firm.

A semi- solution could be to embed the legal clinic as an internship, which is part of the *Master de Abogacía* and is managed by the Lawyers Societies. Alternatively, a third party, as for instance a public or private incubator, to be the manager of a legal clinic.

Conclusion

The rules governing the provision of legal advice, and as a consequence thereof legal clinics, differ from Member State to Member State. Although we have established in a previous brief that there is no set model for legal incubators, this nonetheless presents significant disadvantages. First, this makes it more **difficult for legal clinics to share best practices**. Second, in some Member States **it may even be impossible to start a legal clinic in the first place**.

Two major barriers liable to constrain the establishment of a legal clinics have been identified:

- **The first barrier relates to the monopolization of legal aid: in some Member States, legal advice can only be provided by a qualified lawyer. Depending on how legal advice has been defined by the national legislator, this exclusivity can be far-reaching.** Consequently, students are not allowed to grant legal counselling, except when under the guidance of a lawyer. Country examples are: Germany, Portugal and Israel
- **The second barrier is related to the bar associations present in the Member States.** Some incubators feel that they are being inhibited by constraints implemented by the local bar. The Country examples are: Portugal, Spain and Israel.

Although not as prevalent, the economic climate of the country involved may also play a crucial role. An example of the latter can be found in Spain, where due to the high number of unemployed lawyers, the creation of a legal clinic also has severe ethical consequences.

ILINC RECOMMENDS

RECOMMENDATION I:

- **By providing start-ups a cost-friendly alternative to legal advice and students a practical learning experience, legal clinics fulfil both a market and educational need. The establishment of university-based legal clinics should therefore be further promoted.**

RECOMMENDATION II:

- **The provision of legal advice should not be monopolized by qualified lawyers or individuals already in possession of a law degree.**

RECOMMENDATION III:

- **Member States should increase legal certainty by clearly defining different types of legal service provision. This to enable third-party service providers, such as legal clinics, to distinguish between legal services that are to be exclusively provided by qualified professionals and those that are not.**

RECOMMENDATION IV:

- **Member States should clearly specify those legal services that can only be provided by qualified lawyers or by individuals already in possession of a law degree.**

RECOMMENDATION V:

- **In an open society, where legal advice can be provided by third parties, the range of control of the local bar and bar associations should remain limited. The bar should not be able to exert pressure or indirectly affect legal service provision by third parties. Rather, their influence should be restricted to the activities performed by lawyers.**

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ILINC is the European Network of Law Incubators. Its main objective is to facilitate the provision of free legal support to start-ups while, at the same time, offering postgraduate law students the opportunity to engage in professional practice in the fast-moving and highly exciting world of technology start-ups.

Visit us on our website:

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