Compliance, and resulting consequences on the labelling framework of Gaia-X

Authored by:

Hubert Tardieu (Independent Gaia-X Board Member)

Marie Anne Frison Roche (Institut d'Etudes Politiques de Paris)

Martine Gouriet (Électricité de France)

Pierre Gronlier (Gaia-X AISBL)

Contents

Compliance, and resulting consequences on the labelling framework of Gaia-X

1. Compliance Law and compliance regulatory mechanisms

Compliance Law is a new branch of Law, still not fully achieved. Currently, there is a "narrow definition" applied that entails the obligation of businesses to show that they are constantly and actively following all the applicable regulations, without considering the substantial content of these numerous rules.

Others adopt a "richer definition", and a more substantive definition entailing the obligation or the will of certain companies to achieve "monumental goals" that go beyond an economic perspective angle and quantitative performance.

Taking up on the narrow part of the definition, the emerging idea of Compliance prescribes or prohibits behaviour - (for example, requiring access to natural monopoly or prohibiting cartel) that is not necessarily against the interests of the obliged company. Indeed, regardless of the principle of the freedom to act, the company has an interest in respecting the rules as a result of living in a universe where the Law should be respected by all, thus avoiding any violations. In addition, it harms its interests if it uses its forces to disregard Law.

Therefore, the company has an interest in "complying" with the Law spontaneously, using its forces in Ex Ante to prevent itself from any violation or to sanction them within it. This ability to "keep up" shows the points of contact between Compliance and Ethics. For this reason, the company will issue additional standards to legalise external standards, various internal documents, charters, and programs where it considers the external legal requirements. These "codes of conduct" are accompanied by educational programs in which the company asks each person who represents it, its employees but also those who act in its interests, for example, its suppliers - to respect the Law.

In terms of the second and more substantive definition, normatively Compliance Law is the determination of goals of a political nature, expressing "aims", going beyond the simple respect of the Law and expressing ambitions that go beyond the free functioning of markets and the welfare of the consumer. It could be the safeguarding of the planet, the education of children, the protection of women, etc. Therefore, currently, Compliance Law is the legal tool used to reflect on matters of personal data protection in European Law. In the future, Climate issues shall find a lot of solutions in Compliance Law mechanisms, notably through the Banking Compliance section.

In this sense, the European Union Law has strongly evolved, forming a new balance between the Competition Law and Compliance Law. New regulations, such as the *Digital Markets Act*, assuring in *Ex Ante* the real conditions of fair competition, and moreover the *Digital Service Act*, asking private operators to control the substance of what is developed in the digital space, articulated in the *Data Act*, assuring the fair value of the European economy of Information, show the new European legal spirit: not only of free competition but of a sovereign and open European data industry, protected by the Law. This evolution has concretised the richer and substantive definition of Compliance Law. The establishment of a new European directive of corporate sustainability due diligence, which is the direct translation of the *devoir de vigilance*, put in place by the enterprises themselves in their compliance toolbox, show the alliance in *Ex Ante* between crucial operators and political entities through Compliance Law.

Classically, these "monumental goals" were expressed by the public authorities and were long pursued exclusively by them. The State's first, in the name of the general interest, especially through public authorities, renewing through the Regulatory Law that balances dynamism, competition and other permanent concerns. In the new Compliance Law, firstly private entities may express their concern for these "monumental goals" and take them for their own *raison d'être*. Corporate social responsibility expresses this necessity of equilibrium between competition and monumental goals, such as autonomy. Secondly, private entities must use their position, information, structural organisation and power to reach these "monumental goals", which are internalised. They do so under the supervision of public administrative bodies and, at the end of the day, judicial bodies.

Technically, Compliance mechanisms have been created in financial and banking areas to prevent systemic risks. Now, they are exported in the digital space and respect the concrete nature of the objects about what information is, for instance people, energy, nature, health, and so on. The crucial private entities which develop these industries, notably through the information about them, must give, in *Ex Ante*, the proof of Compliance firstly with the general public European legal rules, such as GDPR or Competition Law, but also, with the monumental goals, which are the pillar of an autonomous and sovereign Europe.

To that end, private entities must be organised with stability and transparency in a system with charts, engagements, compliance programs, etc., to improve the integration of the enterprises in the general European goals, protected by public bodies.

2. The pioneering approach of Gaia-X: achieving legitimacy in formulating the need for a strategic autonomy

The Gaia-X project was initially announced at the "Digital Gipfel" in Dortmund in October 2019. The first task of the Franco-German team was to agree on a common position paper (in line with the joint announcement of Peter Altmaier and Bruno Lemaire) describing the objectives of Gaia-X. The paper was published in February 2020[1] – exactly on the day before the publication by the European Commission on the European Strategy for data.[2]

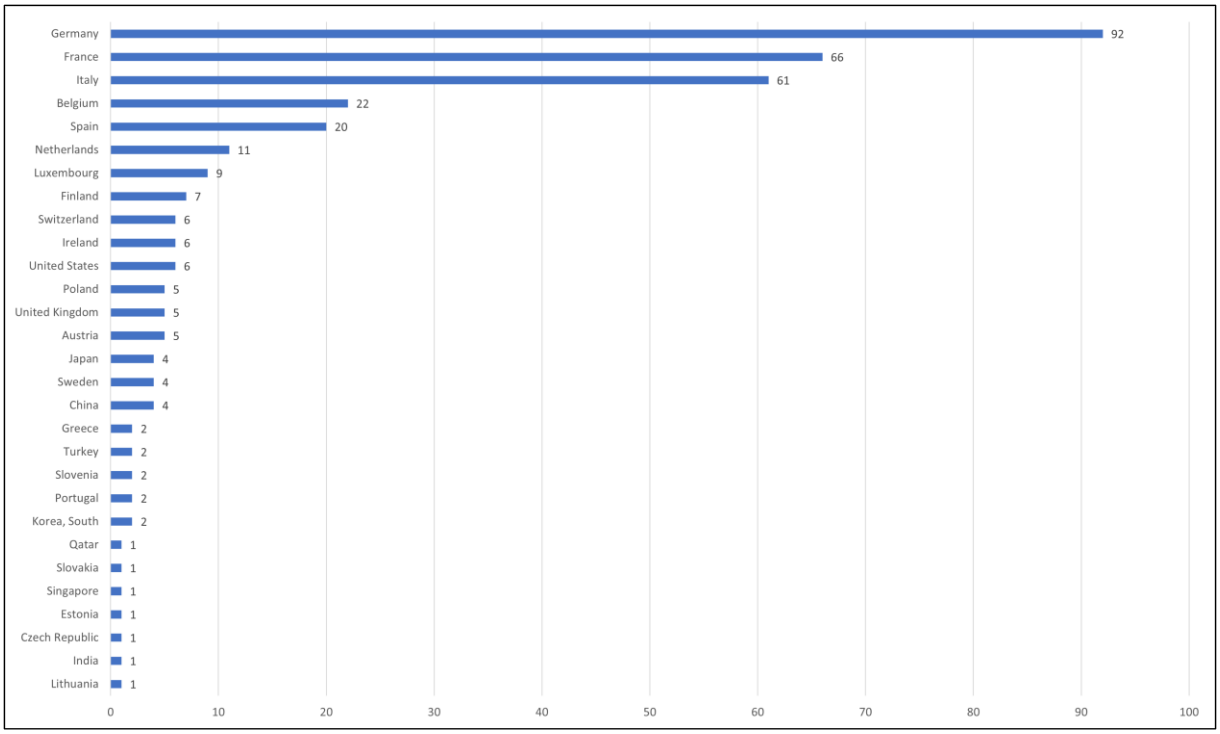
On June 4, 2020, a group of twenty-two companies (eleven French, eleven German) consisting of seven user companies, eleven cloud service providers, two academic institutions and two industry associations announced their intention to create a not-for-profit association under Belgian law to implement the Gaia-X objectives. The summer of 2020 was then dedicated to establishing the article of associations and setting up the technical basis of the association, i.e., policy rules, architecture of standards and reference implementation. The main hurdle was to forge a consensus vis-à-vis the non-European cloud service providers: welcoming them as members but restricting the board to representatives of European companies. By mid-September, the association was created as an AISBL under Belgian law, requiring a royal decree for the effective creation by the end of February 2021. By August 2021, the initial management board representatives were established as illustrated by the graph below.

1 See https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-position-on-gaia-x.pdf?__blob=publicationFile&v=4

2 See European Commission (2019), European Strategy on Data, Brussels.

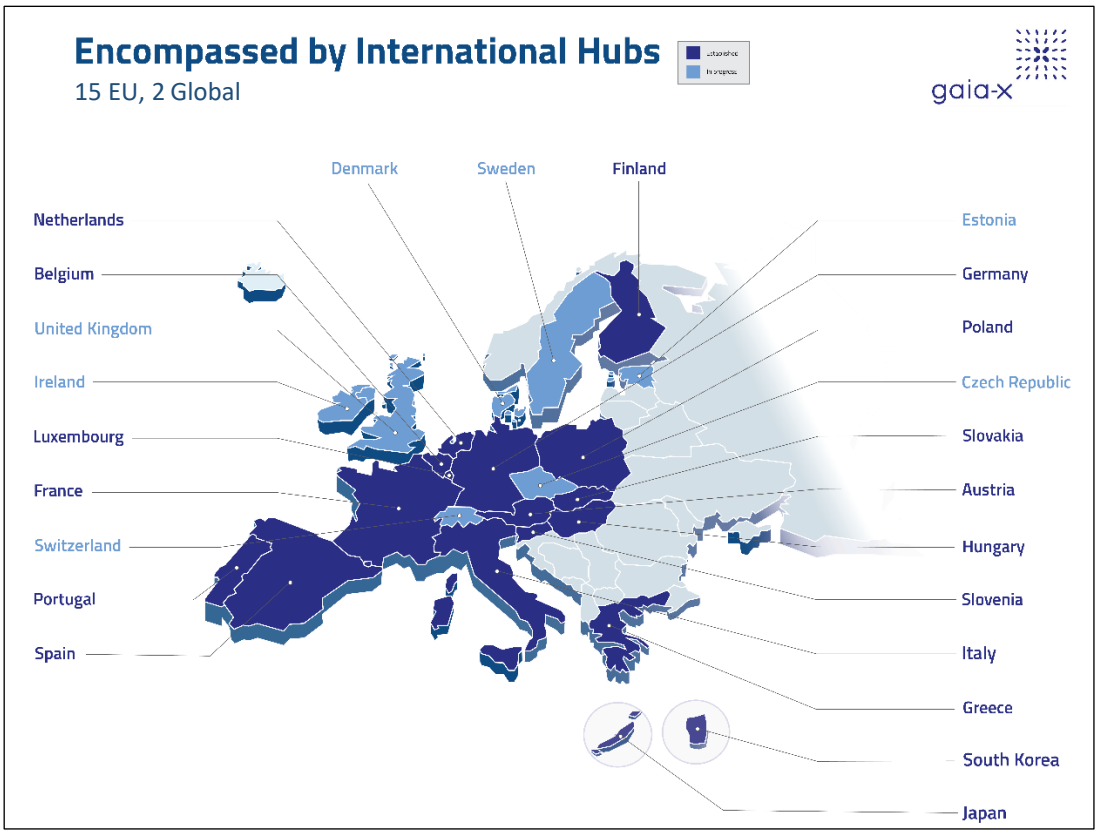
The final management board was decided back in June 2022, while a full team is now in place to support all operations and is already available on our site in the following link (see who is who)

To gather the community that has formed around the shared vision of cloud and data sovereignty, the 1st Gaia-X Summit was organised, attracting more than 4500 participants, with the the 2nd Summit organised in Italy back in November 17-18 2022 and this year's Summit scheduled to take place in Paris, on the same dates users sent top executives to explain how they intended to create data spaces and an overall data infrastructure ecosystem. Most of the European cloud service providers and all the major US service providers presented their expectations and positions, the inception year and the adoption respectively. As from March 21, the board, composed of one representative per original member, with the CEO and CTO recruited and placed to form the initial management board. By that time and the first EGA 21, more than two hundred and seventy companies had declared their full intention to become members of Gaia-X coming from twenty-two countries. By OGA 2022, the Gaia-X member based skyrocketed to 348 members, currently at 350 members by the end of June 2022.



Such a member base was and still is an important step to secure the buy-in from European countries, but equally cross-border. In terms of next steps, it was decided to create national hubs to regroup national players and to build local ecosystems of users that would bring the necessary user cases to further enable the business value, and respective services that would fully comply with the Gaia-X framework and EU values.

By the end of 2021, there were already fourteen European hubs established , with a close a connection to the local governments. Such a process this proves to be an essential step in the multi-country approach chosen for the digital decade. Gaia-X is now taking up operations with a new board of directors elected early June 2021, including representatives of seven European countries and a clear 5-year strategy endorsed by the Gaia-X CEO and Member States through their participation in national hubs and the government advisory board. Non-European Hubs are also in preparation, with two international hubs already established. The current hub map is illustrated below



Gaia-X takes part in Member States' strategy by contributing both to the creation and delivery of Lighthouses, such Catena-X, Structura-X, EUProGigant that intend and commit to use and comply with the Gaia-X framework and data infrastructure ecosystem to launch the aforementioned "trusted cloud" strategies.

In parallel, and of equal importance is that the French "Trusted cloud" strategy announced in May 2021 makes explicit reference to Gaia-X. This strategy authorises the GAFAM to license their software to French suppliers, the latter being able to operate the software in their own sovereign clouds. Gaia-X supports this approach, which should be generalised at European level with the upcoming launch of EUCS (European Cybersecurity Certification Scheme for Cloud Services) aimed at harmonizing the certification principles of the different member states.

Here make reference to the DG competition letter endorsing Gaia-X and mention the timeline – look at the press release and the letter itself

Moreover, the European Commission issued a comfort letter that fully supports Gaia-X mission, specifically because of its compliance with Article 101 (1) TFEU, which sets the precedent of European antitrust law.

3. Digital Sovereignty vs. Strategic Autonomy during the digital decade

The Gaia-X project has its roots in Industry 4.0, i.e., the intelligent networking of machines and processes for industry with the help of information and communication technologies. Indeed, it quickly became clear that data sovereignty and trusted data sharing based on cloud services was needed to seize the innovation potential that Industry 4.0 brings about. Gaia-X was initiated as a response to the massive shift of the German automotive industry, amongst others, towards the storage

of data on US-based cloud platforms provided by Amazon, Microsoft, and Google, which was always accompanied by certain anxiety about data and cloud sovereignty. Since then, Gaia-X applicability and knowledge transfer applies to other vertical ecosystems aside from manufacturing, including agriculture, tourism, health, mobility, and others.

Cloud platforms enable business growth, both through data-driven innovation scenarios and due to the flexibility gains and cost reductions compared to traditional data centers. But, looking beyond the automotive sector, the situation in Europe, when it comes to cloud computing, it is characterised by two series of figures.

First, only 26% of European companies are using the cloud, with respectively 21% in France and 20% in Germany. These figures compare to more than 60% adoption of cloud services in Scandinavia and more than 50% in the US. Not using cloud computing bears the risk of undermining the competitiveness of the European industry, from a costs' perspective, as well as in terms of a more limited flexibility and agility when it comes to leveraging innovative business models. Doctolib, a startup setting up a platform between patients and doctors, for example, would not have been able to organise 15 million appointments in January 2021 without relying extensively on cloud services. Indeed, cloud platforms enable data sharing between several partners of a value chain and help overcoming the traditional company-specific silos data are typically buried in.

The second figure reflects the origin of cloud service providers, which are for more than 70% American and Chinese companies, with only one European company in the national top 3 of a country, i.e., OVH in France.

The main reasons inhibiting a faster adoption of cloud computing in Europe have been identified: portability, interoperability, and data sovereignty. Portability means the ability to switch from one cloud service provider to another at a minimum cost for applications, data, and infrastructure. Interoperability targets the ability to exchange data between companies using different cloud service providers. Data sovereignty refers to the self-determination of data holders with respect to their data, i.e., their ability to share data together with "terms and conditions" specifying and limiting the authorized uses of the data.

Industry actors have now launched major data spaces projects aiming to enable data sharing, for instance between the major automotive manufacturers, part manufacturers and equipment manufacturers in Germany with Catena-X, or between aircraft manufacturers and airline companies with Skywise. The creation of data spaces is in progress in many other domains: smart farming, health, manufacturing, energy, finance, energy, mobility, and smart city, all falling under a well-articulated plan regrouping the main stakeholders.

The European Digital Decade's ambition of "75% of European enterprises having taken up cloud computing services, big data and Artificial Intelligence" by 2030 is but another way of saying that data and cloud in Europe should be properly used by 75% of European businesses in 2030.

The dilemma of digital sovereignty vs. strategic autonomy can now be clearly stated: *what is the best path for European businesses to benefit from the industrial data economy? Shall we create a European service provider able to compete with American hyperscalers? Or shall we achieve strategic autonomy in the most critical sectors such as automotive, health and energy, by following a multi-cloud strategy, using a combination of cloud service providers including non-European ones, provided they respect the rules in terms of portability, interoperability, and data sovereignty?*

France has tried the first option in 2012 with Numergy and Cloudwatt, launched by SFR and Orange with the support of the French government; the programs were terminated in early 2015 with no buy-in from users.

At the end of 2021, several countries (in particular, France, Germany, and Italy) initiated trusted cloud services for both the public sector and sensitive domains, where cloud penetration is given the highest priority (e.g., Orange, Deutsche Telekom).

For the rest of the industry, the way forward is a combined push/pull scheme, where pull is created by the incentives of data sharing within data spaces, user cases and lighthouses and the push is a combination of cost and flexibility attractiveness, and the relaxation of obstacles with respect to portability, interoperability, and data sovereignty.

The pandemic has suddenly accelerated the digital transition by bringing an unprecedented amount of funding through a brand-new distribution mechanism relying on country recovery and resilience plans.

4. Identifying Monumental Goals for Gaia-X

In line with its vision for strategic autonomy, Gaia-X will define monumental goals for each data space.

The most advanced Lighthouse, Catena-X, resulting from the automotive data space defines its goal in the following terms:

The European automotive industry's existing structures, such as processes in the field of parts logistics, are to be integrated into the network and further optimised. Alongside the benefits of greater efficiency in the supply chain, the network participants expect more efficient quality and logistics processes, greater transparency in terms of sustainably reduced CO2 emissions, and simplified master data management. Continuously connected data chains in this way make it possible to create digital twins of automobiles, based which innovative business processes and service offerings can be developed.

The Energy Data Space has defined as well its monumental goal as:

Reaching Carbon Neutrality before 2050 and therefore fostering all the digital solutions for energy efficiency and low carbon energy while maintaining European Strategic Autonomy in Energy. This means provide an ecosystem for the development of use cases on a European scale to foster the energy transition and reach carbon neutrality. Thus, sharing data in a trusted, secure, and sovereign way, reaching a significant size, and becoming reference for the industry.

The translation of such monumental goals in quantitative and measurable objectives are at the core of the Gaia-X labelling framework and respective criteria

5. Gaia-X labelling framework

The Gaia-X labelling framework establishes quantitative and measurable objectives. **Gaia-X Labels** are issued for Service Offerings only and ensure that a predefined set of policy and technology requirements are met. A labelling framework has been established, as well as a labelling catalogue Gaia-X Labelling Criteria. The GXFS project is also working to operationalise the process and in cooperation with the Gaia-X Association and related Framework of specifications.

The Gaia- X labelling framework also establishes levels of labels and the notion of label issuers and labels owners. There are different labels owners (such as different industries, different governments and so on) and Gaia- X association itself is a label owner.

Gaia-X owns 3 different levels:

- **Label Level 1** – Data protection, transparency, security, portability, and flexibility, are guaranteed in line with the rules defined in the Gaia-X Policy Rules Document and the basic set of technical requirements derived from the Gaia-X Architecture Document. For cybersecurity, the aim is to converge with ENISA European Cybersecurity Scheme Level 1.
- **Label Level 2** – This advanced Label Level 2 extends the basic requirements from Level 1 and reflects a higher level of security, transparency of applicable legal rules and potential dependencies. The option of a service location in Europe must be provided to the consumer. With regards to cybersecurity, the aim is to converge with ENISA European Cybersecurity Scheme Level 2.
- **Label Level 3** – This level targets the highest standards for data protection, security, transparency, openness, and trust. It extends the requirements of Levels 1 and 2, specifically with criteria that ensure immunity to non-European access and a strong degree of control over vendor lock-in. Service location in Europe is required. For cybersecurity, the aim is to converge with ENISA European Cybersecurity Scheme Level 3.

With these 3 different levels of labels, the key point of European sovereignty is solved as level 3, which is only accessible for those companies, whose location and main headquarters are in Europe and for which immunity to non-European laws is possible. All other companies will be allowed to use level 1 and level 2 labels.

It is also coherent with the idea of "trusted cloud" supported by France, Italy and Germany (see above), where cloud penetration is given the highest priority and where non-European cloud technologies are accepted, provided they are fully operated by European companies.

A survey to all the members of the association has been held. All the members have written more than 700 comments on the detailed criteria- the way they are processed and the final labelling catalogue has then be approved by the board of directors and provided here: Gaia-X Labelling Criteria.

As to competition law, the view taken is that the labelling framework does not entail an antitrust risk. The labels do not foreclose non-European service providers. it is not mandatory to comply with the labels. Companies are free to provide or purchase services that do not comply with the labels.

Indeed, there are good arguments to compare to a food label that would guarantee the local character of a product. Even if non-local food producers cannot use the label, the label does not infringe competition law as such.
Moreover, members will have the opportunity to provide their views to modify this label or to envisage the addition of an additional label in the frame of the survey.

As a conclusion, we can say that these 3 different levels follow some compliance rules established and approved *ex ante* by the board of the association and will enable it to follow its "monumental goal "described above. These 3 different levels of labels are also compliant with the competition law to which, they would now need to be implemented.

Bibliography :

M.-A. Frison-Roche (ed.), *Compliance Monumental Goals*, Journal of Regulation & Compliance and Bruylant, 2021.