

# SWIPO Common Governance 4.3 – final draft

## for SWIPO Codes of Conduct under the Article 6 of the Free Flow of non-personal Data Regulation

This document sets forth the SWIPO Common Governance. Its main purpose is to create the framework within which various Codes of Conduct (CoCs) can be developed and go into operations on the market with the goal to address the switching and portability dimension of cloud services and support the objectives of the Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018. Among other things, the Regulation provides that “the detailed information and operational requirements for data porting should be defined by market players through self-regulation, encouraged, facilitated and monitored by the Commission, in the form of Union codes of conduct” that appropriately address specific and unique technical requirements of specific market segments and service types (Sector CoCs) but that also need to share many common requirements to become credible, functional and ensure fair competition and a balance of interests at all time. The work is based on a common understanding that was developed by the self-regulatory working group SWIPO (SWitching and PORTing) which was facilitated by the European Commission and was composed of a broad variety of representatives of cloud service providers and users.

## 1 SWIPO Bodies

To properly reflect the requirements of a transparent and trusted but also efficient SWIPO Ecosystem (“SWIPO”) including all its Sector CoC, SWIPO consist of several governance bodies with distinct powers.

### 1.1 Executive Board

#### 1.1.1 Composition

- (1) There shall be an Executive Board consisting of two representatives for each sector (**Sector Specific Representatives**) representing Customers and Providers respectively, and one “at

large” representative. The number of Sector Specific Representatives can be changed by the decision of the General Assembly.

- (2) The Executive Board will elect a Chairman and other officers as appropriate from among its members every two years.
- (3) No more than one Executive Board member shall be an employee, designee or representative of any particular Member at any time, nor can an Executive Board Member also serve at the same time on a Sector Specific Steering Board. Furthermore, Executive Board members cannot be related to each other in blood or by marriage, nor can they be employees of SWIPO, its Secretariat or any entity providing organizational support or services to SWIPO.
- (4) The Executive Board members serve in an individual and fiduciary capacity and are required to act in the best interests of SWIPO.

### **1.1.2 Election of the Representatives**

- (1) Sector Specific Representatives shall be elected by the members of the relevant Sector Group to serve a two-year term. Sector Specific Representatives may be re-elected for any number of successive additional terms via an open call process and pursuant to voting procedures as otherwise provided herein.
- (2) On request of two-thirds of the members of the respective Sector Group there shall be a vote whether to replace a Sector Specific Representative before the completion of an incumbent’s two-year term.

### **1.1.3 Functions**

- The Executive Board is responsible for the oversight of all SWIPO operations and governance, including the finance and administration of SWIPO.
- These functions include decisions about but are not limited to:
  - Making up-front determinations as to the common text of all Sector CoCs, permitting different text between or among Sector CoCs only when it has been established that there is a compelling need to differentiate among CoCs for technical reasons, and establishing good practices for information exchanges between Sector Groups;
  - Determining the appropriate membership fees and approving any additional fees. In doing this, to address the needs of SMEs and different interests between providers and customers, the Executive Board can create different types of membership-fees, but the overarching principle of entitlement to vote, and "one Member one vote" shall not be changed;
  - Making decisions that are delegated to the Executive Board by this Common Governance;

- Proposing amendments to this Common Governance document and any other common documents that are deemed appropriate and necessary for the purposes of SWIPO;
- Coordinating the process of on-boarding new Sector Groups;
- Safeguarding the alignment of Sector CoCs, taking into account possible unfair competition issues and as otherwise deemed appropriate and necessary for the purposes of SWIPO.
- If the Executive Board, on its own initiative or after a written request of at least 10% of the Members of the General Assembly, concludes that a Sector Group is not respecting SWIPO principles, policies and procedures appropriately, the Executive Board shall decide and take appropriate actions to re-align the respective Sector Group with SWIPO and remedy any inappropriate actions or situations.
  - If the respective Sector Group decides to reject the actions proposed, the General Assembly shall be called to resolve the issue, which may result in disbanding the Sector Group.
- Related to the Complaints Mechanism, the Executive Board must:
  - Ensure that there is adequate expertise of members of the Complaints Body to be able to render a fair, neutral and competent decision when a dispute or complaint is raised.
  - If the Executive Board believes that there is sufficient reason to question whether the Complaints Body may not be acting in an independent, objective and unbiased way, it will solicit further information and views from the General Assembly, which must then vote on how to resolve the underlying complaint or otherwise remedy the situation.

#### **1.1.4 Procedures**

- (1) The Executive Board shall decide by consensus.
- (2) Where the Executive Board does not reach a consensus decision, at least one member of the Executive Board may refer the matter to the General Assembly for it to decide.
- (3) The Executive Board shall record and distribute at least once a month its non-confidential decisions and activities to the General Assembly, including an annual summary of the respective reports received from the Sector Boards.
- (4) The General Assembly has the right to initiate a review and revisit a decision of the Executive Board and will do so no later than 10 business days after electronic distribution of such decision if so requested by 10% of the SWIPO Members.

## **1.2 General Assembly**

### **1.2.1 Composition**

- (1) Any organization can join SWIPO as a Member provided there is a clear interest and a commitment to adhere to all of the SWIPO rules, decisions, policies and procedures.
- (2) Each Member shall appoint one voting representative to the General Assembly. A voting representative may designate in writing an alternate to act on that representative's behalf if that representative is not able to participate in a meeting, vote or other SWIPO activity. Each Member must declare whether it is a Provider Member or a Customer Member. Any Member having declared its adherence (through at least one of its services) to one of the SWIPO Codes must declare that it is a Provider Member. Individuals not acting in a professional capacity are not allowed to become Members.
- (3) Membership is conditioned on the payment of specific fees, where applicable, as determined by the Executive Board (which could be none). Fees shall be composed of an appropriate compensation of costs of the general administration of SWIPO plus an appropriate compensation of specific costs related to a Sector Group.
- (4) If considered necessary to augment the administrative functions and services provided to the General Assembly, the General Assembly may decide to elect a Chair of the General Assembly among its members and define the Chair's responsibilities.

### **1.2.2 Functions**

- (1) The General Assembly shall represent all Members of SWIPO and is responsible for the overall SWIPO activities.
- (2) The General Assembly shall decide upon any matters as described in this document.
- (3) The General Assembly can decide on any other matters if so requested by the Members in accordance with this document or upon request by the Executive Board.

### **1.2.3 Procedure**

- (1) The General Assembly will conduct the majority of its business electronically, including voting. In addition to any legal obligations, the General Assembly can meet physically, where in person decisions can be made, only if such a meeting is approved by a qualified majority of the General Assembly.
- (2) For all votes of the GA, the balance of interests shall be respected.
- (3) Unless otherwise specified, any decision shall only be accepted by a qualified majority of three quarters of all eligible votes of the Members.

## 1.3 Sector Groups

### 1.3.1 General

- (1) Members or non-members may propose to the Executive Board to split, merge, disband or establish Sector Specific Groups (“**Sector Groups**”) to develop and manage Codes of Conduct that include all required common text among CoCs and also address sector specific needs (“**Sector CoC**”).
- (2) The Executive Board shall approve such a proposal that is made in accordance with 1.3.1 (1), provided that the proposers substantiate the necessity and feasibility of such additional Sector Group and that the Sector Group can be promptly composed according to this Common Governance.
- (3) Once a Sector Group is established, any SWIPO member can join the group and can participate in any of the Group’s activities.
- (4) Each Sector Group shall be managed by a Sector Board which will govern specific aspects related to the respective Sector CoC.
- (5) Subject to Executive Board approval, Sector Boards may choose to appoint a sector specific Secretariat which handles Sector CoC specific tasks. The allocation of tasks performed by the general Secretariat as outlined in this Common Governance cannot be subject to the task of any sector specific Secretariat. Sector specific Secretariats must not duplicate the work or the responsibilities of the Executive Board or of any Secretariat that the Executive Board appoints.
- (6) Each Sector Board may establish additional fees. These fees must be approved by the Executive Board and shall be based on the principle that Provider members must bear the brunt of the financial obligation. At any time, the members of the Sector Group may decide to disband the Sector Group based on a qualified majority ruling. The result of such a vote shall be communicated immediately to the Executive Board. In case of a positive vote, this results in due course in closure of the Sector Group and the related Sector Board will be dissolved and terminated. Members can remain SWIPO Members but will lose the membership in the disbanded group. Any related activities that happen external to SWIPO after a Sector Group is disbanded is forbidden from using SWIPO marks, copyrighted material or other SWIPO intellectual property inappropriately or imply any former affiliation to SWIPO in any activity or communication.

### 1.3.2 Composition of Sector Groups

- (1) Any SWIPO Member can become a member of one or more Sector Groups.
- (2) For each Sector Group, all members of such Sector Group must declare whether they are a Provider Sector Group Member or a Customer Sector Group Member.

- (3) The decision of being a Provider Sector Group Member or a Customer Sector Group Member is independent from the membership status (provider or customer) within the General Assembly. For the avoidance of doubt: Within Sector Groups, a representative of a General Assembly Provider Member can be a Customer Sector Group Member.
- (4) Any Member having declared its adherence (through at least one of its services) to one of the SWIPO Codes in such sector must declare that it is a Provider Member within this Sector Group.

### **1.3.3 Composition of Sector Boards**

- (1) Each Sector Board shall be comprised of at least 6 members, equally representing Providers and Customers.
- (2) The Sector Board will elect two Co-Chairs, one Provider and one Customer, and other officers as appropriate, from the Sector Board members every two years through an open call process. Each member of a Sector Board shall be elected by the Sector Group through an open call process for a 2-year term by the Sector Group Members.
- (3) The Sector Group shall decide about the power of the Sector Board.

### **1.3.4 Procedures**

- (1) Unless explicitly stated otherwise, each Sector Group shall make decisions based on a simple majority vote.
- (2) Votes on Codes of Conduct will be by qualified majority as outlined in section 2.1.3 “Majorities, Quora and Balance of Interests for decisions within the bodies of SWIPO”.
- (3) Each Sector Board shall present its decisions and activities to the Executive Board and the General Assembly twice per year or whenever such a decision or activity may affect the general alignment of SWIPO.
- (4) The Sector Board shall record votes and decisions on the respective Sector Code and distribute them to the General Assembly.
- (5) The General Assembly has the right to initiate a review and revisit a decision of a Sector Board, and will do so no later than 10 business days after distribution of such decision if so requested by 10% of the SWIPO Members. If such a request is submitted, the GA must perform a vote on the matter within 20 business days. If no such request is submitted, the decision is considered to be approved by the General Assembly.
- (4) To keep administrative burdens minimal and ensure stability in the market, members of a Sector Group must not adopt an update to their Sector Code more than once every 12 months, except in urgent matters.

- (5) Sector Groups may create working groups to develop a Sector CoC and related deliverables. Only members of the Sector Group may send participants to these working groups.

### **1.3.5 Common Elements**

- (1) Any Sector CoC shall incorporate – either literally or by reference – any common provisions, including this governance section, approved by the General Assembly. Sector Boards shall adopt procedures to safeguard that any changes to common provisions are incorporated in due time.
- (2) If a Sector Group has not incorporated amendments in the Sector CoC of the aforementioned provisions accordingly, the Executive Board may decide appropriate actions.

## **1.4 Complaints Body**

SWIPO will ensure that an independent body is in place that will decide upon complaints related to infringements of SWIPO CoCs in a fair, unbiased and competent manner. The duties, rights, requirements and any other necessary details related this Complaints Body shall be defined in Annex 1 (Complaints and Appeals) of this SWIPO Common Governance. Annex 1 shall be an integral element of this SWIPO Common Governance.

## **1.5 Secretariat**

### **1.5.1 General**

- (1) The Executive Board is responsible for ensuring effective Secretariat functions. This function could be performed internally and/or sub-contracted.
- (2) The Executive Board or a contracted Secretariat shall handle all tasks of SWIPO which are relevant for the overall functioning of SWIPO, especially all core administrative matters such as hosting the General Assembly and supporting the General Assembly, or the Executive Body with the performance of their functions, including accounting and membership management. It may also maintain a Public Register and being first point of contact for Providers, Customers or any other interested party.
- (3) The Executive Board may determine further details what functions shall be performed by the Secretariat.
- (4) The Secretariat shall operate in a manner that is as efficient and lean as possible in order to reduce administrative costs to the overall SWIPO Membership.

### **1.5.2 Sector Secretariats**

- (1) For services and functions that are exclusively related to Sector Boards and Sector CoCs, a Sector Board may appoint, via contracts through the Executive Board, a dedicated Sector Secretariat, provided that the Sector Secretariat does not act or appear to act as if they are the Secretariat for the whole of SWIPO
- (2) Costs related to any Sector Secretariat shall be subject to sector specific provisions but not subject to the common SWIPO operating costs. The Executive Board or its Secretariat is responsible for the booking keeping of Sector Groups though may delegate to the Sector Secretariat Body.
- (3) The Executive Board, at the request of a Sector Board, may delegate functions to the Secretariat e.g. processing of declarations of adherence, if the Sector Board establishes an appropriate procedure to the satisfaction of the Executive Board that safeguards the following:
  - Sector Secretariat notifies the Secretariat in due time about any relevant changes;
  - Sector Secretariat performs functions with the same level of credibility and trust-enabling as the general Secretariat; especially if the processing of declarations of adherence is concerned; The Executive Board can revoke the delegation at any time.

## **2 Procedures**

### **2.1 Principles of procedures**

#### **2.1.1 Voting Rights**

- (1) Each Member shall have the voting rights or delegate the voting rights in the bodies it is a member of (the General Assembly for all Members, Sector Boards according to Membership and affiliation). Proxies are only allowed at physical meetings and good for one single meeting. An attending Member is limited to carrying up to 2 proxies, which must be communicated in writing to the Secretariat prior to the meeting.
- (2) In case of votes in a physical meeting, the agenda shall be announced at least one week in advance.

#### **2.1.2 Convening the bodies of SWIPO**

- (1) Members may participate either physically or remotely via electronic means or conference calls, whereas for latter all members shall always be able to hear each other and at the same time. Upon request of one third of the members or where the respective chair of that body deems it appropriate, members shall meet physically.
- (2) Each body may be convened by email sent with at least 14 days' prior notice – unless agreed otherwise by the rules of the respective body - and, including the agenda and purpose of the



meeting. A Member shall be deemed to have been notified if the notice is sent to the email address on record for the Member.

### **2.1.3 Majorities, Quora and Balance of Interests for decisions within the bodies of SWIPO**

#### **2.1.3.1 Quora**

Unless otherwise provided by this Common Governance, the required quorum for any meeting of any body of SWIPO shall be 50% of the respective members, and 1/3rd of Providers and 1/3rd of Customers.

#### **2.1.3.2 Majorities**

- (1) Unless otherwise provided by this Common Governance, each body's decisions shall only be validly taken with a majority of cast votes of all the members of the respective body, provided that two-thirds of the Customer Members and Providers voted.
- (2) Unless otherwise provided by this Common Governance, a qualified majority is two third of cast votes.
- (3) Abstentions shall count towards establishing a quorum, but shall neither positively nor negatively be counted as a vote.

#### **2.1.3.3 Unanimous decisions**

Each body may pass unanimous decisions in writing or hold a meeting without any prior formalities, provided that all Members of the respective body are present (either physically or remotely) and express their agreement; in case of a vote such agreement shall entail both the agreement to the call for vote and to the respective decision.

#### **2.1.3.4 Balance of Interests**

- (1) If, within any body of SWIPO and decision-making process, the potential number of votes related to Customers are less than the potential number of votes related to Providers by at least 15% - or vice versa, the general procedures laid down in this Common Governance shall not apply. Instead, the General Assembly shall develop and implement a mechanism that addresses the imbalance and balance issues accordingly and safeguards that a balance of interests is guaranteed, and one interests group will not be unreasonably overruled by the other.
- (2) The same applies within any body of SWIPO and decision-making process in case the votes related to one sector outnumbers the votes of other sectors by at least 15%.

#### **2.1.4 Amendments to SWIPO Common Governance**

- (1) This SWIPO Common Governance must be approved by the General Assembly. Sector Groups may enhance their governance procedures provided such additions do not contradict these statutes. In the unlikely event of an inconsistency between the SWIPO Common Governance and Sector Groups governance procedures, the SWIPO Common Governance shall prevail.
- (2) Amending the SWIPO Common Governance shall be by qualified majority.

### **2.2 Additional Rules of Procedure**

- (1) Any body of SWIPO may adopt rules of procedure to address the specific needs of such body and to keep the performance of dedicated functions as efficient as possible provided they do not contradict the SWIPO Common Governance.
- (2) Rules of procedure must not adversely deviate from relevant provisions and must not undermine the principles of SWIPO as provided by the SWIPO Common Governance and any other applicable common documents. The Executive Board shall determine both the provisions that are considered to be relevant against this background and the principles that must not be undermined.

### **2.3 Review and approval of a Code of Conduct**

Before proceeding to a final approval, a Sector Group must conduct a public review period that shall last at least 60 days and must address the comments.

## **3 Membership General Assembly**

### **3.1 Eligible Members**

- (1) With its application a Member shall acknowledge and accept the principles of SWIPO and any legitimate changes thereof, and agrees to abide by SWIPO governance documents, procedures and policies.
- (2) With its application a Member shall support the principles, further development and positive attribution in the public that SWIPO creates and strives for.
- (3) Members must not use mere membership in SWIPO in any external communication in a way that is likely to create an improper impression that such Member is compliant with the substantive provisions of any Sector CoC.

## 3.2 General

- (1) After joining SWIPO, a Provider becomes Provider Member of the General Assembly (“**Provider Member**”); a Customer becomes Customer Member of the General Assembly (“**Customer Member**”), accordingly.
- (2) A Member can join, and subsequently leave, a Sector Group at any time upon written notice to the Sector Board.

## 3.3 Automatic Removal of membership

Any member shall have their membership of SWIPO removed under the following circumstances:

- (1) Failure to pay outstanding dues, 60 days after the last payment fell due. Two reminders shall be sent to the member by the Secretariat to give warning.
- (2) Failure to participate in meetings, for a consecutive period of six months. Members attending any SWIPO meeting, sending an alternate, or providing a proxy to another member are deemed to have participated for the purpose of this rule.

Memberships which are lost due to these reasons can be automatically restored by payment of any outstanding fees and following the normal joining process.

# 4 Declaration of Adherence and Complaints

## 4.1 Declaration of Adherence

### 4.1.1 Eligibility and Confirmation of Compliance

- (3) Any Provider, whether a Member of SWIPO or not, may declare one or more services as adhering to a Sector Code in accordance with the procedure at 4.1.2 below.
- (4) Providers, which declare services adherent, confirm to be fully compliant with all provisions of the applicable Sector Code. Fees may be charged to declare adherence, which may differ based on being a Member of SWIPO or not.

### 4.1.2 Declaring a Service Adherent

- (1) Any declaration of adherence shall be submitted to the relevant Secretariat through the template as provided and published by the appropriate Sector Board, from time to time. Any such template shall entail at least the following information:
  - Legal name of the Provider
  - full name of the declared service
  - which Sector CoC the declared service adheres to

- a binding declaration of conformity of the Provider that the declared service is fully compliant with all provisions laid down in the respective Sector CoC the service is declared adherent to by the submitted declaration of adherence.
- (2) The relevant Secretariat shall process submitted declarations of adherence according to the applicable procedures. Any such procedures shall entail at least the following:
- plausibility verification process regarding the provided information (legal name of the Provider, declared service, applicable Sector CoC);
  - documentation of the provided information and the performed verification process;
  - enlisting of the declared services in a Public Register.
- (3) A Public Register shall provide interested parties with a sufficient level of transparency. The information necessary for that purpose shall be determined by the applicable procedures. A Public Register shall provide at least the following information:
- Name of the service adherent
  - legal Name of the Provider
  - day of declaration of adherence
  - date of expiration
- (4) Providers shall inform the relevant Secretariat about changes to their service that have been declared adherent that may relate to the provisions of any applicable Sector CoC the service has been declared adherent to. Where such changes have been material, the Provider shall submit an updated declaration of adherence for the service concerned.
- (5) A declaration of adherence is valid for not more than 36 months.
- (6) Any new declaration of adherence may only be done against the latest version of a Sector Code: but older declarations of adherence against prior versions will still be valid as declarations against the prior version, within their 36 months validity period.

## **4.2 Appeals**

SWIPO shall establish a process to address appeals in connection with an action or inaction related to this SWIPO Common Governance and related documents. Within this process, fair, neutral and competent decisions shall be ensured at any time. Further details related to this appeals-process shall be defined in Annex 1 (Complaints and Appeals) of this SWIPO Common Governance. Annex 1 shall be an integral element of this SWIPO Common Governance.

## **5 Evaluation**

The SWIPO CoCs and their governance structure shall be evaluated 24 months after the launch of the first Sector CoC under these principles. The evaluation may focus on:

- the impact of these principles regarding the levels of interest of Customers and Providers for Sector Codes;
- the efficiency of the structure and potential obstacles for non-members to join them;
- the complaints raised to Complaints Committees

Based on the outcome of an evaluation, the Executive Board could consider the necessity of implementing a more elaborate check of compliance for services that are declared adherent before such services are enlisted in Sector CoC Public register(s), as well as the necessity of a constant monitoring of compliance – e.g. based on samples – and/or adjusting the list of applicable sanctions and remedies that can be imposed by the Complaints Body. Such considerations could be further developed by a Working Group and submitted to Sector CoC members to be approved.