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Open Data and Intellectual Property Rights

9 December 2021



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Agenda and introduction

Planning

- 14:00 – 14:05 Welcome and introduction to the topics
- 14:05 – 14:30 Presentation and discussion of changes brought by the Open Data Directive
- 14:30 – 15:00 Presentation and discussion on the shift from static data sharing to Data-as-a-Service
- 15:00 – 15:10 Coffee break
- 15:10 – 16:00 Panel discussion session with Annette Hillebrand (WIK) Ton Zijlstra (Geonovum)

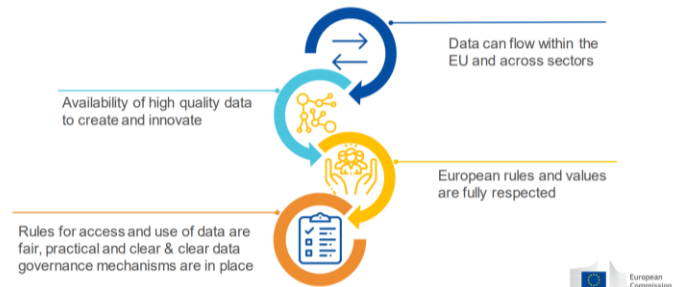
- Slides will be made available to you
- Background discussion/reflection document - https://data.europa.eu/sites/default/files/report/intellectual_property_rights_report.pdf

General context for today's training session

- Landslide changes in the market – XaaS, more data, and better data
- Landslide changes in European data policies and legislation

European Strategy for Data

A common European data space, a single market for data



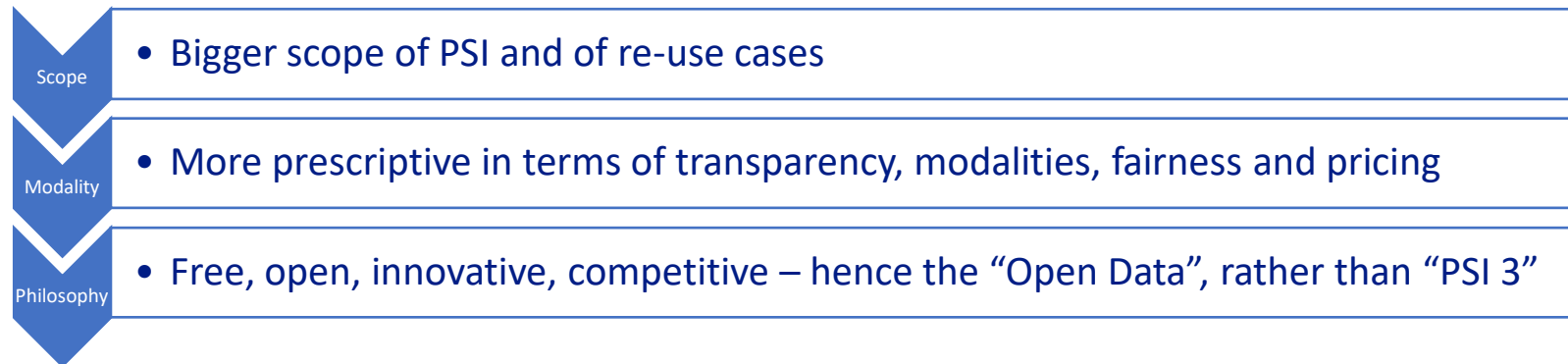
- General shift: data sharing is beneficial, and should be efficient, dynamic, fair, and conducive to innovation
- How does this affect intellectual property rights in data sharing?

The Open Data Directive

PSI for today's data economy

Historically...

- Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information
- Recast and modernization of prior PSI Directives (Older PSI Directive 2003/98/EC, amended by Directive 2013/37/EU)
- General trends:



- Open Data Directive was to be implemented by 16 July 2022

Main Innovations of the Open Data Directive (I)

- **List of High Value Datasets**

- “Documents the re-use of which is associated with important benefits for society, the environment and the economy”
- To be laid down in an implementing act, within a thematic range indicated in an Annex (which can be extended via delegated acts): Geospatial, Earth observation and environment, Meteorological, Statistics, Companies and company ownership, Mobility
- Examples:
 - Postcodes, and national and local maps (Geospatial);
 - Energy consumption and satellite images (Earth observation and environment);
 - In situ data from instruments and weather forecasts (Meteorological);
 - Demographic and economic indicators (Statistics);
 - Business registers and registration identifiers (Companies and company ownership); and
 - Road signs and inland waterways (Mobility)
- Free of charge, disseminated in machine readable formats through APIs; and where relevant as a bulk download
- Exceptions:
 - Commission may exempt specific high-value datasets held by public undertakings if the re-use distorts competition
 - High-value datasets in the possession of libraries, university libraries, museums and archives need not be free.
 - Exemption from the free requirement up to two years if the dissemination would impact their budget

Main Innovations of the Open Data Directive (II)

- **Extension of scope:**
 - Also documents in which libraries, including university libraries, museums and archives hold intellectual property rights; and documents held by public undertakings (under public sector control, in certain sectors such as water, energy, transport, rail and air carriers, and postal services)
 - Research data resulting from public funding – Member States must implement “open access policies”, integrating “open by default” and FAIR principles
- **New rules on charging:**
 - Free re-use (not marginal cost) becomes a principle
 - Marginal costs for reproduction, provision and dissemination of documents as well as for anonymisation and protection of commercially confidential information may be allowed.
 - Narrow exceptions (requirement to generate revenue; libraries, including university libraries, museums and archives; and public undertakings)

Main Innovations of the Open Data Directive (III)

- **Real-time data and APIs:** obligation on public sector bodies and public undertakings to make dynamic data available for re-use immediately after collection, via suitable APIs, and where relevant as a bulk download
 - ‘dynamic data’ means documents in a digital form, subject to frequent or real-time updates, in particular because of their volatility or rapid obsolescence; data generated by sensors are typically considered to be dynamic data;
- **Licensing:** Member States shall encourage standard licences (where licences are used) to promote openness. Re-use of documents shall not be subject to any conditions, unless justified by public interest
- **Practical arrangements** to facilitate re-use: Member States shall facilitate the search for documents available for re-use, such as asset lists with relevant metadata, accessible where possible and appropriate online and in machine-readable format, and portal sites that are linked to the asset lists.

Implementation in practice

- Overview of national implementations: see <https://digital-strategy.ec.europa.eu/en/policies/public-sector-information-directive>
 - 12 Member States have adopted specific PSI re-use measures
 - 3 Member States have used a combination of new measures specifically addressing re-use and legislation predating the Directive
 - 12 Member States have adapted their legislative framework for access to documents to include re-use of PSI
- But on 30 September: infringement procedures against 19 Member States for failure to notify
(https://ec.europa.eu/commission/presscorner/detail/en/mex_21_4962)

Relation to intellectual property rights

- No exemptions or amendments!
 - “The intellectual property rights of third parties are not affected by this Directive”
 - Not applicable to “documents for which third parties hold intellectual property rights”
- But clear impact on licensing practices and modalities: push towards openness, greater scope, fairness and flexibility

From static sharing to APIs

The shift to data as a service

XaaS and data as a service

The market pitch...

Buy a media carrier!

Buy a download!

Buy a service!

The legal model...

Ownership

Licence

Subscription

Dynamic data and APIs making their way into legislation

- **Public Sector Information, via the 2019 Open Data Directive**
 - Dynamic data access and APIs
 - Emphasis on high value datasets
- **Banking, via the 2015 Payment Services Directive 2**
 - Account data through APIs to third party payment service providers and account information service providers (with the consent of the account holder)
- **Energy, via the (2018 update of the) 2012 Directive on Energy efficiency**
 - Mandates the use of intelligent metering systems (e.g. smart meters) to enhance energy saving and support the development of energy networks (smart grids).
- **Automotive, via the (2019 update of the) 2007 Regulation on access to vehicle repair and maintenance information**
 - Access to independent operators, in a non-discriminatory manner compared to the access granted to authorised dealers and repairers.
- **Not all about APIs, but all about dynamic data access**

Is a subscription a licence? Do APIs require licences?

- Firstly: IPRs were not always critical to begin with:
 - Copyright requires originality – a low bar, but still a bar
 - Database rights require qualitatively and/or quantitatively substantial investment
 - 2004 rulings from the EU Court of Justice: not for databases that are the by-products of the main activity of an organization
 - So public sector database rights are generally rare
 - Other IPRs (patents, trademarks, trade secrets, ...) are less impactful in practice
- Terms of service are a licence too, in a way
 - 2015 case - Ryanair v PR Aviation: no IPR, but still infringement of T&Cs
 - So, « write your own laws »?
 - But IPRs can help openness too: 2012 UsedSoft GmbH v Oracle International Corp. ruling: you can sell copyright licences. Can you “sell” T&C rights? Not likely...

Are APIs better than licences from an IPR perspective?

- As lawyers say: “It depends”
- APIs are more conducive to establishing ecosystems
 - Governance and consultation become more important
- APIs don’t depend on IPRs
 - But the Open Data Directive continues to apply
- There is some homework for subscriptions
 - IPR claims and licenses
 - Usage constraints and innovations (including third party – AI, for instance)
 - SLAs
 - Availability, retention, and continued usage of historical data

Panel Discussion

Panellists

- **Annette Hillebrand (WIK)**
 - Expert advisor with WIK for 25 years
 - Worked on studies around the Free Flow of Data and PSI for the Commission
 - Recently focussing on local governments and digitisation: digitization strategies including e-government, open data, smart city initiatives
- **Ton Zijlstra (Geonovum)**
 - Secretary to the Dutch government tactical council on the EU digital and data strategies
 - Geonovum is the knowledge institute for Dutch data holders relating to INSPIRE, data governance and standardisation.
 - Implementation, impact and opportunities for the new EU legal framework around digitalisation, AI and data.

Feedback?

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Thank you very much!

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