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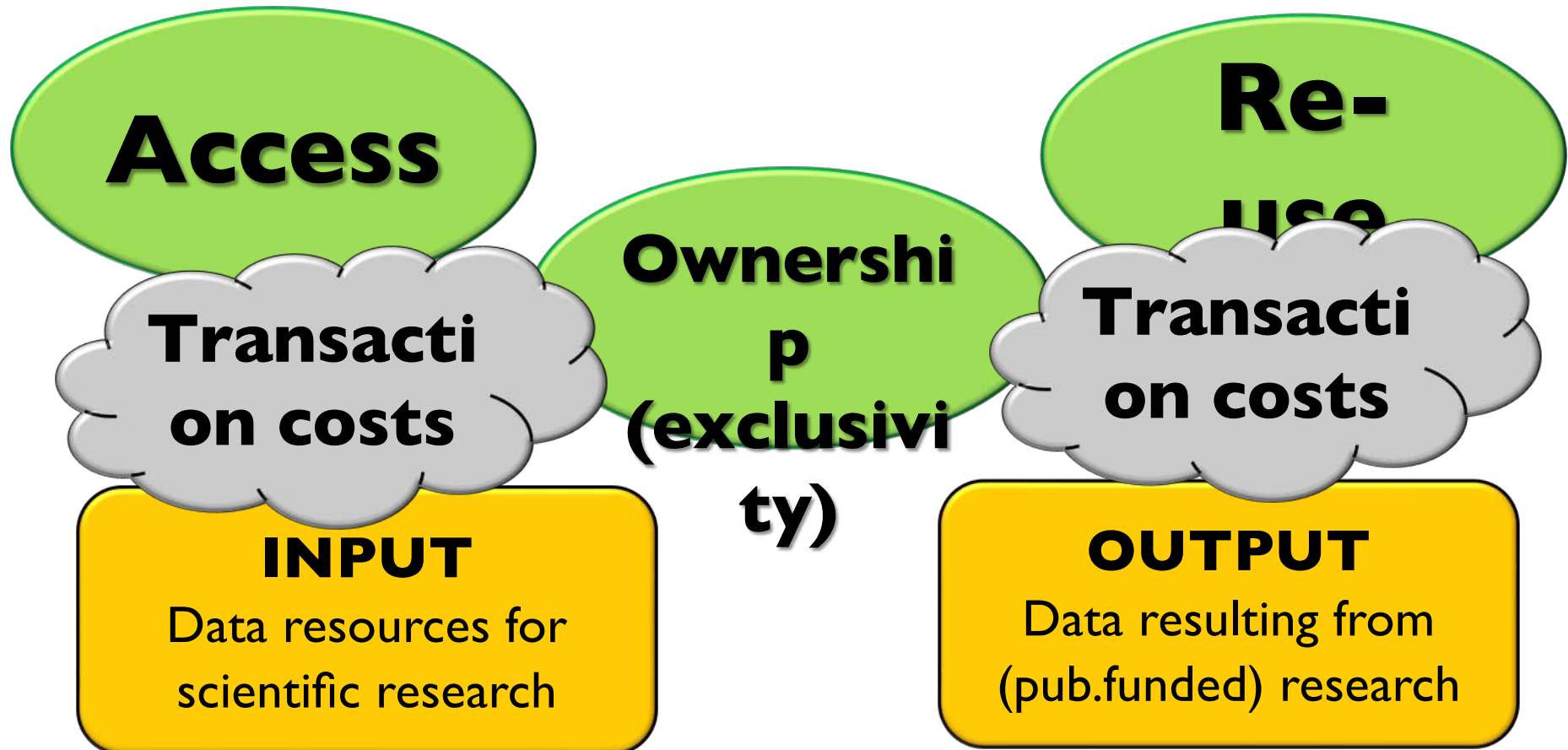
THE UNSOLVED *LIAISONS* *DANGEREUSES* BETWEEN THE EU IP ACQUIS AND THE DATA PACKAGE

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biomedica» - Università di Trento, 28 Ottobre 2022



IP and research data



What is «data» ?

Art. 2(1) DGA, Art. 2(1) Data Act Proposal

Any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audio-visual recording

→ Beyond RAW data!



Our roadmap (and timeline)

Past

IP and (scientific) data before the Data Package

Present

The Data Package: a brief overview

Future

Missing bits and the road ahead



The past

IP AND (SCIENTIFIC) DATA BEFORE THE DATA PACKAGE



The sources at stake

- Database Directive (96/9/EC)
- InfoSoc Directive (2001/29/EC)
- From the PSI (2013/37/EU) to the Open Data Directive (2019/1024/EU)
- Trade Secret Directive (2016/943/EU)
- CDSM Directive (790/2019/EU)



The Database Directive (96/9/EC)

Exclusive rights	Exceptions
Art. 5 – Copyright <ul style="list-style-type: none">- Based on originality of expression- Temporary or permanent reproduction- Translation, adaptation, arrangement, alteration- Distribution- Communication to the public	Art. 6 <ul style="list-style-type: none">- Any use necessary for purpose by lawful user- Reproduction for private purposes of non-electronic DB- Illustration for teaching or sci-research- Purposes of public security or admin/judicial procedures- Any other copyright exception
Art. 7 – Sui generis right <ul style="list-style-type: none">- qualitatively/quantitatively substantial investment- Extraction and re-utilization (distribution, rental, transmission, NO lending) of whole or substantial part	Art.8 – lawful users / insubstantial parts, any purpose Art. 9 – lawful users / substantial parts <ul style="list-style-type: none">- Private purposes, non-electronic DB- Illustration for teaching or sci-research- Purposes of public security or admin/judicial procedures



The InfoSoc Directive (2001/29/EC)

- **No specification on boundaries of protected works**
 - Only from CJEU's case law we can derive exclusion of data, facts, news etc, in line with Berne Convention
 - See *Infopaq*, *Levola*, *Brompton*
- **Article 5(3)(a) – permits**
 - reproduction and communication/making available to the public
 - for uses for the sole purpose of illustration for teaching or scientific research, as long as the source (...) is indicated (...) and to the extent justified by the non-commercial purpose to be achieved



From PSID 1&2...

- **First PSI → 2003/98/EC**
 - Institutional/task-oriented approach to determine whether information was subject to re-use
 - Documents held by public universities excluded from PSI 2003
- **Second PSI → 2013/37/EU**
 - University libraries included in scope, cultural establishments excluded (excepts for public GLAMs)
 - To allow re-use is mandatory for PSBs, but optional for GLAMs
 - Exclusion of materials protected by third-party IPRs, BUT! If IPRs of GLAMs → still re-use



... to the Open Data Directive

- EC adopted proposal to revise PSI Directive (2013/37/EU) in April 2018 within package to create common EU data space
- Proposal aimed to overcome barriers preventing full re-use of PSI, such as
 - **Lack of coverage of data generated by utilities and transport sector, having great re-use potential, and research data from public funding**
 - Charge for reuse of PSI beyond what is needed to cover reproduction and dissemination costs
 - Lack of real-time access to dynamic data held by PS bodies
 - Agreement PS-private sector to gain \$\$\$, causing lock-in of PSI in favor of big companies



Directive 2019/1024 (ODD): subject matter

Directive (EU) 2019/1024 on open data and the re-use of public sector information

- existing documents held by **PSBs**
- existing documents held by **public undertakings** that are (...)
- acting as Community shipowners fulfilling public service obligations pursuant to Article 4 of Regulation (EEC) No 3577/92;
- **research data** pursuant to the conditions set out in **Article 10**



Exemptions

PSI exemption for edu and research establishments split in two

- Docs held by educational establishments still exempt but not if higher education
- Docs from higher education, research performing/funding organizations and TTOs still exempt BUT NOT research data

Other exemptions

- a) Docs the supply of which falls outside scope of PSB's tasks
- b) Docs held by public undertakings produced (i) outside services in general interest OR (ii) in activities exposed to competition (no pub.procurement)



Exemptions (ii)

Other exemptions (cont)

c) Docs on which 3rd parties hold IPRS

- d) Docs excluded from access (eg sensitive data, national security, statistical or commercial confidentiality)
- e) Docs excluded from access for sensitive infrastructure protection, data/individual protection, or having special access regimes
- f) Docs held by PS broadcasters, cultural establishments other than libraries



Research data under Article 10 ODD

- **NOT ALL are subject to reuse**
 - Only if publicly funded and already publicly available through institutional or subject-based repositories
- **As open as possible, as closed as necessary (for PD, IPRs, confidentiality, security, reasonable commercial interest)**
- **Non-discrimination** in conditions for re-use
- **No exclusive arrangements** between private and public actors **(not applicable to digitization of CH)**
 - If necessary, review every 3 years
 - If digitization of CH, no longer than 10y, review at 11th and every 7y → and public body should be provided with free copy of digitized resources
 - Same treatment for non-exclusive agreement that still restricts re-use



Request and conditions for reuse

- Request processed in 20 working days; refusal explained + appeal
- Data available in **open, machine-readable, accessible, findable and re-usable format**, together with **metadata**, possibly in **open standards**
- Free of charge (only marginal cost), except for GLAM and PSB/undertakings required to generate revenue (but max ROI)
 - Calculation criteria should be transparent, pre-established, published
- Re-use NOT subject to condition
 - unless objective, proportionate, necessary, non-discriminatory, justified on grounds of pub.int.) and not be used to restrict competition



Obligations of Member States

- Make practical arrangements to facilitate search of docs available for re-use and cross-linguistic search
- Make effort to simplify access to datasets
- Single point of access, accessible formats, readily findable and reusable by electronic means
- **Support availability of research data by adopting policies and action aiming at making publicly funded research data openly available**
- Open access policies following principles of open by default
- Compatible with F-A-I-R principles



High-value datasets (Annex 1)

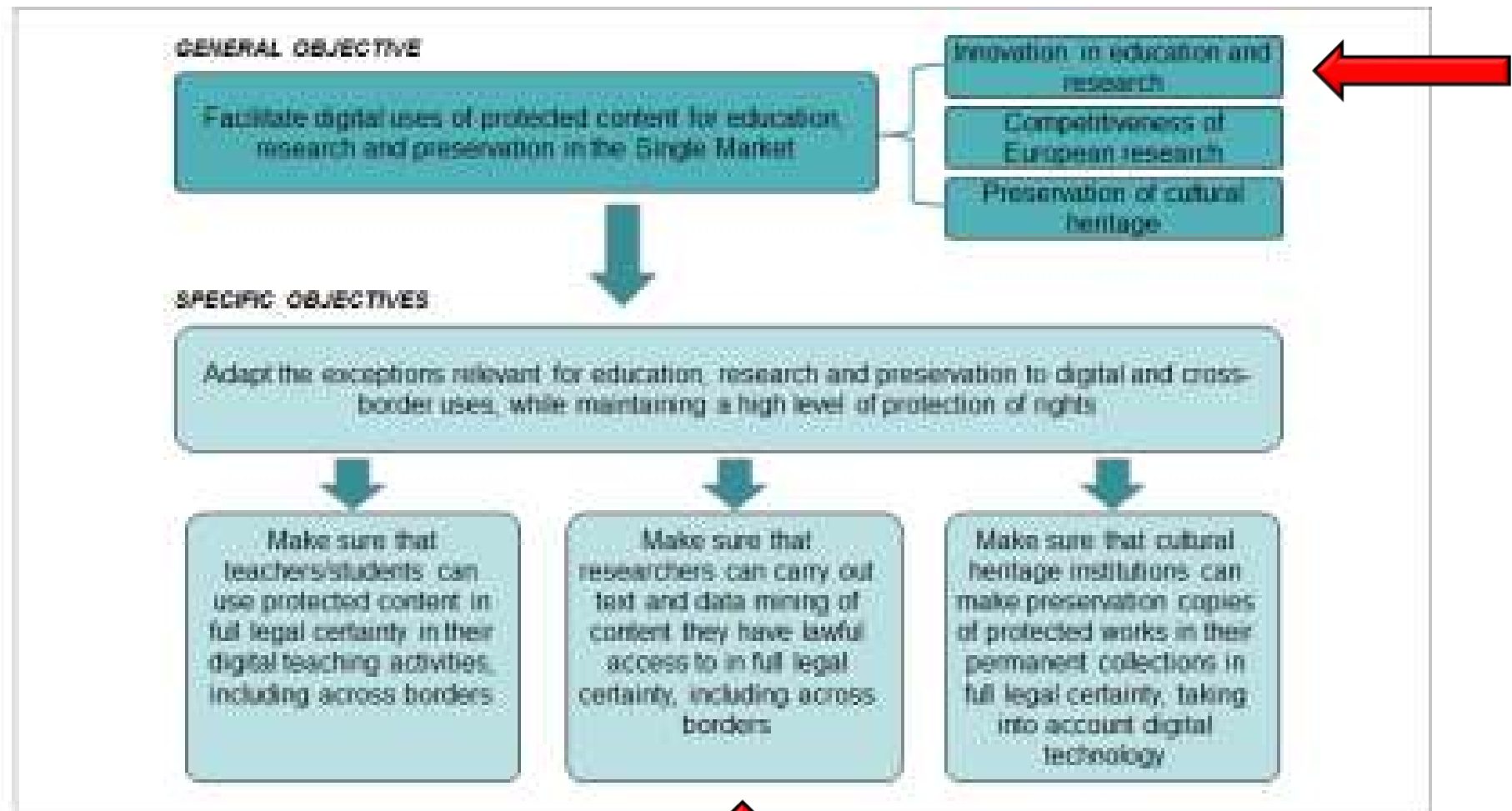
- Identification of datasets based on assessment of their potential to
 - Generate significant socioeconomic or environmental benefits and innovative services
 - Benefit a high number of users, particularly SMEs
 - Assist in generating revenues
 - Be combined with other datasets
- NO free availability if distortion of competition in relevant markets
- Geospatial, earth observation and environment, meteorological, statistics, companies and company ownership, mobility → EC can broaden list
- Arrangements to include terms applicable to re-use, formats of data and metadata, tech arrangements for dissemination
- Datasets should be (i) free of \$, (ii) machine-readable, (iii) provided via APIs and (iv) via bulk download



Trade Secret Directive (2016/943/EU)

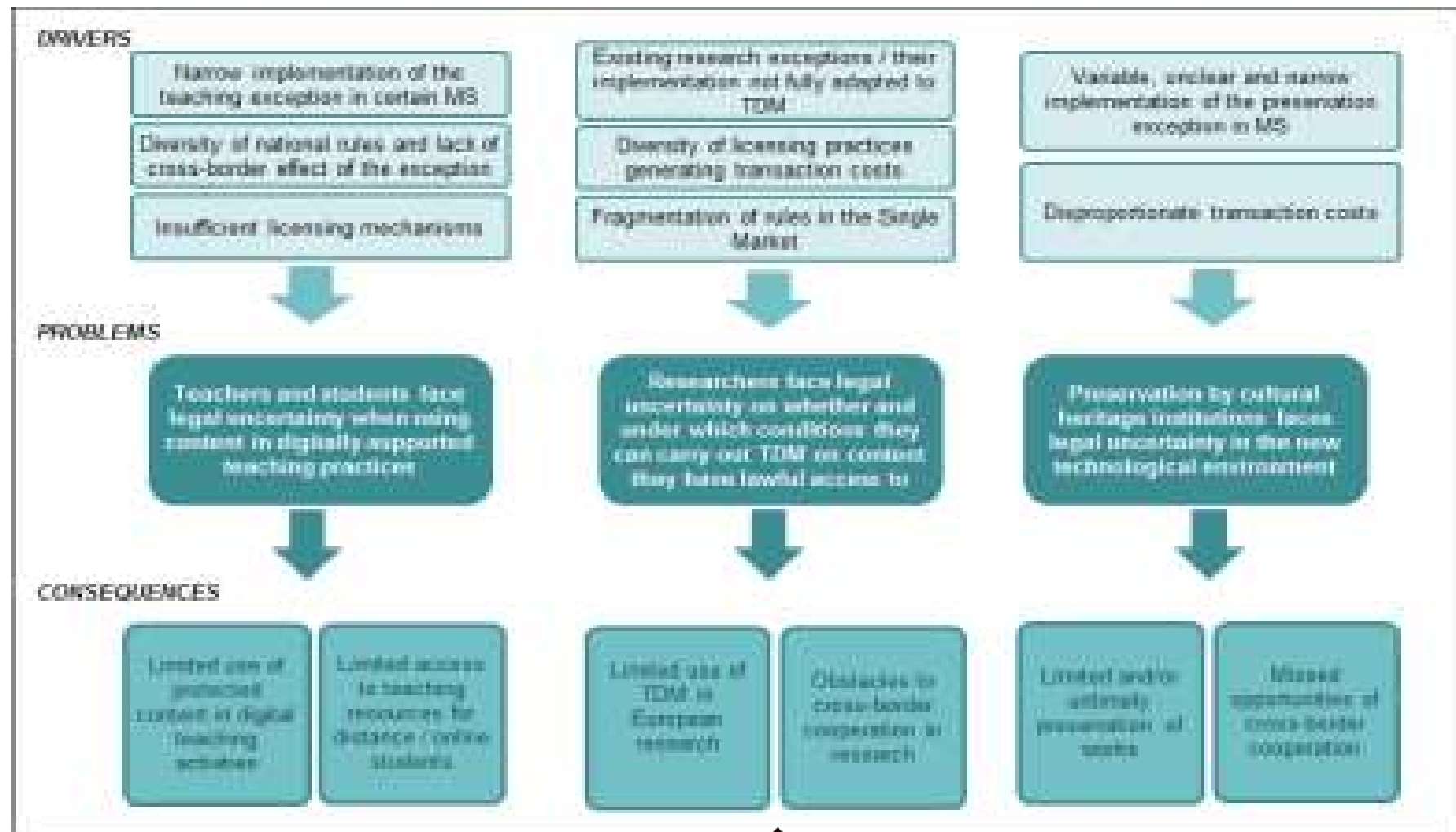
- May cover also data corpora if requirements are satisfied
- Exceptions do not cover public research interest (see arts 1(2) and 5
 - Exercise of right to freedom of expression and information under CFREU (including respect for freedom and pluralism of media)
 - Revealing misconduct, wrongdoing or illegal activity → if to protect general public interest
 - Disclosure by workers to representatives as part legitimate exercise of their functions
 - Protection of legitimate interest recognized by law





From *Impact Assessment on the modernization of EU copyright rules*, SWD(2016) 301 final, p. 82





From *Impact Assessment on the modernization of copyright rules*, SWD(2016) 301 final, p. 83



Art 3 – “Text and data mining for the purpose of scientific research”

1. Member States **shall provide for an exception** to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, and Article 15(1) of this Directive for **reproductions and extractions** made by **research organisations and cultural heritage institutions** in order to carry out, for **the purposes of scientific research**, text and data mining of works or other subject matter to which they have **lawful access**.
2. Copies of works or other subject matter made in compliance with paragraph 1 shall be **stored with an appropriate level of security** and **may be retained** for the purposes of **scientific research**, including for the **verification** of research results.



Art 3 – “Text and data mining for the purpose of scientific research” (ii)

3. Rightholders shall be allowed to **apply measures to ensure the security and integrity** of the networks and databases where the works or other subject matter are hosted. Such measures shall not go beyond what is necessary to achieve that objective.
4. Member States shall encourage rightholders, research organisations and cultural heritage institutions to define **commonly agreed best practices** concerning the application of the obligation and of the measures referred to in paragraphs 2 and 3 respectively.



Art 4 – “Exception or limitation for text and data mining”

1. Member States shall provide for an exception or limitation to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, Article 4(1)(a) and (b) of Directive 2009/24/EC and Article 15(1) of this Directive for **reproductions and extractions of lawfully accessible works** and other subject matter for the purposes of text and data mining.
2. Reproductions and extractions made pursuant to paragraph 1 may **be retained for as long as is necessary** for the purposes of text and data mining.



Art 4 – “Exception or limitation for text and data mining” (ii)

3. The exception or limitation provided for in paragraph 1 shall apply on condition that the use of works and other subject matter referred to in that paragraph **has not been expressly reserved by their rightholders in an appropriate manner**, such as machine-readable means in the case of content made publicly available online.
4. This Article **shall not affect the application of Article 3** of this Directive.





- Clear(er) legal framework
- Harmonized approach in the DSM
- Decreased burden for research institutions
- Public-private partnerships covered (Recital 11)



- Implies that TDM is of relevance to copyright
 - Only reproduction and extraction would have required authorization
- Beneficiaries limitation → what about SMEs?
- Difficult demarcation btw Arts 3 and 4
- Role model effect and fragmentation of regulatory solution in big data economy
- What if no lawful access?



The present

THE DATA PACKAGE: A BRIEF OVERVIEW



The European Strategy for data at a glance



The **European Strategy for data** (2020) aims to make the EU a leader in a data-driven society.



The **Data Governance Act** (2020) facilitates data sharing across sectors and Member States.



The **Data Act** (2022) clarifies who can create value from data.



Ten **European common data spaces**, ranging from industry to mobility, from European Green Deal to energy and health.



Data Governance Act (DGA, Regulation (EU) 2022/868): main pillars

- I. Subject matter and definitions
- II. Mechanism for re-use of PS data conditional on respect of rights of others**
- III. Notification regime for data intermediation services
- IV. Data altruism
- V. Requirements for competent authorities
- VI. European Data Innovation Board
- VII. Miscellaneous



DGA: subject matter and scope

- Regulation laying down
 - Conditions for re-use in EU of certain categories of data held by public sector bodies
 - Notification and supervisory framework for provision of data intermediation services
 - Framework for voluntary registration of entities which collect and process data made available for altruistic purposes
 - Framework establishing a European Data Innovation Board
- No creation of obligation on PS bodies to allow re-use, nor releasing them from confidentiality obligations



Re-use of data held by PS bodies

- **Categories of data covered (art.3(1)) → protected on grounds to**
 - Commercial confidentiality (including business, professional and company secrets)
 - Statistical confidentiality
 - Protection of IP rights of third parties
 - Protection of PD if they fall outside GDPR
- **Categories of data NOT covered (art.3(2)) → data held by**
 - Public undertakings, public service broadcasters/subsidiaries et al
 - Cultural and educational establishments
 - Public sector bodies protected for reasons of public security, defense, national sec.

• Data coming from activities falling outside scope of public task of PS bodies

The EU IP framework and the Data Package

Caterina Sganga



Conditions for reuse

- Non-discriminatory, transparent, proportionate, objectively justified in light of categories/nature of data and purposes of re-use, NOT restricting competition
- PSB must ensure that protected nature of data is preserved, e.g. by
 - Anonymizing PD, modifying, aggregating confidential info, including TS and IP-covered content
 - Providing or controlling secure processing environment for remote or within-premises access and re-use
 - Imposing confidentiality requirements on re-users
 - Ensuring that re-use is compliant with IPRs



Conditions for re-use (cont)

- PSB must ensure that protected nature of data is preserved, by
 - Reserving rights to verify process, means, results of data processing by re-users
 - Prohibiting use of results containing info that jeopardize third-party's rights
 - Preventing re-identification of data subjects and notifying data breaches
- If re-use of data cannot be granted → PSB to **put best efforts** to assist re-users to seek consent/permission
- Sui generis right of database maker CANNOT be exercised by PSB to prevent or restrict re-use of such data



Re-use of data held by PS bodies

- **Fees (art.6)**
 - Transparent, non-discriminatory, proportionate, objectively justified, NOT restricting competition, also payable online
 - **Incentives and discounts can be provided for non-commercial purposes (scientific, SME, start-ups, according to State-aid rules)**
 - Limited to costs for reproduction/dissemination, maintenance of secure processing environment, rights clearance, anonymization, assistance of re-users for consent/permission



Data altruism

Voluntary sharing of data on the **basis of the consent of data subjects to process personal data** pertaining to them, or **permissions of data holders to allow the use of their non-personal data** without seeking or receiving a reward that goes beyond compensation (...) for **objectives of general interest** (healthcare, climate change, mobility, statistics, public services, public policy making or scientific research purposes)

- **National policies for DA** to assist data subjects in making PD held by PSB available and set info to be provided to DB on re-use
- **Public registers** of recognized data altruism organisations
- Not for profit, in general interest, independent
- Transparency requirements
- Purpose limitation, information to data subjects, easy withdrawal



Data intermediation services

*Service which aims to establish comm R for the purposes of data sharing between an **undetermined number of data subjects and data holders on the one hand and data users on the other**, through technical, legal or other means, including for the purpose of exercising the rights of DS in relation to personal data*

- Several exclusions (enriched data sold w/o intermediation, intermediation of copyright content, IoT connected services, PSB data sharing services etc.)
- Subject to conditions and notification to competent authority to start services (info obligations, certification logo, EU registry)
- Providers ensure security, fraud prevention, information



DGA and research data?

- DGA does not distinguish between research/non-research data
- RPOs could be buyers/sellers via data intermediation services, not likely
- Data altruism has as major driver enabling research use of data
- RPOs and RFOs could benefit from re-use of public data for scientific research → specific reference in Recital 2 (PSB to adopt standardized tech under FAIR principles)
- Universities subject to DGA obligations as data holders
 - Data held by educational branch and library (cultural establishment) seem exempted under Art 3(2)



Proposal for Data Act

- Most cloud- and **private- oriented** Regulation, focusing on access right and corresponding obligations in private sphere
- **Elements relevant for research data**
 - Access obligation imposed on businesses in case of exceptional public interest needs
 - Access to certain IoT data for users of connected products
 - Clarification of IP status of IoT data
 - FRAND licensing for data accesses, with special protection for SMEs
 - Switching of cloud services and data portability
 - Interoperability for data spaces



Proposal for Data Act

- **Access obligations imposed to business for exceptional need in public interests**
 - Two limitations: must be public emergency or clear lack of data preventing PSB from exercising its public interest tasks
 - PSB can share data with other PSB or RPO (data NOT subject to ODD)
- **Product user access to IoT data and ownership**
 - Users given right to access and share data generated by their IoT devices
 - Access by design or duty of delivery upon simple e-request
 - User can share data with third parties but NO for competing products
 - **Article 35 → no sui generis database rights on DB containing data generated by IoT devices**



Proposal for Data Act

- **FRAND terms for access licenses**
 - Data holder cannot contract around data access provisions vs data recipient
 - Obligation to provide access does not force DH to divulge trade secrets
- **Facilitating cloud switching**
 - Specific obligations for data processing services, esp. interoperability
- **Interoperability Data Space**



DAP and research data

No real focus on research and science, but 6 elements relevant

1. IoT and exceptional need data will typically not be research data, but can become so when put to research purpose
2. Similar complication on exceptional need for data to which researchers have access for they are assisting a PSB → which body governs, DA, DGA, ODD?
3. When data are both IoT and research → which law prevails to developing licensing scheme?
4. An RPO will not be in position to demand access under Arts 14-15 DAP → not responsible to tackle emergency
5. Which types of licensing models? Do we need standardization and interoperability?
6. ODD (open research) not applicable on data sharing mechanisms under DGA and Da



The future

MISSING BITS AND THE ROAD AHEAD



Missing elements before the Data Package

- **In EU COPYRIGHT LAW**

- InfoSoc research exception is too narrow (art.5(3)(a) “illustration”?; non-profit nature) and overridable by contract
- Implementation heavily fragmented – legal uncertainty
- Scope of database protection remains uncertain
- No coordination between database and copyright exceptions
 - Most striking: art.5(3)(a) InfoSoc covers reproduction and communication to the public, art.6(3) DBD covers all uses by a lawful user of a DB, art.9(b) DBD covers only extraction and not re-use → **this hinders data sharing (based on how we interpret notion of public)**
- TDM exception still limited



Missing elements before the Data Package

- **In EU DATA LAW**

- ODD remains key instrument for sharing research data but presents a number of shortcomings
 - No application on data covered by 3rd party IPRs
 - Ambiguity on nature of research data as opposed to other PSI
 - Ambiguity as to which entities are responsible for permitting re-use with regard to research data
 - Unclear when research data are considered publicly available and thus subject to re-use obligations
 - Public funding criterion and the role of the private sector



Data Package: steps forward and gaps

- Keeping machine-generated raw data outside scope of sui generis right (Art.35 DAP)
 - But: does this apply always or only in the context of rights of data access and data sharing under Arts.4-5 DAP?
 - Raw data may still be subject to TS, contractual obligations etc
- Broadening opportunities of re-use of research data also in case of presence of third-party IPRS (Art.3 DGA)
- If research institutions are PSBs, access right but confined to specific emergency situations
 - Also PSBs may share data obtained from private entities to third parties → but limited to exceptional needs (art.21(1) DAP based on art.14(1) DAP) → also here scope quite narrow



Data Package: steps forward and gaps

- Granting right to access data to users and the possibility to share it with a third party (art.5(1) DAP) → also researchers
- No holistic intervention on subject-matter scope of sui generis database protection in DAP
- No holistic intervention on L&Es of Database Directive
 - Gaps on research exception for sui generis right remain
 - Lack of coordination with general copyright exceptions remain



What is yet to be done

- Need for a **general, mandatory, not overridable research exception** in EU copyright and database law with detailed content
 - Learn from shortcomings in arts.3-4 CDSM (see below)
- **Rethink TDM exception** for collaborative/mixed research
 - Too restrictive notions of “lawful access”, PPP and non-profit nature
 - No making available but just reproduction
- **Courts to take into account special purpose of scientific research** when determining the scope of database protection (as in *Innoweb* and *CV Latvia*)
 - Sci research does not substitute demand for primary DB (not vs investment)
 - **BUT!** (i) This does not work for DB made for academic use and (ii) legal uncertainty anyway → **need for legislation**



What is yet to be done

- Need to formally introduce right to data access for purposes of scientific research (art.5(1), 14(1) and 21(1) DAp are not enough)
- Clarify key aspects of ODD, DGA and DAp that are relevant for RPOs, research activities and research data sharing, i.e.
 - How the university and its different constituent parts are subject to the ODD and to the DGA
 - Who are the primary addressees of obligation to make certain research data available for re-use in the ODD
 - When research data should be made available for re-use in repositories
 - What is the relationship between ODD, DGA and DAp with respect to data obtained by PSB under exceptional need provisions





Thank you for your attention!

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