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Does Commercial Use of e-Infrastructures have Legal Implications?

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2013 eIRG Task Force on Legal Issues

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- What new regulatory issues are raised by non-state-funded organisations using state-funded e-infrastructures?
  - Noting that even state-funded use can raise hard legal questions!
  - http://www.e-irg.eu/images/stories/dissemination/white-paper_2013.pdf
- Some developments since then – see [u] on slides

Areas Reviewed

- Data Protection
- State Aid
- Procurement
- Network Regulation
- Access Policies
- Software Licences

Data Protection

- May cover both content, if personal, and account data
- Data controller/processor model doesn't fit e-Infrastructures
- Definition of personal data unclear and unharmonised
- Formalities for processing also unharmonised
- Exports from EEA subject to strict controls
- Commercial/non-commercial doesn't seem to matter
- [u] draft Data Protection Regulation may improve harmonisation
- [u] EUParl draft may make research on personal info harder

State Aid

- R&D&I exemption fits commercial use of e-Infrastructures
  - State contribution limited (typically to 50%)
  - Must have incentive effect, i.e. not just what market would do anyway
- Formalities unclear
  - How to demonstrate incentive effect?
  - How to cost state/private contributions?
    - Especially where there isn't a market to compare against
- [u] New (May 2014) rules on R&D&I
  - http://europa.eu/rapid/press-release_MEMO-14-368_en.htm
  - New exemptions for "research infrastructure" and "innovation clusters"
  - Increased maximum aid intensities for notified research infrastructure
  - Guidance: infrastructure funding, public-private interactions, incentive effect, etc.

Procurement

- Possible problem if past procurement excluded commercial use
- Application to public-private (user) partnerships not clear
- PPI (innovation) raises questions of valuing IPR etc.
- Possible use of Pre-Commercial Procurement (PCP)
  - If building e-infrastructures involves research challenges
  - And if existing grant funding systems don't work
- [u] New 2014 Public Procurement Directive
  - Public-public partnerships clarified
  - "Innovation Partnerships" may be another approach to development
  - Not clear if it helps public-private partnerships

Network Regulation

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- Two sets of law: ECS (~networks) and ISS (~services)
- **Private** ECS lightly regulated and harmonised
- Public ECS regulation heavier and less harmonised
  - Design/reporting requirements likely to prevent e.g. Bandwidth on demand
  - Ensure user community is sufficiently demarcated (SURFnet case)
- ISS law currently about (non-)liability, but ECS-type duties planned
  - 'market operator' proposal might catch e-Infrastructures too
- [u] EUParl draft NIS Dir less likely to see e-Infs as 'market operators'

Access Policies

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- Commercial use generally restricted/prohibited

- Research Networks
  - Very diverse policies
  - May allow customers' commercial partners

- Research Services
  - May allow basic research including private sector partners
  - Some looking at greater industry engagement (e.g. SMEs)

- [u] Might Charter for Access simplify this picture?

Software Licences

- Standard software
  - Often bought with restrictive licence (for education, non-profit, sector)
  - Likely to need time & money to negotiate extension of these
- Bespoke software
  - Licensing may not be clear (e.g. if developed through a series of projects)
  - IPR ownership may not be clear, so can't extend licence anyway
  - Ensure ownership and licence are agreed before developing
- [u] cloud licensing models may be an additional challenge

Conclusions

- Data protection law struggles with e-Infrastructure model
  - Commercial use unlikely to make this either worse or better
- Other laws permit use for new commercial R&D (up to 50%)
  - But process/formalities unclear
  - [u] new State Aid Framework a clear improvement - thanks
- Access policies and software licences are a barrier
  - Need to plan (and budget) to extend these

Main recommendations

- To legislators
  - Clarify application of existing laws to e-Infrastructures
  - Consider e-infrastructures in impact assessment of new laws

- To operators
  - Consider expanding access policies to permit commercial use
    - But ensure 'private' status of communications services is kept
  - Review licenses and procurements to check for any barriers
  - Ensure that licences & IPR for bespoke software are clear

THANK YOU

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