Commercial Use of e-Infrastructures
Legal Implications

Areas Reviewed

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

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Conclusions

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

Additional content Issues noted

- Personal data law, especially health data
  - Note that this is hard to override by private law instrument
- Regulation of simulations, etc. (safety, health, etc.)
- Open access (IPR, Database etc.)

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

Data Protection

- Covers both content and account data
- Data controller/processor model does not 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

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
- Commission modernisation paper (post-2013) promotes e-Inf

Procurement

- Possible problem if past procurement excluded commercial use
- Application to public-private partnerships not clear
- PPI (innovation) raises questions of valuing IPR etc.
- Pre-Commercial Procurement (PCP)
  - R&D funding mechanism, not "procurement"
    - No buyer or transfer of goods/services
    - Still subject to State Aid rules
  - Possibly useful if building e-Infrastructures involves research challenges
  - And if existing grant funding systems don't work

Network Regulation

- 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
  - 'market operator' proposal could maybe catch e-Infrastructures too

Access Policies

- Commercial use generally restricted/prohibited
- Networks
  - Very diverse policies
  - May allow customers' commercial partners
- Services
  - May allow basic research including private sector partners
  - Some looking at greater industry engagement (e.g. SMEs)

Software Licences

- Standard software
  - Often bought with restrictive licence (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