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Legal aspects of data sharing platforms

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Agenda

- Welcome
- Opportunities and challenges of data sharing (Interactive poll session)
Alessandro Bruni, KU Leuven / Safe-DEED
- FAQ: Legal constraints of data sharing
Lidia Dutkiewicz, KU Leuven / TRUSTS
- Q&A Session → please put your questions in the “question”-field (in the toolbar)

Closing



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Interactive poll

Value of (personal) data



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Legal constraints of data sharing

What keeps businesses from sharing data and what can be done about it?



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Data Strategy

- According to **the European Commission's Data Strategy** *“in spite of the economic potential, data sharing between companies has not taken off at sufficient scale. This is due to:*
 - *a lack of economic incentives (including the fear of losing a competitive edge),*
 - ***lack of trust*** *between economic operators that the data will be used in line with contractual agreements,*
 - *imbalances in negotiating power,*
 - *the fear of misappropriation of the data by third parties, and*
 - ***a lack of legal clarity on who can do what with the data*** *(for example for co-created data, in particular IoT data).”*



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Study on data sharing between companies in Europe

- *“The most common obstacles to data sharing are technical barriers and related costs, as well as **legal obstacles**.*

(...)

*Legal obstacles may entail the uncertainty about “**data ownership**” and **what can be lawfully done with the data**, along with difficulties in meeting the legal requirements on **data protection** in a business-to-business context.”*

FAQ: What can be lawfully done with the data in B2B context?



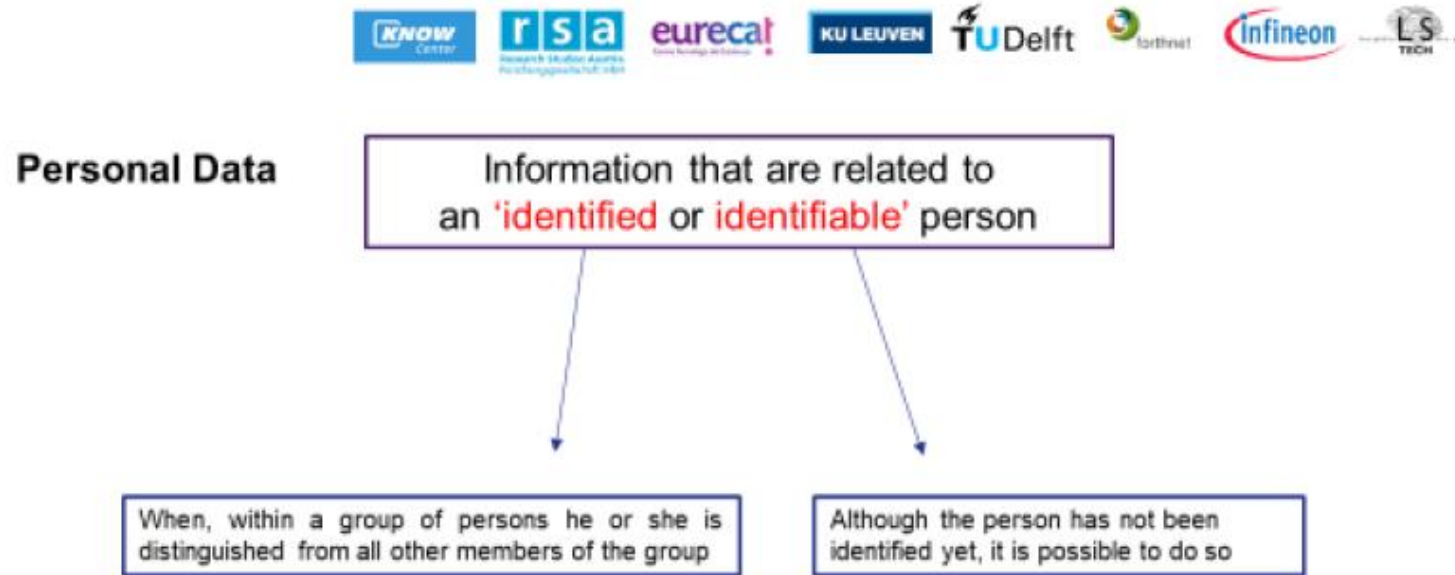
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Q: What rules apply?

- No definition of “data sharing” or “shared data”
- The EU legal framework applying to data (transactions) is a **patchwork** of different rules. Horizontal rules are mainly composed of:
 - for personal data, the General Data Protection Regulation (GDPR)⁵⁷;
 - for non-personal data:
 - the Digital Content Directive (DCD) applicable in a B2C relationship and
 - the Free Flow of Data Regulation (FFDR) applicable in a B2B relationship
- Other rules are sectoral e.g. in the financial sector the Second Payment Services Directive (PSD2); in the automotive sector the new Motor Vehicle Regulation; in the energy sector the new Electricity Directive etc.

How can data exchange be achieved within this patchwork framework – a holy grail question

Q: Is it personal or non-personal data?



- The precise determination of what can be deemed “personal data” is not always easy
 - Establishing the identifiability of the person requires a dynamic, context-sensitive analysis of the factual situation
 - Problematic “mixed datasets”

Q: Is it anonymized data?

- A major distinction has to be drawn between **pseudonymized** and **anonymized** data
 - If pseudonymization is done in a **retraceable way**, individuals are still indirectly identifiable since it is possible to backtrack their identity using additional information.
 - Resulting data are still considered **personal data** under the GDPR.
 - If pseudonymization is done in a **non-retraceable way**, e.g., using one-way cryptography algorithms, individuals are no longer identifiable since the link between their pseudonym and identity is either inexistent or has been permanently deleted. **Such non-retraceable anonymization techniques generally create anonymized information.**
 - In general, in such case, **the GDPR is not applicable to the processing of such data.**

Q: Who 'owns' the data?

- Thinking of data as a commodity that could be turned into a tradeable asset is rather new
 - Data market ecosystems are based on the concept called the 'commodification' of data. Up to now, the legal framework has generally not followed this business pattern
- **There is no "ownership right" on data in the Member States of the EU.** Most legal scholars also consider that such an ownership right *should not* be set up, due to the specific nature of data
 - Data can legally not be 'sold' like a good
 - The misalignment between the legal framework and the economy reality

Q: How can I trust data I share is not mis-used?

- Many companies currently fear that sharing their data would imply a loss of competitive advantage and represent a risk of misuse
- The role of data marketplaces: **trusted** intermediaries that bring data suppliers and data users together to exchange data in a secure online platform
 - How can one ensure that a data marketplace fulfils its role of the 'trustworthy' intermediary?

Q: How can I trust data I share is not mis-used?

The Data Governance Act (DGA) proposal

- With the Data Governance Act (**DGA**) proposal, in order to increase **trust** in data sharing services, the EC aims to create an EU wide regulatory framework, which would set out harmonized requirements related to the trustworthy provision of data sharing services.
- **How will data intermediaries ensure trust in data sharing?**
 - Data intermediaries, such as data marketplaces will pool and organise data neutrally
 - To ensure this neutrality, the data-sharing intermediary cannot exchange the data for its own interest (e.g. by selling it to another company or using it to develop their own product based on this data)
 - The data-sharing activity will be strictly separated from other data services (separate legal entity)
 - The data and metadata acquired can be used only to improve the data-sharing service



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Q: What obligations does third-party intermediary (data marketplace) have?

- The Platform to Business Regulation ('P2B Regulation') promotes two main principles:
 - Transparency: clear, unambiguous T&C
 - Fairness: effective out-of-court redress mechanisms (internal complaint handling system, mediation)



Platforms, Free Flow of Data and Data Market Place

Platform to Business

What we need to do

- (a) they constitute information society services within the meaning of the European Electronic Communication Code;
- (b) they allow business users to offer goods or services to consumers, to facilitate the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded;
- (c) they are provided to business users based on contractual relationships between, on the one hand, the provider of those services and, on the other hand, both those business users and the consumers to which those business users offer goods or services.

Understand to whom the platform intends to offer its services because it might determine whether it will fall or not within the P2BR scope.



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Q: What obligations does third-party intermediary (data marketplace) have?

Data Governance Act (DGA)

- Under the DGA Proposal, data intermediaries will be required to **notify** the competent public authority of their intention to provide such services.
 - Public authorities will monitor compliance with the requirements
 - The EC will keep a register of data intermediaries
- Articles 10 and 11 of the DGA Proposal provides a long list of **notification duties and conditions** with which data sharing services need to comply to provide data sharing services across the EU.

Q: What obligations does third-party intermediary (data marketplace) have?

Data Governance Act (DGA)

- The obligation to appoint a legal representative for providers not established in the EU
- The “neutrality” requirement:
 - a prohibition of cross-usage of data
 - an obligation to place data sharing services in a separate legal entity
- Fair, transparent and non-discriminatory procedure for access to the service, including as regards prices
- Requirement to ensure a reasonable continuity of provision of the services
- Adequate technical, legal and organisational measures in order to prevent transfer or access to non-personal data that is unlawful
- Measures to ensure a high level of security for the storage and transmission of non-personal data



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Q: How will data marketplaces be organized in the future?

- The emergence of different categories of “data sharing providers”, the novel concept of “data cooperatives” and “data altruism organizations”
- European data spaces
 - More dedicated proposals on data spaces are expected to follow in 2021
- Data interoperability
- Standardization activities
- Data Act
 - Data Act on rights on access and use of data expected in 2021



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Questions



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Thank you !

Stay in touch: Follow us on LinkedIn and Twitter!

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