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Open Data and Liability

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TABLE OF CONTENTS

TABLE OF CONTENTS 3

INTRODUCTION 4

1 LIABILITY RELATED TO THIRD-PARTY RIGHTS 5

1.1 Prevention of access 5

1.2 Infringement of copyrights and database rights 6

1.3 Addressing the liability risks 7

2 LIABILITY RELATED TO INCORRECT DATA 10

2.1 No re-use conditions 10

2.2 Re-use under contractual relations 11

2.3 Addressing the liability risks 12

3 LIABILITY FOR UNFAIR COMPETITION 13

3.1 Interests of incumbent market parties 13

3.2 Addressing the liability risks 15

4 FINAL OBSERVATIONS 16

ABOUT THE AUTHOR 17

INTRODUCTION

Open Data momentum building up

Over the last years, the quiet little stream called 'Public Sector Information' (PSI) has gradually turned into a white-water mountain river, changing its short name to Open Data on the fly. Policy makers throughout Europe, captured by the Open Data virus sparked by the omnipresent Open Data community, have started to realize the socio-economic potential of re-use of Open Data and are in the process of turning this into concrete policy measures both at the European and national levels.

Liability as an Open Data showstopper

However, quite often, the ambitions of public sector bodies (PSBs) holding Open Data are bogged down by (perceived) lurking risks of liability. (Lawyers within) PSBs tend to warn of risks that may occur when data are opened up, arguing that (a) the data may not be public or (b) it may be incorrect or (c) free use may create unfair competition. In this topic report we will look at these perceived risks, assess the real risks and come up with practical suggestions on how to overcome them, thus allowing PSBs to surmount this obstacle.

Obviously, national legal frameworks on liability differ per Member State. However, the character of the legal risks pertaining to opening up PSI is the same, allowing for a horizontal approach throughout Europe.

The starting point

Imagine a PSB that has an extensive and rich repository of PSI that could well be re-used and that is wildly energized by the concept of free Open Data. Now, also imagine the director general of this PSB checking with in-house legal counsel whether opening up of its data could get the organisation into trouble. Put differently: the starting point is a PSB, rich in valuable PSI, that is quite willing to open up its data for free re-use; not a PSB that is dependent on incomes from charging for PSI and from its own downstream re-use activities, relying on intellectual property rights (IPRs) to preserve its position (so access = re-use).

Three potential risks

When focusing on the legal liabilities there are essentially three potential risks:

a. the data are opened up for re-use and the mere fact of allowing re-use infringes third-party rights
b. the opening up of data does not infringe third-party rights (so nothing wrong with that) but the content is incorrect and re-users relying on it incur damages
c. no infringement of third-party rights or no incorrect data, but the free provision of data affects the position of existing market parties supplying comparable data, leading to damages

Structure of this topic report

Accordingly, chapter 1 looks into third-party rights liability risks, chapter 2 examines incorrect content liability risks and chapter 3 addresses unfair competition liability risks. Doing so, each chapter describes the legal bases of the potential risks and makes an assessment of how big these risks are and to what extent they could lead to actual liability for the PSB opening up its data. Furthermore, the report suggests solutions and practical tools for addressing these risks, supported by some easy-to-grasp illustrations.

This document was finalised on 12 December 2012.

Marc de Vries
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1 LIABILITY RELATED TO THIRD-PARTY RIGHTS

The first potential risk relates to the situation wherein a third party has a right connected to the data opened up. Here we should distinguish between public law rules related to the prevention of access and private law rules that disallow PSBs to publish and copy the data.

1.1 Prevention of access

The legislation of all the European Member States holds rules on access to and secrecy of PSI. In most cases there is a general Freedom of Information Act (FOIA) allowing access to PSI as a rule, but holding exemptions and limitations for certain types of PSI and specific rules for certain sectors. Jointly, these constitute the access regime.

Typically, the catalogue of exemptions (either from the FOIA or the sectoral rules) relate to interests that are considered of greater importance than the (general) interest of openness. Classic examples are interests of the State (e.g. safety, public health, prosecution), interests of companies (e.g. company secrets provided confidentially to the authorities (for instance in the framework of qualifying for a subsidy scheme)) or interests of individuals, most notably, privacy and data protection. Obviously, the latter two, and in particular the privacy interests, block a substantial amount of data from access (let alone re-use).

Data protection

Privacy protection is an important element in ensuring the credibility and viability of PSI re-use. Public sector information can involve data that permits the identification of specific persons, thus impacting their personal lives. A specific directive has been adopted in the European Union (the so-called Data Protection Directive), which aims to protect the right to privacy with respect to an individual's personal data. It does so by establishing a common set of rules that must be observed when processing personal data.

Bird's eye view of data protection law and PSI re-use law

The Data Protection Directive defines 'personal data' as 'any information relating to an identified or identifiable natural person'. This includes not only direct references to a person such as the person's full name, address or any identification numbers, but can also include less direct information such as photos or information on living conditions. The concept of personal data is thus quite broad. As a result, PSI can easily include personal data.

The PSI Directive emphasizes that its provisions should be implemented and applied in full compliance with the principles of the Data Protection Directive (recital 21) and that the PSI Directive does not affect the level of protection of individuals with regard to the processing of personal data (article 1(4) of the PSI Directive). As a result, any PSI initiative in which personal data is processed will also need to comply with the rules of the Data Protection Directive.

The Data Protection Directive operates on the basis of a number of major principles, most prominently:

- Legitimacy: personal data may only be processed when there is a clear lawful basis for this (e.g. if a law permits the re-use of trade register information to ensure transparency and accessibility, then re-use is clearly legitimate).
- Purpose: personal data must be collected for specified, explicit and legitimate purposes and should not be processed in a way incompatible with those purposes (e.g. medical treatment information from a hospital may not be made available to insurance companies).
- Proportionality: personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed (e.g. when creating crime maps, it is excessive to mention the exact address where a crime took place).

- Quality: the accuracy of the personal data must be protected to a reasonable extent (e.g. if a PSB makes geographic data available for re-use without guarantees of accuracy, it should provide mechanisms to report any errors).
- Security: personal data must be reasonably protected against unlawful processing, such as accidental or unlawful destruction, corruption or loss of the data (e.g. when trade register information is licensed for re-use but not made generally available to the public, then re-users should be required to implement security measures to prevent data loss).
- Individual rights: people should be informed on the re-use, and it should be possible for them to access the data and to have it corrected or removed if needed (e.g. if PSI includes pictures taken in public, citizens accidentally photographed should be able to object).
- Protection of special categories of data: this includes racial or ethnic origin, political opinions, religious beliefs, and health or sex life (e.g. if citizen register data that also specifies religion is made available for re-use, information on religion should be removed unless the law permits this).[1]

From a liability perspective, it is important to emphasize that where personal data are publicly available, for instance, through business registers, data protection rules still disallow re-users to process these data, as the 'principle of purpose' (see text box above) only allows use of these data for the specific aim and within the specific context for which the personal data were collected.

Put differently, as a rule, when Open Data hold personal data – in particular within the context of large digital data sets – they are to be removed or anonymized. Otherwise, the entire data set is 'poisoned' (at least from a re-use perspective) and a PSB allowing access to, and obviously also re-use of, that data set infringes data protection rules.

Sanctions
What if, in spite of the presence of personal data, a PSB has allowed re-use of these data? Here we have to make a distinction between the civil liability towards the persons whose privacy rights have been affected and the public liability of the PSB towards the national data protection authority.

Civil law liability
In most Member States the financial risks for infringement of privacy of persons is limited. Obviously, the persons concerned can request an immediate cease and desist order, and the mere fact that the rules have not been observed constitutes the liability. But quite often the financial damage will be minimal or even non-existent and as this is the judge's basis for assessing and determining the compensation, it is unlikely that a PSB will be held liable to pay large amounts in such an event.

Public law liability
Should the infringement have a massive impact, it will likely attract the attention of the national data protection authority. Although differing from Member State to Member State, as a rule these authorities can impose sanctions, including fines and penalties for non-compliance. Obviously, within inter-governmental relations and assuming that the infringement was unintended, it is highly unlikely that the authority would impose financial sanctions on a PSB. This being said, of course the political damage for the minister responsible may be significant, but that falls outside the scope of this topic report.

1.2 Infringement of copyrights and database rights

The second type of infringement of this first category – data re-use has been allowed despite existing third-party rights – concerns copyrights and, in particular, database rights.

[1] For more information on this subject along with practical examples, please refer to our topic report on 'Open government data: reconciling PSI re-use rights and privacy concerns'.

Character of copyrights and database rights
Copyrights protect authors of works, which may include elements of Open Data. Copyright protection is based on international treaties (e.g. the Berne Convention, WIPO Treaty, TRIPS), European rules (Copyright Directive) as well as national rules (Copyright Acts). The right originates *ipso iure*, through the mere shaping of the work, and ends 70 years after the author's death. Database rights have been created under the 1996 EU Database Directive. It protects the producer of the database: the entity that did the investment[2] necessary to collect the data that jointly constitute the database. The term of protection is much shorter – 15 years – but is renewed when the database is updated (significantly).

Relevance for Open Data
Briefly put, the copyright and database right frameworks provide exclusive rights to the author and the producer, respectively, essentially disallowing any third party to publish, distribute and copy the protected material. Accordingly, these right holders can act against an infringement by any third party.

Obviously, PSBs also collect information that is not necessarily theirs. So if a PSB were to allow re-use of data that are protected by third-party database and copy rights, it not only infringes these rights itself, it also allows a third party to infringe these rights. In other words, a PSB has the responsibility to check whether it is entitled to open up data for re-use, as this is an act with relevance to copyright and database rights. If a PSB does not hold all the IPRs it should either refrain from allowing re-use of these data or request the right holder for permission (a licence) to allow re-use.

Governmental right holders
It should be kept in mind that these right holders are not limited to the private sector; public sector bodies can also own copyrights and database rights and accordingly exercise these rights. This is not hypothetical. Often PSBs rely on information from other PSBs, for instance the Cadastre or the Mapping Agency. Where such organisations still rely on incomes from allowing re-use, relying on IPRs, they equally exercise these rights internally, disallowing associate PSBs to open up such data.

Sanctions
Whether the IPR holder is public or private, as a rule, an infringement will create the basis for liability, irrespective of the Member State in which it occurs. Accordingly, the national court will have to determine, based on its national rules on civil liability (a) whether damages have been incurred, (b) the extent to which they should be compensated and (c) who is liable to pay the compensation.

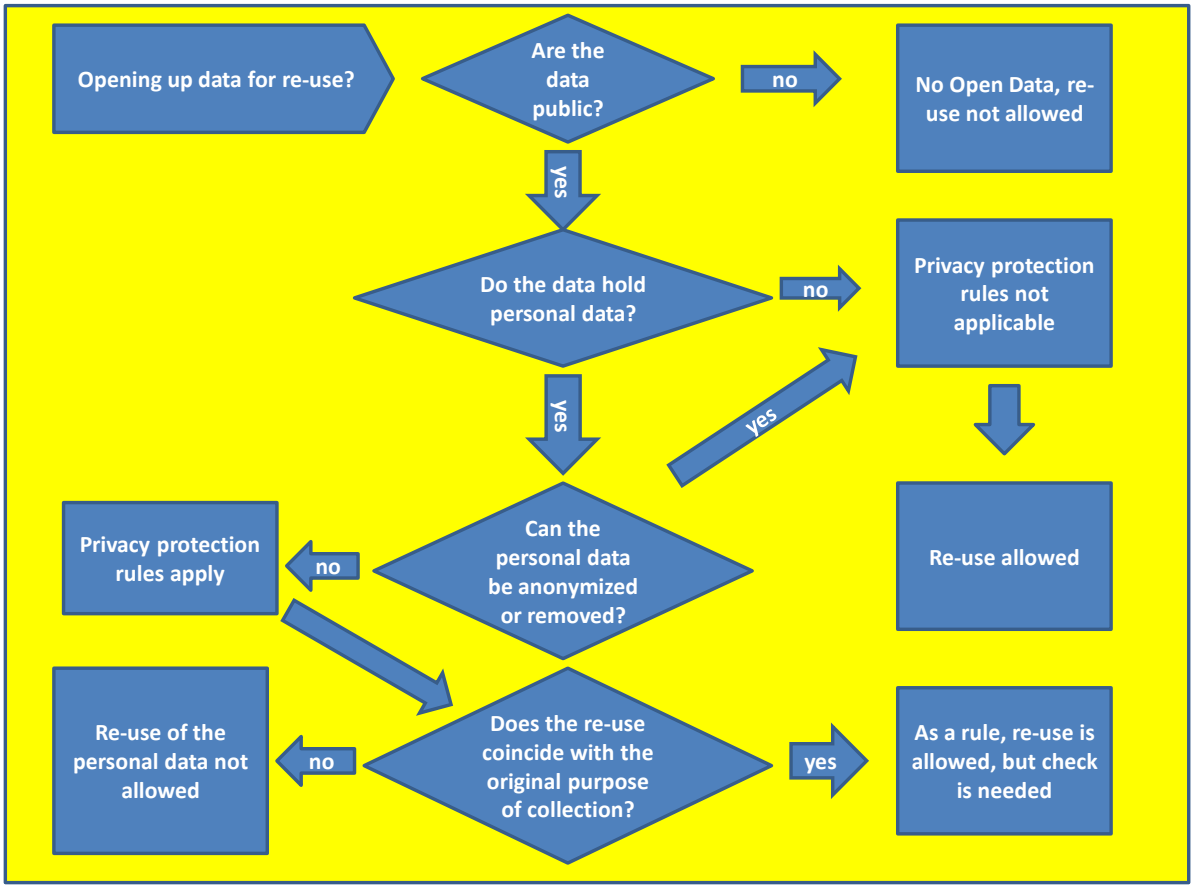
1.3 Addressing the liability risks

Privacy and Open Data
Privacy protection and Open Data do not mix well. As a rule, PSBs should apply the rule that data sets holding systematic registrations of personal data create a no-go area. Even if the register is public (like the business register), the processing of the personal data for the purpose of allowing re-use will likely infringe third-party privacy rights. Accordingly, PSBs should either anonymize these personal data, so no connection can be made between the data and the natural person, or the personal data should be removed all together.

The illustration below summarizes the decision sequence to be followed.

[2] The investment must be significant and measured on the basis of the efforts to *collect* the content, so not the creation of the *content* itself (European Court of Justice, Case C-203/02 British Horseracing Board Ltd v William Hill Organization Ltd [2004] ECR I-10415).

Illustration 1: decision scheme Open Data and privacy

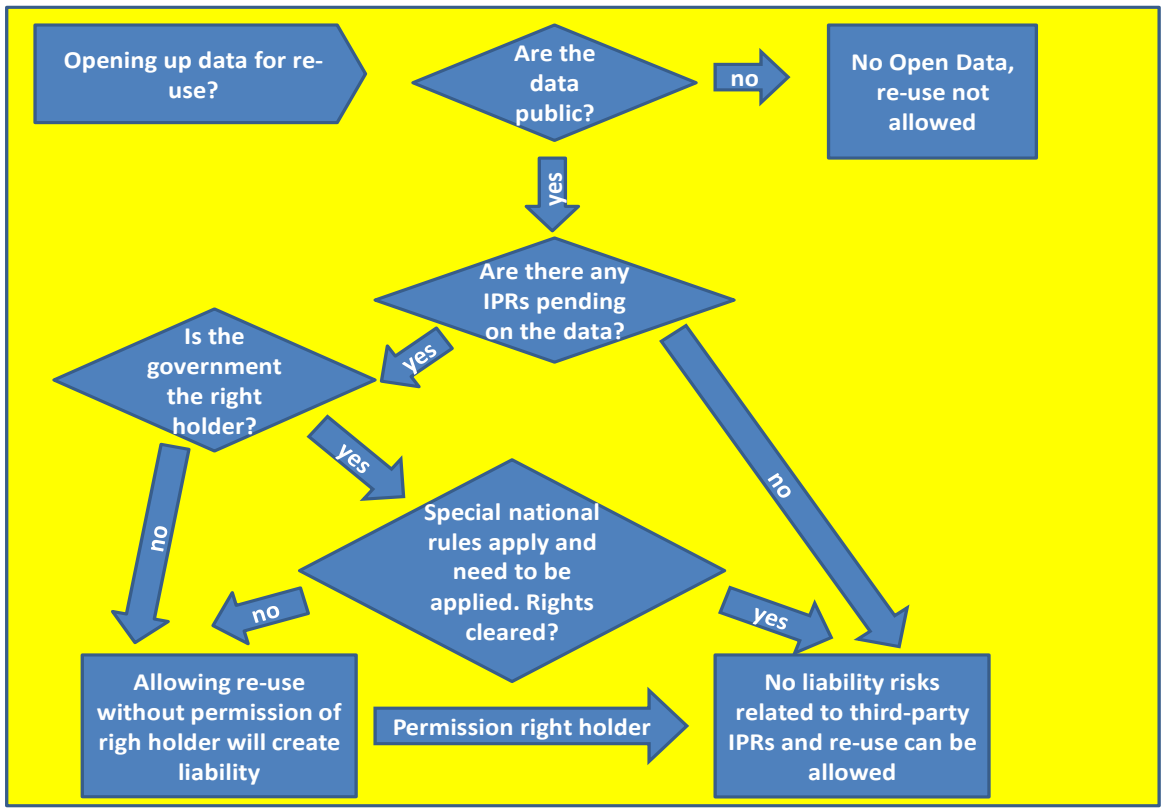


IPRs and Open Data

So when checking whether third-party IPRs prevent re-use, the PSB should first assess whether the data are in fact public. If not, obviously, they drop out. Subsequently, it should see whether there are any third-party IPRs that apply to the data the PSB wishes to open up for re-use. If the IPRs are held by associate PSBs, special national rules will apply and will need to be consulted. Where the data are held by private sector parties, allowing re-use will infringe these rights and will establish a basis for liability of the PSB, unless permission is obtained from the right holders.

Illustration 2 below summarizes the decision sequence to be followed.

Illustration 2: decision scheme Open Data and third-party rights



2 LIABILITY RELATED TO INCORRECT DATA

The risks of the second category are fundamentally of a different nature: the data are public (so no privacy concerns) and there are no IPRs in play (so the act of opening up the data is completely legitimate). The problem lies with the quality of the data: they do not represent reality.

> Suppose that the national ministry for roads and water works maintains a database of details of bridges, including passage heights. However, some of the heights are now out-dated. If these data were opened up and if a transport company, relying on these data, were to damage one of its trucks, this would be a typical case falling under this category.

Basis for liability
Obviously, the first issue a lawyer will look at is the basis for potential liability, and this links in with the relation between the PSB and the re-user. There are basically two modalities: (a) the data have been provided by the PSB for re-use without any conditions or (b) the data have been provided under a licence agreement.

2.1 No re-use conditions

In this situation, there are no contractual ties between the PSB and the re-user, meaning that the re-user must rely on tort law to establish a basis for liability. Although most areas of tort law are nationally oriented (and thus fairly disharmonized), nevertheless there is a core set of requirements to vest liability, being:
1. a mistake must have been made, when acting (or not acting) in disconformity with an obligation
2. the person that made the mistake must be liable for the act
3. the act by the person must have caused damages for the injured party
4. there is a causal relation between the act and the damage
5. the rule relied on by the injured party should have been created to protect its interests
6. the amount of damages to be paid need to relate to the specifics of the case at hand

Context of re-use is different from public task use
Applying these requirements to a PSB opening up its data for re-use, the first issue is what parties can and should expect from each other. Obviously, the PSB has the responsibility to ensure that the data have a certain quality. But what is the extent of this responsibility? The main point of Open Data is that the public sector produces the data within the public task and that the re-use, by definition, is something outside that public task. This means that the context of the public task use of the data may be fundamentally different from the secondary use (re-use) by the re-users.

> For instance, if the ministry of road and water works collects bridge data, including the passage heights, for the purpose of keeping track of maintenance of the bridges, the passage height becomes a rather insignificant attribute. If that data is incorrect, the company doing the maintenance may need to drive back to the office and get another ladder. But that would be it.

The extent of precaution required
Obviously, this also ties in with the level of precautionary measures one can expect the PSB to take. If it is crystal clear that the purpose of re-use of the data features zero tolerance for failure, this puts heavy pressure on the PSB. This, for example, applies to PSI databases that are relied on in high-risk transactions, like buying property. Therefore, typically, national cadastres have their own liability regimes: if it turns out that the incorrectness of the data can be blamed on the cadastre, the State is liable to compensate damages of those who rightfully trusted the data. Of course, data of a different nature correspond with a fundamentally lower level of precautions and warranties.

Weaker causal relation will mitigate basis for obligation to pay damages
Another element to take into account is that even if one were to conclude that the PSB did not live up to the requirements one could rightfully expect, still the liability to repay the damages would be limited. Here the causal relation between the liability and the damages comes into play: where this causal relation becomes more remote and unclear, the basis to allocate all damages to opening up the (incorrect) data becomes weaker.

Responsibility of re-users
Of course, even the re-user has a responsibility. If the data can be verified through other sources, it seems logical to demand that the re-user performs such a check. Moreover, if it is obvious that the data cannot be right, the PSB cannot be held responsible for resultant damages.

2.2 Re-use under contractual relations

PSI Directive holds relevant provisions
If the PSB not only wishes to allow re-use but also wants to impose certain obligations on the re-users or disclaim certain of its obligations, it can rely on licence terms as foreseen in article 8 of the PSI Directive. The only requirements for such licence terms are that these conditions shall not unnecessarily restrict possibilities for re-use and shall not be used to restrict competition. Furthermore, under article 8(2) of the Directive, when licences are used, Member States shall ensure that standard licences for the re-use of public sector documents are available in digital format and can be processed electronically, and the use of standard licences should be encouraged.

Exoneration possibilities limited
This being said, the contractual model does not allow the PSB to be exonerated from any potential liabilities. The 1993 Unfair Contract Terms Directive[3] introduces the notion of "good faith" in order to prevent significant imbalances between the rights and obligations of consumers and those of sellers and suppliers, which includes governmental organisations in contractual relations. This general requirement is supplemented by a list of examples of terms that may be regarded as unfair. Terms that are found to be unfair under the Directive are not binding on consumers. Accordingly, where a PSB relies on standard terms that exonerate it from liability or otherwise limit redress possibilities, it is likely those terms will be void, at least towards consumers.

Applicability of standard terms impose certain procedures
Next to that, in many Member States there are certain forms and procedures to be observed in order to ensure that the standard terms are in fact applicable to a contract. Typically, this will involve making the standard terms known before the contract is closed and obtaining consent from the re-user as to the applicability. Obviously, this can be created more easily in a digital environment, but it certainly creates more hassle, as the re-user will have to register and each contract entered into will need to be saved by the PSB. Furthermore, in case the re-user provides the data to its clients, the PSB may still be held liable by this second tier re-user, as the standard terms do not relate to this re-user.

In summary, although the use of standard licences may seem appealing, there are certainly major drawbacks, apart from the issue that the exonerations may not hold up in a court of law. Rather, just as the PSI Directive encourages, PSBs should provide the data 'as is', without further restrictions, and ensure sufficient accompanying information (such as a basic level of metadata and a proclaimer) addressing and managing the expectations of the re-user.

[3] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Official Journal L 095, 21/04/1993 P. 0029 – 0034.

2.3 Addressing the liability risks

Certain level of precautions required

Nevertheless, it is arguable that allowing re-use comes with a certain level of responsibility. This responsibility would typically involve the provision of a very basic level of metadata; for example, author, date of publication, source, description of data, and context of (public task) collection. Further, it is advisable to connect a proclaimer to the data, basically describing what the re-user should expect (and what not).

In this context, it should also be kept in mind that the alternative – putting more burdens on the shoulders of PSBs willing to open up their data for re-use – will certainly create more reluctance. And this is exactly what we do not want to happen. In other words: when facing the dilemma of requiring PSBs to be perfect or having to deal with a level of uncertainty as to the correctness of the data, without the PSB being liable for this, the latter appears more preferable.

3 LIABILITY FOR UNFAIR COMPETITION

3.1 Interests of incumbent market parties

The liability risks of the third category are quite different from the first two. Let's return to our starting point: a PSB opening up its data for re-use without any charges. Of course there may be market parties that provide similar information (services) on the downstream market. Obviously, as a free alternative becomes available, their clients may switch to the free governmental version, thus creating a loss of income. Accordingly, such commercial providers may claim that the free provision of data creates unfair competition and that the PSB allowing such free re-use should compensate the damages incurred.

Applicable legal framework blends PSI law and competition law
The relevant legal framework is partly determined by European law, more precisely by article 102 TFEU on abuse of dominance, by article 107 TFEU on the (limited) applicability of competition law rules to PSBs and, of course, by the PSI Directive. Moreover, there are Member States that have specific rules to regulate the market activities of PSBs.

Interconnection is complex
The PSI Directive is inspired by competition law. This can be seen clearly in articles 8 (on licensing), 10 (on non-discrimination) and 11 (on exclusive arrangements). The recitals to the Directive also illustrate that competition law is a fundamental driver for the PSI Directive, as highlighted in recitals 1, 9, 20, 25 of the preamble. Hence, the goals of the PSI Directive fully complement those that competition law sets out to achieve. Most prominently, opening up PSI for re-use and maximising its full economic potential will contribute to European market integration. Competition law therefore acts as the 'yardstick' by which we can assess the implementation, application and effectiveness of the PSI rules. It also acts as a fall back to regulate the behaviour of PSBs (possibly together with private sector players) acting on the market. Furthermore, where the PSI Directive is silent when it comes to sanctions for behaviour that infringes its principles, the application of general competition law brings national (and potentially European) competition authorities into the picture[4]. It is clear from recital 20 that this enforcement of competition law is to be very much encouraged[5].

With the economic aims of the Directive, and given that competition law can apply to PSBs when they participate in economic activities, it is clear that there will be a degree of overlap between the provisions of the PSI Directive and competition law. At the same time, the Directive 'extends' the application of competition law principles to PSBs as *quasi*-sectoral competition rules. It imposes certain obligations that go beyond the general rules (e.g. transparency, maximum tariffs for re-use of PSI, non-discrimination) supporting re-users.

Risk of liability limited to PSB's economic activities
Competition law only applies in case the provision of (free) data can be regarded as a market activity. Accordingly, a PSB cannot be liable for creating unfair competition if it does not perform an economic activity. Assessing whether this is the case, we can rely on solid case law from the ECJ, starting with the famous *Höfner* case – basically casting a wide net – followed by an array of rather casuistic cases further fine tuning the concept of market activities.[6]

[4] National competition authorities and the competition rules of individual Member States will come into play when there is no 'effect on trade between Member States'.
[5] Recital 20 reads: "Public sector bodies should respect competition rules when establishing the principles for re-use of documents."
[6] Case C-41/90 Höfner and Elser v Macrotron GmbH [1991] ECR I-01979; Case C-263/86 Belgian v Humbel and Edel [1988] ECR 05365; Case C-109/92 Wirth v Landeshauptstadt Hannover [1993] ECR I-06447; Case C-157/99

PSI Directive sets the maximum level a PSB can earn on re-use
Where charges are levied, the Directive provides for a maximum, cost-based level. Thus:

1. the total income from charges for re-use of PSI may not exceed:
   a. the cost of collection, production (including creation and collation), reproduction and dissemination (including user support),
   b. together with a reasonable return on investment; and
2. these charges should:
   a. have due regard to the self-financing requirements of the PSB concerned, where applicable, and
   b. be cost-oriented over the appropriate accounting period and calculated in line with the accounting principles applicable to the PSBs involved.

PSI Directive bans price discrimination
The Directive also forbids PSBs from applying discriminatory terms – in particular charges – to comparable categories of re-use, explicitly distinguishing between commercial and non-commercial re-use. This also applies to the PSB that re-uses its own data: if the PSB holding the documents allows for public sector re-use – either internally or through another (associate) PSB – the Directive will have a 'levelling effect' since the same conditions for re-use have to be imposed as those governing agreements with other re-users. Of course the PSB can also decide to lower the charges towards these other re-users.

No obligation to charge
This being said, it is important to stress that the provisions in the Directive on charging for re-use of PSI do not prejudice the right of PSBs to apply lower charges or no charges at all. In fact the Directive encourages PSBs to make PSI available at charges that do not exceed the marginal costs for reproducing and disseminating the documents. Accordingly, from the perspective of the PSI Directive, there seems no legal rule preventing PSBs from providing free re-use.

The PSB's intentions must be fair
Obviously, the underlying intentions of the PSB must be fair and targeted towards creating a level playing field for all market parties. This will certainly not be the case if the PSB lowers its charges (to zero) only to kill any competition in the downstream market. Combined with a prohibition on re-use in the upstream market, it will not take long before the PSB will become the sole supplier both in the (non-existent) upstream market and in the downstream market for value-added services. Subsequently, the PSB could raise its prices again (even exceeding the price paid before the free provision). This so-called market squeeze would certainly qualify as an infringement of article 102 TFEU, as the PSB would be abusing its dominant position.[7]

Contractual ties or raised expectations
Although the PSI Directive may explicitly allow PSBs not to charge, there can still be circumstances that could nevertheless establish a basis for liability because of the creation of unfair competition. Typically, this would concern situations where the PSB and the market parties would have entered into an agreement whereby the PSB had committed itself to a certain market behaviour (including a commitment not to enter the market). Alternatively, in the absence of such an agreement, it could also be that the PSB would have raised legitimate expectations as to such behaviour. In these

B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen (*Smits/Peerbooms*) [2001] ECR I-05473.
[7] Case C-62/86 AKZO Chemie BV v Commission [1991] ECR I-3359; Case C-333/94P Tetra Pak International SA v Commission (*Tetra Pak II*) [1996] ECR 1–5951

situations, there could be a basis for such a claim, but obviously, it would be based on breach of contract, rather than tort law.

Legitimate governmental acting
Finally, there can also be a basis for compensation even if the zero charging is not considered an infringement. Such 'legitimate governmental acting' obviously lacks an illegitimate character, but as the market parties suffer damages, this may impose an obligation on the PSB to offer compensation.

3.2 Addressing the liability risks

The risks that a PSB will be liable for creating unfair competition as it allows for free re-use will be very limited. Firstly, the question is whether the activity should be regarded as a market activity. The European case law, let alone the national case law of the Member States, is very casuistic on this.

Secondly, where the PSI Directive actually promotes the free provision of data, it is unlikely that a court will rule that living up to that recommendation will actually be unlawful. This may be different in case the PSB's intentions are not sincere, for instance if it uses this instrument to kill competition with the aim of returning to charging once a monopolistic position has been established. Furthermore, contractual arrangements may create the risk of liability, for instance if the PSB has committed itself to refrain from opening up data for free.

4 FINAL OBSERVATIONS

Liability risks related to opening up data for re-use appear to be limited

Where it concerns the risk of infringing third-party rights, these risks do not fundamentally differ from the current risks. At present when a request for access or re-use of PSI is made, the PSB will apply the regulatory framework described above. The only difference is that the rhythm of publication and volumes of data are quite different: the decision to allow re-use will move from the end of the creation process to the beginning and the amounts of data will be much larger than when allowing re-use upon request.

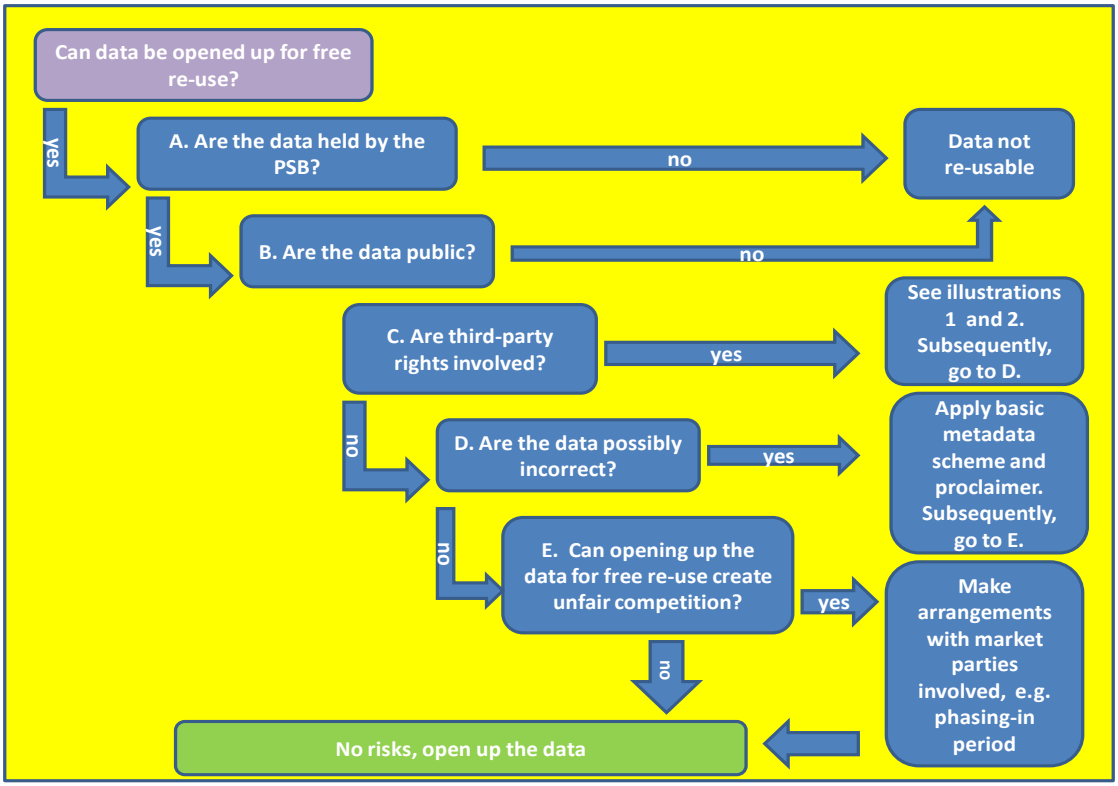
Risks related to incorrect data also appear to be limited. Public sector bodies that provide their data 'as is' do exactly what the Directive requests them to do. Expecting from a PSB that any data are 100% correct is simply impossible, particularly since the context of re-use will, by definition, be different from the public task context in which they were generated. Obviously, what we can expect from PSBs is that they address the expectations re-users may have. In that context the use of a basic metadata set and proclaimers seems advisable.

Finally, the risks for creating unfair competition towards incumbent market parties by 'dumping' Open Data for free also appears limited, provided the intentions of the PSB are sincere and there are no contractual obstacles or raised expectations in place.

Checklist to be observed

The illustration below provides a simple overview of the steps to be taken and the checks to be made. Obviously, where specific national rules may apply, the PSB should definitely also check these before opening up its data.

Illustration 3: checking scheme liability and Open Data



ABOUT THE AUTHOR

Marc de Vries, BA LLM, is a member of the ePSI team and has professional degrees in both law and economics (Utrecht 1991). He has been active in the field of public sector information re-use for more than 15 years, both at the national and European levels. He serves clients in the public and private sectors in the Netherlands and beyond, EC institutions in particular. Marc regularly publishes books and articles on legal and economic issues surrounding PSI re-use and he is frequently invited as a subject matter expert to speak at conferences.