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EU Digital and Data Legislation – access and reuse

INSPIRING ERA EXCHANGE - ERA ACTION 1&2:
EU copyright rules and data access rights for research in the age of AI

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ERA Study

- Mapping of literature, OS policies, EU and national copyright and data legislation
- Surveys with researchers, RPOs, publishers (commercial and institutional)
- Impact assessment
- Policy options

Sant'Anna School of Advanced Studies – Pisa

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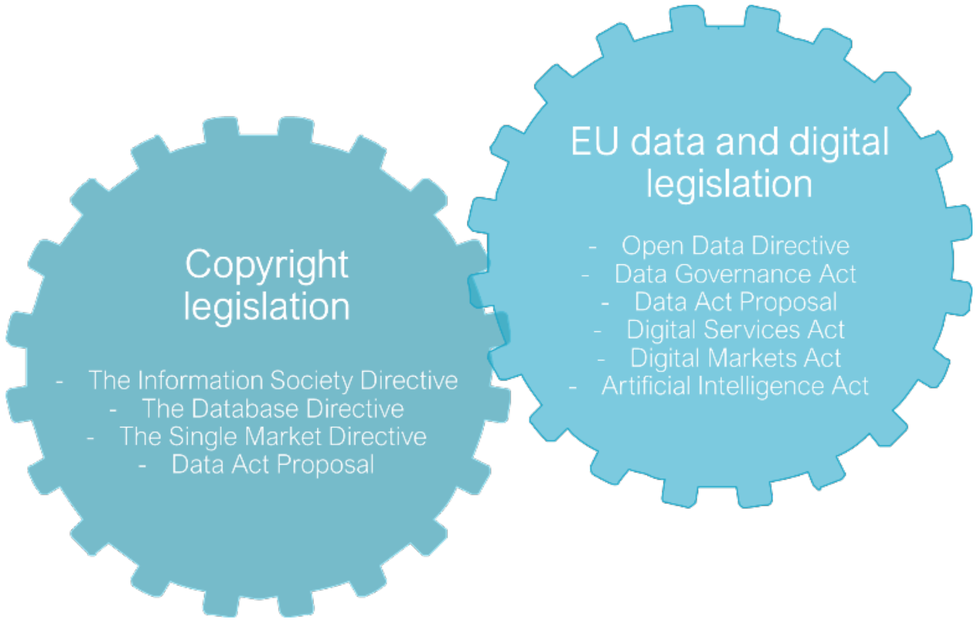
Instituut voor Informatierecht
Institute for Information Law

PPMi

available at https://data.europa.eu/doi/10.2777/633395

Scope of the study: legislative and regulatory frameworks

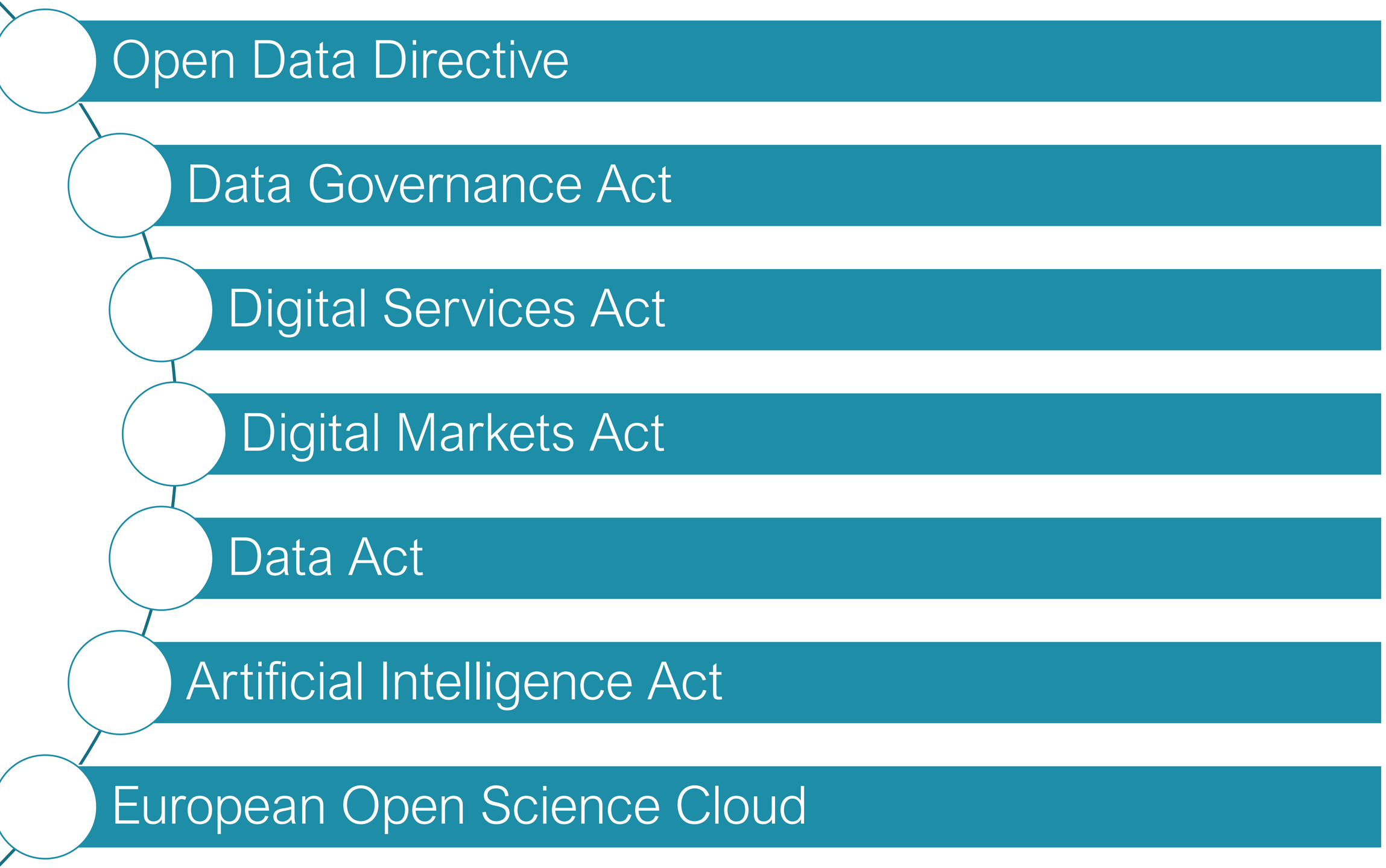
Study's main objective → to assist the EC in the delivery of the main outcomes of priority action 2 of the European Research Area Policy Agenda 2022-2024 ("Propose an EU copyright and data legislative and regulatory framework fit for research")



Two main outcomes:

1. **Identifying regulatory barriers and challenges** to access and reuse of publicly funded R&I results and of publications and data for scientific purposes
2. **Proposing legislative and non-legislative measures to improve the current EU copyright and data legislative and regulatory frameworks** to make it fit for scientific research, open research data and ERA.

EU DIGITAL AND DATA LEGISLATION: OVERVIEW OF STUDY RESULTS


Open Data Directive
Data Governance Act
Digital Services Act
Digital Markets Act
Data Act
Artificial Intelligence Act
European Open Science Cloud

Objectives:

The study has **two interconnected objectives:**

- Identify and assess the relevant provisions **for researchers and research organizations** (*first and second part of the study*);

- Develop recommendations on **how researchers and research organizations** can benefit from and comply with the rights and the obligations (*third part of the study*).

Simplified ToC

1. Introduction
2. Open Data Directive
3. Data Governance Act
4. Digital Services Act
5. Digital Markets Act
6. Data Act
7. Artificial Intelligence Act (proposal)
8. European Open Science Cloud

- Individual approach
- highlight the provisions and describe the rights and obligations of each legal instrument that could become relevant for researchers and research organisations

9. Interplay between relevant legislative acts and frameworks
10. Synthesis: Main opportunities and challenges for research under the EU DDL
11. Recommendations on the legislative and non-legislative levels
12. References

9. Interplay between relevant legislative acts and frameworks

Main objective: to provide an integrated analysis of the **interactions of DDL**

First part discusses three overarching concepts: (i) data; (ii) research and (iii) research organizations.

Finding: i) Generalized lack of coordination at the definitory level of key regulatory concepts;

Second Part identifies specific links and connections in DDL and assess their relationship.

Goal: enhance legal certainty and identify opportunities and potential obstacles for a coordinated and consistent interpretation of DDL.

Structure: each section on a particular overlap is divided as follows: (a) the provisions involved in the interplay, (b) the nature of the interplay and (c) the analysis of this interplay. For systematic treatment (b) the interplay is classified as:

- Consistent;
- Complementary/clarification;
- Derogation/exemption;
- Contradiction;
- Unclear.

9. Interplay between relevant legislative acts and frameworks (Part 1)

RESEARCH ORGANIZATION (DEFINITION)					
DATA ACT	CDSM	DIGITAL SERVICES ACT	OPEN DATA DIRECTIVE	DATA GOVERNANCE ACT	ARTIFICIAL INTELLIGENCE ACT (PROPOSAL)
DEFINITION OF RESEARCH ORGANISATION? NO SEEMS TO ECHO, IN PART, THE CDSM DISTINCTION BETWEEN NOT-FOR-PROFIT RESEARCH AND PUBLIC INTEREST RESEARCH (ART. 21, ART. 2(1), REC. 76, DA)	*DEFINITION OF RESEARCH ORGANISATION*? YES, BY DESCRIBING THEIR CHARACTERISTICS ("PRIMARY GOAL … IS TO CONDUCT SCIENTIFIC RESEARCH OR TO CARRY OUT EDUCATIONAL ACTIVITIES INVOLVING ALSO THE CONDUCT OF SCIENTIFIC RESEARCH.") MAY ALSO ENCOMPASS PRIVATE AGENTS, IF PURSUING A PUBLIC INTEREST MISSIONS RECOGNIZED BY THE MS OR REINVESTS ALL ITS PROFITS IN ITS SCIENTIFIC RESEARCH TO BE A PSB IS NOT A FORMAL REQUIREMENT	*DEFINITION OF RESEARCH ORGANISATION*? EXPLICITLY REFERS TO THE DEFINITION PROVIDED IN THE CDSM (ART. 40(8), DSA)	*DEFINITION OF RESEARCH ORGANISATION*? NOT DIRECTLY. APPROACH FOCUSED ON PSBS (INCLUDES UNIVERSITIES AND OTHER INSTITUTIONS UNDER PUBLIC LAW, AND CERTAIN PRIVATE ENTITIES) DEFINES UNIVERSITIES CITES BUT DOES NOT DEFINE RPOS AND RFOS'	*DEFINITION OF RESEARCH ORGANISATION*? NOT DIRECTLY. ADOPTS THE SAME DEFINITION OF PSB OF THE ODD DOES NOT DEFINE UNIVERSITIES DOES NOT DISTINGUISH RPOS FROM UNIVERSITIES AND/OR LIBRARIES	*DEFINITION OF RESEARCH ORGANISATION*? NO. REFERS TO RESEARCHERS AS INDIVIDUALS (E.G. RESEARCHERS; SCIENTISTS. SEE AI ACT EP, ART 69(3), REC 45, REC 61A, REC 85, ART 53 A, REC 85).

Some examples of the impact on “data” of DDL

- **Taxonomy of public and private (non personal) data and access/reuse rules**

- HighValueDatasets; research data; PSI; DGA data, Data Act data, copyright&related right “data”, etc.

- **DA examples**:

- user of IoT has right to access (as co-generator) IoT data for free and to ask data holder to transfer data to designated third party including for commercial purposes

- Actual positive **B2G obligation to give access to privately held datasets** when request comes from PSB (including ROs) in cases of special need (e.g, climate, health emergencies, etc).

- **Right to switch** in cloud and hedge

- **No SGDR** in IoT data

- Unfair contractual terms related to data access and use between enterprises

Some examples of the impact on “data” of DDL

- DGA examples:
- Data Intermediation Services (exclusion of the intermediation of copyright-protected content, such as online content-sharing service)
- AIA examples:
- training data in general and in GPAI
- CDSM:
- Arts. 3&4 storage copies
- Opt-outs
- Art. 17
- DSA:
- Art. 40.

Etc.

10. Synthesis: Main opportunities and challenges for research under the EU DDL

Main objective: aims to present if and how researchers, research organisations, and other actors of the research ecosystem can comply with the rights and obligations deriving from the DDL & EOSC

Researchers and Research Organisations as *users* of data

Opportunities

Wider availability and reusability of Pub. Sec. Data

Wider availability of (FAIR) research data

Access to Priv. Sec. Data

Clarity over charging fees

Challenges

Complexity/Legal uncertainty in data access

Challenges from the interplay of DDL and EOSC

Academic Freedom and increased influence of 3rd parties

Researchers and Research Organisations as *providers* of data

Opportunities

Wider availability of resources to enable (re)use and sharing of data

Recouping costs for provision of data

Challenges

Legal uncertainties

Compliance costs

Lack of incentives to register DAO

Academic Freedom

Researchers and Research Organisations as *users* of data (example)

OPPORTUNITIES
(RESEARCHERS' ACCESS TO PRIVATE SECTOR DATA)

EOSC/DATA SPACES/ DATA ACT
B2G DATA SHARING OBLIGATIONS (DATA ACT)

(MOSTLY) INDIRECT APPROACH THAT TAKES THE FORM OF A SEMI-REGULATED MARKET FOR DATA OR, IN OTHER WORDS, OF COMMON EUROPEAN DATA SPACES.

DATA HOLDERS CAN EXCHANGE DATA IN A SEMI-CONTROLLED AND TRUSTED ENVIRONMENT PROTECTIVE OF EU CORE VALUES

FROM THIS PERSPECTIVE, THE MANY RULES ON FAIR, FRAND AND NON-ABUSIVE DATA TRANSACTIONS, AS WELL AS THOSE ON PORTABILITY, INTEROPERABILITY AND SWITCHING OF PROCESSING SERVICES CAN BE APPRECIATED IN THEIR FULL POTENTIAL.

DIGITAL MARKETS ACT
TRANSPARENCY OBLIGATIONS IMPOSED ON GATEKEEPERS

RULES ON ACCESS TO DATA RELATING TO ADVERTISING AND REAL-TIME DATA GENERATED IN THE USE OF THE RELEVANT CORE PLATFORM SERVICE (ART. 6(10) DMA)

DIGITAL SERVICES ACT
ART. 40 DSA REPRESENTS A RATHER INNOVATIVE PROVISION THAT COULD ALLOW RESEARCHERS TO ACCESS PRIVATELY HELD DATA PREVIOUSLY UNAVAILABLE.

IT ENABLES RESEARCHERS, UNDER SEVERAL SPECIFIC CONDITIONS, TO GAIN ACCESS TO THE DATA OF THE VLOPS AND VLOSES.

CHALLENGES
(COMPLEXITY AND LEGAL UNCERTAINTY IN DATA ACCESS AND REUSE FOR RESEARCH PURPOSES)

DATA ACT
COMPLIANCE WITH THE CONDITIONS IN ART. 21 DA

WHILE ART. 43 CLARIFIES IOT DATA ARE NOT PROTECTED UNDER SGDR, THERE IS A LACK OF CERTAINTY CONCERNING OTHER IPRS (BROAD DEFINITION OF DATA MAY ENCOMPASS MATERIALS PROTECTED BY COPYRIGHT AND RELATED RIGHTS)

ARTIFICIAL INTELLIGENCE ACT (PROPOSAL)

UNCERTAINTY REGARDING THE CONDITIONS UNDER WHICH RPOS WILL BE DEEMED PROVIDER MAY HINDER ACTS OF SHARING TRAINING DATASETS OR AI SYSTEMS

AMBIGUITY OF THE EXEMPTION FOR AI COMPONENTS MADE AVAILABLE UNDER OS LICENSES

IF EXEMPTION IS LIMITED TO AI COMPONENTS AND NOT AI SYSTEMS, IT MAY HAVE A CHILLING EFFECT ON RESEARCH ORGANISATIONS BY SUGGESTING THAT MERE DATA AND/OR OTHER AI CANNOT BE MADE AVAILABLE UNLESS UNDER OS LICENSES

Researchers and Research Organisations as *providers* data (example)

OPPORTUNITIES
(WIDER AVAILABILITY OF LEGAL AND TECHNICAL RESOURCES TO ENABLE AND FOSTER ACCESS, (RE)USE AND SHARING OF DATA)

EOSC/DATA ACT

ON THE **DDL DIMENSION:** DATA ACT INTEROPERABILITY REQUIREMENTS MAY PROVIDE IMPORTANT TECHNICAL BENCHMARK FOR DATA SHARING IN THE EU, ESPECIALLY WITHIN THE CONTEXT OF DATA SPACES AND THE EOSC, AND THUS, IN THE LONG-TERM, FACILITATE ACCESS AND SHARING OF DATA, AS WELL AS RESEARCH COLLABORATIONS.

OUTPUTS FROM EOSC-RELATED PROJECTS (OA) CAN SERVE AS VALUABLE TOOLS FOR RESEARCHERS AND RESEARCH ORGANISATIONS, OFFERING INSIGHTS AND FACILITATING TAILORED LEGAL COMPLIANCE ACROSS VARIOUS RESEARCH-RELATED AREAS

CHALLENGES
(LEGAL UNCERTAINTIES)

OPEN DATA DIRECTIVE/DATA GOVERNANCE ACT/ DIGITAL SERVICES ACT

OPEN DATA DIRECTIVE AND DATA GOVERNANCE ACT
POTENTIAL DISCREPANCIES BETWEEN THE ODD AND THE DGA CONCERNING THE TREATMENT OF RPOS AND THE CONCEPT OF RESEARCH DATA.

SCOPE OF APPLICATION FOR EDUCATIONAL ACTIVITIES, LIBRARIES, RESEARCH FUNDING ORGANISATIONS AND PUBLIC-PRIVATE PARTNERSHIPS WHICH ALSO DO NOT FULLY CONVERGE BETWEEN ODD AND DGA.

OPEN DATA DIRECTIVE AND DIGITAL SERVICES ACT
LEGAL UNCERTAINTY ON WHETHER RESEARCH DATA REPOSITORIES IN SCOPE OF THE ODD WOULD ALSO FALL WITHIN THE SCOPE OF THE DSA.

OVERARCHING

RULES STEMMING FROM EU LAW, NATIONAL LAWS, INTERNATIONAL TREATIES AND OTHER DIFFERENT SOURCES (E.G. FUNDERS' REQUIREMENTS, INSTITUTIONAL POLICIES, JOURNALS' REQUIREMENTS) CAN OVERWHELM RESEARCHERS, GENERATE LEGAL UNCERTAINTY, AND GENERATE SIGNIFICANT COMPLIANCE COSTS.

ARTIFICIAL INTELLIGENCE ACT

UNCERTAINTY WHETHER RESEARCH ORGANISATIONS SHOULD COMPLY WITH OBLIGATION TO PROVIDE A “DETAILED SUMMARY" OF THE COPYRIGHT PROTECTED TRAINING DATA. ARE THEY PROVIDERS? WHAT REPRESENTS A "DETAILED SUMMARY"?

11. Recommendations on the legislative and non-legislative levels (examples)

- **Main objective:** provide a set of recommendations on the legislative and non-legislative levels, with the overarching goal of optimizing the alignment of EU Data and Digital Legislation and EOSC with the need of promoting scientific research

- **Structure:** Key findings and recommendations are divided in "Instrument-specific" and "overarching key findings and recommendations"

- **Targeted profiles:** recommendations are addressed to (a) Researchers and Research Organisations; (b) Law- and Policymakers; (c) Interpreters and Enforcers and (d) Private Sector

11. Overarching recommendations to law- and policymakers (examples)

- Key **terminology, concepts and data access and reusability provisions** related to actors and activities within the research ecosystem should be **consistently defined/interpreted** in a manner that safeguards the underlying goals of greater access to knowledge, particularly if publicly funded.

- Assess feasibility of developing a coordinated, actionable and horizontal set of data access and reuse provisions for scientific research, e.g., Business to Research (B2R) data sharing obligations **to mitigate compliance costs of a complex regulatory system** that **risks overburdening researchers and research organizations.**

11. Overarching recommendations to law- and policymakers (examples)

- Scientific research should be the clear policy and regulatory objective of provisions relating to scientific research, not simply a tool employed to achieve different goals. Examples may be found in Art. 40 DSA or in the B2G provisions of the DA. In both cases researchers are granted specific access frameworks, but the ultimate goal is not scientific research.

- A fundamental right approach to key elements such as scientific research, data access and reusability, digital and infrastructural self-determination of researchers and research organization, as well as risk mitigation measures to ensure that DDL adequately safeguards academic freedom.

- Is DDL sufficient? Assess feasibility of dedicated Researcher's/Digital University Act?

Useful resources

Full study: https://op.europa.eu/en/publication-detail/-/publication/77395a15-133b-11ef-a251-01aa75ed71a1/language-en

Press release: https://research-and-innovation.ec.europa.eu/news/all-research-and-innovation-news/enhancing-research-accessibility-and-reuse-new-study-outlines-strategic-measures-2024-05-16_en

Blog: https://www.law.kuleuven.be/citip/blog/new-study-improving-access-to-and-reuse-of-research-results-publications-and-data-for-scientific-purposes/