

# KU Leuven Centre for IT & IP Law (CiTiP) – imec

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# Conceptualizing digital infrastructure:

A study of data sharing legal regimes in the field of network industries

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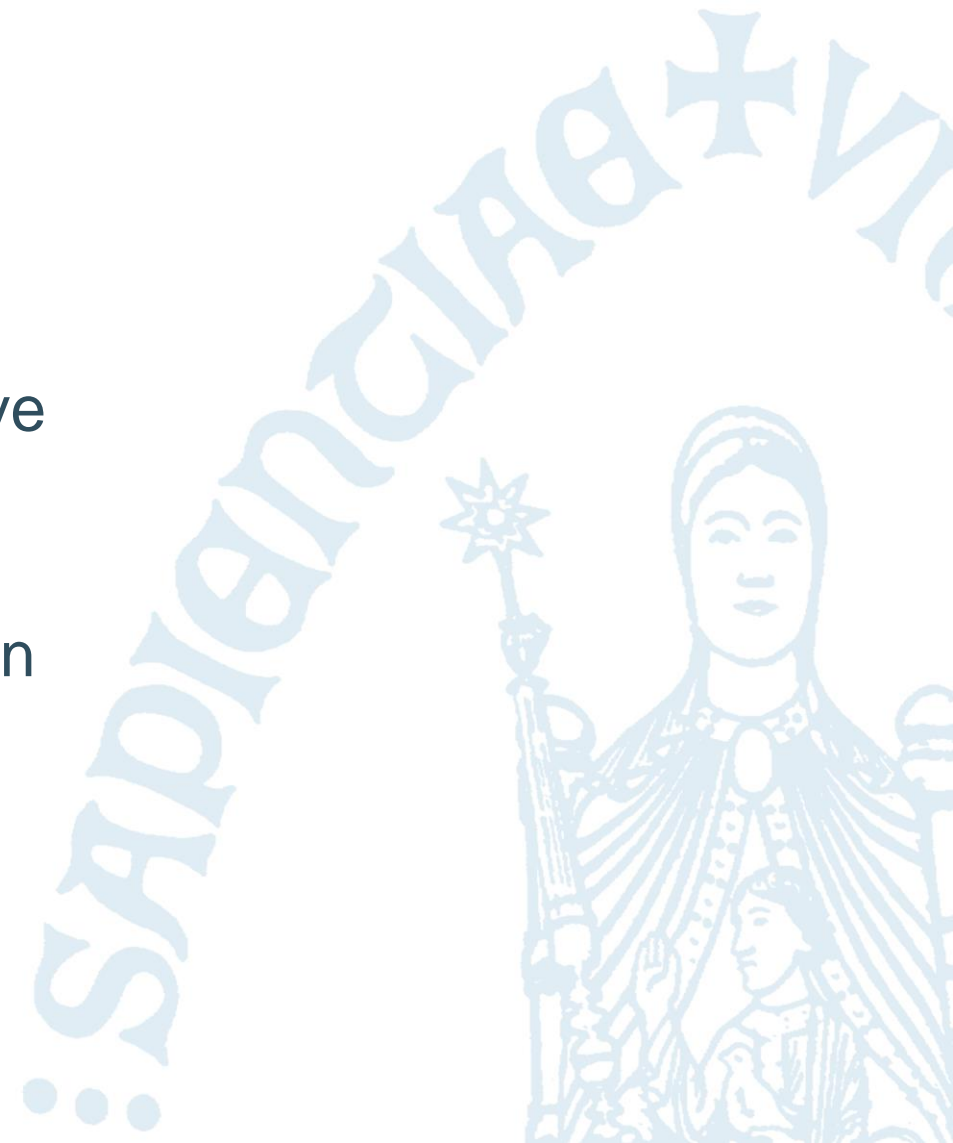


Do they have something in common?!



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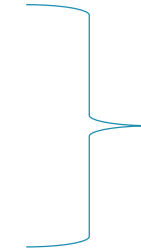
# 1. Definition of infrastructure



# Infrastructure

- “The underlying framework of a system” (Frischmann 2012)

- General purpose – input into wide range of G&S
- Non-rivalrous consumption to some appreciable extent
- Social demand driven primarily by downstream activities



2 levels

- Infrastructure >< ‘essential facility’

- Purpose & subsequent beneficiary(ies)
- But, EFD as a source to regulate infrastructure with liberalization of network industries

## 2. Study of a few data sharing legal regimes (legislative initiatives) in EU law



# A few data sharing legal regimes (or legislative initiatives)

## 1. PSI Directive – under revision

- Competition law – esp. EFD – as a source of inspiration (Lundqvist 2018)
  - PSI entities as “data monopolist providers”
- ... but not only → **purposive view of data as infrastructure**

## 2. In-vehicle data – institutional on-going discussions (EC & IMCO)

- Private undertakings! (esp. vehicle manufacturers)
- Distinction: competition law rationale (EFD) vs. data as purposive infrastructure
  - as extracted from (Kerber 2016)

## 3. Energy data management - legislative proposal

- Regulation of (a) access to ‘energy data’ under ‘FRAND’ conditions for ‘eligible parties’, (b) data management and even (c) data management operator
  - Non-retained idea of an “independent central data hub” (Impact Assessment)
- Competition law inspiration (+ *ex ante* sector-specific electricity regulation) vs. data as purposive infrastructure



### 3. From data-sharing obligations to a conceptualization of digital infrastructure



# Key takeaways

## Regulated entities targeted by as “exclusive data holder”

- Even private undertakings! Monopolist access to every data source (e.g. vehicle)
- recognized or **established by law** as monopolist data provider (parallel data market)

## Beyond these similarities, 2 rationales

- competition law (esp. EFD) vs. data as purposive infrastructure
  - Prevention of harm in derived markets vs. innovation fostering
- But references are blurred (“fair competition”)

## Layering

- A new ‘digital layer unbundling’...
  - e.g. energy data management [operator]
- ... in addition to the “digital platform” layer (Finger & Montero 2018) → contradictions?

# Moving beyond

## Policy proposal

### Differentiating legal regimes *according to the rationale*

- **Distinction wrt beneficiaries and purpose of re-use**
  - Beneficial treatment for beneficiaries in related market (likely to be) harmed by data monopoly...
  - ... vs. broader range of 3<sup>rd</sup> parties (data harvesting / data as purposive infrastructure)
  - E.g. conditions for re-use (price, ...)
- **Expected outcome**
  - Save the “pro-competitive” effect of data sharing regime (responding criticism of Lundqvist 2018)
  - Purpose of re-use matters? Vs. the mis-conception of data transacted as a commodity
  - Towards a “fair price” for network industries operators

## Food for thought – further research needed

### Balancing legitimate interests of stakeholders in digital infra. regulation

- **Representation of the parties at stake (non-exhaustive)**
  - Data holder
    - When subsidized public service activities (e.g. physical infra management): article 14 TFEU?
  - Beneficiaries & overriding general interest
  - Data subject (personal data)
- **Balancing**
  - Importance of a clear & specific rationale!
    - Distinction competition law / data as infrastructure
    - Public law requirement? (FR law, see Padova 2018)
  - Triangular balancing ⇔ impact of data protection law on the choice of the regulatory means

**Thank you for your attention!**

**Do you have any questions or comments?**

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