



Reuse policy

A study on available reuse
implementing instruments
and licensing considerations

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Intellectual
Property

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Foreword

Reuse of Public Sector Information (PSI) is an important driver for economic growth and creation of new information-based businesses in the knowledge economy. In recognition of this, the European Commission has established for itself an ambitious reuse policy, enshrined in the Commission Decision 2011/833/EU on the reuse of Commission documents (the Reuse Decision).

The European Commission's reuse policy acknowledges that certain instruments are capable of contributing towards the overall effective implementation of the Reuse Decision. Instruments such as open licences fall within this purview and can serve in furthering the Institution's policy objectives. The purpose of this document is to assess a range of implementing instruments which could be used by the Commission within the context of its reuse policy.

To this end, four main instruments have been selected for assessment. The first instrument is the Reuse Notice currently used by the Commission on most online and print media. The three other alternative instruments are the Creative Commons licensing suite, the Open Data Commons licensing suite, and a bespoke licence (i.e. a tailor-made open licence drafted and maintained by the Commission).

The Central IP Service adopted a uniform assessment methodology on the basis of generally accepted norms of open licensing, adapted to the specific institutional and legal context of the Commission. The chosen methodology is used consistently throughout the document in order to offer as objective an assessment as possible.

Although a range of observations are presented pursuant to the assessments carried out, this document does not intend to promote or recommend one instrument over another. Observations are made in an unbiased manner and for the purposes of enabling viable policy considerations under Article 12 of the Reuse Decision. A visual summary of the observations is provided at the end of the document for the reference of the reader.

Independently of the particular context of the present document, the Central IP Service is aware that discussions on the subject-matter are ongoing within other EU Institutions. In this regard, although this study is primarily addressed at the Commission services, observations made herein may serve as a reference for any other EU Institution or body which seek to implement similar reuse policies within their own institutional context. To this end - and in accordance with the Communication to the Commission SEC(2012)103 - the Central IP Service can assist any interested EU bodies in their efforts towards designing a consistent approach for the reuse of EU public documents.

The Central IP Service of the European Commission

Introduction

Policy context and legal background

Knowledge, data and information produced by public bodies are demonstrably of value to a large number of industries. Efforts over the past decade, from the G8 Open Data Charter¹ to various governmental initiatives across the globe, aim at unlocking the economic potential of the so-called 'public sector information' within the wider knowledge economy, particularly through encouraging reuse.²

The European Union has been at the forefront of the global endeavour towards greater openness and reusability of publicly held knowledge, data and information for economic progress. Starting with the PSI Directive 2003/98/EC, as amended by the Directive 2013/37/EU, and coupled with the wider array of initiatives within the framework of the Digital Agenda for Europe, the European Union has positioned itself as a main driver in the building of a European data economy.

The PSI Directive seeks to put in place a most effective framework for enabling the reuse of PSI, avoiding where possible legal restrictions, reducing transactional costs and ensuring legal interoperability of licensing instruments.³

In the same spirit, the European Commission established for itself a set of rules with the objective of enabling the most widespread and unrestricted reuse of the knowledge, data and information it generates. The Commission Decision 2011/833/EU⁴ (the 'Reuse Decision'), replacing the earlier Commission Decision 2006/291/EC,⁵ currently governs the rules in relation to the reuse of Commission documents.⁶

Description of the reuse principles

This section outlines the principles enshrined in the Reuse Decision. These should be understood as the overarching standards that serve as a benchmark for assessing the suitability and performance of the legal tools currently used for implementing the Reuse Decision. At the same time, these principles serve as the basis for assessing any alternatives or complementing measures to the present *status quo*.

The Reuse Decision defines reuse as the "*use of documents [i.e. any content or part of such content, whatever its medium] by persons or legal entities of documents, for commercial or non-commercial*

¹ <https://ec.europa.eu/digital-single-market/en/news/eu-implementation-g8-open-data-charter>

² Principle 5, 13: "*We will support [...] open licences or other relevant instruments – while respecting intellectual property rights – so that no restrictions or charges are placed on the re-use of the information for non-commercial or commercial purposes, save for exceptional circumstances.*" The principle is also included in the recital of the new PSI Directive of 2013 (2013/37/EU), preamble point 3: "*[...] encourage the wide availability and re-use of public sector information for private or commercial purposes, with minimal or no legal, technical or financial constraints [...].*"

³ This is typically the case where materials sourced from different licensors are combined together to form a derivative work which is then itself offered under licence to third-parties. On this subject, see for example the 2013 PSI Directive, preamble point 5: "*This rapid technological evolution makes it possible to create new services and new applications, which are built upon the use, aggregation or combination of data. [...].*"

⁴ Decision 2011/833/EU on the reuse of Commission documents (Reuse Decision) [2011] OJ L 330/39.

⁵ Decision 2006/291/EC on the reuse of Commission information [2006] OJ L 107/38.

⁶ In accordance with article 13 of the 2011 Reuse Decision, the instrument was subject to a review exercise in 2015. This review did not lead to any change to the existing Decision.

purposes other than the initial purpose for which the documents were produced".⁷ The main aim of the Commission Reuse Decision is to facilitate the reuse of Commission information, while avoiding administrative burdens for reusers and for the Commission.⁸ In accordance with these objectives, the Reuse Decision is underpinned by the following general principles:

- Universal;
- Unrestricted;
- Simple;
- Cost-free;
- Non-discriminatory; and
- Transparent.

Universal: "All documents shall be available for reuse"

Reuse policy applies universally to all public documents produced by the Commission (or by external entities on its behalf) which the Commission is in a position to allow reuse. Article 4 of the Reuse Decision clearly reads *"All documents shall be available for reuse"*. Documents for which the Commission is deemed not to be in a position to allow reuse are limited only to a narrow list, without unreasonably hampering the overall universality of the Decision's broad scope.⁹

Unrestricted: "Documents shall be made available for reuse (...) without restrictions"

Reuse Decision is intended to be feasibly unrestricted. Article 6(1) of the Reuse Decision establishes that *"Documents shall be made available for reuse (...) without restrictions"*. The Decision does not introduce any arbitrary restrictions, such as, for example, country of origin of the reuser, nature or purpose of the reuse, or other restrictions which could prevent the Reuse Decision's universality or applicability. The Decision draws a difference between restrictions and conditions, in the sense that certain specified conditions may be applied to the act of reuse so long as those conditions do not *"unnecessarily restrict possibilities for reuse"*.¹⁰ The Commission nonetheless reserves the right to take appropriate measures in the event a reuser engages in deception or fraud using Commission documents.¹¹

Simple: "Avoiding unnecessary burdens for reusers"

Simplicity refers to the ease with which third parties can reuse Commission documents (i.e. user friendliness). Article 1 of the Reuse Decision stipulates that the Decision carries the aim of *"avoiding unnecessary administrative burdens for reusers"*. To this end, Article 7(c) establishes that reuse shall be *"without the need to make an individual application"*. The Decision acknowledges, however, that

⁷ Commission Reuse Decision, Article 3(1) and (2).

⁸ Id. Article 1.

⁹ Id. Article 2(2) of the Reuse Decision excludes documents which are subject to third party rights or to confidentiality obligations, software, documents covered by industrial property rights, documents access to which is limited under Regulation (EC) No 1049/2001 or whose reuse would interfere with the validation of provisional research results, or documents the disclosure of which would constitute grounds for refusal with regards to registration of industrial property rights.

¹⁰ Id. Article 6(2) specifies permissible conditions as acknowledging the source of the document, not distorting the original meaning or message of the documents and non-liability of the Commission for any consequence stemming from the reuse. Other conditions can only be applied to a particular class of documents after the consultation of the Reuse Decision inter-service group pursuant to Article 12.

¹¹ Article 2(4) of the Reuse Decision.

in certain limited and justified cases, an individual application for reuse might be necessary, albeit following the prescribed procedure under Article 7.

Also associated with the principle of simplicity is the favouring of making available documents in machine-readable format, i.e., "*in a way sufficiently structured for software applications to identify reliably individual statements of fact and their internal structure*".¹² This principle is further elaborated in Article 5 of the Reuse Decision, whereby Commission services are instructed to "*identify and progressively make available suitable data in their possession*" through "*a data portal as a single point of access to structured data so as to facilitate ... reuse*".

It should be noted that the Communication to the Commission C(2016) 6626 on Data, Information and Knowledge Management at the European Commission also commits to making documents as fully available as possible for use and re-use, in machine-readable formats.

Cost-free: "The reuse of documents shall in principle be free of charge"

Article 4(b) establishes that all documents shall be available for reuse "*without charge*". Article 9 further stipulates that "*the reuse of documents shall in principle be free of charge*" except for marginal costs incurred for the reproduction and dissemination of documents (such as, for example, printing and postage). Therefore, in principle, the Commission cannot make reuse conditional upon the payment of monetary sums.

Non-discriminatory: "Any applicable conditions (...) shall be non-discriminatory"

Reuse Decision establishes in Article 11 that "*any applicable conditions for the reuse of documents shall be non-discriminatory for comparable categories of reuse*". The Decision further stipulates in the same Article that "the reuse of documents shall be open to all potential actors in the market" and that "no exclusive rights shall be granted" unless it is "necessary for the provision of a service in the public interest".¹³ Attention should also be drawn to the fact that the Reuse Decision does not discriminate between reusers (e.g. public or private entities), their purposes (commercial or non-commercial) or their nationality (EU or non-EU). As such, all reusers benefit from the Reuse Decision in the same manner, in a non-discriminatory fashion.

Transparent: "Any applicable conditions shall be pre-established and published"

Article 10(1) of the Reuse Decision stipulates that "*any applicable conditions and standard charges for the documents available for reuse shall be pre-established and published, through electronic means where possible and appropriate*". Moreover, Article 11(3) establishes that "*any exclusive arrangement shall be transparent and made public*" thereby further consolidating the understanding that transparency is an underlying principle of the Reuse Decision.

Although the Reuse Decision is, *ipso jure*, binding upon the European Commission, its effective implementation relies *ipso facto* on the development, deployment and use of appropriate instruments. Some of these instruments, such as the Data Portal, are indeed directly prescribed in the text of the Decision. Others are only referenced, without a detailed prescription as to their exact nature.

¹² Id. Article 3(5)

¹³ Id. Article 11(3) and (4).

One such implementing instrument is mentioned in Article 6(1) of the Reuse Decision whereby "an open licence or disclaimer setting out conditions explaining the rights of the reusers" is referenced. Article 12(3) further stipulates that "the terms of the open licence referred to in Article 6 shall be settled in agreement by the Directors-General responsible for this Decision [i.e. DG CONNECT] and for the administrative execution of decisions related to intellectual property rights [i.e. the JRC], after consultation of the inter-service group (...)".

As such, it is understood that the Decision acknowledges the opportunity to develop, deploy and use an appropriate implementing instrument addressed towards the reusers, so as to facilitate the effective implementation of the Reuse Decision. Currently, the Reuse Decision is implemented by way of a copyright notice (otherwise referred to in this document as the Reuse Notice). The following sections of this study will observe the effectiveness and efficacy of the current implementing instrument while also looking into alternative instruments which may supplement or facilitate the Reuse Decision's effective implementation.

Methodology

In order to ensure an objective and systematic approach in assessing the different options considered in this document, the Central IP Service has adopted nine criteria:

- conformity to EU law;
- policy compatibility;
- openness;
- licence micro-elements;
- licence reusability;
- licence interoperability;
- flexibility;
- machine readability; and
- uptake.

Conformity to EU law and policy compatibility

Conformity to EU law and compatibility with the Reuse policy are considered to be mandatory requirements of an effective implementing instrument. Consequently, any option not meeting these requirements cannot therefore be taken into consideration.

For the purposes of this methodology, an instrument shall be considered non-conformant to EU law if its terms conflict with a binding provision of EU law. Enforceability will be assessed as part of the EU law conformity.

Policy compatibility will be evaluated against the underlying principles of the Reuse Decision as described in the preceding section: universal, unrestricted, simple, cost-free, non-discriminatory and transparent.

Each option will then be assessed against the remaining criteria with a view to establish their effectiveness against less stringent, yet equally important, characteristics.

Openness

According to generally accepted terminology¹⁴, openness means that '*anyone can freely access, use, modify, and share for any purpose (subject, at most, to requirements that preserve provenance and openness)*.' In view of the intellectual property rights subsisting in most of the content produced by public administrations, the four requisite rights - access, use, modify and share - are often granted by way of a licence; for this reason, licences conforming to the openness requirements are referred to as open licences.

Licence micro-elements¹⁵

Licence micro-elements refer to the typical components of a licence. The assessment will in particular consider how the licence is offered to the licensee. The objective is to understand whether the considered instrument qualifies as a *non-transactional licence*,¹⁶ i.e. a licence whose performance does not require a direct interaction with the licensor (e.g. the mechanism according to which the use of the licenced material equals acceptance of the terms). Non-transactional licences increase legal certainty while reducing the costs associated with licensing PSI. In order to further qualify the application of the licence, this study will also take into consideration whether the licence text is stored in a permanent location, whether it features a clear versioning system and whether its upgrade process is subject to a public consultation.¹⁷

Additional micro-elements pertain to the nature of the licence grant (*i.e.* whether certain rights are explicitly excluded from the grant, such as trade mark rights), its scope,¹⁸ as well as the presence of additional conditions (e.g. attribution, non-endorsement, sublicensing), warranty disclaimers, limitations of liability, applicable law and jurisdiction.¹⁹

Licence reusability

Licence reusability refers to whether or not the text of a licence can be reused by any licensor without the need to modify or customise the terms of that licence. A reusable licence is normally made available at a permanent URL for ease of access and reference. Recipients of a reusable licence can thus adopt the same licence document in order to further disseminate the obtained resource or any derivative work thereof. The concept of licence reusability should not be confused with reuse of the documents.²⁰

¹⁴ <http://opendefinition.org/>. It should be noted that the Reuse Decision contains a distinct definition of openness pointing to the non-transactional nature of a licence instead.

¹⁵ The term 'micro-elements' is terminology adopted within the LAPSI Thematic Network to '*denote the minimum unit of rules that a licence contains and which is significant for assessing its interoperability with other types of licences*'. See LAPSI *Licence Interoperability Report*, *infra*, footnote 19.

¹⁶ The non-transactional nature of the licence is a default characteristic under article 6(1) of the Reuse Decision: '*Documents shall be made available for reuse without application unless otherwise specified [...]*'. See also Article 3(4) for the definition of 'open licence' for the purpose of the Reuse Decision.

¹⁷ In this regard, the European Commission has already produced a non-transactional reusable licence specific for software. The European Union Public Licence (EUPL), currently in its version 1.2, is available on the [Joinup](#) platform.

¹⁸ i.e. whether the licence terms cover all assets foreseen within the Reuse policy.

¹⁹ A more detailed description of the license micro-elements is provided in the document: *Licence Interoperability Report*, authored by the LAPSI 2.0 Thematic Network, CIP-ICT PSP-2012-6 under Grant Agreement n.325171.

²⁰ As also defined in Article 3(1)(2) of the Reuse Decision.

Licence interoperability

Interoperability takes into consideration the relation and compatibility between different licences, with a view to determine the likelihood of conflicts in downstream distribution of content resulting from the combining together of various works from multiple sources. The interoperability criterion thus requires that a licence be considered together with other equivalent licences used in the PSI ecosystem.²¹

Flexibility

In spite of the general reuse principles mandating that public administrations should not unnecessarily restrict possibilities for reuse, regulators acknowledge that not all PSI can be released under the same licence terms.²² In this context, therefore, flexibility refers to the characteristic of a licence instrument to be expressed in the form of a 'suite' of off-the-shelf solutions that can be adopted depending on the specific need.

Furthermore, it should be noted that use of licences is in principle not necessary if a work or content is not subject to intellectual property rights protection. As such, it may be desirable to either discourage the unnecessary licensing such works or to adopt flexible instruments capable of distinguishing between works which are protected and those which are not.²³

Machine readability

Machine readability refers to whether or not a licensing instrument can be expressed in a form that a computer can process and understand. It should be underlined that machine-readability of a document (within the meaning of Article 3(5) of the Reuse Decision) and machine-readability of a licence should not be confused with each other. Terms of a machine-readable licence are recognised through specific resource description frameworks (RDF) that are used to embed rich metadata within the mark-up of web resources or in digital media files. A machine-readable licence can thus be parsed by search engines in order to provide users with those results (e.g. photographs, videos or other documents) which match their needs from a licensing standpoint, therefore reducing the chances of inadvertent violation of the licence terms.

Uptake

Uptake concerns the overall global penetration of a given licensing instrument, that is to say how widespread and popular its adoption has been or is expected to be. While an exact quantification is hardly possible in the case of non-transactional licensing, this study will nonetheless seek to present a reliable order of magnitude based on both internal sources and available third-party projections. Licence uptake may be considered as an indicator of the degree of awareness amongst users, and by extension, of the risk of inadvertent violations of the licence terms. Uptake potential also allows to

²¹ The prospected interoperability of a licence depends on other criteria presented in this section, with particular regard to its openness and reusability.

²² See for example Article 8.1 of the PSI Directive or Article 6, last paragraph, of the Reuse Decision.

²³ See in this regard the policy recommendations produced by the Commission-funded thematic network on Legal Aspects of (reusing) Public Sector Information (LAPSI), *D5.2. Licensing guidelines* (2014), paragraph 2.1. More resources available on Europa at: <https://ec.europa.eu/digital-single-market/en/news/legal-aspects-public-sector-information-lapsi-thematic-network-outputs>

address specific considerations which may arise due to interoperability problems linked to license proliferation.

Current implementing instruments

Reuse Notice

Description

Following the adoption of the revised Reuse Decision in 2011, relevant Commission services, in consultation with the Legal Service and the inter-service group, considered two instruments to aid the Decision's effective implementation: a bespoke Commission reuse licence or a standard copyright notice (the Reuse Notice). Consequently, adopting a Reuse Notice was considered to be the preferred option, largely due to its simplicity and pace of implementation. The formulation currently in use on the Europa portal reads as follows:²⁴

Reuse is authorised, provided the source is acknowledged. The Commission's reuse policy is implemented by the Decision of 12 December 2011 - reuse of Commission documents.

The general principle of reuse can be subject to conditions which may be specified in individual copyright notices. Therefore, users are advised to refer to the copyright notices on individual websites maintained under Europa and in individual documents. Reuse is not applicable to documents subject to intellectual property rights of third parties.

The Reuse Notice is sometimes reduced to the first two lines presented above and accompanied by either a hyperlink to the Reuse Decision (online), or by a more precise reference to the Decision (on printed material).

As mentioned in the Reuse Notice on the Europa portal, "*The general principle of reuse can be subject to conditions which may be specified in individual copyright notices*" and the notice is indeed sometimes formulated differently. This is addressed in the Interinstitutional Style Guide prepared by the Publications Office of the European Union.²⁵ In the copyright section of the Guide (currently under review), the Publications Office states the following:

"The reuse of Commission documents is regulated by Decision 2011/833/EU of 12 December 2011. When the principle of reuse is applicable, it is advisable to use the following wording:

© European Union, [year] Reuse authorised. The reuse policy of European Commission documents is regulated by Decision 2011/833/EU (OJ L 330, 14.12.2011, p. 39).

In accordance with the abovementioned decision, the author services may add to this one or more of the following conditions:

(a) the obligation for the reuser to acknowledge the source of the documents:

© European Union, [year]

²⁴ https://ec.europa.eu/info/legal-notice_en#copyright-notice.

²⁵ <http://publications.europa.eu/code/en/en-250302.htm>.

Reuse is authorised provided the source is acknowledged.

The reuse policy of European Commission documents is regulated by Decision 2011/833/EU (OJ L 330, 14.12.2011, p. 39).

(b) the obligation not to distort the original meaning or message of the documents;

(c) the non-liability of the Commission for any consequence stemming from the reuse."

In an effort to harmonise the various non-standard notices used by the different Commission services in relation to their documents, the Central IP Service included in the Intellectual Property Portal of My IntraComm an example encompassing all the conditions permitted in the Reuse Decision:

"© European Union, [year]. The Commission's reuse policy is implemented by Commission Decision 2011/833/EU of 12 December 2011 on the reuse of Commission documents. Reuse is authorised, provided the sources and authors are acknowledged and the original meaning or message of the texts are not distorted. The European Commission shall not be liable for any consequence stemming from the reuse."²⁶

Assessment

Effectiveness and aptitude of the current implementing instrument (i.e. the Reuse Notice), following a period of five years since its initial adoption, is assessed in the present section against the methodology established earlier in this document.

EU law conformity

In the past five years, the Central IP Service has not encountered any instances where the Commission had to seek judicial enforcement of its rights in a document bearing the Reuse Notice, nor had it to defend the validity or enforceability of the Reuse Notice in a court of law. It is widely held that copyright notices indeed constitute a legally viable tool for copyright-holders to attach terms and conditions when making their works available to the public.²⁷ As such, use of a copyright notice as an instrument to implement the Reuse Decision is in principle conformant to EU law.

Compatibility with the reuse policy

Considering that the standard text of the Reuse Notice is largely a reference to the Reuse Decision, its compatibility with the underlying policy – and its compliance with the Decision – is evident. Nothing in the standard Reuse Notice arbitrarily hinders the underlying principles of the Reuse Decision. It is universal, unrestricted, cost-free and non-discriminatory.

In view of the underlying principles of simplicity and transparency, however, it has been observed over the past five years that relying on the use of the Reuse Notice as the sole instrument to

²⁶ https://myintracomm.ec.europa.eu/corp/intellectual-property/advice/written_works/Pages/TX003.aspx. An additional example is included to use in documents produced by the European Commission which include third party illustrations: "Text: © European Union, [year] Reuse of this [report/study/article/etc] is authorised provided the source is acknowledged. The Commission's reuse policy is implemented by Commission Decision 2011/833/EU of 12 December 2011 on the reuse of Commission documents. For reuse of the photos on page 10, permission must be sought directly from [identification of the copyright holder]."

²⁷ This can further be inferred from para. 55 in the preamble to the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, as well as Article 7 therein.

implement the Reuse Decision has resulted to an extent in unnecessary administrative burdens for reusers and the Commission services alike.

First observation in this regard concerns the large number of support requests received on a regular basis by the Central IP Service. Most of these requests, received both from Commission services and reusers, indicate a lack of clarity in understanding what the Reuse Decision entails and what the consequences of using the standard Reuse Notice would be.²⁸

Second observation is that there are instances where reusers require written assurances of the rights they can exercise under the Reuse Notice. This is in part due to the fact that the rights which preside under the umbrella of reuse are not always immediate to a reader. Additionally, in certain national jurisdictions, such as Belgium, copyright law requires any grant of economic rights to clearly precise the nature and extent of the rights granted per each right. As such, corporate or institutional reusers within such jurisdictions demonstrate a tendency to seek additional written assurances.

Third observation is that not all reusable documents produced by the Commission include an individual notice or redirect users to the Reuse Notice on the Europa portal. Absence or material variations in the text of the notice are susceptible to negatively affect the simplicity and transparency of the reuse policy.

In conclusion, while the Reuse Notice is compatible with the Reuse Policy, the fact that it relies mostly in a reference to the legal text of the Reuse Decision may generate ambiguities as to the layman's interpretation of the licensing conditions.

Openness

Insofar as no further conditions are added to it, the standard Reuse Notice is open by virtue of its reference to the Reuse Decision. Although the text of the notice does not explicitly mention the rights to access, use, modify and share, its open nature is deduced by the text of the Decision.²⁹

Licence micro-elements

The Reuse Notice contains basic licensing elements that introduce a conditional relationship with the recipients of reusable documents. Although none of the elements found in the Reuse Notice go against the binding provisions of law or the reuse policy, it is evident that the text of the Reuse Notice lacks many of the typical elements of a licence. Nonetheless, considering the definition of non-transactional licence (i.e. a mechanism according to which the use of the material equals acceptance of the terms under which they are provided), the current implementing instrument qualifies as such.

As mentioned earlier, however, the various Reuse Notices currently in use do not precisely define the scope of the authorisation granted to reusers. Although the term "reuse" is defined in the Reuse Decision as "*the use of documents by persons or legal entities of documents, for commercial or non-commercial purposes other than the initial purpose for which the documents were produced*",³⁰ this definition does not directly deal with the scope of the authorisation (in terms of the rights under

²⁸ Based on support requests received by the Central IP Service since 2012.

²⁹ In particular: preamble paragraphs 10 and 12, Articles 3(1)(2), 3(1)(4), 4 and 6(1) of the Reuse Decision.

³⁰ Commission Reuse Decision, Article 3(2).

copyright law) granted to reusers (it should be noted that "reuse" *per se* is not a definite legal construct under copyright law). Additionally, no references are made to the territorial scope or to the term of the authorisation, nor to the possibility of sublicensing any rights.

As for restrictions to reuse, one will not fail to note that the only mandatory requirement under the Reuse Decision is acts calculated to deceive or to defraud.³¹ The conditions mentioned in article 6(2) of the Reuse Decision were instead included as examples of possible conditions. Where these or other conditions apply, they "*shall be pre-established and published*",³² by an "*open licence or disclaimer setting out conditions explaining the rights of reusers*".³³

Considering the above, the acknowledgement requirement is not mandatory in the text of the reuse policy,³⁴ and thus was never intended as a mandatory obligation for reusers. Conversely, in spite of being listed in the Decision, other conditions listed alongside the acknowledgement requirement did not find application in the standard text of the Reuse Notice displayed on the Europa portal. Therefore, documents will only be subject to the additional conditions mentioned in the Decision³⁵ if referred to in individual notices.

As such, in the absence of a direct reference, warranty disclaimers and limitations of liability are not tied together to the reuse permission. Arguably, it might be possible to rely on the "Disclaimer" in the legal notice on the Europa portal whenever the document subject to reuse is included in this portal without an individual Reuse Notice. However, this is not written as (and does not contain) a disclaimer of IP warranty.

Licence Reusability

In view of its inextricable link to a Commission act, the Reuse Notice does not appear to be reusable by third-parties insofar as the text of the notice is concerned. As mentioned in the methodology section, this criterion is understood as the characteristic of a licence to be reused by any licensor without the need to modify the terms therein. Given that the current implementing instrument contains a direct reference to the Reuse Decision (which is in principle binding upon and directed specifically at the European Commission), the use of the standard Reuse Notice by third parties for their own works is not appropriate or fit for their purpose.

Licence interoperability

The specific terms of the Reuse Notice are not susceptible of creating barriers to the downstream distribution of content arising from multiple sources under a specific licence. This is particularly due

³¹ Id., Article 2(4).

³² Id., Article 10(1).

³³ Id., Article 6(1).

³⁴ Commission Reuse Decision, Article 6(2): "Those conditions [...], *may* include the following: a) The obligation for the reuser to acknowledge the source of the documents. [...]" (emphasis added).

³⁵ Namely, the obligation not to distort the original meaning or message of the documents and the non-liability of the Commission for any consequence stemming from the reuse.

to the fact that the Reuse Decision (and the licensing instruments admissible under it) does not include a share-alike³⁶ clause or limitations to the commercial use of a document (or parts of it).

Flexibility

The standard Reuse Notice on the Europa portal – which authorises reuse, subject to the acknowledgement of source – applies uniformly to any document which is available on the portal, which is subject to the Reuse Decision and which does not carry its own individual copyright notice. The fact that the standard Reuse Notice refers to the possibility of additional conditions in specific copyright notices on individual documents gives the standard Reuse Notice a relatively wide degree of flexibility, albeit within the bounds of the Reuse Decision.

Machine readability

Currently, the Reuse Notice is not machine-readable (nor easily made so). This prevents software applications and search engines from signalling these documents as reusable, thereby creating an obstacle to their broader identification, dissemination and use.

Uptake

As of 30 August 2017, the European Commission published 9834 datasets in the Open Data Portal. These datasets have been released not only under the standard Reuse Notice on Europa, but also through specific copyright notices. The datasets made available via the Open Data Portal represent only a small amount of the number of documents released by the European Commission, the majority of which is released either on the Europa portal or through the Publications Office of the European Union. Ultimately, however, the Central IP Service is not in a position to ascertain the exact number of the reusable documents released under the standard Reuse Notice or its variations.

Alternative implementing instruments

As an alternative to the Reuse Notice, other instruments may be adopted for the implementation of the reuse policy. The three instruments considered in this section of the study were selected on the basis of general trends within EU public administrations as well as ongoing discussions within the EU Institutions: a) Creative Commons, b) Open Data Commons, and c) a bespoke licence.

a) Creative Commons

Description

This section observes the Creative Commons (CC) licence suite as a potential implementing instrument for the Reuse Decision.

CC is a non-profit organisation whose goal is to increase the '*the body of work freely available for legal use, sharing, repurposing, and remixing*'.³⁷ Since its launch, the organisation produced five major versions of the license suite (1.0, 2.0, 2.5., 3.0 and 4.0). The adoption of a new version is

³⁶ 'Share-alike' is the denomination given to the condition, included in certain licences, which require copies or adaptations of the licensed work to be released under the same or similar licence as the original. The share-alike mechanism is thus often described as generating a 'viral effect' affecting any subsequent downstream distributions of the concerned work.

³⁷ <https://creativecommons.org/use-remix/>.

always subject to a large public consultation process, involving many participants, stakeholders, and experts, including the Creative Commons Affiliate Network which 'includes over 500 researchers, activists, legal, education and policy advocates, and volunteers who serve as CC representatives in over 85 countries'.³⁸ Tables comparing the various versions and summaries of the debates are then published on the CC website.

Prior to version 4.0, in addition to the generic licence suite, Creative Commons featured "ported" versions of its licenses in several different jurisdictions.³⁹ However, version 4.0 (published on 25 November 2013) represented an end to the porting project as the licence suite was designed in a manner that is enforceable worldwide, independently of the applicable law.

The CC licence suite is composed of six different non-transactional licences, all made available free of charge to the public: CC-BY, CC-BY-SA, CC-BY-NC, CC-BY-ND, CC-BY-NC-SA and CC-BY-NC-ND. These licences grant users the right to use, reproduce and share the work, and with the exception of CC-BY-ND and CC-BY-NC-ND, they also grant the right to adapt the original material and to create derivative works.

Within the specific context of CC licences, BY indicates the attribution requirement; SA indicates that a share-alike condition applies to derivative works (i.e. that any derivative work is distributed under an identical or compatible licence)⁴⁰; NC indicates that permitted use is limited to non-commercial purposes⁴¹; and ND indicates that no derivative works are allowed.⁴² Although the licences vary according to how these elements are combined, the attribution requirement is present in all CC licences.

CC licences are structured in three different layers: i) the legal text of the licence itself; ii) the Commons Deed, which is a layman's summary of the main features and terms of the actual licence; and iii) a "machine-readable" version, which includes the key licence elements written into a format that computers can recognise.⁴³

CC has also created CC0 Public Domain Dedication ("no copyright reserved"), through which authors relinquish all copyright and similar rights over a work and dedicate those rights to the public domain. Rather than granting generous rights of use to licensees, the CC0 licence is meant to opt out of copyright and database protection. According to the CC website: "*CC0 enables scientists, educators, artists and other creators and owners of copyright- or database-protected content to waive those interests in their works and thereby place them as completely as possible in the public domain, so*

³⁸ <https://creativecommons.org/about/global-affiliate-network/>

³⁹ Porting involved the translation and legal adaptation of the licence suite to the languages and copyright laws of individual jurisdictions (e.g. the CC BY 2.0 BE is a version of the CC BY 2.0 that was adapted ("ported") to be conform with the mandatory provisions of Belgium law).

⁴⁰ The SA (Share alike) condition is summarised by CC as "*If you remix, transform, or build upon the material, you must distribute your contributions under the [same license](#) as the original*".

⁴¹ The NC (Non-Commercial) condition is summarised by CC as "*You may not use the material for [commercial purposes](#)*".

⁴² The ND (No-Derivatives) condition is summarised by CC as "*If you remix, transform, or build upon the material, you may not distribute the modified material*".

⁴³ Google Images, for instance, allows to select research "tools" based on "usage rights", whereby the user can decide to only ask for documents which were initially placed under a certain licence (e.g. "labelled for non-commercial reuse", corresponding in the CC suite to the criterion "NC" for "non-commercial").

*that others may freely build upon, enhance and reuse the works for any purposes without restriction under copyright or database law".*⁴⁴

However, because dedicating works to the public domain is not permissible in many jurisdictions, CC0 includes a public licence fall-back clause to address situations where the applicable law does not permit surrendering or waiving copyright. In such cases, the tool becomes a very permissive licence, while the authors declare that they will not exercise any remaining copyright in the work or assert any associated claims, hence giving the creator a way to waive all their copyright and related rights in their works to the fullest extent allowed by law.

Creative Commons is a well-established licence suite. In July 2014, the Commission Notice 'Guidelines on recommended standard licences, datasets and charging for the reuse of documents' (2014/C 240/01) recommended that Member States adopt Creative Commons licences as a way to "allow the reuse of PSI without the need to develop and update custom-made licences at national or sub-national level".⁴⁵ At the time, it was also recognised that the "CC licences are being used more and more by content creators (scientists, artists, etc.) and are slowly becoming a 'de facto' standard for the publishing of PSI in Europe".⁴⁶ The use of CC licences is also recommended for data developed in projects funded by the European Union's Horizon 2020 Framework Programme (to be published by default as "open data").⁴⁷ More recently, the Council, in its "Conclusions on the transition towards an Open Science system" invited the European Commission and the Member States "to promote the use of licensing models, such as Creative Commons, for scientific publications and research data sets". Finally, the Open Knowledge Foundation identifies its use (together with Open Data Commons) as a best practice for "opening up data".⁴⁸

For the purposes of the present document, the assessment within this section will focus on the most recent version of the CC licence suite, namely CC 4.0. This version incorporates provisions on database *sui generis* rights,⁴⁹ drafted with simpler legal terms and designed to be enforceable worldwide. Prior versions will therefore not be taken into consideration, with the exception of the CC 3.0 IGO, which was created specifically for use by intergovernmental organisations. In addition to the licences, CC0 will also be assessed.

Assessment

This section assesses the effectiveness and aptitude of the CC licences as potential implementing instruments for the Reuse Decision, against the methodology established earlier in this document.

⁴⁴ <https://creativecommons.org/share-your-work/public-domain/cc0/>.

⁴⁵ Commission Notice 'Guidelines on recommended standard licences, datasets and charging for the reuse of documents' (2014/C 240/01).

⁴⁶ Frequently asked questions: "PSI guidelines", Memo/14/191, 17 July 2014. http://europa.eu/rapid/press-release_MEMO-14-491_en.htm

⁴⁷ Guidelines to the Rules on Open Access to Scientific Publications and Open Access to Research Data in Horizon 2020 (published by DG RTD): "In all cases, the Commission encourages authors to retain their copyright and grant adequate licences to publishers. Creative Commons offers useful licensing solutions. This type of licence is a good legal tool for providing open access in its broadest sense".

⁴⁸ <https://blog.okfn.org/2017/06/08/the-state-of-open-licensing-in-2017/>.

⁴⁹ Database *sui generis* rights are exclusive rights accorded automatically under Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases. The right is granted for a period of 15 years from the time of creation when there has been a substantial investment in obtaining, verifying or presenting the content of the database. Database rights may exist independently of copyright protection.

EU law conformity

CC 4.0 licences rely only on one "international" version, with no further reference to any particular national law, rendering porting to national jurisdictions no longer necessary. The following points describe some of the most relevant aspects in terms of EU law conformity:

- Definitions in Section 1 are generic and appear to be compatible with EU law (including the reference to Effective Technological Measures in Directive 2001/29)⁵⁰.
- The database *sui generis* rights (Section 1(j); Section 4) are covered.
- In many Member States, moral rights are subject to specific provisions regarding their "licensing" or "transfer"; Section 2(b)(1) takes this into consideration.
- In Section 5, limitations of liability are meant to be as protective as possible for the licensor, while acknowledging potential limitations in different national jurisdictions.
- Existing exceptions under copyright law (which cannot be waived in certain national jurisdictions, such as Belgium) remain applicable. CC licences are conceived so as not to limit the rights of users where they can invoke an existing exception (see Section 8(a)).
- The licence is irrevocable (for the term of protection), except in case of breach by licensee (which is standard).

In conclusion, it is deemed that CC licences contain no provision contrary to EU law or to general principles of law in Member States. This is not surprising, as the CC licences progressively evolved from an initially "US-oriented" text to a more and more international version, pursuant to the long and extensive review process which CC licences have undergone. In addition, it is worth noting that CC licences were considered as valid and enforceable in a number of Member States,⁵¹ including under the laws of Belgium,⁵² Germany,⁵³ Netherlands,⁵⁴ Spain⁵⁵ and Sweden.⁵⁶

Compatibility with the Reuse policy

This part looks into the compatibility of the various CC 4.0 licences with the Reuse policy. For the sake of completeness, the assessment will also include CC-BY 3.0 IGO in view of its admitted relevance to intergovernmental organisations as well as CC0.

> *CC-BY 4.0: Compatible*

CC-BY satisfies the following legal standards established under the Reuse Decision:

⁵⁰ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (also known as the 'InfoSoc Directive').

⁵¹ https://wiki.creativecommons.org/wiki/Case_Law

⁵² Civ. Nivelles (11e ch.), 26 octobre 2010; M. Lambrecht, 'Première décision Creative Commons: contrats de licence et modèles économiques du libre accès', *Revue du droit des technologies de l'information* 2011, 70; Cassiers V., Janssens MC., van Zimmeren E. (2016) License Contracts, Free Software and Creative Commons – An Overview of the State of Play in Belgium, in Metzger A. (eds) *Free and Open Source Software (FOSS) and other Alternative License Models*, *Ius Comparatum - Global Studies in Comparative Law*, vol 12. Springer; Dr Tanja Dörre; Current case law on Creative Commons licences, *Journal of Intellectual Property Law & Practice*, Volume 10, Issue 4, 1 April 2015, Pages 310–312, <https://doi.org/10.1093/jiplp/jpv037>

⁵³ LG Cologne, MMR 2014, 478; Higher Regional Court (OLG) Cologne, BeckRS 2014, 21041; LG Hamburg, Beschluss vom 18.11.2016, 310 O 402/16).

⁵⁴ *Curry v. Audax* <https://wiki.creativecommons.org/wiki/File:Curry-Audax-English.pdf>

⁵⁵ *SGAE v. Luis*; *SGAE v. Fernandez*.

⁵⁶ *Äventyrsgruvan i Tuna Hästberg v. Gunnarsson*.

- Article 2(4): action in case of defraud or deceit by reuser;
- Articles 3(2) and 4: reuse authorised including for commercial purposes, at no charge, with no need to make an application;
- Article 6(2): CC BY licence does not include any condition that would "*unnecessarily restrict possibilities for reuse*".⁵⁷

The aptitude of the CC-BY licence insofar as it concerns the reuse of documents which, by exception, would be made available upon an individual application (under Article 7 of the Reuse Decision) is questionable due to potentially contradicting goals of dissemination.

> *CC-BY-SA 4.0: Partially non-compatible (unless validated under Article 6 of the Reuse Decision)*

Section 3(b) of CC-BY-SA imposes the use of the same licence (or a compatible one) on derivative works created by the licensee. The Reuse Decision does not explicitly foresee a share-alike condition under Article 6(2) and it may be questionable whether or not adopting a share-alike condition would run counter to the spirit of the reuse policy.

Nonetheless, in addition to the 3 conditions specified under Article 6(2) of the Reuse Decision, other conditions may be applied to certain classes of documents after consultation with the inter-service group established under Article 12⁵⁸ insofar as such conditions do not "*unnecessarily restrict possibilities for reuse*".⁵⁹

> *CC-BY-ND 4.0: Non-compatible*

Sections 2(a)(1)(B) of CC-BY-ND prohibits the "*sharing*" (as defined in Section 1(h) – i.e. communicate to the public, display, etc.) of "*Adapted Materials*" (as defined in Section 1(a) – i.e. adaptations). This limitation arbitrarily restricts the scope of the Reuse Decision, is not provided for among the permitted conditions, and runs counter to the spirit the reuse policy. Additionally, the right to modify is part of the underlying tenants of any open licence, and its absence negates its aptitude as an implementing instrument.

⁵⁷ It should be mentioned that CC-BY does not directly provide for an obligation "*not to distort the original meaning or message of the documents*", although this is not a mandatory obligation under Article 6(2) of the Reuse Decision. Nonetheless, the CC-BY contains safeguarding provisions in case Commission documents are modified: Section 3(a)(1)(B): "[You must] *indicate if You modified the Licensed Material and retain an indication of any previous modifications*" (emphasis added). Section 2(a)(6): "*Nothing in this Public License constitutes or may be construed as permission to assert or imply that You are, or that Your use of the Licensed Material is, connected with, or sponsored, endorsed, or granted official status by, the Licensor [...]*." Section 2(b)(1): "*Moral rights, such as the right of integrity, are not licensed under this Public License, nor are publicity, privacy, and/or other similar personality rights; however, to the extent possible, the Licensor waives and/or agrees not to assert any such rights held by the Licensor to the limited extent necessary to allow You to exercise the Licensed Rights, but not otherwise.*" Section 3(a)(3): "

If requested by the Licensor, You must remove any of the information required by Section 3(a)(1)(A) to the extent reasonably practicable." (i.e. remove attribution). Also see FAQ on CC: "*What can I do if I offer my material under a Creative Commons licence and I do not like the way someone uses it?*" <https://creativecommons.org/faq/#what-can-i-do-if-i-offer-my-material-under-a-creative-commons-license-and-i-do-not-like-the-way-someone-uses-it>

⁵⁸ See last paragraph of article 6(2) of the Reuse Decision. The interservice group is described in article 12.1. of the Reuse Decision as follows: "*An inter-service group shall be set up, chaired by the Director-General responsible for this Decision, or his representative. It shall be composed of representatives of the Directorates-General and Services. It shall discuss issues of common concern and draw up a report on the implementation of the Decision every 12 months*".

⁵⁹ See first paragraph of article 6(2) of the Reuse Decision.

> *CC-BY-NC 4.0, CC-BY-NC-SA 4.0 and CC-BY-NC-ND 4.0: Non-compatible*

Sections 2(a)(1) and 4(a) of CC-BY-NC limit the scope of the licence to non-commercial purposes. This is expressly contrary to Article 3(2) of the Reuse Decision and amounts to an arbitrary limitation to the scope of the Reuse Decision. Furthermore, licences which limit reuse only to non-commercial purposes do not qualify as open licences. This conclusion applies equally to CC-BY-NC-SA and CC-BY-NC-ND to the extent they also restrict commercial use and in the case of CC-BY-NC-ND, limit non-derivative works.

> *CC-BY 3.0 IGO: Compatible*

As a version of the CC-BY licence, intended specifically for inter-governmental organisations, the CC-BY 3.0 IGO is in principle compatible with the Reuse Decision. However, it contains particular clauses which may be perceived as questionable or undesirable within the particular institutional and legal context of the European Commission. Among such are:

- The designation of UNCITRAL arbitration rules for the settlement of disputes;^{60 61}
- Absence of the possibility to seek recourse under applicable law, unless through mutual agreement with the disputing party;
- Absence of improvements otherwise present in CC-BY 4.0 (such as, for example, references to database *sui generis* rights).

> *CC0: Compatible*

The CC0, due its very open character, is in principle compatible with the Reuse Decision. However, it contains particular clauses which may be perceived as questionable or undesirable within the particular institutional and legal context of the European Commission.

One such particular concern stems from the extensive scope of the waiver, with the implication that the licensor loses control over the manner in which the work is used. Although this may appear not to have a direct implication on the reusability of the work, it may make it more difficult for the

⁶⁰ Differently from the 3.0 and 4.0 licence suite, CC 3.0 IGO suite includes a provision under which "*where the licensor is an IGO, unless otherwise mutually agreed, disputes are resolved by mediation or, if that is unsuccessful, through arbitration*".

⁶¹ Section 8(h) provides as follows:

Where the Licensor is an IGO, any and all disputes arising under this License that cannot be settled amicably shall be resolved in accordance with the following procedure:

i. Pursuant to a notice of mediation communicated by reasonable means by either You or the Licensor to the other, the dispute shall be submitted to non-binding mediation conducted in accordance with rules designated by the Licensor in the copyright notice published with the Work, or if none then in accordance with those communicated in the notice of mediation. The language used in the mediation proceedings shall be English unless otherwise agreed.

ii. If any such dispute has not been settled within 45 days following the date on which the notice of mediation is provided, either You or the Licensor may, pursuant to a notice of arbitration communicated by reasonable means to the other, elect to have the dispute referred to and finally determined by arbitration. The arbitration shall be conducted in accordance with the rules designated by the Licensor in the copyright notice published with the Work, or if none then in accordance with the UNCITRAL Arbitration Rules as then in force. The arbitral tribunal shall consist of a sole arbitrator and the language of the proceedings shall be English unless otherwise agreed. The place of arbitration shall be where the Licensor has its headquarters. The arbitral proceedings shall be conducted remotely (e.g., via telephone conference or written submissions) whenever practicable.

iii. Interpretation of this License in any dispute submitted to mediation or arbitration shall be as set forth in Section 8(f), above.

European Commission to exercise its rights reserved under Article 2(4) of the Reuse Decision from a strictly procedural point of view.⁶²

Additionally, the following questions persist in relation to CC0:

- it is uncertain whether the extensive waiver would be held valid in some jurisdictions, especially in the continental "droit d'auteur" jurisdictions, such as in Belgium, as it could be seen by some as contradicting some of the basic principles of the inalienable "droit d'auteur";
- CC0 does not require attribution of the work, should that be desirable for the Commission services to maintain.

CC0 could be used for marking "*documents in the public domain (e.g. where IPR protection has expired or in jurisdictions where official documents are exempt from copyright protection by law)*".⁶³ CC0 could also be considered as an option for the open dissemination of datasets.

In view of the above assessment, CC-BY 4.0 emerges as the most compatible instrument provided in the CC licence suite for the purposes of implementing the Reuse Decision, as it not only satisfies the legal standards established in the Decision but also conforms to the underlying principles embodied in the reuse policy.

In relation to the principles presented earlier in the Methodology section of this document, CC-BY 4.0 is:

- *Universal*: it is conceived to be applicable to all documents (at the choice of the licensor);⁶⁴
- *Unrestricted*: generally speaking, the only condition is attribution;
- *Simple*: there is no need for an application and it is user-friendly;
- *Cost-free*: the text of CC-BY does not require payment of fees;
- *Non-discriminatory*: terms of CC-BY are open to all potential actors in the market;
- *Transparent*: the text of the licence is publicly available, accompanied by supporting documents, guidelines and other material in multiple languages.

These principles also apply to CC-BY 3.0 IGO and CC0, however, as mentioned earlier, these licences need to be considered within the wider institutional and legal context of the European Commission, due to their various specificities.

Openness

As mentioned earlier, CC-BY, CC-BY-SA and CC0 qualify as open licences within the generally accepted meaning of the term.⁶⁵

⁶² Article 2(4) of the Reuse Decision requires the European Commission to "take the appropriate measures to protect the interest and the public image of the EU in accordance to applicable rules".

⁶³ *Supra*, footnote 45.

⁶⁴ See FAQ on CC: "CC licenses may be applied to any type of work, including educational resources, [music]<https://wiki.creativecommons.org/wiki/Musician> "wikilink"), photographs, databases, government and public sector information, and many other types of material. The only categories of works for which CC does not recommend its licenses are computer software and hardware [...]"

⁶⁵ <http://opendefinition.org/licenses/>

Licence micro-elements

CC licences qualify as "non-transactional licences". Users do not have to apply for, opt in or express their consent explicitly in order to benefit from a CC licence. Texts of CC licences are available permanently on the CC website, and all CC licences are indexed using a clear versioning system. Licences include their version numbering in their title (e.g. CC BY 4.0 is by definition version 4.0 of the CC BY licence). Release of a new version will not have any effect over works previously licenced under older versions. As mentioned earlier, adoption of a new version is always subject to a large public consultation, and the current international version includes all the necessary micro-elements of a standard licence. It should however be mentioned that the current CC licences are not available in all official EU languages.⁶⁶

Licence reusability

CC licences are fully reusable in the sense that they may be reused by any licensor without the need to modify their terms.

Licence interoperability

Among the CC licences, CC0 and CC-BY produce the least possible interoperability frictions. In fact, CC-BY imposes a minimal condition (i.e. attribution) and both CC0 and CC-BY permit the modification of the original material, for commercial and non-commercial purposes, thereby not hindering downstream compatibility in derivative works resulting from merging together of material from multiple sources.

Flexibility

CC licences are conceived as a suite of off-the-shelf licences that can cater for different licensing needs. While CC licensors may not diminish the rights granted to users under a licence,⁶⁷ they may decide to waive certain conditions (for the greater benefit of users) or, for instance, give a warranty.⁶⁸

Machine readability

CC licences are machine-readable. All technical explanations are provided on their website for licensors wishing to disseminate content under a CC licence and incorporate the machine-readable code in an electronic file. This then allows software and search engines to identify the documents in function of the corresponding licences.

Uptake

The 2016 "State of the Commons" report published by Creative Commons mentions that more than 1.2 billion documents are now available on the internet under a CC licence;⁶⁹ this number is

⁶⁶ It is feasible that the Creative Commons would welcome the European Commission's support, if necessary, to further facilitate the currently ongoing translation efforts for CC licences in all EU official languages.

⁶⁷ <https://creativecommons.org/faq/#can-i-change-the-license-terms-or-conditions>

⁶⁸ <https://creativecommons.org/faq/#can-i-enter-into-separate-or-supplemental-agreements-with-users-of-my-work>

⁶⁹ <https://stateof.creativecommons.org/>

increasing every year. CC-BY is also increasingly used for open access publications⁷⁰ and as one of the options in popular content sharing services, such as Flickr, Vimeo and YouTube.⁷¹

b) Open Data Commons

Description

Open Data Commons (ODC) is a not-for-profit project devoted to providing legal tools for open data.⁷² Initially funded by Talis, an IT company, and later on transferred to Open Knowledge International⁷³, a UK-based NGO, the project released its first open licence targeting data in 2008: the ODC Public Domain Dedication Licence (PDDL).⁷⁴ The main purpose was to provide a standard legal tool covering database *sui generis* rights since the former versions of the CC licences did not cover this IP right. Other two licences have been released by the project since: the Open Database Licence (ODC-ODbL) and the Open Data Commons Attribution Licence (ODC-By). Responsibility for these licences lies on an Advisory Council composed of IP practitioners and academics from different countries.⁷⁵

While PDDL is, strictly speaking, not a licence, but a public domain dedication for databases (and content), ODC-By allows reusers to copy, distribute and use the database as well as to produce works and to modify, transform and build upon the database provided attribution is made according to the indications specified in the licence. ODbL additionally includes a share-alike requirement and the obligation to keep the database open, meaning that, if the database is redistributed using technical protection measures (TPM), a version without such measures must also be made available. ODC-By and ODC-ODbL licences apply to databases only, and not to the contents of the database individually.

Although the wording of the ODC licences has been inspired by those of Creative Commons, it has been argued that they are too complex for the layman.⁷⁶ As further detailed below, in an attempt to accommodate different needs in database projects, ODC licences introduce numerous concepts (such as 'collective databases', 'derivative databases' and 'produced works') and specific features for ODC-ODbL, adding a certain level of complexity. In order to make the legal text easier to understand, licences are also presented in a human-readable summary including intuitive icons that explain rights and obligation for reusers.

⁷⁰ <https://oaspa.org/steady-growth-fully-oa-journals-ccbly-license/>. The Commission itself uses Creative Commons for the publication of articles in scientific journals as most journals with open access options for their publications only offer the possibility to implement open access by making the articles available under a CC BY licence. This is typically the case for the scientific publishers with which JRC has negotiated open access framework publishing agreements.

⁷¹ CC BY 3.0 is normally the option used by the Commission in videos posted on YouTube, where the only available choice is between the Standard YouTube licence and CC BY 3.0.

⁷² <https://opendatacommons.org/>

⁷³ Former Open Knowledge Foundation.

⁷⁴ <https://opendatacommons.org/norms/>

⁷⁵ <https://opendatacommons.org/about/advisory-council/>

⁷⁶ D. Beldiman, Access to Information and Knowledge 21st Century Challenges in Intellectual Property and Knowledge Governance, (2013), p. 88. Also Science Commons, Comments on the Open Database License Proposed by Open Data Commons, on <http://sciencecommons.org/resources/readingroom/comments-on-odbl>

Assessment

Given the similarities between Open Data Commons and Creative Commons, it may be useful to analyse the ODC licences in relation to the observations already made in regard of Creative Commons:

Conformity to EU law

> ODC-By

Upon their conception, ODC licences aimed to address one of the former challenges related to the application of CC licences for databases: ODC licences cover both copyright and database *sui generis* rights. Although the project originated in the UK, the licences have been drafted in a way that can be used internationally. The definitions in the licence are clear and in line with European law. Certain definitions are indeed inspired by, or taken word by word from, the Directive 96/9/EC on the legal protection of databases.

Although Section 5 of ODC-By foresees a waiver of moral rights, it also refers to situations where this may not be possible. Explicit reference is also made to database limitations, exceptions (including fair use and fair dealing where applicable) as well as to the rights of a database's lawful users.

Section 7 on warranties grants particular protection to the licensor, to the extent allowed by the relevant jurisdiction. In the same spirit, the text provides for a generous limitation of liabilities in Section 8. When liability cannot be excluded by law, it is limited to actual and direct financial loss provided that Licensor's negligence is proven. Again, this exclusion of liability is in accordance with standard practices.

As regards applicable law, ODC-By refers to the laws of the jurisdiction where the licence terms are "*sought to be enforced*".

> ODC-ODbL

The text of the ODC-ODbL licence is mostly the same as the ODC-By except for Section 4(4) and (5) introducing a share-alike mechanism. Additionally, Section 4(6) requires users of derivative works to provide their licensees with a copy of the derivative database, and Section 4(7) regulates the use of technical protection measures (TPM). These conditions do not appear to contrast with EU law provisions.

> PDDL

The main purpose of the PDDL is to relinquish all the rights on the Work (here 'Work' may refer to the database, to the content or to both). Noting that such relinquishment may not be possible in certain jurisdictions, PDDL contains a fall-back solution: when a full waiver of rights it is not possible a royalty-free, non-exclusive license to use the work without restriction is granted to the user.

Although it may be concluded from the above assessment that ODC licences are in conformity with EU law, certain commentators have questioned the enforceability of ODbL, and in particular of the share-alike clauses, when applied to content that is not protected by either copyright or database *sui*

generis rights.⁷⁷ Different from CC licences, both ODC-ODbL and ODC-By are intended to apply to non-protected databases through the explicit consideration of the ODbL as a contract (Section 2). Recent jurisprudence of the Court of Justice of the European Union (CJEU) opens the room to apply freedom of contract when dealing with databases not protected by the database *sui generis* right to the extent allowed by national law.⁷⁸

Compatibility with the Reuse policy

ODC licences comply with the principles of the Reuse Decision, particularly with regards to their unrestricted, simple, cost-free, non-discriminatory and transparent nature. However, it should be underlined that the ODC licences cannot be considered to apply universally to all kinds of reusable documents, due to the fact that they are specific to databases.

Given the fact that the Reuse Decision does not prescribe the adoption of a single instrument for all classes of documents, it is nonetheless useful to look into the possible aptitude of the ODC licences for the purposes of the reuse policy.

> *ODC-By: Compatible*

ODC-By satisfies the following legal standards established under the Reuse Decision:

- Article 2(4): action in case of defraud or deceit by reuser;
- Article 3(2) and 4: reuse authorised including for commercial purposes, at no charge, with no need to make an application;
- Article 6(2): conditions related to acknowledgement of the source and non-liability of the licensor are present; ODC-By includes an attribution requirement that mandates to "*keep intact any copyright or Database Right notices and notices that refer to this License*" when publicly conveying the database or a derivative database.⁷⁹ In case of produced works, such as images, audio-visual material, text or sound, created by using the original database, it is enough if the user includes a notice that makes anyone accessing the work be aware of the fact that the content was obtained from the database.⁸⁰
- It should be pointed out that ODC-By does not contain a provision which reflects the non-distortion option provided under Article 6(2)(b) of the Reuse Decision.
- Different from CC and other open licences such as the UK's OGL, ODC-By does not include a "non-endorsement" clause.

⁷⁷ Science Commons, Comments on the Open Database License Proposed by Open Data Commons.

In this respect vid also the explanation provided in ODC FAQs: "*Are Share-Alike Provisions Such as Those in the ODbL Enforceable In All Jurisdictions?*", stating that "*the ODbL and its Share-Alike provisions will apply in a good number of jurisdictions (either via "rights" or contract). Where there is any uncertainty about the existence of "rights" or a contract no other licenses can do any better and at worst the license becomes a very clear statement of your "community norms". [...] Where neither "DB" rights or a contracts exists no license will be enforceable. If this is of concern to you your only real alternative is to not make the database available*"; <https://opendatacommons.org/faq/licenses/#Are Share-Alike Provisions Such as Those in the ODbL Enforceable In All Jurisdictions>.

⁷⁸ CJEU, case C-30/14, Ryanair Ltd v PR Aviation BV [2015] ECDR 13.

⁷⁹ Section 4(2). At the time the licence was adopted, it was not certain if the attribution requirements in CC licences required mentioning all the contributors of a database. For this reason, the wording of the ODbL was considered, by some projects (notably the Open Street Map) to be more appropriate for databases involving a high number of contributors. See http://wiki.openstreetmap.org/wiki/Open_Data_License/Legal_Structure.

⁸⁰ See Section 4(3). The licences provide an example for such a case: "*Contains information from DATABASE NAME, which is made available here under the Open Database License (ODbL)*".

> ODC-ODbL: *Partially non-compatible (unless validated under Article 6 of the Reuse Decision)*

ODC-ODbL contains a share-alike condition requiring that distributions of any derivative databases are made under the terms of the ODbL license or a compatible licence. Share-alike provisions, however, have certain limits: they do not apply to a collective database⁸¹ if the original database has attached the ODbL licence, neither to "produced works"⁸², not to internal uses. In this sense, ODbL is more flexible than CC BY SA that would require all the derivative works, including produced works, created from a CC BY SA database to be licensed under the same license as the original.⁸³

When distributing a derivative database or a produced work from a derivative database, the ODbL also requires a machine readable copy of the derivative database or an alteration file to be made available at no more than a reasonable production cost for physical distributions and free of charge if distributed over the internet. ODbL allows distribution of databases with TPMs provided that a free version of the database without TPM embedded is made available to users.

As mentioned in the assessment of CC-BY-SA 4.0, the Reuse Decision does not explicitly foresee a share-alike condition under Article 6(2) and it may be questionable whether or not adopting a share-alike condition would run counter to the spirit of the reuse policy.

Nonetheless, in addition to the 3 conditions specified under Article 6(2) of the Reuse Decision, other conditions may be applied to certain classes of documents after consultation with the inter-service group established under Article 12 insofar as such conditions do not "*unnecessarily restrict possibilities for reuse*".⁸⁴

> PDDL: *Compatible*

Due to the similarities between PDDL and CC0, the conclusions made in relation to CC0 also apply to the PDDL.

Imposing fewer restrictions than other legal tools, certain stakeholders consider dedications to the public domain as the best way to proceed when dealing with open data, and, in particular, with research data.⁸⁵ The attribution requirement of other licences is indeed perceived as unnecessary and, in some case, even problematic (leading to the so called attribution stacking). The PDDL might thus be suitable for Commission data, documents in the public domain or those solely protected by the database sui generis right (e.g. raw scientific data).

Despite the lack of an attribution requirement, the normative conventions for citation remain applicable. In this regard, PDDL also provides for a set of non-binding community norms that encourage proper credit for data and database contributors.⁸⁶ All things considered, the application

⁸¹ As specified in Section 1 of the licence " *Collective Database*" – Means this Database in unmodified form as part of a collection of independent databases in themselves that together are assembled into a collective whole. A work that constitutes a Collective Database will not be considered a Derivative Database".

⁸² Defined as "a work (such as an image, audiovisual material, text, or sounds) resulting from using the whole or a Substantial part of the Contents (via a search or other query) from this Database, a Derivative Database, or this Database as part of a Collective Database", id.

⁸³ In the same line, A. Ball, How to Licence Research Data (2014), pp. 7-8.

⁸⁴ See Article 6(2) of the Reuse Decision.

⁸⁵ Science Commons, Comments on the ODL proposed by ODC.

Also favouring public domain licences: N. Korn and C. Oppenheim in Licensing Open Data: a practical guide, (2011).

⁸⁶ <https://opendatacommons.org/norms/>.

of PDDL raises the same concerns in relation to moral rights as those described in the section on CC0.

Openness

All the ODC licences are in line with the standard requirements of openness, since all three allow free access, use, modification and sharing of the contents.

Licence micro-elements

All ODC licences are non-transactional licences, since no direct interaction with the licensor is required. The three licences are all available on the website of the Open Data Commons project. Although ODC has a versioning system, no new versions have been released since the publication of the first licences.⁸⁷

The ODC licences cover both copyright and neighbouring rights⁸⁸ as well as the database *sui generis* right.⁸⁹ Neither the ODC-By nor the ODC-ODbL apply to the individual contents of a database, and as such, individual contents of a database can be made subject to different terms by their respective proprietors. A typical case would be a database of images: while the database may be licenced under ODC-By or ODC-ODbL, its contents may be subject to different conditions.⁹⁰

In addition to the three ODC licences assessed above, there is also a specific ODC licence for database contents, titled the Database Contents License (ODC-ODcL). The ODC-ODcL may be used by the licensor together with the ODbL.⁹¹ Certain authors consider the distinction unpractical and a potential source of confusion and incompatibility,⁹² whereas others perceive the distinction as an advantage compared to CC licences, since the latter "*cannot be used without difficulty in certain complex cases such as collections of variously copyrighted works*".⁹³ The PDDL may, on the contrary, be used to dedicate both content and data to the public domain.

ODC licences are granted for the duration of the applicable rights in the database and can only be terminated because of the licensee's breach of terms. Rights may be reinstated subject to certain conditions. It should also be mentioned that the current ODC licences are not available in all official EU languages.

Licence reusability

The ODC licences are standard reusable licences by design. Any of the licences can thus be adopted off-the-shelf by licensors without the need to customise the terms therein.

⁸⁷ On the current status of the licence see <https://discuss.okfn.org/t/maintenance-and-future-of-the-open-data-commons-licences/4460>. From the discussion, it may be concluded that ODC have not been updated along the years because a lack of demand from the community.

⁸⁸ Rationale to apply to neighbouring rights in ODC-By and ODC-ODbL is not clear, since neighbouring rights as defined in the *acquis communautaire* do not apply to databases, D. Beldiman, op. cit. p. 89.

⁸⁹ See for ODC-By and ODC-ODbL s. 2 and s. 3, as well as s. 2 for PDDL. ODC licences do not cover any patents over the contents or the database nor any trademarks associated with the database. See s. 2.3 for ODC-By and ODC-ODbL and ss. 2.2, 4.2 and 4.3 for PDDL.

⁹⁰ At this regard see *Why Do You Distinguish Between the "Database" and its "Contents"?* in the ODC Faq: <https://opendatacommons.org/faq/licenses/>.

⁹¹ Legal text available on <https://opendatacommons.org/licenses/dbcl/1.0/>.

⁹² D. Beldiman, op. cit. p. 89.

⁹³ A. Ball, *How to Licence Research Data* (2014), p. 7.

Licence interoperability

No particular interoperability issues were observed with regard to the ODC-By and the PDDL. By incorporating the share-like requirement, however, the ODC-ODbL does introduce potential interoperability issues. As with CC-BY-SA, the share-alike condition of the ODC-ODbL may generate downstream licensing frictions.

Flexibility

The ODC licence suite offers an appreciable level of flexibility, giving licensors three different licensing tools to distribute their work.

Machine readability

Currently the ODC licences are not offered in a machine readable form.

Uptake

It is difficult to reliably assess the uptake of ODC licences due to their lack of machine readable features. A search on the European Data Portal, however, shows 1,843 datasets published under ODC-ODbL (only 63 datasets under ODC-By). By comparison the UK OGL-licensed datasets amount to 33465 and CC-BY reaches 31438. ODC licences are also used in relation to some datasets in the EU Data Portal.⁹⁴

Overall, although ODC licences have certain merits, they do not demonstrate sufficient aptitude to fully satisfy implementation needs under the Reuse Decision for the broader class of documents. ODC licences are specifically designed for data, and as such, they only partially cover the scope of the Reuse Decision. Finally, their level of complexity may entail substantial transaction costs both for reusers and the Commission.

c) Bespoke Commission licence

Description

The Reuse Decision directly refers to the possibility of using an open licence "*setting out conditions explaining the rights of reusers*"⁹⁵ as an instrument to aid the Decision's effective of implementation. Under Article 12(3) of the Reuse Decision, the terms of this licence shall be settled in agreement by the Directors of DG CONNECT and JRC, after consulting with the dedicated inter-service group.

As mentioned earlier,⁹⁶ the introduction of a bespoke Commission reuse licence was considered following the adoption of the revised Reuse Directive in 2011. At the time, a custom licence was drafted and submitted to the inter-service group for discussion, but, in the end, the group eventually resolved to adopt a copyright notice (i.e. the Reuse notice) as a more light-weight instrument to implement the reuse policy.

Nonetheless, the opportunity of drafting a custom licence as a means to implement the reuse policy maintains its relevance to the present analysis. A bespoke licence would allow the Commission to

⁹⁴ <http://data.europa.eu/euodp/en/home/>

⁹⁵ Reuse Decision Article 6(1).

⁹⁶ See *supra*, section 'Current implementing instruments'.

retain control over the wording of the licence as well as the licence update process. In this case, the experience obtained with the design and adoption of the European Union Public Licence (EUPL) for software (currently, in its version 1.2) could provide useful guidance.

Arguably, the open licence referred to in the Reuse Decision could either be drafted *ex novo* or, be inspired by an already existing licence instrument such as the UK Open Government Licence.⁹⁷

Assessment

Unlike the other instruments considered so far, there are currently no custom terms to assess. The assessment of a prospective bespoke licence can nonetheless be shaped through options and suggestions, based on the methodology underlying this document.

EU law conformity and compatibility with the reuse policy

Producing a licence text compliant with EU law is expected to be a rather straight forward exercise for the European Commission.

Considering that reuse is not restricted within the EU territory, the Commission will have to establish a reasonable scope to test the enforceability of the new text. A study on the enforceability of the custom terms could be produced with a view to ensure that the licence is valid and enforceable in all relevant jurisdictions, the minimum being set at all EU Member States (MS). The latter scope is ever more important if the bespoke licence is drafted with a view to be adopted by other EU institutions, including those whose seat is in a different MS than the Commission's.

The same positive assumption can be made with regard to policy conformity, as the Institution is certainly best placed to give proper application to the policy it produced. The resulting text will thus introduce transparent, effective and non-discriminatory terms.⁹⁸

Openness

A bespoke licence should conform to the requirements of openness⁹⁹ by enabling access, use, modification and (re)distribution of documents for any purpose and without the need for reusers to make individual applications (non-transactional nature). A bespoke open licence can very feasibly maintain the attribution condition permitted under the Reuse Decision while still satisfying the requirements of openness. In this regard, it should be reminded that licences which require reusers to relicence the modified document under the same licence terms (i.e. share-alike mechanism) are also considered open licences, although the Reuse Decision does not list share-alike among the explicitly permitted conditions the Commission may attach to the act of reuse.¹⁰⁰

Licence microelements

It is reasonably safe to expect that, as a starting position, the text of the bespoke licence will match the current Reuse Notice by maintaining attribution as its main condition. Whether this condition

⁹⁷ <http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3/>

⁹⁸ Reuse Decision, preamble paragraph 3.

⁹⁹ Id. paragraph 10.

¹⁰⁰ According to the Open Definition, Creative Commons Attribution Share-Alike licence (CC-BY-SA) and the Open Data Commons Open Database License (ODbL) are listed as open licences along with the CC0, the CC-BY, the ODC-BY, and the Open Data Commons Public Domain Dedication and Licence (PDDL).

will be accompanied by the other conditions cannot be excluded at present; as mentioned earlier, Article 6 of the Reuse Decision leaves this possibility open.¹⁰¹ In application to the Reuse policy, the licence will be non-transactional and will take effect through the actual use of the licenced material by reusers without the need of additional transactions between the parties.

In order to increase legal certainty and transparency, the licence text should be stored online at a unique persistent URL¹⁰² under the Europa site or other suitable domain. Depending on the digital form and nature of a document (e.g. a video clip), the licence text could thus be simply linked to. A persistent URL would be all the more important if the licence was subject to versioning as a consequence to periodical reviews.

The terms of the bespoke licence should include a clear licence grant, where reusers' granted rights are affirmed unambiguously within the general definition of reuse provided by the Decision. In the same spirit, the licence would outline its scope, explicitly specifying certain elements of the documents from reuse.¹⁰³ In addition to the inclusion of conditions mentioned earlier, the licence should also feature a warranty disclaimer and limitations of liability in line with standard licensing practice.¹⁰⁴

Licence Reusability

A reusable licence is one that can be adopted by anyone – and not just the licence issuer – for the distribution of IP-protected content. While most open licences are also reusable licences (e.g. Creative Commons and Open Data Commons), the bespoke licence could be open without being also reusable. This is the case of the UK Open Government Licence (OGL 2.0).¹⁰⁵ Designing a non-reusable licence may allow the Commission to target its specific needs in terms of jurisdiction and any other desirable term or condition stemming from its status as an EU public body. Caution is advised in establishing such specific terms in order not to hamper the downstream licence interoperability of its documents.

In addition, Commission documents subsist within an 'ecosystem' of EU-wide public content, which are often mixed and cross-referenced.¹⁰⁶ It goes without saying that the more Commission-specific the licence terms are, the less adaptable the licence will be to the eventual requisites of other EU institutions and bodies. Ultimately, if each EU body was to adopt a specific licence for the reuse of its own documents, this would negatively impact the reusability of the corpus of EU-produced documents as a whole as well as their inter-institutional management via the Open Data Portal.

¹⁰¹ *Supra*, page 10.

¹⁰² i.e. the uniform resource locator, which describes the location of a resource on the web. Persistent URLs are commonly used for the publication of standard licensing instruments including the Commission's [EUPL](#).

¹⁰³ As an example, a possible licence exclusion clause could state: '*This licence shall not apply to any official sign, hallmark or emblem of the European Union or to any identifiable intellectual property rights of third-parties, personal data or other data subject to privacy law constraints, which might be included in the document.*'

¹⁰⁴ For example: '*The document is provided "as is" without representations, warranties, obligations and liabilities of any kind, either express or implied, to the full extent permitted by law including, but not limited to, any implied warranty of merchantability, integration, satisfactory quality and fitness for a particular purpose.*

Except in the cases of wilful misconduct or damages directly caused to natural persons, the European Commission will not be liable for any incidental, consequential, direct or indirect damages including but not limited to the loss of data, lost profits, or any other financial loss arising from the use of, or inability to use, even if the European Commission has been notified of the possibility of such loss, damages, claims or costs or for any claim by any third-party.'

¹⁰⁵ LAPS 2.0 Thematic Network, *D5.2 Licensing Guidelines*, page 6.

¹⁰⁶ *Supra*, footnote 3.

Licence Interoperability

Considering that a growing number of public and private works are licenced under existing mainstream instruments,¹⁰⁷ the bespoke licence should be interoperable by design. As already done when producing the European Union Public Licence for software,¹⁰⁸ the Commission should ensure that the terms of the bespoke licence are downstream compatible with those of other standard licences with the intent of achieving as frictionless a reuse as possible. An open licence with a reduced number of conditions (e.g. attribution only) would be preferable in this regard.

Flexibility

While the concept of 'document' is used in the Reuse Decision to include a variety of Commission works, not all documents are the same in their nature. This is particularly true, for example, in the case of data, such as raw scientific measurements or data, the collection of which does not necessarily attract copyright protection or any other IP right. In these cases, a licence may not be necessary in the first place.¹⁰⁹ For these cases, an exclusion clause could be introduced within the bespoke licence as a means to allowing those particular works to be reused unconditionally and to the maximum extent possible.

Arguably, a one-fits-all solution would be easier to implement and manage. Flexibility however could also be brought about by either introducing additional conditions or removing default ones in regard to one or more categories of documents. As a matter of fact, the opportunity of introducing conditions other than the source acknowledgement is foreseen by the Reuse Decision, subject to consultation with the inter-service group.¹¹⁰

Machine readability

Machine readability is not essential for a given licensing instrument to effectively implement the reuse policy. However, its availability would certainly increase legal certainty, facilitate greater accessibility and availability, and help evaluate the reuse policy in more quantifiable terms.

Adding machine readability features to the bespoke licence would require the Commission to produce a sui-generis metadata vocabulary and work towards its adoption, so that search engines could retrieve the relevant licensing information. One alternative means to accomplishing this is to add mark-up elements to the human readable text so that it can be interpreted by a machine (e.g. XML, RDFa).¹¹¹

¹⁰⁷ *Supra*, Creative Commons 'Uptake' section, page 18.

¹⁰⁸ The Commission paid particular attention to interoperability when designing its copyleft open source licence, the European Union Public Licence (EUPL). The EUPL was designed to be downstream interoperable with a number of mainstream copyleft licences granting the same level of safeguards.

¹⁰⁹ LAPSI 2.0 Thematic Network, *D5.2 Licensing Guidelines*, page 7. A licence for the reuse of public sector information (PSI) is deemed unnecessary in case of PSI exempted from copyright protection and public domain PSI (i.e. copyright has either expired or never subsisted). Non-copyrightable subject matter includes i.a. factual information and raw data.

¹¹⁰ Reuse Decision, article 6(2) last paragraph.

¹¹¹ An option that is worth mentioning is the use of the Open Digital Rights Language (ODRL), currently being standardised by the W3C Permissions & Obligations Expressions (POE) Working Group (<https://www.w3.org/2016/poe/charter>). The option of developing a specific metadata vocabulary needs to be weighed carefully against the technical and semantic interoperability issues it could bring. It would be preferable to use a standard vocabulary and, if need be, develop an ad hoc vocabulary including only those metadata elements not available in that standard vocabulary.

Uptake

Whether the choice will be to create a reusable instrument or not, the bespoke licence is not expected to become a mainstream licensing instrument outside of the EU public sector information ecosystem. Its uptake will at best involve other EU bodies, while the downstream sharing of works based upon Commission documents will most likely occur under either proprietary terms or under other standard licences.

Further considerations

As mentioned earlier, the Reuse Decision acknowledges that different instruments may be used for its effective implementation (such as an open licence or a disclaimer, or alternative instruments as may be devised by the inter-service group). The Reuse Decision does not prescribe a single instrument nor does it preclude the use of multiple instruments concomitantly. As such, the Reuse Notice can feasibly co-exist with or be replaced by one or more open licences, giving Commission services options to choose from when making their documents available. In order to avoid unnecessary duplication and confusion, however, these options should be as few as possible. In this regard, the guiding principle could be summarised as follows: "*as many instruments as necessary, but as few as possible*".

The present section draws on the arguments presented earlier in this document, and provides further legal considerations, arising from the potential introduction of Creative Commons, Open Data Commons and a bespoke licence as alternative or additional instruments for facilitating the effective implementation of the Reuse Decision.

Creative Commons

An important point with regards to the introduction of alternative implementing instruments is the assessment of the potential risks associated with enforceability and litigation. This section will provide a comparative overview of the current instrument (i.e. the Reuse Notice) vis-à-vis CC-BY 4.0.

An explicit disclaimer of warranties and liability

CC licences include a standard disclaimer of liability:

Disclaimer of warranties and Limitation of Liability (Section 5)

a) Unless otherwise separately undertaken by the Licensor, to the extent possible, the Licensor offers the Licensed Material as-is and as-available, and makes no representations or warranties of any kind concerning the Licensed Material, whether express, implied, statutory, or other. This includes, without limitation, warranties of title, merchantability, fitness for a particular purpose, non-infringement, absence of latent or other defects, accuracy, or the presence or absence of errors, whether or not known or discoverable. Where disclaimers of warranties are not allowed in full or in part, this disclaimer may not apply to You.

b) To the extent possible, in no event will the Licensor be liable to You on any legal theory (including, without limitation, negligence) or otherwise for any direct, special, indirect, incidental, consequential, punitive, exemplary, or other losses, costs, expenses, or damages arising out of this Public License or use of the Licensed Material, even if the Licensor has been advised of the possibility of such losses, costs, expenses, or damages. Where a limitation of liability is not allowed in full or in part, this limitation may not apply to You.

c) The disclaimer of warranties and limitation of liability provided above shall be interpreted in a manner that, to the extent possible, most closely approximates an absolute disclaimer and waiver of all liability.

This type of provision is acceptable under article 6(1)(c) of the Reuse Decision and is usual in open licences. Section 5 of CC-BY contains an explicit IP warranty disclaimer. The "disclaimer" part of the legal notice on the Europa portal, on the other hand, does not contain an explicit reference to IP. As such, the disclaimer provided in CC-BY would benefit the Commission not only for online documents but also for printed material which normally do not contain any disclaimer to begin with.

In the event the Commission chooses to provide a warranty, CC licences allow to do so by adding a separate provision, waiving the disclaimer.¹¹²

Using CC would not deprive the Commission of any privilege or immunity it may benefit from. Section 8(d) of CC-BY states that "*Nothing in this Public License constitutes or may be interpreted as a limitation upon, or waiver of, any privileges and immunities that apply to the Licensor or You, including from the legal processes of any jurisdiction or authority*". A similar provision is at present not included in the Reuse Notice.

Applicable law and competent jurisdiction

As mentioned elsewhere, CC 4.0 licence suite does not include applicable law or jurisdiction clauses. In the absence of these clauses, the law governing a dispute and the competent jurisdiction would be determined in accordance with the applicable rules of private international law, mainly "Rome I"¹¹³ (applicable law, contractual obligations) and "Rome II"¹¹⁴ (applicable law, non-contractual obligations) and "Brussels Recast" (competent jurisdiction).¹¹⁵

Open Data Commons

Similar to the preceding section, a comparative assessment of the potential consequences between the current Reuse Notice and the ODC-By/PDDL is presented.

An explicit disclaimer if warranties and limitation of liability

As many other open licences, ODC-By licence includes detailed wording aiming at protecting the Licensor in the context of a liability claim.

Section 7 on warranties and disclaimer states:

7.1 The Database is licensed by the Licensor "as is" and without any warranty of any kind, either express, implied, or arising by statute, custom, course of dealing, or trade usage. Licensor specifically

¹¹² See in [Considerations for licensors and licensees](#) (Additional provisions):

'[a]Consider offering a warranty. If you are confident you have cleared all rights in the material, you may choose to warrant that the work does not violate the rights of any third parties. [b]Specify additional permissions, if desired. You have the option of [granting permissions](#) above and beyond what the license allows; for example, allowing licensees to translate ND-licensed material. If so, consider using [CC+](#) to indicate the additional permissions offered.'

¹¹³ REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 June 2008 on the law applicable to contractual obligations (Rome I).

¹¹⁴ REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

¹¹⁵ REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels recast).

disclaims any and all implied warranties or conditions of title, non-infringement, accuracy or completeness, the presence or absence of errors, fitness for a particular purpose, merchantability, or otherwise. Some jurisdictions do not allow the exclusion of implied warranties, so this exclusion may not apply to You.

Section 8 on limitation of liability reads:

"8.1 Subject to any liability that may not be excluded or limited by law, the Licensor is not liable for, and expressly excludes, all liability for loss or damage however and whenever caused to anyone by any use under this License, whether by You or by anyone else, and whether caused by any fault on the part of the Licensor or not. This exclusion of liability includes, but is not limited to, any special, incidental, consequential, punitive, or exemplary damages such as loss of revenue, data, anticipated profits, and lost business. This exclusion applies even if the Licensor has been advised of the possibility of such damages.

8.2 If liability may not be excluded by law, it is limited to actual and direct financial loss to the extent it is caused by proved negligence on the part of the Licensor."

Given the similarity of the text, same consideration as for CC applies here. ODC-By does not contain any clause expressly referring to the preservation of the licensor's immunities.

Applicable law and competent jurisdiction

According to Section 10.4 (choice of law) of ODC-By, *"This License takes effect in and will be governed by the laws of the relevant jurisdiction in which the License terms are sought to be enforced."* Therefore, the ODC-By includes a more clear designation of the applicable law and by implication, the competent jurisdiction.

Overall, similar to the observations made in the previous section in relation to Creative Commons: use of an ODC licence does not appear to increase risks in case of litigation.

Bespoke licence

A predictable advantage in choosing a bespoke licence would be that of controlling the wording of the licence as well as the licence update process. Anticipating jurisdictional consequences of an instrument whose form and content are currently undefined is perhaps neither practical nor useful. Depending on the choices made by the Commission in regard to the points raised in the previous sections of this study, one could indeed derive different scenarios.

It is reasonable to expect that the new instrument could have beneficial effects in terms of legal certainty. On the other hand, the adoption of a custom text would also pose sustainability challenges in that it would require resources to design and maintain¹¹⁶ the licence. Furthermore, as the experience with EUPL has demonstrated, a continuous monitoring of updates of other standard public licences would be necessary in order to preserve interoperability.

Summarising table

Observations made in the present document are summarised in the table below:

¹¹⁶ LAPSI 2.0, D5.2 Licensing Guidelines, page 18.

	REUSE NOTICE	CREATIVE COMMONS (CC-BY 4.0)	OPEN DATA COMMONS (ODC-BY)	BESPOKE LICENCE
EU LAW CONFORMITY	+	+	+	+
REUSE COMPATIBILITY	+	+	+	+
<i>UNIVERSAL</i>	+	+	-	+
<i>UNRESTRICTED</i>	+	+	+	+
<i>SIMPLE</i>	+/-	+	+/-	+
<i>COST-FREE</i>	+	+	+	+
<i>NON-DISCRIMINATORY</i>	+	+	+	+
<i>TRANSPARENT</i>	+/-	+	+	+
OPENNESS	+	+	+	+
LICENCE MICRO-ELEMENTS	+/-	+	+/-	+
LICENCE REUSABILITY	-	+	+	?
LICENCE INTEROPERABILITY	+	+	+	?
FLEXIBILITY	+	+	+	?
MACHINE READABILITY	-	+	-	?
UPTAKE	?	+	+/-	-

GETTING IN TOUCH WITH THE EU

In person

All over the European Union there are hundreds of Europe Direct information centres. You can find the address of the centre nearest you at: https://europa.eu/european-union/contact_en

On the phone or by email

Europe Direct is a service that answers your questions about the European Union. You can contact this service:

- by freephone: 00 800 6 7 8 9 10 11 (certain operators may charge for these calls),
- at the following standard number: +32 22999696, or
- by electronic mail via: https://europa.eu/european-union/contact_en

FINDING INFORMATION ABOUT THE EU

Online

Information about the European Union in all the official languages of the EU is available on the Europa website at: https://europa.eu/european-union/index_en

EU publications

You can download or order free and priced EU publications from EU Bookshop at: <https://publications.europa.eu/en/publications>. Multiple copies of free publications may be obtained by contacting Europe Direct or your local information centre (see https://europa.eu/european-union/contact_en).

