

Bird & Bird

Data governance in smart manufacturing – a legal perspective

European Commission Workshop “Common European data spaces for Smart Manufacturing”

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Overview

- Data and database
- Protecting know how / trade secrets when you share
- Data(base) transactions
- GDPR – some ease in going forward?
- Conclusion

Data and database



Data – information – new business models

Value / new business models via data collections

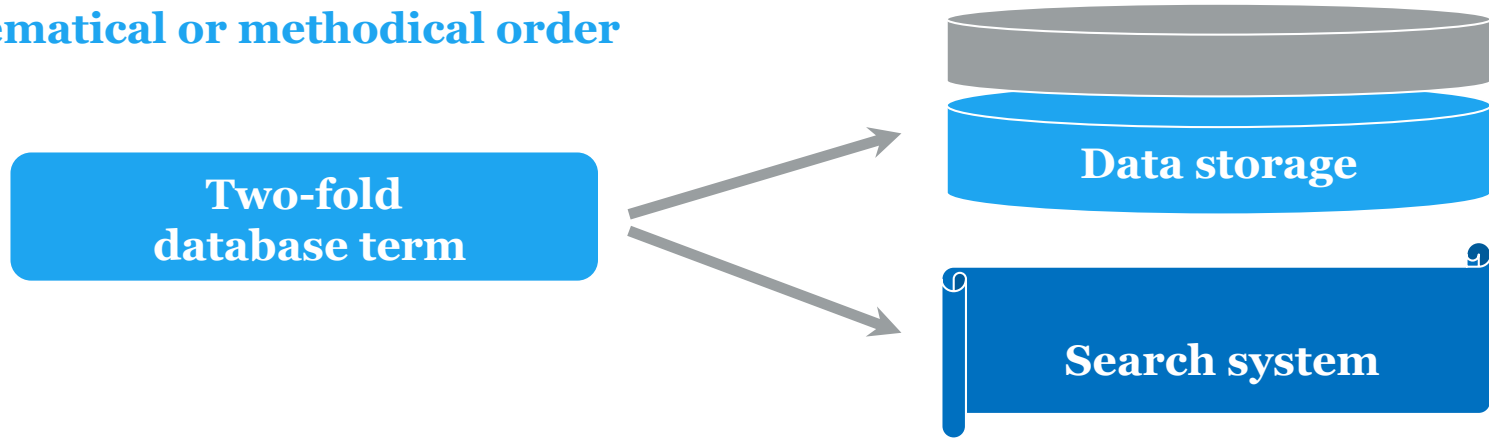
- Individual data entries ⇨ raw data (e.g. sensor data)
- Content-/context level ⇨ metadata
 - Descriptive nature and/or proprietary content
 - "20°" vs. "20° celsius, 16 September 2019, 2:30 pm, Conf-Centre Albert Borschette, Brussels"
- Context orientation and differentiation via metadata
 - Use cases condition monitoring, remote access
 - Data exchange platforms
 - Data as a service



⇨ **Fair use rule for data analysis (e.g. Japanese copyright exemption)?**

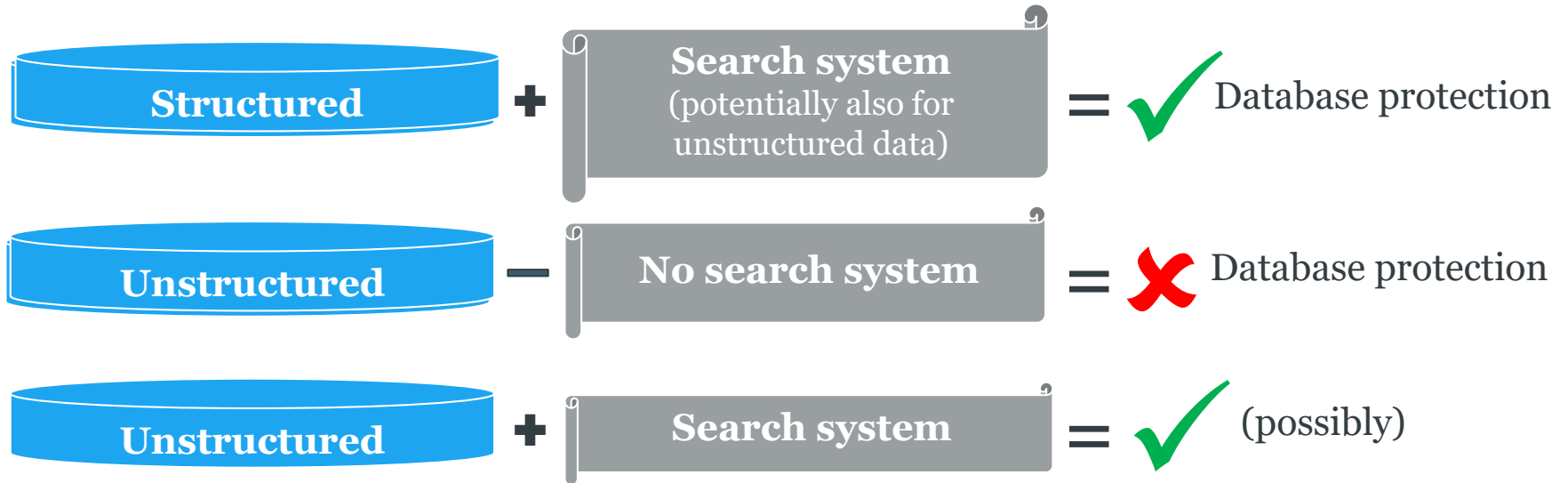
Protecting database (1)

Systematical or methodical order



- Data can be stored in an unsorted manner
- Electronic access to individual elements
- Constituent combination with a search system is key

Protecting database (2)



What if database and search system fall apart in data space?

Contractual frameworks indispensable!

Protecting know how / trade secrets
when you share



EU Trade Secret Directive (2016/943)



Towards a better framework – implementation varies

- Protects information of commercial value, because it is secret
 - Requires reasonable measures to keep secret
 - Organizational measures (need to know access)
 - Encryption and other technical safeguards
- Recourse / civil action against unlawful disclosure etc.

Confidentiality agreements (NDA)

- Common standards under review
 - Technical security essential
 - Excluding reverse engineering
- Contractual penalties and liquidated damages



Protecting trade secrets / know-how when you share?

Enforcement of trade secrets / know-how infringement

- Different legal systems wrt providing evidence
- Tracking data abuse – tagging of data at source?
- Taxonomy of data

Considerable hesitance at SME level to share data

- Technical readiness wrt data-driven business models
- Machine runtimes etc. indicate level of business occupancy
- Unbalanced market position towards large platform providers?
- Lock-in effects – ensuring data portability?
- Evidence of data deletion

**It's all
in the metadata!**

Data(base) transactions



Data(base) transactions – some general points

General objectives

- Usage rights in data/database (for structured data) and/or unstructured data
- Protection against unauthorized usage / modification
- Indemnification by data suppliers
- Limitation of liability for transfer / licensing-out



Prior to data transactions ⇒ due diligence

- Data origin – single source or multi-sourcing in data space?
- Third-party rights (e.g. database rights, trade secrets)?
- Third party access through regulation?
- GDPR compliance?
- Relevance of common framework in data spaces

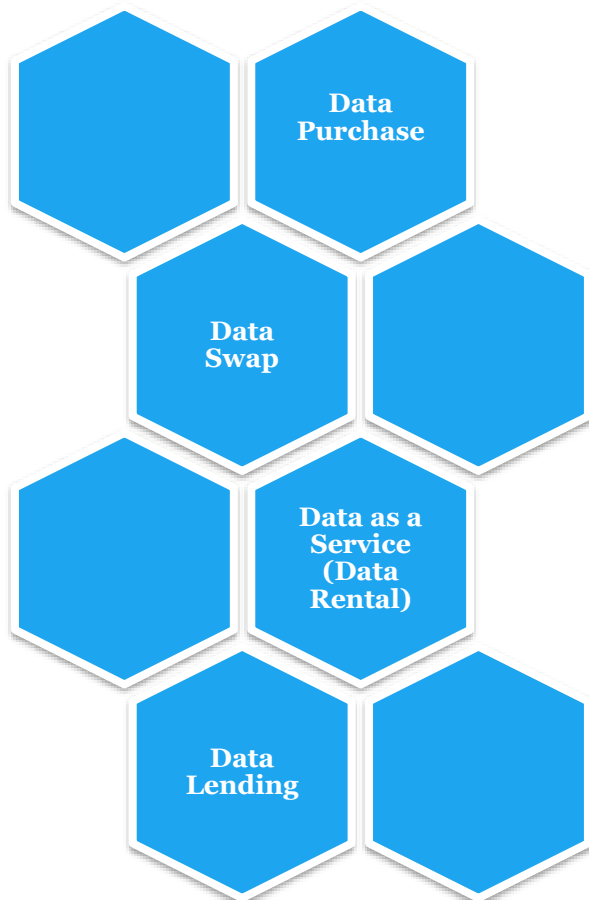
**Risk
assessment**

Corner stones of data(base) transactions

- Nature of contract (purchase, rental, services or works contract)?
- Compensation (monetary / non-monetary, "trading in data")
- Scope and deliverables
 - Data taxonomy, quality and tagging
 - Usage rights, e.g. for AI purposes
 - Right to modify data (impact on database rights)
 - For licensing-out: prohibit significant changes
- Confidentiality / trade secrets protection
- Privacy compliance – joint controllership in data spaces (Art. 26 GDPR)?
- Contractual warranties and liability
 - Data quality and errors?
 - Warranty wrt to data / AI as a service (predictable / unpredictable outcomes)
- Exit and data portability



Setting the landscape for data(base) contracts



	Data Purchase	Data Swap	Data as a Service (Data Rental)	Data Lending
Contractual model	Transfer of data against one-off payment	Transfer of data without monetary consideration (e.g. data as consideration)	Transfer of data in return for a monthly fee; indefinite until notice of termination or specific contract term	Transfer of data without any monetary or other form of consideration (e.g. data, feedback reports, etc. as consideration)
Duration	Indefinite contract term	Indefinite contract term	Indefinite until notice of termination or expiration of specific contract term	Indefinite until notice of termination or expiration of specific contract term
Usage rights	<ul style="list-style-type: none"> • Exclusive or non-exclusive • Geographically limited or unlimited • Restriction to agreed usage purposes 	<ul style="list-style-type: none"> • Exclusive or non-exclusive • Geographically limited or unlimited • Restriction to agreed usage purposes 	<ul style="list-style-type: none"> • Exclusive or non-exclusive • Geographically limited or unlimited • Restriction to agreed usage purposes 	<ul style="list-style-type: none"> • Exclusive or non-exclusive • Geographically limited or unlimited • Restriction to agreed usage purposes
Licensing duration	Perpetual/ unlimited in time	Perpetual/ unlimited in time	Temporary (end of licensing by termination or expiration of specifically agreed contract term)	Temporary (end of licensing by termination or expiration of specifically agreed contract term)
Sublicensing	<ul style="list-style-type: none"> • Sublicensable subject to contractual qualification, OR • prohibition of sublicensing 	<ul style="list-style-type: none"> • Sublicensable subject to contractual qualification, OR • prohibition of sublicensing 	<ul style="list-style-type: none"> • Sublicensable subject to contractual qualification, OR • prohibition of sublicensing 	<ul style="list-style-type: none"> • Sublicensable subject to contractual qualification, OR • prohibition of sublicensing
Reproduction and distribution	<ul style="list-style-type: none"> • Reproduction, distribution and publishing of data or parts of data is prohibited, OR • contractually permitted 	<ul style="list-style-type: none"> • Reproduction, distribution and publishing of data or parts of data is prohibited, OR • contractually permitted 	<ul style="list-style-type: none"> • Reproduction, distribution and publishing of data or parts of data is prohibited, OR • contractually permitted 	<ul style="list-style-type: none"> • Reproduction, distribution and publishing of data or parts of data is prohibited, OR • contractually permitted
Sui generis right of database maker	<ul style="list-style-type: none"> • Data Consumer's general prohibition to reproduce, distribute and publish significant parts of database • The same applies to repeated and systematic actions with regard to insignificant parts of database • Parties are free to agree otherwise 	<ul style="list-style-type: none"> • Data Consumer's general prohibition to reproduce, distribute and publish significant parts of database • The same applies to repeated and systematic actions with regard to insignificant parts of database • Parties are free to agree otherwise 	<ul style="list-style-type: none"> • Data Consumer's general prohibition to reproduce, distribute and publish significant parts of database • The same applies to repeated and systematic actions with regard to insignificant parts of database • Parties are free to agree otherwise 	<ul style="list-style-type: none"> • Data Consumer's general prohibition to reproduce, distribute and publish significant parts of database • The same applies to repeated and systematic actions with regard to insignificant parts of database • Parties are free to agree otherwise
Usage types	Known and unknown types of use depending on contractual restriction	Known and unknown types of use depending on contractual restriction	Known and unknown types of use depending on contractual restriction	Known and unknown types of use depending on contractual restriction

GDPR – some ease in going forward?



Privacy in smart manufacturing

"Today Data is the greatest asset. Both opportunities as well as the biggest challenges are being created by the global flow of data."

(Narendra Modi, World Economic Forum 2019)



Joint controllership (Art. 26 GDPR)

- Shared liability for compliance
- Sample contracts for platforms / data consortia

More legal benefits wrt pseudonymisation required

- Personal data more a "collateral"
- Not at heart of manufacturing models
- SME are strongly concerned

Purpose limitation and variation?

- Limited flexibility (Art. 6 para. 4 GDPR)
- Big Data goes beyond

Issues for GDPR revision

- Flexibility for machine learning/ AI training
- Criteria for pseudonymisation
- Reducing notification duties (Art. 13, 14 GDPR)

Conclusion



Legal issues for smart manufacturing

Reliable contractual frameworks

- Template contracts for platform / data space providers
- Fair and balanced terms
- Robust protection of trade secrets in data spaces
- Liability of platform / data space providers?

Helping develop data taxonomies

- Descriptiveness and standards
- Easing data portability

Fair use exemption for AI processing (e.g. Japanese copyright law)?

GDPR

- Joint controllers every where?
- More clarity and ease wrt pseudonymous data

"Alexander Duisberg is recognised for his depth of industry experience and his knowledge of digital transformations."

- Who's Who Legal, 2018

"Alexander Duisberg stands out for fantastic work advising clients on digital transformation on an international scale."

- Who's Who Legal, 2018

Thank you & Bird & Bird

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