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Topic Report No. 11

Recognising the road to data.gov.de

An assessment of the European and national regulatory framework impacting PSI re-use in Germany

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Citation method

The text will use the following citation conventions in order to improve the readability of the text. As a matter of preference legislation will be referred to by its English language short name. Cited for the first time in the text, the legislation's German short name will be given alongside.

The full text of Federal legislation can be obtained from the "**Gesetze-im-Internet Portal**" website produced by the German Federal Ministry of Justice in cooperation with juris GmbH. References to portals, professional and trade associations, institutions and other public bodies are given in bold text indicating that the web-link to the portal or organisation is given in a list of references in an annex at the end of the text.

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Abstract

One of the positive starts to the new decade has been the active interest of governments and public bodies in “open data” and “open government” agendas, an interest which in turn fosters greater transparency by making public sector data more accessible. Leaders here have been the UK and the USA. Germany implemented the EU PSI Directive with the Federal Information Re-use Law (Informationsweiterverwendungsgesetz – IWG) in December 2006. The IWG is a Federal law which has effect upon Federal authorities, Federal State authorities and municipal bodies alike. This is in contrast to related legislation such as the freedom of information, access to environmental information, consumer information and geoinformation which require implementation at the Federal and Federal State level. This Topic Report gives an overview of the German regulatory framework surrounding PSI re-use and provides a critical assessment of the extent to which it supports an open data agenda for Germany.

Keywords

Open data, transparency, data protection, freedom of information, environmental information, geoinformation, INSPIRE Directive.

About the Author

An innovative thought leader and experienced change manager, Michael Fanning is a science and law graduate (BSc., LL.B) and Managing Director of Online Consultants International GmbH the sister company to Online Consultants International Ltd. itself founded in 1988.

Active across an international stage, he has given numerous presentations and published several papers on the legal and business information markets, from both a practical as well as a theoretical point of view. Michael Fanning is on the Board of Directors of the German Society for Information Science and Practice (DGI) and acts as special advisor to the DGI's working group 'Information Competence in Businesses'.

Drawing upon an extensive background in comparative law, Michael Fanning is a specialist in information access rights in Europe and a founding member of the German Society for Freedom of Information. He is also Vice-chairman of the 'IWG-Netzwerk e.V.' a German professional association which promotes the re-use of information from the public sector and is modelled on the Locus Association in the UK.

As a member of GEOkomm e.V., a Brandenburg/Berlin based professional association and network promoting access to and the re-use of geo- and environmental information; he is also the national *rapporteur* for the Brussels based PSI Alliance. The PSI Alliance was established in 2008 in order to encourage the public sector to maintain a trading environment that is fair and equitable, particularly with respect to the licensing and re-use of public sector information (PSI).

Michael Fanning is a member of the Open Data Network where he contributes to key themes such as the operational consequences of regulatory framework interdependence; licensing of public sector information; strategic, operational and change management aspects in the construction of sustainable information infrastructures in the public and private sectors.

1. Introduction

At the beginning of 2010 the UK government announced the launch of **data.gov.uk**, a website of resources and information designed to provide access to data assets from the public sector in the United Kingdom.[1] The development and launch of **data.gov.uk** followed swiftly the invitation by the then Prime Minister Gordon Brown to Sir Tim Berners-Lee and Professor Dr. Nigel Shadbolt to assist the government in its plans to develop "digital Britain."

The meeting at 10 Downing Street symbolised the coming together of future thinking on information and knowledge management and advanced technology with the highest level of political office. In the United States the first legislative enactment undertaken by president Obama was the Transparency Act. The subsequent launch of **data.gov** in the USA following the commitment of high political office to transparency, open-data and public sector information re-engineering was clear understood and resonated through the PSI re-use community. Germany was no exception.

The developments in the UK and USA were discussed at length in the specialist journals and blogs, an example being the German chapter of the **Open Data Network**. Questions were drawn and comparisons made. The seemingly obvious question: when will Germany have an open data movement inevitably found its way to the offices of Peter Schaar, the German **Federal Commissioner for Data Protection and Freedom of Information**. In response to the question: how realistic would a **data.gov.de** be for Germany, Herr Schaar replied that in his view a **data.gov.de** lies far into the future. Not only were information requests under freedom of information (FOI) legislation mostly processed using paper based methods but also in each case the public authority involved had to assess whether the request involved information protected by data protection legislation, or came under the exclusion clauses relating to business and trade secrets.[2]

Other commentators from the **Open Data Network** in Berlin lamented the lack of personalities in Germany of the calibre of Sir Tim Berners-Lee and Prof. Nigel Shadbolt and bemoaned the fact that Germany is (again) in the "Schlusslicht", which rendered idiomatically means at the bottom of the league, as regards PSI re-use in Europe.[3]

Now leaving aside the lamentation regarding the lack of personalities for another occasion, the statement that Germany when compared to the UK is in the "Schlusslicht" i.e. at the bottom of the league, as regards European PSI re-use only makes sense if indeed the UK and Germany are covering the same (or at least a similar route) on the journey to exploit the re-use of public sector information.

Herr Schaar flagged some of the difficulties involved in the application of freedom of information legislation in Germany. Even a cursory comparison here is revealing. Although current debate accompanying the UK journey supports notions of transparency and open government, the UK is now reaping the benefits of seeds sewn in the past.

1 http://news.bbc.co.uk/2/hi/8470797.stm
2 http://www.epsiplatform.eu/news/news/reflections_on_a_german_data_gov
3 http://opendata-network.org/

In the United Kingdom the Freedom of Information Act 2000[4], hereafter referred to as the FOIA, not only set up the general right of access to public sector information it also forced (in the sense it was a statutory requirement) 100,000 public authorities of all sizes across the country to reengineer their own information holdings and to examine the conditions of their holding. The FOIA was enacted in 2000 yet entered into force on 1st January 2005 i.e. five years after it was enacted. Half way through the preparation phase public authorities were required to a produce a Publication Plan which outlined what information is held, what information may be made accessible and under what conditions.

In other words the FOIA provided a legal and regulatory framework requiring public authorities to reengineer their records management. The statutory requirements were fleshed out in a Code of Practice entirely devoted to records management. The UK **Information Commissioner** whose task it is to oversee the Publication Schemes also offered a considerable amount of advice. Academic institutions, most notably **The Constitution Unit of University College London (UCL)** undertook numerous studies which helped oversee implementation.

By contrast in Germany the Federal Information Freedom Law (Informationsfreiheitsgesetz – IFG), the last piece of legislation enacted by former Chancellor Schröder's Red/Green coalition government, was passed dramatically on 5th September 2005 and entered into force little more than three months later on 1st January 2006. The Federal Information Freedom Law applied however, to only Federal authorities, some 5,000 organisations. As far as information and records management was concerned the legislation recommended the publication of information electronically but only required the publication of organisation charts and filing plans.

Today's open data initiatives are for the most part dependent upon yesterday's information engineering programmes. When comparing and learning from other jurisdictions great care must be taken about what is being compared and more particularly about what conclusions are being drawn from the comparison. Apples and pairs may both be fruits, but they are clearly different is shape and taste and on that basis feature differently in different products, such as jams, drinks and cakes.

With a healthy degree of caution in mind this Topic Report will give an overview of the legislative framework surrounding PSI re-use in Germany and give a view on to what extent the current framework could yield or is likely to yield an open data initiative similar to that in the United Kingdom. As a consequence of the assessment the Topic Report will also suggest what a future strategic direction for the development of PSI re-use in Germany might be and give a view on where a **data.gov.de** impulse could emerge from.

[4] http://www.opsi.gov.uk/acts/acts2000/ukpga_20000036_en_1

2. The legislative framework effecting PSI re-use in Germany

2.1. The legislative framework from a PSI re-user's perspective

In Germany it is not uncommon to refer to legal frameworks as the "paragraph jungle". The metaphor is both fitting and accurate as a journey through the paragraph jungle has as many hazards for the travelling legal subject as a journey through its physical equivalent. Physical and legal jungles can be sources of discovery and wonder but most usually are sources of anxiety and hidden dangers.

Diagram 1 below gives a pictorial representation of the kind of legislative landscape a person or organisation seeking to re-use public sector information in Germany may well encounter. Rather than focus directly on the norms *per se* the preferred approach is to view the legislative framework in terms of "themes". This is an intuitively useful and pragmatic approach because, as we shall see later, behind any given "theme" rarely lies a single piece of legislation but rather a whole eco-system of overlapping, interlinked and inter-acting norms. In any given journey these legislative eco-systems will vary in the degree of legal effect and relevance they exert upon the PSI re-user in their journey from seeking PSI (i.e. START) to concluding an agreement with a public sector body to be able to re-use the information (i.e. GOAL). For instance, common factors effecting the journey are the type of information being requested, i.e. geo-, environmental, company or legal information etc, the location physically and administratively of the public body holding the information, i.e. Federal, Federal State or municipal authority; Bavaria or Sachsen-Anhalt etc.

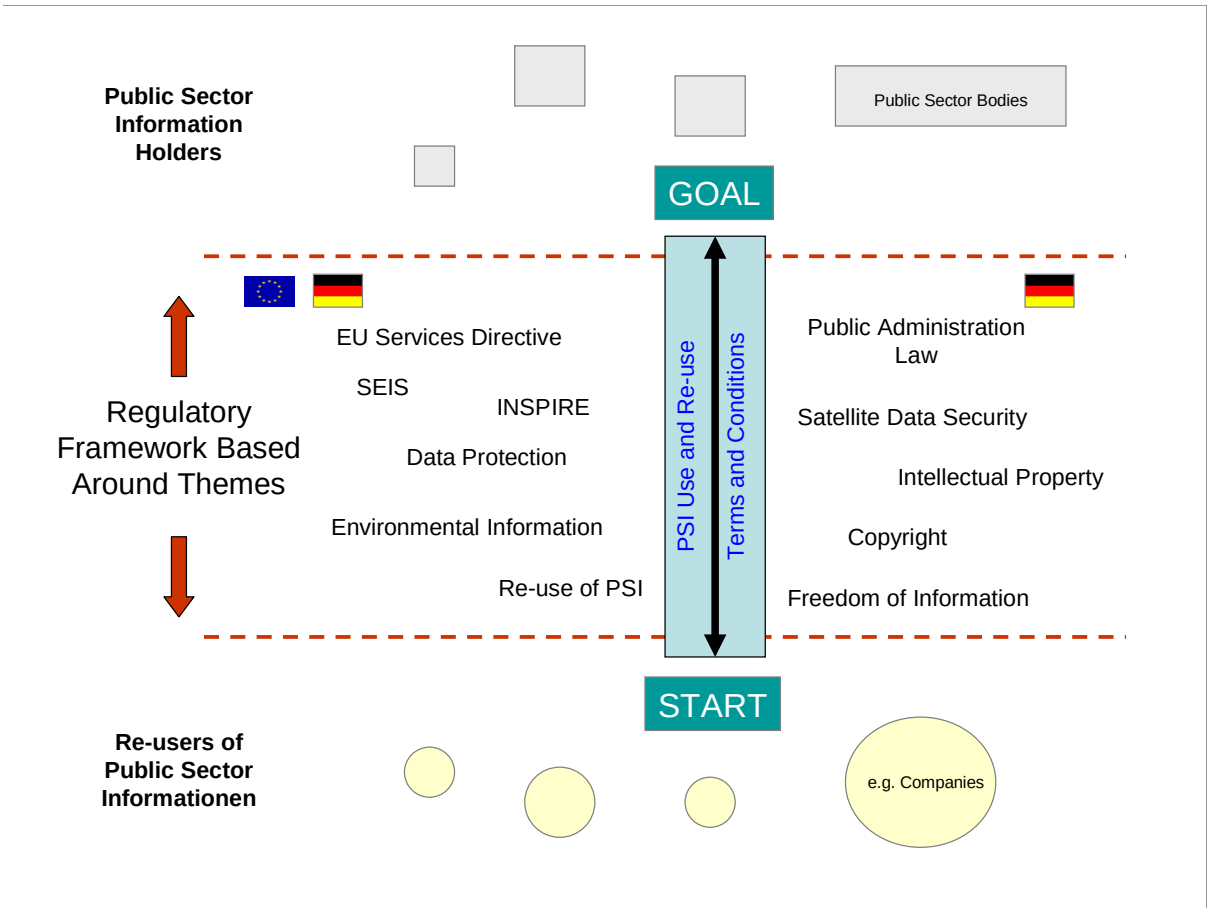

Diagram 1: An overview of the regulatory framework in Germany governing PSI re-use

Generally speaking the PSI re-user can only start the journey where there is right to access the information being sought. This is for the most part usually provided for by freedom of information legislation but not always. Access to information held in official registers such as the Population Registration Register or Trade Register, each of these holding address and company information respectively, are covered by legislation specifically regulating the public task. These specialist legislative provisions take precedent over the freedom of information legislation. Also, where freedom of information legislation provides for access to official information across the board, environmental information is subject to another access scheme.

Whether the sought after data can be re-used depends upon whether the information falls under the legislative provisions on re-use of public sector information. Re-use although implied may well be restricted by data protection, copyright or intellectual property considerations.

Some of the legislative eco-systems have a particularly national focus. For example, Federal and Federal State freedom of information legislation tends to be composed of relatively few paragraphs compared to say, its UK equivalent. However, these have to be read against the Federal and Federal State Administrative Procedural Laws. Others, such as the INSIRE Directive, the Shared Environmental Information System (SEIS) initiative and even the EU Services Directive have a focus that lies elsewhere but are nevertheless legal frameworks which encourage access to and re-use of geo data and environmental data.

It is also worth noting that in the last instance all three are based upon EU Directives and initiatives and their subsequent implementation into German law. This does not apply to all the themes under consideration. For instance FOI in Germany does not involve an EU Directive. It is very noticeable that where in the UK the FOI played an enabling role in setting the foundation for PSI re-use, this has not been the case in Germany.

Lastly, the diagram highlights the attraction and potential of dedicated PSI offices and institutions such as the Office of Public Sector Information (OPSI) and the "click-view licence" as developed in the UK.

2.2. The legislative framework in the context of the German legal system

Germany is a Federation comprising 16 Federal States. Each Federal State has its own parliament and executive and judiciary and enjoys a degree of legislative autonomy as far as this is provided for in the Basic Law (Grundgesetz). The Parliament of the Federation is the Bundestag to which the populace sent MPs and the Bundesrat which represents the interests of the Federal States.

In addition to the Federal and Federal State levels of administrative authority there is also the administrative level of the municipalities. Most striking to a common lawyer is the level of autonomy these local authorities have. For example, many of the official registers, so important for PSI, are run on an entirely local basis. So for instance there are over 5,000 Population Registration Registers. The Cadastre is also essentially a local responsibility.

The reference to address data and to cadastral data highlight one of the challenging aspects of PSI re-use in Germany, namely with respect to the information being sought, who has legal competence over the information's collection, use and re-use?

The Basic Law (Grundgesetz) founding the Federal Republic sets out the legal competences based upon area, both geographical and by subject. So for example areas such as foreign relations, defence and the economy are dealt with by Federal legislation, i.e. by legislation enacted by Parliament, here the Bundestag and Bundesrat. Other areas, for example education, are the responsibility of the individual 16 Federal States and are dealt with by the legislator in each of the Federal States, for example the Parliament (Landtag) in Stuttgart or the Parliaments (Bürgerschaft) in Bremen and Hamburg respectively.

While the principle of subsidiary generally prevails the Bund can in specific cases claim legal competence where the interests of the Federal Republic are better served. Article 74 Article 74 I Nr. 11 of the Basic Law states that in certain cases the Federation can draw legislative competence to itself where it is in the interest of the Federation to maintain a unified system and approach for national benefit.

This hierarchy or matrix of legal competences dependant upon on regional administrative areas as well as subject matter has consequences for the legal framework that comprises PSI re-use. Table 1 given in the annex at the end of the Topic Report gives an overview of the legislative provisions by theme.

Whereas data protection, environmental information and freedom of information are themes requiring each Federal State as well as the Bund to implement legislation, the Federal Government citing Article 74 I Nr. 11 GG implemented the IWG and Satellite Data Security Law using a Federal Law (Bundesgesetz). That is to say, the legislation once enacted is in force for the Federation the Federal States and the municipal authorities (Bund-Länder-Kommunen). Federal level competence to enact the IWG was justified on economic grounds and the Satellite Data Security Law on the basis of national security. In contrast the German legislation that implements the INSPIRE Directive comes under the competence of the Federation as well as the Federal States.

3. The legislative framework's "legislative eco-systems" by theme

3.1. Protection of Personal Data

The right to be left alone in terms of a legislative eco-system has been built up and shaped by technological change. One of the earliest formulations followed the invention of photography and was articulated in the seminal essay by Warren and Brandeis published in 1895. Today, a major technological impulse has come from the emergence of the internet and the opportunities and applications it has spawned; the issues and impact upon fundamental rights being however as problematic today as they were then.

Although often associated directly with European Union law, legislative activity revolving around the protection of data has taken place in Europe for some time and predates the first EU directives by many years. Indeed, Germany was one of the first countries in which legislation was enacted with the aim of protecting an individual's personal data and thereby their privacy. The Federal State of Hesse was the first Federal State to enact data protection law in 1970. In 1977 the Federal Government enacted the Federal Data Protection Law (Bundesdatenschutzgesetz - BDSG). By 1981 all the 16 Federal States had enacted data protection legislation. The EU Data Protection Directive 1995/46/EC, on the other hand, was passed in 1995.

The current version of the German Federal Data Protection Law dates from the 20th December 1990, yet was reformulated following a proclamation of 14th January 2003 and amended again by legislation in 2005 and 2006. These latter changes took into account EU legislation. In 2009 following numerous incidents involving the misuse of personal data, amendments were made to the German Federal Data Protection Law all of which took effect on 1st September 2009.

Seen from the perspective of a PSI re-user data protection legislation provides a right of access to official information and in this respect can open a door to information held by public sector bodies. Data protection legislation can on the other hand close doors by being a ground upon which information, requested following for example a freedom of information request or an environmental information request, is denied. In areas where business interests are looking at PSI for example, address data for directories and targeted marketing or geospatial information for GIS based applications, data protection is becoming regarded as more of a hindrance to or "brake" on PSI re-use.

In Germany, at least up until 4-5 years ago, the role of data protection in the re-use of geoinformation was regarded as relatively unproblematic. As geoinformation became more available and the lobby for its commercial re-use grew this position changed. Responding to these concerns the Commission for Geoinformation Business set up in 2001 by the German Federal Ministry for Economics and Technology (**GIW-Kommission**) commissioned a series of studies looking specifically at the role of data protection in geoinformation based products and services.

The studies[5] themselves and the reaction to them highlight the extent to which there continues to be dissent and disagreement. The variance of legal opinion together with such a wide variety of differing views amongst the community's stakeholders - while undeniably useful

[5] See http://www.geobusiness.org/Geobusiness/Navigation/publikationen.html

for discussion and debate - points nevertheless to considerable legal uncertainty in this area. A high level of legal uncertainty implies a high level of risk which in turn makes non-commercial as well as the commercial exploitation of geo data unattractive. Simply put, legal uncertainty puts a brake on innovation.

The situation in this regard became more visible in 2010. Google have been photographing communities in Germany for the Google Street View product. This has raised cause for concern and led to the production of at least three legal opinions on the matter each taking a different view. While the debate is useful care needs to be taken where passions are roused. One of the consequences of the current Google Street View developments has been to prompt arguably well meaning political action which may do more harm than good. Specifically the Federal State of Hamburg has proposed changes to the Federal Data Protection Law in the Bundesrat, the parliamentary body that represents the interests of the Federal States. The advocates of these proposed legislative changes argue that their proposals would strengthen the basic rights of property owners. A contrary view has been passionately argued by the **German Association for Geoinformation** (**DDGI)** who says it would be hugely negative for the geoinformation re-use community.

Disappointingly covered in the mainstream press, blogger wisdom warns against overreaction, acknowledges that the Google Street View project triggers serious re-thinking on the role of protecting privacy in the digital age but calls for an informed, considered and thorough debate in what is a dynamic theme comprising a complex set of issues. The disharmony and tensions in the German data protection legislative eco-system are exemplified by that fact that Hesse, quoted as being "motherland of data protection" remains one of the 5 Federal States that does not yet have freedom of information legislation. Further, and somewhat ironically, the country whose Constitutional Court judges in the landmark Census Decision of 1981 raised "informational self-determination" to the status of a constitutionally enforceable basic right, has been recently chastised by the European Court of Justice for failing to ensure the true independence of its data protection supervisory authorities.

3.2. Freedom of Information

The enactment of law within a legislative eco-system over an extended period of time has not just been a problem for the theme of data protection. The temporal diversity, both in terms of the enactment and implementation of freedom of information legislation has prevented the legislation's ideas from gaining ground over a broader territory. The situation is aggravated by there being no EU legislative structure hovering in the background to offer direction, shape and structure.

Similar to data protection the first legislative freedom of information initiatives began at the Federal State level. Brandenburg in 1998 was the first Federal State to enact legislation providing a general right of access to information held by public authorities. A driver for transparency in this particular instance was the desire to provide citizens of the former German Democratic Republic (DDR) with an opportunity to examine the files kept on them by the former State Security Service. The transparency of official information became part of the regional, collective process of coming to terms with the past. Indeed, Brandenburg is the only Federal State where the right to access official information has been enshrined in the Federal State's constitution.

After Brandenburg, in the space of three years three other Federal States followed suite and also enacted legislation providing for the general right of access to official information. These were Berlin (1999), North-Rhine Westfalia (2000) and Schleswig-Holstein (2001).

In 2005, during the closing stages of its administration the then Federal Government enacted the Federal Information Freedom Law (Informationsfreiheitsgesetz – IFG) which applied to Federal Authorities only. Federal level freedom of information legislation, coupled with the experience of Brandenburg, Berlin, North-Rhine Westphalia and Schleswig-Holstein provided an impulse to the other Federal States that was gradually followed by the Saarland, Mecklenburg-Western Pomerania, Bremen, Hamburg, Rhineland Palatinate, Thuringia and Saxony-Anhalt. Noteworthy is that the Federal State of Hamburg having enacted freedom of legislation first in 2007, completely revised the legislation and re-enacted it again in 2009.

Although parliamentary protocols attest to the lively and passionate debates that have gone on in the remaining five Federal States, the ruling governments in most notably Bavaria, Baden-Württemberg and Hesse have expressly and repeatedly declined to implement such legislation. Curiously though, at the municipal level Herr Peter Schaar, the German Federal Commissioner for Data Protection and Freedom of Information, in a recent report observed that many local authorities in Bavaria and Baden-Württemberg are espousing and practicing freedom of information principles in their dealings with citizens.

Given the importance of freedom of information legislation as an enabler of PSI re-use three additional points are worth noting.

Firstly, the implementation of freedom of information in Germany already covers an 11 year period from Brandenburg in 1998 to Hamburg (again) in 2009. Compared to the venerable legislative provisions of the current German Civil Code, enacted in 1900 or the Commercial Code, enacted in 1897, this is not such a long time. However, the 11 year temporal diversity of freedom of information legislation has a millennium change in the middle of it. This can be seen also as a symbolic division marking a world, where in 1998, the internet was fledgling and unfamiliar. Contrast this to 2009 where the internet is sophisticated, regarded as commonplace; as being “a cloud” or even something that is completely invisible yet always present. Not only has technology changed dramatically over this period, so too have the options available to both re-users and holders of public sector information.

Secondly, the extended development time of freedom of information in Germany has also led to issues and problems that will have practical consequences for PSI re-users. For example, the Brandenburg “Akteneinsichts- und Informationszugangsgesetz (AIG)” provides for a rights to inspect files. The presumption in the way the provisions are formulated is that the requested information will be found in the official files, i.e. dedicated, identifiable information containers. This is in contrast to the more recent freedom of information legislation which like the Federal Information Freedom Law uses very different terminology that implies a much broader scope. According to the relevant provision[6] of the Federal Information Freedom Law official information is any record made for official purposes independent of the means with which it is preserved. Drafts and notes that are not part of an official record are not included. In other word the requested information need not lie in a verifiable, identifiable information container.

[6] § 2 sub-para. 1 IFG

Thirdly, the Explanatory Notes issued with freedom of information legislation provide background on what the legislator intends to achieve with the legislation. There are very few references in these Explanatory Notes nor in the accompanying parliamentary protocols where freedom of information is given as an enabler of public sector re-use. Instead the rationale for freedom of information has followed a consistent track of empowering the citizen and providing for the building of a collective consensus (Willensbildung). That the acquired information could also be re-used as an economic good (Wirtschaftgut) is not a conceptual bridge that has been adequately crossed. In fact, there is one specific example where the bridge has been deliberately closed. A provision[7] in the Berlin Freedom of Information Law states that the publication, storing or collection of information for commercial use where the information has been obtained in the course of inspecting files or requesting information from them is not permitted. To what extent this prohibition will be a barrier to the procurement of geoinformation from public authorities in Berlin has to be clarified.

3.3. Environmental Information

The EU Directive 2003/4/EC of the European Parliament and the Council on public access to environmental information implemented the Aarhus Convention into European Law. The EU Directive 2003/4/EC repealed an earlier Council Directive 90/313/EEC (the so-called environmental information directive) and introduced significant improvements in providing access to environmental information.

In Germany EU Directive 2003/4/EC was transposed into German law by the Federal Environmental Information Law (Umweltsinformationsgesetz – UIG) of 22nd December 2004 (BGBl. I S. 3704) which entered into force on 14th February 2005. The UIG of 2004 replaced the former UIG of 1994. The UIG of 2004 was however, only for Federal Authorities and each of the 16 Federal States were required to transpose the EU Directive into their own Federal State legal system. This they did and swiftly so that in a period from 2004 to 2006 all 16 States had the appropriate legislation. Compare this to freedom of information legislation where over a period of 11 years only 11 Federal States have enacted such legislation.

The new regulatory environment now means that all public authorities - even those not directly dealing with environmental issues – are required to make environmental information available to the public. The requirement to disclose such information even extends to private bodies, where these are under the control of an authority and exercise public functions relating to the environment. The new regulatory environment also requires public authorities holding environmental information in electronic databases to make it available to the public and to disseminate the information actively and systematically. One of the practical outcomes to emerge out of this regulatory requirement has been the **PortalU®** web portal.

PortalU® is the Environmental Information Web Portal of German public bodies at the Federal and Federal State levels responsible for environmental matters. The portal offers central access to over 2,500,000 web pages and about 500,000 database entries from over 340 public organisations in Germany. The aim of the portal is to establish a fast and reliable survey of all relevant public environmental information. This is being done in accordance with EU Directive 2003/4/EC on public access to environmental information. All environmental metadata from the environmental data catalogues (UDKs) at the Federal and

[7] § 13 sub-para. 7 of the Berliner Informationsfreiheitsgesetz – IFG

Federal State levels are bundled in PortalU® and subsequently transferred to a body referred to as the **Geodateninfrastruktur in Deutschland (GDI-DE)**, the German organisation tasked to oversee the implementation of the INSPIRE Directive, so as to be able to help fulfil the aims of the EU INSPIRE Directive 2007/2/EC and establish a spatial data infrastructure for Europe.

At the time of writing 28 data bases from public administrations are available. 17 of them are environmental data catalogues "UDKs", which contain about 5,000 INSPIRE relevant metadata entries. The UDKs are updated by the employees of the particular public institutes concerned using a web based application.

3.4. PSI Re-use

The EU PSI Directive (2003/98/EC) was transposed into German law by the Federal Law on the Re-use of Information from Public Bodies referred to more usually by its shorter (!) title „Informationsweiterverwendungsgesetz – IWG" rendered in English as the Information Re-use Law. [8]

Enacted on 13th December 2006 the IWG entered into force on 19th December 2006. Official sources describe the IWG as a 1:1 implementation of the EU PSI directive.[9] Unlike some of the legislative eco-systems previously discussed the IWG is a Federal Law based on Article 74 I Nr. 11 of the Basic Law and as such applies to the Federation, Federal States and the municipal administrations.

Reflecting the aims and goals of the EU PSI Directive itself, the IWG does not create a right of access to official information. However the application of the IWG assumes that such a right is already in place. The decisions as to whether official information may be re-used and the details of that use are the responsibility of the public authority concerned.

Article 9 of the EU PSI Directive holds that "(m)ember States shall ensure that practical arrangements are in place that facilitate the search for documents available for reuse, such as assets lists, accessible preferably online, of main documents, and portal sites that are linked to decentralised assets lists." In this respect the German **Federal Ministry of Economics and Technology** soon after the legislation's enactment made reference to a number of portals.[10] These references were replaced by a more general reference to Bund Online but this too is no longer available.

Important for the comparison with the United Kingdom is the observation that the IWG makes no specific reference to publication obligations or duties on the part of the public authorities nor makes any reference to information directories. § 4 sub-para. 4 IWG does refer to General User Conditions (Nutzungsbestimmungen), General Re-Use Tariffs (Entgelte) as well as Fees (Gebühren) stating that they should be made available electronically where this is possible. In other words this is a weak form of obligation.

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8 Gesetz über die Weiterverwendung von Informationen öffentlicher Stellen (Informationsweiterverwendungsgesetz – IWG) (BGBL. I, S. 2913) of 13th December 2006.

9 http://www.bmwi.de/BMWi/Navigation/Technologie-und-Innovation/Informationsgesellschaft/informationen-des-oeffentlichen-sektors.html

10 For example, a legal information portal (www.justiz.de), a company registry information portal (www.handeslregister.de) and geographic information portals (www.geodatenzentrum.de and www.geoportal.bund.de).

The Explanatory Notes (Begründung) to the IWG took the view that "no or very little implementation within the Federal Authorities is required here".[11] The Explanatory Notes refer instead to § 11 sub-para. 1 IFG under which the Federal Authorities are required to maintain directories (Verzeichnisse führen) out of which the existing information collection (Sammlung) and its purpose (Zweck) may be determined.

Hence, § 11 IFG already an important legal provision in the practical implementation of the Federal Freedom of Information Act in Germany, has also become a key provision in terms of the „practical arrangements" as understood by Article 9 of the EU PSI Directive (2003/98/EC).

3.5. Satellite Information

In November 2007 the German Parliament passed the Act to Safeguard the Security Interests of the Federal Republic of Germany from Endangerment by the Distribution of High-Grade Earth Remote Sensing Data (Satellitendatensicherheitsgesetz - SatDSiG).[12] The act entered in to force on 1st December 2007.

Background information on the SatDSiG published by the Federal Ministry of Economics and Technology states that the purpose of the Act is two fold:

> "on the one hand, to safeguard the security and foreign policy interests of the Federal Republic of Germany in connection with the distribution and commercial marketing of satellite-acquired earth remote sensing data especially on international markets. On the other hand, the Act will create legal certainty for affected companies and make the terms of operating in the new business areas calculable for the developing companies involved in satellite data marketing - thus also for the expanding geo-data industry. It will therefore fulfil an important condition, enabling German companies to translate satellite applications into commercially viable business models and enter new sales markets."[13]

The Act only covers "high-grade" satellite data and its distribution by primary distributors. The need to ensure such material does not threaten national and international security interests has been established for some time most notably by the USA, Canada, France as well as India and now more recently Japan. Indeed one of the stated drivers for the German legislation was the need to be compliant with the USA security requirements as a condition in order to receive export licenses for US components which are needed by the German built satellites.

For the purposes of this Topic Report the SatDSiG has been included as like the IWG discussed above, it is a relevant example illustrating how the Federation assumes legal competence for the whole country – in this case under the auspices of economic necessity as

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[11] Begründung zum IWG, BT-Drs. 16/2453, Seite 10.

[12] Gesetze zum Schutz vor Gefährdung der Sicherheit der Bundesrepublik Deutschland durch das Verbreiten von hochwertigen Erdfernerkundungsdaten (Satellitendatensicherheitsgesetz – SatDSiG) vom 23. November 2007 (BGBl. I S.2590).

[13] National Data Security Policy for Space-Based Earth Remote Sensing Systems.
Background Information for the Act on Satellite Data Security (Satellitendatensicherheitsgesetz - SatDSiG).
Issued by the Federal Ministry of Economics and Technology (BMWi), Bonn, 15th April 2008, page 1.

provided for by Art. 74 sub-para. 1 Nr. 11 GG. It is also a curious piece of legislation in that neither in the text of the Act itself nor the accompanying Explanatory Notes is the IWG or PSI re-use specifically referred to although the aim of the legislation is to enable "German companies to translate satellite applications into commercially viable business models and enter new sales markets". Yet, the legislator clearly sees the SatDSiG as making a major contribution to the "expanding geo-data industry."

3.6. Geoinformation

The legislative framework that dominates the geoinformation community revolves around the implementation of the INSPIRE Directive. The acronym INSPIRE (Infrastructure for Spatial Information in Europe) represents Directive 2007/2/EC of the European Parliament and of the Council establishing an Infrastructure for Spatial Information in the Community.

The INSPIRE Directive addresses the problem of the lack of interoperability of spatial data sets and hence the applications based upon them within the European Union. Poor data and poor application interoperability make policy formulation let alone policy implementation unnecessarily difficult in an ever increasing inter-connected world.

The aim therefore of INSPIRE is to have the 27 EU Member States create a European spatial database based around 34 spatial data themes with integrated spatial information services to facilitate cross-border use of data in Europe. The member states are obliged to progressively make available interoperable geodata.

The INSPIRE Directive was enacted in April 2007 and entered into force six weeks later on 7th May 2007. Unlike some of the other legislative eco-systems referred to above INSPIRE is a designed eco-system rather than one that has evolved. So for example the Directive sets goals and in the annexes defines the data set building blocks. It also provides for the rule making framework which oversees implementation. The Directive creates a set of Common Implementing Rules (IRs) in specific areas. This is to ensure compatibility and usage between Member States. The IRs are adopted as Commission Decisions or Regulations and are binding in their entirety.

In Germany the INSPIRE Directive has been implemented for application amongst Federal authorities with the Federal Spatial Data Access Law (Gesetz über den Zugang zu digitalen Geodaten (Geodatenzugangsgesetz) - GeoZG).[14] Currently, the Federal States are working on their respective implementations. Bavaria was the first of all the jurisdictions in Germany to implement the directive. There is slight variance in the implementation of the INSPIRE Directive amongst those Federal States that have implemented the Directive so far.

Bearing in mind the questions being considered in this Topic Report noteworthy here is the nation wide consensus on the need for implementing the Directive. This has forced cooperation across Federal, Federal State and Local Authorities. Leading in this respect is the Federal Ministry of Economics and Technology (BMWi) which has also integrated the voice of the business community through the work of the GIW-Kommission and the in particular the GeoBusiness section. Although the INSPIRE Directive will develop into a complicated system of norms it is less likely to be a paragraph jungle and (hopefully) more of a structured landscape of norms with strong systematic roots in the public administration.

[14] Geodatenzugangsgesetz vom 10. Februar 2009 (BGBl. I S. 278).

3.7. Additional developments potentially affecting the PSI re-use legal framework

3.7.1. Shared Environmental Information System (SEIS)

The European Commission's initiative to create a **Shared Environmental Information System (SEIS)** throughout the European Union is also driven by the need for greater interoperability of environmental information. Similar to geodata and INSPIRE, SEIS is based on the realisation that interoperability between information sources and of applications based upon them is essential in order to provide timely, relevant and reliable information on the environment which is "absolutely necessary for decision makers to respond to the environmental problems of our time." Further, the aim of SEIS is to set out a road map to improve within the EU the way that information on the environment is collected, analysed and communicated. In this way citizens will be able to better assess risks in terms of the quality of air and water in their neighbourhood, the risk of flooding, droughts or pollution.

Always keen to report on best practice the European Commission cites the German Environmental Information Web Portal PortalU® as an example of a real-life SEIS.[15] An information system offering – in a distributed information environment - central access to "public environmental information at all administrative levels, from federal and state level" with "more than 2 million web pages and over 500,000 data base entries from over 240 public institutions" the Commission's description also notes that "(t)he *organisational structure* (cooperation between federal level and all 16 states of Germany) of the long-term project PortalU® proved to be *sustainable network*. Especially, new challenges in reference to INSPIRE or SEIS are discussed from different kinds of views from a *group of experts until consensus is found*." (italics added).

3.7.2. IT-Staatsvertag and IT-Planungsrat

According to the German Federal Ministry of Interior the entry into force on 1st April 2010 of the IT-Staatsvertag promises to herald a new era of cooperation between and across the Federation and Federal States as regards the implementation of information technology (IT) and eGovernment.[16] The IT-Staatsvertrag which involved a change to the Basic Law sets out the legal basis for greater cooperation and is an outcome of the Federal Reform II which was tasked with examining the financial relationships between Federal and Federal States. The IT-Staatsvertrag set up the IT-Planungsrat. The first meeting of the IT-Planungsrat took place at the Federal Chancellors Office (Bundeskanzleramt) on 22nd April 2010. The IT-Planungsrat's role is to further the interoperability of information technology solutions implementing eGovernment programmes and derive better coordination and efficiency gains out of the €17 million spent annually.[17]

[15] http://ec.europa.eu/environment/seis/real_life_de.htm
[16] http://www.bmi.bund.de/SharedDocs/Pressemitteilungen/DE/2010/04/it_planungsrat.html
[17] http://www.initiatived21.de/aktuelles/news/bundesinnenminister-dr-schaeuble-fordert-aufnahme-von-it-ins-grundgesetz

4. Assessment and Analysis

This brief overview together with the visual portrayal of the main legal provisions as given in Table 1 below give an impression of how diverse and fragmented the legal landscape that confronts the PSI re-user in Germany really is. Points to highlight are:

- **Diversity is by subject, coverage and time span.**
  The diversity is aggravated not only by the segments and roles but also by time. Large swathes of current Federal and Federal State legal provisions regulating data protection and freedom of information were enacted during the internet's infancy. This is in direct contrast to legislation post 2005 that assume the ubiquity of the internet and construct legal obligations on that basis.

- **Short transposition times with implementation after the fact.**
  The time from enactment to entering into force is very short. If only the Federal level provisions are considered this is 2 months on average. Compare this to the 5 years allotted to the Freedom of Information Act 2000 in the United Kingdom. What this largely means is that legal rights and duties are set up first before the organisational machinery and procedures are put in place to realise them. It is as if Germany disposes over an enormous matrix or scaffolding of norms (the paragraph jungle) that whilst large and complex, the matrices or scaffolding are not properly anchored in organisations or by institutions and procedures.

- **PSI Re-use is seen as an outcome rather than a driver.**
  Geo- and environmental information are areas where the market is adapting more easily to a PSI-re-use agenda. However, the main drivers are transparency for citizens and the re-working of internal processes for better reporting and supervision (INSPIRE / geoinformation) and (SEIS / environmental information).

In Germany the following can be ascertained. Much of the legislation surrounding PSI re-use has been driven by EU legislation but there is no evidence of a coordinating hand. However, the areas are diffuse, and fragmented. There is no clear strategy to have the implementations complement each other. There is little if any coordination across departments and institutions equivalent to the 100,000 organisations affected by the FOIA 2000. Similarly there is no requirement akin to the FOIA's Publication Plan. Noticeable also is the singular lack of high government involvement compared to the UK and USA.

5. Conclusion

Returning now to the original questions posed at the beginning of this Topic Report. These were (i). to what extent the current framework enveloping PSI re-use in Germany could yield or is likely to yield an open data initiative similar to the United Kingdom and (ii). in the light of the above assessment what is likely to be the most promising future strategic direction for the development of PSI re-use in Germany? On the basis of the observations and analysis above the following answers are offered:

- **Compared to the UK, Germany's freedom of information legislation has been a weak driving force with respect to the reengineering of public sector records management which in the UK effectively lay down the foundation for open data in government.**

  In the UK FOI legislation not only provided for access to official information it also laid down practical foundations for the legislation's implementation and application. The collective overhaul of records management together with the sensitising of user and public authority alike to a dialogue driven by information needs was something the PSI re-user community could also draw upon.

  In Germany FOI legislation driven by varying themes, spread over 11 years with only minimal obligations upon public authorities to address information management themes has not played a role as an enabler or facilitator to any significant extent. This is not to say that records management has not been addressed. On the contrary it has but mainly in the context of implementing IT systems.

  The key point here is that the legal duty to provide access to information has not been a driver. In the United Kingdom substantial resources were set aside to support implementation of FOI legislation. A study by UCL in London estimated that the annual cost of implementing the FOIA in 2007 came to around £26 million for central government. Local government it is thought is likely to cost that much again. Contrast this with the relevant section in the Explanatory Notes for the Federal IFG which stated that the implementation of the legislation would impose no extra burden upon the tax payer.

- **Geo- and environmental information are the areas most likely to spark a wider interest in PSI re-use being a product of both cooperation between Federal, Federal State and Local Administrations and legislation conceived after the internet went mainstream.**

  Compared to IFG legislation in Germany the public authorities at both the Federal and Federal State level responded swiftly to implementing information access rights that involve environmental information and geoinformation.

  This has a lot to do with the fact that implementation was driven by the specific requirements of an EU directive as well as a time-table set out to meet them. Public authorities also had prior experience with access to environmental information and probably felt more comfortable with the prospect of sharing the information they held about the environment, i.e. the subject matter was more easily defined.

In fact German experience as typified by the PortalU® service has been cited as an example of best practice and as a role model for the forthcoming Shared Environmental Information System (SEIS).

Lastly, the slow but progressive consensus building work carried out under the INSPIRE Directive particularly by bodies such as the **Geodateninfrastruktur in Deutschland (GDI-DE)** provides both a model and set of procedures for reengineering information infrastructures in other domains.

Concluding on the perspective that a legal framework can be likened to a natural landscape, it would be true to say that the United Kingdom is now reaping the benefit of what they have sewn in the past. In comparison, at the beginning of a new decade, Germany is currently in the process of "sewing" and as a consequence the "crop" and its "yield" are not yet certain and in any case are likely to manifest themselves differently.

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Table 1: Overview of the main legislative acts in Germany makeing up the PSI re-use legal and regulatory framework.

FEDERATION (BUND) / FEDERAL STATES (LÄNDER)	Data Protection	Environmental Information	Freedom of Information	Re-use of Public Sector Information	Security of Satellite Data	Geo-data Infrastructure	Shared Environmental Information System (SEIS)
Federation	✓ 1990	✓ 2004	✓ 2005	✓ **2006**	✓ **2007**	✓ 2009	! *(Planned)* *Note: PortalU®*
Baden-Württemberg	✓ 2000	✓ 2006	X	✓ 2006	✓ 2007	✓ 2009	PortalU®
Bavaria	✓ 1978	✓ 2006	X	✓ 2006	✓ 2007	✓ 2008	PortalU®
Berlin	✓ 1990	✓ 2006	✓ 1999	✓ 2006	✓ 2007	✓ 2009	PortalU®
Brandenburg	✓ 1999	✓ 2007	✓ 1998	✓ 2006	✓ 2007	✓ 2010	PortalU®
Bremen	✓ 1995	✓ 2005	✓ 2006	✓ 2006	✓ 2007	✓ 2009	PortalU®
Hamburg	✓ 1990	✓ 2005	✓ 2009	✓ 2006	✓ 2007	✓ 2009	PortalU®
Hesse	✓ 1999	✓ 2006	X	✓ 2006	✓ 2007	✓ 2010	PortalU®
Mecklenburg-West Pomerania	✓ 2002	✓ 2006	✓ 2006	✓ 2006	✓ 2007	! *(Planned for 2010)*	PortalU®
Lower Saxony	✓ 1978	✓ 2006	X	✓ 2006	✓ 2007	! *(Planned for 2010)*	PortalU®
North Rhine –Westphalia	✓ 2000	✓ 2007	✓ 2001	✓ 2006	✓ 2007	✓ 2009	PortalU®
Rhineland Palatinate	✓ 1994	✓ 2005	✓ 2008	✓ 2006	✓ 2007	! *(Planned for 2010)*	PortalU®
Saarland	✓ 1978	✓ 2007	✓ 2006	✓ 2006	✓ 2007	✓ 2009	PortalU®
Saxony	✓ 1991	✓ 2006	X	✓ 2006	✓ 2007	! *(Planned for 2010)*	PortalU®
Saxony-Anhalt	✓ 1992	✓ 2006	✓ 2008	✓ 2006	✓ 2007	✓ 2009	PortalU®
Schleswig- Holstein	✓ 2000	✓ 2007	✓ 2005	✓ 2006	✓ 2007	! *(Planned for 2010)*	PortalU®
Thuringia	✓ 2001	✓ 2006	✓ 2007	✓ 2006	✓ 2007	✓ 2009	PortalU®

ANNEX: References

data.gov.uk – UK Government
http://data.gov.uk/

data.gov – US Government
http://www.data.gov

DDGI - Deutsche Dachverband für Geoinformation e.V.
http://www.ddgi.de/

Geodateninfrastruktur in Deutschland (GDI-DE)
http://www.gdi-de.org/de_neu/start.html

Gesetze-im-Internet Portal
http://www.gesetze-im-internet.de/

GIW-Kommission
http://www.geobusiness.org/Geobusiness/Navigation/giwk.html

Information Commissioner (United Kingdom)
http://www.ico.gov.uk/

Open Data Network - Deutschland
http://opendata-network.org/

PortalU® - German Environmental Information Portal
http://www.PortalU®.de/

Shared Environmental Information System (SEIS)
http://ec.europa.eu/environment/seis/

The Constitution Unit, University of London (UCL)
http://www.ucl.ac.uk/constitution-unit/research/foi/index.htm

Federal Commissioner for Data Protection and Freedom of Information
http://www.bfdi.bund.de/cln_134/Vorschaltseite_EN_node.html

Federal Ministry for Economics and Technology
http://www.bmwi.de/