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## The commercialization of public sector information. Delineating the issues.

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*The past decades have witnessed an increasingly 'market-oriented' approach to the production and dissemination of public sector information. It has led to concern on the part of the private sector about unfair competition. It triggers fear about the accessibility of data, both in terms of availability and affordability. Freedom of information campaigners worry about the impact on the access rights which serve democratic accountability. The so-called commercialization of government information thus raises a variety of concerns. In order to be able to assess the validity of these concerns, and of regulatory means to address them, it is necessary to first describe which models of production and distribution make up this 'commercialization'. The focus will be on the situation in the EU, notably the United Kingdom and the Netherlands, which exemplify different commercialization policies. These national policies, as well as the principles enshrined in the 2003 EU Directive on re-use of public sector information will be compared with US federal policy on access to and exploitation of public sector information. In the EU, the policy of the US tends to be seen as favourable to the public domain. To conclude some suggestions are made as regards means to prevent or correct negative consequences of commercialization.*

The assumption that there is a trend toward the commercialization of public sector information merits closer scrutiny. What is meant by public sector information? What organisation models are indicative of a market-oriented rather than a public task oriented information supply? If it is true that government organisations strive to generate income with the production or distribution of information they collected or generated, does that necessarily have a negative impact on the 'public domain'? What instruments play a role in stimulating access to and re-use of public sector information? How can these be used to secure a public domain?

# 1 Delineating the field

## 1.1 Definition of public sector

There is of course no universal definition of ‘public sector’. In this paper the functional definition of the EC *Directive on the re-use of public sector information*<sup>1</sup> will serve as reference (hereafter PSI Directive). It is taken from the directives on public procurement<sup>2</sup> and defines ‘public sector body’ in art. 2 as: ‘the State, regional or local authorities, bodies governed by public law and associations formed by one or several such authorities or one or several such bodies governed by public law’. A *body governed by public law* is any body that meets three cumulative criteria: 1) to be established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character, 2) to possess legal personality and 3) to be closely dependent –as regards financing, management or supervision– on the State, regional or local authorities or other bodies governed by public law.

In a number of rulings<sup>3</sup>, the ECJ has clarified what a ‘public sector body is’ under the above definition. ‘Legal personality’ refers to bodies under private and public law. It is also settled case-law that ‘needs in the general interest, not having an industrial or commercial character... are generally needs which are satisfied otherwise than by the supply of goods and services in the marketplace and which, for reasons associated with the general interest, the State chooses to provide itself or over which it wishes to retain a decisive influence.’ To determine whether there is a commercial character all facts and circumstances must be taken into account, such as ‘a lack of competition on the market, the fact that its primary aim is not the making of profits, the fact that it does not bear the risks associated with the activity, and any public financing of the activity in question.’<sup>4</sup> A body whose activities in the general interest only constitute a relatively small proportion of the total activities can nonetheless be a body governed by public law in the sense of the procurement and thus PSI Directive.<sup>5</sup>

In the area of government information, the ECJ ruled in *Mannesmann Anlagenbau Austria* that the printing of official administrative documents by the *Österreichische Staatsdruckerei* is a such a need operated in the general interest, not having a commercial character.<sup>6</sup> Other examples of public bodies under the PSI Directive definition would include data selling companies such as are owned and run by the Dutch Land Registry (Kadata) and the combined Chambers of Commerce (NV Databank). The so-called ‘trading funds’ –which are an important feature of the UK’s information infrastructure– also qualify as public sector bodies under the Directive. Other bodies that will typically fall under the above definition are universities and schools, public broadcasting companies and executive non-departmental public bodies that carry out executive and/or commercial functions such as the British Library and British Museum. However, art. 1(2) puts education, research and cultural establishments outside the scope of the PSI Directive.

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<sup>1</sup> Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information, OJ 2003 L345.

<sup>2</sup> Directive 93/37/EEC (OJ 1993 L 199, p. 54) and Directive 92/50/EEC (OJ 1992 L 209, p. 1).

<sup>3</sup> Case C-360/96 BFI Holding [1998] ECR I-6821, Case C-44/96 Mannesmann Anlagenbau Austria and Others [1998] ECR I-73, Case C-214/00 Commission v Spain [2003] ECR I-0000, Case C-373/00 Adolf Truley [2003] ECR I-0000, and Case C-18/01 Korhonen [2003] ECR I-0000.

<sup>4</sup> Case C-283/00 Commission v Spain, 16 October 2003, at 81.

<sup>5</sup> welke uitspraak?

<sup>6</sup> Case C-44/96 Mannesmann Anlagenbau Austria and Others [1998] ECR I-73.

## 1.2 Types of government information

The public sector holds such a vast amount of disparate information that it may be helpful to use some sort of categorization. A distinction made in Dutch policy documents on improving access to public sector information is between research data, public registers, administrative data and auxiliary data.<sup>7</sup>

This categorization is useful for our purposes because by and large it corresponds with the way production and publication of data is organized in the public sector. Research data and public register data are often held by relatively independent public bodies, who increasingly have to operate their secondary (sometimes also their primary) activities under a cost recovery model. These may be executive agencies (Dutch Royal Meteorological Service), or be still more removed from departments as non-departmental public bodies (Dutch Land Registry) or public-type companies such as the UK's trading funds (e.g. Ordnance Survey, Companies House). Generally speaking, the more independent from central government such a public body is, the more it is likely to operate under a cost recovery scheme (including a 'fair' return on investment). Administrative data and auxiliary data are present throughout the public sector at the national and local level.

*Research data* comprises the information collected by public organisations whose key task it is to collect data for use by others. The primary customers are different parts of government, who use the data in policy making and administration. The secondary customers are international governmental organisations and the public at large (where the private sector typically uses the data as input for its information products and services). Examples are national bureaus of statistics, meteorological services (Met office, KNMI), hydrographic services and mapping agencies such as the US Geological Survey.

*Public register data* covers, as the name suggests, the public registers that are held on the basis of specific laws and regulations. Their purpose often lies in enhancing security in (legal) relations. Examples are companies registers, intellectual property registers, population registers, vehicle registers, and the land registry or cadastres. Aggregate data from such public registers are also a valuable source of information for public sector policy-making. Although their name suggests otherwise, public registers are not necessarily generally accessible, due to privacy concerns (data protection). On the whole however, broad access is consistent with the purpose of the registers. The same is true for *public records*, comprising laws and regulations, court decisions, minutes of meetings of legislative bodies (national and local), etc. Where access to public registers is typically regulated by specific statutes, public records may be accessible on the basis of freedom of information laws and instruments dealing with archives. Access free of charge or at the cost of reproduction at a maximum is typically the rule for such information.

*Administrative data* result from the exercise of a particular administrative task that is directly aimed at citizens or companies. These include tax registers, police registers, social security files, and zoning permissions. Data protection law will often bar access to this type of data by other government organisations and the private sector.

*Auxiliary data* comprises information not belonging to any of the above categories. This data is collected (internally or externally) and enhanced to support policy making or the execution of government policies.

Public sector information that is not represented in the categories mentioned is information produced in education and academic research, or by publicly funded

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<sup>7</sup> Elektronische bestanden van het bestuur, 1998, BDO Consultants for Ministry of Internal Affairs.

cultural and audiovisual institutions. It is not clear to me why these institutions are disregarded. One reason may be that it is a mixed category of institutions ranging from those that are independent from government other than for subsidies to those that have been set up under public law with a specific public task. A probably more important reason is that their basic function is the creation and/or transfer of knowledge or information to society at large. This implies that policies for broad access are already in place, as an integral and essential feature of the way these institutions work. The latter may also be what the PSI Directive is referring to where it explains that education, research and cultural establishments are excluded from the scope of the directive because ‘their function in society as carriers of culture and knowledge give them a particular position.’<sup>8</sup>

According to some recent studies into demand for various types of government information, particularly geographic information has big potential for commercial re-use. This information primarily falls within the category research, but is also present in public registers and to a lesser extent in the other categories. Information contained in public records such as companies registries and intellectual property registrations is also considered interesting, as is legal information.<sup>9</sup> That geographic information and public registers are considered by government and the private sector as the most promising sources for the development value added products and services could well be due to the fact that much other information is subject to data protection laws and therefore not freely exchangeable. I will not go into the effects of data protection on the commercial use of government information, as it is part of the wider issue of commercial use of personal data which is addressed in the essay by prof. Corien Prins.

## 2 Overview of market-oriented tendencies

In EU countries the quest for a leaner and more efficient public sector has been ongoing with varied intensity since the 1980s. Various organisation models are used to achieve greater efficiency. Decentralization is the least farreaching, whereas privatization the most, with public-private partnerships (including out sourcing) in the middle. Below is a sketch of these developments in the government information sector, with examples mostly from the UK and the Netherlands.

### 2.1 Decentralization

In the Netherlands, parts of the central administration with an important information supplying task were initially stimulated to generate more income from users of their information both in the public and private sectors. To allow them more flexibility, some of them were turned into executive agencies (e.g. National Bureau of Statistics, National Royal Meteorological Service, Topographic Service). Some were brought another step further from under the responsible department’s wings, and turned into non-departmental public bodies (NDPB). Such a *zelfstandig bestuursorgaan* is a separate public legal entity with its own budget and (limited) regulatory powers. An example of an executive agency turned independent is the Land Registry/Cadastre

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<sup>8</sup> Explanatory Memorandum to the Proposal for a Directive on the re-use and commercial exploitation of public sector documents (COM (2002) 207), at 6.

<sup>9</sup> Study PIRA, p. 10 EC; Study Berenschot, .

(*Kadaster*), which holds the public records on real estate and co-produces (digital) large scale maps of the entire country. The Chambers of Commerce, which maintain the national companies register through their joint company Databank N.V., have long had the status of non-departmental public body. With the introduction of a cost-recovery scheme for each type of activity of the Chambers, NV Databank started charging all its customers from both the private and public sectors. A similar development characterises the operations of the vehicle registry since it was turned into a NDPB.<sup>10</sup>

In the United Kingdom large information producing public sector bodies have also been ‘decentralized’. In recent years major information collecting and disseminating bodies have acquired trading fund status, including the Companies Registry, Land Registry, Ordnance Survey, Meteorological Office, UK Hydrographic Office, Driver and Vehicle Licensing Agency and the Patent Office.

Trading funds are (parts of) departments which do not require an annual budget voted by parliament. They generate their own income and –in principle– retain these revenues; they are also allowed to borrow. They must in principle charge for the full cost of services they provide (cost recovery model). It is possible for a trading fund to seek profits, i.e. when it provides goods and services in competition with other suppliers. It may also be specifically authorized to charge what the market will bear (‘market prices’).<sup>11</sup> Trading funds are not as far at arms length from central government as public corporations or nationalized industries. The responsible minister is accountable to parliament not only for general policy but also for all aspects of its operations and activities.<sup>12</sup>

Cost recovery models are a frequent but not necessary feature of decentralization. Nor do they imply that government information becomes less accessible to citizens and businesses because of higher prices. On the contrary, if the decentralization effort is successful in terms of increased efficiency and better customer orientation, it may well lead to cheaper access. For example, prices dropped substantially in the first few years after the Dutch land registry was made an NDPB.

## 2.2 Privatization

In this context privatization denotes the complete transfer of the production or distribution of certain information from the public to the private sector. This implies that at the political level a choice has been made that the activity is no longer considered to be a public task. Such policy choices may be based on changed perceptions of the role of government, but can also be based on (unfair) competition concerns (see par. 3.4 below). This was the case in the recent overhaul of the activities of the Dutch Royal Meteorological Institute (KNMI). Partly because private business complained that KNMI increasingly entered into competition with it, KNMI had to abort its ‘commercial’ activities completely.<sup>13</sup>

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<sup>10</sup> Van Eechoud/Kabel, *Prijsbepaling van elektronische overheidsinformatie*, Kluwer 1998, p. 16, 24 ff. Public bodies that maintain registers generally distinguish the activity of supplying data from the register from the activity of registration (i.e. the party that needs to have information registered is charged and the party that receives information from the register is charged.)

<sup>11</sup> Guide to the establishment and operation of Trading Funds, Treasury Department January 2001.

<sup>12</sup> Guide to the establishment and operation of Trading Funds, Treasury Department January 2001, at 1.5.2.

<sup>13</sup> Kamerstukken II [opzoeken; begrotingsoverleg]

In the UK, the recent plan to turn the Ordnance Survey from trading funds into a state owned company was dropped after it drew fierce criticism. The relevant select committee in the Commons considered it unwise to subject the mapping agency to a legal framework designed for commercial activity when it was unclear where the Ordnance Survey's public tasks end and commercial activity begins.<sup>14</sup>

Full blown privatization does not seem to occur often where public sector information is concerned. Often the government will want to maintain some influence because it has an interest in the quality and reliability of supply. A transfer to the private sector does not necessarily have a negative impact (or impact at all) on the public domain. Particularly if it concerns activities that are privatized on the grounds that they compete with private sector services. The impact may well be negative if it involves a transfer of a (near) public monopoly to a private monopoly. This is what happened in the context of exclusive public-private partnerships on remote sensing in the US (the Landsat debacle) and on a database containing all central government legislation in the Netherlands (Kluwer database).

### **2.3 Public private partnerships**

The attempt to manage public sector information more efficiently by enlisting the aid of the private sector has in the past led to some poor policy choices. But whether or not the shift to a public-private partnership adversely affects access of course depends on the particulars of the agreement.

In the 1980s the Dutch central government concluded that its efforts to create and operate a database system containing all (consolidated) legislation were not successful, and that the development and maintenance of such a database could best be left to the private sector. A consortium led by Kluwer, market leader in legal information publishing, was awarded the 10 year contract. For a set price, the consortium would build the system and give access to its content to the departments of central government and the judiciary. Other public sector bodies (including NDPBs, local authorities, waterboards, provincial authorities) as well as citizens and businesses were to be given access on 'market conditions'.

The agreement gave the consortium a virtual monopoly because the government agreed to not supply the raw materials (laws and decrees) in electronic form to anyone else. Nor would it cooperate with other private parties interested in developing a similar product. The consortium acquired all intellectual property rights in the database. Laws, decrees, court decisions and the like are not copyright in the Netherlands, but a collection can be copyrighted (under copyright if original, under *geschrevenbeschermt* if not original, or since implementation of the 1996 EC Database directive, under the database right). The fact that of all public sector information, the government chose to commercialize the electronic publication of its *laws*, caused public outcry.

When in the mid 1990s the government reviewed and expanded its policies on access to public sector information, it adopted a radically different approach. It paid the consortium to make the database accessible via a government website. When the 10 year agreement ended a new deal was struck, this time with the privatized State printing office. All consolidated legislation of central government as well as all official

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<sup>14</sup> Government's Response to the Transport, Local Government and the Regions Select Committee's Tenth Report on Ordnance Survey, 2002; Select Committee report: HC 481 published 22 June 2002.

records of parliament are now accessible via internet at no charge. Under the new policy, this type of information, as well as decisions of (administrative) courts is now considered as ‘basic information of the democratic state’, which is to be made freely available and usable (e.g. funded by tax money).

A similar situation, but then with regard to hydrographic maps, has arisen in Canada. There the Canadian Hydrographic Service in the early 1990s had started to convert paper charts of Canadian waters into electronic form. It entered into a partnership with the company NDI because it felt it was not equipped and lacked the funds to handle the conversion by itself. NDI was given the exclusive right to produce and distribute those products in digital form; and to grant sublicences to others to reproduce and distribute digital products containing data from the Canadian Hydrographic Service.<sup>15</sup> The pricing of the digital charts is based on a (commercial) model that considers the costs of production and dissemination as well as market forces.<sup>16</sup> Other companies have not recognized NDI’s exclusive rights and refused to pay them royalties. This led the Canadian Hydrographic Service to launch a media campaign advising users to stay clear of infringing products.<sup>17</sup>

Another infamous example of public-private partnerships that adversely affect access to information funded by the government is the Landsat debacle. The US remote sensing programme Landsat started in the 1970’s and was run initially by NASA, then by the National Oceanic and Atmospheric Administration (NOAA), a part of the Department of Commerce. It had launched satellites dubbed Landsat 1 through 5 by the time the programme was ‘commercialized’ in 1984. The Landsat 5 was turned over to a private sector consortium, which was contracted to also construct, launch and operate new remote sensing satellites and market the data. It received large amounts of public funds to do so. The consortium only launched a successor satellite in 1993, nine years later than originally envisaged. This Landsat 6 never made it to orbit.

In the mean time, the prices charged for data from Landsat soared, severely affecting the wide distribution of data that had characterized the programme before. Especially researchers could no longer afford the latest data. In 1992 the commercialisation of the Landsat system was reversed. The new Land Remote Sensing Policy Act ((15 USC 82) P.L. 102-555) introduced a system whereby the government can procure the design and delivery of satellites but acquires or retains ownership of the Landsat system and the unenhanced data it generates. The act also contains a data policy that is consistent with the general policy for access to government data as laid down in OMB Circular A-130 (see par. 3.4.1 below).

Apparently the experiment with the remote sensing system was such a failure that congress wanted to avoid a repeat with weather satellites. Section 5671 of the Land Remote Sensing Policy Act provides: ‘Neither the President nor any other official of the Government shall make any effort to lease, sell, or transfer to the private sector, or commercialize, any portion of the weather satellite systems operated by the Department of Commerce or any successor agency.’

Public-private partnerships can of course also be a success, and lead to the creation and availability of data that would otherwise not be produced because no single organisation has the appropriate resources. The cooperative effort to produce a digital large scale map (GBKN) of the Netherlands is an example. The PPP was set up in 1992 and consists of a central coordinating body (under private law) and regional

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<sup>15</sup> [http://stjohns.cbc.ca/regional/servlet/View?filename=nl\\_chartfight20040409](http://stjohns.cbc.ca/regional/servlet/View?filename=nl_chartfight20040409),

<sup>16</sup> See: <http://www.charts.gc.ca/pub/en/help/copyrightfaq.asp#Q2>.

<sup>17</sup> ‘Boaters lost in marine chart fight’, CBC Montreal Online news, Web Posted | Apr 9 2004.  
<<http://stjohns.cbc.ca>>, <http://www.charts.gc.ca/pub/en/help/copyright.asp>.

bodies which are responsible for creating and updating the data for their region. Partners in the central body are associations of local authorities, water boards, and utilities companies (water, gas, electricity), as well as major telecommunications companies and the Land Registry. The regional bodies are PPP's in themselves, with associations and individual companies or public sector bodies taking part, depending on the presence or interest they have in data from the particular region.

There are three classes of parties: participants, regular users and incidental users. The participants not only receive data, but also bear part of the responsibility of supplying data and maintaining it. They commit themselves to take part in the PPP for at least 5 years. Users have access to the data on the basis of a 5 year contract. To determine the relative financial contributions, classes of participants and users have been determined, that each pay a percentage of the costs (e.g. local authorities are a class of heavy users, who contribute more than a waterboard). Incidental users can order data, or subscribe to a subset of data with regular updates.

Currently the participants and users typically are end-users who need the data for planning, construction and maintenance of physical infrastructure. The licence agreements do not allow for re-distribution of the data, something that may change in the near future as companies in the information market become interested in using the data to develop value-added products..

Conflicts that need to be addressed in partnerships are usually the private sectors interest in exclusiveness versus the public sectors interest in wider access, as well as data quality and continuity of supply. If these conflicts can not be resolved, the public sector is wise to keep production and dissemination in its own hands. That is what happened with the Dutch small scale topographic database, which the Topographic Service of the Ministry of Defense had been building since the 1990s. The Ministry of Defense, although an important user of the map, no longer regarded its production as a core activity.

In consultation with other stakeholders from the public sector, MoD explored the possibility that private sector would take over the completion and maintenance of the small-scale digital map. There were no serious candidates who could meet the required continuity and quality at acceptable terms of access/pricing. The choice was made to integrate the Topographic service in the Land Registry/ Cadaster. The production and distribution of the topographic database will be done on a cost recovery basis, i.e. all public sector users will contribute proportionally. It seems private sector users also will be charged prices which include the costs of data collection in addition to costs of reproduction and distribution. The government reasons that if the collection and update of the database would have been left to the private sector on a commercial basis, private sector users would also have had to pay market fees.<sup>18</sup>

The small-scale digital map is expected to be used as a backbone for data-exchange throughout the public sector. It can be argued that if it so important for the exercise of public tasks, its production and maintenance should be funded with public money. Private sector users would then pay the cost of reproduction and dissemination of the data they are supplied.

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<sup>18</sup> Kamerstukken II 2002/03, 28748 MvT p. 6.

## 3 Policy instruments affecting access

### 3.1 Intellectual property

The existence of an intellectual property regime for public sector information is not necessarily indicative of commercialization policies: that government information is copyrighted does not mean it can only be accessed under restrictions and at cost or 'market' prices. The reverse is of course also true: the fact that public sector information is not subject to IPRs does not make it more easily accessible to the private sector (or across the public sector for that matter). It takes access policies to stimulate the re-use of government information and determine the conditions of use. As is elaborated below (par. 3.4 and 3.4), IPRs appear to be only a minor factor in pricing and access policies.

The US policy of excluding information produced by the federal government from copyright protection is often quoted as an important instrument for the development of value added services by the private sector. To facilitate access even further it has been proposed to also exempt the results of federally funded research from copyright in the HR 2613 Sabo Bill on Public Access to Science. However, if it is indeed true that –as has been said about the Netherlands<sup>19</sup>– local governments in the US hold most of the information that is interesting for commercial exploitation, copyright policies at the state and local level could be more relevant than Federal policies. Local policies do not necessarily follow the Federal example.

The UK is among the countries with a strong tradition of copyright for public sector information with its so-called Crown copyright. Works of all government departments and parts of departments, such as trading funds, have Crown status. Her Majesty's Stationery Office (HMSO) is the principal organisation to manage and license government information which is subject to crown copyright. Departments of central government need authorisation of HMSO to license their 'own' data to third parties. Many major information producing bodies have received such permission, e.g. the meteorological office (MetOffice), landregistry, Ordnance Survey, Companies house and the National Archives.

Rather than as a hindrance to widespread distribution of government information, intellectual property rights of the public sector can be used as tools to further access. IPRs can be used in addition to contractual arrangements to ensure that down stream in the information market liberal access and pricing policies are upheld. For example, it has been suggested that HMSO could revoke this authorization if the agency in question does not comply with fair information practices (see below par. 3.4.3).<sup>20</sup>

### 3.2 Freedom of Information

During the legislative process that resulted in the Directive on re-use of public sector information, the Commission was keen to keep access issues out of the discussions,

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<sup>19</sup> See par. 3.3

<sup>20</sup> Suggested in Consultation Document on Proposal for a Directive of the European Parliament and Council on the re-use and commercial exploitation of public sector documents, Department of Trade and Industry/ HMSO, 12 september 2003, p. 5

whereas parliament pushed for amendments that would make clear commercialization policy should not curb rights under freedom of information laws. There are various reasons why that is a real threat.

1. Where the public sector pursues a policy of pro-active publication at full cost recovery charges, and the relevant FOIA contains provisions to the effect that no requests can be made for information which is already publicly available,<sup>21</sup> regardless of the price.<sup>22</sup>
2. Transfer of information production to bodies that are not subject to FOIA. The extent to which this is possible depends of course on the scope of a national freedom of information law. In the Dutch FOIA for example the definition of public sector bodies is very wide, comparable to the definition in the PSI directive. In the US even private non-profit organisations in education and research are subject to freedom of information laws with regard to information stemming from research (co) funded by Federal government.<sup>23</sup>
3. Where the private sector is a partner in the collection or dissemination of public sector information, it may have a commercial interest, own intellectual property or give the information in confidence<sup>24</sup>, all of which could trigger a FOIA exception. As the expansion of IPRs continues, so do chances that it will limit access under freedom of information law.
4. There may be an incentive to discourage FOIA requests if FOIA charges are collected centrally (as is the case under US federal FOIA) and go towards the general budget, whereas fees for (commercial) re-use would go towards the public body where the information originates (as is the case with copyright fees collected by HMSO in the UK).

Above are sketched potentially negative effects of commercialization policies on access under freedom of information law. But one could also look at the relation between freedom of information and stimulating commercial use from the perspective of the latter. The basic idea of FOI legislation is that government information is made available for any interested party, either pro-actively or on request, at no charge or at the cost of reproduction and dissemination maximum. Such broad access may well make such information uninteresting for commercial exploitation.

On the other hand, access under freedom of information law generally does not give the right to exploit the information if it is subject to intellectual property rights. In

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<sup>21</sup> Under the UK FOIA publication is considered to include not only posted on a website or published by a public body, but also published by a commercial publisher. See Dep. Constitutional Affairs, *Freedom of Information Act 2000 - Publication Schemes, Central Government and Non-Departmental Public Body Guidance*, July 2002 at 11.2).

<sup>22</sup> This seems to be the case in Canada, see Alasdair Roberts. 'Closing the Window: How Public Sector Restructuring Limits Access to Government Information.' *Government Information in Canada/Information gouvernementale au Canada* No. 17 (March 1999). [<http://www.usask.ca/library/gic/17/roberts.html>].

<sup>23</sup> Shelby Amendment of 1999, enacted in OMB Circular 110-A, s. 36. Initially broader in scope, it has been limited to research that federal government refers to in its laws and regulations (e.g. studies on health effects of environmental pollution that are used to justify environmental laws). For a discussion of its potentially adverse effects on the research community, see *The Scientist* 14[6]:13, Mar. 20, 2000, and Eugene Russo, *Debating Shelby*, *The Scientist* 15[7]:14, Apr. 2, 2001.

<sup>24</sup> To prevent an overbroad scope of the exception for information provided in confidence, the UK guideline is that public sector bodies should consider the FOI implications before agreeing to confidentiality provisions in contracts or accepting information in confidence from a third party. (Lord Chancellor's Code of Practice on the Discharge of the Functions of Public Authorities under Part 1 of the Freedom of Information Act).

the Netherlands, France, Germany, the UK and other EU countries there exists copyright and database rights in most government information. The US policy of excluding federal government information from copyright is quite exceptional. Also, the idea of improving access to public sector information for commercial purposes is that the private sector develops value-added products and services, not that they redistribute unenhanced data.

### **3.3 Information registers & Publication schemes**

The PSI Directive rightly recognizes that stimulating access to information requires knowledge about which material is available on what terms. It therefore instructs Member-States to ensure the availability of inventories or ‘asset lists’ of the public sectors main information resources, preferably on-line (art. 9). It does not specify a minimum set of meta-data that should be made available, nor does it give any indication of what ‘main documents’ are.

Progress has been made recently on metadata services, which are increasingly accessible on-line. In many EU-countries central governments actively pursue the development and maintenance of portals which give access to catalogues of public sector information using common metadata. A potential problem is that the information described in these catalogues is not the most interesting from the perspective of (commercial) re-use. One Dutch inventory shows that most electronic datasets are kept by local government (provinces, counties), and that geographic information is an important type of data they hold.<sup>25</sup> Geographic information in turn considered to be particularly interesting for re-use.<sup>26</sup> To the extent that policy on access for commercial use is directed principally at data held by central government its positive effects may thus be limited. Also, many registers and portals are inspired by the objectives of freedom of information law: to improve democratic accountability and stimulate participation in decision-making. Information offered for direct access will then be selected on its relevance for obtaining those objectives rather than its suitability for commercial re-use.

Another source for meta-data are information registers, i.e. catalogues of unpublished government information. These may be maintained on the basis of Freedom of Information Acts. At the EU-level, Regulation 1049/2001 on access to documents of parliament, Council and Commission instructs the EU institutions to give public access to a register of documents (art. 11 Regulation). In the Netherlands there is no legal duty for public sector bodies to keep registers of unpublished information for FOIA purposes. The US federal freedom of information act does require departments and agencies to pro-actively supply information on its tasks, policies, procedures, etc. in so-called ‘reading rooms’, increasingly hosted on Internet.

A very broad scheme is the UK’s Information Asset Register (IAR), which contains standardized metadata on unpublished government information. It was initiated by the government after it had appeared that parties interested in re-use have substantial trouble in locating government information. The Information Asset Register forms part of the ‘UKOnline Action Plan’ and is coordinated by HMSO. It also plays a role in the development of publication schemes.<sup>27</sup>

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<sup>25</sup> Elektronische bestanden van het bestuur, 1998, BDO Consultants for Ministry of Internal Affairs, p. VII.

<sup>26</sup> Study PIRA, p. 10 EC; Study Berenschot.

<sup>27</sup> HMSO Guidance Notes nr 18 of 2002.

Under the new Freedom of Information Act (effective 2005) departments will be required to adopt a ‘publication scheme’. These are meant to help make a significant amount of information easily and routinely available. According to section 19 of the UK’s freedom of information Act:

- each public authority must develop and maintain scheme which relates to the publication of information by the authority
- information must be published in accordance with the publication scheme
- schemes must be approved by the Information Commissioner and reviewed regularly.
- publication schemes must specify the classes of information (to be) published, how the information will be published and what -if any- fees are charged

According to the information commissioner public bodies should include information on how their organisations work (including an outline of decision-making processes work and how key appointments are made).<sup>28</sup>

### **3.4 Fair information practice policies**

In the Netherlands and the US the focus of policy has been on limiting the activities of public sector bodies to the supply of unenhanced or raw data that has been produced in the exercise of public tasks. The aim is to leave the development of value-added products and services to the private sector. In the UK there is no general information policy that limits the activities of the public sector in this way. Market activities are not frowned upon as long as rent seeking is only secondary to the fulfilment of public tasks.

#### **3.4.1 United States OMB Circular A-130**

The primary policy document relevant to commercialization of government information is OMB circular A-130 (rev 4). The Office of Management and Budget is responsible for the coordination of Federal information resources management’. In Circular A-130 it establishes a policy for the information activities of all agencies of the executive branch of the Federal government. ‘Agencies’ include all executive departments, military departments, government (controlled) corporations and other establishments in the executive branch (s. 6C Circular A-130). Government information means information created, collected, processed, disseminated, or disposed of by or for the Federal Government (s. 6h Circular A-130). Circular A-130 contains a variety of provisions that aim to improve the management of public sector information and its accessibility, both for purposes of democratic accountability as well as commercial re-use. Its central objective though, is to assist federal agencies in to organise their information activities efficiently. From the perspective of commercialization, the important provisions contained in section 8 are the following.

- Agencies must collect or create only that information necessary for the proper performance of agency functions and which has practical utility.
- User charges must not be higher than the cost of dissemination. Costs associated with original collection and processing of the information are not to be charged, unless the agency is under a statutory requirement to do so, or where its information activities benefit a special identifiable group.

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<sup>28</sup> Information Commissioner, *Publication schemes. Guidance and methodology*, April 2003, point 6.7.

- Distribution arrangements should ensure the timely and equitable dissemination of information (no exclusive or restricted arrangements).
- There should be no restrictions on the re-use, resale or redissemination of information (added fees, royalties, etc.).

Data policies in specific laws, such as the Land Remote Sensing policy Act of 1992 contain more detailed provisions which are aimed both at securing the availability of data to the public sector and for purposes of scientific research, and at supporting the development of the commercial market for remote sensing data. The provision of commercial value-added services based on ‘raw’ remote sensing data must be left to the private sector. To achieve this all unenhanced data from government funded and owned land remote sensing system must be made available to all users. All (classes of) users must be treated equally, which means that the conditions regarding delivery, format, pricing, etc. must be the same for customers requesting the same datasets. An exception is made for the federal government and its affiliated users (e.g. researchers working on Federal and international global change programmes). These users may be charged reduced prices, if the data are used solely for noncommercial purposes.

An example where federal government secures access for its own uses is in federally funded research. Under OMB Circular 110 –mentioned above where the Shelby-amendment is discussed– the federal agency that funds research which results in copyrighted work(s), reserves an irrevocable right to reproduce, publish, or otherwise use the copyrighted work for Federal purposes, and to authorize others to do so. The right is non-exclusive and royalty-free (s. 36 A ). Research data that are produced with federal funding may also be used (accessed, published, etc.) by the funding agency. It can also authorize others to access and use the data for Federal purposes (s. 36 C 1-2). The commercial exploitation of research is left to the research community.<sup>29</sup>

### **3.4.2 The Netherlands Instruction on Market Activity by public sector bodies**

The Dutch Competition Act –which is modelled after European competition laws– does not address the issue of public sector activity in the market, other than through the prohibition to abuse a dominant position and the special provision for services in the general interest, similar to art. 90 EC Treaty.

After a series of reports and debates on unfair competition by public sector in the second half of the 1990s, parliament and the influential Social and Economic Council (SER) urged the cabinet to prepare an act regulating when and under what terms public sector bodies can perform market activities. The objective of such a law was twofold: on the one hand it would prevent unfair competition by the public sector, caused by the advantages stemming from assets or expertise resulting from public tasks. On the other hand it would secure that the execution of public tasks would not suffer from commercial activities.<sup>30</sup> Particularly the ‘market access’ part of the law would have to

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<sup>29</sup> Researchers can obtain copyright (despite the federal funding), see s. 36 OMB Circular 110-A. Industrial property in federally funded research can be maintained and exploited by the researchers on the basis of the 1980 Bayh-Dole Act (PL 96-517).

<sup>30</sup> *Kamerstukken II* 2003–2004, 28 050, nr. 7, p. 2. The influential Scientific Council for Government Policy (WRR) had voiced concern over the changing, more commercially oriented culture in the public sector and its impact on the values that are essential to public service (WRR, *Het borgen van publiek belang*, SDU 2000).

ensure that the public sector only engages in market activities if that is the appropriate way to serve the public interest. The proposed act contained special more lenient provisions for public and private funded research institutions in as far as they engage in market activities concerned with the development or dissemination of new knowledge. Companies that perform statutory tasks exclusively were to be excluded from the act<sup>31</sup>. Public private partnerships in the shape of design, build, maintenance are not covered by the act, but joint ventures in which public and private bodies participate are.

The draft act attracted fierce criticism in parliament, particularly as regards the 'access' rules. Especially the proposed requirement that the specific market activity must be backed by a formal (statutory) decision was seen to needlessly encroach upon the autonomy of executive agencies and NDPBs. To work efficiently the agencies generally operate fairly autonomously in serving the public interest. Another point of criticism concerns the administrative burden that the access rules would impose.

After a change of government, the proposed act was reviewed; in early 2004 the proposal was officially revoked. The approach now is to focus on preventing unfair competition by including new rules on conduct in the Competition Act for both public undertakings and private sector entities with exclusive or special or and by revising the existing Instruction on market activities.

For central government, the 1998 *Instruction on market activities by organisations within the central administration* still contains the principal rules.<sup>32</sup> States that bodies or agencies belonging to the (legal person) State may only involve in market activities:

1. if these are an (in)direct statutory task, or
2. if they follow from international obligations
3. if they are intimately connected to the exercise of a statutory public task and the responsible Minister has issued an order allowing the activity.<sup>33</sup>

Market activity comprises the supply of goods or services to parties outside the State (i.e. departments and agencies belonging to the legal entity State) in competition with others. If market-activity is undertaken in situation 3, the integral cost of the products or services must be used as a basis for price-setting. The pricing scheme must also correct fiscal advantages of the public body engaging in market activity. These rules do not apply to major information producing bodies such as the Land Registry/ Ordnance Survey and the Chambers of Commerce (who operate the companies registers). These are NDPB's with separate legal entity to which the Instruction does not apply, but the specific laws and orders that regulate their activity have been adapted so as to avoid unfair competition (separate accounts, no cross-subsidies, etc.).

The Instruction also states that data that are collected in the exercise of public duties and to which access is not restricted on the basis of duties of confidentiality or data protection law, must be made available to third parties (i.e. the private sector) under equal conditions. If the data are confidential or subject to privacy laws, the public body may not use them in market activities, as as to prevent unfair competition.<sup>34</sup> Ministers are responsible for compliance with the instruction.

<sup>31</sup> Ministerie EZ, *Overheidsbedrijven in Nederland*, dec 2002.

<sup>32</sup> *Vaststelling aanwijzingen inzake verrichten marktactiviteiten door organisaties binnen de rijksdienst*, *Stcr.* 1998, 98.

<sup>33</sup> There is also a rule on the use for commercial activities of surplus capacity of capital goods necessary for the exercise of a public task (eg army airbases), but it is not relevant for our subject.

<sup>34</sup> This provision seems superfluous, because if data are confidential or may not be freely distributed because of data protection law, it is unlikely that the public body in question could commercially exploit the data.

In an instructive case concerning the dissemination of traffic information collected by the public sector, the District Court of The Hague ruled that the Traffic Information Center should not make available basic data to the general public itself via its website. Under the Instruction on Market Activities such activity is allowed. The executive agency of the Ministry of Transport and Water in question has the policy of supplying basic traffic information free of charge to private sector companies, so that companies may provide value-added services (website with information for motorists, sms alerts of traffic jams, etc.). The licenses are non-exclusive and contain on certain conditions to ensure the integrity of the information and indication of its source.<sup>35</sup> An interesting detail is that the company which obtained the injunction against the Traffic Information Center is operated by former employees who decided to 'go commercial'.

### **3.4.3 United Kingdom's Information Fair Trader Scheme**

UK policy for central government differs quite substantially from US Federal policy. As early as 1966, the US federal government issued OMB Circular A-76 on commercial activities.<sup>36</sup> It lays down the rule that government should not compete with the private sector. The government should not perform a market activity if that can be done more efficiently by the private sector. A commercial activity is any service or product that could be obtained from the private sector.

In the UK public bodies are allowed to enter into competition with private sector suppliers, as long as they adhere to competition rules. To avoid price-dumping, which could be the result of charging only costs of dissemination, UK public sector suppliers can charge market prices (based on what customers will pay rather than on cost recovery). Exclusive distribution arrangements are not necessarily to be avoided under UK policy. Restrictions on the re-use of data are allowed since they are an integral part of cost recovery schemes based on price and product differentiation (where data bought for commercial use are considered a different product from data acquired for non-commercial use such as scientific research).

As the body responsible for the management of Crown copyright, HMSO developed a policy to improve dissemination and pricing of government information. The Information Fair Trader Scheme (IFTS) should ensure that re-users of public sector information will be treated 'reasonably and fairly' by public sector information providers. All Crown bodies that have a licensing delegation from HMSO must join the Scheme (all are currently trading funds), but it is open to most public sector organisations to join voluntarily. The IFTS scheme will apply to any information that is released proactively or on request under the Freedom of Information Act 2000 (or its predecessor the Code of Practice on Access to Government Information). The chief principles of the scheme are as follows:

- In principle all information managed by HMSO will be licensed for any use, by any user.
- Details on licensing and pricing policy should be made public and explained clearly.

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<sup>35</sup> US Telecom B.V. ('De VerkeersInformatieDienst'), v. Staat. 4 augustus 2003, Vz Rb Den Haag.

<sup>36</sup> OMB Circular A-76 Performance of commercial activities (revised 1999). A-76 is accompanied by an extensive handbook which details when activities are allowed in-house or must be contracted out, cost calculation rules, etc.

- Decisions on licensing requests should be motivated and be consistent with Information Fair Trader principles.
- All (prospective) licensees should be treated equal (for the same type of licence).
- Licensing and pricing policy must not be in breach of competition law
- Organisations should not abuse their marketpower.
- Organisations agree to independent reviews, to see if they can and do comply with the fair trader scheme.
- Organisations agree to an investigation by HMSO of apparently incorrect licensing decisions.
- There must be a procedure for complaints on incorrect licensing decisions.

We have seen that the general policies in the US, UK and the Netherlands lay down the principle that access for purposes of re-use should be given on a non-discriminatory basis. This implies that exclusive partnerships between public and private sector bodies are to be avoided. The PSI Directive prohibits exclusive agreements, unless ‘an exclusive right is necessary for the provision of a service in the public interest’ (art. 11). Exclusive agreements must be reviewed regularly (at least every three years).

The question is of course how strict or broad this necessity-criterion will be interpreted. It may well prove to be cosmetic, considering that the thrust of the PSI Directive is to get more government information on the market rather than change existing publication practices.

### **3.5 Pricing strategies**

It is a popular belief that government information –once produced for public sector purposes– should be made available at marginal cost to the private sector. Marginal costs in this context are usually equated to the cost of reproduction and dissemination of the information product). This low-cost access supposedly serves as an incentive for economic activity that will generate more tax income than the supply of public sector information at prices above marginal cost could. As we have seen the principle of marginal cost access is laid down in Circular A-130 of the US Office of Management and Budget (OMB, see par. 3.4.1). Fees may also be waived altogether, or set below marginal costs, for instance to secure access for non-profit scientific research. Circular A-130 does not exclude full cost recovery, but the agency practicing it must be acting under a statutory requirement.

There is no consensus on the welfare effects of marginal cost access to government information. Economists at the UK’s Treasury department are not convinced that such a pricing policy would necessarily increase social benefit. If the trading funds such as the Ordnance Survey are not allowed to recover their (large) fixed costs, the expenditure would have to be funded through taxes. Therefore, ‘efficiency gains from improved resource allocation in the information market are likely to be broadly offset by fiscal burdens elsewhere in the economy.’<sup>37</sup> Another argument put forward against the marginal cost model is that it may lead to underfunding of public sector bodies.

The UK government recognizes that under a cost-recovery model for all public sector information, there is little incentive for the re-use of information by the private

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<sup>37</sup> Cross cutting review of the knowledge economy. Review of government information, Final report, chapter 5. Treasury/DTI 2000

sector. Its new policy –following a review of crown copyright and access to government information in 2000– is that crown copyright information is made available at marginal cost.<sup>38</sup> There are a number of important exceptions to this principle. The first is that all public sector bodies continue to be free to develop value-added services charged at market prices, i.e. only the information which is central to core responsibilities of the public sector is to be made available at the cost of reproduction and dissemination. The second is that the trading funds (Ordnance Survey, Meteorological Office, etc.) keep their cost recovery models<sup>39</sup>, because these provide services that go beyond the government's own needs. The third exception is in the interests of fair competition: where the information service is provided in competition with the private sector, the price charged should approximate to the market price (which may well include a profit element).

An increasing amount of 'core' information is also made available on-line, free of charge, but here democratic accountability and not reuse is the driving force. Laws, policy documents, parliamentary papers, etc. are accessible via a central website. In the Netherlands, what is dubbed 'basic information of democratic society', is now also increasingly available on-line and free. Under freedom of information law, the maximum charges are the costs of reproduction and dissemination. Although policy is quite similar to the UK's new crown copyright policy, there are no general binding rules for government information. As in the UK, there are NDPB who by law must operate under a cost recovery scheme. Under the Instruction on market activities mentioned earlier, to prevent unfair competition with private sector suppliers, market prices may have to be set.

## 4 Preliminary Conclusions

The public sector has such wide ranging activities and tasks that it does not seem to be appropriate to have one set of rules for access to all government information. Commercialization policies need not have an adverse effect on the public domain, particularly where their aim is to open up information resources that so far are used internally (e.g. administrative and auxiliary data).

It also makes sense to distinguish the different objectives of access. On the one hand, stimulating economic growth is the objective, which can be done by allowing the private sector to use public sector information as a resource. This objective implies that considerations of economic efficiency should guide access and pricing policies for commercial reuse. The prevention of unfair competition is an important strategy in this respect (e.g. no cross-subsiding on the part of the public sector, non-exclusive access for the private sector at equal terms).

Possibly, easy access at marginal cost results in more tax income from extra economic activity than can be generated with cost recovery based charges. It could also be that the economic effects are different for different types of data and uses (e.g. register data

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<sup>38</sup> Cross cutting review of the knowledge economy. Review of government information, Final report, chapter 5, point 5.17 ff. Treasury/DTI 2000. Crown copyright licensing yields an estimated 340 m GBP annually; over 90% of that income is generated by 5 organisations, of which 4 are trading funds. They each derive between 20-50% of their income from the public sector.

<sup>39</sup> Across broad categories of information products fees should cover the integral cost of the information, cross subsidies are not allowed.

vs. research data, internal use v. commercial publication). Such conclusions can best be left to economists.

The second objective of giving access to public sector information is to enhance democratic accountability and participation in decision making. Obviously, this interests is best served by broad and low cost (or free) access to information that is pertinent to the what, why and how of public responsibilities. There is a danger that the economic and the democratic collide, and that economic interests win out if no measures are taken to re-enforce freedom of information law. These could include:

- Prevent public sector bodies from withdrawing information from the scope of FOIA (i.e. through outsourcing information production, privatization, etc.). A broad definition of ‘public sector body’ –such as that in the Directive on re-use of public sector information– is the most obvious means to achieve it.
- Stimulate alertness on the effect of third party information supplied in confidence, which could trigger a limitation to access. Require a ‘FOIA effects’ test, aimed at weeding out inappropriate claims of confidentiality (cf. UK).
- Explicitly allow non-commercial use of information accessed under FOIA in which third parties own copyright or other intellectual property. This could be a thorny issue, given the internationally accepted three-step-test for limitations on copyright and other intellectual property.<sup>40</sup>
- Explicitly rule out the possibility that commercial exploitation of public sector information qualifies as a financial interest that invokes a FOIA limitation.

As regards intellectual property, it is not a realistic proposition to exclude public sector information from protection. It may even not be desirable. As has been proposed with respect to HMSO, the public sector rightowner could use copyright or other IPRs to support broad access. As in open source (and open archives), intellectual property rights may be used to counter overbroad claims in products or services based on government information.

Both for access with a view to commercial re-use and access under FOIA, the availability of metadata and of clear and well publicized access and pricing policies is of paramount importance. Initiatives such as the UKs Information Asset Register for unpublished government information resources, and the Publication Schemes (compulsory under UK FOIA, comparable to the US’s digital reading rooms) deserve following.

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<sup>40</sup> See Martin Senftleben. *Copyright, limitations and the three-step test. An analysis of the Three-Step test in International and EC Copyright Law* (Information Law Series) London: KLL 2004.