The Use and Re-use of Government Information from an EU Perspective

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Abstract

The problems that occur in the commercial use and re-use of government information are the subject matter of a proposed EU directive. The paper describes the economic value of government information and documents, and its potential and actual commercial use. The paper then analyses the conceptually different approaches in Europe and the United States towards a legal framework for the commercial use of public sector documents and government information. The commercialization by governments of their own information and the arguable difficulties it creates for fair competition with the private sector are indicated, with some policy and ethical considerations as conclusions.

1. Introduction

Regulating the use of government information within the European Union had its first initiatives by the European Commission in the mid-eighties, initiated by the IT industry, and were mainly of a consultative nature. They resulted some years later in the “Synergy Guidelines”. The latter remaining rather unsuccessful, and after having elaborated a Green Paper, the European Commission finally proposed a directive on the matter in June 2002. If the Synergy Guidelines were stressing the importance of accessible government information for both the industry, in order to commercially exploit it, and in the interests for citizens, the proposed directive represents a paradigm shift; as it takes only into account the needs for commercial exploitation.

2. Data and Information

Governments are undoubtedly the largest collectors of commercially valuable information. In exercising its different duties, a government and its agencies obtain, collect, collate, recreate and store huge amounts of information. Public sector information is not only the basis of public sector decision-making; it also contributes essentially to the information structure of our societies. The features of public sector information are unique: it can –where necessary- be collected pursuant to a legal obligation weighing on the information provider, it is associated with neutrality, and it provides an “informational backbone” to economic and scientific activities. In this paper 'data' covers every symbol, sign or measure that is in a form that can be directly captured by a person or a machine. Conventionally, the most useful data is that which represents (or purports to represent) real-world facts and events. "Information" is a notion that is much more difficult to define as it has different meanings. It refers to either a process allowing one to obtain knowledge and insight, or the knowledge in the result of this process, or as a commodity. Public sector information is defined as all information held by public sector bodies, irrespective of the medium through which it is conveyed. Thus it includes information written on paper or stored in electronic form or as a sound, visual or audio-visual recording, and any part thereof.

Public sector information may be divided in different categories: economic information (financial information, information concerning undertakings and economic statistics), environmental information (of a hydrographical nature, information on the use of land, information regarding the quality of the environment, geographical and meteorological information), agricultural and fishing information (information on harvests, use of resources, and fisheries), social information (demographic information, behavioral information, information concerning health and sickness), legal information (information regarding crimes, but also on laws and jurisprudence), scientific information (results of research by universities and government subsidized
research institutions), cultural information (objects situated in museums and art galleries, as well as library services) and finally, political information (press releases by governments, proposals and consultation). Besides its use in exercising governments' public task, this information can also be used for commercial purposes, either by governments themselves or by third parties, and thus, makes such information a valuable resource.

3. The U.S. and Europe: A Mirror Image?

The main reason for putting in place a European system that regulates the commercial use of public sector information appears to find its origin in U.S. policy attitudes. In the U.S., commercialization of public sector information is a well-established industry. According to a study for the European Commission, the estimated economic value of government information per annum in the E.U. is about 68 billion Euro or 1% of the BNP of the European Union. This is as much as well-established sectors like those of legal services, printing or textiles.

Although the E.U. in this matter refers to the U.S. as an example there are a number of fundamental differences between U.S. and European attitudes.

A comparative analysis of the American and European system on access of government information falls outside the scope of this paper. Nevertheless one should draw attention to some differences which are of importance in the discussion on the commercialization of public sector information. First, at the U.S. federal level a system of open records exists. The basis of this system lies in the Federal Constitution and the Copyright Law, with the former prohibiting any government restriction regarding freedom of expression and information, and the latter excluding any copyright on works of the federal government. The system, in particular the absence of any copyright on federal documents, is exceptional compared to other countries.

Indeed, in European countries such as France, Germany, the United Kingdom and Sweden, government information can benefit from copyright protection, as these countries are part to the Berne Convention by which countries are left free to decide which protection to give to legislative, administrative and legal documents. Secondly, in Europe, not even within the European Union, there exists no common legal framework regarding the accessibility of government information. Each country organizes its freedom of information laws according to its own administrative laws and practices, and this is unlikely to change soon.

Specifically regarding the issue of commercialization, there are several more differences between Europe and the U.S. First, there is a conceptual difference as it is argued that in those countries that have both legal instruments to allow access to information and policy instruments concerning commercial exploitation of public sector information, two approaches are possible, each reflecting different philosophies. There is the approach of the U.S., which makes no distinction between accessing government information and the dissemination or commercialization of it. The one implicitly appears to be part of the other: obtaining access to public sector information on the basis of, for example, the Freedom of Information Act automatically includes the right of reusing that same information. In Europe on the contrary, the right of accessing government information and using it are two conceptually different activities. The actual access belongs to the sphere of human and fundamental rights, while the commercial use of government information relates to the realm of intellectual property rights and fair competition.

Furthermore, there are differences between both continents in the role public sector agencies are perceived to play in the commercialization of government information. While in the U.S. cultural traditions favor commercialization of public information, the question raised is whether public sector activity could be justified. The opposite presumption is the norm in Europe, where the question is whether commercial exploitation of public information can be justified. Thus, in the U.S., where commercialization of government information by the private sector is a well-established practice, the discussion rather focuses on what role agencies may play in commercializing their own information, while in Europe the discussion is on whether government information can be disseminated for commercial purposes at all.

Finally, there is a tension existing between freedom of information and privacy. The fact that government agencies possess a large amount of private information is an important issue in Europe, rather more than is the case in the U.S. This is mainly because European and U.S. positions on privacy and freedom of information are mirror images of each other: while Europe has comprehensive systems reflecting a commitment to protection of privacy, the U.S. has rather a patchwork of incomplete protections reflecting uncertain commitment to privacy. At the same time, historically, the U.S. has a well-established legal framework guaranteeing access to federal government information, while in Europe this is not the case.

4. Commercializing government information: shifts occurring

Before the use of IT was widely introduced at government agencies, it was felt that the public sector should make available, free of charge or at marginal cost price, raw data that was produced in the context of its tasks, be it to citizens as part of their democratic and
consumer rights or to business with a view to commercial re-use. It was perceived to be the task of the private sector to add value to the raw data it obtained, and consequently satisfy market needs by selling it. However, increased use of informatics in government agencies facilitating information storage and handling, created somewhat of a paradox. On the one hand the electronic medium renders information in possession of government agencies more attractive for the private sector, since electronic format information providers may more easily repackage and recombine such information and bundle it with new types of retrieval software to create commercially viable products, thus reducing the costs to transpose government data in sellable information, and as a possible result increase their margin of profit. On the other hand, the difference between raw data and sellable information has become more vague, and thus the intervention of the private sector less necessary. Nowadays it demands little effort to combine different data and obtain commercially valuable information. As a result, from an end-user point of view, there is less need for added value to raw government data by private intermediaries, since such raw information already has a high value to start with. Government agencies themselves can easily bring together data from different sources, and present them in a format that can immediately be used by those requesting it.

As contradictory as it may seem, the private sector might also have an interest in allowing governments to commercialize their own information. It was argued that if private actors would succeed in keeping the public sector out of the market, this could have several negative consequences for the private sector: first, some public sector information resources might be discontinued altogether, and for the remainder of available information a larger value-adding effort may become necessary for the private sector. Secondly, even if kept outside the market of commercializing public sector information, government agencies will still be under a legal obligation of allowing a general right of access, which will result, in many areas at least, of information demand being turned away from the market, since information requesters will go to the direct source, where they would only have to pay the administrative fee, rather than a market price.

Private sector industries appear to claim government information as their property, since in the past their ‘in-between’ role was indispensable for making the government data useable. At present their situation appears threatened. The fact that governments may now present their data and information in a user-friendly way decreases the value private sector may add, and makes its intervention appear no longer, or less, indispensable. If government information is presented in a ready-to-use way, its commercialization may largely by-pass the private sector.

These may be the main underlying reasons for pursuing regulatory effort regarding government information within the European Union; the foremost concern appears to have been to eliminate competition from government agencies selling their own information at market prices, with the distortion of fair competition as the main argument.

One distortion might be that governments, due to their function as tax collector, already benefit from the necessary resources that should allow them to disseminate information. In addition, being the tax collector and not having to pay taxes creates the possibility of unfair competition by allowing sales below cost, hence driving out private sector initiative altogether. However, as was argued, “unlike other types of goods or services, the very existence of government information is uniquely due to the existence of the government itself. Government information is not a raw resource. The concept of unfair competition is therefore a poor argument. In fact, the government is supplying private industry with an already-developed resource at no cost.”

Peterson thus refutes the taxpayer protection argument: as the resource is obtained through expenditure of public funds, it does not mean that it is available for the use of any taxpayer at no charge. Nobody would walk into a government office to use a typewriter, simply because it was paid for by taxpayer's money.

The claim that public sector involvement would chill initiative and destroy existing jobs is based on questionable assumptions, since the past has proven otherwise. Indeed when government was supplying information products, private companies already successfully competed through two strategies: repacking and reselling of the same basic information (copyright is not an issue) and by adding value (new elements subject to copyright). These strategies have been exploited in many ways. As Wells Branscomb argued, information society has produced a rich marketplace of new information products, and the ease of entry into this new marketplace attracts a large number of entrepreneurs who depend for their livelihood upon access to these new information resources.

Commercial activities of public sector information providers do not, contrary to what is often argued, disturb fair competition in any significant way. Only private undertakings will be forced to remain creative, and keep ahead of the information services governments provide. Indeed, if governments are allowed to introduce their information on to the market for what it is worth, provided the administration involved is authorized to profit directly from the income thus generated, this could re-establish the balance between the public and the private sector. The private sector would no longer be able to merely resell basic information, but would have to finalize a semi- or quasi-finished product. This may result in the
public sector depriving the private sector of some lucrative opportunities but this does not exclude creative use of commercially valuable information by the latter.\textsuperscript{28}

In this, one should recall that \textit{in se} competition between the public and the private sector is not prohibited in Europe. European competition law allows public sector entities to compete with private sector entities, as long as public sector information providers do not abuse their position.\textsuperscript{29} Far more disturbing to fair competition would be the creation of a monopoly over public sector information by a private company e.g. in a situation in which a private company refuses to supply public sector information to other economic actors or imposes excessively high prices.\textsuperscript{30} However, in this one has to bear in mind article 86 of the EC-treaty. According to its paragraph 2, once a proposed information service is described as serving the public interest, authorities charged with managing such a service are no longer required to respect Community provisions on fair trade where these pose a \textit{de facto} or \textit{de iure} barrier to the accomplishment of the public interest mission.\textsuperscript{31} This is an exception to article 82 of the EC-treaty and to fair competition in general. The acknowledgement of a breach of article 82 EC-treaty is all but evident.\textsuperscript{32}

Therefore public sector agencies should be allowed to benefit from the potentials of information and communication technologies for their administrative duties and add value to their information resources. Nevertheless, this information should also remain accessible for citizens, which might be done by linking the accessibility of such information to its use by the administration. Or, as Bunkert suggests, to the extent that administrations make use of the value-added procedures of information handling, either by themselves or by employing third-party services, to the same extent these services should be covered by the access principle.\textsuperscript{33} This means that the more public agencies add value to their own information (for example by crossing data from different origins), and the more they use this information in the exercise of their public task, the more information, in absolute terms, should become accessible to citizens (including private undertakings). In this case however, government agencies should, first, be allowed to let private undertakings re-use their information, second, at a price for what it is worth, which might be well above the mere costs, and third, to let the public sector agencies directly benefit from this income.\textsuperscript{34} Essential may be the notion of a link between a government agency adding value to the information it possesses and the extent to which it contributes to the exercise of its public task. It might be interesting to take criteria of finality into account, and to point out that in several European countries there is an obligation to justify whenever a government agency or an administration takes a decision. Judicial review on these justifications could become part of the review process of granting access to and allow re-use of public sector documents. One could for example suggest that all information indispensable for a government agency to take a decision, and which helps the decision to be justified and reasonable, should be out of reach of commercialization and should be available to all at no or at minimum cost.

5. Conclusion

As to the private information sector, it ought either be kept out of any activity that would result in merely repacking public sector information, or, on the contrary, be allowed to repack, but sell at the same price level than government agencies would, and guarantee full accessibility. If, however, private undertakings are adding value to the information sold by the public sector for what it is worth, one may have to reason differently. Indeed, the shift is from accessibility, part of a fundamental democratic right, to commercialization, which touches fair competition and intellectual property rights. Since, in the latter case, a private undertaking is acting within a proper market sphere, it no longer acts within the sphere of public sector information, in the sense of information used by the public sector in the exercise of its public task. It now acts in a market in which there will have to be considerable added value in order to justify a price higher than the one at cost. This shift is in accordance with the above-mentioned conceptual difference one makes in Europe between accessing public sector information and commercializing it.\textsuperscript{35}

In this, the public sector, depending on which information it uses in order to exercise its public task, defines which documents are accessible to citizens on the one hand, and at the same time, defines the market within which private undertakings may act at market prices. A policy of private exploitation may lead, however, to a selective kind of accessibility of public sector information, as only those information products will be produced for which there exists a profitable market, and less ‘attractive’ segments neglected, as exploitation decisions will be based on economic grounds and not on criteria of public service.\textsuperscript{36}

The question that arises is how to define whether or not the information used by the public sector is needed for exercising its public task. Democratic principles and economic benefits go hand in hand only up to a certain degree, making inevitable the search to strike an appropriate balance between public and private interests. Governments can benefit from public-private partnerships and private agencies’ know-how and expertise, but from a democratic point of view the pursuit of transparency essentially is a government duty which cannot be transferred to the market.\textsuperscript{37} In the relation between
This debate is one beyond the role governments should play in the commercial use or re-use of their own information; indeed, the current debate on this topic is part of one on the balance in an information society between democratic rights and citizenship on one hand and market forces on the other. Market phenomena are not, as the history of economic thinking shows, driven by natural laws but by historically grown patterns of perceptions of what a marketplace should be. These patterns are formed by the cultural, social and political conditions under which they were generated. Market systems exist, but in the face of these man-made systems, man may, and must, take political responsibility for shaping the future of information society.\(^\text{10}\)

\(^{1}\) I use the term ‘government information’ although ‘public sector information’ or ‘psi’ can be used just as well. In this paper it is meant to cover the informational resources gathered and produced in the public sector in the course of its activities.


\(^{12}\) Although some exceptions do exist, like for example the 1994 act that introduced the National Technical Information Service as part of the federal Department of Commerce, as a clearinghouse for the collection and dissemination of scientific, technical and engineering information created by other federal agencies. Since it is required to be self-sustaining, it must set prices for its information products and services that will cover its costs. One result is that the prices for many NTIS documents exceed the costs of reproduction. Gellman, R., 'The American model of access to and dissemination of public information', Stockholm 1996 Conference: Access to Public Information: A key To Commercial Growth and Electronic Democracy, 1996, http://europa.eu.int/ISPO/legal/stockholm/en/gellman.htm, 16/7/2002, p. 5.


\(^{14}\) At most the E.U. has introduced in 2001 a regulation concerning the accessibility of documents from the European Parliament, the Council and the


17 Ibid, p. 3.


30 See for example, on the refusal to supply information, the ruling of the European Court of Justice in the famous Magill-case. ECJ, RTE & ITP v. Commission, 1995, ECR, I, 743.


34 One might then suggest to only use this income in order to improve the accessibility or further add value.

35 See paragraph nr. 5 at page 6.


37 Ibid, p. 25.

38 Ibid, p. 23.