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### Rights of Access to Public Sector Information

van Eechoud, M.; Janssen, K.

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# LAPSI Policy Recommendations on Rights of Access to Public Sector Information

WG6- Constitutional, Human Rights and Environmental Perspectives.  
Partner responsible: IViR (Mireille van Eechoud), ICRI (Katleen Janssen).

*Final*

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## **Executive Summary**

The reliance on national access norms is an important feature of the EU's re-use framework. It impacts the kinds of policy choices that can be expected to be effective in stimulating commercial and non-commercial re-use of public sector information by private actors (businesses, civil society organizations, individual citizens, etc.). In this paper we assess in more detail the relationship between the PSI Directive and (statutory) rights of access and duties to disclose information under national laws and European law (the latter especially in the area of environmental law).

The conclusion is that despite the fact that access to information is increasingly recognized internationally as a fundamental right, the nuts and bolts of it will remain squarely a national affair for the foreseeable future, environmental information excepted. This makes it especially important that EU re-use policies and instruments enable public sector bodies in Member States to work within their existing access infrastructure, in terms of local divisions of competences, procedures and control over pro-active dissemination of information. If the requirements imposed under EU re-use law do not align with local freedom of information laws, it may produce a negative effect on transparency. Not only that, it may also adversely affect conditions for fostering (commercial) re-use.

At the same time, it is worth keeping in mind that documents that are public under freedom of information laws are not necessarily of interest to re-users, especially since the request procedures under such laws are not geared to the supply of (dynamic) datasets.

The relationship between access regimes and re-use rules is still poorly understood on many levels, notably the type of rights/obligations on access that exist which are especially relevant to re-use, and whether these are accompanied by procedures that meet the specific needs of re-users. Having a better understanding of this will allow identification of the most promising areas for re-use and help prioritize EU action at the interface of access and re-use.

## 1 Introduction

Access to public sector information is of course a *conditio sine qua non* for re-use. Yet although the PSI Directive gives a minimum framework for the conditions under which commercial and non-commercial re-use of public sector information is to take place, it currently does not oblige Member States to allow re-use. Nor does it prescribe in any way what government information must be publicly accessible.

In a three step model of 1) Arrange for information to be publicly available, 2) Allow re-use of said information, 3) Ensure practical and legal conditions foster alternative uses of PSI, the directive clearly operates only at stage 3, and in a modest manner at that. Even if the upcoming revision of the directive will lead to a duty for Member States to allow re-use, the decision about what information or data is made public would remain a domestic one. There are sound reasons for this, and we shall discuss them below. An important one is that the legislative competence of the EU to regulate access to national government information is limited.

More generally, because the PSI Directive covers virtually the entire public sectors of 27 States and potentially much of the information and data of all public sector bodies covered, it operates in a field marked by great diversity in terms of size, structure and organization of the bodies it addresses. The Directive can affect information policies of the smallest of local municipalities and the largest national information producers such as ordnance surveys,<sup>1</sup> and any public sector body in between. It is therefore necessarily general in outlook, even with respect to the issues it does aim to address directly.

## 2 Scope of this paper

Re-use policies rely for their effectiveness on practices and rules that ensure access. In this document we focus on the interplay between the PSI Directive and EU instruments that give rights and obligations to government information at the level of Member States. Access to information held by EU institutions is not considered separately. The PSI Directive is not aimed at EU institutions themselves, so has no connection to notably Regulation 1049/2001 on public access to documents.<sup>2</sup> The latter will be referred to incidentally though, as an example of a ‘freedom of information act’.

The term ‘freedom of information’ is somewhat ambiguous, as it is sometimes also used as a synonym for freedom of expression (free speech). In this paper we use it exclusively to denote rights of access to public sector information, which are often laid down in generic freedom of information acts (‘FOIA’). These acts go by a variety of titles. To name a few: Act on transparency in public

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<sup>1</sup> For example, the UK ordnance survey has an annual turnover well in excess of E 100 mio (annual reports at <http://www.ordnancesurvey.co.uk>), coming in roughly equal measure from private and public sectors; IGN France has an annual budget of E 132 mio and employs over 1500 staff (annual reports at [www.ign.fr](http://www.ign.fr)); the Dutch Kadaster (land registry and mapping) has revenues of E 160 mio and approx. 2000 staff (annual reports at [www.kadaster.nl](http://www.kadaster.nl)).

<sup>2</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145. The Recast proposed in 2008 by the Commission (COM(2008)0229) is still pending because it is such a controversial topic. The Parliament accepted the proposal in December 2011 with considerable amendments, and the ball is now in the Council’s court. In the mean time, early 2011 the Commission proposed an amendment to the Access regulation in a different procedure, to at least make the current Regulation applicable to all EU institutions, as the TFEU prescribes, see COM(2011) 137 final.

administration (Wet Openbaarheid van Bestuur, NL), Act on freedom to access administrative documents (chapter 2 of Loi n° 78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal; FR), Informationsfreiheitsgesetz (DE); Lov om offentlighed i forvaltningen (DK).

We discuss the wider legal framework for freedom of information laws, notably the development towards the recognition of access to government information as a fundamental right under the European Convention on Human Rights (ECHR), the relation to the Charter of Fundamental Rights of the EU, and the Council of Europe Convention on Access to Official Documents (2009). All these potentially impact domestic access regulation as well as EU access policy.

In the area of spatial and environmental information, the EU has already harmonized rights of access and publication duties to a degree in the context of environmental policy, which is why we consider the relevant instruments and their connection to re-use separately. Before we turn our attention to access law, we set out what relation the PSI directive currently has to access, and what the competence of the EU is with respect to regulating access to public sector information.

The analysis will show:

- That there is limited competence by the EU to directly regulate general access to information held by public sector in Member States (beyond information that is also or only held by EU institutions).
- That there is a clear development towards the recognition of rights to access government information, driven in part by international norms on human rights. This is however coupled with diversity in national laws, reflecting local legal (constitutional) traditions. These local access regimes will remain an essential building block in EU re-use policy.
- That a sizeable and from the re-use perspective important field of access, namely to environmental and more widely spatial data<sup>3</sup>, already exists, making optimal coordination of policies between responsible policy makers an important factor in promoting effective re-use possibilities.

### 3 Access in the PSI Directive

It is important to note that the current directive does not autonomously prescribe what public information its re-use rules apply to. It in principle captures ‘documents held by public sector bodies’, broadly defining these terms in Article 3 and thus drawing into its sphere a wide array of organizations<sup>4</sup> and information. Subsequently the field of application is narrowed on the basis of three characteristics:

- of organizations, e.g. public broadcasters, museums, are excluded from the scope of the Directive (Art. 1(2) sub d-f), even if under national rules their information must be made public;
- of activity by an included public sector body, i.e. ‘commercial’ activities beyond the public task of a public sector body are not covered (Art. 1(2) a) ;
- of information status:
  - documents in which a third party has intellectual property rights are excluded per se (art. 1(2) sub b), even if domestic access rules mandate disclosure,
  - any information that under local access regimes is not disclosed because of countervailing private or public interests, e.g. of the sort generally found in freedom of information acts, is not covered by the re-use rules either (Art. 1(2) sub c).

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<sup>3</sup> ‘Spatial data’, also referred to as ‘geographic data’ are all types of data on the location and shape of, and relationships among, geographic features. This includes remotely sensed data as well as map data. Examples are data on buildings, roads, waterways, land use, soil types, climate/weather, population in area, pollution.

<sup>4</sup> Public undertakings are not covered by the Directive (see recital 10). On problematic aspects of this exclusion see the LAPSI Position Paper No 3: The Exclusion of “Public Undertakings” from the Re-Use of Public Sector Information Regime’.

The exclusions of public sector information based on the last two characteristics (activity and information status) can only be determined by directly looking to national law and practices.

A key provision of the Directive is Article 2(3). It states ‘This Directive builds on and is without prejudice to the existing access regimes in the Member States. This Directive shall not apply in cases in which citizens or companies have to prove a particular interest under the access regime to obtain access to the documents.’ Re-use of documents obtained under so-called privileged disclosure rules is therefore not covered by the Directive. In practice the distinction between general and privileged access is not always clear in national laws, a point taken up below.

Recital 9 clarifies that ‘The Directive builds on the existing access regimes in the Member States and does not change the national rules for access to documents.’ The Directive applies to documents that are public under national freedom of information acts, but also to information that is made public on the basis of specific national rules such as those which regulate information collection and dissemination of statistics offices, land registries and other public registers. It is unclear whether information made public without a clear legal basis is also covered.

In the review process it has been suggested to expand the scope of the directive to generally accessible documents, i.e. those accessible under domestic rules on access to documents (where access does not require the demonstration of any specific individual interest), and ‘documents that public sector bodies license, disseminate or give out’.

## 4 Competence

To better grasp the relation between the EU’s shared competence to regulate re-use and the competences to regulate access, this section briefly sets out the treaties’ division of competences and key requirements for their exercise.<sup>5</sup> Of note, while the exercise of especially legislative competence is a matter so at the heart of the European project that it warrants scrupulous attention, this is of much greater importance ‘ex ante’ than ‘ex post’. Once a legal instrument has been adopted, it is extremely rare for the ECJ to find it in breach of primary EU law.

### 4.1 Conferred powers, Subsidiarity, Proportionality

The attribution or conferral principle of Article 5 TEU requires that the Community act only in so far as the Treaty confers it powers to do so, and only to attain the EC’s objectives. These objectives are laid down in Article 2 TEU. In addition to the lofty aim ‘to promote peace, its values and the well-being of its peoples’, the EU’s objectives are still predominantly economic: to establish an internal market; work for the sustainable development of Europe based on balanced economic growth and price stability, and a highly competitive social market. The EU must respect the national identities of Member States, ‘inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.’ (Art. 4(2) TEU). Article 6(f) TFEU confers competence to carry out *supporting* actions of the Member States in the area of administrative cooperation, i.e. non-legislative measures. Conceivably, rapprochement of rights of access to government information could be based on this article.

The Court of Justice has elaborated that the attribution principle requires a close relation between aims and content of a harmonization measure on the one hand, and the essence of the legal basis underlying that measure on the other. Article 296 TFEU requires every measure with intended legal

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<sup>5</sup> Much of the following section is based on chapter 1 of Van Eechoud et al., *Harmonizing European Copyright Law*, Kluwer: Deventer 2009.

effect to expressly refer to its legal basis in the Treaty.<sup>6</sup> The Court of Justice further demands that the application of the legal basis involved be well-founded on objective grounds – particularly as regards the aim and content of the measure – in the statement of reasons.<sup>7</sup>

Where there is shared competence, as is the case with re-use of government information, the *principle of subsidiarity* prescribes that the Community acts only to the extent that the objectives of the proposed action (1) cannot be sufficiently achieved by the individual Member States, and (2) can be better achieved by the Community.<sup>8</sup> Political and economic considerations drive the decision that a) there is a problem to be addressed, and b) the problem is best addressed at the European level. The ECJ respects this political nature by allowing for a wide margin of appreciation,<sup>9</sup> but does require that the intensity of the action undertaken does ‘not go beyond what is necessary to achieve the objective pursued.’<sup>10</sup>

*The proportionality principle* primarily governs the *mode and intensity* of Community intervention in the laws and policies of the Member States. The Court of Justice has ruled that (1) Community action must be fit to achieve its aims, (2) it may reach no further than necessary in this respect, and (3) the disadvantages caused shall not be disproportionate to the aims pursued.<sup>11</sup>

## 4.2 Legal bases

The EU treaties contain no competences specific to freedom of information law. That is, under Article 15(3) TFEU instruments must be enacted which operationalize the public’s right to access to documents of all EU institutions, but these do not concern access to documents at Member State level.

In Case C-411/06 the ECJ held that in principle an act must be based on a single legal basis, matching the main or predominant purpose of a measure.<sup>12</sup> The PSI Directive is based on Article 114 TFEU. The current directive’s stated objective<sup>13</sup> is to encourage the development of Community-wide services and products for which public sector information is an important primary material. Recital 6 states that ‘Minimum harmonisation of national rules and practices on the re-use of public sector documents should therefore be undertaken, in cases where the differences in national regulations and practices or the absence of clarity hinder the smooth functioning of the internal market and the proper development of the information society in the Community.’

Article 114 grants the EU power to harmonize the laws of the Member States to the extent required for the functioning of the internal market by normal co-decision procedure (qualified majority vote). In addition, Article 115 also allows for harmonization by directive of laws, regulations or administrative provisions of the Member States that directly affect the establishment or functioning of the internal market, by special procedure (unanimous vote).

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<sup>6</sup> It suffices if the legal basis follows unmistakably from the statement of reasons accompanying the directive or regulation. See Case 45/86 [ECR 1987, 2671].

<sup>7</sup> Case 45/86 [ECR 1987, 2671] *Generalized Tariff Preferences* (Commission vs. Council). See also Case C-300/89 [ECR 1991, I-2867] *Titanium dioxide* (Commission vs. Council).

<sup>8</sup> See the guidelines in The Protocol on subsidiarity and proportionality.

<sup>9</sup> Because it is essentially a political principle, it is argued that subsidiarity should not be depoliticized and further judicialized: Tim Koopmans, ‘Subsidiarity, Politics and the Judiciary’, *EuConst*, Volume 1, Issue 01, January 2005, pp 112-116.

<sup>10</sup> ECJ 10 December 2002, Case 491/01, para. 184. ECR 2002 p. I-11453 (*Tobacco Advertising II*).

<sup>11</sup> See e.g. Case 137/85, *Maizena*; Case C-331/88, *Fedesa*; Case C-339/92, *ADM Ölmühlen*; Case C-101/98, *Union Deutsche Lebensmittelwerke*; and Case C-210/00, *Käserei Champignon Hofmeister*.

<sup>12</sup> ECJ C-411/06, 8 September 2009 (Commission v Parliament & Union).

<sup>13</sup> The proposal for amendment tracks the requirements of art. 114 more closely, by stating that the objective is to ‘to facilitate the creation of Union-wide information products and services based on public sector documents, to ensure the effective cross-border use of public sector documents by private companies for added value information products and services, and to limit distortions of competition on the Union market.’

Where it concerns rights to access government held information, or obligations on the part of public sector bodies to disseminate information the internal market article is not an obvious independent basis for intervention. After all the primary objectives of access rights have to do with safeguarding transparency of public actors, with enhancing democratic accountability and participation in decision-making, not with extracting economic value from PSI. While it is true that divergences in domestic access laws can indirectly affect the smooth functioning of the internal market, by itself that does not make Article 114 TFEU (let alone Art. 115) a proper legal basis for action.

The question is of course, if Article 114 is the proper basis for harmonizing *re-use* norms, does it follow that access can be harmonized as well because it is a precondition for actual re-use. Is, in other words, re-use a hook to bring in access? Such a broad reading would in effect make national transparency norms subservient to the economic interest in creating Community wide PSI based services. The requirements of subsidiarity and proportionality come into play here, with all the attendant questions: how different are access regimes, what exactly is the impact on the various PSI-based information markets, how would various harmonization measures affect the national, regional and local administrations of Member States, would transparency improve or deteriorate (e.g. where the prospect of having to allow commercial re-use makes public sector bodies less open), what would the added costs be (in terms of implementing and maintaining changes to existing access regimes throughout all Member States) in relation to the economic benefits of Community wide PSI services, and for whom?

The ECJ has ruled that a mere *finding* of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms (in our context notably the freedom to provide services and or of distortions of competition liable to result therefrom) are not sufficient to justify the choice of Article 114 as a legal basis.<sup>14</sup> There must therefore be a real and noticeable effect of diverging rules on the internal market. As for laws aimed at improving competition in the internal market, the ECJ requires that ‘the distortion of competition which the measure purports to eliminate is appreciable.’<sup>15</sup>

A further legal base is to be found in Article 352 TFEU. It provides a residual competence: ‘If action by the Community should prove necessary to attain, in the course of the operation of the Internal market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.’ It is difficult to see how and when direct harmonization of domestic access rules for the purpose of enabling an internal re-use market to develop cannot be based on Article 114, 352 can serve as a basis for action.

There are several treaty bases that affect access in different areas, notably environmental policy-making. The EU shares competence with Member States in environmental matters (Art. 4(2) e TFEU). Article 191 details the objectives of EU action in environmental matters, which in short is protecting the environment to a high level, and Article 192 provides the legal basis for (legislative) measures.<sup>16</sup> There are over 100 directives, regulations<sup>16</sup> and decisions in the environmental field.<sup>17</sup> For

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<sup>14</sup> Case 45/86 [ECR 1987, 2671] *Generalized Tariff Preferences* (Commission vs. Council), para. 84.

Weatherhill posits that the rulings in Keck and Tobacco Advertising testify to a trend to ‘take more seriously the importance of leaving space for diversity between national laws’, S. Weatherhill, in: U. Drobnig et al. (ed.), *Divergences of property law, an obstacle to the internal market?*, 2006, p. 144-149.

<sup>15</sup> Titanium Dioxide para 23.

<sup>16</sup> European Environmental Law in the EU Member States. An Overview of Implementation Effectiveness, M. Rudnicki, I. Wereśniak-Masri & A. Kozińska, eds., 2011

<sup>17</sup> See Handbook on the Implementation of EC Environmental Legislation (Regional Environmental Center for Central and Eastern Europe 2007), which identifies over 100 measures operational in the period 2003-2007. Available at <http://ec.europa.eu/environment/enlarg/handbook/handbook.htm>

our purposes, most relevant is the Directive on Access to Environmental Information<sup>18</sup>, which is one of the directives meant to implement the Aarhus Convention, on which more below.<sup>19</sup>

Many initiatives are taken at national and Community levels to collect, harmonize or organize the dissemination or use of spatial and environmental information. To a large extent, these are about creating EU wide information resources, e.g. pollution registers, transport data, and the Inspire infrastructure system. Although they do not directly affect freedom of information laws, they can impact access, notably the INSPIRE Directive.<sup>20</sup> More on this in section 6.2 below.

## 5 National access rights and obligations: diverse and complex

For Member States that have ‘freedom of information’ acts, these are a major, but by no means the only instruments that regulate access to government information. In States where regional and local autonomy is a particularly marked institutional (and constitutional) feature, access to information can be a matter for devolved regulation. For example Germany has a law on access to federal information, and each ‘Land’ promulgates its own law. The United Kingdom has separate freedom of information laws for England/Wales/Northern Ireland and Scotland.

The scope and field of application of freedom of information acts differ, on all the essential questions:

- Which public sector bodies are subject to obligations to make information ‘public’?
- What documents or information is covered (incl. for example datasets, audio-visual content)?
- Nature of the duty to publish pro-actively and of the right to request access.
- When information can be withheld because of other overriding rights and interests (interests ranging from national security to privacy, from commercial or other economic interests to public safety).
- What type of access is given (format, inspection only or copies)?
- The procedure to be followed.
- What fees apply?
- What use can be made of the information?
- What if any judicial review procedure is available.

For example, the 2001/1049 Regulation on access to EU documents distinguishes documents that have to be published in official journals, documents that have to be made available electronically (via the asset registers each institution must have), and documents accessible upon application. In the law of Member States provisions on which information is to be actively published can be much more dispersed, if present at all. At the administrative level, the activities of large information producing bodies may be (partially) excluded and subject to specific regulation. This tends to be the case for Statistics offices, meteorological services, land registries, companies registries and other public registries. The laws governing their activities vary in the level of detail, including on obligations to publish information.

National freedom of information acts often do not apply to documents from the legislature (e.g. parliaments, local representative organs) and judicial authorities. But publication of laws and other binding instruments is typically mandatory under constitutional norms of Member States because it is required for legal effect. The transparency of legislative proceedings is constitutionally guaranteed by

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<sup>18</sup> Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information.

<sup>19</sup> E.g. another (partial) implementation instrument is the Public Participation Directive, Directive 2003/35/EC, OJ L 156, 25.6.2003.

<sup>20</sup> Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE) (OJ L 108, 25.04.2007)

public deliberations and legally prescribed publication of proposals and debate in official records. Likewise, due process and basic principles of fair administration of justice lie behind domestic rules that ensure legal proceedings are conducted in public and decisions are made available, typically upon request but increasingly also pro-actively and on-line. Some national freedom of information acts do however apply broadly across all functions of government (legislative, judiciary, executive), cover all conceivable types of publication and access including the provision of online access.<sup>21</sup>

All in all, often a myriad of rules in different instruments together shape transparency in administration, law making and adjudication. To our knowledge, it is primarily civil society organizations in the area of transparency that take inventories of existing freedom of information laws.<sup>22</sup> More comprehensive analyses of all (major) disclosure/public access norms in any given Member States are not readily available. In depth comparative studies are also sparse. So we actually know little about the ecology of norms, how they relate, and how re-use policies affect access and the dissemination of PSI. A complicating factor is that disclosure obligations or access rights cross a spectrum from entirely public to resolutely private.

### *Public versus privileged access*

The PSI Directive states it only applies to information that is publicly accessible. It does not extend to privileged access, situations ‘in which citizens or companies have to prove a particular interest under the access regime to obtain access to the documents’ (Art. 3(2) Directive). This captures the distinction often made between freedom of information acts, a key feature of which typically is that no private interest is required for access, and other disclosure rules. Similar information may be subject to privileged disclosure in one Member State and subject to public disclosure in the other, e.g. in tax matters. The distinction general versus privileged disclosure is in practice not binary, but more gradual. Privileged disclosure can mean only few people have access to certain information (e.g. to records in legal proceedings, information rights under data protection laws), but also that an almost indeterminate number have access.

For example, the right to receive information in the context of administrative decision-making procedures such as a local planning permission for a new housing scheme can rest with a variety of persons or organizations. Rights in information can exist for those applying for permission (the property developer and land owners), for those directly affected (local citizens, owners of adjacent land), civil society groups that represent a collective interest (e.g. protecting historical landscapes) or others with a legitimate interest. Obviously, the distinction between ‘access for all’ and personal privileged access makes sense from the perspective of the goals served by different access rules. In the case of our local planning permission, transparency serves to protect primarily individual interests. In generic freedom of information law, the public interest in disclosure is the dominant interest, even though in practice freedom of information acts are mostly invoked to serve (also) private interests.

From the perspective of stimulating re-use, the distinction between privileged and public access makes less sense however, because the private interest in re-using government information is taken to be an important driver to achieve the larger public interest in economic growth. If the privileged access does not come with a confidentiality obligation for the recipient (e.g. because the information received is commercially sensitive, or contains personal data), why should re-use of said information not be possible? And if it is allowed, what reasons are there to exclude it from the scope of the PSI directive? Having said that, the non-discrimination requirement of the PSI directive (i.e. treat similar re-users similar) of course chimes best with a principle of non-discriminatory access.

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<sup>21</sup> For example, the Polish law on Access to Public Information of 2001 is very broad (see B. Banaszak & M. Bernaczyk ‘Open Government in Poland: The Current Situations and its Perspectives’, European Public Law 2011, 261-275).

<sup>22</sup> For example, Access-info [<http://www.access-info.org/en/useful-resources>] and Privacy International [<https://www.privacyinternational.org>] have transparency monitors based on freedom of information acts.

## 6 Statutory rights of access – European dimension

### 6.1 Access and the role of the Council of Europe

While transparency of the public sector may be a shared basic principle of democratic states, how it is shaped in constitutional and administrative law, in terms of duties to disclose information and (enforceable) rights to seek access differs substantially. As will be set out in a little more detail below, at the level of the EU there are limited rights and obligations with respect to PSI of Member States. At the level of the Council of Europe, highly relevant is the Access Convention, because it would introduce an obligation to enact access rights. But especially since it is unsure when that convention will enter into force, it is equally important to consider to what extent the European Convention on Human Rights (ECHR) impacts access to PSI.

#### Access Convention

The Council of Europe Convention on Access to Official documents (Tromsø 18 June 2009) focusses on what may be termed ‘classic’ freedom of information. It obliges States to ensure for everyone an enforceable right to information on request, without motives having to be disclosed. The convention prescribes in some detail the right, the possible limitations to disclosure and the essentials of the request and review procedure. In addition, public authorities should engage in actively making information available. However, the latter obligation is sketched in imprecise terms and leaves much discretion as to which information is actively published, how and when.

The notion of documents used is very wide: ‘any information drafted or received and held by public authorities that is recorded on any sort of physical medium whatever be its form or format’.<sup>23</sup> It does – like any instrument working with the notion of ‘document’, including the PSI Directive – pose some problems with determining the scope of application to datasets, and leaves it to contracting states to decide whether they regard as a document any dataset that is easily retrievable by existing means.

For both pro-active disclosure and disclosure on request, the underlying idea is that public access to government information is essential for the exercise of fundamental rights, that it enhances transparency and accountability of the public sector, and enables informed participation by citizens in the democratic process. Note that the value of PSI as an economic resource is not a recognized driver.

Among the possible limitations to disclosure three stand out in their capacity to thwart re-use policies: privacy and other legitimate private interests; commercial and other economic interests; the economic, monetary and exchange rate policies of the State (Art. 3(1) sub f, g, h Access Convention). Any of these interests can trump disclosure, if that ‘would or would be likely to harm’ them and there is no overriding public interest. Presumably, intellectual property rights of public sector bodies (and private sector), commercial interests of PSI holders that themselves engage in market activities, and large costs<sup>24</sup> associated with making information available are interests protected within the scope of said limitations.

From the perspective of enabling (commercial) re-use, a recurrent theme is that knowledge is required of available sources, and that data or information must be readily available in useable form. It can be questioned to what extent traditional freedom of information acts along the lines of the Access Convention support such notions. The pro-active publication of resources (or at least information on availability) is a loosely defined and secondary obligation in the Convention, but from the re-use perspective is arguably at least as relevant as access on request. It resonates with open data policies, of which identification of and communication about available resources are always an integral part.

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<sup>23</sup> Explanatory report, paras 11-14 <<http://www.conventions.coe.int/Treaty/EN/Reports/Html/205.htm>>.

<sup>24</sup> If responding to a request for documents is excessively costly, potentially the request may also be refused for being ‘manifestly unreasonable’ (art. 5(5) at ii Access Convention).

The right of access under the Convention pertains primarily to documents of public authorities with *administrative* functions: these include local, regional and national administration, but also the legislature, judicature and legal persons at least for their administrative tasks. Contracting states are free to regard documents related to all public activities of legislative bodies and judicial authorities as subject to the right of access under the Convention,<sup>25</sup> and to also include natural or legal persons in as far as they have public functions or are funded with public money. The scope of application of the Convention in terms of organizations covered thus differs substantially from the PSI Directive.

Taken together, a number of features affect the Convention's capacity to bring down barriers to re-use. This includes the coverage in terms of organizations, limitations to disclosure, margin of discretion as regards inclusion of datasets, and the focus on individual access on request rather than pro-active dissemination. So even if the Convention would in the short term come into effect for the EU and all its Member States (which is by no means a given) it will result in a modest level of harmonization of domestic access laws. On the other hand, it would improve matters on the enforcement side, because states will have to ensure for independent and impartial review procedures (before courts or otherwise), which should in principle be expeditious and inexpensive (Art. 8 Access Convention).

In conclusion, failing a direct competence to harmonize freedom of information legislation, the EU in view of its Digital Single Market agenda clearly has an interest in the adoption of the Council of Europe Access Convention by its Member States.

### **Access and the right to freedom of expression**

It is uncertain when the Council of Europe Access convention will come into force. Some major EU Member States have indicated signing it has no priority.<sup>26</sup> So for the foreseeable future, the closest that European states get to shared legal norms may be in the context of the European Convention on Human Rights (ECHR) of the Council of Europe. The exception is on environmental information, discussed below.

Article 10 ECHR enshrines the right to freedom of expression, including the right to 'receive and impart information and ideas without interference by public authority and regardless of frontiers'. The European Court of Human Rights (ECtHR) until a few years ago held the position that article 10 does not impose a positive obligation on States to grant access to information held by the public sector to anyone (or the mirror: an enforceable general right to access to public sector information), let alone oblige a State to collect and disseminate information on its own motion.<sup>27</sup> But in recent years the Court has interpreted the freedom to receive information broader,<sup>28</sup> and it explicitly stated it is moving 'towards the recognition of a right of access to information.'<sup>29</sup>

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<sup>25</sup> E.g. the Swedish and Polish freedom of information acts apply to all three sectors (administrative, legislative, judicial branch).

<sup>26</sup> The Dutch Minister of Justice wrote to the Dutch parliament that signing the Convention has no priority for Dutch government (because of the costs associated with checking the compatibility of large numbers of acts with transparency clauses against the Convention), and that France, Germany and the UK have similar views. Kamerstukken II 2010/11, 32 802, nr. 1.

<sup>27</sup> See e.g. *Guerra*, ECtHR 19 February 1998, Reports 1998-I 53; *Loiseau (dec.)*, n° 46809/99, CEDH 2003-XII. Under what circumstances the state has an obligation to inform citizens that have a special interest in information (e.g. on local environmental matters, in order to safeguard their health and safety) is a different matter, and will more likely involve art. 2, 6 or 8 ECHR (as in *Guerra*, where the Court derived an obligation under art. 8 to disclose environmental information relating to local matters, which for local citizens was important to safeguard their health). See also ECtHR 2 November 2006, *Giacomelli v Italy*.

<sup>28</sup> See *Matky c. la République tchèque* (dec.), no. 19101/03, 10 July 2006.

<sup>29</sup> *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, §§ 35 to 39, 14 April 2009; see also *Gillberg v. Sweden* [GC] - 41723/06, ECtHR 3.4.2012, appl. 41723/06.

It is still difficult to see where the Court is heading however, because the cases so far primarily concern a refusal to grant access under existing domestic provisions. Such a refusal can infringe the right to freedom of expression, but it appears only when it involves matters of public importance and the person or organization requesting information does so with a view to furthering public debate.

If access to original documentary sources held by the government is indeed to be regarded as part of the right to freedom of expression, withholding access can breach Article 10 ECHR if the conditions of Article 10(2) are not met. Article 10(2) lists the legitimate aims for interference with freedom of expression, and further demands that the interference must be “prescribed by law” and be “necessary in a democratic society” in order to achieve those aims. In *Kenedi v. Hungary* the Court held that access to previously classified documents was indispensable for conducting legitimate historical research on the operation of state security services. The ‘obstinate refusal’ of the Hungarian government to provide access to document despite orders by domestic courts to do so constituted an unlawful interference with the applicant’s right to freedom of expression.<sup>30</sup>

Another reason why it is difficult to gauge the relation between freedom of information (access) and freedom of expression is that traditionally the ECtHR has elaborated the right to unimpaired gathering of information under Article 10 as a precondition for the press to be able to perform its role as public watchdog. It is typically in this light that a refusal to grant access to government information is viewed. In *TASZ* the Court accorded a civil society group the same protection as it traditionally extends to the press because it was involved in the ‘legitimate gathering of information on a matter of public importance’<sup>31</sup>. The Court had previously recognized civil society’s important contribution to the discussion of public affairs. In *TASZ* it ruled that if the authorities are the only source of certain information on issues of public interest, and withhold it from the press or other organizations that exercise the functions of a social watchdog, this can run counter to the government’s obligation under Article 10 to eliminate barriers to the exercise of press functions. The information that the organization sought access to was ready and available. The government therefore had a duty not to hinder the flow of information, unless disclosure could legitimately be refused on the grounds of Article 10(2) ECHR. The matter was thus more about interference with the press than a denial of a general right of access to official documents.

### *Perspectives*

The current treatment of access rights as part of freedom of expression and other fundamental rights recognized in the ECHR is not (yet?) stable and certainly lacks enough prescriptive details to regard them as a truly useful basis on which the legal framework for re-use can be built. But one may assume that the ECtHR will develop access rights further, and thus indirectly impact the EU re-use policy framework.

The Court of Justice of the EU has long recognized that the ECHR as well as common shared constitutional traditions of Member States are a source of fundamental rights which are part of general principles of EU law. The 2000 EU Charter of Fundamental Rights however, which acquired legally binding status under the Lisbon reform treaty (Art. 6 TEU), only codifies existing fundamental rights. This instrument can therefore not contribute independently to ‘harmonized’ access rights in Member States. Also, the Charter is addressed at the EU institutions (which must respect the charter rights in legislative and administrative acts) and the Member States, but the latter only is bound by the Charter rights when it is either implementing EU instruments, or acting within the scope of Union law.<sup>32</sup> The

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<sup>30</sup> ECHR 26 May 2009 (2<sup>nd</sup> Ch.), application no. 31475/05.

<sup>31</sup> *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, §§ 35 to 39, 14 April 2009. In the instant case, TASZ wanted to report on the procedure that a Member of Parliament had brought for review of the constitutionality of criminal legislation concerning drug-related offences.

<sup>32</sup> E. Spavental, *The Horizontal Application of Fundamental Rights as General Principles of Union Law*, in A. Arnulf et al (eds), *A constitutional order of States?* Hart publishing Oxford 2011.

ECHR will become directly binding upon the EU after its accession to the Convention; negotiations between the Council (EU) and the Council of Europe are in progress since 2010.

As we have seen at the EU level access to documents of the EU institutions is formalized in Regulation 2001/1049/EC and other secondary instruments. The ECJ did not recognize access as a general principle of EU law, partly because the traditions in Member States with respect to access rights are so different.<sup>33</sup> The Charter only provides for a right to access documents of EU institutions (Art. 42). So for the foreseeable future it is the European Court of Human Rights that sets the minimum standards for access rights in Member States. A notable exception is the area of spatial and environmental information.

## 6.2 EU environmental policy and access

As was indicated above, the EU is very active in legislating on the environment, and among the instruments that stand out from the perspective of re-use policy are the Access to environmental information directive and the INSPIRE Directive. Environmental policy has fundamental rights dimension, Article 37 EU Charter states that a high level of environmental protection and improvement of quality of the environment must be integral part of all EU policies. This mirrors the Union's environmental policy objectives as laid down in Article 191 TFEU.

It is of course well beyond the scope of this recommendation to analyse all environment specific EU instruments to gauge their relevance for access issues.<sup>34</sup> Indeed the same goes for other policy areas where rights to information may exist (e.g. health and education). It is however important to consider the relationship between INSPIRE and the PSI Directive, as both are presented as complementary to each other<sup>35</sup> and INSPIRE does impose obligations on Member States to make public certain spatial data.

### Access to Environmental Information

The Aarhus convention,<sup>36</sup> to which the EU is party, requires parties to it to give persons three means which help effectuate their right to live in an adequately safe environment and their (shared) duty to safeguard the environment for future generations. These means are: access to environmental information, participation in decision-making and access to justice in environmental matters. The first topic is the subject of the Directive on access to environmental information (2003)<sup>37</sup>, which replaced the 1990 Directive.<sup>38</sup> Key characteristics relevant from the perspective of re-use are the following. The Directive provides for access on request, where like under general FOIA no particular interest needs to be shown. The grounds for refusal are optional and include intellectual property rights as well as the confidentiality of commercial or industrial information to protect a legitimate economic interest (incl. that of the public sector). Administrative and independent judicial review procedures should be available with respect to refusals to grant access.

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<sup>33</sup> See e.g. Anne Flanagan, EU Freedom of Information: Determining where the Interest Lies, European Public Law Dec 13 [2007] 4.

<sup>34</sup> E.g. Regulation (EC) No 166/2006 concerning the establishment of a European Pollutant Release and Transfer Register, OJ L33, 4.2.2006, and the national publicly accessible emission registries that are also regulated by the UNECE Kieve Protocol on PRTRs (21 May 2003), an international treaty the purpose of which is 'to enhance public access to information through the establishment of coherent, nationwide pollutant release and transfer registers (PRTRs)'.

<sup>35</sup> See the explanatory memorandum to the proposal for Proposal for a Directive of the European Parliament and of the Council Amending Directive 2003/98/EC on re-use of public sector information, COM(2011)877 final at 1.3.2.

<sup>36</sup> UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus Denmark 25 June 1998.

<sup>37</sup> Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information, OJ 2003 L 41

<sup>38</sup> Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment.

Active dissemination is an important instrument: a key objective is that ‘environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information.’ The Directive prescribes a minimum list of information types that must be published pro-actively. It includes legal information on the environment, policies, plans and programmes, and monitoring data. The Directive is silent on the matter of whether re-use of environmental information can be conditioned (or even disallowed).

The Directive does allow public sector bodies to levy ‘reasonable’ charges for access, in principle even market prices.<sup>39</sup> This is in contrast to most national freedom of information laws where copies are supplied for free or against payment of a fee covering the costs of reproduction. This deviation of the more common freedom of information principle (also preferred in the PSI Directive where it concerns charges for re-use) must presumably be understood in light of the fact that the Environmental information directive applies to public sector bodies which may not be subject to general freedom of information laws in Member States. The categories of public authorities that the Directive applies to are different from those covered by the PSI Directive. It includes governments or other public administration, and generally any private or public body with (legal) public responsibilities or functions in environmental matters. The legislative and judicial branches of government are excluded.

### **Inspire and other spatial data instruments**

In theory, the INSPIRE directive and the PSI directive do not overlap because, even though the INSPIRE directive applies to a subsection of documents addressed in the PSI directive, i.e. spatial data held by or on behalf of public authorities.<sup>40</sup> INSPIRE deals with the sharing of spatial data between public authorities for the performance of their public tasks relating to the environment. The PSI directive on the other hand addresses any use of public sector data outside of the public task. INSPIRE’s legal basis is Article 192 TFEU (previously Article 175 of the EC-Treaty) on the EU’s environmental policy. In the preparatory documents for the INSPIRE directive, provisions on stimulating re-use were also included in the text of the directive, but these provisions were removed in order to clearly focus on intra public sector information sharing. While the INSPIRE directive does not directly address re-use, in practice certain elements of it can have a considerable impact on how the availability of public sector spatial data is organized.

The INSPIRE directive obliges Member States to provide citizens with public access to a network of services, including discovery services (to search for existing and available data), view services and download services. In constructing this right of access, the directive has stayed as close as possible to the directive on access to environmental information in order to prevent any disparities between the two directives. This is because there is a large overlap in their scope of application. Notably, a large part of environmental information will be considered spatial data and vice versa. Hence, the citizens can get access to these services, unless access is limited based on the same optional grounds of refusal as included in the directive on access to environmental information, including intellectual property rights, the confidentiality of commercial or industrial information and the protection of privacy. Access to the discovery services (e.g. through data search portals) should always be free of charge, and view services should in principle also not be charged for.<sup>41</sup> For downloading spatial data, no limits are imposed on the charges.

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<sup>39</sup> Art. 6 juncto recital 18.

<sup>40</sup> Provided that these public authorities also fall under the definition of public sector body in the INSPIRE directive. For a comparison on the notions of public sector body and public authority in both directives (and directive 2003/4 on access to environmental information, see K. Janssen (2010). *The availability of spatial and environmental data in the European Union. At the crossroads between public and economic interests*, Alphen a/d Rijn: Kluwer Law International.

<sup>41</sup> Unless “where such charges secure the maintenance of spatial data sets and corresponding data services, especially in cases involving very large volumes of frequently updated data” (Art. 14(2) INSPIRE directive).

Hence, these provisions could be considered to create duties for the public authorities to actively disseminate their spatial data, including many datasets that are traditionally not part of general freedom of information law but rather subject to specific regimes, such as meteorological, cadastral and topographic data. In combination with the detailed requirements on metadata and interoperability of spatial data, these services provide a valuable and well-organized system of resources for re-use. In addition, e-commerce services have to be created for the paid services, allowing (partly) online transactions, and a European portal will provide one-stop access to the data. As the Member States and public authorities have to organize the data sharing between public authorities and create agreements and licences to do this, the next step towards organizing re-use is only a small step to take.

However, important issues remain. First, as noted the INSPIRE directive only deals with sharing among public bodies and public access. Beyond imposing access obligations (search and view), the directive does not indicate what uses can be made of the data viewed or downloaded by citizens and businesses, and how such use may be conditioned. Member States can choose to allow re-use of spatial data and set conditions in conformity with the PSI Directive. But it is also conceivable that they treat the dissemination of spatial data under domestic freedom of information legislation and follow its particular provisions on re-use. In some Member States that amounts to not allowing commercial re-use, or not allowing re-use of information that is subject to (public sector) copyright or database rights.

Second, and possibly more serious, the requirement for the public bodies to provide citizens and businesses with services for viewing, overlaying, downloading and transforming data to may result in a considerable extension of the public task. Public sector bodies might enter into competition with private sector services suppliers rather than fostering the creation of new or improved services by the private sector. Public bodies may be tempted to provide their commercial services (and charge for them) under the flag of INSPIRE network services, while at the same time not allowing others to re-use the data.

From a technical point of view, the requirements of INSPIRE relating to metadata, data specifications and interoperability, and the European portal provide a big stimulus for re-use, as they make it easy to find available data, and to combine them in cross-border products and services. Hence, the INSPIRE infrastructure is a strong pillar to build on in the creation of a policy for re-use, as the policy principles that have to be adopted regarding the sharing of data between public authorities could easily be extended to re-use by the private sector and society at large. However, it has to be kept in mind that the obligations of the INSPIRE directive have created a considerable burden on the Member States and their public sector bodies. Even though a transition period is foreseen until 2019, it is expected that many public bodies will not have adequate resources to meet the intermediate and final deadlines for the creation of services and having achieved interoperability of the spatial data sets and services. Considering that key SPATIALIST players are the many large public sector spatial information producers, i.e. those among the most well-organized data holders in the spectrum (and they can provide support to the local authorities), repeating such an exercise for other types of public sector data would require an enormous amount of resources. In addition, it runs the risk of putting all the focus on technical requirements rather than actually making the data available, as is occurring now in the framework of INSPIRE.

Hence, the INSPIRE model could be a very good model to promote re-use, but it runs the risk of derailing into a technical exercise that would require too much effort from the Member States and public bodies and actually create hesitance to promote re-use.

## **7 Access and re-use: aligning interests**

In this final section the focus is on three questions. What are the relevant developments we see in the interface of access and re-use? In light of those developments, what is needed to move forward on re-use? And finally, what are the most promising possibilities to move forward?

## 7.1 Developments

### Convergence of interests?

Broadly speaking, general access laws serve public interests of a political-democratic nature. Traditional key phrases are: accountability of public administration and citizen empowerment to participate in decision-making. But transparency in government is also hailed as a means to increase efficiency of public services and improve the quality of policy making and execution. The latter are primary objectives in the specific field of spatial data: better availability of information and exchange among public sector bodies are key aspects of the EU's spatial data infrastructure INSPIRE.

If we consider EU policy, when PSI as a resource was first explored by the EC in the late 1980s, it was in the context of public sector enabling private sector actors to provide value added information services and products, in large part also with public sector bodies as customer.<sup>42</sup> This orientation soon morphed into a much broader set of objectives: stimulate the development of information markets, make government more efficient, improve the quality of e-government services, as well as harness the traditional notions of transparency as necessary for citizens to exercise their (fundamental) rights, of accountability and stimulating participation in democratic decision making processes. And indeed, the recent trend in Member States and the EU to move towards open data signifies the growing role seen for re-use norms to further democratic and political objectives. Civil society organizations play a key role in the development towards 'open data' on the web<sup>43</sup>, and their motivation often is to foster political engagement, which is also an important objective of freedom of information laws.

So can we conclude that all these respective general and particular interests converge when it comes to access? It is a legitimate question whether the interests of businesses primarily concerned with monetizing PSI are congruent with the interests of citizens and civil society organizations in transparency. It is not at all obvious that they attach the same value to information resources, or are hindered by the same restrictions on access. Another question is whether existing freedom of information type legislation is actually attuned to (commercial) re-use, even if such laws would generally allow re-use, something which is currently not the case, or at least unclear in many jurisdictions. For businesses, what matters first is whether FOI-documents have potential for exploitation to begin with. The type of documents available may not be interesting for commercial re-use. But what is equally important is the procedural side, how requests for information must be made and how they are processed (more on this below).

As to the efficiency gains attributed to re-use, it is difficult to see how making PSI available would directly contribute to the efficiency of the public sector body involved, especially considering it will in all likelihood require additional information management resources. To what extent increased transparency contributes to greater efficiency for the public sector as a whole is of course extremely difficult to assess.

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<sup>42</sup> The 1989 European Commission 'Guidelines for improving the synergy between the public and private sectors in the information market' are clearly oriented at increasing the role of the commercial private sector; ten years on commercial exploitation and improving access for reasons of democracy featured side by side in EC PSI policy, see for a historical overview: Katleen Janssen & Jos Dumortier, Towards a European framework for the re-use of public sector information: a long and winding road. 11 Int. J. L. & Info. Tech. 184 (2003).

<sup>43</sup> See for an analysis of key players in the US and UK open data initiatives: B. Hogge, Open Data study, Transparency and Accountability Initiative, Open Society Foundation, London 2010.

## **Access on request v pro-active dissemination**

Key to understanding freedom of information laws is that the public interest in disclosure is the default interest against which other interests are weighed. This explains why persons requesting information do not need to advance a motivation. The interest is a given, even if in practice the requester typically has a private interest in disclosure. It also explains the predominant role of access on request, with pro-active dissemination being of secondary importance. From the perspective of accountability, an enforceable right to access information for individual citizens (or groups) is essential, the more so since obligations to actively disseminate tend to be vague and their fulfillment is ultimately dependent on political pressures within the public administration (i.e. not enforceable in a legal sense).

Arguably, from the perspective of creating new services and products, pro-active dissemination of resources by public sector bodies is of more relevance, or at least the publication of information that aids discoverability of attractive resources. An argument often voiced in support of pro-active dissemination concerns the unpredictability of future uses: applications are developed because people have easy access to data and can combine different sources ('what you get is what you need'), not because they have a preconceived idea about what data have potential ('what you need is what you get').

And indeed the proposal for amendment highlights that data must be 'made discoverable and effectively available'<sup>44</sup> The success of recent open data initiatives seems to indicate that an awareness of positive effects of pro-active making publicly available for re-use is vital, both at the highest policy levels and in the middle layers of public administration, where the actual strategies have to be put into effect. The open data initiatives also show that the line between 'active' and 'passive' dissemination as enshrined in freedom of information laws is porous in the digital environment, which begs the question whether acts need to recognize this development.

## **7.2 What is needed?**

Considering that access is a vital element in any re-use policy, our understanding of how the diversity and complexity of national and European access norms affect the potential for re-use is still limited. The reverse is also true: do re-use policies that are primarily focused on economic benefits impact the effective operation of freedom of information laws and by extension their promotion of democratic values? This question is particularly pertinent because the definition of re-use is so wide as to cover all sorts of uses that are traditionally associated with freedom of information law (e.g. use of PSI in journalism, by civil society interest groups). A better understanding of the combined transparency norms would allow identification of bottlenecks to re-use.

Another issue concerns the bigger role for active dissemination of information by public sector bodies we see in the context of re-use. Under current freedom of information laws, active dissemination is mostly a one-directional process with little enforcement backing. What are the options to improve this situation in an efficient manner, without burdening public sector bodies with added costs for information management? Does it require legal changes or can improvements be achieved through other means? Are open data initiatives at Member State and EU level the way forward, or is an orientation on more than datasets necessary?

Considering the vast amounts of information held throughout the public sector, active dissemination policies can never replace the provision of information on request. But a potential drawback of access on request lies in the procedures. They have not been conceived with dynamic supply of bulk data in mind, of the kind that may well be the most relevant for commercial exploitation or other uses. Indeed

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<sup>44</sup> Proposal for a Directive of the European Parliament and of the Council Amending Directive 2003/98/EC on re-use of public sector information.

repeat and bulk requests are easily regarded as cumbersome and not in keeping with the spirit of Freedom of Information Acts by public sector workers having to deal with requests.

Historically the orientation on single limited size provision is understandable, and it makes sense too if one considers the sheer variety in size and activities of the public bodies covered (down to the part-time county clerk who doubles as a FOI-official for his village administration). It would be valuable to have instruments that enable an assessment of the suitability of request procedures for access aimed at re-use. What aspects are of particular importance (e.g. timeliness, possibility of bulk data, dynamic supply, continuity), which procedures work for whom, what can be improved without harming classic freedom of information concerns? Here again, the tie-in with open data initiatives is obvious, as are the possibilities to profit from the experience that large PSI holders (e.g. Statistics, public registries) already have with dynamic information supply services.

### **7.3 What is possible?**

From the discussion above on the division of competences between Member States and the EU it is clear that direct action on access poses a problem. To the extent that freedom of information laws (or their absence) and special access regimes pose a barrier to effective cross-border re-use, the EU is largely dependent on non-regulatory measures to remove these.

#### *Move to an integrated approach in spatial information*

In the area of environmental and spatial information there is possibly more room for manoeuvre. Here the EU has in fact exercised its shared competence, thus curtailing the possibilities for Member States to act unilaterally. Public administration is a major producer (outsourced or in-house) and user of geographical information. Geographic information is also persistently identified as having major potential for commercial exploitation by the private sector. It is the sector 'par excellence' where Community actions can be coordinated so as to create better opportunities for re-use.

#### *Focus on the CoE Access Convention*

Access is politically a sensitive issue, with opinions on the right balance between openness and other interests divided. As case in point are the protracted debates between the EU institutions on the 'recast' of the 2001 Regulation on public access to EU documents. The initial Commission proposal dates back to 2008. The EP has only recently adopted its position in 1<sup>st</sup> reading with many amendments that will be controversial in the Council. In Member States also, the operation of existing freedom of information acts is subject of debate, and governments have voiced concern over their sustainability.<sup>45</sup> Considering that the Community cannot move on freedom of information laws at Member State level directly, the Council of Europe Convention on access appears to be the most promising instrument to attain some level of harmonization. A certain rapprochement between the laws of Member States derives from the impact of the European Convention on Human Rights, but this seems modest so far and has little connection with re-use policy. If the Council of Europe Convention would come into effect for the EU and its Member States, that would result in a substantial approximation of laws. The Access Convention however reflects rather classical freedom of information traditions and seems little attuned to (commercial) re-use needs. It is therefore not a panacea.

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<sup>45</sup> e.g. UK (Minister Clark), The Netherlands (parliament letter minister Donner), plans to curb access in Hungary, on-going difficulty with introduction of access law in Spain.

*Embrace diversity, grow from local*

The current re-use framework of the PSI Directive is very flexible, and needs to be because it covers such a bewildering variety of public sector bodies and information across 27 nations. Considering the very limited possibilities for the EU to directly regulate access to public sector information held by Member States at a general level, a sectorial approach may work better. What is more, re-use is still predominantly issue of economic policy, as it is among the key items on the agenda pushing the creation of the Digital Single Market by 2015.

If a more detailed view is developed of any access bottlenecks on the demand sides for different domains (e.g. legal information, patent information, property information, statistics) it may be easier to formulate where action is likely to yield the greatest results, bearing in mind the PSI Directive's primary aim of enabling Community wide information services to be developed. Another strategy could be to foster the link up of local dissemination initiatives to create regional trans-border services because obviously much public sector information does not travel well.