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January 2008

## Does the Directive on the Re-use of Public Sector Information affect the State's database sui generis right?

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## Knowright conference, 18-19 September 2008, Krakow

### Does the Directive on the Re-use of Public Sector Information affect the State's database *sui generis* right?

\* Dr Estelle Derclaye

Published in J. Gaster, E. Schweighofer & P. Sint, *Knowledge rights – Legal, societal and related technological aspects*, Austrian Computer Society, 2008, p. 137-169. Pages are marked in the text with a star (\*).

#### \* 137 Abstract

*The Database Directive, which created a new database sui generis right and harmonised the copyright provisions for databases, does not exclude “state databases” from protection. The question is whether the state should benefit from such intellectual property protection. De lege ferenda, it has been advocated that neither copyright nor sui generis right should protect such databases for several reasons, a major one being that they are financed by taxpayer’s money. Several solutions exist de lege lata to try and curtail this negative aspect of the Database Directive as applicable to “state databases” (mainly the human right to information and competition law). One solution, specific to the situation of the state, has not been discussed in depth yet. It is provided by the Public Sector Information (PSI) Directive which grants the possibility for anyone to re-use public sector information (and therefore data from state databases) free of charge or at minimal cost, even for commercial purposes. Therefore, even if the state could claim sui generis right on some of its databases, the PSI Directive appears to reduce this right quite substantially. The paper examines in detail whether the PSI Directive does actually do so and analyses some national implementation laws which further highlight its ineffectiveness in curtailing the sui generis right in state databases. It then proposes solutions to remedy this problem.*

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## \* 138 Introduction

How many of us know that in the EU, the public sector<sup>1</sup> is the largest producer of information?<sup>2</sup> Well, it is, and the range of information it produces or holds is extremely rich and diverse. It comprises among others reports, internal administrative documents, geographical maps and more broadly any mapping data, statistics, company information, census data, forms, technical reports, patent information, documentaries, and, databases, such as library and museum catalogues, guides, codes of practice, collections of deeds, trains and bus schedules and exam results.<sup>3</sup> Not only is this information valuable, it is also generally complete and accurate and therefore reliable.<sup>4</sup> This obviously gives a lot of power to the state. But there is more. The *sui generis* right (also called database right), which has been with us since 1996<sup>5</sup>, creates a new intellectual property right (IPR) to protect the investment made to collect, verify or present information within a database. The right has been criticised for giving too much protection to database producers or even further for giving them a monopoly on information.<sup>6</sup> Whilst this is often not the case, it can sometimes happen and state databases constitute a prime example. Indeed, most of the time, the information contained in such databases is for the reasons stated above, the most exhaustive and most accurate on the market, and therefore the only one or if not, at least the best. The *sui generis* right that the state has therefore gives it a lot of power as it can charge monopoly prices for it. Notwithstanding this anti-competitive effect, other reasons, the strongest being surely that it leads to double taxation, entail that “state *sui generis* right” is unacceptable.

However, the state is in a special position compared to private parties. National and European laws provide that it has to give access to its documents either free of charge or at minimal cost and allow its re-use. There is therefore a conflict between the *sui generis* right and this right of access and re-use.<sup>7</sup> Or is there? How effective is the Directive on the re-use of public sector information (PSI Directive)<sup>8</sup> to trump the state’s *sui generis* right and is the Database Directive really giving such a right to the state in the first place? Despite its importance, this topic has not been investigated in

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<sup>1</sup> The terms public sector and state will be used interchangeably and refer to the same notion namely to the three state’s branches, legislative, executive and judicial.

<sup>2</sup> [4]

<sup>3</sup> [4]; [16], p. 622, 626, 628.

<sup>4</sup> As noted by [43], p. 1, this is because “all citizens targeted by the legislation in question [are] required to provide it (...) and sanctions are envisaged for anyone giving false information.”

<sup>5</sup> Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases of 11 March 1996, OJ L77/20, 27 March 1996 (further referred to as the “Database Directive”).

<sup>6</sup> See e.g. [36], p. 10; [46], p. 94; [19], p. 268–273.

<sup>7</sup> There is of course also a conflict between the database right on the one hand and the human right to information (art. 10 ECHR), national laws on abuse of right and competition rules on the other hand, but these are not explored here. For more information see e.g. [13], p. 3-23; [3], p. 233 ff.

<sup>8</sup> Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information, OJ L 345, 31 December 2003, p. 90-96 (further referred to as the “PSI Directive”).

detail yet.<sup>9</sup> This is what this paper sets out to do. Section 1 briefly reminds what the *sui generis* right is and what broad rights it gives to database producers. Section 2 concentrates on the PSI \*139 Directive. It gives the reasons why it is better that government information be available as widely and cheaply as possible and retraces the history of the Directive. It then describes what the PSI Directive provides. Section 3 looks at the situation in two Member States (Belgium and the UK) in relation to the database right, access and re-use of public sector information. The last section looks at the conflict and answers the question addressed by this paper, namely whether the Public Sector Information Directive affect state database right.<sup>10</sup> As it concludes it does not, it proposes solutions, based on the Database Directive and national laws, to curtail state *sui generis* rights.

## 1. The database *sui generis* right

As the audience will be most familiar with intellectual property rights, the description below will be a summary of the most important provisions of the Directive relating to the *sui generis* right. Copyright concepts relevant to the discussion will be assumed.

The database right was introduced in 1996 by Directive 96/9/EC on the legal protection of databases. It is provided for in chapter 2 of the Directive (art. 7-11); articles 1 and 13 are also relevant. In 2004, the European Court of Justice (ECJ) interpreted the right and reduced some of its vague and overbroad aspects.<sup>11</sup> Nevertheless, the right is still in many respects, as had been rightly criticised in the literature, over-protective of database producers' interests in comparison to that of users. This summary will highlight the main features of the right with a focus on its negative, i.e. over-protective, aspects.

This new intellectual property right grants database producers a right to prevent extraction and reutilisation of the contents of the database (art. 7(1)). Databases are defined in article 1(2) as collections "of independent works, data or other materials, systematically or methodically arranged and individually accessible by electronic or other means". Databases can be in any form, e.g. analog or digital, off or online (art. 1(1)). This definition is quite broad and it arguably includes collections of tangible

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<sup>9</sup> Questions had recently been referred to the ECJ by the German Federal Supreme Court but the case has (unfortunately for lawyers) been withdrawn. See reference for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 24 April 2007, *Verlag Schöne GmbH v. Sächsisches Druck- und Verlagshaus AG*, Case C-215/07, OJ C 155, 7 July 2007, p. 12. For the underlying Decision of the Bundesgerichtshof, 28 September 2006, [2007] GRUR, p. 500-502. For a summary of the case with comments, see [30].

<sup>10</sup> The copyright on state databases will not be examined although most conclusions would be similar. This is because often the structure of databases will not be original and no copyright will subsist. When it does, it will often not have to be re-used as such as they are many ways of organising databases and different ones might be more useful to an industry than that created by the state. Therefore, no conflict will arise.

<sup>11</sup> Four related decisions of 9 November 2004, *Fixtures Marketing Ltd v. Organismos Prognostikon Agonon Podosfairou (OPAP)* (case C-444/02) [2005] 1 CMLR 16 (further referred to as "OPAP"); *Fixtures Marketing Ltd v. Oy Veikkaus AB* (case C-46/02) [2005] ECDR 2 (further referred to as "Veikkaus"); *Fixtures Marketing Ltd v. Svenska Spel AB* (case C-338/02) [2005] ECDR 4 (further referred to as Svenska Spel) and *The British Horseracing Board Ltd v. William Hill Organisation Ltd* (case C-203/02) [2005] 1 CMLR 15 (further referred to as "BHB"), also available on [www.curia.europa.eu](http://www.curia.europa.eu) (last accessed on 29 August 2008). Unless indicated otherwise, all web sites have been last accessed on that date. For more detail on the *sui generis* right in general, see [15].

objects. Despite its breadth, the definition is somewhat circumscribed as the items must be independent from each other. This will for example exclude statistical tables whose numbers are dependent on one another, i.e. no element has autonomous informative value. In addition, the elements must be arranged systematically or methodically. This will exclude haphazard collections.

The right accrues when a qualitatively or quantitatively substantial investment in the obtaining, verifying or presenting of the materials is proven (art. 7). There is no definition of investment. However, from the Directive's recitals and the ECJ's interpretation, it is clear that investment can be financial, material (acquisition of equipment e.g. computers) or human (number of employees, hours of work). What is substantial is also left undefined in the Directive and the ECJ has not ventured in giving an interpretation. Many national courts<sup>12</sup>, and the Advocate General in its \* 140 Opinion<sup>13</sup>, have interpreted the requirement as being rather low. For example, a few days work or a few hundred pounds or euros may be sufficient to qualify the database. According to the ECJ, a *quantitatively* substantial investment refers to the amount of money and/or time invested in the database while a *qualitatively* substantial investment refers to the effort and/or energy invested in the database. The alternative requirement set out in the Directive (quantitatively *or* qualitatively) therefore allows the protection of databases which have required only a substantial investment in effort or energy rather than in money.

The ECJ construed the term "obtaining" as meaning only collecting the elements of a database. This excludes their creation.<sup>14</sup> This interpretation is very important because a lot of so called spin-off databases, similar to those in question in the ECJ cases, i.e. horseracing and football fixtures, are now excluded from protection. This includes for example event schedules, television or radio programmes, timetables, telephone subscriber data, stock prices and sports results. If the substantial investment in the collection, verification or presentation of the materials is inseparable from the substantial investment in their creation, the right will not subsist. On the other hand, verifying and presenting have been given a straightforward dictionary meaning. Verifying thus means ensuring the reliability of the information contained in the database, monitoring the accuracy of the materials collected when the database was created and during its operation. Presenting refers to "the resources used for the purpose of giving the database its function of processing information, that is to say those used for the systematic or methodical arrangement of the materials contained in that database and the organisation of their individual accessibility".<sup>15</sup> The database producer is the person who takes the initiative and the risk of investing; subcontractors are not makers (recital 41).

The database right grants to the database maker, the right to prevent the extraction and the reutilisation of a substantial part, evaluated quantitatively or qualitatively, of the contents of the protected database (art. 7). The rights of extraction and reutilisation can be compared to the rights of reproduction and communication to the public in copyright law, as they are very similar. A substantial part has not been defined but the

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<sup>12</sup> See [12], p. 275-298.

<sup>13</sup> Opinion of Advocate General Stix-Hackl, 8 June 2004, case C-46/02 (*Veikkaus*), para. 49, available on [www.curia.europa.eu](http://www.curia.europa.eu)

<sup>14</sup> See e.g. paragraph 24 (*Svenska Spel*).

<sup>15</sup> Paragraph 27 (*Svenska Spel*).

ECJ said it had to represent a substantial investment. The substantial part evaluated quantitatively refers to the volume of the data extracted or re-utilised from the database and it must be assessed in relation to the volume of the contents of the whole of the database. The substantial part evaluated qualitatively refers to the scale of investment in the obtaining, verification or presentation of the contents, regardless of whether that subject (or part) represents a quantitatively substantial part of the contents.<sup>16</sup> Users can freely extract or re-utilise insubstantial parts so long as they do not do it repeatedly and systematically so that the accumulation of insubstantial parts becomes a substantial part.<sup>17</sup>

There are three exceptions to the rights but they are all optional so Member States did not have to implement them. Thus the number of exceptions varies from Member State to Member State. According to article 9 of the Directive, lawful users, i.e. those who have acquired a lawful copy of the database<sup>18</sup>, can (a) extract a substantial part of the contents of a non-electronic database for private purposes, (b) extract a substantial part of any database for the purposes of illustration for teaching or scientific research as long as it is not for commercial purposes and the source is \* 141 indicated and (c) extract and/or reutilise a substantial part of any database for the purposes of public security or an administrative or judicial procedure. The right of the user to use insubstantial parts not amounting to a substantial part (art. 8) has been made imperative (art. 15) but not the three optional exceptions. Therefore, database makers can override them by contract and by technological protection measures (TPMs) provided, however, that article 6(4) of the Copyright Directive<sup>19</sup> is respected.

Finally, databases are protected for 15 years from their completion or their publication (art. 10). Furthermore, each time the database maker reinvests substantially in the obtaining, verifying or presenting of the elements of her database and there is a substantial change, he or she gets a new term of 15 years. What is unclear however is whether he or she gets it on the whole new database which comprises the “old” elements (i.e. those whose term has expired) or only on the elements which have newly been included, verified or presented. Therefore, the right can last potentially perpetually.

Of particular interest to this article, because it touched upon state databases, is article 8 of the Directive Proposal which was finally deleted from the text. It provided for a compulsory licence and read: “1. Notwithstanding the right provided for in article 2(5) to prevent the unauthorised extraction and re-utilisation of the contents of a database, if the works or materials contained in a database which is made publicly available cannot be independently created, collected or obtained from any other source, the right to extract and re-utilise, in whole or substantial part, works or materials from that database for commercial purposes, shall be licensed on fair and non-discriminatory terms. 2. The right to extract and re-utilise the contents of a

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<sup>16</sup> Paragraph 70 and 71 (BHB).

<sup>17</sup> Article 7(5) and 8(1) as construed by the ECJ, paragraph 86 (BHB).

<sup>18</sup> No clear guidance is given in the Directive as to who is a lawful user and the ECJ did not have to interpret the term. This is our preferred interpretation as well as that given by several authors. See [15], p. 120ff. and authors cited.

<sup>19</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L167/10, 22 June 2001 (also called the Copyright or InfoSoc Directive).

database shall also be licensed on fair and non-discriminatory terms if the database is made publicly available by a public body which is either established to assemble or disclose information pursuant to legislation, or is under a general duty to do so". Also of interest for the purposes of this paper is article 13 which provides that the *sui generis* right is without prejudice to other forms of protection of the database such as among others the legislation on access to public documents.

It can now be seen what is still problematic with the *sui generis* right. While the rights are broad (even though not unduly), the exceptions are scarce, very narrow and in practice, their existence depend on each national law. Therefore, in some countries they may well be bluntly absent. Users, and lawful ones at that, can never reuse substantial parts of a database for commercial purposes without authorisation. If they want to reuse insubstantial parts, they must make sure that these parts do not amount to a substantial part. The terms "substantial part" being by definition vague and therefore subject to interpretation in each case, it puts users in an awkward situation when they want to decide whether to use bits of databases: should they ask permission or not? Finally, the right is in effect, for dynamic databases, perpetual. This is because there is no obligation for the database producer to identify those elements on which there has been no new investment, and if the user cannot identify them, he or she must always ask permission if he or she wants to use substantial parts in most cases.

## **\* 142 2. The Directive on the re-use of public sector information**

### **2.1. Rationale for open access to PSI and history of the Directive**

Open access to government documents is not a new issue. It has its origins in government secrecy, which dates back to the Old Regime. Secrecy, which initially had to insure that tasks be efficiently executed by the administration, became a tool of power.<sup>20</sup> The late 18<sup>th</sup> and 19<sup>th</sup> centuries' philosophers and economists Jeremy Bentham and John Stuart Mill, among others, exposed the "evil" of secrecy namely that if the government can keep things secret, it will abuse its power.<sup>21</sup> Indeed, as happened, when the government started cultivating secrecy vis-à-vis its citizens as well as the Parliament without this power shift being accompanied by the setting up of control by the Parliament or even by the citizen him- or herself, it was thought that this situation could not be considered satisfactory from the standpoint of democratic demands.<sup>22</sup> It is now considered that freedom of information is the basis of democracy.<sup>23</sup> Sweden was the pioneer, requiring open access to government information as early as 1766.<sup>24</sup> In 1981, the Council of Europe took a recommendation to encourage members to adhere to this basic democratic principle. It recommends that members make "the utmost endeavour [...] to ensure the fullest possible availability to the public of information held by public authorities".<sup>25</sup> The

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<sup>20</sup> [16], p. 19- 20.

<sup>21</sup> [37], p. 2.

<sup>22</sup> [16], p. 20, citing a great number of authors.

<sup>23</sup> [16], p. 21; [24], p. 185-186. Recital 16 of the PSI Directive mentions this too.

<sup>24</sup> [37], p. 30; [16], p. 169. See Freedom of the Press act 1766. On the Swedish law, see e.g. [42], in [37], p. 35-54.

<sup>25</sup> See preamble of Recommendation n° R(81)19 of the Committee of Ministers of 25 November 1981 of the on access to information held by public authorities, available on



recommendation contains the basic principles concerning the recognition and organisation of an access right to information detained by administrative authorities. Its content can be summarised as follows.<sup>26</sup> It is a right of access for all persons, natural or legal, which are under the jurisdiction of the state. Access is exercised by request. Requests must not be justified by a particular interest. Only restrictions necessary to the protection of legitimate public or private interests in a democratic society are admissible. Finally, refusal decisions must be justified and subject to an appeal. All national legislations adopted by the Members of the Council of Europe are similar to the recommendation.<sup>27</sup> Even before the recommendation, some countries had legislation on access to public information mainly based on the U.S. 1966 Freedom of Information Act.

Of course freedom does not mean complete gratuity although this should normally be the rule<sup>28</sup>, as shall be seen below. Apart from the already strong reason mentioned above for the openness of government information, there are several other reasons for making government documents, and more generally public sector information, available to the public. They can be classified in positive and negative reasons.

\* 143 Negative reasons:

Linked to the question of abuse of power described above, if the government can charge for its information and holds a monopoly it can of course abuse the latter and charge excessive prices.<sup>29</sup> This has happened often in the not too distant past. Before the PSI Directive, several firms complained that governments were engaging in price discrimination to drive its competitors out of business.<sup>30</sup> Secrecy is not only bad in itself but it creates inequality as, if the state keeps the information, it creates an inequality compared to the public who does not.<sup>31</sup> Secrecy may also lead to corruption and waste of public money.<sup>32</sup> Another major reason is that it is unfair that the government charges for the information. It leads to double taxation since public sector information is financed by taxpayer's money.<sup>33</sup> It is also unfair or perhaps even illogical to charge the public for the information because by delegation, the public is in fact the author of the information and could even be said to own copyright or related rights (such as the *sui generis* right) in it, again by delegation.<sup>34</sup>

Positive reasons:

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[http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/administrative\\_law\\_and\\_justice/texts\\_&\\_documents/Conv\\_Rec\\_Res/Recommendation\(81\)19.asp](http://www.coe.int/t/e/legal_affairs/legal_co-operation/administrative_law_and_justice/texts_&_documents/Conv_Rec_Res/Recommendation(81)19.asp)

<sup>26</sup> [16], p. 168.

<sup>27</sup> [16], p. 168.

<sup>28</sup> An argument can be made that “it is usually a small section of the public who wish [sic] to use a particular public sector information product and that the user should not be subsidised by the general public and that he should make some contribution towards the costs of production.” See [39], p. 6. Similarly, see [24], p. 192 (“Since in the end public sector information is paid for by the taxpayer, the question could be asked if public authorities have the right to charge for the access to their information. On the other hand, some information is only requested by a very small group of interested parties, and it would not be fair either to let those requests be financed by contributions of the general public.”)

<sup>29</sup> [5], p. 87.

<sup>30</sup> [60], p. 9 citing Switzerland and Germany as examples.

<sup>31</sup> [37], p. 4.

<sup>32</sup> [16], p. 23.

<sup>33</sup> [5], p. 87; [32], 273; [7], p. 6.

<sup>34</sup> Extending the argument of [20], p. 243 and ff. who discusses Crown copyright.

The strongest positive reason is perhaps that the right of access to information is a human right.<sup>35</sup> Another reason is that open access to PSI will increase participation in the decision process. With this information, the citizen can fully participate to the *res publica*.<sup>36</sup> It should strengthen the confidence of the public in the administration.<sup>37</sup> In addition, “openness to governmental processes is essential to good governments”.<sup>38</sup> If the public knows about the decision taken in its name and has the possibility to express its views on them, then the quality of the decisions will improve especially because so the makers can say that “they are acting in the public view”.<sup>39</sup> It is also accepted that public service is governed by the principle of gratuity. “The only possible interpretation of this principle is that the civil service takes in charge all the costs necessary for the accomplishment of its mission. Certainly, the cost of a copy excepted, such would be the case if the public information service consisted of a simple right of view on site.”<sup>40</sup>

The most important reason, though, is economic. Public authorities are afraid to lose revenue by freeing up their information for which they used to charge.<sup>41</sup> Loss of revenue is therefore the main argument against freeing government information. But in fact numerous economic studies and simply experience in various countries have amply shown that by giving the information away, returns from taxation will far exceed the revenue public authorities expect from the sale of their information in the first place.<sup>42</sup> In other words, cost recovery is less economically efficient than \*144 open access.<sup>43</sup> In yet other words, if PSI is freed, it will create a new information economy. Investors will want to invest in value-added information services. This will create jobs and new products on which the government will charge taxes. The monies collected from these taxes will be higher than the amount it would make by charging businesses for the raw data in the first place.<sup>44</sup> Therefore, “the free availability of

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<sup>35</sup> Article 10 European Convention on Human Rights (ECHR).

<sup>36</sup> [16], p. 22; see also [58], p. 94 and Belgian law relating to the publicity of administration of 11 April 1994 (stating that the law’s goal is to break the distrust and incomprehension of the citizen towards the public authority); [24], p. 185-186.

<sup>37</sup> See preamble of the recommendation.

<sup>38</sup> [37], p. 2.

<sup>39</sup> [37], p. 4.

<sup>40</sup> [43], p. 7.

<sup>41</sup> [5], p. 86.

<sup>42</sup> [60], [61], p. 137 ff. In his paper, Weiss shows the benefits of open access in contrast with cost recovery, giving examples of failed or limited cost recovery experience both in the USA and Europe. For this, he cites a great number of economic studies to which the reader is referred to. For instance, a study analysed the difference between commercial meteorology markets in USA and Europe, showing that of the USA is much healthier than that of Europe, owing again to differences in data policies. See his p. 8. He concludes his study, p. 17, by stating that there is even consensus that charging at the marginal cost of dissemination for PSI leads to optimal economic growth and “far outweigh[s] the immediate perceived benefits of aggressive cost recovery”. On this reason, see also [7], p. 6. For a recent UK economic study, see [38]. Many other studies are also quoted in the Explanatory Memorandum to the PSI Directive, COM (2002) 207 final, p. 5-6.

<sup>43</sup> [60], p. 2. In addition, the state might not always have the resources to add value to the information. So if it does not allow anyone to do so, such valuable added service will never come to existence, which will decrease social welfare. According to interviews on lawyers and non lawyers about planning and environmental legal information carried out by [32], p. 272-273 whilst basic information is useful, what users want is editorial input to control and make the basic legal information coherent.

<sup>44</sup> See e.g. [24], p. 185-186. See also [7], p. 6, noting that normally the administrations’ profits from charging for PSI are very modest. See also [60], p. 14 noting that the UK “Met Office” decided to make significant categories of data available free of charge because it does not make many profits from it.

public information directly conditions the competitiveness of the European industry.”<sup>45</sup> A recent study commissioned by the EU estimates the overall market size for PSI in the EU to an enormous 10 to 48 billion euros.<sup>46</sup> Other negative aspects of cost recovery are that it prevents the constitution of transnational e.g. environmental or meteorological databases<sup>47</sup> and often leads to cross-subsidies between government branches.<sup>48</sup> If the government wants to continue its information business, the best solution is to separate the commercial activities of the government from the non-commercial ones.<sup>49</sup>

There are of course instances where secrecy is crucial. There are therefore commonly accepted exceptions to the general rule that government information should be free. These exceptions are mainly<sup>50</sup>:

- information concerning international relations and national security. The main reason is that each country needs to retain some secrecy regarding its defence plans and also that it might embarrass the government if information is disclosed openly to other governments and therefore endanger national security.
- Information relating to law enforcement and the prevention of crime. If the government disclosed the ways it finds criminals it would be counterproductive.
- Discussions, advice given and opinions expressed with the government. This is because many decisions are generally taken after long discussions which are often hotly debated and people change their minds. If such discussions were always open, government employees would feel more constrained when expressing their opinions. This would damage open debate which consequently would lead to less good decisions, to the detriment of the \*145 government and the public itself.<sup>51</sup> Of course, when the policy has been decided, secrecy is no longer required.
- Information obtained in confidence from outside sources. This is an obvious application of the principle of confidential information. Another justification to this exception is that the government needs to maintain sources of information which “may dry up if its informants cannot rely on any assurance of confidentiality given to them by the government”.<sup>52</sup>
- Information which if disclosed would violate an individual’s right of privacy
- Information which “if disclosed or disclosed prematurely, would confer an unfair competition on some person or would subject some person, or the government, to an unfair advantage.”<sup>53</sup>

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<sup>45</sup> [17], p. 133.

<sup>46</sup> [9]

<sup>47</sup> [60], p. 3.

<sup>48</sup> [58], p. 97.

<sup>49</sup> [60], p. 18. In Sweden, where the state practiced price discrimination, the Statskontoret recommended that the commercial arm of the relevant governmental department be completely privatised and that its data be placed in the public domain. Ibid., p. 10. [58], p. 97 also notes that cross-subsidies between government branches has led to the splitting in some countries of the commercial arm of the public sector organisation. See also recital 9 of the PSI Directive which aims to avoid cross-subsidies.

<sup>50</sup> [37], p. 8-17 explains their rationale in detail.

<sup>51</sup> [37], p. 11. See also [16], who notes at fn. 34 who also notes that this way government employees do not lose their time by answering questions on policies not yet decided.

<sup>52</sup> [37], p. 14.

<sup>53</sup> [37], p. 17.

- Information covered by legal professional privilege.

It is in this context and for most of the reasons explained above that the PSI Directive was adopted.<sup>54</sup> Its origins can be traced back almost 20 years ago now, when in 1989, the Commission already drafted some guidelines for improving the synergy between the public and private sectors in the information market<sup>55</sup> whose goals were similar to those now enshrined in the Directive. In 1992, the Member States themselves had invited the Commission and the Council of the European Communities to legislate to set up an access to information policy to the information that the Commission and Council hold. These exhortations led to the adoption by the Council and Commission of decisions setting up such access.<sup>56</sup> Three years later the European Parliament did the same. The right now appears in article 255 ECT.<sup>57</sup> The Council carried out its duty mentioned in paragraph 2 of article 255 in 2001 with Regulation 1049.<sup>58</sup> The right to access PSI now forms part of the duty of transparency which is enshrined in article 42 of the Charter of Fundamental Rights of the European Union of 7 December 2000, as modified on 12 December 2007. There is also a right of good administration in article 41 of the Charter, which is based on decisions of the Community courts. It concerns among others the justification of administrative decisions.<sup>59</sup> The PSI Directive has its more direct origins in the Green Paper on Public Sector Information in the Information Society, issued in January 1999. After the Green Paper, the Communication “eEurope 2002: creating an EU framework for the exploitation of public sector information” was adopted on 23 October 2001. It announced a Directive proposal which led to the Directive, which was enacted on 17 November 2003.

## \* 146 2.2. Analysis of the provisions of the Directive

As rather discretely stated in recital 5 of the Directive, the main goal of the Directive is to stimulate the growth of the European information market by broadly allowing PSI *re-use*.<sup>60</sup> Access is normally already an established fact because of the Charter and national laws on public access to PSI. Indeed, Europe wants to become “the most competitive and dynamic knowledge-based economy in the world. Estimates had shown the information industry in Europe to be smaller by a factor of five when

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<sup>54</sup> For a short history of the Directive, see [http://ec.europa.eu/information\\_society/policy/psi/important\\_dates/index\\_en.htm](http://ec.europa.eu/information_society/policy/psi/important_dates/index_en.htm)

<sup>55</sup> Official Community Publication, ISBN 92.825.9238.3 cited by [43], p. 2.

<sup>56</sup> [16], p. 171-172. See Decision of the Council 93/731/EC of 20 December 1993, OJ 31 December 1993, n. L 340/43 and Commission Decision 94/90/CECA/Euratom, 8 February 1994, OJ 18 February 1994, n. L 46/58.

<sup>57</sup> It states that "1. Any citizen of the European Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission Documents, subject to the principles and conditions to be defined in accordance with paragraphs 2 and 3. 2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in article 189b within two years of the entry into force of the Treaty of Amsterdam. 3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents."

<sup>58</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, 31 May 2001, 43. On article 255 ECT and Regulation 1049, see [26], p. 31-37.

<sup>59</sup> [10], p. 18.

<sup>60</sup> [4]; [7], p. 5.

compared to that of the United States.”<sup>61</sup> To do so, the Directive sets out minimum<sup>62</sup> harmonisation conditions so that this growth happens without distortions of competition between the companies exploiting that PSI.<sup>63</sup> Indeed, before the Directive Member States had varied policies concerning PSI; in some countries, it was freely available, in others, not. Thus incidentally, the Directive also aims to improve access to information.<sup>64</sup>

The main provisions of the Directive can be summarised as follows. Chapter I sets out general provisions. The Directive’s first article says that the “Directive establishes a minimum set of rules governing the re-use and the practical means of facilitating re-use of existing documents held by public sector bodies of the Member States.” It then proceeds to exclude a number of documents such as most importantly, those on which third parties hold IPR<sup>65</sup>, those of public service broadcasters and their subsidiaries, those held by educational and research establishments, such as schools, universities, archives, libraries and research facilities including, where relevant, organisations established for the transfer of research results, and documents held by cultural establishments, such as museums, libraries, archives, orchestras, operas, ballets and theatres. It also does not apply to documents which are excluded by national access regimes including on the grounds of the protection of national security, defence, or public security, statistical or commercial confidentiality (art. 1.2). The Directive does not apply when citizens or companies have to prove a particular interest under a Member State’s specific access regime to obtain access to documents. The Directive is without prejudice to those existing national access regimes (art. 1.3). This should mean that when a document falls within the scope of both the national law implementing the PSI Directive and the national law on access to PSI, if the latter asks the person to prove an interest, the former does not apply. In other cases where none of the laws required an interest, it seems that again the latter will prevail over the former.

The Directive then defines what it means by public sector body, document and re-use (art. 2). A public sector body is the State, including regional and local authorities and bodies governed by public law. The latter are then further defined and include among others bodies financed for the most part by the State (art. 2.2.c). As rightly noted by a commentator about the similar provision in the UK implementation of the Directive, it is safer to write down who owns the information so that it is clear whether the provision on re-use of PSI apply or not.<sup>66</sup> It should be added that such agreement does not prejudge of the actual ownership of the information. Indeed, if the contract states that the information is owned by a private party but it has been financed in most part by the state the Directive should still apply. This is problematic though in the sense that it might be in the state’s (and not only in the private party’s) interest to ensure that the information processing \*147 (gathering, verifying, presenting etc.) is financed in most part (50.1% should do) by the private party so that it escapes the provisions of

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<sup>61</sup> [56].

<sup>62</sup> That means that Member States can go beyond those minimum standards, as specifically stated in recital 8.

<sup>63</sup> See [3], p. 255.

<sup>64</sup> [4]

<sup>65</sup> See also recital 22.

<sup>66</sup> [4], also noting that “parties are advised to nominate one partner to process PSI requests to avoid unnecessary bureaucracy.”

the Directive. Indeed, the state might strike a deal with the private party to obtain a percentage of the profits or any other advantage. There appears to be no safeguard on this point in the Directive. The Directive does not further define the State. Does that include all three branches? This is not as straightforward as it appears as some national access regimes do not include legislative and judicial documents.<sup>67</sup>

A “document means “(a) any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording); (b) any part of such content” (art. 2.3.). Recital 9 specifies that the definition does not include computer programs. Recital 11 further states that “it covers any representation of acts, facts or information - and any *compilation* of such acts, facts or information - whatever its medium (written on paper, or stored in electronic form or as a sound, visual or audiovisual recording), held by public sector bodies (emphasis added).” This should therefore include databases. It is clear that the documents must already exist in the sense that the public authorities are not obliged to *produce* or *adapt* a document for an applicant (art. 5).<sup>68</sup> Finally, to put it simply, re-use is defined as the use of documents, for commercial or non-commercial purposes, by private persons (be they citizens or companies) other than public sector bodies.

Article 3 then contains the general principle: “Member States shall ensure that, where the re-use of documents held by public sector bodies is allowed, these documents shall be re-usable for commercial or non-commercial purposes in accordance with the conditions set out in Chapters III and IV. Where possible, documents shall be made available through electronic means.” Thus, the Directive does not really set an obligation to Member States at all.<sup>69</sup> There is a pre-condition for re-use. The latter must be allowed. Who decides this? The State. Simply because of article 3, the Directive may well be a hit and miss. It is doubtful that the Directive sets out a duty to supply the information in the first place.<sup>70</sup> As well stated by some commentators, the “Directive thus seems to contain merely a moral duty for public sector bodies to facilitate the re-use of their information.”<sup>71</sup> Article 3 and recital 9 “leave[s] it open to any public sector body to refuse to licence PSI as long as a reason is given. If practiced extensively, this provision would undermine the entire Directive.”<sup>72</sup> However, “whilst it does not oblige public sector bodies to permit re-use of their documents, there is a presumption that information will be available for re-use unless there are good reasons otherwise.”<sup>73</sup> Also, many Member States have access regimes in place.<sup>74</sup> But these may not be similar (the law being therefore not harmonised at EU level) and can always be repealed. Also, strictly speaking, if a Member State does not want to supply information, it can safely shelter itself under recital 9.

The second and third chapters of the Directive concern the procedural aspects of requests for re-use. It requires that public sector bodies should process such requests within a reasonable time consistent with that already stated in national access regimes

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<sup>67</sup> See Belgium below.

<sup>68</sup> Nor to provide extracts, in this case at the condition however that it would “involve disproportionate effort, going beyond a simple operation.”

<sup>69</sup> This is clearly stated in recital 9.

<sup>70</sup> [3], p. 255.

<sup>71</sup> [3], p. 255-256.

<sup>72</sup> [7], p. 7.

<sup>73</sup> [4]

<sup>74</sup> On these, see below section 3.

or otherwise no longer than 20 days (an additional 20 days can be added if the request is complex or extensive), and process the request as well as give access to the documents wherever possible electronically (art. 4.1, 4.2 and 5.1). If \*148 the public sector body refuses, it must state the reason and the means of redress if the applicant wants to appeal the decision (art. 4.3 and 4.4.). Article 6 sets out the principles governing charging. Where charges are made, the total income from supplying and allowing re-use of documents shall not exceed the cost of collection, production, reproduction and dissemination, together with a reasonable return on investment. Article 7 then sets out a transparency requirement according to which the public sector body must publish conditions and standard charges for re-use of its documents. They can allow the re-use only at some conditions if they wish but they should not restrict competition (art. 8). Any conditions for the re-use shall be non-discriminatory for comparable categories of re-use (art. 10). If a public body re-uses its information in competition with private entities, it must apply itself the same conditions that it applied to them. Exclusive agreements are also forbidden, except when they are in the public interest (art. 11).<sup>75</sup> Finally, the Directive would not be so useful if Member States had no obligation to indicate what their PSI is and where it can be found. Article 9 therefore provides that “Member States shall ensure that practical arrangements are in place that facilitate the search for documents available for re-use, such as assets lists, accessible preferably online, of main documents, and portal sites that are linked to decentralised assets lists”.<sup>76</sup>

As can be seen, the text of the Directive does not address the issue of the clash between the administration’s IPR on its documents and its “obligation” to let third parties freely re-use them. However, recitals 22 and 24 contain some indication. Recital 22 first clearly states the intellectual property rights of third parties are not affected by the Directive. This is a simple logical reminder as the Directive only deals with state materials. It then defines intellectual property rights for the purpose of the PSI Directive. They include only copyright and related rights, including *sui generis* forms of protection but not industrial property rights. The recital goes on to say, more controversially: “The Directive does not affect *the existence or ownership of intellectual property rights of public sector bodies, nor does it limit the exercise of these rights in any way beyond the boundaries set by this Directive. The obligations imposed by this Directive should apply only insofar as they are compatible with the provisions of international agreements on the protection of intellectual property rights*, in particular the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). *Public sector bodies should, however, exercise their copyright in a way that facilitates re-use*”(emphasis added).<sup>77</sup> Recital 24 simply states that the Directive is without prejudice to the Copyright in the Information Society and Database Directives. These recitals certainly are the fruit of compromises between Member States partisans of open access and those more inclined to be able to continue charging fees for their documents wherever possible. It puts the finger on the, admittedly dolorous, issue that the Directive did not tackle and

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<sup>75</sup> [4], saying that “for example where the PSB [4] could demonstrate that no commercial publisher was willing to publish the document without an exclusive licence and this would affect the provision of a public service.”

<sup>76</sup> National laws may already provide for this obligation. See e.g. the UK Freedom of Information Act; [47], at 333.

<sup>77</sup> On the respect of international conventions, see also art. 1.5 of the Directive.

which it should have in order to achieve proper harmonisation, namely whether there should be any intellectual property right on state materials.<sup>78</sup> Recital 22 almost gives conflicting messages. Your IPR are not affected neither in their existence, ownership and even exercise but you should exercise your IPR in a way that facilitates re-use. In fact, the sentence is even less broad, because it only mentions copyright. This means that Member States could always argue that they can continue exercising their related rights and their database *sui generis* right as fully and \*149 disregard the Directive. As can be seen, to say the least, the Directive leaves a wide margin of manoeuvre to Member States.<sup>79</sup>

The Directive had to be implemented by 1 July 2005 but many Member States were late and some were sued by the Commission (e.g. Belgium which was last to implement<sup>80</sup>). Article 13 requires the Commission to carry out a review of the application of the Directive by 1 July 2008. A consultation has been launched to this effect and has been extended until 15 September 2008.<sup>81</sup> The consultation document asks among others whether it “would be appropriate to include cultural establishments, educational and research organisations and public service broadcasters within the scope of the Directive” and whether “legislative amendments [should] be introduced in the Directive to make it more efficient, and if so which ones and why”. The Commission also asks whether guidelines on proper implementation and application of the Directive would be useful.<sup>82</sup>

### **3. The national experience**

As seen above, the relationship between the *sui generis* right and government data is barely addressed in the Database and PSI Directives. What about the national laws implementing them? I chose two countries which present some differences and some similarities in this regard, and not only because one is from the civil law tradition (Belgium) and the other from that of the common law (the UK). Although the object of the article is not to look at them in detail, the national laws on access to public documents which existed before the PSI Directive and complement it (or “access regimes” as the PSI Directive calls them) offer points of comparison too. The following sections on Belgium and the UK will review in turn the laws implementing the Database Directive, with a focus on the *sui generis* right, the laws on access to PSI or administrative documents and the laws implementing of the PSI Directive.

#### **3.1. Belgium**

Before tackling the Belgian and British implementations of the *sui generis* right, a quick reminder of the international and national context on copyright on official documents is in order. We shall see that the origins of the problem (i.e. that official documents can be protected by copyright) is that the major international copyright convention does not settle the question.

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<sup>78</sup> [40], at 41, cited by [32] p. 249.

<sup>79</sup> [58], p. 106.

<sup>80</sup> [7], p. 2. It notified the Commission that it had done so only on 8 May 2008.

<sup>81</sup> See [http://ec.europa.eu/information\\_society/policy/psi/docs/pdfs/online\\_consultation/review.pdf](http://ec.europa.eu/information_society/policy/psi/docs/pdfs/online_consultation/review.pdf)

<sup>82</sup> A recent paper has set out answers and recommendations to the consultation on behalf of the important organisation ePSIPlus. For details, see [7], p. 2.



Article 2 bis.1 of the Berne Convention provides that “Union Members may exclude from protection political speeches and speeches delivered in the course of legal proceedings.” Similarly, article 2.4 provides that “it shall be a matter for legislation of the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature and to official translations of such texts”. According to some commentators, there are two categories of official material.<sup>83</sup> The first category is composed of sources of the law of the land i.e. statutes, statutory instruments and regulations, decrees, bills, reports of parliamentary debates and records of parliamentary committees, and judgments of courts and tribunals. In the second category we find “documentation of government departments, official reports and other material emanating \*150 from or in connection with the administration of the government.”<sup>84</sup> The ways countries treat these two types of official texts varies considerably. Civil law countries often provide that material in the first category is not protected by copyright.<sup>85</sup> However, government reports and documents prepared by government departments are generally not within this exclusion and are therefore protected by copyright according to the normal rules.<sup>86</sup> By contrast, in the UK and the Commonwealth countries and other countries whose legal system is based on British law, the rule generally is that the Crown has copyright in Acts of Parliament and other items of official material created under its control and the Parliament has Parliamentary copyright in bills and other parliamentary material created under its authority.

### 3.1.1. Copyright and database right

What is the situation in Belgium in relation to the *sui generis* right?

The provisions relating to the *sui generis* right of the 1998 Database Act<sup>87</sup> implementing the Database Directive do not address the issue of ownership of *sui generis* right in state information. The exception for official acts<sup>88</sup> was added neither to copyright nor to *sui generis* right for databases. This is so although article 6.2.d of the Directive authorised implicitly such exception as it allows Member States to introduce exceptions traditionally admitted by their copyright law.<sup>89</sup> However, one of the Database Act’s provisions (the new art. 20 ter), which modifies the Belgian copyright act<sup>90</sup>, states that unless provided otherwise by contract or in the statute of civil servants, the employer is presumed to have the economic rights relating to

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<sup>83</sup> [51], n° 6.35, p. 254.

<sup>84</sup> [51], n° 6.35, p. 254.

<sup>85</sup> See e.g. art. 5 German law which excludes laws, orders, government reports and decisions and similarly, art. 8 of the Austrian law; art. 5 of the Italian copyright act, which excludes “official acts of the state and of the public administrations whether Italian or foreign”.

<sup>86</sup> [51], n° 6.36, p. 255. See e.g. article 9 of the Swedish copyright act which excludes official maps from the exclusion of copyright protection. [50], p. 232. France has a tradition of excluding public documents but there are also exceptions to this exclusion. See [34], n° 106, p. 90.

<sup>87</sup> Law of 31 August 1998, implementing in Belgian law the European Directive of 11 March 1996 relating to the legal protection of databases, M.B. 14 November 1998, in force 14 November 1998 (“Database Act”).

<sup>88</sup> See next paragraph.

<sup>89</sup> [16], p. 621. It is arguable however whether article 8 (paragraph 2 at least) is an exception to copyright.

<sup>90</sup> Copyright act of 1994 as last amended by the act of 22 May 2005, implementing in Belgian law the European Directive 2001/29/EC relating to the harmonisation of certain aspects of copyright and related rights in the information society, M.B. 27 May 2005, p. 24997 (“Belgian Copyright Act”). The term “copyright” will be used throughout this section to mean “authors’ right” although technically speaking the terms “authors’ right” should be used as Belgium is a civil law country.

databases created in the non cultural industry by one of its employees or agents in the course of their duties or following the employer's instructions. Therefore, it is implicit that the state can have copyright in its databases. This is so even if according to article 8(2) of the copyright act, official acts of the authority are not protected by copyright.<sup>91</sup> Indeed, the notion is not defined in the act but it is considered that not all acts emanating from the administration are official acts.<sup>92</sup> In addition, the notion of "official act" does not equate with that of "public document". There are many public documents which can benefit from IPR and which are not official acts.<sup>93</sup> It has been submitted that "official act" in the copyright act means acts, regulations and executive measures, parliament works, judgments and indictments of the Crown Prosecution Service.<sup>94</sup> The criterion for an act to qualify as official is \*151 supposedly the exercise by the authority of its *imperium*.<sup>95</sup> The act also implies that the state can have copyright as its article 3.3 mentions it as a possible employer and provides the same provisions for agents as for employees. Thus there can be a conflict between the Belgian legislation implementing the PSI Directive and copyright law. Since the database act is silent on this issue concerning the *sui generis* right, by analogy with the situation under the copyright act, one could say that the same conflict also applies to the *sui generis* right.

### 3.1.2. Access to information regimes

In Belgium, since 1993, the right to access PSI is a fundamental right. Article 32 of the Constitution provides that "everyone has the right to consult each *administrative* document that concerns him or her and to receive a copy, except in the cases and conditions laid down in the federal law, decree or rule provided for in article 134". The *travaux préparatoires* specifically mention that this right is necessary to ensure democracy. "It is the condition *sine qua non* of the effectiveness of the other rights and freedoms recognised to the individual and at the collective level, the condition *sine qua non* of an independent and efficient administration, by the existence of a greater external control".<sup>96</sup> This constitutional right establishes the rule of publicity, and even of transparency, of the administration.<sup>97</sup> In fact, as we have seen in section 2.1, this duty of transparency is now enshrined in the Charter of Fundamental Rights of the European Union. But the right of access is not absolute because the Constitution allows the federal and federate entities to derogate to it.<sup>98</sup> In Belgium, the federate entities, which consist in six different regions and communities, can in addition to the federal level take decrees to do so.<sup>99</sup> All six levels of power as well as

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<sup>91</sup> In addition, article 8(1)(2) states that speeches pronounced in deliberating assemblies, public audiences of courts and tribunals or in political meetings can be freely reproduced and communicated to the public, but the author alone has the right to publish them separately.

<sup>92</sup> [53], p. 780 citing [21], p. 437. See also CTB/96/7 and CTB/96/122, cited by [48], p. 37.

<sup>93</sup> [16], p. 622.

<sup>94</sup> [16], p. 620, citing [55], p. 5.

<sup>95</sup> [16], p. 620, citing [55].

<sup>96</sup> [33], p. 57.

<sup>97</sup> The two terms are not synonymous. Publicity is institutional whilst transparency is relational. Transparency is constituted of three things: knowledge (the citizen knows what information the public authorities have on him), intelligence (the citizen wants to understand why a decision has been taken in his or her favour or to his or her detriment; thus the administration must justify its decisions) and participation. See [10], p. 15-17.

<sup>98</sup> [53], p. 765.

<sup>99</sup> Communities and regions take decrees. However, decrees of the region of Brussels-Capital are called "ordonnances".

the provinces and municipalities have adopted quasi identical provisions, all loyally following the federal law.<sup>100</sup>

So what does the bulk of this legislation provide? First, the notion of administrative authority is not indicated in the Constitution. So most of the federal and federate entities decided to refer to the notion in the article 14.1 of the federal laws on the Council of State coordinated on 12 January 1973.<sup>101</sup> This includes among other more obvious authorities (such as the King<sup>102</sup> and the ministers<sup>103</sup>), less obvious ones such as the Belgian national railway company (SNCB), the national office for employment (ONE), the Banking Commission (Commission bancaire) and professional organisms of public law such as the Order of pharmacists and the Order of architects when exercising administrative missions.<sup>104</sup>

Article 32 of the Constitution does not define the notion of administrative document either but its *travaux préparatoires* give the broadest possible interpretation: “any information, under whatever form, that the public authorities hold [...] all available information, whatever the medium: written documents, sound and visual recordings including data comprised in the automated treatment of \*152 information. Reports, studies, even of consultative non official Commissions, some minutes and reports, statistics, administrative directives, circular letters, contracts and licences, public inquiry registers, exam notebooks, films and photos that a public authority holds”.<sup>105</sup> The federal laws, decrees and ordonnances have adopted this broad definition.<sup>106</sup> The notion covers all documents which exist before or after the entry into force of article 32. It covers not only administrative acts but also the preparatory documents to decisions. However, administrative authorities can refuse to communicate them if their divulgence could cause misunderstandings because they are incomplete.<sup>107</sup> The Council of State has decided that model answers to exams for admission in the administration are administrative documents.<sup>108</sup> Opinions given by the legislative section of the Council of State are administrative documents.<sup>109</sup> But the notion of administrative document does not cover legislative and judicial documents including documents from judicial investigations.<sup>110</sup> Are also excluded the acts of the executive branch which are closely linked to the legislative or judicial functions. This includes nominations and resignations of ministers and decisions of administrative jurisdictions such as the Council of State.<sup>111</sup>

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<sup>100</sup> [53], p. 766-767; [16], p. 248. The federal law on the publicity of administration was adopted on 11 April 1994.

<sup>101</sup> [33], p. 35-37; 64-65. Some entities however proceeded by enumeration.

<sup>102</sup> Of course, documents issued by him within his functions. The notion does not extend to his private correspondence and other private documents. [33], p. 78.

<sup>103</sup> Members of ministerial cabinets are excluded.

<sup>104</sup> [33], p. 79-81. This therefore excludes documents when the orders exercise their judicial functions.

<sup>105</sup> [33] etc., p. 62-63.

<sup>106</sup> [33] etc., p. 63. See e.g. article 1.2.2. of the federal law of 11 April 1994.

<sup>107</sup> [33], p. 83.

<sup>108</sup> [33], p. 83, citing decision of 18 July 2003, *Boute v. Belgian State*, n° 121.790.

<sup>109</sup> Decision of federal CADA 1995 cited by [33] p. 84.

<sup>110</sup> See decisions of the Council of State, the Constitutional Court and the president of the tribunal of first instance of Brussels cited by [33], p. 63-64. The latter court (for the decision see *Journal des Tribunaux*, 1998, p. 710) clearly said that it does not concern the legislative and judicial branches only the executive one.

<sup>111</sup> [33], p. 77.

The content of the right and the procedural aspects are well described by Lewalle, Donnay and Rosoux.<sup>112</sup> According to the different legislative instruments, everyone can consult the document, obtain explanations about it and receive a copy of it. It is forbidden to require from the citizen that he or she justifies a specific interest. Article 32 of the Constitution supposes that the consultation is free but that does not mean that it must be gratis, especially if a copy of documents is requested. For the administration to be able to charge a fee, there must be an authorisation by the statute as such fee restricts the fundamental right. The fact that this right is fundamental means that it must have the broadest interpretation possible.<sup>113</sup> Thus according to the case law of the Council of State, the exceptions to the rights must be interpreted restrictively and enumerated exhaustively by the statute. Administrative authorities must expressly avail themselves of the exception in the law and indicate clearly the cause of its refusal and operate concretely a balance of the interests in question. There is an autonomous appeal system if the administrative authority has refused the request. First, the individual must address a reconsideration request to the administrative authority. At the same time, the individual can appeal to the appeal Commission established to that effect, the Commission d'accès aux documents administratifs (CADA).<sup>114</sup> A further appeal can be made to the Council of State. Only the decision of the public authority on request of reconsideration can be attacked before the Council of State. At no time can the justification of an interest be asked to the individual.

What does the legislation say concerning the relationship between IPR and access to PSI? First of all, worryingly, the different legislative instruments only mention copyright whereas other intellectual property rights also risk having a great impact in this area especially the *sui generis* \*153 right.<sup>115</sup> The texts provide that if the administrative document is protected by copyright, the author's authorisation is not required for the consultation of the document on the spot. But the authorisation of the owner (i.e. author or person to whom copyright has been transferred) is required if the work is communicated by giving a copy to the person that requests it. It has also been held that before the public authority in question communicates the document it must check whether it is protected by copyright.<sup>116</sup> The rule applies when the copyright belongs to a third party not the administration itself.<sup>117</sup> Therefore, it does not apply when the administration is itself the owner of the copyright, otherwise article 32 of the Constitution could be useless. As implicitly reflected in the texts, the conflict between the right of access and copyright will only occur if the person asks for a copy

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<sup>112</sup> See p. 67-73. See also p. 60-61. Also note that article 13 of the federal law on the publicity of administration adds that the act does not prejudice other legislative provisions which give a greater publicity to administration.

<sup>113</sup> [33] etc., p. 60, citing the *travaux préparatoires*.

<sup>114</sup> After implementation of the PSI Directive, a new organ replaces the CADA, which has two sections, one for appeals relating to the publicity of the federal administration and the other for re-use of federal administrative documents. The regions and communities indicated it would be the CADA or the appeal organ equivalent to CADA. See [17], p. 152.

<sup>115</sup> [16], p. 248. However, see article D19(1)(e) of a convention of the Walloon region, available on <http://environnement.wallonie.be>, cited by [22], p. 654, which includes copyright and rights on databases. Some legislative texts are more general and simply mention intellectual property rights. See e.g. article D19(1)(e) the Environmental Code of the Walloon region, available at <http://wallex.wallonie.be/index.php?doc=4549>

<sup>116</sup> CADA/2004/16, 16 February 2004 and Commissie voor de toegang tot bestuursdocumenten (CTB), CTB/2007/22, 29 March 2007, cited by [53], p. 778.

<sup>117</sup> See CADA/2004/37, 29 March 2004, cited by [53], p. 779.

of the document as there is no right to prevent consultation or access in copyright law.<sup>118</sup> Therefore, there is no conflict if the administration can satisfy to the demands of transparency when it reformulates in a new document only the information or ideas contained in the document protected by copyright.<sup>119</sup> Since the Constitution gives the right to receive the administrative document itself and not a rewording of it, the conflict will generally occur. However, it will not if the reproduction in question falls within one of the exceptions to copyright (e.g. private use, parody, research).<sup>120</sup> When the applicant wishes to reproduce the protected documents commercially though, there will be a conflict.

The several appeal commissions have given interesting interpretations of the legislation. The Walloon Appeal Commission for access to environmental information (Commission de recours pour l'accès à l'information environnementale (C.R.A.I.E.)) held that the Walloon region should normally introduce a clause in the contract concerning architect studies it commissioned, transferring the copyright to itself. Therefore the region cannot oppose this clause to the party wanting access, otherwise the right to information would be completely emptied of its substance.<sup>121</sup> But on the other hand, when copyright still belongs to the third party, a copy of the document can only be delivered after agreement of the owner.<sup>122</sup> Only when the owner cannot be found and the authority has made reasonable efforts to trace him or her can it deliver the architect's plans to the person who owns or possess the building and who asks the plans in order to restore the building. Only that person can have access to the plans in this case.

The commissions also held that there must be a balance between access and copyright protection. There will be abuse of copyright if there is a manifest disproportion between the usefulness for the \*154 copyright owner to prevent the reproduction of the document and the inconvenience for the other party not to receive a copy of the document.<sup>123</sup> Until recently the case law of the C.R.A.I.E. invoked copyright on architectural plans to refuse their communication. Municipalities also continue to refuse this communication forgetting about the federal law of 5 August 2006 which made copyright a relative exception subject to balance of interests.<sup>124</sup> But generally, the C.R.A.I.E. proceeds to such balance which often favours the person making the

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<sup>118</sup> There is some controversy about this though. Some believe that as the notion of "making available" in Directive 2001/29 does not exclude an individual access to the work, it could cover digital access to administrative documents. They therefore think that to allow the consultation of a protected work without the copyright owner's authorisation could infringe unless it falls within one of the exceptions to copyright. See [11], p. 292-293. *Contra*: [52], p. 64 and [53], p. 772 ff. We share Strowel and Van der Maren's views and add that the exception of article 5.1 of the Infosoc Directive applies to consultation on the spot of electronic documents. In addition, the making available right implies that the individual chooses the place and the time it accesses the document. So as the law provides that he or she accesses it in person where the administration is located ("on the spot") and according to its opening times, this does not fall within the ambit of the right.

<sup>119</sup> [11], p. 286, p. 290.

<sup>120</sup> [11], p. 291.

<sup>121</sup> C.R.I.E., 3 June 1999 [2000] A&M, p. 437.

<sup>122</sup> CTB/2007/22, 29 March 2007, cited by [53], p. 780.

<sup>123</sup> [53], p. 781. See e.g. C.R.I.E., aff. n° 282, 23 May 2005, Amén., 2006/1, p. 25-26; also available on <http://environnement.wallonie.be>

<sup>124</sup> [22], p. 655.

request.<sup>125</sup> In three recent cases concerning copyright belonging to the administration, the Commission held that the public authority has a mission of public service and must make publicly available environmental studies that it commissioned even if the study were to be copyright protected, as the law favours without contestation the divulgation interest.<sup>126</sup>

In conclusion, copyright can clearly slow down the diffusion of information if works contain information.<sup>127</sup> Appeal commissions must therefore operate a balance of interests according to proportionality. The right to prevent copying will often yield to legitimate access demands because the usefulness for the copyright owner to prevent the reproduction of the document will weigh very little in the scale compared to the inconvenience for the other party not to receive a copy of the document.<sup>128</sup> The same may be said of the database right, because of its similar principles and its less generous exceptions.

### 3.1.3. Re-use of PSI

How has the implementation of PSI Directive changed or added to this state of affairs? Most of the implementation laws reproduce faithfully the provisions of the Directive. But they are provisions which are more specific than those of the Directive and some which create some substantial differences with it. The more detailed provisions are as follows. First of all, to abide by the Directive, the federal law, the Flemish decree and the ordonnance of the region of Brussels-capital deleted the provisions of the publicity of administration provisions which forbade the commercial reuse of documents obtained through the access right granted by these legislative instruments.<sup>129</sup> As to the definition of document, all legislative instruments except the Flemish decree clearly express the idea that it is not raw data but data which have been treated previously by the public authority.<sup>130</sup> Only completed documents that public authorities hold and decide to make available to third parties are covered.<sup>131</sup> This restriction is there to avoid that an intermediary version of a document, which is not definitive, be published when it could be a source of misunderstanding. Most implementations instruments also define what is to hold documents; it is to possess them, to have a certain control over them or manage them.<sup>132</sup> At no level of power in Belgium has the principle of the obligation to authorise re-use been imposed, thereby following closely the Directive.<sup>133</sup> As to the format in which the document must be supplied, the *travaux préparatoires* of the Flemish \*155 decree provide an example of requests which ask for extracts and demand a disproportionate effort, which goes beyond a simple manipulation, namely requests which ask to collect single data from different documents and put them in new electronic format.<sup>134</sup> Specifically in relation

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<sup>125</sup> [22], p. 655 and decisions cited at her fn 58. These concerned cases where the copyright belonged to a third party.

<sup>126</sup> [22], p. 655, citing C.R.A.I.E., cases n° 253, 254 and 256, 19 September 2007 (these three decisions have been appealed before the Council of State).

<sup>127</sup> [53], p. 785.

<sup>128</sup> [53], p. 785.

<sup>129</sup> [17], p. 153.

<sup>130</sup> [17], p. 127-155, at 138.

<sup>131</sup> [17], p. 139-140. All Belgian implementation instruments say this except one.

<sup>132</sup> [17], p. 140.

<sup>133</sup> [17], p. 143.

<sup>134</sup> [17], p. 148, also noting p. 147 that the federal law, the Walloon and French Community decrees and the ordonnance of the region of Brussels-Capital provide that the documents must be

to IPR, Belgian legislation not unnecessarily provides that if a document is protected by an IPR, in order to be able to make them available to third parties, the public authority must have ensured that the IPR were transferred to it.<sup>135</sup>

An important difference with the Directive is that the Belgian implementation instruments go beyond the Directive on the charging issue. If an authority asks for a fee the amount cannot go over the marginal costs of reproduction and distribution. It is only when the creation of the document requires several additional operations that the fee can include the collection, production, reproduction and dissemination costs, whilst allowing a reasonable return on investment.<sup>136</sup> This provision therefore enables the re-use of PSI much better than the Directive, at least in principle. Indeed, an additional operation is not defined. Therefore, it may be that public authorities will quickly argue that there are additional (albeit in reality artificial) operations in order to go beyond the minimal fee...<sup>137</sup>

On the other hand, some of the Belgian implementation instruments contain more restrictive provisions. Administrative documents which are made available unconditionally by a public authority, and which stay that way, are excluded; in other words, they are not subject to a request for re-use.<sup>138</sup> This should mean however that the offer to re-use must be unconditional not only the diffusion.<sup>139</sup> However, this is not what happens in practice. Most Belgian public authorities make legal documents available through their own respective Internet sites. But their re-use is not always allowed. For instance, the Council of State (the highest administrative court) indicates that “the content of the decisions on this site is freely accessible to all. It is however forbidden to reproduce (...) the selection and organisation of this information without the express consent of the Council of State and if necessary third parties, owners of these rights”. The Walloon region stipulates for its legal database “Wallex” that “texts, metadata, non official considerations, classifications, lay-out, illustrations and other elements constituting the site “wallex.wallonie.be” are protected by law. All this data is the property of the Walloon region. Unless otherwise provided, all this data can be used freely but so long as mention of their source is made and only for non-commercial or advertising use.” The web site of the region of Brussels-Capital states that “the information can be used for your personal use but the parliament of the region reserves all its IPR on the portal and the information made available.” The Flemish Community’s web site states the same thing. Neither the Official Gazette nor the Juridat web sites (the latter is an official site which contains judicial decisions) mentions anything. But the Ministry of Economy’s web site (on which these two sites depend) gives the same indication as those of the Flemish Community and Region of Brussels-capital.<sup>140</sup> However, notwithstanding these mentions, re-uses of this information, as they are not offered unconditionally, are subject to the laws and decrees on PSI. Unfortunately, users who are not legal experts will generally not

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communicated in the form requested if they can be so communicated without causing exaggerated (“inconsidérés”) costs. The term “inconsidérés” is vague.

<sup>135</sup> [17], p. 141.

<sup>136</sup> [17], p. 149.

<sup>137</sup> [17], p. 149.

<sup>138</sup> [17], p. 141.

<sup>139</sup> [17], p. 141.

<sup>140</sup> These examples are cited by [17], p. 141-142.

know this and will be led to believe that they cannot re-use the information or have to ask permission and pay a copyright royalty...

\*156 All legal texts except the Flemish decree, which is a little vaguer, require minimal demands for re-use i.e. mention of source, mention of date of last update and non-alteration of data, which are not objectionable. However, the Flemish decree requires other mentions to be indicated i.e. the copyright notice (!), the commitment to inform the public authority of any error discovered in the information transmitted or grant the public authority a free access to the product created with the information furnished.<sup>141</sup> This is amazing as it amounts to some sort of payment *a posteriori* for the information which surely implicitly goes against article 6 of the Directive. In the same vein, the Royal decree executing the federal law and the Flemish decree require that the request must also describe the reuse that is planned and the aim of this reuse.<sup>142</sup> This justification requirement does not appear in the access regimes reviewed above which state that one does not have to reveal the purpose for which one wants the document.<sup>143</sup> The Flemish decree gives a sensible reason why such information is needed. It allows the adaptation of the conditions that will be imposed to the person making the request. Reuse for commercial purposes can therefore lead to more fees being paid or to publication conditions being more restrictive than for non-commercial reuse.<sup>144</sup> It is a pity that the Directive has not clearly stated that no justification is to be asked to re-use the information, although it could be derived from article 1.3 that applicants do not need to prove an interest.<sup>145</sup> As can be seen, this silence allows Member States to require such interest. Also as we saw in section 2.1., the Council of Europe recommends that a justification should not to be given.<sup>146</sup> Requiring a justification might indeed deter requests in the first place or give a pretext for the state to refuse access. However, simply being required to state that it is for commercial purposes is not objectionable since the public sector bodies are allowed to charge for the information in this case.

Also concerning requests, the same legal texts stipulate that the request must be addressed to the public authority which has the administrative document in question or which has deposited it in the archives. Unfortunately, the public register does not state which authorities hold these documents. If there is no means of knowing which documents the public sector bodies hold, the PSI Directive has in practice no sense. This is the reason why article 9 of the Directive requires that Member States facilitate the search for publicly available documents. More research would have to be done to see if Belgium complies with article 9 on this point though.

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<sup>141</sup> [17], p. 143-144.

<sup>142</sup> [17], p. 146.

<sup>143</sup> [17], p. 146.

<sup>144</sup> [17], p. 146-147.

<sup>145</sup> Article 1.3 provides "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."

<sup>146</sup> Although arguably this is for *access* not re-use. However, most of the time the two are inseparably linked. See also [47], p. 330 citing the Advisory Panel on Public Sector Information 1<sup>st</sup> Annual Report, July 2004 which notes that the difference between access and re-use is not clear.



## 3.2. United Kingdom

### 3.2.1. Copyright and database right

It has been said that “[t]he United Kingdom is not a country in which ideas of free access to, and free use of, government information flourish with any vigour. Were this so, there would have developed, as in the United States, much more embracing notions of public domain material in which no copyright may be claimed.”<sup>147</sup>

\*157 This statement still holds true as the UK is the one of the very few countries in Europe which grants copyright and database right to all works produced by the three branches of the state.<sup>148</sup> However, these copyrights are tempered by some exceptions in sections 45-50 of the act. Accordingly, copyright is not infringed by anything done for the purposes of reporting parliamentary, judicial, Royal Commissions or statutory inquiries proceedings (s. 45.2 and 46.2). Copies of reports of Royal Commission and statutory inquiries can also be freely issued to the public (s. 46.3). Section 47.3 provides that “where material which is open to public inspection pursuant to a statutory requirement, or which is on a statutory register, contains information about matters of general scientific, technical, commercial or economic interest, copyright is not infringed by the copying or issuing to the public of copies of the material, by or with the authority of the appropriate person, for the purpose of disseminating that information”. But section 47.4 restricts this exception by stating that “the Secretary of State may by order provide that subsection (1), (2) or (3) shall, in such cases as may be specified in the order, apply only to copies marked in such manner as may be so specified”. Finally, materials comprised in public records can be copied without infringing copyright (s. 49).

Likewise, if one closely examines the implementation of the Database Directive in the UK, one can say that Cornish and Llewelyn’s statement at the beginning of this section must be nuanced. Regulations 14.3 and 14.4 of the Copyright and Rights in Databases Regulations taken in 1997<sup>149</sup> provide, by analogy with Crown and Parliamentary copyright that the Queen and the Parliament can be owners of *sui generis* right in the databases they make, in those made under their direction or control and those made by their officers or servants in the course of their duties. Like section 45-50 of the copyright act but in broader terms, Regulation 20.2 (Schedule 1 of the Regulations) provides exceptions to database right for public administration. Relevant to our discussion, paragraphs 3.2 and 3.3 state: “(2) Where the contents of a database are open to public inspection pursuant to a statutory requirement, database right in the database is not infringed by the extraction or re-utilisation of all or a substantial part of the contents, by or with the authority of the appropriate person, for the purpose of enabling the contents to be inspected at a more convenient time or

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<sup>147</sup> [6], p. 565 citing Lord Goff in *AG v. Guardian Newspapers (No. 2)* [1990] 1 AC 109 at 283. See also [47], p. 333 citing the Advisory Panel on Public Sector Information 1<sup>st</sup> Annual Report, July 2004.

<sup>148</sup> S. 163-166 of the UK copyright act. The Parliament and the Crown have different copyrights. The Crown has copyright on acts, whilst the Parliament on bills. In addition, they own copyright in any work which is made under their control or by one of their employees, officers or servants if created in the course of their duties. There is controversy as to who owns the copyright in judicial decisions (judges or the Crown), but there is no controversy that copyright subsists in them. On Crown copyright, see [28], para 22.37; [6], p. 564-566; [2], p. 126; [54], p. 279-280; [50], p. 204-240; and in English in [1996] 10 IPJ 157.

<sup>149</sup> See S.I. n° 3032 of 18 December 1997, in force since 1 January 1998.

place or otherwise facilitating the exercise of any right for the purpose of which the requirement is imposed. (3) Where the contents of a database which is open to public inspection pursuant to a statutory requirement, or which is on a statutory register, contain information about matters of general scientific, technical, commercial or economic interest, database right in the database is not infringed by the extraction or re-utilisation of all or a substantial part of the contents, by or with the authority of the appropriate person, for the purpose of disseminating that information.”

Similarly to section 49, paragraph 5 of regulation 20.2 provides that “the contents of a database which are comprised in public records [...] may be re-utilised by or with the authority of any officer appointed under that Act, without infringement of database right in the database.”

Schedule 2 of the Regulations, although not addressing specifically administrative documents, can also be mentioned. It provides for the imposition of compulsory licences when the Competition \*158 Commission issues “a report concluding that a database owner’s refusal to grant licences on reasonable terms or conditions in a licence restricting the use of it by the licensee operate against the public interest. In such circumstances, the conditions of a licence can be unilaterally cancelled or modified and, in addition, a compulsory licence may be granted. The terms of such a licence can be determined by the Copyright Tribunal, if necessary.”<sup>150</sup> This provision nicely complements the application of national and Community competition rules and applies to all database owners including the state.

Therefore, the UK implementation is rather generous and already had provisions allowing for the broad re-use of PSI. It is not clear but it may be argued, according to these provisions, that the state cannot charge for the information it is obliged to give, which would be a major step beyond the Directive’s obligations. They are also no conditions attached (except of course that the contents of the database must be open for public inspection according to a statutory requirement) and all the database can be extracted, not only a substantial part. These provisions certainly do not cover all PSI as defined in the PSI Directive (because they do not cover all PSI bodies and all documents) but they have the merit to exist in comparison to the silence of the Belgian law.

### 3.2.2. Access to information regimes

Cornish and Llewlyn’s statement must also be played down because of the Freedom of Information Act of 2000 (FOIA) and other access to information regimes.<sup>151</sup> Like the equivalent legislation in Belgium, the FOIA, provides a general *right of access* to PSI. The regulations implementing the PSI Directive therefore complement it as they promote the *re-use* of PSI.

The main provisions of the act can be summarised as follows. The act’s title is “an act

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<sup>150</sup> [8], p. 283. See esp. Sched. 2, paragraphs 6.4, 6.5, 11.4 and 15.1.

<sup>151</sup> Most of the act entered into force on 1 January 2005. Some of its provisions entered into force earlier than that. For Scotland, see the Freedom of Information Act of Scotland, which is considered to provide even more transparency than the UK FOIA. See [26], p. 129 citing [1], p. 92. On the act, see also [59]; [35]. There are also other acts fulfilling the same aim, e.g. the Data Protection Act 1998, the Human Rights Act 1998 and the Environmental Information Regulations 2004 but there is no space here to review them as well.

to make provision for the disclosure of information held by public authorities or persons providing services for them (...). It also amends the data protection and public records acts. According to section 1 of the act, any person making a request for information to a public authority has the right “(a) to be informed in writing by the public authority whether it holds information of the description specified in the requested and (b) if this is the case, to have that information communicated to him”. The act gives a long list of public authorities. This covers over 100,000 individuals and entities.<sup>152</sup> “All information held by public authorities is accessible unless exceptions provided by law apply.”<sup>153</sup> There are two series of exceptions (in part II of the act, s. 21-44). Some are absolute in the sense that the public interest disclosing the information is outweighed by the public interest in keeping it secret. These exceptions are: information accessible to the applicant by other means, information supplied by or relating to bodies dealing with security measures, court records, parliamentary privilege, prejudice to effective conduct of public affairs (if the information is held by the House of Commons or House of Lords), personal information (not falling within the second category of exceptions), information provided in confidence and prohibitions on disclosure by or under an enactment or community law. The second set of exceptions is subject to the balancing of interests.<sup>154</sup> These exceptions are: information intended for future publication, national security, \*159 defence, international relations, relations within the UK, the economy, investigations and proceedings conducted by public authorities, law enforcement, audit functions, formulation of government policy, prejudice to effective conduct of public affairs (if the information is not held by the House of Commons or House of Lords), communications with Her Majesty and honours, health and safety, environmental information, personal information (not falling within the first category of exceptions), legal professional privilege and commercial interests.

The request must be in writing and provide the name and address of the applicant as well as the information requested (s. 8). The public authority can charge a fee (s. 9). But fees are subject to regulation by the Secretary of State to avoid excessive prices. In practice, the law is so complex that authorities seldom charge for providing information.<sup>155</sup> The authority must reply promptly and in any event no later than 20 days after the request was received (s. 10). If it refuses, the authority must state which exemption applies and why it does. Any person can complain to the Information Commissioner about such refusal (s. 50) and he or she can decide that the authority has failed to comply with its duty and indicate how it can remedy it. Such decisions can have binding character (s. 52). If the authority fails to comply, the Commissioner can take the matter to a court (s. 54). Both the applicant and the authority can appeal decisions of the Information Commissioner before the Information Tribunal, whose decisions can be appealed on points of law before the High court (s. 57-59). The Information Commissioner can give recommendations to public authorities and submits an annual report on the exercise of its function to both Houses of Parliament (s. 48 and 49). In order to facilitate access, public authorities must publish schemes in which they disclose the information they publish or intend to publish, the manner it will be published and whether the material will be available free of charge or not to the public (s. 19). What is important to note is that the FOIA does not grant a right to

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<sup>152</sup> [59], p. 43.

<sup>153</sup> [26], p. 126.

<sup>154</sup> [26], p. 126.

<sup>155</sup> [59], p. 59.

reproduce the information, so that authorisation must always be asked. This is where the PSI regulations are useful.

### 3.2.3. Re-use of PSI

Finally, is the same statement outdated thanks to the implementation to the PSI Directive? Most likely not, as an examination of the text of the Re-use of Public Sector Information Regulations<sup>156</sup> shows that it is quasi identical to the Directive's text even if they are some slight and some more important differences. Of course, the public sector bodies are different in every country. Regulation 3 provides a precise list of those bodies. The complaints procedure is also laid out in more detail in the regulations (reg. 17-21). More importantly, regulation 6(d) provides that "a request for re-use shall *state the purpose* for which the document is to be re-used (emphasis added)." Although the Directive is silent on this point, it would be logical for the reasons seen above (section 3.1.3) that no justification be asked. Like at some levels of power in Belgium, the right of re-use given by the British text is for this reason considerably weakened. This is amplified by the fact that the distinction between access and re-use is unclear so that the same bodies are subject to both the FOIA and the PSI regulations and thus face conflicting obligations.<sup>157</sup>

Since the Office of Public Sector Information (OPSI), together with Her Majesty's Stationery Office (HMSO), is the body responsible for the management of most of the UK government's intellectual property<sup>158</sup>, its current policies provides a useful example of the practice based on the PSI \*160 regulations since their entry into force.

Firstly, it is worth noting that the Crown has waived its copyright on UK legislation.<sup>159</sup> Thus, when accessing legislation on the OPSI web site, the documents reproducing the legislation contain a statement which gives a free but conditional licence. For instance, the text before the PSI regulations notes that "The legislation contained on this web site is subject to Crown copyright protection, it may be reproduced free of charge provided that it is reproduced accurately and that the source and copyright status of the material is made evident to users. (...) The text of this Internet version of the Statutory Instrument which is published by the Queen's Printer of Acts of Parliament has been prepared to reflect the text as it was Made. A print version is also available and is published by The Stationary Office (...)". The web page gives a link where the statutory instrument can be purchased. In the case of the PSI regulations, the price is £3. It is therefore clear that all government legislation (at least that made available on the OPSI web site) is freely accessible and re-usable. The existence of copyright or related rights in single elements of a database such as that of that OPSI makes available on its web site, directly affects the exercise of the database right. Indeed, even if an insubstantial part is extracted lawfully under the right, it must not infringe any right in that part itself (art. 7.4). The Crown waiver solves this problem.

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<sup>156</sup> S.I. 2005 n° 1515, in force 1 July 2005, available on [www.opsi.gov.uk](http://www.opsi.gov.uk) For an overview, see [4].

<sup>157</sup> [47], p. 333 quoting the Advisory Panel on Public Sector Information 1<sup>st</sup> Annual Report 2004 (APPSI July 2004).

<sup>158</sup> [56], also noting that "OPSI is also the regulator of public sector information holders for their information trading activities." C. Tullo is Director of the Office of Public Sector Information and a Director of the National Archives with responsibility for Information Policy and Services.

<sup>159</sup> See [www.opsi.gov.uk/about/faqs-crown-copyright.htm](http://www.opsi.gov.uk/about/faqs-crown-copyright.htm)

On its FAQs web page, the OPSI web site goes on to say that Crown copyright includes not only legislation, but also government codes of practice, reports, official press releases, government forms and many public records. It also states that databases enjoy separate protection under the database right regulations so that they are not automatically covered by Crown copyright.<sup>160</sup> OPSI also offers a “click-use licence” for other Crown copyright documents than legislation, and also for PSI and Parliamentary copyright. There is no charge to access all this information through this licence but there may be if the user contracts under the value-added licence depending on the type and amount of Crown copyright information [sic]<sup>161</sup> re-used.<sup>162</sup> However, other government documents which are managed by trading funds, such as the Ordnance Survey, still charge for their documents.<sup>163</sup> After this stock-taking exercise, the picture is therefore mixed. Whilst a huge progress has been made by the government through the waiver of its Crown copyright on many documents, a lot of other government documents are available but still at a charge. It is not clear whether trading funds comply with the Directive and corresponding regulations as they must make profits. Indeed, recently, the Treasury “indicated that in a climate of mounting concern about the soundness of government finances, the last thing it needs is an intellectual case for abolishing a stream of revenue”.<sup>164</sup> So as has been rightly stated, “what is clear is that matters really have moved these past [few] years” in the field of access and re-use of government information be it or not protected by IPR.<sup>165</sup>

## **\* 161 4. The failure of the PSI Directive: solutions based on the Database Directive and national laws**

### **4.1. Preliminary question: does the state really have *sui generis* rights?**

The preliminary question to the question posed in this article is whether the database right really subsists in most state databases. If not, then the answer to the question whether the PSI Directive trumps or at least dampens down considerably state *sui generis* rights is moot. One may wonder why this preliminary question should even be asked. Indeed, at first sight, it seems like most state databases will meet the requirements: their elements will be independent and logically organised and will be very substantial in size. Most of the time, the state’s *sui generis* right will last forever as the state will regularly update its databases. A close examination of the Database Directive’s provisions on the *sui generis* right shows that it is not so clear and there is at least some uncertainty in this respect but that it cannot be excluded that in some cases, the state owns such *sui generis* right.

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<sup>160</sup> As we have seen above, this is partially true as the regulations more or less mimic the copyright act in this respect.

<sup>161</sup> Since there is no copyright in information as such, this statement from the web site must be a figure of speech. Private parties will only have to pay if they re-use expressions and not only ideas and information from the Crown copyright documents.

<sup>162</sup> See [www.opsi.gov.uk/click-use/index.htm](http://www.opsi.gov.uk/click-use/index.htm)

<sup>163</sup> [56], 272-274. This is because they are obliged to achieve a return on their investment. See also [60], [38].

<sup>164</sup> “In sight of victory”, The Guardian, 20 March 2008, <http://www.guardian.co.uk/technology/2008/mar/20/freeourdata.politics>, discussing [38].

<sup>165</sup> [47], p. 335.

The Directive itself does not address this issue specifically so it can be said that state databases are included so long as they fulfil the requirements of the right. Moreover, the Directive and its preparatory materials implicitly indicate that states can benefit from the right. First, according to article 6(2) of the Directive, Member States can apply traditional exceptions existing in copyright laws for databases (which arguably include the exclusion of official material<sup>166</sup>) but the Directive does not provide the same clause for *sui generis* right.<sup>167</sup> This means that since the list of exceptions for to the rights of extraction and reutilisation is exhaustive, public sector bodies are entitled to *sui generis* right on their databases. Another perhaps stronger indication is the deletion of article 8 of the Directive Proposal from the final text of the Directive. This deletion implies that the state bodies can own *sui generis* rights.

So far so good. But can the state really be a database maker? The definition given by recital 41 of the Directive is that a database maker is “the person who takes the initiative and the risk of investing.” Surely the state most of the time takes the initiative to create databases; the question is therefore whether it can also be said to *invest* in the making of databases. If not, it cannot be considered a maker (or producer) and in any case does not fulfil the requirement of substantial investment that triggers the right’s subsistence. It is disputable that the state takes a financial risk when it creates databases.<sup>168</sup> It already has the money to create the database in the first place and if not, can and certainly will collect it, with the almost total guarantee of being paid, from the taxpayer... Or state databases are generally not based upon a substantial investment which shall be recuperated on a market.<sup>169</sup> As clearly exposed by a commentator, “public authorities collect and maintain governmental data because they have a *legal mandate* to do so; unlike private authors and publishers they do *not need economic incentives* to do their legal duty.”<sup>170</sup> However, as the current interpretations of the terms “maker” and “investment” is either scarce or uncertain<sup>171</sup>, there is \*162 uncertainty on this point. It may then be argued that even if the state owns the databases it creates, the supposed investment the state makes is not qualifying because most of its databases are by-products of its activities (so-called spin-off databases). In other words, the information is not gathered, verified or presented but as in the *British Horseracing Board* and *Fixtures Marketing* cases<sup>172</sup>, it is generated or there is no separate investment in the collection, verification or presentation of it. Although this is difficult to argue on the basis of the above-mentioned ECJ cases, the state might still in the end prove a *sui generis* right. Anyway, in other cases, a particular state entity will really have collected, verified or presented data rather than created it (e.g. meteorological, geographical data).

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<sup>166</sup> In most Member States however, official material is not covered by an exception, but is more categorically, excluded subject-matter so that copyright does not even subsist in the first place.

<sup>167</sup> [44], p. 60.

<sup>168</sup> In this direction [57], § 87b, para. 25 cited by [31].

<sup>169</sup> This is if the state does not charge for the data. But even if the state were to charge, it would not mean that it had invested in the first place if the database making activity is fully funded by public money. An example of databases not (fully) funded by public money is the trading funds in the UK. On these see [60], [38].

<sup>170</sup> [41], p. 8-9, adding that “logically, there is no justification for copyright in basic public information including actual data, the basic text of statutes and judicial opinions, and bitmaps or representation of geographic data”. The same could by analogy be said for the *sui generis* right.

<sup>171</sup> See [3], p. 146; [12].

<sup>172</sup> See above fn. 11.

As can be seen the cases where the state can benefit from a *sui generis* right are normally rather rare. In the cases in which the public sector is uncertain it benefits from the right, it has two possibilities to help itself. First, it may try and ensure that its data is protected by outsourcing its collection, verification or presentation to the private sector, thereby also probably breaching the PSI Directive. This very question was addressed in the question the German Federal Supreme Court asked to the ECJ in the *Verlag Schöne* case.<sup>173</sup> Second, in any case, even if the *sui generis* right did not accrue, the fact that the state in most cases is the only source of some data gives it a monopoly position, enabling it to charge a monopoly price. In these cases, of course, current EU and national competition laws can be of some help.<sup>174</sup>

#### **4.2. Does the PSI Directive trump or dampen down objectionable state *sui generis* rights?**

As the state will in some cases own *sui generis* rights, the question posed by the article can now be tackled. Does the PSI Directive trump or dampen down such objectionable *sui generis* rights? The answer, depending on how one reads the Directive, can be: not sure, not really or absolutely not. In any case, it is definitely unclear whether it does. The main reason is because article 3 and recital 9 do not oblige the state to allow the re-use of its documents. As stated in section 2.2, the Directive thus seems to impose a mere moral duty for public sector bodies to facilitate the reuse of their information.<sup>175</sup> But even this is unclear because of conflicting recitals (mainly recitals 9, 22 and 24). Obviously the whole goal of the Directive was to facilitate re-use so in doubt, one could argue that the provisions should be interpreted in this light. More fundamentally, the Directive can be criticised for not tackling the core of the problem, namely whether the State should be allowed to own copyright and related rights (including the *sui generis* right) on its documents.<sup>176</sup>

There are other reasons why the PSI Directive does not trump or even dampen down the state's *sui generis* rights. First, it is unclear whether all three branches of the state are clearly within the scope of the Directive. Second, the fact that the Directive does not prevent public sector bodies to ask the \*163 applicant to prove an interest has allowed Member States to provide they can<sup>177</sup>, thereby discouraging (at least some) requests in the first place. Third and most importantly, public sector bodies can charge for "the cost of collection, production, reproduction and dissemination, together with

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<sup>173</sup> The questions were as follows: "1. Do Article 7(1) and (5) and Article 9 of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases prohibit a legal provision of a Member State, according to which an official database which is published as a matter of general information for official purposes (in this instance: a systematic and complete collection of all calls for tender documents emanating from a German *Land*) does not benefit from *sui generis* protection under the directive? 2. If the answer to Question 1 is in the negative: is this also the case where the database is constructed not by a public body but by a private undertaking on its behalf, to which all bodies of this *Land* issuing calls for tender must directly submit their calls for tender documents for publication?"

<sup>174</sup> See [14], p. 206-225, discussing the UK *Attheraces* case (*Attheraces Ltd, Attheraces (UK) Ltd v. British Horseracing Board Ltd, BHB Enterprises Plc* [2007] EWCA Civ 38) which involved such a situation.

<sup>175</sup> See [3], p. 256.

<sup>176</sup> [40], at 41, cited by [32] p. 249.

<sup>177</sup> See above section 3 for Belgium and the UK.

a reasonable return on investment”.<sup>178</sup> This is very close to the price that a database producer would charge in a competitive environment, even if the firm holds a *sui generis* right. It is however highly disputable that the public sector’s mission is to make profits.<sup>179</sup> However, many studies showed that full cost recovery is economically inefficient. One study showed that public sector information available in digital form should be made available by the public sector at no more than the cost of dissemination whilst another study also shows that data should be accessible at no more than marginal cost of reproduction.<sup>180</sup> Most levels of power in Belgium have opportunely gone beyond the Directive’s obligation by requiring that the fee does not go over the marginal cost of reproduction and dissemination (unless the request requires several additional operations on the part of the public sector body). Unfortunately, the Flemish community even requires the applicant to grant free access to the state to the product it made out of the information so communicated... Fourth, whilst the Directive arguably addresses competition concerns by prohibiting exclusive arrangements (art. 11) and arguably excessive prices (art. 6, 8) as well as forcing the state to apply to itself the same conditions as private companies if it decides to market its own data (art. 10), the Directive will in many cases not push the prices down by much in comparison with other database markets. Some discriminatory practices, exist; for instance “the inclusion of a small proportion of third party data on a data set exempts the whole data set from the provisions of the Directive” and sometimes “subsets of data are priced at the same (higher) cost of licensing the whole set”.<sup>181</sup> There is also no guidance on how the term “reasonable” in article 6 might be measured. “If applied widely to establish high charges based on no transparent calculation of how prices were arrived at, this provision could also undermine substantially the implementation of the Directive in the longer term by enabling public sector bodies or their agencies to trade in manner which is essentially commercial and competitive with private sector re-users”.<sup>182</sup>

The overall picture is therefore rather grim. In plain words it can be summarised as follows. We are not sure whether the state might have *sui generis* rights in some its databases. If and when it does, the PSI Directive does not change much to its rights, if anything: the state may not charge excessive prices - but what is an excessive price anyway? - and that was already prohibited by competition law. One can wonder why we are paying the European institutions. Or maybe we should put this example down to the fact that in democracies, many decisions and solutions are inevitably the fruit of compromises. But then, it is generally better not to vote a law than to end up with a bad one, worse than the *status quo*... The consolation prize is however that the Directive also applies to the Community institutions.<sup>183</sup> *De lege ferenda*, it would obviously make sense that the EU excludes once and for all state databases from copyright and *sui generis* right protection altogether (as many Member States have

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<sup>178</sup> The Explanatory Memorandum to the PSI Directive, p. 6 even clearly recognises that “certain public sector bodies depend on the income from the sales of their information resources to finance part of their operations. It [the Directive proposal] does not impose any radical change as to the charging policies (...) The only restriction imposed is an upper limit in cases where the public sector bodies make unreasonable profits on the basis of their information resources”.

<sup>179</sup> [7], p. 8, also noting that it is “questionable whether the phrase “return on investment” [in article 6] should be used in the context of carrying out a public task”.

<sup>180</sup> [60], respectively p. 4 and p. 6.

<sup>181</sup> [7], p. 4.

<sup>182</sup> [7], p. 8.

<sup>183</sup> Explanatory Memorandum to the PSI Directive, p. 11.



done long ago for copyright laws anyway, it should not be so difficult<sup>184</sup>). \*164 Alternatively, in the same vein, the EU should oblige “Member States to extend, *mutatis mutandis*, all the exemptions and limitations applying to works protected under copyright also to *sui generis* protection of non original databases. The obligation should be phrased so as to establish a dynamic link between both fields, to the effect that limitations set out in new copyright legislation would automatically become applicable, under the suitable terms and circumstances, also to the *sui generis* right.<sup>185</sup>” “Otherwise a certain bias with respect to the *sui generis* right would be perpetuated and cemented in the system of Community law although there is no reason, for example, to exclude digital private copying in this field completely (see Art. 9 (a) Directive) as compared to the situation in general copyright law where this exception remains an optional possibility for the Member States (see art. 5 (2) (b) Infosoc Directive).”<sup>186</sup>

### 4.3. Solutions based on the Database Directive

Whilst waiting for a European Godot, what solutions are there to remedy this problem *de lege lata*? A strict interpretation of the Directive in the footsteps of the ECJ 2004 decisions will already restrict the number of cases where the state owns *sui generis* rights. Courts should in particular not allow the circumvention of the Directive by the state through the outsourcing of its database activities to private companies. However, according to some, this solution “fails with respect to collections of data which have been compiled by private commissioners which by their service fulfil a public task.”<sup>187</sup> Another solution can be based directly on an analogical and teleological interpretation of the Database Directive. Courts could apply the exception or exclusion of official documents to the *sui generis* right by analogy with their respective copyright laws.<sup>188</sup> Indeed, article 13 of the Directive included a reference to laws on access to public documents to complement article 9 because the latter does not explicitly provide an exception for databases made by governmental bodies.<sup>189</sup> Certainly, “[t]he admissibility of an equivalent exception for databases should preferably have been made clear in the Directive by expressly including such an exception in articles 6 and 9.”<sup>190</sup> The application by analogy of the copyright exception to the *sui generis* right would also avoid contradictions between different Directives in the field of copyright and related rights (such as the Database and Infosoc Directives).<sup>191</sup> It is a shame that the questions asked to the ECJ by the German Federal Supreme Court have now been withdrawn as they addressed these two points.<sup>192</sup>

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<sup>184</sup> The thorniest issue might be to agree on the exact definition of an official document though.

<sup>185</sup> [31] citing [27], p. 557.

<sup>186</sup> [31]

<sup>187</sup> [31]

<sup>188</sup> For similar arguments, see [29], p. 790; with the same result on the basis of a fictive waiver of rights, [18], n° 611 ff; See [30] [2007] GPR, p. 190-194 commenting on the Decision of the Bundesgerichtshof (German Federal Supreme Court) of 28 September 2006 [2007] GRUR, p. 500-502.

<sup>189</sup> [18], p. 177, n° 730.

<sup>190</sup> See [3], p. 254-255.

<sup>191</sup> [31]. See further [30].

<sup>192</sup> The text of the questions is reproduced at fn. 173.

#### 4.4. Solutions based on national laws

The second type of solution is based on some national laws, mainly those of the Netherlands and France, which could serve as examples to other Member States. Article 8 of the Dutch Database Act is refreshing. It reads: “1. The public authority shall not have the right referred to in Article 2, paragraph 1, with respect to databases of which it is the producer and for which the contents are formed by laws, orders and resolutions promulgated by it, legal decisions and administrative decisions. 2. The right, referred to in Article 2, paragraph 1, shall not apply to databases of which \*165 the public authority is the producer, unless the right is expressly reserved either in general by law, order or resolution or in a particular case as evidenced by a notification in the database itself or when the database is made available to the public”.<sup>193</sup> The Netherlands felt that it was desirable to introduce equivalent provisions to articles 11 and 15(b) of the Dutch Copyright Act for the *sui generis* right.<sup>194</sup> This is in line with one of the solutions advocated above. Sadly, article 15(b) of the copyright and 8(2) of the Database Act specifically provide that the *sui generis* right can be reserved. It would have been in the public interest (including that of taxpayers who can end up paying twice for the same thing) “to deny, on principle, a public authority any rights in databases containing laws and the like”.<sup>195</sup> Unfortunately as well, some Dutch commentators believe that when a database does not qualify for copyright or *sui generis* right protection, it can still benefit from the *geschriftenbescherming*.<sup>196</sup> We think along with other commentators that this is an unfortunate omission by the Dutch legislature.<sup>197</sup>

The French experience of ensuring access to legal databases made by a public authority is also worth noting. A 2002 Decree imposes a legal duty on the French government to produce databases containing (inter)national legislation and case law and to make available on the Internet and to licence their contents merely against distribution costs.<sup>198</sup> This decree seems to serve the public interest better than the Dutch provision, as it puts the French government under a legal duty to actually produce such online databases, which the Dutch law does not so require. On the other hand, these French legal databases do enjoy protection by the *sui generis* right so that a licence is required to use substantial parts, unlike such databases made by a Dutch public authority.

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<sup>193</sup> Databankenwet, Act of 8 July 1999, Staatsblad, 303. This English text appears in [3], p. 221 without indication it is an official translation of the Dutch text.

<sup>194</sup> See [3], p. 221-222 citing the Explanatory Memorandum to the Database Act, Kamerstukken II 1997/98, 26 108, no. 3, p. 20. Article 11 of the Dutch copyright act establishes that no copyright exists in laws, orders and resolutions promulgated by the public authorities, legal decisions and administrative decisions. Article 15(b) states that reproducing or making available works which were made available by or through the public authorities is not considered an infringement of copyright, unless the copyright is explicitly reserved.

<sup>195</sup> See [3], p. 223.

<sup>196</sup> [49], para. 3.57, p. 136 and [45]. The *geschriftenbescherming* is the ancestor of the *sui generis* right, as it was taken, along with the Nordic catalogue rule, as a model for it. On those see e.g. [23], p. 83; [25], p. 67.

<sup>197</sup> See [3], p. 223; [18], p. 151, n° 614.

<sup>198</sup> See Decree n° 2002-1064 of 7 August 2002 relating to the public service of law diffusion on the Internet, OJFR, 2002, n° 185, 9 August 2002, p. 13655, <http://legifrance.gouv.fr> This decree amends a decree of 1996. For a discussion see [3], p. 224, 256-257.

The efforts of these countries go in the right direction although they still are not sufficient. Several ways to improve the access and re-use of PSI based on the French and Dutch experience could be found. For instance, a combination of the provisions of French and Dutch laws would already form a better system. But arguably excluding all PSI from IPR would be the clearest, simplest and most effective solution. Despite this general unsatisfactory state of affairs, it is reassuring to see, that national laws on access to PSI and their current practice (at least that is what the examples of the UK and Belgium show) already generously allow access, if not re-use, to PSI.<sup>199</sup> In both countries, applicants must not justify their requests of access. In Belgium, as the right to access PSI is protected constitutionally, it must be interpreted broadly and exceptions to it, restrictively. Accordingly, most of the case law states that public authorities must grant access to their documents \*166 even if they have an IPR on them and must even grant access to IPR-protected subject-matter which belongs to third parties if it is in the public interest. Unfortunately however, documents subject to the Belgian access regimes only include those of the executive branch and not the legislative and judicial branches. In the UK, the database regulations already free up a number of public databases and also allow their re-use. In addition, the FOIA forces the state to adopt publication schemes and although the Crown has waived only some of its copyright, charges are rarely sought for accessing PSI. But there is an important dent in this generally satisfactory situation: the continuing charging practice of trading funds.

## **Conclusion**

So does the PSI Directive affect the state's *sui generis* right? The answer is a rather clear no. Nevertheless, the Belgian and British national implementations of the Database and PSI Directives have in some ways gone beyond the Directive's obligations, which is a good start. Also their national access regimes are generally rather generous when it comes down to access but also re-use of IPR-protected PSI. Although the review of the PSI Directive may come a bit too early<sup>200</sup>, it will be interesting to read the results of the consultation launched in anticipation of the Directive's review. When reviewing the Directive, the Commission should compare the situation before and after the Directive. Proper (economic) studies should again be made to see if the Directive goes far enough or not. Most probably it does not but it cannot be said that it is such a bad start. At least the intention was there. It will also be interesting to see what the second review of the Database Directive leads to, which should practically be done at the end of this year as well.<sup>201</sup> More needs to be done if the EU information industry is to compete on a level-playing field with the USA<sup>202</sup>

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<sup>199</sup> In addition, many Member States also have laws, which are often based on European Directives, requiring former state monopolists (e.g. privatised telecom operators or broadcasting corporations) to grant access to information. See [3], p. 254-255, citing at fn. 101 the French Code of Posts and Telecommunications which requires France Telecom to supply anyone who requests it with "a consolidated list of all the information contained in the general telephone directory (the *annuaire universel*) at a price reflecting cost."

<sup>200</sup> [7], p.2. As many Member States have just finished implementing the Directive, there is not yet much practice or case law.

<sup>201</sup> Technically the first review should have occurred in 2001 but happened in 2005. A new review must be conducted every three years (art. 16.3 of the Directive).

<sup>202</sup> [17] at 134 also notes that we can legitimately worry about the fact that the information services market is still dominated by the USA, as this leads researchers, companies and even European

but more importantly for the citizen and in fact the whole world to be adequately informed. This is of the utmost importance in our times in view of the increasing dangers caused by humans to the planet, not to mention global warming. If we want to react adequately, we need information and such information is generally detained by governments. As we have all subsidised it, we arguably all have a right to have this information available free of charge and to re-use it as freely as possible. For such acute global problems, time is of the essence. Public sector information needs to be freed now not in five or ten years' time.

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