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LAPSI POSITION PAPER NO 1: THE “PRINCIPLES GOVERNING CHARGING” FOR RE-USE OF PUBLIC SECTOR INFORMATION

BY

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FINAL VERSION

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POSITION PAPER NO 1: THE “PRINCIPLES GOVERNING CHARGING” FOR RE-USE OF PUBLIC SECTOR INFORMATION

1. **THE ISSUE TO BE REVIEWED.** It is anticipated that the “principles governing charging” for re-use of public sector information held by public sector bodies will be subject to the impact assessment exercise under Art. 13(2) of the Directive and to a thorough review intended to explore different policy options in the area and possible legislative amendments. While in principle the whole area of charges is subject to scrutiny, the issue for which LAPSI’s contribution is sought is more limited and is described as follows:

“Possible exceptions to a default rule of charging only marginal costs. Currently public sector bodies can charge the cost of collection, production, reproduction and dissemination, together with a reasonable return on investment (Art. 6). If the upper limit for charging was lowered to the marginal costs of reproduction and dissemination of documents, with a possibility for a limited number of exhaustively spelled out exceptions, what could these exceptions be (taking into account e.g. the self-financing obligations of some public sector bodies, investment on digitising documents etc...) ? Who would decide in practice on the exceptions (Member States, public sector bodies...)?”

Accordingly, the analysis presented here specifically focuses on an hypothetical regime which i. provides that charging is subject to an upper limit (or “ceiling”), identified with the marginal costs of reproduction and dissemination of documents; and ii. admits that the default is overridden by specific exceptions. The underlying assumption is that the current rules concerning charges are amended; and that the current recoverability also of the cost of “collection” and “production” of the documents, as well as of “a reasonable return on investment” made in view of the collection, production, reproduction and dissemination from charges made by public sector bodies is for the future admitted only in specific, exceptional cases.

While the present discussion shall mainly deal with the identification of the various options available under the new regime as far as exceptions are concerned and with the governance level at which decisions on the same exceptions should be taken, the scrutiny shall extend to the rationale itself of this hypothetical new regime, to the extent necessary to clarify the available options.

2. **THE CONTROLLING PROVISIONS AND THE PRINCIPLES UNDERLYING THEM.** While only one specific recital of the Directive, No 14, and one specific provision, Art. 6, of the same legal instrument directly deal with the rules concerning the charges for re-use by commercial and non commercial re-users of public sector information held by public sector bodies, there is a number of recitals and provisions which directly or indirectly relate to the issue. These may be grouped into three clusters, which will be separately examined hereafter to assess the impact the underlying principles may have on the issue of charges for the re-use of public sector information.

- a. **THE GOAL OF FOSTERING THE EMERGENCE OF EU-WIDE INFORMATION SERVICES AND OF CONTRIBUTING TO THE ADVANCEMENT OF THE EU SOCIETY AT LARGE.**

- i. According to the current text of the Directive, charging is to be consistent, among others, with the fundamental and overarching objective of contributing to the establishment of an internal market (Recital 1) and more specifically to “the creation of conditions conducive to the development of Community-wide services” (Recital 5). As “broad cross-border geographical coverage [of the relevant information services] will be essential in this context” (Recital 5), it is to be expected that also charging policies should

give priority to this dimension. While it may be taken for granted that the chance of an emergence of “new aggregated information products and services at pan-European level” (Recital 12) will depend on a variety of factors, including the timeliness with which the information is supplied to the re-users, the transparency of the conditions of re-use (Recital 15, Art. 7), the searchability of the data sets (Recital 23, Artt. 5 and 9), it is to be expected that also re-use costs will have a very prominent place in the list of factors that play a crucial role in this process. This dimension, which could be referred to as the **creation of conditions conducive to the emergence of cross-border, EU-wide information services**, originally present at the time of the adoption of the Directive, is still to be considered as a priority at the current review stage, as the corresponding perspective has been further reinforced by later initiatives and no doubt ranks very high in the priorities list of EU policies, as recently confirmed by the Digital Agenda.¹

- ii. Cross-border, EU-wide information services are only part of the story, however. Public sector information re-use may also play a crucial role even in **fields which** do not have an immediate connection with information services markets, even though they **give a major contribution to the advancement of the EU society at large**. It is well recognized that public sector information re-use is important also for non-market purposes. It enhances transparency of governmental action and contributes to e-democracy; it may be an important resource for civil society organizations, from NGOs to churches, cultural and academic institutions, trade unions, etc., as well as for individuals. In this connection it is often noted that making re-use of public sector information subject to *any form or amount of payment* would have an adverse impact on the meritorious activities these entities and individuals engage in.² It might be added as well that freedom to experiment with public sector information and to explore its potential is coessential for a resource which is valuable precisely because it can be merged and combined with other resources in ways which are not likely to be anticipated by governmental organizations and possibly not even by incumbent businesses. Free re-use of public sector information may therefore be seen as an essential ingredient to kick-start initiatives which may start outside the perimeter of formal business activity but eventually turn out to be a breakthrough. To corroborate this line of reasoning reference may be made to innovative business, such as Google and Facebook, which have been initiated in the gray area laying in between academic pursuit and amateur experimentation and outside traditional business channels.

b. **THE COMPETITIVENESS MANDATE.**

- i. Re-use may either be commercial or non commercial. When it is commercial, as it is normally to be expected in connection with the information services referred to in the previous paragraph **a.i.**, a market may emerge in which the (normally private) commercial re-user and the public sector body holding the information meet. This happens when the public sector body directly or indirectly, e.g. by means of a commercial division or of an entity affiliated to

¹ EUROPEAN COMMISSION, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *A Digital Agenda for Europe*, Brussels, 19.05.2010 Com (2010) 245, at 5, 9-10, 30-32.

² See P. UHLIR, *Policy Guidelines for the Development and Promotion of Governmental Public Domain Information*, UNESCO, Paris, 2004.

it, provides information services that are in competition with the ones which the commercial re-user supplies or intends to supply. This occurrence is an established fact rather than a theoretical assumption, as indeed shown in actual practice by several decisions by EU member States' courts and authorities concerning public sector information. Indeed, in the recent past controversies over re-use charges for financial information services,³ address referencing and land information systems, matching digital postal address files with geographical maps,⁴ or for other information services⁵ have come up for decision. The current rules take into account this competitive dimension of the charges by public sector bodies holding public sector information to actual or potential commercial re-users in various ways. Thus, the mandate of "fair, proportionate and non-discriminatory conditions for the re-use" of public sector information (Recital 8) no doubt also refers to charging.

While in principle there is no obstacle for a public sector body to "use documents within the organization for activities falling outside the scope of its public tasks" and it also may be taken for granted that such "activities falling outside the public task will typically include supply of documents that are produced and charged for exclusively on a commercial basis and in competition with others in the market" (Recital 9), the Directive however recognizes that specific competitive concerns arise when commercial activities by public sector bodies entail competition with re-users in the information services markets. Among these concerns specific reference is made to the possibility of the occurrence of cross-subsidies (Recital 9), which may materialize as income accrued in areas where the public sector body is exposed to little or no competition may generate rents and these are used to achieve competitive advantage over private rivals in contestable markets.

The Directive additionally mandates that conditions for re-use, including charging, should not be discriminatory (Recital 19; Art. 10). It should be noted that the danger envisaged here does not concern the possibility of discrimination between different commercial re-users; what is at stake rather is the parity of conditions between the public and the private sector, which is to be specifically preserved where the public sector body itself re-uses the document "as [an] input for its commercial activities which fall outside the scope of its public tasks" (Art. 10(2)). In this connection, the relevant provision mandates that "the same charges... shall apply to the supply of documents for those [commercial] activities [of the public sector entity] as apply to other users". Recital 19 clarifies that, while the supply of public sector information from one public sector body to the other may be "free of charge" as long as the re-use is "for the exercise of public tasks", when on the contrary the supply is in view of commercial activities of the public sector body at the receiving end, then the non-discrimination mandate applies.

The case may also be made that, when information created and organized by one arm of a public sector body within the scope of its public

³ See App. Torino 11 febbraio 2010, PNP Italia s.r.l. c. Agenzia del Territorio.

⁴ See Review Board of the Advisory Panel on Public Sector Information APPSI, Report 30 April 2007 and Office of Public Sector Information, Report on its Investigation of a complaint (SO 42/8/4): Intelligent Addressing and Ordnance Survey, 13 July 2006. The two Reports are available at <http://www.appsi.gov.uk/review-board/review-SO-42-8-4.pdf> and at <http://www.nationalarchives.gov.uk/documents/so-42-8-4.pdf>.

⁵ See e.g. ###

sector task is made available to a different arm of the same body, which uses the same information “as input for its commercial activities which fall outside the scope of its public tasks” (Art. 10(2)), then exactly the same non-discrimination mandate applies. Indeed, Art. 2(4) clarifies that this situation qualifies as a case of “re-use” under the Directive, even though both the activity falling within and without the public task are carried out by the same entity,⁶ while at the same time it establishes that “exchange of documents between public sector bodies purely in pursuit of their public tasks does not constitute re-use” (second part of Art. 10(2)). As a result, it follows that the arm of the public sector body, which uses information “as input for its commercial activities that fall outside the scope of its public tasks” (Art. 10(2)) should bear costs not lesser than the ones borne by its competitors on the market.⁷ It is therefore submitted that already under the original design of the Directive, the principles governing charges for re-use of public sector information were intended to be consistent with competition law principles; that this duty of consistency can at no time be revoked in question, and that these principles hold even more true in connection with the currently proposed review of the rules, as compliance with Artt. 106 TFEU and, through it, also with Artt. 101 and 102 TFEU is mandated by directly applicable primary EU law.

- ii. The quest for competitiveness also has an additional dimension. The points made in the previous paragraph **i.** consider situations where the public sector body is the sole source of the data. No doubt this occurrence prevailed at the time the Directive was discussed and adopted. Even today there is a great number of sectors in which by definition the information may not come from a source other than the public entity, typically because the information is collected by the public sector body as a spinoff of a duty of individuals and entities to register data concerning them with the public sector body. Thus, under current rules, no entity other than a public sector body is in a position to collect data based on legally mandated registration land transactions, companies data, drivers and vehicles.⁸ However, God is not mandated to register the weather it bestows on us with any public sector body; and the number of data which are generated and collected otherwise than by fulfillment of a registration duty is large and – given technological advances – growing.

A revision of the Directive undertaken more than 10 years after it was originally conceived and designed should therefore take into account that in an increasing number of situations there are companies which enter (or

⁶ See also to the same effect Recitals 8 and 9 (“re-use should include further use of documents *within the organization itself* for activities falling outside the scope of its public task”; italics added).

⁷ Of course, these costs may take the form of charges, if the commercial arm of the public sector body is organized as a separate entity; if this is not the case, it would appear that separate bookkeeping should be introduced for the commercial activity, so that a cost component equal to the charge may be entered into the commercial arm’s books. [reference is needed to the case for separate accounting by commercial arms of public sector bodies]. Interestingly enough, member State competition laws are known to mandate the setting up of a separate entity under the circumstances considered in the text. Specifically Art. 8 of the Italian competition Act, No 287 of 1990, provides that public entities “shall operate through separate companies if they intend to trade on markets other than those on which they” operate because of their public task; and that – “In order to guarantee equal business opportunities, when” public undertakings “supply their subsidiaries or controlled companies ... with goods or services, including information services, over which they have exclusive rights by virtue of” their public task, “they shall make these same goods and services available to their direct competitors on equivalent terms and conditions”

⁸ For a full treatment of the peculiarities of “registration based” public sector body see D. NEWBERRY-L. BENTLY-R. POLLOCK, *Models of Public Sector information provision via Trading Funds*, Study commissioned jointly by the Department for Business, Enterprise and Regulatory Reform (BERR) and HM Treasury, § 4.9 and *passim*.

contemplate entering) the market for the creation and the gathering of data⁹ and may do so in competition with a public sector body. If this is the case, we cannot imagine imposing an obligation on the public sector body to leave the market and stop gathering the data. In such a setting, however, the charging model adopted by the public sector body (zero cost; but also marginal cost) risk falsifying competition on the market.

The public sector body adopting these charging models is sure to survive, as the cost of gathering the data is paid by the public purse to the extent it falls within its public task. However, at zero or marginal cost level any normal business model adopted by private businesses is doomed. Pricing below average costs may also have a negative anti-competitive effect which is similar to predatory pricing in a competitive context and create a foreclosure effect in the upstream market. More generally, making public sector information too cheap may harm the businesses opportunities of private undertakings that would compete with public sector bodies in the generation of substitutable information. It is there submitted that any revision of the PSI directive should also take into account the potential impact on the incentives of private businesses in developing such activities in the upstream market of generating and supplying information.

- c. **MINIMUM HARMONIZATION AND SUBSIDIARITY.** The regime concerning charges for re-use of public sector information should also take into account a third dimension. The harmonization accomplished through the Directive should not go beyond what is necessary to achieve the various objectives it seeks to accomplish (Recitals 6 and 25); therefore its provisions, including the ones concerning charging, should be in accordance with the principles of Subsidiarity and proportionality as enshrined in Art. 5 of the Treaty. This limitation in the scope of the Directive is clearly spelled out in Art. 1(1).

It should however be noted that in this area member States do not only retain powers in the area of charging policies. They also keep an unlimited discretion as to the question whether re-use is allowed in the first place: as Recital 9 clearly indicates, “the decision whether or not to authorize re-use will remain with the Member States or the public sector body concerned”.

We never should forget that the two levels, i.e. the issue “at what price?” and the question “Yes or no?”, do interact. If the rules concerning charging forced (or “nudged”) a public sector body to authorize re-use at a price it feels unsatisfactory, and the same public sector body (or a member State authority in charge) has the option to altogether deny the authorization, it is outright possible (or even likely) that the adoption at the EU level of charging policies which lower public sector bodies’ income may end up shrinking rather than expanding the amount of public sector information supplied.

In any event it should also be pointed out that the implications of the principle of Subsidiarity are not given once and for all times. Indeed, more recent EU legislation in the field of PSI, namely the INSPIRE Directive,¹⁰ shows how the reciprocal boundaries of EU and member State action may depend on the specificity of the from time to time considered area and evolve over time.

⁹ Examples are supplied by GoogleMaps and GoogleStreetView. The trend towards cloud computing may be an additional driver in this direction in the future.

¹⁰ See Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE).

Below we analyze how the just described sets of principles affect the options currently available in connection with the identification of the possible exceptions to a default rule concerning charging and of the governance level at which decisions on the exception should be taken. A discussion of the rationale governing a charge policy based on marginal cost of reproduction and distribution of public sector information, as spelled out in the hypothetical rule considered at the beginning of this paper (§ 1), should however come first.

3. **THE RATIONALE FOR A CHARGING POLICY BASED ON MARGINAL COST OF REPRODUCTION AND DISTRIBUTION OF PSI AND ITS COROLLARIES.** It should be clear that the overarching rationale for charges based on marginal cost of reproduction and distribution of public sector information is to be found at the intersection of two opposing principles. On the one hand the argument may be made that public sector information is generated on the basis of taxpayers' money and that therefore potential users should not be called to contribute once again for the re-use of resources for which they already collectively paid.¹¹ On the other hand, the case is also made that a specific request for public sector information in view of re-use may entail extra-costs, which may be incurred in making the specific information retrievable, in aggregating it, in making it available or otherwise distributing it in response to a specific re-use request. If this is the case, this argument goes, there is no reason why the general taxpayer should also bear these extra-costs linked to a particular request and thereby subsidize with resources derived from the general budget what really is a specific cost which can be allocated to the specific individual or entity planning the re-use.¹²

In this perspective, charges would seem warranted and appropriate to the extent they enable the recovery of the specific extra-costs which can be allocated to a particular re-user.¹³ Should this assumption be accepted, then it would have a definite impact on the case for moving towards a marginal costs based system issues dealt with here.

First, the case for a default rule capping costs recoverable through charges to the marginal costs of reproduction and dissemination, as considered in the proposal analyzed here, would be greatly strengthened. Art. 6 of the Directive currently refers to the costs of "collection", "production", "reproduction", and "dissemination". As spelled out in Recital 14, "production includes creation and collation". While this statement leaves the boundaries between collection and production somewhat blurred and fuzzy, as both notions point to the initial moment of gathering, verifying and organizing the data that the public sector body obtains, generates or retrieves in carrying out its public task, it may be persuasively argued that neither "collection" nor "production" as here understood may warrant the inclusion of an element of extra-cost, which may be allocated to a potential or prospective re-user

¹¹ Two remarks are here in place: first that this statement does not take into account the multiple non-market reasons for allowing reuse discussed above at paragraph 2.a.i. (a point we will revert to later); second, that even we confine ourselves to market considerations, a number of questions remain open: what is the rationale to allow re-use to entities and individuals who are not (residents and therefore) taxpayers of the specific member State under the jurisdiction of which the public sector body collected the data sets; is there any difference in this connection between residents of other member States on the one side and residents in third countries? It might also be considered that the re-user the Directive intends to assist typically should operate in all the member States but might well pay taxes only in one.

¹² See E. DERCLAYE, *Does the Directive on the Re-use of Public Sector Information affect the State's database sui-generis right?*, in J. Gaster, E. Schweighofer & P. Sint, *Knowledge Rights – Legal, societal and related technological aspects*, Austrian Computer Society, 2008, 137 ff., at 142 and note 28. The reference in the text to extra costs linked to a specific request may be further refined by resorting to the analysis contained in D. NEWBERY-L. BENTLY-R. POLLOCK, *Models of Public Sector information provision*, quoted above at note 8, § 2.3.1.

¹³ In this perspective the notion of what constitutes an appropriate charge should be tested against a standard which in turn is appropriate to the context. It would appear that a good benchmark can be derived by using the norms of fairness, efficiency and sustainability, which have been developed by the economics literature in connection with common pool resources, on the ground that their extension to knowledge or information commons has been persuasively advocated, as documented by C. HESS-E. OSTROM, *Introduction: An Overview of the Knowledge Commons*, in C. Hess-E. Ostrom (eds.), *Understanding Knowledge as a Commons. From Theory to Practice*, MIT Press, Cambridge-London, 2007, 3 ff.

individually. In fact, information collected and produced by the public sector body in the carrying out of its task typically is the nuts and bolts of the machinery which supports the mandate of such a public sector body. Conversely, extra-costs which can be individually allocated to prospective re-users normally arise only at a later stage, to the extent the public sector body engages in preparing extra-copies, usually in analogue format,¹⁴ in disseminating them, by delivering hard copies or by uploading downloadable digital files and facing the costs preliminary to the same reproduction and dissemination (as recognized, incidentally, in Recital 14, which states that “dissemination includes user support”).

Second, following this line of reasoning, a strong case may be made that the exceptions to the default rule should be narrowed down as much as possible. Indeed, as the rationale for recovery of costs encountered by public sector holding bodies should strictly be limited to extra costs which can be allocated to individual re-users, accordingly the exceptions to the default rule should be confined to taking into account extra-costs which, while not strictly attributable to the creation of extra copies (“reproduction”) or their distribution (“dissemination”), still would not be connected with some activities carried out on behalf of prospective re-users rather than with the core public mission of the public sector entity holding the information.¹⁵ In this regard Recital 14 mentions “user support”; now, it can be imagined that a similar case may be made for other preparatory activities, which are specifically connected with the creation and dissemination of the copies the re-using public may require. The costs of dedicated servers, of search services, of dedicated portals, of maintenance of the above, are often mentioned in this connection. The case may be made that also these costs should be taken into account when calculating what is the marginal cost to be charged to re-users. But the line should be drawn at some point, before the cost considered gets too far from the re-user and too close to the core mission of the public sector entity. A criterion to decide when these “upfront” or “recurring” cost may be included in the notion of marginal cost might be offered by consideration of transaction costs. There is empirical evidence to the effect that determining these “upfront” or “recurring” costs and allocating them with some precision to re-users may cost more than the revenue that the exercise brings in.¹⁶ It should further be considered that, once charges based on marginal costs include elements which go beyond reproduction and dissemination, it becomes by definition necessary to engage in an exercise whereby the initial re-user is prevented from passing on the data sets it obtains to a fellow re-user. This is so because otherwise only the portion of the “upfront” or “recurring” cost paid by the initial re-user is recovered by the public sector body while the subsequent re-user (or re-users) “free ride” on that component.¹⁷ Now, the costs of setting up legal or technological restrictions both on re-users and on downstream transactions between the initial re-user and parties which may obtain data sets from the latter, as well as of policing and enforcing them, may be extremely costly. As a result, a crude rule of the thumb may be established whereby these “upfront” or “recurring” costs should not be included in the calculation of marginal costs, unless it is

¹⁴ As digital files typically do not need the creation and storing of extra copies for additional fruition.

¹⁵ Admittedly, the sharp contrast between collection of data sets linked to the core mission of the public sector body and their dissemination linked to re-users need is to a large extent artificial. What if the public sector body were to take care of completing data sets even beyond what is strictly required by its public task to make the full set available to re-users? Clearly this would be a situation which can be dealt by way of an exception to a rule based on marginal cost of dissemination and distribution.

¹⁶ An interesting, if simplified, example had been supplied (by L. BENUSSI-R. IEMMA, - G. DAMIANO, *Aspetti economici dell'informazione del settore pubblico: fondamenti teorici e approfondimenti empirici*, unpublished manuscript) where the Authors point out that the average annual earnings deriving from the distribution of digital and paper maps by the Geographic department of the Piedmont Region in Italy amount to approximately € 30.000 and that the annual expenditure required to manage the sales procedures reaches (or even overcomes) the same amount. In such situations, just giving away the data sets for free entails a net saving.

¹⁷ For an analysis of the situations in which restrictions on re-use and redistribution are required see D. NEWBERY-L. BENTLY-R. POLLOCK, *Models of Public Sector information provision*, quoted above at note 8, § 2.4.

proved that they are much larger than the transaction costs they entail.¹⁸

Third, the identification of the governance level at which the decisions as to the exceptions to the default rule are taken should closely follow the rationale for charging. Only the specific public sector body that has reason to believe that the particular kind of data it is collecting and producing entails extra-costs specifically linked to their “reproduction” and “dissemination”, which can be allocated to individual re-users and go beyond the marginal costs of “reproduction” and “dissemination” for the benefit of re-users, should be in a position to claim that these extra-costs have to be recovered and be accountable for that claim. Following this line of reasoning, it should also be detailed whether this claim to recover extra-costs should be sufficient to substantiate a case for an exception, as decided by the same public sector body; or whether the claim should be first audited by an independent external body or even trigger a decision by a different agency or authority, possibly acting in a supervisory capacity. In the alternative, the establishment of a simplified complaint procedure, possibly to be entirely carried out on line, might be envisaged; the outcomes of the procedure could be subject to review by an outside body. In any event, the standard of proof for the decision (in terms of specificity of the grounds; of evidence required and the like) should be clearly established.

4. **THE EXERCISE AND ITS DESIGN.** Of course, neither the overall rationale for charging for re-use of public sector information nor the rationale for a charging policy based on marginal cost of reproduction and distribution as discussed in § 3 stands in a vacuum. On the contrary, it only provides a starting point that has to be fleshed out by taking into account the three sets of principles which, as earlier indicated (in § 2), directly or indirectly affect charging.

Before engaging in the exercise, it is worth noting that the outcomes may greatly vary, depending on the priority given to each set of principles. The principle of Subsidiarity (as discussed in § 2.c) may well be invoked to expand the number of exceptions whereby individual member States – or public sector bodies residing in these member States – may claim for charges going beyond the mere marginal costs of reproduction and dissemination, in order to factor into the charging decisions taken at the level of domestic fiscal policy. In this context recovery of a reasonable return on investment may be invoked; and even recovery of “collection” and “production costs”, in turn increased by a “reasonable return rate”, may come back.

Nor should it come as a surprise either that the opposite conclusion may be reached starting off from the principle that the benefits of public sector information are to be found in its contribution to society as large rather than in specific markets or in the revenue generated to replenish public sector body coffers (*see* § 2.a.ii). Under this perspective, any sum beyond zero cost is too much.

What may be more surprising is that the purpose of fostering the emergence of cross-border services and of injecting competitiveness into their markets may work both ways as far as charging policy is concerned. On the one hand it may provide ammunition for arguments working towards the restriction of the extent of admissible exceptions to a charging policy based on marginal reproduction and dissemination costs (*see* § II.b.i.); on the other it may suggest that, in a situation where competitive data sets may be supplied by private competitors and the decision whether to supply public sector information still

¹⁸ The very fact that the “upfront” or “recurring” costs are very large should however ring an alarm bell. *See* the contributions by technologist and computer science experts, such as D. ROBINSON, H. YU, W.P. ZELLER- E.W. FELTEN, *Government Data And The Invisible Hand*, in 11 *Yale J.L. & Tech.* 2009, 160 ff. In particular, the idea that setting up dedicated websites for the public, or providing formats as under Art. 5 of the Directive, entails an extra cost which can be incorporated in reproduction and dissemination charges should be double checked – and probably resisted – on the basis of the argument that public sector bodies should only provide “raw data now”, i.e. reusable data, not fancy web sites; and that in accordance with the engineering principle of separating data from interaction, public sector bodies should avoid seeking the best tools and leave to the market – and to market-based technologies – the optimization of the presentation of the data.

remains in the hands of member States and of the public sector body under their jurisdiction, resort to a charging policy based on marginal costs may restrict both competition and the supply of public sector information.

As a result, the analysis may not possibly be expected to provide a set of unequivocal and clear cut recommendations. Nevertheless the discussion may provide the basis for the presentation of a range of options, the costs and benefits of which will come up for review in the final part of this paper (§ 7). The choice between the different options should be greatly facilitated by incorporating into the analysis factual evidence; therefore the exercise will also strive to refer to case studies, empirical evidence and metrics that are either available or worth looking for.

5. **CHARGING POLICY, WELFARE MAXIMIZATION AND SUBSIDIARITY.** It is (almost) an article of faith that “by making public sector information freely and easily accessible for re-use, the returns from taxation on growing business activity will greatly exceed the revenue expectations of public sector bodies” intending to commercialize their information and data operations.¹⁹ Empirical evidence to this effect is amply available; and could and should be further expanded and complemented.²⁰ The task is no doubt facilitated by the possibility of cross-Atlantic comparisons, as the USA Federal government model, aptly described in terms of marginal cost pricing plus copyright waiver, offers ample opportunities of contrasting our practices with the ones followed by our – in this regard more fortunate – brethren on the other side of the ocean.²¹

The policy implication of this approach sometimes is radical: charges should be at zero cost; economic growth in the economy at large due to re-use of public sector information is due to bring about also an increase in tax receipts larger than the charges for PSI re-use foregone by a zero cost policy. Even if we accept this account, which admittedly is more than plausible, this is not yet the end of the story, though. It stands to reason that individual public sector bodies will beg to differ; and do so on acceptable, and indeed equally plausible, grounds. First, we should consider the position of UK Trading Funds. These apparently operate under a straight commercial mandate: to generate as much revenue to recover principally their costs and to relieve the general taxpayer’s burden as much as possible.²² Here charging policy is based on average costs, non on marginal costs.

Even more to the point is the situation of cash-strapped public sector bodies: with reference to them it has been rightly remarked that “in a significant number of member States public sector revenue generation is a norm firmly embedded within public sector culture”.²³ This is so for the simple reason that the economic phenomenon which is described as the “fiscal crisis of the State” has been a harsh reality for our economies for at

¹⁹ R. DAVIES, *Recommendation of the ePSIplus network to the EC review of the Directive on PSI re-use*, Paper presented at the first Communia conference, available on <http://www.communia-project.eu/node/112>, item 6.

²⁰ See also for additional references P. UHLIR, *The Socioeconomic Effects of Public Sector Information on Digital Networks: An Analysis of Different Access and Reuse Policies*, National Research Council, 2009; D. NEWBERRY-L. BENTLY-R. POLLOCK, *Models of Public Sector information provision*, quoted above at note 8, 45 ff.

²¹ For a more detailed account of the evolution of the US rules concerning access and re-use of public sector information see H. BURKERT, *The Mechanics of Public Sector Information*, in G. Aichholzer-H. Burkert (eds.), *Public Sector Information in the Digital Age. . Between Markets, Public Management and Citizens’ Rights*, Edward Elgar, Cheltenham, 2004, 3 ff. at 9 ff. Empirical evidence is to be found in P. WEISS, *Borders in Cyberspace: conflicting public sector information policies and their economic impact*, in G. Aichholzer-H. Burkert (eds.), *Public Sector Information in the Digital Age*, above, 137 ff.

²² See also for the legislative sources D. NEWBERRY-L. BENTLY-R. POLLOCK, *Models of Public Sector information provision*, quoted above at note 8, 6. For a characterization of Ordnance Survey’s supply of information services in the field of address referencing and land information systems, matching digital postal address files with digital information maps, as an activity falling “outside the scope of the public task” of the entity under (the UK provision corresponding to) Art. 5(2)(a) of the Directive see Report 30 April 2007, quoted above at note 4, § 2.17 ff.

²³ R. DAVIES, *Recommendation of the ePSIplus network to the EC review of the Directive on PSI re-use*, quoted above at note #, item 6.

least the last five decades.²⁴ As a consequence, many public sector bodies have come to assume that it is expected of them that a substantial share of the income needed to carry out their core mandate itself comes out of proceeds generated from commercial activities rather than out of general taxation. This is even more so in connection with institutions entrusted with the task of generating, preserving and disseminating art, culture and research,²⁵ and this angle should not be neglected, particularly at a time when the inclusion of “cultural data” in the Directive is being seriously debated.

Objections coming from these quarters cannot be simply defused by showing that the extra tax income deriving from business activity fostered by low or zero cost access to public sector information would be larger, and possibly much larger, than the proceeds from higher charges for public sector information re-use; and making the case that just applying a portion of the extra tax income generated downstream by low charges to meet the same needs which currently are financed upstream out of high charges for public sector information re-use would be Pareto superior²⁶ to exacting high charges from re-use.

The difficulty in this line of reasoning, based on the general notion of welfare maximization at the gross domestic product level, is twofold. If we take the perspective of public sector bodies, we can understand that they would prefer to have the egg today rather than the hen tomorrow. If they give up on the revenues that they may have become accustomed to raising from charges from public sector information, they may be sure of what they stand to miss but they cannot be sure at all whether the loss will be compensated and to which extent a portion of the general fund of tax income – which may possibly have in the meantime been boosted by the lowering of these charges – will in fact be reserved to meet the costs the public sector body incurs. In other words, lowering high charges for public sector information may well be Pareto-optimal on paper, but public sector bodies are not to find out if this really is the case until budget allocations compensating their loss of revenue are voted each year by lawmakers.

It is likely that this objection should not be overestimated. In fact, the argument has been spelled out here mainly as it may help to understand why so many public bodies show cold feet when more liberal principles are discussed in connection with re-use charges; still it may well be brushed aside remarking that what counts in reviewing a Directive is the position of member States and of their citizens, rather than sectional interests, worthy as they may be in a specific case. It becomes much more difficult, however, to override this objection when the same argument is rephrased a second time and it comes in the perspective – and in the language – of the member States and of the extent of the sovereign powers retained by them. After all member States retain a discretion in deciding which expenditure should be financed by general taxation and which through special purpose taxes; and that the same liberty *a fortiori* applies when the decision is whether to raise revenue out of market transactions to apply it to expenditure or to raise taxes.

This area of fiscal policy would appear one in which indeed member States retain a large amount of sovereignty.

From this angle, and back to the specific issue we are dealing with, it would appear that the default rule whereby charges can only recover marginal reproduction and dissemination costs, would have to be tested against the principle of Subsidiarity. It is submitted that this is a relational concept, in that it cannot be determined unilaterally and

²⁴ The much hailed work of J. O’CONNOR, *The Fiscal Crisis of the State*, was published by St Martin’s Press in New York back in 1973. Ch. 2 identifies the Sixties as the turning point to which the crisis dates back.

²⁵ For a balanced account of the shortcomings entailed by this approach within the domain of Universities see R.R. NELSON, *Observations on the Post-Bayh-Dole Rise of Patenting at American Universities*, in *IPQ* 2001, 1 ff.

²⁶ In the Kaldor-Hicks variant of the notion or Pareto-superiority: see N. KALDOR, *Welfare Propositions in Economics and Interpersonal Comparisons of Utility*, and J.R. HICKS, *The Foundations of Welfare Economics*, in *Economic Journal* 1939, respectively at 549–52 and 696–712.

must be conceived as a trade-off between “the objectives of the [EU] action” and the assessment of the appropriate levels of action of the Community or of the member States, as the case may be, appropriate to reach these objectives under Art. 5 TEU. Indeed, nothing prevents the Directive from going beyond the current minimum harmonization stage spelled out in Art. 1(1) of the Directive. It would however seem that a certain amount of discretion should be retained for member States to determine the mix between general taxation and other sources of revenue. In this perspective, it would seem that, while the default rule whereby charges can only recover marginal reproduction and dissemination costs may be introduced as proposed, at a minimum each member State should retain the freedom to introduce exceptions to these rules. It may also be argued that these exceptions should be consistent with the concept that member States may provide for charges going beyond marginal reproduction and dissemination costs, include collection and production costs and extend to reasonable return on investment, as far as this corresponds to a tax policy decision (e.g. to avoid financing through general tax funds transfers to public sector bodies and to resort to other financing means, including special purpose taxes, levies or charges, which specifically affect certain categories of re-users rather than the general taxpayer).²⁷

It may be argued that, as the exceptions here envisaged are linked to each member State’s options in the field of tax policy, the decision as to these exceptions is best placed at the central governance level, i.e. in the arena where State lawmakers decide the trade-off between tax policy and other considerations.²⁸

It is not suggested here that the freedom to introduce exceptions to the default rule should be unlimited,²⁹ to the extent it is supported by a rationale that links back to the prerogatives member States retain in the field of tax policy. Indeed also member States’ tax policy is constrained by a number of rules and of policies, including competition policy and the overarching duty to contribute to the widening and deepening of the internal market, which should also play a primary role in framing the exceptions, as we shall presently see.

6. **CHARGING AND THE EMERGENCE OF A COMPETITIVE, CROSS-BORDER MARKET IN INFORMATION SERVICES.** Indeed, whatever room is left for member States’ discretion under the analysis sketched out under the heading of Subsidiarity in § 5, it must be considered that this approach would still be subject to the limits that derive from the separate – and possibly in part countervailing – objectives, which, as earlier discussed, consist in the goal of fostering the emergence of a cross-border market in information services (*see* above, § 2.a.i) and of doing so in ways which are in conformity with the pro-competitive mandate characteristic of the EU (*see* above § 2.b.i and ii).

6.1. Even admitting to the possibility of exceptions to the default rule here discussed based on claims to tax policy autonomy coming from the member States, these should in no event be allowed to contribute to anticompetitive outcomes. In this perspective, special attention should be paid to the fact that data created and collected by public sector bodies even today tend to be sole-source data. As shown by the specialized literature, this is the case because in many instances, the data held by public sector bodies cannot be duplicated or replicated by private actors. This is so because typically the data set cannot be independently created, collected or created by any other source, as the data are obtained as inputs in the exercise of sovereign powers. This is clearly shown in the case of land registry

²⁷ Theoretically, a distinction between commercial and non-commercial re-users might also be taken in consideration and was discussed in a previous draft of this paper. The option was subsequently discarded, as a consequence of i. the uncertainties this distinction entails; ii. the costs its policing and enforcement entails; and iii. the adverse impact the distinction has on downstream reuse (which is discussed in the separate discussion paper on licensing). In this context it would be appropriate to assess the functioning and impact of Art. 14(3) of the INSPIRE Directive.

²⁸ Contrast the approach suggested for decisions as to exceptions based on the existence of extra-costs generated by specific re-use requests considered above in § 3.

²⁹ By way of example see Artt. 14(2) and 17(3) of the INSPIRE Directive.

data which certify conveyance of real estate. Here the relevant inputs cannot be obtained by any private entity, as no private agent is admitted to engaging in this public recording task;³⁰ therefore no private entity can obtain them, unless it receives them from the official public registrar in the first place.³¹

This means that, to the extent there is a market for sole source data, the public sector body supplying them finds itself, *de iure*, in a monopolistic position; this situation in turn triggers the “special responsibility” under Art. 102 TFEU of the dominant business, which prevents it from charging excessive or unfair prices for its goods and services; in turn, Art. 106 makes sure that the same principle also applies to commercial activities of public sector bodies.³²

The bottom line is that, whatever exception to the default rules is provided, it should at a minimum avoid charges that may amount to abuse of dominant position.

This line of reasoning should also be expanded to spell out that the risk should be avoided that a specific charging policy enabled by an exception to the proposed default rule may contribute to the creation of cross-subsidies from one activity of a public sector body to the other, to the extent, of course, also the latter is a commercial activity on its own merit.³³

While this approach may provide an appropriate benchmark against which to test the acceptability of exceptions to the default rule, it should also be considered that once again this benchmark is only a starting point. After all, the purpose of the Directive cannot be confined to preserving the respect of competition law in the market for public sector information-based services. In fact, the task of achieving this goal falls back on the provisions of Artt. 101, 102 and 106 TFEU, which are supposed to be able to deliver the outcome irrespective of the adoption of a sector-specific Directive.

Therefore, the acceptability of the exceptions to the default rule must be tested not only against the competitive mandate, which, as indicated, is derived from general EU legislation rather than from the Directive itself, but also against the specific targets of the Directive itself, i.e. the contribution to the widening and deepening of the internal market which may come from the emergence of cross-border, EU-wide information services.

It is likely that the guidance given by the classical competition principles just referred to is quite limited: exceptions to the default rule should not allow for a “margin squeeze”, where a dominant, vertically integrated public sector body that allows re-use charges downstream competitors such fees that these are squeezed out. The same would apply to cross subsidies.

6.2. It is likely however that the biggest risks to competitive structure might come not from exceptions to the default rule, but from the application of the default rule itself. As indicated in § 2.b.ii, pricing of public sector information below average costs incurred by public sector bodies may also have a negative anti-competitive effect which is similar to predatory pricing in a competitive context and create a foreclosure effect in the upstream market. More generally, making public sector information too cheap may harm the businesses opportunities of private undertakings that would compete with public sector bodies in the generation of substitutable information.

7. THE OPTIONS.

³⁰ Unless, of course, legislation enabling the creation of private alternatives (such as Trusted Third Parties) is passed; in which case questions as to the completeness of the data and their integration would arise.

³¹ On “registration based” public sector body *see* above, note 8.

³² The point is forcefully raised by E. DERCLAYE, *Does the Directive on the Re-use of Public Sector Information affect the State's database sui-generis right?*, above at note 12, 163, who, after reaching the conclusion that the PSI Directive does not trump or affect State IP rights, including data base rights, quite provocatively, states: “the state may not charge excessive prices... and that was already prohibited by competition law. One can wonder why we are paying the European institutions”.

³³ [the Ecomet 2 case should provide a case study; the same applies to the French SHOM case, which was not recognized as a cross-subsidy case]

Against this background, what are then finally the options in connection with “principles governing charging” available for purposes of the impact assessment and review exercise?

7.1. **OPTION 1** is retaining the *status quo*. Very often this alternative is described as a non-option, as the need to move away from the current situation is perceived as very strong. While there are reasons to believe that the current situation indeed is unsatisfactory, the final remarks below will indicate that there may in this specific case good reasons not to leave the *status quo*.

7.2. **OPTION 2** consists in adopting a zero cost charging policy. At the current state of the development of EU law this is likely to be only a theoretical alternative. Even accepting the – quite persuasive – arguments in favor of a zero cost charging policy, it has to be admitted that, as long as the decision rests with the member States and the public sector bodies under their jurisdiction, the adoption of a zero charges policy is nearly an impossibility under current circumstances (*see* § 5). It should moreover be considered that if a zero cost charging policy were considered admissible under the principle of Subsidiarity, which is a very doubtful proposition (*see* § 5), then such a zero cost policy would be likely to backfire, if combined with rule which leaves member States unlimited discretion as to the question whether re-use is allowed in the first place. As earlier indicated, all what a member State or a public sector body which has reason to believe that a zero cost policy for public sector information is not sustainable has to do is to decide to altogether refuse re-use. Under this not unlikely scenario the net outcome of the adoption of a zero cost rule would be a dramatic shrinkage of the public sector information supplied.

7.3. **OPTION 3** consists in the hypothesis we have been considering at the outset: an hypothetical regime which i. provides that charging is subject to an upper limit (or “ceiling”), identified with the marginal costs of reproduction and dissemination of documents; and ii. admits that the default is overridden by specific exceptions.

These exceptions would look very different depending on the assumptions they are based on. If the rationale discussed in § 3 is accepted, then the exceptions could conform to the following principles:

7.3.1.1. “up front” e “recurring” costs not specifically incurred in the reproduction and distribution on behalf of a specific re-user may be recovered by way of an exception only if proof is given that this does not entail to high transaction costs (a rough rule of the thumb of $\frac{1}{4}$ might be adopted);

7.3.1.2 it is suggested that the notion of **black list**, which has proved successful in completion law, is adopted to indicate which exceptions to the default rule are not admissible; the black list might include:

7.3.1.2.1 prohibition of charges exceeding marginal reproduction and distribution not relating to one specific product (e.g. relating to groups of products), the rationale for the prohibition being that only very specific collection, production costs might be included in the charge;

7.3.1.2.2. rule against “stacking” of licenses; for any authorization requested, the re-user should in principle pay a single fee, not multiple fees;

7.3.1.2.3. “sampling” of data, i.e. access to samples of the data set, should never entail charges, to avoid creating entry barriers;

7.3.1.2.4 rule against “full line forcing” and “tie-ins”; on no event should the grant of a license be made conditional on the re-user to subscribe to a different license it has not requested;

7.3.1.2.5. rule against charges – or continued charges – for non updated data sets;

7.3.1.2.6 prohibition of obligation on re-user to license back data it may have combined with the data set originally obtained.

7.3.1.3. the exceptions under 7.3.1. should be decided (or requested) at the level of each public sector body;

7.3.1.4. the decision as to the exception should be made contingent either to an internal audit body; or to an approval by a supervisory authority;

7.3.1.5. as an alternative or a complement to 7.3.1.4 a simplified, on line complaint procedure should be established.

7.3.1.6 a set of guidelines and principles should be prepared at the EU level to provide guidance on the issues referred to in 7.3.1.; the current text of Art. 6 would have to be complemented by providing for the issuance of the guidelines intended to illustrate the default rule and the exceptions to it;

7.3.1.7. the guidelines should provide that only the exceptions specifically provided for are admissible (closed list) and that they are to be interpreted strictly.

It is to be expected that the exceptions would look very different, if one moves from the idea that, whatever may be the rationale for a charging policy based on marginal reproduction and distribution cost, its implementation must defer to the principle of Subsidiarity as discussed in § 5.

As a result:

7.3.2.1. also collection and production costs should be allowed as exceptions;

7.3.2.2. “up front” e “recurring” costs not specifically incurred in the reproduction and distribution on behalf of a specific re-user may be recovered by way of an exception only if proof is given that this does not entail to high transaction costs (again a rough rule of the thumb of $\frac{1}{4}$ might be adopted);

7.3.2.3. the black list would not look very different;

7.3.2.4. however, the governance level at which the decision would have to be taken would be different, i.e. not at the level of the public sector body concerned but at some higher level of governance where overall tax policy decisions are taken.

7.3.2.5. also the overview mechanism should be different, i.e. not based at the level of each public sector body (audit or approval), but in form of a report by the Ministry or Department involved in the tax decisions reflecting on PSI fees;

7.3.2.6 a set of guidelines and principles should be prepared at the EU level to provide guidance on the issues referred to in 7.3.1.; the current text of Art. 6 would have to be complemented by providing for the issuance of the guidelines intended to illustrate the default rule and the exceptions to it.³⁴

8. **FINAL REMARKS.** In the end, we have seen that the radical option of zero cost, attractive as it may be on paper, is not really an option. We also tried to flesh out **OPTION 3** which really is the object of this paper. One might wonder whether one of the two sub-options presented above, 7.3.1. and 7.3.2., and the exceptions to the default rule of marginal costs corresponding to the two models make it possible to overcome the objection raised against marginal cost above at § 2.b.ii, according to which (i) pricing below average costs may have a negative anti-competitive effect which is similar to predatory pricing and create a foreclosure effect in the upstream market; and (ii) more generally, making public sector information too cheap may harm the businesses opportunities of private undertakings that in

³⁴ In either case, it may be imagined that extra-hurdles have to be overcome in specific situations, e.g. when the exception would affect a cross-border service; this can be made either by raising the hurdle in connection with typically transnational services, e.g. meteorological as opposed; the difficulty with this approach is that most services are capable of being cross-border, and should become such; the same applies, e.g. for smart addressing, financial services. The other possibility is that when the re-user shows that the data set he obtains for re-use is combined with data sets from other member States, then the exception does not apply; or is subject to a higher burden, e.g. can apply only on the basis of prior independent audit. This means that the solution may also be found at the procedural level.

the current context are likely to compete with public sector bodies in the generation of substitutable information. Of course, the availability of exceptions to the default rule to certain extent may reduce the envisaged adverse impact of the rule; but in such a context it may be asked whether it would not preferable not to change the rules at all.