PUBLIC SECTOR INFORMATION : TOWARDS A MORE COMPREHENSIVE APPROACH IN INFORMATION LAW?

by

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Abstract

The EC is currently encouraging the commercialisation of public sector information to help to improve the competitive position of European information providers. Public sector information is the object of various, often conflicting, interests which have found their legal expression in data protection, access to information, secrecy, copyright and competition law regulations. This framework is not without contradictions, nor has it reached a degree of uniformity that would be desirable within a common market. This situation exemplifies the need to develop a more stringent framework for, in this case, administrative information law. The normative elements for such a framework could be derived and integrated from the various sets of regulations already addressing public sector information. The difficulties in establishing such a body of law should not be underestimated, nonetheless because such an approach will have to transgress traditional boundaries between constitutional, administrative and civil law.

1. Introduction

> "The actual progress in concepts of information in law in the last ten years seems to be relatively small and remains more on a descriptive and analysing than on an explanatory level. But the growing practical relevance and necessity of such concepts arising from day to day problems with information technologies mainly in the area of general and sectoral data protection have created an atmosphere that at the same time makes researchers feel the necessity of an omnibus approach and makes this approach respectable to the science community as a whole. It seems that in the iterative process RVI [*Rechts- und Verwaltungsinformatik* - one of the German terms describing interaction between information technology and law] is in again for the stage of generalisation."[2]

This unwise prediction was published almost exactly ten years ago. During that time, the various sectors of the legal community have continued to contribute solutions in the field of information technology and the law:

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2 Burkert, H.: Theories of information in law (1982). in *Journal of Law and Information Science* 1, No.2, pp. 120-130, at p.130.

criminal law addressed computer crime, civil law contributed to solutions for hard- and software contracts; it was mainly competition law that dealt with changes in the telecommunications infrastructure; administrative law observed freedom of information regulations in the age of electronic filing; copyright law had to come to terms with the not unfamiliar, but increasingly pervasive intangible character of some of its objects. Only data protection could be regarded as a somewhat new area which was not easily to be placed within traditional concepts of administrative and civil law, particularly where it set out to cover the private sector in addition to the public sector. Law, although perhaps slow in its reactions, seemed to have proved itself capable of managing the new problems with its traditional yet sufficiently differentiated set of tools of interpretation and cautious modification. Although more publications now than ten years ago seek to present these reactions under one umbrella[3] and although at recent conferences[4] we hear of bolder attempts at a general systematisation in the name of information law, the apparent lack of a practical need for a comprehensive approach still weakens the quest for such a comprehensive structure.

I want to describe a particular problem and current activities to face this problem which, in my view, may render such a practical need for comprehensiveness more apparent, even if still restricted to what may be called "administrative information law". Although limited in its scope "administrative information law" may already carry with it elements of a larger structure of "information law".

The problem is the commercialisation of public sector information which was brought to the legal community by an economic policy which seeks to activate the resources of the public sector for the information market. I shall try to present this problem against the background of more recent activities within the European Community (EC). It should be kept in mind, however, that these problems have been, are or will become relevant at least in all OECD member states, having originated, in my view, in the US. The EC perspective adds an additional flavour, the peculiarities of EC law, and allows me to draw from the observations of a recently concluded study.[5]

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3 E.g.: Mackaay, E.: *Economics of Information and Law*. Boston 1982. Soma, J.T.: *Computer Technology and the Law*. New York 1983ff;. Huet, J.; Maisl, H.: Droit de l'informatique et des télécommunications. Paris 1989. Tapper, C.: *Computer Law*. 4th edition. London and New York 1989. Dommering, E.J.: *An Introduction to Information Law. Works of Fact at the Crossroads of Freedom and Protection*. In: Dommering,E.J.; Hugenholtz, B.P. (ed.): *Protecting Works of Fact. Copyright, Freedom of Expression and Information Law*. Deventer 1991, 1- 58; and see also the publications in the *Computer/Law* Series published by Kluwer.

4 The integrative approach to information law was one of the central topics of the Amsterdam Conference "Information Law Towards the 21st Century" in June 1991. The proceedings will soon be published.

5 The PUBLAW 1 study, a study financed by the EC's General Directorate XIII/B and carried out in cooperation between the Centre de Recherches Informatique et Droit, Facultés Universitaires de la Paix de Namur (Prof.Dr. Yves Poullet, Marie-Hélène Boulanger, Thérèse Davio and Cecile de Terwagne), the University College London (Prof.James Michael in co-operation with M. Stavropoulou) and GMD-FS.INFOW (Herbert Burkert in

Again, however, it should be kept in mind that the structural problems arising from the need to harmonise different legal systems in view of a common market will not be limited to the EC: the EC has already united with the EFTA countries to form the European Economic Space even before most of its members will have become EC members, and the North American continent is joining into one economic zone.

2. The Problem

The problem of commercialising public sector information was discovered' on the EC level in the early 80's. Commercialisation was perceived as an opportunity for economic policy in the field of information services: the internal market for information services in the EC was (and still is) relatively small in comparison to the US market; in the world market for information services European information providers still play a secondary role. Having further observed that a large percentage of European information services is still offered for free by public or semi-public bodies[6], it was felt that not only could the information resources of the public sector be used more extensively to improve the supply side of that market, but also that these resources could be used with more efficiency economically if there were a better strategy for their commercialisation. In 1989 the Commission therefore issued the "Guidelines for improving the synergy between the public and the private sectors in the information market" (EC Synergy Guidelines). As the Guidelines stated under No.1:

> "Public organisations should, as far as is practicable and when access is not restricted for the protection of legitimate public or private interests, allow these basic information materials to be used by the private sector and exploited by the information industry through electronic information services."

But as already indicated in this sentence, the EC Guidelines also recognised that such a policy of commercialisation was not only economic policy-related but also posed legal problems as well, because the public sector is operating in a close net of interests in its information expressed in various regulations. The politics of commercialisation had to face these existing legal restrictions and, particularly important for the EC on its way

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cooperation with Birgit Brauner and Tina Klapp). The views expressed here are those of the author and neither necessarily those of the EC Commission nor of those institutions and persons involved in that study. A follow-up study is now under way, PUBLAW 2, organised by the Policy Studies Institute, London, which looks into current policies in EC member states as well as in North America, in view of possible further Community action.

6 In 1989 about 52% of the databases produced in the EC originated from the non-profit sector (Commission of the European Communities, Directorate General Telecommunications, Information Industries and Innovation, Information Market Observatory, IMO Working paper 90/5, Luxembourg December 1990, p.4). According to the same source only about 15% of the US databases originated from non-profit organisations.

to a single internal market, differences in such restrictions among the member states.

This situation calls for the particular role of the Community Bodies. The EC is a supranational autonomous organisation of international public law based on the Treaty of Rome (1957), reformed by the Single European Act (1986) and perhaps reformed soon again by the Treaty of Maastricht, currently with 12 Member States (Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, United Kingdom). Its bodies are the Commission, the Council of Ministers (one departmental minister per country, the department depending on the subject matter discussed in the Council), the European Council (established 1986: the Heads of Government of the Member States setting the political directions for the European unity), the European Parliament (directly elected in the Member States)[7], the European Court and the European Commissioner of Audit. The basic treaties are referred to as primary Community law; the community bodies set secondary Community law by issuing regulations and directives. In addition there are (non-binding) recommendations, administrative acts, decisions and pronouncements by the bodies and the decisions by the European Court. Primary EC law and EC regulations are directly applicable in the Member States; directives are addressed to the Member States requiring transformation into national law; courts of the Member States have to apply primary EC law and regulations directly; they have to interpret national laws in the light of the directives. If, for a decision which national courts intend to pass, it is necessary to interpret Community law (rather than merely applying it[8]) or if they intend to challenge its validity, they have to formulate this problem as a question of law and submit it to the European Court. Its decision is directly binding on the national courts. Community law thus prevails over national law, even national constitutional law.[9]

This brief excursion into Community law already indicates one significant change in European information law: Community action, particularly when it turns into Community law, is becoming more important than national legal developments, although, of course, the development of Community law is strongly influenced by what is happening in the Member States, or more realistically, in its largest Member States.

With regard to public sector information, the EC has remained attentive but cautious so far. The EC Synergy Guidelines are, as their name indicates, only recommendations. The Member States are not bound by them. But, as we shall see, the EC is increasing the regulatory pressure in various areas directly affecting the commercialisation of public sector information.

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7 Not to be confused with the Parliamentary Assembly of the Council of Europe; its members are nominated by the parliaments of the Council of Europe Member States. For the Council of Europe and its role see below.

8 The difference between (mere) application and interpretation is one of the many delightful problems of Community law.

9 How it exactly does so is another much disputed issue in European Law.

3. Public Sector Information - Conflicting Interests and the Legal Environment

While exerting such pressure the EC has to be aware of the interests attached to public sector information.

- The public sector itself needs the information to fulfill its responsibilities. Administrations have their own political interest in deciding who is getting what information when and for what purposes in order to remain in control of critical situations.

- The citizens need public sector information to know and understand their entitlements and obligations. They need public sector information to participate effectively in a democratic society. The citizen, as a consumer, may have to rely on the neutrality of the public sector to obtain necessary market information. As an information provider to the public sector citizens trust that the confidentiality of their information is being guarded.

- Market participants, not just commercial information providers, need access to infrastructural information as well. They feel the burden of providing such information to the administrations. They, too, wish to see their proprietary information protected by the public sector.

- The information market providers finally have an interest in obtaining information in the optimal format at minimal costs and in the best quality available to add value.

Many of these needs and interests are already reflected in the traditional legal environment. Copyright, for example, has been around for some three hundred years. So have regulations on secrecy, and this indeed is a further problem of legal policy for commercialising public sector information: You cannot and you would not start from scratch when the technology is changing. It is like town planning - you seek to adapt: there are areas which are old and which can remain; there are areas which have to be modernised; there are areas where you have to rebuild. The problem of technology-related legal policy is to identify where to do what and still make the structure visible, transparent, and coherent.

The EC project already mentioned has identified five problem areas of regulatory activity relevant for the commercialisation of public sector information: data protection, access legislation, secrecy, copyright, and competition law.

3.1. Data Protection

Data protection itself can be seen as a technology-induced regulatory reaction. It relates to personal data in the public sector and, in most European countries, to the private sector as well, and thus its reuse by the information industry and by their customers. Data protection regulations seek to ensure that public sector information holdings of personal information follow a set of what is considered as fair information practices.

Data protection (privacy) protection has been adopted in the following member countries: Denmark, France, Germany, Ireland, Luxembourg, the Netherlands, Portugal and the United Kingdom. This still leaves Belgium, Greece, Italy, and Spain without such legislation as well as problems which arise from inconsistencies between the already existing legislations.

The general situation in the EC has remained so unsatisfactory in view of the single market that after hesitating for a long time, the Commission has finally issued a draft directive on data protection. The proposed directive seeks to provide common conditions for the handling of personal information within the Common Market.[10] This proposal has just been reviewed in the European Parliament; as soon as the Council has formulated its position, it will go into a second cycle of drafting.

The general principles that have developed throughout the national legislations have already been summarised in other international legal instruments like the Convention of the Council of Europe for the Protection of Individuals with regard to Automatic Processing of Personal Data and the OECD Guidelines on Data Protection. These main principles: the collection limitation principle, the data quality principle, the purpose specification principle, the use limitation principle, the security safeguards principle, the openness principle, the individual participation principle, and the accountability principle will also have to find their way into the final text of the directive. But to what degree of detail the directive will then force the member states to either legislate or re-legislate is still open.

The effects of data protection on the commercialisation of personal data are obvious. Personal data is not usually collected by the public sector in order to be communicated in bulk to the private sector for commercialisation purposes. Such transfer therefore usually implies a change of purpose. Such a change is, in principle, made admissible in national legislations based on some or all of the following conditions: if there is individual consent, if there is an overriding public interest or if the interest of the receiver supercedes the interest of the person concerned. The last two conditions involve a weighing up of interests. Such balancing is difficult to sufficiently generalise, as it would be necessary for bulk commercial use.

There has been in existence, however, before the advent of privacy regulations, a large body of register laws which have provided for the collection and accessibility of personal information in order to make such information public. These laws very often provide a general unrestricted right of access to personal information. Register legislation has been coined for traditional - paper file - registers. These registers had 'built-in' restrictions which had served as tacit protection mechanisms. Where such registers become automatic they usually provide a new quality of accessibility, e.g. such registers may now more easily be retrieved by individual names; once transferred they can more easily be matched with already existing electronic compilations in the private sector. Register regulations on accessibility therefore have to be reconsidered. This reconsideration has to take into account the reasons for which these traditional registers had provided general

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10 Commission of the European Communities COM (90) 314 final.

access (e.g. to guarantee the integrity of the voting process - voters' registers - or to balance limited liability of business corporations with transparency of their structure - company registers). As a result of this reviewing process in some EC countries, access to such traditional, but now automated, registers has become restricted.[11]

The EC, while going ahead with a general directive on data protection, will also have to consider the need for special sector regulations to avoid the possibility of current special sector activities in the member states creating a new divergence.

This task is further complicated by the legal constraints facing the EC. One of the issues hotly debated in the context of the draft directive is the competence of the EC to regulate public sector (personal) information at all. EC competence is mainly (although not exclusively) restricted to market-related issues; the handling of public sector information, if seen as an administrative procedure, would be outside such competence, and seen from the subject area, police information is clearly not within EC competence.[12] On the other hand, data protection as a framework condition for the marketing of public sector information would fall under this competence. But how can one expect practicable and comprehensive regulations for public sector (personal) information if member states are left free to regulate generally, while the EC would regulate the commercial aspects via the directive?[13]

Finally the EC is facing political opposition, with regard to the commercialisation of public sector information and its relation to data protection, by another important European actor, the Council of Europe. In September 1991 the Council of Europe, perhaps alarmed by what it perceived as possible implications of the EC Synergy Guidelines for data protection, issued its recommendation "on the Communication to Third Parties of Personal Data held by public bodies".[14]

The *Council of Europe* was founded in 1949 and has more than 20 European States as its members, including members from the emerging democracies in Eastern Europe. The Council of Europe is an organisation of

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11 E.g. voters register in Luxembourg, car registers in France and Germany.

12 The Treaty of Schengen relating to police information is not an EC law instrument; it is a treaty, not yet ratified in all participating countries, outside EC law although related to some of the consequences of a single European market, mainly the consequences of the abolition of border controls within the EC.

13 The draft directive tried to overcome this dilemma by limiting the applicability to all areas to which EC law is applicable (thus stating only the obvious) and *recommending* that the member states apply the directive to all other personal information not covered by the EC directive. This approach is currently heavily criticised, although it only reflects a general EC dilemma: although in practice on its way to political unity the EC is still largely constructed as an instrument to achieve economic unity.

14 Recommendation No. R (91) 10 adopted by the Committee of Ministers on September 9, 1991.

European cooperation in almost all fields, with the exception of national defence, with the aim of achieving a greater unity, particularly in the field of law. The cooperation is dedicated to the promulgation of the ideas of democracy, human rights and the rule of law. The organs of the Council of Europe are the Committee of Ministers (the ministers for foreign affairs of the Member states) and the Parliamentary (Consultative) Assembly (delegates from parliaments of Member states). The Council of Europe's main instruments are conventions. The most famous is the European Convention on Human Rights. It is also the Council of Europe which has been the most active proponent of data protection in Europe by adopting the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (adopted by the Committee of Ministers of the Council of Europe on 17 September 1980).[15] Current Council of Europe activities in the field of data protection focus on sector oriented approaches.[16]

It is the problem of purpose limitation on which the Council of Europe recommendation strongly focuses when it states e.g.:

> "2.1 The communication, in particular by electronic means, of personal data or personal data files by public bodies to third parties should be accompanied by safeguards and guarantees designed to ensure that the privacy of the data subject is not unduly prejudiced.
>
> In particular, the communication of personal data or personal data files to third parties should not take place unless:
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> a) a specific law so provides; or
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> b) the public has access thereto under legal provisions governing access to public-sector information; or

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15 Long before the Convention, the Council of Europe had already been acting through resolutions: Resolution 73(22) adopted by the Committee of Ministers on the protection of the privacy of individuals vis-à-vis electronic data banks in the private sector and Resolution 74(29) adopted by the Committee of Ministers on the protection of the privacy of individuals vis-à-vis electronic data banks in the public sector.

16 E.g.: Recommendation No. R (81)1 adopted by the Committee of Ministers of the Council of Europe on 23 January 1981 on regulations for automated medical data banks. Recommendation No. R (83)10 adopted by the Committee of Ministers of the Council of Europe on 23 September 1983 on the protection of personal data used for purposes of scientific research and statistics. Recommendation R (85) 20 adopted by the Committee of Ministers of the Council of Europe on 25 October 1985 on the protection of personal data for the purposes of direct marketing. Recommendation No. R (86) 1 adopted by the Committee of Ministers on 23 January 1986 on the protection of personal data used for social security purposes. Recommendation No. R (87) 15 adopted by the Committee of Ministers on 17 September 1987 regulating the use of personal data in the police sector. Recommendation R (89) 2 on protection of personal data used for employment purposes adopted by the Committee of Ministers on January 18, 1989.

c) the communication is in conformity with domestic legislation on data protection; or

d) the data subject has given his free and informed consent.

2.2 Unless domestic law provides appropriate safeguards and guarantees for the data subject, personal data or personal data files may not be communicated to third parties for purposes incompatible with those for which the data were collected.

2.3 Domestic legislation on data protection should apply to the processing by a third party of personal data communicated to him by public bodies."

Council of Europe recommendations do not have a direct legal impact on an EC directive. However, in view of the high reputation of the Council of Europe in matters of fundamental rights and freedoms in Europe, they create a burden of political legitimation which has to be taken into account by the EC in the final wording of the directive. Furthermore, in view of the lack of an EC instrument on fundamental rights and freedoms, the Commission has to take into account that the European Court of Justice, in decisions on Community law in which fundamental rights are at issue, frequently has recourse not only to constitutional guarantees in the Member Sates, but also to the European Declaration of Human Rights, which after all has been endorsed by the Community bodies.[17]

3.2. Access to Government Information

Access to government information regulations, i.e. regulations giving a right of access unrestricted by the need to show a particular interest, are less common within the EC.

EC member states with such legislation are currently: Denmark, France, and, to some extent, Greece and the Netherlands, which has just passed a revised statute. Drafts have been introduced into the parliamentary process in the Federal Republic of Germany (with regard to environmental data); Ireland has recommended to its administration to follow the principles of the Council of Europe's Recommendation 81 (19) on access to administrative documents.[18] The Italian Parliament, in the context of its

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17 In a Joint Declaration by the Parliament, Council and Commission stating that they will observe the fundamental rights as expressed in the national constitutions and the European Convention (Official Journal 1977 C 103/1). The European Court of Justice, since the late 60's, has increasingly taken into account fundamental rights, seeing them as an integral part of Community law.

18 Again, this is an area where the Council of Europe has been more active than the EC. These recommendations perfectly summarise the basics of access legislation: "(I) Everyone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities other than legislative bodies and judicial authorities. (II) Effective and appropriate means shall be provided to ensure access to information. (III)Access to information shall not be refused on the ground that the requesting person has not a specific interest in the matter. (IV)

constitutional reform activities, has seen a drafted access law, which is close to the text of the French law. Portugal has constitutional clauses relating to a right of access. Courts have, however, interpreted these clauses so far, as demanding a special lawful interest. Also, the Spanish Constitution provides such an access right; here too, however, no transforming legislation has been passed yet. The EC Commission has issued a directive on access to environmental information which will force member states to enact such legislation by 1993.[19] The EC, however, has not yet acted on a draft directive on general access to public sector information.

National laws may differ as to the degree of detail in which they word exemptions to a general right of access, as to whether they set time limits for responses to be observed by the administration. The laws may further differ in the fee structure for access requests, in the establishment of a supervisory authority and with regard to the possibilities left to an individual whose access request has been refused.

More recent problems with access legislation occur from the advent of electronic filing in public administrations (e.g. the applicability of such regulations to electronic documents and data banks.) Other problems stem from interactions with data protection. If a country has both sets of regulations, how can the interests of privacy be balanced against the public's right to know? To what extent can one access other people's personal data using the access law? May a person requesting information for him or herself choose between the access right in the data protection law and the access right in the freedom of information law?

As a citizen's right the access request can be exercised on payment of fees which are meant to cover merely the basic costs of providing copies and support media. The market value of such information, however, might be considerably higher. On the other hand, the mere existence of public access legislation forces - very often for the first time - public administration to set up and publish information inventories. These information inventories may help the private sector to decide on the market potential of such information.

Access to information shall be provided on the basis of equality. (V) The foregoing principles shall apply subject only to such limitations and restrictions as are necessary in a democratic society for the protection of legitimate public interests (such as national security, public safety, public order, the economic well-being of the country, the prevention of crime, or for preventing the disclosure of information received in confidence), and for the protection of privacy and other legitimate private interests having, however, due regard to the specific interest of an individual in information held by the public authorities which concerns him personally. (VI) Any request for information shall be decided upon within a reasonable time. (VII) A public authority refusing access to information shall give the reasons on which the refusal is based, according to law or practice. (VIII) Any refusal of information shall be subject to review on request."

19 Council Directive of 7 June 1990 on the freedom of access to information on the environment (90/313/EEC).

3.3. Secrecy

The public sector acts as a trustee of private sector and individual information. To maintain the flow of input, this trust must be justified. But secrecy is not only a matter of trust. It is also one of the tools used by public sector administrations to overcome deficits in resources by the freedom to time their actions and re-actions at will. Both considerations have become part of various obligations in EC member states that are directed at those who handle public sector information, regulations ranging from civil service codes to penal law. But also in access legislations we find specific exemptions which have to be observed in the interest of maintaining this strategic advantage or in the interest of third parties, whether individuals, companies, or other public sector institutions.

The effects on commercialisation are of an indirect nature. Strict rules on confidentiality and their enforcement create individualised risks for public sector employees who in turn tend to favor a defensive approach to information requests.

3.4. Copyright

Copyright poses two problems in the context of commercialisation of public sector information: To what extent does it apply to public sector information resources at all; and in view of an increasing trend towards electronic filing and electronic data banks, does it apply to such compilations?

In all EC countries public sector documents are copyrightable, either unrestrictedly, as e.g. in the UK, or with some exemptions relating to specific official documents and texts of law, as e.g. in Germany. If the public sector uses this right, and in particular the penal law elements of copyright, for checking on the unauthorised use of public sector material, there might easily occur conflicts with freedom of information principles or other regulations which provide for accessibility. With regard to electronic data bases, the EC has finally reacted in view of uncertainties in the interpretation of national law. It has just started to circulate a draft directive on copyright protection for data banks among the member states. Copyright - where it is available - is certainly the most effective legal instrument to steer the commercial exploitation of public sector information via the licensing process. Such commercial use may, however, produce negative effects in return. Those who have provided material to such data bases may, in turn, demand financial compensation. Licensees may find themselves in an unclear situation with regard to those who access such data banks on the basis of a general right of access. It is doubtful whether the public sector can dispose of its 'publicity' functions simply by 'licensing away' a database. And finally there may be clashes with competition law principles.

3.5. Competition Law

Two types of competition questions have to be differentiated here: competition of the public sector with the private sector; and public sector influence on competition within the private sector.

While EEC competition law privileges public sector enterprises which provide services of a *general economic interest*, e.g. transport services, this privilege, however, is only granted in as far as it would not endanger the aims of the European Economic Community. While some information services might qualify as a service of general economic interest, in areas where this privilege does not apply, the public sector, while not being barred from providing the information service, would nevertheless be subjected to the rules of EEC competition law as any other market participant. The public sector therefore has to refrain from discriminatory practices e.g. with regard to licensing the use of public sector data banks. Even if there is public sector copyright, the public sector would not be allowed to use copyright for either discriminatory licensing or by refusing to grant licenses at all, if the public sector holds a dominant position.[20]

4. The Problem: Inconsistencies in the Present Information Law Framework

We have briefly analysed five types of regulations. While EC economic policy seeks to encourage the availability of public sector information for commercial purposes,

- access laws demand that public sector information is made accessible (and kept accessible) as widely as possible at the price of its support with no regard for motives and further purposes;
- data protection laws demand that personal information is as little available as possible and if available, the purpose for which it has been collected has to be taken into account;
- secrecy laws demand that information is not being distributed freely and favour a climate of non-disclosure;
- copyright law may permit the public sector to keep a close control on the further use of such information, although with limitations mainly set by competition law;
- competition law demands that if information is distributed by the public sector its 'natural' advantages as (in many cases) the monopolist collector of such information should not be exploited; by giving away such information for distribution by other parties, none of these parties should receive preferential treatment.

If the EC seeks to succeed with its plans for the information market it will have to take into account these framework conditions. The EC Synergy Guidelines have already recognised the importance of the legal framework by including a section on legal and statutory responsibilities:

> "17. The public sector should strive to eliminate unjustified legal or other obstacles to the use of public information by the private sector and its exploitation by the information industry while

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20 Judgment of the Court of First Instance of 10 July 1991 - T -70/89. The decision has been appealed.

> ensuring that commercial and other confidentiality considerations and civil and criminal liability are respected [...] 18. The public sector should to the highest extent possible make use of the discretion given under Article 2 (4) of the Bern Convention to exempt from copyright texts of a legislative administrative or legal nature and official translations of such texts. In the case of texts falling under the copyright convention the public sector ought not to award exclusive right of reproduction to a single organisation as this might hinder value enhancement by other users. [...] 19. When public sector information or data is made available for private sector use or exploitation. any pre-existing citizens' rights of access to the original information as determined by legislation must be preserved."

However these somewhat general clauses neither sufficiently take into account the complex interactions between these types of regulations, nor do they deal with the problem of differences in national regulations. We have referred to such difficulties e.g. in the area of data protection, which at the same time poses fundamental problems to the commercialisation of personal information from the public sector. We have pointed to a lack of tradition and a reluctance of the EC concerning general access legislation which in turn is faced with secrecy obligations. While licensing under copyright rules might give the public sector sufficient discretion to start commercialisation policies, such licensing policies might themselves come into conflict with basic EC competition law concepts.

This situation might well provide an opportunity for a more comprehensive approach to regulating information in and from the public sector. Furthermore it might lead to a re-thinking of the normative elements of a policy for commercialising public sector information.

5. Towards a Normative Reconstruction of Information Law

Facing complexity and within that complexity very often inconsistency is not totally new to the legal community, it is its daily experience. Any lawyer for example faced with giving advice in a comprehensive undertaking like the establishment of a company is aware of the need to take into account various areas of laws and regulations ranging from tax law, corporate law, labour law, to health and safety regulations and local by-laws on zoning, often involving the laws of different countries. In the course of such and similar undertakings inconsistencies may be discovered and have to be addressed, either by interpretation or by calling the legislature to its duty. Law is rarely structured around types of real-life events; it is the task of the legal community to seek, collect and select the relevant norms applicable to the event and its potentialities. The legal community seeks to address the problems caused by the increasing complexity by specialisation, and in compensation for specialisation, by improving its own internal informational and communicational infrastructure and by cooperation.

These attempts at compensation are not always successful. The area of legal regulations surrounding the handling of information by means of information and communication technology is particularly difficult, as our

very practical problem of the commercialisation of public sector information has shown. It requires the cooperation of two parts of the legal community which are separated by a gap which seem to be as large as the one once deplored by C.P. Snow in his essay on the "two cultures". It is the gap between those who are mainly familiar with areas like constitutional and administrative law, or more comprehensively, using a European continental term, with public law, and those mainly dealing with private law, or, again with reference to a continental European concept, civil law.

Organising and reconstructing law around the issue of information handling in the era of (electronic) information and communication technology, and around public sector information handling in particular, may well be an opportunity to overcome this gap. And overcome it must be, because the legal inconsistencies are but an expression of a political crisis of legitimacy. This leads us to the normative element. Information law is not just an attempt to systematise and re-structure legal rules around the notion of information handling. Behind this structural problem is hiding a normative issue which has to be made transparent and to be addressed.

Public law, at least in the European continental notion, is governed by an understanding of the particular relationship in which the power of the state is balanced by fundamental rights and freedoms and due process rules. The civil law perception is one of principally equal bearers of rights and obligations. Although this ideal characterisation is modified by numerous interventions by which the legislature has imposed restrictions in the public interest on private sector parties and although, under the term of "horizontal effects", within EC law[21], legal obligations of public authorities may be transferred to private sector parties, it is this basic differentiation which characterises at least continental European legal systems in general. It is, for example, against this background that omnibus privacy legislation is (still) often criticised (and not only in North America) for transferring an approach acceptable in the context of the citizen/state relationship to what are seen to be freely interacting parties.

This conceptual separation, however, experiences a crisis of legitimacy. Such a crisis occurs when concepts hitherto unquestioned and almost self-evident suddenly become an object of dispute[22]. It results from consequential thinking: if objects which have been surrounded by a close net of public sector legal principles are transferred into the private sector, it would seem that such transfer could not legitimately occur without public sector obligations accompanying these objects to their new destination in the private sector. Such has already been the case e.g. in such European countries where public sector communication carriers become private sector carriers and

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21 For more detail see: Kapteyn, P.J.G.; Verloren van Themaat, P: *Introduction to the Law of the European Communities. After the coming into force of the Single European Act.* 2nd edition edited by Gormley, L.W., Deventer 1989, 346 ff.

22 With regard to the concept of a crisis of legitimacy see: Laufer, R.: The Question of the Legitimacy of Computers: An Epistemological Point of View. In: *Report from Namur: Landscapes for an Information Society.* New York 1990, 31-61.

have to take over the obligations of communication secrecy, originally guaranteed as a defensive right against state interference. Such should be the case as well, when public sector information, which had been provided, very often under a legal obligation in the public interest, to the public sector is then transferred to private sector information service providers. Such a conceptual shift can already be observed with regard to personal information. Technological opportunities have rendered such information transferable. It has thus become feasible, economically, to transfer once "in-alienable" rights associated with "personality", and to turn them into an exchangeable commodity. This development has led to counteracting concepts like privacy and, even more strongly, personal self-determination, which in turn are no longer exclusively directed against the state but against anyone involved in such transaction processes. In terms of a legal paradigm shift, this change is only comparable with the changes in the concept of a "person" which have led from the acceptance of slavery to labour law and finally, under the influence of constitutional and thus public law, to constructs like "affirmative action". The normative framework of the commercialisation of public sector information will have to take into account such shifts.

And this is only the data protection part of the problem. A similar paradigm shift might be observed, albeit in a different direction, when citizen information, a prerequisite of democratic participation in the public process, is sold, thus recalling the connection, since then overcome in democratic theory, between voting rights and property.

It is against these changes in normative concepts that re-organisation processes in information law are already under way. In the US, for example, on the federal level, there are attempts at reformulating the Paperwork Reduction Act to reconcile the various interests in public sector information, by addressing the dissemination of public sector information and reconciling it with access to information, privacy and private sector interests.[23] Such attempts, in my view, can only have limited effect if there are not sufficient guarantees for personal information once it has entered the private sector. The privatization of public sector activities leads, as stated above, to a "constitutionalisation" of private law. It comes as no surprise therefore that for example the Quebec government, having already addressed access and privacy in the public sector, is currently deliberating privacy legislation for the private sector *and* specific legislation on the commercialisation of public sector information.

But the need for a more comprehensive approach to information law stems not only from the need to react to a crisis of legitimacy and the shifts of concepts it produces. It is the public sector itself which needs such a comprehensive set, based on clear normative assumptions. Under constant political pressure to economise its undertakings, and having been provided, by information and communication technology, with an instrument of rationalising its tasks, it cannot set out to do so without operating in an environment that sufficiently proceduralizes its duties, obligations and areas

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23 Cf. e.g.: US Congress: *Paperwork Reduction and Federal Information Resources Management Act* of 1990. 101st Congress, 2d Session, House of Representatives, report 101-927. October 23, 1990.

of discretion. Such proceduralization needs a comprehensive, inherently coherent framework of rules. Such is at least one task of information law.

Such information law may well be re-configured, not only structurally but also normatively, at least with regard to "administrative information law", from the general principles already inherent in the different areas we have covered. From data protection law we learn that not only is the misuse of personal data an act to be avoided, but that electronic imaging of persons and simulating their interactions is an act requiring justification and that such acts should be based on informed consent. Such acts of consent need not remain individualised - this is why the data protection principles allow, for example, modification of the purpose limitation principle if based on a law, i.e. based on a collective act of consent; this importance of legislation makes it even more important to learn from freedom of information legislation that *informed* consent is not just a prerequisite of informational self-determination but of political codetermination in democratic societies; secrecy in that context becomes the principle of reasonable expectancy of trust in exchange for individualised information obligations; copyright is shown as a limited privilege for a contribution of informational creativity to the common good and competition law as a balance against information and communication monopolies, which not only have *economic* adverse effects. These principles are not bound to artificial (in the meaning of socially created habits of perception) separations between the public and the private sector, but they are connected to the importance of information and communication in our societies.

These principles can be made operational in the EC environment: The current activities on data protection will have to be complemented by similar activities for access to government information. Such a common framework should minimise the commercial interests of the public sector in the information for which it is responsible; voters are not shareholders of a common enterprise; the sources of public income should remain under the strict control of the parliamentary process; this control should not be diluted by public sector inventiveness to create an additional income "on the side", as much as we wish to compensate for public sector spending. This should not keep the private sector from obtaining public sector information resources and being adequately compensated for their value-adding inventiveness; indeed this opportunity to *add* value should be an equal opportunity for all participants and in particular for the ever more important "voluntary" sector and thus not be dependent on licensing fees.

These final remarks may come as a normative chill after a so far gently descriptive breeze, but then again, apart from providing structures and offering re-organisations it will be one of the tasks of the information law community to contribute to the normative debate, not by usurping what will remain the task and responsibility of the legislator, but by pointing out normative interdependencies and consequences and warning, in time, against the external costs, as well as illuminating possible external benefits, for our value systems co-caused by technological and economic change.