

## Tilburg University

### Access to Public Sector Information

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**Study on a Green Paper regulating Public Access to  
Government Information**

**findings presented by Corien Prins**

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## **INTRODUCTION**

### *A European policy on citizens' access to government information?*

Access to government held information is an important issue with respect to the European Union: Especially when it comes to the establishment of the Common Market and to the creation of a meaningful European Citizenship, this issue is of particular importance. Several documents and texts have acknowledged this.

Why is it important to consider this issue at a European level?

Well first, when looking at the present situation in the Member States regarding the regulation on citizens' access we see diversity. Nine out of fifteen Member States of the European Union have adopted general access acts. Portugal and Spain have constitutional paragraphs on public access to information held by government and administration. Austria, Germany, Ireland and the United Kingdom neither have these. Germany merely knows a right to receive information from general accessible sources. Italy merely works with a system for openness for parties involved in administrative procedures. Austria, Germany, Spain, Portugal, Ireland and the United Kingdom have no public access acts. Administrative procedure law in Germany provides rights for persons who are involved in non-contentious administrative procedures. In two-third of the Member States the right to access is not granted to foreigners. In Denmark, Finland, France, The Netherlands and Sweden such a right is granted.

It could be argued that the diversity regarding regulations hinders the realization of the main purposes of the European Union, that is to establish a strong Internal Market. For, this diversity may hinder the free flow of information and consequently the free flow of information services. Also, as known, citizens' access is a precondition for a Europe where decisions are taken as closely as possible to citizens (as proclaimed in the article A of the Treaty).

### *Considerations and arguments for citizens' access in Europe*

When looking at legal texts, official policy documents and other documents and publications of the Member States, the Institutions, third countries and national and international organisations, a number of considerations and arguments regarding citizens' access can be deduced. These considerations and arguments refer to the following subjects:

- a the meaning of citizens' rights, such as the freedom to receive information;
- b the importance of transparency and openness within national governments and the EU Institutions;
- c a strong economical position of the EU towards third countries, inter alia in North America and Asia;
- d a free European information services market without legal and administrative barriers distorting fair competition between Member States;
- e policies on other subjects, such as the protection of the environment.

## **THE NECESSITY OF A FRAMEWORK ON ACCESS IN EUROPE**

In the past few months, a consortium of Tilburg University and Leiden University, in the Netherlands have undertaken a study, the principle question of which is:

*To what extent is it necessary that Europe should construct a legal and regulatory framework on access?*

There are at least three relevant judicial perspectives or points of view that should be taken into consideration when answering this question.

**I.** The Internal Market point of view in general and the information market in particular. The issue at stake is economic progress within the Union. From this point of view, it may be argued that the exploitation of government *c.q.* public sector information, under conditions of free and full competition, is needed for the establishment of an internal information services market that in its turn is needed to develop Europe's industry.

**II.** The second perspective stresses aspects that concern principles of democracy and Rule of Law. From this perspective, access is seen as a citizens' or human right needed to ensure the legitimacy of democratic decision making processes. Access is thus a device in the constitutional system of separation of powers through check and balances. Its purpose is also to enable a meaningful and responsible citizenship needed for true democracy. Prime consideration in this respect is that for citizens to become more aware of and involved in the European process transparency should not only be improved in the European institutions but also in the Member States.

**III.** The third perspective is that of the Cultural heritage. In a global information society cultural identity must be protected. Europe's public sector has important cultural resources that may be exploited for the benefit of both citizens and the information society.

As known, Europe is about to enter the information society. In an information society the importance and meaning of information will continue to increase, making that these issues will become of growing significance. Thus, it might well be that the existing regulations on access will need to be reassessed, and possibly adjusted to this new type of society.

In our present society, information, including public sector information, will become the driving force of industrial development in the European Union and other parts of the industrialized or developed world. We know that Europe's public sector information resources offer substantial opportunities for Europe to develop its information industries and enter the global information market. Studies have shown that the European public sector is in volume probably the world's biggest information producer, at least double that of the US. By making this information available and accessible to the private sector, as was the objective of the Synergy Guidelines of 1989, the internal information market is to be developed and reinforced considerably. For a number of reasons, these guidelines have had limited effect. To fully exploit the public sector information market potential, a much more extensive EU policy may have to be considered.

In addition, in our information society, government or public sector information will also include electronic, digitized information contained in the computerized systems of the government or public sector authorities. The legitimacy of decision making processes, the functionality of checks and balances, and responsible citizenship will be improved through

access to these new information resources. As mentioned, for citizens to become more aware of and involved in the European process transparency should not only be improved in the European institutions but also in the Member States. This is particularly so in the context of increasing information and communication technologies use for decision making by national administrations.

The afore-mentioned three perspectives, as said:

The Internal Market point of view;

The democracy and Rule of Law point of view; and

The perspective of the Cultural heritage

are not incompatible with each other. The issues of the Rule of Law points of view may be served by an Internal Information Market approach, provided that certain preliminary questions are answered and a number of preconditions are fulfilled.

However, when considering a possible policy on access to government information,

*several questions need to be answered*

In case the European Union opts for a Community policy regarding citizens' access to government information the question arises what should such a policy include? In this light answers should be given on the following issues:

- what is understood by 'government information'; what does it include, and what not?
- what is meant by citizens' access (personal access by individuals or public access by both individuals and companies?);
- to what extent has the information to be made available?
- what about standardisation of government information?
- what about the price of the information (should it be set? and if yes, should a distinction be made between what citizens pay for the information and what companies pay)?
- what about the format of the information, is the public sector required to make the information available in an electronic standard form? (how does this question relate to the one on standardization?)
- by what legal instruments can the necessary regulation on citizens' access in the Member States, as well as in the Institutions be achieved (Directive, Recommendation, no legal instrument)? What are the consequences of the use of certain legal instruments?
- how should related legal issues be taken into account (intellectual property, dataprotection, commercial secrecy, liability, competition)?

## **ELEMENTS OF A POSSIBLE FRAMEWORK**

### **I. Introduction**

If we thus assume that access to government held information is an important issue with respect to the European Union, especially to the establishment of the Common Market and to the creation of a meaningful European Citizenship and the European Union should construct a policy framework on access to government information; other issue arise.

It is clear that in case the European Union indeed opts for a Community policy regarding citizens' access to government information, certain preconditions need to be fulfilled. A framework to be constructed can neglect neither the Rule of Law nor the Internal Market point of view. It is inconceivable, in particular in the European context, to consider access only from one point of view. The question to be answered is not which of these points of view comes first, but how justice can be done to both, and how they can be balanced against each other. It is this aspect I shall concentrate upon during my talk.

However, before coming to the question how the Rule of Law and the Internal Market point of view can be balanced against each other, let me first point to the most important issues that come to the fore when looking at the Rule of Law point of view, on the one hand, and the Internal Market point of view, on the other hand.

### **II. The Internal Market point of view**

From an Internal Market point of view, the essential issues the policy framework should take into account, can be categorised roughly and maybe arbitrarily in three manners. Essentials that concern:

1. the exploitation of the information,
2. technology, and
3. competition.

Along the lines of this categorization, the following essentials for the framework may be derived:

#### *1. Exploitation*

**I. Availability of information** In our view, the policy framework should as a basic assumption depart from the explicit acknowledgement, that public sector information, in principle, should be available for private sector exploitation. The principle reason for this assumption is that the information society is to be market driven, and private investment will be the driving force. Without the availability of this information it will be very hard for Europe to fully develop its information markets. Therefore, it is essential from an Internal Market point of view, that the framework acknowledges explicitly, that public sector information in principle must be available for exploitation by the private sector.

**II. Scope of disseminated information** Second, all exemptions on the principle that the private sector should be enabled to exploit public sector information, need explicit argumentation. The argument underlying this statement is that there are, of course, many

legitimate reasons to allow exemptions on the principle that the private sector exploitation of public sector information should be possible, such as state security, corporate confidentiality or the privacy of citizens. However, the framework should let no doubt, that every exemption needs explicit argumentation. In case the concerning interests have to be balanced, the framework should provide the legal instruments needed.

**III. Scope of dissemination** We further believe to be a third essential that the framework should express that legal person and corporations are also entitled to obtain the public sector information they need for the development of services based on this information. Access should be granted not only to natural persons or citizens, but also to legal persons or corporations. Denying access to the latter for no sustainable reason, implies, that private sector information industries, with respect to this information, cannot fully use the otherwise available legal arrangements, such as corporate identity and liability limitations. In the context of the Internal Market, this cannot be.

Of course the question that arises at this point is what price may be charged for the dissemination of government information to legal persons as well as citizens. We believe that from an Internal Market point of view the price charged by the public sector should be cost price, thus the price for dissemination.

**IV. Active public sector** Our fourth essential is that the framework recognises that the public sector should act as to enable the private sector to develop services regarding public sector information. As regards this aspect, the framework should define the role of the public sector in distinct terms. For one thing, the framework should recognise with respect to the availability of its information, that the public sector cannot remain entirely passively. To make its information available for exploitation by the private sector, the public sector must play an active role. The question here arises in what manner the public sector should be active.

Well, when looking at the European Commission (DG XIII) Synergy Guidelines of 1989, we note that the fourth of these Guidelines recommends, that, as far as practicable, a uniform policy is developed for all public sector information resources, for this enhances the availability of the information, and consequently the opportunities for private sector exploitation. In this light it appears essential that the public sector compiles and publicises policies defining the conditions of release of the information. The public sector should thus be required to publish what, where and how the information can be obtained. With this information, private sector information industries should be able to find out, without too much effort, what public sector information resources are available, what information can be extracted thereof, and what procedures they have to go through to actually obtain this information.

In addition, the necessary active role of the public sector implies, that it should regularly review the information it collects with respect to the possibility of further use and exploitation. In particular, the public sector should consider the collection and storage procedures and the standards used, because these determine largely possible reuse and exploitation.

Finally, the public sector should be active in that it reveals its information resources, and the procedures by which the private sector can obtain the information that these contain.

## 2. *Technology*

Technology changes. We therefore believe that the criteria for access should not be based exclusively on the concepts of documents, records or files. The guidance principle should be, that in principle, access concerns all information that can be extracted from public sector information systems, even if this information is not contained in a document or a record. However, this guiding principle does not always hold.

**I. Availability of information** Public sector entities cannot be compelled to provide all information asked for by private sector information industries. Access to their information resources has to be limited for practical reasons. In particular, a public sector entity cannot be compelled to supply certain information, if the retrieval of that information would unreasonably interfere with the settings of its task. So, the criteria whether the information is to be provided, should be based on the efforts that the public sector has to make to retrieve the information. Thus, the criteria should be the time and costs involved.

**II. Manner to disseminate information** We believe that as for the medium of access the framework should also provide the criteria, whether the information is supplied to the private sector on paper or on any other more manipulative information carrier. With respect to further use and exploitation, the framework should not exclude the latter. However, the public sector cannot be obliged to provide the information on a particular medium or in a particular format, if this would unreasonably interfere with the settings of its task. Criteria similar to the above-mentioned, are necessary. The criterion whether the information is to be provided on a particular medium or in a particular format, or not, should be based on the efforts that the public sector has to do this, thus, the time and costs involved.

## 3. *Competition*

From an Internal Market point of view, we believe that as a basic assumption all private sector enterprises should be enabled to exploit public sector information under conditions of free competition and open markets. Thus, the framework should not allow any discrimination on the grounds of nationality.

For competition purposes, it is of particular importance that the public sector does not act as to exclude or discourage private sector exploitation. This implies, on the one hand, an active role of the public sector, for it should enhance the availability of its information and reveal its information resources. On the other hand, the public sector should be reticent with respect to its dissemination activities, for it is also to be recognised, that all public sector dissemination activities eventually may threaten private sector exploitation. The reason for this is obvious. Any information product provided by the public sector for free or at cost price cannot easily be sold for profit by the private sector. From an Internal Market point of view, it must thus be concluded that the dissemination and exploitation of public sector information by the public sector should only be permitted if that or exploitation is considered an essential and inseparable part of a public sector task, for instance because the private sector is unwilling to provide the information to citizens on reasonable terms.

### **III. The Rule of Law point of view**

From a Rule of Law point of view, other essential issues can be distinguished that the policy framework should take into account. As known, there are disparities between national legislations on public access. These disparities, can possibly affect the access rights of citizens of the European Union. Together with the free movement of persons and services in the internal market, requests for government information from citizens out of other Member States will increase. Therefore and for reasons of transparency, as has been mentioned earlier today, it could be necessary to come to a policy framework on access within the European Union, which guarantees a certain level of accessibility to citizens all over the Union.

From a Rule of Law point of view, we believe that such a framework must comprise an adequate level of access principles, which gives citizens of the European Union the opportunity to gain access on an equal basis in the various Member States. Of essential importance in this respect is that the framework is not predetermined to level out the access laws in the Member States.

**I. Availability of information** One of the essential principles in this respect is that citizens are provided with the right to ask for information, meaning that when government does not supply information actively, a citizen must always have the possibility to obtain the desired information by asking for it. Further, we believe that a citizen's access right comprehends access to all information held by public authorities for exercising their public task, unless there is a legitimate reason to withhold. Of course, the access rights may not disturb daily procedures of the administrative bodies. This implies that the compliance of a request may not require enormous efforts for an authority.

In principle, access should be provided on the basis of equality. When special efforts have to be made by the administration, authorities may refuse disseminating or may contract the applicant and deliver for the initial costs. The authorities may, however, not yield profits.

**II. Scope of access** The first principle of the Council of Europe's Recommendation on Access to Information held by Public Authorities contains the basic assumption, that "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". When looking at actual practice and noting the relevant bodies in Member States to whom citizens can address a diverse picture, however, appears. Thus, it becomes important that uniform principles on this matter are introduced. The framework should therefore clearly define or indicate to which administrative and governmental bodies or authorities citizens can address their requests to.

An access right may only become meaningful when it is used at the right place. In the applicable legal systems it is stated that citizens have to address their requests for information to the agencies that made the decisions or produced the documents. However, to the nonprofessional it is not always clear which agency is responsible for the required information. It should thus be stipulated that when a requested agency is not in a position to provide the information, the requester should be referred to the appropriate authority or the request should be forwarded to this authority, which makes an access right more meaningful.

The scope of access to public sector information is further determined through possible limitations to an access right. When looking at the Data Protection Directive, we note that it contains limitations that correspond with limitations found in several national access laws. The Recommendation of the Council of Europe on public access states that access principles may only be subject 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 the preventing the disclosure of information received in confidence), and for the protection of privacy and another 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. In order to grant citizen's a clear picture of what restrictions may apply, it is thus of importance that a possible policy framework defines generally allowed restrictions on public access.

**III. Scope of Access Means** The second principle of the Council of Europe's Recommendation contains the basic assumption, that effective and appropriate means have to be provided to ensure access to information. The basis to comply with this principle is to stipulate and publicise rules on access. These rules should foresee in access rights in the Member States of the European Union, which, as said, guarantee an adequate level of accessibility to citizens all over the Union. In addition, public authorities should actively inform citizens what information is obtainable at their offices. It should make possible to citizens to search in indexes on public sector information. In our information age, it appears obvious that citizens should be able to obtain the information by means of electronic networks and databases. As you probably know, WebServers are available of Directorates of the European Commission, notably DG XIII, and other European electronic servers. In the United States, as a result of the policies of the Clinton-Gore administration, an enormous amount of information is free available on Internet.

**IV. Active Public Sector** Various other essential principles require the public sector to take an active approach when it comes to granting access. First, public authorities have to reply within a reasonable time to a citizen's request for information. They also have to inform the applicant whether and to whom its request is forwarded. Further, the public sector should provide for possibilities for applicants to have their requests reviewed, with the possibility to receive a second opinion, for example of a national Commission on Access.

#### **IV. Balancing the Interests**

It is well understood, that the balancing solutions are to be found in the synergy between the private and the public sectors. Typically, the conflicts are about the different roles both sectors have to perform. The most important issue is the acceptability of value adding or commercial dissemination activities by the public sector. From a Rule of Law point of view, the public sector is compelled to ensure an adequate level of accessibility. This is ordinary interpreted as an obligation imposed on the public sector to disseminate its information to the public. From an Internal Market point of view, however, all activities initiated by the public sector to enhance the accessibility - and in particular to achieve commercial exploitation - of its information, may threaten the opportunities for commercial exploitation by the private sector.

The information society is to be market driven, and private investment will be the driving force. Without the availability of this information it will be very hard for Europe to fully develop its information markets. Therefore, it is essential from an Internal Market point of view, that a policy framework acknowledges explicitly, that public sector information in principle must be available for exploitation by the private sector.

But then again, the assumption that private sector exploitation should be encouraged, does not necessarily imply, that the public sector should never be permitted to commercially disseminate its information. As a starting point, the public sector is required to provide its information to the public in case market demand is inadequate. It is hardly surprising, that the private sector is most attracted to public sector information for which there is most demand, and to those markets that are easiest to supply. Because of this so-called 'cream-skimming problem' a large amount of the information is not provided by the private sector, or only under conditions that do not meet the universality or pricing requirements, necessary from a Rule of Law point of view. In these cases the public sector will have to disseminate the information itself.

In numerous cases, it can, however, be difficult to determine whether the market demand is indeed inadequate, whether the public sector should provide the information to the public as a public service. It is a matter of policy-making to decide whether the prices charged by the private sector, are to be considered excessive from a Rule of Law perspective. Each time this is to be decided, the pros and cons of public sector dissemination have to be weighed against each other. The public sector could provide the information for free, or the marginal costs of the dissemination, and by doing this enhances the accessibility of the information. Also, it could develop low-priced user-friendly interfaces to facilitate access to its information resources.

However, the result could be that private sector initiatives regarding public sector information are torpedoed. In the end, the nett returns in terms of increased accessibility could be negative. In certain cases, the public sector may directly commercialize its information resources as a means of reducing public sector deficit. Important fair competition questions may arise in this respect. Because there are no explicit and general applicable borderlines, policy is to be made within broad guidance principles, incorporated in a possible regulatory framework. We have selected several points for discussion on this matter. We shall touch upon them in further detail during the afternoons discussion. Here I would like to introduce the relevant questions and elaborate on them in some more detail. The question is thus to what extent the following principles may indeed offer guidance while balancing the Rule of Law point of view and the Internal Market point of view.

The first principle is that:

*The public sector is, in general, compelled to maximize the usefulness of its information.*

We believe that the general conception of the duties of the public sector leads to the conclusion, that the point of departure should be the interests of the public, i.e. citizens. The public sector is thus compelled to maximize the usefulness of its information. This means, that it should strive to make a substantial amount of its information, notably the information that is not subject to privacy or intellectual property or any other legitimate restrictions, as accessible as possible, thus easily retrievable and obtainable for the public,

without delays, and without extensive costs. This implies, that the public sector should also stimulate diversity in public sector information products.

Second, we believe that:

*To meet the demands of citizens, the public sector should stimulate diversity in public sector information products*

As experience shows in other, more developed information markets, such as television broadcasting or the CD audio market, citizens (*c.q.* consumers) have differentiated needs for all kinds of information products. Therefore, to meet the demands of the citizens, it is necessary to develop and disseminate various, differentiated information products. This indicates, in general, that private sector initiatives are needed, for this sector is far better equipped to perceive and meet specialised needs of citizens.

A third balancing principle would be that:

*Public sector entities should restrict themselves to information dissemination imposed by law or necessary for undertaking their tasks*

Public sector entities have to point out legitimate grounds for all their activities, especially if these activities may do harm to the interests of others, for instance, if these activities hinder the opportunities for the private sector. The public sector is allowed to disseminate its information, only if that activity is authorised by law. However, even when the public sector is allowed to disseminate its information only in those circumstances that this is authorised by law, most public sector entities could interpret quite broad authorising regulations to encompass information dissemination activities. Thus, it is of particular importance that public sector entities should take care not to unfairly compete with private sector information providers. The prime function of any public sector entity is not to make money. That is mainly the goal of the private sector.

*The public sector is always compelled to use its budget economically*

Even if the dissemination of its information is considered a part of its task, this might very well for budgetary reasons, be the contract out to specialised commercial private sector information providers.

A final guidance principle that can be helpful to develop policy, is the principle, would be that:

*The public sector should provide an adequate level of objective access principles with which the private sector should comply when disseminating government information*

From a Rule of Law point of view, the public sector is compelled to ensure an adequate level of accessibility. In the light of this obligation, the public sector must by means of open and objective criteria guarantee a certain level of accessibility to all citizens where government information is commercially exploited by the private sector.

## **THE CONSTRUCTION OF THE FRAMEWORK**

If Europe needs a policy framework on access to public sector information, the question to be answered is: on what basis and how should this framework be constructed?

A number of subquestions can be distinguished:

### **What is the Union's competence?**

#### **Should action be merely taken by the Member States, having in mind the principle of subsidiarity?**

According to the subsidiarity principle, Union action is appropriate only, if the framework cannot be achieved by regulation at a national level, or if the framework can be better, or more effectively achieved, by action at a Union level, or if the framework can be more effectively regulated at a Union level. In other words subsidiarity limits action of the Union to areas where it is better placed to act than individual Member States.

### **What arguments exist to justify European Union action?**

In the context of the internal market, the global information society creates challenging business opportunities. To gain a substantial share of these, the European Union should strive to remove the barriers that hinder the establishment of a competitive internal information market. The Council of the European Union has decided, first in 1988 and on several occasions ever since, that the development of an internal information market occupies an essential place in the consolidation and strengthening of the internal market and the development towards an information society. It is explicitly recognised that the Union and the Member States have an important role in backing up these developments, among other things, by giving political impetus and creating a clear and stable regulatory and legal framework. In the context of the rule of law the objectives of the framework on access is to respect fundamental Rights and freedoms of natural persons, e.g the right to receive information. The right of access to public sector information is not explicitly aimed for or emphasized in the Treaty on European Union or the EC Treaty. The respect of this right is, however, in line with the objective of the Union to respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights.

### **What action should be undertaken at European Union level?**

Given the varying national situations (cultural diversity, social situation, political and specific technological environment) which have to be respected, a European Union policy instrument has to be applicable in various contexts. A legal instrument should therefore be confined to strict necessary measures.

### **What instrument is the most appropriate for European-wide action?**

DG XIII published in 1989 the "Guidelines for improving the synergy between the public and private sectors in the information market". These guidelines, that were advisory only, provided a basic set of generally agreed principles and recommendations regarding the roles of the public and private sectors. They were designed to help the public sector in decision-making related to issues of access, thereby supporting the development of the internal information market. Also, they provided ground rules for avoiding unfair

competition. The guidelines were aimed at the development of national guidelines in individual Member States. Given this: would a recommendation or a directive thus be a more appropriate basis to construct the framework? Is a more aggressive awareness and public discussion exercise required? Should the emphasis be given to pilot projects demonstrating the benefits of joint public/private sector exploitation?