Institutional Repository - Research Portal
Dépôt Institutionnel - Portail de la Recherche
researchportal.unamur.be

University of Namur
UNIVERSITÉ DE NAMUR

RESEARCH OUTPUTS / RÉSULTATS DE RECHERCHE

The commercialization of data held by the public sector

Poullet, Yves

Published in:
Computer Law and Security Report

Publication date:
1993

Document Version
Publisher's PDF, also known as Version of record

Link to publication

Citation for pulished version (HARVARD):
Poullet, Y 1993, 'The commercialization of data held by the public sector', *Computer Law and Security Report*, vol. 9, no. 5, pp. 227-233.

General rights
Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal ?

Take down policy
If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Download date: 02. May. 2026

THE COMMERCIALIZATION OF DATA HELD BY THE PUBLIC SECTOR

The use of new information and communication technologies is making civil services more aware of the influence of the information resources at their disposal.[0] Machinery for the collection, filing and diffusion of administrative information has gradually developed. This improved organization and flow of informational resources is initially managed in the interests of administrative efficiency. In this first stage, information held in the public sector continues to be thought of as an aid to administrative action.

The improvement of information circuits has provoked, in the second stage, an awareness in the general population of the growth of power that such an improvement represents. Legislation designed to promote administrative transparency (laws of motivation in administrative acts and such as define access to administrative documents) and protection legislation designed to permit control of data by the individual citizen, as well as by independent monitoring bodies (as in France by the CADA and the CNIL), oblige the civil services concerned to make their information resources and aims more transparent. Contiguous with this new awareness of information as a resource, civil services have begun to develop new functions for administrative data. It is no longer simply a question of considering information held by a civil service as an aid to good administration, but of viewing that information in the light of a potential product susceptible to market exploitation.

Yves Poullet reports

LEGITIMACY AND CONDITIONS

The profound change in the nature of stored information varies, from being considered as an aid to being considered as a commercial resource. It awakens both hope and a certain unease.

Hope: civil services are "natural wellsprings of information"[1] where everyone likes to dip his bucket. Such a spring, as well as being inexhaustible, possesses qualities which are rarely enjoyed by commercial information products: it is exhaustive, and the information contained is generally reliable, taking into account the obligatory and legally binding manner in which it is collected.

Unease: a civil service entering the private information market risks destabilizing the delicate balance of the latter. Private operators are already asking themselves: at what price will civil services be prepared to commercialize information? Will they be able to reserve exclusive rights over the information products they themselves develop, or will they, either themselves or through a network of privileged alliances, create new ones?

This sense of unease prompted the European Communities in 1989 to produce "Guidelines for improving the synergy between the public and private sectors in the information market", fashioned along the American model. A reminder of the essential principle: "Although certain functions are inherently governmental in nature, being intimately related to the public interest ..., the government should look first to private sources, where available, to provide commercial goods and services needed by the government to act on the public's behalf, particularly when cost comparisons indicate that private performance will be the most economical...".

The unease of commercial operators is matched by that of private citizens: could any information, including information of a nominative nature, be commercialized in the name of necessary administrative transparency? Should not the right of access cede place to the right of privacy?

Our intention here is to sketch the main outline of a regulatory framework for the commercialization of data controlled by the civil service. In this respect, laws of access appear at the least to be a foundation for a company to make available its information products as a basic service, while at the same time indicating the limits and conditions of that availability (I). Beyond this, laws of access may justify the civil service in developing supplementary information services, although the laws of competition indicate serious restrictions to such a development (II).

I. SO CALLED LAWS OF ADMINSTRATIVE TRANSPARENCY AND THE OFFERING OF A UNIVERSAL SERVICE BY CIVIL ADMINISTRATIONS: LIMITS AND CONDITIONS

THE RIGHT OF ACCESS AND THE OBLIGATION OF THE STATE TO MAKE ITS INFORMATION PRODUCTS AVAILABLE

In a study on the 'right to know', M. Kirby cites the following quote from an American president: "A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives". This declaration illustrates the obvious link between liberty of expression and the right to information, in particular with regard to the public sector. "The right of free access to information held by the public sector, insofar as is understood from the current phrase "freedom of information" (cf. notably the US Freedom of Information Act), is closely allied to human rights and fundamental liberties".[2]

Article 10 § 1 of the European Convention on Human Rights enshrines this link as follows: "Every individual has the right to freedom of expression. This right includes freedom of opinion and the freedom to communicate information and ideas without suffering the interference of public authorities and without consideration of frontiers (...)" In other words, freedom to receive information implies that the free circulation of information carriers is assured, whether these be written, audio, visual or other types of information carrying media. For

public authorities, this involves both an obligation to abstain, inasmuch as they may not in any way hinder the freedom to receive or communicate, and an obligation to act, in the sense that they are required to assure the free flow of information.[3]
It is evident that it is on the basis of Article 10 of the Convention of the Council of Europe, that numerous countries have witnessed the flourishing of laws governing access to information held by public authorities. The reference to Article 10 § 1 of the European Convention on Human Rights (ECHR) is useful to our purpose, because it enables us to precisely measure the extent of a citizen's right of access in particular with regard to any commercialization controlled by the civil service.[4] Thus, the purely commercial nature of a piece of information does not place it beyond the reach of the right of access,[5] similarly, the fact that the object of a demand is not a piece of information pure and simple, but rather a class of information or complete information product, does not justify a negative response from the authorities.[6] No obstacle may be placed in the way of access, merely due to the fact that the information is going to be transmitted abroad.[7] Finally, and most important, the right of access is open even to those who intend to make commercial use of the data transmitted.[8] In other words, the right of access justifies placing the civil service's data bank on the commercial market, it even obliges such a step.
Article 10 § 2, however, contains some important reservations that are taken up by all the national laws governing right of access: "The exercising of these liberties entails certain rights and responsibilities and may be subject to certain formalities, conditions, restrictions or sanctions, foreseen by law, such as constitute necessary measures in a democratic society for the maintenance of national security, territorial integrity or public safety, for the upholding of order or the prevention of crime, for the protection of health or morality, for the protection of the reputation or the rights of third parties, to prevent the divulgence of information of a confidential nature or in order to guarantee the authority and impartiality of the judiciary".
We shall pause to examine one of these exceptions: the prohibition on "divulging confidential information."[9] The idea expressed here is not, strictly speaking, equivalent to the idea of nominative data. "Nominative data, as understood in data protection laws, is any information which directly or indirectly enables a person to be identified." This does not alter the fact that the right of access must take into account the imperatives of data protection, enshrined both in the laws of data protection and in article 8 of the ECHR.
Establishing harmony between the imperatives of data protection legislation and those of legislation for administrative transparency in the public sector is really no easy thing.[11] It is not a question of prohibiting all marketing of nominative data held by the state, but of posing certain limits. Recommendation no. R (91) 10 on the communication to third parties of data of a personal nature held by public institutions,[12] already sets the first limit: "data of a personal nature may not be communicated to third parties for goals incompatible with the reason for which it was collected."
If the laws of access legitimate a priori the placing of non-confidential nominative data at the disposal of third parties, this availability must be made subject to a case by case examination and kept in accordance with the principles of the person on file's having both right of access and refusal over the data concerned,[13] both principles deriving from data protection legislation.
In this sense, verifying the stated goals of those who demand right of data access is in fact justified by the application of data protection law.[14] Anyone applying for access to a bank of nominative data,[15] must justify the pertinence of his use of that data with regard to his stated and legitimate aims, as well as the absence of any higher interest of the person or persons on file in protecting their data. One can see that this subtle balancing of interests must take place case by case and satisfy not only the specific regulations applying to the information product in question, but also and particularly those regarding the status of the potential client for that product.

THE SUBJECT AND CONDITIONS OF SUCH AVAILABILITY

The issue of the scale of charges for data availability is the matter most frequently raised, but without wishing to deny its importance, it nevertheless appears to us as secondary. The first question to be raised is surely the actual subject concerned by such an obligation to render data accessible: to which degree can a civil service be obliged, within the framework of its public service mission, to raise the intrinsic value of the basic data it collects or administrates in the day to day pursuit of its tasks. The second question to arise, presuming that the first has been answered, involves the conditions of such availability. Similarity to the rules of the ONP (Open Network Provision) will bring us to examine the narrow framework of the only tariff condition. The third question concerns the specific matter of a third party's right to dispose in the case of a private commercial operator.

a. The subject made available

The example of access to decisions taken by courts of law may serve to illustrate the question. It may be that a court's administration is satisfied that its obligation to be accessible is fulfilled merely by authorizing anyone who wishes to take a copy of the proceedings from the court recorder, or it may be that they feel that their obligation to inform extends to setting up a vast data bank which can be accessed on the basis of certain key words and a suitably user-friendly language. In this way, any interested person using any one of a variety of public outlets or his lawyer's office, can be informed, not only of a judgement in a case, but also of its context vis-a-vis other useful references. In other words, what is the limit of the obligation to universally inform to which article 10 of the ECHR binds government services?
The answer is by no means simple. It depends on the technical state of the art, as well as on political decisions. These latter must take into consideration the condition of the market or, more precisely, the degree to which private operators are already, either partially or completely, responding to the legitimate expectation of the public to be informed. Our intention is to apply certain criteria to the solution of this question.
Mr. Gaudrat[16] distinguishes three types of intrinsic value increase that can be given by a public service to the basic information it collects or produces: increased intellectual value (e.g. a list of key words to aid in the evaluation of the types of

judgement produced), increased documentary value resulting from organization, classification or selection of information, and increased technical value resulting from the data being available on this or that storage medium (e.g. the setting up of an electronic data bank on CD-ROM) or through this or that communications network. Basically, in what way is a public institution or service obliged to raise the inherent value of data in order to fulfil its minimum obligation to render a certain document accessible 'in situ'?

Our reflections on the legal basis of the right of access make clear that the right of the citizen to be informed places upon the state the burden of assuring the free flow of information. It goes without saying that such an obligation imposes upon a civil service, not only that information be made available in its primary state, but also the informational products necessary to usefully access it. If the judicial administration develops data banks for the internal use of its own magistrates, these must progressively be made available to the public, the only limit being the time necessary for the introduction of adequate technical and organizational facilities.[17]

Beyond this, the obligation to ensure the free flow of information with regard to any citizen, may lead a public service to consider that the information product itself needs improvement. Particular regard will then need to be given to the danger of free market rules leading to a virtual confiscation or monopoly of information for the sole benefit of a certain few. It can therefore be seen as within the framework of its public service mission and motivated by a certain transparency, that decisions are taken to respond to, or even anticipate, public demand.[18] An administration must, in effect, demonstrate, that the universal right of access to information which is useful to a good understanding of the role of that administration, contributes to an improvement in the information product itself.[19]

b. Conditions of availability

The preceding reflection leads to a definition of a basic public information service that a public department needs to set up in order to fulfil its public service mission. A comparison with the guidelines of the ONP defining public telecommunications legislation at the European Community level,[20] will help us to form a more precise picture of what such a service should offer. These are: tariff/rules, publicity, standardization and non-discrimination. These rules become obvious if our intention is to maintain an atmosphere of loyal competition on the market.[21]

In that which concerns tariffs, the civil service's duty to communicate information to the public, and the tariffication of such a set-up are, for the most part, defined by the principle of gratuity. The only possible interpretation of this principle is that the administration takes in charge all the necessary costs for the accomplishment of its mission. Certainly, other than the cost of a copy, such would be the case if the public information service consisted of a simple right of view on site.[22] However, if this public service in some way increases the inherent value either by assuring, in some way, ease of access for everyone (for example, through the setting up of a distribution centre, the renting of lines, the creation of public terminals) or by improving the inherent value of the product in a way strictly within the framework of the administration's own needs,[23] then the principle of gratuity does not prevent the levying of a charge on this increased value to cover the administration's increased costs. In any such hypothesis, the principle forbids the levying of charges for the collection or elaboration of data, if such is required anyway within the framework of the department's internal needs. In that which concerns telecommunications regulations, the method of approach prescribed is cost based.[24]

The principle of publicity is conceived as a corollary of the principle of non-discrimination.[25] Operational and tariff-conditions for a public information service must be publicly known and published. Each civil service should best evaluate the way to proceed to ensure that every potential user can be made aware of the sources of information made available to him by the government, the characteristics of such products and their conditions of use. As regards conditions of use, these can be standardized. Such standardization is not merely a technical matter, for while it can include the conditions of interconnection to the distribution centre, it can equally include organizational matters such as office opening hours etc..

It is noticeable that the establishment of such principles responds essentially to the wishes of the American Information Industry Association:[26]

INFORMATION INDUSTRY ASSOCIATION

Government Information Policy Access Principles State and Local Information Policy

1. Citizens have a right of access to information held by government entities which should only be restricted by enactment of narrowly drawn statutes necessary to protect certain specific legitimate interests as privacy [...]
3. Information held by a government entity should be available to all persons on an equal and timely basis in all reproducible media used by the government entity to store or to distribute the information.
4. No person, public or private, should have a monopoly control over information held by a government entity, nor should government impose or claim any copyright or other restrictions on the ability of citizens to use and disseminate such information.
5. Government should encourage the widest possible dissemination of public information by making it available at a price not to exceed the marginal cost of dissemination [...]".

This position merits a supplementary reflection; it forbids a government to impose any form of copyright on the information products at its disposal. This position conforms to American legislation, which accords no copyright to governments. It disturbs the European jurist, for whom rights of authorship extend to all persons, the state as well as private citizens (cf. on this matter the subject as developed by H. Burkert et al., 1992).

In our opinion, a citizen's right of access does not intrinsically deny the State the right to protection of its intellectual property, but rather limits its efficacy. In particular, author's rights may not be in opposition to the individual's right of free

access as defined above. We shall return to this point when we begin to look at the question of a government's commercialization of so called supplementary information products.

THE PARTICULAR CASE OF A SERVICE MADE AVAILABLE BY A THIRD PARTY

The hypothesis dealt with here is that which occurs when a public authority either applies to a private operator, or creates, with or without the support of external funding, a branch to assure that the public information service described above is made available to the public. Cases are not lacking, and this can be for the most part explained by a civil service's desire to make use of competent specialists of a type not usually found within its own ranks, and by the desire to place certain activities outside the state budget.

According to the 5th European Directive Line, "When public sector data and information is placed at the disposal of the private sector for its own exploitation, no restrictions may be placed on that which concerns categories of clients [...]. This derives from the principle of general and equal access for the entire population to the information concerned (cf. the laws of access). If a government body does not take the commercialization of its information into its own hands, but has recourse to a private intermediary, the principle of universal access justifies the setting up of articles and conditions for the company which enjoys exclusive rights."

These articles and conditions guarantee that the private company respects the requirements of availability drawn up by the civil service. In the event of non-adherence to the same, and although the doctrine of the "Drittwirkung" of rights and fundamental liberties contained in the European Charter of Human Rights is still undergoing debate, it seems that one might extend the obligation to transparency by requiring the same to be submitted to by any third party engaged by the state in the management of information and data pertaining to the public sector.

II. THE COMMERCIALIZATION OF SUPPLEMENTARY INFORMATION SERVICES

THE PRINCIPLE

May a government body, by adopting a more aggressive attitude, move beyond the basic universal information service, with its strict regulation, to offer supplementary information services: is the justice administration authorized to develop paying research services based on its data bank, whose results it later makes available to the general public? May a public statistical institution respond to specific requests regarding the evolution of a particular sector?

Without doubt, it is with reference to such issues that the principle adhered to by the American Budgetary Office (cited above) and the 8th line of conduct drawn up by the European Commission must be understood: "When a government body offers electronic information services directly, it must avoid any practices detrimental to competition. Before setting up a new electronic information service or developing an existing service, the government must first assure itself that no existing private sector service might equally well serve or be adapted to meet this need." An extensive interpretation of such a requirement would result in calling into question the whole idea of a universal information service or would reduce it to the strictest minimum. Indeed, it contradicts, as we have shown, the very clear responsibility of government to assure the free circulation of information, the corollary of the citizen's right to be informed.

A restrictive interpretation appears, however, to better respect this obligation of the state. It limits the government's obligation to circumspection to anything that is not covered by the universal information service itself and invites it, in conformity with line 9 of the European guidelines, to carry out a periodic examination of those electronic information services which it directly exploits, with a view to deciding whether they should be operated by the private or public sectors, whether it is desireable that the private sector participate in their production or distribution, or whether they could be replaced by compatible commercial services. To this end, the technique of joint ventures with the private sector or the branch system developed in the Netherlands[28] may prove to be acceptable commercial solutions for supplementary services.[29] To recap, a government's intervention in such a commercialization can only be justified in the event of a loophole in the private sector and can only be carried out in strict adherence to the rules of competition with the private sector.

CONDITIONS

What is implied by that respect of the rules of competition to which the public sector must submit as soon as its activities extend beyond the limits of its public service?

Once again, the analogy with the telecommunications sector proves useful.[12] Two essential rules may be suggested. Firstly, even if a government entity itself commercializes its supplementary information products, it may not indulge in the mixing of subsidies, that is to say, it may not finance the extending of its activities with funds gained from its basic public service. Furthermore, it may not benefit at the expense of any private sector competitor from any advantages concerning, or arising from, access to the public information service. In other words, it should apply to itself the same interface norms, the same tariff regulations, as are valid for its competitors.[31]

The principles of right of competition are applied as follows: "Whenever a public entity behaves like a private one, or whenever it intervenes in a market by way of a private entity, it seems appropriate that the laws of competition be applied, as would be the case for a private operator."[32]

Respect for the rules of the game on the open market imply that a public authority has a responsibility to deliver information, and the obligation to refrain from any action which would result in a monopoly. A recent case[33] judged by the Council for Competition in France serves to illustrate this. This case concerned meteorological data collected by the National Bureau of Meteorology (DMN). This civil service department had developed a commercial outlet for its data in the form of a telephone information service available to the public. The Council for Competition considered this to be a service activity within the parameters of article 53 of the 1986 ordinance on liberty of price and competition. The DMN enjoyed a dominant position on the market for telephone weather information. A private company tried to create a rival service, requesting to this end, the possibility of using coded

aeronautical data gathered by the DMN The department opposed this request with a legitimate refusal based on reasons of security connected with certain international obligations of the state (aeronautical messages are reserved for aircraft operators). On the other hand, had the department refused to provide messages containing general meteorological data, the refusal would not have been justified. It would have been an abuse of the DMN's dominant position on the market, had it "directly or indirectly deprived the Société du Journal Téléphoné, its rival, of those sources of meteorological information which permit it to subsist on the market." The right of competition may also be used as a means to force a civil service body to provide data to the private sector, in order that the latter can commercialize it, even if it poses as a rival to the civil service by so doing. Finally, when a government entity commercializes by way of a third party, the concession granted to the latter must respect the same rules of fair competition.

The 6th Directive Line for the Synergie considers in this respect, that "conventions and accords agreed with suppliers of databases or distribution centres in the private sector may not concede exclusive rights, if these could place constraints on the competition." It goes on to say that "If, for motives such as the need to penetrate a new market or for the provision of a service of general interest, an exclusive right is judged necessary, this must be subject to periodic review."

The reflections already outlined with regard to titularity to the profit of the civil service of rights of authorship on informational property, lead us to certain other complementary considerations.

We recall the principle already noted (supra no. 18 in fine) with regard to public service information, which the draft directive (art. 8.1.) on the protection of data banks elucidates as follows: "Notwithstanding the right forseen under article 2§5 forbidding the non-authorized extraction and re-utilization of the contents of a database; if the works or matters contained in a publicly accessible database cannot be created, reassembled or obtained from any other source, the right of extraction and re-utilization for commercial purposes may be made the object of licences, under equitable and non-discriminatory terms."

One might certainly say that such an arrangement is intended only to apply to the commercialization of information products relevant to a public service, is it the same for supplementary services not distributed to the general public, but for which, due to the deficiency of the private sector, the government is liable to find itself in a dominant position.

In connection with this, we recall the European Tribunal's Luxembourg Court in its recent decision in the **Magill** case. The Magill company wished to publish a magazine comprising all the television programmes broadcast both in the Irish Republic and Northern Ireland. However, the BBC publishes all its own programmes in its own TV magazine, and reserves the exclusive right to such publication based on the author's rights to the programme timetable information which the BBC administers. The court remarked that "at the time concerned, no general weekly television guide was available on the Irish market." The Magill company, therefore, filed complaint with the European Commission against the BBC, on the basis that it was in contravention of articles 85 and 86 of the Treaty of Rome. The Commission decided to impose an obligation on the BBC to grant a licence on its programme information. The tribunal recognized the factual monopoly held by the BBC as well as the monopoly of right based on its authorship of the programme timetables. It concluded that the BBC "manifestly occupied a position of dominance at the time considered, both on the market defined by the programme lists themselves, as well as regards the magazines in which they were published on the Irish and Northern Irish markets." Had the BBC abused its dominant position and had it infringed the dispositions of article 86? According to the judges, the BBC had abused its position of dominance inasmuch as it had used it to "prevent the introduction onto the market of a new product" by using its right of authorship in a manner not in accordance with the primary purpose of that right. In consequence, the Magill company was accorded a licence on the programming timetable of the BBC. The decision is now being appealed and the result awaited.

The solution in jurisprudence of the **Magill case** is therefore similar to that foreseen in article 8 of the draft directive, which one can resume as follows: "The protection of data banks by right of intellectual property creates in the authority of their creator a situation of dominance that the latter may be inclined to abuse." We find ourselves here at the crossroads of intellectual property and the right of competition. As regards the significance of this decision to the commercialization of data banks in the public sector, it constitutes a supplementary step towards a more extensive synergy between the civil service and private suppliers of information. Once the public sector holds a right of authorship over a data bank gathered by civil servants in the course of their duties, it may no longer hide itself behind the right of authorship in order to assure itself of a pre-eminant position in the commercial exploitation of the data and thereby pose an obstacle to private sector competition. The Magill judgement and the draft directive both constrain government departments to place their information at the disposal of the private sector by means of licences, thereby realizing that state of things intended by the Commission in 1989 with the adoption of the Directive Guidelines.

CONCLUSIONS

These are as follows:

- the commercialization by the civil service of data in its possession is based in law essentially on the citizen's right to be informed;
- contingent on the application of certain legislation, notably that concerning data protection, such a basis in law places a responsibility on the civil service beyond the minimal right of access confined to untreated information communicated on site; namely the responsibility to set up, in a way open to further evolution, such information products and services as can guarantee to each and everyone access to information of quality;
- the availability of this universal information service operates according to transparent and non-discriminatory rules. Tariffs must be based solely on the actual costs of delivery for the information product concerned;
- in addition to its public service mission, the civil service may only develop further information goods and services inasmuch as a deficiency on the open market is apparent. This must be done in respect of the rules of fair competition

and may not make unfair use of such rights of authorship as may be at the civil service department's disposal.

Y.Poullet, Dean of the faculty of Law, Namur, France
Director of the Centre for Computer Research and Law (CRID), Namur

We should particularly like to thank Mr H. Burkert (G.M.D./ Cologne) and Miss C. de Terwangne (CRID/Namur) for their valuable critical input.

BIBLIOGRAPHY

Ph. Gaudrat, Commercialisation des données publiques, Rapport pour l'Observatoire Juridique des Nouvelles Technologies de l'Information, 70 pages, cité Ph. Gaudrat, 1992.

C. de Terwangne, La Liberté de l'information, article à paraître, cité, cité C. de Terwangne 1992.

H. Burkert, From the commercialization of public information to Adminstrative Information Law, Informatique et Droit, Congrès International de Montréal, 30 Sept.-3 Oct. 1992, cité H. Burkert, 1992.

Gouvernement du Québec, Groupe de travail sur la Commercialisation des données des organismes publics, Rapport au ministre des communications du Québec, fév. 1991.

Th. Leonard, Y. Poullet, Les Libertés comme fondement de la protection des données nominatives, in La protection de la vie privé, F. Rigaux (éd.), 1992, à paraître, cité Th. Leonard - Y. Poullet.

H. Maisl, La commericalisation des données administratives, une nouvelle question à débattre, A.J.D.A., Nov. 1988, cité H. Maisl, 88.

H. Burkert, J. Michael, Th. Davio, C de Terwangne, Y. Poullet, Commercialization of data held by the public sector, Publaw rapport, DG XIII/EEC, to be published, cité H. Burkert et alii, 1992.

Th. Davio, C. de Terwangne, Y. Poullet, A la recheche d'un cadre conceptuel pour la commercialisation des données détenues par le secteur public, Colloque de Buenos Aires, Lamy, 1991.

F. Llorens et P. Soger Couteaux, La soumission des personnes publiques au droit de la concurrence, D., 1989, Chr.67.

M. Pattison, The European Commission's proposal on the protection of computer databases, E.I.P.R., 1992, 113 et s.

J.E. Schoettl, L'administration dispose-et-elle d'un droit d'auteur?, D.I.T., 1988, 11 et s.

Y. Poullet, note sous l'arrêt Magill, D.I.T., 1992, 40 et s.

M. Kirby, "Media Law Reform — Beyond Shangri-la, The Right to Know, Granada, Guildhall Lectures, 1985, cité M. Kirby.

F. Sudre, Droit communautaire et liberté d'information au sens de lá Convention Européenne, E.J.I.L., 1991, 5 et s.

FOOTNOTES

[0]See Burkert, 1992, on this change in the function of information in the politics of administration.

[1]See Gaudrat, 1992.

[2]C. de Terwangne, 1992.

[3]F. Sudre, Community rights and the freedom of information as defined by the European Convention on Human Rights, E.J.I.L., 1991, p.5 etc.

[4]Regarding this relationship, the analysis of the jurisprudence of the European Court and the recommendations of the Council of Europe in the same vein, read C. de Terwangne, 1992.

[5]E.C.H.R, judgement in **Müller et al.**, 24 May 1988, series A, no. 133, § 27. Cf. also judgement in **Groppera Radio**, 28 March 1990, series A, no. 173, p.55.

[6]This is notably the case in the **De Guillustreerde Pers** case, where the petition concerned the lists of radio and T.V. programmes published each week by the Netherlands Foundation for Radiodiffusion. The Human Rights Commission decided that it was a matter of "a compilation of facts which constitute news in the sense that they act as a guide to radio listeners and television viewers (...)" (Commission, 6 July 1976, **De Guillustreerde Pers N.V. c. Netherlands**, Decisions and Reports 8, p.5). We shall compare this with the **Magill case**, judged by the Court of Justice of the European Community (infra no. 26).

[7]Cf.the actual text of article 10 § 1 of the E.C.H.R. "without consideration of frontiers". The states party to the convention are required to respect the rights enumerated in regard to "any person depending effectively upon their authority, whether that authority be exercised within their own territory or abroad".

[8]Judgement in **Autronic A.G. c. Switzerland.** The European Court here affirms in a clear manner, that the protection of article 10 extends to all persons, whether these appear under the statute of a limited company or under any other form and regardless of whether or not their activities are of a commercial nature. The court's clarification comes as a response to a subtle argument from the Swiss government, contending that to pursue a lucrative goal is incompatible with the notion of freedom of expression, such as it is protected by the Convention, and that there can be no question of exercising the latter for purely commercial ends. Such activity is a question of economic freedom, freedom of enterprise, which is not covered by the Convention. The Court, with great clarity, refuses to follow this line of reasoning.

By taking such a position, the Court effectively scuppers certain interpretations of article 10 of the French law of 17 July 1978 relative to rights of access (law no. 78, 753 of the 17 July 1978, J.O. 18 July 1978), which "excludes, for its beneficiaries or third parties, the possibility of reproduction, diffusion or use to commercial ends of documents communicated." The French Commission on Access to Civil Service Documents (CADA), has itself interpreted this text and shown that French law of access can serve as a basis for the development of commercialization of civil service data. Indeed, the Commission considers that laws of access do not permit questions to be raised on the motive behind an application for access.

[9]Such is the way that the French law of 17 July 1978 proposes that this be viewed: documents which "contain a personal appreciation or describe the comportment of someone." The CADA has settled on a very similar definition by considering the following as nominal: "documents carrying a description or a value judgement about a legal entity actually named therein or easily recognizable therefrom." B. Laserre (in B. Laserre, N. Lenoir and B. Stirn, La transparence administrative, Paris, PUF, 1987, 106 etc.) prefers a more restrictive definition than that of nominative data in the sense that it is understood under the data protection laws. Knowing that a law has as its object to guarantee a person's right of access to information, it would be excessive to deny him that right under the pretext that the document requested cites the name of a third party.

[10]Classic definition, notably presented in Convention 108 of the Council of Europe relative to data protection.

[11]We should like to cite, in passing, the subtle approach to the matter taken in Quebec, where both access and data protection are the objects of a single legislative instrument (Loi sur l'avis aux documents des organisms publics et sur la protection des renseignments personnels, C.R.G., chap. 1.2.1).

[12]Recommendation of 9 September 1991 (cf. in particular annex 2.2 of this recommendation).

[13]Another limit can be adduced from recommendation no. R (85) 20 relative to direct marketing, which accords the person on file the right to know the destination of the file, as well as the right to refuse to have his name in the communicated list (cf. as concerns telephone books and orange or pink lists).
[14]Which, as we have observed, is not the case where non-nominative data is concerned (supra, no. 6 and particularly footnote (9).
[15]On this delicate issue of balancing interests, see T. Leonard, Y. Poullet, 1992.
[16]Gaudrat, 1992
[17]...and not financial constraints (cf. infra, the problem of tariffs. It is rather a question of constraints linked to the necessity of setting up a distribution centre, of developing the appropriate information systems or of controlling access, etc.
[18]To take but one example, the Ministry for Economic Affairs may legitimately perceive, that to make available an expert system to give assistance in the complexities of state or European financial aid is an inherent part of its public service mission; such a decision arising from a consideration that the lack of just such a system is rendering it increasingly difficult for small and medium-sized businesses to take advantage of such funding, due to the extreme difficulty of understanding the legislation.
[19]An analogy with the public telecommunications service may serve to illustrate this thesis. The right to a universal system of voice transportation justifies not only the connection of all subscribers, but equally the continuing improvement of the quality of the infrastructure (notably as regards capacity) to render effective the right of each to enter into communication with the other at any time.
In our opinion therefore, a service to the public can never be exhausted, as is affirmed by Gaudrat (1992) when he writes, "to the most rudimentary system of technology capable of reaching the entire public with whom contact is imposed by the administration's public service mission."
[20]Cf. in particular the Council directive of 28 June 1990 relative to the establishment of an interior telecommunications market by the setting up of an open telecommunications network, J.O.C.E., no. L 192/1.
[21]Cf. article 2.10 of the ONP directives defining the conditions of distribution: "Without prejudicing their case-by-case application, the requirements of network distribution may include such related conditions as:
- technical interfaces, including, where necessary, definition and establishment of network terminals;
- conditions of use, including, where necessary, definition and establishment of network terminals;
- conditions of use, including, where necessary, access to frequencies;
- tariff principles;

and article 3.1 defining the principles of such distribution:
"The requirements of open network distribution must respond to the principles cited below:
- they must be founded on objective criteria;
- they must be transparent and published as an appropriate manner;
- they must guarantee equality of access and be non-discriminatory, in conformity with community law.

[22]It is such a reduced service which is considered by the majority of laws of access to civil service data; thus article 4 of the French law of 17 July 1978 envisages: "access to administrative documents can be by means of a) on site consultation, except where the preservation of the document renders either this or the copying thereof impossible; b) except in the event of reproduction risking damage to the document, by the making of a single copy at the expense of the applicant, at a price which may not exceed the real cost of the functional charges incurred by the carrying out of this requirement.
[23]Cf. the example cited under note 19.
[24]Such a costing policy is recommended by the 4th directive line of the synergy: "The price decided may pass on the costs arising from the initial work of preparation or of making the service available to the private sector, but without including such costs as arise from collection and treatment of the data, inasmuch as these are performed within the day to day framework of the civil service department.
[25]The court and the European Commission on Human Rights are in agreement when they consider that an observed act of discrimination is not admissible if one of the following elements is present:
- if the distinction has no legitimate goal, that is to say, it lacks any objective justification and no reasonable account has been given of the intention and effects of such a measure; and
- when no reasonable relation of proportion exists between the intention and the means employed.

[26]Cf. the "American Information Industry" Position Paper of 1990.
[27]The use of the word "supplementary" is deliberate. As it is here a question of services not included in the basic universal service, to use the term "increased inherent value" would be misleading, since the basic universal service may already include several such increases in the inherent value of data (cf. supra, no. 10 onwards).
[28]For the Dutch example, read Burkert et al., 1992.
[29]These techniques present another advantage, that of distracting government funds from their primary task, that of assuring public service. One may well fear that the government might be tempted into investing in the establishment of new information services, in the expectation of substantial returns at some future data.
[30]This seems to be the new position taken by the INSEE, the French office of statistics, with reference to the results of the various statistical studies that it carries out.
The institute has at its disposal such technical and human potential, coupled with such experience as to grant it a factual monopoly, due to the extent of its enquiries and research, in the making of statistical surveys of French society and the French economy. The costs involved, for example, in making a census of the population, could never be assumed by a private enterprise, much less by several concurrent private businesses. On the other hand, such a study is made use of by the government or by local authorities, and as such presents a collective unit that can justify being financed by the taxpayer.
On the other hand, controversy has arisen over the commercial exploitation of these diverse statistical studies. The INSEE distributes its information in the form of a certain number of standardized information products. However, the INSEE does not consider that the carrying out of studies for a client derives from its public mission (while at the same time quite exceptionally keeping this possibility open for itself). The limit that the INSEE imposes on its programme of direct commercialization of its information is of a double nature: It must concern the (or a) collective of interesting information, and the fixed cost of its production must be high, thereby assuring that an entrance into this particular market by the private sector is very difficult. At the same time, a commercialization outside this frame of reference is not excluded but would be more selective.
[31]This implies, at the least, creating virtually distinct centres of profit or branches enjoying separate accountability.
[32]M.C. Boutard-Labarde and L. Vogel, 1989.
[33]Decision no. 92-D.35 of the "Conseil de la concurrence", 13 May 1992, relating to a livery of seisin of the telephone book company against the direction of the National Meteorological Bureau, B.O.C.C.R.F., 6 July 1992, 224.
[34]Judgement T-70/89, 10 July 1991, (Magill). This judgement has been notably commented on by B. Hugenholz, "Copying without infringing three easy pieces on the 'protection' of information", Managing Intellectual Property, 1992, p. 38; cf. also Y. Poullet, D.I.T., 1992, p.40.