

Engineering success:

The Democratic Costs of the Common Market for Public Sector Information in the European Union

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Abstract

The present research revisits the theoretical debate on the asymmetry between the supranational and intergovernmental policy making modes in the European polity. The thesis elaborates on the research of Fritz Scharpf using the framework of the policies on re-use and access to public sector information in the European Union.

According to Scharpf the institutional structure of the EU has an inbuilt bias towards the supranational mechanisms on the expense of intergovernmental ones. The main beneficiary of the supranational lawmaking has been the negative, market-making integration, whilst the positive integration and the re-regulatory approach are used much less often. Scharpf argues that negative integration may not suffice to reach the goals of the common market where there are significant qualitative and institutional differences between the member states. A call to harmonize the differences in the name of the common market may, however, challenge the traditional value-balance of regulation.

To test the arguments above, the thesis considers the impact of rigorous implementation of the Directive 2003/98/EC on re-use of public sector information on national laws of access to such data in two EU member states that have employed opposite stances towards the regulation, namely, Latvia and United Kingdom. The analysis confirms the preference towards the market-making integration. It also shows that application of European regulations may on the surface liberalise the market for PSI while in the particular situations of the Member States the necessary measures of harmonisation that are necessary to support the common market initiative may bring about larger issues such as significant trade-offs in aspects associated with human-rights.

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Abbreviations

Commission – European Commission

Communities – European Communities

Court – European Court of Justice

Directive - Directive 2003/98/EC “on the re-use of public sector information”

EC – European Commission

ECC – European Economic Communities

ECJ – European Court of Justice

EU – European Union

FOI – freedom of information

FOIA – Freedom of Information Act (United Kingdom)

FOIL – Freedom of Information Law (Latvia)

MS – Member State/-s of the European Union

OPSI – Office for Public Sector Information (United Kingdom)

Treaty (EC Treaty) - Treaty establishing European Union and the Treaty establishing the
European Community

PSI – Public sector information

UK – United Kingdom

Introduction

The idea of a single market lies at the heart of European integration. In practice, in the world of sovereign states with different legal orders, systems of administration and citizenship, international economic integration is feasible only if economics and politics are kept as separate as possible (Majone 2005:43). While this liberal principle is embedded in the treaty of Rome, the Single Market advanced by political entities and largely by political means is not without its challenges and political costs to the sovereignty, traditional institutional systems, and values of the Member States (MS) of the European Union (EU).

The structure of the EU is characterized by an asymmetry between the supranational policies, whereby decisions are initiated and formulated by autonomous EU bodies independently from the MS, and policies resulting from a traditional process of international deliberation (Weiler 1981). Consequently one also observes an imbalance between the use of mechanisms of negative (market creating) integration exercised by the supranational actors, and positive integration or measures to reconstruct the system of economic regulation at the level of the larger economic unit (Scharpf 1999:45; Olsen 2000) that depend on the results of the international debate.

The ongoing expansion of the EU's policy domains (Majone 2005:43; Fligstein, McNichol 1997), currently encompassing also the areas of mixed markets (e.g. public services) and those more characteristic to functions of traditional public administrations (e.g. public sector information), invites an analysis of the existing theories explaining the interaction and coherence of supranational and national policies.

The theoretical framework of this thesis draws primarily on the theories that explain the process of European integration, focusing on the issues of governance, but mainly from the concepts developed by Fritz W. Scharpf, who stresses the impact of shifting economic policies to the European level upon democratic legitimacy and institutions in the nation state. Scharpf maintains that due to the institutional specifics of the EU, its supranational policies are characterized by three interdependent features. Firstly, there is a bias towards mechanisms of negative integration and therefore a primarily economic focus of the policies regardless the nature of the sector to which they are applied to (Scharpf 1999, 2003). Secondly, elaborating on that he questions the sufficiency of the negative integration in advancing the goal of the common market. Finally, he suggests that along with further expansion of supranational competencies, European integration curtails democratic costs for the existing balance of democratic and economic values as well as the traditional institutions of the MS.

This thesis aspires to test Scharpf's concept with regard to a new realm of supranational regulation – the re-use of public sector information (PSI). Public access to and use of PSI is recognized as an inherent part of the principle of good governance and a right enshrined in the laws and constitutions of MS. While technological progress can contribute to the quality of implementation of the right, arguably the very same set of legal and technical tools can be used to gain a considerable economic profit. Realization of the common market in economic terms necessarily raises issues of the inter-relationship of economic and social dimensions of EC policy (Craig and De Burca 2003:1170). The thesis will examine this tension, addressing the possible effects of a rigorous implementation of the EU Directive 2003/98/EC “on the re-use of public sector information” on the existing national institutions granting the right of popular access to

public sector information in the MS. Creating a new sector of the Single Market, supranational law transforms PSI from the key tool of democratic participation to an economic input – a “key resource” for Europe’s knowledge-based economy (EC 1989:1, 1998:1).

The author will analyse the legal background of the re-use policies in the EU and the institutional process of the adoption of the Directive based on the existing research and interviews to argue about the preference for negative integration and the economic bias of supranational policies. To determine the consequences of supranational regulation on the national level, the author will assess the coherence between the respective EU policies and the existing regulations at the MS level, using public data, legislation as well as conclusions in the existing research. Considering the democratic costs of the supranational law, the author will rely on expert interviews, comparative analysis of the regulations at the national and EU level, as well as application of predictive theories.

This thesis has both theoretical and substantial contribution to the existing body of research. So far Scharpf’s concept has only been illustrated considering the social welfare policies and public services, in part (Scharpf 1996, 2000, 2002; Heritier 2001). The present research will test the concept in a new set of conditions (Whewell 1984:19) and focus on the aspects of good governance. The research will also address a new realm of the EU policy. Issues of access and use of PSI in the EU are under researched, yet of high importance for both the Union and its MS. The majority of the previous analysis on the re-use has focused on exploring and explaining the concept (Jansen, Dumortier 2003; Burkert 2005; Blakemore, Craglia 2006; ePSIGate, 2006) but there have been few critical assessments involving the both the supranational and national regulatory regimes (Weiss 2004). The task of looking at the inter-policy coherence of national/supranational law is

even more engaging and necessary bearing in mind the constitutional status of access to PSI in the MS, as well as its practical role to secure democratic participation and freedom of speech both in the EU and its MS.

The following is divided into four Chapters. The first is devoted to the theoretical aspects of European integration. The goal of this Chapter is to examine the nature of the two prevailing regulatory mechanisms of EU integration: the notions of positive and negative integration. The second Chapter introduces the key concepts characterizing the market for the public sector information in the EU. The third Chapter is devoted to testing the three hypotheses, briefly described above, using the example of the particular case of the integration of markets for re-use of public sector information. The final part of the thesis contains the summary of the research and conclusions.

1. Theories and policies of EU integration

The theoretical framework of this thesis is informed by the ideas of Fritz Scharpf. Scharpf (1988, 1996, 1999, 2003) analyses the process of European integration focusing in particular on aspects of governance. One of Scharpf's main inferences focuses on the institutional bias of the EU towards market making as opposed to market correcting policies. The three hypotheses of this thesis are derived from Scharpf's research.

This Chapter aspires to contextualize the present research. In doing so it provides a theoretical perspective on European integration, introduces the notions of positive and negative integration, and reflects on the critical opinions about Scharpf's assumptions. The Chapter also introduces the three hypotheses this thesis will seek to explore and test in the Chapters to follow.

1.1. ***Theoretical background of the European integration***

A simple description of the process of European integration commonly refers to three key theories: Functionalism, Federalism and Neo-functionalism that shaped the early discourse of European integration (Chryssochoou 2001:37; Majone 2005: 42; Craig, de Burca 2003:5). The central question of the theoretical debate is the focus of the process of integration. Shall it be the institutional architecture or rather the process, political or economic integration first (Chryssochoou 2001:37)? The balance between the supranational or intergovernmental realms of the Union is closely related to that.

Within such a framework, Functionalism sought to explain the benefits of transnational cooperation vis-à-vis unilateral state action. For Functionalists integration was a “Group involvement in peaceful problem-solving schemes, supported by the necessary technical expertise” (Chryssochoou 2001:38). Functionalists shared a non-majoritarian governance focus maintaining that the “old-style non-specialist assemblies” are to be replaced by a “management committee government” (Chryssochoou 2001:39, Mitrany 1975:119), and stressed the centrality of the transnational actors. The goal of the integration was a conflict-free mode of transnational order.

If from a Functionalist perspective a joint action is a means of defining the general interest, Federalism “seeks the joint action as the means of obtaining more effective central institutions” (Kitzinger *in* Chryssochoou 2001:41). European federalists did not, as Chryssochoou (2001:45) denotes, perceive the nation-state as an *a priori* of existence (see also Wetherill 1995:282) and proposed its transcendence by a “rational federal development” (Harrison *in* Chryssochoou 2001:41). Distinctive from formalists, federalist scholars underline the importance of the direct link between the federal citizenry and the central government, and the necessity of a balance between efficiency

and democracy, autonomy and interdependence. For the cause of European unity federalism was a “projection of an inclusive political community based on the democratic functions of the government” (Chryssochoou 42-46).

Neo-functionalism in the late 1950s attempted to synthesize the Functionalist and Federalist ideas (Majone 2005:43), developing new principles and values of transnational interaction, patterns of regional institution building and decision-making (Chryssochoou 2001:53). Church maintains: “Neo-functionalism was the first really deep and complex explanation of the Communities” akin to ideology in the hallways of Brussels” (Chryssochoou 2001:58). Neo-functionalists purport that the economic integration would be self-sustaining and eventually lead to political integration (Majone 2005). The theoretical basis of such prediction is the concept of “spill-over” where “a given action related to specific goal, creates a situation in which the original goal can only be achieved by further integrative action” (Lindberg 1963:9; Majone 2005: 43; Chryssochoou 2001:54). Neo-functionalist ideas gave rise to the Community method of governance, based on a strong position of supranational actors. A deliberate reluctance to identify any blueprint for the final state of integration of the EU (Dehousse 2000) is yet another milestone of the theory. Integration advances as “an abstract, non politicized, passive and output-oriented permissive consensus” (Chryssochoou 2001:55).

Scholars agree that Functionalist and neo-functionalist ideas (Lodge 1963: xix; Watherill 1995) have overpowered the federalist call for constitutional structures. The separation of the realms of politics and economics has been a strategic goal of the framers of the Paris (1952) and Rome (1957) Treaties, mirrored by Monnet’s incrementalist approach to integration (Chryssochoou 2001:53), and the pivotal role of the Community

method¹ (EC 2001:8). The above has also shaped the preferences of the decision-making modes in the EU where mechanisms of negative supranational integration have a constitutional advantage over the positive integration advanced by the intergovernmental institutions (Watherill 1995, Majone 2005, Heritier 2001).

1.2. *Modes of European integration*

A theory of economic policy distinguishes between two types of integration: the positive and the negative (Scharpf 1999:45). The origins of these notions can be traced back to the beginnings of the European Communities in the 1950s, and are attributed to Jan Tinbergen, a Dutch economist and a Nobel Laureate in Economics (1969). Scholars note that Tinbergen “applauded the international economic integration movement as it could remove trade barriers [which he dubbed negative economic integration] and could even result in new institutions for coordinated and centralized policy-making [positive economic integration]” (Cornelisse, Van Dijk 2006:6). Until today the primacy of economic integration goes largely unchallenged, represented almost exclusively as the “general interest” of the EU (Craig, De Burca 2003, Heritier 2001:825, Scharpf 1997:527). The following passages will introduce the regulatory goals, legal grounds and the institutional and procedural aspects of the two regulatory policies advancing this goal. The entrance point of this review is the research of Fritz W. Scharpf.

1.2.1. Negative integration

The policies of negative integration represent the neo-liberal view on economic integration. This view purports that “most legitimate aspirations of economic integration

¹ Community method is characterized by the three pillars: Commission’s monopoly of the legislative initiative, Co-decision procedure of the Council and the Parliament, the role of the European court of justice in securing the rule of law (EC 2001:8)

are realized with the completion of the common market” (Scharpf 1999:49; Hix 2005:239). Its policies serve as a means to “eliminate the inter-state barriers for goods and factor flows without harmonization of economic institutions” (Libman 2005:1). In the specific context of the EU integration such measures remove tariffs as well as non-tariff (physical, technical and fiscal) barriers to free trade and competition (Hix 2005, Scharpf 1999, Majone 2005) within the Community. The second part of the definition underlines the anti-interventionalist character of the policies of negative integration best described by Majone (2005:144) as he notes that “the aim of the policy making [here] is not to find the best possible solution for a problem but to drive forward the process of integration”. Majone alludes to the inherent preference of negative integration as certain provisions are enshrined in the EC Treaty since its adoption:

According to the framers of the treaty, the European institutions themselves, [...] rather than mimicking the interventionism of national policymakers, were to rely primarily on the measures of negative integration (Majone 2005: 36)

The basic rules of negative integration were, indeed, contained in the founding treaty of now the EU as the “The treaty of Rome contained explicit measures to reduce and abolish tariffs and quantitative restrictions on trade between the MS” (Scharpf 1999:50). The Treaty also refers to the basic principle of European law: free and undistorted competition. From such a baseline, authors argue (Weiler 1981, Scharpf 2003:82), integration had been primarily advanced through supranational measures. Of particular interest here is the competence of the European Court of Justice (Art. 220 *et seq.* of the Treaty) and the European Commission (Art. 85 of the Treaty). By definition, supranational and non-majoritarian institutions are vested with unilateral powers of enforcement and implementation of the EU law. It allows the institutions to take a direct

action and bypass the traditional political decision-making if the effectiveness of the common market was or could be undermined. The legitimacy and assent of the parties to the Treaty can be regarded as implicit, regardless the subjective preferences of the MS.

Once the prevalence of the Community interest in a particular sector was established, so were the supranational political competencies. What matters here is the ambit of the Community competence, and the axiomatic statement that each measure adopted by the EU must be justified by an article of the Treaty. While amending the Treaty is clearly an intergovernmental remit, in practice much depends on the dynamics of the interpretation (by the European Court of Justice) of two crucial Articles of the Treaty: Article 308 and 95 defining the conditions that establish the competence of the Community if not explicitly stated in the Treaty, and the legal grounds for the supranational measures of harmonization (Craig, de Burca 2003:138). Once the powers of the Community are extended through the unanimous intergovernmental agreement in the Council (in accordance with the “necessary-and-proper” clause of the Art. 308), so is the remit of economic regulation and the competence of the Court (Scharpf 1997; 1999, Majone 2005:38).

The success of negative integration, however, is not unconditional. Firstly, the common market has to be assumed as a shared vision of all the MS in the particular field—that is to say, there must be a certain homogeneity between the national systems. Negative integration therefore ignores the fact that there are spheres of national policy where it is much harder to assume common aspirations that are shared by different countries (e.g. welfare, networks, public utilities). In these realms, there is a starker salience of qualitative and institutional differences (Scharpf 1996:29) between national policies. In other words, what EU regards as a monopoly, a MS may regard as a

legitimate state intervention in order to protect a common national interest. Hence, given the differing national institutional landscapes, “levelling the playing field” through liberalization may still affect the entrepreneurs in different countries in different ways. A certain level of harmonization is needed to ensure the economic effectiveness of the liberalization policies.

1.2.2. Positive integration

Along with the calls for effectiveness, the common market, while unchallenged as the ultimate goal of the European integration, has increasingly come to be considered as an incomplete one, and in a need of complementary goals which serve the general interest by promoting social cohesion and equality (Heritier 2001:825). Here the notion of positive integration comes into consideration, referring to the measures aimed at reconstruction of the system of economic regulation at the level of now a larger economic unit (Scharpf 1999:45).

By their nature rules of positive integration do not resort to or rely upon the principle of the supremacy of the EU law, rather, as Hix (2005) points out they by definition replace the national rules and therefore are of a reregulatory character with a direct impact on the national institutions. Scharpf points out that measures of positive integration can be either market making or market correcting² in their effects (a more common view stresses the market correcting character primarily (Heritier 2001:826, Scharpf 1996:15). Regardless of their nature, all measures of positive integration require explicit political legitimation by the Council; hence the threshold to stimulate the inertia

² For example: harmonization of standards, e.g Art. 132, urging MS to harmonize systems of aid to exports to the third countries, promoting undistorted competition or process oriented regulations like the workers right to retain benefits under legal regimes of several countries, Art. 42 EC Treaty

of integration is considerably higher than in the case of negative integration. The success of the measure depends on the constellations of interest in the Council in the each particular case, yet the majority position is hard to overcome (Scharpf 1996:19). It is worthwhile to note that explicit legal capacity to use positive regulation was not characteristic to the EU polity until the amendments brought around by the Treaty of Amsterdam (Craig and de Burca 2003:33) with its aspiration to enhance the effectiveness of the Union and render it more open to the European society. The amendments brought to the Treaty a broad anti-discrimination provision, with the full decision- making power resorting with the European Communities.

The measures of positive integration that are designed to facilitate market-building are of particular interest to this thesis. Those might be regarded as the necessary measures of harmonization in order to ensure the effectiveness of the later liberalizing policies or negative integration (as discussed above). The main preconditions of the success of such supranational policies therefore coincide with those characteristic to the negative integration: common interests, shared values, and low salience of particular institutional structures. But bearing in mind the re-regulatory character of the measures of positive integration, there are two additional questions to consider. First, granted the need of the agreement of the Council, the feasibility of harmonization policies *per se* as the heterogeneity of national preferences may be incommensurable with the goal of the common market, hence the impossibility of the consensus at the EU level. The preferences may be protected by powerful organized interests that no government can lightly disregard (Scharpf 1996:30) On the other hand, the salience of qualitative and institutional differences may not necessarily be characteristic of the majority position in the Council. Therefore, it is necessary to consider concerns the challenge that

harmonization or “levelling out” the national institutional landscapes pose to vested institutional interests, traditional regulatory values, and preferences justified by a particular public interest in the Member State.

1.3. Hypotheses

Scharpf asserts that the main beneficiary of EU supranational law/policies, embodied in binding regulations and directives, has been the negative or market creating integration. Protected by the goals of the primary law of the Communities, liberalization can be extended without much political attention (Scharpf 1998:15).

Hence, one can hypothesize that negative integration is preferred at the European level due to its institutional advantages.

If the above proves to be true, there are two possible ways of policy development. On the one hand, liberalization alone may not be sufficient to provide for an effective common market that is free from any barriers to free trade and competition and affect the market players in different countries in different ways. Scharpf asserts that the success of negative integration (different trajectories of liberalization as a result of EU policies) depends on institutional differences that characterize the respective sector (Scharpf 1998:32).

Therefore one may hypothesize that in the absence of positive integration at the EU level, national regulatory differences may undermine the effectiveness of supranational law.

On the other hand, even if due to the institutional constraints supranational measures of harmonization are not feasible, liberalization may trigger further positive actions of harmonization on behalf of the MS in order to reach the goals of the common market. Scharpf argues that there may be sectors where from a strictly economic vantage

point of the present quasi-automatic negative integration the existing institutional structures can be interpreted as barriers to a common market that must be removed. The higher the political salience of these differences between the MS, the more cumbersome it is to reach an international consensus and the common market goals. If pressured, however, the democratic and political costs of such an agreement at a national level can be high. The existing balances of values and interests incorporated in specific national institutions will be upset (Scharpf 1998:32).

Thus, it is possible to hypothesize that in the sectors where the costs of negative integration are less likely to be deemed politically acceptable (where such differences are highly politically sensitive or reflect a constitutional feature of the MS), negative integration may result in consequences which harm the democratic values of the Member States.

1.4. Scharpf criticized

Scharpf's approach and interpretations of the problematic of the balance between the positive and the negative integration, and supranational/intergovernmental policy making in the EU has invited conceptual as well as instrumental critiques.

Criticizing the practice of integration, Scharpf reveals his preference to a more narrow (historical) interpretation of the EC Treaty, resorting to the intention of its framers rather than considerations of the inherent meaning and purpose of the idea of the European Communities. In that he opposes the very use of the notion of "rights" in the Community legal discourse (not found in the original texts of the Treaty). In line with that De Burca challenges one of Scharpf's core arguments of "integration by stealth" promoted by supranational institution with recourse to the principle of the supremacy of

the Community law and the “constitutionalization of the competition law” (Scharpf 1996:15, 1999:52). In his general analysis on rights in the community law, De Burca (1995:39) asserts that objections to the principle of supremacy are inherent in the German legal system “in which constitutionally recognized rights were allegedly infringed by Community measures”³, and therefore questions the neutrality of the research. In other words, is Scharpf looking out for the best model for the EU or for Germany?

This criticism addresses primarily the rationale behind Scharpf’s reasoning and arguments about the balance between the supranational and inter-governmental aspects of the EU integration. But it does not put in doubt the validity of the two mechanisms of European integration – the positive and negative integration – that lie at the heart of Scharpf’s argumentation.

Related to the above, one may argue that while Scharpf doubts the benevolence of the common market, his criticism of the preference of negative integration is equally value-laden. It arises from his premise that the European polity might be usefully compared to the institutions and politics of federal nation-states (2004:846), namely the German federation. Scharpf asserts that the social-democratic preferences of the polity are eroded as the “semi-automatic” negative integration limits the capacity of the state to address certain problems, command Scharpf’s special attention (1996:18-32). He sees supranational mechanisms as part of the solution to this “decision making trap” (1988; 2004). Phal and Olsen have criticized the normativism behind such argumentation. Olsen (Olsen 2000:312) has openly challenged Scharpf maintaining

Interventionist, welfare state goals are contested in contemporary Europe.[...] [T]he assumption that the problems

³ In the case against Germany, [11/70] Internationale Handelsgesellschaft, the ECJ held that the principle of supremacy of the EC law holds, even when there was a conflict with the provisions of a MS constitution. The German constitutional court later ignored the decision of the ICJ.

of the welfare state are, and should be, the most important concern of European citizens, is not based on empirical evidence and explicit normative argumentation. Rather, the will of the people is assumed.

At the same time, Phal on similar grounds has criticized “Communities’ concern with social cohesion” *per se*, as that entails the assumption that both cohesion and consensus exists on a MS level (Phal in De Burca 1995:49).

While the argumentation of Scharpf may, indeed, lack empirical evidence, the author of this thesis would not fully concur with the criticisms above. Scharpf does not argue that the welfare state is the main concern of the European citizens. Yet he doubts the existence of persuasive arguments about the willingness of the political willingness of the countries to renounce national sovereignty and to commit themselves to closer economic integration, partially losing the decision making capacity that may be necessary to ensure a sustainable development under the conditions of intense competition and facing the need to meet more demanding standards of performance (1988; 1999:169). Thus, the arguments of the critics may be easily reversed to argue that they have failed to convince the reader that the neo-liberal view commands more uniform support, and does not underline some of the core arguments of convinced Euro-sceptics.

Heritier (2001:826) also challenges Scharpf’s prime argument. She argues that empirical findings with regard to certain sectors of mixed economies (a crucial part of Scharpf’s argument, 1999:58) partially contradict his claim. There are particular institutional mechanisms and strategies which work to the advantage of market-correcting policies in the network services, which after deregulation foster re-regulation in the public interest. She argues that the shifting of an issue from one arena to another leads to

the change of institutional rules lending more bargaining power to a minority position, and, secondly, includes an actor with a strong stake in general-interest issues; namely, the European Parliament (Heritier 2001:827). Admittedly, though, Scharpf himself later purports (2003:83) that the “decision rules”, used by Heritier, distinction between Treaty revision, Internal market and competition path is parallel to his classification of the three modes of policy making (supranational, joint decision and intergovernmental)

Majone (2005) raises the argument of the legal status and the *de facto* effectiveness of the policies of positive integration, noting the soft-law and non binding character of the intergovernmental measures. He writes: “At issue here is not the merit of the objectives of various positive measures, but only whether, or to what extent, they can be legitimately pursued at European level – using a Community method rather than through soft law [and intergovernmental negotiation]” (Majone 2005:158). Majone also challenges the very need for an extended supranational cooperation, arguing that that the “repeated policy failures [of positive integration] and the weak incentives to learn from those failures” strengthen the argument of the need to return to the negative integration “in the original spirit of the treaty”, and quite contrary to Scharpf, he argues that positive integration should be pursued only where it can be shown that, with respect to a certain problem, EU regulations are demonstrably welfare-enhancing (Majone 2005:143).

Here, one might argue that the views of Scharpf and Majone are not entirely opposite. They look at European integration from two different aspects. While Majone is concerned primarily with the effectiveness of the EU policies, Scharpf’s concern is wider, as he links the issue with the overall impact of such policies on the quality of governance in the MS. In his research Scharpf addresses not only the direct, but also the indirect effects of the EU integration.

2. Methodology

This Chapter introduces the methodology of the research and justifies the choice of the case, which is used to probe the plausibility of the theoretical assumptions behind the hypotheses.

The primary challenge of this research is the lack of empirical evidence about the practical implications of the Directive “on re-use of public sector information”. The law is relatively new (transposition finished on June 2005), and therefore there is a dearth of reliable data about the implementation of the national freedom of information laws as applied in accordance to the supranational (also EU) policies. The official review of the Directive is scheduled for the year 2008. Given such limitations, the presumption underlying the methodology is that the analysis of the possible outcomes is a necessary part of policy making. The present research is therefore an interpretive inquiry in the intrinsic value of the particular the EU policy (compare: Finch 1986) and the inter-policy coherence of the measures produced on the EU and national levels. The research primarily relies on deductive analyses of official records (Lincoln, Guba 1985:277). The approach is best described and justified by Atkinson and Coffey (1997:47-48) who maintain that:

It is tempting to treat observational and oral data as the primary source data, and documentary materials as secondary. [...] We would urge that documentary materials would be regarded as data in their own right. They often enshrine a distinctively documentary version of social reality.

Records alone, however, cannot describe the actual workings of an institution, nor can it be regarded as firm evidence of what they report (Hodder 2000), and “different types of texts have to be understood in the contexts of their conditions of production”

(Atkinson and Coffey 1997:47). Therefore recorded sources (records, documents, and existing research) and interviews with the key actors describing the decision-making process in the EU and the Member States is an important source of information explaining the processes that shaped the Directive. Businesses are the main beneficiaries of the supranational law and an important source of data. Given the wide consultative outreach of the European Commission, the information is derived from the documents submitted to the Commission, existing analysis of the case studies of the re-use of PSI in the MS, as well as from the interviews with prominent re-users.

More specifically, this thesis will explore and seek to probe three hypotheses that stem from the research of Fritz Scharpf that are already briefly outlined in the introduction. The theoretical backdrop of the three assumptions is provided in an introductory Chapter that looks at the three main theories of EU integration and especially their impact on EU law, institutions and integration policies. The Chapter will also introduce the two main regulatory policies related to EU integration dubbed as the positive and negative integration, the author will use the existing research to introduce the origins of the policies, and analyse the EU Law, mainly the provisions of the founding Treaties of the EU, as well as the conclusions of prominent experts of EU law, entailed in their research, to describe the policy and legal mechanisms behind the two core notions of Scharpf's research.

The first hypothesis maintains that in the EU negative integration is more likely to be chosen than its positive counterpart. To test the above it is necessary to establish what factors determine the choice between the supranational and intergovernmental process of decision-making in the EU. To achieve that, the author will analyse the provisions of the EU treaties and policy papers explaining the choice of the treaty base and mode of

integration. Probing the argument with regard to the area of the re-use of public sector information (PSI), the author will examine the records (official reports and publications, policy papers, transcripts of debate, commentaries of the MS as well as the interest groups) as well as the existing research pertaining to the historical process of the integration. Issues of importance for the present research are those of the sectoral focus of the new policies and consequently the choice of the decision making mode in the EU.

The second hypothesis asserts that in the absence of positive integration, the success of integration may be undermined by the differences of the national regulatory regimes. Homogeneity and similar priorities are preferred if negative integration is to succeed. Thus the hypothesis requires establishing the goals of the market integration and the nature of the barriers to the Single Market in the MS, bearing in mind that in the name of economic integration it is harder to overcome institutional barriers than the economic. To achieve that the author will analyse the records and documents leading up to and framing the re-use policies in the EU and interview the experts involved in the process. The market barriers, on the other hand, are determined by the *de facto* of access and use of PSI in the MS.

In the present thesis, the author will look at the regulatory regimes of two MS: Latvia and the United Kingdom. There are several reasons that justify the choice of the cases. Latvia is an example of a rather liberal regime of access to PSI, as well as a MS that was non EU member at the moment the Directive was passed. The United Kingdom represents both a strong force behind the Directive, as well as an example of a restrictive and legally and institutionally nuanced freedom of information regulation. Also legal regimes where PSI is/is not subject to government copyright, the former being an important aspect in the re-use debate, and the UK being the sole example of the regime in

the EU. The countries therefore represent the opposites on the spectrum of the scope (in terms of subjects as well as content-wise) of the right to access PSI. One may therefore claim that the results of the present research may be interpolated with regard to the impact of negative integration of the re-use of PSI in other EU countries. The experience of the author as one of the members of the working group that worked on the process of transposition of the Directive in the Latvian regulation (Cabinet of Ministers, 15.06.2006) allows claiming that the regime of re-use of PSI in UK was widely regarded as a positive model. The author will also analyse the existing legislation and policies, as well as examples of the practice of the re-use of PSI, based on the recorded case studies and, where possible, interviews with the re-users. Once the mismatch between the supranational regulation and the national law and practice is specified, it is possible to assess whether the measures of negative integration, by the limits of their regulatory capacity, can be a sufficient remedy.

The third hypothesis asserts that harmonization may involve trade-offs for the existing balance of regulatory values and institutions. To test the hypothesis it is necessary to determine (deduce) the change in the key provisions of the national law that might be required to effectively serve the goals of the economic goals underlying the Directive. The differences between this “standard” and the *status quo* will illustrate the areas of the conflict of the supranational policies and the national regulatory values (making it possible to draw more general conclusions about the problematic sectors for negative integration). The costs and benefits of economic integration in a particular sector can be assessed through the evaluation of the political salience of a particular legal mechanism as well as against the backdrop of the regulatory tradition (values). Important sources of information to assess the above are the international standards binding to the

state, their national implementation measures, as well as the assessments of the experts of to access to public sector information, and available empirical evidence such as amendments to the MS law. The author will devote special attention to the documents on the historical policy process of the Directive. The goal here is to determine and compare how the policy documents consider the re-use (policy of negative integration) and freedom of information (policy of positive integration), determining their mutual relation. The author will primarily refer to EU law and policy documents, as well as and especially, the material describing the input from the MS and interest groups. The author will then compare the findings with the information characterizing the institutional process of the adoption of the Directive based on the existing research and the expert interviews.

2.1. *The added value of the present research*

The concept of Fritz Scharpf, underlying the present research has been developed and probed in the context of social policies (Olsen 2000:311-12). The present research will probe the concept in a new set of conditions. The benefits of such approach are best described by Weiler (1984: 19) as he maintains that

the evidence in favor of our induction is of a much higher and forcible character when it enables us to explain and determine [e.i. predict] cases of a different kind from those, which were contemplated in the formation of our hypothesis. The instances in which it has occurred, indeed.

Scharpf has noted (2003:32) that the shortcomings of negative integration are more likely to appear with regard to the settings traditionally sheltered or exempted from market competition. The present research will address the areas of access to public sector information and the commercial re-use of public sector information. Compared to the

social policies, the re-use of the PSI is less socially but more politically sensitive. The policy has no distributive effects and it does not entail direct fiscal or social consequences to a wider population, however, it is part and parcel of the political and administrative discussion about the quality of democracy, good governance and administration. Hence, one may argue that, as opposed to the social policies vested with a great popular interest, issues concerning PSI are more open to possibilities for supranational and international political pressure to create a level playing field.

On the other hand, management of public sector information is an inherent part of the constitutional, human rights and administrative law of the MS. Patterns of national regulation vary significantly due to political and ideological reasons. While the above is similar to the social policies (serving as a source of the concept), several aspects of the re-use policy render it a desirable topic for analysis, strengthening the argument of possible adverse effects to the regulatory values of the MS. Management of PSI is a policy central to a democracy; the measures of negative integration partially exempt it from the regulatory competence of the nation state in order to promote a marginal supranational goal (MEPSIR 2006).

3. The Case: Access and re-use of public sector information

As remarked in the introduction, the present thesis will probe the concept of Fritz Scharpf outlined in the previous Chapter, with regard to the policies aimed at the liberalization of the market for PSI in the EU. In particular, it explores the possible consequences of rigorous implementation of the Directive 2003/98/EC “on the re-use of public sector information” on the institutions and traditional regulatory values of the MS.

This Chapter will introduce the key notions of the substantive case of the research: public sector information (PSI), access to public sector information, and the key notion of the EU policies in the respective field, the (commercial or non-commercial) re-use of public sector information. The re-use of PSI is conditional on a healthy regime of access to such data. The Chapter will therefore also describe the most important aspects of the interplay of the access and re-use policies, emphasizing the areas that are most important for the success of re-use, and look at the pattern of the national access regulation therein.

3.1. *Public sector information*

Management of public sector information is an indivisible part of a modern public administration. As different systems stand for different content of the notion of “public sector”, there is no uniform definition of public service information (PSI). As Blakmore and Craglia (2006:13) explain: “[a]ny definition is the outcome of political process [...] and at the end of this battle the debate moves on to considerations of how access to PSI can be resourced, and who can *exploit* or *re-use* it.” Yet, though the notion is highly contextualized, it is possible to identify the main issues addressed by the definition debate. Most commonly those involve the ambit of the notion of the public sector (based on functional, institutional or financial approaches), the types of information (documents only, administrative or all, finished or also internal etc.), the nuances of the distinction between administrative versus non administrative information (e.g. laws). In light of the above, Burket (2005:3) proposes a neutral and explanatory account, describing PSI as the information generated by governments and administrations on whatever level or by institutions under government control regardless their legal status.

For the purposes of this thesis, however, the author will adhere to the definition found in the respective EU law, which refers to PSI as “[e]xisting documents held by public sector bodies of the Member States”, where public sector bodies comprise “state, regional and local level authorities, bodies governed by public law and associations formed by one or several such authorities, or one or several bodies governed by such law”. The “bodies governed by public law” are described cumulatively by serving the purpose of a general interest, legal personality, and the majority of public finance (EU 2003: §1).

The very notion of public sector information clearly identifies the realm where it is necessary and cherished: such information is the fabric of public administration. At closer look, however, the function of PSI fall in two broad categories, depending on whether the information is used within or outside the realm of public administration (Burkert 2004:3-15), in accordance to or for purposes other than those for which it was collected or created. Since the beginning of the 1960s there have been a growing number of policies addressing popular access to PSI. These policies are based on the premise that such information is vital for citizens to participate in a democratic society and economic processes, and to be aware of the extent of their rights and duties (Hanssen and Dumortier 2003:185; Ackerman and Sandoval 2006; EU 1998; Beatson and Cripps 2000). Next to democratic importance, PSI also has a considerable economic value for the industry in general and information industry in particular (Hanssen and Dumortier 2003; EU 1989; 1998). A brief insight in both of the function follows.

3.2. *Access to public sector information*

An access to information law serves to empower “any private person or entity” not vested with a specific (procedural) interest in the solution of a particular case, to request and obtain public sector information. The law establishes a subjective right and the corresponding duties of the public sector institutions. The aims of such regulation most commonly are to provide a comprehensive, free, timely and most convenient access to public sector information, and furnish an effective mechanism of appeal and redress.

Access to information laws are traditionally characterized and evaluated by variety of substantive and procedural features (Article 19, 2001; Council of Europe 2002; Mendel 2003). Central to the success of the access to information law are:

- The scope of the right of access. Mainly, looking at whether the law comprises documents (records) vis-à-vis information in general.
- The ambit of the restrictions of access, referring to the enlistment of the legitimate public interests justifying the refusal of access (e.g. state security, commercial secrets, personal data, and internal administrative debate being amongst the most common clauses of exceptions).
- The timeframe of access.
- The existence and the structure of fees and/or charges.
- The institutional mechanisms of appeal and redress, and the respective competencies of the responsible bodies (Council of Europe 2002, Article 19, 2001).

Despite the existence of widely recognized guidelines and soft law instruments on the European level, the practice of regulation regarding all the aspects outlined above varies significantly from one country to another. It reflects the national political consensus on the importance of the values enshrined in the law, as well as the structure and traditions

of the public administration (Mendel 2003, Justice Initiative 2006). The political support to the need of such regulation *per se* is equally varied.

3.3. Re-use of public sector information

Amongst the three notions, the re-use might be the less familiar one. How do we recognize re-use? The UK office of Fair Trade (2006:3) has developed an excellent explanation and guideline.

“When you look at a map, listen to a weather forecast, check the details of a public company or even trace your family tree you are probably using Public Sector Information. Many of the products/services developed by businesses will involve adding value to the original PSI, such as an in-car navigation system. In almost all cases the public institution will be the only source for the original information and in many cases it may itself be in competition with these other businesses in providing products with added value to end users.”

Authors assert that the origins of the idea of the re-use of PSI dates back to the 1920ties and 1930ties (Burkert 2004:7). Along with the development of information technology and growing recognition of the informational needs of the emerging information society, the private sector became interested in PSI as a valuable economic input (EU 1989). Since the end of the 1980ties the EC has attempted for the uniformity of national regulation in the area in order to “promote an optimal synergy between public sector support and private sector initiatives” (EU 1989). The Directive on re use of public sector information is an embodiment of these attempts (EU 1989:3; 1998; 2006; Fruth 2000).

The Directive defines the re-use of PSI as: “the use by persons or legal entities of documents held by public sector bodies, for commercial or noncommercial purposes other than the initial purpose within the public task for which the documents were

produced” (EU 2003: §2). The document seeks to encourage public sector institutions to allow the re-use of their information and individuals and businesses to use the possibilities, to develop local but, most importantly, pan-European products and services based on PSI (EU 2003). The Directive aspires to align the differences and attain minimum harmonisation of the traditional rules and practices of re-use of PSI in the MS (EC 2003, Recitals 2-6, §5; Mc Cullagh, Leith 2004; OPSI 2005:2). Acting through series of prohibitions and measures providing for harmonization of the legal norms and administrative practices, the Directive establishes the main principles and mechanisms of the re-use of PSI:

- prohibits the governments to restrict re-use of documents through asserting their copyright in materials,
- prohibits exclusive commercial agreements which limit the ability of other companies to enter the re-use/added value marketplace utilising these materials (McCullagh, Leigh 2004:15),
- requires transparency of charges for obtaining the PSI,
- requires MS to ensure a minimum of administrative protection of the rights of re-use established in the national law, such as maximum terms of reply and notification on delay in the administrative procedure, as well as appeals procedures for the requests for re-use, and
- provides for the possibility to apply conditions of re-use through licences, requiring adoption of a standard licence in order to avoid discriminatory practices (EU 2003: §. 4-8).

Thus the Directive presents a typical example of the policy of negative integration. While the goals of regulation remain the exclusive competence of the supranational bodies, it is

the responsibility of the MS to adopt or align the national legislation in order to ensure a successful implementation of the supranational goals.

3.4. *The interplay between the access and the re-use of public sector information*

It is important to note at the onset that the Directive does and cannot oblige the institutions to allow re-using the information they hold. The provisions encourage the institutions to allow the re-use. The Directive recognizes that possibility of re-use of PSI is tightly linked with the possibility to access such data in the MS: “This Directive builds on and is without prejudice to the existing access regimes in the Member States” (EU 2003: §1(3)) and applies exclusively to the information that is regarded as generally accessible in each respective MS. The Directive cannot regulate the substantial issues of access to information directly. That way there are several aspects of the existing national access regulations that need to serve the democratic and the economic goals equally well. The most important amongst those are the scope of the accessible information, the speed and quality of access, and the odds of competition. The pan-European ambitions of the EU policies also entail an objective need for the uniformity and predictability of the circumstances on the national “playing field”. Bearing in mind this national and pan-European perspective, the remainder of this Chapter provides a conceptual assessment of the interplay between the two policies in aspects most important to their success.

The notion of public sector. The notion of public sector determines the reach of the subjective right to request and receive information: the broader the interpretation, the wider the possibility to re-use the information. Being a measure of negative integration, the Directive does not amend or substitute the national law. Its power extends only as far as the definition of the public sector institution chosen for the access of information law

of a particular MS. Hence, while one MS may have provided for an extensive and unqualified definition, another may allow public access only in the central government. The standards of access may differ even within one country, depending in the constitutional framework of public administrations, e.g. in federal systems (Chandler 2000:9).

The notion of restricted access information. Information can be re-used if it is generally accessible according to the legislation of the MS. The Directive does not apply to cases where citizens or companies have to prove particular interest in obtaining the information (EU 2003:§1(3)). According to one of the key principles of access to information regulation, that information is generally accessible and that the law does not provide for the opposite (Council of Europe 2002). The scope of such limitations and the interpretation differ greatly from one country to another (Mendel 2003; Banisar 2006).

Definition of information. The Directive applies to “documents”, referring to “any content [or any part of such content] whatever its medium”. The definitions of this main object of the access to information law differ. The Directive aligns with the lowest common denominator, referring only to documented information. However, even here the individual countries may have chosen to specify the content of such legislation???, e.g. referring to data about individuals, objects, facts, events, phenomena and processes. On the other hand, the regulation may apply to “official documents”, and therefore limit the right of access to information that complies with certain formal requirements.

Fees. The general principle of access to information legislation provides that information shall be accessible at no or low cost. The practice of regulation, however, varies. One can observe three main models of pricing: no fee, a flat fee, or compensation of administrative costs incurred while processing the information.

Administrative refusals. Provision of information is not the primary function of a public institution. Therefore cases when abiding to the law entails a justifiable impediment to the normal discharge of its functions (e.g. requests for large amount of information), the institution may refuse access to information due to administrative reasons. If re-use of information is made possible without any conditions and/or the timeframe of the response is relatively short, interpretation of similar norms may cause problems to the potential re-users.

Timeframe. The general principle of open access laws provides: “The requests should be processed rapidly and fairly”. Interpretation of “rapidity”, however, is a country-specific notion. The timeframe of disclosure may vary from 14 to 30 days on average, and may be extended on administrative grounds (Mendel 2003). The objective time of the provision of information may be significantly longer (Transparency International – Latvia 2001, Justice Initiative 2006) due to the accumulation of requests and the lack of administrative capacity.

Copyright. The government may or may not choose to apply copyright PSI. With rare exceptions (most notably the UK), European legislators have chosen to follow the pattern of the US federal legislation, which explicitly prohibits applying copyright to PSI.

4. Access and re-use of PSI in Latvia and the United Kingdom

The previous Chapter introduced the key concepts of the policies that are used in this thesis to probe the arguments of Fritz Scharpf. The analysis emphasized the role of legislation and regulation not only in functioning but the very existence of the market for PSI and highlighted the possible areas of concern.

The goal of the present Chapter is to look at how countries have changed the national regulation in the face of EC law. The Chapter uses examples of Latvia and UK.

4.1. *The legal regime of access to information and re-use in Latvia*

4.1.1. The history of the policy and regulation

The content of the right to access PSI as well as the conditions and mechanisms of re-use of PSI in Latvia is determined by the Freedom of information law (FOIL). To the best knowledge of the author there are no known policy documents, planning or analysis leading up to the present legislation. However, it is possible to trace back the origins of the present law to an unsuccessful legislative initiative, the “Law on informatics” (Ministry of Transportation 1998). In its present form, the law was supported by an overwhelming majority of the Parliament. The regulation formed part of the “action plan” to combat corruption. The wide initial political support for the adoption of the law has also been attributed to the role of the diplomatic pressure of the North Atlantic Treaty Organization, requiring an effective legislative mechanism to form an antidote to the recently adopted law on State secrets (Latvijas Vestnesis 1996) (Berzins 2000).

Researchers have emphasized that the law represents an example of a very liberal regulatory regime and is greatly influenced by the regulation of Sweden and the United States – the primary examples of legislation before the adoption of now a widely recognized Recommendation of the Council of Europe in 2002. On a critical point, however, the authors note that the effectiveness of the provisions may be undermined by lack of controls. While the law rests on broad principles and provides for a wide administrative discretion, the regulation lacks strong mechanisms and traditions of implementation (Ericsson 1999; 1999a; Berzins 2000; Berzina and Ozolina 2000).

In light of the above, the FOIL has been subject to a continuous criticism about the quality of the implementation of the law (Transparency International – Latvia 1999, 2002; Berzina and Ozolina 2000). Despite its initial support, FOIL has not been substantially updated or improved because doing so has proven politically sensitive; the only changes to the original legislation have taken the form of case-based amendments. The idea of even a partial review of the legislation did not succeed until October 2006.⁴ There are no separate legal instruments to address the issues of re-use of PSI. The Directive is implemented via several provisions of the present law and, unless stated otherwise, the request of re-use is processed in the same order as a regular request for access to information. The law provides that an institution may provide for re-use conditions. Those may not restrict competition (§17).

4.1.2. Key provisions of law on access and re use of PSI

The notion of the public sector. The law applies to “institutions” (§2(1)). The notion comprises: “a legal entity (an authority, a unit or an official) on which specific public authority powers in the field of State administration have been conferred by a regulatory enactment or public law contract” (FOIL; Administrative procedure law 2001, §1) as well as “every institution and persons who implement functions and tasks of [public] administration” (FOIL:§1(4)). Hence, the definition covers both institutional and functional aspects of the public administration. Interestingly enough, the law provides for a “direct impact” of the provisions of the Directive, stating that public enterprises

⁴ goals of this review included the need to transpose the provisions of the re-use directive. Subject to the recent amendments, the overall quality and the internal coherence of the provisions of the law have improved, but a general review might begin in the autumn 2007 (Egona Ālers, personal communication 30.03.2007). The following passages are devoted to the content of the present regulation.

funded by public persons and regardless of the amount of such support, are bound to apply the marginal cost of model, when providing information for re-use (§13 (5)).

The definition of information. The FOIL defines information as “information or compilations of information, in any technically possible form of fixation, storage or transfer”(§1(1)). In addition, the law specifies that the scope of its application does not extend beyond “documented information, which is within the circulation of information of institutions” (§2 (1)). Thus, the regulation covers only the information which is already created and registered in the respective institution. It is important to note that to this day, the interpretation of the three above key concepts of the FOIL has been contested and is subject to the interpretation of the court. The only exception amounts to the notion of “institution”, where the plaintiff contested the legal status of the Prosecutor’s General Office (The Supreme Court 2005).

The notion of restricted access information. There are seven categories of information which are exempted from the scope of the application of the FOIL based on the content (§5 (2)). The restrictions are determined strictly based on the content of the data. The list of restrictions, however, it not exhaustive and includes a catchall provision providing that further exceptions may be defined by other laws. Hence, the actual content and content of the restrictions remains uncertain.

Fees. The law provides that “generally accessible information which does not require any additional processing shall be provided free of charge”. The fee may not exceed the marginal cost of processing the information (§13 (1)). A recent albeit unsuccessful initiative of the Government sought to introduce the system based on full-cost recovery.

Timeframe. A person is entitled to receive the information it requests within 15 days of lodging the application. If the information requires additional processing the term may be extended to 30 days (§14). According to the general administrative law, a wrong application must be forwarded to the competent institution within 7 days of receipt, with due notification of the applicant. Violations of time-frame constitute sufficient grounds to claim personal redress.

Administrative refusals. Institution may refuse the information on the grounds of its content (restricted access). Yet, the FOIL also provides the right to decline the request of generally accessible information if the request or conditions (manner of provision) “are not commensurate with the resources at the disposal of the institution”, and, if the request is fulfilled, “the work of the institution or the rights of another person are threatened” (§11² (3)).

Control over the implementation of the law. The State Data Inspection has supervised compliance with this law since 2003. The competence of the institution, however, is restricted to consultative and permissive powers. The Inspectorate has no ordering power. It cannot issue administrative acts and impose administrative sanctions for violations of the law. The institution has also not received the political support in the form of budget allocations necessary to ensure the fulfilment of the function. The only legally binding measures therefore may be taken by the administrative court.

Register of information. There is no uniform system of classification of the PSI. Each institution creates and maintains its own register of information. No existing system provides for a “user-friendly” classification of information. Attempts of the governmental working group to create the regulation that would establish a uniform standard of the

“assets lists of main documents” and “decentralized assets lists” have not been successful. Existence of the assets list is required by the re-use directive (§9).

Copyright. The regime of copyright law cannot be applied to public sector information in Latvia.

4.2. Legal regime of access to information and re-use in the United Kingdom

4.2.1. The history of the policy and regulation

Commenting on the access to PSI in The United Kingdom, Toby Mendel (2003:91) writes: “The United Kingdom presents an interesting conundrum on freedom of information, contrasting a vibrant media operating in an atmosphere of relatively high respect for freedom of expression with a government which has, at least until recently, been obsessed by secrecy.” The Freedom of Information Act (FOIA), amending the situation, was passed in November 2000. The new act would supersede the “Code of practice on access to government information”, introduced by the then Minister of Science and Public Service on April, 1994 and later revised in 1997.

The Act was a result of lengthy planning and discussion. In December 1997, the Government also issued a White Paper entitled “Your Right to Know” where it provided a detailed description of the proposal for a Freedom of Information Act. The policy document was followed by a year-long consultation process. A draft bill was introduced in May 1999, and followed again by a process of pre-legislative scrutiny by committees in both Houses of Parliament and a public consultation (OPSI 2000). At the end of the day, the act provided for a five-year implementation period before it entered in full effect on January 2005. The period was intended to give the various institutions obliged to comply with the new regulation sufficient time to prepare.

In his general evaluation Mendel (2003:91) notes that the Act includes very good process guarantees, along with a number of innovative promotional measures. At the same time it is seriously undermined by the very extensive regime of exceptions.

Following the Directive on re-use of PSI, in 2005 the Cabinet introduced “The Re-use of Public Sector Information Regulations 2005”. As explained by the implementation guidance by The Advisory Panel on Crown Copyright (2004), the Directive is about re-use of information not access to it. Therefore potential users may use the FOIA to get access to information and then use the Regulations to re use it.

4.2.2. Key provisions of law on access and re-use of PSI

The notion of the public sector. The notion of “public authority” includes bodies enlisted by a special annex to the law. The Secretary of State may complement the list with additional bodies. The decision must be based on the nature of their functions. The Act also applies to public enterprises, defined as bodies wholly owned by the Crown or a public authority other than a government department, are also public authorities (§1; 5; 6). In total, the Act provides for a right to access to information held by over 100,000 public bodies (Banisar 2006:129). The Copyright Panel (2004:§5) has stressed that with regard to the scope of their subject matter (public information) and the broad scope (public bodies) of access and re-use instruments, the regulation is similar, but not identical. The Regulation applies to a more narrow scope of public bodies (§3).

The definition of information. The Act defines information simply as “information recorded in any form” (§1(3)). While the authorship of the information is not important, the information must be “held” by the public authority (Mendel 2003:92).

The notion of restricted access information. The FOIA provides for a wide range of exemptions. The enlistment of those spans 13 pages (Banisar 2006:129) and comprises a wide spectrum of content of information (personal data), as well as broader groups of exceptions (communication with the Royal family), protecting particular types of information regardless of the content.

Fees. The Regulation provides that the institution may charge to allow re-use. The cost may not exceed the actual costs of providing the information (or marginal costs) and a reasonable return (§15). The FOIA (§9) on the other hand is based on the real costs of information and the charge may not exceed 10% of the reasonable marginal costs, unless the costs of compliance exceed “appropriate limit” (§12) determined in relation to each particular request. The Directive has certainly fostered the debate on the practice of pricing PSI. Two recently released independent reviews on both the quality of the implementation of the access regime and the growing perspectives of re-use of PSI have expressed diametrically opposite opinions on the need of higher (or even flat) fees for an FOI request, or no fee for the provision of the information for re-use (Frontier Economics 2006:4; Mayo Steinberg 2007:36; see also MEPSIR 2006).

Timeframe. The FOIA provides that the request must be answered/information provided no later than 60 (§10) days after the receipt of the request. The same applies to the requests of re-use. Yet, the regulation provides for special exceptions “where documents requested for re-use are extensive in quantity or the request raises complex issues the public sector body may extend the period for responding by such time as is reasonable in the circumstances.” The studies of assessment on the implementation of the FOIA maintain that delays as well as the broad discretion conferred to the institutions in

the notion of “reasonable” extension, is the main problem so far (The House of Commons 2006)

Administrative refusals. The FOIA allows institutions not to comply with “vexatious requests”. As explained by the FOIA advocates (Campaign for Freedom of Information 2006), a “vexatious request” is made in order to disrupt the authority’s work or is part of an obsessive pattern of requests. Independent experts also stress the amount and nature of information requested (Frontier Economics 2006:5-6)

Control over the implementation of the law. The enforcement of the FOIA and the re-use directive likewise is the competence of an Information Commissioner. The Commissioner has the power to issue guidelines regarding the implementation of the law, as well as, based on individual claims, notices of non compliance with the Act. The acts of the Commissioner may be appealed to the Information Tribunal (§52-57)

Register of information. The five-year implementation period of the FOIA required the institutions subject to the new regulation to carry out a comprehensive audit of their information resources, in line with the new provisions. Each authority was required to develop a “publication scheme” (§19). This scheme defines information and documents that the authority intends to public, describes how the information is to be published, as well as the conditions of pricing. In addition to that the Regulation on re-use requires the authorities to produce the list of “main documents” available for re-use (§16). Along with the publication schemes, each institution is required to maintain and make publicly (on line) an accessible “Information assets register” that focuses mainly on the un-published PSI. There is a unified system of classification of information.

Copyright. The material which is produced by employees of the Crown in the course of their duties is subject to Crown copyright. All PSI and the information covered

by Crown copyright is subject to a free of charge PSI license that “explains how users throughout the world may reproduce certain Crown copyright information and PSI” (www.opsi.gov.uk). In order to facilitate the re-use of PSI the government has developed an on-line licensing system (<http://www.opsi.gov.uk/click-use/>).

4.3. *The national marketplace for the re-use of PSI*

The goal of this section is to summarize the arguments of the two previous chapters. To look at how the regulatory landscape translates into the landscape of business.

The overview of the regulation reveals that there are significant differences between the MS when it comes to the political importance as well as mode and intensity of dealing with the access and re-use policies. There is, however, one important parallel: the EU framework is assimilated and not transposed in the national legislation, as the policies tend to promote national rather than supranational goals.

In Latvia there is no coherent policy planning, both with regard to the regime of access to and re-use for PSI and the regulation is characterized by incremental change and shaped by the political consensus of the moment. The access and re-use regulation entail high administrative transaction costs to the potential re-user, mostly due to the lack of coordination of the key policies of management of PSI. There are serious flaws in the mechanisms of rights protection and no monitoring mechanisms other than judicial, for the implementation of the law. One can argue that such uncertainty undermines the development of a reliable marketplace for the re-use of PSI on a national level.

The *status quo* of the United Kingdom suggests that the economic potential of PSI is recognized. While little is accessible, the government has taken steps to ensure the

availability of comprehensive information on the public data that is both published by the government and available for re-use. There is slow (House of Commons 2006) but sufficiently resourced complaints procedure. In both countries there is an uncertainty about the preferred regime of pricing of PSI in case of access and re-use likewise.

Regardless the comparative advantages from the analytical perspective, the effectiveness of the re-use regulations in the UK, especially the asset registers and the complaints mechanism, are severely criticized by the re-users (Office of Fair Trade 2006)

5. The democratic costs of negative integration

Drawing from the research of Fritz Scharpf earlier in this thesis the author developed three hypotheses that predict the existence of a set of patterns in the process and the consequences of the policies of EU integration that are intended to advance the common market. The goal of this Chapter is to test the hypotheses with regard to the case of the integration of the MS markets for the products and services based on the PSI. The thesis uses the example of the national markets in Latvia and the UK. The conditions for access and therefore the re-use of PSI in both of the countries were discussed in the previous Chapter.

5.1. *Hypothesis 1: The preference of the negative integration*

Scharpf stresses the increasing role and competencies of the non-majoritarian bodies of the EU – the Court and the Commission in the EU decision making process. He maintains that due to this peculiarity negative (market-making) integration, advanced primarily by the supranational institutions, is preferred over the intergovernmental modes of decision making and policies of positive or market-correcting integration.

Mechanisms of negative integration are only possible where the particular area of policy has been recognized as part of the first pillar or common market issues. Hence, the first step to probe the hypothesis as well as to set the scene for the following discussion is to explain how PSI became a part of the common market. The second task is to highlight the points where during the decision-making process the EC has preferred the negative integration over the positive.

The discussion about the re-use of PSI as a Community issue began in 1970s. The success of US was lucrative, and the UK information industry urged the Commission to consider actions to unify the EU market for commercial exploitation of PSI (Burkert 2004:11). The European Economic Communities (EEC) did recognize the economic value of PSI (Janssen and Dumortier 2003:186), yet it was also facing a formidable choice. The PSI-based services were undoubtedly a significant issue for the development of the common market but it was not necessarily clear whether the issue could be advanced on its own, without being linked to any of the existing common market goals/programs. The inspiring success of the US, however, was based on the positive impact of the federal access to information regulation (1966) (Fruth 2000; Burkert 2004:11). In the EEC, then a union of 12 member states⁵, only Greece, Netherlands, Denmark and France had introduced the regulation providing for a public access to PSI (Vleugels 2006). Two of the biggest MS – Germany and United Kingdom – had a long-standing tradition of administrative opacity.⁶ Contrary to the re-use, access to PSI is an issue of administrative and constitutional law, outside the remit of the supranational

⁵ Belgium, France, Italy, Luxembourg, West Germany, Netherlands, Denmark, Ireland, United Kingdom, Greece, Portugal and Spain

⁶ UK has introduced the FOIA in the 2000, in force since 2005. Federal FOI regulations in Germany were adopted in 2006

competence. Being part of the second pillar issues, any agreement on the measures of integration requires unanimous assent of the MS.

Faced with such dilemma, the Commission produced a rather unusual document - Guidelines (EC 1989), a result of a five year thinking-process (Janssen and Dumortier 2003:186). The Guidelines pleaded that PSI “could be made available for the private sector for construction and marketing of the electronic data base services” (Introduction §1). The document cautiously called for abolition of the existing monopolies (exclusive agreements) in the re-use of PSI (§6) and suggested that the price of information should be fair, yet “not necessarily include the full cost of collecting the information” (§4). Instead of public debate, the guidelines sparked criticisms (Burkert 2004:12), mainly due to the obvious lack of the balance between the public and the private sector. The role of the public sector was, at times, reduced to that of a mere supplier of raw data (Janssen and Dumortier 2003:187). The document avoided the issue of access to PSI and focused explicitly on the possibility to re-use such data for commercial purposes.

After the series of studies and reports (the so-called PUBLAW reports⁷ focusing on the impact of the Guidelines in the MS), the Commission suggested the need for a binding legal instrument to establish the framework for the re-use of PSI. The issue was repeatedly addressed in the Green Paper (EC 1998) – a result of a lengthy process of preliminary consultations with governments and the society alike (Janssen and Dumortier 2003:190). The document admittedly mentioned the importance of access to PSI. It reiterated the benefits, stressed the differences of the conditions of access to PSI in the MS and raised the issue whether such differences might create barriers for the European framework for the re-use of PSI.

⁷ Some of the texts are available from: <http://europa.eu.int/ISPO/legal/en/access/access.html>

In the 2001 legislative initiative (EC 2001, 2001a) the issue of the re-use of PSI had found its place in the realm of the common market as part of the *eEurope* 2002 Action Plan⁸ “An Information Society for All”. Re-use was to provide for a significant part of the digital content, and contribute to the knowledge-based economy of Europe (EC 2000:3). The proposal recognized that the non-legislative methods – soft law, the infringement procedure under the rules of the Treaty (e.g. competition) – fail to tackle the main problem: the diverging rules and practices of re-use in the MS. Harmonization was therefore both an appropriate and proportional solution. In the interests of proportionality access to PSI was mentioned only with a disclaimer that the interest of the EC lied specifically with the economic aspects of PSI. No new proposals were to be made about the regimes of access to PSI (§1). The pressure of public opinion made the Commission drop yet another way of negative integration. The EC had proposed a general right to re-use (as a counter strategy to positive integration of the access regimes). In its final form the “right” was qualified to the generally accessible information and only when public bodies decide to allow the re-use (Janssen and Dumortier 2003:196-98).

Given the conclusions that can be drawn from the analysis above, one has sufficient grounds to argue that the claim advanced by the first hypothesis is true. The particular example of the integration in the sector of re-use of PSI shows that measures of negative integration prevail and are deliberately preferred in the EU policy-making process, while the possibility of positive integration is, at times, explicitly avoided. It is best described by one of the criticisms to the “no action” strategy during the public consultations on the draft policy measures:

⁸ The ultimate objective is to bring everyone in Europe - every citizen, every school and every company - on-line as quickly as possible. More: <http://www.e-europestandards.org/#eEurope2002>

Account must be taken of the fact that both issues, access and exploitation, cannot be separated without the danger of disregarding essential parts of the discussion. To say that both interests have to be balanced is merely stating the obvious. (ICRI 2002)

Positive integration in the context of re-use of PSI entails the need to recognize not only the conceptual importance of access to PSI in the MS but also the objective needs of the uniformity of at least the procedural aspects of the right to access PSI.⁹

There are many voices that confirm the conclusion. Experts have challenged the vertical (issue-based) negative approach to regulation of information policies as non-appropriate and outdated from the very onset of the initiative (Legal advisory board minutes 11.05.1999). Today, practitioners point at the bias towards the negative and economic perspective in the implementation procedures of the Directive. Spain, a country with one of the least developed access to information regimes in the EU, has been denounced by the EC for not implementing the re-use regulations. The EC has not mentioned the need to promote access to PSI in order to foster the possibilities of re-use beyond the subjective wish of a particular institution (Darbeshire, H., individual communication, 23.06.2007)

⁹ Some argue that the preference of the *status quo* is related to rough success with harmonization of the national regimes of protection of personal data. Data protection, too, is a human rights issue that had become a common market concern as “processing of personal data is necessary to safeguard the economic well-being” (Directive 95/46/EC, Recital 13). Given this experience, the EC refused to follow the initial proposal issued in the 1983 and mirror this approach to the freedom of information (Burkert 2004:12).

5.2. Hypothesis 2: Lack of positive integration undermines the common market

Preference towards the use of the mechanisms of negative integration, admittedly, adds to the speed of European integration. Yet Scharpf questioned whether such efficiency contributes to effectiveness of the common market. Based on that the second hypothesis of the present thesis suggests that in the absence of positive integration at the EU level, the regulatory differences on a MS level may undermine the effectiveness of the supranational law. This section will highlight the effects of such differences (legislation as well as the institutional arrangements) on the implementation of the EU policies on re-use of PSI. The author will discuss the main goals and mechanisms of the Directive in the context of the *de facto* of access and re-use of PSI in Latvia and UK. The point of reference for the comparison of the national regulation is the Directive, the ideal type market environment, described by the document. The comparison is based on the content of the relevant legislation, already described in the Chapter 3, official interpretations of the law, as well as conclusions of comparative and analytical studies addressing the regulation and policy of access to PSI in Latvia and UK.

Since the 1989 Synergy Guidelines the overarching goal of the EU policy initiatives on re-use and commercial exploitation of PSI has been the possibility of a common market (EC 1989; 1998; 2001). The Directive attempts to establish a reliable and predictable marketplace that would encourage investment in the development of the sector of PSI-based products and services. It strives for the homogeneity in the national regulation regarding the key but mostly procedural aspects of re-use: scope of the subjects, timing, and possibility of redress *et.al.* (assessed in a greater detail in Chapter 3 above). In the ideal-type situation, a person seeking the possibility to re-use PSI should

be able to view comparable lists of the available data, expect to be able to access documents from the same type of institutions, require the same type/form of information, rely on a predictable pricing scheme and receive the data in roughly the same time. And, if the application is not a success, be entitled to an effective appeals procedure. The question behind the analysis to follow is therefore: how interoperable are the two access regimes from the perspective of a potential re-user? Has implementation of the Directive helped to remove the barriers to the common market?

Scope of the law. Both FOI acts cover all the institutions defined by the Directive. They differ in the approach to defining the notion of an institution. In the UK the subjects of the law are determined directly by the FOIA in the form of an exclusive list that may be extended at the order of the executive. In Latvia the definition of the scope of the subjects of the FOIL, especially in the borderline cases like the ones concerning the entities funded from a public source, is frequently in the hands of a court (Austere 2006).

Generally accessible information. The scope of generally accessible data is determined by the content of the exceptions (Article 19, 2001; Council of Europe 2002). As described in the Chapter 3 above, the Latvian system rests on a very narrow and liberal (there are no absolute exceptions), yet, at the same time vaguely formulated system of exceptions and, once again, the exact content of the definitions would frequently be in the hands of a court. UK, on the other hand, provides for a much more limited access to data content-wise, yet the definitions of the content of the restricted access information are, in the view of the author, clearer and more predictable. So is the market place (Banisar 2006:155).

Information accessible for re-use. It has been already said that the Directive does not establish an enforceable right to re-use PSI but merely encourages institutions to

allow/facilitate to that. The registers listing the generally accessible information that is also available for re-use are therefore an essential part of implementation. In UK such registers are a must-have in accordance with the Regulation on re-use and are effectively paralleled by the publication schemes determining the type, content and manner of access to a particular information under the FOIA (Regulations §16; FOIA §19). In Latvia, the attempt to create a model publication scheme that would serve both purposes of facilitating failed due to the lack of common mechanism of classification of information. The matter is not regulated and hence left at the discretion of each institution.

Pricing scheme. Both laws employ similar pricing scheme referring to the marginal cost¹⁰ as a method for determining the price for the access to PSI. However, calculus of such cost has an entirely different point of reference – the real costs of processing information in UK (Frontier Economics 2006), and the cost of technical re-production of information in Latvia. While in Latvia the requestor may not be charged more than the costs of re-production, in UK the calculation is based on the full-cost of the administrative process, yet the levy may not extend 10% of the common cost, there is no fee for access to PSI, which cost less than 600£ or 450£ in central and local government respectively.

Timing. The Directive establishes a minimum threshold of the response time to the re-use request: 20 working days. As mentioned above, in the Latvian law the procedure that applies to re-use is identical to the regular requests for information. The institution is bound to reply within 15 days, the period may be extended once, any appeal must be considered within 30 days. In UK the term spans 20 working days. Yet, at the

¹⁰ Marginal costs refer to the costs of re-production of data as opposed to the real costs of production of information that may include the cost of labor, administrative costs as well as the organizational costs of the institution e.g. electricity or heating.

circumstances where the request raises “complex issues” the period may be extended by the period that is “reasonable” for the particular request (Banisar 2006: 156). The set period of reply is essentially a measure that helps to balance the interests of effectiveness public administration (from both financial and qualitative aspects) and the democratic interest of citizenry. Change of the terms of reply, to the mind of the author, is arguably one of the most sensitive areas of law that has both rights and budget implications.

Copyright. The UK protects applies a copyright regime to PSI. Latvia does not. Hence, the re-use in UK is only possible upon the licence while in Latvia there is no legal grounds to control the use of the PSI once it was been released to the requestor. The above has procedural as well as substantive implications. While in the UK the process of licensing may prolong the process of access, in Latvia, the absence of the possibility to control the quality and accuracy of the information once it has been released has been a powerful chilling effect to endorsing the re-use.

Who is entitled to access/re-use? While never mentioned in the Directive, a crucial issue for enabling any pan-European initiative is the definition of entities and individuals who may access information. The FOIL in Latvia in particular requires the applicant for access to PSI to provide an address of domicile or registration in Latvia, hence *a priori* limiting the right to re-use information only to the companies registered in Latvia (FOIL §11). The law of UK, at the same time applies to “any person” (FOIA §1) and requires simply an address for correspondence (FOIA §8).

Pro forma both countries, Latvia and UK, have complied with the EU regulation. The national regulation now reflects all the key elements of the supranational framework. Returning to the hypothesis, however, one must question whether the rules of the Directive now internalized in the national regulation have/can be effective to establish a

predictable and reliable market-place for PSI. The analysis included in this chapter suggests that the present regulatory reality can be rather characterized as “absorption” of the EU rules that implies accommodation of policy requirements “without real modification of the essential structures and changes in the “logic” of political behaviour” (Featherstone, Radelli 2003:37). In the present case the two countries have preserved their traditional problem views regarding access and re-use of PSI as two rather separate issues. Re-use is an “ad on” to access legislation, fully conditional upon the qualities and interoperability of the national FOI regimes that remain a matter of positive integration. Therefore one can conclude that the argument advanced by the second hypothesis, namely that in the absence of prior or supporting measures of positive integration (harmonization of the PSI regimes in the given case) the effectiveness or even possibility of a common market is undermined by the differences of national regulation, is true. The Directive remains “an attempt to create solidarity through law by declaring common principles and rights in the hope tat these will influence the legal systems of the member states as an integrating force” (De Burca 1995:49).

5.3. *Hypothesis 3: The democratic costs of the common market*

The third hypothesis begins from a premise that MS do comply with the EU regulatory framework even when the national and supranational priorities and problem views collide. Scholars of Europeanization have developed variety to explanations to the paradox referring to adaptational pressure (Featherstone and Radelli 2003: 45-50) as well as party politics (Treib 2003:7). This discussion stemming from the theory of Europeanization is closely related to the third hypothesis of the present thesis. The hypothesis suggests that while harmonization may be necessary to complement the

market making measures and reach the goals of the common market, the results, however, may entail trade-offs for the balance of democratic and economic values and traditional institutions of the MS.

As argued above, from the vantage point of a common market, the Directive needed but did not resolve several issues. Those include: access rights, copyright, competition rules and pricing policies (Leith and McCullagh 2004). In the context of the present case study, resolving these issues essentially entails approximation of the national rules of access to PSI. A self-evident question to follow is the standard to which the legislations are most likely to align. The author proposes two key variables. First of all it is most likely to be the legislation of a country with a stronger institutional system/tradition of implementation of the FOI act.¹¹ Secondly, the legal system that has been or is regarded as more successful in implementing the Directive (model-setting), includes arguments as simple as more empirical data and general knowledge. Against such background the key question for a simple analysis is which of the access regimes, UK or Latvia, advances the re-use better. And what change does there need to be in the regulation of the other country to enable successful pan-European initiatives of re-use of PSI?

Scope of the law. Primary interest of the businesses is a predictable scope of the right of re-use. In terms of regulation, it relates primarily to the definition of institution and the realm of accessible information. As described above, there are large conceptual differences between the way how the legislation defines institutions subject to the regulation of the law. From a vantage point of a potential re-user the system of lists of

¹¹ The argument stems from the literature of Europeanization where researcher point out that change of national policies, approximation with the EU standard, is much harder if it requires change of existing institutional setup as well as policy change (Featherstone and Radelli 2003)

the institutions that are subject to the FOI allows the person interested in the request for information to rely on the stability of the interpretation of the legislative text.

Scope of the available information. The definition of the restricted access information is, possibly, one of the most politically salient issues of the FOI regulation (Ackerman and Sandoval 2006). The matter is closely linked with the issues of national sovereignty. Regardless the common standards (Council of Europe 2002), national interpretations vary (Mendel 2003). Definitions are important, yet from the practical perspective of re-use the re-user is mainly interested to understand what information is readily accessible for re-use. From such a perspective the British system of the publication schemes (even though targeted to a different audience) is more conducive to re-use initiatives. While under the Latvian system, the liberal and broad definitions of the classes of exceptions do not provide a reliable guideline neither on the types, nor the content, of the information held by the public entity.

Timeframe. With regard to the timeframe of processing the requests for re-use and the possibility of administrative refusals, e.g. the in case of voluminous requests, the Latvian regulation is more favourable. The law provides for the reply in 15 days with a maximum 15 day extension and, comparing to the UK, provides a relatively clear guideline for exercising the discretion with regard to the requests that involve significant administrative costs.

Pricing. The system of pricing, too, in Latvia may appear to be more lucrative to the re-user. The possibility to obtain information at the marginal cost of its dissemination (not the real cost of production), especially if the information (as suggested by the Directive) is provided in an electronic format, is very low.

Copyright. Recalling the arguments of the UK industry in the 1980s as well as the US example, the systems without the copyright are more preferable to those with.

Competition. At times institutions compete with the private entities in the market for re-use, essentially “crowding out the investment” (Office of Fair Trade 2006:121). Along with that, however, is the pro-active publication of the raw data, regarded as an important element of an effective FOI regime (Article 19, 2001). From a perspective of a re-user, all information that is readily available for free and for all, is merely a potential loss. While in Latvia there is no regulation of the pro-active publication, there is an extensive practice. In UK, on the other hand, the publication schemes are an essential element of the implementation of the FOIA. While in the case of Latvia, it might be harder to document the change, no or delayed publication in the interests of the common market may affect both FOI regimes equally.

Granted the analysis in the previous Chapters that highlight and explain the nature of the main differences of the national access laws, what may then be the costs of the harmonization that is needed for the common market between the two countries regarded in this study to be effective?

Scope of the law. The main trade-off for the Latvian law and system of access to PSI in case of harmonization is the elastic and dynamic development of the scope of the right of access to PSI. It is guaranteed through the mechanism of judicial control. The control over the “list” of the subjects of law, on the other hand, is an exclusive competence of the lawmaker and the executive in the UK. In the absence of a strong institutional infrastructure, as is in the place in the UK, the access to PSI partially loses its status as a subjective and enforceable right.

Scope of the information available. The content of the category of restricted access information is a matter of political discussion where, one may say with a definite certainty, an EU-wide agreement is unlikely. Therefore, with a view to the enhanced cooperation between the businesses and public administrations, it appears more feasible that a call for harmonization of FOI regimes might rather affect the practices of access and interpretation of the law. Lists and publication schemes that are characteristic to UK are conducive to re-use, yet extensive reliance on the publication schemes in UK and the related division between the routine and non-routine requests (DCA 2006) challenges the basic principle of the FOI laws, providing that the person is entitled to receive the information that is not pronounced as restricted, and not just the information that the government is willing to impart. The practice in Latvia presently is just the opposite and requires for a clear enumeration of the categories of restricted access information that serve as internal guidance for the institution.

Timeframe. With regard to the timing, harmonization of the FOI regimes in the present case may essentially lead to a debate similar to that on the net neutrality. Re-use requests, granted their economic importance, might be prioritized over the routine requests for access to PSI (Burkert 2004: 14-16). In terms of specific trade-offs for the UK, one may want to consider that in Latvia, the lack of the infrastructure of the implementation of the FOIL (e.g. oversight) renders the process comparatively cheaper. In UK, however, the costs of information are directly linked with the costs of institution providing the service. Loss of the main source of income therefore¹² may influence the quality of the implementation of the law.

¹² Admittedly, the supporters of re-use maintain that the loss will return to the government in the form of taxes paid by the re-users as they sell the products of added value (MEPSIR 2006)

Copyright impedes re-use but some form of copyright- like conditions of use may be deemed necessary to ensure that the potential re-users are not unnecessarily discriminated. Re-users require large amounts of data that may normally be refused on administrative grounds. Therefore, as opposed to the regular requests, re-users are required to specify their interest in the information. Yet, unless there is a form of license, the government has no effective mechanisms of protecting its interest. A recent example in Bulgaria¹³, discussions in Latvia (Re-use working group 13.07.2006; 25.08.2007) as well as opinions of the experts (Darbeshire and Bancheva, personal communication) reveal, that governments may be tempted to impose additional procedural burden to access to PSI to avoid the direct and indirect costs related to the additional administrative burden.

The analysis above sought to assess the existing or possible legislative measures that may be necessary to approximate the national FOI regulations in order to encourage re-use of PSI. In line with the third hypothesis of the present thesis, the author argues that an alternative path of integration (as opposed to inertia – hypothesis 2) is active harmonization/approximation of the national law that is not necessarily triggered by EU measure but can also be unilateral. The underlying question of the analysis is whether the common market advanced by the measures of negative integration is necessarily benign in its consequences? The author hypothesized that the results may entail trade-offs for the existing balance of regulatory values and harm the integrity of national regulation.

Analysis of the national law with a view to the goals of the Directive that it needs to contribute to indicates that the argument advanced by the hypotheses are true.

¹³ While transposing the re-use directive, the parliamentarians argued that the European law that is superior to the national law requires introducing a mandatory statement of interest for all information requests, regardless whether accessing generally or restricted access data. Relying on the Directive the law also attempted to push back the timeframe of the reply.

Approximation of national legislations may entail loss of regulatory balance as the interests of certain groups of requestors, e.g. the commercial entities seeking re-use, may be alleviated at the cost of the more general “democratic” interest. The analysis is primarily conceptual, as there is not yet enough empirical evidence to claim an impact on the substantial provisions of the national law (e.g. the institutional scope of the law as well as the content of the accessible information). But opinions of experts, who call for the guidance from the EC on “how to implement the Directive whilst protecting the right to information” (Darbeshire, personal communication 25.06.2007) and the limited examples from the legislatures that have sought to adjust the national law to the Directive closely (the case of Bulgaria) allow cautious estimates of the possible future impact of the Directive on the practice of implementation of the national FOI.¹⁴ Most likely the latter may entail narrowing the scope of popular access data, or establishing two tiers of access – re use first and then popular interest (Burkert 2004; Janssen and Dumortier 2003). An interesting point for a future discussion is the fact that with regard to review of the effects of the Directive the Commission has shown particular interest in only certain types of data: geographical, meteorological and legal information (EC 28.06.2007).

Conclusion

Drawing from the research of Fritz Scharpf on the nature and effects of European integration, this thesis has explored and sought to probe three arguments. The author argues that the European polity is systemically and intrinsically biased toward the choice

¹⁴ The European Commission (EC) has published the call for tender that initiates the first stage of the European Commissions planned review of the implementation and impact of the Directive 2003/98/EC.

More information available from:

http://ec.europa.eu/information_society/policy/psi/index_en.htm

of economic goals and mechanisms of negative (market-making) as opposed to positive (market-creating) integration. Secondly, that in the absence of the positive/intergovernmental measures, the goals of the common market may be compromised by the differences of the national law. And thirdly that harmonization may entail costs to the balance of traditional regulatory and institutional values in the MS.

The thesis first explores the nature of the negative and positive integration in the light of the historical development of the theories of the European integration. The author concludes that there are substantial grounds to believe that the preference for the negative integration is engrained in the institutional system of the EU since its beginnings via the strong neo-liberal focus and the emphasis on the supranational and non-majoritarian institutions in the process of policy-making and implementation.

In order to probe the three hypotheses the thesis explores in depth two policies that represent the concepts of the negative and positive integration: the re-use of public sector information and access to such data in the MS. The concept of re-use is enshrined in the Directive 2003/98/EC “on re-use of public sector information”; the terms and conditions of access to public sector information are determined by national access to information legislation. The thesis focuses on the law and policies of two countries: Latvia and United Kingdom.

The author concludes that there is a discernable preference towards the mechanisms of negative integration and argues that the latter can manifest as an artificial distinction between the economic and social aspects of the common market for PSI-based products and services. In the particular case, treating access to information is a “non issue”, while implicitly recognizing that the possibility to re-use PSI is only due to the development and approximation of the national FOI laws that are now interpreted as

barriers to the common market. Hence, the present research supports Scharpf's arguments about the asymmetry between the supranational and intergovernmental European policy making and the related preference towards market-making rather than market correcting measures at the EU level.

The second hypothesis questions the efficiency of the negative integration in achieving the goals of the common market. The author finds a justifiable need for re-regulatory measures (approximation of the access to PSI policies) on the MS level in order to ensure the possibility of a common market. Presently the legislations of the two MS – Latvia and UK - have internalized the goals of the common market, and the transposition has not triggered re-regulation. The countries have refused to share the problem view of the EU, and to regard the national FOI law as a barrier to the common market. The author argues that the countries have done the minimum to enable re-use in their respective jurisdictions, albeit ignoring the perspective of “interoperability” of the re-use frameworks that enable the functioning of the common European market. Hence, the research supports Scharpf's argument of semi-automatic negative integration without due consideration of the nature of the “barriers” to the common market. When those are represented by traditional and politically salient institutions of the MS, the success of the negative law alone may not suffice without intergovernmental measures.

The third hypothesis suggests an alternative path of European integration – harmonization – which may entail trade-offs for the existing institutional and regulatory values of the MS. The author finds that the assumptions advanced by the hypothesis are generally true, yet cannot be proven with full security due to the lack of the necessary evidence on the practices of implementation of the new re-use/access to information rules in the MS. Looking at the *de facto* regulation and the expected outcome of the process of

integration, the author concludes that in the particular case harmonization or approximation of the national legislations directly with the rules of the Directive or with the regime that is more conducive to the success of the re-use of PSI is likely to affect procedural guarantees ensured by the FOI regulation that prevent arbitrariness in the decision-making process (e.g. limiting the scope, amount of the generally accessible information through the timing of the provision of information or price).

In substantial terms the author concludes that rigorous implementation of the Directive 2003/98/EC will not lead to the common market in the MS but may reinvigorate the discussion about the necessity to harmonize the national provision of access to PSI, rising issues of applicable standards and political preferences as well as certain and, so far, partially justified concerns of the negative effects of the harmonization policies on the quality of the right to access public sector information by the citizens of the MS.

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