

POLICY RECOMMENDATION REGARDING THE INTERFACE BETWEEN THE PROTECTION OF COMMERCIAL SECRECY AND THE RE-USE OF PUBLIC SECTOR INFORMATION

by

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In respect of the competing interests related to favoring re-use of PSI, on one side, and protecting the commercial secrecy, on the other side, no reasonable reasons were identified to put in question the current perspective of EU law in its essential aspect: as a rule, the access to PSI which derives private economic value from its confidential nature should be barred to re-users; by exception, only if specific public interest so requires, the confidential nature of the information may be set aside, but in this case with adequate compensation for the affected legitimate interest related to business secrecy. Such compensation might include obstacles to re-use, which are limited in time, space and scope.

From this perspective, the current wording of the Article 1, paragraph 2, letter c, second line of the Directive 2003/98/CE which excludes from its scope „documents which are excluded from access by virtue of the access regimes in the Member States, including on the grounds of statistical or commercial confidentiality” seems adequate for two reasons. First, as a rule the confidentiality nature of the trade secrets determines, as a rule, an obstacle to access, and not merely to re-use. In these cases, the obstacle to re-use is only a natural consequence of the obstacle to access. Second, by exception, the access regime to confidential information may be more liberal in consideration of specific public policies. Still, even in those cases, as a compensation for the originator of the information, some limited restrictions may be

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imposed to re-use. Therefore, again, the restriction to re-use appears as a consequence of the legal regime of access.

This provision however creates a side problem which has no solution of principle in the EU Directive of PSI re-use. This problem is for the PSB to practically determine which of the information reached under its control is of such a nature that it is entitled to refuse third parties' access for the purposes of re-use. In order to answer this problem, the paper recommends a uniform set of guidelines to be adopted by the EU Commission regarding the good practices of identifying and protecting the PSI in which private parties have legitimate interests related to commercial secrecy.

KEYWORDS

PSI, public sector information, re-use, protection, commercial secrecy

1. PRELIMINARY QUESTIONS: WHAT IS THE LAPSI FRAMEWORK?

The legal framework to consider is composed on one side of Directive 2003/98/CE (PSI Directive), completed with the Directives no. 2007/2/EC (INSPIRE Directive) and 2008/56/EC (MSF Directive), and on the other side of EU fundamental principles embedded in Treaties and Conventions, including the TRIPs agreement to which the European Union is a member.

Under the Article 1, paragraph 2, letter c, second line of the Directive 2003/98/CE, this directive shall not apply to documents which are excluded from access by virtue of the access regimes in the Member States, including on the grounds of statistical or commercial confidentiality.

Maintaining the protection of the commercial confidentiality is an obligation undertaken by the European Union under the Article 39.2 of TRIPs Agreement. According to this Article, natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:

- (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- (b) has commercial value because it is secret; and

- (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

Those normative provisions create the frame for solving the conflict which might appear in case the public sector information (PSI) making object of applications for re-use was collected by the public authority from private holders which have legitimate interests in keeping the respective information under a confidentiality regime.

This conflict is solved by excluding from the scope of the PSI directive the documents held by the public sector bodies (PSBs) to which the access is bared because those documents contain third parties' confidential information.

The PSBs may hold such documents in cases when, in the exercise of their public tasks, such bodies were granted access to private confidential information. The PSBs will be entitled to such access only under a duty of confidence. That means that they are bound to use the confidential information only for the specific purpose of accomplishing the public task justifying their entitlement to access that information. They are not allowed to use it for other purposes, to disclose it to third parties or to grant such parties any authorization to (re-)use.

Therefore, any application concerning such documents, addressed to the PSBs by eventual re-users, will be dismissed on the grounds of protecting third parties commercial secrecy interests.

The purpose of this policy recommendation is to assess the capacity of this solution to offer a reasonably fair and economically desirable balance of the conflicting interests involved as well as the possibilities to improve it by legal means to be implemented at EU level.

2. INTERESTS INVOLVED

2.1. FIRST OBJECT: MARKET DEVELOPMENT

As it is known, the legal means to stimulate the re-use of the PSI are purported to create new information products which would determine economic growth and to contribute to the overall access to and dissemination of information which should promote the scientific and cultural development, public debate and democracy.

On the other hand, the concept of trade secrets encompass very broad categories of information such as know-how, industrial processes, market-

ing strategies, software source codes, undisclosed TV formats, lists of clients or suppliers and so on. Their common feature is that they derive an economic value for their holder from the fact of being secret, because this holder will have a competitive advantage for being the single one or one of the few that may use in their business an information that is not generally known or readily accessible to his competitors. The national laws in Member States generally provide sanctions for illicit access, disclosure or use of the confidential information, under regimes of prevention of the unfair competition, of liability for tort or for breach of confidence. Generally, in most of the EU countries, as opposed to intellectual property rights, the trade secrets are not protected by a real exclusivity but only by prohibition of unfair ways to access, disclose or use the protected information. Also, the duration of such protection is not pre-established but it usually lasts as long as the holder takes the reasonable steps to ensure that the information is confidential and the respective information is still not generally known or not readily accessible to the business environment.

The rationale behind this type of “soft” protection relies on considerations related to the economy of information. In the event that the law does not prevent the unfair means to access, disclose or use the confidential information, the holder would invest in creating and developing factual ways to prevent those means, while the potential free riders would invest in circumventing those factual ways. Such extensive lateral investments would result in unjustified social cost. On the contrary, if the unfair means to access, disclose or use the information are legally prevented, the holder will be stimulated to produce such information while the third parties might invest in reverse engineering it, which is an acceptable way of dissemination of that information. Both the production and dissemination of incremental technological information are socially desirable and they contribute to technical progress, economic growth and development of the competitive environment. As for the business information (marketing, accounting, pricing and so on), the production of this kind of information contributes to raising the quality of the competition. The relative opacity of this information maintains the independent business conduct of the agents and prevents the monopolistic collusions.¹

¹ See Landes, W., Posner, R., 2003, “The Economics of Trade Secrecy Law”, in *The Economic Structure of Intellectual Property Law*, Harvard University Press

2.2. SECOND OBJECT: PARTICIPATIVE DEMOCRACY

Beyond the market consideration exposed before, the re-use of PSI also represents a desirable way of dissemination of a kind of information which, in one way or another, relates to the PSBs and therefore to public interest. Dissemination of public interest information contributes to development of a general informed debate on public interest issues and thus consolidates the participative democracy. Free access to such information contributes also to non-discrimination both in the economic sense of a competitive market and in the political sense of opened debate and public scrutiny on the decisions and activities impacting the public interest.

The protection of commercial secrecy is rarely confronted to this kind of participative democracy concerns. This is because generally the information covered by this protection is *economically* valuable, not necessarily politically valuable. On the contrary when, by the way of exception, it is established that keeping the information secret would adversely affect a specific legitimate public interest, the disclosure of the information might be mandated in order to protect the said interest, providing that the use of this information by third parties is restricted in order to protect the legitimate (private) interest of the originators.

In other terms, the protection of a public interest may justify a limit to the protection of business secrecy but such limit should be exceptional, strictly necessary and proportionate to the importance of the public interest protected. It is therefore to be expected that the mere public interest of open debate will rarely set aside the interest to keep secret information which is economic in nature and genuinely private.

2.3. SUBJECTS: PSI PRODUCERS, HOLDERS, USERS AND RE-USERS

The policies behind the protection of the confidential information on one side and the liberalization of access and re-use of the PSI on the other side engage various private and public interests.

The producers and holders of the trade secrets will seek for the protection of their investment. Their natural trend is to prolong the competitive advantage offered by the information produced as a result of this investment. The limitation of such protection would become somehow arbitrary if it is accepted that the compliance with an obligation to disclose it to the

public authority for purposes related to its public mission causes complete loss of its economic value. Indeed, if, once disclosed to the authority, the information is freely accessible to any third party, including for re-use purposes, it is not secret anymore and the source of economic value thus disappear.

Of course third parties might be willing to find the trade secrets with one competitor from the public authority to which this one was bound to trust them. However, this free riding would create certain unfairness. As long as the production of secret commercial information requires some investment, while the access for re-use purposes will be liberalized, if the investor and the re-user are equally free to use the resulting information, then the former will be placed in a competitive disadvantage towards the later. On long term, either the investment in producing the incremental information will be discouraged or the circumventing conducts will be encouraged, the holder of the secrets plausibly trying to avoid its communication to the public authority.

Another very important interest to consider is the interest of the PSBs related to the management of the trade secrets disclosed to it. As long as the qualification of certain PSI as trade secret entails legal regime consequences as for the right/obligation of that PSB to not grant access to it, the PSB must have an accurate evidence of what is commercial secret information and what is not. The mere qualification given by the holder to his information might be excessive and therefore it will generally not be sufficient for the public authority to accept such qualification. Since the refusal of access must be strictly confined to the trade secrets, the authority should be able to assess if all legal requirements for such a qualification are accomplished in respect of specific information. Such assessment however involves very complex factual findings regarding for example to the level of knowledge or ease of access that the competitors of the holder enjoy in respect of the information, its ability to procure economic value to the holder, the overall holder's conduct towards the information and so on. Moreover, all those circumstances are dynamic and information which was trade secret at the moment when it was trusted to the PSB might become public knowledge at the date when the application for access or re-use is made. This is why a complex system of classification and management of the information should be put in place and solutions have to be found in order to allocate the costs involved by such a system to those who actually take advantage of it.

3. INTERESTS PROTECTED WITH THE CURRENT LEGAL FRAMEWORK

In the conflict between the beneficial effects of re-use and those of the legal protection of trade secrets, Article 1, paragraph 2, letter c, second line, of the Directive 2003/98/CE prefers this later protection. It puts out of the scope of the directive any commercial secret information excluded from public access by virtue of the access regimes of the Member States.

Moreover, other EU law sources create access restrictions grounded on commercial secrecy in respect of the information trusted to the EU and EEA PSBs. For example, according to Article 28.1 of the Regulation no. 1 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, the information collected by the Commission during the investigation it performs within its antitrust attributions shall be used only for the purpose for which it was acquired. This provision clearly excludes any possibility of re-use of this information. The second paragraph of the same Article states the general duty of professional secrecy in charge of the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as of the officials and civil servants of other authorities of the Member States.

Under Articles 27.4 and 30.2 “where the Commission intends to adopt a decision on the investigation of possible infringement of Articles 81 and 82 of the Treaty, the publication of such decisions shall have regard to the legitimate interest of undertakings in the protection of their business secrets.” Also, under Article 27.2 of the same regulation, the right to defense recognized to the parties at the hearings held within the investigation proceedings cannot preclude the legitimate interests of undertakings in the protection of their business secrets. Therefore, the right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States. In particular, the right of access shall not extend to correspondence between the Commission and the competition authorities of the Member States, or between such national competition authorities. Anyway, nothing in the mentioned paragraph shall prevent the Commission from disclosing and using information necessary to prove an infringement.

This means that the private interests that the parties might have in preserving their trade secrets overweight the other private interests, for example, those derived from the right to defense. If this way of balancing conflicting private rights may negatively affect the right to defense, which represents one of the most important human rights and is decisive for the effectiveness of justice and rule of law, *a fortiori* it will set aside the economic interest of eventual re-users of the confidential PSI. As for the interests of the information originators, they might be set aside, at their turn, by the public interest that the Commission performs its public task of implementing the EU competition policy.

This hierarchy of interests is rather typical for the actual stage of the EU law in respect of any trade secret to which the PSBs have access with the occasion and for the purposes of accomplishing their public task. Rather than creating added value as for other kinds of PSI, the free access for re-use of the confidential PSI will destroy the economic value of that information because such value is essentially derived from its confidential nature.

The adoption of such an approach is mandatory in certain fields under the international obligations undertaken by the European Union. For example, under the Article 39.3 of the TRIPs agreement, "Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public or unless steps are taken to ensure that the data are protected against unfair commercial use."²

It is interesting to remark that even before its adhesion to the TRIPs agreement; the European Union did not choose to merely prohibit the disclosure of the market approval data.

Taking into consideration the general interest that the publication of these data might present for the public health, the EU law does not create an obstacle to disclosure, but only a legal obstacle to re-use. Indeed, Article 10(1) of the Directive 2001/83/EC, as amended by Directive 2004/27/EC, introduced a nonretroactive, 8+2+1 formula that grants absolute "data exclusivity" for reference medicinal products for eight (8) years. Directive

² See Skillington, G.L., Solovy, E.M., 2003, The Protection of Tests and Other Data Required by Article 39.3 of the TRIPs Agreement, Nw. J/ Int'L & Bus (24), pp. 1-52.

2001/83/EC, as amended, Art. 10(1). The same periods of protection apply in the case of centrally authorized products pursuant to Article 14(11) of Regulation (EC) No. 726/2004. All medicinal products, including biologics, are governed by the same exclusivity regime.

For products authorized by the national competent authorities, the applicant shall not be required to provide the results of pre-clinical tests and of clinical trials, if applicants can demonstrate that the medicinal product is a generic of a reference medicinal product, which is or has been authorized under Article 6 for not less than eight (8) years in a Member State or in the European Economic Area. Generic, hybrid, and biosimilar products cannot obtain market approval until at least ten (10) years (i.e., 8+2) have elapsed from the initial authorization of the reference product, i.e., "marketing exclusivity". However, this ten (10)- year period may be extended to eleven (11) years, if during the first eight (8) years of granting of the marketing authorization ("MA"), the MA holder obtains an MA for one or more new therapeutic indications (i.e., 8+2+1).

This example shows that the protection of the PSI confidential information is susceptible of two forms. One form is to create an obstacle to *access* and thus to ensure the protection of PSI trade secrets against disclosure. The second form to allow access but to create an obstacle to *re-use* for a certain period of time.

Under the current EU frame the rule is to prohibit both access and re-use of trade secrets trusted to the PSBs within the accomplishment of their public mission. If public interest policies require an exception from this principle, then the access may be permitted but the re-use is bared for a time. In this second case, once filed with the market authority the data cease to be secret but instead it receives a reinforced protection, using a similar technique to an IP right exclusivity.³

As for the concrete ways in which the exclusion from access of the PSI trade secrets is practically achieved, the EU framework generally lets the concern of their regulation to the "access regimes of the Member States".

In respect of the secret commercial information reached under the control of the EU PSBs, strict rules might be used to ensure the identification and preservation of this information by the respective bodies. For example, the non-disclosure obligation applying to the EU Commission in its an-

³ See also Eisenberg, R., 2011, "Data Secrecy in the age of regulatory exclusivity" in Dreyfuss, R., Strandburg, K., *The law and Theory of Trade Secrecy*, Edward Edgar Publishing Ltd.

trust powers, as well as the practical procedure to determine its scope of application are included in detail in the Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty.

4. LEGAL PROBLEM: HOW TO LIMIT THE REFUSE OF APPLICATIONS FOR RE-USE ON GROUNDS OF COMMERCIAL CONFIDENTIALITY TO JUSTIFIED CASES ONLY

The provisions mentioned in the previous section show a clear option of EU bodies in respect of the choice to be made between allowing the re-use of any commercial information reached under the control of a public authority and preserving the economic value that the undisclosed commercial information derives from the fact of being secret. The incentive to investment and fair competition that the protection of trade secrets secures clearly overpasses the eventual added value that the free access and re-use to such information via PSBs might bring.

Basically there is no case in which the mere conflict between the private interest to hold the economic information confidential and the one of freely re-using it to be solved by the EU legislator in favor of the later. Only if other public interest (such as creating and maintaining a workable competition in the marketplace or satisfying the public health needs) intervene, then the interest of the trade secret holder might be sacrificed. Even in such cases, if the information loses its confidential status, the re-use may be bared by regimes of legal exclusivity created to compensate the investment made by the originator of the information in order to produce it.⁴

The EU option in this respect is far of being singular. The same view is constant both in the national law systems of the Member States, as well as in other developed economies. The US, which usually serves as referential in respect of the promotion of an open PSI policy, does not apply it in respect of the trade secrets. Under US law, they are considered as property which the public authorities cannot violate by undue disclosure.⁵

⁴ For economic effects of this legal framework, see Eisenberg, L., 2003, *Patents, Products Exclusivity, and information Dissemination: How Law Directs Biopharmaceutical Research and Development*, *Fordham Law review* (4, 72) pp. 477 ss.

⁵ See Peritz, R., 2007, "Competition policy and its implications for intellectual property rights in the United States", in Aderman S, *Intellectual Property Rights and Competition Policy*, Cambridge University Press, pp. 154-160.

Moreover, the protection of the undisclosed information against unfair use represents an obligation of the European Union under the TRIPs Agreement.

From the economic perspective, such protection seems socially more beneficial than a regime of free access and re-use of any private economic information that has to be communicated to PSBs in view of allowing their public mission to be accomplished. It grants an adequate reward for investment in producing and managing new information, fair dissemination of such information and workable and stimulating competition between originators, without creating – in most of the cases – disproportionate exclusivities.

For all those reasons, it seems that the current perspective of EU law should not be put in question in its essential aspect: as a rule, the access to PSI which derives private economic value from its confidential nature should be barred to re-users; by exception, only if specific public interests require so, the confidential nature of the information may be set aside, but in these cases with adequate compensation for the affected legitimate interests related to business secrecy. Such compensation might include obstacles to re-use, which are limited in time, space and scope.

From this perspective, the current wording of the PSI Directive which excludes from its scope “documents which are excluded from access by virtue of the access regimes in the Member States, including on the grounds of statistical or commercial confidentiality” seems adequate for two reasons. First, as a rule the confidentiality nature of the trade secrets determines, as a rule, an obstacle to access, and not merely to re-use. In these cases, the obstacle to re-use is only a natural consequence of the obstacle to access. Second, by exception, the access regime to confidential information may be more liberal in consideration of specific public policies. Still, even in those cases, as a compensation for the originator of the information, some limited restrictions may be imposed to re-use. Therefore, again, the restriction to re-use appears as a consequence of the legal regime of access.

This provision however creates a side problem which has no solution of principle in the EU Directive on re-use. This problem is for the PSB to identify which one of the information reached under its control is of such a nature that it is entitled to refuse third parties’ access for the purposes of re-use. On one hand, this problem seems decisive to determine the scope of a liberal legal regime of re-use. On the other hand, the implementation of a

system of PSI management able to allow such identification generates costs, the burden of which should be distributed among the interest holders involved.

It is obvious that solving those issues implies determining the scope of the Directive, not by creating a new rule to delimit this scope, but by creating procedures of applying the existing rule. This is why those rules should be situated to a subsequent level of normative force comparing to the implemented rule.

Another point is to determine if those secondary level rules need to be issued at the national level or at the EU level. The usual rule to solve such problem is the Article 5.3 of the EU Treaty according to which the European Union takes a certain action only if the objectives of the said action cannot be reached to a sufficient extent by the Member States.

The objective of a uniform code of procedures meant to allow to the Member States to exclude on commercial secrecy considerations some of the PSI hold by their PSBs from the liberal re-use regimes would be coherent with the general approach of the EU PSI Directive to harmonize the national *re-use* regimes of the Member States. However, it should be noticed that the exclusion of the confidential information from this approach is grounded on the national *access* regimes, access regimes which do not dispose of a general instrument of harmonization at EU level.

A reasonable method to reconcile those two kind of perspectives over a problem which is necessarily situated in a boulder area between the national and the EU competence is to start with an uniform set of guidelines to be adopted by the EU Commission regarding the good practices of identifying and protecting the PSI in which private parties have legitimate interests related to commercial secrecy.

The following principles should be included in this set of good practices:

- I. An initial classification of the information should be made by the holder with the occasion of providing information to the public authority within its public task. If one private holder is bound to supply a certain PSB with documents or information which, in his opinion should remain confidential, he will submit a request for the documents or information to be kept in confidence.
- II. The request shall be reasoned and specify which part of the information or documents is perceived as confidential.

- III. The PSB shall also be supplied with a copy of the documents in question where the confidential information has been deleted. This copy might serve to a more effective management of PSI.
- IV. If no request is submitted for confidentiality, the PSB is justified in assuming that the information or documents in question are not confidential.
- V. The information for which a request to be kept in confidence was filed by the originator should be classified by the authority in two categories: information the confidential nature of which is permanent and not contentious ("certain confidential nature" such as accounting evidences, lists of clients, pricing methods) and information the confidential nature of which is contentious or might be lost in time ("potential confidential nature").
- VI. When an application for access or for re-use regards information of a certain confidential nature, the application will be rejected.
- VII. When an application for access or for re-use regards information of a potential confidential nature, the PSB will request the originator either to authorize the application or to provide reasonable justification for the confidential nature of the information, as at the date of re-user's request.
- VIII. A reasonable term should be granted to the originator in order to offer such justification.
- IX. Should such justification be provided by the originator, the application for access or re-use will be dismissed.
- X. In the contrary case, the PSB should decide to accept the application for access and re-use.
- XI. This decision is notified to the originator which has a short term to challenge it in front of a certain jurisdiction. If this jurisdiction is administrative, its decisions should be able to be challenged in court.
- XII. The decision to accept the application for access and/or re-use of information which have a potential confidential nature will not be implemented as long as this decision is not final and binding.
- XIII. The decision of the PSB to deny access to information based on its confidential nature should be notified to the applicant who has a short term to challenge it in front of a certain jurisdiction. If this ju-

risdiction is administrative, its decisions should be able to be challenged in court.

- XIV. The exercise of right to defense in the jurisdictional or judicial proceedings cannot breach the legitimate interests of the originator to maintain the confidential nature of the information.
- XV. Considering that maintaining this system of information management and control involves costs that should not burden the public budget (data systems, infrastructure, employees), an exception from charging the PSI supply for re-use on marginal costs basis might be justified in case of availing information which, at the time of application, was classified as having a potential confidential nature.

5. ARGUMENTS IN FAVOUR OF ... AND RELATED COUNTER-ARGUMENT

The arguments to sustain the proposal of guidelines regarding the good practices of identifying and protecting the PSI in which private parties have legitimate interests related to commercial secrecy are the following:

- 1. The normative instrument chosen has no direct mandatory force, which allows long periods of adaptation of those good practices to the local bureaucratic environment of any PSB.
- 2. It however creates premises for a certain harmonization at European level in a field with considerable impact on the EU market from the perspective of both economic value of trade secrets and of added value that a legal environment favorable to PSI re-use should create.
- 3. The proposal prevents an arbitrary injunction in the legitimate interest to preserve business secrets grounded on policies favorable to re-use.
- 4. It also prevents excessive obstacle to re-use falsely grounded on commercial secrecy.
- 5. The national criteria applied by the Member States in qualifying a trade secret are not affected.
- 6. The jurisdictional control over the decision of the PSBs may be integrated in larger systems of control applying to PSI management or to administrative decisions in general.
- 7. The suspension of effects of a decision to grant access to information during the jurisdictional control of such decision prevents the ir-

reparable harm that would be caused to the originator by the waste of the confidential nature of the information he provided.

8. The primary effort to preserve the confidential nature of the information belongs to the immediate beneficiary of this nature: the originator.
9. The costs of a system meant to prevent excessive limitation of re-use are allocated to its immediate beneficiaries, the re-users, without excessive burdens on the public budget.

6. ARGUMENTS AGAINST ... AND RELATED COUNTER-ARGUMENT

This proposal might confront the following counter-arguments:

1. While it has no strict normative value, a recommendation of good practices might be ineffective in putting to the same level various bureaucratic cultures in a field where the main interests in conflict are individual and external to the public mission of the PSB.
2. Its complexity and management costs might represent a disincentive for the PSBs to put it in place.
3. The duration of a quasi-contradictorial system of releasing the potentially confidential information might delay the re-use, while the attribution of its costs to re-users might discourage it.

Those objections seem not decisive to the extent that, under the current legal frame established by the PSI Directive, the national PSBs are already under an obligation to refuse disclosure for re-use of the information that are excluded from access under the national access regimes on grounds of commercial secrecy. In order to comply with this obligation, the PSBs already *need* to proceed in a certain way in order to identify the information for which its confidential nature might serve as ground to refuse the access and re-use.

The proposed policy recommendation simply seeks a *modus operandi* to satisfy this need in the most balanced, reasonable and cost effective way. Its inclusion in a non-mandatory recommendation of good-practices will ensure a gradual harmonization at European level without breaking the continuity and adaptation to the existing practices of various national or local PSBs.

7. IF POSSIBLE: WHAT IS HEAVIER BETWEEN V. AND VI.?

See the above.

8. SECOND-BEST OPTION

The second best option would be to refrain from any change in the actual legislative balance between trade secrets and PSI re-use and to let untouched the current diversity of ways to implement this balance. Those ways generally result from established practices which are adapted to local and material peculiarities of each PSB and correspond to its institutional culture.

As already mentioned, there are not serious legal or economic reasons to question the basic view taken by the EU lawgiver that the interest of reusing certain economic information should not overpass the interest of not disclosing it, when the later interest is justified by the economic value drawn by the information from its confidential nature.

As for the possibility of a stronger EU intervention than simple guidelines in order to implement this balance of interests, it seems not adequate to the current stage of the issue. On one hand, there is no uniform access regime at the EU level and the problem of identifying and protecting a trade secret is essentially a problem of access regime, and only at a secondary level a problem of the re-use regime. On the other hand, the huge diversity of information covered by trade secrets, of bureaucratic cultures of the PSBs at national and local level and of administrative structures involved make it very difficult to adopt a uniform procedure to deal with identification and protection of business secrets.