

¹VALUE ADDED GI SERVICES: RESPECTIVE ROLES OF PRIVATE AND PUBLIC SECTOR PLAYERS

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Abstract

There has been an ongoing debate where to draw a dividing line between public sector and private sector duties. Even with regard to GI, in the Netherlands this debate predates the drafting of the Directive 2003/98/EC on the re-use of public sector information. Public sector organisations need to have (geo) datasets in order to execute their public duties. Over the years they have set up – often good quality – datasets and services. The private sector assisted in setting up some of these public sector datasets, and partly developed similar datasets on its own. But what happens to the latter if the public sector datasets are made available for re-use as facilitated by the PSI Directive? This may cause direct competition between public sector organisations and the private sector. However, to what extent may this amount to unfair trading practices? The rules the public sector has to adhere to when they enter the open market are not very distinct. The PSI Directive has not done much to define the line between public and private sector. So, what exactly are the rules public sector organisations have to adhere to when they compete with the private sector? To what extent should the role of public sector organisations as a player in the open market be defined? How can a level-playing field be generated? How does this apply to public sector geo-information? This paper casts some light on this issue.

Traditionally, public sector bodies in the Netherlands could – within certain boundaries – set their own licence conditions and fees for supplying public sector information. In 1996 a commission chaired by M.J. Cohen produced an extensive report, the so-called Cohen Report. In general, the Cohen Report stated that public sector organisations executing their public duties should not engage in market activities in competition with the private sector. The report specified four exceptions:

1. Market activities inextricably bound up with a public task;
2. Activities relating to knowledge infrastructure (university research funded by external money);
3. Exploitation of remnant minimum capacity (public use of military airports);
4. Market activities resulting from privatisation (energy distribution).

The report made some sweeping recommendations for reviews of specific public sector bodies and to draft guidelines for market activities as a precursor to formal legislation. The report was well received by parliament and consequently most of the recommendations were carried out relatively quickly afterwards. The guidelines – only

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applicable to *national* public sector bodies not covered by their own legislation – were adopted in 1998. However, in the following years the bill lost its broad approval base and was ultimately withdrawn by a subsequent minister in 2004. While formal legislation never came to be, at least the Cohen Report did pave the way for creating a level playing field for national public sector organisations and the private sector (Welle Donker & de Jong 2007).

In the Netherlands pricing regimes for supplying geo-information vary between cost recovery and marginal cost recovery, depending on the mandate of the organisation. In the last year or so, there has been a noticeable trend shift towards reduction of fees or to shift altogether from cost recovery to open access policies by a number of public sector organisations. This trend is partly a flow-on effect of the implementation of the PSI Directive and partly due to the introduction of authentic registers (ARs). Between 2007 and 2009 these ARs will be set up and maintained by only one public sector body. It will be compulsory for all other public sector bodies to use the same register, “collect once, re-use many times”. Ideally, no money exchange should take place between public sector organisations using the ARs. However, this is a point of contention for some of the ARs, like the Trade Register and the ARs that include geo datasets owned and maintained by the Cadastre. The Cadastre employs a cost-recovery policy, as prescribed by the Cadastre Act, but is now pressured to consider lowering its price in relation to the ARs. The implementation of the PSI Directive has also opened up the market. For example, the price and the use restrictions of the provinces and water boards have been nullified.

Several authors claim that making public sector geo datasets freely available to the private sector for developing value added services will benefit the knowledge economy. This then in turn would benefit society in general and the government in particular in the form of value added taxes, income and company taxes (Weiss 2002; Pluijmers 2002; Pira International Ltd 2000). But if a private company has already developed similar datasets, then this may amount to unfair trading practices by public sector organisations. The Dutch Department of Transport & Water Management has developed several geodatasets using data from its own sources, from provincial and municipal councils, water boards and from the private sector (aerial photographs). The Department is considering making these datasets available for re-use free of charge. Whilst freeing up the Digital Terrestrial Files, relating to e.g. the waterways, has not caused a big stir, the proposed release of the National Roads File (NWB) is causing a lot of unrest among companies like Tele Atlas and Navteq (de Zeeuw et al. 2007). The private sector may rightfully claim that supplying NWB for free will endanger their businesses.

So, giving datasets away for free may cause problems for the private sector. Similarly Norwegian geodata companies needed to refocus some of their business when the public sector joined hands in a co-funded equal sharing arrangement under Digital Norway (Persson 2007). Additionally, private sector organisations can access this public sector geo-information against a fee and under restrictions via one government owned company. Complaints about this hybrid organisation can be heard, and one can wonder how it relates to the PSI Directive, especially with regard to minimising exclusivity arrangements. Comparable is the case where public organisations may abuse their natural monopoly position as far as market activities are concerned as illustrated by the

Ordnance Survey versus Intelligent Addressing case in the UK. Intelligent Addressing (IA) was developing a value added product using data from the Ordnance Survey (OS) and other sources. The OS then started to develop their own version, claiming this to be part of their public tasks. The licence agreement negotiations between IA and the OS were a lengthy process and IA claimed that the OS made the terms of the licence agreement so complex that IA considers them tantamount to a refusal to supply (OPSI 2006).

There are no specific European guidelines for public sector organisations performing market activities in competition with the private sector. There are rules in the Treaty establishing the European Community applying to undertakings (art.81, 82 & 86) and to State aid (art. 87–89). The Transparency Directive 80/723/EC (amended on 26-07-2000) requires that financial relations between public authorities and public undertakings should be transparent with separate accounts for different activities. However, in practice it is hard to get a clear insight into the financial relations (PriceWaterhouseCoopers 2005). This may give us a lead to defining public duties and economic activities. If a public sector organisation has its own marketing department, chances are that the organisation is engaging in economic activities that fall outside the scope of public duties. A strict separation of public duties and market activities is essential to ensure the private sector can develop value added products and services without competition from the public sector. One of the biggest areas of complaint concerns licence fees and conditions. These should be made transparent and consistent for all categories of users. The PSI Directive makes an allowance for differential charging policies for commercial and non-commercial use. However, the prices should not be so prohibitive that the private sector cannot use the datasets. Apart from regulations preventing public organisations the use of cross-subsidising or tax advantages, there should be a single National Competition Authority dealing with complaints. The National Competition Authority should be given a sufficient mandate to deal quickly with complaints and to impose sanctions if needed.

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