

## **Drawing Up a New Legal Ecosystem for Open Data to Improve Citizen Participation and Collaboration**

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It may seem straightaway paradoxical to deal with the legal framework of the public data reuse in a research work analyzing citizen participation and collaboration in promoting open government. If there is no doubt that public data reuse is a central issue of open governments, *a priori*, this policy falls under the third requirement of the open government, namely, transparency. Yet, this assertion shall be qualified since we consider that the right to re-use public information does not only pursue the objective of transparency in public administrations, but that it has above all for end to favor the flow of information.

This one is a requirement to favor a citizen participation and collaboration that is effective and efficient. A quality distribution of the information is a requirement for a public-spirited debate or to enabling the citizenry to participate in the co-construction of the law. Indeed, citizens cannot participate or collaborate without a full knowledge of the facts. In this respect, transparency is a requirement, but it required also an efficient flow of the information disclosed by governments and public administrations. In the same way, companies cannot bring their participation or their collaboration to the digital economy, and thus to the development of the society, if they cannot easily reuse the public information that should be disclosed in an open government. In this respect, companies' participation and collaboration will be, for example, in the service of the quality, the effectiveness and the efficiency of public services by developing apps that analyze data opened by public administrations. This analysis helps improve public policies.

For these reasons, analyzing the legal framework of the public information reuse is essential to understand the restrictions to citizen participation and collaboration, and, on the contrary, to think

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how ensuring an effective distribution of the public information that is disclosed by governments. That last requirement is essential because it enables citizens, civil servants, or companies to better participate and collaborate. From this point of view, it is crucial to examine whether governments should provide a free access to their data. To put it in another way, can we accept that public information reuse is subjected to the payment of fees by the re-user?

The least that one can say about this issue is that the free re-use of public information has become today the abiding principle of open data policies. However, a more differentiating analysis based on the creation of new resources thanks to the payment of fees could help governments to lead an effective and efficient open data policy. This evolution is a huge requirement to renew citizen participation and collaboration in the open government age.

## **§ 1 – Opening Data: Free or Fee-based? A New Legal Issue to Ensure an Effective and Efficient Citizen Participation in the Open Government Age**

### **A) A New Legal Issue Introduced with the Adoption of the 17 November 2003 Directive on Public Sector Information Reuse**

Seeking legal solutions to the problems posed by the reuse of public data would not have been relevant ten years ago, simply because, at least in France, the problem did not arise. It's not that French law did not deal with public data, but it took until 2005 for France to adopt a legal framework encouraging open data.

On the one hand, it is true that in the late 1970s France became interested in the legal regime of access to administrative documents by consecrating a "right to information of the governed"<sup>3</sup> in the Law of 17 July 1978. However, at that time, it consisted of only a right to communicate administrative documents and not a right to re-use them. This right to communicate was recognized as subject to the rights of literary and artistic property<sup>4</sup>. However, the Law of 17 July 1978 did not provide for the right to re-use public information. On the contrary, it expressly prohibited the

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<sup>3</sup> Article 1<sup>st</sup> of the Law No. 78-753 of July 17, 1978.

<sup>4</sup> *See* Article 10 of the Law No. 78-753 of July 17, 1978.

reproduction, distribution or use of communicated documents for commercial purposes. Thus, with this legal framework, the process of opening public data would have lost all its meaning.

European Union law will encourage France to step up to a turning point in terms of open data through the transposition of the 17 November 2003 Directive on public sector information reuse<sup>5</sup>.

This transposition was carried out by the Order of June 6, 2005<sup>6</sup>, which innovated by creating a legal regime dedicated to the reuse of public information.

The European Union's foremost goal was to harmonize the practices of public information openness, those differences in legislation which may be obstacles to European common market objectives<sup>7</sup>, as this process is of major interest with the advent of the information society.<sup>8</sup>

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<sup>5</sup> Directive n° 2003/98/EC of November 17, 2003, of the European Parliament and of the Council on the re-use of the public sector information.

<sup>6</sup> See the ordinance n° 2005-650 of June 6, 2005 (ordonnance relative à la liberté d'accès aux documents administratifs et à la réutilisation des informations publiques).

<sup>7</sup> The directive of 2003 recalls that:

“(1) The Treaty provides for the establishment of an internal market and of a system ensuring that competition in the internal market is not distorted. Harmonization of the rules and practices in the Member States relating to the exploitation of public sector information contributes to the achievement of these objectives.

[...]

(6) There are considerable differences in the rules and practices in the Member States relating to the exploitation of public sector information resources, which constitute barriers to bringing out the full economic potential of this key document resource.

Traditional practice in public sector bodies in exploiting public sector information has developed in very disparate ways. That should be taken into account. Minimum harmonization of national rules and practices on the re-use of public sector documents should therefore be undertaken, in cases where the differences in national regulations and practices or the absence of clarity hinder the smooth functioning of the internal market and the proper development of the information society in the Community.

(7) Moreover, without minimum harmonization at Community level, legislative activities at national level, which have already been initiated in a number of Member States in order to respond to the technological challenges, might result in even more significant differences.

The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased cross-border exploitation of information.”

<sup>8</sup> Those issues are explained by the directive of 2003 in the following terms:

“(2) The evolution towards an information and knowledge society influences the life of every citizen in the Community, *inter alia*, by enabling them to gain new ways of accessing and acquiring knowledge.

(3) Digital content plays an important role in this evolution.

Despite the importance of these issues, in its 2003 version, the Directive on public sector information was barely binding for Member States. First, in terms of public information, European law only covers the reuse of public information, not access to it, which remains the exclusive competence of Member States. Therefore, the 2003 Directive only covers the second stage (reuse), not the first (access to information). Yet, in order to reuse, one must first have access to public information, which provides significant wiggle room for Member States.

Moreover, the initial version of the 2003 Directive left the States free decide whether or not to allow the reuse of public information. Since the States wished to adopt a legal framework authorizing the reuse of public information, they had to do so while respecting European Union law, especially the 2003 Directive. Among EU requirements we should mention the rules of competition among re-users of different Member States or the supervision of public information reuse pricing.

## **B) Towards Recognizing to French Citizenry a Genuine Right to Access and Reuse Public Information**

France could have contented itself with fulfilling its commitments vis-à-vis the European Union by transposing the Directive *at the very least*. Instead, it opted for recognizing a genuine right to reuse public information. The transposition of the 2003 Directive enshrines a right to reuse public sector information for a purpose that was not that for which it was produced.<sup>9</sup> The 2005 Ordinance,

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Content production has given rise to rapid job creation in recent years and continues to do so. Most of these jobs are created in small emerging companies.

(4) The public sector collects, produces, reproduces and disseminates a wide range of information in many areas of activity, such as social, economic, geographical, weather, tourist, business, patent and educational information.

(5) One of the principal aims of the establishment of an internal market is the creation of conditions conducive to the development of Community-wide services. Public sector information is an important primary material for digital content products and services and will become an even more important content resource with the development of wireless content services. Broad cross-border geographical coverage will also be essential in this context. Wider possibilities of re-using public sector information should *inter alia* allow European companies to exploit its potential and contribute to economic growth and job creation.”

<sup>9</sup> See the ordinance n° 2005-650 of June 6, 2005.

which transposes this text, thus allows the reuse of information within a wider interpretation, including for commercial purposes, which is conducive to the open data process.

By adopting a broad interpretation of the right to reuse public information, France stood out as one of the European countries, like the United Kingdom for example, to have opted for a legal regime encouraging open data.

Since then, France did not need to make significant efforts to comply with the new requirements of European Union law following the revision of the 2003 Directive by the Directive of 2013. While Directive 2003/98/EC imposes few requirements in terms of the reuse of public information, the European Union has become aware of the need for a more binding framework to meet the challenges of the information society. To do this, the 2013 Directive seeks to require Member States to make all public information materials on public services reusable, with exceptions specified in the text, such as when it consists of intellectual property rights or sensitive data (personal data, data protected by trade secrets or for national security reasons, etc.). Member States were required to transpose the Directive and to apply it by 18 July 2015 at the latest. This is the context of the Law on gratuitousness and the terms for the reuse of public sector information that was adopted by the French Parliament in December 2015<sup>10</sup>, which that aims to transpose the 2013 Directive.

France's transposition effort basically consists in the extension of the right to reuse in the educational and cultural field, from the 2003 to the 2013 directives. These areas fell outside the scope of the initial version of the 2003 Directive, and the 2013 revision makes them part of the scope of the Directive on reuse. Indeed, the right to reuse public information now also applies to documents held by educational and research institutions or by some cultural institutions such as libraries (including university libraries), museums and national archives<sup>11</sup>.

It is true that France had already paved the way for the reuse of educational and cultural documents with the 6 June 2005 Ordinance, but it was a specific regime. This scheme is an alternative to

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<sup>10</sup> See the Law n° 2015-1779 of December 28, 2015, on gratuitousness and the terms for the reuse of public sector information (loi relative à la gratuité et aux modalités de la réutilisation des informations du secteur public).

<sup>11</sup> See the directive of June 26, 2013.

ordinary law under the Law of 17 July 1978<sup>12</sup> and allowed educational and research institutions as well as cultural institutions, organizations or services to set themselves the conditions for the reuse of the documents that they develop or hold. The text of the transposition of Directive 2013<sup>13</sup> deletes the Article of the Law of 17 July 1978<sup>14</sup> that set the alternative scheme for documents of teaching, research or cultural institutions. This had the effect of placing them under the regime of ordinary law.

Moreover, the text transposing the 2013 Directive will help clarify the French legal framework for exclusive rights. These agreements, which consist of granting a monopoly on the exploitation of public information to a single beneficiary, are prohibited in principle, but are authorized by and under exceptional conditions. Thus, according to the 2003 Directive, the Ordinance of 6 June 2005 already provided for the possibility of granting exclusive rights to a third party re-user of public information where such right is necessary for the performance of a public service mission<sup>15</sup>. The transposition text of the 2013 Directive will specify that in this case, the exclusivity period may not exceed ten years and the merits for granting it should be reviewed periodically and at least every three years. Similarly, it will add a new exception to the prohibition<sup>16</sup> of exclusive rights since the 2013 Directive<sup>17</sup> now provides for the digitization of cultural resources.

Finally, the transposition of the 2013 Directive by the 2015 Law on the free reuse of public data will seek to reduce the scope of the principle for pricing the reuse of public information. Again, France will surpass its transposition obligation by affirming the principle of free re-use of public data. That is to say that Citizenry may have access to more information than in the past, not only through the information made available on line by governments, but also through the new information created by the reuse of public information. Indeed, enabling citizens to freely reuse

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<sup>12</sup> In particular, *see* Article 10 of the Law of July 17, 1978.

<sup>13</sup> *See* the Law n° 2015-1779 of December 28, 2015.

<sup>14</sup> *See* Article 11 of the Law of July 17, 1978.

<sup>15</sup> *See* Article 14 of the Law of July 17, 1978.

<sup>16</sup> *See* Article 2 of the Law n° 2015-1779 of December 28, 2015, that amends Article 14 of the Law of July 17, 1978.

<sup>17</sup> *See* Article 11 of the directive of June 26, 2013.

public information help them to analyze and comment this information. The consequence is that providing a free right to reuse information not only encourages citizen participation and collaboration, but it also increases the information available. The citizenry will access not only to the official information, but also to the information derived from the official information. By “derived information”, we mean the information commented and analyzed by the citizenry. This one can all the more exercise their critical power towards the public information that they have a right to reuse it. In other words, if guaranteeing the right to access to public information is important, ensuring the right to reuse public information is equally crucial to encourage citizen participation and collaboration. However, as explained below, the generalization at all costs of this principle of gratuitousness without considering other methods of valuation might be seen, paradoxically, as an obstacle to maximizing the reuse of public data. That is what we call “the paradox of the principle of gratuitousness”.

## **§ 2. – The Legal Recognition of the Principle of Gratuitousness for Public Information Reuse**

### **A) The Gratuitousness Principle as a Mean of Valuing Public Information**

The free reuse of public information is often seen as a prerequisite for an effective opening of public information policy. Indeed, there is no doubt that opening public information for free promotes its reuse. This information is not retained by governments and used for the sole benefit of the public service for which it was collected. Instead, it is opened for free to serve the creation of an economic or democratic value.

This favorable impact of gratuitousness of public data, highlighted by several reports<sup>18</sup>, is understandable because information held by many public administrations (encrypted tables, databases, cartographic information systems, electronic records, etc.) represents an intangible

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<sup>18</sup> For instance, see M. Lind, THE VALUE OF PROVIDING DANISH ADDRESS DATA FREE OF CHARGE, July 12, 2010, Danish Enterprise and Construction Authority (DECA); G. Almirall, M. Moix Bergadà, P. Queraltó Ros, M. Craglia, THE SOCIO-ECONOMIC IMPACT OF THE SPATIAL DATA INFRASTRUCTURE OF CATALONIA, Official Publications of the European Communities, 2008; Mohammed Adnène Trojette, OUVERTURE DES DONNÉES PUBLIQUES. LES EXCEPTIONS AU PRINCIPE DE GRATUITÉ SONT-ELLES TOUTES LÉGITIMES?, Rapport au Premier ministre (France), October 2013.

heritage that is reliable, rare and diverse (the collected data concern the economy, society, geography, meteorology, tourism, patents, education, business, etc.).

Not exploiting this data can be a loss of democratic and economic wealth. Whereas opening them may provide for its redevelopment for greater transparency and efficiency of public services and for the creation of innovative services leveraging open data. In other words, at the very least, opening data is useful to citizens, public service users, journalists, researchers, software developers, businesses, or the government administrations that may wish to learn more about their operation. Because the data represent information with economic value, governments may be tempted to require payment for this reuse through the payment of a fee, especially in order to obtain new resources. However, excessive pricing can be an obstacle to optimum re-use of public data.<sup>19</sup> For these reasons, EU law and French law first legally framed the pricing of public data reuse. They did not ban, but then proceeded to restrict it further.

### **B) The Principle of Marginal-Cost Pricing Affirmed by European Union law**

At first, European Union law, through the 2003 European Directive, limited the amount of the fee to be paid by the re-user to an amount not exceeding the total sum of the cost of providing public information and a reasonable return on investment<sup>20</sup>. In other words, it was possible for the administration responsible for the opening of public data to make a re-user pay a fee equal to the cost of collection, production, reproduction, and distribution, plus a reasonable return on investment, calculated on an appropriate accounting period.

However, to encourage reuse of public information, the 2013 Directive sought to reduce the amount of fees paid by re-users. Their price is now limited to the marginal-cost of reproduction, provision and dissemination of public information. European Union law on the reuse of public information thus shifted from a total cost rationale, including a return on investment, to a marginal-cost

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<sup>19</sup> About the debate of the pricing of the public sector information re-use, see William Gilles, *La tarification de la mise à disposition des données publiques électroniques des collectivités territoriales*, REVUE LAMY COLLECTIVITÉS TERRITORIALES, n° 76, 2012.

<sup>20</sup> See Article 6 (Principles governing charging) of the directive of 2003.



rationale, no longer considering the investment made by the administration in collecting the information.

The marginal-cost pricing limit applies to all reusable public information, except three cases for which the 2013 Directive has retained the old rationale. Thus, Member States may provide for a fee for which the amount is calculated from the cost of collection, production, reproduction, distribution, conservation and rights acquisition, while allowing a reasonable return on investment in the three following cases: a) for the information from public sector agencies "required to generate revenues to cover a substantial part of the costs of discharging their public service missions"; b) as an exception, for the "documents for which the public sector body concerned is required to generate sufficient revenue to cover a substantial portion of costs for their collection, their production, reproduction and their dissemination". Finally, for public information opened by libraries, including university libraries, museums and archives.<sup>21</sup>

### **C) The Principle of Gratuitousness of Public Information Reuse Asserted by French Law**

The legal framework was set forth by the directives on public sector information of 2003 and 2013, which stipulate the maximum amount of fees that can be charged to public data re-users. However, the maximum amount shall not constitute an obligation and Member States also have the possibility of providing a more favorable legal regime for re-users. France has chosen this second path by adopting gradually the principle of gratuitousness of public information reuse.

At first, France merely transposed the legal pricing regime as provided by the 2003 Directive. Thus, the 2005 Ordinance, transposing the text, authorized the administrations which open their public information to establish a fee that reflects the cost of information provision, including, where applicable, the cost of treatment to render it anonymous and the costs of information collection and

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<sup>21</sup> See Article 6 (Principles governing charging) of the directive of 2013.

production. In accordance with what was authorized by the 2003 Directive, governments could include in the fee calculation basis a reasonable return on their investments.<sup>22</sup>

However, France wanted to go further by promoting the free reuse of public information, especially that collected and produced by the State. Also, the French government decided in 2011 to limit reuse fees on data opened by the State by providing that they must be authorized by a decree.<sup>23,24</sup>

France has pursued this commitment to free public information reuse by signing the G8 Charter on opening data of June 18, 2013. We recall that the signatory States recognized "that open public data should be accessible and reusable for free to promote more widespread use"<sup>25</sup>, and sought to "support the publication of data by using free licenses or other relevant instruments, in compliance with intellectual property rights, so that the information can be reused freely and unrestrictedly for commercial purposes or not, except in exceptional cases." Indeed, as the Charter highlights, "to make the State's data available to the public by default and make them reusable for free in formats that are open, easily accessible and readable by computers and describe this data clearly to allow the public to easily understand their content and meaning, is to provide new sources of innovation in the private sector, to entrepreneurs and non-governmental organizations"<sup>26</sup>.

Finally, France has just decided to extend the principle of free access to all public information opened by the government (State and local authorities) through the transposition text of the 2013 Directive by the Law of December 28, 2015<sup>27</sup>. This change seeks to promote the reuse of public data by limiting the exceptions to the principle of gratuitousness, on the one hand, to public authorities required to generate their own resources and, on the other, the digitization of cultural

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<sup>22</sup> See Article 15 of the Law of July 17, 1978.

<sup>23</sup> The decree n° 2011-577 of May 26, 2011 (décret relatif à la réutilisation des informations publiques détenues par l'État et ses établissements publics administratifs) adds two paragraphs to Article 38 of the decree of December 30, 2005. This provision is specified by the ministerial circular of May 26, 2011 (circulaire du 26 mai 2011 relative à la création du portail unique des informations publiques de l'Etat « data.gouv.fr » par la mission « Etalab » et l'application des dispositions régissant le droit de réutilisation des informations publiques), and in particular, annexes II and III.

<sup>24</sup> The list of fees is mentioned on: <https://www.data.gouv.fr/fr/Redevances>.

<sup>25</sup> See the final release of the G8 Summit, Lough Erne, June 20, 2013.

<sup>26</sup> Ibidem.

<sup>27</sup> See Article 5 of the Law n° 2015-1779 of December 28, 2015, that amends Article 14 of the Law of July 17, 1978.

capital.<sup>28</sup> So doing, France yet again exceeds its European obligations, since rather than considering marginal-cost pricing as allowed by the EU law, it prefers to cloak its policy of opening up public data to the principle of free reuse.

However, this commitment to free reuse of public information should not prevent one from thinking of methods to value it, in particular by using additional resources.

### **§ 3. – The Limits of the Legal Framework for Public Information Reuse Based Exclusively on the Principle of Gratuitousness**

#### **A) The Paradox of the Principle of Gratuitousness**

*A priori*, everyone is in favor of gratuitousness. It is obviously easy to defend such an option since everyone obviously wants to benefit from a free provision. However, if we reflect more deeply, this attitude amounted to an especially easy way and highlights a lack of responsibility, especially given government that have a weak financial situation, such as France.

Indeed, gratuitousness can sometimes become a problem when governments do not have enough money to implement a quality policy of open data. That means that sometimes they do not open a lot of data, or if they do so, only weak data are opened. Thus, citizens have a low interest for the data opened because they consider that they are not useful. This leads to a paradox: providing a right to reuse freely public information should encourage transparency, participation and collaboration, but as governments do not dedicate enough resources to open good quality data, the citizenry does not exercise their right. For this reason, we consider that if gratuitousness is justified in most cases because one must encourage access to data and their reuse, this principle should not prevent one from thinking about public policy financing arrangements, and open data policies.

What would be the point of gratuitousness applied to low quality data and too few data? However, a more complex approach, and therefore more intelligent one, would, in our opinion, likely ensure funding to implement an ambitious policy of opening up public data.

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<sup>28</sup> See the explanatory statement of the Law n° 2015-1779 of December 28, 2015.

Take the example of free public transport. At first, people are happy because they can use public transport for free.... Then, gradually, they let their dissatisfaction become known as the transportation system becomes antiquated. This obsolescence is due to the lack of investment; the government did not have sufficient resources to finance updating because their budgets have been reduced due to the gratuitousness. This example illustrates the complexity of the issue of gratuitousness. If it can enjoy the support of everyone at first, difficulties may arise, particularly when public resources are insufficient to finance effective public policy.

Thus, the principle of gratuitousness can be helpful and understandable, but it should not prevent the valuation of the intangible heritage of public persons. The two concepts for public data reuse have often been considered contradictory when in reality, they can be complementary. Indeed, one can provide for a free basic principle in addition to a mechanism that values the datum in a more complex circuit focused around value-added or acquired rights services. The thinking that opposes everything that is free and everything that is paid is therefore a sterile debate. What is less so, however, is the need to forge an economic model and to find solutions to the complex problems that may arise from it.

In a more empowering perspective, therefore, first one must question the effectiveness of open data. The pricing issue should only be treated afterwards. In other words, to evaluate the effectiveness of open data, it is important to ask questions on two levels.

From a qualitative point of view, the question consists of opening public data compliant with international opening standards to encourage their reuse.

From a quantitative point of view, it is necessary to open the most data possible.

Once the goal is set, then one must identify what the constraints are in order to remove them.

Among these constraints, we must mention the hesitation of some governments to open their data. Given this situation, an educational effort is needed to make them understand the interest they may have in opening their data.

To our mind, the real problem that remains is funding in order to achieve an ambitious opening of public information policy. To do this, one must go beyond the binary debate between free and fee. The reality is probably more complex.

And herein lies oftentimes a misunderstanding. We may well defend a position that is more nuanced than that, in which everything is free, while encouraging opening public information because we are certain of the interest of this movement, we are aware of what it can bring to the economy, and it is precisely for these reasons that we must find a solution to finance an ambitious policy of re-opening public information, with data service and quality.

## **B) The Construction of a New Legal Framework Base on the Public Information Valuation**

### **1) Acquiring Rights and Fees for Additional Services as an Additional Tool for Enhancing Public Information**

Re-users do not correspond to any single category and some have specific needs. An instrument for the enhancement of public data could take these specificities into account. Two axes of valuations can be considered to raise new resources, and better fund the public information opening policy.

**On the one hand, one could envisage the creation of "fees for acquiring rights"**. This proposal assumes the principle that some re-users can accept or even wish to purchase additional rights to have more flexibility in data management. For example, the new mechanism could be based on a basic license authorizing a "*share alike*" of documents, that is, an identical copy of public information, which the re-user may then wish to acquire to have *a more permissive license in exchange for payment of rights*. The valuation of public data is therefore based, in this case, on additional rights that the re-user wishes to acquire on the given open datum in its raw format.

These additional rights do not undermine the principle of non-discrimination and free competition, which could be an obstacle to their implementation in accordance with European Union law. Indeed, any re-user may acquire these additional rights, by consequence without discrimination among future potential re-users. In addition, it should be noted that earnings from the rights acquired by the re-user are not intended to finance the collection or provision of data, but additional rights in relation to this basic process. Fees or other compensation that may be paid in connection

with the acquisition of these rights should therefore not be confused with reuse fees, which are strictly controlled by the 2013 PSI Directive.

**On the other hand, a second proposal to value public information would be to provide fees for additional service.** In other words, the re-user who wishes to enjoy additional services in contrast to the basic service of raw information provision should pay the price corresponding to this additional service. These additional services would be a real added value in comparison to the basic service, and they may take the form of *alerts*, *increased update frequency* (e.g. quarterly rather than yearly), *access to reworked data*, provision in a *specific format*, etc.

In this case, the introduction of fees would not be subject to access or reuse of public data in raw state, but rather the performance of a value-added service by the government. Again, this is not a public data reuse fee. As such, they fall outside the scope of the PSI Directive.

In the two above-mentioned proposals, the only goal is to enable the government, if it so wishes, to charge for supplementary or additional acquired rights services. These charges for additional services cannot be assimilated to those set forth in the European directive, if only because they correspond to work done by the government or a service provided by the latter to re-users in relation to the distribution of basic public information.

Thanks to these additional services, governments will earn new resources. However, in our proposal, the aim is not to reallocate new resources for the Government budget in general, but to find revenues to finance an open data policy that is efficient and effective, and thus encouraging transparency, and citizen participation and collaboration. Our next proposal pursues the same goal.

## **2) The Tax on Large Data Consumers as a Funding Tool for the New Public Data Ecosystem Valuation**

A final, more innovative, proposal would be to promote public information through a tax paid by the major re-users. The need to create this new funding source stems from the finding that the main beneficiaries of data reuse, who are the Internet actors, do not participate sufficiently in the financing of the economy from which they derive their profits.

Most often, these companies use aggressive tax schemes to evade taxes and repatriate taxable profits in tax havens, taking advantage of legal loopholes between international tax treaties. In addition, they often fail to develop their economic model using the "free worker"<sup>29</sup>, that is, they make users contribute to the development of a website (e.g. Wikipedia), a product or a service without compensating them. The Colin & Collin Report underlines that free labor existed prior to the digital economy (e.g. Tupperware meetings), but that it has taken on a new dimension in the Information Society. Indeed, free labor is growing at a much larger scale as the model of the digital economy is based on data and information that are either collected automatically or indicated by the users. This information obtained nearly for free are then valued.

This free labor theory can in some ways be applied to the opening of public information since they are collected and opened by the authorities without making the re-user bear the costs; or, if they're not free, at a marginal-cost under European Union law.

While the free opening of this data can be justified as explained above, it becomes problematic when it prevents governments from having sufficient resources to conduct a quality open data policy.

For these reasons, we propose to find new resources to fund an effective policy of opening up public data. In addition to the fees that have already been mentioned, we should consider the creation of a new funding source from the major re-users of data, the main beneficiaries of the digital economy.

This new funding could take the form of a tax calculated according to the volume and quality of open data. The latter would be gradual so as to weigh only on the largest data consumers and, thus, not penalize small re-users. Furthermore, in France, start-ups benefit from a tax exemption for seven years to enable them to achieve sufficient economic stability. The goal is to avoid having this new tax, the terms of which were set forth in a report resulting from my 2015 hearing before

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<sup>29</sup> See Pierre Collin & Nicolas Colin, *RAPPORT MISSION D'EXPERTISE SUR LA FISCALITÉ DE L'ÉCONOMIE NUMÉRIQUE*, 2013.

the French Senate<sup>30</sup>, create barriers for newcomers to the digital market economy since they are the drivers of the information society.

However, it is precisely the role of law to regulate the digital economy by finding a compromise between freedom of enterprise, the traditional need to finance public services (the purpose of taxes) and the search for a new valuation of the intangible resources of government to benefit the collective well-being, and in our case, to favor the citizenry participation and collaboration in an open government age.

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<sup>30</sup> *See* William Gilles, DÉCLOISONNER LE DÉBAT SUR L'OPEN DATA. POUR UNE POLITIQUE AMBITIEUSE DE RÉUTILISATION DES INFORMATIONS PUBLIQUES, Report, Imodev, Octobre 2015. *See also* William Gilles, REFONDER LE DROIT ET LA GOUVERNANCE DE L'INFORMATION PUBLIQUE À L'ÈRE DES GOUVERNEMENTS OUVERTS, Report, IMODEV, May 2014.