



23 November 2010

APPSI's response to the online survey of the PSI Directive Consultation

Context and possible action to consider

Do you think that PSI re-use has reached its full potential in Europe?

Disagree

Could further action towards opening up public data resources and practical measures facilitating re-use (asset lists of available documents, simplified or no licensing conditions, marginal costs etc.) contribute to unlocking innovation and developing new services, applications and mash-ups?

Agree strongly

Community-wide products and services using PSI are not limited to national borders. Do you think that divergent national rules can make it more complicated to grasp economic opportunities and to develop cross-border products and services?

Agree

Should further action be taken at Community level to promote cross-border products and services re-using PSI?

Agree

In your opinion, should the PSI Directive be amended?

Yes

Amendments to the Directive

If yes, should there be more substantive amendments to the Directive?

Yes

and/or technical adjustments to the Directive clarifying some of the provisions?

Yes

If you think that the PSI Directive should be amended, which issues should in your opinion be addressed? Which provisions should not be amended?

Issues to be addressed:

1. With certain explicit exceptions, (e.g. public sector information that contains personal information and other confidential data), Public Sector Bodies (PSBs) should ideally be required to make PSI available for re-use. At the very least, guidance should be issued creating a presumption that PSI should be available unless specified exceptions apply. As a national example, the UK government has recommended that action is taken to ensure that all UK PSBs should at least have to meet the requirements of the UK Government's Information Fair Trader Scheme, revised if necessary to include the Regulations;
2. PSI originally created as part of the public task of a PSB or integral to the discharge of a public function should be within the scope of the Directive even if structural changes to the mode of delivery are made (e.g. outsourcing or privatisation of the function);
3. the scope of the exclusion of documents in which third parties own intellectual property rights should be clarified, so as to bring within the scope of the Directive documents (i) where the third party is another EU public sector body; (ii) the documents contain re-usable content that is not protected by the third party rights; and (iii) documents where the third party has previously licensed the document for re-use;
4. wherever exclusive arrangements remain, a justification should be published and that all information about exclusive arrangements should appear in one place.

Should "soft law" measures be taken possibly in addition to a modification of the Directive, such as Commission guidance or recommendations, regarding the application / interpretation of the PSI Directive?

Yes

If yes, which "soft law" measures would you favour?

1. High level EC policy guidance should be provided on interpretation of the concept of 'public task' and on how Member States should create and operate a public process for its definition and periodic review; the process should include provision for public consultation and challenge;
2. EC guidance should be provided to give much greater encouragement in the Directive for adoption of a marginal cost regime (for most documents), and clarification provided as to whether, and the extent to which, the costs that can be re-charged to re-users should relate only to the provision of the documents in question, or whether the charges should be calculated so as to recover the costs relating to all documents supplied by the PSB; guidance should also be provided on the principles that should apply to the calculation of costs, following best practice in Member States;

3. If charges for PSI are more than marginal costs, then there must be guidance on charging to prevent cross-subsidy between products. This may require proper segregation of PSBs' accounts and it must be possible to have independent review and challenge of those accounts;

4. High level guidance should be provided on the terms 'access' and 're-use', including by the PSB itself. There is confusion between these terms - for example does showing information, obtained under Access legislation, on a web site constitute re-use? In this area, there appear to be overlaps between this Directive and Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information. There is clearly confusion within the UK (and no doubt in other countries) as to what can and what cannot be charged for and the means by which charges can and should be levied.

Substance

Scope (Article 1)

Currently, the PSI Directive is not applicable to information held by cultural, educational and research public service broadcasters. In your opinion, as far as information is not covered by third party intellectual property rights (excluded in any case from the scope of the PSI Directive), should the Directive apply to information held by

Public service broadcasters	Disagree
Educational and research establishments?	Disagree
Cultural establishments	Disagree

Could you please indicate reasons for or against the inclusion of information held by these establishments? What would be the benefits / difficulties if the scope was extended to cover such information? Are there certain data sets, if not all, held by these establishments that could be valuable for developing new services or applications and that should be made available to re-use?

APPSI has seen no evidence from a UK perspective that would suggest that the Directive needs to apply to these bodies.

Definitions (Article 2)

Do you think that the definitions of the PSI Directive cause problems and should be amended or clarified?

Yes

If yes, could you please indicate which definitions / problems, and how they could be clarified / addressed?

1. The definition of 'public sector body': APPSI notes that there is a category of information, originally produced to discharge a public function, which retains the character of PSI, but which falls outside the scope of the Directive because it is held by bodies that are not PSBs. These are often bodies that were PSBs but have since been given another status. In the UK an example is the Royal Mail. In some Member States (but not all) this type of

PSI remains in the public sector, which creates anomalies of treatment across the EU, impeding harmonisation in access to PSI.

2. Definition of 'Public Task': APPSI recommends that high-level policy guidance be provided by the Commission on interpretation of the concept of 'public task' and that Member States should put in place a process for its definition and periodic review. In its role of complaints review, the Review Board of APPSI has already had first hand experience of the lack of clarity as to what is covered by 'public task' in the UK and has highlighted the need for clearer definitions of the term and for processes to define 'public task'. This process should involve public consultation and the process should not be solely the preserve of the individual PSB. APPSI is very pleased that there is on-going work in the UK at present on the need for better definition of 'public task'.

3. Definition of 'document': Documents whose supply is outside the public task of the PSB are excluded from the scope of the Directive i.e. there is no encouragement to make the information available for re-use. Typically these include documents that are produced and charged for exclusively on a commercial basis, sometimes in competition with others in the market. The Directive's definition of 'document' is not intended to cover computer programmes.

4. The definition of 'document' used in the Directive usefully applies to any type of information. Difficulties can, however, arise in the context of charging. For example, tensions can arise where a re-user requires an extract from a (very) large dataset, but the public sector body's need to recover the costs of producing the larger dataset leads it to levy a charge based on the entirety of those costs, rather than the fraction attributable to the extract (see our response to the questions on Amendments to the Directive, Soft Law measures, 2nd point). This has, in some cases, made it very difficult to develop any reasonable dialogue between producers and re-users of data based on a common understanding of a 'cost per document'.

General principle (Article 3)

Do you think that all public sector information which is already publicly accessible should also be re-usable?

Agree strongly

In your opinion, what would be the advantages / disadvantages of this?

The main advantages would be:

- a. an increase in the opportunities for exploiting a valuable resource and hence greater innovation and job creation as well as greater transparency; and
- b. a reduction in the complexities inherent in the current system which can result in serious and expensive problems for those wishing to re-use information.

2. The main disadvantages would be:

- a. that PSBs could lose income at a time when many are already considerably stretched financially; and
- b. if PSBs are asked to provide documents in other formats (e.g. re-usable rather than PDF), additional costs could be involved and would need to be funded.

Processing of requests (Article 4)

Do you think that the requirements applicable to the processing of re-use requests should be tightened or clarified?

Yes

If yes, how should this be done?

There needs to be a clear time limit for requests to be answered by the PSI Holder and a process of independent appeal in the case of rejection or long delays in reaching an agreement, as is the case with the UK's Freedom of Information procedure for responding to requests for access to public sector information.

Available formats (Article 5)

In your opinion, should more re-use friendly formats (e.g. machine readable) be promoted?

Yes

If yes, could you please specify which formats and how?

1. To enable re-use, more machine readable formats should be encouraged. However, the challenge of funding the provision of alternative formats mentioned in the comment on Article 3 needs to be addressed.

2. There are several formats which could be used – the emphasis should be on open, machine readable formats.

3. Different types of PSI may need to be made available in different formats, depending on the type of information being provided.

4. Any changes to this Directive should take account of the decisions made in the implementation of the INSPIRE Directive. There are differences between the Directive, INSPIRE, and Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information, that need to be reconciled. For example, the Directive and INSPIRE both cover many overlapping areas. As the regulations under the INSPIRE framework are developed, there is a risk that the details may take a different approach from that taken by the PSI Directive (e.g. on charges). An example of unexpected consequences is discussed in our response to the questions on Amendments to the Directive, Soft Law measures, 2nd point.

Charging (Article 6)

In your opinion, public sector information should be made available for re-use

at charges based on full cost recovery, together with a reasonable return on investment? Disagree

at charges based on full cost recovery? Disagree

at charges based on partial cost recovery? Disagree

at marginal costs for reproducing and disseminating the documents? Agree strongly

at marginal costs as the basic rule with certain limited exceptions? Agree for free as regards both commercial and non-commercial re-use? Agree for free as regards non-commercial re-use? Agree strongly

What would be the benefits of charging based on marginal costs? What could be the disadvantages?

1. The Advantages would be:
 - a. additional opportunities for re-use; and
 - b. potentially a more level playing field, particularly when PSBs themselves produce commercial products based on the same PSI; and
 - c. potentially a reduction in total costs compared with charges based on full cost-recovery from the saving of administrative effort.

2. The Disadvantages, when compared with full cost recovery would be:
 - a. the need to reduce other services if funding is to be found for PSI when PSB budgets are being cut by up to 30%;
 - b. the potential loss of information produced by PSBs resulting from the lack of funding; and
 - c. a loss of quality in PSI resulting from a reduction in funding.

3. The Disadvantages, when compared with free provision of PSI would be:
 - a. the maximum possible exploitation of the PSI might not be achieved.

What could be the exceptions to a default rule of marginal costs?

A key issue for the UK, as for any Member State, is how far the collection, production and dissemination of PSI should be financed by the taxpayer and how far, if at all, it should be financed by the user. This is not just a matter of finance policy, but of economic efficiency and social utility. If the primary objective is to maximise revenue generation from re-use charges (and thereby reduce the burden on taxation), this may well reduce the extent to which PSI is re-used due to pricing levels which make it outside the reach of some user groups – not all of which have equal purchasing power (c.f. utility companies and Non-Governmental Organisations). There is common experience and agreement that provision of PSI at marginal or zero cost increases the number of users. Examples from as far apart as Australia and Austria support this view. There has also been some debate in the UK of whether the ‘user pays’ or the ‘free provision of data collected at taxpayer expense’ model provides the greatest overall benefit to society e.g. does it lead to a diminution in quality of the information. No definitive conclusions have been found to the latter question.

Overall, we consider that any exceptions to a default rule of marginal costs (or free-at-the-point-of-use) should be kept to the absolute minimum and reserved for those instances when not being able to recover full costs would result in a significant loss of PSI of the required quality.

Do you think that the current rules on charging (allowing full cost recovery, together with a reasonable return on investment) should be tightened and/or clarified in respect of how much re-users can be charged?

Yes

If yes, in what way?

Clarification should be provided as to whether, and the extent to which, the costs that can be re-charged to re-users should relate only to the provision of the documents in question,

or whether the charges should be calculated so as to recover the costs relating to all documents supplied by the PSB; and also that guidance be provided on the principles that should apply to the calculation of costs, following best practice in Member States. The bulk of the APPSI members have urged the UK government to move to a marginal cost pricing model for PSI.

When PSI is charged for there needs to be proper segmented accounting by the PSB to prevent cross-subsidy and mission-creep. This needs to be coupled to independent and effective governance with sanctions. This is expensive to organise and administer and thus marginal cost pricing could well be a better solution for the Member States.

Some services provided by the Public Sector could still attract a fixed fee in this scenario.

Transparency (Article 7)

Do you think that the current transparency rules regarding conditions and standard charges for re-use of PSI should be changed / clarified?

Yes

If yes, could you please indicate how you think this should be done?

At present there is no easy way of knowing if there is cross-subsidy between PSI “products” produced by PSBs and there are concerns that there may well be considerable cross-subsidy in some areas. Most PSI Holders/ Producers have no real requirement to keep proper segmented accounts. This can create market distortions which, along with the lack of “boundaries”, can impede innovation and enterprise.

Rather than resorting to complex rules, the principles need to be clearly articulated and there needs to be an appeal body with real powers available to investigate and resolve breaches swiftly.

Licences (Article 8)

Do current licensing regimes of Member States or of individual public sector bodies still create problems for re-use (e.g. by imposing unfair conditions or by unduly restricting the possibilities for re-use)?

Yes

If yes, what can be done to address these issues?

Much has been achieved in recent times in the UK to reduce these problems but residual and complex matters remain under discussion. A particular issue relates to derived data. In some cases, current licences appear to be mainly designed for the situation whereby an organisation gets PSI then processes it for sale or internal use. The complexity comes when there is further processing, including combining data from different sources, where the rules round such re-use can be very complicated and may inhibit the full exploitation of the PSI. Hence clear principles and guidance need to be drawn up to overcome what is a critical continuing constraint on PSI.

Practical arrangements (Article 9)

Do you think that more measures should be taken to facilitate the search for documents available for re-use?

Yes

Non-discrimination (Article 10)

In your opinion, have the current rules on non-discrimination caused problems in practice and should they be tightened / clarified to foster fair trading conditions?

Yes

Prohibition of exclusive arrangements (Article 11)

Do you think that exclusive arrangements are a problem and that more measures should be taken to address them?

Yes

If yes, could you please specify which?

APPSI is not aware that there has been a notable reduction in the number of exclusive arrangements in the UK since implementation of the Directive, although there is evidence that some PSBs converted some arrangements into non-exclusive licences in anticipation of the Regulations coming into force. It is hard to identify where exclusive licences exist and to quantify the problem. It is also hard to know how far, in the absence of the Directive, the number of exclusive arrangements would have been greater.

APPSI recommends that, wherever exclusive arrangements remain, a justification should be published and that all such information about exclusive arrangements should appear in one place for each Member State.

APPSI is pleased to note that The National Archives has such a central site, see <http://www.nationalarchives.gov.uk/information-management/policies/exclusive-agreements.htm>, which presently monitors some, but not all, of the PSBs in the UK.

Practical measures

Should the Commission encourage deployment measures at national level such as exchange of good practices, awareness raising and/or practical measures facilitating re-use?

Yes

If yes, could you please indicate which deployment measures?

The Commission already encourages good practice through its seminars and the ePSI Platform. These are excellent initiatives which help countries learn from each other and they should continue to be encouraged.

Should the Commission promote practical measures such as national portals (like the www.data.gov.uk or the www.data.gov in the US) with a strong political drive towards opening up the wealth of public sector data?

Yes

If yes, could you please specify which measures?

APPSI members have welcomed the UK government's opening up of PSI through the establishment of www.data.gov.uk and consider that such arrangements could with advantage be extended in other countries to the benefit of the whole EU community.

General issues

What changes in policy of Member States and/or public sector bodies regarding re-use of public sector information have you noticed since the adoption of the PSI Directive in 2003?

APPSI's focus is the re-use of PSI and, specifically, encouraging greater use of PSI. In the UK, it is The National Archives that has responsibility for policy and regulation of the re-use of PSI. Much of the work in this context is governed by 'The Re-Use of Public Sector Information Regulations 2005 (the Regulations) introduced by the UK government to implement the Directive, although in some respects this work has begun to go beyond the strict requirements of the Directive by encouraging a more pro-active approach to release of PSI, and exploring sanctions for non-compliance (at least by central government departments and agencies) that rely on the terms of licence of Crown copyright. Detailed accounts of the impact of the Regulations and of progress that has been made in the UK since they came into force have been published by The National Archives in 2008 & 2009 (see <http://www.nationalarchives.gov.uk/information-management/legislation/directive-and-regulations.htm>).

The UK was one of eight Member States to have implemented the Directive by the 1st July 2005v deadline. The effect of the Directive in the UK has been beneficial in a number of ways. It has:

- given greater prominence to the re-use of PSI on the political agenda;
- helped to fuel debate about proper policy in this area;
- applied a degree of pressure on PSI producers to make information available (though not in all cases);
- provided ground-rules which make it easier for potential private sector PSI re-users to apply leverage to PSI producers to allow re-use of their data.

There is a growing recognition by all PSBs, including Local Authorities, that they have to make PSI available. This has been helped, recently, by government policy in the UK on making PSI available and the associated high level support for this and for making PSI available for free re-use, under the UK government's open government licence, launched on 30 September 2010, and for data to be in a format whereby they can be re-used.

In general, the EU Directive and supportive EC actions have been helpful but the recognition of the importance of PSI at the highest levels in the present and the previous UK governments has been crucial to the success of PSI re-use in the UK, in some cases leading to change that goes beyond the scope of the Directive. Political power has been crucial to many recent – and welcome – developments.

What have been the positive effects of the PSI Directive and of these changes? Please give also figures on growth in terms of turnover, staff, number of clients, downloads etc., where possible.

See answer to previous question. The Directive has helped to bring about change and open the debate to a wider audience. In the UK it gave a new level of authority and recognition to The National Archive's work in this area and supported the work of private sector associations. All have had a beneficial effect.

What are the remaining barriers to re-use (availability of information, charging, licensing conditions, etc.)?

Enforceability: When it considered the implementation of the Directive in UK law, APPSI was originally concerned to create a relatively 'light touch' process for handling complaints against PSBs that were alleged to be in breach of the obligations created under the Directive. However one of the problems experienced by private companies is the absence of real sanctions that could be applied in cases where PSBs are non-compliant.

Non-mandatory PSI: The Directive does not contain an obligation to allow re-use of documents (Recital 9). It is difficult to see how the full benefit of PSI re-use as a basis for economic growth and social utility can be enjoyed unless the re-use of PSI is proactively facilitated by PSBs. However, evidence obtained from local authorities (local governments) in the UK suggests an alarming lack of awareness and engagement with the issues, or interest in promoting the re-use of PSI held by them. A survey in 2008 by PSI Research shows that, of the 75% of all local authorities in England and Wales responding to the survey, 8 out of 10 admit they have not produced an Information Asset Register and a number have made it clear that they do not intend to comply with the Regulations since these are not mandatory. APPSI draws the conclusion that, in the absence of an obligation to permit re-use, there is little or no incentive for many PSBs across the EU to make PSI available for reuse, especially those with limited resources and other priorities.

In the UK, the provision of PSI by local authorities is, however, unlikely to improve since they are required to make reductions in expenditure of nearly 30% over the next four years as part of the UK Government's plans to reduce the national deficit. Making PSI more widely available will only be at the expense of other mainstream services unless specific resourcing is made available and the process of preparing the information for re-use is simplified.

Would you have any other comments or input that you wish to give regarding the review of the PSI Directive?

The answers provided above by the Advisory Panel on Public Sector Information (APPSI) in response to the European Commission's consultation have been based on APPSI's report to the EC in 2008, *The impact and success of legislation on the re-use of public sector information (Directive 2003/98/EC of the European Parliament and Council of 17 November 2003 and the UK Regulations)*, July 2008. Some conclusions have been amended as a consequence of the rapid developments in the UK PSI scene since that report was submitted. The original report is much more detailed than these responses and can be accessed at: <http://www.appsi.gov.uk/reports/ecsubmission-07-2008.doc>.