

EN

EN

EN



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, [...] [COM\(\[...\]\) \[...\]](#) final

DRAFT

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**Re-use of Public Sector Information
– Review of Directive 2003/98/EC –**

{SEC(2009) xxx}

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**Re-use of Public Sector Information
– Review of Directive 2003/98/EC –**

1. INTRODUCTION

The aim of this Communication is to review the application of the Public Sector Information (PSI) Directive,¹ and to highlight the potential for re-use of PSI in the digital age. PSI is the single largest source of information in Europe. Examples include maps and satellite images, legislation and case-law, statistics and company, population and patent registers. PSI is used as raw material for a variety of products and services offered to Europe's citizens every day, such as car navigation systems, weather forecasts, financial and insurance services.

The value of the EU PSI market is estimated at €27 billion,² which is four times the EU market for mobile roaming services.³ This shows the central role of public sector content in the digital age as a driver of economic activity. A further increase in the use of this resource will therefore directly contribute to the EU's goals of increasing competitiveness and creating more jobs.

The PSI Directive removes major barriers in the internal market to re-use, such as discriminatory practices, monopoly markets and a lack of transparency. Progress has been made since its adoption, but Member States (MS) need to take further steps to unlock the full potential of PSI for the EU economy.

A staff working document accompanying this Communication supports the analysis and conclusions.

2. RE-USE OF PSI FOR INNOVATION AND GROWTH

The internet has drastically changed the way companies and citizens can access and re-use PSI. The availability of content in digital format makes it possible to re-use it in new ways, combining information from different sources and adding value to it. Examples are navigation services, real-time traffic information, weather forecasts sent directly to our mobile phones and credit rating services. Such products and services based wholly or partly on PSI generate new businesses and jobs and give consumers more choice and more value for money. They often concern more than one MS, as the need for information does not stop at the border.

¹ Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information, OJ L 345/90, 31.12.2003.

² Study on Measuring European Public Sector Information Resources (MEPSIR), Helm *et al.*, 6/2006.

³ Estimated at €6.5 billion in 2007; Commission Communication 23.9.2008 on the review of Regulation (EC) No 717/2007, COM(2008) 579 final.

Some services using PSI, such as personal navigation devices, are in such demand that sales tripled from 2006 to 2007 (31 million devices sold) and are expected to more than double to 68 million units in 2012.⁴ They are among the fastest growing areas in consumer electronics. Nokia, the world's largest mobile phone manufacturer, paid almost €6 billion to acquire Navteq, the world's leading digital map maker.

The market is still evolving and added value will be increased to basic navigation by integrating further layers of information, e.g. traffic information allowing drivers to anticipate traffic jams, weather forecasts at the destination and information on parking space or on public transport alternatives.

Although re-use of PSI is growing, much of its potential is still not being tapped because of the way public sector bodies handle their information resources. One of the reasons for this is the focus on short-term cost recovery, as opposed to benefits in the wider economy. This focus is often triggered by pressure on public sector bodies to finance part of their activities. It can result in competition between the public and the private sector, restrictive licensing and charging conditions, and the granting of exclusive rights.

In addition, there are practical issues hindering the re-use of PSI, e.g. lack of information on available PSI. In other cases, public sector bodies are lukewarm to the basic idea of commercial re-use of their information or fail to realise its economic potential.

A study by the Office of Fair Trading⁵ suggests that the way PSI is supplied by public sector bodies costs the UK economy £500 million every year in lost opportunities.

The situation in the EU is in clear contrast with the US, where re-use is strongly encouraged. Citizens and businesses enjoy broad rights to electronically accessible PSI and have extensive scope for commercial re-use. There is no copyright on federal PSI and there are no restrictions to re-use. Furthermore, fees for re-use are limited to, at most, marginal costs for reproduction and dissemination.

3. IMPLEMENTATION OF THE PSI DIRECTIVE

The PSI Directive was adopted in November 2003. It harmonises basic conditions for making PSI available to re-users, in a bid to foster Community-wide products and services based on PSI and to avoid distortions of competition. It regulates non-discrimination, charging, exclusive arrangements, transparency, licensing and practical tools to make it easy to find and re-use public documents. There was a transitional period for existing exclusive arrangements that expired on 31.12.2008. MS are free to go beyond the minimum standards set by the Directive.

All MS have implemented the Directive, although only four of them met the deadline of 1.7.2005. The Commission has opened 18 infringement cases against MS⁶ and the European

⁴ <http://www.instat.com/press.asp?ID=2343&sku=IN0804074ID>, 25.6.2008.

⁵ The commercial use of public information (CUPI), OFT, 12/2006.

Court of Justice (ECJ) has delivered 4 judgments for failure to implement the Directive.⁷ MS have implemented the Directive in different ways:

- 1) 11 MS have adopted specific PSI re-use measures (BE, DE, GR, ES, IE, IT, CY, LU, MT, RO, the UK).
- 2) 4 MS have used a combination of new measures specifically addressing re-use and legislation predating the Directive (DK, AT, SI, SE) and 8 MS have adapted their legislative framework for access to documents to include re-use of PSI (BG, CZ, FI, FR, LV, LT, NL, PT).
- 3) 4 MS have notified the Commission only of measures with no specific re-use provisions (EE, HU, PL, SK).

The Commission monitors the implementation and application of the Directive through comprehensive conformity analysis. It also pursues intensive administrative cooperation. This has led to swift legislative changes in several MS, e.g. DK, EL, IE, MT and SE, which had originally notified insufficient implementation measures.

The Commission applies the principles of the PSI Directive also to its own documents through a Commission re-use policy. Commission Decision 2006/291/EC, *Euratom*⁸ goes beyond the Directive by applying charges based on (at most) marginal costs and by making all documents re-usable. Examples are EUROSTAT's statistical data, Commission translation memories, the EC law database EUR-Lex and studies. Commission information is often available in 22 or even 23 languages which gives it a unique value e.g. for machine translation tools.

4. IMPACT AND SCOPE OF THE PSI DIRECTIVE

4.1. Changes brought about by the Directive

The Directive clarifies the legal framework for re-using PSI in the internal market, where markedly different rules and practices in the MS used to apply. The following examples illustrate the effects of the Directive.

- 1) New re-use friendly legislation: In BE, the Directive has changed the fundamental approach towards the commercial re-use of public sector information, which used to be forbidden and is now encouraged.
- 2) Exclusive arrangements concluded by public sector bodies have been terminated in some MS (e.g. NL, SE; in the latter case, the change was triggered by Commission action after a complaint). The NL and UK have made extensive surveys to identify exclusive arrangements concluded by central government and local authorities. LV has set up a procedure to ensure

⁶ Non-communication of implementation initially regarded BE, CZ, DE, GR, ES, IT, CY, LV, LT, LU, MT, NL, AT, PT and HU, and non-conformity of national implementing measures with the Directive currently concerns IT, PL and SE.

⁷ Regarding AT, BE, ES and LU.

⁸ OJ L 107, 20.4.2006, p. 38.

that any exclusive rights granted are in line with the Directive, and subject to prior opinion of the competition authorities.

3) Charging: The NL has announced it is moving towards charging only marginal costs or less, in line with the Preamble to the Directive, which recommends this approach. In other MS, individual public sector bodies have moved towards a marginal cost regime, e.g. the Spanish Cadastre, or drastically reduced their prices, such as the Austrian Mapping Agency. These policies have led to a significant increase in both the number and variety of re-users.

The Austrian Mapping Agency (BEV) has reduced its prices by up to 97% for certain datasets. As a result, use of the information has exploded, in some cases by 7 000%. New users have emerged from small and medium-sized enterprises and new re-use sectors (e.g. health and agriculture). The decrease in prices has been offset by the enormous increase in demand and BEV's total turnover has remained stable.

4) Conflict resolution mechanisms for PSI re-use have been put in place, e.g., in FR, SI and UK and the use of these mechanisms demonstrates the need for quick and inexpensive dispute settlement and mediation. The French CADA, *Commission d'accès aux documents administratifs*, had 53 PSI re-use cases in 2007.

5) Web portals on available PSI as a tool for finding, using and trading information have been created, e.g., in SI and the UK.

In the UK, the Office of Public Sector Information has facilitated re-use over the years. It has launched the Government's click-use licences, with currently 15 000 licensees, and runs the Information Fair Trader Scheme to ensure that public sector bodies meet the requirements of fairness and transparency. Its website, which gives extensive information on available PSI and provides an "unlocking service" to help resolve problems with re-use, is the 9th most visited Government site.

4.2. Studies and consultations confirm the impact of the Directive

In the study evaluating the impact of the Directive in three main PSI sectors – geographical, meteorological and legal/administrative – the different indicators monitored to measure PSI re-use highlight market growth and an increase in re-use in all of these sectors in recent years.⁹

In the geographical sector, download volumes of PSI in 2007 had grown by approximately 350% since 2002, and in Germany alone the market was estimated to be €1.5 billion, a 50% increase since 2000.¹⁰

National Meteorological Offices have reported increases in download volumes of 70% between 2002 and 2007, and the EU meteorological market was estimated in 2006 to be worth €30 million, a 60% increase since 1998.

Re-users' main complaints in the *geographical and meteorological* sectors concern high prices, restrictive licensing conditions and discrimination. In the meteorological sector in particular, re-users having problems obtaining European PSI have gathered data from

⁹ Assessment of the Re-use of Public Sector Information (PSI) in the Geographical Information, Meteorological Information and Legal Information sectors, MICUS, 12/2008.

¹⁰ *Idem*.

elsewhere (US or private data sources) or abandoned the development of specific services altogether.

In the *legal and administrative* sector, the majority of content holders have made significant changes to their data policies in the last few years and offer the information now for free on the internet. This change is contributing to strong market growth. Content holders have reported a 40% increase in the market since 2002 and re-users also confirm a steady increase in income. The main concern of re-users in this sector is the lack of information on what PSI is available and where to find it.

In France, the legal information sector is one of the most dynamic sectors in the professional digital information market, with strong market growth, 17% in 2007, resulting from high value-adding.¹¹

The Commission consulted the MS and stakeholders¹² for this review. The respondents consider that the PSI Directive has had positive effects on PSI re-use. However, both stakeholders and MS indicate that the full potential of PSI re-use has not yet been realised. Public sector bodies lack awareness of their responsibilities and opportunities, and private companies have limited knowledge of their rights and the availability of PSI.

Re-users propose amendments to the Directive to make its provisions more stringent. These suggestions include extending the scope of the Directive, obliging public bodies to allow re-use, imposing marginal cost charging, requiring independent regulators and/or conflict resolution mechanisms, clarifying the public tasks, establishing national asset lists/repositories and imposing obligatory annual reporting by MS to the Commission. Finally, they seek guidance on certain terms of the Directive that they consider to be ambiguous, such as the definitions of documents, public tasks, marginal cost charging and reasonable return on investment.

The majority of the MS responding to the consultation believe that it is premature to amend the Directive, preferring to allow further time for its full implementation. Public sector bodies consider that the current framework provided by the Directive works well.

4.3. Scope of the Directive

Article 13 of the PSI Directive requires the Commission to review the scope of the Directive. In practice this means examining whether cultural, educational and research organisations and public broadcasters, which are currently excluded from the scope, should be covered.

The respondents to the consultations underline the potential for re-use of the information held by cultural, research and public broadcasting institutions. Some stakeholders express their support for extending the scope, indicating that it would have a positive impact on the development of the content market in Europe.

The MS (except LV and LT) and stakeholders representing the excluded sectors consider, however, that at this stage the scope should not be widened, since the administrative burden and associated costs would not be outweighed by the potential benefits. They point out that a

¹¹ Serda GFII press release, 27.1.2009.

¹² Results of the consultations and individual contributions can be found at http://ec.europa.eu/information_society/policy/psi/index_en.htm.

large part of the material held by these institutions is also covered by third party intellectual property rights, and would therefore not in any case fall within the scope of the Directive. This latter argument is backed by the results of a recent study,¹³ which concluded that at present the scope of the Directive should not be extended to the cultural sector.

The Commission encourages the excluded sectors to apply the principles of the PSI Directive, particularly as regards transparency, non-discrimination and the absence of exclusive arrangements, when allowing re-use of their information resources.

One area of particular interest is the availability of scientific information paid for by the public purse. This information should be widely available and useable to all in order to maximise its usefulness for research and innovation, in line with the Commission Communication on scientific information in the digital age.¹⁴

Another area of concern relates to content belonging to the public domain. In a recent Communication on Europe's cultural heritage at the click of a mouse,¹⁵ the Commission stressed the importance of "keeping public domain works accessible after a format shift. In other words, works in the public domain should stay there once digitised and be made accessible through the internet". There is, however, a tendency among cultural institutions to charge for accessing or re-using digitised public domain material. This may lead to the privatisation of public domain material in the digital age, instead of allowing the widest possible accessibility and use for the benefit of citizens and companies. The Commission will closely follow developments in this area.

5. WHAT ACTION NEXT?

The PSI Directive was implemented by many MS with considerable delay. The prohibition of exclusive arrangements only became fully applicable as from 1.1.2009. Therefore, the Directive in its present form has not yet had its full impact.

For this reason **the Commission does not intend to propose amendments to the Directive at this point**. The Commission will **carry out a further review at the latest in 2012** when more evidence on the impact, effects and application of the Directive should be available and will communicate the results to the European Parliament and to the Council. **Legislative amendments will be considered at that stage** if the potential of re-use is still being hampered.

In the meantime, there is much room for improvement in the way MS deal with their PSI resources in the market. The Commission draws attention to the following areas in particular.

1) Full implementation and application of the PSI Directive

This is the first essential step towards lifting barriers that hinder the re-use of PSI, such as monopoly markets and discriminatory treatment. **The Commission will continue to monitor**

¹³ Assessment of the Economic and Social Impact of the Public Domain in the Information Society, Rightscom, 4/2009.

¹⁴ COM(2007) 56 final.

¹⁵ COM(2008) 513 final.

whether MS meet their obligations and act against those who are in breach of the Directive.

2) Terminating exclusive arrangements

All existing exclusive arrangements had to be terminated by 31.12.2008, unless it can be demonstrated that, by way of exception, they are necessary for the provision of a service in the public interest.¹⁶ There is however evidence of exclusive arrangements still in force in the MS. **The Commission will closely scrutinise observance of this obligation. It will launch an exercise investigating the extent of such arrangements in summer 2009.**

3) Charging

Public sector bodies should be transparent on the calculation basis they apply in terms of abiding by the upper limit for charges set by the Directive. Calculations should not be based on the total turnover of the public sector body, but on the individual databases or items concerned.

A recent study by Cambridge University is one of several to suggest that charging no or only marginal costs (costs of reproducing and disseminating documents) maximises PSI re-use and that the social and economic benefits far outweigh the immediate financial benefits of cost recovery.¹⁷ The PSI Directive recommends this approach in its Preamble. Marginal cost charging is also one of the key principles of the recently adopted OECD recommendation for Enhanced Access and More Effective Use of Public Information.¹⁸

Further, continuous analysis of the economic case for marginal costs is a Commission priority for the future, to be carried out in cooperation with MS and stakeholders.

4) Facilitating re-use

In line with Article 3 of the Directive, public sector bodies should ensure that documents that are re-usable (i.e. accessible for *any* use beyond the initial public tasks for which they were originally produced) can be re-used for commercial or non-commercial purposes. While facilitating re-use, public sector bodies should fully comply with European and national rules on data protection.

Public sector bodies are encouraged to identify and make their information resources readily and promptly available, in stable formats. Information asset registries and national PSI portals are important tools in this respect. Cooperation between the public and the private sector is essential and partnership and innovation should be stimulated.

The Commission will promote the exchange of good practices in measures facilitating re-use between MS, in particular through the PSI expert group. It will contribute to awareness-raising and the deployment of re-use policies through projects such as the PSI platform.

¹⁶ Article 11(2) and (3) of the Directive.

¹⁷ Models of Public Sector Information Provision via Trading Funds, Newbery *et al.*, 2/2008.

¹⁸ C(2008)36, 6/2008.

5) *Ensuring fair competition between public sector bodies and re-users*

Public sector bodies should ensure fair licensing conditions for private re-users – avoiding discrimination, cross-subsidies and exclusive rights – even if they compete with re-users in the market.

The Directive leaves it to the MS to define the public tasks of public sector bodies. However, in some cases the line between the public tasks and market activities of public sector bodies is not clearly demarcated. There are also cases where public tasks are defined in such a way that they cover a very wide range of activities and occupy almost the whole market of added-value PSI services. These situations can easily lead to cross-subsidies, where a public sector body uses its “raw” information for further value-added services under more favourable conditions than those offered to competitors. It is very difficult for private re-users to compete with public sector bodies in such circumstances.

In order to ensure fair competition and non-discrimination, as prescribed by Article 10(2) of the Directive, if public bodies re-use their own documents to produce added-value services in competition with other re-users, equal charges and other conditions must apply to all of them. Separation of accounts for the public tasks and market activities of public sector bodies helps to achieve this objective. Also, while the MS can define the public tasks of public sector bodies, they have to take account of certain limits and criteria set by EC law as interpreted by the ECJ.¹⁹ **The Commission encourages MS to define public tasks in such a way that they allow maximum PSI re-use, and will promote good practices and monitor developments in this area.**

Competition rules, where applicable, can also play an important and complementary role in contributing to unlock the PSI re-use potential, by ensuring that re-use of information be open to all potential actors in the market on a non-discriminatory basis, consistent with the provisions of the Directive.

6) *Conflict resolution*

Re-users are often dependent on their sources and are unwilling to complain about public sector bodies, which may be their sole suppliers of PSI. Formal court procedures can be long and expensive. Efficient, inexpensive and independent conflict resolution mechanisms should therefore be available. A few MS (e.g. FR, SI and UK) have put such mechanisms in place, which has increased the number of complaints. The Directive requires the availability of means of redress but leaves it to the MS to decide on the actual practicalities. **The Commission encourages MS to set up PSI complaint mechanisms and will monitor developments in this area.**

¹⁹ The term *public task* is closely related to public services or services in the general economic interest, and is in some languages interchangeable (e.g. *mission de service public* in French). The ECJ has examined on a case by case basis whether certain activities in the MS can be considered to be such services and set certain criteria, such as the universality and continuity of the service, uniform tariff rates and equal terms.

Summary of key points for action

Member States:

- Ensure **full and correct implementation and application** of the Directive
- **Terminate exclusive arrangements** as prescribed by the Directive
- **Apply licensing and charging models that facilitate** the re-use of PSI
- **Ensure fair competition** between public sector bodies and re-users

In addition, Member States are encouraged to promote the identification and ready availability of information resources and to set up **quick and inexpensive conflict resolution mechanisms**.

Commission:

- **Closely monitor** implementation and application of the Directive
- Scrutinise **exclusive arrangements** (2009-10) in particular
- **Analyse the economic case for marginal costs**
- Encourage **exchange of good practices (proactive re-use policies, public tasks, conflict resolution)**
- **Further review by 2012**, accompanied where appropriate by a proposal for amendments to the Directive

6. CONCLUSIONS

The PSI Directive has introduced the basic conditions to facilitate the re-use of PSI throughout the EU. Progress has been made since its adoption. Commercial re-use of PSI has been allowed, monopolies have been broken, fair trading conditions have been introduced, prices have decreased and there is more transparency. Progress and implementation of the Directive in the MS is however uneven.

Big barriers still exist. These include attempts by public sector bodies to maximise cost recovery, as opposed to benefits for the wider economy, competition between the public and the private sector, practical issues hindering re-use, such as the lack of information on available PSI, and the mindset of public sector bodies failing to realise the economic potential.

These problems and progress by MS to redress them need to be monitored and assessed before the Commission can consider legislative amendments to the PSI Directive.

MS need to focus their efforts now on full and correct implementation and application of the Directive, terminating exclusive arrangements, applying licensing and charging models that facilitate the availability and re-use of PSI, ensuring equal conditions for public bodies re-using their own documents and other re-users, and promoting quick and inexpensive conflict resolution mechanisms.

The Commission will carry out a further review by 2012 when more evidence on the impact, effects and application of the Directive should be available and will consider legislative amendments at that stage, taking into consideration the progress made in the meantime in the Member States.