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COMMISSION STAFF WORKING PAPER
EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

Accompanying the document

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND THE COUNCIL_amending
European Parliament and Council Directive 2003/98/EC on the re-use of public sector
information**

{COM(2011) 877 final}
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1. SCOPE AND CONTEXT

1.1. Scope

This impact assessment focuses on whether there is a need, in the light of developments in the market for the re-use of public sector information (PSI), to amend the provisions of the Directive 2003/98/EC on the re-use of public sector information (PSI Directive), which sets out basic conditions for the re-use of PSI throughout the EU. The Commission has taken into account changes on the re-use markets, including changes brought about by the Directive, and has assessed whether there are any barriers remaining and, if so, what these are and how best to tackle them.

1.2. Context

The PSI Directive was adopted on 17 November 2003. The purpose of the legal framework established by the Directive is to unlock the economic potential of government-owned data by making the data available for commercial or non-commercial re-use in order to stimulate innovation.

The PSI Directive is a building block of the Digital Agenda for Europe and the Europe 2020 strategy for smart, sustainable and inclusive growth¹. The review of the Directive is a key action under the Digital Agenda (1c). The economic importance of open data resources, including government data, is now widely recognised. For example, according to a report in *The Economist* in 2010, data have become ‘*an economic raw input almost on a par with capital and labour*’², while the Digital Britain Final Report recognises data as ‘*an innovation currency ... the lifeblood of the knowledge economy*’³. However, in addition to fuelling the innovation and creativity that stimulate economic growth, open public data also make governments transparent, accountable and more efficient.

A recent study estimates the total market for public sector information in 2008 at €28 billion across the EU⁴ but that the overall economic gains from further opening up public sector information by allowing easy access amount to €40 billion a year for the EU27. The total direct and indirect economic gains from PSI use across the whole EU27 economy would be in the order of €140 billion annually⁵, showing clearly that there are considerable economic benefits from greater re-use of PSI. The challenge is to provide the market with an optimal legal framework to facilitate and stimulate actual commercial and non-commercial re-use of public data.

Article 13 of the Directive called for a review of the application of the Directive before 1 July 2008. The review was carried out by the Commission and was published in Communication COM(2009) 212⁶. It found that, despite the progress made, a number of barriers still remained, namely attempts by public sector bodies to maximise cost recovery as opposed to

¹ http://ec.europa.eu/information_society/digital-agenda/index_en.htm.

² <http://www.economist.com/node/15557443>.

³ <http://webarchive.nationalarchives.gov.uk/+/interactive.bis.gov.uk/digitalbritain/report/>.

⁴ Review of recent studies on PSI re-use and related market developments, G. Vickery, August 2011.

⁵ Review of recent studies on PSI re-use and related market developments, G. Vickery July 2011, publication forthcoming.

⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0212:FIN:EN:PDF>.

benefits for the wider economy, unfair competition practices between the public and the private sector or the mindset of public sector bodies failing to realise the economic potential. The Commission concluded that a further review should be carried out by 2012 when more evidence of the impact, effects and application of the Directive would be available.

A wide-ranging public consultation on the review of the Directive was conducted from 9 September 2010 until 30 November 2010 and yielded 598 replies from all interested parties, including governments, public sector content holders (also from currently excluded sectors), commercial and non-commercial re-users, experts, academics and citizens.

Responses to the consultation demonstrate that, although compared with the previous review, the culture of re-use has made headway in many Member States, much remains to be done to maximise the potential of PSI re-use. In particular, public sector bodies and re-users alike called for clarification of and guidance on the charging and licensing principles and on data formats. Also, more re-users than PSI holders were in favour of amending the Directive to make all accessible information re-usable, adopt additional measures to open up public data resources, and introduce practical measures facilitating re-use (including asset lists of available documents, simplified or no licensing conditions and marginal cost charging).

2. PROBLEM DEFINITION

The following problems have been identified for a company seeking to develop a commercial online product that draws on public data across all the EU Member States.

2.1. Insufficient clarity and transparency

- Re-use is still hindered by the lack of information on what data are actually available, and by restrictive or unclear conditions of re-use, including on pricing of information.
- There is not enough certainty that a set of data falls within the scope of re-use, with some public sector bodies relying excessively on the concept of ‘public task’ to restrict re-use.
- SMEs are likely to find the process for obtaining permission to re-use PSI too complex and shelve their product for lack of resources to follow the process through to its ultimate conclusion.

2.2. Locked resources

- The scope of the Directive currently excludes data collected or produced by public broadcasters, educational and research establishments and cultural institutions. Data from some of them, in particular cultural public domain material, is subject to re-use, albeit under unregulated conditions so the rationale for the exemptions has to be subjected to a new cost/benefit analysis.

2.3. Excessive charging and lack of a level playing field

- Re-users complain about charges being set at a level which effectively acts as a barrier to re-use, in particular for SMEs.

- Public sector bodies often misallocate costs between their unrefined and refined information operations and cannot ensure that the prices charged to businesses producing refined information products for their unrefined information are consistent with those they charge internally.
- Some public sector bodies combine the exercise of their public tasks with commercial revenue-raising activities, which is not in itself prohibited by the PSI Directive. When competing against the private sector on the markets for products and services based on the PSI that they produce and/or collect, some of these public sector bodies tend to impose anti-competitive pricing and licensing conditions.

2.4. Inconsistent approach across the Member States

- Implementation and application of the Directive and progress in PSI re-use across the EU has been uneven.
- The varying speed with which individual Member States implement a PSI re-use policy creates the risk of further fragmentation of the internal market, to the detriment of businesses, consumers and citizens.

2.5. Insufficient enforcement of re-use provisions

- Although the Member States have general redress systems that work, only some have made provision for specific authorities to hear complaints against public bodies infringing the rules on the re-use of PSI.
- Re-users in most Member States face cumbersome and lengthy proceedings that are ill-suited to deal with their complaints. The lack of an effective redress mechanism in some Member States (time to decision, effective competences of bodies) leads to inefficiencies on some markets with the resulting negative impacts on competition and innovation and, ultimately, on consumer welfare.

3. RATIONALE FOR EU ACTION, EU ADDED VALUE AND SUBSIDIARITY

The PSI Directive was adopted on the basis of Article 114 TFEU (95 TEC), as its subject matter covers the free circulation of services and the proper functioning of the internal market. Any amendments to the Directive should thus have the same legal basis,

The economic importance of open data, in particular government data, as a basis for new information services and products is now more widely recognised. While the basic framework for the re-use of PSI has been harmonised at EU level, some issues remain.

First, the purpose of the Directive is to alleviate the fragmentation of the internal market and to stimulate cross-border PSI-based products and services, since discrepancies in national PSI regulations can prevent the smooth functioning of the internal market for PSI re-use.

For example, action is needed at EU level, in the form of an amendment to the scope of the Directive, in order to guarantee that public domain material held by cultural establishments is made available for re-use in a consistent manner across the EU and not within the individual Member States alone.

Secondly, the aim of the legal framework established by the Directive is to ensure conditions that will maximise the potential benefits of re-use of public data resources in Europe. However, with the development of PSI-based activities, some of the current substantive rules do not reflect this objective. For example, the current charging regime is considered inadequate as an incentive for activities based on the re-use of public data. In addition, several Member States have individually moved to a marginal cost charging regime, whereas others have maintained a cost recovery regime. Only action at EU level in the form of binding harmonisation can ensure that the default charging rule and exceptions are consistent across the EU in order to stimulate re-use activities.

4. POLICY OBJECTIVES

PSI is an important primary material for digital content products and services with a large, hitherto unexploited potential. The general objective of this EU action is to contribute to economic growth and job creation by improving the conditions for the exploitation of PSI and facilitating the further development of the internal PSI re-use market. Moreover, opening up of PSI for re-use will have a positive effect on the transparency, efficiency and accountability of governments and contribute to citizen empowerment. The general objective is fully in line with the horizontal EU-level strategies, in particular the Commission's Europe 2020 Strategy launched on 3 March 2010 with the aim of turning Europe *'into a smart, sustainable and inclusive economy delivering high levels of employment, productivity and social cohesion'*.

This general objective is broken down into specific objectives, which are to:

- (1) **Prevent distortions of competition on the EU market:** a level playing field re-users and incumbent 'hybrid' public sector bodies engaging in commercial activities.
- (2) **Stimulate the digital content market for PSI-based products and services:** several conditions regarding data re-use along the PSI exploitation chain, both commercial and non-commercial, must be fulfilled to stimulate economic growth and job creation through PSI re-use.
- (3) **Stimulate cross-border exploitation of PSI:** A true, thriving internal market for PSI re-use will not emerge unless the regulatory and practical barriers to re-use across the EU are removed.

5. POLICY OPTIONS

The following options are examined in the impact assessment report (Chapters 4 and 5): (i) no change to the Directive (baseline), (ii) repeal of the Directive, (iii) soft law measures, (iv) legislative amendments, and (v) a package solution combining soft law measures and legislative amendments.

No policy change: no change to the Directive (baseline)

In 2009, after the first review of the Directive, the Commission concluded that the progress and implementation of the Directive was uneven, and identified a number of remaining barriers. Due to insufficient evidence on the impact and application of the Directive, the Commission decided to conduct a further review by 2012 in order to consider whether legislative amendments were necessary, taking into consideration the progress made by the

Member States in the meantime. For the re-use of PSI, this option of ‘no policy change’ would mean that the current provisions of the Directive and the national transposing instruments remain applicable.

Discontinuing existing EU action: repeal of the PSI Directive

The PSI Directive has established basic conditions for PSI re-use throughout the EU and has brought about a change in policies and legislation in the Member States. Without the Directive, Member States would be free to repeal or amend national implementing legislation on PSI re-use. This particular option would effectively result in the removal of all the regulatory obligations currently contained in the Directive and in the transposing instruments.

Soft law measures

These instruments, e.g. Commission guidelines or recommendations, provide additional information and/or interpretation on some of the provisions of the PSI Directive.

During the consultation, respondents in all categories suggested adoption of soft law measures for licensing models, technical formats and price calculations (including for calculating marginal costs). Respondents also generally called for more awareness raising actions, (exchange of best practices, expertise and experience).

Legislative amendments

This option consists of amending the substance of the Directive, i.e. the rights and obligations established by its provisions. Such legislative options include: i) extending the scope of the Directive to the currently excluded sectors; ii) establishing a rule for charging based on marginal costs, possibly with exceptions; iii) amending the general principle to make accessible documents re-usable; iv) making it obligatory to publish data in machine-readable formats; v) making it obligatory to appoint an independent regulator; vi) reversing the burden of proof of compliance with charging requirements; vii) requiring the scope of ‘public task’ to be defined by legislative means only.

Package solution

This option would combine substantive changes to the re-use framework (legislative amendments option) with additional guidance on the principles to be applied by national authorities when they implement it at national level (soft law measures option).

6. COMPARISON OF POLICY OPTIONS AND IMPACTS

Option 1 (*status quo*) would increase the likelihood of differing approaches at national levels, giving rise to regulatory uncertainty and distorting conditions of competition in the internal market.

Option 2 (*repeal of the Directive*) would remove the safety net provided at EU level by the minimum PSI re-use rules leading to increased legal uncertainty and divergence of national approaches, to the detriment of competition and the internal market for the re-use of PSI. Repealing the Directive is also entirely inconsistent with related initiatives on data accessibility and re-usability pursued at EU and national level.

Option 3 (*soft law measures*), alone it would facilitate application of the rules of the PSI Directive on licensing and charging, but would nonetheless increase the likelihood of divergent approaches at national level, creating regulatory uncertainty and distorting competitive conditions in the internal market.

Option 4 (*legislative amendments*) would establish a regulatory framework conducive to re-use: it would broaden the scope of the Directive by bringing in cultural material, create an enforceable EU right to re-use public data, bring down prices for the re-use of PSI, and enhance the effectiveness of the redress mechanism for enforcement of the right to re-use.

Option 5 (*package of soft law measures and legislative amendments*) shares the benefits of Option 4, but it would in addition make it easier to apply the rules of the PSI Directive on licensing and charging. As a result, it would ensure the convergence of national regulatory approaches to re-use throughout the internal market, thereby enhancing legal certainty, increasing incentives and lowering barriers to PSI re-use.

A comparison of these different policy options suggests that **Option 5** (*package of soft law measures and legislative amendments*) offers the best balance between promotion of PSI re-use, harmonisation and legal certainty in the light of national circumstances and implementation costs.

7. MONITORING AND EVALUATION

The core indicator of progress towards meeting the identified objectives is the correct transposition and application of the PSI Directive.

Progress in the re-use of PSI and related policies across the EU will also be measured in accordance with indicators, which may be refined in collaboration with the Member States (as envisaged by the eGovernment Action Plan 2011-2015).

The Commission will gather data through a reporting obligation for Member States, input from stakeholders as part of a regular dialogue, and independent studies.

The Commission will review the application of the Directive and will communicate the results to the European Parliament and to the Council three years after the transposition date