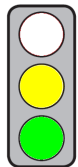


## MAIN ISSUES

**Objective of the Communication:** The Commission comments on the impact so far of the Directive on the re-use of public sector information ("PSI Directive"; 2003/98/EC) and presents possible additional measures.

**Parties Affected:** Commercial and other users of public sector information; scientists; scientific publishing companies; public authorities.



**Pros:** (1) Information from public sector bodies should be made available to the general public.  
(2) Marginal cost charging for the use of public sector information is to be welcomed.

**Cons:** The consideration to make "scientific information" paid for by the public purse available to the general public is to be rejected, as this would mean that scientific publishing companies could no longer maintain their role in science and intellectual property rights would be affected.

## CONTENT

### Title

**Communication COM(2009) 212** of 7. May 2009: **Re-use of Public Sector Information** – Review of Directive 2003/98/EC

### Brief Summary

Legal provisions cited refer to Directive 2003/98/EC to be reviewed.

#### ► Object and aim

- The public sector possesses extensive information such as maps, satellite images, legislation, judicial decisions, statistics, company data or population and patent registers, all of which can serve as raw material for products and services offered by private providers such as navigation systems, weather forecasts or financial and insurance services. The Commission estimates the market volume of this "public sector information" (PSI) in the EU at EUR 27 billion.
- According to the Commission, the increased use of PSI acts "in the digital age as a driver of economic activity" (p. 2), which has the effect of increasing competitiveness and creating more jobs.
- The Directive 2003/98/EC ("PSI Directive") is to remove barriers to the private use ("re-use") of PSI in the internal market.
- The aim of the Communication is to review the impact thus far of the PSI Directive and to show new ways to tap the full economic potential in re-using PSI.
- According to the Commission, the way in which public sector bodies in the EU handle PSI "is in clear contrast with the US" (S. 3), where re-use is strongly encouraged. 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".

#### ► Rules of the PSI Directive

- The PSI Directive does not impose any obligation on Member States to allow access to PSI and its re-use (Art. 1 (2) lit. c, 9. Recital). However, it does harmonise the conditions under which accessible PSI are to be made available.
- In particular, the PSI Directive regulates:
  - charges for supplying and allowing re-use (cost recovery together with a "reasonable return on investment", Art. 6),
  - the transparency of the conditions and standard charging for re-use (Art. 7),
  - licences for the use of PSI (Art. 8),
  - Member States' obligations to ensure "practical arrangements" facilitating the search and re-use of PSI (Art. 9),
  - the prohibition of discriminatory conditions for the re-use of PSI through different users (Art. 10) and
  - the prohibition of agreements through which public sector bodies grant exclusive rights to single market actors (Art. 11 Abs. 1); exclusivity agreements are admissible only in exceptional cases if concluded in the public interest (Art. 11 (2)).

- The following documents are especially excluded from the application scope of the PSI Directive:
  - documents excluded from access by a Member State to protect national security or business secrets,
  - documents for which third parties hold intellectual property rights or
  - documents held by public broadcasting corporations, educational and research establishments (e.g. universities, libraries) or cultural establishments (e.g. museums, theatres) (Art. 1 (2)).
- Member States may take measures exceeding the minimum set of rules established by the PSI Directive and allow for a wider scope of re-use (Art. 1 (1)).
- By 31. December 2008 all Member States had to “terminate” all existing exclusive arrangements on the re-use of PSI (Art. 11 (3)).

► **Impact of the PSI Directive**

The market for PSI has grown significantly in three sectors particularly (p. 6):

- For geographical PSI the re-used amount of data grew by 350% between 2002 and 2007. In Germany the market volume was EUR 1.5 billion in 2007.
- For meteorological PSI the re-used amount of data grew by 70% between 2002 and 2007. In the EU the market volume was EUR 350 million.
- For legal PSI the re-used amount of data grew by 40% between 2002 and 2007.

► **Consultation results on the PSI Directive**

From May to September 2008 the Commission consulted the Member States and PSI re-users regarding the application of the PSI Directive.

- Member States are satisfied with the Directive. They believe that it is premature to amend the Directive.
- Re-users complain about high prices, restrictive licensing conditions and a lack of information on the availability of PSI. Therefore, they propose the following amendments to the Directive:
  - that the scope of application be extended,
  - that public bodies be obliged to allow the re-use of PSI,
  - that charging principles limited to the costs for reproduction and dissemination of PSI be established (“marginal cost charging”),
  - that independent regulators and/or conflict resolution mechanisms be introduced and
  - national PSI asset lists be drawn up.

► **Persisting barriers to the re-use of PSI**

The Commission criticises “the way public sector bodies handle their information resources” (p. 3).

In addition to the “lukewarm” attitude of public sector bodies towards commercial re-use (p. 3), the Commission sees the following hindrances:

- lack of information for private companies on the availability of PSI and their relating rights,
- public sector bodies’ obligation in many Member States to finance parts of their activities through their own commercial re-use,
- possible competition between public sector bodies and private re-users in commercial re-use which can lead to restrictive licensing and charging conditions, and the granting of exclusive rights.

► **Future opportunities for the increased re-use of PSI**

– **Extending the scope of the PSI Directive**

- The Commission deems an extension of the scope of the Directive to public cultural, educational and research establishments as well as public broadcasting corporations problematic, since they are covered by third party intellectual property rights.
- However, the Commission wishes that also within these excluded sectors
  - “scientific information” paid for by the public purse are widely available to all – i.e. cost-free,
  - decisions on a possible free access to PSI for their re-use are made in a transparent and non-discriminatory manner,
  - contents not protected by copyright (“public domain”) should remain in the public domain and be cost-free once digitised and made accessible through the internet.

– **Transparent and marginal cost charging**

- Public sector bodies are to disclose the calculation basis they use for complying with the upper limit for charges for the availability of PSI (Art. 6).
- If public sector bodies charge no or only marginal costs to cover only the reproduction and dissemination of PSI (“marginal cost charging”), then, according to the Commission, the social and economic benefits far outweigh the immediate benefits of additional public revenue.

– **Facilitation of PSI supply**

The Commission invites public sector bodies to identify their PSI resources and make them available in “stable formats” through national information registers and via internet (p. 9).

– **“Fair Competition” between public sector bodies and re-users**

If public sector bodies use PSI for commercial activities which fall outside their “public tasks”, Member States must ensure “fair competition” under equal conditions for all market actors (Art. 10 (2)). For this purpose, the Commission encourages Member States to define “public tasks” in such a way that they allow “maximum PSI re-use” (p. 9) and further considers establishing a stricter application practice of competition law.

#### – Conflict resolution

As private re-users of PSI are dependent on their cooperation with public sector bodies, they often hesitate to complain about the behaviour of the latter. Furthermore, court procedures can be long and expensive. The Commission therefore requires Member States to establish efficient and inexpensive conflict resolution mechanisms.

### Changes Compared to the Status quo

The Commission wishes to review the effects of the PSI Directive again in 2012 at the latest and – if necessary – will then propose amendments.

### Statement on Subsidiarity

Since different national rules on the re-use of PSI impose barriers on the internal market, it is the Commission's opinion that a "minimum degree of harmonisation" is necessary.

### Political Context

The Commission has established a PSI platform ([www.epsiplus.net](http://www.epsiplus.net)). There discussion forums are available and information on the latest developments in re-using PSI, best practices, examples of new products and services as well as legal rules.

### Options for Influencing the Political Process

Leading Directorate General:	DG Information Society and Media
Consultation Procedure:	Not intended.

## ASSESSMENT

### Economic Impact Assessment

#### Ordoliberal Assessment

The Commission's concern **to make** already existing **information of public sector bodies available to all is to be welcomed** in principle.

**However, it is not the task of the public authorities to generate profits in the market**, since public activities with profit targets distort competition at the expense of private actors. Therefore, **the commercial use of public information through public authorities should not be allowed**. In this context, the aim of "fair competition" between public sector bodies and private re-users is incorrectly expressed by the Commission, as public sector bodies should not even enter into competition with private companies in the first place. A stricter application of competition law, as announced by the Commission, is to be welcomed as a minimum requirement.

As public sector bodies should not pursue any commercial interests, the current rule of the PSI Directive, which provides for a "reasonable return on investment" (Art. 6), must be criticised. In fact, **it is favourable that the Commission aims at introducing marginal cost charging**.

**The Commission's consideration**, however, **to make scientific information paid for by the public purse available to the general public** on the basis of the PSI Directive, **is to be rejected**. Cost-free access would, of course, have considerable benefits for many users; however, **patent protection must be ensured** first and foremost. Cost-free access to results from the applied sciences paid for by taxes must not lead to patents being undermined or even not filed for registration at all. This would massively limit the incentive for research. Also unclear is still the question of whether and how this Directive will apply to research which – such as the Fraunhofer Institute in Germany – is partly financed through public and partly through private funds. The Commission does not address either issue.

Besides, scientific publishing companies would actually be deprived of the very business basis which serves to ensure a target group-specific processing of information and also has a selective function. The latter is indispensable, particularly in view of the flood of scientific publications. Scientific publications are available at scientific institutes and libraries – increasingly online too – so that potential users already have access to the results of tax-financed scientific studies.

#### Impact on Efficiency and Individual Freedom of Choice

The efficient use and processing – i.e. also the private re-use of public information – is to be welcomed in principle. The collection of information requires the deployment of scarce resources. The use and dissemination of information once collected, however, hardly incurs any additional costs. **A marginal cost charging for PSI is therefore to be principally welcomed** also with regard to efficiency. Fees which are higher than the marginal costs convey the wrong signals regarding scarcity and thus exclude too many potential users from PSI. The costs for collecting information should, as a rule, be covered by the general tax revenue.

#### Impact on Growth and Employment

In certain economic areas a reduction of fees can have a positive impact on growth and employment.

### Impact on Europe as a Business Location

Not evident.

## Legal Assessment

### Legal Competence

An EU-wide harmonised standard for the re-use of PSI removes barriers to the development of – mainly cross-border – services based on PSI and thus improves the functioning of the internal market. The legal competence for that is laid down in Art. 95 TEC.

### Subsidiarity

Unproblematic.

### Proportionality

Unproblematic.

### Compatibility with EU Law

**The Commission's intention to facilitate as far as possible the re-use of PSI must necessarily reach its limits where intellectual property rights are affected.** This limit should also be considered in view of the Commission's plan to make scientific information paid for by the public purse available to all.

### Compatibility with German Law

In 2006 the PSI Directive was transposed into German law by the Re-Use of Information Act (*Informationsweiterverwendungsgesetz – IWG*). While access rights to PSI are governed particularly by the Freedom of Information Act (*Informationsfreiheitsgesetz – IFG*), the Environmental Information Act (*Umweltinformationsgesetz – UIG*) and various state laws, the IWG itself does not provide for any access rights (§ 3 (1) IWG). Decisions on the re-use of an already existing right to access PSI must be taken in a non-discriminatory and transparent manner (§§ 3 und 4 IWG).

In Germany, exclusivity agreements which by way of exception “are not required for services in the public interest” expired *ipso jure* by 31. December 2008 (Art. 11 (3), § 3 (4) a. E. IWG).

However, it is controversial whether the German practice of re-using legal information is in line with EU legislation. Juris GmbH, a legal information platform 50% of which is held by the Federal Republic of Germany, receives, pursuant to its cooperation agreement with the German government, legal texts and court decisions in a special format for exclusive re-use. In particular it is questionable if the cooperation agreement actually constitutes an exclusivity agreement. If positive, it expired *ipso jure* at the end of 2008.

Irrespective of this question, the Commission is of the opinion that in amending the remuneration conditions of the cooperation agreement the Directive on the award of public service contracts (92/50/EEC) was infringed. Therefore, on 14. April 2009 – as a preliminary stage to Treaty infringement proceedings pursuant to Art. 226 TEC – it demanded formally a statement on the matter from Germany.

## Alternative Policy Options

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## Possible Future EU Action

Currently not evident.

## Conclusion

The Commission's wish to make already existing public sector information available to all at a charge of marginal cost is to be welcomed in principle. The commercial re-use of PSI through public sector bodies should, however, not be allowed from an ordoliberal viewpoint. The re-use of PSI by private companies is to be welcomed. Nevertheless, in so doing the intellectual property rights of third parties must not be affected. For that reason, especially the Commission's consideration to make scientific information paid for by the public purse available to all is to be rejected. Access to tax-financed research results must not lead to patents being undermined or even not filed for registration at all.