



Opinion of the European Data Protection Supervisor

on the 'Open-Data Package' of the European Commission including a Proposal for a Directive amending Directive 2003/98/EC on re-use of public sector information (PSI), a Communication on Open Data and Commission Decision 2011/833/EU on the reuse of Commission documents

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16 thereof,

Having regard to the Charter of Fundamental Rights of the European Union, and in particular Articles 7 and 8 thereof,

Having regard to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data¹,

Having regard to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data², and in particular Article 41(2) thereof,

HAS ADOPTED THE FOLLOWING OPINION:

1. INTRODUCTION

1.1. Background

1. On 12 December 2011, the Commission adopted a Proposal for a Directive amending Directive 2003/98/EC on re-use of public sector information (PSI) (the 'Proposal').³ The Proposal is part of the 'Open-Data Package', which also includes two other documents adopted on the same day: (i) a Commission Communication entitled 'Open data - An engine for innovation, growth and transparent governance' (the 'Communication')⁴ and (ii) a Commission Decision on the reuse of Commission documents (the 'Decision')⁵.

¹ OJ L 281, 23.11.1995, p. 31.

² OJ L 8, 12.1.2001, p. 1.

³ COM(2011) 877 final.

⁴ COM(2011) 882 final.

⁵ 2011/833/EU.

2. The EDPS has not been consulted as required by Article 28(2) of Regulation (EC) No 45/2001. This is regrettable in view of the large amount of personal data potentially concerned by this initiative. This Opinion is therefore based on Article 41(2) of the same Regulation. The EDPS recommends that a reference to this Opinion be included in the preamble of the instrument adopted.

1.2. Objectives and scope of the Proposal and the Decision; focus of the EDPS Opinion

3. The objective of the Proposal is to update and amend the existing text of Directive 2003/98/EC on re-use of public sector information (the 'PSI Directive').
4. The PSI Directive aims at facilitating the re-use of public sector information throughout the European Union by harmonizing the basic conditions for re-use and removing barriers to re-use in the internal market. The PSI Directive contains provisions on non-discrimination, charging, exclusive arrangements, transparency, licensing and practical tools to facilitate the discovery and reuse of public documents.⁶
5. One of the key novel policy objectives of the Proposal, as described in Section 5.1 of the Communication, is the objective to introduce the 'principle that all public information that is not explicitly covered by one of the exceptions is reusable for both commercial and non-commercial purposes'.⁷ In particular, the proposed amendment to Article 3(1) of the PSI Directive specifically requires Member States to ensure that 'existing documents' held by public sector bodies of the Member States shall be 'reusable for commercial and non-commercial purposes'.
6. Other relevant new provisions of the Proposal include, subject to some exceptions, the limitation on the amounts that can be charged by the public sector for the information reused to 'marginal costs incurred for their reproduction and dissemination' (revised Article 6(1)). Further, the Proposal also expands the scope of the PSI Directive to include libraries, archives, museums and university libraries.
7. The objective of the Decision is to establish the rules applicable to the Commission for the reuse of its own documents.
8. This Opinion focuses, in Sections 2 and 3, on the Proposal itself while Section 4 briefly comments on the Decision. Section 2 provides a general overview of the data protection concerns relating to open data, with challenges and considerations that serve as important points of reference and determine, to a large part, the approach that the EDPS takes in his more specific recommendations in Section 3.

2. GENERAL COMMENTS

2.1. Application of data protection law

9. As a preliminary remark, the EDPS emphasizes that although there is a vast amount of public sector information that does not contain personal data, the public sector also

⁶ See Explanatory Memorandum to the Proposal, Section 1.

⁷ See also Section 3.2, para 6 of the Explanatory Memorandum to the Proposal which calls for action at Union level to 'guarantee' that 'reuse is allowed for valuable core public sector data across Member States'; and Section 5, heading 'Legislative amendments', item (iii) of the Executive Summary of the Impact Assessment, which calls for 'amending the general principle to make accessible documents reusable'.

holds large amounts of personal data of varying nature and sensitivity. Examples are: information about directors and other representatives of companies registered in a trade register, information about salaries of civil servants or expenses of Members of Parliament, and the health records of patients held by a national health service.

10. In this context, it is important to note that any information relating to an identified or identifiable natural person, be it publicly available or not, constitutes personal data. Moreover, the mere fact that such data has been made publicly available does not lead to an exemption from data protection law. The reuse of personal data made publicly available by the public sector, thus remains subject in principle to the relevant data protection law.⁸
11. As will be described in more detail in Section 3.1, the PSI Directive, as proposed, is not entirely clear as to whether it also applies to personal data, and if so to what extent and under which conditions.

2.2. Key data protection concerns

12. Establishing a principle of reuse for all public sector information is likely to make such information much more easily accessible. This may bring potential benefits leading to greater transparency and innovative reuse of public sector information, including some categories of personal data.
13. However, increased accessibility of information may also increase the risks of misuse of personal data. These risks apply even if the personal data concerned have already been made publicly available (or can be made publicly available) according to the 'access regime' of the Member State concerned. Unless adequate safeguards are implemented, and consistently and effectively enforced, the information made available for reuse may be unlawfully harvested (across Europe and beyond)⁹, combined with other information, sold, and ultimately used for purposes that (i) were not foreseen initially, (ii) may be disproportionate and (ii) may lack an adequate legal basis. Among the privacy risks present are also criminal activities such as identity theft.
14. Such risks are not entirely novel, and apply to many large-scale projects where large amounts of personal data, previously stored in local government offices in paper form, are made publicly available in digital form on the Internet.¹⁰
15. However, open data projects take accessibility of information to a whole new level. Indeed, many open data projects involve (i) making entire databases available (ii) in standardized electronic format (iii) to any applicant without any screening process, (iv) free of charge, and (v) for any commercial or non-commercial purposes under an open license. This new form of accessibility is the main purpose of open data, but it is not without its risks if applied indiscriminately and without appropriate safeguards. To illustrate: a traditional e-government portal allowing public access to specific personal

⁸ See the judgment of the European Court of Justice of 16 December 2008 in Case C-73/07 *Tietosuoja- ja valtuutettu vs Satakunnan Markkinapörssi Oy en Satamedia Oy*, at paragraphs 38-49. See also paragraph 3, section II.2 of Opinion 7/2003 of the Article 29 Data Protection Working Party, cited in full in footnote 11 below.

⁹ Regarding international transfers and reuse of PSI by organizations in third countries, see Section 3.4 below.

¹⁰ See, for example, the EDPS Opinion on the Proposal for a Directive of the European Parliament and of the Council amending Directives 89/666/EEC, 2005/56/EC and 2009/101/EC as regards the interconnection of central, commercial and companies registers (2011/C 220/01), Section III.1.

data in a trade registry, if correctly configured, and with adequate security measures in place, may make it very difficult for any third party to harvest (and thus, subsequently use) the content of the entire database. By simply opening up the entire database for reuse for any interested party, accessibility and the risks inherent thereto increase exponentially.

2.3. PSI reuse under the current data protection framework

16. To address data protection concerns, the PSI Directive refers to the general data protection framework:

- recital 21 notes that the PSI 'Directive should be implemented and applied in full compliance with the principles relating to the protection of personal data' and
- Article 1(4) declares that the PSI Directive 'leaves intact and in no way affects the level of protection of individuals with regard to the processing of personal data'.

17. However, neither the existing PSI Directive nor the Proposal provide any specific provisions on data protection to address the fact that they mandate the reuse of a large amount of public sector information and may have a significant impact on data protection.

18. In this respect, the Article 29 Data Protection Working Party ('WP29') provided further guidance in 2003 with regard to the application of the current data protection framework to the reuse of PSI when it includes personal data.¹¹ The WP29 Opinion focused on the principle of purpose limitation¹², but also addressed other issues such as the legitimacy (legal grounds) of the public disclosure and reuse of PSI, the special protection provided for sensitive data, transfers to third countries, data quality, and data subjects' rights.

19. The WP29 Opinion shows that applying the current legal framework for data protection to PSI reuse raises a number of issues.

20. In particular, it is not easy to implement the principle of purpose limitation effectively in case of PSI reuse. On the one hand, the very idea and driving force for innovation behind the concept of 'open data' and PSI reuse is that the information should be available for reuse for innovative new products and services, and thus, for purposes that are not previously defined and cannot be clearly foreseen. On the other hand, purpose limitation is a key data protection principle and requires that personal data that have been collected for a specific purpose should not at a later stage be used for another, incompatible purpose, unless certain additional conditions have been met.¹³ It is not easy to reconcile these two concerns (open data and data protection).

¹¹ See Opinion 7/2003 on the re-use of public sector information and the protection of personal data - Striking the balance - of the Article 29 Data Protection Working Party adopted on 12 December 2003 (WP 83). See also two other related Opinions of the WP29: Opinion 3/1999 on Public sector information and the protection of personal data adopted on 3 May 1999 (WP20) as well as Opinion 5/2001 concerning a European Ombudsman Special Report, adopted on 17 May 2001.

¹² See Article 6(1)(b) of Directive 95/46/EC.

¹³ This principle equally applies to personal data that are publicly available. The mere fact that personal data are publicly available for a specific purpose, does not necessarily mean that such personal data should also be open for reuse for any other purpose.

21. The challenge is to clearly define in advance the personal data that could be made publicly available and the appropriate data protection safeguards which ensure legal certainty while allowing innovation and reuse for any (lawful) purpose.
22. Another key principle provided for in Directive 95/46/EC is proportionality¹⁴. There are many different methods, modalities and granularities of making personal data publicly available. Some of these may be more intrusive than others and present more risks. Consequently, some may be considered proportionate, while others may not.¹⁵ To ensure proportionality while allowing room for flexibility is therefore another key challenge.
23. In a similar context – i.e. the balance between the right to protection of personal data and the right to public access to documents – the EDPS has recommended that EU institutions and bodies should follow a ‘proactive approach’ to the issue. This requires that the scope for a public disclosure of personal data is analysed proactively and at the earliest stage, and that the persons involved are informed accordingly so as to allow them to exercise their rights.¹⁶ This approach will help to find appropriate solutions on a case by case basis and would also appear to be relevant for the possible reuse of PSI containing personal data.

2.4. The Proposal should address data protection more specifically

24. Although Directive 95/46/EC provides a solid legal framework and the Opinion of WP29 offers important clarifications, some provisions of the PSI Directive itself should also be clarified and further specified to help ensure a higher and more consistent level of data protection across the European Union as well as a higher level of legal certainty for data subjects.
25. In the current state of harmonization of European law, there are considerable differences among national rules and practices with regard to PSI reuse. In particular, cultural attitudes to transparency and as a consequence national legislation on access to documents diverge. National data protection laws implementing Directive 95/46/EC are also not always similar in this respect.
26. Despite these differences, the data subjects must be reassured that their data will be consistently protected irrespective of their transfer to another Member State, for purposes of reuse.
27. In addition, undue complexity and fragmentation should be avoided not only to ensure adequate protection to data subjects but also to enable free flow of personal data across Europe, another key objective of Directive 95/46/EC.

¹⁴ See Article 6(1)(c) of Directive 95/46/EC.

¹⁵ See, for example, ECJ judgment of 9 November 2010, joined Cases 92/09 and C-93/09 (*Schecke and Eifert*); in particular, paras 81, 85 and 86. In this case the ECJ underlined that derogations and limitations in relation to the protection of personal data must apply only in so far as strictly necessary. The ECJ considered, in particular, that the European institutions should explore different methods of publication in order to find the one which would be consistent with the purpose of the publication while causing the least interference with the data subjects' rights to private life and to the protection of personal data.

¹⁶ See the EDPS paper on ‘Public access to documents containing personal data after the *Bavarian Lager* ruling’ of 24 March 2011, available at the EDPS website (<http://www.edps.europa.eu>), especially its chapter III on page 6-11.

28. The December 2011 Draft Policy Recommendations on Privacy prepared by the Thematic Network LAPSI¹⁷ clearly illustrate the unsatisfactory and unnecessary disparities in the manner in which the PSI Directive has been transformed in Member States with regard to data protection.
29. Furthermore, considering that the legal framework for data protection is currently under review¹⁸, the EDPS considers that it would also be appropriate where relevant if new concepts such as privacy by design and accountability were taken into account, and practical tools such as data protection impact assessments were specifically referred to in the Proposal.¹⁹
30. For these reasons, the EDPS recommends that the Proposal should go beyond simply referring to the 'principles relating to the protection of personal data' (see recital 21) and should more clearly define in what situations and subject to what safeguards information containing personal data may be required to be made available for reuse, as further elaborated in Section 3.

3. SPECIFIC RECOMMENDATIONS

3.1. The applicability of the principle of reuse to personal data should be clarified and made subject to additional conditions

Relevant provisions: Article 1(2)(c) and 1(3)

31. The proposed amendment to Article 3(1) of the PSI Directive (read together with Article 1(1))²⁰ specifically requires Member States to ensure that 'existing documents' held by public sector bodies of the Member States shall be 'reusable for commercial and non-commercial purposes'.
32. Neither the existing PSI Directive nor the Proposal contains any specific exceptions for personal data. That said, Article 1(2)(c) excludes from the scope of the PSI Directive 'documents which are excluded from access by virtue of the access regimes in the Member States, including on the grounds of the protection of national security (i.e. State security), defence, or public security, [and] statistical or commercial confidentiality'.
33. Article 1(3) further provides that the PSI Directive 'builds on and is without prejudice to the existing access regimes in the Member States' and that it 'shall not apply in cases in which citizens or companies have to prove a particular interest under the access regime to obtain access to the documents.'

¹⁷ LAPSI is a European Thematic Network 'on Legal Aspects of Public Sector Information', funded by the Commission, see <http://www.lapsi-project.eu/>. Last version of the draft Policy Recommendations is available at http://www.lapsi-project.eu/wiki/index.php/Policy_recommendation_on_privacy.

¹⁸ See Commission proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (COM(2012)11 final). See also EDPS Opinion on the data protection reform package, 7 March 2012, available at http://www.edps.europa.eu/EDPSWEB/edps/Consultation/Reform_package.jsessionid=46ACCFDB9005EB950DF9C7D58BDE5377.

¹⁹ See, for example, Commission Recommendation of 9.3.2012 on preparations for the roll-out of smart metering systems C(2012) 1342 final.

²⁰ Unless otherwise indicated, references are made to the revised Articles of the PSI Directive, as proposed.

34. These provisions imply that documents containing personal data only fall under the PSI Directive if such documents are, or can be made, publicly available by virtue of 'the access regimes in the Member States'.

Article 1(2)(c) should specifically refer to the protection of privacy and personal data as a ground for exclusion from access

35. Article 1(2)(c) leaves it entirely up to each Member State how to design its own 'access regime' and only includes some examples on what grounds a document may be 'excluded from access'. Privacy and data protection are at present not specifically listed among these examples.

36. For the sake of clarity and a consistent approach with the general rules on public access to documents, the EDPS recommends that Article 1(2)(c) be amended and the notion of 'protection of privacy and personal data' be specifically mentioned among the examples of possible grounds for exclusions from access regimes.

Assessment of data protection risks and safeguards to mitigate such risks

37. As shown above in Section 2.2, open data projects take accessibility of information to a new level and may pose significant additional risks to the protection of personal data.

38. In this perspective, the EDPS recommends that the Proposal address, at least in a general way, the issue how reuse of public sector information containing personal data can be made compliant with data protection rules.

39. It is crucial that public sector bodies take a proactive approach²¹ when making personal data available for reuse. A proactive approach would make it possible to make the data publicly available with the explicit purpose of reuse, subject to specific conditions and safeguards in compliance with data protection rules.

40. To achieve this, the EDPS recommends that the Proposal specify that before a public sector body makes personal data available for reuse, it should carry out an assessment to decide whether the personal data involved can be made available for reuse. This assessment should also establish under what conditions and subject to what specific data protection safeguards reuse is permissible. Such an assessment would be comparable to the data protection impact assessment as foreseen in the proposal for a general data protection regulation²². The EDPS suggests including the main elements of the assessment in the text of the proposed Directive.

41. The assessment must ensure that there is an adequate legal basis for the transfer and reuse of the data under national law, the reuse is available only for a compatible purpose, and applicants are required to comply with all other provisions of applicable data protection law. The assessment may also identify additional safeguards: it might result, for example, in requiring full or partial anonymization before the data are made available for reuse and a prohibition on re-identification of data-subjects (see paras 45-46 and 56 below).

²¹ See in this context also the EDPS paper mentioned in footnote 16.

²² With regard to data protection impact assessments, see Article 33 of the Commission proposal for a general data protection framework and paras 200-205 of the 7 March 2012 EDPS Opinion on the data protection reform package cited in footnote 18.

42. Where appropriate, applicants may also need to satisfy specific additional terms and conditions in their licenses, or even prepare a data protection impact assessment themselves (see para 53 below). In some cases the public sector body may also limit the number of licenses it may award and restrict it to applicants meeting certain criteria from the data protection perspective (see para 52 below).

3.2. Anonymization

Partially anonymized and/or aggregate data may also include personal data

43. It must be emphasized that the data will continue to be considered as 'personal data', and thus, subject to data protection law, so long as the individuals can be identified, either directly or indirectly. The fact that some 'anonymization techniques' have been used, does not mean that the data are necessarily considered as 'anonymized' in the meaning of recital 26 of Directive 95/46/EC.²³ A dataset may contain personal data, and may eventually lead to identification of an individual even after direct identifiers have been removed and various additional anonymization techniques have been used.²⁴
44. Full anonymization is not always feasible, and is becoming increasingly difficult to achieve with the advance of modern computer technology and the ubiquitous availability of information. Nevertheless, unless full anonymization can be completely ensured, data protection requirements continue to apply such as, for example, the need for an appropriate legal basis for the transfer and reuse, the principle of purpose limitation, and the specific protection afforded to sensitive data (such as health-related information). Therefore, compliance with data protection laws must be ensured whenever data are not fully anonymized.

Adequate levels of anonymization should be ensured

45. To address these situations, the EDPS recommends that the Proposal should clearly specify that the public sector body must ensure that the personal data concerned have been anonymized and are made available for reuse in such anonymized form only, unless the assessment carried out pursuant to points 37-42 above establishes, in full compliance with applicable data protection law, that the personal data may be made available in such a way that the data subjects could be identified (e.g. names of directors in a trade register).
46. The assessment carried out pursuant to points 37-42 should further establish whether data protection law permits the data to be made available for reuse after only partial anonymization and if so, what level of anonymization is required in order to minimize the risk of re-identification and misuse of the personal data. In principle, anonymization should be carried out to the extent appropriate, considering on one hand the purposes of processing and on the other hand the nature of the data and the potential consequences for the individuals in case they are re-identified.²⁵

²³ Recital 26, see notably: 'to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person'.

²⁴ See Opinion of the Article 29 Data Protection Working Party on the concept of personal data (WP 136), page 15-20. See also the leading judgment of the UK House of Lords of 9 July 2008 in *CSA v. SIC*, as well as relevant provisions of a number of EDPS opinions, for example, Section 3.1 of the EDPS Prior Checking Opinion of 3 September 2010 on the European Surveillance System ('TESSy').

²⁵ An example where aggregated data were made available for reuse subject to certain safeguards may be the UK's crime maps. Here the creators of the dataset for information reuse not only removed personal identifiers (such as names of perpetrators and victims of crimes committed) before making the data available for reuse, but

47. Where the assessment shows that the personal data cannot be made available for reuse after partial anonymization and full anonymization is not feasible, the EDPS notes that PSI containing personal data does not necessarily and always have to be made publicly available in order for these data to benefit from the possibilities of reuse. Data can, for example, be made available for reuse to only some licensees, selected on the basis of specific criteria.
48. For example (if all other data protection requirements are met), fine-grain microdata²⁶, after some degree of anonymization, may be made available for scientific purposes to qualified researchers, who have undergone a strict screening process, and agreed to comply with strict licensing conditions including strict confidentiality obligations.²⁷

3.3. Licensing

Relevant provision: Article 8

49. The proposed Article 8(1) provides that '[p]ublic sector bodies may allow re-use without conditions or may impose conditions, such as indication of source, where appropriate through a license. These conditions shall not unnecessarily restrict possibilities for re-use and shall not be used to restrict competition.'

Data protection clause

50. The EDPS recommends that Article 8 of the Proposal clearly require that whenever personal data are included in the PSI that is made available for reuse, the license terms should include a specific data protection clause.
51. With regard to the content of this clause, the EDPS emphasizes that depending on the circumstances - such as the data protection risks present, the complexity of the case, the nature of the personal data involved and the expected purposes of reuse - the content and detail required for a license may vary. Therefore, a simple reference to the need to comply with applicable data protection law will not be sufficient.
52. The EDPS would also welcome if the Proposal clarified - in Article 8 or eventually in a recital - that where appropriate the public sector body may make the reuse of personal data subject to a screening of applicants, may limit the number of licenses that it may award and may restrict the award of the license to applicants who demonstrate that they meet specific criteria from the data protection perspective. In

also aggregated data to such an extent so as to minimize the risk of re-identification and misuse of the data. This was done as a result of a balancing exercise which aimed at minimizing risks while at the same time providing a useful level of detail for those who wished to be informed about crime rates in particular neighbourhoods.

²⁶ Microdata are 'sets of records containing information on individual respondents or on economic entities. In other words, microdata are the basic information collected within surveys...' (Source: Eurostat, at http://epp.eurostat.ec.europa.eu/portal/page/portal/research_methodology/statistical_confidentiality/confidential_data/introduction#microdata).

See also Wikipedia definition: at [http://en.wikipedia.org/wiki/Microdata_\(statistics\)](http://en.wikipedia.org/wiki/Microdata_(statistics)): 'In the study of survey and census data, microdata is information at the level of individual respondents. For instance, a national census might collect age, home address, educational level, employment status, and many other variables, recorded separately for every person who responds; this is microdata.'

²⁷ See, for example, EDPS Prior Checking Opinion of 22 July 2010 on 'Empirical analysis of correlations between work system variables and decision-making'.

any event, the second sentence of the proposed Article 8(1) should not be interpreted to preclude this discretion.

The applicant should demonstrate how the risks are addressed

53. The EDPS further recommends that - in cases where this is necessary considering the risks to the protection of personal data - applicants should demonstrate²⁸ that any risks to the protection of personal data are adequately addressed and that the applicant will process data in compliance with applicable data protection law.

Purposes of reuse

54. In addition, the EDPS recommends that the Proposal clarify that reuse of PSI containing personal data can be made contingent upon the purpose for which reuse is made, in derogation from the general rule allowing reuse for any commercial and non-commercial purposes. License conditions, in particular, should include the purposes for which personal data can be processed, or at least indicate the original purposes for which data were collected, and require that reuse must be made for a compatible purpose.

55. With regard to the concept of 'compatible purpose', the EDPS notes that pursuant to Article 6(1)(b) of Directive 95/46/EC, '[f]urther processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards'. Recital (29) further specifies that 'these safeguards must in particular rule out the use of the data in support of measures or decisions regarding any particular individual'.

56. Where appropriate in light of the assessment carried out pursuant to points 37-42 above (for example, but not only, when partially-anonymized statistical data are made publicly available for scientific research), the EDPS recommends that the Proposal require that the license conditions should include that re-users shall not make any attempt to identify the data subjects or use the data in support of measures or decisions regarding these individuals. They should also not allow or facilitate third parties to do so.

3.4. Reuse by organizations outside of the European Union

57. Article 26(1)(f) of Directive 95/46/EC allows an exception from the general requirements governing international data transfers in cases where the 'transfer is made from a [public] register'.

58. However, this exception cannot be interpreted to provide a legal basis in itself for data transfers of entire databases for purposes of reuse to a country which would not provide an adequate level of protection. As already stated by the WP29 and by the EDPS in several opinions²⁹, derogations to the requirements for transfers shall apply on a case by case basis and should not allow frequent, massive or structural transfers.

²⁸ This can be done, for example, by carrying out a data protection impact assessment. With regard to data protection impact assessments, see footnote 24 above.

²⁹ See the Working document of the Article 29 Working Party of 26 November 2005 on a common interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995 (WP114); and EDPS opinion of 7 March 2012 on the data protection reform package, par. 224.

59. There is a great difference between transferring publicly available data, case by case, based on Article 26(1)(f), to a third country that does not provide an adequate level of protection, on the one hand, and allowing access to and full reuse of an entire database (or large parts of this database) to a country which does not provide adequate levels of protection for personal data. Similarly, there is a difference between on the one hand allowing a third country citizen to download, possibly after payment of a fee, a selective list of the board of directors of a company, and allowing on the other hand a Member State's entire business registry data, including personal addresses and handwritten specimen signatures of all of its registered company representatives to be made available for reuse in a third country.
60. Therefore, the EDPS recommends that the PSI Directive specifically address the issue of international data transfers by requiring an adequate level of protection or another adequate legal basis for transfers to third countries for purposes of reuse. The EDPS also recommends that the Proposal specify that license conditions must also reflect this requirement, and when necessary, contain appropriate contractual clauses. Reliance on Article 26(1)(f) of Directive 95/46/EC is not sufficient.

3.5. Costs of anonymization

Relevant provision: Article 6

61. The Proposal proposes to modify Article 6 and require that '[w]here charges are made for the re-use of documents, the total amount charged by public sector bodies shall be limited to the marginal costs incurred for their reproduction and dissemination.'
62. This general prohibition from charging over and above marginal costs of reproduction and dissemination is followed by a number of exceptions, including for libraries, museums and archives, as well as for certain other public sector bodies exploiting intellectual property rights. No specific exceptions are set forth for public sector information containing personal data.

Exception for costs of anonymization

63. Anonymization of existing documents held by public sector bodies may, in some cases, be a complex, time-consuming and expensive task requiring specific expertise that not all public sector bodies may have available. However, carrying out such anonymization may often be necessary in light of the risks involved and may also be a worthwhile investment considering the value of the partially or fully anonymized public sector information that can thus be made available for reuse. Allowing public sector bodies to be compensated for their costs may help ensure that the task of anonymization will be carried out thoroughly and thus, may lead to a higher level of data protection while at the same time also contributing to a higher level of transparency and availability for reuse.
64. For these reasons, it could be considered whether to provide another exception under Article 6(1) to allow the public sector body to charge the licensee at least the reasonable expenses it incurs to pre-process (e.g. digitalize), aggregate and/or (partially or fully) anonymize the personal data offered for reuse, where the use of such techniques are justified in light of the increased risks deriving from offering such data for reuse.

65. Charging for reuse, of course, should not be confused with charging for access under access to documents legislation. To minimize any potential conflicts in this regard, it could be helpful if the Proposal were to clarify (for example, in a recital) that this derogation is without prejudice to national access to documents legislation, which may require that access to documents must be provided free of charge or at a price not exceeding, for example, the 'marginal costs incurred for their reproduction and dissemination'.

3.6. Further guidance on anonymization and licensing; consultation of the WP29

66. The EDPS recommends that the Commission develop further guidance on the data protection aspects of PSI reuse, in particular, on anonymization and licensing, in a Commission document (Commission recommendation, implementing act or working document). In this context, a template for adequate data protection clauses in licenses could be particularly helpful. The EDPS further recommends that the Proposal specifically refer to such additional guidance and specify the form in which such guidance will be provided (e.g. implementing acts).

67. Additionally, the EDPS notes that the WP29 could continue to play a useful role by providing expert advice and promoting more consistency in this field, especially by collecting best practices from Member States and developing harmonized approaches based on lessons learnt from national experience. As noted in point 18, the issue of PSI reuse was on the agenda of the WP29 in 2003. In light of the current review of the PSI Directive and the experience gained in the meantime, as well as the current review of the EU data protection framework, an update could also, among others, address in more detail the issues of anonymization and licensing.

4. ANALYSIS OF THE COMMISSION DECISION

68. The EDPS regrets that he has not been consulted on the draft Decision before its adoption. Considering that the Decision has already been adopted, he will only briefly highlight some of the items that could have benefited from improvement. He suggests that his comments be taken into account, for the time being, at least in interpreting the provisions of the Decision. In a second stage, when the Decision is reviewed, an amendment should be considered.

69. The EDPS, first, recommends that the term 'public data' in Art 2(a) be more clearly defined, taking into account applicable EU legislation on access to documents and data protection, as well as the jurisprudence of the European Courts.

70. The EDPS further recommends that the Decision be clearer on whether it also applies to personal data other than those that can be disclosed under EU access to documents legislation. Art 2(c) seems to exclude this but for purposes of legal certainty it would be helpful if this were made clearer.

71. Finally, the comments made with regard to the Proposal on anonymization (Section 3.2), licensing (Section 3.3), international transfers (Section 3.4) and costs of anonymization and aggregation (Section 3.5) also apply *mutatis mutandis* to the Decision.

5. CONCLUSIONS

72. The reuse of PSI that contains personal data may bring significant benefits, but also entails considerable risks to the protection of personal data. In light of these risks, the EDPS recommends that the Proposal should more clearly define in what situations and subject to what safeguards information containing personal data may be required to be made available for reuse. In particular, the Proposal should:

- establish more clearly the scope of applicability of the PSI Directive to personal data (Section 3.1);
- require that an assessment be carried out by the public sector body concerned before any PSI containing personal data may be made available for reuse (Section 3.1);
- where appropriate, require that data be fully or partially anonymized and license conditions specifically prohibit re-identification of individuals and the reuse of personal data for purposes that may individually affect the data subjects (Sections 3.2 and 3.3);
- require that the terms of the licence to reuse PSI include a data protection clause, whenever personal data are processed (Section 3.3);
- where necessary considering the risks to the protection of personal data, require applicants to demonstrate (via a data protection impact assessment or otherwise) that any risks to the protection of personal data are adequately addressed and that the applicant will process data in compliance with applicable data protection law (Section 3.3);
- clarify that reuse can be made contingent upon the purpose for which reuse is made, in derogation from the general rule allowing reuse for any commercial and non-commercial purposes (Section 3.3);

73. In addition, the EDPS suggests:

- to consider allowing costs of pre-processing (such as digitalization), anonymization and aggregation to be charged to license-holders where appropriate (Section 3.5), and
- that the Commission develops further guidance, focusing on anonymization and licensing and consult the WP29 in this regard (Section 3.6).

Done in Brussels, 18 April 2012

(signed)

Peter HUSTINX
European Data Protection Supervisor