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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

Amending Directive 2003/98/EC on re-use of public sector information

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. 1. CONTEXT OF THE PROPOSAL

1.1. Grounds for and objectives of the proposal

Directive 2003/98/EC of the European Parliament and the Council on the re-use of public sector information ('PSI Directive') was adopted on 17 November 2003. The Directive aimed to facilitate the re-use of PSI throughout the Union by harmonising the basic conditions for re-use and removing major barriers to re-use in the internal market. The Directive contains provisions on non-discrimination, charging, exclusive arrangements, transparency, licensing and practical tools to facilitate the discovery and re-use of public documents.

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 resulted in the publication of Communication COM(2009) 212¹. It found that, despite the progress made, a number of barriers still persisted, namely 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. The Commission concluded that a further review should be carried out by 2012, when more evidence on the impact, effects and application of the Directive would be available. This proposal of the Commission is the result of the second review.

Public sector information is an important primary material for digital content products and services with a large hitherto unexploited potential. The general objective of this Union action is to contribute to economic growth and job creation by unlocking the economic potential of government-owned data through improved conditions for the exploitation of PSI. The general objective is fully in line with the Union's horizontal 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'*.

The opening up of PSI for re-use will also have a positive effect on the transparency, efficiency and accountability of governments and contribute to citizen empowerment.

Ultimately therefore, the PSI Directive aims to catalyse a change of culture in the public sector, creating a favourable environment for value-added activities resulting from the re-use of public information resources.

The regulatory challenge is to provide the market with an optimal legal framework to stimulate the digital content market for PSI-based products and services, including its cross-border dimension, and to prevent distortions of competition on the Union market for the re-use of PSI. The Commission proposal therefore targets the chain of commercial and non-commercial exploitation of PSI, to ensure specific conditions at different stages of the chain so that access is improved and re-use facilitated.

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0212:FIN:EN:PDF>.

Data must be unlocked and made discoverable and effectively available for re-use. Financial and non-financial transaction costs must remain as low as possible. Re-users must have access to an efficient and effective redress mechanism to be able to enforce their rights. The original Directive must be reinforced in order to overcome the remaining barriers, e.g. lack of information about what data are actually available, restrictive or unclear rules governing access and re-use conditions, discouraging, unclear and inconsistent pricing where the re-use of information is chargeable, and the overall excessive complexity of the process for obtaining permission to re-use PSI, in particular for SMEs. In addition, re-users and incumbent ‘hybrid’ public sector bodies (combining public tasks with the commercial exploitation of data) must enjoy a level playing field and competitive conditions unrestrained by any discriminatory treatment or unjustified exclusive agreements for the exploitation of PSI. Finally, the internal market for PSI re-use will thrive only if regulatory and practical borders to re-use across the Union are removed and the same types of data are available on similar, if not the same, terms and conditions irrespective of their national origin.

Benefits to be gained from improved access and facilitated re-use include: innovation in products based directly on PSI and in complementary products; reduced transaction costs and efficiency gains in the public sector; and, increasingly, the combining of different public and private information to produce new goods.

1.2. General context

Public bodies produce, collect or hold a wealth of information and content, ranging from statistical, economic or environmental data to archival material, collections of books or works of art. The digital revolution has significantly increased the value of this resource for innovative products or services based on data as raw material.

The economic importance of opening data resources, including public data, is now widely recognised. For example, according to a 2010 report by The Economist, data have become ‘*an economic raw input almost on 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. A recent study estimates the total market for public sector information in 2008 at €28 billion across the Union⁴. The same study indicates that the overall economic gains from further opening up public sector information by allowing easy access are around €40 billion a year for the EU27. The total direct and indirect economic gains from PSI applications and use across the whole EU27 economy would be in the order of €140 billion annually.

Beyond fuelling the innovation and creativity that stimulate economic growth, open public data also empower citizens, thereby enhancing participatory democracy and promoting transparent, accountable and more efficient government.

The challenge for the Directive is to provide the market with an optimal legal framework to facilitate and stimulate the commercial and non-commercial re-use of public open data. Ultimately therefore, the Directive and its revision aim to catalyse a change of culture in the public sector, creating a favourable environment for value-added activities resulting from the re-use of public information resources.

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

³ <http://webarchive.nationalarchives.gov.uk/+/interactive.bis.gov.uk/digitalbritain/report/>, p. 214.

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

The review of the Directive thus forms part of the Digital Agenda for Europe and the Europe 2020 strategy aiming for smart, sustainable and inclusive growth⁵. The review is in fact a key action of the Digital Agenda (key action 1c).

1.3. Consistency with other policies

1.3.1. PSI policy and Union rules of competition

One of the aims of the PSI Directive is to limit distortions of competition on the Union market and thus create a level playing field for all potential re-users of PSI. In this regard, the PSI Directive contains a specific formulation of the more general Union rules on competition, namely Article 10(2) — prohibiting cross-subsidies — and Article 11 — prohibiting, with exceptions, exclusive agreements.

1.3.2. PSI policy and environmental policy

The PSI Directive, Directive 2003/4 on public access to environmental information (the Aarhus Directive) and Directive 2007/2/EC establishing an Infrastructure for Spatial Information in the EU (INSPIRE) together constitute a set of Union measures to ensure the widest possible dissemination of environmental information held by public bodies. These Directives, although not sharing common immediate objectives, complement one another and share the common objective of enhancing the transparency and availability of public data.

The Directive on public access to environmental information contributes to greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making, and, ultimately, a better environment. It supports the Commission's policy on the re-use of PSI, as wide access to information is a precondition for its re-use, and environmental data are a very important source of information for the creation of new products and services. The INSPIRE Directive plays a similar role where spatial data are concerned.

In addition, the PSI Directive is of crucial importance for the overall coherence of the forthcoming Shared Environmental Information System.

1.3.3. PSI and integrated maritime policy

In September 2010 the Commission issued a Communication to the European Parliament and to the Council — Marine Knowledge 2020 — aimed at unlocking the potential of Europe's marine knowledge. Its three-pronged approach, seeking to make the use of marine data easier and less costly, to foster competitiveness of marine data users and to enhance understanding of Europe's seas and oceans, is consistent with and reinforces the Commission's policy towards the re-use of PSI.

1.3.4. PSI policy and common transport policy

One of the 40 initiatives put forward in the new Transport White Paper⁶ is the creation of framework conditions to promote the development and use of intelligent systems for

⁵ http://ec.europa.eu/information_society/digital-agenda/index_en.htm.

⁶ WHITE PAPER Roadmap to a Single European Transport Area — Towards a competitive and resource efficient transport system. COM(2011) 144 final (28.3.2011).

interoperable and multimodal scheduling, information, online reservation systems and smart ticketing.

This initiative is directly related to the Action Plan⁷ for the Deployment of Intelligent Transport Systems (ITS) for road transport and its interfaces with other modes, adopted by the Commission in December 2008, and to Directive 2010/40/EU⁸ of 7 July 2010 on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport. These two instruments aim to accelerate and coordinate the deployment of ITS applications, including Union-wide real-time traffic information services and Union-wide travel information services.

Under Directive 2010/40/EU, the Commission will adopt binding specifications for ‘the provision of Union-wide real-time traffic information services’ and for ‘the provision of Union-wide travel information services’ to address the provision of traffic regulation data by the transport authorities and to guarantee access by private companies to relevant public data.

Such specifications, but also a possible follow-up legislative proposal to ensure access to and re-use of public transport information, could contribute significantly to the Commission’s policy on the re-use of PSI, by giving citizens or companies the right to access and re-use road traffic or public transport information for new products and services based on the highly dynamic content of such data. This supports the Commission’s policy on the re-use of PSI.

1.3.5. PSI policy and the initiative on open access to scientific information

The Commission’s objective in the area of scientific information is to maximise the benefits of information technologies (internet, supercomputing networks, data mining) for better access to and easier reuse of scientific knowledge. ‘Open access’ policies pursue the goal of making scientific articles and research data freely accessible to the reader on the web. The Commission intends to take steps to promote access to and preservation of scientific information, including publications and data of research projects funded by the Union budget.

The Commission’s objectives in this area are very closely aligned with those of the PSI Directive in the sense that both aim to make public information more widely available in Europe for access and re-use.

1.3.6. PSI policy and policy on digitisation and cultural heritage

The digitisation of cultural collections promotes access to culture by making European cultural heritage held by Europe’s cultural institutions — books, maps, audio, films, manuscripts, museum objects, etc. — more easily accessible to all for work, study and leisure. At the same time, digitisation turns these resources into a lasting asset for the digital economy, creating many opportunities for innovation, although the full exploitation of digital cultural assets is still embryonic. Business models are being explored and commercial activities are just starting. The goals of ensuring the wide availability of public sector information (PSI Directive) and placing digitised cultural assets at the disposal of creative and innovative businesses (digitisation policy) are entirely consistent and mutually reinforcing and fully comply with the European Agenda for Culture and the Council Workplan on Culture.

⁷ COM(2008) 886 final/2 — Corrigendum of 20.3.2009.

⁸ OJ L207/1, 6.8.2010.

2. RESULTS OF CONSULTATIONS WITH INTERESTED PARTIES AND IMPACT ASSESSMENTS

2.1.1. Public consultation

A wide-ranging public online consultation on the review of the Directive was held in accordance with established Commission standards. The consultation was open from 9 September 2010 until 30 November 2010. It was published on the Commission's 'Your Voice in Europe' webpage:

(<http://ec.europa.eu/yourvoice/ipm/forms/dispatch?form=psidirective2010>).

A press release was issued upon the launch of the open consultation. The launch was also publicised on Twitter, on the Commission's Information Society PSI Website (http://ec.europa.eu/information_society/policy/psi/index_en.htm) and on the ePSIplatform portal⁹. In addition, stakeholders were informed about the consultation and invited to submit their views through their associations or via individual email messages. All interested parties, including governments, public-sector content holders (including from currently excluded sectors), commercial and non-commercial re-users, experts, academics and citizens, were invited to contribute.

The consultation yielded 598 replies, which were published on the Commission's PSI website¹⁰. The responses encompassed all the various actors in the PSI value chain: PSI content holders (8%), other public authorities not holding any PSI (4%), PSI re-users (13%), academics and experts (23%), citizens (48%) and respondents identified as 'other' (4%).

An overwhelming majority of respondents signalled that PSI re-use had not reached its full potential and supported further action to stimulate re-use and promote the cross-border provision of PSI-based products and services. Many respondents favoured amendments to the Directive, ranging from some 40% of PSI content holders up to over 70% of re-users. Suggestions for legislative amendments and for additional soft-law guidance did not differ significantly among specific categories of respondents, but most supported amending the general principle to establish a right to re-use and adopting additional measures (to open up public data resources and to facilitate re-use, e.g. asset lists of available documents, simplified or no licensing conditions, marginal costs, etc.).

The question of charging also received much attention from all respondents. It is clear from many submissions that clarification and guidance are required on many charging issues, including charging strategies versus free access, as well as the admissible tariffs. Charging for re-use based on either full or partial cost recovery was not supported by stakeholders. Frequently, respondents called for either a ban on charging or clarification of the term of 'reasonable return on investment'. Most supported free non-commercial re-use. Many arguments for and against the marginal costs solution were advanced by respondents in all categories, and there is no consensus on this point.

Finally, respondents across all sectors generally called for support and deployment measures to promote PSI re-use, including across borders. These measures range from guidance on many topics (licensing, charging, data quality) to support for the development of national data portals and for a European single access point to data.

⁹ <http://www.epsiplatform.eu/>.

¹⁰ http://ec.europa.eu/information_society/policy/psi/index_en.htm.

In summary, responses to this consultation demonstrate that, compared with the 2009 review, the culture of re-use has advanced in many Member States (in particular the UK, France, and Denmark). However, much remains to be done to maximise the potential of PSI re-use and to fully exploit the rules established by the 2003 PSI Directive, several provisions of which require amendment or clarification. In addition, the lack of consensus or trends among respondents with respect to the issue of charging for the re-use of PSI demonstrates that no one-size-fits-all solution will do and differences in the needs of both PSI holders and PSI re-users must be taken into account in order not to inhibit data re-use.

The responses received were taken into account in the assessment of options that led to the package of legislative and soft-law measures included in this proposal.

2.1.2. Collection and use of expertise

Over the last few years, the Commission has conducted the following studies to assess the different aspects of the PSI re-use market, including its economic valuation: MEPSIR (Measuring European Public Sector Information Resources)¹¹, study on Exclusive Agreements¹², Economic Indicators and Case Studies on PSI pricing models¹³, study on pricing models for PSI (Deloitte, not yet published), study on the market value of PSI (Vickery, not yet published), study on the re-use of cultural material¹⁴.

The studies measured the re-use of PSI in the Member States, estimated the overall market size for PSI in the Union (in 2006 and 2010-2011), assessed the existence of possible exclusive agreements concluded by public sector bodies under Article 11 of the Directive, provided insight into current PSI developments in Member States, recommended economic indicators to measure PSI re-use, assessed different models of supply and charging for PSI, and provided an overview of the re-use of PSI in the cultural sector. The results of these studies have provided valuable economic data to determine the most appropriate options for revision of the PSI Directive.

In addition, the Commission has obtained important legal analysis from research undertaken within the LAPSI¹⁵ (Legal Aspects of Public Sector Information) thematic network, which looked into the legal implications of specific issues involving the re-use of PSI such as exceptions to a default rule for charging marginal costs, the concept of ‘public task’ and non-discrimination, whether or not public undertakings should be covered by the PSI Directive, and licensing conditions.

Finally, further data have been gathered through networking, cooperation, coordination and awareness-raising activities with Member States and stakeholders. The ePSIplatform provides wide-ranging PSI data from across the Union¹⁶.

¹¹ http://ec.europa.eu/information_society/policy/psi/actions_eu/policy_actions/mepsir/index_en.htm.

¹² http://ec.europa.eu/information_society/policy/psi/facilitating_reuse/exclusive_agreements/index_en.htm.

¹³ http://ec.europa.eu/information_society/policy/psi/docs/pdfs/economic_study_report_final.pdf.

¹⁴ <http://tinyurl.com/culturePSI>.

¹⁵ <http://www.lapsi-project.eu/>.

¹⁶ <http://www.epsiplatform.eu/>.

2.1.3. *Impact assessment*

The impact assessment examined 5 options to deal with the identified problems, i.e. insufficient clarity and transparency of PSI re-use rules, locked information resources, excessive charges, lack of a level playing field, insufficient enforcement of re-use provisions, and inconsistent approaches adopted by individual Member States. Apart from repealing the Directive, the options broadly fall into two categories, i.e. options involving maintaining the current provisions and options involving changes ranging from simple technical ‘tweaks’ to substantial amendment of the provisions.

Option 1: No policy change: no changes to the Directive (baseline)

For the re-use of public sector information, this option of ‘no policy change’ would mean that the current provisions of the Directive and the national transposing instruments remain applicable.

Option 2: Discontinuing existing Union action: repeal of the PSI Directive

The PSI Directive has set the basic conditions for PSI re-use throughout the Union and has led to 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 for PSI re-use. This would effectively result in the removal of all the regulatory obligations currently contained in the Directive and in the transposing instruments.

Option 3: Soft law measures

These instruments, e.g. Commission guidelines or recommendations, provide additional information and/or interpretation of some of the provisions of the PSI Directive. Soft law measures would include e.g. recommended licensing provisions, guidance on technical formats, or guidance on price calculations (including for calculating marginal costs).

Option 4: Legislative amendments

This option consists of amending the substance of the Directive, i.e. the rights and obligations established by its provisions. This includes: i) extension of the scope of the Directive to currently excluded sectors (cultural, educational and research establishments as well as public service broadcasters); 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) imposing a requirement to publish data in machine-readable formats; v) imposing a requirement to appoint an independent regulator and to provide for an effective and efficient redress mechanism; vi) reversing the burden of proof of compliance with charging requirements; vii) imposing a requirement to define the scope of ‘public task’ by legislative means only.

Option 5: Packaged solution

This option would combine substantive changes to the re-use framework (Option 4) with additional guidance on the principles to be applied by national authorities when they implement it at national level (Option 3).

Result of the impact assessment

In the impact assessment, the capacity of PSI-based products and services to bring economic and social benefits to all consumers was weighed against the economic and social costs resulting from potential losses in revenue incurred by releasing public data for re-use at no or low cost. Particular attention was paid to the fact that any policy in this area must ensure that there is level playing field between hybrid public bodies engaging in commercial re-use of the data they produce or collect with public funds and their private competitors and that a disproportionate burden is not imposed on the public sector, thereby endangering PSI production, investment and innovation.

According to the assessment, no changes to the current legal framework (option 1) will increase the likelihood of divergent approaches at national level, giving rise to regulatory uncertainty and distorting competitive conditions in the internal market.

Repealing the Directive (option 2) would remove the safety net provided at Union level by the minimum PSI re-use rules. Leaving Member States free to act in an area previously subject to harmonised Union rules would give rise 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 would also be totally inconsistent with related data accessibility and re-usability initiatives pursued at Union and national level.

Adopting soft law measures only (option 3) will facilitate application of the rules of the PSI Directive on licensing and charging, but will nonetheless increase the likelihood of divergent approaches at national levels, giving rise to regulatory uncertainty and distorting competitive conditions in the internal market.

Amending the current provisions of the Directive (option 4) will help establish a more re-use friendly regulatory framework: this will broaden the scope of application of the Directive by including cultural material, create an enforceable Union right to re-use PSI, bring down prices for the re-use of PSI, enhance the effectiveness of the redress mechanism for enforcement of the right to re-use, and bring about a more level playing field with public bodies competing with private re-users. However, this option carries a risk of divergences — and legal uncertainty — in the application of individual provisions, in particular on cost calculation and licensing conditions.

Combining legislative amendments with soft law measures (option 5) combines the benefits of option 3 and 4. This will hence ensure the convergence of national re-use friendly regulatory approaches throughout the internal market, thereby enhancing legal certainty, increasing incentives and lowering barriers to PSI re-use. The analysis undertaken in the impact assessment indicates that this option offers the best balance between promotion of the re-use of PSI, harmonisation and legal certainty in the light of national circumstances.

3. LEGAL ELEMENTS OF THE PROPOSAL

3.1. Legal basis

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

3.2. Subsidiarity and proportionality

The PSI Directive was adopted on the basis of Article 114 TFEU (formerly Article 95 TEC). The overall aim of this revision is to eliminate persisting and emerging differences between Member States in the exploitation of public sector information, which hamper realisation of the full economic potential of this resource. Specific aims are to facilitate the creation of Union-wide products and services based on PSI, to ensure the effective cross-border use of PSI for value-added products and services, to limit distortions of competition on the Union market, and to prevent the deepening of disparities among Member States in dealing with re-use of PSI.

The content of the proposal corresponds to those aims.

The economic importance of open data, in particular government data, as a basis for new information services and products is now more widely recognised than in 2002, when the Commission made its proposal for a Directive. While the basic framework rules for the re-use of public sector information have been harmonised at Union level, several issues remain and others have emerged.

As a result, the existing legal framework is considered by stakeholders to be no longer sufficiently capable of ensuring conditions that can maximise the potential benefits of public data resources in Europe. With the development of PSI-based activities, some of the current substantive rules hamper the development of activities based on the re-use of PSI and lead to a fragmented internal market.

The current charging regime, based on cost recovery as allowed by the rules of the Directive, is considered inadequate for incentivising activities based on the re-use of public data. Only harmonisation at Union level can ensure that the default charging rule and exceptions are consistent across the Union in order to stimulate re-use activities.

Moreover, in some Member States public bodies have discretion as to whether to permit re-use¹⁷. As a result, *‘there is an obvious lack of harmonisation amongst the Member States regarding re-use of public data, which may also apply to (public) traffic data’*¹⁸. Action at Union level is necessary to guarantee e.g. that re-use is allowed for valuable core public sector data across Member States and that individual commercially active public bodies do not hamper the development of innovative products and services.

Also, difficulties in obtaining effective redress in several Member States when PSI re-use rules are infringed deter re-users from engaging in ambitious re-use projects across the Union.

Further harmonisation of the basic principle, the charging regime, the scope and enforcement mechanisms in order to alleviate fragmentation of the internal market and to stimulate cross-border PSI-based products and services cannot be achieved at Member State level alone.

As regards scope, the object of the revision is not to regulate, directly or indirectly, the right of access to public documents, which remains the sole and exclusive competence of Member

¹⁷ UK Re-use of Public Sector Information Regulations 2005, ‘A public sector body may permit re-use’ (regulation 7(1)).

¹⁸ Study on guaranteed access to traffic and travel data and free provision of universal traffic information, Lyon, 11 October 2010.

States. The revised provisions would apply to the re-use of documents where these are generally accessible, including under national access rules.

Also, the object of the revision is not to regulate the processing of personal data by public sector bodies or the status of intellectual property rights, which are not affected beyond what is already the case under the existing rules of the Directive.

Without targeted action at Union level, regulatory activities at national level, which have already been initiated in a number of Member States, might exacerbate the significant differences that already exist. Such existing national provisions will in the absence of further harmonisation disturb the functioning of the internal market. Conversely, Union action is restricted to the elimination or prevention of the identified obstacles.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

Amending Directive 2003/98/EC on re-use of public sector information

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee¹⁹,

Having regard to the opinion of the Committee of the Regions²⁰,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information²¹ establishes a minimum set of rules governing the re-use and the practical means of facilitating re-use of existing documents held by public sector bodies of the Member States.
- (2) Open data policies which encourage the wide availability and re-use of public sector information for private or commercial purposes, with minimal or no legal, technical or financial constraints, can play an important role in kick-starting the development of new services based on novel ways to combine and make use of such information. However, this requires a level playing field at Union level in terms of whether or not the re-use of documents is authorised, which cannot be achieved by leaving it up to the different rules and practices of the Member States or the public bodies concerned.
- (3) Allowing re-use of documents held by a public sector body adds value for the re-users, for the end users and for the society in general and in many cases for the public body

¹⁹ OJ C , , p. .

²⁰ OJ C , , p. .

²¹ OJ L 345, 31.12.2003, p. 90.

itself, by providing feedback from re-users and end users which allows the holder to improve the quality of the information collected.

- (4) Since the first set of rules on re-use of public sector information was adopted in 2003, the amount of data in the world, including public data, has exploded and new types of data are being generated and collected. In parallel, we are witnessing continuous revolution in technologies for analysis, exploitation and processing of data. This rapid technological evolution makes it possible to create new services and new applications, which are built upon the use, aggregation or combination of data. The rules adopted in 2003 no longer keep pace with these rapid changes and as a result the economic and social opportunities offered by re-use of public data risk to be missed.
- (5) At the same time, Member states have now established re-use policies under the 2003/98/EC Directive and some of them have been adopting ambitious open data approaches to make re-use of accessible public data easier for citizens and businesses beyond the minimum level set up by the Directive. To prevent different rules in different Member States acting as a barrier for the cross-border offer of products and services, and to enable comparable public data sets to be re-usable for pan-European applications based on them, a minimum harmonisation is also required as to what public data is available for re-use in the internal information market, consistent with the relevant access regime.
- (6) Directive 2003/98/EC does not contain an obligation to allow re-use of documents. The decision whether or not to authorise re-use remains with the Member States or the public sector body concerned. At the same time, the Directive builds on national rules on access to documents. Some Member States have expressly linked the right of re-use to this right of access, so that all generally accessible documents are re-usable. In other Member States, the link between the two sets of rules is less clear and this is a source of legal uncertainty.
- (7) Directive 2003/98/EC should therefore lay down a clear obligation for Member States to make all generally available documents re-usable. As it constitutes a limitation to the intellectual property rights held by the authors of the documents, the scope of such a link between the right of access and the right of use should be narrowed to what is strictly necessary to reach the objectives pursued by its introduction. In this respect, taking into account the Union legislation and Member States' and Union's international obligations, notably under the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), documents on which third parties hold intellectual property rights should be excluded from the scope of Directive 2003/98/EC. If a third party was the initial owner of a document held by libraries (including university libraries), museums and archives that is still protected by intellectual property rights, that document should, for the purpose of this Directive, be considered as a document for which third parties hold intellectual property rights.
- (8) The application of Directive 2003/98/EC should be without prejudice to the rights that employees of public sector bodies may enjoy under national rules.
- (9) Moreover, where any document is made available for re-use, the public sector body concerned should retain the right to exploit the document.

- (10) The scope of application of the Directive is extended to libraries (including university libraries), museums and archives. The Directive does not apply to other cultural institutions, such as operas, ballets or theatres, including the archives that are part of these institutions.
- (11) To facilitate re-use, public sector bodies should make documents available through machine readable formats and together with their metadata where possible and appropriate, in a format that ensures interoperability, e.g. by processing them in a way consistent with the principles governing the compatibility and usability requirements for spatial information under Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE)²²
- (12) Where charges are made for the re-use of documents, they should in principle be limited to the marginal costs incurred for their reproduction and dissemination, unless exceptionally justified according to objective, transparent and verifiable criteria. The necessity of not hindering the normal running of public sector bodies covering a substantial part of the operating cost relating to the performance of their public task from the exploitation of their intellectual property rights should notably be taken into consideration. The burden of proving that charges are cost-oriented and comply with relevant limits should lie with the public sector body charging for the re-use of documents.
- (13) In relation to any re-use that is made of the document, public sector bodies may, where practicable, impose conditions on the re-user, such as acknowledgment of source. Any licences for the re-use of public sector information should in any case place as few restrictions on re-use as possible. Open licences available online, which grant wider re-use rights without technological, financial or geographical limitations and relying on open data formats, may also play an important role in this respect. Therefore, Member States should encourage the use of open government licences.
- (14) Proper implementation of some of the features of this Directive, such as means of redress, compliance with charging principles and reporting obligations require supervision by independent authorities competent on the re-use of public sector information. To ensure consistency between approaches at Union level, coordination between the independent authorities should be encouraged, particularly through exchange of information on best practices and data re-use policies.
- (15) Since the objective of this Directive, namely to facilitate the creation of Union-wide information products and services based on public sector documents, to ensure the effective cross-border use of public sector documents by private companies for added-value information products and services, and to limit distortions of competition on the Union market, cannot be sufficiently achieved by Member States and can therefore, in view of the intrinsic pan-European scope of the proposed action, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on the Functioning of the European Union. In accordance with the principles of proportionality, as set out in that Article,

²² OJ L 108, 25.4.2007, p. 1.

this Directive does not go beyond what is necessary in order to achieve those objectives.

- (16) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, including the right to property (Article 17). Nothing in this Directive should be interpreted or implemented in a manner that is inconsistent with the European Convention on Human Rights.
- (17) It is necessary to ensure that the Member States (see recital 19) report to the Commission on the extent of the re-use of public sector information, the conditions under which it is made available, and the work of the independent authority. To ensure consistency between approaches at Union level, coordination between the independent authorities should be encouraged, particularly through exchange of information on best practices and data re-use policies.
- (18) The Commission should assist the Member States in implementing the Directive in a consistent way by giving guidance, particularly on charging and calculation of costs, on recommended licensing conditions and on formats, after consulting interested parties.
- (19) In accordance with the Joint Political Declaration of Member States and the Commission on explanatory documents of [date], Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.
- (20) Directive 2003/98/EC should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1
Amendments to Directive 2003/98/EC

Directive 2003/98/EC is amended as follows:

1. Amendments to Article 1: (Subject matter and scope):
 - (1) In paragraph 2, point (a) is replaced by the following:

‘(a) documents the supply of which is an activity falling outside the scope of the public task of the public sector bodies concerned, as defined by law or by other binding rules in the Member State in question;’
 - (2) In paragraph 2, point (e) is replaced by the following:

‘(e) documents held by educational and research establishments, such as research facilities, including, where relevant, organisations established for the transfer of research results, schools and universities (except university libraries

in respect of documents other than research documents protected by third party intellectual property rights) and ;’

(3) In paragraph 2, point (f) is replaced by the following:

‘(f) documents held by cultural establishments, other than libraries, museums and archives;’

(4) In paragraph 4, ‘Community’ is replaced by ‘Union’.

(5) At the end of paragraph 5, the following sentence is added:

‘The provisions of this Directive are without prejudice to the economic or moral rights that employees of public sector bodies may enjoy under national rules.’

2. In Article 2 (Definitions) the following paragraph is added:

‘6. ‘machine-readable’ means that digital documents are sufficiently structured for software applications to identify reliably individual statements of fact and their internal structure.’

3. Article 3 is replaced by the following:

‘Article 3

General principle

(1) Subject to paragraph (2) Member States shall ensure that documents referred to in Article 1 shall be re-usable for commercial or non-commercial purposes in accordance with the conditions set out in Chapters III and IV.

(2) For documents for which libraries (including university libraries), museums and archives have intellectual property rights, Member States shall ensure that, where the re-use of documents is allowed, these documents shall be re-usable for commercial or non-commercial purposes in accordance with the conditions set out in Chapters III and IV.

4. Amendments to Article 4 (Requirements applicable to the processing of requests for re-use):

(1) At the end of paragraph 3, the following sentence is added:

‘However, libraries (including university libraries), museums and archives shall not be required to include such a reference.’

(2) At the end of paragraph 4, the following wording is added:

‘The means of redress shall include the possibility of review by an independent authority that is vested with specific regulatory powers regarding the re-use of public sector information and whose decisions are binding upon the public sector body concerned.’

5. Amendments to Article 5 (Available formats):
 - (1) In paragraph 1, the words ‘through electronic means’ are replaced by ‘in machine-readable format and together with their metadata.’.
6. Amendments to Article 6 (Charges):
 - (1) The following paragraphs are inserted at the beginning of the Article:

‘1. Where 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.’

‘2. In exceptional cases, in particular where public sector bodies generate a substantial part of their operating costs relating to the performance of their public service tasks from the exploitation of their intellectual property rights, public sector bodies may be allowed to charge for the re-use of documents over and above the marginal costs, according to objective, transparent and verifiable criteria, provided this is in the public interest and subject to the approval of the independent authority referred to in Article 4(4), and without prejudice to paragraphs 3 and 4 of this Article.’

‘3. Notwithstanding paragraphs 1 and 2, libraries (including university libraries), museums and archives may charge over and above the marginal costs for the re-use of documents they hold.’
 - (2) The existing text of Article 6 becomes paragraph 4.
 - (3) A new paragraph 5 is added:

‘The burden of proving that charges comply with this Article shall lie with the public sector body charging for re-use.’
7. In Article 7 (Transparency), the words ‘over and above the marginal costs or’ are inserted after ‘calculation of charges’.
8. Amendments to Article 8:
 - (1) Paragraph 1 is replaced by the following:

‘Public sector bodies may allow re-use without conditions or may impose conditions, such as indication of source, where appropriate through a licence. These conditions shall not unnecessarily restrict possibilities for re-use and shall not be used to restrict competition.’
9. Article 9 is replaced by the following:

‘Article 9

Practical arrangements

Member States shall ensure that practical arrangements facilitating the cross-lingual search for documents available for re-use are in place, such as asset lists of main documents with relevant metadata, accessible preferably online and in machine-readable format, and portal sites that are linked to decentralised asset lists.’

10. In Article 11 (Prohibition of exclusive arrangements), the following sentence is added at the end of paragraph 3:

‘However, such arrangements involving cultural establishments and university libraries shall be terminated at the end of the contract or in any case not later than 31 December 20XX [6 years after entry into force of the Directive].’

11. Article 12 (Transposition) is replaced by the following:

Article 12

Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.’

12. In Article 13 (Review) the date of 1 July 2008 is replaced by [3 years after the transposition date] and the following paragraph is added:

‘Member States shall submit a yearly report to the Commission on the extent of the re-use of public sector information, the conditions under which it is made available and the work of the independent authority referred to in article 4(4).’

Article 2

- (1) Member States shall adopt and publish, by 18 months at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.
- (2) When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Article 3

This Directive shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

Article 4

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Brussels,

For the European Parliament

For the Council

The President

The President