

Robert Davies, ePSIplus Network Co-ordinator, [rob.davies@epsiplus.net](mailto:rob.davies@epsiplus.net)

Recommendations of the ePSIplus Network to the EC review of the Directive on PSI re-use

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### Abstract

ePSIplus, funded under the eContentplus programme, has monitored and reported on developments on the transposition of the Directive on PSI re-use since September 2006. The sum total of the accumulated knowledge from these sources has been used to formulate the ePSIplus network recommendations on the review of the PSI Directive, which this document represents. The ePSIplus recommendations are to be discussed and validated at the ePSIplus Conference to be held in Brussels on 13 June 2008. This paper presents the draft recommendations. Whilst this is not solely germane to content and data which falls within a 'classical' definition of public domain (i.e. outside applicable copyright term), it is highly relevant to a broader concept of public domain where public information of all kinds may be open to all forms of re-use for a wide range of economic and social purposes. The recommendations fall under seven main headings: Progress on implementation of the Directive; Channels for redress; Discriminatory practices; Access to PSI; Stimulating the private sector to act; The Economic case; and Specific provisions of the Directive.

### Basis for the ePSIplus recommendations

ePSIplus, funded under the eContentplus programme, has monitored and reported on developments on the transposition of the Directive on PSI re-use (European Commission, 2003) since September 2006, building on the work of its successor activity EPSINet (2003-5). The tools at the disposal of ePSIplus include comprehensive monitoring of online sources, a network of national correspondents in every Member State and the information generated by a very extensive programme of national meetings on PSI re-use and Thematic Meetings covering key issues with cross-border expert participation. This work is underpinned by an expert team of contracted in-house analysts.

The information gathered by these means is edited and incorporated as news, reports, cases etc on the content rich ePSIplus website [www.epsiplus.net](http://www.epsiplus.net) which also provides an important distribution channel to 2500 registered stakeholders from the private, public, and academic research sectors in every member state and outside Europe.

The sum total of the accumulated knowledge from these sources has been used to formulate the ePSIplus network recommendations on the review of the PSI Directive, which this document represents. An annex to these recommendations available through the website highlights specific pieces of supporting evidence which underpin and illustrate these recommendations. The ePSIplus recommendations are to be discussed and validated at the ePSIplus Conference to be held in Brussels on 13 June 2008.

The relevance of this work to the public domain and the Communia network chiefly lies in the significance of a wider, easier and lower cost availability for all purposes of information which been produced through public funding. Whilst this is not solely germane to content and data which falls within a 'classical' definition of public domain (i.e. outside applicable copyright term), it is highly relevant to a broader concept of public domain where public information of all kinds may be open to all forms of re-use for a wide range of economic and social purposes.

## ePSIplus Recommendations

### 1 Progress on implementation of the Directive

Transposition of the Directive into national legislation by the deadline date (July 2005) was far from uniform and this situation gave rise to the Commission taking action through the European Court of Justice to ensure the attention of all Member States. All Member States have now completed the transposition process. Nevertheless, the relatively slow and recent enactment of national legislation means that the impending review of the Directive comes at a point when, in many countries, there has been insufficient time for its possible consequences to be fully assessed or for important actions to be taken by Member States.

This problem is exacerbated by the undeniably low level of awareness and understanding of the existence or intention of the legislation in many Member States as a starting point, compounded by a parallel absence of awareness and apparent eagerness to take creative advantage of the opportunities opened up, on the part of businesses trading in the information area.

Whilst some progress has been made in moving the market and social benefits of increased commercial trading in PSI higher up the political agenda, both in Europe and internationally (e.g. through the work of OECD), the whole process needs to be given more time and continued effort, in order to optimise the potential for impact.

Therefore, at this stage we see little case for adjusting the Directive through further legislation, although certain of its provisions do contain apparent weaknesses which may be considered endemic and which somewhat diminish its force in principle and – there is reason to believe – in practice.

#### Recommendation 1

1.1 The focus of effort for the next 2 years at least should be upon encouragement to Member States in implementing and enforcing the main provisions of the Directive and to the private sector in pursuing the business opportunities created. This should be supported by the provision of a further Communication to provide guidance from the Commission, where the need for clarification has been identified. There is also a need for continued monitoring of key indicators. Revision of the Directive may very well be needed at some stage, but now is too early: the effort would be likely to distract attention from that which is needed to enforce the current legislation. Further awareness, advocacy and clarification of the spirit and intentions of the existing Directive should have a higher priority.

## 1.2 Recommendation

Member States should be required to submit an annual PSI Directive implementation status report to the Commission, which is publicly available and describes the progress made over the past year. Transparent access to such reports is vital in order that PSI stakeholders may react to the content of the published annual report.

## 2 Channels for redress

Availability of redress for re-users through existing legal channels (such as Competition Law) remains in the main obscure and expensive. The ability of businesses to pursue complaints about breaches of regulation regarding PSI re-use depends upon the existence of a body at national level which is established for this purpose, has adequate visibility, is impartial and provides easy and affordable access to methods of redress. At present, fear of the possible adverse consequences of making a complaint upon existing business arrangements with public sector bodies may well be preventing many such complaints from being pursued.

Very few Member States have yet established such a body. The most prominent examples remain the UK (OPSI, now part of the National Archive) and Slovenia (the Information Commissioner). To be effective, such bodies need to have 'teeth' and their rulings ideally to have legal force. In effect, their role should be akin to that of a regulator. Given the right remit, such bodies can also have a positive impact on public sector attitudes towards making information available for re-use and on information access structures. If transposition was the first necessary activity and has been achieved, the establishment of independent channels of redress of this kind in each Member State is the vital next step in implementation of the Directive.

## Recommendation 2

Member States should establish independent regulatory bodies in order to stimulate and govern the PSI re-use market more effectively. The Commission should issue further guidance and good practice support to encourage action to establish such bodies in all Member States. Particular attention should be given to the need for accessible and affordable appeals procedures.

## 3 Discriminatory practices

The most frequent cause of private sector complaint is the persistence of discriminatory practices in the licensing of data. Although the number of legal cases brought on these grounds is almost certainly not equal to the number of instances of difficulty (see Channels for redress above), there is a mounting set of evidence that this is a substantial problem area.

The range of barriers to re-use which are encountered is quite wide and includes:

- the continuation of exclusive arrangements between public and private sector organisations, sometimes as a result of public private partnership (PPP);

- denial or dispute by a public sector body that data or information of some types falls under the provisions of the Directive in any case;
- the setting of contractual conditions which exclude certain types of re-use (for example which may be deemed competitive with public sector commercial models or which limit the quantity or type of data available so as to be less than optimally useful for commercial purposes);
- subsets of data are priced at the same (higher) cost of licensing the whole set;
- viewing sample data in order to make a decision on its potential value is highly priced;
- it is claimed that the inclusion of a small proportion of third party data in a set exempts the whole data set from the provisions of the Directive;
- opaque and conditional pricing regimes which cannot be verified as non-discriminatory (e.g., which are not published or the calculation of which is not clear and/or which disguise cross-subsidies within public bodies);
- reasons being cited such as disproportionate effort required for timely response to requests.

### Recommendation 3

3.1 Rigorous action is required on the part of Member States to enforce the provisions of the Directive on exclusive arrangements, non-discriminatory licensing and transparency of pricing. The strengthening of public sector audit procedures to ensure that these are adhered to appears to be a precondition for success. Claims for exemption from the Directive e.g. on the grounds of public task, should at least be traceable to a published mandate for the public sector body concerned.

3.2 The Commission should continue action to ensure Member States enforce the winding up of pre-existing exclusive arrangements according to the specified timetable e.g. by end 2008. Any temptation to allow exclusive arrangements as being 'in the public interest' should be used with extreme parsimony according to very clear criteria: the perception that this important principle can be flouted with comparative ease appears to be a potential Trojan Horse.

## 4 Access to PSI

The challenge of ensuring that PSI can be discovered (i.e. is made available for discovery by public bodies) in order that it can be re-used remains an area in which progress is slower than it could or should be. Easy access to information produced by governments is highly relevant to the major i-2010 priority of creating a Single European Information Space.

Whole tranches of PSI (perhaps especially data held by local authorities) remain holed up in inaccessible 'silos' across every Member State. In such conditions it remains almost impossible for businesses to gain sufficient access to even decide whether a commercial proposition is available. The emergence of new pan-European or cross-border products and services based on PSI re-use is slow. Gains in free access to information made under national FOI/access legislation and e-Government initiatives do not in general address the need to mine 'deep' data held within the public sector.

In part this is a matter of the implementation of the right standards and infrastructure. In part it is also a matter of public sector attitudes and the lack of policy or operational incentives to prioritise the exposure of data on the web in a systematic way, for the purposes of re-users and others).

The solution may in future take a number of forms, including: the creation of national information asset registers with their own portals; creating and maintaining metadata in repositories which can be harvested by any service provider at national or European level; or of ensuring that information is exposed on the web to initiatives such as Google PSI. The potential role of newer semantic web and Web 2.0 technologies in enhancing access to and use of PSI is also a subject of rising interest.

#### Recommendation 4

4.1 There are numerous initiatives in other parts of the European information domain which are relevant to the needs of PSI. Concertation between European bodies and frameworks such as the CEN/ISSS eGovernment standards focus group, INSPIRE and the European Digital Library Initiative should be established by the Commission in order to arrive at a suitable set of standards, an infrastructure and an Action Plan which brings about steadily improving discovery of access to the full range of PSI.

4.2 Practical initiatives to create 'asset registries' or other PSI infrastructures supporting re-use should be supported at national level and where cross-border in nature, at European level. Initiatives of this kind should incorporate rights expression facilities including the ability for the user to identify and use the applicable standard licence.

#### 5 Stimulating the private sector to act

The main premise of the Directive is to encourage the growth of the European information market. There are in existence certain sectors and business areas (geographic and meteorological information, legal information, credit information, registries of various kinds and latterly travel information) etc where there is ample evidence that a sustainable market exists for services which rely in part or in whole in the re-use of PSI, where it can be obtained on the general terms advocated by the Directive. The evidence so far suggests that business expansion into new areas does not occur as naturally as may be hoped, although there do appear to be stirrings in some sectors.

The general discouragements to business to invest in new products and services which depend on PSI are well known and include: a sense of high risk and uncertainty in dealing with the public sector in general; previous instances of the public sector acting competitively when confronted with private sector initiatives; and lack of predictability in pricing and access to data, in particular where timing of access is paramount.

Nevertheless, efforts such as the Directive to 'take the horse to the water' must be succeeded by efforts to encourage it to drink. In this respect, the successful establishment (with the initial support of ePSIplus) in late 2007 of the PSI Alliance as

an independent body to advocate private sector interests at European level, is an encouraging development which should be nurtured as far as possible.

## Recommendation 5

5.1 The private sector should continue to mobilise itself through European bodies such as the PSI Alliance and analogous national offshoots or predecessors such as Locus (UK). The Commission, European parliamentarians and regulatory bodies at national level should ensure that they receive a fair hearing, are accepted as bona fide industry sector representatives and respond in a manner which helps build business confidence in stable and predictable conditions for businesses built on PSI re-use.

5.2 This coin is to a certain extent two-sided: the market is likely to thrive better overall if businesses do not seek to conclude monopoly-type arrangements for access to PSI for re-use.

## 6 The Economic Case

It has become macro-economic article of faith that by making PSI freely and easily accessible for re-use (the USA Federal model – marginal costs pricing plus copyright waiver - is often cited), the returns from taxation on growing business activity will greatly exceed the revenue expectations of public sector bodies which commercialise their information and data operations.

Studies and initiatives continue to occur sporadically with a view to demonstrating the case (e.g. the ‘Cambridge Study’ into the UK Trading Funds, research initiated by OECD etc) and continue to support this line upon which is, in essence, the main economic rationale on which the Directive depends.

Where public accounts are available and sufficiently transparent, the evidence suggests that profits from public sector commercialisation are frequently very modest and likewise that high proportions of income generated are made by charging the public sector for information which it provided itself in the first place, at the expense of the same taxpayers.

The case for this type of swirling of public sector finances appears to rest heavily on the idea that authoritative public data collection tends to assure a high level of data quality (a presumed deterioration in the USA data quality is often cited in this context). This idea still commands extensive support, although it is largely unproven and eroded increasingly by the rapid emergence and deployment of new ‘popular’ technologies, perhaps especially in the geographic information sector.

Unfortunately, policy makers in ‘line’ Ministries are often deterred from acting, when confronted with the need to compensate public bodies with budget support for loss of direct income from sales. This deterrence may also be allied with the prospect of prolonged political maneuvering and dispute with public sector entrepreneurs, concerned to protect their organisational existence. It is also true that in a significant number of Member States public sector revenue generation is a norm firmly embedded within public sector culture.

## Recommendation 6

In the view of ePSIplus, no other course of action remains other than to continue and intensify work to establish and disseminate the economic case for low or no charges conclusively. The Commission should seek the support of at least one Member State in which conditions for longitudinal work can be established in at least one PSI sector, in order to create a convincing basis for effective dissemination to others.

## 7 Specific provisions of the Directive

There has been extensive discussion of various aspects of the wording and provisions of the Directive within the ePSIplus Network. These have ranged across a variety of topics including:

- The problems which may be caused in developing cross-border products by different definitions across Member States of phrases such as ‘document’, ‘the public task’ and ‘third party copyright’. And possible differences of meaning in different translations of the Directive.
- The possible extension of its scope to include, at least, information held by the cultural sector. ePSIplus makes no specific recommendation on this score, which is the part-subject of a separate Commission study on the value of the public domain. It does however advocate some caution in extending the scope of the Directive into additional complex areas until its effectiveness is demonstrated within the existing sectors to which it applies.
- The possible need for greater harmonisation with other legislation e.g. Data Protection, database legislation, competition law, INSPIRE etc.

ePSIplus believes that there are two potentially serious weaknesses in the Directive itself as currently drafted. It is appreciated that these may well have been the result of compromises necessary to ensure that Directive survived the original co-decision procedure

Article 3 states that: Member States shall ensure that, where the re-use of documents held by public sector bodies 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. Where possible, documents shall be made available through electronic means.

Recital 9 amplifies this provision in the following way: This Directive does not contain an obligation to allow re-use of documents. The decision whether or not to authorise re-use will remain with the Member States or the public sector body concerned.

In effect, this leaves it open to any public sector body to refuse to license PSI as long as a reason is given. If practiced extensively, this provision would undermine the entire Directive.

Article 6 states that: where charges are made, the total income from supplying and allowing re-use of documents shall not exceed the cost of collection, production, reproduction and dissemination, together with a reasonable return on investment. Charges should be cost-oriented over the appropriate accounting period and calculated in line with the accounting principles applicable to the public sector bodies involved.

Whilst considerations of public sector efficiency are acknowledged, it appears questionable whether the phrase 'Return on Investment' should be used in the context of carrying out a public task. There is also an absence of guidance on how the term 'reasonable' might be measured. If applied widely to establish high charges based on no transparent calculation of how prices were arrived at, this provision could also undermine substantially the implementation of the Directive in the longer term by enabling public sector bodies or their agencies to trade in a manner which is essentially commercial and competitive with private sector re-users.

#### Recommendation 7

7.1 The Commission should produce guidance to the effect that it was the intent of the Directive that public sector bodies should make their information available for re-use on request unless one of a limited and specified set of conditions applies and can be demonstrated. Member States, who are enabled by the Directive to go beyond its basic provisions, should encourage strongly the application of this guidance and regulators should monitor its adoption.

7.2 Member States and regulatory bodies should monitor proactively the basis on which prices are established by public sector bodies and should govern the 'Reasonable Return on Investment' provision with firm guidance on allowable charging principles and levels. The Commission should support this by producing additional guidance on the subject. Ideally this guidance will further encourage adoption of the marginal costs pricing principle (which has now been adopted, for example, by OECD (OECD, 2007)).

#### References

European Commission. Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information.

ePSIplus <http://www.epsiplus.net/>

OECD Policy Principles described at  
[http://www.epsiplus.net/news/psi\\_policy\\_principles](http://www.epsiplus.net/news/psi_policy_principles)