

Reply to the Public Consultation - Review of the PSI Directive

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1. Introduction

The PSI directive was adopted on 17 November 2003 and had to be transposed by the Member States before 1 July 2005. Only six of them made this deadline, and only by the 8th of May, 2008 have all the Member States notified the Commission of their transposition. Due to this long process in some of the Member States, it may be difficult to estimate or review the impact of the PSI directive on the availability of public sector information for re-use. However, some issues can already be pointed out.

2. Implementation of the Directive in Belgium

In Belgium, the directive had to be implemented on the federal level and the regional level. This means that six sets of legislation were needed to fully transpose the directive. Most of the regional decrees were based on the federal law, except the Flemish decree. One of the questions that arise regarding the federal law (and the corresponding regional decrees) is the very strict interpretation of the legislation on the protection of personal data. The PSI directive states in its article 1.4 that it “leaves intact and in no way affects the level of protection of individuals with regard to the processing of personal data under the provisions of Community and national law, and in particular does not alter the obligations and rights set out in Directive 95/46/EC”. The Belgian federal law has implemented this by stating that public sector documents containing personal data can only be made available for re-use after they have been anonymised.¹ This seems to go further than the Law of 8 December 1992 on the processing of personal data² (adapted to Directive 95/46/EC in 1998³) seems to require. The law assumes that any type of re-use that involves personal data is contrary to the legislation protecting personal data. However, for some types of re-use, e.g. research, this is not necessarily the case, provided that the conditions for the processing of personal data imposed by the law are fulfilled. Moreover, this may be a problem for the intention of some public sector bodies who intend to make their documents available for re-use, e.g. the Company Register (Kruispuntbank Ondernemingen).

¹ Article 4, Wet van 7 maart 2007 tot omzetting van de richtlijn 2003/98/EG van het Europees Parlement en de Raad van 17 november 2003 inzake het hergebruik van overheidsinformatie, *B.S.* 19 April 2007.

² Wet van 8 december 1992 tot bescherming van de persoonlijke levenssfeer ten opzichte van de verwerking van persoonsgegevens, *B.S.* 18 March 1993.

³ Directive 95/46/EC of the 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 data, *OJ L* nr. 281, 23 November 1995, 31.

3. Definitions in the directive

3.1. Re-use

Article 2.4 of the PSI directive defines re-use as “the use by persons or legal entities of documents held by public sector bodies, for commercial or non-commercial purposes other than the initial purpose within the public task for which the documents were produced. Exchange of documents between public sector bodies purely in pursuit of their public tasks does not constitute re-use”.

This broad definition of re-use can create confusion with existing legislation on access or freedom of information. When should a citizen request access to a document and when should he request re-use? In some cases, the distinction between access and re-use will be very clear. E.g. requests of the information industry will generally address an entire data set or large parts thereof, and certain types of data will be more interesting for the information industry than others, e.g. spatial data or meteorological data. However, the definition of re-use in the PSI directive does not only refer to this type of commercial re-use, it addresses “any type of use” outside of the public task, for commercial and non-commercial purposes. Does this also include students that use a picture from the official website of their municipality to use in a paper for their university course? Or an NGO that requests a report on the protection of rare species in one of the Member States?

An example that might cause problems is the requests for information from journalists. Ever since freedom of information or access legislation was introduced, they have been using these national laws to obtain information to publish about the performance of government. Journalists are often seen to have a fundamental job of informing the public, relating to freedom of speech, freedom of information and freedom of the press. So the use of access legislation as a means to “check up” on the democratic government that was selected seems a logical choice. However, if “re-use” includes “any use for commercial and non-commercial purposes - does this also include the use by journalists? Many other examples can be found that float between re-use and access to information. Should re-use be redefined in order to clarify this distinction?

3.2. Public task

Second, the definition of re-use addresses any use for commercial or non-commercial purposes “outside of the public task”. In many of the Member States, this reference to the public task seems to cause problems, also because of the field of application of the Directive, which excludes documents “the supply of which is an activity falling outside the scope of the public task”.⁴ The question what constitutes a public task and what activities of the public sector bodies fall outside of this public task appears unclear in many Member States. However, it is vital to understand the scope of the public task, as this will determine whether the PSI directive and its transposing legislation are applicable.

Moreover, the scope of the public task determines the position of public sector bodies that make their own added value products or services based on their own public sector documents. On the one hand, they may be required to do so, because they have a task of informing the public, while on the other hand they may also be creating information products that fall outside of their public task, and that are competing with private sector products on the market. If the latter situation appears, the public sector should apply its re-use conditions and prices to its own documents, as

⁴ Article 1.2 a) of the PSI directive.

stated in article 10.2 of the PSI directive. In addition, it will also be subject to competition law. As public bodies often have a monopoly on their data, there is a considerable risk of abuse of dominant position. Therefore, it is important to know which information services should be offered by the public sector as a part of its public task and which information services are offered outside of that public task. Considering the struggle of the Member States to give a definition of this public task, the European Commission should give more guidance on this concept. This is vital to increase the possibilities for the information industry to create cross-border and pan-European products.

4. Obligation to make public sector documents available for re-use

The PSI directive leaves it up to the Member States and the public sector bodies to decide whether they make their public sector documents available for re-use. Very few Member States went further and made all their documents generally available for re-use. This does not encourage public sector bodies to make re-use of their documents possible. In Belgium, for instance, local authorities are very concerned about the consequences of the re-use legislation, and they are very weary of making their documents available for re-use. The impact of the PSI directive will remain minimal if these public sector bodies are not stimulated to make their documents available. On the one hand, the European Commission and the Member States have a responsibility to clarify the rules of their PSI legislation and to stress the importance of this legislation for the development of information products and services. On the other hand, once the public sector bodies are more comfortable with the idea of re-use, a general obligation to make their documents available could ensure that the information lying within those documents is optimally exploited by the users.

5. Looking ahead

While it can be stated that the PSI directive has had a positive influence on the re-use of public sector documents in the European Member States, the long process of transposition makes it difficult to judge the actual impact that the directive has made and will make on the availability of information.

While the Member States have implemented the PSI directive, they are also in the course of implementing the INSPIRE directive on spatial data, and already have transposed Directive 2003/4/EC on access to environmental information. In addition, the European Commission has launched the Digital Library Initiative⁵, and is preparing an initiative on a Shared Environmental Information System for Europe⁶. All these initiatives deal with specific types of information, but they should not be treated as separate items. The European Commission should make sure that the linkages between these directives and initiatives are taken into account, in order to guarantee the optimal availability of information and maximum efficiency of implementation in the Member States.

⁵ See http://ec.europa.eu/information_society/activities/digital_libraries/index_en.htm.

⁶ COMMISSION OF THE EUROPEAN COMMUNITIES, *Towards a Shared Environmental Information System (SEIS). Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions*, COM (2008) 46 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0046:FIN:EN:PDF>.