

MINUTES

7TH MEETING PUBLIC SECTOR INFORMATION GROUP

LUXEMBOURG, 11 MARCH 2005

1. WELCOME AND INTRODUCTION

The Chairman, Javier Hernandez-Ros welcomed the members of the PSI Group, in particular Malta and Poland who participated in the PSI Group for the first time. He explained that the 7th meeting of the Group had been convened to allow the Member States to discuss and exchange views on some of the core issues under the directive in ample time before the transposition deadline of 1 July 2005.

2. UPDATE BY MEMBER STATES ON THE STATE OF PLAY ON THE TRANSPOSITION OF THE DIRECTIVE

In Austria, a draft federal law is in inter-service consultation before it will be presented to the Parliament at the end of April. Due to the federal system in Austria the different Länder will have to implement regional laws on re-use. At the moment 2 Länder are consulting on the directive and its implementation. The directive will also lead to legislative measures in the 7 remaining regions.

Belgium will put forward a draft federal law in May 2005 to remove the existing prohibition on re-use of public sector information. Transposition efforts are under way in the Flemish region. The regions of Walloon and Brussels are lagging behind, but they will build on the experience of the Flemish region. A working group is in place acting as a forum for the discussion of transposition issues, *inter alia*, on the regional and the national level.

Draft amendments to the law on access to government information was presented 6 months ago in **The Czech Republic** and passed on to the Government in January. The Parliament will discuss the finalized version in April. As it stands, the PSI directive will not affect any other of the existing legislation.

France has adopted a framework legislation allowing for the transposition of the PSI directive by 'decret'. Secondary legislation is under preparation under the supervision of the Office of the Prime Minister.

A draft law is under discussion between the relevant ministries in **Germany**. A preliminary text is expected to be publicly available for consultation in March. The

German Parliament will not be able to vote on the proposal on time so as to meet the transposition deadline.

Greece thanked the Commission for the well organized PSI conference in Athens in January and for their participation and contribution to that event. On the status of transposition, the representative from Greece said that a request has been sent to all the relevant ministries in a stock taking exercise with the aim of getting an overview of public sector information available for re-use within the framework of the PSI directive. A PSI working group is set up to deal with the different responses. Greece intends to present a draft law implementing the directive to Parliament in April.

Ireland will implement the directive using secondary legislation and they are confident that they will meet the transposition deadline. The results of a consultation on the PSI directive show that many organizations intend to go beyond the minimum requirements, for instance by converting existing formats and by proactively contributing to increased re-use of public sector information. Ireland is developing a system that will cover the whole country but will allow individual public sector bodies to administer their own assets lists. The setting up of an appeal mechanism is under discussion.

Italy has a working group in place. A framework law, allowing for the transposition of the directive by secondary legislation, will soon go through the Senate.

Iceland will implement a general rule allowing re-use, in a particular section of the existing law on access. At the moment, the Ministry responsible for the PSI directive is looking into practical implementation issues such as how to deal with re-use requests, etc.

Latvia is reviewing existing legislation and evaluating the need, if any, to make changes. In principle, the law on Free Access to Government Information and the law on State Information already contain provisions that allow re-use of public sector information in line with the PSI directive. Latvia acted proactively to allow re-use shortly after the publication of the Green Paper in 1999.

In **Lithuania** they expect a draft law to be submitted to Parliament in June, following an ongoing internal consultation. A seminar on re-use will be held in April where the Commission will be represented. At the moment Lithuania is focusing on the practices of state registers and on the issue of asset lists.

Luxembourg thanked the Commission for organizing this meeting of the PSI Group in ample time before the transposition deadline. Since the last meeting of the Group Luxembourg has made considerable progress. No objections were received from any of the Ministries participating to the internal consultation which was organized on the PSI directive and draft legislation will be presented towards the middle of April.

The Office of the Prime Minister, the responsible government body for the transposition of the directive in **Malta**, has set up a PSI working group. Several existing acts already deal with re-use. No objections have been raised against the principles of the directive.

The Netherlands is still on course for meeting the transpositions deadline, although the schedule is tight. The draft law will be handled in the Council of Ministers on Friday 18 March, before the proposal is passed on to the Council of the State and the Parliament.

Poland considers that the 2001 law on Access to Government Information satisfies the requirements of the PSI directive and will notify the Commission shortly on the timely transposition of the directive.

Portugal reported that the Legal Policy and Planning Office is about to finish a first draft law implementing the directive. The ongoing election is, however, likely to cause delays in the process of transposition.

Slovakia foresees no obstacles to the timely transposition of the directive at the moment. They consider that the Act on Free Access to Information fulfills the requirements of the directive. Practical arrangements will be set up to facilitate re-use.

In **Spain** the PSI working group is conducting an internal consultation on a draft transposition text. The result of this exercise will be presented in April. A draft law could then be presented to Parliament in June.

The **UK** will end their consultation on the proposed draft secondary legislation on 18 March. In parallel, a guide on best practices has been produced to help public sector bodies implement the directive. Several open meetings with representatives from the private and the public sector have been organized to make the directive and its consequences known. **UK** expects to be on time, but mentioned that the national election could cause delays.

3. WHAT MEMBER STATES CAN EXPECT AFTER THE TRANSPOSITION DEADLINE

Wolf-Dietrich Grussmann, the Infringements coordinator in DG Information Society and Media, gave a presentation on what Member States can expect after the transposition deadline. Grussmann pointed out that, against the background of the Internal Market Strategy, the overall aim of the Commission following the so-called Barcelona target is a 0% transposition deficit two years after the transposition deadline. At the moment this target has only been met by five Member States (January 2005). For the rest, the transposition deficit ranges from 1,5% to 4,74% according to the latest figures. The White Paper on European Governance mentions three ways in which the Commission could help Member States to improve timely and correct implementation: 1) Use of expert committees and networks like the PSI Group, 2); bilateral technical assistance (offered to Member States leading up to the transposition of the PSI directive); 3) Transposition Guidelines (Presented bilaterally on request and in the PSI Group meetings). With the aim to produce peer pressure and to ensure full transparency, a particular site on the “Europa” server is dedicated to information on the transposition of directives. This site gives information on the calendar for transposition, progress in notification of national measures implementing directives and infringements.

Turning to the state of notification on the transposition of the PSI directive, Grussmann said that four Member States have formally notified transposition measures to the Commission as of the 1 March. These are Lithuania, Malta, Poland and Slovenia, although in the case of Malta this could only be considered a transposition comment. He then gave a brief account of how to notify, referring to the use of the electronic notification database or alternatively the role of the Permanent Representations.

Following the transposition deadline a first judgment on the side of the Commission will be made to determine the completeness of the reported measures against the directive provisions. Those countries failing to meet the transposition deadline will receive a standard letter of non-transposition.

The Infringement procedure and its different steps are described in Article 226 EC and Article 228 EC.

4. WAYS AND MEANS OF IMPLEMENTING THE DIRECTIVE

Following the request from several Member States, the Commission gave an overview on some of the core terms and definitions of the PSI directive. As a preliminary remark, the Commission indicated that the aim of the comments was to give technical advice on the implementation of the PSI-directive. The views expressed are based on the experience of Commission staff involved in the preparations of the directive and the subsequent negotiations. They do not represent a finalised or official position of the European Commission on these or related issues.

4.1 *Definitions*

As a general remark, the Commission stressed that the different definitions under the directive are autonomous and uniform Community concepts. They are independent of any national concepts that might exist and must be understood and interpreted against the background and the purpose of the specific legal instrument, as referred to by the ECJ (Adolf Truly C-373/00). There must be equality and uniformity of the EU law principles.

“Public sector body” means any state, regional or local authority - bodies that are governed by public law and associations of such authorities or bodies.

“Bodies governed by public law” refer to legal persons that are mainly financed, managed or controlled by the State or other public authorities/bodies, bodies that are specifically established to meet needs in the general interest, not having an industrial or commercial character. These conditions are cumulative (BFI Holding C-360/96).

The terms *“Needs in the general interest”* “must be assessed individually in each and every case (Adolf Truly C-373/00). For instance, acquiring and supplying office space and property maintenance/management services to tech firms to build up a local technological development centre was seen a “Needs in the general interest” (Korhonen C-18/01). So are activities related to the organisation of trade fairs, exhibitions and conferences (Agora and Excelsior, joint cases C 223/99 and C-260/99)

As indicators to determine if an undertaking has an “*Industrial or commercial character*” the following points were mentioned: Competition, normal markets conditions, if making profit is its primary aim or if is bearing the losses associated with its activity.

“*Needs in the general interest, not having an industrial or commercial character*”: Satisfied otherwise than by the supply of goods and services in the marketplace, which, for reasons associated with the general interest, the State/Authority chooses to provide itself, or over which it wishes to retain a decisive influence (Commission/Kingdom of Spain – C-283/00).

“*Document*”, means any content irrespective of its medium. Written, stored in electronic form, or as a sound, visual or multimedia recording. It is a wide and comprehensive concept. It does not include computer programmes (Recital 9).

“*Re-use*” includes use 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.

“*Personal data*” means any information relating to an identified or identifiable natural person (Article 2 (a) Directive 95/46/EC). It does not include data related to natural persons or data which does not allow the direct or indirect identification of the natural person to which it refers.

- Questions and answers:

Portugal: Is there a contradiction between Article 1.2 (a) and Recital 9 of the directive so far as use of documents within public sector organisation is concerned?

C: *There is no contradiction between Article 1.2 (a) and Recital 9. The recital says that to avoid cross-subsidies, re-use should include further use of documents within the organisation itself for activities falling outside the scope of its public task. This should be read in conjunction with article 10.2, dealing with cross-subsidies. Article 1.2 (a) simply says that the directive shall not apply to documents the supply of which is an activity falling outside the scope of the public task. In other words, the real market activities of public sector bodies are themselves not covered by the directive, but the input for these activities is.*

Germany: If a document that was initially produced by a public body for the public task is used by another public sector body for another purpose at a later stage, should this use then be considered to be re-use?

C: *The directive distinguishes between the uses of documents for the initial purpose for which is was produced by the public sector and commercial or non-commercial purposes other than that. The exchange of information between public sector bodies purely in pursuit of their public task is not considered re-use (art. 2.5). This may change if one public sector body charges another public sector body for using the information, which cannot be considered ‘exchange of information’.*

The UK: One issue that had surfaced against the Freedom of Information act in the UK is if making documents available under the access regime constitutes re-use.

*C: According to Article 1.3 the PSI directive does not widen national access regimes: “This Directive builds on and is without prejudice to existing access regimes in the Member States.”. However, when re-use – **any** use for commercial or non-commercial purposes other than the initial purpose for which the documents were produced – is allowed, the documents shall be re-usable for commercial or non-commercial purposes in accordance with the conditions of the directive (article 3).*

Lithuania asked about their state registers, which function on a commercial basis. What effect, if any, would the PSI directive have on profit earnings of these entities.

C: If these enterprises are public sector bodies within the meaning of the directive, certain conditions apply when documents are made available for re-use. Charges have to respect the principles governing charges in Article 6, any applicable conditions for the re-use of the documents shall be non-discriminatory etc. This may have consequences for the charging structure.

4.2 Non-discrimination and exclusive arrangements. Chapter IV of the directive

Fair competition is a core element of the directive. No single player may be granted an advantage over another on the basis of public sector information. In this context, the article on prohibition of exclusive arrangements is the logical consequence of the article on non-discrimination.

According to Article 10.1 any applicable condition shall be non-discriminatory for comparable categories of re-use. “Any condition” is a wide concept and refers to pricing, delivery, quality etc. The reference to comparable categories indicates that the directive allows Member States to differentiate between commercial and non-commercial re-use and to apply different conditions to these categories. Article 10.2 aims at avoiding cross-subsidies in so-called “hybrid” public sector bodies, which at the same time manage both public task and commercial activities. A clear split between public task and commercial activities of public sector bodies is necessary to ensure conformity with the relevant provisions of the directive.

The basic principle on exclusive arrangements according to Article 11 is that no exclusive arrangements are allowed based on public sector information. In principle, this also excludes entering into of exclusive deals following a tender procedure. Exclusive deals are **only** allowed under the exception of Article 11.2 when an exclusive deal is **necessary** for the provision of a **service in the public interest** (double condition). Exclusive deals granted under this exception must be reviewed regularly to validate the reasons for which the exclusive deal was granted. For reason of transparency, exclusive arrangements must be made publicly available. Existing exclusive arrangements must be phased out until 31 December 2008 (Article 11.3).

- Questions and answers:

Germany: What about the public availability of exclusive deals entered into between the entry into force of the directive and the transposition into national law? Is the directive requiring that exclusive deals entered into between the entry into force of the directive and the transposition date are made public already from the date of publishing in the official journal?

C: As a general point, the Commission reminded that, during the implementation period, MS should abstain from actions going against the directive (such as entering into exclusive deals). As for the specific question, the directive indicates that the exclusive arrangements established after the entry into force of the directive shall be transparent and made public (art. 11.2). The issue can, however, probably be dealt with in a pragmatic way, to avoid the constitutional problem of retroactivity raised by the German delegation.

4.3 The processing of requests

Requests for re-use should be processed, through electronic means where possible and appropriate, within time-limits that are consistent with that of the access regimes (Article 4.1). If no time frames for treating access requests exist in national law a request for re-use public sector information must be treated within 20 working days after its receipt. In complex cases and in connection with extensive requests for re-use, another 20 days may be added, according to Article 4.2, in the case where no time frames for treating access request exist in national law. In cases where a request for re-use has been denied, that decision must be substantiated and the applicant must be duly notified. In case the negative decision is based on third party rights, the notification should mention the name of the right holder, where known, or alternatively of the licensor. Any negative decision should contain a reference to the means of redress in accordance with Article 4.4.

Portugal: Are Member States obliged to make a “closed” list of grounds for refusal when applying the conditions under Article 4.3?

C: In principle yes. A closed list of grounds for refusal will contribute to legal security.

Austria: Is a verbal application for re-use valid or must all requests be made in writing?

C: This is clearly a case for the national law in each Member States to decide, but the PSI directive does not prevent Member States to require requests for re-use to be made in writing.

4.4 Charges

Several provisions of the Directive are relevant to the issue of charges: Article 6 (Recital 14) gives the general principles governing charges, Article 7 (Recital 15) applies rules on transparency to the charging policies of public sector institutions, and Article 10 on non-discrimination guarantees that the same charge, if any, is applied to the same category of re-use. For instance, public sector bodies could apply one charge on re-use for commercial purposes and another charge for non-commercial use of the same document. Charges are optional. In any case, charges should be at maximum cost-oriented and not exceed the cost of collection, production, reproduction, dissemination and a reasonable return on investment. When calculating the cost-base to determine charges standard accounting principles applicable to the public sector

bodies involved should be applied. If necessary, the charges should be adjusted against the total number of users at the end of the accounting year.

Several questions following the presentation dealt with the limits of the directive on the type of costs that could be included when calculating the charge, for instance if the directive allowed public sector bodies to include the cost of collection. In the UK some organisations had pointed out that calculating charges on the basis of a “document” would be too restrictive to their own practices. Other questions concerned the need to harmonise charging principles within Member States, and how to deal with diverging practices and cost calculation across different types of state registers.

C: The limit in Article 6 on charges is an upper limit. When setting the charge the spirit of the directive must be kept in mind, as set out in recital 14. This upper limit is without prejudice to the right of Member States or public sector bodies to apply lower charges or apply no charge at all. Member States should encourage public sector bodies to make documents available at charges that are not exceeding the marginal costs for reproduction and dissemination.

In general, if public sector bodies are charging for the information, they should set up a simple and analytical accounting system that allows them to calculate costs associated to documents that are made available for re-use. This approach would solve many of the practical challenges raised by Member States in connection with the implementation of the directive and at the same time increase transparency.

*Member States must keep in mind that the PSI directive is a framework for the re-use of public sector information regulating the market behaviour of public sector bodies. The directive is not requiring Member States to harmonise charges and cost regimes across different types of public sector bodies. When charges are applied, however, the upper limit of the directive must be respected when calculating the price re-users will have to pay for specific documents. The calculation can **not** be based on the total income/costs of the public sector body as a whole, but must be based at the document/database level. The burden of financing the public task should not be put on the shoulders of re-users.*

5. AOB AND WRAP UP BY CHAIRMAN

The Chairman reminded the members of the Group to update the transposition fiches when progress is made towards the transposition deadline. The Commission will continue to support Member States in their transposition efforts and will participate in information meetings in Member States as long as time and resources permit.

The next meeting of the Group will be organised towards the end of October this year.