



EUROPEAN COMMISSION

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Dear President,

The Commission would like to thank the Bundesrat for its Opinion on the proposal for a Directive amending Directive 2003/98/EC on the re-use of public sector information (PSI Directive) {COM(2011) 877 final} and apologises for the delay in replying.

The Commission takes note of the concerns expressed by the Bundesrat with respect to the compliance of several aspects of the proposal with the principle of subsidiarity, in particular of the proposal to appoint an independent regulator with special legal authority and the proposal to extend the scope of the PSI Directive to certain cultural institutions.

After a thorough examination of the data gathered for the impact assessment of the proposed directive, the Commission concluded that although Member States have functioning general redress systems, only some have set up specific authorities to hear complaints against public bodies infringing the rules for re-use of PSI. While some national independent authorities are exemplary insofar as redress systems are concerned, re-users from many other Member States complain about cumbersome and lengthy proceedings, ill suited for dealing with their complaints, which due to the nature of the products and the markets concerned often require swift resolution.

The lack of an effective redress mechanism in some Member States (lengthy time to decision, lack of effective competencies of general courts) prevents re-users from enforcing their rights against monopoly suppliers of PSI, leading to inefficiencies on some markets, resulting in negative impacts on competition and innovation and ultimately on consumer welfare.

In addition, due to the differences in the judicial systems of individual Member States, the plaintiffs often face significant costs and difficulties in identifying competent courts or authorities and applicable rules of procedure, with negative impacts on the internal market for re-use of PSI.

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On the basis of these findings, the Commission proposed to include in the amended directive a requirement for Member States to appoint an independent authority vested with specific powers to oversee the correct application of the charging rules and other principles of the directive (such as transparency and non-discrimination).

The authority would be a privileged, easily recognisable and accessible venue for a swift resolution of disagreements between re-users and public bodies with respect to re-use processes and conditions. Its existence would allow bringing the powers between public bodies in balance.

However, the proposed directive leaves it entirely up to the Member States to set up the independent authority in accordance with their national legal systems and their respective judicial organisation. Moreover, the proposed directive does not require an appointment of a new authority. On the contrary, the Commission would encourage Member States to grant appropriate powers to an existing authority, including to a specific court or court chamber.

Finally, the provision requiring Member States to appoint an independent authority is not an isolated example of such a provision. For example, the directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (as amended in 2009) requires Member States to allow any user or provider of electronic communications networks or services the right of appeal to an independent appeal body. It also contains a number of detailed requirements relating to the organisation of the National Regulatory Authorities.

The Commission remains convinced that the proposal to appoint an independent authority under the PSI directive does not encroach either on the exclusive constitutional competence of each Member State, or on the organisation of their respective judicial systems.

The proposed extension of the scope of the directive impacts the three types of public cultural institutions insofar as it eliminates existing differences between Member States on the exploitation of cultural material. It also subjects the institutions' commercial activities (excluding activities pursued in the fulfilment of their public task) to a harmonised set of rules of fairness, transparency and non-discrimination. The aim is to facilitate the creation of EU-wide products and services based on public sector information, including public cultural material. The proposal would enhance an effective cross-border use of public sector information by private companies, limit distortions of competition on the EU market and avoid a situation whereby a different pace in the Member States in dealing with the re-use of public sector information leads to further disparities. The extension of scope is limited to only three types of public cultural institutions: libraries (including university libraries), museums and archives. Indeed, their collections already constitute valuable raw material for re-use in countless products such as mobile applications. Other types of cultural institutions remain excluded because of their "performing arts" specificity. Almost all of their material is covered by many intellectual property rights and is therefore in any case excluded from the application of the PSI directive.

Moreover, only the public domain material is subject to the proposed obligation to make it available for re-use. The material protected by intellectual property rights of a given

institution would be subject to the re-use conditions only if such institution were to authorise its re-use. In addition, the material covered by third party intellectual property rights remains entirely excluded.

The proposed extension is of a limited nature:

- it remains subject to the conditions established in the 2003 Directive, including the default charging regime;*
- a specific transitional period for eliminating exclusive agreements is foreseen in the proposal;*
- it foresees an exemption from the obligation to indicate third party IPR holders.*

The limited extension, as explained in the impact assessment report¹ and in the explanatory memorandum, reflects the recognition of the specificity of cultural institutions and their role in the dissemination and preservation of cultural heritage. The proposed limited extension of the scope of the PSI directive to certain cultural institutions in no way affects the cultural creation, the cultural diversity or cultural policies such as dissemination or preservation of the cultural heritage of the EU Member States.

The proposal merely reflects the reality that cultural institutions do engage in commercial re-use of their material, in particular since digitised cultural resources became valuable raw material for the development of commercial products and services.

Cultural institutions therefore do not differ from other public sector bodies, which operate on the market for re-use of public sector information. By their activities, they can influence the functioning of the internal market and the competitive landscape on the market for re-use of cultural material. Subjecting the commercial activities of public sector bodies, cultural or others, to the rules of fairness, transparency and non-discrimination doesn't impact the internal administrative organisation of the Member State, nor their strictly cultural policies. On the other hand, by harmonising the minimum set of rules applicable to re-use of cultural resources, it eliminates the barriers to cross-border trade and provides a level playing field among re-users.

This is why the Commission has concluded that the commercial activities of public cultural institutions, insofar as they impact competition or the functioning of the internal market, should be subject to EU legislation aiming at preventing or eliminating distortions. Subjecting the commercial exploitation of certain cultural resources by certain public cultural institutions to a set of rules aimed at securing competitive conditions and preventing the fragmentation of the internal re-use market remains well within the boundaries of the EU competence and does not encroach upon the exclusive competence of the Member States in the area of culture.

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2011:1552:FIN:EN:PDF>

As Members of the Bundesrat are certainly aware, discussions on the Commission proposals are currently ongoing within the ordinary legislative procedure. Several points raised by the Bundesrat in its Opinion are being discussed. I hope that these clarifications have addressed the concerns raised in the opinion of the Bundesrat and I look forward to continuing our political dialogue in the future.

Yours faithfully,

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Vice-President*