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Abstract

This document contains some general criteria and recommendations with regards to the PSI framework for institutional embedding and enforcement. More precisely this document is aimed at supporting policy makers in the upstream choice and design of regulators and general mechanisms that could facilitate access and re-use of PSI. Please note that this deliverable was written on the basis of national (or even regional) non exhaustive list of examples provided by the LAPSI 2.0 partners.

Introduction

Policy makers, the public sector, civil society, businesses and the general public have all broadly accepted the value of public sector information (PSI) for economic growth, public participation and accountability. In many countries, there is a constitutionally based “right to information” and on that basis the re-use of PSI and open data are encouraged. Once the new PSI Directive 2013/37/EC (herein after the new PSI Directive) is transposed in the Member States of the European Union, citizens and businesses will have a right to re-use information held and made available by public sector bodies.

Nevertheless, having such a right is not suitable if one cannot enforce it. Therefore, it is essential that the right to re-use PSI is supported by an effective redress mechanism.

The LAPSI 2.0 project team has identified a number of criteria, which redress mechanisms should fulfil in order to provide re-users with sufficient guarantees and to ensure that the economic potential of PSI can actually be realised. Each criterion was drawn taking as a starting point one or more “good examples or good practices” described from the redress processes already existing in different EU Member States. These examples may serve as an inspiration for other organisations or countries when implementing or adapting their redress mechanisms.

In the discussion on possible “guide lines” in relation to the enforcement of PSI legislation and its possible redress procedures, the LAPSI 2.0 team first identified criteria for a particular redress mechanism to be considered as good practice. Next, the team elaborated on the critical elements related to each criterion.

As it has already been highlighted in Deliverable D.4.1 (*Good practices on Institutional embedding and enforcement*), the LAPSI 2.0 team found that **the most important characteristic of a well-functioning redress procedure is that it only comes into play when absolutely necessary**. By providing potential re-users with sufficient information on the data and datasets that are available, what they are allowed to do with it, and which fees should be paid for such re-use, conflicts requiring time-consuming redress procedures can be avoided. Therefore, open data policies should focus on transparency and provide easily accessible information to any potential re-user. This certainly includes a general transparency effort at the level of the policy makers, but also provisions of sufficient high quality information on freely/easily accessible/public data portals and/or on the public sector information holders’ websites. It can also include for instance an *ex ante* approved charging scheme, e.g. laid down into an Act, regulation or ministerial decree.

A higher level of transparency as a key issue — preferably in a section of PSB’s e-offices — in structured and usable ways would be therefore recommended, and should at least include the following:

- institutional preventive mechanisms in order to avoid litigation,

- documents/data that can be re-used and which format they are available in,
- general criteria for refusing a re-use request,
- terms and conditions of re-use, indicating the latest update,
- a catalogue of re-usable public information in each PSB, bearing in mind that access to all the existing re-usable public information resources regardless the public body should be accessible from a single place,
- how to demand access to PSI for re-use purposes and how to appeal against refusal,
- all the information regarding the procedure to obtain access and the competent authority to allow re-use of PSI in each public body,
- a guide on cost-free status and fees in the field of PSI re-use.

Although this information should be available through electronic means at each PSB website, it is highly recommended to set up a national Internet portal where re-users can find all the information they may need regardless of the public body that owns the data (national, regional, local). This website should include a link to all existing websites specialized on PSI re-use. Internal legal rules will determine the competent authority to create and actualise this "integrating" website.

A suitable prevention system should enhance transparency. From the perspective of prevention, it would be quite useful for re-users to have a general rule of making all available data and documents re-usable under no special conditions, so that only some general conditions should be respected (general license) such as: the original source of re-usable documents must be cited and the date of the latest update of re-usable documents must be indicated when it appears in the original document[1]. Nevertheless, special terms may be established, but they shall be determined beforehand if necessary (special licences). Only exceptionally and when justified, a formal request and a formal procedure would be demanded.

It is also essential to organize regular face-to-face meetings at a national/regional level to promote and raise awareness in this field that can be considered a *must* for the PSI re-users community in each country/region. These meetings would also be useful in order to shorten the distance between the criteria used in the choices of PSB and the needs of re-users.

Should not be possible to prevent PSI-related conflicts, a suitable redress mechanism shall be established in order to limit uncertainty and solve conflicts. This mechanism must take into account that several and diverse interests may appear apart from those related to public bodies and

[1] A further criterion could be that information shall not be distorted. However, this criterion may be easily abused by PSBs. This is why there is not consensus on its presence among the general conditions to be respected.

re-users and, therefore, all of those actors, including third parties (i.e.: the owner of IP rights or personal data), have to be taken into account in order to defend their position. As a consequence, a formal procedure may be necessary so that all of them can express their arguments according to the requirements of the principle of equality, public and private interests are safeguarded and the competent body/authority can decide bearing in mind the abovementioned exigencies.

In many Member States public bodies are subjected to Administrative Law, which is characterized by the attribution of strong powers to Public Administration in order to protect public interest. One of the most relevant is the right to decide unilaterally any controversy raised by a citizen/company even when the initial decision was appealed at the administrative level. Therefore, those redress mechanisms based on a formal contestation of a previous decision may not be efficient enough unless they are ruled by an independent body or an autonomous authority. Even more, in those Member States where an administrative appeal is established, it may be shaped as optional for the PSI re-user in order to speed up the judicial revision of the decision adopted by the public body refusing access to PSI and/or re-use.

The following five criteria were considered “essential” for an effective redress mechanism:

1. Mediation
2. Assignment of a responsible administrative body
3. Transparency of conflict procedure
4. Swiftness of the procedure
5. Attention for the practical organisation of the procedure

In the next subsections, a description will be given for each criterion.

Mediation (or conciliation)

Mediation could be considered a “half way solution” between prevention and redress. Some ideas to take into account:

- Introduce mediation procedures in national legal systems if/when possible since it would allow both parties to find a solution without entering into a legal (administrative or judicial) procedure. Nevertheless, it must be remembered that mediation is always optional and would coexist with administrative and judicial procedures; it would never substitute nor eliminate those mechanisms.

- Only MS are competent to decide if mediation is possible in the fields of Administrative Law. Even if they decide to set up this mechanism, in those countries belonging to the “continental” version of Administrative Law mediation may not be a main solution since it cannot take the place of formal administrative appeals. Mediation must be coherent with the general principles of each national legal system.

- Charge-free, confidential, conducted by impartial mediators: mediation provides a low cost and speedy alternative to formal complaints, because it is a charge-free process that roots in parties’ joint consent to discuss the issues in dispute and define a solution for them.

- Although mediation is an informal process, legal rules should establish at least a time limit to reach an agreement between public bodies and re-users. This procedure must allow the participation of third parties when their interest of rights (i.e.: personal data, IP…) are concerned in order to avoid further complaints that may delay the final decision.

- Even where a settlement is not achieved, the process of mediation itself helps parties to narrow and clarify the issues that are at the heart of a dispute. Furthermore, the discussions are without prejudice and the conflicting parties can continue with proceedings if mediation fails.

- This guideline would also include the clear designation of the mediators, that is, the competent body to direct the procedure. It should be one with the know-how to perform such a procedure and with the requirements needed in order to treat all conflicts fairly and impartially (this may be one of the main difficulties to solve).

- If the parties would not come to an agreement, the mediating body should also be able to issue a decision. Of course, such a decision should be open for appeal under the official redress procedure, but it can offer a first solution to the conflict.

- Mediation should be preferably oral, flexible, and adversarial as well as immediacy guided.

Assignment of a responsible administrative body/authority

A good way to organise an efficient redress mechanism is by **assigning a specific administrative body or authority that is competent to handle the complaints**. This does not necessarily mean that a new administrative body has to be set up for dealing with PSI issues, but rather that the adequate means and expertise are assigned to address complaints on PSI re-use. Pre-existing authorities/bodies could be assigned to solve PSI re-use complaints.

This designated body should have the following characteristics:

- **All the decisions related to PSI re-use in each public entity should be adopted by an authority or body**. When the demands on access for re-use purposes are under the responsibility of the authority that holds the data and coordination is not assured, there is a risk of contradiction since each of them may decide according to their own criteria. If this happens and there is not a way of standardizing all the decisions adopted inside each public entity, legal certainty may be harmed and a significant increase of disputes may break out. As a consequence this authority/body could achieve a higher level of specialization that may also avoid unjustified complaints**.**

- **Material specialisation.** As far as it is possible there should be just one authority/body/administrative organ competent to decide on PSI conflicts inside each public administration (note that in decentralized countries probably there will be several of them). This is an excellent way to achieve material specialisation. 1) Considering the close logical relation between access and PSI re-use, it can be assumed to be a good option that this body were competent for deciding on appeals regarding the right to access as well as re-use of PSI. It can also be taken into account the possibility of assigning this competence to the Personal Data Protection Authority, if possible according to national peculiarities, since personal data protection usually is an issue involved in access and re-use requests. 2) This body should be competent to solve on appeals against decisions by which a public sector body refused or dismissed the request for access or re-use of public sector information as well as to initiate misdemeanour procedures for violations of the applicable legal rules.

- **Impartiality and autonomy**. This body should be impartial and should be able to decide "independently" on the complaints (independence understood here as a certain degree of autonomy, not in the sense of judicial independence). In order to maintain its autonomy, the administrative body should have: 1) appointed members and predetermined causes for dismissal (composition is a key aspect in order to obtain real autonomy or independence, as well as impartiality and objectivity); 2) organisational and functional autonomy, not subjected in any way to PSI holders; 3) expert, sufficient, consistent and administrative-technical staff; and 4) a sufficient and consistent budget (budgetary independence), to ensure that it can be staffed with people that have the necessary expertise and specialisation to decide on the –often very specific– matters relating to PSI.

- **Binding decisions**. 1) The decisions issued by the designated administrative body should be binding under the rules of the Administrative Law. Namely, this body must have the power to issue binding and enforceable decisions (second-instance, administrative decisions). The redress body should be able to take binding decisions and have the tools to enforce the execution of these decisions by the public sector information holders and to check whether the decision was executed appropriately. For example, the redress body should impose an obligation to report on the measures taken to remedy the conflict on the PSI holders. Not enforcing them may constitute a misdemeanour. 2) When the decision becomes final and enforceable and the PSI is not made available, the applicant should be able to turn to the administrative body who can initiate an inspection and/or misdemeanour procedure and it can also demand that the public sector body reports why its decision has not be enforced and it can also issue a fine. 3) This decision can be, nevertheless, disputed before the Administrative Courts.

- **Rules and procedure to determine the competent body in case of positive/negative competence dispute**. 1) According to national peculiarities, each national legal system should provide rules regarding which authority is competent. 2) However, no matter how clear these rules are, competence dispute may arise in certain complicated complaints involving different rights and interests. In case of a competence dispute, legal rules must establish the competent authority to solve it and a procedure for determining the competence between different authorities who claim they are both competent (the so-called "positive competence dispute") or not to be competent ("negative competence dispute"). 3) The competence dispute might involve authorities of different territorial level (national v. regional; regional v. local) or with different material competence (consumers protection, PSI re-use…). It must be taken into account that access and data protection are fundamental rights with *vis attractiva*. 4) At first sight, the most frequent conflicts that may arise between PSI holders and PSI re-users or between PSI re-users themselves are those related to personal data protection or free competence. In that sense: 4.1.) Competition law: Both the European Commission and the National Competition Authorities are entitled to apply EU competition law. Furthermore, National Competition Authorities can also apply their national competition laws. As a consequence, in the PSI-cases in which competition law issues will be at stake, the PSI competent bodies will have to coordinate their action with that of the Commission and the national competition authorities. To be sure, the PSI Directive includes many provisions with a clear antitrust flavour, such as articles 8 and 10 about non-discriminatory licenses. Therefore, there could also be scenarios where the involvement of the European Commission and the National Competition Authorities would be useless, except for the diverse remedies that follow from the application of competition law. 4.2.) Personal data protection: in general terms, cases involving personal data protection to be solved by Data Protection Authorities differ from those involving personal data protection to be solved by PSI re-use competent body. In the first type of cases we may find a violation of personal data. In the second type of cases probably we will

find a denial of PSI re-use based on the protection of personal data. Conflicts of competence in strict sense should be rare, but not necessarily[2]. When the impediment to PSI re-use lies on personal data protection, report of the Data Protection Authorithy must be requested by the PSI re-use competent body. This report should include not only an answer about possible violations of personal data protection but also solutions to harmonize re-use and data protection when possible.

- **Exchange of information**. Although Administrative Law usually includes means of cooperation, collaboration and communication among different Public Administrations and different public bodies, it must be underlined the convenience of including some specific legal provisions imposing the exchange of relevant information among the different authorities competent to solve PSI re-use complaints. In decentralised countries that have sub-national structures with their own competence on PSI matters, it is very important to maintain a harmonised approach to complaints from PSI re-users against public sector information holders. This would require at least a coordination structure with organised communication and exchange of experience between the different redress bodies involved.

- **Redress procedure should be free of charge (or the charges should be very low)**. As the European Union intended to promote the availability of new services by adopting the new PSI directive, one has to consider that these new services are very often provided by start-ups or SMEs. Should this be the case at the local level, for those kind of enterprises high procedural fees or the risk of loosing high court fees are a crucial factor and could result in a negative project decision.

[2] For instance, should the PSI re-use Competent authority order the PSB to release the data, the Personal Data Protection Authority may demand not to release them. PSB shall then understand which rules have to be followed.

Transparency of redress procedure

As explained in Deliverable D4.1 (*Good practices on Institutional embedding and enforcement*) no matter how well the redress procedure is organised, if the potential complainants do not know how to access the means of redress or do not have sufficient information about the different steps in the complaint procedure, it may become completely useless. Therefore, it is highly recommended to increase the transparency of the redress procedure for the re-use of PSI. Note that this is **transparency specifically related to redress procedure** and therefore is considered in a different section: transparent redress procedure is the key line to be stressed here, besides transparency in general terms. Since administrative procedure cannot be avoided, it must be adapted to special PSI re-use needs and bettered when possible.

This objective could be reached by:

- publishing guidelines for re-users on how to file a complaint and the different steps of the process, combined with possible assistance in case of questions, e.g. through the availability of a help desk
- making accessible in a structured and usable way the previous decisions by the competent authority or PSB to decide about the complaints, so that re-users would be able to know if it is worth complaining or not
- making public the answers or recommendations which correspond to the consultations made by PSB about what answer they can give to certain requests of the public when this competence is reserved to the same body/authority in charge of solving the claims in the field of PSI re-use
- publishing an annual report with statistic information about the complaints made and the decisions adopted by the competent PSB or authority that may include not only the number of filed, approved and denied complaints, but the number and list of received court decisions, with which the applicant's lawsuit was accepted, including the reasons for such decision.

Swiftness of the procedure

A particular redress procedure at the administrative level should be set up in order to avoid the inconveniencies and delay of the judicial review. This procedure has to be swift and handled within a minimal timeframe to provide re-users with legal certainty and facilitate the investments required in order to offer their value-added services. The following recommendations would be useful when to adapt the existing procedures or to set up new rules:

- the lack of a formal answer within the deadline should be considered as an uphold unless a higher public interest is concerned, although a prolongation has to be allowed when the complexity of the case or other objective reasons demand its extension
- upon receiving the complaint, the appellate body should receive it immediately after and a brief deadline should be given in order to send its statement
- a clear and brief deadline should also be established in order to enforce the decisions by the appellate body/authority
- administrative review should always be optional and not compulsory for the PSI re-users so they can always go directly to a judicial process in case it is considered pertinent.
- special attention for the practical organisation of the procedure: the formalities of a redress procedure may be stricter than those at the first instance level since harder requirements have to be satisfied when a complaint is made. Nevertheless, the practical aspects of the redress procedure may also play an important role in discouraging re-users from filing a complaint against a PSI-holder. As we have already stated in Deliverable D.4.1 (*Good practices on Institutional embedding and enforcement*) good practices would include the possibility for complaints to be filed electronically and possibly via a standard form provided on the redress body's website. Some practical suggestion would also include: a) the use of no set form to fill out or format for the complaint; b) limit the compulsory use of digital signature to those persons/entities that are generally obliged to use it and offer alternative and easier identification mechanism (i.e. previous identification, username and password...); c) offer an official, secure and swift service to receive the final decision within the redress procedure and any other communications related to it and try to avoid any formal mechanism that may hinder the complaints[3].

[3] Introduction of a previous public hearing should be considered as a good option in cases were mediation is not allowed according to some LAPSI 2.0 partners. However, other member of the network disagreed with this option because the oral hearings are costly and time consuming (for any of the interested parties: PSB, re-user, regulator).

The need of a personal and direct responsibility

Besides the institutional perspective, a personal responsibility should be considered among the indirect redress mechanism in order to avoid the inconveniences of clearly unjustified denials of re-use and administrative silence. Apart from a solution based on liability to compensate damages, those authorities and civil servants that do not allow access for re-use purposes when it is clearly stated by law, should be fined and therefore obliged to pay it out of their own earnings.

This solution must only be applied when the decision or inactivity could be considered as intentional or at least an example of serious negligence. Otherwise, the absence of any direct consequence to the person in charge of taking the decision may become a main inconvenience even when access is recognized as an unquestionable right for re-use purposes since public bodies will assume all negative consequences, but not the person who has not fulfilled the legal provision. The proposed alternative is particularly useful when the judicial review may take too long since it may damage the interest of PSI re-users, who frequently need a quick and definitive answer.

The effectiveness of this measure requires to be adopted either by a judge or an independent body; although it may also be appropriate when the administrative authority that has to decide on the appeal or complaint is not related to the one that initially refused the re-use demand and has at least an autonomous status.