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## 1 Access as the linchpin for re-use of public sector information

This introduction sets out the relationship between Directive 2003/98/EC on the re-use of public sector information (hereafter: PSI Directive) and national access regimes, and explains the methods by which we identified and structured good practices associated with rights of access to PSI. By way of summary, a table at the end of this chapter gives an overview of the different good practices identified and their effect on the three main aspects we analyse: that PSI must be discoverable (it is known what information is held by which organisation), available (public under FOIA, at reasonable terms and prices) and usable (meeting user needs, e.g. as regards format and timeliness).

### 1.1 Access under the PSI Directive

The Public Sector Information Directive sets out a general framework for the conditions governing the right to re-use information resources held by public sector bodies, which includes provisions on non-discrimination, transparent licensing and the like.<sup>1</sup> It is the main EU instrument for stimulating the creation of value added information products and services (tools, apps, content). The objective of the PSI Directive is to achieve a more level playing field across the EU/EFTA through minimum harmonization of national rules and practices, thus enabling European companies (and citizens) to exploit the full potential of re-using data produced by the public sector.

Re-use of government information naturally requires access to the information. However, the PSI Directive itself does not oblige Member States to grant access. This can be explained by the fact that the EU has only limited legislative competence to regulate access to public sector information at Member State level.<sup>2</sup> Thus, the PSI Directive applies to documents that are *already* made publicly accessible under the national rules for access to documents (art. 1(3) PSI Directive).

An important improvement of the PSI Directive as amended in 2013 is that it *requires* rather than invites Member States to allow the re-use of documents of information that can be accessed under national access regimes (art. 3(1) PSI Directive).

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<sup>1</sup> Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information; also see Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information. For a consolidated version of the PSI Directive consult <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2003L0098:20130717:EN:PDF>

<sup>2</sup> LAPSI 1.0 Policy Recommendation N. 6, Rights of Access to Public Sector Information (hereafter: Policy Recommendation 6), available via <http://www.lapsi-project.eu/outputs>.

## 1.2 Role of Freedom of information laws

Undeniably, the many open data policies that take shape all around Europe drive the potential for businesses and citizens alike to create new information services and products. Usually, such open data policies seem to be only loosely related to statutory rights to information and disclosure duties of PSBs. Rather they engage 'soft law' instruments at most. The commitment countries undertake in the context of the mushrooming Open Government Partnership are a case in point: countries 'sign up' to a number of transparency principles and draft their own action plans. We shall pick up on the importance of such informal norms later. Since the brief of the LAPSI network is on *legal* barriers to and enablers of re-use, our focus in this paper is on the legal framework for statutory rights to information in Member States.

Rights of access to information tend to be constitutionally guaranteed (as is also the case at the EU level) and then elaborated in a general 'freedom of information act' or 'FOIA'. The latter is the common term used in Anglo-Saxon countries. Elsewhere, general laws governing transparency are called 'access to official documents' acts, or 'access to government information' acts, or more recently also 'open government' acts and 'right to information' acts. In this paper all such terms are used interchangeably, with FOIA used as the default term.

Because FOIAs are the most generic instruments in that they apply to large parts of the public sector and many types of information, we focus on them here. However, information can also be made public on the basis of other legislative instruments. Some public sector bodies publish information on the basis of sector-specific regulation containing particular publication duties (e.g. public registries, meteorological services, legal information). This is why we also consider examples from sector specific legislation. Furthermore, access might also be granted not on the basis of an explicit legal right or obligation, but as part of 'good' policy, for example when local agencies make data sets available via data portals without legally being obliged to do so,<sup>3</sup> or when PSBs use their discretionary policy space to promote re-use, as for example the Norwegian meteorological institute does.

Access rules are in essence framed towards government accountability and transparency, whereas allowing re-use (also) has an economic objective.<sup>4</sup> As just said, the EU has limited competence to harmonise national access regimes. The right to re-use thus sits on top a variety of national access rules that all differ in scope and field of application.<sup>5</sup> The type of information that FOIA covers might not be of particular interest for (commercial) reuse; or it might be, but FOIA will only allow access and not re-use. The procedures for obtaining access might also not be conducive to re-use, if it is time consuming for example, or prohibitively costly. Such enforcement problems are addressed in more detail in a dedicated WP.

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<sup>3</sup> For more information on all the different national access rights and obligations see Policy Recommendation 6.

<sup>4</sup> At least, the PSI Directive stimulates re-use because of the economic benefits. Remarkably, re-use policies have been most successful in Member States that promote re-use based on arguments of transparency and accountability. See Janssen, K. 'The influence of the PSI directive on open government data: An overview of recent developments', *Government Information Quarterly* 2011-4, 446.

<sup>5</sup> For more information on all these differences in access rules see Policy Recommendation 6.

### 1.3 Aspects of access

Tapping into the re-use potential of public sector information (PSI) requires that re-users know:

1. What information or data public sector bodies hold and what its characteristics are (PSI must be **discoverable**),
2. What information may be accessed, through which procedure, and what the conditions for reuse are, including pricing (PSI must be **available**).
3. Whether the data is of such quality (in terms of e.g. format, granularity, timeliness, completeness, accuracy) that it is **usable**.

The focus in this document is on the first two aspects in particular, as these are typically key elements of freedom of information legislation, i.e. laws that grant access to public sector information. The 'availability', in terms of workable conditions and pricing for the re-user veers towards the re-use side, as opposed to the mere access that Freedom of Information Laws are traditionally concerned with. But we can and will certainly identify in national FOIAs provisions that are supportive of re-use. **Usability** is primarily determined by user needs of course; but knowledge about data quality can also be considered as an aspect of discoverability (e.g. publication of metadata on datasets in asset registers).

### 1.4 Methodology

Given the key enabling role that access regulation plays for re-use, we ask '*What are examples of good practices in access regimes that overcome the legal barriers to re-use of PSI?*' Because the LAPSI network is concerned with legal aspects, our focus is on the regulatory side. However, it should be noted of course that good access practices need not necessarily consist of *legal* practices. Having rights of use in laid down in statutes for example is not necessarily better than using licences to ensure access, even if it has the advantage of legal certainty. In the same way, actual publication practices that exist without there being immediate legal obligations to disclose information in a certain way might work well to.

A (legal) practice is 'good' if it makes an access regime more re-use friendly. Our focus is on the user perspective. In discussions we established some main characteristics of 'good' practices. From the perspective of a re-user this includes rules which:

1. Ensure the widest possible access to resources
2. Limit the restrictions to what can be done with the information;
3. Provide legal certainty on what uses can be made;
4. Respect user preference with respect to e.g. format of supply;
5. Help to reduce search costs;
6. Give re-users a voice in decision-making on what data are made open and how.

The latter aspect is virtually absent from freedom of information laws, but there are initiatives in Member States geared towards identifying promising datasets for example. The availability of review and enforcement procedures is subject of the work package on enforcement and will thus be addressed largely elsewhere.

Likewise, the WP on Licensing analyses which licensing types are re-use friendly and thus to be preferred. So to the extent that points 2-3 above cover procedure and licensing aspects, this document does not go in to detail so as to avoid overlap with the work of other LAPSI WPs.

These Good practices are primarily aimed at policymakers who are considering reform, or the introduction, of access rules that are conducive to re-use. Alternatively, and easier to do, policymakers might use them to provide PSBs guidance on how to apply FOIA in a re-use friendly way wherever the law permits.

### Characterization of FOIA elements

Our research is structured in the following way. As a recent treaty, the Tromsø Convention on Access of 2009<sup>6</sup> can be held to reflect fairly commonly occurring provisions in national access laws. Taking the Convention supplemented by a number of (recent) national FOIAs, we identified and clustered the elements that we might expect to be present in most freedom of information acts and that are directly relevant for re-use.

These provisions relate to:

- a) the scope of PSBs and information types covered;
- b) possible grounds for non-disclosure (limitations on access);
- c) access for all (non-discrimination);
- d) any charges for access;
- e) standards on how to process requests for access;
- f) form in which access should be granted;
- g) review procedures.

Less common provisions, but highly relevant to re-use are those on

- h) the uses that may be made of information
- i) instruments informing on the resources/information present within PSBs
- j) duties to pro-actively disclose certain public sector information.

Taking the aspects of access identified above at 3 (that PSI must be discoverable, available and usable); we then mapped for each of these categories what the relevant provisions of the PSI Directive favour. This allows us to highlight any tension between the norms (and objectives) of the PSI Directive and FOIA norms. If for example access is granted by handing over a paper copy to an applicant, this restricts the re-user in what can actually be done with the data. This explanation leads to what could be a 'good' practice to solve this tension. In this example: when the user has the possibility to specify the preferred format; or the default mode of granting access under the relevant FOIA would be digital and in open format.

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<sup>6</sup>The Convention on Access is our starting point because this is a widely agreed on set of access rules. Note that we do *not* take the substantive rules of this Convention as the norm for what is a 'good' practice. It is not a given the Convention's minimum requirements are good from a re-use perspective.

From a re-user perspective good practices also include non-regulatory instruments that make public sector information known, available and usable (e.g., data portals that are created outside of any FOI obligations).

Overall we looked into the activities of EU member states. In particular we looked for examples in the United Kingdom, Slovenia, The Netherlands and Spain, either because open data monitors and experts in our network point out these countries have very active open data policies or because they have recent FOIAs. We also included some examples of non-EU countries (Australia) because their well-developed access and re-use regimes contain informative examples for our project.



## 1.5 Summary table

**Table: Freedom of information laws characteristics conducive to promoting re-use of PSI (LAPSI 2.0 Good practices, June 2014)**

<b>Good FOIA practice</b>	<b>Helps make PSI</b>	<b>Discoverable</b> (known what PSI is where)	<b>Available</b> (what PSI public, how to get it, terms& pricing)	<b>Usable</b> (fit for purpose re-user)
<b>Broad scope information &amp; bodies covered</b>			√	
<b>Few and narrowly described limitations</b>			√	
<b>Access for all (non-discrimination)</b>			√	
<b>Access to bulk &amp; dynamic data</b>				√
<b>Quick response times</b>				√
<b>Pro-active disclosure duties</b>		√	√	
• <b>Online</b>		√	√	
• <b>Open format</b>				√
• <b>User led</b>				√
<b>Search support</b>		√		
<b>Referral system</b>		√		
<b>Information registers / portals</b>		√		
<b>User preferred form</b>				√
• <b>Open formats</b>				√
• <b>Machine readable</b>				√
<b>No or low costs of access</b>			√	
<b>Efficient review access procedure</b>			√	√

## 2 Re-use friendly legal practices

### 2.1 Broad scope of access rights

In the introduction we have seen that the practical value of the right to re-use PSI depends largely on the availability of information under local access to information acts. Obviously then, the *scope* of such laws is important, on four issues especially: a) the type of institutions covered, b) the information types covered, c) the permitted grounds to refuse disclosure and d) any obligation to pro-actively disclose information in addition to answering access requests. From the re-users perspective, pro-active disclosure duties are closely tied to discoverability (knowing which information is available for re-use, and knowing its attributes), which is why we discuss them mainly in the Discoverability section. In this and the next section the focus is on the *legal status of PSI as public information*.

The scope of the PSI Directive is determined by the concepts ‘Public Sector Body’ and ‘Document’, as defined in article 2. Tension between the local access regime and the EU re-use regime can occur in the sense that both regimes are autonomous and define their own scope. It turns out national access regimes differ on the type of bodies that are subject to obligations to make information public and the type of documents or information covered.<sup>7</sup> Information that falls within the scope of the PSI Directive therefore, does not necessarily have legal status as public information under local law.

From a re-use perspective it is ‘good’ if it is clear beforehand with which institution a re-use request may be filed and what types of ‘documents’ can be requested. Also, the less bodies are excluded, the more PSI will be available, so the less restrictive the definitions of PSB and document, the better.

### Good practices

#### *Latvia - Broad scope of institutions and information*

The FOIA of Latvia provides for broad definitions of *information* and *institution*: ‘information is defined as ‘information or compilations of information, in any technically possible form of fixation, storage or transfer’ and ‘institution’ is defined as ‘every institution, as well as persons who implement administration functions and tasks if such person in the circulation of information is associated with the implementation of the relevant functions and tasks’.<sup>8</sup> Courts and other independent bodies are included to the extent the request refers to an administrative function. In light of the traditional separation of powers it is common for Member States’ law to

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<sup>7</sup> Policy Recommendation 6, p. 7.

<sup>8</sup> Section 1 of the Latvia FOIA.

have separate norms on access to legal information (see the section on legal information below).

*The Netherlands – Broad scope of information covered*

The Dutch *Wet Openbaarheid van Bestuur* ('Wob') gives a right of access to 'information contained in documents', the latter covering all types of media, including datasets. According to the letter of the *Wob*, the information has to relate to an 'administrative matter', but the highest administrative court has consistently interpreted that notion very broadly, to include any information that is somehow related to the making and execution of public policies. In practice, the right of access thus applies to virtually any information held by a PSB.

*Slovenia – Broad scope of institutions and information covered*

The FOIA of Slovenia covers a large number of bodies and distinguishes two types of bodies: the more typical PSBs and certain private law entities. The PSBs include state bodies, local government bodies, public agencies, public funds and other entities of public law, public powers holders and public service contractors. *All* government bodies are included, so even courts and parliament. Covered information by the FOIA for these bodies includes all documents that all mentioned bodies obtain or create when performing their public duties.

An amendment of 2014 added the category of private law entities that are under direct or indirect dominant influence of the Republic of Slovenia, of municipalities or of other public law entities. Only certain information types held by such private entities are subject to the access law. Access rights are limited to information on concluded contracts related to obtaining, disposing with or managing physical assets of a business entity or expenditures of a business entity for ordering goods, construction, agency, advisory or other services and sponsorship, donation and copyright contracts and other agreements, pursuing equal effect. In addition, FOIA covers information on the type of representative or membership in executive, management or supervisory body, the agreed or paid amount or benefit of executive, management or supervisory body member, other business entity representative, and information regarding employment or appointment of these persons, which demonstrates fulfilment of employment or appointment measures and conditions.

Note that the FOIA is wide in scope with regards to the bodies that are covered, but the information covered by the act is more restricted, especially with regards to the private law entities. The latter information solely consists of transparency issues, and not datasets that might typically be of interest for commercial re-use.

*Spain – Broad scope of information covered*

The extent to which PSI is covered by the Spanish FOIA is very broad. It includes all information held by the PSBs, regardless of the format in which the information is embodied.

## 2.2 Grounds for non-disclosure

Even if the general provisions of the FOIA make it applicable to many information types from many institutions, limitation provisions that are broadly formulated may narrow down the scope of the re-use regime dramatically.

From the perspective of the re-user it is good if the limitations are 'set down precisely in law' and are in a closed list, restricted in number. The Tromsø Convention on Access requires that limitations must be necessary in a democratic society, a reference to the European Convention on Human Rights. As the European Court of Human Rights develops a right to access government information under article 10 ECHR (freedom of expression), it is likely that national access regimes and especially grounds for excluding access are more often tested against article 10 ECHR. To what extent Member States can then maintain absolute grounds of refusal is uncertain.

In any case, most Freedom of Information Acts contain more relative grounds of refusal, whereby the interest in public disclosure must be weighed against one of the enumerated interests, for example national security, privacy, crime prevention, or legitimate commercial interests of third parties. The list of exemptions can be elaborate (as in the UK's FOIA, with more than 20 grounds for refusing access) or relatively short, but just how much PSI it carves out from public access depends of course to a large degree on how narrow or broad they are applied.

It is preferable to have limitations that are formulated, interpreted and/or applied as strictly (narrow) as possible, as that would allow for more re-use under the directive. For individual PSBs, or FOIA officers, the availability of guidelines may be good as these can assist in the assessment of whether PSI is exempt on the basis of FOIA. Such guidelines ensure more transparency towards re-users on the exemptions that may apply to their access request. A good practice would also consist of having the same (and only those) limitations that apply to access, also apply to re-use.

To the extent that there are (legitimate) limitations to access, it may be considered good practice if the law sets time limits beyond which the limitations invoked no longer apply or demands that their continued effect be reviewed (although this is less useful for time sensitive information types). Furthermore, from the perspective of the re-user it is good if the law does not enable PSBs to reject a request for access for the reason that producing the document is too time consuming, or too burdensome in monetary terms.

It is also good practice if the same, and only those, limitations that apply to access also apply to re-use. It should be noted that as regards intellectual property rights, the fact that information held by a public body is subject to third party intellectual property rights does not exclude it from the scope of FOIA per se. Access may still

be given, but the use made of the information is limited by the IPRs. The PSI Directive on the contrary does not apply to information in which third parties own e.g. copyright or database rights.

## Good practices

### *Australia – Provide factors for weighing interests*

The Australian Freedom of Information Act 1982 (FOIA) is very elaborate on documents that are exempted from access. The law distinguishes exempt documents from conditionally exempt documents.<sup>9</sup> The exempted documents are not just listed in one provision in the act, but there is one section for every type of exemption, allowing the act to go into detail concerning what does and what does not constitute an exempt document of that particular type.

The conditionally exempt documents are handled the same way, but differ in the fact that they are not absolute grounds for refusal.<sup>10</sup> With regards to these documents, PSBs have to weigh the interests affected by an eventual disclosure of the documents. What is interesting about the Australian act is that it enumerates a list of relevant factors and a list of irrelevant factors in weighing these interests, narrowing the discretion of the PSBs and allowing for more legal certainty.<sup>11</sup> By providing such a list of relevant and irrelevant factors, the decisions of the PSBs on whether or not to disclose documents may be more predictable and transparent. At the same time, it gives support to PSBs in making the decision with regards to disclosure of the documents.

### *The Netherlands--Closed list of exemptions*

The Dutch Wet Openbaarheid van Bestuur lists absolute and relative grounds for refusing access. The highest administrative court has repeatedly held that no other grounds can be invoked to refuse access. Notably, the fact that searching and copying the information requested takes a lot of resources are not relevant for the decision whether the information must be made public.<sup>12</sup>

### *Sweden – Limited grounds of exemption*

The Swedish FOIA (Freedom of the Press Act, elaborated in the Public Access to Information and Secrecy Act of 2009) recognizes a limited and exhaustive number of grounds on which disclosure may be refused (e.g. national security; monetary policy; crime prevention and prosecution).

<sup>9</sup> Article 11A(4) and (5) FOIA 1992.

<sup>10</sup> Article 11B of FOIA 1992 requires the PSBs to balance the public interest with.

<sup>11</sup> Article 11B(3) sums up the factors favouring access; Article 11B(4) sums up the irrelevant factors.

<sup>12</sup> See among other cases Administrative Division Council of State, [ECLI:NL:RVS:2009:BI2651](https://ecli.europa.eu/DocView.aspx?doc=ECLI:NL:RVS:2009:BI2651) (in Dutch), for English summary see <http://www.epsiplatform.eu/content/landmark-decision-landmark-case>

### 2.3 Pro-active disclosure duties

National freedoms of information acts tend to recognize two types of access: passive and active. Pro-active or 'active' dissemination refers to the situation that a public sector body takes the initiative to publish PSI. Access given on request (or: passive disclosure). It is reasonable to assume that making data publicly available pro-actively has the larger positive effects on re-use. It would also seem to be easier to build a transparent re-use system on the basis of pro-active publication duties. Most national access regimes however focus on access on request; this is reflected in the fact that a large part of most freedom of information acts is dedicated to aspects of the request procedure.

In between passive and active disclosure are systems where the granting of multiple requests for the same information triggers an obligation to actively publish the information, e.g. on the PSB website or a data portal. It might be assumed that multiple requests are an indicator of re-use potential, and it would therefore be good practices if PSBs must publish such information actively. That it is maybe desirable but not necessary to have impose a legal obligation is evident from the fact that in many countries public authorities move towards a system where FOIA applications and the information released are published online (see also the Norwegian Electronic Post Journal discussed in section 2.5).

Of note, the boundaries between access on request and publishing pro-actively seem to blur in the digital environment. If data is 'delivery ready' at known terms, we consider it as pro-active dissemination.

#### Good practices

##### *Slovenia – Mandatory online publication*

The Slovenian Access to Public Information Act (APIA) provides that PSBs are obliged to make available PSI online that is included in a statutory list. The list consists mainly of information that is of particular relevance from the perspective of transparency: consolidated texts of regulations, proposals of regulations, documents that are of important nature for the decisions of the PSB and its interaction with other actors and information on their activities and services. Nonetheless, it is good example of how could be dealt with data that is more likely to be commercially re-used and exploited.

##### *Spain – Mandatory pro-active disclosure*

The Spanish FOIA goes further than solely providing which PSI can be granted access to: the law also provides for pro-active publication of PSI in certain cases, so without a request having to be made.<sup>13</sup> The act does not provide for limitations to this

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<sup>13</sup> Sections 5-11 of *Ley 19/2013, de 9 de diciembre, de transparencia, acceso a la información pública y buen gobierno* (hereafter: *Spanish FOIA*).

obligation to PSBs. If personal data are involved in the PSI, anonymisation prior the disclosure is required. While such a provision does not extend the scope of information covered by the FOIA *per se*, it promotes access to, especially certain kinds of, public sector information.

#### *Spain – Frequently requested information*

According to the FOIA of Spain public sector information that is frequently requested, has to be made accessible online.<sup>14</sup> This information is to be published through a transparency portal, where the PSB in question also has to publish certain kinds of information pro-actively.<sup>15</sup>

#### *UK – Publication Schemes*

The UK's Freedom of Information Act 2000 does not directly oblige public sector bodies to disclose PSI pro-actively. However, all public authorities have a duty to adopt and maintain a publication scheme.<sup>16</sup> Such a scheme must specify classes of information which the PSB publishes or intends to publish (e.g. details on its own organisation and tasks, on the registers or other datasets it holds) and detail how it will do so. The public sector body is then committed to make information available to the public according to its own scheme. PSBs thus accept an obligation to publish pro-actively by way of adopting a publication scheme. The schemes also function as search support: re-users know what the PSB will make public. If a public sector body drafts its own scheme, it has to be approved by the Information Commissioner. Public sector bodies can also adopt a model publication scheme prepared by the Information Commissioner.<sup>17</sup>

#### *UK – Local Government Transparency Code*

Separate from the FOIA regime, the UK's Minister responsible for local government has issued the 2014 '[Local Government Transparency Code](#)', which obliges local authorities (only in England) to pro-actively disclose certain information online, in a format and under a licence that allows open re-use.

On a quarterly basis, local authorities must disseminate PSI regarding: expenditures exceeding £500, Government Procurement Card transactions and procurement information.<sup>18</sup> Certain kinds of PSI have to be published annually, among which data regarding subsidies given, organisation charts, as well as data on land and building assets owned.<sup>19</sup> The code recommends other PSI to be disclosed as well. This is, however, not an obligation.<sup>20</sup>

<sup>14</sup> Section 21 of Spanish FOIA.

<sup>15</sup> Section 10 of Spanish FOIA.

<sup>16</sup> Art. 19 and 20 Freedom of Information Act 2002.

<sup>17</sup> A model may include environmental information, public access to which is prescribed by Directive 2003/4/EC of 28 January 2003 on public access to environmental information (implemented in the UK in the Environmental Information Regulations (IER)).

<sup>18</sup> §§17 and 18 of the Local Government Transparency Code

<sup>19</sup> §§24 and 25 of the Local Government Transparency Code.

<sup>20</sup> Part 3 of the Local Government Transparency Code.

Requiring PSBs to pro-actively disclose PSI promotes access and therefore also re-use. The code from the UK mainly concerns information that is interesting with respect to transparency, but it also encourages PSBs to disclose any data that they hold or manage, or in other words to be open by default.

## 2.4 Non-discrimination

There are many situations in law where a right to access government held information is conditional: for example where it concerns the rights of data subjects to be informed about personal data held about them, rights to information in the context of legal disputes, planning permission procedures or access to statistical micro-data for researchers.<sup>21</sup> In such cases access is typically 'privileged' in that the person must have a particular (legally recognized) interest in obtaining access or have a certain status. The PSI directive only applies where there is 'public' access, so in cases of 'privileged' access Member States do not have to ensure that re-use is allowed.

The PSI Directive seems purposefully vague in its references to what must be understood as public information. It states 'This Directive builds on and is without prejudice to access regimes in the Member States' (art. 1(3) PSI Directive). It does not apply to 'documents which are excluded from access by virtue of the access regimes in the Member States' or which are 'documents access to which is restricted by virtue of the access regimes in the Member States, including cases whereby citizens or companies have to prove a particular interest to obtain access to documents [author emphasis] (art. 1(2) sub c and ca PSI Directive). We can recognize here the FOIA absolute and relative grounds of refusal for access to certain information (discussed above) as well as the distinction between privileged access and general access.

Rights to information as enshrined in freedom of information laws fundamentally mean: access for all, not privileged access. The Tromsø Convention stipulates that access to official documents is: 'the right of everyone, without discrimination on any ground' (art. 2(1) Tromsø Convention). The principle of non-discrimination is often expressed explicitly in national FOIAs, in a provision stating that *anyone* can request access, or in a provision that stipulates the applicant does need to *motivate* his or her request. In its broadest sense, non-discrimination not only means no distinction is to be made between different groups of natural persons, but that legal persons can also invoke FOIA. Furthermore, in light of EU law, no distinction should be made between domestic and foreign applicants.

It is beyond the scope of this paper to analyse the application of the non-discrimination principle in depth; for our purposes it suffices to say that MS that

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<sup>21</sup> For example, the Dutch *Centraal Bureau voor de Statistiek* (Statistics office) holds data that it may not disclose due to data protection and commercial confidentiality restrictions; on the basis of the Act governing its research, collection and dissemination duties, it has set up a system where certain researchers can get access to micro-data under strict conditions. A clear example of privileged access.



adhere to a broad interpretation of non-discrimination enlarge the pool of information available for re-use. Since an objective of the PSI Directive is to stimulate the development of cross-border information services built on PSI, non-discrimination at the point of access is of great importance.

The PSI Directive itself contains a non-discriminatory provision in article 10. However, this provision is not as broad as the non-discriminatory principle in access regimes. Article 10 states that *comparable* categories of re-use must be treated similar where it concerns any conditions and charges imposed for re-use.

## Good practices

### *The Netherlands – No motivation of request*

The Dutch *Wet Openbaarheid van bestuur* (FOIA) explicitly states that whoever requests access to information need not motivate his or her request. The legislative proposal for a new Open Government Act that is currently pending before parliament (Second Chamber) extends the no-motivation clause of the current FOIA to requests for re-use.

### *Norway – No motivation of request*

In Norway any person may file a request for access and does not need to provide a reason for their application. They may also request access anonymously. Section 3 of the FOIA states that ‘Any person may apply to an administrative agency for access to case documents, journals and similar registers of that administrative agency.’ Coupled with this everyone has the right to reuse PSI for any purpose. A ‘reuse by default’ regime is enshrined in the Norwegian Freedom of Information Act. Section 7 prescribes that the user is given the right to reuse documents for any purpose unless this is prevented by other legislation or the rights of a third party.

### *Slovenia – No motivation of request*

Under Slovenian law access is not conditional on the showing of a legitimate interest. Everyone may file a request and re-use PSI. Article 17 paragraph 3 of Access to Public Information Act (APIA) establishes that ‘The applicant is not required to give the legal grounds for the request or expressly characterize it as a request for the access to public information. If it is evident from the nature of the request that the latter concerns access to public information under this Act, the body shall consider the request pursuant to this Act.’

### *Spain – No motivation of request*

In Spain it is not required to justify or explain your access request and you do not need to show any interest.<sup>22</sup> Requesters *can* do it on a voluntary basis.

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<sup>22</sup>Section 17.3 of Spanish FOIA.

## 2.5 Discoverability of PSI

Discoverability is one of the first thresholds a re-user needs to overcome to get access to PSI. What kind of information is available? Where can this information be found? What are its attributes? These are key questions a re-user asks himself. Thus, PSI must be discoverable from a re-users perspective. Discoverability is an important aspect for both pro-active disclosure and access on request.

Without proper knowledge about what information is available and where this information can be found, actual re-use will be restrained. Therefore, a re-user needs support to lower the search costs.<sup>23</sup> We have identified different forms of search support embedded in access laws: referral systems, request support and public information registers. The latter make take the form of data portals, but generally speaking, data portals are developed either on the basis of sector specific regulation (e.g. Inspire, see annex) or with only a modest link to formal legislation like FOIAs. Considering their great value for discoverability we have included some examples.

### Referral system & Request support

A referral system helps applicants get to information in cases where they may be unsure which institution to address with an access request. Rather than simply denying an application, referral duties ensure that the PSB redirects the applicant to the relevant PSB that actually holds the information. The Tromsø Convention on Access favours such a system: if a public authority does not hold the requested information or is not competent to decide on access, it should 'wherever possible, refer the application or the applicant to the competent public authority' (Article 5(2) Tromsø Convention).

If documents are held by a public sector body but re-use and even access is restricted because a third party outside government holds intellectual property rights (esp. copyright and database rights) in the content, a referral to the IP holder reduces search costs for the re-user as well, by making it easier to know where to go for clearance of IP rights.

Referring applicants to the 'right' PSB is one way to make it easier to find information. But also when the applicant is already at the right door so to speak, it can be difficult to know what information is obtainable. FOIAs that oblige public authorities to assist applicants in detailing their request show good practice. Again, the Tromsø Convention contains such a standard, as contracting states must ensure that 'the public authority shall help the applicant, as far as reasonably possible, to identify the requested official document' (art. 5(1) Tromsø Convention).

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<sup>23</sup>Policy Recommendation 6, p. 16: 'what you need is what you get' rather than 'what you see is what you get'.

## Public information registers / portals

Few general access laws oblige public sector bodies to provide insight into their information/data holdings by publishing an overview ('register'), let alone have it included in data portals. Yet means that aid the 'discoverability' of PSI – knowing which information resources exist and what organisation holds them—are important for effective access. Information registers 'Scandinavian style' contain information on incoming and produced documents/datasets at a certain PSB. Traditionally such registers are not made with a view to disclosing structured data, so the suitability for re-use is not optimal.

While a one-stop-shop for all kinds of PSI in a certain country or region (or even EU wide) can be very convenient for the re-users, it may imply of course substantial effort to be expended by the PSBs that have to report their information holdings and make them available. This might also explain why initiatives to set up data portals often operate at a sector specific level (e.g. [Inspire geo-portal](http://inspire.geo-portal.org), geo-observation data through <http://www.geoportal.org>), or on the basis of voluntary participation (e.g. [data.overheid.nl](http://data.overheid.nl)) and attract PSBs that are already accustomed to publishing data online (e.g. statistics offices, mapping agencies). The number of data portals at central, regional and local levels of government in Member States is growing rapidly. Their structure, contents and institutional embedding appear to be quite diverse. For an overview of official data portals of EU Member states see <http://datacatalogs.org/group>

## Good practices

### *The Netherlands – duty to provide search support and to refer applicants*

Requests for information must be made to the PSB that holds information. Under the Dutch FOIA, a PSB must assist the applicant in identifying which documents it seeks access to. This is an indispensable part of system because the statutory right is to *information* laid down in documents; an applicant need only name the (administrative) matter on which he or she likes to be informed, it is not necessary to know specifics about documents.

The Dutch system also obliges public bodies to refer misdirected applications for access to PSI to the relevant public body holding the information. So if a request is made to a public body that does not hold the information, the public body has a duty to refer the applicant to the relevant public body. In this way, the re-user will still obtain the relevant information without having the burden to locate the relevant public body that does hold it. This duty to referral is established in article 4 of the Dutch FOIA (WOB).

### *The Netherlands – duty to refer to IP holder*

A duty to wherever possible refer an applicant who seeks to reuse PSI to the relevant third party IP holder is part of the pending legislative proposal for the new Open

Government act which when passed will replace the current FOIA (*Wet Openbaarheid van Bestuur*).

#### *Slovenia – duty to refer*

If a request of access to PSI is directed at the body that is not competent to assess the application, it has to send the application immediately to the competent PSB and notify the applicant accordingly. Therefore, a request cannot be refused on the mere grounds that it is directed at the wrong PSB. The notification enables the applicant to send a future request to the right body, allowing for a more efficient procedure.

#### *Norway: OEP – Norwegian Electronic Post Journal*

The OEP (Norwegian Electronic Post Journal)<sup>24</sup> was launched as a one-stop shop for access to Public Documents in 2010. The goal being to provide user friendly access to public sector information and documents.

OEP provides has a dual function:

- Users can search the metadata about every archived document that the Government has in its possession, and;
- They can request access to documents electronically via the service. This can be done anonymously, free of charge and with no requirement to justify why they require access.

By digitizing the process and adding technical solutions for handling requests in the Case Handling Systems, the time spent on handling requests is greatly reduced and requests are handled in a matter of days.

Usage statistics prove that this approach has been highly successful. After launching the service the number of FOIA-requests for Ministerial documents has increased by 400%. In 2010 when the system was launched it forwarded 56 000 requests. In 2013 this number increased to 203 000. For journalists and other users, OEP has contributed to making access to public documents easier and more streamlined. The digital access to public documents has enabled them to be better suited to have oversight of the government. User surveys show that the user basis for the OEP consists of approximately 50 per cent Journalists. Amongst the others users, we can identify concerned Citizens, NGO's, Businesses and Civil servants.

#### *Queensland, Australia: publication of statement of affairs*

The FOIA of Queensland, Australia, obliges PSBs to publish an up-to-date statement of the affairs of the PSB on a yearly basis. This includes a description of the documents that are usually held by the PSB, which consists among others of documents that 'are available for inspection at the agency' and documents that are available for purchase or free of charge. By publishing the available documents in the possession of a PSB, applicants know upfront the available documents they

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<sup>24</sup> Available at: <https://oep.no>.

might want to have access to. This makes it easier to find PSI and enables efficient searches for government data by potential re-users.

*United Kingdom – central data portal <http://data.gov.uk>*

The data portal of the United Kingdom government is a well-known example of a centralized portal. The portal provides for a large number of published datasets – almost 14,000 – which originate from several public sector bodies. It also provides for almost 4,000 titles of databases which are not (yet) published, but that are held by certain PSBs, so it serves discoverability and access simultaneously. The portal enables the person seeking information to efficiently search for the right information: the datasets are categorized, there is a normal search option and there is an option to use a map based search engine to filter on geographical aspects. The site also provides special tabs for the categories of information concerning 'Public Roles & Salaries', 'Open-Spending' and 'Spend Reports', the kind of information that is usually asked for by information seekers such as journalists. Furthermore, it is possible to request for datasets and to see which datasets other users already requested.

*Sweden – register of official documents*

Under Swedish FOIA, public authorities must keep a register of all official documents<sup>25</sup> received by it or created by it.

## **2.6 Ability to request bulk information and quick response times**

FOIAs are normally not designed for requests concerning large amounts of data, let alone that PSBs are expected to provide automatic updates on the requested information. Pro-active disclosure (or 'near' pro-active disclosure) through portals seems the most obvious way to ensure re-users can have bulk access in a timely manner. If an application needs to be made for access, slow response rates adversely affect the value of access.

### **Ability to request bulk information or dynamic supply**

That FOIAs are generally not geared towards providing dynamic access to bulk data can be explained by a number of facts: FOIAs primarily serve objectives of accountability, they traditionally are concerned with individual documents, and often date from pre-internet times when the supply of structured data online was not developed, or only for very specific types of information and public sector bodies (like Statistics, Company registers). To have bulk supply, and to have it not on the basis of repeat access requests but dynamically, reduces transaction costs for the re-user and thus favours re-use. Ideally an access regime anticipates the needs of the re-users and therefore allows bulk requests and makes provision for continuous flow of information after a request.

<sup>25</sup> Some types of documents are exempt, e.g. documents that are already easily accessible,

## Quick response times

A request for *re-use* of information must be processed within a reasonable time, says Art. 4 PSI Directive. This provision does not govern time limits for access procedures under local FOIA, but the PSI Directive does demand that re-use decision timeframes are consistent with access decision time frames. For many providers of information products and services, timeliness of data supply will be one of the crucial factors that determine the actual re-use potential. So FOIA processing time is important. A good practice thus consists of a prompt process time. At the least, the response times for access requests should be subject to the 'reasonable time' criterion in the PSI directive, including its fall-back criterion of twenty working days.

## Good practices

### *Slovenia – Requests online*

The Slovenian FOIA provides that request applications, among other sorts of documents such as complaints, may be filed in electronic form with a secure electronic signature with a qualified certificate. These applications are to be filed through the competent PSB's system or the unified system that the Minister is appointed to establish. However, this unified system did not yet get off the ground and in practice PSBs tend to accept applications by e-mail that are not electronically signed.

While the case of Slovenia shows a certain mismatch between a situation desired by legislation and the daily practice of PSBs, the legislation itself may be considered a good practice. When such legislation is actually put into practice, PSI can more easily be requested online and enables (to a greater extent) the possibility of multiple request of the same kind of data over time. Simultaneously, this example shows that 'good' legislation alone may not suffice. The implementation of the legislation by PSBs is crucial to whether a law has the desired impact.

### *Norway – Quick response*

In Norway a request must be dealt with as soon as is practically possible and preferably within one day. Normal requests should not take longer than 3 days. In larger cases more time may be necessary, this is acceptable, however the decision on whether to grant access must still be made within the 3 days. If the request is not handled within 5 days, it is automatically sent to the responsible Ministry. In practice the average response time is about 36 hours. This example does not only show a good practice of legislation that provides for short response times, as three days constitute a very short term; in practice the average is even shorter which makes it a good *non-legal* practice.

### *The Netherlands – Aligned response times*

Under the pending proposal for an Open Government Act (which when passed will replace the existing FOIA), the rules with regard to the processing time of access

requests are extended to apply to re-use requests.<sup>26</sup> The maximum processing time would be two weeks.<sup>27</sup>

## 2.7 Re-use friendly formats

The PSI Directive requires PSBs to disclose PSI only in pre-existing formats, but it favours supply in machine-readable form, and appropriate meta-data as well as the use of open formats (art. 5(1)) PSI Directive. Member States do not have to oblige PSBs to 'create or adapt' PSI in order to comply with the directive (art. 5(2)).

Again, it is important to note that while the Directive sets down rules for re-use and obviously favours the supply of PSI in electronic, structured form in non-proprietary formats, on the access side national regimes determine the form in which access is granted. This has the potential to create problems for an effective re-use regime. For example if a public sector body may give access by allowing inspection only, or by supplying paper copies. In this light, access rules that oblige disclosure in electronic form, in a format desired by the public it will be good for re-users if a national regime provides access to PSI in an open format to ensure the re-user can re-use the PSI effectively. This concerns both the cases of pro-active disclosure and access on request. As such access regime will contribute to the usability of PSI. National rules differ substantially,<sup>28</sup> but there is a trend among Member States to integrate re-use friendly format provisions in the access law. Even more important for the promotion of reuse are the many open data strategies, which set out policies for making government data re-usable, even if not reflected in binding legal norms.

Providing access to data by way of an API or other type of network service enhances usability of the data in the sense that re-users can more easily manage the data they get access to. On the other hand. API limits (size of requests handled for example) can decrease the usefulness compared to supply through downloads.

Requirements on metadata documentation and the interoperability of data also affect the forms in which access is provided. Standardized meta documentation across PSBs working in the same sector ensures the data is easier to manage. See the Inspire case study in the Annexes. Interoperability refers to providing data in the machine readable format.

From the reuse perspective, the 'golden' way may be to make structured information available online as Linked Data. The development and use of uniform resource identifiers (URIs, names or locators) however is at varying stages of development in Member States, and not surprisingly, not a feature addressed in access laws but rather in sector specific actions. The EC funded Europeana project for example is piloting the use of URI for linked data on cultural heritage object. The

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<sup>26</sup> Article 6.2 paragraph 1 of the Dutch legislative proposal for an Open Government Act.

<sup>27</sup> Article 4.4 paragraph 2 of the Dutch legislative proposal for an Open Government Act.

<sup>28</sup> Policy Recommendation 6, p. 7.

operationalization of the European Case Law Identifier and the *European Legislation Identifier* (ELI) will bring linked legal information closer.

However, it is important to note that the initial aim of FOIAs is to promote transparency. Disclosure in only machine-readable or ‘expert-readable’ format ignores the (important) transparency aspect of FOIA. Thus, it is important that PSI keeps being disclosed in a ‘human readable’ format that is in a form that is intelligible for the average citizen.

### **Good practices**

#### *Netherlands – Follow preferred format applicant*

Under the Dutch Wet Openbaarheid van Bestuur, the public body must in principle grant access in a form that the requesting user prefers. The obligation does not go so far as to force public authorities to convert data to a format which it itself normally does not use.

#### *Slovenia – Applicant determines format*

The Slovenian FOIA provides that the applicant must specify the format in which it wants to obtain the requested PSI (for access *and* re-use). If the PSB delivers the documents or information in another format than is requested, the applicant may file a complaint to the Information Commissioner.<sup>29</sup> This constitutes a good practice, because allowing (or obliging) an applicant to determine the format in which PSI is to be acquired enables the potential re-user to request the format he needs to effectively re-use the information.

#### *Spain – Access electronic by default*

The Spanish legislation provides that access to information is granted through electronic means by default.<sup>30</sup> Other ways to access the requested information are, however, possible. Electronic means are more appropriate for re-use than, say, paper means, but the ‘re-use friendliness’ still depends on *how* electronic access is given; it does not necessarily guarantee that the PSI is in a format that is useful for re-use purposes. PSBs might use their discretion to provide the information not just through electronic means, but also to *re-use suitable* electronic means.

#### *Norway – Soft law on formats*

The Norwegian FOIA allows the Agency itself to determine the format in which to deliver the information. However there are now a number of ‘soft law’ tools in existence which encourage and support the opening up of information in machine readable formats. These include Open Data Guidelines which can be found [here](#) in Norwegian. The Guidelines addresses a number of issues, such as that access and

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<sup>29</sup> Article 17 of the Slovenian Access to Public Information Act (APIA).

<sup>30</sup> Section 22 of *Spanish FOIA*.



re-use should be free (in principle); data should be provided in machine readable formats; have adequate documentation, be visible and findable at a permanent (internet) address. Coupled with the guidelines, the Norwegian Government has adopted a [Circular on Digitisation](#), which has specific terms on the release of Government data and requires the majority of State organisations to adhere to the following terms:

- The organisation will make their suitable information available in machine readable format.
  - New systems and upgrading of existing systems shall make it possible for data to be made available in machine readable format.
  - The organisation shall follow the 'Guidelines on making public data available'.
- These tools are proving very useful in getting data released in Norway.

### *United Kingdom – follow applicants preference*

Under the revised UK freedom of information act, when someone request access to information contained in a dataset and wishes to receive it in digital form, the public body concerned is under an obligation to 'so far as reasonably practicable, provide the information to the applicant in an electronic form which is capable of re-use.' (Section 11, FOIA).

## **2.8 No or reasonable charges**

An important aspect with regard to access to PSI concerns the costs of access. National freedom of information acts differ substantially when it comes to whether applicants must pay to access information, and for what activities of the public body: does it include resources (time) spent searching, examining documents to determine whether they are exempt from access, editing documents (e.g. anonymizing, deleting commercially confident data), the cost of copying, cost of medium, postal charges or a fee to cover e.g. the cost of running a portal?

Any charges made for access will impact the practical availability of PSI for re-use, especially considering that many freedom of information laws still operate on the principle that applicants must pay for each copy of a document. The Tromsø Convention stipulates that if applicants are charged for copies, the charges must not exceed the actual costs of reproduction and delivery of the document. Tariffs of charges should be published (art. 7 Tromsø Convention). This is in fact a commonly used system. Now that since the PSI Directive revision, charging at most marginal costs of dissemination is the default rule for *re-use* charges as well<sup>31</sup>, the cost systems seem to be broadly in line. There are of course other aspects to charging: what a PSB does or does not charge for may affect the provision of information

<sup>31</sup>Note however the exception to marginal cost pricing that the PSI Directive allows, and that the EFTA court has interpreted in Case E-7/13 [Creditinfo Lánstraust hf. v Þjóðskrá Íslands \(Registers Iceland\) and the Icelandic State](#) (16 December 2013).

products and services in markets. We refer to the work done in the LAPSI 2.0 WP on competition for such aspects.

## 2.9 Proper review procedure to assure accessibility

Without proper and timely review and enforcement, access rights cannot be effectively exercised. The same applies of course to re-use rights (art. 3 PSI Directive). A good access regime must therefore include a proper enforcement mechanism. With regard to good enforcement practices we refer to LAPSI 2.0 WP4 and the final version of *Good practices on Institutional embedding and enforcement*.

## 3 Interim findings

The above lists a variety of good practices that national authorities might take into account to establish an access regime that is re-use friendly, meaning that is in line with the goals and rationale of the PSI Directive and as such stimulates re-use. Ten different elements that feature in national statutory access regimes have been assessed and 'good practices' with regard to these elements have been collected. The list is not meant to be exhaustive, it can be used as a guideline for national authorities to improve their access regime and stimulate re-use.

On all elements we describe different good practices. No ranking of practices has been made to yield 'best practices', as multiple practices may be regarded as good. What matters is whether the outcome of the practice is re-use friendly and promotes re-use. For an access-regime to be regarded as re-use friendly, it needs to take the following elements into account:

- The scope of the concepts of 'Public Sector Body' and 'document' must be clear beforehand and interpreted broadly;
- Limitations to access needs to be defined precisely, be limited in number (exhaustive list) and interpreted narrowly so as to ensure the broadest possible access for re-use;
- An access regime must incorporate a non-discrimination principle, that is treat all applicants on equal footing;
- Re-users must be able to request bulk information and PSB's should allow a dynamic supply of information. In addition, requests must be processed promptly;
- An access regime has mechanisms that provide search support to improve the discoverability of PSI;
- The format in which the documents are disclosed should be machine-readable to stimulate re-use. However, this aspect should not affect format from being human readable;
- Charges for access should not be made, or be kept low so as to not created additional costs for re-use (bearing in mind however competition law concerns);
- An access regime must provide a proper review procedure.



## 4 Sector specific examples

As noted in the introduction, freedom of information laws have the widest coverage in terms of types of public sector bodies and types of information when it comes to rights of access and duties to disclose PS. Much of the information/data that is both of commercial interest and of public interest is however regulated by sector specific legislation. Unlike FOIA, the rationale for this specific legislation is not (or not so much) to increase accountability of public services or enable informed participation in democratic processes. Rather, PSBs are charged with producing and disseminating certain kinds of information such as statistics, meteorological data, company data and cadastral data to safeguard other (public) interests. These include the steady and reliable supply of information needed for public policy and administration (e.g. statistics for economic/social policy, meteorological data for environmental policies), or to provide legal certainty to actors and promote smooth legal transactions (e.g. public registers on companies, land ownership).

In this section we look to three sector specific areas, in order to paint a richer picture on legal aspects of access. In the field of **meteorological data**, we describe the move by the Norwegian and Dutch meteorological institutes towards delivering more open data within the 'confines' so to speak of their respective regulatory environment. In the field of **company data**, we look to a number of countries thought to have a 'progressive' re-use approach as well. Finally, as an example of how large scale cooperation in the public sectors across borders can lead to improved possibilities for re-use we consider the **INSPIRE** regulatory framework through a re-use lens.

### 4.1 Legal information

#### Online free access to legal information

The development of legal publishing in recent decades from paper based (near) commercial monopolies towards electronic open access is instructive, as it concerns what is public sector information par excellence. Everyone is presumed to know the law so the old *adagio* goes. Promulgation of the legal instruments is prescribed in many a constitution. It ensures the law is known and by way of publication the law obtains its force. Considering the role of courts not only in applying but in shaping (written) law through interpretation the publication of case law makes decision making by the courts more transparent (and this serves accountability) and helps institutions and citizens to follow the development of law.

In the pre-Internet era law was published in specialized journals and case law journals, either printed by printers with a legal monopoly or by a few commercial legal publishers. Most legal information publications were tailored to and accessed almost exclusively by professionals in the field of law. The creation of legal information

systems in the public sector (large scale from the 1980s onwards) initially focussed on internal processes and needs. Governments created computerized legal databases in house or outsourced them. Commercial publishers provided dialup connections and later laws and cases on digital media (e.g. CD-ROM) to legal professionals. The larger public *de facto* had no access to the law.

The rise of the Internet and the World Wide Web created opportunities for governments to make legal information better accessible and prompted demand. Free access to legal information via the internet is now routinely provided by courts, legislatures, government departments, local authorities as well as law schools. In addition, commercial legal information services abound. Multiple justifications for free access are voiced. As basic information of democratic states<sup>32</sup>, legislation and case law should be available to everyone without barriers. In the same vein it is argued that states should make available authoritative (consolidated) versions of legislation and cases. Indeed, in the past few years EU Member States have increasingly passed legislation that makes the electronic version of laws authentic rather than (just) the print version. Another argument runs that governments should not expect to recover the costs of publishing laws let alone grant legal monopolies for commercial exploitation. In the context of re-use of course, the argument is that legal information as a free resource will stimulate the private sector to create value added services and products.

There has been continuous debate on the question to what extent governments should enable free access (that is, fund publication through general taxation) and how far their publication activities should go, e.g. be tailored to citizens, especially in light of the absence or presence of alternative suppliers like Legal Information Institutes (a strong tradition in Anglo-Saxon countries). The competition aspects of service provision are addressed in a separate WP in the LAPSI projects so will not be discussed in this paper. Rather, in the next paragraphs we compare the ways in which member states currently provide open access to legal information. The recent report of the EU cases project on the 'state of the art' of open legal publishing has been a primary source.<sup>33</sup>

### Good practices aspects

To discuss the current trend in legal open data, it is useful to differentiate between the access to legal information (legislation and case law) and the re-use of legal data. Since we are discussing pro-active publication, only a few of the good practices aspects discussed above for FOIA are relevant. The following aspects, adapted from the recent EU Cases report, are relevant to assess:<sup>34</sup>

<sup>32</sup>This term was coined in the 2000 Dutch government's policy paper which announced (inter alia) that legal information (legislation, case law) would be made publicly available online for free. 'Naar optimale beschikbaarheid van overheidsinformatie', Kamerstukken II, 1999-2000, 26 387, no. 7.

<sup>33</sup>EUCases (European and National Legislation and Case Law Linked in Open Data Stack), *Report on the state-of-the-art and user needs* (13.01.2014)  
<[http://eucases.eu/fileadmin/EUCases/documents/EUCases\\_Deliverable\\_1\\_1\\_submitted.pdf](http://eucases.eu/fileadmin/EUCases/documents/EUCases_Deliverable_1_1_submitted.pdf)>

<sup>34</sup>EUCases, *Report on the state-of-the-art and user needs*, 2014, p. 19.

- Scope of information covered, esp. completeness: is the provided legal information complete, i.e. is (nearly) all legislation and case law covered?
- Form of supply: can data be downloaded in bulk, with a regular update and in machine-readable format?
- Data structure and formats: is the legal information structured and available in formats so as to promote re-use?
- Added value/context: are there any features added to the legal information, or is it provided as is promulgated by the respective body? For example: providing consolidations of acts, historical versions, summaries (of case law), etc.
- Legal links: is the legal information provided with links to other relevant documents, case law or provisions (in other laws) to which the text refers?
- Licensing policy: may the legal data be re-used, if so under what terms?

The current state of affairs shows a generally positive development regarding the completeness and the legal added value of legal information in EU Member States.<sup>35</sup> The Dutch government for example has separate sites for national legislation<sup>36</sup>, local laws, case law<sup>37</sup> and official publications<sup>38</sup>, but these are also accessible through a central portal. Legislation is available through an API in the authentic, consolidated and historical versions, and contains links to other legal texts. Case law is increasingly provided with tags and links to decisions by other courts in the same dispute, but not yet as structured data. The official publications (e.g. legislative proposals and parliamentary records) contain links to legislation and other relevant documents. Austria, France and the UK also provide linked data.<sup>39</sup> The National Archives preserves the UK public record, and make it accessible via <http://www.legislation.gov.uk/><sup>40</sup> under an open government licence. It contains a register of all past and present UK legislation, starting with Acts of the English Parliament dating from the year 1267.

With regards to the aspect of re-use, there is a legal trend to reduce (as in France and Austria) or abolish fees (EUR-Lex since 2014) for the re-use or delivery of legal data. There are still some issues with regard to re-use conditions, especially in Germany and Italy, and this burdens the re-use of case law information in these countries.<sup>41</sup> A positive development can also be found in the delivery formats of legal data, as open formats (XML) are more and more introduced and bulk download is available.<sup>42</sup> For example, the Dutch government delivers all Dutch law<sup>43</sup> in bulk for free and provides for an API.

<sup>35</sup>EUCases, p. 60. Note that this research is among six EU Member States (Austria, Bulgaria, France, Germany, Italy and the United Kingdom).

<sup>36</sup>[wetten.overheid.nl](http://wetten.overheid.nl).

<sup>37</sup>[rechtspraak.nl](http://rechtspraak.nl).

<sup>38</sup>[officielebekendmakingen.nl](http://officielebekendmakingen.nl)

<sup>39</sup>Among the countries in EUCases.

<sup>40</sup>The National Archives was formed when four government bodies came together: Her Majesty's Stationary Office, the Public Record Office, the Office of Public Sector Information (OPSI) and the Royal Commission on Historical Manuscripts.

<sup>41</sup>EUCases, p. 61.

<sup>42</sup>Id.

<sup>43</sup>In a so-called 'Basis Wetten Bestand' (BWB, literally: 'Basis Acts File'): <https://data.overheid.nl/data/dataset/basis-wetten-bestand>.

## 4.2 Meteorological data

National meteorological institutes have a rich history of international cooperation and sharing of data, particularly through the World Meteorological Organization (WMO), and EUMetNet (organisation of National Meteorological Services in the EU). It is normal for Met offices to have to recover at least part of their cost by charging for the various products and services they provide. This is true for example the British Met Office which as a so-called 'Trading Fund' answering to the Department for Business, Innovation and Skills (BIS) is required to operate on a commercial basis, but also for the Norwegian and Dutch meteorological offices. However, the latter have at the same time developed open data policies.

### Norwegian Met Office open data

The Norwegian Meteorological Institute took the initiative in 2007 to release all weather data free of charge, despite having an income from this data. The Director of the Institute defined meteorological data and products produced by the institute as *common goods*. Common goods the production of which was already paid for by the tax payer, and that should therefore be freely publicly available. The consequence was that the Institute gave up a marginal income in favour for the society at large.

MET Norway also facilitates download services, which also are used for their own core services (APIs). Looking at the cost of the production chain, making data available represents a marginal cost in comparison to what the initial costs to collect and process represent. Data and products are licensed under open licences, with the attribution licence from Creative Commons as the main licence. The 4.0 version is suitable for our only requirement, which is that the source of the information is credited (attribution). It also contains clear language on licensees' rights and obligations, thus facilitating efficient use of the data.

### The Netherlands Met Office open data

The legal basis for access and use/re-use of meteorological data in the Netherlands is the *Act on the Royal Netherlands Meteorological Institute*.<sup>44</sup> It establishes the KNMI and details its tasks: among which is to provide society with information concerning the 'weather and other geophysical phenomena' in the form of weather forecasts and the supply of weather data to the private sector and in some cases to the public sector as well. Article 2(2) (1) (b) of the Act on the KNMI explicitly states that the KNMI has the task to make their data available. Article 6(1) of the Act on the KNMI provides that the KNMI data are made available *on request*, so strictly speaking there is no obligation to publish pro-actively. At this point several departments are involved with pilots on how to ensure 'open by design'. Still, we are not aware of any actual

<sup>44</sup> *Wet op het Koninklijk Nederlands Meteorologisch Instituut (KNMI)* (hereafter: WKNMI) <http://wetten.overheid.nl/BWBR0012952>.

plans to implement such an ‘open by design’ principle for meteorological data in the near future.

The one major limitation on the KNMIs activities stems from government policy legislated from the late 1990s onwards in various sectors to prevent public sector bodies from competing (unfairly) in information markets. As a result, the default position is that the KNMI should charge on the basis of full cost pricing. However, in consultation with the private sector, the KNMI now pursues the central government’s **open data policy** and makes available a large part of its raw data for re-use on a ‘best effort’ basis.<sup>45</sup> As of 1 October 2009, all basic data/services of the KNMI are free of licences. The different categories of users that the act and the implementing decree recognizes, and the different access and re-use conditions it lays down are thus only relevant for data from the foreign NMSs that the KNMI distributes as member of ECOMET, the European group of National Meteorological Services (NMSs).<sup>46</sup>

The ‘products’ KNMI supplies are documented in the **data catalogue** it is legally obliged to maintain and publish. It describes which data are available and –where applicable–the accompanying prices and conditions for re-use.<sup>47</sup> This catalogue is a type of asset register that indicates the different categories of available data for re-use. Because of the extensive information about available data on the website of the KNMI, the search costs of the re-user are limited.

The KNMI ensures a **continuous flow of data**, but it is not under a legal obligation to do so. All data is supplied through the FTP server of the KNMI. If several data categories have been requested, the KNMI sorts these categories in different FTP sub-directories.<sup>48</sup> The law and decree that regulate KNMI do not prescribe a maximum or minimum processing time for a request. In practice, the requested data is available on the FTP service of the KNMI. A Service Level Agreement applies to the re-users and explains the expected performances of the KNMI and conditions of the data.<sup>49</sup> A so-called ‘KNMI-process operator’ monitors all processes 24 hours a day in order to act adequately when malfunctioning occurs.<sup>50</sup> Once a year a Service Level Agreement consultation between the re-user and the KNMI is held to discuss the incidents and potential delays in processing time.<sup>51</sup> With this meeting, the KNMI aims to improve the availability of the data in time and on best quality.

<sup>45</sup> [Letter](#) from Secretary of State of the Ministry of Infrastructure and Environment to Dutch Parliament of March 28, 2013 (hereafter: Letter), p. 11.

<sup>46</sup> <http://ecomet.eu/ecomet-catalogue/introduction>.

<sup>47</sup> See article 7 of the WKNMI. The catalogue is available on: <http://www.knmi.nl/datacentrum/catalogus/catalogus/catalogus-gegevens-overzicht.html>.

<sup>48</sup> See the KNMI catalogue, available on <http://www.knmi.nl/datacentrum/catalogus/catalogus/catalogus-gegevens-overzicht.html>.

<sup>49</sup> The Service Level Agreement (SLA) is available on [http://www.knmi.nl/datacentrum/catalogus/catalogus/content/SLA-documenten/Versie%2001-juli2010/SLA\\_KNMI-Users\\_meteorological\\_raw\\_data\\_def1\\_0.pdf](http://www.knmi.nl/datacentrum/catalogus/catalogus/content/SLA-documenten/Versie%2001-juli2010/SLA_KNMI-Users_meteorological_raw_data_def1_0.pdf).

<sup>50</sup> See the KNMI catalogue, available on <http://www.knmi.nl/datacentrum/catalogus/catalogus/catalogus-gegevens-overzicht.html> and SLA 2.3.2, available on [http://www.knmi.nl/datacentrum/catalogus/catalogus/content/SLA-documenten/Versie%2001-juli2010/SLA\\_KNMI-Users\\_meteorological\\_raw\\_data\\_def1\\_0.pdf](http://www.knmi.nl/datacentrum/catalogus/catalogus/content/SLA-documenten/Versie%2001-juli2010/SLA_KNMI-Users_meteorological_raw_data_def1_0.pdf).

<sup>51</sup> SLA 6.1 and 6.2, available on [http://www.knmi.nl/datacentrum/catalogus/catalogus/content/SLA-documenten/Versie%2001-juli2010/SLA\\_KNMI-Users\\_meteorological\\_raw\\_data\\_def1\\_0.pdf](http://www.knmi.nl/datacentrum/catalogus/catalogus/content/SLA-documenten/Versie%2001-juli2010/SLA_KNMI-Users_meteorological_raw_data_def1_0.pdf).



Added value services or customized data are available but not as (free) open data. The form in which access will be given to a user is determined in the agreement that also specifies the conditions for use and service level.<sup>52</sup> The catalogue states that meteorological data will be made available in a coded version compatible with the format of the national and international conventions.<sup>53</sup>

Since the Dutch meteorological office has moved the majority of its data supply to an open data model from 2009 onwards, the KNMI Act and the Decree based on it that detail how it should provide its services and what charging models it has to use have become outdated. The Act is under review and likely to be adapted. In many respects one could argue that the KNMI does not follow the law but we have no indication that private sector companies challenge it for doing so. It is therefore a clear example of how re-use stimulating policies and practices can be implemented in spite of the restrictive laws.

### 4.3 Companies registers

Using the combined knowledge on the state of play for companies registries in the LAPSI network we have identified three European Countries, namely the UK, The Czech Republic and Norway, as examples of good practice in the area of open Company register data. This is not to say there are not more examples of good practices. The online business register of Slovenia for example, run by the Slovenian Supreme Court is accessible free of charge for registered users and holds data on company registry number, tax number, name, business address, activity, etc.

Charging for information is a major (and controversial) issue for companies registries. In general they are not funded from general taxation but through fees charged on the input side (persons/institutions that are required to have certain information registered) and the output side (persons/institutions wishing access to information). The PSI Directive recognizes that this as a legitimate funding model, by exempting PSBs operating under cost recovery obligations from the default principle that charges should not exceed the marginal costs of dissemination. Competition aspects inform debate on the 'proper' scope of the public task in the light of developing information markets, and the possibilities to e.g. outsource or privatize certain information production. For a discussion of competition law aspects, including cost issues, we refer to the work of LAPSI WP3. Our focus in this document is on aspects of access proper.

Whilst none of the companies registers has as yet opened up the entire register in machine readable formats, they have and continue to take many positive steps. Below we look at the legal framework within which they operate, what data is open

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<sup>52</sup>Article 6(1) WKNMI.

<sup>53</sup> See the KNMI catalogue, available on <http://www.knmi.nl/datacentrum/catalogus/catalogus/catalogus-gegevens-overzicht.html>.

and in which formats, why they opened up, the major challenges they have encountered and the usage rates of the data.

### Legal Framework

The legal framework in each country clearly defines the role of the Company Register.

The **UK** Companies House is a Trading Fund and must operate on the basis of cost recovery. Companies House fees are linked, as required by EU Law and [HM Treasury Guidance](#), to the forecast cost of providing each service and the way in which customers access them. The principal fees rules and statute that Companies House follows are that as a Trading Fund, Companies House has a statutory duty to break even over time ('taking one year with another') and to achieve an average annual return (surplus) of 3.5%.

In the **Czech Republic** the public register is governed by Act No. 304/2013 Sb., on public registers of legal entities and individuals. Section 1 states that the register is an information system of the public administration, and that it is to be maintained electronically by the respective court. Section 3 of the Act states inter alia that the court must publish the data 'in a way enabling remote access'.

In **Norway** the Act relating to the Central Coordinating Register for Legal Entities (Enhetsregisterloven) places very few restrictions on the actual publication of company data. In fact it states that everyone has a right to access the information about companies in the register. The only restriction applies to National ID Numbers which are considered sensitive information and are not published. However there is a specific [regulation](#) for the Company Register which makes it an income generating service and obliges the Register to charge a set price for the delivery of raw data. The price is determined together with the Ministry. It is this regulation which has and continues to restrict the free publication of the entire Register as raw data.

### Data available, formats

With the exception of personal/sensitive information contained in the registers, all of the information is accessible in its entirety to the public, in each of the countries. Whilst data is accessible this does not necessarily imply that it is all available at no cost as raw data.

In the **UK** the information contained on the public register has always been available for public inspection. The registrar has a statutory obligation to make information on the register available to the public. Companies House is actively seeking to release all information as free data. They currently have two free data download products, the Company Data Product is a free downloadable data snapshot containing basic company data of live companies on the register and the Accounts Data Product offers a free daily and monthly downloadable ZIP file, containing the individual data files (instance documents) of company accounts filed electronically.

The UK does not currently offer an API but they are working on a new service that will make data available via an API. Companies House data is open access (apart from the exclusions) but it is made available to use under s43 of the Copyright, Designs and Patents Act due to third party copyright issues. Therefore it doesn't make its data available under an Open Government Licence (OGL).

In the **Czech Republic** the register has been maintained and made available in electronic form since 2007. While the entire register is already publicly available, it is not in machine readable form. Some data contained in the commercial register can be obtained from the ARES register (Administrative Register of Economic Subjects) also in machine readable form. Also the data from ARES is published by a NGO Initiative opendata.cz as linked open data under the ODC PDDL licence.

Data is available online on request-respond basis through web application run by the Department of Justice. Though access is not restricted for 'common users', effective machine processing of data is eliminated due to a randomly required CAPTCHA authentication. Moreover, users with 3000+ requests per day or 50+ requests per minute would be disallowed to access the web application.

**Norway** provides a raw data service, where approximately 50% of the registered information on the company is available as an API via [Difis datahotell](#). This first raw data version was made available on the 12 June 2012. Norway was the first country in the Open Government Partnership to open up its company register as a raw data API service. It is updated 6 times per week and made available under the Norwegian Licence for Government data. There is interest in opening up more details from the Register. However there is no specific date for when more details will be made available.

### Drivers for opening up

In the **UK** the Registrar has a statutory obligation to make information available to the public. Recently, alongside the Met Office, Land Registry and Ordnance Survey, Companies House became a member of the Public Data Group (PDG) of Trading Funds. The PDG aims to maximise the value and access of the data each Trading Fund holds, for long-term economic and social benefit. It is charged by the Government with providing a more consistent approach towards access and accessibility of public sector information and delivering more data free for re-use.

In the **Czech Republic**, the main driver was the increased effectiveness of the public administration. Also, improvements made in January 2007 were a result of the complex digitization of Justice. Furthermore the Czech government became a part of the Open Government Partnership in September 2011, and one of its declared goals here is open data.

In **Norway**, aside from the fact that there is a high user demand for access to raw data, there are also a number of other reasons which have led to the opening up of the raw data. The Common Guidelines for the Ministry for Government Administration and Church Reform encouraged State Organisations to open up their

data. This has been followed up by the Circular of Digitisation 2013, which strongly encourages opening up in machine readable formats.

The Company Register is a 'National Common Component' which should be easily available and accessible for citizens, businesses and the Public Sector. The Register of Business Enterprises operates on the fundamental principle that any information from the Registers that it develops, and the Company Register in particular, be easily accessible for the user.

DIFIs (Norwegian Agency for Public Administration and eGovernment) role as a catalyst and supporter for the opening up of data, coupled with its 'Datahotel' which is a cost effective service which the Company Register could avail of for swift and effective delivery of raw data, were instrumental in realizing the release of the data.

### Challenges encountered

The main challenges encountered have been primarily cultural, technical and financial.

Companies House in the **UK** is constantly developing new channels to make information available using the latest technology. They adhere to the principles of cost recovery set out in the legal framework and are constantly working towards developing more access to free data. The aim is to make the information on the register openly available and they are currently considering how best to achieve this within its existing legal framework.

In the **Czech Republic** the main issues encountered have been cultural and technical. The transitional period after January 2007 was challenging given the shift required by practitioners to go from a paper based to electronic system. Also equipping the institutions with adequate technical resources took some time. However this was gradually overcome.

The current challenge is to enable an API, or to at least provide the data in machine readable form. Closely related to this topic is the need to actually 'open' the data for re-use. Interlinking of the commercial register with other public registers is also planned for the near future. Another challenge is the functional interlinking with the Czech system of Basic Registers.

In **Norway** the major challenge has been financial. The ensuing reduction in income restricts the opportunity to release the entire register as raw data for free use, given that it is an income generating service. Despite this though the Company Register is going as far as it possibly can to open up its data for re-use.

They also face some technical issues resulting from a legacy database structure, and much of the remaining data which is not available through the current API is unstructured data, so a solution must be found here.

## Usage of the data

In the **UK** during the last financial year (2012/13) customers carried out over 233 million free searches of the UK Register which includes almost 137 million URI requests. During the same period there were almost 6.3 million paid searches. There have been just under 22,000 downloads of our accounts data product since we released it on 1st November 2013.

There are no relevant, concise and up-to-date statistics in the **Czech Republic**. The most recent data officially available is from the year 2000, where there have been around 20 000 - 60 000 queries to the register per day. It could be assumed, that today the numbers are significantly higher.

In **Norway** there is very high usage of the API with over 1.4 million look ups per month. Usage is constantly increasing, in January 2013 there were ca. 400,000 look ups per month.

## 4.4 INSPIRE<sup>54</sup>

The European Directive establishing an infrastructure for spatial information in the European Community (INSPIRE) Directive (2007/2/EC) lays down general rules aimed at the establishment of the Infrastructure for Spatial Information in the European Community (hereinafter referred to as Inspire), for the purposes of Community environmental policies and policies or activities which may have an impact on the environment (art. 1 INSPIRE directive). In reality, the effects of INSPIRE are not limited to environmental policies but have standardization effects throughout the public sectors of Member States, as many PSBs produce and use the kind of geographical data that INSPIRE regulates.

INSPIRE aims at addressing the problems regarding the availability, quality, organisation, accessibility and sharing of spatial information. This requires measures that address exchange, sharing, access and use of interoperable spatial data and spatial data services across the various levels of public authority and across different sectors (recital 3 INSPIRE directive).

The INSPIRE framework consists of multiple pieces of legislation. First, it concerns the Directive itself, and the implementation of the Directive in EU Member States legislation. Secondly, the Directive dictates the detailing of several measures through implementing rules. These can be Commission Regulations, or Commission Decisions. Finally there are technical guidelines.

INSPIRE applies to a wide range of 34 themes of public geographic data.

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*Requirement of discoverability: datasets should be known, recognizable and findable.*

INSPIRE requires Member States to publish actively INSPIRE data and services through the INSPIRE geo-portal and may also provide access through national access points (art. 15(2) and art. 11 INSPIRE directive).

*Requirement of availability: datasets should be de jure accessible*

INSPIRE does not require data providers to distribute their data through open licences. For data sharing with other public authorities there are some rules provided in article 17. Each Member State shall adopt measures for the sharing of spatial data sets and services between its public authorities. Those measures shall enable those public authorities to gain access to spatial data sets and services, and to exchange and use those sets and services, for the purposes of public tasks that may have an impact on the environment. These measures shall preclude any restrictions likely to create practical obstacles, occurring at the point of use, to the sharing of spatial data sets and services.

*Requirement of availability: datasets should cost no more than a reasonable reproduction cost, preferably downloading via the Internet without charge.*

INSPIRE requires that access to the discovery and viewing services are without cost. Only in exceptional cases the viewing may come with a cost (art. 14(1) and (2)). INSPIRE does not limit the price for other services such as the download services. Member States may allow public authorities that supply spatial data sets and services to license them to, and/or require payment from, the public authorities or institutions and bodies of the Community that use these spatial data sets and services. Any such charges and licences must be fully compatible with the general aim of facilitating the sharing of spatial data sets and services between public authorities. Where charges are made, these shall be kept to the minimum required to ensure the necessary quality and supply of spatial data sets and services together with a reasonable return on investment [...]. (art. 17 INSPIRE directive).

Charging is not allowed in all cases, notably not for spatial data sets and services provided by Member States to Community institutions and bodies in order to fulfil their reporting obligations under Community legislation relating to the environment (Art. 17(3)). For other uses at EU level, the Commission Regulation on INSPIRE data and service sharing (No 268/2010) requires that 'Where requested, offers for the provision of access to spatial data sets and services to the Community institutions and bodies made by Member States shall include the basis for charges and the factors taken into account. (Art. 6(2)).'

*Requirement of usability: datasets should be de facto accessible and usable*

INSPIRE requires that INSPIRE data and services are accessible through the INSPIRE network services: discovery, viewing, downloading, transformation and invoke (art. 11) (and spatial services). The Commission Regulation (EC) No

976/2009 and Commission Regulation No 1088/2010 set the requirements for the quality of service criteria relating to performance, capacity and availability. For example, it sets the minimum response time, and the probability of a network service to be available shall be 99 % of the time.

The usability aspect is further addressed in several pieces of legislation:

- Commission Regulation (EC) No 1205/2008 of 3 December 2008 implementing Directive 2007/2/EC of the European Parliament and of the Council as regards metadata OJ L 326/12
- Commission Regulation (EU) No 1089/2010 of 23 November 2010 implementing Directive 2007/2/EC of the European Parliament and of the Council as regards interoperability of spatial data sets and services OJ L 323/11
- Commission Regulation (EU) No 102/2011 of 4 February 2011 amending Regulation (EU) No 1089/2010 implementing Directive 2007/2/EC of the European Parliament and of the Council as regards interoperability of spatial data sets and services OJ L 031/13
- Commission Regulation (EU) No 1253/2013 of 21 October 2013 amending Regulation (EU) No 1089/2010 implementing Directive 2007/2/EC as regards interoperability of spatial data sets and services OJ L 331/1

These regulations require standardized metadata documentation, and data and services harmonisation which should enable and stimulate the cross-border interoperability of INSPIRE datasets and services. Interoperable datasets implies that they need to be machine-readable. Open formats are not required by INSPIRE.

INSPIRE also requires data providers to make available updates of data on a regular basis. All updates shall be made at the latest 6 months after the change was applied in the source data set, unless a different period is specified for a specific spatial data theme (art. 8 Commission Regulation 1089/2010).

INSPIRE does not require data to be complete or require authorities to collect new data to make the data complete.

INSPIRE does not require that data providers or national contact points establish helpdesks to support the (potential) users or providers of INSPIRE data and services. However, the Commission Decision as regards monitoring and reporting requires the extensive monitoring and reporting on the progress of the INSPIRE implementation and its performance (including usage and costs of implementation and benefits). Here, the usage/ benefits are an important part of the reporting. Therefore, the INSPIRE program in the Netherlands explores the benefits of INSPIRE actively and attempts to help where possible to stimulate INSPIRE use.

In summary, all INSPIRE data and services are required to be published in one central portal the European INSPIRE portal. Ultimately, the European INSPIRE portal will provide access to all INSPIRE data and services of all Member States. With the metadata obligation, the obligation to conform to INSPIRE data specifications, and the requirement to do this through services prescribed, INSPIRE makes a very important contribution, in particular to the de facto access to public sector geographic information.

The INSPIRE framework may serve as an example on how to promote re-use for information other than spatial information.



## 5 Conclusions

In the interim conclusions we summarized what type of provisions in freedom of information acts seem conducive to promoting re-use and are thus 'good practice', as evidenced in particular national freedom of information legislation. In this section we take more of a helicopter view, and also consider some of the practical/implementation aspects that are so crucial for the integration of 'open access and use'.

### *Open by design?*

Public sector bodies of course primarily consider their own organization's needs when designing information (management) systems, unless their *raison d'être* is the collection and supply of information to multiple external organisations, be it in the public or private sectors. These include PSBs operating public registers like those for company data, cadastral data, or public records and collections (libraries, archives) as well as meteorological offices, statistics offices and the like.

Other PSBs increasingly recognize that the PSI they hold has a potential life beyond the immediate execution of their public tasks. But as public access to the information they hold –if catered for at all– is generally governed by freedom of information laws, one might expect that thinking about public access and shaping it primarily takes place with the structures and principles of FOIA in mind.

'Access by design' is historically engrained in some public access regimes, like those of Norway and Sweden: in such systems public authorities are called upon to also consider the interest of the public in access while shaping their information systems. The growing shift towards pro-active disclosure of PSI and the cementing of 'open by default' as a general principle for how public authorities should regard public sector information can be expected to impact information management strategies and infrastructures in a re-use stimulating manner, way beyond the restrictions of freedom of information laws that are focussed on individual applications and case-by-case assessment of whether certain information can be released.

On the importance of having a legal framework to support re-use, the case studies of the Norwegian and Dutch meteorological institutes show two things. One, that within the discretionary powers that the management of large PSI producers have there might be ample room to pursue open data policies. Two that detailed regulation of large PSI producers seems ill suited to enable them to respond to changes in information markets. It is perhaps a peculiarity of the Dutch system of public administration that the meteorological office can pursue open data policies despite, rather than in accordance with, the regulation that controls its activities. To be sure, there may be competition law or unfair competition implications: these have been analysed for PSI re-use in general in depth in the LAPSI 1.0 working group on competition, as well as in WP 3 of the LAPSI 2.0 network.

### *Active disclosure duties*

Where duties to actively disclose are concerned, the good practices examples show that these mostly concern information about a PSB's role, responsibility and organization, as well as (increasingly) spending information and what could be called 'basic' information in any democratic state: laws, cases and other legal information. Some but by no means all of this information seems to have great re-use potential.

Of great importance is also that when there is political leadership and a middle layer of engaged civil servants, organisations may go as far as possible to proactively disclose information - despite not having a binding legal requirement to do so. In Norway we have seen not only the Meteorological Institute stand out, but also the Company Register. Despite being required to generate income from their data, the company register has in recent years taken the initiative to open up as much as possible, while not affecting their income requirement. Even the UK companies register, which as a trading fund has to operate on a 'commercial' basis, has managed to provide open access to certain datasets, even though the terms and conditions are not subject to open licences.

It is important to remember that although there is a tendency at the EU level (and in Member States) to embrace 'open data', that is: making data available to all with no conditions or very few conditions attached (such as an obligation to credit the PSB as source), this is not at all what the PSI Directive demands. In the PSI Directive what matters are transparent, accessible and non-discriminatory terms of use. For an analysis of licensing good practices, we refer the reader to the work produced in WP5 of the LAPSI 2.0 project.

Although active publication duties might seem to be a good legal 'hook' to base the provision of open government data on (e.g. machine-readable, structured, unrestrained use), it should be noted that they will need to also retain their traditional function as bases for informing the *general* public (average citizen) intelligibly about government tasks and policies. The Dutch FOIA for example states explicitly that when publishing pro-actively, the PSB must ensure that the information is provided in a timely, intelligible manner and form, and disseminated to the largest interested audience so as to enable citizens to share their views with the PSB in a meaningful way.

### *User led open data*

One of the challenges of open data initiatives is how to prioritize the opening up of datasets. Freedom of information laws are not designed to allow for 'user led' or multi-stakeholder identification of PSI that is most promising or desirable to open up to re-use. In practice governments do seek user input when making such decisions.

The European Commission has recently done so by commissioning an analysis of how to identify high value data sets.<sup>55</sup> In the Open Government Partnership participating countries commit to involving civil society and other stakeholders in drafting action plans for opening up data. Other popular means to help identify which datasets deserve priority are by organizing ‘hackathons’, public (web) consultations<sup>56</sup> and including feedback mechanisms in open data portals.<sup>57</sup>

### *Soft harmonization of FOIA?*

In time, we might expect that FOIAs start to resemble each other more, so a certain level of harmonization will occur without EU intervention. There is a gradual development towards the recognition of access to government information as a fundamental right.<sup>58</sup> The Council of Europe Convention on Access to Official Documents (Tromsø Convention 2009) also comes into play, although the fact that it has not entered into force due partly to a lack of commitment of EU Member States casts doubt on its indirect harmonizing effect on national access to information acts.<sup>59</sup> But even if the Convention on Access would enter into force it would only result in a modest level of harmonisation of domestic access laws and not achieve much with respect to pro-active disclosure which is so important for promoting re-use.<sup>60</sup> As was said in the introductory chapter, the Tromsø Convention contains only a general obligation to make information available pro-actively if this is ‘appropriate’ and in the interest of ‘promoting the transparency and efficiency of public administration and to encourage informed participation by the public in matters of general interest’ (Article 10 Tromsø Convention). This is a far cry from specifying a (minimum) catalogue of public sector information that should be available online for re-use purposes.

A harmonizing effect on public duties to actively disclose certain PSI is not to be expected from the judgements of the European Court of Human Rights either. The case law of the ECHR on access rights under article 10 ECHR is in its early stages, and even if it is developed further is not likely to give the kind of detailed guidance on what information must be available at what terms that really stimulates re-use.

As it stands, multi-stakeholder initiatives like the Open Government Partnership seem to have a larger potential as drivers of soft harmonization. The Open Government Partnership brings together countries that commit to (among other things) pro-active disclosure of datasets meeting open data standards. Such practices might acquire the force of norms over time and eventually be reflected in FOIAs.

<sup>55</sup><https://joinup.ec.europa.eu/community/semic/document/report-high-value-datasets-eu-institutions>

<sup>56</sup>One example is the city of Bremen (DE) that organized a public consultation on which data should be released. <http://www.stateboard.de/opendata/>

<sup>57</sup> For example, the Dutch central open government data portal has a form through which an application can be made for release of data not yet listed on the portal, see <https://data.overheid.nl/data/behoefte-aan-meer-data>.

<sup>58</sup>Policy Recommendation 6, also see Wouter Hins and Dirk Voorhoof, Access to State-Held Information as a fundamental Right under the European Convention on Human Rights, *European Constitutional Law Review*, Volume 3 Issue 01, February 2007, pp. 114-126.

<sup>59</sup> Council of Europe Convention on Access to Official Documents of 18 June 2009, Tromsø (CETS 205).

<sup>60</sup>LAPSI Policy Recommendation 6.

However, all these development will bring limited harmonization at best, so it may very well be that a level playing field across Europe for re-use will not materialize because of differences at the access level. As long as the local access rules apply equally to domestic and foreign citizens and businesses, the adverse effects may be limited.

#### *Assisting public sector bodies to make the shift*

On a final note, we would like to highlight the importance of providing practical tools to PSBs to help them make their information resources available for re-use. Many such tools exist in leading countries. Open data portals are but one example. The UKs model publication schemes –although currently not drafted with stimulating re-use in mind– is another, as are guidelines from the UKs Information Commissioner and of the National Archives, especially the Information Fair Trader Scheme which seeks commitment from managers of public services to adopt a re-use by default regime and provides supporting documentation.

For the innumerable organizations that have to make the assessment of whether data is public under FOIA or can be published on other ground, tools like decision trees provide structured ways to do so. In the Netherlands, the city of Rotterdam has developed one to help departments (in Rotterdam, or other municipalities) in determining whether data they hold can be made available for re-use. It lists the different type of questions that need to be answered (on the applicability of FOIA among other things), and it provides a structured way to decide on these questions. It routes the PSB to four outcomes: ‘these data cannot be published’; ‘these data can be made available via the Rotterdam open data portal’; ‘these data can be made available after minor adjustments in the format’; and ‘contact the city council for help’.

More generic support tools include the ‘open data ready assessment tool’ from the World Bank’s open data toolkit<sup>61</sup> and the Open data handbook by the Open Knowledge Foundation.<sup>62</sup> The Open Society Foundation produces an online inventory of guides aimed at open government more generally, including information on steps to optimize rights to access to government information and open government data.<sup>63</sup> Drawing upon existing initiatives, the LAPSI network itself will also produce a toolkit specifically targeted at PSI re-users and public sector bodies that seek to promote re-use in line with the PSI Directive’s norms.

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<sup>61</sup><http://data.worldbank.org/about/open-government-data-toolkit/readiness-assessment-tool>

<sup>62</sup><http://opendatahandbook.org/en/>.

<sup>63</sup><http://www.opengovguide.com/standards-and-guidance>