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LAPSI Policy Recommendation N. 7
Strengthening Institutional Support for PSI

LAPSI Working Group 6
Constitutional, Human Rights and Environmental Perspectives

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FINAL VERSION

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Executive Summary

- *Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 —the PSI (public sector information) re-use Directive—has not achieved a minimum harmonisation of national legislations in this area given the lack of strict standard policy. The amendment of its provisions should therefore be considered, in order to introduce stricter measures that mandate higher levels of efficiency in PSI re-use since it imposes few demands on the side of member states.*
- *Nevertheless, the convenience of imposing the creation of new institutions at national level has been pointed out, in order to remedy the lack of clear legal provisions and therefore encourage PSI re-use. This option may seem paradoxical in a certain way as it proposes a solution based on institutional harmonisation before legal harmonization has been achieved.*
- *Among other factors—related to institutional backing—the setting up of mandatory independent authorities has been suggested, mainly in order to control those contraventions of the legal framework related to access and re-use as well as to provide rapid and inexpensive mechanisms for dispute resolution.*
- *Legislation on PSI re-use is somewhat unsatisfactory so we might consider the problem we face not as one of a lack of institutional support but as one of the inadequacy and vagueness of the legal standard applicable in many cases. In part, those member states that incorporate internal regulations sometimes do so in a not-very-accurate way because the PSI re-use Directive allows them to do so. In addition, the Directive does not even require accuracy of member state legislators in national development, regardless of the specific content.*
- *This paper suggests that—to promote legal certainty, transparency and a better-functioning market—the PSI re-use Directive should force member states to specify which types or categories of public sector information are reusable and which ones are not, so that legal operators may know what to expect. The directive should therefore establish an obligation for member states to specify if a certain type of information is reusable or not, but they must justify the specific reasons for preventing re-use. This cannot be considered an invasion of national competences since the final decision belongs to national authorities.*
- *In addition, in order to address some criticisms of the current situation and solve the aforementioned problems, the PSI re-use Directive should impose on member states the requirement that a) national regulations specify the authority responsible for resolving PSI re-use requests in each case and b) establish easier and faster administrative procedures and legal proceedings before the courts.*
- *Re-users, stakeholders and scholars in the field have also highlighted the excessive length and complexity of the administrative proceedings and judicial review process as major practical problems, among many others.*
- *This inconvenience has led to the proposal for the new wording of the PSI Re-use Directive in order to set up independent agencies as an elegant solution. Our arguments will focus on the problems posed by this issue as its advantages are more evident and have already been analysed by other LASPSI policy recommendations.*

1 The new wording suggested for Article 4 of Directive 2003/98/EC and the proposal for the creation of independent agencies

Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003—hereinafter the PSI Re-use Directive—means to facilitate the re-use of public sector information within the EU framework. For this purpose it has tried to harmonise the basic conditions in which PSI re-use would take place and to remove key obstacles that may exist in the domestic market—such as discriminatory practices, monopolies or a lack of transparency—and always within the limited possibilities allowed for given the distribution of powers between the EU and member states in this particular case.

The current wording provided for future review of the implementation of the PSI Re-use Directive in order to proceed with the possible modification of the regulatory text in case amendments were needed.

However, before analysing this further, two salient points should be highlighted:

> 1st) The directive does not adequately promote harmonised regulation of PSI re-use: the contents of the PSI Re-use Directive could be described as light, very limited or scarce. The directive only just achieves a minimum level of harmonised national legislation in this area given the lack of strict standard policy. All things considered, the text imposes few demands on member states.
>
> 2nd) To a large extent, this happens in the understanding that the presumption of re-use is access to public sector information and on this point the competence of the EU is more than limited: access to public sector information is a national competence reserved for member states (by reference to and in accordance with the information laid out in a more clarified and complete form in WG 6, LAPSI Rec. 1 *On Rights of Access to Public Sector Information*).

Although PSI re-use is increasing, its enormous potential still seems unexploited. The implementation of the directive by member states, to date, has failed to completely eliminate some of the main practical problems (e.g. inadequate regulation, inaccurate content, a lack of information on available public sector information, the difficulty in accessing it by appropriate means, little or zero provision for public authorities to permit the commercial re-use of information in its possession, the continuity of exclusive agreements with insufficient transparency, the excessive complexity of the procedures in order to obtain permission to carry out re-use, and burdensome review systems).

That is why amending the directive should be considered, in order to introduce stricter provisions to achieve higher levels of efficiency in PSI re-use. Nevertheless, instead of doing so, the convenience of imposing the creation of new institutions at national level has been pointed, in order to remedy the lack of clear legal provisions and therefore encourage PSI re-use. This option may seem paradoxical in a certain way, for it implies *institutional harmonisation* before *legal harmonisation*.

Regarding the idea of institutional backing, it has been suggested that mandatory independent authorities are set up mainly in order to control contraventions of the legal framework regarding access and re-use, as well as providing rapid and inexpensive mechanisms for dispute resolution.

The text initially proposed for the future draft of Article 4 of the directive deserves special attention. The new wording would add, after paragraph 4, the following clause:

> "The means of redress shall include the possibility of review by an independent authority that is vested with specific regulatory powers regarding the re-use of public sector information and whose decisions are binding upon the public sector body concerned".

Subsequently, on March 5, 2012, a Presidency working paper suggested the following wording, with variations in detail:

> "The means of redress shall include the possibility of review by an independent authority that is vested with specific regulatory powers regarding the re-use of public sector information documents and whose decisions are binding upon the public sector body concerned".

2 EU competence on PSI re-use: analysing the issue from a different perspective

Before analysing the particular competence awarded to the EU in terms of PSI re-use, a brief review of several statements on the general question of distribution of powers between member states and the EU is necessary[1] since competence must be considered a key aspect of institutional backing; a logical *prius,* we would say.

2.1. A general overview

The attribution of powers to the EU must be explicit and specific. We find those specific competency titles that legitimise each EU action within the articles of the treaties that demonstrate the different functions of the EU.

The powers of the EU are always specific authorisations to do something concrete. Although the aims are very broad in this international organisation, it does not have all the powers it needs to achieve its objectives since it only has the ones specified in detail and specifically found within the treaties. It should be noted that the categories "exclusive competence", "shared competence" and "support competence" used by TEU and TFEU are merely ineffective generic categorisations that always require a specific legal basis.

The main issue within the EU from this perspective is function or, more accurately, functional purpose, so that the power granted is always limited by it.

2.2. Delimitation of the powers system

Clarification of EU powers was one of the aims outlined in Declaration Nº 23 annexed to the Treaty of Nice in 2001, needed to reflect and address the 2004 reform. The background was the debated extension of EU competences, which similarly fell within the Laeken Declaration on the future of the European Union[2].

The Lisbon Treaty is to inherit almost all of the provisions relating to distribution of powers contained in the failed Constitutional Treaty and thereby assumes the basic principle in the matter,

[1] In general (chronologically ordered): HINOJOSA MARTÍNEZ, L. M., *El reparto de competencias entre la Unión Europea y sus Estados miembros*, Tirant Lo Blanch, Valencia, 2006; SANDER, F., "Subsidiarity infringements before the European Court of Justice: futile interference with politics or a substancial step towards EU federalism?", *The Columbia Journal of European Law*, vol. 12, nº 2, 2006, pp. 517-ss; VON BOGDANDY, A. y BAST, J., "The vertical order of competences", *Principles of European Constitutional Law*, Hart Publishing, Oxford, 2006, pp. 335-ss; MANGAS MARTÍN, A. y LIÑÁN NOGUERAS, D. J., *Instituciones y Derecho de la Unión Europea*, Tecnos, Madrid, 2011, pp. 69-ss.

[2] European Council, 14 & 15 December 2001: "The question arises of how to ensure that a redefined division of competence does not lead to a creeping expansion of competences of the Union or an assault on the exclusive competence of Member States and, where appropriate, regions. How is it possible to secure while not weakening the European dynamic? *Indeed, in the future the Union will be able to react to fresh challenges and developments and must be able to explore new areas of activity.* Should the purpose of Articles 95 and 308 be reviewed in light of the body of jurisprudence?"

which is none other than the traditional allocation of competences, along with the parallel concept of express and specific powers.

The idea of competence still rests upon the "case by case" formula but, in its provisions, the Treaty of Lisbon significantly broadens them. The categories of competences are defined (exclusive; shared or concurrent; and support, coordination and complement) and set forth the subjects corresponding to each type of power (TFEU Art. 3-6). It should be noted that the Treaty opted to cast a wider net than the one outlined by the EU Court.

We must stress that it is in the area of shared or concurrent competences in which EU action is governed by the principles of subsidiarity and proportionality. The EU has to justify that a specific action is needed at the EU level, that it is therefore more effective and that it is a supranational problem. The instrument usually employed in this field is the directive.

Distribution of competence, both in decentralised states as well as in international organisations, is rarely static since it is subject to change and/or modification, but it is especially exposed to evolutionary interpretations seeking a) to adapt the rule to the time and context in which it must be applied and to the new needs which have appeared and b) to ensure its full effectiveness.

The U.S. doctrine of implied powers[3] has been received, *mutatis mutandis*, within the EU: the doctrine may include the necessary competences, including new ones, for achieving the objectives set by the treaty or that are essential to the exercise of the functions assigned to the organisation. This will overcome rigidities and achieve the objectives of the treaty to develop their full potential in those cases where no competence was provided expressly or has been inadequately planned.

This "flexibility clause" allows the EU to adopt rules for unforeseen situations—perhaps PSI re-use could be considered one of these cases—when it lacks explicit competence in the treaties provided that the objective falls within those assigned. TFEU Article 352 offers the Council and the Commission actionable means to achieve the objectives set out in the treaties (TEU Article 3) and may also serve as an instrument to reach the aim of each of its specific provisions in those cases where the required competences are neither expressly provided nor adequate.

Although some authors have considered that abuse of the clause became clear in the past, it was not thought prudent to eliminate it due to its inherent value and because it is considered essential for the harmonious development of economic activities and a continuous and balanced expansion, as required by the treaty. It also lets EU institutions correct and balance the rigid system of specific allotments.

It must be taken into account that TFEU Article 352 requires the prior approval of the EU Parliament, that is used to achieve an EU goal, that EU action is necessary, that the treaty has not provided the necessary powers in this regard (since it is a subsidiary/ancillary mechanism), and that its use in areas of shared competence is subject to compliance with the principle of subsidiarity. All of these requisites could be argued to exist in the field of PSI re-use.

*** The *exercise* of EU competences, not their definition, is governed by the principles of subsidiarity, proportionality and adequacy of resources/means.**

Subsidiarity (TEU Article 5): intended to rationalise the sometimes too diffuse and flexible area of

[3] "*A political power not expressly named in a constitution but that is inferred because it is necessary to the performance of an enumerated power*". Concept developed by Hamilton and borrowed by *Justice Marshall* in McCulloch vs. Maryland 17 US 316 (1819): "*The Constitution grants to Congress implied powers for implementing the Constitution's express powers, in order to create a functional national government*" and "*State action may not impede valid constitutional exercises of power by the Federal government*".

shared or concurrent competences. The very existence of the EEC until the creation of the EU implies the recognition that member state action is insufficient in certain areas and that international action is needed. When it comes to talk about PSI re-use we see that national action in this field is insufficient and that encouragement from EU institutions is required.

Whenever the EU acts within its powers, if it does so by virtue of shared competence, the intervention must be justified a) due to the failure of member state action (as is the case with PSI re-use), b) for more efficient common action (to allow PSI re-use to help further achievement of EU targets) and c) by the extent or effects of the action at the EU level.

The effectiveness criterion is not enough alone to justify EU intervention. Such an action should also be made necessary by the supranational scale of the problem and the impact of the solution.

It is, therefore, an ambiguous and versatile principle that allows member states to protect against excessive and untimely EU incursions and community leaders to invoke it to legitimately increase the scope of EU action.

The subsidiarity principle is amenable to judicial control, although it may involve conducting assessments of a political nature and of economic opportunity inadequately suited to proper judicial supervision. There are few cases where a violation of the principle of subsidiarity has been invoked and, in general, the CJEU is usually limited to checking that the recital of the opposed/challenged norm has somehow justified the act in question and with general statements in relation to the three concurrent criteria required: the EU dimension of the problem, the need to act and the proposed higher effectiveness if this response is adopted by EU institutions[4].

Proportionality and adequacy of means: In general, these principles affect the exercise of all sorts of competences, not only those of shared powers.

According to Article 5, paragraph 4, no EU action may exceed what is necessary to achieve the objectives established in the treaty. The EU will have adequate means but its actions should be strictly limited to those necessary (TEU Article 3.6). If the goals or objectives are covered by the treaties, even if a specific competence were not granted explicitly or the necessary powers were not explicitly recognized, the EU can provide the means necessary to attain its objectives and carry through its policies.

Protocol Nº 2 requires that any burden, whether financial or administrative, falling upon national governments, local authorities, economic operators and citizens should be proportionate to the aim pursued. It added that EU measures should leave broad scope for decisions to be made nationally, examining where appropriate "local and regional dimension of the planned actions". All things being equal, directives should be preferred to regulations and framework directives should be preferred to detailed ones.

2.3. A Fragmenting EU competence in terms of re-use: a feasible option?

The PSI Re-use Directive makes use of the principle of subsidiarity to justify its legal basis, but does so from a number of assumptions which may be called "classic":

1) that access is the premise of re-use and is a basic member state competence (WG 6, LAPSI Rec. 1, *On Rights of Access to Public Sector Information*);

[4] Court of the European Communities (Full Court) case The Queen v Imperial Tobacco Ltd and Others, Judgment of 10 December 2002; Court of Justice of the European Union (Great Hall), case information technology, telecommunications and informatics, Judgment of June 8, 2010; Court of Justice of the European Union (Third Chamber), airport charges Directive 2009/12/EC case, Judgment of 12 May 2011.

2) that re-use is a single matter, not fragmented from the perspective of competence;
3) that the overall competence of the EU is limited only to the establishment of certain basic conditions for the member state and that it is the member states which decide to allow PSI re-use in the exercise of their powers.

So without denying the extent of the success and truth of these claims, and taking as a starting point the aforementioned ideas about "case by case" powers, implied powers, the principle of subsidiarity, proportionality and adequacy of means, we understand that the new wording of the directive should bear in mind the following ideas:

1) In general, re-use—closely connected with access—shall be regulated by each member state and shall not be imposed by the EU (**1st general rule**). The EU should limit its actions to regulate some basic and elementary conditions of re-use that shall be applied wherever the member state has freely chosen to allow it. Where the directive rules basic conditions of re-use it will always comply with EU powers (e.g. free competition). **Member states are competent to decide on PSI re-use.**

2) In favour of legal certainty, transparency and better functioning of the market, the new wording of the directive itself may force member states to declare which types or categories of PSI are reusable and which ones are not, so that legal operators may know what to expect. Each public sector body should be forced to specify which information is reusable and which is not and why; but in doing so they are entirely free to decide about access and reuse. Therefore, the PSI Re-use Directive should establish an obligation for member states to specify if a certain type of information is reusable or not, but in this case they must justify the specific reasons for preventing re-use (**2nd general rule**). This cannot be considered an invasion of national competences since the final decision belongs to the national authorities. **Member states must specify which PSI is reusable**.

3) When internal legislation, in contravention of the provisions of point 2, does not expressly suggest whether a particular type of public information is reusable or not, the directive could establish, as a **general subsidiary rule (3rd rule)** applicable in the absence of specific member-state regulation, that in such cases information is reusable provided that such re-use is compatible with community law and does not involve harm or injury to the intellectual property, data protection or any other right or legitimate or general interest worthy of protection. Member states wishing to avoid this consequence ("re-use implicitly permitted") only have to legislate and do it accurately in the sense outlined in point 2. **In the case of member-state silence, re-use may be considered implicitly permitted.**

4) **Public information generally available should always be considered reusable by member states (4th general rule)**. Member states should not rule against this general statement unless it is required by a good/fair cause, is proportionate and is worthy of protection in accordance with the principles of the EU legal system and/or the relevant national one. There should always be a certain margin of appreciation for local peculiarities, but exercising caution and restraint. All these decisions must be completely motivated by national authorities.

   Of course, member states remain competent to decide if re-use will be allowed for commercial or non-commercial purposes or on the type of license required, if any.

5) **Establishment by the directive of certain particularly relevant, strategic and profitable categories in which re-use should be allowed in any case (5th rule)**. Member states would be only free to choose between allowing re-use without conditions, or with a general or standard license. Re-use here would be considered mandatory. Not to allow access and parallel re-use of some particularly significant information could be understood as representing an obstacle to the market and to the free movement of goods and services, so the EU would then have jurisdiction to intervene. This could, however, perhaps be one of the boldest steps from a competence standpoint.

   This solution implies a failure to consider re-use as a whole and fragmenting it into as many plots as types of information can be distinguished. Therefore, re-use would not be considered in itself to be a specific subject related to a general competence: access and re-use of each type or subtype of information would become an instrument, an incidental or tangential subject related to each of the specific competencies of the EU. In fact, some cases have already been made or are being taken that way, imposing open access and the re-use of some public information from EU institutions, in line with sectorial regulations (e.g. space information, environmental information).

   It would be necessary, therefore, to think about the categories to be included in this option and that would in any case support progressive or developmental regulation.

3 Non-content-based formal duties to be imposed by the directive

Before analysing the particular competence awarded to the EU in terms of PSI re-use, a brief review of several statements on the general question of distribution of powers between member states and the EU is necessary[5] since competence must be considered a key aspect of institutional backing; a logical *prius,* we would say.

3.1. The present legal situation

There is no broad consistency among member-state legal frameworks for incorporating the text of the directive, or in the practices observed. This was somewhat expected given the content of the PSI Re-use Directive and the existing differences between national laws regarding access to public sector information.

Sometimes the right to re-use (with a corresponding obligation for public authorities to allow it) is set out in an accurate, clear and precise form, specifying possible legal regimes depending on the type of information. In others, by contrast, generic authorisation is anticipated to be the very public sector bodies who decide whether or not to allow access to information for re-use purposes and preserve them either for commercial or non-commercial aims (with the possibility of different legal regimes, given the heterogeneity of information).

There also tends to be the constant existence of a list of **exceptions to re-use laid down in law** and

[5] In general (chronologically ordered): HINOJOSA MARTÍNEZ, L. M., *El reparto de competencias entre la Unión Europea y sus Estados miembros*, Tirant Lo Blanch, Valencia, 2006; SANDER, F., "Subsidiarity infringements before the European Court of Justice: futile interference with politics or a substancial step towards EU federalism?", *The Columbia Journal of European Law*, vol. 12, nº 2, 2006, pp. 517-ss; VON BOGDANDY, A. y BAST, J., "The vertical order of competences", *Principles of European Constitutional Law*, Hart Publishing, Oxford, 2006, pp. 335-ss; MANGAS MARTÍN, A. y LIÑÁN NOGUERAS, D. J., *Instituciones y Derecho de la Unión Europea*, Tecnos, Madrid, 2011, pp. 69-ss.

therefore not subject to evaluation by public bodies[6]. These listings are not necessarily restrictive, limitative or precise. In those cases not included in the lists it might be possible, depending on national legislation, either to refuse to allow re-use at all or to allow it only for non-commercial purposes, but in any case the discretion of the authorities must be understood to be motivated, to fit into national law and to be subject to judicial review.

In addition, while the **exclusive rights** are not viewed with favour, they are allowed under certain circumstances whenever they are fully justified as required for the provision of public interest or a public service (the principle of proportionality on the part of the member state will again to be respected). In any case, practice varies from one member state to another and some criticism comes from the opacity and lack of justification of exclusive agreements in certain cases.

3.2. Lack of precise legal norms: the first real problem

1st) Explicit regulation: The directive should oblige member states to act normatively in a clear and accurate way, listing which information is reusable and which is not, without fixing the re-usable element itself, certain exceptions aside (see the 5th rule above).

The lack of clarity or certainty of the law regarding reusable information can be understood as an obstacle to the market, to the free movement of goods and services and to the correct fulfilment of other EU aims; the EU, then, would be competent to intervene, even in a subsidiary and proportionate way. Part of these specific duties should refer to the incorporation of control mechanisms, paying special attention to the resolution of conflicts before government bodies and the courts.

Perhaps one way to reduce undesirable regulatory gaps and the corresponding uncertainty about the status of certain categories of reusable PSI would be the establishment in the directive of a general principle according to which, in the absence of clear rules that prevent a certain type of PSI re-use, public sector information will be understood to be reusable. This principle must be fully compatible with and respectful of the rules on intellectual property, data protection and other limits regulating PSI re-use in the directive (see WG 2, LAPSI Rec. *On Privacy and Personal Data Protection. Privacy Aspects between Private and Public Law*).

In addition, to address some criticisms of the current situation and solve the aforementioned problems, the directive could impose a requirement on member states a) to ensure national regulations clearly define which agency or department is responsible in each case for resolving PSI re-use requests and b) to establish easier and faster administrative procedures and proceedings before the courts.

2nd) Publication: The directive should require the publication of certain content by various suitable, easily accessible, understandable means, in order to provide transparency to the market.

It must in any case include the applicable legislation in general; the categories of reusable and the categories excluded from re-use; re-use conditions in each case; the procedure to be followed, as appropriate, to request, obtain or proceed with re-use; legal terms; means of review and appeal; the existence of exclusive agreements, their duration and the reasons for the grant; charging principles; court decisions, case law and administrative precedents on the subject. There are no competence impediments, in principle, for such a duty of publication.

This should take place internally or nationally (with the proper coordination or collaboration in decentralized states), but also at EU level. The coexistence of both a national and a European level

[6] Respecting the MS in this particular point, the principle of proportionality must be remembered in the sense required by the Court Decisions, and for all, Decision of the CJEU, Second Chamber, December 21st, 2011.

is desirable although any breach of the duty of publication may be sanctioned by European authorities.

It would in any case be of great interest if the directive encouraged electronic means for promoting publication.

3rd) Regular reporting duty: once again on two levels, national and European. Information should be sent periodically not only regarding applicable regulations and any amendments, but especially information related to all types of incidents (number of requests, response by the authorities, sectors where requests for re-use are more frequent; existence and conditions of exclusive arrangements, and disciplinary infractions; conditions of access and format in which the information is provided, update formats).

4th) Best practices guide: the directive may impose the elaboration of such a document on member states; nevertheless, national or regional guides must not exclude the existence of an EU best practices guide. This could potentially provide even greater guidance and harmonisation since it must be taken into account that decentralised member states may have developed different guidelines that should be coordinated.

3.3. Formal duties

The attribution of powers to the EU must be explicit and specific. We find those specific competency titles that legitimise each EU action within the articles of the treaties that demonstrate the different functions of the EU.

The powers of the EU are always specific authorisations to do something concrete. Although the aims are very broad in this international organisation, it does not have all the powers it needs to achieve its objectives since it only has the ones specified in detail and specifically found within the treaties. It should be noted that the categories "exclusive competence", "shared competence" and "support competence" used by TEU and TFEU are merely ineffective generic categorisations that always require a specific legal basis.

The main issue within the EU from this perspective is function or, more accurately, functional purpose, so that the power granted is always limited by it.

4 Special consideration of independent agencies: reinforcing institutional backing

Re-users, stakeholders and scholars in the field have all highlighted the silence over which authority is responsible for deciding on re-use and the excessive length and complexity of the administrative proceedings and judicial review process as major practical problems, all framed against a backdrop of regulatory uncertainty and official reluctance.

This has led to a proposed solution involving the creation of independent independent agencies. However, we must stress that:

A) The first step is to provide accurate legal provisions; if they are then found not to work, specific institutions of this nature could be created. At the present time it may be premature to consider the creation of such agencies.

B) Already-existing institutional backing is solid enough from a general perspective bearing in

mind the standards of an average democratic state.

4.1. General pre-existing institutional backing

Member states are legally bound to develop the directive. The development rules will enforce fulfilment for national government agencies and the different official bodies of the respective public sectors. This compliance will be assured by ordinary and customary mechanisms according to the **rule of law**.

Given that legal duties are imposed, they shall automatically be met by public authorities. In the case of infringement, citizens or institutions can demand the government fulfils those legal duties or that the courts demand the government do so. We should not forget that in the context of democratic states, all public authorities must act in full subordination to the constitution and the rest of the legal system and there are several ways to control any breach.

4.2. Different possibilities for specific or additional institutional backing

The "institutional" options of member states to adopt this compliance on PSI re-use vary and range from 1) creating independent agencies to 2) entrusting such performance to the ordinary administrative structure, and 3) the special creation of *ad hoc* bodies incardinated under ordinary public administration and, therefore, without consideration of independent authorities, but with autonomous operation.

4.3. Are independent agencies an ideal solution?

However, on the desirability or necessity of special institutions or independent authorities with responsibility for PSI re-use, similar to those existing in some sectors (data protection or telecommunications competition, to name some prominent examples), there are some questions which must be highlighted.

Our arguments will focus on the inconvenience or problems raised by this issue since other LAPSI Recommendation Policies underline their benefits. Both aspects are to be considered together when making a decision on the amendment of PSI Re-use Directive (Art. 4).

1) <u>High economic costs and added complexity</u>

There are undeniable disadvantages to the creation of independent agencies, especially at the present time, most notably the high economic costs and an undesirable increase in the already high complexity of public administration; an inconvenience accentuated in decentralised states. In fact, the current trend in a number of member states is towards the removal or at least the reduction or fusion of these bodies.

2) <u>The need for a uniform approach in institutional backing</u>

It is hard to answer this question given the present situation. There seems not to be a priority need—at least not for now—for achieving a uniform approach to controlling institutions in charge of supporting PSI re-use or for imposing a model based on the creation of independent agencies. The priority should be to ensure not only a harmonised, clear and precise legal framework but also to guarantee that it is respected. Indeed, EU objectives tend in general to be firstly normative (non-institutional) with a direct impact at the national level, although sometimes measures of this nature have been adopted.

How member states implement and monitor such a regulatory framework would be an issue

requiring specific institutional solutions decided on by the EU only if serious breaches of duties demonstrate verifications revealing an inability of regular institutions to adequately control compliance based on structural motifs. However, until that situation is an undoubted reality, imposing a harmonised institutional model can be understood as disproportionate and contrary to the preference shown by the framework directives.

States are required primarily to properly implement the directive by development rules. Which institutions come bound to execute and monitor strict compliance of these regulations is a matter that could differ profoundly from one member state to another. There may indeed national institutional differences which the EU has no competence to interfere with; similarly, the EU cannot do so in the distribution of powers within each member state (consider decentralised states in which the competence to develop the directive is reserved by minor local or regional authorities).

Imposing a uniform institutional model for member states in the field of PSI re-use, therefore, may exceed the powers of the EU. We must remember the requirements of the principle of subsidiarity and those of proportionality referred to above.

Besides, institutional issues are extremely sensitive because they affect the organisation of the powers and governments of the member state. Nevertheless, there are some fields where the EU has imposed the establishment of independent agencies nationwide on them; although it could be questionable from a theoretical point of view, whether or not this can be done from a practical standpoint, it is clear that no serious questions have been raised because no protests were made in this regard.

If there are theoretical doubts about the possibility of establishing a degree of harmonisation of institutional backing and it does not appear, at least at present, as a primary need because there are other more pressing priorities and alternative media, it may not be appropriate to include specific references in the directive for now.

3) Other possibilities for institutional backing

In case arguments clearly favour the creation of special institutional backing, one alternative might be to create a European Agency which may be even more effective, result in more unifying practices and become a best guarantor of the transparency and the fluidity of the market (their functions, obviously, would be somewhat different). The competence of the EU to create such an agency is less controversial from a competence standpoint[7].

4) Independent agencies and the separation of powers

There are other reasons, more robust from a doctrinal point of view, that discouraged the creation of independent agencies in the field of PSI re-use because they have been partially ineffective. We are referring to the organisational or institutional origin of PSI, which would determine in some cases the non-submission to such agencies, pursuant to the basilar principles of the rule of law such as the separation of powers.

From this perspective, it seems possible to identify at least two reasons for distinguishing PSI in terms of control. The first one is the material nature of PSI. The second is not always noticeable: the body or public power generated by PSI.

Because of the public body that originates PSI, there are peculiar circumstances that deserve some comment: PSI from the judiciary and constitutional courts. In member states where there is a supreme judicial council or equivalent, with functions that are usually common and with a clear

[7] Decision of EUCJ, May 2nd 2006, case against UK Parliament.

purpose to ensure the independence of the judiciary, it is hardly conceivable that their submission to any authority other than judges and courts is possible from a legal or constitutional perspective. No administrative authority may monitor or control their actions, including problems related to PSI re-use. Only courts —and usually a supreme one— can control the action of supreme judicial councils since this is a basic requirement of the principle of separation of powers.

Something similar happens with PSI from the legislative power: the ultimate sovereign body could hardly be put under an administrative agency unless a clear infringement of constitutional principles takes place.

5) Different types of PSI from a material point of view and the problems they could raise: institutional consequences

From this point of view, not all types of PSI show the same profile and it is conceivable that each of them raises specific problems. While it is quite possible that in some cases data protection is one of the issues to consider in particular, in other cases this issue will hardly be relevant (e.g. meteorological PSI or PSI related to transportation or roads).

Where data protection or intellectual property—to name the most obvious examples of subject-related peculiarities we might find in PSI re-use—are seriously involved, it might be advisable to allow the intervention of independent agencies, but not necessarily newly created ones with competence for PSI re-use. We suggest that the intervention of pre-existing independent authorities competent in those subjects, such as data protection, intellectual property or free competition—to name just a few—could be desirable.

But this solution, again, implies different new problems. The central issue is that within re-use, deep singularities from a legal point of view can be raised and taking this as a starting point, we find that:

a) the existence of an independent agency for PSI re-use *per se* does not guarantee sufficient material specialization to settle all of the issues raised quickly and in a satisfying way (not just re-use will be involved, but also competition law, intellectual property, data protection, public health and many other subjects); and

b) the competence of this PSI re-use independent authority may constantly collide with that of other agencies or authorities. In addition, there could be dangerous contradictions of their criteria, thereby generating legal uncertainty. Solutions would have to be offered by law or by tribunals. In the case of collision between a data protection authority and a PSI re-use agency, the solution seems rather simple: the first one should have some preferential *vis atractiva* because it involves a fundamental right related itself to privacy. But when PSI re-use and free competition collide, the solution to be adopted is not so clear without a legal rule setting up the conflict.

6) Different alternatives existing in institutional backing, not only independent agencies

When redrafting the obligation to create internally independent agencies is suggested as explicit content of the directive, we must insist that it does not seem to be a priority or an urgent need, as already explained. Furthermore, the drawing up of the directive should be, to this end, more open or alternative, never imposing a single model for all member states since they remain competent on deciding about this kind of organisational issues.

Therefore, three main alternatives for the PSI Re-use Directive must be considered in this regard:

a) keeping silent about this point and not including any mention of the creation of specific

institutions, leaving complete freedom to member states to proceed as they deem appropriate, based on local peculiarities;

b) imposing the same institutional model for all member states, through the creation of an independent authority (this is the meaning of the proposal we have reproduced at the beginning);

c) a middle, open way, which does not impose a model at all but mentions and suggests a range of varied possibilities, such as:

- entrusting the matter to the ordinary public administration structure;
- the creation of an independent authority;
- the involvement of other existing independent authorities, such as data protection agencies (there are many more), and considering PSI re-use as a whole or fragmenting it from a material point of view;
- mentioning specific solutions for the most pressing problems (e.g. arbitration or conciliation systems for conflict resolution);
- the creation of organs integrated with the public administration system but working with functional autonomy (a solution close to independent agencies, but not exactly the same).

All these alternatives for institutional backing have obvious pros: the advantages in terms of economic costs are clear, in addition to the benefit of sharing resources and experiences. But it is difficult to offer a best solution for all member states, since its appropriateness will vary from one to other.

An additional reflection is to be made on the specific case of allocation of competence for re-use to the data protection agencies: nowadays, for many of them, re-use as a subject of their competence is completely alien. Consequently, not only may there be a problem of a lack of substantive expertise, but we could also find that when re-use and data protection are opposed in a particular case, almost certainly privacy will be safeguarded without any further consideration. As has been shown by several recent examples in member states, these agencies tend to favour privacy against access to public information and, therefore, this solution may even produce some distorting—or even counterproductive—effects from the perspective of transparency and PSI re-use.

It must also be underlined that many of these independent agencies are so specialized from a material point of view that they sometimes incur in legal deformations, as they tend to see the legal system from a single perspective, without considering other rights or interests that could collide with transparency for re-use purposes.

Another possibility to be considered is to attribute various functions related to PSI re-use not to a single authority, but to several of them, depending on the problem or legal issue first positioned in each case (data protection, intellectual property, exclusive agreements that may infringe completion rules, national security, quality of public services, environment). That means that PSI re-use is not understood as a unit, but a torn fragment and considered accessory to other matters. It is again a decision that should be taken at national level, not by European institutions.

7) Functions of the independent agencies

At the origin of the commitment to the creation of independent agencies is a confidence that the powers attributed to them would irrefutably be better performed and thereby solve the problems noted above (especially that of slow channels or means for conflict resolution). Before analysing this position, it is appropriate to look back at the hypothetical powers they could take.

The answer may differ from one member state to another, but the following are usually suggested as possible, among others: developing a good practices guide; inspection and monitoring; the possibility of imposing sanctions; development and regulatory functions; setting legal standards; and above all the resolution of demands and conflicts in a quicker and more "independent" way.

In any case, if a minimum competence were set out in the directive, nothing would prevent the optional expansion of competencies at the national level (the expansion of jurisdiction not imposed by the EU but voluntarily undertaken by the member state). However, it is critical to understand that these agencies, in almost all systems we would dare to say, could never have conferred judicial powers, once again because of the principle of separation of powers.

Attention must be paid as well to two troublesome suggested functions. Firstly, the power to impose sanctions. In many legal systems, there are theoretical difficulties in sanctioning governments or public bodies. These independent authorities may punish a natural person or a private legal person or public officials or employees, once the fraud, malice or neglect has been proven, but not always public bodies. In fact, some national provisions that have developed the directive have incorporated disciplinary regimes for re-users but not for the government and public sector bodies.

Secondly, the resolution of demands and conflicts procedures should be quick:

1) It must be remembered that the existence of special mechanisms for the resolution of demands and conflicts before these agencies in many member states (if not in all of them) will not prevent subsequent judicial intervention (by institutions which are themselves overburdened, it should be added). Courts' jurisdiction is universal and immunity cannot be created.

   Nevertheless, it is possible and desirable to introduce conciliation mechanisms and administrative procedures for solving disputes in a faster and cheaper way, but the possibility of further review by courts of justice cannot be excluded in any case.

2) One also wonders if many of these functions could not be more efficiently carried out by those public bodies involved in each case, through their regular organisation. For this purpose, special administrative procedures can be laid down—in terms of re-use—based on the principle of celerity, agility and short periods: nothing prevents public administrations from being objective in applying the law and setting up adequate administrative mechanisms.

3) Special judicial review proceedings could also be introduced based equally on the principle of celerity. The principle of preference would be questionable, as it is usually reserved for very specific subjects, such as the protection of fundamental rights.