CONSULTATION ON PSI DIRECTIVE REVIEW

INTRODUCTION

The Commission held a consultation on the review of Directive 2003/98/EC on the re-use of public sector information (PSI Directive) between June 2017 and late January 2018. The aim of this consultation was to assess the functioning of the Directive, consider the scope of the review, and reflect on policy options. At the same time, it explored the issue of access to private sector data which are of public interest. The consultation sought to involve PSI holders (public sector bodies) and re-users (public, private, commercial and non-commercial actors).

The feedback received from workshops (mainly from PSI holders) and an online questionnaire (68 % of respondents to which were primarily interested in re-using PSI) form the basis for the analysis and conclusions presented here.

Inception impact assessment

The inception impact assessment was available for feedback on the Better Regulation portal from 18 September to 16 October 2017. The seven replies (from associations, public organisations, national statistical offices and private individuals) addressed topics including improving the interoperability of data, maintaining current charging rules, and maintaining the exception for cultural establishments. On extending the Directive’s scope to public utilities undertakings, concerns were raised as to cost and coherence with other legislation.

Online consultation

The public online consultation (19 September to 16 December 2017) asked for views on how the Directive is implemented, (including problems, objectives and possible options for the future) and addressed the issue of public access to data of public interest held by the private sector. It targeted all interested parties, including governments, public sector content-holders and users, commercial and non-commercial re-users, experts and academics, and the general public.

The 273 replies, from all Member States, included:

- almost 29 % from public organisations (general and statistical services, research, etc.);
- almost 25 % from associations (representing public or private actors); and
- 25 % from citizens.

Of the business respondents, half were very large organisations (5 000+ employees) and 40 % were SMEs.
In addition, 58 position papers and five stand-alone contributions were received, mostly on specific issues, e.g. access to scientific information and to private sector data of public interest.

**Other consultation actions**

- **Workshop** on public bodies’ access to commercially held data of public interest (26 June 2017);
- **Meeting** of Member State representatives from the ‘PSI group’ (15 November 2017);
- **Meeting** of the National Points of Reference on access to and preservation of scientific information (5 December 2017);
- **Workshop** on access to scientific information and extending the scope of the Directive to research data (14 December 2017);
- **Workshop** for PSI holders and re-users (18 January 2018);
- **Public Hearing** on the PSI Directive review (19 January 2018); and
- **High-level** roundtable on opening up transport and utilities sector data (23 January 2018).

**RESULTS OF THE CONSULTATION PROCESS**

**Evaluation**

The implementation of the Directive was assessed against the Better Regulation criteria (effectiveness, efficiency, relevance, coherence, EU added-value and clarity). The online consultation was the main opportunity for stakeholders to make detailed statements.

**Effectiveness**

- ✓ 81% of respondents to the online consultation felt that more data held by public sector bodies had become available for re-use;
- ✓ 73% agreed that PSI was increasingly providing a basis for innovative services and products;
- ✓ over half (and most of those who provided additional feedback as free text) felt that PSI had become more affordable, including for start-ups and SMEs;
- ✗ several stakeholders felt that cross-border use of PSI was still difficult, as practices across Member States vary widely and this creates legal uncertainty;
- ✗ only 38% of respondents felt that exclusive arrangements were used exceptionally and only in the cases set out in the Directive (while Member States representatives generally report that they are not aware of exclusive arrangements based on PSI); and
- ✗ 67% saw the variety of licensing conditions as still hampering effective re-use.

At the 18 January workshop for PSI holders and re-users, there were several calls for EU intervention to prevent exclusive agreements.
**Efficiency**

- 66% of online respondents argued that implementation costs borne by public sector bodies are offset by the socio-economic benefits of data re-use;
- 72% argued that compliance requires public bodies to improve data management, leading to cost savings and efficiency gains; but
- 44% criticised the redress procedures as lengthy, inefficient and costly.

**Relevance**

Respondents overwhelmingly agreed that the PSI Directive is still relevant, in particular because it ensures PSI supply (85%), fair market access for re-users (84%), the transparency and accountability of public sector bodies (81%) and the usability (e.g. machine readability) of data (77%).

Many said that rapid technological advances made the Directive even more relevant; these affect the possible forms of data re-use and the legislation should take account of them.

Stakeholders and especially Member State representatives were generally very supportive of the review process, based on the observation that the uneven implementation across Member States is creating fragmentation of the single market or bottlenecks to market development.

**Coherence**

- in general, it was felt that the Directive was coherent with other relevant EU legal acts;
- the *sui generis* database right was seen as problematic because public bodies could use it to restrict the applicability of the PSI access and re-use rules; and
- although the Directive’s relationship with personal data protection legislation is clear, the issue of personal data is delicate by nature and misunderstandings could arise (e.g. anonymisation needs in the PSI context). In particular, some public sector bodies have raised the question of appropriate techniques to be used for pseudonymisation or anonymization processes.

**EU added value**

- 87% of online respondents agreed that the Directive had encouraged national authorities to open up more public sector data;
- almost 63% felt that it had facilitated access to PSI from countries other than that in which the person concerned lives;
- almost 64% felt that it had helped create an EU-wide market for products and services based on PSI; but
additional feedback shows that the re-use of data across borders is still burdensome, as national practices are still very different and sometimes ‘data protectionist’ (e.g. on valuable datasets such as business, address and real estate, and planning registers).

**Clarity**

- 57% of online respondents felt that the Directive was easy for public bodies and re-users to understand and implement; but
- 63% felt that some provisions could be made simpler or clearer.

**Review of the Directive**

**Practical arrangements for document access and searches**

There was general support for further standardisation of metadata, standardisation of data themselves, and greater availability and usability of real-time data. These positions were confirmed in the dozen of papers addressing these questions.

Of the 194 online respondents, 46% strongly agreed and 25% agreed that metadata should be made available in a mandatory open standard, e.g. DCAT-AP. Respondents acknowledged the need for metadata documenting the content of data so as to ensure their actual re-usability. The standardisation of data themselves was seen as (highly) desirable. Mandatory open standards were recommended as the way to improve data usability. Some saw funding as a critical issue.

There was an even spread of opinion as regards the availability of dynamic data (e.g. sensors, satellite data). Examples (e.g. Transport for London, Seapilot) were cited during the workshop on 18 January. Many opinions in the online consultation and position papers reported a remaining need for (more) real-time data, the cost of such availability and a need to prioritise efforts on the basis of real demand.

It was stressed that data standards should relate to specific domains (transport, geospatial, statistical, etc.). In particular for dynamic data, the cost and technical complexity of setting and implementing standards raise a need for appropriate supporting measures.

77% of respondents confirmed the need to encourage public bodies to provide dynamic data in real time and invest in technical solutions (e.g. APIs, Application Programming Interfaces) facilitating data usability. This high demand is still only partially met. This confirms the stakeholders' opinion also expressed in a public online consultation earlier in 2017, where 68% of respondents clearly supported an increased use of APIs.

**Charging rules**

38% of the 206 online respondents expressed a slight preference for keeping the rules that prevent public bodies from setting excessive or arbitrary charges on re-use. However, 42% wanted to abolish the exceptions to Article 6(1) (so that the marginal cost of dissemination would
become the upper limit for charging) or at least clarify (49%) the circumstances in which they can apply.

PSI re-users are clearly in favour of abolishing or at least clarifying exceptions, while most PSI holders consider that they should not be changed and need no clarification.

Stakeholders also expressed divergent views in their additional feedback. Some argued that the rules should promote open access by eliminating or at least minimising charges. Many others cited challenges that public administrations are facing that justify the rules, e.g.: the sustainability of investment in digitalisation (especially if more is to be done on standards, interoperability, dynamic data, etc.), and balancing the interests of PSI holders and re-users.

The variety and opacity of national charging practices was raised at the workshop for PSI holders and re-users.

**Scientific information and data held by research and educational establishments**

There was a consensus that data from publicly funded scientific research should be as openly accessible and re usable as possible.

81% of the 178 online respondents agreed that a common EU open access policy should apply to all research-funding organisations and academic institutions; only 6% disagreed. This position was also voiced at the public hearing and the workshop on access to scientific information.

There were similar views on opening up the (currently exempt) administrative data of educational and research establishments, although at the meeting of National Points of Reference in access to an preservation of scientific information, a Member State representative expressed concerns in the context of competition among universities in Europe.

Of 159 online respondents, 90% supported the principle of opening up scientific results (publications and research data) from public funding. In the open fields in the online consultation and at the workshop on access to scientific information, stakeholders stressed the similarities between such results and government-held information, in particular as regards data re-use value.

At the same time,

- some respondents pointed to issues for future policy-making, including the financial sustainability of publishers, the protection of intellectual property rights (IPRs), the protection of personal data and trade secrets;
- structural solutions will be required that do not add unnecessarily to the administrative burden for researchers; and
- there are other linked barrier to be addressed, including imperfect data-management capabilities, onerous licensing conditions, and problems with common (meta)data standards.
**Data held by entities providing services of public interest**

On extending the scope of the Directive to data generated by publicly owned companies or independent operators performing public tasks, those in favour outnumbered those against. Only 23% of the 193 online respondents to the question agreed that such data were currently available for re-use. In a breakdown by sector, the figure is higher for transport (36%) and considerably lower (14%) for utilities. 71% believe that such data should be made available for re-use, whether the data-holder is public or private. 81% indicated that, if there were such an obligation, the data should be available for all re-users and for other purposes. However, the very few responses coming from energy, waste and water businesses expressed either doubts or strong opposition.

While stakeholders in favour emphasised the benefits (e.g. better and cheaper services for citizens), others based their opposition or caution on factors such as the commercial sensitivity of some data, the need to ensure a level playing-field for public and private actors, personal data protection considerations and the need to safeguard the security of critical infrastructure. In particular stakeholders from the transport sector have expressed concerns. They believe that data is crucial for maintaining their competitiveness and as a result any requirements to make it more open and re-usable should be carefully balanced, as new obligations in this regard may distort competition in the sector. Stakeholders from entities active in the transport and utilities sectors have also indicated that imposing data sharing obligations on them may have an impact on ensuring the security of critical infrastructure. Moreover, some are anxious that compliance with the new requirements will mean additional administrative burden. As a result any requirements to make it more open and re-usable should be carefully balanced.

At the 23 January roundtable, some argued that the issue should be addressed through sectoral legislation.

**Relationship with the Database Directive**

A third of the 190 online replies reported instances of public sector bodies invoking rights under the Database Directive to prevent the re-use of PSI from databases, including transport data, legislation and case law, company registers, and public undertakings’ data in areas such as healthcare, translation memories and cultural heritage.

In general, the concern was that public bodies circumvent the PSI Directive by invoking database rights, even though the data are not subject to public sector or third-party rights. The interplay between the two Directives was also raised at the public hearing.

Of the 196 online respondents to the question, 68% were in favour of clarifying the relationship between the Directives, so as to ensure that public bodies cannot invoke database rights in order to prevent the re-use of PSI. Stakeholders noted that this was already the case in some national and regional jurisdictions (France, Flanders). Recommended approaches ranged from guidelines and clearer formulations to making the *sui generis* database right inapplicable to databases that
are maintained by public bodies or with public funding. On the other hand, 17 % found the relationship sufficiently clear, thanks *inter alia* to recitals 22 and 23 of the PSI Directive, which stress that public bodies should exercise their IPRs in a way that facilitates re-use. Public transport undertakings and utilities insisted that they needed to keep their database rights over publicly funded data, in order to protect their legitimate interests in the competitive market.

**National access regimes and barriers to data re-use**

National access regimes do not generally seem to constitute a major obstacle to PSI re-use, but 39 % of online respondents felt that the differences between them hamper the emergence of EU-wide services and products based on PSI. Some suggested that a common definition of the types of document that could be exempted (e.g. due to national security restrictions) would help prevent the frequent misuse/abuse of exemptions. Differences between national access regimes were also raised at the 18 January workshop for PSI holders and re-users and at the public hearing.

28 % of online respondents agreed that the link between access and re-use is clear and useful, and that it prevents re-use that could harm the interests of the state, individuals or third parties. However, 23 % argued that the link is not clear and 18 % said that national rules on access (e.g. time limits for obtaining responses, administrative charges, lack of appeal options) are stricter than the Directive and hamper re-use. Some felt that certain national access regimes lack clarity and transparency.

As reasons for not making data available, public bodies cited data security rules and obligations (21 %), excessive costs (15 %), and possible misuse (13 %).

As for data held by operators under a public service contractual arrangement, the main arguments were that the arrangement did not require that they be made available and that it would be too costly.

In cases where requests for data had been granted, the obstacles reported were poor metadata (34 %), a lack of information on data management (33 %), and unclear or inconsistent terms and conditions for re-use (30 %).

Also a quarter of respondents referred to a lack of machine-to-machine interfaces (APIs), and machine-readable/standardised licences. Individual stakeholders cited the scope of IPRs, the geographical scope of licences and the unavailability of linked open data.

78 online respondents provided further input on ways to ensure data protection in the context of PSIs. Suggested solutions included:

- technical (e.g. pseudonymisation, anonymisation, encryption, separation of networks);
- legal (e.g. consent-oriented solutions or ‘privacy by design’ rules); and
- other (e.g. training of officials, appointing a person in charge of anonymisation).
Access by public sector bodies to private sector data of public interest

Acceptance of the idea of allowing public administrations to access and re-use private sector data of public interest has increased since the ‘Building a European data economy’ consultation (June 2017). It was supported by 88 % of 205 respondents, across all types of contributors.

Of the 189 online respondents, 81 % felt that specific legal measures were needed. Among them, EU legislation by sector was mainly supported, followed by general principles, and then by adoption of specific rights and guarantees.

Businesses tended to support specific rights and guarantees, while public organisations favoured EU wide legislation by sectors and general principles. Online, in papers and at the public hearing, statistical offices and other public organisations expressed support for laying down principles common to all Member States and highlighted the need to legislate before wide national disparities appear in the field of statistics.

Although businesses supported that approach online, in papers and at events such as the public hearing many businesses and associations stressed the importance of voluntary measures and contractual freedom to implement them.

Stakeholders in all categories called for a clearer definition of ‘public interest’ and clarity on the objectives and scope of the initiative. This suggests a need for further discussion with stakeholders, including public organisations with a view to establishing clear areas for action.

Next steps

The consultation results contribute to the evaluation and review of the PSI Directive, as part of the data package to be adopted in April 2018. The evidence collected to support the impact assessment was fed into an analysis of organisations’ expected positions on the policy options (lighter vs. heavier regulation), according to their role in the PSI context (Member States, PSI holders and re-users, public transport and utilities undertakings, educational and research establishments). It was concluded that stakeholders are most likely to support lighter regulation.