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Review of the Directive on the Re-use of Public Sector Information (Directive 2013/37/EU)

This briefing is one in a series of 'implementation appraisals' produced by the European Parliamentary Research Service (EPRS) on the operation of existing EU legislation in practice. Each briefing focuses on a specific EU law that is likely to be amended or reviewed, as foreseen in the European Commission's annual work programme. Implementation appraisals are aimed at providing a succinct overview of publicly available material on the implementation, application and effectiveness to date of specific EU law, drawing on input from EU institutions and bodies, as well as external organisations. They are provided by the EPRS Ex-Post Evaluation Unit to assist parliamentary committees in their consideration of new European Commission proposals, once tabled.

Summary

The [Directive on the re-use of public sector information 2013/37/EU](#) (PSI Directive) provides a common legal framework for a European market for public sector information. It entered into force on 17 July 2013 following a review of the initial PSI Directive of 17 November 2003.

This implementation appraisal is written in anticipation of the second review of the directive, the plans for which are likely to be presented by the end of April 2018 as part of a broader package targeting the data economy. The upcoming review will attempt to identify opportunities for reducing regulatory costs and for simplifying the existing legislation without negatively affecting the achievements of the underlying policy goals.

The ongoing evaluation of the [Directive on the legal protection of databases 96/9/EC](#) (Database Directive) will feed into the review by identifying potential issues with the interplay between the PSI and Database Directives. The Commission has also announced that the PSI review will be aligned with the follow-up actions to the [REFIT mid-term policy evaluation of Directive 2007/2/EC, 'INSPIRE'](#) (Directive establishing an Infrastructure for Spatial Information in the European Community). For these reasons, both these directives have been included in this appraisal.

1. Background

The [Directive on the re-use of public sector information \(2003/98/EC\)](#) entered into force on 31 December 2003 and was revised by [Directive 2013/37/EU](#) in 2013. The review of the PSI Directive is one of the REFIT initiatives included in the Commission work programme for 2018.

In the May 2017 [Mid-Term Review of the Digital Single Market \(DSM\) Strategy](#) (COM(2017) 228), the Commission announced that it would, 'in spring 2018, based on an evaluation of existing legislation and subject to an impact assessment, prepare an initiative on accessibility and re-use of public and publicly funded data and further explore the issue of privately held data which are of public interest'.

Public sector information, such as legal, traffic, meteorological, economic and financial data, constitutes the largest information source in the EU. Allowing such data to be re-used for other purposes (i.e. GPS navigation and weather forecasting) has an enormous economic growth and innovation potential.

The [2015 European Data Portal Study](#) forecasted that the market size of Open Data would reach a value of €75.7 billion in 2020. According to this study, the number of direct Open Data jobs could reach almost 100 000 by 2020 and the forecasted public sector cost savings for the EU28+ in 2020 could amount to €1.7 billion. The Commission hopes to explore this potential, inter alia by lowering market entry barriers and increasing the supply of machine-readable data.

The PSI Directive is built around the key pillars of the digital internal market: free flow of data, transparency and fair competition. Its primary focus is on the economic aspects of the re-use of information rather than on the access of citizens to public information. It encourages the Member States to make as much information available for re-use as possible so as to stimulate data-based innovation.

The directive addresses information held by public sector bodies in the Member States, at national, regional and local levels, such as ministries, state agencies, municipalities, but also by organisations funded for the most part by or under the control of public authorities (e.g. meteorological institutes).

Since the revision in 2013, content held by museums, libraries and archives also falls within the scope of the directive. Types of content and information covered by the directive, include written texts, databases, audio files or film fragments. It does not currently apply to the educational, scientific and broadcasting sectors.

2. Overview of current legislation

The [Directive on the re-use of public sector information \(2003/98/EC\)](#) sets minimum rules for the re-use of data and the practical means for re-use of existing documents. Moreover, documents – available electronically where possible – should be re-usable for commercial or non-commercial purposes. Access is excluded for documents not related to public tasks of public sector bodies, and those concerned with national security, commercial confidentiality, public service broadcasters, and education, cultural and research establishments, and documents covered by third-party intellectual property rights.

Two European Commission reviews of the directive identified shortcomings (see paragraph 3.1). They noted insufficient clarity and transparency of PSI re-use rules, inaccessible information resources, excessive charges, the absence of a level playing field (e.g. unfair competition), insufficient enforcement of re-use provisions and different approaches among Member States.

The directive was revised by [Directive 2013/37/EU](#), which entered into force on 17 July 2013. Member States were obliged to transpose by 18 July 2015. The revision aimed at correcting differences arising among Member States, improving access and securing the effective cross-border use of public sector data. The idea was to create an up-to-date common basis throughout the EU for the use of public sector data, encouraging public bodies to make data available electronically for free or, if they chose not to, for a charge no greater than the combined cost of collecting, storing, processing and making the data available.

On 17 July 2014, the Commission also published [guidelines](#) (Commission Notice 2014/C 240/01) to help the Member States transpose the revised rules and to indicate best practice in several fields of importance for the re-use of public sector information. The PSI guidelines were prepared on the basis of contributions to a [public consultation](#) in autumn 2013 and following recommendations by a [dedicated expert group \(PSI Group\)](#).

The guidelines provide non-binding guidance on best practices within three subject areas of particular relevance for the re-use of public sector information in Europe. The guidance document is targeted at the

national administrations, to guide them in the transposition of the revised PSI Directive and to encourage practices that increase the role of public sector information in the digital market. It includes recommendations on the use of available open standard licences, the elements to include in custom-made licences, datasets to be published as priority, ways to make them more readily re-usable, the application of the marginal cost rule, and the cost elements that can be taken into account for cost-recovery charging.

Key elements of the current PSI Directive:

- All content that can be accessed under national access to documents laws should in principle be re-usable for commercial and non-commercial purposes.
- Conditions for re-use must be non-discriminatory for comparable categories of re-use.
- Charges for re-use should in principle be limited to the marginal costs of the individual request (reproduction, provision and dissemination costs).
- Exceptions apply to museums, libraries and archives and to situations in which either the public sector body as such is required to generate revenue to cover a substantial part of the costs relating to the performance of its public tasks or situations in which such a requirement applies to a specific piece of content ('document').
- Public sector bodies are encouraged to apply lower charges or to apply no charges at all. On request, public sector bodies must indicate the method used to calculate charges.
- Charges and other conditions for re-use have to be pre-established and published. If a request for re-use is refused, the grounds for refusal and the means of redress need to be explained.
- Prohibition of cross-subsidies: if public sector bodies re-use their own documents to offer added-value information services in competition with other re-users, equal charges and other conditions must apply to all of them.
- Prohibition of exclusive arrangements: public sector bodies may not enter into exclusive arrangements with individual re-users, excluding others. Two exceptions apply: exclusive rights may be authorised in exceptional circumstances if they are necessary to provide services in the public interest; or in the context of the digitisation of cultural resources. In both cases, review clauses ensure that exclusive arrangements are regularly reviewed against the evolution of technology and the market for digitisation and provision of electronic services.
- Requests for re-use shall be processed within a specific timeframe (20 days for standard cases).
- Licenses should not unnecessarily restrict possibilities for re-use or be used to restrict competition. Member States are encouraged to use standard licenses in digital format.

Related legislation includes the Directive on the legal protection of databases and the Directive establishing an infrastructure for spatial information in the European Community (INSPIRE).

The [Directive on legal protection of databases 96/9/EC](#), known as the Database Directive, was adopted in 1996 as part of the EU copyright *acquis*. It aimed to create a harmonised legal framework of ground rules for the protection of a wide variety of databases while ensuring the legitimate interests of users to access information contained in databases. Since its entry into force, the role and importance of the database market have evolved. The Database Directive established a new exclusive *sui generis* right for database producers, valid for 15 years, to protect their investment of time, money and effort, irrespective of whether the database in itself was innovative. The directive also harmonised copyright law applicable to the structure and arrangement of the contents of databases.

As a rule, the provisions of the PSI Directive do not affect intellectual property rights (IPRs), including *sui generis* rights, while indicating that rights held by public sector bodies should be exercised in line with the provisions of the PSI Directive. Despite this, some public bodies have been tempted to invoke their *sui generis* right under the Database Directive to prevent the re-use of the content of their databases.

The Commission is in the process of analysing the functioning of the Database Directive, with a special focus on this *sui generis* protection of databases. It will also examine whether the directive is still fit for purpose in view of recent technological, economic and legal developments, in particular in an increasingly data-driven economy.

[Directive 2007/2/EC of March 2007 establishing an Infrastructure for Spatial Information in the European Community \(INSPIRE\)](#) entered into force 15 May 2007. It is gradually being implemented, with full implementation expected by 21 October 2020. The actions envisaged by this directive aim at removing obstacles hampering the sharing of spatial data between and across all levels of government

The directive aims at facilitating the access and use of spatial data related to the environment. This data needs to be shared between public authorities for all their tasks related to the environment. Member States have to ensure that the data are shared without any practical obstacles. The directive covers a wide range of spatial data ranging from basic mapping information, such as transport networks and administrative units, to key environmental information such as emissions, environmental quality and the location of protected sites. It is important that different types of data can be combined to obtain the best information on how to better protect our society from, for example, the many possible impacts of climate change and air pollution as well as natural and technological disasters. The better the information available, the more cost-effective the measures can be to protect our environment.

The INSPIRE Directive was designed to address specifically the thematic environmental policy needs for spatial data by removing four major obstacles to the availability of such data:

- A wide variety of organisational, cultural, institutional, financial and legal obstacles hampered the sharing and re-use of spatial data by public authorities and public stakeholders.
- Spatial data was difficult to find online on the internet and was poorly documented, if at all.
- Many public authorities did not have online services in place allowing others, including the public, to discover, access and use their spatial data.
- Spatial data was often organised in incompatible formats making it difficult to combine different spatial data sets in the absence of a common vocabulary.

The Commission has announced that the PSI review will be aligned with the follow-up to the REFIT mid-term policy evaluation of Directive 2007/2/EC, 'INSPIRE'.

3. EU-level reports, evaluations and studies/European Commission implementation reports and studies

In preparation for the proposed revision of the first PSI Directive in 2013, the Commission presented an initial [review](#) in 2009 of the way in which PSI rules were being put in practice. The review confirmed that PSI re-use had been on the rise but also that EU Member States had to remove remaining barriers to re-use in order to realise the full potential of PSI for the EU economy. This led to a revision of the directive in 2013.

In its [combined evaluation roadmap/inception impact assessment](#)¹ of August 2017, the Commission identifies a number of shortcomings in the way the directive plays out in practice.

It concludes that, despite progress in opening up public datasets for re-use since the adoption of the directive, a number of obstacles to wide public sector information re-use still persist. Rapid technological progress has allowed public sector bodies to generate a wealth of dynamic datasets. The provision of real-time access to such data, via adequate technical means – referred to as application programming interfaces (APIs) – and in

¹ The [Better Regulation Guidelines](#) (SWD (2015) 111 final) describe an 'inception impact assessment' as a roadmap for initiatives subject to an impact assessment. It sets out the description of the problem, issues relating to subsidiarity, policy objectives and options, and the likely impacts of each option in greater detail.

conformity with recognised interoperable standards, is nevertheless still rare. This deprives re-users of a chance to tap into this pool of high-value datasets for further re-use (e.g. real time travel apps). This is made worse by unclear data management practices, including insufficient use of persistent identifiers, low frequency of updates, and lack of rules for keeping track of different versions of the data.

Several public sector bodies also continue to set charges for re-use well above the sums needed to cover the costs related to their reproduction and dissemination, despite a body of evidence pointing to the lack of macroeconomic justification. The result is an obstacle to re-use and a market barrier, which is further amplified by the use of heterogeneous sets of licences (often not machine-readable) with varying degrees of limitation on access and re-use.

Importantly, many datasets of considerable value for society and the economy remain shielded from the EU's legal framework on account of the fact that, in numerous Member States, the execution of public sector tasks is increasingly entrusted to independent private sector entities not covered by the PSI Directive. This may also be the case with data held by publicly owned utility companies or transport operators. Moreover, the re-use of some types of valuable publicly-funded data, such as research data, are so far not covered by EU-level legislative rules.

According to the Commission, problems may arise in situations where public bodies rely on rights provided by the Database Directive to prevent the re-use of the content of their databases. Similarly, there is some uncertainty regarding the relationship with the INSPIRE Directive and the Public Access to Environmental Information Directive, (PAEI) 2003/3/EC.

Finally, given the evolution of the public sector's role in the data economy, the public sector bodies of the Member States face an increasing need to access data held by private entities, whenever the insight derived would improve the functioning of the public policies and services, such as delivery of official statistics, or help advance research.

The Commission included the INSPIRE Directive in its Regulatory Fitness and Performance Programme (REFIT) in 2013 to assess whether this instrument remains fit for purpose at the halfway mark of its implementation. In the [implementation report](#), the Commission concludes that – in view of the broader policy objectives – the INSPIRE Directive is generally consistent with the objectives of the European Interoperability Framework and the broader objectives of the EU digital single market. Moreover, links have been established to the new initiatives of the European Open Science Cloud and the European Data Infrastructure, under the European Cloud initiative and the eGovernment action plan. Specific issues that may need attention include consistency of access to data policies, also set out in the Public Sector Information Directive. This relates to broader issues on the free flow of data, identified as a priority issue for the digital single market.

In its [communication of 10 January 2017, 'Building a European data economy'](#), the Commission says that 'frequently, data portability considerations are closely related to questions of data interoperability, which enables multiple digital services to exchange data seamlessly, facilitated by appropriate technical specifications'. The PSI Directive and associated guidance emphasise the importance of rich, standardised meta-data following established vocabularies to facilitate searching and interoperability. The INSPIRE Directive and its interoperability regulations and guidance for spatial data services and data, including sensor observation data, currently apply to public sector spatial data. In the case of online platforms, such data interoperability facilitates not only switching, but also the concurrent use of several platforms (referred to as 'multi-homing') as well as widespread cross-platform data exchange, which has the potential to enhance innovation in the digital economy.

4. European Parliament positions / MEPs' questions

4.1 Resolutions of the European Parliament

In its [resolution of 16 May 2017 on the EU eGovernment Action Plan 2016-2020](#) (2016/2273(INI)), the European Parliament stresses the importance of 'open data', but also the need for safeguards that ensure respect for copyright and data protection. It states that public administrations should, to the extent possible, make information available, especially when the volume of data generated is very large, such as in the case of the INSPIRE programme. The MEPs call for the speedier release of data into the public domain, better quality of data and easier access to data in machine-readable formats. They point out that interoperability, open standards and open data are not only fundamental in a cross-border context but are also needed at the national, regional and local administrative levels in each Member State.

In its [Resolution of 16 February 2017 on the European Cloud Initiative](#) (2016/2145(INI)), the European Parliament argues that public administrations should have open access to government public data by default. MEPs call for progress to be made in determining the degree and pace of releasing information as open data, in identifying key datasets to be made available and in promoting the re-use of open data in an open form. Furthermore it points at the [ISA2 programme](#) as 'an opportunity to develop interoperability standards for big data management within public administrations and in their dealings with businesses and citizens'.

4.2 Written questions

Throughout the first years of implementation of the PSI Directive and anticipating the first review of the directive in 2013, MEPs have submitted many written questions to the Commission, primarily in relation to specific Member State authorities that, for some reason, were restricting access to their data. Questions were also raised about pricing strategies and technical barriers that stood in the way of the formation of the single European digital market and act as a barrier to the realisation of PSI's full business potential.

5. Court of Justice

The Court of Justice of the European Union has issued several judgments since the database directive's adoption, in particular on *sui generis* protection.² These judgments will also be analysed in the evaluation work by the Commission.

6. The European Committee of the Regions and the European Economic and Social Committee

In October 2012, in its [opinion on the first review of the PSI directive](#), the Committee of the Regions (CoR) welcomed the Commission initiative to review the PSI Directive and the accompanying communication on open data, as they had 'the potential to become valuable assets for citizens, businesses and public authorities and could help to create jobs and improve the quality of public services'. It emphasised the importance of having common rules and practices governing the re-use and exploitation of public sector information to ensure that the same basic conditions are applied to all players in the European information market, conditions for re-using such information are more transparent, and distortions of the internal market are eliminated. The CoR noted that local and regional authorities are among the main target groups for measures under the digital agenda, which include the revision of the PSI directive and the communication on open data, and that they play a particularly important role in driving its implementation. It underlined the importance of full respect for EU and national privacy legislation. The use of open data must also uphold the intellectual property rights of third parties, at the same time as ensuring that the same data protection and

² See for example [Case C-30/14](#), Ryanair Ltd v PR Aviation BV, of 15 January 2015, or [Case C-604/10](#), Football Dataco and Others v Yahoo! UK Ltd and Others, of 30 March 2012

privacy standards apply to a situation when public sector data is used for commercial purposes as when such data remains within the public sector.

The European Economic and Social Committee (EESC), in its [opinion on the Commission communication 'Building a European Data Economy', of July 2017](#), calls on the Commission to carry out a precise analysis of the state of play and of defensive attitudes to the free flow of data in the Member States in order to remove unjustified barriers by putting the right legal and technical provisions in place. It strongly supports the Commission's proposal that any data storage in the Member States should be guided by the principle of free movement. The EESC asks for a roadmap and deadlines for opening up national markets. It also recommends that the opening up of national markets should be covered under the European Semester.

7. The European Data Protection Supervisor

In an [opinion](#) of 18 April 2012 on the proposal for amending PSI Directive 2003/98/EC, the European Data Protection Supervisor (EDPS) called for data protection safeguards before public sector information containing personal data can be re-used. The opinion highlighted the need for specific safeguards for data protection whenever public sector information contained personal data. It recommended that public sector bodies take a 'proactive approach' when making personal data available for re-use. This would make it possible to make data publicly available, on a case by case basis, subject to conditions and safeguards in compliance with data protection rules.

8. European Commission public consultation

From January to April 2017, the Commission ran a [public consultation on Building a European Data Economy](#) to help shape the future policy agenda on the European data economy. The consultation focused, inter alia, on whether and how data localisation restrictions inhibit the free flow of data in Europe, on accessibility of data and portability, interoperability, and standards.

It turned out that many IT service providers have experienced demands by their customers for local data storage or processing, mostly owing to an assumption or perception that they are required to do so. Most of the respondents (62 %) are in favour of removing data localisation restrictions within the EU, preferably by means of EU legislation. Other sizable groups of respondents favour guidance on data storage, processing within the EU, and increasing the transparency of data localisation restrictions

On the question of accessibility of data, most of the respondents (67 %) say they believe wider data sharing should be facilitated and incentivised. Nonetheless, a majority does not support regulatory intervention, be it by creating ownership-type rights or by licensing obligations. What they clearly support is the increased use of APIs, the provision of non-binding guidance and the sharing of best practice.

When it comes to current data portability conditions, most respondents hold neutral to positive attitudes. The most important advantages of data portability cited are the possibility to switch providers, derive value from the data and give access to third parties. Amongst the potentially positive effects, respondents list better access to data, increased innovation and competition and reduced 'vendor lock-in' (dependency on a data provider). However, many point out possible negative effects, e.g. higher cost, stricter formatting rules and less flexibility.

A majority (59 %) of the cloud service providers who responded, offer standard compliant solutions, while 81 % of the user respondents said they prefer such solutions. The most prominent reasons to require standard compliant solutions are security, data and privacy protection and service interoperability. A majority of respondents believe common metadata schemes are important technically to facilitate data access and

discoverability, preferably implemented by improving existing standards. Guidelines are the preferred policy instrument to implement priorities, followed by EU regulation.

The recent [Open Data Maturity in Europe 2017 Report](#)³ explores the level of open data maturity in the EU28. It reveals that governments across Europe not only prioritised open data more strongly in 2017, but are actually engaging in a race to the top. The majority of the countries demonstrate a solid understanding of the impact of open data in paving the way for the data economy. The report categorises countries into different clusters: beginners, followers, fast trackers and trendsetters. It shows that in 2017, the number of trendsetters in the EU28 has nearly doubled to 14 countries in comparison to only 8 EU countries in 2016. European countries have been assessed both in terms of open data readiness – assessing the span of their open data policies – and in terms of open data portal maturity. Where in 2015 EU countries had only completed 44.2 % of their open data journey in reaching full open data maturity, this number had increased to 58.7 % in 2016 and to 72.5 % in 2017.

Despite this progress however, some obstacles continue to stand in the way of the EU28 open data transformation. The barriers most frequently mentioned by public administrations of the EU28 in 2017 were of a financial, legal, technical or political nature. The report highlights the strong impediment that the financial and legal aspects in particular continue to represent in the publication of data.

Table: [Directive 2013/37/EU](#) on the re-use of public sector information

EP committee responsible at the time of adoption of the EU legislation: Committee for Industry, Research and Energy (ITRE)
Date of adoption of original legislation in plenary: 26 June 2013
Entry into force: 17 July 2013
Planned date for review: Q2 2018

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www.europarl.europa.eu/thinktank (Internet) – www.eptinktank.eu (blog) – www.eprs.sso.ep.parl.union.eu (Intranet)

³The European Data Portal has been developed by the European Commission with the support of a consortium led by Capgemini Consulting, including INTRASOFT International, Fraunhofer Fokus, con.terra, Sogeti, the Open Data Institute, Time.Lex and the University of Southampton.