

## Initial Appraisal of a European Commission Impact Assessment

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# Revising the rules on the re-use of public sector information

Impact assessment (SWD(2018) 127 (final), SWD(2018) 128 (summary)) accompanying a Commission proposal for a Directive of the European Parliament and of the Council on the re-use of public sector information (COM(2018) 234 final)

This briefing seeks to provide an initial analysis of the strengths and weaknesses of the European Commission's [impact assessment](#) (IA) accompanying the above-mentioned [proposal](#), submitted on 25 April 2018 and referred to the European Parliament's Committee on Industry, Research, and Energy (ITRE).

Public sector information (PSI) refers to government-held data that are collected by public bodies, such as libraries, hospitals and weather stations. Examples of such data include written texts, databases, audio files and film fragments. The use of such data by entities other than those who collected them (individuals, public bodies or private companies), referred here as 're-use', is currently governed by [Directive 2003/98/EC](#) of the European Parliament and the Council on the re-use of public sector information, adopted on 17 November 2003. The directive aimed to facilitate the re-use of public sector information throughout the European Union (EU) by harmonising the basic conditions for and removing major barriers to re-use in the internal market. It introduced provisions on non-discrimination, charging, exclusive arrangements, transparency, licensing and practical tools to facilitate the discovery and re-use of public sector information. Directive 2003/98/EC was revised by [Directive 2013/37/EU](#), which entered into force on 17 July 2013. The Commission conducted an evaluation of that directive in 2017, as required by the directive's monitoring provisions.

On the basis of the evaluation, the Commission considered it necessary to revise the current PSI legislation and therefore submitted a proposal for a new directive on the re-use of PSI. The proposal was presented as part of a package of measures aiming to facilitate the [creation of a common data space](#) in the EU and as part of the Digital single market strategy.

According to the Commission, a revision of the existing legislation would be particularly beneficial for the EU in four respects: it should reduce market access barriers to SMEs, increase the availability of data by bringing more types of data under the scope of the new directive, increase the transparency of public-private arrangements for the use of data that have so far benefited mostly large companies, and finally, increase business opportunities through the dissemination of dynamic data (data that get updated continuously).

### Problem definition

The Commission impact assessment identifies four main problems:

- insufficient use of methods for access and re-use of dynamic data by machines;
- fragmentation and market-entry barriers;
- insufficient availability of public and publicly funded data for re-use;
- distortion of competition in the internal market (IA, p. 13).

A number of examples illustrate the problem of fragmentation. For example, licensing practices diverge across the EU, resulting in higher entry barriers for companies, SMEs and start-ups in some Member States than in others. Similarly, charges for datasets with the same quality and type of data vary among Member States.

With regard to the problem of poor availability of public and publicly funded data, the IA explains that 'public sector tasks may be carried out not only by public authorities themselves but can instead be entrusted to entities with organizational or management links to the public sector, or to those that lack such links but benefit from public funding (public undertakings). In some cases public sector tasks are also performed by private entities, which act on the basis of special or exclusive rights or concessions from public sector bodies. This is typically the case in the transport and utility domains (provision of water, electricity, etc.). Currently, data held by public undertakings in these domains does not fall under the scope of the current legislation' (IA, p. 13). Furthermore, the IA explains that data held by entities active in the transport and utilities domains are amongst the most valuable for stakeholders in the data economy, and can serve as the basis for a number of added-value services and applications. Providing open access to such data would be of considerable value for commercial re-use, because issues related to domains such as the environment, transport, energy and housing are among those that are most often consulted in open data portals.

The IA attaches particular importance to the problem involving research data availability and points out that there is currently no common policy for open access to research data in Europe. The EU leverage to remedy this problem is limited. As a result, the limited availability of research data for re-use makes it difficult to conduct further scientific research based on such data or to apply data analytics technologies and to mix such data with other public or private datasets so as to produce added-value services (IA, p. 18).

As far as the problem of distortion of competition is concerned, the IA explains that the public sector often needs to rely on public-private partnerships, in which companies offer advanced data analytics to public organisations. The distortion of competition takes place when public organisations are not sufficiently aware or trained to understand and spot the potential risks related to establishing exclusive partnerships with companies (IA, p. 18). In this regard, the IA points out the need to create a level-playing field for both public and private sector entities.

Overall, the presentation of the problems seems adequate, although it is not entirely clear why the IA links all four main problems to the same drivers, namely technological change and the rapid development of various data-sharing technologies (IA, p. 9). The lack of a common approach in the field of research data and other shortcomings of the current legislation would logically precede the recent trend of technological advancement rather than being driven by it. On the strong side, the problem definition provides a wealth of examples and data, largely taken from the evaluation of the current directive. The IA is also very convincing in showing that it is SMEs that are affected most negatively by the problems.

## Objectives of the initiative

The general objective of the proposal is defined as follows: 'to contribute to the strengthening of the EU's data economy by enhancing the positive effect of the re-use of public sector data on the economy and society' (IA, p. 25). There are three specific objectives linked to this general objective:

- adapting to technological change in the field of data management and use;
- lowering the existing barriers to accessing the public shared information (PSI) re-use market and preventing the emergence of new barriers;
- making more data available for re-use as raw material for innovation.

The IA includes a set of operational objectives:

- incentivising public bodies to use modern methods of access and use of dynamic data;

- limiting the range of situations in which charging for PSI is allowed;
- ensuring transparency around arrangements that can lead to 'data lock-in';
- higher supply of data from the utilities sector and research establishments.

The operational objectives are formulated in the same rather general terms as the specific ones and do not express the concrete actions for delivery. Moreover, they do not follow the recommendations of the Commission's better regulation guidelines in terms of being option-specific, i.e. assessed with the view to evaluation and monitoring, and S.M.A.R.T (specific, measurable, achievable, realistic, and time bound).

### Range of options considered

The IA explains that two options were discarded at an early stage: that of discontinuing existing EU action and that of introducing soft legal measures only. The IA explains that although the latter option could be a non-intrusive way of addressing the problems, it was discarded on the basis of the experience gained in applying the soft-law measures that already exist in the current legislation. Although these measures have fulfilled a useful role in providing clarity and giving a general direction to Member States, due to their non-binding character, they have been taken up with different intensity in the different countries. Also, re-users who are looking for legal certainty cannot rely upon them. Finally, according to the IA, soft-law measures cannot fully prevent the development of regulatory divergences among Member States (IA, p. 27). The options that were considered realistic included the following three such measures:

- Option 1. Baseline scenario: no change. This option means that that the current provisions of the directive would remain applicable. The Member States would be bound by the rules set by the 2003 directive, modified by Directive 2013/37/EU.
- Option 2 Packaged solution consisting of both amendments to the PSI Directive and soft law (low-intensity scenario).
- Option 3 Packaged solution consisting of both amendments to the PSI Directive and soft law (high-intensity scenario).

These two options contain hard- and soft-law elements of a varying degree of regulatory intervention. The main elements of the low- and high-intensity scenarios are described in relation to each of the problem areas (i.e. dynamic data, charging, scope (research data), scope (data in the transport sector and the utilities sector), and exclusivity) and to the provisions of the current directive.

### Policy options of lower and higher regulatory intervention intensity – implementation modalities in the PSI Directive (IA, p. 32)

	Lower-intensity Option 2	Higher-intensity Option 3
Dynamic data	<p>Binding measures: adding a reference in the directive to incentivise public sector bodies to make dynamic data available for re-use immediately after collection (or at least in a timeframe that does not unduly impair the exploitation of their economic potential), and to use APIs.</p> <p>Binding measures (intermediate intensity): There would be an obligation to use APIs for the availability of high-value datasets (see below).</p>	<p>Binding measures: strengthening the current rules on data formats (Article 5), by adding an obligation for public sector bodies that already produce dynamic data, to make all such data available for re-use immediately after collection, and to systematically use APIs.</p>

<p><b>Charging</b></p>	<p>Binding measures: stipulating that the default rule is zero charges or charges limited to the marginal costs. Limiting the range of situations under which exceptions to marginal cost charging would be possible, while specifying (in line with Notice 2014/C 240/01) the eligibility of costs covered. Publishing the list of public sector bodies that could apply charges above marginal costs.</p> <p>Binding measures (intermediate intensity): defining high value datasets to be released at zero charge across the EU via a delegated act.</p>	<p>Binding measures: while not introducing the principle of full gratuity, eliminating the current exceptions to the rule that charges can cover the marginal costs of dissemination at maximum.</p>
<p><b>Scope (research data)</b></p>	<p>Binding measures: extending the scope to publicly funded research data:</p> <ul style="list-style-type: none"> <li>– Member States would be obliged to develop policies for open access to research data resulting from publicly funded research, while keeping flexibility on the specific details.</li> <li>– For research data that are already accessible through repositories, the directive would ensure re-usability within the scientific community and beyond.</li> </ul> <p>Soft law: update of the Recommendation on Scientific Information.</p>	<p>Binding measures: extending the scope to publicly funded research data by laying down detailed rules on open access (including options on how to comply, embargo periods, rules on opt-outs from open access obligations, and enforcement).</p> <p>Member States would be obliged to ensure that all publicly funded research data are available in open access mode and are fully re-usable.</p> <p>Soft law: update of the Recommendation on Scientific Information.</p>
<p><b>Scope (data in the transport and utilities sectors):</b></p>	<p>Binding measures: extending the scope to:</p> <ul style="list-style-type: none"> <li>– public undertakings in the utilities sector covered by the Public Procurement Directive and public undertakings acting as public service operators under Regulation (EC) No 1370/2007.</li> </ul> <p>The default rules of the original PSI Directive ('2003 rules') would apply: where data are made available for re-use, transparency, non-discrimination, maximum charges based on full-cost and reasonable return on investment, and non-exclusivity requirements would be required. Public undertakings would not be covered by the requirements applicable to the processing of requests for the re-use of their data.</p> <p>There would be a reference to data that should be openly available, in line with the relevant sectoral EU legislation, to ensure that existing obligations are respected.</p>	<p>Binding measures: extending the scope to:</p> <ul style="list-style-type: none"> <li>– public undertakings in the utilities sectors covered by the Public Procurement Directive and private and public undertakings acting as public service operators under Regulation (EC) No 1370/2007;</li> <li>– private economic operators that have been awarded a concession, as defined in Directive 2014/23/EU, pursuing one of the activities in the transport sector and the utilities sector.</li> </ul> <p>The default rules of the PSI Directive would apply (marginal cost charging, transparency, data formats, processing of requests, etc.).</p> <p>There would be a reference to data that should be openly available, in line with the relevant sectoral EU legislation, to ensure that existing obligations are respected.</p>
<p><b>Non-exclusivity:</b></p>	<p>Binding measures: strengthen the current article on exclusive arrangements in the directive, by introducing a procedural safeguard. This would require making public (ex ante, i.e. before taking effect) the terms of arrangements with private sector players, involving the re-use of public sector data where there is a risk of the lock-in of public sector data. In addition, the final text of the agreement should also be publicly available.</p>	<p>Binding measures: strengthen the current article on exclusive arrangements to prohibit the conclusion of agreements between public sector bodies and private companies, which may lead to the lock-in of public sector data.</p>

Overall, it appears that the range of options was in fact limited to one general option that was split into two scenarios, or sub-options.

The impact assessment analyses the options for their economic and social impacts and finds these to be rather positive. The IA envisages an increase in the direct economic value of the public sector information for the EU-28 from €52 billion in 2018 to €149 billion in 2030 (IA, p. 33). Following this increase, job creation in the data sector is expected to increase under both the high- and the low-intensity option: from 64 000 persons employed based on PSI re-use today, to 709 000 persons based on the lower-intensity regulatory intervention option, and to 795 000 based on the higher-intensity regulatory intervention option. The IA uses an example of rapid job creation among application developers working together with the Transport for London; however, more comprehensive evidence would have been useful to support these numbers. With regard to social impacts, the IA mentions life-saving health care and transport where positive impacts are to be expected, but it provides only a limited qualitative or quantitative assessment. The IA discusses environmental impacts in a rather superficial manner, by saying that they are expected to be positive. Also, the analysis of issues related to data protection and fundamental rights is very limited and appears at the introductory section of the report (IA, p. 3), whereas it would have been particularly useful if it had been a part of the assessment of the impacts.

The impact assessment compares the options against the criteria of efficiency, effectiveness, coherence, legal/political feasibility and proportionality. The range of criteria appears to be comprehensive and in line with the better regulation guidelines. In comparison, option 3 (higher intensity), appears to have more drawbacks in terms of coherence, legal/political feasibility and proportionality than option 2. In comparing the options, the IA often refers to what stakeholders might find politically feasible (IA, p. 48); however, the report does not provide more details to support these assumptions. The IA considers option 2 (lower intensity) to be the preferred option for the proposal.

### Subsidiarity / proportionality

Article 114 of the Treaty on the Functioning of the European Union (common rules on competition, taxation and approximation of laws) is identified as the legal basis for the proposal. As far as proportionality is concerned, the actions proposed are considered proportionate, 'since national intervention will not be able to achieve the same results (increase in openly re-useable PSI), whilst at the same time ensuring a competitive and non-discriminatory environment across the entire Single Market. The proposed actions, in particular restricting the use of exceptions to marginal cost charging and introducing the obligation to make certain high-value datasets freely available, can be seen as the next step towards full availability of PSI for re-use' (IA, p. 24).

No reasoned opinions were submitted by the national parliaments by the subsidiarity deadline of 20 July 2018.

### Budgetary or public finance implications

The IA states that the proposal has no impact on the European Union budget.

### SME test / competitiveness

The IA explains that public sector information is used across the European economy by a range of companies, but is particularly important for the growth of start-ups and SMEs. Furthermore, the IA provides examples illustrating that fragmentation in the rules on access to public sector information has a negative effect particularly on SMEs and start-ups. It states that among the reasons why the playing field among re-users is uneven is the fact that large multinational companies can easily afford to buy public datasets, while SMEs cannot. At the same time, its mostly SMEs that benefit from open data. The IA does not provide more quantitative details regarding the impacts on SMEs, although it mentions that 645 000 new jobs would be created by 2027, which 'for the large part come from employment created by SMEs' (IA, p. 43). Although competitiveness and innovation are mentioned as important goals underlying the revision of the current regulation, the impact assessment does not delve into the details.

## Simplification and other regulatory implications

The Commission explains, without quantification, that the proposal contains provisions aimed at further reducing the administrative burden and generating increased cost savings related to the implementation of the directive, inter alia through the introduction of charging rules and the clarification of the interplay with other EU legal instruments. It is also stated that further digitisation of data would lead to a decrease of the administrative burden for public sector bodies due to a lower number of re-use requests to process and a lower risk of complaints. Furthermore, the discontinued reporting obligation would reduce the administrative burden and related costs of public sector bodies at the local, regional and national level (Explanatory Memorandum, p. 9).

There are also various simplification gains foreseen for holders of documents (including research data), to which the directive would extend as a result of the proposal. For example, research data repositories would be designed to automate the dissemination process, making any intervention by the researcher in question unnecessary. Such web-based repositories, typically funded by academic institutions, have, however, dedicated helpdesks in order to assist re-users in terms of technical problems with accessing documents they contain. The implementation mechanism of these provisions is not very clearly explained in the IA.

## Quality of data, research and analysis

The IA is based on a rather solid combination of three studies: a REFIT evaluation performed in parallel with the impact assessment, a [study](#) on the functioning of the PSI Directive (SMART No 2017/0061), and a study on the PSI request repository (SMART No 2016/0088), both carried out by Deloitte at the request of the Commission. Most of the quantitative data used for analysing the impacts of the options are taken from the Deloitte studies. The evidence-collection process included, among other things, obtaining feedback from the Member States on the availability of public sector information for re-use, as well as a special evaluation activity conducted through the European Data Portal on the maturity of open data across Europe. These data are not reflected in the analysis very explicitly. The IA explains that it took into account the following: a series of indicators that cover the level of development of national policies promoting open data; an assessment made available on national data portals; as well as the expected impact of open data (IA, p. 58). The report does not, however, detail how these data were used during the impact assessment; for example, it does not explain whether the discarding of options was done on the grounds of the evidence at hand. As a strong point however, one could mention the detailed analysis of the baseline scenario developed in the IA.

## Stakeholder consultation

The IA refers to a public online consultation that was conducted between 19 September and 16 December 2017 for the dual purpose of the PSI Directive evaluation and the impact assessment. A very detailed analysis of the public consultation is presented in the mandatory annex (Annex 2). The Commission received 273 replies from all Member States and the respondents included representatives of all major categories of stakeholders (public organisations, associations, citizens, and SMEs). The Commission asked the stakeholders to assess the current status quo in terms of efficiency, relevance, coherence, EU added value, and clarity. The feedback is reflected in the evaluation of the PSI Directive and in the problem section of the impact assessment.

As stated by the IA, the majority of stakeholders agreed that the PSI Directive was well-aligned with current and new rules on the protection of personal data (IA, p. 4). The IA explains that despite this generally positive view, some stakeholders voiced uncertainty over the functioning of the PSI Directive. In particular, 'it emerged that while the principle of precedence of data protection rules over PSI re-use obligations is undisputed and well understood, public sector bodies may encounter practical implementation questions on how to facilitate re-use while ensuring compliance with the GDPR in situations where certain public registers also contain

personal data (e.g. car registration databases or hospital records). This most often concerns the suitability of techniques that can be used for anonymization or ways by which purpose limitation can be ensured' (IA, p. 4).

Furthermore, according to the IA, the stakeholders also indicated that data from the transport sector and the utilities sector should be more widely available. A large majority (71 %) of respondents to the online consultation, in particular from the re-user community, believe that data generated in the context of the provision of a public task by publicly owned companies or by independent economic operators, irrespective of the public or private nature of the data holder, should be made available for re-use. Similarly, an overwhelming majority of replies (81 %) indicate that if there were an obligation to make data generated in the context of the provision of a public task available, such data should be available for all interested re-users for any purpose (IA, p. 15).

However, it is not very clear at what level of detail the stakeholders were consulted on the possible options and their potential impacts presented in the report. In addition to the open public consultation, several other stakeholder consultation activities were held, namely workshops and an online questionnaire. These activities were mainly related to the review of the PSI Directive and not to the impact assessment as such.

## Monitoring and evaluation

For the monitoring and evaluation mechanisms, the Commission proposes to use the existing tools provided by the European Data Portal, through which the annual 'landscaping exercise' (monitoring performance indicators in each EU Member State) is conducted. In the Commission's view, the exercise should be continued, while the definition of the performance indicators should be adjusted, so as to be taken into account from the date of adoption of the proposal. The IA does not specify what indicators would be adjusted. Apart from the portal, several other evaluation activities are proposed, such as the use of expert groups, an EU-wide online register of requests submitted by re-users, and ad hoc studies. The proposal also includes a review clause (Article 16), which stipulates making an evaluation of the implementation of the proposal four years after the transposition date of the amending directive.

## Commission Regulatory Scrutiny Board

The RSB issued a positive [opinion](#) with reservations on the draft IA on 14 March 2018. The board pointed out 'significant shortcomings' that the lead DG Communication, Networks and Technologies was recommended to address. In particular, the RSB was concerned that the impact assessment did not sufficiently address the stakeholders views on the use of personal data and database protection. Furthermore, the RSB considered the range of options too narrow.

The final IA contains the mandatory annex (IA, p. 55), in which it explains how the comments of the RSB were addressed. It appears that the RSB's most important comments concerning the fact that the IA had not fully addressed stakeholders' views when defining the options and assessing the impacts had not been fully addressed in the final report. At the same time, the comments regarding the narrow range of options and the issues with data protection remain valid.

## Coherence between the Commission's legislative proposal and IA

The proposal appears to be coherent with the outline of the preferred option assessed in the IA.

## Conclusions

The impact assessment presents a useful analysis of the challenges facing the field of public shared information in the EU. The emphasis on SMEs and on the improvement and simplification of the re-use of public research data is a strength of the IA. On the other hand, the range of options examined is limited and the operational objectives lack specificity. Furthermore, the views of stakeholders could have been better reflected and their concerns in terms of use of personal data and database protection would have deserved to be discussed in the analysis.

This briefing, prepared for the Committee on Industry, Energy and Research (ITRE), analyses whether the principal criteria laid down in the Commission's own Better Regulation Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal.

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